No. 17-20545

In the United States Court of Appeals for the Fifth Circuit

ENVIRONMENT TEXAS CITIZEN LOBBY, INCORPORATED; SIERRA CLUB,

Plaintiffs-Appellees,

v.

EXXON MOBIL CORPORATION; EXXONMOBIL CHEMICAL COMPANY; EXXONMOBIL REFINING & SUPPLY COMPANY,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Texas, Houston Division,
Case No. 4:10-cv-4969

UNOPPOSED MOTION FOR LEAVE TO FILE BRIEF OF PUBLIC JUSTICE AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES

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Counsel for *amicus curiae*

Pursuant to Federal Rule of Appellate Procedure 29 and Fifth Circuit Rule 29, Proposed *Amicus* Public Justice moves for leave to file the attached brief in support of Plaintiffs-Appellees' En Banc Brief.

Public Justice is a nonprofit legal advocacy organization that specializes in socially significant civil litigation, with a focus on fighting corporate and governmental misconduct. The organization maintains an Access to Justice Project that pursues litigation and advocacy efforts to remove procedural obstacles that unduly restrict the ability of workers, consumers, and people whose rights have been violated to seek redress in the civil court system. Public Justice has litigated dozens of cases in federal and state courts fighting for proper interpretations of Article III standing.

ARGUMENT

Proposed *Amicus* Public Justice submits the attached brief to express the importance of the ability of injured citizens to seek remedies through the civil justice system. This requires proper analysis regarding Article III standing in citizen suits, and Proposed *Amicus* seeks to file this brief to highlight how decades of case law support Plaintiffs-Appellees' argument, the Fifth Circuit panel majority opinion,

and the lower court's findings of law that all conclude that traceability does not require a showing of scientific certainty or tort-like causation, and that separation-of-powers principles require courts to consider legislative determinations about standing in private rights of action.

Whether to grant a motion for leave to participate as *amicus curiae* is within the Court's discretion. *Richardson v. Flores*, 979 F.3d 1102, 1106 (5th Cir. 2020); *see also*, *e.g.*, *United States v. Gozes-Wagner*, 977 F.3d 323, 345 (5th Cir. 2020) (noting court's "broad discretion" to consider "amici's additional arguments"). Courts typically grant leave to file as amicus curiae when amici demonstrate sufficient interest in a case and their brief is relevant to the issues raised in the case. *See Neonatology Assocs., P.A. v. Comm'r of Internal Revenue*, 293 F.3d 128, 129 (3d Cir. 2002) (Alito, J.) (granting leave to file amicus brief where "amici have a sufficient 'interest' in the case and . . . their brief is 'desirable' and discusses matters that are 'relevant to the disposition of the case'" (quoting Fed. R. App. P. 29(a)(3)); *Lefebure v. D'Aquilla*, 15 F.4th 670, 676 (5th Cir. 2021) (Ho, J.) ("[W]e would be 'well advised to grant motions for leave to file amicus briefs unless it is obvious that the

proposed briefs do not meet Rule 29's criteria as broadly interpreted.'" (quoting *Neonatology Assoc.*, 293 F.3d at 133)).

The Court should grant *Proposed Amicus's* motion for leave because the proposed brief is timely and useful. *First*, it is timely because it is filed "no later than 7 days after the principal brief of the party being supported is filed" concerning the issue of remedy. Fed. R. App. P. 29(a)(6). It is also filed prior to the deadline for the opposing parties' reply brief and, as noted below, the opposing parties have indicated that they either consent to or do not oppose its filing.

Second, the brief may be useful to the Court because it provides information on Article III standing not present in the parties' briefs. Specifically, it emphasizes how *TransUnion* did not disturb the district court's conclusion that Plaintiffs have satisfied standing requirements and did not impact how a court should address traceability at all.

Counsel for Proposed *Amicus* has consulted with the parties' counsel. Plaintiffs-Appellees and Defendants-Appellants have consented to this motion and to the filing of the attached *amicus curiae* brief.

Pursuant to the Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), Proposed *Amicus* states that no counsel for any party authored the proposed brief in whole or in part, and no person or entity, other than *amicus* and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

Accordingly, Proposed A*micus* respectfully requests that the Court enter the attached proposed order and grant leave to file the attached proposed brief.

Dated: April 26, 2023

Respectfully submitted,

s/ Sarah R. Goetz

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CERTIFICATE OF COMPLIANCE

This document complies with the type-volume limit of Fed. R. App. P. 27(d)(2)(A) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) and 5th Cir. R. 32(b), this document contains 649 words according to the word count function of Microsoft Word 365.

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s/ Sarah R. Goetz

Sarah R. Goetz

Date: April 26, 2023

CERTIFICATE OF SERVICE

I hereby certify that on April 26, 2023, a true and accurate copy of the foregoing motion was electronically filed with the Court using the CM/ECF system. Service on counsel for all parties will be accomplished through the Court's electronic filing system.

s/ Sarah R. Goetz

Sarah R. Goetz

Date: April 26, 2023

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BRIEF OF *AMICUS CURIAE* PUBLIC JUSTICE IN SUPPORT OF PLAINTIFFS-APPELLEES

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CERTIFICATE OF INTERESTED PERSONS

No. 17-20545
Environment Texas Citizen Lobby, et al. v. Exxon Mobil Corporation, et al.

The undersigned counsel of record certifies that, in addition to the persons and entities identified in the certificates filed by the parties and prior *amici*, the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case.

Public Justice is a non-profit, tax-exempt organization incorporated in the District of Columbia. Public Justice has no parent company, and no publicly held company has 10% or greater ownership interest in Public Justice.

These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal:

***Amicus curiae*:** Public Justice

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INTERESTS OF *AMICUS CURIAE*[1]

Public Justice is a nonprofit legal advocacy organization that specializes in socially significant civil litigation, with a focus on fighting corporate and governmental misconduct. The organization maintains an Access to Justice Project that pursues litigation and advocacy efforts to remove procedural obstacles that unduly restrict the ability of workers, consumers, and people whose rights have been violated to seek redress in the civil court system. This case is of interest to Public Justice because it raises questions regarding Article III standing that affect the ability of injured citizens to seek remedies through the civil justice system. Public Justice has litigated dozens of cases in federal and state courts fighting for proper interpretations of Article III standing.

INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiffs in this case have done just what Congress intended when it enacted the Clean Air Act's citizen-suit provision, which deputizes private citizens to enforce the Act's permitting requirements and

[1] No party's counsel authored this brief in whole or in part, no party or party's counsel contributed money intended to fund this brief, and no person other than *amicus curiae*, its members, and its counsel contributed money to fund this brief. All parties consent to the filing of this brief.

emissions restrictions. They brought suit against Exxon Mobil ("Exxon") for its ongoing violation of the Act at a refinery that, over the course of eight years—and extending through the time the suit was filed—caused plaintiffs' members living near the plant to breathe in toxic fumes, smell chemical odors, and observe black smoke and flaring at the complex. Exposure to the emissions led to physiological symptoms, including headaches and respiratory symptoms, and affected plaintiffs' members' ability and desire to live, visit loved ones, and recreate in the area. Plaintiffs ask the Court to hold Exxon accountable for its harmful and unlawful emissions by imposing a civil penalty to deter future violations.

Exxon seizes on a recent Supreme Court case, *TransUnion v. Ramirez*, 141 S. Ct. 2190 (2021) (*"TransUnion")* to argue that plaintiffs must satisfy a tort-like causation standard—essentially, a traceability standard requiring scientific certainty—to demonstrate Article III standing in order to for this Court to impose a civil penalty that reflects the Clean Air Act's penalty scheme. But *TransUnion* stands for no such thing. That case concerned whether members of a class action seeking damages under the Fair Credit Reporting Act had satisfied injury-in-fact's concreteness requirement, a far cry from the circumstances of the

case at hand. It did not even *mention* traceability, the central dispute of this litigation. Exxon's preferred test finds no purchase in *TransUnion*.

This Court should reject Exxon's proposed test and hew to the well-established standard that the panel properly applied: namely, that a factfinder can conclude that a proven injury-in-fact is fairly traceable to the defendant's pattern of unlawful conduct if the conduct "(1) causes or contributes to the kinds of injuries alleged by the plaintiffs and (2) has a specific geographical or other causative nexus such that the violation could have affected their members." *Env't Tex. Citizen Lobby, Inc. v. ExxonMobil Corp.*, 47 F.4th 408, 414 (5th Cir. 2022) ("*ETCL III*") (internal quotation marks omitted).

Exxon's preferred mode of analysis would undercut the maxim that, while Article III standing is an independent constitutional requirement, courts should continue to take into consideration legislative determinations regarding private rights of action. Failing to do so would threaten to strip Congress of its ability to legislate in response to complex policy problems, threatening the separation of powers that is at the core of Article III standing and resulting in individuals' inability to exercise rights delegated by Congress.

ARGUMENT

I. *TransUnion* does not disturb the district court's conclusion that plaintiffs have satisfied Article III standing requirements.

Exxon suggests that the Supreme Court's recent opinion in *TransUnion* is vitally important to the outcome of this case. Indeed, it references the case more than thirty times in its opening brief. But *TransUnion* does not change the Article III standing analysis for citizen suits under the Clean Air Act. Rather, it reaffirms the longstanding principle that Article III requires a concrete injury, not just a statutory violation, to satisfy the injury-in-fact requirement. And it reiterates a test for how courts should evaluate "concreteness." In this case, there is no dispute that plaintiffs' members suffered "various breathing difficulties and other physical symptoms, feared for their health, saw and smelled Exxon's pollution, and worried about the risk of explosion," Appellees Br. 11, ECF No. 374, and that those injuries were sure to and did in fact continue after litigation commenced, *id.* at 51—in other words, that their injuries are sufficiently concrete. Thus, as the panel correctly stated, "*TransUnion* did not upset [the court's] approach to injury-in-fact." *ETCL III*, 47 F.4th at 416.

a. In *TransUnion*, a group of consumers brought a class-action suit alleging that TransUnion, a consumer-reporting agency, had failed to comply with the Fair Credit Reporting Act's required procedures for ensuring accurate consumer credit data, and consequently that it maintained credit files containing false information about the plaintiffs. 141 S. Ct. 2190, 2207–08 (2021). The credit reports showed, misleadingly, that the consumers' names were a potential match with a name on a government list of individuals who posed a national-security threat. *Id.* at 2201. But for most plaintiffs, that misleading information had never been disseminated to anybody; it was just sitting in TransUnion's databases. The core issue in the case was whether the harm to that class of plaintiffs was sufficiently concrete to satisfy the injury-in-fact requirement. *Id.* at 2204. The Court held that those consumers whose inaccurate credit reports TransUnion had disseminated to third parties (i.e., potential creditors) had suffered concrete injuries, but those whose inaccurate information sat unpublished in TransUnion's databases had not. *Id.* at 2208–13.

b. Exxon argues that *TransUnion*'s reiteration of the well-established principle that a statutory violation in and of itself does not automatically confer Article III standing, *id.* at 2205, "has profound

implications for environmental citizen suits like the present case," Exxon Br. 36, ECF No. 346. Not so.

The Court in *TransUnion* was merely recognizing a longstanding principle, one that it has articulated time and again—including in the context of environmental citizen suits. *See, e.g.*, *Spokeo, Inc. v. Robins*, 578 U.S. 330, 341 (2016) ("Article III standing requires a concrete injury even in the context of a statutory violation."); *Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009) ("[D]eprivation of a procedural right without some concrete interest that is affected by the deprivation—a procedural right *in vacuo*—is insufficient to create Article III standing."); *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). This Circuit has likewise acknowledged, prior to *TransUnion*, that a statutory violation by itself does not confer an Article III injury in the absence of concrete harm. *See Campaign Legal Ctr. v. Scott*, 49 F.4th 931, n.8 (5th Cir. 2022) ("Even before *TransUnion* . . . this court held that a plaintiff must assert personal consequences in addition to a claimed . . . injury." (citing *Laufer v. Mann Hosp., L.L.C.*, 996 F.3d 269, 272–273 (5th Cir. 2021)); *Lee v. Verizon Commc'ns, Inc.*, 837 F.3d 523, 529 (5th Cir. 2016).

Plaintiffs here *have,* of course, shown that they suffered concrete injuries in this case, in contrast to the class members in *TransUnion*

whose credit reports were never disseminated to third parties and who therefore failed to show any concrete harm stemming from the consumer-reporting agency's FCRA violations. As the Court analogized in *TransUnion*, when a factory in Maine pollutes, a resident of Maine whose property is affected may sue but an unaffected resident of Hawaii may not, regardless of the breadth of a congressionally created private right of action. *See TransUnion,* 141 S. Ct. at 2205–06. Baytown citizens who have been injured by and face the imminent threat of future injury at the hands of the Baytown facility have more than a statutory stake in Exxon's unlawful activity—they have suffered concrete harm.

Hence, the conclusion of the *TransUnion* Court that more than a statutory violation is required does not affect the actual question at hand: having shown a concrete injury-in-fact beyond a mere statutory violation (and, as discussed later, having shown that that injury-in-fact is traceable to the defendant's conduct), what is the breadth of the claim that the plaintiff can assert?

Relatedly, despite spending much real estate discussing *TransUnion*, Exxon does not even suggest that the specific holding of *TransUnion*—that, in evaluating concreteness, courts should look to whether the alleged injury has "a close historical or common-law

analogue," *TransUnion*, 141 S. Ct. at 2204 (quoting *Spokeo*, 578 U.S. at 341)—is relevant to this case. In *TransUnion*, the Court "had no trouble" concluding that the class members whose information was shared with third parties had suffered an injury similar to one traditionally recognized in American courts, namely, the "reputational harm associated with the tort of defamation." *Id.* at 2208–09. The same could not be said for those members whose information had never been shared. *Id.* at 2209–10. That part of the Court's analysis is simply not relevant to the dispute in this case.

And in all events, Exxon fails to grapple with *TransUnion*'s statement that the type of claim asserted and the kind of relief sought matter for purposes of determining concreteness. *Id.* at 2210–11. Again, Exxon misinterprets the Court's opinion in that case, and in trying to apply that analysis to the present case, confuses damages based on the risk of future harm with civil penalties for injunctive or prospective relief. Exxon Br. 56.

In *TransUnion*, the Court held that the plaintiffs whose credit files had not been disseminated could not establish Article III injury based on the "risk of future harm" that would result if their files were to be shared with third parties in the future. *Id.* at 2211. The plaintiffs had failed to

demonstrate how being exposed to the risk of having inaccurate information published—when that risk never materialized—was itself a concrete injury that would allow a claim for retrospective damages. But importantly, the Court distinguished between claims seeking damages based on the risk of future harm, as in *TransUnion*, and forward-looking claims for injunctive or prospective relief, in which the risk of future harm *can* satisfy Article III's concreteness requirement.[2] *See id.* at 2210 (citing *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414 (2013); *Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983)). This case falls into the latter category. Plaintiffs here are not seeking damages but civil penalties, which are a form of prospective, not retrospective, relief. Appellees Br. 42–43. For that reason, Exxon's argument fails and the *TransUnion* analysis regarding damages based on the risk of future harm is not applicable here.

[2] In reaching this conclusion, the Court emphasized not just that risk-of-future-harm claims for prospective relief are different from claims for retrospective damages due to an unrealized risk of harm in the past, but also that the plaintiffs had simply presented no factual evidence that that past latent risk had in fact harmed them—"that they suffered some other injury (such as an emotional injury) from the mere risk" of disclosure. *See TransUnion*, 141 S. Ct. at 2211. Nor did the plaintiffs provide evidence indicating that disclosure of their inaccurate credit files was imminent or even likely, as would be required for a claim based on future harm. *See id.* at 2212.

II. The panel majority and the district court correctly relied on decades of precedent to determine that traceability does not require a showing of tort-like causation or scientific certainty.

As discussed above, the dispute in *TransUnion* was about what constitutes a concrete injury. *TransUnion* said precisely nothing about traceability—a separate element of Article III standing. The word "causation" does not appear anywhere in the 53-page decision. Nor does the word "traceability" or its cognates.

And since *TransUnion* upset no apple carts, the panel and the trial court rightly relied on established case law to determine that plaintiffs had satisfied the traceability requirement. To require a higher standard would deny Congress the ability to effectively legislate in response to complex policy problems where causal chains are uncertain. The effects of such a change in Article III requirements would not be cabined to citizens bringing suit under the Clean Air Act or other environmental statutes, either. The Court should refrain from working such a dramatic change in the law.

a. The lower court correctly held that plaintiffs "do[] not have to 'show to a scientific certainty that defendant's [emissions], and defendant's [emissions] alone, caused the precise harm suffered by plaintiffs.'" ROA.75425-79 at 555 (quoting *Texans United for a Safe Econ.*

Educ. Fund v. Crown Cent. Petroleum Corp., 207 F.3d 789, 792 (5th Cir. 2000); *Save Our Cmty. v. United States Env't Prot. Agency*, 971 F.2d 1155, 1161 (5th Cir. 1992)) (citations omitted).

As both the panel majority and the dissenting judge agreed, plaintiffs need not show that it is substantially probable that defendant's conduct is the proximate or but-for cause of their injuries. *See ETCL III*, 47 F.4th at 417 ("Although a but-for causal connection is *sufficient* to establish traceability, the Supreme Court has never said such proof is *required*." (internal citation omitted)); *id.* at 423 (Oldham, J., dissenting) ("The Court has also said that a plaintiff need not show but-for causation."); *see also Khodara Env't, Inc. v. Blakey*, 376 F.3d 187, 195 (3d Cir. 2004) (Alito, J.) ("Article III standing demands 'a causal relationship,' but neither the Supreme Court nor our Court has ever held that but-for causation is always needed."). Rather, to satisfy the "fairly traceable" requirement, this Court has explained that it is sufficient to show that a defendant "contribute[d] to the pollution" that caused the harm. *Ctr. for Biological Diversity v. United States Env't Prot. Agency*, 937 F.3d 533, 544 (5th Cir. 2019) (quoting *Sierra Club v. Cedar Point Oil Co. Inc.,* 73 F.3d 546, 558 (5th Cir. 1996)). In other words, plaintiffs need show only that it is substantially probable that there is *some* nexus—

some increased risk of, or contribution to—the kind of injury that plaintiffs suffered.

Indeed, in environmental cases, courts routinely find Article III causation even when plaintiffs cannot definitively prove that it was defendants' pollution, in particular, that injured the plaintiffs. *Id.*; ROA.75425-79 at 555. In those cases, it's enough to allege that defendants' unlawful pollution contributes in the relevant geographic area to the *kind of injury* that plaintiffs suffered. *See, e.g.*, *Cedar Point,* 73 F.3d at 557 (requiring only a geographical nexus and that "the pollutant causes or contributes to the kinds of injuries alleged by the plaintiffs"); *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.,* 204 F.3d 149, 161 (4th Cir. 2000) (en banc) ("[r]ather than pinpointing the origins of particular molecules, a plaintiff must merely show that a defendant discharges a pollutant that causes or contributes to the kinds of injuries alleged in the specific geographic area of concern" to satisfy Article III) (internal quotations omitted); *Pub. Int. Rsch. Grp. of N.J., Inc. v. Powell Duffryn Terminals Inc.*, 913 F.2d 64, 72 (3d Cir. 1990) ("A plaintiff need not prove causation with absolute scientific rigor to defeat a motion for summary judgment. The 'fairly traceable' requirement . . . is not equivalent to a requirement of tort causation." (alteration in

original)); *cf. Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 180–82 (2000) (finding citizen-suit plaintiffs had constitutional standing to challenge 489 Clean Water Act permit violations that occurred between 1987 and 1995 without requiring plaintiffs to connect their injuries to specific unlawful discharges).

Exxon essentially argues that instead of applying long-standing Article III standing frameworks to analyze causation, a far more demanding, tort-like standard for causation should be applied. But to do so would "raise the standing hurdle higher than the necessary showing for success on the merits." *Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. at 169. "[T]he fairly-traceable inquiry is much more forgiving that the merits-based, tort-causation inquiry." *Webb v. Smith*, 936 F.3d 808, 814 (8th Cir. 2019).

It bears emphasizing the narrowness of the well-settled rule guiding this inquiry. The standard set forth in *Cedar Point*—that causation requires only a geographical nexus and that the pollutant causes or contributes to the kinds of injuries alleged by the plaintiffs—applies only in cases like this where the plaintiffs have already proven that they were in fact injured. If that isn't proven, *Cedar Point* of course has no relevance. But once a plaintiff proves that they have been injured,

and the only question is the likelihood that the defendant's undisputed conduct caused that injury, the *Cedar Point* line of cases provides helpful guidance to a trier of fact in determining whether causation is more likely than not. So recognizing and applying this Court's longstanding precedent does not threaten to work some floodgates of expanded standing, as Exxon suggests.

b. Exxon's preferred approach to traceability also fails to take into account fundamental principles of separation of powers, and specifically the judiciary's long history of respecting Congress's legislative judgments about how to define private rights of action. *See, e.g.*, *Perez v. McCreary, Veselka, Bragg & Allen, P.C.*, 45 F.4th 816, 822 (5th Cir. 2022) ("When evaluating whether intangible harms are concrete, Congress's views are also entitled to 'due respect'" (quoting *TransUnion*, 141 S. Ct. at 2204)); *Laidlaw Env't. Servs.*, 528 U.S. at 185 (Congress's determination that civil penalties in Clean Water Act cases would deter future violations "warrants judicial attention and respect"). *TransUnion* itself emphasized this point, explaining that there must be recognition given to "Congress's decision to impose a statutory prohibition or obligation on a defendant, and to grant a plaintiff a cause of action to sue over the defendant's violation of that statutory prohibition or obligation." *TransUnion*, 141 S.

Ct. at 2204; *see also Utah Physicians for a Healthy Env't v. Diesel Power Gear, LLC*, 21 F.4th 1229, 1243 (10th Cir. 2021) (looking to Congress's determinations regarding the Clean Air Act to conclude that "[t]he purpose of citizen-suit provisions is to increase enforcement of public law when the government lacks the resources or will to handle the entire task"); *Spokeo*, 578 U.S. at 341 (quoting *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in the judgment)) ("Congress has the power to . . . articulate chains of causation that will give rise to a case or controversy where none existed before").

c. Adopting Exxon's novel standard for Article III causation threatens to undercut not just citizen suits under the Clean Air Act, but also a number of other statutory schemes, undermining longstanding federal statutes and courts' consistent determinations that plaintiffs need not demonstrate tort-like causation to establish standing.

Take, for example, the Sherman Anti-Trust Act, which makes it illegal to engage in a conspiracy to restrain trade. In cases brought under this statute, courts do not require plaintiffs to establish a direct causal relationship between each defendant's unlawful activity and the harm plaintiffs suffered. For example, in *Oxbow Carbon & Minerals LLC v. Union Pacific Railroad Company*, companies that mined, sold, and

shipped coal and petroleum coke brought a Section 1 action against railroad operators, alleging they engaged in anticompetitive conduct by fixing prices above competitive levels through uniform fuel surcharge and allocating certain markets to each other. 81 F. Supp. 3d 1, 5–6 (D.D.C. 2015). Defendants moved to dismiss for lack of standing because while the amended complaint stated that plaintiffs paid fuel surcharges they would not have paid absent the conspiracy, the complaint failed to allege to whom plaintiffs paid those surcharges. *Id.* at 7. The district court rejected this argument, explaining that because defendants were "jointly and severally liable under Section 1 for any injury suffered by plaintiffs," they "need not identify, at this stage, to which co-conspirator they paid fuel surcharges." *Id.* The court rejected the notion that "each defendant's relationship with a plaintiff be explicitly identified" and concluded that "plaintiffs need only allege, as they have in the amended complaint, that they suffered damages as a result of the conspiracy in which defendants participated." *Id.*; s*ee also Sanner v. Bd. of Trade of City of Chi.*, 62 F.3d 918, 925 (7th Cir. 1995) (requiring only that defendants' conduct "played some role in setting" prices that plaintiff paid); *Loeb Indus., Inc. v. Sumitomo Corp.*, 306 F.3d 469, 480 (7th Cir. 2002) (same).

Similarly, the Anti-Terrorism Act ("ATA"), as amended by the Justice Against Sponsors of Terrorism Act, 18 U.S.C. § 2333, "authorizes victims of terrorism to recover against anyone shown to have played a primary (direct) or secondary (aiding-and-abetting) role." *Atchley v. AstraZeneca UK Ltd.*, 22 F.4th 204, 214 (D.C. Cir. 2022). In an ATA action, courts have found that there need not be a direct link between the support provided to a terrorist organization and a particular attack that injured the plaintiff. *See, e.g.*, *Kaplan v. Lebanese Canadian Bank, SAL*, 999 F.3d 842, 855 (2d Cir. 2021) (explaining that "Congress[] instruct[ed] that JASTA is to be read broadly and to reach persons who aid and abet international terrorism 'directly or indirectly'"). *Any* provision of fungible resources to a terrorist organization qualifies as aiding and abetting under the statute because it "allows it to grow, recruit and pay members, and obtain weapons and other equipment." *Atchley*, 22 F.4th at 227.

Exxon's proposed approach strips Congress of the power to create legally enforceable rights where chains of causation are uncertain—or, in other words, to legislate. If a statutory right cannot be enforced in Court, it is no right at all. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (holding that "where there is a legal right, there is also a legal remedy") (quoting 3 William Blackstone, Commentaries *23). Thus, if

courts raise the standard of Article III causation to preclude consideration of statutory liability schemes, there will be little remedy for harms that arise out of collective, diffuse, or otherwise hard-to-track causal chains, and an inability to legislatively respond to complex policy problems in ways that advance and protect the public interest and preserve our nation's separation of powers.

CONCLUSION

For the reasons explained above, the district court's judgment should be affirmed.

Respectfully submitted,

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Counsel for *amicus curiae*

Date: April 26, 2023

CERTIFICATE OF COMPLIANCE

With Type-Volume Limit, Typeface Requirements,
and Type-Style Requirements

I certify that this filing complies with the type-volume limitation of 32(a)(7)(B) because it contains 3724 words, excluding the parts exempted by Fed. R. App. P. 32(f).

This filing also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and Fifth Circuit Rule 32.1 and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in proportionally spaced typeface using Microsoft Word for Windows, version 2016 in Century Schoolbook 14-point font typeface, with 14-point font typeface for footnotes.

s/ Sarah R. Goetz

Sarah R. Goetz

Date: April 26, 2023

CERTIFICATE OF SERVICE

I certify that on April 26, 2023, a copy of the foregoing brief was filed electronically through the appellate CM/ECF system with the Clerk of the Court. I further certify that all parties required to be served have been served.

s/ Sarah R. Goetz

Sarah R. Goetz

Date: April 26, 2023