ANDREW S. OLDHAM, *Circuit Judge*, joined by JONES, SMITH, WILLETT, DUNCAN, ENGELHARDT, and WILSON, *Circuit Judges*, dissenting:

In sports and war, defeat comes to the first side to give up. In law, apparently, that is not true.

This is an important case that impacts not only Exxon but also standing doctrine and environmental law more generally. Three-judge panels of our court have heard it three times. We granted en banc rehearing presumably because a majority of active judges recognized the inadequacy of the panels' decisions. *See Env't Tex. Citizen Lobby, Inc. v. ExxonMobil Corp.*, 61 F.4th 1012, 1012–13 (5th Cir. 2023) (mem.).

After two years of en banc deliberations, here is how everything shakes out. Eight members of the en banc court support JUDGE JONES's rule to vacate. *See ante*, at 83 (Jones, J., dissenting). Seven support JUDGE DAVIS's rule to affirm. *See ante*, at 4 (Davis, J., concurring). CHIEF JUDGE ELROD supports the district court's rule and thus would also affirm. *See ante*, at 2 n.** (per curiam). JUDGE HO—the ninth vote for today's judgment—supports none of this. But rather than completing the task and choosing a legal rule (any legal rule), today's en banc majority throws up its hands and announces a *non sequitur*: "We have taken too long trying to make up our minds, so, oh well—affirmed."[1]

Twenty-first century jurists write opinions to explain judgments. And those opinions carry enormous significance. Here, an opinion should have

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[1] JUDGE HO supplies the ninth vote for the per curiam opinion. Then he says he did not join the per curiam? *See ante*, at 71 n.3 (opinion of Ho, J.). And he styles his opinion "JAMES C. HO, *Circuit Judge*, in support of dismissing rehearing en banc as improvidently granted." *Ante*, at 66 (opinion of Ho, J.). This is confusing. So I simply refer to it as "opinion of Ho, J."

told parties throughout our circuit what to expect from citizen suits under the Clean Air Act. One of the virtues of a legal opinion is that it lets lawyers, jurists, and the public grade our work. But what is the world supposed to make of today's rationale? What is the magic number that appears on the majority's shot clock, such that a case pending for *X* days warrants we-give-up affirmance? In which penumbra or emanation should we look to find the legal authority for that shot clock? And perhaps most importantly, why is it *Exxon's* fault that nine members of this court could not agree by the hidden deadline?

All we know is that today's judgment rests on frustration with the process of drafting a majority opinion. The majority says its inability to write an *opinion* necessitates its *judgment*. Not only does that tail-wagging-the-dog approach undermine confidence in the judgment. It also gives primacy to the opinion—in contravention of millennia of legal tradition.

I

A

Since at least the time of Roman rule, the essential task of courts has been to render judgments. From the second century BC to the third century AD, Roman jurists typically rendered oral judgments without providing any reasons for them. *See* Ernest Metzger, *Roman Judges, Case Law, and Principles of Procedure*, 22 L. & HIST. REV. 243, 250–51 (2004); Richard H. Helmholz, *The* Ratio Decidendi *in England: Evidence from the Civilian Tradition*, *in* 1 RATIO DECIDENDI: GUIDING PRINCIPLES OF JUDICIAL DECISIONS 73, 75 (W. Hamilton Bryson & Serge Dauchy eds., 2006). Even when some decisions included language that "grammatically could seem to refer to reasoning," this "often refer[red] only to the factual circumstances of the case." Laurens Winkel, *Ratio Decidendi—Legal Reasoning in Roman Law*, *in* RATIO DECIDENDI, *supra*, at 9, 9–10.

The primacy of judgments is also apparent throughout English legal history. From the medieval period into the nineteenth century, the ecclesiastical courts rendered decisions without explaining their reasoning. *See* Helmholz, *supra*, at 77–78, 80–81. For at least part of the thirteenth century, even the common law courts omitted the "reasons for judgments." JOHN BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 188 (2019). As time wore on, the common law courts began to provide oral reasoning for some, though not all, of their decisions. *See* Paul Brand, *Reasoned Judgments in the English Medieval Common Law, 1270 to 1307*, *in* RATIO DECIDENDI, *supra*, at 55, 57.

Around the same time, private reporters started to write down—literally, report—the judges' oral reasoning in certain cases. *See ibid.*; BAKER, *supra*, at 189. This practice continued well into the nineteenth century. *See* John H. Langbein, *Chancellor Kent and the History of Legal Literature*, 93 COLUM. L. REV. 547, 576–78 (1993). The reporters, not the courts, "selected the cases, stated the facts, summarized the views of counsel, summarized the views of those judges who gave oral opinions, and supplied annotations of [their] own." *Id.* at 578. Moreover, the oral opinions these reporters summarized were not opinions of the court but were seriatim—each judge explained his own view of the case. *See* Kevin M. Stack, *The Practice of Dissent in the Supreme Court*, 105 YALE L.J. 2235, 2238 (1996). Obviously, the judges did not need to agree on an opinion to render judgments.

The focus on judgments rather than opinions carried over to America. During the colonial period, "the reporting of any decision was unusual." Langbein, *supra*, at 572–73 (quotation omitted); *see also* William Baude & Jud Campbell, *Early American Constitutional History: A Source Guide* (Mar. 11, 2023) (unpublished manuscript at 17), https://perma.cc/A63D-KBZN ("Published reports of American judicial decisions were unknown at the founding and somewhat rare in the early republic."). After the Constitution

was adopted, reporting in state courts remained sparse. For example, Chancellor James Kent, a prominent New York judge, explained in a letter that "[t]he opinions from the bench were delivered *ore tenus*," and "there [were] no reports or State precedents" when he "came to the bench" in 1798. Letter from James Kent to Thomas Washington (Oct. 6, 1828), *in* 3 VA. L. REG. 563, 568 (1897). Decisions of the lower federal courts "were reported even later and more erratically than were those of the states." William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513, 1556 n.204 (1984). Indeed, "no reports of the decisions" of William Cushing or William Paterson while sitting on the circuit courts "were ever published," nor were decisions of William Johnson or Samuel Chase on certain circuits. *Ibid.* And others had their opinions "published late and incompletely." *Ibid.*

That is why the Supreme Court has unflinchingly insisted that the judicial power vested by Article III is "the power of a court to decide and pronounce a judgment and carry it into effect." *Muskrat v. United States*, 219 U.S. 346, 356 (1911) (quotation omitted); *see also Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 219 (1995) (judicial power is the power "to render dispositive judgments" (quotation omitted)). Rendering a judgment is thus both necessary and sufficient to exercise the judicial power. *See* Edward A. Hartnett, *A Matter of Judgment, Not a Matter of Opinion*, 74 N.Y.U. L. REV. 123, 145 (1999). Issuing an opinion is neither. An opinion "merely explain[s] the grounds" for a judgment. William Baude, *The Judgment Power*, 96 GEO. L.J. 1807, 1844 (2008).

Early American practices underscored this distinction. For most of the Supreme Court's first decade, it delivered opinions seriatim only. *See* John Harrison, *Judicial Interpretive Finality and the Constitutional Text*, 23 CONST. COMMENT. 33, 36 (2006). Initially, the Court also issued only oral judgments and opinions, relying on private, unappointed reporters. *See id.* at

44. Critically, "[n]either the Constitution nor the Judiciary Act of 1789 provided for the delivery of written opinions, let alone their public distribution." John Harrison, *The Power of Congress to Limit the Jurisdiction of Federal Courts and the Text of Article III*, 64 U. CHI. L. REV. 203, 230 (1997). The Judiciary Act of 1789, however, "required the clerks of federal courts, including the Supreme Court, to maintain accurate records of the orders, decrees, judgments, and proceedings of the courts." Hartnett, *A Matter of Judgment*, *supra*, at 128. And the first Congress "provided for the preservation and distribution of its statutes" as well as treaties. *See* Harrison, *Judicial Interpretive Finality*, *supra*, at 44. Thus, while Congress wanted to preserve statutes, treaties, and judgments, it apparently cared not at all about opinions.

An examination of the early Supreme Court reporters confirms the judicial focus on resolving disputes rather than on issuing opinions. The work of the Court's first reporter, Alexander J. Dallas, was characterized by "[d]elay, expense, omission and inaccuracy." Craig Joyce, *The Rise of the Supreme Court Reporter: An Institutional Perspective on Marshall Court Ascendancy*, 83 MICH. L. REV. 1291, 1305 (1985). At least in part, this was because the Court did not provide any written materials to Dallas. *See id.* at 1298. By the time William Cranch became the Court's second reporter, the Court had started a new practice "of reducing [its] opinion to writing, in all cases of difficulty or importance." *See* 5 U.S. (1 Cranch) iii, iv–v (1804). But these writings were merely "the Justices' *notes*, sometimes polished and sometimes not, of opinions delivered orally." *See* Joyce, *supra*, at 1310 n.110. Like Dallas before him, Cranch also struggled with delay, expense, omission, and inaccuracy. *See id.* at 1312. In 1816, Henry Wheaton replaced Cranch, and the following year he was named by Congress as the Court's first official reporter of decisions. *See* Hartnett, *A Matter of Judgment*, *supra*, at 129 & n.33. Although Wheaton was much timelier and more accurate than his predecessors, Wheaton still exercised considerable discretion in omitting cases he

deemed unimportant. *See* Joyce, *supra*, at 1329. In addition, "Wheaton's volumes did not enjoy wide circulation." Hartnett, *A Matter of Judgment*, *supra*, at 130. Founding-era practices thus indicate that opinions, while valuable, remained secondary to judgments.

Judgment primacy is reflected not only in judicial practices stretching from the Roman to the American Republic, but also in two of the oldest doctrines of federal jurisdiction. In 1792, it was firmly established that federal courts act judicially only when they render a final judgment that binds the parties to the case. *See Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792). The Supreme Court recognized the flip side of that principle just one year later when it told the President that federal courts cannot answer legal questions *without* rendering a judgment. *See Correspondence of the Justices*, *in* RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 50–52 (7th ed. 2015) [hereinafter HART & WECHSLER]. Both doctrines have been repeatedly maintained throughout our Nation's history. *See, e.g.*, *United States v. Ferreira*, 54 U.S. 40 (1851); *Gordon v. United States*, 69 U.S. 561 (1864); *Muskrat*, 219 U.S. 346 (1911); *Plaut*, 514 U.S. 211 (1995). Although opinions play an important role in federal courts, they must always take a back seat to judgments. *Cf. Texas v. Hopwood*, 518 U.S. 1033, 1033 (1996) (Ginsburg, J., respecting the denial of *certiorari*) ("This Court . . . reviews judgments, not opinions." (quotation omitted)).

B

None of this is to say that opinions are irrelevant. If the Legal Process School taught us anything, it taught us there is virtue in *reasoned* decision-making. Reasoned opinions explain to the parties (and the vanishingly small number of other people who read what judges say) that a particular judgment rests on legal principle rather than arbitrary "fiat" or "*ad hoc*" caprice. *See*

Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 11, 15 (1959). Opinion writing thus promotes "genuinely principled" judging, whereby a judgment is reached "on analysis and reasons quite transcending the immediate result that is achieved." *Id.* at 15. Without a reasoned opinion, "[t]he parties will have no idea of the basis of [] decision; and the losing party, being left in the dark, may be harder to convince that the decision is just." HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 381 (1958). And maybe "even more important, other private persons will have no aid in planning future conduct." *Ibid.*

Today's majority, however, gets it wrong coming and going. It could have just said "affirmed" without opinion. Sure, without reasoned explanation, some might doubt the principle in that judgment. But at least it would rest on centuries of legal tradition. Alternatively, the majority could have written a reasoned opinion to explain why it is resolving this important case in plaintiffs' favor.

Today's majority chooses neither route. It says that the *opinion* is the only thing that matters. So much so that when the opinion-writing process takes too long, it is best just to affirm to get rid of the case. The majority thus allows the lack of an opinion to dictate its judgment. Yet, of course, the takes-too-long rationale could just as easily support vacatur, reversal, a coin flip, or any other arbitrary decision. "Justice delayed is justice denied"? *Ante*, at 2 (per curiam). Perhaps. But justice is no better served by a per curiam judgment that rests only on frustration. The rule of law demands more than picking a judgment based on the expediency of getting the case off our docket.

II

The majority's per curiam opinion is bad. But JUDGE DAVIS's concurrence is worse. I join in full the powerful dissent by JUDGE JONES, which

explains many of the legal errors in the concurrence. Three of those errors merit emphasis here: (A) it confuses the relevant judgments, (B) it would exacerbate the constitutional tension in the Clean Air Act's citizen-suit provision, and (C) it misconstrues *Laidlaw*.

A

JUDGE DAVIS's concurrence purports to explain why some members of the en banc majority voted to affirm. In addition to the myriad problems identified by JUDGE JONES, a fundamental one screams out: The opinion would affirm an *altogether different judgment* than the one affirmed by the per curiam opinion.

JUDGE DAVIS's concurrence would affirm the district court's *2017* judgment imposing $19.95 million in civil penalties. *See ante*, at 4 & n.2 (Davis, J., concurring) (urging affirmance of *Env't Tex. Citizen Lobby, Inc. v. ExxonMobil Corp.*, 2017 WL 2331679, at *31 (S.D. Tex. Apr. 26, 2017)). The per curiam, however, affirms a *2021* judgment imposing $14.25 million in civil penalties. *See ante*, at 2 (per curiam) (affirming *Env't Tex. Citizen Lobby, Inc. v. ExxonMobil Corp.*, 524 F. Supp. 3d 547, 577 (S.D. Tex. 2021)). So seven of the nine judges who form today's per curiam majority have voted to affirm two altogether different and inconsistent civil-penalty judgments. And no one explains how or why it is an acceptable compromise to go from affirming one judgment to another.

It is an odd "concurrence" that reaches a result different from the majority it purports to support. This further underscores that today's decision pays little attention to the judgment power.

B

Next, JUDGE DAVIS's concurrence would exacerbate the constitutional tension in citizen suits. The Clean Air Act's citizen-suit provision

already "push[es] against the limits of Article III." HART & WECHSLER, *supra*, at 805. So you might expect a court to approach that provision with some modesty. But JUDGE DAVIS's concurrence does the opposite. It proposes a standard that is wildly unworkable. It would transmogrify standing doctrine into an unrecognizable mess. And it would conflate past versus present versus future injuries, past versus future traceability, retrospective versus prospective relief, *and* private versus public redressability—all in one en banc case. JUDGE DAVIS's concurrence interprets the citizen-suit provision to allow (1) someone who was injured in the past to seek (2) civil penalties that are (3) somehow tied to *past* injuries yet somehow "traced" to *future* violations (whatever that means), and that (4) must be deposited not in the injured plaintiff's pocket but instead in the Treasury, without (5) any proof that any of it is necessary to stop an ongoing harm or to deter a future one. None of this makes sense or is consistent with Article III.

C

Nor is any of this supported, much less required, by *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167 (2000). In that case, the Court said civil penalties can redress certain kinds of environmental harms, but *only* "[t]o the extent that they encourage defendants to discontinue current violations and deter them from committing future ones." *Id.* at 186; *see also id.* at 187 (holding "that citizen suitors lack standing to seek civil penalties for violations that have abated by the time of suit"). But what are the environmental harms that JUDGE DAVIS's concurrence wants to stop or deter? *Laidlaw* requires some showing that *this* penalty will deter *that* harm. *See id.* at 187. But the concurrence does nothing to apply that redressability rule.

More fundamentally, *Laidlaw* provides no help to today's majority because it did not address traceability *at all*. The *Laidlaw* Court presumably saw

no need to discuss traceability because all the plaintiffs' injuries were easily traceable to one ongoing wrongful act—the discharge of mercury into the North Tyger River. *Id.* at 181–83. That was the one ongoing wrongful act a civil penalty would stop and then deter. By contrast, the concurrence claims that plaintiffs' injuries are somehow traceable to *thousands* of idiosyncratic violations that bear no relationship to asthma, cancer, or headaches—like a "fire" lasting less than one minute in a cigarette butt can, ROA.13214, 51213, 50482, and a non-fire lasting zero minutes from an extension cord, ROA.13214, 18333–35. Not only are those violations not traceable to plaintiffs' past injuries, but they also cannot be traced to ongoing future harms. Does Exxon have a systematic, ongoing problem with cigarette butts and extension cords? If there is some other ongoing or future conduct that might cause plaintiffs' injuries, what is it? *Laidlaw* does nothing to help plaintiffs out of this traceability problem.

If we do not know what ongoing or future conduct should be actionable, why would any judge on our court prefer to affirm a $19.95 million penalty calculation to fix it?[2] Given that JUDGE DAVIS's concurrence would hold Exxon liable for every single one of the 16,386 violation days, why not hold Exxon liable for every single dollar of the statutory maximum ($573.51 million) to provide even better deterrence? *Laidlaw* supplies no answer to any of these questions.[3]

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[2] Or $14.25 million for that matter. Again, today's majority is agnostic about what the civil penalty should be, as evidenced by the fact that seven of its nine members voted to affirm two different judgments.

[3] The constitutional tension is further amplified by contrasting this case to *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000), decided the same Term as *Laidlaw*. *Stevens* held that a *qui tam* relator has Article III standing to seek civil penalties payable to the Treasury. The *Stevens* Court based its holding on three things that are not true of Clean Air Act citizen suits: (1) the long history of *qui tam* actions, (2) that a *qui tam* relator is a partial assignee of a claim belonging to the Government, and

III

Next, a few words on JUDGE HO's opinion. That opinion says we should dismiss the grant of rehearing en banc as improvidently granted ("DIG") and reinstate the prior decisions of the three-judge panel. *See ante*, at 66 (opinion of Ho, J.). It argues that this is permissible because of the Supreme Court's longstanding practice of dismissing the writ of *certiorari* as improvidently granted. The DIG of a writ of *certiorari* makes sense because of the history and nature of that writ in that Court. Of course, *our* court does not have *certiorari* jurisdiction. And the entire comparison of our jurisdiction to the Supreme Court's is fallacious.

I first (A) describe the history of the writ of *certiorari*, the effect of the writ on lower court judgments, and why it makes no sense to "DIG" an en banc case in the court of appeals. I then (B) explain why it is no better to DIG and reinstate the panel opinion ("DIG+reinstate"). Then I (C) discuss JUDGE HO's understanding of standing and *Laidlaw*. Finally, I (D) detail the inconsistent judgments offered by JUDGE HO.

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(3) that the *qui tam* relator himself recovers a "bounty." *Id.* at 771–78. Even with all three of those qualifiers, *Stevens* raises numerous questions about actions like these. *See* HART & WECHSLER, *supra*, at 156 (asking some); *cf. United States ex rel. Polansky v. Exec. Health Res., Inc.*, 143 S. Ct. 1720, 1741 (2023) (Thomas, J., dissenting) (noting that the False Claims Act's "*qui tam* provisions have long inhabited something of a constitutional twilight zone" and that "[t]here are substantial arguments that the *qui tam* device is inconsistent with Article II"). True, the *Stevens* Court focused primarily on the injury prong. But its cautious, historically sensitive approach in the unusual situation where an individual seeks civil penalties payable to the Government should give us pause here. JUDGE DAVIS's concurrence, by contrast, would extend civil-penalty standing with much less support, none of which is grounded in history or tradition.

A

1

Certiorari is an ancient writ. The "precise origins" of the writ "are uncertain." Jerome J. Hanus, *Certiorari and Policy-Making in English History*, 12 AM. J. LEGAL HIST. 63, 73 (1968). But its earliest known use occurred in 1260, and within two decades, the "writ was in common use." S.A. de Smith, *The Prerogative Writs*, 11 CAMBRIDGE L.J. 40, 45–46 (1951).

Over time, the writ's nature solidified. "The key words" used in the writ were "*certiorari volumus*": "we wish to be certainly informed." BAKER, *supra*, at 159 n.100. And indeed, the writ of *certiorari* began as simply "the King's personal command for information." de Smith, *supra*, at 55. But three distinct functions soon emerged. First, the writ was used "to order the transfer of *records* to a superior court." Benjamin B. Johnson, *The Origins of Supreme Court Question Selection*, 122 COLUM. L. REV. 793, 813 (2022) (emphasis added). Second, the writ was used "to remove a [criminal] *case* when the accused could not get a fair trial in the lower court." *Ibid.* (emphasis added). Here, the writ necessarily brought the case up to a higher court before a judgment was rendered below. And third, *certiorari* was used to bring up a *case* to review a lower court judgment "in the nature of a writ of error." *Ibid.* (quotation omitted). Thus, *certiorari* "effected the removal of a judicial record or cause (often an indictment) from a lower court for trial or other disposition in King's Bench." James E. Pfander, *Jurisdiction-Stripping and the Supreme Court's Power to Supervise Inferior Tribunals*, 78 TEX. L. REV. 1433, 1444 (2000).

Importantly, *certiorari* was a prerogative writ. 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *132 (1768). That meant, among other things, *certiorari* would not issue "as of mere course" or as of right. *Ibid.* In other words, it was not mandatorily issued by

the King's Bench when sought by a litigant (though the writ issued as of course when the King requested it in a criminal case). *See* Edward Jenks, *The Prerogative Writs in English Law*, 32 YALE L.J. 523, 529 (1923); de Smith, *supra*, at 42–44. The King's Bench thus had discretion whether to issue *certiorari*. *See* de Smith, *supra*, at 42–44.

State courts in eighteenth-century America regularly issued writs of *certiorari* in accordance with principles laid down by English practice. *See, e.g.*, *Steiner v. Fell*, 1 U.S. (1 Dall.) 22, 22–23 (Pa. 1776); *In re Oyster's & Emigh's Rd.*, 1 Yeates 3, 3 (Pa. 1791); *Jewell v. Arwine*, 1 N.J.L. 38, 38 (N.J. Sup. Ct. 1790); *Waller v. Broddie*, 2 N.C. (1 Hayw.) 28, 28 (N.C. Super. Ct. L. & Eq. 1794); *Durham v. Hall*, 3 H. & McH. 352, 352 (Md. Gen. Ct. 1795); *Hinson v. Short*, 1 Del. Cas. 95, 96 (1796); *Beck v. Knabb*, 1 Tenn. (1 Overt.) 55, 56–60 (Tenn. Super. Ct. L. & Eq. 1799); *Lawton v. Comm'rs of Highways of Cambridge*, 2 Cai. 179, 181–83 (N.Y. Sup. Ct. 1804); *Massachusetts v. Inhabitants of New Milford*, 4 Mass. 446, 447 (1808).

So too did the United States Supreme Court. The Judiciary Act of 1789 included the All Writs Act, *see* Pub. L. No. 1-20, § 14, 1 Stat. 73, 81–82, which empowered the Supreme Court to issue writs of *certiorari* throughout the first century of the Republic. *See* Johnson, *supra*, at 815. But the Court used the writ only to bring up the record—not the case. *Ibid.*; *see also, e.g.*, *Ex parte Burford*, 7 U.S. (3 Cranch) 448, 449 (1806); *United States v. Young*, 94 U.S. 258, 259–60 (1876); *Ex parte McCardle*, 73 U.S. 318, 324 (1867). This was true even though the Court recognized the other two uses of the writ at common law. *See* Johnson, *supra*, at 815; *see also Fowler v. Lindsey*, 3 U.S. (3 Dall.) 411, 412–14 (1799) (opinion of Washington, J.); *Harris v. Barber*, 129 U.S. 366, 369 (1889); *Hartranft v. Mullowny*, 247 U.S. 295, 299 (1918).

Why did the early Court not use *certiorari* to take up cases? Because the early Congresses made the Court's appellate jurisdiction mandatory—

not discretionary—so the role of *certiorari* was more limited. *See* HART & WECHSLER, *supra*, at 24–25, 30, 461; Johnson, *supra*, at 815–16. Congress explicitly provided for two methods of reviewing lower court judgments: the appeal and the writ of error. The two differed in that the writ of error was an appellate proceeding at law, while the appeal was its "equitable analogue." Johnson, *supra*, at 808–09. But critically, both were mandatory. STEPHEN M. SHAPIRO ET AL., SUPREME COURT PRACTICE § 4.1 (11th ed. 2019) [hereinafter STERN & GRESSMAN]. If an appellant filed an appeal, the Supreme Court had no discretion to refuse to hear the case.

When Congress eventually permitted the Court to take up cases via *certiorari*, the writ retained its historic nature. In 1891, Congress for the first time provided that the Supreme Court could bring up a certain class of cases by *certiorari*, "as if it had been carried by appeal or writ of error." Judiciary Act of 1891, Pub. L. No. 51-517, § 6, 26 Stat. 826, 828. Congress did so to give the Court some discretion over its otherwise mandatory (and thus back-logged) docket. *See* 21 CONG. REC. 10222 (1890) (statement of Sen. William M. Evarts) (explaining that introducing *certiorari* "does firmly and peremptorily make a final[i]ty on such subjects as we think in their nature admit of finality, and at the same time leaves flexibility, elasticity, and openness for supervision by the Supreme Court"); Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill*, 100 COLUM. L. REV. 1643, 1650–52 (2000).

Congress made several changes to the Supreme Court's *certiorari* jurisdiction throughout the twentieth century. *See* HART & WECHSLER, *supra*, at 30. But it did not change the writ's character. *See* Johnson, *supra*, at 837. Rather, Congress only increased the number of cases the Court could take by *certiorari*. *Ibid.* And it did so precisely because *certiorari* had always been discretionary, allowing the Court to reduce backlog and to focus on matters of national importance. *See id.* at 850–51 (discussing the expansion of

certiorari to reduce backlog); H.R. REP. NO. 100-660, at 14 (1988), *as reprinted in* 1988 U.S.C.C.A.N. 766, 779 (explaining that *certiorari* helped the Court focus on matters of "wide public importance or governmental interest" and maintain "uniformity and consistency in the law").

2

Today, virtually all of the Supreme Court's cases are heard by way of discretionary, *certiorari*-based jurisdiction. Except for a small category of mandatory appeals from three-judge district courts, the Court's ability to hear cases is premised on its discretionary choice to grant the writ of *certiorari*. *See* STERN & GRESSMAN, *supra*, at § 2.1; 28 U.S.C. §§ 1253, 1254, 1257; S. CT. R. 10 ("Review on a writ of certiorari is not a matter of right, but of judicial discretion.").

The Supreme Court's action in denying a writ of *certiorari* has no effect on the judgment below. It has been "evident" for over a hundred years that refusing to grant *certiorari* "is in no case equivalent to an affirmance of the decree that is sought to be reviewed." *Hamilton-Brown Shoe Co. v. Wolf*, 240 U.S. 251, 258 (1916). Its denial "imports no expression of opinion upon the merits of the case." *United States v. Carver*, 260 U.S. 482, 490 (1923). It simply means the Supreme Court "has refused to take the case." *Darr v. Burford*, 339 U.S. 200, 226 (1950) (Frankfurter, J., dissenting). The judgment below is untouched by denial of the writ.

Granting the writ likewise does not affect the lower court's judgment. Granting *certiorari* allows the Court to review that judgment *in the future*. It does not mean the Court has reversed or vacated that judgment or done anything to it at all. *Cf.* 2 TRACY BATEMAN ET AL., FEDERAL PROCEDURE § 3.6 (Laws. ed.). Practice makes this clear. After granting *certiorari*, the Court often reverses or vacates a lower court judgment, which would be wholly unnecessary if granting *certiorari* already did so.

All of this makes complete sense. For centuries, *certiorari* was a device used to call up the records of a lower court for review by a higher court. Merely calling up those records—or, contrariwise, refusing to do so—does nothing to the lower court's judgment. Nor does it, even implicitly, approve of *or* cast doubt upon the lower court's judgment or reasoning.

When the Supreme Court does decide to grant the writ of *certiorari*, it may likewise exercise its discretion to dismiss it. The practice of dismissing a writ of *certiorari* as improvidently granted has a long pedigree in American law. State courts have dismissed writs of *certiorari* as improvidently granted since the earliest days of the Republic. *See, e.g.*, *State v. New Brunswick*, 1 N.J.L. 393, 393 (N.J. Sup. Ct. 1795) (per curiam) (explaining that if it issues the writ of *certiorari* "improvidently," the court can later dismiss the writ); *Inhabitants of New Milford*, 4 Mass. at 447 (quashing the "certiorari [that] issued improvidently"); *State v. Woodward*, 9 N.J.L. 21, 25 (N.J. Sup. Ct. 1827) (same); *Haines v. Campion*, 18 N.J.L. 49, 50–51 (N.J. Sup. Ct. 1840) (same); *State v. Ten Eyck*, 18 N.J.L. 373, 374 (N.J. Sup. Ct. 1841) (dismissing the writ of *certiorari* as improvidently granted); *Van Vorst v. Kingsland*, 23 N.J.L. 85, 89 (N.J. Sup. Ct. 1851) (same); *Malone v. Water Comm'rs*, 30 N.J.L. 247, 250 (N.J. Sup. Ct. 1863) (same).

The Supreme Court of the United States, shortly after Congress gave it the power to issue writs of *certiorari* to take up cases, began to dismiss writs of *certiorari* as improvidently granted, explicitly relying on state court precedent in doing so. *See Furness, Withy & Co. v. Yang-Tsze Ins. Ass'n*, 242 U.S. 430, 431 (1917) (citing *Malone*, 30 N.J.L. 247). By 1955, there were several dozen instances where the Court dismissed a writ of *certiorari* as improvidently granted. *See Rice v. Sioux City Mem'l Park Cemetery*, 349 U.S. 70, 78 n.2 (1955) (citing "more than sixty such cases," *id.* at 78). The practice has continued uninterrupted through today. *See, e.g.*, *United States v. Texas*, 595 U.S. 74, 75 (2021) (per curiam); *Moyle v. United States*, 144 S. Ct. 2015 (2024)

(per curiam); *Facebook, Inc. v. Amalgamated Bank*, 604 U.S. __ (2024) (per curiam).

When the Supreme Court dismisses a writ of *certiorari* as improvidently granted, it does not act on the lower court's judgment. A DIG is essentially "equivalent to that of a denial of certiorari" in the first place. Richard L. Revesz & Pamela S. Karlan, *Nonmajority Rules and the Supreme Court*, 136 U. PA. L. REV. 1067, 1982 n.59 (1988). It is thus not a decision "upon the merits of the case." *United States v. Rimer*, 220 U.S. 547, 548 (1911); *see also, e.g.*, *Layne & Bowler Corp. v. W. Well Works*, 261 U.S. 387, 393 (1923); *Mishkin v. New York*, 383 U.S. 502, 512 (1966). Nor does it imply that the Court is "approving or disapproving the view of the" court below. *Hodges v. United States*, 368 U.S. 139, 140 (1961). So, critically, a DIG "leav[es] the judgment of the court below unaffected." *Tyrrell v. District of Columbia*, 243 U.S. 1, 6 (1917); *see also* Scott H. Bice, *The Limited Grant of Certiorari and the Justification of Judicial Review*, 1975 WIS. L. REV. 343, 388. The issuing of the writ brings up the records to be reviewed, and the dismissal of the writ sends those records back. Both actions are permissible only because *certiorari* is entirely discretionary—on the front and the back end. *See* STERN & GRESSMAN, *supra*, at §§ 5.5, 5.15.

3

You might be wondering: What does any of this have to do with courts of appeals and en banc rehearing? I asked the same question when I read the first invocation of "DIG" in this case. The answer is: Nothing.

An inferior court like ours has no power to hear cases on *certiorari*. Instead, we review final judgments of inferior courts through mandatory appeals. *See, e.g.*, ERWIN CHEMERINSKY, FEDERAL JURISDICTION 26 (8th ed. 2021) ("The courts of appeals have obligatory jurisdiction to hear appeals from all final decisions of the district courts of the United States.");

see also 28 U.S.C. § 1291. When a litigant appeals a district court's final judgment, the relevant court of appeals must hear and decide the case.

True, like the decision to issue a writ of *certiorari*, the decision to grant rehearing en banc is discretionary. But unlike when the Court grants *certiorari*, our decision to grant en banc rehearing acts on the panel's judgment and opinion by vacating both. *See* 5TH CIR. R. 41.3 ("Unless otherwise expressly provided, the granting of a rehearing en banc vacates the panel opinion and judgment of the court and stays the mandate."). The underlying judgment and its accompanying opinion become nullities—they cease to exist as a matter of law. *See United States v. Pineda-Ortuno*, 952 F.2d 98, 102 (5th Cir. 1992); *Selvage v. Lynaugh*, 842 F.2d 89, 91 (5th Cir. 1988). That is why "when an en banc court never reaches an issue decided by the panel in the same case, the issue remains an open one." *Hooten v. Jenne*, 786 F.2d 692, 695 (5th Cir. 1986) (per curiam) (citing *Longoria v. Wilson*, 730 F.2d 300, 304 (5th Cir. 1984)). So if the en banc court dismisses the grant of the petition for rehearing en banc, it does not merely leave an issue undecided; it leaves the entire appeal undecided. This we cannot do.

Thus, it is true that "[t]he Supreme Court regularly dismisses certiorari as improvidently granted, despite the absence of any rule authorizing such practice." *Ante*, at 73 (opinion of Ho, J.). It is also irrelevant because we are not the Supreme Court, and our jurisdiction is not discretionary. DIGs are part and parcel of a discretionary, writ-based jurisdiction that forms no part of our docket. That is why JUDGE HO's opinion cannot cite a single example of anything other than a writ of *certiorari* being dismissed as improvidently granted.

B

JUDGE HO's opinion attempts to avoid this problem by claiming that the en banc court could DIG and then reinstate the panel opinion and

judgment. This second option—DIG+reinstatement—fares no better than the DIG itself.

When the Supreme Court DIGs a case, it does not need to reinstate anything. That is because the act of granting a writ of *certiorari* did nothing to disturb the judgment below in the first place. The lower court judgment remains in place unless and until the Supreme Court affirms, vacates, reverses, &c. So the act of DIGing simply removes any doubt that the Supreme Court will leave the judgment undisturbed.

But were our en banc court to dismiss its rehearing as improvidently granted as JUDGE HO suggests, it would lose power to enter any judgment at all. The en banc court would lose its jurisdiction over the case as soon as the dismissal was entered. Just as a court cannot order the case dismissed and then proceed to the merits, *see Ex parte McCardle*, 74 U.S. 506, 514 (1869), neither can the en banc court DIG the case and then proceed to the merits.

Perhaps what JUDGE HO meant to say is that the en banc court could *vacate* our en banc rehearing order? *See Env't Tex. Citizen Lobby*, 61 F.4th at 1012–13. That rehearing order in turn vacated two Fifth Circuit panel decisions (one dated July 29, 2020, and the other dated August 30, 2022). *See id.* at 1013. So perhaps my esteemed colleague envisions an en banc decision vacating the rehearing order as improvidently granted ("VIG")—which might have the effect of revivifying our panel decisions from 2020 and 2022? *Cf. Hotze v. Hudspeth*, 16 F.4th 1121, 1126 (5th Cir. 2021) (Oldham, J., dissenting) ("Vacated authority, of course, is no authority at all.").

Here too, however, there are problems all the way down. First, a VIG has none of the historical pedigree of its DIG cousin. Second, a VIG and DIG are different judgments, and JUDGE HO endorses only the latter. And third, a VIG reinstating the 2020 and 2022 panel decisions cannot be reconciled with the per curiam decision. (More on that later. *See* Part III.D, *infra*.)

JUDGE HO offers no rationale for why any of these results should obtain—much less for how these different judgments are somehow so interchangeable that they can be swapped around at will.

C

Piling confusion on confusion, JUDGE HO then explains his view of standing anyway: He states that he would have voted to vacate under his view of *Laidlaw*. *See ante*, at 68 (opinion of Ho, J.). There are three principal problems with this.

First, while joining the majority's decision, JUDGE HO writes a separate opinion that reaches a very different judgment. The majority would affirm. JUDGE HO would vacate. *See ante*, at 68 (opinion of Ho, J.) (arguing we should vacate the district court's judgment and remand to give Exxon the "opportunity to rebut the presumption of traceability"). Once again, another opinion that reaches a result different from the majority opinion it joins.

Second, JUDGE HO's application of *Laidlaw* is fallacious. It goes like this: *Laidlaw* is binding precedent; under *Laidlaw*, a civil penalty *can* theoretically deter future injury; therefore, $14.25 million *will* deter plaintiffs' future injuries. The premises are obviously correct. But that does nothing to compel the conclusion. Rather, there must be a connection between the specific penalty authorized and the particular harms suffered. And neither JUDGE HO's opinion nor JUDGE DAVIS's concurrence can offer one word to explain how the specific sum of $14.25 million will do anything to redress plaintiffs' injuries.

Third, it is no answer to say plaintiffs satisfied traceability and hence satisfied redressability. *See ante*, at 66 & n.1, 68–70 (opinion of Ho, J.). True, "traceability and redressability are *often* flip sides of the same coin," but "that is not *always* the case." *Murthy v. Missouri*, 144 S. Ct. 1972, 1996 n.11 (2024) (quotation omitted) (emphasis in original). That is why we say that

assessing standing under *Lujan* is a tripartite inquiry, not a bipartite one. In short, traceability and redressability can, and do, diverge. *See FDA v. All. for Hippocratic Med.*, 144 S. Ct. 1540, 1555 n1. (2024); *Murthy*, 144 S. Ct. at 1995–96 & n.11; *United States v. Texas*, 599 U.S. 670, 676 (2023); *California v. Texas*, 593 U.S. 659, 672 (2021). So under *Laidlaw*, and an unbroken line of other Supreme Court cases, plaintiffs invoking our jurisdiction must point to injuries they have now; must trace those injuries to the defendant's conduct; and must explain how a monetary remedy will stop ongoing conduct or deter future conduct that is causing or will cause those injuries. JUDGE HO's opinion—and JUDGE DAVIS's concurrence, for that matter—identify *nothing* that is ongoing or likely to recur absent civil penalties.

D

Finally, let's parse the four different votes cast by my esteemed colleague in this case. *First*, JUDGE HO votes to *affirm* the district court's 2021 judgment in the per curiam. *Second*, JUDGE HO says he would *vacate* the district court's 2021 judgment. *Third*, JUDGE HO's opinion votes to DIG our en banc court's grant of rehearing. *Fourth* and finally, JUDGE HO would DIG+reinstate the panel's 2020 and 2022 decisions, presumably on the theory that that is the same as affirming the district court.

VOTE	RESULT
(1) Affirm	Exxon must pay $14.25 million because the hidden shot clock expired.
(2) Vacate	JUDGE JONES authors plurality; case returns to district court.
(3) DIG	Appeal remains undecided.
(4) DIG+reinstatement	N/A because it's impossible; but if a VIG is intended and possible, CA5 panel decisions from 2020 and 2022 revivified.

Those are different and inconsistent judgments. Not much need be said about the difference between vacating the district court judgment (2) and affirming it (1): those obviously reach different results. But what about affirming the district court (1) and one of the DIG variants (3)–(4)? Are (1), (3), and (4) all different ways of saying the same thing?

No. Again, the reason why lies in the judgment power. The per curiam opinion affirms the district court's 2021 judgment (1). But even assuming a DIG+reinstatement (4) is possible, it would revivify two different Fifth Circuit panel decisions—one from 2020 and another from 2022. Those are very different judgments.

Take for example the 2020 Fifth Circuit panel decision. As JUDGE HO concedes, that decision was wrong because it created rigid, *per se*, and *irrebuttable* inferences of traceability. Yet DIG+reinstatement (4) brings that decision back to life—even while JUDGE HO's opinion says it is wrong. JUDGE HO would substitute a burden-shifting framework that has been applied by no court anywhere in the Nation. *See ante*, at 68–70 (opinion of Ho, J.). And JUDGE HO's opinion offers no way to reconcile that burden-shifting approach with the 2020 panel decision that DIG+reinstatement (4) would reimpose. Meanwhile, simply affirming the district court (1) means that the 2020 panel decision remains vacated.

Or take the 2022 Fifth Circuit panel decision. DIG+reinstatement (4) would bring that decision back to life, thus requiring future Clean Air Act panels to follow it. But that is not the same as the per curiam affirming the district court's 2021 judgment on a shot-clock theory (1). DIG+reinstatement (4) has obvious implications for our rule of orderliness that a shot-clock affirmance (1) does not.

* * *

None of this can be dismissed as "feign[ed] incredulity" or the stuff of "fainting couch[es]." *Ante*, at 74 (opinion of Ho, J.). If jurisdiction is so important that it must be addressed even as an alternative ground to vacate an injunction, *see ante*, at 80–81 (opinion of Ho, J.), it's quite something to duck the jurisdictional problems and vote to affirm on the merits because this is "just" a business case that took too long.

It is obviously true that "[w]e must not treat business interests more favorably than other litigants." *Ante*, at 77 (opinion of Ho, J.). But it is also true that we should not *disfavor* a party simply because it takes the corporate form. Or because we think its appeal was too difficult.

Today's decision purports to settle nothing about the Clean Air Act. It decides nothing about standing. And it does nothing to assist future parties to important environmental law cases in our circuit.

Instead, it announces a new shot clock for dis-enbancing a case. And it has all the theoretical rigor of the Roman crowds signaling *pollice verso*. I respectfully but emphatically dissent.