ANDREW S. OLDHAM, Circuit Judge, concurring in part, dissenting in part, and concurring in the judgment:

I agree that the district court's judgment must be vacated, and that we must remand the case for additional proceedings. I write separately to emphasize that our precedents in this area are a mess. The majority admirably attempts to make sense of them. But I'm afraid that task is too big for any panel. Eventually, our en banc court should clean up this confusion.

I.

The mess started in 1990. That's when the Third Circuit created a three-part standard for determining traceability in citizen suits under the Clean Water Act. *See Pub. Interest Research Grp. of N.J., Inc. v. Powell Duffryn Terminals Inc.*, 913 F.2d 64, 72 (3d Cir. 1990). Under *Powell Duffryn*, the plaintiff must show:

> a defendant has 1) discharged some pollutant in concentrations greater than allowed by its permit 2) into a waterway in which the plaintiffs have an interest that is or may be adversely affected by the pollutant and that 3) this pollutant causes or contributes to the kinds of injuries alleged by the plaintiffs.

Ibid. It's not obvious how the Third Circuit devised that standard because the court cited nothing at all to support it. *See ibid.*

For better or worse, we relied on *Powell Duffryn*'s *ipse dixit* in *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co. Inc.*, 73 F.3d 546, 557–58 (5th Cir. 1996). Oddly, our *Cedar Point* decision did not *even cite*—much less analyze—the Supreme Court's canonical decision on Article III standing in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). Much of *Cedar Point* contravenes *Lujan* and its progeny. *Compare, e.g.*, *Cedar Point*, 73 F.3d at 556–57 (embracing the plaintiffs' theory of "threatened injury" without discussing the requirement that it be "concrete," "imminent," and "certainly impending"), *with Lujan*, 504 U.S. at 567 nn.2–3 (requiring plaintiffs to establish a "concrete injury" that was "imminent" and "certainly impending"), *and Clapper v.*

Amnesty Int'l USA, 568 U.S. 398, 409 (2013) (similar). But even when *Cedar Point* relied on the Third Circuit's standard rather than Supreme Court precedent, it recognized that "a literal reading of *Powell Duffryn* may produce results incongruous with our usual understanding of the Article III standing requirements." 73 F.3d at 558 n.24. Therefore, *Cedar Point* utilized a more amorphous approach to Article III standing that turned on things like whether the relevant waterway is "large." *Ibid.*

The third prong of the *Powell Duffryn-Cedar Point* standard is the most pernicious. It says that the plaintiff need only prove that the relevant pollutant "causes or contributes to the *kinds of injuries* alleged by the plaintiffs." *Powell Duffryn*, 913 F.3d at 72 (emphasis added); *see also Cedar Point*, 73 F.3d at 557 (adopting this *ipse dixit*). That eliminates traceability altogether. Think about it. Would we ever say: my house burned down; arsonists burn down houses; therefore, an arsonist burned down my house? Of course not. My house could have burned down because the wiring was faulty, I left the stove on, my dog tipped over a candle, a bolt of lightning struck the roof, a litterbug's cigarette started a wildfire, or myriad other potential causes. Therefore, we would require *some sort* of allegation of but-for causation linking the fire to the arsonist. But *Powell Duffryn-Cedar Point* eliminates that. It's enough to say that someone has asthma; pollutant X can cause asthma; therefore, pollutant X caused someone's asthma. *Cum hoc ergo propter hoc.*

Rather than recognize the fallacies inherent in *Powell Duffryn-Cedar Point*, some courts have extended its illogic. For example, the Fourth Circuit relied on both cases to hold that the "fairly traceable" standard is "not equivalent to a requirement of tort causation." *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 161 (4th Cir. 2000) (quotation omitted). It is unclear what that sentence is supposed to mean. I suppose it could mean that a plaintiff can establish traceability without establishing the

tort requirement of *proximate* causation. That's true. *See, e.g.*, *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 134 n.6 (2014) ("Proximate causation is not a requirement of Article III standing, which requires only that the plaintiff's injury be fairly traceable to the defendant's conduct.").

But some of our sister circuits *also* have eliminated *but-for* causation. For example, the Sixth Circuit said: "In the nebulous land of 'fairly traceable,' where causation means more than speculative but less than but-for, the allegation that a defendant's conduct was a motivating factor in the third party's injurious actions satisfies the requisite standard." *Parsons v. U.S. Dep't of Justice*, 801 F.3d 701, 714 (6th Cir. 2015). That's much like *Powell Duffryn*, which distinguished the "requirement of tort causation" from "scientific certainty." 913 F.2d at 72. And much like *Powell Duffryn*, *Parsons* cited exactly *nothing* to support its *ipse dixit*. Also much like *Powell Duffryn*, *Parsons* makes little sense. Asking whether a particular allegation is "more than speculative but less than but-for," *Parsons*, 801 F.3d at 714, is like asking whether a particular product is more than a preponderance but less than defective. The first is the plaintiff's burden; the second is the actual fact that the plaintiff must prove.

Our circuit already has recognized the constitutional problems posed by the ever-growing mountain of *ipse dixits* and logical fallacies that comprise the *Powell Duffryn-Cedar Point-Gaston Copper-Parsons* line of cases. *Cedar Point* itself recognized its approach could generate "results [that are] incongruous with our usual understanding of the Article III standing requirements." 73 F.3d at 558 n.24. And we've reiterated that concern in other cases. For example, we've held that plaintiffs could not establish traceability by showing that they "use[d] a body of water located three tributaries and 18 miles 'downstream' from" a polluting refinery. *Friends of the Earth, Inc. v. Crown*

Cent. Petroleum Corp., 95 F.3d 358, 361 (5th Cir. 1996); *see also ibid.* ("We are persuaded that this case presents a situation in which *Powell Duffryn*'s focus on the plaintiff's interest in the 'waterway' into which unlawful pollution flows passes Article III bounds."). We've also held that the *Powell Duffryn-Cedar Point-Gaston Copper-Parsons* standard must be limited to "a case involving a small body of water, close proximity, well-understood water currents, and persistent discharges." *Ctr. for Biological Diversity v. EPA*, 937 F.3d 533, 545 (5th Cir. 2019). And although we have at least one Clean Air Act case that describes *Cedar Point* as "the law in this Circuit," *Texans United for a Safe Economy Education Fund v. Crown Central Petroleum Corp.*, 207 F.3d 789, 793 (5th Cir. 2000), apparently we've never applied the *Powell Duffryn-Cedar Point-Gaston Copper-Parsons* traceability standard to air pollution. (Indeed, it's quite awkward to do so because that standard turns on whether the relevant waterway is "large"—an adjective that makes no sense as applied to air.)

II.

Today's panel confronted the unenviable task of making sense of the *Powell Duffryn-Cedar Point-Gaston Copper-Parsons* line of cases; squaring it with *Crown Central*, *Center for Biological Diversity*, and *Texans United*; and then attempting to reconcile the whole mess with Article III of the Constitution. I admire the majority's efforts to square the circle. In my view, however, it's impossible.

A.

Let's start with the common ground between the majority and me. We all agree that the *Powell Duffryn-Cedar Point-Gaston Copper-Parsons* line of cases allows for something less than "tort-like . . . proximate cause" to establish traceability. *See ante*, at 13 & n.4. Of course, that does not excuse the plaintiffs from proving *but-for* causation.

After all, the Supreme Court long has held that a plaintiff's injuries are not fairly traceable without but-for causation. *See, e.g.*, *Allen v. Wright*, 468 U.S. 737, 758 (1984) (holding that plaintiffs failed to establish traceability because "it is entirely speculative . . . whether withdrawal of a tax exemption from any particular school would lead the school to change its policies"—that is, whether the tax exemption is the but-for cause of plaintiffs' injuries); *Duke Power Co. v. Carolina Envtl. Study Grp., Inc.*, 438 U.S. 59, 74–78 (1978) (holding that "a 'but for' causal connection" between plaintiff's injury and defendant's act sufficed for traceability); *Warth v. Seldin*, 422 U.S. 490, 505 (1975) (holding that Article III requires plaintiffs "to establish that, in fact, the asserted injury was the consequence of the defendants' actions"); *see also* Richard H. Fallon, Jr., *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of* Lyons, 59 N.Y.U. L. REV. 1, 17 n.91 (1984) (observing that the Supreme Court's causation analysis "replicate[s] the tort law concept of 'cause in fact' or 'but for' causation"). As have some of our sister circuits. *See, e.g.*, *Cmty. Nutrition Inst. v. Block*, 698 F.2d 1239, 1247 (D.C. Cir. 1983) ("A plaintiff need only make a reasonable showing that 'but for' defendant's action the alleged injury would not have occurred."); *cf. Honeywell Int'l, Inc. v. EPA*, 705 F.3d 470, 472 (D.C. Cir. 2013) (Kavanaugh, J.) ("Honeywell's injury is fairly traceable to the now-permanent 2008 interpollutant transfers by Arkema and Solvay because the injury would not have occurred but for the 2008 transfers."). Even the Third Circuit—which gave us the unfortunate *Powell Duffryn* standard—says the traceability "requirement is akin to 'but for' causation in tort and may be satisfied even where the conduct in question might not have been a proximate cause of the harm." *Finkelman v. Nat'l Football League*, 810 F.3d 187, 193 (3d Cir. 2016) (quotation omitted).

Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., 528 U.S. 167 (2000), obviously says nothing to the contrary. The Court in that case did not say anything at all about but-for causation. And it certainly didn't purport to overrule any of its traceability cases that applied but-for causation—like *Allen v. Wright* or *Duke Power*. Reasonable people might disagree—as the Justices did in *Laidlaw*—over whether Friends of the Earth proffered sufficient evidence of traceability. *See ante*, at 13 n.4 (summarizing the disagreement). But that doesn't mean *Laidlaw* announced *sub silentio* a new legal standard. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 91 (1998) ("We have often said that drive-by jurisdictional rulings of this sort . . . have no precedential effect."). So the but-for causation requirement remains part of the irreducible constitutional minimum for Article III traceability.

B.

So where do I diverge from the majority? First, it's not obvious to me that the *Powell Duffryn-Cedar Point-Gaston Copper-Parsons* doctrine should apply at all. As noted above, *Cedar Point* turns on whether a particular body of water is "large." 73 F.3d at 558 n.24. Whatever sense that might make in water-pollution cases, it makes little or none in air-pollution cases.

Second, even if the *Powell Duffryn-Cedar Point-Gaston Copper-Parsons* doctrine applies, the en banc court should revisit it. The district court already has conducted two trials in this case. We are remanding for a third. And there's no guarantee that the third time will be a charm. One problem with an inherently indeterminate doctrine—like *Powell Duffryn* and its progeny—is that it cannot generate predictable results the first time around.

To illustrate, consider a hypothetical plaintiff Bob who lives in Baytown. Bob has asthma—that is, an injury. The question is whether his asthma injury is traceable to Exxon's illegal emissions. From January 1 through January 10, Bob was visiting his sister in France. Meanwhile:

- On January 2, Exxon emitted pollutants that "could have reached beyond the Exxon complex into the offsite areas of Baytown where Plaintiffs' members lived and recreated." *Ante*, at 16.
- On January 5, Exxon released "pollutants in excess of nonzero emissions limits" or that constituted "a 'reportable quantity' under state regulations." *Ante*, at 16.
- On January 8, Exxon emitted pollutants "that could have caused or contributed to flaring, smoke, or haze, even if the emission was of a small magnitude." *Ante*, at 17.

Can Bob recover for these emissions? Obviously, our decision today doesn't say. And I don't know the answer under the *Powell Duffryn-Cedar Point-Gaston Copper-Parsons* line of cases. Nor do I envy the district court, which will have to hazard a guess. The only thing I know for sure is that Article III's traceability requirement bars Bob from recovering a penny.

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The *Powell Duffryn* framework cannot be squared with Article III's traceability requirement. *Cedar Point*'s half-hearted adoption of *Powell Duffryn* fares little better. Although in many cases we may be able to distinguish and disapply *Cedar Point*, our ability to faithfully apply Article III should not turn on whether a lawsuit involves a lake, a Gulf, or a smokestack. At some point, our en banc court should bring our precedent in line with the Constitution.