**Case No. 23-1832**

**IN THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT**

CONSERVATION LAW FOUNDATION, INC.,
*Plaintiff-Appellant*,

v.

ACADEMY EXPRESS, LLC; DPV TRANSPORTATION, INC.; BOSTON CHARTER BUS, LLC,
*Defendants-Appellees,*

ACADEMY BUS, LLC; WYNN RESORTS, LTD.; WYNN MA, LLC; WYNN RESORTS HOLDINGS, LLC; WYNN AMERICA GROUP, LLC; WYNN RESORTS FINANCE, LLC,
*Defendants*.

*On Appeal from the United States District Court*
*for the District of Massachusetts No 1:20-cv-10032*
*The Honorable William Young*

# BRIEF OF THE APPELLANT

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**RULE 26.1 DISCLOSURE STATEMENT OF CONSERVATION LAW FOUNDATION, INC.**

Plaintiff-Appellant Conservation Law Foundation, Inc. ("CLF"), a nongovernmental corporate party to the above-captioned proceeding, has nothing to disclose pursuant to Federal Rule of Appellate Procedure 26.1(a). CLF has no parent corporation nor is it a corporation in which any person or entity owns stock.

Dated: December 11, 2023

Respectfully submitted,

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## JURISDICTIONAL STATEMENT

The district court had jurisdiction over these citizen suits pursuant to 42 U.S.C. § 7604 because they were brought against persons alleged to have violated or to be in violation of an emission standard or limitation under the Clean Air Act.

This Court has jurisdiction pursuant to 28 U.S.C. § 1291 because this is a timely appeal from a final order or judgment of the district court that disposes of all parties' claims. ADD022. The district court entered judgment on September 15, 2023, and CLF filed its Notice of Appeal on October 10, 2023. ADD022; JA403.

## STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. In a citizen suit brought under the Clean Air Act, did the district court err in holding that CLF had not shown injury-in-fact, when numerous members testified that they smelled and inhaled noxious motor vehicle exhaust, were obliged to do so when waiting for transportation at various bus stops, found their enjoyment of walking and other activities impaired by noxious motor vehicle exhaust, in some cases experienced physical injury such as aggravation of allergic or asthmatic reactions, and reasonably feared that the ongoing discharge of exhaust from idling buses injures their health?

2. In a citizen suit brought under the Clean Air Act, did the district court err in holding that CLF had not shown that its members' injuries were fairly traceable to the Defendants, where numerous members who testified to having

sustained or reasonably fearing injuries-in-fact from motor vehicle exhaust lived, worked, walked, or recreated well within a mile (sometimes within yards) of bus stations where violations regularly occur?

3. In a citizen suit brought under the Clean Air Act, did CLF show that the injuries complained of were likely redressable through the imposition of civil penalties or injunctive relief?

## STATEMENT OF THE CASE

In January 2020, CLF filed two actions under the Clean Air Act's citizen suit provision, seeking injunctive relief and the imposition of statutory penalties against three bus companies (collectively, the "Defendants"). In September 2023, the district court granted summary judgment to the Defendants in both actions, holding that CLF lacked standing to sue. CLF appealed those judgments here, seeking reversal and a remand of the case to the district court for trial.

The Clean Air Act's citizen suit provision authorizes any person to sue another who is in violation of the Act. 42 U.S.C. § 7604(a)(1). The Act imposes emissions standards and limitations set out in state plans approved by the EPA. *Id.* at § 7604(f)(4). The Massachusetts State Implementation Plan prohibits any person from unnecessarily running the engine of a vehicle when the vehicle is stopped for a foreseeable time exceeding five minutes. 310 Mass. Code Regs. § 7.11(1)(b). The Connecticut State Implementation Plan prohibits the operation of a mobile source

for more than three minutes when the mobile source is not in motion. Conn. Agencies Regs. § 22a-174-18(b)(3)(C). Both state plans were approved by the EPA Administrator, making the idling limits enforceable under federal law. *See* 40 C.F.R. § 52.1120; 37 Fed. Reg. 23,085; 42 U.S.C. § 7410; 40 C.F.R. § 52.385; 79 Fed. Reg. 41,427. The idling limits were developed to protect public health, as idling vehicles spew toxic pollution into the air and cause serious health effects. JA154.

This appeal involves the Defendants' pattern and practice of violating those idling limits. The record in the district court involved hundreds of idling violations. In the lead action against Defendant-Apellee Academy Express, LLC ("Academy"), case number 1:20-cv-10032-DPW, the Amended Complaint alleged, and associational discovery showed, that Academy buses unlawfully idled at Riverside Station (the "Newton Go Bus Stop"), the Braintree Lot, the 33 Harry Agganis Way Stop (the "Agganis Way Stop"), Alewife Station (the "Cambridge Go Bus Stop"), and the Bridgeport Lot. JA057–061. In the companion case brought against Defendants-Appellees Academy, DPV Transportation, Inc. ("DPV"), and Boston Charter Bus, LLC ("BCB"), case number 1:20-cv-10033-DPW, the complaint alleged, and associational discovery showed, that the Defendants unlawfully idled at the Wellington Station Stop, Mystic Street, and 170 Everett Avenue (the "Everett Neighborhood Runner Stop"). JA014–022.

Over 18 days in 2019, seven days in 2020, and one day in 2021, investigators documented Academy buses idling in excess of the applicable state's idling limit 140 times, and tracking monitors in Academy's buses recorded an additional seven idling violations. JA057–061; JA014–022; JA375. Over 12 days in 2019 and one day in 2020, investigators documented DPV buses idling in excess of the Massachusetts idling limit 146 times. JA015–022. Over four days in 2019, investigators documented BCB buses idling in excess of the Massachusetts idling limit 19 times. JA022. On nine out of ten occasions when investigators observed the Defendants' buses, there were buses violating the standard. Thus, CLF documented a pattern and practice of excessive idling that occurs when Defendants operate their buses. JA161; JA216.

On February 19, 2021, Defendants moved for summary judgment under Federal Rule of Civil Procedure 56, asserting that CLF lacked standing under Article III of the Constitution of the United States, and thus that the court lacked subject-matter jurisdiction. JA086; JA102. CLF opposed the motions, submitting declarations from its members. Declarations showed that the Defendants' violations of the Clean Air Act harmed, and continue to harm, CLF members who live, work, or recreate in close proximity to the areas where bus tailpipes continuously emit harmful air pollution. JA142; JA198. As set out in detail in the Appendix and below, members testified that they smelled and breathed noxious

motor vehicle exhaust and found it unpleasant to do so, that in some cases they experienced adverse physical reactions, that their enjoyment of recreation was impaired, and that they held reasonable concerns about negative health impacts from the air pollution.

The motions remained pending for a considerable period. In 2023, CLF was granted leave to supplement the record. JA363; JA365. CLF filed testimony from additional members and a supplemental brief addressing significant authorities decided while the original motions were pending. JA367–381; JA382–394.

Thereafter the matter was reassigned (Young, D.J.). JA395. At that point, the declarations of 20 CLF members had been filed with the Court. JA120–128; JA171–97; JA278–91; JA324–29; and JA342–50. On August 10, 2023, the two cases were consolidated. JA402. On September 15, 2023, the district court granted the Defendants' motions. ADD022. This appeal followed. JA403.

## SUMMARY OF THE ARGUMENT

The district court erred by dismissing these citizen suits for want of standing. Demonstrating through its members that it has a compelling "personal stake" in the dispute, *see, e.g., TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021), CLF met each of the three familiar tests in *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992). Declarations from CLF's members showed (i) injuries-in-fact, that were

(ii) fairly traceable to Defendants' excessive and unlawful idling, and that are (iii) redressable through the relief sought in the district court.

*Injury-in-fact* (*supra* at 12–29). "Injury-in-fact" means any intrusion by the defendant – even an "identifiable trifle" – on an interest that is "legally protected." *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 689 n.14 (1973). When it enacted the Clean Air Act, Congress legally protected the citizen's interest in breathing air free from pollution in excess of lawful limits. *See Katz v. Pershing,* LLC, 672 F.3d 64, 71 (1st Cir. 2012) (noting that a class of interests becomes "legally protected" when Congress so decrees). The authorities hold that injury-in-fact may be shown by:

(i) diminished recreational enjoyment or recreating less;

(ii) breathing or smelling polluted air;

(iii) experiencing physical discomfort or adverse health effects; *or*

(iv) reasonable concern or fear about the health effects of pollution.

The record amply documented all four categories of injury. CLF's members testified to adverse reactions to the noxious smell of bus exhaust and to experiencing allergic reactions, worsened sleep apnea, asthma and nasal congestion, and difficulty breathing, as well as to significant, reasonable concerns about the impact upon their health of excessive exhaust in their communities. While the district court conceded that two of CLF's members had shown injury-in-

fact, it erred by not acknowledging the same with respect to 18 members. ADD016.

*Traceability* (*supra* at 29–45). CLF demonstrated that its members' injuries are fairly traceable to Defendants' persistent violation of the idling limits. An air pollution injury is fairly traceable to the defendant when the defendant emits the injurious pollutant in the person's geographic area of concern. *E.g., Utah Physicians for a Healthy Env't v. Diesel Power Gear LLC*, 21 F.4th 1229, 1244–45 (10th Cir. 2021). The Constitution does not put the citizen plaintiff to the practical impossibility of proving that she ingests the same molecules of pollutants that the defendant discharges. "By showing a geographical connection, the plaintiff has adequately attributed the pollution to the source, and the injury is fairly traceable to the polluter." *Id.* at 1245.

The undisputed record showed that CLF's members' injuries are fairly traceable to Defendants' pattern and practice of idling buses in excess of limits. While the permissible geographical connection generally extends to a distance of a few miles (in *Utah Physicians*, up to 120 miles), the record below showed that two members adversely experienced air pollution within a few hundred yards of bus idling locations, most within a quarter mile, and the others well within the range found in other circuit courts to meet the definition. The district court's erroneous

conclusion that this evidence was "too attenuated" was an extreme outlier, which would all but foreclose the citizen suit as a remedy for air pollution in urban areas.

*Redressability* (*supra* at 45–48). The district court did not reach the redressability test, but it presents no serious issue here. Redressability is shown whenever relief, if granted, would reduce the probability of injury. *Massachusetts v. U.S. EPA*, 549 U.S. 497, 525 n.23 (2007). In a leading citizen-suit case under the parallel provisions of the Clean Water Act, the Supreme Court squarely rejected a redressability challenge, holding that an injunction against continued violations would help redress the injury and that a civil penalty paid to the United States, by imposing on the defendant a strong incentive to comply with the environmental laws, would do the same. *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 185–86 (2000). CLF asked the district court to enjoin the Defendants from further bus idling violations and to impose upon them the civil penalties prescribed by Congress. JA025; JA065. This relief, if granted, would redress CLF's injuries.

## ARGUMENT

### I. STANDARD OF REVIEW

Because the existence of standing is a legal question, the standard of review is *de novo*. *Maine People's All. & Nat. Res. Def. Council, Inc. v. Mallinckrodt, Inc.*, 471 F.3d 277, 283 (1st Cir. 2006). When reviewing a district court's grant of a

defendant's summary judgment motion, this Court will "take[] as true" the "specific facts" set forth by a plaintiff. *Massachusetts v. U.S. Dep't of Health & Hum. Servs*., 923 F.3d 209, 222 (1st Cir. 2019) (citing *Lujan,* 504 U.S. at 561). Summary judgment is appropriate only when the record, read as required, demonstrates that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(a); *Morelli v. Webster*, 552 F.3d 12, 18 (1st Cir. 2009).

## II. THE DISTRICT COURT ERRED IN HOLDING THAT CLF LACKED STANDING WHERE CLF PROVED INJURIES-IN-FACT FAIRLY TRACEABLE TO DEFENDANTS' VIOLATIONS OF THE CLEAN AIR ACT.

Every year, vehicle emissions are linked to thousands of deaths in the northeastern United States.[1] Idling pollution causes coughing, watery eyes, headaches, and dizziness. Academy and the other Defendants idle their buses well beyond legal limits, pumping excessive emissions into the air where CLF members live, work, and recreate.

Despite CLF's members' attestations of numerous injuries, each fairly traceable to Defendants' unlawful pollution, the district court granted summary judgment to Defendants in the actions below for lack of subject matter jurisdiction,

[1] Calvin A. Arter et al., *Mortality-based damages per ton due to the on-road mobile sector in the Northeastern and Mid-Atlantic U.S. by region, vehicle class and precursor,* 16 Envtl. Res. Letters 065008 (2021), https://iopscience.iop.org/article/10.1088/1748-9326/abf60b.

ruling that CLF "has not met the traceability requirement for its claims … and therefore lacks standing to proceed." ADD020.

As a matter of law, this ruling erred on two fronts. First, although the district court conceded that two of CLF's members demonstrated injury-in-fact, it erred by failing to acknowledge the injuries of numerous others.[2] All 20 CLF members expressed a reasonable fear of the adverse health effects of breathing pollution from Defendants' buses. Eleven testified to adverse health effects. Sixteen testified to breathing or smelling polluted air and 13 testified to diminished recreational enjoyment. These injuries fall squarely within the types of injury broadly recognized in the federal courts. Indeed, this Court recently held that a person's reasonable fear of a potential future discharge of pollution met the injury and traceability prongs of the standing test. *See Housatonic River Initiative v. U.S. EPA*, 75 F.4th 248 (1st Cir. 2023).

Second, the district court departed from the settled rule that air pollution injuries are fairly traceable to the defendant when the defendant emits an injurious pollutant in a plaintiff's geographic area of concern, erroneously holding that traceability was "too attenuated." ADD019. Numerous courts have found traceability where the geographic connection included distances of several miles.

[2] The district court's opinion addresses standing for only 10 of CLF's member witnesses. ADD003-05; ADD014-16; ADD018-19. The record contained declarations from an additional 10 witnesses. JA278-91; 324-29; 342-50.

As we show below, 20 CLF members suffered air pollution injuries in proximity to illegal idling, including 15 members who were within *two tenths of a mile* from the buses.

The district court appears to have viewed the "injury-in-fact" and "fair traceability" tests through the lens of tort law, imposing on them higher barriers than the Constitution or the relevant precedents permit. As a matter of law, this view of standing is wrong.

### A. CLF Has Standing Under the Associational Test.

CLF is a nonprofit corporation dedicated to protecting the environment. Such an organization has standing to bring suit when: (1) any one of its members would have individual standing to sue; (2) the interests protected are in line with the organization's purpose; and (3) the lawsuit does not require individual member participation. *Housatonic,* 75 F.4th at 264–65 (citing to *Hunt v. Wash. State Apple Advert. Comm.*, 432 U.S. 333, 343 (1977)). There is no dispute that CLF meets the second and third tests. This appeal turns on the first: whether any member of CLF would have had standing to sue on their own behalf.

Twenty CLF members testified by declaration in the district court. JA120–28; JA171–97; JA278–91; JA324–29; JA342–50. Although the Defendants continuously and unlawfully emitted noxious exhaust in communities where those members live, work, walk, and recreate, the district court held that those members

have no "personal stake" in those violations of law – that CLF's suit did not raise the sort of "genuine, live dispute between adverse parties,"[3] necessary to establish standing.

Running through the district court's decision are two thematic errors: one legal, one factual. Legally, the district court appears to have viewed the "injury-in-fact" and "fair traceability" tests through the lens of tort law, imposing on them higher barriers than the Constitution or the relevant precedents permit. *See* discussion *infra* at 24-25, 30-34. Factually, the district court simply did not address significant portions of the factual record that show that CLF satisfies the tests. *See* discussion *infra* at 15-29, 34-42.

### B. The District Court Misapprehended the Core of Constitutional Standing: That the Plaintiff Demonstrate a "Personal Stake" in the Controversy.

The Defendants argue that CLF has not alleged a "case or controversy" within the meaning of Article III, section 2 of the Constitution. *See generally, Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). For more than 60 years, Supreme Court decisions have taught that the core requirement of this provision is that the plaintiff have a "personal stake" in the dispute. *See, e.g., TransUnion,* 141 S. Ct. at 2203; *Raines v. Byrd*, 521 U.S. 811, 819 (1997); *Baker v. Carr*, 369 U.S. 186, 204 (1961). To determine whether that personal stake exists, the Supreme Court

[3] *Carney v. Adams*, 141 S. Ct. 493, 498 (2020).

evolved the now-familiar *Lujan* test. Whether CLF's members have a personal stake in remedying actual, unlawful discharges of vehicle pollution in their communities depends on whether at least one member: (i) has sustained an "injury-in-fact," (ii) "fairly traceable" to the Defendant, that (iii) likely can be redressed by an order from the district court. *Lujan*, 504 U.S. at 560–61.

According to decades of case law, the "injury-in-fact" and "fairly traceable" tests must not be viewed as tort concepts. *Const. Party of Pa. v. Aichele*, 757 F.3d 347, 366 (3d Cir. 2014) (quoting *Bennett v. Spear*, 520 U.S. 154, 168–69 (1997)). Rather, the question is whether the tests show that CLF has "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult [constitutional] questions*." Dubois v. U.S. Dept. of Agric.*, 102 F.3d 1273, 1280 (1st Cir. 1996) (citing *Baker*, 369 U.S. at 204).

In short, in an environmental case, the "injury-in-fact" and "fairly traceable" tests require only an "identifiable trifle" of adverse impact on the plaintiff and that there be a geographic connection between the plaintiff's exposure to pollutants and the polluter's unlawful contributions of the same kinds of pollutants. This standard was clearly met by the undisputed record presented to the district court.

1. An injury-in-fact requires only that the Plaintiff personally experienced an identifiable adverse consequence, however small.

"Injury-in-fact" means any intrusion by the defendant on an interest that is "legally protected." *Lujan*, 504 U.S. at 560; *SCRAP*, 412 U.S. at 690 n.14 ("[t]he basic idea that comes out in numerous cases is that an identifiable trifle is enough for standing …"). Congress may "elevat[e] to the status of legally cognizable injuries concrete, de facto injuries that were previously inadequate in law." *Lujan,* 504 U.S. at 578*; Katz*, 672 F.3d at 75.[4]

Congress found that "air pollution continues to be a threat to the health of the American people." H.R. REP. NO. 91-1146 (1970), *reprinted in* 1970 U.S.C.C.A.N. 5356, 5360. To create a better mechanism to address the nation's air pollution problems, Congress enacted the citizen suit provision of the Clean Air Act, granting to "any person" the authority to bring suit against one who emits pollutants in violation of regulatory limits. *Id.*; 42 U.S.C. § 7604(a). There is no doubt that Congress elevated to a legally protected interest the right of CLF's members to breathe air that is not polluted beyond regulatory limits.

[4] As the Supreme Court has elsewhere observed, "We have no doubt that, if the Congress enacted a statute creating such a legal right, the requisite injury for standing would be found in an invasion of that right." *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 224 n.14 (1974).

Having established a legally protected interest, Congress may grant citizens standing to seek a judicial remedy for any identifiable invasion of that interest, however small. "An identifiable trifle is enough for standing." *Conservation Law Found., Inc. v. Reilly,* 743 F. Supp. 933, 940 n.10 (D. Mass. 1990) (citing *SCRAP*, 412 U.S. at 690 n.14); *accord Sierra Club v. Franklin Cnty. Power of Ill., LLC*, 546 F.3d 918, 925 (7th Cir. 2008) ("identifiable trifle" sufficient to show injury-in-fact in environmental case); *LaFleur v. Whitman*, 300 F.3d 256, 270–71 (2d Cir. 2002) (same).

2. The district court erred in holding that only two of CLF's members suffered an injury-in-fact.

The district court held that two of CLF's members (Mr. Wagner and Ms. Morelli) demonstrated an "injury-in-fact" because of their loss of recreation. ADD016. But the district court erred when it rejected the testimony of 18 other members who also showed injury-in-fact by averring similar injuries. JA120–28; JA171–97; JA278–91; JA324–29; JA342–50. These errors had serious consequences in the district court, where the erroneous injury analysis led to an erroneous traceability (causation) analysis. *Conn. Parents Union v. Russell-Tucker*, 8 F.4th 167, 173 n.19 (2d Cir. 2021) ("injury and causation are often entangled…").

As we show below, the evidence proffered related to injury was "particularized" – that is, it affected the declarants personally. *Spokeo*, 578 U.S. at

339 (quoting *Lujan*, 504 U.S. at 560 n.1). And the evidence proffered was "concrete" – that is, the members described their reactions to, and the effects of, noxious fumes. *See Lujan*, 504 U.S. at 560.

The record amply illustrates four categories of harm, any one of which, standing alone, would qualify as an injury-in-fact.

i. *Thirteen members testified to diminished recreational enjoyment.*

One way that harm is shown is with evidence that the pollution causes a plaintiff to refrain from recreation or to recreate less. *Laidlaw*, 528 U.S. at 181–84; *Mallinckrodt*, 471 F.3d at 284; *Utah Physicians,* 21 F.4th at 1241, *aff'g Utah Physicians for a Healthy Env't v. Diesel Power Gear LLC ("UPHE I")*, 374 F.Supp.3d at 1132–33 (D. Utah 2019); *Franklin Cnty. Power of Ill.*, 546 F.3d at 925–26; *Sierra Club v. Tenn. Valley Auth. ("TVA")*, 430 F.3d 1337, 1344–45 (11th Cir. 2005); *Ecological Rights Found. v. Pac. Lumber Co.,* 230 F.3d 1141, 1147–51 (9th Cir. 2000); *Pub. Int. Research Grp. of N.J., Inc. v. Powell Duffryn Terminals Inc.*, 913 F.2d 64, 71 (3d Cir. 1990); *Friends of the Earth, Inc. v. Consol. Rail Corp.*, 768 F.2d 57, 61 (2d Cir. 1985); *Conservation Law Found., Inc. v. Am. Recycled Materials, Inc.,* No. CV 16–12451–RGS, 2017 WL 2622737, at *3 (D. Mass. June 16, 2017).

The district court observed that certain members did not testify that they had refrained from recreation altogether. ADD015–16. But that is not necessary to

show harm. Many courts found standing where a plaintiff continued to recreate but enjoyment was impaired. *Consol. Rail Corp*., 768 F.2d at 61 (holding environmental organization's member had standing because he visited a polluted river regularly and found the pollution "offensive to [his] aesthetic values"); *Am. Bottom Conservancy v. U.S. Army Corps of Eng'rs*, 650 F.3d 652, 658 (7th Cir. 2011) ("[I]t is enough to confer standing that the[] [plaintiff's] pleasure is diminished even if not to the point that they abandon the site.") (citations omitted); *TVA*, 430 F.3d at 1345 (11th Cir. 2005) ("enjoyment of [member's] activities ha[ve] been impaired by emissions"); *Am. Recycled Materials, Inc*., 2017 WL 2622737, at *2–3 (diminished enjoyment of recreation affected by water pollution establishes injury-in-fact).

The district court found that two CLF members, Mr. Wagner and Ms. Morelli, experienced recreational harms that constitute injuries-in-fact. ADD016. Yet 11 other CLF members testified to enjoying recreation less or refraining from recreation because of air pollution and met the standard for injury-in-fact:[5]

[5] CLF members suffered from injuries traceable to *all* Defendants' bus lots. Every CLF member suffered from injuries traceable to Academy's idling buses at the Cambridge Go Bus Stop, the Newton Go Bus Stop, the Agganis Way Stop, the Bridgeport Lot, the Braintree Lot, and/or the Wellington Station Stop. And CLF members Wang, Rubin, and Shelley suffered from injuries traceable to DPV and/or BCB's idling buses at Mystic Street and/or the Everett Neighborhood Runner Stop.

**Ms. Epke** averred, "Because of poor air quality created by vehicle idling in the area of [Academy's Cambridge Go Bus Stop], I avoid that area whenever possible… If Academy stopped idling its vehicles, … I wouldn't have to refrain from outdoor activities in the area." JA279 ¶¶15, 16. **Ms. Nanthakijjar** averred, "While waiting for my husband to pick me up at [Academy's Cambridge Go Bus Stop], I would smell exhaust… I'll either hold my breath or try to go inside." JA350 ¶¶10, 11. **Mrs. Dimock** averred, "If the air quality and idling noises near [Academy's] Braintree [L]ot improved, I might walk or run more in that area." JA325 ¶14. **Ms. Pereira** averred, "If there wasn't so much vehicle exhaust in the area…we would spend more time in the section of the Mystic River Reservation closest to [Defendants'] Wellington Station [Stop] and we would walk further across the bridge." JA345 ¶12. **Ms. Becker** averred, "I'm very active outdoors near where I live… I don't think I would bike or hike outdoors if I were living in Bridgeport where the air is more polluted." JA175 ¶15. **Ms. St. Germain** averred, "My concerns about air pollution lessen how much I am able to enjoy my time outdoors." JA290 ¶18. **Ms. Perot** averred, "I enjoy my time outdoors less, as I am worried about what the pollution is doing to my lungs." JA329 ¶11. **Ms. Caldwell** averred, "If Academy stopped idling its vehicles… I would… not have my enjoyment of the outdoors diminished by fears of negative impacts of vehicle exhaust and air pollution." JA287 ¶21. **Ms. Ly** averred, "I go out of my way to

avoid breathing in vehicle exhaust." JA183 ¶19. **Mr. Andrews** averred, "I hate exercising in exhaust fumes; when I exercise, it feels like I breathe in more fumes. I avoid biking on Commonwealth Avenue when I can because there is so much traffic and exhaust there." JA172 ¶18. **Mr. Azhar** averred, "I have at times decided not to go outdoors for a run in the area where Academy idles its vehicles when the air quality was bad. . . I've avoided spending time on the[] benches [near Academy's Agganis Way Stop] because of the poor air quality in the area." JA348 ¶¶10, 15.

*ii. Sixteen members testified to breathing or smelling polluted air.*

Courts have widely held that breathing or smelling polluted air or likely exposure to increased air pollution constitutes an injury-in-fact. *Utah Physicians,* 21 F.4th at 1241 ("members suffered injury-in-fact because of… exposure to diesel exhaust"); *LaFleur*, 300 F.3d at 270 ("likely exposure to additional SO2 in the air… is certainly an 'injury-in-fact'"); *Nat. Res. Def. Council, Inc. v. Nat'l Highway Traffic Safety Admin. ("NHTSA")*, 894 F.3d 95, 104 (2d Cir. 2018) (witnesses who breathe polluted air where they live and work suffer injury-in-fact); *Texans United v. Crown Cent. Petrol.*, 207 F.3d 789, 792 (5th Cir. 2000) ("breathing and smelling" polluted air constitutes Article III injury); *Nat. Res. Def. Council, Inc. v. U.S. EPA*, 507 F.2d 905, 910 (9th Cir. 1974) (holding that the plaintiff would

undoubtedly "suffer injury if compelled to breathe air less pure than that mandated by the Clean Air Act").

The district court again erred when it observed, without citation, that "[t]he smell of exhaust alone appears insufficient to establish an injury," ADD015, – even where members testified that when smelling the unpleasant odors, they had experienced difficulty breathing, scratchy throat, dry mouth, and coughing.[6]

At least 14 CLF members (beside Mr. Wagner and Ms. Morelli) breathed or smelled polluted air and were likely exposed to increased air pollutants. **Ms. Andrews** describes exhaust pollution near her Allston apartment and states that Academy buses' idling exhaust "makes the air quality in Allston a lot worse." JA172–73 ¶¶15, 20, 21. **Mr. Kendall** notices that the air quality directly affects his health, and he can tell the air quality is poor near Defendants' Wellington Station Stop. JA179 ¶¶23, 25. **Ms. Ly** avoids Academy's Newton Go Bus Stop because of the vehicle exhaust she breathes there. JA183 ¶¶18, 19. **Ms. St. Germain** can "see exhaust coming from vehicles and smell vehicle exhaust in the air" when walking by Academy's Cambridge Go Bus Stop. JA289 ¶7. **Ms. Bolduc** often smells exhaust in the vicinity of her gym near Academy's Agganis Way Stop. JA190 ¶10. **Ms. Dimock** notices the smell of heavy-duty vehicles in the area around

[6] The district court added, opaquely, that "[p]otentially, these health effects could be sufficient to constitute an injury," but did not appear to conclude that they did. *See* ADD015-16.

Academy's Braintree Lot and feels as though she is inhaling noxious gas when inhaling vehicle exhaust. JA325 ¶¶11, 17. **Ms. Caldwell** notices the smell of vehicle exhaust near Academy's Cambridge Go Bus Stop and tries to hold her breath when near idling buses because breathing vehicle exhaust makes her feel immediately repulsed. JA286 ¶¶10, 13. **Ms. Epke** is aware of the idling buses at Academy's Cambridge Go Bus Stop when she uses the Alewife station because it becomes hard for her to breathe. JA279 ¶9. **Ms. Perot** experiences exhaust from idling buses near Academy's Cambridge Go Bus Stop. JA328 ¶6. **Mr. Azhar** states that it is unpleasant to breathe vehicle exhaust around Academy's Agganis Way Stop. JA348 ¶11. **Ms. Nanthakijjar** could smell exhaust when waiting for her husband to pick her up at Academy's Cambridge Go Bus Stop. JA350 ¶10. **Mr. Cahill** often notices the bad air quality near Academy's Cambridge Go Bus Stop where he sees buses idling. JA196 ¶15. **Mr. Shelley** smells vehicle exhaust when shopping near DPV's Everett Neighborhood Runner Stop. JA121 ¶17. **Ms. Rubin** notes the potent smell of diesel fuel and exhaust when she shops and goes to the casino next to DPV and BCB's Everett Neighborhood Runner Stop and Mystic Street. JA125–26 ¶¶9, 18.

In sum, 16 CLF members testified to the unpleasant experience of breathing or smelling air polluted by vehicle exhaust and met the injury-in-fact prong of the

standing requirements. JA120–28; JA171–73; JA177–84; 189–90; 195–97; JA278–92; JA324–25; 328–29; JA347–50.

iii. *Eleven members testified to physical discomfort or adverse health effects.*

Experiencing even minor physical discomfort or adverse health effects constitutes "injury-in-fact." *See Utah Physicians*, 21 F.4th at 1239 ("sinus irritation" and "coughing spells"); *Clean Wis. v. U.S. EPA*, 964 F.3d 1145, 1157 (D.C. Cir. 2020) (concerns about exacerbated health effects from asthma, allergies, and other respiratory conditions identified in brief of plaintiff, ECF No. 1801178 at 4); *Hall v. Norton*, 266 F.3d 969, 973 (9th Cir. 2001) ("persistent and worrisome cough").

In *Utah Physicians*, a mobile source air pollution case, the trial court determined the plaintiff's members met the injury-in-fact requirement for standing and the Tenth Circuit agreed. 21 F.4th at 1241 (quoting *UPHE I*, 374 F. Supp. 3d at 1132) (members suffered injury-in-fact because of "adverse health effects from elevated air pollution in the Wasatch Front or exposure to diesel exhaust" and reduced participation "in outdoor recreational activities due [to] their concerns about fine particulate matter pollution").

The district court evidently thought the injuries in *Utah Physicians* were more serious. But its observation that "the members in *Utah Physicians* suffered much more concrete injuries than the Foundation has identified here," ADD020

n.3, misapprehends the nature of a "concrete" injury-in-fact. Concrete in this context does not mean "serious." It simply means something actual and identifiable. *Conservation Council of N.C. v. Costanzo,* 505 F.2d 498, 501 (4th Cir. 1974) ("[I]njury need not be great or substantial; an 'identifiable trifle', if actual and genuine, gives rise to standing."). The members in this case experienced harms every bit as actual and identifiable as those of the members in *Utah Physicians*, where at least three members identified medical conditions, two members pointed to economic injuries due to running air filters, and three members avoided outdoor exercise. JA179–80 ¶27; ¶¶26–28; JA183 ¶¶19, 23; JA278 ¶6; JA325 ¶14; JA172 ¶18; JA187 ¶24; Pl.'s Mot. and Mem. for Partial Summ. J. at 4–10, *UPHE I*, 374 F. Supp. 3d 1124 (No. 2:17-cv-32-RJS-DBP), ECF No. 58.

Here, four CLF members testified to allergies and sleep apnea made worse by air pollution. **Mr. Kendall's** allergies and sleep apnea are made worse by air pollution. JA179–180 ¶27. **Mr. Wagner** experiences chronic nasal congestion, a history of asthma, and severe allergies exacerbated by vehicle exhaust. JA187 ¶¶26–28. **Ms. Ly's** asthma symptoms are made worse by vehicle exhaust. JA183 ¶¶19, 23. **Ms. Caldwell** experiences severe allergies to the point of struggling to breathe, made worse by poor air quality. JA286 ¶¶14, 18. The only thing that distinguishes this case is its outcome.

The district court dismissed Mr. Kendall, Mr. Wagner, and Ms. Ly's medical conditions by stating, "it is unclear whether these fears of health effects from exhaust pollution are reasonable, even for those who may have a predisposition to respiratory illness," and did not address the Caldwell and Wang evidence. ADD014. As a matter of law, the court erred when it did not find that Mr. Kendall, Ms. Ly, Ms. Caldwell, and Mr. Wang suffered an injury-in-fact.

In addition, **Ms. Becker** notices that breathing in exhaust fumes makes her lightheaded. JA175 ¶14. **Mr. Azhar** describes inhaling vehicle exhaust as a very hot air that rushes into his lungs and chokes him. JA348 ¶11. Vehicle exhaust causes **Ms. Perot** to choke and feel as though it is poisoning her. JA329 ¶9. **Ms. Dimock, Ms. Ly**, and **Ms. St. Germain** all experience coughing when they breathe in vehicle exhaust. JA325 ¶¶17, 20; JA183 ¶19; JA290 ¶16. **Mr. Azhar**, **Ms. St. Germain**, and **Ms. Epke** all notice that exhaust fumes make their eyes water. JA348 ¶11; JA290 ¶16; JA279 ¶9. **Mr. Shelley**, **Ms. Rubin**, and **Ms. Epke** all have difficulty breathing after inhaling vehicle exhaust. JA122 ¶27; JA127 ¶36; JA279 ¶9. **Ms. Nanthakijjar's** nose burns and she develops a headache when she breathes in exhaust. JA350 ¶11. Each of these injuries is more than an "identifiable trifle" and constitutes injury-in-fact. *See SCRAP*, 412 U.S. at 689 n.14. The district court did not address these injuries, each of which was sufficient alone to meet the "injury-in-fact" test.

iv. *All 20 of CLF's members testified to a reasonable concern or fear about the health effects of pollution.*

A reasonable concern or fear about the impact of pollution on one's health is another form of injury-in-fact. *Laidlaw*, 528 U.S. at 183–84; *United States v. Tonawanda Coke Corp.*, 636 F. App'x 24, 29–30 (2d Cir. 2016); *Sierra Club v. U.S. EPA*, 762 F.3d 971, 977 (9th Cir. 2014) (quoting *Hall*, 266 F.3d at 976). A wealth of record evidence showed members' reasonable fears of negative health effects from vehicle exhaust.

The district court thought that such fears must be tied to specific medical conditions or accompanied by "more tangible harms." ADD012. This too was an error of law. "Reasonable fear" in the standing context is *not* equivalent to a tort injury standard. *See Powell Duffryn,* 913 F.2d at 72; cases cited *supra* at 12. An "increased health-related uncertainty" about air pollution is an injury in and of itself. *New York Pub. Int. Rsch. Grp. v. Whitman*, 321 F.3d 316, 325 (2d Cir. 2003); s*ee also Nat. Res. Def. Council, Inc. v. U.S. Food & Drug Admin.*, 710 F.3d 71, 79-80 (2d Cir. 2013) (finding injury based on only a threat of harm from triclosan exposure "notwithstanding the scientific uncertainty as to triclosan's harmfulness to humans"); *Clean Wis.*, 964 F.3d at 1156 (a petitioner may "merely assert[] realistic health concerns instead of providing medical evidence.").

Even the fear of harm from a future rather than a present event is an injury-in-fact: "[I]f there is a reasonable prospect that a carcinogen released into the environment today may cause cancer twenty years hence, the threat is near-term even though the perceived harm will only occur in the distant future." *Mallinckrodt*, 471 F.3d at 279 n.1. Several courts, including this one, recognize that the risk or threat of a future harm is a concrete injury-in-fact. *Housatonic*, 75 F.4th at 265 (members show injury-in-fact where they fear that a *proposed* disposal facility will negatively impact their use and enjoyment of the area and their property values). *See also TransUnion*, 141 S.Ct. at 2210; *Spokeo,* 578 U.S. at 341–342; *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414 n.5 (2013); *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 160 (4th Cir. 2000); *Vill. of Elk Grove Vill. v. Evans*, 997 F.2d 328, 329 (7th Cir. 1993).

As Dr. Mary Rice, an assistant professor of medicine at Harvard Chan-NIEHS Center for Environmental Health and a pulmonary and critical care physician at Beth Israel Deaconess Medical Center, opined: "pollutants in vehicle exhaust, including oxides of nitrogen (NOx) and particulate matter (PM), are well-documented to cause health effects." JA170 ¶13. In the district court, Mr. Wagner, Ms. Morelli, and at least 16 other members averred that they understand the dangers of breathing vehicle exhaust and they experience a real threat of future

injury due to the Defendants' regular practice of idling. Each has a reasonable concern or fear about the health effects of vehicle pollution:

**Ms. Bolduc** averred, "I am very worried that my health has been harmed because I have been exposed to the polluted air near [Academy's Agganis Way Stop]. In fact, I often smelled exhaust in the vicinity of my gym." JA190 ¶10. **Ms. Ly** averred that she "worr[ies] about my asthma getting worse, and I worry that breathing in vehicle exhaust could worsen it." JA183 ¶23. **Mr. Kendall** averred, "I have a lot of problems with allergies and with sleep apnea, and I worry that air pollutants could be making these respiratory issues worse." JA179–80 ¶27. **Ms. Epke** averred, "[w]hen exposed to vehicle exhaust, I also become stressed and worried about the long-term health effects…." JA279 ¶13. **Ms. Perot** averred, "The issue of vehicle exhaust and poor air quality makes me feel anxious and helpless." JA283 ¶13. **Ms. St. Germain** averred, "[w]hen I spend time outdoors, I worry that breathing air pollution, including pollution from Academy's idling vehicles, is having a negative effect on my lungs and my overall health." JA290 ¶18. **Ms. Becker** averred, "I worry about the health effects for myself and for my mother of being exposed to exhaust from Academy's idling vehicles in Bridgeport." JA176 ¶23. **Ms. Pereira** averred, "I worry about how exposure to diesel exhaust, including from DPV's vehicles, is affecting my health and the health of my family." JA345 ¶14. **Ms. Caldwell** averred, "I am deeply concerned

about the health impacts to myself, my partner, and my community from breathing vehicle exhaust." JA287 ¶20. **Ms. Dimock** averred, "I am concerned about how breathing in vehicle exhaust, including from Academy's idling vehicles, could be harming my health." JA325 ¶18. **Mr. Azhar** averred, "I spend a lot of time and energy worrying about the harmful effects of vehicle exhaust, including from Academy's idling vehicles." JA348 ¶12. **Ms. Andrews** averred, "I am worried about the long term and immediate health effects of breathing exhaust from vehicles, including from Academy's idling buses." JA172 ¶17. **Mr. Antaya** averred, "I worry about how breathing in vehicle exhaust in Bridgeport, including from Academy's idling vehicles, could be harming my health." JA327 ¶13. **Ms. Nanthakijjar** averred, "I worry about the long-term effects of breathing in exhaust fumes." JA350 ¶12. **Mr. Cahill** averred, "I am worried about my health and… the health effects of breathing in vehicle exhaust." JA197 ¶21. **Ms. Rubin** averred, "I worry about my health and the health of my children when we spend time in any location with poor air quality due to vehicle exhaust, including the locations in Malden, Chelsea, and Everett near where DPV, Boston Charter Bus, and Academy idle their buses." JA127 ¶34. **Mr. Shelley** averred, "I also worry about the unnecessary risks to my health from breathing pollution from DPV, Boston Charter Bus, and Academy vehicles." JA122 ¶28. **Mr. Wang** averred, "I am also concerned about how exposure to the benzene and formaldehyde in diesel exhaust (including

from DPV and BCB's idling vehicles) could be increasing my risk of cancer." JA343 ¶16.

The district court reasoned that a citizen's fear was reasonable only when linked to "specific medical conditions." ADD014. The case law requires no such link; a person in perfect health may reasonably fear that their health will be impaired by illegal pollution. And as stated above, even when the record showed a specific medical condition, the district court rejected the evidence with an *ipse dixit*: "[i]t is unclear whether these fears of health effects from exhaust pollution are reasonable, even for those who may have a predisposition to respiratory illness." *Id*. Other evidence – Mr. Wang's and Mr. Caldwell's averred concerns regarding their asthma – went unremarked in the decision. ADD014–16; *see* JA343 ¶13; JA286 ¶18.

All of CLF members testified to a reasonable fear that breathing air pollution, to which the Defendants' buses contribute, would impair their health. The evidence from any one of those members was sufficient to establish injury-in-fact.

### C. The District Court Erred in Holding that CLF Did Not Prove Traceability.

#### 1. An air pollution injury is fairly traceable to the defendant when the defendant emits the injurious pollutant in the person's geographic area of concern.

The Third Circuit's seminal decision in *Powell Duffryn* established the traceability standard in environmental citizen suits. 913 F.2d at 72. The court held that traceability is met when the plaintiff shows "that a defendant has . . . discharged some pollutant [that] causes or contributes to the kind of injuries alleged." *Id.* More recently, the Fourth and Tenth Circuits held that an environmental injury is fairly traceable to the defendant when the defendant emits the injurious pollutant in the person's geographic area of concern. *Gaston Copper*, 204 F.3d at 161; *Utah Physicians*, 21 F.4th at 1244–45 (citing line of cases applying the *Powell Duffryn* traceability standard).

Indeed, simply showing "that a defendant discharges a pollutant that causes or contributes to the kind of injuries alleged" has been the applied traceability test in almost every circuit in both Clean Water Act *and* Clean Air Act citizen suits. *See Connecticut v. Am. Elec. Power Co., Inc. ("AEP")*, 582 F.3d 309, 347 (2d Cir. 2009), *aff'd on standing, rev'd on other grounds sub nom. Am. Elec. Power Co., Inc. v. Conn.*, 564 U.S. 410, 420 (2011) (Clean Air Act) ("Rather 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.'");

*Tex. Indep. Producers & Royalty Owners Ass'n v. U.S. EPA,* 410 F.3d 964, 973–74 (7th Cir. 2005) (Clean Water Act); *TVA*, 430 F.3d at 1345 (Clean Air Act); *Gaston Copper*, 204 F.3d at 161 (Clean Water Act); *Texans United*, 207 F.3d at 793 (Clean Air Act); *Nat. Res. Def. Council v. Sw. Marine, Inc.*, 236 F.3d 985, 995 (9th Cir. 2000) (Clean Water Act); [7] *Clean Water Action v. Searles Auto Recycling, Corp.*, 268 F.Supp.3d 276, 281 (D. Mass. 2017) (quoting *Maine People's Alliance v. Holtrachem Mfg. Co., LLC.*, 211 F.Supp.2d 237, 253 (D. Me. 2002)).

The district court took a different approach to traceability, appearing to search the record for an impossibility: direct proof that molecules from tailpipe emission A reached member B. *See* ADD019. In doing so, it appeared to import a causation standard from the law of torts. But this too was legal error. "The 'fairly traceable' requirement . . . is not equivalent to a requirement of tort causation." *AEP,* 582 F.3d at 346 (citing *Nat. Res. Def. Council, Inc. v. Watkins*, 954 F.2d 974, 980 n.7 (4th Cir. 1992)); *Barbour v. Haley*, 471 F.3d 1222, 1226 (11th Cir. 2006);

[7] "While precedents from our sister circuits are not binding on us, where well-reasoned decisions from our far away colleagues can aid in analyzing the cases before us, it would be silly to ignore them." *Modeski v. Summit Retail Sols., Inc.*, 27 F.4th 53, 63 n.12 (1st Cir. 2022) (Thompson, J., dissenting); *see United States v. Tavares*, 705 F.3d 4, 20 (1st Cir. 2013) (looking to sister circuits).

*Gaston Copper,* 204 F.3d at 161; *Sierra Club, Lone Star Ch. v. Cedar Point Oil Co.*, 73 F.3d 546, 557–58 (5th Cir. 1996); *Powell Duffryn*, 913 F.2d at 72.[8]

The court in *Utah Physicians* "ke[pt] with the view of" the courts cited above when it held that an injury is fairly traceable to the defendant when the defendant emits the injurious pollutant in the geographic area where the person is injured. 21 F.4th at 1244–45. "By showing a close geographical connection, the plaintiff has adequately attributed the pollution to the source, and the injury is fairly traceable to the polluter." *Id.* (citing to *Lujan*, 504 U.S. at 560) (internal quotation marks and citations omitted).[9] And as another court put it, an injury-in-fact is fairly traceable when "pollutants that can be attributed to Defendant could cause harm and *are present in the geographic area in which the standing witness has an interest*." *Nat. Res. Def. Council v. Illinois Power Res., LLC*, 202 F. Supp. 3d 859, 870 (C.D. Ill. 2016) (emphasis added); *accord Searles Auto Recycling*, 268 F.Supp.3d at 281 (quoting *Holtrachem*, 211 F.Supp.2d at 253).

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[8] As Justice Kennedy's concurrence in *Lujan* explained, "Congress has the power to define injuries *and articulate chains of causation that will give rise to a case or controversy where none existed before.*" 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in judgment).

[9] In *Utah Physicians*, the court found a geographic connection because defendants contributed nitrous oxides (NOx) and particulate matter (PM) to the air in a geographic area of more than 120 miles, and evidence showed that NOx and PM pollution contributed to the adverse effects experienced by the organization's members in that area. 21 F.4th at 1244-45; *UPHE I*, 374 F. Supp. 3d at 1131 n.10 (description of size of area).

Courts that have identified a "geographic area of concern" or "geographic connection" have found traceability where plaintiffs were much further from the source of pollution than is the case here. *See Laidlaw,* 528 U.S. at 183 (**40 miles**, Clean Water Act); *Utah Physicians*, 21 F.4th at 1246 (**120 miles**, Clean Air Act);[10] *Whitman*, 321 F.3d at 325 (**"a few miles,"** Clean Air Act); *Sierra Club v. BP Prods. N. Am., Inc.,* No. 2:19-CV-337-PPS-JEM, 2021 WL 1399805, at *10 (N.D. Ind. Apr. 14, 2021) (**13 miles**, Clean Air Act); *Am. Recycled Materials, Inc.*, 2017 WL 2622737, at *3 (**2 miles**, Clean Water Act); *Conservation Law Found. Inc. v. Pub. Serv. Co. of N.H.,* No. 11–cv–353–JL, 2012 WL 4477669, at *6 (D.N.H. Sept. 27, 2012) (**10 miles**, Clean Air Act); *Holtrachem,* 211 F.Supp.2d at 253 (**20 miles**, Clean Water Act); *NHTSA*, 894 F.3d at 104 (members "liv[ed] in polluted areas and along roadways" where vehicle pollution *might have* increased due to proposed rule).

In short, the fairly traceable standard does not require plaintiff to trace molecules; it is enough that the violations are contributing the relevant pollutants

[10] Below, the district court labored to distinguish *Utah Physicians*, ADD020 n.3, noting that the vehicles there moved throughout the geographic area, but here the violations occur when the buses are stationary. The distinction cuts the other way. The movement of vehicles throughout the 120-mile Wasatch region puts them much further from plaintiff's members, while here, the record shows several members within 500 feet of the bus stops. The members in *Utah Physicians* did not testify that they were ever near the pollution-emitting vehicles at issue in the case. 21 F.4th at 1248.

to the geographic area of concern. *See Utah Physicians*, 21 F.4th at 1245 (members testified to injuries from vehicle pollution in their geographic region, *in general*, and not from Defendant's specific vehicles); *Powell Duffryn*, 913 F.2d at 73 (members saw grease in the river that was not linked to defendant, but was the same type of pollutant that the defendant discharged in excess of permit limit); *Am. Recycled Materials, Inc.*, 2017 WL 2622737, at *3 (a plaintiff does not have to "show to a scientific certainty that defendant's actions, and defendant's actions alone, caused the precise harm suffered by the plaintiffs.") (brackets omitted).

It follows that plaintiff's injury need not be "linked to the exact dates" when defendant discharged in excess of permit limits. *Texans United*, 207 F.3d at 793; *accord WildEarth Guardians v. Colo. Springs Utils. Bd.*, No. 17-CV-00357-CMA-MLC, 2018 WL 317469, at *7 (D. Colo. Jan. 8, 2018) (the argument that members must trace injuries to the time of a violation "has been squarely rejected by courts"); *Concerned Citizens Around Murphy v. Murphy Oil USA, Inc.*, 686 F. Supp. 2d 663, 671 (E.D. La. 2010).

Even a reasonable fear that defendant's pollution will, in the future, foul the air or water that plaintiff uses has been held sufficient to establish traceability. *Housatonic,* 75 F.4th at 265 (members lived near a *proposed* waste disposal site and feared approval of the disposal facility would negatively impact their use and enjoyment of the area); *NHTSA*, 894 F.3d at 104–05 (members would suffer greater

air pollution injuries *if* final rule caused lower civil penalties for noncompliance with fuel economy standards); *Whitman*, 321 F.3d at 325–26 (members alleged exposure to potentially excessive pollutants *if* EPA failed to enforce the Clean Air Act).

2. Undisputed record evidence supported a geographic connection.

Except for its effort to distinguish *Utah Physicians*, the district court appears to have assessed traceability without addressing environmental cases. ADD017. It began by citing cases that do not address environmental injuries, nor whether "the defendant emitted an injurious pollutant in the person's geographic area of concern."[11] *Id*. Instead, the district court quoted two traceability standards referenced in *Utah Physicians*,[12] and concluded that it "need not resolve which of these standards, if either, is most appropriate, because the Foundation has not demonstrated any basic link between the asserted injuries and the Bus Companies'

[11] *Dantzler, Inc. v. Empresas Berríos Inventory & Operations*, 958 F.3d 38 (1st Cir. 2020), was a class action suit brought by shippers who import goods into Puerto Rico. *Allen v. Wright*, 468 U.S. 737 (1984), was a class action suit brought by parents of Black children who alleged that the IRS had not adopted sufficient standards to deny tax-exempt status to discriminatory private schools. In *Simon v. Eastern Kentucky*, 426 U.S. 26 (1976), the Court addressed standing in a challenge of a tax exemption to a hospital.

[12] The district court in *Utah Physicians* rejected the "meaningful contribution" traceability standard: "[u]nlike plaintiffs in a GHG case, UPHE need not trace Defendants' emissions from a point source to global climate change and then back to the Wasatch Front. Rather, UPHE complains that Defendants' emissions in the Wasatch Front directly and immediately contribute to air pollution in the Wasatch Front, and that the air pollution causes its members harm." 374 F.Supp.3d at 1135.

bus stops." ADD018. Even ignoring this statement's circular reasoning, the district court adopts the wrong standard. Courts do not deny an environmental plaintiff standing because he is not at the precise site of the discharge or emissions; dozens of courts uphold standing where plaintiffs are further from the site than is the case here. *See* discussion *supra* at 32.

The Court may begin with the two CLF members to whom the district court conceded injury-in-fact: Ms. Morelli and Mr. Wagner. Mr. Wagner, whose chronic nasal congestion and severe allergies are worsened by vehicle exhaust, refrains from spending time outdoors due to vehicle exhaust or running near the Defendants' bus lot because he fears breathing pollutants emitted by Defendants' vehicles. JA187–88 ¶¶24, 26–27, 31. Mr. Wagner commuted around 350 feet from Academy's Cambridge Go Bus Stop, where he saw and smelled exhaust fumes. JA186 ¶¶16, 18. He bikes less than half a mile from Academy's Wellington Station Stop. JA186-87 ¶¶20–21.

Ms. Morelli, whose asthma is worsened by vehicle pollution, is worried about breathing in pollutants emitted by Defendants' vehicles when she is waiting for a ferry 1.5 miles away from Academy's buses at the Bridgeport Lot and when she was jogging and attending class three miles away from Academy's buses at the Newton Go Bus Stop; both distances well within the geographic areas held sufficient by numerous courts. JA191–93 ¶¶6, 7, 10, 14, 18; *see* discussion *supra* at

32. With an *ipse dixit* citing to no authority, the district court held their links to the Defendants was "too attenuated." ADD019.

Many courts have held that much larger geographic areas supported standing. *See* discussion *supra* at 32. And dozens of witnesses – none mentioned in the district court's opinion – were far closer to the sources of pollution:

**Ms. Perot** is another member who, at the relevant time, lived less than a mile from Academy's Cambridge Go Bus Stop and went for runs 100 feet from the stop almost every day. JA282 ¶¶4, 5. Breathing in idling bus exhaust has caused her to choke. JA283 ¶9. She worries about the long-term health effects of breathing in exhaust from Academy's idling buses. *Id.* at ¶¶10–11. She checks the air quality daily and spends less time outdoors when the air quality is poor. *Id.* at ¶¶12, 14.

At the relevant time, **Ms. St. Germain** lived 0.4 miles from Academy's Cambridge Go Bus Stop. JA289 ¶¶4, 5. She also frequently walked around her neighborhood sometimes within 100 feet of this bus stop. *Id*. at ¶6. Vehicle exhaust has caused her to experience numerous physical symptoms, including coughing and watery eyes. JA290 ¶16. She is very worried about the health effects from exposure to Defendants' vehicle exhaust. *Id*. at ¶14.

**Ms. Pereira** frequents two restaurants 0.2 miles from Defendants' Wellington Station Stop, routinely walks 0.4 miles away from the stop, and occasionally commutes via Wellington Station around 100 feet from the stop.

JA344–45 ¶¶6, 7, 9. Ms. Pereira would spend more time walking and dining outdoors near the bus stop if not for the strong exhaust smell and fumes. JA345 ¶¶8, 12, 15. She also has concerns about how the exhaust is affecting her health as idling exhaust makes her eyes water. *Id.* at ¶11.

**Ms. Rubin** regularly shops around 500 feet from DPV's Everett Neighborhood Runner Stop. JA124–25 ¶¶6–8. She periodically commutes via Wellington Station around 100 feet from Defendants' Wellington Station Stop; shops and bikes around 0.2 and 0.3 miles away from the Wellington Station Stop; and visits Encore Boston Harbor Casino 0.2 miles from BCB's Mystic Street stop. JA126 ¶¶15, 17, 19–20, 22–23, 27. She has noticed the smell of diesel exhaust near all three stops. JA125–27 ¶¶9, 18, 34. She worries about her health when spending time near the locations where Defendants idle, and she has found it uncomfortable to breathe in areas of excessive vehicle exhaust. JA127 ¶¶34–36.

**Ms. Caldwell** lived 0.44 miles from Academy's Cambridge Go Bus Stop and often walked within 100 feet of the stop and noticed vehicle exhaust. JA285–86 ¶¶5, 10. She worries about the health effects of breathing in vehicle exhaust, including from the Defendants' idling vehicles, particularly since she has allergies and difficulty breathing. JA286–87 ¶¶16, 18, 20. She checks the air quality daily and limits the time she spends outdoors when the air quality is poor. JA286 ¶15.

At the relevant time, **Mr. Kendall** regularly took the train to Defendants' Wellington Station Stop to visit his girlfriend, where he noticed poor air quality and often saw buses while waiting around 200 feet from Academy's Wellington Station Stop for her to pick him up. JA177 ¶5. He suffers from allergies and sleep apnea and worries that air pollutants could make these issues worse. JA179–80 ¶27.

During the relevant time, **Mr. Cahill** often commuted within 100 feet from Academy's Cambridge Go Bus Stop, biked within 250 feet of the stop, and dined one quarter mile from the stop with his family. JA196 ¶¶10, 15, 17. He often observed buses idling and noticed poor air quality there. *Id.* at ¶15. Mr. Cahill worries about the health effects of breathing in vehicle exhaust. JA197 ¶21.

**Mr. Wang** suffers from asthma and regularly runs 300 feet away from BCB's Mystic Street bus stop and about 0.5 miles away from Defendants' Wellington Station Stop. JA343 ¶¶11, 12. He would enjoy his runs more if the air were cleaner. *Id.* at ¶14. He has concerns about how the exhaust is affecting his health, particularly since his asthma is triggered by air pollution. *Id.*

At the relevant time, **Ms. Epke** lived 0.6 miles from Academy's Cambridge Go Bus Stop and commuted and recreated around 300 feet from the stop. JA278 ¶4. She has seen Academy's buses idling on numerous occasions. JA278–79 ¶¶4, 10. From the idling vehicle exhaust, she experiences difficulty breathing and

watery eyes, and she is very worried about the long-term health effects from exposure to air pollution from Academy's vehicles. JA279 ¶¶9, 13. She avoids spending time near the bus stop as much as possible and refrains from outdoor activities because of the poor air quality. JA279–80 ¶¶15, 19.

**Ms. Nanthakijjar** commutes near Academy's Cambridge Go Bus Stop and routinely waited 350 feet from idling buses for up to 20 minutes. JA349–50 ¶¶7, 9 There, breathing in vehicle exhaust makes her nose burn and gives her a headache. *Id.* at ¶11. She is concerned about the health effects of breathing in vehicle exhaust from the Defendants' idling vehicles. *Id.* at ¶12.

At the relevant time, **Ms. Ly** commuted to work from Riverside Station about 400 feet from Academy's Newton Go Bus Stop several times a week, where she waited outside for 15-20 min for her ride home. JA182–3 ¶¶14, 16. She worries that Academy's idling buses at this stop could affect her health both on her commute and at her home one mile away. JA183 ¶21.

**Mr. Shelley** smells vehicle exhaust and notices poor air quality when shopping around 500 feet from the DPV Everett Neighborhood Runner Stop and when shopping less than one mile from Defendants' Wellington Station Stop. JA121 ¶¶8, 11, 12, 15–17. He has a hard time breathing when he is near vehicle exhaust from buses, and he is concerned about health risks from breathing pollution from Defendants' vehicles. JA122 ¶¶27–28.

During the relevant time, **Ms. Andrews** lived 1.2 miles from Academy's Agganis Way Stop and frequently passed by the stop as she commuted via bike around the neighborhood. JA171–2 ¶¶6–7, 13. She biked to her gym 0.1 miles from the stop four mornings per week. JA172 ¶8. Ms. Andrews noticed poor air quality in her neighborhood and worried about the health effects of breathing exhaust from Academy's idling buses. *Id.* at ¶¶14, 17. She hates biking in areas with exhaust fumes, and when she can, avoids certain routes with more exhaust. *Id.* at ¶18.

**Mr. Azhar** regularly exercises at a gym about 260 yards from Academy's Agganis Way Stop. JA347 ¶5. He commutes by bike and wears a mask to avoid breathing in polluted air while passing by the stop. JA 347–48 ¶¶6, 9. Breathing in vehicle exhaust at the stop has caused him to experience physical symptoms, including choking and watery eyes. *Id.* at ¶11. He worries about the harmful effects of air pollution from Defendants' idling vehicles and avoids spending time outdoors near the stop. *Id*. at ¶¶10, 14.

At the relevant time, **Ms. Bolduc** spent a significant amount of time running near Academy's Agganis Way Stop and going to her gym, less than 0.25 miles from the stop. JA189 ¶¶7, 8. She has smelled exhaust in the vicinity of her gym and worries about her health from this prolonged exposure to air pollution. JA190 ¶10.

**Mr. Antaya** works 1.2 miles from Academy's Bridgeport Lot. JA326 ¶4. He regularly holds his breath to avoid breathing in vehicle exhaust fumes and is very concerned about the acute and longer-term effects of breathing in Academy's vehicle exhaust. JA327 ¶¶12, 14. If the air quality near his office were better, he would spend more time outside. *Id*. at ¶15.

**Ms. Dimock** teaches at a school one mile from, and lives 1.5 miles from, Academy's Braintree Lot. JA324 ¶¶7–9. She has seen buses idling at the bus lot and avoids walking near it because of the exhaust. JA325 ¶¶12–13. Breathing in vehicle exhaust causes her to cough, and she is concerned about the health effects from breathing in exhaust from the Defendants' idling vehicles. *Id.* at ¶¶17–18. If the air quality were better at the Braintree Lot, she would spend more time walking and running outdoors in the area. *Id*. at ¶14.

**Ms. Becker** regularly visits her mother and spends time outside about 1.5 miles from Academy's Bridgeport Lot. JA174 ¶¶6–7. She notices poor air quality in Bridgeport and worries about how the fumes from Academy's idling buses are affecting her health. JA175–76 ¶¶13, 23. Ms. Becker notes that exhaust fumes make her feel lightheaded. JA175 ¶14.

In short, the record below contains sworn – and uncontradicted – averments from members who breathe and are negatively affected by vehicle pollution in the geographic area of the Defendants' idling buses. Several of those members were a

couple hundred feet away from bus stops or lots where buses regularly idle unlawfully, and 15 of those members were within two tenths of a mile.

3. The district court's "urban environment" rationale was error.

The district court's "urban environment" rationale betrays its fundamental traceability error. It reasoned:

> These connections between the members' injuries and the Bus Companies' conduct are just too attenuated to satisfy the second prong of the standing inquiry. *In an urban environment, a span of a mile or two contains numerous vehicles and bus stops. In such an environment, the injuries alleged cannot be conclusively linked to the excessive idling by the Defendants.* ADD019 (emphasis added).

The district court evidently thought that the contribution of pollution by multiple sources to a geographic area makes it impossible to establish traceability for any one of them. But the law is precisely opposite. An injury is fairly traceable to *any* polluter who contributes the injurious pollutant in the person's geographic area of concern. *See supra* at 9-34. "The Constitution does not require an affiant who claims that defendant's discharge '*in particular* injured him in some way' given the number of [polluting] entities." *AEP,* 582 F.3d at 347 (quoting *Cedar Point*, 73 F.3d at 558). Even where the geographic area spanned 120 miles, the district court in *Utah Physicians* stated:

> To be sure, Defendants' emissions are a small fraction of total emissions in the Wasatch Front. But … Defendants do not articulate a principled threshold requirement for causation. Further, a causation standard that precludes citizens from suing for CAA violations directly contributing

> pollution to the air they breathe would seriously undermine the CAA's citizen enforcement provision. 374 F. Supp. 3d at 1135.[13]

The district court's rationale would make it impossible to bring a citizen suit under the Clean Air Act in a city or any highly polluted industrial area. (The poorer the air quality, the more likely that numerous sources contribute; the more the sources, the more "attenuated" (per the district court's logic) the traceability). ADD019. This would lead to the absurd result of denying standing to enforce pollution laws in the areas that are the most polluted.

Perhaps this absurdity is best summarized by considering just two pieces of the record. Three hundred and fifty feet from Academy's Cambridge Go Bus Stop, Ms. Nanthakijjar's nose burned, and her head ached from vehicle exhaust. JA350 ¶11. Walking to a gym 260 yards from Academy's Agganis Way stop, Mr. Azhar sometimes choked and his eyes watered. JA347–48 ¶¶5, 11. Each worried about what this vehicle exhaust was doing to them. Under the decision below, the Constitution of the United States bars either of them from seeking relief in a

[13] *See also Am. Recycled Materials*, 2017 WL 2622737, at *3 (citing *Interfaith Cmty. Org. v. Honeywell Int'l, Inc.*, 399 F.3d 248, 257 (3d Cir. 2005)) (plaintiff did not have to "show to a scientific certainty that defendant's actions, and defendant's actions alone, caused the precise harm suffered by the plaintiffs.") (brackets omitted); *San Francisco Baykeeper v. City of Sunnyvale*, 627 F. Supp. 3d 1102, 1116 (N.D. Cal. 2022) (citing *Sw. Marine*, 236 F.3d at 995) ("[t]he traceability requirement does not mean Plaintiff must show to a scientific certainty that Defendants caused the alleged harm.").

federal court, decreeing that neither has enough of a "personal stake." ADD009. To state this senseless proposition is to dispose of it.

Finally, the district court expressed concern that:

> "allowing suit against the Defendants for anyone suffering the most minor of injuries who has occasionally traveled within two miles of any bus stop could mean that every resident of the greater Boston area has standing to sue the Bus companies." ADD019–20.

No doubt violations of federal environmental laws within cities adversely and personally affect many citizens. Within limits, Congress intended to give each of them a remedy. But there are significant limits. Those personally affected may bring suit only for conduct that violates laws established by Congress, and only where they meet the notice prerequisites of a citizen suit and EPA or the state agency declines to proceed. In that suit, they may seek only remedies designed to deter that misconduct. Citizen suit plaintiffs cannot assert any claim for personal damages (which might require the sort of evidence that the district court seemed to be looking for). And where suit is brought by an organization, as in this case, that organization must meet the associational standing requirements, on behalf of actual citizen members, seeking statutory penalties and injunctive relief.

CLF did so just as the Clean Air Act contemplated when Congress "created 'private attorneys general' to aid in enforcement." *Nat. Res. Def. Council, Inc. v. U.S. EPA*, 484 F.2d 1331, 1337 (1st Cir. 1973); *see also Pub. Int. Research Grp. of N.J., Inc. v. Magnesium Elektron, Inc.,* 123 F.3d 111, 114 (3d Cir.1997) ("citizen

suits supplement government efforts to enforce the [Clean Water] Act") (citations omitted). Citizen plaintiffs "effectively stand in the shoes of the EPA." *Powell Duffryn*, 913 F.2d at 74 (citing *Sierra Club v. Chevron U.S.A., Inc.,* 834 F.2d 1517, 1522 (9th Cir. 1987)). "[T]he citizen plaintiff does not personally benefit from bringing the action." *Chevron U.S.A.*, 834 F.2d at 1522.

**D. CLF Proved Redressability.**

While the district court did not reach the question, CLF meets the redressability test. This third prong of the plaintiff's "personal stake" in a federal lawsuit requires it to show that the suit can remedy the injury complained of. As the Supreme Court has put it, CLF must "show … it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Laidlaw,* 528 U.S. at 181; *see also Mass. v. EPA*, 549 U.S. 497, 525 n.23 (2007).

CLF made that showing. The complaints in these consolidated actions asked the Court to enjoin the Defendants from further bus idling violations and to impose upon them the civil penalties prescribed by Congress. JA025; JA065. An injunction against idling provides redress for injuries caused by a continuing pattern and practice of idling. *See Laidlaw*, 528 U.S. at 185.

So too with civil penalties. As Justice Ginsburg explained in *Laidlaw*, a citizen suit brought under the Clean Water Act:

> "It can scarcely be doubted that, for a plaintiff who is injured or faces the threat of future injury due to illegal conduct ongoing at the time of suit, a

> sanction that effectively abates that conduct and prevents its recurrence provides a form of redress. *Civil penalties can fit that description*. To the extent that they encourage defendants to discontinue current violations and deter them from committing future ones, they afford redress to citizen plaintiffs who are injured or threatened with injury as a consequence of ongoing unlawful conduct." *Id*. at 185–86 (emphasis added).[14]

"Redressability" in citizen suits seeking penalties and injunctive relief is a settled proposition. For example, *Utah Physicians* involved the installation of air pollution control "defeat devices" on diesel trucks. 21 F.4th at 1234. The Tenth Circuit affirmed that plaintiffs had standing to seek civil penalties and an injunction against use of the devices within a large geographic area of Utah. *Id*. at 1241. "As for the standing of the individual members of UPHE, the first [injury in fact] and third [redressability] requirements *are not in serious doubt*… the members' injuries are redressable through both injunctive relief and the imposition of penalties on wrongdoers whose violations were ongoing at the time UPHE filed suit." *Id*. (emphasis added, citation to *Laidlaw* omitted).

The Second Circuit found the proposition similarly obvious: "[c]ommon sense and basic economics… tell us that the increased cost of unlawful conduct will make that conduct less common." *NHTSA,* 894 F.3d at 105 (internal quotation

[14] A decision denying standing in a case of this kind would have the opposite effect: deterring any company operating vehicles *from compliance* with the law. Since an affirmance here would effectively immunize vehicle operators against citizen suits, operators who undertook any expense of compliance with the law would be at a competitive disadvantage.

marks and citations omitted) (environmental association had standing to seek relief from agency's refusal to impose certain penalties on auto manufacturers who failed to meet fuel efficiency standards). This was so even though the deterrent effect was indirect:

> As to causation and redressability, [defendant] argues that the connection between potential industry compliance and the agency's imposition of coercive penalties intended to induce compliance is too indirect to establish causation and redressability. *We are not persuaded*. *Id*. at 104 (emphasis added).

CLF's members have suffered harm from persistent violations of the idling laws. They reasonably fear that they will continue to suffer those harms, for the Defendants do not acknowledge their violations nor attempt to come into compliance. By enjoining and/or economically deterring further misconduct, a favorable decision from this Court would deliver redress for CLF's harms.

## CONCLUSION

For the foregoing reasons, CLF requests that the Court reverse the district court's decision and hold that CLF has standing to sue Defendants for their violations of the Clean Air Act.

Date: December 11, 2023

Respectfully submitted,

Conservation Law Foundation, Inc.

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**CERTIFICATE OF SERVICE FORM**
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I hereby certify that on December 11, 2023, I electronically filed the foregoing document with the United States Court of Appeals for the First Circuit by using the CM/ECF system. I certify that the following parties or their counsel of record are registered as ECF Filers and that they will be served by the CM/ECF system: Jon C. Cowen, Thomas David Duquette, and John Scott Day.

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(s) Heather A. Govern

Attorney for Conservation Law Foundation, Inc.

Dated: December 11, 2023

# ADDENDUM

ADDENDUM
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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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| CONSERVATION LAW FOUNDATION, INC., Plaintiff, v. ACADEMY EXPRESS, LLC Defendants. | ) | CIVIL ACTION NO. 20-10032-WGY |
| CONSERVATION LAW FOUNDATION, INC., Plaintiff, v. ACADEMY EXPRESS, LLC, DPV TRANSPORTATION, INC., AND BOSTON CHARTER BUS, LLC, Defendants. | ) | CIVIL ACTION NO. 20-10033-WGY |

YOUNG, D.J. September 14, 2023

**MEMORANDUM OF DECISION**

In these environmental actions, the Conservation Law Foundation ("the Foundation") brings suit against companies operating buses in Massachusetts and Connecticut, alleging that the Defendants Academy Express, LLC; DPV Transportation, Inc.; and Boston Charter Bus, LLC excessively idle their buses in violation of Massachusetts and Connecticut law under the Clean Air Act. The Defendants move for summary judgment based on a lack of standing under Article III of the United States

Constitution. This Court agrees that the Foundation lacks associational standing on this record and therefore granted the pending motions for summary judgment. Mot. Summ. J., 32 ECF No. 41; Mot. Summ. J., 33 ECF No. 40; Mot. Summ. J., 33 ECF No. 44.

## I. BACKGROUND

### A. Factual Background

Academy Express, LLC ("Academy"); DPV Transportation, Inc.("DPV"); and Boston Charter Bus, LLC ("Boston Charter") (collectively, the Defendants or the "Bus Companies") all operate fleets of buses in Massachusetts; Academy also operates buses in Connecticut. See Compl., 33 ECF No. 1 ¶ 2; Am. Compl., 32 ECF No. 29 ¶ 2. Academy buses stop at the Newton Go Bus stop, the Pond Street lot, the Harry Agganis Way shuttle stop, the Cambridge Go Bus stop, and the Bridgeport lot. See Am. Compl., 32 ECF No. 29 ¶ 75–105. On specific days from October 2019 to February 2020, an investigator for the Foundation observed and documented the length of time Academy buses idled at these bus stops in excess of the allowable time under state regulations. See Am. Compl., 32 ECF No. 29 ¶¶ 106–225. The observed idle times ranged from four minutes to two hours and thirty-seven minutes. See Am. Compl., 32 ECF No. 29 ¶¶ 140–200.

DPV, Boston Charter, and Academy buses stop at the Everett Neighborhood Runner Stop, the Wellington Orange Line Station, and Mystic Street. See Compl., 33 ECF No. 1 ¶¶ 100–13. On

specific days from September to November 2019, an investigator for the Foundation observed and documented the length of time DPV, Boston Charter, and Academy buses idled at these bus stops. See Compl., 33 ECF No. 1 ¶¶ 114–301. The observed idle times ranged from six minutes to two hours and thirty-six minutes. See Am. Compl., 32 ECF No. 29 ¶¶ 195–96.

The Foundation is a nonprofit organization dedicated to protecting the environment in New England. Id. ¶ 17. It has over 5,100 members, including 2,842 in Massachusetts and 144 in Connecticut. Id. ¶ 19. Its members include Mary Katherine Andrews, Kathleen Becker, Georgia Buldoc, Thomas Cahill, Robert Kendall, Sophia Ly, Sabrina Morelli, Tommaso Wagner, Staci Rubin, and Peter Shelley. See Aff. Heather Govern, 32 ECF Nos. 47-4 to 47-11; Aff. Opp'n re Mot. Summ. J., 33 ECF Nos. 46-5 to 46-6.

Many of these members have noted the smell of exhaust around the Bus Companies' bus stops and all are concerned about effects of exhaust on their health and the health of their loved ones. See Aff. of Heather Govern, 32 ECF Nos. 47-4 to 47-11; Aff. Opp'n re Mot. Summ. J., 33 ECF Nos. 46-5 to 46-6. Ms. Andrews avoids certain bike routes with more exhaust, but only "when [she] can." Andrews Decl., 32 ECF No. 47-4. Ms. Becker would hike less if she lived in Bridgeport, where her mother resides. Becker Decl., 32 ECF No. 47-5. Mr. Cahill is worried

about the effects on his young son, who has a higher risk of developing respiratory illnesses such as asthma. Cahill Decl., 32 ECF No. 47-11. He is also considering whether to stop using a bike trail, but at present he continues to make regular use of the trail. Id. at 3.

Mr. Kendall suffers from allergies and sleep apnea but has not noticed his allergies getting worse. See Kendall Decl., 32 ECF No. 47-6; Kendall Decl.,33 ECF No. 46-4; Kendall Dep., ECF No. 47-15 at 43. Ms. Ly had self-diagnosed asthma when she was younger and has experienced coughing when breathing in exhaust. See Ly Decl., 32 ECF No. 47-7. Mr. Wagner had asthma when he was younger and describes the smell of exhaust as "acrid." Wagner Decl., 32 ECF No. 47-8. He has noted that his mouth is drier than normal and feels scratchy when running or breathing heavily in areas with exhaust. Id. Mr. Wagner "would definitely run more" if the air quality around his home improved. Id. at 3. On occasion he has decided not to spend time outdoors after smelling exhaust fumes. Id. at 4. Ms. Morelli would run and walk more if there was less air pollution near the Academy bus stops in Riverside and Bridgeport. See Morelli Decl., 32 ECF No. 47-10. Ms. Rubin has on occasion found it difficult to breathe in areas with excess vehicle exhaust. See Rubin Decl., 33 ECF No. 46-6. Mr. Shelley

would feel more comfortable if there was less exhaust in his neighborhood. See Shelley Decl., 33 ECF No. 46-5.

**B. Legal Background**

The Clean Air Act contains a citizen suit provision authorizing any person to sue another who is in violation of the Act, which encompasses emissions standards and limitations in state plans approved by the EPA Administrator. 42 U.S.C. § 7604(a)(1), (f)(4). The Massachusetts State Implementation Plan prohibits any person from unnecessarily running the engine of a vehicle when the vehicle is stopped for a foreseeable time exceeding five minutes. 310 Mass. Code Regs. § 7.11(1)(b). Connecticut has a similar regulation that prohibits excessive idling of a vehicle for more than three minutes. Conn. Agencies Regs. § 22a-174-18(b)(3)(C). Both state plans were approved by the EPA Administrator. See 40 C.F.R. § 52; 37 Fed. Reg. 23,085; 42 U.S.C. § 7410; 40 C.F.R. § 52.385; 79 Fed. Reg. 41,427. The Clean Air Act also contains a pre-suit notice requirement that mandates written notice to the EPA, state, and alleged violator sixty days prior to initiating a lawsuit. 42 U.S.C. § 7604(b).

**C. Procedural History**

On November 8, 2019, the Foundation sent letters to Academy, DPV, and Boston Charter Bus notifying them of the alleged Massachusetts violations. See Compl., 33 ECF No. 1 ¶ 72; Am. Compl., 32 ECF No. 29 ¶ 41. The letters were also sent

to the EPA and the Massachusetts Department of Environmental Protection. See Compl., 33 ECF No. 1 ¶ 74; Am. Compl., 32 ECF No. 29 ¶ 42. On January 8, 2020, the Foundation filed two complaints, one against Academy (1:20-cv-10032) and one against all three Bus Companies (1:20-cv-10033). See Compl., 33 ECF No. 1; Am. Compl., 32 ECF No. 29. The Complaints brought suit under the Clean Air Act, alleging that the Bus Companies violated the Massachusetts anti-idling regulation. See Compl., 33 ECF No. 1; Am. Compl., 32 ECF No. 29. In July 2020, the Foundation sent Academy another letter notifying it of the alleged violations in Connecticut. See Am. Compl., 32 ECF No. 29 ¶ 44. Three months later the Foundation filed an amended complaint, alleging that Academy also violated the Connecticut anti-idling law. See Id.[1]

In responding to the Complaints, the Bus Companies asserted a lack of standing. Def.'s Answer, 33 ECF No. 10 at 14, 21 at 16, 23 at 16. After this Court ordered discovery on the issue of associational standing, the Bus Companies moved for summary judgment on grounds of lack of standing. See Def's Ans., 33 ECF No. 41; Mem. Supp. Summ. J., 32 ECF No. 42. The Bus Companies

[1] Academy argues that the Foundation has not met the requirements of pre-suit notice under 42 U.S.C. § 7604(b)(1)(a), but it fails to identify any facts supporting this argument. See Mem. Supp. Summ. J., 32 ECF No. 42 at 13-15. Finding that the Foundation notified all defendants of its claims in writing sixty days prior to filing suit and shared these letters with the EPA and relevant states, the Court concludes that the Foundation has met the citizen suit requirement for notice.

argue that the Foundation has not identified any of its members who have suffered an injury in fact that is fairly traceable to the Bus Companies' conduct. See Def's Ans., 33 ECF No. 41; Mem. Supp. Summ. J., 32 ECF No. 42. The Foundation responds that its members have suffered various injuries, including breathing polluted air. See Mem. Opp'n Summ. J., 32 ECF No. 46; Mem. Opp'n Summ. J., 33 ECF No. 48. The Foundation also argues that standing cannot be decided on this record and requests that the matter be delayed until expert discovery has been completed. See Mem. Opp'n Summ. J., 32 ECF No. 46 at 7; Mem. Opp'n Summ. J., 33 ECF No. 48 at 6. The parties have fully briefed the issues. See Def.'s Reply, 32 ECF No. 51; Pl.'s Sur-Reply, 32 ECF No. 55; Def.'s Reply, 33 ECF Nos. 53-54; Pl.'s Sur-Reply, 32 ECF No. 59-60.

**II. STANDARD OF REVIEW**

A movant is entitled to summary judgment when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). An issue of material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Materiality depends on the substantive law, and only factual disputes that might affect the outcome of the suit can preclude summary judgment. Id.

In reviewing the evidence, this Court must "draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence." Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 150 (2000). This Court must also "disregard all evidence favorable to the moving party that the jury is not required to believe." Id. at 151. The moving party bears the initial burden of demonstrating that "the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof." Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). If the movant does so, then the nonmovant must set forth specific facts sufficient to establish a genuine issue for trial. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586–87 (1986).

**III. ANALYSIS**

The Court concludes that the Foundation lacks associational standing for all its claims against the Bus Companies.

**A. Associational Standing**

For an association suing on behalf of its members to establish standing, it must demonstrate that "its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." Friends of

Earth v. Laidlaw Env't Servs. (TOC), LLC, 528 U.S. 167, 181 (2000); Me. People's All. v. Mallinckrodt, 471 F.3d 277, 283 (1st Cir. 2006). The Bus Companies do not dispute that the second and third elements have been met, so this Court instead focuses on whether the Foundation members, individually, would have standing to sue in this case.

"Article III confines the federal judicial power to the resolution of 'Cases' and 'Controversies.' For there to be a case or controversy under Article III, the plaintiff must have a 'personal stake' in the case -- in other words, standing." TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2203, (2021). "[T]o establish standing, a plaintiff must show (i) that he suffered an injury in fact that is concrete, particularized, and actual or imminent; (ii) that the injury was likely caused by the defendant; and (iii) that the injury would likely be redressed by judicial relief." Id. (citing Lujan v. Defs. of Wildlife, 504 U.S. 555, 560-61 (1992)). The Court addresses the first two of these factors below.[2]

**1. Injury in Fact**

The injury in fact must be "concrete and particularized"; it must also be "actual or imminent, not conjectural or

[2] The Court need not reach the question of redressability because there are no violations for which an injury in fact is fairly traceable to the Bus Companies' conduct.

hypothetical". Lujan, 504 U.S. at 560 (quoting Whitmore v. Arkansas, 495 U.S. 149, 155 (1990)). Association members cannot be merely "concerned bystander[s]," but must demonstrate that they have a "personal stake" in the litigation. Conservation L. Found. of New England, Inc. v. Reilly, 950 F.2d 38, 42-43 (1st Cir. 1991) (quoting Allen v. Wright, 468 U.S. 737, 756 (1984), abrogated by Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118 (2014)).

The plaintiff must show that "he personally has suffered some actual or threatened injury ...." Valley Forge Christian Coll. v. Am. United for Separation of Church & State, 454 U.S. 464, 472 (1982) (quotations omitted). "Requiring a plaintiff to demonstrate a concrete and particularized injury caused by the defendant and redressable by the court ensures that federal courts decide only the rights of individuals," and that federal courts exercise "their proper function in a limited and separated government." TransUnion LLC, 141 S. Ct. at 2203 (citations and quotations omitted). "Concreteness and particularity are two separate requirements." Lyman v. Baker, 954 F.3d 351, 360 (1st Cir. 2020) (citing Spokeo, Inc. v. Robins, 578 U.S. 330 (2016)). An injury is "concrete" when it "actually exist[s]." Id. (quotations omitted). An injury is "particularized" when it "affect[s] the plaintiff in a personal and individual way," Lujan, 504 U.S. at 560 n.1, that goes

beyond widely shared "generalized grievances about the conduct of government," Lyman, 954 F.3d at 361 (citing Becker v. Fed. Election Comm'n, 230 F.3d 381, 390 (1st Cir. 2000)).

In environmental cases, the question is not whether there is injury to the environment, but whether the plaintiff herself has been injured. Laidlaw, 528 U.S. at 181. In such cases the Supreme Court looks at physical and economic harms, but also asks whether plaintiffs are persons "for whom the aesthetic and recreational values of the area will be lessened." See Id. at 183 (quoting Sierra Club v. Morton, 405 U.S. 727, 735 (1972)). If this aesthetic or recreational harm is grounded in "reasonable concerns" about a defendant's actions, it may establish injury in fact. Id. at 183–84. For example, refraining from boating and hunting in areas around an electric power plant would constitute an injury. Sierra Club v. Tenn. Valley Authority, 430 F.3d 1337, 1345 (11th Cir. 2005). A reduction in recreational value is sufficient for standing purposes; a total abstention from a formerly enjoyed activity is not necessary. See Conservation L. Found., Inc. v. Am. Recycled Materials, Inc., No. 16-12451-RGS, 2017 WL 2622737, at 3 n.2 (D. Mass. June 16, 2017) [Stearns, J.]; see, e.g., Am. Canoe Ass'n v. Murphy Farms, Inc., 326 F.3d 505, 519–20 (4th Cir. 2013) (finding injury when member experienced reduction in enjoyment

of rivers when water appeared unclean with diminished fish population).

Turning to health effects, "[p]robabilistic harms are legally cognizable." Me. People's All. v. Mallinckrodt, 471 F.3d 277, 283 (1st Cir. 2006). A "purely subjective fear" of an environmental harm, however, is not sufficient to establish standing; concerns related to recreational harms must be "premised upon a realistic threat." Id. at 284. "To establish an injury in fact based on a probabilistic harm, a plaintiff must show that there is a substantial probability that harm will occur." Id. Other circuits have noted that medical evidence is not necessary, but that "realistic health concerns" may constitute an injury. Clean Wis. v. EPA, 964 F.3d 1145, 1156 (D.C. Cir. 2020) (per curiam) (finding that exposure to unhealthy ozone concentrations during outdoor activities established an injury). Examples of credible and concrete health effects include concerns that a proposed power plant would be detrimental to the health of members with documented respiratory problems exacerbated by air pollution. Sierra Club v. U.S. EPA, 762 F.3d 971, 977 (9th Cir. 2014).

Courts have considered fear of health effects not tied to specific medical conditions only alongside more tangible harms. See Env't Tex. Citizen Lobby v. Exxonmobile, 968 F.3d 357, 367 (5th Cir. 2020) (including fear for health in list of members'

injuries); Tenn. Valley Authority, 430 F.3d at 1345 (noting testimony that member found it "frightening" to breathe polluted air). In Environment Texas Citizen Lobby, the plaintiff's members also "regularly saw flares, smoke, and haze coming from the complex; smelled chemical odors; suffered from allergy-like or respiratory problems; . . . refrained from outdoor activities; or moved away." 968 F.3d at 367–68. In Tennessee Valley Authority, members also experienced diminished vistas, refrained from certain outdoor activities, and testified about diminished enjoyment in other activities because of emissions. Tennessee Valley Authority, 430 F.3d at 1345.

Some courts have found that simply breathing and smelling polluted air is an injury in and of itself. See Nat. Res. Def. Council v. EPA, 507 F.2d 905, 910 (9th Cir. 1974) ("There is no doubt, however, that [plaintiff], as a resident of Arizona, will suffer injury if compelled to breathe air less pure than that mandated by the Clean Air Act."). This Court holds, however, that the requirement of an actual injury — one that is concrete and particularized — necessitates more than just breathing in polluted air. A smell of pollution may be sufficient if members demonstrate that they have been injured by the experience. See, e.g., Texans United for a Safe Econ. v. Crown Cent. Petroleum Corp., 207 F.3d 789, 792 (5th Cir. 2000) (finding injury when members were exposed to sulfurous odors that were "overpowering

and capable of inducing physical discomfort"). Without any associated physical side effects, recreational or aesthetic harm, or well-grounded fear of health effects, this Court is not satisfied that breathing may constitute an Article III injury.

The evidence the Foundation has presented as to its members' injuries resulting from the Defendants' excessive idling is meager at best. The theme present in all the member declarations is a concern regarding adverse health effects. See Aff. Heather Govern, 32 ECF No. 47-4 to 47-11; Aff. Opp'n re Mot. Summ. J., 33 ECF No. 46-5 to 46-6. These concerns, however, are not linked to specific medical conditions. Mr. Kendall suffers from allergies and sleep apnea but has not noticed his allergies getting worse. See Kendall Decl., 32 ECF No. 47-6; Kendall Decl., 33 ECF No. 46-4; Kendall Dep., 32 ECF no. 47-15 at 43. Mr. Wagner had asthma when he was younger. See Wagner Decl., 32 ECF No. 47-8. Ms. Ly had self-diagnosed asthma when she was younger. See Ly Decl., 32 ECF No. 47-7. Mr. Cahill is worried about the effects on his young son, who has a higher risk of developing respiratory illnesses such as asthma. See Cahill Decl., 32 ECF No. 47-11. It is unclear whether these fears of health effects from exhaust pollution are reasonable, even for those who may have a predisposition to respiratory illness. The Foundation's own expert, Dr. Rice, plans to testify that "responses to air pollution vary greatly

in people. Some individuals are highly sensitive to exposure to air pollution and may experience symptoms or illness while others may not." Rice Decl., 32 ECF No. 47-2 at 2.

Many of the members noted the smell of exhaust, which Mr. Wagner described as "acrid." See Wagner Decl., 32 ECF No. 47-8; Bolduc Decl., 32 ECF No. 47-9; Rubin Decl., 33 ECF No. 46-5; Shelley Decl.,33 ECF No. 46-6. The smell of exhaust alone appears insufficient to establish an injury. Ms. Ly, however, has experienced coughing when breathing in exhaust and Mr. Wagner has noted that his mouth is drier than normal and feels scratchy when running or breathing heavily in areas with exhaust. See Ly Decl., 32 ECF No. 47-7; Wagner Decl., 32 ECF No. 47-8. Ms. Rubin has on occasion found it difficult to breathe in areas with excess vehicle exhaust. See Rubin Decl., 33 ECF No. 46-5. Potentially, these health effects could be sufficient to constitute an injury.

The members all seem to spend significant amounts of time outdoors and for the most part have not modified their behavior due to the exhaust levels in their communities. Mr. Cahill is considering whether to stop using a bike trail, but at present he continues to make regular use of the trail. See Cahill Decl., 32 ECF No. 47-11. Ms. Becker asserts that she would hike less if she lived in Bridgeport, which she does not. See Becker Decl., 32 ECF No. 47-5. These are purely hypothetical

recreational harms. Ms. Andrews avoids certain bike routes with more exhaust, but only "when [she] can." Andrews Decl., 32 ECF No. 47-4.

The only true recreational harms are asserted by Mr. Wagner and Ms. Morelli. Mr. Wagner asserts that he "would definitely run more" if the air quality around his home improved. Wagner Decl., 32 ECF No. 47-8 at 3. He also states that he has on occasion decided not to spend time outdoors after smelling exhaust fumes. Id. at 4. Ms. Morelli declares that she would run and walk more if there was less air pollution near the Academy bus stops in Riverside and Bridgeport. See Morelli Decl., 32 ECF No. 47-10. The Court finds that these recreational harms experienced by Mr. Wagner and Ms. Morelli constitute injuries in fact.

The Foundation has not, however, established injury in fact for claims against Academy relating to the Pond Street/Braintree Lot or the Agganis Way stop. See Env't Tex. Citizen Lobby v. Exxonmobile, 968 F.3d 357, 367 (5th Cir. 2020) (requiring standing for each violation of the Clean Air Act). Environmental cases present particularly difficult standing questions, because the negative effects of pollution may not always be visible or immediately discernable.

The Supreme Court has provided guidance on the types of acceptable injuries. This Court must operate within those parameters.

**2. Traceability**

To establish standing, the asserted injuries must be fairly traceable to the alleged excessive idling by the Bus Companies. This "traceability" element, essentially a causation element of Article III standing, "requires the plaintiff to show a sufficiently direct causal connection between the challenged action and the identified harm." Dantzler, Inc. v. Empresas Berríos Inventory & Operations, Inc., 958 F.3d 38, 47 (1st Cir. 2020) (quoting Katz v. Pershing, LLC, 672 F.3d 64, 71 (1st Cir. 2012)). Although an indirect causal relationship is not necessarily fatal, an injury is less likely to satisfy this requirement where the causal chain between the defendant's action and the alleged harm depends on the actions of a third party. See Id. at 48 (citing Allen v. Wright, 468 U.S. 737, 757-59, (1984); Simon v. E. Kentucky Welfare Rights Org., 426 U.S. 26, 42-45, (1976)).

The parties focus on Utah Physicians for a Healthy Environment v. Diesel Power Gear LLC, which provides a model causation analysis for air pollution from "mobile sources" such as buses. See 374 F. Supp. 3d 1124, 1133-35 (D. Utah 2019). Causation is a tricky question in such a situation because

pollution comes from many different sources, of which the Defendants' contribution may only be a drop in the bucket. The Utah Physicians court considered two criteria in such a case: either a plaintiff must show "merely that a defendant discharges a pollutant that causes or contributes to the kinds of injuries alleged in the specific geographic area of concern," or a plaintiff must demonstrate that these discharges constitute a "meaningful contribution" to the environmental harm. Id. at 1133–35. The Court need not resolve which of these standards, if either, is most appropriate, because the Foundation has not demonstrated any basic link between the asserted injuries and the Bus Companies' bus stops.

Ms. Ly has coughed when breathing in exhaust, but she has not stated specifically that this has occurred at Riverside station near Academy's Newton Go stop. Ly Decl., 32 ECF No. 47-7 at 3. Ms. Rubin has found it difficult to breathe in areas with excess vehicle exhaust, but her declaration does not specify that this has occurred around any of the Defendants' bus stops. Rubin Decl., 33 ECF No. 46-5. In addition, Ms. Rubin only occasionally uses the Wellington Orange Line stop when there are train diversions, and she visits areas near the bus stops once every month or two for shopping, twice a month for meetings, and once a year to visit the restaurants and spa at

the casino. Id. She also bikes near the bus stops every two weeks over the summer. Id. at 3.

Ms. Morelli's declaration pertains to the Academy bus stops in Riverside (over two miles from where she runs and attends school) and Bridgeport (where she visits her brother's girlfriend five to six times per year). Morelli Decl., 32 ECF No. 47-10. These connections are too tenuous to conclude that her spending less time outside than she prefers is caused by or related to the Bus Companies' idling buses. Though Mr. Wagner has experienced a dry throat around his home, that home is over two miles from Academy and DPV's Wellington Orange Line stop. Wagner Decl., 32 ECF No. 47-8. He also refrains from running, but it appears that the closest Mr. Wagner runs or walks to one of the bus stops is a mile and a half away. Id. at 2. Wagner asserts that he has on occasion refrained from spending time outdoors after smelling exhaust fumes, but he does not specify that this has ever occurred near any of the Bus Companies' bus stops. Id. at 4.

These connections between the members' injuries and the Bus Companies' conduct are just too attenuated to satisfy the second prong of the standing inquiry. In an urban environment, a span of a mile or two contains numerous vehicles and bus stops. In such an environment, the injuries alleged cannot be conclusively linked to the excessive idling by the Defendants. Allowing suit

against the Defendants for anyone suffering the most minor of injuries who has occasionally traveled within two miles of any bus stop could mean that every resident of the greater Boston area has standing to sue the Bus companies. This Court cannot find that this aligns with the Supreme Court's guidance on standing.[3]

The Court also notes that the expert testimony offered by the Foundation would not affect this analysis, and thus rejects the Foundation's argument under Rule 56(d) that summary judgment on the issue of standing is premature before the close of expert discovery. Mem. Opp'n Mot. Summ. J., 32 ECF No. 46 at 20, 7-9.

The Court therefore holds that the Foundation has not met the traceability requirement for its claims against Academy, DPV, or Boston Charter, and it therefore lacks standing to proceed.

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[3] The Foundation points to the large geographic area of roughly 120 miles approved in Utah Physicians for a Healthy Environment v. Diesel Power Gear LLC, 374 F. Supp. 3d 1124, 1131 n.10 (D. Utah 2019). Mem. Opp'n Mot. Summ. J.,32 ECF No. 46 at 19. There are two important distinctions, however, between this case and Utah Physicians. First, as the Bus Companies note, the members in Utah Physicians suffered much more concrete injuries than the Foundation has identified here. See id. at 1132-33. Reply Resp. Mot. Summ. J., 33 ECF No. 53 at 3. Second, perhaps more importantly, the emissions in that case were of the "mobile source" variety, with defendant's trucks contributing to emissions while moving throughout the region. Id. at 1131. Here, while buses are a mobile source, the alleged violations only occurred while the buses were idling in place. The geographic scope of the emissions is thus more relevant in this case.

**IV. CONCLUSION**

For the reasons set forth above, Academy's, DPV's, and Boston Charter's motions for summary judgment were granted. Mot. Summ. J., 32 ECF No. 41; Mot. Summ. J., 33 ECF No. 40; Mot. Summ. J., 33 ECF No. 44.

**SO ORDERED.**

/s/ William G. Young

WILLIAM G. YOUNG
JUDGE
of the
UNITED STATES[4]

[4] This is how my predecessor, Peleg Sprague (D. Mass. 1841-1865), would sign official documents. Now that I'm a Senior District Judge I adopt this format in honor of all the judicial colleagues, state and federal, with whom I have had the privilege to serve over the past 45 years.

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**United States District Court**

**District of Massachusetts**

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**Case Number:** 1:20-cv-10032-WGY
**Filer:**
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**Docket Text:**
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H.R. REP. 91-1146, H.R. Rep. No. 1146, 91ST Cong., 2ND Sess. 1970, 1970 U.S.C.C.A.N. 5356, 1970 WL 5912 (Leg.Hist.)

***5356** P.L. 91-604, CLEAN AIR AMENDMENTS OF 1970

HOUSE REPORT (INTERSTATE AND FOREIGN COMMERCE COMMITTEE) NO. 91-1146,
JUNE 3, 1970 (TO ACCOMPANY H.R. 17255)
SENATE REPORT (PUBLIC WORKS COMMITTEE) NO. 91-1196,
SEPT. 17, 1970 (TO ACCOMPANY S. 4358)
CONFERENCE REPORT NO. 91-1783,
DEC. 17, 1970 (TO ACCOMPANY H.R. 17255)
CONG. RECORD VOL. 116 (1970)
DATES OF CONSIDERATION AND PASSAGE
HOUSE JUNE 10, DECEMBER 18, 1970
SENATE SEPTEMBER 22, DECEMBER 18, 1970
THE HOUSE BILL WAS PASSED IN LIEU OF THE SENATE BILL. THE
HOUSE REPORT AND THE CONFERENCE REPORT ARE SET OUT.

(CONSULT NOTE FOLLOWING TEXT FOR INFORMATION ABOUT OMITTED MATERIAL. EACH COMMITTEE REPORT IS A SEPARATE DOCUMENT ON WESTLAW.)

HOUSE REPORT NO. 91-1146

JUNE 3, 1970

THE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE, TO WHOM WAS REFERRED THE BILL (H.R. 17255) TO AMEND THE CLEAR AIR ACT TO PROVIDE FOR A MORE EFFECTIVE PROGRAM TO IMPROVE THE QUALITY OF THE NATION'S AIR, HAVING CONSIDERED THE SAME, REPORT FAVORABLY THEREON WITH AN AMENDMENT AND RECOMMEND THAT THE BILL AS AMENDED DO PASS.

THE AMENDMENT IS AS FOLLOWS:

THE AMENDMENT STRIKES OUT ALL AFTER THE ENACTING CLAUSE AND INSERTS IN LIEU THEREOF A SUBSTITUTE WHICH APPEARS IN THE REPORTED BILL IN ITALIC TYPE.

## PURPOSE OF LEGISLATION

THE PURPOSE OF THE LEGISLATION REPORTED UNANIMOUSLY BY YOUR COMMITTEE IS TO SPEED UP, EXPAND, AND INTENSIFY THE WAR AGAINST AIR POLLUTION IN THE UNITED STATES WITH A VIEW TO ASSURING THAT THE AIR WE BREATHE THROUGHOUT THE NATION IS WHOLESOME ONCE AGAIN. THE AIR QUALITY ACT OF 1967 (PUBLIC LAW 90-148) AND ITS PREDECESSOR ACTS HAVE BEEN INSTRUMENTAL IN STARTING US OFF IN THIS DIRECTION. A REVIEW OF ACHIEVEMENTS TO DATE, HOWEVER, MAKE ABUNDANTLY CLEAR THAT THE STRATEGIES WHICH WE HAVE PURSUED IN THE WAR AGAINST AIR POLLUTION HAVE BEEN INADEQUATE IN SEVERAL IMPORTANT RESPECTS, AND THE METHODS EMPLOYED IN IMPLEMENTING THOSE STRATEGIES OFTEN HAVE BEEN SLOW AND LESS EFFECTIVE THAN THEY MIGHT HAVE BEEN.

## SUMMARY OF PROVISIONS AND COMPARISON WITH EXISTING LAW

### (1) NATIONAL AMBIENT AIR QUALITY STANDARDS

THE SECRETARY OF HEW WILL BE AUTHORIZED AND DIRECTED TO ESTABLISH NATIONWIDE AMBIENT AIR QUALITY STANDARDS. THE STATES WILL BE LEFT FREE TO ***5357** ESTABLISH STRICTER STANDARDS

  

ESTABLISH EMISSION STANDARDS WOULD PREEMPT STATE AUTHORITY TO ESTABLISH OR ENFORCE ANY AIRCRAFT EMISSION STANDARDS.

UNDER PRESENT LAW THE SECRETARY DOES NOT HAVE SUCH AUTHORITY TO ESTABLISH SUCH STANDARDS ALTHOUGH THE AIRCRAFT INDUSTRY HAS VOLUNTARILY AGREED TO ABATE SMOKE EMISSIONS.

(8) POLLUTION FROM FEDERAL FACILITIES

THE LEGISLATION DIRECTS FEDERAL AGENCIES IN THE EXECUTIVE, LEGISLATIVE AND JUDICIAL BRANCHES TO COMPLY WITH APPLICABLE FEDERAL, STATE, INTERSTATE, ***5360** AND LOCAL EMISSION STANDARDS. THE SECRETARY IS AUTHORIZED TO EXEMPT ANY FACILITY ON A YEAR BY YEAR BASIS. THE SECRETARY IS TO REPORT EACH JANUARY TO THE CONGRESS ALL EXEMPTIONS GRANTED DURING THE PRECEDING CALENDAR YEAR, TOGETHER WITH THE REASON FOR GRANTING EACH SUCH EXEMPTION.

INSTEAD OF EXERCISING LEADERSHIP IN CONTROLLING OR ELIMINATING AIR POLLUTION THE FEDERAL GOVERNMENT HAS TENDED TO BE SLOW IN THIS RESPECT. THE FOREGOING PROVISIONS ARE DESIGNED TO REVERSE THIS TENDENCY. THE LEVEL OF APPROPRIATIONS AVAILABLE FOR THE MODIFICATION OF FEDERAL FACILITIES TO ELIMINATE OR REDUCE AIR POLLUTION HAS BEEN INADEQUATE. THE COMMITTEE HOPES THAT THE ADMINISTRATION WILL SEEK AND THE CONGRESS WILL PROVIDE ADEQUATE APPROPRIATIONS TO REMEDY THIS UNFORTUNATE SITUATION.

(9) EXTENSION OF AUTHORIZATIONS

THE BILL AUTHORIZES APPROPRIATIONS FOR THE FISCAL YEAR 1971, TOTALING $200 MILLION, FOR THE FISCAL YEAR 1972, $250 MILLION, AND FOR THE FISCAL YEAR 1973, $325 MILLION. OF THESE AMOUNTS, $75 MILLION FOR 1971, $100 MILLION FOR 1972, AND $125 MILLION FOR 1973 ARE EARMARKED FOR RESEARCH RELATING TO CONTROLLING POLLUTION RESULTING FROM THE COMBUSTION OF FUELS. THESE AUTHORIZATIONS CONSTITUTE A SUBSTANTIAL INCREASE OVER AND ABOVE THE LEVEL OF APPROPRIATIONS AUTHORIZED DURING THE PRECEDING YEARS. THE HIGHEST AMOUNT AUTHORIZED FOR ANY ONE FISCAL YEAR (FISCAL YEAR 1969) WAS $185 MILLION.

NEED FOR LEGISLATION

AIR POLLUTION CONTINUES TO BE A THREAT TO THE HEALTH AND WELL-BEING OF THE AMERICAN PEOPLE. WHILE A START HAS BEEN MADE IN CONTROLLING AIR POLLUTION SINCE THE ENACTMENT OF THE AIR QUALITY ACT OF 1967, PROGRESS HAS BEEN REGRETTABLY SLOW. THIS HAS BEEN DUE TO A NUMBER OF FACTORS: (1) CUMBERSOME AND TIME-CONSUMING PROCEDURES CALLED FOR UNDER THE 1967 ACT; (2) INADEQUATE FUNDING ON FEDERAL, STATE AND LOCAL LEVELS; (3) SCARCITY OF SKILLED PERSONNEL TO ENFORCE CONTROL MEASURES; (4) INADEQUACY OF AVAILABLE TEST AND CONTROL TECHNOLOGIES; (5) ORGANIZATIONAL PROBLEMS ON THE FEDERAL LEVEL WHERE AIR POLLUTION CONTROL HAS NOT BEEN ACCORDED A SUFFICIENTLY HIGH PRIORITY, AND (6) LAST, BUT NOT LEAST, FAILURE ON THE PART OF THE NATIONAL AIR POLLUTION CONTROL ADMINISTRATION TO DEMONSTRATE SUFFICIENT AGGRESSIVENESS IN IMPLEMENTING PRESENT LAW.

ON THE OTHER HAND, THE PICTURE IS NOT ENTIRELY BLEAK. CITIZENS AND OFFICIALS ON THE GRASSROOT LEVEL THROUGHOUT THE UNITED STATES HAVE BECOME SERIOUSLY AROUSED OVER THE THREAT OF AIR POLLUTION TO HEALTH AND WELL-BEING AND THEY ARE ANXIOUS TO HAVE

  

STRINGENT CONTROLS IMPOSED AND ENFORCED EFFECTIVELY AT THE EARLIEST POSSIBLE DATE. IT IS ALSO IMPORTANT TO NOTE THAT SOME INDUSTRIES HAVE BECOME AWARE OF THE NEED FOR EFFECTIVE POLLUTION CONTROL MEASURES. THIS GROUND SWELL IS IMPORTANT IF WE ARE TO SECURE CLEAN AIR EVERYWHERE IN THE UNITED STATES, AND IT IS IMPORTANT THAT THIS MOMENTUM NOT BE LOST. THEREFORE, IT IS URGENT THAT CONGRESS ADOPT NEW CLEAN AIR LEGISLATION WHICH WILL MAKE POSSIBLE THE MORE EXPEDITIOUS IMPOSITION OF SPECIFIC EMISSION STANDARDS BOTH FOR MOBILE AND STATIONARY SOURCES AND THE EFFECTIVE ENFORCEMENT OF SUCH STANDARDS BY BOTH STATE AND FEDERAL AGENCIES.

THE IMPOSITION OF NATIONAL AMBIENT AIR QUALITY STANDARDS AND DECLARING EACH STATE AS AN AIR QUALITY CONTROL REGION ARE STEPS AIMED TOWARDS THE ***5361** ACHIEVEMENT OF THOSE OBJECTIVES. EFFECTIVE POLLUTION CONTROL REQUIRES BOTH REDUCTION OF PRESENT POLLUTION AND PREVENTION OF NEW SIGNIFICANT POLLUTION PROBLEMS.

THEREFORE, PARTICULAR ATTENTION MUST BE GIVEN TO NEW STATIONARY SOURCES WHICH ARE KNOWN TO BE EITHER PARTICULARLY LARGE-SCALE POLLUTERS OR WHERE THE POLLUTANTS ARE EXTRA HAZARDOUS. THE LEGISLATION, THEREFORE, GRANTS AUTHORITY TO THE SECRETARY OF HEALTH, EDUCATION, AND WELFARE TO ESTABLISH EMISSION STANDARDS FOR ANY SUCH SOURCES WHICH EITHER IN THE FORM OF ENTIRE NEW FACILITIES OR IN THE FORM OF EXPANDED OR MODIFIED FACILITIES, OR BECAUSE OF EXPANDED OR MODIFIED OPERATIONS OR CAPACITY, CONSTITUTE NEW SOURCES OF SUBSTANTIALLY INCREASED POLLUTION.

AUTOMOTIVE POLLUTION CONSTITUTES IN EXCESS OF 60 PERCENT OF OUR NATIONAL AIR POLLUTION PROBLEM AND SUCH POLLUTION IS PARTICULARLY DANGEROUS IN THE HIGHLY URBANIZED AREAS OF OUR COUNTRY. THEREFORE, INCREASED ATTENTION MUST BE PAID TO THAT SOURCE OF POLLUTION BY INSISTING ON THE KINDS OF MOTOR VEHICLES AND FUELS WHICH WILL REDUCE POLLUTION TO MINIMAL LEVELS. THE COMMITTEE HOPES THAT THE AUTOMOBILE MANUFACTURERS WILL NOT LIMIT THEIR CHOICE OF ANTIPOLLUTION DEVICES TO THOSE DEVELOPED BY THEM IN-HOUSE, AND THAT THE TWO GREAT INDUSTRIES-- AUTOMOBILE MANUFACTURERS AND AUTOMOTIVE FUEL PRODUCERS-- WILL JOIN HANDS TO DEVELOP THE MOST EFFECTIVE TECHNOLOGIES. THE GOVERNMENT IS NOT PARTICULARLY WELL EQUIPPED TO DESIGN CARS OR TO DETERMINE THE COMPOSITION OF FUELS APPROPRIATE TOWARDS THESE ENDS. HOWEVER, CONGRESS WOULD BE DERELICT IF IT DID NOT VEST IN THE GOVERNMENT APPROPRIATE RESIDUAL AUTHORITY WITH REGARD TO VEHICLES AND FUELS TO MAKE THE NECESSARY DECISIONS SHOULD MEMBERS OF THESE INDUSTRIES FAIL TO DO SO ON THEIR OWN.

THE LEGISLATION, THEREFORE, PROVIDES FOR MORE STRINGENT TESTING OF AUTOMOBILES. SUCH TESTING IS NOT LIMITED, AS HERETOFORE, TO THE TESTING OF PROTOTYPES. SUCH TESTING WILL CONTINUE BUT THE TESTS SHOULD REQUIRE EACH PROTOTYPE RATHER THAN THE AVERAGE OF PROTOTYPES TO COMPLY WITH REGULATIONS ESTABLISHING EMISSION STANDARDS.

IN ADDITION TO PROTOTYPE TESTING, DAILY TESTING EITHER ON A SAMPLING OR CAR-BY-CAR BASIS WILL BE REQUIRED OF VEHICLES AS THEY COME OFF THE ASSEMBLY LINES. IF SUCH TESTS RAISE REASONABLE QUESTIONS OF COMPLIANCE WITH APPLICABLE EMISSION STANDARDS, THE SECRETARY MAY SUSPEND OR REVOKE THE CERTIFICATE. HE MAY, HOWEVER, ISSUE CERTIFICATES FOR THOSE CARS WHICH ACTUALLY COMPLY WITH THE REGULATIONS IN EFFECT AT THAT TIME.

THE MANUFACTURERS MUST WARRANT THAT THE VEHICLES HAVE CONTROL SYSTEMS OR DEVICES SUBSTANTIALLY OF THE SAME CONSTRUCTION AS THE SYSTEMS AND DEVICES ON THE PROTOTYPE VEHICLES FOR WHICH A CERTIFICATE HAS BEEN ISSUED. LABELS OR TAGS MUST BE PERMANENTLY

  