

No. 19-1152

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

FRIENDS OF BUCKINGHAM; CHESAPEAKE BAY FOUNDATION, INC.,
Petitioners,

v.

STATE AIR POLLUTION CONTROL BOARD; RICHARD D. LANGFORD,
Chair of the State Air Pollution Control Board; VIRGINIA DEPARTMENT OF
ENVIRONMENTAL QUALITY; DAVID K. PAYLOR, Director, Virginia
Department of Environmental Quality,
Respondents,

and

ATLANTIC COAST PIPELINE, LLC,
Intervenor.

On Petition for Review of Approval and Issuance of Stationary Source Permit
No. 21599 by the State Air Pollution Control Board and the Virginia Department
of Environmental Quality

**BRIEF OF *AMICUS CURIAE* LAWYERS' COMMITTEE FOR CIVIL
RIGHTS UNDER LAW IN SUPPORT OF PETITIONERS**

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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Pursuant to FRAP 26.1 and Local Rule 26.1,

Lawyers' Committee for Civil Rights Under Law

(name of party/amicus)

who is _____ amicus _____, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? YES NO

2. Does party/amicus have any parent corporations? YES NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? YES NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(a)(2)(B))? YES NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) YES NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? YES NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Jon M. Greenbaum

Date: June 7, 2019

Counsel for: Lawyers' Committee for Civil Rights

CERTIFICATE OF SERVICE

I certify that on June 7, 2019 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

/s/ Jon M. Greenbaum
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TABLE OF CONTENTS

Corporate Disclosure Statement Pursuant to Circuit Rule 26.1(b).....	ii
Table of Contents	iv
Table of Authorities	vi
Interest of <i>Amicus Curiae</i>	1
Statements Pursuant to Rule 29(a)(4)	3
Introduction	4
Argument	8
I. Environmental Justice Plays an Integral Role in Protecting Communities of Color from Environmental Harms.....	8
II. Communities of Color Continue to Suffer Disproportionate Harms by Pollutants Because of Systemic Failure to Consider Environmental Justice Concerns.	11
A. African-Americans are exposed to significant amounts of air pollution.....	12
B. African-Americans face disproportionate health risks from pollution. ..	14
III. Virginia’s Laws and Policies on Environmental Justice Play a Critical Role in Safeguarding Communities of Color, Including Union Hill.....	14
A. DEQ and SAPCB disregarded their obligation to make environmental justice considerations in issuing the permit for the BCS.	16
B. Incorporating environmental justice considerations is essential because communities of color disproportionately suffer from environmental harms in the greater Richmond area.....	18
IV. Case Studies of Communities Suffering from Preventable, Environmental Harms Highlights the Necessity of Environmental Justice Considerations.....	21
A. The Bronx, New York.....	21

B. Dickson County, Tennessee23

C. West Port Arthur, Texas.....25

D. Baton Rouge, Louisiana27

Conclusion29

Certificate of Service33

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STATUTES

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INTEREST OF *AMICUS CURIAE*

The Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee") is a nonpartisan, nonprofit organization that was formed in 1963 at the request of President John F. Kennedy to enlist the private bar's leadership and resources in combating racial discrimination. The Lawyers' Committee's principal mission is to secure equal justice for all through rule of law. To that end, the Lawyers' Committee has participated in hundreds of impact lawsuits challenging race discrimination. The organization has promoted the intersection of racial justice and environmental justice since 1991 and played a critical role in the advocacy that led to President William J. Clinton's Executive Order 12898, "Order on Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations." The Lawyers' Committee has also targeted the inequitable policies of both polluting companies and government agencies.

The Lawyers' Committee also advocated for environmental justice in Virginia in the late 1990s. The organization represented the residents of a majority African-American community in *Washington Park Lead Committee, Inc. v. United States Environmental Protection Agency*, No. 2:98CV421, 1998 WL 1053712 (E.D. Va. Dec. 1, 1998), a lawsuit that alleged that the constitutional rights of the community members were violated when the EPA refused to relocate them from a community contaminated with lead poisoning into integrated housing.

More recently, the Lawyers' Committee assisted residents in Port Arthur, Texas where low income, predominantly African-American public housing projects abut an area with dozens of petrochemical refineries. Indeed, in 2009, Port Arthur was named an "Environmental Showcase Community" by the U.S. Environmental Protection Agency (EPA), which concluded that relocation of the residents of low-income predominantly African-American public housing projects damaged by Hurricane Ike should be a high priority because of the environmental dangers posed by the refineries.

As a leading national racial justice organization, the Lawyers' Committee therefore has a vested interest in ensuring that racial and ethnic minorities in environmental justice communities are protected from industrial pollutants that are harmful to the health of community residents. As it follows, the Lawyers' Committee has a direct interest in ensuring that the Virginia State Air Pollution Control Board and the Virginia Department of Environmental Quality properly consider environmental justice concerns in its permitting process as required under state law.

STATEMENTS PURSUANT to RULE 29(a)(4)

All parties have consented to the filing of this brief.

No party or counsel thereof authored this brief in whole or part; no person other than *amicus* contributed money that was intended to fund preparing or submitting this brief.

INTRODUCTION

Seventy-five miles west of Richmond, Virginia, lies a small African-American community whose health is at stake in this case because of the failure of the Commonwealth of Virginia to implement environmental justice policies. Known as Union Hill, freedmen and freedwomen founded this community 150 years ago as one of at least 200 black communities across the country established in the aftermath of the Civil War. DeNeen Brown, *Black Towns, Established by Freed Slaves after the Civil War, Are Dying Out*, Wash. Post (Mar. 27, 2015), <https://wapo.st/2MHRsPM>. Although the founders of Union Hill had to create a way of life after surviving one of the most horrific tragedies in American history, the community has thrived for multiple generations, largely because of self-reliance. The community built schools, operated farms and raised livestock, and families have owned property over the course of multiple generations. And to this day, the community's residents attend two churches, Union Hill Baptist Church and Union Grove Missionary Baptist Church, which began as brush arbors for slaves before Emancipation.¹ The residents of Union Hill, who are predominantly African-

¹ Brush arbors were places of worship for African-American parishioners before and after slavery. H.J. Hill, *The History of Brush Arbors*, THE CLASSROOM (May 17, 2019), <https://www.theclassroom.com/the-history-of-brush-arbors-12080347.html>.

American and direct descendants of the community's founders, have managed to preserve their rich culture and history.²

As other communities established by freedmen and freedwomen are beginning to disappear throughout the country, Union Hill's existence also faces a formidable threat. See Brown, *Black Towns, Established by Freed Slaves after the Civil War, Are Dying Out, supra*. In the heart of Union Hill lies the site of a proposed compressor station known as the Buckingham Compressor Station (BCS). The BCS would serve the Atlantic Coast Pipeline (ACP), a 600-mile underground pipe that will transport natural gas from West Virginia, through Virginia and North Carolina by pressurizing gas for transportation throughout the pipe.

If allowed to proceed, the BCS would cause severe environmental harms to Union Hill and destroy the community. It would be the only station in the Commonwealth of Virginia that serves the ACP. It would increase toxic emissions in the Union Hill area from less than 80 pounds per year to more than one hundred tons annually. Amy Mall, *VA Pipeline Compressor Station Threatens Nearby Community*, Nat. Resources Def. Council (Sept. 5, 2018),

² Union Hill has even been recognized by the nation's first statewide historic preservation organization, Preservation Virginia, as a significant Post-Emancipation settlement that "reveal[s] the success and struggles of generations of African Americans in Virginia." Press Release, Preservation Virginia, 2016 Virginia's Most Endangered Historic Places (May 3, 2016), https://preservationvirginia.org/press_release/2016-virginias-most-endangered-historic-places/.

<https://on.nrdc.org/2My3Hi6>. Furthermore, the siting of the station in Union Hill is a cruel reminder of the dark history behind the creation of the community. The proposed location of the BCS sits on a 68.5-acre tract of land that was once known as the Variety Shade Plantation. Purchased from the descendants of slaveholders who owned the plantation, the land houses the unmarked graves of many African-Americans who died in bondage.

But more importantly, the BCS would subject residents of Union Hill to environmental harms that would negatively affect their health. Operating the compressor station will require four giant gas-fired turbines that would “run 24/7 to produce horsepower equivalent to two hundred NASCAR race cars.” *Compressor Station Proposed for Buckingham County*, Friends of Buckingham, <https://bit.ly/2WYFO7r> (last visited May 28, 2019). A study of Union Hill describes the air pollution that the BCS would produce as follows: “Imagine 291-2,005 (depending on the toxin measured) diesel school buses running 24/7. That’s the toxic result of this incessant, industrial activity.” *Id.* The 24-hour-a-day exposure to these emissions would only exacerbate the health conditions of a community where over half of the residents have pre-existing illnesses including: asthma, allergies, multiple sclerosis, lupus, chronic obstructive pulmonary disease, chronic bronchitis, congestive heart disease, and diabetes. In the wake of granting the BCS permit, Virginia’s Department of Environmental Quality (DEQ) has called for an

environmental justice study to examine the potential health ramifications of the compressor station. Robert Zullo, *After Union Hill Compressor Station Permit Battle, DEQ Issues Request for Environmental Justice Study*, Va. Mercury (Apr. 17, 2019), <https://bit.ly/2Kx2owZ>.

Yet the Virginia State Air Pollution Control Board (SAPCB) and DEQ completely disregarded these crucial considerations when the DEQ issued the permit for the construction and operation of the BCS after the SAPCB's recommendation. Indeed, the vulnerabilities of Union Hill, and the environmental harms the community would certainly face, fulfill the Environmental Protection Agency's (EPA) definition of an environmental justice community. And federal and state policies acknowledge the importance of avoiding environmental harms that disproportionately affect communities of color. Under Va. Code § 10.1-1307(E), SAPCB and DEQ must consider community health and safety factors. Both agencies supported granting the BCS permit without requiring a health assessment or even considering health risk factors. D.E. 40-1 at 35–36.

The failure to consider environmental justice impacts has harmed communities of color throughout the United States. Relevant authorities can avoid these harmful impacts by considering environmental justice concerns during their permit granting processes. Here, the Court faces a timely opportunity to confirm that Virginia law requires the SAPCB to undertake an environmental justice assessment

before DEQ grants the permit for the BCS. Upholding DEQ's issuance of the permit would effectively read Va. Code § 10.1-1307(E) out of Virginia law and, as a result, cause Union Hill irreparable environmental harms.

ARGUMENT

It is widely acknowledged that communities of color and low-income communities endure an inordinate amount of environmental abuses due to their proximity to industrial activity. Ronald Bass, *Evaluating Environmental Justice Under the National Environmental Policy Act*, 18 *Envtl. Impact Assessment Rev.* 83–92 (1998), <https://bit.ly/2ZadPPo>. These communities face greater environmental harms because they are excluded from the relevant decision-making processes. Michele L. Knorr, *Environmental Injustice: Inequities Between Empirical Data and Federal State Legislative and Judicial Responses*, 6 *U. Balt. J. Env'tl. L.* 71, 72 (1997). The disparate impact of industrial activity on minorities and low-income communities has led to the evolution of “environmental justice.”

I. Environmental Justice Plays an Integral Role in Protecting Communities of Color from Environmental Harms.

Environmental justice envisions that all individuals, regardless of their race or socio-economic status, have equal opportunity to present their views before consequential environmental decisions or actions occur. Andrew J. Doyle, *Environmental Justice on the Move*, *Fed. Law.*, July 2015, at 3. The EPA defines environmental justice as “the fair treatment and meaningful involvement of

all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.” *Learn About Environmental Justice*, U.S. Env'tl. Protection Agency, <https://bit.ly/2nkHuqf> (last visited June 5, 2019). In this context, no community should “bear a disproportionate share of the negative environmental consequences resulting from industrial, governmental and commercial operations or policies,” and communities are entitled to participate in the decision-making processes for activities that may affect their environment or health. *Id.* Communities that are the most vulnerable to environmental harms are known as “environmental justice communities.” Lyndon Valicenti, *What Does an Environmental Justice Community Even Mean?*, Foresight Design Initiative (July 19, 2017), <https://bit.ly/2InrXOn>.

During the second half of the 20th century, the U.S. government acknowledged the correlation between race and exposure to environmental hazards. In 1970, the Presidents’ Council on Environmental Quality recognized that racial discrimination adversely affects low-income individuals and the quality of their environment. Council on Env'tl. Quality, *Annual Environmental Quality Report (1970)*, <https://www.slideshare.net/whitehouse/august-1970-environmental-quality-the-first-annual-report-of>. The following decade, in 1983, the U.S. General Accounting Office conducted a study in Houston, Texas finding that most commercial hazardous waste facilities in EPA Region IV were located in African-

American communities. Gen. Accounting Office, B-211461, Siting of Hazardous Waste Landfills and Their Correlation with Racial and Economic Status of Surrounding Communities (1983). A report released by the United Church of Christ's Commission for Racial Justice (CRJ) in 1987 confirmed that the correlation between the siting of waste facilities and race, as observed in Houston, existed nationwide. Commission for Racial Justice, United Church of Christ, Toxic Wastes and Race in the United States 14 (1987), <https://bit.ly/2oiQgo3> (hereinafter "Toxic Wastes and Race").³ However, the U.S. government did not develop policies to address environmental justice problems until the 1990s.

In 1994, President William J. Clinton signed Executive Order 12898: "Federal Actions to Address Environmental Justice in Minority and Low-Income Populations." Exec. Order No. 12898, 59 Fed. Reg. 32 (Feb. 11, 1994). The Order required that all federal agencies

...make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations.

Id. Nevertheless, the Order provides executive departments and agencies with discretion on how to implement environmental justice. *Id.* To this day, Executive Order 12898 continues to apply to executive departments and agencies. Robert

³ The study found that the communities with the greatest number of commercial hazardous waste facilities had the highest composition of minority residents.

Esworthy & David M. Bearden, Cong. Research Serv., IF10529, Role of the U.S. Environmental Protection Agency in Environmental Justice (2018), <https://fas.org/sgp/crs/misc/IF10529.pdf>.

II. Communities of Color Continue to Suffer Disproportionate Harms by Pollutants Because of Systemic Failure to Consider Environmental Justice Concerns.

As discussed briefly above, CRJ conducted the first study that analyzed the disproportionate exposure of minority communities to environmental hazards in 1986. The study measured the correlation between race, poverty, and environmental injustice. *Toxic Wastes and Race*, *supra*, at 14. The corresponding report, titled *Toxic Wastes and Race in the United States*, was released the following year and found that across the nation, race was the most significant variable associated with the location of sites producing hazardous wastes. *Id.* at xiii. Communities containing pollution-producing industrial sites had, on average, twice as many residents of color as communities without them (24% versus 12%). *Id.* at xii. Furthermore, the report found that three out of every five Black or Latino Americans live in communities with uncontrolled toxic waste sites. *Id.* at xix.

Since the issuance of Executive Order 12898, multiple reports have found that the burdens of pollution still fall disproportionately on communities of color. *See Toxic Wastes and Race*, *supra*; Lesley Fleischman & Marcus Franklin, *Fumes Across the Fence-Line: The Health Impacts of Air Pollution from Oil & Gas*

Facilities on African American Communities, NAACP, (Nov. 2017), http://www.naacp.org/wp-content/uploads/2017/11/Fumes-Across-the-Fence-Line_NAACP_CATF.pdf (hereinafter “Fleischman”). Studies in 2007 and 2017 found that people of color continue to make up the majority of people who live closest to industrial facilities that produce harmful pollutants. See *Toxic Wastes and Race*, *supra*, at x; Fleischman, *supra*, at 4. Neighborhoods that host industrial facilities are comprised of 56% people of color on average, whereas non-host neighborhoods are typically comprised of 30% people of color. *Toxic Wastes and Race*, *supra*, at x. Overall, of the approximately 9.2 million people living within three kilometers of hazardous industrial facilities, more than 55% are people of color. *Id.*

A. African-Americans are exposed to significant amounts of air pollution.

African-Americans are, on average, exposed to 21% more pollution than the general population. Christopher W. Tessum et al., *Inequity in Consumption of Goods and Services Adds to Racial-Ethnic Disparities in Air Pollution Exposure*, 116 Proc. Nat’l Acad. Sci. U.S., 6001, 6002 (2019), <https://www.pnas.org/content/pnas/116/13/6001.full.pdf>. They are exposed to 30% more polluted air than white Americans, and are 79% more likely than white Americans to live in neighborhoods where industrial pollution poses the greatest threat to their health. Fleischman, *supra*, at a; *Toxic Wastes and Race*, *supra*, at 3.

In 19 states, African-Americans are more than twice as likely to live in such neighborhoods (David Pace, *Minorities Suffer Most from Industrial Pollution*, NBC News (Dec. 14, 2005, 9:03 AM), <https://nbcnews.to/2WQngG6>) despite the fact that at least a quarter of these states have populations that are less than 10% African-American, *Black Population by State 2017*, World Population Rev., <https://bit.ly/2K1V1hH> (last visited June 6, 2019).

Specifically, 2.4% of all African-Americans, over one million people, live within a half mile of an oil or gas facility, with many more living within the radius of neighborhoods affected by emissions from these sites. Fleischman, *supra*, at j. More than 6.7 million African-Americans live in the 91 U.S. counties that host oil refineries. *Id.* at 4. Furthermore, these numbers increase every year. *Id.*

Although the government and stakeholders have made great strides in reducing both visible and invisible air pollution in the United States, African-Americans are still at great risk of substantial health threats from air pollution. *Air Pollution: Current and Future Challenges*, U.S. Env'tl. Protection Agency, <https://bit.ly/2jEjHNh> (last visited June 6, 2019). The Clean Air Act lists 187 “hazardous air pollutants,” sometimes called “air toxics,” that are known or believed to have serious health or environmental effects. *Id.* Pollutants such as ozone, nitrogen dioxide, airborne lead, and particulate matter are still present around the country and are documented to have negative effects on human health. *Id.* Industrial

activity also produces greenhouse gases such as carbon dioxide, nitrous oxide, and methane, which contribute to climate change. *Id.* Climate change also has secondary detrimental effects, such as the danger of increased temperatures for children and the elderly, aggravation of food shortages, and increased climate catastrophes. *Id.*

B. African-Americans face disproportionate health risks from pollution.

The health risks associated with both short and long-term air pollution from industrial sites, including natural gas and oil facilities, are extreme. *Id.*⁴ Over one million African-Americans live in areas where their risk of cancer due to the effects of air pollution from natural gas processing exceeds the EPA's guidelines for cancer risk. Fleischman, *supra*, at b. The EPA found that urban areas often have elevated risks from pollutant inhalation. *Air Pollution: Current and Future Challenges*, *supra*. Health problems associated with air pollution from gas and other facilities include asthma attacks, headaches, anemia, brain damage, birth defects, cancer, and respiratory irritation that ranges from mild to fatal. Fleischman, *supra*, at 22, 27, 30.

III. Virginia's Laws and Policies on Environmental Justice Play a Critical Role in Safeguarding Communities of Color, Including Union Hill.

⁴ Generally, experts believe that the health effects of air pollution should be studied as a whole, without distinguishing particular pollutants. Juliana Maantay, *Asthma and Air Pollution in the Bronx: Methodological and Data Considerations in Using GIS for Environmental Justice and Health Research*, 13 HEALTH & PLACE 32, 41 (2007), <https://bit.ly/31aa7ap>.

States play a crucial role in developing and implementing laws and policies to protect environmental justice communities. Today, every state and the District of Columbia have implemented an environmental justice law, executive order, or policy. Robert D. Bullard, et al., *Environmental Justice Milestones and Accomplishments: 1964-2014* (2014), <https://bit.ly/31eW0Av>. This, in turn, signifies that each state government controls the extent to which environmental justice considerations integrate with policies, practices, and decision-making processes of relevant agencies. James M. Van Nostrand, *Energy and Environmental Justice: How States Can Integrate Environmental Justice into Energy-Related Proceedings*, 61 *Cath. U. L. Rev.* 701, 703 (2012). Thus, state law and the policies of state agencies are the primary means by which environmental justice communities are protected from environmental harms and adverse health effects.

In Virginia, state agencies, including the DEQ, recognize that “the term ‘environmental justice’ has historically meant ensuring that racial minorities and other vulnerable populations ‘are not disproportionately affected by environmental exposures that have known adverse effects.’” D.E. 40-1 at 33 (citing Advisory Council Letter 1 (AR013407)); *see also Glossary*, Va. Dep’t Env’tl. Quality, <https://bit.ly/2ItJpB1> (last visited June 6, 2019).

Under Va. Code § 10.1-1307(E), the DEQ and SAPCB are required to consider community health and safety impacts for operations that will cause air pollution—these factors fit within the framework of environmental justice.

A. DEQ and SAPCB disregarded their obligation to make environmental justice considerations in issuing the permit for the BCS.

Notably, during the approval process for the permit to construct and operate the BCS, DEQ showed its willingness to disregard its commitment to promoting environmental justice at every turn. In 2017, Virginia established the Governor’s Advisory Council on Environmental Justice (ACEJ) in response to Executive Order 12898. Office of the Governor, Commonwealth of Virginia, Executive Order Number Seventy-Three: Establishment of an Advisory Council on Environmental Justice (2017), <https://bit.ly/2MzgMrh>. ACEJ’s primary responsibility was to identify and eliminate environmental justice issues in the state by issuing recommendations for proposed legislation, regulations, and policies. *Id.*

ACEJ met with community members of Union Hill and concluded that the community “has a significant population fitting the environmental justice criteria.” Robert Zullo, *Hey Environmentalists, Maybe He’s Just Not That Into You*, Va. Mercury (Sept. 11, 2018), <https://bit.ly/2x46SUI>. The committee then recommended that DEQ suspend the permitting process for the BCS until further review of the station’s impact on the health and lives of those living in close proximity. *Id.* Soon

after, Governor Ralph Northam dissolved ACEJ and created a new body called the Virginia Council on Environmental Justice. Robert Zullo, *After Union Hill Compressor Station Permit Battle, DEQ Issues Request for Environmental Justice Study*, Va. Mercury (Apr. 17, 2019), <https://bit.ly/2Kx2owZ>. The new body did not include former members of the ACEJ. According to a former member of the ACEJ, the dismantling of ACEJ and the creation of a new council was a “surprise.” Robert Zullo, *In Wake of Compressor Station Vote, Northam’s Order Reconstitutes Environmental Justice Advisory Council*, Va. Mercury (Jan. 23, 2019), <https://bit.ly/2XxT5AC>.

A few months after the agency approved the BCS permit, DEQ announced that it was seeking a consultant to perform an agency wide environmental justice study aimed at “recommending regulatory and statutory changes” that would enable the agency “to promote equity in environmental decision making.” Zullo, *After Union Hill Compressor Station Permit Battle, supra*. But the creation of a new environmental justice council and DEQ’s hiring of an environmental justice consultant does not absolve the Virginia government from its legal obligation to protect Union Hill. Despite the fact that these changes were made in response to the outcry about Union Hill, the State has not taken action to remedy the errors it made during the BCS permitting process. Ultimately, the SAPCB and DEQ still granted the permit to construct the BCS while failing to consider environmental justice

impacts. In the interest of environmental justice, and under Virginia law, the Court should vacate and remand the BCS permit for further consideration.

B. Incorporating environmental justice considerations is essential because communities of color disproportionately suffer from environmental harms in the greater Richmond area.

The imminent environmental harms facing the Union Hill community are grim. Operating the BCS will cause an exponential increase in nitrogen oxide and daily fine particle pollution that will cause respiratory illnesses and cancers, and prevent the Union Hill community from enjoying their natural resources and cultural heritage. D.E. 40-1 at 18, 27. However, the situation in Union Hill is not unique. If this Court upholds the BCS permit, Union Hill will become another statistic in the prevalent environmental injustices near Richmond that have disproportionately affected minorities.

Virginia ranks 22nd among the states for total toxic air emissions. Virginia Chapter Sierra Club, *Top 15 Virginia Localities with the Highest Toxic Air Emissions*, at 2 (2014), <https://bit.ly/2K1RARj>. However, in accordance with the general nationwide pattern, communities of color in Virginia are disproportionately exposed to toxic air pollutants. *Id.*

Richmond, Virginia contains four of the top fifteen most polluted zip codes in the state. *Id.* Three of those four zip codes have higher African-American

populations than the Virginia state average. *American FactFinder*, U.S. Census Bureau, factfinder.census.gov (last visited June 1, 2019). The majority of the emissions in this area are respiratory irritants such as ammonia, hydrochloric acid, and sulfuric acid. These substances contribute to Richmond's rank by the Asthma and Allergy Foundation of America as the number one "asthma capital" of the United States. Virginia Chapter Sierra Club, *Top 15 Virginia Localities*, *supra*, at 4. Other long-term effects of these substances include respiratory problems, such as chronic bronchitis and emphysema, as well as gastritis and dermatitis. *Id.* Industrial pollutants common to the area, such as toluene and methanol, have also been linked to birth defects, neurological damage, and more. *Id.* Notably, the 2010 United States Census found that Richmond's population was half comprised of African-Americans, whereas Virginia's total population was only 19.8% African-American. *QuickFacts Richmond city, Virginia*, U.S. Census Bureau, <https://bit.ly/317oIDk> (last visited June 1, 2019) (showing 2010 Census information for the city's population, and its 48.8% African-American share); *QuickFacts Virginia*, U.S. Census Bureau, <https://bit.ly/2MxQ2Hy> (last visited June 1, 2019) (showing the 19.8% African-American population for the state in 2010).

Union Hill is 75 miles from the city center of Richmond. By contrast, Union Hill's zip code is astonishingly clean, with fewer than 80 pounds of local air emissions from pollutants each year. Toxics Release Inventory Explorer for Zip

Code 23936 in 2017, U.S. Env'tl. Protection Agency, <https://bit.ly/2QSeq5j> (last visited June 1, 2019). This would dramatically change if site of the BCS remains in Union Hill. If the compressor station begins operating in the community, it would be permitted produce up to 155 *tons*, or 310,000 pounds, of emissions per year in the regular course of business, before accounting for any leaks, level spikes, or other emergencies that may occur. Amy Mall, *VA Pipeline Compressor Station Threatens Nearby Community*, Nat. Resources Def. Council (Sept. 5, 2018), <https://on.nrdc.org/2My3Hi6>. Among the most prevalent of the 70 chemical components of compressor emissions are nitrogen oxide, carbon monoxide, volatile organic compounds, and particulate matter. P. N. Russo & D. O. Carpenter, Institute for Health and the Environment, *Health Effects Associated with Stack Chemical Emissions from NYS Natural Gas Compressor Stations: 2008-2014*, at 19 (2017), https://www.albany.edu/about/assets/Complete_report.pdf. Exposure to these substances can cause respiratory and cardiovascular diseases, neurological and developmental disorders, and cancer. *Id.* at 3. Because of the environmental and health threats posed by the compressor station, Preservation Virginia has listed Union Hill as a “Most Endangered Historic Place.” Mall, *VA Pipeline Compressor Station, supra*.

The fact that the population residing within a one-mile radius of the proposed site is 83% people of color and 61% African-American cannot be written off as mere

coincidence in light of the pernicious pattern of environmental racism in the United States. *See* Lakshmi Fjord, Union Hill Community Household Study Site and Methods Report 16 (2018), <https://bit.ly/2KyJ9TO>. Too often industrial interests take advantage of the diminished political capital of communities of color in order to pollute with relative impunity, and the proposed BCS site in Union Hill is yet another striking example of this trend.

IV. Case Studies of Communities Suffering from Preventable, Environmental Harms Highlights the Necessity of Environmental Justice Considerations.

Throughout the country, communities of color have suffered from environmental harms caused by industrial activities because of the failure to address environmental justice concerns. The following case studies demonstrate these harms and further emphasize the risks faced by Union Hill if the site of the BCS remains in the community.

A. The Bronx, New York

The Bronx, one of the five boroughs of New York City, is an illustrative example of the ways in which industrial pollution disproportionately affects communities of color. As demonstrated in Juliana Maantay's 2007 study, *Asthma and Air Pollution in the Bronx*, the borough contains the highest percentage of minority residents (85.5%) of New York City's five boroughs. Juliana Maantay, *Asthma and Air Pollution in the Bronx: Methodological and Data Considerations in*

Using GIS for Environmental Justice and Health Research, 13 *Health & Place* 32, 35 (2007), https://www.monroecollege.edu/uploadedFiles/_Site_Assets/PDF/Maantay_Health_and_Place.pdf. It is also the least affluent, as 46% of residents live below the poverty line in some communities. *Id.* Because of these circumstances and other factors, “it is almost a given” that the Bronx would be highly susceptible to the threat of increased industrialization and pollution. *Id.*

Unlike the rest of New York City, which experienced rapid gentrification between the 1970s and the 1990s, the Bronx remains home to a majority of low-income residents of color. *Id.* As other boroughs grew wealthier, the industrial sites in those boroughs were rezoned for commercial and residential use. *Id.* As a result, city planners turned to vulnerable communities in the Bronx and did precisely the opposite—they rezoned former residential areas as industrial sites. *Id.* Thus, when companies sought to open pollution emitting facilities in New York City, the sites available to them were virtually all in the Bronx. *Id.* As a result, the residents of these communities are exposed to a vastly disproportionate amount of air pollution, and approximately 66% of the Bronx’s landmass falls within a “buffer zone”⁵ that is highly susceptible to the pollution from various polluting sites. *Id.* at 48. Within

⁵ In this study, “buffer zones” were defined as the geographic areas surrounding different sources of ambient air pollution, with the size of a given buffer zone being determined by the nature and types of emissions being released by the particular source. *Id.* at 46-47.

these zones, 88% of the residents are people of color, and 33% live below the federal poverty level. *Id.*

The health effects of this increased exposure are severe. The prevalence of asthma diagnoses and complications in the Bronx, as compared to the other boroughs, demonstrate a particularly striking difference. People within the buffer zones around industrial facilities are up to 66% more likely to be hospitalized for issues relating to asthma. *Id.* at 49. The hospitalization rate for children with asthma in the Bronx is 70% higher than the average for New York City as a whole, and an astounding 700% higher than the average for the rest of New York State. *Id.* at 34. The asthma-related death rate for residents of the Bronx is double that of the rest of New York City. *Id.* at 33. The increased incidence and severity of asthma due to pollution in the Bronx has devastating effects on the community. However, it is but one of the many dire health consequences of exposure to industrial pollutants.

B. Dickson County, Tennessee

As the CRJ highlighted in its 2007 report, *Toxic Wastes and Race at Twenty*, Dickson, Tennessee has also suffered from a “not in my backyard” approach to industrial sites, resulting in zoning changes that led to greater pollution exposure for communities of color. Robert Bullard et al., *Toxic Wastes and Race at Twenty 1987-2007*, at 135 (2007), <https://on.nrdc.org/1WgQ011>. As in the most polluted neighborhoods of the Bronx, the residents of the Eno Road neighborhood in Dickson

are mostly African-American. Furthermore, much like Union Hill, the Eno Road community was established by freedmen and freedwomen immediately after the Civil War. Bob Herbert, *Poisoned on Eno Road*, N.Y. Times (Oct. 2, 2006), <https://nyti.ms/2zFnhQw>.

Despite the fact that Dickson County is overwhelmingly white (92.6%) (*QuickFacts, Dickson County, Tennessee, U.S. Census Bureau, https://bit.ly/2K2s7yc* (last visited June 1, 2019) (using 2010 Census info)) and has an area of nearly 500 square miles, its only cluster of waste facilities is located mere feet from the mostly-black Eno Road community (Bullard, *Toxic Wastes and Race at Twenty, supra*, at 137). Indeed, waste from the surrounding areas of Dickson County, including a plant for car and tire production, was regularly disposed of in the same landfill, leading to pollutants such as benzene, toluene, ethylbenzene, acetone, and petroleum hydrocarbons leaching into the water and soil around Eno Road. *Id.* at 136. As a result, despite the fact that African-Americans make up less than 5% of the county's population and occupy less than 1% of its land mass, they are exposed to the overwhelming majority of the environmental pollution in Dickson County. *Id.* at 137.

Eventually, when government officials discovered that the landfill was polluting water in the surrounding area in 1988, they warned white families of the danger and provided them with alternative sources of safe water. Herbert, *supra*.

Meanwhile, the black families on Eno Road did not receive a warning—instead, they were told the water was safe—and continued to drink from contaminated wells for over a dozen years. *Id.* Testing ultimately revealed that the water was contaminated with trichloroethylene, or TCE, a known human carcinogen (National Toxicology Program, *RoC Review of Trichloroethylene (TCE)*, Dep't Health & Human Services, <https://ntp.niehs.nih.gov/pubhealth/roc/listings/tce/index.html> (last updated July 26, 2018)) as early as the 1980s (Herbert, *supra*). Over the decades, testing has placed the levels of TCE in the community's drinking water at 24 to 29 times higher than the acceptable maximum set by the EPA. *Id.* Despite this, and the government's knowledge of the contamination, the Eno Road community's residents were not connected to safe water until 2000, after massive damage had already been done. Bullard, *Toxic Wastes and Race at Twenty*, *supra*, at 141.

The Eno Road community has experienced health problems, including cancer, ever since. Herbert, *supra*. A continuing pattern of neglect, carelessness, and outright lies from the local government caused this African-American community, a very small cluster in the mostly white Dickson County, to be victimized by ongoing toxic pollution and subject to the devastating diseases it causes.

C. West Port Arthur, Texas

In Port Arthur, on the border between Texas and Louisiana, there are two oil and gas facilities that occupy more than 7,500 acres of land (Fleischman, *supra*, at

23), nearly 15 % of the town's total land area (*QuickFacts, Port Arthur city, Texas*, U.S. Census Bureau, <https://bit.ly/2IsM0v7> (last visited June 1, 2019) (using 2010 data)). These two facilities refine over 900,000 barrels of crude oil each day. Fleischman, *supra*, at 23. However, the residents of the bordering neighborhood, West Port Arthur, a historic African-American community, disproportionately bear the burden of the pollution produced by the facilities. Wen Stephenson, *Welcome to West Port Arthur, Texas, Ground Zero in the Fight for Climate Justice*, *The Nation* (June 3, 2014), <https://www.thenation.com/article/welcome-west-port-arthur-texas-ground-zero-fight-climate-justice/>. The residents of West Port Arthur are 95% African-American, and are exposed to tremendous amounts of airborne pollutants, including benzene, carbon monoxide, and sulfur dioxide. Fleischman, *supra*, at 23. Due to the fact that the pollution faced by African-Americans in Port Arthur was so much more severe than what other groups faced, the EPA named it an "Environmental Justice Showcase Community" to indicate its status as a town in environmental crisis. *Environmental Justice Showcase Communities Fact Sheet*, U.S. Env'tl. Protection Agency (Nov. 2009), <https://bit.ly/2Z5ails>. Despite this, progress has been slow in Port Arthur.

Because of these emissions, cancer rates among the African-American population in Jefferson County, where Port Arthur is located, are 15% higher than for the average Texas resident, and the cancer mortality rate is more than 40%

higher. Fleischman, *supra*, at 23–24. Residents of Port Arthur are also four times more likely than residents residing upwind of the refineries, to suffer cardiovascular and respiratory conditions, headaches, nervous system disorders, and ear, nose, and throat conditions. *Id.* at 24. Birth defects and reproductive problems are also known effects of these pollutants. *Id.* at 23.

Similar to the Union Hill community, the residents of Port Arthur have relied on collective activism to combat the presence of pollution producing facilities in their community. *Id.* at 24. The local organization known as the Community In-Power and Development Association (CIDA) advocates for low-income communities in Port Arthur who are disproportionately burdened by the effects of the oil industry on the region. *Id.* CIDA negotiated an agreement with one of the companies to financially assist Port Arthur residents with their health care costs and construct a community clinic. *Id.* Although CIDA has made progress for the impacted communities, these developments cannot undo the harms the communities have already suffered.

D. Baton Rouge, Louisiana

From 2005 to 2014, oil and gas facilities across Louisiana experienced over 3,300 accidents that released more than 24 million pounds of airborne toxins. *Id.* at 26. Rates of accidents including leaks in pipelines and other types of infrastructure remain high, with 117 accidents occurring in April 2017 alone. *Id.* These accidents

push the total amount of emissions for facilities over the already considerable amount—millions of pounds—that is permitted by the EPA guidelines. *Id.* at 27.

Spikes in emissions resulting from these accidents have dire health effects on Louisianans living near oil refineries. *Id.* at 26. As with other oil and gas facilities, a major component of the pollution is benzene, which is known to cause cancer in humans. *Id.* The facilities also emit large quantities of sulfur dioxide, which can cause asthma attacks. *Id.*

The city of Baton Rouge, home to an 1,800-acre ExxonMobil facility (among others), is 50% African-American. *Id.* This plant alone emitted over four million pounds of pollutants between 2008 and 2011. *Id.* at 27. The pollution in the air is palpable, with residents reporting strong, foul odors that caused “burning” in the nostrils as well as nausea. *Id.*

Despite ongoing, concerted community action, toxic emissions in the Baton Rouge area continue to be a burden on its residents of color, diminishing their quality of life and causing chronic health problems. Anna Rolfes, Founding Director of the nonprofit organization Louisiana Bucket Brigade, noted that “What we’re recording here is another form of violence – this kind the long, steady attack of carcinogens and neurotoxins that ruin the health and the lives of those in Louisiana, usually African Americans, who are unfortunate enough to live cheek to cheek with Big Oil’s refineries.” *Id.*

CONCLUSION

Environmental justice plays a crucial role in preventing communities of color from suffering disproportionate impacts of industrial activity. African-Americans have already greatly experienced the harmful effects of pollution throughout the country because of the failure to implement environmental justice. Virginia law seeks to rectify these injustices by requiring the SAPCB and DEQ to make environmental justice considerations before granting an industrial permit. But they did no such thing for the Union Hill community, and now the community is at risk of environmental devastation. For the foregoing reasons, *Amicus* urges the Court to vacate the permit for the Buckingham Compressor Station.

Dated: June 7, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and 29(a)(5) because it contains 5802 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing amicus curiae brief with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the CM/ECF system on June 7, 2019. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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