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## Citizen Suits for Mobile Sources: Enforcement Against Incidents of Emissions Cheating

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# Citizen Suits for Mobile Sources: Enforcement Against Incidents of Emissions Cheating

Paige Lambert\*

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INTRODUCTION

Section 203(a)(3)(A) and (B) of the Clean Air Act (“CAA” or “the Act”) contain provisions that prohibit tampering with any vehicle’s emission control device or installing a “defeat device” which would render the vehicle’s emission controls inoperative.<sup>1</sup> The Environmental Protection Agency (“EPA”) has been the primary authority for detecting such emissions cheating and for bringing enforcement actions against any known perpetrators.<sup>2</sup> However, a citizen group recently brought an action to enforce Section 203(a)(3) using the Act’s citizen suit provision—the first reported case to do so.<sup>3</sup>

In January 2017, the Utah Physicians for a Healthy Environment (“UPHE”) filed a complaint in the United States District Court for the District of Utah against four entities and four individuals—David W. Sparks (“Heavy D”), David Kiley (“Diesel Dave”), Joshua Stuart (“Redbeard”) and Keaton Hoskins (“The Muscle”)—collectively referred to as the “Diesel Brothers.”<sup>4</sup> The Diesel Brothers rose to fame in 2016 with the advent of their self-named reality television show on the Discovery Channel, which “follows Heavy D, Diesel Dave and the team at Dieselsellerz as they build big, bad trucks, pull elaborate pranks and push the limits with new stunts.”<sup>5</sup> UPHE, aware that the Diesel Brother’s operations (or, if you prefer, elaborate pranks) often involved tampering

<sup>1</sup> 42 U.S.C. § 7522.

<sup>2</sup> *Clean Air Act Vehicle and Engine Enforcement Case Resolutions*, EPA, <https://www.epa.gov/enforcement/clean-air-act-vehicle-and-engine-enforcement-case-resolutions> (last updated Jan. 5, 2021).

<sup>3</sup> Complaint, *Utah Physicians for a Healthy Env’t, Inc. v. Diesel Power Gear LLC*, 374 F. Supp. 3d 1124 (D. Utah 2019) (No. 2:17-cv-32).

<sup>4</sup> *Id.* at 1.

<sup>5</sup> DISCOVERY.COM, <https://www.discovery.com/shows/diesel-brothers> (last visited Feb. 12, 2021).

with or removing emission controls on the diesel trucks that are at the center of their business, filed a complaint which alleged “significant, repeated and ongoing violations of the [CAA] by removing and defeating emission control systems on diesel vehicles.”<sup>6</sup> UPHE alleged that those violations were contributing to increased pollution in the Wasatch Front, harming their members.<sup>7</sup> In March 2019, Chief Judge Robert Shelby granted partial summary judgement to UPHE, affirming the group’s standing and holding that several of the defendants could be liable for violating the Act and Utah’s State Implementation Plan.<sup>8</sup> The Memorandum Decision and Order identified that genuine issues of material fact existed on some claims, precluding a complete summary judgement.<sup>9</sup>

Notwithstanding this ongoing litigation, Chief Judge Shelby’s granting summary judgement on several threshold issues, such as standing and the assignment of personal liability, set the precedent for an increase in future enforcement actions addressing emission control violations.<sup>10</sup> Increasing the number of citizen enforcement actions against mobile sources can have far-reaching implications. Although it would encourage litigation and increase judicial burden, more enforcement cases will enable the Act to do more in the pursuit of its purpose—“to protect and enhance the quality of the Nation’s air resources.”<sup>11</sup> Citizen suits could help put a dent in the administrative burden of an under-resourced EPA. They could empower citizen groups and states to identify and prosecute smaller scale incidents of emissions cheating that have localized effects on air quality and human health. Citizen suits should be another tool in a multi-faceted approach to addressing climate change by ensuring the integrity of emission control programs and policies.

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<sup>6</sup> Complaint, *supra* note 3, at 2.

<sup>7</sup> *Id.* at 4.

<sup>8</sup> *Utah Physicians for a Healthy Env’t v. Diesel Power Gear LLC*, 374 F. Supp. 3d 1124, 1130 (D. Utah 2019).

<sup>9</sup> *Id.* at 1140–41.

<sup>10</sup> On March 6, 2020, after a bench trial, the court concluded that defendants Hoskins, Sparks, Stuart, B&W Auto LLC, and Diesel Power Gear LLC were liable for violating 42 U.S.C. §§ 7413(b)(1) & 7522(a)(3). The defendants were ordered to pay civil penalties ranging from \$86,107 to \$333,700 plus attorney fees and were permanently enjoined. *Utah Physicians for a Healthy Env’t v. Diesel Power Gear LLC*, No. 2:17-cv-00032-RJS-DBP, 2020 WL 4282148, at \*27–28 (D. Utah Mar. 6, 2020). The defendants filed a Notice of Appeal to the Tenth Circuit on April 7, 2020. Notice of Appeal, *Utah Physicians for a Healthy Env’t v. DIESELSellerz.com et al.*, No. 2:17-CV-00032 (Docket No 172). Full docket available on Westlaw, *Utah Physicians for a Healthy Env’t v. DIESELSellerz.com et al.*, 2:17CV00032.

<sup>11</sup> Clean Air Act, 42 U.S.C. § 7401(b)(1) (2018).

This Note will analyze how citizen groups and states may be able to bring these enforcement cases against polluters under the Clean Air Act's citizen suit provision. It begins with a background overview of the regulatory framework for motor vehicle emission controls and explains the harm to human health and the environment in the absence of emission controls. Next, this Note will explain how citizen groups and states may be well suited to bringing enforcement actions for tampering and defeat device violations. Finally, this Note predicts the obstacles that citizen groups and states will face in bringing those actions—namely, demonstrating standing, establishing liability, and avoiding diligent prosecution bars against duplication—and provides suggestions to overcome them.

## II. BACKGROUND

### *A. Regulation of Mobile Sources Under the Clean Air Act*

Mobile sources contribute a significant amount of pollutants to ambient air pollution in the United States. The transportation sector contributed twenty-nine percent of U.S. greenhouse gas emissions in 2017, accounting for the largest portion of total emissions by sector.<sup>12</sup> The transportation sector is also responsible for over half of nitrogen oxides (“NO<sub>x</sub>”) total emissions inventory.<sup>13</sup> Additionally, the transportation sector contributes almost ten percent of volatile organic compounds (“VOCs”) emissions, ten percent of particulate matter (“PM”) emissions, and contributes to the emissions of air toxics like benzene and formaldehyde.<sup>14</sup>

Given the polluting potential of transportation, Title II of the CAA addresses “Emission Standards for Moving Sources.”<sup>15</sup> This legislation notoriously preempts state regulation of emission standards for new automobiles, and courts have maintained that “regulation of motor vehicle emissions had been a principally federal project” given the difficulty of subjecting motor vehicles to a patchwork of fifty different regulatory

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<sup>12</sup> *Fast Facts on Transportation Greenhouse Gas Emissions*, EPA, <https://www.epa.gov/greenvehicles/fast-facts-transportation-greenhouse-gas-emissions> (last updated July 29, 2020).

<sup>13</sup> *Smog, Soot, and Other Air Pollution from Transportation*, EPA, <https://www.epa.gov/transportation-air-pollution-and-climate-change/smog-soot-and-local-air-pollution> (last updated Nov. 20, 2020).

<sup>14</sup> *Id.*

<sup>15</sup> 42 U.S.C. §§ 7521–7590.

regimes.<sup>16</sup> Outside of setting emission standards, however, the Act “preserv[es] the right of states ‘otherwise to control, regulate, or restrict the use, operation, or movement of registered or licensed motor vehicles.’”<sup>17</sup>

The Administrator of the EPA prescribes emission standards for new automobiles.<sup>18</sup> In order to be sold or introduced into commerce in the United States, motor vehicles must be covered by a certificate of conformity that establishes compliance with that model year’s pertinent emission standards, ensuring that the vehicle contains adequate and functional emission control systems.<sup>19</sup> The Act prohibits any person to “remove or render inoperative” any emission control device before or after its sale.<sup>20</sup> To ensure aftermarket compliance, or continued emissions control after vehicles are sold, the Act also prohibits any person from manufacturing, selling, or installing “any part or component intended for use with . . . any motor vehicle . . . where a principal effect of the part or component is to bypass, defeat, or render inoperative” emission control devices.<sup>21</sup> In other words, the Act forbids anyone from disrupting the functionality of the emission control system of a vehicle before or after the vehicle is sold.

### *1. Emissions Cheating by Vehicle Manufacturers*

In spite of these provisions, vehicle manufacturers continue to perpetuate emissions cheating by installing defeat devices that enable a vehicle to circumvent an emissions test and obtain a certificate of conformity, although the vehicle does not actually comply with standards in real driving conditions.<sup>22</sup> U.S. regulations define defeat devices as any device that “reduces the effectiveness of the emission control system under conditions which may reasonably be expected to be encountered in normal vehicle operation.”<sup>23</sup> Defeat devices can look different in different cases, but consider the high-profile Volkswagen emissions scandal that made

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<sup>16</sup> *Engine Mfrs. Ass’n v. U.S. EPA*, 88 F.3d 1075, 1079 (D.C. Cir. 1996).

<sup>17</sup> *Id.* at 1093 (quoting 42 U.S.C. § 7543(d)).

<sup>18</sup> 42 U.S.C. § 7521(a)(1).

<sup>19</sup> *Id.* § 7522(a)(1).

<sup>20</sup> *Id.* § 7522(a)(3)(A).

<sup>21</sup> *Id.* § 7522(a)(3)(B).

<sup>22</sup> See RACHEL MUNCRIEF ET AL., INT’L COUNCIL ON CLEAN TRANSP., *DEFEAT DEVICES UNDER THE U.S. AND EU PASSENGER VEHICLE EMISSIONS TESTING REGULATIONS* (2016), [https://theicct.org/sites/default/files/publications/ICCT\\_defeat-devices-reg-briefing\\_20160322.pdf](https://theicct.org/sites/default/files/publications/ICCT_defeat-devices-reg-briefing_20160322.pdf).

<sup>23</sup> 40 C.F.R. § 86.1803-01 (2019).

headlines in 2015, later nicknamed “Dieselgate.”<sup>24</sup> In that case, Volkswagen installed software that “sensed when the car was being tested and then activated equipment that reduced emissions.”<sup>25</sup> But, during regular operation of the vehicle, “the software turned the equipment down . . . increasing emissions far above legal limits, most likely to save fuel or to improve the car’s torque and acceleration.”<sup>26</sup> Ironically, the cars containing these defeat devices were branded as “clean diesel cars,” and were marketed to “environmentally conscious consumers, with advertising emphasizing the power and mileage typical for diesel engines in combination with unprecedented low emissions levels.”<sup>27</sup> Yet on actual road conditions, one clean diesel car “could pollute as much nitrogen oxide . . . as 150 equivalent gasoline cars.”<sup>28</sup>

The Volkswagen scandal, while the most well-known, is not the only incidence of emissions cheating by vehicle manufacturers. In early 2019, the federal government and the state of California reached a settlement agreement with Fiat Chrysler for cheating emissions tests and “failing to disclose unlawful defeat devices.”<sup>29</sup> The agreement requires Fiat Chrysler to “implement a recall program to repair more than 100,000 noncompliant diesel vehicles sold or leased in the United States, offer an extended warranty on repaired vehicles, and pay a civil penalty of \$305 million.”<sup>30</sup> In September 2020 the EPA announced a “proposed settlement with German automaker Daimler AG and its American subsidiary Mercedes-Benz USA, LLC” for emissions cheating.<sup>31</sup> The proposed settlement would require Daimler to “recall and repair the emissions systems in

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<sup>24</sup> Guilbert Gates et al., *How Volkswagen’s ‘Defeat Devices’ Worked*, N.Y. TIMES, <https://www.nytimes.com/interactive/2015/business/international/vw-diesel-emissions-scandal-explained.html> (last updated Mar. 16, 2017); Jeff S. Bartlett et al., *Guide to the Volkswagen Emissions Recall*, CONSUMER REPORTS, <https://www.consumerreports.org/cro/cars/guide-to-the-volkswagen-dieselgate-emissions-recall/> (last updated Oct. 23, 2017).

<sup>25</sup> Gates et al., *supra* note 24.

<sup>26</sup> *Id.*

<sup>27</sup> Diane Alexander & Hannes Schwandt, *The Impact of Car Pollution on Infant and Child Health: Evidence from Emissions Cheating 2* (IZA Inst. of Labor Econ., Discussion Paper No. 12427, 2019).

<sup>28</sup> *Id.*

<sup>29</sup> *Fiat Chrysler Automobiles Clean Air Act Civil Settlement Information Sheet*, EPA (Jan. 10, 2019), <https://www.epa.gov/enforcement/fiat-chrysler-automobiles-clean-air-act-civil-settlement-information-sheet>.

<sup>30</sup> *Id.*

<sup>31</sup> *U.S. Reaches \$1.5 Billion Settlement with Daimler AG Over Emissions Cheating in Mercedes-Benz Diesel Vehicles*, EPA (Sept. 14, 2020), <https://www.epa.gov/news-releases/us-reaches-15-billion-settlement-daimler-ag-over-emissions-cheating-mercedes-benz>.

Mercedes-Benz diesel vehicles sold in the United States between 2009 and 2016 and pay \$875,000,000 in civil penalties and roughly \$70,300,000 in other penalties.”<sup>32</sup>

## 2. Emissions Cheating by Aftermarket Tampering or Defeat Device

Some incidents of emission control non-compliance involve tampering with emissions controls or installing a defeat device *after* the vehicle is sold by the manufacturer—i.e., “aftermarket” or “downstream” violations. For example, the EPA settled a downstream case with Abbyland Trucking, Inc. in 2017.<sup>33</sup> Abbyland operates a service truck repair center and admitted to selling and installing defeat devices manufactured by Performance Diesel Inc., which defeated the emission control devices of over 200 heavy-diesel trucks.<sup>34</sup> The parties agreed to settle the action with a civil penalty of \$75,000 after Abbyland submitted a request for a mitigated penalty based on a claimed inability to pay.<sup>35</sup> However, the EPA was entitled to administratively assess a penalty of up to \$362,141 under the terms of the Clean Air Act.<sup>36</sup>

Another method of downstream non-compliance with emission control provisions is to tamper with these systems after they have obtained a certificate of conformity by simply removing or rendering inoperative an emission control component on a certified motor vehicle. These cases are the most straightforward and the least sophisticated—violators here remove the emission control devices from their vehicles, or otherwise modify them so that they do not work. For example, the EPA settled a case with Freerksen Trucking, Inc. in 2017, after receiving a complaint that Freerksen had “performed emission control removal and modification to its trucking fleet.”<sup>37</sup> To resolve the case, Freerksen “reported to EPA that emission controls [had] been reinstalled on 21 affected trucks” and Freerksen agreed to pay a civil penalty of \$50,000.<sup>38</sup>

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<sup>32</sup> *Id.*

<sup>33</sup> Consent Decree and Final Order, *In the Matter of Abbyland Trucking, Inc.*, No. CAA-05-2018-0003, available at <https://www.epa.gov/sites/production/files/2018-01/documents/abbylandtruckinginc18.pdf> [hereinafter *In the Matter of Abbyland Trucking*].

<sup>34</sup> *Id.* at 6.

<sup>35</sup> *Id.* at 6–7; 42 U.S.C. § 7524(c)(1); 40 C.F.R. §§ 19.4, 1068.125(b) (2019).

<sup>36</sup> *In the Matter of Abbyland Trucking*, *supra* note 33.

<sup>37</sup> Consent Decree and Final Order, *In the Matter of Freerksen Trucking, Inc.*, No. CAA-05-2018-0001, available at <https://www.epa.gov/sites/production/files/2018-01/documents/freerksentruckinginc18.pdf>.

<sup>38</sup> *Id.* at 4–5.

In addition to these cases, the EPA states that in the last five years, it has resolved more than seventy cases involving over one million aftermarket defeat devices.<sup>39</sup> In recognition of this prolific non-compliance, the EPA announced in June 2019 that it would be selecting “Stopping Aftermarket Defeat Devices for Vehicles and Engines” as one of six National Compliance Initiatives for the FY 2020-2023 cycle.<sup>40</sup>

This tampering happens commercially, as described above, but it also happens at the hands of individuals who damage the emissions control devices in their personal vehicles. The motivations for tampering ranges from wanting to increase an engine’s horsepower and torque, to making a statement of rebellion against the environmentally-conscious.<sup>41</sup> Coining the phrase “rolling coal,” some diesel truck drivers tamper with their vehicles in order to “belch black smoke, at pedestrians, cyclists, and unsuspecting Prius drivers.”<sup>42</sup> It is relatively easy for truck owners to override their emissions controls, given the availability of “tuning kits” on websites like Amazon, paired with the guidance of reality shows like the “Diesel Brothers.”<sup>43</sup> The unsuspecting targets of coal rollers describe the experience as “an assault,” and some states have responded by passing laws that explicitly ban coal rolling by assigning additional fines, “going beyond the federal laws that already prohibit drivers from tinkering with emissions controls.”<sup>44</sup>

## *B. The Importance of Emissions Control Compliance*

### *1. Public Health*

Scientific and economic studies are beginning to demonstrate the harmful effects of vehicle emissions cheating. In the aftermath of Volkswagen’s “Dieselgate,” a group of researchers supported by the Stanford Institute for Economic Policy Research seized the opportunity

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<sup>39</sup> *Enforcement Alert*, EPA (Dec. 2020), <https://www.epa.gov/sites/production/files/2020-12/documents/tamperinganddefeatdevices-enfalert.pdf>; FRANK ACEVEDO & CODY YARBROUGH, U.S. ENVTL. PROT. AGENCY: MIDWEST CLEAN DIESEL INITIATIVE STEERING COMM. MEETING, TAMPERING & AFTERMARKET DEFEAT DEVICES 14 (Apr. 25, 2019), <https://www.epa.gov/sites/production/files/2019-05/documents/tampering-aftermarket-defeat-devices-2019-mcdi-mtg-33pp.pdf>.

<sup>40</sup> *National Compliance Initiatives*, EPA, <https://www.epa.gov/enforcement/national-compliance-initiatives> (last updated Jan. 5, 2021).

<sup>41</sup> Hiroko Tabuchi, *‘Rolling Coal,’ as a Protest or a Prank, Brings Smokey in Pursuit*, N.Y. TIMES, Sept. 5, 2016, at A1.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*; see, e.g., N.J. REV. STAT. § 26:2C-8.57 (2015).

presented by the cheating cars to seek out empirical evidence on the health impacts of car pollution.<sup>45</sup> The study called the dispersion of almost 600,000 cheating diesel cars between 2008 and 2015 a “natural experiment” that overcomes the empirical challenges that typically accompany a study of car pollution, such as socioeconomic selection and avoidance behavior.<sup>46</sup> The study utilized car registrations “to track how cheating diesel cars spread across the country” and “link[ed] this data to detailed information on each birth conceived between 2007 and 2015.”<sup>47</sup> The results were striking:

We find that counties with increasing shares of cheating diesel cars experienced large increases both in air pollution and in the share of infants born with poor birth outcomes . . . [F]or each additional cheating diesel car per 1,000 cars there is a 2.0 percent increase in air quality indices for fine particulate matter (PM<sub>2.5</sub>) and a 1.9 percent increase in the rate of low birth weight. We find similar effects on larger particulates (PM<sub>10</sub>; 2.2 percent) and ozone (1.3 percent), as well as reductions in average birth weight (-6.2 grams) and gestation length (-0.016 weeks).<sup>48</sup>

The study also included data suggesting that an increase in the number of cheating diesel cars was correlated with an increase in asthma emergency department visits in young children.<sup>49</sup> While it is commonly true that the burdens of pollution are disproportionately placed on disadvantaged communities, this study found that the health impacts of cheating diesel cars were not limited to disadvantaged groups, which may “demonstrate[] that good baseline health and health care access do not fully buffer the impacts of car pollution and emphasize[] the role of exposure.”<sup>50</sup> Under this theory, increased exposure to vehicle emissions means increased risk of health problems, regardless of baseline health and socioeconomic privilege. This means reductions of vehicle pollution can have powerful implications on human health society wide.<sup>51</sup>

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<sup>45</sup> Alexander & Schwandt, *supra* note 27.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 2–3.

<sup>48</sup> *Id.* at 3.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 5.

<sup>51</sup> *Id.*

Further, studies are beginning to link additional chronic diseases with exposure to air pollutants from vehicle exhaust.<sup>52</sup> In a study funded by the National Institute of Environmental Health Sciences and the National Heart, Lung, and Blood Institute, researchers found a relationship between long term exposure to ozone, nitrogen oxides, and particulate matter found in air pollution to increases in emphysema, a disease typically associated with smoking, characterized by destroyed lung tissue that hampers the body's ability to effectively transfer oxygen.<sup>53</sup> The Director of the National Heart, Lung, and Blood Institute emphasized the importance of finding effective strategies to control air pollution in order to support improved heart and lung health.<sup>54</sup>

Given the demonstrable adverse health effects of increased exposure to air pollutants like ozone, nitrogen oxides, and particulate matter, the role of effective emission control technologies should not be underestimated. Increased enforcement of emission control compliance is a critical step in the direction of cleaner air and healthier people.

## 2. *Ambient Air Quality and Achieving NAAQS*

The National Ambient Air Quality Standards ("NAAQS") are the "cornerstone" of the Clean Air Act.<sup>55</sup> Part of the original 1970 Act, the NAAQS are determined by the EPA Administrator and essentially define what constitutes "clean air."<sup>56</sup> NAAQS are set for each of six criteria pollutants, and then the EPA determines whether the air quality in different areas of the country meets the standard for clean air for each criteria pollutant.<sup>57</sup> Areas that meet the pollutant standards are classified as in "attainment" for the pollutant, and areas that do not meet the standard are in "nonattainment" for the pollutant.<sup>58</sup> The Act places responsibility on the states to achieve and maintain air quality that is in "attainment" by developing and submitting a state implementation plan ("SIP") to the EPA for approval.<sup>59</sup>

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<sup>52</sup> See *Study Finds Link Between Long-term Exposure to Air Pollution and Emphysema*, NAT'L INST. OF ENVTL. HEALTH SCI. (Aug. 13, 2019, 11:00 AM), <https://www.niehs.nih.gov/news/newsroom/releases/2019/august13/index.cfm>.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> DAVID R. WOOLEY & ELIZABETH M. MORSS, CLEAN AIR ACT HANDBOOK § 1:2 (2020).

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

A quick glance at the EPA's Green Book will demonstrate how many areas are in nonattainment for criteria pollutants, especially for 8-Hour Ozone.<sup>60</sup> Take, for example, the North Front Range ozone nonattainment area in Colorado. The area was previously classified as in "moderate nonattainment" under the 2008 NAAQS, but more than a decade later, the area continued to record ozone levels that should have classified the area as in "serious nonattainment."<sup>61</sup> A change in Colorado's gubernatorial leadership, combined with a lawsuit from environmental groups, prompted the EPA to finally reclassify the region as serious nonattainment in December of 2019.<sup>62</sup> The reclassification means that the state of Colorado will have to revise its SIP and require new categories of controls on emissions sources. It will also require "the state's permitting program to apply a lower threshold for permitting large sources."<sup>63</sup>

Motor vehicles emissions have immediate implications for the levels of criteria pollutants present in ambient air, especially for ground level ozone. Continuing to use Colorado as an example, a 2017 study by the National Center for Atmospheric Research ("NCAR") identified that "mobile sources ... are [among] the largest contributors to local ozone production" in the North Front Range, and that mobile sources contribute roughly thirty to forty percent of total North Front Range ozone production on high ozone days.<sup>64</sup> The study concluded that "measures resulting in lowering the emissions from ... mobile sources could result in substantial reductions of [North Front Range] ozone."<sup>65</sup> While the NCAR study was area specific, this conclusion can likely be extrapolated to other areas that are also in serious or severe nonattainment, such as California's San Joaquin Valley and Ventura County.<sup>66</sup> Mobile source emission control technologies play an important role in reducing criteria pollutants in the ambient air, so ensuring their effective use will enable compliance with

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<sup>60</sup> *Current Nonattainment Counties for All Criteria Pollutants*, EPA (Jan. 31, 2021), <https://www3.epa.gov/airquality/greenbook/ancl.html> [hereinafter *Nonattainment Counties*].

<sup>61</sup> *EPA reclassifies Denver area to "Serious" nonattainment for ozone*, EPA (Dec. 16, 2019), <https://www.epa.gov/newsreleases/epa-reclassifies-denver-area-serious-non-attainment-ozone>; Chase Woodruff, *EPA Downgrades Denver Air Quality After Delays that Irked Activists*, WESTWORD (Dec. 16, 2019), <https://www.westword.com/news/epa-downgrades-denver-air-quality-after-delays-that-irked-activists-11577887>.

<sup>62</sup> Woodruff, *supra* note 61.

<sup>63</sup> *EPA reclassifies Denver area to "Serious" nonattainment for ozone*, *supra* note 61.

<sup>64</sup> NAT'L CTR. FOR ATMOSPHERIC RSCH., *PROCESS-BASED AND REGIONAL SOURCE IMPACT ANALYSIS FOR FRAPPÉ AND DISCOVER-AQ 2014*, at 1–2 (July 31, 2014).

<sup>65</sup> *Id.* at 42.

<sup>66</sup> *Nonattainment Counties*, *supra* note 60.

EPA emissions standards. This, in turn, enables significant progress towards NAAQS attainment.<sup>67</sup>

While attaining NAAQS ultimately promotes the previously discussed goal of protecting public health and welfare, attaining NAAQS will be accompanied by other environmental benefits. For example, ozone sensitivity occurs across species and ozone exposure is associated with a variety of vegetation and ecosystem effects.<sup>68</sup> Increased ozone exposure can reduce crop yields and can exacerbate species' vulnerability to disease, harsh weather, and insect infestation.<sup>69</sup> This can lead to shifts in species composition and "changes in ecosystems and associated ecosystem services."<sup>70</sup> Accordingly, while attaining NAAQS is critical for public health, attainment also has important implications for protecting ecosystems.

### III. UTILIZING THE CITIZEN SUIT PROVISION TO ENFORCE SECTION 203 VIOLATIONS AND STATE IMPLEMENTATION PLANS

#### *A. The Citizen Suit Provision of the Clean Air Act*

The citizen suit provision of the Clean Air Act, Section 304, provides that "any person may commence a civil action on his own behalf ... against any person ... who is alleged to have violated (A) an emission standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation."<sup>71</sup> The definition of "person" for the purpose of this Section is clear and broad and includes "an individual, corporation, partnership, association, State, municipality, political subdivision of a State, and any agency ... of the United States."<sup>72</sup> Under this definition, citizen groups will qualify as associations and will be able to bring actions provided they have met standing requirements,

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<sup>67</sup> *History of Reducing Air Pollution from Transportation in the United States*, EPA, <https://www.epa.gov/transportation-air-pollution-and-climate-change/accomplishments-and-success-air-pollution-transportation> (last updated Nov. 4, 2020).

<sup>68</sup> EPA, REGULATORY IMPACT ANALYSIS: FINAL NATIONAL AMBIENT AIR QUALITY STANDARD FOR OZONE 11 (2011), *available at* <https://www.nrc.gov/docs/ML1224/ML12240A237.pdf>.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> 42 U.S.C. § 7604(a)(1).

<sup>72</sup> *Id.* § 7602(e).

discussed *infra*.<sup>73</sup> Further, by defining “person” to include a “State” Congress has “authorized states to use the federal citizen suit authorities” in addition to other methods of enforcement that states have at their disposal, such as joining the EPA in enforcing SIPs and other state programs.<sup>74</sup>

Plaintiffs have utilized the CAA’s citizen suit provisions for a wide variety of purposes, from enforcing a federally enforceable statute, regulation, or permit to requiring compliance with federally-approved SIPs.<sup>75</sup> A plaintiff may seek an injunction or ask the court to impose civil penalties using the same penalty assessment factors that the EPA would use.<sup>76</sup> Penalties must be deposited in the United States Treasury and citizens cannot recover monetary damages, but a portion of the penalty may be used for “beneficial mitigation projects” and courts may award costs of litigation to any party at the court’s discretion.<sup>77</sup>

There are many reasons to encourage citizen groups and states to enforce the Clean Air Act’s tampering and defeat device prohibitions, or to enforce related provisions which have been incorporated into a SIP.<sup>78</sup> Citizen groups and states may be more able and willing to identify and prosecute small-scale violations as they occur, compared to the giant Volkswagen-type scandals that capture national attention. Citizen groups and states may have a special motivation to address the violations that happen in their own backyard and which harm their members, citizens, or constituents most directly. Additionally, the reality of federal agencies like the EPA is that, barring a grant of additional appropriations, the extent of agency enforcement will be limited as resources are limited. Allowing citizens and states to assume their “private attorneys general” roles by utilizing the citizen suit provision to address mobile source emission controls enables increased enforcement of these important provisions.

However, because there is little precedent for bringing citizen suits against mobile sources, moving beyond the early stages of litigation may

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<sup>73</sup> *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 181 (2000).

<sup>74</sup> Jeffrey G. Miller, *Theme and Variations in Statutory Preclusions against Successive Environmental Enforcement Actions by EPA and Citizens - Part One: Statutory Bars in Citizen Suit Provisions*, 28 HARV. ENVTL. L. REV. 401, 401–02 n.3 (2004).

<sup>75</sup> WOOLEY & MORSS, *supra* note 55, at § 11:47.

<sup>76</sup> *Id.* at § 11:45.

<sup>77</sup> *Id.*

<sup>78</sup> Many states have passed laws which prohibit tampering with a vehicle’s emission control equipment. *See In re Volkswagen “Clean Diesel” Mktg., Sales Practices, & Prod. Liab. Litig.*, 959 F.3d 1201, 1219–20 n.19 (9th Cir. 2020). When such a law is incorporated into a SIP, that provision is federally enforceable, and a citizen group can bring an action to enforce it. *See, e.g., Utah Physicians for a Healthy Env’t v. Diesel Power Gear LLC*, 374 F. Supp. 3d 1124, 1142 n.92 (D. Utah 2019).

be a challenge. Plaintiffs wishing to utilize the citizen suit provision to force compliance must surmount several obstacles in order to succeed on their claims.

### *B. Obstacles for Cases Brought Under the Citizen Suit Provision*

Specific application of the Clean Air Act's citizen suit provision in the courts has shed light on the legal issues that plaintiffs may come to bear in pursuing these claims. Two noteworthy cases (*Utah Physicians for a Healthy Environment* and *In Re: Volkswagen*) have addressed these issues to varying degrees, leaving open questions that future plaintiffs will have to grapple with.<sup>79</sup> What, precisely, will plaintiffs have to show to demonstrate standing in cases brought to enforce Section 203? Do the tampering and defeat device prohibitions qualify as an "emission standard or limitation or order" under the Act? Might diligent prosecution bar citizen suits, and if so, can citizen groups and states still intervene in ongoing governmental enforcement actions? And if cases do make it past these threshold issues, then who can be liable for violations under Section 203 beyond the manufacturers? Corporate officers? Dealerships or resellers? Does liability extend so far as to touch an individual operator of a vehicle?

#### *1. Article III Standing*

The first threshold issue that plaintiffs bringing cases under the citizen suit provision must consider is what they need to establish to demonstrate standing. "To satisfy Article III of the Constitution, a plaintiff must have standing to bring a claim in federal court."<sup>80</sup> The "irreducible constitutional minimum of standing" requires demonstrating three elements: "a plaintiff must show (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision."<sup>81</sup>

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<sup>79</sup> *Utah Physicians for a Healthy Env't.*, 374 F. Supp. 3d 1124; see *In re Volkswagen*, 894 F.3d 1030 (9th Cir. 2018).

<sup>80</sup> *Utah Physicians for a Healthy Env't.*, 374 F. Supp. 3d at 1131.

<sup>81</sup> *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs.*, 528 U.S. 167, 180–81 (2000) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)).

*a. Injury-in-Fact*

The plaintiffs in *Utah Physicians for a Healthy Environment* (“UPHE”) established injury-in-fact by providing affidavits from several members demonstrating injuries related to air pollution.<sup>82</sup> In reaching that determination, the court reiterated that the injury must not be to the environment, but to the plaintiff.<sup>83</sup> Specifically, when a plaintiff’s concern is about pollution, the plaintiff “suffers injury in fact when their concerns directly affect their recreational, aesthetic, or economic interests.”<sup>84</sup> The court held that UPHE’s affidavits showed that their members’ pollution concerns did affect their interests – each member testified to experiencing adverse health effects from elevated air pollution in the Wasatch Front region, and some members testified that concerns about breathing particulate matter kept them indoors, away from their recreational activities.<sup>85</sup>

However, demonstrating injury-in-fact can be a more formidable obstacle where harms to health or recreational interests caused by air pollution seem more attenuated rather than particularized. In *Amigos Bravos v. BLM*, the plaintiffs were six citizen groups challenging the BLM’s decisions to approve oil and gas lease sales in New Mexico, alleging the BLM’s failure to consider climate change and greenhouse gases was contrary to law.<sup>86</sup> The plaintiffs alleged that BLM’s actions would cause air pollution which contributes to climate change, and that “climate change will have a negative impact on the New Mexico climate and therefore impinge upon their members’ ability to live, recreate, and earn a living.”<sup>87</sup> In its analysis, the court called this alleged injury “pure conjecture” and rejected the argument that it was sufficient to demonstrate “reasonable concerns” and “reasonable probability” of harm.<sup>88</sup> The court went on to state that there was no consensus “with regard to what the specific effects of climate change will be on individual geographic areas,” concluding that there was no “factual showing of perceptible harm.”<sup>89</sup> The action was dismissed for failing to demonstrate injury-in-fact and causation.<sup>90</sup>

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<sup>82</sup> *Utah Physicians for a Healthy Env't*, 374 F. Supp. 3d at 1132–33.

<sup>83</sup> *Id.* at 1132 (citing *Laidlaw*, 528 U.S. at 181).

<sup>84</sup> *Id.* (citing *Laidlaw*, 528 U.S. at 183–84).

<sup>85</sup> *Id.* at 1132–33.

<sup>86</sup> *Amigos Bravos v. U.S. Bureau of Land Mgmt.*, 816 F. Supp. 2d 1118, 1122 (D.N.M. 2011).

<sup>87</sup> *Id.* at 1127.

<sup>88</sup> *Id.* at 1128–29.

<sup>89</sup> *Id.* at 1129–30.

<sup>90</sup> *Id.* at 1122, 1134, 1136.

Thus, the court's finding of injury in *UPHE*, contrasted against findings of no injury in other air pollution cases, suggests that plaintiffs should emphasize the link between any increased exposure to pollutants in their very immediate location with very specific injuries to their health or recreational interest. For example, it was not enough for the plaintiffs in *Amigos Bravos* to "generally allege that they recreate on BLM lands in New Mexico," but rather plaintiffs needed to "specifically identify" that they used the exact lands "where BLM approved the oil and gas leases."<sup>91</sup> An idiosyncratic specificity seemed to make the difference for *UPHE*: the defendants contributed diesel exhaust to the Wasatch Front, and the plaintiff's members suffered harms from increased diesel exhaust in the Wasatch Front.<sup>92</sup>

*b. Traceability*

Traceability, interchangeably called causation, is also a difficult hurdle to clear in environmental cases, given the latent or attenuated harms that are frequently associated with air pollution. This is especially true in light of holdings such as the Ninth Circuit's decision in *Washington Environmental Council v. Bellon*, which held that citizen groups lacked standing to compel their state administration to regulate greenhouse gases emitted from oil refineries for lack of causal nexus.<sup>93</sup> In the decision to deny rehearing *en banc*, dissenting Circuit Judge Gould summarized the gravity of the holding, writing that "the panel has essentially read private citizens out of the equation when it comes to using courts to address global warming."<sup>94</sup>

In spite of the uncertainty for private citizens bringing global climate change cases, courts may be more willing to accept private citizens bringing localized air pollution cases. However, specifying a standard for a required degree of traceability between a defendant's polluting actions and a plaintiff's alleged harms remains a challenge. Different circuits have adopted variations of a standard for traceability in the pollution context, but many of these standards come from Clean Water Act cases and their applicability to Clean Air Act cases greatly hinges on the facts of the case.

Many of the pollution causation standards applied by the U.S. Courts of Appeals derive from a standard discussed in a 1990 Clean Water Act case, *Public Interest Research Group of New Jersey, Inc. v. Powell*

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<sup>91</sup> *Id.* at 1132.

<sup>92</sup> *See* *Utah Physicians for a Healthy Env't v. Diesel Power Gear LLC*, 374 F. Supp. 3d 1124, 1132–33 (D. Utah 2019).

<sup>93</sup> *Wash. Envtl. Council v. Bellon*, 732 F.3d 1131, 1141 (9th Cir. 2013).

<sup>94</sup> *Wash. Envtl. Council v. Bellon*, 741 F.3d 1075, 1079 (9th Cir. 2013), *reh'g denied en banc* (Gould, C.J., dissenting).

*Duffryn Terminals Inc.*<sup>95</sup> There, a citizens group brought an action against a bulk storage facility for “consistently and uninterruptedly dump[ing] pollutants into [a tidal strait] in concentrations greater than that allowed by its permit.”<sup>96</sup> The trial court granted an injunction and awarded over three million dollars in civil penalties, and on appeal, the Third Circuit considered the issue of standing.<sup>97</sup> In its analysis on traceability, the court articulated that “plaintiffs need only show that there is a ‘substantial likelihood’ that defendant’s conduct caused plaintiffs’ harm,” and described a three-part test for establishing this likelihood in a Clean Water Act Case: the plaintiff has to show that the defendant “1) discharged some pollutant in concentrations greater than allowed by its permit 2) into a waterway in which the plaintiffs have an interest that is or may be adversely affected by the pollutant and that 3) this pollutant causes or contributes to the kinds of injuries alleged by the plaintiffs.”<sup>98</sup> The court held that the citizens group satisfied the three-part test, as well as the other requirements for Article III standing.<sup>99</sup> Several years later, the Third Circuit revisited the issue of standing in *Public Interest Research Group of New Jersey, Inc. v. Magnesium Elektron, Inc.* to clarify the application of this three-part causation test:

This test in no way replaces the three-prong test for standing under Article III of the Constitution. It merely enables a plaintiff to link an environmental injury to the defendant’s pollution when the plaintiff is unable to prove ‘to a scientific certainty’ that the defendant’s discharges (and not those of some other nearby polluter) caused that injury. Our decision in *Powell Duffryn* does not and could not stand for the principle that generic claims of harm, without more, satisfy the injury requirement for standing.<sup>100</sup>

Other Circuits have borrowed from the language of both *Powell Duffryn* and *Magnesium Elektron* in determining standards of causation in pollution cases. For example, the Fifth Circuit directly applies *Powell Duffryn*’s three-part test for determining if an injury is fairly traceable to a defendant’s discharge, and emphasizes that “the fairly traceable element does not require that the plaintiffs show to a scientific certainty that the

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<sup>95</sup> See *Pub. Int. Rsch. Grp. of N.J., Inc. v. Powell Duffryn Terminals Inc.*, 913 F.2d 64, 72 (3d Cir. 1990).

<sup>96</sup> *Id.* at 69.

<sup>97</sup> *Id.* at 68.

<sup>98</sup> *Id.* at 72.

<sup>99</sup> *Id.* at 73.

<sup>100</sup> *Pub. Int. Rsch. Grp. of N.J., Inc. v. Magnesium Elektron, Inc.*, 123 F.3d 111, 121–22 (3d Cir. 1997) (citations omitted).

defendant's effluent, and the defendant's effluent alone, caused the precise harm suffered by the plaintiffs," but merely that the pollution contributes to the injury.<sup>101</sup> The Fourth Circuit agrees, specifying that traceability "does not mean that plaintiffs must show to a scientific certainty that defendant's effluent caused the precise harm suffered by the plaintiffs," and that "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 in the specific geographic area of concern."<sup>102</sup> Again, each of these cases concerns pollution in the context of the Clean Water Act, but courts may choose to apply these water pollution standards in the context of localized air pollution, as seen in *UPHE*.

The court in *UPHE* acknowledged that "the Tenth Circuit has not adopted a standard for evaluating causation when many sources contribute to injury-causing air pollution."<sup>103</sup> The court reasoned by analogy: was the Diesel Brother's contribution of pollution to the Wasatch Front more conceptually similar to a defendant that pollutes a lake, or a defendant that makes a meaningful contribution to the earth's greenhouse gases and thus precipitates global climate change?<sup>104</sup> The court decided that the Diesel Brother's direct pollution of the Wasatch Front was more similar to polluting a lake, a confined and discrete area, rather than the global atmosphere.<sup>105</sup> Accordingly, the court adopted a standard that comes from a Clean Water Act citizen suit provision case: "to meet its burden on causation, [a plaintiff] must show [that defendants] discharged a pollutant that causes or contributes to the kinds of injuries suffered by [the plaintiff]" in the plaintiff's specific locality.<sup>106</sup> In choosing this standard, the court reasoned that 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."<sup>107</sup>

The court's discussion of traceability in *UPHE* alludes to the general trend in the judicial system's approach to climate change which plaintiffs must take note of—courts are unwilling to accept climate change's

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<sup>101</sup> *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co.*, 73 F.3d 546, 558 (5th Cir. 1996) (internal quotation omitted).

<sup>102</sup> *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 161 (4th Cir. 2000) (internal quotation omitted).

<sup>103</sup> *Utah Physicians for a Healthy Env't v. Diesel Power Gear LLC*, 374 F. Supp. 3d 1124, 1133 (D. Utah 2019).

<sup>104</sup> *Id.* at 1133–34.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 1135.

<sup>107</sup> *Id.*

attenuated causation chain. In fact, the court in *UPHE* frankly states that “plaintiffs have struggled” to establish traceability when they attempt to create a causation chain from a defendant’s greenhouse gas emissions, out to global climate change, and back to a concrete, particularized, and imminent injury.<sup>108</sup> Given this, plaintiffs bringing cases under the citizen suit provision arguing violations of Section 203 may be wise to exclude global climate change arguments and keep all allegations local in scope. Plaintiffs must show that a local defendant’s actions caused a local increase in exposure to pollutants, causing a local injury. The local approach to traceability is more amenable to meeting traditional causation standards over the global approach to traceability.

*c. Redressability*

Finally, plaintiffs must demonstrate redressability. A plaintiff must show that it is “likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.”<sup>109</sup> A plaintiff must “have standing to pursue each form of relief it seeks,” and so, for citizen suits where multiple forms of relief may be sought, a plaintiff must demonstrate redressability for each form of relief.<sup>110</sup> The plaintiffs in *UPHE* met this burden for their civil penalty and mitigation project demands, as both would have a deterrent effect on future violations.<sup>111</sup> The plaintiffs in *UPHE* also demonstrated that declaratory and injunctive relief would “provide redress by curbing ongoing violations and halting Defendants’ continued contribution to Plaintiff’s members’ pollution-related injuries.”<sup>112</sup> However, the plaintiffs also requested mandatory injunctive relief calling for the Diesel Brothers to “recall and either repair or destroy all of the illegal parts and vehicles they have conveyed to third-parties that continue to pollute.”<sup>113</sup> The court found that this relief did not redress the plaintiff’s injuries, because it was overly broad and was “not tied to the geographic area in which *UPHE*’s members’ suffer cognizable injury,” again emphasizing local over regional or global impacts.<sup>114</sup> This introduces another factor for future plaintiffs to consider: if plaintiffs seek creative forms of injunctive relief, they must consider whether the court will accept those forms of relief as redressing their particular injuries.

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<sup>108</sup> *Id.* at 1134.

<sup>109</sup> *Id.* at 1135 (citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 181 (2000)).

<sup>110</sup> *Id.* at 1135.

<sup>111</sup> *Id.* at 1135–36.

<sup>112</sup> *Id.* at 1136.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

A final consideration in the context of redressability is a potential defense that plaintiffs are precluded from pursuing injunctive relief under Section 204 of the CAA.<sup>115</sup> This section states that “actions to restrain [Section 203 violations] shall be brought by and in the name of the United States.”<sup>116</sup> The preclusion argument based on this provision would be that the statute “expressly requires that all actions to enforce Section [203] be brought by, and only by, the United States government” instead of by citizen groups or states.<sup>117</sup> This is a matter of statutory interpretation that is currently at issue in a separate case brought by the Utah Physicians for a Healthy Environment that is before the United States District Court for the District of Utah at the time this Note was written.<sup>118</sup> UPHE’s counterargument is that “nowhere does CAA Section [204] ‘expressly require’ that ‘all’ actions to enjoin tampering violations be brought ‘only’ by the United States,” and that the provision stands for enforcement authorization rather than enforcement preclusion.<sup>119</sup>

#### *d. Special Considerations for Citizen Groups*

Citizen groups will have additional standing burdens to consider which individual citizens bringing suit do not have to account for. An association such as a citizens group only has standing to bring an action on behalf of its members “when 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.”<sup>120</sup> Accordingly, a citizens group bringing a claim will have to demonstrate “organization standing”—that at least one of its members could have standing to sue in their own right. The member has to have suffered an injury (e.g., health or recreational harm from increased exposure to air pollution) that is fairly traceable to the defendant’s conduct (e.g., a local defendant whose defeat or tampering with emission control devices is increasing air pollution in the immediate area) that will likely be redressed by the court’s favorable decision (say, an injunction that

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<sup>115</sup> 42 U.S.C. § 7523(b).

<sup>116</sup> *Id.*

<sup>117</sup> Pl.’s Surreply at 1, *Utah Physicians for a Healthy Env’t v. TAP Worldwide, LLC* (No. 2:19-cv-628) (D. Utah Feb. 19, 2020).

<sup>118</sup> See Docket, *Utah Physicians for a Healthy Env’t v. TAP Worldwide, LLC* (No. 2:19-cv-628) (mentioning *Utah Physicians for a Healthy Env’t v. Diesel Power Gear LLC, et al.* (Case No. 20-4043) as a similar case being brought).

<sup>119</sup> Pl.’s Surreply, *supra* note 117, at 2, 5.

<sup>120</sup> *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 181 (2000) (citing *Hunt v. Wash. State Apple Adver. Comm’n*, 432 U.S. 333, 343 (1977)).

abates the exposure will restore health or recreational opportunity).<sup>121</sup> The citizens group will also have to demonstrate that enforcing emissions control provisions has some relevance to the group's mission or purpose, such as a health association demonstrating the relevance between exposure to air pollutants and negative health effects.

*e. Special Consideration for States*

States bringing an action under the citizen suit provision of the Act may have "special solicitude" in the standing analysis, as "states are not normal litigants for the purposes of invoking federal jurisdiction."<sup>122</sup> Well before the landmark case *Massachusetts v. EPA*, which held that Massachusetts had standing in a suit seeking to force the EPA to take action to regulate greenhouse gases from motor vehicles, it was clear that states, as sovereigns, had the ability to bring an action in federal courts.<sup>123</sup> A 1982 Supreme Court opinion, *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel Barez*, articulated that there were three main interests at stake for states to claim in federal courts.<sup>124</sup> First, states have standing to sue in federal court to claim a proprietary interest—primarily involving ownership of land.<sup>125</sup> Second, as *parens patriae* ("parent of the country"), a state may sue on behalf of its citizens to protect a quasi-sovereign interest such as the health and well-being of its citizens.<sup>126</sup> Third, states may bring a claim in federal courts to protect their sovereign interests, which include "the power to create and enforce a legal code, both civil and criminal, and the power to demand recognition from other sovereigns."<sup>127</sup>

The Court in *Massachusetts* seemed to land on the conclusion that the state of Massachusetts had standing to protect their quasi-sovereign interests, but qualified that conclusion by acknowledging that Massachusetts also had a "procedural right" under the Clean Air Act to challenge the EPA's rulemaking.<sup>128</sup> This procedural right was critical in order for the plaintiffs in *Massachusetts* to demonstrate standing. The majority noted that "a litigant to whom Congress has accorded a procedural right to protect his concrete interests . . . can assert that right

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<sup>121</sup> *Utah Physicians for a Healthy Env't v. Diesel Power Gear LLC*, 374 F. Supp. 3d 1124, 1132 (D. Utah 2019).

<sup>122</sup> *Massachusetts v. EPA*, 549 U.S. 497, 518–20 (2007).

<sup>123</sup> Amy J. Wildermuth, *Why State Standing in Massachusetts v. EPA Matters*, 27 J. LAND RES. & ENVTL. L. 273, 295 (2007).

<sup>124</sup> *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel Barez*, 458 U.S. 592 (1982).

<sup>125</sup> Wildermuth, *supra* note 123, at 295.

<sup>126</sup> *Id.* at 298; *Massachusetts*, 459 U.S. at 518–19.

<sup>127</sup> Wildermuth, *supra* note 123, at 311.

<sup>128</sup> *Massachusetts*, 549 U.S. at 520 (citing 42 U.S.C. § 7607(b)(1)).

without meeting all the normal standards for redressability and immediacy,” thus entitling the state to relaxed standing requirements under Article III.<sup>129</sup> In the dissenting opinion, Chief Justice Roberts wrote that relaxing standing requirements for a state’s procedural injury “has no basis in our jurisprudence, and support for any such ‘special solicitude’ is conspicuously absent from the Court’s opinion.”<sup>130</sup>

If it continues to hold water, then the relaxed standing requirement for states can be a powerful tool to get air pollution cases into court—an urgent necessity in light of the latent harms of air pollution. However, if procedural rights are “rights to a certain kind of process, not rights to a specific outcome,” then an action brought under the citizen suit provision in order to enforce Section 203 or a SIP will likely not qualify as a procedural right.<sup>131</sup> The redress for an enforcement action is, after all, enforcement, and plaintiffs will seek civil penalties and injunctive relief rather than some form of agency procedure.

State standing under the doctrine of *parens patriae* may also be subject to a relaxed standard. The court in *Amigos Bravos* recognized that “standing may also be relaxed where a State is suing in its capacity as a quasi-sovereign to protect its interests and those of its citizenry from air pollution, global warming, or other environmental threats that endanger the public’s health or welfare.”<sup>132</sup> A state could make a strong argument that enforcing Section 203 and its SIP is a suit to protect the wellness interests of its citizens. In that case, the question would become whether a state with a quasi-sovereign interest, but no procedural injury, would still be entitled to the same relaxed standing as a state with both a quasi-sovereign interest and a procedural interest, as was the case in *Massachusetts*.

## 2. Statutory Standing

Plaintiffs may also experience challenges with statutory standing. The citizen suit provision enables statutory standing for a plaintiff when a person violates “an emission standard or limitation under this chapter or . . . an order issued by the Administrator or a State with respect to such a standard or limitation.”<sup>133</sup> Accordingly, plaintiffs have to demonstrate that

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<sup>129</sup> *Id.* at 517 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 n.7 (1992)).

<sup>130</sup> *Id.* at 536 (Roberts, C.J., dissenting).

<sup>131</sup> Devin McDougall, *Reconciling Lujan v. Defenders of Wildlife and Massachusetts v. EPA on the Set of Procedural Rights Eligible for Relaxed Article III Standing*, 37 COLUM. J. ENVTL. L. 151, 156 (2012).

<sup>132</sup> *Amigos Bravos v. U.S. Bureau of Land Mgmt.*, 816 F. Supp. 2d 1118, 1125 (D.N.M. 2011).

<sup>133</sup> 42 U.S.C. § 7604(a).

they are making “allegations that come within this statutory language.”<sup>134</sup> To date, courts seem to be split on whether or not the provisions of Section 203 qualify as an emission standard or limitation, or an order. In *Utah Physicians for a Healthy Environment*, the court only briefly discusses the issue in a footnote, noting that “the term ‘emission standard or limitation’ includes standards established by a State Implementation Plan (SIP). 42 U.S.C. § 7604(a), (f).”<sup>135</sup> The court did not address whether the provisions of Section 203 are also emission standards or limitations. However, in the case *In re Volkswagen “Clean Diesel” Marketing, Sales Practices, & Products Liability Litigation*, the Ninth Circuit held that the provisions of Section 203 were not an “emission standard or limitation or orders issued . . . with respect to such standards or limitations within the meaning of [the citizen suit provision].”<sup>136</sup> The Ninth Circuit did imply that a citizen suit can be brought to enforce a SIP which often contains regulations for ensuring the integrity of emissions control programs.<sup>137</sup>

As the District of Utah did not address whether Section 203 contains an emission standard or limitation, and the Ninth Circuit explicitly stated that Section 203 is not an emission standard or limitation, the safe bet for a plaintiff is to bring a citizen suit alleging violations of both Section 203 and a violation of the respective state SIP. Alleging only a violation of Section 203 may lead the case to be dismissed for lack of statutory standing.

### 3. Diligent Prosecution

The issue of diligent prosecution will be more relevant for the larger, newsworthy cases of emissions cheating than local incidents of defeat devices. This issue arises from another provision of the Clean Air Act, Section 7604(a)(1)(B): “No action may be commenced . . . if the Administrator or State has commenced and is diligently prosecuting a civil action in a court of the United States or a State to require compliance with the standard, limitation, or order.”<sup>138</sup> Thus, if the government is already prosecuting the same defendant for the same violation, then a citizen cannot also bring suit against that defendant. In that case, the provision does allow for any citizen to intervene in the government’s prosecution,

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<sup>134</sup> *St. Bernard Citizens for Env’tl. Quality, Inc. v. Chalmette Refining, LLC*, 354 F. Supp. 2d 697, 700 (E.D. La. 2005).

<sup>135</sup> *Utah Physicians for a Healthy Env’t v. Diesel Power Gear LLC*, 374 F. Supp. 3d 1124, 1130 n.1 (D. Utah 2019).

<sup>136</sup> *In re Volkswagen “Clean Diesel” Mktg., Sales Practices, & Prod. Liab. Litig.*, 894 F.3d 1030, 1041 (9th Cir. 2018).

<sup>137</sup> *Id.* at 1043.

<sup>138</sup> 42 U.S.C. § 7604(b)(1)(B).

so this option remains as a “matter of right” for a plaintiff seeking to enforce an emissions control violation.<sup>139</sup> However, *In re Volkswagen* demonstrates that intervening plaintiffs must be aware of and seek to enforce the exact same standard or limitation: “A person suing to enforce a different ‘standard, limitation, or order’ with regard to certain emissions from that invoked by the government in its enforcement action is not barred from doing so by § 7604(b).”<sup>140</sup> For example, if a plaintiff only seeks to enforce a SIP but the government is only enforcing Section 203 violations, the plaintiff does not have the right to intervene.

#### 4. Establishing Liability

Finally, bringing a suit to enforce Section 203 and SIPs under the citizen suit provision of the Act implicates questions of liability. The text of the Act is broad: it is unlawful for “any person” to remove or tamper with emission control devices, and for “any person” to manufacture, sell or install a defeat device. While “person” is not defined in Part A of Title II (Motor Vehicle Emission and Fuel Standards), “person” is defined in the Act’s general provisions.<sup>141</sup> This signals that the definition of “person” in the general provision applies to the Motor Vehicle Emission Standards. The general provisions define “person” to include “an individual, corporation, partnership, association, State, municipality, political subdivision of a State, and any agency, department, or instrumentality of the United States and any officer, agent, or employee thereof.”<sup>142</sup> This inclusive definition could implicate an array of defendants from the chain of transactions involved in the sale and resale of a motor vehicle.

The court in *UPHE* acknowledged that the citizen suit provision authorizes actions against a wide range of possible defendants and specifically highlighted two subcategories of actors that can be liable, although they are not explicitly mentioned by the terms of the Act.<sup>143</sup> The first is that the broad definition of “person” should be read to include “any responsible corporate officers.”<sup>144</sup> To establish a responsible corporate officer’s liability, the individual may be “held personally liable . . . if he knew of the facts underlying the violations, had the ability to prevent or correct the violations, and failed to do so.”<sup>145</sup> The responsible corporate

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<sup>139</sup> *Id.*

<sup>140</sup> *In re Volkswagen*, 894 F.3d at 1039.

<sup>141</sup> 42 U.S.C. § 7550; *id.* § 7602(e).

<sup>142</sup> *Id.* § 7602(e).

<sup>143</sup> *Utah Physicians for a Healthy Env’t v. Diesel Power Gear LLC*, 374 F. Supp. 3d 1124, 1138 (D. Utah 2019).

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 1139.

officer doctrine has been a powerful tool in environmental enforcement cases.<sup>146</sup> The doctrine allows courts to disregard the corporate form and hold directors or managers personally liable, without piercing the corporate veil.<sup>147</sup> As the court in *UPHE* noted, the responsible corporate officer doctrine has been successfully argued to hold executive officers personally liable for violations of both the CAA and the Clean Water Act.<sup>148</sup>

The second subcategory recognized by the court in *UPHE* includes actors that execute a “pass-through sale”—a transaction where an actor re-sells a modified truck with emissions defeat parts already installed in it.<sup>149</sup> For these transactions, the court noted that Section 203(a)(3)(B) “prohibits by its plain language the sale of an emissions defeat part ‘as part of’ a vehicle where the seller knows or should know the part is being ‘put to such use.’”<sup>150</sup> The court’s holding accordingly implicates a secondary tier of actors that can be liable under the Act, even if the individuals themselves did not tamper with emissions controls or install defeat devices.

In some cases, the knowledge requirement does place a limit on the reach of liability. Under the text of the Act, there is strict liability for “removing or rendering inoperative [emissions control devices] . . . prior to its sale and delivery to the ultimate purchaser,” so knowledge is not an element of that unlawful act.<sup>151</sup> However, “after such sale and delivery to the ultimate purchaser,” a person must “knowingly” remove or tamper with an emissions control device to be liable.<sup>152</sup> For persons selling or installing defeat devices, the Act places the requirement that the person has to “know or should know” that the device will be sold or installed for the purpose of defeating emissions compliance.<sup>153</sup> Case law supports that “an act is done knowingly when it is done voluntarily and intentionally, and not by mistake or accident.”<sup>154</sup> While it would be hard to argue that a person mistakenly tampered with emissions control systems or accidentally installed a defeat device, the knowledge requirement could shield some defendants from liability.

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<sup>146</sup> *Id.* at 1137 (citing *United States v. Park*, 421 U.S. 658, 673–74 (1975)).

<sup>147</sup> See *Reed v. Reid*, 980 N.E.2d 277, 298 (Ind. 2012).

<sup>148</sup> *Utah Physicians for a Healthy Env’t*, 374 F. Supp. 3d at 1137 n.68.

<sup>149</sup> *Id.* at 1140.

<sup>150</sup> *Id.*

<sup>151</sup> 42 U.S.C. § 7522(a)(3)(A).

<sup>152</sup> *Id.*

<sup>153</sup> *Id.* § 7522(a)(3)(B).

<sup>154</sup> *United States v. Haney Chevrolet, Inc.*, 371 F. Supp. 381, 384 (M.D. Fla. 1974).

With these threshold obstacles in mind, plaintiffs can formulate an approach for a novel citizen suit in their jurisdiction, brought to enforce Section 203 violations.

## CONCLUSION

An increase in private actions brought against Section 203(a)(3)(A) and (B) violators can be a powerful tool in mitigating the polluting potential of mobile sources. Given the deleterious health effects that come from mobile sources, it is imperative that this existing legal tool can be utilized to its full potential. Furthermore, unless and until comprehensive climate and greenhouse gas legislation is passed in the United States, the citizen suit of the Clean Air Act may be one of the only viable legal options for citizen groups to combat climate change. And while there may be other avenues available to hold actors perpetuating emissions cheating liable for the harm they cause,<sup>155</sup> utilizing the citizen suit provision can help maintain the Act's relevance for this specific air quality issue.

As plaintiffs continue to bring actions in response to a violation of Section 203 or a SIP, they should be mindful of the threshold obstacles articulated above. As with many environmental law cases, standing will likely be the most formidable impediment to proceeding on the merits of the case. Plaintiffs should highlight the discrete and particularized injuries to their health, recreation, or economic interests which result from a mobile source's defeated emissions controls and keep the causal chain between the defendant's actions and the plaintiff's harms as localized as possible. The most successful claims for relief will ask for civil penalties, declaratory, and injunctive relief, although plaintiffs could try to explore more creative remedies like the *UPHE* plaintiffs attempted, albeit unsuccessfully, in asking for a mandatory recall or repair of affected vehicles. Finally, plaintiffs should try to establish a wide range of liable defendants under the Act's broad definition of "person." If plaintiffs are successful on these threshold issues, then the Clean Air Act can continue to do the important work that it was originally designed to accomplish.

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<sup>155</sup> For example, states like Colorado have brought consumer protection cases against companies perpetuating large-scale emissions cheating, and some plaintiffs have tested the waters of bringing a suit under the federal Racketeer Influenced and Corrupt Organization Act. See Press Release, Colorado Attorney General, Attorney General Phil Weiser announces consumer protection/environmental settlements with Fiat Chrysler, auto supplier Robert Bosch for undermining auto emissions regulations with unlawful defeat devices in diesel vehicles (Jan. 29, 2019), <https://coag.gov/press-releases/01-29-19/>; see also *Bledsoe v. FCA US LLC*, 378 F. Supp. 3d 626, 650 (E.D. Mich. 2019).