COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

No. SJC-13521

CONSERVATION LAW FOUNDATION AND GREENROOTS, INC.,

Appellants,

v.

ENERGY FACILITIES SITING BOARD,

Appellee.

ON RESERVATION AND REPORT BY A SINGLE JUSTICE OF THE SUPREME JUDICIAL COURT FOR SUFFOLK COUNTY

ON APPEAL FROM A FINAL DECISION OF THE ENERGY FACILITIES SITING BOARD

BRIEF OF *AMICUS CURIAE* THE UNION OF CONCERNED SCIENTISTS IN SUPPORT OF APPELLANTS AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Massachusetts Supreme Judicial Court Rule 1:21, *amicus curiae* the Union of Concerned Scientists states it has no parent companies and no publicly held company has a 10 percent or greater ownership interest in it.

DECLARATION

Pursuant to Mass. R. App. P. 17(c)(5), the Union of Concerned Scientists further states that: (A) no party's counsel authored this brief either in whole or in part; (B) no party or party's counsel or any other person or entity contributed money that was intended to fund preparing or submitting this brief; and (C) neither the Union of Concerned Scientists nor its counsel represents or has represented one of the parties to this appeal in another proceeding involving similar issues or was a party or represented a party in a proceeding or legal transaction that is at issue in this appeal.

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STATEMENT OF ISSUES

The Union of Concerned Scientists ("UCS") addresses the following issue presented by the Court in its *amicus* announcement of January 5, 2024: Whether the Energy Facilities Siting Board properly approved a petition and application for a Certificate of Environmental Impact and Public Interest in connection with the proposed construction of an electric substation in East Boston.

STATEMENT OF INTEREST

UCS is a non-profit science organization committed to applying rigorous, independent scientific research to advocate for a healthy, safe, and just future. UCS was established over 50 years ago by scientists and students at the Massachusetts Institute of Technology and now has more than 500,000 members and a team of 250 scientists, analysts, policy experts, organizers, and communicators. UCS is focused on developing practical and innovative solutions to tackle the consequences of climate change.

UCS recognizes the stark disparities in environmental and climate risk exposure among marginalized communities and has prioritized environmental and climate justice in its mission. These communities often bear a disproportionate burden of environmental hazards, a reality that intersects directly with the work UCS undertakes. As an organization committed to fostering a healthy and safe planet for

all, UCS urges governments to play a larger enforcement role in holding polluters accountable.

As part of its commitment, UCS has conducted research on the uneven impacts of climate change and pollution in various communities. In 2023, UCS published a research report revealing the inadequacy of an EPA rule targeting ethylene oxide emissions, a known carcinogen. Additionally, UCS collaborated with a number of frontline community organizations, including communities in Puerto Rico and South Carolina, to prepare a report identifying barriers hindering communities' resilience to climate change including displacement, government neglect, lack of access to funding, and the need for community-driven solutions.

UCS has long followed the East Boston Substation Project at issue in this case and previously expressed concern through written comments about the lack of meaningful engagement associated with the Energy Facility Siting Board's certificate decision. Given the importance of the environmental and energy justice issues implicated in this case, UCS urges the Court to reverse the EFSB's certificate decision and remand for further proceedings.

SUMMARY OF ARGUMENT

Considering the environmental justice and cumulative impacts of infrastructure siting is more important than ever before due to the propensity of climate change to exacerbate those impacts. Environmental justice ("EJ") communities in urban areas often lack green space and therefore experience higher summer temperatures—with fewer places to seek shelter—than other communities. They also experience higher rates of flooding and poorer air quality. Climate change will intensify these disproportionate harms.

Now is the time to prioritize environmental and energy justice. To move beyond the status quo, a just energy transition must center the needs of EJ communities, ensure that benefits and necessary burdens are equitably distributed, and deploy new and creative ways to ensure that communities have a say in decisions and processes that affect their interests.

The recent passage of the Act Creating a Next-Generation Roadmap for Massachusetts Climate Policy ("the Roadmap Act" or "the Act") demonstrates that environmental and energy justice are finally a legal priority in Massachusetts. The law codifies the Commonwealth's commitment to pursuing EJ policies that are robust and protective of EJ communities and directs a set of agencies—including the Energy Facilities Siting Board ("EFSB")—to prioritize the consideration of a defined set of EJ principles in their work.

The EFSB's certificate decision in this case was a missed opportunity to move beyond the status quo and meaningfully apply the Roadmap Act. The Eagle Hill community is exactly the sort of community the Act was passed to protect, and it is already suffering exactly the sort of cumulative environmental burdens the Act was designed to alleviate. Eversource's certificate petition asked the EFSB to grant a total of 14 permits and approvals, and even though the community engagement procedures employed during the EFSB's decision-making process showed progress, room for improvement remained. The Roadmap Act expects agencies to move beyond traditional approaches, but the EFSB's process included more of the same.

UCS understands that the transition to a low-carbon energy economy requires the construction of additional infrastructure at a speedy rate and that undue delays serve no party's interests. It also recognizes that, as the energy transition proceeds, communities across the country will be asked to shoulder burdens for the greater good. But those facts cannot justify pressing forward with business as usual when the needs of EJ communities hang in the balance. The Roadmap Act appropriately recognizes that *now* is the time to ensure that these communities have a voice.

UCS agrees with Conservation Law Foundation, GreenRoots, and the Boston Residents Group that the EFSB's certificate decision should be vacated and remanded. It submits this brief to explain why these issues are important, to highlight

the problems that come with continuing business as usual, and to describe what can and should be done differently in the future.

ARGUMENT

I. Environmental and energy justice demand immediate action to mitigate the environmental inequities present in the Commonwealth.

A. The environmental and energy justice movements exist to alleviate the disproportionate environmental burdens carried by marginalized communities.

Numerous studies have confirmed that the burdens of climate change, air and water pollution, industrial overuse and siting, exposure to chemicals, and lack of green space tend to fall disproportionally on low-income communities and non-white communities. *See generally* Robert D. Bullard, *Dumping in Dixie: Race, Class and Environmental Quality* (1990); *see also, e.g.*, Darya Minovi, Union of Concerned Scientists, *Invisible Threat, Inequitable Impact: Communities Impacted by Cancer-Causing Ethylene Oxide Pollution* 1-2 (Feb. 2023), https://www.ucsusa.org/sites/default/files/2023-02/Invisible-Threat-Inequitable-Impact-fact-sheet.pdf; Liam Downey & Brian Hawkins, *Race, Income, and Environmental Inequality in the United States*, Sociol Perspect. 11-13 (2008), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2705126/pdf/nihms100969.pdf.

As the "Father of Environmental Justice," Dr. Robert D. Bullard, has put it, EJ "embraces the principle that all people and communities are entitled to equal

protection of environmental, energy, health, employment, education, housing, transportation, and civil rights laws and regulation." Robert D. Bullard, *Environmental Justice-Once A Footnote, Now A Headline*, 45 Harv. Env't L. Rev. 243, 244 (2021). Energy justice is an important relative of EJ. It requires ensuring that all communities have access to energy resources, that energy resources are distributed fairly and in a manner that does not disproportionately burden some communities more than others, and that communities affected by the development of energy resources and energy infrastructure are able to participate in the decisions that affect them. *See* Gabriel Chan & Alexandra B. Klass, *Regulating for Energy Justice*, 97 N.Y.U. L. Rev. 1426, 1432 & n.17 (2022).

B. Historical practices have contributed to environmental and energy injustices in the Boston metro area.

Environmental and energy injustices abound in Massachusetts. Even though air quality in the Commonwealth has generally improved since the early 2000s, the most substantial improvements occurred in communities that already had relatively healthy air. Anna Rosofsky et al., *Temporal Trends in Air Pollution Exposure Inequality in Massachusetts*, 161 Env't Rsch. 76, 76-86 (2018), https://doi.org/10.1016/j.envres.2017.10.028. More densely populated and industrial areas—areas more likely to be home to low-income people or people of color—saw fewer improvements over the same period. *Id.* at 83-84.

Likewise, research conducted by UCS in 2019 showed that Asian American, African American, and Latino residents of Massachusetts were exposed to an average of 26 to 36 percent more particulate matter air pollution than were the Commonwealth's white residents. Maria Cecilia Pinto de Moura & David Reichmuth, Union of Concerned Scientists, *Inequitable Exposure to Air Pollution from Vehicles in Massachusetts* 1-2 (June 2019), https://www.ucsusa.org/sites/default/files/2020-05/inequitable-exposure-to-vehicle-pollution-ma.pdf. In general, the regions across Massachusetts with higher particulate matter concentrations tend to be home to more non-white residents than areas with particulate matter concentrations below the state average. *Id.*; *see generally* Harvard Chan-NIEHS Center for Environmental Health, *Environmental Racism in Greater Boston: An Interactive Web Resource*, https://www.hsph.harvard.edu/niehs/environmental-racism-project/ (last visited Apr. 15, 2024) (analyzing the disproportionate impact of environmental hazards on people of color throughout Boston).

The uneven distribution of green space in metro Boston further adds to these inequities. A recent report from the city of Boston confirmed that neighborhoods south and west of Boston have a denser tree canopy than those to the north and east. City of Boston, *Urban Forest Plan* 206 (Sept. 2022), https://www.boston.gov/sites/default/files/file/2023/03/2022%20Urban%20Forest

%20Plan%20-%20single%20page-3.pdf. The City also recognized that "[f]ormerly redlined and marginalized areas have, on average, less canopy coverage than other areas," and that "decades of marginalization by redlining practices, disinvestment, and other policies and practices of racial exclusion" are a "significant factor" in the differences in tree cover. *Id.* at 206; *see also id.* at 208 (noting that boundaries set by the Home Owners' Loan Corporation in the 1930s still correlate with differences in tree cover); *id.* at 207 (graph depicting canopy coverage by neighborhood and confirming that East Boston has the least cover).

Finally, past approaches to energy siting have overconcentrated electricity infrastructure—particularly power plants—either within or close to EJ communities. *See* Paula García et al., Union of Concerned Scientists, *Siting for a Cleaner, More Equitable Grid in Massachusetts* 3 (Mar. 2024), https://www.ucsusa.org/sites/default/files/2024-03/MA-infrastructure-fact-sheet-3-21.pdf. In fact, "80 percent of existing polluting electricity generating units—with their associated health risks—are located in or within one mile of an EJ neighborhood," even though EJ neighborhoods make up about 50 percent of the state's census block groups. *Id.*; *see also id.* at 4 (Table 1).

Electrical substations are a particular problem. In fact, nearly 70 percent of the state's 419 substations are either located inside or within one mile of an EJ neighborhood. *Id.* at 5; *see id.* at 6 (Figure 2). Planned substation projects are likely

to extend this trend: seven of eleven mapped future projects are proposed for siting within EJ neighborhoods. *Id*. at 6; *see also* Lara J. Cushing et al., *Historical Red-Lining is Associated with Fossil Fuel Plant Siting and Present-Day Inequalities in Air Pollutant Emissions*, 8 Nature Energy 52, 55-57 (Jan. 2023), https://rdcu.be/dDdZt (finding that fossil fuel power plant siting decisions reflect historical red-lining trends).

C. The energy transition must center the needs of EJ communities.

The climate crisis demands a green energy transition that focuses first and foremost on the needs of EJ communities. Climate change will only compound the injustices that EJ communities already face. In Massachusetts, at least 60 percent of the homes facing chronic inundation between now and 2050 are valued below the state median. Kristina Dahl et al., Union of Concerned Scientists, *Underwater: Rising Seas, Chronic Floods, and the Implications for US Coastal Real Estate* 10 (June 2018), https://www.ucsusa.org/sites/default/files/attach/2018/06/underwater-analysis-full-report.pdf. Some EJ communities will also continue to experience increased temperatures compounded by a lack of green space. *See* Jeremy S. Hoffman et al., *The Effects of Historical Housing Policies on Resident Exposure to Intra-Urban Heat: A Study of 108 US Urban Areas*, 8 Climate 12 (Jan. 2020), https://doi.org/10.3390/cli8010012.

The interests of these communities cannot be ignored in the name of a speedy clean energy transition. To be sure, the infrastructure necessary to accommodate electrification must be built somewhere, and lack of access to reliable energy is an energy injustice. But a just energy transition must also consider EJ, public health, jobs, affordability, and access to economic benefits. Youngsun Baek et al., Union of Concerned Scientists, *A Transformative Climate Action Framework: Putting People at the Center of Our Nation's Clean Energy Transition* 4-5 (July 2021), https://www.ucsusa.org/sites/default/files/2021-08/A-Transformative-Climate-Action-Framework.pdf. It must likewise ensure that the interests of those communities that have "historically shouldered a disproportionate burden of fossil fuel extraction and climate change" are prioritized. Elizabeth J. Kennedy, *Equitable, Sustainable, and Just: A Transition Framework*, 64 Ariz. L. Rev. 1045, 1087 (2022).

The fact that a community may benefit from the construction of a particular facility is no reason for it to carry all the burden. *Cf. id.* at 1065. Benefits and burdens should be shared equitably. Thus, the permits and reviews associated with the construction of energy facilities must ensure that already overburdened communities are not forced to bear more of the environmental burdens, health impacts, and social costs of these facilities than other communities are. Baek et al., *supra*, at 4-5. Historically marginalized and already overburdened communities must also be

empowered to participate meaningfully in the processes that will affect their neighborhoods. *Id.* at 15.

II. The Roadmap Act formally prioritizes the consideration of EJ principles in Massachusetts.

The Roadmap Act demonstrates the Commonwealth's commitment to serving vulnerable communities already burdened by environmental harms. 2021 Mass. Legis. Serv. Ch. 8 (Mar. 2021). Previously, EJ policy in the state primarily relied on executive orders, leaving it vulnerable to change with each administration. Paola Rosa-Aquino, *Activists Hail Massachusetts Law as Crucial Step on Environmental Justice*, The Guardian (Apr. 2, 2021), https://www.theguardian.com/us-news/2021/apr/02/massachusetts-law-environmental-justice. The Roadmap Act signals a new approach by formally defining and codifying protections for EJ communities. Indeed, before signing, then-Governor Baker expressed his intent to sign a Roadmap Act that made existing policy provisions "even stronger and more protective of environmental justice populations." Mass. Sen. Bill No. 13 at 3 (Feb. 7, 2021), https://malegislature.gov/Bills/192/S13.pdf (statement from Governor Baker amending proposed bill).

The Roadmap Act begins by establishing a clear definition for "environmental justice population." G. L. c. 30, § 62. An "environmental justice population" is a neighborhood where (1) the annual median household income is not more than 65 percent of the statewide annual median; (2) minorities make up at least 40 percent

of the population; (3) at least 25 percent of the households lack English proficiency; or (4) minorities comprise at least 25 percent of the population and the annual median income of the municipality where the neighborhood is located does not exceed 150 percent of the annual statewide median. *Id.*

The Roadmap Act also instructs the Secretary of Energy and Environmental Affairs ("EEA") to direct EEA agencies and other entities within its control to consider "environmental justice principles in making any policy, determination or taking any other action related to a project review . . . that is likely to affect environmental justice populations." *Id.* § 62K. The obligation to consider EJ principles applies to all projects, including those that do not require application of the Massachusetts Environmental Policy Act ("MEPA"). *Cf. GreenRoots, Inc. v. Energy Facilities Siting Bd.*, 490 Mass. 747, 753-54 & n.6 (2022).[1]

Under the Roadmap Act, "environmental justice principles" are those that "support protection from environmental pollution and the ability to live in and enjoy a clean and healthy environment, regardless of race, color, income, class, handicap, gender identity, sexual orientation, national origin, ethnicity or ancestry, religious belief or English language proficiency." G. L. c. 30, § 62. Relevant here, those principles include (1) the "meaningful involvement of all people with respect to the

[1] This brief takes no position on MEPA's application here. Even if MEPA does not apply, the Roadmap Act's requirement to consider EJ principles remains robust.

development, implementation and enforcement of environmental laws, regulations and policies"; and (2) "the equitable distribution of energy and environmental benefits and environmental burdens." *Id.*

The Roadmap Act defines environmental benefits and burdens broadly. "Environmental benefits" include access to clean natural resources, such as air and water, open space, playgrounds, and recreational facilities. *Id.* "Environmental burdens," by contrast, are "impairment[s] to natural resources" resulting from, *inter alia*, climate change, air pollution, water pollution, "activities that limit access to natural resources and constructed outdoor recreational facilities and venues," and damage to "marine shores and waters, forests, open spaces, and playgrounds." *Id*. Governor Baker specifically mandated that the definition reference climate change impacts to reflect that "environmental justice populations are particularly vulnerable to the impacts of climate change." Mass. Sen. Bill No. 13, *supra* p.11, at 3.

The EEA's 2021 EJ Policy internalizes the Roadmap Act's mandates and guides the EFSB's application of the law. The policy confirms that "environmental justice principles" must be an "integral consideration" in all actions taken by EEA and its subagencies, including, for example, "in making any policy, making any determination or other action related to a project review . . . that [is] likely to affect environmental justice populations." CLF Brief Add. at 401. The policy also commits the EEA to taking affirmative steps "to restore degraded natural resources, to

increase access to open space and parks, to address environmental and health risks associated with existing and potential new sources of pollution, to appropriately address climate change, and to improve overall quality of life by," for example, "[e]nhancing opportunities for residents to participate" in decision-making, and "enhancing the environmental review of new or expanding significant sources of environmental burdens" in EJ neighborhoods. *Id.* at 401-02. Like the Roadmap Act's mandate to consider EJ principles, the commitments set forth in EEA's 2021 EJ Policy apply to all sorts of projects, including those that do not require enhanced analysis under MEPA. *Id.*; *cf. id.* at 407-09 (describing additional procedures specific to enhanced public participation under MEPA).

III. The Eagle Hill community needed the Roadmap Act's full protections here.

As the EFSB's first application of the Roadmap Act's EJ mandates to a proposed energy infrastructure facility and the first time EJ was a feature of the EFSB's review of a certificate petition, the East Boston substation certificate proceeding provided a golden opportunity to move beyond the status quo. But even though the EFSB's proceedings reflect some progress, several opportunities for improvement remained.

A. The Eagle Hill community is the sort of community the Roadmap Act was passed to protect.

The Eagle Hill community is an EJ population in every sense of the definition. *See* G. L. c. 30, § 62 (defining "environmental justice population"). In the part of Eagle Hill where the substation is to be built, the median household income is at 44 percent of the state's median, about 43 percent of the households lack English language proficiency, and minorities comprise 74 percent of the population. *Map: Massachusetts 2020 Environmental Justice Populations*, MassGIS (Nov. 2022), https://www.mass.gov/info-details/massgis-data-2020-environmental-justice-populations (click "Downloads" and "View in Environmental Justice Viewer"). Any one of those factors is sufficient to designate that part of Eagle Hill an EJ population. Every other part of Eagle Hill is also an EJ community under at least one element of the definition. *See id.*

Eagle Hill also experiences more than its fair share of the sorts of environmental burdens referenced in the Roadmap Act. In fact, "East Boston's baseline for environmental burden is higher than most other communities in Massachusetts." Record Appendix ("RA")-XVII:417 (statement of Benjamin B. Downing, former state senator). This disproportionate burden exists primarily because of existing infrastructure in and around the community, including a major highway, noise and air pollution from Logan International Airport, traffic congestion, and storage of jet fuel tanks as well as road salt and sand along Chelsea

Creek. *See* RA-XVII:421-22, 432, 456, 489, 606-07; RA-XIX:152-53; *see also* CLF Brief at 15-18.

The community's proximity to this extant infrastructure already exposes residents to numerous health issues. A 2014 report by the Massachusetts Department of Public Health Bureau of Environmental Health on the impacts of Logan Airport on surrounding communities found that children in high exposure areas are four times more likely to exhibit signs of asthma compared with children in low exposure areas. Mass. Dep't of Pub. Health, *Logan Airport Health Study* 103 (May 2014), https://www.mass.gov/doc/logan-airport-health-study-english-0/download. It also found that adults with chronic obstructive pulmonary disease were "more likely to have lived in the high exposure area for three or more years." *Id.*

The Eagle Hill community also lacks access to the sorts of environmental benefits referenced in the Roadmap Act, such as open space. Across Boston, about 7.59 acres of open space exist for every 1,000 residents. In East Boston, however, that number falls to only about 5.33 acres for every 1,000 residents. RA-XIX:189. Eagle Hill itself is particularly "lacking in the availability of diverse recreational and passive open space resources." *Id.* It also lacks tree coverage. Indeed, only about 7 percent of East Boston (including Eagle Hill) is covered by tree canopy. *Urban Forest Plan*, *supra* p.7, at 29. This is far below the citywide average of 27 percent. *Id.* at 13.

Those missing benefits compound the effects of climate change. The lack of tree canopy coverage contributes to the community's heat vulnerability, rendering it an urban heat island. Paula García, Union of Concerned Scientists, *East Boston, a Controversial Substation and Opportunities Ahead*, UCS: The Equation (Nov. 12, 2019), https://blog.ucsusa.org/paula-garcia/east-boston-controversial-substation-opportunities/. Urban heat islands yield higher air pollution levels, heat-related illnesses, and mortality. EPA, *Reduce Urban Heat Island Effect* (Jan. 22, 2024), https://www.epa.gov/green-infrastructure/reduce-urban-heat-island-effect. The dearth of permeable, organic surfaces also raises the area's baseline susceptibility to flooding such that community members are forced on occasion to kayak down the streets. RA-XVII:489. That flooding will only worsen as sea levels rise. *See* RA-XVIII:564-66; RA-XVII:503-05 (similar); *see also* Dahl et al., *supra* p.9, at 10.

The substation project will add to the community's existing burdens. As CLF's brief explains, CLF Brief at 41-47, the substation, which will be located across from a playground and next to a park, presents safety risks. And although the EFSB suggests otherwise, the burdens imposed by the substation will not be temporary or fully mitigated. *Contra* EFSB Brief at 51. Once constructed, the substation will remain just one more piece of permanent industrial infrastructure in an already over-burdened neighborhood. *See* RA-XVII:599-607.

To be sure, access to reliable energy is a benefit and a key component of energy justice. But as explained in more detail below, the EFSB should have considered whether this substation was necessary for energy reliability. *See infra* pp.26-27 (discussing non-wires alternatives). Likewise, the fact that the community will benefit in some ways from construction of the facility does not mean that justice has been served. After all, while the benefits of the substation will be widely shared, the burdens will disproportionately fall on the Eagle Hill community. *See* G. L. c. 30, §§ 62, 62K (requiring EEA agencies to consider EJ principles, including "the equitable distribution of energy and environmental benefits and environmental burdens").

B. The certificate proceedings presented missed opportunities to move beyond the status quo.

UCS recognizes that Eversource and the EFSB have taken steps to facilitate community engagement during the review and approval of the substation project. Eversource held meetings in late 2021 with a focus group composed of members of the Eagle Hill Civic Association who agreed to provide input regarding the aesthetic design for the substation enclosure. RA-XIII:38 & n.13. Eversource and representatives from the Eagle Hill community also entered into a "Community Benefits Agreement" to enhance open spaces and recreational opportunities in the neighborhood. RA-XVIII:192-94. And the EFSB held public hearings specific to the certificate proceeding via Zoom, after standard work hours, with simultaneous

Spanish translation, and after providing notice in several languages in local papers, through community postings, and online too. *See* RA-XVI:339-40 (hearings regarding Eversource's certificate request); EFSB Brief Add. at 79-80 (hearing regarding EFSB's tentative decision). These initiatives reflect progress.

But the proceedings also presented room for improvement. For example, much of the public engagement took place via traditional public hearings and listening sessions that occurred without substantial space and time for community members to give feedback or engage in a two-way dialogue with decision-makers. Those sorts of sessions may facilitate some community engagement, but they can feel opaque or one-sided to community members. As State Senator Lydia Edwards explained at a June 2022 evidentiary hearing for the certificate proceeding, meaningful engagement involves "a full, comprehensive back-and-forth" with communities. RA-XX:236; *see also* Goda Perlaviciute, *Contested Climate Policies and the Four Ds of Public Participation: From Normative Standards to What People Want*, 13 WIRES Climate Change, at 3 (Nov. 16, 2021), https://doi.org/10.1002/wcc.749 (explaining that while "open and transparent information is an important basis for public acceptability of policies," it "does not yet qualify as public participation").

Other scholars have explained that standard public listening sessions sometimes end up feeling "merely cosmetic," especially "when poor people are

involved" given the "particularly high barriers to meaningful participation" they face. Jaime Alison Lee, *"Can You Hear Me Now?": Making Participatory Governance Work for the Poor*, 7 Harv. L. & Pol'y Rev. 405, 414 (2013); Anika Singh Lemar, *Overparticipation: Designing Effective Land Use Public Processes*, 90 Fordham L. Rev. 1083, 1118 (2021) (warning that public hearings generally "are not dialogues that result in an informed consensus"); Alejandro Esteban Camacho, *Mustering the Missing Voices: A Collaborative Model for Fostering Equality, Community Involvement and Adaptive Planning in Land Use Decisions Installment Two*, 24 Stan. Env't L.J. 269, 279-80 (2005) (explaining that traditional "participatory procedures are relatively minimal and are often fragmented and confusing").

UCS commends the EFSB for holding the hearings online but notes that virtual hearings fix only some of the problems associated with in-person hearings. Accessing online hearings can be difficult for EJ communities, which are more likely than others to have unreliable internet access or at-home computing technologies. *See* Y. Li et al., Emmett Environmental Law & Policy Clinic, *Opportunities to Advance Environmental Justice in Renewable Energy Siting* 9 (June 2023), http://clinics.law.harvard.edu/environment/files/2023/07/Opportunities-Advance-EJ-Renew.-Energy-Siting_06.05-FINAL-formatted.pdf; *see* Pew Research Center, *Americans' Use of Mobile Technology and Home Broadband* 5-6 (Jan. 2024),

https://www.pewresearch.org/internet/wp-content/uploads/sites/9/2024/01/PI_2024.01.31_Home-Broadband-Mobile-Use_FINAL.pdf (depicting differences in home internet based on race, household income, and neighborhood type).

Even when barriers to attendance can be overcome, informational imbalances can also hinder meaningful participation in public hearings. For example, hearing notices may not signal to community members that their interests will be affected by the project under review. The hearings themselves may address complicated technical concepts that may require additional explanation, may not be captured by translators, or may be difficult to comment on meaningfully without time-intensive study or additional expertise. *See* Li, *supra* p.20, at 11-12 (citing Luke W. Cole & Sheila R. Foster, *From the Ground Up: Environmental Racism and the Rise of the Environmental Justice Movement* 110-12 (2000)).

Informational imbalances between project proponents and community members can also limit meaningful exchanges and the sharing of ideas. Camacho, *supra* p.20, at 288-89 & n.77. In fact, that very concern was expressed in the certificate proceedings under review. One witness, a resident of East Boston, testified during the certificate proceedings that "current public utility data" was insufficient to determine whether the proposed substation is needed. RA-XVII:415. This sort of critique has persisted through several stages of project review. *See* RA-XVII:458-59; *see also* Paula García, Union of Concerned Scientists, *Open Letter*

Demands Clean Energy Alternative to Risky Eversource Substation, UCS: The Equation (Dec. 5, 2019), https://blog.ucsusa.org/paula-garcia/open-letter-demands-clean-energy-alternative-to-risky-eversource-substation.

Finally, no matter the robustness of the public participation process or the opportunities for engagement, many traditional engagement processes simply occur too late to make a meaningful difference. They occur only after the project has been designed and projects sites have been identified and assessed for feasibility. *See* Li et al., *supra* p.20, at 12. At that point, the community's participation in any listening sessions or hearings is unlikely to prompt decision-makers to meaningfully reconsider the need for the project or its substantial contours. Rebecca M. Bratspies, *Human Rights and Environmental Regulation*, 19 N.Y.U. Env't L.J. 225, 287 (2012) (recognizing that public comments "typically come too late in the process to be genuinely transformative"). This late engagement also prevents project proponents and regulators from appropriately considering new technologies. *See infra* pp.26-27 (discussing non-wires alternatives and energy storage options).

IV. The robust consideration of EJ principles requires moving beyond the status quo for the benefit of all.

A. A few meaningful changes will ensure that the needs of EJ communities are appropriately taken into account.

In the future, more can and should be done to ensure that the EFSB meaningfully engages with communities in the manner demanded by the climate

crisis and envisioned by the letter and spirit of the Roadmap Act and 2021 EJ Policy. UCS hopes to see future siting and certificate processes proceed with the following measures and values in mind, and it urges the SJC to encourage the EFSB to seriously consider them now and in the future.

To start, additional measures should be taken to facilitate meaningful community engagement. Traditional engagement procedures no longer suffice; future processes must include the sharing of information and ideas in both directions. Traditional hearings can and should occur when appropriate, but they should occur over several days in short sessions. This will lower the barriers to participation by people with difficult work schedules or childcare obligations. Speaking slots should also be allocated in a manner that will allow participants to predict, at least within some range, when they will have an opportunity to speak.

Public hearings should continue to be supplemented with affirmative outreach and engagement with communities and community organizations through small-group meetings, task forces, and focus groups. *See* Astrid Caldas et al., Union of Concerned Scientists, *Building Community Resilience: Lessons from Frontline Leaders* 11 (June 2023), https://www.ucsusa.org/sites/default/files/2023-06/Building-Community-Resilience_6-26.pdf; *see also* Lee, *supra* p.20, at 425 (discussing the value of "face-to-face meetings of small groups of participants to better foster two-way engagement and dialogue"). Indeed, a recent report published

by the Commonwealth's Commission on Energy Infrastructure Siting and Permitting recommended exactly that, urging the EFSB to develop "minimum stakeholder engagement requirements," like inviting community groups to serve as project partners or participate as advisory bodies. Mass. Comm'n on Energy Infrastructure Siting and Permitting, *Recommendations to Governor Maura Healey on Clean Energy Infrastructure Siting and Permitting Reform* 25 & n.23 (Mar. 2024), https://www.mass.gov/doc/recommendations-to-governor-maura-healey-on-clean-energy-infrastructure-siting-and-permitting-reform.

This outreach must also occur early in the project design and siting process to ensure that community input is considered when it can still make a meaningful difference. *See* American Council for an Energy-Efficient Economy, *Energy Burdens in Boston* 2 (Sept. 2020) https://www.aceee.org/sites/default/files/pdfs/aceee-01_energy_burden_-_boston.pdf (discussing the importance of pursuing programs "that fit the needs of the community rather than fitting the community into an already designed program"). Project proponents should also continue providing notice of engagement opportunities through local papers and mailings and should consider providing notice at schools, religious institutions, and neighborhood festivals. Lemar, *supra* p.20, at 1142.

Future public engagement processes must also be crafted to ensure that community members receive transparent information from project proponents and

that information is provided in multiple languages and translated in terms that can be understood by people without relevant technical expertise. Likewise, mechanisms for community members to bring their concerns to the attention of the EFSB should be made clear before project approval occurs, and accountability measures should be in place to ensure that community feedback is received and addressed. *See* Paula García et al., *Siting for a Cleaner, More Equitable Grid*, *supra* p.8, at 7-8.

The EFSB should also ensure that its decisions at all stages of the project review and approval process consider not only a project's marginal impacts on EJ communities but their cumulative impacts as well. After all, environmental burdens do not exist in isolation and often occur in concentrated spaces. *See supra* pp.6-9, 13. Even when a formal cumulative impacts analysis is not necessary, the EFSB should still consider how a project might add to a community's existing burdens. Doing so would be consistent with the Roadmap Act's mandate, reinforced in the 2021 EJ Policy, to ensure that environmental benefits and burdens are equitably distributed. *See* G. L. c. 30, § 62; *see supra* pp.12-14. A proper assessment will build a scientific foundation that will allow project proponents, policymakers, and community members to assess the impact of a proposed action with reference to existing and future conditions. Paula García et al., *Siting for a Cleaner, More Equitable Grid*, *supra* p.8, at 7.

Finally, project proponents should be expected to consider non-traditional energy development and storage opportunities at all appropriate times. *See* G. L. c. 164, § 69O (confirming that, even at the certificate stage, the "need for the facility" should be considered). Eversource applied for approval to construct the substation 10 years ago, and technology has advanced substantially since. *See* RA-XII:353-55 (February 2020 letter from Lydia Edwards, then Boston City Councilor, urging EFSB to consider alternative energy solutions and citing UCS modeling). Project designs should reflect current technology, not the technology available when the project was first proposed.

In the future, for example, UCS expects project proponents to consider energy alternatives that will not require the construction of large substation facilities in already crowded communities. These technologies include "non-wires" alternatives like rooftop solar. *See* E4 the Future et al., *Non-Wires Alternatives: Case Studies from Leading U.S. Projects* 10 (Nov. 2018), https://e4thefuture.org/wp-content/uploads/2018/11/2018-Non-Wires-Alternatives-Report_FINAL.pdf (recognizing that a "significant shift is taking place in the electric power sector today" and the rise of "non-wires alternatives").

In fact, UCS has studied the rooftop solar potential in East Boston and confirmed that the installation of rooftop solar panels across East Boston could yield close to 100 megawatts of energy—enough to meet the electricity needs of 15,000

to 20,000 households in Massachusetts. Paula García, Union of Concerned Scientists, *A Clean Energy Alternative to a Risky Proposed Substation in East Boston*, UCS: The Equation (Nov. 21, 2019), https://blog.ucsusa.org/paula-garcia/a-clean-energy-alternative-to-a-risky-proposed-substation-in-east-boston. Indeed, the roofs of even just one third of East Boston's triple-decker homes could potentially house an aggregated solar capacity of close to 10,000 kilowatts, enough to meet the electricity needs of 1,500 to 2,000 households. *Id.* Pairing these solar systems with one modest-sized battery each could add up to more than 9,000 kilowatt hours of energy storage. *Id.*; *see also* RA-XVII:433 (testimony referencing UCS's study).

B. The robust consideration of EJ principles in project designs will yield multiple benefits.

Incorporating the principles described above into the project design and approval process will serve all interests. These principles and procedures will enhance equity and foster higher-quality decision-making by including diverse perspectives and input. *See* Michele Estrin Gilman, *Beyond Window Dressing: Public Participation for Marginalized Communities in the Datafied Society*, 91 Fordham L. Rev. 503, 523 (2022).

Properly implementing environmental and energy justice principles into project reviews may also prevent delays caused by community opposition and litigation. Indeed, "public participation adds democratic legitimacy to governmental decisions because people gain trust from processes they understand and impact." *Id.*;

see also Jennifer Nash & Daniel E. Walters, *Public Engagement and Transparency in Regulation: A Field Guide to Regulatory Excellence*, Penn Program on Regulation 5 (June 2015), https://www.law.upenn.edu/live/files/4709-nashwalters-ppr-researchpaper062015.pdf (explaining that "deliberation conducted by a regulator can reveal common interests and diffuse conflict").

Finally, continually evaluating the opportunity to pursue new technologies like the non-wires alternatives mentioned above will facilitate an effective clean energy transition with stable and reliable access to energy and fewer environmental burdens. Studies confirm that non-wires alternatives result in reliable and climate-resilient energy at a lower cost for ratepayers while also facilitating needed progress toward the clean energy transition. *See* García, *A Clean Energy Alternative*, *supra* p.27 (describing the reliability and savings benefits of rooftop solar and storage). Those opportunities must be given meaningful attention.

CONCLUSION

For all these reasons, UCS agrees with CLF, GreenRoots, and the Boston Residents Group that the EFSB's certificate approval should be vacated and remanded for further proceedings.

Respectfully submitted,

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As *Amicus Curiae*,
By its attorneys,

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[2] The Clinic would like to acknowledge the contributions of Harvard Law School student Anshika Agrawal.

CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Massachusetts Rule of Appellate Procedure 17(c)(9), that this brief complies with the applicable Massachusetts Rules of Appellate Procedure pertaining to the filing of *amicus* briefs, including, but not limited to Mass. R. App. P. 17 and 20.

This brief complies with the length limitations in Mass. R. App. P. 20(a) because it is produced in the proportional font Times New Roman at size 14 and contains 5,799 total non-excluded words under Mass. R. App. P. 20(a)(3)(E) as counted using the word count feature of Microsoft Word Version 2203.

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CERTIFICATE OF SERVICE

I hereby certify that on April 15, 2024, a copy of this *Amicus* Brief relating to *Conservation Law Foundation v. Energy Facilities Siting Board*, Massachusetts Supreme Judicial Court No. SJC-13521, was served by eFileMA on:

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