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STANDING IN THE WAY OF ENVIRONMENTAL JUSTICE

Lauren Cormany*

INTRODUCTION

In the 1980s, a groundbreaking study revealed that the most determinative factor in the location of environmental hazardous sites was not social or economic status, but race.[1] In 2021, the Environmental Protection Agency ("EPA") published data revealing that people of color are 2.4 times more likely to be exposed to heavy pollution than White people.[2] Individuals regularly exposed to environmentally hazardous sites risk developing long-term, life-threatening health problems. The most severe illnesses associated with exposure to toxic chemicals include cancer and heart disease.[3] Toxic chemical inhalation also causes various nervous, immune, and reproductive system problems, and the inhalation of "fine particulate matter" contributes to between 85,000 and 200,000 premature deaths every year.[4] The term "environmental racism" encompasses a variety of issues, including the disproportionate siting and permitting of environmentally hazardous facilities near minority communities.[5] Bringing justice to communities experiencing environmental racism is one of the many objectives of the environmental justice movement.

Despite nearly forty years of research and advocacy, discriminatory siting continues to plague communities across the United States. The road to environmental justice is fraught with many barriers. The judicial system could be a powerful tool for communities impacted by environmental racism; however, the courts provide little opportunity for justice under the current interpretation of the

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[1] *See* Robert D. Bullard, *Environmental Justice in the 21st Century: Race Still Matters*, 49 PHYLON 151, 151–52 (2001).

[2] Christopher W. Tessum, David A. Paolella, Sarah E. Chambliss, Joshua S. Apte, Jason D. Hill & Julian D. Marshall, *$PM_{2.5}$ Polluters Disproportionately and Systemically Affect People of Color in the United States*, 7 SCI. ADVANCES 1, 1 (2021) (discovering "[r]acial-ethnic minorities in the United States are exposed to disproportionately high levels of ambient fine particulate air pollution ($PM_{2.5}$), the largest environmental cause of human mortality" in an EPA commissioned report).

[3] *See generally Human Exposure and Health: Disease and Conditions,* ENV'T PROT. AGENCY (July 14, 2023), https://www.epa.gov/report-environment/disease-and-conditions [https://perma.cc/XS7H-MF5E].

[4] Tessum et al., *supra* note 2, at 2.

[5] Renee Skelton & Vernice Miller, *The Environmental Justice Movement*, NRDC (Mar. 17, 2016), https://www.nrdc.org/stories/environmental-justice-movement [https://perma.cc/W5CB-67CR].

law. While community organizing forms the cornerstone of the environmental justice movement, it is imperative that legal remedies are available for victims of environmental racism as well. The judiciary plays an important role in the broader environmental justice movement, and Congress must respond accordingly in drafting legislation that addresses environmental justice concerns.

This Note proceeds as follows. Part I provides an overview of the history of environmental racism in discriminatory siting of toxic facilities by highlighting the problems exacerbating the issue and by examining a case study in Louisiana's "Cancer Alley," one of the most well-known examples of disproportionate siting and its lethal effects. Part II provides a brief overview of the barriers to justice victims of environmental racism face when asserting environmental harms as claims in the context of the modern standing doctrine's constitutional and prudential components. It examines the two causes of action plaintiffs currently use to bring cases about discriminatory siting: the Fourteenth Amendment's Equal Protection Clause and Title VI of the Civil Rights Act of 1964. To highlight each doctrine's drawbacks, Part II also provides a selection of case studies in the Federal courts so far. It then explains the history of the Fair Housing Act and its success in combatting discrimination practices in housing by drawing upon several case studies.

Part III proposes three ways forward for providing communities with a cause of action and citizen standing in Federal courts for challenging discriminatory siting decisions. It includes an analysis of the Biden Administration's solutions for environmental racism issues through its Justice40 executive order and Congress's solution through the Environmental Justice For All Act.[6] However, this Note explains that these solutions must go further, and it provides recommendations for their revision. Part III closes with an analysis of the Fair Housing Act and proposes amendments that would empower communities to challenge discriminatory siting decisions in Federal courts on their own.

I. BACKGROUND

A. Brief History and Case Study of Environmental Racism

Dr. Robert Bullard, often referred to as the "Father of Environmental Justice," defines environmental racism as "any policy, practice, or directive that differently affects or disadvantages (whether intended or unintended) individuals, groups, or communities based on race or color."[7] Environmental racism takes many forms, one

[6] *See* Exec. Order No. 14,008, 86 Fed. Reg. 7619 (Jan. 27, 2021); H.R. 2021, 117th Cong. (2021).

[7] Bullard, *supra* note 1, at 160. Scholars and scientists across the nation refer to Dr. Bullard as the "Father of Environmental Justice" due to both his ground-breaking books and his subsequent life's work bringing awareness to the problem of environmental racism. He continues to publish studies and create awareness for communities facing disproportionate effects of pollution based on race. *See generally* Osha Davidson, *A Conversation with Robert Bullard, 'Father of Environmental Justice,'* YALE CLIMATE CONNECTIONS (Feb. 6, 2023),

of the most prominent being the disproportionate siting of toxic or waste facilities near minority communities.[8] Because state and local governments reserve the right to regulate land-use, zoning and permitting decisions are made by local officials.[9] The local officials hold the final authority on the siting decision and the process often includes discussions with a board of local community members.[10] When the project crosses state lines or involves a federal agency actor, the federal government steps in to impose its own land-use regulations and its national environmental policies.[11] The local aspect of siting creates a unique set of circumstances that has contributed to disproportionate impacts on communities based on race and socio-economic status.

Local and state housing policies have a long history of supporting White communities in a way that do not reciprocate for communities of color.[12] Fearing resistance or delay in construction, governments and companies often take the path of least resistance and site toxic facilities near communities that likely will not have the political power to stop them.[13] The "Not in My Backyard" ("NIMBY") practice exemplifies this broader phenomenon and has also accelerated the propensity for governments to site toxic facilities in communities of color. NIMBY groups typically begin in primarily White, upper- to middle-class neighborhoods, and they fight undesirable facilities near their property.[14] Minority communities often do not have the funding, political power, or organizational tools to block toxic facility siting in the same way as White communities.

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https://yaleclimateconnections.org/2023/02/a-conversation-with-robert-bullard-father-of-environmental-justice/ [https://perma.cc/6A82-GVXC].

[8] *See generally* Michael Fisher, *Environmental Racism Claims Brought Under Title VI of the Civil Rights Act,* 25 ENV'T L. 285, 297, 299–300 (1995).

[9] *See* Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 387 (1926) (holding that zoning and land-use decisions are a valid exercise of the police power derived from the Tenth Amendment). *Village of Euclid* essentially established a basis for cities to separate out non-conforming uses, or undesirable sites near neighborhoods under the authority of protecting the community's "health, safety, morals, or general welfare." *Id.* at 395.

[10] Julia Mizutani, Note, *In the Backyard of Segregated Neighborhoods: An Environmental Justice Case Study of Louisiana*, 31 GEO. ENV'T L. REV. 363, 369–70 (2019) (highlighting the issues with pursuing environmental justice through a case study of communities in Louisiana and the barriers they faced to bring their issues to court).

[11] These policies include but are not limited to the procedural requirements of the National Environmental Policy Act's Environmental Impact statement process, the NPDES permitting process requirements of the Clean Water Act, and operating permitting requirements of the Clean Air Act.

[12] *See generally* RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA (2017) (cataloging a history of inequality of housing laws throughout the United States on the basis of race and how the government effectively perpetuated segregation well into current history).

[13] Mizutani, *supra* note 10, at 370.

[14] Mara Gay, *In New York, NIMBYism Finally Outstays Its Welcome*, N.Y. TIMES (Sept. 28, 2022), https://www.nytimes.com/2022/09/28/opinion/new-york-housing-crisis.html? [https://perma.cc/K88K-2KNP].

Further, as compared to White communities, environmental regulations are not equally enforced in communities of color. The regulatory schemes of almost all environmental statutes rely on self-reporting and community investigation.[15] Nearly all environmental crimes investigations begin with a citizen or former employee reporting to the EPA some misconduct.[16] Due to the history of racism and the growing undesirability of toxic facilities, minority communities have been left to carry the burden for the rest of society.

The most infamous example of disproportionate siting comes from the eighty-five-mile stretch along the Mississippi River between Baton Rouge and New Orleans, Louisiana, nicknamed "Cancer Alley."[17] Historically, Cancer Alley was comprised of a string of rural towns and sugarcane fields left by the horrific legacy of slavery in the United States.[18] Beginning in the 1980s, the area became a hotspot for the petrochemical industry, likely due to its proximity to the Gulf of Mexico's oil refinery operations, other heavy chemical processing, and relatively low-cost land.[19] It now houses twenty-five percent of the United States' total petrochemical plants.[20]

The link between the industrial-pollutant emissions and health disparities of communities in the region give the area its name. Companies in the area produce about fifty different carcinogenic chemicals in their industrial processes, including the known carcinogens "benzene, formaldehyde, ethylene oxide, and . . . chloroprene."[21] The EPA makes clear chloroprene is a highly dangerous chemical

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[15] Environmental regulation relies on self-reporting due to the limited resources of the EPA and other enforcement bodies. This self-reporting reliance is supported by all environmental crime statutes having a heightened penalty for dishonest acts or tampering with the testing process. *See generally* Federal Water Pollution Control Act, 33 U.S.C. §§ 1251–1389; Clean Air Act, 42 U.S.C. §§ 7401–7671q; Resource Conservation and Recovery Act, §§ 6901–6981.

[16] *See Criminal Investigations*, ENV'T PROT. AGENCY, https://www.epa.gov/enforcement/criminal-investigations#:~:text=Criminal%20investigations%20may%20be%20prompted,crimes%20could%20also%20be%20prosecuted [https://perma.cc/K88K-2KNP] (last updated Mar. 30, 2023).

[17] Tristan Baurick, *Welcome to "Cancer Alley," Where Toxic Air Is About to Get Worse*, PRO PUBLICA (Oct. 30, 2019, 12:00 PM), https://www.propublica.org/article/welcome-to-cancer-alley-where-toxic-air-is-about-to-get-worse [https://perma.cc/976W-9UQJ]; Mizutani, *supra* note 10, at 372–73.

[18] Baurick, *supra* note 17.

[19] *See* Emilie Karrick Surrusco, *Cancer Alley Rises Up*, EARTHJUSTICE (Sept. 14, 2022), https://earthjustice.org/feature/cancer-alley-rises-up [https://perma.cc/HKM7-B78Q]; Nicole Greenfield, *Advocates Are Sparking a Revolution in Louisiana's 'Cancer Alley*,*'* NRDC (Nov. 10, 2022), https://www.nrdc.org/stories/advocates-are-sparking-revolution-louisianas-cancer-alley [https://perma.cc/D89V-BZUB].

[20] Mizutani, *supra* note 10, at 372–73.

[21] Megan O'Leary, *Lung Cancer in Louisiana's Cancer Alley*, LUNG CANCER CTR. (Feb. 10, 2022), https://www.lungcancercenter.com/news/cancer-alley-louisiana/#:~:text=

because of its high risk of causing cancer, and immune, respiratory, and nervous system problems just from inhalation.[22] Louisianians lament the high number of cancer diagnoses, respiratory illnesses, and miscarriages on the same block or even same street in the area.[23] Due to the amount of heavy industrial processing plants concentrated in a relatively small area, residents have a statistically significant higher risk of developing cancer than the rest of the country.[24] The population in Cancer Alley is forty percent Black, and eighty of its census tracts are ninety percent Black.[25] A 2005 study of air quality in Louisiana compared income-based metrics to race-based metrics in order to determine the risk of developing cancer.[26] The study revealed that the most determinative factor in a person's risk for developing cancer was not income, but race.[27] The next Section examines possible ways for communities like those in Cancer Alley to seek justice for disproportionate siting of toxic industrial plants.

B. Standing as a Barrier to Environmental Justice Claims

Plaintiffs that bring lawsuits involving environmental issues generally face a myriad of barriers. The modern standing doctrine provides one of the most formidable obstacles in pursuing a claim of environmental racism. Standing generally refers to a plaintiff's ability to bring a case in court. The standing doctrine provides judges with parameters for what types of issues are eligible or appropriate for a judicial remedy. In federal court, the standing doctrine consists of both a constitutional and prudential component. The following will address each component in turn.

Article III of the U.S. Constitution limits jurisdiction to cases and controversies. This requirement is referred to as Constitutional standing.[28] The courts have developed a three-part test for determining if Constitutional standing has been met. The defendant must show the following to meet the Constitutional standing standard: (1) an actual injury or threat of injury; (2) a causal connection between the

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Pollutants%20In%20Cancer%20Alley%20Air&text=Among%20these%20are%20benzene%2C%20formaldehyde,used%20in%20several%20industries%20today [https://perma.cc/2MFJ-UMNJ].

[22] *See IRIS Assessments: Chloroprene*, ENV'T PROT. AGENCY, https://iris.epa.gov/ChemicalLanding/&substance_nmbr=1021 [https://perma.cc/42MC-65VC] (last visited June 9, 2023).

[23] Baurick, *supra* note 17.

[24] Wesley James, Chunrong Jia & Satish Kedia, *Uneven Magnitude of Disparities in Cancer Risks from Air Toxics,* 9 INT'L J. ENV'T RSCH. PUB. HEALTH 4365, 4369 (2012).

[25] *Id.* at 4366 (providing data for the EPA-sponsored study on the disproportionate effects of pollution on minority communities).

[26] *Id.* at 4368.

[27] *Id.*

[28] U.S. CONST. art. III, § 2, cl. 1; Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992) (establishing the modern standing doctrine and setting precedent for future public interest groups bringing claims on behalf of communities).

injury and the conduct complained of; and (3) that the court can grant relief in some way.[29]

To break down each of these components further, the injury must be one that is "an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical."[30] The connection between the injury and act by the defendant must be "fairly traceable . . . and not the result of the independent action of some third party not before the court."[31] Lastly, the court must be able to provide a remedy and it must be "likely as opposed to merely speculative that the injury will be addressed by a favorable decision."[32] Without each component, the court will not move forward to issue at hand, or the "merits" of the case.

The second part of standing doctrine is referred to as prudential standing. The prudential standing components developed over time through case law, and courts choose to enforce them as they find appropriate. Prudential standing limits claims involving generalized grievances, third-party standing, and other injuries that fall outside the zone of interest or scope of protection afforded by the Constitution or statute at issue.[33] They do not come explicitly from Article III of the Constitution, but from a policy by the judicial branch to limit issues to those they deem fit for a judicial forum. Generalized grievances refer to injuries that are not specific to the plaintiff but are "common to all members of the public."[34] Limiting generalized grievance claims comes from a concern that the court will not be able to provide an adequate remedy because of the sheer scope or breadth of the problem. The third-party standing component has similar goals. It aims to limit organizations from bringing a case on behalf of someone in an effort to leave "abstract questions of wide public significance" to other branches of government that may be in a better position to address them.[35] Finally, the zone of interests test requires the "plaintiff's grievance arguably fall within the zone of interests protected or regulated by the statutory provision or constitutional guarantee invoked in the suit[.]"[36] This limits standing to only those actually injured and specific interests considered in the statutory scheme at question.

Many environmental issues impact an entire community or humanity in general. The widespread nature of the harm sometimes prevents a party from showing actual, specific injury, and the causation component causes problems for victims of air pollution because of the attenuated connection between air pollutants

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[29] *Lujan*, 504 U.S. at 560–61.

[30] *Id.* at 560 (internal quotation marks omitted).

[31] *Id.* (internal quotation marks omitted).

[32] *Id.* at 561 (internal quotation marks omitted).

[33] *Id.* at 560–61.

[34] *Id.* at 575 (quoting United States v. Richardson, 418 U.S. 166, 177 (1974)).

[35] Kowalski v. Tesmer, 543 U.S. 125, 129 (2004) (quoting Warth v. Seldin, 422 U.S. 490, 500 (1975)).

[36] Bennett v. Spear, 520 U.S. 154, 162 (1997) (deciding whether the interest in preserving endangered species falls within the scope of interest in the Endangered Species Act citizen suit provision).

and illnesses. Although scientific data supports links between health concerns and carcinogens, proof of actual causation can be difficult.[37] Unfortunately, many of the consumer products and industrial processes individuals encounter every day have a risk of releasing a carcinogen.[38] It can be difficult for a plaintiff to surmount the evidentiary hurdle of showing the causal connection between one specific carcinogen-emitting factory as the cause of their illness.[39] Claims often fail under the generalized grievance prohibition for similar reasons.[40] Organizations or citizen groups bringing complaints on behalf of a particular community also face the risk of failing due to third-party standing limitations.

To remedy some of the problems associated with bringing a case alleging environmental harm, Congress included citizen suit provisions in many of its environmental statutes.[41] Citizen suit provisions generally provide an explicit cause of action for citizens to enforce the statute against the government, organizations and corporations, or other private citizens. These provisions concretely establish an injury for the citizen and help them surmount the difficulty of showing standing. Courts often respond to citizen suit provisions by relaxing the standing requirements.[42]

In 2020, a group of young adults in Oregon surmounted the actual injury obstacle by convincing a federal court to accept the detrimental effects of climate change as an actual injury without having to draw upon a citizen suit provision.[43] In supporting the decision, District Court Judge Aiken explained that

> [a] deep resistance to change runs through defendants' and intervenors' arguments for dismissal: they contend a decision recognizing plaintiffs' standing to sue, deeming the controversy justiciable, and recognizing a federal public trust and a fundamental right to climate system capable of

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[37] *See, e.g., Health and Environmental Effects of Hazardous Air Pollutants*, ENV'T PROT. AGENCY (Mar. 27, 2023), https://www.epa.gov/haps/health-and-environmental-effects-hazardous-air-pollutants [https://perma.cc/7AYY-YULA]; Nicole Rura, *More Evidence of Causal Link Between Air Pollution and Early Death*, HARV. T.H. CHAN SCH. PUB. HEALTH (June 26, 2020), https://www.hsph.harvard.edu/news/press-releases/more-evidence-of-causal-link-between-air-pollution-and-early-death/ [https://perma.cc/5SGR-HFKL]; Note, *Causation in Environmental Law: Lessons from Toxic Torts*, 128 HARV. L. REV. 2256, 2258–59 (2015) [hereinafter *Causation in Environmental Law*].

[38] *See, e.g., Learn About Asbestos*, ENV'T PROT. AGENCY (Mar. 27, 2023), https://www.epa.gov/asbestos/learn-about-asbestos [https://perma.cc/Y8X9-CNHL].

[39] *See Causation in Environmental Law*, *supra* note 37, at 2265–67.

[40] *Id.*

[41] *See, e.g.*, 33 U.S.C. § 1365; 42 U.S.C. § 7604; 16 U.S.C. § 1540(g).

[42] *See* Evan Tsen Lee & Josephine Mason Ellis, *The Standing Doctrine's Dirty Little Secret*, 107 NW. U. L. REV. 169, 190–92 (2012).

[43] *See* Juliana v. United States, 947 F.3d 1159, 1168 (9th Cir. 2020) (finding that a group of young adults from various states experiencing the effects of climate change do have a concrete injury recognizable by a court of law).

> sustaining human life would be unprecedented, as though that alone requires its dismissal.[44]

Courts often shy away from moving to the merits of environmental justice-related issues because of the abstract or politically charged nature of environmentally related cases.[45] *Juliana* provided a new precedent and looks forward to a future where more courts feel comfortable moving to the merits of a climate change or environmental justice-related case.

While many environmentalists rejoiced and saw *Juliana* as a path forward for the environmental justice movement, communities of color continue to face many obstacles to justice. Victims of environmental racism still do not have a viable cause of action to bring a case. They continue to face problems showing causation and the other prudential components; further, victims currently cannot bring claims under any relevant statutes.[46] As part of a cohesive plan for bringing justice to victims of environmental racism, Congress should statutorily create a cause of action that specifically addresses discriminatory siting.

II. ANALYSIS

Part II analyzes the two main avenues used to challenge discriminatory siting and proposes a way forward following in the footsteps of the Fair Housing Act.[47] Attorneys currently use two different legal doctrines to challenge discriminatory siting of heavy industry and waste facilities near minority communities: the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964.[48] Both approaches utilize civil rights law as opposed to environmental law, as more traditional environmental legislation—the National Environmental Policy Act, the Clean Air Act, the Clean Water Act, and others—does not directly address siting decisions for toxic facilities. The environmental statutes typically contain their own specific procedural and substantive provisions for their own specific goals.

Specifically, Part II addresses why neither the Equal Protection Clause nor Title VI presents a viable option for providing timely relief to communities facing environmental racism through disproportionate siting of toxic facilities. Utilizing the Fair Housing Act, Section II.C also provides insight into new avenues for how

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[44] Juliana v. United States, 217 F. Supp. 3d 1224, 1262 (D. Or. 2016) *rev'd,* 947 F.3d 1159, 1168 (9th Cir. 2020).

[45] *Causation in Environmental Law, supra* note 37, at 2272.

[46] *See infra* Part II.

[47] Plaintiffs also bring nuisance suits in state courts to challenge potentially harmful siting decisions. While these lawsuits are another powerful tool in the environmental justice movement, a nuisance-specific analysis is outside the scope of this Note. This Note focuses on Federal jurisdiction and comprehensive solutions to environmental justice concerns for communities throughout the country.

[48] *See* James H. Colopy, *The Road Less Traveled: Pursuing Environmental Justice Through Title VI of the Civil Rights Act of 1964*, 13 STAN. ENV'T L.J. 125, 127–28 (1994).

environmental racism claims might be a legal avenue for relief. Part III following suggests some solutions.

A. Equal Protection Claims and the Problem of Showing Discriminatory Intent

The Fourteenth Amendment houses the Equal Protection Clause and mandates that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[49] Through the Equal Protection clause, plaintiffs can sue a state for discriminatory treatment in distributing the burdens and benefits of state laws.[50] Therefore, in theory, plaintiffs have a cause of action against siting decision-makers for disproportionately siting hazardous sites near minority communities. In practice, however, the doctrine of equal protection does not extend to justice for victims of environmental racism.

In *Washington v. Davis* the court found the Equal Protection Clause did not include an extension past intentional discriminatory acts.[51] The Equal Protection analysis instead required a showing of discriminatory intent.[52] In other words, the court interpreted the Equal Protection Clause to protect against actions that had "a racially discriminatory purpose," but it did not protect against actions "solely because [they had] a racially disproportionate impact."[53] Since the court made "discriminatory intent" a component of the Equal Protection doctrine, plaintiffs now must provide evidence that the government official acted intentionally to discriminate. Proof that the impacts of their decision had discriminatory effects no longer suffice to trigger Equal Protection clause rights.

In 1977, the court expanded and reaffirmed the discriminatory intent doctrine in *Village of Arlington Heights v. Metropolitan Housing Development Corporation*.[54] In *Arlington Heights*, the court used the *Davis* standard requiring evidence of discriminatory intent and applied it to land-use zoning decisions.[55] The court furthered the strict evidentiary requirements for showing intentional discrimination. They stated that to meet the evidentiary standard for discriminatory intent, the plaintiff had to show that race was as a "motivating factor" in making the

[49] U.S. CONST. amend. XIV, § 1.

[50] Colopy, *supra* note 48, at 127 (explaining the history of Title VI and a proposing that more plaintiffs bring cases under the provision to continue momentum in the EPA and courts).

[51] Washington v. Davis, 426 U.S. 229, 240 (1976) (dismissing a case that involved policies that had the effect of limiting the number of black police officers in the District of Columbia but did not prove intentional discriminatory acts).

[52] *Id.*

[53] *Id.* at 230.

[54] Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977) (extending the rule set forth in *Davis* and applying it to a zoning decision to refuse changing a community from single-family housing to multi-family housing, reflecting the socio-economic statistics showing minority families are more likely to live in multi-family houses).

[55] *Id.* at 264–65.

zoning or siting decision.[56] The court then included a list of possible evidentiary options for proving racially motivated actions including comments made by government officials, sudden changes in zoning decisions before administering siting permits, and departure from typical procedure in siting decisions.[57]

In the context of polluting facilities in disproportionately minority communities, siting issues often involve disparate impact—a disproportionate amount of toxic and polluting facilities near communities of color compared to predominately White communities. In most cases of environmental racism, plaintiffs lack evidence to show the government intentionally sited a polluting facility near a minority community. Due to the heightened standard of discriminatory intent, the Equal Protection Clause also does not provide victims of environmental racism with a viable path to justice.

Two early cases demonstrate the barriers to using the Equal Protection Clause as a cause of action for environmental racism claims. In 1971, a community group sued to block the construction of two highways through a public park in Harrisburg, Pennsylvania.[58] The group—the Harrisburg Coalition Against Ruining the Environment—alleged that the Department of Transportation violated their Equal Protection rights by planning to extend I-81 and a new road called the River Relief Route through Wildwood Park. The park provided a center for recreation and community gathering in a historically Black neighborhood of Harrisburg. The primary evidence the group used to prove discriminatory intent was an alleged statement from the Director of Public Works during a meeting with the Governor of Pennsylvania. The Director allegedly stated: "Wildwood Park was allowed to deteriorate by past City administrations because black people started to use the Park and white people began to go elsewhere for their recreation."[59] The court declined to consider this evidence in their decision since the Director said the statement came from other people telling him this was so, rather than his own personal knowledge or opinion.[60] The court then decided to dismiss the Equal Protection Clause claim because the group did not present sufficient evidence of discriminatory intent in choosing Wildwood Park for the highway site.[61] Here, the court set a high bar for providing concrete evidence of discriminatory intent in choosing industrial or environmentally hazardous sites in predominately minority neighborhoods. Even despite a clear, racially charged statement, the court still declined to find discriminatory intent.

Another instance of the judiciary requiring more concrete evidence of discriminatory intent came in another case a few years later. In *Bean v. Southwestern Management Corporation*, a community group sued to enjoin a siting permit for a

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[56] *Id.* at 265–66.

[57] *Id.* at 267.

[58] *See* Harrisburg Coal. Against Ruining Env't v. Volpe, 330 F. Supp. 918 (M.D. Pa. 1971).

[59] *Id.* at 926.

[60] *Id.*

[61] *Id.* at 927.

waste facility near a minority community in Houston, Texas.[62] To meet the evidentiary standard of discriminatory intent, the plaintiffs used a theory of a pattern of discrimination in solid waste facility siting and a departure from the typical procedure for waste facility siting in this particular instance.[63] The court rejected both theories and found that the plaintiffs did not provide enough facts to show discriminatory intent.[64] Although the plaintiffs provided statistics and data supporting both of their theories, the court held they did not meet the high standard of proving discriminatory intent.[65]

More recently, in 2021 an individual in Indiana sued a variety of government officials, including the Indiana Department of Child Services, under a theory of Equal Protection violations for environmental racism.[66] The plaintiff, Yananta, alleged the state violated several of his rights and those of his daughter when they wrongfully separated the two.[67] The judge dismissed the case for failure to assert a claim stating the following:

> The court is unaware of any case recognizing a standalone claim of environmental racism, though Defendants refer to a law review article explaining that such a claim may proceed under the Equal Protection Clause of the Fourteenth Amendment or Title VI of the Civil Rights Act. . . . Regardless of the vehicle in which Yananta seeks to allege his environmental racism claim, he has failed to allege any facts that could support such a claim against the Woods Defendants, or indeed any of the other Defendants. Sweeping claims of "environmental deprivation through racist doctrines" and "environmental racism" with no accompanying factual allegations are insufficient to support a claim.[68]

While the court did not definitively reject the possibility of an Equal Protection Clause cause of action for environmental racism, it implied its hesitance in delving into a new application of the doctrine.

B. Title VI Claims and Sandoval's Bar on Disparate Impact Claims

Title VI of the Civil Rights Act of 1964 states, "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[69] Title VI further allows federal

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[62] Bean v. Sw. Waste Mgmt. Corp., 482 F. Supp. 673 (S.D. Tex. 1979).
[63] *Id.* at 677.
[64] *Id.*
[65] *Id.*
[66] Isi Chito Lusa Yananta v. Ind. Dep't of Child Servs., 2021 U.S. Dist. LEXIS 42133 (S.D. Ind. Feb. 8, 2021).
[67] *Id.* at *3–4.
[68] *Id.* at *14–15 (citations omitted).
[69] 42 U.S.C. § 2000d.

agencies to "effectuate the provisions of section 601 [42 U.S.C. § 2000d]."[70] The EPA provides funding to state environmental agencies. Each state then uses the federal funds to carry out the nation's environmental policies. State action with EPA funds includes the siting and permitting of waste facilities and heavy industry through subsequent federal regulations. Therefore, Title VI authorizes the EPA to bring a suit on behalf of minority communities facing the negative impacts of discriminatory siting.[71]

While on the surface Title VI seems like a viable option for bringing environmental justice to minority communities, it fails in practice. In *Alexander v. Sandoval*, the Supreme Court decided Title VI provides no private cause of action for citizens alleging a disparate impact.[72] In *Sandoval*, the plaintiff challenged the Alabama Department of Public Safety under Title VI through a theory of disparate impact.[73] The Alabama Department of Public Safety decided to only administer driving tests in English.[74] Sandoval challenged the decision as discriminating against people based on their national origin and disparately limiting the availability of driver's licenses for people of non-American nationality.[75] Since the Department of Public Safety received its funding from the United States Department of Transportation and Department of Justice, the plaintiff believed Title VI provided him with a cause of action. However, the court analyzed previous court decisions concerning private rights of action in the Civil Rights Act and the legislative history of Title VI.[76] It concluded that Congress did not intend to create a private citizens' right of action under the statute for a disparate action situation.[77] It held that private citizens could not enforce the provisions of the regulations promulgated by the agencies onto state departments.[78]

Under *Sandoval*, communities alleging discrimination must rely on the EPA to bring forward Title VI claims. The EPA carries out its investigations without the involvement of the complainants and ultimately decides if it will pursue a claim in court.[79] So far, the EPA has seemed unwilling to pursue disparate impact siting or environmental racism claims.[80] According to a 2016 study by the United States

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[70] *Id.* § 2000d-1.

[71] Fisher, *supra* note 8, at 286 (evaluating the shortcomings and barriers to bringing a claim involving discriminatory waste facility siting under Title VI).

[72] Alexander v. Sandoval, 532 U.S. 275, 293 (2001).

[73] *Id.*

[74] *Id.* at 275.

[75] *Id.*

[76] *Id.*

[77] *Id.* at 293.

[78] *Id.*

[79] Fisher, *supra* note 8, at 315.

[80] *See* Susan H. Richardson, Alexander M. Bullock & Jeffrey J. Davidson, *A Sleeping Giant Awakens (Maybe?) – "Environmental" Enforcement of Title VI of the Civil Rights Act of 1964 in the Era of the Biden Administration*, MONDAQ (Jan. 2, 2022), https://www.mondaq.com/unitedstates/environmental-law/1148050/a-sleeping-giant-awake

Commission on Civil Rights, the EPA received hundreds of Title VI complaints in the past few decades but made only two formal findings of discrimination.[81] The Agency made both legal findings during Barack Obama's presidency; however, the Agency's hesitation to investigate and pursue disparate impact claims has happened in both Republican and Democratic administrations.[82] Due to both discretion and the lengthy process of administrative investigations, the vast majority of victims of environmental racism fail to receive any relief under Title VI.

However, the future looks somewhat more promising for utilizing the EPA's process of Title VI enforcement. In 2022, the EPA released its initial investigatory findings of disparate impact in a parish of Louisiana's "Cancer Alley." The report concluded,

> EPA's initial investigation raises concerns that the Departments' methods of administering their programs and activities related to air pollution control and health risk mitigation and communication as described below may have an adverse and disparate impact on Black residents who live and/or attend school near Denka, who live near the proposed location for the Formosa facility, and those who live in the Industrial Corridor.[83]

This indicates a motivation to begin pursuing and prioritizing disparate impact cases. However, for the reasons mentioned above, the environmental justice movement needs to rely on a variety of avenues to bring solutions to communities experiencing environmental injustice.

C. The Fair Housing Act: A New Way Forward?

In the mid-1950s, civil rights activists began fighting for fair housing practices by bringing discrimination claims in courts and organizing communities for protests across the United States.[84] Instead of relying on jurisprudence and developing doctrines through case law to eradicate racism in the housing sector, Congress

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ns-maybe-environmental-enforcement-of-title-vi-of-the-civil-rights-act-of-1964-in-the-era-of-the-biden-administration [https://perma.cc/78YN-2PAX] (providing insight into the changing policy ideas around amending Title VI to include standing for environmental racism victims).

[81] *Id.*

[82] *Id.*

[83] Letter from Lilian S. Dorka, Deputy Assistant Adm'r for External C. R., to Sec'y Brown and Sec'y Philips EPA Complaint Nos. 01R-22-R6, 02R-22-R6, and 04R-22-R6 (2022).

[84] *See* U.S. DEP'T OF HOUSING AND URBAN DEV., HISTORY OF FAIR HOUSING, https://www.hud.gov/program_offices/fair_housing_equal_opp/aboutfheo/history [https://perma.cc/LQV5-BQK8] (last visited June 9, 2023); *see, e.g.*, Shelley v. Kraemer, 334 U.S. 1 (1948) (finding racially motivated covenants in deeds unconstitutional and moving the ball forward on not allowing discrimination in housing practices before the Fair Housing Act of 1964).

passed Title VIII of the Civil Rights Act of 1968, or the Fair Housing Act, in the wake of Dr. Martin Luther King's assassination.[85] Many states then followed in Congress' footsteps and created their own state law versions.[86]

The Fair Housing Act expressly prohibits discrimination based on race, color, religion, sex, familial status, or national origin.[87] Specifically, it forbids an individual or government from engaging in practices to "discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin."[88] The Act further stipulates in section 3617, "[i]t shall be unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed . . . any right granted or protected . . . ."[89] It also contains an explicit cause of action for private citizens in its citizen suit provision in stating, "[a]n aggrieved person may commence a civil action . . . after the occurrence or the termination of an alleged discriminatory housing practice, or the breach of a conciliation agreement entered into under this subchapter, whichever occurs last, to obtain appropriate relief with respect to such discriminatory housing practice or breach."[90] The Fair Housing Act did more than just provide victims of discrimination with a legal path to a remedy; it sent the message that the United States would no longer tolerate discriminatory housing practices. This double intention helped to curb the problem of discriminatory housing across the United States.

In 2015, the Supreme Court interpreted the Fair Housing Act to allow both disparate impact claims and intentional discrimination.[91] The case involved a challenge to the Texas Department of Housing and Community Affairs for its allocation of tax credits for low-income housing in Dallas, Texas.[92] The plaintiffs alleged that the state Department of Housing and Community Affairs perpetuated neighborhood segregation in Dallas by disproportionately awarding tax credits for low-income housing developments in Black neighborhoods far more often than White neighborhoods.[93] The court analyzed two other civil-rights-based statutes enacted around the same time as the Fair Housing Act and the legislative intent behind their enaction.[94] In finding that the Fair Housing Act did envision addressing disparate impact claims, it concluded, "antidiscrimination laws must be construed to encompass disparate-impact claims when their text refers to the consequences of actions and not just to the mindset of actors, and where that interpretation is

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[85] *See* U.S. DEP'T OF HOUSING AND URBAN DEV., *supra* note 84.

[86] *See, e.g.*, UTAH CODE § 57-21-1.

[87] Fair Housing Act, 42 U.S.C. § 3604.

[88] *Id.* § 3604(b).

[89] *Id.* § 3617.

[90] *Id.* § 3613(a).

[91] *See* Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 531 (2015).

[92] *Id.* at 526.

[93] *Id.*

[94] *Id.* at 531–32.

consistent with statutory purpose."[95] The court also acknowledged the history of discriminatory siting in United States history in stating, "[t]hese unlawful practices include zoning laws and other housing restrictions that function unfairly to exclude minorities from certain neighborhoods without any sufficient justification. Suits targeting such practices reside at the heartland of disparate-impact liability."[96] Victims of discriminatory housing practices do not need to rely on the Equal Protection Clause, the Department of Housing and Urban Development (HUD), or the Civil Rights Act of 1964 to bring a claim. While not always perfect in its enforcement, the legislation, at the very least, provides a solution to the specific wrongful conduct plaintiffs allege—something victims of environmental racism do not yet have.[97]

The Fair Housing Act seems like it could provide relief for plaintiffs in environmental racism cases. The Fair Housing Act's citizen suit provision remedies the issue of relying on the EPA in Title VI claims. Its disparate impact standard cures the problem of discriminatory intent in Equal Protection Clause claims. However, disproportionate siting challenges brought under the Fair Housing Act have largely failed.[98] Community groups have tried to persuade courts to interpret the words "services" and "facilities" in the context of the provision prohibiting persons from "discriminat[ing] against any person . . . in the provision of *services* or *facilities* in connection therewith, because of race, color, religion, sex, familial status, or national origin" as including toxic facility siting decisions.[99] Most courts have been hesitant in finding the Fair Housing Act to include environment-related siting decisions and created precedent requiring a tighter connection between the dwelling and housing services.[100]

Several cases establish how the Fair Housing Act has fallen short. For example, in *Laramore v. Illinois Sports Facility Authority*, the court rejected broader private or public decisions as falling under the purview of the Fair Housing Act in stating, "[e]ven under a broad reading, however, 'services or facilities' refers to 'services generally provided by governmental units such as police and fire protection or garbage collection.' Section 3604(b) cannot be extended to a decision such as the selection of a stadium site . . . ."[101] More recently, following Hurricane Katrina in

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[95] *Id.* at 533.

[96] *Id.* at 539.

[97] Jerusalem Demsas, *America's Racist Housing Rules Really Can Be Fixed*, VOX (Feb. 17, 2021, 8:00 AM), https://www.vox.com/22252625/america-racist-housing-rules-how-to-fix [https://perma.cc/RZ67-RR22]; *see generally* ROTHSTIEN, *supra* note 12 (discussing the systemic effects of discriminatory housing in the United States despite the Fair Housing Act's success).

[98] Mizutani, *supra* note 10, at 386–87.

[99] Fair Housing Act, 42 U.S.C. §3604 (emphasis added).

[100] *See* Terenia Urban Guill, *Environmental Justice Suits Under the Fair Housing Act*, 12 TUL. ENV'T L.J. 189, 226 (1998).

[101] 722 F. Supp. 443, 452 (N.D. Ill. 1989); *see also* Southend Neighborhood Imp. Ass'n v. St. Clair Cnty.,743 F.2d 1207, 1210 (7th Cir. 1984) ("Section 3604(a) is designed to ensure

New Orleans, Louisiana, community groups sought to restore neighborhoods with an eye to both equitable housing and environmentally just recovery efforts.[102] Since cleanup plans after a natural disaster combine both housing programs and environmental programs, environmental justice advocates hoped *Laramore* would create new precedent for future discriminatory environmentally hazardous siting.[103] However, the EPA facilitated a settlement between the community group Louisiana Environmental Action Group, the HUD, and the polluting waste facilities nearby.[104] The settlement, while a win for the East New Orleans community and step forward for the environmental justice movement, dodged any new precedent for future cases.

Since the legislature did not intend for the Fair Housing Act to address problems of the siting of toxic facilities and environmental zoning, courts have been hesitant to allow plaintiffs to use it in this way. Victims must again rely on discretion and broad interpretation in asserting their claims. To promote uniformity in enforcement of the Fair Housing Act and provide a clearer path forward for victims of environmental racism, the title should be amended.

III. PROPOSED SOLUTIONS

The following Part analyzes three proposed solutions to the issues identified above, specifically, the issues with bringing citizen suits challenging discriminatory siting of toxic facilities near minority communities.

A. House Bill: The Environmental Justice For All Act

A proposed solution to the issue of standing in discriminatory siting and disparate impact environmental claims comes in the form of a house bill called the Environmental Justice For All Act.[105] Section 602(b) of the bill amends Title VI of the Civil Rights Act by stating, "[i]n an action brought by an aggrieved person under this title against a covered entity who has engaged in unlawful discrimination based on disparate impact prohibited under this title (including implementing regulations), the aggrieved person may recover attorney's fees (including expert fees), and costs of the action."[106] The provision directly addresses the issues with bringing a claim of disparate impact under Title VI of the Civil Rights Act and overturns *Sandoval*.[107] Through the Environmental Justice For All Act, Congress authorizes communities to bypass the EPA and take immediate action on their own.

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that no one is denied the right to live where they choose for discriminatory reasons, but it does not protect the intangible interests in the already-owned property raised by the plaintiff's allegations.").

[102] Mizutani, *supra* note 10, at 387.

[103] *Id.*

[104] *Id.*

[105] H.R. 2021, 117th Cong. (2021).

[106] *Id.*

[107] *Id.*

While promising and important to consider, the bill still provides too narrow of a solution. Even with the citizen suit-provision, Title VI still only applies to claims of disparate siting in a round-about way. Plaintiffs must rely on the fact that the permitting authority in their community received federal funds for the project. Since Title VI says nothing specifically about zoning and permitting, plaintiffs must continue to rely on a broad interpretation of the statute's provisions.

It is likely, then, that Congress must continue to rely on amending Title VI instead of explicitly prohibiting discriminatory siting because of federalism concerns.[108] Siting and zoning permits typically come from state or local zoning boards.[109] Congress likely cannot direct state and local permitting authorities to create their own prohibitions on discriminatory siting and disparate impact claims.

However, Congress can follow the precedent of *National Independent Business v. Sebelius* and encourage states to comply with the federal policy against discriminatory siting by making it contingent on federal funding for various environmentally hazardous projects.[110] A policy such as this would add more teeth to the bill already affirming citizen enforcement of disparate impact claims. While the provision in *Sebelius* went too far and became effectively a coercive "gun to the head" for states to comply with federal programming in the Affordable Care Act, the precedent does not bar Congress from creating reasonable parameters around their allocation of funds.[111] In the case of discriminatory siting of toxic facilities, the federal government can expand their programs to require local and state officials to create their own disparate impact analyses before receiving federal funds. To avoid the issues raised in *Sebelius*, the federal programs could cut down a percentage of federal funds given to a project for not coming up with some way to address environmental racism in their decision. The analysis could look similar to the procedural requirements of the National Environmental Policy Act, for example.[112] Procedures like those in the National Environmental Policy Act could also serve to define what kind of projects may fall under the category of an environmentally hazardous project from the outset. This way, the Environmental Justice For All Act could provide citizens with a cause of action and create further policy incentives to prevent discriminatory siting of toxic facilities in the first place.

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[108] Due to the history of Federalism principles, Congress cannot directly compel the states to create certain policies or carry out their policies. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius 567 U.S. 519 (2012).

[109] *Infra* Part II.

[110] *See Sebelius*, 567 U.S. at 581–84 (invalidating a provision of the Affordable Care Act compelling states to implement their programs or risk losing all Medicaid funding).

[111] *Id.* at 581.

[112] The National Environmental Policy Act creates procedural requirements for agencies making large decisions about land use and project planning. Agencies must create an Environmental Impact Statement, or alternatively, a Finding of No Significant Impact before going forward with a large agency decision. Something similar for state siting decisions would not be preempted because NEPA does not have environmental justice requirements, such as looking at disparate impacts on a community based on race or national origin.

More simply, states would be encouraged to do their part in providing citizens a path to environmental justice. States should enact their own versions of the Environmental Justice For All Act and explicitly include a cause of action for citizens alleging disparate impact in toxic waste facility siting or add citizen standing to their own state civil rights bills. This circumvents the problem of federalism concerns and addresses the concerns more appropriately at the local level—where the siting and zoning decisions are made. Overturning *Sandoval* presents a positive step in the right direction; however, state and local governments must do more to fill in the gaps of federal policy and provide a path to change and justice in discriminatory siting of environmentally hazardous facilities.

B. Executive Order: Justice40

During his campaign, President Biden promised a place for environmental justice in his White House agenda. Since his presidency began in 2020, he has created both the White House Environmental Justice Interagency Council ("IAC") and the White House Environmental Justice Advisory Council ("WHEJAC") to address national environmental justice concerns.[113] He also issued Executive Order 14008 or "Justice40" during his first few days in office. The Justice40 initiative promises to disburse forty percent of the federal funds allotted to environmental cleanup to "disadvantaged communities."[114] The policy hopes to allocate funds for minority communities experiencing the most dramatic effects of pollution and, more broadly, climate change.[115] President Biden included Justice40 as part of his Build Back Better Framework as well.[116]

President Clinton took a similar approach and signed an executive order to address environmental racism following the first studies connecting race and toxic siting in the 1990s.[117] However, the executive order did little to change the landscape of disparate impacts of toxic facility siting throughout the United States.[118] Likewise, Justice40 does nothing to remedy the barriers plaintiffs face in pursuing environmental justice in court and forces communities to wait on the government for justice. This avenue also provides no long-term solution for environmental racism; rather, it only allocates funds to already impacted communities on a broad

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[113] THE WHITE HOUSE, ENVIRONMENTAL JUSTICE, https://www.whitehouse.gov/environmentaljustice/ [https://perma.cc/2KBR-79T5] (last visited Aug. 9, 2023).

[114] Exec. Order No. 14,008, 86 Fed. Reg. 7619 (Jan. 27, 2021).

[115] THE WHITE HOUSE, JUSTICE40, https://www.whitehouse.gov/environmentaljustice/justice40/ [https://perma.cc/9TKX-A288] (last visited Aug. 9, 2023).

[116] THE WHITE HOUSE, THE BUILD BACK BETTER FRAMEWORK, https://www.whitehouse.gov/build-back-better/ [https://perma.cc/P4YB-TMEJ].

[117] Bullard, *supra* note 1, at 152 (explaining the drawbacks of President Clinton's executive order and its failure to create change in solving issues of environmental racism).

[118] *See id.*

scale. And even worse, Justice40 does not mention race at all.[119] Additionally, while President Biden remains in office, Justice40 likely stands, but future administrations may pass new executive orders curtailing it. Funding and awareness through Justice40 help as an avenue for victims of environmental racism to seek justice; however, they do not go far enough to address the broader enforcement problems identified.

C. Amending the Fair Housing Act

Congress regularly adapts the Fair Housing Act to address new civil rights issues time to time to extend its protection to new groups that are in need.[120] Most environmental racism cases concern the placement of toxic facilities near the homes of minority families. Instead of environmental justice advocates having to rely on a court's broad interpretation of the Fair Housing Act, Congress should amend it to include an explicit provision prohibiting the discriminatory siting of environmentally hazardous facilities.

Congress could follow a clearer path to address environmental justice concerns by making discriminatory siting of environmentally hazardous facilities subject to litigation under the Fair Housing Act. The section could read much like the main provision in stating, "it shall be unlawful to create a disparate impact for exposure to environmentally hazardous or toxic substances on a community due to race, color, religion, sex, familial status, or national origin."[121] This provision could stand alone in the Fair Housing Act with a possible cross-reference to the definition section. In defining hazardous substances or potentially dangerous pollutants, the Fair Housing Act could borrow standards from the Clean Water Act, Clean Air Act, or Resource and Recovery Conservation Act.[122] Alternatively, this provision could delegate to the EPA, in connection with the HUD, the authority to promulgate separate rules setting out the potentially harmful substances and emissions standards for the Fair Housing Act. The data the EPA has already collected concerning the cancer-causing potential of certain chemicals could also be a benchmark for this section.[123] For

[119] Lisa Friedman, *White House Takes Aim at Environmental Racism, but Won't Mention Race*, N.Y. TIMES (Feb. 15, 2022), https://www.nytimes.com/2022/02/15/climate/biden-environment-race-pollution.html?searchResultPosition=1 [https://perma.cc/D5PZ-FAAY] (evaluating the efficacy of the Biden administration's politically promised plan for combatting environmental racism and other environmental justice concerns).

[120] For example, Congress added "familial status" and "handicap" to the protected classes in 1988. *See* Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619.

[121] *Cf.* 42 U.S.C. § 3604 (modifying the current statutory language to include this provision).

[122] The EPA categorizes six criteria pollutants under the Clean Air Act. *See* 42 U.S.C. §§ 108–09.

[123] *See Health and Ecological Hazards Caused by Hazardous Substances*, ENV'T PROT. AGENCY (Jan. 3, 2023), https://www.epa.gov/emergency-response/health-and-ecological-hazards-caused-hazardous-substances [https://perma.cc/2TKN-GHYK].

example, the agency could set an air quality standard for a certain amount of known cancer-causing chemicals in communities near air pollutant producing sites.

Another less explicit solution would be to amend the definition section of the Fair Housing Act. Section 3602 provides a list of definitions for terms used throughout the statute.[124] Congress should amend section 3602 to define "services" and "facilities" to explicitly include the siting and permitting of environmentally dangerous facilities, waste sites, and other polluting industries. This provision could read as follows:

> "Services" means, including but not limited to, publicly owned treatment works, recycling plants, waste facilities, private industrial plants, electricity producing sites, and other projects contributing to the community and in some way emitting hazardous substances. "Facilities" means, including but not limited to, publicly owned treatment works, waste processing sites, recycling processing sites, and other private and public industrial producers of air pollutants or other potentially toxic substances.[125]

D. Summary of Proposed Solutions

These proposed amendments would address many of the issues environmental plaintiffs face. Unlike Title VI, the Fair Housing Act does not hinge on the receipt of federal funds. Plaintiffs have a cause of action against local siting authorities without this contingency. Further, the Fair Housing Act would provide environmental plaintiffs with a broader pool of defendants that extends past government actors. Private corporations that repeatedly and systemically choose to place their facilities next to minority neighborhoods would also be held responsible under the Fair Housing Act. The Fair Housing Act would also allow the disparate impact analysis so environmental plaintiffs would not face the barrier of proving the Equal Protection clause's discriminatory intent analysis. Finally, a specific environmental amendment to the Fair Housing Act would signal to the public, government, and private companies that this country will no longer tolerate minority communities disproportionately bearing the burdens of toxic and waste facilities.

CONCLUSION

Private citizens need an avenue for justice through the judicial system on the siting of hazardous facilities. The health impacts of exposure to toxic facilities—like cancer, respiratory illnesses, and birth defects—are severe and victims deserve their day in court. While initiatives by government agencies and grassroots organizations provide influential roads to improvement, the judiciary stands to only bolster the efficacy of the work in the environmental justice field. The most effective way to

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[124] Fair Housing Act, 42 U.S.C. § 3602.

[125] *Cf.* 42 U.S.C. § 3602 (modifying the current list to include the proposed provisions).

include the courts is through the legislature creating a cause of action targeting the issues that communities face. Solutions to the issue of citizen standing in challenging discriminatory effects of siting toxic facilities include amending the Fair Housing Act and adding stronger policies to both the Environmental Justice For All Act and President Biden's Justice40 executive order.