NOTE

Is Strict Scrutiny Too Strict? Remediating Racial Disparities in Environmental Hazard Exposure

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ABSTRACT

As environmental justice issues garner national attention, legislatures have considered ways to address unequal exposure to environmental hazards. Some have passed laws that prioritize brownfield remediation grants to minority communities with the goal of getting grant money to communities that need it most. These laws are subject to strict scrutiny review because they differentiate on the basis of race. To survive strict scrutiny review, the government must prove that it has a compelling interest to remediate racial discrimination and that the policy is narrowly tailored to meet that interest. This Note argues that neither federal nor state governments are likely to meet these requirements because courts have imposed a nearly insurmountable burden to overcome strict scrutiny. Instead, this Note proposes that states should prioritize environmental grants to communities that are subject to the highest number of environmental burdens. The Council of Environmental Quality already lists thirty environmental burdens that qualify a community as "disadvantaged." State legislatures can use these

* J.D., expected May 2025, The George Washington University Law School; B.A. 2022, Loyola University Maryland. I would like to extend my sincere gratitude to all the editors and staff at *The George Washington Law Review* and to Professor Pollack for his mentorship throughout the note-writing process. I am also grateful to all my environmental law professors, especially Professor Dunn and Professor Heineken, for their thoughtful feedback. Finally, I would like to thank my parents for their support throughout all my academic pursuits.

factors to assess which communities are faced with the greatest cumulative environmental burdens. This will address the racial disparity in proximity to environmental hazards because Black, Hispanic, and Asian communities are, on average, disproportionately subject to higher cumulative burdens. Importantly, it will also avoid strict scrutiny review by remaining race-neutral.

Table of Contents

Introduction

The Ironbound, a predominately Hispanic and immigrant neighborhood in Newark, New Jersey, is home to a seventeen-mile stretch of the Passaic River contaminated with toxic waste that threatens human health.[1] The hazards come from the Diamond Alkali site, a former chemical plant that used to be one of the world's largest producers of Agent Orange.[2] In the 1950s and 1960s, the site produced

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1 Erik Ortiz, *'We've Been Forgotten': In Newark, N.J., a Toxic Superfund Site Faces Growing Climate Threats*, NBC News (Oct. 1, 2020, 6:00 AM), https://www.nbcnews.com/news/us-news/we-ve-been-forgotten-newark-n-j-toxic-superfund-site-n1240706 [https://perma.cc/6MGH-W6LR].

2 *America's Biggest Crime Scene*, PBS: Peril & Promise (May 31, 2022), https://www.pbs.org/wnet/peril-and-promise/2022/05/episode-2-americas-biggest-crime-scene-hazard-nj/ [https://perma.cc/KE92-FGFD].

dioxin, a hazardous chemical known to cause cancer, as a byproduct of Agent Orange.[3] Dioxin leached into the nearby Passaic River and has been found in parks, swimming pools, and even the basements of homes.[4] Despite the evidence of contamination, setbacks in negotiations with Diamond Alkali's successors has delayed the timeline for federal cleanup, and New Jersey has not allocated enough cleanup funds.[5] Neither state nor federal agencies have set a target date to fully clean the site.[6] According to residents of the Ironbound, "[i]t feels like we've been forgotten."[7]

Just two hundred miles north of Newark, the city of Brockton, Massachusetts, had a different experience. Like Newark, Brockton was disproportionately burdened by brownfields[8] as compared to other Massachusetts cities,[9] and almost seventy percent of its population do not identify as White.[10] Unlike Newark, though, Brockton received a total of $475,000 to clean up environmental contaminants in 2023 and 2024, after a revitalization plan was proposed in 2016.[11] By clearing environmental hazards, previously unused areas can now be developed as part of the Downtown Urban Revitalization Plan, bringing economic opportunity in addition to environmental safety.[12] The disparity between the Ironbound and Brockton brownfields can be blamed, in

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3 *See id.*

4 *See Community Activism Around Diamond Alkali Superfund Site Leads to Strong EJ Legislation, NJ, US*, Glob. Atlas of Env't Just. (Apr. 25, 2023), https://ejatlas.org/conflict/diamond-alkali-superfund-site-dioxin-pollution-in-passaic-river [https://perma.cc/5MEE-XGVU].

5 *See* Ortiz, *supra* note 1.

6 *Id.*

7 *Id.*

8 The Environmental Protection Agency defines "brownfield" as a piece of land that has been contaminated with hazardous chemicals or other pollutants, making it unsuitable for development before it is cleaned. *About*, EPA (Aug. 2, 2024), https://www.epa.gov/brownfields/about [https://perma.cc/62P3-EF7V]. Contaminants from brownfields can sometimes leach into the surrounding community, as demonstrated by the Diamond Alkali contaminants in the Ironbound. *See Community Activism Around Diamond Alkali Superfund Site Leads to Strong EJ Legislation, NJ, US*, *supra* note 4.

9 *See Massachusetts Brownfield Tracking Spreadsheet*, Mass. Dep't of Env't Prot. (2018), https://www.mass.gov/doc/brownfields-list/download [https://perma.cc/2VAQ-NXSB] (provides list of brownfield sites in Massachusetts).

10 *See QuickFacts: Brockton City, Massachusetts*, U.S. Census Bureau, https://www.census.gov/quickfacts/fact/table/brocktoncitymassachusetts/RHI225223 [https://perma.cc/UE87-P485].

11 *See FY23 Community One Stop for Growth Awards*, Mass.gov, https://www.mass.gov/info-details/fy23-community-one-stop-for-growth-awards [https://perma.cc/FM7E-UYVJ]; *FY24 Community One Stop for Growth Awards*, Mass.gov, https://www.mass.gov/info-details/fy24-community-one-stop-for-growth-awards [https://perma.cc/5AN2-UMRG]; Brent Addleman, *Massachusetts Spending $2.6M to Address Brownfields*, Ctr. Square (Nov. 14, 2022), https://www.thecentersquare.com/massachusetts/article_1168e732-645f-11ed-acb0-7b328861ffad.html [https://perma.cc/T4YN-GJ5B].

12 *Transforming Downtown Brockton*, Brockton, https://brockton.ma.us/city-departments/planning/transforming-downtown/ [https://perma.cc/7L24-U8D7].

part, on differences between the states' brownfield grant programs.[13] New Jersey's Brownfield and Contaminated Site Remediation Act[14] does not instruct agencies to consider any demographic or risk factors when allocating redevelopment funds other than to prioritize sites where "discharge poses an imminent and significant threat."[15] In contrast, Massachusetts's Brownfield Redevelopment Fund prioritizes grants for cleanups within one mile of a community with a high minority population, low median household income, or a low percentage of English language proficiency.[16]

The constitutionality of brownfield redevelopment grant programs that prioritize recipients on the basis of race—like Massachusetts's program—is uncertain.[17] Although some states have passed laws to remedy long-standing racial disparities in exposure to environmental hazards,[18] any state or federal legislation that differentiates on the basis of race must be evaluated by courts under strict scrutiny review.[19] To survive strict scrutiny, the legislation must be narrowly tailored to serve a compelling interest.[20] For example, courts have struck down COVID-19 relief programs that favor minority applicants, finding that they fail this two-part test.[21] In a 2023 case, *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College* ("*SFFA*"),[22] the Supreme

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13 *Compare* N.J. STAT. ANN. § 58:10B-7 (West 2024), *with* MASS. GEN. LAWS ch. 23G, § 29A(d)(12) (2024), *and id.* ch. 30, § 62.

14 N.J. STAT. ANN. § 58:10B-7 (West 2024).

15 *See id.*

16 *See* ch. 23G, § 29A(d)(12); ch. 30, § 62. In 2022, the Massachusetts Development Finance Agency awarded over $2.6 million in grants to city governments and local nonprofits to clean up contaminated brownfields. Addleman, *supra* note 11. Over $1.6 million of this fund went to cleanup efforts of brownfields located in environmental justice neighborhoods (defined as communities with a high minority population, low median household income, or a low percentage of English language proficiency). *See FY23 Community One Stop for Growth Awards*, *supra* note 11.

17 *See* Alex Brown, *It May Have Just Gotten Harder to Protect Minority Communities from Pollution*, WASH. STATE STANDARD (Aug. 29, 2023, 12:28 PM), https://washingtonstatestandard.com/2023/08/29/it-may-have-just-gotten-harder-to-protect-minority-communities-from-pollution/ [https://perma.cc/D6NY-BK6F]; J. Michael Showalter & Robert A.H. Middleton, *Will Environmental Justice Programs Be Affected by SCOTUS's Affirmative Acton Decisions?*, ARENTFOX SCHIFF (July 6, 2023), https://www.afslaw.com/perspectives/environmental-law-advisor/will-environmental-justice-programs-be-affected-scotuss [https://perma.cc/XZL6-F869].

18 *Infra* Section I.B.2.

19 Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 220 (1995).

20 16B C.J.S. *Constitutional Law* § 1275 (2024).

21 Vitolo v. Guzman, 999 F.3d 353, 357, 360–64 (6th Cir. 2021) (rejecting a federal loan program for restaurants that granted priority to Black, Hispanic, Asian, and Native American restaurant owners because it could not survive strict scrutiny); Faust v. Vilsack, 519 F. Supp. 3d 470, 476 (E.D. Wis. 2021) (rejecting a United States Department of Agriculture ("USDA") loan forgiveness plan for socially disadvantaged farmers because USDA could not establish that the plan was narrowly tailored to serve a compelling interest); *accord* Wynn v. Vilsack, 545 F. Supp. 3d 1271, 1288 (M.D. Fla. 2021) (rejecting the same USDA plan because it was not narrowly tailored).

22 600 U.S. 181 (2023).

Court struck down university affirmative action programs—programs where universities explicitly weighed race as a factor in admission.[23] The Supreme Court ruled that race could not be used to allocate benefits on a "zero-sum" basis because doing so would use race as a negative and, therefore, would not be narrowly tailored.[24]

Reacting to *SFFA*'s narrowing of strict scrutiny review, lawmakers of existing race-based environmental grant programs are considering revising these programs to remove race considerations.[25] At the federal level, the Council on Environmental Quality ("CEQ") revised a tool that instructs agencies on allocating environmental grant funding in ways that deemphasized race.[26] Although the CEQ's screening tool initially considered race, it now considers thirty race-neutral environmental burdens.[27] At the state level, legislators in Washington and Michigan are examining the legality of their states' environmental justice efforts.[28] In Massachusetts, too, there are concerns that the legislation prioritizing grants based on race may not be constitutional.[29]

This Note argues that current brownfield redevelopment grants that prioritize funding on the basis of race will not survive strict scrutiny despite evidence that Black, Hispanic, and Asian communities are generally burdened with higher numbers of environmental stressors, because the grants are not narrowly tailored to serve a compelling interest. Instead, state governments should enact legislation that prioritizes grants to communities that are subject to the highest number of cumulative burdens, as outlined by the CEQ's thirty race-neutral environmental burdens, to bridge the racial disparity without triggering strict scrutiny review. Part I of this Note describes the history of environmental discrimination in the United States and considers current legislation intended to remedy these discrepancies, including

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23 *Id.* at 230–31.

24 *See id.* at 218–19, 230.

25 In Washington, for example, lawmakers are considering amending a statute that directs funding for air quality projects to "overburdened" communities, including racial or ethnic minorities. Brown, *supra* note 17.

26 Suzanne Yohannan, *CEQ Floats Justice40 Screening Tool but Defends Decision to Drop Race*, InsideEPA (Feb. 18, 2022), https://insideepa.com/daily-news/ceq-floats-justice40-screening-tool-defends-decision-drop-race [https://perma.cc/B338-BG26]. *See generally* Showalter & Middleton, *supra* note 17 (describing the Biden Administration's general reluctance to use race as a factor in environmental justice policies because of the Supreme Court's attitude toward affirmative action).

27 *Infra* Section I.B.1.

28 *See* Brown, *supra* note 17.

29 *See* Letter from Conservation L. Found., to Hon. Karen E. Spilka, President, Mass. Senate, Hon. Robert A. DeLeo, Speaker, Mass. House of Representatives, Hon. Michael J. Rodrigues, Chair, Mass. Senate Comm. on Ways & Means, & Hon. Aaron Michlewitz, Chair, Mass. House Comm. on Ways & Means 5–7 (June 18, 2020) [hereinafter Letter from CLF], https://www.clf.org/wp-content/uploads/2020/06/Letter-on-Environmental-Justice-Legislation-and-Constitutionality-.pdf [https://perma.cc/HU2G-75H5].

race-neutral federal legislation and a race-conscious Massachusetts law. Part I also discusses the two-part test for strict scrutiny review and the heightened narrow tailoring requirements set by *SFFA*. Part II considers whether federal or state governments can demonstrate a compelling interest to remedy race-based environmental discrimination and meet the narrow tailoring requirement. Part II then recommends that state legislatures prioritize grants based on exposure to environmental burdens so that communities with a higher number of environmental risk factors are the first to get environmental grants.

I. Background

Past race-based discrimination in the United States led to wide disparities in exposure to environmental burdens today.[30] Despite this history of racial discrimination, federal programs do not explicitly address race.[31] In contrast, states like Massachusetts are more direct in targeting racial environmental disparities, introducing legislation that instructs agencies to prioritize grants to communities with populations that are predominately members of racial minorities.[32] This race-based legislation, however, must be reviewed under a strict scrutiny standard because racial classifications are inherently suspect under the Equal Protection Clause and thus subject to close levels of judicial scrutiny.[33] To survive strict scrutiny, the policy must be narrowly tailored to address a compelling government interest.[34]

A. Legacy of Environmental Discrimination

Historic federal and state policies created conditions that attracted environmental hazards to Black and immigrant communities.[35] Beginning in the 1930s, the federal government designated predominantly Black and immigrant communities as "[h]azardous" and, therefore, typically ineligible for federally backed loans or favorable mortgage terms.[36]

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30 *Infra* Section I.A.

31 *Infra* Section I.B.1.

32 *Infra* Section I.B.2.

33 *See* April J. Anderson, Cong. Rsch. Serv., IF12391, Equal Protection: Strict Scrutiny of Racial Classifications 1 (2023) (describing "[w]hen strict scrutiny [a]pplies").

34 *See infra* Section I.C.

35 Raymond Zhong & Nadja Popovich, *How Air Pollution Across America Reflects Racist Policy from the 1930s*, N.Y. Times (Mar. 9, 2022), https://www.nytimes.com/2022/03/09/climate/redlining-racism-air-pollution.html [https://perma.cc/J52A-G7XM]; Darryl Fears, *Redlining Means 45 Million Americans Are Breathing Dirtier Air, 50 Years After It Ended*, Wash. Post (Mar. 9, 2022, 8:00 AM), https://www.washingtonpost.com/climate-environment/2022/03/09/redlining-pollution-environmental-justice/ [https://perma.cc/Y95B-FZNU].

36 Bruce Mitchell & Juan Franco, Nat'l Cmty. Reinvestment Coal., HOLC "Redlining" Maps: The Persistent Structure of Segregation and Economic Inequality 4–5 (2018).

The process, known as "redlining," degraded the value of land owned by Black and immigrant families.[37] This undesirable property attracted development projects like highways, incinerators, and industrial plants that took advantage of the cheap land.[38] State and local zoning decisions continued to attract environmental hazards to redlined areas, resulting in the placement of more of the same hazards in predominately Black, Hispanic, and Asian communities.[39]

The Fair Housing Act[40] outlawed federal redlining policies in 1968,[41] but their effects remain.[42] Predominately Black, Hispanic, and Asian communities are, in the aggregate, closer to hazardous waste facilities than predominately White communities.[43] Historically redlined communities have higher rates of exposure to air toxins and closer proximity to hazardous waste facilities, among other environmental hazards.[44] Nationwide studies indicate that predominately Black, Asian, and Hispanic communities experience higher concentrations of air pollution, even when controlling for income, employment, and age.[45] State-level studies

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37 *See id.*; Patrick Trent Greiner & Rachel G. McKane, *Does Racism Have Inertia? A Study of Historic Redlining's Impact on Present-Day Associations Between Development and Air Pollution in US Cities*, Env't Rsch. Letters, Oct. 2022, at 1, 1.

38 Zhong & Popovich, *supra* note 35; Fears, *supra* note 35; Greiner & McKane, *supra* note 37, at 1.

39 Fears, *supra* note 35; Julia Mizutani, Note, *In the Backyard of Segregated Neighborhoods: An Environmental Justice Case Study of Louisiana*, 31 Geo. Env't L. Rev. 363, 366 (2019) (describing how state and local zoning laws restrict industrial development in "wealthier, whiter communities," which directs development to "poorer, black communities").

40 42 U.S.C. §§ 3601–3619.

41 *Redlining*, Legal Info. Inst. (Apr. 2022), https://www.law.cornell.edu/wex/redlining [https://perma.cc/32U4-VPGG].

42 Greiner & McKane, *supra* note 37, at 2; Haley M. Lane, Rachel Morello-Frosch, Julian D. Marshall & Joshua S. Apte, *Historical Redlining Is Associated with Present-Day Air Pollution Disparities in U.S. Cities*, 9 Env't Sci. & Tech. Letters 345, 348 (2022).

43 Paul Mohai & Robin Saha, *Which Came First, People or Pollution? Assessing the Disparate Siting and Post-Siting Demographic Change Hypotheses of Environmental Injustice*, Env't Rsch. Letters, Nov. 2015, at 1, 8. The study rejects the possibility that Black, Hispanic, and Asian families are simply moving to polluted areas. *Id.* By examining changes in the presence of hazardous waste facilities over time, it concludes that demographic changes "tend to 'attract' [hazardous waste facilities] rather than the other way around." *Id.*

44 Issam Motairek, Zhuo Chen, Mohamed H.E. Makhlouf, Sanjay Rajagopalan & Sadeer Al-Kindi, *Historical Neighbourhood Redlining and Contemporary Environmental Racism*, 28 Loc. Env't 518, 523 (2023) (finding "a significant association between historical[ly] redlin[ed]" areas and a variety "of environmental exposures"); Lara J. Cushing, Shiwen Li, Benjamin B. Steiger & Joan A. Casey, *Historical Red-Lining Is Associated with Fossil Fuel Power Plant Siting and Present-Day Inequalities in Air Pollutant Emissions*, 8 Nature Energy 52, 52 (2022) (finding that redlined neighborhoods were more likely to have a fossil-fuel plant sited nearby and more likely to experience higher rates of air pollution).

45 *See, e.g.*, Lara P. Clark, Dylan B. Millet & Julian D. Marshall, *Changes in Transportation-Related Air Pollution Exposures by Race-Ethnicity and Socioeconomic Status: Outdoor Nitrogen Dioxide in the United States in 2000 and 2010*, Env't Health Persps., Sept. 2017, at 1, 8–9

show the same trends; in Massachusetts, for example, Black, Asian, and Hispanic communities are more likely to live near ecological hazards than White communities.[46] This exposure results in higher rates of lead and arsenic exposure, asthma, and cancer in affected communities.[47]

These racial disparities in exposure to environmental hazards and the associated health effects become even more clear after considering the cumulative impact of multiple environmental and social hazards.[48] Emphasizing cumulative impacts acknowledges that a community experiencing multiple social and environmental hazards is more burdened and less resilient than a community experiencing just one hazard.[49] Predominately Black and Hispanic communities are more likely to experience higher cumulative impacts of environmental hazards compared to White communities.[50] A Massachusetts study, for example, found that "high-minority communities" are nine times more likely to face a higher cumulative burden exposure rate than "low-minority communities."[51]

Despite the disproportionate environmental impact on predominately minority communities, funding for environmental justice grants often fails to reach these communities.[52] Communities with fewer

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(on average, nonwhite groups are exposed to thirty-seven percent more NO_2 air pollution than white groups); Provat K. Saha, Albert A. Presto, Steve Hankey, Julian D. Marshall & Allen L. Robinson, *Racial-Ethnic Exposure Disparities to Airborne Ultrafine Particles in the United States*, Env't Rsch. Letters, Oct. 2022, at 1, 1 (finding ambient particle number concentrations are thirty-five percent higher for Asian, Black, and Hispanic groups than the national mean, even after controlling for income).

46 *See* Daniel R. Faber & Eric J. Krieg, *Unequal Exposure to Ecological Hazards: Environmental Injustices in the Commonwealth of Massachusetts*, 110 Env't Health Persps. 277, 277 (2002) (finding "hazardous . . . facilities are disproportionately . . . concentrated in communities of color"); Veronica Eady, *Environmental Justice in State Policy Decisions*, *in* Just Sustainabilities: Development in an Unequal World 168, 173 (Julian Agyeman et al. eds., 2001) ("communities of colour" in Massachusetts "host nine times the number of hazardous waste sites" as compared to "white communities"); Yunliang Meng, *Schools near Toxics Release Inventory Sites: An Environmental Justice Study for Schoolchildren in Boston, MA*, Cybergeo: Eur. J. Geography, 2020, at 1, 1 (schools in Boston with high percentage of minority schoolchildren are more likely to be located near hazardous sites).

47 *See* A. Rochaun Meadows-Fernandez, *The Double Jeopardy of Environmental Racism*, Hopkins Bloomberg Pub. Health (Oct. 14, 2020), https://magazine.jhsph.edu/2020/double-jeopardy-environmental-racism [https://perma.cc/3KVH-UMZU].

48 *See* Faber & Krieg, *supra* note 46, at 277, 286.

49 *See* Off. of Rsch. & Dev., EPA, Cumulative Impacts Research: Recommendations for EPA's Office of Research and Development 3–5 (2022).

50 *See* Rajat Shrestha, Sujata Rajpurohit & Devashree Saha, *CEQ's Climate and Economic Justice Screening Tool Needs to Consider How Burdens Add Up*, World Res. Inst. (Mar. 15, 2023), https://www.wri.org/technical-perspectives/ceq-climate-and-economic-justice-screening-tool-cumulative-burdens [https://perma.cc/6S4G-7TRX].

51 Faber & Krieg, *supra* note 46, at 286.

52 Brady Dennis & Vanessa Montalbano, *Funding for Environmental Justice Is Coming. Will It Reach Communities Most in Need?*, Wash. Post (Jan. 11, 2023, 7:30 AM),

"financial, technical, and legal resources" struggle to apply for environmental grants.[53] Without additional support, the local governments in these communities often lack the capacity to develop, administer, and report on projects that would qualify for these grants.[54]

B. Environmental Justice Laws

In an attempt to bridge the environmental disparity created by redlining and other discriminatory practices, federal and state governments have considered environmental grant programs that prioritize minority and low-income communities.[55] The federal Justice40 program requires agencies to direct forty percent of federal spending to "disadvantaged communities," as defined by the CEQ's Climate and Economic Justice Screening Tool ("CEJST").[56] On the state level, several states have enacted or considered legislation that would allocate funding for environmental projects on the basis of race.[57]

1. Federal Government

The Biden Administration's Justice40 Initiative required[58] that forty percent of certain federal climate, clean energy, pollution remediation, and other spending go to "disadvantaged communities."[59] The Justice40 initiative called on the CEQ to design CEJST as a tool to map

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https://www.washingtonpost.com/politics/2023/01/11/funding-environmental-justice-is-coming-will-it-reach-communities-most-need/ [https://perma.cc/FH7D-8NBM]; *see also* Glenn Thrush, *An Alabama Town's Sewage Woes Test Biden's Infrastructure Ambitions*, N.Y. Times (Jan. 24, 2022), https://www.nytimes.com/2022/01/12/us/politics/infrastructure-environmental-racism-alabama-black-belt.html [https://perma.cc/28RK-6TU4].

53 Jonathan L. Ramseur, Cong. Rsch. Serv., R44963, Wastewater Infrastructure: Overview, Funding, and Legislative Developments 5 (2018).

54 *See* Carlos Martín, Andre M. Perry & Anthony Barr, *How Equity Isn't Built into the Infrastructure Bill—And Ways to Fix It*, Brookings (Dec. 17, 2021), https://www.brookings.edu/articles/how-equity-isnt-built-into-the-infrastructure-bill-and-ways-to-fix-it/ [https://perma.cc/3TJC-CFWB].

55 *Infra* Sections I.B.1–.2.

56 *Infra* Section I.B.1.

57 *Infra* Section I.B.2.

58 Although the future of the Justice40 Initiative is uncertain under the Trump Administration, *see* Amudulat Ajasa & Anna Phillips, *What Trump's Second Administration Could Mean for Environmental Justice*, Wash. Post (Dec. 4, 2024), https://www.washingtonpost.com/climate-environment/2024/12/04/trump-epa-biden-environmental-justice-pollution/ [https://perma.cc/V229-CG5T], the development of the CEJST and its implementation are central to how state agencies should address environmental remediation in the future, as this Note discusses, which remains true regardless of federal actions.

59 *Justice40: A Whole-of-Government Initiative*, White House, https://www.whitehouse.gov/environmentaljustice/justice40/ [https://perma.cc/JP7M-5JDF]; *see also* Exec. Order No. 14,008, 86 Fed. Reg. 7,619, 7,631–32 (Jan. 27, 2021).

disadvantaged communities across the country.[60] To define "disadvantaged community," CEJST names thirty environmental burdens sorted into eight categories: climate change, health, legacy pollution, water and wastewater, energy, housing, transportation, and workforce development.[61] A community is considered "disadvantaged" if it meets at least one of the thirty environmental burdens and the associated socioeconomic burden.[62] For example, a census tract in Newark, New Jersey[63] is considered disadvantaged because it meets ten environmental burdens in six different categories: climate change,[64] housing,[65] legacy pollution,[66] transportation,[67] water and wastewater,[68] and workforce development.[69] A nearby census tract in Hudson County, New Jersey[70] is also considered disadvantaged because it meets one environmental burden: linguistic isolation.[71] In total, 109.1 million people live in disadvantaged communities, as defined by CEJST.[72]

The CEJST definition for "disadvantaged communities" was developed iteratively with opportunities for public comment throughout the process.[73] Environmental organizations and State Attorneys

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60 *Justice40: A Whole-of-Government Initiative*, WHITE HOUSE, https://www.whitehouse.gov/environmentaljustice/justice40/ [https://perma.cc/JP7M-5JDF].

61 For a comprehensive list of the thirty environmental burdens and their associated socioeconomic burden, see *Methodology*, CEJST, https://screeningtool.geoplatform.gov/en/methodology [https://perma.cc/DAW7-2JLP].

62 *Id.* CEJST designed each environmental burden to be accompanied by a corresponding socioeconomic burden—for most environmental burdens, the community must also be "at or above the [sixty-fifth] percentile for low income." *Id.*

63 Climate and Economic Justice Information for Census Tract No. 34013006900, CEJST, https://screeningtool.geoplatform.gov/en/ [https://perma.cc/6VZ3-D3M8] (click "Explore the Map"; then search for "Newark, NJ"; then zoom in toward the highlighted boundary; then click on "Oliver St," located east of McCarter Highway, west of Van Buren Street, and south of Walnut Street). Alternatively, see row 41,299 of the "communities list data" spreadsheet. *Downloads*, CEJST, https://screeningtool.geoplatform.gov/en/downloads [https://perma.cc/6Q69-P87H] ("communities list data" spreadsheet provides the full data set CEJST used to calculate burdens).

64 It is in the ninety-seventh percentile for projected flood risk. *Supra* note 63.

65 It is at or above the ninetieth percentiles for housing cost, lack of green space, and lack of indoor plumbing. *Supra* note 63.

66 It is in the ninety-eighth or ninety-ninth percentile for proximity to hazardous waste facilities, proximity to risk management facilities, and proximity to superfund sites. *Supra* note 63.

67 It is in the ninety-seventh percentile for diesel particulate matter exposure. *Supra* note 63.

68 It is in the ninety-ninth percentile for underground storage tanks and releases. *Supra* note 63.

69 It is in the ninety-ninth percentile for linguistic isolation. *Supra* note 63.

70 Climate and Economic Justice Information for Census Tract No. 34017012300, CEJST, https://screeningtool.geoplatform.gov/en/ [https://perma.cc/6VZ3-D3M8] (click "Explore the Map"; then search for "Arlington, NJ"; then click on "Arlington"; the Census Tract is located south of Route 7, north of Stewart Avenue, and west of Beech Street). Alternatively, see row 41,601 of the "communities list data" spreadsheet. *Downloads*, *supra* note 63 ("communities list data" spreadsheet provides the full data set CEJST used to calculate burdens).

71 It is in the ninety-third percentile for linguistic isolation. *Supra* note 70.

72 Shrestha et al., *supra* note 50.

73 *Id.*

General have criticized CEJST for not including race as an additional socioeconomic criterion.[74] Those commenters argue "race is the most important predictor of the distribution of environmental hazards," and failing to explicitly consider race is insufficient to address this disparity.[75] They believe omitting race will force agencies to overlook middle-class Black, Asian, and Hispanic communities that still experience disproportionate environmental impacts.[76] Some commenters have also called on CEJST to include cumulative burdens, so that communities that experience multiple environmental burdens will be viewed as more "disadvantaged" than communities that experience fewer environmental burdens.[77]

2. State Legislation

Several states, like Michigan and Rhode Island, have proposed legislation that would allow regulators to prioritize benefits to minority and low-income communities.[78] A few states have succeeded in passing laws that direct state agencies to prioritize grant funding to minority communities.[79] In March 2021, Massachusetts enacted "An Act Creating

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74 *See, e.g.*, Letter from Simone Lightfoot, Associate Vice President for Env't Just. & Climate Just., Nat'l Wildlife Fed'n & Shannon Heyck-Williams, Senior Dir. for Climate & Energy Pol'y, Nat'l Wildlife Fed'n, to Brenda Mallory, Chair, CEQ (Apr. 22, 2022) (on file with author) [hereinafter Nat'l Wildlife Fed'n Letter]; Letter from Carla D. Walker, U.S. Dir., Env't Just. & Equity, World Res. Inst., to CEQ (May 24, 2022) (on file with author); Letter from Letitia James, Att'y Gen. of N.Y., Brian E. Frosh, Att'y Gen. of Md., Maura Healey, Att'y Gen. of Mass., Joshua H. Stein, Att'y Gen. of N.C., Ellen F. Rosenblum, Att'y Gen. of Or., Karl A. Rancine, Att'y Gen. of D.C., TJ Donovan, Att'y Gen. of Vt., to Brenda Mallory, Chair, CEQ 13 (May 25, 2022) (on file with author) [hereinafter State Attorneys General Letter].

75 Nat'l Wildlife Fed'n Letter, *supra* note 74, at 1.

76 *See* Letter from Emily Miller, Staff Att'y, Food & Water Watch, to CEQ 3 (on file with author).

77 *See* State Attorneys General Letter, *supra* note 74, at 1–3.

78 Michigan legislators introduced a bill in June 2023 that would direct a public service commission to prioritize clean energy benefits to "communities consisting predominantly of minorities or households below the poverty line." H.R. 4760, 102d Leg., Reg. Sess. § 6(3)(e) (Mich. 2023). Similarly, the Rhode Island legislature considered a bill that "would define 'environmental justice focus areas' based on a combination of . . . factors," including the population's race. *U.S. States Begin 2023 by Introducing Bills to Address Cumulative Impacts of Pollution*, Nat'l Caucus of Env't Legislators (Apr. 3, 2023), https://www.ncelenviro.org/articles/u-s-states-begin-2023-by-introducing-bills-to-address-cumulative-impacts-of-pollution/ [https://perma.cc/2WJA-JP4B]; S.B. 770, 2023 Leg., Jan. Sess. § 42-17.11-2(6).

79 For example, the Washington legislature enacted a law in 2021 that declared its "compelling interest in preventing and addressing . . . environmental health disparities" of "vulnerable populations" through fund allocation. Wash. Rev. Code § 70A.02.005(3) (2024). The act defines vulnerable populations as including "[r]acial or ethnic minorities." *Id.* § 70A.02.010(14)(b)(i). Similarly, Colorado passed a law in 2022 that directed the Colorado Energy Office to prioritize air quality improvement grants to "[d]isproportionately impacted communities." Colo. Rev. Stat. § 24-38.5-116(3)(b)(III)(A) (2024). It defines a "[d]isproportionately impacted community"

a Next Generation Roadmap for Massachusetts Climate Policy" ("MA Climate Law").[80] The MA Climate Law amended the law establishing Massachusetts' Brownfields Redevelopment Fund, directing the Massachusetts Development Finance Agency to administer grants for environmental assessments and cleanups and give "preference . . . to projects located within 1 mile of an environmental justice population."[81] Under the MA Climate Law, "environmental justice population[s]" include communities in which racial minorities make up at least forty percent of the population.[82] The MA Climate Law is supported by environmental groups, like the Conservation Law Foundation ("CLF"), which champion the bill as necessary to narrow the racial disparity in exposure to environmental hazards.[83]

C. Strict Scrutiny

Any legislation that classifies persons or objects into groups is subject to judicial review to ensure that it complies with the Equal Protection Clause.[84] Legislation that disadvantages certain individuals but "do[es] not target suspect classes . . . or fundamental interests" is subject to rational basis review.[85] This highly deferential standard prevents courts from declaring legislation unconstitutional unless there is no conceivable rationale for the classification.[86] For example, *Ohio Bureau of Employment Services v. Hodory*[87] considered a statute that granted unemployment benefits to employees who were terminated

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as including communities where "the proportion of the population that identifies as people of color is greater than forty percent." *Id.* § 24-4-109(2)(b)(II)(C).

80 Mass. Gen. Laws ch. 23G, § 29A(d), ch. 30, § 62 (2024); Miriam Wasser, *What You Need to Know About the New Mass. Climate Law*, WBUR (Mar. 26, 2021), https://www.wbur.org/news/2021/03/26/new-mass-climate-law-faq [https://perma.cc/N44C-SCWR].

81 Mass. Gen. Laws ch. 23G, § 29A(d) (2024). The Development Finance Agency is also directed to consider other factors, including the poverty levels in the area, the "community benefits associated with the project," and whether the municipality in which the site is located has provided other funding for brownfield redevelopment. *Id.* § 29A(f).

82 *Id.* ch. 30, § 62 (2024). The definition also includes communities where (1) "annual median household income is not more than [sixty-five] per cent of the statewide . . . median," (2) "[twenty-five] per cent . . . of [the] households lack English language proficiency," or (3) "minorities comprise [twenty-five] per cent . . . of the population and the . . . median household income" is no more than 150 percent of the state median household income.

83 *See* Letter from CLF, *supra* note 29, at 1; Rishya Narayanan, *We Resolve to Keep Fighting for Strong Climate Laws*, CLF (Mar. 3, 2022), https://www.clf.org/blog/2022-fight-for-strong-climate-laws/ [https://perma.cc/8YGM-SFTE].

84 *See* 16B Am. Jur. 2d *Constitutional Law* § 849 (2024).

85 *Id.* § 850. Age, for example, is not a suspect class, so policies that group people by age are subject to rational basis review, not strict scrutiny review. *See* Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 312–13 (1976).

86 16B Am. Jur. 2d, *supra* note 84, § 850.

87 431 U.S. 471 (1977).

because an employer locked them out but disqualified employees from receiving benefits if they were terminated after going on strike.[88] The Court upheld the policy, reasoning that there was a rational basis for differentiating between employees that voluntarily went on strike and employees who were involuntarily locked out of the workplace, even if the system provided "only 'rough justice.'"[89]

When legislation classifies and disadvantages individuals based on a "suspect classification" like race, it is subject to strict scrutiny review.[90] Unlike rational basis review, strict scrutiny review is a rigorous standard that invites close judicial review.[91] Judicial decisions applying strict scrutiny are highly fact-dependent and have produced splintered opinions,[92] but over time, a cohesive jurisprudence has emerged.[93] To determine whether a race-based grant program can survive strict scrutiny, courts apply a two-part test: first, the government action must serve a compelling interest, and, second, it "must be the least intrusive or restrictive" means possible to achieve that interest.[94] This standard is difficult to meet: in the past thirty years the Supreme Court has struck down almost every affirmative action plan it has reviewed.[95]

1. Compelling Interest

For a race-based policy to meet the compelling interest requirement, the government must establish that the policy's stated goal can be considered a compelling government interest.[96] Remediating past discrimination is considered a compelling government interest when the discrimination is rooted in a specific government policy or law.[97]

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88 *Id.* at 491.

89 *Id.* at 491, 493.

90 *See* 16B Am. Jur. 2d, *supra* note 84, § 854. Strict scrutiny review is also implicated when a classification is "aimed at [a] fundamental interest[]." *Id.* There is also a third category of review, known as "intermediate scrutiny," that applies to classifications that are not facially suspect but still create "some . . . constitutional difficulties," such as classifications based on sex, gender, or illegitimacy, but it is outside the scope of this Note. *Id.* § 853.

91 *Id.* § 854.

92 *See* Anderson, *supra* note 33, at 1.

93 *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (affirming and applying strict scrutiny review); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 218–30 (1995) (providing an overview of strict scrutiny jurisprudence).

94 *See* 16B C.J.S., *supra* note 20.

95 *See e.g.*, *J.A. Croson Co.*, 488 U.S. at 511; *SFFA*, 600 U.S. 181, 230 (2023). *But see* Grutter v. Bollinger, 539 U.S. 306, 343 (2003); *see also* Peter N. Salib, *Big Data Affirmative Action*, 117 Nw. U. L. Rev. 821, 850 (2022).

96 *See, e.g.*, *J.A. Croson Co.*, 488 U.S. at 493–506.

97 Faust v. Vilsack, 519 F. Supp. 3d 470, 475–76 (E.D. Wis. 2021). Courts have found exactly two government interests that are compelling enough to survive strict scrutiny: (1) "remediating . . . discrimination," and (2) "avoiding imminent . . . risk[] to human safety in prison[]." *SFFA*, 600 U.S. 181, 207 (2023).

In *United States v. Paradise*,[98] for example, the Court agreed that the Alabama Department of Public Safety had a compelling interest in remediating discrimination in its promotion process because of the department's prior policy that blocked promotion for Black troopers.[99] In contrast, "an amorphous claim" of "past discrimination in a particular industry" or "societal discrimination" cannot create a compelling interest because it is not rooted in a specific government policy.[100] In *City of Richmond v. J.A. Croson Co.*,[101] the Supreme Court denied the City of Richmond's claim that it had a compelling interest in remediating past discrimination in the construction industry because the city made only a "conclusionary statement" that there was industry-wide discrimination without pointing to specific policies that caused the discrimination.[102]

Although industry-wide discrimination alone is too vague to create a compelling government interest to remediate discrimination, the government can establish a compelling interest when it identifies industry-wide discrimination *and* specific government policies that support the industry.[103] "It is beyond dispute" that the government has a compelling interest to prevent government spending from "financ[ing] the evil of private prejudice."[104] In *Adarand Constructors, Inc. v. Slater*,[105] the Tenth Circuit evaluated a clause in a prime contract between the Department of Transportation ("DOT") and Mountain Gravel & Construction Company that provided the company with additional compensation if it hired minority-owned subcontractors.[106] DOT supported its compelling-interest claim by presenting evidence that private enterprises were intentionally discriminating against minority subcontractors through "old boy" networks, barriers to subcontractor union membership, and access to capital, resulting in private enterprises using federal funds to discriminate against minority-owned subcontractors.[107] The Tenth Circuit determined that DOT had a compelling interest in remediating discrimination in the distribution of federal funds because specific government policies were funding the industry.[108] The Equal Protection Clause, the court reasoned, does not require the federal government to

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98 480 U.S. 149 (1987).

99 *Id.* at 170.

100 *J.A. Croson Co.*, 488 U.S. at 499; Regents of California v. Bakke, 438 U.S. 265, 307 (1978).

101 488 U.S. 469 (1989).

102 *Id.* at 500; *see also* Ensley Branch, NAACP v. Seibels, 31 F.3d 1548, 1565 (11th Cir. 1994) ("A local-government employer cannot rest on an 'amorphous claim' of societal discrimination . . . ." (quoting *J.A. Croson Co.*, 488 U.S. at 499)).

103 Adarand Constructors, Inc. v. Slater, 228 F.3d 1147, 1175–76 (10th Cir. 2000).

104 *J.A. Croson Co.*, 488 U.S. at 492.

105 228 F.3d 1147 (10th Cir. 2000).

106 *Id.* at 1155–56.

107 *Id.* at 1167–70.

108 *Id.* at 1176.

"pour money" into a discriminatory industry.[109] In this way, for remediating government discrimination to count as a compelling interest, the government can be either an active or passive participant in the discriminatory system, but it must participate.[110]

When a policy is intended to remediate a discriminatory policy, the government must show that the policy is connected to actual racial discrimination, not just a disparate impact.[111] In *Vitolo v. Guzman*,[112] the Sixth Circuit ruled against the defendants because their only basis for discrimination was evidence of a racial disparity between White-owned and non-White-owned restaurants.[113] The court held that statistical disparities, like differences in the proportion of white and Black applicants that receive a benefit, are not enough to show a connection because they leave "too many variables" to prove that the policy at issue caused the disparate impacts.[114]

A discriminatory policy must also be recent to establish that it is connected to present racial disparity.[115] In 1993, plaintiffs in *Brunet v. City of Columbus*[116] alleged that the Columbus Fire Department engaged in past discrimination against women because, prior to 1975, job announcements for the fire department specifically required applicants to be male.[117] Although at the time of the lawsuit, "only . . . [0].72 percent of the City's firefighter force were women,"[118] the Sixth Circuit rejected the plaintiff's claim because fourteen years had passed since the discrimination occurred and was therefore "too remote" to serve as a foundation "for a . . . compelling interest."[119]

If the government has taken race-neutral remedial measures to ameliorate discrimination prior to enacting a race-based policy, there must also be evidence to show that the effects of the past discrimination

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109 *Id.*

110 *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 492 (1989); Vitolo v. Guzman, 999 F.3d 353, 361 (6th Cir. 2021).

111 *Vitolo*, 999 F.3d at 361–62.

112 999 F.3d 353 (6th Cir. 2021).

113 *Id.* at 361–62.

114 *Id.*; *see also J.A. Croson Co.*, 488 U.S. at 503. This does not render statistical disparities useless. Although disparities are not dispositive, they can be "probative of a pattern of discrimination" when supported by specific discriminatory policies. *See id.* at 489–90, 501.

115 Michael Conklin, *Legality of Explicit Racial Discrimination in the Distribution of Lifesaving COVID-19 Treatments*, 19 IND. HEALTH L. REV. 315, 321 (2022).

116 1 F.3d 390 (6th Cir. 1993).

117 *Id.* at 408.

118 *Id.* at 407.

119 *Id.* at 409. The D.C. Circuit reached a similar conclusion in *Hammon v. Barry*, 826 F.2d 73, 76–77 (D.C. Cir. 1987), in which it found that a discriminatory policy was too remote to create a compelling interest because it was reversed eighteen years prior to the government's attempt to establish a remedial policy to address the discriminatory policy's effects.

still exist.[120] In *Wynn v. Vilsack*,[121] the court acknowledged "that [the] U.S.[] [Department of Agriculture] had a dark history of past discrimination against minority farmers."[122] However, the government had already taken several remedial measures attempting to correct this discrimination, including increasing outreach to socially disadvantaged farmers and entering into settlement agreements with some victims of discrimination.[123] The government argued that these policies were insufficient to cure the discrimination and more remediation was necessary.[124] The court, however, placed the burden on the government to prove that the previous remedial measures were insufficient.[125] Finding that the government failed to meet this burden, the court rejected the government's claim of a compelling interest because Congress had taken some remedial steps to correct this discrimination, even without affirmative evidence that these steps had been successful.[126]

2. Narrow Tailoring

The second part of the strict scrutiny test is that the statute must be narrowly tailored.[127] In *Paradise*, the Court analyzed whether the Alabama Department of Public Safety court-ordered promotion policy, which required that at least half of the promoted troopers in the department be Black, was narrowly tailored.[128] The Court, concluding that the policy was narrowly tailored, provided four requirements for narrow tailoring: flexibility, duration, alternatives, and burden on third parties.[129]

First, the mandated program must be flexible.[130] A program is flexible when the race requirements can be waived when necessary,[131] and when race is not the decisive factor in the decision.[132] In *Paradise*, for example, the promotion policy was sufficiently flexible because it could be waived if there were no qualified Black candidates available for promotion and it did not require the department to make unnecessary

120 *See* Wynn v. Vilsack, 545 F. Supp. 3d 1271, 1279 (M.D. Fla. 2021).

121 545 F. Supp. 3d 1271 (M.D. Fla. 2021).

122 *Id.* at 1279.

123 *Id.*

124 *Id.*

125 *Id.*

126 *See id.*

127 ANDERSON, *supra* note 33, at 2.

128 United States v. Paradise, 480 U.S. 149, 153, 167 (1987).

129 *See id.* at 171. The Court in *Paradise* also included a fifth requirement, that there is a "relationship" between "numerical goals" and "the relevant labor market," but it is not relevant to this Note because none of the considered environmental statutes include numerical goals. *See id.*

130 *See id.* at 177–79.

131 *Id.* at 178.

132 *See* Gratz v. Bollinger, 539 U.S. 244, 272 (2003).

promotions to meet a quota.[133] In contrast, the points-based admission policy considered in *Gratz v. Bollinger*[134] was not flexible enough to survive strict scrutiny because it distributed twenty points to every applicant from an underrepresented minority group.[135] Distributing twenty points, or one-fifth of the points required for admission, resulted in the admission of "virtually every qualified underrepresented minority applicant" and, therefore, served as a "decisive" factor in admission.[136]

Second, the race-based policy must end within a given time frame or when it achieves a specific goal.[137] In *Paradise*, for example, the Court concluded that the Alabama Department of Public Safety's promotion policy had a sufficient end point because the policy would expire when twenty-five percent of the department's corporals were Black.[138] The end goal must also be specific and quantifiable.[139] In *SFFA*, the Court rejected the claims of Harvard and the University of North Carolina ("UNC") that their affirmative action policies had a clear end date because they would end when students could "receive the educational benefits of diversity" without affirmative action.[140] This goal was qualitative and unspecific and, therefore, too abstract to be an adequate end point.[141]

Third, the race-based policy must be necessary, meaning it is the only remedy that could serve the compelling government interest.[142] "Narrow tailoring does not require exhaustion of every conceivable race-neutral alternative,"[143] but courts have rejected race-based policies when the government failed to adequately consider new race-neutral policies to remedy a disparity.[144] In *Faust v. Vilsack*,[145] for example, the court rejected the claim that a federal loan forgiveness plan for minority farmers was necessary to remedy the racial disparity.[146] Although the government contended that decades of race-neutral alternatives failed to close the disparity, the court found that Congress did not "engage[] 'in a genuine effort'" to remedy the disparity by considering new

133 *See Paradise*, 480 U.S. at 177–78.

134 539 U.S. 244 (2003).

135 *See id.* at 270, 272.

136 *Id.* at 273–74.

137 *See Paradise*, 480 U.S. at 178.

138 *Id.* at 179–80.

139 *See SFFA*, 600 U.S. 181, 224 (2023).

140 *Id.*

141 *Id.*

142 *See Paradise*, 480 U.S. at 171, 176–77 (holding that the court-imposed requirement that at least fifty percent of promotions go to Black officers was narrowly tailored because other plans had failed to remedy the disparity).

143 Grutter v. Bollinger, 539 U.S. 306, 309 (2003).

144 *See* Vitolo v. Guzman, 999 F.3d 353, 363 (6th Cir. 2021).

145 519 F. Supp. 3d 470 (E.D. Wis. 2021).

146 *Id.* at 476.

measures, like prioritizing loans for farmers excluded from previous plans or improving outreach and education.[147]

Fourth, the court must consider the policy's burden on third parties.[148] *Grutter v. Bollinger*[149] established that race-based policies were not overly burdensome when they were used "as a 'plus' factor," meaning race was one of many factors that gave a candidate's application a boost while ensuring that every admitted applicant was qualified.[150] In 2023, however, the Supreme Court in *SFFA* narrowed what was permitted under *Grutter*, eliminating the possibility that race-based admissions policies could survive strict scrutiny.[151] *SFFA* considered whether Harvard's and UNC's admissions policies, which directed their committees to consider race in admissions decisions, complied with strict scrutiny.[152] The Court rejected Harvard's and UNC's argument that prioritizing certain applicants based on their race, without explicitly using race as a negative, did not impose a burden on third parties.[153] Instead, the Court reasoned that admitting one applicant required rejecting another, so prioritizing one student based on race necessarily disadvantaged another student.[154] In "zero-sum" programs like college admissions, in which only a certain number of spots are available, providing a benefit to some applicants but not others necessarily disadvantages some applicants.[155] Race cannot be used as a factor to distribute benefits that are "zero-sum," the Court held, because doing so will always impose a burden on a third party.[156]

Although *SFFA* prohibited race-based admissions policies, it left an opening for schools to consider an individual student's experiences, even when shaped by race.[157] The Court noted that universities are still permitted to consider applicants' personal discussions of how race affected their lives, including "through discrimination" or "inspiration."[158] The Court allowed universities to consider how membership in a certain

147 *Id.* (quoting *Vitolo*, 999 F.3d at 362).

148 *See* United States v. Paradise, 480 U.S. 149, 182–83 (1987) (holding that the hiring goal was not overly burdensome to third parties because it "only postpone[d] the promotions of qualified whites" without foreclosing all opportunities and, therefore, was narrowly tailored).

149 539 U.S. 306 (2003).

150 *Id.* at 341 (quoting Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 318 (1978)) (holding that an admissions policy that treated membership in a racial minority group as merely a "'plus' factor" in a candidate's file was narrowly tailored because it did not direct the admissions office to disfavor nonminority applicants).

151 *See SFFA*, 600 U.S. 181, 211, 218–19 (2023).

152 *See id.* at 190–91.

153 *Id.* at 218.

154 *Id.* at 218–19.

155 *Id.*

156 *See id.*

157 *See id.* at 230.

158 *Id.*

racial group has affected a student, so long as they consider a student's skills, personality, or interests that were shaped by their race rather than the student's race alone.[159] Such admissions policies are permitted when they focus on the student as an individual rather than a member of a racial class.[160] Policies that group students by their skills, personality, or interests, rather than by their race, avoid suspect classifications.[161] Because these policies do not rely on suspect classifications, courts can evaluate them under the highly deferential rational basis review, instead of strict scrutiny review.[162]

II. Analysis & Recommendation

Policies that prioritize recipients of environmental grants based on race, like the MA Climate Law,[163] likely will not survive strict scrutiny. Given the stringent requirements for demonstrating discrimination,[164] a state or federal program will likely be unable to show a history of discrimination that is specific and direct enough to constitute a compelling interest.[165] Even if the government shows a compelling interest, it will fail to meet the narrow tailoring requirement.[166] Although drafting a policy with adequate flexibility and duration is possible, demonstrating a policy's necessity is difficult.[167] More importantly, considering race in a grant program with a finite amount of funding—a zero-sum program—disadvantages some racial groups to the benefit of others, which was prohibited by *SFFA*.[168] Therefore, grant programs that prioritize certain applicants based on race are likely to be found unconstitutional.

Instead of prioritizing applicants based on race, state governments should prioritize certain applicants based on the cumulative impacts of

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159 *Id.* at 230–31 ("A benefit to a student who overcame racial discrimination, for example, must be tied to *that student's* courage and determination. Or a benefit to a student whose heritage or culture motivated him or her to assume a leadership role or attain a particular goal must be tied to *that student's* unique ability to contribute to the university. . . . In other words, the student must be treated based on his or her experiences as an individual—not on the basis of race.").

160 *See id.*

161 *See* 16B Am. Jur. 2d, *supra* note 84.

162 *See supra* notes 85–89 and accompanying text (explaining when strict scrutiny review is required and when rational basis review is permitted).

163 Mass. Gen. Laws ch. 23G, § 29A(d), ch. 30, § 62 (2024).

164 *Supra* Section I.C.1.

165 *Infra* Section II.A.

166 *Infra* Section II.B.

167 *Compare* United States v. Paradise, 480 U.S. 149, 177–80 (1987) (holding that the promotion policy was sufficiently flexible and had an appropriate expiration date), *with* Vitolo v. Guzman, 999 F.3d 353, 363 (6th Cir. 2021) (finding that a grant program policy was not narrowly tailored because the policy failed to adequately consider race-neutral alternatives).

168 *See SFFA*, 600 U.S. 181, 218–19 (2023) (holding that an admissions policy that benefited some students based on their race while disadvantaging others could not survive strict scrutiny).

different environmental burdens, as identified by the CEQ.[169] Considering cumulative impacts will allow states to address the racial discrepancy without directly using race.[170] *SFFA* permits this policy because it allows the government to consider how factors connected to race impact the specific experiences of individual communities.[171]

A. Compelling Government Interest

Neither federal nor state governments are likely to succeed in demonstrating a compelling interest in remediating discrimination because they will likely fail to show specific, direct instances of past discrimination. Even if the federal government succeeds in demonstrating that specific federal redlining policies discriminated against Black, Hispanic, and Asian communities, a court will likely find federal policies too remote to create a compelling interest because they were abolished fifty years ago.[172] States will meet many of the same challenges, as illustrated in this Note by a case study of the MA Climate Law. Careful analysis demonstrates that Massachusetts, like the federal government, cannot meet the compelling interest requirement because it has not shown a specific instance of discrimination.[173]

1. Possible Federal Measures

It is unlikely that a federal statute could fulfill the compelling interest requirement of strict scrutiny because any race-based federal action must address a specific instance of discrimination with a strong connection to present racial disparities.[174] The most obvious federal discriminatory policy that supports a compelling interest is the government's redlining policy: multiple studies demonstrate that redlining discriminated against Black and immigrant homeowners.[175] And although the federal government was not actively building landfills or pumping toxic chemicals into the air, its policies authorized and facilitated industry action that created environmental hazards in predominately Black, Hispanic, and Asian communities.[176] Advocates of race-based federal environmental statutes could argue that, like in

169 *Infra* Section II.C.

170 *Infra* Section II.C.1.

171 *Infra* Section II.C.2.

172 *Infra* Section II.A.1.

173 *Infra* Section II.A.2.

174 *Supra* Section I.C.1.

175 *Supra* notes 35–39 and accompanying text; *see also* State Attorneys General Letter, *supra* note 73 (arguing that the history of federal redlining policy justifies special consideration of race in federal environmental policy).

176 *See supra* notes 35–39 (explaining how federal policies contributed to persistent unequal exposures to environmental hazards).

Adarand Constructors, Inc. v. Slater, in which the federal government had a compelling interest in remediating discrimination perpetrated by prime contractors that were financed by federal procurement funds, the federal government has a compelling interest in remediating discriminatory effects of brownfield sites that developed because of federal redlining policy.[177]

Federal redlining policies, however, are likely too remote to create a compelling interest.[178] The Fair Housing Act banned redlining in 1968, more than fifty years ago.[179] In *Brunet*, the Fire Department's discriminatory hiring policy was "too remote" because it expired just fourteen years prior to the consent decree[180]—even where, a decade later, less than one percent of employees were women.[181] If a fourteen-year gap was too long to wait, than a fifty-year gap between redlining policies and policies to repair the damage of redlining will almost certainly be too long. This is true even though studies have traced the effects of redlining to modern environmental disparities.[182] Therefore, a fifty-year gap since the end of redlining policies is too remote to create a compelling interest even if the effects of redlining persist.

Furthermore, recent race-neutral federal policies, especially the Justice40 Initiative, make it difficult to show a compelling interest in enacting race-based policies because there is not yet evidence that Justice40 was ineffective.[183] The Biden Administration's Justice40 Initiative directs forty percent of federal spending for pollution remediation to "disadvantaged communities."[184] *Wynn* rejected United States Department of Agriculture's ("USDA") claim that it had a compelling interest to use race-based policies to remediate loan discrimination against minority farmers because Congress had already undertaken race-neutral policies intended to reduce discrimination, like increasing outreach to disadvantaged farmers.[185] As a result, the government failed

177 *See* Adarand Constructors, Inc. v. Slater, 228 F.3d 1147, 1176 (10th Cir. 2000).

178 *See supra* notes 115–19 and accompanying text.

179 *Redlining*, *supra* note 41.

180 Brunet v. City of Columbus, 1 F.3d 390, 392, 409 (6th Cir. 1993); *see also* Hammon v. Barry, 826 F.2d 73, 77 (D.C. Cir. 1987).

181 *Brunet*, 1 F.3d at 407, 409.

182 *Supra* notes 42–44 and accompanying text (describing how historically redlined communities are still closer to environmental hazards and more heavily polluted).

183 *See supra* notes 120–26 and accompanying text. The application of this rule in *Wynn* demonstrates one of the paradoxes of the current strict scrutiny jurisprudence. While the presence of possible race-neutral policies undermines a compelling interest to remediate past discrimination, showing narrow tailoring requires a prior attempt to fix the discrimination through race-neutral policy. *See* Wynn v. Vilsack, 545 F. Supp. 3d 1271, 1279 (M.D. Fla. 2021); Faust v. Vilsack, 519 F. Supp. 3d 470, 476 (E.D. Wis. 2021). Together, these two rules make it possible for a court to strike down a remedial policy under strict scrutiny in almost every situation.

184 *Supra* note 59 and accompanying text.

185 *Wynn*, 545 F. Supp. 3d at 1279.

to meet its burden to show that previous legislation was inadequate.[186] Like Congress's remedial measures in *Wynn*, brownfield remediation initiatives under Justice40 are already designed to address environmental disparities without using race.[187] Because they were introduced in 2023, it remains to be seen whether these measures will effectively close racial disparities in environmental exposures.[188] Like in *Wynn*, where the court established a high bar to evaluate whether a race-neutral program is effective, courts will likely reject claims that the race-neutral Justice40 program is insufficient until the program is several years old and its effects can be clearly evaluated.[189]

2. MA Climate Law: A Compelling Interest Case Study

The MA Climate Law exemplifies the challenges of demonstrating that a state has a compelling interest in remediating past discrimination. There is no shortage of evidence of disparities in exposure to environmental hazards in Massachusetts,[190] and these disparities exist because zoning laws enacted by state legislatures disproportionately harmed predominately Black, Hispanic, and Asian communities.[191] In CLF's open letter to Massachusetts representatives, CLF pointed to this evidence as confirmation that a compelling interest to give race-based priority in environmental grants exists.[192]

However, CLF's analysis underestimated the high standards for what constitutes a compelling interest.[193] Although CLF referenced "historical de jure state discrimination," this general claim is likely too vague to survive a compelling interest analysis.[194] Like in *J.A. Croson Co.*, where the Court interpreted claims of industry-wide discrimination in the contracting industry to be too vague to create a compelling interest, a court would likely find CLF's broad claims of "historical de jure

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186 *Id.*

187 *See Biden-Harris Administration Announces $235 Million Investment to Assess and Clean Up Brownfield Sites Across America*, Env't Prot. Agency (Sept. 26, 2023), https://www.epa.gov/newsreleases/biden-harris-administration-announces-235-million-investment-assess-and-clean [https://perma.cc/GGP6-R4LB] (directing forty percent "of certain [f]ederal investments to disadvantaged communities that are . . . overburdened by" environmental hazards); CEQ, Instructions to Federal Agencies on Using the Climate and Economic Justice Screening Tool 5 (2023) (listing the eight race-neutral categories of burdens used to define "disadvantaged communities").

188 *See* Dennis & Montalbano, *supra* note 52.

189 *See Wynn*, 545 F. Supp. 3d at 1279.

190 *See supra* note 46.

191 *See* Eady, *supra* note 46.

192 *See* Letter from CLF, *supra* note 29, at 5–6.

193 *See supra* Section I.C.1 (describing the compelling interest requirements).

194 *See* Letter from CLF, *supra* note 29, at 6.

state discrimination" inadequate.[195] In both instances, the allegations fail to point to a specific discriminatory policy, program, or action.

CLF's only other evidence of past discrimination is a statistical disparity between frequency of exposures to ecological hazards in White communities compared to communities of color,[196] but evidence of a disparity, standing alone, cannot show a connection between past discrimination and present disparities.[197] Like in *Vitolo*, where the court rejected the government's claims of past discrimination because it was based on statistical disparities between Black- or Hispanic-owned businesses and White-owned businesses, a court would likely reject CLF's claims of past discrimination based on racial disparities in proximity to environmental hazards in Massachusetts.[198] Both fail to prove the direct connection between the statistical disparities and government action.

Examining the shortcomings in CLF's case illustrates the high bar required to demonstrate a state's compelling interest in remediating past discrimination. In 2024, state policies rarely—if ever—openly demonstrate intent to discriminate against certain races.[199] Although a history of racial discrimination created pervasive racial disparities, modern policies that do not openly discriminate are typically not enough to trigger a compelling interest.[200] Therefore, any brownfield remediation grant will likely fail to establish a compelling interest in prioritizing based on race.

B. Narrow Tailoring

Even if a state successfully demonstrates a compelling interest for race-based brownfield remediation programs, it will likely struggle to meet the four narrow tailoring requirements. Although carefully drafted policies could meet the flexibility and duration requirements, it will be difficult to show necessity and likely impossible, in a grant context, to avoid burdening third parties.[201] A race-based environmental grant program could meet the first requirement, flexibility, with careful drafting.[202] The MA Climate Law, for example, requires the Development Finance Agency to give "preference" to projects near an environmental justice population, but, in the absence of eligible projects, the grant is directed to another project based on other considerations.[203] Like *Paradise*,

195 *See id.*; City of Richmond v. J.A. Croson Co., 488 U.S. 469, 500 (1989).

196 *See* Letter from CLF, *supra* note 29, at 5–6.

197 *See supra* notes 112–14 and accompanying text.

198 *See* Vitolo v. Guzman, 999 F.3d 353, 361–62 (6th Cir. 2021).

199 *Cf.* Salib, *supra* note 95, at 865–66.

200 *See id.* at 866.

201 *See supra* Section I.C.2.

202 *See supra* notes 130–36 and accompanying text.

203 *See supra* notes 81–82 and accompanying text.

where the requirement that fifty percent of all promotions go to Black troopers was considered flexible because it could be waived if no qualified Black candidates were available, the MA Climate Law emphasizes a "*preference*" for projects near an environmental justice population, rather than a requirement.[204] Furthermore, race is not the "decisive" factor of the MA Climate Law.[205] Unlike *Gratz*, where the admissions policy of distributing points to any underrepresented minority applicant guaranteed that "virtually every . . . qualified . . . minority applicant would be admitted, the MA Climate Law does not guarantee funding for any community.[206] Although it directs agencies to prioritize based on race,[207] the statute does not dictate how they should balance this factor with other considerations, like unemployment levels or anticipated benefits of remediation.[208] Therefore, the MA Climate Law is flexible enough to ensure that grants go to qualified candidates.

Careful drafting could also ensure that a race-based environmental grant program meets the second narrow tailoring requirement: the policy has an end point.[209] The MA Climate Law does not currently provide an end point.[210] It could comply with this requirement, however, by adding a provision that terminates the program when Massachusetts reaches a point where Black, Hispanic, and Asian communities are equally likely to be located near a brownfield compared to White communities. Like in *Paradise*, where the Public Safety Department's race-based promotion policy was narrowly tailored because it would expire when twenty-five percent of all corporals in the department were Black, this amended climate law would expire when it met its goal of equalizing brownfield exposure.[211] This end goal is specific and measurable, unlike Harvard's and UNC's end goal of achieving "educational benefits of diversity" in *SFFA*, which the Court rejected for being abstract and unreviewable.[212] Therefore, it is possible to draft a statute that can satisfy the duration requirement of the narrow tailoring prong.

The third requirement for narrow tailoring, that the policy is necessary, is more difficult to meet because it requires the government to show that it has seriously considered—and found ineffective—race-neutral

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204 *See* United States v. Paradise, 480 U.S. 149, 177 (1987); MASS. GEN. LAWS ch. 23G, § 29A(d) (2024) (emphasis added).

205 *See supra* notes 135–36 and accompanying text.

206 *See* Gratz v. Bollinger, 539 U.S. 244, 272–74 (2003).

207 MASS. GEN. LAWS ch. 23G, § 29A(d)(12) (2024).

208 *Id.* § 29A(f) (2024).

209 *See Paradise*, 480 U.S. at 178.

210 *See* MASS. GEN. LAWS ch. 23G, § 29A(d) (2024).

211 *See Paradise*, 480 U.S. at 179–80.

212 *See SFFA*, 600 U.S. 181, 224 (2023).

alternatives.[213] The MA Climate Law would be unlikely to survive this high standard. Although the law was intended to remedy long-standing environmental injustice in Massachusetts development projects, the legislature did not indicate consideration of race-neutral legislation before adopting the race-based policy.[214] Like in *Faust*, where the court rejected the plan because the USDA did not consider race-neutral programs before implementing its race-based loan forgiveness program, there is no evidence that Massachusetts considered and implemented race-neutral programs, like education and outreach, in an attempt to close the racial disparity.[215] Although it is theoretically possible for a legislator to fully consider and implement any race-neutral policy to respond to racial disparities before finding that race-conscious policies are necessary, meeting this standard is burdensome.

The last element of narrow tailoring, that the policy cannot burden third parties,[216] makes it impossible for race-based environmental grants to overcome the narrow tailoring requirement. *SFFA* established that when providing a benefit to one applicant would deny the benefit to another, prioritizing some applicants based on their race would burden members of nonprioritized racial groups.[217] Like the college admissions programs in *SFFA*, which are "zero-sum" because there are a limited number of spots available, grant funding is also zero-sum—there is only so much funding to distribute, and eventually it will run out.[218] When an agency chooses to give grant funding to one community, it necessarily denies funding to another. Therefore, if the fact that the community is predominately non-White has any impact on the agency's decision to award it grant funding, it necessarily denies funding to a similarly situated but predominately White community. Under *SFFA*, this result is impermissible under the Fourteenth Amendment because it disadvantages some communities based on their race.[219] Because *SFFA* eliminates the possibility that a race-based, zero-sum benefit could be narrowly tailored, a race-based environmental grant program cannot survive strict scrutiny review.

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213 *See, e.g.*, Vitolo v. Guzman, 999 F.3d 353, 363 (6th Cir. 2021) (listing other policies that the Small Business Administration could have implemented to ensure that grants reached minority-owned businesses before prioritizing grants based on race).

214 *See* Wasser, *supra* note 80. Before the Brownfield Redevelopment Fund was amended in 2021, studies indicated that the fund had failed to address racial disparities in rates of brownfield redevelopment. *See, e.g.*, Meng, *supra* note 46.

215 *See* Faust v. Vilsack, 519 F. Supp. 3d 470, 476 (E.D. Wis. 2021).

216 *See SFFA*, 600 U.S. at 218–19.

217 *Id.*

218 *See id.*

219 *See id.* at 219.

C. *Alternative to Race-Based Policies*

It is unlikely that a state or federal grant program that prioritizes funding to predominately non-White communities will survive strict scrutiny review,[220] but *SFFA* creates room for alternatives. The majority in *SFFA* permitted policies considering how race shaped an applicant's qualities.[221] States can follow this guidance by enacting legislation that directs agencies to prioritize funding based on the cumulative environmental burdens a community experiences rather than race. This will narrow the racial disparities in brownfield exposure because Black, Hispanic, and Asian communities typically experience a higher number of cumulative environmental impacts.[222] It will also avoid strict scrutiny review because it does not explicitly consider race.[223]

1. *Considering Cumulative Impacts to Narrow Racial Disparities*

Legislation that prioritizes funding based on cumulative environmental impacts, or the number of social and environmental stressors affecting a community, can narrow the racial disparity in exposure to environmental hazards without explicitly using race. To determine how to evaluate a community's cumulative environmental impacts, the thirty environmental burdens set forth by CEJST provide a useful starting point.[224] Applying these burdens as the federal government does, however, would be largely ineffective. CEJST designates communities that meet even one of the thirty environmental burdens as "disadvantaged," so there is no way to differentiate communities that meet one burden with those meeting upwards of ten burdens.[225] Because of CEJST's broad definition of "disadvantaged," "109.1 million individuals," or "[t]hirty-three percent of the U.S. population," "liv[e] in disadvantaged communities."[226] Prioritizing such a large group of people fails to differentiate the most burdened communities from other, less burdened ones. Recall the two census tracts in New Jersey[227]: the tract in Newark meets ten environmental burdens while the tract in Hudson

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220 *See supra* Sections II.A–.B.

221 *Supra* notes 157–62 and accompanying text.

222 *Infra* Section II.C.1.

223 *Infra* Section II.C.2.

224 *See Methodology*, *supra* note 61. CEJST is an especially helpful tool because unlike other screening tools, like EJScreen, it was specifically designed to distribute federal funding. *See* sources cited *supra* note 187.

225 *See supra* notes 61–62 and accompanying text.

226 *See* Shrestha et al., *supra* note 50.

227 *Supra* notes 63–71 and accompanying text.

County meets only one, but both are labeled as disadvantaged.[228] As a result, slightly burdened communities are treated the same as heavily burdened ones.

CEJST's failure to consider the cumulative effects of multiple environmental burdens disproportionately harms communities that are primarily Black, Indigenous, and people of color because they are, on average, exposed to a higher number of CEJST burdens.[229] For example, communities that meet ten environmental burden thresholds are, on average, forty-one percent Black, thirty-five percent Hispanic or Latino, and seventeen percent White, while communities that meet just three environmental burdens are, on average, fifteen percent Black, twenty-eight percent Hispanic or Latino, and fifty percent White.[230] Likewise, studies show that predominately Black, Hispanic, and Asian communities are more likely to experience a higher number of environmental burdens when compared to White communities.[231] Heavily burdened communities also have the most difficulty applying for government funding,[232] meaning that non-White communities that are not prioritized in fund allocation often fail to receive funds.[233]

To fix the blind spot in the federal government's use of the CEJST factors for fund disbursement and ensure that environmental funding reaches the communities that need it most, states should draft environmental grant legislation that prioritizes grant funding to communities that meet the highest number of CEJST environmental burdens.[234] Communities that experience several, and especially ten or more, environmental burdens should be prioritized over those that meet just one or two. If states prioritize funding based on the number of environmental burdens that a community experiences, heavily burdened communities will be prioritized over slightly burdened ones. For example, communities in the Newark census tract would be prioritized above those in the Hudson County tract because the Newark census tract meets ten burden thresholds while the Hudson County tract meets only one.[235]

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228 *Supra* notes 63–71 and accompanying text. *See generally supra* note 62 and accompanying text (explaining that a census tract is considered disadvantaged if it meets even one environmental burden and associated socioeconomic burden).

229 *See* Shrestha et al., *supra* note 50.

230 *Id.*

231 *Supra* notes 48–51 and accompanying text.

232 *Supra* notes 52–53 and accompanying text.

233 *See, e.g.*, Thrush, *supra* note 52 (describing the challenges poor, rural, and predominately Black towns face in obtaining federal grant funding).

234 In a report on the CEJST, the World Resource Institute proposed that federal agencies implement similar regulations when defining "disadvantaged communities" for the purpose of the Biden Administration's Justice40 Program. *See* Shrestha et al., *supra* note 50.

235 *See supra* notes 63–71 and accompanying text.

Considering a community's cumulative environmental burdens when allocating funding will address the racial disparity in exposure to environmental hazards because predominately Black, Hispanic, and Asian communities are more likely to experience more cumulative environmental burdens.[236] By prioritizing grant funding based on the number of environmental burdens that a community experiences, greater grant funding will reach communities that have been disadvantaged because they are predominately Black, Hispanic, or Asian. State agencies should still be directed to consider other factors, such as whether the goals of the project are ascertainable,[237] but including a community's cumulative environmental burdens in that analysis will ensure that the funding goes to a community that needs it.

2. Judicial Review of Cumulative Impact Policies

State legislation that prioritizes funding to the communities that meet the highest number of burdens will avoid strict scrutiny review because it neither utilizes race nor serves as a pretext for race.[238] Instead, because it does not classify groups based on a suspect class or fundamental right, it will be subject to the highly deferential rational basis review standard.[239] This may be true even if the goal of the legislation is "to undo the effects of past discrimination" by disproportionately benefiting a historically disadvantaged racial group.[240] Justice Scalia suggested in his concurring opinion to *J.A. Croson Co.* that contract award programs that favor small businesses could have a "racially disproportionate impact" so long as "they are not based on race."[241] Just as a contract award program may favor small businesses with the goal

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236 *Supra* notes 229–33 and accompanying text.

237 This Note does not propose that state legislators remove additional considerations for brownfield redevelopment grants. For example, the MA Climate Law directs the Massachusetts Development Finance Agency, in evaluating brownfield redevelopment fund applications, to consider (in addition to the race of the community requesting the funds), the level of poverty in the community surrounding the project, the effectiveness of the project, the associated community benefits of the project, the project's proximity to transportation infrastructure, "whether the project site is . . . a federal empowerment zone," and whether the municipality "has made available . . . funds" for brownfield cleanup projects before. MASS. GEN. LAWS ch. 23G, § 29A(f) (2024). Rather, this Note suggests that states replace the specific directive to grant preference to communities with high populations of non-White residents with a directive to grant preference to communities that experience a higher number of environmental burdens.

238 *See supra* note 85 and accompanying text.

239 *See supra* note 85 and accompanying text.

240 *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 526 (1989) (Scalia, J., concurring). Justice Thomas endorsed this argument in *SFFA*, 600 U.S. 181, 249 (2023) (Thomas, J., concurring) ("The government can plainly remedy a race-based injury that it has inflicted—though such remedies must be meant to further a colorblind government, not perpetuate racial consciousness.").

241 *J.A. Croson Co.*, 488 U.S. at 526 (Scalia, J., concurring).

of narrowing racial disparities in contract awards,[242] an environmental grant program may favor heavily burdened communities with the goal of narrowing racial disparities in exposure to environmental hazards.

Policymakers are free to implement policies that account for the effects of racial discrimination on individuals, so long as the focus is on the individuals' experiences of discrimination, not the discrimination itself.[243] In *SFFA*, the Court allowed universities to consider how membership in a specific racial group has affected a student, so long as they consider the way a student's skills, personality, or interests were shaped by their race rather than the student's race alone.[244] Considering cumulative environmental burdens on a community by using the CEJST burdens is similar to considering a student's skills, personality, or interests because it examines the specific characteristics of a given community, not simply the race of a community's members. Although the number of environmental burdens a community experiences is shaped by racial discrimination[245] and considering cumulative burdens would shrink racial disparities,[246] the cumulative burdens on a community look at the specific effects of race on an individual community. In this way, the community is "treated based on [its] experience[] as an individual."[247] Like university policies that consider a student's skills, personality, or interests,[248] state policies that consider a community's cumulative environmental burden would not group people based on a suspect class like race. Therefore, a court need only apply rational basis review to policies that prioritize grant funding based on cumulative environmental impact.[249]

Prioritizing grant funding based on a community's cumulative environmental impact could easily survive rational basis review. All that is needed to survive rational basis review is a rational connection between the classification and the policy goal.[250] There is clearly a rational connection between the policy of directing grants to environmentally

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242 *Id.*

243 *See SFFA*, 600 U.S. at 230–31.

244 *Id.* ("[N]othing in this opinion should be construed as prohibiting universities from considering an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise. . . . A benefit to a student who overcame racial discrimination, for example, must be tied to *that student's* courage and determination. Or a benefit to a student whose heritage or culture motivated him or her to assume a leadership role or attain a particular goal must be tied to *that student's* unique ability to contribute to the university. In other words, the student must be treated based on his or her experiences as an individual—not on the basis of race.").

245 *Supra* notes 48–51 and accompanying text.

246 *Supra* notes 236–37 and accompanying text.

247 *See SFFA*, 600 U.S. at 231.

248 *Id.* at 230–31.

249 *See* 16B Am. Jur. 2d, *supra* note 84, § 850 (rational basis review is appropriate when a policy does not differentiate individuals on the basis of a "suspect class[]," such as race).

250 *Supra* notes 85–89 and accompanying text.

burdened groups and the goal of mitigating environmental damage. It ensures that grant funding reaches the communities living with the most environmental damage. Like *Hodory*, which applied rational basis review to uphold a statute because it is not irrational to differentiate employees who voluntarily went on strike from those who were locked out of the workplace when allocating unemployment benefits, it is not irrational to differentiate between communities that meet one environmental burden from those that meet multiple burdens when allocating environmental grant funding.[251]

In fact, prioritizing grants based on cumulative burdens solves many of the problems that strict scrutiny review is intended to prevent.[252] One of the major concerns when passing race-based legislation is preserving flexibility to ensure that, at a minimum, the recipient of a benefit is qualified.[253] Prioritizing environmental funding to the community experiencing the highest number of environmental burdens will ensure that the funding reaches the most burdened community. Although studies show that the most burdened community is often a predominately Black, Hispanic, or Asian community,[254] prioritizing benefits based off the number of environmental burdens a community experiences will make the program flexible enough to adjust for instances when the most burdened community's population is not predominately a racial minority.

Another concern raised in *SFFA* is that race-based admissions used "race for race's sake" rather than evaluating each student as an individual.[255] Using cumulative burdens to prioritize funding, however, would address this concern. Legislatures can be sure that when agencies award a grant, it is because the community was environmentally burdened. A related concern in *SFFA* is the use of race as a penalty that prevents White students from being admitted.[256] When grants are awarded based on cumulative impact, predominately White communities that are more heavily burdened are not shut out of environmental funding. Rather, grants are targeted more directly based on the problem they are intended to solve: high environmental burdens. Prioritizing funding for communities with higher cumulative environmental burdens would concentrate funding in a way that could bridge the racial

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251 *See* Ohio Bureau of Emp. Servs. v. Hodory, 431 U.S. 471, 491 (1977); *see also* 16B Am. Jur. 2d, *supra* note 84, § 850 (explaining "that courts hardly ever strike down a policy as illegitimate under rational basis scrutiny").

252 *See supra* Section I.C.

253 *See supra* notes 130–36 and accompanying text.

254 *See supra* notes 48–51 and accompanying text.

255 *SFFA*, 600 U.S. 181, 220 (2023).

256 *See id.* at 218–19.

disparities in environmental burdens without implicating the problems from race-based policies that strict scrutiny review is intended to prevent.[257]

In summary, states should implement policies that direct state agencies to prioritize environmental grant programs to communities that bear the highest number of environmental burdens. These environmental burdens should match the list of thirty environmental burdens laid out by CEJST.[258] Including a community's cumulative environmental burdens in the consideration of where to allocate brownfield remediation funds will ensure that the funding goes to a community that needs it.

Conclusion

Recall the Ironbound, a neighborhood in Newark, New Jersey where the chemical dioxin leached out of a hazardous waste facility and contaminated the area.[259] Based on the CEQ definition of "disadvantaged" and the CEJST data, about thirty percent of New Jersey census tracts are "disadvantaged."[260] The average disadvantaged census tract in New Jersey carries between one and two environmental burdens out of the thirty burdens outlined by the CEQ.[261] In the Ironbound, however, nine of the twelve census tracts in the neighborhood carry at least ten environmental burdens.[262] If New Jersey amended its current Brownfield and Contaminated Site Remediation Act to prioritize remediation funds based on cumulative burdens, the Ironbound site would be near the top.[263] This would also provide aid to a predominately Hispanic and immigrant community that has historically been forced to bear disproportionate levels of toxic facilities.[264] Prioritizing grants based on cumulative burdens is a valuable way to accomplish the ultimate goal of getting environmental grants into the hands of the right people in order to close the racial discrepancy in exposure to environmental hazards.

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257 *See* Shrestha et al., *supra* note 50 (explaining that the impact of race is "visible in the pattern of cumulative burden disadvantaged communities experience").

258 *See Methodology*, *supra* note 61.

259 *See supra* notes 1–7 and accompanying text.

260 *See Downloads*, *supra* note 63 (the "communities list data" spreadsheet provides the full data set CEJST used to calculate burdens).

261 *See id.* (calculated by taking the average of column O, "Total threshold criteria exceeded," for all New Jersey census tracts (rows 40,688–42,697); there is an average of 1.499 threshold criteria exceeded for all census tracts in New Jersey).

262 *See id.* (rows 41,298–41,309 are the census tracts located in the Ironbound neighborhood, and column O indicates the number of total environmental burden thresholds the census tract meets).

263 For New Jersey's current prioritization system, see N.J. Stat. Ann. § 58:10B-7 (West 2024).

264 *See* Ortiz, *supra* note 1.