



## STATE OF FLORIDA

ASHLEY MOODY  
ATTORNEY GENERAL

### PETITION FOR RULEMAKING

April 16, 2024

Administrator Michael S. Regan  
c/o Jeffrey M. Prieto, General Counsel  
U.S. Environmental Protection Agency  
Office of the General Counsel  
Mail Code 2310A  
1200 Pennsylvania Ave., NW  
Washington, DC 20460

Dear Administrator Regan:

I write to you on behalf of the State of Florida and 22 other States to demand that the Environmental Protection Agency (EPA) amend its regulations under Title VI of the Civil Rights Act of 1964 to bring them in line with the text of that statute and with the Equal Protection Clause of the U.S. Constitution.

Title VI prohibits, among other things, racial discrimination by entities that receive federal funding. *See* 42 U.S.C. § 2000d. For many years, the EPA's Title VI regulations have gone beyond prohibiting racial discrimination to impose so-called "disparate impact" requirements. *See* 40 C.F.R. § 7.35(b), (c); *Alexander v. Sandoval*, 532 U.S. 275, 281–82 (2001) (describing similar regulations as "disparate impact" regulations). As many scholars have recognized, these requirements actually *promote*—rather than *prevent*—discrimination based on race. For years, however, the federal government has not meaningfully enforced these regulations.

All that changed when President Biden took office. During his time in office, the EPA has taken unprecedented steps to use the EPA's Title VI regulations to advance what it calls "environmental

justice.”<sup>1</sup> One of the core goals of environmental justice is to ensure “a proportional environmental result”—in other words, “a condition in which no racially or economically defined group disproportionately experiences adverse environmental impacts.” Michael D. Mattheisen, *Applying the Disparate Impact Rule of Law to Environmental Permitting Under Title VI of the Civil Rights Act of 1964*, 24 Wm. & Mary Env’t L. & Pol’y Rev. 1, 4 (2000) (former EPA attorney describing the EPA’s environmental justice goals under Clinton Administration).

In practice, “environmental justice” asks the States to engage in racial engineering in deciding whether to, for example, issue environmental permits, rather than relying on the effect on the environment and other appropriate factors. Not surprisingly, the U.S. Supreme Court has called into question whether the EPA’s regulations are lawful, *see Sandoval*, 532 U.S. at 282 (noting the “considerable tension” between disparate impact regulations and Title VI’s prohibition on intentional discrimination), and other scholars have even suggested that the EPA’s regulations violate the Equal Protection Clause, *see, e.g.,* Richard Primus, *Equal Protection and Disparate Impact: Round Three*, 117 Harv. L. Rev. 493 (2003); Kenneth Marcus, *The War Between Disparate Impact and Equal Protection*, 2008–2009 Cato Sup. Ct. Rev. 53 (2009).

Just last year, the U.S. Supreme Court reiterated that “[e]liminating racial discrimination means eliminating all of it.” *Students for Fair Admissions v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 206 (2023) If that constitutional edict is to mean anything, it must mean that the federal government cannot by executive fiat compel States to discriminate against their own citizens. For these reasons, and those that follow, we are filing this Petition to demand that the EPA engage in rulemaking to repeal its unlawful regulations. *See* 5 U.S.C. § 553(e); 40 C.F.R. § 7.35(b)–(c)

## I. Background

Title VI of the Civil Rights Act of 1964 provides that no person shall “be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” 42 U.S.C. § 2000d. Federal agencies, including the EPA, are empowered to “effectuate [that] provision[]” by “issuing rules, regulations, or orders of general applicability.” 42 U.S.C. § 2000d-1. Following the passage of Title VI, several agencies including the EPA promulgated regulations to implement and interpret Title VI’s prohibition on discrimination for the programs they administer. *See, e.g.,* Nondiscrimination in Programs Receiving Federal Assistance from the Environmental Protection Agency –Effectuation of Title VI of the Civil Rights Act of 1964, 38 Fed. Reg. 17968 (Sept. 8, 1972); Implementation of Title VI of Civil Rights Act of 1964 With Respect to Federally Assisted Programs Administered by Department of Justice, 31 Fed. Reg. 10265, 10266 (July 29, 1966).

Notably, these regulations included prohibitions on conduct that has an unintentional disparate impact on protected classes of persons. *See, e.g.,* 38 Fed. Reg. at 17969 (prohibiting actions that “have or may have the effect of subjecting a person to discrimination”); 31 Fed. Reg. at 10266 (prohibiting criteria or methods of administration based on their “effect”). Those regulations persist largely unchanged today. 40 C.F.R. § 7.35(b), (c) (prohibiting recipients of EPA assistance

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<sup>1</sup> See Environmental Justice, EPA, <https://www.epa.gov/environmentaljustice> (last visited Apr. 3, 2024).

from actions that “have the effect” of discrimination); 28 C.F.R. § 42.104 (Department of Justice regulations containing similar prohibitions).

A few years after federal agencies promulgated these regulations, the Supreme Court clarified Title VI’s reach. Specifically, in *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978), the Court concluded that Title VI prohibits “only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment.” *Id.* at 287 (opinion of Powell, J.); *see also id.* at 328 (opinion of Brennan, J., White, J., Marshall, J., and Blackmun, JJ.). Given that a disparate impact alone does not violate the Equal Protection Clause, *see Washington v. Davis*, 426 U.S. 229, 242 (1976), this holding called into question the lawfulness of the disparate impact regulations.

Notwithstanding that clarification, neither the EPA nor any other agency changed its regulations. In 2001, however, the Supreme Court was even more clear. The Court explained that “it is . . . beyond dispute . . . that [42 U.S.C. § 2000d] only prohibits intentional discrimination.” *Sandoval*, 532 U.S. at 280–81; *see also Alexander v. Choate*, 469 U.S. 287, 293 (1985) (“Title VI itself directly reach[es] only instances of intentional discrimination.”). Although *Sandoval* did not directly address the validity of Title VI disparate impact regulations, the Court expressed significant skepticism on the validity of those regulations. 532 U.S. at 281–82. The Court explained that the regulations were “in considerable tension with the rule . . . that [42 U.S.C. § 2000d] forbids only intentional discrimination.” *Id.* at 282.

Since *Sandoval*, the EPA and other agencies have *still* left their Title VI disparate impact regulations largely unchanged with one exception. In 2020, the Department of Justice proposed a revision to its Title VI regulations that would have removed the disparate impact provisions.<sup>2</sup> Although the proposed changes were sent to the Office of Management and Budget for review, they were ultimately abandoned in early 2021 shortly after President Biden took office.<sup>3</sup>

Under the Biden Administration, the EPA has enforced its Title VI regulations in unprecedented ways. As of 2016, the EPA had never made a formal finding of discrimination or denied or withdrawn final assistance based on its Title VI regulations.<sup>4</sup> Even though “almost all” Title VI complaints filed with the EPA were based on a disparate impact theory, the Office of Civil Rights “avoided” pursuing these complaints “for fear that the agency would lose such a case if challenged in court.”<sup>5</sup> But in its Strategic Plan for FY2022–FY2026, the EPA announced its intention to “take decisive action to advance environmental justice” namely by “strengthen[ing] the EPA’s External

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<sup>2</sup> *See* Laura Meckler & Devlin Barrett, *Trump Administration Seeks to Undo Decades-Long Rules on Discrimination*, Wash. Post (Jan. 5, 2021), [https://www.washingtonpost.com/education/civil-rights-act-disparate-impact-discrimination/2021/01/05/4f57001a-4fc1-11eb-bda4-615aaefd0555\\_story.html](https://www.washingtonpost.com/education/civil-rights-act-disparate-impact-discrimination/2021/01/05/4f57001a-4fc1-11eb-bda4-615aaefd0555_story.html). Full text of proposed changes available at [https://www.washingtonpost.com/context/read-the-document-justice-department-s-proposed-amendment-to-title-vi-regulations/78790299-551d-4c6f-b93b-f55c07bfde86/?itid=lk\\_readmore\\_manual\\_9](https://www.washingtonpost.com/context/read-the-document-justice-department-s-proposed-amendment-to-title-vi-regulations/78790299-551d-4c6f-b93b-f55c07bfde86/?itid=lk_readmore_manual_9).

<sup>3</sup> Annalise Wagner, *Rolling Back DOJ’s Title VI Protections: Trump’s Abandoned Attempt and Potential Impacts on EJ Enforcement*, Harv. Env’tl & Energy L. Prog. (Apr. 16, 2021), <https://eelp.law.harvard.edu/2021/04/doj-title-vi/>.

<sup>4</sup> U.S. Comm’n on Civil Rights, *Environmental Justice: Examining the Environmental Protection Agency’s Compliance and Enforcement of Title VI and Executive Order 12,898* at 40 (Sept. 2016), [https://www.usccr.gov/files/pubs/2016/Statutory\\_Enforcement\\_Report2016.pdf](https://www.usccr.gov/files/pubs/2016/Statutory_Enforcement_Report2016.pdf).

<sup>5</sup> *Id.* (quotations omitted).

Civil Rights Office and its ability to enforce federal civil rights laws to their fullest extent.”<sup>6</sup> The EPA then began investigating several state agencies based only on disparate impact theories.<sup>7</sup> In January 2023, its Office of the General Counsel went so far as to advise the agency that the EPA not only has the authority to consider disparate impact claims but “to consider cumulative impacts when evaluating whether there is an adverse impact from a recipient’s policy or practice.”<sup>8</sup>

In January 2024, a federal court in Louisiana enjoined the EPA from enforcing its regulations against the State of Louisiana. *Louisiana v. EPA*, No. 2:23-cv-692, 2024 WL 250798 (W.D. La. Jan. 23, 2024). Specifically, the Court found that EPA has “constructed Title VI to allow it to regulate beyond the Statute’s plain text and by doing [so], invade the purview of the State’s domain.” *Id.* at \*30.

## II. Proposed Regulatory Changes

The undersigned States petition the EPA to amend part 7 of title 40 of the Code of Federal Regulations in the following ways:<sup>9</sup>

### PART 7 – NONDISCRIMINATION IN PROGRAMS OR ACTIVITIES RECEIVING FEDERAL ASSISTANCE FROM THE ENVIRONMENTAL PROTECTION AGENCY

#### Subpart B – Discrimination Prohibited on the Basis of Race, Color, National Origin or Sex

Section 7.35 is amended by revising paragraphs (b) and (c) to read as follows:

~~(b) A recipient shall not use criteria or methods of administering its program or activity which have the effect of subjecting individuals to discrimination because of their race, color, national origin, or sex, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program or activity with respect to individuals of a particular race, color, national origin, or sex. [Removed]~~

(c) A recipient shall not choose a site or location of a facility that has the purpose ~~or effect~~ of excluding individuals from, denying them the benefits of, or subjecting them to discrimination under any program or activity to which this part applies on the grounds of race, color, or national

<sup>6</sup> U.S. Env’t Protection Agency, FY 2022–2026 EPA Strategic Plan 28 (Aug. 2022), <https://www.epa.gov/system/files/documents/2022-03/fy-2022-2026-epa-strategic-plan.pdf>.

<sup>7</sup> See, e.g., Letter from Lilian S. Dorka, Deputy Assistant Administrator For External Civil Rights, EPA, to Dr. Chuck Carr Brown, Sec’y, La. Dep’t of Env’t Quality re: Letter of Concern (Oct. 12, 2022), <https://www.epa.gov/system/files/documents/2022-10/2022%2010%2012%20Final%20Letter%20LDEQ%20LDH%2001R-22-R6%2C%2002R-22-R6%2C%2004R-22-R6.pdf>; Letter from Anhthu Hoang, Acting Director, Off. of External Civil Rights Compliance, EPA, to Shawn Hamilton, Sec’y, Fla. Dep’t of Env’t Protection re: Acceptance of Administrative Complaint (June 12, 2023), <https://www.epa.gov/system/files/documents/2023-06/05RNO-22-R4%20FLORIDA%20DEP%20Recipient%20Acceptance%20Letter%20-%20FINAL.pdf>.

<sup>8</sup> Office of the General Counsel, EPA, EPA Legal Tools to Advance Environmental Justice: Cumulative Impacts Addendum 45 (Jan. 2023), <https://www.epa.gov/system/files/documents/2022-12/bh508-Cumulative%20Impacts%20Addendum%20Final%202022-11-28.pdf>.

<sup>9</sup> Additions are indicated by underlined text and deletions are indicated by ~~strikethroughs~~.

origin or sex; or with the purpose ~~or effect~~ of defeating or substantially impairing the accomplishment of the objectives of this subpart.

### III. Reasons for Granting the Petition

The EPA should grant this Petition and change its regulations because the current regulations are incompatible with Title VI and the Equal Protection Clause. First, the EPA's current regulations exceed the rulemaking authority granted to the agency under 42 U.S.C. § 2000d-1. That statute only grants the EPA the power to "effectuate" Title VI's prohibition on discrimination, which does not include the power to impose liability based on a disparate impact theory alone. Second, by prohibiting conduct based on disparate impact alone, the EPA's regulations force States to classify citizens by race and take race-based actions in violation of the Equal Protection Clause. Both inconsistencies compel the EPA to grant this Petition. *Cf. Massachusetts v. EPA*, 549 U.S. 497, 528–35 (2007) (finding unlawful the EPA's denial of a petition for rulemaking where the agency's denial was based on an incorrect interpretation of the relevant statute).

#### a. The EPA's Current Regulations are Contrary to Law Because Title VI Does Not Authorize Regulations that Prohibit Conduct Based on Disparate Impact Alone.

To start, the EPA's regulations exceed its statutory authority by prohibiting conduct not prohibited by Title VI. Section 2000d-1, on which the EPA relies to promulgate its regulations, grants authority "to effectuate the provisions of section 2000d." To "effectuate" means "to bring about," *Effectuate, American Heritage Dictionary* (2d ed. 1982), or "to carry into effect, accomplish," *Effectuate, Oxford English Dictionary* (revised 2008). That power then is only the power to accomplish the mandate of § 2000d. *See Manhattan Gen Equip. Co. v Comm'r of Int. Rev.*, 297 U.S. 129, 134 (1936) ("The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law . . . but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute."); *cf. Sandoval*, 532 U.S. at 286–87 (concluding that a private cause of action for a regulation is only available if the regulation prohibits conduct prohibited by the statute being implemented).

Title VI does not impose liability based on disparate impact alone, and thus the EPA's power to "effectuate" Title VI cannot go further. *See Save Our Valley v. Sound Transit*, 335 F.3d 932, 944 (9th Cir. 2003) ("A regulation cannot 'effectuate' a statutory right by creating a new and different right."). As the Supreme Court has recognized, 42 U.S.C. § 2000d only prohibits conduct that the Fourteenth Amendment would prohibit for state actors. *See Bakke*, 438 U.S. at 287 (Powell, J., announcing the judgment); *see also id.* at 328 (opinion of Brennan, J., White, J., Marshall, J., and Blackmun, JJ.). And disparate impact "[s]tanding alone . . . does not trigger" the Equal Protection Clause. *See Washington v. Davis*, 426 U.S. at 242.

Indeed, implicitly reading disparate impact liability into Title VI makes little sense because disparate impact already has an established function in anti-discrimination caselaw. Under existing equal protection jurisprudence, disparate impact may be a factor in determining whether the government acted with discriminatory intent, but it is far from dispositive in finding unlawful discrimination. *See Vill. of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 265

(1977) (“Absent a [stark] pattern . . . , impact alone is not determinative.”). To adopt the EPA’s reading would be to take the exact opposite position on the typical role of disparate impact, a dramatic departure from expected practice. *See Biden v. Nebraska*, 143 S. Ct. 2355, 2378 (2023) (Barrett, J., concurring) (“Background legal conventions . . . are part of [a] statute’s context.”). And where Congress has provided a role for disparate impact in anti-discrimination law, it has done so explicitly. *See* 42 U.S.C. § 2000e-2(k) (establishing a burden of proof for employment discrimination complaints based on a disparate impact theory).

Even if disparate impact liability were consistent with the purpose of Title VI—a conclusion that is doubtful at best, *see Sandoval*, 532 U.S. at 286 n.6 (observing “how strange it is to say that disparate-impact regulations are ‘inspired by, at the service of, and inseparably intertwined with’ [§ 2000d] when [§ 2000d] permits the very behavior that the regulations forbid” (quoting dissenting opinion of Justice Stevens))—the EPA is not entitled to enlarge its authority to conduct not expressly contemplated by Congress. “Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* further the statute’s primary objective must be the law.” *Rodriguez v. United States*, 480 U.S. 522, 526 (1987). As they currently stand, EPA’s Title VI regulations greatly exceed the scope of authority granted under § 2000d-1.

Several principles of statutory interpretation confirm that conclusion. First, Title VI attaches conditions to a State’s acceptance of federal funds, so its conditions must be “set out ‘unambiguously.’” *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006) (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 483 U.S. 1, 17 (1981)). Applying the “Spending Clause’s required clear-statement rule,” *Adams v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 815–16 (11th Cir. 2022) (en banc), the EPA’s interpretation of Title VI is only correct if the statute unambiguously provided the States notice that it regulates based on disparate impact. Because the text of § 2000d only prohibits intentional discrimination, *see Sandoval*, 532 U.S. at 281, States could not have reasonably foreseen that the EPA would prohibit conduct merely causing a disparate impact in “effectuat[ing]” § 2000d. *See Adams*, 54 F.4th at 816 (concluding that a definition of Title IX that would greatly expand types of discrimination required unambiguous notice).

Second, no reasonable person could understand Congress to have given the EPA the “highly consequential power” it claims without “clear congressional authorization.” *West Virginia v. EPA*, 597 U.S. 697, 723–24 (2022). The power the EPA claims is the power to establish a vast scheme of antidiscrimination prohibitions beyond what Congress expressly authorized. *See Brnovich v. Dem. Nat’l Comm.*, 141 S. Ct. 2321, 2341–43 (2021) (describing the potential scope of liability imposed by a “freewheeling disparate-impact regime”). Indeed, imposing a prohibition based on disparate impact alone compels recipients of federal funds to anticipate all potential effects a project might have on distinct racial and ethnic groups. *See Ricci v. DeStefano*, 557 U.S. 557, 594 (2009) (Scalia, J., concurring) (observing that disparate impact requirements “often requir[e] employers to evaluate the racial outcomes of their policies, and to make decisions based on (because of) those racial outcomes”). Congress does not typically use “subtle device[s]” to establish “extraordinary grants of regulatory authority,” and the EPA should resist any urge to assume it has done so here. *West Virginia*, 597 U.S. at 723 (quotations omitted).

At bottom, the EPA's Title VI regulations as written greatly exceed the authority granted under § 2000d-1 and should be revised to better conform to the statutory grant of authority.

**b. The EPA's Regulations Create Constitutional Problems for States Because They Compel States to Take Actions that Violate the Equal Protection Clause.**

Apart from being devoid of textual support, the EPA's regulations have the added defect of compelling unconstitutional actions by state actors. As countless commentators have recognized, avoiding disparate impact liability necessarily compels funding recipients to impose racial classifications and allocate benefits and burdens of government policies based on race. *See, e.g.,* Richard Primus, *Equal Protection and Disparate Impact: Round Three*, 117 Harv. L. Rev. 493 (2003); Kenneth Marcus, *The War Between Disparate Impact and Equal Protection*, 2008–2009 Cato Sup. Ct. Rev. 53 (2009). This creates Equal Protection problems for States accepting federal funding from the EPA.<sup>10</sup> At the very least, the statute should be read to avoid those serious constitutional concerns. *See Nielsen v. Preap*, 139 S. Ct. 954, 971 (2019) (“[W]hen a serious doubt is raised about the constitutionality of an act of Congress, this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.” (quotations and alterations omitted)).

As crafted, the EPA's regulations prohibit conduct that causes a disparate impact to “individuals of a particular race, color, [or] national origin” without any finding of discriminatory intent. *See* 42 C.F.R. § 7.35(b)–(c). A state recipient of funds may violate the regulation if, through no invidious intent, its conduct has a disproportionate effect on individuals of a particular race, color, or national origin. Thus, to avoid running afoul of the regulations, a funding recipient will impose race-conscious criteria to evaluate their programs and take race-based actions “when a disparate impact would otherwise result.” *Ricci*, 557 U.S. at 594 (Scalia, J., concurring); *accord id.* at 579 (majority opinion) (city fire department abandoned promotional exam to avoid anticipated disparate effects on racial minorities).

As the Supreme Court recently reiterated, “[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.” *Students for Fair Admissions*, 600 U.S. at 208 (quoting *Rice v. Cayetano*, 528 U.S. 495, 517 (2000)). Indeed, the mere act of classifying individuals by their race “may stigmatize those groups singled out for different treatment” and “exact[s] costs and carr[ies] with [it] substantial dangers.” *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 609 (1990) (O’Connor, J., dissenting), *overruled in part by Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995). For that reason, “all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny.” *Adarand*, 515 U.S. at 227. And funding recipients cannot avoid strict scrutiny by asserting compliance with anti-discrimination

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<sup>10</sup> These same considerations suggest that race-conscious conduct violates Title VI's prohibition on discrimination itself. *See generally* *Students for Fair Admissions*, 600 U.S. at 287–97 (Gorsuch, J., concurring); *Gratz v. Bollinger*, 539 U.S. 244, 276 n. 23 (2003) (“We have explained that discrimination that violates the Equal Protection Clause of the Fourteenth Amendment committed by an institution that accepts federal funds also constitutes a violation of Title VI.”).

laws like Title VI. *See Shaw v. Reno*, 509 U.S. 630, 653 (1993) (rejecting the argument that strict scrutiny does not apply where States are attempting to comply with antidiscrimination laws).

In order to avoid disparate effects on racial minorities, funding recipients must also set up de facto quota systems that ensure the effects of their actions meet predetermined metrics. *See Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmty. Project, Inc.*, 576 U.S. 519, 542 (2015) (speculating that without limits “disparate-impact liability . . . would almost inexorably lead governmental or private entities to use numerical quotas” (quotations omitted)); *Watson v. Ft. Worth Bank & Tr.*, 487 U.S. 977, 993 (1988) (O'Connor, J., plurality) (“[I]f quotas and preferential treatment become the only cost-effective means of avoiding [liability], such measures will be widely adopted.”). “Quotas impose a fixed number or percentage which must be attained, or which cannot be exceeded.” *Grutter v. Bollinger*, 539 U.S. 306, 335 (2003) (quotations omitted). Because the EPA’s regulations prohibit any action that results in racial disparities, a funding recipient must set demographic targets for their projects to maintain compliance. This kind of allocation based on group membership is a constitutional nonstarter. *See id.* at 330 (observing that percentage-based racial targets would be “patently unconstitutional”).

The EPA’s own guidance admits that the regulations compel the imposition of quotas.<sup>11</sup> The EPA’s guidance requires a finding of discrimination if the recipient could have engaged in “equally effective alternative practices.”<sup>12</sup> But any recipient choosing an alternative course of action to avoid a racial disparity would be taking action on the basis of race. *See Ricci*, 557 U.S. at 594 (Scalia, J., concurring) (arguing that disparate-impact provisions require parties to “make decisions based on (because of) . . . racial outcomes” which is “discriminatory”). And as Judge Edith Jones has explained, this aspect makes little sense in the environmental context because it “presuppose[s] that public bodies have alternatives to locating public works projects in economically disadvantaged neighborhoods.” *Rollerson v. Brazos River Harbor Navigation Dist.*, 6 F.4th 633, 647 (5th Cir. 2021) (Jones, J., concurring in the judgment).

Such race-based action has no hope of surviving strict scrutiny. As the Supreme Court emphasized in *Students for Fair Admissions*, it has only found a compelling interest for racial classifications in two circumstances outside of higher education admissions: “remediating specific, identified instances of past discrimination” and “avoiding imminent and serious risks to human safety in prisons.” 600 U.S. at 207. And even in higher education, the Court reiterated that “[c]lassifying and assigning” individuals “based on their race requires more than an amorphous end to justify it.” *Id.* at 214 (quotations and alterations omitted).

“[D]isparate impact doctrine is a conceptual cousin of affirmative action,” *Primus, supra* at 537, and suffers one of the same fatal flaws that doomed the affirmative action policies in *Students for Fair Admissions*. EPA’s regulations and the policies they perpetuate have no “logical end point.” *Students for Fair Admissions*, 600 U.S. at 221 (quotations omitted). Like the Harvard admissions policies, the goals of a disparate impact assessment are to achieve proportional effects. *See id.*; C. Boyden Gray, *Disparate Impact: History and Consequences*, 54 La. L. Rev. 1487, 1491 (1994)

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<sup>11</sup> *See* EPA External Civil Rights Compliance Office, Compliance Toolkit (Jan. 2017), at 8–11, [https://www.epa.gov/sites/default/files/2017-01/documents/toolkit-chapter1-transmittal\\_letter-faqs.pdf](https://www.epa.gov/sites/default/files/2017-01/documents/toolkit-chapter1-transmittal_letter-faqs.pdf).

<sup>12</sup> *Id.* at 27–28.



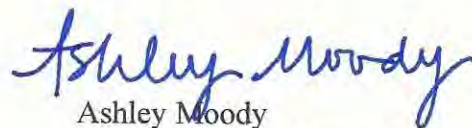
(revealing that the purpose behind the 1991 codification of disparate impact in Title VII was “proportional hiring”). But as Chief Justice Roberts explained, that goal “‘effectively assure[s] that race will always be relevant . . . and that the ultimate goal of eliminating’ race as a criterion ‘will never be achieved.’” *Students for Fair Admissions*, 600 U.S. at 224 (quoting *City of Richmond v. Croson*, 488 U.S. 469, 495 (1989)).

There may be limited ways disparate impact considerations can be utilized that comport with the Equal Protection Clause. For instance, “[i]t might be possible to defend [the practice] by framing it as simply an evidentiary tool used to identify genuine intentional discrimination.” *Ricci*, 557 U.S. at 595 (Scalia, J., concurring); *accord Rollerson*, 6 F.4th at 648 (Ho, J., concurring in part and concurring in the judgment). But EPA’s regulations go far beyond that and ultimately compel unconstitutional actions by State actors who receive federal funds.

#### IV. Conclusion

“One of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities.” *Students for Fair Admissions*, 600 U.S. at 214 (quotations omitted). Indeed, Title VI reflects that value by protecting all persons from “be[ing] denied the benefits of, or be[ing] subjected to discrimination under any program or activity receiving Federal financial assistance” based on his or her “race, color, or national origin.” 42 U.S.C. § 2000d. Disparate impact theory does just the opposite: “it forces us to look at race—to check for racial imbalance and then decide what steps must be taken to advance some people at the expense of others based on their race.” *Rollerson*, 6 F.4th at 650 (Ho., J., concurring in part and concurring in the judgment). By imposing disparate impact liability where it is not called for by statute, the EPA’s regulations gravely depart from the original understanding of Title VI and compel States to unconstitutionally discriminate against their citizens by incorporating disparate-impact liability. EPA should grant this Petition and revise its Title VI regulations to be consistent with Title VI and the Equal Protection Clause.

Sincerely,

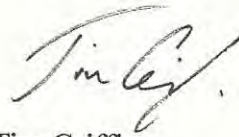


Ashley Moody  
Florida Attorney General

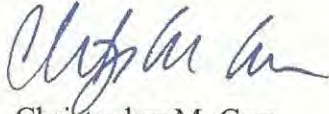
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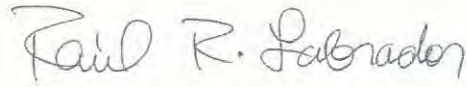
Steve Marshall  
Alabama Attorney General



Tim Griffin  
Arkansas Attorney General



Christopher M. Carr  
Georgia Attorney General



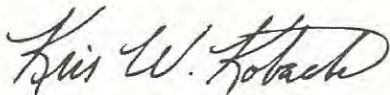
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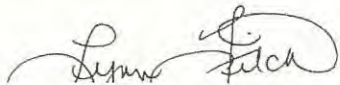
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Kris Kobach  
Kansas Attorney General



Russell M. Coleman  
Kentucky Attorney General



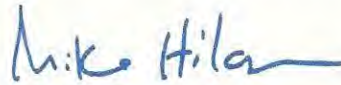
Lynn Fitch  
Mississippi Attorney General



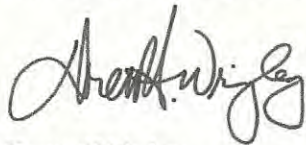
Andrew Bailey  
Missouri Attorney General



Austin Knudsen  
Montana Attorney General



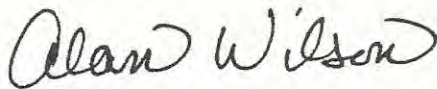
Mike Hilgers  
Nebraska Attorney General



Drew Wrigley  
North Dakota Attorney General



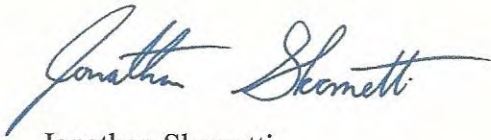
Gentner Drummond  
Oklahoma Attorney General



Alan Wilson  
South Carolina Attorney General



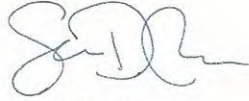
Marty Jackley  
South Dakota Attorney General



Jonathan Skrametti  
Tennessee Attorney General



Ken Paxton  
Texas Attorney General



Sean D. Reyes  
Utah Attorney General



Jason S. Miyares  
Virginia Attorney General



Patrick Morrissey  
West Virginia Attorney General



Bridget Hill  
Wyoming Attorney General