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The Legal Case for Equity in Local Climate Action Planning

Amy E. Turner

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Over the last half decade, local climate action plans have regularly come to incorporate considerations of racial and socioeconomic equity, recognizing the ways in which low-income communities and communities of color experience earlier and worse consequences from global warming, and these communities are also at risk of being harmed by policies meant to address climate change. Until now, however, the discourse on equity in climate action planning has largely pertained to policy; it acknowledges the disproportionate harm that certain communities experience as a result of climate change and policies to address climate change, and suggests policy tools that can address these disparities. Missing is a discussion of why local governments are compelled or strongly encouraged by law to develop climate plans that aim to address racial and socioeconomic inequity alongside rising GHG emissions. This Article seeks to fill in the missing legal context for why equitable climate action planning is strongly encouraged by three aspects of federal law: the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution, Title VI of the Civil Rights Act of 1964, and recent federal law developments like the Inflation Reduction Act and Justice40. While none of these mandate that local governments consider equity in their climate action planning, they do provide a compelling legal argument for local climate policy that is equitable and racially just.

The Article explores all three areas of federal law and suggests ways in which they might interplay with equitable local climate action planning. In addition to delineating new applications for these areas of federal law, the research seeks to provide a legal rationale for local climate policy that is just and equitable that can support local government efforts when their

[*] Director, Cities Climate Law Initiative, Sabin Center for Climate Change Law at Columbia Law School. Thank you to participants in the Fordham Urban Law Journal's February 10, 2023 symposium on *Building a Greener Future Through Urban Sustainability* and to my Sabin Center colleagues for helpful feedback on this research.

climate action plans face political, fiscal, legal, and other forms of challenge.

INTRODUCTION

Over the last half decade, local climate action plans (CAPs), which are the primary policy documents through which local governments in the United States chart a course towards major reductions in community-scale greenhouse gas (GHG) emissions,[1] have regularly come to incorporate considerations of racial and socioeconomic equity. Whether framed in terms of "climate justice," a "Green New Deal," a "just transition," or otherwise, local governments have come to recognize the ways in which low-income communities and communities of color experience earlier and worse consequences from global warming,[2] and these communities are also at risk of being harmed by policies that purport to address climate change.[3] Therefore, dozens of U.S. cities now have climate action plans that feature equity or climate justice, sometimes as co-equal objectives alongside traditional greenhouse gas mitigation and climate adaptation.[4]

Until now, however, the discourse on equity in climate action planning has largely pertained to policy; it acknowledges the disproportionate harm

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1. *See, e.g.*, *Climate Action Plans*, INST. FOR LOC. GOV'T, https://www.ca-ilg.org/climate-action-plans [https://perma.cc/J4XB-WT8M] (last visited July 27, 2023).

2. *See EPA Report Shows Disproportionate Impacts of Climate Change on Socially Vulnerable Population in the United States*, ENVT'L PROT. AGENCY (Sept. 2, 2021), https://www.epa.gov/newsreleases/epa-report-shows-disproportionate-impacts-climate-change-socially-vulnerable [https://perma.cc/2ZDB-7FK2].

3. For example, building electrification can impose significant costs on low-income residents whether or not they electrify. Per the Greenlining Institute: "Residents from these communities experience multiple and often compounding economic barriers that make electrification nearly impossible if they are expected to go it alone. However, they will also be the hardest hit if they wind up being the last customers served by the gas distribution system, because they can least afford the risk of significantly increased bills that will be needed to support aging and stranded infrastructure." GREENLINING INST., EQUITABLE BUILDING ELECTRIFICATION: A FRAMEWORK FOR POWERING RESILIENT COMMUNITIES 17 (Oct. 1, 2019), https://greenlining.org/wp-content/uploads/2019/10/Greenlining_EquitableElectrification_Report_2019_WEB.pdf [https://perma.cc/EJ5P-YA8B]. As another example, New York City's planned congestion pricing program is projected to reduce traffic and associated air pollution in Manhattan, but to increase it in the South Bronx, an environmental justice community that is one of the most polluted areas of the city. *See* Ana Ley, *A Plan to Push Cars Out of Manhattan Could Make the Bronx's Air Dirtier*, N.Y. TIMES (Sept. 12, 2022), https://www.nytimes.com/2022/09/12/nyregion/nyc-congestion-pricing-manhattan-bronx.html [https://perma.cc/374A-QBSM].

4. *See* Claudia V. Diezmartínez & Anne G. Short Gianotti, *US Cities Increasingly Integrate Justice Into Climate Planning and Create Policy Tools for Climate Justice*, 13 NATURE COMMC'NS 1, 2 (2022), https://www.nature.com/articles/s41467-022-33392-9 [https://perma.cc/3QJP-NGZC].

that certain communities experience as a result of climate change and policies to address climate change, and suggests policy tools that can address these disparities. Missing, however, is a discussion of why considerations of equity and climate justice matter from a legal perspective. In other words, why are local governments compelled or strongly encouraged by law to develop climate plans that aim to address racial and socioeconomic inequity alongside rising GHG emissions? That these questions have not been fully explored means that the very real policy imperative to imbue local climate policy with a focus on equity may fall by the wayside when doing so becomes too costly or challenging, or when local governments fear that opponents will bring legal challenges to their climate action plans and related policies and actions.

This Article fills in the missing legal context for why equitable local climate action planning is not merely a nice-to-have; it is effectively compelled, or at least strongly encouraged, by federal law. Three areas of federal law are relevant here. First, the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution[5] and the case law that interprets it prohibit discrimination on the basis of race, among other protected characteristics. In particular, federal case law interpreting the Equal Protection Clause's applicability to state and local procurement and hiring programs illustrates how local governments might rely on the limited use of racial classifications to develop more equitable climate policy. Second, Title VI of the Civil Rights Act of 1964 requires local governments to adhere to federal agency requirements promulgated under Section 602 (in addition to prohibiting intentional racial discrimination).[6] Alleged violations of Title VI regulations have in recent years led federal agencies to put on hold or express concerns about federal projects that have climate impacts and may involve discrimination on the basis of race. Third, recent federal legislation and executive actions require that local efforts to address climate change direct a significant portion of most federal funding to low-income and minority communities. This is accomplished through initiatives such as the Biden Administration's Justice40 commitment,[7] specific appropriations made for "disadvantaged communities" and "energy communities" in the federal Infrastructure Investment and Jobs Act (IIJA) of 2021[8] and the Inflation Reduction Act (IRA) of 2022,[9] and federal agency discretion. This

5. U.S. CONST. amend. XIV, § 1.

6. Civil Rights Act of 1964, 42 U.S.C. § 2000d.

7. Exec. Order No. 14008, 86 Fed. Reg. 7619 (Jan. 27, 2021).

8. Infrastructure Investment & Jobs Act, Pub. L. No. 117-58, § 11132, 135 Stat. 429 (2021) [hereinafter "IIJA"].

9. Inflation Reduction Act, Pub. L. No. 117-169, 136 Stat. 1818 (2022) [hereinafter "IRA"].

federal legislation is bolstered by federal executive action, which also directs certain climate and energy spending to disadvantaged communities.

This Article proceeds in five parts. Part I discusses equity and climate justice in the local climate policy context, and specifically within local climate action planning. Parts II through IV then address the three main federal law imperatives for local governments to make racial and socioeconomic equity a core part of their climate action plans. First, Part II addresses the law of Equal Protection under the 14th Amendment of the U.S. Constitution, including case law that considers the Equal Protection implications for race-conscious procurement and hiring practices by local governments. In particular, Part II addresses the limitations of the Equal Protection Clause as a driver for considering racial equity as a part of climate planning while arguing that it strongly suggests local governments do so. Part III discusses Title VI of the Civil Rights Act of 1964 and how it plays out in federal highway projects that have significant climate and equity implications. Part IV then discusses how federal law developments in 2021 and 2022 effectively direct local governments to direct a considerable portion of their climate efforts towards "disadvantaged communities" and "energy communities," as well as to low- and moderate-income households and individuals, through specific appropriations and enhanced incentives for projects located in these areas. Part V concludes.

To be clear, there is no "smoking gun" federal law requirement that local climate action plans consider racial and socioeconomic inequity. And setting facially race-neutral climate action policy will likely result in less legal scrutiny, as the legitimacy of race-conscious laws and policies is well-trod material for courts and scholars alike. A local government can enact a technocratic climate action plan that considers each unit of GHG equally and charts a course to reduce emissions accordingly. But federal law makes a strong case for what this Article terms "*equity-infused climate action planning*," one that is increasingly difficult to set aside. As this Article will establish, by ignoring equity in climate action planning, a local government is at best leaving federal dollars on the table and at worst acting as a "passive participant" in contributing to inequality via climate policies under which low-income and minority populations fare worse than wealthier, largely White residents.

I. EQUITY IN LOCAL CLIMATE ACTION PLANNING

Before proceeding with an exploration of the federal law drivers for equitable local climate policy, it is important to identify the tools that local governments use in this space. Local governments generally map their policy approaches in a climate action plan, and in recent years these CAPs have increasingly come to incorporate considerations of equity and climate

justice. Part I briefly discusses these plans, the trend toward policy approaches that define and incorporate equity, and the overlapping concepts of equity and race.

A. What is Climate Action Planning?

Climate action planning describes the tools used by local governments to measure community-wide greenhouse gas emissions and chart a course towards deep reductions in those emissions. Climate action plans, or CAPs, are detailed strategy documents that set out a community's goals with respect to decarbonization and outline specific policy approaches,[10] even if they are aspirational at the time the CAP is drafted. A CAP is considered a critical document in advancing municipal-level climate policy. Climate action planning is both highly technical and community-driven, and local governments generally solicit input from community members in developing these plans. Ideally, the CAP is adopted legislatively, though this is not always the case, and a committed local government will periodically revisit the CAP and its strategies as it moves its decarbonization work forward.

In more recent years, local CAPs have moved away from a mere recitation of the sector-based sources of community GHGs (i.e., the buildings, transportation, energy, and waste sectors) and included alongside these measures and mitigation strategies discussions of climate justice and equity. A study by Claudia V. Diezmartínez and Anne G. Short Gianotti of Boston University documents a growing consideration of justice and equity in American local CAPs.[11] Reviewing data for the 100 largest cities in the United States, the study team found that as of June 2021, 58 cities had CAPs and, of those, 40 cities (69%) "are attentive to justice in their climate action plans."[12] 20 of those cities were categorized as "aspir[ing] for justice," meaning that they "articulate justice and/or equity as a goal, vision, guiding principle, or core value . . . but do not explicitly describe policy actions or . . . strategies" to advance their aspirations.[13] The other 20 cities were categorized as "explicitly planning for climate justice" by "systematically embed[ding] justice into the design of their climate policies by using justice and/or equity as a criterion to select policy intervention and/or by using justice focused policy tools to develop and operationali[z]e climate action policies."[14] The study further identified that justice and equity have become

10. *See Climate Action Plans*, *supra* note 1.
11. *See* Diezmartínez & Short Gianotti, *supra* note 4, at 2.
12. *Id.*
13. *Id.*
14. *Id.*

more prevalent in local CAPs over time,[15] a finding that would appear to be confirmed by the equity- and justice-oriented CAPs introduced since the study's publication.[16]

B. "Equity-Infused Climate Action Planning" Reflects Local Governments' Varying Terminology

While the inclusion of equity- and justice-oriented principles is becoming more common in local CAPs, the vocabulary used to describe what local governments are doing, or what objectives they aim to achieve, has not fully solidified into a universally-employed set of terms. Diezmartínez and Short Gianotti note that "[c]ities tend to use the language of 'equity', rather than 'environmental justice' or 'climate justice,'" and that "when cities provide a definition for these concepts, they generally define 'justice' as prioriti[z]ing historically vulnerable communities and those disproportionately affected by climate change, while 'equity' tends to be more broadly defined as ensuring equitable access and distribution of the benefits of climate policies."[17]

Often, local governments define these terms for themselves based on guidance offered by other cities and by peer networks that support these communities' climate action planning. For example, the City and County of Honolulu defines five relevant strains of equity: (1) procedural equity ("[a]ccessibility and inclusivity of decision[-]making processes by those most impacted[]"); (2) distributional equity ("[b]enefits are distributed to prioritize those most in need[]"); (3) structural equity ("[t]ransparency and accountability are institutionalized, acted upon and regulated[]"); (4) intergenerational equity ("[d]ecisions prioritize the health & wellbeing of future generations[]"); and (5) cultural equity ("[t]he acknowledgement and undoing of racism with the concurrent construction of equitable multicultural norms").[18] Austin, Texas defines racial equity as "the condition when race no longer predicts a person's quality of life outcomes in our community[,]" making reference to the "history of racial segregation and [environmental

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15. *Id.*

16. *See e.g.*, CITY OF AUSTIN, CLIMATE EQUITY PLAN (2020-21), https://www.austintexas.gov/sites/default/files/files/Sustainability/Climate%20Equity%20Plan/Climate%20Plan%20Full%20Document__FINAL.pdf [https://perma.cc/3M6P-W873]; CITY OF MILWAUKEE, CLIMATE & EQUITY PLAN (2023), https://storymaps.arcgis.com/stories/b3c3db305fc649a2bfb16dcaad7fa048 [https://perma.cc/5XU6-VBCB].

17. *See* Diezmartínez & Short Gianotti, *supra* note 4, at 2.

18. *Defining Equity*, CITY AND CNTY. OF HONOLULU OFF. OF CLIMATE CHANGE, SUSTAINABILITY & RESILIENCY, https://resilientoahu.org/equity [https://perma.cc/ET8W-Q5FU] (last visited Apr. 15, 2022).

justice] issues in Austin."[19] San Diego, California uses the term "climate equity" as an umbrella term for "address[ing] environmental justice and social equity concerns."[20] The Providence, Rhode Island *Climate Justice Plan* refers to the plan's efforts to "seek[] a just and equitable approach to transitioning the city away from fossil fuels," noting further that, "[i]n Providence and around the world, people of color have contributed the least to the climate crisis yet they are disproportionately burdened by the polluting industries that are causing climate change and other environmental degradation."[21] The Urban Transitions Alliance, an international group which counts Baltimore, Buffalo, Cincinnati, and Pittsburgh among its members, defines equity as encompassing access ("[e]nsuring just distribution and accessibility"), opportunity ("[o]ffering fair perspectives for all") and participation ("[m]aking all voices heard").[22] The terms and definitions local governments use vary for a variety of reasons, as communities have different priorities, goals, demographics, histories, and more, each of which can inform a different vision for a sustainable, equitable and/or just future.

Related, though distinct, terms include "environmental justice" and "energy justice." According to the U.S. Environmental Protection Agency, "environmental justice" refers to "the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation and enforcement of environmental laws, regulations and policies."[23] The term "energy justice" describes a framework for understanding the energy system, with "the goal of achieving equity in both the social and economic participation in the energy system, while also remediating social, economic, and health burdens

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19. COMMUNITY CLIMATE AMBASSADOR PROGRAM, CITY OF AUSTIN OFFICE OF SUSTAINABILITY 2, https://www.austintexas.gov/sites/default/files/files/Sustainability/ENG_Final%20Abassador%20Report.pdf [https://perma.cc/56PK-XBS9]; *see also* Memorandum from Brion Oaks, Chief Equity Officer, to the City of Austin Department Directors (Oct. 22, 2019), http://www.austintexas.gov/edims/pio/document.cfm?id=329993 [https://perma.cc/8YK2-W6SM].

20. CITY OF SAN DIEGO, CLIMATE EQUITY INDEX REPORT 3 (2019), https://www.sandiego.gov/sites/default/files/2019_climate_equity_index_report.pdf [https://perma.cc/PQU9-4KS4].

21. CITY OF PROVIDENCE, CLIMATE JUSTICE PLAN 13 (2019), https://www.providenceri.gov/wp-content/uploads/2019/10/Climate-Justice-Plan-Report-FINAL-English-1.pdf [https://perma.cc/NL7B-ET5D].

22. *Launch of Equitable Transitions Guidebook*, URB. TRANSITIONS ALL. (June 30, 2022), https://urbantransitions.org/equitable-transitions-guidebook-launch/ [https://perma.cc/T9VM-QJUM].

23. *Learn About Environmental Justice*, ENVT'L PROT. AGENCY, https://www.epa.gov/environmentaljustice/learn-about-environmental-justice [https://perma.cc/D9ZA-9V6Q] (last updated Sept. 6, 2022).

on those disproportionately harmed by the energy system."[24] Neither of these terms fully overlap with equity-infused local climate action planning in the United States, but the terms are deeply intertwined and environmental justice and energy justice principles inform local climate equity work.

I choose in this Article to use the terms *equity-infused climate action planning* and *equity infused CAP* to refer to a range of equity- and justice-oriented considerations that may be at play in a local climate action planning process that does not focus solely on GHG emissions or take a fully technocratic approach to reducing those emissions. While there are a range of terms I could draw from, and an even larger number of policy approaches at play, it is less important for the purposes of this Article to fully delineate the vocabulary than it is to establish that local governments are increasingly seeking to embed notions of equity and justice into their CAPs. In doing so, this Article can move on to identify the potential legal underpinnings for equity-infused climate action planning, an area of scholarship that has not yet been well-developed, but that has the potential to play a significant role as local governments hit obstacles in their equity-infused climate action planning. To put it another way, I view the differences in terminology and policy approaches in the equity-infused climate action planning space to be inherent to a procedurally and distributively equity-infused process. The specific ways in which a municipality's residents are unequally affected by climate change and by climate policy vary from place to place. What this Article has to offer is a discussion of the federal legal frameworks that may support and bolster an equity-infused climate action planning process, however a local government or community may refer to it.

C. Equity-Infused Climate Action Planning: Race is not a Proxy for Equity

Of particular note is the role that racial classifications play in equity-infused climate action planning. It is well-documented that many racial-minority communities are disproportionately burdened by adverse environmental and climate impacts, including but not limited to exposure to local air pollution and other forms of pollution, negative health burdens such as increased asthma rates, disruptions due to natural disasters, and more. The same communities have in many instances also been further harmed by governmental policies relating to housing, transportation, and other areas that overlap with climate policy. In some places, a local government may determine that equitable climate policy requires taking racial classifications into account.

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24. INITIATIVE FOR ENERGY JUST., https://iejusa.org [https://perma.cc/GS8G-M8ES] (last visited Mar. 22, 2022).

Race-conscious classifications by governmental entities give rise to particular legal questions. Whether racial classifications are appropriate for a particular climate policy is entirely specific to the facts at hand — the locality, the role of the local government in previous or ongoing racial discrimination or harms, and the policy being considered. This paper does not recommend whether the use of racial classifications is appropriate for any particular municipality's CAP or other climate policy. Rather, it offers legal bases for equity-infused climate action planning. The first two legal bases discussed below, the Constitution's 14th Amendment Equal Protection Clause and Title VI of the Civil Rights Act of 1964, are discussed in relation to the potential for local governments to undertake race-conscious climate action planning. The third legal basis discussed herein, the development of federal law and policy that prioritizes climate investment in "disadvantaged communities," largely pertains to race-neutral policy. Local governments will need to determine the appropriate policy approaches for themselves and look for legal bases to support their CAPs and the policies that are pursued as a result of the climate action planning process.

II. FOURTEENTH AMENDMENT EQUAL PROTECTION CLAUSE AS A MORAL IMPERATIVE FOR EQUITY-INFUSED CLIMATE ACTION PLANNING

The first and oldest legal framework supporting equity-infused climate action planning approaches is admittedly a normative one; the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution in actuality makes the consideration of race in governmental policymaking a legally and administratively cumbersome undertaking. Still, the case law that interprets the Equal Protection Clause makes a compelling argument for doing so. These cases note that a governmental entity "has a compelling interest in assuring that public dollars . . . do not serve to finance the evil of private prejudice."[25]

While there are several strains of Equal Protection case law, the cases that most comprehensively consider the role local governments play vis-à-vis the Equal Protection Clause have to do with governmental procurement practices known as Minority Business Enterprise or Minority and Women-Owned Business Enterprise (MBE or MWBE) programs, or hiring practices that preference minority job candidates. MWBE programs aim to increase the market participation of MWBEs in public projects, often giving preference to bids that promise to hire MWBE subcontractors. Both race-conscious hiring and MWBE programs are relatively common among local governments in the United States, and they have not gone without legal

25. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 492 (1989).

scrutiny. In order to survive review, race-conscious policies must pass a standard of strict scrutiny, for which courts will look for such policies to fulfill a two-pronged test: (1) the establishment of a "compelling governmental interest" in having a race-conscious policy in place; and (2) a showing that the policy is "narrowly tailored" to achieve the objectives supported by the governmental entity's compelling interest.[26] Many race-conscious procurement and hiring practices have survived judicial review under this standard, while others have not. Both kinds of cases — those that uphold race-conscious programs and those that do not — help sketch a framework for how race-conscious policies can be developed to survive litigation.

The near ubiquity of race-conscious procurement and hiring programs in municipalities (and states and federal agencies) draws parallels to the potential trajectory of equity-infused climate action planning, with more cities considering equity in their CAPs each year. The Equal Protection Clause as interpreted by the procurement and hiring case law is supportive of equity-infused climate action planning in two ways. First, the Supreme Court suggests a moral imperative for local governments to consider their roles in broader discriminatory systems. Second, the case law provides a roadmap for CAPs and other local climate action policies that rely on racial classifications to survive the two-pronged strict scrutiny test, the judicial standard under which such race-conscious policies are reviewed.

A. *City of Richmond v. J.A. Croson* and Local Policy

In *City of Richmond v. J.A. Croson Co.*, the U.S. Supreme Court considered and struck down a local procurement policy that required prime construction contractors to award at least 30% of the dollar amount of a prime contract to subcontractors that were MBEs.[27] While the Court allowed that evidence of discrimination in the local construction industry could satisfy the "compelling governmental interest" prong of strict scrutiny analysis, it held that it did not do so sufficiently in this case, where the city pointed only to a general history of discrimination in the construction

26. A governmental entity must "narrowly tailor" its program such that the "means chosen to accomplish [the program's] asserted purpose [are] specifically and narrowly framed to accomplish that purpose." Grutter v. Bollinger, 539 U.S. 306, 333 (2003). Factors that support the assertion that a race-conscious program is narrowly tailored include: "(1) the efficacy of alternative, race-neutral remedies, (2) flexibility, (3) over- or under-inclusiveness of the program, (4) duration, (5) the relationship between numerical goals and the relevant labor market, and (6) the impact of the remedy on third parties." Rothe Dev., Inc. v. Dep't of Def., 107 F. Supp. 3d 183, 208 (D.D.C. 2015), aff'd sub nom. Rothe Dev., Inc. v. United States Dep't of Def., 836 F.3d 57 (D.C. Cir. 2016) (referencing United States v. Paradise, 480 U.S. 149, 171 (1987) (plurality and concurring opinions)).

27. *See* 488 U.S. at 511.

industry and to a disparity in how many city construction contracts are awarded to minority residents in the city (the Court noted that "the relevant statistical pool for purposes of demonstrating discriminatory exclusion must be the number of minorities qualified to undertake the particular task," i.e., how many MBEs are qualified to work on public construction projects).[28] Moreover, a plurality of the Court wrote that, even if discrimination could be shown "with the particularity required by the Fourteenth Amendment,"[29] Richmond's response was not "narrowly tailored" to remedying that discrimination. The Court noted a few reasons why Richmond's procurement policy was not narrowly tailored: there was no evidence that Richmond considered race-neutral strategies to alleviate discrimination in the construction industry;[30] the policy was not geographically restricted (minority contractors anywhere in the country could take advantage, even if they had not experienced discrimination in the Richmond construction market);[31] and the 30% set aside was inflexible (no waivers or exceptions were available)[32]. In contrast, an earlier federal program that passed strict scrutiny review had a more flexible 10% set aside for which a waiver was available to accommodate prime contractors that could not otherwise satisfy the requirement.[33]

While Richmond's program was struck down, *Croson* delineates how a procurement policy — or other local policy — that relies on race-based classifications might survive the two-pronged strict scrutiny judicial review. At a minimum, a local government would need to demonstrate the precise scope and nature of the discrimination that it seeks to remedy (i.e., the "compelling governmental interest") and develop a "narrowly tailored" response. For example, a plurality of justices noted that "if the city could show that it had essentially become a 'passive participant' in a system of racial exclusion practiced by elements of the local construction industry, we think it clear that the city could take affirmative steps to dismantle such a system. It is beyond dispute that any public entity . . . has a compelling interest in assuring that public dollars . . . do not serve to finance the evil of private prejudice."[34] In a later case, *Adarand Constructors, Inc. v. Peña* — which related to federal procurement policies, not local ones — the Court indicated that there was a pathway for procurement policies containing race-based classifications to pass strict scrutiny review: "When race-based action

28. *Id.* at 501–02.
29. *Id.* at 492.
30. *See id.* at 507.
31. *See id.* at 506.
32. *See id.* at 508.
33. *Id.* at 488–89.
34. *Id.* at 492.

is necessary to further a compelling interest, such action is within constitutional constraints if it satisfies the 'narrow tailoring' test this Court has set out in previous cases."[35]

B. A Body of Case Law Assessing Race-Conscious Procurement and Hiring

In the years since the *Croson* and *Adarand* decisions, many state and local governments have conducted the kind of study needed to show discrimination sufficient to support procurement policies that set aside some amount or proportion of local contracts for MWBEs, and some of these have survived judicial scrutiny. In fact, a cottage industry has emerged to help local governments complete studies meant to identify and document the evidence needed for a MWBE program to comport with the Equal Protection Clause and related case law.[36] The U.S. Court of Appeals for the Fourth Circuit upheld a North Carolina program that sought to remedy discrimination against African American and Native American subcontractors in the road construction sector.[37] There, the state commissioned a study of the industry, which was updated periodically, that "concluded that North Carolina minority and women subcontractors suffered from discrimination in the road construction industry and were underutilized in State contracts."[38]

Support for the conclusion included both statistical and survey (or anecdotal) evidence.[39] While the court noted that a governmental entity "need not conclusively prove the existence of past or present racial discrimination to establish a strong basis in evidence for concluding that remedial action is necessary" (a "significant statistical disparity" may suffice), "the State's data powerfully demonstrates that prime contractors grossly underutilized African American and Native American subcontractors in public sector subcontracting."[40] Further, in finding the North Carolina program narrowly tailored, the court noted that: (1) the state had tried to achieve its minority subcontractor targets through race-neutral means; (2) the program was limited in time; (3) the state set its goals for minority

35. Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 237 (1995).

36. *See, e.g.*, *MWBE Consulting*, CAPALINO, https://www.capalino.com/service/mwbe-consulting/ [https://perma.cc/7EGD-DDKW] (last visited Sept. 9, 2023); *Disparity Studies*, KEEN INDEPENDENT RSCH., https://keenindependent.com/practice-areas/disparity-studies/ [https://perma.cc/MH5S-TH97] (last visited Sept. 9, 2023); *Disparity Solutions*, MGT PERFORMANCE, https://www.mgtconsulting.com/capabilities/performance/disparity-solutions/ [https://perma.cc/L3DP-SE37] (last visited Sept. 9, 2023).

37. *See* H.B. Rowe Co. v. Tippett, 615 F.3d 233, 236 (4th Cir. 2010).

38. *Id*. at 237.

39. *Id*. at 251.

40. *Id.* at 241, 250.

subcontractors in relation to the availability of such minority subcontractors, not in relation to the population as a whole; and (4) prime contractors could receive a waiver for the subcontractor goals upon a showing of "good faith efforts" to meet those goals, generally by showing they had solicited and considered minority subcontractor bids.[41]

Similarly, the U.S. Court of Appeals for the Tenth Circuit upheld a Denver program that set targets for minority-owned subcontractors.[42] Reviewing significant statistical and anecdotal evidence, including disparity studies and testimony at trial, the court "conclude[d] that Denver has demonstrated a compelling interest in the race-based measures."[43] The court held the Denver program to be narrowly tailored but did not provide substantive analysis on this point. On the other hand, the U.S. Court of Appeals for the Ninth Circuit struck down the state of Washington's application of a federal transportation program, essentially holding that the federal government's findings of discrimination nationally could not be used to establish a compelling governmental interest that would satisfy strict scrutiny in the local context.[44]

Outside of the procurement context, there have been similar efforts to enact race-based hiring programs at the local government level. For example, a federal district court in Florida upheld a local fire department hiring program that favored some minority candidates, finding that the department's evidence of statistical disparity and anecdotal evidence was sufficient to establish a compelling governmental interest (i.e., to remedy the department's discrimination) and that the program was narrowly tailored due to the lack of efficacy of race-neutral remedies, the flexibility of and limited duration of the program, the relationship of the program's goals to labor market availability, and the limited impact of the program on "innocent" third parties (in other words, that existing employees would not be laid off).[45]

C. The Equal Protection Clause, "Passive Participation," and Equity-Infused Climate Action Planning

In *Croson*, a plurality of justices wrote "if the city could show that it had essentially become a 'passive participant' in a system of racial exclusion practiced by elements of the local construction industry, we think it clear that the city could take affirmative steps to dismantle such a system."[46] In the

41. *Id.* at 251–54.

42. *See* Concrete Works of Colorado, Inc. v. Denver, 321 F.3d 950, 994 (10th Cir. 2003).

43. *Id.* at 992.

44. *See* West States Paving Co. v. Washington State Dep't of Transp., 407 F.3d 983 (9th Cir. 2005).

45. *See* Peightal v. Metro. Dade Cnty., 815 F. Supp. 1454, 1467–71 (S.D. Fla. 1993).

46. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 492 (1989).

procurement context, the justices meant that the city could refuse to spend tax dollars on construction contracts that overwhelmingly provide work to White-owned businesses. In the Court's words, it had a "compelling interest" in directing its money in this way, even though the particulars of Richmond's program could not withstand strict scrutiny.

The *Croson* notion of "passive participation" takes on new significance in light of the increasing use of equity-infused climate action planning, as well as the disparate impacts of climate change,[47] the history of racial discrimination by all levels of government in housing and other policies,[48] and the potential for climate policy to mitigate not only climate change but also economic inequality.[49] In particular, the equity-infused climate action plans proliferating in municipalities may be only the beginning. Equity-infused climate action plans highlight significant disparate impacts along racial lines; and local governments have expressed their willingness to respond to these racially disparate impacts in their climate policies.[50] With a greater understanding of the issues at play, many would also prefer to at least avoid further exacerbating disparate impacts via "passive participation" in a racially unjust climate policy and market framework.

How might a local government play the role of "passive participant" in a racially unjust system of climate policy impacts, and what might a *Croson*-compliant race-conscious climate action plan look like? The answers will vary from place to place. Geographic, climate, socioeconomic, fiscal, and other factors differ from one community to the next. Moreover, *Croson*

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47. *See* Alique G. Berberian et al., *Racial Disparities in Climate Change-Related Health Effects in the United States*, CURR. ENVT'L HEALTH REP., at 451–64 (2022), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9363288/ [https://perma.cc/94DT-2NUL]; *see generally* S. Nazrul Islam & John Winkel, *Climate Change and Social Inequality* 4 (Dep't of Econ. & Soc. Aff., Working Paper No. 152, 2017), https://www.un.org/esa/desa/papers/2017/wp152_2017.pdf [https://perma.cc/8G97-TUK3].

48. *See generally* RICHARD ROTHSTEIN, THE COLOR OF LAW (2017).

49. *See, e.g.*, Shannon Baker-Branstetter & Rachel Chang, *The Inflation Reduction Act Reduces Emissions and Income Inequality*, CTR. FOR AM. PROGRESS (Apr. 11, 2023), https://www.americanprogress.org/article/the-inflation-reduction-act-reduces-emissions-and-income-inequality/ [https://perma.cc/GEF7-M7G5] (discussing efforts to tie climate policy to measures to alleviate inequality).

50. *See, e.g.*, *Milwaukee Climate & Equity Plan*, CITY OF MILWAUKEE, https://city.milwaukee.gov/climate/Climate-Plan [https://perma.cc/NE9V-ERVC] (last visited July 26, 2023) ("In the face of these threats, Milwaukee will support a new clean energy economy that provides opportunities for people of color to more fully and equitably participate in the economic life of the city."); Andrea Lopez-Villafaña, *San Diego's Climate Equity Report Targets Neighborhoods that Need Investment*, SAN DIEGO UNION-TRIB. (Feb. 18, 2020), https://www.sandiegouniontribune.com/communities/san-diego/story/2020-02-18/san-diegos-climate-equity-report-targets-neighborhoods-that-need-investment [https://perma.cc/4TKC-97M6] ("'San Diego is setting a new standard for the rest of the country when it comes to addressing climate action and equity,' Mayor Kevin Faulconer said in a statement.").

expressly said that determinations about local racial disparities could not simply draw from nationwide statistics; local governments must support their race-conscious policies with evidence of local impacts.[51] Still, a vision for this kind of climate action planning process can be sketched out with lessons from the national context.

First, the impacts of climate change are well documented to harm communities of color to a greater degree than they do White communities.[52] What is more, in some instances the impacts of *policies* responsive to climate change, or meant to alleviate climate impacts, also have racially disparate outcomes, even if this is not intended. For example, building decarbonization efforts by local governments and their partners can cause neighborhood gentrification, rising rents, and displacement of low-income and minority residents.[53] On the flip side, building decarbonization policies may spur upgrades in wealthier, predominantly White neighborhoods but not in lower-income communities and communities of color.[54] As another example, the phase-out of fossil fuel use in buildings in favor of electrification may cause energy bills to go up in the short and long term, increasing energy burden — a problem disproportionately faced by minority residents.[55] Transportation decarbonization policies can be problematic as well; consider New York City's planned congestion pricing program, which is projected to reduce tailpipe pollution in Manhattan but increase local air pollution in parts of the South Bronx,[56] one of the most highly polluted areas in the country with an outsized rate of childhood asthma and other negative health disparities.[57]

To survive a court challenge, local governments would need to be able to show evidence of discrimination and establish that a climate policy was sufficiently narrowly tailored to remedy or correct for the discrimination. One could imagine that, with the appropriate study and documentation of

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51. *See J.A. Croson Co.*, 488 U.S. at 501–02.

52. *See* ENVT'L PROT. AGENCY, *supra* note 2.

53. *See* Clara Stein & Corina McKendry, *A New Phase of Just Urban Climate Action in the Rocky Mountain West*, COGITATIO PRESS (Mar. 16, 2023), https://www.cogitatiopress.com/urbanplanning/article/viewFile/6019/6019 [https://perma.cc/22RR-LW74].

54. *See* GREENLINING INST., *supra* note 3, at 13.

55. *See* Ariel Drehobl et al., *How High are Household Energy Burdens? An Assessment of National & Metropolitan Energy Burden across the United States*, AM. COUNCIL FOR AN ENERGY-EFFICIENT ECON. (Sept. 2020), https://www.aceee.org/sites/default/files/pdfs/u2006.pdf [https://perma.cc/4L2H-6BLZ].

56. *See* Ley, *supra* note 3.

57. *See* J. Mijin Cha et al., *The Bronx Is an Epicenter for Coronavirus and Environmental Injustice*, DATA FOR PROGRESS (May 19, 2020), https://www.dataforprogress.org/blog/5/18/bronx-is-epicenter-for-coronavirus [https://perma.cc/M8ML-LHVT].

discriminatory housing policy, for example, efforts to retrofit buildings in minority communities to be more energy-efficient and emit less local air pollution could be justified as remedying discrimination in local housing markets (in some places, it could have the opposite effect). Significantly more would need to be done to study discriminatory contexts — particularly given that such study needs to be local in nature and cannot generally draw from national statistics — and to develop responsive and narrowly tailored local climate policies that could survive strict scrutiny. *Croson* also leaves open the possibility for government policies to correct for discrimination by private actors, not just for governmental discrimination.

These climate policy impacts are not universal, and the nuances of any particular climate policy as applied in different communities is beyond the scope of this Article. But the complexity is the point — a local government could easily find itself a "passive participant" in a system of racial exclusion by virtue of climate policy impacts that relate to historic and/or ongoing discrimination within the community.

I do not want to overstate the Equal Protection arguments in favor of race-conscious climate policy, where such race-consciousness is deemed necessary for a local government's climate policy to be equitable. The basic rule that a governmental action "will not be held unconstitutional solely because it results in a racially disproportionate impact"[58] remains very much intact, with the Supreme Court cutting off Equal Protection claims as a viable avenue for redress by environmental justice plaintiffs, as discussed further in Section II.D. The *Croson* cases themselves wrestle with the appropriateness of a government's "compelling interest" as a justification for race-conscious policy; they do not suggest that a local government is ever required to adopt race-conscious policy, merely that one might be justified in doing so. The *Croson* line of cases can therefore be used as a shield against challenges to race-conscious climate policy rather than as a legal imperative. Race-conscious climate policy, as set out or contemplated by an equity-infused local CAP, may be defensible against legal challenge (assuming supporting evidence is in place) because a local government has a compelling interest in not contributing to inequitable climate impacts.

The *Croson* line of cases by no means compels local governments to take race into account in their procurement practices; indeed, the cases affirm that a race-neutral approach will yield far less legal scrutiny. But they make a strong normative argument for local governments to consider equity — racial and socioeconomic — in their climate action plans in a once-you-see-it-you-can't-unsee-it sort of way. In *Croson*, the Court's plurality writes, "[i]t is beyond dispute that any public entity, state or federal, has a compelling

58. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 264–65 (1977).

interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice."[59] Local governments have historically contributed to discrimination through policy areas adjacent to climate policy such as housing, land use, transportation and, as directly called out in the *Croson* line of cases, jobs.[60] Less well-documented are ways local governments have responded to climate change (and thus have spent taxpayer resources) that may have been inequitable (to say nothing of the impacts of climate change itself, which while unequally distributed are generally not directly the fault of local governments). In any case, a local government's role in passively contributing to discrimination will vary with the facts on the ground, but given historic practices like redlining and deed restrictions,[61] and the inherent complexity of climate policy and its impacts on local communities, there will almost certainly be opportunities for a local government to tailor its climate planning and policies to better respond to, alleviate, or mitigate its contribution to discrimination or discriminatory policy impacts.

One can read the *Croson* line of cases as prescribing a strict race-neutral approach to all governmental policymaking. To do so would ignore that *Croson* nearly implores local governments to ask themselves whether and how they may have passively contributed to discrimination. Such an inquiry will inherently vary from place to place; there can be no one-size-fits-all set of conclusions about how a particular local government contributed or continues to contribute to discrimination in policy areas as varied as climate mitigation and adaptation, procurement, housing, land use, and transportation. In some instances, the discrimination uncovered through such an inquiry will prove to be inherently racial, while in others it will fall along socioeconomic lines. The ways in which a local government can fix the problem to counteract its discriminatory role will vary accordingly.

The *Croson* framework this Article proposes undoubtedly makes for more work for already resource-strapped local governments. But for a local government committed to equitable climate policy — and so many of them claim to be, as their climate-and-equity plans attest[62]— it is work worth

59. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 492 (1989).

60. *Id.* at 500–01.

61. *See* ROTHSTEIN, *supra* note 48, at 59–75, 77–91.

62. *See, e.g.*, *Milwaukee Climate and Equity Plan*, ENVT'L COLLABORATION OFF., https://city.milwaukee.gov/climate/Climate-Plan [https://perma.cc/L32M-76VW]; *Minneapolis Climate Equity Plan*, MINN. SUSTAINABILITY (Aug. 16, 2023), https://www2.minneapolismn.gov/government/programs-initiatives/climate-equity/climate-equity-plan/ [https://perma.cc/T2N3-QHA2]; *Austin Climate Equity Plan*, CITY OF AUSTIN, TEX., https://www.austintexas.gov/page/austin-climate-equity-plan [https://perma.cc/VFT8-6FCD]; *RVAgreen 2050: Climate Equity Action Plan 2030*, CITY OF RICHMOND, VA., https://www.rva.gov/sites/default/files/2023-

doing. The inquiry into a local government's discriminatory practices is very much aligned with the procedural equity imperative of an equitable climate action planning process. Communities traditionally excluded from the decision-making table should have their voices heard; this a core tenet of equitable climate policymaking.

This Article's arguments with respect to Equal Protection-compelled local climate action planning would be incomplete without recognizing that many local governments lack the resources to commission the kind of disparity study needed for race-based policies to survive strict scrutiny. While a *Croson*-style study would likely be needed to withstand legal review of race-conscious climate policies, an equitable climate action planning process can clarify socioeconomic disparities in a local government's actions with respect to climate, housing, transportation, land use, and procurement. These can be addressed through race-neutral measures outlined in a climate action plan and aligned policies. Further, where a climate action planning process identifies racial discrimination but the local government lacks resources to respond via a *Croson*-style study, the community's climate action plan can nonetheless seek to mitigate this discrimination through race-neutral measures. For example, in many instances race and other indicators of disadvantaged community status — like income, education level, or health disparities — are correlated. Local governments have ample legal authority to calibrate their climate policies to address these non-racial disparities without expending the significant resources that can go into developing a study needed to withstand strict scrutiny. This approach may be less satisfying than a race-based policy approach supported by the Court's *Croson* framework, but it nonetheless may address some discriminatory aspects of a local government's past or present climate and other policies.

D. Students for Fair Admissions and the Shifting Contours of Strict Scrutiny

On June 29, 2023, the eve of this Article's final due date, the U.S. Supreme Court handed down decisions in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*[63] and *Students for Fair Admissions, Inc. v. University of North Carolina*.[64] In one combined opinion, the Court invalidated race-conscious aspects of both schools' admissions policies, holding that these race-conscious elements failed strict

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01/FullDocumentRVAgreenClimateEquityActionPlan2030.pdf [https://perma.cc/PS2A-V5DG]; *Oakland 2030: Equitable Climate Action Plan*, CITY OF OAKLAND, CALIF., https://cao-94612.s3.amazonaws.com/documents/Oakland-ECAP-07-24.pdf [https://perma.cc/RV9T-XC6S].

63. No. 20-1199, slip op. at 1 (S. Ct. June 29, 2023).

64. *Id.*

scrutiny review. The Court took issue with both the "compelling governmental interest" and the "narrow tailoring" prong of strict scrutiny. On the former, the Court held that the interests cited by both schools as justifying their admissions programs — including "training future leaders," "better educating students through diversity," "promoting the robust exchange of ideas," and "preparing engaged and productive citizens" — were too vague to be "subjected to meaningful judicial review" and therefore "not sufficiently coherent for purposes of strict scrutiny."[65] Justice Roberts wrote for the Court: "How is a court to know whether leaders have been adequately 'train[ed]'; whether the exchange of ideas is 'robust'' or whether 'new knowledge' is being developed?"[66] In short, these cited interests failed in the Court's view to satisfy the "compelling governmental interest" test.[67] The Court further held that the schools "fail to articulate a meaningful connection between the means they employ and the goals they pursue."[68] Essentially, the Court questions the tailoring of the schools' means — limiting underrepresentation of racial minority groups — to the schools' stated (though in the Court's view insufficient) goals. The opinion also held that Harvard's and UNC's programs fail the "narrow restrictions" of the Court: that admissions policies "may never use race as a stereotype or negative, and — at some point — they must end."[69]

Students for Fair Admissions threatens the lawfulness of the equity-infused climate action planning process described in this part, particularly in that the decision is one more strike in the Court's gradual chipping away at governmental entities' ability to use race-conscious criteria in developing policy. However, equity-infused local climate policy as supported by a *Croson*-style disparity study can be distinguished in a number of ways. First, the "compelling governmental interest" being put forth to justify an equitable climate policy can be better assessed by a court, at least if the local government takes care in articulating it. While city access to data can be a sticking point, with proper data it can often be shown that residents of color experience greater and worse impacts of both climate change and the policies a local government might use to address them. For example, a local government could point to a statistical study of the likelihood of neighborhood gentrification, rising rents, and displacement of residents of color in a particular neighborhood that can be tied to building decarbonization policy in that same place. From there, a narrowly-tailored response can be developed — again, one the success of which can be

65. *Id.* at 23.
66. *Id.*
67. *Id.* at 22.
68. *Id.* at 24.
69. *Id.* at 22.

assessed by a court. Protections for renters and for affordable housing with a particular emphasis on an affected racial group, for example, could be made part of a climate policy in a measurable way. All of this is very much tied to the geographic, climate, socioeconomic, fiscal, and other factors that describe and define a city's reality, and is possibly made more difficult by the *Students for Fair Admissions* opinion, but the pathway to satisfying strict scrutiny is not foreclosed.

That race-conscious policies must be limited in time — or at least subject to review — is already well-documented in the *Croson* line of cases, and an end date and other criteria for program sunsetting can easily be worked into race-conscious elements of a local CAP or policy. Less clear is the Court's caution that race may not serve as a "negative." In procurement, as in college admissions, contracts and seats in freshman classes are both "zero-sum,"[70] in the Court's parlance. But climate policy is in general not zero-sum, and local governments can take care to ensure that any race-conscious elements of their policies are not punitive to white residents.

None of this is to say that *Students for Fair Admissions* is a win for equity-infused local climate policy. Federal courts will surely pay close attention to the decision in assessing other race-conscious policies and requirements, and the Court introduced highly limiting new criteria for what may and may not be considered a compelling governmental interest. Still, while race-conscious policies face a higher barrier to surviving strict scrutiny as a result of this decision, the Court does not do away with the possibility altogether. Left intact is the two-prong strict scrutiny test, and policies that have a well-articulated "compelling governmental interest" and "narrow tailoring" — in particular ones that can be measured or assessed by a court — and that have end dates and do not treat any racial classification as a "negative" may still be upheld.[71]

E. Equal Protection's Shortcomings for Environmental Justice

The law of Equal Protection has its shortcomings in an environmental justice context; in particular, plaintiffs claiming a violation of Equal Protection will need to establish that a governmental entity's actions were "motivated by a discriminatory purpose" in order to obtain any remedy in court. For this reason, scholars have long written about Equal Protection's historic failings to redress environmental injustice.[72]

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70. *Id.* at 43.

71. *Id.* at 22.

72. *See, e.g.*, Carlton Waterhouse, *Abandon All Hope Ye That Enter? Equal Protection, Title VI, and the Divine Comedy of Environmental Justice*, 20 FORDHAM ENVT'L L. REV. 51 (2009); Uma Outka, *Environmental Injustice and the Problem of the Law*, 57 ME. L. REV. 209, 210 (2005).

Two cases relating to topics other than environmental justice set the stage for the relevant Equal Protection jurisprudence. The first is *Washington v. Davis*, in which the Supreme Court held that a written personnel test required for employment with the Washington, D.C. police department did not constitute discrimination under the Equal Protection Clause despite disparate impacts in hiring along racial lines alleged by plaintiffs.[73] The Court wrote that, to establish a violation of Equal Protection, plaintiffs would need to show "an invidious discriminatory purpose,"[74] not a mere disparate impact. The Court held similarly in *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, a zoning dispute in which the Court noted that the "ultimate effect" of a local government's denial of a rezoning petition had a discriminatory and disproportionate impact on Black residents, reasoning that "impact alone does not call for strict scrutiny" in assessing Equal Protection claims.[75] The Court found no violation of the right to Equal Protection.[76] Other federal courts have applied this reasoning in environmental justice cases, as in *R.I.S.E., Inc. v. Kay*, in which the U.S. Court of Appeals for the Fourth Circuit noted the "disproportionate impact [of landfill siting] on [B]lack residents," but found that the siting board did not act in an "unusual or suspicious way."[77] Cases like these have largely chilled reliance on the Equal Protection Clause as a tool for litigating environmental justice claims.

What *Washington v. Davis*, *Arlington Heights*, *R.I.S.E. v. Kay*, and other cases like it mean in this context is that the bar for plaintiffs to claim that a local government's climate policy or CAP was racially discriminatory would be extremely high. Such plaintiffs would need to show intentional discrimination rather than any sort of disparate impact. The very high bar for a successful Equal Protection claim means that, except in the rarest of circumstances, once a disparate impact occurs, it is too late to be fixed by an Equal Protection claim in court. The need to show intentional discrimination has long stymied environmental justice claims and is likely to frustrate litigation by plaintiffs seeking to redress inequity or injustice in the local climate action planning context as well.

Still, what Equal Protection cannot do should not distract from what it can. First, petitioners in these Equal Protection cases were seeking redress *ex post* for disparate impacts that had already occurred; the court's job was merely to parse whether "discriminatory purpose" caused the claimed harms. By contrast, the Equal Protection Clause, as interpreted in the *Croson* line of

73. *See generally* 426 U.S. 229 (1976).
74. *Id.* at 242.
75. 429 U.S. 252, 259 (1977).
76. *Id.* at 253.
77. No. 91-2144, 1992 WL 295129, at *2, *4 (4th Cir. Oct. 15, 1992).

cases, offers local governments a prospective logic for considering the discriminatory impacts of their climate policy, whether racial, socioeconomic, or otherwise. In the equity-infused climate action planning context, Equal Protection would be used as a prospective legal tool — a yardstick against which to align their climate action planning — rather than as *ex post* protection for violations of fundamental rights. The lack of an enforcement mechanism for disparate impacts not motivated by discriminatory intent is significant, but it need not undermine a local government's own inquiry, supported by input from affected community members, into the potential for its climate action plan to cause discriminatory harms, or for its climate action plan to do less than it could to mitigate discriminatory or unequal climate-related harms. Moreover, though more normatively, as the intersections between climate policy and racial and socioeconomic equity become more widely understood, with international, national, and local groups publishing guidance for the development of equity-infused local climate action plans,[78] local governments slide more to the "discriminatory purpose" end of the spectrum than the race-blind-but-effectively-inequitable end of climate action planning.

To be sure, no court has said as much. Rather, local governments will have to build this plane as they fly it, wielding the normative arguments of the *Croson* court, lessons learned from years of experience by many governmental entities to conduct the disparity studies needed to survive strict scrutiny, and the climate and socioeconomic particulars of their communities to craft narrowly-tailored policy responses that work in their local contexts. *Croson*'s guidance regarding the appropriateness of ensuring non-participation in a "system of racial exclusion" as a compelling governmental interest can be backstopped by the practices of consultants and others who have developed best practices for racial disparity studies to develop policy that reflects a community's needs with respect to climate equity while ensuring that equity-infused climate action planning does not improperly (i.e., without the adequate compelling governmental interest and narrow tailoring) rely on racial categorizations that overstep the bounds of the

78. *See, e.g.*, C40 Cities Climate Leadership Group & C40 Knowledge Hub, *How to Embed Equity and Inclusivity in Climate Action Planning*, C40 KNOWLEDGE, https://www.c40knowledgehub.org/s/guide-navigation?language=en_US&guideArticleRecordId=a3s1Q000001iaiBQAQ&guideRecordId=a3t1Q0000007lEWQAY [https://perma.cc/GV8L-2MC6] (last visited May 4, 2023); *Equity Foundations 1.0 Training*, URB. SUSTAINABILITY DIRS. NETWORK, https://www.usdn.org/equity-foundations-training.html [https://perma.cc/WSJ5-ZQ69] (last visited May 4, 2023) (describing a version "2.0" of the training for which materials are available only to members); Rebecca Wessinghage, *Prioritizing Equity in Local Climate Action: An Equity Framework From Industrial Legacy Cities*, CITY TALK (Feb. 19, 2021), https://talkofthecities.iclei.org/prioritizing-equity-in-local-climate-action-an-equity-framework-from-industrial-legacy-cities/ [https://perma.cc/HCF7-RHBL].

Fourteenth Amendment. The results, one hopes, will be a richer, more accessible climate action planning process and more effective and just climate policy.

III. TITLE VI OF THE CIVIL RIGHTS ACT OF 1964

The second body of federal law that could be used to drive equity-infused climate action planning is Title VI of the Civil Rights Act of 1964.[79] Like the Equal Protection Clause, its relationship to local climate policy is a bit circuitous, but nonetheless worth delineating. It is also worth noting that, as with the Equal Protection Clause, federal case law long ago discouraged environmental justice plaintiffs from seeking redress via Title VI.[80] Nonetheless, Title VI has more recently been cited by federal agencies as compelling further review of the discriminatory impacts of federal projects.[81] Thus, Title VI, like the Equal Protection Clause, can be viewed as prospective legal justification for equity-infused climate action planning, even if the threat of a litigation driver to address racial discrimination is low.

Title VI prohibits discrimination "on the ground of race, color, or national origin" by any activity receiving federal funding.[82] Very easily, projects relevant to both climate and equity can be called to mind. For example, federal highway projects — both interstate highways and smaller roads that nonetheless receive federal funding, require federal approvals, or otherwise are defined as "federal-aid highways"[83] under Title 23 of the United States Code — have significant implications for a surrounding community's transportation greenhouse gas emissions and for local air pollution emitted from vehicle tailpipes, which have disproportionately harmful health impacts in minority communities. Perhaps more to the point, from a racial equity standpoint, a wide array of discriminatory impacts — and indeed some overt, intentional discrimination — has been documented as resulting from highway projects.[84] The interstate highway system, in particular, drove urban segregation, White flight to the suburbs, and the physical and

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79. *See* 42 U.S.C. § 2000d.

80. *See, e.g.*, Alexander v. Sandoval, 532 U.S. 275, 275–76 (2001); S. Camden Citizens in Action v. N.J. Dep't of Envt'l Prot., 274 F.3d 771, 774 (3d Cir. 2001).

81. *See infra* Section III.B.2; *see also* Letter from Michael S. Regan, Adm'r of U.S. Envt'l Prot. Agency, to Lori E. Lightfoot, Mayor of Chicago (May 7, 2021) (on file with author); Crain's Staff, *General Iron Move Halted as Biden EPA Weighs In*, CRAIN'S CHI. BUS. (May 7, 2021), https://www.chicagobusiness.com/government/general-iron-move-halted-biden-epa-weighs [https://perma.cc/TYS9-VW9D].

82. 42 U.S.C. § 2000d.

83. 23 U.S.C. § 101(a)(6).

84. *See generally* Deborah N. Archer, *"White Men's Roads Through Black Men's Homes": Advancing Racial Equity Through Highway Reconstruction*, 73 VAND. L. REV. 1259 (2020).

economic destruction of largely Black neighborhoods during the mid-20th century.[85] These discriminatory impacts are better understood now, and several cities have completed or are studying highway removal projects meant at least in part to remedy highway-caused racial discrimination. Similarly, housing initiatives requiring federal support have both climate and equity impacts. From a climate perspective, housing policy decisions can have GHG implications. For example, the location of housing impacts whether and how often residents must use private cars to travel. Apartments that share walls also have the potential to be more energy efficient than stand-alone, single-family homes. And, of course, housing affordability and quality is a significant equity issue, with communities across the country falling short on available housing for low-income residents.[86]

A. Federal Agency Implementing Regulations Under Section 602

Title VI is largely not going to drive significant litigation against local governments, though litigation under other statutes may serve as a complement to the Title VI administrative complaint process. Rather, Title VI matters to local governments because of the requirements federal agencies put in place to comply with Section 602 of Title VI, which requires any federal agency or department "empowered to extend Federal financial assistance to any program or activity . . . issu[e] rules, regulations, or orders of general applicability" to ensure such agency or department's compliance with Title VI.[87] The department or agency may then enforce these requirements by "termination of or refusal to grant or to continue assistance" to a recipient, including a local government, that fails to comply with them.[88] When it comes to local climate action planning, these regulations are the way in which Title VI gets its teeth.

When dealing with federal agencies, including in connection with many of the programs enacted or expanded by the U.S. Infrastructure Investment and Jobs Act[89] and Inflation Reduction Act,[90] local governments will need to navigate the applicable federal agency's Section 602 implementing regulations. Federal agencies including the Department of Transportation,[91]

85. *See id.*

86. *See* THE GAP: A SHORTAGE OF AFFORDABLE HOMES, NAT'L. LOW INCOME HOUS. COAL. (2023), https://nlihc.org/gap [https://perma.cc/7UFX-AA6N].

87. 42 U.S.C. § 2000d.

88. *Id.*

89. *See* IIJA, Pub. L. No. 117-58, 135 Stat. 429 (2021); 23 U.S.C. § 101.

90. *See* IRA, Pub. L. No. 117-169 136 Stat. 1818 (2022); 26 U.S.C. § 55.

91. *See* 23 C.F.R. § 200.1 (2023).

Department of Housing and Urban Development,[92] Department of Energy,[93] and the Environmental Protection Agency[94] all have their own Section 602 regulations, as well as significant guidance available to help states and local governments comply with those regulations.[95] Each of these agencies, among others, has a significant role to play in areas well-trod in local CAPs, including transportation emissions, energy efficient and walkable housing, renewable energy, and air pollution, and therefore local governments with robust CAP strategies that rely on federal support will find their local climate policy and Section 602 regulations inextricably linked.

Functionally, Section 602 regulations require local governments to imbue certain aspects of local climate policy – that is, any that rely on federal support – with equity. These rules impose some consideration of equity, nondiscrimination, and public participation on local governments, and local governments would be wise to consider equity impacts not only in connection with projects that are already expected to need federal funding, approval, or assistance, but also for projects that may someday seek federal support and that will therefore become subject to Section 602. In other words, local governments should plan to be in a position to comply with Section 602 regulations for all aspects of their CAPs in case CAP strategies become eligible for federal assistance and therefore subject to regulation later. Moreover, states are also subject to Section 602 regulations. While local governments will not be able to sue their state governments for failure to comply with Section 602 regulations, their existence and applicability to state governments may further bolster equitable state and local climate action approaches.

B. Case Study: Federal Highway Administration Regulations and Highway Expansions

Without an explication of the Section 602 rules each federal agency has promulgated, their applicability to local climate action planning can appear abstract. In the interest of brevity, this Article examines the Section 602 regulations of one agency, the U.S. Federal Highway Administration (FHWA), and discusses how obligations under these regulations have played out in local communities.

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92. *See* 24 C.F.R. § 1.1 (2023).

93. *See* 10 C.F.R. § 1040.1 (2023).

94. *See* 40 C.F.R. § 7.10 (2023).

95. *See, e.g.*, *Federal Civil Rights Laws (Including Title VI) & EPA's Non-Discrimination Regulations*, ENVT'L PROT. AGENCY, https://www.epa.gov/external-civil-rights/federal-civil-rights-laws-including-title-vi-and-epas-non-discrimination [https://perma.cc/2ULY-9F5F] (last visited May 16, 2023).

1. Federal Highway Administration Regulations

The FHWA, which has oversight over federal roads (including without limitation interstate highways), has Section 602 regulations in place that require states and state transportation agencies[96] to make assurances that "no person . . . on the grounds of race, color, or national origin, be . . . subjected to discrimination under any program or activity" receiving assistance from the FHWA or the U.S. Department of Transportation.[97] Crucially — and in contrast to Title VI itself — "discrimination" is defined as "intentional *or unintentional*" action.[98] Moreover, states and state transportation agencies are required to "take affirmative action to correct any deficiencies found by the FHWA," with "affirmative action" defined as "[a] good faith effort to eliminate past and present discrimination in all federally assisted programs, and to ensure future nondiscriminatory practices."[99] The FHWA regulations address not only distributive equity in the form of nondiscrimination, but also procedural equity, including opportunities for citizen participation and review of complaints.[100]

2. Houston and Beyond: Highway Expansion Projects

The intersection of local equity-infused climate action planning efforts and the FHWA's Title VI regulations is well-viewed through the lens of the Interstate-45 ("I-45") expansion project in Houston, Texas, and the related legal and administrative interventions. The story of I-45 in Houston is a familiar one, illustrative of the ways in which the interstate highway system tore through largely Black and Latinx neighborhoods in the mid-20th century as part of systemically and sometimes overtly racist efforts to segregate and destroy minority communities while facilitating "white flight"[101] to the suburbs.[102] As the administrator of the I-45 expansion project, the Texas Department of Transportation ("TxDOT") was responsible for compliance with the Title VI regulations promulgated by the FHWA.

In March 2021, the FHWA paused the I-45 expansion project, citing "serious Title VI . . . concerns" raised by stakeholders living or working near

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96. As political subdivisions of states, units of local government are also subject to Section 602 regulations when applicable.

97. 23 C.F.R. § 200.9(a)(1) (2023).

98. *Id.* § 200.5(f) (emphasis added).

99. *Id.* § 200.5(a).

100. *See e.g.*, *id*. § 200.9(b).

101. *See* Archer, *supra* note 84, at 1288.

102. *See* Jimmie Briggs, *Before the Highway: Houston, Texas*, AARP LIVABLE CMTYS. (Feb. 1, 2023), https://www.aarp.org/livable-communities/getting-around/info-2023/before-the-highway-houston-texas-rose-childress.html [https://perma.cc/2KVN-83PT].

the highway.[103] The pause came only one month after TxDOT issued a Record of Decision ("ROD") allowing the project to proceed as set forth in the Final Environmental Impact Statement ("FEIS") required by the National Environmental Policy Act ("NEPA").[104] Various groups filed complaints with TxDOT in early 2021[105] alleging that an ROD consistent with the FEIS would violate Title VI. One such complaint, by the group Air Alliance Houston, cites not only Title VI, but also the Title VI regulations and President Clinton's Executive Order No. 12,898, which directs federal agencies to "identif[y] and address[] . . . disproportionately high and adverse human health or environmental effects of [their] . . . activities on minority populations[.]"[106] Separately, Harris County, Texas sued TxDOT[107] under NEPA, the Administrative Procedure Act, and Section 4(f) of the Department of Transportation Act to stall the project.[108] While Harris County's complaint references FHWA's pause on the project "to evaluate serious Title VI concerns,"[109] the suit demonstrates the inherent limitations of Title VI. Title VI offers opportunities for administrative process; litigants must point to other legal obligations of states and federal agencies for which they have a cause of action. In this way, the Harris County complaint served as a complement to the ongoing Title VI administrative complaint process. The matter was ultimately resolved by agreement between the FHWA and TxDOT and the I-45 expansion project is now permitted to proceed.[110]

The Houston saga reverberated elsewhere in the country, though to mixed results. Soon after the FHWA paused the I-45 expansion, the Wisconsin

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103. CJO Spokesperson (@CJOspox), TWITTER (Mar. 11, 2021, 4:13 PM), https://twitter.com/CJOspox/status/1370120750905094149 [https://perma.cc/F9ZG-DPFH]; *see also* Anna Kasradze, *Civil Rights Complaints, Lawsuit Put I-45 Highway Expansion on Hold*, SIERRA CLUB (Mar. 23, 2021), https://www.sierraclub.org/texas/houston/blog/2021/03/civil-rights-complaints-lawsuit-put-i-45-highway-expansion-hold [https://perma.cc/JAZ6-7TQC].

104. *See* 42 U.S.C. § 4321; *see also* Notice: Record of Decision Available for Public Review, TEX. DEP'T TRANSP. (Mar. 2021), https://www.txdot.gov/content/dam/project-sites/nhhip/docs/nhhip-notice-noa-rod-english.pdf [https://perma.cc/X3TU-ZNSA].

105. *See* Kasradze, *supra* note 103.

106. Exec. Order No. 12898, 59 Fed. Reg. 7629 (Feb. 11, 1994).

107. *See* Complaint, Harris Cnty. v. Tex. Dep't of Transp., No. 4:21-cv-00805 (S.D. Tex. Mar. 11, 2021).

108. Department of Transportation Act of 1966 § 4, 49 U.S.C. § 303. Section 4(f) prohibits USDOT from approving projects that "require[] the use of any publicly owned land from a public park, recreation area, or wildlife . . . refuge . . . or any land from an historic site . . . unless there is no feasible and prudent alternative . . . and the program includes all possible planning to minimize harm." *Id.*

109. *See* Complaint, *Harris Cnty.*, No. 4:21-cv-00805, at 18.

110. Letter from FHWA to Marc Williams, Exec. Dir., Tex. Dep't of Transp. (Mar. 6, 2023), https://www.txdot.gov/content/dam/docs/news/houston/nhhip-letter%20concluding-nepa-audit.pdf [https://perma.cc/8LMX-FFA2]; *see also* Letter from Achille Alonzi, Div. Admin., FHWA, to James M. Bass, Exec. Dir., Tex. Dep't of Transp. (Mar. 8, 2021).

Department of Transportation (WisDOT) announced that it would undertake a supplemental environmental impact statement in connection with the planned expansion of I-94 in Milwaukee.[111] The supplemental environmental review was not mandated by the federal government, but it did follow a letter from project opponents to U.S. Secretary of Transportation Pete Buttigieg that stated, "the initial EIS failed to conduct a meaningful, legally required environmental justice analysis, and used outdated traffic projections from 2009 that no longer reflect current commuting behavior."[112] Moreover, Wisconsin's transportation secretary noted that the supplemental review "will help us make certain that our efforts to ensure racial equity with this project are comprehensive and aligned with federal priorities."[113] The draft supplemental EIS was completed in late 2022, once again identifying the "8-lane alternative" (i.e., the option that widens rather than maintains or shrinks the highway);[114] the supplemental EIS was open for public comment through January 2023.[115]

An I-5 expansion plan in Oregon has also played out against the backdrop of Title VI and other racial equity concerns. There, after undertaking environmental review and receiving FHWA approval to expand I-5, three Portland groups sued USDOT and the FHWA, again under NEPA, the Administrative Procedure Act, and Section 4(f) of the Transportation Act.[116] In parallel, state officials revised project plans in an attempt to grapple with environmental justice concerns, adding to the project a cap over the expanded highway that would reconnect the neighborhood torn apart by I-5's initial construction.[117] In response to the project redesign, the FHWA in early 2022 directed the Oregon Department of Transportation (ODOT) to

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111. Press Release, Wisconsin Dep't of Transp., WisDOT to Expand Review of I-94 East/West Project (Apr. 15, 2021), https://wisconsindot.gov/Pages/about-wisdot/newsroom/news-rel/041521-SEIS.aspx [https://perma.cc/MZH5-9NWF].

112. Letter from Deb Nemeth, Exec. Dir., 1000 Friends of Wis., et al. to Pete Buttigieg, Sec'y, U.S. Dep't of Transp. (Mar. 16, 2021), https://urbanmilwaukee.com/wp-content/uploads/2021/04/I-94-Milwaukee-Coalition-Letter-to-Sec.-Buttigieg-3.16.2021.pdf [https://perma.cc/E396-8M5L].

113. Press Release, Wisconsin Dep't of Transp., *supra* note 111.

114. *See* U.S. DEP'T OF TRANSP. FED. HIGHWAY ADMIN., FHWA-WI-EIS-2022-01-D, SUPPLEMENTAL ENVT'L IMPACT STATEMENT & SECTION 4(F) EVALUATION (2022), https://wisconsindot.gov/Documents/projects/by-region/se/94ew-study/2022/sdeis/summary.pdf [https://perma.cc/F6KT-VD2R].

115. *See I-94 East-West Corridor Study- Envt'l Documents*, WIS. DEP'T OF TRANSP., https://wisconsindot.gov/Pages/projects/by-region/se/94stadiumint/info.aspx [https://perma.cc/2HJK-RHWP] (last visited July 24, 2023).

116. *See* Department of Transportation Act of 1966 § 4, 49 U.S.C. § 303.

117. *See* Jonathan Maus, *After Two-Year Stoppage, Portland Ready to Work on I-5 Rose Quarter Project*, BIKEPORTLAND (June 23, 2022), https://bikeportland.org/2022/06/23/after-two-year-stoppage-portland-ready-to-work-on-i-5-rose-quarter-project-357624 [https://perma.cc/Y5BH-M9XB].

update its environmental assessment (EA).[118] The Supplemental EA was completed in November 2022 and found that the new highway lanes would not have significant impacts to the environment.[119] The litigation against ODOT and the FHWA remains ongoing.

The role that local governments played in each of these projects is admittedly complex, and it would be overstepping to assert that local climate action planning drove a particular approach to any of them. While Harris County, Texas sued over I-45, Houston did not. Local officials in Portland were involved in the I-5 project redesign, including negotiations with ODOT; still, there was no obvious connection to Portland's CAP. The Milwaukee County Board of Supervisors pointedly voted down an effort to introduce a six-lane (i.e., same-size) version of the I-94 project.[120] Local governments in Syracuse's surrounding suburbs joined a lawsuit to oppose a highway deconstruction project there (though the city of Syracuse did not).[121] Rather than providing a cohesive roadmap for how local governments can point to Title VI as a legal justification for equity-infused climate action planning, these disputes demonstrate the range of legal issues at play.

While each of the highway expansion projects described in this part were ultimately permitted to proceed, the FHWA's Title VI regulations effectively delayed and could have driven substantive changes to the projects' plans. They ensured that, at least to a modest degree, concerns about discriminatory impacts were considered, and gave both residents an opportunity to be heard. Moreover, the experiences in Houston, Milwaukee, and Oregon suggest that state and local governments should be attuned to FHWA regulations under Section 602 going forward. Local governments should not expect that projects subject to FHWA input will sail through without issue and would be wise to consider Title VI requirements as early as the climate action planning stage.

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118. *See* Letter from Phillip A. Ditzler, Or. Div. Adm'r, U.S. Dep't of Transp., to Kris Strickler, Dir., Oregon Dep't of Transp. (Jan. 18, 2022), https://nomorefreewayspdx.files.wordpress.com/2022/01/22-01-18-i5-rose-quarter-improvement-project.pdf [https://perma.cc/P7ML-EH6F].

119. *See Supplemental EA*, OR. GOV'T, https://odotopenhouse.org/i5-rose-quarter-sea [https://perma.cc/SB3N-7NCN] (last visited Aug. 13, 2023).

120. *See* Milwaukee Cnty. Bd. of Supervisors Res. 22-1180 (Wis. 2022).

121. *See* Renew 81 for All v. N.Y. State Dep't of Transp., No. 007925/2022 (N.Y. Sup. Ct., Onondaga Cnty. Feb. 14, 2023).

C. Title VI's Shortcomings: No Cause of Action to Sue to Enforce Section 602 Regulations

As with Equal Protection, Title VI has historically offered environmental justice plaintiffs little in the way of a private right of action to sue the government for Title VI-prohibited discrimination, unless such discrimination is intentional. This Article does not assume that Title VI will act as a driver of litigation in connections with local CAPs, but rather underscores the regulations that will apply to many CAP strategies.

The Supreme Court has held that plaintiffs may not sue federal agencies to enforce Section 602 regulations, and this holding has been extended by other federal courts to apply to environmental justice plaintiffs. In *Alexander v. Sandoval*, which examined an Alabama driver's license exam offered only in English, plaintiffs argued that the English-only requirement discriminated against groups based on their national origin.[122] The Supreme Court rejected this contention.[123] The Court held that, while potential plaintiffs had a right of action under Section 601 of Title VI regarding alleged intentional discrimination by recipients of federal funds, there is no implied private right of action under Section 602.[124] Importantly, Section 601 deals with intentional discrimination only, while federal agency regulations promulgated under Section 602 may address discrimination that is not intentional but that has a disparate impact, as was the case in the FHWA regulations described above.

Effectively, the Court's conclusion that the private right of action granted by Congress applied only to the intentional discrimination prohibited by Section 601, not to the broader set of regulations promulgated under Section 602 and, by extension, the unintentional discrimination that may be prohibited by them. The Court did not assess the validity of the regulations themselves; rather, it foreclosed the plaintiff's right to bring suit.[125] A case before the U.S. Court of Appeals for the Third Circuit, *South Camden Citizens in Action v. New Jersey Department of Environmental Protection*, in which the court upheld a permit for a cement plant, extended the *Sandoval* holding to the environmental justice context.[126] Quoting *Sandoval*, the Third Circuit wrote that "[l]anguage in a regulation may invoke a private right of action that Congress through statutory text created, but it may not create a right that Congress has not."[127] It is important to note that while *Sandoval*

122. *See* Alexander v. Sandoval, 532 U.S. 275, 279 (2001).
123. *See id.* at 293.
124. *See id.* at 285.
125. *See id.* at 285–86.
126. *See* 274 F.3d 771, 774 (3d Cir. 2001).
127. *Id.* at 778–79 (quoting *Sandoval*, 532 U.S. at 291).

and *South Camden Citizens* illustrate the hurdle that environmental and climate justice plaintiffs must clear, they do not lessen the applicability of Section 602 regulations to environmental or climate justice-related projects.

The low risk of litigation associated with a local government's failure to imbue its climate action planning process with racial equity considerations does not relieve the local government of its obligation to follow the Section 602's regulatory requirements. A local government would have to essentially opt out of federal support to avoid any sort of compliance with Section 602 regulations, an increasingly untenable proposition given the federal funding opportunities described in Part VI, such as the Inflation Reduction Act and the Infrastructure Investment and Jobs Act. Ideally, local climate action is a shared project of the federal, state, and local levels of government alongside the business community and civil society, with the federal government offering support to local governments on the condition that Section 602 and other federal rules are followed. Even if this optimistic view of harmonious federalism is incorrect, local governments will need to navigate Section 602 to oppose federal projects that could increase community GHG emissions or support projects that could reduce them. The Houston, Milwaukee, and Portland expansion projects and Syracuse highway deconstruction project each offer guidance on how Section 602 rules might be relevant.

IV. RECENT FEDERAL LAW DEVELOPMENTS

While equal protection and civil rights law do support a strong equity component to local climate action planning, the arguments behind them are normative and highly legalistic. A more direct approach to equity-infused local climate action planning can be found in recent developments in federal law, which effectively require governments to consider equity in their GHG mitigation policy through federal funding parameters.

Upon taking office in 2021, President Biden signed Executive Order No. 14008, which among other things included a "Justice40" commitment, pledging that 40% of the benefits of certain federal climate and energy spending flow to the benefit of "disadvantaged communities."[128] Also in 2021, Congress passed the Infrastructure Investment and Jobs Act (IIJA), which, while aimed at a range of infrastructure projects, factors significantly into transportation projects running through communities around the country that receive federal dollars. In 2022, Congress passed the Inflation Reduction Act containing $369 billion in spending on climate and clean energy. Both laws, and the IRA in particular, contain significant appropriations and incentives that can only be used in, or are most valuable

128. Exec. Order No. 14008, 86 Fed. Reg. 7619 (Jan. 27, 2021).

in, lower income or "disadvantaged" communities.[129] In addition, President Biden signed Executive Order No. 14052, which applied the Justice40 principles to the IIJA[130] and Executive Order No. 14082 applying the same principles to the IRA.[131] In other words, Justice40 can be considered an "overlay" to the IIJA and the IRA, but it also has significant distinct features. While neither of these laws nor any of Biden's executive orders require local governments to develop project proposals that direct 40% of a project's benefits to disadvantaged communities, federal laws and executive branch implementation of those laws are working to effectively compel local governments to develop and execute projects in disadvantaged communities or that otherwise satisfy equity-focused statutory requirements in order to qualify for federal funding. Local governments that ignore the justice- and equity-oriented provisions of the last few years' federal laws and orders will close themselves off to significant financial assistance.

Of particular note in these federal actions is the developing definition (or definitions) of the term "disadvantaged communities." The Justice40 commitment directs investment into disadvantaged communities but leaves the identification of those communities up to a screening tool subsequently developed over more than a year by the White House CEQ (described below). Advocates were especially interested in the role that racial classifications would play in identifying disadvantaged communities through the screening tool, and many voiced concerns that the screening tool does not take race into account. Moreover, between a beta version of the screening tool and "version 1.0," the number of communities identified as "disadvantaged" communities rose from 23,470 to more than 27,000.[132] The IRA also has several provisions that expressly direct funding to disadvantaged communities, but the term is for the most part not defined in that law. Federal agencies will have to determine how to allocate such funds, and likely will use the same methodology for identifying disadvantaged communities as the CEQ screening tool.

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129. *See Environmental Justice (EJ) Provisions of the 2022 Inflation Reduction Act*, HARV. ENVT'L & ENERGY L. PROGRAM (Nov. 2022), http://eelp.law.harvard.edu/wp-content/uploads/EELP-IRA-EJ-Provisions-Table.pdf [https://perma.cc/2R6L-AU8S]; *see, e.g.*, 42 U.S.C.A. § 300j-19a.

130. *See* Exec. Order No. 14052, 86 Fed. Reg. 64335 (Nov. 15, 2021).

131. *See* Exec. Order No. 14082, 87 Fed. Reg. 56861 (Sept. 12, 2022).

132. Press Release, The White House, Biden-Harris Admin. Launches Version 1.0 of Climate and Economic Justice Screening Tool, Key Step in Implementing President Biden's Justice40 Initiative (Nov. 22, 2022), https://www.whitehouse.gov/ceq/news-updates/2022/11/22/biden-harris-administration-launches-version-1-0-of-climate-and-economic-justice-screening-tool-key-step-in-implementing-president-bidens-justice40-initiative/ [https://perma.cc/RC9D-VXXA].

A. Justice40 & Other Federal Executive Actions

Soon after his January 2021 inauguration, President Biden signed Executive Order 14008, titled "Tackling the Climate Crisis at Home and Abroad," which set out a commitment for certain federal climate and energy spending that "40 percent of the overall benefits [of certain federal climate and energy spending] flow to disadvantaged communities."[133] More specifically, the Order directed the White House Council on Environmental Quality (CEQ), federal Office of Management and Budget (OMB), and the White House Office of Domestic Climate Policy (ODCP), in consultation with a new White House Environmental Justice Advisory Council, to issue recommendations on how federal agencies can accomplish this goal. The Order listed "clean energy and energy efficiency; clean transit; affordable and sustainable housing; training and workforce development; the remediation and reduction of legacy pollution; and the development of critical clean water infrastructure" as areas to which the Justice40 commitment applies.[134] Federal agencies have also issued guidance regarding their implementation of Justice40,[135] generally available on each of their respective websites. As of summer 2022, more than 450 federal programs have been made subject to Justice40 under applicable agency actions,[136] meaning that a wide range of the programs relied on in climate-adjacent urban and local policy, including transportation, housing, and environmental protection.

Decisions about Justice40 spending will largely be driven by a screening tool developed by the White House Council on Environmental Quality (CEQ). CEQ released version 1.0 of its "Climate and Economic Justice Screening Tool" (CEJ Screening Tool or the "screening tool") in November 2022 identifying more than 27,000 disadvantaged or "partially disadvantaged" communities.[137] A primary purpose of the screening tool is to guide federal agencies as they implement the Justice40 commitment, but the tool can also be accessed by others, including local governments, both to see how projects might fit into Justice40 goals and for their own determinations about disadvantaged areas in their municipalities. The Justice 40 screening tool has been the subject of a significant amount of

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133. Exec. Order No. 14008, *supra* note 128, at 7632.

134. *Id.*

135. *See Justice40: A Whole-of-Government Initiative*, THE WHITE HOUSE, https://www.whitehouse.gov/environmentaljustice/justice40/ [https://perma.cc/AK4C-MZLC] (last visited Aug. 14, 2023).

136. *See Justice40 Initiative Covered Programs List*, THE WHITE HOUSE (Aug. 18, 2022), https://www.whitehouse.gov/wp-content/uploads/2022/07/Justice40-Covered-Programs-List_v1.1_07-15-2022.pdf [https://perma.cc/C9W7-6RCU].

137. *See* Press Release, The White House, *supra* note 132.

criticism by advocates, particularly for its failures to incorporate the racial or ethnic characteristics of a neighborhood in disadvantaged community designations and for its perceived failures in identifying disadvantaged communities in rural areas.[138] A discussion of the Justice40 screening tool's shortcomings is included in Part IV.E.2 below.

In addition to the Justice40 commitment, the Biden Administration has prioritized equity in other ways, including Executive Order 13,985, Advancing Racial Equity and Support for Underserved Communities Through the Federal Government.[139] In response to EO 13,985, federal agencies developed equity action plans, which will also shape climate and energy decision-making.

1. Justice40 and CAPs

The Justice40 commitment by its terms applies only to federal spending. A local government is not required to direct its own funds in a similar manner, nor must it seek federal funding in proportions that direct 40% of a project's benefits to disadvantaged communities. It may seek funding that does not account for disadvantaged communities at all, or it may decline to apply for federal funding at all. But Justice40 makes a compelling case for local governments to develop and present projects that prioritize disadvantaged communities. Working with these communities to identify opportunities for climate and clean energy investments will position local governments to make the case for federal funding of such investments.

Moreover, the work to identify Justice40 appropriate opportunities should ideally be reflected in a municipality's climate action plan, or at least be somewhat advanced in the planning process. Federal funding opportunities often — though not always — effectively require applicants to be relatively far along in their planning for eligible projects. Frequently, there simply isn't time for local governments to do all of the planning work required to submit a funding application that is likely to be successful. IIJA, for example, left some local governments scrambling for "shovel-ready" projects that could tap into available funding.[140]

A local CAP is a natural place to feature emissions-reducing projects appropriate for federal funding, even if no such funding is procured. When

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138. *See* Affie Ellis, *Justice40 and the Evolution of Environmental Justice*, 45 WYO. LAW. 32, 33–34 (2022); *see also* Naveena Sadasivam, *Why the White House's Environmental Justice Tool is Still Disappointing Advocates*, GRIST (Feb. 27, 2023), https://grist.org/equity/white-house-environmental-justice-tool-cejst-update-race/ [https://perma.cc/6UDD-ZEWY].

139. *See Advancing Equity and Racial Justice Through the Federal Government*, THE WHITE HOUSE, https://www.whitehouse.gov/equity/#equity-plan-snapshots [https://perma.cc/QHD7-94V4] (last visited Sept. 9, 2023).

140. This observation is based on the Author's own anecdotal knowledge.

such funding becomes available, federal agencies will be seeking projects that can help them fulfill their Justice40 obligations, and local projects that advance these goals will likely have appeal to grant reviewers. Whether in connection with deploying rooftop and community solar, bolstering transit options, building out vehicle charging networks, constructing or deconstructing roads, offering building retrofit assistance, or any other local climate project or policy that could be eligible for federal funding or assistance, Justice40 will be top of mind at federal agencies. A local government that incorporates equity metrics into these CAP strategies will be ready for funding applications that effectively require them to convince a federal agency decisionmaker that agency spending will flow to disadvantaged communities sufficient to advance the Justice40 target. Local governments need not limit themselves to projects that themselves direct 40% of spending or benefits to disadvantaged communities; a project that directs 100% of spending or benefits to disadvantaged communities would be even more helpful to a federal agency's efforts to achieve the overall goal.

Central to local efforts to center equity in climate action planning will be data to support assertions that projects or policies will in fact benefit disadvantaged communities. As the NGO World Resources Institute wrote:

> [C]omplying with the Justice40 Initiative likely means that [cities] will need to describe in applications and funding plans how funding will flow to disadvantaged communities . . . . Cities will need to undertake quantitative data assessments and qualitative community listening sessions in order to understand community needs and then tailor their applications accordingly.[141]

Furthermore, "[o]nce funding has been awarded, recipients will be expected to measure and report how the funding was used to support disadvantaged communities."[142] While the CEJ screening tool can help in this regard, local governments will need to do a significant amount of outreach within local communities to ensure that Justice40 projects are actually helping CEQ-designated disadvantaged communities. Community outreach is, of course, also key to procedurally and distributionally equitable climate policy, and therefore core to equity-infused climate action planning.

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141. Carla Walker, Lacey Shaver & Caitlin Macomber, *How Prepared Are US Cities to Implement the Justice40 Initiative?*, WORLD RSCH. INST. (Aug. 4, 2022), https://www.wri.org/technical-perspectives/how-prepared-are-us-cities-implement-justice40-initiative [https://perma.cc/J3XB-3AA4].

142. *Id.*

B. Infrastructure Investment and Jobs Act

The Infrastructure Investment and Jobs Act (IIJA, also referred to as the Bipartisan Infrastructure Law) was signed into law in November 2021. The law allocates approximately $1.2 trillion — though only about $550 billion of this is new funding — to a range of infrastructure priorities [143]. The largest portion of this new funding, $110 billion, is allocated to roads, bridges, and major projects, and "[to] reauthorize the [the federal] surface transportation program for [the next] five years."[144] While there is overlap between this transportation spending and local climate (i.e., transportation GHG emissions) policy, this pot of funding can largely be viewed as business-as-usual spending on building and maintaining federal highways. Other priorities of the IIJA are more closely aligned with local climate goals, including funding for public transit ($91 billion), electric vehicle charging ($7.5 billion), electric school buses ($5 billion), ferries ($250 million), and highway deconstruction (termed the "Reconnecting Communities" program, $1 billion).[145] In addition, the IIJA appropriates funding for programs that do not advance local climate goals but that do aim to improve environmental justice, such as $55 billion for clean drinking water and lead pipe replacement and $21 billion for environmental remediation.[146] The law also includes $65 billion for power infrastructure, which local governments will not tap into directly but which will allow for more abundant and resilient clean energy generation and transmission.[147]

Alongside the IIJA, President Biden also signed Executive Order 14082 expressly tying the IIJA to the administration's Justice40 commitment by directing agencies to "prioritize . . . investing public dollars effectively and efficiently . . . including through the Justice40 Initiative."[148] Thus, while IIJA does not make as many specific appropriations for disadvantaged communities, energy communities, or other low-income, minority, or marginalized communities as does the Inflation Reduction Act (described below), its spending in the Justice40-covered areas ("clean energy and energy efficiency; clean transit; affordable and sustainable housing; training

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143. Press Release, The White House, Fact Sheet: The Bipartisan Infrastructure Deal (Nov. 6, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/11/06/fact-sheet-the-bipartisan-infrastructure-deal/ [https://perma.cc/ZUG7-Q6V9].

144. *Id.*

145. *See* A GUIDEBOOK TO THE BIPARTISAN INFRASTRUCTURE LAW FOR STATE, LOCAL, TRIBAL, AND TERRITORIAL GOVERNMENTS, AND OTHER PARTNERS, THE WHITE HOUSE 35, 63, 136 (2022), https://www.whitehouse.gov/wp-content/uploads/2022/05/BUILDING-A-BETTER-AMERICA-V2.pdf [https://perma.cc/J3C7-DZKG].

146. *Id.* at 224, 369.

147. *Id.*

148. Exec. Order No. 14082, 87 Fed. Reg. 56861–62 (Sept. 12, 2022).

and workforce development; the remediation and reduction of legacy pollution; and the development of critical clean water infrastructure") also support equity-infused local climate efforts, at least for as long as President Biden's executive orders remain enforced.

Most IIJA funding will not flow directly to local governments, but some of it has and will likely continue to do so. In particular, local governments are directly eligible for competitive grant programs including the $7.5 billion Rebuilding American Infrastructure with Sustainability and Equity (RAISE) grant program for local transportation projects, the $2.5 billion Charging and Fueling Infrastructure grants, the $1 billion Reconnecting Communities Pilot Program, and the $5 billion Clean School Bus Program, among others. Local governments have already been awarded funds under some of these programs,[149] and additional rounds of grantmaking are yet to take place.

The IIJA is not an unabated win for equitable climate action planning,[150] but it does support equity-infused climate action planning at the local level as part of a broader set of current federal policies. Some of the programs funded by the IIJA have clear connections to equity-infused local climate policy, such as the Reconnecting Communities Program, which is an express response to the well-documented discriminatory and polluting impacts of the federal interstate highway system.[151] Other competitive programs, like the RAISE grant program and the Clean School Bus Program, are likely to preference applications that provide significant benefits to disadvantaged communities, consistent with Justice40 goals and other Biden administration priorities. In addition, the IIJA may advance local equity-infused climate action planning by ending restrictions on local hiring programs in connection

149. *See, e.g.*, *Awarded Clean School Bus Program Rebates*, ENVT'L PROT. AGENCY, https://www.epa.gov/cleanschoolbus/awarded-clean-school-bus-program-rebates [https://perma.cc/T4BH-LFWH] (last visited Aug. 14, 2023); *Raise Grants: Rebuilding America Infrastructure with Sustainablity and Equity*, U.S. DEP'T OF TRANSP., https://www.transportation.gov/sites/dot.gov/files/2022-09/RAISE%202022%20Award%20Fact%20Sheets_1.pdf [https://perma.cc/L5Q4-22BT] (last visited Aug. 14, 2023).

150. In particular, the IIJA has a focus on rebuilding highway infrastructure, including $350 billion in highway spending. *See Bipartisan Infrastructure Law, Funding*, U.S. DEP'T OF TRANSP. FED. HIGHWAY ADMIN. (Aug. 13, 2023), https://www.fhwa.dot.gov/bipartisan-infrastructure-law/funding.cfm [https://perma.cc/5Z8X-HGTY].

151. *See* IIJA, Pub. L. No. 117-58, § 11509, 135 Stat. 429, 588–92 (2021); *see also Reconnecting Communities Pilot Program*, U.S. DEP'T OF TRANSP. (July 14, 2023), https://www.transportation.gov/grants/reconnecting-communities [https://perma.cc/Q37U-GSPG] ("The Bipartisan Infrastructure Law (BIL) established the new Reconnecting Communities Pilot (RCP) discretionary grant program, funded with $1 billion over the next 5 years. It is the first-ever Federal program dedicated to reconnecting communities that were previously cut off from economic opportunities by transportation infrastructure.").

with federal transportation grants, possibly allowing local governments to better allow for a "just transition" for local workers.[152]

C. The Inflation Reduction Act

Reached after significant negotiation among members of Congress, 2022's Inflation Reduction Act represented the largest-ever federal investment on climate and clean energy. The Act's estimated $369 billion spend to address climate change addresses a range of strategies, including air pollution monitoring, clean energy deployment, electric vehicles, active transportation, building and appliance upgrades, open-ended programs developed by applicants, and much more.[153] There are two main ways in which the IRA will deploy federal dollars: by direct grantmaking in aggregate amounts prescribed by the statute, and through new and expanded tax incentives for investments in certain kinds of clean energy and GHG-reducing projects.[154] The tax incentives are essentially uncapped in aggregate dollars of credit that may be claimed. Local governments will be able to take advantage of the IRA by applying for competitive grant funds appropriated in the Act, by accessing previously unavailable tax credits through a "direct pay" mechanism,[155] and by encouraging community residents and businesses to tap into rebates, incentives, and other funds for which they qualify. While funding and incentives are available for all neighborhoods and residents, the IRA directs significant amounts to disadvantaged communities and to low- and moderate-income households in ways that incentivize local governments to undertake an equity-infused climate planning process. In addition, President Biden signed Executive Order 14082 expressly tying the IRA to the administration's Justice40 commitment.[156]

Many sections of the IRA direct specific investments in or for the benefit of "disadvantaged communities," and "energy communities," and for or on behalf of low- and moderate-income U.S. residents.[157] "Energy communities" are defined as census tracts in or near which a coal mine has

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152. *See* IIJA, Pub. L. No. 117-58, § 25019, 135 Stat. 429 (2021); *Infrastructure Investment and Jobs Act: Overview for Cities*, NACTO (Dec. 2021), https://nacto.org/wp-content/uploads/2021/08/NACTO-IIJA-City-Overview.pdf [https://perma.cc/6RUW-2XBH].

153. *See generally The* Inflation Reduction Act *Drives Significant Emissions Reductions and Positions America to Reach Our Climate Goals*, U.S. DEP'T OF ENERGY OFF. OF POL'Y (Aug. 8, 2022), https://www.energy.gov/sites/default/files/2022-08/8.18%20InflationReductionAct_Factsheet_Final.pdf [https://perma.cc/J47T-7XCK].

154. *Id.*

155. *See id.*; IRA, Pub. L. No. 117-69, § 6417, 136 Stat. 1818, 2003 (2022).

156. *See* Exec. Order No. 14082, *supra* note 131.

157. *See generally* HARV. ENVT'L & ENERGY L. PROGRAM, *supra* note 129, at 1, 3–5.

closed since December 31, 1999 or a coal-fired power plant has closed since December 31, 2009; metropolitan and nonmetropolitan statistical areas that at any time since December 31, 2009 have had 0.17% or greater employment or 25% or greater tax revenues "related to the extraction, processing, transport, or storage of coal, oil, or natural gas" or had above-average unemployment rates over the previous year; and brownfield sites as defined under the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA).[158] "Disadvantaged communities" are defined only for purposes of one section of the IRA, having to do with DOE-originated and state-administered HOMES rebate program,[159] but we can expect to see regulatory action delineating the features of disadvantaged communities consistent with other uses of that term under federal law and regulation. It is likely that "disadvantaged communities" as used in the IRA may overlap or mirror the term as defined by the CEJ Screening Tool for purposes of Justice40. It would be far simpler administratively for agencies to take the same approach to identifying disadvantaged communities under the IRA as for Justice40, though the CEJ Screening Tool has shortcomings, particularly in its failure to account for racial classifications in assigning disadvantaged community status.

Of the Congressional appropriations made in the IRA, $40 billion is estimated to flow into environmental justice communities or to low-income individuals (some estimates are higher than this).[160] Generally, these dollars are woven into programs throughout the IRA, with Congress specifying that a certain dollar amount of a program may be spent only in a disadvantaged or energy community, while the remainder of the appropriation may be spent in any community (often, the dollar breakdowns mirror the Justice40 commitment, with 40% of the total appropriation for a particular program directed expressly to disadvantaged communities). Some appropriations also fund activities that are widely understood to address historic and ongoing inequities in climate policy, such as the appropriation for highway deconstruction and other transportation projects like greenways and providing access to transit hubs and other essential destinations.[161] That the IRA makes funding available to mitigate the impacts of inequitable highway

158. *See* IRA, Pub. L. No. 117-69, § 13101(g), 136 Stat. 1818, 1912 (2022); *see also* 42 U.S.C. § 9601(39).

159. *See* IRA, Pub. L. No. 117-69, § 13101(g), 136 Stat. 1818, 2036 (2022).

160. *See IRA: Our Analysis of the Inflation Reduction Act*, JUST SOLS. COLLECTIVE, 5, https://assets-global.website-files.com/5fd7d64c5a8c62dc083d7a25/63232854dd4d104128f01b8c_JSC%20-%20Analysis%20of%20the%20Inflation%20Reduction%20Act%20-r3.pdf [https://perma.cc/AWH9-QM37] (last visited July 27, 2023).

161. *See* IRA, Pub. L. No. 117-69, § 13101(g), 136 Stat. 1818, 2080 (2022).

projects incentivizes local governments to consider and submit funding applications for projects that fit the parameters of the program.

In addition, a $3 billion Climate Justice Block Grant program offers funding to community-based nonprofit organizations (and local governments if they apply collaboratively with such a community group) for:

> community-led air and other pollution monitoring, prevention, and remediation, and investments in low- and zero-emission and resilient technologies that related infrastructure and workforce development that help reduce greenhouse gas emissions and other air pollutants; mitigating climate and health risks from urban heat islands, extreme heat, wood heater emissions, and wildfire events; climate resiliency and adaptation; reducing indoor toxics and indoor air pollution; [and] facilitating engagement of disadvantaged communities in State and Federal advisory groups, workshops, rulemakings, and other public processes.[162]

The broad remit of the block grant program encourages a significant move toward procedurally and substantively equitable climate policy. Accessing funding requires a local government to work in collaboration with community groups on largely community-led approaches, including those that would improve the lives of members of disadvantaged communities negatively impacted by elevated levels of indoor and outdoor air pollution, dangerous urban heat impacts, and other health and safety risks. That block grants can also provide funding for participation by disadvantaged community members in public processes and rulemakings is particularly important, offering needed funds to compensate community members for their time and expertise. This latter funding could serve to push local governments to advance procedurally equitable policymaking efforts, which are widely recognized as important but for which funding is often lacking.

A number of other IRA appropriations offer funding specifically for activities by local governments and other eligible applicants in low-income and disadvantaged communities. A $37.5 million program will offer funding "for grants and other activities to monitor and reduce greenhouse gas emissions and other air pollutants at schools in low-income and disadvantaged communities," as well as related technical assistance.[163] A $750 million port decarbonization program, for which local governments that have jurisdiction over a port are eligible to apply, includes funding for climate action planning that "includes a strategy to collaborate with, communicate with, and address potential effects on low-income and disadvantaged near-port communities and other stakeholders."[164]

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162. *Id.* § 60201 at 2080; 42 U.S.C. § 7438(b)(2) (internal numbering omitted).
163. *See* IRA, Pub. L. No. 117-69, § 60106, 136 Stat. 1818 (2022).
164. *See id.* at 60; 42 U.S.C. § 7433.

Many of the IRA's rebate programs and tax incentives also prioritize investments in low-income communities and amplify incentives for low- and moderate-income (LMI) individuals and families. For example, rebates for heat pumps, induction stoves, and other building electrification appliances and measures are available only to households earning 150% or less of the area median income (AMI) and are available without a cost share by the individual only for households earning less than 80% of AMI.[165] For home efficiency improvements, rebate amounts may be twice as high for LMI households as for non-LMI households.[166] Electric vehicle rebates are restricted to taxpayers below income thresholds set at $300,000 for joint tax return filers, $225,000 for head of household filers, and $150,000 for all other households[167] — amounts that would generally not be considered "low income," but that do exclude the highest-earning households.[168] That each of these individual-facing rebates and tax incentives prioritize LMI households gives local governments a statutory justification for expanding outreach programs in low-income communities and among LMI households. Whereas without IRA incentive programs many electric and other clean energy technologies would be cost-prohibitive to low- and moderate-income residents, local governments can now rely on federal and state (as funded by the IRA) programs to lessen costs, bringing these investments within reach for some lower-income households.

Other tax incentives that are more likely to be accessed by businesses than individuals also prioritize an equity-infused planning approach. Renewable energy tax credits like the Section 48E Investment Tax Credit and the Section 45 Production Tax Credit[169] can be enhanced from 6% to 30% if prevailing wage requirements from the Department of Labor are met.[170] A credit for the construction of new energy efficient homes also offers a five-times multiplier if prevailing wage requirements are met. Some of the renewable

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165. *See* IRA, Pub. L. No. 117-69, § 50122, 136 Stat. 1818 (2022).

166. *See id.* § 50121.

167. Income restrictions are half of these amounts for purchase of used electric vehicles. *See id.* § 13401.

168. *See id.* § 13401; *U.S. Federal Poverty Guidelines Used to Determine Financial Eligibility for Certain Federal Programs*, OFF. OF THE ASSISTANT SEC'Y FOR PLAN. & EVALUATION (Feb. 1, 2021), https://aspe.hhs.gov/2021-poverty-guidelines [https://perma.cc/QU6Z-D2MX].

169. *See* IRA, Pub. L. No. 117-69 § 10301, 136 Stat. 1818 (2022).

170. Prevailing wage adders are available for tax credits under Internal Revenue Code §§ 30C, 45, 45Q, 45V, 45Y, 45Z, 48, 48C, and 48E. *See* Prevailing Wage and Apprenticeship Initial Guidance under Section 45(b)(6)(B)(ii) and Other Substantially Similar Provisions, 87 Fed. Reg. 73580 (Nov. 30, 2022), https://www.federalregister.gov/documents/2022/11/30/2022-26108/prevailing-wage-and-apprenticeship-initial-guidance-under-section-45b6bii-and-other-substantially [https://perma.cc/78ME-RCQH].

energy tax incentives, including the ITC and PTC, offer bonus credit for projects sited in disadvantaged communities and/or energy communities. Owners of multifamily buildings may also access the electrification and home efficiency rebate programs if they make updates to LMI housing.[171] In all these regards, local governments are encouraged by the IRA's structure to consider how they might work with businesses and residents to encourage housing and distributed renewable energy development in areas or to serve residents that qualify the projects for enhanced credits. Renewable energy developers will be seeking to maximize the IRA tax credits their projects qualify for, and a local government looking to attract renewable energy projects in its community will be helped by its ability to identify and market projects that can qualify for the enhanced tax credits.

More broadly, IRA incentives will improve the economics of beneficial electrification, electric vehicles, and distributed renewable energy projects undertaken by builders and landlords, opening new avenues for outreach by local governments. These IRA incentives can bolster a local government's own climate investments; for example, a local government that invests (on its own or with partners) in an expanded EV charging network can presumably assume higher usage of these chargers in underserved areas as lower- and moderate-income households are better able to afford electric vehicles. For local governments able to adapt to the ways the IRA has shifted the climate policy landscape, a climate action planning strategy focused on beneficial electrification, renewable energy, and infrastructure upgrades in disadvantaged communities and for low- and moderate-income residents will complement the Act's many individual-facing incentives.

It is important to note that the IRA is not viewed as universally positive for environmental justice communities. Advocates have raised concerns about funding appropriated for use by the fossil fuel industry; provisions that expand oil and gas leasing; overreliance on electric vehicles as compared to public transit; incentives that will favor moderate-income residents over low-income households that cannot afford upfront costs; and the inclusion of technologies like hydrogen and nuclear power, biofuels, and carbon sequestration; among other concerns.[172] However, in the local climate policymaking context, the law meaningfully pushes municipalities to adopt an equity-infused approach. Because so much money is set aside for low-

171. *See* IRA, Pub. L. No. 117-69, §§ 50121(c)(2)(C), 50122(c)(4)(B)–(C), 136 Stat. 1818 (2022).

172. *See, e.g.*, Press Release, Climate Justice Alliance, The Inflation Reduction Act Is Not a Climate Justice Bill (Aug. 6, 2022), https://climatejusticealliance.org/the-inflation-reduction-act-is-not-a-climate-justice-bill/ [https://perma.cc/GWK9-BW9V]; Fangwei Cheng et al., *Impacts of the Inflation Reduction Act on the Economics of Clean Hydrogen and Synthetic Liquid Fuels*, ENVT'L SCI. & TECH., at A, B–C, E (2023).

income households and communities, local governments will be wise to pursue IRA funding — both through grants and by helping residents take advantage of incentives — for projects in disadvantaged communities and serving LMI residents. Doing so will help municipalities qualify for competitive grant programs that direct a substantial portion of their funding to disadvantaged communities. In many instances, available funds are increased where prevailing wage and other labor requirements are met,[173] further encouraging local governments to prioritize well-paying "green" jobs. In addition, efforts to help LMI residents access incentives for electric vehicles, home energy and electrification retrofits, and renewable energy will unlock more money to support community-wide decarbonization and jobs than an approach that omits specific outreach to these potential recipients. Where a resident may still be unable to use a tax credit or rebate, many of these benefits are also open to project developers and building owners who perform energy upgrades or build renewable energy in disadvantaged communities or for low- or middle-income residents. Taken together, by not pursuing an equity-infused, disadvantaged community focused climate strategy, a local government would leave significant federal money on the table.

In addition to statutory language directing resources to disadvantaged communities and LMI households, federal agency implementation of the IRA can be expected to prioritize significant investment in disadvantaged communities. Even where the IRA does not specify that a program must grant a certain dollar amount to projects that serve disadvantaged communities, agencies will review competitive grant programs in light of the Justice40 commitment. Agencies have begun to share their Justice40 implementation guidelines, and these will apply to IRA implementation. Moreover, what early indication we've seen from agencies seeking public input on IRA rulemakings suggests that agencies are highly attuned to the IRA's potential in disadvantaged communities. For example, the U.S. Environmental Protection Agency's (EPA's) request for information ("RFI") regarding the $5 billion appropriation for Climate Pollution Reduction grants,[174] open through January 18, 2023, asks for public input on how "the EPA [should] integrate the needs of underserved communities into the design of this program," including about "equity and justice concerns, opportunities, or priorities" and how to address the statutory requirement to consider the "degree to which greenhouse gas air pollution is projected to be reduced in total and with respect to low-income and disadvantaged

173. *See supra* notes 163–70 and accompanying text.
174. *See* IRA, Pub. L. No. 117-69, § 60114, 136 Stat. 1818 (2022).

communities."[175] Similarly, EPA asked a number of questions about low-income and disadvantaged communities in its RFI regarding the funding of "green banks" as part of the $27 billion Greenhouse Gas Reduction Fund appropriation,[176] starting with how to define "low income" and "disadvantaged."[177] The RFI also asked about the "kinds of technical and/or financial assistance . . . the Greenhouse Gas Reduction Fund [should] facilitate to ensure that low-income and disadvantaged communities can participate in and benefit from the program" and "to support and/or prioritize businesses owned or led by members of low-income or disadvantaged communities."[178] The RFI also asked about other program design features like additionality that could direct funds to projects in low-income or disadvantaged communities (i.e., "projects that would otherwise lack access to capital or financing").[179]

All of this flows into a local government's climate action planning process. Local governments are generally resource constrained; there is simply no way they can tackle every facet of GHG reductions at once. Climate action plans that prioritize equity and climate justice through a focus on disadvantaged and energy communities and low- and moderate-income households will have access to far more resources to reduce community scale GHG emissions than plans that do not. Between the IRA statutory language, Justice40 overlay, and expressed agency priorities, local governments will need to put forth funding proposals that consider the needs of disadvantaged or energy communities and direct considerable resources to them. They also would be well-served to tap into the tax incentive and rebate bonuses that offer extra dollars if they are redeemed in disadvantaged or energy communities or by low-income households and individuals. In addition, worker protections are prioritized in various IRA provisions.[180] In these ways, and in addition to other reasons a local government may have for centering their climate action planning efforts around equity and climate justice, federal funding decisions (those already made by statute or rulemaking and those yet to be decided via agency discretion) effectively add

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175. *Questions Regarding OAR's Implementation of the Inflation Reduction Act*, ENVT'L PROT. AGENCY, https://www.epa.gov/inflation-reduction-act/questions-regarding-oars-implementation-inflation-reduction-act#Pollution [https://perma.cc/Y989-YFCE] (last visited July 31, 2023).

176. IRA, Pub. L. No. 117-69 § 60103, 136 Stat. 1818 (2022).

177. *See* Envt'l Prot. Agency, *Request for Information – Greenhouse Gas Reduction Fund*, REGULATIONS.GOV, https://www.regulations.gov/document/EPA-HQ-OA-2022-0859-0002 [https://perma.cc/CM4J-5FM5] (last visited July 31, 2023). The comment period closed in December 2022.

178. *See id.*

179. *Id.*

180. *See supra* note 170.

a new legal justification for equity as an important component of local climate action plans.

D. Federal Policy and Equity-Infused Local Climate Action Planning

Though Justice40, the IIJA and the IRA have no affirmative requirements that local governments, absent reliance on federal funding or approval, consider equity in their climate action planning, they represent perhaps the most cogent case for doing so. The resources on offer are enormous. The IRA is the single largest federal climate and clean energy spending effort in history. IIJA offers significant additional funding for infrastructure projects that can reduce or increase GHG emissions, and Justice40 will shape essentially all federal dollars spent on climate and clean energy during the Biden administration.

The IRA, in particular, and the IIJA to a lesser extent, appear to formalize the notion that decarbonization is a shared federal, state, and local project. The laws set the terms of a form of "environmental federalism" that "combin[es] local and state regulation with federal subsidies paid directly to individuals as well as state and local governments."[181] The provisions in these laws that prioritize disadvantaged communities, LMI households, and worker protections are augmented by Justice40 and other agency efforts to ensure equitable distribution of funding under these laws and other federal sources. Altogether, the federal responsibilities in this shared project effectively push local governments to develop projects that distribute resources equitably, or at least in the aggregate consistent with Justice40 and statutory goals. Local governments that fail to heed this call will have less compelling applications for competitive grant opportunities, realize fewer benefits of individual-facing rebates and tax incentives, and will have a harder time attracting building and energy developer investments. The IRA contains very few hard requirements for local governments or others, but its direction of federal funding strongly supports an equity-infused local climate action planning process.

E. Shortcomings of the IRA, IIJA & Justice40 as a Driver of Equity-Infused Climate Action Planning

1. Potential Lack of Political Alignment in the Future

When the IRA was enacted, activists declared it a "once-in-a-generation" climate win, and it followed not only years of advocacy but months of "will

181. Katrina Wyman, *Building Efficiency*, 40 ENVT'L F. 24, 26 (2023), https://www.eli.org/the-environmental-forum/building-efficiency [https://perma.cc/PU7D-4SHF].

he or won't he?" speculation about the intentions of Senator Joe Manchin of West Virginia, a pivotal vote for any legislation in the then evenly-divided Senate. The IRA is at least codified as law; repealing it would be at least as Herculean a task as passing it in the first place. The funding is committed, but no one can be sure when another similarly ambitious law will be enacted. On less sure footing is Justice40, which, in combination with Executive Order No. 14052, specifies how climate and energy spending in IIJA will be allocated (and to a lesser extent, Executive Order No. 14082, which applies Justice40 to the IRA, though the IRA has more Justice40-aligned appropriations contained within the statutory text). The Justice40 target — and it is a target, not a binding goal — is set by executive order, not by Congress and not by an agency rulemaking provided for by law. While it may be reasonable to assume Justice40 will remain in place for so long as President Biden remains in office, there can be no assurance that a new administration would continue to abide by it.

Taken together, then, Justice40, the IIJA and the IRA can be viewed as limited-in-time opportunities. Absent repeal, appropriated amounts under IIJA and the IRA will remain appropriated, but additional appropriations at a similar scale are not guaranteed. And, perhaps more importantly, the current emphasis on climate and energy spending in disadvantaged communities may fall away in a new presidential administration. A change in presidential administration could spell the end of not only the formal Justice40 commitment but also the current agency efforts to prioritize funding applications that offer benefits to disadvantaged communities, conduct outreach among low-income, minority, and disadvantaged community residents, and offer technical assistance to help such residents navigate the byzantine arena of IIJA and IRA programs.

2. Justice40's CEJ Screening Tool

A key question for the CEJ Screening Tool, and thus for the Justice40 initiative overall is how to define "disadvantaged community." Because of its prominent role in the Justice40 commitment itself, the term's definition effectively directs huge amounts of funding. Not all are happy with the criteria used by the CEJ Screening Tool to identify disadvantaged communities, and it may therefore remain an imperfect tool that nonetheless has significant policy implications. Specifically, in developing the Screening Tool CEQ opted not to incorporate consideration of race in identifying areas appropriate for heightened levels of funding or other assistance. Several groups have identified, either before or after the CEJ Screening Tool was released publicly, that racial categorizations are important in accurately identifying underserved, vulnerable, or "disadvantaged" communities. Agencies have been reluctant to make

determinations about assistance for disadvantaged or other communities based on racial classifications because race-conscious classifications in governmental policy must be able to survive strict scrutiny if challenged in court.[182] A recent and particularly salient example is the striking down of a 2021 program by the U.S. Department of Agriculture to forgive some loans for "socially disadvantaged" farmers, with "socially disadvantaged" defined as groups that had been "subjected to racial or ethnic prejudice because of their identity as members of a group."[183] This is precisely why the arguments made in Part II of this Article proposing the Equal Protection Clause as a legal underpinning for equity-infused local climate action planning are merely normative; the case law suggests a moral imperative to infuse equity, including racial equity, into local CAPs, but the work that goes into establishing evidentiary support for race-conscious climate policy will be significant. The CEJ Screening Tool has also been criticized for failing to account for proximity to hazardous waste facilities, for cumulative impacts, and for factors relevant to identifying disadvantaged communities located in rural areas.[184]

While the CEJ Screening Tool avoids the legal scrutiny that arises from race-conscious policy, it will still be a useful tool for local governments to identify communities eligible to receive Justice40 funds and for use in their own analytic efforts to identify communities of particular need. In many places, some of the indicators for disadvantaged communities can serve as proxies for race; for example, indicators for higher rates of asthma may effectively overlap with largely minority communities.[185] What's more, the fact that CEQ did not perform the analysis needed to adequately support use of race-based classifications in developing the Screening Tool does not make the tool incompatible with local efforts to develop race-conscious policy. Local governments may perform sufficient analysis to understand which communities are disadvantaged in ways attributable to race or ethnicity and use that analysis to support race-conscious climate policy as a complement

182. *Supra* Part II.

183. Faust v. Vilsack, 519 F. Supp. 3d 470, 474 (E.D. Wis. 2021) (enjoining H.R. 1319, 117th Cong. § 1005(a)(1) (2021)); *see* Ellis, *supra* note 138, at 34.

184. *See* Ellis, *supra* note 138.

185. *See Asthma and African Americans*, U.S. DEP'T OF HEALTH & HUM. SERVS. OFF. OF MINORITY HEALTH, https://minorityhealth.hhs.gov/omh/browse.aspx?lvl=4&lvlid=15 [https://perma.cc/W8U4-LFHS] (last visited May 12, 2023); *Asthma and Hispanic Americans*, U.S. DEP'T OF HEALTH & HUM. SERVS. OFF. OF MINORITY HEALTH, https://minorityhealth.hhs.gov/omh/browse.aspx?lvl=4&lvlid=60 [https://perma.cc/6PLT-9DGL] (last visited May 12, 2023); *Asthma and American Indians/Alaska Natives*, U.S. DEP'T OF HEALTH & HUM. SERVS. OFF. OF MINORITY HEALTH, https://minorityhealth.hhs.gov/omh/browse.aspx?lvl=4&lvlid=30 [https://perma.cc/8ZPT-F5CP] (last visited May 12, 2023).

to federal Justice40 efforts. Data available in the CEJ Screening Tool could be used to bolster these local efforts.

CONCLUSION

The increasing number of local governments pursuing an equity-infused local climate action planning approach can find more support from federal law sources than have previously been identified. While local governments have significant flexibility to shape their CAPs and related processes, federal law shapes the requirements and opportunities for equity-infused climate action planning, especially though not exclusively where federal funding is involved. The Equal Protection Clause of the Fourteenth Amendment has been shaped by case law to chart a path forward for race-conscious local policy, and this path could be adapted to the climate context. Moreover, the *Croson* court and the many cases that follow it effectively ask local governments (among other governmental entities) to consider the role they may play in perpetuating discrimination. Title VI of the Civil Rights Act of 1964 sets parameters for local engagement in federal projects through the federal agency regulations required by Section 602, and these regulations can disallow even unintentional discrimination in projects and policies that contribute to or lessen local GHG emissions. The FHWA regulations have meaningfully delayed highway projects while complaints alleging discrimination are considered.[186] And federal law and other federal action over the last two years has ushered in a new approach to climate investment that emphasizes disadvantaged communities and low- and middle-income residents. While this approach may not last beyond the Biden administration, it will shape a great deal of federal funding in the meantime.

All in all, local governments looking to infuse their climate action planning with equity considerations are not unsupported by federal law. Though federal law may not compel — or at times even make it straightforward for — local governments to pursue an equity-infused climate action planning approach, it does bolster such an approach through court guidance, agency requirements, and federal funding. By identifying these instances of support in federal law, this Article aims to help shield local equity-infused CAPs from legal attack, and to offer arguments in favor of an equity-infused approach where one is alleged to be unlawful. Moreover, this Article aims to help policymakers prioritize an equity-infused approach when other factors intrude: cost, politics, or competing interests. Equity-infused climate action planning is not something that should be tossed aside, but demands its own prioritization. Local governments and advocates for local equity-infused climate action planning can find support for an equity-

186. *See, e.g.*, Letter from FHWA, *supra* note 110; *see also* Kasradze, *supra* note 103.

infused approach in federal law and should amplify these federal law opportunities to support an equitable and just climate policy approach.