Recommending Judicial Reconstruction of Title VI to Curb Environmental Racism: A Recklessness-Based Theory of Discriminatory Intent

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ABSTRACT

Environmental racism involves the federal government's sponsorship or licensing of private entities that discharge environmental hazards (such as air pollution flowing from nuclear power plants) in communities largely comprised of minority races or ethnicities. It also includes federal funding of state agencies involved with these private projects. By funding state agency involvement, the federal government facilitates disproportionate exposure to environmental harms by a protected class, potentially violating Title VI of the Civil Rights Act of 1964. While skeptics argue that geographic placement of these projects is purely driven by economic factors rather than race or ethnicity, this Note argues that courts should infer an agency's unlawful bias (conscious or subconscious) from a reckless environmental decision that adversely affects a protected class. Recklessness refers to (a) an agency's substantial knowledge of foreseeable harm that its decision will inflict on a protected class and (b) its failure to eliminate or mitigate that harm through reasonable efforts. Whereas disparate impact infers discriminatory intent solely from a decision's effects, a recklessness-based theory of discrimination in the environmental decision-making context falls organically within the umbrella of disparate treatment. This is because evidence of a funding agency's foresight of harm to a protected class, in addition to the decision's effects, can constitute circumstantial evidence of discriminatory intent. Jurisprudence unrelated to environmental racism has already experimented with similar knowledge-based theories of intent as a more accurate way of diagnosing instances of unlawful discrimination. This framing also offers a necessary lens for characterizing the true nature in which environmental racism occurs; environmental decision-making that disproportionately harms a protected class likely never takes the form of a bare desire to harm that class. Requiring hostility would thus exclude environmental decision-making from Title VI protections, contrary to Title VI's purpose.

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TABLE OF CONTENTS

I. Introduction: Environmental Racism Litigation is Increasingly Necessary but Debilitated by Unworkable Discrimination Standards Under Title VI 422
A. Snapshot of Environmental Racism in the United States 422
B. Status of Legal Claims Available to Challenge Alleged Environmental Racism 424
C. Proposal: Judicial Reconstruction of the Intent Standard Used in Disparate Treatment Claims of Environmental Racism 425
II. Why Courts Should Expand the Intent Standard for Disparate Treatment Claims of Environmental Racism—Structural Racism 427
III. How Courts Can Impute a Recklessness Standard of Discriminatory Intent to Title VI Claims of Environmental Racism 431
A. Lessons from Precedent Unrelated to Environmental Racism 431
B. Applying the Reckless Intent Framework to Environmental Racism 433
C. Limiting Available Defenses to Prima Facie Claims of Environmental Racism 435
IV. Conclusion: Judicial Recognition of Agency Recklessness Can Revive the Utility of Disparate Treatment Claims of Environmental Racism. 437

I. INTRODUCTION: ENVIRONMENTAL RACISM LITIGATION IS INCREASINGLY NECESSARY BUT DEBILITATED BY UNWORKABLE DISCRIMINATION STANDARDS UNDER TITLE VI

Title VI justifies a revised judicial method for evaluating allegations of environmental racism. As a backdrop, section A shares the instance of environmental racism that first captured national attention in recent U.S. history: the 1982 construction of a waste landfill in Warren County, North Carolina. This section then provides a working definition for environmental racism and discusses the 2014 contamination of Flint, Michigan's water to substantiate the problem's ongoing presence. Thereafter, section B explains a legal roadblock to challenging government-funded environmental racism—the unavailability of Title VI disparate impact claims for challenging government-funded environmental racism. Disparate treatment remains available to private litigants, but courts often narrowly construe disparate treatment to require evidence of intentional discrimination. Thus, to fulfill Title VI's intent, section C argues that courts adjudicating allegations of environmental racism should infer discriminatory intent from agency recklessness—that is, foresight that an environmental project would disproportionately harm a protected class but failure to reasonably remove or reduce that harm. This standard more fully embodies how racism can taint environmental decision-making today.

A. SNAPSHOT OF ENVIRONMENTAL RACISM IN THE UNITED STATES

Environmental injustice first engrossed the nation in 1982 when North Carolina agreed to site a waste landfill in the largely African American community of

Warren County.[1] The landfill would contain polychlorinated biphenyls ("PCBs"),[2] "man-made organic chemicals" that the Environmental Protection Agency ("EPA") has identified as "probable human carcinogens."[3] The siting decision in Warren County thereby signaled a possible link between race and harmful, government-funded environmental actions. Compelled by this newfound alarm, in 1990 the EPA finally integrated antidiscrimination policy into its mission when EPA Administrator William Reilly created the Environmental Equity Work Group.[4] Shortly thereafter, in 1994, President Clinton issued Executive Order 12,898, which underscored the statutory obligation of federal agencies that "substantially affect human health or the environment" to avoid "subjecting persons (including populations) to discrimination . . . because of their race, color, or national origin."[5]

Federally funded projects producing environmental harms that disproportionately impact a protected class may violate Title VI. In 2011, quoting a 2005 report, then-Attorney General Eric Holder reminded the public that "'African Americans were almost 80% more likely than white Americans to live near hazardous industrial pollution sites.'"[6] Environmental harms like the one that transpired in Warren County can encompass exposure to physical hazards, such as pollution and pesticides, or adverse alteration of a community's social environment, like removal of a public transportation hub. This diverse range of activities implicates federal agencies, such as the EPA and the Department of Transportation ("DOT"), as well as state agencies with analogous local missions that receive federal financing.

Despite the executive branch's apparent efforts to stem decisions that unequally distribute environmental harms, the "Flint Water Crisis" proved the modern-day existence of government-driven environmental racism.[7] In 2013, the city of Flint, Michigan decided to start procuring its water from the Flint River rather than from the previously used Detroit system while the city constructed a new water pipeline.[8] Though conveniently inexpensive, the new water presented as "foul-smelling, discolored, and off-tasting" and produced severely "elevated blood lead levels" in children.[9] As of 2018, Flint's demographics consisted of

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1. U.S. DEP'T OF ENERGY: OFFICE OF LEGACY MGMT., https://perma.cc/BD29-YMJ2 (last visited May 11, 2019).

2. *See id.*

3. *Learn About Polychlorinated Biphenyls (PCBs)*, U.S. ENVTL. PROT. AGENCY, https://perma.cc/MTM7-DJDW (last visited May 14, 2019).

4. Robert D. Bullard et al., *Toxic Wastes and Race at Twenty: Why Race Still Matters After All of These Years*, 38 LEWIS & CLARK ENVTL. L. J. 371, 380 (2008).

5. Exec. Order No. 12,898, 59 Fed. Reg. 7,629 (Feb. 11, 1994).

6. U.S. DEP'T. OF JUSTICE, PROTECTING AGAINST RACE, COLOR, AND NATIONAL ORIGIN DISCRIMINATION BY RECIPIENTS OF FEDERAL FUNDS 10 (2005), https://perma.cc/BS4C-TL24.

7. Melissa Denchak, *Flint Water Crisis: Everything You Need to Know*, NAT'L RES. DEF. COUNCIL (Nov. 8, 2018), https://perma.cc/3T39-9QB3.

8. *Id.*

9. *Id.*

around 53.9% African American residents and 39.9% white residents,[10] which likely prompted suspicion that the crisis sprung from government indifference to the physical wellbeing of minority residents. Lending credence to this belief, the Michigan Civil Rights Commission attributed the "disparate racial outcomes as exemplified by the Flint Water Crisis" to "systemic racism."[11] Perhaps more vigorous environmental justice enforcement in federal courts could have heightened the city's due diligence enough to deter its decision to revert to a lower quality water source.

B. STATUS OF LEGAL CLAIMS AVAILABLE TO CHALLENGE ALLEGED ENVIRONMENTAL RACISM

Title VI supplies both disparate treatment and disparate impact claims as weapons against racially discriminatory federally funded activities. Section 601 provides that: "No person . . . shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[12] This codifies a private cause of action for intentional discrimination and, upon a finding of liability, a right to damages and injunctive relief.[13] Relatedly, § 602 permits federal agencies to "'to effectuate the provisions of [§ 601] . . . by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute."[14] Pursuant to § 601, the Department of Justice enacted 28 C.F.R. § 42.104(b)(2) in 2000, which provided a disparate impact claim by barring recipients of federal funds from "'utiliz[ing] criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin.'"[15]

Regardless, Supreme Court analysis has stymied the capacity of citizens to litigate against environmental racism under these provisions. In *Alexander v. Sandoval*, the Court limited the availability of Title VI disparate impact claims to agencies rather than private citizens.[16] The decision concluded that citizens only possess causes of action to bring Title VI discrimination claims against federally funded entities under a § 601-based theory of intentional discrimination.[17] The

10. U.S. CENSUS BUREAU, QUICK FACTS: FLINT CITY, MICHIGAN, https://perma.cc/VJ23-HP2F (last visited Oct. 25, 2019).

11. MICH. CIVIL RIGHTS COMM'N, THE FLINT WATER CRISIS: SYSTEMIC RACISM THROUGH THE LENS OF FLINT iii (2017).

12. 42 U.S.C.A. § 2000d (2018).

13. *See* Alexander v. Sandoval, 532 U.S. 275, 278–80 (2001).

14. 42 U.S.C. § 2000d–1 (2018).

15. *Sandoval*, 532 U.S. at 281, 278 (quoting 28 C.F.R. § 42.104(b)(2) (2000)).

16. *See id*. at 285, 288–89.

17. *See* Wyatt G. Sassman, *Environmental Justice as Civil Rights*, 18 RICH. J.L. & PUB. INT. 441, 452–53 (2015).

Court explained that "private rights of actions to enforce federal law must be created by Congress."[18] Congress only expressly created a private cause of action in § 601, whereas disparate impact or other regulations are enacted by the executive branch pursuant to § 602 and subject a broader scope of agency action to potential liability.[19] Without evidence of intentional discrimination, an adversely affected citizen suspecting a racially discriminatory, federally funded environmental action must therefore rely on agency enforcement through disparate impact claims under § 602.[20] If dissatisfied with agency enforcement, citizens can pursue an "administrative complaint process."[21]

Proving intentional discrimination under Title VI involves the same methodology as proving intentional discrimination under the Fourteenth Amendment's Equal Protection Clause ("EPC") because Title VI was enacted in furtherance of that provision.[22] Under the EPC, and therefore under Title VI, litigants can prove intentional discrimination using direct[23] or circumstantial evidence (the "Arlington Heights mosaic of factors" or the "McDonnell Douglass framework").[24] The Department of Justice counsels that courts should use the *Arlington Heights* framework in adjudicating alleged mistreatment of groups rather than individuals.[25] This test finds the combination of various forms of circumstantial evidence adequate to prove intentional discrimination.[26] If plaintiffs prove a discriminatory motive under the *Arlington Heights* framework, the burden then shifts to the defendant to show "the same decision would have resulted even had the impermissible purpose not been considered."[27] This suggests that *Arlington Heights* should apply in adjudicating environmental racism, which impacts groups. However, the environmental racism cases discussed in this Note indicate that many courts hesitate to infer intentional discrimination from circumstantial evidence and, instead, demand more direct evidence of discriminatory intent.

C. PROPOSAL: JUDICIAL RECONSTRUCTION OF THE INTENT STANDARD USED IN DISPARATE TREATMENT CLAIMS OF ENVIRONMENTAL RACISM

Given the decision in *Sandoval*, a citizen lacks the right to argue Title VI liability using disparate impact. Although disparate impact under Title VI remains

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18. *Sandoval*, 532 U.S. at 286.

19. *Id.* at 285–86 (explaining "the disparate-impact regulations do not simply apply § 601—since they indeed forbid conduct that § 601 permits").

20. CYNTHIA BROUGHER, CONG. RESEARCH SERV., R42952, NONDISCRIMINATION IN ENVIRONMENTAL REGULATION: A LEGAL ANALYSIS 5 (2013) (citing *Sandoval*, 532 U.S. at 287–89).

21. *Id.*

22. U.S. DEP'T OF JUSTICE, TITLE VI LEGAL MANUAL, SECTION VI- PROVING DISCRIMINATION-INTENTIONAL DISCRIMINATION 3 (citing *Grutter v. Bollinger*, 539 U.S. 306, 343–44 (2003)).

23. *Id.* (quoting *Coghlan v. Am. Seafoods Co.*, 413 F.3d 1090, 1095 (9th Cir. 2005)).

24. *Id.*

25. U.S. DEP'T OF JUSTICE, *supra* note 22, at 343.

26. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265–66 (1977).

27. *Id.* at 270 n.21.

available to federal agencies, the EPA has proven historically negligent in efficiently pursuing complaints and, as of 2016, had never made a "formal finding of discrimination."[28] Through its complaint process, the EPA's Office of Civil Rights can withhold funding from EPA funding recipients, including state agencies.[29] However, the Office frequently fails to comply with statutory deadlines[30] and often dismisses complaints.[31] Reasons for dismissal include a complainant's failure to identify an EPA funding recipient, failure to state an adequate Title VI claim, inadequate evidence of a Title VI violation, or failure to issue a complaint within 180 days (although the Office can override this statute of limitations for "good cause").[32] According to the Center for Public Integrity, the Office has declined to investigate a purported Title VI violation even when "there was reason to believe" a funding recipient had a "discriminatory policy."[33] These reviews intimate that both inadvertent administrative deficiencies and deliberate lack of willpower may explain the Office's failure to find unlawful discrimination since its founding.

Given disparate impact's unavailability to private litigants and the foregoing flaws in the EPA's use of disparate impact to enforce Title VI, a private claim of disparate treatment may confer the only opportunity for citizens to contest government-sponsored environmental racism. This renders the workability of the intent standard under these disparate treatment claims increasingly important. According to the Supreme Court, the legislative intent behind Title VI was to "avoid the use of federal resources to support discriminatory practices" and "to provide individual citizens effective protection against those practices."[34] A narrow view of intentional discrimination that requires explicit animus by the funding agency will never diagnose and cure the "ingrained institutional bias"[35] that the Michigan Civil Rights Commission blamed for Flint's polluted water.[36] Decisionmakers may always shroud their decision-making in concern for the city's financial health. Thus, a narrow intent framework (requiring evidence of desire to harm a minority) does not acknowledge the structural racism that uniquely enables environmentally racist outcomes.

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28. *See* U.S. COMM'N ON CIVIL RIGHTS, ENVIRONMENTAL JUSTICE: EXAMINING THE ENVIRONMENTAL PROTECTION AGENCY'S COMPLIANCE AND ENFORCEMENT OF TITLE VI AND EXECUTIVE ORDER 12,898 4 (2016).

29. *Id*. at 22.

30. *See id*. at 25–26.

31. *Id*. at 40.

32. *Id*. at 40–41.

33. *Id*. at 40.

34. Cannon v. Univ. of Chi., 441 U.S. 677, 704 (1979) (explicating legislative intent behind Title IX and "its model" Title VI).

35. Editorial, *Environmental Racism: Time to Tackle Social Injustice*, THE LANCET (Nov. 2018), https://perma.cc/N5BP-QM8A.

36. *See* MICH. CIVIL RIGHTS COMM'N, *supra* note 11, at iii.

This Note therefore recommends judicial reconstruction of the standard for discriminatory intent specific to adjudicating alleged environmental racism—agency recklessness toward a protected class. This standard would infer intentional discrimination from an agency's reckless disregard for a minority population's health, evinced by its anticipation that an environmental project would disproportionately harm a protected class coupled with its failure to reasonably eliminate or mitigate that harm. Federally funded entities may defend environmentally harmful actions disproportionately affecting minorities as rooted in pure economic pragmatism. However, structural racism, implicit bias against minorities, and the absence of fear of retribution by a wealthy, politically powerful majority may license environmental harm to subordinate minority communities, contrary to Congress's intent.

To justify this reconstruction, Part II argues why courts should adopt a recklessness standard for discriminatory intent under § 601-based claims of environmental racism. Discriminatory intent in an agency's environmental decision-making may derive from structural racism—historic patterns of discrimination that relegated certain citizens to low-income neighborhoods. Also, while the purpose behind an environmental project may masquerade as motivated by affordability and state objectives like reducing waste, these neutral goals should not always overshadow harm minority groups suffer due to structural racism. Thereafter, Part III explains how courts can successfully (within doctrinal bounds) adopt a recklessness standard for discriminatory intent. Specifically, courts can adapt comparable tests from cases outside the environmental racism context that infer discriminatory intent from a decisionmaker's anticipation of racially disparate effects and other circumstantial evidence. Lastly, Part IV concludes and addresses challenges to a recklessness standard for discriminatory intent. Namely, inferring intent from foresight of adverse effects may resemble inferring intent solely from the effects themselves (disparate impact), and *Sandoval* presumably closed off disparate impact Title VI claims to private citizens. Also, socioeconomic status is not a protected class, so critics may accuse courts of subtly seeking to shield poor residents from environmental harms.

II. WHY COURTS SHOULD EXPAND THE INTENT STANDARD FOR DISPARATE TREATMENT CLAIMS OF ENVIRONMENTAL RACISM—STRUCTURAL RACISM

While economics may ostensibly drive environmental decisions affecting low-income neighborhoods, structural racism contributes to the sizable minority presence in those areas. Evolving systems of segregation throughout the 20th century sustained racial residential segregation.[37] Prior to the 1970s, racial residential segregation resulted from "overt white prejudice, pervasive discrimination in

37. *See* Douglas S. Massey, Jonathan Rothwell, & Thurston Domina, *The Changing Bases of Segregation in the United States*, 626 ANNALS, AM. ACAD. POL. & SOC. SCI 74 (2009).

housing and lending markets, and racially biased federal policies,"[38] such as "racial zoning laws" and "racially restrictive covenants."[39] Although federal civil rights legislation eventually banned blatant segregation, some scholars argue that current racial residential segregation is not only preserved by income inequality but also by ongoing racial bias in housing and rental markets that "trap minorities in undesirable neighborhoods."[40]

Bolstering this theory, the National Fair Housing Alliance projected in 2006 that housing discrimination occurs at least 3.7 million times annually, despite severe underreporting.[41] In 1990 in Detroit, for example, household income would have predicted a Black-White segregation index of 15 instead of the assessed index of 88—this suggests variables unrelated to income influenced segregation,[42] such as housing discrimination. Although Detroit's segregation index shrunk to 73.7 in 2013-2017,[43] a modest decrease across twenty years implies the continued function of structural factors in preventing neighborhood integration.

Once structural racism has essentially predestined a minority group to a low-income neighborhood, "Strategic-Structural racism" may propel a government's decision to site an environmental hazard in that neighborhood.[44] "Strategic-Structural racism" refers to "the manipulation of the forces of intentional racism, structural racism and unconscious bias for economic or political gain."[45] Under this definition, racism does not require "racist intent" but a decisionmaker's knowledge of a community's "vulnerability" and resolution to abuse it.[46] As recounted above, past and ongoing discriminatory housing practices constrain minorities to low-income areas targeted by agencies for environmental projects. By recognizing structural racism's distortion of community demographics, courts can stop attributing racially disparate environmental impacts purely to legitimate state action.

Lucero v. Detroit Public Schools exemplifies a court's rejection of structural racism's responsibility in dictating environmental outcomes.[47] In that case, the District Court dismissed a disparate impact challenge to the construction of a

38. *Id.* at 75.

39. DORCETA E. TAYLOR, TOXIC COMMUNITIES: ENVIRONMENTAL RACISM, INDUSTRIAL POLLUTION, AND RESIDENTIAL MOBILITY 193 (2014).

40. *Id.* at 267–68.

41. *Id.* at 268.

42. *Id.* at 267. The "segregation index" represents the percentage of black city residents who "would need to relocate to be fully integrated with whites across metropolitan neighborhoods." William H. Frey, *Black-white segregation edges downward since 2000, census shows*, BROOKINGS INSTITUTION (Dec. 17, 2018), https://perma.cc/VRW2-NPUZ.

43. Frey, *supra* note 42.

44. *See* Peter J. Hammer, *The Flint Water Crisis, the Karegnondi Water Authority and Strategic-Structural Racism*, 45 CRITICAL SOC. 103, 103–04 (2017).

45. *Id.* at 103.

46. *Id.* at 104–05.

47. *See generally* 160 F. Supp. 2d 767 (E.D. Mich. 2001).

public school on land purportedly contaminated by decades of industrial manufacturing.[48] The new school's student body would unite two former student bodies consisting of 61% Hispanic and 13% African American students and 21% Hispanic and 58% African American students, respectively.[49] Regardless, the court reasoned that the local government is not "responsible for the racial makeup of the population of elementary students who live" in the school district.[50] Given this logic, the court immunized the agency from Title VI liability by portraying the school's racial composition as a preexisting, unalterable fact divorced from the state's decision to locate the school on a contaminated site. This rationale, however, would discharge agency liability for virtually any claim of environmental racism. As long as a construction project advances a legitimate government interest, the government would never bear responsibility for adverse impacts inflicted on a community absent evidence of a racial purpose. Noticeably missing from the court's analysis is discussion about the institutionalized racism that may have forced or nudged minority families into that school district.

Contrary to this analysis, the Eleventh Circuit implicitly recognized structural racism in *Dowdell v. City of Apoka, Florida*, affirming the trial court's finding of intentional discrimination given the "ongoing relative deprivation of the black community in the provision of municipal services."[51] Together with "magnitude of the disparity" and foreseeability of that disparity, the court found discriminatory intent due to the municipality's "pattern of decisionmaking" aimed at denying equality to all residents.[52] For example, an ordinance had forced African American residents to live south of the railroad until 1968.[53] By considering past municipality-driven discrimination, the court framed structural racism as somewhat responsible for the disparate treatment currently at issue.

Besides the residual effects of past and present housing discrimination, structural racism is also associated with racial health disparities.[54] Greater relative exposure to environmental hazards, like PCBs and air pollution, is one factor that disproportionately harms minority communities, but "racial residential segregation" also aggravates health through "dilapidated housing" and more limited availability of decent hospital care.[55] These structural factors juxtapose with "interpersonal discrimination as a psychosocial stressor" (obstructing sleep and spurring unhealthy eating habits and drug use) to create inequitable racial health outcomes.[56] By diminishing the overall health status and resilience of minorities,

48. *See id*. at 771–73, 789, 805.
49. *Id*. at 771.
50. *Id*. at 789.
51. *See* 698 F.2d 1181, 1184–86 (11th Cir. 1983).
52. *Id*. at 1185–86.
53. *Id*. at 1186.
54. Zinzi D. Bailey et al., *Structural racism and health inequities in the USA: evidence and interventions*, 389 LANCET 1453 (2017).
55. *See id*. at 1456–57.
56. *Id*. at 1456.

structural factors both expose them to greater environmental hazards and exacerbate the health consequences of those hazards. If a community bears a disproportionate health risk, that may translate to relatively lower income; this "negative feedback loop" between health and income is coined the "health-poverty trap."[57] Thus, this relatively greater exposure to environmental hazards may itself serve as an additional structural factor that obstructs some minorities from exiting low-income areas and thereby confines them to those areas across generations.

One case in which a district court glossed over this structural factor is *Bean v. Southwestern Management Corp*.[58] In *Bean*, the plaintiffs brought a claim under 42 U.S.C. § 1983, but the court still examined the evidence for discriminatory intent[59] in a manner that should mirror evaluation for discriminatory intent under § 601. In particular, the plaintiffs claimed that the Texas Department of Health's authorization of a solid waste facility's construction in Harris County had a racially discriminatory purpose partly due to "the context of the historical placement of solid waste sites."[60]

To prove this claim, the plaintiffs showed that 15% of Houston's solid waste facilities are located in the disputed facility's "target area," even though this area only holds 6.9% of Houston's population.[61] Further, they argued that the area's 70% minority population links this disparity to racial discrimination.[62] The court questioned the import of these data and ultimately rejected their claim.[63] Evidently, the court did not consider the Department legally required to contemplate how compounding health hazards from numerous waste facilities in Harris County may contribute to enclosing the minority community in a cycle of poverty. Each waste facility placed in Harris County presumably increased the aggregate health hazards residents suffer from the facilities altogether. Thus, the Department's repeated placement of waste facilities in that area may have rendered it increasingly difficult for residents to lead lives adequately healthy and successful to move to healthier areas untainted by as many environmental harms.

Unlike the *Bean* court, courts should acknowledge the presence of structural racism in assessing whether an environmental action was prompted by intentional discrimination. Structural racism is germane to identifying intentional discrimination because decisionmakers should have been aware (and so have constructive awareness) of structural factors that impede some minorities from escaping lower-quality neighborhoods. If a low-income neighborhood is principally comprised of minority residents due to structural racism, environmental decisionmakers should be legally

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57. Dhruv Khullar & Dave A. Chokshi, *Health, Income, & Poverty: Where We Are & What Could Help*, HEALTH AFFAIRS (Oct. 4, 2018), https://perma.cc/E7BN-ELPU.

58. *See generally* 482 F. Supp. 673 (S.D. Tex. 1979).

59. *Id*. at 677.

60. *Id*. at 678.

61. *Id*.

62. *Id*.

63. *Id*. at 672–81.

obligated under Title VI to exert reasonable efforts to eliminate or mitigate risk to those residents. If decisionmakers fail to do so, their reckless disregard for the health and lives of those minority residents should constitute circumstantial evidence of intentional discrimination. This pathway to inferring discriminatory intent from recklessness is outlined in more detail below.

III. HOW COURTS CAN IMPUTE A RECKLESSNESS STANDARD OF DISCRIMINATORY INTENT TO TITLE VI CLAIMS OF ENVIRONMENTAL RACISM

A. LESSONS FROM PRECEDENT UNRELATED TO ENVIRONMENTAL RACISM

Some antidiscrimination jurisprudence outside of environmental racism has relied on a decisionmaker's foresight of an action's adverse impact combined with other circumstantial evidence to infer discriminatory intent. This jurisprudence can legitimize a court's consideration of agency recklessness in adjudicating environmental racism because agency recklessness is also circumstantial evidence of discriminatory intent. In particular, a recklessness test for intentional discrimination is a logical outgrowth of the test proposed in *Arlington Heights*, which governs Equal Protection Clause and Title VI analysis.[64] *Arlington Heights* enumerates types of circumstantial evidence courts can consider to determine whether discriminatory intent unlawfully motivated a government action.[65] These include the government action's effects ("a clear pattern, unexplainable on grounds other than race"), the "historical background" of the action, the "sequence of events" prior to the action, and the action's "legislative and administrative history."[66] Subsequent cases have cited *Arlington Heights* for the proposition that a decisionmaker's foresight of disparate harm can support a finding of discriminatory intent.[67]

Recklessness would first require proof of agency awareness of prospective harm, which mirrors the foreseeability factor. It would next require proof of an agency's failure to react reasonably to that knowledge by attempting to reduce the predicted harm. This element is not specifically stated in *Arlington Heights*, but the factors in that opinion are not necessarily exhaustive. Also, while *Arlington Heights* said that "impact alone is not determinative,"[68] an agency foreseeing disparate harm together with its unreasonable reaction to that prediction should be enough to show intentional discrimination. Department of Justice guidance on proving intentional discrimination under Title VI cites several apt cases, including

64. U.S. DEP'T OF JUSTICE, *supra* note 22; *see, e.g.*, Coal. for the Advancement of Reg'l Transp. v. Fed. Highway Admin., 959 F. Supp. 2d 982, 1020 (W.D. Ky. 2013).

65. *See* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265–68 (1977).

66. *Id.* at 266–68.

67. *See, e.g.*, S. Camden Citizens in Action v. N.J. Dep't of Envtl. Prot., 254 F. Supp. 2d 486, 497 (D.N.J. 2003).

68. 429 U.S. at 266.

Pryor v. NCAA and *Almendares v. Palmer*.[69] Each case insinuates that a decision-maker's anticipation of harm can help evince intentional discrimination.

In *Pryor*, the plaintiffs alleged that the NCAA intentionally discriminated against African American students in violation of Title VI by enacting Proposition 16, which "establishes scholarship and athletic eligibility criteria for incoming student athletes."[70] They argued that Proposition 16's educational prerequisites, while facially neutral, excluded a disproportionate number of African American students from athletic teams and scholarships and that the NCAA expected and intended that result.[71] Accepting this theory of liability, the court found that the NCAA's prior knowledge that Proposition 16 would produce this disparate impact "sufficiently state[s] facts showing intentional, disparate treatment" and overturned a motion to dismiss.[72] It cited *Reno v. Bossier Parish School Board* for the principle that an action's effects concern intent because "'people usually intend the natural consequences of their actions.'"[73] Although a later court refused to certify the class,[74] *Pryor*'s preliminary ruling elevates the importance of prior knowledge to deciding discriminatory intent.

The court in *Almendares v. Palmer* also considered foreseeability when determining whether discrimination could have motivated administration of a welfare program.[75] The Spanish-speaking plaintiffs alleged that a state food stamp program's lack of bilingual services constituted intentional discrimination based on national origin.[76] To conclude that the plaintiffs stated an adequate claim for Title VI relief, the court cited *Arlington Heights* for the principle that disparate impact and other circumstantial factors can evince intentional discrimination.[77] Accordingly, the state's failure to provide bilingual services could indicate discriminatory intent if the state was aware of its legal duty under the Food Stamp Act to supply bilingual services and was aware of the harm imposed by its failure to do so.[78]

Agencies overseeing environmental projects may not have a parallel codified duty to safeguard minority groups from environmental harms. Still, they should spend federal funds in a manner consistent with Title VI's overarching mandate, so their knowledge of a project's future disparate impact could also support a finding of discriminatory intent.

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69. U.S. DEP'T OF JUSTICE, *supra* note 22, at 16 (first citing Almendares v. Palmer, 284 F. Supp. 2d 799 (N.D. Ohio 2003); then citing Pryor v. Nat'l College Athletic Ass'n, 288 F.3d 548 (3d Cir. 2002)).

70. 288 F.3d at 552.

71. *Id*. at 552.

72. *Id*. at 564–65, 570.

73. *Id*. at 564–65 (quoting Reno v. Bossier Parish Sch. Bd., 520 U.S. 471, 487 (1997)).

74. *See* Pryor v. Nat'l Collegiate Athletic Ass'n, No. Civ.A. 00-3242, 2004 WL 1207642, at *6 (E.D. Pa. Mar. 4, 2004) (citing *Reno*, 520 U.S. 471).

75. *See generally* 284 F. Supp. 2d 799 (N.D. Ohio 2003).

76. *Id*. at 801–02.

77. *Id*. at 805.

78. *Id*. at 807–08.

B. APPLYING THE RECKLESS INTENT FRAMEWORK TO ENVIRONMENTAL RACISM

As described above, courts have inferred intentional discrimination from a defendant's knowledge of foreseeable, adverse effects on a protected class combined with other circumstantial evidence. Deciding whether circumstantial evidence proves intentional discrimination is inherently subjective. The test's malleability thereby empowers judges to mold it uniquely for different types of claims. In adjudicating environmental racism, judges could grant greater legal weight to evidence that a decisionmaker harbored knowledge of future harm and even consider a new factor, such as unreasonable mitigation efforts. A recklessness standard for discriminatory intent thereby uses and supplements the factors recommended in *Arlington Heights*[79] specially for allegations of environmental racism.

To prove intentional discrimination under this theory of intent, a litigant would specifically need to demonstrate that an agency predicted an adverse impact on a minority group or should have predicted an adverse impact and thereby possessed constructive knowledge of future harm. If so, litigants would next need to prove that the agency did not take reasonable steps to remove or mitigate that adverse disparate impact. Applying this recklessness standard for discriminatory intent to environmental racism cases would only invalidate actions with evidence of a decisionmaker's careless disregard for minority lives. And structural racism's dominant role in exposing minorities to environmental harms justifies this customized approach for environmental racism claims.[80]

Precedent involving alleged environmental racism reveals how courts often detect an agency's rash, inattentive behavior toward a minority group but refuse to find unlawful intentional discrimination. *Erie CPR v. Pennsylvania Department of Transportation*, a 2018 district court decision involving proposed infrastructural changes in a minority community,[81] illustrates the significance of the recklessness standard for discriminatory intent by omission. In that case, the plaintiffs sued state agencies and a city council for intentional racial discrimination in violation of Title VI and pursued an injunction against a bridge's destruction, where its destruction would disproportionately affect minorities.[82] They specifically accused these agencies of disparate treatment by contrasting their current demolition plan with the state's previous expenditure of federal funds on bridge replacements in predominantly white communities.[83] Nonetheless, the court only presumed negligence from the defendants' failure to discover the community's reliance on the bridge for non-vehicular (walking and bicycling) purposes and related failure to assess the cost of repairing the bridge for those uses.[84]

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79. *See* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265–66 (1977).
80. *See supra* Part II.
81. *See* 343 F. Supp. 3d 531, 537 (W.D. Pa. 2018).
82. *Id.* at 537, 547–48.
83. *Id.* at 545.
84. *See id.* at 550–51.

Although the court conceded that the defendants may have exhibited "negligence," it refused to infer discriminatory intent from that finding.[85] The court explained how evidence that the agencies were "deliberately indifferent" to the minority community may have amounted to intentional discrimination, but mere negligence could not prove unlawful intent.[86] In generating a fictional dichotomy between unintentional negligence and intentional indifference, the court overlooked the possibility of a spectrum from negligence to intentional indifference that captures the middle ground of recklessness. Recklessness is more than an agency's forgivable error (negligence) but less than its calculated disregard ("deliberat[e] indifferen[ce]").[87] Finding the defendants in *Erie CPR* liable for Title VI liability under this theory would infer intentional discrimination from their failure to interact with the affected community because that oversight displays reckless disinterest in the community's welfare.

In *Bean*, discussed above, the District Court similarly acknowledged but dismissed the legal salience of an agency's lack of concern for a solid waste facility's adverse impact on a minority community.[88] While the court described the agency's decision to grant the facility a permit as "unfortunate and insensitive," it refused to recognize a "substantial likelihood" that the decision had a racially discriminatory intent.[89]

Flint's predicament also epitomizes how the recklessness principle could preclude environmentally racist processes. Individuals governing Flint's water management showed greater concern for financial risk than for the community's safety.[90] As Flint's disparate health outcome demonstrated, an absence of express hostility toward a minority population does not exclude racism's silent yet instrumental impact on agency action in the form of apathy. A recklessness standard for discriminatory intent could subject that type of government action to Title VI liability and thereby discourage it.

In excluding consideration of an agency's recklessness toward a minority group, the above courts may have emboldened future agency actions to lack concern for a minority community's needs. They approved agency actions that did not sufficiently engage community members to investigate an environmental action's impact on community life and that did not consider all reasonable, less harmful alternatives. Finding an agency liable for intentional discrimination based on its recklessness in shirking these, among other, duties would constitute more than shrewd policy to reduce discriminatory effects. In accordance with § 601, it would identify a variant of purposeful discrimination; recklessness toward a protected class should itself evince purposeful discrimination. This construction

85. *Id*. at 550.
86. *Id*. at 553.
87. *See id*. at 550, 553.
88. *See* 482 F. Supp. 673, 678–80 (S.D. Tex. 1979).
89. *See id*. at 680.
90. *See* Hammer, *supra* note 44, at 112.

of discriminatory intent would also better align with Title VI's purpose—to "avoid the use of federal resources to support discriminatory practices."[91] A discriminatory practice should include an action that recklessly authorizes anticipated harm to a protected class without reasonable elimination or mitigating efforts.

South Camden Citizens in Action v. New Jersey Department of Environmental Protection models this analytical framework by employing a test for discriminatory intent more akin to a recklessness standard.[92] There, the plaintiffs challenged construction of a cement grinding facility in the largely African American and Hispanic community of "Waterfront South" in South Camden, New Jersey.[93] Responding to a Motion to Dismiss under Federal Rule of Civil Procedure 12(b), the court initially determined that the plaintiffs adequately stated an intentional discrimination claim under Title VI.[94] It cited *Arlington Heights* to infer plausible discriminatory intent and specifically explained how the plaintiffs alleged the decisionmaker was "well-aware of the potential disproportionate and discriminatory burden placed upon that community and failed to take measures to assuage that burden."[95] Regardless of this preliminary finding, in 2006 the court ultimately granted summary judgment to the defendants.[96] It announced that "alleged historical discriminatory enforcement" and "foreseeable disparate impact" cannot evince intentional discrimination without "other evidence of any intent to discriminate."[97] While seemingly adopting an expansive view of discriminatory intent, the court's unwillingness to infer intent from these two pieces of evidence suggests the need for a new intent paradigm.

C. LIMITING AVAILABLE DEFENSES TO PRIMA FACIE CLAIMS OF ENVIRONMENTAL RACISM

As outlined above, courts should infer intentional discrimination from the combination of an agency's (a) actual or constructive foresight of disparate harm and (b) failure to exert reasonable efforts to remove or mitigate that disparate harm. In light of the latter, defendants may assert economic or other seemingly legitimate justifications for their environmental actions that disproportionately affect minority areas. If courts always defer to these defenses, however, litigants challenging environmental racism may never succeed. Courts should therefore only vindicate a defense in limited situations—when an alternative location for an environmental project or mitigation effort would unreasonably burden the participating governmental body. If it would not significantly burden the

91. Cannon v. Univ. of Chi., 441 U.S. 677, 704 (1979).
92. *See generally* 254 F. Supp. 2d 486 (D.N.J. 2003).
93. *Id.* at 489, 492.
94. *Id.* at 497.
95. *Id.*
96. *See* S. Camden Citizens in Action v. N.J. Dep't of Envtl. Prot., No. Civ.A. 01-702 (FLW), 2006 WL 1097498, at *37 (D.N.J. Mar. 31, 2006).
97. *Id.* at *36.

governmental body or its legitimate objectives, failure to pursue those options should evince lack of concern (recklessness) for a protected class and, in turn, discriminatory intent. For example, a state may defend a disproportionate environmental impact suffered by a minority town by showing that an alternative location for a $1,000,000 project in a more integrated neighborhood would cost the state 1% more than in the selected location. Even if so, this cost differential should not necessarily free the state from a Title VI-based duty to avert a racially disparate effect. Perhaps a reasonableness criterion should require the town to expend an additional $10,000 in this scenario, but the controlling legal framework likely does not incentivize governments to choose racial equality over savings.

For instance, though adjudicating a disparate impact claim under Title VI, *Goshen Road Environmental Action Team v. U.S. Department of Agriculture* illustrates how judicial deference to a state's justification may bias Title VI litigation against plaintiffs.[98] In that case, the town decided to build a wastewater treatment plant on Goshen tract, an area that had mainly been populated by African Americans since the 1870s.[99] According to engineers, the chosen site would absorb "slightly less land due to better soil, its road frontage provided for easier access, and it was farther from the Trent [River]" so it would better protect the river from contamination.[100] The court automatically accepted the legitimacy of these reasons without detailing the relative soil quality and distance from the Trent River between the chosen and alternate sites.[101] As a result, it declined to engage in a more skeptical inquiry into whether the town could lessen the disproportionate environmental harm to the minority community without significantly jeopardizing its legitimate goals. While this inquiry may require some legislative judgment, courts should ensure that Title VI fulfills its directive.

More recently, in *Coalition for the Advancement of Regional Transportation v. Federal Highway Administration*,[102] the plaintiffs brought a Title VI disparate treatment claim against a proposed "cross-river" bridge construction.[103] They argued that the plan would disproportionately impact West Louisville's minority community by imposing high bridge tolls and "shift[ing] Louisville's economic gravity further from poorer and minority populations."[104] Neglecting to comprehensively explore public transit alternatives to reduce this burden, they argued, revealed a discriminatory intent behind these foreseeable disparate impacts.[105] Nonetheless, the court rejected this assertion, noting that the existence of

98. *See generally* No. 98-2102, 1999 U.S. App. LEXIS 6135 (4th Cir. Apr. 6, 1999).
99. *Id.* at *2, *5.
100. *Id.* at *8.
101. *Id.* at *8–*9.
102. *See generally* 959 F. Supp. 2d 982 (W.D. Ky. 2013).
103. *Id.* at 1019.
104. *Id.* at 1019, 1021.
105. *Id.* at 1022.

"nondiscriminatory motivations . . . . precludes an inference of discriminatory intent."[106]

This statement discounts a nuance in human decision-making—the possible operation of multiple motives at once. A partial nondiscriminatory motive behind a government action does not preclude the presence of a partial discriminatory motive. So too, a decisionmaker's failure to research less burdensome alternatives to an environmental project may be fueled by both an interest in efficiency and lack of reasonable concern for an affected minority group. In some circumstances, the latter should suggest a partial discriminatory intent. Thus, further scholarship should consider judicially manageable standards for determining which categories and degrees of government costs should support a government's defense that eliminating or mitigating environmental harms pose unreasonable burdens and which costs should not thwart Title VI liability.[107]

IV. CONCLUSION: JUDICIAL RECOGNITION OF AGENCY RECKLESSNESS CAN REVIVE THE UTILITY OF DISPARATE TREATMENT CLAIMS OF ENVIRONMENTAL RACISM

Disparate treatment is the only private cause of action unquestionably available to citizens pursuing a Title VI challenge to environmental racism.[108] Thus, courts should construct a test for intentional discrimination that identifies practices subtly driven by racial discrimination. If courts demand direct evidence of hostility toward a minority group to find discriminatory intent, litigants may largely fail. Structural racism's relegation of some minorities to areas disparately affected by environmental harms justifies this reconstruction.

A recklessness standard would supply a reasonable, mild reconstruction of the traditional test for intentional discrimination under Title VI. It rephrases the circumstantial factors listed in *Arlington Heights* used to infer discriminatory intent but is tailored to diagnose intentional discrimination as it actually occurs in some environmental decision-making—as reckless disregard for minority lives. Agencies that irresponsibly seek financial benefit at the expense of a jurisdiction's minority population should be found liable for intentional discrimination. Evidence of recklessness tantamount to intentional discrimination may include actual or constructive awareness of future disparate impact on a minority group coupled with failure to take reasonable steps to eliminate or mitigate that harm.

Critics may argue that this approach aims to revive a private claim of disparate impact under Title VI, contrary to *Sandoval*. However, disparate impact evaluates an action's effects, whereas this approach scrutinizes an agency's actual or

106. *See id.*

107. For example, courts can consider a test that compares the severity and breadth of the alleged environmental harm to the type and degree of the government cost that would be needed to remove or make that harm negligible. However, judges may not be well-equipped to assess harms, so this analysis may invite subjectivity unless parties supply data-based assessments.

108. *See* Alexander v. Sandoval, 532 U.S. 275, 285–86 (2001).

constructive knowledge of those effects and its reaction to that knowledge. Critics may also argue that this approach impermissibly treats socioeconomic status as a protected class by affording low-income, minority residents enhanced Title VI protection. However, this approach would not outlaw disparate treatment based on socioeconomic status but based on race. Plaintiffs would need to prove an environmental action's disproportionate, adverse impact on individuals of certain races relative to those of other races. A racially integrated town with all of its waste facilities concentrated in the town's lower-income half would not implicate a Title VI claim for disparate treatment.

Asserting an economic basis for an environmental action may superficially satisfy Title VI's mandate, but Title VI is a substantive promise of equal treatment by federally funded activities. An agency's lackadaisical attitude toward the well-being of minority communities is not legally innocuous. Courts should perceive an agency's deliberate failure to reasonably protect as concomitant with intentional discrimination.