IF IT CAN MAKE IT THERE, IT CAN MAKE IT ANYWHERE: HOW NEW YORK'S "GREEN AMENDMENT" IS CATALYZING ENVIRONMENTAL PROGRESS IN LIGHT OF FEDERAL FAILURES

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INTRODUCTION

It is no secret that residents of Newark, New Jersey, have been overburdened with health problems resulting from harmful pollution.[1] One in every four children in Newark suffers from asthma, a respiratory condition that causes difficulty in breathing and can lead to death.[2] This rate is three times higher than the national average.[3] In addition, children in Newark are hospitalized for asthma at thirty times the national rate and are disproportionately affected by asthma-related deaths.[4] In 2020, the Superintendent of Newark Schools named asthma as a source of impediment to student achievement, indicating that children regularly miss school because of symptoms related to the health condition.[5] This statistic has been especially troubling in recent years, given the complications that COVID-19 has presented for individuals with asthma.[6]

These high rates of asthma have been linked to the considerable amount of air pollution in Newark, a city with a predominantly Black population and a large number of low-income residents.[7] In addition to asthma, Newark residents face other health problems that have been associated with long-term

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[1] Tom Wiedmann, *Newark Environmental Justice Advocates Call on EPA to Update Regulations for Waste Incinerators in Lawsuit*, TAPINTONEWARK, https://www.tapinto.net/towns/newark/sections/east-ward/articles/newark-environmental-justice-advocates-call-on-epa-to-update-regulations-for-waste-incinerators-in-lawsuit (last updated Jan. 24, 2022, 2:18 PM). Spurred by industrialization and the placement of a large waste incinerator within the city, Newark has been the source of harmful pollution for years. In any given hour, two to three hundred trucks travel the roads of Newark—many containing garbage—spewing toxic diesel emissions, which can lead to asthma, cancers, and all kinds of kidney failures. *Id*.

[2] Anthony Johnson, *Study: 1 in 4 Newark Children Has Asthma; EPA Steps in for Air Quality Testing*, ABC (Mar. 23, 2015), https://abc7ny.com/newark-new-jersey-air-quality-epa/569501.

[3] Devna Bose, *'It Takes All of Us': At Community Asthma Workshop, Doctors Say Parent Efforts Are Key*, CHALKBEAT NEWARK (Feb. 21, 2020, 5:24 PM), https://newark.chalkbeat.org/2020/2/21/21178668/it-takes-all-of-us-at-community-asthma-workshop-doctors-say-parent-efforts-are-key [hereinafter *It Takes All of Us*].

[4] *Id*.

[5] Devna Bose, *'It's Killing Children and No One is Talking About it': Asthma Is Taking a Steep Toll on Newark's Students and Their Schools*, CHALKBEAT NEWARK (Dec. 17, 2019, 2:02 PM), https://newark.chalkbeat.org/2019/12/17/21055583/it-s-killing-children-and-no-one-is-talking-about-it-asthma-is-taking-a-steep-toll-on-newark-s-stude [hereinafter *It's Killing Children and No One Is Talking About It*].

[6] *Respiratory Infections and Asthma*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/asthma/respinf.html (last reviewed Sept. 21, 2023).

[7] *It's Killing Children and No One Is Talking About It*, *supra* note 5:

> Many factors contribute to Newark being home to a disproportionately large number of residents with asthma. In part, it's due to the high population of Hispanic and [B]lack residents, who have higher rates of asthma. Newark residents also breathe some of the unhealthiest air in the nation, conditions that experts say contribute to the prevalence of asthma. The city houses the third-largest port and one of the busiest airports in the country, and trucks thunder through its narrow streets on a daily basis.

Id.

pollution in the city, including chronic diseases such as diabetes and hypertension.[8] Not only is Newark burdened with pollution from factories and truck and air traffic, but the city is also home to four Superfund sites.[9] A "Superfund site" refers to any location within the United States that has been contaminated by hazardous waste that is dumped, left out in the open, or otherwise improperly managed, and identified by the Environmental Protection Agency ("EPA").[10] Congress established Superfund—formally called the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA")—in 1980 as a response to the public outcry over the health risks posed by contaminated sites.[11] Superfund enables the EPA, after designating a site as a candidate for cleanup, to compel parties responsible for the contamination to either perform the cleanup or reimburse the government for the EPA's cleanup work.[12] If there is no identifiable responsible party, the EPA may clean up contaminated sites using government funds.[13] Although the Superfund sites in Newark continue to undergo cleanup procedures as ordered by the EPA, the adverse health effects that result from long-term exposure to the sites' chemicals remain a cause for concern.[14]

The prevalence of environmental hazards in Newark—and the disproportionate number of health risks that its residents face because of these hazards—represents a situation typical of many communities of color

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[8] Erik Ortiz, *'We've Been Forgotten': In Newark, N.J., a Toxic Superfund Site Faces Growing Climate Threats*, NBC NEWS (Oct. 1, 2020, 6:00 AM), https://www.nbcnews.com/news/us-news/we-ve-been-forgotten-newark-n-j-toxic-superfund-site-n1240706 (citing OFF. LOC. PUB. HEALTH, N.J. DEP'T HEALTH, CHILDHOOD LEAD EXPOSURE IN NEW JERSEY (2017)).

[9] Ortiz, *supra* note 8:

> New Jersey has 114 Superfund sites, the most in the nation, and Newark is home to four of them. The one in the Ironbound, a former chemical plant where cleanup is priced at $1.4 billion, is especially problematic: It's one of the nine in the state, and [seventy-four] nationwide, that not only are vulnerable to the effects of climate change but contain uncontrolled toxic wastes that could damage human health[.]

Id.

[10] *What is Superfund?*, EPA.GOV, https://www.epa.gov/superfund/what-superfund (last visited Jan. 19, 2024).

[11] *Id*.

[12] *Id*.

[13] *Id*.

[14] Ortiz, *supra* note 8.

across the United States.[15] This disparity is not a new phenomenon.[16] For decades, studies have shown that poorer neighborhoods with a higher percentage of Black, Indigenous, and other people of color are more likely to be located near hazardous waste sites and have more exposure to polluted air.[17] One modern instance of publicized disproportionate environmental harm involved the placement of a landfill that accepts garbage from more than half of the country in an overwhelmingly Black community in Uniontown, Alabama.[18] The residents of Uniontown vehemently opposed this placement, drawing widespread attention to the situation.[19] Today, Uniontown residents continue to suffer from health effects that developed as a result of the exposure to pollution from this landfill.[20] Another example is "Cancer Alley," where a predominantly Black population in a stretch of land

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[15] Aneesh Patnaik, Jiahn Son, Alice Feng & Crystal Ade, *Racial Disparities and Climate Change*, PRINCETON STUDENT CLIMATE INITIATIVE (Aug. 15, 2020), https://psci.princeton.edu/tips/2020/8/15/racial-disparities-and-climate-change:

> Communities of color [in the United States] are disproportionately victimized by environmental hazards and are far more likely to live in areas with heavy pollution. People of color are more likely to die of environmental causes, and more than half of the people who live close to hazardous waste are people of color.

Id.

[16] *Id*.:

> Looking back in time, the establishment of slavery is a precursor to more recent discriminatory policies and social, political, and economic inequalities. Lower income level, limited access to education, and poorer health status are found to be more prevalent in [Black] communities than non-Hispanic white communities. The historical discriminatory practices in housing, education, employment, and healthcare all played a role in the manifestation of these inequalities that contribute to greater vulnerability to climate impacts.

Id.

[17] *Id*. Since the late 1980s, statistics have shown that communities of color in the United State were subject to environmental degradation and dangerous pollution. Today, even though Black people make up thirteen percent of the United States population, sixty-eight percent live within thirty miles of a coal-fired power plant, compared to fifty-six percent of white people. Residents who live near these plants breathe in the most resultant pollutants, which can cause a range of health problems, including heart attacks, birth defects, and asthma. Black children in the United States suffer from asthma at a rate almost two times higher than white children. In addition, Black people are seventy-five percent more likely than white people to live in "fence-line" communities (areas near commercial facilities that produce noise, odor, traffic, or emissions that directly affect the population). *Id*.

[18] Press Release, Cory Booker, U.S. Senator for New Jersey, *Booker Reintroduces Sweeping Environmental Justice Bill* (Aug. 5, 2021), https://www.booker.senate.gov/news/press/08/05/2021/booker-reintroduces-sweeping-environmental-justice-bill [hereinafter Booker Press Release].

[19] *Id*.

[20] Marianne Engelman-Lado, Camila Bustos, Haley Leslie-Bole & Perry Leung, *Environmental Injustice in Uniontown, Alabama, Decades After the Civil Rights Act of 1964: It's Time for Action*, 44 ABA HUM. RTS. MAG. (2021) (available at: https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/vol—44—no-2—housing/environmental-injustice-in-uniontown—alabama—decades-after-the).

between Baton Rouge and New Orleans, Louisiana face an elevated rate of cancer and inexplicable illnesses due to the residents' proximity to many industrial plants and oil refineries.[21]

In recent years, the COVID-19 pandemic has shed more light on the inequities that result from differential exposure to environmental risks among communities of color and predominantly white communities.[22] In the United States, Black and Latino patients represented more than half of all in-hospital COVID-19 related deaths from March 2020 to July 2020, and Black patients were much more likely to require ventilation in hospitals during this time period.[23] The increased need for ventilation can be partially attributed to the higher rates of asthma in Black communities.[24] These disparate rates of COVID-19 complications have been associated with the large number of environmental hazards located within communities of color as opposed to predominately white communities.[25]

Additionally, individuals from the communities most affected by environmental hazards are typically the least likely to (1) reap the benefits from the industrial investments that cause the hazards[26] and (2) be able to afford doctors and specialized medical care.[27] Moreover, it is particularly

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[21] Booker Press Release, *supra* note 18.

[22] Darryl Fears & Brady Dennis, *'This is Environmental Racism': How a Protest in a North Carolina Farming Town Sparked a National Movement*, WASH. POST (Apr. 6, 2021), https://www.washingtonpost.com/climate-environment/interactive/2021/environmental-justice-race ("Today, Black people are nearly four times as likely to die from exposure to pollution than [w]hite people . . . During the coronavirus pandemic, the consequences [of unequal exposure to pollution] have proved particularly deadly.").

[23] *Id*.

[24] Peter Beech, *What is Environmental Racism and How Can We Fight It?*, WORLD ECON. F. (July 31, 2020), https://www.weforum.org/agenda/2020/07/what-is-environmental-racism-pollution-covid-systemic.

[25] Fears & Dennis, *supra* note 22.

[26] *See, e.g.*, Haldane King, *What Does Environmental Justice Mean in 2022?*, MOLEKULE (Feb. 25, 2022), https://molekule.com/blog/what-does-environmental-justice-mean-in-2022:

> A sacrifice zone is an environment that has been permanently damaged for industrial or technological progress. . . . Communities in Appalachia that have been devastated by mountain-top removal mining, "Cancer Alley" along the Mississippi river where there are 150 petrochemical plans, and Camden, [New Jersey] where the loss of manufacturing facilities left a legacy of poverty and toxicity are examples of sacrifice zones. In all these cases, executives and members of other communities earned billions of dollars for these projects while the local populace was neither enriched by the project nor protected from the inevitable industrial byproducts.

Id.

[27] Roni Caryn Rabin, *Racial Inequities Persist in Health Care Despite Expanded Insurance*, N.Y. TIMES, https://www.nytimes.com/2021/08/17/health/racial-disparities-health-care.html (last updated Aug. 29, 2021). Fewer health care providers and specialists are found in low-income and minority neighborhoods, which is a function of structural racism and a legacy of residential segregation. Moreover, despite innovations like Medicare Advantage, Medicare beneficiaries who are minorities still have less

challenging for individuals affected by these hazards—such as Newark residents—to sue polluting companies and obtain relief for harm suffered, thereby creating a significant disadvantage for afflicted communities.[28] This difficulty often occurs because affected communities lack the resources to bring awareness to an environmental hazard or to fight a costly legal battle.[29]

With the goal of combating the unequal distribution of environmental hazards and pollution, the environmental justice movement emerged in low-income communities and communities of color.[30] Today, the EPA defines "environmental justice" as "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."[31] The environmental justice movement has been described as "a movement seeking to address the unequal distribution of pollution and other environmental hazards that result from modern industrial production."[32] The movement seeks to prevent companies from profiting by contaminating communities that neither have any say in the contamination nor see a fair share, or any portion, of the profits.[33]

The beginning of this movement is often attributed to a 1982 protest in Warren County, North Carolina, a predominantly Black community.[34] Residents of Warren County protested the government's decision to designate their community as the site for a hazardous-waste landfill that would accept polychlorinated-biphenyl ("PCB")-contaminated soil.[35] Exposure to PCBs has been found to cause many kinds of cancer in rats, mice, and other study animals and is therefore considered "reasonably likely" to cause cancer in humans.[36] PCBs remain in the environment for long periods of time, cycling between the air, water, and soil.[37] The Warren County

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access than white individuals to a physician who is a regular source of care. In addition, minority communities are more likely to have higher poverty rates and less access to health insurance. *Id*.

[28] Beech, *supra* note 24. ("[Black] communities [often] lack the resources to raise awareness or fight a costly legal battle–resources which are available to wealthier white communities, who are better able to divert airport expansions, power stations or landfills elsewhere in a process known as NIMBYism–standing for 'not in my backyard'.").

[29] *Id*.

[30] *History of Environmental Justice*, SIERRA CLUB, https://www.sierraclub.org/environmental-justice/history-environmental-justice (last visited Jan. 22, 2024).

[31] *Learn About Environmental Justice*, EPA.GOV, https://www.epa.gov/environmentaljustice/learn-about-environmental-justice (last updated Aug. 16, 2023).

[32] King, *supra* note 26.

[33] *Id*.

[34] *History of Environmental Justice*, *supra* note 30.

[35] *Id*.

[36] *What are the Human Health Effects of PCBs?*, CLEARWATER NEWS & BULLS., http://www.clearwater.org/news/pcbhealth.html (last visited Jan. 3, 2024).

[37] *Learn About Polychlorinated Biphenyls*, EPA.GOV, https://www.epa.gov/pcbs/learn-about-polychlorinated-biphenyls#what (last updated Apr. 12, 2023).

protest sparked research which later exposed the disproportionately high burden of environmental degradation and pollution in minority communities.[38] These statistics, in turn, spurred environmental justice activism throughout the United States.[39] Protesters fought for the removal of environmental hazards from minority communities and sought to provide affected individuals with the ability to seek relief from harms that result from the disproportionate placement of these hazards.[40]

Although it began as an activist-driven social movement, environmental justice has shifted into an official regulatory priority of the Biden administration.[41] In August 2022, President Biden signed the Inflation Reduction Act[42] ("Act") with the goal of combating issues which result from climate change.[43] The Act[44] specifically furthers environmental justice objectives by investing in programs that focus on reducing pollution and addressing disproportionate environmental harm in low-income communities and communities of color.[45] Since the Act was signed, it has brought increased investments to clean-energy jobs and manufacturers and has helped

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[38] *History of Environmental Justice*, *supra* note 30.

[39] *Id*.

[40] *Id*.

[41] President Joseph Biden, Remarks on Actions to Tackle the Climate Crisis (July 20, 2022, 2:43 PM) ("Climate change is literally an existential threat to our nation and to the world. . . . As President, I'll use my executive powers to combat climate – the climate crisis in the absence of congressional actions, notwithstanding their incredible action."); *Environmental Justice*, WHITE HOUSE, https://www.whitehouse.gov/environmentaljustice (last visited Feb. 22, 2023) ("'We've put environmental justice at the center of what we do, addressing the disproportionate health, environmental, and economic impacts that have been borne primarily by communities of color–places too often left behind.' President Joe Biden, Earth Day 2022").

[42] Inflation Reduction Act of 2022, Pub. L. No. 117-169, 136 Stat. 1818 (codified as amended in scattered sections of 26 U.S.C.) [hereinafter Inflation Reduction Act of 2022].

[43] *Fact Sheet: One Year In, President Biden's Inflation Reduction Act is Driving Historic Climate Action and Investing in America to Create Good Paying Jobs and Reduce Costs*, WHITE HOUSE (Aug. 16, 2023), https://www.whitehouse.gov/briefing-room/statements-releases/2023/08/16/fact-sheet-one-year-in-president-bidens-inflation-reduction-act-is-driving-historic-climate-action-and-investing-in-america-to-create-good-paying-jobs-and-reduce-costs/#:~:text=The%20Inflation%20Reduction%20Act%20is,making%20the%20tax%20code%20fairer [https://tinyurl.com/bdz2pfzj] [hereinafter *Fact Sheet: One Year In*]:

> [O]n August 16, 2022, President Biden signed the Inflation Reduction Act into law – the largest investment in clean energy and climate action ever. The Inflation Reduction Act is a transformative law that is helping the United States meet its climate goals and strengthen energy security, investing in America to create good-paying jobs, reducing energy and health care costs for families, and making the tax code fairer.

Id.

[44] Inflation Reduction Act of 2022, *supra* note 42.

[45] *Fact Sheet: Inflation Reduction Act Advances Environmental Justice*, WHITE HOUSE (Aug. 17, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/08/17/fact-sheet-inflation-reduction-act-advances-environmental-justice.

protect communities from the impacts of climate change.[46] Furthermore, under the Biden administration, the EPA has become more active in the environmental justice arena and, in September 2022, it launched a national office dedicated to advancing environmental justice and civil rights.[47]

Although the Biden administration has focused on this issue throughout its term, it is unclear whether future administrations will do the same.[48] Thus, with the 2024 United States presidential election looming, it remains critical to codify federal environmental justice reforms so that progress in this area is not thwarted by a possible change in presidential administration.[49] However, Congress has been, and continues to be, reluctant to pass legislation that codifies environmental justice reform.[50] Many proposed environmental bills over the past twenty years have failed to make any significant progress in Congress.[51] This stagnation in Congress has many causes, including the uncertainties and long-term effects inherent in proposed

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[46] *Fact Sheet: One Year In*, *supra* note 43:

> Just twelve months after the law was signed, it is already having a significant impact on American workers and families, and is delivering for underserved communities and those that have been too often left behind. Outside groups estimate the Inflation Reduction Act's clean energy and climate provisions have created more than 170,000 clean energy jobs already, companies have announced over $110 billion in clean energy manufacturing investments in the last year alone, the law is delivering billions of dollars to protect communities from the impacts of climate change, and millions of seniors are saving money because their insulin is capped at $35 per month.

Id.

[47] Coral Davenport, *E.P.A. Will Make Racial Equality a Bigger Factor in Environmental Rules*, N.Y. TIMES (Sept. 24, 2022), https://www.nytimes.com/2022/09/24/climate/environmental-justice-epa.html.

[48] *See* Hanna Perls, *EPA Undermines its Own Environmental Justice Programs*, HARV. ENV'T & ENERGY L. PROGRAM (Nov. 11, 2020), https://eelp.law.harvard.edu/2020/11/epa-undermines-its-own-environmental-justice-programs; *see also* Emily Newburger, *'Why is it so Hard to Make Environmental Law?'*, HARV. L. TODAY (Apr. 18, 2023), https://hls.harvard.edu/today/why-is-it-so-hard-to-make-environmental-law (discussing how the differing views of each administration have resulted in "'presidential administration whiplash' on environmental law," hindering the progress of environmental goals).

[49] *Id*. Environmental law and environmental justice goals are broad. Although states play an important role in getting these kinds of laws passed, the United States needs a national system to best achieve progress. Because of the differing views of each presidential administration on the importance of environmental goals and on the role of administrative agencies generally, codifying a federal law presents the most effective way to ensure long-term environmental justice progress. *Id*.

[50] *Id*. Because of the long-term prevention goals of environmental laws, as opposed to laws that focus on short-term immediate environmental gain, Congress has not focused on passing environmental reforms. "We also have a system where people run for office on short-term time horizons. 'Politicians are responsive to the here and now. . . [t]hey don't get any votes from the there and then.'" *Id*.

[51] Perls, *supra* note 48 (listing the timeline of environmental justice efforts by the EPA and environmental justice activity during the presidencies of Obama and Trump). "[C]ongress shut down environmental lawmaking since 1990, so that every administration is trying to do thing[s] with the old statutory language, which does not easily fit. It takes a lot of gymnastics to try to make these things fit. That is a disaster for lawmaking." Newburger, *supra* note 48.

environmental laws and the significant lack of compromise on the importance of furthering environmental goals.[52]

More specifically, codifying environmental justice reforms that modify statutes to allow individuals to bring suits based on discriminatory *effects* of an action rather than the discriminatory *intent* of the action is particularly important in the context of environmental harm because these harms are often not apparent until years after an action occurs.[53] Thus, plaintiffs who seek redress on their claims can typically only show the discriminatory disparate effect of an action—such as that it resulted in harmful pollution that led to health problems in a minority community—rather than the action's discriminatory intent.[54] Moreover, allowing environmental justice plaintiffs to sue for disparate impact discrimination is essential because many environmental policies and decisions have "historically layered on impacts in areas that [were] already overburdened."[55] Therefore, the ability of environmental justice plaintiffs to effectively sue for disparate impact discrimination claims is a key factor in allowing individuals from minority communities to achieve some form of relief.[56]

However, given that codification of such an environmental justice reform is not something that Congress is likely to achieve in the near future, this Note explores the current avenues that exist for individuals who wish to redress the harms caused by environmental injustices. Specifically, this Note discusses (1) the history of the private right of action under Title VI of the Civil Rights Act of 1964;[57] (2) the current procedures available to plaintiffs to sue for disparate impact discrimination claims based on environmental injustice; (3) alternative options available to environmental justice plaintiffs; and (4) a proposal that considers the most effective and realistic method that these plaintiffs can use to sue for disparate impact claims of environmental injustice.

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[52] Newburger, *supra* note 48:

> You are regulating people and activities at one time and one place for the benefits that will be secured for people at another time and another place. It is inherently distributional. And that makes it hard to pass [environmental] laws . . . "because the benefits and the burdens are spread out." In addition, under these circumstances, it's hard to know exactly what the cause and consequence will be. "Environmental law is riddled with uncertainty."

Id.

[53] Ellen M. Gilmer & Kellie Lunney, *Environmental Justice Bill Sharpens Civil Rights Litigation Tool*, BL (Apr. 8, 2021, 4:45 AM), https://news.bloomberglaw.com/environment-and-energy/environmental-justice-bill-sharpens-civil-rights-litigation-tool.

[54] *Id*.

[55] *Id*. (disparate impact discrimination involves "actions that appear neutral but have lopsided effects on people of color.").

[56] *Id*.

[57] 42 U.S.C. § 2000d.

Additionally, this Note evaluates a provision of the Environmental Justice Act of 2021,[58] a proposed bill which codifies the private right to sue for disparate impact claims under Title VI of the Civil Rights Act of 1964,[59] finding that such a law would best effectuate the goals of environmental justice plaintiffs who seek relief from the disproportionate harm that they suffer. However, this Note ultimately concludes that, because of this proposed bill's stagnation in Congress, the more realistic way for environmental justice plaintiffs to achieve relief is by harnessing the more manageable standard of suing for disparate impact discrimination under state law; specifically, under the newly adopted Green Amendments to various state constitutions.[60]

I. BACKGROUND

A. Title VI's History and Its Applicability to Environmental Justice Lawsuits

Title VI of the Civil Rights Act of 1964 ("Title VI") prohibits discrimination on the basis of race, color, or national origin in any program or activity that receives federal funds or other federal financial assistance.[61] Under § 601 of this statute, individuals can sue based on claims that they were excluded from participation in, denied the benefits of, or subjected to discrimination by any program or activity covered by Title VI.[62] However, individuals who sue under § 601 are required to show evidence of intentional discrimination.[63] This is a relatively high standard, especially because many plaintiffs who sue under Title VI can only provide evidence of the

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[58] Environmental Justice Act of 2021, S. 2630, 117th Cong. (introduced to Senate, Aug. 5, 2021) [hereinafter Environmental Justice Act of 2021].

[59] § 2000d.

[60] *See* N.Y. CONST. art. I, § 19.

[61] § 2000d. A recipient of federal funds means, for the purposes of Title VI:

> [A]ny state or its political subdivision, any instrumentality of a state or its political subdivision, any public or private agency, institution, organization, or other entity, or any person to which Federal financial assistance is extended directly or through another recipient, including any successor, assignee, or transferee of a recipient, but excluding the ultimate beneficiary of the assistance.

The Facts on Title VI of the Civil Rights Act of 1964, EPA.GOV, https://www.epa.gov/ogc/facts-title-vi-civil-rights-act-1964#:~:text=No%20person%20in%20the%20United,activity%20receiving%20Federal%20financial%20assistance (last updated Dec. 30, 2022).

[62] § 2000d; Alexander v. Sandoval, 532 U.S. 275, 279 (2001) ("private individuals may sue to enforce § 601 of Title VI and obtain both injunctive relief and damages.").

[63] *Sandoval*, 532 U.S. at 279.

discriminatory effects of an action rather than the intentions behind it.[64] Historically, plaintiffs who could not meet the high threshold of proving intentional discrimination but were able to assert evidence that an entity had engaged in practices that resulted in a disparate impact on a certain group of individuals utilized § 602 of Title VI to seek relief.[65]

Prior to 2001, many federal courts held that § 602 of Title VI provided plaintiffs with a private statutory right of action[66] to sue for claims of disparate impact discrimination.[67] "In contrast to a disparate-treatment case, where a plaintiff must establish that the defendant had a discriminatory intent or motive, a plaintiff bringing a disparate-impact claim [merely] challenges practices that have a disproportionately adverse effect on minorities and are otherwise unjustified by a legitimate rationale."[68] Therefore § 602, by dispensing with any requirement of a showing of intentional discrimination, appeared to create a lower standard of proof than § 601 because a claim under § 602 only required evidence that an action had an alleged discriminatory effect on an individual or a community.[69]

However, in 2001, the Supreme Court held in *Alexander v. Sandoval* that no private right of action exists to enforce disparate impact discrimination claims promulgated under Title VI, eliminating the right of plaintiffs to sue privately for claims under § 602.[70] In *Sandoval*, a class action lawsuit was brought under the United States Department of Justice's ("DOJ") Title VI regulations to enjoin a policy implemented by the Alabama Department of Public Safety.[71] The Alabama Department of Public Safety had upheld a change in Alabama's driver's license policy, which required that the state's driver's license examination be administered in English, rather

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[64] *See, e.g.*, S. Camden Citizens in Action v. N.J. Dep't of Env't Prot., 274 F.3d 771, 790-91 (3d Cir. 2001) (dismissing plaintiffs' suit where plaintiffs could only show disparate-impact discrimination under § 602, and not intentional discrimination under § 601).

[65] *See, e.g.*, Bossier Par. Sch. Bd. v. Lemon, 370 F.2d 847, 852 (5th Cir. 1967); Guardians Ass'n of N.Y.C. Police Dep't. v. Civ. Serv. Comm'n, 466 F. Supp 1273, 1285 (S.D.N.Y. 1979); Blackshear Residents Org. v. Housing Auth. of Austin, 347 F. Supp 1138, 1146 (W.D. Tex. 1971).

[66] "Not all statutory violations give rise to a private right of action. A private statutory cause of action exists 'only when the statute, explicitly or implicitly, provides for such a cause of action.'" Shumate v. Drake Univ., 846 N.W.2d 503, 507 (Iowa 2014) (citing Mueller v. Wellmark, Inc., 818 N.W.2d 244 (Iowa 2012) (quoting Sanford v. Manternach, 601 N.W.2d 360, 371 (Iowa 1999))). "A private right of action is the right of an individual to bring suit to remedy or prevent an injury that results from another party's actual or threatened violation of a legal requirement." *Id*.

[67] *See, e.g.*, *Lemon*, 370 F.2d at 852; *Guardians Ass'n*, 466 F. Supp. at 1285; *Blackshear Residents*, 347 F. Supp at 1146.

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

[69] *See, e.g.*, *Lemon*, 370 F.2d at 852; *Guardians Ass'n*, 466 F. Supp. at 1285; *Blackshear Residents*, 347 F. Supp at 1146.

[70] Alexander v. Sandoval, 532 U.S. 275, 278 (2001).

[71] *Id*.

than in multiple languages, as the policy previously allowed.[72] The plaintiffs argued that this decision violated § 602 of Title VI because the policy had the effect of preventing non-English speakers from obtaining drivers' licenses simply because of their national origins.[73] However, the plaintiffs were unable to provide any evidence that the Alabama Department of Public Safety had any discriminatory intentions when taking the disputed action.[74]

Whereas the lower courts sided with the plaintiffs, thereby ordering the Alabama Department of Public Safety to accommodate non-English speakers and provide a new policy, the Supreme Court ruled that Title VI did not provide the plaintiffs with a cause of action to overturn the regulation.[75] The Supreme Court clarified that the private right of action that Title VI allows is only for disparate treatment, rather than disparate impact.[76] This distinction meant that the plaintiffs failed to assert a cognizable claim for relief because they were only able to provide evidence of a discriminatory impact.[77]

Shortly after the *Sandoval* decision,[78] the Third Circuit explicitly addressed the case's application to environmental justice lawsuits in *South Camden Citizens in Action v. New Jersey Department of Environmental Protection*.[79] In *South Camden Citizens*, private litigants from a minority community asserted that the issuance of an air-quality permit, and the cement facility that would be in operation under the air-quality permit, would have a discriminatory disparate impact, in violation of § 602 of Title VI.[80] The Third Circuit found that, based on *Sandoval*,[81] the plaintiffs could not maintain their action under § 602 because they did not have the private right to bring a disparate impact claim under Title VI.[82] The Supreme Court later denied certiorari, effectively confirming that the *Sandoval*[83] limitation on private rights of action for disparate impact claims under Title VI applies to environmental justice lawsuits.[84]

Notably, however, the *Sandoval* court explicitly recognized that § 602 authorizes federal agencies—such as the EPA—to effectuate the provisions

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72 *Id*.

73 *Id*.

74 *Id*.

75 *Id*.

76 *Id*.

77 *Id*.

78 *Id*. at 275.

79 S. Camden Citizens in Action v. N.J. Dep't of Env't Prot., 274 F.3d 771 (3d Cir. 2001).

80 *Id*. at 774.

81 *Sandoval*, 532 U.S. at 275.

82 *S. Camden Citizens in Action*, 274 F.3d at 774.

83 *Id*.

84 S. Camden Citizens in Action v. N.J. Dep't of Env't Prot., 536 U.S. 939 (2002) (denying cert).

of Title VI by issuing rules, regulations, or orders of general applicability.[85] Hence, federal agencies, such as the EPA, may pass Title VI regulations that specifically allow for disparate impact claims, which are enforceable under administrative law by those agencies.[86] Therefore, individuals wishing to pursue disparate impact claims under Title VI now must request representation in lawsuits from agencies that have issued regulations under Title VI.[87]

Environmental justice plaintiffs who assert claims of harm based on disproportionate health impacts, such as the high rates of asthma in Newark,[88] typically sue under the EPA's implementing Title VI regulations, as opposed to constitutional law or federal environmental laws, despite their apparent ability to use all of these avenues to seek redress.[89] These plaintiffs have historically been unable to make claims under the Equal Protection Clause of the Fourteenth Amendment of the Constitution ("EPC") because they have struggled to establish discriminatory intent, which is the same reason why § 601 of Title VI is of little use to them.[90] In addition, although several environmental statutes—including the CERCLA, the Clean Air Act, the Clean Water Act, and the Resource Conservation and Recovery Act—allow for a private right of action, these statutes fail to address disproportionate harmful impacts on low-income or minority communities.[91] As such, although litigation involving these environmental statutes may address individual nuisances related to past harm or allow a community to fight locally undesirable land use, evidence of disparate impact discrimination is rarely sufficient to defeat a sitting or permitting decision.[92] Therefore, environmental justice plaintiffs who wish to assert claims of disparate impact

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[85] *Sandoval*, 532 U.S. at 278 (citing 42 U.S.C. § 2000d(1)). Notably, the DOJ oversees implementation of Title VI throughout the federal government and requires all agencies to develop regulations and guidance under Title VI. *The Facts on Title VI of the Civil Rights Act of 1964*, *supra* note 61. The DOJ specifically promulgated a disparate impact regulation under Title VI, forbidding recipients of federal funding 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." 28 C.F.R. § 42.104 (2003).

[86] *Sandoval*, 532 U.S. at 278.

[87] *Id*.

[88] Johnson, *supra* note 2.

[89] Regina Paparo, *Not a Box To Be Checked: Environmental Justice and* Friends of Buckingham v. State Air Pollution Control Board *(4th Cir. 2020)*, 45 HARV. ENVT'L L. REV. 219, 231 (2021).

[90] *See, e.g.*, Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 270-71 (1977) (dismissing an equal protection claim where respondents failed to carry their burden of proving that discriminatory purpose was a motivating factor in the action of which they complained).

[91] Paparo, *supra* note 89, at 231.

[92] *Id*.

discrimination under federal law are best served by turning to Title VI's implementing regulations to seek redress.[93]

B. Navigating Environmental Justice Plaintiffs' Current Path to Legal Redress Under Federal Law

Because § 601 of Title VI[94] has been held to require the same showing of intentional discrimination as a cause of action under the EPC,[95] suing under § 601 is not a viable option for environmental justice plaintiffs, who typically cannot show that an alleged wrongdoer acted with the intent to discriminate.[96] Individuals who seek to bring federal claims of discrimination under Title VI based on harm suffered as a result of environmental injustice are therefore forced to rely on administrative agency regulations implementing § 602 of Title VI.[97] For instance, the EPA's Title VI regulations prohibit EPA-funded entities[98] from taking actions, including permitting actions, that are intentionally discriminatory or that have a discriminatory effect based on race, color, or national origin.[99] These regulations indicate that people who wish to file actions under § 602 of Title VI may file complaints with the EPA against the entity that they believe has wronged them.[100]

Thus, EPA regulations implementing Title VI[101] allow agencies to represent individuals' claims of disproportionate harm suffered from environmental hazards without having to meet the high threshold of proving intentional discrimination.[102] The EPA has also determined that a showing of adverse health effects and the potential for future adverse effects, depending on their nature and severity, may provide an adequate basis for a

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[93] *Id*.

[94] 42 U.S.C. § 2000d.

[95] U.S CONST. amend. XIV. To state an equal protection claim, a plaintiff must allege (and ultimately prove) intentional discrimination. Washington v. Davis, 426 U.S. 229, 241 (1976).

[96] Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 287 (1978). ("In view of the clear legislative intent, Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment.").

[97] Alexander v. Sandoval, 532 U.S 275, 278 (2001).

[98] OFF. INSPECTOR GEN., REP. NO. 20-E-0333, U.S. ENV'T PROT. AGENCY, IMPROVED OVERSIGHT OF FUNDING RECIPIENTS' TITLE VI PROGRAMS COULD PREVENT DISCRIMINATION 1 (2020) ("Every year, the EPA awards more than $4 billion in funding for assistance agreements to recipients, such as state governments and nonprofit agencies.").

[99] 40 C.F.R. § 7.10 (2010).

[100] *Id*. Specifically, the "EPA's Office of External Civil Rights Compliance (OECRC) [] is responsible for EPA's enforcement of Title VI. All Title VI administrative complaints are processed and investigated by OECRC." *Federal Civil Rights Laws (Including Title VI) and EPA's Non-Discrimination Regulations*, EPA.GOV, https://www.epa.gov/external-civil-rights/federal-civil-rights-laws-including-title-vi-and-epas-non-discrimination (last updated Oct. 23, 2023).

[101] 42 U.S.C. § 2000d.

[102] 40 C.F.R. § 7.10.

finding of adversity under its disparate impact regulations.[103] Therefore, the EPA's regulations, by allowing agencies to assert claims on behalf of individuals who are disproportionately harmed by environmental hazards and pollution, present plaintiffs who are only able to provide evidence of disparate impact discrimination with a seemingly viable option to seek relief.[104]

To bring suit, environmental justice plaintiffs must request that the EPA file a § 602 action on their behalf, rather than suing alleged discriminatory entities directly.[105] Upon filing a complaint with the EPA, agency officials review the submitted claims and determine whether they believe that a cognizable claim exists.[106] If agency officials conclude that a viable action exists, the agency will bring suit against the alleged wrongdoer on behalf of the plaintiff(s) who filed the initial complaint, provided the agency determines that voluntary compliance appears unattainable.[107]

If a court finds that a recipient of federal assistance has violated Title VI,[108] the agency providing the assistance will either (1) initiate proceedings to terminate its funding of the entity or (2) refer the matter to the DOJ for appropriate legal action.[109] However, individuals whose disparate impact cases are not pursued by administrative agencies do not have an individual cause of action against the entity that, they believe, has harmed them.[110]

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[103] U.S. Dep't Just., Just. Title VI Legal Manual, § 7 (2021) [hereinafter Title VI Legal Manual].

[104] 40 C.F.R. § 7.10.

[105] *See* Alexander v. Sandoval, 532 U.S. 275, 278 (2001). *The Facts on Title VI of the Civil Rights Act of 1964*, *supra* note 61 ("Title VI allows persons to file administrative complaints with federal departments and agencies alleging discrimination based on race, color, or national origin by recipients of federal funds.").

[106] *The Facts on Title VI of the Civil Rights Act of 1964*, *supra* note 61. The Office of Civil Rights ("OCR") within the EPA is responsible for the enforcement of federal civil rights laws, such as Title VI. The OCR has a responsibility to evaluate Title VI complaints in a fair and balanced way. *Id*.

[107] *Title VI of the Civil Rights Act of 1964*, CIV. RTS. DIV., U.S. DEP'T JUST. https://www.justice.gov/crt/fcs/TitleVI (last updated Feb. 21, 2024). The OCR is required to acknowledge receipt of a properly filed complaint within five days. It must then initiate complaint-processing procedures and, within twenty days, "review the complaint for acceptance, rejection, or referral to the appropriate federal agency. If the complaint is accepted, within 180 days of the start of the complaint-investigation process OCR must notify the complainant and recipient agency of the agency's findings and recommendations for voluntary compliance. Albert Huang, *Environmental Justice and Title VI of the Civil Rights Act: A Critical Crossroads*, ABA (Mar. 1, 2012), https://www.americanbar.org/groups/environment_energy_resources/publications/trends/2011_12/march_april/environmental_justice_title_vi_civil_rights_act.

[108] 42 U.S.C. § 2000d.

[109] *Title VI of the Civil Rights Act of 1964*, *supra* note 107.

[110] *Sandoval*, 532 U.S. at 278 (holding that that no private right of action exists for disparate-impact claims brought under Title VI).

II. ANALYSIS

A. Environmental Justice Plaintiffs' Ability to Bring Disparate Impact Claims Under the EPA's Title VI Regulations

Although EPA regulations implementing Title VI[111] appear to provide environmental justice plaintiffs with the ability to sue for disparate impact claims, this system has many shortcomings.[112] Most significantly, the EPA is unable to represent the vast majority of environmental justice plaintiffs' claims because of backlogs and inherent limitations, such as lack of funding, resulting in its failure to pursue most of the proposed claims.[113] Even the claims that are acted upon by the EPA often result in significant delays, making it years before environmental justice plaintiffs can get any redress for harms suffered.[114] Hence, many plaintiffs who assert disparate impact claims are unable to obtain any kind of meaningful relief, and, because of this inability, companies are not strongly incentivized to take precautions before acting in a way that may produce discriminatory effects.[115]

On the other hand, the current procedure used by environmental justice plaintiffs to bring disparate impact lawsuits may prevent courts from becoming overrun with individual cases dealing with environmental justice issues by limiting the quantity of cases that are pursued.[116] Moreover, the EPA may be best situated to choose cases, typically class action lawsuits, that will bring widespread awareness to environmental justice concerns.[117] In addition, petitioning an agency to represent a claim, rather than bringing a private lawsuit, may be a cheaper alternative for environmental justice

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[111] 40 C.F.R. § 7.10 (2010).

[112] Robert J. Klee, *What's Good for School Finance Should Be Good for Environmental Justice: Addressing Disparate Environmental Impacts Using State Courts and Constitutions*, 30 COLUM. J. ENVT'L L. 135, 148-51 (2005). "Unfortunately, the reality of EPA's enforcement of its Title VI regulations serves as a roadblock to environmental justice claims due to inherent procedural deficiencies, a history of mismanagement and denials of claims, and fundamental fairness and impartiality concerns." *Id*. at 148.

[113] Tony LoPresti, *Realizing the Promise of Environmental Civil Rights: The Renewed Effort to Enforce Title VI of the Civil Rights Act of 1964*, 65 ADMIN. L. REV. 757, 781-84 (2013); Gilmer & Lunney, *supra* note 53 ("The Environmental Protection Agency, which fields many Title VI complaints involving environmental justice, has been plagued with inaction and backlogs. A 2020 report from the EPA's inspector general called for improved oversight to ensure that state environmental agencies and other EPA funding recipients comply with the Civil Rights Act.").

[114] Klee, *supra* note 112, at 149-51. "Beyond the procedural advantages of a private lawsuit, the EPA's actual procedures for handling and reviewing [environmental justice] administrative complaints have been suspect, at best." *Id*. at 149. The EPA has a long history of taking years to pursue claims under § 602 of Title VI and only pursuing a select few of these claims to act upon at all. *Id*.

[115] *Id*. at 150-51 ("The EPA's track record of enforcement under Title VI gives no indication that a private litigant could initiate a successful environmental justice action against a state permitting agency.").

[116] *But see* LoPresti, *supra* note 113 (explaining the EPA's incompetency in effectively pursuing Title VI claims).

[117] Klee, *supra* note 112, at 148.

plaintiffs—who typically are from low-income communities—because they do not have to incur litigation expenses or hire a lawyer.[118]

However, many of the supposed benefits of the current federal system do not make much of a difference in practice.[119] Most notably, the EPA has not acted on the majority of proposed environmental justice claims, thereby failing to bring significant awareness to these issues.[120] Additionally, one must weigh concerns about affording environmental justice plaintiffs the private right to sue for disparate impact claims against the benefits of doing so. For instance, bringing a private lawsuit in court offers plaintiffs considerable procedural advantages, including discovery, the right to appeal, a chance at reasonable attorneys' fees, and prospective and retroactive relief.[121] Going to court also provides the complainant with a greater opportunity to explain the alleged discriminatory impact.[122] In contrast, suing through an administrative agency does not offer any of these advantages and at best, can only result in a potential withholding of federal funds from an entity found in violation of § 602 of Title VI.[123] Furthermore, because the EPA takes over a complainant's case as soon as it confirms receipt of a complaint, suing through the EPA's Title VI regulations often prevents environmental justice plaintiffs from becoming meaningfully involved in their case and tends to leave communities "out of the loop."[124]

In weighing the potential benefits of the current system for bringing disparate impact claims under the EPA's Title VI regulations against its procedural disadvantages and the inability of most affected individuals to receive any form of tangible relief, it is clear that this system "will not achieve environmental justice anytime soon (regardless of the administration)."[125]

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[118] *Id*.

[119] *Id*.

[120] *Id*. at 151-52. To the contrary, the EPA mainly focuses on ensuring polluting facilities remain at the current minimum national standards. "State governments and regulated industries pressure the EPA to not slow down or interfere with the permitting process, especially if jobs and money are at stake." *Id*. at 152.

[121] *Id*. at 149.

[122] Gilmer & Lunney, *supra* note 53.

[123] Klee, *supra* note 112, at 149:

> [B]ringing a lawsuit in a federal court offers clear procedural advantages. A private lawsuit affords the litigant discovery, the right to appeal, a chance at reasonable attorneys' fees, and prospective and retroactive relief, among other benefits, all of which are absent in the administrative process. The EPA cannot revoke the permit issued by the state agency; rather it may only withhold federal funds from the state agency in violation [of § 602 of Title VI].

Id.

[124] Gilmer & Lunney, *supra* note 53 ("Once [complainants] submit a complaint to the EPA's External Civil Rights Compliance Office, the agency confirms receipt and takes over from there, often leaving communities out of the loop.").

[125] Klee, *supra* note 112, at 152.

More specifically, under the current system, the provisions of § 602 of Title VI[126] are essentially rendered useless for the vast majority of individuals who are disproportionately targeted by environmental hazards and pollution.[127] Therefore, because it seems unlikely that the Supreme Court will return to the pre-*Sandoval*[128] view of § 602,[129] which deemed private enforcement a necessary supplement to government enforcement of Title VI and its implementing regulations,[130] the vast majority of environmental justice plaintiffs are left without an effective way to seek relief for disparate impact claims of harm.

B. Codification of the Private Right to Sue Under § 602 of Title VI: An Idealistic Goal with Real World Hurdles

In light of the inadequacies in the current system for bringing disparate impact claims under Title VI,[131] environmental justice activists have pushed for Congress's codification of the private right to sue under § 602 to create a viable way for plaintiffs to seek relief.[132] Senator Cory Booker, a longtime Newark, New Jersey, resident—and the city's mayor from 2006 to 2013—has taken significant strides to promote the importance of environmental justice at the federal level throughout his tenure as a United States senator.[133] Environmental justice has been a principal focus of Senator Booker's governmental work, as he has seen firsthand how low-income communities and communities of color are disproportionately affected by environmental hazards and pollution.[134] To address the concerns of communities of color and low-income and indigenous communities, Senator Booker introduced a bill called the Environmental Justice Act of 2021 during Congress' 117th session.[135] In addition to proposing various ways to consider the needs of these communities when making decisions about environmental hazards and pollution, this bill includes a provision that addresses the concerns of plaintiffs for whom the current system denies the ability to effectively achieve redress on disparate impact claims of harm suffered.[136]

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126 42 U.S.C. § 2000d.

127 Klee, *supra* note 112, at 152.

128 Alexander v. Sandoval, 532 U.S. 275 (2001).

129 42 U.S.C. § 2000d.

130 *See* Bossier Par. Sch. Bd. v. Lemon, 370 F.2d 847, 852 (5th Cir. 1967); Guardians Ass'n of N.Y.C. Police Dep't. v. Civ. Serv. Comm'n, 466 F. Supp 1273, 1285 (S.D.N.Y. 1979); Blackshear Residents Org. v. Housing Auth. of Austin, 347 F. Supp 1138, 1146 (W.D. Tex. 1971).

131 Klee, *supra* note 112, at 152.

132 Booker Press Release, *supra* note 18.

133 *Id*.

134 *Id*.

135 Environmental Justice Act of 2021, *supra* note 58.

136 *Id*.

Specifically, section ten of Senator Booker's bill proposes codifying an individual's right to bring an action under Title VI[137] against entities that received federal assistance and engaged in discriminatory practices that have a disparate impact.[138] Codification would effectively overturn *Sandoval*'s[139] limitation on a private right of action for disparate impact claims under Title VI.[140] By affording individuals the ability to sue directly for disparate impact claims, section ten of the Environmental Justice Act of 2021 presents an effective way for environmental justice plaintiffs to use the provisions of Title VI[141] to their advantage, allowing for some form of justice to be achieved.[142]

Although most activists agree that codifying the private right to sue under § 602 of Title VI presents the most promising widespread way for environmental justice plaintiffs to achieve some form of relief for disproportionate environmental harms suffered, the progress of the Environmental Justice Act of 2021 was stalled in Congress.[143] Since August 2021, when the Senate read the bill twice and referred it to the Committee on Environment and Public Works, Congress has not taken any further action.[144] This stagnation is not surprising given Congress' history of failing to prioritize environmental justice.[145] While the codification process is halted, focusing on other ways to get around the limitations that *Sandoval*[146] set in place remains critical for environmental justice progress.

C. Using the Fair Housing Act as a Model: Crafting More Tailored Environmental Justice Legislation for Improved Congressional Support

Title VIII of the Civil Rights Act—The Fair Housing Act ("FHA")—makes it illegal to discriminate in the sale or rental of housing, or in other housing-related activities, based on race, color, national origin, religion, sex, familial status, and disability.[147] Like most environmental justice plaintiffs, individuals who sue under the FHA[148] typically cannot provide evidence of discriminatory intent and instead are only able to sue for harms that resulted

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137 42 U.S.C. § 2000d.

138 Environmental Justice Act of 2021, *supra* note 58.

139 Alexander v. Sandoval, 532 U.S. 275, 293 (2001).

140 Environmental Justice Act of 2021, *supra* note 58.

141 42 U.S.C. § 2000d.

142 Environmental Justice Act of 2021, *supra* note 58.

143 *Id*.

144 *Id*.

145 Perls, *supra* note 48.

146 Alexander v. Sandoval, 532 U.S. 275, 278 (2001).

147 42 U.S.C. § 3601.

148 *Id*.

from the discriminatory effect of an action.[149] Hence, this similarity renders a comparison of the FHA to proposed bills that aim to further environmental justice ideals useful.

Unlike Title VI of the Civil Rights Act,[150] the FHA does not require a plaintiff to prove a discriminatory motive to assert a prima facie case.[151] Instead, proof of discriminatory impact or disparate treatment is sufficient to state a claim.[152] Thus, the FHA's impact is similar to the potential impact of an environmental justice specific law, such as a more tailored version of section ten of the proposed Environmental Justice Act of 2021,[153] which would allow environmental justice plaintiffs specifically to bring private lawsuits based on disparate impact discrimination and would not require a showing of discriminatory intent.[154] Unlike the current version of the proposed Environmental Justice Act of 2021,[155] the FHA does not purport to overrule any Supreme Court interpretation of Title VI, instead limiting its scope to certain claims related to a finite, select subject matter.[156]

Courts interpreting the FHA have recognized that disparate impact claims are often the only practical way for plaintiffs to challenge a decision or action that has discriminatory effects.[157] In *Texas Department of Housing and Community Affairs v. Inclusive Communities Project*, the plaintiff alleged that the defendant perpetuated segregated housing patterns by allocating too many federal tax credits in predominantly Black inner city areas and too few in predominantly white suburban neighborhoods.[158] The plaintiff based its argument on statistical evidence of the allocation of these tax credits.[159] The Court upheld the plaintiff's claim, determining that the

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[149] *See, e.g.*, Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 525-27 (2015) (plaintiffs—arguing that the defendant's action of disproportionally allocating tax credits resulted in continued segregated housing patterns—were unable to provide evidence of the defendant's discriminatory intent but were able to assert a *prima facie* case of disparate impact discrimination through statistics regarding the discriminatory effects of the action).

[150] 42 U.S.C. § 2000d.

[151] § 3601; *Tex. Dep't of Hous.*, 576 U.S. at 545 (holding that disparate impact claims are cognizable under the FHA).

[152] *Tex. Dep't of Hous.*, 576 U.S. at 519 (finding that disparate impact claims were cognizable under the FHA).

[153] Environmental Justice Act of 2021, *supra* note 58.

[154] *But see Tex. Dep't of Hous.*, 576 U.S. at 519 (finding that disparate impact claims are cognizable under the Fair Housing Act).

[155] Environmental Justice Act of 2021, *supra* note 58.

[156] § 3601.

[157] *See, e.g.*, *Tex. Dep't of Hous.*, 576 U.S. at 540 (noting that the "availability of disparate-impact liability . . . has allowed private developers to vindicate the FHA's objectives and to protect their property rights by stopping municipalities from enforcing arbitrary and, in practice, discriminatory ordinances barring the construction of certain types of housing units.").

[158] *Id.* at 526.

[159] *Id.* at 527.

defendant failed to meet its burden to show that there were no less discriminatory alternatives for allocating the tax credits.[160]

In *Inclusive Communities*, the Court recognized that the plaintiff had no way of proving that the resulting effects of the allocations were intentional, but that it could provide evidence that the effects of the policy were nonetheless discriminatory.[161] The Supreme Court held that the plaintiff's disparate impact claim was cognizable under the FHA, noting that the purpose of the FHA's enactment was to "eradicate discriminatory practices within a sector of [the United States'] economy" and that the FHA purposely includes result oriented language.[162] Notably, the reasoning in *Inclusive Communities*[163] bears similarity to that of the *Sandoval* dissent, which stated: (i) that Title VI was "intended to benefit a particular class of individuals;" (ii) that Title VI's purpose would not be frustrated by the implication of a private right of action; and (iii) that the legislative history of the statute "support[s] the conclusion that Congress intended that [Title VI would provide for] such a right."[164]

Due to the apparent similarities between (1) the legislative intent behind both the FHA and Title VI—at least, according to the *Sandoval* dissent and pre-*Sandoval* case law[165]—and (2) the inability of many environmental justice plaintiffs and plaintiffs who sue under the FHA to provide evidence of intentional discrimination, the FHA can serve as a model for Congress to

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[160] *Id*. at 528.

[161] *Id*. at 527.

[162] *Id*. at 521; *Id*. at 540:

> Recognition of disparate-impact liability under the FHA [also] plays an important role in uncovering discriminatory intent: It permits plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment. In this way disparate-impact liability may prevent segregated housing patterns that might otherwise result from covert and illicit stereotyping.

Id. at 540 (citing 42 U.S.C. § 3601).

[163] *Tex. Dep't of Hous.*, 576 U.S. at 539-40.

[164] Alexander v. Sandoval, 532 U.S. 274, 313 (2001) (Stevens, J., dissenting) (citing Cannon v. Univ. of Chi., 441 U.S. 677 (1979)).

[165] *Sandoval*, 532 U.S. at 294 (Stevens, J., dissenting) (internal citations omitted) (citing Lau v. Nichols, 414 U.S. 563 (1974)):

> In separate lawsuits spanning several decades, we have endorsed an action identical in substance to the one brought in this case [which] demonstrated that Congress intended a private right of action to protect the rights guaranteed by Title VI . . . and concluded that private individuals may seek declaratory and injunctive relief against state officials for violations of regulations promulgated pursuant to Title VI. . . . Giving fair import to our language and our holdings, every Court of Appeals to address the question has concluded that a private right of action exists to enforce the rights guaranteed both by the text of Title VI and by any regulations validly promulgated pursuant to that Title, and Congress has adopted several statutes that appear to ratify the status quo.

Id. (internal citations omitted); *see also Cannon*, 441 U.S. at 677; *Guardians Ass'n*, 466 F. Supp. at 582.

pass more tailored environmental justice legislation.[166] More specifically, environmental justice activists could strive to promote the adoption of a narrowly focused law, akin to the FHA, that would extend the private right to sue under § 602 of Title VI to plaintiffs specifically in the context of environment related harms.

Further, the effect that the FHA has had on an individual's ability to sue for disparate impact housing discrimination claims—including dispelling fears of overburdening the courts with an increased amount of private-action lawsuits—can provide valuable guidance about the impact that a proposed bill that focuses on codifying the private right to sue under § 602 of Title VI for environmental justice plaintiffs may have.[167] Until such a tailored environmental justice law is proposed and gains traction, plaintiffs suing for disparate impact discrimination due to environmental injustice must look to other options to seek relief. Because congressional attention to the issue of environmental injustice currently remains limited in comparison to their focus on housing discrimination at the time the FHA was passed, environmental justice plaintiffs will need to explore alternative avenues to sue for disparate impact discrimination for the foreseeable future.[168]

D. Evaluating Other Options Currently Available to Environmental Justice Plaintiffs Seeking Redress for Disparate Impact Claims under Title VI

Although *Sandoval*[169] eliminated environmental justice plaintiffs' ability to bring private disparate impact lawsuits under Title VI,[170] other methods exist for these individuals to seek relief under this statute besides suing under administrative agencies' interpreting regulations.[171] The principal alternative theories of recovery to consider are "(1) filing suit under 42 U.S.C. § 1983[172] to enforce Title VI's disparate-impact regulations and (2) filing suit in state courts alleging violations of state anti-discrimination laws (which will, of course, differ in each state)."[173] Because *Sandoval*[174] left open the question of whether Title VI's disparate impact regulations may be

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166 *Sandoval*, 532 U.S. at 313 (Stevens, J., dissenting); 42 U.S.C. § 3601.

167 § 3601.

168 *But see* Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 520-21 (2015) (describing the history of the FHA and its later amendments, noting that it was enacted to eradicate discriminatory practices within a sector of the United States' economy).

169 *Sandoval*, 532 U.S. at 278.

170 42 U.S.C. § 2000d.

171 Adele P. Kimmel, Rebecca Epstein & James L. Ferraro, *The* Sandoval *Decision and Its Implications for Future Civil Rights Enforcement*, 76 FLA. BAR J. 24, 27 (2002).

172 § 1983(1).

173 Kimmel, Epstein & Ferraro, *supra* note 171, at 26-27.

174 *Sandoval*, 532 U.S. at 278.

enforced against public recipients of federal funds under 42 U.S.C. § 1983,[175] this provision appears to present environmental justice plaintiffs with a way to seek relief.[176]

To allege a successful lawsuit under § 1983, a plaintiff must claim that the action occurred "under color of state law" and that the action resulted in the deprivation of a constitutional right or a federal statutory right.[177] However, courts have held that § 1983[178] may not be used by plaintiffs to implement § 602 of Title VI[179] because § 1983 acts only as an enforcement mechanism of codified rights, and the private right to sue under § 602 is not codified in Title VI.[180] Moreover, "an administrative regulation cannot create an interest enforceable under section 1983 unless the interest already was implicit in the statute authorizing the regulation."[181] Thus, because the private right of action is not explicit in § 602 of Title VI,[182] plaintiffs cannot rely on § 1983 to enforce this provision of Title VI or its implementing regulations.[183] Therefore § 1983 does not provide environmental justice plaintiffs with the ability to bring private actions for disparate impact claims under Title VI.[184]

Private parties also have the option to file suit in state courts, alleging violations of state public accommodations or other anti-discrimination laws.[185] However, some state laws offer more civil rights protection than others, so this option's viability would depend on the jurisdiction.[186] Some state court judges also may be reluctant to issue a ruling against state officials subject to political pressure and the particular jurisdiction.[187] On the other hand, a growing number of states are adopting laws that promote

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[175] § 1983(1).

[176] Kimmel, Epstein & Ferraro, *supra* note 171, at 24-25.

[177] § 1983(1).

[178] *Id*.

[179] § 2000d.

[180] *See, e.g*., Franks v. Ross, 293 F. Supp. 2d 599 (E.D.N.C. 2003) (holding that Black homeowners could not use § 1983 to enforce § 602 of Title VI by alleging that state officials, acting under color of state law and in their official capacities, violated § 602 in choosing to issue and reissue a permit for a landfill in their predominately Black community without regard to any alternative sites because § 602 did not create a private cause of action).

[181] S. Camden Citizens in Action v. N.J. Dep't of Env't Prot., 274 F.3d 771, 774 (3d Cir. 2001).

[182] § 2000d.

[183] § 1983(1); *S. Camden Citizens in Action*, 274 F.3d at 774 ("inasmuch as Title VI proscribes only intentional discrimination, the plaintiffs do not have a right enforceable through a [section] 1983 action under the EPA's disparate impact discrimination regulations.").

[184] § 1983(1); *S. Camden Citizens in Action*, 274 F.3d at 774 ("inasmuch as Title VI proscribes only intentional discrimination, the plaintiffs do not have a right enforceable through a [section] 1983 action under the EPA's disparate impact discrimination regulations.").

[185] Kimmel, Epstein & Ferraro, *supra* note 171, at 26-27.

[186] *Id*. at 27.

[187] *Id*. at 28.

environmental justice and allow plaintiffs to seek recovery based on claims of discriminatory disparate impact.[188] At least ten states have codified environmental justice in some form, and at least thirteen additional states have pending legislation on the issue.[189] Thus, suing under state environmental justice laws presents an increasingly promising alternative for plaintiffs living in certain states to seek relief from harms suffered due to environmental injustice.[190] However, because many states have yet to pass environmental justice legislation, codifying the private right to sue for disparate impact claims under Title VI,[191] as proposed laws such as the Environmental Justice Act of 2021[192] suggest, remains the most idealistic way for the majority of individuals in the United States to achieve redress, although it is faced with many practical implementation hurdles.[193]

III. PROPOSAL

A. Emerging Green Amendments to State Constitutions Represent the Leading Avenue for Environmental Justice Plaintiffs to Achieve Meaningful Relief Amidst Federal Shortcomings

While codifying a federal environmental justice law would be the most comprehensive approach for individuals from minority communities and communities of color to seek redress, the federal government's inclination to pursue this path remains unlikely.[194] Given the federal law challenges associated with both (1) the existing process for pursuing disparate impact claims under Title VI and (2) Congress' endeavors to enact federal environmental justice legislation, activists should redirect their efforts towards urging state and local governments to codify environmental justice reforms.[195] One promising trend that environmental justice activists should specifically focus on involves promoting the incorporation of Green

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[188] Dylan Bruce, *ANALYSIS: State Laws are Codifying Environmental Justice*, BLOOMBERG L. (Mar. 9, 2021, 4:18 AM), https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-state-laws-are-codifying-environmental-justice; Kimmel, Epstein & Ferraro, *supra* note 171, at 28.

[189] Bruce, *supra* note 188.

[190] *Id.*; Kimmel, Epstein & Ferraro, *supra* note 171, at 28.

[191] 42 U.S.C. § 2000d.

[192] Environmental Justice Act of 2021, *supra* note 58.

[193] *See supra* Part II(B).

[194] *See supra* Part II(B).

[195] Bruce, *supra* note 188; *see* Paparo, *supra* note 89, at 237 ("In the absence of explicit federal statutory protections against environmental justice and racism, state law is more important than ever in protecting vulnerable communities.").

Amendments into the bill of rights of state constitutions.[196] These amendments guarantee citizens the inalienable right to clean air, clean water, and a healthy environment.[197] Individuals can therefore use Green Amendments to challenge an allegedly harmful action, even where they previously did not have a legal basis to do so or where the action was previously permitted by local or state agencies.[198]

In 2021, New York approved the addition of a Green Amendment into its state constitution, securing each resident's "right to clean air and water, and a healthful environment."[199] The State Assembly sponsor of New York's Green Amendment accredited the amendment's passage to an unfortunate "increased frequency of environmental crises," noting that "the highest incidences of asthma that are known [occur] in some of [New York's] inner cities and environmental justice communities where people are dying too young of diseases that they get simply by breathing the air or drinking the water."[200] For communities that are disproportionately affected by pollution and environmental hazards, the passage of New York's Green Amendment is particularly valuable, as they now have legal standing to insist that their state government be proactive in preventing any action that infringes upon their specified rights to "clean water, clean air, and a healthful environment."[201]

New York's Green Amendment clearly creates new avenues for environmental litigation, but its vague language has caused uncertainty about whether it creates a private cause of action.[202] Whereas it seems from the amendment's plain language that it provides citizens the ability to sue any individual or entity that does not comply with state environmental standards,

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[196] *States Look to Carry Green Amendment Momentum into 2022*, NAT'L CAUCUS ENV'T LEGISLATORS (Feb. 9, 2022), https://www.ncelenviro.org/articles/states-look-to-carry-green-amendment-momentum-into-2022.

[197] *Id*.

[198] Michael Murphy, Katelyn Ciolino, Jackson Garrity & Katrina Krebs, *Decisions Expansively Interpreting New York's Green Amendment Create Uncertainty*, BEVERIDGE & DIAMOND (Jan. 4, 2023), https://www.bdlaw.com/publications/decisions-expansively-interpreting-new-yorks-green-amendment-create-uncertainty.

[199] N.Y. CONST. art. I, § 19; *New York's "Green Amendment" Being Put to the Test*, HARTER SEACREST & EMERY LLP (Feb. 24, 2022), https://hselaw.com/news-and-information/legalcurrents/new-york-s-green-amendment-being-put-to-the-test.

[200] *States Look to Carry Green Amendment Momentum into 2022*, *supra* note 196. Notably, during the period of time in which New York was affected by smoke from Canadian wildfires in June 2023, the rate of asthma-related emergency room visits in the New York City zip codes was disproportionately high in low-income, predominately Black and Hispanic communities. Arya Sundaram, *Asthma ER Visits During NYC Smoke Haze Were Highest in High-Poverty, Black and Latino Areas*, GOTHAMIST (June 12, 2023), https://gothamist.com/news/asthma-er-visits-during-nyc-smoke-haze-were-highest-in-high-poverty-black-and-latino-areas.

[201] N.Y. CONST. art. I, § 19; *New York's "Green Amendment" Being Put to the Test*, *supra* note 199.

[202] N.Y. CONST. art. I, § 19; *New York's "Green Amendment" Being Put to the Test*, *supra* note 199.

a key sponsor in the New York State Legislature indicated, during floor debates, that the amendment does not create anything new in terms of rights of action.[203]

This issue is expected to be further litigated over the next several years, but at least two New York courts have already allowed private suits to proceed under the Green Amendment.[204] First, in *Fresh Air for the Eastside, Inc. v. New York*, the Supreme Court of Monroe County denied a motion to dismiss plaintiffs' Green Amendment claims, reasoning that private citizens could bring lawsuits under this amendment based on alleged rights violations, and the court could compel the State to address the alleged impacts.[205] A second case, *Fresh Air for the Eastside, Inc. v. Town of Perinton*, reaffirmed this determination by again allowing private citizens to sue their local municipality for harm suffered as a result of exposure to environmental waste.[206] Hence, thus far, New York's Green Amendment presents a promising way for plaintiffs to bring private suits for relief on disparate impact claims of environmental harm.[207] Furthermore, these cases confirm that New York's Green Amendment is self-executing, meaning plaintiffs can challenge an action without any additional grant of authority from a legislature or regulatory entity.[208]

Before New York's passage of this amendment, only two other states—Pennsylvania and Montana—had Green Amendments included in their states' bill of rights.[209] However, upon New York's passage, a trend of increased awareness and appreciation of state level Green Amendments began among legislators and activists.[210] In 2022, at least nine states began or continued to take legislative action to advance a Green Amendment.[211] Thus, the passage of legislation similar to New York's Green Amendment in an increasing number of states seems likely, given the recent trend.[212]

Continuing this momentum and promoting the inclusion of a Green Amendment in as many states as possible across the United States would serve as an invaluable tool for communities facing disproportionate

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[203] *New York's "Green Amendment" Being Put to the Test*, *supra* note 199.

[204] Fresh Air for the Eastside, Inc. v. State, 2022 NY Slip Op 34429(U) (Sup. Ct.); Decision and Order, Fresh Air for the Eastside, Inc. v. Town of Perinton, et al, No. E2021008617 (filed Dec. 20, 2022).

[205] Fresh Air for the Eastside, Inc., 2022 NY Slip Op 34429(U).

[206] *Fresh Air for the Eastside, Inc.*, No. E2021008617.

[207] N.Y. CONST. art. I, § 19; *New York's "Green Amendment" Being Put to the Test*, *supra* note 199.

[208] Murphy, Ciolino, Garrity & Krebs, *supra* note 198.

[209] *States Look to Carry Green Amendment Momentum into 2022*, *supra* note 196.

[210] *Id.*

[211] *Id.*

[212] *Id.*

environmental burdens.[213] Because these amendments establish a constitutional mandate recognizing a healthy environment as an inherent legal right of all citizens, they serve to insulate individuals from the influence of political changes within the state government.[214] Moreover, including Green Amendments in states' constitutions draws attention to the immense health and environmental burdens that many minority communities and communities of color face.[215] These amendments "provide a way to embed in a state [c]onstitution principles that ensure environmental justice is a substantive obligation of government, not merely an aspirational goal, an obligation focused primarily on process, or an inequity only corrected through policy initiatives."[216] Considering Congress' failure to advance federal legislation that would promote environmental justice goals and the flaws of the current federal procedure for suing for disparate impact claims, promoting the inclusion of Green Amendments in states' laws presents the most effective and realistic way for environmental justice plaintiffs to achieve relief on their disparate impact claims of harm.[217]

CONCLUSION

The damages that minority communities, such as Newark, suffer as a result of environmental injustice remain a serious cause for concern in the United States. Hence, people living in these communities inevitably require an effective way to achieve redress for harm suffered. Whereas these individuals may, in theory, seek relief on disparate impact claims of environmental harm under Title VI[218] by suing through administrative agencies, they are unable to sue privately for these kinds of claims under *Sandoval*.[219]

Sandoval limited individuals' ability to sue under Title VI based on an activity's alleged discriminatory effect, as opposed to its discriminatory intent.[220] Because it is typically very difficult for individuals harmed by

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[213] *Green Amendment*, NAT'L CAUCUS ENV'T LEGISLATORS, https://www.ncelenviro.org/issue/green-amendment (last visited Jan. 23, 2023).

[214] *Id*. ("Green Amendments provide a backstop that can be used by community, public, government, and even business interests to provide a check on government authority that overreaches and fails to protect environmental rights.").

[215] *Id*. ("Green Amendments support avoidance of unfair targeting of communities of color, Indigenous communities, and low-income communities – groups often disproportionately affected by poor air and water standards.").

[216] *Environmental Justice Fact Sheet*, FOR THE GENERATIONS, https://forthegenerations.org/wp-content/uploads/2020/04/FTG_EnvironmentalJusticeFactSheet-2020-04.pdf (last visited Dec. 27, 2023).

[217] *States Look to Carry Green Amendment Momentum into 2022*, *supra* note 196.

[218] 42 U.S.C. § 2000d. Title VI prohibits discrimination on the basis of race, color, or national origin in any program or activity that receives federal funds or other federal financial assistance. *Id*.

[219] Alexander v. Sandoval, 532 U.S. 275, 278 (2001).

[220] *Id*. at 278.

environmental injustice to prove intentional discrimination, the *Sandoval* decision significantly hindered the chances for environmental justice plaintiffs to bring claims under Title VI.[221] Notably, however, the *Sandoval* Court recognized that plaintiffs may sue for disparate impact discrimination under agency regulations implementing Title VI, thereby allowing agencies to bring these kinds of claims on behalf of environmental justice plaintiffs.[222] Although suing under agency regulations implementing Title VI appears to create an effective way for environmental justice plaintiffs to sue for disparate impact discrimination claims, agencies often fail to effectuate the needs of these plaintiffs due to backlogs in requests, resulting in the adjudication of only a small proportion of claims filed.[223] Furthermore, agencies' priorities and limitations may shift depending on the view of the presiding Supreme Court and the current presidential administration.[224] Consequently, the current federal system leaves many individuals who have colorable claims of disparate-impact-related to harms suffered from environmental hazards with a significantly reduced ability to effectively seek redress.

Because the *Sandoval* decision[225] involved statutory interpretation rather than constitutional interpretation, Congress has the option to overrule this case by passing a law codifying the private right to sue for all disparate impact claims under Title VI.[226] For instance, passing the Environmental Justice Act of 2021[227] or a similar regulation would afford plaintiffs the private right to sue for disparate impact claims under Title VI, a far-ranging federal solution for individuals harmed by actions that have a discriminatory effect on their communities and, often, their health. Congress also has the option to pass a more tailored law—modeled after the FHA[228]—that affords plaintiffs the private right to sue for disparate impact claims based on environmental injustice, carving out an "exception" to § 602 of Title VI[229] without explicitly overruling the broader holding of *Sandoval*.[230]

However, Congress has been reluctant to pass laws codifying environmental justice reforms, and many proposed bills—including the

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221 *Id*.

222 *Id*.

223 *See supra* Part II(A)

224 *See, e.g*., West Virginia v. EPA, 142 S. Ct. 2587, 2616 (2022) (limiting the extent of the EPA's power by invoking the "major questions doctrine").

225 *Sandoval*, 532 U.S. at 278.

226 Kimmel, Epstein & Ferraro, *supra* note 171, at 24-25.

227 Environmental Justice Act of 2021, *supra* note 58.

228 42 U.S.C. § 3601.

229 § 2000d.

230 *Sandoval*, 532 U.S. at 278.

Environmental Justice Act of 2021[231]—face stagnation.[232] Thus, while federal legislation remains pending, codifying environmental justice reforms in state law represents the most realistic way to help mitigate the damages that environmental injustice has caused—and continues to cause—in minority communities and communities of color. Notably, New York's recent passage of its Green Amendment to its state constitution—which entitles all of its residents to clean air, clean water, and a healthful environment—and, thereafter, court interpretations of this amendment present environmental justice plaintiffs with a hopeful method of obtaining relief, specifically allowing plaintiffs to sue alleged wrongdoers for disparate impact claims of harm without petitioning an agency to represent them.

Moreover, New York's recent passage of this amendment has ignited a movement among other states to focus on codifying environmental justice reforms.[233] Thus, environmental justice activists should turn their attention to petitioning state legislatures as they endeavor to bring about these changes. Providing plaintiffs with the explicit ability to sue under state law for harms resulting from environmental injustice will empower individuals in communities that have been repeatedly targeted as sites of environmental hazards, representing one realistic, workable resolution to a greater societal dilemma.

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231 Environmental Justice Act of 2021, *supra* note 58.

232 *See supra* Introduction.

233 *See supra* Part III(A).