

Defending Race-Conscious Policy: New York State's Criteria for Identifying Disadvantaged Communities

Jack Jones¹

Beginning in the 1980s, a coalition of community groups, activists, and non-profits loosely referred to as the “environmental justice movement” campaigned to draw awareness to the disproportionate distribution of environmental burdens to low-income communities of color. These burdens cause severely negative health impacts, reduce property values (which in turn reduce generational wealth), and impact quality of life. Low-income communities of color also receive fewer environmental benefits, including parks and green space (which reduces heat in urban areas) and access to healthy food. Climate change further threatens vulnerable communities by causing increased heat in already-overheated neighborhoods, more frequent and severe storms, and rising sea levels in coastal areas.

In 2019, New York State enacted the Climate Leadership and Community Protection Act (CLCPA), an ambitious piece of legislation that creates a framework to reduce statewide greenhouse gas emissions and to invest in “disadvantaged communities” (DACs). The latter goal reflects the environmental justice movement’s success. The current set of criteria developed under the CLCPA to identify U.S. census tracts within New York as DACs considers, among a large set of factors, the racial and ethnic demographics of the tracts. While this approach reflects the environmental justice movement’s values, it also makes the CLCPA vulnerable to a potential constitutional challenge. Drawing on decades of precedent from the U.S. Supreme Court in cases regarding affirmative action programs, a plaintiff might bring a case arguing that the New York State government is distributing benefits based on

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individuals' race or ethnicity, in violation of the Equal Protection Clause.

This Note examines the degree to which the CLCPA's current DAC criteria are vulnerable to such a challenge, and sets forth how the state might argue that the DAC criteria do not violate the Equal Protection Clause. Specifically, this Note argues that the state could mount a strong argument at the outset that such a plaintiff cannot satisfy the requirements for standing. In the alternative, the state could argue that the criteria should not draw strict scrutiny because race and ethnicity are relatively insignificant factors in a complex and context-sensitive process. If the criteria do draw strict scrutiny, the government could argue that it has a compelling interest in remedying the effects of its past acts of racial discrimination, and that the criteria are narrowly tailored to this interest. And finally, the government could argue that even if the criteria are unconstitutional for considering race, the issue is severable, and the criteria can be easily amended to remove race and ethnicity.

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I. INTRODUCTION

New York's Climate Leadership and Community Protection Act (CLCPA), enacted in 2019, is an ambitious effort to reduce statewide greenhouse gas (GHG) emissions and to invest in climate resiliency measures. It also promises to address the heightened vulnerability that climate change causes and will cause for "disadvantaged communities" (DACs)—communities that suffer from a lack of economic opportunities and from environmental burdens—by prioritizing investments in these communities.² The CLCPA requires state agencies to consider impacts on DACs when making decisions, and proposes targets for investments in DACs in a range of areas that the state has historically underfunded in such communities.³

This approach reflects the goals of what is often called the "environmental justice" movement, which aims to rectify the disproportionate burden of environmental harms that falls on low-income communities of color.⁴ The environmental justice movement emerged in the 1980s as a response to "environmental racism," or the disproportionate siting of environmental pollution burdens in and near communities of color.⁵ The CLCPA's legislative findings align with the environmental justice movement's analysis, insofar as they acknowledge that disadvantaged communities "bear environmental and socioeconomic burdens as well as legacies of racial and ethnic discrimination."⁶

Although the CLCPA introduces the term "disadvantaged communities," it does not offer a definition that identifies specific communities. Instead, it created the Climate Justice Working Group (CJWG), composed of state officials and representatives from environmental justice communities, and tasked the CJWG with developing criteria to identify DACs.⁷ Following the CLCPA's directive to identify DACs based partly on whether communities contain "members of groups

2. See 2019 N.Y. Laws 106 § 1(7).

3. See *id.*; see N.Y. ENV'T CONSERV. LAW § 75-0117 (McKinney 2024).

4. See generally NATIONAL PEOPLE OF COLOR ENVIRONMENTAL LEADERSHIP SUMMIT, PRINCIPLES OF ENVIRONMENTAL JUSTICE (adopted Oct. 1991), <https://www.ejnet.org/ej/principles.html> [<https://perma.cc/NYV8-S39N>]; see also Renee Skelton & Vernice Miller, *The Environmental Justice Movement*, NAT. RES. DEF. COUNCIL (Aug. 22, 2023), <https://www.nrdc.org/stories/environmental-justice-movement> [<https://perma.cc/DC6K-P9J3>].

5. See JULIE SZE, NOXIOUS NEW YORK: THE RACIAL POLITICS OF URBAN HEALTH AND ENVIRONMENTAL JUSTICE 13 (2006).

6. 2019 N.Y. Laws 106 § 1(7).

7. See N.Y. ENV'T CONSERV. LAW § 75-0111 (McKinney 2024).

that have historically experienced discrimination on the basis of race or ethnicity,”⁸ the CJWG developed criteria that include racial and ethnic demographic data.⁹

While this decision reflects the CLCPA’s mission to address environmental injustices that most significantly impact low-income people of color, it also creates potential constitutional issues. The Equal Protection Clause of the Fourteenth Amendment to the U.S Constitution requires that no State “deny to any person within its jurisdiction the equal protection of the laws.”¹⁰ While the amendment was initially passed to protect recently-emancipated Black Americans after the abolishment of American slavery, equal protection arguments have increasingly been used in recent decades as a basis to challenge race-conscious government programs that attempt to address racial inequality by prioritizing non-White groups for benefits or opportunities,¹¹ commonly known as “affirmative action” programs.¹² The CJWG’s criteria may face a challenge along these lines, arguing that the New York State government is discriminating on the basis of race in violation of the Equal Protection Clause.

Part II of this Note discusses the details of the CLCPA’s commitments to DACs and the CJWG’s methodology for determining which communities will be designated “disadvantaged,” and briefly mentions two laws passed after the CLCPA that rely on the DAC designations for their implementation. It then compares the CJWG’s DAC methodology to a similar effort by the Biden administration. Part III outlines the relevant jurisprudence regarding race-based classifications under the equal protection doctrine. Finally, Part IV describes how a hypothetical challenge to the CJWG’s use of racial and ethnic demographic data in the DAC criteria might be articulated, and discusses how the New York State government can best counter such a challenge.

8. *Id.* § 75-0111(1)(c).

9. See Climate Just. Working Grp., *Disadvantaged Communities Criteria Fact Sheet*, N.Y. STATE, <https://climate.ny.gov/Resources/Disadvantaged-Communities-Criteria> [on file with the Journal] (last visited May 5, 2024).

10. U.S. CONST. amend. XIV, § 1.

11. See discussion *infra* Part III(A).

12. See *Affirmative Action*, ENCYC. BRITANNICA (last updated Jan. 25, 2024), <https://www.britannica.com/topic/affirmative-action> [https://perma.cc/A34L-YEGS].

II. THE CLCPA'S CRITERIA FOR DESIGNATING DISADVANTAGED COMMUNITIES

This section first presents the history and relevant text of the CLCPA. It then explores the CJWG's methodology for designating census tracts as "disadvantaged communities," and discusses two laws, the Environmental Bond Act and the Cumulative Impacts Law, which use the CJWG's DAC list for their implementation. Next, it discusses a similar effort by the federal government, consisting of the Justice40 initiative and the Climate and Economic Justice Screening Tool, and compares the federal government's approach and methodology with New York State's.

A. Relevant Text of the CLCPA

The CLCPA was signed into law on July 18, 2019, and amended portions of New York State's Environmental Conservation Law, Public Service Law, Public Authorities Law, Labor Law, and Community Risk and Resiliency Act.¹³ The CLCPA adopts targets for the economy-wide reduction of New York State's GHG emissions compared to 1990 levels, with the goal of at least a 40% reduction of 1990 levels by 2030 and a goal of a 100% reduction by 2050.¹⁴ To progress towards these goals, the CLCPA requires the New York State Department of Environmental Conservation (DEC) to establish a statewide GHG emissions limit as a percentage of 1990 emissions with an interim limit of 60% of 1990 emissions in 2030 and a limit of 15% of 1990 emissions in 2050.¹⁵ DEC subsequently adopted these targets in a rulemaking proceeding.¹⁶ In order to facilitate action towards the GHG limits, the CLCPA created the Climate Action Council to prepare and approve a scoping plan for reaching the targets.¹⁷ A draft

13. 2019 N.Y. Laws 106.

14. 2019 N.Y. Laws 106 § 1(4).

15. N.Y. ENV'T CONSERV. LAW § 75-0107(1) (McKinney 2024). The discrepancy between the statutory goal of a 100% reduction in GHGs by 2050 and the direction to the DEC to set the 2050 limit at 15% is due to the DEC's ability to "establish an alternative compliance mechanism to be used by sources subject to greenhouse gas emissions limits to achieve net zero emissions," which is limited at 15% of statewide GHGs. Any such offsets may not result in DACs "having to bear a disproportionate burden of environmental impacts." N.Y. ENV'T CONSERV. LAW § 75-0109(4) (McKinney 2024).

16. N.Y. COMP. CODES R. & REGS. tit. 6 §§ 4961-496.5 (2020).

17. N.Y. ENV'T CONSERV. LAW § 75-0103(11) (McKinney 2024).

scoping plan was released for public comment in 2022,¹⁸ and the Climate Action Council approved and adopted the final scoping plan in December 2022.¹⁹

The CLCPA's legislative findings and declaration state that [c]limate change especially heightens the vulnerability of disadvantaged communities, which bear environmental and socioeconomic burdens as well as legacies of racial and ethnic discrimination. Actions undertaken by New York state to mitigate greenhouse gas emissions should prioritize the safety and health of disadvantaged communities, control potential regressive impacts of future climate change mitigation and adaptation policies on these communities, and prioritize the allocation of public investments in these areas.²⁰

Accordingly, the CLCPA makes a number of commitments to “disadvantaged communities,” including directing DEC to “[p]rioritize measures to maximize net reductions of greenhouse gas emissions and co-pollutants in disadvantaged communities . . . and encourage early action to reduce greenhouse gas emissions and co-pollutants.”²¹ It directs DEC to develop a “community air monitoring program,” to “identify the highest priority locations in disadvantaged communities” and to implement a monitoring system to record air pollutant concentrations in at least four communities statewide.²² It also directs the New York Public Service Commission (PSC) “to ensure that, where practicable, at least twenty percent of investments in residential energy efficiency, including multi-family housing, can be invested in a manner which will benefit disadvantaged communities . . . including low to moderate income consumers.”²³ Further, the PSC shall, “[t]o the extent practicable, specify that a minimum percentage of energy storage projects should deliver clean energy benefits into NYISO zones that serve disadvantaged communities . . . and that energy storage projects be deployed to reduce the usage of combustion-powered peaking facilities located in or near disadvan-

18. CLIMATE ACTION COUNCIL, DRAFT SCOPING PLAN (Dec. 30, 2021), <https://climate.ny.gov/Resources/Draft-Scoping-Plan> [on file with the Journal].

19. *New York State Climate Action Council Finalizes Scoping Plan to Advance Nation-leading Climate Law*, N.Y. STATE ENERGY RSCH. & DEV. AUTH. (Dec. 19, 2022), <https://www.nyserda.ny.gov/About/Newsroom/2022-Announcements/2022-12-19-NYS-Climate-Action-Council-Finalizes-Scoping-Plan-to-Advance-Nation-Leading-Climate-Law> [<https://perma.cc/9PJ6-Q5RW>].

20. 2019 N.Y. Laws 106 § 1(7).

21. N.Y. ENV'T CONSERV. LAW § 75-0109(3)(d) (McKinney 2024).

22. *Id.* § 75-0115.

23. N.Y. PUB. SERV. LAW § 66-p(6) (McKinney 2024).

tagged communities.”²⁴ The New York State Energy Research and Development Authority (NYSERDA) is directed to “consider enhanced incentive payments for solar and community distributed generation projects,” particularly for those serving DACs.²⁵

Perhaps the two most important commitments that the CLCPA makes to DACs are with respect to the investment of funds and to actions and decisions by state agencies. First, the CLCPA directs that

State agencies, authorities and entities . . . shall, to the extent practicable, invest or direct available and relevant programmatic resources in a manner designed to achieve a goal for disadvantaged communities to receive forty percent of overall benefits of spending on clean energy and energy efficiency programs, projects or investments in the areas of housing, workforce development, pollution reduction, low income energy assistance, energy transportation and economic development, provided however, that disadvantaged communities shall receive no less than thirty-five percent of the overall benefits of spending on clean energy and energy efficiency programs, projects or investments and provided further that this section shall not alter funds already contracted or committed as of the effective date of this section.²⁶

In other words, all state governmental entities shall, “to the extent practicable,” ensure that DACs receive a minimum of 35%, with a goal of 40%, of the benefits of investments in the areas of clean energy, energy efficiency, and the “projects or investments” areas listed.²⁷

Second, the CLCPA mandates that, “[i]n considering and issuing permits, licenses, and other administrative approvals and decisions, including but not limited to the execution of grants, loans, and con-

24. *Id.* § 66-p(7)(a). The New York Independent System Operator, or NYISO, manages New York’s power grid and wholesale energy markets. *See* NEW YORK ISO, <https://www.nyiso.com> [<https://perma.cc/23GA-ZQXV>] (last visited Mar. 28, 2024).

25. N.Y. PUB. SERV. LAW § 66-p(7)(b) (McKinney 2024).

26. N.Y. ENV’T CONSERV. LAW § 75-0117 (McKinney 2024) (emphasis added).

27. *See id.* California pursued a similar approach with respect to its Cap-and-Trade Program, which mandates that 25% of proceeds from the program be invested in DACs. *See California Climate Investments to Benefit Disadvantaged Communities*, CAL. ENV’T. PROT. AGENCY, <https://calepa.ca.gov/envjustice/ghginvest> [on file with the Journal] (last visited May 5, 2024). The California EPA is responsible for identifying DACs based on “geographic, socioeconomic, public health, and environmental hazard criteria,” but race is not one of the considerations. CAL. HEALTH & SAFETY CODE § 39711(a) (West 2024) (effective June 20, 2014). Per a 1996 ballot initiative, the Constitution of California prohibits the State from granting “preferential treatment to any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.” CAL. CONST. art. I, § 31(a). While this ban might not be read to reach mandated investments for DACs if they do not fall into one of the three enumerated areas, this constitutional amendment’s general hostility to the consideration of race by the government in policy decisions is a likely explanation for why the California legislature did not direct the state EPA to consider race in designating DACs.

tracts . . . all state agencies, offices, authorities, and divisions shall not disproportionately burden disadvantaged communities”²⁸ This amounts to a directive to all state governmental entities to evaluate the impacts of any actions on DACs and to take steps to ensure that such communities are not “disproportionately” burdened.

B. The CJWG’s DAC Criteria

While the CLCPA repeatedly uses the term “disadvantaged communities” in reference to the communities that will receive prioritized investments, the CLCPA’s definition of term does not specify which New York communities will be considered “disadvantaged.” Instead, the CLCPA defines DACs as “communities that bear burdens of negative public health effects, environmental pollution, impacts of climate change, and possess certain socioeconomic criteria, or comprise high-concentrations of low- and moderate- income households, as identified pursuant to section 75-0111 of this article.”²⁹ Section 75-0111 establishes within DEC a Climate Justice Working Group with representatives from environmental justice communities, DEC, the state Department of Health, NYSERDA, and the state Department of Labor.³⁰ The CJWG is tasked with “establish[ing] criteria to identify disadvantaged communities for the purposes of co-pollutant reductions, greenhouse gas emissions reductions, regulatory impact statements, and the allocation of investments related to this article.”³¹ Specifically,

28. 2019 N.Y. Laws 106 § 7(3). DEC made a program policy available for public comment in September 2023 which provides guidance to DEC staff for reviewing permit applications under Section 7(3) of the CLCPA. N.Y.S. DEP’T OF ENV. CONSERVATION, DRAFT DEC PROGRAM POLICY ON PERMITTING AND DISADVANTAGED COMMUNITIES UNDER THE CLIMATE LEADERSHIP AND COMMUNITY PROTECTION ACT (Sept. 27, 2023), https://extapps.dec.ny.gov/docs/permits_ej_operations_pdf/draftdep23dash1policy.pdf [<https://perma.cc/D6FT-EXSS>]. The draft policy would require a “disproportionate burden report” to be prepared for any projects seeking a DEC permit that appear likely to affect a DAC. *Id.*

29. N.Y. ENV’T CONSERV. LAW § 75-0101(5) (McKinney 2024).

30. *Id.* § 75-0111(1).

31. *Id.* § 75-0111(1)(b). Separately from the DAC criteria, the CLCPA also required DEC, NYSERDA, and the New York Power Authority to jointly “prepare a report on barriers to, and opportunities for, access to or community ownership of” distributed renewable energy generation, energy efficiency investments, and other “services and infrastructure” to reduce climate change impacts. 2019 N.Y. Laws 106 § 6. The agencies released this report in December 2021. N.Y.S. ENERGY RSCH. & DEV. AUTH., N.Y.S. DEP’T OF ENV’T CONSERVATION, & N.Y. POWER AUTH., NEW YORK STATE DISADVANTAGED COMMUNITIES BARRIERS AND OPPORTUNITIES REPORT (Dec. 2021), <https://climate.ny.gov/-/media/Project/Climate/Files/21-35-NY-Disadvantaged-Communities-Barriers-and-Opportunities-Report.pdf> [on file with the Journal].

[d]isadvantaged communities shall be identified based on geographic, public health, environmental hazard, and socioeconomic criteria, which shall include but are not limited to:

- i. areas burdened by cumulative environmental pollution and other hazards that can lead to negative public health effects;
- ii. areas with concentrations of people that are of low income, high unemployment, high rent burden, low levels of home ownership, low levels of educational attainment, *or members of groups that have historically experienced discrimination on the basis of race or ethnicity*; and
- iii. areas vulnerable to the impacts of climate change such as flooding, storm urges, and urban heat island effects.³²

The CLCPA thus directs the CJWG to develop criteria to identify DACs within New York State based on, among other factors, the presence of members of groups that have experienced racial or ethnic discrimination. However, the criteria selected by the CJWG is not permanent: the CJWG is to “meet no less than annually to review the criteria and methods used to identify disadvantaged communities and may modify such methods to incorporate new data and scientific findings . . . [and the CJWG] shall review identities of disadvantaged communities and modify such identities as needed.”³³

On December 13, 2021, the CJWG released its draft criteria, including an interactive map and a list of the designated DACs, for public comment. A 120-day public comment period for New Yorkers began on March 9, 2022 and was extended to August 5, 2022.³⁴ The CJWG’s draft criteria consists of 45 indicators used to identify census tracts as DACs, which are broken into two groups: 1) Environmental Burdens and Climate Change Risk and 2) Population Characteristics and Health Vulnerabilities.³⁵ Each of these two groups contains indicators divided into categories:

32. N.Y. ENV’T CONSERV. LAW § 75-0111(1)(c)(emphasis added).

33. *Id.* § 75-0111(3).

34. See Climate Just. Working Grp., *Disadvantaged Communities Criteria*, N.Y. STATE <https://climate.ny.gov/Resources/Disadvantaged-Communities-Criteria> [<https://perma.cc/HK2Y-7KNW>] (last visited May 5, 2024).

35. CLIMATE JUST. WORKING GRP., DRAFT DISADVANTAGED COMMUNITIES CRITERIA OVERVIEW, <https://climate.ny.gov/-/media/project/climate/files/Summary-Documentation-on-Disadvantaged-Community-Criteria.pdf> [<https://perma.cc/9GKG-XR9N>] (last visited May 5, 2024) [hereinafter DRAFT DAC OVERVIEW].

ENVIRONMENTAL BURDENS AND CLIMATE CHANGE RISK³⁶		
<u>Potential Pollution Exposures</u>	<u>Land Use and Facilities Associated with Historical Discrimination or Disinvestment</u>	<u>Potential Climate Change Risks</u>
Vehicle traffic density; diesel truck and bus traffic	Proximity to remediation sites	Extreme heat projections
Particulate matter (PM2.5)	Proximity to regulated management plan sites	Flooding in coastal and tidally influenced areas (projected)
Benzene concentration	Proximity to major oil storage facilities	Flooding in inland areas (projected)
Wastewater discharge	Proximity to power generation facilities	Low vegetative cover
	Proximity to active landfills	Agricultural land
	Proximity to municipal waste combustors	Driving time to hospitals or urgent/critical care
	Proximity to scrap metal processors	
	Industrial/manufacturing/mining land use	
	Housing vacancy rate	

POPULATION CHARACTERISTICS AND HEALTH VULNERABILITIES³⁷			
<u>Income</u>	<u>Race and Ethnicity</u>	<u>Health Outcomes & Sensitivities</u>	<u>Housing Mobility & Communications</u>
Percent <80% Area Median Income	Percent Latino/a or Hispanic	Asthma emergency department visits	Percent renter-occupied homes
Percent <100% of Federal Poverty Line	Percent Black or African American	COPD emergency department visits	Housing cost burden (rental costs)
Percent without bachelor's degree	Percent Asian	Heart attack (MI) hospitalization	Energy poverty/cost burden
Unemployment rate	Percent Native American or Indigenous	Premature deaths	Manufactured homes
Percent single-parent households	Limited English proficiency	Low birthweight	Homes built before 1960

36. *Id.*37. *Id.*

	Historical redlining score	Percent without health insurance	Percent without internet
		Percent with disabilities	
		Percent adults age 65+	

The two income-related indicators (percent <80% Area Median Income and percent <100% of Federal Poverty Line) as well as the indicators for “percent Latino/a or Hispanic” and “percent Black or African American” are given double the weight of the other indicators.³⁸

The CJWG’s scoring approach combines the percentile ranks of these indicators for each census tract within New York State to measure an individual tract’s level of overall “Environmental Burdens and Climate Change Risks” and “Population Characteristics and Health Vulnerabilities” relative to other tracts. These two scores are then multiplied together to form the “combined score” for each tract.³⁹ Tracts were also given both a “statewide” and “regional” score to “balance rural and urban burdens and vulnerabilities,” which helps to “include more tracts outside of New York City.”⁴⁰ Tracts with “higher scores relative to (a) other tracts in the State; or (b) their region (New York City or Rest of State)” were identified as DACs.⁴¹ The CJWG’s goal was to identify 35% of the state’s census tracts as DACs, so the cutoff for DAC designation is the percentile that achieves this distribution.⁴²

The CJWG’s draft criteria identified 1,721 of New York State’s 4,918 census tracts as DACs, meaning that under the draft criteria

38. CLIMATE JUST. WORKING GRP., CLIMATE JUSTICE WORKING GROUP MEETING PRESENTATION 21 (Mar. 23, 2023), <https://climate.ny.gov/-/media/Project/Climate/Files/CJWGMeeting03272023Presentation.pdf> [on file with the Journal] (last visited May 4, 2024).

39. CLIMATE JUST. WORKING GRP., DRAFT DISADVANTAGED COMMUNITIES CRITERIA AND LIST TECHNICAL DOCUMENTATION 1, 21 (Mar. 9, 2022), <https://climate.ny.gov/-/media/project/climate/files/Technical-Documentation-on-Disadvantaged-Community-Criteria.pdf> [<https://perma.cc/7V5Q-7AFP>] [hereinafter DRAFT DAC TECHNICAL DOCUMENTATION].

40. DRAFT DAC OVERVIEW, *supra* note 35, at 4.

41. *Id.* at 1.

42. See DRAFT DAC TECHNICAL DOCUMENTATION, *supra* note 39, at 22. Additionally, all individual households with a total household income at or below 60 percent of State-Median Income are included in the criteria “solely for the purpose of State agencies and authorities investing or directing a percentage of clean energy and energy efficiency programs, projects, or investments to DACs” DRAFT DAC OVERVIEW, *supra* note 35, at 4. This allows individual households in non-DAC census tracts to be included with respect to these investment areas.

nearly 35 percent of New York State census tracts qualify as DACs. The CJWG's Summary Documentation of the Draft Disadvantaged Communities Criteria states that most tracts were "identified on the basis of 45 indicators . . ." ⁴³ Additionally, "[a]pproximately 35 percent of New York's population and 35 percent of the state's households are included in the draft geographic DAC list." ⁴⁴ The CJWG's Summary Documentation noted that "the communities covered by the draft geographic DAC criteria have far more low-income, Black and African American, and Hispanic/Latino households." ⁴⁵ The CJWG also created an interactive "Disadvantaged Communities Map" of New York State census tracts. ⁴⁶

On March 27, 2023, after considering public comments, the CJWG voted to approve and adopt the criteria. ⁴⁷ Although the CJWG noted that it considered a number of methodological changes based on public comments, it ultimately did not change its system of factor-weighting. ⁴⁸ It did, however, change how the component scores were combined, electing to add, rather than multiply, the two component scores. ⁴⁹ Due to this change in the methodology, a total of 244 tracts' designations were switched, with 114 tracts switching from designation as a DAC to a non-DAC, and 130 tracts switching from designation as a non-DAC to a DAC. ⁵⁰ Some of these switches were noted by news media at the time of the final criteria's approval. ⁵¹ The CJWG also released an updated interactive map, ⁵² as well as a set of maps of counties grouped by region. ⁵³

43. DRAFT DAC OVERVIEW, *supra* note 35, at 4.

44. *Id.*

45. *Id.*

46. Climate Justice Working Group, *supra* note 34.

47. *Id.*

48. CLIMATE JUST. WORKING GRP., *supra* note 38 at 17. See also N.Y. State Energy Rsch. & Dev. Auth., *March 27, 2023 Climate Justice Working Group Meeting*, YOUTUBE, at 16:56 (uploaded Mar. 28, 2023), <https://www.youtube.com/watch?v=0MPANYMdXEY> [<https://perma.cc/VX3P-XHYH>].

49. *Id.*

50. Analysis based on materials made available at Climate Just. Working Grp., *supra* note 34, including the full list of tract designations under the draft and final criteria. These materials are on file with the Journal.

51. Samantha Maldonado, *Final Map of "Climate Disadvantaged" Communities Now Includes Blocks Previously Excluded — But Other Vulnerable Areas Left Out*, CITY (Mar. 29, 2023), <https://www.thecity.nyc/2023/03/29/final-map-climate-disadvantaged-communities> [<https://perma.cc/CSF5-JCF7>].

52. Climate Justice Working Group, *supra* note 34.

53. CLIMATE JUST. WORKING GRP., NEW YORK STATE DISADVANTAGED COMMUNITIES CRITERIA VERSION 1.0 MAPS, <https://climate.ny.gov/-/media/Project/Climate/Files/Disadvantaged->

C. Application of the DAC Criteria to New York's Environmental Bond Act and Cumulative Impacts Law

Two laws passed after the CLCPA incorporate, for purposes of implementation, the DAC designations made by the CJWG under the CLCPA: the Environmental Bond Act of 2022 and the “cumulative impacts” law of 2023.

1. The Environmental Bond Act

In November 2022, voters approved by ballot measure the Clean Water, Clean Air, and Green Jobs Environmental Bond Act (Bond Act).⁵⁴ The Bond Act made available a minimum of \$1.1 billion for “restoration and flood risk reduction,” up to \$650 million for “open space land conservation and recreation,” up to \$1.5 billion for “climate change mitigation,” and a minimum for \$650 million for “water quality improvement and resilient infrastructure”⁵⁵ The Bond Act incorporates that DAC designations made under the CLCPA.⁵⁶ Within the category of climate change mitigation, the Bond Act requires that \$200 million be directed towards reducing or eliminating “water pollution or air pollution affecting disadvantaged communities”⁵⁷ The Bond Act reiterates the CLCPA’s targets for allocating funding to disadvantaged communities, setting a “goal that forty percent of the funds . . . benefit disadvantaged communities,” with a minimum of “no less than thirty-five percent of the benefit of the funds” reaching disadvantaged communities.⁵⁸

2. The Cumulative Impacts Law

In March 2023, New York Governor Kathy Hochul signed a bill into law that some analysts called the nation’s “strongest environmental justice law” to date.⁵⁹ The law’s section describing legislative intent

Communities-Criteria/2023-DAC-Maps-Version-1.pdf [https://perma.cc/J37U-WVNM] (last visited May 5, 2024).

54. Zoe Grueskin, *New York Passes \$4.2bn Environmental Bond Act on Midterm Ballot*, GUARDIAN (Nov. 10, 2022) <https://www.theguardian.com/us-news/2022/nov/10/new-york-passes-environmental-bonds-midterm-elections> [https://perma.cc/9XHT-DUU3].

55. N.Y. ENV'T CONSERV. LAW § 58-0103 (McKinney 2024).

56. *Id.* § 58-0101(4).

57. *Id.* § 58-0701.

58. *Id.*

59. Michael B. Gerrard & Edward McTiernan, *New York Adopts Nation's Strongest Environmental Justice Law*, N.Y.L.J. (May 10, 2023), <https://www.law.com/newyorklawjournal/2023>

states that because of an “inequitable pattern in the siting of environmental facilities, minority and economically distressed communities bear a greater environmental health burden due to the cumulative pollution exposure from multiple facilities.” Accordingly, “the state has a responsibility to establish requirements for the consideration of [decisions regarding the siting of environmental facilities] by state and local governments in order to ensure no community bears a disproportionate pollution burden, and to actively reduce any such burden for all communities.”⁶⁰ To accomplish this goal, the law amends the process for environmental impact review under the State Environmental Quality Review Act, the state law that requires agencies to perform environmental impact reviews for actions that could impact the environment.⁶¹ Effective January 2025⁶², the law directs DEC to require an applicants for new permits or permit renewals or modifications to prepare an “existing burden report” whenever a new project may “cause or contribute more than a de minimis amount of pollution to any disproportionate pollution burden on a disadvantaged community,” unless a report has already been prepared for the permit in the past ten years.⁶³ DEC is barred from issuing the permit if it determines that the project will “cause or contribute more than a de minimis amount of pollution to a disproportionate pollution burden on the disadvantaged community,”⁶⁴ or in the case of permit renewals or modifications, if the project would “significantly increase the existing disproportionate pollution burden on the disadvantaged community.”⁶⁵ The law incorporates

/05/09/new-york-adopts-nations-strongest-environmental-justice-law/ [on file with the Journal]. Governor Hochul initially signed a version of this bill into law in December 2022, but she released an approval memorandum at that time stating that the law may need to be amended and that she had signed the bill based on an agreement with the Legislature to make amendments to minimize its scope, in order to balance the implementation of infrastructure projects with the need to protect DACs from cumulative impact harms. *See id.*; *see also* Stacey Sublett Halliday et al., *New York Enacts Environmental Justice Permitting Law*, BEVERIDGE & DIAMOND (Jan. 10, 2023), <https://www.bdlaw.com/publications/new-york-enacts-environmental-justice-permitting-law/> [<https://perma.cc/M87V-X7Q2>]. Accordingly, an amended version of the bill was passed on February 15, 2023, and signed by Governor Hochul on March 3. *See* S. 1317, 2023–2024 Reg. Sess. (N.Y. 2023). The text of the bill discussed in this section is that of the second, amended version.

60. S. 1317 § 1, 2023–2024 Reg. Sess. (N.Y. 2023).

61. *See* Gerrard & McTiernan, *supra* note 59.

62. *Id.*

63. N.Y. ENV'T CONSERV. LAW § 70-0118(2)(a)–(c)(McKinney 2024).

64. *Id.* § 70-0118(3)(b).

65. *Id.* § 70-0118(3)(c)–(d).

the definition of “disadvantaged communities” under the CLCPA,⁶⁶ so implementation of the law rests on the CJWG’s designation of DACs.

D. The Federal Climate and Economic Justice Screening Tool’s DAC Criteria

On January 27, 2021, President Biden issued Executive Order 14,008, titled “Tackling the Climate Crisis at Home and Abroad.”⁶⁷ In addition to taking steps to develop the U.S.’s international leadership in combating the climate crisis in tandem with President Biden’s decision to rejoin the Paris Agreement, the Order aimed to develop a “government-wide approach to the climate crisis.”⁶⁸ The Order set forth the goals of “reduc[ing] climate pollution in every sector of the economy; increas[ing] resilience to the impacts of climate change; protect[ing] public health; conserv[ing] our lands, waters, and biodiversity; deliver[ing] environmental justice; and spur[ring] well-paying union jobs and economic growth, especially through innovation, commercialization, and deployment of clean energy technologies and infrastructure.”⁶⁹ The Order included a number of provisions to coordinate action between different agencies and support a clean energy transition and announced that the Biden administration’s policy was “to secure environmental justice and spur economic opportunity for disadvantaged communities that have been historically marginalized and overburdened by pollution and underinvestment in housing, transportation, water and wastewater infrastructure, and health care.”⁷⁰

In addition to amending and updating Executive Order 12,898, issued by President Clinton in 1994 to address environmental justice, the order directed the Chair of the Council on Environmental Quality (CEQ) to “create a geospatial Climate and Economic Justice Screening Tool and . . . annually publish interactive maps highlighting disadvantaged communities.”⁷¹ It also established the “Justice40 Initiative,” directing the Chair of the CEQ, the Director of Management and Budget, and the National Climate Advisor, in consultation with the newly-created White House Environmental Justice Advisory Council,

66. N.Y. ENV’T CONSERV. LAW § 70-0118(1)(a) (McKinney 2024).

67. Exec. Order No. 14,008, 86 Fed. Reg. 7619 (Jan. 27, 2021).

68. *Id.* at 7622.

69. *Id.*

70. *Id.* at 7629.

71. *Id.* at 7631; Exec. Order No. 12,898, 59 Fed. Reg. 7629 (Feb. 11, 1994).

to “jointly publish recommendations on how certain Federal investments might be made toward a goal that 40 percent of the overall benefits flow to disadvantaged communities,” focusing on “investments in the areas of clean energy and energy efficiency; clean transit; affordable and sustainable housing; training and workforce development; the remediation and reduction of legacy pollution; and the development of critical clean water infrastructure.”⁷² The Biden Administration expanded this initiative with a second executive order in April 2023, which, among other things, created a new Office of Environmental Justice, created an Environmental Justice Scorecard to track the federal government’s progress in addressing environmental justice, and announced updates on its Justice40 goals.⁷³

The Climate and Economic Justice Screening Tool (CEJST), which builds on EPA’s prior EJScreen tool, is used to identify DACs in order to support implementation of the Justice40 Initiative.⁷⁴ Coming two years after the CLCPA, it builds on the model that the CLCPA and CJWG developed for prioritizing investments in DACs.

Like the DAC criteria and map developed by the CJWG, the CEJST uses census tracts as the units to identify DACs.⁷⁵ Tracts are designated as “disadvantaged” if they either i) “meet the thresholds for at least one of the tool’s categories of burden,” or ii) “are on land within the boundaries of Federally Recognized Tribes.”⁷⁶ Also like the CJWG’s criteria, most of the indicator dataset are percentiles, with tracts’ environmental and socioeconomic burdens measured relative to all other tracts (although in this case compared to all tracts nationwide rather than only those in New York). The indicators are

72. Exec. Order No. 14,008, 86 Fed. Reg. at 7630.

73. Exec. Order No. 14,096, 88 Fed. Reg. 25,251 (Apr. 26, 2023); *see also* Press Release, White House, FACT SHEET: President Biden Signs Executive Order to Revitalize Our Nation’s Commitment to Environmental Justice for All (Apr. 21, 2023), <https://www.whitehouse.gov/briefing-room/statements-releases/2023/04/21/fact-sheet-president-biden-signs-executive-order-to-revitalize-our-nations-commitment-to-environmental-justice-for-all> [<https://perma.cc/D5KT-JBK7>].

74. Press Release, White House, FACT SHEET: President Biden Takes Executive Actions to Tackle the Climate Crisis at Home and Abroad, Create Jobs, and Restore Scientific Integrity Across Federal Government (Sept. 30, 2022), <https://www.whitehouse.gov/ceq/news-updates/2022/09/30/ceq-extends-public-process-to-inform-development-of-the-first-version-of-the-environmental-justice-scorecard> [<https://perma.cc/VW7J-M8P6>].

75. Council on Env’t Quality, *1.0 List of Disadvantaged Communities*, CLIMATE & ECON. JUST. SCREENING TOOL (last updated Nov. 22, 2022), <https://static-data-screeningtool.geoplatform.gov/data-versions/1.0/data/score/downloadable/1.0-communities-list.pdf> [<https://perma.cc/DYY9-WG66>].

76. *Id.*

grouped into the categories of climate change, energy, health, housing, legacy pollution, transportation, waste and wastewater, and workforce development. The CEJST prioritizes low-income communities by setting a threshold requirement: besides workforce development, which is measured differently, the threshold value for an indicator in any of these categories is the 90th percentile only if the tract is also at or above the 65th percentile for low income. For instance, a tract that has a measurement above the 90th percentile for expected agriculture loss rate (grouped under “climate change”) will be designated a DAC only if it is also at or above the 65th percentile for low income.⁷⁷

The types of indicators that the CEJST uses overlap significantly with the CJWG’s criteria,⁷⁸ but the CEJST does not use racial or ethnic demographic data to designate DACs.⁷⁹ On the CEJST’s Frequently Asked Questions page, the CEQ answers the question “Is race included in the tool’s methodology?” by stating that the CEJST “does not use racial demographics in its methodology,” and that the tool “displays data about race and age only to provide information when a census tract is selected.”⁸⁰ Nonetheless, the CEQ notes that

[i]t is well-documented that communities of color suffer disproportionately from environmental and health burdens. Due to decades of underinvestment, such communities also face greater risks from climate change. Although the CEJST does not use race in its methodology, the tool creates a map that seeks to reflect the on-the-ground burdens and realities that disadvantaged communities face. The tool shows communities that have environmental burdens and face injustice.⁸¹

This explanation is echoed with slightly different phrasing in a more formal FAQ document issued by the White House.⁸²

Although the CEJST does not formally consider race, two indicators present in the CEJST’s criteria are analogous to indicators that the

77. *Id.*

78. See Appendix I for a comparison of the sets of indicators in the CEQ’s and CJWG’s criteria.

79. Council on Env’t Quality, *Communities list data*, CLIMATE & ECON. JUST. SCREENING TOOL, <https://screeningtool.geoplatform.gov/en/downloads#7.74/43.176/-78.512> [on file with Journal] (last visited May 5, 2024).

80. Council on Env’t Quality, *Frequently Asked Questions*, CLIMATE & ECON. JUST. SCREENING TOOL, <https://screeningtool.geoplatform.gov/en/frequently-asked-questions> [<https://perma.cc/L7WX-V7MQ>] (last visited May 5, 2024).

81. *Id.*

82. *Climate and Economic Justice Screening Tool: Frequently Asked Questions*, WHITE HOUSE, <https://www.whitehouse.gov/wp-content/uploads/2022/02/CEQ-CEJST-QandA.pdf> [<https://perma.cc/4U74-3UXL>] (last visited May 5, 2024).

CJWG criteria groups under “Race and Ethnicity.”⁸³ The first is “linguistic isolation” (“limited English proficiency” in the CJWG criteria), which the CEJST groups under “workforce development.”⁸⁴ The second is “experienced historic underinvestment,” which is essentially a measure of the “redlining” mortgage security risk maps made by the federal Home Owners Loan Corporation (HOLC) starting in the 1930s, and which the CEJST groups under “housing.”⁸⁵ HOLC’s maps labeled neighborhoods on a scale from “A” to “D,” with “A” being the most secure and “D” being the least secure areas to offer loans. By tending to label neighborhoods with Black residents as the riskiest areas to offer loans, HOLC is generally believed to have intentionally used its mortgage security maps to steer New Deal money towards White middle-class Americans in the form of low-interest loans, while reinforcing racial segregation and denying Black Americans the opportunity to benefit from the New Deal’s historic investments.⁸⁶ Redlining by HOLC has been tied to a number of negative environmental, health, and economic outcomes in the neighborhoods that were assigned low grades.⁸⁷

The decision by CEQ not to consider race and ethnic data in its designation of DACs was met with controversy. A number of academics, non-profits, and environmental justice activists argued that race was inextricably tied to environmental pollution, and that the Justice40 initiative could not sufficiently address environmental racism with-

83. DRAFT DAC OVERVIEW, *supra* note 35, at 2.

84. Council on Env’t Quality, *supra* note 75.

85. *Id.*; CLIMATE JUST. WORKING GRP., *supra* note 38. Both the CJWG and CEJST use datasets from the National Community Reinvestment Coalition, which digitize the HOLC maps and assign values to each HOLC risk category, with 1 point for “As,” “2 for “Bs,” etc. All of the values within a tract are added and then multiplied by a weighting factor based on the area within the tract. The higher the resulting score, the more the tract is identified as one that experienced historical redlining and underinvestment. See Helen Meier & Bruce C. Mitchell, *Historic Redlining Scores for 2010 and 2020 US Census Tracts*, INTER-UNIV. CONSORTIUM FOR POL. & SOC. RSCH. (Sept. 25, 2023), <https://www.openicpsr.org/openicpsr/project/141121/version/V3/view> [<https://perma.cc/DDB5-SR8X>].

86. See Maria Godoy, *In U.S. Cities, the Health Effects of Past Housing Discrimination Are Plain to See*, NAT’L PUB. RADIO (Nov. 19, 2020), <https://www.npr.org/sections/health-shots/2020/11/19/911909187/in-u-s-cities-the-health-effects-of-past-housing-discrimination-are-plain-to-see> [<https://perma.cc/4KMR-5KP4>]; see RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA*, 63–64 (2018).

87. See Godoy, *supra* note 86; National Community Reinvestment Coalition, *Redlining and Neighborhood Health*, <https://ncrc.org/holc-health> [<https://perma.cc/33TV-KWSR>] (last visited May 5, 2024); DRAFT DAC TECHNICAL DOCUMENTATION, *supra* note 39, at 45.

out incorporating race into the CEJST.⁸⁸ A substantial number of the over 2,000 public comments that CEQ received on the beta version of the CEJST criticized the exclusion of race and argued that disproportionate racial impacts could not sufficiently be addressed through other indicators acting as proxies for race.⁸⁹ In particular, some advocates argued that by not using racial demographics, the CEJST risked excluding communities that suffered from legacies of environmental racism.⁹⁰ Because the CEJST criteria requires that a census tract score highly in one of the listed categories of vulnerabilities or burdens (climate change, energy, health, housing, legacy pollution, transportation, waste and wastewater, and workforce development) and be at or above the 65th percentile for low income, the tool essentially filters out all middle-income communities, meaning that middle-income communities of color in areas that are impacted by long-term environmental pollution do not qualify as DACs.⁹¹ Further criticism centered on the binary designation of tracts as DACs or not DACs, without assessing the cumulative impacts of numerous environmental and health burdens.⁹² Comments from the Attorneys General of New York, Maryland, Massachusetts, North Carolina, Oregon, Vermont, and the District of Columbia recommended that the CEJST be refined to consider racial demographics in its methodology and to adopt a cumulative impacts metric.⁹³

The White House Environmental Justice Advisory Council, which is tasked (along with the Chair of the CEQ, the Director of Management and Budget, and the National Climate Advisor) with publishing recommendations on how federal investments might support the Justice40 investment goals, also criticized the CEJST's exclusion of racial

88. See Lisa Friedman, *White House Takes Aim at Environmental Racism, but Won't Mention Race*, N.Y. TIMES (Feb. 15, 2022), <https://www.nytimes.com/2022/02/15/climate/biden-environment-race-pollution.html> [on file with the Journal]; Drew Costley, *Race Excluded as WH Rolls Out Climate Justice Screening Tool*, ASSOC. PRESS NEWS (Feb. 18, 2022), <https://apnews.com/article/climate-science-environment-pollution-fe337100f1bb1f5fa86f081af8a3b69f> [<https://perma.cc/8SKN-BA7D>].

89. Jean Chemnick, Politico, *Experts to White House: EJ Screening Tool Should Consider Race*, E&E NEWS (June 1, 2022), <https://www.eenews.net/articles/experts-to-white-house-ej-screening-tool-should-consider-race/> [<https://perma.cc/Y737-REVH>].

90. *Id.*

91. See Council on Env't Quality, *supra* note 75; see Chemnick, *supra* note 89.

92. Chemnick, *supra* note 86.

93. Letter from the Attorneys General of New York, Maryland, Massachusetts, North Carolina, Oregon, Vermont, and the District of Columbia re: Climate and Economic Justice Screening Tool Beta Version (May 25, 2022), <https://stateimpactcenter.org/files/NY-AG-Multi-State-Comments-on-CEJST.pdf> [<https://perma.cc/44S3-G4RX>].

demographic data in its process of designating DACs.⁹⁴ The Advisory Council recommended that the CEJST include metrics of “structural racism,” including redlining, residential segregation, “racialized disparities of extreme wealth and deprivation,” and foreclosures, in addition to indicators for Native American and tribal land.⁹⁵ The Advisory Council also recommended that the CEQ consider designating tracts that met the thresholds for all of the indicators but did not satisfy the income requirement as DACs, and proposed that the CEQ develop a cumulative impacts metric to reflect communities that experience a number of “environmental and social stressors.”⁹⁶ It noted that this metric could be based on existing screening tools such as California’s CalEnviroScreen.⁹⁷

Administration officials justified the decision to exclude race from the CEJST methodology by arguing that it would insulate the Justice40 initiative from legal challenges.⁹⁸ CEQ Chair Brenda Mallory also stated that this strategy would still result in the protection of communities of color.⁹⁹ A number of contemporaneous articles cited a decision by the U.S. District Court for the Middle District of Florida as a reason that the CEQ might be wary of explicitly using race in its methodology.¹⁰⁰ In its 2021 decision blocking the Biden administration from issuing loan forgiveness payments to “socially disadvantaged farmers,” which the government defined as farmers who are Black, American Indian/Alaskan Native, Hispanic, Asian or Pacific Islander, the court ruled that the government’s use of race violated a White farmer’s right to equal protection because it inflexibly assigned benefits to farmers strictly on the basis of race.¹⁰¹

94. Letter from the White House Env’t Just. Advisory Council Re: Recommendations for the Climate and Economic Justice Screening Tool (Aug. 16, 2022), https://www.epa.gov/system/files/documents/2022-08/CEJST%20Recommendations%20Letter%208_4_2022%20Final.pdf [<https://perma.cc/V2X9-Z65X>].

95. *Id.* at 2–3.

96. *Id.* at 5, 8.

97. *Id.* at 8.

98. Friedman, *supra* note 88; Costley, *supra* note 88.

99. Friedman, *supra* note 88.

100. *See id.*; *see* Costley, *supra* note 88; *see* Chemnick, *supra* note 89; *see* Rajat Shrestha et al., 6 *Takeaways from the CEQ Climate and Economic Justice Screening Tool*, WORLD RES. INST. (Mar. 30, 2022), <https://www.wri.org/insights/6-takeaways-ceq-climate-and-economic-justice-screening-tool> [<https://perma.cc/ATD4-UDDR>].

101. Michael Levenson, *Judge Blocks \$4 Billion U.S. Debt Relief Program for Minority Farmers*, N.Y. TIMES (Jun. 23, 2021), <https://www.nytimes.com/2021/06/23/us/politics/biden-debt-relief-black-farmers.html> [on file with the Journal].

Some analyses of the CEJST suggest that it succeeds in designating DACs in a manner that prioritizes communities of color. An analysis by *Grist* stated that the tool “appears to implicitly account for race in its selection of disadvantaged communities,” and that, as the number of non-White residents in a tract increases, the tract becomes more likely to be designated as a DAC.¹⁰² Although the *Grist* analysis registered shortcomings in the CEJST’s methodology that were also identified by other groups, such as the lack of a cumulative impacts metric and the exclusion of all communities that fail to meet its low-income cutoff, the analysis specifically emphasized that the criteria used appeared to effectively function as proxies for race.¹⁰³ Another analysis by *E&E News* reached similar results, specifically finding that of nearly 6,300 U.S. census tracts in which Black residents are a majority, 77 percent were identified as DACs; of nearly 8,000 tracts in which Hispanic residents are a majority, 83 percent were identified as DACs; and of 14,200 tracts where White residents make up more than 90 percent of the population, only 22 percent were designated as DACs.¹⁰⁴

On the other hand, a study released in 2023 found that the program could fail to decrease racial disparities in air quality in the U.S., and could even increase disparities by improving air quality in White communities designated as DACs faster than in communities of color also designated as DACs.¹⁰⁵ The study developed a model to predict concentrations of fine particulate matter, or PM 2.5, and found that even if PM 2.5 pollution improved faster in communities designated as DACs by the CEJST, PM 2.5 pollution would remain significantly worse for communities of color than for White communities.¹⁰⁶ One of the authors argued explicitly that the study’s results indicated that

102. Naveena Sadasivam & Clayton Aldern, *The White House Excluded Race from its Environmental Justice Tool. We Put it Back In.*, GRIST (Feb. 24, 2022), <https://grist.org/equity/climate-and-economic-justice-screening-tool-race/> [<https://perma.cc/F3W5-AF4D>].

103. *Id.*

104. Thomas Frank, *How the White House Found EJ Areas Without Using Race*, E&E NEWS (Jan. 24, 2023), <https://www.eenews.net/articles/how-the-white-house-found-ej-areas-without-using-race/> [<https://perma.cc/XN6G-TDX9>].

105. Yuzhou Wang et al., *Air Quality Policy Should Quantify Effects on Disparities*, 381 SCIENCE 272, 272 (2023) (finding that “although application of CEJST to guide ambient air pollution emission reductions may eliminate the modest exposure disparities by income and for disadvantaged communities, it may not ameliorate the frequently larger disparities by race-ethnicity”).

106. Delger Erdenesanaa, *Signature Biden Program Won’t Fix Racial Gap in Air Quality, Study Suggests*, N.Y. TIMES (July 20, 2023), <https://www.nytimes.com/2023/07/20/climate/justice40-pollution-environmental-justice.html> [<https://perma.cc/982A-Z7DF>].

the CEJST's failure to account for race and ethnicity prevented the program from addressing racial and ethnic disparities, arguing that the study's results suggest that "if you don't account for race/ethnicity, then you won't be address the disparities by race/ethnicity."¹⁰⁷ The CEQ disputed these conclusions, arguing that the study made assumptions about implementation that did not reflect how the Justice40 initiative would be implemented.¹⁰⁸

It is difficult to draw conclusions about the differences between the CEJST's map of DACs within New York State and the CJWG's for two reasons: first, although the CEJST and the CJWG criteria are thematically similar, they use different indicators and measure similar indicators in different ways; second, the CEJST designates DACs based on percentiles that include all census tracts nationally, while the CJWG criteria only compares census tracts within the state, which fundamentally changes the cutoff for DAC designation. Despite the CJWG's inclusion of race and ethnicity in its criteria, the *E&E News* analysis found that "the White House methodology appears to be slightly more favorable to racial and ethnic minorities in New York than the state screening tool"¹⁰⁹ (then in its draft form). It should be emphasized that this discrepancy is not necessarily the counterintuitive result of the CJWG's decision to include race as an indicator; instead, it may be due to numerous differences in methodology and the fact that the CEJST compares NY tracts to all tracts nationwide in making its designations.

III. EQUAL PROTECTION DOCTRINE

As discussed in detail in Part IV, *infra*, the use of racial and demographic data as indicators in the CJWG's DAC criteria may be challenged under the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. This section explores the development of equal protection doctrine from the passage of the Fourteenth Amendment to the jurisprudence of the current Supreme Court. It then briefly discusses New York State's equal protection doctrine, which stems from the state constitution.

107. *Id.* (quoting Julian Marshall).

108. *Id.*

109. Frank, *supra* note 104.

A. Federal Equal Protection Doctrine

The Fourteenth Amendment to the U.S. Constitution was adopted in 1868, in the aftermath of the Civil War,¹¹⁰ with the specific purpose of ensuring and protecting the civil rights of formerly-enslaved Black citizens.¹¹¹ The final clause of Section 1 of the Fourteenth Amendment prohibits states from “deny[ing] to any person within [their] jurisdiction the equal protection of the laws.”¹¹²

Despite this language, in 1896 the Supreme Court held in *Plessy v. Ferguson* that a Louisiana state law mandating segregated, “equal but separate” railway cars for Black and White passengers did not violate the clause.¹¹³ The majority’s argument rested in part on the premise that the state legislature did not have the power to attempt to overcome “social prejudice.”¹¹⁴ Writing in dissent, Justice John Marshall Harlan criticized the majority’s rationale, arguing that the clear purpose of the state law was race-based discrimination in violation of the Equal Protection Clause and proclaiming that the Constitution is “color-blind, and neither knows nor tolerates classes among citizens.”¹¹⁵

Justice Harlan’s theory of a “color-blind” Constitution supported legal efforts to desegregate public facilities, culminating in *Brown v. Board of Education* in 1954. *Brown* famously declared that separate school systems for Black and White children were “inherently unequal,” and that the systems denied Black children “the equal protection of the laws guaranteed by the Fourteenth Amendment,” overturning *Plessy*.¹¹⁶ In the decades since *Brown*, however, the notion of

110. See *14th Amendment to the U.S. Constitution: Civil Rights (1868)*, NAT’L ARCHIVES, <https://www.archives.gov/milestone-documents/14th-amendment> (last visited Feb. 20, 2024).

111. See Paul Finkelman, *John Bingham and the Background to the Fourteenth Amendment*, 36 AKRON L. REV. 671, 691 (2003) (arguing that the purpose of Section 1 of the Fourteenth Amendment was to “protect the life, liberty, safety, freedom, political viability, and property of the former slaves”); see also *Shelley v. Kraemer*, 334 U.S. 1, 23 (1948) (stating that the “historical context in which the Fourteenth Amendment became a part of the Constitution should not be forgotten . . . it is clear that the matter of primary concern [to the Amendment’s framers] was the establishment of equality in the enjoyment of basic civil and political rights and the preservation of those rights from discriminatory action on the part of the States based on considerations of race or color”).

112. U.S. CONST. amend. XIV, § 1.

113. *Plessy v. Ferguson*, 163 U.S. 537, 540 (1896), *overruled by* *Brown v. Bd. of Ed.*, 347 U.S. 483 (1954).

114. *Id.* at 551.

115. *Id.* at 559 (Harlan, J., dissenting).

116. *Brown v. Bd. of Ed.* 347 U.S. 483, 495 (1954).

a “color-blind” Constitution has increasingly been invoked by legal conservatives to oppose race-conscious affirmative action programs.¹¹⁷ The difference in how legal conservatives and liberals, broadly speaking, interpret the Equal Protection Clause is best summarized by the dueling approaches of Chief Justice John Roberts and Justice Sonia Sotomayor. In 2007, in a case striking down a race-conscious affirmative action program in a public high school system on the grounds that it violated the Equal Protection Clause, Chief Justice Roberts concluded his plurality opinion by declaring that “[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”¹¹⁸ In response, Justice Sotomayor argued in her dissent in an unrelated case in 2014 that “[t]he way to stop discrimination on the basis of race is to speak openly and candidly on the subject of race, and to apply the Constitution with eyes open to the unfortunate effects of centuries of racial discrimination.”¹¹⁹

These two approaches have been characterized as “anticlassification” and “antisubordination” approaches to the Equal Protection Clause, respectively.¹²⁰ Adherents of the anticlassification approach argue that the Equal Protection Clause prohibits the government from classifying people on the basis of race for any purpose, while adherents of the antisubordination approach argue that the guarantees of the Equal Protection Clause can only be realized through government-enacted reforms that address historical and ongoing racial inequality through programs that explicitly support marginalized and oppressed racial groups.¹²¹

Another infamous case interpreting the Equal Protection Clause provided the basis for the legal standard which courts now apply to determine whether a government action or program unconstitution-

117. See, e.g., *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 230–31 (2023) (striking down Harvard College’s and the University of North Carolina’s race-conscious admissions programs and quoting Justice Harlan’s *Plessy* dissent); see also Brent E. Simmons, *Reconsidering Strict Scrutiny of Affirmative Action*, 2 MICH. J. OF RACE & L. 51, 53 (1996) (arguing that the modern Supreme Court “has meticulously laid the groundwork for a new and untested colorblind jurisprudence, with the ultimate aim of invalidating government use of race-conscious affirmative action as an instrument of public policy in dismantling entrenched patterns of systemic discrimination against minorities and women”).

118. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007) (plurality opinion).

119. *Schuette v. Coal. to Defend Affirmative Action, Integration & Immigrant Rts. & Fight for Equal. By Any Means Necessary (BAMN)*, 572 U.S. 291, 381 (2014) (Sotomayor, J., dissenting).

120. See Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 UNIV. OF MIAMI L. REV. 9, 9–10 (2003).

121. See *id.*

ally discriminates on the basis of race. In 1944, the Supreme Court upheld the government's exclusion of Japanese Americans from "war areas" on the West Coast during the Second World War in *Korematsu v. United States*, and declined to rule on the question of whether their subsequent internment in camps violated the Constitution.¹²² Despite this outcome, Justice Hugo Black declared at the outset of his majority opinion that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect," and that "courts must subject them to the most rigid scrutiny."¹²³ This standard, which has come to be known as "strict scrutiny,"¹²⁴ continues to guide how courts assess race-based classifications by the government,¹²⁵ even though the Court formally overruled the substantive aspects of the *Korematsu* decision in 2018¹²⁶ and many legal academics consider the decision to be part of the "anticanon" of Supreme Court decisions.¹²⁷

The Court signaled the further development of this approach to equal protection analysis in its 1967 decision in *Loving v. Virginia*, which struck down a Virginia state law that outlawed marriages between persons of different races on the grounds that it violated the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment.¹²⁸ Under the approach that has developed since *Korematsu* and *Loving*, courts now apply different levels of scrutiny depending on whether a government action or program makes a suspect classification, such as classifying on the basis of race.¹²⁹

122. *Korematsu v. United States*, 323 U.S. 214, 217–18, 222 (1944), *abrogated by* *Trump v. Hawaii*, 585 U.S. 667 (2018).

123. *Id.* at 216.

124. *See, e.g.*, Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 U.C.L.A. L. REV. 1267, 1274 (2007) (discussing the origins of the strict scrutiny standard in *Korematsu*).

125. *See id.* at 1275–78 (discussing the application of strict scrutiny to race-based classifications); *cf.* Evan Gerstmann & Christopher Shortell, *The Many Faces of Strict Scrutiny: How the Supreme Court Changes the Rules in Race Cases*, 72 PITTSBURGH L. REV. 1, 4–5 (2010) (arguing that the Supreme Court actually applies different versions of the strict scrutiny standard depending on what it is assessing).

126. *Trump v. Hawaii*, 585 U.S. at 710.

127. *See, e.g.*, Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 422–27 (discussing the arguments for and against considering *Korematsu* to be part of the anticanon). Professor Greene argues that cases in the anticanon "embod[y] a set of propositions that all legitimate constitutional decisions must be prepared to refute." *Id.* at 380.

128. *Loving v. Virginia*, 388 U.S. 1, 11–12 (1967).

129. *See, e.g., id.* at 9–10 (1967) (holding that because the statutes in question "contain[ed] racial classifications," the government carried a "very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race,"

Laws that do not make a suspect classification are subjected to “rational basis review” and will be upheld if they are rationally related to some legitimate government interest.¹³⁰ Laws that make a suspect classification, including race, are subjected to “strict scrutiny”; to pass strict scrutiny, the law must be “narrowly tailored” to a “compelling government interest.”¹³¹ There is also a middle tier of “intermediate scrutiny,” a standard more exacting than rational basis review but less so than strict scrutiny,¹³² which generally applies to laws that make distinctions based on sex or gender.¹³³

In 1989, the Supreme Court held in *City of Richmond v. J.A. Croson Co.* that strict scrutiny is applied to any policy or program that makes classifications on the basis of race, even if the policy or program’s aim is to support racial integration or another antisubordination-style goal.¹³⁴ Partly because of this decision, in the modern era strict scrutiny largely works to strike down affirmative action programs that make distinctions between racial or ethnic groups.¹³⁵ Mean-

while for statutes “involving distinctions not drawn according to race,” the Court would “merely ask[] whether there is any rational foundation for the discriminations”

130. See, e.g., *Golinski v. U.S. Off. of Pers. Mgmt.*, 824 F. Supp. 2d 968, 981 (N.D. Cal. 2012) (“Laws that do not burden a protected class or infringe on a constitutionally protected fundamental right are subject to rational basis review. Under the rational basis review, a law must be rationally related to the furtherance of a legitimate governmental interest”) (citation omitted).

131. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (holding that “all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests”).

132. See *U.S. v. Virginia*, 518 U.S. 515, 531–33 (1996) (holding that parties “who seek to defend gender-based government action must demonstrate an ‘exceedingly persuasive justification’ for that action,” which may not rely on “overbroad generalizations about the different talents, capacities, or preferences of males and females”) (citations omitted).

133. See, e.g., *U.S. v. Virginia*, 518 U.S. at 540 (finding that a state military college’s male-only admissions policy violated equal protection principles); *Craig v. Boren*, 429 U.S. 190, 204 (1976) (holding that an Oklahoma statute that prohibited the sale of beer to females under the age of 18 and males under the age of 21 “invidiously discriminate[d] against males 18–20 years of age”).

134. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (holding that “[a]bsent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are ‘benign’ or ‘remedial’ and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics”).

135. See, e.g., *Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll.*, 600 U.S. 181, 213 (2023) (ruling that Harvard College’s and the University of North Carolina’s race-conscious admissions programs failed to “comply with strict scrutiny,” and “must therefore be invalidated under the Equal Protection Clause”); see also *Simmons*, *supra* note 117, at 55–56 (noting that after the Court’s 1989 decision in *Croson*, a “politically conservative, yet

while, precedents such as *Washington v. Davis* and *Village of Arlington Heights* generally require that, for a court to find that a facially neutral law violates the Equal Protection Clause by discriminating against a racial or ethnic group, it must first find that an explicit intention to discriminate was a motivating factor behind the law's enactment.¹³⁶

Several of the most significant Supreme Court cases addressing affirmative action policies have involved education. In the 1978 case *Regents of U.C. v. Bakke*, the Supreme Court considered an affirmative action policy at the University of California Davis School of Medicine which set aside 16 seats out of 100 for "minority" applicants.¹³⁷ The plaintiff, a White male whose application was rejected, sued the school, alleging that the policy violated the Equal Protection Clause and Title VI of the Civil Rights Act of 1964.¹³⁸ A fragmented Court ruled that the university's admissions program was unconstitutional.¹³⁹ In a plurality opinion, however, Justice Lewis Powell recognized that "diversity" constituted a compelling interest for higher education institutions¹⁴⁰ and opined that a "properly devised admissions program," presumably that did not rely on a quota system, could still involve "the competitive consideration of race and ethnic origin."¹⁴¹

In an illustrative pair of cases in 2003 addressing affirmative action policies used by the University of Michigan's law school and un-

judicially 'activist' majority adopted the standard of strict scrutiny for state and local government use of race-conscious affirmative action," a "significant decision . . . in effecting a fundamental change in equal protection jurisprudence").

136. See *Washington v. Davis*, 426 U.S. 229, 239 (1976) (noting that "our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact"); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977) (stating that "[p]roof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause"). *But see Washington*, 426 U.S. at 241-42 (stating that a discriminatory purpose need not be "express" to render the law unconstitutional, and that "an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another").

137. See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 272-76 (1978) (plurality opinion).

138. *Id.* at 265-66.

139. See *id.* at 270-72.

140. See *id.* at 311-12 (stating that "the attainment of a diverse student body" is a "constitutionally permissible goal for an institution of higher education"). The recognition of this interest, which was only ever cognizable in higher education cases, was essentially overruled by *Students for Fair Admissions* in 2023. See 600 U.S. at 214 (ruling that the interests that the respondents claimed were compelling, including the educational benefits of diversity, "cannot be subjected to meaningful judicial review").

141. *Bakke*, 438 U.S. at 320.

dergraduate school, the Supreme Court expanded on the approach announced in *Bakke*. In *Grutter v. Bollinger*, the Court considered the law school's admissions policy, which used a holistic process with race applied only as a "soft" variable.¹⁴² The policy's goal was to reach a "critical mass" of non-White students.¹⁴³ Justice Sandra Day O'Connor, writing for the majority, held that the law school's policy was based on the compelling interest of "attaining a diverse student body,"¹⁴⁴ and was narrowly tailored because, by avoiding a quota system for racial groups and instead considering "race or ethnicity more flexibly as a 'plus' factor in the context of individualized consideration of each and every applicant,"¹⁴⁵ it ensured individualized consideration of applicants and did not "unduly harm members of any racial group."¹⁴⁶ She clarified that while "[n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative," it does "require serious, good faith consideration of workable race-neutral alternatives that will achieve" the program's goals.¹⁴⁷ However, Justice O'Connor stated that "race-conscious admissions policies must be limited in time" and proposed a "sunset provision" predicting that affirmative action programs such as this one would no longer be necessary twenty-five years from the decision (which would have been 2028).¹⁴⁸

In the companion case, *Gratz v. Bollinger*, Chief Justice William Rehnquist wrote a majority opinion striking down the University of Michigan's undergraduate admissions policy, which used a point-based system and assigned an automatic twenty points to non-White candidates, on the grounds that it violated the Equal Protection Clause in addition to Title VI and 42 U.S.C. § 1981.¹⁴⁹ The Court found that the school's interest in diversity could constitute a compelling government interest for the same reasons set forth in *Grutter*.¹⁵⁰ Nonetheless, it determined that the policy was not narrowly tailored due to the fact that its points-based system failed to provide

142. *Grutter v. Bollinger*, 539 U.S. 306, 306 (2003).

143. *Id.*

144. *Id.* at 328.

145. *Id.* at 334.

146. *Id.* at 341.

147. *Id.* at 339.

148. *Id.* at 341-43.

149. *Gratz v. Bollinger*, 539 U.S. 244, 255, 275-76 (2003).

150. *Id.* at 268.

the “individualized consideration” required by Justice Powell in *Bakke*.¹⁵¹

Taken together, *Grutter* and *Gratz* might indicate that while affirmative action programs can consider an individual’s race in a holistic manner where outcomes are never decided by race alone, they can never create racial quotas. Four years after these cases, the Supreme Court considered an equal protection claim brought by the parents of students challenging a Seattle school district’s system of awarding slots in oversubscribed high schools to students based on the student’s race in order to support school integration.¹⁵² Chief Justice Roberts’s plurality opinion noted that prior cases had recognized “two interests that qualify as compelling”: “remedying the effects of past intentional discrimination” and “diversity in higher education.”¹⁵³ Chief Justice Roberts held that the defendants did not have a compelling interest in remedying the effects of past intentional discrimination because one of the two relevant sets of schools had never been segregated by law and the other had been found by a District Court to have satisfied its desegregation decree.¹⁵⁴ In keeping with the distinction from *Grutter* and *Gratz*, Chief Justice Roberts noted that, unlike in *Grutter*, race was “not simply one factor weighed with others in reaching a decision . . . it is *the* factor.”¹⁵⁵ Chief Justice Roberts also found that the program was not narrowly tailored to the alleged compelling interest in diversity because “the plans are directed only to racial balance, pure and simple, an objective this Court has repeatedly condemned as illegitimate.”¹⁵⁶

Justice Anthony Kennedy did not join the section of Chief Justice Roberts’s plurality opinion determining that the program was not narrowly tailored and wrote a separate opinion concurring in part and concurring in the judgment, which might be considered controlling under the *Marks* rule,¹⁵⁷ arguing that the government may some-

151. *Id.* at 270–72.

152. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 710 (2007) (plurality opinion).

153. *Id.* at 720, 722.

154. *Id.* at 720–21.

155. *Id.* at 723 (emphasis in original).

156. *Id.* at 726.

157. In *Marks v. U.S.*, the Supreme Court held that when “a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, ‘the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds’” *Marks v. U.S.*, 430 U.S. 188, 194 (1977) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976)).

times take race into account in crafting policy.¹⁵⁸ Justice Kennedy argued that an approach in which the school board used “race conscious” mechanisms such as “including strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race” would “not lead to different treatment based on a classification that tells each student he or she is to be defined by race” and so would be unlikely to draw strict scrutiny at all.¹⁵⁹ Under Justice Kennedy’s approach, a school board could not use race as a single determinative factor, but it could accomplish the same goals through numerous other means with the explicit goal of school integration without drawing strict scrutiny. This opinion remains important, even after the *Students for Fair Admissions* decision discussed next, because it is arguably controlling and because it proposes that the government may perform a number of race-conscious actions in an affirmative action program without triggering strict scrutiny at all, so long as the program does not indicate that racial classification is the purpose or defining aspect of the program.

In 2022, the Supreme Court took up a case regarding affirmative action admissions policies at Harvard University and the University of North Carolina that was widely predicted to have a significant impact on race-conscious admissions programs in higher education.¹⁶⁰ The Court ruled in its June 2023 decision that the universities’ admissions policies violated the Equal Protection Clause.¹⁶¹ The “core

158. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 787–88 (2007) (Kennedy, J., concurring in part and concurring in the judgment).

159. *Id.* at 789.

160. *See, e.g.*, Adam Liptak & Anemona Hartocollis, *Supreme Court Will Hear Challenge to Affirmative Action at Harvard and U.N.C.*, N.Y. TIMES (Jan. 24, 2022), <https://www.nytimes.com/2022/01/24/us/politics/supreme-court-affirmative-action-harvard-unc.html> [on file with the Journal].

161. *Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll.*, 600 U.S. 181, 213 (2023). Before the decision, many analyses of the litigation explained that Harvard, as a private institution, only needed to comply with Title VI, while the University of North Carolina needed to comply with both Title VI and the Equal Protection Clause. *See, e.g.*, Liptak & Hartocollis, *supra* note 160 (“Harvard, a private entity, must comply with a federal statute that bans race discrimination as a condition of receiving federal money; the University of North Carolina, which is public, must also satisfy the Constitution’s equal protection clause”). However, the majority opinion by Chief Justice Roberts explained that the Court applied the Equal Protection Clause to Harvard as well, reasoning that “discrimination that violates the Equal Protection Clause of the Fourteenth Amendment committed by an institution that accepts federal funds also constitutes a violation of Title VI.” Although Justice Gorsuch questions that

purpose” of the Equal Protection Clause, according to the majority opinion authored by Chief Justice Roberts, was to eliminate “all governmentally imposed discrimination based on race.”¹⁶² Any exceptions must “survive” the “daunting two-step examination” of strict scrutiny.¹⁶³ In this case, the majority ruled that the interests that the universities claimed were compelling, including the educational benefits of a diverse student community, were “not sufficiently coherent for purposes of strict scrutiny” and could not be “subjected to meaningful judicial review.”¹⁶⁴ Additionally, the universities failed to “articulate a meaningful connection between the means they employ and the goals they pursue.”¹⁶⁵

This decision effectively overruled the *Bakke* and *Grutter* approach that allowed for limited consideration of race in admissions programs,¹⁶⁶ although *Grutter* and *Gratz* may remain instructive outside of the context of higher education for their distinction between holistic processes and quotas. However, while *Students for Fair Admissions* may cause major changes in higher education admissions programs and racial diversity in universities,¹⁶⁷ it did not fundamentally change the strict scrutiny test. The majority’s opinion reiterated the existing doctrine, although its emphasis was on the high standard that the strict scrutiny test sets.¹⁶⁸ Crucially for the topic of this

proposition, no party asks us to reconsider it. We accordingly evaluate Harvard’s admissions program under the standards of the Equal Protection Clause itself.” *Students for Fair Admissions*, 600 U.S. at 198 n.2 (quoting *Gratz v. Bollinger*, 539 U.S. 244, 276 n.23 (2003) (citation omitted)).

162. *Students for Fair Admissions*, 600 U.S. at 206 (quoting *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984)) (quotation marks omitted).

163. *Id.*

164. *Id.* at 214.

165. *Id.* at 215.

166. The majority opinion, however, does state that universities may consider “an applicant’s discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise,” so long as the student is evaluated as an individual and not the basis of their race. *Id.* at 230–31.

167. The impacts of *Students for Fair Admissions* on higher education affirmative action programs are not yet clear. Some scholars have argued that the decision may not significantly hamper race-conscious admissions programs, because colleges may still admit students “according to multifactorial, discretionary, and ultimately obscure data,” and precedents such as *Washington v. Davis* set a high bar for plaintiffs challenging allegedly unconstitutional racial discrimination. See Peter N. Salib & Guha Krishnamurthi, *The Goose and the Gander: How Conservative Precedents Will Save Campus Affirmative Action*, 102 TEX. L. REV. 123, 125 (2023).

168. See *id.* at 206–07.

Note, the majority acknowledged that remedying specific instances of past discrimination can be a compelling government interest.¹⁶⁹

B. New York State Equal Protection Doctrine

The New York State Constitution states that “[n]o person shall be denied the equal protection of the laws of this state or any subdivision thereof.”¹⁷⁰ The New York Court of Appeals ruled in 1949 that this clause “is no more broad in coverage than its Federal prototype,”¹⁷¹ an interpretation that was restated in 1996.¹⁷²

A recent bill proposed to amend the state constitution’s Equal Protection Clause by expanding protected categories, adding categories including “ethnicity” and “national origin,” and also stated that “[n]othing in this section shall invalidate or prevent the adoption of any law regulation, program, or practice that is designed to prevent or dismantle discrimination on the basis of a characteristic listed in this section”¹⁷³ This bill was drafted after the Supreme Court overturned *Roe v. Wade* in 2022,¹⁷⁴ and includes language prohibiting discrimination based on “pregnancy, pregnancy outcomes, and reproductive healthcare and autonomy.”¹⁷⁵ The bill passed both the Senate and the Assembly on January 24, 2023,¹⁷⁶ but must be ratified by New York voters in November 2024 before the constitutional text will be amended.¹⁷⁷

At the time of this Note’s publication, New York State’s equal protection doctrine therefore remains substantively identical to its federal analog. An interesting question beyond the scope of this paper

169. “[O]utside the circumstances of these cases [involving the affirmative action admissions programs], our precedents have identified only two compelling interests that permit resort to race-based government action. One is remediating specific identified instances of past discrimination that violated the Constitution or a statute. The second is avoiding imminent and serious risks to human safety in prisons, such as a race riot.” *Id.* at 207.

170. N.Y. CONST. art. I, § 11.

171. *Dorsey v. Stuyvesant Town Corp.*, 87 N.E.2d 541, 548 (N.Y. 1949).

172. *Brown v. State*, 674 N.E.2d 1129, 1140 (N.Y. 1996) (stating that this clause “was intended to afford coverage as broad as that provided by the Fourteenth Amendment to the United States Constitution,” citing *Dorsey*).

173. S. 108A, 2023–2024 Reg. Sess. (N.Y. 2023).

174. See generally *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215 (2022).

175. S. 108A, 2023–2024 Reg. Sess. (N.Y. 2023).

176. See S. 108A, 2023–2024 Reg. Sess. (N.Y. 2023); see Assemb. 1283, 2023–2024 Reg. Sess. (N.Y. 2023).

177. See *Equal Rights Amendment Advances to New York Voters in November 2024*, N.Y. CIV. LIBERTIES UNION (Jan. 24, 2023), <https://www.nyclu.org/en/press-releases/equal-rights-amendment-advances-new-york-voters-november-2024> [<https://perma.cc/95CP-WX8S>].

is whether the Court of Appeals' interpretation means that the New York State Equal Protection Clause always reflects the current state of equal protection jurisprudence under the U.S. Supreme Court, or whether the New York Court of Appeals must affirmatively "update" its interpretation of the state's Equal Protection Clause in order to incorporate any relevant decisions by the U.S. Supreme Court regarding the federal clause since the last time the New York Court of Appeals interpreted the state clause.

The following section explores how a hypothetical plaintiff might formulate an equal protection challenge to the CJWG's DAC criteria and outlines how the government can defend against such a challenge.

IV. POTENTIAL EQUAL PROTECTION CHALLENGES TO THE USE OF RACE AND ETHNICITY AS INDICATORS TO DEFINE "DISADVANTAGED COMMUNITIES"

A plaintiff bringing an equal protection challenge to the DAC criteria developed by the CJWG might argue that: 1) the statute, both in its statutory text and in the specific DAC criteria that the CJWG developed, classifies New York State citizens by race in order to distribute benefits, and therefore draws strict scrutiny; 2) the state cannot allege a compelling government interest in the broad, statewide redress of disparate racial impacts because case law permits the finding of a compelling interest only in remedying specific instances of intentional discrimination; and 3) even if the state can satisfy the compelling interest requirement, its approach is not narrowly tailored because it is too broad and both over- and under-inclusive. This hypothetical plaintiff will be referred to as "the plaintiff" below.

While the DAC criteria have not faced a challenge along these lines to date, a pending lawsuit does allege that the manner in which the CJWG considers race and ethnicity is unconstitutional. In July 2023, the Town of Palm Tree (also known as Kiryas Joel) in Orange County, New York and associated parties filed an Article 78¹⁷⁸ action in state court challenging the exclusion of the four census tracts which make

178. New York's Article 78 allows citizens to challenge action or inaction by a state or local administrative agency. *See generally* N.Y. C.P.L.R. §§ 7801–06 (McKinney 2024); *see also Article 78 Proceedings—How to Appeal an Agency Decision*, LAWNY, <https://www.lawny.org/node/62/article-78-proceedings-how-appeal-agency-decision> [<https://perma.cc/UL5X-WPYW>] (last visited May 6, 2024).

up the town from the final list of DACs.¹⁷⁹ Two of the four tracts were initially designated as DACs under the draft criteria, but were not under the final criteria.¹⁸⁰ The plaintiffs argued that the decision to exclude these tracts violated procedural requirements under the State Administrative Procedure Act and the State Environmental Quality Review Act, and that the CJWG's methodology for determining DACs was arbitrary and capricious.¹⁸¹ On the final claim, the plaintiffs argued that the decision to weigh the "percent Latino/a or Hispanic" and "percent Black or African American" indicators twice as much as other indicators in the Race and Ethnicity group was arbitrary and resulted in the exclusion of the town's tracts, which might have otherwise have been included due to a high value for the "limited English proficiency" indicator.¹⁸² Importantly, the relief that plaintiffs requested was an injunction ordering the CJWG to include the town's tracts in the list of DACs, rather than an order to revise or eliminate the consideration of race in the CJWG's methodology.¹⁸³ In the plaintiffs' memorandum of law, there was a brief mention of the "strict scrutiny" standard from equal protection doctrine, arguing that the CJWG failed to meet the requirements for race-conscious government action,¹⁸⁴ but the plaintiffs' case generally takes for granted that the CJWG is pursuing race-conscious policy, and instead argues that the town, whose residents are predominantly Satmar Hasidic Jews,¹⁸⁵ should be included under the CJWG's framework. In December 2023, the court ruled that the plaintiffs had standing to pursue their case.¹⁸⁶

179. Verified Petition at 2, *Town of Palm Tree v. Climate Just. Working Grp.*, No. 907000-23 (N.Y. Sup. Ct. July 26, 2023).

180. *Id.* at 8.

181. *Id.* at 3–4.

182. *See id.* at 9.

183. *Id.* at 24.

184. Petitioners' Memorandum of Law at 21–22, *Town of Palm Tree v. Climate Just. Working Grp.*, No. 907000-23 (N.Y. Sup. Ct. Sept. 15, 2023) (arguing that the CJWG's "use of [racial] factors . . . does not come close to surviving the applicable strict scrutiny test (*see Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll.*, 60 U.S. 181 (2023) (holding that any race-based government actions, i.e., the DAC Criteria here, must withstand strict scrutiny)").

185. *See* Lisa W. Foderaro, *Call It Splitsville, N.Y.: Hasidic Enclave to Get Its Own Town*, N.Y. TIMES (Nov. 19, 2017), <https://www.nytimes.com/2017/11/19/nyregion/hasidic-kiryas-joel-upstate.html> [<https://perma.cc/Q6KH-SMFK>].

186. Decision and Order, *Town of Palm Tree v. Climate Just. Working Grp.*, No. 907000-23 (N.Y. Sup. Ct. Dec. 27, 2023).

While the plaintiffs' initial complaint did not clearly set out a constitutional claim, because of the reference to the strict scrutiny standard and *Students for Fair Admissions* the state attorney general's office demanded a bill of particulars, in part to clarify whether the plaintiffs were making a constitutional claim.¹⁸⁷ In their bill of particulars submitted in response to the state's request, the plaintiffs stated that they allege that "Respondents [DEC and the CJWG] violated the Equal Protection Clause of the U.S. Const. amend. XIV and NY Const. Art. 1, § 11, since the claim alleges that Respondents' determinations were arbitrary and capricious in that the CJWG gave 2x weight to some Race/Ethnicity indicators but not to others. Such action contravenes the Equal Protection Clauses of the state and federal constitutions."¹⁸⁸

This case has not yet reached resolution as of the time of this Note's publication. The plaintiffs' constitutional claim is different in a crucial manner from the hypothetical claim discussed here. While the plaintiffs argue that the CJWG's process violated the equal protection doctrine, they do not argue that the CJWG may not consider race at all; in fact, the remedy they seek would allow the CJWG to continue considering race and ethnicity in designating DACs, but require it to modify its formula slightly. However, the arguments made by the plaintiffs and by the state are often relevant to the analysis below, so reference is made to this case throughout the following sections.

A. Standing

As a preliminary matter, the hypothetical plaintiff must satisfy the requirements to establish standing. Article III of the Constitution restricts the power of the federal judiciary to the adjudication of "Cases" and "Controversies."¹⁸⁹ To determine whether a case or controversy exists, federal courts apply the doctrine of "standing": to establish standing, a plaintiff must demonstrate: 1) that they have suffered an "injury in fact," which is "concrete and particularized"

187. See State's Letter Requesting an Extension to Submit Answer, *Town of Palm Tree v. Climate Just. Working Grp.*, No. 907000-23 (N.Y. Sup. Ct. Feb. 29, 2024).

188. Petitioners' Verified Bill of Particulars, *Town of Palm Tree v. Climate Just. Working Grp.*, No. 907000-23 (N.Y. Sup. Ct. Feb. 9, 2024) (attached as Exhibit A to State's Verified Answer to the Verified Petition, *Town of Palm Tree v. Climate Just. Working Grp.*, No. 907000-23 (N.Y. Sup. Ct. Mar. 25, 2024)).

189. U.S. CONST. art. III, § 2.

and “actual or imminent, not conjectural or hypothetical”; 2) that there is a “causal connection between the injury and the conduct complained of,” meaning that the injury is “fairly. . . trace[able] to the challenged action of the defendant, and not. . . th[e] result [of] the independent action of some third party not before the court”; and 3) that it is “likely,” rather than “speculative,” that the injury will be redressed if the court decides for the plaintiff.¹⁹⁰ In order to challenge an administrative action in New York state courts, plaintiffs must satisfy a two-part test: they must show 1) injury in fact, meaning that the “plaintiff will actually be harmed by the challenged administrative action”; and 2) the injury “must fall within the zone of interests or concerns sought to be promoted or protected by the statutory provision under which the agency has acted.”¹⁹¹

The plaintiff might face significant difficulty establishing standing. First, the plaintiff would need to demonstrate injury in fact. This would likely require at a minimum that the plaintiff live in a tract that was not designated as a DAC. To demonstrate that the plaintiff was injured specifically by the inclusion of racial and ethnic demographics as indicators for the CJWG’s criteria, the plaintiff would also need to demonstrate that, had such indicators been excluded, the census tract they live in would have been designated as a DAC. If a plaintiff cannot demonstrate that their tract’s designation would have switched to a DAC if racial and ethnic demographic information were not used as indicators, they cannot demonstrate that they have actually been injured in any concrete, particularized, and non-hypothetical way. To demonstrate a particularized injury, the plaintiff would need to show that their specific census tract is injured by the CJWG’s DAC criteria; alleging a statewide harm of “racial discrimination” would not be sufficient.

Attempting to demonstrate this would raise technical difficulties. It is possible that a plaintiff could gather the necessary information through publicly available resources, in addition to discovery or re-

190. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (citations and quotations omitted).

191. *New York State Ass’n of Nurse Anesthetists v. Novello*, 810 N.E.2d 405, 407 (N.Y. 2004) (citations omitted). While the formulation of this standard is different, it reflects the concerns of the first two prongs of the federal test, asking whether the plaintiff was really injured and whether the injury was sufficiently related to the agency’s action, focusing on the purpose and scope of the enabling statute. This section discusses the federal standard, which is broader because of its redressability requirement, but the analysis for “injury in fact” and “causal connection” would be similar under the New York standard.

quests under the state Freedom of Information Law,¹⁹² to recreate the process without racial and ethnic demographic indicators, but this would be a data-intensive project and it would be difficult to demonstrate to a court that racial and demographic information were the “but-for” cause of a specific census tract being designated as a DAC or not, given the large number of factors considered in the DAC criteria.

Additionally, it might not be sufficient for the plaintiff to demonstrate that they live in a tract that, if not for the consideration of racial and ethnic demographics, would have been designated a DAC, as this does not itself injure the plaintiff (or might be considered a hypothetical or speculative injury, which would fail the standing test¹⁹³). Instead, to satisfy both the first and second prongs of standing (injury in fact and a causal connection between the action and the injury), the plaintiff might need to demonstrate that the tract that they live in would have received certain investments or benefits had it been designated a DAC, which were withheld or distributed elsewhere to tracts that were designated as DACs. It may be difficult to demonstrate that the CLCPA’s DAC designations were the but-for cause of investments or benefits denied or withheld, if there are other potential reasons that the benefit might not have been dispensed to their community.

Finally, the plaintiff’s alleged injury may not be redressable by a court decision. The CLCPA does not mandate any individual, specific investments in DACs; instead, it creates a goal for what percentage of the *benefits* from investments should be received by DACs.¹⁹⁴ Even if the plaintiff can establish that the relevant tract would have been designated a DAC had racial and ethnic demographic information not been included, DAC designation would not guarantee any specific investments. If the plaintiff’s alleged injury is that certain benefits programs and investments were not made in their tract because of the DAC criteria, a court likely could not order the state to make such investments without exceeding its jurisdiction;¹⁹⁵ it could only, at

192. See generally *Open FOIL NY*, N.Y. STATE, <https://www.ny.gov/programs/open-foil-ny> [<https://perma.cc/E68V-JUXD>] (last visited Feb. 24, 2024).

193. See *Lujan*, 504 U.S. at 560 (requiring that a plaintiff’s alleged injury in fact must be “actual or imminent, not conjectural or hypothetical”) (citations and quotation marks omitted).

194. N.Y. ENV’T CONSERV. LAW § 75-0117 (McKinney 2024).

195. See, e.g., *N.Y. State Inspection, Sec. & L. Enft Emps. v. Cuomo*, 475 N.E.2d 90, 93 (N.Y. 1984) (stating that while “it is within the power of the judiciary to declare the vested rights of a specifically protected class of individuals, in a fashion recognized by statute . . . the manner

most, order the CJWG to redo the DAC criteria to exclude race. Even if this led to the plaintiff's tract being designated a DAC, there is no guarantee of that individual tract receiving any specific benefits or investments. Therefore, the plaintiff may not be able to satisfy the requirements of standing.

However, the court's December 2023 ruling on the state's motion to dismiss in *Town of Palm Tree* resolved similar issues in favor of the plaintiffs. The court found that "inclusion on the list of disadvantaged communities creates a benefit for certain communities to the detriment of communities" that are excluded and therefore are not prioritized for investment. The court also noted that denying the plaintiffs standing "would create an impenetrable barrier to the judicial review of the issue raised herein."¹⁹⁶

This decision indicates how a court might find standing for a plaintiff bringing an equal protection challenge directly to the CJWG's use of race in its methodology (although, of course, another state court or a federal court might reach a different outcome). By ruling that non-prioritization for investment is an injury in fact to citizens in tracts that are not designated as DACs, that the CJWG's DAC methodology is a direct cause of this harm, and that an order to the CJWG to remove the race-related indicators from its DAC methodology would redress the plaintiff's injury, a court could find that the first two requirements of standing are met. However, the plaintiff might still be required to demonstrate that, if the race-related indicators were removed from the CJWG's methodology, the designation of the relevant census tract would change from non-DAC to DAC.

B. Ripeness

The plaintiff may also struggle to satisfy the preliminary requirement to demonstrate "ripeness." The doctrine of ripeness is applied "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements" when a plaintiff seeks injunctive or declaratory judgment against administrative actions or determinations that may not yet have caused direct

by which the State addresses complex societal and governmental issues is a subject left to the discretion of the political branches of government") (citations omitted).

196. Decision and Order at 6-7, *Town of Palm Tree v. Climate Just. Working Grp.*, No. 907000-23 (N.Y. Sup. Ct. Dec. 27, 2023).

or concrete impacts to a plaintiff.¹⁹⁷ To establish that a case is ripe, a plaintiff must demonstrate 1) “fitness of the issues for judicial decision” and 2) that “withholding court consideration” would cause “hardship to the parties.”¹⁹⁸

The requirement to demonstrate “hardship” would raise many of the same issues as the “injury-in-fact” requirement for standing: namely, can the plaintiff establish that they are actually experiencing or will actually experience injury or hardship if a court does not intervene? Again, even if the plaintiff can establish that but for the inclusion of race and ethnic demographic data in the CJWG’s criteria the plaintiff’s tract would have been designated as a DAC, this does not necessarily mean that the tract would receive any specific benefits or investments. The difficulty of identifying a specific injury or hardship that a court’s intervention could address may therefore prevent the plaintiff from satisfying ripeness requirements (and, for this reason, a court might simply perform this analysis simultaneously with the standing analysis, or consider any arguments regarding hardship to be resolved by a decision on standing).

C. Strict Scrutiny

A plaintiff challenging the use of race in the CLCPA’s DAC criteria would likely argue that the CLCPA, both in its statutory text and in the specific DAC criteria that the CJWG developed, classifies New York citizens by race in order to distribute benefits. This would require that the criteria be analyzed under strict scrutiny under precedents such as *Croson*¹⁹⁹ and *Bakke*.²⁰⁰ The plaintiff might point first to the language in the CLCPA directing the CJWG to identify DACs based on criteria including “areas with concentrations of people that are . . . members of groups that have historically experienced discrimination on the basis of race or ethnicity,”²⁰¹ and argue that this language explicitly directed the CJWG to use racial and ethnic demographic information in order to identify DACs. Although it might be argued in response that this language sets a goal for what types of

197. *Abbott Lab’ys v. Gardner*, 387 U.S. 136, 148 (1967), *abrogated by Califano v. Sanders*, 430 U.S. 99 (1977).

198. *Nat’l Park Hosp. Ass’n v. Dep’t of Interior*, 538 U.S. 803, 808 (2003); *see also Abbott Lab’ys*, 387 U.S. at 149.

199. *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989).

200. *See Regents of Univ. of California v. Bakke*, 438 U.S. 265, 290 (1978) (plurality opinion).

201. N.Y. ENV’T CONSERV. LAW § 75-0111(1)(c)(ii) (McKinney 2024).

communities should be included, rather than mandating the inclusion of any specific indicators in the criteria, this defense would be moot because the CJWG did choose to use racial and ethnic demographic information as indicators, unless the plaintiff also brings a facial challenge to the statute itself.

At this stage, the state might argue that strict scrutiny is inappropriate because the indicators related to race and ethnicity only make up six of 45 total criteria and are being balanced in a semi-holistic process.²⁰² The state might distinguish many of the key Supreme Court cases striking down affirmative action programs where race and ethnicity played a significant and often outcome-determinative role, such as the quota for “minority” students struck down in *Bakke*,²⁰³ the automatic assignment of points for non-White students in the admissions system struck down in *Gratz*,²⁰⁴ or the system of assigning open spots in high schools based entirely on a student’s race struck down in *Parents Involved*.²⁰⁵ The state might analogize the CJWG’s process to the holistic admissions process upheld in *Grutter*²⁰⁶ and reference Chief Justice Roberts’s comparison of this process to the Seattle high schools’ system in *Parents Involved*, which he argued violated the Equal Protection Clause partly because race was “not simply one factor weighed with others in reaching a decision . . . it [was] *the* factor.”²⁰⁷ Here, the state can argue that race *is* simply one factor weighed with other (more heavily weighted) factors in reaching a decision.

Further, the state can point to Justice Kennedy’s (arguably controlling) concurrence in *Parents Involved*, where he argued that measures such as “including strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race . . . do not lead to different treatment based on a classification that tells each student he or she is to be defined by race” and are therefore

202. See *supra* notes 35–37 and accompanying text.

203. *Bakke*, 438 U.S. at 265.

204. *Gratz v. Bollinger*, 539 U.S. 224 (2003).

205. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (plurality opinion).

206. *Grutter v. Bollinger*, 539 U.S. 306 (2003).

207. *Parents Involved*, 551 U.S. at 723.

“unlikely” to draw strict scrutiny.²⁰⁸ The state can argue that the DAC criteria are an example of the kind of actions that Justice Kennedy identified here: DACs are identified based on some, but not exclusive or prioritized, consideration of racial and ethnic demographics for the purpose of allocating resources in a targeted fashion, and so should not draw strict scrutiny.²⁰⁹

D. Compelling Interest

If a court determines nonetheless that it must apply strict scrutiny to the DAC criteria, the state will need to demonstrate that its use of race is in furtherance of a compelling interest.²¹⁰ The only relevant interest for the DAC program is in remedying past discrimination.²¹¹ The state’s strongest evidence to establish this interest would be documented instances of state-sponsored racial discrimination and evidence of their legacy, such as housing discrimination and unequal distribution of environmental burdens through permitting.²¹²

Although it is narrow, this basis for race-conscious government action remains lawful, even under the Roberts Court’s jurisprudence. Chief Justice Roberts acknowledged as much in *Students for Fair Admissions*, identifying “remediating specific, identified instances of past discrimination that violated the Constitution or a statute” as a

208. *Id.* at 789 (Kennedy, J., concurring).

209. *Town of Palm Tree* is of less relevance on the question of whether or not the DAC criteria should draw strict scrutiny than it is on the following issues (compelling government interest and narrow tailoring). This is because the *Palm Tree* plaintiffs’ claim that the CJWG’s choice to double-weight the indicators for Black and Hispanic residents should draw strict scrutiny prompts a different analysis than a challenge to the CJWG’s overall use of race in its criteria would. In *Palm Tree*, the state argued in its memorandum of law in support of its answer that the CJWG’s choice to double-weight the indicators for Black and Hispanic residents, and not other indicators, should receive rational basis review rather than drawing strict scrutiny because when a “race-ethnicity indicator in a remedial program is challenged as under-inclusive and there is no claim that its under-inclusiveness was motivated by discrimination, the indicator is constitutional if it has a rational basis.” Memorandum of Law in Support of Respondents’ Verified Answer at 19–20, *Town of Palm Tree v. Climate Just. Working Grp.*, No. 907000-23 (N.Y. Sup. Ct. Mar. 25, 2024) (citation omitted). The state argued that the choice to double-weight these indicators should pass rational basis review, because the decision is rationally related to the legitimate state purpose of remediating the impacts of past discrimination that was “disproportionately directed at Black and Hispanic people.” *Id.* at 21.

210. *Parents Involved*, 551 U.S. at 720.

211. See *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986) (noting that a racial classification can only be allowed “upon some showing of prior discrimination by the governmental unit involved”).

212. See discussion *infra* in this section.

compelling interest for race-conscious government action.²¹³ Importantly, however, Chief Justice Roberts characterized this interest in *Parents Involved* as “remedying the effects of past *intentional* discrimination,”²¹⁴ a distinction that echoes prior cases ruling that, when a plaintiff alleges that a government action is racially discriminatory and unconstitutional, “[p]roof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.”²¹⁵

Under this standard, the state would be required to demonstrate that its race-conscious program is designed to remediate the effects of prior racially discriminatory state actions that violated the Equal Protection Clause, or another constitutional clause or statute. Many of the most unambiguous examples of state-sponsored racial discrimination by New York State are from before the Civil Rights Movement of the 1960s, such as the creation of “Whites-only” planned communities in New York City by Metropolitan Life Insurance Company²¹⁶ and the creation of Levittown on Long Island.²¹⁷

213. *Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll.*, 600 U.S. 181, 207 (2023).

214. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007) (plurality opinion) (emphasis added).

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

216. The New York State Legislature in 1938 amended the state’s insurance code to permit insurers to invest in low-rent housing for the specific purpose of allowing Metropolitan Life Insurance Company to build the 12,000-unit Parkchester Apartments in New York City, despite being aware that Metropolitan Life would exclude Black people from the apartments. ROTHSTEIN, *supra* note 86, at 106. When one apartment in Parkchester was sublet to a Black family, Metropolitan Life’s president had them evicted. *Id.* at 62. Metropolitan Life also built the 9,000-unit Stuyvesant Town planned community, which it announced would be “for white people only.” New York City condemned and cleared eighteen square city blocks for the development and granted Metropolitan Life a 25-year tax abatement. *Id.* at 106. The evicted population was at least 37 percent nonwhite, mostly Black and Puerto Rican, even though the 1950 census found that only 12 percent of the city’s population was nonwhite. ROBERT CARO, *THE POWER BROKER: ROBERT MOSES AND THE FALL OF NEW YORK*, 968 (1975). Because a city’s power must be granted by a state, New York City’s actions (and the actions of any municipality in New York State) are attributable to New York State for the purpose of demonstrating past discriminatory actions by the state. *See, e.g., Hunter v. City of Pittsburgh*, 207 U.S. 161, 178 (1907) (stating that “[m]unicipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be entrusted to them”). When Stuyvesant Town’s racially exclusive policy was challenged, the Supreme Court of New York County ruled that “[i]t is neither a violation of any provision of the Federal and State Constitutions [for a landlord] to refuse [housing] on the ground of race, color, creed, or religion” *Dorsey v. Stuyvesant Town Corp.*, 74 N.Y.S.2d 220, 224 (N.Y. Sup. Ct. 1947), *aff’d sub nom. Dorsey v. Stuyvesant Town Corp.*, 85 N.Y.S.2d 313 (N.Y. App. Div. 1948), *aff’d in part, appeal dismissed in part sub nom. Dorsey v. Stuyvesant Town Corp.*, 87 N.E.2d 541 (N.Y. 1949). The New York Court of Appeals upheld the decision, finding that beneficiaries of

There also, arguably, remains room under equal protection doctrine for more expansive conceptualizations of what constitutes state-sponsored racial discrimination. In *Village of Arlington Heights*, the Supreme Court explained that where “there is a proof that a discriminatory purpose has been a motivating factor in the decision,” judicial deference to legislative and administrative decisions is “no longer justified.”²¹⁸ Evidence relevant to determining whether such a discriminatory purpose was a motivating factor includes: whether the “impact of the official action” affects one race more than other; whether a “clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face”; the “historical background of the decision” and the “specific sequence of events leading up to the challenged decision”; and the legislative or administrative history.²¹⁹ This language points towards a fairly broad, context-sensitive inquiry into the historical context surrounding state actions or inactions, the decisionmakers involved, and the process of decision-making, with evidence of disparate impacts providing a strong starting point, even if it is not alone sufficient to demonstrate a constitutional violation. This approach could allow the state to point to instances of historical racial discrimination where the state’s role or evidence of state intent were more nebulous, but where racially disparate impacts clearly point towards an intent by state policymakers to support or expand a system of racial discrimination. Such exam-

tax exemptions and the power of eminent domain were not subject to the Fourteenth Amendment, and therefore the racially exclusive policy was not unconstitutional state action. *Dorsey v. Stuyvesant Town Corp.*, 87 N.E.2d 541 (N.Y. 1949).

217. Levittown was a planned community for returning veterans from the Second World War. Although many Black veterans met the income requirements, they did not apply because of an understanding that Levittown was intended only for white families. William Levitt, the creator of Levittown, refused a Black applicant because Levitt would not have been able to secure Federal Housing Administration loans had he chosen to integrate the community. *See* ROTHSTEIN, *supra* note 86, at 68–70. A Black man named William Cotter sublet an apartment for his family from a homeowner in Levittown. When the lease ran out in 1953, their landlord, Mid-Island Properties, refused to sell him the property or to renew the lease. Jim Merritt, *Hidden figures: These African-Americans with Long Island Ties Made History*, NEWSDAY (Feb. 25, 2019), <https://www.newsday.com/long-island/li-life/black-history-hidden-figures-of-long-island-e24617> [<https://perma.cc/XT2G-9X29>]. Cotter sued Mid-Island Properties, alleging that the company’s refusal was based on racial discrimination, but a New York State Supreme Court dismissed the suit. *See Motion for leave to appeal to the Appellate Division denied in Mid-Island Properties, Inc. v. Johnson*, 126 N.Y.S.2d 202 (App. Div. 1953) [Author’s note: unable to find the text of the underlying decision by the New York State Supreme Court].

218. *Arlington Heights*, 429 U.S. at 265.

219. *Id.* at 266–68.

ples could include state action and inaction in connection with the redlining of neighborhoods in New York;²²⁰ many of Robert Moses's actions in various state and city roles throughout his career, particularly the mass displacement of New York City communities through urban renewal initiatives and through highway projects;²²¹ lending practices for homeowner loans;²²² and racially exclusionary zoning by local governments.²²³ In an affidavit submitted by the state in *Town of Palm Tree*, the state lays out these examples of state-sponsored racial discrimination in New York in addition to others, arguing that “[r]edlining, discriminatory lending, the implementation of the G.I. Bill, racially restrictive covenants, and exclusionary zoning,” in addition to highway construction and public housing projects, have “led to significant differences in wealth and well-being between white households and Black and Hispanic households.”²²⁴

On the other hand, in order to narrow the case, the state might argue that the relevant actions that a plaintiff might challenge are individual decisions regarding investments or benefits programs, not the overall DAC criteria. Individual decisions regarding investments or permits might be more easily tied to specific instances of past intentional discrimination in individual tracts, whereas the entire CLCPA framework would be more difficult to tie to specific, individualized actions.

Further, if the state can identify which specific census tracts have been designated as DACs that would *not* have been designated as DACs if the race and ethnic indicators were not used in the DAC criteria, it could then attempt to identify specific instances of past intentional discrimination by the state or municipal governments that

220. See discussion *supra* notes 85–87 and accompanying text.

221. Robert Moses's highways and urban renewal projects displaced some 250,000 people during his career. *Brooklyn: BQE*, SEGREGATION BY DESIGN, <https://www.segregationbydesign.com/brooklyn/brooklynqueens-expressway> [<https://perma.cc/9DM3-BUZN>] (last visited May 6, 2024). A disproportionate number were low-income people of color, and many sources allege Moses intentionally targeted these communities and also steered environmental benefits towards largely-White communities. See *id.*; see generally ROBERT CARO, THE POWER BROKER: ROBERT MOSES AND THE FALL OF NEW YORK (1975), including 533, 557–60, 968.

222. See generally OFF. OF THE N.Y. STATE ATT'Y GEN., RACIAL DISPARITIES IN HOMEOWNERSHIP (Oct. 31, 2023), <https://ag.ny.gov/sites/default/files/reports/oag-report-racial-disparities-in-homeownership.pdf> [<https://perma.cc/D7R6-GNFX>].

223. See generally Noah Kazis, *Ending Exclusionary Zoning in New York City's Suburbs*, NYU FURMAN CTR. (Nov. 9, 2020), https://furmancenter.org/files/Ending_Exclusionary_Zoning_in_New_York_Citys_Suburbs.pdf [<https://perma.cc/29CW-SDFS>].

224. Affidavit of D Pei Wu, Ph.D., at 32–33, *Town of Palm Tree v. Climate Just. Working Grp.*, No. 907000-23 (N.Y. Sup. Ct. Mar. 25, 2024).

occurred in or harmed communities in those tracts. This alone might be sufficient to establish a compelling interest: consideration of race would be necessary to include such communities in the CLCPA programs in order to address the effects of past acts of intentional racial discrimination.

More generally, for investments or benefits programs targeted at specific areas, the state might show a history of intentional discrimination in housing and education in that area and demonstrate that the effects and legacies of such discrimination are ongoing through empirical evidence. This way, current evidence of inequity might be relevant, while if offered alone as evidence of disparate impacts it might be insufficient to satisfy the equal protection doctrine under the Roberts Court. For instance, in a city with a history of state courts enforcing racially restrictive covenants, current evidence of housing inequity along racial lines might be considered relevant as evidence of the legacy of the state's previous acts of intentional discrimination.²²⁵ The Supreme Court ruled in 1948 that property deeds with racially restrictive covenants do not themselves violate the Equal Protection Clause, because "there has been no action by the State,"²²⁶ but that judicial enforcement of any such covenants would constitute state action in violation of the Clause.²²⁷ Richard Rothstein argues, however, that the recording of deeds with such clauses constituted state action in violation of the Equal Protection Clause.²²⁸ If the state adopts this argument, it will have a significant body of evidence to draw on to demonstrate past acts of intentional racial discrimination.

E. Narrow Tailoring

The state will also need to demonstrate that its program is narrowly tailored to its compelling interest. The plaintiff would likely argue that 1) the way that race is considered is too broad to be narrowly tailored to specific acts of intentional discrimination, and 2) race and ethnic demographics need not be used as indicators in the CJWG's criteria in order to achieve the CLCPA's goals, perhaps pointing to the CEJST's race-neutral methodology for designating DACs.

225. *See, e.g.,* *Ridgway v. Cockburn*, 296 N.Y.S. 936 (N.Y. Sup. Ct. 1937), in which the court held that a racially restrictive covenant was enforceable.

226. *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948).

227. *Id.* at 20.

228. *See* ROTHSTEIN, *supra* note 86, at 90.

The plaintiff's first argument could be that the CJWG's decision to consider the population density of four non-White racial groups in each tract is not a narrowly tailored response to individualized acts of discrimination. Further, individual acts of discrimination against specific non-White groups cannot justify an overall policy of prioritizing all non-White citizens for benefits or investments. The state might respond by again emphasizing the minimal role that the racial and ethnic demographic indicators play in determining which tracts are designated DACs, and explaining that tracts with mostly White populations may still be listed as DACs if they score highly for other indicators, such as low-income households or environmental burdens. This issue is closely connected with the state's effort, discussed above, to show that it has a compelling government interest; the more broadly the state defines its past racially discriminatory actions that it now seeks to remedy, the more a broad, statewide initiative may appear necessary.

The state can also argue that specific decisions regarding investments and benefits are the relevant government actions responding to specific acts of intentional discrimination, and that the statewide identification of DACs is only a step in guiding such benefits and investments to the appropriate communities. This argument essentially redirects the dispute to local acts of historical discrimination by the state and current programs addressed directly at remedying the local impacts of those acts.

The state also faces a challenge in overcoming what Chief Justice Roberts calls one of the "twin commands of the Equal Protection Clause" in *Students for Fair Admissions*: "that race may never be used as a 'negative' . . ." ²²⁹ In that case, Chief Justice Roberts found that the defendants' argument that "an individual's race is never a negative factor in their admissions programs" was "hard to take seriously," because "[c]ollege admissions are zero-sum. A benefit provided to some applicants but not to others necessarily advantages the former group at the expense of the latter." ²³⁰ Inclusion or exclusion from the DAC list might be viewed similarly: one census tract's inclusion on the DAC list necessarily advantages it compared to another tract not included. The *Town of Palm Tree* court reached this conclu-

229. *Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll.*, 600 U.S. 181, 218 (2023).

230. *Id.* at 218–19.

sion in its decision on the state's motion to dismiss.²³¹ However, the state might distinguish the circumstances of higher education, where applicants compete for a limited and discrete benefit—a spot in the accepted class—and the circumstances of the DAC list, which is created to guide a far less specific or zero-sum benefits program with a flexible goal of 35% to 40% of benefits in a range of broadly enumerated areas.²³² Additionally, the state can emphasize that its DAC criteria is subject to annual review,²³³ so it does not raise the kinds of concerns discussed in *Grutter* regarding race-conscious programs with no endpoint.²³⁴

The plaintiff's second argument could be that the CJWG can meet the CLCPA's environmental justice goals without actually using racial and ethnic demographics as indicators in the DAC criteria. The plaintiff might discuss the CEQ's race-neutral approach in the CEJST²³⁵ and argue that this demonstrates that the CJWG could accomplish its goals without using racial and demographic data. The plaintiff might even go as far as advocating for a "proxy" approach, where a number of other indicators such as income, environmental pollution, exposure to toxic hazards, and health outcomes can act as a proxy for race and ensure that low-income communities are designated as DACs.

Here, the state's potential arguments at the earlier stage regarding whether strict scrutiny applies might cut against it: whereas at the earlier stage the state must minimize the significance of racial and ethnic demographic data in its process of identifying DACs, here it must demonstrate that including the data is absolutely necessary to satisfy its compelling interest. The state might argue that the use of racial and ethnic demographics is necessary to ensure that middle-income communities of color that have been experienced stagnant income growth (i.e., through lowered property values) due to industry siting are included as DACs so that they are prioritized for compensation for the effects of historical discrimination and protected from further disproportionate distribution of environmental burdens through siting and state permitting.

To make this argument, the state can contend that members of communities which have experienced the impacts of past discrimi-

231. See *supra* note 196 and accompanying text.

232. See N.Y. ENV'T CONSERV. LAW § 75-0117 (McKinney 2024).

233. *Id.* § 75-0111(3).

234. See *supra* note 148 and accompanying text.

235. See discussion *supra* Part II(D).

natory actions by the state should be eligible to receive the benefits of remedies addressed to those actions, even if they are currently middle-income and are not currently being exposed to disproportionate environmental burdens. This is consistent with the CLCPA's text, which directs the CJWG to identify DACs to include "members of groups that have historically experienced discrimination on the basis of race or ethnicity,"²³⁶ rather than merely those who are currently experiencing the most severe impacts of such discrimination. Even within the Roberts Court's narrow equal protection jurisprudence, it can be argued that the remedy for historical government discrimination need not be limited to only those who remain most disadvantaged by it.

Second, the state can acknowledge that it is true that § 7(3) of the CLCPA will protect *low-income* people of color from disproportionate environmental burdens through siting and state permitting. However, a significant body of research indicates that a person's race is a significant predictor of whether that person will experience the impacts of environmental pollution; when income is controlled for, people of color are more likely to be exposed to environmental pollution and hazards than White people.²³⁷ If § 7(3) of the CLCPA es-

236. N.Y. Env't Conserv. Law § 75-0111(1)(c).

237. See, e.g., Robert Bullard et al., *Toxic Wastes and Race at Twenty 1987-2007*, UNITED CHURCH OF CHRIST JUST. AND WITNESS MINISTRIES (2007), <https://www.ucc.org/wp-content/uploads/2021/03/toxic-wastes-and-race-at-twenty-1987-2007.pdf> [on file with the Journal] (finding that a previous study "found race to be more important than socioeconomic status in predicting the location of the nation's commercial hazardous waste facilities," and that this study shows "that race continues to be a significant and robust predictor of commercial hazardous waste facility locations when socioeconomic and other non-racial factors are taken into account. A separate analysis of metropolitan areas alone produces similar results"; in fact, "race is 'a stronger predictor than income, education, and other socioeconomic indicators'"); Paul Mohai & Robin Saha, *Which Came First, People or Pollution? Assessing the Disparate Siting and Post-Siting Demographic Change Hypotheses of Environmental Justice*, ENV'T RSCH. LETTERS, Nov. 18, 2025, at 15-16 (finding that "the racial composition of geographic areas tends to be a stronger independent predictor of which areas [nationwide] are destined to receive hazardous waste [Treatment Storage and Disposal Facilities] than are other socioeconomic characteristics of the areas," and concluding that "racial discrimination and sociopolitical explanations (i.e., the proposition that siting decisions follow the 'path of least resistance') best explain present-day inequities"); Ihab Mikati et al., *Disparities in Distribution of Particulate Matter Emission Sources by Race and Poverty Status*, 108 AM. J. PUB. HEALTH 480 (2018) (finding that the burdens of particulate matter-emitting facilities were 1.28 times higher for non-white Americans than the average population and 1.54 times higher for Black Americans, and that disparities for Blacks were more pronounced than disparities on the basis of income status); Kyle Crowder & Liam Downey, *Interneighborhood Migration, Race, and Environmental Hazards: Modeling Microlevel Processes of Environmental Inequality*, 115 AM. J. SOCIOLOGY 1110, 1110 (2010) (finding that neighborhood industrial pollution is inequitably distributed along racial lines even when education, household income, and other characteristics are controlled); see,

entially works to shield only low-income communities of color from disproportionate environmental impacts, then the result of the CLCPA may be that middle-income communities of color will become significantly more likely to shoulder the burdens of industrial siting and environmental pollution. In other words, because race is a significant factor in where environmental burdens are experienced, if the CLCPA protects only low-income communities of color from disproportionately experiencing such burdens, it may simply reroute them to middle-income communities of color. Therefore, including racial and ethnic demographic data in determining DACs is necessary to allow middle-income communities of color that meet many of the other threshold requirements for identification as a DAC to be protected from shouldering disproportionate burdens; in the language used by the Supreme Court, there is no “workable race-neutral alternative.”²³⁸

Finally, the state could embrace a more ambitious argument: that the CLCPA’s investments in DACs are a means of *satisfying* the requirements of the Equal Protection Clause which the state has historically violated with respect to low-income communities of color. Similarly to the last argument discussed, the state might argue that including race in the criteria is necessary to ensure that communities of color are prioritized for investment even if the community as a whole is middle- rather than low-income. This argument would recognize that government discrimination across sectors including housing, education, and the allocation of environmental burdens has had racialized impacts that affect citizens and communities that are not currently low-income but have still had their economic mobility and quality of life limited by state-sponsored racial discrimination.

To support this argument, the state can note that New York Renew, a coalition that was key in advocating for the CLCPA to be enacted, chose the goal of 40% of climate investment benefits for DACs based on “analysis that this was a level of spending proportional to the targeted population,” because the 2010 U.S. Census shows that

e.g., Lana P. Clark et al., *Changes in Transportation-Related Air Pollution Exposures by Race Ethnicity and Socioeconomic Status: Outdoor Nitrogen Dioxide in the United States in 2000 and 2010*, 125 ENV’T HEALTH PERSPS., Sept. 2017, at 1 (2017) (finding that outdoor nitrogen dioxide disparities by race and ethnicity decreased from 2000 to 2010, but that the mean nitrogen dioxide concentration remained 37% higher for non-White Americans than for White Americans, and that non-White Americans were 2.5 times more likely than White Americans to live in a block group with an average nitrogen dioxide concentration above the World Health Organization annual guideline).

238. *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003).

New York State's population of color is 41.7% of the total population, and the 2014 American Community Survey shows that about 43.7% of households in New York State earn an annual income below \$50,000.²³⁹ Although the CLCPA ultimately mandates a minimum of 35% with a goal of 40%,²⁴⁰ the state can contend along these lines that the use of race is narrowly tailored to the state's compelling interest in addressing historic underinvestment in communities of color, and that the 35–40% mandate was set to *avoid* an equal protection violation that might occur if the CLCPA did not ensure that a sufficient percentage of investment benefits reach communities of color. In other words, the state might argue that, without the use of race in the DAC criteria, the CLCPA would run the risk of entrenching state policies that violate the Equal Protection Clause. According to this view, the CLCPA is a mandate to the State to comply with the Equal Protection Clause, and the 40% goal in conjunction with the use of race in the DAC criteria are a means of preventing constitutional violations.

F. Severability

If, however, a federal court determines that either the CJWG's criteria or the CLCPA's text violates the equal protection doctrine, the state can argue that the criteria or text is severable from the CLCPA as a whole. The law has a section that mandates this result, reading:

If any word, phrase, clause, sentence, paragraph, section, or part of this act shall be adjudged by any court of competent jurisdiction to be invalid, such judgement shall not affect, impair, or invalidate the remainder thereof, but shall be confined in its operation to the word, phrase, clause, sentence, paragraph, section, or part thereof directly involved in the controversy in which such judgement shall have been rendered.²⁴¹

The state's position at this stage is strong. If the CJWG's criteria is declared invalid, the CJWG can simply remove the racial and ethnic demographic indicators, rerun its process, and create a new list of DACs based on the result. It can also make any changes to its process to try to accommodate for the removal, as long as it does not use racial and ethnic data as part of its methodology. If the statutory text

239. *Justice & Equity in the Climate and Community Protection Act*, N.Y. RENEWS, <https://www.nyrenews.org/equity-memo> [<https://perma.cc/YY8W-H3HL>] (last visited Mar. 19, 2023).

240. N.Y. ENV'T CONSERV. LAW § 75-0117 (McKinney 2024).

241. See 2019 N.Y. Laws 106 § 13.

itself is declared invalid, the directive to the CJWG to identify DACs based partly on communities that have experienced discrimination on the basis of race or ethnicity can simply be struck from the statute, and the CJWG can rerun its process without the relevant indicators.

V. CONCLUSION

In the past fifty years, the Supreme Court has dramatically narrowed the field in which the government can consider race and ethnicity in crafting policy. However, there remain viable approaches to crafting race-conscious policy that can withstand strict scrutiny.

While the decision to use racial and ethnic demographic data as indicators in the DAC criteria may make the CLCPA vulnerable to a constitutional challenge, the New York State government can offer a robust defense of its decision at each stage of legal inquiry. This defense would also reflect the ultimate goals of the CLCPA, in recognizing harms that the state has done to low-income communities of color through racial discrimination and through the disproportionate distribution of environmental burdens.

The CLCPA made New York State a leader in fighting climate change and in addressing the legacies of state-sponsored discrimination against low-income communities and communities of color. The model created by New York may be legally vulnerable under a strict and context-insensitive formulation of equal protection doctrine, but it represents a significant step towards a governmental acknowledgement of the massive scale and impacts of hundreds of years of racially discriminatory policies, coupled with a framework and legal obligations for beginning to address those impacts. While a ruling that the state may not consider race in its DAC criteria might not fundamentally alter the CLCPA's implementation, it would be a significant setback for race-conscious government programs that aim to address the long-term effects of state complicity in structural racism.

APPENDIX I

Comparison of Indicators Present in CLCPA/CJWG and CEJST/CEQ
DAC Criteria²⁴²

Indicator	Present in CLCPA/CJWG Criteria	Present in CEJST/CEQ Criteria
Environmental Burdens and Climate Change Risk		
Vehicle traffic density	Yes	Yes (as "Traffic proximity and volume")
Diesel trucks and bus traffic	Yes	Yes (as "Diesel particulate matter exposure")
Particulate matter (PM2.5)	Yes	Yes
Benzene concentration	Yes	No
Wastewater discharge	Yes	Yes
Proximity to remediation sites	Yes	Yes (as "Proximity to Superfund sites")
Proximity to Risk Manage- ment Plan sites	Yes	Yes
Proximity to major oil stor- age facilities	Yes	Yes (as "Underground storage tanks and releases")
Proximity to power genera- tion facilities	Yes	No
Proximity to active landfills	Yes	No
Proximity to municipal waste combustors	Yes	No
Proximity to scrap metal processors	Yes	No
Industri- al/manufacturing/mining land use	Yes	Partial (as "Abandoned mine land"; "Formerly Used Defense Sites")
Housing vacancy rate	Yes	No
Extreme heat projections	Yes	No

242. Compiled from information made available by the Climate Justice Working Group and the Climate and Economic Justice Screening Tool. See DRAFT DAC TECHNICAL DOCUMENTATION, *supra* note 39; see Climate and Econ. Just. Screening Tool, *supra* note 75.

Flooding in coastal and tidally influenced areas (projected)	Yes	Yes (as "Projected flood risk")
Flooding in inland areas (projected)	Yes	Yes (as "Projected flood risk")
Low vegetative cover	Yes	
Agricultural land	Yes	Partial (as "Expected agricultural loss rate")
Driving time to hospitals or urgent/critical care	Yes	No
Expected building loss rate	No	Yes
Expected population loss rate	No	Yes
Projected wildfire risk	No	Yes
Lack of green space	No	Yes
Lack of indoor plumbing	No	Yes
Lead paint	No	Yes
Proximity to hazardous waste facilities	No	Yes
Transportation barriers	No	Yes
Population Characteristics and Health Vulnerabilities		
Low median income	Yes (as "Percent <80% Area Median Income")	Yes
Percent at or below of Federal Poverty Line	Yes	Yes
Percent without bachelor's degree	Yes	X (as "High school education" – percent whose education is less than a high school diploma)
Unemployment rate	Yes	Yes
Percent single-parent households	Yes	No
Percent Latino/a or Hispanic	Yes	No
Percent Black or African American	Yes	No
Percent Asian	Yes	No
Percent Native American or Indigenous	Yes	No
Limited English proficiency	Yes	Yes (as "Linguistic isolation")

Historical redlining score (based on HOLC maps)	Yes	Yes (as "Historic under-investment"; based on HOLC maps)
Asthma	Yes (based on emergency department visits)	Yes (based on share of people who have been told they have asthma)
COPD emergency department visits	Yes	No
Heart attack (MI) hospitalization	Yes	No
Premature deaths	Yes	No
Low birthweight	Yes	No
Percent without health insurance	Yes	No
Percent with disabilities	Yes	No
Percent adults age 65+	Yes	No
Percent renter-occupied homes	Yes	No
Housing cost burden (rental costs)	Yes	Yes
Energy poverty / cost burden	Yes	Yes
Manufactured homes	Yes	No
Homes built before 1960	Yes	No
Percent without internet	Yes	No
Diabetes	No	Yes
Heart disease	No	Yes
Low life expectancy	No	Yes