

January 2000

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Recommended Citation

Kenneth Owen, *Environmental Justice Enforcement Requires Reassessment Under the Equal Protection Clause, Title VI of the Civil Rights Act, and Environmental Statutes*, 30 Golden Gate U. L. Rev. (2000).
<http://digitalcommons.law.ggu.edu/ggulrev/vol30/iss3/2>

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ARTICLE

ENVIRONMENTAL JUSTICE ENFORCEMENT REQUIRES REASSESSMENT UNDER THE EQUAL PROTECTION CLAUSE, TITLE VI OF THE CIVIL RIGHTS ACT, AND ENVIRONMENTAL STATUTES

BY KENNETH OWEN*

Pursuing environmental justice is merely advocating social justice in a socio-physical context-the community biosphere.¹

I. INTRODUCTION

The concept of “environmental justice” requires “the fair treatment of all races, cultures, incomes and educational levels with respect to the development, implementation and enforcement of environmental laws, regulations and policies,” with “fair treatment ‘implying’ that no subgroup of people should be forced to shoulder a disproportionate share of the negative en-

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vironmental impacts of pollution or environmental hazards due to lack of political or economic strength."² The few reported federal cases that have alleged discrimination in environmental justice siting situations under the Equal Protection Clause of the Fourteenth Amendment have been unsuccessful because plaintiffs have been unable to prove intentional or purposeful discrimination.³ Communities of color burdened by environmental hazards then sought judicial relief under Title VI, section 601, of the Civil Rights Act of 1964.⁴ Again, however, the courts required plaintiffs to prove purposeful discrimination.⁵

This requirement has proven to be a formidable barrier to successful environmental litigation. Although the Supreme Court has yet to rule on whether a private cause of action can proceed under the regulations adopted pursuant to Title VI, Section 602,⁶ which say that minority plaintiffs needed only to prove disparate impact to prevail,⁷ the administrative complaints filed under the regulations have been unsuccessful.⁸ Even lawsuits filed under other federal statutes, such as the Clean Water Act, have become more difficult because the Supreme Court has held that plaintiffs, including minority communities, cannot assert standing under the environmental statutes for wholly past violations.⁹ Communities of color will

² Office of Solid Waste & Emergency Response Env'tl. Justice Task Force, U.S. Env'tl. Protection Agency, Draft Final Report 17 (1994).

³ See generally *R.I.S.E. Inc. v. Kay*, 768 F. Supp. 1141 (E.D. Va. 1991), *aff'd without opinion*, 977 F.2d 573 (4th Cir. 1992); *East Bibb Twiggs Neighborhood Ass'n v. Macon-Bibb County Planning & Zoning Comm'n*, 706 F. Supp 880 (M.D. Ga. 1989), *aff'd*, 896 F.2d 1264 (11th Cir. 1989); *Bean v. Southwestern Waste Management Corp.*, 482 F. Supp. 673 (S.D. Tex. 1979), *aff'd without opinion*, 782 F.2d 1038 (5th Cir. 1986).

⁴ Title VI of the Civil Rights Act of 1964, § 601, 42 U.S.C. § 2000d (West 1999).

⁵ See *Alexander v. Choate*, 469 U.S. 287, 293 (1985); *Guardians Ass'n v. Civil Serv. Comm'n of the City of New York*, 463 U.S. 582, 608 n.1 (1983) (Powell, J., concurring).

⁶ See *Chester Residents v. Seif*, 132 F.3d 925 (3d Cir. 1997), *vacated*, 524 U.S. 974 (1998).

⁷ See 42 U.S.C. §2000d-1 (West 1999).

⁸ See Angela Rowen, *EPA MIA*, SAN FRANCISCO BAY GUARDIAN, June 10, 1998 available at <<http://www.sfbg.com/News/32/36/OnGuard/index.html>>.

⁹ See *Steel Co. v. Citizens For A Better Env't*, 523 U.S. 83 (1998).

thus continue to suffer from environmental injustice until advocates can overcome the barriers to proving intentional discrimination.

This article will suggest what is required to prevail under the purposeful discrimination standard under the Equal Protection Clause and Title VI of the Civil Rights Act of 1964. Interestingly, no equal protection environmental justice case or Title VI action has been presented to a jury charged with determining the factual issue of intent. The author will next explore the possibility of winning environmental justice cases under the citizen suit provisions that are part of most environmental statutes. Lastly, the author will suggest arguments to possible defenses that might be raised by defendants.

II. PURPOSEFUL DISCRIMINATION UNDER THE EQUAL PROTECTION CLAUSE

A. IN GENERAL

The Equal Protection Clause of the Fourteenth Amendment provides that “no state shall make or enforce any law which shall . . . deny to any person within its jurisdiction equal protection of the laws.”¹⁰ This guarantee of equal protection applies to actions by both state and local governments.¹¹ Federal governments are also bound by equal protection principles; however, the federal guarantee of equal protection comes from the Supreme Court’s interpretation of the Fifth Amendment’s Due Process Clause.¹² While the Equal Protection Clause does not apply to “merely private conduct, however discriminatory or wrongful,” a private party involved in a conspiracy with a government official can be held liable under civil rights statutes for violating the Equal Protection Clause.¹³ “It is enough

¹⁰ U.S. CONST. amend. XIV, § 1.

¹¹ See *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 173 (1970).

¹² See *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954).

¹³ *Adickes*, 398 U.S. at 169. See also *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 172 (1972).

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that he is a willful participant in joint activity with the State or its agents.”¹⁴

The Equal Protection Clause imposes a general restraint on the governmental use of classifications, such as race, gender, alienage, illegitimacy, wealth, or any other characteristic. To the use of these classifications, a plaintiff can make two types of challenges. The first type of challenge is that the statute or regulation violates equal protection “on its face,” meaning that the classification is written into the statute or regulation.¹⁵ The second type of equal protection challenge is “as applied” and is used if the statute or regulation is valid on its face, yet is being administered in a purposefully discriminatory way.¹⁶ Most challenges to governmental decisions with regard to environmental justice concerns will be of this second type.

In any challenge, a court will apply a strict scrutiny standard of review to any classification that relates to a suspect classification.¹⁷ Such classifications include race, national origin, and sometimes alienage.¹⁸ Because the environmental justice movement, in general, is concerned with governmental action that unfairly affects people of color, the equal protection environmental justice claims will typically require a strict scrutiny standard of review.¹⁹ Under the standard, the classification will be upheld only if it is necessary to promote a compelling governmental interest.²⁰ Significantly, the burden is

¹⁴ *Adickes*, 398 U.S. at 152 (quoting *United States v. Price*, 383 U.S. 787, 794 (1966)).

¹⁵ See *Craig v. Boren*, 429 U.S. 190, 191-192 (1976); *Strauder v. West Virginia*, 100 U.S. 303 (1880).

¹⁶ See *Williams v. Illinois*, 399 U.S. 235, 242 (1970).

¹⁷ See *Korematsu v. United States*, 323 U.S. 214, 216 (1944).

¹⁸ See *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985).

¹⁹ See *Washington v. Davis*, 426 U.S. 229, 242 (1976) (citing *McLaughlin v. Florida*, 379 U.S. 184 (1964)).

²⁰ See *McLaughlin*, 379 U.S. at 192.

upon the governmental body to persuade the court that this classification does so and is thus constitutional.²¹

Strict scrutiny of a suspect classification will only be applied where the government action is intentional.²² As the United States Supreme Court has said, “[p]urposeful racial discrimination invokes the strictest scrutiny of adverse differential treatment. Absent such purpose, differential impact is subject only to the test of rationality.”²³ Consequently, action by the government that produces a disparate impact, without a showing of intentional discrimination, does not create a suspect class, and consequently, strict scrutiny is unavailable.

B. PROVING PURPOSEFUL DISCRIMINATION

If the law discriminates on its face, no showing of purposeful discrimination is necessary because “[a] racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification.”²⁴ Similarly, if the law is neutral on its face and yet is applied in an invidiously discriminatory manner, statistical proof alone is sufficient to prove a violation of the Equal Protection Clause.²⁵ The most difficult cases to prove then are where the law is racially neutral on its face and ostensibly applied in accordance with its terms, yet the governmental action results in

²¹ See *Washington*, 426 U.S. at 241 (1976). “With a prima facie case made out, ‘the burden of proof shifts to the State to rebut the presumption of unconstitutional action by showing that permissible racially neutral selection criteria and procedures have produced the monochromatic result.’” *Id.* (quoting *Alexander v. Louisiana*, 405 U.S. 625, 632 (1972)).

²² See *Wisconsin v. City of New York*, 517 U.S. 1, 18 n.8. “Strict scrutiny of a classification affecting a protected class is properly invoked only where a plaintiff can show intentional discrimination by the Government.” *Id.* (citing *Washington*, 426 U.S. at 239-245).

²³ *Rogers v. Lodge*, 458 U.S. 613, 617 n.5 (1982) (quoting *Washington*, 426 U.S. at 247-48). See also *Wisconsin*, 517 U.S. at 18 n.8.

²⁴ *Personnel Adm’r of Massachusetts v. Feeney*, 442 U.S. 256, 272 (1979) (quoting *Brown v. Board of Education*, 347 U.S. 483 (1954); *McLaughlin*, 379 U.S. 184).

²⁵ See *Gomillion v. Lightfoot*, 364 U.S. 339, 341 (1960); *Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886).

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a disparate impact. In such cases, to prove that the disparate impact, or effect, of the government action is the result of purposeful discrimination requires resort to circumstantial evidence.²⁶

In 1976, the Supreme Court in *Washington v. Davis*²⁷ explicitly required that plaintiffs prove an intent to discriminate in order to establish an equal protection violation.²⁸ In *Washington*, the plaintiffs had failed a written test to determine whether they had acquired the specific level of verbal ability and reading comprehension necessary to become a police officer in the District of Columbia.²⁹ They, as black applicants failed, since blacks failed the test four times as frequently as whites.³⁰ The plaintiffs asserted that this differential impact constituted an equal protection violation even though those who composed the test had no intent to discriminate against blacks.³¹ The Supreme Court held that a neutral law does not violate the Equal Protection Clause *solely* because it results in a racially disproportionate impact; instead, the disproportionate impact must be traced to an intent to discriminate on the basis of race.³²

The *Washington* plaintiffs might have been successful if they had filed a claim under Title VII of the Civil Rights Act of 1964. The *Washington* Court conceded that under Title VII, "employees or applicants proceeding under it need not concern themselves with the employer's possibly discriminatory purpose but instead may focus solely on the racially differential impact of the challenged hiring or promotion practices."³³ The

²⁶ See *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 266 (1977).

²⁷ 426 U.S. 229 (1976).

²⁸ See *id.*

²⁹ See *id.* at 233-34.

³⁰ See *id.* at 230.

³¹ See *id.*

³² See *Washington*, 426 U.S. at 242 (emphasis added).

³³ *Id.* at 238-39.

Court, however, refused to establish a disparate impact standard for the Equal Protection Clause, reasoning that “[w]e have never held that the constitutional standard for adjudicating claims of invidious racial discrimination is identical to the standards applicable under Title VII, and we decline to do so today.”³⁴ The logic behind requiring the higher standard for proving intentional discrimination under the Equal Protection Clause appears to be that government actions, held merely to a disparate impact standard, “would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white.”³⁵ Despite this reluctance, the purposeful discrimination requirement of *Washington* has thus far been extended to such areas as jury selection,³⁶ zoning and public housing,³⁷ and voting rights.³⁸

C. ARLINGTON HEIGHTS ELEMENTS OF PURPOSEFUL DISCRIMINATION

The *Washington* Court further observed that “[d]isproportionate impact is not irrelevant, but is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution.”³⁹ One year later, in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,⁴⁰ the Supreme Court recognized its importance in that “[t]he impact of the official action - - whether it ‘bears more heavily on one race than another’ - - may provide an important starting point.”⁴¹ *Arlington Heights* also said that in addition to an initial

³⁴ *Id.* at 239.

³⁵ *Id.* at 248.

³⁶ See generally *Batson v. Kentucky*, 476 U.S. 79 (1986).

³⁷ See generally *Arlington Heights*, 429 U.S. 252.

³⁸ See generally *Rogers*, 458 U.S. 613.

³⁹ *Washington*, 426 U.S. at 242.

⁴⁰ 429 U.S. 252 (1977).

⁴¹ *Id.* at 266.

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showing of disproportionate impact, circumstantial evidence is required to prove discriminatory intent.⁴² Such circumstantial evidence includes four elements to consider. First, the court should consider the historical background of the decision that might reveal a series or pattern of government action taken for invidious purposes.⁴³ A second consideration is the specific sequence of events immediately preceding the action.⁴⁴ A third are any departures, substantive or procedural, from the ordinary decision-making process and a fourth is the legislative or administrative history, such as contemporary statements by members of the decision-making body, minutes of its meetings, or reports.⁴⁵

1. *Statistical Evidence of Disparate Impact*

Prevailing under the *Arlington Heights* standard is not impossible, but it does require a clear understanding of each component of the inquiry. Statistics are the starting point of any successful equal protection challenge and, in rare cases, statistics alone can prove intentional discrimination. "Sometimes 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."⁴⁶ In *Yick Wo v. Hopkins*,⁴⁷ for example, the Supreme Court reversed a conviction under a municipal ordinance, which was "fair on its face and impartial in appearance."⁴⁸ *Yick Wo* involved a San Francisco ordinance requiring that all laundries housed in wooden buildings be licensed before operating.⁴⁹ Yick Wo, a Chinese citizen, applied for and was refused permission to operate his laundry, and was thereafter convicted of a violation of

⁴² See *id.*

⁴³ See *id.* at 267.

⁴⁴ See *id.*

⁴⁵ See *Arlington Heights*, 429 U.S. at 267.

⁴⁶ *Id.* at 266.

⁴⁷ 118 U.S. 356 (1886).

⁴⁸ *Id.* at 373.

⁴⁹ See *id.* at 357.

the ordinance and sentenced to imprisonment.⁵⁰ The Board of Supervisors of San Francisco granted all but one of the eighty non-Chinese applicants and denied all two hundred Chinese applicants.⁵¹ The Court held:

The fact of this discrimination is admitted. No reason for it is shown, and the conclusion cannot be resisted, that no reason for it exists except hostility to the race and nationality to which the petitioners belong, and which in the eye of the law is not justified. The discrimination is therefore illegal, and the public administration which enforces it is a denial of the equal protection of the laws, and a violation of the fourteenth amendment of the constitution.⁵²

In *Yick Wo*, the disparate impact by itself was sufficient to prove invidious discrimination.⁵³ Similarly, in *Gomillion v. Lightfoot*,⁵⁴ an Alabama statute changed the city boundaries from a square to a twenty-eight-sided figure, allegedly removing "all save only four or five of its 400 Negro voters while not removing a single white voter or resident."⁵⁵ The effect of Alabama's redefining the city boundaries clearly discriminated against blacks; before the change they had had constituted forty percent of the registered voters, after they accounted for only a percent or two of the new city.⁵⁶ "[T]he Court concluded that the redrawing of Tuskegee, Alabama's municipal boundaries left no doubt that the plan was designed to exclude blacks."⁵⁷

Cases such as *Yick Wo* and *Gomillion*, however, are rare. "Absent a pattern as stark as that in *Gomillion* or *Yick Wo*,

⁵⁰ See *id.* at 358.

⁵¹ See *id.* at 359-360.

⁵² *Yick Wo*, 118 U.S. at 374.

⁵³ See *id.*

⁵⁴ 364 U.S. 339 (1960).

⁵⁵ *Id.* at 341.

⁵⁶ See *id.* at 348.

⁵⁷ *Miller v. Johnson*, 515 U.S. 900, 913 (1995).

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impact alone is not determinative and the Court must look to other evidence.”⁵⁸ The point at which this must be done is still unclear as the Court has drawn no bright line. In *Washington v. Davis*, Justice Stevens’ concurring opinion observed that “the line between discriminatory purpose and discriminatory impact is not nearly as bright, and perhaps not quite as critical, as the reader of the Court’s opinion might assume.”⁵⁹ Thus, the advocate should look for statistics that approach the standard established in *Yick Wo* and *Gomillion* as that would end the inquiry. The closer the statistical impact approaches *Yick Wo* and *Gomillion*, the less need for other circumstantial evidence to prove intent.

In several jury-selection cases, however, the Court has found a constitutional violation even when the statistical pattern did not approach the extremes of *Yick Wo* or *Gomillion*.⁶⁰ In *Turner v. Fouche*,⁶¹ cited by the Court in *Arlington Heights*, the Court recognized:

The undisputed fact was that Negroes composed only 37% of the Taliaferro County citizens on the 304-member list from which the new grand jury was drawn. That figure contrasts sharply with the representation that their percentage (60%) of the general Taliaferro County population would have led them to obtain in a random selection.⁶²

From this evidence, the Court held that appellants had made out their prima facie case of jury discrimination because they could show both a substantial disparity between the percentages of Negro residents and those on the new jury list and that the disparity initiated, at least in part, during a portion of the selection process where the jury commissioners invoked

⁵⁸ *Arlington Heights*, 429 U.S. at 266.

⁵⁹ *Washington*, 426 U.S. at 254.

⁶⁰ See *Arlington Heights*, 429 U.S. at 266 n.13.

⁶¹ 396 U.S. 346 (1970).

⁶² *Id.* at 359.

their subjective judgment.⁶³ *Turner* thus stands for the fact that a substantial disparity, that is, a participation reduction from sixty percent to thirty-seven percent, is sufficient for a prima facie showing. While this is a long way from the one hundred percent reduction demonstrated by *Yick Wo*, the advocate must still show a disparate impact.

Generally, in environmental justice cases, census tracts or zip codes have been utilized for demonstrating disparate impact. While these methods have been helpful, more sophisticated approaches could be more effective at showing disparate impact. For example, the district court in *Bean v. Southwestern Waste Management Corp.*⁶⁴ found useful the plaintiffs' definition of "minority" and "Anglo" census tracts.⁶⁵ The plaintiffs suggested that since the city of Houston's population is thirty-nine percent minority and sixty-one percent Anglo, then a minority census tract is one with more than thirty-nine percent minority population and Anglo census tracts are those with more than sixty-one percent Anglo population.⁶⁶ Interestingly, the court suggested that "[i]t may be that more particularized data would show that even those sites approved in predominantly Anglo census tracts were actually located in minority neighborhoods, but the data available here does not show that."⁶⁷ The court concluded that if the solid waste sites were located next to minority communities in predominantly Anglo census tracts, "the outcome of this case would be quite different."⁶⁸ The case might also have been different depending on the size of the area affected by a solid waste site. "If it affects a smaller area than the census tract, it becomes particularly important to know where in each census tract the site is located. If it affects a larger area than the census tract, then a target

⁶³ See *id.* at 360.

⁶⁴ 482 F. Supp. 673 (S.D. Tex. 1979), *aff'd without opinion*, 782 F.2d 1038 (5th Cir. 1986).

⁶⁵ See *id.* at 677.

⁶⁶ See *id.* at 679.

⁶⁷ *Id.* at 677.

⁶⁸ *Id.* at 680.

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area of analysis becomes much more persuasive.⁶⁹ Consequently, statistics, and the way they are presented, can have a significant impact on the outcome of an environmental justice equal protection case.

2. Historical Background of the Decision

Statistical evidence of discriminatory impact can be sufficiently supplemented by the types of proof outlined in *Arlington Heights*. For instance, in *Griffin v. County School Board Of Prince Edward Co.*,⁷⁰ a group of Negro children sued the County School Board of Prince Edward County, Virginia in 1951, alleging that they had been denied admission to public schools attended by white children.⁷¹ In 1954, the Supreme Court held that the Virginia segregation laws denied equal protection to the Negro children and ordered the school board to desegregate.⁷² The board, instead, closed its public schools.⁷³ Since the private schools, supported by state and local tuition grants and tax credits, were operated only for whites, Negro children could not attend school.⁷⁴ In 1964, the Supreme Court was finally able to put an end to the legal maneuvering by the state of Virginia by holding that closing the public schools also denied blacks equal protection.⁷⁵ This case thus illustrates that a historical pattern showing invidious discrimination of "resistance at the state and county level, by legislation, and by lawsuits," can circumstantially prove discriminatory intent.⁷⁶

Likewise, *Davis v. Schnell*⁷⁷ shows that the historical background can prove discriminatory intent. In *Davis*, ten Negro

⁶⁹ *Bean*, 482 F. Supp. at 680.

⁷⁰ 377 U.S. 218 (1964).

⁷¹ *See id.* at 220.

⁷² *See id.*

⁷³ *See id.*

⁷⁴ *See id.* at 222-23.

⁷⁵ *See Griffin*, 377 U.S. at 232.

⁷⁶ *Id.* at 229.

⁷⁷ 81 F. Supp. 872 (S.D. Ala. 1949), *aff'd*, 336 U.S. 933 (1949).

citizens of Mobile County, Alabama challenged the validity of an Amendment to the Alabama Constitution, which required that only those persons who could understand and explain any article of the Federal Constitution could be registered as electors in Alabama elections.⁷⁸ The plaintiffs alleged that the amendment was intended to prevent black citizens from exercising their right to vote.⁷⁹ The district court took judicial notice of the history of the period immediately preceding the adoption of the amendment to support its conclusion that the amendment violated the equal protection clause.⁸⁰

Yet another example lies within *Keyes v. School District No. 1, Denver, Colorado*.⁸¹ On the issue of segregative intent, the Court recognized that “a finding of intentional segregation as to a portion of a school system is not devoid of probative value in assessing the school authorities’ intent with respect to other parts of the same school system.”⁸² Indeed, when the case involves a single school board, it is highly relevant since “the prior doing of other similar acts, whether clearly a part of a scheme or not, is useful as reducing the possibility that the act in question was done with innocent intent.”⁸³

Such “prior doings,” if able to develop into a pattern establishes “a prima facie case of unlawful segregative design on the part of school authorities, and shifts to those authorities the burden of proving that other segregated schools within the system are not also the result of intentionally segregative actions.”⁸⁴ Advocates thus should look for a historical pattern of discrimination in equal protection environmental justice cases to supplement the statistical evidence of disparate impact.

⁷⁸ *See id.* at 874.

⁷⁹ *See id.*

⁸⁰ *See id.* at 878, 880.

⁸¹ 413 U.S. 189 (1973).

⁸² *Id.* at 207.

⁸³ *Id.*

⁸⁴ *Keyes*, 413 U.S. at 208.

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3. Specific Sequence of Events

Statistical evidence of discriminatory impact can also be supplemented by the specific sequence of events immediately preceding the action.⁸⁵ For example, in *Arlington Heights*, the plaintiff attacked the village's refusal to rezone land from single-family to multiple-family, a rezoning that would have allowed construction of low-income integrated housing.⁸⁶ While the Court held that the Village's refusal did not violate the Equal Protection Clause, it also suggested that if the property had always been zoned for multiple-family use, but had then been changed to single-family classification when the integrated project was proposed, "we would have a far different case."⁸⁷

4. Departures from Normal Procedures

Statistical evidence of discriminatory impact can also be supplemented by departures from the normal procedural sequence, such as, for example the elimination of public hearings on the siting of a solid waste facility. In addition to procedural departures, substantive ones are also relevant, "particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached."⁸⁸ In *Dai-ley v. City of Lawton*,⁸⁹ for example, the plaintiffs purchased a former school site in a predominantly white residential neighborhood and planned to build low-income housing on the site.⁹⁰ The plaintiffs applied to the planning commission for the required zone change, which was objected to by a petition signed by about 250 white neighbors.⁹¹ The planning commission then refused to rezone the land even though the surrounding area

⁸⁵ See *Arlington Heights*, 429 U.S. at 267.

⁸⁶ See *id.* at 254-55.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ 425 F.2d 1037 (10th Cir. 1970).

⁹⁰ See *id.* at 1038.

⁹¹ See *id.*

was zoned high density and that both the present and former director testified that from a zoning standpoint there was no reason why the school site should not be rezoned high density.⁹² From this evidence, the Court found there to be a sufficient showing “that the public bodies acted as they did because of the opposition to the project by the residents of the North Addition.”⁹³ Thus, “the record sustain[ed] the holding of racial motivation and of arbitrary and unreasonable action in violation of the Fourteenth Amendment and of [section] 1983.”⁹⁴

5. Legislative or Administrative History

Statistical evidence of discriminatory impact can also be supplemented by the legislative or administrative history, “especially where there are contemporary statements by members of the decision-making body, minutes of its meetings, or reports.”⁹⁵ Consequently, advocates should inquire into the legislative history of the statute or regulation for any evidence of racial prejudice. No matter how much time has elapsed, a provision will continue to be a violation of equal protection so long as it has a discriminatory impact.⁹⁶

D. BEYOND ARLINGTON HEIGHTS

Significantly, *Arlington Heights* provides a five part inquiry into the types of evidence that might support a prima facie showing of discriminatory intent.⁹⁷ This inquiry, however, was not meant to be exhaustive; twenty years after *Arlington Heights*, the Supreme Court in *Reno v. Bossier Parish School*

⁹² *See id.*

⁹³ *Id.* at 1039.

⁹⁴ *Dailey*, 425 F.2d at 1040.

⁹⁵ *Arlington Heights*, 429 U.S. at 268.

⁹⁶ *See Keyes*, 413 U.S. at 210-11. *See also* *Hunter v. Underwood*, 471 U.S. 222, 229-30 (1985).

⁹⁷ *See id.* at 268.

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*Board*⁹⁸ has continued to advise courts to look to the *Arlington Heights* framework for guidance in “examining discriminatory purpose in cases brought under the Equal Protection Clause.”⁹⁹

Once a prima facie case of intentional discrimination is established, the state must rebut the presumption of unconstitutional action by showing that it use racially neutral criteria and procedures.¹⁰⁰ This burden can prove difficult for defendants as *Turner v. Fouche*¹⁰¹ illustrated. There, the state failed to prove that it had “included or excluded no one because of race.”¹⁰² Similarly, in *Keyes*, the Court held that it was insufficient for the state to rely on “some allegedly logical, racially neutral explanation for their actions.”¹⁰³ Instead, their burden was to prove that “segregative intent was not among the factors that motivated their actions.”¹⁰⁴ Additionally, in *Dailey*, the Court held that plaintiffs’ prima facie case “must be met by something more than bald, conclusory assertions that the action was taken for other than discriminatory reasons.”¹⁰⁵ This burden requires the defendant to show that the governmental action would have occurred anyway, even without the discriminatory intent.¹⁰⁶ If the state could establish that it would have taken the same action despite a discriminatory motive, the plaintiff could no longer claim that the state improperly considered race and the defendant would have satisfied the burden of proof.¹⁰⁷

⁹⁸ 520 U.S. 471 (1997).

⁹⁹ *Id.* at 488.

¹⁰⁰ See *Washington*, 426 U.S. at 241 (1976) (quoting *Alexander v. Louisiana*, 405 U.S. 625, 632). See also *Arlington Heights*, 429 U.S. at 270 n.21.

¹⁰¹ 396 U.S. 346 (1970).

¹⁰² *Id.* at 360-61.

¹⁰³ *Keyes*, 413 U.S. at 210.

¹⁰⁴ *Id.*

¹⁰⁵ *Dailey*, 425 F.2d at 1039-40.

¹⁰⁶ See *id.*

¹⁰⁷ See *Arlington Heights*, 429 U.S. at 270 n.21.

Although the *Arlington Heights* five-part inquiry is useful, there is not a bright-line test for proving discriminatory purpose. The Court did, however, begin to develop a more precise definition of intentional discrimination in *Personnel Administrator of Massachusetts v. Feeney*.¹⁰⁸ In this case, Feeney, a woman and nonveteran, challenged a Massachusetts statute that gave veterans an “absolute lifetime” preference for consideration for state civil service jobs as discriminatory against women in violation of the Equal Protection Clause.¹⁰⁹ Although she had passed a number of open competition civil service examinations for better jobs, because of the preference statute, she was ranked in each instance lower than male veterans who had achieved lower test scores than herself; ninety-eight percent of veterans were male.¹¹⁰ Although the Court observed that “[t]he enlistment policies of the Armed Services may well have discriminate[ed] on the basis of sex,”¹¹¹ it nevertheless held that “when the totality of the legislative actions establishing and extending the Massachusetts veterans’ preference are considered, the law remains what it purports to be: a preference for veterans of either sex over nonveterans of either sex, not for men over women.”¹¹² The Court thus concluded that while the substantial edge granted to veterans may reflect an unwise policy, Feeney “ha[d] simply failed to demonstrate that the law in any way reflect[ed] a purpose to discriminate on the basis of sex.”¹¹³

Feeney is significant in clarifying and distinguishing the presumption that a person intends the natural and foreseeable consequences of his voluntary actions.¹¹⁴ Specifically, the Court declared that while it would be inaccurate to state that the impact on women was unintentional because they were fore-

¹⁰⁸ 442 U.S. 256 (1979).

¹⁰⁹ *See id.* at 259.

¹¹⁰ *See id.* at 264, 269-70.

¹¹¹ *Id.* at 278.

¹¹² *Id.* at 280 (quoting *Washington*, 426 U.S. at 242).

¹¹³ *Feeney*, 442 U.S. at 281.

¹¹⁴ *See id.*

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seeable, equal protection requires the plaintiff to prove that the action was taken precisely because of, not in spite of, the discriminatory impact.¹¹⁵ The Court's clarification of intent thus reaffirmed and added to the *Arlington Heights* framework for guidance in determining whether a particular act was motivated by discriminatory animus.¹¹⁶ More significantly, the Court reaffirmed the notion that when governmental action has a disparate impact on a group, "a strong inference that the adverse effects were desired can reasonably be drawn."¹¹⁷ The Court cautioned, however, that this inference is a tool, not proof of discriminatory intent.¹¹⁸ Since the impact here was unavoidable, the policy favoring veterans was legitimate, and there was no evidence demonstrating discriminatory intent, the inference was not helpful to the plaintiffs.¹¹⁹

*Rogers v. Lodge*¹²⁰ further elaborated on the meaning of intent under the equal protection clause. In *Rogers*, the plaintiffs argued that the at-large election system for Burke County, Georgia violated the Equal Protection Clause because it diluted the voting strength of the minority population.¹²¹ According to the 1980 census, the population of Burke County was fifty-four percent black; however, blacks constituted only thirty-eight percent of the registered voters.¹²² As a result, "[n]o Negro ha[d] ever been elected to the Burke County Board of Commissioners."¹²³ From these facts and from the district court's inquiry into the "ability of blacks to participate effectively in the political process,"¹²⁴ the Court affirmed the district

¹¹⁵ See *id.* at 278-79 (quoting *United Jewish Org. v. Carey*, 430 U.S. 144, 179 (1977) (concurring opinion)).

¹¹⁶ See *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 488 (1997).

¹¹⁷ *Feeney*, 442 U.S. at 279 n.25.

¹¹⁸ See *id.*

¹¹⁹ See *id.*

¹²⁰ 458 U.S. 613 (1982).

¹²¹ See *id.* at 616-71.

¹²² See *id.* at 615.

¹²³ *Id.*

¹²⁴ *Id.* at 624.

court's conclusion that "historical discrimination had restricted the present opportunity of blacks effectively to participate in the political process."¹²⁵ Additionally, the Court held that although the election method was 'racially neutral when adopted, [it was] being *maintained* for invidious purposes"¹²⁶ and thus violated the Equal Protection Clause. As *Rogers* illustrates, an additional element that an advocate should inquire into is the due process afforded to communities of color with regard to any governmental action. Examples of important topics to question are whether the process provides them with notice of public meetings of the government action, whether communities of color can participate in the proceedings, and whether the advocates are allowed to present evidence on behalf of the minority communities. The answer to these questions can add to the totality of relevant facts necessary to prove intent.

In *Rogers v. Lodge*, the law was racially neutral when adopted; conversely, in *Hunter v. Underwood*,¹²⁷ the adoption of a law in 1901, although racially neutral on its face, was motivated by a desire to discriminate against blacks on account of race.¹²⁸ Per this law, which disenfranchised persons convicted of any crime, including misdemeanors, involving moral turpitude, the plaintiffs, one black and one white, were blocked from the voter rolls because they had each been convicted of the misdemeanor of cashing a bad check.¹²⁹ In blocking the plaintiffs, the Board of Registrars relied on opinions of the At-

¹²⁵ *Rogers*, 458 U.S. at 625. In affirming the district court's findings of fact and conclusions of law, the Court recognized that the district court applied the proper test outlined in *Washington v. Davis* and *Arlington Heights*:

. Although both cases "rejected the notion that a law is invalid under the Equal Protection Clause simply because it may affect a greater portion of one race than another . . . both cases recognized that discriminatory intent need not be proven by direct evidence. 'Necessarily, 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.'" *Id.* at 618.

¹²⁶ *Id.* at 616 (emphasis in original).

¹²⁷ 471 U.S. 222 (1985).

¹²⁸ *See id.* at 230.

¹²⁹ *See id.* at 224.

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torney General, which held that the misdemeanor of cashing a bad check was a crime involving moral turpitude.¹³⁰ Interestingly, arguably more serious crimes, such as second-degree manslaughter, assault on a police officer, and mailing pornography, were not considered crimes involving moral turpitude.¹³¹ Nevertheless, as a result of this law, blacks were disenfranchised approximately ten times more than whites and had done so from its inception.¹³² While the counsel for the government defendants conceded that race was a factor in adopting the law, they argued that the purpose of the law was to disfranchise poor people, blacks and whites alike and that this motive was permissible under the Equal Protection Clause.¹³³ The Court, however, held that while the law may have been adopted to discriminate against poor people, it would not negate the fact that the state intended to discriminate against all blacks.¹³⁴ A mixed motive, therefore, did not immunize the governmental action from an equal protection challenge.¹³⁵ Consequently, once the plaintiffs proved that racial discrimination was a “substantial” or “motivating” factor behind the law, defendants had to demonstrate that the law would have been enacted anyway.¹³⁶ Here, because the evidence clearly showed that, in 1901, the motivation for the provision in the Alabama Constitution was to discriminate against blacks, the law was unconstitutional.

E. EQUAL PROTECTION ENVIRONMENTAL JUSTICE CASES

Within this *Arlington Heights* framework, the plaintiffs in the three reported federal equal protection environmental jus-

¹³⁰ See *id.*

¹³¹ See *id.* at 227.

¹³² See *Hunter*, 471 U.S. at 227.

¹³³ See *id.* at 230.

¹³⁴ See *id.* at 232.

¹³⁵ See *id.*

¹³⁶ See *id.* at 228.

tice cases were unable to prove intentional discrimination.¹³⁷ Nevertheless, much can be learned from these cases and an advocate for the environmental justice movement should not be discouraged from pursuing an equal protection case if the evidence supports a cause of action. For example, in *Bean v. Southwestern Waste Management Corp.*,¹³⁸ the Texas Department of Health ("TDH") granted a permit to defendant Southwestern Waste Management to operate a solid waste facility in a minority community.¹³⁹ In response, the plaintiffs sought a preliminary injunction against the decision as being racially discriminatory in violation of their civil rights.¹⁴⁰ To obtain a preliminary injunction, the plaintiffs must, among other things, show a substantial likelihood of success on the merits.¹⁴¹ The plaintiffs, however, failed to do so because the statistical data they offered did not rise to the level of discriminatory intent.¹⁴² Further, plaintiffs' assertion of a discriminatory pattern or practice in the placement of solid waste sites was similarly unavailing.¹⁴³ Accordingly, the plaintiffs could not prove discriminatory intent.¹⁴⁴

Regarding the plaintiffs' second theory of liability, which was that "TDH's approval of the permit, in the context of the historical placement of solid waste sites and the events surrounding the application, constituted discrimination," the court found that the statistical evidence, although not focused on TDH's actions so much as the historical trend, still failed un-

¹³⁷ See generally *R.I.S.E. Inc. v. Kay*, 768 F. Supp. 1141 (E.D. Va. 1991), *aff'd without opinion*, 977 F.2d 573 (4th Cir. 1992); *East Bibb Twiggs Neighborhood Ass'n v. Macon-Bibb County Planning & Zoning Comm'n*, 706 F. Supp. 880 (M.D. Ga. 1989), *aff'd*, 896 F.2d 1264 (11th Cir. 1989); *Bean v. Southwestern Waste Management Corp.*, 482 F. Supp. 673 (S.D. Tex. 1979), *aff'd without opinion*, 782 F.2d 1038 (5th Cir. 1986).

¹³⁸ 482 F. Supp. 673 (S.D. Tex. 1979).

¹³⁹ See *id.* at 675.

¹⁴⁰ See *id.*

¹⁴¹ See *id.* at 676.

¹⁴² See *id.* at 677.

¹⁴³ See *Bean*, 482 F. Supp. at 677.

¹⁴⁴ See *id.*

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der close scrutiny.¹⁴⁵ The court was persuaded by the Assistant Attorney General's argument that the historical placement of sites in the eastern half of the city was "because that is where Houston's industry is, not because that is where Houston's minority population is."¹⁴⁶ This reasoning, however, while sufficient for the district court at the time, might not hold up under the subsequent Supreme Court decision in *Hunter v. Underwood*,¹⁴⁷ where the Court held that the presence of the second, non-discriminatory motive, would not immunize the governmental action from an equal protection challenge.

Even though it ruled against the plaintiffs' motion for a preliminary injunction, the district court in *Bean* was sympathetic to the plaintiffs' situation and said that if it were TDH it might have not granted the permit.¹⁴⁸ This was because "[i]t simply does not make sense to put a solid waste site so close to a high school, particularly one with no air conditioning. Nor does it make sense to put the land site so close to a residential neighborhood."¹⁴⁹ The court then noted that "[t]he failure of the plaintiffs to obtain a preliminary injunction does not, of course, mean that they are foreclosed from obtaining permanent relief assuming the case goes forward, discovery could lead to much more solid and persuasive evidence for either side."¹⁵⁰ Consequently, the court also denied TDH's motion to dismiss the complaint.¹⁵¹

In the second reported equal protection environmental justice case, *East Bibb Twiggs Neighborhood Ass'n v. Macon-Bibb County Planning & Zoning Commission*,¹⁵² the plaintiffs alleged that the Macon-Bibb County Planning & Zoning Com-

¹⁴⁵ *Id.* at 678.

¹⁴⁶ *Id.* at 679.

¹⁴⁷ 471 U.S. 222 (1985).

¹⁴⁸ *Bean*, 482 F. Supp. at 679.

¹⁴⁹ *Id.* at 679-80.

¹⁵⁰ *Id.* at 680.

¹⁵¹ *See id.* at 681.

¹⁵² 706 F. Supp 880 (M.D. Ga. 1989), *aff'd*, 896 F.2d 1264 (11th Cir. 1989).

mission's ("Commission") decision to allow the creation of a private waste landfill in a minority census tract was motivated in part by considerations of race in violation of their equal protection rights.¹⁵³ Following extensive discovery by the parties, the court conducted a *non-jury trial* and concluded that in light of the *Arlington Heights* five part inquiry, "this court is convinced that the Commission's decision to approve the conditional use in question was not motivated by the intent to discriminate against black persons."¹⁵⁴ In support, the court observed that the other landfill approved by the Commission was in a majority while neighborhood at that this fact disrupted the asserted patter of discrimination with respect to the location of landfills.¹⁵⁵ The district court, erroneously applying the rather difficult statistical standard established in *Yick Wo* and *Gomillion*, thus concluded that there was not a clear pattern of racially motivated decisions.¹⁵⁶ The court then, rather cursorily, applied *Arlington Heights* and concluded that the Commission's action did not violate the Equal Protection Clause.¹⁵⁷

In the most recently reported federal decision, *R.I.S.E. Inc. v. Kay*,¹⁵⁸ Virginia plaintiffs challenged a decision of the King and Queen County Board of Supervisors, which approved a solid waste landfill site in a predominantly black area of the county, as a violation of their equal protection rights.¹⁵⁹ While the district court found that "[t]he placement of landfills in King and Queen County from 1969 to the present has had a disproportionate impact on black residents," the court concluded that "the plaintiffs have not provided any evidence that satisfies the remainder of the discriminatory purpose equation

¹⁵³ See *id.* at 881.

¹⁵⁴ *Id.* at 884 (quoting *Arlington Heights*, 429 U.S. at 266.

¹⁵⁵ See *id.*

¹⁵⁶ See *id.* at 885.

¹⁵⁷ See *East Bibb Twiggs*, 706 F. Supp. at 887.

¹⁵⁸ 768 F. Supp. 1141 (E.D. Va. 1991), *aff'd without opinion*, 977 F.2d 573 (4th Cir. 1992).

¹⁵⁹ See *id.* at 1143.

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set forth in *Arlington Heights*.¹⁶⁰ In so holding, the court reasoned, that approving the site of the landfill was based on environmental factors, not race.¹⁶¹ This conclusion seems to fly in the face of the court's own findings of historical facts which reveal a pattern of official actions taken for invidious purposes. Specifically, the court first found that the population of King and Queen County is approximately fifty percent black and fifty percent white.¹⁶² Second, it found that sixty-four percent of the blacks live within a half mile radius of the proposed landfill site and that while twenty-one of the twenty-six families living along the three mile stretch of landfill bound traffic are black, the other five are white.¹⁶³ Third, the court found that at the time the Mascot landfill was sited in 1969 and the population living within a one mile radius of the site was one hundred percent black.¹⁶⁴ The court next found that when the Dahlgren landfill was sited in 1971, the estimated ninety-five percent of the population living in the immediate area were black.¹⁶⁵ The court's final finding was that not only was the Owenton landfill was sited in 1977 when an estimated one hundred percent of the residents living within a half-mile radius of the landfill were black, but that the First Mount Olive Baptist Church, a black church, was located one mile from the landfill.¹⁶⁶ These facts alone should have satisfied the *Yick Wo* and *Gomillion* standard because the pattern was "unexplainable on grounds other than race."¹⁶⁷ The court, however, was persuaded by the state's assertion that the approval of the sites was based on the relative environmental suitability of the sites.¹⁶⁸ Furthermore, the district court's reasoning seems to

¹⁶⁰ *R.I.S.E. Inc., v. Kay*, 768 F. Supp. 1144, 1149 (E.D. Va. 1991).

¹⁶¹ *See id.* at 1150.

¹⁶² *See id.* at 1148.

¹⁶³ *See R.I.S.E. Inc., 768 F. Supp. at 1148.*

¹⁶⁴ *See id.*

¹⁶⁵ *See id.*

¹⁶⁶ *See id.* at 1148.

¹⁶⁷ *Arlington Heights*, 429 U.S. at 266 (citing *Gomillion*, 364 U.S. 339; *Yick Wo*, 118 U.S. 356 (emphasis added)).

¹⁶⁸ *See R.I.S.E. Inc., 768 F. Supp. 1144, 1150.*

ignore the Supreme Court's holding in *Hunter v. Underwood*, which instructs that even though there could be two purposes that motivated the governmental action, and yet only one of these was discriminatory against the suspect class, the presence of the second, non-discriminatory motive would not immunize the governmental action from an equal protection challenge.¹⁶⁹ If such had been followed, the burden of proof would have then shifted to the defendants who would have had to show "something more than bald, conclusory assertions that the action was taken for other than discriminatory reasons."¹⁷⁰ In other words, the defendant would have had to show that the governmental action would have occurred anyway, even without the intent. As this might have been difficult, if the district court had applied the proper legal standard, the results could have been different.

F. APPLYING EQUAL PROTECTION PRINCIPLES TO HYPOTHETICAL SITUATIONS

Applying the principles discussed above to a number of hypothetical equal protection environmental justice cases illustrates an effective approach to the challenge posed by proving discriminatory intent. Because Robert Bullard has observed that Environmental Justice is concerned with the distribution of the benefits and burdens of environmental protection, the author suggests that a *benefit* versus *burden* framework is the best way to analyze environmental equal protection claims¹⁷¹ In such an analysis, the first step is to identify the groups benefited and burdened by the government action. One method of identification is by census tract data.¹⁷²

¹⁶⁹ See *Hunter*, 471 U.S. at 231.

¹⁷⁰ *Dailey*, 425 F.2d at 1040.

¹⁷¹ See Robert D. Bullard, *Race and Environmental Justice in the United States*, 18 YALE J. INT'L. L. 319, 334 (1993). Robert Bullard is Ware Professor of Sociology and Director of the Environmental Justice Resource Center at Clark Atlanta University in Atlanta, Georgia.

¹⁷² See FFIEC Geocoding System, (last modified April 22, 1999) <<http://www.ffiec.gov/geocode/>>.

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To illustrate some examples, the hypothetical County of San Franjustco was chosen. See Figure 1. San Franjustco County has a total population of 100,000 and is divided into ten census tracts, A through J, each with a population of 10,000. The total population of San Franjustco County is fifty percent minority and fifty percent white. Therefore, a minority census tract is one with more than fifty percent minority population and a white tract is one with more than fifty percent white population.¹⁷³ Accordingly, by definition, Figure 1 indicates that Census Tracts C, D, F, G, and J are minority census tracts. Conversely, Census Tracts A, B, E, H, and I are white census tracts.

Example 1

The San Franjustco County Board of Supervisors approves a solid waste landfill in Census Tract F, a minority census tract with a minority population of eighty percent. In this case, only the residents of Census Tract F can use the solid waste landfill. Thus, the landfill site both benefits and burdens the entire population of Census Tract F. In this situation, there is no disparate impact, and consequently no violation of the Equal Protection Clause because both the minority population and white population are benefited and burdened equally.

Example 2

The Board of Supervisors approves a solid waste landfill in Census Tract I, a white census tract with a white population of seventy percent. As above, only Census Tract F residents can use the landfill; thus, the site both benefits and burdens the entire population of Census Tract I. In this situation, there is no apparent disparate impact. *Bean* suggests, however, that more particularized data could indicate that even those sites approved in predominantly white census tracts were actually located in minority neighborhoods within the tract. For instance, suppose the thirty percent minority population is lo-

¹⁷³ *Bean*, 482 F. Supp. at 679 (applying the court's definition of "minority census tract" and "Anglo census tract").

cated within one neighborhood of Census Tract I, and the solid waste landfill is located in the minority neighborhood. In such circumstances, “a strong inference that the adverse effects were desired can reasonably be drawn.”¹⁷⁴ A showing of disparate impact on the minority neighborhood within the white census tract would then require supplemental evidence to support a prima facie case of intentional discrimination. An advocate would then be justified in searching for additional circumstantial evidence under the *Arlington Heights* framework.

Example 3

The Board of Supervisors approves a solid waste landfill in Census Tract G, a minority census tract with a minority population of ninety percent. As above, the landfill site both benefits and burdens the entire population of Census Tract G, at least initially. The Board of Supervisors, instead of approving a solid waste landfill in Census Tract E, a white census tract with a white population of ninety percent, approves the expansion of the solid waste facility in Census Tract G, and allows the population of Census Tract E to transport its solid waste to the facility in Census Tract G. The population of Census Tract G is disparately burdened by E’s garbage and the population of Census Tract E is disparately benefited by the Board’s decision. A situation like this comes close to the standard established in *Yick Wo* and *Gomillion*. Little, if any, supplemental evidence should be necessary to prove a prima facie case of intentional discrimination.

Example 4

The Board of Supervisors approves the permits for the construction of two powerplants, which benefit the entire county. One powerplant is approved for construction in Census Tract B, a white census tract with a white population of sixty percent, and the other is approved for construction in Census Tract C, a minority census tract with a minority population of sixty percent. As *East Bibb Twiggs* suggests, there is no

¹⁷⁴ *Feeney*, 442 U.S. at 279 n.25.

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showing of disparate impact, unless the plaintiff can show a pattern of placing the powerplants in minority neighborhoods within the census tracts.

The above examples suggest that the starting point of an equal protection challenge could very well be the ending point. Clearly, without disparate impact, there is no equal protection violation. What might appear at first blush to be an environmental justice issue may simply be the only area to site a particular facility. The advocate thus must make an intelligent assessment of the impact before taking on the case.

G. SUMMARY

The plaintiffs in the three reported federal equal protection environmental justice cases, which relied on the *Arlington Heights* framework, were unable to prove intentional discrimination.¹⁷⁵ Unfortunately, judges, acting as the fact finder, decided all these cases. It is strongly suggested that had a jury, especially one composed of a representative minority community, decided the factual issue of discriminatory intent, the results might have been quite different.

III. PURPOSEFUL DISCRIMINATION UNDER TITLE VI OF THE CIVIL RIGHTS ACT

A. IN GENERAL

Some environmental justice advocates, frustrated by the discriminatory intent standard under the Equal Protection Clause, have turned to Title VI of the Civil Rights Act of 1964, section 601 of which provides that “[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity re-

¹⁷⁵ See generally *R.I.S.E. Inc.*, 768 F. Supp. 1141, *aff'd without opinion*, 977 F.2d 573 (4th Cir. 1992); *East Bibb Twiggs*, 706 F. Supp 880, *aff'd*, 896 F.2d 1264 (11th Cir. 1989); *Bean*, 482 F. Supp. 673, *aff'd without opinion*, 782 F.2d 1038 (5th Cir. 1986).

ceiving Federal financial assistance.¹⁷⁶ Section 602 authorizes and directs federal agencies to issue rules and regulations to implement this prohibition.¹⁷⁷ Before these rules and regulations can become effective, however, Presidential approval must be obtained.¹⁷⁸ Once that is obtained, federal agencies, such as the Environmental Protection Agency (“EPA”), are authorized to terminate aid to state or local agencies that receive federal funds or to take any other step authorized by law.¹⁷⁹ Before aid may be terminated, however, the head of the Federal Department or agency must file a written report of the circumstances and grounds for such action with the committees of the House of Representatives and Senate having legislative jurisdiction over the program or activity involved.¹⁸⁰ Furthermore, no action becomes effective until thirty days have elapsed after the filing of such report.¹⁸¹ After the thirty days and after federal aid has been terminated, Section 603 of Title VI affords judicial review of agency orders to halt federal aid.¹⁸²

Title VI was “meant to cover only those situations where federal funding is given to a non-federal entity which, in turn, provides financial assistance to the ultimate beneficiary.”¹⁸³ In these situations, funds may be halted or denied for any program or activity defined in section 606 that receives federal assistance by way of grant, loan, or contract other than a contract of insurance or guaranty.¹⁸⁴ Thus, when a department or agency of a state or local government receives federal financial

¹⁷⁶ 42 U.S.C. § 2000d (West 1999).

¹⁷⁷ *Id.* § 2000d-1.

¹⁷⁸ *See id.*

¹⁷⁹ *See id.*

¹⁸⁰ *See id.*

¹⁸¹ *See* 42 U.S.C. § 2000d-1.

¹⁸² 42 U.S.C. § 2000d-2 (West 1999).

¹⁸³ *Williams v. Glickman*, 931 F. Supp. 1, 6 (D.D.C. 1996) (quoting *Soberal-Perez v. Heckler*, 717 F.2d 36, 38 (2d Cir. 1983), *cert. denied*, 466 U.S. 929 (1984)). *See also* 42 U.S.C. § 2000d-4a (West 1999).

¹⁸⁴ 42 U.S.C. § 2000d-4a (West 1999)(added by the Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988)).

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assistance, Title VI coverage extends to *all* programs or activities, "including those programs and activities that are not EPA-funded."¹⁸⁵ "Program or activity" is defined as "all of the operations of a state department or agency, not just the specific program or activity receiving federal funds."¹⁸⁶ Conversely, "Title VI does not apply to programs conducted directly by federal agencies."¹⁸⁷

The threshold question in a Title VI case then, is whether the state or local government defendant is receiving federal funds. Typically, federal financial assistance for environmental protection to state and local governments is extensive because most federal environmental laws provide funding for state programs.¹⁸⁸ On an annual basis, the EPA awards financial assistance in the form of grants to state and local agencies that administer continuing environmental programs under statutes that EPA is charged to administer, including the Clean Air Act,¹⁸⁹ the Clean Water Act,¹⁹⁰ and the solid Waste Disposal Act.¹⁹¹ Thus, it should not be too difficult for the environmental justice advocate to establish a federal financial nexus under Title VI.

B. GUARDIANS REQUIRES PROOF OF PURPOSEFUL DISCRIMINATION

In *Guardians Ass'n v. Civil Service Commission of New York*,¹⁹² the Supreme Court decided whether Title VI reaches

¹⁸⁵ EPA, *Interim Guidance for Investigation of Title VI Administrative Complaints Challenging Permits* 3 (Feb.1998) <<http://www.es.epa.gov/oeca/oej/titlevi.html>>.

¹⁸⁶ *Sandoval v. Hagan*, 7 F. Supp. 2d 1234, 1250 (M.D.Ala. 1998).

¹⁸⁷ *Williams*, 931 F. Supp. at 5 (quoting *Fagan v. United States Small Bus. Admin.*, 783 F.Supp. 1455, 1456 n.10 (D.D.C. 1992), *aff'd.*, 19 F.3d 684 (D.C. Cir. 1992)).

¹⁸⁸ Richard J. Lazarus, *Pursuing 'Environmental Justice': The Distributional Effects of Environmental Protection*, 87 NW. U. L. REV. 787 (1993).

¹⁸⁹ 42 U.S.C. § 7401(West 1999).

¹⁹⁰ 33 U.S.C. § 1251 (West 1999).

¹⁹¹ 42 U.S.C. § 6901 (West 1999).

¹⁹² 463 U.S. 582 (1983).

both intentional and disparate-impact discrimination.¹⁹³ *Guardians* involved a class of minority police officers who claimed that the City of New York violated Title VI by appointing and terminating officers based on an examination that had a discriminatory impact on African-American and Hispanic candidates.¹⁹⁴ Although seven members of the court agreed that proving a violation required discriminatory intent, the rationale behind that rule did not command a majority.¹⁹⁵ Justice Powell even remarked in his concurring opinion that the lack of a majority opinion would “further confuse rather than guide” the law interpreting Title VI.¹⁹⁶ Two years later, in *Alexander v. Choate*,¹⁹⁷ a unanimous Court clarified the holding of *Guardians* and established a two-part test to determine whether a violation had occurred.¹⁹⁸ In the first prong, the Court held that Title VI directly reached only intentional discrimination.¹⁹⁹ In the second, the Court held that disparate impact claims were governed by agency regulations implementing Title VI.²⁰⁰

In *Cannon v. University of Chicago*,²⁰¹ cited in *Guardians*, eight justices agreed that Title VI applied to private actions against a state or local agencies that received federal funds.²⁰² Furthermore, they recognized that the question of whether a plaintiff has a cause of action “is analytically distinct and prior to the question of what relief, if any, a litigant may be entitled to receive.”²⁰³ Thus, when answering the first prong in *Alexan-*

¹⁹³ See *id.* at 584.

¹⁹⁴ See *id.* at 585.

¹⁹⁵ See *Alexander v. Choate*, 469 U.S. 287, 293 (1985).

¹⁹⁶ *Guardians*, 463 U.S. at 608 (Powell, J., concurring).

¹⁹⁷ 469 U.S. 287 (1985).

¹⁹⁸ See *id.* at 293.

¹⁹⁹ See *id.*

²⁰⁰ See *id.*

²⁰¹ 441 U.S. 677 (1979).

²⁰² *Guardians*, 463 U.S. at 594-595.

²⁰³ *Id.* at 595.

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der, “[t]he usual rule is that where legal rights have been invaded and a cause of action is available, a federal court may use any available remedy to afford full relief.”²⁰⁴ Consequently, in *Guardians*, Justice White, announcing the judgment of the Court, concluded, “compensatory relief, or other relief based on past violations of the conditions attached to the use of federal funds, is *not available* as a private remedy for Title VI violations not involving intentional discrimination.”²⁰⁵ In other words, damages are available in a private cause of action only for intentional violations of Title VI. Supporting this interpretation, the Court in *Franklin v. Gwinnett County Public Schools*,²⁰⁶ observed that the clear majority of the *Guardians* Court “expressed the view that damages were available under Title VI in an action seeking remedies for an intentional violation, and no Justice challenged the traditional presumption in favor of a federal court’s power to award appropriate relief in a cognizable cause of action.”²⁰⁷

C. TITLE VI REGULATIONS ONLY REQUIRES PROOF OF DISPARATE IMPACT

Soon after Title VI was enacted, a Presidential task force, including the Justice Department, produced model Title VI enforcement regulations mandating that “recipients of federal funds not use criteria or methods of administration which have the *effect* of subjecting individuals to discrimination.”²⁰⁸ Thereafter, seven federal agencies and departments carrying out this mandate quickly promulgated regulations that applied a disparate impact or effects test.²⁰⁹ Thus, while a cause of action

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 602-603 (emphasis added).

²⁰⁶ 503 U.S. 60 (1992).

²⁰⁷ *Id.* at 70. *See also* Lane v. Pena, 518 U.S. 187, 191(1996) (citing *Franklin* for the interpretation that a “clear majority” of the Court in *Guardians* confirmed that damages were available for intentional violations of Title VI).

²⁰⁸ *Guardians*, 463 U.S. at 618 (Marshall, J., dissenting) (emphasis in original) (citing 45 C.F.R. § 80.3(b)(2) (1964)).

²⁰⁹ *See id.*

brought under the statute requires proof of discriminatory intent, an administrative claim filed with a federal agency under the regulations requires only proof of disparate impact.

After the initial promulgation of regulations, all Cabinet Departments and about forty federal agencies adopted standards barring programs with a discriminatory impact.²¹⁰ In 1984, pursuant to Section 602 of Title VI, EPA's Office of Civil Rights ("OCR"), which handles Title VI complaints, similarly issued regulations prohibiting recipients from using:

criteria or methods of administering its program which have the *effect* of subjecting individuals to discrimination because of their race, color, national origin, or sex, or have the *effect* of defeating or substantially impairing accomplishment of the objectives of the program with respect to individuals of a particular race, color, national origin or sex.²¹¹

Unfortunately, environmental justice groups have had little success filing Title VI complaints with the EPA. As a result, environmental justice groups from around the country met from May 31 to June 1, 1998 in Oakland, California for the annual conference of the National Environmental Justice Advisory Council ("NEJAC") to demand that the Environmental Protection Agency prosecute polluters of low-income and minority communities under its regulations.²¹² In response to this

²¹⁰ See *Guardians*, 463 U.S. at 619 (Marshall, J., dissenting). "Regulations of the Cabinet Departments are as follows. Dept. of Agriculture, 7 C.F.R. § 15.3(b)(2) (1982); Dept. of Commerce, 15 C.F.R. § 8.4(b)(2) (1982); Dept. of Defense, 32 C.F.R. § 300.4(b)(2) (1982); Dept. of Education, 34 C.F.R. § 100.3(b)(2) (1982); Dept. of Energy, 10 C.F.R. §§ 1040.13(c), (d) (1982); Dept. of Health and Human Services, 45 C.F.R. §§ 80.3(b)(2), (3) (1982); Dept. of Housing and Urban Development, 24 C.F.R. §§ 1.42(2)(i), (3) (1982); Dept. of Interior, 43 C.F.R. §§ 17.3(b)(2), (3) (1982); Dept. of Justice, 28 C.F.R. §§ 42.104(b)(2), (3) (1982); Dept. of Labor, 29 C.F.R. §§ 31.3(b)(2), (3) (1982); Dept. of State, 22 C.F.R. § 141.3(b)(2) (1982); Dept. of Transportation, 49 C.F.R. §§ 21.5(b)(2), (3) (1982); Dept. of Treasury, 31 C.F.R. § 51.52(b)(4) (1982). For a listing of the federal agencies with such standards, see CFR Index (1982)." *Id.* at n.7.

²¹¹ 40 C.F.R. § 7.35(b) (1999) (emphasis added).

²¹² See Angela Rowen, *EPA MIA*, SAN FRANCISCO BAY GUARDIAN (June 10, 1998) at 1 available at <<http://www.sfbg.com/News/32/36/OnGuard/index.html>>.

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demand, Ann Wood, head of the OCR, told environmentalists that the agency does not have the resources to process all the complaints it receives.²¹³ Indeed, EPA has received fifty Title VI complaints since 1993 and of those, twenty-eight have been rejected, fifteen are under investigation, and seven are pending approval or rejection; not one, however, has been upheld.²¹⁴

In February of 1998, the OCR released its Interim Guidance for Investigation of Title VI Administrative Complaints Challenging Permits, which is intended to provide a framework for processing the increasing number of Title VI complaints alleging discriminatory *effects* from the issuance of pollution control permits by state and local agencies that receive EPA funding.²¹⁵ As explained in the Guidance, one of the conditions for receiving funding under EPA's continuing environmental program grants is that the recipient agencies comply with EPA's Title VI regulations for as long as any EPA funding is extended.²¹⁶ In the event that EPA finds discrimination in a recipient's permitting program and the recipient is not able to come into compliance voluntarily, EPA is required by its Title VI regulations to initiate procedures to deny, annul, suspend, or terminate EPA funding.²¹⁷ EPA may also use any other means authorized by law, including a referral of the matter to the Department of Justice, to obtain compliance.²¹⁸

In *Select Steel Corp. of America*, the first case to be adjudicated under Title VI regulations and EPA's Interim Guidance, EPA dismissed the complaint after an investigation and adjudication that lasted an incredibly short period of only two months.²¹⁹ Within this time frame, as outlined in EPA's In-

²¹³ See *id.*

²¹⁴ See *id.* at 2.

²¹⁵ See EPA, *Interim Guidance supra* note 185.

²¹⁶ See 40 C.F.R. § 7.80(a)(2)(iii) (1999).

²¹⁷ See 40 C.F.R. §§ 7.115(e), 7.130(b) (1999).

²¹⁸ See 40 C.F.R. § 7.130(a) (1999).

²¹⁹ See EPA File No. 5R-98-R5 (Select Steel Complaint) available at <<http://www.epa.gov/reg50opa/steelcvr.htm>> (Complaint filed June 9, 1998; Accepted

terim Guidance, EPA was to follow five basic steps in analyzing the allegations of discriminatory effects from a permit decision. In the first step of this process, EPA was “to identify the population affected by the permit that triggered the complaint.”²²⁰ In *Select Steel*, however, EPA found no adverse effect from the permitted activity, and therefore, found no discriminatory effect that would violate Title VI and EPA’s implementing regulations.²²¹ EPA had thus conducted merely a cursory one-step evaluation and dismissed the complaint without considering steps two through five.

It is interesting to note that EPA’s Interim Guidance states that an individual may file a private right of action in court to enforce the nondiscrimination requirements in Title VI or EPA’s implementing regulations without first exhausting administrative remedies.²²² This statement is supported by a footnote to the Third Circuit Court of Appeal’s decision in *Chester Residents Concerned for Quality Living v. Seif*.²²³ The Supreme Court, however, has subsequently vacated *Chester Residents*.²²⁴ Thus, whether a private right of action exists to enforce the regulations is unclear.

The existence of this right is also unclear because on October 21, 1998, funds for the Interim Guidance were suspended until the Guidance became finalized.²²⁵ As of March 3, 2000,

for Investigation on August 17, 1998; Dismissed on October 30, 1998). “After reviewing all of the materials submitted and information gathered during the investigation, EPA has not found a violation of Title VI and EPA’s implementing regulations. Accordingly, EPA is dismissing the complaint as of the date of this letter.” *Id.* at 5.

²²⁰ EPA, *Interim Guidance supra* note 185 at 8. “The affected population is that which suffers the adverse impacts of the permitted activity.” *Id.*

²²¹ See EPA File No. 5R-98-R5 (Select Steel Complaint).

²²² See *id.* at 3.

²²³ See *id.* at 10.

²²⁴ See 524 U.S. 974 (1998).

²²⁵ See H.R. 4194, Department of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1999 (Enrolled Bill, Sent to President) signed on October 21, 1998. “[N]one of the funds made available in this Act may be used to implement or administer the interim guidance issued on February 5, 1998.” *Id.*

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OCR was still in the process of revising the Interim Guidance, with no date proposed for publishing the Final Guidance.²²⁶ Whenever this Guidance is finally published, however, it may or may not allow for a private right of action, as it does now, without first exhausting the Title VI administrative complaint procedures as is currently required by well-settled case law. Moreover, it may be difficult to circumvent the Supreme Court's reasoning that "[w]here the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures."²²⁷ Nevertheless, while funding is still unavailable any administrative complaints filed after October 21, 1998 will be processed under the regulations.²²⁸

D. CHESTER RESIDENTS PROVIDES FOR A PRIVATE CAUSE OF ACTION UNDER TITLE VI REGULATIONS

In *Chester Residents for Quality Living v. Seif*,²²⁹ city residents and a nonprofit public interest corporation brought an action against the Pennsylvania Department of Environmental Protection Agency based on Title VI and EPA's regulations regarding the issuance of permits for the construction of waste facilities.²³⁰ The defendants moved to dismiss for both failure to state a claim under Title VI, as the plaintiffs did not allege discriminatory intent, and for failure to state a claim under EPA regulations, as there is no private right of action under them.²³¹ The district court granted the defendants motion to dismiss Claim I, which alleged that the defendants violated Title VI, because they did not allege discriminatory intent; the court, however, granted plaintiffs' leave to amend their complaint.²³² The court also dismissed Claims II and III, which alleged that

²²⁶ Telephone Interview with Michael Mattheisen, Program Analyst, US EPA, Office of Civil Rights (March 3, 2000).

²²⁷ *Morton v. Ruiz*, 415 U.S. 199, 235 (1974).

²²⁸ *See id.* *See also* 40 C.F.R. §§ 7.120-7.130 (1999).

²²⁹ 944 F. Supp. 413 (E.D. Pa. 1996).

²³⁰ *See id.* at 414-15.

²³¹ *See id.* at 415.

²³² *See id.* at 417.

the defendants violated EPA's regulations, finding no private cause of action existed under the EPA civil rights regulations promulgated pursuant to section 602 of Title VI.²³³ Subsequently, the plaintiffs decided not to amend their complaint and the district court therefore entered a final judgment on that count.²³⁴ This may have been an error for the plaintiffs given the apparent disparate impact and supporting historical evidence of discrimination.²³⁵

The plaintiffs, nevertheless, appealed to the United States Court of Appeals for the Third Circuit the issue of whether a private right of action exists under the regulations promulgated pursuant to Section 602 of Title VI.²³⁶ In analyzing this issue, the Third Circuit stated that because *Guardians* did not decide whether a private right of action existed under the section and because it was a case of first impression for the circuit, it would apply its own three-prong test to determine whether such a right existed in this case.²³⁷ After doing so, the Third Circuit concluded "that private plaintiffs may maintain an action under discriminatory effect regulations promulgated by federal administrative agencies pursuant to section 602 of Title VI of the Civil Rights Act of 1964."²³⁸

Following the Third Circuit's decision on December 30, 1997, the defendants then filed a Petition for Writ of Certiorari.²³⁹ Two months later, the Petition for Writ of Certiorari

²³³ See *id.*

²³⁴ *Chester Residents v. Seif*, 132 F.3d 925, 928 (3d Cir. 1997).

²³⁵ See *Chester Residents*, 944 F. Supp. 413. Plaintiffs point to defendants grant of five waste facility permits for facilities located within Chester since 1987. Only two Census Tracts in all of Delaware County contained more than one waste facility and both of these were located in areas with populations that were predominately African-American. See *id.* at 415-16.

²³⁶ See *Chester Residents*, 132 F.3d at 927.

²³⁷ See *id.* at 929, 933.

²³⁸ *Id.* at 937.

²³⁹ See *Chester Residents*, 132 F.3d 925, petition for cert. filed (March 30, 1998) (No. 97-1620).

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was granted.²⁴⁰ On August 17, 1998, however, the Supreme Court vacated the Third Circuit's decision as moot because four months earlier, in April 1998, the petitioners had revoked the waste facilities permit after it had failed to apply for an extension.²⁴¹ The Court thus remanded the case back to the Third Circuit with instructions to dismiss, citing *United States v. Munsingwear, Inc.*²⁴² Under *Munsingwear*, the "established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending [a] decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss."²⁴³ This procedure not only allows for "future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance," but also preserves the rights of all the parties and prejudices no one.²⁴⁴

Because the Supreme Court's decision clears the path for future litigation, if the Pennsylvania Department of Environmental Protection Agency reissues the permit for the construction of the waste facility, another plaintiff would have to retry the issue of whether a private right of action exists under discriminatory effect regulations promulgated by federal administrative agencies pursuant to section 602 of Title VI of the Civil Rights Act of 1964. As of now, because of the vacated decision, the Supreme Court has never decided the issue. Several other circuit courts nevertheless seem to believe that an implied cause of action in federal district court exists under Title VI regulations.

²⁴⁰ See *Seif v. Chester Residents Concerned for Quality Living*, 524 U.S. 915 (1998), cert granted (U.S. June 8, 1998) (No. 97-1620).

²⁴¹ See *Seif*, 524 U.S. 974.

²⁴² 340 U.S. 36 (1950).

²⁴³ *Id.* at 39-40.

²⁴⁴ See *id.*

E. SEVERAL CIRCUIT COURTS PROVIDE FOR A PRIVATE CAUSE OF ACTION UNDER TITLE VI REGULATIONS

While the Third Circuit in *Chester Residents* correctly observed that the Supreme Court in *Guardians* did not “explicitly address whether a private right of action exists under discriminatory effect regulations promulgated under section 602,”²⁴⁵ other Circuit Courts have expressly found that a private cause of action can be maintained in federal district court under the regulations. In *David K. v. Lane*,²⁴⁶ for example, the Seventh Circuit observed that “[i]t is clear that plaintiffs may maintain a private cause of action to enforce the regulations promulgated under Title VI of the Civil Rights Act.”²⁴⁷ The court also observed, however, that “plaintiffs need not show intentional discriminatory conduct to prevail on a claim brought under these administrative regulations. Evidence of a discriminatory effect is sufficient.”²⁴⁸

In another Seventh Circuit case, *Gomez v. Illinois State Board Of Education*,²⁴⁹ the court recognized that “[a]lthough the voting of the Justices may be difficult for the reader to discern at first, a majority of the Court in *Guardians Association* concluded that a discriminatory-impact claim could be maintained under those regulations, although not under the statute.”²⁵⁰ The Seventh Circuit, however, clearly misconstrued *Guardians* for the proposition that “the plaintiff’s Title VI claim based on the implementing regulations survives the defendant’s 12(b)(6) challenge.”²⁵¹

²⁴⁵ *Chester Residents*, 132 F.3d at 929.

²⁴⁶ 839 F.2d 1265 (7th Cir. 1988).

²⁴⁷ *Id.* at 1274 (quoting *Cannon v. University of Chicago*, 441 U.S. 677 (1979); *Guardians*, 463 U.S. 582.

²⁴⁸ *Id.*

²⁴⁹ 811 F.2d 1030, 1044-1045 (7th Cir. 1987).

²⁵⁰ *Id.* at 1044-1045 (quoting *Guardians*, 463 U.S. at 607, n. 27, 608, n. 1).

²⁵¹ *Id.* at 1045.

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In another case, *Larry P. v. Riles*,²⁵² the Ninth Circuit Court of Appeals held that “proof of discriminatory effect suffices to establish liability when the *suit* is brought to enforce regulations issued pursuant to the statute rather than the statute itself.”²⁵³ While the Ninth Circuit accurately quotes Justice Powell’s footnote in *Guardians*, the very next sentence states that “the regulations may be enforced only in a *suit pursuant to 42 U.S.C. § 1983*; anyone invoking the implied right of action under Title VI would be limited by the discriminatory-intent standard to prove violations of Title VI.”²⁵⁴ The latter statement is incorrect because the Supreme Court, in *Alexander v. Choate*, which was decided later, held that “actions [by state agencies receiving federal funds] having a disparate impact on minorities could be redressed through *agency regulations* designed to implement the purposes of Title VI.”²⁵⁵ Consequently, the Ninth Circuit’s reasoning that it has subject-matter jurisdiction over Title VI disparate-impact claims is clearly erroneous.

The Eleventh Circuit, in *Elston v. Talladega County Board of Education*,²⁵⁶ stated that “the regulations promulgated pursuant to Title VI may validly proscribe actions having a disparate impact on groups protected by the statute, even if those actions are not intentionally discriminatory.”²⁵⁷ Thus, without ever deciding the issue, the Eleventh Circuit assumed that there was a private right of action in federal district court to redress violations of Title VI regulations.

Similarly, in *Villanueva v. Carere*,²⁵⁸ the Tenth Circuit assumed, without ever deciding that it had subject-matter juris-

²⁵² 793 F.2d 969 (9th Cir. 1984).

²⁵³ *Id.* at 981-82 (quoting *Guardians*, 463 U.S. at 608 n. 1 (Powell, J., concurring) (emphasis added).

²⁵⁴ *Guardians*, 463 U.S. at 608 n.1 (emphasis added).

²⁵⁵ *Alexander*, 469 U.S. at 293 (emphasis added).

²⁵⁶ 997 F.2d 1394 (11th Cir. 1993).

²⁵⁷ *Id.* at 1406 (quoting *Guardians*, 463 U.S. at 584, n. 2).

²⁵⁸ 85 F.3d 481 (10th Cir. 1996).

diction over Title VI regulations, that a private right of action was available under the regulations.²⁵⁹ The Court observed that “[a]lthough Title VI itself proscribes only intentional discrimination, certain regulations promulgated pursuant to Title VI prohibit actions that have a disparate impact on groups protected by the act, even in the absence of discriminatory intent.”²⁶⁰ The Tenth Circuit then went on, without jurisdiction, to uphold the “district court’s findings that neither the school closings nor the opening of PSAS resulted in a negative disparate impact on the Hispanic population.”²⁶¹ Thus, the court found for the appellees with respect to the parents’ Title VI claims.²⁶² Significantly, the district court, as well as the Tenth Circuit, assumed jurisdiction for an implied right of action under the regulations. Thus, it would appear that the courts are confusing the term “claim under the regulations” for a “claim under a lawsuit” filed in federal district court.

While a number of circuit court of appeal decisions seem to allow a private cause of action under the regulations in federal district court,²⁶³ the Supreme Court in *Alexander v. Choate*²⁶⁴ seems to suggest that there is *no* private right of action in federal district court under Title VI regulations when it held that “actions having an unjustifiable disparate impact on minorities could be redressed through *agency regulations* designed to implement the purpose of Title VI.”²⁶⁵ This, more significantly, is supported by EPA Title VI regulations, which expressly provide private parties with an administrative mechanism through which they can raise allegations of unintentional dis-

²⁵⁹ *See id.*

²⁶⁰ *Id.* at 486 (quoting *Guardians*, 463 U.S. at 584, n. 2).

²⁶¹ *Id.* at 487.

²⁶² *See id.*

²⁶³ *See Chester Residents*, 132 F.3d at 936-37 (collecting cases).

²⁶⁴ 469 U.S. 287 (1985).

²⁶⁵ *Id.* at 293 (emphasis added). *See also Guardians*, 463 U.S. at 610, n.3 (Powell, J., concurring). “Congress’s creation of an express administrative procedure for remedying violations *strongly suggests* that it did not intend that Title VI rights be enforced privately either under the statute itself or under § 1983.” *Id.* (emphasis added).

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crimination.²⁶⁶ Because it is axiomatic that plaintiffs must first exhaust administrative remedies, the environmental justice advocate must first look to the agency regulations for procedures to resolve state actions that have an unjustifiable disparate impact on communities of color.

F. JUDICIAL REVIEW OF ADMINISTRATIVE PROCEEDINGS

Regardless of whether the Title VI regulations allow for a private right of action, administrative actions thereunder may be challenged in Federal District Court under the Administrative Procedure Act ("APA").²⁶⁷ Under this Act, a plaintiff need not establish a private right action under a statute.²⁶⁸ Rather, because EPA's Title VI regulations provide for a federal administrative complaint process,²⁶⁹ any agency action can be challenged under the APA.²⁷⁰ Where Title VI agency regulations do *not* provide for an administrative complaint procedure, however, the advocate could presumably go directly to district court.²⁷¹

Judicial review under the APA requires both federal agency action and finality. Regarding the first requirement of a federal agency action, Section 702 provides in part, "[a] person suffering legal wrong because of agency action, . . . is entitled to judicial review thereof."²⁷² Moreover, an action in Federal District Court, which seeks a relief *other than money damages*

²⁶⁶ See 40 C.F.R. §§7.120-7.130 (1999). "A person who believes that he or she or a specific class of persons has been discriminated against in violation of this part may file a complaint." *Id.* at § 7.120(a).

²⁶⁷ See 5 U.S.C.A. §§ 701(a), 702 (West 1999).

²⁶⁸ See *Chrysler Corp. v. Brown*, 441 U.S. 281, 317 (1979). See also *California v. Sierra Club*, 451 U.S. 287 (1981).

²⁶⁹ 40 C.F.R. § 7.120-7.130 (1999).

²⁷⁰ 5 U.S.C. § 551 (West 1999).

²⁷¹ *Rosado v. Wyman*, 397 U.S. 397, 406 (1970) ("neither the principle of 'exhaustion of administrative remedies' nor the doctrine of 'primary jurisdiction' has any application" to a situation where the agency lacks procedures for complainants to "trigger and participate in" the administrative process). See also *Cannon*, 441 U.S. at 707, n. 41.

²⁷² 5 U.S.C. § 702 (West 1999).

and states a claim that an “agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority” will not be dismissed or denied “on the ground that it is against the United States or that the United States is an indispensable party.”²⁷³ In other words, Section 702 waives the sovereign immunity of the United States in suits seeking judicial review of agency actions where judicial review has not been expressly authorized by statute.²⁷⁴ Judicial review under the APA thus may be denied only if Congress clearly intended to foreclose review or the issue is one committed to agency discretion.²⁷⁵

The second requirement under the APA is that agency action must be *final* before judicial review will be permitted. Section 704 provides in part that “[a]gency action made reviewable by statute and *final agency action* for which there is no other adequate remedy in a court are subject to judicial review.”²⁷⁶ On the other hand, “a preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action.”²⁷⁷ The courts have imposed this finality element as a pragmatic consideration to precede judicial review of administrative actions.²⁷⁸ When determining whether an agency action is final, the Supreme Court in *FTC v. Standard Oil Co. of California*,²⁷⁹ held that three factors must be considered: (1) whether the agency action represented a definitive statement of the agency’s position; (2) whether the action had a direct and immediate effect of the day-to-day business of the complaining parties; and (3) whether judicial review would interfere with the proper func-

²⁷³ *Id.* (emphasis added).

²⁷⁴ See *Parola v. Weinberger*, 848 F.2d 956, 958 (9th Cir. 1988).

²⁷⁵ See 5 U.S.C. § 701(a) (West 1999).

²⁷⁶ 5 U.S.C. § 704 (West 1999) (emphasis added).

²⁷⁷ *Id.*

²⁷⁸ See *Califano v. Sanders*, 430 U.S. 99, 105-107 (1977); *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967).

²⁷⁹ 449 U.S. 232 (1980).

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tioning of the agency and the courts.²⁸⁰ Because an EPA rejection or ultimate dismissal of a Title VI Administrative Complaint satisfies these three elements, a plaintiff could seek review in Federal District Court under the APA.²⁸¹ Even if an agency action does not meet these requirements, it may still be subject to judicial review when the harm to the person seeking review outweighs the harm to the administrative process from permitting such review.²⁸² Under this exception, when an agency action, or inaction, will endanger public health or safety, judicial review is immediately available.²⁸³

In addition to these two requirements, judicial review, as a general matter, is not available until the plaintiff has *exhausted* all administrative remedies.²⁸⁴ The purpose of this is to protect agency autonomy, and to promote judicial efficiency.²⁸⁵ The principle of autonomy recognizes that agencies, not courts, should have responsibility for the programs that Congress has charged them to administer.²⁸⁶ The principle of judicial efficiency recognizes that if the complaint is resolved at the agency level, judicial review may never be required, or if the complaint is not resolved, at least a useful record may be produced.²⁸⁷ There are, however, exceptions to the exhaustion requirement. The most significant is that administrative remedies need not be pursued if the litigant's interest in immediate judicial review outweighs the government's interests in efficiency or administrative autonomy.²⁸⁸ Application of this

²⁸⁰ See *id.* at 239-240.

²⁸¹ See 5 U.S.C. § 703 (West 1999). Cf. *Clark v. Busey*, 959 F.2d 808, 813 (9th Cir. 1992) (agency inaction on petition for rule making is not ripe for review where inaction does not amount to denial).

²⁸² See *Environmental Defense Fund v. Hardin*, 428 F.2d 1093, 1098-1099 (D.C. Cir. 1970).

²⁸³ See *id.*

²⁸⁴ See *Meyers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938).

²⁸⁵ See *McCarthy v. Madigan*, 503 U.S. 140, 145 (1992).

²⁸⁶ See *id.*

²⁸⁷ See *id.*

²⁸⁸ See *id.* at 146.

balancing principle is “intensely practical . . . because attention is directed to both the nature of the claim presented and the characteristics of the particular administrative procedure provided.”²⁸⁹ One significant factor of this balancing, which a court will look at in determining whether to allow immediate review of agency action, is the irreparable injury to the plaintiff.²⁹⁰

Once a plaintiff has satisfied these requirements, a court will then review the action under the APA’s standard of review. Unlike other statutes, the APA’s standard narrow and presumes that the agency action is valid.²⁹¹ The agency action, however, is not shielded from a “thorough, probing, in-depth review.”²⁹² Additionally, while the APA does not give a court power “to substitute its judgment for that of the agency,” it does allow the court to “consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.”²⁹³ Consequently, under the Administrative Procedure Act, a court must set aside an agency’s action only if the decision is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”²⁹⁴ Normally, an agency action is considered arbitrary and capricious when the agency bases its decision on factors that Congress did not want considered, completely fails to consider an important aspect of the issue, makes a decision that is contrary to law and the evidence before it, or offers an explanation for its decision that is so implausible that it cannot be attributed to a difference of opinion or agency expertise.²⁹⁵ Moreover, under environmental statutes, an action may be arbitrary and

²⁸⁹ *Id.*

²⁹⁰ *See id.* at 147.

²⁹¹ *See Ethyl Corp. v. EPA*, 541 F.2d 1, 34 (D.C. Cir. 1976), *cert denied*, 426 U.S. 941 (1976).

²⁹² *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971).

²⁹³ *Id.* at 416.

²⁹⁴ *See* 5 U.S.C. § 706(2)(A) (West 1999).

²⁹⁵ *See Motor Vehicles Mfrs. Assn. v. State Farm Mut.*, 463 U.S. 29, 43 (1983).

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capricious if the agency has not “considered the environmental consequences” of its action.²⁹⁶

In addition to reviewing an agency’s action for a clear error of judgment, a court also has the ability to review the agency’s adherence to applicable regulations and agency programs.²⁹⁷ Thus, an individual who is adversely affected or aggrieved by agency action, such as EPA’s failure to comply with Title VI Regulations, “may ask a court to set aside the agency action which is not in accordance with law or to compel agency action unlawfully withheld.”²⁹⁸ Under section 706(1), when so requested, “[t]he reviewing court *shall* compel [an] agency action unlawfully withheld or *unreasonably delayed*.”²⁹⁹ Consequently, the environmental justice advocate should review the federal regulations to insure that EPA is complying with the Title VI regulations and that EPA is not unreasonably delaying administration of the regulations.³⁰⁰ If EPA is not complying with the regulations in a timely manner, an action should be filed in Federal District Court challenging the EPA’s actions under the APA.

As another general matter, judicial review is not available unless the plaintiff has standing. To have standing to sue under the Administrative Procedure Act, a plaintiff’s alleged injury must be within the zone of interests protected by the statute allegedly violated.³⁰¹ While environmental justice plaintiffs may have standing to sue under the APA, the state action complained of in the Title VI complaint may elude judicial review if the complained of project proceeds to completion. Un-

²⁹⁶ *Strycher’s Bay Neighborhood Council v. Karlen*, 444 U.S. 223, 227 (1979).

²⁹⁷ *See Community Action of Laramie County, Inc. v. Bowen*, 866 F.2d 347, 352 (10th Cir. 1989) (collecting cases for principle that agency’s “failure to follow its own regulations . . . may be challenged under the APA”).

²⁹⁸ *NAACP v. Secretary of Housing & Urban Development*, 817 F.2d 149, 152 (1st Cir. 1987).

²⁹⁹ 5 U.S.C. § 706(1) (West 1999) (emphasis added).

³⁰⁰ *See, e.g., EPA Regulations*, 40 C.F.R. § 7.120 (1999).

³⁰¹ *See Association of Data Processing Service Orgs, Inc. v. Camp*, 397 U.S. 150, 151-53 (1970).

fortunately, because EPA cannot issue injunctions under the regulations and because Title VI Administrative Complaints can take as long as two years to resolve, it is imperative that the environmental justice advocate get his foot in the federal court door as quickly as possible to avoid irreparable injury.³⁰² As the Ninth Circuit recognized in *Fair v. United States E.P.A.*,³⁰³ “[t]he sole reason this case ‘evaded review’ is the appellants’ failure to take requisite action. They posted no bond accompanying their request for a preliminary injunction with the district court, nor did they seek a stay of the district court’s judgment pending this appeal.”³⁰⁴

An interesting situation arises when the environmental justice advocate has both a Title VI claim for intentional discrimination as well as the lesser included claim of disparate impact. Does the advocate file a Title VI complaint in federal district court against the state or local agency for intentional discrimination and concurrently file an administrative complaint with the federal agency, such as the EPA, for state agency actions having a disparate impact? While no court has addressed this specific issue, some guidance can be found in the judicially created doctrine of “primary jurisdiction.” If the doctrine of primary jurisdiction is applicable, the court must allow the agency to go first.³⁰⁵

In deciding the case of *United States v. Western Pacific Railroad Co.*,³⁰⁶ the Supreme Court was forced to consider at the outset whether the lower court had properly applied the primary jurisdiction doctrine; that is, the court considered whether the lower court had “correctly allocated the issues in the suit between the jurisdiction of the [agency] and that of the

³⁰² See *McCarthy*, 503 U.S. at 147 (administrative remedy deemed inadequate “[m]ost often . . . because of delay by the agency”).

³⁰³ 795 F.2d 851 (9th Cir. 1986).

³⁰⁴ *Id.* at 855.

³⁰⁵ See *Texas & Pacific Railway v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907).

³⁰⁶ 352 U.S. 59 (1956).

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court.”³⁰⁷ In holding that “[t]he doctrine of primary jurisdiction, like the rule requiring exhaustion of administrative remedies, is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties,”³⁰⁸ the Supreme Court stated that while the exhaustion rule “applies where a claim is cognizable in the first instance by an administrative agency alone,”³⁰⁹ primary jurisdiction “applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body.”³¹⁰ Additionally, with regard to exhaustion, “judicial interference is withheld until the administrative process has run its course,” for primary jurisdiction “the judicial process is suspended pending referral of such issues to the administrative body for its views.”³¹¹ This referral of issues to the administrative agency, however, “does not deprive the court of jurisdiction.”³¹² Rather, the court still has the discretion to either “retain jurisdiction or, if the parties would not be unfairly disadvantaged, to dismiss the case without prejudice.”³¹³ Consequently, applying the doctrine of primary jurisdiction to a Title VI claim when both intentional discrimination and disparate impact is alleged would suggest that the administrative agency would first determine the lesser-included claim of disparate impact. Once this issue of disparate impact is determined by the agency, the court could resume jurisdiction to determine whether the disparate impact could be supported with the circumstantial evidence necessary to prove intentional discrimination.

³⁰⁷ *Id.* at 62.

³⁰⁸ *Id.* at 63.

³⁰⁹ *Id.*

³¹⁰ *Id.* at 64.

³¹¹ *Western Pacific*, 352 U.S. at 64.

³¹² *Reiter v. Cooper*, 507 U.S. 258, 268-269 (1993).

³¹³ *Id.*

In cases where primary jurisdiction is found, the court must decide what to do with a case that it has remanded to the agency. The Supreme Court in *Best v. Humboldt Mining Co.*³¹⁴ considered just that issue. In *Best*, the United States sued in district court to condemn certain real property, the mining claims on which were arguably invalid.³¹⁵ With regard to these claims, the Supreme Court held that the Bureau of Land Management had primary jurisdiction.³¹⁶ The Court, however, also held that the district court should retain the condemnation case on its docket for a trial on the remaining issues after the Bureau resolved the claim dispute.³¹⁷

In cases where primary jurisdiction is found inapplicable, however, the court may proceed with its action regardless of the happenings in the agency proceeding. In *Nader v. Allegheny Airlines*,³¹⁸ for example, a plaintiff who was "bumped" from an airline flight because of overbooking sued the airline in a common law fraud action.³¹⁹ Although the Civil Aeronautics Board ("CAB") had the power to order airlines to cease unfair and deceptive practices, the Supreme Court permitted the action to continue in federal district court because a CAB proceeding would not have been as effective.³²⁰ The CAB had no power to award damages to the plaintiff nor could it immunize the airline from damages in any future suits.³²¹ Similarly, in *Great Northern Railroad Co. v. Merchants' Elevator Co.*,³²² the Supreme Court held that a court might also maintain jurisdic-

³¹⁴ 371 U.S. 334 (1963).

³¹⁵ *See id.* at 334-335.

³¹⁶ *See id.* at 339.

³¹⁷ *See id.* at 340.

³¹⁸ 426 U.S. 290 (1976).

³¹⁹ *See id.* at 293.

³²⁰ *See id.* at 305-306.

³²¹ *See id.* at 302.

³²² 259 U.S. 285 (1922).

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tion over the matter where it needs no special expertise to review the administrative action.³²³

Since the law is not yet settled in the area of concurrent Title VI claims, it is suggested that the advocate file claims in both federal district court and the federal agency under the regulations to avoid any statute of limitations issues.³²⁴

G. SUMMARY

A private cause of action can be maintained under Title VI against state and local agencies, which receive federal funds, for damages as well as for declaratory and injunctive relief under the discriminatory intent standard. Conversely, under Title VI regulations the only relief available is limited to an equitable remedy since damages are only available for intentional violations of Title VI. Despite this, an environmental justice advocate should first look to the regulations for any administrative process through which to resolve administrative complaints as an advocate may be required to exhaust all Title VI administrative remedies prior to filing a cause of action in federal court under the APA.³²⁵ The Title VI regulations adopted by EPA may provide a clue for how EPA will investigate and resolve such an administrative complaint.³²⁶ An advocate, however, may not be required to exhaust all remedies when the agency action, or inaction, will endanger public health or safety or result in irreparable injury to plaintiffs. In such case, judicial review is immediately available. During this process, a suit for damages for intentional violations of Title VI can be tried before a jury; equitable relief under the APA, however, is going to be decided by a judge. The advocate's best chance for success is to get the case before a jury, especially one composed

³²³ See *Id.* at 294.

³²⁴ See *infra* notes 465-468 and accompanying text for a discussion of timely filing.

³²⁵ See Paul K. Sonn, *Fighting Minority Underrepresentation in Publicly Funded Construction Projects After Croson: A Title VI Litigation Strategy*, 101 YALE L.J. 1577, 1581 n. 25 (1992) (listing all federal cabinet Departments with Title VI regulations codifying the discriminatory effect standard).

³²⁶ See 40 CFR § 7.120 (1999).

of the representative minority population affected by the government's decision.

IV. CITIZEN SUIT PROVISIONS UNDER FEDERAL ENVIRONMENTAL STATUTES

A. IN GENERAL

Title VI was "meant to cover only those situations where federal funding is given to a non-federal entity which, in turn, provides financial assistance to the ultimate beneficiary."³²⁷ Title VI, therefore, is inapplicable to programs conducted directly by federal agencies,³²⁸ such as the Clean Water Act,³²⁹ the Safe Drinking Water Act,³³⁰ the Clean Air Act,³³¹ the Solid Waste Disposal Act,³³² the Emergency Planning and Community Right-to-Know Act,³³³ and the Toxic Substance Control Act.³³⁴ Environmental justice advocates thus have relied on the citizen suit provisions contained in these, and most other federal environmental statutes, to enforce federal programs. Generally, the citizen suit provisions in virtually all the major federal environmental statutes provide that "any citizen may commence a civil action on his own behalf."³³⁵ Furthermore, the

³²⁷ *Williams v. Glickman*, 931 F. Supp. 1, 6 (D.D.C. 1996). *See also* 42 U.S.C. § 2000d-4a (West 1999).

³²⁸ *See id.* at 5-6.

³²⁹ *See* 33 U.S.C. §§ 1251 - 1387 (West 1999).

³³⁰ *See* 42 U.S.C. §§ 300f - 300j-26 (West 1999).

³³¹ *See id.* §§ 7401 - 7671q.

³³² *See id.* §§ 6901 - 6992k.

³³³ *See id.* §§ 11001 to 11050.

³³⁴ *See* 15 U.S.C. §§ 2601 - 2692 (West 1999).

³³⁵ *See, e.g.*, Toxic Substance Control Act, 15 U.S.C. § 2619(a) (West 1999); Clean Water Act, 33 U.S.C. § 1365(a) (West 1999); Safe Drinking Water Act, 42 U.S.C. § 300j-8(a) (West 1999); Solid Waste Disposal Act, 42 U.S.C. § 6972(a) (West 1999); Clean Air Act, 42 U.S.C. § 7604(a) (West 1999); Emergency Planning and Community Right-To-Know Act, 42 U.S.C. § 11046(a) (West 1999). The Federal Insecticide, Fungicide, Rodenticide Act (FIFRA), 7 U.S.C. § 136 (West 1999), however, does not contain a citizen suit provision.

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civil action can be commenced against any person, including the United States, and any other governmental instrumentality or agency to the extent permitted by the Eleventh Amendment to the U.S. Constitution.³³⁶ A citizen can also sue the *Administrator* where there is alleged a failure to perform any act or duty under the statute that is not discretionary.³³⁷

As a jurisdictional requirement, most, if not all, federal environmental statutes require plaintiffs to give a notice of intent to sue.³³⁸ Furthermore, they generally provide that no action may be commenced prior to sixty days after the plaintiff has given notice of the alleged violation (1) to the Administrator, (2) to the State in which the alleged violation occurs, *and* (3) to any alleged violator of the statute.³³⁹ This provision is mandatory and failure to give notice, in the manner prescribed by the Administrator in the regulations,³⁴⁰ will lead to a dismissal.³⁴¹ The purpose of the sixty-day notice is to give the violator the opportunity to correct the violation, as well as to give the Administrator the opportunity to enforce the statute using their resources.³⁴² If the Administrator or other federal or state authorities are "diligently prosecuting" the action, no citizen suit may be commenced, though citizens are authorized to *intervene* in federal enforcement actions as a matter of right.³⁴³ Consequently, the environmental justice advocate will need to

³³⁶ *See id.*

³³⁷ *See id.* (emphasis added).

³³⁸ *See, e.g.*, Toxic Substance Control Act, 15 U.S.C. § 2619(b) (West 1999); Clean Water Act, 33 U.S.C. § 1365(b) (West 1999); Safe Drinking Water Act, 42 U.S.C. § 300j-8(b) (West 1999); Solid Waste Disposal Act, 42 U.S.C. § 6972(b) (West 1999); Clean Air Act, 42 U.S.C. § 7604(b) (West 1999); Emergency Planning and Community Right-To-Know Act, 42 U.S.C. § 11046(d) (West 1999).

³³⁹ *See id.*

³⁴⁰ *See, e.g.*, Toxic Substance Control Act, 15 U.S.C. § 2619(b)(2) (West 1999); Clean Water Act, 33 U.S.C. § 1365(b)(2) (West 1999); Safe Drinking Water Act, 42 U.S.C. § 300j-8(b)(3) (West 1999); Solid Waste Disposal Act, 42 U.S.C. § 6972(c) (West 1999); Clean Air Act, 42 U.S.C. § 7604(b)(2) (West 1999); Emergency Planning and Community Right-To-Know Act, 42 U.S.C. § 11046(d)(2) (West 1999).

³⁴¹ *See Hallstrom v. Tillamook*, 493 U.S. 20, 33 (1989).

³⁴² *See id.* at 29.

³⁴³ *See id.* at 33 (emphasis added).

refer to the appropriate regulations to satisfy the notice requirements.

Typically, most environmental statutes provide that whenever on the basis of any information the Administrator determines that any person has violated or is in violation of any requirement of the statute, the Administrator may either issue an order that assesses a civil penalty for any *past or current violation* and/ or requires compliance immediately, or within a specified time period.³⁴⁴ Alternatively, the Administrator may commence a civil action in a United States district court in the district in which the violation occurred for appropriate relief, including a temporary or permanent injunction.³⁴⁵ The Administrator can also seek criminal penalties against any person who knowingly or willfully violates the statute.³⁴⁶ Given the plethora of options, the government enforcement authorities enjoy considerable discretion in deciding whether or not to initiate enforcement proceedings and in choosing the type of enforcement action to initiate.³⁴⁷ Because judicial enforcement actions generally are more formal and more expensive, environmental authorities usually go to court only to prosecute the most egregious violations. For example, in fiscal year 1997, EPA referred a total of 426 civil cases and 278 criminal cases to the Department of Justice for prosecution.³⁴⁸ If no enforcement action is taken, however, within the sixty-day time period, the environmental justice advocate can then file suit in federal district court.

³⁴⁴ See, e.g., Toxic Substance Control Act, 15 U.S.C. § 2615 (West 1999); Clean Water Act, 33 U.S.C. § 1319 (West 1999); Safe Drinking Water Act, 42 U.S.C. § 300h-2 (West 1999); Solid Waste Disposal Act, 42 U.S.C. § 6928 (West 1999); Clean Air Act, 42 U.S.C. § 7613 (West 1999); Emergency Planning and Community Right-To-Know Act, 42 U.S.C. § 11045 (West 1999) (emphasis added).

³⁴⁵ See *id.*

³⁴⁶ See *id.*

³⁴⁷ See *Heckler v. Chaney*, 470 U.S. 821, 835 (1985).

³⁴⁸ EPA, Office of Enforcement and Compliance Assurance, *Fiscal Year 1997 Enforcement and Compliance Assurance Accomplishments Report* (visited March 28, 2000) <<http://es.epa.gov/oeca/97accomp.pdf>> (Table A-5. EPA Civil Referrals to the Department of Justice FY74 through FY97; Table A-4. EPA Criminal Enforcement FY83 through FY97).

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B. GWALTNEY REQUIRES ONGOING VIOLATION

In *Gwaltney of Smithfield v. Chesapeake Bay Foundation*,³⁴⁹ environmental groups filed a claim in federal district court under the Clean Water Act citizen suit provisions alleging that the permittee had violated and would continue to violate conditions on the permit by exceeding effluent limitations on certain pollutants.³⁵⁰ The district court denied the permittee's motion to dismiss for lack of subject matter jurisdiction, which was affirmed by the Fourth Circuit Court of Appeals.³⁵¹ The permittee then petitioned for certiorari. The issue before the Supreme Court was whether the Clean Water Act confers federal jurisdiction over citizen suits for wholly past violations.³⁵²

Underlying the Court's analysis is the principle that the objective of the Clean Water Act is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."³⁵³ The Act thus makes it unlawful to discharge any pollutant into navigable waters except as authorized by statute.³⁵⁴ Pursuant to the National Pollutant Discharge Elimination System ("NPDES"),³⁵⁵ the Administrator may issue permits authorizing the discharge of pollutants in accordance with specified conditions.³⁵⁶ The holder of a federal NPDES permit is then subject to enforcement action by the Administrator.³⁵⁷ Between 1981 and 1984, Gwaltney violated the conditions of its NPDES permits on numerous occasions by exceeding the effluent limitations on five of the seven pollutants covered.³⁵⁸ During this same period, however, Gwaltney installed new equip-

³⁴⁹ 484 U.S. 49 (1987).

³⁵⁰ *See id.* at 54.

³⁵¹ *See id.* at 56.

³⁵² *See* 33 U.S.C. § 1365(a) (West 1999).

³⁵³ *Id.* § 1251(a).

³⁵⁴ *See id.* § 1311(a).

³⁵⁵ *See id.* § 1342.

³⁵⁶ *See id.* § 1342(a).

³⁵⁷ *See* 33 U.S.C. § 1319 (West 1999).

³⁵⁸ *See Gwaltney*, 484 U.S. at 53.

ment that allowed the company to be in compliance with its NPDES permit for the first part of 1984.³⁵⁹ Nevertheless, in response to the violations, environmental groups filed suit after giving notice in June 1984 to the Administrator and the Virginia State Water Control Board.³⁶⁰ These groups alleged that the petitioner “has violated . . . [and] will continue to violate its NPDES permit.”³⁶¹

After a lengthy statutory interpretation of the citizen suit provision phrase “to be in violation,” the Supreme Court concluded, “citizens, unlike the Administrator, may seek *civil penalties* only in a suit brought to enjoin or otherwise abate an *ongoing violation*.”³⁶² In other words, the citizen suit provisions are “primarily forward looking,”³⁶³ and “do[] not permit citizen suits for wholly past violations.”³⁶⁴ In line with this reasoning, the Court observed “the purpose of [the sixty-day] notice to the alleged violator is to give it an opportunity to bring itself into complete compliance with the Act and thus likewise render unnecessary a citizen suit.”³⁶⁵

Consequently, under the citizen suit provisions, a defendant can simply wait to the last minute to come into compliance with the permit. Since there is no ongoing violation, the case is dismissed as moot. As the *Gwaltney* Court recognized, “[l]ongstanding principles of mootness . . . prevent the maintenance of suit when ‘there is no reasonable expectation that the wrong will be repeated.’”³⁶⁶ Proving this expectation, however, is a “heavy one” because the defendant must demonstrate that it is “*absolutely clear* that the allegedly wrongful behavior

³⁵⁹ See *id.* at 54.

³⁶⁰ See *id.*

³⁶¹ *Id.*

³⁶² *Id.* at 59 (emphasis added).

³⁶³ *Gwaltney*, 484 U.S. at 59.

³⁶⁴ *Id.* at 64.

³⁶⁵ *Id.* at 60.

³⁶⁶ *Id.* at 66.

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could not reasonably be expected to recur.”³⁶⁷ “Mere voluntary cessation of allegedly illegal conduct does not moot a case; if it did, the courts would be compelled to leave ‘[t]he defendant . . . free to return to his old ways.’”³⁶⁸ Moreover, in determining whether the defendant has met the burden, “[i]t is the duty of the courts to beware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit, and there is probability of resumption.”³⁶⁹ The mootness doctrine should thus protect plaintiffs from defendants trying to circumvent statutory liability.

C. BEYOND *GWALTNEY*

On remand, the Fourth Circuit reasoned that citizen suits could be based on “a good faith allegation of ongoing violation,” requiring proof of such violation at trial.³⁷⁰ This could be accomplished either “(1) by proving violations that continue on or after the date the complaint is filed, or (2) by adducing evidence from which a reasonable trier of fact could find a continuing likelihood of a recurrence in intermittent or sporadic violations.”³⁷¹ With these instructions, the Fourth Circuit remanded the case to the district court, which found that although the violations had not continued, at the time the suit was filed “there existed a very real danger and likelihood of further violation.”³⁷² The district court then reinstated the entire judgment against Gwaltney.³⁷³ Gwaltney again appealed to

³⁶⁷ *Id.* (emphasis in original).

³⁶⁸ *United States v. Concentrated Phosphate Export Ass’n.*, 393 U.S. 199, 203 (1968) (citing *Gwaltney*, 484 U.S. at 66).

³⁶⁹ *United States v. Oregon State Medical Soc.*, 343 U.S. 326, 333 (1952) (citing *Gwaltney*, 484 U.S. at 66).

³⁷⁰ *Chesapeake Bay Foundation v. Gwaltney of Smithfield, Ltd.*, 844 F.2d 170, 171 (4th Cir. 1988).

³⁷¹ *See Id.* at 171-72.

³⁷² *Chesapeake Bay Foundation v. Gwaltney of Smithfield, Ltd.*, 688 F.Supp. 1078, 1079 (E.D. Va. 1988).

³⁷³ *See id.* at 1080.

the Fourth Circuit, which affirmed the trial courts conclusions.³⁷⁴ In doing so, the court held that regardless of subsequent events, because there was an ongoing violation when the suit was filed and because “a suit seeking penalties is intrinsically incapable of being rendered moot by the polluter’s corrective actions” the case was not moot.³⁷⁵

D. SUMMARY

The citizen suit provisions of the federal environmental statutes provide the environmental justice advocate with an enforcement tool for *ongoing violations* of federal law. If a citizen suit is headed for mootness, the environmental justice advocate would be wise to invite the Administrator of the EPA to join in the lawsuit, as this would assure standing as well as provide penalties going to the United States Treasury for the past violations. Even if not invited, under most citizen suit provisions, the Administrator may intervene as a matter of right.³⁷⁶

If a defendant clearly abates the violation prior to trial, the environmental justice advocate will have succeeded in eliminating an environmental harm, even if the abatement could have occurred sooner. In this situation, the environmental justice advocate should be able to recover litigation costs, including reasonable attorney and expert witness fees.³⁷⁷ The legislative history of the costs of litigation section in virtually all citi-

³⁷⁴ *Chesapeake Bay Foundation v. Gwaltney of Smithfield, Ltd.*, 890 F.2d 690 (4th Cir. 1989).

³⁷⁵ *Id.* at 696.

³⁷⁶ *See, e.g.*, Toxic Substance Control Act, 15 U.S.C. § 2619(c)(1) (West 1999); Clean Water Act, 33 U.S.C. § 1365(c)(2) (West 1999); Safe Drinking Water Act, 42 U.S.C. § 300j-8(c) (West 1999); Solid Waste Disposal Act, 42 U.S.C. § 6972(d) (West 1999); Clean Air Act, 42 U.S.C. § 7604(c)(2) (West 1999); Emergency Planning and Community Right-To-Know Act, 42 U.S.C. § 11046(h)(1) (West 1999).

³⁷⁷ *See, e.g.*, Toxic Substance Control Act, 15 U.S.C. § 2619(c)(2) (West 1999); Clean Water Act, 33 U.S.C. § 1365(d) (West 1999); Safe Drinking Water Act, 42 U.S.C. § 300j-8(d) (West 1999); Solid Waste Disposal Act, 42 U.S.C. § 6972(e) (West 1999); Clean Air Act, 42 U.S.C. § 7604(d) (West 1999); Emergency Planning and Community Right-To-Know Act, 42 U.S.C. § 11046(f) (West 1999).

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zen suit statutes recognizes that the award of costs “should extend to plaintiffs in actions, which result in successful abatement but do not reach a verdict.”³⁷⁸

V. PROCEDURAL ISSUES IN FILING CLAIMS UNDER THE EQUAL PROTECTION CLAUSE, TITLE VI, AND FEDERAL ENVIRONMENTAL STATUTES

Whether an environmental justice advocate files a civil action under the Equal Protection Clause or Title VI, the challenge will be the same: proving discriminatory intent. However, while the Equal Protection Clause will be available for cases where the government actor is not receiving federal funds, Title VI will only be available when federal funds are being received. A citizen suit filed under the federal environmental statutes creates its own unique challenges. Regardless, bringing the case before a jury will provide the environmental justice advocate with the best chance of success.

A. JURISDICTION

1. *Under the Equal Protection Clause*

Under a Fourteenth Amendment equal protection challenge,³⁷⁹ subject matter jurisdiction will be found at 28 U.S.C. § 1331, 28 U.S.C. § 1343(a)(3), and 42 U.S.C. § 1983. Section 1983 creates a mechanism for recovering both monetary damages and injunctive relief from governmental actors and entities whose actions under “color of” state or local law deprive a plaintiff of rights, privileges or immunities secured by the United States Constitution or federal statutes.³⁸⁰ Thus, “[t]he

³⁷⁸ *Gwaltney*, 484 U.S. at 67 n.6. *But see* *Farrar v. Hobby*, 506 U.S. 103, 111 (1992) (explaining that “to qualify as a prevailing party, a civil rights plaintiff must obtain at least some relief on the merits of his claim”).

³⁷⁹ An equal protection challenge can also be maintained against a federal agency under the Due Process Clause of the Fifth Amendment.

³⁸⁰ Section 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia,

purpose of section 1983 is to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails.³⁸¹ Section 1983, however, “ ‘is not itself a source of substantive rights,’ but merely provides ‘a method for vindicating federal rights elsewhere conferred.’ ”³⁸² Nevertheless, the Supreme Court has held that “[a] broad construction of section 1983 is compelled by the statutory language, which speaks of deprivations of ‘any rights, privileges, or immunities secured by the constitution and laws.’ Accordingly, ‘we have repeatedly held that the coverage of [section 1983] must be broadly construed.’ ”³⁸³

2. Under Federal Statutes

In *Maine v. Thiboutot*,³⁸⁴ the Court ruled that parties may rely upon section 1983 to challenge violations of *federal statutes* as well as constitutional law.³⁸⁵ “[U]nder section 1983 state ‘officers may be made to respond in *damages* not only for violations of rights conferred by federal equal civil rights law, but for violations of other federal constitutional and statutory rights as well.’ ”³⁸⁶ However, not all violations of a federal statute give rise to section 1983 actions.³⁸⁷ “A plaintiff alleging a violation of a federal statute will be permitted to sue under section 1983 unless ‘the statute [does] not create enforceable rights, privileges, or immunities within the meaning of [sec-

subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. 42 U.S.C. § 1983.

³⁸¹ *Wyatt v. Cole*, 504 U.S. 158, 161 (1992).

³⁸² *Albright v. Oliver*, 510 U.S. 266, 271 (1994).

³⁸³ *Dennis v. Higgins*, 498 U.S. 439, 443 (1991).

³⁸⁴ 448 U.S. 1 (1980).

³⁸⁵ *See id.* at 4 (emphasis added).

³⁸⁶ *Id.* (emphasis added).

³⁸⁷ *Suter v. Artist M.*, 503 U.S. 347, 355-356 (1992).

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tion] 1983,' or unless 'Congress has foreclosed such enforcement of the statute in the enactment itself.'³⁸⁸

With regard to this second section 1983 limitation, "[t]he burden is on the State to show 'by express provision or other specific evidence from the statute itself that congress intended to foreclose such private enforcement.'³⁸⁹ The Court in *Middlesex City Sewerage Authority v. National Sea Clammers*,³⁹⁰ found such foreclosure because of the comprehensiveness of the Federal Water Pollution Control Act's enforcement scheme, which granted EPA substantial power to use of noncompliance orders, *civil suits*, and criminal penalties to enforce its provisions.³⁹¹ The Court in *Sea Clammers* also held that even though most federal environmental citizen suit provisions contain savings clauses,³⁹² which generally provide that nothing in the citizen suit provision "shall restrict any right which any person . . . may have under any statute or common law or to seek . . . *any other relief*," the express remedies provided in the federal environmental statutes "preclude suits for *damages* under [section] 1983, and that the *saving clauses do not require a contrary conclusion*."³⁹³

The reach of the *Sea Clammers* decision, however, is narrow. One reason is that the cases in which congressional intent is found to foreclose a section 1983 remedy are "exceptional." Accordingly, section 1983 "remains a generally and presumptively available remedy for claimed violations of federal law."³⁹⁴ Another reason is because the decision does not "stand for the

³⁸⁸ *Wilder v. Virginia Hosp. Ass'n.*, 496 U.S. 498, 508 (1990).

³⁸⁹ *Id.* at 520-521.

³⁹⁰ 453 U.S. 1 (1981).

³⁹¹ *See id.* at 13 (citing 33 U.S.C. § 1251).

³⁹² *See, e.g.*, Toxic Substance Control Act, 15 U.S.C. § 2619 (West 1999); Clean Water Act, 33 U.S.C. § 1365 (West 1999); Safe Drinking Water Act, 42 U.S.C. § 300j-8 (West 1999); Solid Waste Disposal Act, 42 U.S.C. § 6972 (West 1999); Clean Air Act, 42 U.S.C. § 7604 (West 1999); Emergency Planning and Community Right-To-Know Act, 42 U.S.C. § 11046 (West 1999).

³⁹³ *Sea Clammers*, 453 U.S. at 30 n.31 (emphasis added).

³⁹⁴ *Lividas v. Bradshaw*, 512 U.S. 107, 133 (1994).

proposition that a federal statutory scheme can preempt independently existing constitutional rights, which have contours distinct from the statutory claim;" rather, it "speaks only to whether federal statutory rights can be enforced both through the statute itself *and* through section 1983."³⁹⁵ Consequently, there is nothing in the holding of *Sea Clammers* to suggest that an environmental justice advocate could not file a section 1983 civil action under the Equal Protection Clause or Title VI for intentional discrimination. There is also nothing in *Sea Clammers* to suggest that the advocate could not file an administrative complaint under Title VI regulations for state actions that have a disparate impact on communities of color. Instead, *Sea Clammers* only limits the availability of the *damages* component of a section 1983 remedy under federal environmental statute enforcement proceedings. Remedies will, therefore, be limited to the specific relief available under the various citizen suit provisions.

Sea Clammers' decision regarding the relief available under the savings clause was revisited in the subsequent case of *International Paper Co. v. Ouellette*.³⁹⁶ In this case, the Court held that the savings clause in the Clean Water Act,³⁹⁷ allows *state law actions* against water pollution notwithstanding the existence of federal law and standards.³⁹⁸ In so holding, the Court reasoned that the savings clause "negates the inference that congress 'left no room' for state causes of action;"³⁹⁹ rather it "specifically preserves other state actions, and therefore nothing in the Act bars aggrieved individuals from bringing a nuisance claim pursuant to the law of the *source* State."⁴⁰⁰

³⁹⁵ *Seamons v. Snow*, 84 F.3d 1226, 1233 (10th Cir. 1996).

³⁹⁶ 479 U.S. 481(1987).

³⁹⁷ *See* 33 U.S.C. § 1365(e).

³⁹⁸ *See International Paper Co.*, 479 U.S. at 497.

³⁹⁹ *Id.* at 492 (emphasis added).

⁴⁰⁰ *Id.* at 496 (emphasis added).

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3. *Under Title VI*

As in a section 1983 challenge, damages, as well as injunctive relief, will be available under a Title VI intentional discrimination case. For these cases, however, the “reach of Title VI’s protection extends no further than the Fourteenth Amendment.”⁴⁰¹ Thus, jurisdiction for a Title VI challenge, found at 28 U.S.C. § 1331, 28 U.S.C. § 1343(a)(4), and 42 U.S.C. § 2000d, will be judicially implied under the holding in *Guardians* only when a plaintiff has alleged an intentional discrimination.

Once this is met, under Title VI EPA regulations, an administrative complaint can be filed under Title 40, section 7.120 of the Code of Federal Regulations or under EPA’s Final Guidance, assuming they have been implemented. Judicial review of the agency determination on this administrative complaint can be immediate if the agency action, or inaction, endangers public health or safety, or after a final decision has been rendered if brought under the APA. Relief under the APA, however, will be limited to injunctive relief.⁴⁰²

4. *State Court Jurisdiction*

Most state courts are courts of general jurisdiction. Therefore, state courts have subject matter jurisdiction over any cognizable claim, including state and federal question cases, except for certain federal question cases in which the federal district courts have exclusive jurisdiction. For example, federal courts would have exclusive jurisdiction over admiralty, bankruptcy, and patent cases.⁴⁰³ Any doubt that a state court could entertain such actions was dispelled by the Supreme Court in *Martinez v. California*.⁴⁰⁴ In that case, although the Court did not answer the question of whether state courts were obligated

⁴⁰¹ U.S. v. Fordice, 505 U.S. 717, 732 n.7 (1992).

⁴⁰² See 5 U.S.C. § 702 (West 1999).

⁴⁰³ 28 U.S.C. § 1333 (West 1999); 28 U.S.C. § 1334 (West 1999); 28 U.S.C. § 1338 (West 1999).

⁴⁰⁴ 444 U.S. 277 (1980).

to entertain section 1983 actions, it held that "Congress has not barred them from doing so."⁴⁰⁵ Consequently, in *Maine v. Thiboutot*,⁴⁰⁶ the plaintiffs "exhausted their state administrative remedies and then sought judicial review of the administrative action in the state superior court. By amended complaint, respondents also claimed relief under [section] 1983 for themselves and others similarly situated."⁴⁰⁷ There is nothing in the case law to suggest that an environmental justice advocate could not maintain, in a State Superior Court, an Equal Protection Challenge under 42 U.S.C. § 1983, a Title VI intentional discrimination suit under 42 U.S.C. § 2000d, a Review of Title VI administrative complaint under 5 U.S.C. § 702 or any claims under the various federal environmental statute citizen suit provisions. The advocate should thus consider whether there would be any advantages to filing the environmental justice case in state court.

B. STANDING

In *Arlington Heights*, the Court considered the plaintiffs' standing to bring the suit and found that, in a constitutional setting, the issue is "whether the plaintiff has alleged such a personal stake in the outcome of the controversy [as] to warrant *his* invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf."⁴⁰⁸ In addition, the plaintiff must show that he is personally injured by the challenged action of the defendant.⁴⁰⁹ The injury, however, may be indirect, but the complaint must indicate that the injury is indeed fairly traceable to defendant's acts or omissions.⁴¹⁰ Finally, the Court concluded that the plaintiff had

⁴⁰⁵ *Maine*, 448 U.S. at 3 n. 1 (citing *Martinez*, 444 U.S. at 283-284, n. 7).

⁴⁰⁶ 448 U.S. 1 (1980).

⁴⁰⁷ *Id.* at 3.

⁴⁰⁸ *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 261 (1977).

⁴⁰⁹ *See id.*

⁴¹⁰ *See id.*

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to show an injury that is “likely to be redressed by a favorable decision.”⁴¹¹

In *Steel Co. v. Citizens for A Better Environment*,⁴¹² the Court reiterated the three constitutional requirements that comprise the core of Article III’s case-or-controversy requirement: (1) an injury in fact; (2) causation; and (3) redressability.⁴¹³ The advocate must satisfy the standing requirements before proceeding with an environmental justice case. Moreover, these requirements must continue to exist at every stage of review, not merely at the time of the filing of the complaint.⁴¹⁴ If the plaintiffs fail to satisfy an element of standing at any point, the action becomes moot.⁴¹⁵

In *Steel Co.*, an environmental group brought a civil action against a steel manufacturer under the Federal Environmental Emergency Planning and Community Right-To-Know Act of 1986 (“EPCRA”).⁴¹⁶ Under this statute, civil penalties, authorized as damages, are payable to the United States Treasury.⁴¹⁷ Consequently, the Court concluded that “the complaint fails the third test of standing, redressability,”⁴¹⁸ because a damages remedy paid to the Treasury will not redress the plaintiffs’ injuries, assuming the plaintiffs’ could assert an injury in fact in the first place. Had plaintiffs alleged a “continuing or imminent violation” of EPCRA, however, “the requested injunctive relief may well have redressed the asserted injury.”⁴¹⁹ In other words, civil actions brought under federal environmental statutes, which only allow for penalties payable to the Treasury, cannot be maintained unless the plaintiff can allege a con-

⁴¹¹ *Id.* at 262.

⁴¹² 523 U.S. 83 (1998).

⁴¹³ *See id.* at 103.

⁴¹⁴ *See* *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997).

⁴¹⁵ *See* *United States Parole Comm’n v. Geraghty*, 445 U.S. 388, 397 (1980).

⁴¹⁶ 42 U.S.C. §§ 11001 to 11050 (West 1999).

⁴¹⁷ *See* *Steel Co.*, 523 U.S. at 106. *See also* 42 U.S.C. § 11045(c) (West 1999).

⁴¹⁸ *Id.*

⁴¹⁹ *Id.* at 110 (O’Connor, J., concurring).

tinuing or imminent violation of the statute. Thus, *Steel Co.* merely reaffirms *Gwaltney's* ongoing violation requirement.

*Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*⁴²⁰ also reaffirms *Gwaltney's* holding. In *Friends of the Earth*, Laidlaw Environmental Services, Inc. ("Laidlaw") owned and operated a hazardous waste incinerator located in Roebuck, South Carolina.⁴²¹ As part of that facility, Laidlaw maintained a wastewater treatment plant for water used in air pollution control devices for the incinerator.⁴²² Laidlaw discharged that treated wastewater into the North Tyger River pursuant to a National Pollutant Discharge Elimination System ("NPDES") permit issued by the South Carolina Department of Health and Environmental Control.⁴²³ This permit required the defendant to monitor and report their discharges through, for example, discharge monitoring reports ("DMRs") and laboratory reports.⁴²⁴ The plaintiffs filed suit under the citizen suit provisions of the Clean Water Act on June 12, 1992, alleging discharges in excess of the permit limits.⁴²⁵ Although Laidlaw moved to dismiss on July 1, 1992, its motion was denied.⁴²⁶ In May 1995, the parties filed cross-motions for summary judgment.⁴²⁷ On June 27, 1995 the district court denied plaintiffs' motion for partial summary judgment and granted, in part, Laidlaw's motion with regard to effluent discharge violations other than mercury, citing *Gwaltney v. Chesapeake Bay Foundation, Inc.*⁴²⁸ Thus, the only issue before the district court was the mercury violations, as these were

⁴²⁰ 956 F. Supp. 588 (D.S.C. 1997) *rev'd*, 120 S.Ct. 693 (2000).

⁴²¹ *See id.* at 592.

⁴²² *See id.*

⁴²³ *See id.*

⁴²⁴ *See Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs.*, 890 F. Supp. 470, 475 (D.S.C. 1995).

⁴²⁵ *See Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs.*, 956 F. Supp. 588, 592 (D.S.C. 1997). *See also* 33 U.S.C. § 1365 (West 1999).

⁴²⁶ *See Laidlaw*, 956 F. Supp. at 592 (motion was denied on December 14, 1992).

⁴²⁷ *See id.*

⁴²⁸ *See id.*

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ostensibly *ongoing* at the time the lawsuit was filed on June 12, 1992.⁴²⁹

In awarding civil penalties against Laidlaw, the district court correctly reasoned that section 309(d) mandates a civil penalty once a violation is established.⁴³⁰ The court then went on to assess a penalty of \$405,800 for the 475 pre-complaint mercury exceedance violations and 14 post-complaint violations,⁴³¹ the 419 pre-complaint monitoring violations with only one alleged post-complaint monitoring violation; and the 503 pre-complaint reporting violations with zero post-complaint reporting violations.⁴³² Under *Gwaltney*, however, the district court clearly erred in assessing penalties for the 475 *past* mercury violations and the 503 *past* reporting violations because in *Gwaltney*, the Supreme Court had concluded, “citizens, unlike the Administrator, may seek *civil penalties* only in a suit brought to enjoin or otherwise abate an *ongoing violation*.”⁴³³ Since the Administrator was not a party to the citizen suit, the district court clearly exceeded its jurisdiction in awarding penalties for the past violations. Under the district court’s calculations, the proper penalty assessed Laidlaw for the post-complaint violations should have been \$15,100, not \$405,800.⁴³⁴

At this point, Laidlaw should have moved for a dismissal of the case as being moot under *Gwaltney*, since Laidlaw could have demonstrated “that it is ‘*absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur.’”⁴³⁵ The district court recognized that Laidlaw’s “compli-

⁴²⁹ See *id.*

⁴³⁰ See *Laidlaw*, 956 F. Supp. at 601 (citing 33 U.S.C. § 1319(d); 1365(a)).

⁴³¹ Eleven violations occurred between June 12, 1992 and October 1992. Each year thereafter, in 1993, 1995 and 1995, there was only one exceedance annually. See *id.* at 600.

⁴³² See *Id.* at 600, 609-10.

⁴³³ *Gwaltney of Smithfield v. Chesapeake Bay Found.*, 484 U.S. 49, 59 (1987) (emphasis added).

⁴³⁴ See *Laidlaw*, 956 F. Supp. at 610 and 621. There is one monitoring violation at \$100 and fourteen exceedance violations at \$15,000. *Id.*

⁴³⁵ *Gwaltney*, 484 U.S. at 66 (emphasis in original).

ance history *demonstrates* that Laidlaw's efforts have remedied its compliance problem."⁴³⁶ Moreover, the district court stated that "Laidlaw has been in substantial compliance with all parameters in its NPDES permit since at least August 1992," including the discharge levels for all metals, temperature, pH and all monitoring and reporting obligations.⁴³⁷ "In fact, Laidlaw has been in compliance with the vast majority of its permit requirements for a much longer period of time, extending back to March 1991 when the [metals removal] system was installed."⁴³⁸ After Laidlaw failed to do so, however, the district court concluded that "[t]he lack of demonstrated harm and the fact that Laidlaw is now and has for an extended period of time been in compliance with its permit compels the conclusion that no injunction or other form of equitable relief is appropriate. Accordingly, plaintiffs' request for equitable relief is denied."⁴³⁹

Apparently not satisfied with the penalties assessed against Laidlaw, the plaintiffs appealed the decision to the Fourth Circuit Court of Appeals, arguing that the district court abused its discretion by ordering an inadequate penalty.⁴⁴⁰ The Fourth Circuit concluded, however, that because the plaintiffs did not appeal the "denial of declaratory and injunctive relief, the only potential relief that may be available to redress their claimed injuries is the civil penalty imposed upon Laidlaw, which would be paid to the United States Treasury."⁴⁴¹ Accordingly, under *Steel Co.*, which held that civil penalties do not confer standing to prosecute a private enforcement action under the citizen-suit provisions because it could not redress the injury plaintiff had allegedly suffered, the court concluded that the

⁴³⁶ *Laidlaw*, 956 F. Supp. at 609 (emphasis added).

⁴³⁷ *Id.* at 611.

⁴³⁸ *Id.*

⁴³⁹ *Id.* In a separate order, the court stayed the time for a petition for attorney's fees until the time for appeal had expired or, if either party appealed, until the appeal was resolved. See *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs.*, 149 F.3d 303, 305 (4th Cir. 1998).

⁴⁴⁰ See *Laidlaw*, 149 F.3d at 305.

⁴⁴¹ *Id.* at 306.

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action was *moot*.⁴⁴² The Fourth Circuit, therefore, vacated the district court's order and remanded with instructions to dismiss.⁴⁴³ Consequently, not only did Laidlaw avoid \$405,800 in penalties, but "[p]laintiffs' failure to obtain relief on the merits of their claims preclude[d] any recovery of attorney's fees or other litigation costs because such an award is available only to a 'prevailing or substantially prevailing party.'"⁴⁴⁴

The plaintiffs again appealed the decision and the Supreme Court reversed, concluding that the Fourth Circuit erred when it dismissed the suit as moot.⁴⁴⁵ In doing so the Court stated, "[i]n directing dismissal of the suit on grounds of mootness, the Court of Appeals incorrectly conflated Supreme Court case law on initial standing to bring suit, with the Court's case law on post-commencement mootness."⁴⁴⁶ On the initial standing issue, the court discussed the redressability requirement, the Court observed:

[T]he civil penalties sought by [the plaintiffs] carried with them a deterrent effect that made it likely, as opposed to merely speculative, that the penalties would redress [plaintiff's] injuries by abating current violations and preventing future ones - - as the District

⁴⁴² See *id.* See also *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103 (1998).

⁴⁴³ *Laidlaw*, 149 F.3d at 306.

⁴⁴⁴ *Id.* at 307 n.5; 33 U.S.C. § 1365(d) (West 1999).

⁴⁴⁵ See *Laidlaw*, 120 S.Ct. 693, 700 (2000).

⁴⁴⁶ See *id.* (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998); *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283 (1982)). In addressing the question of mootness, the Court stated, "[i]t is well settled that 'a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.'" *Laidlaw*, 120 S. Ct. at 708 (quoting *City of Mesquite*, 455 U.S. at 289). Furthermore, the defendant that claims voluntary cessation as a way to mootness "bears the formidable burden of showing that it is absolutely clear [that] the allegedly wrongful behavior could not be reasonably expected to recur." *Id.* at 709. Consequently, the Court held that Laidlaw's claims for mootness from shutting down the Roebuck facility and from its substantial compliance earlier, as far as they meet the above burden, is a "disputed factual matter . . . [and] remain[s] open for consideration on remand." *Id.* at 711.

Court reasonably found when it assessed a penalty of \$405,800.⁴⁴⁷

The Supreme Court's observation, however, ignores the fact that only \$15,100 of the assessed penalty is for current violations. Moreover, while the district court can consider the "history of such violations" for purposes of assessing a current penalty, there is no statutory authority for the court to assess penalties for past violations under the citizen suit provisions.⁴⁴⁸

Nevertheless the Supreme Court, in *Laidlaw*, clarified its holding in *Steel Co.* by recognizing that while "*Steel Co.* held that private plaintiffs, unlike the Federal Government, may not sue to assess penalties for wholly past violations," *Steel Co.* did not address the issue of whether a private plaintiff had "standing to seek penalties for violations that are ongoing at the time of the complaint and that could continue into the future if undeterred."⁴⁴⁹ As the dissent correctly observed, the *Laidlaw* Court thus held "that a penalty payable to the public "remedies" a threatened private harm, and suffices to sustain a private suit."⁴⁵⁰ Not surprisingly, *Laidlaw* merely reaffirms *Gwaltney* for the holding that "citizens, unlike the Administrator, may seek *civil penalties* only in a suit brought to enjoin or otherwise abate an ongoing violation."⁴⁵¹

On remand, *Laidlaw* will likely challenge the district court's subject-matter jurisdiction to award penalties for the past vio-

⁴⁴⁷ *Id.* at 707 (citing *Laidlaw*, 956 F. Supp. at 610-11).

⁴⁴⁸ 33 U.S.C. § 1319(d) (West 1999). "In determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require." *Id.* But see *Natural Resources Defense Council v. Texaco*, 2 F.3d 493,503 (3d Cir. 1993) (once citizen plaintiff establishes ongoing violation of parameter at time complaint is filed, court is obliged to assess penalties for *all proven violations of that parameter*) (emphasis added).

⁴⁴⁹ *Laidlaw*, 120 S.Ct. at 708.

⁴⁵⁰ *Id.* at 715 (Scalia, J., dissenting).

⁴⁵¹ *Gwaltney*, 484 U.S. at 59 (emphasis added).

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lations under the citizen suit provisions. "Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause."⁴⁵² Subject-matter jurisdiction would exist, however, for the post-complaint violations and penalty assessment of \$15,100. Moreover, it would behoove the Administrator to intervene to preserve the penalties assessed for Laidlaw's wholly past violations.⁴⁵³

Had *Laidlaw* been brought under the Clean Air Act, the Court might not have had the opportunity to address the civil penalties issue. Under the Clean Air Act Amendments of 1990, penalties, instead of going to the United States Treasury, "shall be deposited in a special fund in the United States Treasury for licensing and other services."⁴⁵⁴ More significantly, the district court in any citizen suit shall have discretion to order that such civil penalties, in lieu of being deposited in the special fund, "be used in beneficial mitigation projects which are consistent with this chapter and enhance the public health or the environment."⁴⁵⁵ In such situations, a damages remedy is not paid entirely to the Treasury. Consequently, not only will the mitigation projects redress the plaintiffs' injuries, but will render the Article III standing limitations asserted in *Steel Co.* inapplicable to Clean Air Act citizen suits. The 1990 Amendments to the Clean Air Act have thus essentially satisfied *Steel Co.*'s redressability requirement.

Additionally, under the 1990 Amendments to the Clean Air Act, citizen suits can now be maintained for *wholly past viola-*

⁴⁵² *Steel Co.*, 523 U.S. 83, 94 (quoting *Ex parte McCardle*, 7 Wall. 506, 514 (1869)).

⁴⁵³ See 33 U.S.C. § 1365(c)(2) (West 1999). In such action under this section, the Administrator, if not a party, may intervene as a matter of right. *See id.*

⁴⁵⁴ 42 U.S.C. § 7604(g)(1) (West 1999).

⁴⁵⁵ 42 U.S.C. § 7604(g)(2) (West 1999). The court shall obtain the view of the Administrator in exercising such discretion and selecting any such projects. The amount of any such payment in any such action shall not exceed \$100,000. *See id.*

tions that have occurred more than once.⁴⁵⁶ Any limitations imposed by *Gwaltney, Steel Co.*, or *Laidlaw*, thus will not apply to citizen suits under the Clean Air Act. If Congress were so inclined, it could craft similar language into all environmental citizen suit statutes to allow suits for wholly past violations that have occurred more than once, as well as incorporating mitigation projects into the other citizen suit provisions.

C. STATING A CLAIM

Under an equal protection environmental justice claim, to state a cause of action under section 1983, the plaintiff must allege that some person, acting under state or territorial law, has deprived him of a federal right.⁴⁵⁷ Presumably, the advocate will allege discriminatory intent on the part of the defendants, as this element will need to be proven at trial. Similarly, under Title VI “[t]o state a claim for damages under 42 U.S.C. § 2000d, a plaintiff must allege that (1) the entity involved is engaging in racial discrimination; and (2) the entity involved is receiving federal assistance.”⁴⁵⁸ “Although the plaintiff must prove intent at trial, it need not be pled in the complaint.”⁴⁵⁹

Under the citizen suit provisions, the plaintiff will need to allege “a state of either continuous or intermittent violation; that is, a reasonable likelihood that a past polluter will con-

⁴⁵⁶ 42 U.S.C. § 7604(a)(1) (West 1999). A civil action may be brought against any person “who is alleged to have violated (if there is evidence that the alleged violation has been repeated).” *Id.* See also *Fried v. Sungard Recovery Services, Inc.* 916 F. Supp. 465, 467 (E.D. Pa. 1996). “A plain reading of the CAA as amended, however, indicates that the 1990 Amendments overruled *Gwaltney* with respect to wholly past violations. The CAA, therefore, permits citizen suits for both continuing violations and wholly past violation, so long as the past violation occurred more than once.” *Id.*

⁴⁵⁷ See *Gomez v. Toledo*, 446 U.S. 635, 640 (1980).

⁴⁵⁸ *Fobbs v. Holy Cross Health System Corp.*, 29 F.3d 1439, 1447 (9th Cir. 1994), *cert. denied*, 513 U.S. 1127 (1995).

⁴⁵⁹ *Id.*

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tinue to pollute in the future.”⁴⁶⁰ Under the federal laws, a complaint should not be dismissed for failure to state a claim “unless it appears beyond doubt that the plaintiff can prove no set of facts” in support of the claim.⁴⁶¹ For example, in *Scheuer v. Rhodes*,⁴⁶² the Court held that for purposes of a Rule 12(b)(6) motion, the allegations in the complaint are taken as true, even when they “have not yet [been] established by proof.”⁴⁶³ Thus, an environmental justice claim should withstand a motion to dismiss if properly pled because even defective allegations in a complaint can be amended to correct any pleading errors.⁴⁶⁴

D. TIMELY FILING

The advocate should file the case within the applicable statute of limitations. For an equal protection challenge filed under 42 U.S.C. § 1983 are subject to the limitations period is the one found in the particular state’s personal-injury statute.⁴⁶⁵ For claims brought under 42 U.S.C. § 2000d, a number of circuit courts have held that such claims brought are governed by the same state limitations period.⁴⁶⁶ Consequently, the state in which an equal protection challenge or Title VI action is filed will govern the time within which to file the action. A Title VI administrative complaint, however, “must be filed within 180 calendar days of the alleged discriminatory

⁴⁶⁰ *Gwaltney*, 484 U.S. at 57. Section “505 confers jurisdiction over citizen suits when the citizen-plaintiffs make a good-faith allegation of continuous or intermittent violation.” *Id.* at 64.

⁴⁶¹ *Conley v. Gibson*, 355 U.S. 41, 45-6 (1957).

⁴⁶² 416 U.S. 232 (1974).

⁴⁶³ *Id.* at 238.

⁴⁶⁴ See FED. R. CIV. P. 15(a); 28 U.S.C.A. § 1653 (West 1999).

⁴⁶⁵ *Wilson v. Garcia*, 471 U.S. 261, 276 (1985).

⁴⁶⁶ See *Taylor v. Regents of Univ. of Cal.*, 993 F.2d 710, 712 (9th Cir. 1993); *Frazier v. Garrison I.S.C.*, 980 F.2d 1514, 1520-22 (5th Cir. 1993); *Bougher v. University of Pittsburgh*, 882 F.2d 74, 77-78 (3d Cir. 1989); *Chambers v. Omaha Pub. Sch. Dist.*, 536 F.2d 222, 225 n.2 (8th Cir. 1976).

acts, unless the OCR waives the time limit for good cause.⁴⁶⁷ With regard to a complaint under the Administrative Procedure Act, numerous courts have held that it is a “civil action” within the meaning of the Tucker Act,⁴⁶⁸ which contains the general six-year statute of limitations.

E. SUMMARY JUDGMENT

An environmental justice action filed under either the Equal Protection Clause or Title VI should withstand a defendant’s motion for summary judgment. The reason for this is that in *Celotex Corp. v. Catrett*, the Court recognized that “the plain language of Rule 56(c) mandates the entry of summary judgment, *after* adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.”⁴⁶⁹ “[T]he mere existence of *some* alleged factual dispute between the parties will [thus] not defeat an otherwise properly supported motion for summary judgment [since] the requirement is that there be no *genuine* issue of *material* fact.”⁴⁷⁰ A fact is material when it is identified as such by the controlling substantive law.⁴⁷¹ In an environmental justice case, “whether the differential impact . . . reflect[s] an intent to discriminate on account of race, . . . is a pure question of fact.”⁴⁷² Similarly, an issue is genuine when the evidence is such that a reasonable jury could return a verdict for the nonmovant.⁴⁷³ Accordingly, the nonmovant “must do more than simply show

⁴⁶⁷ 40 C.F.R. § 7.120(b)(2) (1999).

⁴⁶⁸ 28 U.S.C. § 1491. “[E]very civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues.” 28 U.S.C. § 2401(a) (West 1999). *See also* *Sierra Club v. Slater*, 120 F.3d 623, 630-31 (6th Cir. 1997).

⁴⁶⁹ *Celotex Corp. v. Catrett*, 47 U.S. 317, 322 (1986) (emphasis added).

⁴⁷⁰ *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986) (emphasis added).

⁴⁷¹ *See id.* at 248.

⁴⁷² *Pullman-Standard v. Swint*, 456 U.S. 273, 287-88 (1982).

⁴⁷³ *See Anderson*, 477 U.S. at 249-50.

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that there is some metaphysical doubt as to the material facts . . . [for w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.' ⁴⁷⁴

Thus, to survive a motion for summary judgment, the advocate, after discovery, must come forward with specific evidence of every element material to the case so as to create a genuine issue for trial. The evidence of disparate impact, together with supplemental circumstantial evidence should create this genuine issue of material fact for the trial court. For example, in *R.I.S.E. Inc. v. Kay*,⁴⁷⁵ the evidence of disproportionate impact on black residents by the placement of landfills in King and Queen County for twenty-five years beginning in 1969, together with the historical facts revealing a pattern of official actions taken for invidious purposes, could lead a rational trier of fact to the conclusion that there was a violation of the Equal Protection Clause.⁴⁷⁶

F. SOVEREIGN IMMUNITY

In general, government defendants do not like to be sued. Thus, in an environmental justice action under the Equal Protection Clause, the government defendants will most likely assert sovereign immunity under the Eleventh Amendment. While it is clear that the Eleventh Amendment will bar a damages claim against state officials sued in their official capacity, it will not, however, bar a damages claim against state officials sued in their personal capacity.⁴⁷⁷ When this is done, state officials can assert "personal immunity defenses, such as objectively reasonable reliance on existing law."⁴⁷⁸ However, while

⁴⁷⁴ *Matsushita Electric Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986).

⁴⁷⁵ 768 F. Supp. 1141 (E.D. Va. 1991), *aff'd without opinion*, 977 F.2d 573 (4th Cir. 1992).

⁴⁷⁶ *See id.* at 1143.

⁴⁷⁷ *See Hafer v. Melo*, 502 U.S. 21, 25 (1991).

⁴⁷⁸ *Kentucky v. Graham*, 473 U.S. 159, 166-67 (1985).

most public officials are entitled to assert qualified immunity as a personal, affirmative defense to a damage liability, it does not bar actions for declaratory or injunctive relief.⁴⁷⁹

In an official capacity, however, the Supreme Court has held, in *Kentucky v. Graham*,⁴⁸⁰ that “personal immunity defenses are unavailable. [Consequently, t]he only immunities that can be claimed . . . are forms of sovereign immunity that the entity, *qua* entity, may possess, such as the Eleventh Amendment.”⁴⁸¹ Similarly, in *Howlett v. Rose*,⁴⁸² the Court recognized that “since municipal corporations and similar governmental entities are ‘persons,’ . . . a state court entertaining a [section] 1983 action . . . [has] abolished whatever vestige of the State’s sovereign immunity the municipality possessed.”⁴⁸³ Thus, the County Board of Supervisors of San Francisco County⁴⁸⁴ could be sued in an official-capacity action filed under section 1983. Local government officials are also “persons” under section 1983 when sued in their official capacities. As such, they are suable in those cases in which the local government would be suable in its own name.⁴⁸⁵ Consequently, local governments and their officials “can be sued directly under [section] 1983 for monetary, declaratory, or injunctive relief where, as here, the action that is alleged to be unconstitutional implements a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body’s officers.”⁴⁸⁶ In the hypothetical, then, San Francisco County could be sued in its own name for monetary, declaratory, or injunctive relief because the municipality is a “person” under section 1983. Moreover, San Francisco County could not as-

⁴⁷⁹ See *Harlow v. Fitzgerald*, 457 U.S. 800, 806-807 (1982).

⁴⁸⁰ 473 U.S. 159 (1985).

⁴⁸¹ *Id.* at 167.

⁴⁸² 496 U.S. 356 (1990).

⁴⁸³ *Id.* at 376.

⁴⁸⁴ See *supra* notes 171-174 and accompanying text for examples.

⁴⁸⁵ See *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 690 n.55 (1978).

⁴⁸⁶ *Id.* at 690.

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sert any sovereign immunity defense because “[t]he bar of the Eleventh Amendment to suit in federal courts . . . does not extend to counties and similar municipal corporations.”⁴⁸⁷

The major distinction of an environmental justice claim filed under Title VI, as opposed to section 1983, is that Congress explicitly abrogated the states’ immunity from suits in federal court alleging violations of Title VI of the Civil Rights Act of 1964.⁴⁸⁸ Significantly, 42 U.S.C. § 2000d-7(a)(2) provides,

In a suit against a State for a violation of a statute referred to in paragraph (1), remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in the suit against any public or private entity other than a State.⁴⁸⁹

Such an abrogation of a state’s Eleventh Amendment immunity “similarly precludes assertion of immunity by state officials sued in their official capacity.”⁴⁹⁰ The Eleventh Amendment is thus not a bar to a private cause of action for damages, as well as declaratory and injunctive relief, under a Title VI suit, against state and local agencies receiving federal funds. Such remedies could compensate a minority community for decreased land values, aesthetics, and the risks to the health and safety of its inhabitants.⁴⁹¹

G. EQUITABLE RELIEF

Equitable claims are generally decided by the district court. However, “when both parties consent, [Federal Rule of Civil

⁴⁸⁷ Mt. Healthy City School Dist. v. Doyle, 429 U.S. 274, 280 (1977).

⁴⁸⁸ 42 U.S.C.A. § 2000d-7(a)(1) (West 1999) (added by the Rehabilitation Act Amendments of 1986, Pub. L. 99-506, 100 Stat. 1845 (1986)).

⁴⁸⁹ 42 U.S.C. § 2000d-7(a)(2).

⁴⁹⁰ Duffy v. Riveland, 98 F.3d 447, 452 n.4 (9th Cir. 1996).

⁴⁹¹ See Bean, 482 F. Supp. at 677, *aff’d without opinion*, 782 F.2d 1038 (5th Cir. 1986).

Procedure ("FRCP") 39(c) invests the trial court with the discretion - - but not the duty - - to submit an equitable claim to the jury for a binding verdict."⁴⁹² As the Supreme Court has recognized the legal action for a damages remedy under the Equal Protection Clause⁴⁹³ and Title VI,⁴⁹⁴ the advocate should demand a jury trial on the issue of discriminatory intent. This demand is an affirmative duty as established by FRCP 38(b), thus, "the failure to file a demand constitutes a waiver of the right."⁴⁹⁵ Such a demand was made in *Beacon Theaters, Inc. v. Westover*, where the Supreme Court held that, per the FRCP, the same court may try both legal and equitable causes in the same action. . . . Whatever permanent injunctive relief [the plaintiffs] might be entitled to on the basis of the decision in this case could, of course, be given by the court *after* the jury renders its verdict."⁴⁹⁶ This allows all issues between two parties to be fully settled by a jury in a single suit.⁴⁹⁷ The environmental justice advocate thus is entitled to a jury trial on the issue of intent under the Equal Protection Clause and Title VI. Injunctive relief, however, should await determination of the legal issues.

H. ATTORNEY FEES

Under section 1983 or Title VI, 42 U.S.C. § 1988 provides, in part, that in an enforcement of a section 1983 violation, brought by or on behalf of the government, or in an enforcement or charge of a Title VI violation, "the court in its discretion, may allow the prevailing party, other than the United

⁴⁹² *Merex A.G. v. Fairchild Weston Sys., Inc.*, 29 F.3d 821, 827 (2d Cir. 1994).

⁴⁹³ See *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 690 (1978).

⁴⁹⁴ See *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 70 (1992). See also *Lane v. Pena*, 518 U.S. 187, 191 (1996) (citing *Franklin* for the interpretation that a "clear majority" of the Court in *Guardians* confirmed that damages were available for intentional violations of Title VI).

⁴⁹⁵ See *Fuller v. City of Oakland*, 47 F.3d 1522, 1530-31 (9th Cir. 1995).

⁴⁹⁶ *Beacon Theaters, Inc. v. Westover*, 359 U.S. 500, 508 (1959) (emphasis added).

⁴⁹⁷ See *id.*

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States, a reasonable attorney's fee as part of the costs.⁴⁹⁸ Section 1988 would thus seem to include fees under Title VI administrative proceedings as well. In comparison, attorney fees under the federal environmental statutes are authorized under the various citizen suit provisions.⁴⁹⁹

VI. CONCLUSION

Environmental justice cases alleging purposeful discrimination must be tried before a jury. A jury composed of a representative community of color will see to it that no subgroup of people should be forced to shoulder a disproportionate share of the negative environmental impacts of pollution or environmental hazards due to lack of political or economic strength. In a purposeful discrimination case, Title VI should prove to be a slightly better vehicle than section 1983, as Congress has expressly abrogated the states Eleventh Amendment immunity. Under Title VI and section 1983, damages, as well as injunctive relief, should be sought.

Under Title VI regulations, the environmental justice advocate must first exhaust any administrative complaint procedures. While up to now, those procedures have not provided any measurable relief to communities of color, EPA's Final Guidance for Investigating Title VI Administrative Complaints may offer some relief. Relief may also be available, in the form of a judicial review of an agency decision, under the Administrative Procedure Act in federal district court. While only equitable relief is available under the APA, sovereign immunity of the federal agencies is expressly waived. In comparison, citizen suits under federal environmental statutes should prove more effective when Congress amends the citizen suit provisions, as

⁴⁹⁸ *Maine*, 448 U.S. at 9.

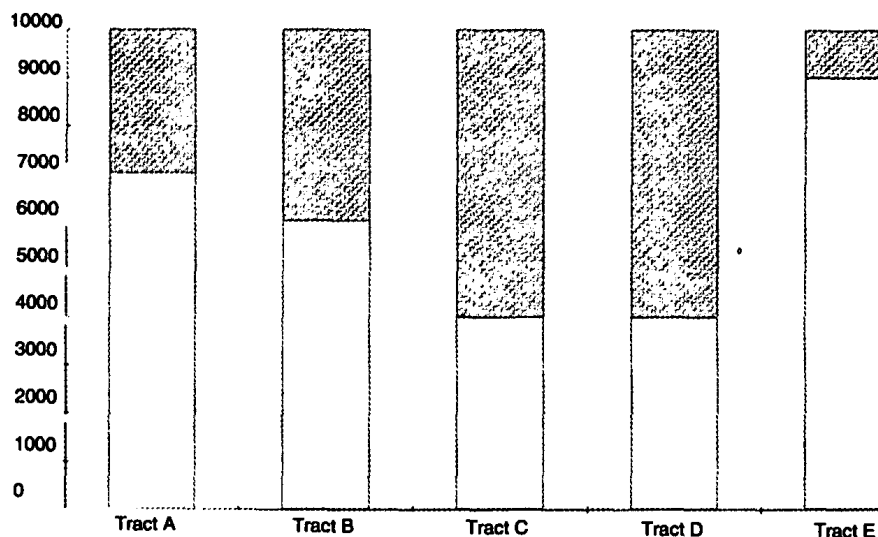
⁴⁹⁹ *See, e.g.*, Toxic Substance Control Act, 15 U.S.C. § 2619(c)(2) (West 1999); Clean Water Act, 33 U.S.C. § 1365(d) (West 1999); Safe Drinking Water Act, 42 U.S.C. § 300j-8(d) (West 1999); Solid Waste Disposal Act, 42 U.S.C. § 6972(e) (West 1999); Clean Air Act, 42 U.S.C. § 7604(d) (West 1999); Emergency Planning and Community Right-To-Know Act, 42 U.S.C. § 11046(f) (West 1999).

it did with the 1990 Clean Air Act Amendments, to allow suits for wholly past violations.

The environmental justice movement is a most worthy challenge that will benefit all of us. As Robert Bullard has recognized, “[a]s important as distributional equity is in the environmental justice movement, equal pollution or equal risk is not the final objective. The environmental justice framework embodies the right of *all* individuals to be protected from environmental hazards.”⁵⁰⁰

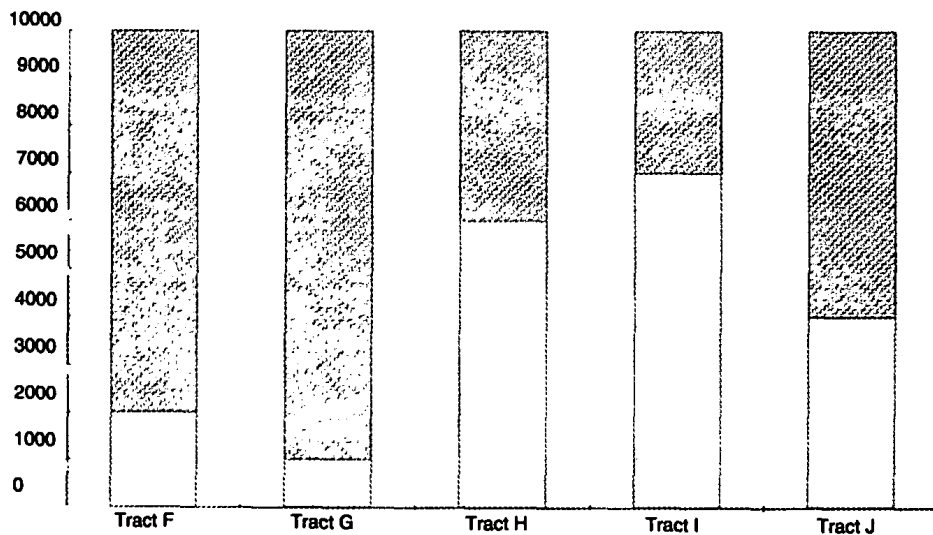
⁵⁰⁰ Robert D. Bullard, *Unequal Environmental Protection: Incorporating Environmental Justice in Decision Making*, in *WORST THINGS FIRST?: THE DEBATE OVER RISK BASED NATIONAL PRIORITIES* at 243 (Adam M. Finkel & Dominic Golding eds., 1994) (emphasis added).

Figure 1



I -1 White EJ Minority

**San Francisco County
Population 100,000
50% Minority, 50% White**



I -1 White EJ Minority