Building for the All!

A Guide for Local, State, and Tribal Governments in the Infrastructure Moment

PolicyLink

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Opportunities to Advance Infrastructure Justice and Accountability

Standards for the Infrastructure Moment

The Infrastructure Investment and Jobs Act (IIJA) ushers in a new era of growth and is designed with the intent to connect diverse, vulnerable, and marginalized people and communities to mobility, environmental justice, and economic opportunity.[1] The IIJA and the more recent Inflation Reduction Act exemplify the commitment of Congress to transportation and mobility, clean energy, broadband access, climate action, resilient communities, and good jobs, and complement the commitment of the Biden–Harris Administration to racial equity—a commitment that offers the promise of spatial justice and distributional equity[2] in the built environment.

It is important to note, however, that the innovation and equity intended in IIJA funds will, in the main, be delivered to American communities using the same structures and delivery systems of the last once-in-a-generation infrastructure moment. Formula funding and block grants to states make up the lion's share of IIJA funds, with the balance to be distributed in competitive processes, including notices of funding opportunities and discretionary grants. Moreover, the complex array of federal regulations, nonbinding departmental guidance documents, and other statutes result in an alphabet soup of legal parameters—some binding and some offered as information only. Ensuring the rights of all people to live, work, learn, play, and worship in spatially just, economically viable, and environmentally resilient communities requires a set of overarching infrastructure standards to guide governing and decision-making in a manner that balances the complex mix of federal regulations with the government's constitutional responsibility to the people.

Affirmative Duty of Government

Although the Executive Branch has committed to advancing racial equity, the U.S. Supreme Court has restricted efforts to address discrimination in several different ways.[3] The Court has strictly limited the government's ability to prevent and remedy discrimination through race-conscious action (i.e., affirmative action), imposing limits the Court situates in the Equal Protection Clause of the Constitution's 14th Amendment.[4] In addition, the Court has aggressively limited the ability of private individuals and organizations to challenge government action as racially discriminatory under the Equal Protection Clause by prohibiting claims against government actions that have undeniable racially discriminatory *effects*—i.e., "disparate impacts."[5] Instead, plaintiffs must meet the exceedingly difficult standard of proving that the challenged action was *intentionally* discriminatory, a tremendously difficult burden of proof.[6]

However, despite these Court-imposed limitations, government is not powerless in this area. Government *can*—and, in some cases, *is required to*—take *certain actions to avoid, prohibit, or remedy the effects of racial discrimination.* Government actors have a compelling interest in avoiding the subsidization of clearly discriminatory behavior by private actors.[7] In addition, Title VI regulations require "that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes, or results in racial discrimination."[8] Thus, government actors are always permitted to:

- evaluate potentially disparate impacts of proposed actions and make decisions to avoid those impacts;
- take steps to avoid supporting discrimination by others by, for example, withdrawing funding from discriminatory recipients or actors; and
- gather data, such as through disparate impact assessments, about impacts of existing programs and past decisions, and adjust decisions so as to avoid discriminatory impacts.

Title VI of the Civil Rights Act

Title VI and its implementing regulations also help ensure racial equity. Title VI prohibits both intentional discrimination and disparate impact discrimination by programs that receive federal financial assistance.[9] Although individuals cannot file Title VI disparate impact suits against funding recipients in federal court, they can file complaints with federal agencies. Federal agencies investigate and act upon those complaints by evaluating whether the complaint (1) identifies a specific race-neutral policy or practice, (2) shows a harm resulting from that policy or practice, (3) provides data and evidence that exemplifies the disparity, and (4) establishes that the policy or practice caused the disparate impact.[10] The impact assessments and audits recommended in this report can help complainants satisfy these criteria.

Gentrification and Displacement

Although federal agencies' Title VI regulations prohibit disparate impacts,[11] only the U.S. Department of Transportation (DOT) has a provision that contemplates *displacement* as a type of prohibited disparate impact—by prohibiting the *locating of facilities* with the "*effect of* excluding persons from, denying them the benefits of, or subjecting them to discrimination...on the grounds of race, color, or national origin."[12] This standard can be understood as prohibiting a facility from being located in a manner that creates uneven displacement pressures that push out protected classes, thereby denying them from accessing the facility's benefits.

Affirmatively Furthering Fair Housing (AFFH) Under the Fair Housing Act of 1968

The Fair Housing Act is another avenue to advance racial equity, as it requires all federal agencies to affirmatively further fair housing when "administer[ing] their programs and activities relating to housing and urban development."[13] The Department of Housing and Urban Development enacted regulations to define and enforce the AFFH duty in 2015.[14] They set forth a broad definition that encourages analysis and mitigation of displacement.[15] It requires overcoming "barriers that restrict access to opportunity," which can include displacement pressures that hinder impacted residents' ability to access opportunities such as "educational, transportation, economic, and other important opportunities in a community."[16]

National Environmental Policy Act (NEPA)

NEPA requires federal agencies to conduct environmental impact statements (EIS) for their "major" actions,[17] like funding decisions,[18] that "significantly affect...the quality of the human environment."[19] However, social and economic impacts (like displacement pressures[20]) alone cannot trigger an EIS—instead, they must accompany some kind of physical impact (like a new roadway or park).[21] When an EIS is performed, however, it can reasonably consider indirect displacement effects and potential mitigations.[22]

An EIS must also look beyond just actions by the federal actor and the effects of individual actions. The EIS must consider "reasonably foreseeable actions" that entities or persons *other than the federal actor* could take because of the proposed project, such as a landlord raising rents.[23] An EIS must also evaluate relevant *cumulative* effects of past actions, not just the effects of individual actions, though the extent of that cumulative evaluation is subject to the agency's discretion.[24]

Environmental Justice Regulations

Federal environmental mandates are increasingly requiring mitigation of environmental justice issues,[25] but courts have limited judicial enforcement of such mandates. For instance, as mentioned above, potential social and economic effects of a project alone, separate from environmental effects, are insufficient to trigger an EIS under NEPA.[26] However, the White House Council on Environmental Quality (CEQ) could soon provide more clarity on specific EIS triggers through pending rule updates.

With advocacy from the environmental justice movement, the Biden–Harris Administration recently established the Justice40 Initiative to require prioritization of climate change investments to disadvantaged and marginalized communities and to make environmental justice part of every federal agency's mission.[27] Some federal agencies have established implementing guidance that maps and identifies disadvantaged communities to guide the redress of past harms.[28]

In April 2022, a new CEQ rule also restored the definition of "effects" of proposed actions to explicitly include "indirect effects," such as "growth-inducing effects and other effects related to induced changes in the pattern of land use."[29] The new rule also generally aims to incorporate environmental justice in decision-making.[30] The rule establishes CEQ's NEPA regulations "as a floor, rather than a ceiling, for the environmental review standards," restoring the authority of federal agencies to evaluate all impacts and center communities in the permitting review process.[31]

Economic Inclusion

Government contracting practices have included diversity goals since the early 1960s, but here too, the U.S. Supreme Court has severely limited race-conscious remedies. It has imposed high burdens on public entities' procurement programs, requiring them to show that they have a "compelling interest" in using *racial* classifications that are "narrowly tailored" to advance that interest[32] or the slightly lower burden of showing an "important" state interest in using *gender*-based classifications that are "substantially related" to that interest.[33] Although such programs may be permissible, they require disparity studies showing past discrimination and careful program design, which come with great expense, years of effort, and substantial risk of litigation. In addition, several state laws have prohibited the use of race-conscious programs by public entities altogether.[34]

Despite these challenges, it is notable that:

- race- and gender-conscious programs in public contracting are legally permissible if they satisfy the strict or intermediate burdens explained above;
- race- and gender-neutral procurement programs (such as small and local business preferences, broad outreach requirements, and technical assistance efforts) are on strong legal ground; and
- public entities still have an *affirmative duty* to avoid race and gender discrimination in the operation of public contracting programs and can take many steps to fulfill this duty.[35]

As such, the federal government maintains procurement programs aimed at preventing discrimination and ensuring inclusivity pursuant to Title VI, Executive Order (EO) 11246 (prohibiting discrimination in employment by federal contractors), and DOT's Disadvantaged Business Enterprise (DBE) Program.[36] Despite the federal government's limited proactive enforcement of EO 11246,[37] the order establishes affirmative hiring goals for women and people of color in employment by construction contractors for federally funded projects.[38] In addition, courts have upheld the DBE program's race- and gender-conscious presumptions in its definition of "social and economic disadvantage."[39]

Proactive Accountability

In addition to direct community involvement, the legal mechanisms above can ensure infrastructure projects' accountability to disadvantaged communities. For instance, residents can bring Title VI disparate treatment claims in court and Title VI disparate impact complaints to the relevant agencies, and federal agencies can improve their proactive enforcement of Title VI and EO 11246.[40] As such, proactive and ongoing monitoring and reporting of all equal protection policies and regulations (reducing reliance on complaint-based enforcement) are recommended infrastructure standards. However, agencies need more support to enable robust, proactive enforcement. Additional funding should be allocated to jurisdictions to help meet these responsibilities.

Implementing Infrastructure Standards

As guidelines and specifications for the actions and outcomes of governing that build on and are contained within the framework of equal opportunity, standards do not necessarily require an act of Congress (pun intended). Cities, counties, and rural governments can lead the charge of creating the rules, norms, and values for equity in the built environment within the current framework of equal protection laws through the local autonomy afforded to federal grant recipients. States and tribal communities can maximize the benefits of federalism and enact changes that impact the 70 to 80 percent of IIJA funds that are implemented through formula funding. Governors can issue executive orders to drive standards and accountability across all departments in state government implementing infrastructure projects. Together, these actions we offer today can pave the way for the longer term legislative actions needed to ensure that investments in the built environment of our nation produce just places and equitable outcomes.

Infrastructure Standards to Meet the Infrastructure Moment

In service of the transformational aspirations in this generation of infrastructure investments, the Infrastructure Standards Working Group ("Working Group") was convened by PolicyLink and the Communities First Infrastructure Alliance. Working Group members include national and regional equity organizations, research institutes, and think tanks, working in solidarity to maximize this governing moment and to chart the path to spatial justice in the American landscape. Working Group member organizations include the following:

- Brookings Metro
- Communities First
- Emerald Cities Collaborative
- Lawyers for Good Government
- Natural Resources Defense Council
- New Urban Mobility Alliance
- Partnership for Southern Equity
- PolicyLink
- Race Forward
- Urban Institute

The Working Group offers a set of recommendations to advance and institutionalize standards in infrastructure investments and programs. These recommendations fall into five categories:

1. **Market shaping:** Opportunities to shape investments in the built environment to prioritize the community and economic development needs and interests of low-income communities and communities of color and to mitigate potential and unforeseen harmful impacts.
2. **Reckoning, repair, and transformation:** Opportunities to advance environmental justice regulations and standards that acknowledge environmental racism and harm that has been done to communities of color, ensure investments repair the harm of past policies, ensure the needed and just climate actions that are a necessary condition for equity, and promote transformative outcomes that uplift all people in the future—a reckoning, repair, and transformation of the American landscape.
3. **Inclusive and equitable innovation:** Opportunities to build standards for new regulatory offices and practices (e.g., regional centers for excellence, pilot programs, etc.) and to ensure that the institutionalization of these practices captures the equitable intent of legislation.
4. **Economic inclusion:** Opportunities to advance income, asset, and wealth opportunities; to protect and advance local economies through requirements for hiring, workforce development, procurement, and contracting; and to achieve a truly inclusive economy.
5. **Governance and democracy:** Opportunities to balance power across the public, private, and civic sectors of society through community-centered decision-making, transparency, and community-led accountability.

While these categories represent opportunities for significant changes in policy, regulations, and guidance, the standards offered here represent immediate opportunities for local, state, and tribal agencies to advance justice and accountability in IIJA-funded infrastructure projects.

Market Shaping

Infrastructure Standard: Disproportionate involuntary displacement of protected classes, whether direct or market-based, is neither just nor legal.

Standardized data categories (e.g., fields, geographic fidelity, time frame, etc.) should be developed to support the measurement of the harm of market pressure, which catalyzes higher housing costs, evictions, and foreclosures. Clearly defined and objective data and analysis can identify patterns of discrimination and, in some cases, establish a compelling interest in supporting a narrowly tailored race-conscious program, or demonstrate the need for other tools to prevent or remedy discrimination. This data forms the basis of mitigation strategies and antidisplacement plans as a crucial, indispensable part of infrastructure development projects. Antidisplacement plans should be community-centered and should reflect the impacted communities' articulated vision of and needs for remaining in place. Elements of community-centered planning should include robust community participation and collaboration that yields "co-benefits" for the government and the governed. Notably, community benefits agreements can be used to prevent or address disproportionate harm to communities' residential stability, business viability, and cultural assets resulting from the market-based pressures of infrastructure investments.

Infrastructure Standard: Private-sector profit through public investment delivers a bigger set of benefits than the public investment alone.

Local, state, and tribal jurisdictions using private investment and private involvement in financing, developing, and operating infrastructure assets should require a disparate impact assessment to determine the impact of the private participation and should make public clear statements of the actual project costs, including planned costs of both corporate profit and debt, subject to necessary confidential protections. This is particularly important when an increase in user fees or a reduction in service is anticipated resulting from the project. Impacted communities should also have meaningful opportunities to comment on proposed infrastructure projects supported by public-private partnerships before a contract is executed. For infrastructure projects that involve the private operation of a public infrastructure asset, the public entity should retain authority over rates and fee structures, ideally through fixed rates and preset escalation criteria. Also, where rates remain subject to change and in recognition of inherent conflicts of interest, private partners, investors, or operators should be prohibited from using public funds to lobby for rate increases, and an advocate should be appointed to represent ratepayers. The public entity should also require compliance with and reporting of all equity, diversity, and inclusion goals for the life of the contract and should conduct regular audits as an accountability mechanism.

Reckoning, Repair, and Transformation

Infrastructure Standard: There are no neutral investments. There will always be burden in the development of the public infrastructure and this burden, and the benefits it enables, must be equitably distributed.

Jurisdictions have a duty to reverse the harmful impacts of institutional neglect while being responsive to the needs of the people. Moreover, beyond the repair of past harm, when making infrastructure siting decisions, implementing local, state, and tribal agencies should seek to prevent undue environmental burdens of climate change and sea-level rise on low-income communities and communities of color. Climate forecasts can inform siting decisions (e.g., identifying forecasted flood zones), material selections (e.g., porous surfaces), and intended uses (e.g., identifying less car-centric options) and should account for sea-level rise. The benefits of these standards should be deployed in a manner that advances equity in environmental justice communities of concern.

Notably, states and tribal communities have the responsibility for defining disadvantaged and should use a definition that addresses disparity and disparate treatment of Black, Latinx, Indigenous, Asian, and other communities of color and low-income communities in rural and urban areas; environmental justice communities; front-line or fence-line communities overburdened by pollution, climate change effects, or both; communities historically reliant on the fossil fuel industry for their livelihoods; and communities with health, wealth, income, and other disparities.

Infrastructure Standard: Climate justice investments prioritize the most vulnerable people and places. Justice40 is the blueprint for prioritizing investments in sustainability and resilience in place.

Justice40 offers significant opportunity for communities to build safe and thriving communities through investments in sustainable and resilient infrastructure.[41] Options for encouraging and enabling the use of federal infrastructure funds for community-led Justice40 planning, coalition-building, and capacity-building should be considered. Furthermore, implementing agencies will require new skills, capacities, and responsibilities to implement Justice40 and should identify options for using federal infrastructure funds to build systemic and staff capacity to protect disadvantaged communities. To advance Justice40 goals, project planning, alignment, monitoring, and compliance with Justice40 regulations should also be explored.

Inclusive and Equitable Innovation

Infrastructure Standard: Equity is on the design side, not the behind side, of infrastructure innovation.

The IIJA and the Inflation Reduction Act combined offer the opportunity to expand the impact of infrastructure investments beyond technological innovation and to create opportunities for social innovation that build community and worker power and provide mechanisms for closing the racial wealth gap. For example, People's Choice Communications is an employee-owned enterprise launched by members of the International Brotherhood of Electrical Workers Local #3 during the Covid-19 pandemic to bridge the digital divide and help community residents have high-quality internet access.[42] In the environmental clean-up space, recycling cooperatives are jointly owned industrial and worker co-ops that specialize in recycling. Where such cooperative opportunities are permitted under state law, communities should prioritize social and collaborative innovation.

Economic Inclusion

Infrastructure Standard: Economic equity and inclusion are the "greater values" in best-value contracting.

State, tribal, and local agencies should explore all opportunities to incorporate economic equity into scoring systems for procurement decisions, using alternative procurement methods where necessary. Traditional "lowest responsible bidding" contracting approaches require the public sector to select the bidder who submits the lowest bid for the fulfillment of a detailed set of bid specifications. With alternative delivery procurement methods (e.g., construction management at risk, design-build, etc.) that enable economic equity in the evaluation criteria, local, state, and tribal jurisdictions can buy the products that maximize the creation of quality jobs, hire the contractor that commits to inclusive procurement and use of the local supply chain, and contract with the private-sector partner that commits to transparency and accountability. In implementing best-value contracting, fund recipients should explore the following approaches:

- Include past performance in attainment of goals for economic inclusion in the contractor evaluation and selection process.
- Require responsible, legally enforceable DBE participation plans for alternative delivery method contracts. The plans should:
  - be considered as a legal commitment by the contractor to attain the inclusion goals;
  - be incorporated in the contract in full text, not by reference;
  - require approval by the agency for changes to the plan prior to execution of changes; and
  - specify that failure to implement the approved plan or to seek approval of the changes to the plan is considered a material breach of contract.
- Use proactive compliance mechanisms and require bidders to submit staffing and contracting use plans either at the solicitation stage or during the contract negotiation stage. These plans should specify the types and skill level of workers and contractors needed at every stage of the project.
- Use legally defensible disparity studies to support race-conscious procurement strategies.
- Apply self-performance standards fairly, recognizing that self-performance requirements that have a higher threshold for disadvantaged businesses create a barrier to participation.

Infrastructure Standard: The economic benefits of infrastructure investments are community-centered, community-driven, measurable, and legally enforceable. The IIJA eliminated the prohibition on local hiring provisions for federally funded projects and creates an opportunity for local jurisdictions to prioritize local and disadvantaged workers. This can be done through a variety of mechanisms, including first source hiring policies, community workforce agreements, and project labor agreements. A first source hiring policy requires contractors working on infrastructure projects to provide the local or regional workforce intermediary an opportunity to fill all job openings with local or disadvantaged workers, before going to the market to recruit workers for the project. Community workforce and project labor agreements present crucial opportunities to coordinate training, hiring, and referral systems on large construction projects, enhancing opportunities for building a diverse workforce in quality construction careers. Additionally, community benefits agreements can contain a range of commitments that drive equity at a local level, including local hiring, job-training requirements and funding, disadvantaged business participation, loans and technical assistance for small contractors, and other commitments.

Governance and Democracy

Infrastructure Standard: Public-, private-, and civic-sector influence is balanced through community engagement, oversight, and co-governance.

Wherever possible, and subject to necessary confidentiality protections, community oversight activities, community liaisons, and co-governance committees that have the ability to participate in enforcement and accountability mechanisms of infrastructure projects should be engaged from planning through implementation. These engagement activities and co-governance committees should provide compensation for participating community members. Funded agencies should explore the potential to use infrastructure funding to fund these engagement and co-governance models.

Infrastructure Standard: The duty of government to prevent discrimination is affirmative. Equal protection for all people and equitable investments in all places is more than the absence of complaints.

State and federal environmental and related policies and plans include protections against noise and air quality impacts, community safety concerns, social and economic disruption,

direct displacement, and disproportionate market pressures (e.g., gentrification), to name a few. Maximizing these protections requires proactive monitoring and enforcement, particularly in projects that are being developed in densely populated urban communities. Additionally, as a part of a whole-of-project approach, civil rights and economic inclusion compliance language should be incorporated in contracts for all projects participants at all levels (e.g., contractors, subcontractors, suppliers, engineers, project management firms, etc.) and should include monitoring and reporting requirements at all levels. This approach also requires proactive monitoring of federal infrastructure work sites, and the surrounding community as warranted, by personnel with civil rights training. Implementing jurisdictions and agencies should have the staff capacity for proactive monitoring and should explore opportunities to use federal infrastructure funds to staff proactive compliance monitoring and ensure the protections for communities and workers that are guaranteed in civil rights and environmental laws and environmental justice executive orders.

Infrastructure and the Built Environment

The Infrastructure Standards offered here represent meaningful opportunities for local, state, and tribal jurisdictions to advance spatial and environmental justice in the implementation of infrastructure projects. Our full report, *Building For The All! Infrastructure Equity Standards for Infrastructure Investment and Transformation of the Built Environment*, not only details opportunities for local, state, and tribal governments but also recommends changes in guidance and regulations at the federal level to ensure that infrastructure investments meet the government's affirmative duty to prevent discrimination and harm.

Notes

1 *See, e.g.,* IIJA Sec. 60101 *et seq.* (supporting greater broadband access to underserved communities as part of "full participation in modern life in the United States").

2 *See* Edward W. Soja, "The city and spatial justice," Justice Spatial | Spatial Justice, Jan. 2009, p. 2, http://cdiwsnc.org/wp-content/uploads/2019/09/the-city-and-spatial-justice_edward-soja.pdf. Soja defines spatial [in]justice as "an intentional and focused emphasis on the spatial or geographical aspects of justice and injustice. As a starting point, this involves the fair and equitable distribution in space of socially valued resources and the opportunities to use them."

3 Legal material in this document is necessarily general and summary in nature. Implementation of specific initiatives to advance equity in infrastructure spending will require focused review and assistance of legal counsel.

4 *See, e.g., City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

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

6 *Village of Arlington Heights*, 429 U.S.C. at 265; *see also Department of Homeland Security v. Regents of the University of California*, 140 S.Ct. 1891, 1915 (2020).

7 *Croson*, 488 U.S. at 491.

8 *See* U.S. Department of Justice (DOJ), *Title VI Legal Manual*, last updated Apr. 22, 2021, https://www.justice.gov/crt/fcs/T6Manual7 at page VII.2.

9 *Id.* at VII.3, VII.5 (citing Attorney General "Memorandum for Heads of Departments and Agencies that Provide Federal Financial Assistance" Jul. 14, 1994, https://www.justice.gov/archives/ag/attorney-general-july-14-1994-memorandum-use-disparate-impact-standard-administrative-regulations).

10 *Id.* at VII.6, *et seq.*

11 *See, e.g.*, 49 C.F.R. § 21.5 (prohibiting the denial, differentiation, or restriction of program benefits and opportunities "on the grounds of race, color, or national origin," either "directly or through contractual or other arrangements" and actions that "have the effect of subjecting persons to discrimination").

12 *Id.* at (b)(3) (emphasis added).

13 42 U.S.C. § 3608(d); *see Jones v. Office of Comptroller of Currency*, 983 F.Supp. 197 (N.D. Ill. 1997); *Jorman v. Veterans Admin.*, 579 F.Supp. 1407 (D.D.C. 1984).

14 80 Fed. Reg. 42271 (2015). Although the Trump Administration had rescinded these regulations, the Biden–Harris Administration restored their definitions through interim final regulations in 2021. 86 Fed. Reg. 30787 (2021).

15 24 C.F.R. § 5.151.

16 *Id.*

17 42 U.S.C. § 4331.

18 *See* 40 C.F.R. § 1508.18 (requiring review of all actions "potentially subject to Federal control" including "projects and programs entirely or partly financed...by federal agencies"); *see, e.g., Touret v. NASA*, 485 F. Supp. 2d 38, 43 (D.R.I. 2007).

19 42 U.S.C. § 4332(C). For many proposed actions, agencies may first prepare an environmental assessment (EA) to determine whether the "significantly affecting" threshold is reached. 40 C.F.R. § 1508.9.

20 Social and economic effects can include impacts to the "quality of life in the urban setting" (*WATCH (Waterbury Action to Conserve Our Heritage Inc.) v. Harris*, 603 F.2d 310, 327 (2d Cir. 1979)), including "[n]oise, traffic, overburdened mass transportation systems, crime, congestion and even availability of drugs[.]" *Hanly v. Mitchell*, 460 F.2d 640, 647 (2d Cir. 1972); *cf. Como-Falcon Community Coalition, Inc. v. U.S. Dept. of Labor*, 609 F.2d 342, 343 (8th Cir. 1979).

21 40 C.F.R. § 1508.14; *see also Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983) (discussing proximate affects).

22 *St. Paul Branch of the NAACP v. U.S. DOT*, 764 F. Supp. 2d 1092, 1108, 1113-15 (D. Minn. 2011) (accepting an EIS that noted the ongoing and future property development in the area, predicted that "population composition and neighborhood character may change," and considered the city's housing strategy and other local efforts to provide affordable housing).

23 40 C.F.R. § 1508.7(g)(3); *see, e.g., City of Davis v. Coleman*, 521 F.2d 661, 661-666 (9th Cir. 1975) (concluding that "increased population, increased traffic, increased pollution, and increased demand for services such as utilities, education, police and fire protection, and recreational facilities" were all relevant effects of a major interchange project).

24 40 C.F.R. § 1508.7(g)(3); CEQ, Memorandum from Council on Env't. Quality on "Guidance on the Consideration of Past Actions in Cumulative Effects Analysis" to the Heads of Federal Agencies (June 24, 2005), https://www.energy.gov/sites/prod/files/nepapub/nepa_documents/RedDont/G-CEQ-PastActsCumulEffects.pdf.

25 *See* EO 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations (Feb. 11, 1994); "Learn about Environmental Justice," EPA (last updated Sep. 6, 2022), https://www.epa.gov/environmentaljustice/learn-about-environmental-justice.

26 *Hanly v. Mitchell*, 460 F.2d 640, 647 (2d Cir. 1972); *cf. Como-Falcon Community Coalition, Inc. v. U.S. Dept. of Labor*, 609 F.2d 342, 343 (8th Cir. 1979).

27 EO 14008, Tackling the Climate Crisis at Home and Abroad, Jan. 27, 2021, Sec. 223.

28 *See* Lawyers for Good Government, *A 50-State Survey of State Policies and Decision Makers to Help Ensure Federal Investments Go to "Disadvantaged Communities" Under Biden's J40 Initiative,* Sep. 2022, https://www.lawyersforgoodgovernment.org/dac-report, which offers a summary of existing Justice40 federal guidance.

29 87 Fed. Reg. 23453, 23462-63, -69 (Apr. 20, 2022), amending 40 C.F.R. § 1508.1(g).

30 *Id*. at 23456.

31 The White House, "CEQ Restores Three Key Community Safeguards during Federal Environmental Reviews," briefing, Apr. 19, 2022, https://www.whitehouse.gov/ceq/news-updates/2022/04/19/ceq-restores-three-key-community-safeguards-during-federal-environmental-reviews/.

32 *See e.g.*, *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

33 *See Craig v. Boren*, 429 U.S. 190 (1976).

34 *See, e.g.,* California Proposition 209 (voter-adopted constitutional provision, 1996) https://ballotpedia.org/California_Proposition_209,_Affirmative_Action_Initiative_(1996); Washington Initiative 200 (voter-adopted statute, 1998), https://ballotpedia.org/Washington_Initiative_200,_Affirmative_Action_Initiative_(1998).

35 *Norwood v. Harrison*, 413 U.S. 455, 492 (1973); *see also Croson,* 488 U.S. at 491.

36 49 C.F.R. parts 23 and 26.

37 As with Title VI, the authors of this report have found that the federal government's enforcement of EO 11246 is primarily complaint-based and not proactive. Section 209(a) of EO 11246 permits the Department of Labor to impose penalties and sanctions that range from contract termination to referral to the Department of Justice, but the authors find that the Department of Labor rarely imposes them.

38 *See* Office of Federal Contract Compliance Programs, *Construction Contractors Technical Assistance Guide*, U.S. Department of Labor, Oct. 2019, https://www.dol.gov/sites/dolgov/files/ofccp/Construction/files/ConstructionTAG.pdf.

39 Western States Paving Co., Inc. v. Washington State Dept. of Transp. 407 F.3d. 983 (9th Cir. 2005).

40 *See* EO 11246, §§ 201, 205, 206.

41 EO 14008, Tackling the Climate Crisis at Home and Abroad, Jan. 27, 2021, https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/27/executive-order-on-tackling-the-climate-crisis-at-home-and-abroad/.

42 "About Us," People's Choice, accessed Dec. 4, 2022, https://peopleschoice.coop/about-us.

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Cover photo: Mural located in Philadelphia, Pennsylvania titled "The Family Is One of Nature's Masterpieces" *(AP Photo/Chris Gardner)*

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