

Building for the All!

Infrastructure Standards for Transformation of the Built Environment

March 2023



Building for the All!

Infrastructure Standards for Transformation of the Built Environment

©2023 PolicyLink. All rights reserved.

PolicyLink is a national research and action institute advancing racial and economic equity by **Lifting Up What Works®**.

policylink.org

Acknowledgments

This work was made possible only through the collaborative efforts of members of the Infrastructure Equity Standards Working Group. This group strives to capitalize on this infrastructure moment and beyond. We have built a set of standards that transcends this moment and promotes equity in the built environment into the future. The Working Group members dedicated countless hours to the project, working tirelessly and collaboratively to achieve consensus on standards to guide equity in places for this generation and for generations to come.

The following individuals are members of the Infrastructure Standards Working Group and contributed to this report:

Jillian Blanchard, Director of Climate Change, Lawyers for Good Government; Helen Chin, President, Communities First Fund and co-lead on Communities First Infrastructure Alliance; Christina Cummings, Vice President of Operations, Partnership for Southern Equity; Xavier de Souza Briggs, Senior Fellow, Brookings Metro, and Senior Advisor, What Works Plus; Judith Dangerfield, PolicyLink, Managing Director, Racial Equity Governing Agenda; Demond Drummer, Managing Director for Equitable Economy, PolicyLink; Carlton Eley, Senior Director for Federal Strategies, Race Forward; Yonah Freemark, Senior Policy Associate, Urban Institute; Stephanie Gidigbi Jenkins, North Star and co-lead on Communities First Infrastructure Alliance; Ardie Griffin, Policy Analyst and Legislative Director, Emerald Cities Collaborative; Sonia Kikeri, National Director of Policy and Civic Engagement, Emerald Cities Collaborative; Abbie Langston, Director of Equitable Economy, PolicyLink; Meishka Mitchell, CEO and President, Emerald Cities Collaborative; Jessica Pizarek, Director of Federal Policy and Advocacy, PolicyLink; Shelley Poticha, Chief Climate Strategist, Natural Resources Defense Council; Axel Santana, Associate, PolicyLink; Anna Shipp, Principal Policy Associate, Urban Institute; J. Phillip Thompson, Massachusetts Institute of Technology; Lauren Thompson, Climate Change/Environmental Justice Staff Attorney, Lawyers for Good Government; Adie Tomer, Senior Fellow, Brookings Metro; Harriet Tregoning, Director, New Urban Mobility Alliance; Canyon Wildwood, Senior Associate, PolicyLink; Daryl Wright, Chief Strategy Officer, Emerald Cities Collaborative; Yasmin Zaerpoor, Director of Water Equity and Climate Resilience, PolicyLink.

The Center for American Progress was consulted in the drafting of the report.

McKinsey & Company provided research on the tenets of a multiracial democracy.

Legal research and counsel were provided by Julian Gross, Shoshana Baird, and Shajuti Hossain of the Law Office of Julian Gross. Additional legal support was provided by Garvey Vincent, Associate, at Renne Public Law Group, LLP.

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



communitiesfirst.us



1140 Connecticut Ave. NW
Suite 900B
Washington DC 20036 – 4003
t (202) 449-9780
emeraldcities.org



40 West 20th Street
11th floor
New York, NY 10011
t (212) 727-2700
nrdc.org



10 G Street NE
Suite 800
Washington, DC 20002
t (202) 729-7600
numo.global



6218 Georgia Ave NW
#5001
Washington, DC 20011
lawyersforgoodgovernment.org



55 Ivan Allen Jr. Blvd. NW
Suite 530
Atlanta, GA 30308
t (678) 383-7774
psequity.org



145 East 57th Street
4th Floor
New York, NY 10022
t (212) 513-7925
raceforward.org

Abbreviations Used

AFFH	Affirmatively Furthering Fair Housing
CBA	community benefits agreement
CEQ	Center for Environmental Quality
CHIPS	Creating Helpful Incentives to Produce Semiconductors and Science Act of 2022
CO₂	carbon dioxide
CWA	community workforce agreement
DBE	Disadvantaged Business Enterprise
DOJ	U.S. Department of Justice
DOL	U.S. Department of Labor
DOT	U.S. Department of Transportation
EIS	environmental impact statement
EO	(U.S. Presidential) Executive Order
EPA	U.S. Environmental Protection Agency
EV	electric vehicle
FTA	Federal Transit Administration
GARE	Government Alliance on Race and Equity
GHG	greenhouse gas
IIJA	Infrastructure Investment and Jobs Act
IRA	Inflation Reduction Act
NEPA	National Environmental Policy Act
P3s	public-private partnerships
SRF	state revolving loan fund
TIFIA	Transportation Infrastructure Finance and Innovation Act

Contents

1.0	Governing Standards in the Infrastructure Moment	6
	The Governing Moment	7
	Affirmative Duty of Government	9
	Implementing Infrastructure Equity Standards	12
2.0	Infrastructure Equity Standards to Meet the Infrastructure Moment	14
	Market Shaping	16
	Reckoning, Repair, and Transformation	23
	Inclusive and Equitable Innovation	32
	Economic Inclusion	34
	Governance and Democracy	41
3.0	Opportunities to Use Standards to Advance Infrastructure Equity in the Governing Moment	44
	Infrastructure and the Built Environment	45
	Governing for the All	46

1.0

Governing Standards in the Infrastructure Moment



The Governing Moment

Governing for the All

Our nation was founded on a bold set of ideals—that all men were created equal and each endowed with equal and inalienable rights to pursue and reach their full potential. These ideals, however, also intentionally excluded many of us—women, immigrants, renters, indigenous people, and people of color. Despite all of the great progress we have made as a country, we still feel the effects of that exclusion and we have yet to fully live in the ideals of liberty, equality, freedom, and well-being set forth in our founding documents. Almost 250 years into this great American experiment of democracy, many of us are still left out. Wealth inequality continues to rise and 100 million people in this nation experience economic insecurity, and disparate impacts of climate change are poised to cause upwards of 250,000 additional deaths per year between 2030 and 2050.¹ Generations of Black and Brown people live in the shadow of smokestacks and elevated expressways, suffer asthma and chronic pulmonary disease, have been displaced and dispossessed by gentrifying market forces, and have lost intergenerational wealth to redlining. These challenges not only harm those affected but pose a fundamental threat to our democracy. Failure to act now will limit the potential of *all of us*.²

We believe that, guided by a set of governing standards that have the potential to bring to life the tenets of a liberating democracy, our governing institutions can function and deliver for all of us. We believe that the standards can be applied in a whole-of-government approach—these standards can support the structure and the functions of government and deliver just solutions to the people. We believe that governing encompasses federal, state, local, tribal, territorial, and regional agencies at the executive, legislative, and judicial branches—the whole of government—and will cascade from federal levels of governance down to local levels and back up again and will be scalable across different branches and functions of governance. Only by achieving both breadth and depth in the standards themselves can we hope to achieve a whole-of-government approach that advances justice and accountability throughout the nation.

With trillions of dollars in investments in the built environment at stake, we begin the work of building governing standards with infrastructure.

1. Abbie Langston, *100 Million and Counting: A Portrait of Economic Insecurity in the United States* (Oakland and Los Angeles: PolicyLink and the USC Program for Environmental and Regional Equity), accessed Dec. 13, 2022, <https://www.policylink.org/resources-tools/100-million>.

2. See, e.g., Angela Glover Blackwell, “The Curb-Cut Effect,” *Stanford Social Innovation Review*, 15(1), 28–33, <https://www.aals.org/wp-content/uploads/2018/06/18ClinicalInterestConvergenceCurbCutEffectArticle.pdf>.

Standards for the Infrastructure Moment

The Infrastructure Investment and Jobs Act (IIJA) ushers in a new era of growth and is designed with intent to connect diverse, vulnerable, and marginalized people and communities to mobility, environmental justice, and economic opportunity.³ The IIJA along with the more recent Inflation Reduction Act (IRA) exemplify the commitment of Congress to transportation and mobility, clean energy, broadband access, climate action, resilient communities, and good jobs. These two acts complement the commitment of the Biden–Harris Administration to racial equity—a commitment that offers the promise of spatial justice and distributional equity⁴ 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 results 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.

3. *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”).

4. *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.”

Affirmative Duty of Government

Given the speed with which the federal government is allocating and distributing IIJA funds, standards for infrastructure investments for the all that meet this moment require a clear-eyed understanding of the current political and judicial environment within which more than \$1 trillion is being invested in the American built environment. The political environment in Washington, DC, has allowed the movement of billions of dollars in infrastructure funds to cities and states, and Executive Order (EO) 13985 (“Advancing Racial Equity and Support for Underserved Communities Through the Federal Government”) captures an intent to advance equity through the executive branch. However, over the past 50 years, the U.S. Supreme Court has steadily eroded the scope of constitutional protections against structural racism fostered by public agencies and has strictly limited the ability of governmental entities to take race-conscious action to avoid or remedy patterns of race and gender discrimination.

Most court decisions concerning public entities’ duties regarding racial discrimination focus on whether particular actions of a government entity violate the Equal Protection Clause of the 14th Amendment. The landmark cases of the 20th century built up a body of law regarding the set of governmental actions that are prohibited as racially discriminatory in the areas of public education, public contracting, civil rights, public services, and regulation more generally. However, the U.S. Supreme Court has held since the 1970s that for a governmental action to be prohibited as racially discriminatory under the Equal Protection Clause, it must be *intentionally* discriminatory.⁵ Showing that an action has severe racially discriminatory *effects*—i.e., a substantial

“disparate impact” on the basis of race—is not enough.⁶ Of course, proving that an action is a product of intentional discrimination is exceedingly difficult; this framework is of no help in addressing systemic racism.

In addition to strictly limiting the ability of plaintiffs to hold the government to account for actions that have racially discriminatory impacts, the U.S. Supreme Court has aggressively restricted laudable governmental efforts to address current and historic patterns of discrimination through the direct approach of race-conscious action, i.e., affirmative action, in areas like employment, contracting, and education.⁷ Thus the Supreme Court has limited the ability of civil rights plaintiffs to challenge governmental decisions that establish or reinforce systemic inequalities, while simultaneously restricting the most obvious and efficacious methods of redressing those inequalities.

The above principles are the product of decades of U.S. Supreme Court decisions and are daunting for racial equity advocates. However, embedded within the familiar and high-profile body of law described above is a permissible window within which the government can take *certain actions to avoid, prohibit, or remedy the effects of racial discrimination*; these actions are *generally permitted, and in some cases required as an affirmative duty* of the government.

6. Disparate impact of an action may be important *evidence* of intentional discrimination, but it is not in itself enough to constitute a violation of the Equal Protection Clause. See *Village of Arlington Heights v. Metropolitan Housing Development Corp.* 429 U.S. 252, 266 (1977):

“Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available. The impact of the official action whether it “bears more heavily on one race than another,” *Washington v. Davis*, supra, 426 U.S., at 242, 96 S.Ct., at 2049 may provide an important starting point. 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. *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886); *Guinn v. United States*, 238 U.S. 347, 35 S.Ct. 926, 59 L.Ed. 1340 (1915); *Lane v. Wilson*, 307 U.S. 268, 59 S.Ct. 872, 83 L.Ed. 1281 (1939); *Gomillion v. Lightfoot*, 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110 (1960).

The Supreme Court has since reaffirmed the need for more than mere statistical differential impacts in the context of the Fair Housing Act (FHA), and indeed stated that policies with disparate impacts do not violate the FHA unless they are “artificial, arbitrary, and unnecessary barriers.” *Texas Department of Housing and Community Affairs v. The Inclusive Communities Project*, 576 U.S. 519, 543 (2015). Moreover, the Court stated that *single-project decisions could by definition not constitute disparate impact policies*. *Id.* “For instance, a plaintiff challenging the decision of a private developer to construct a new building in one location rather than another will not easily be able to show this is a policy causing a disparate impact because such a one-time decision may not be a policy at all.”

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

5. “Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.” *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S.C. 252, 265 (1977). “[A] plaintiff must raise a plausible inference that an ‘invidious discriminatory purpose was a motivating factor’ in the relevant decision.” *Department of Homeland Security v. Regents of the University of California*, 140 S.Ct. 1891, 1915 (2020).

None of the equal protection jurisprudence described above prohibits government actors from:

- evaluating the potential disparate impacts of actions under consideration and making decisions so as to avoid actions that would have disparate impacts on the basis of race,
- taking steps to avoid perpetuating patterns of past discrimination by others or to affirmatively remedy those patterns, or
- gathering data about impacts of existing programs and past decisions and adjusting decisions to avoid continued disparate impacts.

Crucially, in this governing moment, the ability of local, state, and tribal agencies to reckon with and repair disparate negative impacts on communities of color is still enshrined within the context of equal rights and equal protection laws. The ability of communities to hold government accountable to the prevention and remedy of harmful effect of discrimination is still within the power that the people hold, in spite of decades of case law. From the work of the Government Alliance on Race and Equity (GARE) to equip city and county government with racial equity impact assessment tools,⁸ to PolicyLink and the Urban Institute’s Scoring Federal Legislation for Equity,⁹ to new tools developed by federal agencies, equity assessments offer a legally responsible mechanism for governing for equity, within the framework of government’s affirmative duty to the governed and maximizing the 14th Amendment, Title VI, and decades of environmental justice policy. Brookings Metro notes that “better data, accountability, public engagement, and capacity”¹⁰ are critical to addressing risk aversion among government officials. As such, within the context of a legal framework of standards for advancing equity in the built-environment, equity assessments are generously recommended throughout the report, and in this moment are offered as effective tools for governing a multiracial democracy.

8. See, e.g., “Tools and Resources,” Local and Regional Government Alliance and Race & Equity, accessed Dec. 13, 2022, <https://www.racialequityalliance.org/tools-resources/>.

9. Shena Ashley, Gregory Acs, Steven Brown, et al., *Scoring Federal Legislation for Equity: Definition, Framework, and Potential Application* (Washington, DC, and Oakland, CA: Urban Institute and PolicyLink, June 6, 2022), <https://www.urban.org/research/publication/scoring-federal-legislation-equity>.

10. Xavier de Souza Briggs and Richard M. McGahey, *Keeping promises while keeping score: Gauging the impacts of policy proposals on racial equity*, The Brookings Institution, Oct. 11, 2022, <https://www.brookings.edu/research/keeping-score-measuring-the-impacts-of-policy-proposals-on-racial-equity/>.

Additionally, under the Equal Protection Clause, government actors have a compelling interest in avoiding “passive participation” in racial discrimination by subsidizing clearly discriminatory behavior by private actors. “[I]t is ... axiomatic that a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish.”¹¹

These responsibilities can and should be fulfilled in a manner that complies with all legal obligations—including the obligation to satisfy strict scrutiny under the Equal Protection Clause when taking steps that are explicitly race-conscious.¹² However, it is important to note that a racially informed decision is not a racially exclusive decision and, as such, certain actions are on strong ground legally and do not implicate the strict scrutiny analysis that courts have used to restrict the use of race-conscious programs.

In addition to the permissible scope of action under the Equal Protection Clause, federal regulations guiding implementation of Title VI of the Civil Rights Act of 1964 prohibit discrimination in operations of programs that receive federal financial assistance.¹³ Title VI prohibits both intentional discrimination and actions that have a discriminatory “disparate impact,” regardless of intent. Title VI regulations direct agencies receiving federal funds to avoid, prevent, and mitigate “disproportionately adverse effects” on protected classes that are independent of any discriminatory intent.¹⁴ Prohibited discrimination comprises not only the intentional exclusion and/or unjust treatment of protected categories of people, but also policies and practices that are facially race-neutral but that have the effect of discriminating, causing harm, and excluding protected classes.

This broad approach advances the original purpose of Title VI and its implementing regulations, which include ensuring “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.”¹⁵ President John F. Kennedy

11. *Norwood v. Harrison*, 413 U.S. 455, 492 (1973). See also *Croson*, 488 U.S. at 491: “It is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice.”

12. For further discussion of the implications of the strict scrutiny standard, see the “Economic Inclusion” section, below.

13. See U.S. Department of Justice (DOJ), *Title VI Legal Manual*, last updated Apr. 22, 2021, <https://www.justice.gov/crt/fcs/T6Manual7>.

14. *Id.* at VII.3.

15. *Id.* at VII.2 (citing H.R. Misc. Doc. No. 124, 88th Cong., 1st Sess. 3, 12 (1963)).

also acknowledged that “[d]irect discrimination by Federal, State, or local governments is prohibited by the Constitution. But indirect discrimination, through the use of Federal funds, is just as invidious; and it should not be necessary to resort to the courts to prevent each individual violation.”¹⁶

Moreover, the Supreme Court has held that under Title VII, which provides interpretive guidance for Title VI, “practices, procedures, or tests neutral on their face, and even in terms of intent, cannot be maintained if they operate to ‘freeze’ the status quo of prior discriminatory employment practices.”¹⁷ Within the context of the affirmative duty to avoid “passive participation” in racial discrimination under the Equal Protection Clause, Title VI requires agencies to examine whether race-neutral policies disparately impact protected classes.¹⁸ The U.S. Department of Justice (DOJ) directs federal agencies to eliminate such policies “unless they are shown to be necessary to the program’s operation and there is no less discriminatory alternative.”¹⁹

Compellingly, while federal courts have held that there is no right of action of individuals to file suit for violations of Title VI, the prevention, avoidance, and mitigation of disparate impacts remains a part of governing responsibility of recipients of federal funds. The criteria established by the DOJ²⁰ for demonstrating disparate impact include identifying the specific race-neutral policy or practice, establishing the harm that results from the policy or practice, providing the data and evidence that exemplifies the disparity, and establishing the cause of the disparate impact.²¹ These criteria, coupled with the affirmative duty of government to evaluate the potential racial equity impacts of actions under consideration, offer a compelling justification for the type of equity assessments and audits recommended in this report to better ensure equitable investments in the built environment.

16. *Id.* at II.1 (citing H.R. Misc. Doc. No. 124, 88th Cong., 1st Sess. 3, 12 (1963)).

17. *Id.* at VII.2 (citing *Griggs v. Duke Power Co.*, 401 U.S. 424, 429–30 (1971)).

18. See *Norwood v. Harrison*, 413 U.S. at 492; see also *Croson*, 488 U.S. at 491: “It is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice.”

19. DOJ, *Title VI Legal Manual* at 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>).

20. DOJ, *Title VI Legal Manual*.

21. *Id.* at VII.6, *et seq.*; see also *N.Y.C. Envtl. Justice All. v. Giuliani*, 214 F.3d 65, 69 (2d Cir. 2000) (plaintiffs must “allege a causal connection between a facially neutral policy and a disproportionate and adverse impact on minorities”).

Crucially, the significance of the disparate impact regulations is much broader than federal funding and infrastructure investments in place. Consider that the uneven distribution of investments in communities is a platform that undergirds concentrated poverty and residential segregation. As such, these issues are not just about the race, ethnicity, or income of people who live in proximity to each other (by choice or lack thereof) but are instead about the lack of investment, the disinvestment, and the disproportionately harmful investments in places that are home to low-income families and people of color. Translated into geographic form, the uneven investments and distribution of resources is an enabling factor in the structure of racism and concentrated poverty. And in its geographic form, this distributional inequity looks like places of privilege and places of disadvantage, Black places and white places, rich places and poor, places with choice and access and places with the absence of viable options—it looks like communities that we see in all of the states of our nation. Compellingly, if we accept this notion of uneven investment and distribution as an enabling factor in structural racism and concentrated poverty in American communities, then we must also acknowledge that Title VI, in the disparate impact regulations, gives us a potentially powerful tool for structural reform.

To meet this governing moment and keep pace with the allocation and distribution of infrastructure investments, the Infrastructure Standards Working Group is advancing a range of proposals for embedding equity in the implementation of federal infrastructure investments. Despite a series of Supreme Court decisions hostile to efforts to address instances of current discrimination and the effects of historic discrimination, the government maintains a robust ability to identify discriminatory impacts of proposed actions, to prevent discrimination, and to address past discrimination. Infrastructure expenditures should use this ability at every juncture of development, for every dollar spent, in service to the 100 million persons in America who live below or near 200 percent of the federal poverty level,²² especially those facing the challenges of institutional racism.

22. Abbie Langston, *100 Million and Counting: A Portrait of Economic Insecurity in the United States* (Oakland and Los Angeles: PolicyLink and the USC Program for Environmental and Regional Equity, 2018), <https://www.policylink.org/our-work/100-million-economically-insecure>.

Implementing Infrastructure Standards

The IIJA and subsequently the IRA represent once-in-a-generation opportunities for the federal government to develop standards for infrastructure investments that will acknowledge and redress the environmental and racialized harms of the past; avoid, prevent, and mitigate the harmful impacts of the present; and change the trajectory of history through transformative investments in the built-environment of our nation. Standard setting is defined here as the development of a rational framework of rules, norms, values, and accepted measures of compliance that is generally accepted across the spectrum of public and private institutions. Standards can encompass legally enforceable laws and regulations as well as nonbinding guidance and funding documents. By definition, standard setting transcends government and includes regulatory requirements for private corporations and investors. More importantly, standard setting transcends both policy and advocacy as it combines public acceptance, expectation, compliance, and legal enforcement in a single strategy.

We believe that the majority of the equity standards proposed here can be implemented without the need for new legislation or regulation. The standards proposed would affect a wide array of funding streams and programs. Given this diversity, as well as the nuances of all affected agencies and their statutory frameworks, the need for regulatory and legislative authorization may vary and interpretations of each agency's statutory and regulatory authority may differ. Nonetheless, while we aim to identify where we anticipate regulatory and/or legislative change may be required, improved equity standards can be embedded in many different types of documents and procedures implemented by federal agencies, as well as by state, tribal, regional, and local fund recipients. Notices of funding availability, terms of grant agreements, contract terms, Title VI policies, state policies for distribution of formula funds, and formal and informal agency guidance documents²³ can all be vehicles for improved equity standards, without the need for federal legislation or a complex federal regulatory change.

These vehicles for implementation of federal law and funding programs can be transformative, shaping the terms of federal expenditures in places that dictate what projects get funded and what requirements are placed on those projects, and effectively controlling the behavior of numerous public and

private actors. When the federal government places a requirement on federal expenditures (whether through terms of a grant agreement, formal guidance, or otherwise), that term is contractually required of fund recipients, even if not explicitly set forth in a preexisting statute regulation. In many instances, the same is true of state governments.

In addition to affirmative *requirements* that federal agencies place on fund recipients, federal agencies can *encourage* implementation of equity standards by applicants and local fund recipients—in some cases through incentivization in evaluation systems for funding applicants. Notably, implementation of the proposed Infrastructure Equity Standards presented below would use many different approaches. Nonetheless, we aim to set forth a variety of possible approaches to strengthen equity in implementation of infrastructure spending, using tools and principles that can be adapted for use across different agencies and programs and at different levels of government.

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 equity and accountability across all departments in state government implementing infrastructure projects. At the federal level, non-legal guidance can be amended to enable equity in implementation of federal infrastructure projects by local, state, and tribal actors, alleviating the need for these actors to ask permission to invest in equity, and as such lessen the administrative burden in permitting and implementation. Rulemaking can be used to expand the equitable outcomes of current policies. And, always, the American democratic experiment can be advanced through new laws, policies, and structures of governing. IIJA offers this governing moment an opportunity for decision-making around investment in the built environment—at all levels of government—to live up to the promise of equal protection, equal opportunity, freedom,

23. See the Government Accountability Office, "Guidance Documents from Federal Agencies: How agencies clarify legal information, respond to questions, and inform the public," accessed Dec. 2, 2002, <https://www.gao.gov/assets/670/669721.pdf>.

and well-being guaranteed in the laws of our nation. 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.

We know that government leaders can change our governing standards. For example, in the alphabet soup of bureaucratic regulations guiding infrastructure investments, in May 2018, Title 49 Part 650.11 of the Code of Federal Regulations was adopted to make it easier for local, state, and tribal jurisdictions to leverage private investment in the development, maintenance, and operation of public infrastructure.²⁴ On the way to this moment, the American government created a new regulatory framework to remove administrative barriers and enable private-sector participation and profitability. We enabled private investment in infrastructure as the new normal and made private-sector profitability an easier choice. In this infrastructure moment, as billions of dollars flow to states, territories, cities, counties, and communities, we have the opportunity to use legal standards, tools, best practices, and next practices to make equity the new normal in infrastructure implementation. But to do this, we need to make the case and offer a way forward.

The Infrastructure Equity Standards proposed here recognize the unique legal pressures facing government-lead equity efforts and present proactive and principled ways in which infrastructure expenditures can and should seek to remedy past harms and advance spatial equity. Each category of proposed standards addresses the relevant legal landscape and support for various standards, as needed.

24. American Public Transportation Association Task Force on Public-Private Partnerships, *Public-Private Partnerships in Public Transportation: Policies and Principles for the Transit Industry*, last updated March 7, 2017, <https://www.transit.dot.gov/funding/public-private-partnerships-public-transportation-policies-and-principles-transit-industry>.

2.0

Infrastructure Standards to Meet the Infrastructure Moment



In service of the transformational outcomes 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 Infrastructure Alliance](#)
- [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 the following Infrastructure Equity Standards to facilitate both the repair of past harms and the forward-looking advancement of spatial equity. We recognize the urgency of this moment and the opportunity to build resilient, viable, and equitable communities. We also recognize that starting with the lens of the law requires faith in the law and a commitment on our part to amend, expand, advance, transcend, and challenge the law as warranted.

As such, we offer recommendations for cross-cutting interpretational guidance and regulatory opportunities to advance and institutionalize standards in infrastructure investments and programs in the near term and to provide a framework for long-term policy change. 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 justice, 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.

The process for making decisions about investments in infrastructure—including what will be built or repaired, where it will happen, who will benefit, and how it will be paid for—should benefit all people in all places. With this goal in mind, the Working Group offers this set of standards to federal, state, tribal, and local government entities and to our partners working in solidarity in this once-in-a-generation infrastructure moment.

Market Shaping

Infrastructure justice requires a reckoning with the fact that there is no such thing as a “free market.” From America’s founding to the present day, our government has proactively shaped our economy and determined which places enjoy economic prosperity in America and who endures the environmental pain. Through a combination of powerful tools, targeted rules, and specific investments, our government has long determined the value and availability of labor, land, goods, and services. Infrastructure development is part and parcel to the market shaping power of government. These investments in the built environment can create inequities in the housing market; social, economic, and cultural disruption in communities; and disparate treatment in the provision of community resources by (1) contributing to market-based displacement pressures and (2) prioritizing private profitability over public good. The standards recommended here are intended to prevent displacement and prioritize people over profit.

Gentrification and Market-Based Displacement

Gentrification is defined by the Environmental Protection Agency (EPA) as “the process of neighborhood change that occurs as places of lower real estate value are transformed into places of higher real estate value.”²⁵ The original definition, however, was developed by urban sociologist Ruth Glass as “the making of upper class.”²⁶ Glass notes that “[o]nce this process of ‘gentrification’ starts in a district, it goes on until all or most of the original working-class occupiers are displaced, and the whole social character of the district is changed.”²⁷

Recognizing the catalytic effect of gentrification, the Infrastructure Equity Standards acknowledge that while direct displacement may be caused by infrastructure development, involuntary market-based displacement is an impact caused by gentrification. As such, in discussing displacement, we are not

divorcing displacement from gentrification, as this would be like divorcing extreme weather events from climate change. Instead, the standards prioritize attention on market-based displacement as a starting point, while understanding and acknowledging gentrification as a root cause of market-based displacement pressures.

Notably, displacement can be both direct (e.g., physical home, business, and neighborhood demolition) and indirect (e.g., increased rent prices, environmental degradation, and changes that preclude access to housing and community infrastructure by low-to-moderate-income families). Direct physical displacement has policy and regulatory protections and vehicles for relief for affected individuals, even though there is room for improvement. Indirect displacement, conversely, has little protection and less relief for persons in impacted communities. The standards presented here focus on combating the wide array of indirect displacement pressures that push individuals away from their homes, businesses, and communities.²⁸ Current legislation, specifically, Title VI of the Civil Rights Act, the Fair Housing Act, and the National Environmental Policy Act, provide avenues for strengthened standards against indirect displacement as further described below.

Title VI provides one avenue for setting standards that combat uneven market-based displacement of protected classes. Title VI prohibits discrimination under federally assisted programs as follows:

“No 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 receiving Federal financial assistance.”²⁹

25. “Equitable Development and Environmental Justice,” U.S. Environmental Protection Agency (EPA), <https://www.epa.gov/environmentaljustice/equitable-development-and-environmental-justice>.

26. Divya Subramanian, “Ruth Glass: Beyond ‘Gentrification,’” *The New York Review of Books*, January 20, 2020, <https://www.nybooks.com/online/2020/01/20/ruth-glass-beyond-gentrification/>. (This is a review of Ruth Glass’s original essay.)

27. *Id.*

28. Other legislation that addresses direct physical displacement includes 42 U.S.C. § 4601 *et seq.* (Uniform Relocation Assistance and Real Property Acquisition Act); 24 C.F.R. § 578.1; 42 U.S. Code § 1437v (Quality Housing and Work Responsibility Act of 1998); 42 U.S.C. § 5304(d) (Housing and Community Development Act of 1974).

29. 42 U.S.C. § 2000d.

Each infrastructure agency has promulgated Title VI regulations that prohibit discriminatory actions constituting disparate treatment or disparate impacts.³⁰ “Adverse effects” that have disparate impacts can be physical, economic, social, cultural, and/or psychological.³¹ These descriptors are sufficiently broad enough to capture contributions to displacement as adverse effects that Title VI regulations intend to prohibit.³²

In addition, the U.S. Department of Transportation’s (DOT) Title VI regulations include a provision that could be interpreted to prohibit displacement effects:

“In determining the site or location of facilities, a recipient or applicant may not make selections with the purpose or *effect of excluding persons from, denying them the benefits of, or subjecting them to discrimination under any program to which this regulation applies*, on the grounds of race, color, or national origin; or with the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the Act or this part.”³³

The decision to locate a facility in a certain place may have the “effect of excluding persons” or “denying them the benefits of” a program by creating disparate displacement pressures (e.g., by raising property values that effectively push people of color out of the program’s intended areas of benefit). Thus, Title VI can be understood to prohibit infrastructure funding recipients from contributing to gentrifying impacts, such as indirect displacement pressures that disparately impact protected communities.

Similarly, the Fair Housing Act supports federal standards that require both analysis and mitigation of displacement pressures on protected classes. The Fair Housing Act requires “[a]ll executive departments and agencies” to:

“administer their programs and activities relating to housing and urban development (including any Federal agency having regulatory or supervisory authority over financial institutions) in a manner affirmatively to further the purposes of this subchapter and ... cooperate with the Secretary to further such purposes.”³⁴

This duty, known as “Affirmatively Furthering Fair Housing” (AFFH), requires federal funding agencies to take “meaningful actions” in its “activities and programs relating to housing and urban development” to “overcome patterns of segregation and foster inclusive communities free from barriers that restrict access to opportunity based on protected characteristics.”³⁵ Those “barriers” include displacement pressures that hinder impacted residents’ ability to access “educational, transportation, economic, and other important opportunities in a community.”³⁶ To meet this duty, agencies must “address significant disparities in housing needs and in access to opportunity, replacing segregated living patterns with truly integrated and balanced living patterns, transforming racially and ethnically concentrated areas of poverty into areas of opportunity, and fostering and maintaining compliance with civil rights and fair housing laws.”³⁷ Thus, this duty to affirmatively further fair housing requires federal infrastructure agencies to analyze and mitigate indirect displacement pressures associated with their infrastructure investments.

30. This report refers to “infrastructure agencies” collectively as the Department of Transportation (DOT, 49 C.F.R. Part 21), Department of Energy (DOE, 10 C.F.R. Part 1040), Environmental Protection Agency (EPA, 40 C.F.R. Part 7), Federal Emergency Management Agency (FEMA, 44 C.F.R. Part 7), Department of Commerce (Commerce, 15 C.F.R. Part 8), Department of Agriculture (USDA, 7 C.F.R. Part 15), and Department of Interior (DOI, 43 C.F.R. Part 17); DOJ, *Title VI Legal Manual*, Section VII(A) (“The Supreme Court has repeatedly held that Title VI regulations validly prohibit practices having a discriminatory effect on protected groups, even if the actions or practices are not intentionally discriminatory.”); see, e.g., 49 C.F.R. § 21.5 (prohibiting funding recipients from denying, differentiating, or restricting program benefits “on the grounds of race, color, or national origin,” either “directly or through contractual or other arrangements[.]”).

31. DOJ, *Title VI Legal Manual*, page VII.12.

32. See *id.* at VII.13 (recognizing that “establishing adversity in most cases presents a low bar” and that adverse impacts can include: “harm[s] [to] protected class members even without the loss of specific services or benefits,” “threatened or imminent harm,” and a “[m]ix of costs and benefits, effects that are difficult to quantify.”)

33. 49 C.F.R. § 21.5(b)(3) (emphasis added).

34. 42 U.S.C. § 3608(d).

35. 24 C.F.R. § 5.151.

36. *Id.*

37. *Id.*

Finally, the National Environmental Policy Act (NEPA) provides another avenue for setting standards to combat displacement pressures. NEPA requires federal agencies to consider the environmental impacts of federal actions,³⁸ including certain federal funding decisions.³⁹ Environmental impacts include effects to “the quality of the human environment”⁴⁰ or “quality of life in the urban setting,”⁴¹ such as social and economic impacts.⁴² Social and economic impacts can include displacement pressures (through rising property values, transit access, or other physical infrastructure changes) that are proximately related to infrastructure investments.⁴³ Indeed, at least one environmental impact statement (EIS) has considered the indirect displacement impacts on businesses and residents in evaluating a new transportation infrastructure project.⁴⁴ Moreover, the White House Center for Environmental Quality (CEQ), EPA, and EO 12898 have made clear that environmental justice concerns are relevant to NEPA analysis.⁴⁵ Indeed, the

38. 42 U.S.C. § 4331; *see also* “What Is the National Environmental Policy Act?” EPA, <https://www.epa.gov/nepa/what-national-environmental-policy-act>.

39. Whether a federally funded project constitutes a federal action is a nuanced inquiry that focuses on the federal agency’s degree of control and discretion. *See, e.g., Touret v. NASA*, 485 F. Supp. 2d 38, 43 (D.R.I. 2007) (“an agency’s ‘ability to influence or control the outcome in material respect’ is the dominant factor in determining whether a project amounts to ‘major federal action’”) (quoting *Save Barton Creek Ass’n v. Fed. Hwy. Admin.*, 950 F.2d 1129, 1134 (5th Cir. 1992)). For purposes of funding infrastructure projects, we assume that there is sufficient federal involvement to support NEPA review. *See* 40 C.F.R. § 1508.18 (defining federal action to include all actions “potentially subject to Federal control” including “projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies”).

40. 42 U.S.C. § 4332©. 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.

41. *WATCH (Waterbury Action to Conserve Our Heritage Inc.) v. Harris*, 603 F.2d 310, 327 (2d Cir. 1979) (“Our own cases very clearly make NEPA applicable to the quality of life in the urban setting.”).

42. 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); *Hanly v. Mitchell*, 460 F.2d 640, 647 (2d Cir. 1972) (finding that NEPA “must be construed to include protection of the quality of life for city residents” such as the issues of “[n]oise, traffic, overburdened mass transportation systems, crime, congestion and even availability of drugs.”)

43. *See Como-Falcon Community Coalition, Inc. v. U.S. Dept. of Labor*, 609 F.2d 342, 345 (8th Cir. 1979) (referring to alleged impacts such as increased congestion, local commercial and utility impacts, and altering neighborhood character as “social and economic” impacts).

44. *St. Paul Branch of the NAACP v. U.S. DOT*, 764 F. Supp. 2d 1092 (D. Minn. 2011).

45. “CEQ – Environmental Justice Guidance Under the National Environmental Policy Act,” EPA, <https://www.epa.gov/environmentaljustice/ceq-environmental-justice-guidance-under-national-environmental-policy-act>; “Guidance for Incorporating Environmental Justice Concerns in EPA’s NEPA Compliance Analysis” EPA (1998), <https://www.epa.gov/nepa/environmental-justice-guidance-national-environmental-policy-act-reviews>; Exec. Order No. 12898, 59 Fed. Reg. 32 (Feb. 11, 1994) (requiring consideration of disparate environmental impacts).

EPA’s National Environmental Justice Advisory Council has recognized displacement as an environmental justice concern.⁴⁶

No one questions the need for community development and economic growth. However, the means to getting there is just as important as the end. Infrastructure investments that simply improve the environment and boost the economy, while failing to redress, prevent, minimize, and mitigate disproportionate harm and failing to promote equitable outcomes for low-income communities and communities of color, are not sustainable. Furthermore, while these investments may be environmentally friendly, resource efficient, climate resilient, or profitable, if they fail the test of the affirmative duty of government for equal protection, they are not just. As such, and based on the three legal frameworks detailed above, the following standard and practices are proposed to help government jurisdictions live into their affirmative duty to prevent, avoid, minimize, and mitigate inequitable market-based displacement of protected classes of citizens.

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

- **Define displacement and market pressure.** Standardized data categories (e.g., fields, geographic fidelity, time frame, etc.) should be developed to support measurement of the harm of market pressure that 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 supporting a narrowly tailored race-conscious program, or demonstrate the need for other tools to prevent or remedy discrimination.
- **Assess potential gentrification and displacement impacts.** Housing is infrastructure, and so prevention and mitigation of negative gentrification and displacement impacts is a crucial, indispensable part of planning for infrastructure and is not a separate or appendix issue. Local, regional, and state jurisdictions should assess the potential disproportionate impacts on protected classes that the proposed project may have on residential communities. *See* Localized

46. NEJAC, “Unintended Impacts of Redevelopment and Revitalization Efforts in Five Env’t. Justice Communities” page 2 (Aug. 2006), <https://www.epa.gov/sites/default/files/2015-02/documents/redev-revital-recomm-9-27-06.pdf> (setting forth reasons why gentrification and displacement are environmental justice issues); *see also* NEJAC, “Border Environmental Justice Report,” page 95, developed from the Proceedings of the NEJAC Int’l Roundtable on Env’t. Justice on the U.S. Mex. Border (Aug. 19-21, 1999), <https://www.epa.gov/sites/default/files/2015-02/documents/nejac-ej-border-report.pdf> (recommending the development of a committee to determine “whether just compensation has been received by affected parties for issues related to health, environmental contamination, and worker displacement”).

Antidisplacement Policies⁴⁷ and recommendations for analyzing neighborhood change as a useful proxy for the displacement that should be considered as a criterion for awarding funds. In the long-term, discretionary grant programs for infrastructure investments should require antidisplacement plans with applications for discretionary funding. Assessments can be conducted by jurisdictions looking to ensure protection of the most vulnerable persons in infrastructure impacted communities. As a regulatory issue, gentrification and antidisplacement assessments should be incorporated in the environmental documentation process and should include a clear definition, a set of metrics, and publicly available data for determining the impact of market pressure.

- **Develop antidisplacement plans for protected classes.**

Assessment of potential gentrification and displacement impacts cannot be a stand-alone event and the assessment process should inform antidisplacement plans. These plans should be community-centered and should reflect the impacted communities' articulated vision of and need for remaining in place. Elements of community-centered planning should include robust community participation and collaboration that yield "co-benefits" for the government and the governed. Responsive steps could include, for example, thresholds for affordable housing development⁴⁸ to enable people to remain in their communities. The requirements of AFFH, prohibitions against government's role as a passive participant in discrimination, and Title VI regulations around disparate impact require safeguards of protected classes against disproportionate market pressures. Current regulations for both federally funded and state-funded infrastructure projects fall short of this duty of governing.

- **Use community benefits agreements to mitigate market failure.**

In lieu of, or in addition to, federal regulations and policies requiring efforts to avoid, prevent, and mitigate disproportionate market pressure on protected classes, community benefits agreements (CBAs) 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. While CBAs are not an option in all

infrastructure development projects, these agreements offer a mechanism for addressing the market failure in the form of gentrification and the impact of displacement. CBAs can be a particularly powerful tool for public-private partnerships (P3s), including long-term asset concession projects, and for projects using public subsidy to support private development. CBAs can also be used for projects that are subsidized by tax incentives and tax credits as community-financed funding mechanisms for private developers and investors. As a negotiated agreement, CBAs can include funding to support affordable housing or other community-centered development goals and to prevent, avoid, or minimize the negative impacts of market pressure in low-income communities, community-serving commercial corridors, and cultural assets. As such, fund recipients should consider CBAs as a market-failure intervention to address gentrification and displacement in both public and private investments in the built environment. The potential to leverage CBAs is discussed in more detail below.

- **Develop assurances that safeguard protected classes from market pressures that lead to disproportionate displacement impacts.**

Assurances around the affirmative duty of government to address market-based displacement are almost absent in federal regulations governing infrastructure investments. Agency guidance and regulations should reinforce the prohibition that funding recipients *may not* contribute to substantial and identifiable displacement of protected classes and their requirement to remedy, avoid, prevent, and/or mitigate involuntary displacement pressures. Compellingly, assurances represent the commitment of a federal fund recipient to the federal government—a promise of action that binds the recipient to the promise. Federal grant recipients assure federal agencies that they will abide by a list of laws and policies including Title VI, the Clean Air Act, and prevailing wage determinations and administrative cost limits. AFFH and avoiding, preventing, and/or mitigating displacement are not among these promises. An important first step in the near term should be to modify agencies' Title VI prefunding assurance forms to require fund recipients to commit to preventing, avoiding, and mitigating gentrification and market-based displacement pressure.⁴⁹

47. Justin Dorazio, *Localized Anti-Displacement Policies: Ways To Combat the Effects of Gentrification and Lack of Affordable Housing* (Center for American Progress, Sep. 26, 2022), <https://www.americanprogress.org/article/localized-anti-displacement-policies/>.

48. Carlos Martín, "Connecting Americans to Prosperity: How Infrastructure—Including Its Links to Housing—Can Become More Equitable," Joint Center for Housing Studies for Harvard University, Sep. 29, 2022, <https://www.jchs.harvard.edu/blog/connecting-americans-prosperity-how-infrastructure-including-its-links-housing-can-become-more>.

49. Title VI regulations require recipients to submit "an assurance that the program will be conducted, or the facility operated in compliance with" those regulations. See, e.g., 49 C.F.R. § 21.7.

- **Strengthen agencies’ Title VI regulations and implementation.** Federal agencies should adopt Title VI regulations that mirror DOT’s Title VI affirmative action provisions.⁵⁰ The DOT’s provisions (1) clarify that affirmative action entails explicit consideration of race, color, or national origin; (2) acknowledge that recipients should aim to minimize external factors that have caused and perpetuated discrimination; and (3) emphasize that recipients should always consider taking affirmative action, with additional modifications to (4) clarify that affirmative action entails preventing displacement of protected classes.⁵¹ This proactive approach to evaluating the need for affirmative action can be implemented under all of the existing federal agency frameworks. More robust regulatory direction—akin to DOT’s—is appropriate to avoid disparate impacts on protected classes. In the meantime, state, tribal, and local governments can and should use the DOT provisions as a template for advancing equity in fulfillment of their affirmative duty to prevent discrimination and disproportionate harm.

Private Investment and Public Good

Opportunities for private investments in public infrastructure are addressed in several provisions of the IIJA⁵² and carry special community equity risks. Private investments in public infrastructure—often termed P3s—can include a wide range of innovative financing mechanisms, including long-term asset concessions. Importantly, such mechanisms may, in turn, substantially rely on favorable federal loan programs, thus creating federal subsidies for private investments.⁵³ These financing mechanisms and loan programs seek to maximize private investment in the development and operation of public infrastructure. Notably, even when significant federal investment is made through formula or discretionary grant funding, many state, tribal, regional, and local jurisdictions struggle to meet the federal match requirements needed for project implementation. These jurisdictions are then forced to incur debt, to raise taxes or user fees to retire the debt, to create infrastructure trust accounts and save enough money to meet the federal match, or to “pay as you go” by implementing major development projects in small increments. As such, incentives to private actors may be particularly appealing to communities that struggle to meet federal match requirements or otherwise lack liquidity to support necessary infrastructure investments.

By encouraging private sector participants to invest in public works through favorable deals and loan terms, P3s and favorable loan deals offer the promise of capital to state, tribal, and local jurisdictions looking to improve infrastructure, but also risk prioritizing private profitability over public good. Where such mechanisms are employed, they should carry the strongest possible protections for the public interest.

Infrastructure projects that leverage private investment are encouraged by certain federal agencies, particularly the DOT. The enumerated benefits of P3s include (1) limiting immediate

50. Most of the infrastructure agencies’ regulations include provisions that *permit* recipients to undertake affirmative action in order to avoid excluding protected persons from participation in or the benefit of various programs or activities. *See, e.g.*, 49 C.F.R. § 21.5(b)(7); 10 C.F.R. § 1040.8(b). Most infrastructure agencies *require* affirmative action by fund recipients that have previously discriminated and *permit* affirmative action by fund recipients that have not. 10 C.F.R. § 1040.8; 15 C.F.R. § 8.4(b)(6); 7 C.F.R. § 15.3(b)(6); 43 C.F.R. § 7.3(b)(4); *but see* 40 C.F.R. § 7.35(a)(7), 44 C.F.R. § 7.924.

51. 49 C.F.R. § 21.5(b)(7).

52. *See, e.g.*, IIJA § 70701 (expanding the analysis for public-private partnerships (P3s) involving certain transportation projects), § 11508 (requiring certain Transportation Infrastructure Finance and Innovation Act (TIFIA) applicants using P3s to conduct a value-for-money analysis); § 999B (establishing P3 projects as eligible recipients of a new loan and grant program for large-scale CO₂ transportation infrastructure).

53. For instance, the TIFIA provides favorable loans for public and private entities to invest in public infrastructure. *See* Congressional Research Service, *Public-Private Partnerships (P3s) in Transportation*, Mar. 26, 2021, <https://crsreports.congress.gov/product/pdf/R/R45010>, at 6-7 (“Loans can be provided up to a maximum of 49% of project costs. Projects eligible for TIFIA assistance include highways and bridges, public transportation, intercity passenger bus and rail, intermodal connectors, and intermodal freight facilities.”).

cash spending by the public entity, (2) transferring the risk of the project to the private sector, (3) increasing construction and operational efficiency, and (4) in some instances affording access to advanced technology and innovation. However, these projects have the significant potential to extract wealth from the public in order to promote corporate profitability in the name of public good. Unlike traditional public funding for infrastructure development (such as millage, bond issue, or infrastructure trust), P3s may lack adequate transparency to ensure that they are truly a “good deal” for the public in general and for impacted communities in particular. Transparency and accountability are crucial to avoid public payments being used to support potential windfall profits for private investors and corporations.

With these risks in mind, any P3s should be focused on areas where the public is more likely to benefit from private-sector innovation and manufacturing strength—rather than merely enabling private corporations to derive profits through the operation of public services. Similarly, any federal subsidies and public purchasing power should be leveraged to build sustainable industries that minimally offer pathways to high-wage jobs with high-quality benefits; provide worker-ownership opportunities; operate with respect for Indigenous people and places; avoid, prevent, and repair as warranted environmental harm; provide paid leave for workers to vote; and enable organizing and worker power. Important community benefits should not be sacrificed through privatized infrastructure development and operation. And private investment should support a just economy that is regenerative by design.

Crucially, the standards offered here do not represent support for privatizing the operations and management of public infrastructure assets or the delivery of essential public goods and services; they are intended only to provide guidance to state, tribal, and local jurisdictions using these vehicles to finance public infrastructure projects.

Public-Private Partnerships and Public Subsidy of Private Development

Public infrastructure investments should not exclusively benefit a handful of private entities and should not overburden low-income and rural communities or predominantly communities of color with rates, fees, and taxes that have a disproportionate negative impact. As detailed below, standards must ensure that civil rights protections and opportunities for economic inclusion that are mandated for federal infrastructure investments apply to the private dollars that are leveraged for these projects.

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

- **Ensure transparency and community voice.** Local, state, and tribal jurisdictions using private investment strategies for financing, developing, and operating infrastructure assets should develop and make public clear statements of the actual project costs, including planned costs of both equity (corporate profit) and debt, subject to necessary confidential protections. Additionally, impacted communities should have meaningful opportunities to comment on proposed P3 infrastructure projects before a contract is executed.
- **Retain public authority for rates and fees.** Public entities should retain authority over rates and fee structures, ideally through fixed rates and preset escalation criteria. As well, where rates remain subject to change, and recognizing 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.
- **Use community oversight committees.** A compensated community oversight or advisory committee that includes representatives from impacted communities offers an affirmative action, balancing civil, public-sector, and private-sector voice and power.
- **Conduct disparate impact assessments.** Private-sector partners should be required to perform a disparate impact assessment to determine the impact a proposed P3 infrastructure project will have on access to public services by residents of disadvantaged communities. Disparate impact assessments are particularly important where there is any anticipated increase in user fees or reduction in service resulting from the project. Any disparate impacts should be addressed through action plans and should be enforceable contractual terms between the private-sector partner and the public entity.

- **Require compliance with and reporting of all equity, diversity, and inclusion goals for the life of the contract.** Private-sector partners should be required to include a plan for attaining and monitoring compliance with all of the diversity, equity, and inclusion requirements that would apply to a government agency building and operating the public asset. This requirement should be applicable for construction, maintenance, and operations of the infrastructure asset for the life of the contract.
- **Conduct regular audits as an accountability mechanism.** Regular audits should be conducted over the life of the contract including equity assessments to confirm that the project actually avoided displacement, job loss, environmental harm, and wage reductions. Audit reports should be made publicly available to the extent consistent with reasonable confidentiality protections.
- **Advance legislative requirements for P3 protections.** The IIJA includes enhanced community protections for asset concessions arising out of a new technical assistance grant program. For instance, such projects cannot result in increased costs to taxpayer households with an annual income of less than \$400,000.⁵⁴ However, the legislation does not mandate that these protections apply to all P3s, and state, tribal, and local agencies can avoid the protection this provision offers low-to-moderate-income communities by not using the technical assistance grant. Protection for low-to-moderate-income persons in households with an annual income of less than \$400,000 is a good standard. In this instance, it appears to be a standard with a loophole. Future legislation should extend these important community protections to all P3s.

Cost-Benefit and Value-for-Money Analyses

The IIJA established new analytical requirements for transportation-related P3s with estimated total cost more than \$750 million and those that also seek either Transportation Infrastructure Finance and Innovation Act (TIFIA) or railroad-related⁵⁵ assistance.⁵⁶ Under the new legislation, such a P3 must be subject to a value-for-money analysis that includes “the determination of risk premiums assigned to various project delivery scenarios; ... assumptions about use, demand, and any user fee revenue generated by the project; and ... any externality benefits for the public generated by the project.”⁵⁷ The value-for-money analysis can also include “any other information the Secretary of Transportation determines to be appropriate.”⁵⁸ As such, a value-for-money analysis can broadly assess impacts to wages, property values, climate action, environmental justice, job-training funding, or other measures to better ensure that private investments serve the public good. The recommendation for cost-benefit and value-for-money analyses is listed below.

- **Develop clear guidance on incorporating equity in cost-benefit and value-for-money analyses.** Cost-benefit and value-for-money analyses are designed to predict the potential effects of the value of a policy or investment as a single dollar-based measurement of value. These analyses have different regulations and guidance for different agencies and often fail to capture a broad range of impact and benefits, particularly impacts to and benefits of equity in communities. Moreover, it is important that the cost and the benefits reflect the community’s values. As such, the voice of disadvantaged and impacted communities should be solicited, factored, and considered in the regulatory review process of cost-benefit analyses. As well, information and assumptions used in cost-benefit analyses and value-for-money analyses should represent the community’s values, be transparent, and allow for the analysis to be replicated. Clear guidance and requirements for cost-benefit and value-for-money analysis processes to assess the potential economic benefits and/or the potential of wealth extraction and economic harm of the investment is needed. Furthermore, the guidance for conducting these analyses should require community engagement and participation in defining community benefits.

55. That is, assistance under the Railroad Rehabilitation and Improvement Financing Program of the Federal Railroad Administration established under chapter 224 of title 49, United States Code.

56. IIJA § 70701(b).

57. *Id.* at (a)(1)(3)(D)-(F).

58. *Id.* at (a)(1)(5).

54. IIJA § 71001(f)(1)(F).

Reckoning, Repair, and Transformation

Federal environmental law emerged in the late 1960s and early 1970s with the passage of the National Environmental Policy Act, the Clean Air Act, the Endangered Species Act, and the Clean Water Act, among others.⁵⁹ These efforts advanced in spite of state-level and private-sector pushback and are considered to have slowed the previously unchecked advance of environmental degradation. In 1994, because evidence from multiple studies revealed people of color and lower income communities were still disproportionately impacted by pollution, President Clinton issued EO 12898 (“Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations”), which directed federal agencies to identify and address “disproportionately high or adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations, to the greatest extent practicable and as permitted by law.”⁶⁰ As a result, environmental justice was defined by the EPA as “the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income, with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.”⁶¹ This definition remains as the foundation for 25 years of environmental justice laws and regulations.⁶²

Compellingly, however, the ability to advance environmental justice through environmental laws has fallen prey to judicial rulings around intent, weakening these statutes’ ability to seek redress for historical harms. NEPA, for example, requires federal agencies to consider the environmental impacts of federal

59. National Environmental Policy Act (or NEPA), 42 U.S.C. § 4331 (1968); Clean Water Act, 33 U.S.C. §1251 et seq. (1972); Clean Air Act, 42 U.S.C. §7401 et seq. (1970); Endangered Species Act, 16 U.S.C. §§1531-1544 (1973).

60. EO 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations (Feb. 11, 1994).

61. 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>.

62. See a timeline of the EPA’s involvement in the environmental justice movement at “How Did the Environmental Justice Movement Arise?” EPA, last updated Sep. 30, 2022, <https://www.epa.gov/environmentaljustice>.

actions,⁶³ including certain federal funding decisions.⁶⁴ Environmental impacts trigger a full EIS for all “major Federal actions significantly affecting the quality of the human environment”⁶⁵ where the human environment includes “the natural and physical environment and the relationship of people with that environment.”⁶⁶ Since NEPA was originally enacted in 1969, its intent is to “preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity, and variety of individual choice” by calling for a “systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision-making which may have an impact on man’s environment.”⁶⁷ Following various legal challenges, however, courts have concluded that human (i.e., social and economic) impacts alone, separate from environmental impacts, were insufficient to trigger an EIS.⁶⁸ These cases represented a fine distinction, but a distinction nonetheless, and one that daylights the shift in the government’s role to prevent and avoid racial harm to a race-neutral posture.⁶⁹ It is important to note, however, that in spite of these legal rulings, the environmental justice movement continues to advance and influence federal policy and is more efficacious than the case law implies. More recently, building on that understanding, the Biden–Harris

63. 42 U.S.C. § 4331; see also “What Is the National Environmental Policy Act?” EPA, last updated Oct. 26, 2022, <https://www.epa.gov/nepa/what-national-environmental-policy-act>.

64. Whether a federally funded project constitutes a federal action is a nuanced inquiry that focuses on the federal agency’s degree of control and discretion. See, e.g., *Touret v. NASA*, 485 F. Supp. 2d 38, 43 (D.R.I. 2007) (“[A]n agency’s ‘ability to influence or control the outcome in material respect’ is the dominant factor in determining whether a project amounts to ‘major federal action.’”) (quoting *Save Barton Creek Ass’n v. Fed. Hwy. Admin.*, 950 F.2d 1129, 1134 (5th Cir. 1992). For purposes of funding infrastructure projects, we assume that there is sufficient federal involvement to support NEPA review. See 40 C.F.R. § 1508.18 (defining federal action to include all actions “potentially subject to Federal control” including “projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies”).

65. 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.

66. 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).

67. 42 USC §§ 4331(b)(4), 4332(A).

68. *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) (rejecting claims that an environmental impact statement was required for alleged impacts such as increased congestion, local commercial and utility impacts, and altering neighborhood character, because they were entirely “social and economic”).

69. Note, more discussion on the specific environmental impact statement triggers may be required following pending NEPA rule updates from the Council on Environmental Quality.

Administration issued EO 14008 on January 27, 2021, to address climate change and environmental justice—specifically establishing the Justice40 Initiative to ensure that disadvantaged and marginalized communities received priority funding from federal investments.⁷⁰ EO 14008 further provides that:

“[t]o secure an equitable economic future, the United States must ensure that environmental and economic justice are key considerations in how we govern. That means investing and building a clean energy economy that creates well-paying union jobs, turning disadvantaged communities—historically marginalized and overburdened—into healthy, thriving communities, and undertaking robust actions to mitigate climate change while preparing for the impacts of climate change across rural, urban, and Tribal areas.”⁷¹

The EO further requires federal agencies to:

“make achieving environmental justice part of their missions by developing programs, policies, and activities to address the disproportionately high and adverse human health, environmental, climate-related and other cumulative impacts on disadvantaged communities, as well as the accompanying economic challenges of such impacts.”⁷²

The EO goes on to amend EO 12898 to create an Environmental Justice Interagency Council comprising 18 different federal agencies with a goal of developing a “strategy to address current and historic environmental injustice by consulting with the White House Environmental Justice Advisory Council and with local environmental justice leaders.”⁷³

EO 14008 establishes the Justice40 goals to ensure that at least 40 percent of the federal investments in “clean energy and energy efficiency; clean transit; affordable and sustainable housing; training and workforce development; the remediation and reduction of legacy pollution; and the development of critical clean water infrastructure” benefit disadvantaged communities that are marginalized, underserved, and overburdened by pollution. As a result of this order and the Justice40 initiative, federal agencies, such as the Department of Energy, EPA, and DOT have established specific guidance on

ways to implement Justice40 that include mapping and identifying disadvantaged communities and redressing past harms.⁷⁴ Compellingly, in addition to government action, Justice40 offers opportunities to expand environmental justice organizing and advocacy by frontline communities through community planning and engagement.⁷⁵ As such, Justice40 not only advances environmental justice regulations, but also offers a reckoning of the harms of the past (and the present), a mechanism for repair, a framework for transformational investments, and a measurable standard for holding government accountable for reckoning, repair, and transformative impacts for communities that are underserved and overburdened by pollution, climate change, and failing infrastructure.

A new CEQ final rule (effective May 20, 2022) changes the definition of effects and incorporates environmental justice in decision-making.⁷⁶ In the new final rule, CEQ establishes NEPA “as the floor, rather than a ceiling, for the environmental review standards” restoring the ability of federal agencies to evaluate all impacts and to be community-centered in the permitting review process.⁷⁷

70. 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/>.

71. EO 14008, Sec. 219.

72. *Id.*

73. *Id.*

74. 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.

75. See Emerald Cities Collaborative, *The People’s Justice40+ Community Benefit Playbook: A Guide to Capturing Federal Infrastructure Investments*, 2022, <https://emeraldcities.org/j40playbook/>.

76. 87 FR 23453 (Apr. 20, 2022).

77. 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/>.

Moreover, in addition to federal policy and regulations, the environmental justice community is involved in influencing the infrastructure development process and continues to advance the field by the following actions:

- Bridging the information gap in marginalized communities and providing tools, technical assistance and support
- Using impact litigation to raise awareness and daylight environmental justice issues in marginalized communities
- Impacting the permitting process for both public and private infrastructure development projects to assure prevention, mitigation, and redress of harm
- Supporting communities with emergency and administrative actions to repair and redress the harm of past inequity and neglect
- Bridging environmental justice and environmental law in service to people living in America's most vulnerable communities

In the more than 60 years since the enactment of the first environmental regulations and the more than 25 years since the first environmental justice regulations, we have seen the emergence of twin movements: a purely environmental movement and the environmental justice movement. Crucially, the work of the environmental justice movement has given the field the 17 Principles of Environmental Justice⁷⁸ developed in 1991 by delegates to the First National People of Color Environmental Leadership Summit and which serves as “a defining document for the growing grassroots movement for environmental justice.”⁷⁹ The principles address a cross-section of issues, including ecological unity, worker safety, opposition to destructive multinational corporations, and “the right to participate as equal partners at every level of decision-making, including needs assessment, planning, implementation, enforcement and evaluation.”⁸⁰ Additionally, the Jemez Principles for Democratic Organizing developed in 1996 in Jemez New Mexico in a meeting convened by the Southwest Network for Environmental and Economic Justice offers a framework for environmental justice organizing, communications, and understanding among different organizations and representing different movements.⁸¹

78. First National People of Color Environmental Leadership Summit Delegates, “Principles of Environmental Justice,” Oct. 1991, <https://www.ejnet.org/ej/principles.html>.

79. *Id.*

80. *Id.*

81. Southwest Network for Environmental and Economic Justice (SNEEJ) Meeting, “Jemez Principles for Democratic Organizing,” Dec. 1996, <https://www.ejnet.org/ej/jemez.pdf>.

It is important to note the tension between purely environmental protections and the ability to gain protections for Black, Brown, and Indigenous people in Black, Brown, and Indigenous communities, given the utilitarian and facially race-neutral perspective of the environmental movement that seeks the “greater good” through policy and practice.⁸² *This document is not an attempt to represent either the environmental movement or the environmental justice movement.* For now, our attempt is to balance the two in the standards offered here by building on a reckoning, repair, and transformation framework that acknowledges racialized harm, prioritizes redress of harm done to communities of color, and promotes transformative investments in the built environment that benefit all people in all the places of America.

Redress the Harm of the Past and Prevent Harm in the Future

Equitable Distribution of Burden

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.

IJA funds are offered to state, tribal, and local communities to “ensure every American has access to high-speed internet, tackle the climate crisis, advance environmental justice, and invest in communities that have too often been left behind.”⁸³ This is a commitment not before made to the American people and one that requires intentionality in decisions about where and how infrastructure projects will be developed. These commitments are fundamentally governing decisions—informed by environmental review and by legal, financial, and regulatory processes—but they are governing decisions, nonetheless. Intentional siting of projects better ensures that the most vulnerable people and communities do not disproportionately bear the burden of innovation and growth. Intentional decisions about materials better ensure sustainability and resilience. Even with the inevitable negotiations with the grant divisions of federal agencies, state, tribal, and local leaders can govern with the intentionality to reckon with and repair past harm and transform vulnerable and marginalized communities.

82. See Alice Kaswan, “Environmental Justice and Environmental Law,” *Fordham Environmental L. Rev.* 24, no. 2 (2017): 149-179, <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1683&context=elr>.

83. The White House, “President Biden’s Bipartisan Infrastructure Law,” accessed Dec. 2, 2022, <https://www.whitehouse.gov/bipartisan-infrastructure-law/>.

- **Use a reckoning repair and transformation framework to guide the infrastructure investment decision-making process.** Infrastructure investments should build on a reckoning, repair, and transformation framework that highlights the importance of repairing past harm, prioritizing investments in transformational projects, and taking decisive action to avoid (not mitigate) further harm. Consider for example that while Justice40 directs federal agencies to prioritize at least 40 percent of funding benefits from certain programs in climate and water infrastructure in marginalized communities, these investments represent only a fraction of IIJA spending. This apportionment carries a risk that the remainder of IIJA spending will contribute to further harm, and very few protections currently address this risk. By using a reckoning, repair, and transformation framework for infrastructure investment decisions, past harm is redressed, and the new projects implemented in this infrastructure moment are transformational at best and, at worst, do not become the harm to be repaired in the next infrastructure moment. *This is a central tenet that cuts across all pillars of the standards and requires all pillars of the standards to make it true!*
- **Prioritize repair of harm in federal infrastructure investments in environmental justice communities of concern.** Cities, states, and tribal communities should use this infrastructure moment to mitigate the impacts of urban revitalization and brownfields redevelopment, which are environmental practices whose benefits and burdens are not equally shared. Also, the historical harmful impacts of interstate system construction and the associated land use implications should be mitigated. The Reconnecting Communities discretionary grant funds are a laudable first step toward reckoning, repair, and transformation, but only a first step on a path to redress decades of disproportionate harm to low-income communities and communities of color. Jurisdictions have a duty to reverse the harmful impacts of institutional neglect while being responsive to the needs of the people.
- **Define reckoning and repair of past harm as a matter of national and regional significance.** National and regional significance is broadly defined in various federal regulations, evaluating factors such as creation of jobs, expansion of business opportunities, and impacts to the gross domestic product due to quantitatively increased throughput, to name a few. Factors may also include the demographic and economic characteristics of the area served. Expanding the legal definition of projects of national and regional significance in the spectrum of federal regulations to include projects that redress the environmental, economic, and

racialized harm of past policies or infrastructure investments is a meaningful standard for equity in the implementation of federal infrastructure, and one that can be accomplished through agency-level regulatory change or through Office of Management and Budget grant regulations.

- **Define disadvantaged.** Develop a standard criteria for defining “disadvantaged” communities 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; frontline 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. See Lawyers for Good Government’s latest interactive Disadvantaged Communities Report,⁸⁴ which provides the existing state-level definitions and mapping of disadvantaged communities. Only 16 states have an existing definition in the climate and equity context and only 13 have maps identifying the locations of disadvantaged communities. Federal guidance is critical to ensuring implementation of Justice40 and to ensuring that disadvantaged communities are not further harmed by this historic investment in infrastructure.
- **Protect, preserve, and honor the historical and cultural identity of people and places in the infrastructure design process.** In the same way that social and economic impacts must be assessed, and negative impacts avoided, prevented, and/or mitigated in the development of infrastructure projects, cultural impacts should also be assessed, and communities should be protected from disproportionate cultural harm. Cultural assets can include tangible arts and cultural infrastructure (e.g., museums, cultural venues, culture-bearer organizations and enterprises, monuments, etc.) and intangible assets (e.g., shared values, shared identity, worship practices, and community celebrations, etc.). However, current environmental justice assessment processes generally acknowledge only historical districts and properties and/or archeological sites (e.g., burial grounds, etc.) as cultural assets, ignoring the significance of racial, ethnic, and historical assets that connect the lived experience of the people to places. A robust and meaningful assessment of cultural impact should be a component of the environmental documentation process and the definition of cultural assets should be expanded beyond historical districts and burial sites. Agencies should also consider strategic

84. 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*.

relationships with the National Endowment of the Arts and National Endowment for the Humanities in implementing strategies for reckoning and repair of cultural harm to communities. Notably, Environmental Justice Principle #12⁸⁵ “affirms the need for honoring the cultural integrity of all communities, and for providing fair access for all to the full range of resources, including cultural resources.” As such, the implication of this standard goes beyond federal infrastructure projects and is applicable to local, state, and tribal governments.

Environmental Documentation

Infrastructure Standard: Environmental documentation defends and advances—and does not concede—the protections of Title VI, the National Environmental Policy Act, and environmental justice policy.

- **Establish clear guidance for social impact assessments.**

Social impact assessments were introduced in the early 1970s as a part of NEPA and, as noted above, courts subsequently determined that social impact assessments were not required unless the project had a potential accompanying direct physical environmental impact. Nonetheless, social impact assessments have been successfully incorporated into environmental impact assessments. As such, clear guidelines for using social impact assessments should be developed by the federal government and advanced to maximize the legal protection for marginalized communities and communities of color.⁸⁶

Similarly, cumulative impact is the measure of the effects of an action that are added to, or interact with, other effects in a particular place and within a particular time. Cumulative impact assessments look at past, present, and future impacts and offer a potentially legally defensible platform for building

the reckoning, repair, and transformation framework.⁸⁷ Cumulative impact assessments are a part of the NEPA process but are not always used. Furthermore, the extent to which these assessments actually measure “cumulative” impacts and not “additive” impacts is unclear. Moreover, these assessments are only required for environmental impacts and are generally not used to determine racialized harm (e.g., segregation, gentrification, and displacement) in the absence of a geophysical environmental impact.

Federal agencies and permitting processes define the minimum requirements for environmental justice documentation, but fund recipients can increase the depth and rigor of assessments to prevent disproportionate negative impact in environmental justice communities of concern. Notably, while some of the environmental justice documentation recommendations made here call for federal guidance on the use of social impact assessments, cumulative impact assessments, and equity assessments, state, tribal, and local decision-makers can use the suite of environmental justice documentation tools to ensure that governing decisions around federal infrastructure projects are legal, just, and transformative.

- **Incorporate impact assessments in the Title VI post-funding compliance review process.** The Biden–Harris Administration Racial Equity EO 13985 calls for a “systematic approach to embedding fairness in decision-making processes.”⁸⁸ As part of this systematic process, agencies can require or encourage impact assessments as a part of funding, approving, or permitting federal infrastructure projects. Assessments should include an evaluation of past harms and existing disparities, require community engagement at all stages, require clear measures of potential impacts, and analyze metrics at the regional level. Current Title VI regulations provide for ongoing compliance and enforcement after recipients receive funding.⁸⁹ The compliance report forms could be revised to require recipients to include a disparate impact assessment that evaluates their programs’ actual impacts on protected classes and describes their efforts to mitigate any negative impacts. Title VI compliance can and should be more than the absence of complaints.

85. The Principles of Environmental Justice were developed in 1991 by the delegates to the First National People of Color Environmental Leadership summit and can be found at <https://www.ejnet.org/ej/principles.html>. The principles represent the creation of a national and international movement to ensure environmental justice and “to celebrate each of our cultures, languages and beliefs about the natural world...”

86. See “Principles and guidelines for social impact assessment in the USA: The Interorganizational Committee on Principles and Guidelines for Social Impact Assessment,” *Impact Assessment and Project Appraisal*, 21, no. 3 (2003), 231-250, <https://www.tandfonline.com/doi/pdf/10.3152/147154603781766293>. Also see, The Gullah Geechee Cultural Heritage Corridor Management Plan that was prepared by the National Park Service in response to NEPA, Apr. 20, 2019, available at <https://gullahgeecheecorridor.org/resources/management-plan/>. As a plan, it surfaces and interprets cultural assets that could be compromised by interventions in the built environment.

87. 40 C.F.R. Part 1500–1508 The National Environmental Policy Act (NEPA); eCFR :: 40 C.F.R. Part 1500 -- Purpose and Policy.

88. EO 13985.

89. See, e.g., 49 C.F.R. §§ 21.7(a)(1), .9, .11, .13, .19; however, the EPA’s regulations (40 C.F.R. Part 7) do not include the judicial review provision.

Justice40

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.

- **Engage communities in Justice40 planning.** Justice40 offers a significant opportunity for communities to build safe and thriving communities through investments in sustainable and resilient infrastructure. However, the depth, breadth, and complexity of Justice40 regulations and responsibilities are also significant and require thoughtful, data-informed, comprehensive planning and alignment of resources, projects, and investments within the whole-of-government approach defined in EO 14008. Justice40 planning is critical, and the whole-of-government approach must include the officials responsible for governing and must also include the governed. Options for encouraging and enabling the use of federal infrastructure funds for community-led Justice40 planning, coalition-building, and capacity-building should be considered.⁹³ Given the enormity of the climate change challenge, Emerald Cities advises that “[t]he goal is to ensure that federal infrastructure and climate investments significantly benefit the communities that need them most.”⁹⁴ Infrastructure alone will not solve the climate crisis, and the action of people in places is a critical component of Justice40 planning. Finally, options for encouraging and enabling Justice40 oversight committees to be compensated should be considered to better ensure community participation and equitable Justice40 outcomes. Given the need for citizens to participate in the solutions to climate change and environmental sustainability, the whole-of-government approach can also include a whole-of-co-governing approach.
- **Staff agencies for Justice40 compliance.** The enormity and complexity of the Justice40 executive order will require new skills, capacities, and responsibilities for cities, states, counties, and tribal communities. Options for using federal infrastructure funds to build systemic and staff capacity to protect disadvantaged communities and advance Justice40 goals through project planning, alignment, monitoring, and compliance with Justice40 regulations should also be explored.

- **Incorporate assessments in the Title VI assurance form.** As a condition of receiving funding, Title VI regulations require recipients to submit “an assurance that the program will be conducted or the facility operated in compliance with all requirements imposed by or pursuant to this part.”⁹⁰ Although each agency creates its own assurance form, they must include certain minimum requirements—for example, “[a]ny such assurance shall include provisions which give the United States a right to seek its judicial enforcement.”⁹¹ Agencies could modify assurance forms to require recipients to complete a disparate impact assessment, which would help identify and prevent discrimination and disparate treatment and facilitate Title VI compliance.
- **Establish state-level NEPA-like policies in collaboration with the CEQ.** While NEPA guides the decision-making process of federal agencies around public works projects that affect the environment, many states lack equivalent state-level requirements. More jurisdictions should establish NEPA-like policies for infrastructure planning and development in collaboration with the CEQ. State and tribal agencies (and local agencies in the absence of preemptive state laws) can work with CEQ to develop equitable state and local environmental review requirements.⁹²

90. See, e.g., 49 C.F.R. § 21.7.

91. *Id.*

92. NEPA, “States and Local Jurisdictions with NEPA-like Environmental Planning Requirements,” accessed Dec. 4, 2022, <https://ceq.doe.gov/laws-regulations/states.html>.

93. See, e.g., Justice40 Accelerator, <https://www.justice40accelerator.org/>.

94. Rosa González, “The Spectrum of Community Engagement to Ownership,” Facilitating Power, accessed Dec. 4, 2022, <https://movementstrategy.org/wp-content/uploads/2021/08/The-Spectrum-of-Community-Engagement-to-Ownership.pdf>.

- **Incorporate equity tracking as part of Justice40 compliance.** The Biden–Harris Administration’s Justice40 Initiative takes a whole-of-government approach and requires federal agencies to implement regulations to implement Justice40 and track its success. Federal agencies should require grant recipients to track the number and scale of climate-resilience projects going to disadvantaged communities as a part of the federal grant reporting process. Federal agencies should also explore options to incorporate additional guidance in grant notifications and discretionary funding to include equity assessments as part of Justice40 compliance efforts.

Climate, Water, Energy, and Resilience

Infrastructure Standard: Clean air, clear water, clean energy, and resilience in all projects, for all people, in all places.

- **Use intentional decision-making in infrastructure siting and materials.** When making infrastructure siting decisions, 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 projected sea-level rise. The benefits of these standards should be deployed in a manner that advances equity in environmental justice communities of concern.
- **Assess carbon dioxide (CO₂) emissions for transportation projects to identify potential disproportionate impacts.** Assess CO₂ emissions and estimated land-use-based CO₂ as part of evaluating transportation infrastructure impacts. Such an assessment should factor the broader intersection of transportation planning and land use,⁹⁵ and should identify and ameliorate, if possible and permitted, any disproportionate impact on environmental justice communities of concern. Transportation investments should not result in a net increase in CO₂ emissions.⁹⁶

95. See Yonah Freemark, “Throughout History, the US Failed to Integrate Transportation and Land Use. It’s Still Hindering Policymaking Today,” *Urban Wire*: Urban Institute, May 17, 2021, <https://www.urban.org/urban-wire/throughout-history-us-failed-integrate-transportation-and-land-use-its-still-hindering-policymaking-today>.

96. The Justice40 Initiative was established by Executive Order 14008: Tackling the Climate Crisis at Home and Abroad (Jan. 27, 2021).

- **Mitigating CO₂.** Congestion mitigation should not necessarily be considered to automatically reduce CO₂ emissions. A nuanced analysis should measure how projects could induce greater driving levels—both passenger and freight—thus increasing emissions.
- **Seek to use discretionary funding to influence greenhouse gas (GHG) emissions reductions in transportation infrastructure investments.** While incentives for states to reduce GHG emissions were removed from the IIJA prior to its passage,⁹⁷ federal agencies should explore options for conditioning fund disbursements on prioritizing transportation infrastructure projects that reduce both GHG emissions from the transportation sector and impacts on environmental justice communities of concern. In order to facilitate and confirm such reductions, projects should, where possible, include GHG emissions measurements and incorporate equity assessments (discussed above).
- **Prevent disparate impact of CO₂ emissions.** Consider evaluating the distribution of CO₂ emissions in state-defined disadvantaged communities and compare this distribution to the CO₂ emissions distribution in communities of color. Such a comparative analysis may support both Title VI and Justice40 efforts. Note, for example, that the Federal Transit Administration (FTA) already analyzes whether certain service and rate changes will disparately impact communities of color as part of Title VI compliance.⁹⁸
- **Advance distributional equity in state revolving loan funds (SRFs).** Explore options to require state-level reporting regarding the distribution of SRFs to disadvantaged communities and communities of color. If the relative distribution of SRFs to disadvantaged communities and communities of color can be evaluated, then this information could usefully support Title VI compliance and Justice40 goals. Revision of this requirement may require a regulatory and/or legislative change.
- **Build enforceable state compliance requirements for safe drinking water.** Develop, enable, and encourage enforceable and legally defensible federal compliance requirements for how states define and map disadvantage and develop formulas for determining water affordability. Water infrastructure improvement grants are provided for underserved and disadvantaged communities that are unable to afford safe drinking water compliance activities. The

97. Daniel C. Vock, “States Divided on Setting Targets for Curbing Highway Emissions,” *Route Fifty*, Oct. 19, 2022, <https://www.route-fifty.com/infrastructure/2022/10/states-divided-setting-targets-curbing-highway-emissions/378671/>.

98. FTA C 4702.1B, “Title VI Requirements and Guidelines for Federal Transit Administration Recipients” (Oct. 1, 2012).

provision leaves it to the states to define affordability and disadvantage. Where possible, states should also be required to identify how they define and map disadvantaged communities for purposes of climate resilience and clean energy funding pursuant to Justice40.

- **Mitigating stormwater runoff.** Stormwater runoff is an important aspect of environmental justice, as communities of color tend to be disproportionately paved over, resulting in greater potential for flooding, polluted water supplies, and strains on local budgets. Where possible, environmental documentation (such as an environmental assessment or EIS) should account for and seek to ameliorate possible stormwater runoff, including its impact on environmental justice communities of concern. Notably, the Neighborhood Access and Equity Grant program in the IRA (Sec. 60501) provides an opportunity for implementing this standard. IRA includes over \$1.8 billion in funding for replacing paved infrastructure with natural infrastructure and permeable and pervious materials to reduce potential stormwater runoff of surface transportation projects in economically underserved communities.
- **Revise building codes to support sustainability and resilience.** Explore requirements for revising building code and policies guiding funding for rebuilding to ensure that rebuilds of structures lost during climate catastrophes are reconstructed to withstand future climate hazards. The IJA includes \$1.2 billion in funding to update building codes for energy efficiency and climate resilience. Additionally, the IRA (Sec. 50131) includes \$1 billion in funding to support adoption and implementation of new building energy codes. Options to use this funding not only to update codes to address climate hazards but also to help fund the additional costs of such construction for marginalized communities to meet stricter building code requirements should be enabled in the eligible uses of these funding sources.
- **Revise cost-benefit analysis models for federal flood mitigation projects.** Explore opportunities to require flood mitigation infrastructure projects to prioritize the most vulnerable, including low-income communities and communities of color, when implementing flood mitigation infrastructure projects. Flood mitigation assistance grants are available to states and to local and tribal communities for projects that reduce or eliminate the risk of repetitive flood damage to homes and businesses. As noted by the Urban Institute, “[p]rioritizing property in flood mitigation investments often devalues people. It also means that the possessions of people of low wealth and communities of

color are undervalued and overlooked.”⁹⁹ As such, the study recommends “prioritizing the most vulnerable households and communities as an eligibility criterion to acknowledge and address past inequity and harm.”¹⁰⁰

Transportation Access

Infrastructure Standard: Transportation projects prioritize the safe movement of people, not cars.

- **Repair unequal transportation access in transportation investments.** To the maximum extent possible, cost-benefit analyses of transportation investments should account for more than automobile-based benefits. Using only road miles and pavement conditions index scores as metrics for where to invest transportation infrastructure does not account for the true transportation needs of community, or for the health and economic disparities experienced by communities that directly result from transportation investments in the built environment. Notably, the DOT’s *Benefit-Cost Analysis Guidance for Discretionary Grant Programs*¹⁰¹ calls for quantification and monetization of project costs and benefits, along with forecasts of traffic volume based on projections of future economic growth. The guidance also provides a framework for monetizing reduced-mortality health benefits, measured in terms of the costs and benefits associated with increased walking and cycling. In terms of disparities, the guidance acknowledges the distributional impacts of transportation infrastructure investments including both benefit and harm, and states that:

“Projects may even result in some parties being made worse off, even in cases where the proposed project would deliver positive net benefits in the aggregate. While these distributional impacts would not affect the overall evaluation of benefits and costs, applicants are encouraged to provide information (such as the demographics of the expected users or by distinguishing between public and private benefits) that would help USDOT better understand how the project can meet these other public policy goals.”¹⁰²

99. See Anne N. Junod, Carlos Martín, Rebecca Marx, Amy Rogin, *Equitable Investments in Resilience*, Research Report, Urban Institute, Jun. 1, 2021, <https://www.urban.org/research/publication/equitable-investments-resilience>.

100. *Id.*

101. U.S. DOT, *Benefit-Cost Analysis Guidance for Discretionary Grants*, revised Mar. 2022, <https://www.transportation.gov/sites/dot.gov/files/2022-03/Benefit%20Cost%20Analysis%20Guidance%202022%20%28Revised%29.pdf>.

102. *Id.*

This guidance, like other cost-benefit and value-for-money analysis models, centers economic growth as the overarching outcome of the investment, and the guidance states that “USDOT believes that it provides a useful method to evaluate and compare potential transportation investments for their contribution to the economic vitality of the Nation.”¹⁰³ It is notable here that it was investments in the economic vitality of the nation that enabled the development of elevated expressways and the acts of environmental racism that divided and destroyed Black communities across America. To prevent this type of harm in the future, this guidance should be revised, and the monetization of costs and benefits recalibrated to value the repair of past harm and the delivery of equitable distribution of benefit and harm.

measurable long-term commitment of funding recipients to support attainment of this goal and funding should require accountability to these commitments. Additionally, because EV infrastructure is funded by formula funds, state agencies receiving funding for EV charging stations should be required to include and update, as warranted, plans for equitable, zero-emissions investment strategies as a part of their long-range transportation plans.

- **Ensure mode-neutral equitable electric vehicle (EV) charging stations.** In consultation with impacted communities, jurisdictions should ensure mode-neutral treatment and equitable siting of EV charging station infrastructure for commercial and passenger vehicles *including electric scooters and bikes*. The Federal Highway Administration guidance for EV charging station planning requires prioritization, distribution of benefits, and closing mobility gaps for rural, underserved, and disadvantaged communities. The guidance is silent, however, on modality. Notably, the standard offered here is not the first to argue that the IJJA’s EV charging infrastructure should include e-bike and scooter charging. At least one state agency (Oregon’s DOT)¹⁰⁴ is apparently open to including e-bike charging in its charging station roll-out and offers a precedent for mode-neutral treatment in EV infrastructure. Compellingly, whereas a legal argument can be made that the IJJA’s EV charging infrastructure grant program could be read to include e-bike charging and such an interpretation would actually support the IJJA’s underlying access and decarbonization goals, changing the guidance to include e-bikes and scooters as an affordable, low-emission option in EV plans is warranted.
- **Promote and support equitable, zero emissions transportation for all.** The National Electric Vehicle Initiative guidance offered by the Federal Highway Administration offers, as a goal, a national network of EV charging stations to support net-zero carbon emissions by 2050. The EV infrastructure plan required for receipt of formula funding by states should demonstrate the

103. *Id.*

104. See Taylor Griggs, “ODOT says they won’t ignore e-bikes with \$100 million EV charging investment,” BikePortland.org, May 12, 2022, <https://bikeportland.org/2022/05/12/odot-says-they-wont-ignore-bikes-with-100-million-ev-charging-investment-353676>.

Inclusive and Equitable Innovation

Pilot projects provide an opportunity for the government to test a new technology or innovation on a small scale as a mechanism to ascertain the efficacy and feasibility of the innovation, to address uncertainties, and to identify potential pitfalls or harms. Pilot projects are used across the spectrum of government and operate within different regulatory frameworks. As a result, no single overarching set of standards governs how pilot projects are used to enable equitable innovations. With the benefit of integrated standards, pilot projects offer a unique opportunity for government entities to meet their affirmative duty to avoid disparate treatment, disparate impact, and racialized harm.

Moreover, the new American Industrial Policy incorporated in IJJA, IRA, and the Creating Helpful Incentives to Produce Semiconductors and Science Act of 2022 (CHIPS) is centered around funding manufacturing opportunities to create jobs and solve climate and supply chain challenges. However, coupled with Justice40, this investment portfolio not only has implications for job quality and economic equity for businesses owned by people of color but also offers the opportunity for cooperative economics, social innovation, and social impact investing that build and leverage worker and community power. The whole-of-government approach in this moment must align infrastructure investments with equitable economic growth and must look beyond traditional workforce development and disadvantaged business development strategies. This governing moment offers opportunities to look to an innovative future for climate justice and economic equity as detailed below.

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

- **Conduct proactive and retrospective equity assessments on pilot projects.** If a new policy, program, or infrastructure design is being tested, the potential for harm and/or equitable outcomes can and should be assessed and documented in the pilot phase. Clearly, all federal infrastructure projects should incorporate equity assessments, and pilot projects, by design, allow for early evaluation of the potential interactions between innovation and community and early detection of potential community benefit and community harm. An equity assessment provides a mechanism for better ensuring the efficacy of the federally funded pilot project before new initiatives are scaled up, thus preventing the entrance of harm and welcoming transformation in places most in need of innovative investments.

- **Advance social innovation through community, worker, and public ownership of infrastructure assets.** The IJJA authorizes funding for innovative projects to advance energy resilience, broadband access, and recycling technology. Although the outcomes of these initiatives intend to advance equitable access to clean energy, clean communities, and high-speed internet, low-income persons and persons of color are often intended as *consumers* of these innovations (the demand side), not *suppliers* (the supply side) of these opportunities. However, the prospect of expanding the impact of these investments beyond technological innovation and creating opportunities for social innovation that build community and worker power and provide mechanisms for closing the racial wealth gap is an idea that can be realized in this infrastructure moment. Microgrids are used frequently by universities and hospitals and can provide a mechanism for cities, counties, and rural communities to develop local energy sources.¹⁰⁵ Examples of microgrids include the Brooklyn microgrid, which was established in 2016 and is described as “the first energy project in the United States to use blockchain technology for energy transactions.”¹⁰⁶ The Blue Lake Rancheria microgrid is located on approximately 91 acres near the city of Blue Lake, north of Eureka, California.¹⁰⁷ In the telecommunications and broadband space, People’s Choice Communications is an example of 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 access high-quality internet.¹⁰⁸ In the environmental clean-up space, recycling cooperatives are jointly owned industrial and worker co-ops that specialize in recycling and capture all types of solid waste from corrugated paper to plastic to refrigerators. Thus, where such cooperative opportunities are permitted under state law, communities should prioritize social and collaborative innovation in their development.

105. See, e.g., Clean Coalition, <https://clean-coalition.org/>; Microgrid Knowledge, <https://www.microgridknowledge.com/>.

106. Lena Goodwin, “Community Microgrids: Four Examples of Local Energy that Improves Lives,” Microgrid Knowledge, Dec. 19, 2019, <https://microgridknowledge.com/community-microgrids-examples/#:~:text=Community microgrids offer a way for neighborhoods%2C,villages%2C,remote outposts that otherwise lack access to electricity.>

107. Idaho National Laboratory, “Blue Lake Rancheria Microgrid,” U.S. Dept. of Energy Nat’l Lab, 2021, <https://factsheets.inl.gov/FactSheets/Blue%20Lake%20Rancheria%20Microgrid2021.pdf>.

108. “About Us,” People’s Choice, accessed Dec. 4, 2022, <https://peopleschoice.coop/about-us>.

- **Make infrastructure investments that advance equity in electric rates.** The push toward electric heat and EVs could be devastating for low-income communities with current 22 cent per kilowatt hour prices (or higher). Equitable electrification should account for potentially inequitable impacts of *electric rates* on those customers least able to afford the burden. Where consistent with state law, communities should seek to own their own sources of power, as discussed above, and increase opportunities for community residents to get the benefits of “dynamic prices.” For instance, large customers may have the ability to run “smart building” energy systems that take advantage of lower energy costs during nonpeak hours. Improving equitable energy access and reducing overall energy burdens should also include updating building codes to reflect the necessity of electric heat, hot water, and energy efficiency. State public utility commissions, as part of ensuring just and reasonable rates for all customers, should seek to support infrastructure investments and pricing systems that advance equity and reduce relative energy burdens.¹⁰⁹ Overall, an equitable approach to electrification should provide the highest incentives, financing, outreach, and support for the conversion to electric heat and hot water in a manner that minimizes bill impacts for the most vulnerable, ensures comfort, and creates local jobs in the neediest communities. Funding available in the IRA can help facilitate these goals.¹¹⁰
- **Leverage greenhouse gas funding for green banks to advance equitable innovation.** It is also notable here that the IRA provides \$27 billion in funding for the Greenhouse Gas Reduction Fund. This funding can be used to provide capital for the rapid deployment of low- and zero-emission products, technologies, and services.¹¹¹ Notably, this funding

includes set-asides of \$7 billion to states, municipalities, and tribes, and \$8 billion for projects benefiting low-income and disadvantaged communities. The IRA also extends tax rebates for homeowners who install solar panels. If the funds are used to establish a green bank, then examples of effective use could be taken from abroad. Green banks in Europe provide low-cost financing for energy conversions, finance community- and publicly-owned energy ventures, support research and innovation benefiting communities, conduct community education forums on environmental topics, and also provide typical financial services. Green bank funding should be leveraged to enhance community empowerment.

109. Theoretically, state public utility commissions (PUCs) could authorize cost recovery for more aggressive efficiency upgrades for low-income households, with the understanding that saving energy can help reduce load, avoid the need for new generation, and prioritize those least able to undertake the upgrades themselves. Whether the PUCs have the authority to direct utilities to pursue these programs is a state-by-state question, which is why we include the caveat “to the extent consistent with state law” in the discussion.

110. Rates are set by state utility commissions pursuant to state legislation, generally under a “just and reasonable” standard. Utilities operate on a cost-of-service model, meaning that rates are set so as to allow the utility to recover the prudently incurred costs necessary to provide service. While these costs include the cost of debt and financing, the costs for both are set by the state regulator. The commissioners setting the rates are generally appointed by the state governors or elected in some states. It also important to note that any push for reducing costs to one class of customers necessitates another class of customers bearing those costs. Historically, when cost increases have been shifted to industrial customers, those customers have moved, changed to self-generation, or contracted for independent power producers (which harms other customers by reducing the customer base sharing the load).

111. IRA § 60103.

Economic Inclusion

Goals for inclusion in procurement have been a part of government contracting practices since the early 1960s. The Small Business Act of 1958 was intended to level the playing field for historically underused businesses operating under the presumption of the social disadvantage of people of color and women. Since then, federal, state, tribal, and local government agencies have developed a myriad of policies, strategies, and programs to promote inclusion—most of which have been challenged through litigation by powerful business organizations and anti-affirmative action advocates raising a range of legal objections. In addition, right-wing advocacy organizations like the Federalist Society have long challenged affirmative action programs, perversely co-opting the language of traditional civil rights advocacy to fight against race-conscious approaches to preventing and remedying race and gender discrimination. As a result, the U.S. Supreme Court has steadily eroded the ability of government to advance race-conscious remedies to address the impacts of historical discrimination in government procurement, as well as other areas of public life.

The U.S. Supreme Court has established that explicit racial classifications by public entities¹¹² are subject to the “strict scrutiny” standard, under the Equal Protection Clause of the U.S. Constitution. This is the highest level of judicial review, requiring the government to demonstrate both a “compelling state interest” in the challenged classification, and that the classification is “narrowly tailored” to advance that interest.¹¹³ Gender-based classifications are subject to a slightly less rigorous standard of review: “intermediate scrutiny,” requiring the government to demonstrate an “important” state interest and that the gender-based classification is “substantially related” to that interest.¹¹⁴

This framework of heightened scrutiny was developed in the context of federal court review of racist laws and actions by governmental actors.¹¹⁵ However, it has been most vigorously applied by the U.S. Supreme Court in challenges to race-conscious programs meant to remedy, prevent, or ameliorate the effects of discrimination in public education, contracting,

and employment.¹¹⁶ Numerous federal and state court cases have considered equal protection challenges to affirmative action programs in public contracting; federal courts have spelled out detailed standards for when such programs may survive strict scrutiny, based on “disparity studies” demonstrating past discrimination related to the public contracting program in question (i.e., the requisite compelling state interest) and careful program design (i.e., narrow tailoring). However, while a great number of public entities have commissioned disparity studies and adopted race-conscious programs in procurement, they do so only at great expense, with years of effort, and with substantial risk of litigation. In addition, several states laws adopted by voter initiatives prohibit the use of race-conscious programs by the public sector, even where permitted by federal law.¹¹⁷

Despite these challenges, notable programs and standards remain:

- Race- and gender-conscious programs in public contracting are still legally permissible, when they can satisfy strict scrutiny (in case of race-conscious programs) and intermediate scrutiny (in case of gender-conscious programs).
- Race- and gender-neutral procurement programs (such as small and local business preferences, broad outreach requirements, and technical assistance efforts) are on strong ground legally, and can be crafted to at least partially prevent or remedy discrimination in public contracting; advocates and public entities in California and Washington (states where affirmative action is prohibited) have extensive experience refining such programs.
- Public entities still have an *affirmative duty* to avoid race and gender discrimination in operation of public contracting programs and can take many steps to fulfill this duty¹¹⁸; many of the proposed Infrastructure Equity Standards described in this report fall into this category.

112. The Equal Protection Clause of the 14th Amendment is directly applicable to the states (and their local-government subsidiaries) and is applicable to the federal government through “reverse incorporation” via the Fifth Amendment’s due process clause. See *Bolling v. Sharpe*, 347 U.S. 497 (1954).

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

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

115. See, e.g., *Korematsu v. United States*, 323 U.S. 214 (1944).

116. See, e.g., *Regents of Univ. of California v. Bakke*, 438 U.S. 265 (1978) (public education); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (public contracting); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986) (public employment).

117. See, e.g., California Proposition 209 (voter-adopted constitutional provision, 1996), [https://ballotpedia.org/California_Proposition_209_Affirmative_Action_Initiative_\(1996\)](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_\(1998\)](https://ballotpedia.org/Washington_Initiative_200_Affirmative_Action_Initiative_(1998)).

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

Thus, the federal government maintains a range of programs aimed at preventing discrimination or ensuring inclusivity in federal procurement and in work by federal contractors or grant recipients. These include programs adopted to meet the requirements of Title VI (discussed above in Section 1.0: Affirmative Duty of Government); EO 11246 (prohibiting discrimination in employment by federal contractors); and the DOT’s Disadvantaged Business Enterprise (DBE) Program¹¹⁹ (requiring attempts to use specified percentages of DBEs on DOT-funded projects). Notably, despite widespread consensus on the inadequacy of proactive enforcement of EO 11246,¹²⁰ the order does establish affirmative hiring goals for women and people of color in employment by construction contractors who work on federally funded projects.¹²¹ In addition, courts have upheld the DBE program’s race- and gender-conscious presumptions in its definition of “social and economic disadvantage.”¹²²

The proposed Infrastructure Equity Standards set forth below build on these programs and others. They include program improvements as well as promotion of best practices, such as community workforce agreements (CWAs), disadvantaged worker programs, and CBAs, and offer opportunities for legally enforceable standards for attaining the intent of affirmatively advancing racial equity in hiring and employment on federal infrastructure projects.

119. “Disadvantaged Business Enterprise (DBE) Program,” U.S. DOT, last updated Nov. 25, 2022, <https://www.transportation.gov/civil-rights/disadvantaged-business-enterprise>; 49 C.F.R. parts 23 and 26 (*Participation by Disadvantaged Business Enterprises in Department of Transportation Programs*).

120. 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 U.S. Department of Justice, but the authors find that the Department of Labor rarely imposes them.

121. 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>.

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

Contracting and Procurement

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

- **Expand best value contracting and alternative procurement methods.** Federal, 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 fulfillment of a detailed set of bid specifications. This approach leaves no room for a public entity to use a contractor that delivers a value greater than the material value of the good or service being procured.

“Value” can take into account not only cost or satisfaction of minimum standards but also how a business operates as a socially and environmentally responsible enterprise and what commitments that business is willing to make on the project in question. 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 high-quality jobs, hire the contractor who commits to inclusive procurement and use of the local supply chain, and contract with the private-sector partner who commits to transparency, accountability, and shared power and community voice.

For these reasons, many state, tribal, and local government entities have experimented with so-called “best value” contracting, allowing variance from strict low-bid contract awards when bidders can demonstrate increased value delivered to the public with their proposals.

For federal-level infrastructure spending, federal agencies should explore all opportunities to pilot or expand best-value contracting approaches in direct federal contract awards, using equity-promoting measures of value, such as enhanced contracting and hiring commitments, improved approaches to implementing EO 11246 and DBE requirements, workforce development and contractor capacity-building efforts, and other approaches. Federal guidance should also clarify that state, tribal, and local public entities receiving federal funds may use best-value contract award systems when spending federal funds—again, using equity-promoting measures of value.¹²³

123. Note that expanding the use of best-value contracting and other alternative contracting approaches may require regulatory changes for certain federal agencies and funding streams.

In addition, as part of alternative contracting initiatives, federal agencies and state, tribal, and local fund recipients should explore the following approaches:

- **Include past performance in attainment of goals for economic inclusion in the contractor evaluation and selection.** Bid and solicitation documents should require bidders to identify their past and proposed efforts and their track-record in attaining goals for economic inclusion. When determining the diversity, equity, and inclusion value of the bid or proposal, the past performance of the contractor should be an appropriately weighted component of the rubric for evaluation.
- **Require responsible, legally enforceable disadvantaged business enterprise participation plans for alternative delivery method contracts.** Compliance with the provisions of 49 C.F.R. Part 26 historically required bidders on DOT-funded projects to meet the project’s goal for participation of DBE firms or to demonstrate good-faith efforts to achieve the goal. Recent changes to this rule propose that projects using alternative delivery methods, such as construction management at risk, should require *a DBE participation plan in lieu of a commitment to attain the goal or good faith efforts*. In implementing this new rule, funded agencies should build requirements that commit contractors to meeting the goals of their participation plans for inclusion throughout the life of the infrastructure project. Mere submission and approval of the plan should not be the test of compliance, and the plan should include the following requirements:
 - 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.
 - Specify that failure to implement the approved plan or to seek approval of changes to the plan is considered a material breach of contract.
- **Use proactive compliance mechanisms.** Proactive compliance can be supported by requiring bidders to submit staffing and contracting use plans either at the solicitation stage or during the contract negotiation stage. These plans specify the types and skill level of workers and contractors needed at every stage of the project and are generally normal business practices in state and local public works projects.
- **Expand the application of DBE program requirements to private-sector operations for recipients of federal funds.** Private-sector operators of federal infrastructure assets are required to comply with federal requirements for DBEs for

the federally funded infrastructure development and construction processes. These requirements, however, are only applicable to those entities’ operations when expending federal funds. EO 11246, in contrast, prohibits discrimination by federal contractors *across all of their worksites*, as a condition of receipt of federal contracts. This expansive approach should be used with the DBE program, which would expand the reach of the program and drive inclusiveness across a much wider range of contracting decisions and private operations. Implementation standards for P3s and asset concessions contracts should include requirements for use of socially and economically disadvantaged businesses for the life of the lease or contract, by all entities substantially participating in the development, maintenance, or operation of the infrastructure asset—across all their operations.

This practice can also be applied to private corporations receiving Transportation Infrastructure Finance and Innovation Act, Water Infrastructure Finance and Innovation Act, and Carbon Reduction Infrastructure Finance and Innovation Act funding. Notably, the FTA’s Transit Vehicle Manufacturing requirements for DBE offers a model. Under these FTA requirements, transit vehicle manufacturers, as a condition of being authorized to bid or propose on FTA-assisted transit vehicle procurements, must comply with DBE requirements (including regular uniform reporting).¹²⁴ Similar programs could potentially advance equity in other federally subsidized manufacturing projects, as part of implementing the IIJA, by requiring manufacturers to set and report on DBE goals.

- **Use disparity studies to support race-conscious strategies.** The burden of proof required by the strict scrutiny legal requirements for race-conscious procurement programs requires strong statistical data and legal research—in the form of a “disparity study”—to demonstrate the compelling government interest in preventing discrimination in public contracting programs. Legally defensible disparity studies are used in many instances by local, state, and tribal governments looking to meet this burden. These studies, however, are costly and must be updated regularly. Allowing and encouraging the use of federal infrastructure funds to pay for legally defensible disparity studies (and for the legal support and expert testimony needed to defend these studies if challenged) gives local, state, and tribal jurisdictions the tools needed to meet the government’s affirmative duty to address historical discrimination and to level the playing field for businesses owned by people of color.

124. 49 C.F.R. 26 (Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs).

- **Maximize state and local authority to improve implementation of DBE programs.** Recipients of federal funds must develop DBE policies and programs that guide their agencies' procurement and contracting practices. For DOT funding recipients, these policy documents must be in compliance with DBE program regulations. However, it is important for funded agencies to recognize that in many instances the federal guidance represents the minimum that state, local, and tribal jurisdictions must do; fund recipients should be permitted and encouraged to develop enhanced requirements to advance the purposes of the DBE program. For example, while federal regulations require that DBE subcontractors be paid within 30 days, a local fund recipient could implement a 10-day payment requirement, which would help small DBEs maintain cashflow and participate on federally funded projects.

Additionally, the regulations leave determination of good-faith efforts to the grant recipient and recommend evaluation of good-faith efforts based on a "reasonable person" standard. Reasonable person is a legal standard and legal counsel should be available to administrators responsible for evaluating good faith. Minimally, these administrators should have the training needed to assess good faith within the legal framework of "What would a reasonable person do if he/she/they were actually trying to meet the goal?" Federal fund recipients can copy and paste from a DBE program template on a federal agency website, do the minimum, and still be in compliance. Or, they can extract all the power from the federal regulations and do all that the law allows.

- **Apply self-performance standards fairly.** Programs for use of businesses owned by people of color often have requirements that the firm self-perform the work, instead of subcontracting the work. For example, the DOT's DBE program requires that the DBE firm self-perform at least 30 percent of the project.¹²⁵ Moreover, state, tribal, and local jurisdictions can impose a higher self-performance requirement on DBE firms. Self-performance requirements that have a higher threshold for disadvantaged businesses than for non-DBE firms create a barrier to equitable participation and can be discriminatory in effect. If the intent of the program is to level the playing field for disadvantaged businesses, then the self-performance requirement must be fair. Allowing non-DBE contractors to self-perform less than 30 percent of a contract while enforcing higher self-performance requirements on DBEs places a higher physical and financial burden on the disadvantaged business. Local,

state, and tribal jurisdictions and agencies decide the self-performance requirements for all contractors, including DBE contractors, and should not add a disproportionate disadvantage to businesses owned by people of color. Race is not a risk factor, and increased burdens on participating DBEs should not be permitted.

Employment, Workforce Development, and Job Quality

Infrastructure Standard: The economic benefits of infrastructure investments are community-centered, community-driven, measurable, and legally enforceable.

Targeted Hiring

- **Improve monitoring and enforcement of EO 11246.** The equal employment opportunity EO 11246 is a crucial expression of the federal government's core principle that contractors using federal funds must avoid discrimination based on race, gender, disability, or other established categories in hiring. However, enforcement across the country, on thousands of locally implemented construction projects, has been historically challenging. Federal fund recipients submit an assurance to prevent discrimination in hiring and pass the commitment to contractors and developers in the terms and conditions of their contracts. However, even with the availability of technical products for monitoring the participation of people of color and women on infrastructure projects, the proactive monitoring needed to ensure compliance is generally lacking. Federal agencies should require contractors to demonstrate their capacity for monitoring and enforcement of EO 11246 and Davis-Bacon Act wage¹²⁶ requirements as a matter of responsibility, and these requirements should be legally enforceable contract terms.

Moreover, to comply with EO 11246, federal fund recipients must submit a worker utilization plan that demonstrates the contractor's intent to meet the hiring targets or that reflects good-faith efforts to meet the targets. However, fund recipients do not always have the capacity to evaluate whether or not the plan reflects good faith, and the data to support evaluations of a targeted hiring plan are not always available. As well, these monitoring and enforcement

125. 49 C.F.R. § 26.55.

126. The Davis-Bacon Act requires the DOL to establish local prevailing wages that are applicable to contractors and subcontractors performing work on federally funded projects. See "Davis-Bacon and Related Acts," U.S. Department of Labor, accessed Dec. 13, 2022, <https://www.dol.gov/agencies/whd/government-contracts/construction>.

mechanisms generally provide information on the race and gender of persons hired for federally funded projects, but do not provide information on the race and gender of applicants who applied and were not hired. This is particularly critical in right-to-work states. In the absence of proactive monitoring of persons applying and persons hired for federal infrastructure projects, compliance with the affirmative requirements for employment of people of color and women becomes a reactive complaint-based process. Finally, making this information public (with the appropriate protections for the identities of the workers) should also be required along with a mechanism for transparency and accountability.

- **Create opportunities for local disadvantaged workers.** 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 and CWAs. 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. First source agreements are a particularly viable option in right-to-work states and on projects where a CWA is not a viable option. First source hiring policies are currently used in a number of states, regions, and localities.¹²⁷ Definitions vary in different policies and programs and generally include a combination of the following criteria for a disadvantaged worker:
 - Lives in a household where total income is below 50 percent of the area median income
 - Receives public assistance
 - Lacks a high school diploma or GED

- Has a previous history of incarceration lasting one year or more following a conviction under the criminal justice system
- Is a custodial single parent
- Is chronically unemployed
- Is a veteran
- Has been aged out or emancipated from the foster care system
- Has limited English proficiency
- Lives in a high-unemployment ZIP code

- **Ensure community-engaged workforce compliance.** Communities should be engaged as a part of a proactive compliance strategy. This is more than data trolling to penalize developers and contractors; instead, it is intended as a proactive process to engage communities in real-time at shadow or direct “hiring halls” and “contracting agencies” for the project sponsors—helping to connect local residents and businesses to project opportunities and daylighting the hiring process. While Davis-Bacon wage and EO 11246 reporting can make information available on who was hired by race, gender, and skill level, community-engaged compliance can make information available on who was not, and sunshine areas where intervention is needed. Local workforce intermediaries can also participate in this process.
- **Support job quality and hiring standards in federally funded supply/manufacturing contracts.** Federal agencies can encourage U.S. employment plans in manufacturing contracts and use responsible bidder policies to support job quality and apprenticeship use. As noted above, federal agencies should also encourage CBAs, CWAs, and best-value procurement where local partners are prepared to participate meaningfully.
- **Build the talent pipeline.** Building the equitable pipeline of the skilled workers and quality contractors and suppliers needed to support over a trillion dollars in public infrastructure development is a major challenge in this governing moment. Faced with the pervasive issues of racial bias in hiring and procurement and coupled with the weakening of legal protections against discrimination, this moment requires that we shine a light ahead from the best practices to the next practices. Notably, the issue of the talent pipeline is most often addressed at the metropolitan regional level and is a challenge that will require state and local government to lean into systemic changes and to intentionally align workforce and small business ecosystems to advance equity. In this governing moment with over a trillion dollars at stake, cities, counties, and states need a design for an equitable user system that bridges supply and demand in the metropolitan region, that invests in the

127. The State of Oregon (ORS 285C.215 - First-source hiring agreements, 2020, <https://www.oregonlaws.org/ors/285C.215>); The cities of Alameda County, California (“Small, Local and Emerging Business (SLEB) Program: First Source Program,” acgov.org, 2021, <https://www.acgov.org/sleb/sourceprogram.htm>); San Francisco, California (“Comply with the First Source Hiring Program,” Office of Economic and Workforce Development, sf.gov, last updated Jul. 18, 2022, <https://sf.gov/comply-first-source-hiring-program>); Los Angeles, California (“First Source Hiring Ordinance [FSHO],” Bureau of Contract Administration, Los Angeles, 2022, <https://bca.lacity.org/first-source-hiring-ordinance-fsho>); Boston, Massachusetts (“City of Boston Jobs and Living Wage Ordinance, Form B-3, Jun. 2015, https://www.cityofboston.gov/images/documents/B-3FY2016.docx_tcm3-49448.pdf); New Orleans, Louisiana (“Workforce Development,” City of New Orleans, last updated Jan. 14, 2019, <https://nola.gov/workforce-development/hire-nola/first-source/>); Denver Urban Renewal Authority (“DURA First Source Hiring and Outreach Program for Low Income Denver Residents for Urban Renewal Project, approved July 2012, <https://renewdenver.org/wp-content/uploads/2016/12/First-Source-Hiring-Approved-July-2012-1.pdf>); and Washington, DC (“Office of First Source Compliance,” District of Columbia, Dept. of Employment Services, 2022, <https://does.dc.gov/page/office-of-first-source-employment-program>).

regional talent pool, and that expands the capacity of the regional supply chain toward minimal leakage and maximum economic opportunity for the people who live, work, play, learn, and worship in proximity to the infrastructure investment. Implementing agencies and jurisdictions need the ability and authority to leverage public sector funding opportunities across state agencies to build standards for the new paradigms of training, technical assistance, and capital needed to meet the talent and supply-chain needs. Ecosystems that include secondary and post-secondary education, workforce intermediaries, community- and faith-based organizations, and community development financial institutions need to be convened and funded. State executive action stands out as an opportunity to be explored in this governing moment.

Project Labor Agreements and Community Workforce Agreements

- **Use CWAs to support affirmative hiring goals.** CWAs are project labor agreements that contain proactive goals and procedures to advance various workforce policy goals, such as local and disadvantaged hiring or enhanced diversity requirements.¹²⁸ CWAs as a standard for all project labor should advance local hiring, prohibit discrimination, and promote equitable opportunities for a diverse workforce. CWAs present a crucial opportunity to coordinate training, hiring, and referral systems on large construction projects, enhancing opportunities for building a diverse workforce in quality construction careers.

Crucial in this effort is the establishment of the specific CWA terms needed to fulfill the ambition and potential of CWAs to advance equity. As such, standards for CWAs and project labor agreements on federal or federally funded projects include the following provisions.

- Hiring goals: Incorporation of the hiring goals for people of color and women pursuant to EO 11246, in addition to any local or disadvantaged worker goals appropriate for the project.
- Priority referrals: Requirement that unions executing the CWA agree to prioritize referral of people of color, women, and local or disadvantaged workers, as necessary for contractors to satisfy EO 11246 and other project hiring goals.
- Alternative hiring sources: Clarification that if established referral sources cannot provide enough

128. Art Lujan, Lyle A. Balistreri, and Loree K. Soggs, *Community Workforce Agreements: Pathway to Career Opportunities* (GreenWays, Mar. 2013), https://jfforg-prod-new.s3.amazonaws.com/media/documents/CommunityWorkforceAgreements_030413.pdf.

people of color, women, or local or disadvantaged workers to satisfy EO 11246 and other project hiring goals, then contractors can retain such workers from alternate sources.

- Targeted hires: Requirement that joint labor-management apprenticeship programs affiliated with unions executing the CWA agree to enroll apprentices in targeted categories if needed by contractors and refer them to the CWA job site.
- DBE participation: Inclusion and flexibility for certified DBEs working under the CWA, such as the ability to use existing crews and established employee benefits programs.
- Joint labor-management community engagement: Requirement that the CWA involves equity stakeholders in the negotiations, as signatories and as members of a project oversight committee, to ensure cooperation and communication between all parties to the agreement in achieving the diversity goals.

Without the above provisions, CWAs run the risk of impeding implementation of crucial federal equity programs, such as EO 11246, Housing and Urban Development “Section 3”¹²⁹ requirements, DOT’s DBE program, and local hiring and contracting programs.

Additionally, in maximizing the impact of these policies and regulations, local, tribal, and state jurisdictions should be allowed to use federal infrastructure funds to support negotiation, development of, monitoring of, and community participation in multilateral project labor agreements and CWAs. Funding should also support compliance tracking and enforcement capacity to allow monitoring by government, labor, and community groups.

- **Ensure interagency collaboration.** In addition to the above key provisions for CWAs, standards for diversity and inclusion on federally funded projects must be accompanied by a range of proactive policies, strategies, and tools. The broad adoption of project labor agreements and CWAs across federal agencies requires interagency alignment and collaboration to ensure a level of standardization in rule making, goals, metrics, reporting, monitoring, and innovation. Currently, each agency has different levels of commitment and experience in diversity and inclusion policies and practices. Existing regulations are only intermittently reviewed or enforced. Most of these policies and practices

129. Section 3 is a provision of the HUD Act of 1968. See 12 U.S.C. 1701u. The regulations for the Section 3 program are found in 24 C.F.R. Part 75. Section 3 requires HUD funding recipients to provide employment, training, and contracting opportunities to low-income individuals and the businesses that employ them within their community.

are outdated and have not benefited from innovative CWAs, project labor agreements, and other equity approaches that have been developed at the local level. An interagency effort is needed to build the capacity of agencies in best practices in this area.

Community Benefits Agreements

Equity advocates use the term community benefits agreement, or CBA, to mean a set of contractual commitments regarding community benefits that are legally binding and are negotiated or endorsed by a coalition of legitimate representatives of a community affected by a proposed project or initiative. A valid CBA can take many forms of contract or agreement, but the core values of enforceability and inclusiveness have driven the CBA movement.

- **Promote the use of CBAs.** Federal agencies can take a variety of steps to promote use of CBAs by applicants for federal funds. For example, the U.S. Department of Energy recently released a funding opportunity announcement for distribution of IIJA funds for battery materials processing and battery manufacturing.¹³⁰ Applicants for funding must submit an equity plan that describes efforts to negotiate a CBA in conjunction with the project, if selected:

“The applicant should detail its anticipated community engagement efforts before project initiation, during the project, and after the project is complete. Applicant should also describe its plan to negotiate a Community Benefits Agreement, Good Neighbor Agreement, or similar agreement. Such agreements facilitate community input and social buy-in, identify how concerns will be mitigated, and specify the distribution of community benefits, including access to jobs and business opportunities for local residents, thus reducing or eliminating project risks associated with project development.

Such project-specific agreements between developers and community organizations should include provisions on how a project will help the community, such as by paying wages and benefits at or above the prevailing rate when not already required, committing to recruit and hire local workers, especially from underserved communities, including workers from impoverished neighborhoods, and sending job opportunity notices

to and recruiting from local residents and organizations.”¹³¹

As an example, applicants for Department of Energy funding for the battery manufacturing program will be evaluated in part on the strength of their equity plan and its CBA component. Incorporation of CBA negotiation requirements into federal procurement is a new approach, building on local success stories. This initiative is one that can benefit from experimentation by federal agencies and by state and local entities that direct public funds toward development projects. Federal reporting requirements regarding CBA implementation, and evaluation of its effectiveness, will help refine CBA negotiation requirements over the course of IIJA implementation. Federal agencies should consider similar approaches for all discretionary IIJA funding streams.

- **Ensure equity-based commitments.** CBAs can contain a range of commitments that drive equity at a local level: local hiring, small/local business use, job-training requirements and funding commitments, commercial loans and technical assistance for participating small contractors, green space, enhanced environmental mitigations, and so forth. Crucially, the community benefits contained in any CBA should be driven by representatives of affected communities, in the context of the proposed project in question. Monitoring and enforcement are crucial with all CBAs as well, and community oversight and full transparency in implementation is the goal. Federal, state, tribal, and local jurisdictions should validate and consider only CBAs that reflect these standards.

130. Lujan et al., *Community Workforce Agreements: Pathway to Career Opportunities*.

131. Department of Energy (DOE) Office of Manufacturing and Energy Supply Chains (MESC) and Office of Energy Efficiency and Renewable Energy (EERE), Bipartisan Infrastructure Law (BIL) Battery Materials Processing and Battery Manufacturing, Funding Opportunity Announcement (FOA) Number: DE-FOA-0002678, p. 72, May 2, 2022, <https://eere-exchange.energy.gov/FileContent.aspx?FileID=afe3902a-e587-4838-a195-9541bac7f25b>.

Governance and Democracy

The minimum expectation for public participation varies by agency. For example, DOT defines participation as “an open process in which the rights of the community to be informed, to provide comments to the Government and to receive a response from the Government are met through a full opportunity to be involved and to express needs and goals.”¹³² Additionally, community involvement depends on ensuring full access to project information, as well as establishing clear mechanisms for accountability. Without robust transparency and accountability requirements, disparate treatment, disparate impacts, and racialized harms may go undocumented and unaddressed. The Movement Strategy Center defines the spectrum of community engagement, which ranges from ignoring and marginalizing the community to informing, consulting, involving, and collaborating with the community, with co-governance noted as the highest form of engagement.¹³³ Ideally, public participation and involvement in infrastructure development should be more than information and opportunity for public comment. Participation should include robust mechanisms for transparency and accountability and should afford an opportunity for people to inform, plan, monitor, evaluate, lead, and influence decisions and course corrections of projects and investments that shape the places where they live, learn, work, play, and worship.

Community Oversight

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

- **Community oversight committees provide a co-governance mechanism and should be engaged in the planning and implementation of federal infrastructure projects.** Wherever possible, and subject to necessary confidentiality protections, such oversight committees should:
 - have the ability to participate in enforcement and accountability mechanisms,
 - have unfettered access to project documentation,
 - be reasonably compensated to ensure socioeconomic representation from impacted communities,
 - be engaged from planning through implementation, and
 - have input into project course correction as warranted.
- **Community liaisons also offer an opportunity for accountability to community and community access to the decision-making process.** Like oversight committee members, community liaisons should be reasonably compensated. Funded agencies should explore the potential to use infrastructure funding to fund community liaisons to engage directly with decision-makers on project priorities. This may require regulatory and/or legislative changes, depending on the jurisdiction and type of project implicated.

132. 23 C.F.R. 200.5; Title 23-Highways; Chapter I-Federal Highway Administration, Department of Transportation; Subchapter C-Civil Rights; Part 200-Title VI Program And Related Statutes-Implementation And Review Procedures.

133. González, “The Spectrum of Community Engagement to Ownership.”

Proactive Accountability

In addition to direct community involvement, existing legal mechanisms should be leveraged to support infrastructure projects' accountability to disadvantaged communities. Title VI, EO 11246, EO 14088, and EO 13985 offer opportunities for greater accountability.

As previously discussed, Title VI prohibits discrimination under federally assisted programs.¹³⁴ However, Title VI enforcement on infrastructure projects depends largely on federal agency action. Individuals do not have a right to bring Title VI disparate impact claims in federal court,¹³⁵ though they may bring disparate treatment claims in court¹³⁶ and disparate impact complaints to the relevant agencies for investigation.¹³⁷ In turn, federal agencies must monitor and enforce their Title VI regulations by investigating complaints and initiating affirmative compliance reviews.¹³⁸ Each infrastructure agency's regulations also contemplate proactive enforcement and provide procedures to adjudicate any termination of, or refusal to grant or continue funding to, a recipient for violating Title VI.¹³⁹ Title VI regulations also authorize agencies to seek judicial enforcement.¹⁴⁰

134. 42 U.S.C. § 2000d.

135. *Alexander v. Sandoval*, 532 U.S. 275, 293 (2001) (holding that Title VI does not create a private right of action to enforce Title VI regulations, including disparate impact regulations).

136. *Id.* at 279-80.

137. 28 C.F.R. § 42.408(a) ("Federal agencies shall establish and publish in their guidelines procedures for the prompt processing and disposition of complaints.").

138. DOJ, *Title VI Legal Manual*, page VII.5 ("Federal funding agencies should prioritize vigorous enforcement of their Title VI disparate impact provisions both through investigation of complaints and through compliance reviews."); 28 C.F.R. § 42.411(a) ("Effective enforcement of title VI requires that agencies take prompt action to achieve voluntary compliance in all instances in which noncompliance is found. Where such efforts have not been successful within a reasonable period of time, the agency shall initiate appropriate enforcement procedures as set forth in the 1965 Attorney General Guidelines, 28 C.F.R. 50.3.").

139. *See, e.g.*, 49 C.F.R. § 21.13(a) ("If there appears to be a failure or threatened failure to comply with this part, and if the noncompliance or threatened noncompliance cannot be corrected by informal means, compliance with this part may be effected by...other means [] includ[ing]...: (1) A reference to the Department of Justice with a recommendation that appropriate proceedings be brought to enforce any rights of the United States under any law of the United States (including other titles of the Act), or any assurance or other contractual undertaking, and (2) any applicable proceeding under State or local law."); *id.* at .15, .17.

140. *See, e.g.*, 49 C.F.R. §§ 21.7(a)(1), 13(a)(1) ("[C]ompliance with this part may be effected by...(1) A reference to the Department of Justice with a recommendation that appropriate proceedings be brought to enforce any rights of the United States under any law of the United States (including other titles of the Act), or any assurance or other contractual undertaking[.]").

Similarly, EO 11246 requires affirmative action by federal contractors in their employment practices and prohibits them from discriminating against employees and applicants on the basis of race, color, religion, sex, sexual orientation, gender identity, or national origin.¹⁴¹ EO 11246 authorizes the Secretary of Labor (or U.S. Department of Labor [DOL]) to enforce the order,¹⁴² and the EO authorizes the DOL to require prospective contractors to submit targeted race- and gender-conscious programs before entering federal agency contracts.¹⁴³ In addition to receiving and investigating discrimination complaints by employees or prospective employees of a government contractor, the DOL may also investigate employment practices of contractors to determine whether they have violated EO 11246.¹⁴⁴ Finally, EO 11246 states that the DOL *shall* use its best efforts to ensure relevant labor unions cooperate with the implementation of the EO, and *shall* notify the Equal Employment Opportunity Commission or DOJ if the DOL has reason to believe that a union has violated Title VI, Title VII, or other federal law.¹⁴⁵

Despite the regulations and enforcement mechanisms discussed above, more support is needed to enable robust, proactive enforcement. As such, proactive and ongoing monitoring and reporting of all equal protection policies and regulations (reducing reliance on complaint-based enforcement), including Title VI, EO 11246, and environmental justice requirements is a recommended standard for infrastructure equity. Furthermore, infrastructure funding should be available to jurisdictions to support increased staffing to assist in meeting these responsibilities.

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.

- **Ensure a proactive, comprehensive whole-of-project approach to equal protection, equity, and inclusion.** State and federal environmental and related policies and plans include protections against noise and air quality impacts, community safety concerns, social and economic disruption,

141. EO 11246, Sec. 202.

142. EO 11246, Sec. 201, 205.

143. EO 11246, Sec. 211; 41 C.F.R. § 60-1.29. DOL's regulations identify the contractors upon which DOL has decided to impose this requirement: non-construction contractors with at least 50 employees and on a contract of at least \$50,000, 41 C.F.R. §§ 60-1.40, 60-2.1 *et seq.*, and construction contractors on a contract of at least \$10,000. *Id.* at 60-4.1 *et seq.*

144. EO 11246, Sec. 206.

145. EO 11246, Sec. 207.

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, while each project's administering agency maintains responsibility for the environmental justice protections, compliance with federal and state requirements for diversity, equity, and inclusion are frequently incorporated in the contract between the agency and the prime contractor/developer of the infrastructure project. Construction activity involves multiple tiers of subcontractors and suppliers who should also be responsible for complying with all of these protections on infrastructure projects, including nondiscrimination, equal opportunity, use of DBEs, Davis-Bacon wages, and protections against a hostile work environment, as applicable.

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) and should include monitoring and reporting requirements at all levels. Additionally, this approach also requires proactive monitoring of federal infrastructure work sites, and the surrounding community as warranted, by personnel with civil rights training. Compliance with all of the requirements noted here should involve more than a complaint form and a sign telling workers and community how to issue a complaint. 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.

- **Use community participation in monitoring and compliance.** Federally funded agencies require periodic compliance reports and documentation that these reports have been made available for review and feedback. Like most compliance processes, Title VI is a self-assessment process, requiring the funded agency to conduct the monitoring and develop the review. Recipients of federal funds can be encouraged to use public oversight committees for independent, third-party assessment of the agency's compliance with Title VI, EO 14088, and EO 13985 and other equity regulations, including environmental justice requirements and even Justice40 goals.

Infrastructure and the Built Environment

In this infrastructure moment, we have the opportunity to mitigate the combined harmful impacts of the last 60+ years of infrastructure investments and the last 60+ years of case law by using regulatory guidance and legal interpretation that advances equity in the built environment. We have an opportunity to use the standards for equitable investments in place, not only as a set of near-term practices and a long-term policy agenda, but also as a proactive tool to support organizing around issues of spatial and environmental justice. Thus, standards are more than actions that local, state, tribal and federal actors can take. As provisions of government's affirmative duty to its citizens, standards are a set of rules, norms, values, and measures of compliance that citizens can use to hold government accountable.

In the near-term, the standards set forth in this document offer an actionable framework for proactive and integrated advancement of equal protection regulations that are fearfully underused by government agencies, including the Equal Protection Clause of the 14th Amendment, Title VI of the Civil Rights Act, EO 11246, and Affirmatively Furthering Fair Housing, to name a few. Notably, in the current political and judicial environment, it is important that the standards—to the maximum extent possible—buttress local, state, and tribal officials against legal challenges that can further dilute the equity and equal protection laws that remain enforceable. As such, these standards seek to expand the protections of these laws to the limits of their legal efficacy and offer a platform for building the tools and approaches that represent meaningful progress from rules and regulation to results.

Compellingly, “[c]ombining the terms spatial and justice opens up a range of new possibilities for social and political action.”¹⁴⁶ In the long term, the standards should provide a platform for equity advocates and activists to advance the field of spatial justice, including the development of new policies and institutionalization of new practices to support environmental justice and distributional equity as an outcome of federal infrastructure investments.

In the coming months, the Infrastructure Standards Working group will be building tools and identifying best practices for implementation of the standards, and at the same time building the long-term policy agenda that will enable the “next practices” for infrastructure development in support of a thriving multiracial democracy.

146. Soja, 2009.

Moreover, it is important to note here that beyond the impacts of IIJA and IRA on the built environment, the combined impact of IIJA, IRA, and CHIPS signals a new American industrial policy through major investments in the green economy, clean energy manufacturing, and supply chain solutions—all with the potential to reduce America's reliance on foreign suppliers and, more importantly, with the potential to promote economic growth in a way that embeds both economic inclusion and spatial equity in America's economic growth model.

What is most noteworthy in these investment opportunities is the recognition that government is the only institution with the power for ensuring that the return on investments in climate resilience, energy independence, and local/regional supply chains accrue to all people in all American places—cities, states, metropolitan and multistate regions, tribal communities, and territories. Government is the only institution capable of bringing economic equity to scale, and this new industrial policy forgoes decades of America's overreliance on market forces to drive innovation in favor of equitable outcomes. The combined funding mechanisms in these policies afford the opportunity for America to invest in people and places who are willing to do things differently and to provide the proof points to demonstrate that [equity is, in fact, the superior growth model](#).¹⁴⁷ We elevate this concept here to indicate our intent to provide recommendations for maximizing justice and accountability in IRA investments and to build, in the long-term, standards for industrial policy.

147. Sarah Treuhaft, Angela Glover Blackwell, and Manuel Pastor, *America's Tomorrow: Equity is the Superior Growth Model* (Oakland and Los Angeles, PolicyLink, and USC Program for Environmental and Regional Equity, 2011), https://www.nationalequityatlas.org/sites/default/files/SUMMIT_FRAMING_WEB_20120110.PDF#:~:text=Equity%20is%20the%20Superior%20Growth%20Model%20those%20who,other%2C%20the%20better%20off%20we%20will%20all%20be.

Governing for the All

Infrastructure represents one of many areas of governing for a multiracial democracy and addresses the built environment of our nation. Governing, however, is more than infrastructure and place. At the whole-of-government level, PolicyLink has identified seven tenets of a liberating multiracial democracy:

- **Justice:** We design and apply laws and policies that protect all of our individual dignity and lift our communities up.
- **Accountability:** We are able to hold stakeholders accountable for their decisions, with mechanisms in place to take potential action.
- **Responsiveness:** We all have a voice, and our needs are heard, respected, and incorporated into decision-making.
- **Freedom:** We protect our civil liberties from infringement, while prioritizing the advancement of collective well-being.
- **Opportunity:** We all have what we need to reach our full potential, including equal access to the same resources and benefits in society.
- **Solidarity:** We acknowledge and celebrate our shared humanity and operate out of the recognition that achieving prosperity for the most vulnerable will improve our collective outcomes.
- **Delivery:** We are focused on getting things done and work to support efficient, resourced, and high-capacity governing institutions to help deliver on the promise of equity.

Regardless of the political environment and a conservative judiciary notwithstanding, we are clear that these tenets represent the tests of governing for a multiracial democracy and can be applied without apprehension to the decision-making processes of the federal, state, local, and tribal leaders who represent “We the People”! And, as you read the infrastructure standards offered here, we ask that you look for these tenets—look for **justice** in the distribution of benefits and harm and economic **opportunities** for all people in all places. We ask that you look for **accountability** of all sectors—public, private, and civic—and for **responsiveness** in recommendations for transparency, engagement, voice, and influence. We ask that you look for opportunities for the public and civic sectors to work in **solidarity** and promote collective well-being working within **equitable delivery systems**. And we ask that you look for recommended policies and practices that maximize and proactively enforce the **freedom** promised in the protections of the 14th Amendment, Title VI, environmental justice regulations, and civil rights policies and regulations.

We understand that it is only through communities advocating for change that we move closer to liberatory democracy and that these movements of community advocacy have contributed to our most significant advancements toward equity over time. The movements of the past gave us the 14th Amendment, the Civil Rights Act, the National Environmental Policy Act, the environmental justice regulations, and the Affirmatively Furthering Fair Housing policies that we draw on here to better ensure spatial justice in all the places of America. It is today’s movements and the movements of tomorrow that will advance, expand, and challenge these laws and policies.

The people of these movements have fought and continue to fight for the legal and policy changes that bring us closer to our vision of a just future. And, in service to the advocates, actors, grassroots, and power-building organizations engaged in this fight, we will continue to build these standards—issue by issue, agency by agency, jurisdiction by jurisdiction—to serve the whole of government and advance a truly liberating, multiracial American democracy.

In solidarity!



Lifting Up What Works®

Oakland

1438 Webster Street
Suite 303
Oakland, CA 94612
t (510) 663-2333
f (510) 663-9684

New York

75 Broad Street
Suite 701
New York, NY 10004
t (212) 629-9570

policylink.org

Facebook: /PolicyLink
Twitter: @policylink
Instagram: @policylink