

Via Federal eRulemaking Portal: <https://www.regulations.gov> and E-mail

April 25, 2022
Council on Environmental Quality
730 Jackson Place, NW
Washington DC, 20503
Sharmila.L.Murthy@ceq.eop.gov

Subject: Docket CEQ-2022-0002, Council on Environmental Quality Request for Information Regarding Climate and Economic Justice Screening Tool Beta Version

Dear Sharmila Murthy and Council on Environmental Quality Team:

We submit these comments in response to the Council on Environmental Quality’s Request for Information regarding the new Climate and Economic Justice Screening Tool (“CEJST”) beta version. The CEJST tool is an important step in advancing environmental justice at the federal level and we applaud the Biden-Harris Administration efforts to target investments to communities of color and low-income neighborhoods. The tool, in its current form, falls short of its intended goal of “highlighting disadvantaged communities that are marginalized, underserved, and overburdened by pollution” primarily because it does not include race as an indicator. We urge the inclusion of race as a socioeconomic metric and recommend the inclusion of additional datasets to improve the CEJST. We recommend the inclusion of a transportation access category, given that transportation is a lifeline for most people in providing access to jobs, food, and other crucial resources, and is a key factor in economic justice. Finally, we suggest greater transparency around certain metrics already included in the dataset in order to make the CEJST as accessible and useful as possible.

I. CEJST Should Include Race as an Indicator.

We understand the concern that inclusion of race as an indicator may make the screening tool, and associated actions taken based on the output of the tool, vulnerable to legal challenges. That concern is not the focus of this comment letter, though it is worth addressing in brief why this is not a valid reason for excluding race as an indicator. First, the existing inequities that the CEJST aims to identify and the Justice40 Initiative seeks to correct are due, in part, to historical de jure and subsequent de facto racial discrimination, therefore providing support for a compelling government interest in correcting these racial inequities. Furthermore, race is already used as a

decision-making criterion in existing federal environmental laws. For example, guidelines for grants under the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”) include considering the “extent to which a grant would address or facilitate the identification and reduction of threats to the health or welfare of children, pregnant women, minority or low-income communities, or other sensitive populations.”¹ Finally, several states including Massachusetts,² New Jersey,³ and Washington⁴ have already considered this challenge and have proceeded to incorporate race into their own environmental justice statutes, policies, and/or mapping tools. For further examination of this issue, please see Appendix A, “Race as Criterion in Environmental Justice Bills is Crucial and Constitutional,” which outlines why CLF and our partners advocated to the Massachusetts legislature that race be one of the factors used to designate environmental justice populations.

The Request for Information specifically seeks feedback on how the CEJST can be improved to better identify disadvantaged communities, to incorporate cumulative impacts, and which additional datasets should be included to improve the tool. Herein we answer these specific questions and recommend additional datasets in order to most accurately identify disadvantaged communities and reflect cumulative impacts.

A. Research has identified race as the most influential indicator of environmental harms, and relying on economic indicators without incorporating race as a metric will perpetuate systemic inequities.

The relationship between race and environmental quality, in which race is associated with increased proximity to or experience of environmental burdens such as pollution, and lack of access to environmental benefits such as clean air and water or green space, has been well-documented by decades of research. Studies have shown that commercial hazardous waste facilities are disproportionately sited in communities of color,⁵ that Black and Hispanic people live in more polluted neighborhoods and cities than white people,⁶ and that white communities tend to be “greener.”⁷ The United States Environmental Protection Agency’s (“EPA”) own definition of environmental justice explicitly includes race, and as previously stated, other states have passed environmental justice policies which include race as a factor, given these findings.⁸

¹ 42 U.S.C. § 9604(k)(6)(C)(x)

² Massachusetts Executive Office of Energy and Environmental Affairs, Environmental Justice Policy, Accessed April 15, 2022 at <https://www.mass.gov/service-details/environmental-justice-policy>

³ New Jersey Department of Environmental Protection, New Jersey’s Environmental Justice Law, Office of Environmental Policy, Accessed April 15, 2022 at <https://www.nj.gov/dep/ej/policy.html>

⁴ University of Washington, Washington Environmental Health Disparities Map Project, Accessed April 15, 2022 at <https://deohs.washington.edu/washington-environmental-health-disparities-map-project>

⁵ Paul Mohai and Robin Saha, “Which Came First, People or Pollution? Assessing the Disparate Siting and Post-Siting Demographic Change Hypothesis of Environmental Justice,” 10 Environ. Res. Lett. 115008 (2015)

⁶ Michael Ash and T. Robert Fetter, “Who Lives on the Wrong Side of the Environmental Tracks? Evidence from the EPA’s Risk Screening Environmental Indicators Model,” 85(2) Social Science Quarterly 441-462 (2004).

⁷ Joan A. Casey, Peter James, Lara Cushing, Bill M. Jesdale, and Rachel Morello-Frosch, “Race, Ethnicity, Income Concentration and 10-Year Change in Urban Greenness in the United States,” 14(12) Int J Environ Res Public Health 1546 (2017) <https://doi.org/10.3390/ijerph14121546>

⁸ US Environmental Protection Agency, “Environmental Justice,” Accessed April 15, 2022 at <https://www.epa.gov/environmentaljustice>. “Environmental justice is the fair treatment and meaningful involvement

There are many demographic and socioeconomic characteristics which should be considered in evaluating environmental justice, including income, education level, and linguistic isolation, for example. The CEJST rightfully has built these indicators into the tool. Notwithstanding, studies have found that race, more than any other factor, is the primary variable in predicting environmental injustices. Variations in concentration of pollution have been shown to vary according to the racial composition of neighborhoods and households, indicating that income does not solely influence environmental inequalities.⁹ Racist practices such as redlining have been linked to the presence of environmental burdens such as the siting of oil and gas wells¹⁰ and increased instances of extreme heat.¹¹ Given this outsize role of race and the historical effects of racial discrimination on predicting and causing environmental burdens, it is imperative that race is included as a factor in any environmental justice analysis or screening process.

The Request for Information (RFI) solicits feedback as to how the CEJST can “incorporate a cumulative impacts approach that quantitatively measures the combined adverse factors that contribute to the conditions that Justice40 is intending to address.” Because environmental burdens are definitively linked to both historic and current actions motivated by racial discrimination, and given that numerous studies have pinpointed race as the primary factor in determining environmental injustices, race must therefore be a key component of any cumulative impacts approach. Seeking to address environmental racism and injustices on a “colorblind” basis will at minimum render the CEJST ineffective, and worse – and far more likely – risk perpetuating these existing inequities.

- B. The tool wrongly identifies high-risk properties based on at-risk property value, which results in wealthier communities scoring as higher risk thereby reducing the likelihood of low-income communities and communities of color being identified as disadvantaged and appropriate for targeted funds.

The CEJST primarily reflects the impacts of climate change through its “Climate Change” category, which identifies communities as disadvantaged if they meet the threshold for expected agricultural loss rate, building loss rate, or population loss rate, and meet the socioeconomic threshold for low income and not being enrolled in higher education. This category is the only one of the eight categories which reflects the potential impacts from disasters linked to the changing climate, such as flooding, hurricanes, and extreme heat. The category relies on the FEMA National Risk Index and specifically its “Expected Annual Loss” score which reflects the dollar value of buildings, agricultural production, or human lives expected to be lost due to disasters linked to climate change. Places where a greater dollar value is at risk are scored higher, meaning that an area with a higher median home value, for example, would be considered more

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.”

⁹ Liam Downey and Brian Hawkins, “Race, Income, and Environmental Inequality in the United States,” 51(4) *Sociol. Perspect.* 759-781 (2008) <https://doi.org/10.1525/sop.2008.51.4.759>

¹⁰ Julia Kane, “Historically redlined neighborhoods have twice the number of oil and gas wells,” *Grist* (April 13, 2022), <https://grist.org/accountability/redlined-neighborhoods-pollution/>

¹¹ Meg Anderson, “Racist Housing Practices From The 1930s Linked To Hotter Neighborhoods Today,” *NPR* (January 14, 2020) <https://www.npr.org/2020/01/14/795961381/racist-housing-practices-from-the-1930s-linked-to-hotter-neighborhoods-today>

at risk than an area with lower home values, if both areas are facing the same potential risk from climate disasters.

Racist practices, both historic and current, mean that homes and other properties in predominantly communities of color are consistently valued lower than those in places with a larger white population. “In the average U.S. metropolitan area, homes in neighborhoods where the share of the population is 50 percent Black are valued at roughly half the price as homes in neighborhoods with no Black residents.”¹² A study examined Census Data from 1980 to 2015 and found that “during that period, homes in white neighborhoods appreciated in value, on average, almost \$200,000 more than comparable homes in neighborhoods of color.”¹³ “Interest rates on business loans, bank branch density, local banking concentration in the residential mortgage market, and the growth of local businesses are markedly different in majority Black neighborhoods” and this “difference” typically manifests as reduced access to financial opportunity.¹⁴ Similarly, Black farmers are denied USDA loans at disproportionately higher rates than other demographic groups, with a recent analysis finding that white farmers have the highest rate of loan approval compared to all other racial groups.¹⁵ While some of these inequities may be captured by the lower-income metric, these discrepancies have been noted even between neighborhoods and homes of similar quality and income level, where the only difference is the racial makeup of the area.¹⁶

Analyses of disaster aid conclude that more funding and support is typically directed to wealthier, whiter areas.¹⁷ A 2020 report made to FEMA by the National Advisory Council finds that FEMA programs provide an “additional boost to wealthy homeowners and others with less need, while lower-income individuals and others sink further into poverty after disasters.”¹⁸ This result is because FEMA programs provide relief based on lost financial value, thereby providing more support to people and areas that were wealthier from the beginning. Because the CEJST evaluation for risk from climate change is solely based on the financial value that is at risk, places which are already valued higher are more likely to be identified as disadvantaged due to a higher value expected to be at risk, if race is not included as a balancing factor.

¹² Andre M. Perry, Jonathan Rothwell, and David Harshbarger, “The devaluation of assets in Black neighborhoods,” Brookings, (November 27, 2018) <https://www.brookings.edu/research/devaluation-of-assets-in-black-neighborhoods/>

¹³ Junia Howell and Elizabeth Korver-Glenn, “Race determines home values more today than it did in 1980,” Kinder Institute, (September 24, 2020) <https://kinder.rice.edu/urbanedge/2020/09/24/housing-racial-disparities-race-still-determines-home-values-America>

¹⁴ Kristen Broady, Mac McComas, and Amine Ouazad, “An analysis of financial institutions in Black-majority communities: Black borrowers and depositors face considerable challenges accessing banking services,” Brookings (November 2, 2021) <https://www.brookings.edu/research/an-analysis-of-financial-institutions-in-black-majority-communities-black-borrowers-and-depositors-face-considerable-challenges-in-accessing-banking-services/>

¹⁵ Ximena Bustillo, “‘Rampant issues’: Black farmers are still left out at USDA,” Politico (July 5, 2021) <https://www.politico.com/news/2021/07/05/black-farmers-left-out-usda-497876>

¹⁶ Perry, Rothwell, and Harshbarger, 2018

¹⁷ Rebecca Hersher and Robert Benincasa, “How Federal Disaster Money Favors the Rich,” NPR (March 5, 2019) <https://www.npr.org/2019/03/05/688786177/how-federal-disaster-money-favors-the-rich>

¹⁸ Thomas Frank, “Advisers Rebuke FEMA for Racial Disparities in Disaster Aid,” E&E News, Scientific American (January 7, 2021) <https://www.scientificamerican.com/article/advisers-rebuke-fema-for-racial-disparities-in-disaster-aid/>

Given the overwhelming documentation that race is the primary factor in disproportionate exposure to environmental burdens, and because the CEJST uses economic value as a factor in calculating climate risk, race must be included as an indicator in the tool. We recommend including race as a socioeconomic indicator for all eight categories, specifically by including it as a separate criterion from income and education rather than in addition to these.¹⁹ We recommend that the race metric be based on the American Community Survey 5-Year Estimates for the most currently available data, in alignment with other socioeconomic data sources such as the dataset for income.

II. The low-income metric must be adjusted for cost of living and data imperfections.

The CEJST incorporates a low-income metric as one of the socioeconomic indicators, defined as the percent of the census tract’s population in households where the household income is at or below 200% of the Federal poverty level. Income can be a poor measure of financial security and equity since it does not reflect generational wealth and other resources which can lead to disparities, so it is important that the CEJST consider this. It is not clear from the methodology what is being defined as a “household” (i.e. how many people) and whether this metric is being adjusted for differences in cost of living. For example, for a household of four people, 200 percent of the Federal poverty level in 2022 would be an annual income of \$55,500.²⁰ This amount may actually reasonably reflect a family’s or household’s expenses in one part of the country, while in places with very high cost of living this may be insufficient for survival. A tool that seeks to evaluate the entire country must factor cost of living into its analysis to be effective and accurate, and it is not clear whether the CEJST currently does this. For a cost of living assessment the tool should take into account housing burden, transportation burden, energy burden, and a local market basket analysis. It is also important that the term “household” is defined, given that it is a key piece of the low-income metric definition.

Another concern is that annual household income from the American Community Survey 5-Year estimates is not available for certain Census tracts due to privacy concerns or data collection issues. For example, a download of the ACS 2015-2019 5-Year Estimates for the entire country reveals that there are 1,213 Census tracts without median household income information.²¹ While it’s possible that some of these tracts are unpopulated areas and therefore not a concern, many are well-populated. Well-populated places may not be fully evaluated due to lack of data. To address these data imperfections and discrepancies, we recommend that the CEJST be updated to include more explanation regarding how households are defined, how areas missing income data are treated, and how cost of living is addressed in the CEJST. Accounting for the data imperfections is necessary for CEJST users to understand why a particular area is or is not disadvantaged, and such transparency is crucial in an equity-focused screening tool.

¹⁹ For example, the socioeconomic criteria for all categories may read “AND is above the 65th percentile for low income AND 80% or more of adults 15 or older are not enrolled in higher education, OR is above X percentile for people of color.”

²⁰ <https://aspe.hhs.gov/topics/poverty-economic-mobility/poverty-guidelines>

²¹ Table B19013 “MEDIAN HOUSEHOLD INCOME IN THE PAST 12 MONTHS (IN 2019 INFLATION-ADJUSTED DOLLARS)” was downloaded and analyzed on April 19, 2022 from <https://data.census.gov/cedsci/table?t=Income%20%28Households,%20Families,%20Individuals%29&g=0100000US%241400000&y=2019&tid=ACSDT5Y2019.B19013>

III. The tool should include a category focused explicitly on transportation access.

The CEJST does not account for access to transportation options and the many benefits this can provide. The “Clean Transit” category only addresses exposure to diesel particulate matter and traffic proximity and volume, which reflects the ways that transportation can create environmental or health burdens, but fails to consider the ways in which transportation could provide crucial access to essential needs and resources. We recommend including an additional transportation access category which should reflect the number or percentage of people with access to some form of transportation and which should include, at minimum, access to public transportation, access to a car or vehicle, and walkability of an area. These data are available from the EPA’s Smart Location Database.²² Car ownership data are also available via the American Community Survey. An additional supplemental dataset is Walk Score®, which provides scores on walkability, transit access, and bike accessibility.²³

Evaluating communities based on access to various transportation opportunities is important in displaying an accurate picture of mobility and access to economic opportunity. Transportation connects people to jobs, to social opportunities, and to necessities such as grocery stores and health care, and lack of transportation can be a significant burden to a person or community. Excluding transportation from the analysis therefore does not give a comprehensive picture of a community’s advantage or disadvantage. The inclusion of both metrics that reflect car access as well as public transit and walkability should mean that neither rural nor urban areas are favored at the expense of the other.

IV. We recommend further transparency around the datasets that are included, particularly regarding justification for inclusion and how various thresholds are calculated.

The methodology page and documentation as they currently exist for the CEJST are clear, but can be improved. We appreciate the thoroughness in linking to the datasets used for each metric, and the accessible explanations of each category and how a community gets identified as disadvantaged. However, the tool is complex and providing even more information would be helpful to users, particularly those seeking to understand why a community may or may not be identified as disadvantaged.

In particular, it would be helpful to provide justification for the socioeconomic metric of “80% or more of adults 15 or older are not enrolled in higher education.” The Technical Support Document states that the purpose of this metric is to exclude areas with a high percentage of students such as college towns. We question whether this may end up excluding people who are not students and communities which may have no connection to higher education institutions other than proximity. This is a concern especially because the tool uses Census tracts, which can be geographically large in some areas and may reach far beyond the boundaries of a school. We also question the reasoning for excluding college students in the first place, many of whom are

²² US Environmental Protection Agency, “Smart Location Mapping,” <https://www.epa.gov/smartgrowth/smart-location-mapping>

²³ Walk Score, “Walkability, Real Estate, and Public Health Data,” <https://www.walkscore.com/professional/research.php>

from the very communities that the CEJST is seeking to identify. An increasing number of undergraduate students are nontraditional students such as people of color²⁴ and meet the poverty metric, for example.²⁵ Also, an increasing number of students are choosing vocational and technical education alternatives and may be enrolled in community colleges while also working part or full time. A more detailed examination of this metric and justification for the exclusion of places with high numbers of college enrollees would be helpful. It is also worth noting that including race as an indicator may address some of these concerns.

Finally, we understand that the Council on Environmental Quality plans to update the tool with 2020 Census tract boundaries when possible, and we urge this action to be completed as soon as the data are available, given that the 2010 Census tracts are now more than ten years out of date and no longer accurately reflect the demographic reality.

In conclusion, any tool seeking to advance environmental justice and address the disproportionate distribution of environmental burdens and benefits absolutely must include race as a metric. Excluding race as a factor will create a weak tool that will fail to carry out the environmental justice goals of the Biden-Harris Administration and the Justice40 Initiative, and may widen injustices. Furthermore, there are several additional datasets which would further strengthen the CEJST and provide a more accurate reflection of which communities around the country are determined to be disadvantaged and therefore where the Justice40 investments should be directed. Finally, transparency is essential in creating an equity-based screening tool, and we suggest that further explanation be provided around several of the metrics and calculations currently included.

Thank you for your time and attention to this letter. Please direct questions to Staci Rubin, srubin@clf.org.

Sincerely,

Staci Rubin
Vice President, Environmental Justice Program

Ali Hiple
Policy Analyst

APPENDIX A

Comment Letter Regarding Importance of Race as Criterion Regarding Environmental Justice Principles

See next page

²⁴ US Census Bureau, “More Than 76 Million Students Enrolled in US Schools, Census Bureau Reports,” (December 11, 2018), <https://www.census.gov/newsroom/press-releases/2018/school-enrollment.html#:~:text=Of%20just%20the%20current%20undergraduate,black%2C%20and%2011.2%20percent%20Asian.>

²⁵ Richard Fry and Anthony Cillufo, “A Rising Share of Undergraduates Are From Poor Families, Especially at Less Selective Colleges,” Pew Research Center, (May 22, 2019), <https://www.pewresearch.org/social-trends/2019/05/22/a-rising-share-of-undergraduates-are-from-poor-families-especially-at-less-selective-colleges/>



June 18, 2020

The Honorable Karen E. Spilka
President of the Senate
24 Beacon Street, Room 332
Boston, MA 02133

The Honorable Robert A. DeLeo
Speaker, Massachusetts House of Representatives
24 Beacon Street, Room 356
Boston, MA 02133

The Honorable Michael J. Rodrigues
Chair, Senate Committee on Ways & Means
24 Beacon Street, Room 212
Boston, MA 02133

The Honorable Aaron Michlewitz
Chair, House Committee on Ways & Means
24 Beacon Street, Room 243
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Re: Race as Criterion in Environmental Justice Bills is Crucial and Constitutional

Dear Senate President Spilka, Speaker DeLeo, Chair Rodrigues, and Chair Michlewitz,

On behalf of the Massachusetts Environmental Justice Legislative Table and undersigned bill sponsors and individuals, we write in support of environmental justice legislation for the Commonwealth of Massachusetts—specifically [H.4264](#), [S.464](#), and [S.453](#). We applaud the actions of the Joint Environment, Natural Resources, and Agriculture Committee to report these bills favorably to the House and Senate Committees on Ways and Means. These environmental justice bills are a necessary response to decades of actions having a disparate environmental impact on low-income residents, residents lacking English language proficiency, and communities of color in Massachusetts.

Notwithstanding the favorable report on the bills, we understand that concern has been raised about the constitutionality of using race as one criterion in designating neighborhoods as environmental justice populations.¹ We also understand this concern to be based on the United States Supreme Court decision in *Fisher v. University of Texas at Austin*² and actions by the state of California to exclude race from its environmental mapping tool. The purpose of this letter is to explain why using race as one criterion in designating environmental justice populations is both crucial and meets constitutional standards as set forth by the Supreme Court of the United States. Indeed, contrary to the concerns that have been raised, using race as one of many factors to define environmental justice populations is well-established and in widespread use, including by the federal Environmental Protection Agency and many other states.

¹ The other criteria are income, income plus race, and lacking English language proficiency.

² *Fisher v. University of Texas at Austin*, 136 S.Ct. 2198 (2016).

Use of Race in the Massachusetts Environmental Justice Bills is Appropriate and Crucial

The use of race in the Massachusetts environmental justice bills is crucial to ensure protections and benefits for communities of color, including African American, Black, Cape Verdean, Asian and Pacific Islander, indigenous and tribal, and Latino/a/x residents throughout the Commonwealth. H.4264 defines environmental justice as

“the equal protection and meaningful involvement of all people with respect to the development, implementation, and enforcement of energy and environmental laws, regulations, and policies, including climate change policies, and the equitable distribution of energy and environmental benefits, and energy and environmental burdens.”

The corresponding definition of “environmental justice population” establishes criteria and thresholds that identify communities who bear an unfair share or burden of environmental pollution or limited access to natural resources—based on race,³ income, race plus income, or lacking English language proficiency. The bills go on to provide enhanced public participation and agency review for actions that may affect environmental justice populations. These bills are intended to combat the as-yet intractable reality that people of color, low-income residents, and those lacking English language proficiency are disproportionately burdened by environmental contaminants and lack the environmental and energy benefits afforded to other, whiter and wealthier communities.

The Commonwealth of Massachusetts itself argued to the Supreme Court of the United States, only five years ago

“persistent racial segregation is not simply the enduring result of our history[;] rather, segregation continues to be reinforced, and thus perpetuated, by contemporary forms of discrimination, including not only intentional discrimination but also unconscious bias in systemic, discretionary decision-making and purportedly ‘neutral’ policies and practices.”⁴

Such discrimination

“often corresponds with material neighborhood inequities, even after accounting for differences in socioeconomic status. These can include variations in housing standards; access to basic services; access to public amenities like parks, open spaces, and recreation centers; exposure to environmental hazards; and proximity to undesirable land uses.”⁵

³ The bills rely on the term “minority” to signal race. “Minority” has been defined under Massachusetts law as including, but not limited to, “African Americans, Cape Verdeans, Western Hemisphere Hispanics, Asians, American Indians, Eskimos, and Aleuts.” M.G.L. c. 7 § 58 (2018). *See also*, “a person with permanent residence in the United States who is American Indian, Black, Cape Verdean, Western Hemisphere Hispanic, Aleut, Eskimo, or Asian.” M.G.L. c. 7C, § 6(b).

⁴ Brief for Massachusetts et al. as Amici Curiae, *Texas Dep’t of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507(2015).

⁵ *Id.* at 16. citing Michelle Wilde Anderson & Victoria C. Plaut, Property Law: Implicit Bias and the Resilience of Spatial Colorlines, in *Implicit Racial Bias Across the Law* (Justin D. Levinson & Robert J. Smith, eds. 2012);

As Massachusetts Attorney General Maura Healey pointed out in a recent Environmental Justice Brief describing the insufficiency of current environmental justice laws in the Commonwealth, “environmental justice guidelines inform but do not drive decision-making,” permitting “the concentration of polluting industries and facilities in our most vulnerable communities.”⁶

Data show that race is the most consistent factor in determining the location of commercial hazardous waste sites, nationally.⁷ Neighborhoods with higher populations of people of color often lack access to reliable municipal infrastructure and to healthy housing, food, green spaces, and other resources that mitigate environmental and energy burdens.⁸ These same communities are now at increasing risk from the high heat and severe weather events associated with the climate crisis.⁹ In Massachusetts, communities of color have long borne the brunt of exposures to chemical pollution¹⁰ and transportation emissions¹¹ and are right now suffering the most devastating impacts of the coronavirus pandemic,¹² the risks of which increase with prolonged exposure to air pollution.¹³

Patrick Sharkey, *Stuck In Place: Urban Neighborhoods and the End of Progress Toward Racial Equality*, 25 (2013) (citing Douglas S. Massey & Nancy A. Denton, *American Apartheid: Segregation and the Making of the Underclass*, Harvard University Press (1993)); see also Hope Landrine & Irma Corral, *Separate and Unequal: Residential Segregation and Black Health Disparities*, 19 *Ethnicity & Disease* 179, 180-82 (2009).

⁶ Office of the Massachusetts Attorney General Maura Healey, “COVID-19’s Unequal Effects in Massachusetts: Remediating the Legacy of Environmental Injustice & Building Climate Resilience.” May 12, 2020 <https://www.mass.gov/doc/covid-19s-unequal-effects-in-massachusetts/download>.

⁷ Paul Mohai and Robin Saha, *Which Came First, People or Pollution? Assessing the Disparate Siting and Post-Siting Demographic Change Hypothesis of Environmental Justice*, 10 *Environ. Res. Lett.* 115008 (2015) (documenting racial composition of a neighborhood as the strongest predictor of where hazardous waste facilities are located).

⁸ See, e.g., Rachel D. Godsil, *Viewing the Cathedral from Behind the Color Line: Property Rules, Liability Rules and Environmental Racism*, 53 *Emory L.J.* 1807, 1841–49 (2004), <https://ssrn.com/abstract=594066>; see generally *The Call for Environmental Justice Legislation: An Annotated Bibliography* (PRRAC 2018), <https://www.prrac.org/pdf/EJLegislationResearchGuide.pdf>.

⁹ See H. Orru et al., *The Interplay of Climate Change and Air Pollution on Health*, 4 *Current Envtl. Health Report* 504, 504 (2017) (“In general, climate change is expected to worsen air quality in several densely populated regions by changing atmospheric ventilation and dilution, precipitation and other removal processes and atmospheric chemistry.”) See also U.S. Global Change Research Program, *Impacts, Risks, and Adaptation in the United States: Fourth National Climate Assessment, Volume II* (2018) https://nca2018.globalchange.gov/downloads/NCA4_2018_FullReport.pdf.

¹⁰ Daniel R. Faber and Eric J. Krieg, *Unequal Exposure to Ecological Hazards 2005: Environmental Injustices in the Commonwealth of Massachusetts*, *Northeastern Environmental Justice Research Collaborative* 7, 32 (2005), pages 7, 32 (documenting that communities of color in Massachusetts average about six times more chemical releases in to the environment from facilities subject to reporting under the Toxics Use Reduction Act and ten times as many pounds of chemical releases per square mile) <https://www.issuelab.org/resources/2980/2980.pdf>.

¹¹ Union of Concerned Scientists: *Inequitable Exposure to Air Pollution from Vehicles in Massachusetts: Fact Sheet*, 1 (June 2019), <https://www.ucsusa.org/sites/default/files/attach/2019/06/Inequitable-Exposure-to-Vehicle-Pollution-MA.pdf>.

¹² Massachusetts Department of Public Health, *COVID-19 Cases in MA, Count and Rate (per 100,000) of Confirmed COVID-19 Cases in MA by City/Town, January 1, 2020 – April 29, 2020*, <https://www.mass.gov/doc/confirmed-covid-19-cases-in-ma-by-citytown-january-1-2020-april-29-2020/download>.

¹³ Lisa Friedman, *New Research Links Air Pollution to Higher Coronavirus Death Rates*, *New York Times* (Apr. 7, 2020) <https://www.nytimes.com/2020/04/07/climate/air-pollution-coronavirus-covid.html>.

The enhanced public participation and review outlined in these bills address inequities faced by environmental justice communities and provide tools for those communities to shape and benefit from environmental, energy, climate, and public health laws and policies. The “environmental justice population” definition explicitly acknowledging race is rooted in environmental justice and civil and immigrant rights movements to eradicate discrimination, segregation, and unjust treatment of communities of color in Massachusetts and throughout the nation. An environmental justice law that does not directly address racial inequities is antithetical to the law’s purpose, existing laws, and the on-the-ground injustice faced by the people whose experiences shape these laws.

Environmental Justice Laws and Policies that Consider Race are Constitutional.

The United States Constitution allows the Commonwealth to take race into consideration in defining environmental justice populations and providing enhanced public participation and agency review for actions that may impact such populations.¹⁴ In considering whether a law that touches on racial issues is valid, courts first decide the applicable level of scrutiny under which to examine the law. Laws that distribute benefits and burdens on the basis of individual racial classifications (as, for example, affirmative action programs may) are examined with strict scrutiny.¹⁵ In contrast, laws such as the bills in question here, which are demographic in nature and do not confer concrete benefits to any particular individuals, would typically be subjected to “rational basis” review – meaning that they would be constitutional if any rational basis exists for the passage of the law.¹⁶ The environmental justice bills in question use the racial composition of a whole community as one factor in determining the location of an environmental justice population. The weight placed on race merely assists agency officials to define an area in need of consideration, rather than prompting a dispositive determination regarding the distribution of benefits or burdens.¹⁷ Through enactment of these bills, people of all races living and working within environmental justice populations would be treated the same and all would benefit from any enhanced review or public participation afforded to communities with environmental justice populations.

Defining environmental justice populations in the manner envisioned by the bills in question is well-established. The United States Environmental Protection Agency (EPA) and many states have approved similar definitions in engaging in long-overdue remediation of environmental discrimination. The definitions of “environmental justice” and “environmental justice population” in these bills are consistent with environmental justice law and policy established and relied upon

¹⁴ *Texas Dep’t of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2525 (2015) (“[M]ere awareness of race in attempting to solve the problems facing inner cities does not doom that endeavor at the outset.”); *Hayden v. Cty. of Nassau*, 180 F.3d 42, 51 (2d Cir. 1999) (citing *Adarand* at 237 and finding permissible a race conscious approach to eliminate the “persistence of both the practice and the lingering effects of racial discrimination.”).

¹⁵ *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 721 (2007).

¹⁶ *Id.* at 789 (Kennedy, J., concurring in part and concurring in the judgment) (explaining that executive and legislative branches of government have used race-conscious measures “for generations” without constitutional violation).

¹⁷ *Parents Involved* at 783 citing *Johnson v. California*, 543 U.S. 499, 505–506 (2005); *Hayden* at 48-50.

by the EPA and several states around the country.¹⁸¹⁹ In fact, pursuant to federal Executive Order 12898, all federal agencies *must* “make achieving environmental justice part of [their] mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of [their] programs, policies, and activities on minority populations and low income populations...”²⁰²¹ which prohibits discrimination by Massachusetts agencies that receive federal funds. The Environmental Justice Policy of the Massachusetts Executive Office of Energy and Environmental Affairs uses race and has done so since the first environmental justice policy was adopted in 2002.²² Not one of these laws or policies have been overturned as unconstitutional. The bills in question thus fall well within established legal frameworks that have undergirded civil rights and environmental justice for years.

Even if a court were to examine the bills in question here under the higher level of strict scrutiny reserved for race-conscious actions that provide concrete, individualized benefits – which is not the case here – Massachusetts would still be able to easily justify them. Laws subjected to a strict scrutiny review must pass a two-part test: if challenged, the Commonwealth of Massachusetts would first have to show that the state has a compelling government interest in passing the law; and then that the law is narrowly tailored to address that interest. Given the structure, language, and purpose of the laws proposed in Massachusetts, these bills should all survive such review even if subjected to this highest level of scrutiny.

In applying strict scrutiny analysis, the U.S. Supreme Court stated in *City of Richmond v. JA Croson*, “[t]here is no doubt that where gross statistical disparities can be shown, they alone in a proper case may constitute prima facie proof of a pattern or practice of discrimination.”²³ To demonstrate its interest in correcting racial inequity, the Commonwealth can specifically identify the discrimination at issue and support that showing with a strong basis in evidence to conclude that corrective action is necessary. For example, an individual living in a community of color has a 70.6 percent chance of living in one of the most contaminated towns in Massachusetts, while an individual living in a predominantly white community has only a 1.8 percent chance of living in

¹⁸ Existing environmental laws require consideration of race. For example, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), known also as Superfund, uses as a grant decision criterion the “extent to which a grant would address or facilitate the identification and reduction of threats to the health or welfare of children, pregnant women, minority or low-income communities, or other sensitive populations.” 42 U.S.C. § 9604(k)(6)(C)(x).

¹⁹ These state laws include, but are not limited to Section 75-0111(a) of New York’s newly enacted Climate Leadership and Community Protection Act; Virginia’s newly enacted EJ Act, Va Code § 2.2-234 et seq., as well as Sections 67-101(12) and 67-102(A)(11) of Virginia’s Energy Policy statute; Section 65040.12(e)(1) of California’s zoning and planning law; Section 1-701(a) of Maryland’s Environment Code; Section 5 of the Illinois Environmental Justice Act 415 ILCS 155/5; Section 376.78(6) of Florida’s Pollutant Discharge Prevention and Removal statute; and South Carolina Act 171 of 2007.

²⁰ See e.g., Federal Interagency Working Group on Environmental Justice & NEPA Committee, Community Guide to Environmental Justice and NEPA Methods (March 2019) <https://www.energy.gov/sites/prod/files/2019/05/f63/NEPA%20Community%20Guide%202019.pdf>.

²¹ 42 U.S.C. § 2000d et seq.

²² Environmental Justice Policy of the Executive Office of Energy and Environmental Affairs (2002) <https://www.mass.gov/files/documents/2017/11/29/ej%20policy%202002.pdf>.

²³ *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 at 501 (1989); see also *Midwest Fence Corp. v. U.S. DOT*, 840 F.3d 932 at 953 (7th Cir. 2016), *H.B. Rowe Co., Inc. v. Tippett*, 615 F.3d 233 at 241 (4th Cir. 2010).

one of the most contaminated towns in the state.²⁴ This statistic demonstrates why the proposed race conscious EJ legislation is one such “proper case.”²⁵ Further, the unequal distribution of benefits and burdens are, at least in part, the result of historical de jure state discrimination, as well as historical and current state agency decisions about enforcement, approval of permits for facility siting, and investment in transportation infrastructure, among others and in tandem with persistent housing segregation and concentrated poverty.²⁶

The compelling government interest in remedying the persistent “practice and . . . lingering effects of racial discrimination”²⁷ is particularly furthered by these bills, which enhance access to public process for diverse communities.²⁸ In both the educational and law enforcement contexts, courts have upheld laws on the basis that a government was “motivated by a truly powerful and worthy concern and that the racial measure that they have adopted is a plainly apt response to that concern.”²⁹ The communities whose lived experience provides them with the greatest understanding of environmental injustice often have least access to the policymaking process.³⁰ Engagement in public process is not only a core civic value, a lack thereof erodes a community’s ability to advocate for critical resources and protect itself from harm. That these bills explicitly set out to dismantle barriers and create pathways to participation for diverse voices bolsters the compelling government interest of eradicating discrimination.

The consideration of race in the Massachusetts bills passes the Supreme Court’s test for such laws and, like university admissions at issue in *Fisher*, would not violate the equal protection clause of the U.S. Constitution.³¹ The Supreme Court in the *Fisher* case noted the need to reconcile the pursuit of diversity in higher education with the constitutional promise of equal treatment and found this use of race constitutional.³² Race was merely one consideration among others to determine an individual’s denial of admission to the University of Texas in *Fisher*. So, too, the

²⁴ Unequal Exposure to Ecological Hazards 2005: Environmental Injustices in the Commonwealth of Massachusetts (2005).

²⁵ See generally Faber Krieg, Unequal Exposure to Ecological Hazards (2005).

²⁶ Massachusetts *Inclusive Communities* amicus brief at 17. See also Richard Rothstein, *The Color of Law* 25-26, 79, 170-71 (2017) (describing discriminatory housing policies in Boston, Cambridge, and Brookline) Alicia Sasser Modestino et al., *The Greater Boston Housing Report Card 2019* 67, 87 (June 2019) (stating that “few concrete actions have been taken to reverse the legacy of discriminatory federal, state, and municipal policies of the mid- to late-20th century” and that “persistent patterns of segregation across Greater Boston” cannot be explained by differences in income); Michelle Shortsleeve, “Challenging Growth-Restrictive Zoning in Massachusetts on a Disparate Impact Theory.” 27 *BU Pub. Int. LJ* 361 (2018); Ana Patricia Muñoz et al., “The color of wealth in Boston.” Federal Reserve Bank of Boston (2015) <https://www.bostonfed.org/publications/one-time-pubs/color-of-wealth.aspx>.

²⁷ *Hayden* at 51.

²⁸ Existing Massachusetts law explicitly addresses race. For example, state law encourages school committees to eliminate the racial imbalance in public schools. M.G.L. c. 71, § 37C. A Lynn public school plan to implement M.G.L. c. 71, § 37C was determined to be constitutional. *Comfort ex rel. Neumyer v. Lynn School Committee*, 283 F.Supp.2d 328 (D.Mass. 2003).

²⁹ *Alexander v. City of Milwaukee*, 474 F.3d 437, 447 (7th Cir.2007); *Wittmer v. Peters*, 87 F.3d 916, 918 (7th Cir.1996).; *McLaughlin by McLaughlin v. Boston School Committee*, 938 F.Supp. 1001, 1013 (D.Mass 1996).

³⁰ Mass. Executive Office of Energy and Environmental Affairs, *Environmental Justice Policy* 4-5 (2017).

³¹ As noted above, given the diffuse nature of the benefit to environmental justice populations in the bills in question, it is unlikely that a court would apply the level of scrutiny applied in *Fisher* – which involved individual admissions decisions.

³² *Fisher* at 2214.

environmental justice bills incorporate race as one of several criteria to determine a designation to receive enhanced participation and review. As race-neutral alternatives were insufficient to achieve the goal of a diverse student body to promote a well-rounded education in *Fisher*, the environmental justice bills respond to decades of failed race-neutral environmental laws resulting in disparate impacts for people of color. Massachusetts has clear compelling interests in correcting current inequities in environmental and energy burdens and benefits based on race *and* in affording diverse voices the opportunity to influence environmental and energy decisions that impact the Commonwealth and its neighborhoods. As was required by the Supreme Court in the *Fisher* decision, the Commonwealth's environmental justice goals in these bills are concrete and precise.

The sponsors of these environmental justice bills have narrowly tailored them to directly address the Commonwealth's compelling interest in correcting inequity and ensuring access to robust public processes. Narrow tailoring involves analyzing: (1) the extent to which the government considered race-neutral alternatives and concluded they were insufficient; (2) the weight placed on race in the inquiry; (3) whether numerical quotas are used; and (4)-(6) the scope, duration, and flexibility of the program. All bills referenced above meet these six factors.

The above-referenced bills were drafted to respond to empirical studies of environmental justice populations, and the role that race, income, and English language proficiency each play in designating such communities.³³ In this context, where race is not a proxy for something else, race-neutral alternatives are inapposite. Since the Commonwealth implemented its first environmental laws three generations ago, it has lacked any state laws aimed at either preventing or eradicating discrimination in the distribution of environmental or energy benefits and reducing burdens. The outcome of such race-neutral laws and policies is decades of disproportionate siting of environmental burdens and harm to communities of color.³⁴ Race-neutral laws have not succeeded and there is a need for a tailored approach that considers community demographics, including race, to meet the compelling interest of redressing decades of concentrated pollution in communities of color. Furthermore, as stated above, the bills use no quotas, and have flexibility built in through periodic review of statutory definitions, which allows for and benefits from ongoing and periodic interplay between the legislature, the administration, and statutorily created advisory boards. These laws, therefore, meet the narrowly tailored requirement to address the compelling government interest discussed above.

Massachusetts, unlike California, does not prohibit agencies from considering race.

California's particular approach to identifying environmental justice populations—without reference to race—has apparently been cited by critics of the bills in question. However, California's approach lacks relevance to Massachusetts due to peculiar constraints in California law—the California Civil Rights Initiative created a section of the California Constitution that bans use of race in a way that the Massachusetts Constitution does not. In April 2013, the California Office of Environmental Health Hazard Assessment (OEHHA) released an online mapping tool called CalEnviroScreen 1.0, which identifies California communities by census tract that are disproportionately burdened by, and vulnerable to, multiple sources of pollution. The tool

³³ See e.g., Marcos Luna, Evaluation of Massachusetts Environmental Justice Criteria (Aug. 8, 2019) http://w3.salemstate.edu/~mluna/EJ_Criteria_Analysis/index.html.

³⁴ See, e.g., Godsil at 1841–49.

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originally included race as a factor in identifying such communities, but OEHHA removed race as an indicator in CalEnviroScreen 1.1 in September 2013. OEHHA staff explained that, due to a wide and growing range of potential uses of CalEnviroScreen by state agencies, Cal/EPA and OEHHA decided to remove the race indicator based on concerns that *some* uses of the version of CalEnviroScreen that included the race indicator could result in lawsuits.

The OEHHA decision to exclude race in CalEnviroScreen is inapplicable to considerations at issue in Massachusetts for a few notable reasons. First, as noted above, the California Civil Rights Initiative, also known as Prop 209, bans use of race in a way that the Massachusetts Constitution does not. OEHHA specifically cited this section as a reason they removed the race indicator from CalEnviroScreen.³⁵ Second, OEHHA removed the race indicator not as a result of a specific challenge to the way in which the tool was being used, but rather as a precautionary measure to assure state agencies that they could use the tool in any possible application without risk of legal challenges and to encourage the widest possible adoption of the tool. The Commonwealth of Massachusetts does not face these same barriers in developing its solutions to overcome environmental injustice and discrimination.

Based on our review of the current jurisprudence and H.4264, S.464, and S.453, it is our firm belief that these laws fall well within constitutional boundaries, and are critically necessary to promote environmental justice in the Commonwealth.

If you have questions about the content of this letter, please contact Amy Laura Cahn, Senior Attorney and Interim Director, Healthy Communities and Environmental Justice Program, Conservation Law Foundation, at alcahn@clf.org.

Signed,

The Massachusetts Environmental Justice Legislative Table: 350Mass, Alternatives for Community & Environment, Better Future Project, Clean Water Action, Coalition for Social Justice, Conservation Law Foundation, Environmental League of Massachusetts, Green Energy Consumers Alliance, GreenRoots, Groundwork Lawrence, Lawyers for Civil Rights, Massachusetts Climate Action Network, Neighbor To Neighbor, and Toxics Action Center

Senator Sal N. DiDomenico
Senator James B. Eldridge

Representative Adrian C. Madaro
Representative Liz Miranda
Representative Michelle M. DuBois

³⁵ “California Deletes ‘Race’ From Pollution Screening Tool to Avoid Legal Risk,” Risk Policy Report, October 7, 2013, <https://web.archive.org/web/20140512221706/https://insideepa.com/Risk-Policy-Report/Risk-Policy-Report-10/08/2013/california-deletes-race-from-pollution-screening-tool-to-avoid-legal-risk/menu-id-1098.html> (last accessed January 16, 2020).

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