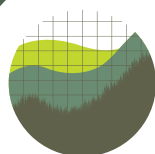




Justice Imperiled

Assessing the Legal Arguments for the Trump Administration's Assault on Federal Environmental Justice Programs

Gabriel L. Levine
June 2026

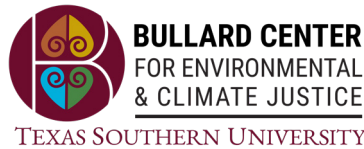


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Introduction

Environmental justice programs are under threat. Since re-assuming office, President Trump and his administration have rescinded executive orders requiring consideration of environmental inequities,¹ terminated the jobs of agency staff responsible for carrying out those orders,² and revoked rules protecting public health in vulnerable communities³—among much else. In the process, the Trump Administration has broken from three decades of bipartisan (if fluctuating) support for redressing environmental inequities.

Three major legal themes have emerged from this onslaught. First, the administration has suggested that constitutional law—in particular, the Supreme Court’s 2023 decision in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College (SFFA)*⁴—requires the wholesale elimination of environmental justice initiatives. Second, the administration has argued that administrative law often allows major regulatory changes to environmental justice initiatives without meaningful public participation. And third, the administration has suggested that environmental justice analysis in government decisionmaking is rarely, if ever, permitted.

The administration is wrong on all three counts. Most notably, the Supreme Court’s affirmative-action jurisprudence does not render environmental justice initiatives categorically unlawful, although it does impose meaningful constraints. Environmental justice programs vary substantially, and the relevant constitutional considerations differ across contexts. Just as importantly, nothing in *SFFA* prevents the government from considering the historical legacies of racism, even if that decision generally restricts them from considering present-day racial demographics.

The Trump Administration’s other arguments fare similarly. Settled principles of administrative law forbid much of what the administration has done to bypass notice and comment. And multiple statutes authorize, and sometimes require, agencies to consider impacts related to environmental justice in rulemaking and permitting.

¹ See Exec. Order 14,148, Initial Rescissions of Harmful Executive Orders and Actions § 2(eee), 90 Fed. Reg. 8237, 8240 (Jan. 28, 2025); Exec. Order 14,173, Ending Illegal Discrimination and Restoring Merit-Based Opportunity § 3(i), 90 Fed. Reg. 8633, 8634 (Jan. 31, 2025).

² EPA, *EPA Terminates Biden’s Environmental Justice, DEI Arms of Agency* (Mar. 12, 2025), <https://perma.cc/2VXP-VMBJ>.

³ See, e.g., National Emission Standards for Hazardous Air Pollutants: Coal- and Oil-Fired Electric Utility Steam Generating Units: Final Repeal, 91 Fed. Reg. 9088 (Feb. 24, 2026) (repealing the 2024 amendments to the Mercury and Air Toxics Standards); Rescinding Portions of Department of Justice Title VI Regulations to Conform More Closely with the Statutory Text and to Implement Executive Order 14281, 90 Fed. Reg. 57,141, 57,143 (Dec. 10, 2025) [hereinafter DOJ Title VI Rule].

⁴ 600 U.S. 181 (2023).

I. The Supreme Court's Affirmative-Action Jurisprudence Does Not Categorically Render Environmental Justice Initiatives Unlawful.

In recent years, the Supreme Court has discerned new constitutional limits on the use of race in governmental decisionmaking, arising from the Equal Protection Clause of the Fourteenth Amendment.⁵ Those limits, however, do not place environmental justice initiatives at wholesale legal risk.⁶ Rather, cases such as *SFFA* function more as a scalpel than a sledgehammer: properly applied, they excise some racial considerations from environmental justice initiatives, but do not destroy the legal architecture of environmental justice.

The basic legal framework is straightforward: Programs that classify on the basis of race are legally vulnerable. So, too, are those for which there is evidence that the government intends to discriminate on the basis of race, even for benign purposes. Otherwise, the Equal Protection Clause poses few challenges.

In practice, this framework accords government officials much flexibility. Officials may analyze racial disparities in environmental burdens, facilitate public participation, and engage community groups with essentially no constitutional risk. Officials also may almost always rely upon non-suspect classifications, including disability, wealth, and environmental vulnerability. When making permitting decisions—such as for pipelines or factories—they may take action to avoid compounding specific historical legacies of racism. When promulgating regulations, they may conduct race-conscious environmental justice analyses, although legal risk will increase as such analyses become more influential in the regulatory decision. Allocating funds requires the greatest caution: where race is implicitly a “motivating factor” for government decisions or an express decision criterion, the government’s actions may well be held unlawful.

⁵ Although the Equal Protection Clause of the Fourteenth Amendment applies only to the States, the Court has long held that the Due Process Clause of the Fifth Amendment imposes essentially the same obligations upon the federal government. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 213–18 (1995).

⁶ Some commentators have suggested that the Supreme Court’s reasoning in *Louisiana v. Callais*, 608 U.S. ___, 146 S. Ct. 1131 (2026), may imply that extant statutory regimes creating liability for unintentional racial discrimination are presumptively unconstitutional. See, e.g., STANFORD LEGAL: *Voting Rights at a Turning Point*, at 32:54–34:05 (SLS Podcasts May 7, 2026) (discussion of Pam Karlan and Nate Persily), <https://perma.cc/Q6JY-JEBV>. Title VI and its implementing regulations rest upon Congress’s “power to fix the terms on which” federal money is spent, not on its power to enforce the Fourteenth Amendment. *Lau v. Nichols*, 414 U.S. 563, 569 (1974). That aspect of *Callais* should therefore not extend to Title VI. Should the Court conclude otherwise, the implications for federal environmental justice programs would be substantial. In any event, because the Trump Administration has not yet urged such a conclusion, this Report largely sets *Callais* aside.

SFFA held unlawful the admissions regimes of Harvard College and the University of North Carolina, and, by extension, those of many other academic institutions as well. The Supreme Court considered those programs “race based,”⁷ insofar as admissions officers explicitly considered applicants’ racial identities (among much else) in their decisions.⁸ For that reason, the programs were subject to “strict scrutiny” under the Equal Protection Clause of the Fourteenth Amendment.⁹ Applying that “daunting” doctrinal framework,¹⁰ the Court concluded that neither school’s program could “be reconciled with the guarantees of the Equal Protection Clause.”¹¹

SFFA also recognized that some consideration of race in university admissions may be permissible, so long as it otherwise withstands strict scrutiny. The decision does not “prohibit[] universities from considering an applicant’s discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise.”¹² Such consideration, however, must avoid assumptions—that is, “stereotype[s]”—about applicants’ racial experiences.¹³ Rather, each applicant “must be treated based on his or her experiences as an individual—not on the basis of race.”¹⁴ Moreover, “race may never be used as a ‘negative.’”¹⁵

Although much of *SFFA* was limited to university admissions, the Trump Administration has invoked the case for broader purposes. In March 2025, the Attorney General circulated a memorandum to federal agencies setting forth the “legal framework” for implementing President Trump’s Executive Orders 14,151 and 14,173 (both of which call for the rescission of various environmental justice initiatives), relying substantially on *SFFA*.¹⁶ The Attorney General characterized *SFFA* as establishing that, with rare exceptions, the Constitution requires “eliminating all” racial discrimination.¹⁷ This principle, the Attorney General claimed, required discontinuing various federal practices identified in the Executive Orders—potentially including some environmental justice initiatives.¹⁸ The Department of Justice subsequently relied upon *SFFA* in rescinding rules implementing Title VI of the Civil Rights Act of 1964—rules that had long safeguarded against racial discrimination by recipients of federal funding.¹⁹

⁷ See *SFFA*, 600 U.S. at 198 (hyphen omitted).

⁸ See *id.* at 192–95 (describing Harvard’s admissions process); 195–97 (describing the University of North Carolina’s admissions process).

⁹ See *id.* at 198 n.2, 206.

¹⁰ *Id.* at 206.

¹¹ *Id.* at 230. As a private institution that receives federal funding, Harvard is subject to Title VI of the Civil Rights Act of 1964 but not directly to the Constitution. The Court, however, has “explained that discrimination that violates the Equal Protection Clause of the Fourteenth Amendment committed by an institution that accepts federal funds also constitutes a violation of Title VI.” *Id.* at 198 n.2 (quoting *Gratz v. Bollinger*, 539 U.S. 244, 276 n.23 (2003)). *SFFA* “accordingly evaluate[d] Harvard’s admissions program under the standards of the Equal Protection Clause itself.” *Id.*

¹² *Id.* at 230.

¹³ *Id.* at 220.

¹⁴ *Id.* at 231.

¹⁵ *Id.* at 218.

¹⁶ U.S. Dep’t of Justice, Implementation of Executive Orders 14151 and 14173: Eliminating Unlawful DEI Programs in the Federal Operations 1 (March 21, 2025), <https://perma.cc/EW3A-474A> [hereinafter AG Memo].

¹⁷ *Id.* at 1 (quoting *SFFA*, 600 U.S. at 206) (emphasis omitted).

¹⁸ See *id.* at 2–4.

¹⁹ See DOJ Title VI Rule, 90 Fed. Reg. 57,141, 57,143–45.

As explained below, however, *SFFA* does not sweep as broadly as the Administration contends. Rather, the decision calls for a nuanced analysis of particular environmental justice programs—and clearly does not reach many of them.

A. Environmental justice initiatives that do not confer benefits or burdens or that do not meaningfully classify among persons raise no substantial Equal Protection issues.

Heightened Equal Protection scrutiny is warranted only where the government confers differential advantages or disadvantages along suspect lines. The Equal Protection Clause addresses government action that “classifies” among persons “with resulting disadvantage to various groups or persons.”²⁰ Where the government does not “grant[] or deny[] benefits” at all,²¹ or where it employs non-“suspect” classifications to distribute benefits, only rational-basis review applies.²² That means the courts “will uphold the [governmental] classification so long as it bears a rational relation to some legitimate end.”²³

“There are only a few exceptions” to the general “rule” of deference to legislatures under the Equal Protection Clause²⁴: classifications based on race or ethnicity,²⁵ national origin,²⁶ alienage, and sex²⁷ are “suspect,” and therefore are subject to heightened scrutiny.

Many environmental justice initiatives are subject to rational-basis review because they confer no benefits or burdens. Staffing environmental justice offices, promoting interagency coordination, and collecting data on environmental burdens all fit this description. No Supreme Court Justice has suggested such efforts are unlawful and nothing in the Court’s Equal Protection cases implies that conclusion.²⁸

Other initiatives enjoy judicial deference because the classifications they employ fall far afield from constitutional concerns. This category includes educating nonprofit organizations, municipalities, and other stakeholders; ensuring broad access to environmental information; and collaborating with communities in enforcement, remedy design, and monitoring.²⁹ Such initiatives

²⁰ See *Romer v. Evans*, 517 U.S. 620, 631 (1996).

²¹ *Sessions v. Morales-Santana*, 582 U.S. 47, 58 (2017).

²² *United States v. Skrmetti*, 605 U.S. 495, 510 (2025) (quoting *Romer*, 517 U.S. at 631).

²³ *Id.*

²⁴ *Id.* at 548 (Barrett, J., concurring).

²⁵ *Id.*

²⁶ *Hernandez v. Texas*, 347 U.S. 475, 479 (1954).

²⁷ *Skrmetti*, 605 U.S. at 548 (Barrett, J., concurring). Alienage is a suspect classification only when invoked by the States, but not when invoked by the federal government. See *id.* at 548 n.1.

²⁸ Justice Gorsuch, joined by Justice Thomas, criticized college applications’ standard “scheme” of racial and ethnic “classifications,” according to which applicants may identify themselves with one of six racial or ethnic groups, or may “write in further details.” *SFFA*, 600 U.S. at 291 (Gorsuch, J., concurring). But those criticisms concerned Title VI of the Civil Rights Act, not the Equal Protection Clause. And even Justice Gorsuch did not suggest using such classifications was unlawful, let alone unconstitutional.

²⁹ See Multi-State Guidance Affirming the Importance and Legality of Environmental Justice Initiatives 5–7 (June 18, 2025), <https://perma.cc/44VK-HPUE>.

do use classifications (such as non-profit status) to distribute benefits (such as information). But the classifications involved do not come close to being suspect. While such initiatives might engender constitutional problems in “the manner of [their] administration,”³⁰ they are plainly lawful so long as they do not exclude persons on suspect grounds.

B. Environmental justice initiatives that use non-suspect classifications that correlate with race also raise no substantial Equal Protection issues, so long as those classifications do not operate as racial proxies.

Nearly as secure are initiatives using classifications that correlate with race. Aside from the categories the Court has already deemed suspect, “the set has remained virtually closed.”³¹ But that does not mean reliance only on non-suspect categories precludes judicial scrutiny: state actors ordinarily may not use non-suspect classifications as proxies for suspect ones.³²

In evaluating alleged proxies, a burden-shifting framework applies. First, a challenger must prove that an “invidious discriminatory purpose” was “a motivating factor” for the government’s action.³³ This means that “the decisionmaker . . . selected or reaffirmed a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.”³⁴ The mere fact that the action “may affect a greater proportion of one race than of another” does not alone establish the action’s unlawfulness.³⁵ Then, should a challenger provide proof of an invidious discriminatory purpose, the government would have “the burden of establishing that the same decision would have resulted even had the impermissible purpose not been considered.”³⁶ In the environmental justice context, the government’s failure to meet this burden would likely be fatal.³⁷

This framework matters because environmental justice often involves classifications that track race. President Biden’s Executive Order 14,096, for example, referred in defining “environmental justice” to “income, race, color, national origin, Tribal affiliation, or disability,” and to environmental vulnerability.³⁸ Income, Tribal affiliation, disability, and environmental vulnerability are all non-suspect categories.³⁹ Yet income, disability, and environmental vulnerability all

³⁰ *United States v. Armstrong*, 517 U.S. 456, 466 (1996) (quoting *Ah Sin v. Wittman*, 198 U.S. 500, 508 (1905)).

³¹ *Skrmetti*, 605 U.S. at 549 (Barrett, J., concurring).

³² See *Rice v. Cayetano*, 528 U.S. 495, 514 (2000).

³³ *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265–66 (1977).

³⁴ *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979).

³⁵ *Washington v. Davis*, 426 U.S. 229, 242 (1976).

³⁶ *Arlington Heights*, 429 U.S. at 270 n.21.

³⁷ The Court has sometimes suggested that even the use of proxies may be justified under strict scrutiny. See *Callais*, 146 S. Ct. at 1146 (explaining that under the Fourteenth Amendment, “if race played a role in a decision made by a government actor, strict scrutiny applie[s]”) (citing *Arlington Heights*, 429 U.S. at 265–66); *cf. Rice*, 528 U.S. at 517–24 (considering and rejecting proposed justifications for racial proxy under the Fifteenth Amendment without applying strict scrutiny); *Hunter v. Underwood*, 471 U.S. 222, 233 (1985) (holding law unconstitutional because “its original enactment was motivated by a desire to discriminate against blacks on account of race and the section continues to this day to have that effect” without referring to strict scrutiny).

³⁸ Exec. Order No. 14,096, § (2)(b), 88 Fed. Reg. at 25,253 (Apr. 26, 2023).

³⁹ See *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 368 (2001) (disability); *Kadmas v. Dickinson Pub. Schs.*,

correlate with racial categories in the United States,⁴⁰ and Tribal affiliation (a political category) has historically been entangled with race in complex fashion.⁴¹ Consequently, when state actors address environmental inequalities tracking these classifications, their decisions are likely to have disparate racial effects.

The Biden Administration's Justice40 Initiative is illustrative. In Executive Order 14,008, President Biden established a goal that 40 percent of benefits from certain federal investments "flow to disadvantaged communities" in areas including clean energy, transit, and housing.⁴² To determine which communities were "disadvantaged" for this initiative, the Office of Management and Budget instructed federal agencies to consider "a combination of variables" that included income and environmental burdens, among others—but not race.⁴³ Independent analyses confirmed that the administration's Climate and Economic Justice Screening Tool identified communities of color as relatively "disadvantaged."⁴⁴ Such correlations alone, however, do not render the Biden Administration's strategy of relying on "race-neutral criteria" to avoid Equal Protection concerns legally vulnerable.⁴⁵

Similarly, the government may lawfully distinguish among persons based upon their environmental vulnerability, despite its statistical association with race. Researchers have found that when individuals are exposed to multiple pollutants, for example, the effects may be synergistic, meaning that the combined effect of the exposures is greater than the sum of each individual

487 U.S. 450, 458 (1988) (wealth); *Morton v. Mancari*, 417 U.S. 535, 553–54 & n.24 (1974) (Tribal affiliation). No Supreme Court case indicates that environmental vulnerability is a suspect classification.

⁴⁰ See, e.g., MELISSA KOLLAR & ZACH SCHERER, *INCOME IN THE UNITED STATES: 2024 2* (2025), <https://perma.cc/A4LL-KJVC> (income); Amy Steinweg, *Non-Hispanic Black Adults Have Higher Rates of Disability Due to Arthritis, Diabetes, Hypertension Than Non-Hispanic White Adults*, U.S. CENSUS BUREAU (July 12, 2023), <https://perma.cc/AF6Y-S5A2> (disability); EPA, *CLIMATE CHANGE AND SOCIAL VULNERABILITY IN THE UNITED STATES: A FOCUS ON SIX IMPACTS 6* (2021), <https://perma.cc/D8JH-Z8FC>; see also Aditya Aladangady, et al., *Greater Wealth, Greater Uncertainty: Changes in Racial Inequality in the Survey of Consumer Finances*, BD. OF GOVERNORS OF THE FED. RESRV. SYS. (OCT. 18, 2023), <https://perma.cc/JE69-WUV9> (wealth).

⁴¹ See, e.g., Addie C. Rolnick, *The Promise of Mancari: Indian Rights as Racial Remedy*, 86 N.Y.U. L. REV. 958, 967–68 (2011).

⁴² Exec. Order No. 14,008, *Tackling the Climate Crisis at Home and Abroad* § 223(a), 86 Fed. Reg. 7619, 7632 (Feb. 1, 2021).

⁴³ OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, MEMORANDUM M-21-28: INTERIM IMPLEMENTATION GUIDANCE FOR THE JUSTICE40 INITIATIVE 2–3 (2021), <https://perma.cc/5SUT-DXAF>. The criteria also included "[r]acial and ethnic residential segregation, particularly where the segregation stems from discrimination by government entities." *Id.* at 2. Classifying according to racial and ethnic segregation is not equivalent to classifying according to race. To the extent that Federal agencies did classify according to race in acting upon this criterion, their actions would nonetheless likely have satisfied strict scrutiny if they had been challenged. That is because the Supreme Court has recognized "remediating specific, identified instances of past discrimination that violated the Constitution or a statute" as a "compelling interest[]" that permit[s] resort to race-based government action." *SFFA*, 600 U.S. at 207.

⁴⁴ See Naveena Sadasivam & Clayton Alder, *The White House Excluded Race From Its Environmental Justice Tool. We Put It Back In*, GRIST (Feb. 24, 2022), <https://perma.cc/W4X6-K437>.

⁴⁵ Jean Chemnick & Kevin Bogardus, *Missing from White House EJ Screening Tool: Race*, E&E NEWS (Feb. 17, 2022), <https://perma.cc/G6X4-KD2W> (quoting Brenda Mallory, chairwoman of the White House Council on Environmental Quality).

exposure.⁴⁶ Exposure to non-chemical stressors, such as heat or noise, can also exacerbate the effects of pollution.⁴⁷ And some persons may be more vulnerable to pollution for other reasons, such as age or preexisting health conditions.⁴⁸ Promoting environmental justice often means classifying persons according to their existing pollution burden, exposure to non-chemical stressors, or individual vulnerabilities.⁴⁹ Use of such classifications is subject only to rational-basis review, a standard environmental justice programs plainly meet.

C. Environmental justice initiatives through which the government considers the legacies of racism are not subject to strict scrutiny, so long as race itself is not a “motivating factor” in the government’s decisions.

Even where environmental justice initiatives involve some consideration of race, they need not face strict scrutiny. The Supreme Court has recently explained that not every “reference” to a suspect classification (like race) “is sufficient to trigger heightened scrutiny.”⁵⁰ Sometimes, race, sex, or ethnicity may be “bound up” with the government’s action,⁵¹ even though the government is not “target[ing] a suspect class”⁵² and its action does not “turn on” a suspect classification.⁵³ Here again, what matters is “the underlying . . . concern.”⁵⁴

Under this doctrine, environmental justice initiatives remedying the historical consequences of racism remain lawful. Executive Order 14,096 called for protecting persons against “disproportionate and adverse human health and environmental effects . . . related to . . . the legacy of racism.”⁵⁵ Understanding the legacies of racism requires a primarily historical inquiry. For example, it might involve considering how previous race-based or otherwise discriminatory governmental decisions burdened certain communities with greater air pollution, leaving those communities more vulnerable to environmental harms today. Based upon that analysis, the government might avoid actions that will exacerbate those harms. This analysis is “bound up in” race, insofar as it examines past racism. But nothing in the government’s conduct need “turn on” the community’s current racial composition.⁵⁶ Rather, the government need only act on the commonsense principle of prioritizing those most affected, regardless of race.⁵⁷

⁴⁶ See Richard L. Revesz, Burçin Ünel & Sarah Wheaton, *The Myth of Evenhanded Administration: Integrating Individual Heterogeneity into Benefit-Cost Analysis*, 76 DUKE L.J. (forthcoming 2026) (manuscript at 5), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=6844060.

⁴⁷ See *id.* at 5, 18.

⁴⁸ See generally *id.* at pt. II.

⁴⁹ Cf. *id.* at 3.

⁵⁰ *Skrmetti*, 605 U.S. at 512.

⁵¹ *Id.*

⁵² *Id.* at 510. Indeed, as Justice Thomas has emphasized, *SFFA* permitted universities “to credit ‘an applicant’s discussion of how race affected his or her life,’” even though such a discussion is “inextricably bound up with” race. *Id.* at 529 (Thomas, J., concurring) (first quoting *SFFA*, 600 U.S. at 230; and then quoting *Bostock v. Clayton Cnty.*, 590 U.S. 644, 660–61 (2020)).

⁵³ *Id.* at 514.

⁵⁴ *Id.* at 513.

⁵⁵ Exec. Order No. 14,096, 88 Fed. Reg. at 25,253.

⁵⁶ *Skrmetti*, 605 U.S. at 514.

⁵⁷ See Richard Revesz, *Ending Environmental Justice May Amplify Uneven Pollution Impact*, BLOOMBERG L. (Feb.

Prioritizing those burdened by the legacies of racism is especially important in permitting processes. EPA has noted that, historically, industrial facilities have “added to the pollution burden in already vulnerable communities without due consideration of whether, either intentionally or in effect, the decisions allowing such outcomes” would contribute to environmental injustice.⁵⁸ In determining whether to permit a new or modified facility in such a community, the government may consider this history. And in doing so, it may analyze whether those historical pollution burdens were bound up with race.

Similar principles apply to disparate-impact analysis under Title VI of Civil Rights Act of 1964. Until December 2025, Title VI regulations created liability against recipients of federal funding for certain conduct having a discriminatory “effect,” even absent discriminatory “purpose.”⁵⁹ The Trump Administration’s Department of Justice eliminated this “disparate impact” liability, expressing “serious concerns about whether the [prior] regulations pass[ed] constitutional muster under the Equal Protection Clause,” citing *SFFA*.⁶⁰ “[D]isparate-impact liability,” the Department of Justice argued, “encourages and, in some cases, requires covered entities to engage in the intentional use of race and racial balancing to eliminate those disparate outcomes by treating certain racial groups differently from others.”⁶¹ The Supreme Court has not yet determined the lawfulness of disparate-impact regulations under Title VI⁶²—an issue with both statutory and constitutional dimensions.⁶³ But it is not true that “eliminat[ing] . . . disparate outcomes” “requires” racial discrimination, let alone unlawful racial discrimination.⁶⁴ Rather, it often requires considering only the enduring legacies of racism, as the Equal Protection Clause permits—and then remedying those legacies by race-neutral means.

For environmental justice initiatives addressing the legacies of racism, as with those using other classifications that correlate with race, the key legal risk relates to government officials’ motivations. But so long as contemporary racial considerations are not a “motivating factor[s]” for public policy, the governmental policy should be subject to rational-basis review and avoid any legal vulnerability under the Equal Protection Clause.⁶⁵

27, 2025), <https://news.bloomberglaw.com/us-law-week/ending-environmental-justice-may-amplify-uneven-pollution-impact>.

⁵⁸ EPA, INTERIM ENVIRONMENTAL JUSTICE AND CIVIL RIGHTS IN PERMITTING FREQUENTLY ASKED QUESTIONS 2 (2022), <https://perma.cc/574K-ZS4J>.

⁵⁹ 28 C.F.R. § 42.104(b)(3) (2025).

⁶⁰ DOJ Title VI Rule, 90 Fed. Reg. at 57,143.

⁶¹ *Id.*

⁶² APRIL J. ANDERSON, CONG. RSCH. SERV., IF13057, WHAT IS DISPARATE-IMPACT DISCRIMINATION? 1 (2025), <https://perma.cc/2X43-K7QL>.

⁶³ See *SFFA*, 600 U.S. at 310 (Gorsuch, J., concurring).

⁶⁴ DOJ Title VI Rule, 90 Fed. Reg. at 57,143.

⁶⁵ *Arlington Heights*, 429 U.S. at 266.

D. Even where environmental justice initiatives involve racial considerations, they may not be subject to strict scrutiny if the government’s actions are facially neutral, the government does not impose a racial barrier to obtaining a benefit, and race is not otherwise a motivating factor.

Even when a program takes race into account in distributing benefits or burdens, it is not necessarily subject to strict scrutiny. Nearly all government actions relevant to environmental justice are race-neutral on their face: pollution regulations, for example, do not prescribe different rules for members of different racial groups. Facially neutral government actions are ordinarily subject only to rational-basis review.⁶⁶

Although the Supreme Court has not clearly articulated the doctrine, it has authorized departures from this rule only in limited circumstances. Where the government distributes benefits through facially neutral means (such as college-admissions decisions), a party may establish standing to sue by alleging discrimination in the underlying decisionmaking process.⁶⁷ Then, the Court will subject that entire decisionmaking process to strict scrutiny.⁶⁸ Absent such Equal Protection injury, however, the Court ordinarily applies either rational-basis review or the burden-shifting framework applicable to proxy cases.

This doctrinal framework is most relevant to race-conscious environmental justice analyses of regulation, although it might also apply elsewhere. In choosing among possible regulations, the government may analyze the likely effects of its options. That analysis might consider, for example, whether a proposal will cause particular racial communities to bear disproportionate environmental burdens. Such an analysis would involve “consideration of race” as such.⁶⁹ But the government’s ultimate choice would be racially “neutral on its face”⁷⁰: nothing in the regulation will expressly confer differential benefits or obligations according to race. Nor would such an action involve a “barrier” that prevents persons in different racial groups “from competing on an equal footing” for the same benefit.⁷¹ Thus, the decisive question will be whether race was a “motivating factor” behind the challenged action.⁷²

Whether the government’s action is subject to strict scrutiny will turn on how exactly officials use the race-conscious environmental justice analysis. If such an analysis is only one factor among several supporting a decision that the government would have made without the analysis, then there is little reason to conclude that race is a “motivating factor.”⁷³ But where a race-conscious

⁶⁶ *Davis*, 426 U.S. at 242.

⁶⁷ See *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 719 (2007); *Gratz v. Bollinger*, 539 U.S. 244, 262 (2003); *Adarand Constructors*, 515 U.S. at 211; *Ne. Fla. Chapter of Assoc. Gen. Contractors of Am. v. City of Jacksonville, Fla.*, 508 U.S. 656, 666 (1993).

⁶⁸ See, e.g., *Parents Involved*, 551 U.S. at 720.

⁶⁹ *SFFA*, 600 U.S. at 218.

⁷⁰ *Davis*, 426 U.S. at 241; see *Coal. for TJ v. Fairfax Cnty. Sch. Bd.*, 146 S. Ct. 541, 544 (2024) (Alito, J., dissenting from denial of cert.).

⁷¹ *Ne. Fla. Chapter of Assoc. Gen. Contractors of Am.*, 508 U.S. at 667.

⁷² *Arlington Heights*, 429 U.S. at 266.

⁷³ *Id.*

analysis changes the decision—where it is akin to Harvard’s use of race as a “determinative tip” in admissions—then the government’s position may be vulnerable. In short, where an agency conducts a race-conscious environmental justice analysis, the likelihood that strict scrutiny applies increases with the extent to which the agency relied on the analysis, and especially on its racial component. And where the environmental justice analysis is race-neutral, rational-basis review applies.

E. Even where racial considerations are a “motivating factor” in the implementation of environmental justice initiatives, those initiatives might nonetheless withstand strict scrutiny, as elaborated by *SFFA*.

The application of strict scrutiny is not the end of a court’s inquiry. Under that doctrinal framework, the government’s use of race must be “used to further a ‘compelling governmental interest[.]’”⁷⁴ The Supreme Court’s precedents have identified only one “compelling interest” relevant to environmental justice sufficient to “permit resort to race-based government action”: “remediating specific, identified instances of past discrimination that violated the Constitution or a statute.”⁷⁵ Such discrimination must be established before pursuing a race-conscious remedy by a “strong basis in evidence”⁷⁶ concerning the specific geographical jurisdiction at issue.⁷⁷ The government’s means, moreover, must be “‘narrowly tailored’—meaning ‘necessary’—to achieve” its compelling interest.⁷⁸ This means the government must show that there are “no workable race-neutral alternatives” that would promote the government’s compelling interest “about as well and at tolerable administrative expense.”⁷⁹

SFFA also identified four additional requirements, which, although derived from affirmative-action jurisprudence, might inform the application of strict scrutiny more generally. First is the rule that race-based government action must “operate . . . in a manner that is ‘sufficiently measurable to permit judicial [review].’”⁸⁰ Second is the requirement that such action “must have a logical end point.”⁸¹ Third and fourth are the “twin commands of the Equal Protection Clause”: “that race may never be used as a ‘negative’ and that it may not operate as a stereotype.”⁸²

⁷⁴ *SFFA*, 600 U.S. at 207 (quoting *Grutter*, 539 U.S. at 326).

⁷⁵ *Id.* (citing, inter alia, *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 720 (2007) and *Shaw v. Hunt*, 517 U.S. 899, 909–10 (1996) (*Shaw II*))

⁷⁶ *Shaw II*, 517 U.S. at 910. The Court has indicated that the discrimination to be remediated may be “public or private,” provided it is identified with precision. *Id.*; accord *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 492, 504 (1989). Recent decisions, however, may signal a retreat from that rule: the Court has stated that “[t]he States and Federal Government have no compelling interest in generally remediating ‘past discrimination in a particular industry or region’ or ‘the effects of societal discrimination.’” *Callais*, (quoting *Shaw II*, 517 U.S. at 910).

⁷⁷ See *J.A. Croson Co.*, 488 U.S. at 492, 505.

⁷⁸ *Id.* (quoting *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 311–12 (2013) [*Fisher I*]).

⁷⁹ *Fisher I*, 570 U.S. at 312 (quotation marks omitted).

⁸⁰ *SFFA*, 600 U.S. at 214 (quoting *Fisher v. Univ. of Tex. at Austin*, 579 U.S. 365, 381 (2016) [*Fisher II*]).

⁸¹ *Id.* at 212 (quoting *Grutter*, 539 U.S. at 342); see *id.* at 213; *id.* at 221.

⁸² *Id.* at 218.

SFFA's strict-scrutiny principles apply most directly to environmental justice initiatives that operate through government grants, loans, and contracts. Some programs, unlike Justice40, have required officials to consider race when determining which persons are "disadvantaged," and hence where to allocate funding.⁸³ Such programs remain subject to strict scrutiny after *SFFA*, as they were beforehand.⁸⁴

Three of *SFFA*'s four strict-scrutiny requirements do not impose substantial new constraints on narrowly tailored government actions meant to remediate specific unlawful discrimination. *SFFA* explained that universities' interest in the educational benefits flowing from racial diversity was "not sufficiently coherent for purposes of strict scrutiny," and thus was insufficiently "measurable."⁸⁵ By contrast, no such problem is likely to arise when the government seeks to remedy past discrimination consistent with the Equal Protection Clause, because previous cases already required the government to define its remedial objective with precision.⁸⁶ For the same reason, the government will have little additional trouble identifying a "logical end point."⁸⁷ In specifying the remedial objective, the government will also be able to specify when that objective is met. As for the "command[]" that race may not be used as a "negative": that has little application when the government pursues a remedial interest. That is because the baseline against which a race-conscious program operates will have been distorted by past unlawful discrimination. Narrowly tailored race-conscious remedies impose a "negative" only insofar as they eliminate relative advantages obtained through specific previous illegality. Such remedies bear little resemblance to affirmative action in college admissions, in which applicants who were not "the beneficiaries of the race-based preference" were disadvantaged by the mere fact of their race.⁸⁸

SFFA's fourth principle, opposing stereotyping, has greater but still limited relevance. *SFFA* prohibited universities from "treat[ing] individuals as the product of their race" by considering mere racial identification in admissions decisions.⁸⁹ But the Court also made clear that universities could "consider[] an applicant's discussion of how race affected his or her life,"⁹⁰ so long as they treat each applicant "as an individual."⁹¹ In the environmental justice context, this suggests that the government may consider how race has affected a particular community, so long as it does not rely upon generalizations. Here, as with identifying a logical end point, the evidence needed to establish a compelling interest will help officials avoid further constitutional problems.

Thus, even where strict scrutiny applies, *SFFA*'s demanding gloss on the doctrine adds little to what the law already required.

⁸³ See, e.g., *Mid-Am. Milling Co., LLC v. U.S. Dept. of Transportation*, No. 3:23-CV-00072-GFVT, 2024 WL 4267183, *1 (E.D. Ky. Sept. 23, 2024) (describing the Disadvantaged Enterprise Program in allocation of federal highway construction funds).

⁸⁴ See *id.* at *7.

⁸⁵ *SFFA*, 600 U.S. at 214.

⁸⁶ See, e.g., *Shaw II*, 517 U.S. at 910.

⁸⁷ *SFFA*, 600 U.S. at 212.

⁸⁸ *Id.*

⁸⁹ *Id.* at 221.

⁹⁰ *Id.* at 230.

⁹¹ *Id.* at 231.

In sum, *SFFA* did not generally place environmental justice initiatives in legal jeopardy. *SFFA* builds upon pre-existing decisions holding that racial classifications are constitutionally suspect, especially when detached from particularized consideration of how race has affected those classified. But many environmental justice initiatives do not raise Equal Protection problems because they do not distribute benefits and burdens. Others use classifications that receive only rational-basis review. Still other initiatives consider the historical legacies of racism, but not race itself. Where race itself is relevant, it might still not be a motivating factor for government officials' decisions. And, finally, where race is a motivating factor or where it is used as an express classification, *SFFA* adds little to the existing demands of strict scrutiny.

Program type	Relevant Equal Protection considerations
Collecting or analyzing data about existing environmental burdens, including by identifying "disadvantaged communities."	None, except insofar as "disadvantage" is determined by reference to race (or categories intended as proxies for race) and is then used to determine the distribution of benefits and burdens.
Promoting public participation	Opportunities to participate must remain equally open to all, regardless of race.
Collaborating with community groups to promote effective enforcement and adaptation	Opportunities for collaboration must remain equally open to all, regardless of race.
Educating the public about environmental harms	Information must remain equally accessible to all, regardless of race.
Considering environmental justice in permitting	Officials may consider non-racial information (such as environmental burden) and specific historical environmental legacies of racism, but will generally be subject to strict scrutiny if they consider race as such.
Considering environmental justice in rulemaking	Officials may consider non-racial information (such as environmental burden). Strict scrutiny becomes more likely to the extent officials rely upon race-conscious environmental justice analyses to justify their decisions.
Considering environmental justice in funding	Officials may consider non-racial information (such as environmental burden). Strict scrutiny applies if race is a "motivating factor" or an express decision criterion. Where race operates as an express decision criterion, officials should obtain strong evidence of specific, unlawful discrimination before implementing only a narrowly tailored race-conscious remedy.

II. Settled Principles of Administrative Law Require Federal Regulators to Solicit and Consider the Public's Concerns.

The Trump Administration has also restricted public participation in rulemaking and other kinds of policymaking. These restrictions violate core principles of environmental justice. They are also frequently unlawful. For decades, administrative and environmental law have required robust consultation with communities affected by myriad government decisions. No legislative amendment or judicial decision has fundamentally altered these requirements.

A. Public participation in government decisionmaking is central both to environmental justice and to administrative law.

Public participation is central to environmental justice. Among the “Principles of Environmental Justice” adopted in 1991 by the First National People of Color Environmental Leadership Summit is “the right to participate as equal partners at every level of decisionmaking, including needs assessment, planning, implementation, enforcement and evaluation.”⁹² Also included are the development of public policy on the basis of “mutual respect” and “the education of present and future generations” in environmental issues.⁹³ Consistent with these principles, scholars have described “meaningful involvement” in environmental governance as a “pillar[]” of environmental justice.⁹⁴ Executive Orders 12,898 and 14,096, which articulated the environmental justice priorities of Presidents Clinton and Biden, respectively, likewise declared the Executive Branch’s commitment to broad participation.⁹⁵

The crucial mechanism for public participation in rulemaking is notice and comment under the APA. When a federal agency seeks to issue a rule with “the ‘force and effect of law,’” it ordinarily must comply with the APA provisions codified at 5 U.S.C. § 553.⁹⁶ Under that section, the agency must first “issue a ‘[g]eneral notice of proposed rule making,’ ordinarily by publication in the Federal Register,” and then “give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments.”⁹⁷ The agency must then

⁹² THE FIRST NATIONAL PEOPLE OF COLOR ENVIRONMENTAL LEADERSHIP SUMMIT, THE PRINCIPLES OF ENVIRONMENTAL JUSTICE (1991), available at <https://www.bullardcenter.org/resources/principles-of-environmental-justice>.

⁹³ *Id.*

⁹⁴ Jonathan Skinner-Thompson, *Procedural Environmental Justice*, 97 WASH. L. REV. 399, 406 (2022).

⁹⁵ See Exec. Order No. 12,898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, 59 Fed. Reg. 7,629, 7,632 (Feb. 11, 1994); Exec. Order No. 14,096, § (3)(a)(vii), 88 Fed. Reg. at 25,254.

⁹⁶ *Perez v. Mortg. Bankers Ass’n*, 575 U.S. 92, 96 (2015) (quoting *Chrysler Corp. v. Brown*, 441 U.S. 281, 302–303 (1979)).

⁹⁷ *Id.* (first quoting 5 U.S.C. § 553(b), then quoting 5 U.S.C. § 553(c)).

“provide[] a reasoned response to all significant comments” if and when it finalizes the rule.⁹⁸ “[W]hen the agency promulgates the final rule, it must include in the rule’s text ‘a concise general statement of [its] basis and purpose.’”⁹⁹

These procedures, although criticized as insufficient by some scholars,¹⁰⁰ provide a legal foundation for promoting environmental justice. As federal courts have recognized, the notice-and-comment process serves at least three important purposes: “(1) to ensure that agency regulations are tested via exposure to diverse public comment, (2) to ensure fairness to affected parties, and (3) to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review.”¹⁰¹ All three are essential to achieving the “meaningful involvement” of those communities most burdened by cumulative environmental harms.

B. With rare exception, the Administrative Procedure Act requires federal regulators to provide opportunities for public comment, explain the bases for proposed rules, and justify their actions.

The Trump Administration has run afoul of the law governing the notice-and-comment process in at least four ways.

First, the Trump Administration has aggressively invoked the “good cause” exception to the notice-and-comment requirements, contrary to settled law.¹⁰² Section 553(b)(B) provides that public comment is unnecessary “when the agency for good cause finds” that it is “impracticable, unnecessary, or contrary to the public interest.”¹⁰³ The U.S. Court of Appeals for the D.C. Circuit has repeatedly emphasized that this exception should be “narrowly construed and only reluctantly countenanced.”¹⁰⁴ Caselaw likewise recognizes that “courts must carefully scrutinize the agency’s justification for invoking” the exception.¹⁰⁵ The Trump Administration has directed federal agencies to broadly invoke the “good cause” exception, including to expedite the rescission of putatively unlawful regulations under *SFFA* and other recent Supreme Court decisions.¹⁰⁶ Courts have not recognized an agency’s determination that an existing regulation is unlawful—or even a presidential directive to repeal the regulation—as sufficient to permit the agency to forgo public

⁹⁸ *Interstate Nat. Gas Ass’n of Am. v. Fed. Energy Regul. Comm’n*, 617 F.3d 504, 511 (D.C. Cir. 2010).

⁹⁹ *Perez*, 575 U.S. at 96 (quoting 5 U.S.C. § 553(c)).

¹⁰⁰ See, e.g., *Skinner-Thompson*, *supra* note 93, at 406.

¹⁰¹ *Prometheus Radio Project*, 652 F.3d at 449 (3d Cir. 2011) (quoting *United Mine Workers*, 407 F.3d at 1259).

¹⁰² See generally JACK JONES & MAX SARINSKY, INST. FOR POL’Y INTEGRITY, PREVENTING PUBLIC PARTICIPATION: THE TRUMP ADMINISTRATION’S MISUSE OF THE GOOD CAUSE EXCEPTION TO FAST-TRACK DEREGULATION (2025), https://policyintegrity.org/files/publications/Good_Cause_Policy_Brief_vF_A.pdf

¹⁰³ 5 U.S.C. § 553(b)(B).

¹⁰⁴ *State of N.J., Dep’t of Env’t Prot. v. EPA*, 626 F.2d 1038, 1045 (D.C. Cir. 1980); accord *Mack Trucks, Inc. v. EPA*, 682 F.3d 87, 93 (D.C. Cir. 2012); *Jifry v. Fed. Aviation Admin.*, 370 F.3d 1174, 1180 (D.C. Cir. 2004).

¹⁰⁵ *Coal. for Parity, Inc. v. Sebelius*, 709 F. Supp. 2d 10, 19 (D.D.C. 2010).

¹⁰⁶ See Memorandum on Directing the Repeal of Unlawful Regulations, 2025 DAILY COMP. PRES. DOC. 466 (Apr. 9, 2025); OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, M-25-28, GUIDANCE IMPLEMENTING THE PRESIDENT’S MEMORANDUM DIRECTING THE REPEAL OF UNLAWFUL REGULATIONS (2025); OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, M-25-36, STREAMLINING THE REVIEW OF DEREGULATORY ACTIONS (2025).

comment.¹⁰⁷ Moreover, the Supreme Court has held that when an agency repeals an unlawful regulation, it must consider any “serious reliance interests” engendered by the prior rule.¹⁰⁸ Because public comment discloses these interests, there will ordinarily be no “good cause” for forgoing comment to repeal even allegedly unlawful rules.¹⁰⁹

Second, and relatedly, the Trump Administration has improperly invoked a different exception to the notice-and-comment requirements for “public benefit programs.”¹¹⁰ Section 553(a)(2) of the APA exempts a rule from notice-and-comment “to the extent that there is involved . . . a matter relating to . . . public property, loans, grants, benefits, or contracts.”¹¹¹ Courts “construe [this] public-benefits exception very narrowly”: “only to agency action that ‘clearly and directly relate[s] to benefits as that word is used in section 553(a)(2)’”¹¹²—that is, to programs such as food stamps and veterans benefits.¹¹³ In eliminating disparate-impact liability under Title VI, the Department of Justice invoked § 553(a)(2) to bypass public comment, reasoning that Congress enacted Title VI “[p]ursuant to its authority to ‘fix the terms on which it shall disburse federal money.’”¹¹⁴ Title VI, however, is not a public-benefit program, and the Department of Justice’s effort to “fill[] in the statutory scheme” goes well beyond a “mere[]” decision concerning “when to enter into a contract or award a grant.”¹¹⁵ By avoiding public comment on a rule of fundamental importance for civil rights, the Trump Administration threatens to “carv[e] the heart out of the [APA’s] notice provisions” in violation of settled precedent.¹¹⁶

Third, the Trump Administration has also contravened the APA by failing to disclose its reasons for rescinding various regulations.¹¹⁷ Consistent with the underlying purposes of the notice-and-comment process, courts have long held that an agency “must disclose in detail the thinking that has animated the form of a proposed rule and the data upon which that rule is based.”¹¹⁸ To facilitate public comment, “it is especially important for the agency to identify and make available technical studies and data that it has employed in reaching the decisions to propose

¹⁰⁷ See JONES & SARINSKY, *supra* note 101, at 3, 5–7.

¹⁰⁸ *Regents of the Univ. of Cal.*, 591 U.S. at 30 (quotation marks omitted).

¹⁰⁹ See JACK JONES & MAX SARINSKY, INST. FOR POL’Y INTEGRITY, “NONDISCRETIONARY” REPEALS: HOW THE TRUMP ADMINISTRATION’S UNTESTED DEREGULATORY THEORY VIOLATES THE ADMINISTRATIVE PROCEDURE ACT 10–12 (2025), https://policyintegrity.org/files/publications/Non-Discretionary_Repeals_Issue_Brief.pdf.

¹¹⁰ *Azar v. Allina Health Servs.*, 587 U.S. 566, 569 (2019).

¹¹¹ 5 U.S.C. § 553(a)(2).

¹¹² *Texas v. United States*, 809 F.3d 134, 177 (5th Cir. 2015), as revised (Nov. 25, 2015), *aff’d by an equally divided court*, 579 U.S. 547 (2016) (citations and quotation marks omitted).

¹¹³ See *id.*; see also *Vigil v. Andrus*, 667 F.2d 931, 937 (10th Cir. 1982); *Humana of S.C., Inc. v. Califano*, 590 F.2d 1070, 1082 (D.C. Cir. 1978).

¹¹⁴ DOJ Title VI Rule, at 57,146 (quoting *Cummings v. Premier Rehab Keller, P.L.L.C.*, 596 U.S. 212, 217–18 (2022)).

¹¹⁵ *Ind. U. S. Tanker Owners Comm. v. Lewis*, 690 F.2d 908, 918 n.43 (D.C. Cir. 1982).

¹¹⁶ *exas*, 809 F.3d at 177 (internal quotation marks omitted).

¹¹⁷ See generally BRIDGET PALS & MAX SARINSKY, INST. FOR POL’Y INTEGRITY, RESCISSIONS WITHOUT REASONS: HOW BAREBONES DEREGULATORY PROPOSALS FLOUT LEGAL REQUIREMENTS (2025), https://policyintegrity.org/files/publications/Barebones_Rescissions_Brief_vF.pdf.

¹¹⁸ *Home Box Office, Inc. v. Fed. Commc’ns Comm’n*, 567 F.2d 9, 35 (D.C. Cir. 1977); see also *Prometheus Radio Project*, 652 F.3d at 449; *Am. Farm Bureau Fed’n v. Env’t Prot. Agency*, 792 F.3d 281, 298 (3d Cir. 2015); *Texas Ass’n Mfrs. v. U.S. Consumer Prods. Safety Comm’n*, 989 F.3d 368, 382 (5th Cir. 2021).

particular rules.¹¹⁹ Final rules based on proposals deficient in these respects are highly likely also to be unlawful.¹²⁰ The Trump Administration, in contrast, has offered minimal justification for a number of proposed regulatory rescissions,¹²¹ sometimes providing just one sentence of relevant reasoning.¹²² It is at best unclear how the Administration would justify such barebones proposals. But any rationalization is unlikely to satisfy existing legal requirements.

Fourth, and finally, the Trump Administration has promulgated rules that are, in substance, arbitrary and capricious. “One of the basic procedural requirements of administrative rulemaking is that an agency must give adequate reasons for its decisions.”¹²³ “[A]n agency cannot simply ignore ‘an important aspect of the problem.’”¹²⁴ Moreover, when an agency changes its position, it must specifically provide a “reasoned explanation” “for disregarding facts and circumstances that underlay or were engendered by the prior policy.”¹²⁵ The Trump Administration has fallen short of these requirements, with profound implications for environmental justice. For example, EPA has rescinded key elements of the emissions standards for coal- and oil-fired electric utility steam generating units.¹²⁶ Environmental justice organizations noted that the proposed rule “fail[ed] to fully account for the serious health and societal harms caused by increased exposure to hazardous air pollutants . . . , particularly in communities that already bear the heaviest environmental burdens.”¹²⁷ And the Institute for Policy Integrity identified other legal and analytical flaws in the proposal.¹²⁸ The APA does not permit such regulatory irrationality.

¹¹⁹ *N. Am.’s Bldg. Trades Unions v. Occupational Safety & Health Admin.*, 878 F.3d 271, 301 (D.C. Cir. 2017) (emphasis omitted).

¹²⁰ See PALS & SARINSKY, *supra* note 116, at 2–6.

¹²¹ See *id.* at i & nn.4, 5.

¹²² See Energy Conservation Program: Proposed Withdrawal of Determination of Fans and Blowers as Covered Equipment, 90 Fed. Reg. 20,930, 20,931 (proposed May 16, 2025).

¹²³ *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221 (2016).

¹²⁴ *Ohio v. E.P.A.*, 603 U.S. 279, 293 (2024) (quoting *Motor Vehicle Mfrs. Ass’n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

¹²⁵ *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009).

¹²⁶ See National Emission Standards for Hazardous Air Pollutants: Coal- and Oil-Fired Electric Utility Steam Generating Units: Final Repeal, 91 Fed. Reg. 9088 (February 24, 2026).

¹²⁷ Chi. Env’t Just. Network, Comments on “National Emission Standards for Hazardous Air Pollutants: Coal- and Oil-Fired Electric Utility Steam Generating Units (Docket No. EPA–HQ–OAR–2018–0794)” (Aug. 11, 2025).

¹²⁸ See generally Inst. for Pol’y Integrity et al., Comments on “National Emission Standards for Hazardous Air Pollutants: Coal- and Oil-Fired Electric Utility Steam Generating Units 90 Fed. Reg. 25,535 (proposed June 17, 2025) [Docket No. EPA-HQ-OAR-2018-0794]” (Aug. 11, 2025).

III. The Administrative Procedure Act, the National Environmental Policy Act, and Substantive Environmental Law All Authorize, and Sometimes Require, Environmental Justice Analysis.

The Trump Administration has also broadly directed federal agencies not to analyze environmental justice issues in rulemaking and other activities. But federal law permits, and sometimes requires, officials to consider environmental justice. By curtailing agency analysis, the Trump Administration has rendered some of its actions legally vulnerable. Authority and responsibility to consider environmental justice reside in at least three categories of statutory sources.

First, the National Environmental Policy Act (NEPA) sometimes mandates consideration of environmental justice, notwithstanding recent court decisions. Courts have long explained that NEPA requires agencies to “take[] a ‘hard look’ at [the] environmental consequences” of proposed actions.¹²⁹ In enforcing this mandate, courts apply the APA’s arbitrary-and-capricious standard.¹³⁰ In so doing, courts have concluded that an agency’s inadequate consideration of environmental justice in a NEPA assessment may render that assessment unlawful.¹³¹ In *Seven County Infrastructure Coalition v. Eagle County, Colo.*,¹³² the Supreme Court arguably heralded the end of “the era of searching NEPA review”¹³³: it held, first, that “when determining whether an agency’s EIS complied with NEPA, a court should afford substantial deference to the agency”¹³⁴ and, second, that an agency evaluating one project need not also analyze “potential environmental effects of future or geographically separate projects.”¹³⁵ Nothing in *Seven County*, however, abrogated the statutory requirement that agencies must analyze the “reasonably foreseeable environmental effects” of their major actions,¹³⁶ and must do so with sufficient detail to “reasonably explain[]” their ultimate decisions.¹³⁷ Environmental justice implications—which

¹²⁹ *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976); see, e.g., *City of Los Angeles, Cal. v. Fed. Aviation Admin.*, 63 F.4th 835, 841 (9th Cir. 2023).

¹³⁰ See *Seven Cnty. Infrastructure Coal. v. Eagle Cnty.*, 605 U.S. 168, 179–80 (2025).

¹³¹ See, e.g., *City of Los Angeles*, 63 F.4th at 849 n.7.

¹³² 605 U.S. 168 (2025).

¹³³ *Sierra Club v. FERC*, 153 F.4th 1295, 1311 (D.C. Cir. 2025).

¹³⁴ *Seven Cnty.*, 605 U.S. at 179–80.

¹³⁵ *Id.* at 190.

¹³⁶ 42 U.S.C. § 4332(C)(i).

¹³⁷ *Seven Cnty.*, 605 U.S. at 180.

are often “proximate” to federal actions rather than “remote”—will therefore often remain mandatory subjects of NEPA analysis.

Second, numerous federal statutes require agencies to consider cumulative burdens, localized harms, and other aspects of environmental justice. In instructing federal agencies not to conduct environmental justice analyses, the Council on Environmental Quality (CEQ) did not—and legally could not—instruct agencies to violate federal law.¹³⁸ And, indeed, many federal statutes countermand CEQ’s directive. Under Section 7 of the Natural Gas Act, for example, the Federal Energy Regulatory Commission (FERC) may not approve a pipeline under its jurisdiction unless the pipeline “is or will be required by the present or future public convenience and necessity.”¹³⁹ That standard, construed in its proper historical context, requires consideration of environmental effects, including cumulative and localized effects.¹⁴⁰ Section 216, which empowers FERC to authorize certain electric transmission projects “consistent with the public interest,” is similar.¹⁴¹ More broadly, in 2022, EPA compiled “legal tools to advance environmental justice.” These tools include multiple examples of statutory authority, both implicit and explicit, to consider cumulative impacts.¹⁴² The effect of CEQ’s recent guidance thus should be more limited than it might first appear.

Third, and finally, the APA’s requirement of responsive, reasoned decisionmaking sometimes obliges agencies to consider environmental justice. As noted above, the APA requires agencies to provide “reasoned response[s] to all significant comments.”¹⁴³ “Significant” comments are those that are “relevant to the agency’s decision and which, if adopted, would require a change in an agency’s proposed rule.”¹⁴⁴ Because the environmental justice movement endures notwithstanding federal policy, the Trump Administration’s—or any administration’s—retreat from environmental justice analysis will not deter public commenters. Properly presented comments raising concerns about a proposed rule’s disproportionate harms or cumulative burdens are undoubtedly “significant,” such that agencies must respond to them. Moreover, even when agencies have satisfied this procedural obligation, agencies must “give adequate reasons for [their] decisions.”¹⁴⁵ Where environmental justice is “an important aspect of the problem” at issue, an agency may not “simply ignore” environmental justice when finalizing a rule—even if it did so when proposing the rule.¹⁴⁶

¹³⁸ See Removal of National Environmental Policy Act Implementing Regulations, 91 Fed. Reg. 618 (Jan. 8, 2026); Council on Env’t Quality, Memorandum re: Implementation of the National Environmental Policy Act 5 (Feb. 19, 2025), <https://perma.cc/YPC9-X64D>.

¹³⁹ 15 U.S.C. § 717f(e).

¹⁴⁰ See JENNIFER DANIS & BRIDGET PALS, INST. FOR POL’Y INTEGRITY, THE SCOPE OF FERC’S REVIEW: COMPOUNDING COMMUNITY IMPACTS AND GAS INFRASTRUCTURE UNDER THE NATURAL GAS ACT 9 (2026), https://policyintegrity.org/files/publications/The_Scope_of_FERC_s_Review.pdf; see also Inst. for Pol’y Integrity, Comments in re S. Nat. Gas Co., LLC (Docket No. CP25-517) (FERC), https://policyintegrity.org/documents/IPI_Comments_-_SSE4_Project_-_2025.08.05_FINAL_.pdf.

¹⁴¹ See generally Inst. for Pol’y Integrity, Comments in re Application for Permits to Site Interstate Electric Transmission Facilities (Docket No. RM22-7-000) (FERC), https://policyintegrity.org/documents/IPI_Comments_Final_5.17.23.pdf.

¹⁴² See EPA LEGAL TOOLS TO ADVANCE ENVIRONMENTAL JUSTICE 2, 7 (2022), <https://perma.cc/K9LJ-ZTPE>.

¹⁴³ *Interstate Nat. Gas Ass’n of Am.*, 617 F.3d at 511.

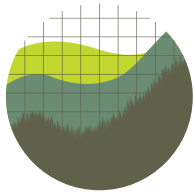
¹⁴⁴ *Am. Fuel & Petrochem. Mfrs. v. E.P.A.*, 937 F.3d 559, 586 (D.C. Cir. 2019) (per curiam).

¹⁴⁵ *Encino Motorcars*, 579 U.S. at 221.

¹⁴⁶ *Ohio*, 603 U.S. at 293 (quotation marks omitted).

Conclusion

The second Trump Administration has both eliminated existing environmental justice programs and weakened the institutional infrastructure for future such initiatives. But the key legal arguments for this assault are weak. Constitutional law imposes meaningful limits on how government decisionmakers consider environmental justice, but does not require the wholesale elimination of environmental justice programs. Administrative law often forbids preventing public participation by forgoing notice and comment. And various statutes permit—and sometimes require—federal officials to consider environmental justice in rulemaking and permitting.



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