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Starting the Clock: Identifying the Trigger for CERCLA's Six-Year Statute of Limitations for a § 107(a) Claim for "Remedial Action" Costs

By Fabio Dworschak

I. INTRODUCTION & ROADMAP

Can I sue? A common question nearly all attorneys face regardless of practice area. An immediate *Yes* is likely the answer in most, if not virtually all, cases for enterprising personal injury lawyers. For the rest, determining the harm suffered and whether that harm is one for which the law provides a remedy usually requires a little more digging. Even once you gain this information, the next step—identifying the claim's statute of limitations, or how long the law permits the injured party to sue to recover—looms large.

This question can be particularly challenging to answer when the question arises from an environmental injury, especially when a party seeks to recover the costs it incurs to cleanup a contaminated facility under the *notoriously* complex Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA").[1] Although there are many complicated statute-of-limitations issues involving CERCLA, this article clarifies the time period within which an injured party must sue to recover "remedial action" costs under § 107(a),[2] CERCLA's cost-recovery provision.[3] As further explained herein, under the applicable statute of limitations in § 113(g)(2)(B), a party must sue to recover its "remedial action" costs under § 107(a) no later than six years after two conditions are met: (i) the permanent remediation standard for the contaminated facility is selected through a process consistent with the national contingency plan ("NCP"); *and* (ii) the initiation of physical on-site construction of the selected remediation for the facility.[4]

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1 42 U.S.C. §§ 9601–9675 (2018).

2 The textual references in the body of this article point to the CERCLA sections as detailed in the enabling act. The citations identify the part of the United States Code where the specific CERCLA section is codified.

3 42 U.S.C. § 9607 (2018).

4 42 U.S.C. §§ 9607, 9613(g)(2)(B) (2018).

This article addresses this statute-of-limitations question in the following order. Section II discusses the relevant portions of CERCLA, including § 107(a) and § 113(g)(2)(B). Section III details the circuit split over the interpretation of § 113(g)(2)(B). Section IV argues for a different approach in interpreting § 113(g)(2)(B). Section V provides concluding thoughts.

II. BACKGROUND

In 1980, Congress enacted CERCLA, 42 U.S.C. §§ 9601–9675, as a "response to the serious environmental and health risks posed by industrial pollution" throughout the United States.[5] CERCLA aims to ensure the "timely cleanup of hazardous waste sites" and "that the costs of such cleanup efforts were borne by those responsible for the contamination."[6] Although its goals are simply stated, CERCLA's statutory implementation scheme is notoriously complex.[7]

CERCLA contains two provisions that allow a potentially responsible party ("PRP") to recover costs for cleaning up a contaminated site from other PRPs.[8] The first of these provisions, § 107(a), provides a broad "right to cost recovery"; the second provision, § 113(f), provides a "separate right[] to contribution."[9] This article focuses on the right to cost recovery under § 107(a).

A. THE ELEMENTS OF A SECTION 107(A) COST-RECOVERY CLAIM.

CERCLA § 107(a) imposes strict liability on PRPs for "hazardous substance"

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5 Burlington N. & Santa Fe Ry. Co. v. United States, 556 U.S. 599, 602 (2009).
6 *Id.* (internal quotations omitted).
7 *See* Territory of Guam v. United States, 593 U.S. 310, 312–14 (2021).
8 *See* 42 U.S.C. §§ 9607(a), 9613(f).
9 Cooper Industries, Inc. v. Aviall Servs., Inc., 543 U.S. 157, 163 (2004). CERCLA's right of contribution under § 113(f) was established via the Superfund Amendments and Reauthorization Act of 1986 (SARA). *Id*. at 162–63.

contamination at a "facility."[10] There are four categories of PRPs (*i.e.,* liable parties):

> (1) the owner and operator of a vessel or a facility,
> (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
> (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and
> (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance[.][11]
> And, among other costs, a PRP is liable for:
> (A) all costs of *removal* or *remedial action* incurred by the United States Government or a State or an Indian tribe *not inconsistent with* the national contingency plan; [and]
> (B) any other necessary *costs of response* incurred by any other person *consistent with* the national contingency plan[.][12]

"Costs of response" means costs of a "removal or remedial action."[13] Therefore, to establish a § 107(a) claim, a party must make the following showing:

Common Elements	Government entities	Private Parties
(1) The site is a "facility"; (2) A "release" or threatened "release" of a "hazardous substance" at the "facility"; and (3) A PRP for the	Elements (1) through (3) plus: (4) a government entity "incurred" "costs of removal or remedial action"; and (5) said actions were "not	Elements (1) through (3) plus: (4) a private entity "incurred" "necessary costs of [a removal or remedial action]"; and (5) said actions were

[10] *Burlington*, 556 U.S. at 608–09. *See also* 42 U.S.C. §§ 9601(9) (defining "facility"), (14) (defining "hazardous substance"), (32) (defining liability).

[11] *See* 42 U.S.C. § 9607(a)(1)–(4).

[12] 42 U.S.C. § 9607(a)(4)(A)–(B) (emphasis added).

[13] 42 U.S.C. § 9601(25) (defining "response" to mean "remove, removal, remedy, and remedial action").

"facility."[14]	inconsistent with the national contingency plan."[15]	"consistent with the national contingency plan."[16]

Once a party has established all these necessary elements, § 113(g)(2) sets the limitations period for when a party needs to file suit based on whether the action seeks "removal" or "remedial action" costs.[17]

B. THE STATUTE OF LIMITATIONS OF A § 107(A) CLAIM

The limitations period for a § 107(a) is set by § 113(g)(2), which provides that "[a]n initial action for recovery of the costs" under § 107 "must be commenced:"

> (A) for a *removal action*, within 3 years after completion of the removal action, except that such cost recovery action must be brought within 6 years after a determination to grant a waiver under section 9604(c)(1)(C) of this title for continued response action; and
> (B) for a *remedial action*, within 6 years after initiation of physical on-site construction of the remedial action, except that, if the remedial action is initiated within 3 years after the completion of the removal action, costs incurred in the removal action may be recovered in the cost recovery action brought under this subparagraph.[18]

Given the different limitations periods and triggering events, it is critical to determine whether the costs being sought are for a "removal" action or "remedial action." However, although they are defined under CERCLA, these terms are far from clear and have significant overlap, causing significant confusion for parties and courts alike.

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14 42 U.S.C. § 9607(a)(1)–(4); *see also* Vine St. LLC v. Borg Warner Corp., 776 F.3d 312, 315 (5th Cir. 2015); Carson Harbor Vill., Ltd. v. Unocal Corp., 270 F.3d 863, 870 (9th Cir. 2001); GenCorp, Inc. v. Olin Corp., 390 F.3d 433, 445 (6th Cir. 2004); Morrison Enters. v. McShares, Inc., 302 F.3d 1127, 1136 (10th Cir. 2002); Gen. Elec. Co. v. AAMCO Transmissions, Inc., 962 F.2d 281, 285 (2d Cir. 1992).

15 42 U.S.C. § 9607(a)(4)(A).

16 42 U.S.C. § 9607(a)(4)(B).

17 *See* 42 U.S.C. § 9613(g)(2)(A)–(B).

18 *Id*. (emphasis added).

C. CERCLA'S DEFINITION OF "REMOVAL" AND "REMEDIAL ACTION."

CERCLA defines "removal" and "remedial action" as follows:

Removal	Remedial Action
[T]he cleanup or removal of released hazardous substances from the environment, such actions as may be necessary taken in the event of the threat of release of hazardous substances into the environment, such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances, the disposal of removed material, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release. The term includes, in addition, without being limited to, security fencing or other measures to limit access, provision of alternative water supplies, temporary evacuation and housing of threatened individuals not otherwise provided for, action taken under section 9604(b) of this title, and any emergency assistance which may be provided under the Disaster Relief and Emergency Assistance Act [42 U.S.C. 5121 et seq.].[19]	[T]hose actions consistent with permanent remedy taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance into the environment, to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment. The term includes, but is not limited to, such actions at the location of the release as storage, confinement, perimeter protection using dikes, trenches, or ditches, clay cover, neutralization, cleanup of released hazardous substances and associated contaminated materials, recycling or reuse, diversion, destruction, segregation of reactive wastes, dredging or excavations, repair or replacement of leaking containers, collection of leachate and runoff, onsite treatment or incineration, provision of alternative water supplies, and any monitoring reasonably required to assure that such actions protect the public health and welfare and the environment.[20]

As illustrated by the above chart, the same action, such as diverting water, covering contaminated soil, providing alternative water supplies, or monitoring can be both a "removal" and "remedial action."[21] This overlap and lack of clarity has caused significant

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19 42 U.S.C. § 9601(23).
20 42 U.S.C. § 9601(24).
21 MPM Silicones, LLC v. Union Carbide Corp., 966 F.3d 200, 220 (2d Cir. 2020).

confusion among the courts.[22] The confusion over whether an action qualifies as a "removal" or "remedial action" has led, in part, to a circuit split on how to discern the start § 113(g)(2)(B)'s six-year limitations period to recover "remedial action" costs under § 107(a).[23]

III. THE CIRCUIT SPLIT OVER § 113(G)(2)(B)'S LIMITATIONS PERIOD.

Circuit are split over when the six-year limitations period under § 113(g)(2)(B) begins for a suit to recover "remedial action" costs under § 107(a). On one side, the Ninth Circuit follows a bright-line rule that the limitations period begins when the remedial action plan for a facility is adopted even if on-site construction of the remediation began at an earlier date.[24] Although the Fifth Circuit has yet to squarely address the limitations question, *Geraghty* suggests a final decision on the remedial action at a site is required before the limitations period can begin.[25]

On the other side of the split, the Second, Sixth, and Seventh Circuits follow a fact-specific approach that starts the limitations period on the date of the on-site construction of the first action that is consistent with the permanent remedy even if no remedial action plan

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22 *See, e.g.*, *id*. at 219 (explaining that "[t]he statutory definitions do not provide clear insight as to the boundary between removals and remediations" because "[t]he definitions of each type of action overlap substantially"); United States v. W.R. Grace & Co., 429 F.3d 1224, 1238–39 (9th Cir. 2005) (explaining that "the overlap between the two definitions" adds "confusion" to trying to determine whether any specific action is a removal or remedial action); Geraghty & Miller, Inc. v. Conoco Inc., 234 F.3d 917, 927 (5th Cir. 2000) (explaining that "[t]here can be some overlap between the two" definitions), *abrogated on other grounds as recognized by Vine St. LLC*, 776 F.3d at 317.

23 *S*ee 42 U.S.C. § 9613(g)(2)(B).

24 *See* Cal. ex rel. Cal. Dep't of Toxic Substances Control v. Neville Chem. Co., 358 F.3d 661, 671 (9th Cir. 2004).

25 *See Geraghty*, 234 F.3d at 927 ("Although G&M suggests that a clean-up program of this magnitude and duration must be categorized as remedial, we are not persuaded. The record shows that the Louisiana Department had yet to issue its final decision, and only that decision will define the ultimate remedial strategy for the Complex.").

has been adopted.[26] A First Circuit has also followed this fact-specific approach.[27]

A. The Bright-Line Rule: The Statute of Limitations begins when the remedial action plan is adopted

In *Neville,* the Ninth Circuit set forth its bright-line rule.[28] *Neville* concerned a dispute between the California Department of Toxic Substances Control ("DTSC") and Neville Chemical Company ("Neville") over historic contamination surrounding Neville's California.[29] In 1986, DTSC issued a Remedial Action Order directing Neville to "(1) begin the process of cleaning the site; (2) conduct a remedial investigation and feasibility study; (3) submit a draft remedial action plan (RAP); and, once the draft RAP was finalized, (4) implement the plan."[30] In 1993, DTSC directed Neville to "implement the extraction and treatment system," which could "potentially become part of the final remedial alternative for the site." [31] DTSC emphasized that this system was an "interim measure to prevent further migration" and that it could not yet determine whether this system would be part of the facility's final remedial action.[32] In April 1994, Neville began excavating three extraction wells at its facility.[33] On May 8, 1995, DTSC approved the final remedial action plan for the facility, incorporating the containment and treatment system initially

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26 *See* Schaefer v. Town of Victor*,* 457 F.3d 188, 203–04 (2d Cir. 2006); *GenCorp, Inc.*, 390 F.3d at 443; United States v. Navistar Int'l Transp. Corp., 152 F.3d 702, 713 (7th Cir. 1998).

27 *See* United States v. Raytheon Co., 334 F. Supp. 3d 519, 526–27 (D. Mass. 2018).

28 Although *Neville's* rule applied to claims brought by a government entity under § 107(a)(4)(A), the *Neville* court that the same rule would apply to claims by private entities under § 107(a)(4)(B) as well. *Neville*, 358 F.3d at 667 n.3; *see also* City of Moses Lake v. United States, 458 F. Supp. 2d 1198, 1218 (E.D. Wash. 2006) (explaining that if the city, a private party, sought remedial action costs under CERCLA it needed to file suit within "six years after its 'remedial action plan,' the Golder Study, was issued").

29 *Neville,* 358 F.3d at 663–64.

30 *Id.*

31 *Id.* at 664–65.

32 *Id.*

33 *Id.* at 665.

designed as an interim measure.[34]

The *Neville* court was tasked with determining the start of "the limitations period for suing to collect remedial action costs from a party responsible for hazardous substances."[35] In answering this question, the *Neville* court reasoned that the limitations period under § 113(g)(2)(B) begins at the "initiation of physical on-site construction of the remedial action."[36] The court then turned to the definition of a remedial action—namely, that for an action to be a remedial action it must be "consistent with permanent remedy."[37] The court concluded that for an action to be "consistent with permanent remedy," the permanent remedy must "already have been adopted" because no party "can be certain that any construction is consistent with a permanent remedy [unless] the permanent remedy is actually selected."[38]

The *Neville* court thus held that the statute of limitations for a remedial action under § 113(g)(2)(B) "can only [begin] after the final remedial action plan is adopted."[39] Applying its rule to the facts of the case, the *Neville* court concluded that because the final remedial action plan was not adopted until May 8, 1995, the statute did not begin to run until that date.[40] Because DTSC filed suit within six years of May 8, 1995, its suit was timely.[41]

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34 *Id.*
35 *Id.* at 663.
36 *Id.* at 669 (quoting 42 U.S.C. § 9613(g)(2)(B)).
37 *Id.* at 666–67 (quoting 42 U.S.C. § 9601(24)).
38 *Id.* at 667.
39 *Id.* at 667.
40 *Id.* at 671.
41 *Id.*

B. THE FACT-SPECIFIC APPROACH: THE LIMITATIONS PERIOD BEGINS ON THE DATE OF THE CONSTRUCTION OF AN ACTION THAT IS CONSISTENT WITH THE PERMANENT REMEDY.

1. SEVENTH CIRCUIT'S UNITED STATES V. NAVISTAR

Navistar appears to be the first circuit court case addressing how § 113(g)(2)(B)'s limitations period triggers. *Navistar* concerns EPA's efforts to address environmental contamination from hazardous wastes deposited in a municipal landfill in Fort Wayne, Indiana.[42] After listing the landfill on the National Priorities List, EPA undertook a formal administrative process, eventually concluding that "the landfill needed to be covered with a permanent clay cap to isolate the hazardous materials from the rest of the environment."[43] In 1989, the United States sued SCA Services of Indiana, Inc. ("SCA"), the owner of the landfill, and subsequently filed a consent decree that the district court approved that same year.[44] The consent decree called for the creation of a remedial design for the site and stipulated that remedial action at the site would only begin after EPA and the state of Indiana approved the remedial design.[45]

On September 11, 1990, SCA submitted the final remedial design to EPA.[46] On September 14, EPA orally approved the final design.[47] On September 17, EPA gave oral authorization for SCA to proceed with the construction of the remedial action.[48] The next day, September 18, the "first 'lift' of clay to build the permanent clay cap was placed on the landfill."[49] The United States subsequently sued Navistar on September 19, 1996 to

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42 *Navistar*, 152 F.3d at 704.
43 *Id.*
44 *Id.*
45 *Id.*
46 *Id.* at 705.
47 *Id.*
48 *Id.*
49 *Id.*

recover the remedial action costs not covered by the consent decree.[50]

Faced with these facts, the *Navistar* court was asked to determine when § 113(g)(2)(B)'s six-year statute of limitations for remedial actions began.[51] To answer this question, the *Navistar* court focused solely on § 113(g)(2)(B)'s text and the definition of "remedial action."[52] Based on these provisions, the Court concluded that if the action at issue was "consistent with [the] permanent remedy," then the limitations period begins to run at the "initiation of physical on-site construction" of that action.[53] There was no dispute that remediation required the construction of a permanent clay cap."[54]

The *Navistar* court thus held that, because the permanent clay cap was consistent with the permanent remedy and the initial construction of that cap occurred on September 18, 1990, § 113(g)(2)(B)'s six-year limitations period began on that date and ended on September 18, 1996, the day *before* the United States filed suit, rendering that suit time-barred.[55] Notably, the Court also held that the inadequacy of the clay was irrelevant because the statute does not require that an initial construction be successful.[56]

2. SIXTH CIRCUIT'S GENCORP, INC. V. OLIN CORP

Six years after *Navistar,* the Sixth Circuit followed suit in *GenCorp*, concerning a dispute over responsibility for the cleanup of the Big D landfill in Ohio.[57] As a part of its operations, Olin Corp. sent hazardous waste to the Big D landfill between 1964 and 1976.[58]

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50 *Id.*
51 *See id.* at 706.
52 *Id.* at 711, 714.
53 *Id.* at 714.
54 *Id.* at 713.
55 *Id.*
56 *Id.*
57 *See GenCorp, Inc.*, 390 F.3d at 438–49.
58 *See id.* at 439. For the purposes of this article, the complicated business relationship between GenCorp and Olin Corp, which is not material to the discussion on the statute of limitations, is omitted.

In the 1980s, EPA took an interest in the landfill after learning that Olin had deposited 28,000 tons of waste at the landfill.[59]

In 1982, Olin, of its own initiative and in consultation with state officials, performed an erosion-control measure to increase the landfill's slope gradient through the addition of topsoil and clay to re-direct storm water run-off.[60] Olin then informed the EPA about its efforts and claimed that the landfill no longer posed a significant threat to human health and the environment and that no further actions were required.[61] EPA disagreed.[62] On March 27, 1990, after negotiations on a remedial action plan fell through, EPA issued a unilateral administrative order requiring Olin to implement EPA's remedial action plan for the landfill.[63] In 1992, Olin began to implement that plan.[64] On October 25, 1993, GenCorp filed a declaratory action against Olin seeking a declaration that it was not liable for remediation action costs at the landfill, and Olin filed a counterclaim seeking those costs from GenCorp.[65]

Faced with these facts, the *GenCorp* court was asked to determine when § 113(g)(2)(B)'s six-year statute of limitations began.[66] In answering this question, the *GenCorp* court, like the *Navistar court,* reviewed § 113(g)(2)(B)'s text and the definition of "remedial action."[67] The *GenCorp* court reviewed with the district court's consideration of the National Contingency Plan regulations, but it noted that the "salient point" is the

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59 *Gencorp, Inc*., 390 F.3d, at 440.
60 *Id*.
61 *Id*.
62 *Id*.
63 *Id*.
64 *Id*.
65 *Id.* at 441.
66 *Id.* at 443.
67 *Id.* at 445.

definition of "remedial action."[68] The court then explained that the 1982 erosion-control measures—namely, adding topsoil and clay and changing the slope of the landfill—did not qualify as "remedial actions" because they were "inconsistent with the federal EPA's remedial plan" issued in March 1990.[69] The final remedial action plan, the Court continued, forced Olin to "dismantle its previous work at the [landfill]."[70] Therefore, the court concluded, "Olin's actions in the 1980s did not trigger the statute of limitations for recovery of its costs related to its remedial actions over a decade later."[71] The *GenCorp* court also discussed the Ninth Circuit's bright-line rule, as the district court had held that the 1982 erosion-control could not be a "remedial action" because "it took place before . . . EPA's unilateral administrative order implementing the final plan for the [landfill]."[72] Unlike the district court, the *GenCorp* court withheld judgment on "whether to adopt the Ninth Circuit's bright-line rule because it would not affect the outcome of this case."[73]

3. SECOND CIRCUIT'S SCHAEFER V. TOWN OF VICTOR

Eight years after *Navistar* and two years after *GenCorp,* the Second Circuit joined the fray in *Schaefer,* a case about efforts to address environmental contamination at a landfill.[74] William Schaefer operated a landfill in New York between 1968 and 1993.[75] During this time, several entities deposited waste at the landfill; some of which turned out to contain hazardous substances.[76]

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68 *Id.* at 444.
69 *Id.*
70 *Id.*
71 *Id.* at 445.
72 *Id.* at 444–45.
73 *Id.*
74 *See Schaefer*, 457 F.3d at 190.
75 *Id.*
76 *Id*. at 191.

In the 1980s, Schaefer and the New York State Department of Environmental Conservation ("DEC") began discussing a renewal of Schaefer's permit.[77] However, after learning that the landfill had received waste containing hazardous substances, in 1986, DEC denied Schaefer's renewal application and "directed Schaefer to close the landfill no later than October 31, 1986."[78] Despite being ordered to close the landfill, Schaefer continued to operate the landfill without a permit while seeking to renew his old permit.[79]

In November 1990, Schaefer purchased a dragline–crawler crane, a piece of equipment necessary to "start th[e] closure."[80] Schaefer used the crane to "dig, drag, and spread on-site soil and other material over the site as cover."[81] Both parties agreed these actions were "clearly remedial"—especially this use of the crane to "dig, drag, and spread soil over the site as cover."[82]

Also in 1990, Schaefer entered into a Consent Order with DEC requiring Schaefer to investigate the contamination at the landfill.[83] In 1992, Schaefer and DEC entered into a second Consent Order (1992 CO) whereby Schaefer "agreed to close the landfill in an environmentally sound manner and to provide post-closure care of the landfill."[84] Schaefer continued to operate the landfill until April 30, 1993, when he "began [the] permanent closure" of the landfill.[85] Several months later, on August 6, 1993, Schaefer submitted a

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77 *Id.*
78 *Id.*
79 *Id*.
80 *Id.* at 203 (internal quotations omitted).
81 *Id.* at 204. The *Schaefer* court also notes that Schaefer took several other actions—without disclosing what those actions were—that "were part of a remedial action and were necessary preparations for closure." *Id.* at 204.
82 *Id*. at 203205.
83 *Id*. at 191.
84 *Id.* at 192.
85 *Id.*

revised closure/post-closure plan, which DEC approved.[86] On January 13, 1999, Schaefer sued to recover his response costs under § 107(a).[87]

Faced with these facts, the *Schaefer* court was asked to determine when § 113(g)(2)(B)'s six-year statute of limitations began.[88] In answering this question, the *Schaefer* court—like the *Navistar* court—relied solely on the text of § 113(g)(2)(B) and the definition of "remedial action."[89] The Court concluded that the use of the crane to cover the landfill constituted on-site construction and since that construction started over six years before he filed suit, Schaefer's § 107(a) cost-recovery claim was time-barred.[90]

IV. BETTER APPROACH

Neither of the competing approaches to identifying the trigger date for § 113(g)(2)(B)'s six-year limitations period correctly applies the rules governing statutes of limitations or adheres to CERCLA's text and implementing regulations. On one hand, *Navistar, GenCorp,* and *Schaefer,* the cases that take a fact-specific approach, err by failing to consider the detailed requirements imposed by the NCP.[91] On the other, *Neville*—decided in the only circuit applying the bright-line rule—errs by failing to wait until on-site construction begins after the NCP requirements are met.[92]

A faithful application of the statute-of-limitations rules, CERCLA's text, and the NCP regulations suggests that the six-year period under § 113(g)(2(B) starts *after*: (i) the

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86 *Id.* Schaefer submitted its original closure/post-closure plan on June 4, 1993, but DEC rejected that plan.
87 *Id.* at 193. By the time of the appeal, it appears that William Schaefer was deceased, as his executor, Betty J. Schaefer, is listed as the named appellant. *Id.* at 188. For consistency, the masculine pronoun is used when referring to Schaefer's lawsuit.
88 *Id.* at 190, 203.
89 *Id.* at 203.
90 *Id.* at 205, 210.
91 *See id.* at 203–04; *Gencorp, Inc*., 390 F.3d at 445; *Navistar*, 152 F.3d at 713.
92 *Neville*, 358 F.3d at 666.

permanent remediation standard for a facility is selected in accordance with the NCP—*that is,* after considering alternative remediation options, gathering public comment, and selecting the final remediation for the facility—and (ii) physical on-site construction of the selected remediation for the facility begins.[93] To date, only one court has applied a similar rule.[94]

To arrive at this interpretation, we must first consider the rules governing statutes of limitations. After that, we consider CERCLA's text and the regulations governing the NCP. Finally, we synthesize these concepts while examining the text of § 113(g)(2)(B).

A. RULES GOVERNING STATUTES OF LIMITATIONS.

Because § 113(g)(2)(B) is a statute of limitations, deciphering its meaning requires understanding how such statutes work. A statute of limitations creates "a time limit for suing in a civil case, based on the date when the claim accrued."[95] "A right accrues when it comes into existence—i.e., when the plaintiff has a complete and present cause of action[.]"[96] A plaintiff has a complete cause of action when they can file suit and obtain relief.[97] A right of action is complete when "all the elements essential to its existence are present."[98]

The limitations period generally begins on the date the claim accrues and ends when the prescribed limitations period expires.[99] However, the default rule may be displaced if

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93 *See* 42 U.S.C. § 9613(g)(2)(B).

94 United States v. Boeing Co., 670 F. Supp. 3d 1185, 1194 (W.D. Wash. 2023) (explaining that "to resolve Boeing's statute-of-limitations defense, the court must determine when on-site construction consistent with the final remedy began, after the final remedial action plan was adopted").

95 CTS Corp. v. Waldburger, 573 U.S. 1, 7 (2014).

96 Corner Post, Inc. v. Bd. Of Governors of the Fed. Rsrv. Sys., 603 U.S. 799, 800 (2024).

97 Bay Area Laundry & Dry Cleaning Pension Tr. Fund v. Ferbar Corp. of Cal., 522 U.S. 192, 201 (1997).

98 United States v. Atl. Mut. Ins. Co., 298 U.S. 483, 489 (1936).

99 *See* Graham Cnty. Soil & Water Conservation Dist. v. United States *ex rel.* Wilson, 545 U.S. 409, 418 (2005).

the statute "create[s] a cause of action that accrues at one time for the purpose of calculating when the statute of limitations begins to run, [and] at another time for the purpose of bringing suit."[100]

A statute of limitations that governs a right afforded to a government entity "must receive a strict construction in favor of the [g]overnment."[101] Unless expressly provided for in the text of the statute, one might expect the same statute of limitations trigger to apply evenly to a government entity and private party.[102] And, importantly, statute of limitations "should be interpreted to provide a clear accrual date, so that each party—but especially the State as plaintiff—knows when the time to bring suit runs out."[103]

Applying these rules to § 113(g)(2)(B) shows that its six-year limitations period *cannot* begin tolling until all the elements of a § 107(a) claim are present.[104] However, the right to sue may vest at a different time than when the claim accrues. The trigger and limitations period should typically be the same for a government or private-entity plaintiff, and the accrual date should be clear to ensure that parties know their deadlines to file suit. With these rules in mind, the next step is to consider the elements necessary to establish a § 107(a) claim.

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100 Reiter v. Cooper, 507 U.S. 258, 267 (1993) (noting, however, that the Court would be hesitant to "infer such an odd result in the absence of any such indication in the statute.").

101 Badaracco v. Comm' of Internal Revenue, 464 U.S. 386, 391 (1984) (quoting E.I. Du Pont De Nemours & Co. v. Davis, 264 U.S. 456, 462 (1924)).

102 *See Navistar,* 152 F.3d at 712 n.17 (noting an array of statute-of-limitations triggers that a government agency might be subjected to depending on its involvement in clean-up); *see also* Schaefer, 457 F.3d at 209 (describing different ways that both private entities and governments might alter when a statute of limitations tolls).

103 *Neville*, 358 F.3d at 666.

104 *See* 42 U.S.C. §§ 9607, 9613(g)(2)(B).

B. THE NECESSARY ELEMENTS OF A § 107(A) CLAIM.

A § 107(a) claim requires that the claimant establish liability and costs.[105] Since a party incurs cleanup costs after liability for contamination has been established, the elements related to costs are usually established last in a § 107(a) claim. As such, determining the date when all the elements of a claim are complete requires understanding when the elements related to cost are met.

The two cost-specific elements are detailed in § 107(a)(4)(A) and (B) and vary depending on whether the party seeking response costs is a governmental entity or private party. A government entity must show that: (i) it incurred remedial action costs that are (ii) *not inconsistent* with the NCP.[106] A private party must show that: (i) it incurred *necessary* remedial actions costs that are (ii) *consistent* with the NCP.[107] The italics highlight the differences between the two cost-related elements.

While private parties and governmental actors face different standards, both must incur remedial action costs and comply with the NCP.

1. A PARTY MUST INCUR REMEDIAL ACTION COSTS

A § 107(a) claim requires a showing that the claimant incurred "remedial action" costs. Therefore, it is critical to determine when a party has taken "remedial action" for which costs are recoverable. CERCLA defines "remedial action" as:

> [T]hose actions[] *consistent with permanent remedy* taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance into the environment, to prevent or minimize the release of hazardous substances so that they do not migrate to cause

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[105] *See* City Colton v. Am. Promotional Events, Inc.-W., 614 F.3d 998, 1002–03 (9th Cir. 2010) (detailing elements of a § 107(a) claim as requiring liability and incurring costs consistent with NCP); Young v. United States, 394 F.3d 858, 862 n.3 (10th Cir. 2005) (detailing same and substantial agreement of circuits on § 107(a) elements); *see also Young*, 394 F.3d at 863–64 (detailing all five elements).

[106] 42 U.S.C. § 9607(a)(4)(A).

[107] 42 U.S.C. § 9607(a)(4)(B).

> substantial danger to present or future public health or welfare or the environment.[108]

CERCLA provides several examples of actions that may qualify as a "remedial action":

> The term includes, but is not limited to, such actions at the location of the release as storage, confinement, perimeter protection using dikes, trenches, or ditches, clay cover, neutralization, cleanup of released hazardous substances and associated contaminated materials, recycling or reuse, diversion, destruction, segregation of reactive wastes, dredging or excavations, repair or replacement of leaking containers, collection of leachate and runoff, onsite treatment or incineration, provision of alternative water supplies, and any monitoring reasonably required to assure that such actions protect the public health and welfare and the environment[109]

In short, as defined, "remedial action[s]" are "those actions *consistent with permanent remedy*" that are taken to address the release or threatened release of hazardous substance and can take the form of one of the examples provided in the definition.[110] CERCLA defines a "remedy" as the same as "remedial action."[111]

This renders the "remedial action" problematically circular. A circular definition uses the term being defined in its own definition.[112] A "remedial action" is, in part, an "action[] consistent with permanent remedy"; a "remedy," in turn, is defined to have the same meaning as a "remedial action."[113] In other words, because a "remedy" and a "remedial action" mean the same thing, a "remedial action" is statutorily defined only by reference to itself: a "remedial action" is an "action[] consistent with permanent [remedial

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108 42 U.S.C. § 9601(24) (emphasis added).
109 *Id.*
110 *Id.*; *see, e.g., Neville,* 358 F.3d at 666–67; *Navistar,* 152 F.3d at 711.
111 42 U.S.C. § 9601(24) (providing that "[t]he terms 'remedy' or 'remedial action' mean[] those actions consistent with permanent remedy").
112 Moneygram Int'l, Inc. & Subsidiaries v. Comm'n., 664 F. App'x 386, 390 (5th Cir. 2016).
113 *See* 42 U.S.C. § 9601(24).

action]."[114] The same is true when "remedy" is used: a "remedy" is an "action[] consistent with a permanent remedy."[115]

When faced with a circular definition, courts interpret the statutory term based on its ordinary meaning.[116] While one interpretation of this rule requires understanding "remedial action" based on its ordinary meaning, the better approach is to apply the dictionary definition only to the word "remedy" as used in "consistent with the permanent *remedy."*[117]

The Court consults the dictionary to derive the "ordinary and natural" meaning of a word..[118] According to the American Heritage Dictionary, a "[r]emedy" is "something that *corrects*, counteracts, or removes an evil or wrong."[119] To "correct" means "to make conform to a *standard*" or "conforming or adhering to an established *standard*."[120]

Applying the ordinary meaning of "remedy" in this context suggests that "remedial action" is an "action[] *consistent with permanent [correction]* taken . . . to prevent or minimize the release of hazardous substances so that they do not migrate to cause

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114 *Id.*

115 *Id.*

116 United States v. Bestfoods, 524 U.S. 51, 66 (1988) (applying the ordinary meaning to the "useless[]" definition of "'operator' as 'any person . . . operating' the facility" (quoting 42 U.S.C. § 9601(20)(A)(ii)); United States v. Nature's Way Marine, L.L.C., 904 F.3d 416, 420 (5th Cir. 2018) (applying the ordinary meaning to "owner or operator" under the Oil Pollution Act due to circular definition); E. Bay Mun. Util. Dist. v. U.S. Dep't Com., 142 F.3d 479, 484 (D.C. Cir. 1998) (applying the ordinary meaning to "owner or operator" under CERCLA); Edward Hines Lumber Co. v. Vulcan Materials Co., 861 F.2d 155, 156 (7th Cir. 1988) (applying the ordinary meaning to "owner or operator" under CERCLA).

117 42 U.S.C. § 9601(24) (emphasis added); *see also* Duncan v. Walker, 533 U.S. 167, 167 (2001) (explaining the "Court's duty to give effect, where possible, to every word of a statute").

118 *Bestfoods*, 524 U.S. at 66.

119 AM. HERITAGE DICTIONARY, https://ahdictionary.com/word/search.html?q=remedy (last visited Sep. 6, 2024) (defining "remedy" as "[s]omething that corrects an evil, fault, or error").

120 *Remedy*, WEBSTER'S NEW WORLD DICTIONARY 312 (3d ed. 1988) (emphasis added); *Correct*, AM. HERITAGE DICTIONARY, https://ahdictionary.com/word/search.html?q=correct (last visited Mar. 30, 2025) (defining "correct" as "[t]o adjust so as to meet a required standard or condition" or "[c]onforming to standards").

substantial danger to present or future public health or welfare or the environment."[121] Because a correction requires a standard the harm must conform or adhere to, an action consistent with a permanent correction requires setting a standard for the corrective measure to follow. But a standard to follow is not enough; it must "prevent or minimize the release of hazardous substances so that [said substances] do not migrate to cause substantial danger to present or future public health or welfare or the environment."[122]

This interpretation of "remedial action" conflicts notably with a long line of cases that effectively define "remedial action" as a long-term or permanent action.[123] These cases also contrast "remedial action" with the definition of "removal" actions, which are generally defined as short-term actions to an immediate threat.[124]

There are some fundamental problems with defining "remedial action" as long-term or permanent action. *First*, doing so disservices the statutory text. Although this interpretation applies CERCLA's definition of "permanent," it ignores that what needs to be permanent is the "remedy." As detailed above, "remedy" is synonymous with "correction." Thus, "remedial action" is not merely long-term or permanent action, it must also be a permanent correction for a release of hazardous substance.

Second, defining "remedial action" as just long-term or permanent action ignores

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121 42 U.S.C. § 9601(24).

122 *Id.*

123 *See MPM Silicones*, 966 F.3d at 214 (explaining that "'[r]emedial actions' are generally long-term or permanent containment or disposal programs. . . ."'); Minn. ex rel. N. Pac. Ctr., Inc. v. BNSF Ry. Co., 686 F.3d 567, 573 (8th Cir. 2012) (explaining "remedial actions are longer term, more permanent responses"); Black Horse Lane Assoc., L.P. v. Dow Chem. Corp., 228 F.3d 275, 293 (3d Cir. 2000) (explaining "remedial actions involve long term remedies"); U.S. v. Lowe, 118 F.3d 399, 402 (5th Cir. 1997) (explaining "a 'remedial action' is generally considered a long-term response or permanent solution); Wash. State Dep't Transp. v. Wash. Nat. Gas Co., 59 F.3d 793, 800 n.6 (9th Cir. 1995) (explaining "CERCLA defines 'remedial' actions essentially as long-term or permanent measures").

124 *See, e.g., Minn.*, 686 F.3d at 573; *MPM Silicones*, 966 F.3d at 215; *Black Horse Lane*, 228 F.3d at 293; *Lowe*, 118 F.3d at 402

that—because of the overlap between the definition of a "remedial action" and "removal" action—the same some action could be both, which prevents the party from knowing whether it has triggered the statute of limitations when the action is taken. CERCLA's definition of "remedial action" refutes the long-term versus short-term distinction by suggesting that a "remedial action" may be the only action at a facility—meaning that "remedial action" can cover both short-term and long-term actions to address the release of hazardous substances.[125]

Instead of defining "remedial actions" as long-term or permanent actions, the better reading of CERCLA's statutory text is that a "remedial action" is an action that either: (i) establishes a permanent standard to prevent or minimize the release of hazardous substances so that such substances do not migrate or present a substantial danger to public health or welfare or the environment at the facility (the "Permanent Correction Standard"), or (ii) implements and conforms to the an established Permanent Correction Standard. The Permanent Correction Standard may require implementating one or more of the actions listed in the definition of "remedial action."

2. THE INCURRED REMEDIAL ACTION COSTS ADHERED TO THE NCP

A § 9607(a)(4)(A) claim requires the claimant to show that the "remedial action [costs] incurred by the United States Government or a State of an Indian tribe" were "not inconsistent with the [NCP]."[126] Courts considering this difference in language have concluded that it goes to the burden of proof. For example, courts have interpreted the "not

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[125] *See* 42 U.S.C. § 9601(24). (defining "remedial action" as "those actions consistent with permanent remedy taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance into the environment. . . ." (emphasis added)).

[126] 42 U.S.C. § 9607(a)(4).

inconsistent with" language as creating a presumption that a government's remedial action is consistent with the NCP.[127] Put differently, a private claimant must show that it adhered to the NCP when conducting its remedial action. The NCP details the "procedures for preparing for and responding to discharges of oil and releases of hazardous substances, pollutants, and contaminants."[128] EPA promulgated the NCP regulations, which are found in Part 300 of Title 40 of the Code of Federal Regulations, pursuant to CERCLA § 105.[129] The NCP's definition of "remedial action" and "remedy" is similar to CERCLA's definition—both define these terms to mean "those actions consistent with permanent remedy."[130] After *Loper Bright Enterprises v. Raimondo* overruled *Chevron* deference, parties should be cautious in relying on the part of the NCP's definition of "remedial action" and "remedy" that differ from the statutory definition in § 101(24).[131]

The NCP requires, among other things, that a remedial action proceed in the following sequence: (1) remedial site evaluation; (2) remedial investigation and feasibility study ("RI/FS"); (3) selection of a remedy; (4) remedial design; and (5) remedial action.[132] The goal is to "select remedies that are protective of human health and the environment."[133]

The NCP process begins with the remedial site evaluation, which may consist of a remedial preliminary assessment and remedial site inspection.[134] The RI/FS phase then

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127 *See, e.g., Washington State Dep't of Transp.*, 59 F.3d at 799 (explaining that "when the United States government, a state, or an Indian tribe is seeking recovery of response costs, consistency with the NCP is presumed").

128 40 C.F.R. § 300.1.

129 *Cooper Industries*, 543 U.S. at 161 n.2 (explaining the NCP "specifies procedures for preparing and responding to contaminations and was promulgated by the Environmental Protection Agency (EPA) pursuant to CERCLA § 105, 42 U.S.C. § 9605[]").

130 *Compare* [40 C.F.R.] § 300.5 *with* 42 U.S.C. § 9601(24).

131 Loper Bright Enterprises v. Raimondo, 603 U.S. 369 (2024).

132 *See* 40 C.F.R. §§ 300.420, 300.430, 300.435, 300.700(c)(5) (2025).

133 *Id.* § 300.430(a)(1)(i).

134 *Id.* § 300.420(a).

"assess[es] site conditions and evaluate[s] alternatives to the extent necessary to select a remedy."[135] A feasibility study is prepared to develop and evaluate alternative remedial options from which the appropriate remedy will be selected.[136] The evaluation includes consideration of the cost of construction for each proposed option.[137] Importantly, the feasibility study "may not be completed until [public] comments on the proposed plan are received."[138]

After the RI/FS phase, the "selection of [the] remedy" process begins.[139] The remedies selected must "reflect the scope and purpose of the actions being undertaken and how the action relates to long-term, comprehensive response at the site."[140] The selection process occurs in two steps. First, "the lead agency, in conjunction with the support agency, identifies a preferred alternative and presents it to the public in a proposed plan, for review and comment," and second, "the lead agency . . . review[s] the public comments and consult with the state (or support agency) in order to determine if the alternative remains the most appropriate remedial action for the site or site problem."[141] "The lead agency [then] make[s] the final remedy selection decision and document[s] that decision in the [record of decision]."[142]

Once the final remedy is selected, the next step is to develop a remedial design and

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135 *Id.* § 300.430(a)(2).
136 *Id*. § 300.430(e).
137 *Id.* § 300.430(e)(7)(iii).
138 *Id.* § 300.430(e)(9)(iii)(I); *see also id.* §§ 300.430(c) (detailing community relations requirements for RI/FS process), 300.700(c)(6)(iii) (applying community relations provisions in § 300.430(c) to private parties).
139 *See id.* § 300.430(f).
140 *Id.* § 300.430(f)(1).
141 *Id.* § 300.430(f)(1)(ii); *see id.* § 300.700(c)(5)(viii), (6)(iv) (applying the selection of remedy requirements, including public participation obligation, on private parties).
142 *Id.* § 300.430(f)(4)(i).

implement the remedial action.[143] In this remedial design/remedial action ("RD/RA") stage, the "actual design of the selected remedy and implementation of the remedy through construction" occurs.[144] The RD/RA activities must "conform[] with the remedy selected and set forth in the ROD or other decision document for that site."[145] "After the completion of the final engineering design, the lead agency shall issue a fact sheet and provide, as appropriate, a public briefing prior to the initiation of the remedial action."[146]

Therefore, to establish the final cost-related element for "remedial action" costs under § 107(a), the claimant must show that it followed NCP's remedial action requirements from site evaluation through public comment[147] on the proposed remedy to construction of the remedial action.[148]

3. THE COST-RELATED ELEMENTS COMBINED

The two cost-related elements detailed above work together to require setting a

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143 *See id.* § 300.435(a); *id.* § 300.700(c)(5)(ix), (applying these requirements to private parties).

144 *Id.* § 300.435(a).

145 *Id.* § 300.435(b)(1).

146 *Id.* § 300.435(c)(3).

147 In certain circuits, significant agency involvement in the consideration and ultimate selection of remediation options for a contaminated site is sufficient to meet the public participation requirements in the NCP. *See, e.g.,* Bedford Affiliates v. Sills, 156 F.3d 416, 428 (2d Cir. 1998) (explaining that state agency involvement in negotiating consent order, investigating the implementation of the preliminary site assessment and the interim remedial measure, and generally overseeing the progress of the cleanup and the soil vapor evacuation system "is an effective substitute for public comment" and "fulfill[s] the public participation requirement").

148 The NCP regulations provide further guidance on when an action is consistent or not inconsistent with the NCP:

> (3) For the purpose of cost recovery under section 107(a)(4)(B) of CERCLA:
> (i) A private party response action will be considered "consistent with the NCP" if the action, when evaluated as a whole, is in substantial compliance with the applicable requirements in paragraphs (5) and (6) of this section, and results in a CERCLA-quality cleanup; and
> (ii) Any response action carried out in compliance with the terms of an order issued by EPA pursuant to section 106 of CERCLA, or a consent decree entered into pursuant to section 122 of CERCLA, will be considered "consistent with the NCP."

40 C.F.R. § 300.700(c)(3). Furthermore, an action will not be considered inconsistent or not consistent with the NCP "based on immaterial or insubstantial deviations from the provisions of 40 C.F.R. part 300." *Id.* § 300.700(c)(4). Parties should be cautious in relying on these provisions in light of *Loper Bright. See, supra,* n. 19.

permanent standard for facility cleanup and ensuring that cleanups follow that standard.[149] The fourth element requires that the costs be incurred for a "remedial action"—*namely,* an action that either establishes the Permanent Correction Standard or implements that standard.[150] The fifth element confirms this requirement by mandating that the "remedial action" be consistent with the NCP—namely, the establishment of the Permanent Correction Standard and its implementation follow the NCP's detailed requirements.[151] With these elements in mind, we next look to § 113(g)(2)(B) to determine when the right to sue vests, when the limitations period begins, and whether these dates are the same.

a. Limitations period in § 113(g)(2)(B)

CERCLA § 113(g)(2)(B) sets the limitations period for a "remedial action" under § 107(a).[152] Under § 113(g)(2)(B), "an initial action for recovery of [remedial action] costs . . . must be commenced . . . within 6 years after *initiation of physical on-site construction of the remedial action*[.]"[153] Moreover, "[e]xcept as otherwise provided in this [§ 113(g)(2)], an action may be commenced under section 9607 . . . for recovery of costs at *any time after such costs have been incurred*."[154]

CERCLA § 113(g)(2)(B) therefore sets different dates for when a party can sue and the limitations period, thereby rejecting the default limitations rule.[155] *First*, § 113(g)(2)(B) allows a party to sue as soon as it has a complete claim even if on-site construction has not yet begun. This makes sense give that remedial action includes costs needed to establish

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149 40 C.F.R. §§ 300.430(f)(1)(ii)(E).
150 *See supra* Section IV.B.i.; 42 U.S.C. § 9601(24).
151 42 U.S.C. § 9607(a)(4)(A).
152 42 U.S.C. § 9613(g)(2)(B).
153 *Id.* (emphasis added).
154 *Id.* (emphasis added).
155 *See supra* Section IV.B.i.

the Permanent Correction Standard which the construction will implement. *Second,* § 113(g)(2)(B) delays the start of the six-year limitations period until the initiation of physical on-site construction of the remedial action, which will occur at some point after a party first incurs the "remedial action" costs to establish the Permanent Correction Standard.[156]

Three examples illustrate the duality of § 113(g)(2)(B). *First,* consider the feasibility study and the corresponding public comment requirement (*that is,* actions to establish the Permanent Correction Standard). The feasibility study develops and evaluates remedial action options and provides those options for public comment.[157] Because the feasibility study (or other document that serves the same function of evaluating remediation options) and public comment process generate costs and those costs are "remedial action" costs—*namely,* costs to establish the Permanent Correction Standard—once a party incurs such a cost, assuming all other elements are met, it can file suit in court to recover its costs. However, incurring said costs does not begin the six-year statute of limitations.[158] Similarly, to the extent work is performed at the facility during or after the feasibility study, that work cannot begin the statute of limitations period because no permanent standard has been set in the feasibility study and, even if one had, it did not comply with the NCP's requirements for setting that standard.[159]

Second, consider the selection of the remedy and corresponding public comment

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156 *See Reiter*, 507 U.S. at 267 (explaining that, with proper indication from a statute, "a statute [can] create a cause of action that accrues at one time for the purpose of calculating when the statute of limitations begins to run, but at another time for the purpose of bringing suit"); 42 U.S.C. § 9607, 9613(g)(2)(B).

157 40 C.F.R. § 300.430(c), (e); *id.* at § 300.700(c)(6)(iii).

158 *See* 42 U.S.C. § 9607, 9613(g)(2)(B).

159 *Id.*

requirement (*that is,* actions to establish the Permanent Correction Standard). The selection process is a two-step process where the relevant agency selects its preferred remediation option and seeks public comment, which it then reviews to evaluate whether its preferred option is the most appropriate.[160] The agency then selects a final remedy and records its decision.[161] As with the feasibility study and corresponding public comment, the costs incurred during the selection process are "remedial action" costs.[162] Once a party incurs such a cost, and assuming all other elements are met, it can file suit to recover said cost.[163] However, as with the feasibility study, merely selecting a final remediation option does not begin the statute of limitations.

The six-year statute of limitations period does not begin until on-site construction for the selected remediation option begins.[164]

Therefore, although a party may sue for remedial action costs as soon as it has a complete cause of action, the six-year statute of limitations only begin *after* the agency has considered alternative remediation options, reviewed public comment on those options, selected the facility's final remediation and initiated physical on-site construction in accordance with the Permanent Correction Standard. To date, only Judge James L. Robart from the Western District of Washington has applied a similar standard.[165]

V. CONCLUSION

CERCLA is a notoriously complex statute with less than clear language, and its

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160 40 C.F.R. § 300.430(f)(1)(ii), (f)(2).
161 *Id.* § 300.430(f)(4)(i), (f)(5)(i).
162 *See id.* § 300.5 (defining "remedial action"); id. § 300.430(f)(1)(ii)(D).
163 *See* 42 U.S.C. § 9607(a)(4)(A)–(B).
164 *Id.*
165 *See Boeing*, 670 F. Supp. 3d at 1194.

statute of limitations to recover remedial action costs is no exception. However, diligent application of the rules for interpreting statutes of limitations combined with faithful adherence to CERCLA's text can shed some light through the fog. Under § 113(g)(2)(B), a party must sue to recover its "remedial action" costs under § 107(a) no later than six years after two conditions are met: (i) selection of the permanent remediation standard for the contaminated facility through a process consistent with the national contingency plan ("NCP") *and* (ii) initiation of physical on-site construction of the selected remediation for the facility. Although this is the fractional view, as only one district court has applied a similar test, hope springs eternal that tomorrow brings a new direction.

The Emerging Trend of State Climate Superfund Bills and the Cases Against Them[1]

By Ashleigh K. Myers, Amanda G. Halter, Jillian Marullo, Kelsey Parker

[1] This is a rapidly evolving area of law. This article reflects legislative and case developments as of September 29, 2025.

I. INTRODUCTION

State infrastructure budgets are increasingly burdened by the costs associated with recovery from and adaptation to extreme weather events. For example, the Great Vermont Flood of July 2023 resulted in over $1 billion in flood damage from a single rain event.[2] Just after the one year anniversary of the storm, Vermont was again hit by torrential rains and flooding from the remnants of Hurricane Beryl—one of the many devastating and costly storms of the 2024 hurricane season that wreaked havoc across the U.S.[3] Further, in 2025, Southern California was devastated by raging wildfires that caused over $250 billion in economic loss.[4] To address the growing financial burdens of extreme weather and natural disasters, lawmakers from thirteen states have sponsored so-called "Climate Superfund" bills in hopes of boosting their states' budgets to repair and better prepare their infrastructure. The first two states to enact such laws—Vermont and New York—are already defending them in court against challenges rooted in federal preemption and constitutional limitations.

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2 *The Great Vermont Flood of July 2023*, ARCGIS STORYMAPS: NWS BURLINGTON, VT (Nov. 15, 2023), https://storymaps.arcgis.com/stories/1734322dab92443386f0a04a9ddbe857; Olivia Geiger, *The Vermont Legislature Considers 'Superfund' Legislation to Compensate for Climate Change*, INSIDE CLIMATE NEWS (Apr. 19, 2024), https://insideclimatenews.org/news/19042024/vermont-legislature-climate-change-superfund/.

3 Lisa Rathke, *A second person has died in Vermont flooding from Hurricane Beryl's remnants, officials say*, ASSOCIATED PRESS (July 12, 2024), https://apnews.com/article/hurricane-beryl-flooding-6e85b0dff85e00938a3de7d15b61d197; Bob Berwyn, *As Hurricane Beryl Surged Toward Texas, Scientists Found Human-Driven Warming Intensified Its Wind and Rain*, INSIDE CLIMATE NEWS (July 8, 2024), https://insideclimatenews.org/news/08072024/beryl-texas-warming-intensified-wind-rain/.

4 Lauren Sommer, *Here's how climate change fueled the Los Angeles fires*, NPR (Jan. 29, 2025), https://www.npr.org/2025/01/29/nx-s1-5273676/la-fires-climate-change-rainfall-extreme-weather. *See* Curt Barry, *L.A. Wildfires Revive Push For California Climate 'Superfund' Legislation,* INSIDEEPA.COM (Jan. 8, 2025), https://insideepa.com/daily-news/la-wildfires-revive-push-california-climate-superfund-legislation; Alex Brown, *New Jersey Among States That Want To Make Oil Companies Pay For Climate Disasters,* N.J. MONITOR (Mar. 31, 2025), https://newjerseymonitor.com/2025/03/31/new-jersey-among-states-that-want-to-make-oil-companies-pay-for-climate-disasters/; Benoît Morenne & Collin Eaton, *Oil Firms Seize Chance to Fight State Climate Laws—With Trump's Help,* WALL ST. J. (Mar. 22, 2025), https://www.wsj.com/business/energy-oil/oil-companies-seek-trumps-help-to-thwart-climate-lawsuits-superfund-laws-7e332d0d.

States legislators are not alone in their belief that greenhouse gas (GHG) emitters should bear the financial burden for climate-related damages. In 2024, Senator Chris Van Hollen (D-MD) and Representative Jerry Nadler (D-NY-12) introduced federal bills, the "Polluters Pay Climate Fund Act," aiming to establish a national framework for climate liability and unify state efforts under a federal umbrella (S.B. 5054 and H.R. 9573).[5] Although the bills did not advance out of committee, the bills have been reintroduced in the current legislative session as H.R. 1135 and S.25.[6]

While each proposed bill and the statutes in New York and Vermont have distinct nuances, they share a common goal and approach: to allocate the financial responsibility for infrastructure repairs and resilience measures to energy companies by generally following the famously stringent "polluter pays," strict-liability framework of the federal Comprehensive Environmental Response, Compensation and Liability (CERCLA), or "Superfund" law. Under this framework, the energy sector may be required to pay into a "fund" to cover the public repair and resilience costs that are otherwise borne by governments, ostensibly in proportion to their shares of legacy GHG emissions. While most states restrict recoverability to the state government, three states introduced bills that would allow private individuals to sue for climate-related damages.[7] However, not all states have opted for an immediate liability approach. Some have chosen a more measured approach, introducing bills that would direct studies on the extent and costs of climate-

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5 S. 5054 118th Cong. (2024), available at https://www.congress.gov/bill/118th-congress/senate-bill/5054/text/is; H.R. 9573 118th Cong. (2024), available at https://www.congress.gov/bill/118th-congress/house-bill/9573.

6 S. 25, 119th Cong. (2025), available at https://www.congress.gov/bill/119th-congress/senate-bill/25/text; H.R. 1135, 119th Cong. (2025), available at https://www.congress.gov/bill/119th-congress/house-bill/1135.

7 *Infra* sections II.A, II.B.

related damages and potential funding mechanisms.[8]

This paper is structured in two parts to provide a comprehensive examination of state-level Climate Superfund laws and their broader legal implications. The first section offers an in-depth analysis of both enacted and pending state legislation, highlighting key provisions and comparing them to the federal Superfund law from which these state initiatives derive their conceptual framework. The second section shifts focus to the ongoing legal challenges surrounding Vermont's and New York's Climate Superfund laws, exploring the arguments presented in litigation.

II. CLIMATE SUPERFUND BILLS AND LAWS

A. THE BIRTH OF THE CLIMATE SUPERFUND

In 1980, Congress enacted CERCLA "in response to the serious environmental and health risks posed by industrial pollution."[9] At the time, CERCLA created a special excise tax on chemical and petroleum products to "fund the Superfund," which was then used to clean up certain hazardous waste sites. This tax—one that was not tied to any measure of damages—was discontinued in 1995 but reinstated for certain chemicals in 2022 through the Inflation Reduction Act.[10] The Climate Superfund laws seek to adopt a conceptually similar approach: transferring the costs from taxpayers to those that contributed significant amounts of GHG emissions through their exploration, production, and refining activities. However, unlike CERCLA's forward-looking tax structure, these laws seek to recover costs accounting for retroactive emissions to fund prospective mitigation and disaster

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8 *Infra* section II.I.
9 United States v. Bestfoods, 524 U.S. 51, 55 (1998); 42 U.S.C. § 9601 *et seq.*
10 26 U.S.C. § 9507(b).

recovery efforts.[11]

In 2023, New York blazed the trail as the first state to introduce the concept of a Climate Superfund, but while it passed in the State Senate, it ultimately died in Assembly.[12] However, the bill gained traction when it was reintroduced January 2024 (A.3351B/S.2129B).[13] At the same time, Vermont, largely prompted by the devastating floods in recent years, introduced its own Climate Superfund Act (S. 259).[14] Vermont beat New York to successful bill passage, doing so with overwhelming support.[15] The bill became law on May 30, 2024 without the governor's signature, taking effect on July 1, 2024, just days before Hurricane Beryl brought tremendous flooding to the state once again.[16]

The day after the 2024 legislative session's close, the New York Senate and Assembly passed its Climate Superfund bill. Then, after six months in legislative limbo, the governor signed it into law on December 26, 2024, just five days before it otherwise would have expired. Although newly enacted, the New York statute was amended just two months later, on February 28, 2025, to, among other things, include jurisdictional language in response to anticipated legal scrutiny—an issue discussed later in this article.[17]

Similar Climate Superfund bills have also been proposed at the federal level and in

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11 *Cf.* United States v. Olin Corp., 107 F.3d 1506, 1513 (11th Cir. 1997) ("By imposing liability upon former owners and operators, Congress manifested a clear intent to reach conduct preceding CERCLA's enactment.").

12 N.Y. Env't Conserv. Law §76-0103. ("New York Climate Change Adaptation Cost Recovery Program").

13 *Id.*

14 Act 122, S. 259, Gen. Assemb. (Vt. 2024), available at https://legislature.vermont.gov/bill/status/2024/S.259?_gl=1*1bpyqmq*_ga*MzMxMTY4LjE3MzU1OTQyOTA.*_ga_V9WQH77KLW*MTczODI2NDIzMi40LjAuMTczODI2NDIzMy4wLjAuMA.

15 *Id.*

16 *Id.*

17 S. 824, 2025–26 Reg. Sess. (N.Y. 2025), available at https://legislation.nysenate.gov/pdf/bills/2025/S824; A. 1474, 2025–26 Reg. Sess. (N.Y. 2025), available at https://www.nysenate.gov/legislation/bills/2025/A1474.

eleven other states: California, [18] Connecticut, [19] Hawaii, [20] Maine, [21] Maryland, [22] Massachusetts, [23] New Jersey, [24] Oregon, [25] Rhode Island, [26] Tennessee, [27] and Virginia. [28] As of June 3, 2025, however, New York and Vermont are the only states to have successfully enacted such legislation. The federal bill and those in New Jersey, California, Tennessee, Oregon, and Massachusetts remain pending, while the bills in Virginia, Rhode Island, New Hampshire, and Connecticut, and HP 1209 in Maine failed to progress out of committee. The proposed legislation in Hawaii and Maine's SP 740 did not pass before the close of the states' legislative sessions but, under their respective legislative rules, may be carried over to the next session.

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[18] Polluters Pay Climate Cost Recovery Act of 2024, S.1497, 2023–24 Reg. Sess. (Cal. 2024), available at https://leginfo.legislature.ca.gov/faces/billStatusClient.xhtml?bill_id=202320240SB1497; s*ee* Barry, *supra* note 4.

[19] S. 1199, 2025 Jan. Sess. (Conn. 2025), available at https://www.cga.ct.gov/asp/cgabillstatus/cgabillstatus.asp?selBillType=Bill&bill_num=SB01199&which_year=2025; H.R. 6280, 2025 Jan. Sess. (Conn. 2025), available at https://www.cga.ct.gov/asp/cgabillstatus/cgabillstatus.asp?selBillType=Bill&bill_num=HB06280&which_year=2025.

[20] Climate Change Superfund Act, S. 1652, 33d Leg. (Haw. 2025), available at https://www.capitol.hawaii.gov/session/measure_indiv.aspx?billtype=SB&billnumber=1652&year=2025.

[21] https://legislature.maine.gov/legis/bills/display_ps.asp?paper=SP0740; https://legislature.maine.gov/legis/bills/display_ps.asp?PID=1456&snum=132&paper=&paperId=l&ld=1808.

[22] Responding to Emergency Needs From Extreme Weather (RENEW) Act of 2025, S. 149, H.D. 0128, 2025 Reg. Sess. (Md. 2025), available at https://mgaleg.maryland.gov/mgawebsite/Legislation/Details/SB0149?ys=2025rs.

[23] Climate Change Adaptation Cost Recovery Act, S. 481, 193d Leg., Reg. Sess. (Mass. 2024), available at https://malegislature.gov/Bills/193/S481.

[24] Climate Superfund Act, S. 3545, A. 4696, 221st Leg., 2024 Sess. (N.J. 2024), available at https://www.njleg.state.nj.us/bill-search/2024/S3545.

[25] S. 1187, 83d Leg. Assemb., 2025 Reg. Sess. (Or. 2025), available at https://olis.oregonlegislature.gov/liz/2025R1/Measures/Overview/SB1187.

[26] Rhode Island Climate Superfund Act of 2025, H. 2524, 2025 Jan. Sess. (R.I. 2025), available at https://s3.amazonaws.com/fn-document-service/file-by-sha384/d86e47a50b69db7b40e82389c09960992d0003eca0161a9ef159e8e2679318162f6dc44629ac521885e21101781cf9db.

[27] Climate Resiliency Fund Act, S. 702, H.R. 0716, 2025 Reg. Sess. (Tenn. 2025), available at https://wapp.capitol.tn.gov/apps/Billinfo/default.aspx?BillNumber=HB0716&ga=114.

[28] Extreme Weather Relief Act, S. 112, H.D. 2233, 2025 Reg. Sess. (Va. 2025), available at https://lis.virginia.gov/bill-details/20251/HB2233.

After substantial revisions to remove all funding and liability provisions, Maryland's bill—narrowed to require only a comprehensive assessment of past and anticipated climate-related damages—passed both legislative chambers but was ultimately vetoed by the governor. New Hampshire introduced a similar proposal that did not progress out of committee.[29]

In addition to Climate Superfund bills that would create liability in favor of state governments, some states are considering legislation that would expand standing to private parties. Bills introduced in California, Illinois, and New York propose creating a private right of action, which would allow individuals to bring claims for damages resulting from climate-related events.[30] While California's bill failed in committee, the proposals in Illinois and New York did not make it out of committee but may be carried over to the next legislative session.

A summary chart of the enacted and proposed Climate Superfund and related legislation follows:

Table 1: Overview of Climate Liability Bills

Jurisdiction	Type	Bill/Law	Status*
Federal	Climate Superfund	S. 25, H.R. 1135 (Polluters Pay Climate Fund Act of 2025)	In committee
California	Climate Superfund	A.B. 1243, S.B. 684 (Polluters Pay Climate Superfund Act of 2025)	In committee[31]

[29] H.R. 106, 2025 Reg. Sess. (N.H. 2025), available at https://gc.nh.gov/bill_status/billinfo.aspx?id=33&inflect=1.

[30] *Supra* section II.H.

[31] S.B. 684 passed the Senate Environmental Quality Committee in a 5-3 vote. A.B. 1243 passed out of the Assembly Natural Resources Committee in a 9-4 vote.

	Private Right of Action	S.B. 222 (Affordable Insurance and Climate Recovery Act)	Failed
Connecticut	Climate Superfund	S.B. 1199, H.B. 6280 (An Act Creating a Climate Superfund)	Failed due to end of legislative session
Hawaii	Climate Superfund	S.B. 1652 (Climate Change Superfund Act)	May carry over to next legislative session
Illinois	Private Right of Action	S.B. 1790, H.B. 3594 (Extreme Weather Recovery Act)	May carry over to next legislative session
Maine	Climate Superfund	HP 1209/LD 1808, SP 740/LD 1870 (An Act to Establish a Climate Superfund Cost Recovery Program to Impose Penalties on Climate Polluters)	HP 1209 failed; SP 740 carried over to next legislative session
Maryland	Climate Study	S.B. 149, H.B. 128 (Responding to Emergency Needs from Extreme Weather)	Passed both chambers; vetoed by Governor
Massachusetts	Climate Superfund	S. 588, H. 1014 (Climate Change Adaptation Cost Recovery Act)	In committee; public hearing held
New Hampshire	Climate Study	H.B. 106 (An Act Establishing a Commission to Study the Financial Costs of Damage Caused by Climate Damage to New Hampshire and the Best Methods for Recouping Such Costs)	Failed (Inexpedient to Legislate[32])
New Jersey	Climate Superfund	S. 3545, A. 4696 (Climate Superfund Act)	In committee
New York	Climate Superfund	N.Y. Envtl. Conserv. Law § 76 (Climate Change Superfund Act)	Enacted

[32] "Inexpedient to legislate" is a committee recommendation that "the bill should not pass." *About the Legislature*, NEW FUTURES (last visited May 20, 2025), https://new-futures.org/about-the-nh-legislature.

	Private Right of Action	S. 4799, A. 72	In committee
Oregon	Climate Superfund	S.B. 1187 (Make Polluters Pay Act)	Introduced, public hearing held
Rhode Island	Climate Superfund	H. 5424, S.B. 326 (Climate Superfund Act of 2025)	Failed (held for further study in both chambers)
Tennessee	Climate Superfund	S.B. 0702, H.B. 0716 (Climate Resiliency Fund Act)	Passed Senate, failed House
Vermont	Climate Superfund	10 V.S.A. ch. 24A (Climate Superfund Act)	Enacted
Virginia	Climate Superfund	S.B. 1123, H.B. 2233 (Extreme Weather Relief Act)	Failed

*Bill Status as of September 29, 2025.

B. RESPONSIBLE PARTIES

The "polluter pays" principle is a foundational concept of the federal Superfund Program. Under CERCLA, entities responsible for the release or threatened release of hazardous substances are required to conduct *site specific* removal and remedial actions at their own expense. If they fail to do so, the government will undertake the cleanup using the Superfund and subsequently seek reimbursement from those designated as responsible parties.[33]

While this "polluter pays" principle also underpins the state and federal Climate Superfund bills,[34] their application diverges significantly from CERCLA. Unlike CERCLA, the climate-related measures are not emitter-, site- or injury-specific. Instead, they are designed to address statewide fiscal deficits related to the impacts of climate change by identifying entities to fund mitigation and recovery efforts, effectively shifting the financial burden from taxpayers to a defined subset of private actors.

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[33] *Bestfoods*, 524 U.S. at 56.
[34] *See id.*

Under this approach, liability is focused on a handful of companies in a single sector: those engaged in the business of extracting or refining fossil fuels and with more than 1 billion metric tons of GHG emissions over a defined historical period. Other significant sources of GHG emissions—such as those in the transportation and agriculture sectors—are not covered under current laws or bill proposals. Lawmakers estimate that these liability thresholds will apply to as many as 100 companies,[35] though other analyses suggest the laws will apply to a narrower group of 30 to 40 major fossil fuel entities. Unsurprisingly, the fossil fuel industry has strongly opposed these laws, criticizing the narrow focus on their sector and the attribution of responsibility for all climate-related damages to a small number of entities.

C. Covered Emissions and Time Periods

Under each of the bills and enacted laws, a "responsible party" would be liable for their emissions that occurred over a statutorily defined historical coverage period. These coverage periods vary by jurisdiction, and it is unclear how each time period was determined. For instance, New York's amended law, along with the federal and two state proposals, begins tracking GHG emissions from the year 2000. Vermont's law, along with proposed legislation in several other states, sets an earlier start date of 1995, while California and Rhode Island extend the period even further, to 1990. Similarly, the cutoff dates for covered emissions differ, ranging from 2018 to 2024.

Despite the extensive coverage periods, none of the laws or bills require that the emissions originate in—or even reach—the legislating state for liability to attach. Notably, New York's law and California's bill expressly apply to "worldwide" and "global"

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[35] Brown, *supra* note 4.

emissions, respectively, explicitly broadening the scope of covered emissions beyond state borders.

While each of the Climate Superfund laws and bills are limited to the fossil fuel industry, the scope of covered emissions varies across jurisdictions in terms of the stage of the fossil fuel lifecycle at which the emissions must occur. The New York law, as well as the federal bill, limit coverage to emissions generated during fossil fuel extraction and refining, excluding those from other activities such as transportation and end-use combustion. In contrast, California and Hawaii expressly include emissions generated throughout the supply chain—specifically, the "extraction, production, refining, sale, or combustion of fossil fuels or petroleum products" and the "extraction, storage, production, refinement, transport, manufacture, distribution, sale, and use of fossil fuels or petroleum products extracted, produced, refined, or sold by the entity," respectively. Amendments to California's senate bill would further broaden its scope to include emissions from combustion, including combustion by third parties. The rest of the states propose to cover emissions broadly associated with the "use" of fossil fuels extracted or refined by the responsible party.

To mitigate jurisdictional challenges, New York amended its Climate Superfund law's definition of "responsible party" to limit liability to entities with sufficient connections to the state to "satisfy the due process clause of the United States Constitution."[36] Similar language appears in bills from California, Connecticut, Hawaii, Massachusetts, Oregon, Tennessee, and Virginia. New Jersey takes a slightly different approach, limiting its application to entities required to pay sales tax in the state. Notably,

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[36] *Infra* section III.

while the Vermont law also contains due process language, it also extends the definition of "responsible party" to include foreign nations that hold or held interests in a fossil fuel business during the covered period, opening the door to potential claims against state-owned enterprises or sovereign entities.

Table 2: Summary of Covered Emissions and Periods

STATE	COVERAGE PERIOD	COVERED EMISSIONS
FEDERAL	2000 - 2024	Emissions attributable to extraction or refining by responsible party.
CALIFORNIA	1990 – 2024	Emissions at any point in the supply chain.
CONNECTICUT	1995 - 2025	Emissions generated from "use" of fossil fuels extracted or refined by responsible party.
HAWAII	2000 - 2018	Emissions at any point in the supply chain.
MAINE	1995-2024	Emissions generated from "use" of fossil fuels extracted or refined by responsible party.
MASSACHUSETTS	1995 - 2024	Emissions generated from "use" of fossil fuels extracted by responsible party.
NEW JERSEY	1995 – 2024	Emissions generated from "use" of fossil fuels extracted or refined by responsible party.
NEW YORK	2000 - 2024	Emissions attributable to extraction or refining by responsible party.
OREGON	1995 - 2024	Emissions generated from "use" of fossil fuels extracted or refined by responsible party.
RHODE ISLAND	1990 - 2024	Point in supply chain in which emissions are generated: unspecified.
TENNESSEE	1995 - 2025	Emissions generated from "use" of fossil fuels extracted or refined by responsible party.
VERMONT	1995 - 2024	Emissions generated from "use" of fossil fuels extracted or refined by responsible party.
VIRGINIA	1995 - 2024	Emissions generated from "use" of fossil fuels extracted or refined by responsible party.

D. Liability and Climate Attribution

The New York and Vermont Climate Superfund laws, along with each of the proposed state bills, adopt the strict and joint-and-several liability frameworks of

CERCLA.[37] Under the strict-liability approach, once the state implementing agency issues a cost recovery demand, the designated responsible parties will be required to pay into the funds regardless of whether their emissions violated any law or permit. The statutes also do not require a showing of causation between a particular entity's emissions and specific climate-related harms.

Under the joint-and-several liability framework, a party may be held financially responsible for 100% of the costs assessed, even if its own emissions represent only a fraction of the total. However, the scope of joint-and-several liability differs between the state and federal bills. At the state level, joint-and-several liability is limited to affiliated entities, such as parent companies and subsidiaries, likely intended to prevent companies from evading liability by dissolving, restructuring, or offloading the directly liable entity.

The federal bill is unique in both respects: it would not impose strict liability, and it would allow for any emitters, regardless of affiliation, to be held jointly and severally liable.

Despite the rigidity of this liability regime, the state laws and bills permit the overseeing agency to adjust a cost recovery demand if the responsible party presents evidence showing the emissions in question were attributable to another party or have already been accounted for.[38] Other states grant the overseeing agency even greater

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[37] 42 U.S.C. § 9607(a); Burlington N. & Santa Fe Ry. Co. v. United States, 556 U.S. 599, 609 (2009); S. 824, 2025–26 Reg. Sess. (N.Y. 2025); A. 1474, 2025–26 Reg. Sess. (N.Y. 2025); Act 122, S. 259, Gen. Assemb. (Vt. 2024).

[38] S. 824; A. 1474; S. 259; Responding to Emergency Needs from Extreme Weather (RENEW) Act of 2025, S. 149, H.D. 0128, 2025 Reg. Sess. (Md. 2025); Climate Change Adaptation Cost Recovery Act, S. 481, 193d Leg., Reg. Sess. (Mass. 2024); Polluters Pay Climate Cost Recovery Act of 2024, S.1497, 2023–24 Reg. Sess. (Cal. 2024); Climate Superfund Act, S. 3545, A. 4696, 221st Leg., 2024 Sess. (N.J. 2024); Extreme Weather Relief Act, S. 112, H.D. 2233, 2025 Reg. Sess. (Va. 2025); Climate Change Superfund Act, S. 1652, 33d Leg. (Haw. 2025).

authority to issue rules prescribing the procedures for cost recovery demands.

Notably, the state Climate Superfund laws and bills do not provide mechanisms for divisibility, apportionment, or contribution among responsible parties, thereby reinforcing the rigidity of the joint-and-several liability framework.

E. Funding the Fund

The ceilings for each of the funds, the contribution amounts required from each responsible party, and the methods for calculating those contributions differ across the state and federal bills. In most cases, the states delegate authority to their environmental agencies to determine the fund ceilings, rather than setting a fixed cap in the legislation. These agencies are tasked with assessing the total climate-related costs to the state. Once these costs are calculated, the states will use the U.S. Environmental Protection Agency's Emissions Factors for Greenhouse Gas Inventories or other publicly available GHG data to estimate each responsible party's share of total covered emissions.

The state agencies will then issue administrative cost recovery demands to each responsible party, based on their proportional share of total covered emissions. To illustrate, if a state assesses $10 billion in climate-related damages and attributes 5% of total covered emissions to a particular entity, it may seek $500 million from that party. Once the demand is issued, the responsible party must pay into the fund in accordance with the statute or any implementing regulations.

Other states have set specific statutory funding targets. The legislation in New York and Hawaii set fund ceilings of $75 billion[39] and $10 billion, respectively. Similarly, the

[39] Notably, New York's $75 billion target represents only half of the state's projected climate-related

federal bill fixes the funding target at an astounding $1 trillion. Each responsible party's contribution is calculated based on its share of total covered emissions relative to all responsible parties, applying that percentage to the fixed fund amount.

Table 3: Fund Caps

State	Funds Demanded
Federal	$1 trillion
Hawaii	$10 billion
New York	$75 billion
Vermont, New Jersey, Virginia, Tennessee, Rhode Island, Connecticut, Massachusetts, Oregon, California, and Maine	To be determined by the agency or state treasurer

Although the mechanics differ, each bill generally follows a common principle: cost allocation is based on the responsible party's proportional share of emissions. To inform these allocations, the legislation relies on advancements in "climate attribution science"—a growing field that aims to quantify the extent to which specific weather events or long-term climate trends can be linked to anthropogenic GHG emissions.[40] Agencies are directed to apply these attribution models to historical emissions data to estimate and assign financial responsibility. The use of attribution science, however, remains controversial, both technically and politically.[41]

Ultimately, aside from borrowing CERCLA's strict liability framework and the general concept of a fund, the state Climate Superfund laws diverge significantly from the

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infrastructure and recovery costs through 2050. Olivia Gieger, *New York Climate Superfund Becomes Law,* INSIDE CLIMATE NEWS (Jan 11, 2025), https://insideclimatenews.org/news/11012025/new-york-climate-superfund-becomes-law/.

40 *Climate Attribution Database*, SABIN CTR. FOR CLIMATE CHANGE L. (2025), https://climateattribution.org/. *See also* Michael Burger, Jessica A. Wentz & Radley Horton, *The Law and Science of Climate Change Attribution*, 51 ENV'T L. REP. 10646 (2021), available at https://scholarship.law.columbia.edu/sabin_climate_change/32.

41 *Infra* section III; *see also* Brown, *supra* note 4.

federal Superfund program, rendering the term "Superfund" something of a misnomer in this context.

F. USE OF THE FUND

Once the fund is established, the states or federal agencies are granted broad discretion to allocate the money toward climate-related initiatives.[42]

While modeled in part on the federal Superfund Program, the state-managed Climate Superfunds diverge in purpose. Rather than funding environmental remediation,[43] these state funds may be used both proactively—to finance mitigation projects and upgrades to existing infrastructure to reduce future climate-related damage—and retroactively—to support recovery and repair following extreme weather events.[44] For context, the Federal Emergency Management Agency estimates that every dollar invested in mitigation infrastructure saves between $4 and $7 in future disaster-related costs.[45]

In New York, the fund is dedicated to "climate change adaptive infrastructure projects," with a portion earmarked for vulnerable communities.[46] Eligible expenditures include preparation for and recovery from hurricanes, flooding, and other extreme events, as well as medical care for illnesses or injuries caused by climate change.[47] Similarly, proposed legislation in Massachusetts, Oregon, Virginia, Tennessee, and Maine

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42 *Infra* section II.f.

43 CERCLA only permits recovery of costs incurred consistent with the National Contingency Plan. 42 U.S.C. § 9607(a)(4)(B).

44 *Cf.* Virginia Properties Inc. v. Home Ins. Co., 74 F.3d 1131, 1132 (11th Cir.1996) (calling CERCLA "a statutory scheme that retroactively imposed strict liability for pollution cleanup"); United States v. Olin Corporation, 927 F. Supp. 1502, 1507, 1507 n. 25 (recognizing that of the 22 federal courts "which have directly addressed the issue of CERCLA's retroactivity, none have declined to apply CERCLA on retroactivity grounds").

45 *Natural Hazard Mitigation Saves Interim Report*, FED. INS. & MITIGATION ADMIN., (June 2018), https://www.fema.gov/sites/default/files/2020-07/fema_mitsaves-factsheet_2018.pdf.

46 S. 824, 2025–26 Reg. Sess. (N.Y. 2025); A. 1474, 2025–26 Reg. Sess. (N.Y. 2025).

47 *Id.*

incorporate environmental justice mandates. Those states, apart from Tennessee, would require a substantial percentage of expenditures—35% to 50%—to benefit environmental justice communities.

Vermont's law, along with several other states' bills, expands the permissible use of funds beyond infrastructure-related projects. These states would authorize spending on any project designed to avoid, mitigate, repair, adapt to, or respond to climate change impacts, including healthcare programs. Vermont, for instance, defines "climate change adaptation projects" broadly to include:

> …nature-based solutions and flood protections; home buyouts; upgrading stormwater drainage systems; making defensive upgrades to roads, bridges, railroads, and transit systems; preparing for and recovering from extreme weather events; undertaking preventive health care programs and providing medical care to treat illness or injury caused by the effects of climate change; relocating, elevating, or retrofitting sewage treatment plants and other infrastructure vulnerable to flooding; installing energy efficient cooling systems and other weatherization and energy efficiency upgrades and retrofits in public and private buildings, including schools and public housing, designed to reduce the public health effects of more frequent heat waves and forest fire smoke; upgrading parts of the electrical grid to increase stability and resilience, including supporting the creation of self-sufficient microgrids; and responding to toxic algae blooms, loss of agricultural topsoil, crop loss, and other climate-driven ecosystem threats to

forests, farms, fisheries, and food systems.[48]

New Jersey's, California's, and Maine's proposed laws would also authorize broad uses of their funds, including non-infrastructure investments, such as healthcare programs and general environmental restoration.[49] Projects could include seawall construction, wetland restoration, transportation infrastructure modernization, and sewage systems upgrades. Amendments to California's bill would further expand eligibility to include "accelerating the transition to clean energy sources" through microgrids, community solar, and other zero-emission technologies.

Vermont's law and the legislation proposed in Connecticut, New Jersey, and Tennessee allow home buyouts, though it remains unclear whether this includes mandatory relocation or is limited to voluntary or infrastructure-adjacent projects. Conversely, some states have proposed the adoption of "Master Plans"—strategic frameworks to be developed and administered by the relevant state agency—to guide how funds will be allocated and implemented over time.

G. Appealing the Cost Recovery Demand

The state Climate Superfund laws and bills generally provide mechanisms for responsible parties to challenge cost recovery demands through an administrative process, followed by judicial review of the final agency decision. While the specific procedures vary somewhat, most preserve a basic structure of administrative exhaustion prior to court involvement.

Notably, the failed Rhode Island bill would have imposed an exceptionally short

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48 Act 122, S. 259 § 597(1), Gen. Assemb. (Vt. 2024).

49 S. 259; Polluters Pay Climate Cost Recovery Act of 2024, S.1497, 2023–24 Reg. Sess. (Cal. 2024); Climate Superfund Act, S. 3545, A. 4696, 221st Leg., 2024 Sess. (N.J. 2024).

20-day deadline from the receipt of a final decision to initiate judicial review—compare this to the six-year statute of limitations applied to claims under the Administrative Procedures Act (APA).[50]

The federal bill does not set forth any appeal procedures. However, any final agency action taken under the federal law, if enacted, would be subject to challenge under the APA, which governs review of federal agency decisions.[51]

H. Private Right of Action Bills

The enacted and proposed Climate Superfund legislation does not create a private right of action, limiting cost recovery efforts to state governments. However, in 2025, lawmakers in New York (S. 4799),[52] California (S.B. 222),[53] and Illinois (S.B. 1790 and H.B. 3594)[54] introduced bills that would allow private individuals or entities to seek damages responsible parties for climate-related losses. While California's bill failed in committee, the other two bills remain pending.

New York's bill, a proposed amendment to its Climate Superfund statute, would allow any private party to file a claim for damages caused, either directly or indirectly, by an entity that emitted at least one billion metric tons of GHG between 1989 and the

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50 Corner Post, Inc. v. Board of Governors of the Federal Reserve System, 603 U.S. 799, 809 (2024) (holding that the statute of limitations under the APA begins once a plaintiff is injured by final agency action).

51 Under the APA, 5 U.S.C. §§ 551–706, a party dissatisfied with a final agency action has the right to seek judicial review in federal court of a final agency action after the exhaustion of all administrative remedies.

52 S. 4799, 2025–26 Reg. Sess. (N.Y. 2025), available at https://www.nysenate.gov/legislation/bills/2025/S4799.

53 S. 222, 2025–26 Reg. Sess. (Cal. 2025), available at https://leginfo.legislature.ca.gov/faces/billStatusClient.xhtml?bill_id=202520260SB222.

54 S. 1790, 104th Gen. Assemb., 2025–26 Reg. Sess. (Ill. 2025), available at https://www.ilga.gov/legislation/104/SB/10400SB1790.htm; H.R. 3594, 104th Gen. Assemb., 2025–26 Reg. Sess. (Ill. 2025), available at https://www.ilga.gov/legislation/fulltext.asp?DocName=10400HB3594lv&SessionID=114&GA=104&DocTypeID=HB&DocNum=3594&SpecSess=&Session=&print=true.

effective date of the amendment. The proposal includes a partial defense: liability may be reduced if the defendant has implemented policies to prevent pollution and avoid false or misleading environmental or sustainability claims. However, the bill is notably vague on several key procedural aspects. It does not specify a minimum damages threshold, define the types of recoverable damages, establish a limitations period, or clarify whether liability would be strict or joint-and-several.

By contrast, the Illinois proposal provides greater specificity. Although the state has not yet introduced standard Climate Superfund legislation, its bill would allow individuals who suffer $10,000 or more in personal injury or property damage due to climate-related events to recover noneconomic, compensatory, and punitive damages. Compensatory damages are defined to include: (1) the fair market value of recovering, rebuilding, or remediating lost, damaged, or destroyed property and (2) the cost of personal injuries, including medical care, mental and behavioral health treatment, pain and suffering, and emotional distress.

Meanwhile, California's bill—which failed in committee—would have authorized recovery for: (1) all damages to person or property sustained in connection with a climate disaster; (2) restitution; (3) litigation expenses; and (4) any other relief deemed appropriate by the court or jury.

Unlike the Climate Superfund framework, California's bill did not impose a minimum emissions threshold, but it did impose a $10,000 minimum damages threshold. Conversely, Illinois's bill does include an emissions-based threshold: like New York, it would allow suits against entities that emitted at least one billion metric tons of GHG beginning in 1965. The Illinois proposal, as well as the failed California bill, would impose

joint-and-several and strict liability, and both include a three-year statute of limitations for filing claims.

I. Climate Study Bills

Rather than immediately impose liability on GHG emitters through Climate Superfund legislation, New Hampshire and, more recently, Maryland opted to first assess the financial impact of climate change through state-directed studies. However, both efforts failed.

Lawmakers in Maryland initially introduced Climate Superfund measures of the type described above,[55] but significantly amended the bills (H.B. 128 and S.B. 149) to eliminate all liability and funding provisions. As revised, the legislation—which passed both chambers but was vetoed by the governor—would have directed state agencies to conduct a comprehensive study on the financial burdens associated with GHG emissions. The study would have evaluated impacts and calculate both incurred and projected costs across a wide range of categories, including public health, natural resources, biodiversity, agriculture, economic development, housing, and flood preparedness and safety. The bill also required an economic assessment on whether those costs should be passed on to fossil fuel companies that emitted more than one billion metric tons of GHG globally between 1995 and 2024.

New Hampshire proposed a similar, though ultimately also unsuccessful, approach. Its bill (H.B. 106) would have established a commission to study the economic costs of climate-related damages and explore potential cost-recovery mechanisms. The commission would have consisted of six members of the state legislature, as well as representatives

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[55] *Supra* section I.A.

from the business and industry community, a nonprofit environmental group, and the Departments of Business and Economic Affairs and Environmental Services. Its mandate included assessing the scope and costs of climate-related damages over the next 20 and 50 years, with consideration of effects on individuals, communities, natural resources, infrastructure, industry, agriculture, and tourism. The commission also would have evaluated possible adaptation or mitigation measures and funding mechanisms, such as municipal bonding, insurance, legal actions, or regulatory fees.

III. REACTIONS AND LEGAL UNCERTAINTY

Proponents laud these bills as effective revenue-generating measures that shift the financial burden of climate-related costs from taxpayers to significant GHG emitters.[56] Especially after the passage of New York's bill, many also predict they will spur other states to adopt similar legislation in the coming year.[57] That prediction appears to be materializing: within a few months of New York's law being signed into law, eleven additional states introduced comparable legislation.[58]

Opponents, however, contend that Climate Superfund laws amount to a retroactive tax in an area where states lack regulatory authority.[59] Specifically, critics argue that the legislation allows states to unilaterally determine financial liabilities—both through statutory mandates and agency-driven processes—without adequate procedural safeguards.

Industry, the Trump Administration, and other opponents have also raised

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56 Martin Lockman & Emma Shumway, *State "Climate Superfund" Bills: What You Need to Know*, SABIN CTR.: CLIMATE L. (Mar. 14, 2024), https://blogs.law.columbia.edu/climatechange/2024/03/14/state-climate-superfund-bills-what-you-need-to-know/.

57 Gieger, *supra* note 39.

58 *Supra* section I.A.

59 It is worth noting, however, that legal challenges to retroactive liability under CERCLA generally failed. *See, e.g.*, *Olin Corp.*, 107 F.3d.

constitutional concerns. One key issue is whether targeted companies, particularly those that do not operate within the regulating state—or even within the United States—have sufficient jurisdictional "contacts" to satisfy the Due Process Clause.[60] Some states, like New York, have attempted to address this issue by incorporating jurisdictional limitations into their statutes to preempt these challenges.[61]

Another legal uncertainty involves overlapping jurisdiction: whether multiple states can impose liability on the same entity for the same emissions. Additionally, many opponents argue that the Clean Air Act (CAA) preempts state Climate Superfund laws, rendering them unenforceable. However, because the state laws are structured to operate more as tax or cost recovery mechanisms—rather than direct emissions regulations—they may be found to fall outside the scope of CAA preemption.

Clarification on these and other legal issues may emerge from five pending federal lawsuits, filed by industry groups, a coalition of Republican-led states, and more recently, the U.S. Department of Justice (DOJ) challenging the laws enacted in Vermont and New York.[62]

A. CHALLENGE AGAINST VERMONT

On December 30, 2024, the American Petroleum Institute (API) and the Chamber of Commerce of the United States (U.S. Chamber) filed suit in federal court challenging

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60 *Infra* section II. A–B.
61 *Supra* section I.
62 Chamber of Com. v. Moore, No. 2:24-cv-01513 (D. Vt. Dec. 30, 2024); W. Va. v. James, No. 25-cv-00168 (N.D.N.Y.); Chamber of Com. v. James, No. 25-cv-01738 (S.D.N.Y.).

Vermont's law.[63] The plaintiffs argue that Vermont exceeded the bounds of its authority[64] and that the law is preempted by the U.S. Constitution and the CAA.[65]

In the complaint, API and the U.S. Chamber contend that Vermont is impermissibly legislating beyond its borders, and that only federal law, not state law, applies to interstate pollution to ensure uniform regulation. Specifically, they argue that the CAA preempts Vermont's law under the Supremacy Clause, asserting that states may regulate GHG emissions only when explicitly authorized to do so by the CAA.[66]

The complaint also cites the 2019 Second Circuit decision in *City of New York v. Chevron*, which held that municipalities could not use state tort law to hold out-of-state energy producers liable for damages associated with GHG emissions. [67] In that case, the court concluded that federal common law, rather than state law, governed claims related to global GHG emissions, and that the CAA displaced any federal common law claims related to domestic emissions.[68] While acknowledging that climate change is "one of the greatest challenges facing humanity today," the *City of New York* court refused to allow the city to

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63 Complaint, Chamber of Com. v. Moore, No. 2:24-cv-01513, (D. Vt. Dec. 30, 2024) ("*Chamber* complaint'); Abigail Mihaly*, Chamber, API File Suit Over Vermont's Novel Climate 'Superfund' Law*, INSIDEEPA.COM (Jan. 2, 2025), https://insideepa.com/climate-news/chamber-api-file-suit-over-vermont-s-novel-climate-superfund-law; Lesley Clark, *Fossil fuel industry allies sue Vermont over landmark climate law*, E&E CLIMATE WIRE (Jan. 6, 2025), https://subscriber.politicopro.com/article/eenews/2025/01/06/fossil-fuel-industry-allies-sue-vermont-over-landmark-climate-law-00196441; *see also* Olivia Gieger, *Vermont's Climate Superfund Faces First Legal Challenge from Fossil Fuel Interests,* INSIDE CLIMATE NEWS (Jan. 25, 2025), https://insideclimatenews.org/news/25012025/vermont-superfund-faces-first-legal-challenge/.

64 *Chamber* complaint, *supra* note 63 at ¶ 3.

65 *Chamber* complaint, *supra* note 63 at ¶ 6–7, 33–34, 77–78.

66 The CAA's statutory scheme "regulates pollution-generating emissions from both stationary sources, such as factories and powerplants, and moving sources, such as cars, trucks, and aircrafts," Util. Air Regul. Grp. v. Env't Prot. Agency, 573 U.S. 302, 308 (2014).

67 City of N.Y. v. Chevron, 993 F.3d 81, 85-86 (2d Cir. 2021). Although, the court could disagree with API and the Chamber of Commerce and determine that *City of N.Y. v. Chevron* does not apply, and the issue of preemption would remain.

68 *Id.*

leverage state law when such claims were governed exclusively by federal law. According to API and the U.S. Chamber, *City of New York* precludes Vermont from enforcing its Climate Superfund statute, which they say effectively regulates global emissions.

API and the U.S. Chamber also cite to *City of New York* and *Illinois v. City of Milwaukee* to argue that Vermont's law is preempted because air and water pollution in their "ambient interstate aspects" fall under federal jurisdiction.[69] In reliance on these cases, the plaintiffs assert that Vermont's statute improperly imposes economic sanctions for lawful conduct occurring out of the state.[70]

The complaint also alleges violations of the Commerce Clause, arguing that the statute burdens interstate and foreign commerce by imposing excessive financial penalties for lawful GHG emissions—including emissions tied to activities occurring outside of the state.[71] However, because Vermont's law does not set a statutory cap for its fund—and it has yet to finalize its estimate of total climate-related damages—this claim may be viewed as speculative, based on a hypothetical penalty of unknown magnitude.

Additionally, the plaintiffs assert that these penalties will constitute unlawful takings of private property without just compensation[72], in violation of the Fifth Amendment.[73] Finally, they allege violations of the Fourteenth Amendment, arguing that

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69 *Chamber* complaint, *supra* note 63 at ¶ 6 (citing Ill. v. City of Milwaukee 406 U.S. 91, 103 (1972); *City of N.Y.*, 933 F.3d at 91–92).

70 *Chamber* complaint, *supra* note 63 at ¶ 6 (citing BMW of N. Am., Inc. v. Gore, 517, U.S. 559, 572 (1996)).

71 *Chamber* complaint, *supra* note 63 at ¶ 8.

72 In 1998, the Supreme Court ruled that "retroactivity is generally disfavored in the law" and that imposing retroactive financial liability for past conduct that was legal at the time could violate the Takings Clause of the Fifth Amendment. The Court noted that "[o]ur decisions, however, have left open the possibility that legislation might be unconstitutional if it imposes severe retroactive liability on a limited class of parties that could not have anticipated the liability, and the extent of that liability is substantially disproportionate to the parties' experience." E. Enter. v. Apfel, 524 U.S. 498, 528–29 (1998).

73 *Id.* at ¶ 11.

the law imposes an irrational and arbitrary punishment based on a flawed and unfair calculation method that singles out a small number of energy producers for global emissions generated by others, and imposes an unconstitutionally vague penalty with the amount left to the unfettered discretion of state agencies.[74]

Since the case was filed, twenty-four states have intervened as plaintiffs with consent and the Northeast Organic Farming Association of Vermont and the Conservation Law Foundation have been granted leave to intervene as defendants.[75] Vermont and the intervenor-defendants have moved to dismiss the complaint for failure to state a claim and lack of jurisdiction, while the plaintiffs and intervenor-plaintiffs have already moved for summary judgment, arguing that the statutes unlawfully seek to regulate out-of-state and global emissions, conflict with the CAA and Second Circuit precedent, and exceed constitutional limits on extraterritorial state authority.

Some commentators speculated that the *Chamber v. Moore* case would deter other states from advancing similar legislation.[76] However, since the suit was filed, additional states—Hawaii, Virginia, New Hampshire, Rhode Island, Oregon, Tennessee, and Maine—have introduced comparable bills, while others have renewed previously stalled proposals.[77] Others have described the Vermont case as premature, noting that the state has not yet quantified damages or issued any cost recovery demands.[78] A January 15, 2025 status report of Vermont's overseeing agency laid out a preliminary timeline for its cost

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74 *Id.* at ¶ 8.

75 The twenty-five states are West Virginia, Alabama, Alaska, Arkansas, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Missouri, Montana, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, and Wyoming.

76 Gieger, *supra* note 63.

77 *Supra* section II.A.; *see also* Brown, *supra* note 4.

78 Gieger, *supra* note 63.

assessment and rulemaking process, with a final report not expected until 2026.[79] In briefing its motion to dismiss, Vermont stated that it does not plan to issue cost-recovery demands until 2028. As a result, some observers believe the court may dismiss or stay the case until Vermont takes further action to implement the law.[80]

B. CHALLENGES AGAINST NEW YORK

On February 6, 2025, four industry groups[81] and twenty-two states[82]—led by West Virginia—filed suit in the Northern District of New York to block the law.[83] The allegations and causes of action in the *West Virginia v. James* complaint largely mirror those made in the Vermont lawsuit, including claims that the law is preempted by the CAA and violates the Commerce Clause, the Fifth, Eighth, and Fourteenth[84] Amendments. The complaint also asserts that the law violates the Due Process Clause and Takings Clause of the New York constitution.[85]

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79 Vt. Agency of Nat. Res., *Act 122 Climate Superfund Cost Recovery Program Report to the General Assembly* 2 (Jan. 15, 2025), available at https://legislature.vermont.gov/assets/Legislative-Reports/2025-Feasibility-Report-Act-122.pdf.

80 Gieger, *supra* note 63; Brown, *supra* note 4.

81 The four industry groups are West Virginia Coal Association, Gas and Oil Association of West Virginia, Inc., America's Coal Associations, and Alpha Metallurgical Resources, Inc.

82 The twenty-two states are Alabama, Arkansas, Georgia, Idaho, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, and Wyoming, led by West Virginia.

83 Complaint at ¶ 17, *W. Va. v. James*, (N.D.N.Y. Albany Div., Filed: Feb. 6, 2025) *(*hereinafter *W. Va. v. James* Complaint); Amended Complaint at ¶ 17, *W. Va. v. James*, (N.D.N.Y. Albany Div., Filed: Apr. 7, 2025) (hereinafter *W. Va. v. James* Amended Complaint); Hilary Howard, *22 States Sue to Block New York Law Targeting Fossil Fuel Companies,* N.Y. TIMES (Feb. 6, 2025), https://www.nytimes.com/2025/02/06/nyregion/climate-change-superfund-act-lawsuit.html.

84 *Apfel*, 524 U.S. at 537 ("At the same time, this Court has expressed concerns about using the Due Process Clause to invalidate economic legislation.").

85 The complaints alleges that the law violates the New York constitution in parts where it is analogous to the federal constitution. *W. Va. v. James* Amended Complaint at ¶¶ 181–186, 217–221 ("[T]he New York State Constitution's guarantees of equal protection and due process are virtually coextensive with those of the U.S. Constitution." (citing Coakley v. Jaffe, 49 F. Supp. 2d 615, 628 (S.D.N.Y. 1999), *aff'd*, 234 F.3d 1261 (2d Cir. 2000))); Like its federal counterpart, the New York Constitution prohibits the government from taking "[p]rivate property … for public use without just compensation." (citing N.Y. CONST. art. I, § 7)).

Like in the Vermont suit, the plaintiffs in *West Virginia v. James* rely on Second Circuit precedent to argue that New York's law exceeds the limits of state jurisdiction and is preempted by the CAA.[86] They contend that because the CAA grants exclusive regulatory authority over GHG emissions to the federal government, states only retain a "slim reservoir" of authority to regulate GHGs outside that framework—insufficient, in their view, to support legislation that arguably targets global emissions.[87] Notably, however, the Second Circuit also acknowledged that the CAA "does not make environmental policy an exclusively federal matter," and instead contemplates cooperative federalism.[88]

The complaint also alleges that New York's law violates the principles of comity and equal sovereignty by attempting to regulate and penalize conduct outside its borders.[89] Specifically, the plaintiffs argue that the state is infringing on equal sovereignty by "imposing economic penalties intended to change out-of-state conduct," in conflict with Supreme Court precedent.[90] As such, they contend that the law undermines the principals of federalism embedded in the federal constitution.[91]

In addition, the plaintiffs assert violations of the Interstate and Foreign Commerce Clauses. They argue that the law unfairly targets fossil fuel companies while favoring in-state renewable energy producers and overlooking other major sources of GHG emissions,

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86 *W. Va. v. James* Complaint at ¶¶ 110–137; *W. Va. v. James* Amended Complaint at ¶¶ 141–150.
87 *W. Va. v. James* Complaint at ¶¶ 11, 90; *W. Va. v. James* Amended Complaint at ¶¶ 11, 95.
88 *City of N.Y. v. Chevron*, 993 F.3d at 87–88; *see* 42 U.S.C. §§ 7401, 7411(c)(1), (d)(1)–(2).
89 *W. Va. v. James* Complaint at ¶¶ 111–115; *W. Va. v. James* Amended Complaint ¶¶ 118–120 (citing Bonaparte v. Appeal Tax Ct. of Baltimore, 104 U.S. 592, 594 (1881)).
90 *W. Va. v. James* Amended Complaint at ¶¶ 119–120 (citing BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 572 (1996)); *see also* Clearfield Tr. Co. v. United States, 318 U.S. 363, 367 (1943).
91 *W. Va. v. James* Amended Complaint at ¶¶ 120, 124.

such as transportation, agriculture, and end-use consumers.[92] They also raise concerns that funds collected from responsible parties could be redirected to private individuals or projects supporting the state's energy transition—such as the development of nuclear or renewable energy facilities under New York's 30% to 70% renewables initiatives[93]—potentially distorting energy markets and burdening interstate commerce.[94]

The *West Virginia v. James* complaint places particular emphasis on foreign policy implications. Because New York's law expressly contemplates cost recovery from "worldwide entities,"[95] the plaintiffs argue it interferes with federal authority over global energy markets and international trade, violating the Foreign Commerce Clause.[96] They further contend that the law interferes with the federal government's approach to global climate issues and bypasses diplomatic channels such as the Paris Climate Agreement under the United Nations Framework Convention on Climate Change—which President Trump has indicated intent to exit.[97]

While this lawsuit was pending, New York introduced an amendment to its then-two-week-old Climate Superfund law (A.1474 and S.824).[98] Among the revisions, the statute now requires responsible parties to have sufficient contacts to the state to "satisfy

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92 *W. Va. v. James* Complaint at ¶¶ 141–42; *W. Va. v. James* Amended Complaint at ¶¶ 152–154.

93 N.Y. PUB. SERV. LAW § 66-p (Consol. 2023).

94 *W. Va. v. James* Amended Complaint at ¶ 155–157.

95 N.Y. ENV'T CONSERV. LAW § 76-0101(8); *W. Va. v. James* Amended Complaint at ¶¶ 110, 130, 160.

96 *W. Va. v. James* Amended Complaint at ¶¶ 159–163.

97 *W. Va. v. James* Complaint at ¶¶ 122, 124–125; *W. Va. v. James* Amended Complaint at ¶¶ 131–133, 160; Exec. Order No. 14,162, 90 Fed. Reg. 8455 (Jan. 20, 2025), available at https://www.whitehouse.gov/presidential-actions/2025/01/putting-america-first-in-international-environmental-agreements/; Matthew Daly & Seth Borenstein, *Trump signs executive order directing US withdrawal from the Paris Climate Agreement — again,* AP (Jan. 20, 2025), https://apnews.com/article/trump-paris-agreement-climate-change-788907bb89fe307a964be757313cdfb0; Sara Schonhardt et al., *What Trump's exit from the climate deal really means,* POLITICO (Jan. 20, 2025), https://www.politico.com/news/2025/01/20/trumps-exit-climate-deal-means-00199406.

98 A.B. 1474, 2025–2026 Leg., Reg. Sess. (N.Y. 2025).

the due process clause of the United States Constitution."[99] The amendment was passed on February 28, 2025.[100] That same day, API, the U.S. Chamber, the National Mining Association, and the Business Council of New York State, Inc. filed a separate lawsuit in the Southern District of New York challenging the amended statute.[101] The *Chamber of Com. v. James* complaint largely mirrors the constitutional and preemption arguments asserted in the Vermont and Northern District of New York cases.

On March 17, New York filed its answer in *West Virginia v. James*, asserting several defenses, including lack of standing, ripeness, mootness, failure to state a claim, lack of final agency action, and denying that the law is preempted or unconstitutional.[102] On April 7, the plaintiffs filed an amended complaint to account for the legislative amendments, which the State answered on May 19. The court has granted the parties leave to file early summary judgment motions, which are scheduled to be fully briefed by the end of February 2026.

Following contested briefing, the Southern District of New York transferred the *Chamber of Commerce v. James* case to the Northern District of New York, where *West Virginia v. James* is pending. New York is expected to file its answer or a motion to dismiss in early October.

These parallel challenges to Vermont's and New York's Climate Superfund laws highlight the broader constitutional and jurisdictional questions surrounding these statutes. The Second Circuit, where all three cases are pending, also includes Connecticut, a state

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99 *Id.*
100 *Id.*
101 *Chamber of Com. v. James*, No. 25-cv-01738 (S.D.N.Y.).
102 Answer to Complaint, *W. Va. v. James*, No. 25-cv-00168 (N.D.N.Y.).

where lawmakers were unable to pass Climate Superfund legislation. Legislators in Connecticut—and across the nation—are undoubtedly watching these cases closely, and the uncertainty surrounding the Second Circuit's eventual rulings likely contributed to legislative hesitation. However, given the interstate and international considerations of climate attribution and imposition of liability for nationwide and global GHG emissions, it is unlikely that the constitutional questions raised by these laws will be fully resolved until the Supreme Court weighs in.

C. Federal Opposition to State Climate Superfund Laws

Amid these developments, representatives from the oil and gas industry met with President Trump on March 26, 2025[103] to request that the Department of Justice intervene in the pending cases challenging Vermont's and New York's Climate Superfund legislation or to file its own lawsuits to challenge the laws.[104] On April 8, President Trump issued Executive Order 14260, *Protecting American Energy From State Overreach*, directing the Attorney General to review, among other things, state Climate Superfund legislation and "take all appropriate action to stop the enforcement" of such laws.

These efforts proved fruitful, but instead of intervening in the pending lawsuits, the U.S. Department of Justice (DOJ) sued New York and Vermont itself.[105] The DOJ's theory in the cases is consistent: that state efforts to assign liability for GHG emissions violate the

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[103] The executives from Exxon, Chevron, ConocoPhillips, and Hess were reported to be in attendance. Benoît Morenne & Collin Eaton, *Oil Firms Seize Chance to Fight State Climate Laws—With Trump's Help,* WALL ST. J. (Mar. 22, 2025), https://www.wsj.com/business/energy-oil/oil-companies-seek-trumps-help-to-thwart-climate-lawsuits-superfund-laws-7e332d0d.

[104] *Id.*; *see* Coral Davenport, *She Inspired Laws to Hold the Fossil Fuel Industry Accountable. Now She's a Target*, N.Y. TIMES (Mar. 27, 2025), https://www.nytimes.com/2025/03/27/climate/she-inspired-laws-to-hold-the-fossil-fuel-industry-accountable-now-shes-a-target.html.

[105] United States v. New York, No. 25-cv-03656 (S.D.N.Y. May 1, 2025); United States v. Vermont, No. 25-cv-463 (D. Vt. May 1, 2025).

Constitution, are preempted by the CAA and interfere with the federal government's exclusive authority over interstate commerce and foreign relations. In each case, the federal government seeks declaratory judgments that the state laws are unconstitutional, along with injunctive relief barring their implementation.

In New York, several organizations have moved to intervene in the State's defense, whereas in Vermont, the court has already granted intervention to the Northeast Organic Farming Association of Vermont and the Conservation Law Foundation.

New York unsuccessfully sought to transfer the federal government's case against it to the Northern District of New York, where *West Virginia v. James* is pending and where the State had previously succeeded in transferring *Chamber of Commerce v. James*. In its answer, New York raised several defenses, including lack of standing, lack of jurisdiction, absence of final agency action, ripeness, and the comity doctrine. The Southern District of New York then permitted the United States to file an early motion for summary judgment only months after initiating suit, while denying the State's parallel request on the ground that its standing and merits arguments constituted independent bases for rejecting the federal government's motion. The court indicated, however, that if the United States' motion is denied, it will reconsider whether to allow the State to file its proposed motion.

Meanwhile, in Vermont, the State and intervenor-defendants moved to dismiss for lack of jurisdiction and failure to state a claim, while the United States filed a motion for summary judgment. In both the New York and Vermont actions, the federal government contends that the statutes impermissibly regulate out-of-state and global emissions, conflict with the CAA and Second Circuit precedent, and exceed constitutional limits on extraterritorial state authority. DOJ further argues that because Vermont produces no fossil

fuels and New York produces very little, both statutes necessarily operate beyond state borders and intrude upon matters reserved to federal authority.

At the parties' request, the District of Vermont has adopted a coordinated briefing schedule in *United States v. Vermont* and *Chamber of Commerce v. Moore*. While the cases have not been consolidated, the court has set identical deadlines for responsive pleadings and for briefing on dispositive motions and is allowing the parties to file consolidated memoranda across the two cases where appropriate.

Meanwhile, industry groups are lobbying Congress for legislation that would limit the exposure of fossil fuel companies in the growing number of lawsuits filed by state and local governments seeking compensation for climate-related harms.[106] No such legislation has been proposed as of September 29, 2025.

These efforts underscore the high stakes and contested landscape in which questions of climate change liability, federalism, and corporate liability are being navigated.

IV. CONCLUSION

Climate Superfund laws represent a significant—and controversial—shift in how liability for public costs associated with extreme weather events may be allocated. Historically, those costs have been borne by the public through government funding. Climate Superfund laws aim to shift this burden by placing direct financial responsibility on the fossil fuel industry in proportion to their historic contributions of GHGs, including permitted emissions.

Proponents view these measures as a necessary corrective to relieve taxpayers of

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[106] *Id.*

the financial burdens of extreme weather events attributed to climate change. Critics argue that the laws run afoul of the Constitution, will substantially increase regulated entities' operating expenses and therefore consumers' costs, relying on potentially unreliable attribution science.

As more states pursue similar legislation and the first wave of legal challenges progress through the courts, the fate of the Climate Superfund model remains uncertain. Given the international scope of climate change and the absence of controlling precedent, resolution may ultimately rest with the U.S. Supreme Court. In the meantime, the energy and legal industries will need to closely monitor this evolving legal landscape as it shapes climate liability.

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Climate Alarmism: The Need for a Sustainable Approach to Climate Change

By Chloe Fisher

I. INTRODUCTION

As global average surface temperatures continue to increase, brushing up against the 1.5 degrees Celsius above pre-industrial temperatures limit set by the Paris Agreement, there is understandably an increased sense of urgency among climate activists. Since the formation of the Intergovernmental Panel on Climate Change in 1988, an increasing number of climate activists paint a dire picture of the world in the wake of rampant climate change; characterizing climate change as an existential threat requiring every resource at our disposal to attack immediately. The science is clear: climate change is real, and the negative effects are here and will continue to be felt around the world, particularly by those who lack the financial resources to adapt to our rapidly changing world. However, to put it mildly, climate policy in the United States does not meet the urgency of the situation. Not only has recent litigation has yielded a rollback in protections from our major environmental statutes, but many climate bills have stalled or died out completely. Climate alarmists—activists that use fear to push climate policy to the extreme—are met with everything from indifference to obstinance. The doomsday picture that climate alarmism paints is not producing its desired outcome: significant and extreme climate policy. This note analyzes the flaws in the climate alarmist's approach to U.S. climate policy and argues for a more incremental approach, considering the current sociopolitical climate.

II. BACKGROUND

To analyze the pitfalls of climate alarmism and to propose an alternative, we must discuss the realities of climate change and its very real and terrible impacts. Additionally, we must define the true meaning of sustainability, an often-misunderstood term. Finally, we must define climate alarmism, including the methods it implores and the policies it

seeks.

A. Climate Change

Climate change refers to the long-term, generally "decades or longer," shifts in weather patterns and temperatures.[1] The scientific community widely agrees that climate change is occurring.[2] Climate change may be caused by natural internal processes or external drivers, including solar cycle modulations or "persistent anthropogenic changes" in the "atmosphere or in land use."[3] This note will focus on anthropogenic causes and the methods by which anthropogenic climate change may be mitigated or reversed.

It is imperative to state at the outset that this note does not seek to dispute climate science or minimize the devastation that climate change has caused or will continue to cause. To the contrary, the goal of this paper is to argue for a more productive climate policy approach to fight against climate change. Though the metrics and modeling systems used by the Intergovernmental Panel on Climate Change (IPCC) are not entirely without critique,[4] they will not be discussed here, as there is sufficient data to show that (1) anthropogenic climate change is happening and (2) it will have devastating effects unless we can reduce greenhouse gas (GHG) emissions, among other things.[5] Therefore, there is

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[1] IPCC, Annex 1: Glossary, in *Global Warming of 1.5°C, An IPCC Special Report on the Impacts of Global Warming of 1.5 °C Above Pre-Industrial Levels and Related Global Greenhouse Gas Emission Pathways, in the Context of Strengthening the Global Response to the Threat of Climate Change, Sustainable Development, and Efforts to Eradicate Poverty* 541, 544 (V. Masson-Delmotte et al. eds., Cambridge Univ. Press 2018), https://doi.org/10.1017/9781009157940.008.

[2] *Scientific Consensus*, Nat'l Aeronautics & Space Admin., https://science.nasa.gov/climate-change/scientific-consensus/ (last visited Jan. 30, 2025) (stating that the scientific consensus is that human-caused climate change is happening, with 97% of climate scientists agreeing).

[3] IPCC, *supra* note 1, at 544.

[4] *See, e.g.*, Roger Pilke & Justin Ritchie, *Distorting the View of Our Climate Future: The Misuse and Abuse of Climate Pathways and Scenarios*, 72 Energy Rsch. & Soc. Sci., Dec. 25, 2021, at 1, 1–2 (arguing that the IPCC misuses climate change effects scenarios, mistakenly advancing the most extreme outcome scenarios as the world's most likely trajectory).

[5] World Meteorological Organization [WMO], WMO-No. 1347, State of the Global Climate 2023 6–7 (2024).

a consensus that anthropogenic climate change is real and requires action to address the issue,[6] consistent with the IPCC's conclusions.[7] Though relevant to the general discussion on climate change and policy, the exact degree to which these effects will be realized is distinct from whether climate alarmists are sharing information about climate change that will produce the desired effect of promoting widespread climate action. This note will focus on the latter inquiry. Any discussion of climate science data is not to dispute the results, but to question or critique its delivery to policymakers and the American public at large.

1. ANTHROPOGENIC CLIMATE CHANGE: A FACT

Since the 1800s, human activities, namely through emissions, have accelerated climate change.[8] The IPCC reports that global surface temperature rose 1.1°C above 1850-1900 average temperatures between 2011-2020.[9] GHG emissions have continued to increase globally, with disproportionate contributions from significant energy and land use.[10]

In response to GHG emissions, rapid and global changes in the atmosphere, ocean, and land have occurred.[11] This has led to adverse impacts such as heatwaves, heavy rainfall, droughts, and tropical cyclones.[12] For each of these impacts, human influence was very likely the primary driver.[13] Furthermore, human influence has likely increased the

[6] NAT'L AERONAUTICS & SPACE ADMIN., *supra* note 2.
[7] *See generally* IPCC, *Summary for Policymakers*, in CLIMATE CHANGE 2023: SYNTHESIS REPORT (Core Writing Team et al. eds., 2023).
[8] *Id.* at 4.
[9] *Id.*
[10] *Id.*
[11] *Id.* at 5.
[12] *Id.*
[13] *Id.*

frequency and severity of compound extreme events since the 1950s, including an increases in the instances of concurrent heatwaves or droughts.[14]

These events have caused significant worldwide damage and devastation.[15] Hundreds of species have been driven to extinction by the rapid increase in the magnitude of heat extremes, with mass mortality events being recorded both on land and in our oceans.[16] In some ecosystems, we are beginning to see irreversible damage, such as receding glaciers or changes in mountain or arctic ecosystems driven by permafrost thaw.[17] Additionally, climate change has already reduced food and water security.[18] The decline in food security persists despite increased agricultural productivity, highlighting the impact that climate change has in slowing agricultural growth regardless of technological advancements.[19] Furthermore, in regions where there have been increases in extreme heat episodes, climate-related food, water, and vector-borne diseases have increased.[20] Lastly, climate-driven weather extremes are likely driving displacement globally, disproportionately affecting small island states in the Caribbean and South Pacific in particular.[21]

However, these effects are only the beginning if average atmospheric temperatures continue to increase. If the trends chronicled by the IPCC continue, adverse impacts from anthropogenic climate change will continue to intensify.[22] We should expect to see a

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[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] *Id.* at 6.
[20] *See id.*
[21] *Id.*
[22] *Id.* at 7.

further decrease in water availability, food production, and biodiversity.[23] Simultaneously, we should expect an increase in food, water, and vector-borne illness, as well as in the frequency and intensity of extreme weather events.[24]

Not only is climate change happening, it is happening at an accelerated rate due to human activity. It has already had and will continue to have devastating effects on humankind unless we reduce GHG emissions.[25]

B. SUSTAINABILITY

Sustainability is the idea that the needs of economic growth should not compromise the needs of future generations.[26] In the environmental context, sustainability emphasizes the importance of ecosystems serving humankind for as long as possible.[27] This includes the significance of preserving natural resources.[28]

Climate action, specifically, is one way in which to promote environmental sustainability.[29] In the context of climate change, sustainability efforts include reforming energy, land use, transportation, and other systems to minimize their effect on global warming.[30] A warming planet threatens sustainability efforts because anthropogenic

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[23] *Id.*
[24] *Id.*
[25] Roberto Molar Candanosa, *Reducing Emissions to Lessen Climate Change World Yield Dramatic Health Benefits by 2030*, NASA GLOB. CLIMATE CHANGE (Nov. 30, 2021), https://climate.nasa.gov/news/3134/reducing-emissions-to-lessen-climate-change-would-yield-dramatic-health-benefits-by-2030.
[26] Stuart Gottlieb, *Biden's Climate Plans Are Unsustainable*, WALL ST. J., (July 31, 2022, 4:48 PM), https://www.wsj.com/articles/bidens-unsustainable-climate-plans-environment-climate-change-policy-green-energy-fossil-fuels-initiatives-11659286021.
[27] *See* Clara Piloto, *What is Sustainability? 3 Clean Energy Solutions to Achieve Sustainability*, MASS. INST. TECH. PRO. EDUC., https://professionalprograms.mit.edu/blog/sustainability/defining-sustainability/ (last visited Feb 18, 2025).
[28] *Id.*
[29] Kathryn Tso & Julie Newman, *What is "Sustainability"? Is it the Same Thing as Taking Action on Climate Change?*, MASS. INST. TECH. CLIMATE, (Mar. 20, 2021), https://climate.mit.edu/ask-mit/what-sustainability-it-same-thing-taking-action-climate-change.
[30] *Id.*

climate change significantly alters the planet and, consequently, our life support.[31] Furthermore, climate change complicates efforts to find sustainable solutions for issues like biodiversity and food security.[32] Therefore, sustainability both affects and is affected by the climate.[33] For example, a warmer climate will make it more difficult to grow food, while extensively cutting down forests will promote climate change.[34]

The concept of sustainability further suggests that to meet the needs of tomorrow, we must also meet the needs of today.[35] This principle is often overlooked because the term "sustainability" is most commonly used in the context of reducing environmental impact. However, true sustainability addresses the issues and needs that we face today *and* how those issues may intensify as time progresses.[36] In this way, sustainability is a delicate balancing act, rather than a set of imperatives designed to entirely eliminate our environmental or social impact.[37]

In this note, I will place special emphasis on sustainability as a balancing act of interests present and future. Additionally, I will refer to sustainability as both a key reason for why the climate alarmist's approach is flawed, and a tool to promote solid climate policy in the very near future.

C. A CHANGING LEGAL LANDSCAPE

Given recent judicial decisions narrowing the scope of foundational environmental

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[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] *See* Gottlieb, *supra* note 26 (explaining that "sustainability" means that economic growth should not compromise the "needs of future generations").
[36] *See id.*
[37] Tso & Newman, *supra* note 29.

laws like the Clean Water Act,[38] coupled with new regulations scaling back the protections granted by laws like the Endangered Species Act,[39] enacting new environmental legislation is increasingly crucial. The decisions exacerbate concerns about the progression of climate change by leaving significant gaps in environmental protections, leaving critical ecosystems and natural resources at greater risk.[40] As courts and agencies constrain existing environmental laws, new legislation is vital to address major environmental threats, like climate change, through clear standards. Though this note will focus on climate alarmism and its influence on new environmental legislation, contextualizing the environmental political climate amid a changing environmental law field highlights the importance of successful, new environmental legislation.

Perhaps the most significant change to the environmental regulatory landscape is the Supreme Court's decision in *Loper Bright Enterprises v. Raimondo*. In *Loper Bright*. Therein, the Supreme Court overturned *Chevron* deference, which allowed courts to defer to federal agency interpretation of ambiguous statutory provisions.[41] This decision reduces agencies', like the Environmental Protection Agency (EPA), regulatory reach where the underlying statutory authority to regulate is unclear, absent a judicial determination on how that provision should be interpreted and thus implemented by the agency.[42]

Though some legal scholars stress that *Loper Bright*'s implications are not quite as

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38 *E.g.*, City of San Francisco v. Env't Prot. Agency, 145 S. Ct. 704, 715 (2025).
39 Rescinding the Definition of "Harm" Under the Endangered Species Act, 90 Fed. Reg. 16, 102 (proposed Apr. 17, 2025) (to be codified at 50 C.F.R. pts. 17, 222).
40 Katie Bleau, *Biodiversity on the Brink: The Consequences of a Weekend Endangered Species Act*, YALE ENV'T REV. (Jan. 28, 2020), https://environment-review.yale.edu/biodiversity-brink-consequences-weakened-endangered-species-act.
41 Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2272 (2024).
42 *Id.*

drastic as they seem,[43] the decision underscores a trend away from deference to EPA expert opinion on critical environmental issues. This trend is exemplified by the Supreme Court's decision in *City of San Francisco v. EPA*, where the Court held that EPA was not authorized to impose "end-result" provisions in NPDES permits conditioning compliance on whether receiving waters meet set standards under the Clean Water Act.[44]

Though not directly related to climate change, the Supreme Court's new limitations on the deference afforded to agency interpretations of our major environmental laws offers insight on how crucial it will be to pass comprehensive climate legislation. Thus, any proposed climate legislation should be well-conceived to withstand any potential legal challenges.

D. ENTER CLIMATE ALARMISM

That brings us to the term that I will dissect for the remainder of this paper: climate alarmism. Climate alarmism calls for the use of fear to advance a climate agenda or views in the climate change debate.[45] It is further characterized by calls for extreme, immediate action to attack climate change.[46] It is rare that the climate alarmist's calls for change are unfounded. In fact, alarmists generally point to scientific data or present environmental disasters to bolster their point that we need sweeping climate action right now. However, it is the delivery of these facts for which the climate alarmist is infamous.

One well-known example of climate alarmism is the Climate Clock, a project that claims to meld "art, science, technology, and grassroots organizing" to get the world to act

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[43] Colter Paulson & Trane J. Robinson, *The Limits of Loper Bright and the Long Decline of Chevron*, NAT'L L. REV. (July 21, 2024), https://natlawreview.com/article/limits-loper-bright-and-long-decline-chevron.
[44] City of San Francisco v. Env't Prot. Agency, 145 S. Ct at 715.
[45] Bas Fransen, *Climate Alarmism Can Hurt: Here are Some Alternatives*, MEDIUM (Feb. 22, 2022), https://ecomatcher.medium.com/climate-alarmism-can-hurt-here-are-some-alternatives-8e0181916a3d.
[46] *Id.*

in time to reach zero emissions before our climate "deadline."[47] The "deadline" refers to the estimation date that Earth will reach 1.5 degrees Celsius warming and the worst effects of climate change will become "irreversible."[48] The data from the deadline is from the Mercator Research Institute on Global Common and Climate Change, and the theory of the carbon budget is based on a nearly linear relationship between cumulative carbon emissions and average temperature rise.[49] The Climate Clock has shown exhibitions—literal large timers counting down in real time to the "deadline"—all over the world, including in New York, Seoul, and Glasgow.[50]

The Climate Clock is a perfect example of climate alarmism because it is a grandiose prediction of a climate apocalypse meant to inspire fear and motivate substantial, extreme climate policy.[51] It seeks to inspire fear in the hopes that fear will be enough to create a movement capable of overhauling many anti-climate political interests. This is an incredibly common theme among climate alarmists.

Additionally, instead of incremental policy changes designed to connect lower emissions with other political goals, like bolstering the economy, climate alarmism calls for actions like "strikes" and "pressure."[52] These calls often coincide with calls for all production to be socialized.[53]

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[47] *Climate Clock*, CLIMATE CLOCK, https://climateclock.world/ (last visited Feb 14, 2025).
[48] *Id.*
[49] *Id.*
[50] *Id.*
[51] *See The Science*, CLIMATE CLOCK, https://climateclock.world/science (last visited Feb. 14, 2025) (describing the science behind the Climate Clock and the "untold ecological and human devastation if we do not" act in time).
[52] *See, e.g.*, Our Changing Climate, *Why Ethical Consumerism Is a Trap*, YOUTUBE (Nov. 22, 2024), https://www.youtube.com/watch?v=RR_hf0XHHTI (arguing that so-called "ethical consumerism" does not exist under a capitalist system, and that the only way to completely mitigate climate chaos is by "fundamentally changing capitalism").
[53] *See id.*

For the purposes of this note, I will assume that the United States's overall social, economic, and political structure will stay relatively unchanged. Therefore, I will assume that the United States will operate under its current capitalistic system, thereby holding the motivations of corporations and the American public at-large steady. However, I will do so while considering the calls by many climate alarmists for a socialized production system.[54] Put differently, I will assume that many climate alarmists will call for socialization as a means of pushing an extreme climate agenda, such as the Green New Deal, while the current United States sociopolitical environment will generally remain in opposition to such a change.[55]

III. THE ALARMIST'S DILEMMA

Based on the science, fears about climate change's impacts on the world are absolutely warranted. However, the climate alarmist's method of using fear to advance a drastic shift in climate policy in the United States is fundamentally flawed. Alarmism fatally falters in two broad ways: its influence on the individual and its impact on society.

A. EFFECT ON THE INDIVIDUAL

An underlying assumption of climate alarmism is that fear is sufficient to motivate people into action against climate change. The theory here is that by using jarring headlines, among other fear-inducing tactics, enough people will be frightened into climate action at both the individual and collective levels. However, the climate alarmist overestimates the effects of climate fear on the individual at best and promotes a deleterious

[54] *See, e.g.*, *id.*

[55] Dino Grandoni & Scott Clement, *Americans like Green New Deal's Goals, but They Reject Paying Trillions to Reach Them*, WASH. POST (Nov. 27, 2019), https://www.washingtonpost.com/climate-environment/2019/11/27/americans-like-green-new-deals-goals-they-reject-paying-trillions-reach-them/.

effect at worst.

First, climate alarmists greatly overestimate the influence that fear has on the individual. One study in the Journal of Environmental Psychology suggests that while climate change anxiety is correlated with an emotional response to climate change, such as racing thoughts or emotional outbursts, there is little to no association with a behavioral response, such as recycling or turning off the lights consistently when leaving a room.[56] A similar study from the Tyndall Centre for Climate Change Research found that, "although such representations have much potential for attracting people's attention to climate change, fear is generally an ineffective tool for motivating personal engagement."[57] These studies illustrate how the climate alarmist is likely mistaken in thinking that fear-mongering is a successful tool for advancing a widespread climate agenda. By assuming that a fear-based emotional response will translate into personal or political action against climate change, the climate alarmist fails to gather the collective action required for individuals for governments to slow or halt climate change. Therefore, alarmism is, at the very least, largely ineffective in advancing an extreme climate agenda.

However, alarmism's false assumption on fear as an effective motivator is only the beginning of its issues at the individual level. In fact, alarmism itself may be the source of inaction and nihilism within populations that already believe in climate science data. Though fearful depictions of climate change are justified by scientific data and can raise

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[56] Susan Clayton & Bryan Karazsia, *Development and Validation of a Measure of Climate Change Anxiety*, 69 J. ENV'T PSYCH. 1, 1–5 (2020).

[57] Anne Saab, *Discourses of Fear on Climate Change in International Human Rights Law*, 34 EUR. J. INT'L L. 113, 120 (2023) (quoting Saffron O'Neill & Sophie Nicholson-Cole, "Fear Won't Do It": Promoting Positive Engagement with Climate Change through Visual and Iconic Representations, 30 SCIENCE COMMC'N 355, at 375 (2009)).

awareness to the issue, thereby incentivizing action, psychologists and communications experts have found that this fear can also lead to detachment, or climate change fatigue.[58] Even worse, these depictions may even inspire active opposition or climate denialism when the fear-provoking representations are viewed as exaggerated or when catastrophic predictions fail to materialize.[59] One report from the American Psychological Association Task Force on the Interface between Psychology and Global Climate Change concluded that "well-meaning attempts to create urgency about climate change by appealing to fear of disasters or health risks frequently lead to the exact opposite of the desired response: denial, paralysis, apathy, or actions that can create greater risks than the one being mitigated."[60]

The psychological effects of alarmism on the individual and their propensity to perpetuate climate harm establishes its dangers. By stressing passive victimhood rather than active agency, the alarmist discourages its audience from positive climate action. Therefore, climate alarmism's effect on the individual is overall harmful and should be rejected in favor of approaches that inspire agency and action.

B. Effect on Society

There are also negative societal implications to the alarmist's approach to climate policy. There are three ways in which the climate alarmist's calls for rapid decarbonization based on a doomsday prediction are unsustainable given present societal conditions:

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[58] *Id.* at 113.
[59] *Id.* at 120.
[60] *Id.* (quoting American Psychological Association Task Force on the Interface between Psychology and Global Climate Change, Psychology and Global Climate Change: Addressing a Multi-faceted Phenomenon and Set of Challenges (2010), at 80, available at www.apa.org/science/about/publications/climate-change).

economically, geostrategically, and politically.[61] Once again, I will primarily discuss these concepts in reference to the United States.

First, we have economic unsustainability. Economic sustainability is defined as the set of strategies and actions seeking economic prosperity today without negatively impacting a community's social, environmental, and cultural conditions.[62] Economic unsustainability suggests a failing outlined in economic sustainability's defined goals.[63]

Next, there is geostrategic unsustainability. Its converse, geostrategic sustainability, is described as developing energy technologies and working with foreign nations to meet current nationwide energy demands while maintaining a degree of energy independence.[64] Maintaining energy independence is vital in order to avoid putting the United States in jeopardy if relations with foreign nations were to become volatile.[65] Geostrategic unsustainability, on the other hand, involves detrimental energy dependence on foreign actors.[66]

Finally, we have political unsustainability. Political sustainability is the balancing act of meeting the political interests of a community today while considering how the same community's perception of those interests may change over time.[67] However, political unsustainability involves disregarding the political will of either today or tomorrow to push an agenda that is unlikely to survive the electoral process.[68]

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[61] Gottlieb, *supra* note 26.
[62] Subramanian Senthilkannon Muthu, *Assessing the Environmental Impact of Textiles and the Clothing Supply Chain*, 3 (2d ed. 2014).
[63] *See id.*
[64] *See* Gottlieb, *supra* note 26.
[65] *See id.*
[66] *Id.*
[67] *See id.*
[68] *Id.*

1. ECONOMIC UNSUSTAINABILITY

First, climate alarmism is economically unsustainable. This point may appear relatively straightforward: rapid decarbonization would lead to significant losses for the fossil fuel industry and high costs due to needed rapid technological advancement and dissemination. However, the economics become more complicated once we take long-term economic projections into account, as the climate alarmist will often use as a defense. However, it is not the long-term economic projections that will stunt decarbonization almost entirely, it is the short term. The climate alarmist's approach ignores the short-term economic costs and their impact. It is the current effects which make the alarmist's approach unsustainable.

To fully understand the scope of alarmism's economic unsustainability, we should start by considering how rapid decarbonization and movement away from fossil fuels will impact today's economic landscape. As shown in *Figure 1*, below, global energy demand is projected to rise by 50% by 2050, with fossil fuels still accounting for 75% of the world's supply.[69] Achieving net-zero emissions by 2050 would likely require $6 trillion in new spending globally yearly for the next 30 years.[70] To put this figure into perspective, this is the equivalent to one-third of all tax receipts from every government in the world.[71]

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[69] *EIA Projects Nearly 50% Increase in World Energy by 2050, Led by Growth in Renewables*, U.S. ENERGY INFO. ADMIN. (Oct. 7, 2021), https://www.eia.gov/todayinenergy/detail.php?id=49876.
[70] Gottlieb, *supra* note 26.
[71] *Id.*

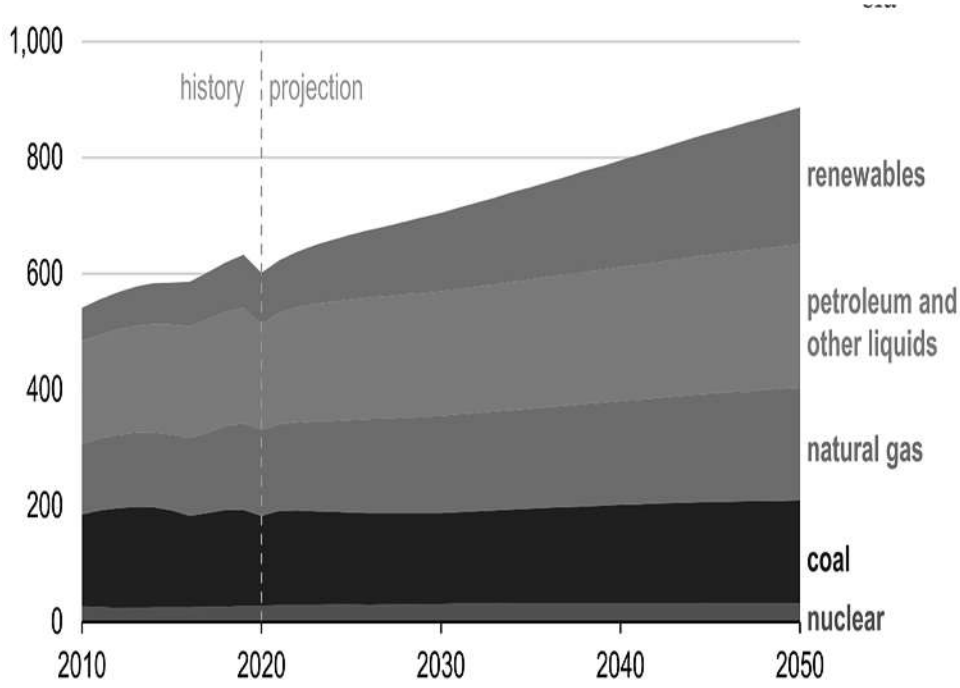

Figure 1: "Global primary energy consumption by energy source (2010-2050)" in quadrillion British thermal units[72]

If these policies are financed by the ratepayer, they will see skyrocketing prices on the fossil fuels used in their day to day lives. In California, for example, a strict climate legislative agenda has contributed to steep gasoline prices, among other issues.[73] In 2022, Californians paid a whopping $5.45 a gallon, while the nationwide average held at $3.68 a gallon.[74] Though nationwide gasoline prices have fallen from their most recent peak in 2022, Californians still currently pay over a dollar more for gasoline compared to the nationwide average.[75] Meanwhile, California pursues an aggressive climate policy, with

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[72] *EIA Projects Nearly 50% Increase in World Energy by 2050, Led by Growth in Renewables*, *supra* note 69.

[73] Editorial Board, *Newsom's 2024 Climate Platform*, WALL ST. J. (Sept. 22, 2022), https://www.wsj.com/articles/gavin-newsoms-2024-climate-platform-california-40-climate-bills-energy-electricity-blackouts-11663702766.

[74] *Id.*

[75] Peyton Headlee, *California Seeing an Increase in Gas Prices, Despite Prices Continuing to Fall Across Country*, KCRA (Sept. 12, 2024), https://www.kcra.com/article/california-increase-gas-prices-despite-lower-national/62180908.

legislation that sets the state's clean energy mandate at 90% by 2035 and 100% by 2045.[76] As of 2022, the state generates around a third of its power from renewables.[77] Therefore, utilities will need to skew investments towards battery storage expansion and manufacturing technology in order to meet the new targets.[78] However, if utilities are not expected to shoulder the financial burden of the new legislation, we may see these development costs pass down to the ratepayer as well.[79] In fact, we have already seen this with gasoline prices.[80] Therefore, there is a valid fear here that many of the steep expenses associated with the climate plan will be passed down to the consumer and hold gas prices at a largely unaffordable level. Therefore, the climate alarmist is immediately met with the costs to the ratepayer that their extreme energy transition goals require.

However, to the alarmist's credit, the investments of today do not consider the economic benefits that tomorrow will likely reap. A new study from Oxford University projects that decarbonization of our energy systems by 2050 would actually *save* at least $12 trillion, globally.[81] The study uses a "fast transition" scenario to show a realistic projection for a decarbonized energy system by 2050 and provide for 55% more energy services globally, compared to today.[82] Therefore, the scenario accounts for the projected increase in global energy consumption.[83] This figure is astonishing, given the narrative that

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[76] Editorial Board, s*upra* note 73.
[77] *Id.*
[78] *Id.*
[79] Jeff St. John, *Who Should Foot the Huge Bill to Switch California Homes to Heat Pumps?*, CANARY MEDIA (Feb. 5, 2024), https://www.canarymedia.com/articles/electrification/who-should-foot-the-huge-bill-to-switch-california-homes-to-heat-pumps.
[80] *See* Editorial Board, *supra* note 73.
[81] Rupert Way et al., *Empirically Grounded Technology Forecasts and the Energy Transition*, 6 JOULE 2056, 2071 (2022).
[82] *Id.* at 2076–77.
[83] *See id.*

an energy transition would bring economic devastation. Therefore, the true likely economic conditions seem to favor the climate alarmist's proposals for required measures to stop climate change, after all. Consequently, the climate alarmist would likely say that not only does the science support the changes we must make to decarbonize, but so does the economy.

However, it is the up-front costs of the energy transition that deeply concern people like the median voter in the United States. The up-front costs of a rapid energy transition may prove particularly financially devastating *today*. And while projections such as the $12 trillion figure out of Oxford are encouraging for society at large, the climate alarmist's calls for rapid decarbonization are still economically unsustainable because they place most of the economic burden on present members of society, rather than dispersing the costs over a greater number of years.

2. GEOSTRATEGIC UNSUSTAINABILITY

The climate alarmist's approach to climate policy is also geostrategically unsustainable. A rushed energy transition would likely bring detrimental energy dependence on other countries.[84] The issue here is *security*. By energy security, I mean the ability for a country to largely maintain its energy outputs, even if outside supply were to cease. Energy security is easy to overlook because supply seems all well and good. That is, until it is not.[85]

The recent energy crisis in Europe illustrates the importance of energy security. In the 2010s and early 2020s, Europe's political focus was on building renewable energy and

[84] Gottlieb, *supra* note 26.
[85] Samantha Gross & Constanze Stelzenmüller, *Europe's Messy Russian Gas Divorce*, BROOKINGS (June 18, 2024), https://www.brookings.edu/articles/europes-messy-russian-gas-divorce/.

low-carbon systems.[86] However, their low-carbon energy trajectory was abruptly halted in February 2022 when Russia invaded Ukraine.[87] Russia used energy withholdings as a war tactic.[88] When the war began, Europe was importing a lot of energy products, including liquified natural gas (LNG).[89] Before the invasion, more than 40% of Europe's imported natural gas came from Russia.[90] Some countries, like Latvia and Austria, relied on Russia for upwards of 80% of their gas supply.[91] However, Germany was certainly Russia's largest LNG customer by volume, importing nearly double the volume of the next largest customer, Italy.[92]

Given the level of dependence that Europe had on Russia's natural gas imports, Russia's move to cut off gas supply beginning in May 2022 were initially devastating.[93] Natural gas imports decreased significantly from Russia via the Nordstream, Ukraine Transit, Yamal, and Turkstream pipelines, as seen below in *Figure 2*.

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[86] *Id.*
[87] *Id.*
[88] *See id.*
[89] *Id.*
[90] *Id.*
[91] *Id.*
[92] *Id.*
[93] Áron Hartvig et al., *The Economic and Energy Security Implications of the Russian Energy Weapon*, 294 SCIENCE DIRECT 1, 4 (2024) (illustrating the spike in gas prices in Europe following Russian supply extinction, most stark in countries with the highest shares of reliance on Russian gas).

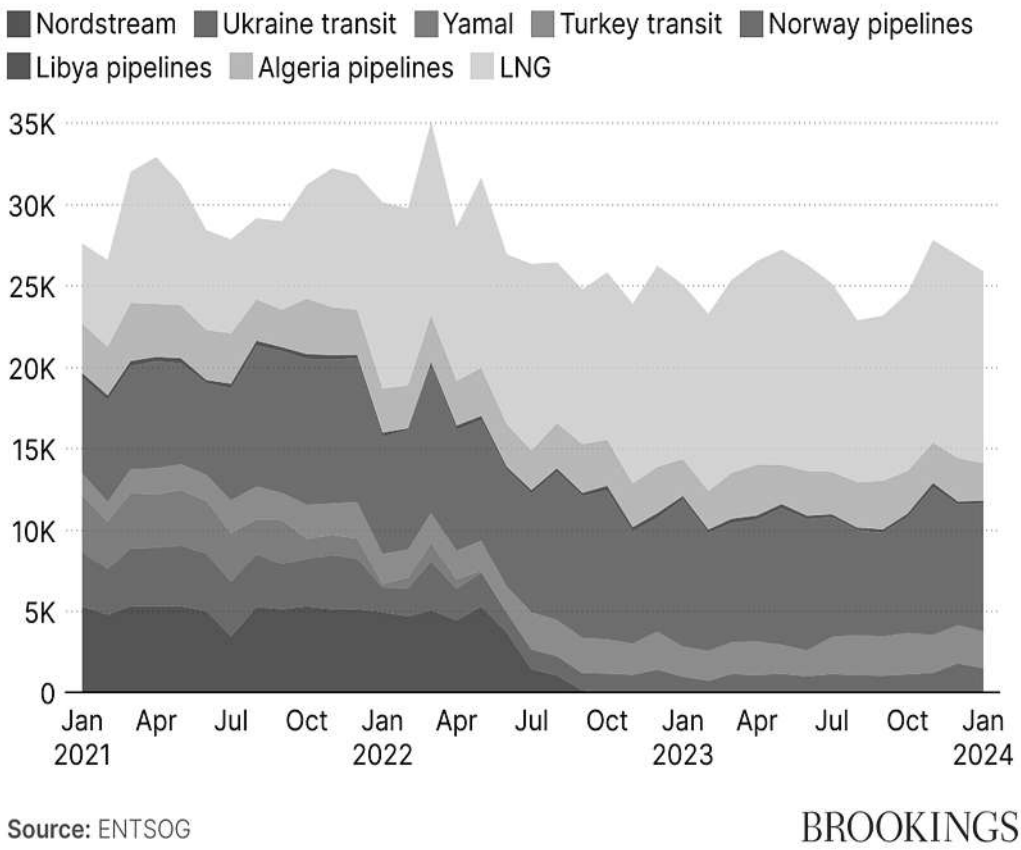

Figure 2: "Natural gas imports to the EU27" in million cubic meters per month[94]

Though Europe's overall reaction has been surprisingly resilient, and the continent has been largely successful in weaning themselves off Russian gas,[95] the nearly dire situation in Europe illustrates the importance of geostrategic sustainability. Without energy security, individual countries like the United States risk energy emergencies that their people simply cannot afford.

However, energy security is an extremely difficult feat when the climate alarmist's goal is to decarbonize as fast as possible. Instead, alarmists put the climate crisis above other salient energy interests. However, this approach leaves us vulnerable. In the United

[94] Gross & Stelzenmüller, *supra* note 85.
[95] *Id.*

States we cannot, for example, rely predominantly on China for renewables technology like wind turbines, solar panels, and lithium batteries.[96] Currently, China holds over "80% of the world's solar manufacturing capacity."[97] Now, let's say the United States goes through a rapid energy transition, per the suggestion of the climate alarmist.[98] If the United States imports the vast majority of the solar energy technology it needed from China, then it will become very dependent on China for our energy supply. Therefore, any discrepancies in foreign supply would cause a potentially catastrophic energy crisis.

However, an energy transition need not come at the cost of energy independence. In fact, the two can likely go together.[99] For instance, developing low-carbon technologies within the United States would improve decarbonization efforts while limiting the amount of energy support required from foreign nations.[100] Slowly developing the U.S.'s low-carbon energy sources domestically would allow for greater energy independence. However, doing so certainly takes longer than the most aggressive approaches to decarbonization in the United States. By pushing for a more rapid energy transition, the climate alarmist fails to consider the potentially devastating ramifications of energy dependence.

3. POLITICAL UNSUSTAINABILITY

Most significantly, climate alarmism is politically unsustainable. Political

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[96] *See id.*
[97] Isabel Hilton, *How China Became the World's Leader on Renewable Energy*, YALE ENV'T 360 (March 13, 2024), https://e360.yale.edu/features/china-renewable-energy.
[98] *See, e.g.*, CLIMATE CLOCK, *supra* note 51, at 2 (stating "[w]e must take action to reduce global greenhouse gas emissions towards zero as quickly as possible within [the time window set by the Climate Clock] for action.")
[99] Gita Bhatt, *Climate Security and Energy Security Must Go Hand-in-Hand*, INT'L MONETARY FUND (Dec. 1, 2022), https://www.imf.org/en/Blogs/Articles/2022/12/01/climate-security-and-energy-security-must-go-hand-in-hand.
[100] *Id.*

unsustainability is characterized by policy proposals that are controversial in nature to a point where (1) a bill does not survive Congress or (2) a policy proposal does not even make it to the point of Congressional proposal. Proposing policies that are essentially dead-on-arrival stifles the goals and messages of the relevant movement, as it disrupts and impedes pragmatic, incremental policy measures that could succeed politically. Political unsustainability in the context of climate alarmism can be seen by the climate alarmist pushing for sweeping climate policy that would fundamentally disrupt the composition of the United States economy or overall political structure.

There is a certain political assumption to climate alarmism that scientific data projecting the particularly devastating effects of climate change should spur revolutionary climate policy. If that alone is insufficient, surely the realization of climate change's effects through extreme weather events—like hurricanes, floods, and droughts—should swing the pendulum. This assumption is not intrinsically flawed: people tend to spring into action once a significant problem begins to affect them and their loved ones. However, this assumption ignores the issues and realities that people face *outside* of climate change. It also takes for granted that the realized effects of climate change are among the top issues for the median voter.[101]

As of 2022, only 1% of US registered voters (and only 3% of Democrats) rank climate change as the country's most important issue.[102] This trend is applicable to voters under 30, only 3% of whom rank climate change first in their concerns.[103] Instead, voters

[101] Gottlieb, *supra* note 26.
[102] *Id.*
[103] *Id.*

consistently rank economic issues highest.[104] And if recent election results, both in the United States and abroad, have anything to show us in these early days of reflection, it is that we should not expect this sentiment to change in the very near future, where alarmists say that climate action is most crucial. Based on these recent global elections, we are living in a new wave of populism. This trend is well-exemplified by the re-election of President Donald Trump. President Trump, who ran his campaign on a right-wing, populist platform, catered to the growing nationwide discontent with the Biden administration. Though we cannot attribute the re-election of President Trump to a rejection of extreme climate policy, climate policy is a significant part of a larger pattern in the growing unpopularity of the Democratic Party's political and cultural platforms.[105] A growing sect of the American population has rejected the perceived overreach of the left wing of the Democratic party.[106]

Relatedly, right-wing conservatives have portrayed climate-related initiatives, including rapid decarbonization as evidence that left-wing Democrats do not care about the plight of everyday Americans.[107] Though misrepresentation of climate change is pervasive within the far-right, and right-wind media will likely continue to use climate policy as political fodder, climate alarmists feed into the far-right's narrative by pushing for the most extreme climate agenda. By exercising more restraint in their fear-based approach and

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[104] *Id.*

[105] *See* Patrick Brown, *A Second Trump Presidency is an Opportunity for Climate Science to Reset*, BREAKTHROUGH INST. (Nov. 20, 2024), https://www.breakthroughjournal.org/p/a-second-trump-presidency-is-an-opportunity?utm_source=post-email-title&publication_id=2392380&post_id=151894001&utm_campaign=email-post-title&isFreemail=true&r=87bdj&triedRedirect=true&utm_medium=email.

[106] *Id.*

[107] *See, e.g.*, Kristen Walker, *How Trump can Pull the Plug on Paris Climate Accord and End this Treaty for Good*, FOX NEWS (Dec. 11, 2024), https://www.foxnews.com/opinion/how-trump-can-pull-plug-paris-climate-accord-end-treaty-good (arguing that Democratic climate initiatives, including the United States's agreement to the Paris Climate Accord, runs counter to the interests of Americans).

advocating for less-extreme and immediate climate legislation, environmentalists may at least minimize the extent to which the far-right is able to use climate change rhetoric to support their own anti-climate political goals.

Furthermore, the alarmist's appeals to scientific data illustrating the present and future effects of climate change, as an instrument of fear provocation, often fail to produce the adoption of sustainable climate policy. This is because trust in scientific expertise has decreased, which reinforces the movement against progressive climate policy.[108] Currently, 1/4 of adults and 1/3 of self-identified Republicans in the US report that they have low or no confidence that scientists act to advance the best interests of the public.[109] One reason for this lack of confidence is that most scientific research is conducted in the university setting.[110] Because many Republicans perceive universities as intimately intertwined with the Democratic party, trust in science naturally suffers.[111] Ultimately, their beliefs are not unfounded.[112] In surveys of academics on party affiliation, there are over ten times more Democratic faculty members than Republican ones.[113] Though that statistic alone may not inherently suggest that research output would sway towards findings affirming left-leaning talking points, approximately 34% of professors feel pressured by their peers to avoid research that may yield controversial results.[114] Furthermore, 91% of professors report that they are at least somewhat likely to censor themselves when it comes to both their publications and verbal engagements.[115]

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[108] Brown, *supra* note 105.
[109] *Id.*
[110] *Id.*
[111] *Id.*
[112] *See id.*
[113] *Id.*
[114] *Id.*
[115] *Id.*

This suggests that although climate alarmism often uses appeals to scientific data chronicling the devastating effects of climate change, large sects of the population remain unconvinced that comprehensive climate policy is necessary. This is not to say that the data is wrong or that climate change will not have devastating impacts, but that people are meeting scientific results with immediate distrust. Therefore, appeals to science are insufficient as a means of provoking the fear necessary to spark substantive climate policy changes.

The insufficiencies in the climate alarmist's approach are apparent when policymakers avoid substantive climate policy altogether to focus on other high-ranking issues that appease their constituents and boost their polls. By relying on fear—even well-founded fear—climate alarmists seemingly fail to attract the political bandwidth necessary to get any meaningful climate policy on the books. Thus, climate alarmism not only insufficiently slows climate change, it undermines the movement to do so altogether. By failing to intertwine climate issues with the issues that voters care about at a time where there is general distrust towards the Democratic party and scientific institutions, the climate alarmist reinforces the idea that the left is out of touch with the lives of most Americans.

Ultimately, if climate policy does not appear to serve people today, it will not live to see tomorrow. Climate alarmists have a marketing problem. Treating extreme policy as a moral imperative, rather than forging sustainable solutions, alienates entire classes of people. Most voters are not satisfied with being told they should vote one way because the other side represents "poor morals." People want to see their lives improve today. 26% of

households report living paycheck to paycheck in this country.[116] For this reason, it is understandable that climate change is not at the top of the median voter's list of issues. Those living paycheck to paycheck will not significantly alter their voting patterns because a climate alarmist tells them their world will fall apart tomorrow. A successful movement would connect the issues that voters care about, like the economy, to the energy transition. Therefore, we should reject the climate alarmist's approach to the U.S. political system and instead intertwine climate policy with issues that receive widespread political support.

IV. A TRULY SUSTAINABLE APPROACH

Instead of fearmongering to advance an extreme climate agenda that is widely disfavored by the electorate, we must consider alternatives that reconcile climate science and the sociopolitical realities of the country. We should focus on the policies that will survive the United States's political system, while making concrete, positive impacts on the environment. Swiftly adopting this approach is crucial, given that the negative effects of climate change are becoming ever more present. After looking at the Inflation Reduction Act (IRA), here are the things I have found that work: subsidies for lower-carbon energy sources, connecting climate legislation to economic development legislation, incremental legislation, concrete plans, (rather than calls for vague, drastic change), and avoiding *over*-reliance on the moral imperatives of preventing climate change.[117]

A. PRAGMATIC POLICY HIGHLIGHT: THE PROMISE OF SUBSIDIES

Subsidies warrant further explanation, as they are often derided as failures by some

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[116] Lorie Konish, *Inflation is Cooling, Yet Many Americans are Still Living Paycheck to Paycheck*, CNBC (Oct. 30, 2024), https://www.cnbc.com/2024/10/30/many-americans-are-still-living-paycheck-to-paycheck-report-finds.html.

[117] *See* Josh Bivens, *The Inflation Reduction Act Finally Gave the U.S. a Real Climate Change Policy*, ECON. POL'Y INST. (Aug. 14, 2023), https://www.epi.org/blog/the-inflation-reduction-act-finally-gave-the-u-s-a-real-climate-change-policy/.

members of the environmental movement.[118] They argue that subsidies fail to change in GHG emissions meaningfully and provide little tangible benefit.[119] Additionally, subsidies have the potential to encourage market manipulation and sink governmental funds. Because subsidies encourage rent seeking behavior and require policymakers to decide on technologies without perfect knowledge, many economists are wary of them.[120] After all, subsidies for industries such as synthetic fuels and biofuels have cost billions of taxpayer dollars without providing much worthwhile output.[121]

However, the federal government has strategically invested in subsidies, and the result showcase their efficacy. During the 1970s and 1980s, for example, government investments in shale gas brought widespread economic benefits that likely recovered all other federal energy investments since the 1950s.[122] The investment equals about a few dollars per ton of avoided carbon emissions.[123] Similarly, investments in nuclear energy subsidies have proven efficient.[124] Nuclear plants have allowed the U.S. to avoid between 15 and 20 gigatons of carbon emissions at less than $5 per ton.[125] This illustrates that the shift toward renewables is not solely in response to market changes.[126] Rather, subsidizing

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[118] *See, e.g.*, Philip Rossetti, *The Inefficiency of Renewable Energy Subsidies*, R STREET INST. (Feb. 16, 2022), https://www.rstreet.org/commentary/the-inefficiency-of-renewable-energy-subsidies/ (concluding that "the estimated costs of [subsidy programs] relative to the tax credit values do not indicate any significant increase in renewable energy uptake beyond what is expected to occur anyway. If this is correct, the environmental benefits of the tax credits are minimal").

[119] Eric Niiler, *Most Climate Policies Don't Work. Here's What Science Says Does Reduce Emissions*, WALL ST. J. (Mar. 14, 2024), https://www.wsj.com/science/environment/climate-change-policies-emissions-ai-research-a02b3f59.

[120] Ted Nordhaus, *Climate Change Requires Big Solutions. But Baby Steps Are the Only Way to Go*, FOREIGN POL'Y (July 20, 2019), https://foreignpolicy.com/2019/07/20/climate-change-requires-big-solutions-but-baby-steps-are-the-only-way-to-go/.

[121] *Id.*

[122] *Id.*

[123] *Id.*

[124] *Id.*

[125] *Id.*

[126] *See* Rossetti, *supra* note 118.

renewables and other low-carbon energy sources have had a significant environmental and economic impact.[127]

Subsidies also incentive climate-friendly policies by diluting costs via concurrent benefits, such as improved air quality, job creation, and the emergence of new industries as novel technologies.[128] They are a shining example of "quiet climate policy," which focuses on depoliticizing and reducing the costs of climate action.[129] This is why subsidies are a promising component of realistic climate policy, in contrast to extreme and emotion-provoking policies pushed for by the climate alarmist. Therefore, in pursuing a sustainable alternative to climate alarmism, we should turn to subsidies and other concrete, incremental climate policies.

B. Case Study: Inflation Reduction Act

The IRA is a prime example of incremental climate policies that addresses both current and future economic and environmental needs. The Act is a narrowly focused piece of legislation, aimed primarily at addressing inflation, reducing the federal deficit, and promoting clean energy.[130] It emphasizes economic stability by using the energy transition as a mechanism to promote economic recovery.[131] It is an incremental approach to the climate crisis in that is certainly does not meet all the necessary requirements to slow climate change or meet the U.S.'s obligations under the Paris Agreement.[132]

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[127] Nordhaus, *supra* note 120.
[128] *Id.*
[129] *Id.*
[130] Building a Clean Energy Economy: A Guidebook to the Inflation Reduction Act's Investments in Clean Energy and Climate Action 2 (2nd ed. 2023), https://case.house.gov/uploadedfiles/inflation-reduction-act-guidebook.pdf.
[131] *See id.*
[132] Maya Domeshek & Dallas Burtraw, *Adding an Emissions Cap to the Inflation Reduction Act Would Help Meet US Climate Goals*, Resources (Nov. 9, 2023), https://www.resources.org/common-resources/adding-an-emissions-cap-to-the-inflation-reduction-act-would-help-meet-us-climate-goals/.

The climate initiatives in the IRA received some Republican support, in large part due to the energy subsidies afforded.[133] In a letter to House Speaker Mike Johnson, 18 Congresspeople urged him to "prioritize business and market certainty" by maintaining the energy tax credit system enacted by the IRA.[134] The Congresspeople championed the energy tax credit system for sparking innovation, driving investment in American energy, and creating jobs across the country.[135] They further posited that "prematurely repealing energy tax credits, particularly those which were used to justify investments that already broke ground, would undermine private investments and stop development that is already ongoing."[136]

The IRA's broad, bipartisan support should be championed and replicated wherever possible. Its success shows that climate legislation can appeal to the greater electorate across party lines.

We can contrast the IRA's approach with the policies promoted by the Green New Deal, which align more closely with the climate alarmist's agenda in that it emphasizes a transformation of the U.S. economy to meet climate goals.[137] Unlike the IRA, the Green New Deal is a broad resolution, not a concrete piece of legislation.[138] The Green New Deal asserts that the entire world must reach net-zero emissions by 2050 and that the United States must lead those efforts.[139] The resolution calls for a total transformation of the U.S.

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[133] *See, e.g.*, Letter from Members of the House Republican Conference to the Speaker of the House of Representatives, H.R. 118th Cong. (2024).
[134] *Id.*
[135] *Id.*
[136] *Id.*
[137] *See* Lisa Friedman, *What Is the Green New Deal? A Climate Proposal, Explained*, N.Y. TIMES (Feb. 21, 2019), https://www.nytimes.com/2019/02/21/climate/green-new-deal-questions-answers.html.
[138] *Id.*
[139] *Id.*

economy and calls on the federal government to rapidly "wean the United States off of fossil fuels."[140] Simultaneously, the Green New Deal seeks to guarantee new jobs in the clean energy industry.[141]

The ambitious Green New Deal ultimately failed to advance in the Senate during the 116th United States Congress.[142] Critics of the resolution often cite the significant upfront economic costs and potential energy security ramifications of switching from fossil fuels too quickly.[143] These critiques highlight the distinction between the IRA and the Green New Deal: the IRA has concrete plans and immediate economic benefits, while the Green New Deal's vagueness creates a murky perception of tangible benefits to Americans today. Though the Green New Deal emphasizes economic growth, it does so in a way that challenges the American economy's structure. The IRA, on the other hand, works within the system to make strides in climate policy.

The distinctions between the IRA and the Green New Deal highlight the importance of incremental legislation designed to address climate change, rather than broad, extreme resolutions. While the IRA was successful in getting through Congress, the Green New Deal was not. Therefore, even though the Green New Deal called for more expansive climate policy measures, the IRA will have a greater positive impact on the environment simply because it survived Congress. In this way, the IRA is a success story that should be recreated—at least while the American public at-large is averse to a transformation of its

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[140] *Id.*
[141] *Id.*
[142] *See* S.J. Res. 8, 116th Cong. (2019).
[143] *Id. See* Sally Benson et al., *Stanford Energy and Environment Experts Examine Strengths and Weaknesses of the Green New Deal*, STANFORD UNIV. (Mar. 28, 2019), https://news.stanford.edu/stories/2019/03/strengths-weaknesses-green-new-deal.

economic base.

V. MEETING THE GRAVITY OF THE SITUATION

Some may argue that while we have not yet achieved sweeping climate legislation in the United States despite various scientific models showing the coming devastation of climate change, alarmism remains an appropriate primary response because it articulates the gravity of the situation and raises climate-change awareness. They may further argue that an incremental approach runs the risk of downplaying the effects of climate change so much that we never enact the climate policies necessary to address climate change.

First, while using fear-provoking headlines and displays raises necessary awareness for the climate movement (especially in mainstream media or high-profile art installations), it is worth asking whether such awareness inspires substantive action. In some cases, individuals may be spurred to action. For instance, one study from Energy, Sustainability and Society found that awareness has an almost immediate effect on the political process, changing voter behavior in favor of more climate-friendly politicians and policy.[144] This is a significant feat, given that we rely on the political system for most of our large-scale climate solutions.

However, climate awareness is already generally high.[145] Given this, the results of the 2024 general election in the United States suggests that changes in voting habits do not

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[144] Sandra Venghaus et al., *The Impact of Climate Change Awareness on Behavioral Changes in Germany: Changing Minds or Changing Behavior*, 12 SPRINGER NATURE 1, 1 (2022) (using Germany as a case study to determine whether the recent increase in climate change awareness can instigate direct behavioral changes or indirect changes via the political process).

[145] United Nations Development Programme, *The world's largest survey on climate change is out – here's what the results show*, UNITED NATIONS DEV. PROGRAMME (June 27, 2024), https://climatepromise.undp.org/news-and-stories/worlds-largest-survey-climate-change-out-heres-what-results-show (showing that, based on a survey statistically representing 87% of the world's population, 56% of people globally say that they think about climate change daily or weekly).

yet amount to a widespread shift in the general electorate towards comprehensive climate policy. Furthermore, climate change remains low in the list of top voter issues in the United States,[146] and climate policy still ranks with lower importance to voters than policies advertised to bolster the economy.[147] This point is important, because climate policies must garner electoral support in these crucial years to keep global warming at a minimum lest we end up with no climate legislation at all. Therefore, incremental policies that adopt economic concerns are still the best path forward, as they retain the positive impacts of awareness without over-reliance on its scope and influence.

Second, a climate alarmist may argue that an incremental approach risks downplaying the effects of climate change, thereby contributing to a perception that the most stringent climate policies are not necessary. It is important to re-emphasize that incremental change may not yield expected-target results set by international climate plans like the Paris Agreement.[148] The climate alarmist is not wrong to feel upset, outraged, or afraid. However, when we consider the goals of the climate alarmist and the warnings of climate scientists, the best we can do for ourselves, and the planet is to take a pragmatic approach. We should maximize positive impacts on the environment by catering to the electoral majority and only advancing policies with a chance at political viability.

However, I would go even further with this point. Not only *should* we make major concessions to get some climate legislation on the books, but we also have a *responsibility* to future generations to do so. Assuming the U.S.'s sociopolitical landscape does not change drastically in the next decade; we need to work within the system to interweave

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[146] Gottlieb, *supra* note 26.
[147] Gottleib, *supra* note 26.
[148] Domeshek & Burtraw, *supra* note 132.

climate policy that meets the electorate's economic needs without irredeemably compromising the interests of tomorrow's electorate.

Though this may feel dark and discouraging, we still have a chance to make a real and significant impact. In fact, evidence illustrates that certain policy approaches work in reducing GHG emissions. The most recent shining example, the IRA, has already promoted the development of clean energy and is projected to meaningfully reduce emissions.[149]

Finally, a climate alarmist may argue that if their policy proposals survive the legislative process, we will finally have untouchable climate policy. However, ensuring that any such policy is clear and direct is still crucial when considering judicial review, given the Supreme Court's decision in *Loper Bright*. The diminished authority of EPA to regulate greenhouse gas emissions under the Clean Air Act makes it crucial that we work quickly to create judicially enforceable and clear statutory mandates that addresses at least some of the regulations that may not survive judicial scrutiny under *Loper Bright de novo* review.

Before *Loper Bright*, *Chevron* deference served as a cushion to agency interpretation of statutes like the Clean Air Act. During the *Chevron* era, courts deferred to agency interpretations of statutes so long as they were "reasonable."[150] This is important for climate legislation given the many regulations surrounding GHG emissions now subject to judicial review under *Loper Bright*.[151] Now, courts must rely on ordinary tools of statutory interpretation, rather than agency expertise, in determining the meaning of

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[149] Bivens, *supra* note 117.

[150] *Loper Bright*, 144 S. Ct. at 2256 (citing Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 104 S.Ct 2778 (1984)).

[151] *E.g.* United States Sugar Corp. v. Env't Prot. Agency, 113 F.4th 984, 997 (D.C. Cir. 2024) (applying the *Loper Bright* framework to hold that EPA exceeded its interpretive authority under the Clean Air Act).

statutory language.[152] By providing clear statutory mandates through concrete, incremental climate legislation, we create a powerful case in the face of judicial scrutiny. While incremental climate legislation is crucial for climate policy to pass in the first instance, it is just as important that any such legislation is clear in its delegation of interpretive authority for it to remain in place.

VI. CONCLUSION

Ultimately, the climate alarmist fails to consider the negative effects of fear on both individual action and promoting successful climate policy. By over-estimating the potential of fear, the climate alarmist generally only enhances climate change anxiety, rather than inspiring individual or collective action. Additionally, using fear as the primary method for promoting climate action may even contribute to climate change fatigue and denialism.

By using fear to advance an extreme climate agenda, climate alarmism in the United States is also unsuccessful at a societal level. Because alarmism is economically, geostrategically, and politically unsustainable, its methods will more likely stunt than aid the environmental movement.

Instead of the alarmist approach, we should focus on incremental, substantive policy solutions, like those advanced in the IRA. Policies like subsidies for renewable energy development are a more sustainable approach to climate policy than climate alarmism because they work within our country's sociopolitical realities rather than trying to fight them to advance a "perfect" solution.

Successful climate action will almost certainly involve less than satisfying policy solutions for the climate alarmist. It would be callous not to recognize that this is a

[152] *Loper Bright*, 144 S.Ct at 2267.

disheartening choice: insufficient climate action or no climate action. However, smaller steps in the right direction are still steps in the right direction. Little victories are not only possible, but they are happening right before our eyes. Subsidies work. Quantitative, concrete proposals work. All is not lost in the fight against climate change.

Passing new climate legislation is crucial. Further, especially given the Supreme Court's narrowing of administrative agency discretion, any such legislation must be tailored to survive judicial scrutiny through clear statutory mandates and economic compromise. We must not let fear of imperfection stop us from making strides in the climate fight during these crucial years. We must be willing to work with the system we have to yield results. This means connecting climate change to the issues that many Americans already care about, like the economy, rather refusing to settle for anything less than a complete economic overhaul in pursuit of a zero-carbon future.

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Louisiana v. EPA and The Potential Loss of EPA's Disparate-Impact Regulations:

Context, Consequences, and Alternatives

By Josh McClain

I. INTRODUCTION

Since at least the 1980s, advocates have been concerned about disproportionate environmental harm in low-income and minority communities.[1] The environmental justice

[1] *See, e.g., History of Environmental Justice*, SIERRA CLUB, https://www.sierraclub.org/environmental-justice/history-environmental-justice, (last visited Feb. 17, 2025).

movement has been particularly prominent in recent years, with the Biden administration making initiatives seeking to address environmental inequalities one of its core focuses.[2] However, even before the change in administration following the 2024 presidential election, however, the environmental justice movement was on a collision course with movements in conservative legal thought and jurisprudence. The U.S. Environmental Protection Agency (EPA) regulations considered in this paper are a prime example of that conflict. As regulations like EPA's are under growing threat (not just from the courts, but now also from the Executive Branch), it is more important than ever to both understand their legal context and assess their value.

To briefly set the stage for the conflict considered here: over the lifetime of the environmental justice movement, the Supreme Court's jurisprudence on race discrimination has shifted in important ways—changes which, like the environmental justice movement, have accelerated in recent years. Around the time the environmental justice movement began, the Court adopted a narrow view of intentional discrimination.[3] That restricted view of intentional discrimination increased the importance of claims based on discriminatory *effects* (where there are disparate impacts, but no clear discriminatory intent), which the Court barred under the Constitution but still allows under some statutes.[4] Increasingly, however, the Court has grown hostile to any awareness or use of race by government actors, presumably including the use of race to understand and address the

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2 Exec. Order No. 14,096, 80 Fed. Reg. 25,251 (Apr. 21, 2023) (revoked by Exec. Order No. 14,148, 90 Fed. Reg. 8,237 (Jan. 28, 2025)).

3 *See, e.g.,* Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979) (holding that unconstitutional discrimination under the Equal Protection Clause requires discriminatory purpose).

4 Washington v. Davis, 426 U.S. 229, 239–41 (1976).

existence of racially disparate environmental impacts.[5]

Recent years have also seen another significant shift in Supreme Court jurisprudence towards a growing alarm and skepticism about the scope of agency power.[6] Neither the Court's concern about uses of race, nor its concern about possible agency overreach, are new. Both have roots going back decades, but they have been meaningfully solidified and expanded by recent rulings.

Enter EPA's disparate-impact regulations. EPA's regulations, promulgated under Section 602 of Title VI of the Civil Rights Act of 1964, reach not just intentional discrimination, but also actions that have the effect of discriminating.[7] Considering discriminatory effects, of course, requires regulated parties to actively be aware of race and racial impacts. This conscious focus on racial impacts makes EPA's regulations—potentially—an important environmental justice tool. It also puts them squarely in the path of growing conservative concern about both uses of race and agency regulatory power.

Perhaps unsurprisingly, given that context, EPA's regulations are currently being challenged by the state of Louisiana. In that case, *Louisiana v. EPA*, a federal district court judge has ruled that EPA and the Justice Department cannot enforcing EPA's disparate-impact regulations across Louisiana—though the parties are still fighting about the exact scope of the ruling.[8]

Louisiana v. EPA is part of a much larger story about how the Supreme Court conceives of racial discrimination, of which this paper only skims the surface. That story

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5 *See, e.g.,* Sttudents for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. v. Univ. of N.C., 600 U.S. 181, 226 (2023) (showing the Court's growing concern about any race-conscious policies).

6 *See, e.g.,* West Virginia v. EPA, 597 U.S. 697 (2022).

7 *See* 40 C.F.R. § 7.35 (b)–(c) (2024).

8 Louisiana v. EPA, No. 2:23-CV-00692, 2024 WL 250798, at *33 (W.D. La. Jan. 23, 2024).

stretches back decades to the immediate aftermath of the passage of the Civil Rights Act of 1964—and, in truth, those decades are just part of a story stretching back past 1868, 1788, and even 1776. In that larger story, the legal context of EPA's environmental regulations promulgated under Title VI is also entangled with other legal questions, most notably affirmative action in higher education. And as mentioned above, the controversy over EPA's regulation pulls in threads from other recent Supreme Court jurisprudence—most prominently skepticism of agency decision-making.

However, before considering any of that legal context, this paper provides background information that is necessary for practical consideration of EPA's regulations, focusing on the real-world evidence of racially disparate environmental impacts. That background makes up Section II. Section III then turns to a small portion of the legal context of EPA's regulations. That story is told at a high level, intending to put those regulations into historical perspective within the Supreme Court's Title VI jurisprudence, focusing on the cases that established the current scheme of agency-enforced disparate-impact regulations. That legal context also shows how recent shifts in jurisprudence have paved the way for the challenge in *Louisiana v. EPA*. Section IV tries to look beyond just doctrinal questions or even interpretive controversies, and instead to the *effect* of the judicial interpretations that seem poised to wipe EPA's regulations away—the effects of losing EPA's disparate-impact regulations. First, the section looks to the reasons to be skeptical that EPA's disparate-impact regulations do much of anything. It then, however, considers what those regulations do—or might do—by comparing them to possible alternatives. The shortcomings of alternative ways of addressing racial disparities in environmental impacts underscore the importance of EPA's Title VI regulations, despite

the regulations' limitations. Underscoring the importance of EPA's regulations also, more broadly, highlights the real-world harms that may result from the current trends in Supreme Court jurisprudence on both race and agency deference.

II. BACKGROUND: RACIAL DISPARITIES IN THE ALLOCATION OF ENVIRONMENTAL BURDENS

The EPA regulations at issue here read, in relevant part:

> (b) A recipient shall not use criteria or methods of administering its program or activity which have the **effect** of subjecting individuals to discrimination because of their race, color, national origin, or sex . . .
> (c) A recipient shall not choose a site or location of a facility that has the purpose or **effect** of excluding individuals from, denying them the benefits of, or subjecting them to discrimination under any program or activity . . . on the grounds of race, color, or national origin or sex; or with the purpose or **effect** of defeating or substantially impairing the accomplishment of the objectives of this subpart.[9]

A small but important repeated word here—"effect"—is at the center of the litigation in *Louisiana v. EPA* and the heart of this paper. The language of 'effect' means that these regulations govern not just intentional discrimination, but also disparate impacts. Through its Title VI regulations, EPA (and every other federal agency) says that recipients of federal funding cannot act in ways that have the effect of discriminating, regardless of their intent. At least in theory, funding recipients could not, for example, site a polluting facility in a place that would disproportionately burden Black residents.

Regulation of disproportionate effects matters, in a broad sense, because those regulations target real harm. Racial disparities in the impact of pollution across the United States are increasingly well documented. Take, for example, air pollution. Despite air pollution levels falling significantly across the country since the 1970s, "[in] 2010,

[9] 40 C.F.R. § 7.35 (b)–(c) (2024) (emphasis added).

racial/ethnic exposure disparities remained across income levels, in urban and rural areas, and in all states, for multiple pollutants."[10] These disparities still persisted more than a decade later: a 2021 study found that, across regions of the country and at every income level, race and ethnicity were linked to higher air pollution exposure.[11] As shown by the persistent effect of race across income levels, race and ethnicity are linked to pollution exposure *independently* from income.[12] In other words, underlying racial disparities in income may compound minority communities' disproportionate exposure to pollution, but that disproportionate exposure is not simply a result of income disparities.

This pattern is not limited to air pollution. The racial makeup of communities—particularly the percentage of Black residents—has been linked to a greater likelihood of hosting hazardous waste treatment, storage, and disposal facilities (TSDFs), again independent of income level.[13] As Mohai and Saha found in 2007, "racial disparities in the distribution of the nation's TSDFs persist despite controlling for the economic and sociopolitical make-up of the tracts [where facilities are sited], suggesting that factors uniquely associated with race . . . may play a role in present-day TSDF locations."[14]

Racial disparities are also not limited to the burdens of pollution—they can be found in how benefits are distributed. Industry can provide real benefits to communities, like high-paying jobs and an increased tax base. Those benefits, however, are not always shared equally. For example, research suggests that minority communities bear

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10 Jiawen Liu et al., *Disparities in Air Pollution Exposure in the United States by Race/Ethnicity and Income, 1990-2010*, 129 ENV'T HEALTH PERSP. 127005-1, 127005-12 (2021).

11 Christopher W. Tessum et al., *PM2.5 Polluters Disproportionately and Systemically Affect People of Color in the United States*, 7 SCI. ADVANCES 1, 2–3 (2021).

12 *Id*.

13 Paul Mohai & Robin Saha, *Racial Inequality in the Distribution of Hazardous Waste: A National-Level Reassessment*, 2 ENV'T STUD. FAC. PUBL'N 343, 361 (2007).

14 *Id.*

disproportionate burdens from high-pollution facilities relative to the economic benefits (such as high-paying jobs) that those communities gain.[15] In short, minority communities bear the brunt of industry's pollution but gain relatively few higher-paying jobs as a result of local industry.[16]

Disparities in pollution exposure layer with and compound other disparities. For example, fine particulate matter ($PM_{2.5}$), a type of air pollution, is a leading risk factor for mortality, especially from cardiovascular diseases.[17] Those mortality risks are not evenly distributed, not just because of disproportionate exposure levels, but also because of disparities in underlying vulnerability. For example, a 2017 study focused on Medicare beneficiaries found that Black people had a $PM_{2.5}$ all-cause mortality risk three times higher than the overall population.[18] One important element of this overall risk is that Black communities are disproportionately vulnerable to cardiovascular disease: Black adults have higher underlying risk factors and are more than twice as likely as white adults to die of cardiovascular disease.[19] As a result, Black Americans are, on average, more vulnerable to serious health consequences than white Americans at any level of $PM_{2.5}$ exposure.[20] And of course, $PM_{2.5}$ exposure levels are not equal.[21] The same communities that are most likely

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15 Michael Ash & James K. Boyce, *Racial Disparities in Pollution Exposure and Employment and US Industrial Facilities*, 115 PROC. NAT'L ACAD. SCI. U.S. 10636, 10339–40 (2018).

16 *Id.*

17 Yiquin Ma et al., *Racial/Ethnic Disparities in PM2.5-attributable Cardiovascular Mortality Burden in the United States*, 7 NAT. HUM. BEHAV. 2074, 2074 (2023).

18 Qian Di et al., *Air Pollution and Mortality in the Medicare Population*, 376 NEW ENG, J. MED. 2513, 2518 (2017).

19 Zulqarnain Javed et al., *Race, Racism, and Cardiovascular Health: Applying a Social Determinants of Health Framework to Racial/Ethnic Disparities in Cardiovascular Disease*, 15 CARDIOVASCULAR QUALITY & OUTCOMES 72, 73 (2022).

20 Ma et al., *supra* note 17, at 2076–77.

21 Timothy Collins & Sara Grinseki, *Racial/Ethnic Disparities in Short-Term PM2.5 Air Pollution Exposure in the United States*, 130 ENV'T HEALTH PERSP. 087701-1, 0877013 (showing racial/ethnic disparities in both short and long-term $PM_{2.5}$ exposures).

to be harmed by air pollution are those most exposed to air pollution.

The historical roots and contemporary causes of these disparities are deeply complicated. To give just a few examples, environmental siting decisions weave together economic, infrastructural, and political factors. Economically, Black communities tend to have lower land values, in part because of government-supported policies like redlining that concentrated Black communities in low-value areas.[22] Black victims are also valued less than white victims in the actuarial tables used to calculate tort payouts.[23] As a result, companies face lower costs—directly throughland costs and indirectly through potential liability—by siting facilities in Black communities.[24] Environmental siting decisions may even avoid certain pieces of critical and vulnerable infrastructure, like hospitals, that are disproportionately located in white communities outside of dense urban areas.[25] Politically, minority and low-income communities are underrepresented in local and national political processes and industry-dominated agency decision-making.[26] Industry would, of course, prefer to locate where there is less chance of political backlash.

Across all of these areas, it is possible to see how underlying historical discrimination—in access to education and high-value employment, in the siting of critical infrastructure, and in political access—leads to modern-day *rational* choices by industry

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22 *See, e.g.*, Office of Economic Policy, *Racial Differences in Economic Security: Housing*, U.S. DEP'T TREASURY (Nov. 4, 2022), https://home.treasury.gov/news/featured-stories/racial-differences-in-economic-security-housing.

23 Kimberly A. Yuracko & Ronen Avraham, *Valuing Black Lives: A Constitutional Challenge to the Use of Race-Based Tables in Calculating Tort Damages*, 106 CALIF. LAW REV. 325, 333 (2018).

24 *See* Ronen Avraham & Kimbery Yuracko, *Torts and Discrimination*, 78 OHIO ST. L.J. 621, 664 (2017).

25 *See* Luke W. Cole & Sheila R. Foster, From the Ground Up: Environmental Racism and the Rise of the Environmental Justice Movement 72–74 (1st ed. 2001).

26 *See generally*, Federico Ricca & Francesco Trebbi, *Minority Underrepresentation in US Cities* (Nat'l Bureau of Econ. Rsch., Working Paper No. 29738, 2022) (describing racial disproportionalities in political representation at multiple levels); Michael Sant'Ambrogio & Glen Staszewski, *Democratizing Rule Development*, 98 Wash. U. L. Rev. 793 (2021) (describing the challenges of accessing the agency rulemaking process).

and agencies that reproduce historical discriminatory effects. Absent other factors, it is perfectly reasonable for a business to try to avoid cost, for regulators to avoid putting polluting sites near hospitals, and for businesses and regulators alike to avoid political backlash. But these choices reproduce and reinforce the effects of discrimination.

That is not to say that racial disparities in environmental pollution are only the product of rational, neutral decision-making replicating past harms. Discrimination also operates more directly throughout the systems that determine exposure to environmental risk. For example studies have found that individual-level discrimination (whether conscious or the product of implicit bias) can push Black renters towards neighborhoods with high pollution.[27] The pervasiveness of implicit bias—and its ability to skew a decision-maker's perceptions of risk and deservingness—has been well-documented.[28] On an individual, sub-conscious level, members of industry, agencies, and non-governmental advocates may perceive less value, incentivizing risk-taking in Black and other minority communities.

Critically, neither modern-day rational decision-making informed by past discrimination or implicit bias involves any conscious choice to discriminate. Malicious intent to harm a particular racial group may create some , but most environmental discrimination today operates without intent. This absence of "intent" is why a consideration of "effect" is important. A requirement to consider the disparate impacts of environmental decisions is meant to capture and address situations where facially neutral

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27 Peter Christensen, Ignacio Sarmiento-Barbieri, & Chistopher Timmins et al., *The Toxics Exposure Gap in the United States: Evidence from the Rental Market* (Nat'l Bureau of Econ. Rsch., Working Paper No. 26805, 2020).

28 *See, e.g.,* Kiesha Ray, *Clinicians' Racial Biases as Pathways to Iatrogenic Harms for Black People*, 24 AMA J. ETHICS 768 (2022) (discussing the role of racial bias in medical decision-making).

decisions are skewed by either underlying inequalities or unconscious decisionmaker biases.

In sum, the problem that EPA's disparate-impact regulations are meant to address is real and significant. This naturally leaves open the question of whether the regulations are legal. It also only heightens the importance to ask whether the regulations *work*. The real and well-documented racial disparities in environmental harm mean that in future EPA regulation, we should consider not just dry legal arguments for and against the validity of those regulations, but also their real-world impact. Are EPA's disparate impact regulations effective? And, perhaps even more critically, if EPA's disparate impact regulations are struck down, are there legal tools that can take their place? The next sections of this paper presents an overview of the legal debate about the validity of EPA's regulations before turning to those critical questions of effectiveness, particularly in light of possible alternatives.

III. THE LEGAL STORY OF EPA'S DISPARATE-IMPACT REGULATIONS

This section examines the legal context of EPA's disparate-impact regulations. First, it contextualizes the current regulatory scheme. To do so, it broadly traces the evolution of the current scheme, primarily through a series of Supreme Court decisions interpreting Title VI. Those decisions whittled away at the potential reach of Title VI, leaving in place the current structure of agency-administered disparate-impact regulations. The section then turns to the current legal challenges to Title VI disparate-impact regulations, briefly showing how a series of recent, major shifts in Supreme Court doctrine opened the door to Louisiana's direct challenge to EPA's disparate-impact regulations. Those recent shifts make two things clear. First, today's consideration of EPA regulations

looks very little like the Supreme Court's historical treatment of those regulations, and second, EPA's regulations are not likely to survive.

A. Evolution of the Current Regime of Title VI Disparate-Impact Regulations

EPA's disparate impact regulations are rooted in Title VI of the Civil Rights Act of 1964. In simple form, Title VI prohibits recipients of federal funding from discriminating on the basis of race, color, or national origin. Specifically, Section 601 of Title VI states:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.[29]

Section 602 then directs every federal agency that is empowered to grant funding to "effectuate the provisions of [Section 601]."[30] The rest of Section 602 provides a framework and presents limitations for agencies' effectuating powers. For example, rules, orders, and regulations issued under Section 602 require Presidential authorization and agencies cannot take enforcement action, including withdrawing funding, until they have tried and failed to secure voluntary compliance. However, it is really the phrase giving agencies implementation authority—"authorized and directed to effectuate the provisions of section [602] of this title"—that is at the heart of today's disparate-impact regime. The debate over agencies' disparate impact regulations centers on precisely what it means to effectuate Section 601's bar on discrimination.

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29 42 U.S.C. § 2000d.

30 42 U.S.C. § 2000d-1. The rest of § 602 puts conditions on agencies' authority under the section—Presidential approval of any agency rules, regulations, or orders, for example—and specifies that agencies can withdraw funding based on a finding of discrimination only after a hearing and an attempt to get voluntary compliance.

1. AGENCY ADOPTION OF DISPARATE-IMPACT REGULATIONS UNDER TITLE VI.

For federal agencies, the answer to the question about the scope of authority to implement Section 601 was clear and immediate: in the years after the Civil Rights Act was passed, every cabinet department and close to 40 federal agencies implemented disparate impact regulations under Section 602—resulting in both facially intentional discrimination by federal funding recipients and incidental discriminatory effects.[31] Just after the passage of the law, the Department of Justice (DOJ), in conjunction with a Presidential task force, drafted model Title VI regulations that addressed discriminatory effects.[32] Later that year, based on the Title VI guidance, seven departments and agencies adopted disparate-impact regulations under Section 602.[33] For example, the Department of Health and Human Services and the Department of Agriculture adopted regulations prohibiting recipients of federal funding from using "criteria or methods of administration which have the effect of subjecting individuals to discrimination."[34] In 1966, DOJ promulgated its own Title VI regulations.[35] EPA followed suit in 1973.[36]

DOJ's role in this rapid and widespread adoption of Title VI disparate-impact regulations particularly strengthens the inference that at least some parties always understood Title VI to encompass disparate impacts. Before DOJ created model language for agency regulations under Section 602, the Department had helped draft Title VI's language and "participated heavily in preparing the legislation."[37] While DOJ's

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31 Guardians Ass'n v. Civ. Serv. Comm'n of City of N.Y., 463 U.S. 582, 619 (1983).
32 *Id*. at 618.
33 *Id*.
34 Compare 45 CFR 80.3 (2025) (DHHS's implementing regulations) *with* 29 Fed. Reg. 16274-75, § 15.3(b)(vi)(2) (USDA's implementing regulations).
35 31 Fed. Reg. 10265 (July 29, 1966).
36 40 C.F.R. § 7.10 (1973).
37 *Guardians*, 436 U.S. at 618.

understanding does not necessarily match Congress's—and neither is necessarily dispositive as to the actual meaning of Title VI—the Department clearly had an immediate, relatively unquestioned understanding that Section 602 could reach discriminatory effects.

Agency promulgation of regulations under Title VI was not just swift, but was also stable: generally speaking, agencies have kept their disparate-impact regulations in place and essentially unchanged over the past 50-plus years.[38] In fact, the first (and only) meaningful attempt to substantively change these regulations came in late 2020—in the closing days of the Trump administration, DOJ began acting to remove the "effects" language from its Title VI regulations, sending an amendment to the Office of Management and Budget for review.[39] DOJ's changes would have eliminated consideration of disparate impacts under its regulations.[40] With the change in administrations, however, DOJ's draft rule was withdrawn and never published.[41]

2. THE SUPREME COURT'S CONSIDERATION(S) OF TITLE VI'S SCOPE

Unlike agencies, courts have wrestled with the question of the permissible scope of Title VI and agency regulation implementation. A majority of the Supreme Court has not—quite—directly addressed the constitutionality of agencies' disparate-impact regulations promulgated under Title VI. Instead, the Court has primarily considered two related questions: (1) whether private plaintiffs can enforce Title VI disparate-impact claims and (2) whether Title VI *itself*—not agency regulations implementing Title VI—can reach disparate impacts or whether it is limited to intentional discrimination. As discussed in

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38 *Compare* 28 C.F.R. § 42.104(b)(2) *with* 31 Fed. Reg. 10,266 (AR2), *and* 40 C.F.R. § 7.35(b) *with* 38 Fed. Reg. 17,968 (AR286).

39 Louisiana v. U.S. Env't Prot. Agency, 712 F. Supp. 3d 820, 832 (W.D. La. 2024).

40 *Id.*

41 *Id.*

more detail below, the Court has, over time, said essentially "no" (individuals cannot bring Title VI disparate-impact claims) and "no" (Title VI itself is limited to intentional discrimination). In answering these questions, however, the Court has left space for agencies to *implement* Title VI's bar on intentional discrimination by prohibiting disparate impacts and for *agencies* to enforce those regulations. The Court's opinions on these issues have been notably fractured. As a result, as the Court has issued rulings affecting Title VI's scope, some justices have commented more directly on Title VI disparate-impact regulations, weighing in both for and against the validity of those regulations. A brief tour of some important Title VI cases shows the evolution of the current status quo and the contours of the arguments on both sides.

First, in 1974, the court seemed to say "yes" to both questions above: a private plaintiff *could* bring suit to enforce a disparate impact claim under Title VI and Title VI *itself* did reach disparate impacts. In *Lau v. Nichols*, the Supreme Court unanimously held that a school district's practices with discriminatory effects violated Title VI, even though there was no showing of discriminatory intent.[42] In reaching that result, the majority "rel[ied] solely on § 601 of the Civil Rights Act of 1964."[43] The majority, did, however, look to agency implementing regulations to construe the statute. Specifically, it noted that the Department of Health, Education, and Welfare (HEW)[44] had issued guidelines under

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42 Lau v. Nichols, 414 U.S. 563, 563-69 (1974). Specifically, the Court held for a private plaintiff who claimed that the San Francisco school district was discriminating against 1,800 non-English-speaking students of Chinese descent by only providing instruction to those students in English, without taking any affirmative steps to provide them with meaningful educational opportunities. *Id.* at 564–69. While the district had been integrated by consent decree in 1971, the Court did not explicitly frame its decision as remedial. *Id.* at 564.

43 *Id.* at 563.

44 Today the Department of Health and Human Services, with the Department of Education created in 1979.

Section 602 to the effect that "[d]iscrimination is barred which has [a discriminatory] effect even though no purposeful design is present."[45] In other words, in *Lau*, the Supreme Court clearly recognized that agencies had implemented disparate-impact regulations under Title VI, but did not question the legality of those regulations because it assumed Title VI *itself* reached disparate impacts. In fact, the majority took the existence of agency disparate-impact regulations as an indication that Title VI itself governed disparate impacts—assuming, in effect, that agencies had accurately interpreted the statute.

In a concurring opinion in *Lau*, Justice Stewart, joined by Chief Justice Burger and Justice Blackmun, took a different approach. They said that Section 601—Title VI's direct ban on discrimination—likely did not bar disparate impacts on its own terms.[46] For the concurring justices, that made "[t]he critical question . . . whether the regulations and guidelines promulgated by HEW go beyond the authority of § 601."[47] Giving "great weight" to the agency's construction of remedial legislation, they said that agency regulations of disparate impact were "reasonably related to the purposes of the enabling legislation" and therefore valid.[48] Put differently, the concurring justices looked squarely at the legitimacy of implementing regulations that (in their view) reached beyond the direct scope of Title VI itself and found those regulations to be lawful.

Lau's majority and concurrence show a clear embrace of disparate impact theory under Title VI, either under Title VI itself or through agency-implemented regulations. The Court did not, however, stop interpreting Title VI at *Lau*. Four years later, in 1978, a

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45 *Lau*, 414 U.S. at 568.
46 *Id*. at 569–70 (Stewart, J. concurring).
47 *Id*. at 571.
48 *Id*. (citing Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 210 (1972); Griggs v. Duke Power Co., 401 U.S. 424, 433–34 (1971); Udall v. Tallman, 308 U.S. 1, 16 (1965)).

fractured court called into question the holding in *Lau* and the *Lau* justices' understanding of Title VI's reach.[49] In *Regents of the University of California v. Bakke*, the Court took up the case of a white man who was rejected from UC Davis's medical school and who challenged the school's policy of holding some seats open for minority students through a separate admissions process.[50] *Bakke* is an immensely complicated case. Four justices held the school's "quota system" to violate Title VI.[51] Another four held the quota system to be valid under the Fourteenth Amendment or Title VI, pointing to *Lau* and arguing for deference to agency implementing regulations.[52] Justice Powell, announcing the judgment of the Court but effectively writing alone, provided a critical fifth vote to hold the policy unconstitutional under the Fourteenth Amendment.[53] A full discussion of Bakke's implications for the consideration of race is beyond the scope of this paper. Instead, this paper focuses narrowly on Bakke's direct implications for agency disparate-impact regulations under Title VI. In that narrow respect, *Bakke's* most significant result might simply be that it upset *Lau's* understanding of Title VI—though even that outcome is unclear.

The murky relationship between *Bakke* and *Lau* (at least for Title VI regulations) is apparent in the cases following *Bakke*. Five years after *Bakke*, *Guardians Ass'n v. Civil Service Com' of City of New York* was the next case to come before the Court with clear implications for Title VI disparate-impact regulations.[54] In *Guardians*, while dealing with

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49 Notably, another case had been decided in the interim, denying disparate impact as a cause of action under the Fourteenth Amendment. Washington v. Davis, 426 U.S. 229 (1976).

50 Regents of Univ. of California v. Bakke, 438 U.S. 265, 276 (1978).

51 *Id.* at 412–13 (Stevens, J., concurring in part).

52 *Id.* at 341–42; 350–51 (Brennan, J., concurring in part).

53 *Id.* at 319–320.

54 *Guardians Ass'n*, 463 U.S. at 582 (1983).

an employment discrimination claim, the justices tried to explain what *Bakke* meant for *Lau*.[55] Justice White announced the opinion of the Court in *Guardians*, but only Justice Rehnquist joined his opinion—and not the part that spoke to Title VI and disparate impact.[56] White believed that *Bakke* had not overruled *Lau* and that Title VI still directly reached disparate impacts.[57] Even if *Lau was* overruled, he believed it was still clear that agency regulations under Title VI could reach disparate impacts.[58] Justice Marshall, dissenting in the judgment, agreed that in light of the history of agency interpretation of Title VI to reach disparate impacts, *Bakke* should be read as not overruling *Lau*.[59] Title VI itself, in his view, could reach disparate impacts.[60] Justice Stevens, joined by Justices Brennan and Blackmun, also dissented but—again—wrote separately.[61] They believed *Bakke* did overrule *Lau*, but thought that agency regulations could still prohibit disparate impacts, believing that "[b]y prohibiting grant recipients from adopting procedures that deny program benefits to members of any racial group, the administrative agencies have acted in a reasonable manner to further the purposes of Title VI."[62]

On the other hand, Justice Powell, Chief Justice Burger, and Justice Rehnquist thought that *Bakke had* overruled *Lau* and that Title VI could only reach intentional discrimination.[63] In a footnote, those justices suggested that agency regulations reaching disparate impacts were "entitled to no deference."[64] Justice O'Connor, writing separately,

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55 *Id.* at 590–93.
56 *Id.* at 584.
57 *Id.* at 591.
58 *Id.*
59 *Id.* at 619, 621, 623–34 (Marshall, J., dissenting).
60 *Id.* at 618.
61 *Id.* at 634.
62 *Id.* at 643–44. (Stevens. J., dissenting)
63 *Id.* at 610–11 (Powell, J., concurring).
64 *Id.* at 611, n.5.

was more direct: she would have held that Title VI requires proof of intentional discrimination and that, as a result, "regulations imposing an impact standard are not valid."[65] Guardians, leaves us, then, with five justices making clear statements that Title VI disparate-impact regulations are legitimate—but split across three opinions and coming out on both sides of the case, and with four justices making direct statements to the contrary.

The Court seemed to clarify its position two years later in *Alexander v. Choate*, a 1985 case about disparate impacts under a different statute (the Rehabilitation Act of 1973).[66] There, Justice Marshall, writing for a unanimous court, said:

> In *Guardians,* we confronted the question whether Title VI . . . reaches both intentional and disparate-impact discrimination. No opinion commanded a majority in *Guardians,* and Members of the Court offered widely varying interpretations of Title VI. Nonetheless, a two-pronged holding on the nature of the discrimination proscribed by Title VI emerged in that case. First, the Court held that Title VI itself directly reached only instances of intentional discrimination. Second, the Court held that actions having an unjustifiable disparate impact on minorities could be redressed through agency regulations designed to implement the purposes of Title VI. In essence, then, we held that Title VI had delegated to the agencies in the first instance the complex determination of what sorts of disparate impacts upon minorities constituted sufficiently significant social problems, and were readily enough remediable, to warrant altering the practices of the federal

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65 *Id*. at 612.
66 Alexander v. Choate, 469 U.S. 287 (1985).

grantees that had produced those impacts.[67]

Choate's statement about Title VI was not central to the case, but it seemed to present a clear understanding that agency implementing regulations could reach disparate impacts. That relatively stable understanding, however, may have been called into question some 26 years later, the last time the Court addressed disparate impact under Title VI.

In 2001, in *Alexander v. Sandoval,* a 5-4 Court held directly that there is no private right of action for individuals—as opposed to agencies—to enforce agency disparate-impact regulations promulgated under Section 602.[68] In making that statement, Justice Scalia, writing for the majority, "assume[d] for the purposes of deciding this case that regulations promulgated under § 602 . . . may validly proscribe activities that have a disparate impact on racial groups."[69] Scalia noted that five justices voiced that opinion in *Guardians* and that "dictum in *Alexander v. Choate* is to the same effect."[70] However, Scalia went out of his way to point out that "[t]hese statements are in considerable tension with the rule of *Bakke* and *Guardians* that § 601 forbids only intentional discrimination," implying strongly that he would have voted to overturn the regulations if they had been challenged.[71]

If Scalia's majority opinion called disparate-impact regulations into question, the dissent in *Sandoval* strongly argued for their validity, making some critical points about the potential importance of those regulations. The dissenters saw the validity of Title VI

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67 *Id.* at 292–94 (footnotes omitted).
68 *Alexander v. Sandoval*, 532 U.S. 275, 293 (2001).
69 *Id*. at 282.
70 *Id*. at 281–82. Perhaps notably, Justice Scalia did not frame *Choate's* statement that Title VI itself only reaches intentional discrimination as dictum.
71 *Id*. at 282.

disparate-impact regulations as "effectively settled," as illustrated by *Guardians*.[72] Nevertheless, they took the time to explain their understanding of why Title VI implementing regulations could reach disparate impacts. To them, Section 602 "grant[ed] the responsible agencies the power to issue broad prophylactic rules aimed at realizing the [antidiscrimination] vision laid out in § 601."[73] The dissenters saw this broad agency discretion as an intentional legislative choice "reflect[ing] a reasonable—indeed inspired—model for attacking the often-intractable problem of racial and ethnic discrimination."[74] To explain why such a model might be needed, they pointed towards "more subtle forms of discrimination" that might not be captured by a plain bar on intentional discrimination.[75] In light of that complexity and their understanding of the statutory design, the dissenters invoked deference under *Chevron* to argue for deference to agencies' interpretation that disparate-impact regulations were necessary.[76]

As this brief discussion makes clear, the history of the Supreme Court's interpretation of Title VI regulations is a tangled mess. Over twenty-six years, there has been no absolutely clear majority statement about the validity of disparate-impact regulations. Five justices in *Guardians* directly embraced those regulations, but in fractured opinions. So, apparently, did all nine justices in *Choate*, but in dicta. On the other hand, a slowly growing number of justices have expressed concerns about the validity of

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72 *Id*. at 298–99 (Stevens, J., dissenting) (treating *Guardians* as having settled that Title VI creates a private right of action for disparate-impacts and, therefore, that disparate impacts are covered under Title VI regulations).

73 *Id*. at 305.

74 *Id*. at 306.

75 *Id*.

76 *Id*. at 309–310 ("In addition, these Title VI cases seemingly ignore the well-established principle of administrative law that is now most often described as the "*Chevron* doctrine." . . . If one understands the relationship between §§ 601 and 602 through the prism of *either Chevron* or our prior Title VI cases, the question presented all but answers itself.")

regulations that reach disparate impacts or have outright declared such regulations invalid.

Between justices' statements in favor of the regulations and statements opposed, roughly two (historical) camps can be identified. One, which would uphold the regulations, focused on redressing past discrimination and catching hidden discrimination, and was more open to using race to do so. That camp generally also emphasized giving deference to agencies to adequately address these complicated issues. The other camp, which would strike down the regulations, focused on the limitations on the definition of discrimination under the Fourteenth Amendment and Title VI. While not explicit in Justices' statements against Title VI disparate-impact regulations, that camp aligned with the Court's general shift towards greater hostility towards "benign" uses of race from the 1970s into the 2000s.[77] In this view—discussed further below—if redressing past discrimination requires that actors are conscious of race, that redress itself is harmful because it perpetuates the use of race as a defining characteristic. This hostility to using race-conscious strategies to address ongoing effects of discrimination is fundamentally incompatible with regulations that require consideration of disparate racial impacts.

B. The Current Legal Challenge to EPA's Disparate-Impact Regulations

The Supreme Court has not revisited the status quo reflected in *Guardians*, *Choate*, and *Sandoval*. Agencies still have Title VI regulations in place, essentially unchanged.[78] Those regulations are still enforceable only by the agencies, not by private parties. That

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77 *See, e.g.*, *Bakke*, 438 U.S. at 294–95; Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 240 (1995) (Thomas, J., concurring) ("I believe that there is a "moral [and] constitutional equivalence," . . . between laws designed to subjugate a race and those that distribute benefits on the basis of race in order to foster some current notion of equality."); Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. *1*, 551 U.S. 701, 741-42 (2007) ("Our cases clearly reject the argument that motives affect the strict scrutiny analysis.").

78 *See, e.g.*, 49 C.F.R. § 21.5(b) (2025) (Department of Transportation regulation prohibiting disparate-impact discrimination).

status quo may, however, be about to change. On May 24, 2023, the State of Louisiana filed a complaint against EPA and DOJ, alleging, among other claims, that EPA's disparate-impact regulations are unlawful.

Louisiana v. EPA grew out of two prominent trends in conservative jurisprudence: skepticism of agency authority and pushback on the use of race for any purpose.[79] In its complaint, Louisiana alleges that "EPA officials have lost sight of the agency's actual environmental mission, and instead decided to moonlight as a social justice warriors fixated on race."[80] The State's rhetoric there might be politically charged, but it is easy to see how EPA's regulations are a tempting conservative target at this moment. The allegation is that EPA is overreaching its statutory and constitutional authority to further racial equity. Race-conscious policies, environmental regulations, and far-reaching administrative action all coming together seems almost tailor-made as a bugbear for the current conservative legal movement.

In the same vein, the complaint in *Louisiana v. EPA* explicitly tapped into some recent shifts in Supreme Court jurisprudence by invoking the "major questions doctrine."[81] As Justice Gorsuch's concurring opinion stated in *West Virginia v. EPA*, the major questions doctrine means that "administrative agencies must be able to point to 'clear

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79 The case could also be tied to other (less ideological) hot-topic trends, like the aggressive use of preliminary injunctions and judge-shopping. For instance,the case was filed in the Lake Charles Division of the Western District of Louisiana, which is not where either of the two permitted facilities at issue are located, but where it had a 90% chance of being assigned to Judge James D. Cain, a Trump appointee who was active in Republican state politics earlier in his career. Western District of La., Standing Orger 1.61, Assignment of CSes to District and Magistrate Judges (2024). If the case had been filed in the Eastern District of Louisiana, where the facilities at issue are located, it would have been randomly assigned to any one of the Eastern District Judges. *Frequently Asked Questions*. U.S. DIST. CT. FOR THE E. DIST. OF LA., https://www.laed.uscourts.gov/court-information/faq (last visited Feb. 21, 2025) (select "How are judges assigned to cases?")..

80 Compl. at 2, *Louisiana*, 2024 WL 250798 (W.D. La. Jan. 23, 2024).

81 *Id.* at 14.

congressional authorization' when they claim the power to make decisions of vast 'economic and political significance.'"[82] In these "extraordinary cases," the Court will respond with "skepticism," demanding that statutory language be exceptionally clear in granting the relevant agency its broad power.[83]

In its *Louisiana v. EPA* complaint, Louisiana alleged that "the power to effectuate [Section 601's] intentional discrimination prohibition by imposing disparate-impact-based liability is precisely the sort of hiding elephants in mouseholes reasoning that the [major questions] doctrine forbids.[84] Moreover, Louisiana argued, EPA's regulations involve "a matter of great political significance," "regulate a significant portion of the American economy," and intrude into the "particular domain of state law."[85] These three factors were laid out by Justice Gorsuch as triggers for a major questions inquiry in his *West Virginia v. EPA* concurrence.[86]

If Louisiana's complaint leveraged a recent jurisprudential change in *West Virginia v. EPA*, in its other arguments, the complaint anticipated (perhaps unsurprisingly) the direction of coming Supreme Court decisions. The complaint was filed shortly before the joint decision in *Students for Fair Admission v. Harvard* and *Students for Fair Admission v. University of North Carolina* [hereinafter *SFFA*] was handed down, but its arguments

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82 West Virginia v. EPA, 597 U.S. 697, 735 (2022) (Gorsuch, J., concurring).

83 *Id*. at 723–24 ("Extraordinary grants of regulatory authority are rarely accomplished through "modest words," "vague terms," or "subtle device[s]."") The major questions doctrine is not alone in showing the Court's growing concern about agency authority—the upcoming decision in *Loper Bright Enterprises v. Raimondo*, which is widely expected to at least curtain *Chevron* deference, is another clear example. *Chevron* deference was, of course, part of what past justices who would have upheld Title VI regulations invoked in arguing for the persuasive weight of consistent agency interpretations that included disparate impacts.

84 Compl. at 14, *Louisiana*, 2024 WL 250798.

85 *Id.*

86 *West Virginia v. U.S. Env't Prot. Agency*, 597 U.S. at 743–44 (Gorsuch, J., concurring).

about race presaged the Court's *SFFA* decision.[87] While *SFFA* limited its analysis to the question of affirmative action in higher education, the majority spoke broadly about the constitutional illegitimacy of any consideration of race. Chief Justice Roberts wrote that "the Court [has] repeatedly held that ameliorating societal discrimination does not constitute a compelling interest that justifies race-based state action."[88] Acting race-consciously to ameliorate discrimination is, in the view of the *SFFA* majority, equivalent to invidious racial discrimination.[89] Louisiana, similarly, argued that "Defendants' attempts to impose disparate-impact-based requirements on the State . . . effectively *compel* the State to *discriminate* on the basis of race."[90] In another parallel, Roberts, again, said that "in [the dissent's] view, this Court is supposed to tell state actors when they have picked the right races to benefit."[91] Louisiana's complaint argued that "EPA divides racial groups into favored and disfavored groups," providing benefits to "favored" minorities.[92] This parallel stems from the fact that *SFFA*'s framing of race surfaced in prior Supreme Court opinions and especially in dissents.[93] *SFFA*'s power for Louisiana's argument, however, was not lost on the State. After its complaint was filed, Louisiana specifically urged the district court to consider *SFFA*.[94]

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87 Louisiana's complaint was filed on May 24, 2023, and the decision in *SFFA* was handed down on June 29, 2023. Compl. at 1, *Louisiana*, 2024 WL 250798; Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181 (2023).

88 *SFFA*, 600 U.S. at 226.

89 *See id*. at 214.

90 Compl. at 3, *Louisiana*, 2024 WL 250798 (emphasis in original).

91 *SFFA*, 600 U.S. at 229.

92 Compl. at 10, *Louisiana*, 2024 WL 250798.

93 *See, e.g.,* League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 511 (2006) (Roberts, C.J., concurring in part and dissenting in part) ("It is a sordid business, this divvying us up by race.") (cited by Compl. at 10, *Louisiana*, 2024 WL 250798).

94 *Louisiana*, 712 F. Supp.3d at 861 (noting that "The State urges the Court to also consider two other cases that invite doubt as to the constitutionality of Defendants' disparate impact regulations": *SFFA* and *Parents Involved*).

Louisiana v. EPA has yet to be fully resolved—the parties are still contesting the ultimate scope of the court's judgment. However, on January 23, 2024, the district court issued a preliminary injunction barring EPA and DOJ "from imposing or enforcing any disparate-impact-based requirements against the State or any State agency under Title VI."[95] And on August 22nd, 2024, the court entered judgment for Louisiana via permanent injunction.[96] The reasons for these decisions are telling: in its January 2023 order, the court embraced the State's argument for the application of the major questions doctrine, saying "[t]he Court agrees with the State that the major questions doctrine is applicable here as to the imposition of disparate impact mandates under Title VI and as such, demands clear congressional authorization."[97] The court also signaled its agreement with the State's racial-discrimination arguments. Specifically, Judge Cain wrote that "[t]he Court agrees with the State that the disparate impact . . . analysis the EPA is requiring . . . creates a race-based decision," which would make the State "potentially subject to unconstitutional proceedings for all future Title VI complaints."[98] In fact, at the end of his opinion, Judge Cain went further, rejecting both the idea of using race to remedy past discrimination and the underlying idea that environmental disparate impacts reflect discrimination at all: "To be sure, if a decision maker has to consider race, to decide, it has indeed participated in racism. Pollution does not discriminate."[99]

The district court's judgment came after the parties agreed to proceed to final

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95 *Id*., at 866.
96 *Louisiana*, 2024 WL 3904868, at *1.
97 *Louisiana*, 712 F. Supp.3d at 863.
98 *Id*. at 843.
99 *Id*. at 866 ("The public interest here is that governmental agencies abide by its laws, and treat all of its citizens equally, without considering race. To be sure, if a decision maker has to consider race, to decide, it has indeed participated in racism. Pollution does not discriminate. Surely, that is why Title VI so plainly does not mention disparate impact.").

judgment without additional dispositive motion practice following the preliminary injunction (i.e., without DOJ ever filing an answer to Louisiana's complaint).[100] Instead of contesting the core issues of the case, the parties only argued over the appropriate scope of the court's injunction.[101] In short, at least in this case, EPA and DOJ simply retreated from defending EPA's regulations.

The agencies' retreat may have been rational given the district court's apparent hostility to their position in its preliminary injunction.[102] Still, the retreat seems highly unlikely to ultimately save disparate-impact regulations—even before Donald Trump's victory in the 2024 presidential election. Even if EPA avoided a larger-scale defeat here, Louisiana's litigation could still serve as a blueprint for future attacks on disparate-impact regulations. If—perhaps under a future administration—EPA seeks to enforce disparate-impact regulations, other conservative states seem likely to jump at the chance to challenge the agency.

Moreover, it seems likely that the Supreme Court would strike down EPA's (and other agencies') Title VI disparate-impact regulations if given the chance. That could happen either 1) on race-based equal protection grounds or 2) as agency overreach. On the equal protection front, agency-implemented disparate-impact regulations could, in theory,

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[100] Joint Request For Briefing Schedule and For Entry of Final Judgment, *Louisiana v. EPA*, No. 2:23-CV-00692-JDC-TPL, Document 56 (W.D. La. Mar. 28, 2024); Order Granting 56 Motion for Briefing Schedule and for Entry of Final Judgment, *Louisiana v. EPA*, No. 2:23-CV-00692, 2024 WL 250798 (2024).

[101] Specifically, Louisiana asked the district court to both vacate EPA's regulations and extend its preliminary injunction to a permanent injunction covering not only Louisiana state agencies, but all entities within the state. Response by State of Louisiana re 57 Order on Motion for Miscellaneous Relief, *Louisiana v. EPA*, No. 2:23-CV-00692-JDC-TPL, Document 56 (W.D. La. Apr. 23, 2024).

[102] It is also undoubtedly not lost on any of the parties involved that this case is proceeding in the Fifth Circuit. If it were to go up on appeal, it seems highly unlikely that EPA's regulation would survive, at least in Louisiana, Texas, and Mississippi.

be distinguished from the higher education affirmative action considered in *SFFA*. In fact, distinguishing agencies' implementation of regulations from other kinds of policies, like higher-education affirmative action, is a key part of how decisions like *Guardians*, *Choate*, and *Sandoval* diverged from the Supreme Court's affirmative action jurisprudence. However, the breadth of the majority's language in *SFFA* points towards a Supreme Court that would gladly sweep away Title VI disparate-impact regulations with the same broom.

On the agency-authority front, it seems likely that the Court would hold EPA's regulations to be a 'major question,' given the potential reach of regulations that apply to all recipients of federal funding under EPA. Even if the Court did not invoke the major questions doctrine, however, it still would almost certainly not give agencies' understanding of Title VI "great weight," as past justices have.[103] In fact, when we consider how the Supreme Court might approach a case like *Louisiana v. EPA*, perhaps the most striking takeaway is just how little the current Court's discussion would look like justices' past consideration of these regulations. Gone would be statements about great deference to how agencies construed the statute. Gone, too, would be flexibility in the use of race to further the purposes of the Civil Rights Act of 1964. And ultimately, it seems, gone would be EPA's disparate-impact regulations.

IV. WHAT'S LOST IF EPA'S DISPARATE-IMPACT REGULATIONS GO AWAY?

If the recent shifts in Supreme Court doctrine and *Louisiana v. EPA* together tell us that EPA's disparate-impact regulations are very likely going away, they tell us very little about what effect that loss would have. If *Louisiana v. EPA* leads—directly or indirectly—to the striking down of EPA's disparate impact regulations, what will be lost? To put it

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[103] Lau v. Nichols, 414 U.S. 563, 571 (1974) (Stewart, J., concurring).

more simply: have EPA's regulations on disparate impact been effective?

To begin to answer that question, this section proceeds in two parts. The first part of this section looks at functional critiques of EPA's disparate-impact regulations, making two main points. First, there are practical reasons to think that these regulations are not the ideal way to address environmental discrimination. Second, there is also very clear evidence that EPA has had little interest in actually implementing its disparate-impact regulations for much of the regulations' existence—though that trend of non-enforcement may have shifted under the Biden administration, which has increased the pace of disparate-impact investigations and resolutions. However, even where EPA *has* pursued disparate-impact claims, the resolution of those claims shows that the Agency's regulations have been enforced with little, if any, impact.

The second part of this section takes a broader view: it looks at possible alternative approaches that could be used to address racially disproportionate environmental harm. There are alternative approaches that might reduce disparate impacts—sways to skirt around looking squarely at disproportionate effects that still try to capture some of the same disparities. However, as the section explores, those alternatives are limited in the situations they reach and in how they could be implemented. Ultimately, the limits of those alternative approaches only underscore the importance of true disparate impact regulations.

A. Functional Critiques of EPA's Disparate-Impact Regulations

One way to evaluate whether it matters if EPA's disparate-impact regulations are struck down is to think consider whether those regulations work. There are reasons to think that EPA's Title VI regulations are not the most effective way to address disparate environmental harms. Some of those reasons are more theoretical—they point to problems with the structure of EPA's regulations, imagining that an alternative structure might work

better. Other reasons are rooted in the actual history of EPA's implementation of its regulations. In either case, it is worth considering the possible problems with these regulations, if only because those problems might mean that advocates should be using a different route to address disparate impacts regardless of the outcome of *Louisiana v. EPA*.

One possible design problem, for example, is that EPA's disparate-impact regulations are separate from any environmental permitting scheme. EPA has detailed processes in place for, say, securing an air permit. Those detailed processes mean that industry actors know what they must do, when, and how. Consistent and centralized permitting processes make regulation predictable and, in theory, improve industries' ability to comply. EPA's Title VI regulations stand apart from that standardized process. As Louisiana was able to point out in its complaint in *Louisiana v. EPA*, "EPA has admitted that LDEQ "follow[ed] the environmental law" in granting the permits."[104] While it is hard to give too much weight to Louisiana's concern here—the state is surely required to follow both environmental *and* civil rights laws—it does point to the inefficiency of addressing disparate racial impacts separately from 'standard' environmental-quality concerns. The point of EPA's disparate-impact regulations is that these issues are not separate. We could hope that, reflecting that interconnection, EPA's implementation of disparate impacts would be folded into permitting processes. The result might be that regulated entities could more easily understand what their obligations are to consider disparate impacts, when those obligations apply, and what results those obligations compel—and that compliance would

[104] Compl. at 4, *Louisiana*, 2024 WL 250798.

improve.[105]

A possible design problem from the perspective of advocates is that EPA's regulations are just that: *regulations*. The administrative nature of these rules, coupled with *Sandoval's* holding that private individuals cannot enforce them, means that there is little opportunity to hold EPA accountable. Even when EPA does take some action, judicial review is on an arbitrary and capricious abuse-of-discretion standard, and the scope and disposition of EPA's Title VI investigations are not reviewable at all.[106]

This limitation has clearly influenced the actual implementation of EPA's regulations. EPA has never "taken or attempted to take any enforcement steps" to compel compliance with its disparate-impact regulations,[107] and never moved past investigations and negotiations. Since 2014, roughly 150 complaints have been sent to EPA alleging Title VI violations.[108] As of October of 2023, 111 complaints were no longer pending, but 74% were rejected without investigation.[109] Another 11% of those complaints were denied after investigation or otherwise closed,[110] and roughly 15% resulted in some resolution

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105 One example of a possible shift in this direction is EPA's Safe Drinking Water Act rules for permitting UIC Class VI wells, which suggest that environmental justice be addressed for the "area of review" surrounding the well as a part of the permitting process—though consideration of disproportionate and cumulative impacts is still only "encouraged" in the permitting process. Memorandum from Radhika Fox, Assistant Administrator, Environmental Protection Agency, to Regional Water Division Directors, Regions I-X, "Environmental Justice Guidance for UIC Class VI Permitting and Primacy" (Aug. 17, 2023) (on file with author) [hereinafter Fox Memo].

106 *See* Californians for Renewable Energy v. EPA, No. C 15-3292 SBA, 2018 WL 1586211, at *4, *9 (N.D. Cal. Mar. 30, 2018) (noting that "both the scope of the . . . investigation as well as its disposition . . . are not reviewable" and applying an abuse-of-discretion standard to plaintiffs' claims that EPA failed to meet Title VI regulatory deadlines), *judgment entered*, No. 4:15-CV-03292-SBA, 2018 WL 11434811 (N.D. Cal. June 13, 2018), *amended in part*, No. C 15-3292 SBA, 2020 WL 13490288 (N.D. Cal. Sept. 30, 2020).

107 *Louisiana*, 712 F.Supp.3d, at 833.

108 Jamie Smith Hopkins, *Facing Environmental Discrimination? Read This Before Complaining to EPA*, CTR. FOR PUB. INTEGRITY (Oct. 25, 2023), https://publicintegrity.org/environment/pollution/environmental-justice-denied/environmental-discrimination-epa-complaint-title-vi-civil-rights/.

109 *Id.*

110 *Id.*

agreement (including informal resolutions and voluntary compliance).[111]

For many years, EPA did not even investigate Title VI complaints. In 2015, environmental advocacy groups sued EPA under the Administrative Procedures Act for failing to timely act on Title VI administrative complaints. EPA regulations include a 180-day deadline for the Agency to respond to complaints.[112] The advocacy groups represented clients who had filed complaints across five different states between 1992 and 2003.[113] At the time the suit was filed, EPA had not taken any action on any of the complaints. In 2018, the court ruled that "EPA has a mandatory duty to issue preliminary findings within 180 days of accepting a complaint for investigation, and . . . EPA failed to comply with that duty."[114] Ultimately, the court issued an order requiring EPA to timely process the plaintiffs' pending and future Title VI complaints.[115]

Perhaps because of that litigation, but more likely as a result of the Biden administration's increased focus on environmental justice, EPA's processing of Title VI complaints sped up in the past administration. As of October 2023, the Biden administration had 24 agreements negotiated or pending—compared to 15 under the first Trump administration, 4 under Obama, and 6 under G.W. Bush.[116]

However, even if EPA was processing more complaints and negotiating more resolution agreements, it is fair to ask whether such enforcement was meaningful. Take, for example, EPA's resolution agreement with the City of Flint, Michigan. One of the worst

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111 *Id*.
112 40 C.F.R. § 7.115 (2025).
113 Californians for Renewable Energy v. EPA, No. C 15-3292 SBA, 2020 WL 13490288, at *1 (N.D. Cal. Sept. 30, 2020).
114 *Id*.
115 *Id*. at *2–*5.
116 Hopkins, *supra* note 108 ("We also found that complaints making it past the agency's initial check steps are more likely now to get action than in previous years.").

and most prominent environmental justice disasters in recent decades, the Flint drinking water crisis gave rise to allegations of racial discrimination in the city's creation of and efforts to mitigate it. EPA's resolution with Flint required the City to: (1) post a "Notice of Nondiscrimination" on its website, (2) establish grievance procedures for discrimination complaints, (3) designate a "Nondiscrimination Coordinator," (4) develop "public participation procedures," including access opportunities for individuals with limited English proficiency or disabilities, and (5) train its staff on nondiscrimination policies.[117] These are no doubt beneficial, but they hardly address the vast racial disparities in the serious (and ongoing) health concerns created by the City's handling of its drinking water.

On the other hand, however, there are also examples of impactful action taken under Title VI disparate-impact regulations. For example, the Federal Highway Administration (FHWA) found disparate impact when the Texas Department of Transportation (TxDOT) routed a new bridge in Corpus Christi that disproportionately impacted majority Black neighborhoods (and discarded less discriminatory alternatives).[118] As a result, TxDOT and FHWA reached a voluntary resolution agreement that included relocation assistance, voluntary property acquisition, low-income housing assistance, and improvements to neighborhood parks.[119]

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[117] Shelly T. Page & Patricia A. Broussard, *Environmental Racism in America: Minority Communities as Dumping Grounds for Environmental Waste,* 49 S. ILL U.L.J. 199, 199–207 (2025) (discussing the Flint Water Crisis as a prominent example of minority communities lacking environmental protections); AGREEMENT BETWEEN CITY OF FLINT, MICH., AND U.S. ENVTL. PROT. AGENCY, EPA COMPL. NO. 19RD-16-R4 (Mar. 4, 2020), https://www.epa.gov/sites/default/files/2020-03/documents/2020.03.04_resolution_letter_for_recipient_19rd-16-r5.pdf.

[118] FED. HIGHWAY ADMIN., "LETTER OF FINDING, DOT #2015-0124," 36 (Jan. 18, 2017), available at https://www.fhwa.dot.gov/civilrights/programs/docs/title_vi_compl_dec/2015-0124.pdf.

[119] FED. HIGHWAY ADMIN., "CITY OF CORPUS CHRISTI TITLE VI VOLUNTARY RESOLUTION AGREEMENT" 4–7 (Dec. 2014), available at https://www.fhwa.dot.gov/civilrights/programs/docs/title_vi_compl_dec/VoluntaryResolution_Agreement.pdf.

Overall, it is clear that EPA's Title VI regulations have not worked effectively. It is also possible to critique the structure of those regulations—either from an industry perspective concerned about clarity and consistency or from an advocacy perspective concerned about the Agency's accountability. However, it is critical to note that EPA's regulations might still be promising in the future even if they have yet to live up to that promise. Examples like FHWA's Title VI investigation and resolution in Corpus Christi show that agency implementation of Title VI disparate-impact regulations *could* make meaningful changes for communities.

B. The Potential—and Limitations—of Possible Alternative Approaches

The possibility that EPA's disparate-impact regulations might be struck down naturally raises questions about what could replace them. Regardless of the threat posed by *Louisiana v. EPA*, the functional critiques of EPA's regulations discussed above would be a reason to consider available alternatives. This section focuses on two main alternatives to address racially disproportionate environmental harms: 1) intentional discrimination claims and 2) regulation of other, non-race factors (like historical pollution burden). Intentional discrimination claims face such a high burden that they are of very little use. On the other hand, non-race-related factors like existing pollution burden might produce valuable results but would also miss important kinds of environmental discrimination. Ultimately, the limitations of both alternatives emphasize the importance of disparate-impact regulations.

Claims for intentional discrimination are the most direct alternative offered by Title VI. These claims can be brought by individuals under Section 601, and intentional discrimination is separately forbidden by agency regulations issued under Section 602. The basis for an intentional discrimination claim, however, has been tightly constrained by the

Supreme Court. Title VI's ban on intentional discrimination is coextensive with the Fourteenth Amendment, which means that the Fourteenth Amendment's test for intentional discrimination applies with equal force to Title VI claims. Where a policy does not facially categorize based on race but only has racial effects, the plaintiff must show that the policy was adopted "at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."[120] While *Village of Arlington Heights v. Metropolitan Housing Development Corporation* purports to describe how this kind of intentional discrimination could be proven, such a is almost impossible to make in practice. [121]

It is worth noting here, because it underscores the restrictiveness of the Court's reading, that the current intentional discrimination test did not have to look this way. When the Court rejected disparate impact as a theory of unconstitutional discrimination in *Washington v. Davis*, Justice Stevens concurred to say that "the line between discriminatory purpose and discriminatory impact is not nearly as bright, and perhaps not quite as critical, as the reader of the Court's opinion might assume."[122] For Justice Stevens, a significant enough disparate impact would be good evidence of discriminatory intent—a conception of intent rooted in the idea that "the actor is presumed to have intended the natural consequences of his deeds."[123] This framing of intent is strikingly different than the 'because of, not merely in spite of' test that the Court has adopted, which demands something more like malice than simple awareness.[124]

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120 Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979).

121 *Compare* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265-68 (1977) (describing factors that can be used to show discriminatory intent absent facial discrimination) *with* United States v. Clary, 34 F.3d 709, 711–14 (8th Cir. 1994) (rejecting the district court's implementation of the *Arlington Heights* factors).

122 *Davis*, 426 U.S. at 254 (1976).

123 *Id*. at 253.

124 *Feeney*, 442 U.S. at 279.

The Supreme Court's narrow reading of intentional discrimination may still allow a second alternative approach: replacing consideration of race with consideration of other, non-race, correlated factors. For example, if part of the core concern of environmental justice is that minority communities have consistently been overburdened by pollution, requiring some consideration of historical pollution burden should address that issue.[125] Presumably, a greater focus on the cumulative effects of pollution would lead to a similar outcome: areas that face concentrated, overlapping pollution burdens—disproportionately minority communities—would see increased environmental protection.

This approach appears inherently valuable, but it is not clear that it could adequately replace the consideration of disparate impacts. Historical overburdening of communities and the cumulative effects of multiple pollution sources are real and serious concerns—they should be considered. However, only considering historical pollution burdens or cumulative effects as a substitute for considering race misses aspects of how environmental discrimination functions. For one thing, implicit bias might still affect the implementation of these policies. Agencies, in other words, could still—consciously or subconsciously—prioritize protecting white communities with high pollution burdens over minority communities with high pollution burdens.[126] We have had a half century of pollution regulation designed to improve environmental conditions and, while we have seen vast improvements in overall pollution levels, we have not seen improvement in relative racial

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[125] *History of Environmental Justice*, SIERRA CLUB: ENV'T JUSTICE, https://www.sierraclub.org/environmental-justice/history-environmental-justice (last visited Mar. 29, 2025).

[126] As a potential example of how this bias can materialize after a whistleblower notified the Agency about the water crisis in Flint, MI, an EPA administrator commented: "I'm not so sure that Flint is the community we want to go out on a limb for." Libby Nelson, *EPA email: "I'm not so sure Flint is the community we want to go out on a limb for,"* VOX, (Mar. 15, 2016), https://www.vox.com/2016/3/15/11239438/flint-epa.

pollution gaps. The disproportion between white communities and minority communities has stayed the same. Presumably, at least some of that failure to reduce racial disparities could reflect agencies' enforcement priorities.

However, the bigger concern with an approach that substitutes consideration of historical burdens or cumulative impacts for consideration of race is that it misses a critical environmental concern that has been central to the environmental justice movement: the prevention of racially disproportionate effects of siting one-time, highly impactful facilities in minority communities.[127] Take, for example, the following story:

In the late 1980s, Louisiana Energy Services, L.P. ("LES") began searching for a location to build a uranium-enrichment facility.[128] In conjunction with siting consultants, LES identified northern Louisiana as the appropriate general location.[129] They then began a screening process to find the best host community and, upon identifying communities that might be interested in hosting the site (when it was framed as a "chemical plant"), scored those communities their viable sites in a multi-stage, multi-factorial process.[130] This process, on its face, appears relatively unobjectionable and even careful.

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[127] Many accounts frame the environmental justice movement as starting with 1982 protests against a Warren County, NC hazardous-waste landfill. A focus on high-impact toxic sites continued in the early environmental justice movement, as seen with the publication of "Toxic Wastes and Race in the United States," an influential 1987 report that showed racial and socioeconomic inequalities in the siting of toxic sites. *See History of Environmental Justice*, SIERRA CLUB, https://www.sierraclub.org/environmental-justice/history-environmental-justice (last visited May 9, 2024).

[128] Louisiana Energy Servs., L.P., 45 N.R.C. 367, 381 (1997). The challenge here was under Executive Order 12898, which directs agencies to consider environmental justice concerns, not under Title VI. However, the case is illustrative for Title VI because the same concerns about racially disparate impact could be addressed by Title VI. This does raise a question about whether EO 12898 is a viable alternative, but if courts act to forbid agencies from considering disparate racial impacts under Title VI, presumably any action based on racially disparate impacts would also be forbidden under the Executive Order. In that sense, these approaches stand or fall together, so EO 12898 is not considered separately as an alternative environmental justice tool in this paper.

[129] *Id.*

[130] *Id.*

However, at each stage of LES's siting process, the poverty level and the percentage of Black residents in the narrowed area under consideration increased from 28% to 37% to 65%.[131] Ultimately, LES selected a site where the community was 97 percent Black.[132]

Part of the reason for this percentage (though not a full explanation) was the use of siting criteria that pushed the site towards Black communities. Specifically, the screening process prioritized placing the facility at least five miles away from schools, hospitals, and nursing homes—institutions that were generally not present in low-income Black communities in the search area.[133] Individual bias also factored in: the siting consultant for LES testified that he had scored an otherwise well-matched community low because "we just felt opinion-wise that people would probably not want this plant to be close to their pride and joy of their lake."[134] That community was mostly white and middle-class.[135] No such concerns were expressed about the community pride of the residents of the selected site. In fact, no concerns *could* be expressed by those community members because, while LES consulted with local communities, it based its score for "community support" on the opinions of leaders from a predominately white community five miles away from the actual, predominantly Black, host community.[136]

In LES's siting process, race did not show up in historical overburdening or cumulative pollution effects. Instead, racial effects were woven into economics and income, infrastructure placement, and political access—all of which, in addition to direct

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131 *Id*. at 386.
132 *Id*.
133 *Id*. at 388.
134 *Id*. at 387.
135 *Id*. at 388.
136 *Id*. at 388–89.

racial bias, influenced the siting decision. One thing that the LES example shows, then, is that to effectively "replace" the consideration of race in these kinds of one-off permitting decisions, you would need to mandate the consideration of—at a minimum—political power, access to infrastructure, and income. Considering all of these factors would, undoubtedly, result in a much more complex administrative process than just looking for racially disparate impacts. Considering these kinds of factors could also invite its own significant political and judicial backlash. And even with that complex process, agencies still would not be guarding against the effects of implicit bias that might affect how communities are valued.

Trying to use proxies to capture complex racial effects raises additional concerns. It seems fundamentally harmful to encourage agencies to use roundabout measures to accomplish unstated goals—not to mention challenging for courts to assess. As Justice Souter said in his dissent in *Gratz v. Bollinger*, "[e]qual protection cannot become an exercise in which the winners are the ones who hide the ball."[137] There is also something fundamentally dishonest about not using race to address affects that are clearly racialized and that are the present effects of past discrimination. It seems not just excessively complicated, but morally wrong to effectively pretend in our regulations that race does not affect exposure to environmental harm. Doing so obscures the historical and contemporary foundations of existing environmental racial disparities.

In short, the alternatives to disparate-impact regulations have significant limitations. First, the Supreme Court's intentional discrimination caselaw effectively closes off that route to addressing most environmental discrimination. Second, considering

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[137] Gratz v. Bollinger, 539 U.S. 244, 298 (2003) (Souter, J., dissenting).

other related factors, like communities' historical pollution burden, would not capture some significant environmental justice concerns. Specifically, such an approach would do nothing to address one-off siting decisions. This paper has emphasized how imperfect—and imperfectly implemented—EPA's disparate-impact regulations are. Looking at alternatives, however, makes it clear that those imperfect regulations are still deeply important. Disparate-impact regulations at least have the potential to address concerns that alternative approaches simply would not reach.

V. CONCLUSION

As a country, we have made massive improvements in environmental quality over the past 50 years. The data shows, however, that we have not succeeded in improving the racial equality of our environmental impacts. Instead, as a legacy of racial discrimination in housing, land ownership, economic opportunity, and political access, significant disparities in environmental exposure continue to exist. Those disparities compound with community vulnerabilities to cause both immediate harm and long-term health and economic damage. As a result, a sense of justice, fairness, or even just a basic desire to improve public health outcomes argues that we need to meaningfully address racial disparities in environmental harms.

Given this reality, EPA's disparate-impact regulations are frustratingly imperfect and underenforced. They are also, however, deeply important, as shown in part by the few examples of meaningful agency action under Title VI and even more compellingly by the limitations of alternative approaches. Disparate-impact regulations have the potential to lead to meaningful positive outcomes for communities. They also, critically, have the potential to reach types of environmental discrimination that otherwise

will go unaddressed.

In light of that importance, *Louisiana v. EPA*'s argument—that these regulations are an overreach of agency power and involve the impermissible consideration of race—is concerning. The real-world cost of that case is likely to be the loss of an effectively irreplaceable tool for environmental justice. On a higher level, then, the likely end of EPA's disparate-impact regulations is one example of the real costs of recent shifts in Supreme Court jurisprudence on agency deference and race—and particularly of the costs of a doctrinal commitment to "colorblindness" in a society where racial disparities are still widespread and deeply impactful.