

**ADOPTED****AMERICAN BAR ASSOCIATION****SECTION OF ENVIRONMENT, ENERGY, AND RESOURCES  
SECTION OF CIVIL RIGHTS AND SOCIAL JUSTICE  
CENTER FOR HUMAN RIGHTS****REPORT TO THE HOUSE OF DELEGATES****RESOLUTION**

- 1 RESOLVED, That the American Bar Association advance environmental justice  
2 principles and considerations in its programs, policies, and activities, including advocating  
3 for legislation and policy, and work with all levels of government to establish  
4 environmental justice laws, regulations, guidelines, policies, and best practices that reflect  
5 the right of every human being to dignity and a clean and healthy environment; and,  
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- 7 FURTHER RESOLVED, That the American Bar Association urges law firms, corporate  
8 and nonprofit legal departments, lawyers, law schools, and state, local, territorial, tribal,  
9 and specialty bar associations to include and consider the perspectives and communities  
10 of color, indigenous communities, low-income communities, and other vulnerable  
11 populations and people as stakeholders in environmental justice decision-making and  
12 implementation.



## REPORT<sup>1</sup>

“Communities of color, indigenous communities, and low-income populations are more likely to be located near hazardous sites and exposed to toxins. Achieving environmental justice would result in the same degree of protection from environmental and health hazards for all people and equal access to the decision-making process to have a healthy environment in which to live, learn, and work.”

-- ABA President Hilarie Bass, *ABA Letter in Support of Environmental Justice Act, 2017*

### **Introduction**

This Report supports adoption and implementation of proposed Resolution 514 to advance environmental justice. The Resolution and Report recognize that a wide spectrum of organizations, including the American Bar Association, affect environmental policy and have multiple opportunities to correct the causes and consequences of the disparate adverse effects and heightened risks of environmental policies on communities of color, indigenous communities, low-income communities, and other vulnerable populations and people. The emergence and importance of environmental justice, and relevant developments at the federal, state, and local levels in litigation, legislation, and policymaking further justifies advancement of these principles by the ABA and inclusion and consideration of these principles by other legal entities.

Resolution 514 would be implemented by various means within the ABA, including by providing ABA Officers, Centers, Entities, Sections, and members with authority and guidance to work with all levels of government and jurisdictions to establish environmental justice laws, regulations, guidelines, policies, and best practices; develop and support conferences, panels, programs and partnerships; publish books, monographs, articles, and blogs; and liaise with relevant governmental authorities, including the White House Environmental Justice Advisory Council and the White House Interagency Council on Environmental Justice, and similar state and international entities. To this end, and in addition to this Resolution, the Resolution’s sponsors will seek Board of Governors (BOG) approval for establishment of an ABA-wide Environmental Justice Task Force to assist with, and coordinate implementation of, the Resolution, including by reporting regularly on its activities to the BOG and the Section Officers Conference.

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<sup>1</sup> Drafted by the Environmental Justice Task Force of the ABA Section of Environment, Energy and Resources: James R. May (chair), Daniel Appelman, Nadia B. Ahmad, Scott W. Badenoch, Jr., Stacey J. Halliday, Howard Kenison (*ex officio*), William Kinsey, and Lawrence Pittman. The Task Force expresses its appreciation for comments from Sumudu Atapattu, Arlena Barnes, David Boyd, Erin Daly, Sheila Foster, Barry Hill, Charles Lee, Daria Neal, Uma Outka, Quentin Pair, Irma Russell, Nicholas Targ, Gerald Torres, Cliff Villa, and Ben Wilson. The assistance of Janet Lindenmuth and Julien Benson-Reid is noted with gratitude.

Environmental justice<sup>2</sup> recognizes that every person has equal dignity<sup>3</sup> and equal rights to a clean and healthy environment and access to information, participation, justice and remedies in environmental matters.<sup>4</sup> Environmental justice aims to address and redress the disproportionate effects of policies and practices on communities of color, indigenous communities, low-income communities, and other vulnerable populations in the United States and around the world who are adversely affected by activities in the U.S.<sup>5</sup> Environmental justice is implicated at every level of decision-making, including issues related to equal protection, civil rights, Native American law, public participation, access to information, impact and risk assessments, access to courts, development and infrastructure, hazardous facility siting, brownfield remediation, citizen science, cumulative impacts, tort remedies, litigation, and citizen suits, limiting toxic exposures and

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<sup>2</sup> “Environmental Justice” has manifold definitions, including, e.g., from the U.S. Environmental Protection Agency (“the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation and enforcement of environmental laws, regulations and policies”); the North Carolina Department of Environmental Quality (“to ensure the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation and enforcement of environmental laws, regulations and policies”); the State of California (“The principles of environmental justice call for fairness, regardless of race, color, national origin or income, in the development of laws and regulations that affect every community’s natural surroundings, and the places people live, work, play and learn”); and Congress, including the 2020 Environmental Justice for All Act (SB 4401; HB 5986)(“the fair treatment and meaningful involvement of all people regardless of race, color, culture, national origin, or income, with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies to ensure that each person enjoys (A) the same degree of protection from environmental and health hazards; and (B) equal access to any Federal agency action on environmental justice issues in order to have a healthy environment in which to live, learn, work, and recreate.”); and the 2019 Clean Economy Jobs and Innovation Act (“the fair treatment and meaningful involvement of all individuals, regardless of race, color, culture, national origin, educational level, or income, with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies to ensure that— (A) populations of color, communities of color, Tribal and indigenous communities, and low-income communities have access to public information and opportunities for meaningful public participation relating to human health and environmental planning, regulations, and enforcement; (B) Each population of color or community of color, Tribal and indigenous community, or low-income community enjoy the same degree of protection from pollution or other environmental and health hazards; and (C) the 17 Principles of Environmental Justice written and adopted at the First National People of Color Environmental Leadership Summit held on October 24 through 27, 1991, in Washington, DC, are upheld”).

<sup>3</sup> See Erin Daly and James R. May, *Exploring Environmental Justice Through the Lens of Human Dignity*, 25 *Widener L. Rev.* 177 (2019).

<sup>4</sup> See e.g., Environmental Justice for All Act, S. 4401; H.R. 5986, 116<sup>th</sup> Cong. § 1(9) 2020 (“All people have the right to breathe clean air, drink clean water, live free of dangerous levels of toxic pollution, and share the benefits of a prosperous and vibrant pollution-free economy); and *id.*, § 2(5) (“It is the policy of Congress that each Federal agency should recognize the right of all people to clean air, safe and affordable drinking water, protection from climate hazards, and to the sustainable preservation of the ecological integrity and aesthetic, scientific, cultural, and historical values of the natural environment.”). See also, Brian Roewe, *Racism in Pollution and Policing: A Conversation with Robert Bullard, Father of Environmental Justice*, NCR ONLINE (Jun. 19, 2020) <https://www.ncronline.org/news/earthbeat/racism-pollution-and-policing-conversation-robert-bullard-father-environmental> (“That means that all communities should have a right to a clean and healthy, liveable environment. That no community should somehow be targeted for things that other people don't want. We want a healthy, liveable environment.”). See generally, James R. May & Erin Daly, *Constitutional Environmental Rights Worldwide*, in *PRINCIPLES OF CONSTITUTIONAL ENVIRONMENTAL LAW* 329. ABA Section of Environment, Energy, and Resources (2011).

<sup>5</sup> Environmental Justice Act of 2017, S. 1996 115<sup>th</sup> Cong. § 1-42 (2017).

releases, and enforceability and access to remedy.<sup>6</sup>

Environmental injustice has been present from ancient times to the height of the transatlantic slave trade to the trans-modern era of the current global regimes.<sup>7</sup> It reflects power imbalances, deeply rooted in dynamics of race, class and wealth, alongside environmental policies involving such inputs as pollution, toxic releases, environmental quality, and climate change, challenges that tend to disproportionately affect communities of color, indigenous communities, low-income communities, and other vulnerable populations the world over.<sup>8</sup>

Environmental injustice is the product of historical redlining<sup>9</sup> and the legacy of the failure to abide by treaties and responsibilities accorded to domestic dependent nations and land conquest with respect to American Indian tribes and indigenous communities. It is reflected at a local, national, international, and global-level,<sup>10</sup> with expressions in national practices,<sup>11</sup> international law,<sup>12</sup> cultural practices,<sup>13</sup> sustainability,<sup>14</sup> climate change,<sup>15</sup>

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<sup>6</sup> SECTION OF ENVIRONMENT, ENERGY, AND RESOURCES, ABA, *THE LAW OF ENVIRONMENTAL JUSTICE, THEORIES AND PROCEDURES TO ADDRESS DISPROPORTIONATE RISKS*, (Michael B. Gerrard and Sheila R. Foster eds., 2nd ed.), (2008).

<sup>7</sup> Nadia Ahmad, “Mask Off” -- *The Coloniality of Environmental Justice*, 25 WIDENER L. REV. 195 (2019).

<sup>8</sup> See generally, Harriet Washington, *A Terrible Thing to Waste: Environmental Racism and Its Assault on the American Mind* (Little, Brown 2020).

<sup>9</sup> RICHARD ROTHSTEIN, *THE COLOR OF LAW* (2017); Sam Fulwood III, *The United States’ History of Segregated Housing Continues to Limit Affordable Housing*, CENTER FOR AMERICAN PROGRESS, (Dec. 15, 2016) <https://www.americanprogress.org/issues/race/reports/2016/12/15/294374/the-united-states-history-of-segregated-housing-continues-to-limit-affordable-housing/>; American Planning Association, “Environmental Justice and Land-Use Planning,” (Patricia Salkin ed.) (2010).

<sup>10</sup> See, *FACES OF ENVIRONMENTAL RACISM: CONFRONTING ISSUES OF GLOBAL JUSTICE* (L. Westra and B. Lawson (eds), Rowman and Littlefield 2001).

<sup>11</sup> See e.g., James R. May & Tiwajopelo O. Dayo, *Environmental Dignity Rights in Nigeria*, 25 WIDENER L. REV. 183 (2019); Lorenzo Pellegrini, Murat Arsel, Martí Orta-Martínez, & Carlos F Mena, *International Investment Agreements, Human Rights, and Environmental Justice: The Texaco/Chevron Case from the Ecuadorian Amazon*, 23 J. OF INT’L ECON. L. 455 (2020).

<sup>12</sup> See e.g., Neil A. F. Popovic, *Pursuing Environmental Justice with International Human Rights and State Constitutions*, 15 STAN. ENVTL L. J. 338 (1996); Hari M. Osofsky, *Learning from Environmental Justice: A New Model for International Environmental Rights*, 24 STAN. ENVTL. L. J. 71 (2005); Carmen G. Gonzalez & Sumudu Atapattu, *International Environmental Law, Environmental Justice, and the Global South*, 26 TRANSNAT’L L. & CONTEMP. PROBS. 229 (2017); Kenneth F. McCallion, *International Environmental Justice: Rights and Remedies*, 26 HASTINGS INT’L & COMP. L. REV. 427 (2003); FREDERICK D. GORDAN & GREGORY K. FREELAND, *INTERNATIONAL ENVIRONMENTAL JUSTICE: COMPETING CLAIMS AND PERSPECTIVES* (ILM Publications, 2012).

<sup>13</sup> See e.g., Tracy-Lynn Humby, *Evaluating the Value of TWAIL, Environmental Justice, and Decolonization Discourses as Framing Lenses for International Environmental Law*, 26 TRANSNAT’L L. & CONTEMP. PROBS. 317 (2017); Gail Osherenko, *Environmental Justice and the International Whaling Commission: Moby-Dick Revisited*, 8 J. INT’L WILDLIFE L. & POL’Y 221 (2005).

<sup>14</sup> See e.g., Donald T. Hornstein, *Environmental Sustainability and Environmental Justice at the International Level: Traces of Tension and Traces of Synergy*, 9 DUKE ENVTL. L. & POL’Y 291 (1999).

<sup>15</sup> See e.g., RANDALL ABATE, *CLIMATE JUSTICE: CASE STUDIES IN GLOBAL AND REGIONAL GOVERNANCE CHALLENGES* (Environmental Law Institute 2016); Tom E. R. B. West, *Environmental Justice and International Climate Change Legislation: A Cosmopolitan Perspective*, 25 GEO. INT’L ENVTL. L. REV. 129 (2012).

land use,<sup>16</sup> and facets at the intersection of environmental law and human rights. In the United States, responses to environmental justice include litigation, federal policy and advisory groups, and proposed legislation at the national<sup>17</sup> and subnational levels.<sup>18</sup> Environmental justice continues to face obstacles resulting from countless unequal socioeconomic and environmental impacts including access to healthy air, water and land, biodiversity, and other environmental conditions, and unintended consequences of mitigation measures.<sup>19</sup> These obstacles are exacerbated by health disparities, including those revealed by the COVID-19 pandemic, and climate change.

The ABA initially engaged environmental injustice more than a quarter century ago. In 1993, the American Bar Association adopted a resolution to address “an increasing body of disturbing evidence that the burden of adverse environmental impacts falls disproportionately on people of color and/or low income populations.”<sup>20</sup> In language that continues to resonate today, it concluded:

[E]nvironmental laws, as well as the means by which they are implemented and enforced, do not adequately protect these populations. While the causes are many and varied, and the specific instances of injustice sometimes difficult to establish under our current legal framework, the prevalence of environmental injustice — or the lack of environmental justice — cannot be ignored and should be addressed by the American Bar Association.

Since then, the ABA “has supported efforts to make sure that a disproportionate share of the burden of environmental harm does not fall on minority and low-income

<sup>16</sup> See e.g., N. Targ, L. Moore, & M. Gerrard, *Environmental Justice and Transactions*, in ENVIRONMENTAL ASPECTS OF REAL ESTATE AND COMMERCIAL TRANSACTIONS 749-770 (Kevin R Murray, ed., 5th ed. 2021).

<sup>17</sup> BARRY E. HILL, ENVIRONMENTAL JUSTICE: LEGAL THEORY AND PRACTICE, (4<sup>th</sup> ed., Environmental Law Institute 2018); Marianne Engelman Lado, *Toward Civil Rights Enforcement in the Environmental Justice Context - Step One: Acknowledging the Problem*, 29 FORDHAM ENVTL. L. REV. 1 (2017).

<sup>18</sup> See e.g., Charles Lee, *A Game Changer in the Making? Lessons from States Advancing Environmental Justice through Mapping and Cumulative Impact Strategies*, 50 ENVTL. L. REP. 10203 (2020); Tonya Lewis & Jessica Owley, *Symbolic Politics for Disempowered Communities: State Environmental Justice Policies*, 29 BYU J. PUB. L. 183 (2014); Alexandra Dapolito Dunn & Adam Weiss, *Environmental Justice in Permitting: State Innovations to Advance Accountability*, 81 Miss. L.J. 747 (2012); James M. Van Nostrand, *Energy and Environmental Justice: How States Can Integrate Environmental Justice into Energy-Related Proceedings*, 61 CATH. L. REV. 701 (2012); Chasid M. Sapolu, *Dumping on the Wai'anae Coast: Achieving Environmental Justice through the Hawai'i State Constitution*, 11 APLPJ 204 (2009).

<sup>19</sup> See generally, Ananya Bhattacharya, *COVID-19 Reveals Environmental Justice Gaps in National Environmental Policy*, ENVTL. L. INST. (Aug. 19, 2020), <https://www.eli.org/vibrant-environment-blog/covid-19-reveals-environmental-justice-gaps-national-environmental-policy>; U. Rich. Digital Scholarship Laboratory, MAPPING INEQUALITY PROJECT, <https://dsl.richmond.edu/panorama/redlining/#loc=5/39.1/-94.58>; Jeremy S. Hoffman, Vivek Shandas, & Nicholas Pendleton, *The Effects of Historical Housing Policies on Resident Exposure to Intra-Urban Heat: A Study of 108 US Urban Areas*, CLIMATE, (Jan. 13, 2020), <https://www.mdpi.com/2225-1154/8/1/12/htm>.

<sup>20</sup> ABA Resolution on *Environmental Justice and Report to the House of Delegates*, at 1 (1993). The resolution was submitted by the ABA's Standing Committee on Environmental Law (SCEL), with ABA Commission on Homelessness and Poverty, ABA Section of Individual Rights & Responsibilities, Hispanic National Bar Association, and National Bar Association as co-sponsors. The SCEL subsequently merged with the ABA Section of Environment, Energy and Resources (SEER).

communities.”<sup>21</sup> These efforts include eliminating discriminatory siting of hazardous facilities, supporting sustainable development, protecting marine ecosystems, preparing and responding to disasters, advancing human dignity and the equal and inherent worth of every person, and reducing anthropogenic causes of climate change. Along with the long-standing Environmental Justice Committee of the Section of Civil Rights and Social Justice, several ABA entities have environmental justice foci, including: Sections of Environment, Energy and Resources; International Law; Science and Technology Law, State and Local Government Law, Real Property, Probate and Trust Law, Administrative Law and Regulatory Practice, Business Law, Tort Trial and Insurance Practice, and Litigation; the Standing Committee on Disaster Response and Preparedness; the Commission on Homelessness and Poverty; and the Law Student Division. Several of these entities have produced studies on environmental justice, including books,<sup>22</sup> articles<sup>23</sup> and webinars.<sup>24</sup> The ABA has also supported the study of environmental justice in law schools, developing environmental justice curricula, and helping to foster the success of environmental law and the Environmental Justice Center at the Howard University School of Law. With support from state and local bar associations, and other foundations, it has sponsored Environmental Law Diversity Fellowships to law students of color for about twenty years. Nonetheless, the ABA lacks a centralized entity for advancing environmental justice, a lacuna this proposed Resolution aims to address. Adoption of this Resolution will also support efforts to urge the Board of Governors to create an ABA-wide Environmental Justice Task Force referenced in this Report

### I. Disproportionate Adverse Effects of Environmental Pollution

Since at least 1971, scientists and federal agencies have documented the disproportionately adverse effects of environmental pollution on low-income populations (below the U.S. poverty line).<sup>25</sup> In the early 1980s, that analysis was refined to reveal that race was the controlling factor in forecasting the location of toxic waste facilities. Recent studies show that these trends have not changed. Communities of color and low-income communities continue to be subject to environmental hazards as “fenceline communities” – or communities most vulnerable to toxic releases due to proximity to industrial facilities. Moreover, these communities are often subject to the cumulative impacts arising from multiple environmental stressors and existing health vulnerabilities.<sup>26</sup>

<sup>21</sup> Letter from ABA President Hilarie Bass, to Senator Cory Booker, (Nov. 16, 2017), [https://www.americanbar.org/news/abanews/aba-news-archives/2017/11/aba\\_president\\_hilari/](https://www.americanbar.org/news/abanews/aba-news-archives/2017/11/aba_president_hilari/).

<sup>22</sup> See e.g., ABA Section of Environment, Energy, and Resources, *THE LAW OF ENVIRONMENTAL JUSTICE*, (Michael Gerrard & Sheila Foster, eds., 2008); Section of Civil Rights and Social Justice and the Environmental Law Institute, ABA, *ENVIRONMENTAL PROTECTION IN THE TRUMP ERA* (2018).

<sup>23</sup> See e.g., Benjamin Wilson, *It's Not Just Zoning: Environmental Justice and Land Use*, A.B.A. SEC. ST.& LOC. GOV'T. L. 2017.

<sup>24</sup> See e.g., “*Environmental Justice in the 21st Century*,” ABA Sec. C.R.& Soc. Just., 2018.

<sup>25</sup> See e.g., Council on Env't. Quality, *The Second Annual Report of the Council on Environmental Quality*, 192-93 (1971) (finding that air pollution is distributed inequitably by income); BRIAN J.L. BERRY ET AL., *THE SOCIAL BURDEN OF ENVIRONMENTAL POLLUTION; A COMPARATIVE METROPOLITAN DATA SOURCE* 563, 570-71 (1977) (reporting that solid waste sites in Chicago are distributed inequitably by income).

<sup>26</sup> See NATIONAL ENVIRONMENTAL JUSTICE ADVISORY COUNCIL, *ENSURING RISK REDUCTION IN COMMUNITIES WITH MULTIPLE STRESSORS: ENVIRONMENTAL JUSTICE AND CUMULATIVE RISK IMPACTS* (2004).

Communities of color and low-income communities are far more likely to live along the fenceline than are White communities.<sup>27</sup> Black and Latino Americans are 75 and 60 percent respectively more likely to live in fenceline zones than White Americans.<sup>28</sup> The imbalances affect children acutely: “Poor children of color already face financial and racial disadvantages; living alongside hazardous chemical facilities is an additional burden that may also expose them to toxic emissions daily.”<sup>29</sup> Studies show “that a significantly greater percentage of Blacks, Latinos, and people in poverty live near industrial facilities that use large quantities of toxic chemicals, compared to national averages ... that larger, more chemical-intensive facilities tend to be located in counties with larger black populations and in counties with high levels of income inequality.”<sup>30</sup> Ultimately, there is “compelling evidence that increasing social inequality is linked to environmental degradation and that the health of people of color and those living in poverty is negatively impacted by being exposed to higher levels of environmental pollution than whites or people not in poverty.”<sup>31</sup>

Tribal communities face unique challenges with respect to environmental justice, given their longstanding struggles for tribal sovereignty and self-determination, as well as overcoming jurisdictional obstacles to environmental protection against non-Tribal actors.<sup>32</sup> In addition, the importance of land and place to tribal culture amplifies threats presented by environmental harm – such as the destruction of subsistence fishing resources due to water pollution. Efforts in federal and state courts to address environmental and other harms have largely been unsuccessful,<sup>33</sup> and administrative tribal consultation efforts - while improved - still leave open questions of whether processes are sufficiently tailored to tribal government and communities, as well as effective for achieving environmental protection.<sup>34</sup>

The COVID-19 pandemic underscores the disparate impacts of these disparities.<sup>35</sup> COVID-19 infects and kills Black, Asian, Native American, and Hispanic patients at least 40 percent more frequently than White patients.<sup>36</sup> Pandemic risk assessment has

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<sup>27</sup> See e.g., Environmental Justice and Health Alliance for Chemical Policy Reform, *Who's in Danger? Race, Poverty and Chemical Disasters: A demographic Analysis of Chemical Disaster Vulnerability Zones* (May 2014).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* (“poor black and Latino children are more than twice as likely to live in fence line zones compared to white children who are living above the poverty line.”)

<sup>31</sup> Center for Effective Government, *Living in the Shadow of Danger: Poverty, Race, and Chemical Facility Hazards* (2016).

<sup>32</sup> James M. Grijalva, *Chapter 2, Control and Accountability – The Twin Dimensions of Tribal Sovereignty Necessary to Achieve Environmental Justice for Native America*, in *TRIBES, LANDS, AND THE ENVIRONMENT* 24-27 (2016).

<sup>33</sup> See e.g., *Hopi Tribe v. City of Flagstaff*, 1 CA-CV 12-0370 (Ariz. Ct. App. 2013); *Rosebud Sioux Tribe v. United States*, 75 Fed. Cl. 15 (2007).

<sup>34</sup> Grijalva, *supra* note 32.

<sup>35</sup> See James R. May & Erin Daly, *Dignity Rights for a Pandemic*, 17 *LAW, CULTURE, AND THE HUMANITIES* (2020).

<sup>36</sup> E.g., Dan Keating, Ariana Eunjung Cha, & Gabriel Florit, *I just pray God will help me’: Racial, ethnic minorities reel from higher covid-19 death rates*, *WASHINGTON POST* (Nov. 20, 2020). <https://www.washingtonpost.com/graphics/2020/health/covid-race-mortality-rate/>.



revealed clear disparate impacts of the disease on population segments including the elderly and racial minorities.<sup>37</sup> A recent study found higher COVID-19 mortality rates in communities of color subject to high levels of air pollution, finding that “an increase of only 1 g/m<sup>3</sup> in PM<sub>2.5</sub> is associated with a 8% increase in the COVID-19 death rate.”<sup>38</sup> A study of 3,000 counties shows higher mortality rates from COVID-19 and long-term exposure to air pollution in communities living near heavily polluted areas.<sup>39</sup> In addition, Indigenous communities have a higher mortality rate from COVID-19, in part due to inadequate access to essential services, such as sanitation.<sup>40</sup> The Navajo Nation experiences among the highest per capita Covid-19 infection rates in the United States, which is in part attributed to inadequate access to potable water.<sup>41</sup> The Centers for Disease Control and Prevention report, “COVID-19 in Racial and Ethnic Minority Groups” underscores the lack of information to assess how health disparities are impacted by environmental factors and living conditions.<sup>42</sup>

## II. Evolution of the Environmental Justice Movement

### A. Civil Rights Movement and Warren County

In 1982, a majority-minority community in Warren County, North Carolina, protested the siting of a toxic waste landfill by lying in front of truckloads of incoming contaminated polychlorinated biphenyl (PCB) soil. The waste was imported from across the state to Warren County, which was the one of the poorest counties and had the highest percentage of people of color. The ensuing protest, the first such against the location of a hazardous waste facility, resulted in the arrests of more than 500 people, which included not only residents of Warren County, but civil rights, labor, environmental, and political leaders and activists.<sup>43</sup>

### B. Reports of Disparate Impacts

Three formative reports provided early data substantiating disparate impacts. In 1982, the U.S. General Accounting Office (now, “Government Accountability Office”) (GAO) found a “correlation between the location of hazardous waste landfills and the racial and economic status of the surrounding communities.”<sup>44</sup> Then in 1987, the United Church of Christ Commission for Racial Justice (UCC) issued a report concluding that the racial composition of a neighborhood is the single most important factor in determining where

<sup>37</sup> Clifford J. Villa, *Remaking Environmental Justice*, 66 LOY. L. REV. 469, 475-76 (2020).

<sup>38</sup> Xiao Wu et al., *Air pollution and COVID-19 mortality in the United States: Strengths and limitations of an ecological regression analysis*, 6(45) SCIENCE ADVANCES (2020).

<sup>39</sup> Sacoby Wilson, “Connecting the Dots Between Environmental Injustice and the Coronavirus”, interview by Katherine Bagley, YALE ENV'T 360, (May 7, 2020).

<sup>40</sup> U.N. Dept. of Econ. and Soc. Affairs, COVID-19 and Indigenous Peoples, 2020. <https://www.un.org/development/desa/indigenouspeoples/covid-19.html>.

<sup>41</sup> Cody Nelson, *COVID Ravages Navajo Nation as Trump Makes Election Play for Area*, THE GUARDIAN, Oct. 8, 2020.

<sup>42</sup> See *Health Equity Considerations and Racial and Ethnic Minority Groups*, C.D.C. (Apr. 19, 2021). <https://www.cdc.gov/coronavirus/2019-ncov/community/health-equity/race-ethnicity.html>.

<sup>43</sup> For a detailed account of the Warren County protests, see EILEEN MCGURTY, *TRANSFORMING ENVIRONMENTALISM: WARREN COUNTY, PCBs, AND THE ORIGINS OF ENVIRONMENTAL JUSTICE* (2007).

<sup>44</sup> U.S. General Accounting Office, Report, *Siting of Hazardous Waste Landfills and Their Correlation With Racial and Economic Status of Surrounding Communities*, GAO/RCED-83-168, B-211461 (June 1, 1983).

a toxic waste facility is sited.<sup>45</sup> These disparities have only increased over time. In 1992, the National Law Journal (NLJ) found that the Environmental Protection Agency (EPA) approved Superfund cleanup remedies that left contamination in-place more frequently in minority communities than in the general population. The National Law Journal (NLJ) also found comparative under-enforcement of other federal environmental laws aimed at protecting residents from air, water, and waste pollution. The NLJ confirmed that the disparity in responding to and enforcing hazardous waste laws was based on race and not wealth or income.<sup>46</sup> In 2007, the UCC updated its earlier report and found that a majority of those living in neighborhoods within 3 kilometers (1.8 miles) of the nation's hazardous waste facilities ("host neighborhoods") were people of color.<sup>47</sup>

### C. National People of Color Leadership Summit (1991)

In 1991, the First National People of Color Leadership Summit issued seventeen "Principles of Environmental Justice."<sup>48</sup> The Principles promoted equality in access to environmental information, participation and access to justice, "demand[ing] the right to participate as equal partners at every level of decision-making, including needs assessment, planning, implementation, enforcement and evaluation."<sup>49</sup> These Principles also sought reconciliation through relief; that is, to "protect[] the right of victims of environmental injustice to receive full compensation and reparations for damages as well as quality health care."<sup>50</sup> A second Leadership Summit in 2002 reaffirmed these principles.<sup>51</sup>

### D. National Environmental Justice Advisory Council (1993 - present)

The National Environmental Justice Advisory Council (NEJAC) is a federal advisory committee to the EPA, formed on September 30, 1993. The NEJAC provides the EPA Administrator with guidance and recommendations related to environmental justice, as well as serving as a forum for discussions on environmental justice implementation among stakeholders. Efforts include the evaluation of a diverse set of strategic, scientific, technological, regulatory, community engagement and economic issues related to environmental justice. NEJAC members represent a cross-section of environmental justice stakeholders, including those from academia, community groups, industry, non-governmental and environmental organizations, state and local governments, and tribal or indigenous groups. In providing guidance and recommendations, the NEJAC prepares recommendation reports on specific topics – most recently on Superfund remediation and

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<sup>45</sup> UNITED CHURCH OF CHRIST COMMISSION FOR RACIAL JUSTICE, "TOXIC WASTES AND RACE IN THE UNITED STATES: A NATIONAL REPORT ON THE RACIAL AND SOCIO-ECONOMIC CHARACTERISTICS OF COMMUNITIES WITH HAZARDOUS WASTE SITES," <https://www.nrc.gov/docs/ML1310/ML13109A339.pdf>.

<sup>46</sup> Marianne Lavelle & Marcia Coyle, "Unequal Protection: The Racial Divide in Environmental Law," 15(3) NAT'L L.J., at SI-12 (Sept. 21, 1992).

<sup>47</sup> NATURAL RESOURCES DEFENSE COUNSEL AND UNITED CHURCH OF CHRIST, "TOXIC WASTES AND RACE AT TWENTY": 1987—2007. <https://www.nrdc.org/resources/toxic-wastes-and-race-twenty-1987-2007>.

<sup>48</sup> See *supra* note 2; *Environmental Justice/Environmental Racism*, ENERGY JUSTICE NETWORK [www.ejnet.org/ej](http://www.ejnet.org/ej).

<sup>49</sup> Energy Justice Network, *supra* note 51.

<sup>50</sup> *Id.*

<sup>51</sup> See *The Second National People of Color Environmental Leadership Summit*, SW. RES. & INFO. CENTER <http://www.sric.org/voices/2003/v4n1/index.php>.

redevelopment for environmental justice communities in February 2020.<sup>52</sup>

#### E. Executive Order 12898 (1994)

Executive Order 12898<sup>53</sup> directs federal executive branch agencies to make achieving environmental justice a part of their missions by “identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of [their] programs, policies, and activities on minority populations and low-income populations.” In addition, EO 12898 established the Interagency Working Group (IWG) on environmental justice. The IWG is composed of heads of specified federal agencies and tasked with providing guidance on identifying disproportionately high and adverse human health or environmental effects on minority and low-income populations, among other responsibilities. EO 12898 signified the importance of federal executive branch agencies considering environmental justice within their various duties, and the execution of such consideration has varied among the agencies. “Integrating EJ into program design has been relatively rare, and comprehensive assessment and analysis exceedingly uncommon. Based upon the agency responses, there appears to be only a few instances in which agencies have incorporated EJ principles and protections into programmatic design.”<sup>54</sup>

#### F. Environmental Justice at the EPA (1990 - present)

The U.S. Environmental Protection Agency has various environmental justice programs.<sup>55</sup> In 1990, the EPA formed an Environmental Equity Workgroup, which delivered a detailed report in June 1992.<sup>56</sup> Among the major findings in its Environmental Equity report, the EPA agreed with community advocates that: “There are clear differences between racial groups in terms of disease and death rates.”<sup>57</sup> The EPA report further found that: “Racial minority and low-income populations experience higher than average exposures to selected air pollutants, hazardous waste facilities, contaminated fish[,] and agricultural pesticides.”<sup>58</sup> Following issuance of the Environmental Equity report, the EPA formed an Office of Environmental Equity, soon to be renamed the EPA Office of Environmental

<sup>52</sup> National Environmental Justice Advisory Council Superfund Working Group, *Phase One Report: Superfund Remediation and Redevelopment for Environmental Justice Communities* (Feb. 2020).

<sup>53</sup> Exec. Order No. 12898, 59 Fed. Reg. 7629 (Fed. 16, 1994). <https://www.archives.gov/files/federal-register/executive-orders/pdf/12898.pdf>.

<sup>54</sup> Denis Binder, et al., *A Survey of Federal Agency Responses to President Clinton’s Executive Order 12898 on Environmental Justice*, 31 ENVTL. L. REP. 11133 (2001).

<sup>55</sup> See generally, U.S. E.P.A., Environmental Justice [www.epa.gov/environmentaljustice](http://www.epa.gov/environmentaljustice). For examinations of environmental justice at the EPA through the years, see generally, Ronald Bass, *Evaluating environmental justice under the national environmental policy act*, 18 ENVTL. IMPACT ASSESSMENT REV. 83 (1998); Luke W. Cole, *Civil Rights, Environmental Justice and the EPA: The Brief History of Administrative Complaints under Title VI of the Civil Rights Act of 1964*, 9 J. ENVTL. L. & LIT. 309 (1994); Robert R. Kuehn, *The Environmental Justice Implications of Quantitative Risk Assessment*, 1996 ILL. L. REV. 103 ; Richard J. Lazarus & Stephanie Tai, *Integrating Environmental Justice into EPA Permitting Authority*, 26 ECOLOGY L. Q. 617 (1999); ENVTL. L. INST., OPPORTUNITIES FOR ADVANCING ENVIRONMENTAL JUSTICE: AN ANALYSIS OF U.S. EPA STATUTORY AUTHORITIES, (2001); Uma Outka & Elizabeth Kronk Warner, *Reversing Course on Environmental Justice Under the Trump Administration*, 54 WAKE FOREST L. REV. 393 (2019); Clifford Rechtschaffen, *Advancing Environmental Justice Norms*, 37 U.C. DAVIS L. REV. 95 (2003).

<sup>56</sup> U.S. E.P.A., ENVIRONMENTAL EQUITY: REDUCING RISK FOR ALL COMMUNITIES (1992).

<sup>57</sup> *Id.* at 2.

<sup>58</sup> *Id.* at 3.

Justice (OEJ), as it remains today.<sup>59</sup>

Through a separate office, formerly known as the EPA Office of Civil Rights, the EPA hears administrative complaints about environmental justice under Title VI of the Civil Rights Act of 1964 (Title VI), 42 U.S.C. § 2000d, which provides that: "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." The EPA has long been criticized for its poor enforcement record and extreme delays in resolving Title VI administrative complaints, with some cases waiting more than ten years for resolution. Prior to 2016, the agency had neither made formal findings of discrimination nor denied or withdrawn financial assistance from a recipient, raising significant questions about the effectiveness of the program. As such, the EPA's Title VI enforcement office, now the External Civil Rights Compliance Office (ECRCO), is the subject of various critiques, including a 2016 investigation and critical report by the U.S. Commission on Civil Rights.<sup>60</sup> ECRCO was reorganized in 2017, which aimed to address the Office's shortcomings by placing it under the oversight of the EPA Office of General Counsel. Yet a 2019 GAO report concluded that these changes were insufficient to resolve many longstanding ECRCO performance issues.<sup>61</sup> In addition, a federal court recently ruled that the EPA violated the Civil Rights Act of 1964 by waiting a decade or more to investigate Title VI civil rights complaints filed by community groups across the country.<sup>62</sup>

### III. Environmental Justice Litigation

Environmental justice claimants have few footholds in federal and state law, using civil rights laws creatively in the absence of specific environmental justice legislation, which underscores the need for further ABA action on environmental justice.<sup>63</sup>

#### A. Equal Protection Clause

The Equal Protection Clause of the 14<sup>th</sup> Amendment provides "nor shall any state deny to any person within its jurisdiction the equal protection of the laws." The Supreme Court has interpreted this to require evidence of "invidious" express or intentional racial discrimination to warrant heightened scrutiny to discriminatory governmental action.<sup>64</sup>

<sup>59</sup> Villa, *supra* note 37, at 491.

<sup>60</sup> U.S. Commission on C.R., *Environmental Justice: Examining the Environmental Protection Agency's Compliance and Enforcement of Title VI and Executive Order 12,898* (Sept. 2016).

<sup>61</sup> U.S. Gov't Accountability Off., *Environmental Justice: Federal Efforts Need Better Planning, Coordination, and Methods to Assess Progress* (Sept. 2019).

<sup>62</sup> See *Federal Court Still Requires EPA to Enforce Civil Rights*, EARTH JUSTICE, <https://earthjustice.org/news/press/2020/federal-court-requires-epa-to-enforce-civil-rights>.

<sup>63</sup> For more about judicial engagement of environmental justice, see e.g., Luke W. Cole, *Environmental Justice Litigation: Another Stone in David's Sling*, 21 FORDHAM URB. L.J. 523 (1994); Elizabeth Gross & Paul Stretesky, *Environmental Justice in the Courts*, in David M. Konisky, ed. FAILED PROMISES: EVALUATING THE FEDERAL GOVERNMENT'S RESPONSE TO ENVIRONMENTAL JUSTICE (MIT Press 2015); Sara Pirk, *Expanding Public Participation in Environmental Justice: Methods, Legislation, Litigation and Beyond*, 17 J. ENVTL. L. & LIT. 207 (2002); Jeff Todd, *A 'Sense of Equity' in Environmental Justice Litigation*, 44 HARV. ENVTL. L. REV. 169 (2020).

<sup>64</sup> *Washington v. Davis*, 426 U.S. 229 (1976).

While there has been a notable lack of success so far in applying Equal Protection principles to the environmental justice context, civil rights advocates have found some success in establishing intentional race discrimination through application of the factors identified by the Supreme Court in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*<sup>65</sup> Among other contexts, the *Arlington Heights* factors have been used to indicate invidious intent in contexts of travel,<sup>66</sup> voting,<sup>67</sup> education,<sup>68</sup> and even religious exercise.<sup>69</sup>

### B. Due Process

The Due Process Clause of the 14th Amendment provides that “nor shall any State deprive any person of life, liberty, or property, without due process of law.”<sup>70</sup> Courts have long recognized a substantive dimension to this clause, relying upon the concept of Substantive Due Process for securing “fundamental rights.”<sup>71</sup> At least one federal court so far has found “fundamental rights” to include a right to a stable climate system.<sup>72</sup> Fundamental rights also include rights to “personal autonomy” and “bodily integrity.”<sup>73</sup> A violation of “bodily integrity” is “an egregious, nonconsensual entry into the body which was an exercise of power without any legitimate governmental objective.”<sup>74</sup> The Supreme Court of Michigan recently held that knowingly subjecting residents of Flint, Michigan, to contaminated drinking water violated Substantive Due Process rights to bodily integrity.<sup>75</sup>

### C. Civil Rights Act of 1964

Title VI prohibits recipients of federal financial assistance from discriminating on the basis of race, color, or national origin.<sup>76</sup> Claims under Title VI have historically related to (1) disparate treatment (discriminatory actions with clear discriminatory intent), or (2) disparate impact (facially neutral program or policy, with discriminatory outcomes). Federal and state claims under Title VI have been filed, for example, to address concerns with state permitting of air pollution sources and state failures to provide for needs of

<sup>65</sup> *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977).

<sup>66</sup> *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017) (affirming TRO against “Muslim ban”).

<sup>67</sup> *Veasey v. Abbott*, 830 F.3d 216 (5th Cir. 2016) (striking down Texas voter ID requirement).

<sup>68</sup> *Arce v. Douglas*, 793 F.3d 968 (9th Cir. 2015) (invalidating elimination of Mexican-American Studies program in Arizona public schools).

<sup>69</sup> *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993) (invalidating city ordinance directed at restricting ceremonial practice of Santeria religion).

<sup>70</sup> U.S. Const. amend. XIV.

<sup>71</sup> See e.g., *Loving v. Virginia*, 388 U.S. 1 (1967) (fundamental right to marriage); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (fundamental right to childrearing).

<sup>72</sup> See *Juliana v. United States*, 217 F.Supp.3d 1224, 1250 (D. Or. 2016) (“Just as marriage is the ‘foundation of the family,’ a stable climate system is quite literally the foundation” of society and civilization), *rev’d* on other grounds, 947 F.3d 1159 (9th Cir. 2020).

<sup>73</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

<sup>74</sup> *Rogers v. Little Rock*, 152 F.3d 790, 797 (8th Cir. 1998), citing *Sacramento Co. v. Lewis*, 523 U.S. 833, 847, n.8 (1998).

<sup>75</sup> *Mays v. Snyder*, 2020 WL 4360845 (July 29, 2020) (observing: “There is obviously no legitimate governmental objective in poisoning citizens”).

<sup>76</sup> 42 U.S.C.A. § 2000d (West 2021).

Limited English Proficiency populations.<sup>77</sup> However, in *Alexander v. Sandoval*, SCOTUS held that intentional discrimination is a necessary component of claims under Title VI and disparate impacts were insufficient grounds for private causes of action.<sup>78</sup> In *Sandoval*, the State of Alabama declared English as the official state language<sup>79</sup>; when an applicant for a driver's license complained that the policy discriminated based on national origin, a 5-4 majority of the Court found that Sandoval could not maintain a private cause of action because he could not prove that the State intended to discriminate.<sup>80</sup> Rather, under Title VI, the plaintiff must demonstrate intentional discrimination through disparate treatment.<sup>81</sup>

#### D. Other Federal Civil Rights Laws

Beyond Title VI, which primarily limits environmental justice advocates to an administrative process before the EPA, the Civil Rights Act also provides environmental justice advocates with the potential for direct action in federal court for damages under 42 U.S.C. § 1983.<sup>82</sup> Under this provision,

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory ... subjects ... any citizen of the United States ... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law....<sup>83</sup>

Section 1983 also offers a potential authority for environmental justice advocates. For example, the Sixth Circuit recently sustained claims under § 1983 against state actors responsible for providing contaminated drinking water to residents of Flint, Michigan.<sup>84</sup> In addition, Title VIII of the Civil Rights Act of 1968 (also known as the Fair Housing Act) has been an increasingly popular tool among environmental justice advocates, providing grounds for civil and administrative claims against federal financial recipients on grounds of discriminatory sale, rental, and financing of dwellings.<sup>85</sup> For example, in 2020, several environmental justice community groups filed a Title VIII administrative complaint with the U.S. Department of Housing and Urban Development (HUD) challenging the City of Chicago's approval of permits allowing relocation of a scrap shredding facility from a largely White neighborhood to a Latino-majority neighborhood.<sup>86</sup> HUD subsequently

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<sup>77</sup> *Californians for Renewable Energy, et al., v. U.S. EPA*, 2018 WL 1586211 (N.D. Cal. 2018) (citizen challenges to EPA inaction on Title VI complaints filed in California, Michigan, Texas, New Mexico, and Alabama).

<sup>78</sup> *Alexander v. Sandoval*, 532 U.S. 275 (2001).

<sup>79</sup> *Id.* at 278-79.

<sup>80</sup> *Id.* at 293.

<sup>81</sup> *Id.*

<sup>82</sup> 42 U.S.C. § 1983 (2012).

<sup>83</sup> *Id.*

<sup>84</sup> *Boler v. Earley*, 865 F.3d 391 (6th Cir. 2017), *cert. denied*, 138 S.Ct. 1294 (2018).

<sup>85</sup> 42 U.S.C. § 3601 (West 2021).; *see also* Megan Haberle, *Fair Housing and Environmental Justice: New Strategies and Challenges*, 26 J. AFFORDABLE HOUS. 271 (2017).

<sup>86</sup> Ariel Wittenberg, *Civil Rights Complaint Filed Over Chicago Plant Relocation*, E&E NEWS (Aug. 13, 2020), <https://www.eenews.net/stories/1063711621>.

suspended the permit indefinitely.<sup>87</sup>

### E. At the State Level

Environmental justice claims at the state level can also play an important role in advancing environmental justice. For example, in *Friends of Buckingham v. State Air Pollution Control Board*,<sup>88</sup> the U.S. Court of Appeals for the Fourth Circuit addressed a community group's challenge to the Board's grant of a permit without the Board meeting its obligations under Virginia law to consider impacts of the permitted project. Notably, the court concluded: "[E]nvironmental justice is not merely a box to be checked, and the Board's failure to consider the disproportionate impact on those closest to the [project] resulted in a flawed analysis."<sup>89</sup> State courts have been receptive to environmental justice advocates advancing claims based upon theories of tort liability, including theories grounded in nuisance, negligence, and trespass. For one recent example, the state court affirmed a judgment for nuisance against industrial hog farms in rural communities in eastern North Carolina.<sup>90</sup> State constitutional provisions are another potential venue for environmental justice claims.<sup>91</sup>

## **IV. Environmental Justice Legislation and Policy**

### A. Federal Level

There have been various proposals to enact environmental justice legislation at the federal level. In 2017, Senator Cory Booker (D-NJ) introduced the "Environmental Justice Act" (EJA). The EJA would have, *inter alia*, overturned *Sandoval* by establishing a private cause of action on the basis of disparate impacts, as well as disparate treatment.<sup>92</sup> The EJA would have also provided that affected communities have "access to public information and opportunities for meaningful public participation relating to human health and environmental planning, regulations, and enforcement," protection from exposure to a "disproportionate burden of the negative human health and environmental impacts of pollution or other environmental hazards," and legal recognition of the seventeen environmental justice Principles adopted by the National People of Color Environmental Leadership Summit.<sup>93</sup> The ABA supported the bill:

[E]nvironmental justice has its own landmark legislation, as clean air and water do. By requiring air and water permitting to look at cumulative impacts to vulnerable communities and clarifying citizens' right to sue, this legislation helps us remove

<sup>87</sup> Rod Sneed, *General Iron permit for Southeast Side scrap shredder delayed indefinitely*, WGN, (May 8, 2021) <https://wgntv.com/news/chicago-news/general-iron-permit-for-southeast-side-scrap-shredder-delayed-indefinitely/>.

<sup>88</sup> *Friends of Buckingham v. State Air Pollution Control Board*, 947 F.3d 68 (4th Cir. 2020).

<sup>89</sup> *Id.*, at 92.

<sup>90</sup> *McKiver, et al., v. Murphy-Brown*, 980 F.3d. 937 (4th Cir. 2020).

<sup>91</sup> See e.g., James R. May & William Romanowicz, *Environmental Rights in State Constitutions*, in PRINCIPLES OF CONSTITUTIONAL ENVIRONMENTAL LAW 305, (ABA Section of Environment, Energy, and Resources, 2011).

<sup>92</sup> See Brentin Mock, *Cory Booker Wants to Tackle the 'Corporate Villainy' Behind Environmental Injustice*, BLOOMBERG CITYLAB, (Nov. 13, 2017) <https://www.citylab.com/equity/2017/11/cory-booker-environmental-justice/545534/>.

<sup>93</sup> See *supra* note 2 for the Environmental Justice Act's definition of "environmental justice."

barriers to justice for victims of man-made environmental disasters.<sup>94</sup>

Recent legislative proposals include the Environmental Justice Mapping and Data Collection Act of 2021 (H.R. 516), which would establish an “Environmental Justice Mapping Committee” tasked with creating a tool to identify “environmental justice communities,” or communities with “significant representation of communities of color, low-income communities, or tribal and indigenous communities that experience, or are at risk of experiencing, higher or more adverse human health or environmental effects, as compared to other communities.”<sup>95</sup> Moreover, the Environmental Justice for All Act would (S. 872) “establish[] several environmental justice requirements, advisory bodies, and programs to address adverse human health or environmental effects of federal laws or programs on communities of color, low-income communities, or tribal and indigenous,” and create a private cause of action.<sup>96</sup> Furthermore, the *American Rescue Plan* appropriates funds for “disproportionate environmental or public health harms and risks in minority populations or low-income populations ...”<sup>97</sup> President Biden has pledged to update and strengthen EO 12898, and has issued several Environmental Justice-advancing Executive Orders, including the *Executive Order on Tackling the Climate Crisis at Home and Abroad*(EO 14008),<sup>98</sup> the *Executive Order on America’s Supply Chains* (EO 14017),<sup>99</sup> and, the *Executive Order on the Establishment of the Climate Change Support Office* (EO 14027).<sup>100</sup>

### B. State Level

State engagement of environmental justice has set the pace for environmental justice practice nationally in multiple arenas, including via statutes, policies, data tools, and courts. For instance, in September 2020, New Jersey passed laws that require the New Jersey Department of Environmental Protection to: (1) identify “overburdened communities”<sup>101</sup> across the state; and (2) consider cumulative impacts when granting new or renewed permits impacting those “overburdened communities” by considering newly required “environmental justice impacts statements” submitted by permit applicants. California has enacted laws to guarantee the Human Right to Water (AB 685) and the Safe and Affordable Drinking Water Fund (SB 200); require consideration of environmental justice in all general plans (SB 1000); establish a community air protection program (AB 617); promote sustainable communities strategies by linking planning efforts around transportation, housing, and employment (SB 375); and provide new resources for clean energy development, such as solar roofs and electric cars, in disadvantaged communities (SB 1204 and SB 1275).<sup>102</sup> New York recently enacted an Environmental

<sup>94</sup> See *supra* note 2.

<sup>95</sup> CONG. RESEARCH SERV., SUMMARY FOR H.R. 516 – 117TH CONGRESS, (2021).

<sup>96</sup> S. 872, 117th Cong. (2021); CONG. RESEARCH SERV., SUMMARY FOR S.872 – 117TH CONGRESS, (2021).

<sup>97</sup> American Rescue Plan Act of 2021, Pub. L. No. 117-2, 135 Stat. 4, 93 (2021).

<sup>98</sup> Exec. Order 14008, 86 Fed. Reg. 7619 (Jan. 27, 2021).

<sup>99</sup> Exec. Order 14017, 86 Fed. Reg. 11849 (Feb. 24, 2021) (see § 4(c)(iv), requiring reports made under the Order to include environmental assessments, and § 5(h), requiring recommendations).

<sup>100</sup> Exec. Order 14027, 86 Fed. Reg. 25947 (May 7, 2021).

<sup>101</sup> The law defines “overburdened communities” as any census block group with significant low-income, minority, or linguistically isolated populations.

<sup>102</sup> See: Lee, C. Kyle, A. Reyes, D. Sampson, N. London, J. & Gersten, Z., *California Environmental Justice Resources*, Washington, D.C. AMERICAN PUBLIC HEALTH ASSOCIATION – ENVIRONMENTAL JUSTICE



Justice Section (Article 48).<sup>103</sup>

There are notable subnational developments elsewhere. Illinois mandates that 25% of its Solar for All program benefits environmental justice communities, including \$750 million in low-income programs for solar, solar workforce, and energy efficiency.<sup>104</sup> In 2019, New York's Climate Leadership and Community Protection Act mandates that 40% of the renewable energy resources involved benefit areas of environmental justice concern.<sup>105</sup> Multiple states have issued environmental justice executive orders.

## V. Call for Adoption and Implementation

The Resolution will be implemented by various means within the ABA, including by providing ABA Officers, Centers, Sections, and members with authority and guidance to work with all levels of government to establish environmental justice laws, regulations, guidelines, policies, and best practices; develop and support conferences, panels, programs and partnerships; publish books, monographs, articles, and blogs; and liaise with relevant governmental authorities, including the White House Environmental Justice Advisory Council and the White House Interagency Council on Environmental Justice, and similar state and international entities. To this end, and in addition to preparing this Resolution's sponsors will seek Board of Governors approval for establishment of an ABA-wide Environmental Justice Task Force to assist with, and coordinate implementation of, the Resolution, including regular reports on its activities to the BOG and the Section Officers Conference.

Respectfully submitted,

Howard Kenison  
Chair, Section of Environment, Energy, and Resources  
August, 2021

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COMMITTEE, (Aug. 2019) <http://graham.umich.edu/media/pubs/California-Environmental-Justice-Resources-45817.pdf>.

<sup>103</sup> N.Y. Env't Conserv. Law § 48 (McKinney 2020).

<sup>104</sup> See, Charles Lee, *A Game Changer in the Making: Lessons from States Advancing Environmental Justice Through Mapping and Cumulative Impact Strategies*, 50 ENVTL. L. REP. 10203, (2020).

<sup>105</sup> N.Y. Env't Conserv. Law § Ch. 43-B, art. 75, Refs & Annos (McKinney 2019).

**GENERAL INFORMATION FORM**

Submitting Entity: Section of Environment, Energy, and Resources  
 Section of Civil Rights and Social Justice  
 Center for Human Rights

Submitted By: Howard Kenison, Chair, Section of Environment, Energy, and Resources

1. Summary of the Resolution(s).

Proposed Resolution 514 recognizes that a wide spectrum of organizations, including the American Bar Association, and urges law firms, corporate and nonprofit legal departments, lawyers, law schools, and state, local, territorial, tribal and specialty bar associations to include and consider the perspectives and communities of color, indigenous communities, low-income communities, and other vulnerable populations and people as stakeholders in environmental justice decision-making and implementation.

2. Indicate which of the ABA's Four goals the Resolution seeks to advance: (1-Serve our Members; 2-Improve our Profession; 3-Eliminate Bias and Enhance Diversity; 4-Advance the Rule of Law) and provide an explanation on how it accomplishes this.

This Resolution advances ABA goals 1-4:

- (1) Serves current and future members of the American Bar Association who are concerned about social justice and racial equity;
- (2) Improves the profession by bringing focus to an issue important to defending liberty and pursuing justice;
- (3) Addresses key legal challenges that contribute to bias in society; and,
- (4) Protects the equal protection of those disproportionately affected by the adverse effects of certain environmental and other policies.

3. Approval by Submitting Entity.

May 7, 2021.

4. Has this or a similar resolution been submitted to the House or Board previously?

Yes. Resolution on Environmental Justice (93A109), approved in 1993.

5. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?

This Resolution builds upon and supports several resolutions, including the:  
 --Resolution on Environmental Justice (93A109)  
 --Resolution on Climate Change (19A111)

- Resolution on Human Dignity under Law (19A113B)
- Resolution on Sustainable Development (13A105)

6. If this is a late report, what urgency exists which requires action at this meeting of the House?

N/A

7. Status of Legislation. (If applicable)

N/A

8. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.

The ABA Section of Environment, Energy, and Resources will coordinate implementation of the Resolution with ABA partners.

9. Cost to the Association.

None.

10. Disclosure of Interest. (If applicable)

N/A

11. Referrals.

N/A

12. Name and Contact Information

Howard Kenison  
 Chair, Section of Environment, Energy, and Resources  
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13. Name and Contact Information.

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**EXECUTIVE SUMMARY**1. Summary of the Resolution.

Proposed Resolution 514 recognizes that a wide spectrum of organizations, including the American Bar Association, and urges law firms, corporate and nonprofit legal departments, lawyers, law schools, and state, local, territorial, tribal and specialty bar associations to include and consider the perspectives and communities of color, indigenous communities, low-income communities, and other vulnerable populations and people as stakeholders in environmental justice decision-making and implementation.

2. Summary of the issue that the Resolution addresses.

Environmental injustice, namely, the disparate adverse effects and heightened risks of environmental policies on communities of color, indigenous communities, low-income communities, and other vulnerable populations and people.

3. Please explain how the proposed policy position will address the issue.

The Resolution and Report recognize that a wide spectrum of organizations, including the American Bar Association, affect environmental policy and have multiple opportunities to correct the causes and consequences of the disparate adverse effects and heightened risks of environmental policies on communities of color, indigenous communities, low-income communities, and other vulnerable populations and people. The emergence and importance of environmental justice, and relevant developments at the federal, state, and local levels in litigation, legislation, and policymaking further justifies advancement of these principles by the ABA and inclusion and consideration of these principles by other legal entities. The Resolution would be implemented by various means within the ABA, including by providing ABA Officers, Centers, Entities, Sections, and members with authority and guidance to work with all levels of government and jurisdictions to establish environmental justice laws, regulations, guidelines, policies, and best practices; develop and support conferences, panels, programs and partnerships; publish books, monographs, articles, and blogs; and liaise with relevant governmental authorities, including the White House Environmental Justice Advisory Council and the White House Interagency Council on Environmental Justice, and similar state and international entities. To this end, and in addition to this Resolution, the Resolution's sponsors will seek Board of Governors (BOG) approval for establishment of an ABA-wide Environmental Justice Task Force to assist with, and coordinate implementation of, the Resolution, including by reporting regularly on its activities to the BOG and the Section Officers Conference.

4. Summary of any minority views or opposition internal and/or external to the ABA which have been identified.

None known.