

## Louisiana Decision Undercuts EPA Title VI Efforts on Environmental Justice

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A district court in Louisiana has barred the EPA and the Department of Justice from imposing disparate-impact-based requirements against the State of Louisiana or its State agencies in civil rights cases under Title VI of the Civil Rights Act of 1964.<sup>[1]</sup> This decision is likely to serve as a template for other states to oppose the EPA's use of disparate impact analyses when advancing environmental justice policies and investigations. Nevertheless, the EPA has continued to apply the disparate impact standard in other states.

### BACKGROUND OF EPA TITLE VI AND DISPARATE IMPACT

In 2021, Environmental Protection Agency (EPA) Principal Deputy General Counsel Melissa Hoffer announced the EPA would, for the first time, exercise “affirmative authority” to ensure that EPA funding recipients comply with Title VI.

<sup>[2]</sup> Under Title VI of the Civil Rights Act of 1964, federally funded programs, activities, and institutions are prohibited from discriminating on the basis of “race, color, or national origin.”<sup>[3]</sup> The EPA suggested that those found to have violated the law may lose their federal funds or approvals.

As previously discussed,<sup>[4]</sup> Title VI regulations permit parties to petition the EPA and other agencies to investigate whether permitting and other actions by funding recipients discriminate against the protected classes. Hoffer's 2021 statements relayed the EPA's plans to start affirmatively using Title VI to further environmental justice (EJ). According to Hoffer, “without meaningful enforcement, recipients of federal funds make decisions every day that exacerbate racial inequities.”<sup>[5]</sup>

Courts have adopted a three-part test to determine whether a funding recipient's policy or practice violates Title VI disparate impact regulations:<sup>[6]</sup>

1. **Disparate impact.** Does the adverse effect of the policy or practice fall disproportionately on a race, color, or national origin group?
2. **Justification.** If so, does the record establish a substantial legitimate justification for the policy or practice?
3. **Less discriminatory alternative.** Is there an alternative that would achieve the same legitimate objective but with less of a discriminatory effect?

### LOUISIANA LAWSUIT AND DISPARATE IMPACT DECISION

In 2022, Earthjustice filed a Title VI complaint on behalf of St. John the Baptist Parish residents in Louisiana. These residents, who live along a stretch of the Mississippi River known for petrochemical manufacturing, alleged the Louisiana Department of Environmental Quality had engaged in racial discrimination in its permitting process in violation of the Civil Rights Act of 1964.<sup>[7]</sup>

In a turning point for the EPA, the agency opened a civil rights investigation into Louisiana's permitting practices. The EPA's proceedings were a rare instance of the agency enforcing regulations concerning actions that involve disparate impact, in contrast to cases of intentional discrimination.<sup>[8]</sup>

In response, Louisiana Attorney General Jeff Landry, now the state's governor, sued the agency. Landry's suit challenged the disparate impact standard, which states that policies that cause disproportionate harm on the basis of race, color, or national origin violate the Civil Rights Act, even when the alleged harm is unintentional.<sup>[9]</sup> This standard allows the EPA to argue that it is discriminatory for state agencies to permit facilities in communities of color overburdened by pollution, even if discriminatory intent cannot be discerned. In a disparate impact case, the investigation focuses on consequences, rather than intent.<sup>[10]</sup> Five weeks after Landry filed his suit, the EPA dropped its investigation into Louisiana's permitting practices. Nevertheless, Landry continued his suit, arguing that the EPA can only enforce the Civil Rights Act in cases where state policies are explicitly discriminatory.<sup>[11]</sup>

In January 2024, Judge James D. Cain Jr. of the U.S. District Court for the Western District of Louisiana ruled for the State of Louisiana. He held that the EPA and the Department of Justice can't impose "any disparate-impact-based requirements against the State or any State agency" in civil rights cases under Title VI of the Civil Rights Act.<sup>[12]</sup> Judge Cain wrote that "pollution does not discriminate" and that "if a decision maker has to consider race, to decide [on enforcement] it has indeed participated in racism."<sup>[13]</sup>

## POTENTIAL IMPACT ON TITLE VI INVESTIGATIONS

Judge Cain's ruling impedes the EPA's use of information that certain advocates argue is essential to environmental justice in measuring harm in areas with disproportionate pollution burdens. Yet, even before Judge Cain's decision, the EPA appeared to have reassessed its approach to Civil Rights Act investigations involving disparate impact, especially in states that are not keen on environmental justice, in hopes to keep challenges like Landry's away from the U.S. Supreme Court.<sup>[14]</sup> A Supreme Court verdict akin to Judge Cain's decision would undermine the agency's authority. Judge Cain's decision to block the EPA and the Department of Justice from enforcing disparate impact requirements under Title VI of the Civil Rights Act is likely to inspire other states to provide similar opposition.<sup>[15]</sup>

In states advancing their own environmental justice initiatives, the EPA is nevertheless continuing its Title VI EJ-focused efforts. On February 14, 2024, the EPA entered into an Informal Resolution Agreement (IRA) with the Illinois Environmental Protection Agency (Illinois EPA) to resolve claims alleging that Illinois EPA had engaged in racial and national origin discrimination in its permitting process.<sup>[16]</sup> In January 2021, the EPA accepted for investigation a complaint against the Illinois EPA. The complaint alleged discrimination on the basis of race and national origin in violation of the Civil Rights Act by the Illinois EPA in its approval of a construction permit which would move a scrap metal recycling facility from Chicago's northern Lincoln Park neighborhood to a neighborhood in southeast Chicago.<sup>[17]</sup> The IRA requires the Illinois EPA to bolster its current EJ considerations during the permit review process and implement several other changes.

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[1] *State of Louisiana v. U.S. Environmental Protection Agency, et al*, No. 2:23-CV-00692 (W.D. La., Jan. 23, 2024), available at [https://earthjustice.org/wp-content/uploads/2024/01/state\\_of\\_louisiana\\_v\\_u\\_s\\_envi\\_60.pdf](https://earthjustice.org/wp-content/uploads/2024/01/state_of_louisiana_v_u_s_envi_60.pdf).

[2] American Bar Association Panel, *Perspectives and Priorities from Senior Biden Administration Officials on the Biggest Environmental, Energy and Resources Challenges and Opportunities* (Oct. 14, 2021), <https://www.americanbar.org/news/abanews/aba-news-archives/2021/10/aba-section-of-environment-energy-and-resources-to-host-virtua/>.

[3] Title VI, 42 U.S.C. § 2000 et seq.

[4] Jonathan Brightbill, *EPA to Affirmatively Enforce Title VI* (Nov. 18, 2021), <https://www.winston.com/en/blogs-and-podcasts/winston-and-the-legal-environment/epa-to-affirmatively-enforce-title-vi>.

[5] Inside EPA, *EPA Lawyer Vows Use of 'Affirmative Authority' To Enforce Civil Rights Law* (Oct. 15, 2021), <https://insideepa.com/daily-news/epa-lawyer-vows-use-affirmative-authority-enforce-civil-rights-law>.

[6] U.S. Department of Justice, *Section VII – Proving Discrimination – Disparate Impact* (accessed Mar 5, 2024), <https://www.justice.gov/crt/fcs/T6Manual7#:~:text=%3B%20Gaston%20Cty.,results%20in%20racial%20discrimination.%E2%80%9D>

[7] *Supra*, note 1.

[8] Hassan Kanu, *Louisiana attorney general's lawsuit seeks to roll back civil rights laws* (June 1, 2023), <https://www.reuters.com/legal/government/louisiana-attorney-generals-lawsuit-seeks-roll-back-civil-rights-laws-2023-06-02/>.

[9] *Id.*

[10] *Lau v. Nichols*, 414 U.S. 563, 568 (1974).

[11] *Id.*

[12] *Supra*, note 1.

[13] *Id.*

[14] Delaney Nolan, *The EPA is Backing Down From Environmental Justice Cases Nationwide* (Jan. 19, 2024), <https://theintercept.com/2024/01/19/epa-environmental-justice-lawsuits>.

[15] Inside EPA, *Louisiana Ruling Will Drive States to Fight EPA Rights Probes, Lawyers Say* (Jan. 31, 2024), <https://insideepa.com/daily-news/louisiana-ruling-will-drive-states-fight-epa-rights-probes-lawyers-say?s=na>.

[16] Available at <https://www.epa.gov/system/files/documents/2024-02/01rno-21-r5-rec-resolution-ltr-and-ira.pdf>.

[17] *Id.*

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