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# Leading With Race In Climate Solutions Legal Attacks + Pathways Forward

— March 6, 2024 —

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# Presentation Overview

- **The Broad Context**
  - Social and political landscape
- **Conservative Legal Attacks On Race-Consciousness**
  - Ongoing legal attacks on racial equity
  - SCOTUS decision
- **What Can We Do? Near-Term Strategies**
  - Understanding the current legal context
  - Defending and extending racial equity
- **What Can We Do? Long-Term Strategies**
  - Organizing and building power to transform laws, courts, and systems of governance

**Leading With Race in Climate Solutions** is a collaborative project of:

Just Solutions  
The Greenlining Institute  
The Chisholm Legacy Project  
Urban Sustainability Directors Network  
Facilitating Power  
Upright Consulting Services

Thanks to The Kresge Foundation

See more:

<https://bit.ly/LeadingWithRaceInClimate>

**Legal Disclaimer:**

*Contents of this presentation include information about equal protection and civil rights laws. Any information included in this curriculum is not intended to constitute legal advice and is for educational purposes only. We recommend consulting an attorney with respect to specific legal matters.*

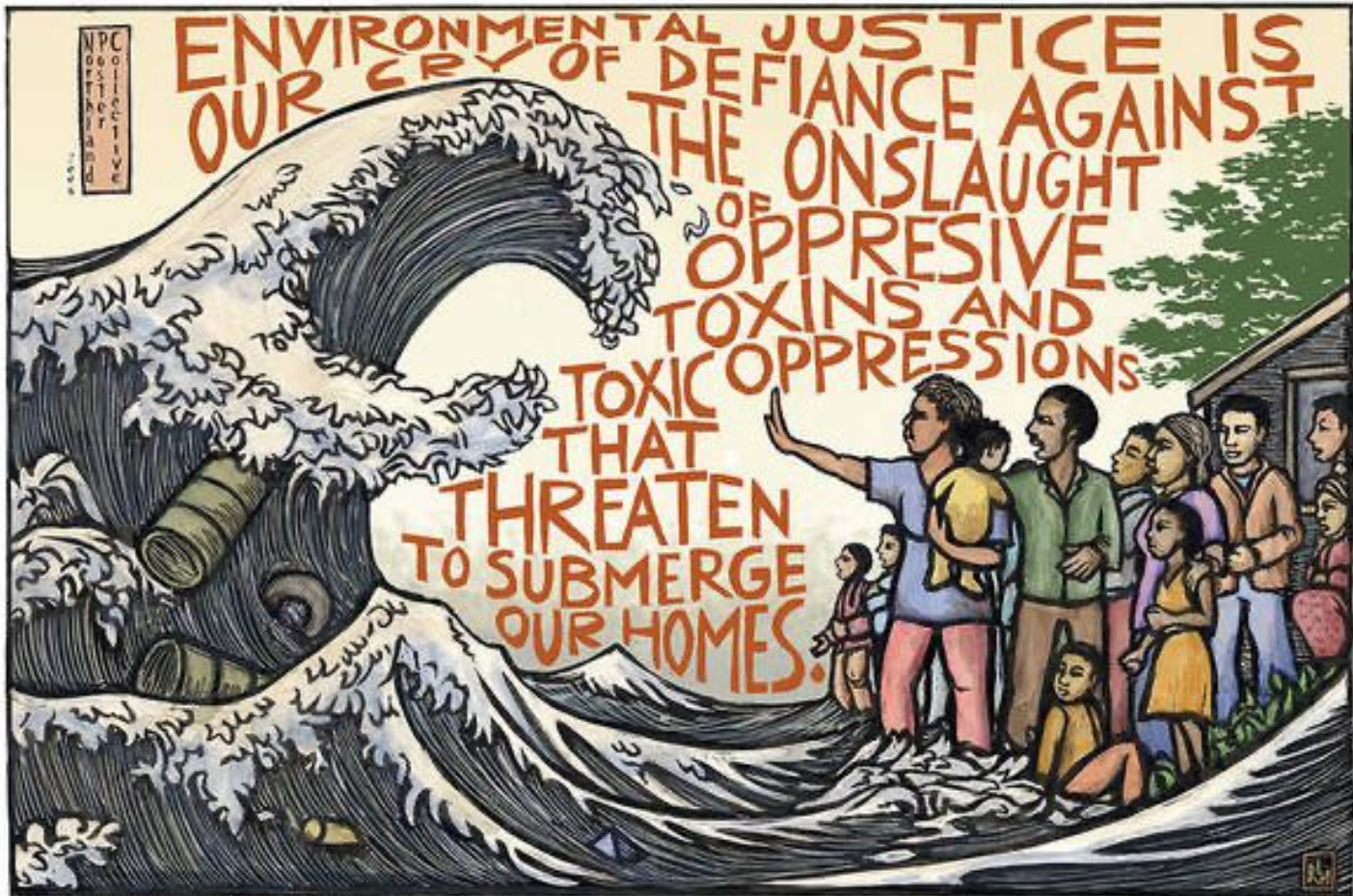
# The Broad Context

# We Must Build A Just, Regenerative Future Amidst Growing Socio-Political Obstacles

- Increasing climate catastrophes
- Rise in authoritarianism
- Increase in hate crimes
- Covid-19 pandemic
- High profile police violence and brutality
- Legal attacks on civil rights
- Rise of “colorblindness” as a pervasive form of modern-day racism
- Deepening racial inequities



Source: Paul Morigi  
Copyright: 2022 Getty Images



# Climate Justice Is Racial Justice

*“There is no way to talk about equitable, effective, and just solutions to climate change without also talking about the disproportionate burdens that communities of color shoulder as the planet warms.”*

– [NPQ article](#) by Jacqueline Patterson, Aiko Schaefer, and Alvaro S. Sanchez



Source: Steve Sanchez/Shutterstock

The U.S. economy is built on a history of slavery, colonialism, and disinvestment that permeates structures and systems to this day.

Without consciously designing for racial equity, governments are limited in their ability to repair past harm and are at risk of perpetuating it.

# **How Conservative Legal Attacks Are Affecting The Ability To Lead With Race In Government Policy And Programs**

# Conservatives Are Leading Attacks On Foundational Civil Rights Laws

- Well-funded, organized right-wing actors are **weaponizing civil rights laws and the equal protection clause** of the Constitution
- Opponents of racial justice have **launched numerous legal attacks and legislative attempts to overturn current law and protections** across a range of jurisdictions and issues
- These **attacks are not new**, they are part of a historical pattern of backlash against progress on racial justice since at least the Civil War

**Key takeaway:** The Right is running a long-term, coordinated strategy to:

- Appoint conservative judges
- Sue to overturn existing laws and legal precedent
- Pass new laws in state and federal legislatures
- Wage a public communications and media strategy



Source: ACLU



# The Attacks Are Part Of A Coordinated, Well-Funded Right-Wing Strategy

Key players include **Edward Blum** (the conservative activist behind affirmative action and voting rights attacks), **Stephen Miller's America First Legal**, the **Federalist Society**, the **Heritage Foundation**, the **American Civil Rights Project**, and the **Pacific Legal Foundation**, among others



## PLF at the Supreme Court

Pacific Legal Foundation is a repeat player at the Supreme Court of the United States. Our attorneys have won cases involving property rights, free speech, and Clean Water and Endangered Species Acts, cases that exemplify threats to liberty and property by the regulatory state.

Rose Knick and PLF senior attorney Dave Breiner

DIRECT REPRESENTATION CASES:

WINS	LOSSES	TOTAL
17	02	19

## Defending liberty and justice for all.

Pacific Legal Foundation is a national nonprofit legal organization that defends Americans from government overreach and abuse.



"America First Legal is the long-awaited answer to the ACLU. We are committed to an unwavering defense of true equality under law, national borders and sovereignty, freedom of speech and religion, classical values and virtues, the sanctity of life and centrality of family, and our timeless legal and constitutional heritage. Through relentless litigation and oversight we will protect America First, Last, and Always."

STEPHEN MILLER  
PRESIDENT, AMERICA FIRST LEGAL

# Example: Coordinated Right-Wing Lawsuits Result In Repeal Of Federal Race-Based USDA Grant Program

- Black farmers have historically been discriminated against and robbed of their land
- A new federal grant program was designed to address this
- Then white farmers launched 12 geographically dispersed legal challenges
- Resulted in the repeal of \$4 billion in USDA grants for farmers of color formerly discriminated against by the government
- Replaced with a colorblind program
- Total pool is now \$2.2 billion, loan forgiveness no longer directly provided

## Black Farmers Refuse to Back Down After Federal Judge Dismisses Suit

*The four farmers argued the government broke its promise when Congress repealed a \$4 billion debt relief program.*



By [Aallyah Wright](#)

May 23, 2023



"This administration ... just abandoned us, left us out there high and dry," says John Boyd Jr., one of the plaintiffs in a class-action lawsuit filed by Black farmers against the federal government. (Steve Helber/Associated Press)

# Right-Wing Lawsuits Have Impacted Race-Based Programs Run By Local Governments



City of Oakland (Photo: oakland.ca.gov)

## Alameda County Sued Over Racial Preferences in Awarding Governmental Contracts

*CFER, PLF say that the County is violating the equal protection clause of the 14th Amendment*

By [Evan Symon](#), July 25, 2022 4:17 pm

The Californians for Equal Rights Foundation (CFER), along with co-plaintiffs represented by Pacific Legal Foundation (PLF), filed a lawsuit against Alameda County on Monday, challenging two public contracting programs that impose race-based preferences for minority-owned companies.

## Facing lawsuit by white business owner, Cook County retools grant program for minorities, women

County's Source Grow Grants will accept new applications after an Edison Park chiropractor claimed bias in how county would distribute \$10,000 grants from federal COVID relief funds.

By [Andy Grimm](#) | Mar 17, 2023, 5:08pm PDT

[Twitter](#) [Facebook](#) [Email](#) [Share](#)



Cook County Board President Toni Preckwinkle in 2022 announced a program that would target businesses owned by minorities, women, the disabled and veterans to receive \$10,000 grants from federal COVID relief funds. County officials have yet to award the money, and have announced they are retooling the program after a white Edison Park business owner filed a class action lawsuit. | [Rich Heintz/Sun-Times file](#)

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- MOST READ**
- A flight from O'Hare to Midway? Yes, but don't try to buy a ticket
  - Suspect arrested in slaying of woman found in Logan Square apartment
  - Stalled Bears stadium talks create

# Attacks On Private Entities Are Increasing As Well

Private entities—including foundations and companies—are seeing increased attacks on:

- Diversity, Equity, & Inclusion programs
- Race-based grants programs
- Diversity hiring initiatives



Ayana Parsons, chief operating officer of Fearless Fund, at an Aug. 17 town hall in Atlanta. (Alyssa Pointer for The Washington Post)

Source: Washington Post

BUSINESS

## Federal court halts private grant program for Black female entrepreneurs

In issuing an injunction, the appellate panel wrote that the Fearless Fund's 'racially exclusionary' program might violate a federal anti-discrimination law

BUSINESS

## Conservative activist sues 2 major law firms over diversity fellowships

The American Alliance for Equal Rights, which led the campaign against affirmative action in college admissions, filed lawsuits against Perkins Coie and Morrison & Foerster

## The campaign against affirmative action shifts to corporate America

Warning against 'race-based quotas,' 13 Republican attorneys general have taken aim at company diversity programs, including Microsoft's 2020 pledge to double Black leaders and suppliers

# The Supreme Court Overturned Affirmative Action In 2023 Ruling

- The ruling **overturned affirmative action**
- Narrows the use of racial classifications under the Equal Protection Clause of the Constitution and Title VI of the Civil Rights Act of 1964

## Key takeaway:

- Diversity is no longer a “compelling state interest”
- Using race as a classification to promote diversity and combat racial inequities isn’t allowed



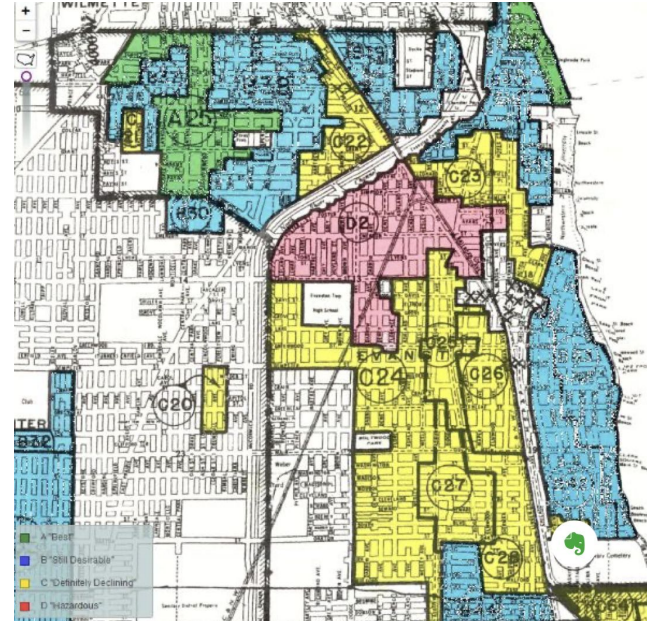
Proponents for affirmative action in higher education rally in front of the U.S. Supreme Court before oral arguments in *Students for Fair Admissions v. President and Fellows of Harvard College* and *Students for Fair Admissions v. University of North Carolina* on October 31, 2022 in Washington, DC. Chip Somodevilla | Getty Images

Source: Getty Images

# Summary Of What's At Stake

## Hard-earned victories towards equity and justice:

- Race-based government programs, policies, and funding allocations  
*Example: USDA's original program for Black farmers*
- Entities receiving government funding who confer benefits or harms based on race  
*Example: Affirmative action programs at universities*
- Race-based contracting and small business programs  
*Example: Government procurement programs prioritized for MWBE*
- Race-based government environmental justice programs  
*Example: EPA's Title VI civil rights investigations of cumulative impacts in EJ communities*
- Race-based reparations programs  
*Example: Evanston's housing reparations program*



Source: Mapping Inequality

Redlining map of Evanston, IL whose reparations program added a non-raced-based component in response to a legal threat from conservatives.

# Acknowledgement

- We want to pause to acknowledge the very real human **pain** and suffering associated with these attacks
- We also want to remember that we are being attacked because of the **progress** we've made



Source: Art by Brandy Chieco

# What Can We Do About It?

1. **Near-Term: Defending And Extending Progress Inside The Current Legal Framework**
  2. **Long-Term: Organizing and Building Power to Transform Laws, Courts, and Systems of Governance**
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# **Near-Term: Defending and Extending Racial Equity Within the Current Legal Framework**

# Race-Conscious Policy

**Race-conscious policy**: designing a policy, program, or initiative, or taking action, with either a racial purpose, goal, or objective, or that is otherwise aware of racial context

Examples:

- Racial data collection and tracking
- “Affirmatively Furthering Fair Housing” (policy focused on promoting racial residential integration and combatting effects of segregation)
- Texas Ten Percent Plan

# Race-Based Policy

**Race-Based policy**: the Supreme Court's term for describing policies that are more specific and targeted than race-conscious; they use race as a decision or selection criterion, generally at the individual level

Examples:

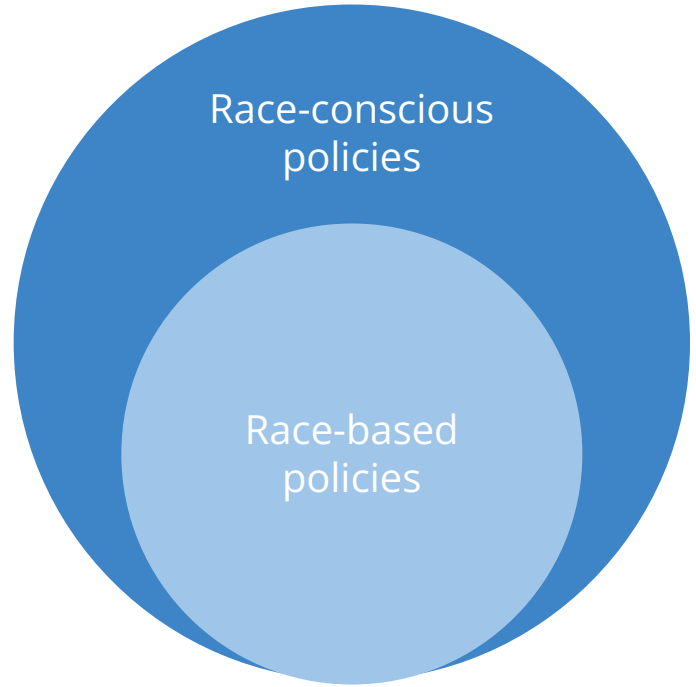
- University-based affirmative action policies
- Setting aside a portion of contracts, sub-contracts, or contracting dollars for minority-owned businesses
- Jim Crow laws

# Clarifying Vocabulary

All race-based policies are also race-conscious, but not all race-conscious policies are race-based

## Key takeaway:

- Race-conscious = legal
- Race-based = complicated and ***potentially*** illegal



# What's Possible and "Legal" Today

- Governments and private entities receiving government funds are highly restricted in their ability to use race-based mechanisms to address structural or systemic racism
- Distributing government-supported benefits based on racial classifications that impact individuals or businesses is largely **illegal** unless:
  - ❑ It's narrowly designed to remedy past intentional discrimination by that specific government entity
  - ❑ It's limited in time and scope
  - ❑ Race-neutral mechanisms were demonstrated not to achieve the same desired result

***Under current law, race-based classification approaches are prohibited in most instances. Race-conscious but non-race-based approaches are allowed.***

## Example: Part 1

**Race-based approach:** A city sets up a grant program to fund household solar and battery storage projects. To address historical racial disparities in access to solar, the fund is set up to preference BIPOC households.

***X Not Legal***



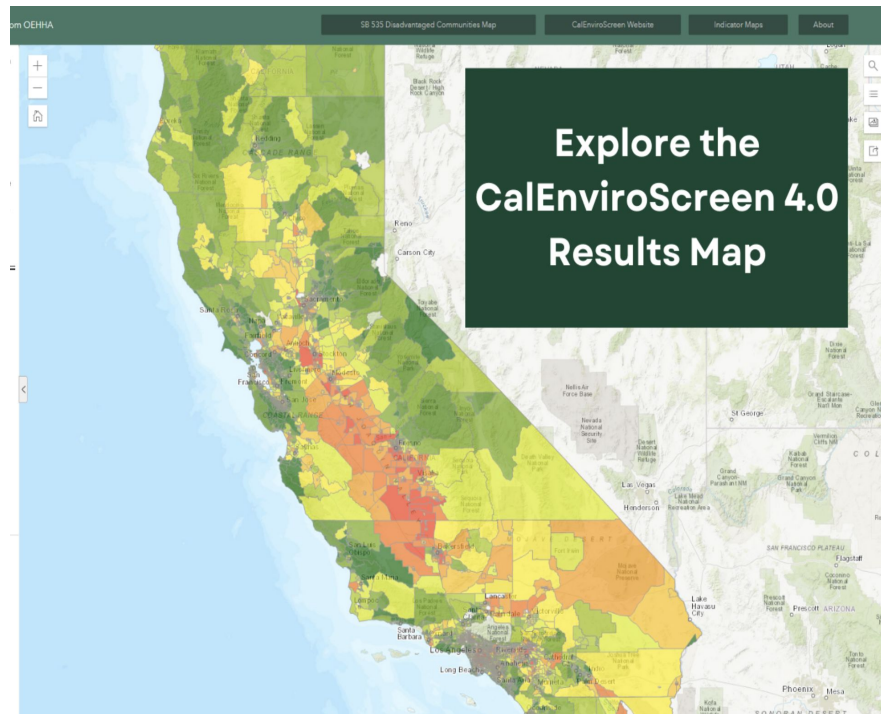
Source: NAACP Solar Equity Initiative kickoff on 2018 MLK weekend

## Example: Part 2

**Race-conscious, but non-race-based approach:** A city sets up a grant program to fund household solar and battery storage projects. To address historical racial disparities in access to solar, the fund is set up to give priority to projects in specific environmental justice geographic areas based on historical redlining, energy burden, income, and asthma rates. Outreach about the grant fund targets community organizations and households within the priority geographic areas.



*Legal*



# Risks of Legal Attacks on Programs or Policies

- Race-based policies and programs are easy to challenge in court.
- Government then must **spend staff time and money on legal defense**. Often these are resources that could be spent advancing legally sound and effective strategies for leading with race.
- Successful legal attacks can result in **programs being shut down** or stripped of all racial equity components.
- Successful legal attacks can result in government being forced to **pay damages and legal fees to opponents of racial equity**.
- Successful legal attacks can result in increased insurance costs, diminished capacity to sell bonds, and sometimes personal liability for individual government leaders.
- Legal risk is likely **making local government more cautious** about racial equity work, even if there are legally sound strategies to lead with race.



# Governments Can Still Do A Lot To Advance Racial Equity

ALLOWED	ACTIVITIES
✓	Outreach, collaboration, and co-creation with communities impacted by racial inequity
✓	Set bold racial equity goals in service of universal outcomes. Talk about race and why it matters
✓	Prioritize community benefits in geographic areas or for communities (not defined by race) that have historically suffered disproportionate burdens and harms related to health, wealth, work and opportunity
✓	Establish offices of racial equity and mandate agency-wide racial equity plans like the Biden Administration's <a href="#">Executive Order</a> to Advance Racial Equity
✓	Collect robust demographic data and ensure policies are advancing racially equitable outcomes
✓	Establish narrowly tailored minority contracting programs to remedy past government discrimination in contracting that is documented in a formal disparity study
✗	<b>Distributing benefits and burdens based on race (in most cases)</b>

# Work With Government To Utilize The 3-Step Process

1. Encourage **bold racial equity commitments** in service of universal outcomes
2. Co-develop program or policy mechanisms and **strategies that avoid distributing public benefits and burdens based on racial classifications**
3. Hold government accountable **to measuring racial equity impacts**, i.e. how the policy mechanisms or strategies affect different racial groups and advance racial equity

# Step 1: Encourage Bold Racial Equity Commitments In Service Of A Universal Goal

For example:

- Ensure everyone has **access** to affordable housing, starting with people who experienced housing discrimination in the past
- Ensure everyone has better health outcomes by eliminating **disparities** in asthma rates between communities of color and white communities

FEBRUARY 16, 2023

## Executive Order on Further Advancing Racial Equity and Support for Underserved Communities Through The Federal Government

 > [BRIEFING ROOM](#) > [PRESIDENTIAL ACTIONS](#)

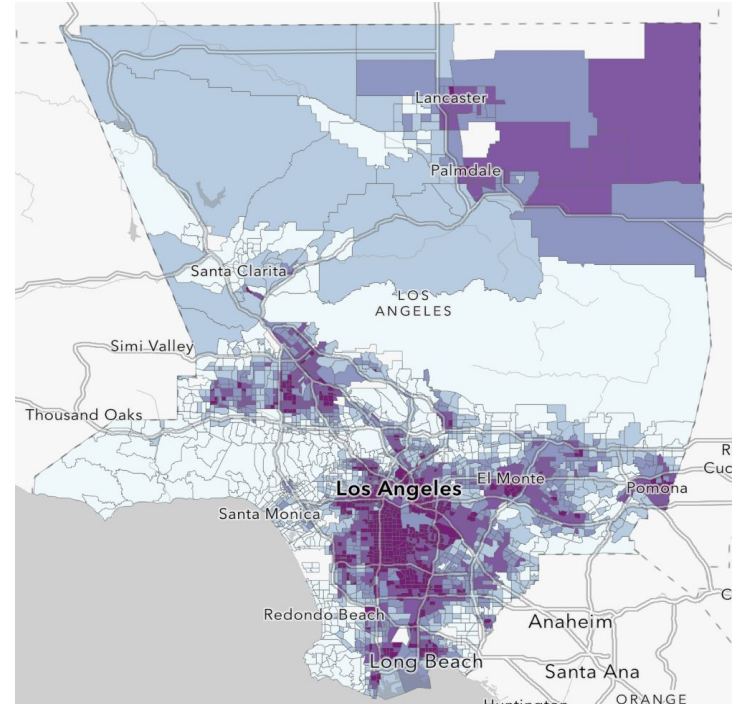


Source: CNN

## Step 2: Co-Develop Policies And Programs That Avoid Distributing Public Benefits And Burdens Based On Race

**Texas Ten Percent Plan:** The University of Texas offers admission to the top 10% of every public high school graduating class, achieving more racial diversity through a non-race-based mechanism

**LA County's Targeted ARPA Fund Program:** LA County set a goal of allocating 75% of American Rescue Plan Act (ARPA) funds to 40% of neighborhoods most impacted by the pandemic and longstanding inequities

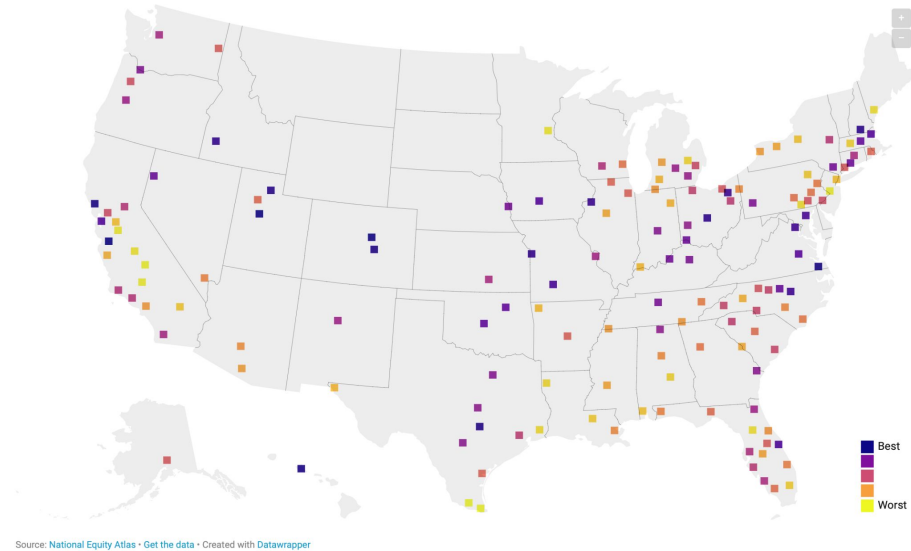


Source: LA County's Map for Targeting ARPA Funds

# Step 3: Hold Government Accountable To Measuring Racial Equity Impacts

- Track relevant disaggregated data correlated with race—assess before and after program implementation
- Encourage governments to use racial equity impact assessments, data collection and tracking, and mapping indices with multiple data points

Racial Equity Index, 150 largest metro areas



Source: PolicyLink National Equity Atlas

# The 3-Step Process for Leading with Race in Policy

1. Set **bold racial equity commitments** in service of universal outcomes
2. Employ policy mechanisms and **strategies that avoid distributing public benefits and burdens on racial classifications**
3. **Measure** the racial equity impacts of the strategies

- Effective
- Legally sound
- Used for decades by movement leaders in states like CA, WA, MI that enacted bans on affirmative action in the 1990s and 2000s

# **Long-Term: Organizing and Building Power to Transform Laws, Courts, and Systems of Governance**

# How Do We Course Correct?

- The Supreme Court has a 6-3 conservative majority
- Three of the six conservative justices are under the age of 60
- There's a need for long-term organizing and strategy development
- Focus on bridging movements—work in solidarity across issue areas with others invested in race-conscious policies
- Develop a long-term, focused strategy to build political power for racial justice



Source: LD on jstock.com

***"Do not get lost in a sea of despair. Be hopeful, be optimistic. Our struggle is not the struggle of a day, a week, a month, or a year, it is the struggle of a lifetime." - John Lewis***



# Actions Advocates Can Take

- **Educate:** share information about the link between racism and existing inequities and inform decision-makers about scope and limits of SCOTUS decision
- **Unite:** connect with communities and grow our movements to incubate a large-scale, long-term strategy to build equitable climate policy
- **Pilot:** advance race-conscious approaches to fighting climate change to test effectiveness and political will
- **Organize:** sign people up to vote, advocate to change government structures that hinder our progress, and win over hearts and minds
- **Communicate:** shape the narrative on why leading with race is imperative

## What the Supreme Court Decision on Affirmative Action Means for Climate Equity Policy



Jacqueline Patterson, Aiko Schaefer, and Alvaro S. Sanchez  
October 30, 2023



# Conclusion And Call To Action

- Climate justice is racial justice
- The opponents of racial justice are organizing, passing laws, and attacking

## We must:

- Hold the line and fight back
- Defend and extend progress on racial equity within the current legal framework
- Organize to build long-term community power
- Transform laws, courts, and systems
- Convene, strategize, coordinate, and align



Source: Art by Cece Carpio (Oakland, CA)

# Thank You

Visit our [project website](#) for more information, including a compilation of resources and a catalog of legal attacks on race conscious policies.

*Produced by Just Solutions, The Greenlining Institute, The Chisholm Legacy Project, The Urban Sustainability Directors Network, Facilitating Power, and Upright Consulting Services. Special thanks to: Rachael DeCruz and Maria Stamas*

# Appendix

# Laws And Amendments The Right Has Targeted

**Equal Protection Clause of 14th Amendment:** *“No State...shall deny to any person within its jurisdiction the equal protection of the laws.”*

- ***Applies to government action*** at all geographic levels: federal, state, and local

**Title VI of Civil Rights Act of 1964:** *“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.”*

- By extension, ***any entity receiving government assistance*** is also barred from discrimination

# Assessing The Legality Of A Race-Based Policy: Part 1

- ❑ Is the government or an entity receiving government funding involved?

*Yes?* Then ....

- ❑ Is the funding or benefit they're conferring based on a racial classification?

*Yes?* Then...

- ❑ Are they allocating benefits to an individual or individual entity in a zero-sum setting?

*Yes?* Then... this program is subject to strict scrutiny.

→ *Proceed to the next slide.*

**Racial classification:** Race is used as an indicator to classify individuals or an individual entity

**Zero-sum setting:** A setting in which there's a limited amount of benefit such that allocating it to someone means there's less for others.

## Part 2: Does The Race-based Policy Or Fund Meet The “Strict Scrutiny” Standard?

**Does the program or policy do all of the below?**

- Serve a compelling state interest—either remedying past intentional discrimination by that specific government entity or supporting public safety in prison race riots?
- Is it narrowly tailored, including did it consider and implement non-race-based alternatives and failed?
- Is it calibrated to avoid “harms,” including by setting sunset dates and subjecting the program to periodic review?

# Targeted Universalism: Robust Tool For Leading with Race

Setting universal goals and developing targeted strategies to achieve those goals based on how different groups are situated within structures, culture, and across geographies



Source: Othering & Belonging Institute

If you want to learn more:

