CONSTITUTIONALLY-BASED ENVIRONMENTAL JUSTICE SUITS AND THEIR LIKELY NEGATIVE ENVIRONMENTAL AND ECONOMIC IMPACT

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INTRODUCTION

Environmental justice and brownfields are inextricably linked.¹

Environmental injustice has been said to occur when "some individual or group bears disproportionate environmental risks, like those of hazardous waste dumps, or has unequal access to environmental goods, like clean air, or has less opportunity to participate in environmental decision-making."² Abandoned, contaminated commercial and industrial properties, referred to as "brownfields," cover urban areas populated predominantly with people of color, low-income individuals, indigenous peoples, and otherwise marginalized communities.³ The physical conditions of these urban areas, including the presence of brownfields, have been said to contribute to such problems as "human disease and illness, negative psycho-social im-
pact, economic disincentive, infrastructure decay, and overall community disintegration. Environmental justice advocates attempt to fight these perceived injustices.

Environmental justice began to emerge as a major issue in 1987 when the Commission of Racial Justice of the United Church of Christ published a report entitled *Toxic Wastes and Race in the United States.* The report concluded that the single most important indicator of proximity to a hazardous waste site is the race of the majority of the community.

Many environmental justice advocates began to argue that the poor conditions found in urban areas are "due in part to racism and classism in the siting of environmental risks, the promulgation of environmental laws and regulations, the enforcement of environmental laws, and the attention given to the cleanup of the polluted areas."

In response to these perceived environmental injustices, advocates continue to look for legal bases to remedy the situation. One case stands at the forefront in addressing possible constitutionally-based legal arguments in support of environmental justice: *South Camden Citizens in Action v. New Jersey Department of Environmental Protection.* Specifically, the plaintiffs have attempted to use both the pro-

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4 *Id.*


6 Michael B. Gerrard, *Discussion, Reflections on Environmental Justice,* 65 *ALB. L. REV.* 357, 358 (2001) (explaining the concept behind the environmental justice movement as the notion that low income and minority communities should not be exposed to environmental hazards to a greater extent than other communities). It is important to note that many methodological issues have been raised about the study. *Id.*


8 The caption refers to a number of dispositions in the District Court for the District of New Jersey as well as one Third Circuit decision. Although cited here in reverse chronological order, the decisions will be referred to numerically in the order in which they were decided: 254 F. Supp. 2d 486 (D.N.J. 2003) ("S. Camden IV"); on remand from 274 F.3d 771 (3d Cir. 2001) ("S. Camden III"); rev'd 145 F. Supp. 2d 505 (D.N.J. 2001) ("S. Camden II"); modifying 145 F. Supp. 2d 446 (D.N.J. 2001) ("S. Camden I"). The case has not yet gone to trial, and as such, there is no final disposition.

There has been one other constitutionally based environmental justice action in which plaintiffs bringing suit under 42 U.S.C. § 1983 against a city for violating the Fourteenth Amendment Equal Protection Clause survived summary judgment. *See Miller v. City of Dallas,* No. 3:98-CV-2955-D, 2002 U.S. Dist. LEXIS 2341, at *12-13 (N.D. Tex. Feb. 14, 2002) (noting that the magnitude and nature of a practice "can alone give rise to an inference of discrimina-
hibition of section 601 of Title VI of the Civil Rights Act of 1964⁹ and
the express right of action for violations of the Equal Protection
Clause⁰ found in 42 U.S.C. § 1983¹¹ to remedy perceived environ-
mental injustices. Unfortunately, should their constitutionally-based
legal arguments succeed, residents of industrialized, impoverished
urban areas with large minority populations will suffer both eco-
nomic and environmental harms. Specifically, a fear of liability will
prevent developers from cleaning and redeveloping brownfields in
order to build newer, cleaner facilities.

This Comment will address the merits of the plaintiffs' claims,
which are currently before the District Court for the District of New
Jersey, as well as the likely negative environmental and economic im-
pact should they win. Part I gives a brief discussion of the facts of,
and the history behind, the case. Part II discusses the merits of the
legal arguments made by the plaintiffs in pursuit of environmental
justice, as well as the reasons why the appropriate standard for evalu-
ating such constitutionally-based environmental justice suits should
be the standard articulated by the Supreme Court in Village of Arling-
ton Heights v. Metropolitan Housing Development Corp.¹² and Columb–
bus Board of Education v. Penick.¹³ Part III examines the economic and en-
vironmental consequences should the plaintiffs win.

the United States shall, on the ground of race, color, or national origin, be excluded from partic-
tipation in, be denied the benefits of, or be subjected to discrimination under any program or
activity receiving Federal financial assistance.”).
¹⁰ U.S. CONST. amend. XIV (“No state shall...
deny to any person within its jurisdiction the
equal protection of the laws.”).
¹¹ The statute provides, in pertinent part:
Every person who, under color of any statute, ordinance, regulation, custom, or usage, of
any State or Territory or the District of Columbia, subjects, or causes to be subjected, any
citizen of the United States or other person within the jurisdiction thereof to the depri-
vation of any rights, privileges, or immunities secured by the Constitution and laws, shall
be liable to the party injured in an action at law, suit in equity, or other proper proceed-
ing for redress . . . .
I. SOUTH CAMDEN CITIZENS IN ACTION V. NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION

A. The Case

A group of Camden, New Jersey residents, from a neighborhood known as Waterfront South, formed an unincorporated community organization called South Camden Citizens in Action ("SCCIA"). On February 13, 2001, this organization filed suit in the District Court for the District of New Jersey against the New Jersey Department of Environmental Protection ("NJDEP") for its issuance of air permits to the St. Lawrence Cement Company ("SLC") to build and operate a facility in Waterfront South. SLC intervened in the action as a defendant.

Camden, New Jersey, has a population of approximately 87,500 people, of which 87% are minorities. In particular, Waterfront South has 2,132 residents, of which 91% are persons of color. The poverty rate in Camden is 39.6%. Camden is the fourth poorest city in the country, and the second most dangerous. Only 4.8% of Camden residents over the age of twenty-five have graduated from college.

One-third of Camden's nine square miles is comprised of manufacturing and associated land use, and brownfields account for more than half of all industrial sites in Camden. Waterfront South alone is home to "the Camden County Municipal Utilities Authority, a sewage treatment plant, the Camden County Resource Recovery facility, a trash-to-steam plant, the Camden Cogen Power Plant, a co-generation plant, and two U.S. Environmental Protection Agency ("EPA") designated Superfund sites." Currently, the EPA is investigating four sites within a half mile of SLC's facility for the possible re-

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14 S. Camden I, 145 F. Supp. 2d at 450.
15 The New Jersey Department of Environmental Protection is responsible for enforcing the environmental laws and regulations of the State of New Jersey, and, where applicable, federal law. Id.
16 Id.; Brief of Intervenor-Appellant St. Lawrence Cement Co., L.L.C. at 3, S. Camden III, 274 F.3d 771 (3d Cir. 2001) (No. 01-2224/01-2296) [hereinafter SLC Brief I].
17 S. Camden I, 145 F. Supp. 2d at 450.
21 Id.
22 Id.
23 Id.
lease of hazardous substances.\textsuperscript{25} Also, NJDEP has identified fifteen "known" contaminated sites in Waterfront South.\textsuperscript{26}

B. The History Behind the Case

SLC is a cement materials supplier, primarily to the "ready mix" concrete industry.\textsuperscript{27} The SLC facility in Camden grinds "granulated blast furnace slag ("GBFS"), a sand-like by-product of the steel-making industry \ldots into [a] \ldots partial substitute for the use of portland cement in concrete."\textsuperscript{26} In order to do so, "[t]he process simply grinds the material into finer particles and drives off its moisture content," leaving the ground GBFS with "properties similar to ordinary dirt or other cement materials."\textsuperscript{29}

In 1998, SLC determined that an under-used site in Camden would be an ideal location for a new GBFS grinding facility ("the Facility").\textsuperscript{30} Thus, it sought to lease the site from its owner, the South Jersey Port Corporation ("SJPC").\textsuperscript{31} SLC has cited numerous reasons for choosing the location.\textsuperscript{32} First, the site is a "port location" on the Delaware River, which allows for removal of any finished product, by barge, directly from the Facility.\textsuperscript{33} Second, the SJPC also owns another port located a few miles away, which allows for the receipt of incoming shipments of GBFS.\textsuperscript{34} Third, the site "is located in an industrial area with a strong existing infrastructure, including ready access to major highways, bridges into Philadelphia and Interstate 95, as well as secondary roads that have historically been used to service port operations."\textsuperscript{35} Fourth, the citizens of Camden can fulfill workforce requirements.\textsuperscript{36} And, lastly, SJPC has a history of port operations, and thus, "already understand[s] the needs of off-loading bulk material and handling bulk cargo."\textsuperscript{37}

On March 8, 1999, SLC signed a lease agreement with SJPC for use of the Waterfront South site and began making plans for the Facility.\textsuperscript{38} Also in March 1999, SLC commenced the pre-application
permitting process with the NJDEP to obtain construction and operation permits, including an air permit for the Facility. Before issuing the air permit, NJDEP required that SLC conduct air dispersion modeling, the results of which were then compared to the EPA’s National Ambient Air Quality Standards (“NAAQS”). SLC’s air dispersion modeling showed that the Facility was well within the NAAQS and all other applicable air quality criteria and standards identified by the NJDEP. In November 1999, once NJDEP had determined that SLC had submitted an administratively complete permit application and had fulfilled other regulatory requirements, construction on the Facility began.

However, it was not until October 31, 2000 that the NJDEP issued SLC’s final air permit. In fact, it did so only after reviewing numerous issues raised by the members of the Camden community regarding: “(1) environmental equity/environmental justice; (2) pre-existing local environmental issues; (3) SLC’s emission limits; (4) the results of SLC’s . . . air dispersion modeling; (5) truck emission standards and carbon monoxide air quality evaluation results . . .; and (6) protection of the health and safety of Waterfront South residents.”

Also, throughout 1999 and 2000, SLC involved the community in the permitting process to avoid future problems, such as lawsuits by dissatisfied community members. SLC voluntarily solicited participation by the citizens of Camden in the “planning, construction and ultimate operation of the Facility.” SLC organized a Community Advisory Panel to discuss issues related to the Facility. Additionally, “SLC voluntarily helped procure independent technical experts selected by the community . . . [who] found that the Facility met applicable standards.”

Furthermore, in July 2000, the NJDEP gave public notice of a scheduled public hearing on SLC’s draft air permit. More than 120 members of the public attended the hearing and more than thirty parties commented on the permit. In addition, during the public comment period, some interested parties provided the NJDEP with

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59 Id. at 8.
60 Id. at 8–9.
61 Id. at 9.
62 Id. at 10–11.
63 Id. at 12. Pamela Lyons, the director of the NJDEP’s Office of Equal Opportunity Contract Assistance and Environmental Equity, aided in providing responses to the issues raised. Id.
64 Id. at 9.
65 Id. at 10.
66 Id.
67 Id. at 11.
68 Id.
written submissions.\textsuperscript{49} Despite all of the community involvement in the permitting process, however, the NJDEP and SLC found themselves defendants in a lawsuit.

II. THE LEGAL ARGUMENTS MADE IN PURSUIT OF ENVIRONMENTAL JUSTICE BY SCCIA MUST FAIL

At first, SCCIA moved for preliminary injunctive and declaratory relief pursuant to section 602 of Title VI of the Civil Rights Act of 1964.\textsuperscript{50} Environmental justice advocates were optimistic that such a claim would succeed given that every state environmental agency receives federal funding and the Title VI implementing regulations adopted by the EPA require a showing not of discriminatory intent, but merely of discriminatory effect.\textsuperscript{51} Thus, a Title VI claim seemed to be the most promising legal tool for fighting perceived environmental injustices.

However, the United States Supreme Court crushed the hopes of environmental justice advocates, including SCCIA, when it issued its decision in Alexander v. Sandoval.\textsuperscript{52} In Sandoval, the Court held that "[n]either as originally enacted nor as later amended does Title VI display an intent to create a freestanding private right of action to enforce regulations promulgated under section 602. We therefore hold that no such right of action exists."\textsuperscript{53} SCCIA, having lost its strongest legal tool for fighting the perceived environmental injustices, advanced an alternative basis to sustain its claim, arguing that 42 U.S.C. § 1983\textsuperscript{54} provided it with a vehicle to remedy a violation of the EPA's Title VI implementing

\textsuperscript{49} Id. at 11-12.
\textsuperscript{51} Gerrard, supra note 6, at 358. In fact, District Judge Orlofsky agreed, finding that the plaintiffs could directly enforce the EPA's Title VI implementing regulations through section 601 and, as such, that there was a reasonable likelihood that operation of the Facility would lead to an adverse, disparate impact on the residents of Waterfront South based on race, color, or national origin. S. Camden I, 145 F. Supp. 2d at 495.
\textsuperscript{52} 532 U.S. 275 (2001). Sandoval was issued only five days after Judge Orlofsky issued his decision in South Camden I. The case then returned to the district court on a motion to vacate the previous opinion and order of the court, or, in the alternative, for a stay pending appeal. In response, the plaintiffs advanced an alternative argument. See S. Camden II, 145 F. Supp. 2d 505 (D.N.J. 2001) (considering whether the plaintiffs could bring their Title VI claim under 42 U.S.C. § 1983).
\textsuperscript{53} 532 U.S. at 293.
\textsuperscript{54} See supra note 11.
regulations. The district court held that the plaintiffs could enforce the disparate impact regulations promulgated by the EPA using § 1983. However, on appeal, the Court of Appeals for the Third Circuit disagreed. SCCIA lost yet another promising legal tool for fighting against environmental injustice.

The plaintiffs, however, did not give up. In its Second Amended Complaint, SCCIA alleged that the NJDEP, by granting an air permit to SLC, "has caused a diminution in both the quantity and quality of the available housing stock in the Waterfront South neighborhood, which has a discriminatory impact on the Waterfront South residents on the basis of race, color and national origin" in violation of the Fair Housing Act, Title VIII of the Civil Rights Act of 1968. The district court disagreed and dismissed the plaintiffs' claim pursuant to Federal Rule of Civil Procedure 12(b)(6) for "failure to state a claim upon which relief can be granted."

The plaintiffs also alleged that SLC created a public nuisance to the residents of Waterfront South through operation of the Facility and "through the associated use of diesel trucks[, which] ha[s] caused dust, soot, vapors, ... and fumes to be emitted." The district court relied only on the disparate impact claim in granting the injunction. Id. at 472.

SCCIA actually included its Fair Housing Act violation claim in the original complaint, but only relied on the intentional discrimination and impact claims in moving for a preliminary injunction. S. Camden I, 145 F. Supp. 2d at 446, 471-72 (D.N.J. 2001). Furthermore, the district court relied only on the disparate impact claim in granting the injunction. Id. at 472.

56 S. Camden III, 274 F.3d 771, 790-91 (3d Cir. 2001). The Third Circuit stated: The Supreme Court's primary concern in considering enforceability of federal claims under section 1983 has been to ensure that Congress intended to create the federal right being advanced. Accordingly, we hold that a federal regulation alone may not create a right enforceable through section 1983 not already found in the enforcing statute. Similarly, we reject the argument that enforceable rights may be found in any valid administrative implementation of a statute that in itself creates some enforceable right. Applying these rules here, it is clear that, particularly in light of Sandoval, Congress did not intend by adoption of Title VI to create a federal right to be free from disparate impact discrimination and that while the EPA's regulations on the point may be valid, they nevertheless do not create rights enforceable under section 1983. The district court erred as a matter of law in concluding otherwise and therefore also erred in finding that plaintiffs are likely to succeed on the merits of their claim.

Id. (citations omitted).

(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.

(b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin.

42 U.S.C. § 3604(a), (b).

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58 S. Camden IV, 254 F. Supp. 2d at 493, 508.
59 Id. at 492.
court dismissed the public nuisance claim pursuant to the defendants' 12(b)(6) motion.\footnote{Id. at 508.}

However, two of the plaintiffs' claims, found in their Second Amended Complaint, survived the motion and have yet to be decided. The first claim alleges that the NJDEP intentionally discriminated against the members of SCCIA, and other African American and Hispanic residents of Waterfront South, on the basis of race, color, and national origin in violation of both section 601 of Title VI, and of the Equal Protection Clause of the Fourteenth Amendment.\footnote{Id.; see supra notes 9-11 and accompanying text. The Equal Protection Clause provides that “No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1.}

The second claim alleges that SLC has created a private nuisance to the residents of Waterfront South through the operation of its Camden facility.\footnote{S. Camden IV, 254 F. Supp. 2d at 508.}

The plaintiffs have asked the district court to grant them relief in the form of rescission of the air permit and certificates issued by the NJDEP to SLC. In addition, the plaintiffs have asked the district court to enjoin the NJDEP from taking further action that allows operation of the Facility and to order the NJDEP “to develop and adopt comprehensive protocols for reviewing permit applications that will prevent the granting of permits that have the effect of discriminating against persons on the basis of color, race, or national origin.”\footnote{Id. at 492.}

Should the plaintiffs succeed in showing such “intentional discrimination,” environmental justice advocates will have a new promising legal tool to fight perceived environmental injustices. Yet, such success will have devastating environmental and economic effects on the City of Camden and other similarly situated urban areas already environmentally and economically devastated.\footnote{See supra text following note 11 (“A fear of liability will prevent developers from cleaning and redeveloping brownfields in order to build newer, cleaner facilities.”).}

A. Intentional Discrimination in Violation of Section 601 of Title VI and the Equal Protection Clause

The plaintiffs allege that the NJDEP defendants, who are the recipients of federal financial assistance and subject to the requirements of Title VI, \textit{intentionally discriminated} against the plaintiffs and other African-American and Hispanic residents of Waterfront [South] and the adjoining communities on the basis of race, color, and
The plaintiffs argue specifically that the following thirteen allegations, as set forth in their Second Amended Complaint, demonstrate "intentional discrimination" on the part of the NJDEP. These allegations are:

(a) The DEP and Commissioner Shinn [now Campbell] knew that the residents of Waterfront South and the surrounding neighborhoods were predominately African-American and Hispanic.

(b) The DEP and Commissioner Shinn [now Campbell] knew that the siting of the SLC facility in Waterfront South would have an adverse impact upon these African-American and Hispanic residents.

(c) The DEP and Commissioner Shinn [now Campbell] [chose] to use the NAAQS and [the] related environmental standards as the criteria for determining whether a permit should be issued, knowing that such a limited analysis could not reveal that the permitting of the SLC facility would create a discriminatory impact on plaintiffs.

(d) The DEP and Commissioner Shinn [now Campbell] refused to conduct a disparate impact analysis because they contended that the operation of this facility would not have any negative impact upon the Waterfront South community.

(e) The DEP and Commissioner Shinn [now Campbell] were fully aware of the requirements of the Title VI and of their obligations, as recipients of federal assistance, to comply with their assurances to the EPA that they will meet such requirements. They knew that their use of the NAAQS and related environmental standards as the sole criteria was not consistent with the EPA's Guidance for recipients of financial assistance and was in violation of Title VI.

(f) The DEP and Commissioner Shinn [now Campbell] knew of the region's non-compliance with the EPA's proposed standard for PM-2.5 and that the scientific evidence on which the EPA proposed standard was based. The DEP and Commissioner Shinn [now Campbell] also knew that SLC would emit significant levels of PM-2.5.

(g) The DEP and Commissioner Shinn [now Campbell] failed to consider the health effects of SLC's PM-2.5 emissions in making its [sic] determination that there would be no adverse effects from SLC operations, and to inform the public about such health effects.

(h) The DEP and Commissioner Shinn [now Campbell] knew of the region's non-compliance with the NAAQS for ozone and that the emissions from diesel trucks and SLC's other emissions would tend to increase the level of non-compliance and cause adverse health effects on the residents.

65 S. Camden IV, 254 F. Supp. 2d at 493 (emphasis added) (citation and internal quotation marks omitted).
66 254 F. Supp. 2d at 493 n.4.
(i) The DEP and Commissioner Shinn [now Campbell] issued the permits to SLC even though they knew of the illegal discriminatory impact it would have upon plaintiffs and other African-American and Hispanic residents.

(j) The DEP and Commissioner Shinn [now Campbell] have engaged in a statewide pattern and practice of granting permits to polluting facilities to operate in communities where most of the residents are African-American and/or Hispanic to a greater extent than in predominately white communities, resulting in discriminatory impact on the grounds of race, color, and national origin.

(k) The DEP and Commissioner Shinn [now Campbell] have failed to develop or implement a procedure that ensures there will be no discrimination in their permitting decisions or to provide for meaningful public participation for residents of communities affected by the permitting decisions.

(l) The DEP and Commissioner Shinn [now Campbell] failed to translate documents which were made available in English into Spanish, even though they knew or should have known that a significant number of the affected people are Hispanic and have limited English proficiency, so that they require Spanish language materials to be available for meaningful participation in the permit process.

(m) The DEP and Commissioner Shinn's [now Campbell] prior history of permitting decisions and their issuance of the permit to SLC despite knowledge of its discriminatory effects demonstrate that defendants intended to and did discriminate against plaintiffs on the basis of race, color, and national origin.67

The plaintiffs' allegations should fail once evaluated using the appropriate U.S. Supreme Court precedent. Although no court has decided any Title VI or § 1983 suits involving environmental justice claims like those in SCCIA v. NJDEP,68 the Supreme Court has set forth the standard for determining whether a facially neutral policy, such as the one at issue, has been issued in violation of section 601 of Title VI or the Equal Protection Clause.

The Court has stated that "the reach of Title VI's protection extends no further than the Fourteenth Amendment."69 To succeed, the plaintiffs must demonstrate that they were the target of purposeful or invidious discrimination.70 It is not enough that the law has a

67 Id.
68 See supra note 8; see also N.Y.C. Envtl. Justice Alliance v. Giuliani, 214 F.3d 65 (2d. Cir. 2000) (examining whether, pre-Sandoval, the city's selling or bulldozing of any of the 1100 city-owned parcels, comprising approximately 600 community gardens, would have a disproportionately adverse impact on New York City's African American, Asian American, and Hispanic residents in violation of the regulations promulgated by the EPA to implement Title VI.).
70 Alexander v. Sandoval, 532 U.S. 275, 285 (rejecting an application of section 601 beyond intentional discrimination); see also S. Camden IV, 254 F. Supp. 2d at 495 ("In order to state a
disproportionately adverse effect upon a racial minority; rather, to be unconstitutional under the Equal Protection Clause, the disproportionate adverse impact must be traced to a discriminatory purpose.\textsuperscript{71}

Thus, environmental justice advocates must satisfy a difficult burden.

A statute, neutral on its face, may not constitutionally be applied so as to invidiously discriminate on the basis or race, color, or national origin.\textsuperscript{72} However, mere knowledge that an act may have a discriminatory effect does not rise to the level of discriminatory intent.\textsuperscript{73} Rather, proof of discriminatory intent requires a "sensitive inquiry into such circumstantial evidence," including, but not limited to, whether "[t]he impact of the official action . . . bears more heavily on one race than another."\textsuperscript{74}

Therefore, the plaintiffs must demonstrate that the NJDEP issued the "facially neutral" air permits "'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."\textsuperscript{75} To satisfy this "because of" standard, "disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination."\textsuperscript{76} In fact, when the disproportionate impact is essentially an unavoidable consequence of a legitimate legislative policy, the "inference simply fails to ripen into proof."\textsuperscript{77} Thus, allegations of disparate impact alone provide an insufficient basis for relief under either section 601 of Title VI or \S\ 1983.

Yet, as rightly noted by SLC in its Brief in Support of its Motion to Dismiss, all of the plaintiffs' thirteen allegations boil down to a mere assertion that the NJDEP defendants "'knew' that the Facility would have an adverse disparate impact on racial minorities but nonetheless

\textsuperscript{71} See Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 273 (1979) (upholding a law which gave preference to veterans for state civil service positions because it was not intentional, although it had the effect of discriminating against women); Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 264-65 (1977) ("Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause . . . ."); Washington v. Davis, 426 U.S. 229, 239 (1976) (denying that a test administered to police applicants in the District of Columbia, which black applicants failed at a higher percentage than white applicants, but which was not designed to discriminate, was unconstitutional).

\textsuperscript{72} Washington, 426 U.S. at 241 (citing Yick Wo v. Hopkins, 118 U.S. 356 (1886) (holding that use of a neutral statute to invidiously discriminate is unconstitutional)).

\textsuperscript{73} See Feeney, 442 U.S. at 256 (holding that mere knowledge does not create a constitutional claim, unlike discriminatory intent).

\textsuperscript{74} Arlington Heights, 429 U.S. at 266 (quoting Washington, 426 U.S. at 242).

\textsuperscript{75} Pryor v. Nat'I Collegiate Athletic Ass'n, 288 F.3d 548, 564 (3d Cir. 2002) (quoting Feeney, 442 U.S. at 279); see also S. Camden IV, 254 F. Supp. 2d at 495.

\textsuperscript{76} Arlington Heights, 429 U.S. at 265.

\textsuperscript{77} Feeney, 442 U.S. at 279 n.25.
issued the Air Permit.\textsuperscript{77} Even assuming the plaintiffs' allegations are true, the district court should not conclude that they rise to the level of intentional discrimination.

In fact, to the extent that the plaintiffs even touch upon the NJDEP defendants' motives for issuing the air permit, they do not allege that race played a role in the decision making, but rather only that the NJDEP and the Commissioner wrongly relied on the Facility's compliance with the NAAQS and other air emission standards instead of looking at the adverse effects the permit may have on the residents of Waterfront South.\textsuperscript{79} However, even if these allegations are true, at most the defendants acted "in spite of" the adverse effects the operation of the Facility would have upon an identifiable group, not "because of" the adverse effects.

In \textit{Village of Arlington Heights v. Metropolitan Housing Development Corp.}\textsuperscript{80} and \textit{Columbus Board of Education v. Penick,}\textsuperscript{81} the Supreme Court identified the objective factors a court should consider in determining whether a discriminatory purpose was a motivating factor, since disparate impact alone is not enough to demonstrate discriminatory purpose.\textsuperscript{82} These factors place a high burden of proof on environmental justice advocates seeking to show intentional discrimination. The first factor a court should examine is "[t]he historical background of the decision . . . particularly if it reveals a series of official actions taken for invidious purposes."\textsuperscript{83} Similarly, "[t]he specific sequence of events leading up to the challenged decision may also shed some light on the decisionmaker's purposes."\textsuperscript{84}

As noted by SLC in its brief, the plaintiffs cannot rely on the historical background of the NJDEP's decision to issue a permit to SLC in order to demonstrate that the NJDEP acted "because of" the adverse effects the permitting would have on the minority residents of Waterfront South.\textsuperscript{85} The historical background of the decision does not reveal any official action taken for invidious purposes. In fact,
the plaintiffs themselves acknowledged that the NJDEP engaged in a "lengthy examination" of the Facility, including its projected air emissions, as well as "subjected [the] permit application to heightened public scrutiny" before issuing the air permits.\footnote{Id. at 22.}

The plaintiffs argue that the NJDEP has historically "engaged in a statewide pattern and practice of granting permits to polluting facilities to operate in communities where most of the residents are African-American and/or Hispanic to a greater extent than in predominately white communities ..."\footnote{S. Camden IV, 254 F. Supp. 2d 486, 494 n.4(j) (D.N.J. 2003).} However, even assuming this is true, it does not reveal a historical pattern of action taken for invidious purposes. Rather, it recognizes the harsh reality that many areas zoned for industrial purposes, which already have an established infrastructure ready to accommodate the needs of many industries, are located in communities where a majority of the residents are African American and/or Hispanic.\footnote{Camden, New Jersey is situated between two waterways, the Delaware and Cooper Rivers. This, combined with its proximity to Philadelphia, contributed to the rise of industry in Camden beginning in the early part of the nineteenth century. City of Camden, New Jersey: Industrialization, \url{http://www.ci.camden.nj.us/history/industrialization.html} (last visited Oct. 28, 2004).} Furthermore, most of these areas became industrialized long before the residents of those communities became predominantly African American and/or Hispanic. For instance, Camden became an industrialized city in the early part of the nineteenth century, growing dramatically well into the early part of the twentieth century.\footnote{Id. ("The latter half of the Nineteenth Century was the most significant period in the developmental history of the City of Camden."). In 1860, the census takers counted eighty manufactories in Camden's nine square miles. \textit{Id.} Ten years later they counted 125. \textit{Id.} The success of railroads built in the nineteenth century linked Camden to Philadelphia, Trenton, New York, and the Atlantic seashore by the year 1881. \textit{Id.}} At the turn of the twentieth century, however, British, German, and Irish immigrants populated the city, and by 1920, Italian and Eastern European immigrants constituted the majority of Camden's population.\footnote{City of Camden, New Jersey: Development of Neighborhoods, \url{http://www.ci.camden.nj.us/history/neighborhooddevelop.html} (last visited Oct. 28, 2004).} Therefore, any environmental justice advocate seeking to demonstrate that the historical background of the decision demonstrates "intentional discrimination" faces a difficult task.

The second factor the Supreme Court said a court should examine in order to determine whether there was intentional discrimination is whether there were any "[d]epartures from the normal procedural sequence," as such a factor "might afford evidence that improper purposes are playing a role."\footnote{Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 267 (1977).} The plaintiffs have not al-
leged that the NJDEP made any "departures from the normal procedural sequence" other than to subject the permit to heightened public scrutiny.

The third factor the Court said may help to indicate a discriminatory purpose is whether there were any "[s]ubstantive departures... particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached." The plaintiffs allege that the NJDEP made "substantive departures" from the EPA's guidelines; but the process taken by the NJDEP is the permitting process "sanctioned by the New Jersey State Legislature under the New Jersey Air Pollution Control Act," which is "in full compliance with all administrative procedural requirements, and approved by the EPA as part of New Jersey's State Implementation Plan." The plaintiffs argue that the NJDEP's willingness to issue permits, despite possible violations of the EPA's proposed PM-2.5 standards, is proof of a discriminatory intent. These standards, however, are non-binding standards that the EPA did not issue until fifteen months into SLC's application review process and that still have not yet been fully implemented. Thus, the plaintiffs have failed to show any "substantive departure."

The final factor the Court said should be examined in order to help determine whether the NJDEP acted with a discriminatory intent is "the foreseeability of the consequences of the state action." As mentioned above, the plaintiffs do argue that the consequences were foreseeable. But, that alone is not enough to satisfy the high burden of showing intentional discrimination by the NJDEP against the residents of Waterfront South. Thus, the plaintiffs have done nothing more than make "vague and conclusory allegations" that do not amount to intentional discrimination in violation of section 601 of Title VI or the Equal Protection Clause. Moreover, in the future, should other environmental justice advocates seek to rely on the mere fact that negative consequences may be foreseeable, they will

92 Id.
93 SLC Brief II, supra note 78, at 22.
94 PM-2.5 refers to "particulate matter 2.5 microns in diameter or smaller." S. Camden I, 145 F. Supp. 2d 446, 462 (D.N.J. 2001).
95 SLC Brief II, supra note 78, at 22.
96 S. Camden IV, 254 F. Supp. 2d 486, 496 (D.N.J. 2003) (citing Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 465 (1979)). One should note that Arlington Heights does in fact mention an additional factor—an "examination of the legislative or administrative history... especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports." 429 U.S. at 268. However, such a factor is not applicable to the case at hand. Moreover, the district court in the South Camden case has not included in its analysis this final Arlington Heights factor. S. Camden IV, 254 F. Supp. 2d 486, 496 (D.N.J. 2003).
97 SLC Brief II, supra note 78, at 23.
most likely be unable to show a violation of section 601 of Title VI or
of the Equal Protection Clause.

Yet, even if the plaintiffs, and/or future environmental justice ad-
voeates, are able to establish that a permitting agency harbored a dis-

criminatory intent in issuing a permit to a facility, it would not neces-

sarily require invalidation of the permit.\(^{98}\) Instead, the burden would
then shift to the permitting agency to show that it would have issued
the permit in the absence of a discriminatory animus by showing that
"permissible racially neutral selection criteria and procedures have
produced the monochromatic result."\(^{99}\)

In the present case, the NJDEP should be able to demonstrate
that it would have issued the permit in the absence of a discrimina-
tory animus by showing that the air pollution criteria applied to the
Facility are the criteria uniformly applicable throughout New Jersey
and the nation. Thus, the permit would have been issued regardless
of racial animus, and therefore, the plaintiffs' arguments of inten-
tional discrimination should fail.

The standard as set forth by the Supreme Court in \textit{Arlington Heights}
and \textit{Penick} is the standard that should be applied to the \textit{South Camden}
case, as well as similar future environmental justice cases.\(^{100}\)
In the few previous environmental justice cases that have addressed a
plaintiffs allegations of an Equal Protection violation, the courts have
followed Supreme Court precedent requiring a showing of inten-
tional discrimination.\(^{101}\) In \textit{R.I.S.E., Inc. v. Robert A. Kay, Jr.},
the plaintiff, R.I.S.E. (Residents Involved in Saving the Environment), a
community organization, argued that supervisors of the King and
Queen County Board of Supervisors had violated the Equal Protec-

\(^{98}\) \textit{Arlington Heights}, 429 U.S. at 271 n.21 (noting that such proof would have required the
defendant to establish that "the same decision would have resulted even had the impermissible
purpose not been considered").

625, 632 (1972)); \textit{see also Turner v. Fouche}, 396 U.S. 346, 361 (1970) (shifting the burden to the
jury commissioners to show there had been no discrimination); \textit{Eubanks v. Louisiana}, 356 U.S.
584, 587 (1958) (finding that uniform and continuous exclusion of African Americans from
juries cannot be attributed to chance, accident, or insufficient qualification).

\(^{100}\) It is useful to note in understanding the parallel of application of \textit{Arlington Heights} and
\textit{Penick} to the \textit{South Camden} case that both lines of cases deal with land use and regulatory zon-
ing.

\(^{101}\) \textit{See Richard J. Lazarus, Pursuing "Environmental Justice": The Distributional Effects of Environ-
mental Protection}, 87 NW. U.L. REV. 787, 830 (1993) (explaining that even in environmental justice
suits, the Fourteenth Amendment requires a showing that race was a motivating factor in the
decision and that the decisionmaker chose or reaffirmed the decision "because of" not merely "in spite of" the adverse effect on minorities); \textit{Joseph Ursic, Note, Finding a Remedy for
502-04 (2002) (describing the few environmental justice cases that have presented equal protection challenges involving the citing of hazardous waste facilities in predominantly minority neighborhoods).

tion Clause by proposing a landfill site in a predominantly African American community.\textsuperscript{103} The \textit{R.I.S.E.} court held that the \textit{Arlington Heights} test was the appropriate standard for determining whether there had been a violation.\textsuperscript{104} Moreover, the court held that although there had been three other landfills sited in neighborhoods that were over ninety-five percent African American, and that "[t]he placement of landfills in King and Queen Country from 1969 until the present ha[d] had a disproportionate impact on black residents," there was no equal protection violation.\textsuperscript{105}

In \textit{Bean v. Southwestern Waste Management Corp.},\textsuperscript{106} the Southern District of Texas held that although the plaintiffs had demonstrated that the siting of a solid waste disposal facility within 1700 feet of a predominantly African American high school was both "unfortunate" and "insensitive," the plaintiffs did not meet their burden under \textit{Arlington Heights} requiring a showing "that the decision to grant the permit was motivated by purposeful racial discrimination."\textsuperscript{107} The \textit{Bean} court went on to state that "[t]his Court is obligated, as well as all Courts are, to follow the precedent of the United States Supreme Court . . . ."\textsuperscript{108}

In \textit{East Bibb Twiggs Neighborhood Ass'n v. Macon-Bibb County Planning & Zoning Commission},\textsuperscript{109} the plaintiffs alleged that the commission's decision to allow for the creation of a private landfill in a predominantly African American community was motivated in part by improper considerations of race in violation of the Equal Protection Clause.\textsuperscript{110} The district court for the Middle District of Georgia held that "[t]o prove a claim of discrimination in violation of the Equal Protection Clause a plaintiff must show not only that the state action complained of had a disproportionate or discriminatory impact but also that the defendant acted with the intent to discriminate."\textsuperscript{111} The \textit{East Bibb} court held that to prove the defendant acted with the intent to discriminate, one must consider the \textit{Arlington Heights} factors.\textsuperscript{112} In the previous environmental justice cases that dealt with Equal Protection claims, the courts held that a showing of discriminatory intent is necessary to succeed, and that to make such a showing, one must use

\begin{itemize}
  \item \textsuperscript{103} \textit{Id.} at 1145-46.
  \item \textsuperscript{104} \textit{Id.} at 1149.
  \item \textsuperscript{105} \textit{Id.}
  \item \textsuperscript{106} 482 F. Supp. 673 (S.D. Tex. 1979).
  \item \textsuperscript{107} \textit{Id.} at 680.
  \item \textsuperscript{108} \textit{Id.} (emphasis added).
  \item \textsuperscript{109} 706 F. Supp. 880 (M.D. Ga.), aff'd, 896 F.2d 1264 (11th Cir. 1989).
  \item \textsuperscript{110} \textit{Id.} at 881.
  \item \textsuperscript{112} \textit{Id.} at 884.
\end{itemize}
the factors set forth in *Arlington Heights*. Thus the deciding courts in the *S. Camden* cases should apply the standard in like fashion.

Although true that "*[s]tare decisis is not an ‘inexorable command,’ ... the doctrine is ‘of fundamental importance to the rule of law’" and precedent should not be overruled absent a "‘special justification.’"

When it comes to environmental justice, however, it is unclear what "specicial justification" exists to warrant a departure that does not exist in other contexts involving racial discrimination. Furthermore, because in the previous environmental justice cases the courts applied the *Arlington Heights* factors to determine whether there was a violation of the Fourteenth Amendment, and none of them identified difficulties in doing so, it furthers the argument that there is no "special justification" for not affording *Arlington Heights* its precedential worth when addressing environmental justice situations like the one presented by the *South Camden* case.

Hence, for the plaintiffs in the *South Camden* case and/or future environmental justice advocates to succeed, they must meet a very high burden, as set forth by the Supreme Court in *Arlington Heights* and *Penick*. Such a high burden makes it likely that environmental justice advocates will have to continue to search for alternative means of attacking perceived environmental injustices. Should the district court decide, however, that SCCIA has successfully demonstrated "intentional discrimination," it will send a signal to environmental justice advocates that the standard set forth by the Court may be less stringent when applied to environmental justice suits.

B. Private Nuisance

An evaluation of the plaintiffs' private nuisance claim, using the proper legal standards, shows that it, as well as similar future claims, should fail. According to the New Jersey Supreme Court, "*[t]he essence of a private nuisance is an unreasonable interference with the use and enjoyment of land." The court further explained that "*[t]he question is not simply whether a person is annoyed or disturbed, but whether the annoyance or disturbance arises from an un-

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114 Although the courts in *R.I.S.E.*, *Bean*, and *Bibb* did not address the additional factor set forth by the United States Supreme Court in *Penick*—that a court should examine the foreseeability of the consequences of the state action—the factor is an important one in the evaluation of constitutionally based environmental justice suits, especially because it provides the plaintiffs with an element of proof that is far easier to satisfy than any of the *Arlington Heights* factors.
115 Sans v. Ramsey Golf & Country Club, Inc., 149 A.2d 599, 605 (N.J. 1959); see also *S. Camden IV*, 254 F. Supp. 2d at 503 (citing *Sans* as the basis for state nuisance claims).
reasonable use of the neighbor's land or operation of his business."\textsuperscript{116} Thus, "reasonableness should be the guiding principle" when making a determination as to the existence of a private nuisance.\textsuperscript{117}

In addition, "[a] defendant is only liable for a nuisance that 'causes significant harm, of a kind that would be suffered by a normal person in the community.'\textsuperscript{118} "Significant harm" means "harm of importance, involving more than slight inconvenience or petty annoyance.\textsuperscript{119}

Here, the operation of the Facility cannot lead to an unreasonable interference with the use and enjoyment of land because the Facility and the plaintiffs' residences are located in an area zoned for industrial development and which has been heavily industrialized for over a century. The plaintiffs even acknowledge that the neighborhood has "many operating industrial facilities, including but not limited to four scrap metal companies, a petroleum coke transfer station, chemical companies, machine shops, and food processing companies."\textsuperscript{120} Furthermore, Camden has historically been an urban area zoned for industrial purposes with a great number of industrial facilities present since the beginning of the nineteenth century, long before the plaintiffs moved to Camden.\textsuperscript{121} Thus, the residents of this industrial neighborhood cannot claim that operation of the Facility is causing "an unreasonable interference with the use and enjoyment of land."

Even if the plaintiffs were able to show that the operation of the Facility has led to an unreasonable interference with the use and enjoyment of the land, their attempt to satisfy the "significant harm" standard should fail. The plaintiffs' attempt to satisfy the standard by stating that "the synergistic and cumulative effects of all of the contaminants in the area and the poor health of the residents make

\textsuperscript{116} Sans, 149 A.2d at 605; see also S. Camden IV, 254 F. Supp. 2d at 503 (using the Sans language as guidance).
\textsuperscript{117} SLC Brief II, supra note 78, at 32 (citing Birchwood Lakes Colony Club, Inc. v. Medford Lakes, 449 A.2d 472, 477 (N.J. 1982) (discussing the general New Jersey rule applied in cases of competing water rights interests)); see also Sans, 149 A.2d at 605–06 (applying a general test of equity in determining whether an adjacent golf course created a private nuisance).
\textsuperscript{118} S. Camden IV, 254 F. Supp. 2d at 504 (quoting \textsc{Restatement (Second) of Torts} § 821F (1979)). "The location, character and habits of a particular community are to be taken into account in determining what is offensive or annoying to a normal individual living in it." § 821F cmt. e.
\textsuperscript{119} § 821F cmt. c.
\textsuperscript{120} SLC Brief II, supra note 78, at 35.
\textsuperscript{122} Sans, 149 A.2d at 605.
these residents especially vulnerable to the effects of pollution." Thus, the plaintiffs are arguing that SLC is a small part of the larger problem: the polluted, industrialized area of Waterfront South. Therefore, the plaintiffs have failed to show that the Facility alone, as opposed to other local industrial entities, has caused them significant harm because the plaintiffs have failed to allege that the Facility alone has caused them any problems. In addition, it would be extremely difficult for any environmental justice advocate to show that one particular facility, that is in compliance with all requirements and located in an area zoned for industrial development, is the particular cause of a private nuisance to the neighboring residents.

III. SHOULD THE PLAINTIFFS WIN, THERE WILL BE ECONOMIC AND ENVIRONMENTAL CONSEQUENCES FOR THE RESIDENTS OF CAMDEN AND OTHER INDUSTRIALIZED IMPOVERISHED URBAN AREAS WITH LARGE MINORITY POPULATIONS

Should the plaintiffs succeed in demonstrating "intentional discrimination" on the part of the NJDEP, there will be significant economic and environmental consequences for the residents of Camden and the residents of other industrialized poor urban areas with large minority populations. Specifically, these economic and environmental consequences will be the result of a failure to redevelop "brownfields" due to a fear of liability, as the standard for what constitutes intentional discrimination may appear to be lower when applied in environmental justice cases, than the standard set forth by the Supreme Court in *Arlington Heights* and *Penick*. The possibility of a lower standard makes the chances of successful litigation more likely, which in turn makes a rise in the number of suits filed more likely. The fear of liability slows projects, which in turn leads to a chilling effect.

As noted above, half of all industrial sites in Camden, New Jersey are brownfields. Section 101 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA") defines the term "brownfield site" as "real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant." The EPA has defined brownfields as "abandoned, idled

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123 Reply Brief in Support of St. Lawrence Cement Co., L.L.C.'s Motion to Dismiss Plaintiffs' Second Amended Verified Complaint for Declaratory Judgment and Injunctive Relief at 17, S. Camden IV, 254 F. Supp. 2d 486 (No. 01-702).
126 42 U.S.C. § 9601(39) (A) (2002). CERCLA is an environmental law establishing "a federal program [designed] to identify and remediate chemical spills and abandoned hazardous waste
or underused industrial and commercial sites where expansion or redevelopment is complicated by real or perceived environmental contamination that can add cost, time or uncertainty to a redevelopment project.\textsuperscript{127} The now-defunct U.S. Office of Technology Assessment ("OTA") defined a brownfield site as a site where redevelopment may be held up, not only by potential contamination, but also by "poor location, old or obsolete infrastructure, and other... factors often associated with neighborhood decline."\textsuperscript{128} Brownfields are often associated with "distressed urban areas, particularly central cities and inner suburbs that once were heavily industrialized, but since have been vacated."\textsuperscript{129}

Brownfields are a serious problem, especially for poor urban areas, home to most brownfield sites.\textsuperscript{130} Brownfields continue to pollute as long as they are not cleaned. There are an estimated 130,000 to over 425,000 contaminated commercial and industrial sites around the country.\textsuperscript{131} The estimated cost of the initial clean up of our nation's brownfields is approximately $650 billion.\textsuperscript{132} Brownfields also represent millions of dollars in lost wages and unrealized tax dollars.\textsuperscript{133} And, according to the OTA, "[t]he presence of brownfields contributes... to reduced economic development and job creation in urban areas, particularly in central cities and older suburbs."\textsuperscript{134} A survey of thirty-three cities, all of which are the home of many brownfields, "conservatively estimated" that each city has a cumulative annual loss of approximately $121 million in tax receipts due to a failure to redevelop brownfields.\textsuperscript{135} More realistically, however, the cities estimated an annual loss of $386 million, suggesting that billions of dollars are lost nationwide each year in local tax receipts as a result of a failure to restore brownfields.\textsuperscript{136}
Brownfields are trapped in what has been described as “a vicious cycle of decline.” First, “[a] property owner, unwilling or unable to sell contaminated property, mothballs it, thus undermining the local tax base.” Vacant facilities then deteriorate and attract arsonists, illegal dumping, the stripping of parts and materials, and other vandalism. Then, “[the unaddressed contamination may spread, further eroding the property value,” which leads to higher cleanup costs and a decrease in the economic viability of neighboring properties. This entire decline leads a potential investor, who would possibly clean and redevelop a brownfield, to seek development opportunities elsewhere, especially due to “uncertain costs and legal liability.” As a result, brownfield sites become unwanted financial and environmental burdens on the community, which in turn leads to skyrocketing unemployment rates. Also, because brownfield communities lose property tax receipts, “public services become less available.”

The vast majority of brownfields are cleaned and redeveloped through private transactions. Fear and uncertainty regarding liability is the primary reason brownfields are not cleaned or redeveloped. Most of the fear held by redevelopers stems from the complexity and ambiguity of CERCLA. Thus, redevelopers who might otherwise invest, shy away from these brownfield sites because of a fear of CERCLA liability.

However, this fear of liability extends beyond redevelopers to lenders as well. One study documented that over forty percent of commercial mortgage bankers had withdrawn from mortgage deals on properties that were potentially contaminated. Of that forty

157 NORTHEAST-MIDWEST INST., supra note 133, at 2.
158 Davis, supra note 126, at 6.
159 Id. at 7 (noting the “crisis” caused by brownfields). In the City of Chicago, cleanup of illegal dumping at brownfield sites costs approximately $11.5 million dollars per year. U.S. ENVTL. PROT. AGENCY, supra note 18, app. B, at B-28.
160 Davis, supra note 126, at 7.
161 Id.
162 Id. (discussing the chain of negative economic consequences resulting from the abandonment of brownfields).
163 Id.; see also Steven Lerner, Brownfields of Dreams, AMICUS J., Winter 1996, at 17 (discussing the problems caused by brownfields, as well as the costs and benefits of redevelopment).
164 Telephone Interview with Alan Waits, Associate Regional Counsel, EPA Region 5 (Jan. 21, 2004) (transcript on file with author). At the time of the interview, Mr. Waits was the acting Environmental Justice Coordinator for EPA Region 5.
165 Davis, supra note 126, at 9.
166 Id. at 7; see 42 U.S.C. ch. 103 (2002).
167 Davis, supra note 126, at 7.
168 Id. at 11.
percent, "[eighty-seven] percent ... said that fear of environmental liabilities had delayed transactions."¹⁴⁹

If Title VI and Equal Protection claims, identical or similar to those made by SCCIA, are successful, redevelopers and lenders will have yet another form of liability to fear: constitutional liability.¹⁵⁰ Such a fear of constitutional liability, similar to the fear of CERCLA liability, will hinder redevelopers from cleaning brownfield sites in order to build new industrial facilities, which will benefit the community both economically, by providing jobs and greater tax receipts, and environmentally, by cleaning contaminated sites and replacing them with newer cleaner facilities.¹⁵¹ Furthermore, the fear of constitutional liability will be exacerbated by the fact that intentional injuries are generally not insurable.¹⁵²

In 1999, the EPA Brownfields Title VI Case Studies Summary Report showed that according to community stakeholders¹⁵³ in Camden, New Jersey; Charlotte, North Carolina; Chicago, Illinois; Detroit, Michigan; Lawrence, Massachusetts; and the City of Miami/Miami-Dade County, Florida, Title VI suits and the fear of environmental justice complaints had not yet negatively impacted the redevelopment of brownfield sites.¹⁵⁴ However, these same stakeholders stated that such liability "could potentially slow down or block progress in the fu-

¹⁴⁹ Id.
¹⁵⁰ It is important to note that, as in the Camden case, the potential constitutional liability would most likely be against the environmental authorities who grant permits, not against the developers themselves. However, the effect is still the same in that the redevelopment process is slowed and redevelopers may lose their permits.
¹⁵¹ See infra text accompanying notes 153–71.
¹⁵³ These stakeholders include “[p]ilot contacts; community and environmental justice groups; community development corporations and other business associations; lenders and developers; environmental groups; and local, State and Federal government contacts.” U.S. ENVTL. PROT. AGENCY, supra note 18, at 2. Pilot contacts provide accurate information on the status of brownfields’ activities, as well as those players that are active and those that are not. Community and environmental justice groups provide “input on the level and timeline of community involvement” and a context for the areas’ demographics. Id. Community development corporations and other business associations give “a balanced view of the business and community aspects of redevelopment and community involvement” and a context for the areas’ demographics. Id. Lenders and developers provide information “on the barriers to brownfields redevelopment,” and how developers view community involvement in the development process. Id. Environmental groups offer information on the “activities and influences of ‘outside’ groups [that] may play a role in complaints filed.” Id. at 2–3. Local government contacts are able to provide an “objective history of [a] brownfields area, [which includes its] past use and redevelopment activities as well as activism in the area.” Id. at 3. State government contacts “provide information on permitting and enforcement issues.” Id. And, lastly, the Federal contacts would “provide a non-EPA perspective on the activities and partnerships involved in the Pilot project.” Id.
¹⁵⁴ Id. at 6–7 (reporting the effects of Title VI concerns on brownfield pilots, according to more than fifty interviews in a study published in 1999).
ture." And, according to Christopher J. Daggett, the former Commissioner of the NJDEP and former Regional Administrator of Region II of the EPA, anything that slows the process of building hinders investors from investing. This is the case because the longer it takes for investors to realize a return on their investments, the greater the return must be to offset the losses caused by the money being "tied up" in the brownfield. Thus, if liability delays a return on an investment, investors and developers will look to build a facility elsewhere instead of redeveloping brownfields.

Specifically, the stakeholders interviewed for the 1999 EPA report, including those in Camden, New Jersey, believed that "early and meaningful community involvement" and "redevelopment that creates a benefit for the local community" are the two most important factors that have prevented and will continue to prevent Title VI complaints. The stakeholders believed that involving the community at the early stages will allow potential problems to be identified and solved in the beginning, when stakes are low and changes can be made. And thus, Title VI liability will be avoided. In fact, one such example cited in the 1999 report came out of Camden, New Jersey. There, Liberty Concrete held community meetings at which it described the "new, cleaner process" it planned to employ, as well as its agreement to allow independent on-site monitoring. Such community meetings helped prevent a suit against Liberty Concrete.

155 Id. at 15.
156 Telephone Interview with Christopher J. Daggett, Executive Vice President, International Risk Group, LLC (Jan. 12, 2004) (transcript on file with author). Mr. Daggett is the former Commissioner of the NJDEP, the former Regional Administrator of Region 2 of the EPA, and is currently involved in the business of brownfields redevelopment. He believes that the two main obstacles to brownfields redevelopment are "time" and "uncertainty." Id.
157 Id.
158 U.S. ENVTL. PROT. AGENCY, supra note 18, at 13. It should also be noted that "sophisticated education in environmental justice and understanding of the Title VI Interim Guidance could potentially slow down or block actions in the future if community involvement and decision-making methods break down, or if a group feels a proposed end use is unacceptable." Id. at 8. One interviewee observed: "When [community] groups don't feel like they have gotten their fair share of the benefits, one way to remedy that is to stir up community activism about the environmental contamination of the site." Id.
159 Id. (referring to the beliefs of stakeholders involved in the Camden and Chicago study Pilots). Communities that have hosted heavy industry for a long time will be skeptical of any new facility if in the past that community has been "treated like a dumping ground for undesirable land use." Telephone Interview with Alan Waits, supra note 144. As such, a new facility should approach the community, understanding its skepticism, and explain to the community how this facility will be an improvement. Id.
160 U.S. ENVTL. PROT. AGENCY, supra note 18, at 12 (describing Pilot results).
However, similar measures taken by SLC failed to lead to an avoidance of litigation.\(^{161}\)

Furthermore, the stakeholders interviewed for the 1999 EPA report stated that job creation is a large part of “community satisfaction,” which leads to an avoidance of Title VI and environmental justice claims.\(^{162}\) In fact, in Camden, with regard to the Liberty Concrete facility, job creation for local Camden residents “played a key role in turning community opposition [in] to approval.”\(^{163}\) However, the SLC facility had fifteen employees at the actual facility, and created work for “hundreds of SJPC employees, including computer operators, longshoremen, truck drivers, and machine operators.”\(^{164}\) Also, “[m]ore than half of the jobs at the Facility are filled by Camden residents, including residents of the Waterfront South community.”\(^{165}\)

Yet, job creation by SLC did not deter Title VI litigation.

SLC benefited the community in other ways as well. In 1999, SLC generated $526,000 in revenue per week.\(^{166}\) In addition, the Facility’s emissions satisfy all of the EPA and NJDEP requirements.\(^{167}\) Thus, the Facility does not harm nearby residents’ health and yet, sixteen Waterfront South residents filed a Title VI suit.

Some stakeholders in the EPA report believed that another important component in reducing the likelihood of Title VI suits against brownfield redevelopers is that brownfields tend to be “abandoned, polluted or otherwise blighted.”\(^{168}\) However, the location of the SLC Facility is a former industrial site that was underused, although not technically a brownfield. And yet, the plaintiffs still sued under Title VI.

Thus, all of the EPA findings regarding factors that reduce the likelihood of Title VI liability against brownfield redevelopers failed to deter litigation in the South Camden case. And, in fact, such Title VI litigation can create a “volatile and distrustful atmosphere.”\(^{169}\)

Such a “volatile and distrustful atmosphere” will keep investors and

\(^{161}\) Alan Walts believes that SLC should have involved the community before beginning the permitting process. Telephone Interview with Alan Walts, supra note 144. Such early involvement may have helped avoid the current litigation.

\(^{162}\) U.S. ENVTL. PROT. AGENCY, supra note 18, at 8.

\(^{163}\) Id.

\(^{164}\) SLC Brief I, supra note 16, at 14.

\(^{165}\) Id.

\(^{166}\) Id. at 13. One should note that SLC does not in fact pay property taxes to the City of Camden because it is located on state-owned land. Instead, the SJPC, its landlord, uses rent collected from SLC and other tenants to make payments, in lieu of taxes, to the city and county governments. See N.J. STAT. ANN. § 12:11A-20 (West 2000) (providing for New Jersey tax exemptions applicable to SJPC).


\(^{168}\) U.S. ENVTL. PROT. AGENCY, supra note 18, at 13.

\(^{169}\) Id. at 15.
redevelopers from cleaning and redeveloping brownfield sites, thus actually hurting those people who choose to sue under Title VI or 42 U.S.C. § 1983.

And yet, the City of Camden and other urban areas similarly situated are in desperate need of newer, cleaner industries, such as SLC, cleaning and redeveloping brownfield sites. Camden and urban areas similarly situated are in desperate need of newer, cleaner industries, such as SLC, cleaning and redeveloping brownfield sites. 

Camden and urban areas similarly situated are in desperate need of jobs suitable for a population lacking higher education. Camden and urban areas similarly situated are in desperate need of developers to clean brownfields that contaminate on a daily basis and lose millions of dollars in tax receipts each year. By filing Title VI and Fourteenth Amendment suits against those industries willing to come into such urban areas, develop newer, cleaner facilities, provide jobs to an unemployed uneducated population, and provide tax receipts to a city in desperate need of money to fight crime and improve schools, the citizens of Camden are hurting themselves, and other urban areas similarly situated, both environmentally and economically.

CONCLUSION

Environmental justice advocates are searching for legal bases to attack perceived environmental injustices. SCCIA is one of the first environmental justice advocacy groups to advance claims of intentional discrimination in violation of section 601 of Title VI and the Equal Protection Clause, and this will likely be the first such case to go to trial. However, should the district court find SCCIA’s arguments persuasive, it will send a signal to environmental justice advocates that the legal standard for determining intentional discrimination, as set forth by the U.S. Supreme Court in Arlington Heights v. Metropolitan Housing Development Corp. and Columbus Board of Education v. Penick may in fact be less stringent when applied to environmental justice cases. Such a signal will most likely lead to an increase in similar litigation.

However, environmental justice advocates, in an attempt to improve the living conditions found in many poor urban areas with large minority populations, will be harming the residents of these areas both economically and environmentally. Redevelopers and lenders, due to a fear of liability, will seek development opportunities elsewhere instead of cleaning and redeveloping brownfields. Such a failure to redevelop brownfields will have a devastating effect on

170 See supra Part I.A and accompanying text.
171 See id.
communities already economically and environmentally devastated. Therefore, SCCIA, in its attempt to help, will in fact be causing greater harm.