NAACP

Office of the General Counsel

September 27, 2022

By Email and Certified Mail

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Re: Complaint Under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, and 40 C.F.R. Part 7 Regarding Discrimination by the State of Mississippi Gravely Adversely Impacting the Drinking Water System for the City and the Health and Well Being of the People of Jackson, Mississippi

Dear Administrator Regan and Acting Director Hoang:

On behalf of the National NAACP, the Mississippi State Conference of the NAACP, and Jackson, Mississippi residents (b)(6) Privacy, (b)(7)(C) Enf. Privacy [redacted],[1] we write to file this Title VI Complaint and request an immediate investigation into the use of federal funds related to drinking water in Jackson and to seek the rapid adoption of comprehensive enforcement remedies. We applaud Administrator Regan's creation of the new Office of Environmental Justice and External Civil Rights and its responsibility to oversee implementation of Title VI.

[1] This placeholder name is used at the request of the complainant to protect her privacy interests pursuant to 40 C.F.R. § 7.120(e). Her name and declaration have been provided to the EPA under separate cover.

1. For years, the State of Mississippi, its agencies, instrumentalities, and officials (collectively "the State") have discriminated on the basis of race against the City of Jackson, Mississippi ("Jackson") and its majority-Black population by diverting federal funds awarded to ensure safe drinking water and unpolluted surface waters and groundwater. This discrimination is evident in the State's repeatedly having deprived Jackson of federal funds to maintain its public drinking water system in favor of funding smaller, majority-white communities with less acute needs—despite the fact that Jackson is Mississippi's most populous city, with a demonstrated need for improvements to water infrastructure. The result is persistently unsafe and unreliable drinking water and massive gaps in the access to safe drinking water that are intolerable in any modern society. These circumstances came to a head within the past few weeks, when Jackson was forced to shut down its drinking water supply for days in late August, and then when—upon the eventual restoration of service—the water remained unsafe to drink and a boil water notice remained in effect until it was lifted by the State Department of Health on September 15, 2022.[2] Nearly all of the residents of Jackson have watched brackish, dirty, impure, and undrinkable water trickle from their taps. At times, some have had no water at all.

2. The events of August and September 2022 are a continuation of repeated incidents when the predominantly Black residents of Jackson either had no public water at all, or were provided with water from their taps that violated applicable federal drinking water standards, adversely affecting their health, safety, and well-being. At the root of this crisis is discrimination in the State's administration of federal funding resources. The State has refused to make adequate federal funds available to Jackson and has prevented Jackson from developing other means of financial support to address the water system's challenges. As detailed below, the State's actions violate Title VI of the Civil Rights Act of 1964, as amended (42 U.S.C. § 2000d–2000d-7), which prohibits recipients of federal financial assistance from discriminating on the basis of race, color, or national origin in their programs or activities.

3. The racial discrimination facing Jackson residents, and the grave and unfair situation it is causing, have been widely reported.[3] As United States Senator Cindy Hyde-Smith (R-MS) recently wrote:

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[2] Miss. State Dep't of Health, State-Imposed Boil Water Notice, https://msdh.ms.gov/page/23,24581,148.html (notice lifted on Sept. 15, 2022). Even after the boil water advisory was lifted, sporadic boil water notices continued in Jackson. *See* Critical Infrastructure Preparedness and Resilience: A Focus on Water: Before the Comm. on Homeland Sec., (Sept. 21, 2022) (Statement of Chairman Bennie G. Thompson (D-MS)), https://homeland.house.gov/imo/media/doc/bgt_opening_statement_full_092122.pdf.

[3] *See, e.g.*, Drew Costley, *Racism Seen as Root of Water Crisis in Mississippi Capital*, AP News (Sept. 16, 2022), https://apnews.com/article/science-race-and-ethnicity-racial-injustice-mississippi-tate-reeves-5d51e0f19e923756f99a0abc3ee0f8b9; Drew Costley & Emily Wagster Pettus, *Decades of Systemic Racism Seen as Root of Jackson Mississippi Water Crisis*, PBS News Hour (Sept. 16, 2022), https://www.pbs.org/newshour/nation/decades-of-systemic-racism-seen-as-root-of-jackson-mississippi-water-crisis; Chi Chi Izundu, et al., *Jackson Water Crisis: A Legacy of Environmental Racism?*, BBC (Sept. 4, 2022), https://www.bbc.com/news/world-us-canada-62783900.

> The City of Jackson serves as the State capital and is the most populous city in Mississippi. On August 29, 2022, floodwaters from the Pearl River overwhelmed the city's primary water treatment plant, resulting in system-wide failure. Approximately 150,000 residents were left without a steady flow of safe drinking water, adequate water pressure to flush toilets, or to fight fires. President Biden issued an Emergency Declaration on August 30, 2022, allowing federal agencies to take temporary measures to begin restoring water to residents, schools, public services, and businesses. In fact, the city remains under a boil water notice implemented more than a month ago.
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> Unfortunately, the water infrastructure crises Jackson residents are facing is not new. A winter storm in February 2021 left tens of thousands of residents without running water, some for up to a month. Storms in 2010, 2014, and 2018 resulted in similar water outages. The crumbling water infrastructure in Jackson has plagued residents for decades . . . .[4]

4. U.S. Representative Bennie G. Thompson (D-MS-02) recently spoke to the dire consequences of the Jackson water crisis in his opening statement for the September 21, 2022 hearing before the United States House of Representatives Committee on Homeland Security, "Critical Infrastructure Preparedness and Resilience: A Focus on Water":

> My community of Jackson, Mississippi, suffered serious flooding last month, which contributed to the failure of a water pumping station and left more than 100,000 of my constituents without clean water or appropriately managed wastewater. Residents could not use the water coming out of their faucets to brush their teeth, bathe, or wash the dishes. The lack of water led to school and business closures, and tens of millions of gallons of untreated wastewater flowed into Jackson-area waterways. The State has recently lifted the boil water advisory, but sporadic boil water notices continue in the city. This crisis is not over – and will not be over until we fix the underlying problems that caused it, starting with a lack of investment in critical infrastructure, such as our water systems. [5]

5. The consistent lack of investment is reflected in Jackson's crumbling drinking water infrastructure, including aging supply and distribution lines that are so fragile that they do not allow the system to maintain sufficient pressure. Indeed, the degraded condition of these lines exacerbates the problems facing Jackson's public water system. According to EPA Administrator Michael Regan, in just the past two years, the city has issued approximately 300 boil water notices

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[4] Letter from U.S. Senator Cindy Hyde-Smith to The Honorable Shalanda Young, Dir., Off. of Mgmt. & Budget (Sept. 8, 2022), https://www hydesmith.senate.gov/sites/default/files/2022-09/09082022%20OMB%20Supplemental%20Jackson%20Water%20Letter.pdf.

[5] *See* Committee on Homeland Security, Hearing Statement of Chairman Bennie G. Thompson (D-MS), Critical Infrastructure Preparedness and Resilience: A Focus on Water (Sept. 21, 2022), https://homeland.house.gov/imo/media/doc/bgt_opening_statement_full_092122.pdf.

and multiple line breaks have occurred.[6] Further, a 2020 EPA Report found that, "The city of Jackson's water distribution system experiences numerous leaks and line breaks, *with crews reportedly repairing 5 or 6 of these per day*. . . . Loss of pressure associated with these incidents requires the city to issue 'Boil Water Notices' (BWNs); *over 750 BWNs have been issued since 2016*."[7] And the funding discrimination impairs Jackson's wastewater treatment system as well, where funding disparities frequently result in flooding and the release of hundreds of millions of gallons of untreated sewage.[8] Jackson's elected leadership has repeatedly requested that the State provide funding solutions proportional to the gravity of the water crisis in Mississippi's largest city. But Jackson's majority-Black population has been repeatedly ignored, spurned, or ridiculed, resulting in the most recent water access inequity and crisis.

6. The condition of Jackson's water facilities is no accident. The State—including the Office of the Governor, the Legislature, the Office of the State Treasurer, and the Mississippi Department of Finance and Administration ("MSDFA"), the Mississippi State Department of Health ("MSDH"), and Mississippi Department of Environmental Quality ("MSDEQ")—have engaged in a long-standing pattern and practice of systematically depriving Jackson the funds that it needs to operate and maintain its water facilities in a safe and reliable manner. For example, the MSDH and MSDEQ both received funds from the EPA to provide safe drinking water and wastewater, and were aware of Jackson's severe needs, but distributed to the city only a small fraction and disproportionately low amount. Indeed, despite Jackson's status as the most populous city in Mississippi, State agencies awarded federal funds from the Drinking Water State Revolving Loan Fund (DWSRF) just *three times* in the twenty-five years that this program has been in existence.[9] Meanwhile, the State has funneled funds to majority-white areas in Mississippi despite their less acute needs.[10]

7. In addition to denying Jackson a share of federal funds proportional to its need for safe and reliable drinking water, the State has exacerbated the funding gap by repeatedly denying Jackson the ability to fund improvements to its drinking water system, to manage its debt, and to thereby protect its residents. For example, the Governor and the State Legislature:

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[6] Press Release, EPA, Statement by Administrator Regan on the Ongoing Water Crisis in Jackson Mississippi, (Sept. 26, 2022), https://www.epa.gov/newsreleases/statement-administrator-regan-ongoing-water-crisis-jackson-mississippi.

[7] NEIC Civil Investigation Report: City of Jackson Water System (No. NEICVP1269E01) at 18 (2020), https://www.epa.gov/system/files/documents/2021-07/neic-civil-investigation-report_city-of-jackson-public-water-system.pdf (emphasis added).

[8] Justin Vicory, *Half-billion gallons of Jackson sewage overflowed into Pearl River, report shows*, Miss. Clarion Ledger (June 1, 2020), https://www.clarionledger.com/story/news/2020/06/01/sewage-pearl-river-jackson-overflow-rain/5282301002/; City of Jackson, Miss., Wastewater Consent Decree Quarterly Report to EPA No. 37 April 2022 through June 2022 (reporting raw sewage discharges to nearby surface waters from April to June 2022, as part of ongoing reporting obligations under the 2012 wastewater Consent Decree City), https://www.cojcd.org/_files/ugd/9f716c_e6905e39fe344e2ebd2879cf282d106b.pdf.

[9] EPA, DWSRF Cumulative NIMS Report for the State of Mississippi, 13–15 (Feb. 2022), https://www.epa.gov/sites/default/files/2020-11/documents/mississippi2020.pdf.

[10] *See, e.g.*, discussion of Bear Creek Water Authority, *infra* at p. 18.

- vetoed infrastructure funding legislation, S.B. 2586, in 2020 that was vital to the Jackson water supply's future;[11]
- rejected a 1% sales tax that would have funded repairs to Jackson's water and sewage system;[12]
- excluded major sources of revenue from the existing sales tax;[13]
- appointed a State Commission that restricts Jackson's Mayor and City Council in expending funds, leaving Jackson's elected officials a with minority representation on the Commission;[14] and
- refused to compensate Jackson for lost tax revenues from significant areas of state-owned, tax-exempt real estate, despite proposals for a "Payment in Lieu of [Property] Taxes" system.[15]

8. The consequences have been disastrous and disproportionately suffered by Jackson's predominantly Black and low-income population, leading to significant adverse and discriminatory effects on the basis of race that are without any legitimate justification. Jackson has plainly faced, for an extended period, a growing need to modernize and maintain its drinking water system — as demonstrated by Jackson's mounting operational challenges and the increasing frequency of health-based and operational water standards violations. State-run facilities, such as hospitals located in Jackson, have removed themselves from the water system due to water quality concerns and further disinvested from its support, by installing their own drinking water wells.[16]

9. The public health consequences for Jackson's residents, as indicated by leading renowned public health experts, including academics, epidemiologists, microbiologists, environmental health, children's health, and health disparities experts—affecting the youngest to the very oldest—are disparate and severe. These consequences may stem from the lack of basic sanitation and hydration, or from the compounding developmental risks from excessive levels of lead, as well as to enhanced risks from a range of chronic health challenges exacerbated by the

[11] Kayode Crown, *Gov. Reeves Vetoes Jackson Water Bill, More Paving, Mask Requirement Ahead*, Jackson Free Press (June 30, 2020), https://www.jacksonfreepress.com/news/2020/jun/30/gov-reeves-vetoes-jackson-water-bill-more-paving-m/.

[12] Adam Ganucheau, et al., Legislative leaders kill key proposal to address Jackson water crisis - Mississippi Today (March 24, 2021), https://mississippitoday.org/2021/03/24/legislative-leaders-kill-key-proposal-to-address-jackson-water-crisis/.

[13] *See* Miss. Code Ann. § 27-65-241.

[14] Mayor Harvey Johnson, Jr., *Challenges of an Aging Water System: The Jackson Water Crisis—A Research Commentary*, Miss. Urban Rsch. Ctr. Online J. of Rural and Urban Rsch. at 13-16 (Spring 2022) https://www.jsums.edu/education/files/2022/03/2022.OJRUR_JacksonWaterCrisis_Special.Issue_.Final_.pdf.

[15] *Id.*

[16] *See, e.g.,* Press Release, Patrice Guilfoyle, Dir., Commc'ns at Univ. of Miss. Med. Ctr., Public statement - City of Jackson water impact on UMMC (Aug. 30, 2022), https://www.umc.edu/news/News_Articles/2022/08/Jackson-Water-Imapct-UMMC.html.

contaminants harbored by Jackson's fragile and repeatedly malfunctioning drinking water system.[17]

10. Funding for clean drinking water in Jackson should be among the State's highest priorities, yet the State has blatantly and repeatedly ignored the city's needs. Only one factor can explain the disproportionate underfunding and repeated sidelining of the State's largest city, with one of the largest Black communities in the country: racial discrimination. The State's pattern and practice of underfunding Jackson is so consistent and the disproportionate harm to a protected group—Jackson's predominantly Black population—so stark as to establish both discriminatory intent and an unlawful disparate impact. Accordingly, we believe that the State (including several of its agencies, instrumentalities, and officials, both separately and collectively) is violating Title VI and its implementing regulations. To remedy these violations, we request that your office immediately investigate, consider a Title VI enforcement referral to the Department of Justice, and bring the State into compliance with civil rights laws by directing the State, including all of its relevant agencies and instrumentalities to ensure that Jackson has equitable and non-discriminatory access to federal funding.

I. COMPLAINANTS

11. The NAACP is a national non-profit organization with the mission to ensure the political, educational, social, and economic equality of rights of all persons and to eliminate race-based discrimination. The NAACP's Environmental and Climate Justice Program addresses environmental injustices that have a disproportionate impact on communities of color and low-income communities in the United States and around the world. The NAACP has participated actively in seeking a resolution of the issues involving Jackson's water crisis, including most recently in filing Comments on the State of Mississippi's Intended Use Plan, urgently requested that the Governor reprioritize the MSDH's Intended Use Plan for federally funded drinking water loans.[18] The structure of these loans effectively limits the amount of federal funds available to Jackson for water infrastructure projects, exacerbating the crisis and echoing the state's historical record of eroding the rights of Black Mississippians.

12. The Mississippi State Conference of the NAACP, which is headquartered in Jackson, represents over 11,000 members across the State of Mississippi. Access to clean drinking water for Jackson's residents is of paramount importance to the health and well-being of the members of the Mississippi State Conference. National and State Conference NAACP leaders, staff, and members have been working with city residents, elected local officials, and Federal representatives to resolve Jackson's water crises for months.

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[17] *See* Declaration Of Public Health Experts David Bellinger, PhD, MSc; Hilary Godwin, PhD; Dr. Lynn R. Goldman, MD, MS, MPH; Charles Haas, PhD; Richard J. Jackson, MD, MPH; Bruce Lanphear, MD, MPH; Thomas A. LaVeist, PhD; Janet A. Phoenix, MD, MPH; And Joan B. Rose, PhD In Support Of Title VI Complaint, attached as Ex. 1.

[18] *See* Letter from (b)(6) Privacy, (b)(7)(C) Enf. Privacy, President, NAACP, to the Honorable Governor Tate Reeves (Sept. 23, 2022), (b)(6) Privacy, (b)(7)(C) Enf. Privacy

13. The Mississippi Center for Justice (MCJ) is a statewide public interest law firm working to dismantle policies and systems that perpetuate racial, economic and social injustice. MCJ employs a cohesive strategy of legal services, public advocacy, coalition-building, and community education, to fulfill its mission. MCJ is committed to addressing emergent needs and fighting root causes of food and water insecurity impacting poor Mississippians, particularly in majority-Black communities, including Jackson, Mississippi, and the Mississippi Delta. MCJ fights for increased equity in healthcare, economic opportunity, and access to disaster relief for low-income communities in Jackson, Mississippi, and around the state.

14. (b)(6) Privacy, (b)(7)(C) Enf. Privacy is a resident of Jackson, Mississippi. As have all Jackson residents, [redacted] has dealt with water access issues on a regular basis for his [redacted] years in the city. He lives under regular boil-water notices—he cannot trust his water for cooking, cleaning, drinking or bathing. The issues are so constant that even when there is no boil water notice, [redacted] and his family use boiled or bottled water anyway—he simply cannot entrust his family's health to the crumbling water system. Unfortunately, these experiences are common to many Jackson residents. But as the head of a national civil rights advocacy organization, [redacted] has a unique vantage point. Day in and day out, he serves the majority-Black community that is adversely impacted by the water infrastructure issues. During last month's water crisis, for instance, he purchased and distributed bottled water to those who could not afford it, or who could not leave their homes to do so. He hears their stories and shares their burdens. [redacted] also sees that this crisis fits squarely into the broader context of Mississippi's underfunding of Black communities, in favor of smaller, white ones.[19]

15. [redacted] has lived in Jackson for [redacted] years, and she has been using bottled water for household needs [redacted] Over the last year, though, her water problems became markedly worse. She can no longer bathe with tap water, nor drink it, nor cook with it. She instead has to use expensive five gallon jugs, which she cannot lift on her own. She attributes the current crisis to the State's misuse of funds.[20]

16. [redacted] has lived in Jackson for [redacted] years. [redacted] is a member of the Jackson Public Schools Board. While he recalls that his family had water problems for more than half a century, the problems in the beginning when Jackson was mostly white, were relatively minor. He recalls the State spending money to build the city's water infrastructure when the city was mostly white. [redacted] also observes that "[a]s Jackson's Black population grew, the water problems seemed to get worse." His experiences provide rare personal context to the State's practice of discriminatory funding toward an increasingly Black city.[21]

17. (b)(6) Privacy, (b)(7)(C) Enf. Privacy [redacted] ike other Jackson residents, he has been personally affected by the water crisis. From his experience in local government, he believes the State could have and should have done more to assist. When Jackson requested a financial assistance grant in response to respond to a devastating 2010 ice storm, the State responded by offering a loan with

[19] *See* Declaration Of NAACP President [redacted] In Support Of Title VI Complaint, attached as Ex. 2.
[20] *See* Declaration Of Jackson Resident [redacted] In Support Of Title VI Complaint, attached as Ex. 3.
[21] *See* Declaration Of Jackson Resident [redacted] In Support Of Title VI Complaint, attached as Ex. 4.

unfavorable terms: the State loaned only half the amount Jackson requested, and deducted loan payments from Jackson's share of sales tax.[22]

18. [redacted] is a lifetime member of the NAACP, and has lived in Jackson off and on [redacted]. A number of years ago he received a notification of contaminants in the water, and he and his family have purchased bottled water ever since. These purchases, sometimes from a water service, sometime from the store, come at considerable expense. Even with the water purchases, they still have to stockpile water in containers to assure they will have water to flush the toilets or use the shower. In his experience, Jackson's water issues are a continuation of racial segregation and discrimination that have persisted for years in Mississippi.[23]

19. [redacted] has lived in Jackson [redacted]. The water crisis has caused her significant financial and personal hardship. In addition to the difficulties of purchasing expensive water and carrying it upstairs to her condo, the unreliable water also presents difficulties for [redacted] daughter, who is blind. Due to her visual impairment, [redacted] daughter is unable to tell if water is brown or discolored. [redacted] now needs to assist her daughter with tasks that require water, like washing her face or showering. The water issues greatly increase [redacted] caregiving workload, and greatly diminish her daughter's independence.[24]

20. [redacted] is the President of the Jackson Public Schools Board of Trustees, and has been a Jackson resident for [redacted] years. He has seen firsthand how water issues disrupt student learning, student access to free or discounted lunch, and even students' ability to use school restrooms. In [redacted] experience, all of these disruptions contribute to a growing educational attainment gap. He has also been personally effected. While [redacted] lives in an area of Jackson that is not as greatly affected, he has still received notices that his young children may have been exposed to lead in the drinking water. [redacted] attributes the current crisis to the State's unwillingness to invest in Jackson, and a deeply racialized component to the relationship between the State and the city.[25]

21. [redacted] is a Jackson Public Schools teacher, parent, and union leader. She has seen the impacts of the water crisis on her life, the lives of her students, and the teachers she represents. Every day, [redacted] lives with the uncertainty of how much water she will have to cook, bathe, and drink. She also lives with the financial pain of having to purchase water every day, or worse, the health impacts of not being able to purchase water. As a lifelong resident of Mississippi, [redacted] recalls having water access problems growing up—but she never imagined that she and her children would be dealing with the same problems, all these years later.[26]

22. [redacted] is a longtime resident of Jackson, Mississippi. [redacted] moved into her current home [redacted] Since then, [redacted] has experienced constant disruptions to her water access—ranging from minimal water pressure, under the best of circumstances, to no water or dark brown water—that have caused her devastating emotional, health, and economic effects. [redacted] husband passed away this August. Jackson's water issues exacerbated the difficulties of his

[22] *See* Declaration Of (b)(6) Privacy, (b)(7)(C) Enf. Privacy In Support Of Title VI Complaint, attached as Ex. 5.
[23] *See* Declaration Of Jackson Resident [redacted] In Support Of Title VI Complaint, attached as Ex. 6.
[24] *See* Declaration Of Jackson Resident [redacted] In Support Of Title VI Complaint, attached as Ex. 7.
[25] *See* Declaration Of Jackson Resident [redacted] In Support Of Title VI Complaint, attached as Ex. 8.
[26] *See* Declaration Of Jackson Teacher Dr. [redacted] In Support Of Title VI Complaint, attached as Ex. 9.

illness. For example, while he was sick, [redacted] was forced to bathe him with "tea-colored" water before he went to a doctor's appointment. At the time of her husband's funeral, [redacted] had no water at all, so she and her family members were forced to use bottled water to wash and cook. [redacted] struggles to afford the cost of bottled water that she is often forced to use. She and her niece believe they have suffered health consequences from using Jackson's water.[27]

II. JURISDICTION

23. Under Title VI, the EPA has a responsibility to ensure that its funds are not used to subsidize discrimination based on race, color, or national origin.[28] Any person may file administrative complaints that allege discrimination based on race with the federal departments and agencies that provide financial assistance from federal funds. *See* Title VI, 42 U.S.C § 2000d; 28 C.F.R. § 42.408.

24. EPA has identified four prerequisites to accepting a complaint for investigation under Title VI of the Civil Rights Act of 1964: (1) the complaint is in writing; (2) the complaint alleges discriminatory acts that, if true, violate EPA's Title VI regulations; (3) the complaint identifies a recipient of EPA funding that committed the alleged discriminatory act; and (4) the complaint is filed within 180 days of the alleged discriminatory act.[29]

25. This complaint meets each of those prerequisites. This written complaint is timely filed because the discriminatory underfunding of the Jackson's water infrastructure—which caused the ongoing crisis—continues to this day. The complaint also identifies long-standing and continuing violations by various entities of the State of Mississippi who receive and disburse federal funding from the EPA and are thus bound by Title VI of the Civil Rights Act of 1964. MSDH has received more than $454 million in Drinking Water State Revolving Loan funds from EPA,[30] and the governor-appointed Local Governments and Rural Water System Improvements Board has established allocation priorities and awards for the EPA funding through the Board's annual Intended Use Plans.[31] Similarly, the MSDEQ, has received significant Water Pollution Control (Clean Water) State Revolving Loan Funds to support improving wastewater infrastructure, amounting to $997 million through 2021.[32] Mississippi is thus required to comply with Title VI and EPA's Title VI implementing regulations, but continually fails to do so. This failure has created disproportionate, severe, and on-going adverse impacts to individuals protected under Title VI.

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[27] *See* Declaration Of Jackson Resident [redacted] In Support Of Title VI Complaint, attached as Ex. A.

[28] EPA, Title VI and Environmental Justice, https://www.epa.gov/environmentaljustice/title-vi-and-environmental-justice#:~:text=Title%20VI%20allows%20persons%20to,by%20recipients%20of%20federal%20funds (last visited Sept. 23, 2022).

[29] 40 C.F.R. § 7.120; EPA External Civil Rights Compliance Office, Case Resolution Manual at 5 (January 2021), https://www.epa.gov/sites/default/files/2021-01/documents/2021.1.5_final_case_resolution_manual_.pdf.

[30] EPA, DWSRF Cumulative NIMS Report for the State of Mississippi, 13–15 (Feb. 2022), https://www.epa.gov/sites/default/files/2020-11/documents/mississippi2020.pdf.

[31] State of Miss. Loc. Gov'ts & Rural Water Sys. Improvements Board, Drinking Water Systems Improvements Revolving Loan Fund Program, Title 33, Part 13 (FY 2021) (Jan. 2021) https://msdh.ms.gov/msdhsite/_static/resources/7992.pdf.

[32] EPA, Clean Water SRF Program Information for the State of Mississippi, https://www.epa.gov/sites/default/files/2021-02/documents/ms.pdf.

III. FACTUAL BACKGROUND

A. Mississippi's History of Discrimination and Discriminatory Funding Created a Crisis

26. The circumstances regarding Jackson's drinking water system are reminiscent of the unequal municipal services provided to Black residents by the town of Shaw, Mississippi, and held to be unconstitutional by the U.S. Court of Appeals for the Fifth Circuit on Equal Protection grounds:

> Nearly 98% of all homes that front on unpaved streets in Shaw are occupied by Blacks. Ninety-seven percent of the homes not served by sanitary sewers are in Black neighborhoods. Further, while the town has acquired a significant number of medium and high intensity mercury vapor street lighting fixtures, every one of them has been installed in white neighborhoods. The record further discloses that similar statistical evidence of grave disparities in both the level and kinds of services offered regarding surface water drainage, water mains, fire hydrants, and traffic control apparatus was also brought forth and not disputed. Finally, it was alleged that this disparity was the result of a long history of racial discrimination.[33]

27. The full Court in *Shaw* found that, "the facts before us squarely and certainly support the reasonable and logical inference that there was here neglect involving clear overtones of racial discrimination in the administration of governmental affairs of the town of Shaw resulting in the same evils which characterize an intentional and purposeful disregard of the principle of equal protection of the laws."[34]

28. Discrimination against Black residents is a prominent feature in the history of Mississippi and in the State's treatment of Jackson, its largest city. When *de jure* discrimination finally became unlawful in Mississippi, *de facto* discrimination ensured that dividing class and race lines remained engrained across the state and in Jackson in particular. This history of discrimination provides the context necessary to understand how the state of Mississippi underfunded the water infrastructure of its largest Black community.

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[33] *Hawkins v. Town of Shaw, Miss.,* 437 F. 2d 1286, 1288 (5th Cir. 1971)(Tuttle, J.), *aff'd en banc,* 461 F.2d 1171 (5th Cir. 1972); *See also Dowdell v. City of Apopka, Fla*., 698 F.2d 1181, 1185–86 (11th Cir. 1983) ("The gravamen of plaintiffs' claim is that Apopka has intentionally maintained a racially and geographically segregated system of municipal services as a result of which the disparities in the provision of street paving, water distribution, and storm drainage facilities have reached constitutional proportions. Discriminatory intent is not synonymous with a racially discriminatory motive[.] Neither does it require proof that racial discrimination is the sole purpose[] behind each failure to equalize these services. It is, rather, the cumulative evidence of action and inaction which objectively manifests discriminatory intent. . . . First, the magnitude of the disparity, evidencing a systematic pattern of municipal expenditures in all areas of town except the black community, is explicable only on racial grounds. Second, the legislative and administrative pattern of decision-making, extending from nearly half a century in the past to Apopka's plans for future development, indicates a deliberate deprivation of services to the black community.") (citations omitted).

[34] *Hawkins v. Town of Shaw, Miss.,* 461 F.2d 1171, 1173 (5th Cir. 1972).

29. In the mid-1970s, civil rights leaders, including former State Senator Henry Kirksey, began what would be a decades-long challenge to end Jackson's racially discriminatory system of government. Their success—beginning with the election of the first Black city council member in 1985 and then the first Black mayor in 1997—corresponded with (and almost certainly caused) an exodus of wealthy white residents to neighboring suburbs. Between 1990 and 2020, the city lost nearly 25% of its population and shifted from having a slim majority of white residents to being majority Black. As of today, over 80% of Jackson's population is Black; the median family income is $40,064, and 24.5% of Jackson's population lives in poverty.[35] Despite the exodus of its wealthy white residents, Jackson is still twice as large as any other city in Mississippi.[36]

30. Jackson's loss of a significant portion of its tax base created financial consequences, which were then compounded by the State's discriminatory racialized funding decisions.[37] Beginning in the mid-1990s, for example, Jackson's first Black mayor, Harvey Johnson, Jr., repeatedly requested that the State provide the city with a payment in lieu of taxes or make loans available to repair the city's aging infrastructure, because Jackson, as Mississippi's capital city, hosts state agencies on extensive tax-exempt properties.[38] Although other states make provisions to compensate capital cities for state-owned property located in those cities, Mississippi refused to make any such payments, or even provide loans to Jackson to maintain its infrastructure. At the same time, the State devised a legislative scheme to divert federal highway and bridge funds meant for majority-Black Hinds County (in which Jackson is the county seat) to the surrounding counties of Madison and Rankin, which remain majority white.[39] Further, as outlined above, the governor and legislature have derailed Jackson's attempts to fund water infrastructure for years by rejecting Jackson's proposed sales taxes and by creating state-run boards to undermine Jackson's elected officials.

B. Recent Funding Denials and Structural Barriers are Part and Parcel of Mississippi's History of Depriving Jackson of Necessary Funds

31. The State's practice of denying Jackson the resources it needs to operate and restore its water facilities persists today. MSDEQ and MSDH, complemented by State officials and other agencies, have consistently reduced or limited Jackson's access to state funding for drinking water and sewer projects, and have structured access to federal funding in such a way as to limit or delay Jackson's access to these funds.

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[35] United States Census Bureau, QuickFacts, Jackson city, Mississippi, https://www.census.gov/quickfacts/jacksoncitymississippi (last visited Sept. 23, 2022).

[36] Demographics by Cubit, Mississippi Cities by Population https://www mississippi-demographics.com/cities_by_population, (last visited Sept. 23, 2022)

[37] *See generally* Mich. Civ. Rts. Comm'n, The Flint Water Crisis: Systemic Racism Through the Lens of Flint, Report of the Michigan Civil Rights Commission (Feb. 17, 2017) https://www michigan.gov/-/media/Project/Websites/mdcr/mcrc/reports/2017/flint-crisis-report-edited.pdf?rev=db527d0e6c404254892c84c907988934.

[38] *Supra* note 11.

[39] *Id.*

32. Jackson owns and operates the public water system, PWS ID No. MS0250008, which provides water for human consumption to a population of approximately 173,514.[40] In 2010, when a freeze caused pipes to burst and the treatment system to fail for several weeks, Jackson faced many of the same drinking water issues it has faced over the past two years of water treatment system shutdowns. Rather, the repeated long-term system shutdowns in 2021 and 2022 have demonstrated the chronic, corrosive effect of the structural funding inequality and racially discriminatory treatment that Jackson has regularly suffered.[41] Despite Jackson's efforts, the State has failed to fund fixes for these resiliency problems.

33. Over the past decade, Jackson has suffered from underfunding by the State that has disproportionately affected Jackson and its residents. The State has repeatedly interfered with Jackson's access to tax revenue and repeatedly reduced or blocked funds from flowing to Jackson for its water facilities.[42] In 2020, for example, Governor Reeves vetoed bipartisan legislation that would have allowed residents to manage the burden of water bills that reflected some of the costs of needed repairs.[43] And, on March 3, 2021—just days after an extensive water service shutdown—Jackson Mayor Chokwe Lumumba wrote to Mississippi Governor Tate Reeves with a detailed request for $47 million in emergency funding to ensure the integrity of the City's drinking water system.[44] The State did not provide the requested funds. Instead, the legislature provided only $3 million.[45]

34. The Mayor again implored the State's leadership soon thereafter to act to avert a crisis by passing an additional one-percent sales tax. As the Mayor explained, "[w]hile there is an urgent need for immediate funding, the one percent sales tax bill for water that is currently under consideration in the legislature would provide the consistent revenue stream necessary to ensure that our residents never have to endure the burden of not having clean water again. . . . [T]he time for strategic efforts to ensure that our residents and businesses are not deprived of clean water again is now."[46] But the State rejected the Mayor's request to create a sustainable source of funding to remedy Jackson's drinking water crisis, and all but assured an inevitable calamity.

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[40] City of Jackson, Miss., Administrative Compliance Order on Consent, Docket No. SDWA-04-2020-2301 at 1 (attached hereto as Ex. 10); EPA, EPA and the City of Jackson, Mississippi Reach Agreement to Improve Drinking Water and Protect Public Health, (July 1, 2021), https://www.epa.gov/newsreleases/epa-and-city-jackson-mississippi-reach-agreement-improve-drinking-water-and-protect.

[41] *See* Donna Ladd, *Jackson, Mississippi has a water crisis because our state legislature has a race problem*, NBC (March 6, 2021), https://www nbcnews.com/think/opinion/jackson-mississippi-has-water-crisis-because-our-state-legislature-has-ncna1259819; Press Release, EPA, EPA and the City of Jackson, Mississippi Reach Agreement to Improve Drinking Water and Protect Public Health, (July 1, 2021), https://www.epa.gov/newsreleases/epa-and-city-jackson-mississippi-reach-agreement-improve-drinking-water-and-protect.

[42] *See supra* note 11-15.

[43] *See* Jason Breslow, *The water crisis in Jackson follows years of failure to fix an aging system*, NPR (Aug. 31, 2022), https://www.npr.org/2022/08/31/1120166328/jackson-mississippi-water-crisis?utm_medium=social&utm_source=twitter.com&utm_term=nprnews&utm_campaign=npr.

[44] Letter from Mayor Chokwe Lumumba to Governor Tate Reeves (Mar. 3, 2020 [sic]), https://www.scribd.com/document/592399908/City-Letter-Water-Crisis#from_embed.

[45] Maya Brown, '*Water is a human right': City of Jackson still in dire need of infrastructure help to fight water crisis* (Apr. 19, 2022), https://www.cnn.com/2022/04/19/us/jackson-mississippi-water-crisis/index.html.

[46] Letter from Mayor Chokwe A. Lumumba to Lieutenant Governor Delbert Hosemann (Mar. 12, 2021), attached hetero as Ex. 11.

35. The State's obstruction of Jackson's efforts to raise revenue did not occur in a vacuum, and is not easily separated from the MSDH's administration of federal funds. Each time the State blocks Jackson's proposals for tax revenue or other funding, it necessarily limits the city's revenue stream and ability to pay for water projects, which places more pressure on water bill ratepayers, who often need to also purchase bottled water for consumption.[47] The MSDH, like any lender, considers those revenue streams when considering whether to grant an SRF loan.[48] Thus, when the state blocks Jackson's attempts to raise revenue (for instance, Jackson's request for a 1% sales tax) the State adversely impacts Jackson's ability to secure an SRF loan.

36. The State has not only blocked Jackson's efforts to secure tax revenue and other streams of funding from the legislature, but it has also systematically and continuously limited Jackson's access to necessary federal funds. As previously indicated, according to EPA statistical data, Jackson's public drinking water system received awards from the Mississippi's drinking water revolving loan fund *in just three of the twenty-five years that this program has been in existence*.[49] Indeed, Jackson did not receive *any* funding from the federal loan program for the program's first *nineteen years*, from 1997-2015.

37. Lack of funding during each of these 19 years contributed to inadequate maintenance and the continual degrading of the system. Meanwhile, the MSDH adopts loan terms that are not feasible for Jackson. For instance, the MSDH caps loan forgiveness for EPA-funded drinking water loans at only $500,000.[50] This amount may be significant to a small water authority that needs one or two million dollars to maintain its system, but such a small cap places Jackson at a structural disadvantage, relative to other communities in Mississippi.[51] Mississippi's most recent Intended Use Plan for future loans has the same $500,000 forgiveness cap, which will further exacerbate the current crisis in Jackson.[52] Likewise, though Congress expanded the SRF loan repayment period to 40 years for disadvantaged communities in 2018, the MSDH continued to enforce a 30 year repayment period for disadvantaged communities until 2022.[53] Given the tremendous financial burden of repairing Jackson's drinking water system—tens of millions of dollars at least—the shortened loan period disproportionately hurt Jackson, due to its many impoverished areas with ratepayer fee-hike sensitivity. Of even greater concern, the MSDH did not have a formal "disadvantaged communities" component in its SRF program until *as recently*

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[47] *See* Declaration Of Jackson Resident Jane Doe In Support Of Title VI Complaint, attached as Ex. A.

[48] Miss. Dep't of Health, 2021 DWSIRLF Annual Report, 16, https://msdh.ms.gov/msdhsite/_static/resources/17152.pdf (noting that the MSDH reviews an applicant's sales tax revenue and water sales to assess whether or not to make a loan)

[49] EPA, DWSRF Cumulative NIMS Report for the State of Mississippi, 13–15 (Feb. 2022), https://www.epa.gov/sites/default/files/2020-11/documents/mississippi2020.pdf.

[50] Miss. Dep't of Health, 2020 DWSIRLF Annual Report, 9–10, https://msdh.ms.gov/msdhsite/_static/resources/13126.pdf.

[51] *See, e.g.*, Miss. Dep't of Health, 2011 DWSIRLF Annual Report, 27, https://msdh.ms.gov/msdhsite/_static/resources/4685.pdf (showing, for example, that the Town of Tunica received $500,000 of principle forgiveness ("PF") on a loan of only $985,945).

[52] *See* Letter from Derrick Johnson, President, NAACP, to the Honorable Governor Tate Reeves (Sept. 23, 2022), https://naacp.org/sites/default/files/documents/NAACP%20letter_JacksonIUP.pdf.

[53] Miss. Dep't of Health, 2011 DWSIRLF Annual Report at iv. (2020 SRF loan repayment periods of 20 years for standard loans and 30 years for loans for disadvantaged communities); *see also* EPA, Handbook for Drinking Water State Revolving Fund Programs, n.7 (December 2020) https://www.epa.gov/sites/default/files/2020-12/documents/dwsrf_revised_cfm_handbook_v2_dec_2020_508.pdf (noting that a 2018 Amendment to the SDWA increased the maximum loan period to 40 years).

as 2012.[54] Thus, with the exception of certain Hurricane Katrina effected communities, prior to 2012 the MSDH required an unnecessarily short loan repayment period of 20 years—a decade shorter than the 30 years allowed by Congress for disadvantaged communities.[55] Each of these features of the Mississippi's DWSIRLF program—the disproportionate forgiveness for smaller communities, the unnecessarily short loan terms, and the lack of a disadvantaged community program—made SRF loans unrealistic for Jackson, and thus had an adverse impact on the city and its majority-Black population.

38. With recent federal pandemic aid, the State has, at almost every juncture, made it nearly impossible for Jackson to receive the funding that it should receive based on its size and needs. For example, the State required cities in Mississippi to provide matching funds to receive certain portions of federal pandemic aid. But, because of the longstanding resource constraints placed on Jackson, discussed above, it could not provide matching funds at the level the State required. As a result, Jackson received less funding than it should have received based on its dire need and the relative population.[56] In short, the State has chronically underfunded Jackson for decades, and then deprived Jackson necessary federal funds because of that underfunding.

39. For Infrastructure Investment and Jobs Act allocations, the State again provided for only $500,000 in loan forgiveness and a maximum of $5 million in loans in its drinking water Intended Use Plan.[57] For smaller jurisdictions, the size of these loans may be adequate, and the loan forgiveness may even fully cover the loan. But these limits are plainly insufficient to address the grave problems facing Jackson's system and disparately treat residents who live in an area that is more than twice the population of any other entity in the State. Here again, Jackson—and its majority-Black population—are placed at a structural disadvantage when competing for federal funds.

40. Most recently, the State required Jackson to deposit any additional funds it receives from a state pass-through grant program of American Rescue Plan Act ("ARPA") funds for water and sewer projects, administered by the MSDEQ to accomplish wastewater and drinking water projects, "in the Capital City Water/Sewer Projects Fund of the State Treasury."[58] No other jurisdiction is required to turn over its grant funds to the State, and the Act establishing this requirement does not specify under what circumstances Jackson will be able to access any funds that it might receive from this grant program. This requirement will at best slow Jackson's access to the funds it so desperately needs, and at worst allow the State recipients of federal funding to continue blocking Jackson's access to funding, potentially paving the way for an attempted forced

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[54] *See* Miss. Dep't of Health, 2011 DWSIRLF Annual Report, 13 https://msdh.ms.gov/msdhsite/_static/resources/4685.pdf ("the Board has not implemented a complete disadvantaged communities program").

[55] *Id.* at 78 (noting a 20 year repayment period).

[56] *See* Molly Hennessy-Fiske, *White then Black residents abandoned Jackson, propelling its water crisis*, Wash. Post (Sept. 4, 2022), https://www.washingtonpost.com/nation/2022/09/04/jackson-water-crisis/.

[57] State of Miss. Loc. Gov't's & Rural Water Sys. Improvements Board, Drinking Water Systems Improvements Revolving Loan Fund, Title 33, Part 13 (FY 2022), https://msdh ms.gov/msdhsite/_static/resources/17153.pdf.

[58] *See* Todd A. Price, *State singles out Jackson for extra oversight of its COVID relief funds*, Miss. Clarion Ledger (Apr. 8, 2022), https://www.mississippicir.org/news/state-singles-out-jackson-for-extra-oversight-of-its-covid-relief-funds; S.B. 2822, section 1(10), https://mswaterinfrastructure.com/wp-content/uploads/2022/06/Mississippi-Senate-Bill-2822.pdf.

takeover of Jackson's water facilities.[59] Here again, the State places structural barrier between Jackson and the funds necessary to improve its water system.

41. The cumulative effect of these many instances of discrimination is a further erosion of funding support for Jackson's public water system. Several prominent water users—led by a State entity—have turned to private water supplies, which diminishes Jackson's water use revenues and further undermines confidence in the system.[60]

42. The most recent constraints being imposed by the State, as administered by MSDEQ and other state agencies, are particularly jarring because they are so at odds with Congress's intent to enhance environmental justice, racial, and social equity in passing ARPA and the Infrastructure Investment and Jobs Act. As EPA has explained in its Implementation Memorandum regarding State Revolving Funds:

> A key priority of the Bipartisan Infrastructure Law [also known as the Infrastructure Investment and Jobs Act] is to ensure that disadvantaged communities benefit equitably from this historic investment in water infrastructure. Disadvantaged communities can include those with environmental justice concerns that often are low-income and communities of color. Disadvantaged communities experience, or are at risk of experiencing, disproportionately high exposure to pollution—whether in air, land, or water.
>
> The Bipartisan Infrastructure Law mandates that 49 percent of funds provided through the DWSRF General Supplemental Funding and the DWSRF Lead Service Line Replacement Funding must be provided as grants and forgivable loans to disadvantaged communities. . . . For the CWSRF, the law mandates that 49 percent of funds provided through the CWSRF General Supplemental Funding must be provided as grants and forgivable loans to communities that meet the state's affordability criteria or certain project types, consistent with the Clean Water Act. To accomplish this, states may need to:
>
> - Evaluate and revise, as needed, the DWSRF disadvantaged community definition and CWSRF affordability criteria.
> - Evaluate the SRF priority point system for project ranking commensurate with need.
> - Use technical assistance funding to help disadvantaged communities identify needs and access funding.
> - Engage residents and community stakeholders in disadvantaged communities.[61]

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[59] *See* Wicker Perlis, *Reeves:* "*I don't think it's very likely that the city is going to operate the water system*", Miss. Clarion Ledger (Sept. 15, 2022), https://www.clarionledger.com/story/news/local/2022/09/16/tension-between-city-and-state-rise-to-surface-jackson-mississippi/69497538007/.

[60] *See* Ross Reily, *2010 water crisis sparked Jackson hospitals to take action,* Miss. Clarion Ledger (Sept. 1, 2022), https://www.clarionledger.com/story/news/2022/08/31/2010-water-crisis-sparked-jackson-hospitals-to-take-action/65466395007/.

[61] Memorandum from EPA on Bipartisan Infrastructure Law: State Revolving Funds Implementation Memorandum (Mar. 2022), https://www.epa.gov/system/files/documents/2022-03/bil-srf-memo-fact-sheet-final.pdf.

43. EPA Administrator Regan put it even more succinctly when he called the Bipartisan Infrastructure Law's $75 Million grant to Mississippi "a historic opportunity to correct longstanding environmental and economic injustices."[62] In light of these statements, which confirm that EPA funding is to be used to assist disadvantaged communities like Jackson, the longstanding and continuing hurdles to federal funding created by the State legislature, MSDEQ and MSDH are inexplicable.

C. The Collapse of Jackson's Water Facilities is the Inexorable Result of Mississippi's Discriminatory Underfunding Practices

44. Even under normal circumstances, Jackson's water pipes generate extremely limited water pressure for many residents, and Jackson's water is discolored, smells, and tastes badly.[63] But since at least 2010, when a burst pipe caused a treatment facility to fail, Jackson's residents have experienced almost constant water problems.

45. In recent years, Jackson residents have faced hundreds of notices requiring them to boil their tap water in order to ensure its safety.[64] The water system has repeatedly been found by EPA to be out of compliance for key factors affecting human health, such as lead—all stemming from the range of maintenance and resiliency challenges culminating in the current crisis—including most recently:

- a July 29, 2022 Boil Water Notice;[65]
- a July 19, 2022 Lead and Copper Rule Treatment Violation Notification;[66]
- a June 30, 2021 Administrative Compliance Order on Consent;[67]
- an April 26, 2021 Notice of Noncompliance;[68]
- a May 11, 2020 Notice of Noncompliance;[69] and
- a March 27, 2020 Emergency Administrative Order raising concerns about turbidity levels and possible contaminants such as E. coli and giardia.[70]

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[62] Press Release, EPA, EPA Announces $74,899,000 for Water Infrastructure Projects in Mississippi (Dec. 2, 2021), https://www.epa.gov/newsreleases/epa-announces-74899000-water-infrastructure-projects-mississippi-0.
[63] Ross Adams, *Some Jackson Residents Complain About Smelly Water*, WAPT (Mar. 11, 2021).
[64] *Supra* note 4.
[65] Miss. State Dep't of Health, State-Imposed Boil Water Notice, https://msdh.ms.gov/page/23,24581,148 html (notice lifted on Sept. 15, 2022).
[66] City of Jackson, Miss., Lead and Copper Rule Treatment Technique Violations, July 19, 2022, https://www.jacksonms.gov/documents/surface-water-treatment-rule-violation-failure-to-take-corrective-action-within-required-timeframe/.
[67] City of Jackson, Miss., Administrative Compliance Order on Consent, Docket No. SDWA-04-2020-2301 (June 30, 2021) (attached hereto as Ex. 10); EPA, EPA and the City of Jackson, Mississippi Reach Agreement to Improve Drinking Water and Protect Public Health, (July 1, 2021), https://www.epa.gov/newsreleases/epa-and-city-jackson-mississippi-reach-agreement-improve-drinking-water-and-protect.
[68] Letter from Carol Kemker, Dir. Enf't & Compliance Assurance Div. to Mayor Chokwe A. Lumumba (Apr. 26, 2021) (attached hereto as Ex. 12).
[69] Letter from Carol Kemker, Dir. Enf't & Compliance Assurance Div. to Mayor Chokwe A. Lumumba (May 11, 2020), https://www.epa.gov/system/files/documents/2021-07/may-11-2020-notice-of-noncompliance_jackson.pdf.
[70] Letter from Carol Kemker, Dir. Enf't & Compliance Assurance Div. to Mayor Chokwe A. Lumumba (Mar. 27, 2020) (attached hereto as Ex. 13).

46. Further, there are fundamental doubts about the sufficiency of testing for elevated levels of lead—a known developmental neurotoxin particularly affecting children and developing fetuses, as well as causing a range of other severe adverse health effects. In Mississippi, Black children—like those in Jackson—are twice as likely to be poisoned by lead as white children.[71] Of course, some level of lead poisoning can be attributed to non-drinking water sources, like lead paint in old houses. But the fact that Black children are more likely to be exposed to other lead sources means that marginal increases in drinking water lead are even more likely to result in blood-lead levels in excess of CDC monitoring levels, and therefore drinking water lead exceedances are even more likely to create adverse health consequences for Black children.[72] Against this backdrop, the State system used to monitor violations of state, local, or federal drinking water regulations currently lists some 14 "group" and 39 "individual" violations of water quality regulations in the city of Jackson.[73] Many of those are specifically for lead rule violations.

47. Jackson's water crisis became even more dire in August of this year, when flooding overwhelmed Jackson's broken water facilities and deprived approximately 150,000 people of access to running water and resulted in sewage pollution in area waterways. The lack of water and unsanitary conditions forced schools and local businesses to close in Jackson; it put residents at risk of fire and affected patient care at certain medical facilities.[74] Without access to running water, many of Jackson's residents resorted to "catching rainwater to flush their toilets and even to brush their teeth with it. And some said they tried to bathe their children in the brown water that came out of their faucets."[75] Still other Jackson residents have relied on costly bottled water for years to protect their health.[76] Wastewater on the scale of tens of millions of gallons entered the

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[71] Erica Hensley, *How many Mississippi kids are poisoned by lead? Massive undercounts, inconsistent testing provides officials few answers*, Mississippi Today (July 24, 2020), https://mississippitoday.org/2020/07/24/how-many-mississippi-kids-are-poisoned-by-lead-massive-undercounts-inconsistent-testing-provides-officials-few-answers/.

[72] Abt Assocs., *Environmental Justice Analysis for the Proposed Lead and Copper Rule Revisions*, Docket No. EPA-HQ-OW-2017-0300-0008, 5-6 (2019), https://www.regulations.gov/document/EPA-HQ-OW-2017-0300-0008; *see* Declaration Of Public Health Experts David Bellinger, PhD, MSc; Hilary Godwin, PhD; Dr. Lynn R. Goldman, MD, MS, MPH; Charles Haas, PhD; Richard J. Jackson, MD, MPH; Bruce Lanphear, MD, MPH; Thomas A. LaVeist, PhD; Janet A. Phoenix, MD, MPH; And Joan B. Rose, PhD In Support Of Title VI Complaint, attached as Ex. 1.

[73] Mississippi.gov, Mississippi Drinking Water Branch, Violation, https://apps.msdh.ms.gov/DWW/JSP/Violations.jsp?tinwsys_is_number=317&tinwsys_st_code=MS (last visited Sept. 23, 2022).

[74] Mackenzie Bean, *How hospitals are responding to the water crisis in Mississippi*, Becker's Hospital Review (Aug. 31, 2022), https://www.beckershospitalreview.com/care-coordination/how-hospitals-are-responding-to-the-water-crisis-in-mississippi html. To keep schools open, some school teachers and administrators dedicated time and resources to building contingency plans for flushing toilets during times of low water pressure, rather than dedicating their attention to educating students. *See* Testimony of Abre' Conner, United States House of Representatives Committee on Homeland Security Hearing: "Critical Infrastructure Preparedness and Resilience: A Focus on Water," (September 21, 2022), https://homeland.house.gov/imo/media/doc/conner_testimony_full_092122.pdf.

[75] Theresa Waldrop, *What it's like trying to survive without water in Jackson, Mississippi*, CNN (Aug. 31, 2022), https://www.cnn.com/2022/08/30/us/jackson-mississippi-water-crisis-effects/index.html.

[76] *See* Testimony of Abre' Conner, United States House of Representatives Committee on Homeland Security Hearing: "Critical Infrastructure Preparedness and Resilience: A Focus on Water," (September 21, 2022), https://homeland.house.gov/imo/media/doc/conner_testimony_full_092122.pdf.

waterways untreated.[77] This most recent crisis, like the earlier water treatment failures and the hundreds of boil-water notices, was a direct result of chronic underfunding by the state legislature, MSDEQ, and MSDH, of Mississippi's largest city, which is more than 80% Black.

48. Moreover, the condition of Jackson's drinking water system increases a range of profound and disparate adverse health outcomes and puts Jackson's residents at even greater risk.[78] Renowned public health experts -- from a wide variety of relevant disciplines who are leaders in the fields of children's environmental health, lead poisoning, microbial contamination, and race-based disparate health effects, many of whom hold prominent positions as Deans or on the faculty of leading academic institutions and are members of the National Academies of Medicine and Engineering -- all have joined to recognize, in their expert opinions, the tremendous and disparate health risks caused by a lack of basic safe water access for sanitation and hydration, continuing system-wide contamination, and the repeated water quality standards violations in Jackson. Moreover, these drinking water system fragilities compound other health-related challenges facing Jackson' Black residents. According to the public health experts, the extraordinary number of boil water notices in Jackson's drinking water system is indicative of a deeply troubled treatment and distribution facilities, and the constant water pipe breaks likely indicate the leakage of contaminants into the treatment system on a continual basis.[79]

49. Contaminated drinking water, such as that in Jackson, contributes to higher rates and more severe incidences of illness and disease in Jackson than in other areas with better overall health baselines, according to these leading public health experts.[80] Jackson residents also face greater lasting stress and mental health challenges resulting from these incidents.[81] The frequency of the water system's repeated violations indicates the direct harms suffered by Jackson's residents, as well as the imperative that should have governed facially non-discriminatory funding decisions.

IV. Title VI Violations

50. The NAACP, the Mississippi State Conference of the NAACP, and Jackson residents [redacted] submit this Complaint against the Governor of Mississippi, the Office of the State Treasurer, MSDH, and MSDEQ, and MSDFA for their separate and collective violations of Title VI and its implementing regulations.

51. The State's decades-long pattern and practice of discriminating against and underserving the people of Jackson, Mississippi—by disinvesting in the City's infrastructure and refusing to fund critical repairs to the system as compared to other areas in the State—violates Title VI and the EPA's implementing regulations, which prohibit federal-funding recipients from

[77] *See* Committee on Homeland Security, Hearing Statement of Chairman Bennie G. Thompson (D-MS), Critical Infrastructure Preparedness and Resilience: A Focus on Water (Sept. 21, 2022), https://homeland.house.gov/imo/media/doc/bgt_opening_statement_full_092122.pdf.
[78] Declaration of Public Health Experts, *supra*.
[79] Declaration of Public Health Experts at para. 14.
[80] *Id.* at para. 18.
[81] *Id.* at para. 23.

discriminating against, or engaging in behavior that disproportionately harms, protected groups. 42 U.S.C. §2000d to 2000d-7; 40 C.F.R. § 7. The treatment of Jackson and its residents—including the State's most recent decision to further burden Jackson's access to federal funding—violate Title VI's protections because they evince a discriminatory intent and have a demonstrable disparate impact on Jackson's predominantly Black population. There can be no justification for such treatment, and there are certainly less discriminatory alternatives available to the State.

A. Legal Background.

52. Title VI of the Civil Rights Act of 1964 prohibits recipients of federal funds from discriminating against individuals on the basis of race, color, or national origin, and provides that "[n]o 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." 42 U.S.C. § 2000d. Title VI applies to all programs and activities receiving federal financial assistance.

53. EPA regulations implementing Title VI make plain that:

> A recipient shall not use criteria or methods of administering its program or activity which *have the effect* of subjecting individuals to discrimination because of their race, color, national origin, or sex, or *have the effect* of defeating or substantially impairing accomplishment of the objectives of the program or activity with respect to individuals of a particular race, color, national origin, or sex.[82]

This language "clearly incorporates a discriminatory effect standard." *Chester Residents Concerned for Quality Living v. Seif*, 132 F.3d 925, 929 (3d Cir. 1997), *vacated on other grounds*, 524 U.S. 974 (1998).

54. To establish an adverse disparate impact, EPA must determine (1) whether the alleged impact is adverse; (2) whether the alleged adversity imposes a disparate impact on an individual or group protected under Title VI; and (3) whether a causal connection exists between the recipient's facially neutral action or practice and the allegedly adverse disparate impact.[83] If EPA finds that a *prima facie* case exists, "the defendant then must prove that there exists a substantial legitimate justification for the challenged practice in order to avoid liability. . . . If the defendant carries this rebuttal burden, the plaintiff will still prevail if able to show that there exists a comparably effective alternative practice which would result in less disproportionality, or that the defendant's proffered justification is a pretext for discrimination." [84]

B. Mississippi's Pattern and Practice of Depriving Jackson and its Residents of Critical Funding for Water Treatment Demonstrates Disparate Effects, and Indicates Racist Intent.

[82] 40 C.F.R. §7.35(b) (emphasis added).
[83] *See N.Y. City Env't Just. All. v. Giuliani*, 214 F.3d 65, 69 (2d Cir. 2000).
[84] *Elston v. Talladega Cnty. Bd. of Educ.*, 997 F.2d 1394, 1407 (11th Cir. 1993).

55. As described, the State and its agencies have systematically deprived Jackson of vital funding and support for its water systems. The State's insistence on limiting the resources available to Jackson, even in the face of the degradation of Jackson's water systems and the disastrous public health and well-being impacts, demonstrates that "a discriminatory purpose has been a motivating factor in the decision[s]" not to allocate necessary resources to Jackson's water system.[85]

56. As *Arlington Heights* established, a number of factors may serve as "evidentiary source[s]" of discriminatory purpose or intent behind decisions or actions that are facially neutral.[86] These factors include "[t]he impact of the official action" and "whether it bears more heavily on one race than another"; the existence of a "clear pattern, unexplainable on grounds other than race"; "the historical background of the decision"; and substantive and procedural departures from normal decision-making; and any indications in the legislative or administrative record of invidious purpose.[87]

57. All of these factors are present in the case of the State's actions to systematically deprive Jackson of the resources it needs to restore and operate its water facilities and of the Federal funding that has been made available to the State. Most importantly, there is a heavy disparate burden, and the State's clear pattern of action leaves no doubt that its most recent decision to underfund Jackson's water system is the product of animus and not justifiable policy choices. As discussed further below, the decision to limit Jackson's access to EPA-funded drinking and wastewater infrastructure benefits—and the years of decisions to prevent Jackson from accessing funds—has a stark disproportionate impact; more than 80% of Jackson's population is Black, and it is these residents who disproportionately suffer the devastating effects of the State's allocation of resources away from Jackson and toward locales with less need and a lower percentage of Black residents.

58. In the same vein, the State's most recent decision to limit Jackson's access to federal funding is not an isolated example—instead, the State has so consistently excluded Jackson from or limited funding opportunities as to demonstrate a "clear pattern, unexplainable on grounds other than race." As noted, the State's conscious and determined neglect of Jackson's water facilities—and the results that neglect has caused—closely resembles the pattern of action that *Town of Shaw* concluded "was . . . neglect involving clear overtones of racial discrimination in the administration of governmental affairs of the town of Shaw resulting in the same evils which characterize an intentional and purposeful disregard of the principle of equal protection of the laws."[88] Likewise, *Gomillion v. Lightfoot* is the paradigmatic example of a clear pattern of action that gives rise to an inference of improper motive.[89] In that case, Alabama gerrymandered Tuskegee to "remove from the city all save four or five of its 400 Negro voters while not removing a single white voter or resident."[90] Just as surely as Alabama's gerrymandering created an inference of racial motive, Mississippi's underfunding of Jackson's water system (and the Black

[85] *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265–66 (1977).

[86] *Id*. at 267.

[87] *Id*. at 266–68 (citations and internal quotation marks omitted).

[88] *Town of Shaw, Miss*, 461 F.2d at 1173.

[89] *Gomillion v. Lightfoot* 364 U.S. 339 (1960).

[90] *Id*. at 341.

residents that system serves) creates the very same inference. At every turn, the State has either explicitly deprived Jackson of funds or structured the allocation process to ensure that Jackson does not receive funds.

59. The additional *Arlington Heights* factors also point toward the discriminatory purpose that lies beneath the State's decision to starve Jackson's water system of funds. As described, the State has historically sought to deprive Jackson of funds; one part of the story of Jackson and its residents is the State's effort to use *de facto* segregation to consolidate the effects of *de jure* segregation, including with respect to Jackson's water system.[91] What's more, the State has singled Jackson out for unusual procedural and substantive treatment. As described, Jackson is the only jurisdiction subject to the State's requirement that any additional ARPA grant funding it receives be kept in an account maintained by the State Treasury. And, rather than provide funding opportunities that would allow Jackson access to adequate grants on a per capita basis, the State has consistently imposed restrictions that ensure that Jackson at best receives the same amount of funds as other much smaller and much less desperate towns and cities. Further, the terms of the State's rotating loans—with shorter loan terms and a forgiveness cap of $500,000—are structured to have a disparate impact on a community of Jackson's size and socioeconomic profile.

C. Mississippi's Pattern and Practice of Depriving Jackson and its Residents of Critical Funding for Water Treatment Has Had a Clear Disparate Impact on a Protected Group.

60. As EPA's Title VI implementing regulations make clear, funding recipients "shall not use criteria or methods of administering its program or activity which have the effect of subjecting individuals to discrimination because of their race, color, national origin, or sex, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program or activity with respect to individuals of a particular race, color, national origin, or sex."[92] To establish a prima facie case of disparate impact under the EPA's Title VI implementing regulations, the EPA must "(1) identify the specific policy or practice at issue; (2) establish adversity/harm; (3) establish disparity; and (4) establish causation."[93] Once these elements are satisfied, under the standard burden-shifting for disparate impact, the EPA considers "whether the recipient has articulated a 'substantial legitimate justification' for the challenged policy or practice."[94] And, if a recipient shows a "substantial legitimate justification," the EPA must determine whether there are less discriminatory alternatives.

61. Each of the elements necessary to make out a prima facie case is present here. The State and its agencies—namely MSDH, MSDEQ, and MSDFA—have engaged in a pattern and

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[91] *See Keyes v. Sch. Dist. No. 1, Denver, Colo.*, 413 U.S. 189, 207 (1973) (describing the "well-settled evidentiary principle that the 'prior doing of other similar acts, whether clearly a part of a scheme or not, is useful as reducing the possibility that the act in question was done with innocent intent'").

[92] 40 C.F.R. 7.35(b).

[93] EPA, U.S. EPA's External Civil Rights Compliance Office Compliance Toolkit at 8 (Jan. 18, 2017) (internal citations omitted), https://www.epa.gov/sites/default/files/2017-01/documents/toolkit-chapter1-transmittal_letter-faqs.pdf.

[94] *Id.* at 9.

practice of underfunding Jackson and its water facilities and ignoring the dire circumstances faced by its residents. As the State has deprived Jackson access to funds, Jackson's water system has degraded. That degradation has disproportionately been suffered by Jackson's predominantly Black population, forcing most to use unsafe and unhealthy water and cutting many off entirely from running water for long periods of time. Finally, the State's practice of misusing and denying funding has caused the degradation of Jackson's water facilities and the disparate impact on Jackson's predominantly Black population.

62. As a basic matter, there is no legitimate question regarding disparity. In order for there to be a disparate impact, EPA must "[c]onduct an analysis to determine whether a disparity exists between the affected population and an appropriate *comparison population* in terms of race, color, or national origin, and adverse impact."[95] Here, the population of Jackson is 82.5% Black.[96] The State's population as whole is 36.6 percent African American. Thus, any differential funding perpetuated by the State will result in profoundly different racial impacts. Moreover, the significant and regular funding made available to water systems with a greater proportion of white residents and to smaller systems than Jackson demonstrates these impacts.[97]

63. As mentioned above, Jackson has received state revolving loans from the MSDH in three years of the program's 25-year history. Compare that result with the success of the Bear Creek Water Authority, for example, which serves rural areas in the majority-white Madison County. Bear Creek, with its customer base of 40,000 customers, received rotating water funds in *nine* of the last 25 years, starting at the very inception of the program: 1997, 2001, 2002, 2003, 2004, 2005 (in which it received three grants), 2015, 2016, and 2018.[98] No surprise, then, that Bear Creek was awarded the Mississippi Water Distribution System of the Year for 2015, 2016, 2017, 2018, 2019, 2020, 2021, and 2022 by the Alabama/Mississippi Section of the American Water Works Association,[99] while Jackson's water system degraded to the point of multiple catastrophic failures.

64. As the frequency and intensity of storm-related events increase with climate change, Jackson's crumbling drinking water infrastructure will continue to have an even harder time staying operational and providing safe water.[100] The recent Pearl River flooding tipped the scale of what the water treatment system could handle and is an example of what Jackson's future increasingly holds without robust corrective measures to enhance its resilience. These impacts are disparate, as other systems have been provided with funding to maintain or enhance

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[95] 65 Fed. Reg. at 39,677.

[96] *Compare* U.S. Census, Bureau, Mississippi: 2020 Census, (Aug. 25, 2021), https://www.census.gov/library/stories/state-by-state/mississippi-population-change-between-census-decade.html, *with* U.S. Census Bureau QuickFacts: Jackson city, Mississippi, https://www.census.gov/quickfacts/jacksoncitymississippi (last visited Sept. 23, 2022).

[97] Furthermore, given Jackson's high level of poverty, other public water systems in the State can sustain ratepayer increases for repairs and maintenance more readily than can Jackson's—a factor ignored in the State's drinking water revolving loan fund priority ranking system that further exacerbates these profound adverse impacts.

[98] *See* Miss. Dep't of Health, Mississippi State Department of Health DWSIRLF Annual Reports, https://msdh.ms.gov/msdhsite/_static/44,0,127,63 html (note: reports date back to 2008, but grants prior to 2008 can be found in the 2008 report).

[99] Bear Creek Water Assoc., About Us, (2022), https://www.bcwaterms.org/about.

[100] Christopher Flavelle, et al., *Mississippi Crisis Highlights Climate Threat to Drinking Water Nationwide*, N.Y. Times (Sept. 4, 2022), https://www.nytimes.com/2022/09/01/us/mississippi-water-climate-change.html.

their resiliency, with consequences that are increasingly dire in the face of a changing climate. As Chairman Thompson recognized in his recent hearing on these challenges:

> many areas around the country have suffered from disinvestment and struggle with aging infrastructure, particularly in communities of color and low-income areas . . . . To make matters worse, infrastructure investments and disaster assistance are often directed to areas that already have more resources rather than those that desperately need it. I have seen this time and time again as these dollars are steered away from communities like those I represent. Clearly, FEMA and its partners must do a better job of ensuring States provide Federal funding to those communities most in need.[101]

65. We appreciate that EPA's Inspector General has recently announced that it is initiating an investigation into the water emergency in Jackson.[102] However, this does not obviate the need for or responsibility that EPA has to examine the State's compliance with the civil rights laws, in keeping with the commitment made by EPA with the creation of the new Office of Environmental Justice and External Civil Rights.

66. Whether the vast funding disparities outlined in this Complaint reflect a fundamental antipathy toward the people of Jackson by State officials (as perhaps evidenced by the Governor's recent statement, upon lifting the most recent boil water notice that "It's . . . *as always*, a great day *not* to be in Jackson"[103]), or mere neglect and its resulting disparate effects, either way the disparities and impacts upon Jackson's Black population have been egregious and shocking. Clean and safe drinking water—a basic human right—has repeatedly been denied. Human lives have been at risk. Without water, it has been impossible to fight fires. Children are at greater risk for lead poisoning and the resulting side effects. Residents with limited mobility, particularly the elderly and disabled, have been unable to obtain the water they need. Those with health issues or vulnerabilities— such as the immunocompromised or infants and children—are at risk of greater disease and illness. And everyday life has been upended, from schools to work places. This crisis cries out for rapid and decisive federal action.

D. Relief Requested

67. Complainants respectfully request that the Environmental Protection Agency:

(a) Immediately accept this Complaint for investigation.

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[101] *See* Critical Infrastructure Preparedness and Resilience: A Focus on Water: Before the Comm. on Homeland Sec., (Sept. 21, 2022) (Statement of Chairman Bennie G. Thompson (D-MS)). https://homeland.house.gov/imo/media/doc/bgt_opening_statement_full_092122.pdf.

[102] EPA Inspector General, Notification: Inquiry into Jackson, Mississippi, Drinking Water Emergency (Sept. 13, 2022), https://www.epa.gov/system/files/documents/2022-.09/Certified_Notification%20Memo%20Jackson%20Miss-FINAL_NNMsignature.pdf.

[103] Anthony Warren, *Gov. Reeves tells Hattiesburg audience it's 'great day to not be in Jackson'*, WLBT (Sept. 16, 2022) (emphasis added).

(b) Undertake a thorough investigation of the State's discriminatory actions and issue a formal Notice of Noncompliance.

(c) Compel compliance with Title VI of the Civil Rights Act through equitable funding allocations to address the Jackson Water Crisis and protect its residents.

(d) Require the State to develop procedures to assure the consideration and documentation of racial equity issues in its federal funding determinations.

(e) Refer these matters to the U.S. Department of Justice for further enforcement.

(f) Consider mandating restitution for the citizens of Jackson.

(g) Conduct regular periodic broader compliance reviews of the State's programs, pursuant to 7 C.F.R. § 7.115(a); and

(h) Evaluate the range of approaches available, pursuant to 40 C.F.R. Part 142, to oversee and ensure the legal sufficiency of Mississippi's continuing primacy in administration of the Safe Drinking Water Act.

We appreciate your prompt and thorough consideration of this Complaint.

Respectfully submitted,

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