

**BEFORE THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

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By Email to Title_VI_Complaints@epa.gov and By Certified Mail

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(b)(6) Privacy, (b)(7)(C) Enf. Privacy

Complainants,

-vs-

CITY OF ALBUQUERQUE, NEW MEXICO,
and
CITY OF ALBUQUERQUE CITY COUNCIL.
Respondents.

COMPLAINT UNDER TITLE VI OF THE CIVIL RIGHTS ACT OF 1964,
42 U.S.C. §§ 2000d and 40 C.F.R. Part 7

I. INTRODUCTION

For decades, industries and local governments have intentionally designated communities of color and low-income communities in Albuquerque and Bernalillo County, New Mexico, as sacrificial zones for pollution through their permitting practices and policy decisions, with more industrial sites located in and adjacent to these neighborhoods than in predominantly white, more affluent communities.¹ Albuquerque's communities of color and low-income communities are exposed to higher concentrations of environmental toxins and pollutants than white, more affluent communities, contributing to higher rates of cancer, heart disease, respiratory-related illnesses, and other diseases as they disproportionately bear the adverse health impacts of pollution.² In an effort to address this ongoing and systemic issue, and protect their communities from further bearing this disproportionate burden, community residents belonging to the

(b)(6) Privacy, (b)(7)(C) Enf. Privacy

(hereinafter, "Complainants"), petitioned the joint City of Albuquerque-Bernalillo

¹ See Joint Center for Political and Economic Studies, *Place Matters for Health in Bernalillo County: Ensuring Opportunities for Good Health for All* (Sept. 2012) at 16-19, <https://www.nationalcollaborative.org/wp-content/uploads/2016/02/PLACE-MATTERS-for-Health-in-Bernalillo-County.pdf>; see Complaint by (b)(6) Privacy, Complainant, to EPA at 4-6 (Sept. 15, 2014) [hereinafter 2014 Complaint] (discussing various construction and air quality permits issued in Albuquerque's low-income communities of color); see also Gabriel Pacyniak et. al., *Climate, Health, and Equity Implications of Large Facility Pollution Sources in New Mexico*, University of New Mexico & PSE Health Energy, at 55 (Feb. 2023), https://www.psehealthyenergy.org/wp-content/uploads/2023/02/FINAL_Climate-Health-and-Equity-Implications-of-Large-Facility-Pollution-Sources-in-NM.pdf (noting the location of most Albuquerque pollution sources are within low-income communities); see also Tina Deines, *In Albuquerque, a Pollution Problem All Too Familiar to Communities of Color*, Bitterroot Magazine (May 31, 2019), (<https://bitterrootmag.com/2019/05/31/in-albuquerque-a-pollution-problem-all-too-familiar-to-communities-of-color/>) (detailing the intentional placement of pollution facilities in and near communities of color in Albuquerque, specifically noting that even two major federally-designated Superfund sites exist within a 2.5 square-mile neighborhood).

² See *id.*; see also Austin Fisher, *Albuquerque Plastic Fire Gives Air Regulators Opportunity 'to Make the Right Decision,'* SourceNM (Aug. 17, 2023), <https://sourcenm.com/2023/08/17/albuquerque-plastic-fire-gives-air-regulators-this-moment-in-history-to-make-the-right-decision/#:~:text=The%20Mountain%20View%20neighborhood%20and,facilities%2C%20and%20the%20sewage%20plant.>

County Air Quality Control Board for a rulemaking to adopt a rule designed to require the local Environmental Health Department to consider these overburdened communities, and the disproportionate health impacts they bear, when reviewing an application for an air pollution permit. This proposed rule, known as the Health, Environment, and Equity Impacts Rule (hereinafter, “HEEI Rule”), was a community-led effort that culminated from decades of community organizing and advocacy by Albuquerque’s communities of color, low-income communities, and communities that historically and continually bear the disproportionate burdens of air pollution.

As detailed throughout this Complaint, the City of Albuquerque and its City Council intentionally interfered with the HEEI Rule rulemaking efforts both leading up to and during the HEEI Rule’s Rulemaking Proceeding. The City Council’s actions, including the use and abuse of its legislative powers through the City’s resources and funds, were motivated by the City’s intent to halt the Rulemaking Proceeding and communities of color-led rulemaking efforts completely – violating Complainants’ rights to meaningfully participate in and have access to the rulemaking process, discouraging public participation in and advocacy for local regulation, and ultimately, discriminating against Complainants on the basis of race, color, and national origin.

Title VI of the Civil Rights Act of 1964, 42. U.S.C. §§ 2000d *et. seq.* and the United States Environmental Protection Agency’s (“EPA”) implementing regulations (hereinafter, “Title VI”) strictly prohibit entities receiving federal financial assistance from engaging in activities that subject individuals to discrimination on the basis of race, color, and national origin, which includes the deterrence and exclusion of individuals from meaningfully participating in and having access to public processes, like a public rulemaking process.³ Accordingly, for the

³ Title VI of the Civil Rights Act of 1964, 42. U.S.C. §§ 2000d; 40 C.F.R. § 7.30; *see* Executive Order 12898 (Feb. 11, 1994).

reasons described below, Complainants respectfully request that EPA promptly and comprehensively investigate whether the City of Albuquerque and its City Council are in compliance with Title VI based on the discriminatory acts that occurred throughout the community-led rulemaking efforts. Moreover, Complainants respectfully request EPA take all actions necessary to ensure the City of Albuquerque and its City Council's compliance with Title VI, including the specific relief requested within this Complaint. EPA's authority to hold the City of Albuquerque and its City Council accountable for its intentionally discriminatory acts, and to bring these entities into compliance with federal anti-discrimination laws, is particularly significant when viewed in the larger scheme of foreseeable, longstanding impacts of the City and its City Council's discriminatory acts: if EPA does not hold these entities accountable and bring them into compliance with Title VI, instead allowing a local government to abuse its power, authority, and resources to discriminatorily interfere in a community-led rulemaking effort – especially when such rulemaking efforts are led by low-income communities of color seeking to remedy past and ongoing discrimination on the basis of race, color, and national origin – the City will ultimately be allowed to perpetuate and uphold a discriminatory barrier to the public participation process for communities of color and low-income communities in the City of Albuquerque, New Mexico.

II. THE COMPLAINANTS

EPA's Title VI implementing regulations permit any person "who believes that he or she or a specific class of persons has been discriminated against in violation of" Title VI and EPA's implementing regulations to file a complaint.⁴ The complaint may be filed by an authorized representative.⁵

⁴ 40 C.F.R. § 7.120(a).

⁵ *Id.*

Complainants in this instance are the (b)(6) Privacy, (b)(7)(C) Enf. Privacy

Complainants represent the Mountain View residential community consisting of approximately 6,000 residents, adjacent to the Rio Grande River and located in the South Valley of Albuquerque in Bernalillo County, New Mexico.⁶ The residents are predominantly Hispanic and working-class to low-income.⁷ According to EPA's EJScreen, the South Valley is ranked within the 80th to 95th percentile both nationwide and statewide for residents identifying as people of color and residents with limited English proficiency.⁸

The Mountain View community has borne the disproportionate share of toxic and hazardous contamination and pollution for decades due to the intentional placement of several major polluting sources in and around the community.⁹ Several oil terminals, scrap yards, chemical storage facilities, the municipal sewage plant, as well as two Superfund sites, are located within the Mountain View community and larger South Valley area, while the community is also located downwind from the Kirtland Air Force Base, Sandia National Lab, and the Albuquerque International Sunport airport.¹⁰ The placement of these various pollution sources in and around the community has resulted in extreme health disparities in Mountain View, including high levels of asthma, cancer, heart disease, and other health issues among residents – with the Centers for Disease Control and Prevention (“CDC”) ranking the community region in the top percentiles

⁶ *Mountain View is City's Industrial Sacrificial Zone*, ABQ Journal (June 28, 2021), https://www.abqjournal.com/news/mountain-view-is-citys-industrial-sacrifice-zone/article_fea747ab-0525-51cf-bda8-5c4fd74c0f7e.html.

⁷ *Id.*; see also *87105 Demographics Summary*, New Mexico Demographics, [https://www.newmexico-demographics.com/87105-demographics#:~:text=The%20largest%2087105%20racial%2Fethnic,and%20American%20Indian%20\(4.0%25\)\(last%20visited%20Feb.%206,%202024\)\(listing%2079.9%20of%20residents%20in%20the%2087105-area%20code%20as%20Hispanic,%20and%20the%20median%20household%20income%20of%20the%20community%20at%20\\$46,124\).](https://www.newmexico-demographics.com/87105-demographics#:~:text=The%20largest%2087105%20racial%2Fethnic,and%20American%20Indian%20(4.0%25)(last%20visited%20Feb.%206,%202024)(listing%2079.9%20of%20residents%20in%20the%2087105-area%20code%20as%20Hispanic,%20and%20the%20median%20household%20income%20of%20the%20community%20at%20$46,124).)

⁸ See *(87105) Albuquerque, New Mexico*, EPA's Environmental Justice Screening and Mapping Tool (Version 2.2), <https://ejscreen.epa.gov/mapper/> (last visited March 13, 2024) [hereinafter *Albuquerque EJScreen*].

⁹ *Mountain View is City's Industrial Sacrificial Zone*, *supra* note 6.

¹⁰ See Fischer, *supra* note 2.

nationwide in its Environmental Justice Index, Social Vulnerability, and Environmental Burden ranks.¹¹ As a result, on average, Mountain View residents have a 10- to 24-year shorter life expectancy than more affluent, predominantly white communities in Albuquerque.¹²

Complainants have collectively worked to address this systemic discrimination impacting their communities through numerous community organizing efforts, media and public outreach, and regulatory proposals, including the proposed HEEI Rule that spurred the discriminatory acts by the City of Albuquerque and Albuquerque City Council that are the subject of and detailed throughout this Complaint. Accordingly, the New Mexico Environmental Law Center (“NMELC”), as the Complainants’ authorized representative, files this Title VI Complaint.

III. JURISDICTION

Title VI charges EPA with the responsibility of ensuring that its funds are not used to subsidize discrimination based on race, color, or national origin.¹³ Any person may file administrative complaints that allege discrimination based on race, color, or national origin with the federal departments and agencies that provide financial assistance from federal funds.¹⁴

EPA has identified four jurisdictional requirements to accepting a complaint for investigation under Title VI: (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.¹⁵ Once a complaint is accepted, EPA’s External Civil Rights

¹¹ See *Census Tract 40.01, Bernalillo County, New Mexico*, Centers for Disease and Control Prevention EJI Index, <https://onemap.cdc.gov/portal/apps/sites/#/eji-explorer> (last visited March 13, 2024) [hereinafter CDC EJI]; see also *Albuquerque EJScreen*, *supra* note 8; see also Fischer, *supra* note 2.

¹² *Mountain View is City’s Industrial Sacrificial Zone*, *supra* note 6.

¹³ *Title VI and Environmental Justice*, EPA, <https://www.epa.gov/environmentaljustice/title-vi-and-environmental-justice> (last updated Feb. 1, 2023).

¹⁴ See 42 U.S.C § 2000d; 28 C.F.R. § 42.408.

¹⁵ 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 [hereinafter Case Resolution Manual].

Compliance Office (“ECRCO”) has the jurisdiction to investigate the allegations in the complaint.¹⁶

This Complaint satisfies all four jurisdictional requirements. Complainants allege that the City of Albuquerque and its City Council intentionally discriminated against them on the basis of race, color, and national origin through these recipients’ illegal and intentional discriminatory interference with a community-led rulemaking petition that sought to address the disproportionate impacts of air pollution borne by communities of color and low-income communities in the city of Albuquerque and Bernalillo County. Complainants, through this Complaint, further identify the repeated and ongoing violations by the City through its use and abuse of the City Council’s legislative powers, federal funds and resources to intentionally interfere with low-income communities of color’s right to petition the government and to disrupt community-led efforts to meaningfully regulate air pollution, thereby effectively discriminating on the basis of race, color, and national origin in violation of Title VI.

The City of Albuquerque is a recipient of federal financial assistance, as defined under EPA’s Title VI regulations.¹⁷ The City of Albuquerque City Council is also a recipient, for purposes of Title VI, because recipients include secondary or subrecipients that receive federal funding indirectly through another entity, and the City Council receives, and is responsible for, the City of Albuquerque’s funds.¹⁸ Moreover, the legislative history of Title VI indicates that Congress

¹⁶ 42 U.S.C. §§ 2000d *et seq.*, 40 C.F.R. § 7.

¹⁷ Under the EPA’s Title VI regulations, a “[r]ecipient” is “any State or its political subdivision, any instrumentality of a State or its political subdivision, [and] any public or private agency... to which Federal financial assistance is extended directly or through another recipient . . .” 40 C.F.R. § 7.25. “EPA assistance” is “any grant or cooperative agreement, loan, contract . . . , or any other arrangement by which EPA provides or otherwise makes available assistance in the form of funds.” *Id.*

¹⁸ See Civil Rights Division, U.S. Dept. of Justice, Title VI Legal Manual at Section V, p.14, <https://www.justice.gov/crt/book/file/1364106/download> [hereinafter Title VI Legal Manual]; see Exhibit 1 [Final Version of City Council Resolution] and Section IV.4 of this Complaint for discussion of the City Council’s use of authority to distribute, use, and withdraw City of Albuquerque federal funds.

intended a “broad application” of Title VI to local governments and their entities.¹⁹ In FY 2023, the City of Albuquerque received \$2,196,822 in federal funding from EPA.²⁰ This includes the ongoing provision of grants, well over a million dollars, “to provide assistance to [the] City of Albuquerque in its efforts to implement air pollution control programs throughout the City of Albuquerque.”²¹ Further, the City of Albuquerque continues to receive federal grants from EPA into this current fiscal year to “improve and maintain the public’s air quality” and address the cumulative impacts of air pollution, with the “intended,” “direct beneficiaries” to be the “residents of Albuquerque” and “state residents who will have decreased risk of adverse health effects, including cancer and neurological effects” from particulate matter pollution.²²

Finally, this Complaint is timely because it has been filed within 180 days of the alleged discriminatory acts, and the discriminatory acts by the City of Albuquerque and its City Council are ongoing as of the date of this Complaint’s filing. The first alleged discriminatory act occurred on October 16, 2023, when City Councilor Dan Lewis formally introduced to the City Council two pieces of legislation intended to disrupt the Albuquerque-Bernalillo County Air Quality Control Board’s (hereinafter, “Air Board”) rulemaking abilities and dissolve the current Air Board, and halt the ongoing public rulemaking process initiated by Complainants.²³ The

¹⁹ See Title VI Legal Manual *supra* note 18, at Sec. V, p. 24 (quoting S. Rep. No. 100-64, at 16 (1988), reprinted in 1988 U.S.C.A.N. 18 (“[W]hen any part of a state or local government department or agency is extended federal financial assistance, the entire agency or department is covered. If a unit of a state or local government is extended federal aid and distributes such aid to another governmental entity, all of the operations of the entity which distributes the funds and all of the operations of the department or agency to which the funds are distributed are covered”)).

²⁰ See City of Albuquerque and the Environmental Protection Agency (EPA), USA Spending, <https://www.usaspending.gov/search/?hash=ef0ea73ad44389d19d5856069df90132> (last visited Feb. 20, 2024).

²¹ See Grant Summary FAIN 00615822, https://www.usaspending.gov/award/ASST_NON_00615822_6800 (last visited Feb. 20, 2024).

²² See Grant Summary, FAIN 02F66201, https://www.usaspending.gov/award/ASST_NON_02F66201_6800 (last visited Feb. 20, 2024); see also Grant Summary, FAIN 01F98001, https://www.usaspending.gov/award/ASST_NON_01F98001_6800 (last visited Feb. 20, 2024).

²³ See *City Councilor Dan Lewis Introducing Legislation to Create New Air Quality Control Board*, Albuquerque City Council (October 13, 2023), <https://www.cabq.gov/council/find-your-councilor/district-5/news/city-councilor-dan-lewis-introducing-legislation-to-create-new-air-quality-control-board>.

discriminatory acts associated with the two pieces of legislation continued throughout November and December 2023, as the City Council formally passed the legislation on November 8, 2023, and on December 4, 2023, overrode the City of Albuquerque Mayor's vetoes of the legislation.²⁴ Discriminatory acts associated with the City Council's legislation became even more formalized, at latest, on December 15, 2023, and December 20, 2023, when the City of Albuquerque published the Ordinance, which was slated to go into effect five days after publication.²⁵ The discriminatory acts by the City of Albuquerque and City Council remain ongoing, with the entities' current involvement in litigation defending the legitimacy of the discriminatory legislation.²⁶ Therefore, because this written Complaint is timely and alleges discriminatory acts on the basis of race, color, and national origin by recipients of EPA financial assistance, this Complaint meets the EPA's jurisdictional prerequisites and ECRCO has the jurisdiction to investigate this Complaint.

IV. DISCRIMINATORY ACTS & TITLE VI VIOLATIONS

Title VI 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

²⁴ See *City Council Overrides Mayor's Vetoes*, Albuquerque City Council (Dec. 4, 2023), <https://www.cabq.gov/council/find-your-councilor/district-5/news/city-council-overrides-mayor2019s-vetoes>; see also Exhibit 1 [Final Version of the City Resolution], Exhibit 2 [Final Version of the City Ordinance] (documenting the Mayor's vetoes of the Ordinance and Resolution as overridden on December 4, 2023).

²⁵ To date, the publication date and effective date of the Ordinance are under contention by parties in litigation. See also Article XI, Section 6, of the Charter of the City of Albuquerque, Article XI, Sec. 6(b) (stating that "[a]n ordinance shall not become effective until five days after it has been published...").

²⁶ See *Albuquerque-Bernalillo County Air Quality Control Board and the Board of County Commissioners of the County of Bernalillo v. City of Albuquerque, New Mexico*, No. D-202-CV-2023-09295 (filed Dec. 5, 2023); *GCC Rio Grande, Inc., et al. v. Albuquerque-Bernalillo County Air Quality Control Board, City of Albuquerque*, No. D-202-CV-2023-09435 (filed Dec. 11, 2023); (b)(6) Privacy, (b)(7)(C) Enf. Privacy

financial assistance.”²⁷ Title VI applies to all programs and activities receiving federal financial assistance.²⁸

When determining whether a recipient’s actions amount to intentional discrimination prohibited by Title VI, agencies can evaluate a complaint under a variety of factors probative of the intent to discriminate.²⁹ Under the *Arlington Heights* framework, ECRCO is to consider the following six factors when analyzing whether a discriminatory purpose, at least in part, motivated a recipient’s actions, effectuating intentional discrimination in violation of Title VI: (1) relevant historical and discriminatory background; (2) the sequence of events leading up to the action; (3) relevant legislative or administrative history; (4) departures from normal procedures; (5) statistical evidence “demonstrating a clear pattern of discriminatory effect,” and (6) any evidence of a consistent pattern of disparate impact on communities of color, such that the “actions of decision-makers [] impose much greater harm on minorities than on non-minorities.”³⁰ To be successful in alleging intentional discrimination under this framework, a Complainant “need provide very little such evidence ... to raise a genuine issue of fact ...; any indication of discriminatory motive ... may suffice to raise a question that can only be resolved by a fact-finder,” like an investigating agency such as ECRCO.³¹

Applying *Arlington Heights* here, as discussed in depth below, evidences the City of Albuquerque and City Council’s discriminatory motives, at least in part, behind the consistent

²⁷ 42 U.S.C. § 2000d.

²⁸ See Title VI Legal Manual, *supra* note 18, at Sec. V, p.6.

²⁹ *Id.* at Sec. VI, p.9-10 (explicitly stating that the *Arlington Heights* framework applies to claims of intentional discrimination under Title VI).

³⁰ *Id.* at Sec. VI, p.10-11; see also *Vill. of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 266–68 (1977); see also *Faith Action for Cmty. Equity v. Hawai’i*, No. CIV. 13-00450 SOM, 2015 WL 751134, at *7 (D. Haw. Feb. 23, 2015) (Title VI case citing *Pac. Shores Props., LLC v. City of Newport Beach*, 730 F.3d 1142, 1158–59 (9th Cir. 2013)); see also *Sylvia Dev. Corp. v. Calvert Cty.*, 48 F.3d 810, 819 (4th Cir. 1995) (adding to the *Arlington Heights* factors evidence of a “consistent pattern” of actions of decision-makers that have a much greater harm on minorities than on nonminorities).

³¹ See Title VI Legal Manual, *supra* note 18, at Sec. VI, p.10 (citing *Pac. Shores Props.*, 730 F.3d at 1159 (citations omitted)).

and debilitating interference with a community-led rulemaking effort and the associated Rulemaking Proceeding. The City Council and its members' acts, in furtherance of the introduction, passage, and enforcement of City Legislation that directly interfered with a legal, community-led Rulemaking Proceeding, relied upon funds, staff, and resources from the City of Albuquerque, a recipient of EPA funding. Thus, the City Council used federal funding to intentionally discriminate on the basis of race, color, and national origin, in violation of Title VI. Accordingly, ECRCO should accept Complainants' Title VI Complaint for investigation, and commence a prompt and comprehensive investigation into the City of Albuquerque and its City Council's compliance with Title VI.

1. Historical Background

The first factor of the *Arlington Heights* framework requires ECRCO to consider the relevant historical background, which includes the state's, and its local governing bodies', history, particularly in relation to the subject matter at issue.³² Relevant historical background includes any prior history of discriminatory permitting and regulatory practices,³³ as well as any information that "reveals a series of official actions [were] taken for invidious purposes."³⁴

The subject matter at issue here is the discriminatory acts committed by the City of Albuquerque and its City Council, as well as the City's air quality permitting practices and intentional placement of industrial sites in and adjacent to the City of Albuquerque's low-income communities of color, and the City of Albuquerque's historical and ongoing resistance to meaningfully regulate and address the issue of these communities bearing the disproportionate

³² *Id.* at Sec. VI, p.11-12; *see N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 223 (4th Cir. 2016) (in a case alleging intentional discrimination in the passage of a voting law, the 4th Circuit considered the historical background in the state generally and related to voting in particular, identifying "North Carolina's history of race discrimination and recent patterns of official discrimination, combined with the racial polarization of politics in the state" as particularly relevant).

³³ *S. Camden Citizens in Action v. New Jersey Dept. of Env'tl. Prot.*, 2006 WL 1097498 at *24 (D.N.J. Mar. 31, 2006).

³⁴ *See Arlington Heights*, 429 U.S. at 267.

adverse impacts of air pollution. This intentional discrimination was most recently evidenced by the City Council's interference with a communities of color-led rulemaking effort, through the introduction and passage of City Legislation to interfere with a legal rulemaking, led by a City Councilor with personal interests in the industries purported to be regulated by the community's proposed HEEI Rule.

A. The City of Albuquerque's Historical Discriminatory Practices

The City of Albuquerque's practice of permitting pollution sources in and adjacent to its communities of color and low-income communities dates back several decades, as do the community-led advocacy efforts to protect these communities' air, water, and soil from further contamination – with little to no meaningful remediation, but instead resistance, from the local government. The City's long history of discriminatory air pollution permitting, enforcement and other regulatory practices is evidenced by the sheer number of polluting facilities and industries within and surrounding Albuquerque's communities of color and low-income communities. Fifteen large stationary sources, which include fossil fuel-fired power plants, oil refineries, gas processing plants and compressor stations, manufacturing plants, and landfills that emit large amounts of toxic and hazardous air pollutants,³⁵ are located within Albuquerque and Bernalillo County: the majority of which are sited in low-income neighborhoods and neighborhoods of color.³⁶ In fact, these sources are located in more low-income communities of color than anywhere else in the state, and more residents live near these facilities than any other residential population in the state of New Mexico.³⁷ Consequently, the Bernalillo County communities with the highest concentrations of pollution and environmental hazards in Bernalillo County are also the communities with the highest populations of people of color; immigrants; and people living

³⁵ Pacyniak et al., *supra* note 1, at 5.

³⁶ *Id.* at 55.

³⁷ *Id.*

150% below the federal poverty line.³⁸ Despite the majority of air-polluting facilities already sited within and surrounding the City's low-income communities of color, the City of Albuquerque's Environmental Health Department continues to issue more industrial air quality permits for sources proposed in low-income communities and communities of color, than in predominantly white, more affluent neighborhoods, for seemingly no reason other than intentional discrimination.³⁹ This trend of discriminatory permitting practices was highlighted recently, when the City of Albuquerque's Environmental Health Department approved an air pollution permit in October 2020 for a proposed asphalt batch plant to be located in the already overburdened Mountain View community – despite the respective land being zoned for rural agricultural use with a special use permit for an industrial park of limited uses, none of which included a hot mix asphalt plant.⁴⁰ It was not until years later in February 2023, after an outpouring of community opposition and under the scrutiny of the Air Board, that EHD rescinded the permit.⁴¹

When these communities' air, water, and soil are inevitably polluted and community members raise their concerns regarding their health and environment, the City of Albuquerque's response has historically been and continues to be, at best, to dismiss communities' concerns and continue to fail to regulate industries or abate pollution accordingly, and at worst, explicitly

³⁸ See Joint Center for Political and Economic Studies, *supra* note 1, at 16-17.

³⁹ To compare the sites of the currently issued and active air quality permits in Albuquerque to the Albuquerque neighborhoods with predominantly residents of color, see Map of City of Albuquerque Active Air Quality Permits, <https://cabq.maps.arcgis.com/apps/interactivelegend/index.html?appid=530f5c65ce544fe2911aff23b68c9905> (last visited March 13, 2024) and Albuquerque Race and Ethnicity Map, <https://bestneighborhood.org/race-in-albuquerque-nm/> (last visited March 13, 2024).

⁴⁰ See New Mexico Terminal Services, LLC., (b)(6) Privacy, (b)(7)(C) Enf. Privacy City of Albuquerque, <https://www.cabq.gov/airquality/news/air-quality-permit-application-new-mexico-terminal-services-llc> (b)(6) Privacy, (b)(7)(C) Enf. Privacy -albuquerque-nm-87105 (last visited April 23, 2024); see also Dkt. 25.3 at 4-5 [Petitioner's Memo in Support of Motion for Summary Disposition Regarding EHD's Permitting of an Illegal Land Use], AQCB Docket No. 2020-1 (New Mexico Terminal Services), https://www.dropbox.com/sh/ixgnvai4j7pajuw/AADFrrOYsYq_IYQLzfKAUyUVa?dl=0&e=1 (emphasis added).

⁴¹ See *id.* Dkt. 77 [Motion to Dismiss]; see also Gwynne Ann Unruh, *South Valley Celebrates Revocation of Asphalt Plant's Permit*, The Paper (Feb. 14, 2023), <https://abq.news/2023/02/south-valley-celebrates-revocation-of-asphalt-plants-permit/>.

interfere with and hinder any meaningful regulatory effort, especially if such effort is led by impacted communities of color. For example, in the 1960s, extremely high nitrate concentrations were reported in South Valley residents' groundwater, but the City of Albuquerque and state authorities' response to residents for over two decades was simply to dig deeper wells for clean drinking water and ignore the problem as much as possible.⁴² It was not until a child was poisoned and hospitalized in 1984 with a case of "blue baby syndrome," or methemoglobinemia, that the City and State were prompted to conduct a more rigorous investigation and subsequently extend the municipal public water supply to the South Valley community.⁴³ This negligent response to Albuquerque low-income communities of color's concerns regarding the pollution of their environments and consequent adverse health impacts remains today, as the City continues to ignore and actively oppose community requests for stronger air pollution regulations and environmental justice protections. In 2014, for example, community residents petitioned the Air Board for a rulemaking to address the cumulative impacts of air pollution disproportionately burdening Albuquerque's low-income communities and communities of color, but the Air Board declined to even consider the community-led petition.⁴⁴ The Air Board voted 6 to 1 to deny the community a rulemaking hearing because, as stated by Air Board members during the March 2014 deliberations, the disproportionate adverse health impacts from air pollution experienced by Albuquerque communities of color are a "land use/zoning issue;" an ordinance regulating air pollution permit applications in these communities is not "the solution to the problem" of communities overburdened by air pollution; and "Albuquerque isn't normally an area with an environmental justice issue," despite EPA's earlier designation of Albuquerque's Mountain View

⁴² See Fischer, *supra* note 2.

⁴³ See *id.*; see also Christina L. Keleher, *Nitrate Contaminated Groundwater in Albuquerque 's South Valley: Is Monitored Natural Attenuation an Appropriate Strategy?*, University of New Mexico Water Resources (April 26, 2009), https://digitalrepository.unm.edu/cgi/viewcontent.cgi?article=1103&context=wr_sp.

⁴⁴ See 2014 Complaint, *supra* note 1, at 7 (issued Complaint No. 13R-14-R6).

community as an “Environmental Justice Community.”⁴⁵ Further, when the Air Board created an “Environmental Justice Task Force” in 2007 to attempt to address ongoing environmental justice issues related to City entities’ work, the City’s legal counsel and employees, seated as members on the Environmental Justice Task Force, continuously obstructed every recommendation made in support of impacted communities for years, such that none of the Task Force’s duties could ever be fulfilled.⁴⁶

The City of Albuquerque’s ongoing acceptance of discriminatory air pollution permitting and regulatory practices has been brought to ECRCO’s attention before, with a Title VI Complaint filed against the Air Board and the City of Albuquerque Environmental Health Department’s Air Quality Division in 2014, in part based on the City’s interference with the Environmental Justice Task Force and refusal to consider the 2014 community-led petition for rulemaking.⁴⁷ EPA accepted the 2014 Complaint for investigation, evaluating, among other things, “[w]hether the Albuquerque-Bernalillo County Air Quality Control Board’s and/or the Albuquerque Air Quality Division’s permitting process discriminates against minority residents on the basis of race and/or national origin, in violation of Title VI of the Civil Rights Act and EPA’s implementing regulations...”⁴⁸ Initially, parties to the 2014 Complaint entered into an Alternative Dispute Resolution with ECRCO; however, the parties were unable to reach a unanimous agreement and ECRCO subsequently reopened its investigation in 2020.⁴⁹ Following ECRCO’s reopening of its investigation, the parties entered into an informal resolution process with ECRCO.⁵⁰ To date, this

⁴⁵ See Albuquerque-Bernalillo County Air Quality Control Board, Regular Monthly Meeting Transcript at 124, 127 131 (March 12, 2014) (emphasis added).

⁴⁶ See 2014 Complaint, *supra* note 1, at 6-7.

⁴⁷ See *id.*

⁴⁸ Letter from Lilian Dorka, EPA, to Eric Jantz, NMELC, and (b)(6) Privacy, (b)(7)(C) Enf. Privacy at 2 (July 19, 2016).

⁴⁹ See Letter from Lilian Dorka, EPA, to Susan Chappell (April 17, 2019) (Air Board Tolling Letter); see Letter from Lilian Dorka, EPA, to Carol Parker, EHD (April 17, 2019) (Air Quality Division Tolling Letter); see Letter from Lilian Dorka, EPA, to Susan Chappell, Board, and Joel Young, Division at 1 (Oct. 16, 2020).

⁵⁰ See Letter from Lilian Dorka, EPA, to Ryan Mast, EHD (Nov. 18, 2020) [hereinafter IRA Initiation Letter]

informal resolution process is ongoing, and no formal resolution agreement has been reached, although ECRCO proposed an Informal Resolution Agreement in 2022 and included language supporting the need to adopt a cumulative impacts rule similar to the HEEI Rule in order to address the City's history of discriminatory permitting. Notably, the Albuquerque Environmental Health Department, the controlling entity of the Air Quality Division and a party to the 2014 Complaint, was also a party to the HEEI Rule Rulemaking Proceeding at issue in this Title VI Complaint,⁵¹ opposed the HEEI Rule in its entirety, and likely colluded with the City to interfere with the Rulemaking.⁵²

B. Background of the HEEI Rulemaking Petition & Introduction of City Council Legislation

To address these ongoing adverse and discriminatory impacts of air pollution that the Mountain View community and larger South Valley community continue to experience, in November 2022, Complainants once again turned to the Air Board, asking the Air Board to adopt an air quality regulation that would ensure the protection of their health and the public welfare. The New Mexico Air Quality Control Act charges the Air Board with the duty and authority to consider, adopt, and promulgate regulations to prevent and abate air pollution, including emissions that interfere with public welfare, in the City of Albuquerque and Bernalillo County.⁵³ Consistent with this duty, the Air Board's rulemaking procedures allow "any person,"

⁵¹ See AQCB Docket No. 2022-3 (20.11.72 NMAC), <https://www.dropbox.com/sh/dzxzfu5lkenswc5/AADfoYX4nxQrAqoqjTFhdz6ta?dl=0.&e=11> Dkt. 6 [EHD Entry of Appearance].

⁵² See *id.*: Dkt. 229 [EHD's Legal Memorandum]; see also Proceedings Transcript at 1792-93 (Dec. 8, 2023); see also EHD Notice of Appeal No. A-1-CA-41669 (Jan. 26, 2024). Furthermore, during EHD's active opposition to and interference with the proposed HEEI Rule and associated Rulemaking Proceedings, EHD only proposed one alternative to the community-led rule, which would have added procedural requirements, but would in no way have addressed the core issue of discriminatory permitting. In fact, the EHD proposal would have allowed discriminatory permitting to continue unabated. EHD called its alternative rule the "Environmental Justice Concepts" – which were ultimately a diluted, ineffective version of the proposed HEEI Rule by Complainants. EHD has further stated that these Concepts are in no way a rule in workable or implementable form, or meant to be. See AQCB Docket, *supra* note 51: Dkt. 96 [EHD's Notice of Environmental Justice Concepts].

⁵³ New Mexico Air Quality Control Act, NMSA 1978 §§ 74-2-5(B); 74-2-2(B).

including members of the public, to petition the Air Board to adopt a regulation.⁵⁴ Thus, pursuant to the New Mexico Air Quality Control Act and the Air Board's regulations, Complainants began their community-led rulemaking efforts and associated Rulemaking Proceeding that gave rise to the City of Albuquerque and its City Council's discriminatory acts alleged within this Complaint. On November, 21, 2022, Complainants petitioned the Air Board to adopt a proposed regulation, the HEEI Rule, pursuant to 20.11.82.18 NMAC. On December 14, 2022, the Air Board granted Complainants' petition and voted 5-0 to hold a rulemaking hearing on the petition and the proposed HEEI Rule.⁵⁵ Following numerous pre-hearing meetings, motions arguments, and rescheduling of the Rulemaking Proceeding date from October 23, 2023, as ordered by the Air Board in September 2023,⁵⁶ to December 4, 2023, and, as discussed by the Air Board at the October 11, 2023, Air Board meeting,⁵⁷ on October 24, 2023, the Air Board published notice in the New Mexico Register, setting the Rulemaking Proceeding to begin on December 4, 2023.⁵⁸

In response, on October 16, 2023, Albuquerque City Councilor Dan Lewis introduced a Resolution seeking to place a moratorium on the Air Board prohibiting it from promulgating regulations addressing "quality of life" impacts, and an Ordinance (collectively, "Legislation") that, among other things, if adopted, also unilaterally restricted the Air Board's ability to promulgate regulations addressing "quality of life" impacts and purged the then-sitting Air Board, in order to stop the scheduled HEEI Rule public rulemaking hearing. The introduction of

⁵⁴ 20.11.82.18 NMAC ("Any person may file a petition with the board to adopt, amend or repeal any regulation within the jurisdiction of the board").

⁵⁵ See AQCB Meeting 2022-12-14 Minutes at 7-8, AQCB Docket, *supra* note 51.

⁵⁶ See Order Appointing Replacement Hearing Officer 2 (September 15, 2023), Dkt. 134.

⁵⁷ See Albuquerque-Bernalillo County Joint Air Quality Control Board October 11 Meeting Minutes, Accessible here:

<https://www.cabq.gov/airquality/air-quality-control-board/documents/2023-10-11-aqcb-meeting-minutes-signed.pdf>.

⁵⁸ See Volume XXXIV, Issue 20, New Mexico Register (Oct. 24, 2023), <https://www.srca.nm.gov/nmac-home/new-mexico-register/volume-xxxiv-issue-20/notices-of-rulemaking-issue-20/> (official Notice of Rulemaking Proceeding published in the New Mexico Register, setting the official date for the Rulemaking Proceeding to begin on December 4, 2023).

the Legislation was in direct response to Complainants’ rulemaking efforts before the Air Board. The Resolution, for example, explicitly mentioned the Complainants’ petition for rulemaking in its reasoning for its moratorium, and the Ordinance extended the Resolution’s moratorium indefinitely.⁵⁹ After the Legislation was passed, Councilor Lewis’ office also issued a number of press releases, using City resources and funding to do so, acknowledging the fact that the City Council Legislation directly targeted Complainants’ petition for rulemaking, with the intent to impede the Air Board from even considering Complainants’ petition.⁶⁰

Coincidentally, Councilor Lewis, during the time in which he introduced the Legislation and the City Council passed the Legislation, held an executive position, and was in negotiations for another executive position, at two separate industry organizations that would be subject to additional regulation under the proposed HEEI Rule.⁶¹ Notably, Councilor Lewis’ appointment as

⁵⁹ See Exhibit 1 at ¶6, ¶9; ¶15 [Final Version of R-23-176]; see Exhibit 2 at § 9-5-1-12 [Final Version of O-23-88].

⁶⁰ See *Council Passed Two Bills that Address Serious Concerns with the Air Board*, Albuquerque City Council (Nov. 9, 2023),

<https://www.cabq.gov/council/find-your-councilor/district-5/news/council-passed-two-bills-that-address-serious-concerns-with-the-air-board> (“At last night’s City Council Meeting, the City Council approved two pieces of legislation (O-23-88 and R-23-176) that are necessary to prevent the Air Board Quality Control Board (Air Board) from passing a rule that will devastate Albuquerque’s economy and harm the safety and health of the community”); see *Mayor Keller Chooses Environmental Extremists Over Major Economic Development and Jobs*, Albuquerque City Council (Nov. 22, 2023),

<https://www.cabq.gov/council/find-your-councilor/district-5/news/mayor-keller-chooses-environmental-extremists-over-major-economic-development-and-jobs> (“Moments ago, the Albuquerque City Council received Mayor Tim Keller’s veto for Bill O-23-88, which aimed to repeal and replace the Air Quality Control Board, and R-23-176, which imposed a specific moratorium on the Board, preventing it from passing a Health, Environment and Equity Impacts rule without scientific evidence because it is outside of their jurisdiction based on case law”); see *City Council Overrides Mayor’s Vetoes*, *supra* note 24 (“Tonight, the Albuquerque City Council overrode the Mayor’s vetoes of O-23-88 and R-23-176. R-23-176 put’s a moratorium on the current Air Quality Board’s Hearing of the HEEI environmental justice rule effective immediately”).

⁶¹ See *About District 5 Councilor Dan Lewis*, Albuquerque City Council,

<https://www.cabq.gov/council/find-your-councilor/district-5/about-the-councilor-district-5> (last visited Feb. 27, 2024); see Drew Goretzka, *NM Asphalt Pavement Association Names Councilor Dan Lewis Executive Director*, Albuquerque Business Journal (Jan. 11, 2024),

<https://www.bizjournals.com/albuquerque/news/2024/01/11/dan-lewis-apanm.html>; see Dan Lewis, LinkedIn, <https://www.linkedin.com/in/danlewisabq/> (last visited Feb. 27, 2024); see Alaina Mencinger, *Councilor Dan Lewis to Recuse Himself from Air Board Votes*, Albuquerque Journal (May 29, 2024), https://www.abqjournal.com/news/city-councilor-dan-lewis-to-recuse-himself-from-future-air-board-votes/article_f9bc59f0-1e22-11ef-a807-fb50267a4913.html (Councilor Lewis admitting he participated in discussions and negotiations for the Executive Director position at the New Mexico Asphalt Pavement Association in the months of November and December 2023).

Executive Director of the New Mexico Asphalt Pavement Association, of which several members were also parties to the HEEI Rule Rulemaking Proceeding and actively opposed the HEEI Rule,⁶² occurred only one month after the Rulemaking Proceeding concluded.⁶³

Even more significantly, in May 2024, Councilor Lewis reached a settlement with the New Mexico State Ethics Commission, stemming from multiple complaints alleging violations of the New Mexico Government Conduct Act based on Councilor Lewis' industry interests and his actions taken as a City Councilor to interfere with the HEEI Rule rulemaking efforts. The State Ethics Commission found Councilor Lewis likely violated state law when he engaged in an official government act that directly affected his personal financial interests.⁶⁴ As part of his settlement agreement with the State Ethics Commission, Councilor Lewis has agreed to recuse himself from any City Council matters that relate to the Air Board, while he holds his executive position at the Albuquerque Pavement Association of New Mexico.⁶⁵ If he fails to timely recuse himself, Councilor Lewis will be required to pay double the usual civil penalty for violations of

⁶² See *Member Roster*, New Mexico Asphalt Pavement Association, <https://apanm.org/members/> (last visited Feb. 28, 2024) (listing Mountain States Constructors, Inc.; Albuquerque Asphalt, Inc.; and BlackRock Services, LLC, as members, who were also all parties to the Rulemaking Proceeding); see AQCB Docket No. 2022-3 (20.11.72 NMAC), <https://www.dropbox.com/sh/dzxzfu5lkenswc5/AADfoYX4nxQrAqoqjTFhdz6ta?dl=0.&e=11>, for the following copies of technical testimony and relevant exhibits submitted by New Mexico Asphalt Pavement Association members in opposition to the proposed HEEI Rule: Dkt. 189 [Albuquerque Asphalt, Inc.; Black Rock Services, LLC; and Mountain States Constructors, Inc. Notice of Intent to Present Testimony]; Dkt. 189.1 [Written Testimony of Paul Wade]; Dkt. 189.5 [Companies' Redline of Petition]; Dkt. 189.6 [Written Testimony of Karl Lany]; Dkt. 189.8 [Written Testimony of Dr. Tami McMullen]; Dkt. 189.10 [Written Testimony of Robert Wood, President and Partner of Albuquerque Asphalt, Inc.]; Dkt. 189.12 [Written Testimony of Robert Caldwell, Founder of Black Rock Services, LLC]; Dkt. 189.14 [Written Testimony of Vincent Martinez]; Dkt. 189.16 [Written Testimony of David Otski, President and Owner of Mountain States Constructors, Inc.]; Dkt. 189.19 [Written Testimony of Michael F. Menicucci]; Dkt. 189.20 [Written Testimony of Jim Garcia]; Dkt. 189.24 [Written Testimony of Sherman McCorkle].

⁶³ See Goretzka, *supra* note 61 (emphasis added).

⁶⁴ Curtis Segarra, *Albuquerque City Councilor Agrees to Recuse Himself in Air Quality Board Discussions After Ethics Commission Settlement*, KRQE News (May 29, 2024), <https://www.krqe.com/news/politics-government/albuquerque-city-councilor-agrees-to-recuse-himself-in-air-quality-board-discussions-after-ethics-commission-settlement/#:~:text=Lewis%20did%20agree%20to%20recuse,of%20the%20Government%20Conduct%20Act;see%20Mencinger,> *supra* note 61.

⁶⁵ See Segarra, *supra* note 64; see New Mexico State Ethics Commission, Settlement and Release (May 1, 2024), <https://www.sec.nm.gov/wp-content/uploads/2024/05/2024-05-28-SEC-Lewis-Settlement-Release-jdf-dl.pdf>.

the Government Conduct Act.⁶⁶ While the recent findings and settlement with the State Ethics Commission restricts Councilor Lewis from further interference with Air Board matters, it does not remedy nor address the discriminatory harm inflicted by Councilor Lewis through his actions detailed throughout the entirety of this Complaint, nor address or prevent future discriminatory conduct that is not specific to Air Board matters. Complainants offer the recent findings and settlement agreement here to emphasize that state regulatory entities have recognized and condemned Councilor Lewis' discriminatory actions throughout the HEEI Rule rulemaking efforts, taken in his capacity as a City official using and abusing City resources, funding, staff, and legal support, while holding conflicting executive and financial interests – further emphasizing that the actions taken by Councilor Lewis and adopted by the City Council were for invidious purposes in violation of Title VI.

The entanglement of Councilor Lewis' industry interests and executive positions, while holding office as a City Councilor, further suggests his introduction and fervent advocacy for the passage of the City Legislation was not in the public's interests, but rather for invidious purposes, indicating a discriminatory intent behind Councilor Lewis' actions. Clearly for Councilor Lewis, ensuring the City's discriminatory permitting continued was more lucrative than remedying decades of civil rights violations and discriminatory conduct against Albuquerque's communities of color and low-income communities. Given the discriminatory history of the City of Albuquerque, especially in the context of air quality permitting and the siting of polluting operations, combined with the City representative's personal financial interests in these industries and his championing of the City Legislation that was intended to cease a community-led rulemaking that would regulate such industries and protect low-income communities of color, the historical background of the City's practices shows a discriminatory

⁶⁶ See *id.*; see Segarra, *supra* note 64. (emphasis added).

motive, against Albuquerque’s low-income communities of color, behind the City’s actions leading up to and during the Rulemaking Proceeding. Accordingly, this factor supports a finding of intentional discrimination on the part of the City of Albuquerque and its City Council against Complainants and Albuquerque’s low-income communities of color.

2. Sequence of Events Surrounding the City Council Legislation

The second factor, the examination of the sequence of events surrounding an official action, includes the consideration of the timing of the action; a legislative body’s urgency in its enactment of the action; and any other indicator that “provides another compelling piece of the puzzle” in evaluating a recipient’s motivation.⁶⁷ Applying this factor here, the timing and urgency surrounding the introduction and passage of the City Legislation indicate the City Council’s motivation was, in large part, driven by the intent to hinder low-income communities of color’s ability to meaningfully participate in the public regulatory process and to address the disparate and cumulative impacts of air pollution on low-income communities and communities of color in Albuquerque, in violation of Title VI.

The Complainants’ petition for rulemaking, submitted on November 21, 2022, sought to address the detrimental cumulative impacts of polluting sources in the City of Albuquerque and Bernalillo County’s most overburdened communities: almost exclusively communities of color and low-income communities. The proposed HEEI Rule would have required the City of Albuquerque’s Environmental Health Department (“Department”) to consider social determinants of health and public welfare impacts when issuing air quality and construction permits in already overburdened communities, and would have required the Department, in some instances, to deny such permits proposed in already overburdened communities.

⁶⁷ See *N.C. State Conf. of NAACP*, 831 F.3d at 227, 229; see Title VI Legal Manual, *supra* note 18, at Sec. VI, p.12.

As previously mentioned, the same week the Air Board announced it would publish public notice setting the Rulemaking Proceeding's commencement date for December 4, 2023,⁶⁸ Albuquerque City Councilor Dan Lewis introduced the Ordinance and Resolution to the Albuquerque City Council for consideration. On November 8, 2023, the City Council voted 5-4 to pass both the Resolution and the Ordinance. On November 22, 2023, the Mayor of the City of Albuquerque vetoed both the Resolution and the Ordinance based on concerns about interference with the public's ability to petition the Air Board for rulemaking; the interference with the Air Board's work unilaterally; and the necessity to preserve communities' abilities to petition for rulemaking concerning the cumulative effects of pollution and the incorporation of environmental justice principles.⁶⁹

As such, the Rulemaking Proceeding began as scheduled on December 4, 2023, and at a regularly scheduled meeting that same evening, the City Council voted 7-2 to override the Mayor's veto of the Resolution and 6-3 to override the Mayor's veto of the Ordinance. The Ordinance was published on December 15, 2023, and went into effect on December 20, 2023, although the effective date of both the Ordinance and Resolution were unclear while the Rulemaking Proceeding was ongoing. The Rulemaking Proceeding continued, despite the threatened withdrawal of City support and resources consistent with the requirements of the City Legislation, as well as public statements by City Councilors demanding the Air Board cease the Rulemaking Proceeding. City Councilor Dan Lewis, the sponsor of the discriminatory legislation, accompanied by a City Attorney, even spoke during the public comment period on

⁶⁸ See AQCB Docket, *supra* note 51: Dkt. 142 [Affidavit of Publication]; Dkt. 142.1 [ABQ Journal Affidavit of Publication]; Dkt. 142.2 [NM Register Affidavit of Publication]; Dkt. 142.3 [AQCB Listserv] (public notices setting the date for the Rulemaking Proceeding to begin on December 4, 2023).

⁶⁹ For Mayor Keller's veto messages, see *Mayor Keeps City-County Joint Air Board*, City of Albuquerque (Nov. 22, 2023), <https://www.cabq.gov/mayor/news/mayor-keeps-city-county-joint-board#:~:text=Mayor%20Keller%20vetoed%20two%20pieces,standing%20partnership%20with%20Bernalillo%20County>.

the second day of the Rulemaking Proceeding, December 5, 2023, claiming that the Rulemaking Proceeding was unlawful and noting that everyone in attendance was breaking the law, in an intentional attempt to intimidate the public and the Air Board and stop the Rulemaking Proceeding. Despite these efforts, on December 11, 2023, the Air Board adopted a version of the HEEI Rule, although noticeably less robust in comparison to the HEEI Rule proposed and advocated for by Complainants throughout the Rulemaking Proceeding. The intentional discriminatory acts by the City of Albuquerque and City Council were intended to interfere with and ultimately halt this community-led rulemaking effort, the products of which led to the Air Board quickly adopting a limited version of the HEEI Rule proposed by Complainants.

The sequence of events leading up to and surrounding the HEEI Rule Rulemaking Proceeding, including the timing of the hasty introduction and passage of the City Legislation seeking to dismantle the Air Board and restrict its rulemaking abilities in the midst of a communities of color-led rulemaking hearing, suggests an improper, intentionally discriminatory motive behind the City Council's actions. Even the then-City Council President, Pat Davis, at the time of the City Council's passage of the City Legislation, recognized and called attention to the suspicious timing and air of foul play surrounding the City Legislation during the Council's initial deliberations on the Resolution and Ordinance on November 8th, stating "I don't think we can make a wholesale change of this with one bill in two weeks in sort of this emergency, knee-jerk reaction."⁷⁰ He went on to warn the City Council during its November 8th deliberations that, "We should not be doing this two weeks before the hearing y'all are worried about."⁷¹ The timing and hastiness of the introduction and enactment of the City Legislation, coupled with the recognition and acknowledgement by the City Council's own members that the

⁷⁰ See Live Recording of Albuquerque City Council Meeting at 4:58:21 (Nov. 8, 2023), https://cabq.granicus.com/player/clip/437?view_id=2&redirect=true.

⁷¹ *Id.* at 4:57:23.

timing, urgency, and language of the City Legislation were indicative of ulterior motives, ultimately provides more “compelling piece[s] to the puzzle” demonstrating that the City’s motivation behind the City Legislation was intentionally discriminatory against Albuquerque’s low-income communities of color, who were seeking to remedy decades of historic discriminatory air pollution permitting practices through a lawful petition for a public rulemaking.⁷²

3. Legislative and Administrative History Showing Intentional Discrimination

Relevant legislative history indicative of discriminatory intent may include “contemporaneous statements by members of the decisionmaking body, minutes of its meetings, or reports.”⁷³ Relevant legislative history may also include information and records requested and considered by members of the legislative body.⁷⁴

It is important to note that Complainants’ actions, which City Council directly targeted and discriminatorily interfered with, included a petition for rulemaking – not an adopted rule or regulation, but merely a community’s attempt to actively participate in their local government and its rulemaking and regulatory processes, asking the Air Board to consider adopting a rule to address decades of discriminatory air permitting. The Air Board was not required to adopt any proposed rule brought forth by Complainants and, at the time of City Council’s discriminatory actions, Complainants’ proposed HEEI Rule was only under consideration by the Air Board during the Rulemaking Proceeding. City Council, however, through its introduction and passage of the Resolution and Ordinance, sought to interfere with Complainants’ ability and right to participate in their local government by preventing the Air Board from even considering

⁷² See *N.C. State Conf. of NAACP*, 831 F.3d at 229 (emphasis added).

⁷³ *Id.*; see *Arlington Heights*, 429 U.S. at 268; see Title VI Legal Manual, *supra* note 18, at Sec. VI, p.12.

⁷⁴ *N.C. State Conf. of NAACP*, 831 F.3d at 230 (finding that the legislative body at issue had requested a report on voting patterns, the data of which informed legislators that African Americans in North Carolina disproportionately used early voting, same-day registration, and out-of-precinct voting).

Complainants' proposed Rule, and moreover, preventing the Air Board from adopting any regulation that would address the systemic, ongoing discriminatory permitting processes committed and allowed by the City of Albuquerque for decades.

Councilor Lewis' actions and statements leading up to and during the Rulemaking Proceeding, at times going so far as to target specific community and Air Board members, provide further indica of the intentionally discriminatory nature of the City Council's actions and Legislation. These statements and actions by Councilor Dan Lewis were taken in his official capacity as a City Council member, using City resources and his platform as a City Councilor, to publicly intimidate and harass members of the public and the Air Board from further participating in and advocating for the proposed HEEI Rule. Leading up to the Rulemaking Proceeding, Councilor Lewis used his platform as a City official, as well as City financial and legal resources, to publish a media statement on the City of Albuquerque's web page, explicitly naming individual Complainants and community members involved in the HEEI Rule rulemaking process, to disparage the HEEI Rule rulemaking efforts.⁷⁵ He placed blame on community members for "the risk of losing thousands of jobs" if the publicly-contentious Rule was enacted, using the City's public platform in the midst of public controversy surrounding the rulemaking to do so.⁷⁶ The released press statement was not the only instance in which Councilor Lewis used his platform as a representative of the City of Albuquerque to publicly intimidate and harass individuals involved in the rulemaking efforts. During City Council meetings, Councilor Lewis made explicit public remarks about Air Board members, as well as dismissive comments

⁷⁵ See *Mayor Keller Chooses Environmental Extremists Over Major Economic Development and Jobs*, *supra* note 60.

⁷⁶ *Id.*

about community members' concerns during public comment.⁷⁷ It was also during these City Council meetings that other City Council members noted Councilor Lewis' introduction of the Resolution and Ordinance had an ulterior motive of harassment and intimidation towards individuals involved in the rulemaking effort. Former City Council President Pat Davis even remarked that the language and design of the Resolution is "all but a veiled personal attack on personal members of the [Air] Board and their attorney and other people," and "reeks of personal animus."⁷⁸ Notably, at this same City Council meeting, on November 8th, immediately following the close of the public comment session and before City Council initially voted the City Legislation into effect, Councilor Lewis reflected, "I think I was only called a racist like five or six times...",⁷⁹ suggesting that even Councilor Lewis understood the discriminatory motive behind his own actions and proceeded anyway.

Councilor Lewis' targeted statements in support of the City Legislation and in an attempt to halt the community-led rulemaking efforts continued when he made an appearance, in his capacity as a City Councilor, and accompanied by a City Attorney, at the Rulemaking Proceeding's public comment session, as mentioned above. During his public comment, Councilor Lewis called members of the Air Board "environmental extremists" and "professional job killers."⁸⁰ The ramifications of such targeted statements and acts of public intimidation were emphasized during Councilor Lewis' public comment, when Air Board Member Kitty Richards stated Councilor Lewis' targeted statements and media pressure has made her "fear for my own

⁷⁷ For full video recordings of the City Council meetings, see *Meeting Minutes, Agendas, and Videos*, City of Albuquerque, <https://cabq.legistar.com/Calendar.aspx> (last visited March 5, 2024) (specifically, the videos for the City Council Meetings on the dates of October 16, November 8, and December 4, 2023).

⁷⁸ See Live Recording of Albuquerque City Council Meeting at 4:56:45, 4:57:24 (Nov. 8, 2023), https://cabq.granicus.com/player/clip/437?view_id=2&redirect=true.

⁷⁹ See *id.* at 2:58:20.

⁸⁰ See Proceedings Transcript at 721.

life,” “fear for my family,” and has “put my family at risk.”⁸¹ Councilor Lewis’ presence and “presentation” at the Rulemaking Proceeding’s public comment session ultimately served as an additional attempt to intimidate both the Air Board and members of the public from further participation in the Rulemaking Proceeding, as well as intentional discrimination against Albuquerque’s low-income communities of color, because Councilor Lewis leveraged his position as a City official and his access to City resources, including City attorneys, to intimidate members of the public and prevent them from continuing forward with a public, communities of color-led rulemaking process under the alleged premise that continuing the Rulemaking Proceeding would be breaking the law.⁸²

There is also evidence, although public access to these documents has been repeatedly, and likely unlawfully, restricted by the City of Albuquerque,⁸³ that City Council members were working alongside, and potentially provided data, information, and advice by the City of Albuquerque’s Environmental Health Department staff and attorneys in the drafting and passage of the City Resolution and Ordinance – meaning that a party to the Rulemaking Proceeding, arguably the most important party to the Rulemaking Proceeding as the agency charged with implementing any rule adopted by the Air Board, aided the City Council in its intentional discrimination. An ongoing New Mexico Inspection of Public Records Act (“IPRA”) request has revealed that communications between Department staff and attorneys, City Council attorneys and staff, and City Councilors took place prior to and near the introduction of the Resolution and

⁸¹ *Id.* at 718 (the following statement was made by Air Board Member Kitty Richards, addressing Councilor Lewis during his public comment: “I am very, very deeply, deeply disturbed by how you have divided our community. I -- I have seen all of the stuff in the newspapers, and I think a lot of it was promulgated by your actions. I fear for my family. I fear for my own life, and it was absolutely unnecessary. And I really -- if you're an elected official, to try and dis -- to villainize me because of your statements, which were utterly untrue, and put my family at risk, it's just unjustifiable. I feel like I am a poll worker in Georgia. It's absolutely unnecessary”).

⁸² To note, at this time, contention already existed between City legal staff on whether the legislation applied to the Rulemaking Proceeding, and continues presently. *See* ongoing litigation discussed in Section IV.B.

⁸³ *See* Exhibit 7 [IPRA Request Communications].

Ordinance.⁸⁴ Specifically, the currently available communications, received by NMELC in May 2024, explicitly show the Department’s Deputy Director Christopher Albrecht, who also participated at the Rulemaking Proceeding as the Department’s sole technical witness, participated in discussions surrounding the City Legislation’s drafting and passage – while also advising industry applicants to submit their air quality permit applications to the Department for approval before the Rulemaking Proceeding concluded.⁸⁵ The City of Albuquerque has continued to withhold the subject and contents of the rest of these communications between the Department, its staff and attorneys, and its City Council on the basis that “they contain privileged communications between attorneys in the City Attorney’s Office... attorneys in Council Services... Council Services staff..., and City Councilors,”⁸⁶ without providing any indication that such a privilege applies to the communications. Though the content of the majority of these communications is unavailable to Complainants at this time, the parties involved, the timing of these communications, the request by City Council for the Department’s review of the discriminatory City Legislation’s language, the Department’s communications with the City surrounding the City Legislation’s passage and effects – including collusion with industry applicants for air quality permit applications, and the City’s reluctance to divulge any additional information surrounding these communications, all raise questions as to what Department data, information, and advice City Councilors and City staff considered in drafting the City Legislation, and ultimately, whether these records would provide further insight into City Council’s discriminatory motives and intent in enacting the City Legislation.

⁸⁴ See *id*; see Exhibit 8 [EHD and City Council Communications Around City Legislation Drafting and Passage].

⁸⁵ See *id* (emphasis added).

⁸⁶ See Exhibit 7. To note, while the City of Albuquerque did finally furnish some documents following a final IPRA request by NMELC in April 2023, the City continues to withhold communications and documents, leaving the IPRA process ongoing to date. See Exhibit 9 [Redacted IPRA Documents] (as an example, some of the documents NMELC has received from the IPRA request unexplainably block out entire documents that are otherwise public information, such as a draft press release *for* the public) (emphasis added).

An examination of the available legislative and administrative history behind the passage of the City Council Resolution and Ordinance, explicitly designed to halt the Rulemaking Proceeding and dissolve the Air Board, ultimately suggests malintent and intentional discrimination on the basis of race, color, and national origin. Certainly, the actions conducted and statements made by members of the City Council, in furtherance of the Legislation's passage, reveal a power dynamic, and the effects thereof, that are all too familiar in cases of intentional discrimination, where communities of color's efforts to gain equal treatment under the law are met with intimidation. As the former City Council President recognized early on, the City Legislation, and the surrounding City Councilor media efforts and statements made in support of its passage, "reek[ed] of personal animus"⁸⁷ – a hallmark of discriminatory intent. Thus, while ECRCO should investigate the possible collusion between the City Council and the Department, the consideration of all available legislative and administrative history surrounding the City Legislation supports the conclusion that the City Council acted with discriminatory intent in, or at least was aware of the discriminatory effects of, its passage of the City Legislation, against Albuquerque's communities of color and low-income communities, in violation of Title VI.

4. The Passage of the City Council Legislation was a Significant Departure from Normal Procedures

The fourth factor requires ECRCO to consider any departures from a legislative body's normal procedures in a matter, as such departures can be indicative of "improper purposes" at play.⁸⁸ Here, City Council departed from the normal procedures governing how the joint City-County Air Board is supported by the City of Albuquerque, using city legislation to unilaterally dismantle and restructure an Air Board authorized by State law; dictate to the Air

⁸⁷ See *City Council Live Recording*, *supra* note 70.

⁸⁸ See *Arlington Heights*, 429 U.S. at 267.

Board its abilities and duties; withdraw funds and resources from the Air Board; and rely upon City Attorneys for assistance in these acts – indicating intentional discrimination, based on race, color, and national origin, in the City Council’s creation and passage of the Resolution and Ordinance, in violation of Title VI. The City Council’s departure from standard procedures is even more significant when considered in the context of the fact that the City Council has never dismantled any local board or commission immediately prior to, nor during, a rulemaking proceeding that the board or commission is conducting.⁸⁹

City Councilor Dan Lewis introduced the Legislation on October 16, 2023, five days after the Air Board announced the scheduled start-date of the Rulemaking Proceeding, in a unilateral attempt by the City to restrict the Air Board’s rulemaking authority and dismantle the existing Air Board,⁹⁰ despite the Air Board serving as a joint local authority acting on behalf of and subject to the supervision of both the City of Albuquerque and Bernalillo County.⁹¹ In fact, the City Council did not provide the Bernalillo County Board of Commissioners notice, consultation, or any form of involvement in the City-produced legislation.⁹² The initial version of the Ordinance endowed the City Council with the unilateral authority to strike any rule or amendment adopted by the joint Air Board, giving the City Council veto power over any decision made by the Air Board, while the joint governing body, the Bernalillo County Board of

⁸⁹ The City Council has dismantled a purely advisory board created by local ordinance in the past, the Civilian Police Oversight Agency Board, in order to strip the Board of its current membership, restrict its authority to oversee citizen complaints alleging police misconduct, and place more power in the City Council. However, unlike the Air Board, this Oversight Board was not created by state statute and was merely an advisory committee with no power to promulgate regulations. See Jessica Dyer, *ABQ City Council Votes to Replace Citizen Police Oversight Board*, Albuquerque Journal (Jan. 19, 2023), https://www.abqjournal.com/news/local/abq-city-council-votes-to-replace-citizen-police-oversight-board/article_9d000d5e-e9f6-54ea-9a7a-29fc5a0991ec.html.

⁹⁰ See City Councilor Dan Lewis *Introducing Legislation to Create New Air Quality Control Board*, *supra* note 23.

⁹¹ Bernalillo County Code, Art. II, §§ 30-31 to -47 (2020); Albuquerque, N.M., Rev. Ordinances §§ 9-5-1-1 to -99 (1996) (emphasis added).

⁹² Alexa Skonieski, *Legislation Introduced to Repeal, Replace Metro’s Air Quality Control Board*, KRQE (Nov. 1, 2023), <https://www.krqe.com/news/politics-government/legislation-introduced-to-repeal-replace-metros-air-quality-control-board/> (emphasis added).

Commissioners, would not retain the same power.⁹³ The Ordinance, upon adoption on December 4, 2023, by City Council, was amended to remove this provision due to issues with its legality. However, the adopted Ordinance still purports to unilaterally dissolve the current City and County jointly-operated Air Board and change the composition of the Air Board, as well as restrict the Air Board’s authority and powers to regulate air quality.⁹⁴

Furthermore, the City Ordinance unilaterally limits the Air Board’s advisory authority by prohibiting the Air Board from recommending and advising the Mayor, Director, Department, County Manager, City Council, County Commission, and Environmental Planning Commission on any air quality matters, needs, programs, and policies.⁹⁵ This is contrary to the Air Board’s statutory advisory and rulemaking authorities under the New Mexico Air Quality Control Act and the Bernalillo County Code, established in support and in furtherance of the Air Board’s duties to abate air pollution and protect the public health and welfare.⁹⁶ Thus, while the Air Board holds both advisory and rule-making powers under the Bernalillo County Code and the New Mexico Air Quality Control Act, the City Ordinance explicitly and unilaterally restricts the Air Board’s advisory powers. This is yet another departure by the City Council from the standard procedures under which the joint Air Board is governed and managed. Former City Council President Pat Davis also noted this departure from regular practice regarding the City

⁹³ See *id.*; see Exhibit 3 at § 9-5-1-6(K)(2) [Initial Version of O-23-88].

⁹⁴ See Exhibit 2 at § 9-5-1-3; § 9-5-1-12 [Final Version of O-23-88].

⁹⁵ See Exhibit 2 at § 9-5-1-12(B)(7) (“The Board shall have no authority to... [r]ecommend to the Mayor, Director, Department, County Manager, City Council, or County Commission policies for air quality matters, needs, improvements, and programs”); see *id.*(8) (“The Board shall have no authority to... [a]dvice the Mayor, Director, Department, County Manager, City Council, or County Commission regarding air quality matters, needs and programs”); see *id.*(9) (“The Board shall have no authority to... [a]dvice the Environmental Planning Commission or County Planning Commission regarding air quality matters”).

⁹⁶ See Bernalillo County Code, Ch. 2, Article VI, Sec. 2-432(f) (“The board of county commissioners may establish by ordinance or resolution such other advisory boards as it determines necessary or desirable. All such boards shall have powers and duties that are advisory only, except as otherwise provided by law, and the board of county commissioners shall reserve the power and duty to make the final decision with respect so all such matters”); see *id.* (stating the Air Board “shall have powers and duties that are advisory only, except as otherwise provided by law”); see NMSA 1978 §§ 74-2-5(B); 74-2-2(B) (establishing the Air Board’s rulemaking authority).

Legislation’s unilateral infringement on the Air Board’s authorities and powers, emphasizing that, “...there’s a process by which the County did open the door, they cracked open the door to have a joint conversation about how to do this, but I think the way... the Resolution and the Ordinance was presented basically said we’re doing this on our own, we don’t need you, we’re not going to hear from you, instead of creating a process that we have done on housing and homelessness, and all other things that we made some progress on. I think this was just the wrong approach.”⁹⁷

The Albuquerque City Council further departed from its standard procedures when it abused its power to distribute the City of Albuquerque’s funds and resources in order to interfere with the Rulemaking Proceeding. The City, by order of the Air Board, was responsible for providing the venue, hearing clerk, and technology for the hybrid Rulemaking Proceeding, as well as the funds necessary for these provisions.⁹⁸ Despite these obligations, however, the City of Albuquerque actively resisted providing such support and threatened to pull its funding and resources for the Rulemaking Proceeding – unless the expenditure of said resources could aid in the interference with the Rulemaking.⁹⁹

The City Council’s Resolution, once adopted, sought to explicitly withdraw the City’s resources for use by the Air Board in the Rulemaking Proceeding.¹⁰⁰ Specifically, the Resolution, passed by City Council on the first evening of the Rulemaking Proceeding, mandated that “[t]he City of Albuquerque shall not use its resources to facilitate any action by the Board to make,

⁹⁷ See Live Recording of Albuquerque City Council Meeting at 4:57:30 (Nov. 8, 2023), https://cabq.granicus.com/player/clip/437?view_id=2&redirect=true.

⁹⁸ See Albuquerque, N.M., Rev. Ordinances § 9-5-1-5(A) (obligating the City to provide staff for the Board); see also AQCB Docket, *supra* note 51: Dkt. 84 [Order Granting Motion for Alternative Record] (City agrees to obtain and pay for a Court Reporter); Dkt. 36 [Air Board Attorney Response to City Attorney Email] (reiterating City due process obligations triggered when providing forums for public participation).

⁹⁹ See *id.*: Dkt. 35 [Email Communication from City Attorney] (City refusing to provide City resources for recording technology for Rulemaking Proceeding); Dkt. 36 [Air Board Attorney Response to City Attorney Email].

¹⁰⁰ See Exhibit 1, at Section 2.

adopt, or amend any regulation or standard described in Section 1 until February 1.”¹⁰¹ The City Council’s Cease and Desist Letter regarding the Rulemaking Proceeding, issued on December 5, 2023, further reiterated that “the Resolution prohibits the City of Albuquerque from using its resources to facilitate any action by the Board to make, adopt, or amend any regulation as described above until February 1, 2024.”¹⁰² Councilor Lewis, during his public display at the second day of the Rulemaking Proceeding, also stated that the City of Albuquerque was prohibited from expending any further resources or funds towards the Rulemaking Proceeding.¹⁰³ Accordingly, the City of Albuquerque sought to withdraw City funds supporting the remainder of the Rulemaking Proceeding. The City, though resistant, seemingly provided these funds and resources for the duration of the Rulemaking Proceeding, once faced with the threat of a temporary restraining order; although, the County ultimately paid the required fees for the publication of the adopted HEEI Rule.¹⁰⁴

The City Council abused its power to allocate and appropriate City funds in order to interfere with a public rulemaking process and the Air Board’s ability to continue forward in a rulemaking meant to meaningfully address decades of discriminatory air permitting, with both threats and legal measures taken to withdraw such support. The City Council’s threat to withdraw City resources and support in the middle of a legally-authorized public Rulemaking Proceeding, ultimately, was a strategic and direct attempt by City Council to cause chaos and interfere with

¹⁰¹ *Id.* (this section explicitly applies to the Rulemaking Proceeding in order to withdraw City support and resources from it, as Complainants’ petition that triggered the Rulemaking Proceeding is stated in the Resolution to be the target of the Resolution).

¹⁰² AQCB Docket, *supra* note 51: Dkt. 222 [Cease and Desist Letter to Air Quality Board].

¹⁰³ *See* Proceedings Transcript at 707 (“I did want to remind you and wanted to share with you that the Albuquerque council did make a law last night, and that law prohibits the hearing -- this hearing today. And it also prohibits resources of the City of Albuquerque to be spent on behalf of this hearing today as well”); *id.* at 708 (“Furthermore, the resolution prohibits the City of Albuquerque from using its resources to facilitate any action by the Board to make, adopt or amend any regulation as described above, until February 1st, 2024. Therefore, the continued participation of the city board appointees in the current hearing violates the resolution passed last evening”).

¹⁰⁴ *See* AQCB Docket, *supra* note 51: Dkt. 241 [Final Order and Statement of Reasons for Adoption of Regulation Concerning Health Environment and Equity Impacts] (Air Board's statement of reasons para. 6 only after the Air Board filed its TRO application).

the Air Board’s ability to hold the Rulemaking Proceeding – a tactical step in the City’s larger efforts to halt the community-led rulemaking efforts and continue to intentionally discriminate against Albuquerque’s low income communities of color.

Importantly, this was not the only misuse of City resources during the Rulemaking Proceeding. As mentioned, when Councilor Lewis attended the Rulemaking Proceeding’s public comment session on December 5, 2023, he was accompanied by Kevin Morrow, a Deputy City Attorney and Deputy Director of City Council Services.¹⁰⁵ Mr. Morrow had signed up for public comment, but upon being called to the stand and sworn in by the Hearing Officer, Mr. Morrow announced he would “yield [his] time” for public comment to Councilor Lewis, noting that Councilor Lewis was “the fourth person signed up on the list,” immediately following Mr. Morrow.¹⁰⁶ The placement of Mr. Morrow and Councilor Lewis’ positions on the public comment list, with Mr. Morrow first and Councilor Lewis immediately following the City Attorney, indicates that this was a strategic measure by the City Attorney and City Councilor to not only work around the public comment time limitations of three minutes per speaker to give the City Councilor more time to speak, but also to further intimidate the Air Board and the public by giving both the City Council Legislation and Councilor Lewis’ actions the appearance and threat of legal legitimacy.

Throughout Councilor Lewis’ “public comment,” he further relied on the Deputy City Attorney to wrongfully assert the City Council Legislation was already in effect, when it was not, claiming that the Air Board must cease the Rulemaking Proceeding immediately.¹⁰⁷ The

¹⁰⁵ *Id.* at 705.

¹⁰⁶ *Id.* at 706; *id.* at 389 (listing Kevin Morrow, City Attorney, as third on the list for public comment, and City Councilor Dan Lewis as fourth on the list for public comment)

¹⁰⁷ *See id.* at 713-17 (Mr. Morrow engaged in a lengthy debate with the Air Board’s attorney regarding the effective date of the Resolution, during which he openly contradicted statements made by the Albuquerque City Attorney, Lauren Keefe, and reiterated Councilor Lewis’ sentiment that the City would be taking legal action against the Air Board for continuing forward with the Rulemaking Proceeding).

presence and use of City legal staff, by a City Councilor, to attempt to enforce a City Council policy not yet effective, falsely assert the policy had become “law,” and that the Air Board was breaking the law by continuing forward with the Rulemaking Proceeding, was a further abuse of City staff and resources by City Council to further intentional discrimination by the City against Albuquerque and Bernalillo County’s low-income communities of color. The use of City legal staff to intimidate the Air Board under false pretenses and threatened legal action served as yet another direct and intentional interference with the Rulemaking Proceeding, in an attempt to halt it completely. Likewise, this act was a direct interference with community members’ right to participate in the public rulemaking process, a rulemaking process that was commenced and led by local low-income communities and communities of color to address decades of intentional discrimination authorized, ultimately, by the City of Albuquerque.

The egregiousness and severity with which City Council departed from normal procedures to interfere with a community-led rulemaking is further evidenced by current litigation resulting from the Rulemaking Proceeding, specifically three separate lawsuits questioning the validity and legality of the City Council Legislation. On December 5, 2023, the Air Board filed the lawsuit, *Albuquerque-Bernalillo County Air Quality Control Board and the Board of County Commissioners of the County of Bernalillo v. City of Albuquerque, New Mexico*, No. D-202-CV-2023-09295, challenging the validity of the City Council’s Resolution and Ordinance and asserting the City’s illegal interference with the Rulemaking Proceeding. On December 11, 2023, industrial permittees and commercial associations filed the lawsuit, *GCC Rio Grande, Inc., et al. v. Albuquerque-Bernalillo County Air Quality Control Board, City of Albuquerque*, No. D-202-CV-2023-09435, challenging the validity of the adopted HEEI Rule and the Air Board’s authority and jurisdiction to adopt the HEEI Rule. On December 11, 2023, Complainants filed

their lawsuit, **(b)(6) Privacy, (b)(7)(C) Enf. Privacy**

also challenging the validity and legality of the City Council's Resolution and Ordinance, as well as asserting the City's illegal interference with the Rulemaking Proceeding and Complainants' constitutional right to petition the government. To date, all three lawsuits are ongoing. Notably, on January 25, 2024, the Air Board received a favorable ruling in its case, with the issuance of a preliminary injunction against the City of Albuquerque enjoining the City from enforcing the Resolution and Ordinance until the merits of the matter, primarily the question of whether the City acted illegally when it interfered with the Rulemaking Proceeding, are resolved.¹⁰⁸ Complainants note that while the pending litigation addresses the validity and legality of the City Council Legislation and associated interferences with the Rulemaking Proceeding, the pending litigation does not address, nor remediate, the City of Albuquerque and City Council's intentionally discriminatory acts and ongoing noncompliance with Title VI. Thus, ECRCO's acceptance of and investigation into this Title VI Complaint is necessary to address the continuing intentional discrimination and Title VI violations against Albuquerque's communities of color and low-income communities, and to bring the City of Albuquerque and its City Council into compliance with Title VI. Complainants merely mention the ongoing litigation here as further evidence that the City Council departed from normal procedures in its enactment of the City Legislation, indicating improper, discriminatory motives were at play.

The City Council's introduction, passage, and subsequent actions taken to enforce the Resolution and Ordinance were an extraordinary departure from the standard procedures under which Albuquerque's regulatory processes are carried out and how the joint Air Board is

¹⁰⁸ See Exhibit 4 [District Court Order issuing preliminary injunction, enjoining the City's enforcement of the Resolution and Ordinance].

governed and managed, for the primary purpose of preventing communities of color from exercising their rights. Again, as mentioned, former City Council President Pat Davis called attention to this significant departure when Councilor Lewis first introduced the City Legislation, stating during the November 8th City Council meeting that the City Legislation was “a wholesale change of how we do this type of regulation.”¹⁰⁹ The former Council President further warned the City Council, before the local government entity went on to approve of and pass the City Legislation, that “[t]his is the wrong approach... It’s bad legislation, it’s bad process.”¹¹⁰ This departure from the City and County’s normal procedures and processes was thus not only extreme, but entirely improper, evident even to other members of the City Council – all of which further supports the inference that improper purposes were at play in the City’s introduction, passage, and enforcement of the City Resolution and Ordinance and a finding of intentional discrimination against Albuquerque’s low-income communities of color, in violation of Title VI.

5. Statistics Demonstrating a Clear Pattern of Discriminatory Effect

The fifth factor requires ECRCO to consider any statistical evidence that demonstrates a clear pattern of discriminatory impacts and effects on communities of color and low-income communities. The statistical evidence often considered here includes the demographics of the affected communities and region,¹¹¹ and any other statistical evidence “of racial inequality in the location and regulatory enforcement” of industrial facilities and their pollution.¹¹² This includes statistical evidence of higher concentrations of air polluting facilities in “poor, high percent minority neighborhoods with low educational attainment,” and the disproportionate adverse health impacts borne by the area’s communities of color.¹¹³

¹⁰⁹ See Live Recording of Albuquerque City Council Meeting at 4:57:20 (Nov. 8, 2023), https://cabq.granicus.com/player/clip/437?view_id=2&redirect=true.

¹¹⁰ *Id.* at 4:58:40.

¹¹¹ See *Arlington Heights*, 429 U.S. at 269.

¹¹² *S. Camden*, 2006 WL 1097498 at *23.

¹¹³ *Id.* at *23-24.

As discussed in the above description of Complainants, Complainants are residents of the Mountain View community of Albuquerque, New Mexico – a predominantly Latino, working class to low-income community that has borne and continues to be affected by the disproportionate impacts of air pollution in the City.¹¹⁴ Due to the significant number of polluting facilities and sites located within and adjacent to the Mountain View community and larger South Valley, including auto recyclers, Albuquerque’s municipal wastewater treatment plant, paint facilities and fertilizer suppliers, residents live alongside and are subjected to “a legacy of contaminated groundwater, two Superfund sites and high levels of air pollution.”¹¹⁵ Within and adjacent to the 87105 ZIP code, where the Mountain View community is located, a dense concentration of polluting operations exists.¹¹⁶ Specifically, as of June 2016, some of the polluting operations in and near the Mountain View community include: Albuquerque Asphalt, Inc., which is permitted to emit 12.29 tons per year (“TPY”) of Nitrogen Oxides (“NOX”), 5.84 TPY of PM₁₀, and 2.38 TPY of PM₂₅; Albuquerque Metals Recycling, Inc., which is permitted to emit 13.66 TPY of Total Suspended Particulates (“TSP”), 7.67 TPY of PM₁₀, and 6.21TPY of PM₂₅; the municipal wastewater treatment plant, which is permitted to emit 191.97 TPY of Carbon, 109.48 TPY of Volatile Organic Compounds (“VOC”), 19.36 TPY of Hazardous Air Pollutants (“HAP”), 4.98 TPY of PM₁₀, and 4.88 TPY of PM₂₅; Phillips 66 Albuquerque Product Terminal, which is permitted to emit 20.5 TPY of Carbon and 93.8 TPY of VOC; Southway Recycle Plant, which is permitted to emit 6.61 TPY of Carbon, 28.85 TPY of NOX, 41.8 TPY of TSP, 17.6 TPY of PM₁₀, and 5.5 TPY of PM₂₅; Portable Concrete Batch Facility-Transit Mix,

¹¹⁴ See Section II for further discussion.

¹¹⁵ See Jessica Kutz, *Will a Wildlife Refuge Benefit a Heavily Polluted Albuquerque Neighborhood*, The Guardian (April 14, 2021), <https://www.theguardian.com/environment/2021/apr/14/albuquerque-new-mexico-green-spaces-mountain-view>.

¹¹⁶ See CABQ Air Pollution Sources, [https://hub.arcgis.com/datasets/CABQ::air-pollution-sources/explore?location=\(b\)\(6\) Privacy, \(b\)\(7\)\(C\) Enf. Privacy](https://hub.arcgis.com/datasets/CABQ::air-pollution-sources/explore?location=(b)(6) Privacy, (b)(7)(C) Enf. Privacy) (last visited March 15, 2024) (all individual pollution operation information is available and was accessed from this source).

which is permitted to emit 20.4 TPY of TSP, 8.02 TPY of PM₁₀, and 1.25 TPY of PM₂₅, and; Albuquerque Asphalt Terminal, which is permitted to emit 10.74 TPY of Carbon, .98 TPY of VOC, 1.35 TPY of PM₁₀, and 1.35 TPY of PM₂₅.¹¹⁷

A 2012 study on public health, pollution exposure, poverty and race defined Bernalillo County's "high risk neighborhoods" as neighborhoods subject to dense concentrations of pollution facilities and higher exposure levels to environmental pollution, which also typically have higher populations of Latino residents and recent immigrants – like the Mountain View and South Valley neighborhoods.¹¹⁸ The EPA's EJScreen further confirms the Mountain View and South Valley communities' status as "high risk neighborhoods," with the South Valley ranked within the 80th to 100th percentile in Air Toxics Respiratory Hazard Index; the 90th to 100th percentile in Diesel Particulate Matter; the 90th to 100th percentile in Ozone; and the 60th to 100th percentile in Air Toxics Cancer Risk compared to both the rest of the state of New Mexico and the United States.¹¹⁹

As a result of the high volume of polluting facilities in Mountain View and the larger South Valley, residents also have an elevated risk of adverse health impacts from air pollution, including, but not limited to, cancer, heart disease, respiratory illnesses, and other chronic illnesses and diseases.¹²⁰ The EPA EJScreen currently ranks the South Valley community in the

¹¹⁷ See *id.*

¹¹⁸ See Joint Center for Political and Economic Studies, *supra* note 1, at 16-19.

¹¹⁹ Albuquerque EJScreen, *supra* note 8.

¹²⁰ See Joint Center for Political and Economic Studies, *supra* note 1, at 17-19; see also Morello-Frosch, R. and Jesdale, B., *Separate and Unequal: Residential Segregation and Estimated Cancer Risks Associated with Ambient Air Toxics in U.S. Metropolitan Areas*, 114 Environmental Health Perspectives 386 (2006), [https://www.sciencedirect.com/science/article/abs/pii/S0269749107002849](https://journals.lww.com/epidem/fulltext/2004/07000/separate_but_unequal_residential_segregation_and.347.aspx#:~:text=Estimated%20cancer%20risks%20from%20cumulative,compared%20with%20low%20segregation%20are as; see Kampa, Marilena and Castanas, Elias, Human Health Effects of Air Pollution, 151 Environmental Pollution 362 (Jan. 2008), <a href=); see Straif, K., et al., eds., *Air Pollution and Cancer*, International Agency for Research on Cancer, Scientific Publication No. 161 (2013), <http://www.iarc.fr/en/publications/books/sp161/index.php>; see Danesh Yadzi, et al., *Long-Term Association of Air Pollution and Hospital Admissions Among Medicare Participants Using a Doubly Robust Additive Model*, 143 Circulation 1584 (April 20, 2021), <https://www.ahajournals.org/doi/10.1161/CIRCULATIONAHA.120.050252>.

60-70th percentile for Asthma, with the CDC Environmental Justice Index also designating the South Valley community with a “high estimated prevalence of asthma,” both in comparison to the rest of the United States.¹²¹ Consequently, more residents from the South Valley have sought emergency health services for asthma than in any other region of Bernalillo County.¹²² Overall, the CDC has categorized the South Valley community in the 97th percentile on its Social Vulnerability Index;¹²³ in the 94th percentile on its Environmental Justice Index;¹²⁴ and in the 85th percentile for Environmental Burdens, compared to the rest of the nation.¹²⁵

Notably, residents of the South Valley, especially residents of color, also have lower life expectancies than predominantly white residents of more affluent neighborhoods throughout the City of Albuquerque and Bernalillo County.¹²⁶ In comparison to the northern half of Albuquerque and Bernalillo County, Albuquerque’s South Valley experiences significantly higher rates of resident deaths from chronic diseases.¹²⁷ Within the South Valley, considerably more residents of color die from chronic diseases than white residents.¹²⁸

¹²¹ See Albuquerque EJScreen, *supra* note 8; see CDC EJI Index, *supra* note 11.

¹²² See Bernalillo County Community Health Council, *Bernalillo County Community Health Profile* at 30 (2019), https://www.healthequitycouncil.net/wp-content/uploads/2021/06/BCHP_2021-.pdf (displaying a map showing rates of over 100 asthma-related emergency room visits per 10,000 residents in the South Valley).

¹²³ See CDC EJI Index, *supra* note 11 (the CDC’s Social Vulnerability Index ranks census tracts based on the potential negative effects on communities caused by external stresses on human health).

¹²⁴ *Id.* (the CDC’s Environmental Justice Index uses data from the U.S. Census Bureau, the EPA, the U.S. Mine Safety and Health Administration, and the U.S. Centers for Disease Control and Prevention to rank the cumulative impacts of environmental injustice on health for every census tract).

¹²⁵ *Id.*; see also *Environmental Justice Index Indicators*, CDC, <https://www.atsdr.cdc.gov/placeandhealth/eji/indicators.html> (last updated May 31, 2023) (the CDC’s Environmental Burdens include, and categorize census indexes according to, air pollution, potentially hazardous and toxic sites, built environment characteristics, transportation infrastructure, and water pollution).

¹²⁶ See Joint Center for Political and Economic Studies, *supra* note 1, at 33; see also *Mountain View is City’s Industrial Sacrificial Zone*, *supra* note 6.

¹²⁷ See Bernalillo County Chronic Disease Deaths Map (2008-2017), <https://www.arcgis.com/home/webmap/viewer.html?webmap=a730afb44786482882df08c801e8ee57&extent=-107.0246,34.9188,-106.3064,35.2475> (some areas of Northern Albuquerque experience rates of 371.0 chronic disease deaths per 100,000 residents; whereas, in some areas of the South Valley, chronic disease death rates range from 492.5 to 568.2 per 100,000 residents).

¹²⁸ See *id.* (for example, Hispanic residents in the South Valley map area defined as “Rio Bravo Second,” experience chronic disease deaths at a rate of 504.0 per 100,000 residents, whereas white residents in the area experience chronic disease deaths at a rate of 377.8 per 100,000 residents).

Ultimately, the significantly larger presence of polluting facilities and higher concentrations of environmental pollutants, emissions, and hazards within the Mountain View and larger South Valley communities of Albuquerque – sited in predominantly low-income communities of color and resulting in higher illness and disease rates, as well as lower life expectancy rates – points to the ongoing legacy of discriminatory pollution practices in the City of Albuquerque. The statistical evidence, when considered all together, is thus indicative and supportive of a clear pattern of intentional discrimination and its impacts and effects on Albuquerque’s low-income communities and communities of color, particularly in Albuquerque’s South Valley.

Conversely, these statistics demonstrate the long-overdue need to remedy discriminatory siting of pollution sources, as Complainants attempted to do. The City Council’s efforts to deliberately obstruct communities of color’s efforts to remedy historic discrimination and protect the health and welfare of themselves and their neighbors, while knowing those communities are the ones most heavily impacted by the ongoing pollution and discriminatory permitting practices, is evidence that the City Council’s majority acted primarily out of racial animus.

6. The Harm from the City of Albuquerque’s and the City Council’s Actions Fall Disproportionately and Foreseeably on Communities of Color

The final factor ECRCO must consider is the difference in the extent of harm the policy or practice disproportionately causes communities of color and low-income communities, as well as the foreseeability of the harm.¹²⁹ Typically, this requires demonstrating “that the extent of harm the policy or practice causes minorities and non-minorities is different.”¹³⁰ Furthermore, if the discriminatory impact of the action was “foreseeable,” then this factor further supports ECRCO’s finding of intentional discrimination.¹³¹ The evaluation of this final factor, alongside the

¹²⁹ See Title VI Legal Manual, *supra* note 18, at Sec. IV, p.13-17.

¹³⁰ *Id.* at 14.

¹³¹ *Id.* at p.15-17; see also *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 464–65 (1979) (“[A]ctions having foreseeable and anticipated disparate impact are relevant evidence to prove the ultimate fact, forbidden purpose...”).

statistical evidence considered in the previous factor, ultimately “acknowledges that disparate impact evidence can be probative of discriminatory intent,”¹³² which, accordingly, involves the consideration of whether the effect of the action will “bear[] more heavily on one race than another.”¹³³ Thus, the discriminatory impact of an action is highly indicative of discriminatory intent behind the action, because the “impact of an official action is often probative of why the action was taken in the first place since people usually intend the natural consequences of their actions.”¹³⁴

Here, it is clear that the City Council’s interference with the community-led rulemaking efforts caused immediate harm to communities of color and low-income communities by interfering with their ability to meaningfully participate in the public regulatory process and allowing the disproportionate and discriminatory impacts of air pollution these communities unjustly continue to bear. Furthermore, the City Council’s interference has foreseeable, longstanding impacts to Albuquerque’s low-income communities of color as it pertains to these communities’ ability to participate in public processes; the Air Board’s ability to address discriminatory air quality permitting practices; and ultimately, to the quality of life and the ongoing disparate impacts of pollution the City of Albuquerque subjects these communities to. The discriminatory impact of the City Council’s actions is both far-reaching and unequivocally foreseeable, with the continuous permitting of facilities emitting hazardous and toxic air pollutants into the air and bodies of Albuquerque’s low-income communities of color – while

¹³² See Title VI Legal Manual, *supra* note 18, at Sec. VI, p. 12; see *Arlington Heights*, 429 U.S. at 266.

¹³³ *Id.*; see also *N.C. State Conf. of NAACP*, 831 F.3d at 239 (concluding that because “African American voters” disproportionately used each of the voting mechanisms removed by the new provisions of the voting law, “sufficient disproportionate impact” had been established); see also *Melendres v. Arpaio*, 989 F. Supp. 2d 822, 902 (D. Ariz. 2013) (awarding injunctive relief to Title VI plaintiffs and finding that plaintiffs demonstrated “racially disparate results” and “additional indicia of discriminatory intent”); see also *Comm. Concerning Cmty. Improvement v. City of Modesto*, 583 F.3d 690 (9th Cir. 2009) (Title VI and equal protection case finding that statistical evidence was sufficient to create inference of intent where a race-neutral precondition to receiving municipal services served to exclude Latino-majority neighborhoods)).

¹³⁴ See *S. Camden*, 2006 WL 1097498 at *23 (quoting *Reno v. Bossier Parish School Bd.*, 520 U.S. 471, 487 (1997)).

restricting and creating further barriers to these communities' ability to advocate for and achieve meaningful air quality regulations – as the natural consequences of the City Council's actions.

A. Immediate Harm Caused by the City Council Legislation

The City Council Legislation, and intentional associated acts by City Council, effectuated an immediate harm to Albuquerque's communities of color and low-income communities by interfering with their ability to participate in public processes and obtain air quality regulations for their communities that would meaningfully address decades of intentional discrimination in the City's execution of its air permitting program. Namely, the introduction and passage of the City Council's Resolution and Ordinance was a direct and intentional attempt to disrupt and dismantle Complainants' petition for rulemaking to the Air Board, effectuating an abuse of the City Council's power in order to discriminate on the basis of race, color, and national origin, in violation of Title VI. As previously mentioned, the legality and validity of this legislation is currently undergoing litigation, most recently with a preliminary injunction issued against the City, enjoining the enforcement and applicability of the Resolution and Ordinance because the Air Board "has a substantial likelihood of prevailing on the merits on the matter,"¹³⁵ such that the City Council's actions are likely to be determined to be contrary to law.

The City Council, through the passage of its Legislation and subsequent acts, was able to accomplish such goals and effectively interfere with Complainants' right to petition the Air Board for rulemaking, despite the validity and legality of the Legislation now undergoing litigation. The initial passage of the City Council Legislation on November 8, 2023, prior to the Mayor's vetoes, led to chaos and confusion regarding whether the Rulemaking Proceeding would continue forward as scheduled. Following the Mayor's vetoes on November 22, 2023, based on concerns with the City Council's unlawful interference with communities' right and ability to

¹³⁵ See Exhibit 4 [PI Order from 2nd Judicial Court of State of New Mexico].

petition the Air Board for rulemaking, the Rulemaking Proceeding continued as scheduled for the week of December 4 through December 8, 2023; but, as mentioned above, on the first evening of the Rulemaking Proceeding, City Council overrode the Mayor's vetoes, approving the Resolution and Ordinance for enactment.¹³⁶ Immediate confusion ensued as to when the Resolution and Ordinance would become effective because the City Charter and the City Municipal Code are silent on the effective date of the Resolution, but state that City ordinances become effective five days after publication.¹³⁷ Contention remains regarding when the Legislation went into effect, with the earliest effective date of the Ordinance claimed to be on December 11, 2023, and the latest effective date of the Ordinance asserted to be on December 20, 2023.¹³⁸

Because the Rulemaking Proceeding was already underway when City Council overrode the Mayor's vetoes and approved the Resolution and Ordinance, certain industry parties to the Rulemaking Proceeding raised arguments, during the Rulemaking Proceeding, that the Air Board could not legally proceed with the Rulemaking Proceeding due to the City Council's actions.¹³⁹ As mentioned, Councilor Lewis, accompanied by a Deputy City Attorney, even showed up during the public comment portion of the Rulemaking Proceeding, on December 5, 2023, to insist the Air Board's continuation of the Rulemaking Proceeding was unlawful,¹⁴⁰ while also

¹³⁶ See Exhibit 1, Exhibit 2 (documenting the Mayor's vetoes of the Ordinance and Resolution as overridden on December 4, 2023).

¹³⁷ Albuquerque City Charter, Article XI, Sec. 6(b) ("An ordinance shall not become effective until five days after it has been published...").

¹³⁸ See pending litigation dockets and associated filings discussed in Section IV.B.

¹³⁹ See HEEI AQCB Volume 6 Petition to Amend Title 20 Chapter 11, Transcript of Proceedings at 570-71 (parties' objections to the Rulemaking Proceeding due to the passage of the City Council Legislation) (Dec. 5, 2023) [hereinafter Proceedings Transcript]; see also AQCB Docket, *supra* note 51: Dkt. 237 [Email Companies' Joinder in New Mexico Mining Association and New Mexico Chamber of Commerce Objection]; Dkt. 238 [Email NTESS Joinder in NMMA/NMCC Objection]; Dkt. 239 [Email Federal Parties' Joinder in NMMA/NMCC Objection]; Dkt. 240 [Email New Mexico Asphalt Pavement Association Members' Joinder in NMMA/NMCC Objection].

¹⁴⁰ See Proceedings Transcript at 705-721 (Councilor Lewis, during public comment, repeatedly asserts to the Air Board that "[t]he resolution prohibits you from having this hearing. This hearing is absolutely illegal"); see also Spencer Schact, *Air Quality Control Board Meets in Defiance of City Council Ruling*, KOB4 (Dec. 6, 2023),

serving a Cease and Desist Letter to the Air Board.¹⁴¹ The Hearing Officer to the Rulemaking Proceeding ordered that the Air Board could proceed with the Rulemaking Proceeding because he determined that the Ordinance would be effective, at earliest, on December 11, 2023.¹⁴² Because of the confusion surrounding the City Council Legislation's validity and the effective date of the Ordinance, the Air Board was ultimately rushed into deliberations on the final day of the Rulemaking Proceeding in order to adopt any form of a rule to address the City's decades of discriminatory air pollution permitting. What resulted was a hastened discussion between Air Board members in a single afternoon and an adopted HEEI Rule that is less robust than what was proposed and advocated for throughout the entire Rulemaking Proceeding by Complainants.¹⁴³

The adopted HEEI Rule is set to go into effect on January 1, 2025.¹⁴⁴ Although the Air Board's adoption of some form of the HEEI Rule petitioned for by Complainants is a measurable success, the intentional discriminatory acts by the City of Albuquerque and its City Council assuredly resulted in a less robust and less effective regulation than what was advocated for by the overburdened communities of Albuquerque and Bernalillo County, and it is not yet known whether the adopted HEEI Rule will effectively address the historical and ongoing discriminatory impacts of air permitting in Albuquerque. Ultimately, the City Council's passage of the Resolution and Ordinance and the resulting confusion that ensued directly and intentionally interfered with Complainants' right to have their petition for rulemaking adequately considered by the Air Board, and resulted in the hastened passage of a rule that likely does not

<https://www.kob.com/new-mexico/air-quality-control-board-meets-in-defiance-of-city-council-ruling/> (including quotes and videos from Councilor Lewis' public comment).

¹⁴¹ See AQCB Docket, *supra* note 51: Dkt. 222 [Cease and Desist Letter to Air Quality Control Board]. Notably, the City failed to take any legal action enjoining the Air Board after the Air Board ignored its Cease and Desist Letter, suggesting that the City Attorneys realized the City Legislation were specious.

¹⁴² See Proceedings Transcript at 391 (Hearing Officer's determination that the Rulemaking Proceeding would proceed as scheduled).

¹⁴³ To compare, see Exhibit 5 [Complainants' Final Version of the Proposed HEEI Rule] and Exhibit 6 [Final Version of Adopted HEEI Rule].

¹⁴⁴ 20.11.72.5 NMAC.

effectuate the purpose of addressing the discriminatory air permitting that Complainants have advocated against for decades.

Moreover, Councilor Lewis' appearance during the Rulemaking Proceeding's public comment session, as a representative of the City of Albuquerque, supported by City of Albuquerque employees and legal staff, served only to intimidate community and Air Board members participating in the Rulemaking Proceeding. Such harassment, with the obvious motive and effect of deterring community members from participating in a public rulemaking process, ultimately rises to the level of intentional discrimination on the basis of race, color, and national origin prohibited by Title VI.¹⁴⁵

Complainants, as community members, brought forth a lawful petition for a public rulemaking to address the historical and discriminatory impacts of pollution disproportionately borne by their communities. However, City Council repeatedly and consistently interfered with this public rulemaking process in an attempt to stop the Air Board from considering a communities of color-led regulation addressing community concerns. The City of Albuquerque and its City Council's continuous interference caused direct and immediate harm to Albuquerque's low-income communities of color and interfered with their right and ability to meaningfully participate in their local government and regulatory processes by successfully

¹⁴⁵ See Title VI, 42 U.S.C § 2000d (prohibiting recipients from excluding persons from participating in any program or activity receiving federal financial assistance); see also Title VI Legal Manual, *supra* note 18, at Sec. VI, p.15 (stating that a recipient's actions having a foreseeable discriminatory effect is relevant evidence of a Title VI violation); see also *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 464–65 (1979) (“[A]ctions having foreseeable and anticipated disparate impact are relevant evidence to prove the ultimate fact, forbidden purpose...”); see, e.g., *N.C. State Conf. of NAACP*, 831 F.3d at 223; *Dowdell v. City of Apopka*, 698 F.2d 1181, 1186 (11th Cir. 1983) (discussing “obviously foreseeable” outcome of the town’s decision to spend nearly all of its revenue-sharing monies on the white community, at the expense of communities of color); see also *United States v. Bannister*, 786 F. Supp. 2d 617, 665–66 (E.D.N.Y. 2010) (expressing support for using discriminatory impact and foreseeable consequences and historical background to demonstrate discriminatory intent); see also *Almendares v. Palmer*, 284 F. Supp. 2d 799, 806 (N.D. Ohio 2003) (finding that state agencies’ failure to provide bilingual services for food stamp applicants had a foreseeable effect of deterring Spanish-speaking applicants and beneficiaries from participating in the state’s food stamps program, and such foreseeability of a discriminatory impact was sufficient evidence to state a Title VI claim that defendants intentionally discriminated on the basis of national origin).

hindering a community-led rulemaking effort to address the disproportionate impacts of air pollution on local low-income communities and communities of color.

B. Foreseeable Future Harm Caused by the City Council Legislation

Actions that have a “foreseeable and anticipated disparate impact” to low-income communities of color, such that the action will “bear[] more heavily on one race than another,” are relevant and indicative of intentional discrimination.¹⁴⁶ Here, the future harm caused by the City Council Legislation, and associated City Council actions, have a reasonably foreseeable and anticipated disparate and intentional impact to Albuquerque’s communities of color and low-income communities. The future harm is both extensive and predictable, as the City Council’s acts not only permit the continuation of the City’s historical practice of siting polluting facilities within low-income communities of color, but also discriminatorily interfered with and prospectively inhibits these communities’ ability to meaningfully and effectively participate in their local government and its public processes – namely, to petition for a rulemaking to address the City of Albuquerque’s ongoing legacy of disproportionately subjecting these communities to the adverse health impacts of air pollution, without adequate regulation.

As discussed throughout this Complaint, Albuquerque’s low-income communities and communities of color disproportionately bear the adverse health impacts of air pollution, due to the intentional placement of polluting facilities and operations in and adjacent to these communities.¹⁴⁷ Without adequate regulation and meaningful protections, air quality permits for polluting operations have continued to be issued for sources located within communities like the Mountain View neighborhood and larger South Valley area, without the adequate and necessary consideration of the adverse health impacts these communities are already experiencing. It is

¹⁴⁶ *Columbus Bd. of Educ. v. Penick*, 443 U.S. at 464–65; see *Arlington Heights*, 429 U.S. at 266.

¹⁴⁷ See Section IV.5 for larger discussion on disparate impacts to Albuquerque’s communities of color and associated statistical evidence.

reasonably foreseeable that, due to the actions of the City Council and the City of Albuquerque, the City’s intentionally discriminatory air pollution permitting practices will continue forward in the same fashion – thereby preserving the City of Albuquerque’s practices of subjecting its low-income communities and communities of color to a higher concentration of environmental health hazards and, consequently, placing these communities’ health at a significant detriment, as they bear the disproportionate burden of the adverse health impacts from air pollution.¹⁴⁸ As discussed above, while a rule was adopted by the Air Board, the adopted Rule is likely far from adequate and may not address the historic and ongoing discrimination and disparate impacts of air pollution in Albuquerque. Further, the regulatory authority responsible for implementing the adopted Rule, the City of Albuquerque’s Environmental Health Department, continues to oppose the adopted Rule.¹⁴⁹ Thus, the adopted HEEI Rule is likely to do little to significantly abate the foreseeable disparate impact that the City Council’s discriminatory acts will have on Albuquerque’s low-income communities of color.

The continuing subjection of Albuquerque’s most vulnerable communities to a disproportionate amount of air pollution and the consequent adverse health impacts is not the only foreseeable future harm caused by the City Council’s Legislation and associated discriminatory acts. Perhaps most important, and the crux of this Complaint, is the fact that the City Council’s Legislation, and associated discriminatory acts in support of the Legislation, also have the foreseeable effect of discouraging low-income communities and communities of color from further participating in public processes and rulemaking efforts in the City of Albuquerque.

¹⁴⁸ See Joint Center for Political and Economic Studies, *supra* note 1, at 19 (reporting that Albuquerque’s communities of color and low-income communities “face a higher concentration of environmental health hazards such as air pollution and toxic industrial wastes than do whiter and higher income census tracts,” and that the “[c]ommunities facing the greatest array of health risks have a larger percentage of low-income, immigrant, and Hispanic families than communities facing the least health risks”) (emphasis added).

¹⁴⁹ See Proceedings Transcript at 1792-93 (Dec. 8, 2023) (EHD requesting the Air Board not adopt the HEEI Rule); see also AQCB Docket, *supra* note 51: Dkt. 229 [EHD’s Legal Memorandum]; see also EHD Notice of Appeal No. A-1-CA-41669 (Jan. 26, 2024) (appealing the adopted rule in its entirety).

As demonstrated throughout this Complaint, the City Council’s introduction, passage, and enforcement of the Resolution and Ordinance were an extreme deviation from the City’s normal procedures, in an explicit attempt to halt the communities of color-led rulemaking effort in its entirety. The City Council’s Legislation and associated acts were publicized widely throughout the region, garnering both local and statewide media coverage and attention.¹⁵⁰ It is also important to note that this community-led rulemaking effort was only the second time in Albuquerque’s history that a community, rather than a government body, has proposed a rulemaking to the Air Board.¹⁵¹ Perhaps even more significantly, the HEEI Rule Rulemaking Proceeding was the first time a community-led rulemaking effort has been accepted by the Air Board for consideration and held for public hearing.¹⁵²

Thus, the significance of this community-led rulemaking effort, and the City’s discriminatory acts to hinder these efforts, is evident. Although Councilor Lewis was certainly at the forefront of many of these discriminatory acts by City Council, these discriminatory acts amount to intentional discrimination against Albuquerque’s low-income communities of color by the entirety of City Council, as an entity of the City of Albuquerque, in the passage of the Resolution

¹⁵⁰ Although only a few of many, the following are examples of the local and statewide media coverage of the HEEI Rule Rulemaking Proceeding, and City Council’s legislative attempts to halt it. *See e.g.* Bryce Dix, *Regulatory Board Messily Approves Limited Environmental Justice Air Permit Rule*, KUNM (Dec. 12, 2023), <https://www.kunm.org/local-news/2023-12-12/regulatory-board-messily-approves-limited-environmental-justice-air-permit-rule/>; Kent Patterson, *Albuquerque Air War: Big Business, Bipartisan Politicos Attack Environmental Justice Rule*, CounterPunch (Dec. 15, 2023), <https://www.counterpunch.org/2023/12/15/albuquerque-air-war-big-business-bipartisan-politicos-attack-environmental-justice-rule/>; Ryan Lowery, *Boarding Up*, The Paper (Nov. 3, 2023), <https://abq.news/2023/11/boarding-up/>; Marilyn Upchurch, *Air Quality Control Board continues hearing despite Albuquerque city council vote to stop it*, KRQE News (Dec. 5, 2023), <https://www.krqe.com/news/politics-government/air-quality-control-board-continues-hearing-despite-albuquerque-city-council-vote-to-stop-it/>; Alice Fordham, *Albuquerque Mayor Vetoes City Council Decision to Replace Air Quality Control Board*, Source NM (Nov. 27, 2023), <https://sourcenm.com/2023/11/27/albuquerque-mayor-vetoes-city-council-decision-to-replace-air-quality-control-board/>.

¹⁵¹ *See* 2014 Complaint, *supra* note 1, at 6-7 (describing the first community petition for a proposed air quality regulation, which was swiftly denied a rulemaking hearing by the Air Board) (emphasis added).

¹⁵² *See* Fischer, *supra* note 2 (describing the community-proposed HEEI Rule as “the first-ever air quality regulation to be petitioned by the community and given a rulemaking hearing”) (emphasis added).

and Ordinance; the City Council and the City’s indifference and/or approval of a City Council member’s statements, acts, and use of City staff and resources, including legal resources, to intimidate members of the public; and the City Council and City’s failure to condemn Councilor Lewis’ discriminatory acts and instead, reward such behavior by electing Councilor Lewis to serve as the Albuquerque City Council President in January 2024.¹⁵³ To allow such blatant and discriminatory interference in a public rulemaking process, through the use of City funds, staff, resources, and power, to prevent local low-income communities of color’s petition for rulemaking to be properly considered, is to endorse and allow the intentional and unequivocal discrimination by a local government body against its own low-income communities and communities of color – in violation of Title VI. While the validity of the adopted HEEI Rule is under appeal, it does not change the fact that the City of Albuquerque and its City Council’s actions served to intentionally discriminate against Albuquerque and Bernalillo County’s low-income communities of color and their rights to meaningfully engage with and participate in the public regulatory process, in violation of Title VI, and that these entities may continue to do so in future community-led rulemaking efforts if these violations are not accounted for and remedied accordingly.

By allowing the City Council’s discriminatory abuse of its powers and authority to go unchecked, Albuquerque’s most vulnerable communities of color will likely be dissuaded from participating in future public regulatory processes, especially in relation to air quality regulation, knowing their own local government will use its power and authority to interfere with and potentially halt any community-led efforts. These communities’ ability to meaningfully

¹⁵³ See *City Councilor Dan Lewis Elected City Council President*, City of Albuquerque, (Jan. 8, 2024) <https://www.cabq.gov/council/news/city-councilor-dan-lewis-elected-city-council-president>; see also Title VI Legal Manual, *supra* note 18, at Sec. VI, p.28 (“A recipient is liable under Title VI for its own conduct when it fails to take adequate steps to address discriminatory harassment” that it knew of or should have reasonably known of) (emphasis added).

participate and be involved in public regulatory processes is not only a protected right afforded to these communities as members of the public, but also a vital and integral component for ensuring effective regulations exist that adequately protect these communities' health, lives, and futures.

Without EPA's scrutiny and enforcement, the City of Albuquerque and its City Council will assuredly continue engaging in discriminatory conduct against Albuquerque's communities of color and low-income communities. This creates the foreseeable risk of future discrimination, harassment, and intimidation by the local government against members of the public, essentially empowering the City of Albuquerque and its City Council to continue interfering with communities of color's ability to meaningfully engage in public processes, like a local board's public rulemaking process. Accordingly, accountability is necessary to prevent future intentional discriminatory acts and abuses of local government power and resources, and to ensure the City of Albuquerque and its City Council come into, and remain in, compliance with Title VI.

V. RELIEF REQUESTED

The discriminatory actions by the City of Albuquerque and its City Council exemplify a concerning trend and practice that needs to be scrutinized for compliance with federal civil rights laws, and addressed accordingly. A lack of accountability risks future intentional obstruction to the public rulemaking process by local governments, signifying that discrimination on the basis of race, color, and national origin are acceptable so long as these discriminatory actions are executed under the guise of "putting jobs" and "economic growth" before the health and well-being of Albuquerque's overburdened communities, low income communities and communities of color.¹⁵⁴ Accountability is thus necessary to ensure Albuquerque and Bernalillo County's low-income communities and communities of color are able to participate in the functions of their local government without the fear, risk, or experience of discrimination by

¹⁵⁴ See *City Council Overrides Mayor's Vetoes*, *supra* note 24.

their own local government; and to ensure the City of Albuquerque and its City Council come into and remain in compliance with Title VI.

Accordingly, Complainants respectfully request that EPA grant the following relief:

- 1) Conduct an investigation into the City of Albuquerque and its City Council's discriminatory conduct and interference in the HEEI Rule Rulemaking Proceeding and associated rulemaking efforts;
- 2) Hold a public listening session and an opportunity to submit public comments on the matter;
- 3) If warranted, reduce or eliminate federal funding for the City of Albuquerque; and
- 4) Take all other actions equitable and necessary, including an affirmative compliance review of the City of Albuquerque, to ensure the City of Albuquerque and its City Council come into and remain in compliance with Title VI and EPA's implementing regulations.

VI. CONCLUSION

For all the reasons outlined above, Complainants request that EPA accept this Complaint for investigation, and upon a finding of discrimination, bring the City of Albuquerque and the City Council of Albuquerque into compliance with Title VI of the Civil Rights Act of 1964 and EPA's implementing regulations.

Thank you for your consideration of this matter.

RESPECTFULLY SUBMITTED on this 31st day of May, 2024, by:

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