A Recipe for Disaster?

Challenging Los Angeles' Motion to Ban Gas Stoves on Equal Protection Grounds

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Abstract

This paper explores whether an equal protection challenge to Los Angeles' motion banning gas stoves in all new residential and commercial buildings is legally viable. Although the motion makes no specific mention of race (making it facially-neutral), Asian Americans have raised concerns about the potential disproportionate impacts on their communities, due to the cultural significance of gas stoves in Asian cuisine. Stimulating the two-step process for evaluating whether unconstitutional discrimination has occurred from a facially neutral law, I demonstrate that such litigation would not be legally viable at this time for three reasons. First, the unique circumstances surrounding the affected population make establishing disparate impact, the first element, much more challenging than similarly situated cases. Second, political processes protecting the pseudo-right of government employees to discriminate increase the burden of the challenger to prove discriminatory intent, the second element. Third, the Los Angeles' motion would likely survive the "narrowly tailored and compelling interest" requirement of strict scrutiny review—the final step in an equal protection challenge. The courts' rigorous standards for proving unseen forms of discrimination reflect a failure to recognize legacies of systemic inequities appearing under the guise of neutrality. This is certainly the case for Asian Americans, whose longtime reliance on gas stoves is influenced by Western colonization, exploitation, and the industrialization of their home nations. Any environmental legislation—however well-meaning—must consider the economic realities of climate policy on the livelihoods of Asian Americans, which are inextricably intertwined with the climate crisis. In this regard, legislatures can play a powerful role in balancing the state's decarbonization goals while safeguarding marginalized communities from policy's unintended consequences.

I. INTRODUCTION

On May 22nd, 2022, the Los Angeles City Council introduced and passed a motion directing one of its committees to develop a regulatory framework to address the climate crisis.[1] One of its key provisions would permanently ban gas stoves in all residential and commercial buildings constructed after January 1st, 2023 to achieve the state's decarbonization goals.[2] Though the motion refrains from mentioning race, a growing number of Asian Americans have pointed out the legislation's discriminatory potential.[3] Ethnic dishes such as Cantonese stir-fry and Korean barbecue historically rely on gas stoves to create their distinct flavor profiles.[4] One theory for this phenomenon requires us to consider the relationship between gas and the industrialization of Asian nations.[5] Asian communities' longtime reliance on gas stoves evolved from a survival tactic to a now common cultural practice which, alongside Asian immigrants, traveled to the United States. By phasing out gas stoves completely after January 1st, the Los Angeles City Council's motion may produce the effect of reducing the quality of food served by establishments, impacting the livelihoods of Asian American small business owners (ie. restaurant closures, layoffs, etc.) and posing a higher barrier of entry to new restaurateurs of Asian descent.

Given the motion's potential discriminatory impact on Asian American restaurateurs, can Los Angeles' motion be challenged on equal protection grounds? Stimulating the two-step process for evaluating whether unconstitutional discrimination has arisen from a

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[1] *See* Wong 14-15.
[2] *See* Wong 14-15.
[3] Celine Pun, "Los Angeles' ban on gas stoves could spell the end for many Korean BBQ, Chinese restaurants," *NextShark*, June 3rd, 2022. https://nextshark.com/gas-appliance-ban-los-angeles.
[4] Though exceeding the scope of this paper, I will briefly note here that electric stoves have been marketed as a potential alternative to gas stoves. At the time of writing this paper, electric stoves are unequipped to replicate the flavor profiles of Asian dishes that would otherwise require intense char or *wok hei*.
[5] Ambuj D. Sagar, Hongyan H. Oliver and Ananth P. Chikkatur, "Climate Change, Energy, and Developing Countries," *Vermont Journal of Environmental Law 7* (2006): 71–94. https://www.jstor.org/stable/vermjenvilaw.7.71

facially neutral law, I demonstrate that such litigation would not be legally viable at this time for three reasons. First, the unique circumstances surrounding the affected population make establishing disparate impact, the first necessary element, much more challenging than similarly situated cases. Second, political processes protecting the pseudo-right of government employees to discriminate increases the burden on the challenger to prove discriminatory intent, the second necessary element. Third, the Los Angeles' motion would likely survive the "narrowly tailored and compelling interest" requirement of strict scrutiny review—the final step in an equal protection evaluation. The courts' rigorous standards for proving unseen forms of discrimination (unconscious bias, facially neutral laws, etc.) reflect a failure to recognize legacies of systemic inequities that have appeared under the guise of neutrality. This is certainly the case for Asian Americans, whose longtime reliance on gas stoves is influenced by Western colonization, exploitation, and the industrialization of their home nations. Any environmental legislation—however well-meaning—must consider the economic realities of climate policy on the livelihoods of Asian Americans, which are inextricably intertwined with the climate crisis; this is especially true for small business owners and low-wage restaurant workers. In this regard, legislatures can play a powerful role in balancing the state's decarbonization goals while safeguarding marginalized communities from policy's unintended consequences.

II. CONSIDERING AN EQUAL PROTECTION CHALLENGE

The Equal Protection Clause of the 14th Amendment guarantees all individuals equal treatment under the law in the Constitution.[6] Laws that interfere with the fundamental rights of suspect classes (race, religion, national origin, immigration status) are subject to a

[6] Erwin Chemerinsky, *Constitutional Law,* 6th ed. (Boston: Wolters Kuler, 2020), 29-34; 552-690; 718-764.

two-part test known as strict scrutiny review.[7][8][9]A law must not only justify the creation of racial classifications by demonstrating a "compelling government interest for which it is enacted for", but it must also be "narrowly tailored to achieve that goal."[10] If the same policy outcomes could be achieved through race-neutral means, the law would not survive the second element of strict scrutiny review.

The high burden placed on the government during strict scrutiny review minimizes the possibility of illegitimate racial prejudice as the motive for a classification's creation.[11] Since discrete and insular minorities[12] are especially vulnerable to state discrimination, the courts subject the government to a higher standard of review. This is justified, considering the historical role of classifications used to segregate African Americans and other racial minorities from whites.[13] Ironically however, the Supreme Court established the strict scrutiny test in *Korematsu v. United States* to justify the internment of 120,000 Japanese-Americans during World War II on the basis of national security—despite no evidence suggesting such a credible threat existed.[14] National security remains just one of the few examples of a government interest surviving strict scrutiny review.

There exist two types of laws that can be challenged on equal protection grounds. Laws that create explicit racial classifications (ie. segregation) are known as "on-the-face," while laws that do not refer to race, but nevertheless produce disproportionate racial outcomes (ie. Jim Crow vagrancy laws), fall into the category of facial neutrality.

Whereas "on-the-face" laws only need to undergo strict scrutiny review, facially

[7] While legal jargon still largely refers to undocumented immigrants as "aliens", I will use the term "undocumented immigrants" throughout this paper in light of the term's negative and offensive connotations.
[8] Discrimination against undocumented immigrants is constitutionally allowed if the action is Congressional. *See* Erwin Chemerinsky, *Constitutional Law,* 6th ed., 29-34; 552-690.
[9] Out of the three standards of review, strict scrutiny is the most rigorous test.
[10] Erwin Chemerinsky, *Constitutional Law,* 29-34; 552-690.
[11] Richmond v. J. A. Croson Co., 488 U.S. 469, 109 S. Ct. 706 (1989).
[12] United States v. Carolene Prods. Co., 304 U.S. 144, 58 S. Ct. 778 (1938).
[13] Plessy v. Ferguson, 163 U.S. 537, 16 S. Ct. 1138 (1896).
[14] Korematsu v. United States, 323 U.S. 214, 65 S. Ct. 193 (1944).

neutral laws must undertake an additional step.[15] Since discriminatory intent is already embedded within explicit racial classifications,[16] the question shifts to whether that classification is justified and for what purpose. Facially neutral laws, however, must prove the existence of both discriminatory impact and discriminatory intent before proceeding with strict scrutiny review. During this process, two questions are asked: does the law demonstrate a racially disproportionate or disparate impact? If so, was the discrimination intentional?

To prove the first element, one must determine whether the law in question produces a statistically significant difference between two similarly situated races, despite all other considerations being roughly equal. The use of statistical evidence to litigate equal protection challenges of this nature first emerged in *Yick Wo v. Hopkins*.[17] Petitioner Yick Wo was fined and imprisoned for operating a laundromat in the city of San Francisco without the proper building permit. Wo however, alleged that the Board of Supervisors responsible for issuing these permits discriminated against individuals of Chinese descent, violating his right to due process under the 14th Amendment. He submitted a writ of habeas corpus to the California Supreme Court on August 24th, 1885. The Court ruled that the City of San Francisco had indeed discriminated against Chinese laundromats on the basis of their race, despite relying on laws that appeared race-neutral such as the building ordinance, to deny them permits.

The fact-finding record was key to the outcome of *Yick Wo v. Hopkins*.[18] Despite all considerations being equal, including full compliance with San Francisco's building ordinance, Chinese laundromats faced a significantly higher rate of permit rejection than their white counterparts. Notwithstanding the fact that over 75% of the city's laundromats

[15] There are three types of "on-the-face" laws: racial segregation, singling out of one group, and laws burdening both minorities and whites. *See* Erwin Chemerinsky, *Constitutional Law,* 725-764.
[16] Erwin Chemerinsky, *Constitutional Law,* 718.
[17] Yick Wo v. Hopkins, 118 U.S. 356, 6 S. Ct. 1064 (1886).
[18] Yick Wo v. Hopkins, 118 U.S. 356, 6 S. Ct. 1064 (1886).

were Chinese-owned, no one of Chinese descent was granted a permit while approximately 98% of all non-Chinese applicants were granted one.[19] The stark statistical difference (0% versus 98%) between two similarly situated populations indicated a clear unequal enforcement of the ordinance.

Village of Arlington Heights v. Metro House Development Corporation outlines two ways to prove the second element, discriminatory intent.[20] [21] The first approach relies on the historical record to locate "invidiousness", or purposeful discrimination, in the sequence of events leading up to the creation of a classification. For example, if a planning commission departed from normal procedure and altered property zoning requirements upon learning of a nonprofit developer's plans to build racially integrated housing, the actions may be indicative of discriminatory intent.[22] The second approach utilizes the legislative and/or administrative history to reveal the true aims of a policy. Sources such as public statements, meeting minutes, and reports may be used to determine whether discriminatory intent is present before proceeding with strict scrutiny review.

Despite the abundance of legal tools and approaches (statistical evidence, historical background, administrative and/or legislative record) available to challengers, several issues inherent to the impact and intent tests make attributing the occurrence of unconstitutional

[19] Yick Wo v. Hopkins, 118 U.S. 356, 6 S. Ct. 1064 (1886).
[20] Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 97 S. Ct. 555 (1977).
[21] Respondent Metropolitan Housing Development Corporation (MHDC) applied with the Village of Arlington Heights Commission (VAHC) to receive approval for a low-income and racially-integrated housing project. The Commission denied MHDC's request to rezone the area from single-family housing to multiple-family (R-5) classification. MHDC alleged that VAHC's denial of the rezoning request was racially discriminatory against individuals of African descent, since the city of Arlington was home to an underwhelmingly low Black population, and when offered the opportunity to change those circumstances, denied MHDC the opportunity to do so. While the District Court found that "the Village's rezoning denial was motivated not by racial discrimination but by a desire to protect property values and maintain the Village's zoning plan", the Court of Appeals reversed this decision. This case came before the Supreme Court on January 11th, 1977 through writ of certiorari by VAHC. While the statistical evidence was sufficient to demonstrate disparate impact, Respondent failed to prove that VAHC had intended to discriminate against Black Americans by denying MHDC re-zoning. In fact, VAHC's motivations for rezoning were applied consistently and without difference to other proposals as well. *See* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 97 S. Ct. 555 (1977).
[22] Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 97 S. Ct. 555 (1977).

discrimination to a facially neutral law incredibly burdensome. For one, the case law lacks clear uniform standards for proving discriminatory impact and intent. What constitutes a "statistically significant" discriminatory impact or disparate impact, not only relies on outdated extremes established by legal precedent but is also subjective to interpretation. Rarely now do cases demonstrate the obvious statistical differences found in *Yick Wo v. Hopkins* (0% versus 98%)[23] or in *Village of Arlington Heights v. Metro House Development Corporation* (0.042%).[24]

Judges have not expressed interest in commenting on a clear bright line or at least narrowing the range of what could be considered statistically significant, either conforming to the extremes of the past, relying on subjective indicators to determine discriminatory impact, or a combination of both. For example, the language of *Neal v. Delaware* references "exclusion" and "significant underrepresentation" as key indicators of potential invidious outcomes.[25] But to what extent? The case law is unable to answer this question definitively, only providing vague, subjective language as a guide. Unless the challenger can demonstrate a statistical difference comparable to the extremes established by cases like *Yick Wo* or *Village of Arlington Heights v. Metro House Development*, whether the disparate impact has been met is left to the judge's discretion. While the discriminatory impact has been occasionally proven under less stringent conditions,[26] the absence of a statistical brightline makes substantiating disparate impact much more difficult.

Establishing discriminatory intent is also burdensome for similar reasons related to vagueness. The lack of judicial clarity surrounding the timeframe of historical relevance, one of two methods used to identify invidiousness, burdens the challenger greatly. When

[23] Yick Wo v. Hopkins, 118 U.S. 356, 6 S. Ct. 1064 (1886).
[24] Out of the 64,000 residents in Arlington Heights Village, only 27 were Black (0.042%).
[25] Neal v. Delaware, 103 U.S. 370 (1880).
[26] *See* Castaneda v. Partida, 430 U.S. 482, 97 S. Ct. 1272 (1977).

considering how to evaluate the historical record, Powell in the opinion offers, "The specific sequence of events leading up to the challenged decision may also shed some light on the decision maker's purposes."[27] Although "sequence" implies continuity up until a certain extent, it makes no reference to a beginning point, blurring the parameters for what type of evidence would be accepted as timely proof of discriminatory intent. This is evident in *Village of Arlington Heights v. Metro House Development* when the Court disregards the respondent's argument which emphasizes Arlington's long history of redlining disproportionately affecting Black residents and instead, focuses on whether rezoning was denied to other contractors in the present day.[28][29] By failing to acknowledge the city's efforts to discriminate against Black Americans in its early history, the Court implies the acceptance of invidiousness only to a certain extent. This standard not only raises questions surrounding when historical relevance begins, but additionally imposes a greater burden of proof on challengers who are representing minorities who face legacies of systemic inequity.

Likewise, it is unclear when the administrative and/or legislative record becomes relevant to establishing discriminatory intent in the second test. Despite these ambiguities, however, challengers will find a more complex issue posed by this test—political processes protecting legislators make it difficult to summon the credible and admissible evidence necessary to prove invidiousness. The courts have affirmed, "since judicial inquiries into legislative or executive motivation represent a substantial intrusion into the workings of other branches of government,"[30] testimonies by government employees are usually barred by privilege.[31] While the Freedom of Information Act (FOIA) and Brown Act serve as

[27] Reitman v. Mulkey, 387 U.S. 369 (1967).
[28] Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 97 S. Ct. 555 (1977).
[29] While the statistical evidence was sufficient to establish disparate impact, Respondent failed to prove that VAHC had intended to discriminate against Black Americans by denying MHDC re-zoning. In fact, VAHC's motivations for rezoning were applied consistently and without difference to other proposals as well. *See Footnote 12 for more.*
[30] Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 91 S. Ct. 814 (1971).
[31] Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 97 S. Ct. 555 (1977).

transparency mechanisms to publicize communications, government actors are aware of their public nature. They are unlikely to reveal information about themselves tied to high political costs,[32] such as discriminatory views. While government actors may rely on private forms of communication to more freely express their thoughts, government privilege reduces the likelihood of such evidence being admissible, even to substantiate discriminatory intent.

Whereas government actors typically undergo greater scrutiny in standard "on-the-face" challenges, the exceptional rigor of the multi-step process for establishing discriminatory intent and impact places a greater burden on challengers to a facially neutral law. The issues outlined above would manifest in a legal challenge to Los Angeles' motion on equal protection grounds as I will demonstrate below.

III. A CASE STUDY OF LOS ANGELES' MOTION TO BAN GAS STOVES ON EQUAL PROTECTION GROUNDS

In 2022, the Los Angeles City Council introduced and passed a motion explicitly requiring gas stoves be banned in "all new residential and commercial buildings… to be built so that they will achieve zero-carbon emissions."[33] Though the motion refrains from mentioning race, opponents have pointed out, if implemented, the legislation could disproportionately impact Asian American restaurateurs who rely on gas stoves to create the distinct flavor profiles of their ethnic cuisines. From Cantonese stir-fry to Korean barbecue, gas stoves are a hallmark of Asian cuisine. One theory for this phenomenon requires us to consider the relationship between gas and industrialization.[34] Many nations—Vietnam,

[32] This refers to classic political game theory, which assumes that the decisions of policymakers are influenced by factors such as re-election and/or a desire to retain power. *See* Nolan McCarty and Adam Meirowitz, *Political Game Theory*, (2007): 5-21.
[33] *See* Wong 14-15.
[34] Sagar, Oliver, and Chikkatur, "Climate Change," 71-94. https://www.jstor.org/stable/vermjenvilaw.7

Philippines, Indonesia, to name just a few—were subject to Western colonization and exploitation, industrializing much later as a result. Even nations like China and Korea lagged behind Western industrialization, relying intensively on gas and coal to play "catch-up". Asian communities' longtime reliance on gas stoves evolved from a survival tactic to a now common cultural practice which, alongside Asian immigrants, traveled to the United States.

Banning gas stoves in new residential and commercial buildings not only fails to acknowledge this key historical context but also bears economic implications. For one, the ban may produce the effect of reducing the quality of food served by establishments, disproportionately impacting the business of Asian American owners—many of whom hail from immigrant backgrounds. In addition to restaurant closures, the ban may lead to increased layoffs of low-wage workers in the restaurant industry in which people of color are overrepresented.[35] Lastly, the ban may pose a higher barrier of entry to new restaurateurs of Asian descent who wish to express their cultural heritage through food.

Our inquiry begins with evaluating whether Asian Americans would be disparately impacted should Los Angeles ban gas stoves in new residential and commercial buildings. Already, we encounter our first issue: the unique circumstances of this case demand us to compare the proportion of Asian-owned restaurants serving Asian cuisine as opposed to general establishments serving Asian cuisine to the broader restaurant population. This scope ultimately makes establishing a disparate impact much more challenging than cases of a similar nature. Whereas most cases assessing discriminatory impact only need to conduct an analysis across two races, this one requires us to distinguish the affected sub-population (Asian owners of restaurants serving Asian cuisine in new buildings built after January 1st) from the broader population (restaurant owners serving Asian cuisine in new buildings built

[35] Brady Collins, AJ Kim, Saba Waheed, Michele Wong. "Overcooked and Underserved: The Challenges of Koreatown's Restaurant Workers," *UCLA Labor Center* 2023, https://labor.ucla.edu/publications/overcooked-underserved-koreatown-restaurant-workers/.

after January 1st) in Los Angeles to compare against the general population (all restaurant owners in Los Angeles in new buildings built after January 1st). While an Asian restaurateur has standing to sue on equal protection grounds, a non-Asian restaurateur serving Asian cuisine would not possess the same legal privileges.[36] This is because Asian Americans, not individuals who simply operate Asian restaurants, constitute a protected class (race) under the 14th Amendment. Though it is generally assumed a majority of establishments serving Asian cuisine are owned and operated by restaurateurs of the same descent, this may not always be the case.

Disregarding the fact that sampling Asian versus non-Asian restaurateurs in Los Angeles would require time, the motion's limited applicability to current restaurant owners would delay our present ability to capture the precise scope of disparate impact. The process of identifying and sampling the affected sub-population (Asian-owned restaurants operating in commercial buildings built after January 1st) would require considerable time and resources. Given the motion's implementation until recently, we should not reasonably expect to observe its effects in the immediacy. Permitting and licensing new buildings, transferring leases, and tracking business trends are all processes that occur over a number of years, prolonging the data collection period needed for our statistical analysis. While predictive modeling can rely on current data to foresee future trends, proof of discriminatory impact must not be suppositive or speculative.[37] Therefore, any potential disparate impact resulting from the banning of gas stoves can only be litigated after its occurrence—which can range anywhere from years to decades.

The unique data collection challenges of this case study only compound the existing

[36] A non-Asian restaurateur could theoretically have standing to sue based on the liberty clause of the 14th Amendment. If the ban on gas stoves disproportionately burdens all establishments (regardless of the owner's race) serving Asian cuisine, it could be alleged that LA City Council has interfered with the right to contract. Though this inquiry warrants further attention, it exceeds the scope of this paper.
[37] Mayor of Phila. v. Educ. Equal. League, 415 U.S. 605, 94 S. Ct. 1323 (1974).

difficulties of establishing discriminatory impact. To successfully prove disparate impact, recall that the results must either demonstrate "exclusion" or "significant underrepresentation" sufficient to the courts' liking or mirror the statistical extremes found in *Yick Wo v. Hopkins* (0% versus 98%) or in *Village of Arlington Heights v. Metro House Development Corporation* (0.042%).[38] [39] Gas stoves, though central to Asian cuisine, are also used by other ethnic communities constituting part of the general population in this case study. While the ban may yield a statistical difference considered alarming by normative standards, the results may be deemed "insignificant" by the courts and fall short of establishing a discriminatory impact. The courts' reliance on statistical extremes and obscure standards reflect their tendency to acknowledge facially neutral discrimination only when it becomes blatantly unignorable. In doing so, the courts fail to recognize legacies of systemic inequities which have appeared under the guise of neutrality which, in this case, manifests in the Asian American community's longtime reliance on gas stoves—a byproduct of Western colonization, exploitation, and delayed Eastern industrialization.

In the event disparate impact could be established, the next step would be to prove discriminatory intent. While there seems to be no language in the historical, administrative, or legislative record indicating invidiousness against Asian Americans, proponents of an equal protection challenge may recall the discriminatory remarks directed at Black and Oaxacan communities made by ex-councilmember Nury Martinez.[40] On October 12th, 2022, President of the Los Angeles City Council Nury Martinez resigned from her position after facing intense backlash for her leaked comments about Black and Oaxacan communities.[41] In addition to mocking physical features common to Oaxacans, she referred to a colleague's

[38] Yick Wo v. Hopkins, 118 U.S. 356, 6 S. Ct. 1064 (1886).
[39] Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 97 S. Ct. 555 (1977).
[40] Solyce Burga, "The Troubling Legacy Behind L.A. Councilwoman Nury Martinez's Racist Remarks," *Time Magazine*, October 14, 2022, https://time.com/6222297/los-angeles-council-nury-martinez-racism-legacy/.
[41] Solyce Burga, "The Troubling Legacy ."

Black child as "a monkey".[42] This conversation occurred privately among several city council members in the context of reviewing redistricting plans for the city.

Even the slightest hint of bias in policymaking, especially in the context of a process with a long historical legacy of denying Black Americans and other disenfranchised minorities the right to vote,[43] is extremely worrisome. The infiltration of bias in policy raises the following question: if Martinez—a signatory to the motion authorizing the creation of an implementation plan to ban gas stoves—made discriminatory remarks targeting the Black and Oaxacan communities, could she possibly have commented similar remarks about Asian Americans out of the public eye? More importantly, if such bias existed, did it motivate her decision in any way to approve the motion?

While Martinez's comments targeting Black and Oaxacan communities rightfully raise concerns about her character, they not only lack factual relevance to our case study concerning Asian Americans but also—if admissible—would also be considered weak evidence of invidiousness as it relates to the Los Angeles motion. When alleging discriminatory intent against a racial or ethnic group, there must be an active demonstration in support of such an occurrence. Simply equating statements made about one race is not factually sufficient nor relevant to assume prejudice directed at another race. It would be illogical to presuppose that the means of racial discrimination are un-unique to the races themselves. For example, Martinez's likening of another councilmember's Black child to "a monkey" invokes Jim Crow caricatures and bears historical-racial implications.[44] If Martinez made the same remarks to describe an Asian child however, the same implications cannot be drawn due to the lack of historical and contextual relevance.

[42] Solyce Burga, "The Troubling Legacy."
[43] Gerrymandering has been used as a tactic in American history to redistrict minorities affiliated with specific political identities, diluting their political power during elections. While the courts have largely ruled racial gerrymandering unconstitutional, there continue to exist certain exceptions which nevertheless, produce disproportionate racial outcomes.
[44] Solyce Burga, "The Troubling Legacy."

Even if the courts were to consider Martinez's discriminatory statements aimed at Black and Oaxacan communities as indicative of potential invidiousness, political processes protecting government actors and the case law's recognition of a pseudo-right to private discrimination make establishing discriminatory intent extremely burdensome on the challenger.[45] Recall that government testimonies are usually barred by privilege, preventing litigators from easily summoning the credible and admissible evidence necessary to prove invidiousness vis-a-vis the administrative and/or legislative record.[46] Should the plaintiff successfully subpoena Martinez, an ex-government employee, to determine whether biased statements against Asian Americans were made internally, the plaintiff must demonstrate exceptional cause.[47] This rule not only exemplifies just one of the numerous hurdles challengers must overcome to establish discriminatory intent but also the courts' attempts to cleanly distinguish the public and private identities of current and former government employees.

In the event exceptional cause was granted, it would be highly unlikely for the courts to rule whether invidiousness factored into Los Angeles' decision to ban gas stoves based on Martinez's testimony alone. While Martinez was a government official at the time of her comments, the case law distinguishes individual discriminatory intent from institutional discriminatory intent, only concerning itself with the latter. When prior discrimination has been committed by an occupant of a state executive office, and an intervening change in administration occurs, "the issuance of prospective coercive relief against the successor to

[45] Understanding why a pseudo-right to private discrimination exists requires us to examine the role of color-blindness in our Constitution. In "A Critique of Our Constitution is Color-Blind", Neil Gotanda argues that the ways in which race has been perceived—especially through the lenses of social status and social construct—have not only instilled an institutional refusal to recognize race in our Constitution by way of "equal treatment" despite unequal beginnings, but have also created the private right to discrimination. *See* Neil Gotanda, "A Critique of Our Constitution is Color-Blind," *Stanford Law Review* (1991): 7.

[46] *Citizens to Preserve Overton Park v. Volpe* established the precedent for protecting legislators from testimony. This was reaffirmed in *Village of Arlington Heights v. Metro House Development Corporation.*

[47] Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 91 S. Ct. 814 (1971).

the office must rest, at a minimum, on supplemental findings of fact indicating the new administration's intent to continue the practices of his predecessor."[48] [49] In other words, invidiousness in this case study can only be established if the LA City Council as a whole, including Martinez's successor, demonstrated a pattern of anti-Asian behavior and decision-making.

The courts' dismissal of private discrimination by government employees as a valid contribution to broader patterns of institutional discrimination in policymaking overlooks the fact that private and public conduct occupy the same sphere. State actions, which are carried out by "human agents, such as police officers or legislators",[50] are invariably influenced by individuals' perceptions of the world and others. The intent tests, which only acknowledge the occurrence of unconstitutional discrimination if it was intended as so, ignore the critical role of unconscious bias in decision-making. Implicit biases, "which can be programmed into our cognitive operations in such a manner that individuals are not explicitly aware",[51] can nevertheless produce disparate outcomes. This is evident in our case study—Martinez's discriminatory comments surfaced in the context of redistricting Black and Oaxacan residents to retain Latino power.[52] If the recording was never leaked to the public and the Los Angeles redistricting plan went into effect, litigation challenging the new map would likely fail per the court's current process for evaluating facially neutral laws. While the redistricting plan may produce statistically significant disparities or even a pattern

[48] Mayor of Phila. v. Educ. Equal. League, 415 U.S. 605, 94 S. Ct. 1323 (1974).
[49] In *Mayor of Philadelphia v. Education Quality League,* Petitioner new mayor of Philadelphia filed a writ of certiorari to the Supreme Court requesting review of the Court of Appeals' decision which found the former Mayor's Office responsible for racial discrimination against Black candidates in the 1971 nominating panel. The Supreme Court reversed, and determined that Respondent's allegations—if upheld at all—only applied to the former mayor and not current Petitioner. *See* Mayor of Phila. v. Educ. Equal. League, 415 U.S. 605, 94 S. Ct. 1323 (1974).
[50] Neil Gotanda, "A Critique of Our Constitution is Color-Blind," *Stanford Law Review* (1991): 7.
[51] Michael Chang, "Doctrinal Instability in Contextual Race-Conscious Review: The Continuing Legacy of the Korematsu Court's Ultra-Deference Standard," *UCLA Asian Pacific American Law Journal* (2023): 120-121.
[52] Solyce Burga, "The Troubling Legacy."

unexplainable by means other than race,[53] establishing disparate impact in the process, the courts would not acknowledge the possible occurrence of unconstitutional discrimination without clear evidence pointing to invidiousness. The courts' assumption that discriminatory intent is naturally explicit and not implicit—or at least, concealed—is flawed. It raises concerns as to whether Los Angeles City Council was simply negligent in their consideration of Asian American restaurateurs who rely on gas stoves as cultural practice, or if implicit and/or unheard biases contributed to the policy decision.

While it is highly unlikely a challenge to the Los Angeles motion would meet the courts' rigorous standards for establishing disparate impact and discriminatory intent for the reasons outlined above, I will briefly discuss a hypothetical strict scrutiny review here. Strict scrutiny review occurs only after a challenger successfully establishes a *prima facie* showing of a facially neutral law, shifting the burden onto the government to meet the "narrowly tailored and compelling interest" requirement.

Despite the greater burden of proof on the government, the circumstances surrounding Los Angeles' motion would likely survive strict scrutiny review. When considering whether the policy is narrowly tailored enough—so as to achieve a policy goal through the least restrictive means—the City Council can point to the deliberate choice to ban gas stoves in all new residential and commercial buildings post-January 2023 as opposed to in all current buildings.[54] The consideration of other alternatives gives weight to the notion the policy was indeed narrowly tailored to achieve its compelling interest.

[53] Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 97 S. Ct. 555 (1977).
[54] Michael Chang, "Doctrinal Instability," 120-121.

When considering the compelling interest, the courts usually weigh the fundamental right being infringed upon relative to the government's policy interest. While one could argue the decision to ban gas stoves will disproportionately affect the right of Asian Americans to contract, it may hold weakly compared to Los Angeles City Council's compelling interest: climate change.[55] Federal and state agencies frequently pass environmental policies whose purpose is rarely challenged by the courts. Furthermore, in recent cases like *Held v. Montana*,[56] [57] the courts have recognized the right to healthy, clean environments as a fundamental right, implicitly affirming climate change as a state vested interest. In light of this development, the courts are less likely to rule against policies aimed towards climate mitigation, especially if they only interfere with the right to contract. The deliberacy of the motion's language and the nature of the compelling interest increases the likelihood that the gas stove ban would survive strict scrutiny review in spite of its potential disparate impact on Asian American restaurateurs.

IV. POTENTIAL REMEDIES

As a result of global systemic inequities, marginalized communities from industrializing nations often find themselves and their economic livelihoods inextricably intertwined with the climate crisis. This is certainly the case for Asian American restaurateurs in Los Angeles, a significant proportion of whom hail from immigrant communities and will face economic shortfalls due to the gas stove ban. The ban may also lead to increased layoffs of low-wage workers in the restaurant industry in which people of color are overrepresented.[58]

[55] The motion clearly states climate change mitigation as its primary motivation with no mention of specific race-targeting.
[56] Held v. Montana, No. CDV-2020-307 (1st Dist. Ct. Mont., Aug. 14, 2023).
[57] Although Montana's state ruling does not apply to California, it can serve as an example for the California courts to follow suit and bears implications for how states respond to federal environmental law.
[58] "Overcooked and Underserved"

Any environmental legislation—however well-meaning—must consider the economic realities of climate policy on the livelihoods of marginalized communities historically burdened by the climate crisis. Whereas the rigorous nature of evaluations involving facially neutral laws set by the judiciary has upheld disparate outcomes, legislatures can play a powerful role in balancing the state's decarbonization goals while safeguarding marginalized communities from policy's unintended consequences.

Instead of banning gas stoves, the City of Los Angeles could work with state legislatures to secure grants incentivizing environmental retrofitting or offering restaurateurs alternative pathways to offset their carbon footprint in lieu of gas stove use. Though exceeding the scope of this paper, this inquiry warrants further attention. Whereas decarbonization is often pitted against business interests, California possesses a unique opportunity to prove the contrary through incentive-based legislation and policies that tackle the realities of decarbonization.

V. CONCLUSION

By failing to acknowledge the contributions of unseen forms of discrimination to broader patterns of disproportionate outcomes where unconscious bias may have served as a factor, the courts overlook—and in certain cases, even perpetuate—the systemic inequities plaguing marginalized communities. Stimulating the two-step process for evaluating whether unconstitutional discrimination has arisen from a facially neutral law, we discover that the impact and intent tests are formulated in such a way as to neglect key historical context, including what would be, the cultural significance of gas stoves in Asian cuisine.

Despite the abundance of legal tools and approaches (statistical evidence, historical background, administrative and/or legislative record) available to challengers, attributing the occurrence of unconstitutional discrimination to a facially neutral law remains incredibly

burdensome. For one, the case law lacks clear uniform standards for proving discriminatory impact and intent. What constitutes a "statistically significant" disparate impact, not only relies on outdated extremes established by legal precedent but is also subjective to interpretation. This issue is certainly no exception to this case study, and when combined with the unique circumstances surrounding data collection—which demand us to compare the proportion of Asian-owned restaurants serving Asian cuisine as opposed to general establishments serving Asian cuisine, to the broader restaurant population—it becomes burdensome to establish disparate impact. Disregarding the fact that sampling Asian versus non-Asian restaurateurs in Los Angeles would require time, the motion's limited applicability on current restaurant owners would also delay our present ability to capture the precise scope of discriminatory impact.

Second, political processes protecting legislators make it difficult to summon the credible and admissible evidence necessary to prove invidiousness. While optimists will cite former council member Martinez's comments targeting Black and Oaxacan communities as evidence of discriminatory intent, they not only lack factual relevance to our case study concerning Asian Americans but—if admissible—would also be considered weak evidence of invidiousness as it relates to the Los Angeles motion. While Martinez was a government official at the time of her comments, the case law distinguishes individual discriminatory intent from institutional discriminatory intent, only concerning itself with the latter. Invidiousness can only be established if the LA City Council as a whole, including Martinez's successor, demonstrated a pattern of anti-Asian behavior and decision-making.

The case law's recognition of a pseudo-right to private discrimination makes establishing discriminatory intent extremely burdensome on the challenger, even in light of the facts of this case study.

Should the challenger miraculously establish disparate impact and discriminatory intent to proceed with strict scrutiny review, the circumstances surrounding Los Angeles' motion would, nevertheless, likely meet the "narrowly tailored and compelling interest requirement". When considering whether the policy is narrowly tailored enough—so as to achieve a policy goal through the least restrictive means—Los Angeles City Council can point to the deliberate choice to ban gas stoves in all new residential and commercial buildings after January 2023 as opposed to in all current buildings.[59] While one could argue the decision to ban gas stoves will disproportionately affect the right of Asian Americans to contract, it may hold weakly compared to Los Angeles' compelling interest: climate change. The deliberacy of the motion's language and the nature of the compelling interest increases the likelihood that the gas stove ban would survive strict scrutiny review in spite of its potential disparate impact on Asian American restaurateurs.

The perception of race as a passive force, instead of an active one shaping the reactionary nature of our legal institutions, makes establishing and defeating facially neutral laws extremely burdensome. The courts' rigorous standards for proving unseen forms of discrimination—unconscious bias, facial neutrality, etc.—uphold policies which continue to produce disproportionate outcomes. In this regard, legislatures can play a powerful role in balancing the state's decarbonization goals through incentive-based models, while safeguarding marginalized communities from policy's unintended consequences. While I am pessimistic about the courts' ability to acknowledge the contributions of unseen discrimination to broader patterns of institutional discrimination, I look towards the legislatures with cautious optimism.

[59] Michael Chang, "Doctrinal Instability," 120-121.

ENERGY, CLIMATE CHANGE, ENVIRONMENTAL JUSTICE & RIVE
PLANNING & LAND USE MANAGEMENT
ECONOMIC DEVELOPMENT & JOBS
HOUSING

MOTION

As the gravity and urgency of the climate emergency become more apparent with each passing year of rising temperatures, dangerous wildfires, and more severe droughts—all of which disproportionately impact communities of color and the most vulnerable Angelenos—the City of Los Angeles must do all in its power to reduce its carbon emissions and move toward a sustainable, zero-carbon economy.

In recent years, the City has made progress towards decarbonizing its electric grid, phasing out urban oil drilling, and investing in electric vehicle charging infrastructure, but we have lagged behind other California cities in tackling our largest source of climate pollution citywide: buildings. Buildings in Los Angeles account for 43% of greenhouse gas emissions—more than any other sector in the city, and more than they comprise at nationwide (30%) or statewide (25%) levels.

Over fifty cities and counties in California have already taken action to reduce carbon emissions in new building construction and prepare their buildings for a carbon-neutral future. It is time for Los Angeles to do the same.

As a critical first step, the City must ensure new buildings being constructed today, rather than relying on fossil fuels as an energy source, are built to leverage our increasingly clean electric grid, which will be carbon-free by 2035, if not sooner. Zero-carbon buildings have better indoor air quality, lower construction costs, fewer safety risks—especially during earthquakes—and lower climate emissions than equivalent mixed-fuel buildings. Transitioning new construction away from fossil fuels will secure public health benefits and economic savings for decades to come, as well as ensure the City meets its Green New Deal zero-carbon buildings goals.

As the City embarks upon the transition to zero-carbon buildings, we must also be mindful that building regulations affect the lived experiences of Angelenos beyond the light switch and the thermostat. We must deliver the benefits of decarbonization in an equitable manner and be sure that decarbonization policies do not raise rents or utility costs for the many tenants in Los Angeles that are already rent-burdened. We must also ensure that the process of decarbonization does not slow down housing production during the worst housing and homelessness crisis our city has ever faced. Finally, we must also acknowledge that shifting to zero-carbon buildings may have potential impacts to jobs in construction, and we must work to mitigate and offset those potential impacts through creative strategies that create new, quality jobs for workers working in industries impacted by the transition of buildings.

To invite community engagement and solutions on these intersecting issues, the Climate Emergency Mobilization Office (CEMO) is addressing building decarbonization in its upcoming Climate Equity LA Series, which will include workshops and community focus groups. Building off of the findings of the Climate Equity LA Series, the City must develop a holistic approach to carbon neutrality and sustainability in our built environment, which centers equity, energy justice, housing justice, and environmental justice. Any new construction decarbonization ordinance, moreover, should be shaped by the testimony and insights that emerge from the series.

Fortunately, though significant, the challenges we face in transitioning to a zero-carbon economy are not insurmountable. We can find solutions, and we must begin to do so—because we have no time to waste.

The question is not if we will require decarbonized construction for new buildings—but when. We must begin this work now so that the city we are building today is laying the groundwork for the cleaner, healthier, and more equitable and sustainable Los Angeles of tomorrow.

I THEREFORE MOVE that the City Council instruct the Department of Building and Safety (DBS), with assistance from the City Attorney, the CEMO, and all relevant departments, to report back within 180 days with a plan for the implementation of an ordinance and/or regulatory framework, effective on or before January 1, 2023, that will require all new residential and commercial buildings in Los Angeles to be built so that they will achieve zero-carbon emissions. The plan should integrate and be informed by the findings of the CEMO's Climate Equity LA Series on building decarbonization, as well as by DBS's engagement with technical experts and key stakeholders per C.F. 21-1463 and additional engagement with building owner/operators, and should include:

- A recommended timeline for the implementation of the ordinance and/or regulatory framework, by building type;
- Recommended regulatory language to ensure that the ordinance and/or regulatory framework does not place the economic burden of transitioning to decarbonized construction on low-income tenants or contribute to housing destabilization or community displacement pressures;
- An analysis of any negative impacts to construction costs and timelines for publicly-funded residential buildings and recommendations for mitigating measures; and
- Strategies to mitigate and offset any potential impacts to construction jobs through programs and/or policies, developed in consultation with workers and labor union representatives for workers in the building trades impacted by the decarbonization of buildings, that would lead to the creation of new, quality jobs for workers working in impacted industries and that could bolster the City's ongoing Targeted Local Hire and Bridge to Jobs programs.

PRESENTED BY:

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Councilmember, 13th District

NURY MARTINEZ
Councilmember, 6th District

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