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ENVIRONMENTAL LAW — RACE — FIFTH CIRCUIT JUDGES CAST DOUBT ON ENVIRONMENTAL JUSTICE SUITS. — *Rollerson v. Brazos River Harbor Navigation District*, 6 F.4th 633 (5th Cir. 2021).

The path toward an environmentally just society has been long and rocky. During his first week in office, President Joe Biden signed two executive orders codifying his Administration’s commitment to environmental justice (EJ).<sup>1</sup> The orders join a long line of executive and administrative actions designed to push the federal government and its partners to consider and protect EJ communities.<sup>2</sup> But despite these efforts, agencies routinely cut corners in EJ analyses conducted under the National Environmental Policy Act<sup>3</sup> (NEPA), and courts may be hostile to claims based on environmental justice.<sup>4</sup> Recently, in *Rollerson v. Brazos River Harbor Navigation District*,<sup>5</sup> several Fifth Circuit judges demonstrated such hostility. In a concurring opinion, Judge Jones threatened a specific element of federal agencies’ EJ analyses: the no action alternative.<sup>6</sup> If adopted more broadly, her reasoning could seriously undermine an important NEPA tool in the fight against environmental injustice.

*Rollerson* represents the culmination of nearly a century of injustice surrounding the Brazos River Harbor Navigation District, also known as Port Freeport. In 1925, Texas established the Port where the Brazos River meets the Gulf of Mexico.<sup>7</sup> Soon thereafter, the Freeport City Council designated its Port-adjacent East End neighborhood a “Negro reservation” and forced nearly all Black residents to relocate there.<sup>8</sup> Freeport’s East End remains majority-minority — eighty-six percent of residents are Black or Hispanic.<sup>9</sup> In recent years, local authorities, the U.S. Army Corps of Engineers, and other agencies have undertaken a Port-expansion initiative: the Freeport Harbor Channel Improvement

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<sup>1</sup> See Exec. Order No. 13,990, 86 Fed. Reg. 7037, 7037 (Jan. 20, 2021); Exec. Order No. 14,008, 86 Fed. Reg. 7619, 7629 (Jan. 27, 2021).

<sup>2</sup> EJ communities are “[p]oor communities of color that are . . . vulnerable and disproportionately impacted by pollution.” Deborah Behles, *From Dirty to Green: Increasing Energy Efficiency and Renewable Energy in Environmental Justice Communities*, 58 VILL. L. REV. 25, 25 (2013).

<sup>3</sup> Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified as amended in scattered sections of 42 U.S.C.).

<sup>4</sup> See, e.g., *Ctr. for Cmty. Action & Env’t Just. v. FAA*, 18 F.4th 592, 614 (9th Cir. 2021) (Rawlinson, J., dissenting) (excoriating the court for ignoring EJ issues in a “case reek[ing] of environmental racism”); see also *id.* at 622 n.9.

<sup>5</sup> 6 F.4th 633 (5th Cir. 2021).

<sup>6</sup> *Id.* at 647 (Jones, J., concurring in the judgment). When analyzing the environmental impact of proposed major federal actions under NEPA, agencies must compare the impact of the proposed action with the impact of inaction, formally known as the “no action alternative.” Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 43,304, 43,362 (July 16, 2020) (to be codified at 40 C.F.R. § 1501.9(e)(2)).

<sup>7</sup> See *About the Port*, PORT FREEPORT, <https://www.portfreeport.com/about> [https://perma.cc/9K2B-UTX9].

<sup>8</sup> *Rollerson*, 6 F.4th at 637.

<sup>9</sup> *Id.* Seventy-two percent of Freeport residents overall are Black or Hispanic. *Id.*

Project.<sup>10</sup> In so doing, the Port has tried to purchase all East End property and has largely succeeded.<sup>11</sup>

On November 1, 2017, a group of current and former East Enders, including Manning Rollerson — a Black former resident “clinging to the deed to his grandmother’s land”<sup>12</sup> — filed an administrative complaint with the Department of Defense (DOD) and other agencies<sup>13</sup> under section 601 of Title VI of the Civil Rights Act of 1964.<sup>14</sup> They accused the Port and City of Freeport of racist land-acquisition practices<sup>15</sup> and requested that the agencies — which were allegedly funding the Project — review the Port and City’s conduct to determine if they had acted improperly.<sup>16</sup>

On August 17, 2018, while the administrative complaint was pending, Rollerson sued Port Freeport in the U.S. District Court for the Southern District of Texas;<sup>17</sup> he later added the Corps as a codefendant.<sup>18</sup> His suit echoed many of the administrative complaint’s concerns.<sup>19</sup> On February 13, 2019, the Corps denied the administrative complaint, stating that the Corps lacked jurisdiction because it had not funded the Project within the meaning of Title VI.<sup>20</sup> Rollerson then filed an amended complaint in court stating three causes of action.<sup>21</sup> The first two counts accused the Corps of violating the Administrative Procedure Act<sup>22</sup> (APA) by (1) denying the administrative complaint and (2) continuing to fund the Project despite its legal shortcomings.<sup>23</sup> The third count accused Port Freeport of violating Title VI by intentionally discriminating against East Enders.<sup>24</sup>

<sup>10</sup> *Id.* The Project intends to “deepen several areas of Freeport harbor, including [an] area . . . adjacent to the East End.” *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> Amal Ahmed, *How to Erase a Neighborhood*, TEX. MONTHLY (Apr. 13, 2020), <https://www.texasmonthly.com/news-politics/east-end-neighborhood-freeport-erased> [<https://perma.cc/6C7Q-7F83>].

<sup>13</sup> Lone Star Legal Aid, Complaint Under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, at 2 (Dep’t of Def., Dep’t of Homeland Sec., Dep’t of Hous. & Urb. Dev., Dep’t of Just. & Dep’t of Transp. Nov. 1, 2017) [hereinafter Complaint] (on file with Harvard Law School Library). The other agencies, including the Department of Homeland Security (DHS), deferred jurisdiction to DOD. *Rollerson*, 6 F.4th at 638.

<sup>14</sup> 42 U.S.C. § 2000d (“No person . . . shall, on the ground of race, . . . be subjected to discrimination under any program or activity receiving Federal financial assistance.”).

<sup>15</sup> See Complaint, *supra* note 13, at 25. The alleged practices included threatening eminent domain and misrepresenting property values, *id.* at 28, as well as lying to residents about property liens and targeting “Spanish-speaking residents . . . without providing documentation in [Spanish],” *id.* at 29.

<sup>16</sup> *Id.* at 38. The administrative complaint pointed to alleged violations of Title VI, NEPA, and the Uniform Relocation Assistance and Real Property Acquisition Policies Act. *Id.*

<sup>17</sup> Complaint ¶ 95, *Rollerson v. Port Freeport*, No. 18-CV-00235 (S.D. Tex. Nov. 15, 2019).

<sup>18</sup> First Amended Complaint at 1, *Rollerson*, No. 18-CV-00235.

<sup>19</sup> See *id.* ¶ 2.

<sup>20</sup> *Rollerson*, 6 F.4th at 638.

<sup>21</sup> Second Amended Complaint ¶¶ 103–29, *Rollerson*, No. 18-CV-00235.

<sup>22</sup> 5 U.S.C. §§ 551–559, 561–570a, 701–706. Rollerson brought the APA challenges under § 706(2). Second Amended Complaint, *supra* note 21, ¶ 108.

<sup>23</sup> Second Amended Complaint, *supra* note 21, ¶¶ 103–19.

<sup>24</sup> *Id.* ¶¶ 120–29.

Both Port Freeport and the Corps moved to dismiss Rollerson's suit.<sup>25</sup> In a memorandum, Magistrate Judge Edison recommended that the district court dismiss Rollerson's claim against the Port, finding that he failed to demonstrate intentional discrimination.<sup>26</sup> He also recommended that the court grant the Corps's motion to dismiss.<sup>27</sup> Concerning Rollerson's first APA claim, the judge pointed to 5 U.S.C. § 704, which prohibits APA review of an agency action for which there is a different adequate legal remedy.<sup>28</sup> Magistrate Judge Edison found that Rollerson's Title VI claim against the Port was one such remedy — per the judge, it was irrelevant that Rollerson's Title VI claim relied upon proving intentional discrimination, while his APA claim rested on disparate impact.<sup>29</sup> As for Rollerson's second APA claim, the judge noted that the APA covers final actions and found that Rollerson had not identified any final action concerning the Corps's alleged Project funding and oversight, thus depriving the court of jurisdiction.<sup>30</sup> The district court accepted the recommendations and dismissed the suit.<sup>31</sup> Rollerson then appealed to the Fifth Circuit.<sup>32</sup>

The circuit court affirmed in part and reversed in part.<sup>33</sup> In the lead opinion, Judge Haynes<sup>34</sup> agreed that Rollerson failed to demonstrate discriminatory intent.<sup>35</sup> She noted that, in trying to prove such intent, Rollerson “relied on Freeport's history of racial segregation.”<sup>36</sup> But, she concluded, “the most relevant ‘historical’ evidence is relatively recent history,”<sup>37</sup> and Rollerson failed to identify any recent “event or circumstance . . . indicative of discriminatory intent.”<sup>38</sup>

Conversely, the circuit court reversed and remanded the district court's decision to dismiss Rollerson's first APA claim.<sup>39</sup> The circuit court held that the district court incorrectly found Rollerson's section 601 intentional discrimination claim against the Port to be an adequate alternative to his

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<sup>25</sup> Port Freeport's Motion to Dismiss at 1, *Rollerson*, No. 18-CV-00235; The United States Army Corps of Engineers' Motion to Dismiss at 1, *Rollerson*, No. 18-CV-00235.

<sup>26</sup> *Rollerson v. Port Freeport*, No. 18-CV-00235, 2019 WL 4394584, at \*8 (S.D. Tex. Sept. 13, 2019).

<sup>27</sup> *Rollerson v. Port Freeport*, No. 18-CV-00235, 2019 WL 5397623, at \*1 (S.D. Tex. Oct. 21, 2019).

<sup>28</sup> *Id.* at \*2.

<sup>29</sup> *See id.* at \*3–4.

<sup>30</sup> *Id.* at \*5.

<sup>31</sup> Order Adopting Magistrate Judge's Memorandum and Recommendation at 2, *Rollerson v. Port Freeport*, No. 18-CV-00235 (S.D. Tex. Sept. 30, 2019) (granting the Port's motion to dismiss); *Rollerson v. Port Freeport*, No. 18-CV-00235, 2019 WL 6053410, at \*1 (S.D. Tex. Nov. 15, 2019) (granting the Corps's motion to dismiss).

<sup>32</sup> *Rollerson*, 6 F.4th at 638.

<sup>33</sup> *Id.* at 637.

<sup>34</sup> Judge Ho joined Judge Haynes's opinion in part.

<sup>35</sup> *Rollerson*, 6 F.4th at 641.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* (quoting *Veasey v. Abbott*, 830 F.3d 216, 232 (5th Cir. 2016) (en banc) (plurality opinion)).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 646–47. The circuit court did not discuss the second APA claim. *See id.* at 639–47.

APA disparate impact claim against the Corps.<sup>40</sup> It explained that DOD has issued regulations under Title VI, section 602,<sup>41</sup> thus enabling a private right to seek APA review for disparate impact — by contrast, section 601 provides private plaintiffs with only an intentional discrimination cause of action.<sup>42</sup> Judge Haynes concluded: “If Congress did not intend for private [section 601] suits to challenge disparate-impact discrimination, then it is difficult to see how it intended for [such] suits to serve as an alternative remedy to APA review for disparate-impact discrimination.”<sup>43</sup>

Judge Haynes also grappled with a second question: whether the Corps’s denial of the administrative complaint was “committed to agency discretion by law” and therefore outside the court’s jurisdiction.<sup>44</sup> She noted that the Corps’s stated rationale for denial — “that it lacked jurisdiction . . . because [it] was not funding the Port’s expansion project”<sup>45</sup> — was more a question of fact than a policy consideration typical of discretionary decisions.<sup>46</sup> Judge Haynes therefore rejected the Corps’s argument but acknowledged that, if the Corps was correct on the funding question, then it simply lacked jurisdiction over the administrative complaint as a matter of law.<sup>47</sup> The court thus remanded the case and instructed the district court to determine whether the Corps had provided Project funding within the meaning of Title VI.<sup>48</sup>

Concurring in part and in the judgment, Judge Ho decried “unelected agency officials [who] usurp[] Congress’s authority when it comes to disparate impact theory.”<sup>49</sup> Per Judge Ho: “Prohibiting racial discrimination means we must be blind to race. Disparate impact theory requires the opposite[,] . . . advanc[ing] some people at the expense of others based on their race.”<sup>50</sup> He concluded by repeating that Congress is the sole branch with the power to adopt disparate impact theory.<sup>51</sup>

In a separate opinion concurring in the judgment, Judge Jones likewise opined “that statutes prohibiting on their face intentional

<sup>40</sup> *Id.* at 644.

<sup>41</sup> Section 602 lets agencies issue and enforce regulations to effectuate section 601. 42 U.S.C. § 2000d-1. Such regulations can address disparate impact. *Rollerson*, 6 F.4th at 643.

<sup>42</sup> *Rollerson*, 6 F.4th at 643.

<sup>43</sup> *Id.* at 644.

<sup>44</sup> *Id.* at 641 (quoting 5 U.S.C. § 701(a)(2)); *see also id.* at 644–46.

<sup>45</sup> *Id.* at 645.

<sup>46</sup> *Id.* at 645–46 (citing *Michigan v. EPA*, 576 U.S. 743, 758 (2015)).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 646–47. Following the remand, DHS revisited its earlier decision to defer jurisdiction to DOD and accepted jurisdiction over the administrative complaint. Nesibe Selma, *DHS Agrees to Review Complaint Against City of Freeport, TX and Port Freeport for Title VI Violations of the Civil Rights Act*, LONE STAR LEGAL AID (Feb. 24, 2022), <https://www.lonestarlegal.org/news/2022/02/dhs-agrees-to-review-complaint-against-city-of-freeport-tx-and-port-freeport-for-title-vi-violations-of-the-civil-rights-act> [https://perma.cc/4AVR-RQ9B].

<sup>49</sup> *Rollerson*, 6 F.4th at 648 (Ho, J., concurring in part and concurring in the judgment).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 650.

discrimination should not be extended by judicial or administrative fiat to encompass disparate impact theories.”<sup>52</sup> But Judge Jones diverged from Judge Ho in her pointed critique of a specific racial-equity theory long grounded in administrative rules and executive orders, rather than congressional statutes — environmental justice. She wrote:

Even if a cause of action based on “environmental justice” exists in the law (a dubious claim not presented to us in this appeal), it would not exist here. Theories of “environmental justice” must presuppose that public bodies have alternatives to locating public works projects in economically disadvantaged neighborhoods. Where there are no alternatives, there is no choice, and there can be no “injustice” in making the sole available choice.<sup>53</sup>

*Rollerson* is not a NEPA case, nor does it feature an EJ cause of action.<sup>54</sup> Yet by criticizing environmental justice, Judge Jones’s concurrence — viewed alongside the opinions of Judges Haynes and Ho — spotlights many of the challenges EJ plaintiffs face in federal court: from a dearth of viable causes of action, to an unsympathetic judiciary that often undermines the limited EJ avenues still available. And if more broadly adopted, her reasoning — which erases the no action alternative — could weaken one of the few viable causes of action left open to EJ plaintiffs: procedural challenges under NEPA and the APA.

To better understand these issues, a brief review of EJ history is in order. The EJ movement coalesced in the 1980s before expanding under the leadership of groups like the NAACP<sup>55</sup> and scholars like Dr. Robert D. Bullard.<sup>56</sup> The effort gained legal significance in 1994, when President Clinton signed Executive Order 12,898, still in effect today, requiring that each agency make “environmental justice part of its mission by identifying and addressing” how its programs harm EJ communities.<sup>57</sup>

Despite this progress, the federal judiciary has largely barred EJ plaintiffs — along with many other disparate impact claimants — from accessing causes of action to pursue their claims. Judge Haynes effectively summarized these roadblocks in *Rollerson*. First, the Supreme Court has limited two key antidiscrimination tools — the Fourteenth

<sup>52</sup> *Id.* at 647 (Jones, J., concurring in the judgment) (citing *Tex. Dep’t of Hous. & Cmty. Affs. v. Inclusive Cmty. Project, Inc.*, 576 U.S. 519, 550–55 (2015) (Thomas, J., dissenting)).

<sup>53</sup> *Id.* (analogizing to *Inclusive Cmty. Project*, 576 U.S. at 540–45 (majority opinion)).

<sup>54</sup> The administrative complaint, Rollerson’s suit, and his appeal only briefly mention environmental justice. See Complaint, *supra* note 13, at 33–34 (noting the EJ impacts of asbestos-removal protocols); Second Amended Complaint, *supra* note 21, at 32–33 (same); Brief of Appellant at 24, *Rollerson*, 6 F.4th 633 (No. 20-40027) (criticizing authorities for trying to “thwart” EJ protections).

<sup>55</sup> See *Environmental Justice History*, U.S. DEP’T OF ENERGY, <https://www.energy.gov/lm/services/environmental-justice/environmental-justice-history> [<https://perma.cc/38CY-ZDVQ>].

<sup>56</sup> See Kyle W. La Londe, *Who Wants to Be an Environmental Justice Advocate?: Options for Bringing an Environmental Justice Complaint in the Wake of Alexander v. Sandoval*, 31 B.C. ENV’T AFFS. L. REV. 27, 28–31 (2004) (surveying EJ origins). See generally ROBERT D. BULLARD, *DUMPING IN DIXIE: RACE, CLASS, AND ENVIRONMENTAL QUALITY* (1st ed. 1990).

<sup>57</sup> Exec. Order No. 12,898, 3 C.F.R. § 859 (1995), *reprinted as amended* in 42 U.S.C. § 4321.

Amendment's Equal Protection Clause and Title VI, section 601 — to claims of intentional discrimination,<sup>58</sup> which are often impossible to prove in the EJ context.<sup>59</sup> Second, in *Alexander v. Sandoval*,<sup>60</sup> the Court held that Title VI, section 602 — which enables agencies to promulgate regulations, including those prohibiting disparate impact, to enforce section 601<sup>61</sup> — does not include a private disparate impact right of action.<sup>62</sup>

Denied *substantive* disparate impact rights, EJ advocates jury-rigged together elements of the APA, NEPA, and executive and administrative actions to pursue *procedural* challenges. For example, many agencies have published internal guidelines to implement Executive Order 12,898,<sup>63</sup> and EJ plaintiffs have successfully sued agencies under the APA and NEPA for acting contrary to those guidelines and the executive order.<sup>64</sup>

Under NEPA, an agency must append to any “recommendation or report on . . . major Federal actions significantly affecting the quality of the human environment” an environmental impact statement.<sup>65</sup> Such statements must contain, inter alia, “alternatives to the proposed action,”<sup>66</sup> including “the no action alternative; other reasonable courses of action; and mitigation measures.”<sup>67</sup> The federal government has called the alternatives analysis “the heart of the environmental impact statement,”<sup>68</sup> and federal guidelines instruct agencies to consider environmental justice throughout the environmental review process.<sup>69</sup> When an agency does not — or when it shortchanges EJ concerns — a court may find that the agency has acted arbitrarily and capriciously, and may consider vacating its action.<sup>70</sup>

<sup>58</sup> See *Rollerson*, 6 F.4th at 639 (citing *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003); *Alexander v. Sandoval*, 532 U.S. 275, 280 (2001)).

<sup>59</sup> See *id.* at 639–41 (finding that under *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264–68 (1977), *Rollerson* failed to show that the Port intentionally discriminated).

<sup>60</sup> 532 U.S. 275 (2001).

<sup>61</sup> 42 U.S.C. § 2000d-1.

<sup>62</sup> *Sandoval*, 532 U.S. at 293; see also *Rollerson*, 6 F.4th at 643.

<sup>63</sup> See *Environmental Justice and National Environmental Policy Act*, U.S. ENV'T PROT. AGENCY (Apr. 1, 2021), <https://www.epa.gov/environmentaljustice/environmental-justice-and-national-environmental-policy-act> [<https://perma.cc/PJ2J-DJ4J>] (listing such agencies). See generally, e.g., DEP'T OF DEF., STRATEGY ON ENVIRONMENTAL JUSTICE (1995).

<sup>64</sup> See, e.g., *Vecinos para el Bienestar de la Comunidad Costera v. FERC*, 6 F.4th 1321, 1330 (D.C. Cir. 2021) (holding that the agency's EJ analysis, conducted pursuant to Executive Order 12,898, was arbitrary under the APA and NEPA); *Cmtys. Against Runway Expansion, Inc. v. FAA*, 355 F.3d 678, 689 (D.C. Cir. 2004) (considering a similar issue).

<sup>65</sup> 42 U.S.C. § 4332(2)(C).

<sup>66</sup> Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 43,304, 43,330 (July 16, 2020) (to be codified at 40 C.F.R. § 1502.14(a)).

<sup>67</sup> *Id.* at 43,362 (to be codified at 40 C.F.R. § 1501.9(e)(2)).

<sup>68</sup> 40 C.F.R. § 1502.14 (2020).

<sup>69</sup> See COUNCIL ON ENV'T QUALITY, EXEC. OFF. OF THE PRESIDENT, ENVIRONMENTAL JUSTICE: GUIDANCE UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT 3–5 (1997).

<sup>70</sup> See, e.g., *Vecinos para el Bienestar de la Comunidad Costera v. FERC*, 6 F.4th 1321, 1330 (D.C. Cir. 2021).

But Judge Jones's opinion, if applied to an environmental impact statement's alternatives analysis, risks undermining one of the few tools still available to EJ plaintiffs. When drafting environmental impact statements, federal agencies routinely contrast the no action alternative's EJ consequences with those of the proposed action.<sup>71</sup> In so doing, agencies recognize that there is *always* at least one available alternative to a given action — the no action alternative — and it follows that the absence of action may sometimes be the sole way to avoid environmental injustice. Judge Jones's pronouncement — “[w]here there are no alternatives [to locating public works projects in economically disadvantaged neighborhoods], there is no choice, and there can be no ‘injustice’ in making the sole available choice”<sup>72</sup> — contravenes this practice.

The facts underlying *Rollerson* — if replicated in a NEPA case — emphasize the no action alternative's potential role in EJ advocacy. Port Freeport's story is one of racial and socioeconomic injustice. When the Port was established in 1925, it emerged into the world of Jim Crow. In nearby Houston, a resurgent Ku Klux Klan spent the early 1920s terrorizing local communities,<sup>73</sup> and Texas would not send Black representation to Congress for another half century.<sup>74</sup> In other words, the Freeport City Council's decision to designate as a “Negro reservation” its Port-adjacent East End was perfectly consistent with Texas's social and political atmosphere at the time.<sup>75</sup> Under these conditions, Louise Richardson, Rollerson's grandmother, purchased the property at issue in *Rollerson*.<sup>76</sup> In later decades, Port Freeport boomed, and the environmental consequences — including air and water pollution — were felt most profoundly by East Enders.<sup>77</sup> The neighborhood suffered, authorities neglected mounting issues, and property prices plummeted.<sup>78</sup> The East End's story mirrors those of the countless other environmentally unjust siting decisions that proliferated throughout the twentieth century.<sup>79</sup>

Were a Port Freeport-like development proposed today — even without 1925's de jure segregation — a disparate impact claim might defeat

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<sup>71</sup> See, e.g., U.S. ARMY CORPS OF ENG'RS, FINAL ENVIRONMENTAL IMPACT STATEMENT: BAYOU CASOTTE HARBOR CHANNEL IMPROVEMENT PROJECT 205 (2019) (finding that the no action alternative had no sizeable impact on EJ communities); U.S. DEP'T OF VETERANS AFFS., FINAL ENVIRONMENTAL IMPACT STATEMENT: REPLACEMENT ROBLEY REX VA MEDICAL CENTER 61 (2017) (same).

<sup>72</sup> *Rollerson*, 6 F.4th at 647 (Jones, J., concurring in the judgment).

<sup>73</sup> See Casey Greene, *Guardians Against Change: The Ku Klux Klan in Houston and Harris County, 1920–1925*, 10 HOUS. REV. 3, 7–11 (1988).

<sup>74</sup> *Black-American Members by State and Territory, 1870–Present*, U.S. HOUSE OF REPRESENTATIVES, <https://history.house.gov/Exhibitions-and-Publications/BAIC/Historical-Data/Black-American-Representatives-and-Senators-by-State-and-Territory/> [<https://perma.cc/FV8U-LYF3>].

<sup>75</sup> See *Rollerson*, 6 F.4th at 637.

<sup>76</sup> See Ahmed, *supra* note 12.

<sup>77</sup> See *id.*

<sup>78</sup> See *id.*

<sup>79</sup> See *id.* (noting similar sites in Austin, Corpus Christi, Dallas, and Houston). See generally BULLARD, *supra* note 56.

the plan (or at least force alterations). But that is of little comfort to today's East Enders, including Rollerson. The Port — with its disproportionate impact, environmental and otherwise, on EJ communities — already exists. And the Project, by expanding the Port into the East End and undercompensating displaced residents, perpetuates past wrongs and does little to retribute families harmed by Port Freeport and racist zoning. The no action alternative helps address these shortcomings.

Ignoring the no action alternative engenders a potentially flawed syllogism: Port Freeport must expand; the area adjacent to Port Freeport is the East End; therefore, Port Freeport must expand into the East End. But one of the propositions upon which this syllogism rests — Port Freeport must expand — presupposes that Port authorities must take affirmative action. The no action alternative, by contrast, forces officials to question this presumption: to consider not taking expansionary action at all.

As the Supreme Court has emphasized, NEPA's "mandate to [federal] agencies is essentially procedural."<sup>80</sup> A court cannot use the statute to replace an agency's conclusions with its own.<sup>81</sup> But by at least *considering* the no action alternative, agencies gain "a benchmark, enabling decisionmakers to compare the magnitude of environmental effects of the action alternatives."<sup>82</sup> The alternative has other benefits: it can help clarify a project's objectives, "underline the need (or lack of need) for action," and "provide[] a framework for linking project-specific planning to a comprehensive plan."<sup>83</sup> It can also illuminate "mitigation measures"<sup>84</sup> to minimize an action's environmentally unjust impact.

Of course, Rollerson's team chose to litigate his case on non-NEPA grounds. But it is easy to imagine what a NEPA case would have looked like: Despite the Project's obvious impact on EJ communities, the Corps's environmental impact statement devoted only six pages — of a 347-page document — to assessing the Project's EJ consequences.<sup>85</sup> Not once in 347 pages did it reference the East End by name, nor did it acknowledge that the Project would displace an entire community of Black and Brown East Enders. And finally, though the statement did consider the EJ consequences of several alternative courses of action, it did not conduct such an analysis for the no action alternative.<sup>86</sup>

<sup>80</sup> *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 558 (1978).

<sup>81</sup> *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227–28 (1980) (per curiam).

<sup>82</sup> Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations, 46 Fed. Reg. 18,026, 18,027 (Mar. 23, 1981).

<sup>83</sup> Amy Helling, Michael Matichich & David Sawicki, *The No-Action Alternative: A Tool for Comprehensive Planning and Policy Analysis*, 2 ENV'T IMPACT ASSESSMENT REV. 141, 142 (1981).

<sup>84</sup> Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 43,304, 43,362 (July 16, 2020) (to be codified at 40 C.F.R. § 1501.9(e)(2)).

<sup>85</sup> 1 U.S. ARMY CORPS OF ENG'RS, FINAL ENVIRONMENTAL IMPACT STATEMENT: FREEPORT HARBOR CHANNEL IMPROVEMENT PROJECT 3-122 to -124, 4-45 to -47 (2012).

<sup>86</sup> See *id.* at 4-45 to -47 (omitting the no action alternative, also known as the second Future Without-the-Project Alternative (FWOP-2), *id.* at ES-4).