

To: Chair Tom Stevens and Members of the Vermont House Committee on General and Housing Affairs

Chair Kesha Ram Hinsdale and Members of the Vermont Senate Committee on Economic Development, Housing and General Affairs

From: Vermont Land Access and Opportunity Board

Through: Vermont Housing and Conservation Board and Robert Appel, Esq.

Re: Initial Report of Land Access and Opportunity Board

Date: February 15, 2023

Executive Summary

The Vermont Land Access and Opportunity Board (“LAOB” or the “Board”) was created by the Vermont General Assembly in [Act 182 of 2022](#). The Board’s mandate is broad and urgent, and its focus has been multi-faceted. Over the last eight months the Board has established initial board systems needed to adopt internal governance and meeting protocols, discussed, drafted and adopted [Priority Objectives](#), and recruited, hired and managed legal consultants to assist in the preparation of this “Initial Report” and recommendations.

Eleven appointing authorities designated representatives to the Board, which met initially on July 25, 2022, and has convened two to three times per month since July for a total of fourteen full board meetings through the date of this report. (See LAOB Terms of Reference and Appointing Authorities at Attachment A). Additionally, Board working groups and meeting facilitators have expended significant energy to move the Board’s mission forward in numerous additional special and subcommittee meetings outside the full Board process. Per Vermont’s Open Meeting Law, the Board’s meetings have been open to the public, and more than 25 guests have participated in the Board’s discussions and shared comments on direction, decisions and process. As administrators of the Board’s work, VHCB staff have spent an additional, roughly two hundred hours of work to support Board operations as of the filing of this report.

The work ahead is extensive, and in this Initial Report the Board is recommending programs and investments to address opportunities across all areas of authority designated to it in Act 182. The Board believes that equitable access—to decent, safe and secure housing, land, and

land-based enterprise—is a human right that all inhabitants of Vermont should fully enjoy without the historical and existing barriers that keep many persons from historically marginalized and disadvantaged communities from realizing these objectives. The need for action, now, to protect Vermonters from historically marginalized and disadvantaged communities, is all the more urgent in the wake of the COVID-19 pandemic, the economic shock that the pandemic caused, the contraction of available housing and rental stock, and the resulting sharp increases in the cost of home ownership, rental housing, and land.

The recommendations in this report detail recommendations for the Board’s work in State Fiscal Year 2024 (SFY’24):

- The Board is recommending an appropriation in SFY’24 of \$1,200,000.00 to continue its work under Act 182 to “acknowledge structural racism and address prevalent wealth disparities by creating new opportunities to improve access to woodlands, farmland, and land and home ownership for Vermonters from historically marginalized or disadvantaged communities who continue to face barriers to land and home ownership.” (Act 182 of 2022, Sec. 22, “Statement of Legislative Intent”).
- That appropriation for SFY’24 will support staffing and operations, including two full time, dedicated staff persons, ongoing support from VHCB, legal and other contractors, and implementation of the Board’s powers and duties in all areas of the mandate under Act 182.
- The Board’s powers and duties enumerated under 10 V.S.A. Section 325u are not legally controversial. The Vermont General Assembly directed the Board, nonetheless, to address “legal, constitutional, and governance questions relevant to the functions of the Board” in this Initial Report. As requested, Section 1 of this Initial report provides an overview of the legal landscape in which the Board is operating and how to mitigate legal or constitutional risk, where there is any, associated with its proposed actions in SFY’24 and beyond. The discussion in Section 1 is supplemented by the Legal Counsel Primer on Equal Protection and Civil Rights Law as it Relates to the Work of the Vermont Land Access and Opportunity Board (at Attachment E) and the Catalog of Reparative Grant Programs in Other Jurisdictions (at Attachment F).

Section 1: Overview of Legal Landscape

The [Land Access and Opportunity] Board exists because ... historical barriers [to access for housing, land and land-based enterprise] continue to exist within systems of legal oppression and exclusion, economic domination, and exploitation of land, creating ongoing, pervasive challenges for historically marginalized and disadvantaged communities, and all those living at the intersections of marginalization, to access land, home security and welcoming communities. Our mission is the programmatic and systematic dismantling of these systems of oppression. In their place, we will seek out, create, fund, and build alternative models for land access, finding home, and mobilizing a network of safe, welcoming communities. We will create the economic and social conditions to make Vermont a haven for individuals, families, and collectives of historically marginalized and disadvantaged communities to live, grow and thrive. (LAOB Priority Objectives Document at Attachment B).

The scope of authority for the newly created LAOB is challenging given its breadth of definition, especially when seen through the prism of the recent trends of the Supreme Court of the United States (“SCOTUS”). Recent and impending decisions¹ can be fairly characterized as “weaponizing”² the equal protection clause of the Fourteenth Amendment against the very persons that this amendment was enacted to protect. In enacting Act 182, the Vermont Legislature sought to remove barriers and increase equitable access to housing, land and land-based enterprise for its targeted population as members of “Historically marginalized or disadvantaged communities.” See 10 V.S.A. § 325t(2), which provides the following definition:

[a] community that has historically suffered from discrimination and has not had equal access to public or private economic benefits due to the race, ethnicity, gender, geography, language preference, immigrant or citizen status, sexual orientation, gender identity, socioeconomic status, or disability status of its members.

¹ See “Supreme Court Seems Ready to Throw Out Race-Based College Admissions” re *Students for Fair Admissions v. Harvard*, No. 20-1199, and *Students for Fair Admissions v. University of North Carolina*, No. 21-707; available at: <https://www.nytimes.com/2022/10/31/us/supreme-court-harvard-unc-affirmative-action.html>.

² “Weaponize” means “**to make it possible to use something to attack a person or group.**” (Emphasis in the original.) <https://dictionary.cambridge.org/us/dictionary/english/weaponizing>

A. Historical Perspective

It is critical to this discussion to acknowledge that the Thirteenth, Fourteenth and Fifteenth Amendments to the United States Constitution, often referred to as the “Reconstruction Amendments,”³ were all enacted between 1865 and 1870 in the wake of the calamitous Civil War. This period also saw the passage of the first series of Civil Rights Acts by Congress.⁴ Perhaps most notable was the so-called “Ku Klux Klan Act of 1871,” which created a private right of action, 42 U.S.C. § 1983. This statute still provides the primary cause of action to ensure that governments must honor all persons’ civil rights.

By passing and ratifying the 13th Amendment (1865) shortly after the cessation of the Confederate States’ insurrection, Congress and the States abolished legal slavery in the United States, except as “punishment for a crime where a party has been duly convicted.” By passing and ratifying the 14th Amendment (1868), Congress and the States bestowed full citizenship on formerly enslaved persons as well as all persons born in this country. The 14th Amendment, passed in 1866, then ratified in 1868, also guaranteed all (most all) persons due process of law and equal protection of the laws and required all of the states to do so as well. Section 2 of the 14th Amendment prohibited the states from denying voting rights”... *to any of the male inhabitants of such State, being twenty-one years of age,* and citizens of the United States.*” The 15th Amendment requires that “The rights of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude,” meaning slavery.

B. The Equal Protection Clause of the 14th Amendment

The Equal Protection clause of the Fourteenth Amendment⁵ that all governmental entities govern impartially; that is, government may not draw distinctions between individuals solely on

³ The Reconstruction Period expired in 1876 wherein the disputed election between presidential candidates Republican Rutherford B. Hayes and Democrat Samuel J. Tilden was resolved in favor of the former based on the majority Republican Congress’ commitment to withdraw Federal troops from the former Confederate States of America.

⁴ See “[Constitutional Amendments and Major Civil Rights Acts of Congress](#)”.

⁵ “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

differences unless such distinctions are necessary to achieve a legitimate governmental objective. The same is true of the Vermont Constitution's analog to the Fourteenth Amendment, which is referred to as the "Common Benefit" clause of Ch. I Article 7.⁶ This constitutional provision provided the basis of the Vermont Supreme Court's decision in *Baker v. State*, 170 Vt. 194, 744 A.2d 864 (1999), which held that the State must treat same sex couples the same as heterosexual couples with regard to civil marriage's rights and responsibilities. In that decision, the Court found that there was no legitimate governmental interest in its then refusal to legally acknowledge "civil unions," which was followed ten years later by this Legislature granting marriage equality to homosexual couples.

Over time, the Supreme Court of the United States ("SCOTUS") has issued a series of rulings that to survive equal protection scrutiny, any and all governmental enactments that establish an affirmative preference for one or more subsets of the community as a whole, referred to as "suspect classifications" by the court, must be narrowly tailored to advance a compelling state interest. (See the more detailed discussion in the Legal Counsel Primer on Equal Protection and Civil Rights Law as it Relates to the Work of the Vermont Land Access and Opportunity Board. at Attachment E). According to these decisions, in order to sustain a constitutional attack on governmental efforts to redress past discriminatory practices and the residual effects of prior slavery and other forms of oppression such as eugenics, the proponents of such remedial legislation must develop and produce a robust set of findings of such past wrongs sufficient to meet the "compelling state interest" prong of the analysis.

In summary, there is a very narrow and difficult chasm in which the State through its Legislature and now the LAOB must tread to create any program or process which advantages one segment of our population over another.

⁶ "That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family, or set of persons, who are a part only of that community; and that the community hath an indubitable, unalienable, and indefeasible right, to reform or alter government, in such manner as shall be, by that community, judged most conducive to the public weal."

C. LAOB Potential Appropriations Recommendations—Risk Assessment

With that rudimentary introduction to the legal landscape for the work of the LOAB, let us proceed more closely to analyze the construct of the Board’s enabling statute, the programmatic powers and duties granted to the Board, and how to undertake those programs consistent with Federal and state legal precedents. As referenced above, the Legislature targeted broad subsets of the larger community in empowering the Board, in order “to promote improvements in access to woodlands, farmland, and land and home ownership for Vermonters from historically marginalized or disadvantaged communities who continue to face barriers to land and home ownership.” See 10 V.S.A. § 325u(a). In comparison to other past legislative enactments prohibiting discrimination based on membership in protected classes, (see footnote 6 below), the LAOB enabling statute expands the universe of those segments of the population beyond those traditionally addressed by prohibitions against discrimination. The LAOB enabling statute adds to the existing list of “protected classes”⁷ the following terms: “... language preference, ... immigrant or citizen status, ... and socioeconomic status.”⁸ None of these terms are defined either in the LAOB enabling statute or elsewhere in the Vermont Statutes.⁹ Nonetheless, at least anecdotally and by limited data produced to date, persons who are encompassed in these additional categories do, in fact, face additional barriers to accessing land and housing as compared to others who do not share those traits.

⁷ “Protected classes” refers to those categories listed in statutes prohibiting discrimination traditionally immutable characteristics. For example, see the list of protected categories in Vermont’s Fair Employment Practices Act at 21 V.S.A. 495(a)(2) which is the most expansive list found to date, “ race, color, religion, ancestry, national origin, sex, sexual orientation, gender identity, place of birth, crime victim status, age, or disability.

⁸ “Socioeconomic status” is defined by Merriam-Webster Dictionary as “Social and economic factors, such as **income, education, employment, community safety, and social supports** can significantly affect how well and how long we live. These factors affect our ability to make healthy choices, afford medical care and housing, manage stress, and more.” (Emphasis in the original).

⁹ Most of these protected terms are either defined by statute or are generally understood. See for example, 1 V.S.A. § 143: The term "sexual orientation" means female or male homosexuality, heterosexuality, or bisexuality. "Sexual orientation" shall not be construed to protect conduct otherwise proscribed by law. See also 1 V.S.A. § 144: The term "gender identity" means an individual's actual or perceived gender identity, or gender-related characteristics intrinsically related to an individual's gender or gender-identity, regardless of the individual's assigned sex at birth.

Act 182 provides the Board with broad authority to meet the intent of the General Assembly, “to acknowledge structural racism and address prevalent wealth disparities by creating new opportunities to improve access to woodlands, farmland, and land and home ownership for Vermonters from historically marginalized or disadvantaged communities who continue to face barriers to land and home ownership.” (Act 182 of 2022, Section 22). Below is a legal assessment of those authorities and the Board’s recommendations for action in SFY’24. Generally speaking, the Board’s legal counsel has concluded that the proposed programs and initiatives are not legally or constitutionally controversial, and its investments and programs will pose *de minimis* legal risk to the State of Vermont provided that programmatic design follows the recommendations set forth in this Initial Report. As a prelude to this assessment of risk, it is critical to note that the acts of the Legislature are deemed constitutional, unless and until, successfully challenged. “The statute is entitled to a presumption of constitutionality. [Citation omitted]. Plaintiffs are not entitled to have the courts act as a **superlegislature** and retry legislative judgments based on evidence presented to the court.” *Benning v. State*, 161 Vt. 472 (1994) (highlight added). In case of an equal protection challenge to the Board’s work, it is also notable that the Attorney General has the duty to defend the acts of the Legislature, 3 V.S.A. Sec. 157.

First, there is little or no risk should the State appropriate funds to the LAOB to implement the powers and duties granted under 10 V.S.A. § 325u(f)(1), (4), (5), (6), (8), which generally authorize the Board to examine State of Vermont policies and programs relating to land and home ownership and provide recommendations to increase inclusivity and equity of access. There is little or no basis for an equal protection challenge given the general and broad authority granted by the enabling statute, 10 V.S.A. Sec. 325 u(a), quoted above. This broad authority is consistent with promoting the general welfare of the entirety of the State’s people. (See Vermont Constitution’s definition of the Legislature’s authority that “they shall have all other powers necessary for the Legislature of a free and sovereign State.” Chapter II, Section 6. See also *Baker v. State*, 170 Vt. 194, 206, 744 A. 2d 864, 873 (1999)).

Likewise, there is little or no legal risk based on the Board’s powers and duties under 10 V.S.A. § 325u(f)(2)-(3) to procure assistance from technical assistance providers to provide guidance and technical assistance to individuals who come from historically marginalized and

disadvantaged communities, where the purpose of such assistance would be to ensure members of the targeted population are supported in their efforts to overcome barriers and obstacles to land and home ownership. Marketing and targeting efforts could be race, origin, identity and /or disability conscious if aimed at preventing discrimination by the underlying housing and farmland access programs and addressing existing participation disparities within those programs. Again, no instrumentality of the State such as the LAOB would be directly involved in the distribution of funds, and this would reduce or perhaps fully negate the potential for an equal protection challenge.

The Board was also granted authority under 10 V.S.A. § 325u(f)(7), to “develop one or more programs with associated rules and procedures to distribute grants” to “improve land and housing access, safety, and health” and for “individual and collective property and home ownership or housing improvements to support safe and sustainable residences for historically marginalized or disadvantaged communities.” This approach is the most likely to invite a 14th Amendment equal protection lawsuit that could be successful in overturning the grant program and blocking it from disbursing any funds should the distribution of such funds state a preference for particular subsets of the community at large. (See Legal Counsel Primer on Equal Protection and Civil Rights Law at Attachment E.)

Nonetheless, other jurisdictions have ventured down this path and, to date, have not been successfully challenged on Equal Protections grounds. Most of these initiatives have been launched within the past five years. There are such processes occurring not only in Burlington, Vermont, but also Evanston, Illinois, Providence, Rhode Island, St. Louis, Missouri, Berkeley, California, as well as a statewide effort in California, among others. In addition, the United Nations Working Group of Experts on People of African Descent has stated that the United States must address the legacy of slavery through compensation to combat the impacts of that legacy. (See the Catalog of Reparative Grant Programs in Other Jurisdictions at Attachment F, listing additional resources and documenting initiatives in other jurisdictions and their progress to date.) In the case of reparative programs launched in other jurisdictions, there have been on-going efforts to assemble documentation that these segments of the populations had suffered intentional and harmful deprivation of opportunities. Such historical demonstrations of

intentional discrimination can provide the best support for arguing that the remedial measure advances “a compelling state interest.”

To be consistent with equal protection jurisprudence, the distribution of any such funds by a governmental entity such as LAOB and the criteria for such awards must also be narrowly tailored to achieve the compelling state interest; that is, to remediate past discriminatory treatment of those who would become eligible for such targeted funding and protect against further future discrimination. The Board, in conjunction with other governmental bodies, will continue to collect, study and propose remedial efforts to redress past discriminatory treatment of the target population to further support the body of evidence that would need to be marshaled to rebut any equal protection challenge to the Board’s authority and activities. Moreover, the Board will continue to work with other entities of the State to coordinate action and refine these recommendations to maximize impact, while mitigating any legal risk

Furthermore, if the Legislature were to appropriate funds to the Board to grant to a yet-to-be identified non-governmental entity (“NGO”), which would then provide direct assistance to the target population discussed above, this could further mitigate the potential equal protection attack, given that the NGO would be disbursing funds, and not the State directly. However, assuming that the funds come from state or federal sources, even with the attenuation of the distribution due to a shift from the State to the private sector, there may still be grounds to claim that the discretion to issue funds is exercised to advantage one or more subsets of the community. The risk could be further mitigated by attaching appropriate restrictive conditions to the grant funding. Such conditions could include caveats that the governmental funds only flow to reparative programs and/or provide direct housing/farmland access services exclusively to individual members of historically marginalized and disadvantaged communities. Likewise, establishing screening criteria for wealth and income would not only help to ensure that funding flows to those who need it most, but also reduce risk of constitutional challenges, given the widespread distribution of funds to those who have demonstrated financial need.

The Board has studied these presenting conundrums and their challenges. In order to best insulate its actions from constitutional equal protection/affirmative action challenges should the Board receive continued funding as requested below, the Board is of the view that, that it will

employ the adage, “a rising tide floats all boats.” Thus, the Board’s focus will be on removing obstacles to *all persons* regardless of their individual status to procuring housing and land access.

Section 2: LAOB Recommendations

Recommendation 1: Overview of LAOB Appropriation Request for SFY’24

Given the importance of this mission and the broad scope of work in front of the Board, it is critical to establish a baseline budget for the Board in the SFY’24 budget. Therefore, the Board requests an appropriation of \$1,200,000.00, as more fully detailed below and in the following subsections of these recommendations.

The requested appropriation would support continued LAOB operations and VHCB support, including the hiring of two full time, dedicated staff members. In addition, this appropriation will support the Board’s ongoing work under the additional recommendations below for Staffing, Governance and Administration; Equity Assessment; Technical Assistance and Organizational Support Grants; Reparative Grants; and Miscellaneous Recommendations.

Budget Overview

Governance, Staffing and Administration	\$330,000.00
Equity Assessment of State Programs and Policies	\$160,000.00
Technical Assistance and Organizational Support Grants	\$320,000.00
Establish Reparative Grant Programs	\$300,000.00
Board Compensation and Access to SOV Facilities	\$90,000.00
Total	\$1,200,000.00

Recommendation 2: Governance, Staffing, and Administration

The LAOB recommends that it continue to be structured as an independent instrumentality of the State of Vermont, with full authority to make decisions, enter into contracts, implement programs, and make grants, all within the scope of its statutory mandate and funding authority. More particularly, in SFY'24 the Board recommends the following actions related to governance, staffing, and administration.

In SFY'24 LAOB requests that it continue to receive administrative support from VHCB. This support would primarily include the hiring and support for two full-time staff persons who would be fully dedicated to supporting the Board's work in SFY'24 and beyond. The first position, to be hired by the Board with support from VHCB, would be an Executive Director ("ED"), who would have duties including, but not limited to, directing the Board's programs, representing the Board in external affairs, and facilitating Board meetings, decision-making, program implementation, budgeting and accounting, etc. The second position, to be hired by the ED, would have duties including, but not limited to, assisting the ED, conducting and memorializing Board meetings, actions and ongoing work, and coordinating with VHCB to ensure compliance with Vermont's Open Meeting and records retention laws, as well as the Board's other legal, financial and regulatory obligations. The Board would have full authority to direct those dedicated staff to act on its behalf.

In order to govern shared operations, the LAOB and VHCB would enter into a Memorandum of Understanding to clarify the roles, responsibilities and authorities of each entity, provide protocols for shared management of dedicated staff, contractors, and contracts, and provide a mechanism for resolution of any disputes in the event that actions directed by the Board conflict with VHCB's interpretation of the Board's authority, resources, or other relevant legal authorities. Subject to that MOU, the Board's actions and decisions would be final decisions, including its direction of staff, contract decisions and spending, and implementation of the recommendations in this Interim Report. This MOU would be effective for a period of time to be determined by the Board and VHCB, subject to periodic review, until such time as the Board's operations become fully independent.

As further detailed in the LAOB Priority Objectives document linked above, it is the Board's goal to transition to fully independent operation, without support from VHCB or other entities or instrumentalities of State government. Unless otherwise determined, dedicated staff

and funding would stay with the Board at that point, but VHCB's role to provide administrative support to the Board would conclude and the MOU governing the relationship between VHCB and the LAOB would terminate. All future appropriations, and the legal responsibility for administration of its public mandate, would become the Board's independent responsibility.

The recommended budget to implement this recommendation is \$330,000.00, which would include salaries and benefits for the employees, as well as overhead and indirect costs for VHCB, for two full time positions for the LAOB to be employed by VHCB.

Recommendation 3: Conduct Equity Assessments and Recommend Improvements to Increase Access to State Investments and Supports for Housing, Land Access and Land-Based Enterprise

Pursuant to 10 V.S.A. Sections 325u(f)(1), (4)-(6), and (8), a primary function of the LAOB will be to meet with the VHCB and other entities of State government, relevant partners, and stakeholders to frame goals for and conduct assessments of, and make recommendations related to State laws, regulations, policies, programs and investments, all in order to improve equity of access to housing, land, and opportunities for land-based enterprise in Vermont. As explained in Section 1 above, this authority provides *de minimis* risk of legal challenge, and in partnership with the agencies, departments, and entities named in statute, as well as other stakeholders, it provides an opportunity for the Board to guide and/or redirect public spending and programs in order to help bring about the important goals established in the statutory mission of the LAOB. In other words, this is critical work of the LAOB, which must be initiated as soon as possible.

In SFY'24, the Board, through its ED, staff and any consultant hired for this purpose, will develop a scope of work and implement the first phase of preparatory work and outreach to community members needed to prioritize actions and next steps under this recommendation. These initial steps would include research to establish an inventory of government and nonprofit programs and resources intended to facilitate equitable access to housing, land access, and land-based enterprise. The Board would also engage in public education and outreach related to the inventory and priorities for action, explicitly including outreach to community members from historically marginalized and disadvantaged communities. It is important to note that the Board's work under this and other priorities would be conducted in order to maximize access for

community members, providing travel vouchers, food, and childcare where necessary to accommodate participation, as well as fair market compensation for community members who might be asked to serve on more formal sub-committees and who would otherwise not be able to participate.

The next phase of the Board’s work under this recommendation would be to evaluate baseline data, identify opportunities, and establish priorities for action under its statutory powers and duties, described in the chart below:

LAOB Authority	Partner Organizations	Citation
Provide recommendations to implement policy developments and programs that promote racial, social, economic, and climate justice.	VHCB, the Vermont Housing Finance Agency, the Vermont Economic Development Authority, the Vermont Agricultural Credit Corporation, and other affordable housing and land access stakeholders.	10 V.S.A. sec 325u(f)(1)
Develop metrics relevant to historically marginalized or disadvantaged communities to understand disparities and track progress in addressing disparities and improving opportunities.	VHCB; the Agency of Agriculture, Food and Markets; the Departments of Financial Regulation and of Housing and Community Development; the Vermont Sustainable Jobs Fund; the Vermont Housing Finance Agency; the Vermont State Housing Authority; the Vermont Economic Development Agency; and other State entities.	10 V.S.A. sec. 325u(f)(4)(A)
Develop strategies and plans to more effectively reach out and provide access to resources that can overcome structural barriers to housing and land ownership.	Housing and Community Development; the Vermont Sustainable Jobs Fund; the Vermont Housing Finance Agency; the Vermont State Housing Authority; the Vermont Economic Development Agency; and other State entities.	10 V.S.A. sec. 325u(f)(4)(B)
Recommend options to provide advantageous tax treatment to properties owned by Vermonters who	Vermont Department of Taxes	10 V.S.A. sec. 325u(f)(5)

come from historically marginalized or disadvantaged communities.		
Review, monitor and recommend options and opportunities to redress State policies, procedures, practices, laws, and rules related to racial and social equity in property ownership... [and] recommend programs and related rules to provide loans, grants, and financial assistance to individuals from historically marginalized or disadvantaged communities.	VHCB and other affordable housing stakeholders; OPR regulated professions related to housing and land access, including legal, banking and finance, real estate brokers, and town officials.	10 V.S.A. sec 325u(f)(6)(A)-(B)
Make recommendations to redress the limitations and problems associated with existing laws, rules, programs, and services related to property ownership for Vermonters from historically marginalized or disadvantaged communities.	Vermont General Assembly and public entity stakeholders as relevant.	10 V.S.A. sec 325u(f)(8)

The recommended budget for implementation of this recommendation includes funding for any consultant(s) to be hired; this budget also includes reasonable and adequate compensation and support, as determined by the Board, for affected community members, necessary to conduct equitable and inclusive outreach: \$160,000.00.

Recommendation 4: Implement the Board’s Authority to Deliver Technical Assistance and/or Organizational Support Grants to Entities Providing Technical Assistance

Pursuant to 10 V.S.A. Sections 325u(f)(2)-(3), the LAOB will endeavor to recruit and retain the services of qualified Vermonters from historically marginalized and disadvantaged communities to assist individuals, families and collectives from historically marginalized and disadvantaged communities to navigate housing and land access; interface with credit agencies and financing entities; develop housing and land access “literacy”; and operate successful rural enterprises or ventures.

The LAOB's initial work under this Recommendation will be to establish a baseline inventory of government and nonprofit programs and resources intended to facilitate equitable access to housing, land access and land-based enterprise. In addition, the Board would conduct outreach and education in order to focus the priorities for action under this recommendation. Consistent with the process for education and outreach described initially under Recommendation 3 above, the Board would include support and compensation to ensure this outreach and education are consistent with the Board's commitment of equitable access to the Board's processes. This will enable the board to better understand and respond to the needs and wishes of community members intended to be served by the Board's mission.

Using data and information gathered in the baseline inventory and outreach process, the Board will allocate funding to either or both of the following actions in order to advance the goals of Act 182:

- Direct consultant contracts with technical assistance providers, including housing and land access navigators and translator services, who match the qualifications, and who are able to provide the services called for, under 10 V.S.A. Sections 325u(f)(2)-(3);
- Funding for organizational grants to support organizations assisting individuals, families and collectives from traditionally marginalized and disadvantaged communities to navigate housing and land access, etc.

The recommended budget for implementation of this recommendation, including costs for any consultant(s) to be hired and reasonable and adequate compensation and support, as determined by the Board, for affected community members, necessary to conduct equitable and inclusive outreach: \$320,000.00.

Recommendation 5: Continue Analysis and Fact-Finding, and Develop Key Partnerships with Parallel Programs in and out of Vermont, in order to Establish a Viable Reparative Grant Program to Support Vermonters from Historically Marginalized and Disadvantaged Communities to Access Housing, Land, and Land-Based Enterprise.

The Board's most important and difficult work is to establish grant based funding opportunities to support individuals, families and collectives from historically marginalized and disadvantaged communities to access housing, land, and land-based enterprise. As discussed in Section 1 of this Initial Report, the U.S. Supreme Court, the lower Federal Courts, and many state courts have established a narrow view of the 14th Amendment and the commitment

intended by the framers of those amendments to use public resources to repair historic wrongs done to Black People, Indigenous People and People of Color in the United States. Those judicial constraints have allowed government-sanctioned racism, marginalization of individuals and families from outside the dominant culture, and intergenerational poverty to flourish. And those legal precedents are offered as excuses by public officials and policy makers when advocates press for progress, support and resources, much less state acknowledgement of systemic racism and wealth disparities or publicly funded reparations.

Nonetheless, there is a growing number of jurisdictions in the United States, including Vermont, where municipal officials, nonprofits and/or state governments have begun to push back, to establish legal pathways to redress historic wrongs, and to establish programs to provide public funding for those who have been harmed by state-sanctioned racism and wealth disparities. At this time, most of those efforts are still fledgling, untested or process-intensive for the people intended to be helped. There is no justice where equal protection jurisprudence and precedents require individuals seeking public assistance to access housing, land, or land-based enterprise, to make a showing of past discriminatory treatment in order to prove that targeted funding would protect against specific future discrimination.

The LAOB recommends that Vermont fund and direct the Board to establish working relationships with actors and officials in jurisdictions like California, where the intent behind public policy initiatives is to establish general findings of harm that would be the basis for public investments in reparative grant programs without causing those who have been harmed to expose their past personal wounds and open up old scars to qualify for assistance. Likewise, in order to continue to establish a factual record in Vermont that supports such public policy progress, the LAOB recommends that it be funded and directed to work across sectors in Vermont to provide leadership and coordination with parallel efforts already established within the State, including the Truth and Reconciliation Commission, Environmental Justice Advisory Board, Health Equity Commission, climate justice efforts, etc. This ongoing work will be resource and time intensive, and may not allow the LAOB to initiate grant funded programming in SFY'24 beyond initial "pilot" programs, even though that is the immediate goal and focus of this work.

More specifically, in SFY'24 the LAOB recommends the following actions and expenditures:

- Continued legal research, analysis, and fact-finding to support the LAOB's mission and the goals of Act 182.
- Outreach to and collaboration with multiple jurisdictions in and out of Vermont to create a catalog of programs providing public assistance to those harmed by institutional racism and prevalent wealth disparities, in order to document options, best practices and legal safe harbors for programming in Vermont. This could also support collaboration with other jurisdictions to introduce Federal legislation or initiate rulemaking to support increased access, equity and justice.
- Outreach to and collaboration with those working on parallel efforts in Vermont, including the Truth and Reconciliation Commission, Environmental Justice Advisory Board, Health Equity Commission, and climate justice efforts. In particular, the LAOB proposes to support those efforts by leading community education, public outreach and fact-finding needed to make all of these efforts more effective, which it would conduct consistent with the goals described above to include compensation and support necessary to ensure that all community members who wish to participate are able.
- Internal work to establish program requirements and criteria for grant programs, including how to appropriately and sensitively screen applicants' wealth and income to ensure that grant funding would support those who need it most.
- If possible, based on the analysis and activities described above, initial "pilot" funding for programs to implement this recommendation.

The recommended budget for implementation of this recommendation, including ongoing legal support, other consultant and operation costs, as well as compensation and supports necessary to conduct equitable and inclusive outreach to affected community members: \$300,000.

Recommendation 6: Board Compensation and Access to Public Facilities

The default statutory per diem compensation rate of \$50.00 set forth in 32 V.S.A. sec 1010 for members of publicly created bodies like the LAOB was established in the 1980s, and has not been updated since then. By maintaining such a low rate of compensation for the important work that members of the public are asked to do on behalf of the State, Vermont effectively excludes from participation those who are unable to afford the serious time required

to make a meaningful impact. This is yet another example of state-sanctioned racism and marginalization that should be addressed.

- The LAOB recommends that a new compensation structure be established for its appointed members who are not otherwise participating in this work as part of other public positions they hold. LAOB members should be compensated based on the amount of time expended in the serious and time-intensive work set before them.
- Therefore, the LAOB requests that the General Assembly amend 10 V.S.A. sec 325u(d) to establish an hourly rate of compensation for Board members of \$50.00, with a cap of 15 hours per month/per member to be compensated at this rate for Board meetings, special meetings, sub-committees and working groups.

Another operational issue that must be addressed is access to public facilities for LAOB meetings and conduct of public outreach events. In addition to the administrative supports that VHCB is directed to provide under Act 182 sec. 22a and 10 V.S.A. sec 325u(a), the LAOB also requests that it be enabled to utilize State of Vermont facilities, meeting rooms, and public spaces for the conduct of board meetings, public education and outreach events.

The recommended budget for implementation of this recommendation is \$90,000.00.

Section 3: Attachments and Administrative Updates from VHCB

- Attachment A: LAOB Terms of Reference
- Attachment B: LAOB Priority Objectives Document
- Attachment C: 2022-23 Meeting Schedule and Meeting Notes
- Attachment D: LAOB Budget Expenditures as of Dec. 31, 2022
- Attachment E: Legal Counsel Primer on Equal Protection and Civil Rights Law as it Relates to the Work of the Vermont Land Access and Opportunity Board
- Attachment F: Catalog of Reparative Grant Programs in Other Jurisdictions

(Attachments beginning on next page)

Attachment A

LAOB Terms of Reference, Board Appointing Authorities and Designees

(Available at: <https://www.vhcb.org/sites/default/files/programs/LOAB/LAOB-terms-of-reference-1-17-2022.pdf>)

Attachment B

LAOB Priority Objectives Document

(Available at: <https://www.vhcb.org/sites/default/files/programs/LOAB/LAOB-Priority-Objectives-working-draft-11-21-22.pdf>)

Attachment C

LAOB 2022-23 Meeting Schedule and Meeting Notes

(Available at: <https://www.vhcb.org/our-programs/land-access-and-opportunity-board>)

Attachment D

LAOB Budget Expenditures as of Dec. 31, 2022

- \$200,000: FY'23 Budget Appropriation to LAOB, through VHCB
- \$44,966.68: Budget expenditures, July 1, 2022 through December 31, 2023
 - \$24,225: VHCB costs for salary, overhead and indirect operating costs
 - \$15,900: Contract costs
 - \$3,850: Board stipends
 - \$300: Board travel
 - \$550: Board in-person meeting cost
 - \$168: RFP cost (advertising)
- \$155,033.32: Remaining budget as of Jan. 1, 2023

- Anticipated expenditures Jan. 1, 2023 to June 30, 2023
 - \$25,000: VHCB costs for salary, overhead and indirect operating costs
 - \$50,000: Contract costs, including ongoing legal support and consultant / facilitator support
 - \$10,000: Board stipends, travel, in-person meeting costs
- \$85,000: Total anticipated expenditures Jan. 1, 2023 to June 30, 2023

Attachment E

**Legal Counsel Primer on Equal Protection and Civil Rights Law as it Relates to the Work
of the Vermont Land Access and Opportunity Board**

(Beginning on next page)

A Primer on Equal Protection and Civil Rights Law as it Relates to the Work of the Vermont Land Access and Opportunity Board^{19,20}

Introduction

The United States of America in the 21st Century has been shaped by the white supremacist institution of slavery and its many persistent vestiges and outgrowths. Vermont willingly joined the United States as the fourteenth state knowing it was joining a nation with slavery at the core of its governmental structure and economy.

The Fourteenth Amendment of the U.S. Constitution was originally adopted during the short-lived Reconstruction era following the Civil War—a horrific war caused by slavery. The well-documented history of the Amendment’s passage makes clear that its purpose was to help repair the damage to Black people wrought by slavery. Its true meaning and just application in today’s affirmative action context cannot be divorced from this original intent.

Professor Eric Schnapper summarizes this history as follows:

From the closing days of the Civil War until the end of civilian Reconstruction some five years later, Congress adopted a series of social welfare programs whose benefits were expressly limited to blacks. These programs were generally open to all blacks, not only to recently freed slaves, and were adopted over repeatedly expressed objections that such racially exclusive measures were unfair to whites. The race-conscious Reconstruction programs were enacted concurrently with the fourteenth amendment and were supported by the same legislators who favored the constitutional guarantee of equal protection.²¹

The land distribution programs of the federal Freedmen’s Bureau are among the examples of race-conscious social welfare programs enacted by the same post Civil War Congress that enacted the Fourteenth Amendment with its stated guarantee of equal protection of the laws. These programs authorized the reservation of millions of acres of “good land” to be rented and ultimately sold to Black people by the federal government at fair rates in parcels up to forty acres. One of the Fourteenth Amendment’s congressional sponsors who also supported these land distribution programs explained as follows:

¹⁹ This Equal Protection Primer was jointly authored by Vermont Attorneys Anthony Iarrapino and Robert Appel.

²⁰ The topic of equal protection under the U.S. Constitution is vast and rapidly changing. It could occupy an entire law school or graduate level course. We recognize that much of this discussion will be familiar to some LAOB members while some of it will be new to others. This is a short(ish) memo to help establish a common understanding of the current state of play with an intended focus on concepts that will guide the LAOB in fulfilling its mission. In addition, the Equal Protection Clause is not the only source of law that will likely have implications for the LAOB. The Vermont Constitution’s Ch. I, Art. 7, the “common benefits” clause has been held to prohibit treating one class of persons less favorably than others. For example, that provision provided the basis for the Vermont Supreme Court’s same sex marriage decision, *Baker v. State*, 170 Vt. 194, 744 A.2d 684 (Vt. 1999). There are other laws that prohibit discrimination including, among others, the federal Fair Housing Act (and Vermont equivalent), as well as federal Civil Rights Acts and the Americans with Disabilities Act.

²¹ *Affirmative Action and the Legislative History of the Fourteenth Amendment*, Virginia Law Review, Vol. 71, 754, June 1985.

We owe something to these freedmen, and this bill rightly administered, invaluable as it will be, will not balance the account. We have done nothing to them, as a race, but injury. They, as a people, have done nothing to us but good. . . . We reduced the fathers to slavery, and the sons have periled life to keep us free. That is the way history will state the case. Now, then, we have struck off their chains. Shall we not help them to find homes? They have not had homes yet.²²

Sadly, the account remains unbalanced as these programs were never fully realized. Like so many other promises made to formerly enslaved people, these programs were casualties of our nation's hasty retreat from Reconstruction.

Following the collapse of Reconstruction, the nation regressed to white supremacist state Jim Crow laws and racially discriminatory national policies designed to deprive a wide range of non-White people equal access to economic opportunity, including home and farmland ownership.²³ The United States Supreme Court ("Court" or "SCOTUS") aided and abetted this regression by failing to enforce the Fourteenth Amendment in meaningful ways until the middle twentieth century, and then only slowly and unevenly.²⁴

Still, the history of the Fourteenth Amendment and its relation to reparative Reconstruction programs like the Freedmen's Bureau land grant initiatives forecloses honest dispute of the proposition that "the framers of the amendment could not have intended it generally to prohibit affirmative action for blacks or other disadvantaged groups."²⁵ Yet, beginning in the late 1980s, a divided Court began interpreting the Equal Protection Clause in ahistorical ways. Decisions in cases such as *City of Richmond v. J.A. Croson Co.*²⁶ perversely elevate the interests of white majorities who have never suffered from widespread systems of state and federal laws that relegate them to second class status because of their whiteness, much less to enslavement (in the case of Black people) or widespread land theft and genocide (in the case of Indigenous persons).²⁷

In so doing, the Court has allowed for the entrenchment of inequality and the perpetuation of harms from slavery and its successor white supremacist laws and institutions. Ironically, the Court's reactionary course has contributed to racial disparities that only heighten

²² Cong. Globe, 39th Cong., 1st Sess. 2779 (1866) (Statement of Rep. Thomas Eliot, MA)

²³ A full accounting of the post-Reconstruction, government-sanctioned economic exploitation and segregation of non-White populations is beyond the scope of this report. For more information on this topic, please see the heavily researched yet highly accessible book "The Color of Law," by author Richard Rothstein. It is "a forgotten history of how our government segregated America." Mixing stories of families victimized by housing segregation with startling statistics, the book explains how the federal government on down to municipalities big and small, North and South, under Democrats and Republicans, actively perpetuated policies preventing non-Whites from attaining, or in some cases retaining, the "American dream" of home ownership.

²⁴ See *Brown v. Board of Education*, 347 U.S. 483 (1954)

²⁵ *Id.*

²⁶ *Richmond v. J.A. Croson Co*, 488 U.S. 469 (1989) wherein the Court applied strict scrutiny in successful challenge to City of Richmond minority-owned business set asides for city construction contracts brought by a White-owned construction firm alleging that the program violated the firm's right to equal protection.

²⁷ Riva Siegel, *FOREWORD: EQUALITY DIVIDED*, Harvard Law Review, Vol. 127, No. 1, Nov. 2013.

the continuing need for affirmative action, including in areas of land and housing access where deep disparities exist for members of historically marginalized and disadvantaged groups.

Fortunately, while the Court has complicated implementation of reparative, race-and-identity conscious government affirmative action programs by subjecting them to “strict scrutiny” legal review (explained more fully below), it has not foreclosed their use altogether.

In fact, promising developments around the country regarding reparations programs at the municipal and state level point the way forward for future efforts here in Vermont.

What is the Equal Protection Clause of the United States Constitution?

The Fourteenth Amendment of the U.S. Constitution says that “No State shall make or enforce any law which shall...deny to any person within its jurisdiction equal protection of the laws.” Notably, the Amendment applies as a restriction on the kinds of laws a state legislature may enact and enforce.

Over time, the U.S. Supreme Court has interpreted the Amendment’s reference to making or enforcing laws to apply to a wide range of activities undertaken by States and their instrumentalities (e.g., state agencies, public universities, municipal police and fire departments, public school districts) as well as disbursing government funds to non-governmental agencies. As a state-created and state-funded board, LAOB, as presently structured, is an “instrumentality” of the State of Vermont. Thus, certain LAOB actions and proposals may be subject to equal protection restrictions.

How has the United States Supreme Court applied the Equal Protection Clause over time?

A Check on “Invidious Discrimination”

According to the Supreme Court of the United States, the constitutional guarantee of equal protection is not a source of substantive rights.²⁸ Rather, it is a right to be free from “invidious” discrimination in statutory classifications and other governmental activity. “Invidious discrimination generally refers to treating one group of people less well than another on such grounds as their race (racism), gender (sexism), religion (religious discrimination), caste, ethnic background, nationality, disability, sexual orientation, sexual preference or behavior, results of IQ testing, age (ageism) or political views.”²⁹ Traditionally, the enumerated protected classes were held to be based on “immutable” characteristics of those in the class. SCOTUS’ determination of whether a state’s action violates the Equal Protection Clause can differ depending on which groups of people are being preferenced or dispreferenced by state law or action, and why.

What is a “suspect classification” and how does it influence decisions in equal protection cases?

²⁸ The First Amendment is a contrasting example as it enumerates several “substantive rights” including the right of free speech, freedom of association, and free exercise of religion.

²⁹ <https://definitions.uslegal.com/i/invidious-discrimination/>

In its equal protection analysis, SCOTUS has termed classifications based on race, religion, legal migration status, and nationality “suspect classifications.” In the Court’s view, state actions that allocate burdens and benefits along these lines may well arise from suspect motives. For that reason, the Court applies a highly skeptical analytical standard when reviewing cases involving state actions that preference or dis-preference one of these “suspect classes.”

This highly skeptical standard of review is referred to as “strict scrutiny.” Some commentators and individual Justices have written that strict scrutiny is “strict in theory, fatal in fact.” What they mean is that, in practice, it is extremely difficult for any state action that favors or disfavors members of a suspect class to survive an equal protection challenge. We explore the mechanics of strict scrutiny in more detail below.

Still, the Equal Protection Clause protects “any person” not just persons in suspect classes. Accordingly, courts may, on equal protection grounds, still strike down state actions favoring or disfavoring a class of persons who are not members of a suspect class.

The Court’s identification of suspect classes has historically been based on, among other things, recognition that certain populations have been victims of systemic disenfranchisement that has distorted the democratic law-making process. Because suspect classes were not equitably represented in policymaking by white majorities, courts felt empowered to overturn popularly-enacted state legislation. As we will see, however, the reactionary six-Justice supermajority of the current Supreme Court is radically altering this understanding, upending decades of precedent in the process.

Against this background, we will briefly review equal protection case law as regards groups that fall under the umbrella of “historically marginalized and disadvantaged communities” as that term is defined in the Vermont law that created the LAOB.

Race/People of Color

For more than fifty years following the ratification of the Fourteenth Amendment, the Supreme Court failed to enforce the equal protection clause to thwart state white supremacist “Jim Crow” laws expressly based on the suspect classification of race. For example, the “separate but equal” doctrine of the notorious *Plessy v. Ferguson*³⁰ case allowed for segregation of Black people in education and public transportation. The Court also turned a blind eye to outright denial of government benefits to Black People in areas such as housing assistance.

With the public-school desegregation decision in *Brown v. Board of Education*,³¹ that slowly began to change. Over the next few decades, the Court applied equal protection restrictions to knock down other pillars of white supremacist state policy. For example, in *Loving v. Virginia*,³² the Supreme Court overturned Virginia laws that criminalized Black and White people marrying each other. The race-based restriction in that case was an example of invidious

³⁰ *Plessy v. Ferguson*, 163 U.S. 537 (1896).

³¹ *Brown v. Board of Education*, 347 U.S. 483 (1954.)

³² *Loving v. Virginia*, 388 U.S. 1 (1967)

discrimination” because, aside from outright racial discrimination and odious concepts of racial purity, Virginia had no legitimate reason to criminalize interracial marriage.

Immigration Status

In 1971, the Court, in *Graham v. Richardson*³³, also determined that migrants who are in compliance with federal immigration laws (then referred to as “legal aliens”) were a suspect class for purposes of equal protection analysis. For that reason, the Court will also be highly skeptical of state actions that treat such migrants differently from U.S. citizens. In the *Graham* case, the Court overturned a state law that made it more difficult for legal migrants as compared to “naturalized” U.S. citizens to obtain state welfare benefits.

National Origin

The Court has also determined that national origin is a suspect classification. In practice, however, the Court has had a hard time distinguishing between race and national origin because the racialized nature of American society and lawmaking often conflate these concepts.³⁴

The Court also has a checkered history of upholding the rights of American citizens targeted by the government because of their foreign ancestry. Most notoriously, the Court has yet to overturn its 1944 decision in *Korematsu v. United States*³⁵, which upheld the World War II policy of placing Japanese Americans in concentration camps as a national security measure.³⁶ That case, however, is considered something of an outlier because of the Court’s extreme deference to Congress and the President in national security matters.

Other classifications that do not trigger “strict scrutiny,” but may still result in Equal Protection Clause violations

Sex/Gender

It took the Court a long time from the passage of the 14th Amendment to apply the Equal Protection Clause to state laws that discriminated on the basis of sex or gender. Its 1971 decision in *Reed v. Reed*³⁷ is the first prominent example of the Court’s invalidation of a statute on this ground. (In that case, a state law favored men over women as court-appointed estate administrators who helped administer wills after a death.) The Court has since invalidated other statutes disfavoring women (or men in one early case brought by Ruth Bader Ginsberg) on the basis of sex alone as violating equal protection. It has not, however, determined that sex or gender is a “suspect class.”

³³ *Graham v. Richardson*, 403 U.S. 365 (1971)

³⁴ A full exploration of this particular topic is beyond the scope of this primer. For those interested in learning more, see Jenny Rivera, *An Equal Protection Standard for National Origin Classifications: The Context that Matters*. Available at <https://digitalcommons.law.uw.edu/cgi/viewcontent.cgi?article=4542&context=wlr>.

³⁵ *Korematsu v. United States*, 323 U.S. 214 (1944)

³⁶ You will note that *Korematsu* did not involve a challenge to a state law, which is the subject regulated by the text of the 14th Amendment. As we will see later in this Primer, the Court applies Equal Protection principles and precedents to the federal government when it interprets the “Due Process” Clause of the 5th Amendment. That Amendment applies specifically to the federal government.

³⁷ *Reed v. Reed*, 404 U.S. 71 (1971)

Developmental Disability

The Court has also invoked the Equal Protection Clause to strike down state actions that discriminate against persons with a developmental disability (though not treating disability as a suspect classification). One example is *City of Cleburne, Texas v. Cleburne Living Ctr.*,³⁸ where the Court overturned a local zoning board's denial of a permit sought by a home for persons with developmental disability. (The Court determined that the local zoning board's decision was motivated by irrational prejudice against developmentally disabled people.)

Sexual Orientation

The Court has also reversed course from prior rulings that upheld laws that discriminated against gays and lesbians, including state laws that criminalized their consensual sexual activity. Most notably, in 2015, in *Obergefell v. Hodges*,³⁹ the Court invoked the Equal Protection Clause to strike down state laws that prevented same-sex marriage. Though the Court's modern sexual orientation cases have generally been protective of gay rights, once again it has not declared sexual orientation a suspect classification.

Socio-economic status

The Court has reviewed many equal protection challenges to state laws that have disproportionately negative effects on persons in poverty. The outcome of these cases is highly dependent on the specific factual context. A leading example is the 1956 case of *Griffin v. Illinois*.⁴⁰ There, the Court ruled that a state statute violated the Equal Protection Clause because it did not allow defendants convicted at trial to take an appeal unless they could pay for a trial transcript, appearing to identify "poverty" as a suspect classification by stating, "[i]n criminal trials, a State can no more discriminate on account of poverty than on account of religion, race, or color."

In subsequent decades and in cases outside the criminal law context, however, the Court has backed away from identifying socio-economic disadvantage as a suspect classification. Some commentators have suggested that this in part because of the challenges of defining who can claim membership in such a class.⁴¹

Indigenous/Tribal Descent

Historically, the Court has treated Native American descent/tribal membership as a category separate from "race" for purposes of equal protection review. Many of the laws dealing with tribes and their members are federal laws. Because the Constitution gives Congress authority to regulate "commerce...with the Indian tribes", federal Courts have generally deferred to congressional and tribal judgments in reviewing federal and tribal laws.

³⁸ *City of Cleburne, Texas v. Cleburne Living Ctr.*, 473 U.S. 432 (1985)

³⁹ *Obergefell v. Hodges*, 576 U.S. 644 (2015)

⁴⁰ *Griffin v. Illinois*, 351 U.S. 12 (1985)

⁴¹ For a more complete discussion of this topic, see Henry Rose, *The Poor as a Suspect Class under the Equal Protection Clause: An Open Constitutional Question*, available at <https://lawcommons.luc.edu/cgi/viewcontent.cgi?article=1064&context=facpubs>

This includes laws that both advantaged and disadvantaged tribal members or others who identified as Native American.⁴²

The Court has not viewed classifications of indigenous persons in those statutes as “suspect.” Laws treating Native Americans differently because of their tribal membership or indigenous descent⁴³ have thus not been reviewed under “strict scrutiny.” As a result, most have been upheld in the face of Equal Protection challenges.⁴⁴ That may be about to change because of a case currently before the Court.

The Supreme Court is now considering an equal protection challenge to the federal Indian Child Welfare Act that regulates adoption of Native American children. The pending case is *Haaland v. Brackeen*, argued on November 9, 2022 but not yet decided. “Congress enacted the Indian Child Welfare Act as a response to a long and tragic history of separating Native American children from their families. The law establishes minimum standards for the removal of Native American children from their families and, when Native American children are taken from their homes, [establishes a preference that] they be placed with extended family members or other Native families even if the families are not relatives.”⁴⁵

Those attacking the law argue, among other things, that this preference for Native American families is impermissibly race-based. They contend that because the Indian Child Welfare Act prefers Native Americans by reason of their tribal status or indigenous descent, the law should be subject to strict scrutiny, and that its preference violates the rights of non-Native persons to be free from racial discrimination. The outcome of the case could change the longstanding legal status of Native Americans in ways that most Native American organizations believe will be negative.⁴⁶ This could affect any effort of the LAOB to fund programs that specifically benefit indigenous persons based on their Native American descent.

Major Shifts in Equal Protection Law Complicate Affirmative Action Efforts

At the height of the 1960s Civil Rights movement and in the decades that followed, most equal protection challenges to state actions involved laws or actions that either expressly excluded Black people from state benefits or disproportionately and negatively affected Black people solely because of their race. In the late 1970s, however, equal protection challenges to affirmative action programs led to a shift in the judicial approach.

“Affirmative action” refers to efforts to increase opportunities for historically marginalized and disadvantaged communities in areas such as education, employment, and even access to housing. These efforts are often undertaken to remedy past discrimination in such opportunities and its ongoing effects.

⁴² Michael Doran, *The Equal-Protection Challenge to Federal Indian Law*, available at <https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1071&context=ilpa>.

⁴³ Again, as stated in the primary report, indigenous peoples were not considered persons under constitutional analysis and not allowed to vote until the passage of the Indian Citizenship Act in 1924.

⁴⁴ See sources cited above.

⁴⁵ Summary provided by <https://www.scotusblog.com/2022/11/closely-divided-court-scrutinizes-various-provisions-of-indian-child-welfare-act/>

⁴⁶ See <https://narf.org/cases/brackeen-v-bernhardt/> documenting the number of tribal groups that have lined up to defend the law and explaining the reasons why.

While affirmative action can take many forms, it generally operates by giving preference to an individual seeking a government benefit by taking an individual's race (or other protected category status) into account. Quotas that set aside a certain portion of a government benefit for distribution only to individuals belonging to historically marginalized communities are one form of affirmative action. Although this remedial measure is virtually prohibited as a result of SCOTUS decisions as discussed further below. Alternatively, the benefit (such as admission to college) may be available to all, regardless of race or other status, but race or other status may be treated as a "plus" factor in evaluating individual applicants.

Starting in the late 1970s, an increasingly conservative Supreme Court became more hostile to affirmative action, often in cases in which whites alleged that affirmative action programs violated their right to equal protection. Because such programs were often race-based, the Court subjected them to strict scrutiny review, and lower federal courts, following the Supreme Court's lead, ruled many affirmative action programs to be unconstitutional violations of equal protection.

*City of Richmond v. Croson*⁴⁷ is a prime example. The City of Richmond, Virginia (former capital of the Confederacy), seeking to remedy its own long history of discrimination against minority-owned firms in awarding government contracts, adopted a precise 30% quota for minority-owned businesses in city contract awards. Non-minority-owned business owners challenged the program as a violation of their right to equal protection.

Reviewing for the first time a challenge by whites to a race-conscious remedial law under the strict scrutiny standard, the Court in a 6-to-3 decision held that "generalized assertions" of past racial discrimination could not justify "rigid" racial quotas in the awarding of public contracts. Emphasizing that the 30% quota could not be tied to "any injury suffered by anyone," Justice O'Connor's⁴⁸ opinion held that the quota was an impermissible employment of a suspect classification. She wrote further that allowing claims of past discrimination to serve as the basis for racial quotas would subvert constitutional values: "The dream of a Nation of equal citizens in a society where race is irrelevant to personal opportunity and achievement would be lost in a mosaic of shifting preferences based on inherently immeasurable claims of past wrongs."

In his dissenting opinion, Justice Thurgood Marshall criticized the majority opinion on numerous grounds. He warned that the opinion "signals that it regards racial discrimination as largely a phenomenon of the past, and that government bodies need no longer preoccupy themselves with rectifying racial injustice." In his view, and in the view of a great many others then and now, "this Nation is [not] anywhere close to eradicating racial discrimination or its vestiges. The battle against pernicious racial discrimination or its effects is nowhere near won." He further warned that the Court's ruling "will inevitably discourage or prevent governmental entities, particularly States and localities, from acting to rectify the scourge of past discrimination. This is the harsh reality of the majority's decision, but it is not the Constitution's command."

⁴⁷ *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989)

⁴⁸ Justice O'Connor is the first woman appointed to the U.S. Supreme Court. She is white. She is no longer a member of the Court.

Sadly, despite the numerous cogent criticisms Justice Marshall and his fellow dissenters leveled, federal courts since *Croson* have continued to apply strict scrutiny to state and federal affirmative action programs with similar results.

A Closer Look at Strict Scrutiny

Despite the application of strict scrutiny, the Court, and some lower courts, has upheld a very few race-based affirmative action programs do not violate equal protection. For example, in one case in which race was considered as one of several factors in college admissions, *Grutter v. Bollinger*,⁴⁹ the Court stated that "[a]lthough all governmental uses of race are subject to strict scrutiny, not all are invalidated by it."⁵⁰ However, such cases exceptions, most having been decided prior to changes in the federal judiciary's makeup during the George W. Bush and Trump Administrations. Their continuing viability is in doubt.

Nonetheless, to help the LAOB examine state programs that can survive equal protection challenge, we should review the basics of strict scrutiny. The Supreme Court has used a three-part test to determine whether a law can "pass" the strict scrutiny standard. The Court's test considers whether the state action"

- Is designed to serve a "compelling" government interest;
- Is "narrowly tailored" to achieve that interest: and
- Whether there are any less restrictive (race-neutral) alternatives available.

Failure to satisfy any part of this three-part test will result in the state action being declared unconstitutional.

Compelling Government Interest

The Court has accepted government efforts to remedy the present effects of its own past discrimination as the leading, but not the only, compelling governmental interest justifying racially-based affirmative action. In the higher education context, in *Grutter, supra*, the Court accepted a university's interest in diversity to enhance the educational experience as another such interest.

Whether the Court would accept other compelling governmental interests, and what they might be, are open questions meriting further consideration and study. Responding to public health emergencies, such as the COVID 19 pandemic, is one intriguing possibility.

For now, however, the most firmly established "compelling governmental interest" is remedying past or ongoing state discrimination. As *Croson, supra*, and cases that followed it show, however, simply citing to a compelling governmental interest in remedying past or ongoing discrimination is not enough. In addition, the Court requires the government to present a "strong basis in evidence" of such discrimination, not generalized to society as a whole. There must be a well-documented record of the government's specific discriminatory acts or policies. It has been said that "the true test of an affirmative action program is usually not the nature of the government's [remedial] interest, but rather the adequacy of the evidence of

⁴⁹ *Grutter v. Bollinger*, 539 U.S. 306 (2003)

⁵⁰ *Id.*

discrimination offered to show that interest.⁵¹ For example, statistical disparities between the number of minorities seeking government employment and the number actually hired would have to be buttressed by strong evidence of intentional employment discrimination in the administration of the government program.

Narrow Tailoring

Even where a Court finds a compelling government interest, the specifics of the program must be “narrowly tailored” to advance that interest. The narrow tailoring requirement is supposed to ensure that “the means chosen ‘fit’ th[e] compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.” *Croson, supra*.

The Court has enumerated several factors to guide this analysis:

- The flexibility of the race-based affirmative program. (Can persons outside the benefitted racial group seek the government benefit under appropriate circumstances?)
- The duration of the remedy. (Is there an end point for the race-based classification? Will the continued need for the remedy be periodically reviewed?)
- The over or under-inclusiveness of the remedial affirmative action. (Does it benefit some groups or individuals who were not victims of the government’s earlier discrimination? Does it leave out other groups or individuals who were victims of that discrimination?)

Available Alternative?

Finally, the government must demonstrate that remedying the present-day effects of the discrimination requires a race-conscious approach; that is, that no feasible, race-neutral approach that would achieve the remedy is available.

Relevant Case Study: Debt Relief for Socially Disadvantaged Farmers under the American Rescue Plan Act

A recent set of lower federal court decisions striking down a race-conscious government debt relief program for minority-owned farms demonstrates the challenge presented to affirmative action programs by the strict scrutiny standard.

In response to the COVID pandemic and the financial chaos it caused, Congress enacted the American Rescue Plan Act.⁵² One provision of the Act provided federal debt relief to “socially disadvantaged farmers and ranchers” participating in certain U.S. Department of Agriculture (USDA) loan programs. The Act defined that group as including “a group whose members have been subjected to racial or ethnic prejudice because of their identity as members of a group without regard to their individual qualities.” Certain racial and ethnic

⁵¹ *Ensley Branch, N.A.A.C.P. v. Seibels*, 31 F.3d 1548, 1564 (11th Cir. 1994) (citations omitted).

⁵² As mentioned above, federal courts apply equal protection analysis to acts of Congress even though the Fourteenth Amendment technically only applies to the States.

groups automatically qualified under the Act, including Black, American Indian/Alaskan Native, Hispanic, Asian, and Pacific Islander.

The program was challenged in several different cases by white farmers who had similar government debt but were not eligible for debt relief under the Act because, being white, they did not qualify as “socially disadvantaged farmers and ranchers.”

The Government offered a two-fold, compelling governmental interest in response: “to remedy the well-documented history of discrimination against minority farmers in USDA loan (and other) programs and [to] prevent public funds from being allocated in a way that perpetuates the effects of discrimination.”

The government sought to show a “substantial basis in evidence” to support this compelling interest by submitting legislative history – the extensive record created by Congress when considering the Act – plus other historical evidence. The other historical evidence included things such as:

... a dramatic decrease in minority owned farms from 1920 to 1992; USDA’s discriminatory treatment of Socially Disadvantaged Farmers and Ranchers when they applied for loans through USDA . . . ; when loans were offered, they were frequently for reduced amounts . . . on less favorable terms; inequities in how the loans of minority farmers were serviced by USDA; lack of SDFR representation on local USDA committees that were responsible for overseeing USDA loan programs; and concerted efforts by USDA to ignore complaints of discrimination made by minority farmers.

The lower court then observed that “[i]t is undeniable—and notably uncontested by the parties—that USDA had a dark history of past discrimination against minority farmers.” See *Wynn v. Vilsack*, 545 F. Supp. 3d 1271, 1275, 1279 (M.D. Fla. 2021)⁵³

Despite this volume of evidence, the Court did not find the government’s interest compelling because the government had previously already taken significant steps to remedy the USDA’s past discrimination. The courts ruled that to support further race-conscious affirmative action, the government needed to show either the inadequacy of the past remedial efforts or, alternatively, that there was ongoing discrimination in USDA loans and programs in which the government was a participant. The courts were unconvinced that the government could do so.

These lower courts also determined that the program was not “narrowly tailored.” First, the courts concluded that the specifics of the debt relief program were not sufficiently connected to an attempt to remedy any specific instance of past discrimination. New farmers who met the race-conscious criteria of the program qualified for debt relief regardless of when they started farming and whether they or their descendants had suffered themselves from the past discrimination in the USDA loan program. In other words, the program was overinclusive.

⁵³ Rather, for the Government to show that additional remedial action is warranted, it must present evidence either that the prior remedial measures failed to adequately remedy the harm caused by USDA’s past discrimination or that the Government remains a “passive participant” in discrimination in USDA loans and programs. [Citation omitted.]. This is where the evidence of continued discrimination becomes crucial, and may be inadequate.

The courts also found the program to be overinclusive because there was little evidence that the USDA's past discrimination in its loan programs was aimed at Asians, Native Hawaiians, and Pacific Islanders. Thus, the proposed remedial program benefited members of racial groups who had not been shown to suffer from the USDA's past discrimination.

The courts also found the program to be insufficiently flexible because there was no circumstance in which someone who was not a member of a socially disadvantaged group could qualify for the debt relief. These very recent cases specifically aimed at a program to promote BIPOC farmland retention underscore the challenging legal environment in which government-funded, race-conscious affirmative action programs must be crafted.

By passing Proposition 5 (aka "Reproductive Liberty Amendment") Vermonters roundly rejected the Supreme Court's interpretation of the Constitution as it applied to abortion. Why can't we do the same when it comes to equal protection and affirmative action programs for housing, farm, and forest access?

The U.S. Constitution is often referred to as the supreme law of the land because of the Supremacy Clause in Article VI. Under that clause, state laws, and even state constitutions, that conflict with the U.S. Constitution or federal law are invalid. When the Supreme Court reversed *Roe v. Wade*⁵⁴ earlier this year in *Dobbs v. Jackson*⁵⁵, it rejected the idea that the Constitution protected a right to abortion. Thus, the decision removed the U.S. Constitution from legal analysis of state abortion regulation, leaving each state to set its own policy.

Here in Vermont, voters decided to enshrine reproductive liberty in the Vermont Constitution. This result is possible because, after the Dobbs decision, there is no longer anything in the U.S. Constitution (or, as yet, federal law) that prohibits states from allowing their citizens to obtain abortions.

By contrast, the U.S. Constitution's Equal Protection Clause is a specific limitation on state authority. As this paper explains, Supreme Court equal protection precedent places severe constraints on when and how a state may use affirmative action programs based on race, national origin, or other protected classifications. While the states may still enact such affirmative action programs within the framework articulated by the Supreme Court, states are not free to reject or ignore that framework and may be subject of suits in federal courts alleging "reverse discrimination" in violation of the 14th Amendment

Conclusion

We hope this summary helps the LAOB to better understand the relevant legal landscape. We look forward to discussing approaches to collaboratively navigating this landscape going forward. We are excited to share and hear thoughts on near-and long-term proposals that could survive constitutional challenge while also making a meaningful difference in promoting access to housing, farmland, and forestland for members of historically marginalized and disadvantaged communities.

⁵⁴ *Roe v. Wade*, 410 U.S. 113 (1973)

⁵⁵ *Dobbs v. Jackson*, No. 19-1392, 597 U.S. ____

Attachment F

Catalog of Reparative Grant Programs in Other Jurisdictions

(Beginning on next page)

Catalog of Reparative Grant Programs in Other Jurisdictions

1. THE UNITED NATIONS

<https://www.ohchr.org/en/transitional-justice/reparations#:~:text=Victims%20have%20a%20right%20to,as%20well%20as%20affected%20communities>. Office of High Commissioner on Human Rights

Victims have a right to reparation. This refers to measures to redress violations of human rights by providing a range of material and symbolic benefits to victims or their families as well as affected communities. Reparation must be adequate, effective, prompt, and should be proportional to the gravity of the violations and the harm suffered.

The High Commissioner, on the occasion of the 15th Anniversary of the Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of gross violations of international human rights law and serious violations of international humanitarian law, highlighted the “catalytic power that genuine remedy and reparations can have on the daily life of victims, families, communities and entire societies.” Reparation measures include:

Restitution, which should restore the victim to their original situation before the violation occurred, e.g. restoration of liberty, reinstatement of employment, return of property, return to one’s place of residence.

- **Compensation**, which should be provided for any economically assessable damage, loss of earnings, loss of property, loss of economic opportunities, moral damages.
- **Rehabilitation**, which should include medical and psychological care, legal and social services.
- **Satisfaction**, which should include the cessation of continuing violations, truth-seeking, search for the disappeared person or their remains, recovery, reburial of remains, public apologies, judicial and administrative sanctions, memorials, and commemorations.

<https://www.npr.org/2021/06/28/1010870697/the-u-n-rights-chief-says-reparations-are-needed-for-people-facing-racism> June 28, 2021

“The U.N. Rights Chief Says Reparations Are Needed For People Facing Racism”

GENEVA — The U.N. human rights chief, in a landmark report launched after the killing of George Floyd in the United States, is urging countries worldwide to do more to help end discrimination, violence and systemic racism against people of African descent and "make amends" to them — including through reparations.

The report from Michelle Bachelet, the U.N. High Commissioner for Human Rights, offers a sweeping look at the roots of centuries of mistreatment faced by Africans and people of African

descent, notably from the transatlantic slave trade. It seeks a "transformative" approach to address its continued impact today.

The report, a year in the making, hopes to build on momentum around the recent, intensified scrutiny worldwide about the blight of racism and its impact on people of African descent as epitomized by the high-profile killings of unarmed Black people in the United States and elsewhere.

2. **THE STATE OF CALIFORNIA**

<https://oag.ca.gov/ab3121> Assembly Bill 3121 (AB 3121) was enacted on September 30, 2020 and establishes the Task Force to Study and Develop Reparation Proposals for African Americans. No funds have yet been distributed.

The institution of slavery is inextricably woven into the establishment, history, and prosperity of the United States. Constitutionally and statutorily sanctioned from 1619 to 1865, slavery deprived more than four million Africans and their descendants of life, liberty, citizenship, cultural heritage, and economic opportunity. Following the abolition of slavery, government entities at the federal, state, and local levels continued to perpetuate, condone, and often profit from practices that brutalized African Americans and excluded them from meaningful participation in society. This legacy of slavery and racial discrimination has resulted in debilitating economic, educational, and health hardships that are uniquely experienced by African Americans.

AB 3121 charges the Reparations Task Force with studying the institution of slavery and its lingering negative effects on living African Americans, including descendants of persons enslaved in the United States and on society. Additionally, the Task Force will recommend appropriate remedies of compensation, rehabilitation, and restitution for African Americans, with a special consideration for descendants of persons enslaved in the United States.

Link to full 492 page Interim Report issued June 2022:

<https://oag.ca.gov/system/files/media/ab3121-reparations-interim-report-2022.pdf>

Link to Executive Summary below:

<https://oag.ca.gov/system/files/media/ab3121-interim-report-executive-summary-2022.pdf>

3. EVANSTON ILLINOIS

<https://www.cityofevanston.org/government/boards-commissions-and-committees/reparations-committee>

Evanston, a suburb north of Chicago on Lake Michigan, is often discussed as an early entry into the field of reparations. The City has a population of 78,000 and is the home to Northwestern University. It is two-thirds white, 16% Black and 9% Asian.

<https://www.cityofevanston.org/home/showpublisheddocument?id=59759>

“Evanston Policies and Practices Directly Affecting the African American Community, 1900 - 1960 (and Present)”

<https://www.theguardian.com/us-news/2020/jan/19/reparations-program-evanston-illinois-african-americans-slavery> 1/19/20

“One city's reparations program that could offer a blueprint for the nation”

Evanston, Illinois, is levying a tax on newly legalized marijuana to fund projects benefiting African Americans in recognition of the enduring effects of slavery and the war on drugs.

<https://www.nbcnews.com/news/nbcblk/evanston-s-reparations-plan-noble-start-complicated-process-experts-say-n1262096> 3/26/21

The historic plan by Evanston, Illinois, to make reparations to its Black residents — including housing grants for a fraction of the city’s families — has prompted questions about whether funding such programs, as opposed to direct payments, can be considered reparations for slavery and racial discrimination at all.

The first phase involves giving 16 residents \$25,000 each, for home repairs or property costs. This plan, however, is far from the direct payments that have come to characterize reparations — redress for slavery and the subsequent racial discrimination in the United States. But experts say Evanston's plan is a noble start to a complicated process.

<https://abc7chicago.com/evanston-reparations-program-illinois-il/11465347/> 1/13/22

“Evanston reparations: 16 recipients selected to receive \$25,000 for housing”

More than 600 people applied for the housing program according to city officials. But initially, only 16 eligible Black residents are going to receive \$25,000 to be used for home down payments, mortgage payments or home repairs, they said.

<https://www.washingtonpost.com/nation/2023/01/09/evanston-reparations-black-residents/> 1/9/23

“A Chicago suburb promised Black residents reparations. Few have been paid.”

Despite its problems, the city's \$20 million effort, aimed at rectifying decades of housing discrimination, is seen as a model for reparations being considered across the country.

4. Providence, Rhode Island

<https://www.providenceri.gov/wp-content/uploads/2020/07/Mayors-Executive-Order-2020-13-1.pdf>

“Declaration of Truth, Reconciliation and Reparation,” Mayor Jorge Elorza’s Executive Order issued on 7/15/2020, which led to the creation of a commission to examine these issues. I

In July 2020, Providence launched a three-phase process to advance Truth-telling, Reconciliations and Reparations for African heritage and Indigenous residents. Mayor Elorza launched the Providence Municipal Reparations Commission (PMRC) to address the injuries outlined in the Truth Telling and Reconciliation phases and provide recommendations to the City on appropriate policies, programs, and projects to begin repairing harm. The City has allocated \$10 million of American Rescue Plan funds to advance this work. The Municipal Reparations Commission partnered with the Truth-Telling and Reconciliations Subgroup and City of Providence staff to engage residents before making recommendations to the City of Providence to advance reparations. TOTAL ARPA ALLOCATION: \$10,000,000

<https://www.providenceri.gov/wp-content/uploads/2021/06/Matter-of-Truth2.pdf>

“A MATTER OF TRUTH The Struggle For African Heritage & Indigenous People Equal Rights in Providence, Rhode Island (1620-2020)” issued June 2021 by the PMRC.

<https://www.providenceri.gov/mayor-elorza-joins-african-american-ambassador-group-coalition-of-partners-to-unveil-reconciliation-framework/> 2/28/22

“Mayor Elorza Joins African American Ambassador Group, Coalition of Partners to Unveil Reconciliation Framework”

https://www.providenceri.gov/wp-content/uploads/2022/02/Elorza-EO_2022-4.pdf

Mayor issues executive order “Establishing Providence Municipal Reparations Committee,” 2/28/22.

5. ST. LOUIS, MISSOURI

<https://www.archcitydefenders.org/local-coalition-of-over-25-organizations-releases-proposal-to-begin-a-reparations-process-in-the-city-of-st-louis/>

“LOCAL COALITION OF OVER 25 ORGANIZATIONS RELEASES PROPOSAL TO BEGIN A REPARATIONS PROCESS IN THE CITY OF ST. LOUIS” June 10, 2022

In December of 2021, a coalition of over 25 local community organizations came together to encourage the Jones administration to develop a process and plan for reparations in the City of St. Louis. In recent weeks, we have seen notable developments in the conversation around reparations for generations of racist harm, including: passage of legislation introduced by Alderman Brandon Bosley to establish a Reparations Fund in the city; statements by Mayor Tishaura Jones that the fund represented a “first step” toward a robust process of reparations; and continuing grassroots efforts to demand reparations as a moral and legal imperative, including a Rally for Reparations in March.

The purpose of this memorandum is to present the case for establishing a reparations commission in the City of St. Louis that will explore the history of race-based harms in the city; reveal the present-day manifestations of that history; and, ultimately, propose a method for directly repairing the harms that have been inflicted and preventing further injury now and in the future. The undersigned coalition recognizes that Mayor Tishaura Jones is the first mayor in St. Louis’s history to expressly support reparations in principle, and it is our collective hope that this memorandum can act as a blueprint for the Jones administration to begin taking concrete action toward that goal.

<https://missouriindependent.com/2022/10/14/st-louis-advocates-optimistic-the-citys-reparations-effort-will-advance/#:~:text=Reparations%20is%20often%20something%20people,Africa%20paid%20to%20apartheid%20victims.>

“St. Louis advocates optimistic the city’s reparations effort will advance: Local groups hope St. Louis can provide blueprint for reparations for other Missouri cities”

This weekend, elected officials — including St. Louis Mayor Tishaura Jones and Congresswoman Cori Bush — will gather for a “Reparations Block Party and Teach-in” with advocates and city residents to talk about what reparations could look like for Black St. Louisans.

“It’s really important to ground ourselves in a history that is specific to St. Louis that has led to a lot of structural divestment, which has a real impact on our reality,” said Kayla Reed, executive director of the advocacy group Action St. Louis, one of the event’s organizers.

Organizers are hopeful the mayor will have news to share about a plan to create a reparations committee for the city. A spokesman for the mayor couldn’t say if Jones would make an announcement in an interview with The Independent, but said that she “looks forward to conversations on Saturday.”

<https://abcnews.go.com/US/wireStory/st-louis-mayor-appoints-commission-reparations-94783426>

“St. Louis mayor appoints commission to consider reparations”

Mayor Tishaura Jones is appointing a reparations commission that will “recommend a proposal to begin repairing the harms that have been inflicted” by slavery, segregation and racism.

St. Louis joins a growing list of places trying to determine how to make amends for past practices that have harmed Black Americans. The new commission will hold open monthly meetings. There is no stated deadline for recommendations.

St. Louis has long been among the nation's most segregated cities. Nearly half of its 300,000 residents are Black and many of them live in north St. Louis, where rates of crime and poverty are high. The median household income for white St. Louisans is \$55,000, nearly twice the median income for Black households, \$28,000. Racial justice advocates blame decades of racism.

Concerns about racial discrimination in the St. Louis area were amplified in 2014 when Michael Brown, a Black teenager, was shot to death by a white officer in the St. Louis County town of Ferguson, Missouri. Though the officer was not charged, investigations showed how Blacks in the region were more likely to be pulled over for traffic stops and victimized by debilitating fines and court fees.

Jones, a Democrat, on Wednesday signed an executive order establishing a volunteer commission that will ultimately recommend how the city should make reparations. The nine-member commission will include a civil rights advocate, clergy member, attorney, academic, public health professional and a youth, the mayor's office said.

“The people closest to the problems are closest to the solution,” Jones said in a statement. “I look forward to reviewing this commission’s work to chart a course that restores the vitality of Black communities in our city after decades of disinvestment. We cannot succeed as a city if one half is allowed to fail.”

<https://www.kcur.org/news/2023-01-25/what-would-reparations-for-black-communities-look-like-in-rural-missouri>

NPR Podcast Published January 25, 2023

Reparation efforts in urban area are gaining national attention, as both Kansas City and St. Louis study what they can do to make amends for harm inflicted on African Americans. But elsewhere in Missouri, rural areas are taking their own steps toward righting historic wrongs on a neighborhood level.

6. ASHEVILLE, NORTH CAROLINA

<https://www.ashevillenc.gov/departments/city-clerk/boards-and-commissions/reparations-commission/>

“Asheville City Council makes initial \$2.1 million in reparations funding appropriation”

On July 14, 2020, the Asheville City Council passed a resolution supporting community reparations for Black Asheville. The resolution calls for the city manager to, “establish a process within the next year to develop short, medium and long term recommendations to specifically address the creation of generational wealth and to boost economic mobility and opportunity in the black community.”

The members of the Reparations Commission were appointed by Asheville City Council on March 8, 2022, and the Buncombe County Board of Commissioners on March 15, 2022. The Reparations Commission is empowered to make short, medium, and long-term recommendations that will make significant progress toward repairing the damage caused by public and private systemic racism. The task of the Reparations Commission is to issue a report in a timely manner for consideration by the City and other participating community groups for incorporation into their respective short-term and long-term priorities and plans.

In an effort to repair the harm done by decades of discrimination, the city manager and city staff have recommended a 3 phase process that includes:

1. Information Sharing and Truth-Telling;
2. Formation of a Reparations Commission; and
3. Finalize and Present the Report

The Community Reparations Commission is charged with developing recommendations to be presented to the City Council and County Commission to repair the harm done by decades of racial discrimination and systemic oppression against Black Asheville residents. The reparations process in Asheville will focus on five impact areas which include housing, economic development, health, education, and criminal justice.

7. ST. PAUL, MINNESOTA

<https://sahanjournal.com/news-partners/st-paul-commission-tackles-reparations-for-descendants-enslaved-people/> January 5, 2023

“New St. Paul commission tackles reparations for descendants of enslaved people”

The group will advise the mayor and City Council on budget and policy decisions to make reparations to Black descendants of slaves.



By KATIE GALIOTO JANUARY 5, 2023

<https://www.govexec.com/management/2022/04/govexec-daily-controversies-surrounding-reparations-programs/366274/>

GOVERNMENT EXECUTIVE NEWSLETTER, APRIL 21, 2022

“Localities are devising programs to provide redress for racial discrimination. But implementing them has brought out the critics”

The movement for cities to provide reparations to African American residents for decades of racially discriminatory policies and practices has gained momentum this spring. But making good on the promise is likely to be a lengthy, complicated and controversial process.

8. BURLINGTON, VERMONT

<https://www.burlingtonvt.gov/Press/mayor-miro-weinberger-vermont-racial-justice-alliance-and-30-plus-chittenden-county>

“Mayor Miro Weinberger, Vermont Racial Justice Alliance, and 30-plus Chittenden County Organizations Together Declare Racism a Public Health Emergency and Announce New Actions” July 16, 2020

Mayor Miro Weinberger, the Vermont Racial Justice Alliance, and more than 30 Chittenden County organizations announced a community declaration of racism as a public health emergency. As part of the declaration, all participants also announced: 1) a commitment to the sustained and deep work of eradicating racism within their organizations; 2) immediate and specific actions that they are taking to address the emergency in the work that they do; and 3) a commitment to participate in ongoing joint

action, grounded in science and data, to eliminate race-based health disparities and eradicate systemic racism in Chittenden County.

<https://www.vtracialjusticealliance.org/btv-reparations-task-force/>

Burlington’s Reparations Resolution was co-created with the Vermont Racial Justice Alliance, and is the next step in their Operation Phoenix R.I.S.E work which galvanized support for Burlington’s Racial Justice Resolution passed in June. The new Reparations Resolution was informed by H.R. 40, a Congressional bill to establish the Commission to Study and Develop Reparation Proposals for African-Americans. H.R. 40 states “the commission shall examine slavery and discrimination in the colonies and the United States from 1619 to the present and recommend appropriate remedies. Among other requirements, the commission shall identify (1) the role of federal and state governments in supporting the institution of slavery, (2) forms of discrimination in the public and private sectors against freed slaves and their descendants, and (3) lingering negative effects of slavery on living African-Americans and society.”

<https://www.burlingtonfreepress.com/story/news/2021/07/26/reparations-what-vermonters-have-learned-government-grassroots-efforts/7948867002/>

“Vermonters find reparations work 'painful and messy and complicated'”

Burlington Free Press, July 26, 2021

<https://legislature.vermont.gov/Documents/2022/Docs/ACTS/ACTR113/ACTR113%20As%20Adopted.pdf>

No. R-113. Joint resolution relating to racism as a public health emergency.

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<https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/> A great primer adding to our understanding of our history.

Two hundred fifty years of slavery. Ninety years of Jim Crow. Sixty years of separate but equal. Thirty-five years of racist housing policy. Until we reckon with our compounding moral debts, America will never be whole.

<https://www.nytimes.com/interactive/2020/06/24/magazine/reparations-slavery.html>

“What is Owed,” *New York Times Sunday Magazine*, June 24, 2020, by Nikole Hannah-Jones, creator of the 1619 Project

“*The Color of Law: A Forgotten History of How Our Government Segregated America*”

A book authored by Richard Rothstein, Distinguished Fellow of the Economic Policy Institute and a Senior Fellow (emeritus) at the Thurgood Marshall Institute of the NAACP Legal Defense Fund, published in 2017 by Liveright Publishing. This book provides a necessary and critical foundation to begin to understand our history and the issues presently being considered. *The Color of Law* was designated one of ten finalists on the National Book Awards' long list for the best nonfiction book of 2017 as well as being a *New York Times* bestseller.