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The Constitutional Right to Save the Environment

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D I A L O G U E

# THE CONSTITUTIONAL RIGHT TO SAVE THE ENVIRONMENT

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## SUMMARY

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More than 50 years ago, Franklin Kury drafted and championed an Environmental Rights Amendment to the Pennsylvania Constitution. His book, *The Constitutional Question to Save the Planet: The Right to a Healthy Environment* (ELI Press 2021), expands upon the story of his amendment to demonstrate how its principles can be the basis for addressing climate change in the rest of the world. On October 13, 2021, the Environmental Law Institute hosted Kury and leading experts to explore the impact environmental rights amendments can have on stabilizing the climate system through legal channels at the state and federal levels. Below, we present a transcript of that discussion, which has been edited for style, clarity, and space considerations.

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**Chandler Randol** (moderator) is Manager of Educational Programs at the Environmental Law Institute.

**Sen. Franklin L. Kury** is a Former Member of the Pennsylvania State Senate and the Pennsylvania House of Representatives.

**John C. Dernbach** is Director of the Environmental Law and Sustainability Center, and Commonwealth Professor of Environmental Law and Sustainability at the Widener University Commonwealth Law School.

**Julia Olson** is Executive Director and Chief Legal Counsel of Our Children's Trust.

**Barry E. Hill** is Adjunct Faculty at Vermont Law School and a Visiting Scholar at the Environmental Law Institute.

**Chandler Randol:** I would like to introduce today's panelists. Sen. Franklin Kury served first in the Pennsylvania House of Representatives from 1966 to 1972, and in the Pennsylvania Senate from 1972 to 1980. As a state representative, he was the author and lead advocate of the legislative proposal that became the Environmental Rights Amendment (ERA) to the Pennsylvania Constitution. He is also the author of *The Constitutional Question to Save the Planet: The Peoples' Right to a Healthy Environment*, published by ELI Press earlier this year.

John Dernbach is a professor at Widener University Commonwealth Law School. He is a nationally and internationally recognized authority on sustainable development, climate change, and environmental law. He is the director of the Environmental Law and Sustainability Center and brings his expertise into the classroom on courses on property, environmental law, international law, and sustainability.

Julia Olson serves as executive director and chief legal counsel for Our Children's Trust. Julia founded Our Children's Trust in 2010 to lead a strategic legal campaign on behalf of the world's youth against governments every-

where. Julia leads *Juliana v. United States*,<sup>1</sup> the constitutional climate change case brought by 21 youth against the U.S. government for violating their Fifth Amendment rights to life, liberty, property, and public trust resources.

Barry Hill is a visiting scholar at the Environmental Law Institute and adjunct faculty at Vermont Law School. Barry has experience in government, where he served as senior counsel for environmental governance at the Office of International and Tribal Affairs as well as the director of the Office of Environmental Justice, both at the U.S. Environmental Protection Agency (EPA), as well as in private practice. He is also the author of *Environmental Justice: Legal Theory and Practice*, a textbook/handbook published by ELI Press.

**Franklin Kury:** I'd like to start by describing the book—how it came to be and what I think it does for the future. The idea for the book came to me about three years ago when I realized that the 50th anniversary of Article I, §27 of the Pennsylvania Constitution would be observed on May 18 of this year.

The whole thing began in 1966, when I ran for the Pennsylvania House of Representatives. I ran on the clean streams issue. The incumbent representative, who was the senior Republican in the state legislature and chairman of the Appropriations Committee, voted against bringing coal companies under the Clean Streams Law.<sup>2</sup> I made that my issue and I won. This was such an upset that my picture was carried in the Philadelphia and Pittsburgh papers as the beginning of the movement of environmental issues as a political issue.

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1. 947 F.3d 1159, 50 ELR 20025 (9th Cir. 2020).

2. H.B.585 of the 1965 session that was later incorporated into the revised clean streams law enacted in 1970, 35 P.S. §691.

I had not thought of writing constitutional amendments. Two years later, so many more legislators like me got elected. We were in the House Conservation Committee, where I was one of the top leaders because of what I had done. The chairman was John Laudadio. We passed about 12 different environmental bills. In three or four years, we passed more environmental bills than in the entire history of the state before or after.

At that point, as all the bills came through, I didn't write most of them. I only wrote one or two. But all of them came through the committee I served on. It occurred to me that we've got to find a way to keep or preserve what these bills are doing. These bills can be repealed as fast as we're passing them, or they can be amended to weaken them. There needed to be something permanent. That was when the idea of an environmental amendment to the constitution came to me. We needed something that would establish broad principles for the state and for future generations.

Then, I came up with three basic ideas. First, is that the public has a right to a decent environment—clean air, pure water, and so on. The second provision is that the public natural resources of Pennsylvania belong to all the people. The third principle is that the government must serve as trustee of these resources for future generations. Those are the three principles I put in the amendment.

My original bill was amended several times. But on Earth Day 1970, with U.S. Sen. Gaylord Nelson on the podium for the first Earth Day in Pennsylvania, we approved the senate amendments to my bill and got it ready to go to the public the following year. On May 18, 1971, the people of Pennsylvania approved this amendment by a vote of 4-1; the number was 1,021,327 to 252,979.

There were four other amendments on the ballot that day. Two of them were defeated. Women's rights passed, but only by 2-1. I'm not downplaying that, simply stating it. The environmental issue passed 4-1 and then it went on the books. I thought something would begin to happen, but it didn't.

I'm sure John Dernbach is going to discuss this in greater detail, but the courts of Pennsylvania soon anesthetized the amendment. They adopted a cost-benefit analysis in *Payne v. Kassab*.<sup>3</sup> It was the main test for interpreting Article I, §27, the environmental amendment, for about 40 years. Virtually nobody succeeded in stopping any degradation of the environment until 2013, when Chief Justice Ronald Castille came up with the opinion he wrote in *Robinson Township v. Commonwealth*.<sup>4</sup>

In *Robinson Township*, he declared that you have to use plain English in reading the constitutional provision on the environment. He actually said that the *Payne v. Kassab* test belonged in the judicial wastebasket. Anyhow, the amendment got new life. Succeeding cases—the cases brought by John Childe and the Pennsylvania Environmental Defense Foundation—reinforced what Justice Castille had done.

Now, Article I, §27 is alive and well and full of vigor. I think that's great.

But it's not enough to celebrate this because another issue that wasn't as pressing when we wrote Article I, §27 has now overwhelmed us—climate change. At that time, in the late 1960s and early 1970s, nobody had heard of climate change. Or if they did, they didn't talk about it. Of course now, it is an overriding issue. As Maureen Dowd said in the *New York Times* recently, the climate change crisis is “apocalypse right now.”<sup>5</sup> We've really got to do something. So, I added in the second half of the book how this amendment can be used in other states and at the federal level. That was why the title of the book was changed. It's not *Happy Birthday, Pennsylvania*. It's *The Constitutional Question to Save the Planet*. Because the three basic principles in the amendment that I expounded in the book can be used and should be used to stop climate change.

The second half of the book reviews the history of other states in the Union. It talks about copper in Montana and how that relates to Pennsylvania. It shows that most states don't have constitutional amendments on the environment. In my opinion, one of the best things in the book is the appendix block. If you look at Appendix IV, it shows all 50 states and how they compare to Pennsylvania. It illustrates just how few of these states have any constitutional provision whatsoever.

The question then is, will we make this a federal amendment? Will we make the Article I, §27 principles part of our U.S. Constitution? The last third of the book is dedicated to advocating for this need. We want to make it explicit. While Julia might argue it's implicit in the Fifth Amendment, and I'd say she's right, she hasn't won. I hope she will, but it's tough. A federal amendment would make the right to a healthy environment explicit.

The book also states that the leadership of the United States is on the line. If we're going to be serious about leading other countries, we've got to start at home. The best way to start at home is to show commitment to a constitutional amendment.

I address the Joseph Biden Administration in a special afterword in the book, which I added after the election. President Biden's environmental plans are great. I hope they succeed. But as Ann Carlson, general counsel of the National Highway and Traffic Safety Administration, pointed out to me when I interviewed her at the University of California, Los Angeles, the problem with legislation or programs is that they can be repealed or amended. The Donald Trump Administration repealed or weakened 65 environmental provisions that the Barack Obama Administration had proposed, and pulled out of the Paris Agreement. So, this is one of the undulating effects of elections. One of the reasons we want to get the amendment passed, in my opinion, is so we don't have this undulation. We're going to make this a basic policy of the U.S. government

3. 312 A.2d 86 (Pa. Commw. Ct. 1973), *aff'd*, 361 A.2d 263, 6 ELR 20796 (Pa. 1976).

4. 83 A.3d 901, 44 ELR 20276 (Pa. 2013).

5. Maureen Dowd, *Apocalypse Right Now*, N.Y. TIMES (July 24, 2021), <https://www.nytimes.com/2021/07/24/opinion/sunday/climate-change-floods-wildfires.html>.

that its job is to protect or save the environment, along with everything else it does.

What this book advocates is revolutionary. Right now, environmental issues are something that the U.S. Congress occasionally accommodates through a statute. But this would instead make environmental stewardship a fundamental responsibility of government. Just like its responsibility to protect the United States from foreign and domestic enemies.

I can't think of a more appropriate enemy to fight than climate change. Every elected official in the federal government would have to swear to uphold this. This is revolutionary, but so what? Our country was born in a revolution. At that time, they didn't talk about the natural environment. They didn't deal with slavery. They didn't deal with women's rights. And they did not protect the environment.

But now, we have the Thirteenth, Fourteenth, and Fifteenth Amendments to prohibit slavery and address racial discrimination. That was long overdue. We have the Nineteenth Amendment on women's political rights. And now, it's long overdue to put environmental protection on the same level as these other provisions.

**John Dernbach:** I'm going to provide a little more detail on the story of what has happened with Article I, §27 in the Pennsylvania courts over the past 50 years. It's a story of abandonment and then restoration. Before we get started, it's useful to take a look at the text of Article I, §27:

The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic, and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.<sup>6</sup>

There are two things going on in these three sentences. The first sentence establishes the right to a healthy environment. The second and third sentences, taken together, create a public trust in the category of resources called public natural resources. The commonwealth's job is to conserve and maintain them for the benefit of everyone, including future generations.

There is no federal analogue to Article I, §27. We don't have hundreds of years of experience thinking about what constitutional environmental rights mean. In addition, there weren't many effective environmental laws when this amendment was passed in 1971. Courts have had a lot of difficulty thinking about how to make environmental rights work and how to reconcile them with economic development.

We got off to a bad start in Pennsylvania. Environmental rights are rights that individuals hold. Every other right in Article I of the Pennsylvania Declaration of Rights, Pennsylvania's analogue to the Bill of Rights, is a right

individuals have against the government. In the 1973 case *Commonwealth v. National Gettysburg Tower, Inc.*,<sup>7</sup> the attorney general treated the first sentence of the amendment as providing a cause of action against a private developer operating on private property to build an observation tower right outside of Gettysburg Battlefield National Park. The attorney general lost in common pleas court, in Commonwealth Court, and in the Supreme Court. But in none of these decisions did the court say that the ERA is a limit on government authority.

The *Gettysburg Tower* decision frightened a lot of people into thinking that, if the ERA is instead a grant of governmental power, the legislature needs to first authorize what occurs under it. So, this case created a never-ending question about whether the ERA is self-executing—that is, whether it can be implemented without legislation.

Then things got worse. Some citizens challenged a street-widening project in Wilkes-Barre, involving conversion of half an acre of a public park into a public street.<sup>8</sup> They said it violated the Article I, §27 public trust. The Commonwealth Court looked at this case and the *Gettysburg Tower* case, and said in effect that ERA is being used for small stuff in terms of environmental impact and that the text of the ERA really isn't suitable. When the court stated that judicial review under the ERA needs to be realistic and not legalistic, it signaled that it was going to invent its own test.

This is the *Payne v. Kassab* test that Franklin talked about. It's pretty much a cost-benefit test. I won't go through the details, but one important thing is that this test has virtually nothing to do with the text of the ERA. It was a remarkable act of judicial activism. Still, it had a profound effect, making the ERA go more or less dormant, as Franklin pointed out, for more than 40 years.

A student and I did a study of how the *Payne v. Kassab* test worked.<sup>9</sup> Basically, people using the amendment to challenge something that the government did hardly ever won under this test. As a young lawyer in the early 1980s at the Pennsylvania Department of Environmental Resources, I saw the ERA actually meant the *Payne v. Kassab* test. I remember looking at the text of §27 at the time and thinking, gosh, these are wonderful words; wouldn't it be interesting if the courts treated these words like law?

And that began to happen in *Robinson Township v. Commonwealth*, a 2013 Pennsylvania Supreme Court decision that held several parts of the Marcellus Shale regulatory statute, Act 13, unconstitutional.<sup>10</sup> Justice Castille wrote an opinion based on Article I, §27, and was joined by two other justices. Section 27 had never before been used to help hold a statute unconstitutional. (A fourth justice said these parts of Act 13 were unconstitutional for a different legal reason.) Although it was only a plurality opinion,

7. 311 A.2d 588, 3 ELR 20876 (Pa. 1973).

8. *Payne v. Kassab*, 312 A.2d 86 (Pa. Commw. Ct. 1973), *aff'd*, 361 A.2d 263, 6 ELR 20796 (Pa. 1976).

9. John C. Dernbach & Marc Prokopchak, *Recognition of Environmental Rights for Pennsylvania Citizens: A Tribute to Chief Justice Castille*, 53 DUQ. L. REV. 335 (2015).

10. *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 44 ELR 20276 (Pa. 2013).

6. PA. CONST. art. I, §27.



it was 162 pages long. It provides a remarkably detailed explanation of what §27 means.

That opinion created a road map for subsequent decisions. Several features of this opinion are worth pointing out. One is that Justice Castille strongly believes in following the text of the constitution. He has spoken at Federalist Society meetings about this same issue. He is also sensitive to environmental issues. Franklin and I have heard him speak publicly about the adverse effects of mining and industrial development on Pennsylvania's natural resources.

The third thing I want to flag is that, when Justice Castille spoke at a dedication of part of a state park for Franklin Kury earlier this year, he quoted two passages from the plurality opinion, both of which contain the term “sustainable development.” His opinion uses that term six times. To me, that meant he saw that there was a way to interpret Article I, §27, the ERA, in a way that is consistent with economic development. The term helped thread the needle, overcoming the aversion that Pennsylvania courts have had to recognizing environmental rights.

The next big decision, in 2017, turned the plurality opinion into a majority opinion. This was *Pennsylvania Environmental Defense Foundation v. Commonwealth (PEDF)*,<sup>11</sup> which involved the use of royalty money the state receives for oil and gas drilling on state lands. Typically, over the years, these wells had been more or less mom-and-pop operations. The state received several million dollars per year in royalties and the like, and used the money for conservation purposes.

But with the advent of shale gas and the economic meltdown that occurred in 2008, the state saw an opportunity to make hundreds of millions of dollars from drilling on public lands and to use that money to help balance the budget. The court said that, under Article I, §27, the state can't do that.

First of all, the *PEDF* court said that the *Payne v. Kassab* test was no longer valid. That changed the landscape. With this case and *Robinson Township*, a remarkable legal shift occurred. Pennsylvania lawyers, policymakers, and judges actually looked at the words of §27 for the first time and took them seriously. Before that, as I've suggested, you'd quote Article I, §27 when writing a brief because you had to—and then you'd get to the *Payne v. Kassab* test, which was the real law. Now, people are looking at §27 and seriously considering its text.

Instead of *Payne v. Kassab*, the *PEDF* court said the proper standard of review is the text of Article I, §27 itself, along with the underlying principles of trust law in effect at the time of its enactment. The court also settled the issue of whether the amendment and its public trust provisions are self-executing. It said, at least in suits against the government, you don't need legislation to carry out §27.

As I mentioned, the first sentence of the ERA establishes the right to a healthy environment. This first clause limits the state's power to act contrary to these rights, so it's a

limit on government authority. The *PEDF* court made that point, repeating what the plurality had said about the first clause in *Robinson Township*.

As for the public trust language in the second and third sentences of §27, the court said this trust includes state parks and forests, as well as the oil and gas they contain. This meant the oil and gas leasing program is also under the public trust. The court identified present and future generations as the named beneficiaries of the trust. Then, it said that all agencies and entities in the commonwealth government at the state or local levels have trust responsibilities.

So, what are the duties of the trustees? They are to prohibit the degradation, diminution, or depletion of public natural resources. The state also has a duty to prevent harm, whether from direct state action or the activities of private parties. The court goes on to make a provocative point that the commonwealth even has a duty to act affirmatively via legislative action to protect the environment.

The court also said that traditional trust law has to be used to determine the meaning of public trust. The Pennsylvania Supreme Court is willing to use traditional trust law principles like loyalty, impartiality, and prudence to apply and provide meaning to §27.

According to the court, because the oil and gas from public lands is part of the public natural resources, the money that comes from the sale of these resources is also subject to the public trust and the state's obligation to conserve and maintain the environment. Therefore, that royalty money cannot be used for nontrust purposes to help balance the state budget.

Then, in a case decided this past summer,<sup>12</sup> the Supreme Court said that its 2017 ruling about royalty money being subject to the conserve-and-maintain obligation also applies to bonus money, rental money, and penalty payments from oil and gas leasing on state land. Once again, this was a majority opinion. What's especially interesting about this opinion is the strength of the language that it uses when talking about the intergenerational aspect of §27.

The court asserted that the language of §27 “unmistakably conveys to the commonwealth that, when it acts as a trustee, it must consider an incredibly long time line and cannot prioritize the needs of the living over those yet to be born.” This is the strongest statement on intergenerational equity that the court has used yet.

What else is going on? There are a lot of other cases concerning §27, including in the Commonwealth Court, in the Supreme Court, and in common pleas courts, as well as before the Environmental Hearing Board. I want to give you a sense of some of the issues that are being teed up or have yet to be decided.

One issue that the Supreme Court is going to be hearing—this is another appeal by the *PEDF*—is how royalty money and other types of public trust money can be spent. What does it mean to spend money to conserve and maintain public natural resources? The Pennsylvania Depart-

11. 161 A.3d 911 (Pa. 2017).

12. *Pennsylvania Env't Def. Found. v. Commonwealth*, 255 A.3d 289 (Pa. 2021).

ment of Conservation and Natural Resources has argued that this money can lawfully be used to pay its operating expenses. The PEDF says the Department's budget used to be based on the general fund, and spending money on salaries and expenses doesn't necessarily do anything to protect the corpus of the trust, which is physical natural resources. There's a lot of money at stake. It will be interesting to see what the Pennsylvania Supreme Court does with that.

Another question involves the role of the first clause of §27, which provides a right to a clean environment. The Supreme Court's recent decisions have firmly moved in the direction of understanding environmental rights as rights against the government. But we've still got the *Gettysburg Tower* decision, which says that the state can use the first sentence of the amendment as a cause of action. Of course, that makes a lot of private landowners—and certainly lawyers for private landowners—nervous about what that might lead to.

A third question is, what's the best way to implement the ERA? Is it best implemented through litigation? Certainly, that's the way it has worked so far. But there are other possibilities for some issues, such as guidance to state agencies, regulations, and perhaps legislation.

I'll give you a quick example. If the state has an obligation to conserve and maintain public natural resources, wouldn't it be a good thing to have an inventory of all those natural resources and for the state to be reporting periodically to the public about how those resources are doing? That's something that an ordinary trustee is obliged to do, and that's something that perhaps the commonwealth should also be doing.

There are other questions that I could raise here, and obviously one of them is about climate change. I think the ERA almost certainly applies to human-induced climate change. Robert McKinstry and I have written a long article about this.<sup>13</sup> The state is beginning to move in the direction of regulating greenhouse gas emissions by joining the Regional Greenhouse Gas Initiative program. I expect that, in the litigation that follows, §27 is going to play some role.

We have a plethora of resources on our Widener website about §27 if you would like to learn more.<sup>14</sup>

The last thing I'll say is that there was a prediction that the *PEDF* and *Robinson Township* cases were going to lead to an apocalypse for the private sector, and development projects were going to be stopped. The practical impact ended up being quite different. If a proposed project doesn't address a particular problem, for example, many lawyers simply advise the project developers to fix that issue to avoid §27 litigation.

**Julia Olson:** It's a pleasure to be here. I want to acknowledge that Franklin Kury was a visionary in the 1970s. He

helped us get to where we are today. It's not far enough, but it set some vital groundwork. It's an honor to be here with the three of you.

I'm going to start with a brief summary of the *Juliana v. United States* case and its status. We're trying to fill a void that exists because we don't have an ERA in the U.S. Constitution, or in other constitutions around the country and the world, that pushes courts to acknowledge the implied rights within basic rights to life and liberty, and the federal public trust doctrine.

The *Juliana* case was brought by 21 young people. It was brought under the Fifth Amendment, under the Substantive Due Process Clause and the Equal Protection Clause. We're challenging the United States' fossil fuel energy system and the policies and practices that continue to promote fossil fuel use.

At its core, this case is about seeking a stable climate system, and addressing the climate crisis and the U.S. government's dominant role globally in causing and perpetuating that crisis. It's also a case about intergenerational rights, protecting the vital natural systems that children and future generations need for survival. These future generations are represented by the clients, an awesome group of young people.

I want to mention one point when we talk about whether the right to a stable climate system is implied or not. James Madison drafted the Fifth Amendment. Back in 1818, he was speaking to a group of farmers and said that the atmosphere is the breath of life. Deprived of it, we all equally perish, meaning humans, animals, and plants. So, going back to even the early days of our nation, there was very much an understanding that the atmosphere, air, and water were vital to life.

Part of the *Juliana* case is really about impacts to the health of young people and children. It's a children's rights case because not only are young people exposed to the same types of air pollution that adults can be exposed to, but because their bodies are still growing and developing, they are actually affected very differently than adults are. Their respiration rates are faster. They're outside more. Their physical and mental health impacts are very significant, and in some instances, really dangerous.

Part of the *Juliana* case is that these young people are not just little adults or smaller individuals, but have distinct abilities and needs, and they are very different physiologically from adults. They can't vote. They don't have political power. They don't have lobbyists. All of that is a really important part of the case.

This case was filed in 2015. It's been on a rollercoaster of procedural hurdles. We've been up to the U.S. Court of Appeals for the Ninth Circuit four different times.<sup>15</sup> We've been up to the U.S. Supreme Court twice.<sup>16</sup> We are now back down in the district court here in the District

13. Robert B. McKinstry & John C. Dernbach, *Applying the Pennsylvania Environmental Rights Amendment Meaningfully to Climate Disruption*, 8 MICH. J. ENV'T & ADMIN. L. 49 (2018).

14. Widener University Commonwealth Law School, *Pennsylvania Constitution Article I, §27 Resources*, <https://widenerenvironment.com/environmental-law/art-1-sec-27-resources/> (last visited Nov. 18, 2021).

15. Our Children's Trust, *Juliana v. United States*, <https://www.ourchildrenstrust.org/juliana-v-us> (last visited Nov. 18, 2021).

16. *United States v. U.S. Dist. Ct. for Dist. of Oregon*, 139 S. Ct. 1 (2018); *In re United States*, 139 S. Ct. 452 (2018).

of Oregon, in Eugene, in front of Judge Ann Aiken.<sup>17</sup> We have sought to amend our complaint. We have addressed some of the issues that the Ninth Circuit identified related to standing and redressability.

So, we now have a new complaint that's slightly altered, with the same basic claims, and are moving forward to a decision on that motion to amend, which we are hoping will come any day now. But there is no set time line. If Judge Aiken grants that motion to amend, then the *Juliana* case is headed back to trial, if the U.S. Department of Justice does not seek extraordinary measures to try to stop it.

If we're allowed to go to trial according to the district court, the only final hurdle that can prevent this trial would be another petition for writ of mandamus. That decision is made by the solicitor general or the attorney general of the United States. That would be the only wall or dam stopping these young people from getting into court and putting forward their evidence at trial. We're hoping that won't happen. We're hoping the Biden Administration will follow ordinary trial litigation practices and come to court and defend the case if they choose to do that.

I'm happy to answer more questions about *Juliana*. While it's our flagship case, we also have other cases. At the same time that Franklin was doing his work in Pennsylvania on the constitutional amendment, Montana was also putting forth an ERA. In the early 1970s, Montana amended its constitution to include Article IX, §1. The article states, in part: "The state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations."<sup>18</sup>

It also has other provisions that require the prevention of degradation and the protection of environmental life-support systems. So, we filed a suit in Montana against the state on behalf of 16 young people.<sup>19</sup> This case also challenges the fossil fuel energy policies and practices of the state of Montana as violating this constitutional provision and harming the youth of the state.

We beat the motion to dismiss, so we are now headed to trial in Montana state court and are preparing for that case, which is really exciting. You may know that Montana is one of the biggest fossil fuel producers in the nation and plays a really important role in fossil fuel extraction.

We have cases in multiple states, some of which have these explicit environmental rights provisions and others that don't.<sup>20</sup> We're also using the public trust doctrine to bring these cases on behalf of youth. We have new cases in development in Utah, Virginia, and Hawai'i right now along with others.

In addition to the state work that we do here in the United States and our federal work, we're working globally. There are environmental rights provisions in most

constitutions now around the world—either public trust provisions or environmental rights provisions. So, there are youths rising up everywhere to bring these claims to protect their right to a climate system that sustains life.

I want to bring up one more issue and then I'll wrap up. There's another "ERA" that we're all familiar with. It's the Equal Rights Amendment, which finally had enough states to ratify when Virginia became the 38th state to ratify it in 2020.<sup>21</sup> But, unfortunately, other states have repealed their ratification, and the deadline for ratification passed four decades ago. It's an example of how these constitutional rights amendments can be very challenging and take a lot of time. Therefore, I think it's important to have both a short-term effort and a long-term effort when we're looking at how to codify constitutional rights with respect to environmental protection.

For those who don't know, on October 8, the Human Rights Council of the United Nations voted to declare by resolution that a healthy environment is a human right.<sup>22</sup> This was a momentous occasion to have a body made up of 47 countries acknowledge this for the first time on the international level. I want to flag that as we head into our discussion.

**Barry Hill:** I'm honored to be part of this distinguished panel. I want to thank the Environmental Law Institute for having this discussion and for inviting me to be part of the dialogue.

The other day, the Mercator Research Institute on Global Commons and Climate Change issued a study.<sup>23</sup> It said that at least 85% of the world's population has been affected by human-induced climate change. In 2021 alone, the study says, there have been 388 deaths in the United States and \$100 billion in damages driven by climate change.

Instead of talking about the constitutional right to save the planet, I'm going to talk about the constitutional right to address climate change and its adverse impact on human health. My message today is that climate change is a public health issue. A human rights-based approach is required to protect the air we breathe, the water we drink, and the food we eat. That's the goal of achieving environmental justice for all.

John and Franklin talked about the first principle, which is that the broad language of an ERA can be used to address climate change because the essential principle of an ERA is that all people have a right to a healthy environment. The second principle is that the broad language of an ERA can be used to address climate justice for all. Finally, the third principle is that the broad language of an ERA can be used to address environmental justice for all, which is my passion.

17. Plaintiffs' Motion for Leave to Amend and File Second Amended Complaint for Declaratory and Injunctive Relief, *Juliana v. United States*, No. 6:15-cv-01517 (D. Or. Mar. 9, 2021), ECF No. 462.

18. MONT. CONST. art. IX, §1.

19. Our Children's Trust, *Montana*, <https://www.ourchildrenstrust.org/montana> (last visited Nov. 18, 2021).

20. Our Children's Trust, *State Legal Actions*, <https://www.ourchildrenstrust.org/state-legal-actions> (last visited Nov. 18, 2021).

21. H.R.J. Res. 1, 2020 Gen. Assemb., Reg. Sess. (Va. 2020).

22. H.R.C. Res. 48/13, U.N. Doc. A/HRC/RES/48/13 (Oct. 8, 2021).

23. Max Callaghan et al., *Machine-Learning-Based Evidence and Attribution Mapping of 100,000 Climate Impact Studies*, 11 NATURE CLIMATE CHANGE 966 (2021).



I'm going to focus on a recently issued study by EPA<sup>24</sup> in which climate change and social vulnerability in the United States are addressed in terms of six impacts. But before I talk about EPA's study, I want to talk about a U.N. Human Rights Council study entitled *Environmental Justice, the Climate Crisis, and People of African Descent*, which was issued on October 5.<sup>25</sup>

The study by U.N. experts concluded that the world is currently facing a climate crisis, environmental racism, pervasive toxic pollution, dramatic loss of biodiversity, and the surge in emerging infectious diseases of zoonotic origin such as COVID-19. These interlocking environmental crises have a negative impact on a wide range of human rights, including the rights to life, health, water, sanitation, food, decent work, development, education, peaceful assembly, and cultural rights, as well as a right to live in a healthy environment.

As Julia said, on October 8, the Human Rights Council voted with 43 countries in favor of this human right to a clean, healthy, and sustainable environment. There were no countries against and four abstentions—China, India, Japan, and Russia. Basically, the U.N. is saying that environmental degradation and climate change are interconnected human rights crises, and that the most vulnerable segments of the population are more acutely impacted. Over the next couple of minutes, I'm going to show you how the Human Rights Council and EPA are united.

The EPA study was significant. It represented an important milestone in understanding the future impacts of climate change in different American populations and especially under-resourced communities in this country. Minorities and poor Americans are most likely to suffer and die from the worst impacts of global warming. EPA's report shows the degree of impact on four socially vulnerable populations, defined based on income, educational attainment, race and ethnicity, and, finally, age. The report quantifies six categories of impacts, including those to health from changes in air quality and extreme temperature, labor, coastal flooding and traffic, coastal flooding and property, and inland flooding and property.

Race and ethnicity are far and away the strongest indicators for heightened climate risk. This is based on EPA's analysis of 49 U.S. cities. Let me share with you some of the key findings of the study. The study began during the Trump Administration and was completed in September. It says that African Americans are projected to face higher impacts of climate change for all six impacts analyzed in the report compared to all other demographic groups.

For example, with a 2-degree Celsius increase of global warming, African Americans are 34% more likely to currently live in areas with the highest projected increases in childhood asthma diagnoses. Black children are 34% more

likely to experience asthma exacerbated by climate change. This rises to 41% on the 4-degree-Celsius projection of global warming. It is a public health issue, according to EPA. To go on, African Americans are 40% more likely to currently live in areas with the highest projected increases in extreme temperature-related deaths. This rises to 59% on a 4-degree-Celsius projection of global warming.

The report finds that African Americans are 40% more likely to die from higher temperatures than the general population if global warming is kept at 2 degrees Celsius. If the world is allowed to warm to 4 degrees Celsius on average, Black Americans would be 59% more likely to die than the general population of the continental United States. Minority communities are also in line for more disruptions as sea levels rise, endangering coastal roads and other infrastructure. White people own a disproportionate share of the property that would be inundated in high warming scenarios, according to the study.

These are startling statistics. It was a comprehensive study and it looked at, as I said, all issues in all areas in the United States. It's rather chilling. Under-resourced communities are going to suffer, without a doubt.

EPA's report supports the Biden Administration's focus on environmental justice and climate justice. Upon its release, EPA Administrator Michael Regan said in a statement that the report "punctuates the urgency of equitable action on climate change. With this level of science and data, we can more effectively center EPA's mission on achieving environmental justice for all."

But EPA does not have an ERA in the Constitution to lean on. EPA does not have climate change legislation to work with at this particular point. Finally, EPA does not have environmental justice legislation to work with. So, how is equitable climate action going to be taken as a practical matter if the Agency does not have the right tools?

The U.N. report states that addressing the climate crisis requires a human rights-based approach. That is why the experts recommended that countries like the United States need to take urgent action to mitigate the climate crisis and address environmental degradation and environmental racism.

Apply a human rights-based approach, emphasizing prevention and participation. Focus on the needs of those most affected and increase accountability. Address the root causes of systemic racism and interrelated environmental disasters. Seize the opportunity to "build forward better," in order to achieve a just and sustainable future in which no one is left behind. Lofty words, but how can it be done? How can it be accomplished?

Julia talked about the Equal Rights Amendment and how long that has taken to reach the cusp of being part of the Constitution—a very, very long time. Franklin said at the very beginning that we need an ERA in the Constitution. How long will that take? How many generations? How will it be done in this political environment that is so divided at this particular point?

We are talking about, as you read in the newspapers, a civil war potentially brewing in this democracy. I'd say that the focus in the United States for the time being must be on

24. U.S. ENVIRONMENTAL PROTECTION AGENCY, CLIMATE CHANGE AND SOCIAL VULNERABILITY IN THE UNITED STATES: A FOCUS ON SIX IMPACTS (2021), [https://www.epa.gov/system/files/documents/2021-09/climate-vulnerability\\_september-2021\\_508.pdf](https://www.epa.gov/system/files/documents/2021-09/climate-vulnerability_september-2021_508.pdf).

25. UNITED NATIONS HUMAN RIGHTS COUNCIL, ENVIRONMENTAL JUSTICE, THE CLIMATE CRISIS AND PEOPLE OF AFRICAN DESCENT (2021).



the six states with ERAs and the 15 other states working on amending their constitutions. As Julia pointed out, people in Montana are focusing some resources and attention on this. If many other states had ERAs, it would be a different scenario altogether. Over the next year, I'm working on this effort in Maryland to amend the state's constitution.

On November 2, 2021, voters in New York State approved amending the state constitution to add an ERA. The ballot measure passed by a margin of more than 2-1 (69% to 31%), and will appear as Article I, §19.<sup>26</sup> A lot must be accomplished in a short period of time. Climate change is no longer an existential threat. It is here. If the Mercator report is correct, 85% of the world's population has already been affected. It can only get worse.

I want to thank you for allowing me to bring you this good news, if you will. It's good because we know what is happening. Now, we must come up with ways we can deal with this issue.

**Chandler Randol:** We have a number of questions from the audience. The first is, can we have a discussion on overcoming the difficulty of getting two-thirds of Congress and three-fourths of states to vote for a constitutional amendment, given today's political realities? Senator Kury, we can start with you.

**Franklin Kury:** As a retired politician, I absolutely agree it's going to be an uphill fight. Chances of getting this through in the immediate future are slim. But on the other hand, we have two choices: quit or try. I'm for trying because climate change is getting so bad. Congress and the states are slow; they need to wake up and do something. I think the sooner we get started, the better off we're going to be. I recognize that it's going to be hard to do that, but I wouldn't let that stop me. We've got to try.

**Julia Olson:** I don't think this is an either/or scenario. We don't need to choose between seeking constitutional amendments and pursuing the path we're pursuing in the courts. We need to have all hands on deck on every front. We are in an emergency. The reason we chose to go to the courts to protect rights that we think are unalienable is because we're out of time to work through the political process.

The political process has failed entirely on this issue, but I do think it's important to have short-term and long-term strategies. Even if it takes 100 years to get the ERA passed, I think it's worth doing. Hopefully, in places like New York and Maryland and other jurisdictions, it will be a shorter time frame. So, I think we need to be working on every front we can right now.

But I want to emphasize that, just as I as a woman don't believe that my rights have to be explicit in the Constitution in order to be recognized and protected, I

don't think the right to air and water and the climate that all of our lives depend upon has to be written in a constitution for a court to protect that right. I just want to be clear about that.

**Franklin Kury:** I want to add that I certainly hope you're going to prevail, Julia, because you put in so much time and effort. You've got the case on your side, you've just got to get the courts to agree. But in addition to your great judicial efforts, we need amendments to the Constitution. Everybody who takes public office in the United States—whether a member of the U.S. House of Representatives, or the U.S. Senate, or the presidency, or the courts—must take an oath to uphold the Constitution. If some version of Article I, §27 is there, that means they're taking an oath to uphold that as well. That's one of the reasons I'd rather we keep pushing and see how far we get. You never know. I think it'll happen eventually.

**Barry Hill:** I believe that there should be a “shotgun approach.” I agree with Julia. The fight must be in the courts, in the streets, in the legislatures at the local, state, and federal levels, in the universities, academic institutions, every aspect of American life, as well as in international courts and international bodies. We talked about the U.N. resolution by the Human Rights Council. Hopefully, the U.N. General Assembly, which has universal membership, will also support such a resolution.

I talked about the fact that there were four abstentions—China, India, Japan, and Russia. If a similar resolution goes to the General Assembly, we shall see if the United States decides not to vote for the human right to a clean, healthy, and sustainable environment. I'm hopeful. But that has been a problem for many years. I represented the United States in many of these international forums when I was with EPA and the Office of International Affairs. One of the problems there was enforceability. The United States has taken the approach that, unless it's enforceable, we're not supportive of a broad human right. We'll see if things will change as far as the Biden Administration is concerned.

But going back to a point that I was making, I agree with Julia that it's not a question of quitting or not trying. It is more of a shotgun approach. We must be effective. Only a coordinated and concerted effort will enable us to make progress. And with the 15 states that are working on ERAs right now and the hopefully seven states that will have effective ERAs, we shall see. But we have got to deal with this present problem of climate change. It's not a threat anymore. It's real.

**Franklin Kury:** I want to clarify something. I'm not suggesting that Julia or others stop their judicial efforts or that we stop at the state level. My argument is for amending the Constitution and to absolutely keep going. I'm not suggesting anybody slow down.

**Chandler Randol:** We have a follow-up question that I think gets to the heart of this debate on what level and

26. Ballotpedia, *New York Proposal 2, Environmental Rights Amendment*, [https://ballotpedia.org/New\\_York\\_Proposal\\_2,\\_Environmental\\_Rights\\_Amendment\\_\(2021\)](https://ballotpedia.org/New_York_Proposal_2,_Environmental_Rights_Amendment_(2021)) (last visited Dec. 2, 2021).

what mechanism to take climate and environmental justice action. The audience member asks what the panel thinks of the National Environmental Policy Act (NEPA),<sup>27</sup> which the courts and everybody else ignores, and says that it reminds them of the sort of overall protection that a constitutional amendment would address. They follow up with a specific quote from NEPA: “Congress recognizes that each person should enjoy a healthful environment.”<sup>28</sup> To clarify the question, might NEPA have a role that perhaps we haven’t been touching on?

**Julia Olson:** I used to litigate under NEPA a lot. NEPA has an interesting history. It was one of the statutes that was adopted in the 1970s. Originally, people like Prof. William Rodgers were arguing that it should have a substantive hook, and have more than a procedural meaning. But over time, the courts have just interpreted NEPA as requiring process and not substance.

I think NEPA, like many of our environmental statutes, actually does articulate the public trust obligations of government. It articulates the right of the people to clean air and water and the benefit of natural resources. And it articulates the intergenerational justice principle, but it has not been interpreted by our courts to be substantively binding on the government in that way. While we use that language in NEPA as evidence that there is a federal public trust obligation in our *Juliana* litigation, NEPA itself is not binding in that way. It’s a process statute.

**Franklin Kury:** This is why I argue for an amendment to the Constitution, because that will override all these statutes. If we get these rights in the Constitution, then everybody is bound to uphold them by taking the oath of office. That’s why I’m for the amendment.

**John Dernbach:** To build on what Julia and Franklin said, the public trust part of the Pennsylvania amendment obliges the government to conserve and maintain public natural resources—period. A question that’s been raised is, to what extent do government trustees have to think in advance about the impacts of their decisions on public natural resources?

There is some recognition that the substantive obligation entails a procedural obligation to do some investigation in advance, which would be like NEPA. But the environmental amendment itself has a substantive bite in terms of the obligation to conserve and maintain. It’s not limited to one statute, so it’s broad in the same way that NEPA is broad.

With respect to the first sentence of the amendment—giving people the right to clean air, pure water, and the preservation of certain values in the environment—the court has made it clear that those rights are against the government. Again, that has substantive bite.

The challenge we may get into is, to what extent does a court get to use §27 to second-guess an agency’s decision

about, for example, emission limitations? We may at some point need to address the question of how much deference you give the agencies under §27. But the potential for the substantive bite is getting developers in many occasions to say, maybe a statute or regulation does not address a particular issue, but we can do better on that issue than what the law requires. Otherwise, we’re going to have §27 litigation. So, the substantive bite is actually a real part of how the ERA is now being experienced and applied.

**Franklin Kury:** If the substantive bite is in the Constitution, citizens can bring litigation against the government to make them live up to their duties. That in itself would give the government a reason to take a different approach toward the environment than it does now. That’s the real hook here—that you’ve got to give people the right to go to court. Statutes don’t do that the way a constitutional amendment does.

**Barry Hill:** NEPA is called the Magna Carta of environmental law. You mentioned §101, in which Congress recognizes that everyone is entitled to a healthful environment. Does that mean that it’s part and parcel of the regulation? It’s a finding. It forms the basis for the Act. But can you use it in order to move forward or for courts to move forward on that? I don’t know.

Let’s look at NEPA. This goes back to what Franklin was saying, that environmental rights should be a constitutional amendment, because subsequent administrations can change legislation. Look at what has happened with this whole notion of cumulative impacts. This was an incredibly important feature of NEPA as it relates to community-based organizations bringing actions or filing lawsuits. But the Trump Administration eliminated entirely cumulative impacts in its July 2020 final regulations.<sup>29</sup>

On October 7, the Biden Administration published in the *Federal Register* a proposal to bring cumulative impacts back.<sup>30</sup> Now, as Franklin said, with an amendment to the Constitution, it may be a long road. It may take time. But it’s something that is very different from a statute, which can be amended, which can be changed, which may not even be enforced by an administration.

That’s the problem that you might have with NEPA regulations. They’re good. They’ve been used for 40-something years. Everyone was used to NEPA. But what happened when the Trump Administration changed NEPA entirely? We’re back to the drawing board. It’s going to take the administrative process to make these changes again to cumulative impacts. It may take the rest of the Biden Administration’s term over the next two to three years. We shall see.

**Chandler Randol:** We have another question, asking to highlight some of the best examples out there on success

27. 42 U.S.C. §§4321-4370h, ELR STAT. NEPA §§2-209.

28. 42 U.S.C. §4331.

29. Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 43304 (July 16, 2020).

30. National Environmental Policy Act Implementing Regulations Revisions, 86 Fed. Reg. 55757 (Oct. 7, 2021).

stories. The question asks, outside of Pennsylvania and the Philippines, what would the panel say are the legal case decisions that best show the effectiveness and implementation of a constitutionally recognized right to a healthy environment? Do you have specific cases? Where and what were the outcomes?

**John Dernbach:** I'm not going to give specific cases, but I will say Hawai'i doesn't get the attention it deserves for what it's done with environmental rights and public trust language in its constitution. Some of the most progressive decisions that you're going to see from any state court come out from Hawai'i.

Increasingly, we're seeing decisions on constitutional environmental rights come out of courts from other countries. The German Federal Constitutional Court held earlier this year that the country's climate change law does not fully protect fundamental constitutional rights, particularly those of young people. There is a growing number of decisions like this.

**Franklin Kury:** In my book, I have a chapter on these cases. I can't remember the cases offhand, but I know the cases that John points out in Montana and Hawai'i are really good. Another great country with a place with an amendment-type language is in the Philippines, which has had stunning cases.

**Barry Hill:** I'm going to mention not a case but a system—a process if you will. I talked about New York earlier. The state's ERA, which was passed via a public referendum in November, is simple, straightforward, and self-executing. As mentioned earlier, voters in New York State approved adding the following language to the state constitution: "Each person shall have a right to clean air and water, and a healthful environment."<sup>31</sup>

As of last year, New York already has environmental justice legislation. New York also has climate change legislation. So, if I look at a state and I'm thinking about the possibility of things happening from a progressive point of view, I would say that New York holds a lot of promise. And so, instead of talking about a particular case that has already happened, I'm thinking about issues that will arise in New York where they have all three of these things functioning properly. There's hope as far as the people of New York are concerned.

**Julia Olson:** Pakistan has some amazing cases, too, on climate. I would argue maybe some of the most hard-hitting, progressive decisions are coming out of their courts on the issue of the climate crisis using their strong public trust provisions.

**Chandler Randol:** This next question asks, what is the role of climate scientists in courts? Julia, we'll start with you.

**Julia Olson:** That's a question I'm really passionate about. As lawyers bringing cases to enforce these types of constitutional provisions or bringing implied rights cases, it's our job to bring to judges the best climate science that's available. What I am seeing in a lot of litigation around the world is lawyers defaulting to the Paris Agreement targets of limiting global temperature rise to 2 degrees Celsius, with the goal of staying no higher than 1.5 degrees Celsius of heating above pre-industrial temperatures.

But when I talk to climate scientists, every single one of them says those levels of heating are catastrophic for humanity and for most life on earth. If we sustain temperatures of 1.5 degrees Celsius or even 2 degrees above pre-industrial temperatures, we'll melt all the ice on the planet. I mean, imagine, we're at 1.1, 1.2 degrees Celsius right now. To have additional heating means life out West is going to be substantially different. Of course, wildfires are going to burn. Our air's going to be filled with smoke. The flooding that's happening in the East and the Southeast will continue to get worse.

As a lawyer, what I ask scientists is, what level of atmospheric carbon dioxide (CO<sub>2</sub>) would actually stabilize our climate system for my clients? What do we need to try to get back to? Because CO<sub>2</sub> levels are driving the temperature changes and these other consequences. And what they all say, across the board, is that we need to return to less than 350 parts per million of atmospheric CO<sub>2</sub>, ideally by the end of the century. That's what it takes to stabilize the energy imbalance of the planet.

Our planet is out of balance when it comes to energy. We have too much heat coming in. In order to stop that problem, we have to bring CO<sub>2</sub> levels way down. There are two ways to do that and they are both essential. One is to reduce emissions very, very quickly. Two is to increase the carbon sequestration capacity of our soils, forests, and wetlands. And we need to bring in the most cutting-edge science into court.

When it comes to having a constitutional amendment, the best scientific evidence should be used to define what it means to truly protect these life-support systems. Because we'd do our children and future generations an enormous injustice if we use politically negotiated targets that are not adequate to protect our climate system as a standard for protecting a human right. Getting real about the science and what's necessary is vital to all of these cases.

**Chandler Randol:** It'd be great if we could have each panelist give concluding thoughts.

**Franklin Kury:** The main thing we have to realize about climate change is that the United States cannot save the planet by itself. It's got to get an agreement with the big contributors to carbon emissions, which are China, India, the European Union, and maybe one other country. But if we get together with them and get an agreement, we have a chance to save the planet.

I think, with the environmental amendment, the basic principles of Article I, §27 are a good basis to deal with and to offer to China, India, and the European Union to get

31. Ballotpedia, *supra* note 26.

agreement on. The best way we can get that done and get it started is on our own here in the United States. At least, we can have efforts underway toward putting it in our Constitution while we're talking to the big contributors around the world. That's why I think the case for an amendment to the Constitution is overwhelming.

**John Dernbach:** I would add that things protected under constitutions tend to become more valued by the public over time by virtue of that protection. When a state or country constitutionalizes the public right to a clean environment, or public trust requirements for protection of the environment, those things over time become reflected more and more deeply as public values. That in turn contributes to their effectiveness in ways that are different from what you would get if you simply look at a variety of different judicial decisions. So, constitutionalizing these rights is a way to build public support for the kind of work that still needs to be done.

**Julia Olson:** I agree with Franklin and John. While the United States can ultimately help save the planet in partnership with other countries who are primarily responsible for emissions, I think the United States alone *does* have the power to tank the planet.

The United States is the only country in the world that won't ratify the Convention on the Rights of the Child.<sup>32</sup> It's my understanding that we are also one of the few countries that opposes the Human Rights Council resolu-

tion stating that the right to a healthy environment is a human right. There are a lot of reasons for that. Money is a big one. Money and power and an entrenched fossil fuel energy system.

It is going to be the battle of our lives to bring the U.S. government into compliance with basic human rights and its trustee obligation to present and future generations. So, I hope that everyone will stay tuned on what happens in the next phase of *Juliana* and hold the Biden Administration accountable. We need all hands on deck in the streets and the courts working on constitutional protection and amendments. This is our moment.

**Barry Hill:** Let me just comment on the difference between rights and privileges. In June of 2010, the U.N. General Assembly said that there should be a human right to water. The United States abstained from that particular vote.

We have seen problems here in the United States as it relates to access to clean drinking water. Not only in Flint, but also in Benton Harbor, another community in Michigan.<sup>33</sup> A predominantly African-American community. The state is telling them not to drink their tap water. So, clean drinking water is a privilege at this point. Everyone on this panel, everyone participating in this webinar, doesn't have a constitutional right, a human right to clean water. That's something that needs to be addressed. We have a privilege, not a right.

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32. 1577 U.N.T.S. 3; 28 I.L.M. 1456 (1989).

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33. Eric Lutz & Erin McCormick, *Michigan Tells Majority-Black City Not to Drink Tap Water Amid Lead Crisis*, GUARDIAN (Oct. 12, 2021), <https://www.theguardian.com/us-news/2021/oct/12/benton-harbor-michigan-lead-contaminated-water-plan>.