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Cover Page Footnote

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Forced to Bear the Burden and now the Children:
The *Dobbs* Decision and Environmental Justice Communities
Mia Petrucci

I. Introduction.

On June 24, 2022, the Supreme Court decided *Dobbs v. Jackson Women's Health Organization*.¹ In *Dobbs*, the Court held that there is no constitutional right to abortion in America, overturning almost half a century of legal precedent.² The Court relied on textualist³ arguments to find that “the Fourteenth Amendment[’s guarantee of liberty] clearly does not protect the right to abortion,” because at America’s inception abortion was a crime.⁴ By holding that abortion is not a constitutionally protected fundamental right, the states are allowed to regulate—and in some cases, ban—abortion themselves.⁵ This decision led to immediate consequences, with 13 states prohibiting abortion within thirty days of the decision.⁶ Many of these abortion bans make no exceptions for rape or fetal health.⁷ This article concludes that the *Dobbs* decision disproportionately impacts people of color with uteruses⁸ and represents an additional burden placed upon environmental justice (“EJ”) communities. This article further argues that the federal reproductive and environmental law schemes need to be amended to alleviate this burden.

This article examines the intersection of reproductive justice and EJ issues and the American federal law scheme that supports and creates these injustices. This article attempts to answer the

¹ *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

² *Id.* at 2242.

³ “Textualism is a mode of legal interpretation that focuses on the plain meaning of the text of a legal document. Textualism usually emphasizes how the terms in the Constitution would be understood by people at the time they were ratified, as well as the context in which those terms appear.” *Textualism and Constitutional Interpretation*, CONST. ANNOTATED, (last visited May 11, 2023).

⁴ *Dobbs*, 142 S. Ct. at 2235.

⁵ *U.S. Supreme Court Takes Away the Constitutional Right to Abortion*, CTR. FOR REPRODUCTIVE RIGHTS (June 24, 2022), <https://reproductiverights.org/supreme-court-takes-away-right-to-abortion/>.

⁶ Caroline Kitchener et al., *States where abortion is legal, banned or under threat*, WASH. POST. (July 22, 2022, 4:30 PM), .

⁷ *Interactive Map: US Abortion Policies and Access After Roe*, GUTTMACHER INST. (Apr. 2, 2023), ([see “Most restrictive” states. E.g., in Texas, “Abortion policies currently in effect in Texas include the following: Abortion is completely banned with very limited exceptions”](#)).

⁸ This article uses the inclusive and gender-neutral phrases “people with uteruses” and “female-bodied people” to recognize that not all people who have uteruses, experience pregnancy, or are victimized by sexual or gender-based violence identify as “women.”

following questions: how does a lack of abortion access disproportionately affect EJ communities?; how can the Biden-Harris Administration act to ensure greater abortion access within their EJ work?; and what should change within the American legal scheme to rectify the disproportionate impact of both environmental harms and lack of abortion access upon people of color with uteruses?

The first section of this article explores the disparate impact the *Dobbs* decision has on EJ communities. This is accomplished through three subsections addressing: (1) how people with uteruses are disproportionately harmed by environmental hazards, (2) sexual and gender-based violence and climate change, and (3) how people of color with uteruses are disproportionately burdened by the *Dobbs* decision. The second section examines the legal frameworks that regulate reproductive health and EJ. The third section makes recommendations to augment the federal law scheme to counteract reproductive and environmental injustices. Recommendations include (1) turning the focus of the environmental law scheme towards further regulation of environmental hazards that cause pregnancy related diseases/complications and fetal abnormalities and (2) piggybacking upon current Biden-Harris Administration EJ initiatives to ensure greater reproductive justice.

II. The Intersection of Environmental and Reproductive Justice.

EJ is defined by EPA as the “fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income, with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.”⁹ States define EJ communities differently.¹⁰ It is well documented that, in the United States, low-income and

⁹ *Environmental Justice*, EPA, <https://www.epa.gov/environmentaljustice> (Feb 6, 2024).

¹⁰ See, e.g., *Environmental Justice*, N.Y.C. MAYOR’S OFF. OF CLIMATE & ENV’T JUSTICE, <https://climate.cityofnewyork.us/topic/environmental->

communities of color are more likely to experience environmental injustices.¹¹ Regardless of whether these communities were intentionally burdened or institutionally neglected by the United States government, the reality is that communities of color face a disproportionate amount of environmental toxins.¹²

The first national study on EJ was conducted in 1987.¹³ The study found that race was “the most significant among variables tested in association with the location of commercial hazardous waste facilities. This represented a consistent national pattern.”¹⁴ To this day, studies show that people of color continue to be disproportionately burdened by environmental harms.¹⁵ Consider the disparity between Black and White communities: 71 percent of Black Americans live in counties in violation of federal air standards, while only 58 percent of White Americans do;¹⁶ “Black Americans 65 and older are three times more likely to die from exposure to fine particle air pollution than White Americans over 65”;¹⁷ 11.2 percent of Black children experience

[justice/#:~:text=NYC's%20environmental%20justice%20law%20defines,vulnerability%20in%20the%20EJNYC%20Report](#) (last visited Mar. 30, 2023) (defining “Environmental Justice Areas” as “low-income or minority communities located in the City of New York, based on US Census data.”).

¹¹ Juliana Maantay, *Zoning Law, Health, and Environmental Justice: What's the Connection?*, 30 J.L. MED. & ETHICS 572 (2002); Paul Mohai et al., *Environmental Justice*, 34 ANN. REV. ENV'T RES. 405 (2009).

¹² See, e.g., *Environmental Justice*, EPA, <https://www.epa.gov/environmentaljustice> (Feb. 6, 2024) ((quoting Professor Robert Bullard in that “whether by conscious design or institutional neglect, communities of color in urban ghettos, in rural 'poverty pockets', or on economically impoverished Native-American reservations face some of the worst environmental devastation in the nation.”)).

¹³ See UNITED CHURCH OF CHRIST COMM'N FOR RACIAL JUS., TOXIC WASTES AND RACE IN THE UNITED STATES 1 (1987).

¹⁴ *Id.* at xiii.

¹⁵ See generally, Maantay *supra* note 11; Mohai et al. *supra* note 11.

¹⁶ Saleem Chapman, *Environmental Justice, Climate Change, & Racial Justice*, EPA (July 24, 2015), https://www.epa.gov/sites/default/files/2015-10/documents/post_2_-_environmental_justice_climate_change.pdf; See also, *Disparities in the Impact of Air Pollution*, AM. LUNG ASSOC. (last updated Nov. 2, 2023), <https://www.lung.org/clean-air/outdoors/who-is-at-risk/disparities>; *Study Finds Exposure to Air Pollution Higher for People of Color Regardless of Region or Income*, EPA (Sept. 20, 2021), <https://www.epa.gov/sciencematters/study-finds-exposure-air-pollution-higher-people-color-regardless-region-or-income>.

¹⁷ Lexi Ambrogio, *Report: For Senior Populations, Black Americans are Three Times More Likely to die from Exposure to Particle Pollution Than White Americans*, ENV'T DEFENSE FUND (June 3, 2022), <https://www.edf.org/media/report-senior-populations-black-americans-are-three-times-more-likely-die-exposure-particle>.

elevated blood lead levels compared to only 2.3 percent of White children;¹⁸ and Black Americans are 75 percent more likely to live near chemical facilities.¹⁹ There has been an increased focus on EJ communities because of how pervasive and disproportionate the disparity is and because of the efforts of EJ movements and related social movements.

Reproductive justice is defined as “the right to have children, to not have children, and to parent children in a healthy and safe environment.”²⁰ Reproductive justice encompasses more than just abortion access.²¹ Other social justice concerns, such as “poverty, economic injustice, welfare reform, housing, prisoners’ rights, environmental justice, immigration policy, drug policies, and violence” all influence the ability of female-bodied people to make healthy decisions about their bodies, their families, and their communities.²² The pro-choice/pro-life framework²³ of discussing reproductive issues is viewed as too narrow to address all of the influences upon a person’s decision to make a choice about their reproductive health.²⁴ In light of both environmental and reproductive justice issues, this section will examine (A) how environmental toxins impact reproductive health, (B) the connection between major climate events and sexual and gender based

¹⁸ Anne M. Wengrovitz & Mary Jean Brown, *Recommendations for Blood Lead Screening Of Medicaid-Eligible Children Aged 1–5 Years: An Updated Approach To Targeting A Group At High Risk*, CDC (Aug. 7, 2009), <https://www.cdc.gov/mmwr/preview/mmwrhtml/rr5809a1.htm>.

¹⁹ PAUL ORUM ET AL., WHO’S IN DANGER? RACE, POVERTY AND CHEMICAL DISASTERS 3 (2014).

²⁰ Jessica L. Liddell & Sarah G. Kington, ‘*Something was Attacking them and their Reproductive Organs: Environmental Reproductive Justice in an Indigenous Tribe in the United States Gulf Coast*’, 18 INT’L J. OF ENV’T RSCH. & PUB. HEALTH 666, 666 (2021) (citing Kimala Price, *What Is Reproductive Justice? How Women of Color Activists Are Redefining the Pro-Choice Paradigm*, 10 MERIDIANS 42–65 (2010)).

²¹ Price, *supra* note 20, at 43.

²² *Id.*

²³ The “choice” framework and rhetoric surrounding reproductive rights is rejected for many reasons, namely that many people simply don’t get to meaningfully choose; the circumstances of many people’s lives and their financial situations makes the “choice” for them. *Id.* at 53. Additionally, reproductive justice as a more expansive movement, involving more than just the right to abortion, allows for more people to become involved in the movement. *Id.* at 43. By moving beyond the pro-choice/pro-life framework, reproductive justice can address more than just “the birth of children, but also the quality of life for those who already exist.” *Id.* at 55.

²⁴ *Id.* at 54.

violence (“SGBV”), and will conclude with (C) an exploration of the specific impact of the *Dobbs* decision on EJ communities.

A. Environmental Hazards and Reproductive Health.

Environmental toxins often directly impact a person’s reproductive health.²⁵ Exposures during childhood to toxic chemicals and other pollutants can affect a person’s menstrual cycle and fertility potential.²⁶ Environmental injuries to reproductive organs include, (1) subfertility,²⁷ (2) intrauterine growth restriction,²⁸ (3) spontaneous abortion,²⁹ (4) pregnancy complications, and (5) birth defects.³⁰ Some of the most common environmental contaminants that impact reproductive health include air pollution, drinking water contaminants, persistent organic pollutants (such as perfluoroalkylated substances (“PFAS”)), non-persistent organic pollutants (such as phthalates, phenols, and parabens), and toxic metals.³¹

Air pollution exposure during pregnancy can lead to adverse gestational outcomes, like low birth weight, intrauterine growth restriction, and preterm birth.³² Newborns also are at an

²⁵ Additionally, it’s important to note, albeit outside of the scope of this article, that environmental pollution is not the only environmental influence on reproductive health. Climate change related factors, like heat, can affect eggs and sperm. Karen Feldscher, *How Our Environment Impacts Reproductive Health*, HARVARD T.H. CHAN (Aug. 23, 2022), <https://www.hsph.harvard.edu/news/features/how-our-environment-impacts-reproductive-health/#:~:text=Environmental%20exposures%20can%20influence%20our,at%20which%20women%20reach%20menopause>. Moreover, climate conditions influence the way people must raise their children. For example, during periods of extreme drought or forest fires, parents are likely to keep their children indoors. *Id.*

²⁶ *Id.*

²⁷ Subfertility is “any form of reduced fertility with prolonged time of unwanted non-conception.” C. Gnoth et al., *Definition and Prevalence of Subfertility and Infertility*, 20 HUMAN REPROD. 1144, 1144 (Mar. 31, 2005).

²⁸ Intrauterine growth restriction is when a fetus does not grow as expected and has a fetal weight that estimated to be below the 10th percentile for its gestational age. *Intrauterine Growth Restriction*, Cleveland Clinic (Aug. 18, 2022), <https://my.clevelandclinic.org/health/diseases/24017-intrauterine-growth-restriction>.

²⁹ “Spontaneous abortion is the loss of pregnancy naturally before twenty weeks of gestation. There are several different types of spontaneous abortion,” including fetal chromosomal abnormalities, maternal age, chronic diseases, and exposure to environmental contaminates. Clark Alves & Amanda Rapp, *Spontaneous Abortion*, NAT’L LIBRARY OF MEDICINE (July 18, 2022), <https://www.ncbi.nlm.nih.gov/books/NBK560521/>.

³⁰ See *Impact of the Environment on Reproductive Health*, WORLD HEALTH ORGANIZATION [WHO] INT’L WORKSHOP ON THE IMPACT OF THE ENV’T ON REPRODUCTIVE HEALTH (1991), <https://pubmed.ncbi.nlm.nih.gov/12285819/>.

³¹ Maria Grazia Porpora et al., *Environmental Contaminants Exposure and preterm Birth: A Systematic Review*, 7 TOXICS 11 (2019).

³² *Id.* (defining preterm birth as “birth before 37 weeks of pregnancy”, which “can be one of the most important causes of mortality and morbidity in newborns, particularly in the case of very early [preterm birth] occurring before 32 weeks of pregnancy.”).

increased risk of respiratory, cardiovascular, and neurodevelopmental disorders due to the exposure.³³ Neurodevelopmental disorders in infants have been linked to an increased rate of sudden infant death syndrome (“SIDS”).³⁴ Additionally, exposure to particulate matter during pregnancy is linked to elevated blood pressure and a higher risk of pre-eclampsia.³⁵ Drinking water contaminants similarly threaten both the pregnant person and the fetus. Microorganisms—such as bacteria, virus, parasites, chemicals, and radioactive substances—in drinking water can lead to serious pregnancy complications.³⁶ These include, preterm birth, intrauterine growth restriction, congenital anomalies (like oral clefts), neural tube defects, and even fetal death.³⁷

Persistent organic pollutants (“POPs”) are chemical pollutants, often used in pesticides and are present in other industrial chemicals.³⁸ POPs have the capability of bioaccumulation³⁹ within human tissues, and in the context of reproductive health, they can accumulate in “blood, placental tissue, amniotic fluid, and breast milk.”⁴⁰ Exposure to POPs has been linked to several reproductive

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* Pre-eclampsia is a pregnancy complication, with symptoms including “high blood pressure, proteinuria, or other signs of damage to the kidneys or other organs.” *Preeclampsia*, Mayo Clinic (Apr. 15, 2022), <https://www.mayoclinic.org/diseases-conditions/preeclampsia/symptoms-causes/syc-20355745>.

³⁶ V. Arun Bhaskar & Koel Chaudhury, *Drinking Water Contaminants: Maternal and Fetal Health Risks*, *MEDICINE* 28, 28 (2018).

³⁷ *Id.* at 28.

³⁸ Porpora et al., *supra* note 31.

³⁹ Bioaccumulation is the process by which chemicals are “taken up by a plant or animal either directly from exposure to a contaminated medium (soil, sediment, water) or by eating food containing the chemical,” leading to build-up within the organism because the chemicals are being absorbed at a faster rate than the body can expel. *Ecological Risk Assessment Glossary of Terms*, EPA (Jan. 5, 2012), https://sor.epa.gov/sor_internet/registry/termreg/searchandretrieve/glossariesandkeywordlists/search.do?details=&glossaryName=Eco%20Risk%20Assessment%20Glossary#:~:text=Definition%3A%20Bioaccumulation%20is%20the%20general,eating%20food%20containing%20the%20chemical; see also *Toxics in the Food Web*, EPA (June 2021), <https://www.epa.gov/salish-sea/toxics-food-web>.

⁴⁰ Porpora et al., *supra* note 31.

disorders and gynecological diseases, such as endometriosis,⁴¹ altered hormonal homeostasis,⁴² neurodevelopmental disorders in infants, SIDS, and increased preterm birth.⁴³ Non-persistent organic pollutants can “affect a baby’s brain, immune system, reproductive health, and development during pregnancy, and...have been linked with decreases in brain and heart health and immune function, adverse birth outcomes, and pregnancy loss.”⁴⁴

Toxic metals can damage a fetus’s DNA, and the pregnant person’s membrane lipids and the enzymes in placental tissues.⁴⁵ Additionally, toxic metals can lead to intrauterine growth restriction, pre-eclampsia, and preterm birth.⁴⁶ Different toxic metals pose different risks to pregnant people: lead—found in water, food, air, soil, and dust—can injure placental tissue leading to high rates of preterm delivery; cadmium—found in air pollution, smoke, and fiber-rich foods—can lead to placental hemorrhage and preterm delivery; mercury—found in fish, cosmetics, preservatives, and insecticides—can lead to oxidative stress and intrauterine growth restriction; and arsenic—found in home building materials, industry waste, and agricultural run off—can lead to miscarriages, stillbirth, preterm birth, and neonatal death.⁴⁷

Because EJ communities are disproportionately burdened by environmental toxins, they are disproportionately impacted by the above-mentioned health impacts. In many cases, when

⁴¹ Endometriosis is “a disease in which tissue similar to the lining of the uterus grows outside the uterus. It can cause severe pain in the pelvis and make it harder to get pregnant.” *Endometriosis*, WORLD HEALTH ORG. (Mar. 24, 2023), <https://www.who.int/news-room/fact-sheets/detail/endometriosis#:~:text=Endometriosis%20is%20a%20disease%20in,period%20and%20last%20until%20menopause>.

⁴² Successful pregnancies rely on sufficient energy and nutrient supply, which is regulated through several hormones, including estrogen, progesterone, insulin, and cortisol. Brooke Armistead, *Placental Regulation of Energy Homeostasis During Human Pregnancy*, 161 ENDOCRINOLOGY SOC. (2020). Thus, altered hormonal homeostasis can negatively impact pregnancy. *Id.* Multiple pregnancy-related diseases can result from dysregulation. See Junji Ishida et al., *Pregnancy-Associated Homeostasis and Dysregulation*, 150 J. OF BIOCHEMISTRY 5 (May 25, 2011).

⁴³ Porpora et al., *supra* note 31.

⁴⁴ Feldscher, *supra* note 25.

⁴⁵ Porpora et al., *supra* note 31.

⁴⁶ *Id.*

⁴⁷ *Id.* at tab. 1.

impacted by these toxins, the health of the fetus is endangered and the ability of the person carrying the fetus to have a healthy pregnancy is diminished. This can lead to unviable pregnancies, health-impaired fetuses, and many other reasons that cause people to consider getting an abortion.⁴⁸ Therefore, disability-selective abortion bans (meaning abortion bans without exceptions for fetal health or development)⁴⁹ will have an increased effect on communities that bear the brunt of environmental harms in America.

B. Sexual and Gender-Based Violence (“SGBV”) and Climate Change.

SGBV is violence committed against a person due to their sex or gender.⁵⁰ SGBV can take a multitude of forms including, (1) sexual violence (*i.e.*, rape, sexual abuse, harassment, exploitation, and forced prostitution), (2) physical, emotional, or psychological violence, (3) socio-economic violence (*i.e.*, denial of access to health services, education, and/or work, the denial of civil, social, economic, cultural, and political rights), (4) domestic violence, and (5) harmful practices (*i.e.*, child marriage and forced polygamous marriage).⁵¹ SGBV can occur at any time in a person’s life; it occurs both in the public and private spheres.⁵² Global climate change is an exacerbating factor for SGBV.⁵³ During climate crises, female-bodied people face increased risk

⁴⁸ While it’s a cause for some people to get abortions, it’s important to note that only a small proportion of people seeking abortions do so because of health concerns or fetal anomalies. *See* Lawrence B. Finer et al., *Reasons U.S. Women Have Abortions*, 37 PERSPS. ON SEXUAL AND REPROD. HEALTH 110 (Sept. 2005). This article only addresses disability-selective abortion bans, and later rape-inclusive abortion bans, because they specially apply to EJ community’s concerns. The exclusion of other types of abortion bans, like those for incest, is not an indication of the author’s opinion on abortion bans as a whole. There is no “correct” or “morally better” reason to seek an abortion.

⁴⁹ *See* discussion *infra* Section IV(A).

⁵⁰ *Sexual and Gender-Based Violence*, UNHCR (last visited Mar. 30, 2023), <https://help.unhcr.org/turkiye/social-economic-and-civil-matters/sexual-and-gender-based-violence/#:~:text=What%20is%20sexual%20and%20gender,cultural%20expectations%2C%20or%20economic%20means.>

⁵¹ *Id.*

⁵² Achintha C. Vithanage, *Addressing Correlations Between Gender-Based Violence and Climate Change*, 38 PACE ENV’T L. REV. 327, 328 (2021) (citing G.A. Res. 48/104, Declaration on the Elimination of Violence Against Women, art. 1 (Dec. 20, 1993); Padmini Murthy et al., *Violence Against Women and Girls: A Silent Global Pandemic*, in WOMEN’S GLOBAL HEALTH AND HUMAN RIGHTS 12–18 (Padmini Murthy & Clyde Landford Smith eds., 2010)).

⁵³ Baharat H. Desai & Moumita Mandal, *Role of Climate Change in Exacerbating Sexual and Gender Based Violence Against Women*, 51 ENV’T POL’Y & L. 137, 138 (2021).

of SGBV due to instability within family units, the surrounding community, and due to forced displacement.⁵⁴ Existing gender inequalities are intensified during disasters, conflicts, pandemics, and especially deepen when the underlying crises has gender-differentiated impacts.⁵⁵

There is a growing wealth of evidence that climate change and major climate events have been causing increased SGBV globally. In 2005, there was a spike in SGBV in the United States post Hurricane Katrina, in the areas hit by the storm.⁵⁶ Following earthquakes in 1997 and 2010 in Japan, there was a spike in SGBV.⁵⁷ During periods of drought, Ugandan female-bodied people “[face] increased domestic violence, child marriage, rape, female genital mutilation.”⁵⁸ Additionally, female-bodied people report high levels of SGBV in emergency and refugee camps set up for climate refugees and in the aftermath of major climate events.⁵⁹ There is also a phenomenon in America in which Native female-bodied people and children are trafficked at increased rates “when Indigenous communities are near large extraction projects that require the use of camps to provide living accommodations for employees.”⁶⁰ Extreme climate events and human-created violence against the earth lead to increased SGBV.

Low-income communities and communities of color are often the least prepared for extreme climate events—due to their lack of capital and inability to adequately prepare and

⁵⁴ *Id.* at 138.

⁵⁵ *Id.* at 139 (citing UN DEV. PROGRAM, OVERVIEW OF LINKAGES BETWEEN GENDER AND CLIMATE CHANGE (2013), <https://www.undp.org/sites/g/files/zskgke326/files/publications/UNDP%20Linkages%20Gender%20and%20CC%20Policy%20Brief%201-WEB.pdf>).

⁵⁶ See Julie A. Schumacher, et al., *Intimate Partner Violence and Hurricane Katrina*, 25 VIOLENCE & VICTIMS 588 (2010); Emily W. Harville, et al., *Experience of Hurricane Katrina and Reported Intimate Partner Violence*, 26 J. INTERPERSONAL VIOLENCE 833 (2011).

⁵⁷ Desai & Mandal, *supra* note 53, at 139.

⁵⁸ *Id.* at 139.

⁵⁹ *Id.* at 140.

⁶⁰ Summer Blaze Aubrey, *Violence Against the Earth Begets Violence Against Women*, 10 ARIZ. J. ENV'T L. & POL'Y 34, 37 (2019) (citing Liza Kane-Hartnett, *Trafficking in Tribal Nations: The Impact of Sex Trafficking on Native Americans*, HUMAN TRAFFICKING SEARCH (Jan. 22, 2018), <http://humantraffickingsearch.org/traffickingofnativeamericans/>) (characterizing extraction projects as violence against the earth and linking violence against the earth to violence against female-bodied people).

recover—and contribute significantly less to the causes of climate change, like greenhouse gas emissions.⁶¹ Thus, most of the severe harms during extreme climate events disproportionately impact these communities. Again, because rape is a form of SGBV, instances of rape increase during extreme climate events. Consequently, female-bodied people of color face further concerns for their bodily safety and autonomy due to climate change exacerbated climate events and human-created violence against the earth. To the extent that climate change induced SGBV leads to unwanted pregnancies,⁶² rape-inclusive abortion bans (meaning abortion bans without exceptions for rape)⁶³ will have an increased effect on the communities that bear the brunt of climate change.

C. The Impact of the *Dobbs* Decision on EJ Communities.

As stated above, environmental contaminants cause pregnancy complications and fetal abnormalities, and female-bodied people of color are statistically more likely to bear this environmental burden.⁶⁴ Additionally, female-bodied persons experiencing extreme climate events are often subjected to increased SGBV, including rape.⁶⁵ Therefore, low-income and communities of color have an increased likelihood of pregnancies created through rape, dangerous pregnancies, unviable pregnancies, and fetal birth defects. The current environmental legal scheme allows for

⁶¹ *EPA Report Shows Disproportionate Impacts of Climate Change on Socially Vulnerable Populations in the United States*, EPA (Sept. 2, 2021), [https://www.oxfam.org/en/press-releases/carbon-emissions-richest-1-percent-more-double-emissions-poorest-half-humanity](https://www.epa.gov/newsreleases/epa-report-shows-disproportionate-impacts-climate-change-socially-vulnerable#:~:text=WASHINGTON%20(Sept.,%2C%20flooding%2C%20and%20other%20impacts; see also Carbon Emissions of the Richest 1 Percent More Than Double the Emissions of the Poorest Half of Humanity, OXFAM Int'l (Sept. 21, 2020), <a href=).

⁶² Additionally, increases in SGBV is not limited to climate stress; SGBV increases during other crises as well, like during global pandemics, such as COVID, or during armed conflict. *See A Second, Silent Pandemic: Sexual Violence in the Time of COVID-19*, HARV. MED. SCHOOL PRIMARY CARE REV. (May 1, 2020), <https://info.primarycare.hms.harvard.edu/review/sexual-violence-and-covid>. In these circumstances as well, low-income and communities of color have fewer options to respond or recover. *Id.*

⁶³ See discussion *infra* Section IV(A).

⁶⁴ See discussion *infra* Section III(A).

⁶⁵ See discussion *infra* Section III(B).

environmental toxins to create health-impaired fetuses; the reproductive legal scheme, especially in the aftermath of the *Dobbs* decision, compels the birth of health-impaired fetuses.⁶⁶

While abortion bans are seemingly the opposite of eugenics or sterilization policies⁶⁷—as they force pregnancies, even forcing the birth of health-impaired fetuses—they pose a different problem. This intersection of reproductive and environmental policies of the federal government is dysgenic, rather than eugenic. Legal scholar Khiara Bridges offers that abortion bans without exceptions are dysgenic because they promote the “survival of or reproduction by less well-adapted individuals.”⁶⁸ Bridges further argues that “the dual role” of both (1) allowing the injury and (2) forcing the health-impaired fetus to be born (or allowing the states to force the health-impaired fetus to be born) is what creates and makes the current United States a dysgenic state.⁶⁹

It is notable that low-income, communities of color are disproportionately being forced to bear health-impaired children.⁷⁰ These are the same communities who were victimized by eugenic policies,⁷¹ forced/coerced sterilization,⁷² and segregation.⁷³ Additionally, because the

⁶⁶ See Khiara M. Bridges, *The Dysgenic State: Environmental Injustice and Disability-Selective Abortion Bans*, 110 CAL. L. REV. 297 (2022).

⁶⁷ The alternative view could also be true; abortion bans can be viewed in the same light as eugenics and sterilization policies, in that they are an exercise of control over female-bodied people and of populations. But the ultimate result of abortion bans with no exception for fetal health and that of sterilization and eugenics are markedly different. Disability-selected abortion bans compel the creation of health-impaired individuals; sterilization/eugenics compel the creation of “the best” society, often functioning to eliminate health-impairments from the gene pool. See *Eugenics*, BRITANNICA, <https://www.britannica.com/science/eugenics-genetics> (last accessed Apr. 9, 2023).

⁶⁸ *Dysgenic*, MERRIAM-WEBSTER DICT., <https://www.merriam-webster.com/dictionary/dysgenic> (last accessed Apr. 9, 2023).

⁶⁹ Bridges, *supra* note 66, at 302.

⁷⁰ See discussion Section III.

⁷¹ Eugenics is the pseudoscientific theory that humanity can be improved by having the “best” (read: white) members of society reproduce and to get rid of the “genetically and socially inferior,” like the “feeble-minded, the insane, the criminalistic, the epileptic, the inebriate, the diseased—including those with tuberculosis, leprosy, and syphilis—the blind, the deaf, the deformed, the dependent, chronic recipients of charity, paupers, and ‘ne’er-do-wells.” BRITANNICA, *supra* note 67.

⁷² See *Forced Sterilization Policies in the US Targeted Minorities and Those with Disabilities—and Lasted into the 21st Century*, UNIV. MI INST. FOR HEALTHCARE POL’Y & INNOVATION (Sept. 23, 2020), <https://ihpi.umich.edu/news/forced-sterilization-policies-us-targeted-minorities-and-those-disabilities-and-lived-21st>.

⁷³ Bridges, *supra* note 66, at 309–14.

environmental burden is borne by primarily nonwhite communities, the lack of abortion access could result in a future where EJ communities are disproportionately disabled and have decreased fertility rates. Another unexpected consequence of lack of abortion access and disproportionately disabled communities of color is forced sterilizations; thirty-one states and Washington, DC, currently allow forced sterilization of disabled people.⁷⁵ Thus, the combination of reproductive and environmental policies creating the dysgenic state could severely impact low-income, communities of color's reproductive autonomy. The *Dobbs* decision can be viewed as a consequence of past and current eugenic policies and the dysgenic state is the eugenic state's successor.⁷⁶ The added burden that lack of abortion access has on EJ communities—because of their proximity to environmental toxins and vulnerability to SGBV—should be a new focus of EJ work to (1) prevent the revictimization of communities and (2) protect reproductive autonomy.

III. The Current, Dysgenic Legal Scheme

A. Reproductive Rights and the Law.

Again, the *Dobbs* decision removed federal protections for abortion access.⁷⁷ By holding that abortion is not a constitutionally protected fundamental right, the states are allowed to regulate abortion themselves, which has led to 13 states making abortion illegal, 11 states enacting hostile laws, and 3 states not protecting abortion.⁷⁸ States that have made abortion illegal⁷⁹ have banned abortion entirely and enforce these laws through criminal penalties.⁸⁰ These types of abortion bans

⁷⁵ NAT'L WOMEN'S LAW CENTER, FORCED STERILIZATION OF DISABLED PEOPLE IN THE UNITED STATES 4 (2022), https://nwlc.org/wp-content/uploads/2022/01/%C6%92.NWLC_SterilizationReport_2021.pdf.

⁷⁶ Bridges, *supra* note 66, at 368.

⁷⁷ *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

⁷⁸ *U.S. Supreme Court Takes Away the Constitutional Right to Abortion*, CTR. FOR REPROD. RIGHTS (June 24, 2022), <https://reproductiverights.org/supreme-court-takes-away-right-to-abortion/>; *After Roe Fell: Abortion Laws by State*, CTR. FOR REPROD. RIGHTS, <https://reproductiverights.org/maps/abortion-laws-by-state/> (last accessed May 11, 2023) [hereinafter *After Roe Fell*].

⁷⁹ These states include Idaho, North Dakota, South Dakota, Missouri, Oklahoma, Texas, Louisiana, Arkansas, Mississippi, Alabama, Tennessee, Kentucky, and West Virginia. *After Roe Fell*, *supra* note 78.

⁸⁰ *Id.*

are both disability-selective and rape-inclusive. As discussed above, disability-selective abortion bans are abortion bans without exceptions for fetal health or development, and rape-inclusive abortion bans are abortion bans without exceptions for rape.⁸¹ Total abortion bans force people to face health complications from pregnancy, birth health-impaired fetuses, and bear rape-created pregnancies.⁸² States that are hostile to abortion⁸³ have legislators that have indicated that they plan/desire to prohibit abortion entirely.⁸⁴ States in which abortion is not protected⁸⁵ are states where abortion may continue to be accessible, but would be unprotected by state and territory law.”⁸⁶ While abortion is only completely illegal in a minority of states, 14 more states teeter on the edge, and with time, almost half of the states may completely ban abortion. Without the constitutionally protected right to abortion, the *Dobbs* decision has created a patchwork of abortion laws across America and led to a race to the bottom between many states sacrificing reproductive justice for their residents.

B. EJ and the Law.

EJ has been primarily regulated through presidential action. Starting in 1994, President Clinton issued Executive Order (“E.O.”) 12898, entitled *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*.⁸⁷ This was the first federal action to address EJ and for nearly thirty years, was the only whole-of-government action, until the Biden-Harris

⁸¹ See discussion *supra* Section III(A), (B).

⁸² *Id.*

⁸³ These states include Georgia, North Carolina, Pennsylvania, Ohio, Indiana, Wisconsin, Iowa, Nebraska, Wyoming, Utah, and Arizona. *After Roe Fell*, *supra* note 78.

⁸⁴ *Id.*

⁸⁵ These states include New Mexico, Virginia, and New Hampshire. *Id.*

⁸⁶ *Id.*

⁸⁷ *Summary of Executive Order 12898 – Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*, EPA (Sept. 12, 2022), <https://www.epa.gov/laws-regulations/summary-executive-order-12898-federal-actions-address-environmental-justice>; see also Exec. Order 12898, 59 Fed. Reg. 7,629 (Feb. 16, 1994).

Administration began.⁸⁸ E.O. 12898 directed federal agencies to (1) “identify and address the disproportionately high and adverse human health or environmental effects of their actions on minority and low-income populations, to the greatest extent practicable and permitted by law;” (2) “develop a strategy for implementing environmental justice;” and (3) “promote nondiscrimination in federal programs that affect human health and the environment, as well as provide minority and low-income communities access to public information and public participation.”⁸⁹ E.O. 12898 also created an Interagency Working Group on EJ tasked with providing guidance to federal agencies “on criteria for identifying disproportionately high and adverse human health or environmental effects on minority populations and low-income populations.”⁹⁰

In 2021, the Biden-Harris Administration built upon E.O. 12898 with E.O. 14008, *Tackling the Climate Crisis at Home and Abroad*.⁹¹ Under E.O. 14008, (1) the Environmental Justice Scorecard was created and published, which evaluates federal agency’s efforts to advance EJ, (2) the Justice40 Initiative was created, which requires “40 percent of the overall benefits [from federal investments and grants] flow to disadvantaged communities;” and (3) both the White House Environmental Justice Interagency Council and the White House Environmental Justice Advisory Council were created.⁹² The latest EJ initiative by the Biden-Harris Administration is the 2023 EJ E.O., E.O. 14096, entitled *Revitalizing Our Nation’s Commitment to Environmental Justice for All*.⁹³ The E.O. creates a new White House Office of Environmental Justice, directs all federal

⁸⁸ *Environmental Justice Timeline*, EPA (July 18, 2022), <https://www.epa.gov/environmentaljustice/environmental-justice-timeline>.

⁸⁹ *Summary of Executive Order 12898 – Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*, EPA (Sept. 12, 2022), <https://www.epa.gov/laws-regulations/summary-executive-order-12898-federal-actions-address-environmental-justice>.

⁹⁰ Exec. Order 12898, 59 Fed. Reg. at 7,629 §1-102(b).

⁹¹ Exec. Order No. 14008, 86 Fed. Reg. 7,619 (Feb. 1, 2021).

⁹² WHITE HOUSE, FACT SHEET: PRESIDENT BIDEN SIGNS EXECUTIVE ORDER TO REVITALIZE OUR NATION’S COMMITMENT TO ENVIRONMENTAL JUSTICE FOR ALL (Apr. 21, 2023); Exec. Order No. 14008, 86 Fed. Reg. at 7,619.

⁹³ White House, *supra* note 92; *see also* Exec. Order No. 14096, 88 Fed. Reg. 25,251 (Apr. 26, 2023).

agencies to consider the disproportionate impact of pollution and other environmental harms, and promote further EJ data collection, and research.⁹⁴ E.O. 14096 proclaims that “[t]o fulfill our Nation's promises of justice, liberty, and equality, every person must have clean air to breathe; clean water to drink; safe and healthy foods to eat; and an environment that is healthy, sustainable, climate-resilient, and free from harmful pollution and chemical exposure.”⁹⁵

Despite the newfound focus on EJ under the Biden-Harris Administration, the current work is not focused upon specific health impacts beyond general diseases that can impact anybody. For example, in the accompanying White House fact sheet to E.O. 14096, the Biden-Harris Administration points to asthma and cancer as the two named public health burdens created by environmental pollutants, relegating any additional health burdens to the category of “other health burdens.”⁹⁶ While environmental toxins impacting people with uteruses and fetal health certainly are considered within the “other health burdens,” they are not centered within the conversation of health burdens. Because of the *Dobbs* decision, environmental toxins that impact reproductive and fetal health should be increasingly scrutinized.

IV. Recommendations

To be clear, this article is not arguing that if the U.S. federal government adequately protected all its citizens from environmental toxins that disability-selective abortion bans would be acceptable because the state did not cause the impairment. Nor is this article arguing that abortion bans that allow for fetal health exceptions are morally good.⁹⁷ This article *is* arguing that a state that creates fetal impairments, compels the birth of the health-impaired fetus, fails to provide

⁹⁴ Exec. Order No. 14096, 88 Fed. Reg. at 25,251.

⁹⁵ *Id.*

⁹⁶ White House, *supra* note 92.

⁹⁷ Bridges, *supra* note 66, at 348–49 (providing an overview of the discourse surrounding disability-selective abortion bans).

adequate support for the child, and likely subjects the child to further environmental harms, is morally deplorable. But accepting the political reality that Congressional action protecting abortion access, through a federal constitutional amendment, is practically impossible (as is the possibility of passing state constitutional amendments in conservative states), the most room for legislative reform is under the EJ umbrella.

A. Increase the Focus on Reproductive Harms in the Environmental Regulatory Scheme.

The current environmental legal scheme legalizes pollution at “politically acceptable” levelsⁱ. Pollution is not illegal; polluters obtain permits allowing them to produce pollutants and release them into the environment.⁹⁸ Chemicals are generally viewed as safe until proven otherwise.⁹⁹ A lot of the literature places the onus on the pregnant person to avoid interacting with chemicals that could impair their pregnancy or their fetus’s health.¹⁰⁰ E.O. 14096 requires community notification on toxic chemical releases within six weeks of any release, which is a good starting point.¹⁰¹ But, the EPA could do more to warn the public of the risks of certain regulated chemicals before releases/spills. This can be accomplished through increased warnings on products and education campaigns to warn people of the risks of certain toxins. Educational campaigns could take the form

⁹⁸ See, e.g., *Regulatory and Guidance Information By Topic: Air*, EPA (June 21, 2022), <https://www.epa.gov/regulatory-information-topic/regulatory-and-guidance-information-topic-air#:~:text=Under%20the%20Clean%20Air%20Act,%2C%20utilities%2C%20and%20steel%20mills>. (explaining that “EPA sets limits on certain air pollutants, including setting limits on how much can be in the air anywhere in the United States.”); *Regulatory and Guidance Information By Topic: Pesticides*, EPA (Jan. 31, 2023), <https://www.epa.gov/regulatory-information-topic/regulatory-and-guidance-information-topic-pesticides> (explaining that “EPA and the states (usually that state’s agriculture office) register or license pesticides for use in the United States.”); *Regulatory and Guidance Information by Topic: Toxic Substances*, EPA (Mar. 9, 2023), <https://www.epa.gov/regulatory-information-topic/regulatory-and-guidance-information-topic-toxic-substances> (explaining that “EPA gathers health, safety and exposure data; requires necessary testing; and controls human and environmental exposures for numerous chemical substances and mixtures. EPA regulates the production and distribution of commercial and industrial chemicals.”).

⁹⁹ *Prenatal Exposure to Toxic Chemicals*, PHYSICIANS FOR SOC. RESP., <https://psr.org/wp-content/uploads/2018/05/prenatal-exposure-to-chemicals.pdf> (last accessed May 11, 2023).

¹⁰⁰ See, e.g., *Preparing for the Nine Months that Last a Lifetime*, CHILDREN’S HEALTH PROTECTION ADVISORY COMM. (Dec. 2013), <https://www.epa.gov/sites/default/files/2014-05/documents/chpac-appendix-a-prenatal-exposure-messages-2013-12-30.pdf>.

¹⁰¹ Exec. Order No. 14096 § 6, 88 Fed. Reg. 25,251 (Apr. 26, 2023).

of a pamphlet explaining the risks that would be provided during the notification of releases to impacted communities or be more broad ranging, reaching communities that haven't been impacted by releases.

But, especially in the case of EJ communities, not all environmental toxins are avoidable. Increased focus on toxins that cause reproductive harm is needed to fully understand the scope of the harm. With more rigorous testing, the implementation of the precautionary principle¹⁰² can be further incorporated in chemical testing under statutes like the Toxic Substances Control Act (“TSCA”) and EPA’s corresponding regulations under TSCA.¹⁰³ This could function to staunch the flow of environmental toxins that impact pregnancy and fetal health. Additionally, EPA has released guidelines for reproductive toxicity risk assessment, which “focus on reproductive system function as it relates to sexual behavior, fertility, pregnancy outcomes, and lactating ability, and the processes that can affect those functions directly.”¹⁰⁴ But, these guidelines are from 1996.¹⁰⁵ It’s likely an update to these guidelines is needed to incorporate new research and knowledge.

Increased warnings, educational campaigns, for both EJ communities and the greater public, heightened scrutiny for testing new chemicals, and updated guidelines on reproductive toxicity risk assessment would reinvigorate EPA’s reproductive health regulatory scheme. Of course, the environmental regulatory scheme has limits in addressing reproductive harms, even if all the above changes are made. For example, increased education cannot always translate to meaningful choice

¹⁰² The precautionary principle is the notion that “where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation [or other harms].” J. Hanson, *Precautionary Principle: Current Understandings in Law and Society*, 4 *ENCYCLOPEDIA OF THE ANTHROPOCENE: ETHICS* 631–66 (2018) (citing U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26 (Vol. 1), annex I, principle 15 (Aug. 12, 1992)).

¹⁰³ See *Industry Testing Requirements Under TSCA Section 4*, EPA (Oct. 4, 2022), <https://www.epa.gov/assessing-and-managing-chemicals-under-tsca/industry-testing-requirements-under-tsca-section-4>.

¹⁰⁴ *Guidelines for Reproductive Toxicity Risk Assessment*, EPA (Sept. 8, 2022), <https://www.epa.gov/risk/guidelines-reproductive-toxicity-risk-assessment>.

¹⁰⁵ *Guidelines for Reproductive Toxicity Risk Assessment*, 61 Fed. Reg. 56,274 (Oct. 31, 1996).

when it comes to exposure to hazardous materials. But a renewed focus on the impact of environmental toxins on pregnant people's bodies in EJ communities would relieve some of the disproportionate burden the *Dobbs* decision has placed upon these communities.

B. Find Room for Reproductive Justice within the Biden-Harris EJ Scheme.

There are multiple avenues for the inclusion of reproductive justice within the Biden-Harris Administration's EJ work. The newly created Environmental Justice Subcommittee of the National Science and Technology Council under E.O. 14096 is tasked with research and data collection.¹⁰⁶ Data and research conducted by this subcommittee could be on environmental toxins impacting pregnancy and fetal health, and gaps within the reproductive and environmental law scheme can be further studied. E.O. 14096 also tasks the White House Environmental Justice Interagency Council with the creation of a "whole-of-government clearinghouse composed of culturally and linguistically appropriate and accessible materials related to [EJ], including . . . any . . . information deemed appropriation."¹⁰⁷ This clearinghouse could provide the above-mentioned educational materials on the different risks environmental toxins pose to pregnancy and fetal health.

Alternatively, instead of working under E.O. 14096, the Biden-Harris Administration could create a New Reproductive and Environmental Justice Executive Order and corresponding Interagency Working Group on Reproductive and Environmental Justice. This new E.O. could (1) plainly announce that it is the policy of the United States to protect reproductive justice notions of "the right to . . . parent children in a healthy and safe environment,"¹⁰⁸ (2) direct the relevant agencies to research and collect data on environmental toxins that impact fertility, pregnancy, and

¹⁰⁶ Exec. Order No. 14096 § 5, 88 Fed. Reg. 25,251 (Apr. 26, 2023).

¹⁰⁷ Exec. Order No. 14096 § 7 (j), 88 Fed. Reg. at 25,251.

¹⁰⁸ Jessica L. Liddell & Sarah G. Kington, "Something was Attacking them and their Reproductive Organs: Environmental Reproductive Justice in an Indigenous Tribe in the United States Gulf Coast," 18 INT'L J. OF ENV'T RSCH. & PUB. HEALTH 666, 666 (2021) (citing Kimala Price, *What Is Reproductive Justice? How Women of Color Activists Are Redefining the Pro-Choice Paradigm*, 10 MERIDIANS 42–65 (2010)).

fetal health, and (3) encourage the reading of reproductive justice into all authorizing statutes to encourage agencies to protect reproductive health. The new E.O. could also expand some of the programs in previous EJ E.O.'s. For example, the community notification on toxic chemical releases could be expanded to require medical monitoring in instances where EJ communities are impacted by known threats to reproductive and fetal health.¹⁰⁹ Ultimately, the creation of new reproductive justice focused EJ work—either through E.O. 14096 or through a new E.O.—would function to rectify some of the disproportionate burden the *Dobbs* decision places upon EJ communities.

V. Conclusion

The *Dobbs* decision will have longstanding consequences on America without federal action to rectify some reproductive injustices. Due to the fact that the Biden-Harris Administration is so friendly to EJ concerns, there is the unique opportunity to shepherd in additional protections for reproductive justice under the protective umbrella of EJ. This would be to the benefit of all Americans, but particularly beneficial to EJ communities, as they are forced to bear the brunt of the burden posed by disability-selective and rape-inclusive abortion bans.

¹⁰⁹ Exec. Order No. 14096 § 6, 88 Fed. Reg. at 25,251.