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# The Right to a Healthy Environment: Underlying Policy Formation Challenges in the United States during the Trump Era

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## I. Introduction

The right to live in a healthy environment is the right to live in an environment where Donald Trump is not president. As this Article demonstrates, Trump's negative impact across a wide spectrum of policy areas implicated by the right's goal of creating and maintaining a healthy environment in the United States ran directly opposite to achieving that goal. Trump era policies not only exacerbated poverty, hunger, and discrimination issues,[1] but they quite literally cost

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1. *See, e.g.,* Jeffrey Kucik, *How Trump Fueled Economic Inequality in America*, The Hill (Jan. 21, 2021, 2:30 PM), https://thehill.com/opinion/finance/535239-how-trump-fueled-economic-inequality-in-america/ [https://perma.cc/75ZX-CLKS] ("Four years after Trump took office, income inequality continues to grow. And it is growing at a faster rate than during any of the last five administrations . . . The distance separating America's highest and lowest income brackets grew by almost 9 percent annually under Trump. That growth is faster than in previous

thousands of Americans their lives during the COVID-19 pandemic, and they continue to do so. Climate change-fueled storms and weather patterns have wreaked havoc across North America long since he left office.[2]

Eighteen months after the Trump presidency ended, on July 28, 2022, at its 76th annual session, the United Nations General Assembly adopted Resolution 300—recognizing the right to a clean, healthy, and sustainable environment.[3] The vote was 161 in favor, 8 abstentions, and 0 against.[4] Although two permanent Security Council members, China and Russia, were among those states abstaining, adoption of this Resolution was seen as a major step forward by both the environmental protection and human rights communities.[5] Moreover, Secretary General Guterres considers the Resolution essential in combatting what he views as the increasing threat to our planet.[6] "This refers to the three main interlinked environmental threats that humanity currently faces: climate change, pollution and biodiversity loss - all mentioned in the

periods . . . A full 20 percent of American children now live in poverty, a number that increased under the Trump administration."); *see also e.g.,* Jason DeParle, *As Hunger Swells, Food Stamps Become a Partisan Flash Point*, N.Y. TIMES https://www.nytimes.com/2020/05/06/us/politics/coronavirus-hunger-food-stamps.html [https://perma.cc/5X8X-XS8C] (Aug. 15, 2021) (In 2020 "[a]mong mothers with young children, nearly one-fifth say their children are not getting enough to eat, . . . a rate three times as high as in 2008 . . . . Even as the pandemic unfolded, the Trump administration tried to push forward with new work rules projected to remove more people from aid . . . . Food stamps remain central to the American safety net—costing much more ($60 billion) than cash aid and covering many more people (38 million) . . . . But Mr. Trump has done all he can to shrink the program. He sought budget cuts of 30 percent. He tried to replace part of the benefit with 'Harvest Boxes' of cheaper commodities. He tried to reduce eligibility and expand work rules to a much larger share of the caseload. When Congress balked, he pursued his goals through regulations."); *see also e.g.,* Benjamin C. Ruisch & Melissa J. Ferguson, *Did Donald Trump's Presidency Reshape Americans' Prejudices?*, 27 TRENDS COGNITIVE SCI. 207, 207 (2023) ("[F]indings suggest that discrimination (particularly hate crimes) increased following Trump's election, and that Trump's rhetoric emboldened people to express prejudices they previously kept hidden, and may even have shifted their privately held attitudes. Together, these lines of work demonstrate that Trump's election reshaped the topography of prejudice in the USA.").

2. *See infra* Parts II and III.

3. G.A. Res. 76/300, The Human Right to a Clean, Healthy and Sustainable Environment (July 28, 2022) [hereinafter G.A. Res. 76/300].

4. *UN General Assembly Declares Access to Clean and Healthy Environment a Universal Human Right,* U.N. NEWS (July 28, 2022), https://news.un.org/en/story/2022/07/1123482 [https://perma.cc/6PBP-3A5D].

5. *Id.*

6. *Id.*

text of the resolution. Each of these issues has its own causes and effects and they need to be resolved if we are to have a viable future on Earth."[7]

The adoption of Resolution 300 was the culmination of many decades of work following the watershed Stockholm Declaration of 1972,[8] and it was also a signal event in the gradual process of what the United Nations's Special Rapporteur for the Environment calls the "greening of well-established human rights, including the rights to life, health, food, water, housing, culture, development, property and home, and private life . . . ."[9] This intentional effort recognizes the symbiotic relationship between the environment and human health. Resolution 300 elevates that process by not only providing explicit recognition of the linkage, but also lodging the right to a healthy environment *sine qua non* on its own footing in the international human rights firmament.

Further, corporations are specifically brought into the enforcement discussion. The Special Rapporteur's underlying report supporting Resolution 300's adoption states, "[i]n particular, States must regulate business enterprises to protect against human rights abuses resulting from environmental harm and to provide for remedies for such abuses."[10] Resolution 300 then incorporates the report by reference,[11] "underscore[s] the responsibility of all business enterprises to respect human rights,"[12] and calls upon corporations, in addition to states and international organizations, "to adopt policies, to enhance international cooperation, strengthen capacity-building and continue to share good

7. *Id.*

8. *Id.*; U.N. Conference on the Human Environment, *Declaration of the United Nations Conference on the Human Environment,* UN Doc. A/CONF.48/14 (June 5-16, 1972); Kent Buse, et al., *The Human Right to a Healthy Environment—Time for the Public Health Community to Take Urgent Action*, The BMJ (Sept. 26, 2022), https://www.bmj.com/content/bmj/378/bmj.o2313.full.pdf ("The . . . Stockholm Declaration on the Human Environment recognised that 'man [sic] has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being.' Over the next two decades, international experts sought to clarify the content of this right and examine the links between the environment and human rights obligations . . . ").

9. John H. Knox (Special Rapporteur on Human Rights and Environmental Issues), *Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*, ¶ 53, U.N. Doc. A/73/188 (July 19, 2018).

10. *Id.* ¶ 17.

11. G.A. Res. 76/300, *supra* note 3, at 3.

12. *Id.*

practices in order to scale up efforts to ensure a clean, healthy and sustainable environment for all."[13]

Consistent with rapidly evolving ESG efforts adopted both by individual corporations and state regulators in the Western industrialized world,[14] such policies will ideally be wedded to meaningful compliance and enforcement measures. However, this leaves out large companies, many of which are state-owned and operated under authoritarian regimes such as China and Russia. Consequently, other international environmental efforts, such as participation in the regulatory framework of the Paris Climate Accords could be looked to instead. China has responded positively to this avenue, pledging to comply with the accords by peaking its fossil fuel emissions by 2030, developing a national plan to cut methane, and committing pledging to "'phase down' coal consumption during its 15th Five Year Plan, which starts in 2026."[15]

So, what are corporations and states obligated to do with respect to ensuring a healthy environment? Resolution 300 acknowledges that "the right to a clean, healthy and sustainable environment is related to other rights and existing international law."[16] A healthy environment is known scientifically as a habitat—from the Latin word *inhabitare*, which means to inhabit.[17] As humans inhabit Earth, the environment is currently society's habitat. Resolution 300 recognizes the essentiality of protecting and preserving this living space as fundamental to the continued success of homo sapiens.[18] Interestingly, Merriam-Webster offers three successive definitions:

> Hab-i-tat (noun)
>
> a: the place or environment where a plant or animal naturally or normally lives and grows
>
> b: the typical place of residence of a person or a group

13. *Id.* at 3.

14. *See* Michael J. Kelly, *ESG: The 5th Element of Corporate Risk Assessment*, 2022 MICH. ST. L. REV. 811, 813, 819 (2022).

15. Lisa Friedman, *What Happened at COP26 on Wednesday: China and U.S. Say They'll 'Enhance' Climate Ambition*, N.Y. TIMES, https://www.nytimes.com/live/2021/11/10/world/cop26-glasgow-climate-summit/china-us-cop26-climate-change [https://perma.cc/VR4P-BVP4] (May 31, 2023).

16. G.A. Res. 76/300, *supra* note 3, at 3, ¶2.

17. *See generally Habitat*, DICTIONARY.COM, https://www.dictionary.com/browse/habitat [https://perma.cc/BDW5-FCNG]; *Inhabitant,* VOCUBALARY.COM, https://www.vocabulary.com/dictionary/inhabitant [https://perma.cc/7T8T-WTDR].

18. *See* G.A. Res. 76/300, *supra* note 3, at 2.

> —the arctic *habitat* of the Inuit
>
> c: a housing for a controlled physical environment in which people can live under surrounding inhospitable conditions (as under the sea)[19]

Humans currently find themselves residing on an Earth climatologically suited to them and, therefore, living under definition 1(a). However, if climate change is not addressed and temperatures are allowed to climb over the next century, the hostility of living conditions on Earth may drive us into definition 1(c). How much housing could be built to shelter humans on a planet they have destroyed is an open question which begets many more ethical and moral dilemmas.

The United Nations's now internationally recognized right to a healthy environment clearly comprehends maintaining humanity within habitat definition 1(a). Therefore, action must be taken to preserve and protect our planetary habitat. From a human rights approach, it can be argued that a right such as this would be seen to embrace several freedoms that, in a sense, operationalize it. For example, the right to a healthy environment could rationally be considered to contain the following freedoms which implicate clear policy areas already addressed under both international and domestic law:

- Freedom from disease
  - Implicates public health policy
  - Implicates outbreak response policy
- Freedom from living in squalor
  - Implicates poverty policy
  - Implicates waste management policy
- Freedom from natural disasters
  - Implicates climate change policy
  - Implicates disaster response policy
- Freedom from hunger
  - Implicates poverty policy
  - Implicates food production/distribution policy
- Freedom from emotional oppression
  - Implicates non-discrimination policy
  - Implicates human rights enforcement policy

Without at least most of these freedoms, one does not have a healthy environment. As this non-exhaustive list of freedoms inherent in the right to a healthy environment indicates, national policies across a broad spectrum of fields must be coordinated to secure the right. Bureaucratic obstacles will be many; quick adjustments and solutions will be few. Yet each government of each U.N. member state should at

19. *Habitat,* Merriam-Webster Dictionary (2023).

least state the goal of achieving this right by issuing directives to the units within those governments responsible for developing and implementing policies supporting these inherent freedoms.

Notably, each freedom rests on a proactive policy approach coupled with a responsive policy approach. For example, with respect to freedom from disease, the proactive approach of disease prevention through effective public health policy is followed by the responsive approach of adequate and effective response measures that must be implemented when outbreaks occur. With respect to natural disasters, combatting climate change mitigates the severity of many natural disasters and this is followed by policies outlining successful response measures when disasters do occur.

These pairings (proactive policy approaches coupled with reactive policy approaches) for each freedom that makes up the right to a healthy environment likely already exist at the national level in some form in most advanced societies.[20] Lesser developed societies, which may in fact have developed similar policies,[21] are less likely to be as successful with institutionalizing and effectuating them for a variety of reasons, not the least of which include capacity and expertise. Thus, Resolution 300 recognizes that "international cooperation has an essential role in assisting developing countries, including highly indebted poor countries, least developed countries, landlocked developing countries, small island developing States, as well as the specific challenges faced by middle-income countries, in strengthening their human, institutional and technological capacity . . . ."[22]

Some policy areas, such as climate change and disease outbreak response, are only as effective as the collective international approach.[23] With respect to these two areas, for instance, borders are largely

20. *See, e.g., Covid-19: Canada's Response*, Gov't of Can., https://www.canada.ca/en/public-health/services/diseases/2019-novel-coronavirus-infection/canadas-reponse.html [https://perma.cc/9BCS-JJY7] (demonstrating Canada's proactive and responsive approaches to COVID-19).

21. *See* Carmen G. Gonzalez, *The Right to a Healthy Environment and the Global South*, 117 Am J. Int'l L. Unbound 173, 174 (2023).

22. G.A. Res. 76/300, *supra* note 3, at 2.

23. Simon Black et al., *World Needs More Policy Ambition, Private Funds, and Innovation to Meet Climate Goals*, IMF (Nov. 27, 2023), https://www.imf.org/en/Blogs/Articles/2023/11/27/world-needs-more-policy-ambition-private-funds-and-innovation-to-meet-climate-goals [https://perma.cc/E8YW-UVJV] ("International cooperation is more important than ever because no country can address climate change by itself."); Kwadwo Agyapon-Ntra & Patrick e. McSharry, *A Global Analysis of the Effectiveness of Policy Reponses to COVID-19*, 13 Sci. Rep., Apr. 6, 2023, at 1, 3 (arguing that the wide variance in national approaches undermined grappling with an international pandemic).

meaningless.[24] Consequently, the international community must lead the way. This can happen through U.N. expertise guiding state action or through state action independent of the U.N. system. The COVID-19 response framed by the World Health Organization (WHO) is an example of the former;[25] the international response to climate change through the Paris Climate Accords and guided by the Intergovernmental Panel on Climate Change (IPCC) is an example of the latter.[26] This Article examines both of these threats to a healthy environment in turn, in the context of the dramatic, and avoidable, life-costing policy failures of the Trump administration.

## II. HEALTH POLICY FAILURE

Good, durable, sustainable health policies undergird a right to a healthy environment.[27] Without such policies the right is hardly achievable. Yet it is important to note two handicaps that can lead the world's wealthiest nation to experience one of the world's worst responses to the COVID-19 pandemic,[28] one structural and one political: (1) lack of a national healthcare system (and, therefore, lack of a

24. *'Climate Change Knows No National Borders,' UN Chief Says*, U.N. (Nov. 4, 2015), https://www.un.org/sustainabledevelopment/blog/2015/11/climate-change-knows-no-national-borders-un-chief-says/ [https://perma.cc/RZT7-NQFP]; Michael C. Camunez, *The Coronavirus Knows No Borders; We Shouldn't Either*, MEDIUM (Mar. 25, 2020), https://medium.com/@michaelcamunez/the-corona-virus-knows-no-borders-we-shouldnt-either-eff397856329 [https://perma.cc/DJU6-5LXH].

25. *The U.S. Government and the World Health Organization*, KFF (May 22, 2023), https://www.kff.org/coronavirus-covid-19/fact-sheet/the-u-s-government-and-the-world-health-organization/ [https://perma.cc/VND2-JQGM] ("WHO [helps] countries prepare for and respond to epidemics and other health emergencies such as COVID-19 . . . .").

26. *IPCC Climate Reports Change Reports: Why They Matter to Everyone on the Planet*, NRDC (Apr. 14, 2023), https://www.nrdc.org/stories/ipcc-climate-change-reports-why-they-matter-everyone-planet#sec-target [https://perma.cc/5U67-CY7T] ("The IPCC [is] the leading scientific authority on all things related to climate change.").

27. Melanie Lowe et al., *City Planning Policies to Support Health and Sustainability: An International Comparison of Policy Indicators in 25 Cities*, 10 LANCET GLOB. HEALTH 882, 882 (2022) ("policies . . . inconsistent with public health . . . [set] up barriers to achieving healthy and sustainable urban environments.").

28. Benjamin Mueller & Eleanor Lutz, *U.S. Has Far Higher Covid Death Rate Than Other Wealthy Countries*, N.Y. TIMES (Feb. 1, 2022), https://www.nytimes.com/interactive/2022/02/01/science/covid-deaths-united-states.html [https://perma.cc/K5BB-LYYS].

national healthcare policy);[29] and (2) a president who undermines the country's ability to respond.[30] In critiquing the Trump administration's dismal handling of the pandemic, the Wall Street Journal noted that on January 1, 2021, "1 in every 990 Americans has died from COVID-19 since the pandemic began."[31]

Internationally, WHO worked to frame policy by issuing best practices and containment guidelines.[32] However, international outbreak guidelines and best practices are only as good as the ability of states to adopt and implement them. In the developed world, the Trump administration dismissed them.[33] At the outset, it was obvious that lesser developed countries would require assistance both with policy implementation and access to vaccines developed in the West.[34] North America and Europe later worked with large multinational pharmacological industries to order and then ship vaccines to Latin America, Africa, and Asia through the COVAX distribution system developed by the WHO.[35]

A more complex exercise, from a policy perspective, involves measuring public health policy performance during the pandemic in societies where such policies occur at various sub-national levels (such

29. *See* John Geyman, *COVID-19 Has Revealed America's Broken Health Care System: What Can We Learn?*, 51 Int'l J. Soc. Determinants Health & Health Serv. 188, 189-90 (2021).

30. Charles F. Parker & Eric K. Stern, *The Trump Administration and the COVID-19 Crisis: Exploring the Warning-Response Problems and Missed Opportunities of a Public Health Emergency*, Pub. Admin., Mar. 29, 2022, at 2.

31. Tom Frieden, *Which Countries Have Responded Best to Covid-19?*, Wall St. J. (Jan. 1, 2021, 11:00 AM) https://www.wsj.com/articles/which-countries-have-responded-best-to-covid-19-11609516800 [https://perma.cc/KN8H-4Q8E].

32. *See A Guide to WHO's Guidance on COVID-19,* World Health Org. [WHO] (July 17, 2020), https://www.who.int/news-room/feature-stories/detail/a-guide-to-who-s-guidance [https://perma.cc/36JJ-HVXT].

33. Charles F. Parker & Eric K. Stern, *The Trump Administration and the COVID-19 Crisis: Exploring the Warning-Response Problems and Missed Opportunities of a Public Health Emergency*, 100 Pub. Admin. 616, 622-23 (2022).

34. *See* Org. Econ. Coop. Dev. [OECD], Coronavirus (COVID-19) Vaccines for Developing Countries: An Equal Shot at Recovery 1-3, 6 (2021).

35. *COVAX: Working for Global Equitable Access to COVID-19 Vaccines*, WHO, https://www.who.int/initiatives/act-accelerator/covax [https://perma.cc/6PM9-5TDL] (Dec. 31, 2023); *see* Gabriele Steinhauser & Stephanie Armour, *U.S. Covid-19 Vaccine Donations to Poor Countries Fall Short of Target*, Wall St. J. (Oct. 1, 2022, 6:06 AM), https://www.wsj.com/articles/u-s-covid-19-vaccine-donations-to-poor-countries-fall-short-of-target-11664618813[https://perma.cc/49H5-N42U].

as within states in the United States) instead of being unified at a national level. In 2022, the Commonwealth Fund published a report on how the public health systems in the 50 states fared during the pandemic. It found, not surprisingly, that "[s]tates that entered the COVID-19 pandemic with stronger health systems had lower rates of preventable deaths and healthier populations."[36]

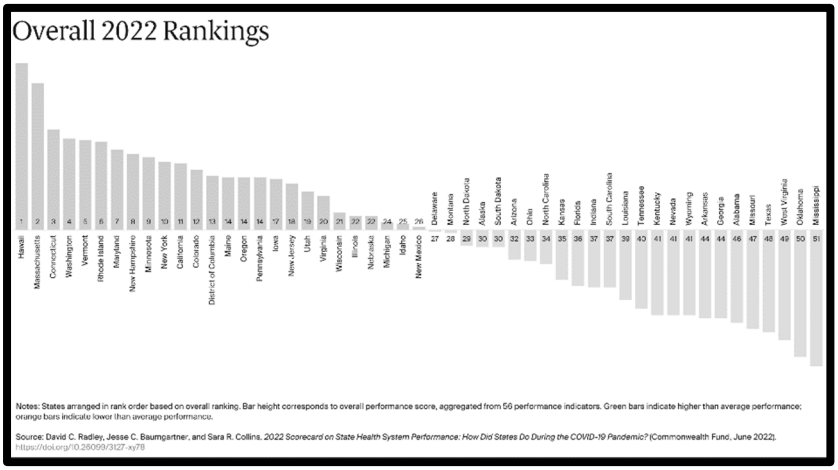


*Figure 1: Health System Performance Measured in 2020 During COVID-19*[37]

As Figure 1 indicates, "Hawaii and Massachusetts top the Commonwealth Fund's 2022 Scorecard on State Health System Performance, based on measures that include health outcomes during COVID-19 in 2020; the lowest-performing states were Mississippi, Oklahoma, and West Virginia."[38] Healthcare system performance was scored across 56 measures including quality and access to healthcare, use and cost of healthcare, health disparities, and outcomes.[39] The 2022 Scorecard added seven COVID-19-specific measures as well "to reflect state progress in vaccinating residents, COVID-19 hospitalization rates and health system stress, and COVID-19-related mortality through the end of March 2022."[40]

36. David C. Radley, et al., *2022 Scorecard on State Health System Performance*, Commonwealth Fund (June 16, 2022), https://www.commonwealthfund.org/publications/scorecard/2022/jun/2022-scorecard-state-health-system-performance [https://perma.cc/ZT7P-UFY9] [hereinafter *State COVID Scorecard*].

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

Such wide disparities in state healthcare system performance revealed by the pandemic point up the main problem inherent in the structural decision to forego national healthcare in favor of state healthcare: unevenness.[41] States with more robust, proactive, public health policies support healthier populations through more robust healthcare systems and institutions.[42] States with less robust policies, systems, and institutions have less healthy populations.[43] Absent an overarching national healthcare system that would tend to normalize things across states, overall "healthiness" of populations within states remained uneven, thereby ensuring that the less healthy populations were more vulnerable to COVID-19 than others—depending on where they lived.[44]

A 2020 study comparing U.S. death rates to those of other developed countries demonstrates the gap between a country like the United States, which doesn't have a national healthcare system, and those like Canada and Australia, which do.[45] The University of Pennsylvania's Dr. Ezekiel Emmanuel determined:

> "What we show pretty consistently, is that the United States did worse in terms of deaths compared to every other of the 18 countries. . . . " As of Sept. 19, the study showed, the U.S. reported an overall Covid-19 mortality rate of 60.3 per 100,000 people. Canada's rate was 24.6 per 100,000 and Australia's rate was 3.3 deaths per 100,000. The overall mortality rates include deaths from the start of the pandemic through mid-September. If the U.S. had the same death rate as that of Canada, there would have been 117,000 fewer Covid-19 deaths; with Australia's death rate, the U.S. would've seen 188,000 fewer deaths. . . . "That's

41. *See generally* Thomas A. Birkland et al., *Governance in a Polarized Era: Federalism and the Response of U.S. State and Federal Governments to the COVID-19 Pandemic*, PUBLIUS: J. FEDERALISM, Aug. 14, 2021.

42. *See, e.g.,* Radley, *supra* note 36 (noting that "[s]tates that entered the COVID-19 pandemic with stronger health systems had lower rates of preventable deaths and healthier populations.").

43. *See id.*

44. *Id.*

45. Erika Edwards, *The COVID-19 Pandemic Has Claimed Far More Lives Than Reported, Study Says*, NBC NEWS, (Oct. 12, 2020, 5:06 PM) https://www.nbcnews.com/health/health-news/covid-19-pandemic-has-claimed-far-more-lives-reported-study-n1242970 [https://perma.cc/2G2U-BH6G]; Lucinda Glover & Michael Woods, *The Australian Health Care System, in* INTERNATIONAL PROFILES OF HEALTHCARE SYSTEMS 7 (Roosa Tikkanen et al. eds., 2020); Sarah Allin et al., *The Candaian Health Care System, in* INTERNATIONAL PROFILES OF HEALTHCARE SYSTEMS 27 (Roosa Tikkanen et al. eds., 2020).

> tens of thousands of Americans who have unnecessarily died. . . . "[46]

An unfortunate ripple effect of poor state health policy during the COVID-19 pandemic was that many more people living in such states died not from COVID-19, but from other ailments because they couldn't be treated and because they were less healthy to begin with, and arrived more quickly at acute states of a health crisis than healthier citizens living in other states with more robust healthcare systems.[47] As Figure 2 depicts, "[t]he death toll from COVID . . . extends beyond deaths directly attributed to the virus. By the spring of 2022, over 1 million Americans had died of COVID-19. But the virus's effect on health outcomes has extended well beyond deaths directly attributable to COVID. Because the pandemic disrupted their ability to get timely care for conditions other than COVID-19, many more people likely died sooner than they otherwise would have."[48]

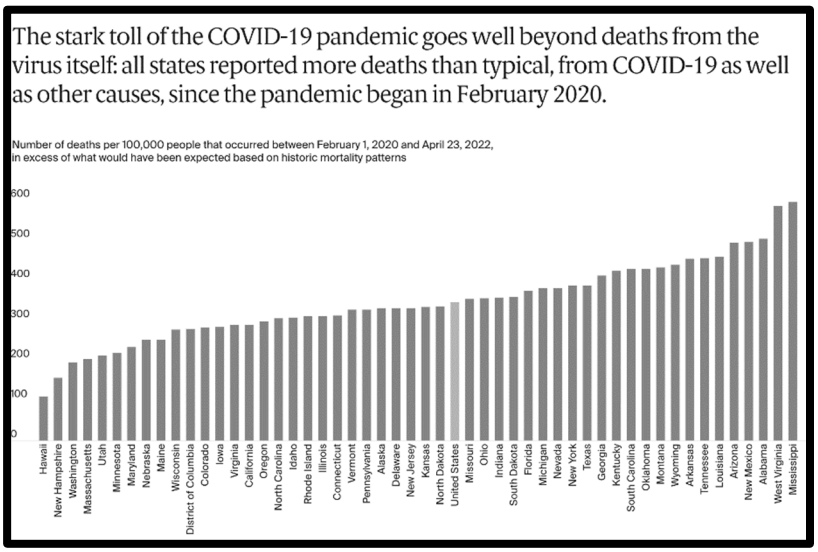


*Figure 2: Deaths by State during COVID Beyond Death From COVID*[49]

46. Edwards, *supra* note 45.

47. *See* Radley et al., *supra* note 36.

48. *Id.* ("Every state has experienced higher-than-expected mortality from all causes — deaths from COVID-19 in addition to deaths from other causes, like heart disease, cancer, and drug overdose — since the pandemic began. The number of excess deaths varies fivefold across states, from 110 per 100,000 people in Hawaii to 596 per 100,000 in Mississippi.").

49. *Id.*

Once the disease broke out, the reactive disease response policy component of the freedom from disease that supports the right to a healthy environment kicked in.[50] Although the federal government took the lead in designing non-binding response guidelines and recommendations to both states and the general public, legally applicable response policies were in the hands of state governors.[51] This suited President Donald Trump fine in that he had made the political calculation to shift the risk of massive failure in confronting the pandemic to the states.[52]

This left him free to downplay the deadliness of the virus, strike anti-masking and anti-vaccination notes that were popular with his misinformed political base, and play up populist rhetoric on individual liberty.[53] This poor response by the Trump administration at the instigation of the President actually slowed down the U.S. pandemic response, shifting more burdens onto the states.[54]

One of the immediate impacts of this dynamic concerned the ability of states to procure masks and medical supplies, which were increasingly in short supply as the pandemic burned through the country.[55] With hospital beds full and ICUs completely booked, stocks were reduced very quickly.[56] Consequently, in the absence of federal procurement

50. *See supra* Part I.

51. *See* Peter Nicholas & Kathy Gilsinan, *The End of the Imperial Presidency*, THE ATLANTIC (May 2, 2020), https://www.theatlantic.com/politics/archive/2020/05/trump-governors-coronavirus/611023/ [https://perma.cc/7KRA-GSZ3].

52. *See id.*

53. *See* Parker & Stern, *supra* note 30, at 617-25.

54. *See id.* at 617, 621-622 ("Once China informed the world of a disease outbreak on December 31, 2019, the Trump Administration's response was marked by downplaying the threat, inaction or partial measures, confusion, and inaccurate public statements. As a result, opportunities to slow the spread by facilitating a vigorous public health response of containment and suppression based on testing, contact tracing, and isolation were missed following the confirmation of the first US case on January 21, 2020. After banning foreign nationals from entering the US, if they had been in China in the prior 2 weeks, on January 31, an apparently overconfident Trump Administration was blindsided by the rapid community outbreak of COVID-19, necessitating a declaration of a national emergency on March 13, 2020. At that time, the federal government remained unable to help states carry out widespread testing—despite Trump's false claims that anyone who wanted a test could get one—and had not addressed the expected massive shortfalls of personal protective equipment (PPE) and ventilators.").

55. *See* Nicholas & Gilsinan, *supra* note 51.

56. Andrew Jacobs et al., '*At War with No Ammo': Doctors Say Shortage of Protective Gear is Dire*, N.Y. TIMES (Mar. 19, 2020), https://www.

under a national health policy, states were left in the position of having to bid against one another in some cases to secure the supplies they needed to respond to the pandemic.[57] Many felt abandoned by the federal government:

> A natural role for the president would be to lead the worldwide hunt for medical supplies, leveraging the government's vast purchasing power. Trump's reluctance to serve as what he calls a "shipping clerk" has left some governors incredulous. "It's absolutely maddening," Governor Jay Inslee, a Washington Democrat, told us. "It's like being in World War II and not getting the federal government to manufacture boots . . . . It's very difficult to understand. I liken it to Franklin Delano Roosevelt saying, *Okay, Connecticut, you build the battleship and I'll be there at the launch and break the bottle.*"[58]

Here too, in the face of President Trump's politically calculated determination to politicize the virus and everything associated with it, states made choices in their reactions to COVID-19, including some of them deciding for political reasons to forego mask mandates, more aggressive vaccination efforts, social distancing, and offers of federal funding for more testing.[59] Those choices cost lives but remained popular with President Trump's political base.[60] A case in point was Idaho's Republican-led government, which in 2021 declined to either accept $40 million in federal assistance for COVID-19 testing in schools

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nytimes.com/2020/03/19/health/coronavirus-masks-shortage.html [https://perma.cc/9JQM-NVE6].

57. *Competition Among State, Local Governments Creates Bidding War for Medical Equipment*, ABC News (Apr. 3, 2020, 12:33 PM), https://abcnews.go.com/US/competition-state-local-governments-creates-bidding-war-medical/story?id=69961539 [https://perma.cc/9WTB-ZSXA].

58. Nicholas & Gilsinan, *supra* note 51.

59. *See* Felicia Sonmez & Hannah Knowles, *Republicans Risk Becoming Face of Delta Surge as Key GOP Governors Oppose Anti-Covid Measures,* Wash. Post (Aug. 11, 2021, 12:48 PM), https://www.washingtonpost.com/politics/republicans-delta-masks-vaccines/2021/08/11/639c6862-fa0c-11eb-9c0e-97e29906a970_story.html [https://perma.cc/D5WE-TTHX].

60. *See* Dareh Gregorian, *States with Republican Governors Had Highest Covid Incidence and Death Rates, Study Finds,* NBC (Mar. 11, 2021, 3:10 PM), https://www.nbcnews.com/politics/politics-news/states-republican-governors-had-highest-covid-incidence-death-rates-study-n1260700 [https://perma.cc/2Y6U-4MKN]; *See* Will Weissert, *Republicans Take to Mask Wars as Virus Surges in Red States*, AP News (Aug. 12, 2021, 3:50 AM), https://apnews.com/article/joe-biden-health-coronavirus-pandemic-fcd36bc56f03fcd46d9ad5839a7b5702 [https://perma.cc/M55V-DYSL].

or to deploy the $1.8 billion "pandemic-related federal assistance sitting idle in the state treasury."[61]

> "If you want your kids in school, you can't be testing," said state Representative Ben Adams, a Republican who represents Nampa, a city of about 100,000 people in southwestern Idaho. Meanwhile, the state is reporting the fifth-highest infection rate in the United States . . . . Schools in at least 14 of Idaho's 115 districts, including Nampa, have had to close temporarily due to COVID-19 outbreaks since the start of the year . . . .
>
> Idaho's experience illustrates how political ideology and polarization around the COVID-19 epidemic have played a role in the decision of mostly conservative states to reject some federal funding meant to help locals officials battle the virus and its economic fallout.[62]

The decision to forego federal COVID-19 funding cut across not just the public education sphere, but also was used by the Idaho state government to push its conservative social agenda on all fronts, including cutting off COVID-19 extended federal unemployment support early so as not to support joblessness, and declining to accept support for childcare because of their conservative view that a woman's place is in the home.[63] "Idaho has also rebuffed $6 million for early-childhood education, as some Republicans in the state said mothers should be the primary caretakers of their children. The state also did not apply for $6 million that would have bolstered two safety-net programs that aid mothers of young children and working families."[64]

Prior to the COVID-19 outbreak, "a dozen Republican-controlled states . . . rejected billions of dollars available through the landmark 2010 Affordable Health Care Act to cover more people under the Medicaid health program for the poor . . . ."[65] That decision helped ensure that such states had demonstrably less healthy, and therefore more vulnerable, populations when COVID-19 hit. And yet, when the time came to accept federal funding to combat COVID-19, instead of accepting it, Republican states dug in their heels and rejected it.[66]

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61. Andy Sullivan, *Insight: COVID-19 Still Rages, but Some U.S. States Reject Federal Funds to Help*, Reuters (Nov. 2, 2021, 4:32 PM), https://www.reuters.com/world/us/covid-19-still-rages-some-us-states-reject-federal-funds-help-2021-11-02/ [https://perma.cc/LT9D-DY9U].

62. *Id.*

63. *See id.*

64. *Id.*

65. *Id.*

66. *See, e.g.*, *id.*

Between March and November 2020, Congress approved six aid packages totaling $4.7 trillion.[67]

Yet conservative politics continued to win out over population protection. "Florida and Mississippi didn't apply for benefits that would give more money to low-income mothers of young children. Four states, including Idaho, North Dakota, and Oklahoma, opted not to extend a program that provided grocery money to low-income families with school-age kids in summer months."[68] Additionally, Iowa refused to accept federal funding for in-school COVID-19 testing and New Hampshire refused to accept federal funding for vaccinations.[69]

Consequently, the same unevenness that bedeviled *proactive* health policy as part of a right to a healthy environment, due to lack of national healthcare policymaking in favor of state healthcare policymaking, also undermined *responsive* health policy.[70] States could choose to simply ignore health crises like COVID-19 that didn't align with their conservative political views.[71] This was especially easy for them when the President provided the political cover to do so by politicizing the virus, and U.S. citizens, ironically more so in those conservative states than others, unnecessarily died as a result.[72] A 2020 study by Columbia University's National Center for Disaster Preparedness found, "the Trump Administration has shown hostility to much of the critical guidance and recommendations put forth by its own health agencies, with the President at times misleading the public on the scope of the threat, attempting to "downplay" the extent of the crisis, and advocating for unproven or unsafe treatments."[73]

The study went on to find that "[r]ather than [present] honest information about . . . the pandemic and [elevate] best practices as states by the Centers for Disease Control and Prevention (CDC), this Administration has actively mocked basic, well-established public health guidelines (such as the use of masks, social distancing, etc.), and

67. *Id.*

68. *Id.*

69. *Id.* ("Republican lawmakers in Idaho . . . cite concerns about local control, . . . .[L]ocal leaders have refused to impose mask mandates . . . and other steps to contain the virus. Idaho has one of the lowest vaccination rates in the nation, with only 55% of adults and teens fully immunized, compared to 67% nationally.").

70. Birkland et al., *supra* note 41, at 2; C. Dominik Guss et al., *The Politics of COVID-19: Differences Between U.S. Red and Blue States in COVID-19 Regulations and Deaths*, 5 Health Pol'y Open, Dec. 15, 2023, at 2.

71. Guss et al., *supra* note 70, at 5, 7.

72. *See* Irwin Redlener, et al., "130,000-210,000 Avoidable COVID-19 Deaths – and Counting – in the U.S." 9 (2020).

73. *Id.*

damaged the impartial reputation of key federal health agencies."[74] Simultaneously, the administration sought to cast blame on foreign entities such as China and the WHO.[75]

With the White House actively discouraging aggressive health policy response measures as the COVID-19 pandemic continued, there was really no way that this aspect of the right to a health environment could ever find enough purchase in the national health policy firmament to have a positive impact. Moreover, as the pandemic progressed, the White House's politicization of it intensified, to the point that death tolls actually reversed themselves from higher rates at the outset of the pandemic in liberal leaning areas of the country to higher rates as the pandemic continued in conservative leaning areas.[76] A Pew Research Center study found that the higher initial COVID-19 tolls experienced in counties which voted for Biden in 2020 at the start of the pandemic, shifted dramatically to higher COVID-19 tolls in counties which voted for Trump.[77] Figure 3, below, depicts this politically driven shift.

74. *Id.*

75. *Id;* Parker & Stern are in accord on this point, but more specifically place direct blame for unnecessary loss of life on President Trump himself. Parker & Stern, *supra* note 30, at 12 ("The US, although it represents just 4% of the world's population, accounted for over 20% of all confirmed COVID-19 cases and deaths worldwide that took place on Trump's watch. This outcome was not inevitable. With a timelier, focused, scientifically informed, and sustained whole-of-government response, it has been estimated that hundreds of thousands of COVID-19 deaths could have been avoided. Ultimately, in the US system, as the commander-in-chief, presidents are responsible for the decisions the federal government makes or fails to make, the mobilization and coordination of the federal response to national crises and setting and enforcing the proper priorities. In the final analysis, when it comes to assessing responsibility for the avoidable failures of the federal government's COVID-19 performance, the evidence examined here indicates that, while not responsible for everything that went wrong, President Trump was a decisive factor behind the tragically sub-optimal US pandemic response."); Parker & Stern, *supra* note 30, at 627 (citations omitted).

76. Bradely Jones*, The Changing Political Geography of COVID-19 Over the Last Two Years,* Pew Rsch. Ctr. *(*March 3, 2022), https://www.pewresearch.org/politics/2022/03/03/the-changing-political-geography-of-covid-19-over-the-last-two-years/ [perma.cc/AEZ6-VKLY)].

77. *Id.*

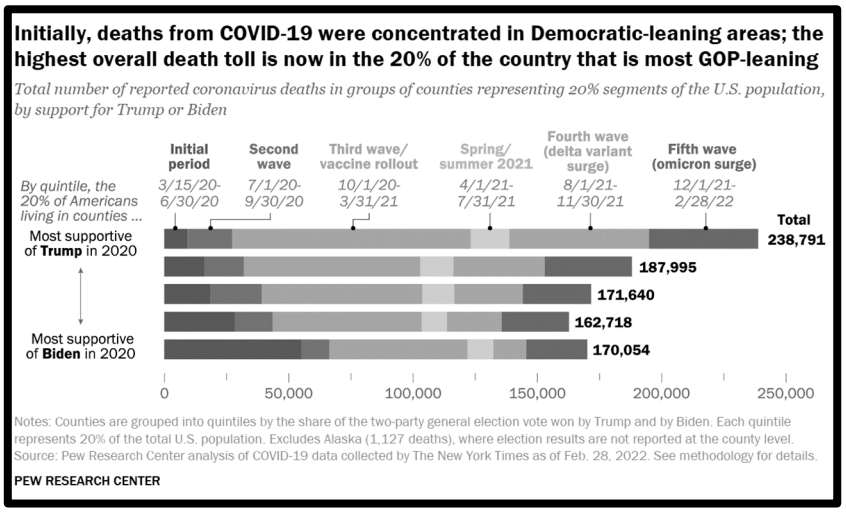



*Figure 3: Higher COVID Tolls Shifted from Blue to Red States as Pandemic Progressed*

The Pew study found that "in the spring of 2020, the areas recording the greatest numbers of deaths were much more likely to vote Democratic than Republican. But by the third wave of the pandemic, which began in fall 2020, the pattern had reversed."[78] By then, Trump's downplay of both the virus and mitigation efforts had taken hold and his allies in state governments like Idaho were parroting him to their populations.[79] The total pandemic period is scientifically divided into five waves that correlate to different strains of the virus.

As vaccines were developed and made available during successive waves, impacts shifted as more Trump followers refused masks and vaccines. "During this third wave – which continued into early 2021 – the coronavirus death rate among the 20% of Americans living in counties that supported Trump by the highest margins in 2020 was about 170% of the death rate among the one-in-five Americans living in counties that supported Biden by the largest margins."[80] This discrepancy between red and blue counties widened as vaccines became more available even as the more dangerous delta strain spread.[81] "During the fourth wave of the pandemic, death rates in the most pro-Trump counties were about four times what they were in the most pro-Biden counties."[82]

78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.*

Absent a comprehensive top-down responsive pandemic health policy from the national level, not only was there little hope of shifting COVID-19's impact to protect more people, but – in the face of President Trump's resistance to designing and effectively implementing one – his followers would ironically be the ones who paid the highest price for following his lead in dismissing both the disease and health measures such as masking, social distancing, vaccination, and isolation to contain it. "The cumulative impact of these divergent death rates is a wide difference in total deaths from COVID-19 between the most pro-Trump and most pro-Biden parts of the country."[83] This resulted in nearly 70,000 more deaths in Trump supporting counties than Biden supporting counties.[84]

Due to all the structural and political realities discussed herein, had the United Nations articulated the right to a healthy environment prior to the COVID-19 outbreak, the United States would have stood little chance to elaborate effective disease related health policies to sustain it. The Trump presidency would have prevented implementation of the right anyway, just as it withdrew from participating in the WHO altogether.[85] Policy failure on both the proactive and response ends of healthcare hampered the ability of the United States to secure this aspect of the right to a healthy environment for its people, causing the United States to experience more excess COVID-19 deaths than any other developed country.[86]

Although the WHO was issuing responsive COVID-19 policy guidelines for coordinating clinical trials throughout the pandemic and developing equitable vaccination distribution protocols[87] - and countries that adopted and aggressively implemented them fared better than those that did not[88] - those policies were undermined in the United

83. *Id.*

84. *Id.* ("Overall, the COVID-19 death rate in *all* counties Trump won in 2020 is substantially higher than it is in counties Biden won (as of the end of February 2022, 326 per 100,000 in Trump counties and 258 per 100,000 in Biden counties.).").

85. Katie Rogers & Apoorva Mandavilli, *Trump Administration Signals Formal Withdrawal from W.H.O.*, N.Y. Times, https://www.nytimes.com/2020/07/07/us/politics/coronavirus-trump-who.html [https://perma.cc/E4S4-K45K] (Sept. 22, 2022)

86. Giorlando Ramirez et al., *Death Toll of the Pandemic Places the U.S. at Top of Most Affected Countries*, KFF News (Nov. 2, 2020), https://www.kff.org/coronavirus-covid-19/slide/death-toll-of-the-pandemic-places-the-u-s-at-top-of-most-affected-countries/ [https://perma.cc/SW7Y-JR95].

87. Rogers & Mandavilli, *supra* note 85.

88. Frieden, *supra* note 31; *Advice for the Public: Coronavirus Disease (2019)*, WHO, https://who.int/emergencies/diseases/novel-coronavirus-2019/advice-for-public [https://perma.cc/R7LN-LZWG], (Mar. 18, 2023).

States at the White House level. This situation also undermined the United States's domestic infectious disease response policy implementation. Thus, despite the availability of international policy expertise, governmental decisions to forego adoption and implementation for no reason other than domestic political reasons would constitute a direct violation of the right to a healthy environment.[89]

## III. Climate Change Policy Failure

Similarly, a second freedom to consider within the ambit of the right to a healthy environment is freedom from natural disasters resulting from or exacerbated by policy failures—especially avoidable policy failures such as those examined above in the COVID-19 context. A habitat, or healthy environment, regularly rocked by hurricanes, tornadoes, wildfires, inundations, mudslides, or catastrophic accidents related to power grids or nuclear meltdowns triggered by such natural disasters, is no longer a hospitable habitat. Thus, it is no longer a healthy environment.

The ravages of climate change are now beginning to manifest.[90] Scientists have concluded that these ravages are direct outcomes of global warming driven largely by carbon-based human activity.[91] As with the COVID-19 pandemic, borders mean little as the negative effects of climate change militate against maintaining a healthy environment. While the impacts of climate change are felt across the board, such as rising sea levels, decreased agricultural production capacity, and increased vulnerability to pests and diseases, it is the increased intensity of severe weather, that is most immediately noticeable, costing the insurance industry billions, and claiming thousands of lives annually.[92]

89. *See* Eric Lutz, *Did the Trump Administration Ignore Early Coronavirus Warnings?*, Vanity Fair (Apr. 20, 2020), https://www.vanityfair.com/news/2020/04/did-the-trump-administration-ignore-early-coronavirus-warnings [https://perma.cc/N96S-7XLZ].

90. *The Effects of Climate Change*, NASA, https://climate.nasa.gov/effects/ [https://perma.cc/6ECM-EPAH].

91. *Id.*

92. *Id.;* Additionally, climate change is forecast to dramatically increase criminal activity, which also erodes a healthy environment. *See e.g., Developments in the Law-Climate Change, Chapter One: Local Prosecution in the Era of Climate Change*, 135 Harvard L. Rev. (Devs. in the L.) 1544, 1547 (2022) ("[C]limate change is expected to alter the frequency and types of crimes that the criminal justice system will be forced to confront, especially in the absence of stronger social safety nets. According to a 2012 working paper from the Harvard Kennedy School, between 2010 and 2099, the United States will experience an additional 3.8 million cases of larceny, 3.1 million burglaries, 2.4 million simple

These broad impacts negatively impact the sustainability of a healthy environment in measurable ways. Specifically, with respect to the health of humans, the impacts are also linked with particular health outcomes—as projected in Figure 4 below:

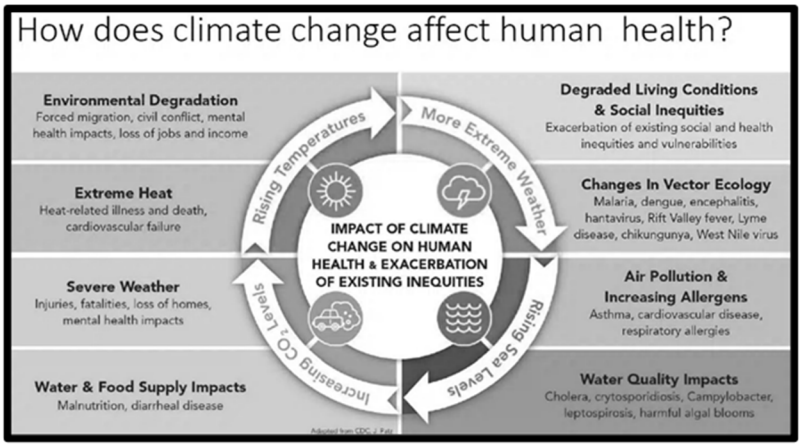



*Figure 4: Climate Change Impacts on Human Health*[93]

Moreover, the prognosis for the next century is dire. The National Oceanic and Atmospheric Administration projects, as represented in Figure 5, the trendlines for increasing carbon dioxide (CO2) emissions and the concomitant temperature rises that would be affected by more or less aggressive abatement policies.[94]

assaults, 1.4 million vehicle thefts, 409,000 robberies, 216,000 cases of rape, and 35,000 murders compared to the baseline as a result of climate change. A 2020 study reached similar conclusions with respect to violent crime generally. Both studies discuss several hypotheses for these increases: first, longer periods of temperate weather (namely during winter months) will increase *opportunities* for crime; second (and relatedly), changing weather patterns may increase the *probability* that crimes are committed successfully; and third, increased temperatures will cause higher rates of physiological heat stress, leading to more frequent conflicts.") (citations omitted); *see e.g., The Rising Costs of Extreme Weather Events*, White House (Sep. 1, 2022), https://www.whitehouse.gov/cea/written-materials/2022/09/01/the-rising-costs-of-extreme-weather-events/ [https://perma.cc/VS49-MG3A].

93. State of Cal., Budget Change Proposal 2 fig. 3 (2021).

94. Rebecca Lindsey & LuAnn Dahlman, *Climate Change: Global Temperature*, Climate.gov (Jan. 18, 2023), https://www.climate.gov/news-features/understanding-climate/climate-change-global-temperature [https://perma.cc/7DYC-6RHS].

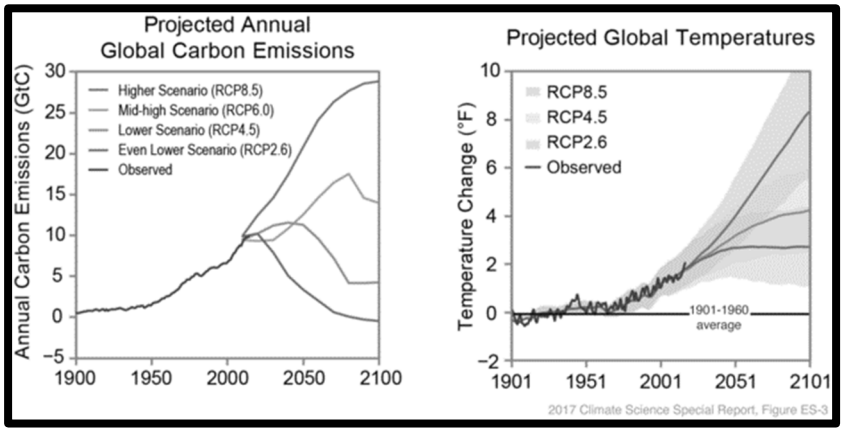



*Figure 5: Policy Impacts on CO2 and Temperature to 2100*[95]

Depicted on the left are "[h]ypothetical pathways of carbon emissions ('representative concentration pathways,' or RCPs) throughout the twenty-first century based on different possible energy policies and economic growth patterns. The right [figure of Figure 5] depicts projected temperature increase[s] relative to the 1901-1960 average depending on which RCP we eventually follow."[96]

Just as the catastrophic effects of climate change are forecast to exponentially increase,[97] the time frame to positively impact climate change is rapidly closing.[98] As the IPCC notes, "[t]he scientific evidence is unequivocal: climate change is a threat to human wellbeing and the health of the planet. Any further delay in concerted global action will miss the brief, rapidly closing window to secure a livable future."[99]

The Paris Climate Accords were designed to create a cooperative international environment wherein nations would work together making pledges to reduce greenhouse gas emissions, prepare action plans to meet those pledges, and monitor one another's progress toward those goals with the ultimate common goal of not only capping, but reducing emissions to avoid the most dire climate predictions.[100] While they focus

95. *Highlights of the Findings of the U.S. Global Change Research Program Climate Science Special Report*, CSSR, https://science2017.globalchange.gov/chapter/executive-summary/ [https://perma.cc/JZ8C-9PJM].

96. Lindsey & Dahlman, *supra* note 94.

97. NASA, *supra* note 90.

98. *Id.*

99. *Id.*

100. *The Paris Agreement*, Council on Foreign Relations, https://world101.cfr.org/global-era-issues/climate-change/paris-agreement [https://perma.cc/N5U2-AWQP] (July 25, 2023).

on dealing with a world facing a 2 degrees Celsius rise in temperature measured against the preindustrial era, they set a goal of keeping this rise below 1.5 degrees.[101] "The Obama administration, the U.S. pledged to cut greenhouse gas emissions to 25% below 2005 levels by the year 2025, a goal that the country is not on track to meet. In addition to pulling the U.S. out of its commitment, the Trump administration rolled back many federal efforts to reduce emissions."[102]

If current trendlines are left to proceed, the healthy environment that humans now have a right to will disappear. But the right itself will not. So, what does that mean? It should mean that once the healthy environment disappears, it then becomes incumbent upon states to *create* the healthy environment that we have a right to. Clearly, it is much easier to *preserve* the environment society already has rather than try to re-engineer it after society has been damaged beyond repair. Yet delay is what put the United States and the world behind on tackling climate change.

A proactive policy response in the United States was severely delayed, even though scientists were stating, since at least the 1980s, that action needed to be taken to lower harmful emissions.[103] As with COVID-19, political gamesmanship prevented meaningful policy formation and implementation. A false debate was triggered by Republicans over whether climate change was even happening, and once that debate was lost, it was followed by another false debate as to whether human activity was causing it.[104] This needlessly wasted four decades within which the United States could have been implementing prior policy targets via the Kyoto Protocols and been in a much better position by 2021 when the government was under President Biden and re-engaged in the Paris Climate Accords.[105]

"Earth's temperature has risen by an average of 0.14° Fahrenheit (0.08° Celsius) per decade since 1880, or about 2° F in total. The rate

101. Scott Detrow, *Biden Makes New Pledge for U.S. Greenhouse Gas Emissions: A 50% Cut*, NPR (Apr. 22, 2021, 6:01 AM ET), https://www.npr.org/2021/04/22/988051091/biden-makes-new-pledge-for-u-s-greenhouse-gas-emissions-a-50-cut [https://perma.cc/L5YY-SAMR].

102. *Id.*

103. Shannon Hall, *Exxon Knew About Climate Change Almost 40 Years Ago*, SCI. AM. (Oct. 26, 2015), https://www.scientificamerican.com/article/exxon-knew-about-climate-change-almost-40-years-ago/ [https://perma.cc/DM5P-V57G].

104. Rebecca Leber, *The First GOP Debate Reveals a Disturbing Level of Climate Change Denial*, VOX, https://www.vox.com/climate/23815966/republicans-climate-change-denial-trees [https://perma.cc/5NQK-Z9UJ] (Aug. 24, 2023, 11:05 AM EDT).

105. Riley E. Dunlap & Aaron M. McCright, *A Widening Gap: Republican and Democratic Views on Climate Change*, 50 ENV'T: SCI. AND POL'Y FOR SUSTAINABLE DEV. 26, 26 (2008).

of warming since 1981 is more than twice as fast: 0.32° F (0.18° C) per decade."[106] The decades-long period of dithering over policy instead of acting in accord with science cost the world an almost irretrievable 2°F temperature increase (1°C).[107]

Oil and gas companies spurred most of these false debates—successfully delaying climate policy formation so they could continue to realize massive profits from increased carbon emissions.[108] Like tobacco companies decades before them, which knew about cancer risks yet denied the linkage and fought public science to protect profit margins,[109] the oil and gas sector knew early on about the risks their products were causing: "[Exxon's] knowledge of climate change dates back to July 1977, when its senior scientist [said] 'In the first place, there is general scientific agreement that the most likely manner in which mankind is influencing the global climate is through carbon dioxide release from the burning of fossil fuels . . . .'"[110] He went on to warn the company that "doubling CO2 gases in the atmosphere would increase average global temperatures by two or three degrees—a number that is consistent with the scientific consensus today."[111]

The action the company took was to intentionally, and successfully, confuse the government and the public for the next several decades by eventually co-opting Republicans through generous campaign contributions into its cause[112] during the false debates about climate change.[113] "[E]xperts agree that Exxon became a leader in campaigns of confusion. By 1989 the company had helped create the Global Climate Coalition (disbanded in 2002) to question the scientific basis for concern

106. Lindsey & Dahlman, *supra* note 94.

107. Lindsay Maizland, *Global CLimate Agreements: Successes and Failures,* Council on Foreign Relations, Lindsay Maizland, https://www.cfr.org/backgrounder/paris-global-climate-change-agreements [https://perma.cc/Q3PG-DFYD] (Dec. 5, 2023, 2:46 PM).

108. *See, e.g.*, Jeffrey Pierre & Scott Neuman, *How Decades of Disinformation About Fossil Fuels Halted U.S. Climate Policy*, NPR (October 27, 2021, 10:35 AM ET), https://www.npr.org/2021/10/27/1047583610/once-again-the-u-s-has-failed-to-take-sweeping-climate-action-heres-why [https://perma.cc/A632-WJAN].

109. *See, e.g.*, Kelly D. Brownell & Kenneth E. Warner, *The Perils of Ignoring History: Big Tobacco Played Dirty and Millions Died. How Similar is Big Food?*, 87 Milbank Q. 259, 260 (2009).

110. Hall, *supra* note 103.

111. *Id.*

112. Michael T. Klare, *Here's Why the GOP Just Loves Fossil Fuels*, Grist (Nov. 18, 2014), https://grist.org/politics/heres-why-the-gop-just-loves-fossil-fuels/ [https://perma.cc/98F5-HUCZ].

113. *See* Hall, *supra* note 103.

about climate change."[114] This group was also active in helping to prevent the United States from signing the Kyoto Protocol in 1998 to control increasing greenhouse gas emissions.[115] "Exxon's tactic not only worked on the U.S. but also stopped other countries, such as China and India, from signing the treaty . . . ."[116] These cynical and self-serving maneuvers bought Exxon and other carbon giants lots of time and profits. "Half of the greenhouse gas emissions in our atmosphere were released after 1988."[117]

The Trump administration resurrected the old discredited talking points from the false climate change policy debates of the prior 40 years and struck a stubborn climate denial posture with disastrous consequences for both the country and the world.[118] "President Trump's climate denialism will probably be his most enduring environmental legacy. The Trump administration's encouragement of coal, oil, and gas combustion, and its weakening of emissions standards, are accelerating the release of greenhouse gases such as CO2 and methane, which will remain in the atmosphere for decades."[119]

The effect of these policy decisions will unleash untold damage on the healthy environment the United Nations has recognized that people have a right to. "The global warming caused by release of these gases will increase the frequency of heatwaves, coastal flooding, violent storms and wildfires, and expand the ranges of vector-borne diseases such as dengue virus, Zika virus, and West Nile virus."[120] Moreover, "[d]eteriorating air quality will increase global mortality from respiratory and cardiovascular conditions (e.g., acute myocardial infarction, stroke, chronic obstructive pulmonary disease, and lung cancer). Some parts of the world could become uninhabitable because of heat, humidity, and pollution, whereas others will suffer shortages of food and water."[121] Such effects are projected to lead to an additional 80,000 deaths over the next decade and increase the respiratory problems of over 1 million people just in the United States.[122]

However, Trump went further by actually undermining and then silencing federal scientists conducting climate change research that ran

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. Steffie Woolhandler et al., *Public Policy and Health in the Trump Era*, The Lancet Comm'n 705, 705, 735 (2021).

119. *Id.* at 734.

120. *Id.*

121. *Id.*

122. *Id.*

counter to the pro-fossil fuel political and economic agenda that the White House was pursuing.[123] This scientific censorship of climate change research manifested not only in restricting scientists from sharing their data, but also in revising and editing reports that were already developed – and even eliminating troublesome scientists: "Trump led a concerted effort to undermine federal scientific research, particularly research relating to climate change. The Trump administration's attacks on climate science dovetailed neatly with one of the former President's key goals: to roll-back climate regulations that scientific research shows would advance public health and environmental quality."[124]

Restrictions on access to scientific information was coupled with casting doubt on the veracity of that which emerged, undermining the public's ability to understand what was going on or oppose the administration's pro-carbon plans.[125] "Those actions created a culture of fear among federal scientists, leading some to voluntarily suppress or distort information at odds with former President Trump's agenda. Many of the scientists who did speak out were removed from their positions, while others were prevented from conducting further research on . . . climate change."[126] Under Trump, 154 documented instances of scientific censorship occurred, nearly three-quarters of which was directed at climate change research.[127] Moreover, "the Trump administration . . . removed scientific information from regulatory documents. For example . . . administration officials deleted information on the local health effects of climate change from regulatory documents supporting the weakening of greenhouse gas emissions controls."[128] Such measures were followed up by "removing and reassigning federal government scientists."[129]

Internationally, just as Trump ignored the WHO which could have helped inform better health policies for the United States during COVID-19, Trump ignored the IPCC which could have helped inform better climate policies for the United States. In this regard, by

123. *See* Romany M. Webb & Lauren Kurtz, *Politics v. Science: How President Trump's War on Science Impacted Public Health and Environmental Regulation*, 188 Prog. Mol. Biol. Transl. Sci. 65, 67, 69 (2022); *see also* Peter Stone*, Big Oil Remembers Friend Trump with Millions in Campaign Funds,* The Guardian, (Aug. 9, 2020, 5:00 PM), https://www.theguardian.com/us-news/2020/aug/09/big-oil-trump-campaign-donations-fossil-fuel-industry [https://perma.cc/F2FT-RX7M].

124. *Id.* at 67.

125. *Id.* at 68.

126. *Id.* at 69.

127. *Id.* at 67.

128. *Id.*at 68.

129. *Id.* at 69.

comparison with his predecessors, Trump did nothing out of the ordinary. The democratic Clinton administration moved the United States closer to the Kyoto Protocol, limiting greenhouse emissions;[130] the Bush administration then moved the United States away from that;[131] the Obama administration moved the United States closer to the Paris Climate Accords again, limiting greenhouse emissions;[132] the Trump administration then moved the United States away from that;[133] and finally the Biden administration re-engaged the Paris mechanism.[134] While this pattern also holds for environmental regulations in general, the damage done to the climate is far worse and longer lasting than replacing clean water regulations.[135]

> "Historically, there is always a pendulum to swing back and forth between Democratic and Republican administrations on the environment, and, theoretically, the environment can recover," said Jody Freeman, a professor of environmental law at Harvard and a former adviser to the Obama administration. "You can put rules back in place that clean up the air and water. But climate change doesn't work like that."[136]

Because of the accumulative nature of heat-trapping greenhouse gases, which can remain in the atmosphere for many years, exacerbating climate change, four years' worth of increased emissions has a devastating effect. These effects will be felt long after the Trump administration.[137] This reality is only compounded by the fact that total emissions have increased, which means one year of emissions under Trump with no meaningful climate change emissions policy is worse than several years under prior presidents. Michael Wara, a climate and energy expert at Stanford University, said, "[b]ecause global emissions in 2020 are so much higher than they were 10 or 20 or 30 years ago,

130. Robert A. Wampler, *The Clinton White House and Climate Change: The Struggle to Restore U.S. Leadership*, NAT'L SEC. ARCHIVE (Dec. 11, 2015), https://nsarchive2.gwu.edu/NSAEBB/NSAEBB537-Clinton-White-House-Frustrated-in-Attempts-to-Forge-US-Global-Leadership-on-Climate-Change-in-1990s/ [https://perma.cc/D6LQ-FWLA].

131. *Id.*

132. *Id.*

133. *The Paris Agreement, supra* note 100.

134. *Id.*

135. Coral Davenport, *What Will Trump's Most Profound Legacy Be? Possibly Climate Change*, N.Y. TIMES, https://www.nytimes.com/2020/11/09/climate/trump-legacy-climate-change.html [https://perma.cc/CTX2-HH6W] (Dec. 3, 2020).

136. *Id.*

137. *See id.*

that means that a year wasted in the Trump administration . . . has much bigger consequences than a year wasted in Ronald Reagan or George W. Bush or Bill Clinton's administration."[138]

Thus, the past four years essentially "represented a closing window in which the world's largest polluting economies, working together, could have charted a path toward slowing the rate of planet-warming emissions."[139] During the last year of the Trump presidency, in part due to loosened emissions standards by the United States, which historically produced 25% of the world's greenhouse gases,[140] carbon emissions reached their highest ever level in human history—417 parts per billion.[141] This is yet another indicator of proactive policy failure to combat climate change and reactive policy failure to address it once it happens, thereby undermining the freedom from natural disasters, a key freedom supporting the right to a healthy environment.

## IV. Enforcement

While international recognition of the right to a healthy environment is most welcome and long overdue, what are the enforcement prospects for this right? On the international level, there are very few. UNGA resolutions are not legally binding, though they may over time come to be seen as evidence of the *opinio juris* of enough states that usage via state practice can form into binding customary law.[142] Yet even then, there remains no meaningful international legal enforcement mechanism other than litigation before the ICJ or some other form of dispute resolution.[143]

Consequently, domestic law must provide the avenue for enforcement. Is there a legal basis to enforce the right to a healthy environment within states? Possibly. One of the reasons that Resolution 300 encountered so little opposition was because a vast majority of states recognize this right within their jurisdictions, constitutionally or otherwise.[144]

138. *Id.*

139. *Id.*

140. Hannah Ritchie, *Who Has Contributed Most to Global $CO_2$ Emissions?*, Our World in Data (Oct. 1, 2019), https://ourworldindata.org/contributed-most-global-co2 [https://perma.cc/ZCS8-BTGC].

141. Davenport, *supra* note 135.

142. *See* Brian D. Lepard, *Customary International Law as a Dynamic Process*, *in* Custom's Future: Int'l Law in a Changing World 62, 73-74 (Curtis A. Bradley ed., 2016).

143. *See* Matúš Štulajter, *Problem of Enforcement of an International Law – Analysis of Law Enforcement Mechanisms of the United Nations and the World Trade Organization*, 33 J. Mod. Sci. 325, 325-326 (2017).

144. Sarah Kuta, *Montana Youths Win Key Climate Lawsuit on Their Right to a 'Clean and Healthful Environment,'* Smithsonian Mag. (Aug. 15,

In the United States, although the right to a healthy environment is neither an explicit constitutional or statutory right, the web of strong federal environmental laws covering air, water, soil, and habitat work together to effectively deliver a healthy environment to Americans.[145] Litigation is a key enforcement mechanism provided by Congress and used by citizens to enforce federal environmental law.[146] At the state level, some have successfully sued to defend a right to a healthy environment. "A judge has ruled that the state of Montana is violating its citizens' constitutional right to a "clean and healthful environment" by allowing continued fossil fuel development without considering its effect on the climate . . . ."[147]

Because Montana, like a handful of other states, has a clause guaranteeing citizens a clean and healthy environment, a plaintiffs group led by youth "argued that an amendment to the Montana Environmental Policy Act, passed in 2011 and updated in May this year, is unconstitutional. The amendment prohibits state agencies from considering potential climate impacts and greenhouse gas emissions when granting permits for new oil and gas projects."[148] The District Court Judge agreed with them, writing Montanans "have a fundamental constitutional right to a clean and healthful environment, which includes climate as part of the environmental life-support system."[149]

Similar lawsuits are beginning to bear fruit at the federal level as well. In *Juliana v. United States*, a federal judge ruled "that a lawsuit brought by young Oregon-based climate activists can proceed to trial years after they first filed the lawsuit in an attempt to hold the nation's

2023), https://www.smithsonianmag.com/smart-news/montana-youths-win-key-climate-lawsuit-on-their-right-to-a-clean-and-healthful-environment-180982734/ [https://perma.cc/QY3H-Q93U].

145. *See Laws and Executive Orders*, EPA, https://www.epa.gov/laws-regulations/laws-and-executive-orders [https://perma.cc/7AGP-KWKP] ("A number of laws serve as EPA's foundation for protecting the environment and public health. However, most laws do not have enough detail to be put into practice right away. EPA is called a regulatory agency because Congress authorizes us to write regulations that explain the critical details necessary to implement environmental laws. In addition, a number of Presidential Executive Orders (EOs) play a central role in our activities.").

146. *See* David E. Adelman & Jori Reily-Diakun, *Environmental Citizen Suits and the Inequalities of Races to the Top*, 92 Univ. Colo. L. Rev. 377, 379 (2021).

147. Kuta, *supra* note 144.

148. *Id.*

149. *Id.*

leadership accountable for its role in climate change . . . ."[150] Specifically, the judge found "[i]t is a foundational doctrine that when government conduct catastrophically harms American citizens, the judiciary is constitutionally required to perform its independent role and determine whether the challenged conduct . . . is unconstitutional."[151]

If the right to a healthy environment becomes enforceable through climate change litigation under federal law, the national policy failures of the Trump presidency in both the COVID and climate change areas, which unleashed massive avoidable loss of life and property, could also result in massive legal exposure.

Environmental suits in the United States can bring the government back into compliance.[152] Criminal prosecutions against polluting corporations, such as the government's prosecution of British Petroleum for its Deepwater Horizon oil spill in the Gulf of Mexico,[153] seek to bring corporations back into compliance and punish them for malfeasance.[154] Tort suits, however, for damages suffered—such as for loss of life—are different in character. Much damage was done, and much life was lost as a result of Trump's policy failures encompassing his antipathy toward both COVID-19 and climate change.[155]

Any plaintiffs seeking damages against the government in U.S. courts would face significant sovereign immunity hurdles,[156] as would plaintiffs attempting to proceed internationally. Damages could be

150. *Oregon Youths' Climate Lawsuit Against U.S. Government Can Proceed to Trial, Judge Rules*, ASSOC. PRESS (June 1, 2023, 8:20 PM EST), https://apnews.com/article/youth-climate-lawsuit-trial-oregon-7ad2fa18f5276f12c64c0ce775aba2f6 [https://perma.cc/3NTW-PYUB].

151. *Id.*

152. *See, e.g.,* Juliana v. United States, 947 F.3d 1159, 1164 (2020) (arguing the U.S. government's failure to take steps to reduce U.S. greenhouse gas emissions violates the government's public trust-related obligations to future generations of citizens.).

153. Press Release, Office of Public Affairs. BP Exploration and Production Inc. Agrees to Plead Guilty to Felony Manslaughter, Environmental Crimes and Obstruction of Congress Surrounding Deepwater Horizon Incident (Nov. 15, 2012), https://www.justice.gov/opa/pr/bp-exploration-and-production-inc-agrees-plead-guilty-felony-manslaughter-environmental [https://perma.cc/M7AK-3PTV].

154. U.S. DEP'T. JUSTICE, JUSTICE MANUAL § 9-28.200 (2023) ("Holding corporations accountable for wrongdoing enables the government to be a force for positive change of corporate culture, and a force to prevent, discover, and punish serious crimes.").

155. Woolhandler et al., *supra* note 118, at 706.

156. *See generally* Vicki C. Jackson, *Suing the Federal Government: Sovereignty, Immunity, and Judicial Independence*, 35 GEO. WASH. INT'L L. REV. 521 (2003).

quantified, however, in the case of COVID-19, with directly attributable deaths and, in the case of climate change, with a calculation of the billions of dollars in property damage due to climate change-fueled wildfires and severe weather events divided by the 25% historical greenhouse gas emissions rate of the United States.[157]

## V. Conclusion

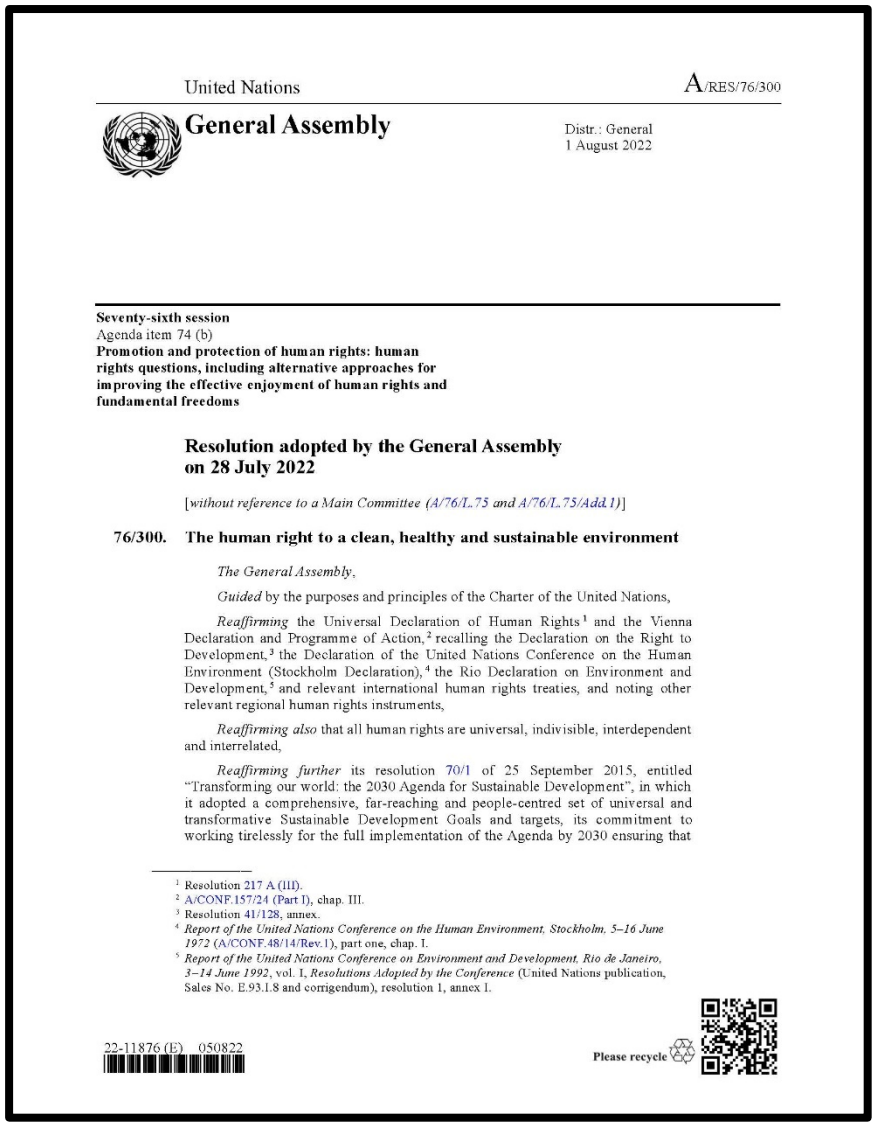
Rights are only as good as the policies supporting them and the enforcement mechanisms which ensure they are respected. The right to a healthy environment recognized by UNGA Resolution 300 is a right that already exists in many countries.[158] With respect to enforcement, these countries must be looked to individually for enforcement possibilities, as there is little prospect for enforcement on the international plane.[159] With respect to policies, both proactive and reactive policies should be in place in each of these countries to animate the freedoms within the right. In the United States, the Trump administration's policy failures on both the proactive and reactive fronts in the face of the COVID-19 pandemic and climate change offer salient examples of what not to do—as both examples completely undermine the freedom from disease and the from natural disasters, contained within the right to a healthy environment.

157. *See, e.g.* Robert A. Hahn, *Estimating the COVID-Related Deaths Attributable to President Trump's Early Pronouncements About Masks*, 51 Int'l J. Health Serv. 14 (2020); Alice C. Hill, *Climate Change and U.S. Property Insurance: A Stormy Mix*, Council on Foreign Aff., (Aug. 17, 2023, 4:17 PM), https://www.cfr.org/article/climate-change-and-us-property-insurance-stormy-mix [https://perma.cc/CRL4-GKBS]; Ritchie, *supra* note 140.

158. Achim Steiner et al., U.N. Env't Programme, What is the Right to a Health Environment?, at 8 (2022).

159. *See* Yann Aguila, *The Right to a Healthy Environment*, IUCN (Oct. 29, 2021), https://www.iucn.org/news/world-commission-environmental-law/202110/right-a-healthy-environment [https://perma.cc/KZM8-92HQ].

# Appendix



United Nations A/RES/76/300

General Assembly

Distr.: General
1 August 2022

**Seventy-sixth session**
Agenda item 74 (b)
**Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms**

**Resolution adopted by the General Assembly on 28 July 2022**

[*without reference to a Main Committee (A/76/L.75 and A/76/L.75/Add.1)*]

**76/300. The human right to a clean, healthy and sustainable environment**

*The General Assembly*,

*Guided* by the purposes and principles of the Charter of the United Nations,

*Reaffirming* the Universal Declaration of Human Rights[1] and the Vienna Declaration and Programme of Action,[2] recalling the Declaration on the Right to Development,[3] the Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration),[4] the Rio Declaration on Environment and Development,[5] and relevant international human rights treaties, and noting other relevant regional human rights instruments,

*Reaffirming also* that all human rights are universal, indivisible, interdependent and interrelated,

*Reaffirming further* its resolution 70/1 of 25 September 2015, entitled "Transforming our world: the 2030 Agenda for Sustainable Development", in which it adopted a comprehensive, far-reaching and people-centred set of universal and transformative Sustainable Development Goals and targets, its commitment to working tirelessly for the full implementation of the Agenda by 2030 ensuring that

[1] Resolution 217 A (III).
[2] A/CONF.157/24 (Part I), chap. III.
[3] Resolution 41/128, annex.
[4] *Report of the United Nations Conference on the Human Environment, Stockholm, 5–16 June 1972* (A/CONF.48/14/Rev.1), part one, chap. I.
[5] *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3–14 June 1992*, vol. I, *Resolutions Adopted by the Conference* (United Nations publication, Sales No. E.93.I.8 and corrigendum), resolution 1, annex I.

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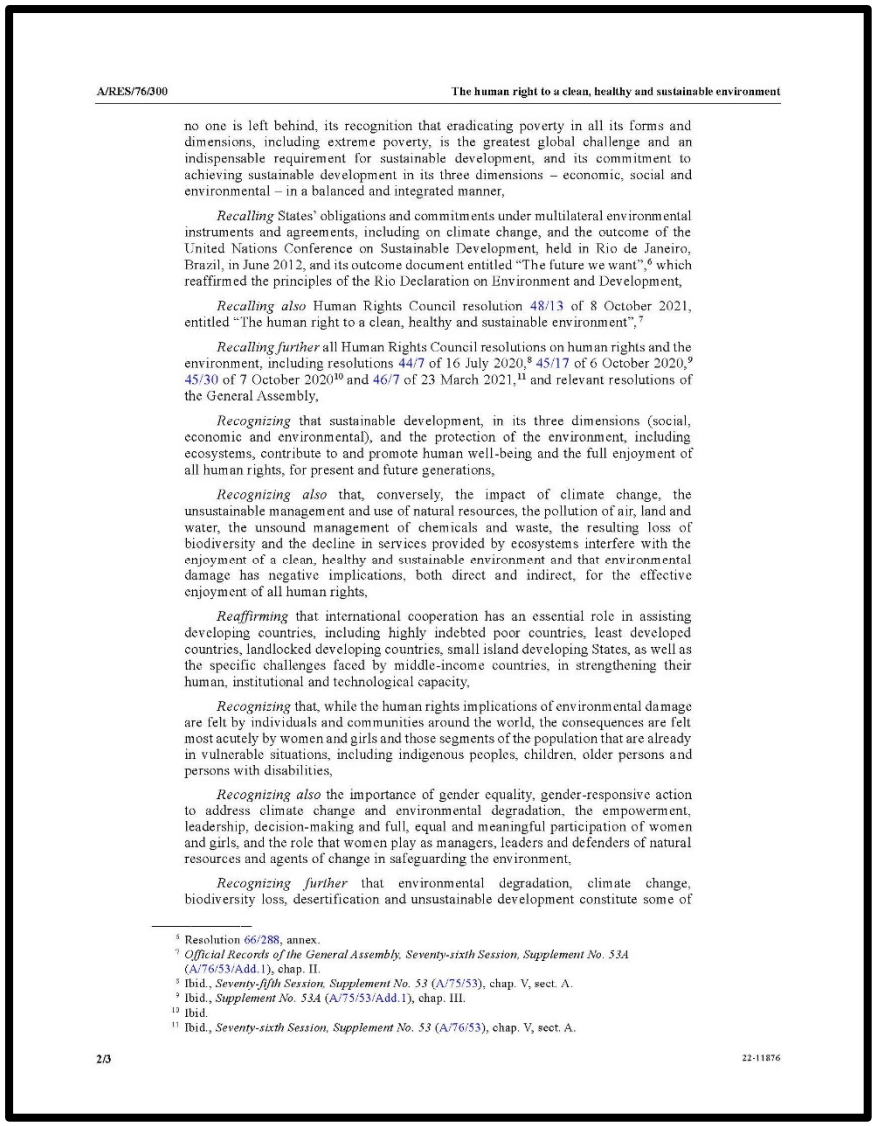




no one is left behind, its recognition that eradicating poverty in all its forms and dimensions, including extreme poverty, is the greatest global challenge and an indispensable requirement for sustainable development, and its commitment to achieving sustainable development in its three dimensions – economic, social and environmental – in a balanced and integrated manner,

*Recalling* States' obligations and commitments under multilateral environmental instruments and agreements, including on climate change, and the outcome of the United Nations Conference on Sustainable Development, held in Rio de Janeiro, Brazil, in June 2012, and its outcome document entitled "The future we want",[6] which reaffirmed the principles of the Rio Declaration on Environment and Development,

*Recalling also* Human Rights Council resolution 48/13 of 8 October 2021, entitled "The human right to a clean, healthy and sustainable environment",[7]

*Recalling further* all Human Rights Council resolutions on human rights and the environment, including resolutions 44/7 of 16 July 2020,[8] 45/17 of 6 October 2020,[9] 45/30 of 7 October 2020[10] and 46/7 of 23 March 2021,[11] and relevant resolutions of the General Assembly,

*Recognizing* that sustainable development, in its three dimensions (social, economic and environmental), and the protection of the environment, including ecosystems, contribute to and promote human well-being and the full enjoyment of all human rights, for present and future generations,

*Recognizing also* that, conversely, the impact of climate change, the unsustainable management and use of natural resources, the pollution of air, land and water, the unsound management of chemicals and waste, the resulting loss of biodiversity and the decline in services provided by ecosystems interfere with the enjoyment of a clean, healthy and sustainable environment and that environmental damage has negative implications, both direct and indirect, for the effective enjoyment of all human rights,

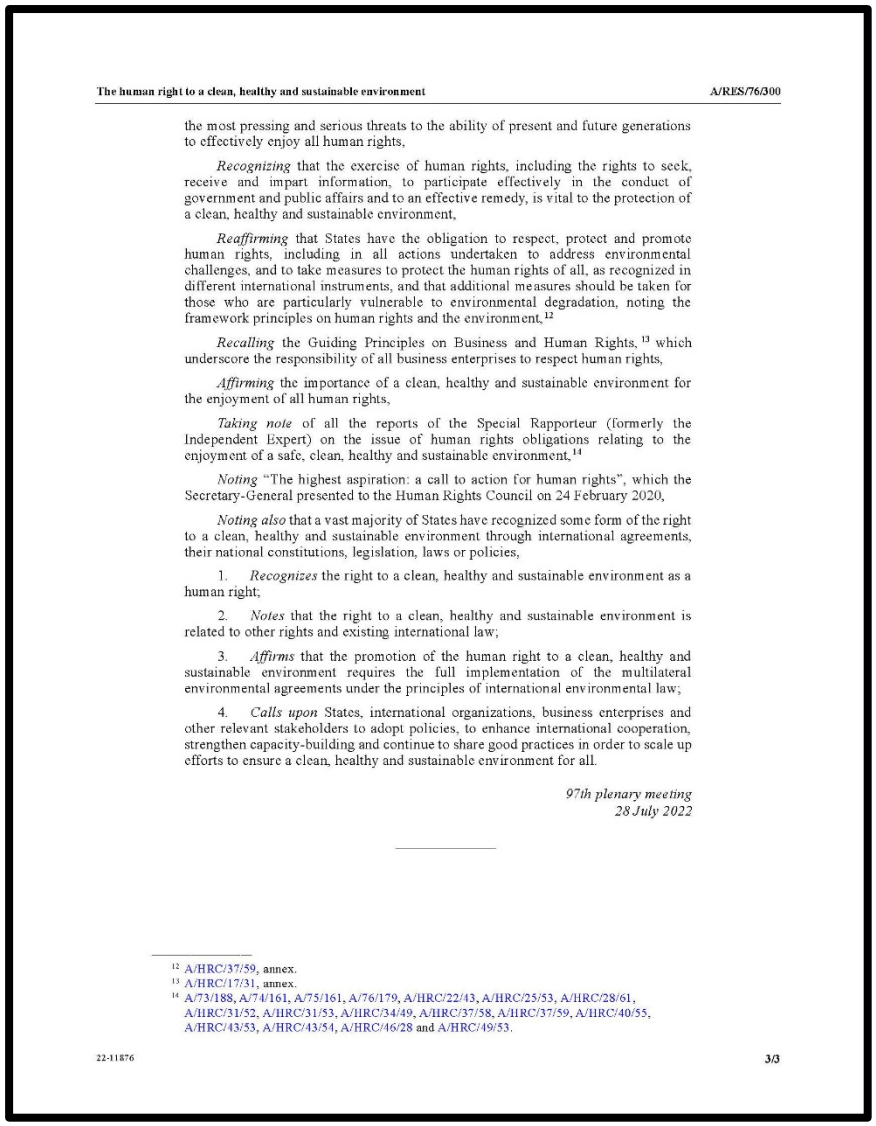
*Reaffirming* that international cooperation has an essential role in assisting developing countries, including highly indebted poor countries, least developed countries, landlocked developing countries, small island developing States, as well as the specific challenges faced by middle-income countries, in strengthening their human, institutional and technological capacity,

*Recognizing* that, while the human rights implications of environmental damage are felt by individuals and communities around the world, the consequences are felt most acutely by women and girls and those segments of the population that are already in vulnerable situations, including indigenous peoples, children, older persons and persons with disabilities,

*Recognizing also* the importance of gender equality, gender-responsive action to address climate change and environmental degradation, the empowerment, leadership, decision-making and full, equal and meaningful participation of women and girls, and the role that women play as managers, leaders and defenders of natural resources and agents of change in safeguarding the environment,

*Recognizing further* that environmental degradation, climate change, biodiversity loss, desertification and unsustainable development constitute some of

[6] Resolution 66/288, annex.
[7] *Official Records of the General Assembly, Seventy-sixth Session, Supplement No. 53A* (A/76/53/Add.1), chap. II.
[8] Ibid., *Seventy-fifth Session, Supplement No. 53* (A/75/53), chap. V, sect. A.
[9] Ibid., *Supplement No. 53A* (A/75/53/Add.1), chap. III.
[10] Ibid.
[11] Ibid., *Seventy-sixth Session, Supplement No. 53* (A/76/53), chap. V, sect. A.





the most pressing and serious threats to the ability of present and future generations to effectively enjoy all human rights,

*Recognizing* that the exercise of human rights, including the rights to seek, receive and impart information, to participate effectively in the conduct of government and public affairs and to an effective remedy, is vital to the protection of a clean, healthy and sustainable environment,

*Reaffirming* that States have the obligation to respect, protect and promote human rights, including in all actions undertaken to address environmental challenges, and to take measures to protect the human rights of all, as recognized in different international instruments, and that additional measures should be taken for those who are particularly vulnerable to environmental degradation, noting the framework principles on human rights and the environment,[12]

*Recalling* the Guiding Principles on Business and Human Rights,[13] which underscore the responsibility of all business enterprises to respect human rights,

*Affirming* the importance of a clean, healthy and sustainable environment for the enjoyment of all human rights,

*Taking note* of all the reports of the Special Rapporteur (formerly the Independent Expert) on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment,[14]

*Noting* "The highest aspiration: a call to action for human rights", which the Secretary-General presented to the Human Rights Council on 24 February 2020,

*Noting also* that a vast majority of States have recognized some form of the right to a clean, healthy and sustainable environment through international agreements, their national constitutions, legislation, laws or policies,

1. *Recognizes* the right to a clean, healthy and sustainable environment as a human right;

2. *Notes* that the right to a clean, healthy and sustainable environment is related to other rights and existing international law;

3. *Affirms* that the promotion of the human right to a clean, healthy and sustainable environment requires the full implementation of the multilateral environmental agreements under the principles of international environmental law;

4. *Calls upon* States, international organizations, business enterprises and other relevant stakeholders to adopt policies, to enhance international cooperation, strengthen capacity-building and continue to share good practices in order to scale up efforts to ensure a clean, healthy and sustainable environment for all.

*97th plenary meeting*
*28 July 2022*

[12] A/HRC/37/59, annex.
[13] A/HRC/17/31, annex.
[14] A/73/188, A/74/161, A/75/161, A/76/179, A/HRC/22/43, A/HRC/25/53, A/HRC/28/61, A/HRC/31/52, A/HRC/31/53, A/HRC/34/49, A/HRC/37/58, A/HRC/37/59, A/HRC/40/55, A/HRC/43/53, A/HRC/43/54, A/HRC/46/28 and A/HRC/49/53.