

# **Remedies for Environmental Injustice: Addressing the Localized Concentration of Air Pollution and Asthma among Newark's Poor**

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# Abstract

Pollution sources and repositories in urban areas have historically been concentrated in poorer, Black and Brown neighborhoods, creating overburdened communities which experience significant health repercussions. In the case of Newark's Ironbound, concentrated air pollution has created a community-wide asthma problem, and made what is sometimes understood to be a mild nuisance into a dangerous, even deadly, disease. Traditionally, Environmental Justice advocates have relied on disparate impact analysis under Title VI to fight the concentrating of pollution; however, following *Alexander v. Sandoval* and *South Camden Citizens in Action v. New Jersey Department of Environmental Protection* these options are foreclosed to the residents of the Ironbound. This paper seeks to investigate the available legal remedies for residents of Newark's Ironbound and similarly positioned communities that could be used to halt or possibly reverse the concentrating of pollution sources in their neighborhoods. Through a combination of policy changes and the use of hybridized legal schemes not typically associated with environmental law, the Ironbound may yet find relief from the asthma epidemic which has so far been unaddressed.

## I. Introduction

While the Civil Rights movement dominated the political landscape of the 1960s, it coincided with the birth of the modern environmental movement.<sup>1</sup> The creation of the Environmental Protection Agency occurred not long after the passage of the Civil Rights Act of 1964.<sup>2</sup> Outside of the federal government and its action, marginalized groups began to organize against the unmitigated release of pollutants into their communities, spawning the first organizations and legal actions which would eventually go on to define a field known as "environmental justice."<sup>3</sup> Environmental Justice (EJ) is more formally defined as "... the fair

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<sup>1</sup> Eileen Maura McGurty, *From NIMBY to Civil Rights: The Origins of the Environmental Justice Movement*, 2 ENVIRON. HIST. 301, 302-03 (1997).

<sup>2</sup> The Environmental Protection Agency was created in 1970. *The Origins of EPA*, EPA, <https://www.epa.gov/history/origins-epa> (last visited Apr. 29, 2022). The Civil Rights Act of 1964 was, as one would imagine, published in 1964. Civil Rights Act of 1964, P.L. 88-352, 78 Stat. 241 (codified at 42 U.S.C. § 1971 et seq. (2006)).

<sup>3</sup> McGurty, *supra* note 1, at 303-05.

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.”<sup>4</sup> In practice, the reality of the EJ movement has been a bitter battle fought by poor, minority communities against consistent efforts to force upon them the overwhelming burden of hosting industrial waste and garbage in their neighborhoods, all while being slowly stripped of any impactful legal tools which might provide them an opportunity to challenge these practices in the courts.

While certainly not for a lack of trying, few successful efforts have been made to fight the concentration of pollution in Black and Brown working-class neighborhoods. Pollution is released or stored in predominantly poor, Black, Hispanic, Asian, or Native American communities at a disparate rate, and this has been the case for decades.<sup>5</sup> Such was the case with 7 year old Leland Sewell and 8 year old Karaji Jones, both students at Newark’s Spencer Miller Community School in Newark’s Springfield/Belmont neighborhood.<sup>6</sup> Leland was born in 2009, premature and with underdeveloped lungs, which made him particularly susceptible to asthma.<sup>7</sup> Premature births, a phenomenon associated with exposure to air pollution during pregnancy,<sup>8</sup> are incredibly common in Newark, driving up the rate of asthma among the city’s children.<sup>9</sup> As of 2015, approximately 1 in 4 children in Newark had asthma, with rates being higher for Black and Hispanic children.<sup>10</sup>

Leland was well aware of his condition, and he and his family were determined not to allow it to prevent him from getting a proper education. According to a profile about the family in NJ.com, Leland’s father Abdula Sewell went to great lengths to ensure he could assist his son

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<sup>4</sup> *Environmental Justice*, EPA, <https://www.epa.gov/environmentaljustice>, (last updated Mar. 23, 2022).

<sup>5</sup> Haley M. Lane et al., *Historical Redlining is Associated with Present-Day Air Pollution Disparities in U.S. Cities*, 9 ENVIRON. SCI. TECH. LETTER 345, 345–46 (2022).

<sup>6</sup> Devna Bose, *‘It’s killing children and no one is talking about it.’ Asthma taking toll in Newark*, NJ.COM (Dec. 21, 2019, 1:15 PM), <https://www.nj.com/essex/2019/12/its-killing-children-and-no-one-is-talking-about-it-asthma-taking-toll-in-newark.html>

<sup>7</sup> *Id.*

<sup>8</sup> Leonardo Trasande et al., *Particulate Matter Exposure and Preterm Birth: Estimates of U.S. Attributable Burden and Economic Costs*, 124 ENVIRON. HEALTH PERSPECTIVES 1913, 1913 (2016).

<sup>9</sup> Linda Washburn, *New Jersey’s infant mortality gap is the nation’s largest*, NorthJersey (Dec. 13, 2017, 4:46 PM), <https://www.northjersey.com/story/news/health/2017/12/13/new-jersey-black-and-white-infant-mortality-gap-nations-largest/936343001/>.

<sup>10</sup> Jessie A. Gleason & Jerald A. Fagliano, *Associations of daily pediatric asthma emergency department visits with air pollution in Newark, NJ: utilizing time-series and case-crossover study designs*, 52 J. ASTHMA 815, 820 (2015).

should he suffer an asthma attack, even going to work as a teacher's aide at his son's school.<sup>11</sup> His family educated about the measures he would need to take to control his asthma; as Abdula Sewell put it "He knew when to sit down, when he needed to go to the nurse, . . . He was very aware of his conditions and limitations."<sup>12</sup>

One morning while at home with his father, Leland began to breathe heavily and indicated that something was wrong.<sup>13</sup> His father understood immediately what was occurring, but even being able to provide immediate assistance in the form of CPR and calling an ambulance, Leland's lungs were too weakened from his condition and exposure to air pollution to save him.<sup>14</sup> Leland was pronounced dead upon arriving at Newark's University Hospital; at only age seven, he had suffered cardiorespiratory arrest brought on by his asthma.<sup>15</sup> Only two-and-a-half years later, a grieving Sewell family received more tragic news: one of Leland's former classmates, a girl named Karaji Jones, who also had asthma had experienced an asthma attack while in school.<sup>16</sup> Karaji, then only eight years old, died of asthma as well.<sup>17</sup>

## *Structure of the Paper*

Leland's story is unfortunately one of many for similarly situated people around Newark, New Jersey. Asthma has wreaked havoc on the city's population, especially its children, as a result of poor air quality caused by the concentration of incinerators and low-density vehicle traffic around it. In this way, air pollution not only becomes a detriment to the health of the citizenry, but also a burden on the local education system and land values. This paper seeks to evaluate potential litigation strategies which might be used to challenge the discriminatory provision of air pollution permits in predominantly Black and Brown communities. In the following section, this paper will detail the health and non-health consequences of concentrated air pollution and explain why Newark, New Jersey has a uniquely significant issue with air pollution. Section III will review the history of

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<sup>11</sup> Bose, *supra* note 6.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

environmental justice and attempt to explain what the ramifications of failed challenges under 42 U.S.C. § 1983 and Title VI against discriminatory permit distribution mean for future litigation strategies. Finally, Section IV will explore potential future litigation strategies (and some non-legal, policy strategies) which might provide overburdened populations such as the Black population in Newark's Ironbound with the potential for relief from further exposure to concentrated air pollution.

Before continuing further, it is important to define a few key terms used throughout this paper. "Concentrated pollution" is used to refer to the concentration of waste or pollution sources within a marginalized community, and "concentrated air pollution" refers to the same concept except that only particulate matter, volatile organic compounds, greenhouse gasses, or otherwise toxic gasses are of concern. Poor air quality is also not used to mean any strictly scientific definition used in the Air Quality Index.<sup>18</sup> Rather, it is simply meant to refer to air with a large enough amount of air pollution as to have a significant effect on the health of anyone consistently breathing it.

## II. The Effects of Poor Air Quality on Health and Other Life Outcomes

As would be expected, long-term exposure to highly polluted air can lead to several health issues, especially those which affect the pulmonary and cardiovascular systems. Certain ailments and disabilities, such as asthma, have clear effects on overall health as well as effects on lifespan.<sup>19</sup> High levels of exposure to air pollution can also trigger the development of a number of non-pulmonary conditions. Among other conditions, high levels of exposure to air pollution may increase the risk of stroke and cancer,<sup>20</sup> as well as cutaneous diseases.<sup>21</sup> Air

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<sup>18</sup> *Air Quality Index (AQI) Basics*, AirNow, <https://www.airnow.gov/aqi/aqi-basics/>, (last visited Apr. 29, 2022).

<sup>19</sup> See generally Qi He & Xinde Ji, *The Labor Productivity Consequences of Exposure to Particulate Matters: Evidence from a Chinese National Panel Survey*, 18 INT'L K. ENVIRON. RSCH. & PUB. HEALTH 12859 (2021).

<sup>20</sup> Takashi Yorifuji et al., *Long-term exposure to traffic-related air pollution and the risk of death from hemorrhagic stroke and lung cancer in Shizuoka, Japan*, 15 Sci. Total Environ. 397, 397 (2013).

<sup>21</sup> Ioannis Manisalidis et al., *Environmental and Health Impacts of Air Pollution: A Review*, 8 FRONTIERS PUB. HEALTH, art. 14, 2020, at 2–3.

pollution also affects mental health, contributing to greater rates of depression.<sup>22</sup> Moreover, it is associated with decreased cognitive development of children and increased cognitive decline rates in adults who are chronically exposed.<sup>23</sup>

However, the consequences of long-term poor air quality exposure go far beyond poor health. Exposure to air pollution leads to decreased productivity, as chronically exposed workers must take time off to recover, with those who work outdoors most negatively affected.<sup>24</sup> While the effect of pollution on productivity has only recently become a topic of concern, early studies investigating the loss of labor due to air pollution are troubling. One study suggests that agricultural workers experience a statistically significant decline in productive working hours even when working under acceptable levels of ozone pollution, and that a 10 parts per billion decrease in ozone pollution might save the agricultural sector in the United States approximately \$700 million.<sup>25</sup>

Children similarly suffer with their ability to attend school. Increases in common air pollutants such as sulfur dioxide, ozone, and carbon monoxide have all been shown to increase absenteeism among young children.<sup>26</sup> Chronic absenteeism in turn leads to poor performance academically and the underdevelopment of social skills.<sup>27</sup> Poor academic performance and continued absenteeism are strong indicators of future negative life outcomes, including both violent and non-violent crime as well as alcoholism.<sup>28</sup> The most unsettling and tragic reality of this connection between air pollution exposure, school absenteeism, and negative life outcomes is perhaps how children and their families are punished for attempting to overcome the health risks that come from attending school

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<sup>22</sup> Naureen A. Ali & Adeel Khoja, *Growing Evidence for the Impact of Air Pollution on Depression*, 19 OSCHNER J. 4, 4 (2019).

<sup>23</sup> Kirsten Weir, *Smog in our brains*, APA (Aug. 2012), <https://www.apa.org/monitor/2012/07-08/smog#:~:text=Over%20the%20past%20decade%2C%20researchers,possibly%20even%20contribute%20to%20depression.>

<sup>24</sup> He & Ji, *supra* note 19, at 12859.

<sup>25</sup> See Matthew Neidell, *Air pollution and worker productivity*, IZA INST. LABOUR ECON. (2017).

<sup>26</sup> See generally A Ponka, *Absenteeism and respiratory disease among children and adults in Helsinki in relation to low-level air pollution and temperature*, 52 ENVIRON RES. 5234 (1990); M.R., Ransom & C.A. Pope III, *Elementary school absences and PM<sub>10</sub> pollution in Utah Valley*, 58 ENVIRON RES. 58204, 58204 (1992).

<sup>27</sup> MA Gottfried, *Chronic absenteeism and its effects on student's academic and socioemotional outcomes. Journal of Education for Students Placed at Risk*, 19 J. EDUC. STUDENTS PLACED AT RISK 53, 53-54 (2014).

<sup>28</sup> See generally Michael Rocque et al., *The Importance of School Attendance: Findings from the Cambridge Study in Delinquent Development on the Life-Course Effects of Truancy*, 63 CRIME & DELINQUENCY 592 (2016).

despite the risks that pollution exposure brings: Leland Sewell and his father did everything they could to ensure he could still attend school, and it cost him his life.<sup>29</sup>

The negative effects of pollution may be resolved in two manners: initial avoidance or, after exposure, remediation activities.<sup>30</sup> The former may be thought of as actions taken to avoid exposure in the first place, including staying indoors, avoiding heavy automobile traffic, and avoiding industrial zones, while remediation activities are those in which an individual recovers from the effects of air pollution post-exposure, such as taking time off work and school to allow the body to rest and heal.<sup>31</sup> While most remediation activities are (somewhat) viable and available options to individuals regardless of social and class status, avoidance of most pollution is generally only available to the wealthiest individuals.<sup>32</sup> Avoidance is preferable to remediation for a number of reasons: not only does avoidance of pollution prevent the lingering health consequences and general unpleasant feeling of having been exposed to pollution that even effective remediation fails to prevent, it also prevents the loss of productivity which occurs before one undergoes remedial activities.<sup>33</sup> Avoidance is, however, more difficult and more expensive to achieve, and is often not an option for poorer, typically Black urban individuals who live in close proximity to heavily-trafficked areas and industrial corridors.<sup>34</sup>

Asthma is a treatable and, though not technically curable, often negligible condition which does not need to restrict the lives of those who have it.<sup>35</sup> However, asthma's higher frequency in Black Americans, coupled with their greater risk of exposure to air pollution and typically lower ability to mitigate the disease's effects, turn this inconvenience for others into a serious, deadly affliction. Black Americans of all ages across the country are at greater risk of dying from asthma-related complications, such as Erica Garner, daughter of police brutality victim

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<sup>29</sup> Bose, *supra* note 6.

<sup>30</sup> See Sandra Aguilar-Gomez et al., *This is Air: The "Non-Health" Effects of Air Pollution* 1–3 (Nat'l Bureau of Econ. Rsch., Working Paper No, 29848, 2022).

<sup>31</sup> See *id.*

<sup>32</sup> See, e.g., Katharina Janke, *Air pollution, avoidance behaviour and children's respiratory health: Evidence from England*, 38 J. HEALTH ECON. 23 (2014).

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

<sup>34</sup> *Children's Environmental Health Disparities: Black and African American Children and Asthma*, EPA, [https://www.epa.gov/sites/default/files/2014-05/documents/hd\\_aa\\_asthma.pdf](https://www.epa.gov/sites/default/files/2014-05/documents/hd_aa_asthma.pdf) (last visited Apr. 29, 2022) (noting how children of racial minorities and poor children are generally exposed to greater levels of air pollution).

<sup>35</sup> *Asthma*, MAYO CLINIC, <https://www.mayoclinic.org/diseases-conditions/asthma/symptoms-causes/syc-20369653> (last visited Sept. 17, 2022).

Eric Garner.<sup>36</sup> Following her father's killing, Erica became a leading activist against police brutality, helping to memorialize her father's last words of "I can't breathe" as a rally cry against injustice and violence committed by police.<sup>37</sup> In 2017, at age 27, she died of a heart attack brought on by an earlier asthma attack.<sup>38</sup> Erica's story is not unique among Black adults, who are the demographic with the highest rate of asthma attacks.<sup>39</sup> In this way, asthma is a racialized and socialized disease: If you are White and financially stable, it is rarely a threat. If you are Black and poor, it may very well take your life.

## *Air pollution in and around Newark's East Ironbound Neighborhood*

Public perceptions of New Jersey as a whole see it as an extremely over-polluted state.<sup>40</sup> From time to time these perceptions even find their way into legal opinions of our nation's highest Court, such as when Justice Rehnquist decreed in *City of Philadelphia v. New Jersey*<sup>41</sup> that the sanitary landfills the Court required New Jersey to keep open "needless to say, do not help New Jersey's aesthetic appearance nor New Jersey's noise or water or air pollution problems."<sup>42</sup> This is not to say that this perception is baseless or misapplied, and New Jersey receives low grades on air quality from state and private environmental reports alike.<sup>43</sup> Poor air quality across the state contributes significantly to New Jersey's high rate of asthma and pulmonary diseases.<sup>44</sup>

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<sup>36</sup> Chase Winter, *Black Lives Matter activist Erica Garner dies aged 27*, DW (Dec. 31, 2017), <https://www.dw.com/en/black-lives-matter-activist-erica-garner-dies-aged-27/a-41982761>.

<sup>37</sup> *Id.*

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

<sup>39</sup> *Asthma Facts and Figures*, ASTHMA AND ALLERGY FOUND. AM., <https://www.aafa.org/asthma-facts/> (last visited Apr. 29, 2022).

<sup>40</sup> Paul J. Lioy & Panos G. Georgopoulos, *New Jersey: A Case Study of the Reduction in Urban and Suburban Air Pollution from the 1950s to 2010*, 119 ENVIRON. HEALTH PERS. 1351, 1351 (2011).

<sup>41</sup> 437 U.S. 617 (1978).

<sup>42</sup> *Id.* at 630.

<sup>43</sup> See, e.g., Jeff Tittel, *New Air Report Shows NJ Still an "F" – Worst Air Quality in Nation*, SIERRA CLUB (Apr. 26, 2020), <https://www.sierraclub.org/new-jersey/blog/2020/04/new-air-report-shows-nj-still-f-worst-air-quality-nation>. EPA collection of air quality data is disaggregated at specified data collection points and not at the state level, though EPA air quality report maps reveal consistently low AQI in New Jersey. See, e.g., *Our Nation's Air: Trends through 2020*, EPA, <https://gispub.epa.gov/air/trendsreport/2021/> (last visited Apr. 29, 2022).

<sup>44</sup> *Asthma in New Jersey*, NJGov (Mar. 22, 2017), <https://www.nj.gov/health/fhs/chronic/asthma/in-nj/#:~:text=In%20New%20Jersey%2C%20more%20than,and%20167%2C000%20children%20have%20asthma.>



Air pollution in the East Ironbound and other neighborhoods in Newark's East Ward primarily arrives from two main sources: traffic and incineration plants. The former is a major source of air pollution due to the nature of Newark's geography: NJ 21, I-280, I-78 and US 1/9<sup>45</sup> pen in the East Ward and expose the area's residents to an immense amount of carbon dioxide, perhaps as much as 1,000,000 metric tons of CO<sub>2</sub> per year.<sup>46</sup> Little of this air pollution is from local sources as well, as Newark happens to sit along the commuter path for thousands working in and around New York City and Newarkers themselves frequently do not own a car.<sup>47</sup> This leaves children at nearby schools such as Hawkins Street Elementary School in critical danger of asthma attacks.<sup>48</sup> As previously mentioned, one in four students in Newark have been diagnosed with asthma.<sup>49</sup> The latter source is also a significant contributor to air pollution in the city. Newark's East Ward is home to the Covanta Essex Incinerator, one of the largest of its kind, which burns over a million tons of garbage in the city each year.<sup>50</sup> Trash enters Covanta Essex from New York City and 22 municipalities around Essex county in order to fuel the burning.<sup>51</sup> Hundreds of thousands of homes and commercial properties in Essex County benefit from the incinerator as a power source, while Newark's East Ward bears the full burden of the toxic air produced by this facility.<sup>52</sup> For the predominantly Black and Brown city of Newark, asthma triggers are overly abundant and must be recognized as a serious impediment to the population's maintenance of its health and educational endeavors.

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<sup>45</sup> <http://nj.street-map.us/newark/>

<sup>46</sup> PAUL ALLEN ET AL, NEWARK COMMUNITY IMPACTS OF MOBILE SOURCES EMISSIONS 11, (MJB&A ed., 2020).

<sup>47</sup> *Percentage of Households w/o a car*, BikesatWork,

[https://web.archive.org/web/20121006060349/http://www.bikesatwork.com/carfree/census-lookup.php?state\\_select=ALL\\_STATES&lower\\_pop=250000&upper\\_pop=999999999&sort\\_num=5&show\\_rows=25&first\\_row=0](https://web.archive.org/web/20121006060349/http://www.bikesatwork.com/carfree/census-lookup.php?state_select=ALL_STATES&lower_pop=250000&upper_pop=999999999&sort_num=5&show_rows=25&first_row=0), (last visited Apr. 29, 2022).

<sup>48</sup> *Id.*

<sup>49</sup> Patti Verbanas, *Preventing Pediatric Asthma Deaths*, RutgersToday (Mar. 30, 2022),

<https://www.rutgers.edu/news/preventing-pediatric-asthma-deaths>.

<sup>50</sup> Devin Michael & Ramon Tavaréz, *Covanta: Ironbound's Unwanted Neighbor*, ENVIRON. JUST. IN THE IRONBOUND, <https://www.ejintheironbound.com/covanta> (last visited Apr. 29, 2022).

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

<sup>52</sup> *Id.*

# III. History of Environmental Justice & Air Quality Control Regulations

Some attribute the birth of the EJ movement to the Memphis Sanitation Workers' Strike, which called for improved pay and working conditions for the predominantly-Black sanitation workers exposed to the city's garbage.<sup>53</sup> The first time environmentalism was promoted in our courts from an EJ perspective, however, was in the case *Bean v. Southwestern Waste Management Corp.*,<sup>54</sup> where residents of Houston's then sole middle-class Black neighborhood Northwood Manor challenged the distribution of landfill permits for the construction of so-called sanitary landfills by the city.<sup>55</sup> The plaintiffs in *Bean* challenged the decision to grant a permit to Southwestern Waste Management on the grounds that the Texas Department of Health had been motivated by racial discrimination when making it, and as such acted in violation of 42 U.S.C. § 1983.<sup>56</sup> The Southern District of Texas rejected granting an injunction for construction and operation of the landfill on the grounds that the plaintiffs had not established a substantial likelihood of success on the merits of their claim, citing little evidence of discriminatory purpose and insufficient statistical proof.<sup>57</sup>

Over a decade later, another challenge to discriminatory granting of landfill permits was made in *East-Bibb Twiggs Neighborhood Assoc. V. Macon Bibb Planning & Zoning Comm'n*.<sup>58</sup> The plaintiffs in *East-Bibb* argued both on the basis of a violation of § 1983 and under the Equal Protection Clause that granting the permit to operate the landfill in a predominantly Black community was racially-motivated discrimination and denied them equal protection under the law, respectively.<sup>59</sup> However, both the Middle District of Georgia

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<sup>53</sup> *Environmental Justice* Timeline, EPA, <https://www.epa.gov/environmentaljustice/environmental-justice-timeline> (last updated Aug. 3, 2021).

<sup>54</sup> 482 F. Supp. 673 (S.D. Tex. 1979). The lawyer who argued the plaintiffs' case in *Bean* was Linda McKeever Bullard, the wife of Dr. Robert D. Bullard who is considered to be the father of the field of environmental justice. See *infra* note 63 and accompanying text.

<sup>55</sup> *Bean*, 482 F. Supp. at 675.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 677.

<sup>58</sup> 888 F.2d 1573 (11th Cir. 1989).

<sup>59</sup> *Id.* at 1574.

and the Eleventh Circuit held that the Black property owners had not shown that the Equal Protection Clause was violated because no discriminatory intent was proven.<sup>60</sup> Ultimately, 42 U.S.C. § 1983 and the Equal Protection Clause standing alone, two of the all-purpose tools for civil rights litigation, failed to produce meaningful results as far as environmental justice was concerned.<sup>61</sup> Given that proving discriminatory intent by traditional means was effectively a non-option, environmental justice advocates began to realize that courts would not seriously consider the merits of their claims if they could not back up these claims with significant scientific evidence providing statistical proof of intent. Even laws which seemingly required no more than a showing of discriminatory impact, such as Title VI of the Civil Rights Act of 1964,<sup>62</sup> could not be effectively utilized with the lack of scientific evidence then available. This would lead to a statistics revolution within the field of environmental justice, spearheaded by a figure close to the litigation in *Bean*.

## *The Scientific Revolution behind*

## *Environmental Justice & Federal Response*

In the face of early defeat in the courts, proponents of the then-burgeoning study of environmental justice sought to collect the evidence necessary to establish discriminatory patterns of behavior in how pollution permits were distributed. Enter Dr. Robert Bullard, the husband of attorney Linda McKeever Bullard who had advocated in *Bean* on behalf of the plaintiffs,<sup>63</sup> who would go on to become known as the father of environmental justice.<sup>64</sup> While studying the case his wife was preparing, Bullard observed that all of Houston's city-owned landfills were in Black neighborhoods, despite Houston's population only being 25% Black.<sup>65</sup> Eventually, Bullard revolutionized environmentalism, challenging the "business-as-usual"

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<sup>60</sup> *Id.* at 1576.

<sup>61</sup> Sandra L. Geiger, *An Alternative Legal Tool for Pursuing Environmental Justice: The Takings Clause*, 31 COLUM. J. L. & SOC. PROBS. 201, 203 (1998).

<sup>62</sup> This was, however, an incorrect assumption. See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 287 (1978); see also *Alexander v. Sandoval*, 532 U.S. 275 (2001).

<sup>63</sup> Gregory Dicum, *Meet Robert Bullard, the father of environmental justice*, GRIST (Mar. 15, 2006), <https://grist.org/article/dicum/>.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

environmental advocacy typically espoused by wealthier, White environmental groups and helping to spawn significant public interest in the polluting of marginalized communities.<sup>66</sup>

Dr. Bullard was far from the only academic interested in providing the science needed to document the concentration of pollution in Black neighborhoods and back up disparate impact claims in our courts. Following a sit-in protest against Warren County, North Carolina for its provision of permits for the construction of PCB landfills in Black neighborhoods, the federal Government Accountability Office published the 1983 report “Siting of Hazardous Waste Landfills and Their Correlation with Racial and Economic Status of Surrounding Communities.”<sup>67</sup> This report found that roughly 75% of hazardous waste landfills were located in communities where Black Americans living below the poverty line comprised at least 25% of the local population.<sup>68</sup> Four years later, the United Church of Christ Commission on Racial Justice published its report “Toxic Wastes and Race in the United States,”<sup>69</sup> frequently referred to as the 1987 Church of Christ Report. This study reported that approximately three out of five Hispanic and Black Americans and half of all Asian/Pacific Islander, and Native Americans lived in a community with at least one abandoned or uncontrolled toxic waste site.<sup>70</sup>

Scientific support for concentration of pollution in majority-minority communities continued to grow through the late 80s and early 90s, culminating in the development of the EPA’s 1998 Interim Guidance (amended and republished in 2000).<sup>71</sup> The Interim Guidance provided complainants to the EPA’s Office of Civil Rights with instructions on how to more effectively prepare complaints challenging permit distribution under Title VI.<sup>72</sup> Though somewhat vague, the language of the Interim Guidance was littered with references to disparate impact analysis. This was important because the Supreme Court had narrowed Title VI to only address cases of intention discrimination,<sup>73</sup> and as such disparate impact analysis would only

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<sup>66</sup> ROBERT D. BULLARD, *CONFRONTING ENVIRONMENTAL RACISM: VOICES FROM THE GRASSROOTS* 7 (Robert D. Bullard ed., 1999).

<sup>67</sup> GAO, *SITING OF HAZARDOUS WASTE LANDFILLS AND THEIR CORRELATION WITH RACIAL AND ECONOMIC STATUS OF SURROUNDING COMMUNITIES* (1983).

<sup>68</sup> *Id.* at 1–3.

<sup>69</sup> COMM’N FOR RACIAL JUST., *UNITED CHURCH OF CHRIST, TOXIC WASTES AND RACE IN THE UNITED STATES* (1987).

<sup>70</sup> *Id.* at xiv.

<sup>71</sup> EPA, *Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs*, 65 FED. REG. 39650 (2000) (hereinafter “Interim Guidance”).

<sup>72</sup> *Id.*

<sup>73</sup> See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 287 (1978).

be conducted through the lens of regulations put in place by the funding federal agencies under § 602 of Title VI.<sup>74</sup> The EPA had made it apparently clear that it was prepared to enforce these regulations, however. For instance, while this guideline provided that they would “not describe how [the] EPA would determine what constituted an adverse impact for Title VI purpose,” it did note that the EPA Office of Civil Rights would determine whether the impact of permit distribution “is both adverse and borne disproportionately by a group of persons based on race, color, or national origins and, if so, whether that impact is justified.”<sup>75</sup>

The strong advocacy and wealth of literature produced on the topics of environmental justice and concentration of pollution by people like Dr. Robert Bullard and the members of the United Church of Christ Commission brought these issues national attention. Many were convinced that disparate impact analysis under Title VI would serve as an effective tool in the legal battle for environmental justice and, based on the Interim Guidance, at least some within the federal government were inclined to agree. Three years after the publication of the Interim Guidance, the Supreme Court would find that, in fact, this was not so.

### *Alexander v. Sandoval & South Camden Citizens in Action v. New Jersey Dep't. Env't Prot.*

Progress in the development of legal strategies for thwarting discriminatory concentrating of pollution permits was effectively ground to a halt following the Supreme Court case *Alexander v. Sandoval*.<sup>76</sup> *Sandoval* was unconcerned with environmental justice; rather, the case centered on a policy of the Alabama Department of Public Safety in which driver's license tests were only given in English.<sup>77</sup> The plaintiffs brought suit under Title VI, claiming that the policy was discriminatory on the basis of national origin.<sup>78</sup> While federal courts had previously interpreted Title VI's § 601 to provide for a private right of action to enjoin policies which disparately impact individuals on protected bases,<sup>79</sup> the Supreme Court held that no such right existed, and that it was solely within the responsibility and power of the applicable

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<sup>74</sup> Tanya L. Miller, *Alexander v. Sandoval and the Incredible Disappearing Cause of Action*, 51 CATHOLIC UNIV. L. REV. 1393, 1395 (2002).

<sup>75</sup> Interim Guidance, *supra* note 71, at 39654.

<sup>76</sup> 532 U.S. 275 (2001).

<sup>77</sup> *Id.* at 279.

<sup>78</sup> *Id.*

<sup>79</sup> See, e.g., *Elston v. Talladega County Bd. of Educ.*, 997 F.2d 1394 (11th Cir. 1993).

federal agency to act in the face of activities which had a discriminatory impact.<sup>80</sup> The Court in *Sandoval* explicitly rejected the notion that disparate impact analysis could serve as the basis for attacking discriminatory activity under § 601.<sup>81</sup> Such activities were deemed by the Court in *Sandoval* as wholly permissible under § 601.<sup>82</sup>

*Sandoval* was a shocking upset for many, as it was widely understood before the case that claims under § 601 allowed for disparate impact analysis.<sup>83</sup> Though more recent case law had indicated a shift in the Court's jurisprudence, the majority's assumption that federally-funded activities with discriminatory impact are not proscribed by § 601 was not unchallenged, and both prior case law from the Supreme Court in *Lau v. Nichols*<sup>84</sup> and the existing practices of federal agencies at the time suggested that the use of disparate impact analysis was permissible when challenging regulations. Of the 40 federal agencies which developed regulations that prohibited federal grants from going to programs that had a discriminatory effect in their implementation after the passage of the Civil Rights Act, 26 of them continued to practice this principle by developing new and appropriate regulations just prior to the case's decision.<sup>85</sup> Furthermore, the First, Second, Fourth, Fifth, Sixth, Ninth, and Tenth Circuits had all decided cases which supported the assumption that Title VI allowed for a private right of action.<sup>86</sup> Title VI was arguably the provision of the Civil Rights Act with the greatest potential to create meaningful change: by preventing discriminatory programs from receiving federal funding, plaintiffs bringing Title VI held significant bargaining power in their gambit to force whatever public entity they were targeting to comply with the Civil Rights Act.<sup>87</sup> As shocking and upsetting to environmental justice advocates as this loss had been, one litigation route still remained open under Title VI. However, it too would soon be rendered wholly ineffective for the citizens of Newark, and many other.

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<sup>80</sup> *Sandoval*, 532 U.S. at 286–88.

<sup>81</sup> *Id.* at 280 ("Second, it is similarly beyond dispute – and no party disagrees – that § 601 prohibits only intentional discrimination.").

<sup>82</sup> *Id.* at 281.

<sup>83</sup> See generally The Harvard Law Review Association, *After "Sandoval": Judicial Challenges and Administrative Possibilities in Title VI Enforcement*, 116 HARV. L. REV. 1774 (2003) [hereinafter *After Sandoval*].

<sup>84</sup> See *Lau v. Nichols*, 414 U.S. 563 (1974).

<sup>85</sup> *After Sandoval*, *supra* note 83, at 1776.

<sup>86</sup> Miller, *supra* note 74, at 1405–07.

<sup>87</sup> Miller, *supra* note 74, at 1394–95.

The alternative hope for EJ activists became Title VI's § 602, which empowers federal departments and agencies to develop their own regulations to enforce the mandate of § 601 and was left relatively undisturbed by the pronouncements in *Sandoval*.<sup>88</sup> However, its tenure as an effective environmental justice tool was short-lived. Taking inspiration from *Bean*, the plaintiffs in *South Camden Citizens in Action v. N.J. Department of Environmental Protection*<sup>89</sup> sought to enforce a private right of action in making use of 42 U.S.C. § 1983 to demand that the EPA actually enforce its disparate impact discrimination regulations created under Title VI § 602, which were unaffected by *Sandoval*<sup>90</sup> and would entail the agency suspending funding to the NJDEP until it considered the discriminatory impact that its provision of pollution permits had.<sup>91</sup> *South Camden* primarily concerned the allowance of an air pollution permit to St. Lawrence Cement Co., L.L.C., which intended to open a slag-processing site in the Camden neighborhood of Waterfront South.<sup>92</sup> The community in the affected neighborhood, which held 20% of the city's contaminated industrial sites,<sup>93</sup> was at that time 63% Black and 28.3% Hispanic.<sup>94</sup> Yet the Third Circuit ultimately rejected the argument that 42 U.S.C. § 1983 could be parlayed with § 602 of Title VI to revive the potential for a private right of action to enforce Title VI regulations, leaving the citizens of Waterfront South without a theory in federal law.<sup>95</sup>

## **IV. Progress after *Sandoval* and *South Camden***

*Sandoval* and *South Camden* meant disaster for proponents of environmental justice, halting a decade's worth of efforts centered around Title VI-based litigation strategies. Over two decades later, few lawsuits have successfully challenged the distribution of pollution

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<sup>88</sup> Civil Rights Act of 1964, § 602 P.L. 88-352, 78 Stat. 241.

<sup>89</sup> 274 F.3d 771 (3d. Cir. 2001).

<sup>90</sup> *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001) (“[W]e assume for purposes of this decision that § 602 confers the authority to promulgate disparate-impact regulations; the question remains whether it confers a private right of action to enforce them.”).

<sup>91</sup> *Id.* at 776.

<sup>92</sup> *Id.* at 775.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 774, n. 1.

<sup>95</sup> *Id.* at 778.

permits or even been successful in forcing the EPA or other federal agencies involved in administering environmental justice to abide by the regulations it put in place under § 602.<sup>96</sup> However, several policy and litigation strategies may be available to revitalize the environmental justice movement, all of which would have implications for marginalized communities in Newark, New Jersey.

## *Policy Option & Traditional Option I:*

### *Empowering the EPA's Office of Civil Rights*

The EPA has struggled to effectively engage with environmental justice complaints for most of its history. Political willpower at the agency to address EPA OCR complaints has been low, historically, in large part due to a reluctance to punish state and local fund recipients which EPA leadership considered vital partners in enforcing environmental regulations.<sup>97</sup> However, the EPA is also well suited to address issues of environmental racism because: 1) its control over funding provided to state environmental protection agencies gives the agency significant leverage over state agencies, such that they must make a sincere effort to comply with EPA regulations touching on discriminatory permit distribution, and 2) the EPA has historically not relied on a particularly complicated complaint filing system, which makes filing a complaint easier for groups or individuals who are not well versed with environmental justice law or who otherwise have difficulty conducting preliminary discovery.<sup>98</sup>

Many EJ advocates will always consider empowering the EPA as an effective enforcer of Title VI to be a top priority because the agency can affect change on a national level.<sup>99</sup> However, it is perhaps not worth putting too much effort into attempts to renovate the EPA into an active, impactful environmental justice organization. Even recently, the EPA still fails to address complaints to the EPA OCR in a timely manner, resulting in cases such as *Californians for Renewable Energy v. EPA*,<sup>100</sup> where the plaintiff organization obtained an equitable remedy whereby the Southern District of California ordered the EPA to follow the

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<sup>96</sup> One notable exception, however, is *Californians for Renewable Energy v. EPA*. No. C 15-3292 SBA, 2018 WL 1586211, at 17 (S.D. Cal. 2018).

<sup>97</sup> Tony LoPresti, *Realizing the Promise of Environmental Civil Rights: The Renewed Effort to Enforce Title VI of the Civil Rights Act of 1964*, 65 ADMIN. L. REV. 757, 774–75 (2013).

<sup>98</sup> *Id.* at 765–66.

<sup>99</sup> *Id.* at 772.

<sup>100</sup> 2018 WL 1586211 (S.D. Cal. 2018).



schedule it put in place for addressing environmental justice complaints.<sup>101</sup> Still, this route is worth considering expending some effort on because, on the seemingly slim chance that the EPA began effectively enforcing its Title VI regulations and was willing to withhold funding from state entities engaging in discriminatory pollution permit distribution, the overburdened citizens of Newark would have a powerful tool at their disposal to prevent the building of further dumps and incinerators within the city. Newark's position in the Third Circuit means that plaintiffs coming to the federal court system from it are bound by *South Camden*, and an active EPA that took § 602 into its own hands would allow these affected citizens to potentially avoid the courts and bypass the near impassable roadblock that is *South Camden*.

## *Policy Option & Traditional Option II:*

### *Seeking State & Local Protection*

Considering the lack of results achieved by the EPA, whether due to lack of political motivation or inability to effectively manage civil rights claims, many proponents of environmental justice have turned to local and state governments for additional protections against racialized exposure to air pollution. New Jersey, for instance, recently passed what some consider one of the strongest environmental justice bills in the country.<sup>102</sup> Said bill, among other things, requires the creation of a list of communities "overburdened" with exposure to pollution, updating of this list every two years to ensure that special attention is given to avoid further overburdening, and publication on city council websites and in local newspapers of environmental impact statements at least 60 days ahead of any air permit being granted.<sup>103</sup> It also requires state entities to rely on less discriminatory measures if complainants present them.<sup>104</sup> As of 2021 nearly every state has passed a bill specifically addressing racialized environmental justice.<sup>105</sup> Interest in environmental justice continues to

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<sup>101</sup> *Id.* at 17.

<sup>102</sup> N.J. STAT. ANN. § 13:1D-157 (West, 2021).

<sup>103</sup> *Id.* at. § 13:1D-157 to § 13:1D-161 (West, 2021).

<sup>104</sup> *Id.*

<sup>105</sup> *State and Federal Environmental Justice Efforts*, NCSL (Jan. 13, 2022), <https://www.ncsl.org/research/environment-and-natural-resources/state-and-federal-efforts-to-advance-environmental-justice.aspx>.

grow among state legislators, as many new bills on the subject are being considered including 150 new bills in 2021 alone.<sup>106</sup>

These state-level protections have the benefit of being tailored more closely to the needs of local communities while simultaneously providing the same level of coverage that EPA regulations would provide due to their ubiquitous nature. However, they also suffer from many of the same drawbacks that empowering the federal EPA do, namely a lack of meaningful enforcement mechanisms. For the poor, Black & Brown population of Newark affected by the aforementioned New Jersey bill, for instance, no explicit mention of an enforcement mechanism is present in its text.<sup>107</sup> Rather, enforcement appears to require invoking the state's administrative procedure act, which has the drawback of disallowing judicial review until the final action of the challenged agency.<sup>108</sup> With the rate at which the NJDEP and similarly situated state environmental protection agencies address permitting complaints, this may leave complainants with little time to prepare a case or seek an injunction before bringing the issue to court. The NJDEP was also the antagonistic force in *South Camden*, and is not likely to inspire hope in many should it be saddled with the task of determining whether alternative permit distribution plans are viable.

Some states have taken a different route: rather than relying on statutes, they have amended their state constitutions to provide citizens with a right to clean air and water. This option proved untenable in the Federal Government in the late 60s and early 70s, when attempts were made to add an amendment to the U.S. Constitution which would provide a "right to a clean environment."<sup>109</sup> Some states have successfully accomplished this, however, including New York which recently amended its bill of rights to include a right to "clean air and water, and a healthful environment."<sup>110</sup> Though not strictly directed at protecting overburdened communities from exposure to concentrated pollution, these constitutional amendments have the benefit of not requiring any sort of additional disparate impact analysis. At this time, little case law exists which clarifies what tangible rights this amendment protects, though it

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<sup>106</sup> *Id.*

<sup>107</sup> N.J. STAT. ANN. § 13:1D-157 (West, 2021).

<sup>108</sup> N.J. STAT. ANN. § 52:14B-12 (West 2021).

<sup>109</sup> Chasid M. Sapolu, *Dumping on the Waianae Coast: Achieving Environmental Justice through the Hawai'i State Constitution*, 11 ASIAN-PACIFIC L. & POL'Y J. 204, 234 (2009).

<sup>110</sup> N.Y. CONST. art. I, § 19.

provides a new litigation strategy for minority communities in the state to attack discriminatory provision of pollution permits. To understand how effective this measure might be, it is worth examining how other states which adopted environmental rights amendments to their constitutions have treated suits brought under them.

Pennsylvania similarly added an environmental rights amendment, Article I section 27, to its constitution in 1971, providing a right to “clean air, pure water, and to the preservation of . . . the environment.”<sup>111</sup> Early attempts to enforce state action to protect the environment were, at best, underwhelming.<sup>112</sup> In *Commonwealth v. Nat’l Gettysburg Battlefield Tower, Inc.*, the Pennsylvania Supreme Court refused to consider whether Art. I, § 27 created a duty for the state to affirmatively protect the environment.<sup>113</sup> Some progress has been made in subsequent litigation, however, such as in *Robinson Township v. Commonwealth*.<sup>114</sup> In *Robinson*, the Pennsylvania Supreme Court struck down an act of the Pennsylvania state legislature which would allow for greater exploitation of natural gas resources.<sup>115</sup> Key to the *Robinson* court’s ruling was the fact that communities in the region where the natural gas drilling would occur would bear a disproportionate burden in dealing with the pollution generated by these actions.<sup>116</sup>

*Robinson* demonstrates just how valuable an environmental justice amendment to the New Jersey Constitution could be to Newark. What might such an amendment to New Jersey’s constitution mean for the poor, Black and Brown population of Newark in its fight against the concentration of air pollution in its city? Let us assume that New Jersey were to adopt an amendment with identical language to that of Pennsylvania, and that The NJDEP granted a permit to a new incinerator in Newark’s East Ward. Litigation under this amendment would be necessary to establish what constitutes enough air pollution exposure as to constitute a violation of a right to clean air, and the state would still have interests in expanding industry and waste management programs. However, even if a low standard were to be set such that Newark residents were currently deemed to have clean air, the addition of even a smaller

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<sup>111</sup> PA. CONST. art. I, § 27.

<sup>112</sup> See generally *Commonwealth v. Nat’l Gettysburg Battlefield Tower, Inc.*, 311 A.2d 588 (Pa. 1973).

<sup>113</sup> *Id.*

<sup>114</sup> 83 A.3d 901 (Pa. 2013).

<sup>115</sup> *Id.* at 913.

<sup>116</sup> *Id.* at 980.

new source of air pollution could trigger a noticeable increase in the already high rates of asthma in the city, which might be enough to trigger action against the NJDEP.<sup>117</sup> All in all, there is cause for some hope, especially considering that the kinds of remedies available in such a suit would likely include revocation of the permit, which could benefit the whole local community.

Before continuing on, it is also worth noting that states are generally afforded more room to experiment with the rights they provide for their citizens than the federal government, and that regardless of critiques which might be made of a “state's-approach” advocacy strategy, the room to be creative that state-focused efforts allow means environmental justice activists should never ignore this option. Hawaii and Vermont, for example, have both experimented with the creation of environmental courts which allow parties to bring environmental claims more quickly to a judiciary well-versed on issues of environmental law.<sup>118</sup> Hawaii, similar to Pennsylvania and New York, protects a “right to a clean and healthful environment” in its constitution,<sup>119</sup> including as part of this right the “. . . control of pollution . . .” and the ability to enforce it against both public and private entities.<sup>120</sup> No such court exists in New Jersey at this time, but such a creative state solution could allow local communities in cities like Newark to avoid the pitfalls associated with overreliance on a frequently sluggish and unsympathetic federal EPA.

### *Litigation Option & Option III: Claims under The Takings Clause*

Perhaps one of the most unusual, yet promising, litigation strategies for environmental justice was one never even touched by the consequences of *Sandoval*: bringing suit under the Takings Clause. Traditional theories of the Takings Clause suggest that it was intended to protect property against physical takings and not against regulations which affect its value,<sup>121</sup> though what constitutes a physical taking goes mere physical, permanent appropriation.<sup>122</sup> Scholarship suggesting that distribution of pollution permits could be challenged as

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<sup>117</sup> See *supra* Section II.

<sup>118</sup> Haw. State Judiciary, *Environmental Court*, STATE HAW., [https://www.courts.state.hi.us/special\\_projects/environmental\\_court](https://www.courts.state.hi.us/special_projects/environmental_court) (last visited Apr. 29, 2022).

<sup>119</sup> HAW. CONST. art. XI, § 9.

<sup>120</sup> *Id.*

<sup>121</sup> Geiger, *supra* note 62, at 224.

<sup>122</sup> See *generally* Cedar Point Nursery v. Hassid, 594 U.S. \_\_\_ (2021).

violating the Takings Clause predates the decision in *Sandoval* by nearly a decade.<sup>123</sup> The particular form that these arguments take can differ substantially, but the most frequently made argument suggests that the Takings Clause forbids the government from imposing some people from wholly bearing a burden which should rightly burden the whole public.<sup>124</sup> This is because, as William M. Treanor puts it, property rights are frequently left vulnerable to failures of the political process, and so those singled out “discrete and insular minorities” who are afforded lesser stake in the political process must receive additional protection from government takings.<sup>125</sup>

Citizens of Newark could potentially bring suit under the Takings Clause based on the premise that the allowance of such significant air pollution in their local community constitutes a physical taking by removing their access to clean air. While theoretically promising, EJ claims brought under the Takings Clause have a few common issues. First, most Takings Clause strategies have failed to show that the claim was ripe for adjudication.<sup>126</sup> Until recently, for a Takings Clause claim to be ripe it must pass the test laid out in *Williamson County Regional Planning Comm’n v. Hamilton Bank*, which requires that the plaintiff has sought compensation through the State’s inverse compensation procedure.<sup>127</sup> This requirement was removed in the context of physical trespasses upon property by government officials in *Knick v. Township of Scott, Pennsylvania*,<sup>128</sup> but it remains to be seen whether or not this relaxing of the *Hamilton Bank* test will be extended to environmental justice claims. Another concern is that the remedy for violations of the Takings Clause is “just compensation”<sup>129</sup>, which traditionally means monetary compensation.<sup>130</sup> Such remedies by no means guarantee that additional sources of air pollution will not be introduced to the city so long as the state or municipal government is willing to pay just compensation. Finally, while cases like *Cedar Point Nursery v. Hassid*<sup>131</sup> appear to expand the definition of a physical taking

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<sup>123</sup> See, e.g., Bernard F. Meroney, “Taking” on the Environment: The Takings Clause and Environmental Law—Some Observations, 36 LOY. L. REV. 1083 (1991).

<sup>124</sup> John DiBari, Comment, *How the Sandoval Ruling will Affect Environmental Justice Plaintiffs*, 76 ST. JOHN’S L. REV. 1019, 1039–40 (2002).

<sup>125</sup> Geiger, *supra* note 62, at 224.

<sup>126</sup> Geiger, *supra* note 62, at 227.

<sup>127</sup> *Williamson County Regional Planning Comm’n v. Hamilton Bank*, 473 U.S. 172, 196–97 (1985).

<sup>128</sup> 139 S.Ct. 2162 (2019).

<sup>129</sup> U.S. CONST. amend. V.

<sup>130</sup> See generally Thomas W. Merrill, *Anticipatory Remedies for Takings*, 128 HARV. L. REV. 1630 (2015).

<sup>131</sup> 594 U.S. \_\_\_ (2021).

well beyond any traditional understanding of the term, it is entirely possible that the taking of one's access to clean air by concentrating air pollution in their city will still be seen as a noncompensable regulatory taking.

### *Litigation Option & Option IV:*

### *Blending Environmental Justice and Disability Law*

The consistent denial of use of disparate impact analysis in traditional environmental justice litigation strategies has de-fanged many of these options, since showing intentional discrimination is nigh impossible. EJ law has been penned in by restrictive interpretations of the extent of Title VI and § 1983. This unfortunate reality necessitates developing creative litigation strategies which may involve relying on sources of law not traditionally associated with environmental justice. Several options exist which might overcome the many obstacles put in place to bringing traditional environmental justice claims, including at least one which are particularly relevant to the issues faced by Newarkers like Leland Sewell.

One such avenue may be available in disability law. As discussed above, the localized effect of concentrated air pollution in Newark prevents local children from making full use of their schools.<sup>132</sup> As such, the Americans with Disabilities Act (ADA) may be of some help in that Title II of the ADA provides: “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs or activities of a public entity, or be subjected to discrimination by any such entity.”<sup>133</sup> Asthma is considered to be a disability covered by the ADA after its 2008 amendment, and is recognized as getting in the way of the use of some public entities such as schools.<sup>134</sup> With over 1/4th of Newark's student population dealing with asthma,<sup>135</sup> and the known consequences of asthma that result in such students missing class time,<sup>136</sup> disability lawsuits brought under the ADA would have strong merits and be readily available to many in Newark. In fact, several lawsuits have already been brought in this vain, including

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<sup>132</sup> See *supra* Sections I, II.

<sup>133</sup> 42 U.S.C. § 12132.

<sup>134</sup> *Are Asthma and Allergies Disabilities*, AAFA, <https://www.aafa.org/asthma-allergies-and-the-american-with-disabilities-act/#:~:text=Yes.,considered%20disabilities%20under%20the%20ADA> (last visited Apr. 29, 2022).

<sup>135</sup> Gleason & Fagliano, *supra* note 10, at 820.

<sup>136</sup> See *supra* Section II.

*American Lung Association v. EPA*,<sup>137</sup> which saw the D.C. Circuit recognize asthmatics as a particular class with a justifiable interest in seeing the EPA promulgate more protective national ambient air quality standards for sulfur dioxide.<sup>138</sup>

While showing potential, reliance on disability law to challenge the concentration of pollution in cities like Newark is not foolproof. One issue with making use of the ADA is that it is generally considered a statute providing relief for individuals,<sup>139</sup> not communities, and as such cases brought under this statute might not be able to capture the effect that concentrated air pollution has on larger populations. Making use of class-action lawsuits might help to overcome this drawback, though it is not necessarily a major concern since a remedy that prevents further concentration of pollution in Newark for one individual would benefit the surrounding community regardless.

## V. Conclusion

The state of New Jersey and city of Newark as a whole suffer from relatively poor air quality. However, the city's poor, minority citizens, especially those living in the East Ward, are particularly at risk of severe and even fatal consequences caused by their exposure to air pollution. Policy and litigation solutions both exist which might provide these populations with a means to block further intrusion into their communities on the part of polluters. While many solutions demonstrate some level of promise in remedying the issue of continued concentration of air pollution in Newark, environmental justice advocates would likely be best served by focusing on pushing for state level law changes, and by attempting to develop hybridized claims between environmental justice law and other fields when federal law must be relied upon.

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<sup>137</sup> 134 F.3d 388 (D.C. Cir. 1998).

<sup>138</sup> *Id.* at 392-393.

<sup>139</sup> Jamie A. Grodsky, *Genetics and Environmental Law: Redefining Public Health*, 93 CAL. L. REV. 171, 224 (2005).