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Ensuring Climate Litigants' Standing: Insights from National and International Climate Litigation

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Note

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In March 2023, the Intergovernmental Panel on Climate Change (IPCC) released its Sixth Assessment Report and confirmed unequivocally that human activities are the cause of climate change. Greenhouse gas emissions over the next few years are capable of causing irreversible and catastrophic damage to our planet. Catalyst litigation plays an important role in tackling climate change by prodding governments to assume a role in implementing adaptation and mitigation measures. Despite the extreme consequences that climate change will have on humanity, jurisdictional issues—such as standing—impose considerable hurdles for climate litigants. And these hurdles ultimately keep plaintiffs from obtaining a ruling, or even a discussion, on the merits of their case. With the power to take immediate action, judges in the United States must view their constitutional role differently—more expansively—to advance climate change policy. But it is not just up to judges alone. Climate plaintiffs can assist judges in realizing their expanded role. In order to overcome issues of standing and attain more judicial engagement in American climate litigation, plaintiffs should bring claims inspired by past cases, both American and international.

With a focus on Juliana v. United States*, this Note argues that plaintiffs in climate change cases can overcome or avoid standing hurdles by employing important lessons from other cases. Part I provides a brief introduction to standing, as outlined in* Lujan v. Defenders of Wildlife*. Part II meanders through the arguably random and unpredictable history of standing in United States climate litigation. Part III explores* Juliana*, a climate case that was struck down in the Ninth Circuit because the court believed the plaintiffs lacked standing. Part IV explores how judges in other*

countries—France and Germany—approach standing and react to plaintiffs' demands in climate cases. Drawing from these national and international cases, Part V recommends how climate case plaintiffs, such as those in Juliana*, should frame their complaints to circumvent standing issues.*

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Ensuring Climate Litigants' Standing: Insights from National and International Climate Litigation

FLORENCE T.B. SIMON*

INTRODUCTION

"The risk of catastrophic harm, though remote, is nevertheless real."[1] This statement, made by Justice John Paul Stevens in 2007, is no less true today.

In March 2023, the Intergovernmental Panel on Climate Change (IPCC) released its Sixth Assessment Report[2] and confirmed "*unequivocally*" that human activities are the cause of climate change.[3] Specifically, the report indicated that the increase in global greenhouse gas (GHG) emissions (such as carbon dioxide and methane) through energy use, land use, consumption, production, and other human activities has warmed the atmosphere, ocean, and land.[4]

Human-caused climate change is inextricably linked to a variety of serious consequences. An increase in pandemics, food and water insecurity, and extreme weather events are only some of the negative impacts of climate change.[5] And "[e]very increment of warming results in rapidly escalating hazards."[6] For example, in the United States alone, there were eighteen climate disasters, including floods, storms, and wildfires, that caused over four hundred deaths and cost well over $165 billion in 2022.[7] All of these events were exacerbated by climate change.[8]

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[1] Massachusetts v. Env't Prot. Agency, 549 U.S. 497, 526 (2007).

[2] Press Release, IPCC, Urgent Climate Action Can Secure a Liveable Future for All, U.N. Press Release 2023/06/PR (Mar. 20, 2023) [hereinafter IPCC Press Release]. *See generally*, IPCC, CLIMATE CHANGE 2023: SYNTHESIS REPORT (Hoesung Lee et al. eds., 2023) [hereinafter IPCC SYNTHESIS REPORT].

[3] IPCC SYNTHESIS REPORT, *supra* note 2, at 42 (emphasis added).

[4] *Id.* at 42–46.

[5] IPCC Press Release, *supra* note 2.

[6] *Id.*

[7] Rachel Cleetus, *Climate Change in 2022: Multiple Billion-Dollar Disasters and Unbearable Human Costs*, THE EQUATION (Jan. 10, 2023, 11:42 AM), https://blog.ucsusa.org/rachel-cleetus/climate-change-2022-multiple-billion-dollar-disasters-unbearable-human-costs/ (describing an annual report released by the National Oceanic and Atmospheric Administration).

[8] *See id.* ("[H]uman-caused global warming is definitely and significantly increasing the odds of severe and once-rare extreme events, alongside driving slow-onset disasters—like sea level rise and the loss of major ice sheets and glaciers—and raising the risk of major tipping points.").

Scientists have confirmed the existence and impact of climate change for decades.[9] Yet, an urgent need for ambitious and immediate climate action exists now more than ever.[10] This is in large part because GHG emissions over the next few years are capable of causing irreversible and catastrophic damage, including rising sea levels.[11] Relatedly, "[c]limate resilient development becomes progressively more challenging with every increment of warming."[12] In turn, the IPCC has warned us: "[w]e are walking when we should be sprinting."[13] So, why are we walking, and how can we start sprinting?

Governments are crucial, and potentially central, vehicles through which we can address climate change.[14] But both the legislative and executive branches in the United States are still "walking,"[15] due to the "absence of sustained political will and federal law aimed specifically at reducing [United States] greenhouse gas (GHG) emissions."[16] To make

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[9] *See generally How Do We Know Climate Change is Real?*, NASA, https://climate.nasa.gov/evidence (last visited Mar. 24, 2024) (describing unequivocal scientific evidence that global warming exists); Hervé Le Treut, Richard Somerville, Ulrich Cubasch, Yihui Ding, Cecilie Mauritzen, Abdalah Mokssit, Thomas Peterson & Michael Prather, *Historical Overview of Climate Change Science, in* CLIMATE CHANGE 2007: THE PHYSICAL SCIENCE BASIS 93 (Susan Solomon et al. eds., 2007) (providing examples of progress in detecting, understanding, modeling, and assessing climate change).

[10] Chelsea Harvey, *IPCC Warning: 'We Are Walking When We Should Be Sprinting'*, GREENWIRE (Mar. 20, 2023, 1:40 PM), https://www.eenews.net/articles/humankind-is-failing-to-slow-warming-ipcc-warns/ (discussing the IPCC's latest assessment report and recent climate events); IPCC Press Release, *supra* note 2 (noting urgent and ambitious actions are needed).

[11] IPCC SYNTHESIS REPORT, *supra* note 2, at 69 ("Continued GHG emissions will further affect all major climate system components, and many changes will be irreversible on centennial to millennial time scales. Many changes in the climate system become larger in direct relation to increasing global warming. With every additional increment of global warming, changes in extremes continue to become larger. . . . Many changes due to past and future GHG emissions are irreversible on centennial to millennial time scales, especially in the ocean, ice sheets and global sea level.") (citations omitted). *See* Juliana v. United States, 947 F.3d 1159, 1176 (9th Cir. 2020) (Staton, J., dissenting) ("[A] three-foot sea level rise will make two million American homes uninhabitable; a rise of approximately 20 feet will result in the total loss of Miami, New Orleans, and other coastal cities.").

[12] IPCC Press Release, *supra* note 2 ("[T]he choices made in the next few years will play a critical role in deciding our future and that of generations to come.").

[13] Harvey, *supra* note 10.

[14] *See* Francesco Sindico, Makane Moïse Mbengue & Kathryn McKenzie, *Climate Change Litigation and the Individual: An Overview, in* COMPARATIVE CLIMATE CHANGE LITIGATION: BEYOND THE USUAL SUSPECTS 1, 4 (Francesco Sindico & Makane Moïse Mbengue eds., 2021) ("Governments are perhaps best positioned to take action to address these urgent and severe challenges and must play a significant role in developing, adopting, and implementing policies and other measures to tackle the range of problems we face due to climate change."); IPCC Press Release, *supra* note 2 (noting that governments are key to enabling sustainable development).

[15] Harvey, *supra* note 10.

[16] Katrina Fischer Kuh, *Litigating Government (In)Action on Climate Change*, *in* CLIMATE CHANGE LAW: AN INTRODUCTION 109 (Karl S. Coplan, et al. eds., 2021) [hereinafter Kuh, *Government (In)Action*]. Even with the passage of the deceptively named Inflation Reduction Act of 2022 (IRA), which "mark[ed] the most significant action Congress has taken on clean energy and climate change in the nation's history," more needs to be done. *Inflation Reduction Act Guidebook*, THE WHITE HOUSE (last updated Sept. 21, 2023), https://www.whitehouse.gov/cleanenergy/inflation-reduction-act-guidebook/. *See* Inflation Reduction Act, Pub. L. No. 117-169, 136 Stat. 1818 (2022) (legislating on climate issues such as energy production and greenhouse gas emissions). Furthermore, there have been

strides in response to climate change, "gap-filling efforts" are essential.[17] And one way we can fill this gap is through catalyst litigation—prodding governments to assume a role in adaptation and mitigation measures—which has already proven to be important in advancing federal climate law.[18]

Although a significant number of climate cases have been brought to state courts in recent years, the majority of climate litigation[19] in the United States takes place in federal courts.[20] Furthermore, given that it is relatively easy to challenge administrative agency action, a large number (but not all) of those climate cases ask that the court review an agency's action.[21]

Despite climate change being a legitimate and serious reality, jurisdictional issues such as establishing standing impose remarkable hurdles for climate litigants in the United States.[22] And these hurdles ultimately keep, or at a minimum slow down, climate case plaintiffs from obtaining a ruling, or even a discussion, on the merits of their cases.[23]

With the power to take immediate action, courts in the United States must view their constitutional role differently—more expansively—to advance climate change policy. Climate case plaintiffs, and the way they plead their cases, will play a vital role in advancing this.

This Note explores how Article III courts in the United States have understood their role in climate cases. With a focus on *Juliana v. United*

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numerous efforts to defund the Act. *See, e.g.*, Tony Romm, *Inflation Reduction Act Foes Race to Repeal Climate, Drug Pricing Programs*, WASH. POST (June 21, 2023, 11:13 AM), https://www.washingtonpost.com/business/2023/06/18/foes-inflation-reduction-act-race-repeal-climate-drug-pricing-programs/ (noting Republican attempts to repeal key portions of the Inflation Reduction Act).

[17] Randall S. Abate, *Automobile Emissions and Climate Change Impacts: Employing Public Nuisance Doctrine as Part of a "Global Warming Solution" in California*, 40 CONN. L. REV. 591, 595 (2008) ("Until the federal government provides a comprehensive and mandatory legislative response to the climate change problem, gap-filling efforts will be essential to achieve some progress in the ongoing challenge to combat the causes and effects of climate change.").

[18] Kuh, *Government (In)Action*, *supra* note 16, at 109 ("Indeed, without catalyst litigation, the US would have little federal 'law' being brought to bear on climate change at all."). *See generally* Chloe N. Kempf, Note, *Why Did So Many Do So Little? Movement Building and Climate Change Litigation in the Time of* Juliana v. United States, 99 TEX. L. REV. 1005 (2021) (discussing the importance of climate litigation at length).

[19] For the purpose of this Note, "climate change litigation" or "climate change cases" refer to the following common definition: "any piece of federal, state, tribal, or local administrative or judicial litigation in which the party filings or tribunal decisions directly and expressly raise an issue of fact or law regarding the substance or policy of climate change causes and impacts." David Markell & J.B. Ruhl, *An Empirical Assessment of Climate Change in the Courts: A New Jurisprudence or Business as Usual?*, 64 FLA. L. REV. 15, 27 (2012). *See* Margaret Rosso Grossman, *Climate Change and the Individual in the United States*, *in* COMPARATIVE CLIMATE CHANGE LITIGATION: BEYOND THE USUAL SUSPECTS 199, 202 (Francesco Sindico & Makane Moïse Mbengue eds., 2021) (citing Markell and Ruhl's definition for climate change litigation). For more information on United States climate cases, see *About*, CLIMATE CASE CHART, http://climatecasechart.com/us-climate-change-litigation/ (last visited Mar. 24, 2024) (providing a United States database of cases organized by type of claim).

[20] Daniel A. Farber, *Climate Change Litigation in the United States*, *in* CLIMATE CHANGE LITIGATION: A HANDBOOK 237–38 (Wolfgang Kahl & Marc-Philippe Weller eds., 2021). *See generally* CLIMATE CASE CHART, *supra* note 19.

[21] Farber, *supra* note 20, at 238.

[22] *Id.*

[23] *Id.*

States, this Note argues that there is still hope in climate case plaintiffs overcoming standing hurdles. Part I provides a brief introduction to standing, as outlined in *Lujan v. Defenders of Wildlife*. Part II meanders through the arguably random and unpredictable history of standing in United States climate litigation. Part III explores arguments and decisions made in *Juliana*, the recent climate case that was struck down in the Ninth Circuit because the court believed the plaintiffs lacked standing. Part IV explores how judges in other countries approach standing and react to plaintiffs' demands in climate cases. Drawing from these national and international cases, Part V recommends how climate case plaintiffs, such as those in *Juliana*, should file, frame, and support their complaints to surpass standing issues.

I. A BRIEF INTRODUCTION TO STANDING

This Part serves as a brief introduction to the standing doctrine's basic requirements. While the doctrine only developed an "explicit constitutional dimension" in the twentieth century,[24] standing is a "critical threshold issue" for parties seeking judicial review[25] and is considered "an essential and unchanging part of the case-or-controversy requirement of Article III."[26]

Article III of the United States Constitution limits the jurisdiction of federal courts to "cases" and "controversies."[27] To determine whether a case or controversy is indeed justiciable, the Supreme Court in *Lujan v. Defenders of Wildlife* elucidated the "irreducible constitutional minimum of standing" by articulating a three-part test.[28] In order to establish standing, plaintiffs bear the burden of satisfying three elements: injury-in-fact, causation, and redressability.[29] First, the plaintiff must demonstrate that they suffered an "injury-in-fact."[30] Such injury must be both (a) "concrete and particularized,"[31] and (b) "actual or imminent, not 'conjectural' or

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[24] Gary Lawson, FEDERAL ADMINISTRATIVE LAW, 1100–02 (9th ed. 2021) ("The seminal case is *Frothingham v. Mellon*, 262 U.S. 447 (1923). . . . From these humble beginnings has sprung, primarily in the past half century, one of the most complex, confusing, and controversial bodies of doctrine the Supreme Court has ever produced.").

[25] Farber, *supra* note 20, at 239.

[26] Lujan v. Defs. of Wildlife, 504 U.S. 555, 559–60 (1992). *See generally* Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459, 459–61 (2008) ("[The author] seek[s] to understand what separation-of-powers functions are served by standing doctrine, what tensions exist within the Court over the meaning of 'separation of powers,' and how well standing doctrine performs these functions.") (citations omitted).

[27] U.S. CONST. art. III.

[28] *Lujan*, 504 U.S. at 560. *See also* Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc., 528 U.S. 167, 180–81 (2000) (outlining the three elements of standing); Farber, *supra* note 20, at 239 (outlining the three elements of standing).

[29] *See supra* note 28.

[30] *Lujan*, 504 U.S. at 560.

[31] *Id.* (citing Warth v. Seldin, 422 U.S. 490, 508 (1975); Sierra Club v. Morton, 405 U.S. 727, 740–741, n.16 (1972)).

'hypothetical.'"[32] Second, a "causal connection between the injury and the conduct complained of" must exist.[33] And the Court has described that the injury needs to be "fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court."[34] Third, the injury must be likely redressable by a favorable decision—the redressability of the injury cannot merely be speculative.[35] If a plaintiff fails to establish any one of the aforementioned elements, the court cannot decide the plaintiff's case on the merits and must dismiss the case; the court does not have jurisdiction over a case when the plaintiff fails to meet the case-or-controversy requirement, which is Article III's "constitutional minimum."[36]

II. A HISTORY OF STANDING IN UNITED STATES CLIMATE LITIGATION

Generally, "the judiciary[] [has] deep unease about its role in developing a societal response to climate change; this uncertainty undergirds the judiciary's largely hands-off approach."[37] So, when it comes to climate litigation, the doctrine of standing is a barrier to deciding weighty and central cases on the merits.[38] A look at past climate cases can elucidate how plaintiffs have succeeded, or struggled, in convincing the courts to hear their issues.

This Part establishes the complex history of standing in United States climate cases by highlighting environmental and climate cases that pushed the boundaries of or were impeded by Article III standing. Although this Part demonstrates the variability and unpredictability of decisions on standing in climate cases, it also illustrates important trends and features of proving standing.

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[32] Whitmore v. Arkansas, 495 U.S. 149, 155 (1990) (quoting Los Angeles v. Lyons, 461 U.S. 95, 102 (1983)). *See also* Clapper v. Amnesty Int'l USA, 568 U.S. 398, 409 (2013) (reiterating that the injury must be "*certainly impending*" and cannot be self-inflicted).

[33] *Lujan*, 504 U.S. at 560.

[34] *Id.* (citing Simon v. E. Ky. Welfare Rts. Org., 426 U.S. 26, 41–42 (1976)). For environmental cases, this can be challenging. *See* Farber, *supra* note 20, at 239 ("For instance, some courts have held that citizens living on a river lack standing to use over discharge that took place far upstream, because the causal connection is too attenuated.").

[35] *See E. Ky. Welfare Rts. Org*., 426 U.S. at 41–42 (noting that Article III requires a federal court act to "redress" an injury); Juliana v. United States, 947 F.3d 1159, 1159 (9th Cir. 2020) ("To establish Article III redressability, the plaintiffs must show that the relief they seek is both (1) substantially likely to redress their injuries; and (2) within the district court's power to award.").

[36] *Lujan*, 504 U.S. at 560. *See* Bradford C. Mank, *No Article III Standing for Private Plaintiffs Challenging State Greenhouse Gas Regulations: The Ninth Circuit's Decision in* Washington Environmental Council v. Bellon, 63 AM. U. L. REV. 1525, 1532–33 (2014) ("For a federal court to have jurisdiction over a claim, at least one plaintiff must be able to prove standing for each form of relief sought; the court must dismiss the case if no plaintiffs meet the standing requirements.") (footnote omitted).

[37] Katrina Fischer Kuh, *The Legitimacy of Judicial Climate Engagement*, 46 ECOLOGY L.Q. 731, 732 (2019) [hereinafter Kuh, *Legitimacy*].

[38] *Id. See also* Farber, *supra* note 20, at 240 (discussing how the dissenting opinion in *Massachusetts v. Environmental Protection Agency* believed that climate change cases involve "a complex web of economic and physical factors").

A. Georgia v. Tennessee Copper

Georgia v. Tennessee Copper, a case that took place well before *Lujan*, provides insight on the importance of states' sovereign capacity.[39] The state of Georgia filed a public nuisance suit against a Tennessee-based company to enjoin the company from discharging noxious fumes that were ultimately destroying forests in Georgia.[40] The Supreme Court found it had jurisdiction to enjoin the company from discharging "sulphurous fumes," on the grounds that they "cause[d] and threaten[ed] damage on so considerable a scale to the forests and vegetable life, if not to health, within the plaintiff State . . ."[41] Notably, the Court underscored the state's role as a "*quasi*-sovereign" that had an independent interest in clean earth and water for its citizens.[42]

B. Sierra Club v. Morton

Prior to *Lujan*, the "injury in fact" aspect of standing was elucidated in the Supreme Court's decision in *Sierra Club v. Morton*.[43] The Sierra Club filed suit after the United States Forest Service allowed a ski resort to be developed in a national wildlife refuge.[44] The Sierra Club "sued as a membership corporation with 'a special interest in the conservation and the sound maintenance of the national parks, game refuges, and forests of the country.'"[45] Unconvinced, the Court held that the "injury in fact" test requires more than an injury to a cognizable interest.[46] The Court maintained that standing requires the party seeking review be injured himself.[47] An individual or organization's "mere interest in the problem" is insufficient on its own to render the party "adversely affected or aggrieved."[48]

While this case presents barriers to achieving standing in federal court, Justice Douglas's dissent proposed a novel approach to defeating standing issues in climate and environmental cases:

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[39] Georgia v. Tenn. Copper Co., 206 U.S. 230 (1907).

[40] *Id.* at 230.

[41] *Id.* at 238–39.

[42] *Id.* at 237 (explaining that as a quasi-sovereign power, "the State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air. It might have to pay individuals before it could utter that word, but with it remains the final power. . . . When the States by their union made the forcible abatement of outside nuisances impossible to each, they did not thereby agree to submit to whatever might be done. They did not renounce the possibility of making reasonable demands on the ground of their still remaining *quasi*-sovereign interests; and the alternative to force is a suit in this court").

[43] Sierra Club v. Morton, 405 U.S. 727, 734–35 (1972) ("[T]he 'injury in fact' test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured.").

[44] *Id.* at 730.

[45] *Id.*

[46] *Id.* at 734–35.

[47] *Id.*

[48] *Id.* at 739.

> The critical question of "standing" would be simplified and also put neatly in focus if we fashioned a federal rule that allowed environmental issues to be litigated before federal agencies or federal courts in the name of the inanimate object about to be despoiled, defaced, or invaded by roads and bulldozers and where injury is the subject of public outrage.[49]

Justice Douglas continued by recognizing that inanimate objects, such as ships and corporations, can be parties to litigation, and ultimately concluded that the voice of inanimate objects within the environment "should not be stilled."[50] This idea arguably reflects the importance and need for state standing, a concept supported in both *Tennessee Copper*[51] and *Massachusetts v. Environmental Protection Agency*.[52]

C. Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.

In contrast to the rather narrow and strict holdings of *Lujan* and *Sierra Club*, *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.* proposed a more relaxed standard. Friends of the Earth, a grassroots environmental organization, filed a citizen suit and enjoined a company for discharging toxics in a river at an amount exceeding the company's permit.[53] After the lawsuit was filed, the company started to comply with its permit. Although the plaintiffs were unable to prove that the company's pollution harmed the environment, the Supreme Court found that the plaintiffs themselves were harmed.[54] Specifically, the Court held that injury in fact was established because the plaintiffs experienced "reasonable concerns" about the impact of the defendant's pollution on their "recreational, aesthetic, and economic interests."[55]

D. Massachusetts v. Environmental Protection Agency

Massachusetts v. Environmental Protection Agency, a case where the plaintiffs also overcame the standing hurdles typically faced in climate cases, further demonstrates the Supreme Court's view of state plaintiffs.[56] A group of states, local governments, and private environmental organizations brought suit against the Environmental Protection Agency (EPA), alleging

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[49] *Id.* at 741 (Douglas, J., dissenting) (footnote omitted).

[50] *Id.* at 742, 749.

[51] 206 U.S. 230, 237 (1907).

[52] 549 U.S. 497, 519, 521 (2007).

[53] Friends of the Earth, Inc. v. Laidlaw Env't. Servs. (TOC), Inc., 528 U.S. 167, 177, 193 (2000).

[54] "The relevant showing for purposes of Article III standing . . . is not injury to the environment but injury to the plaintiff." *Id.* at 181.

[55] *Id.* at 183. In contrast to *Lujan*, the Plaintiffs here "adequately documented [the] injury in fact" through "affidavits and testimony presented by FOE members" that documented the impact of Laidlaw's pollutant discharges. *Id.* at 183–84.

[56] 549 U.S. at 521.

the agency failed to meet its responsibilities under the Clean Air Act.[57] The plaintiffs requested that the Court review the agency's refusal "to regulate [GHG] emissions from new motor vehicles."[58]

As a preliminary matter, the Court maintained that the right to petition for a regulation under the Clean Air Act—a procedural right to concrete interests—made it easier to find standing.[59] The Court stated that "[w]hen a litigant is vested with a procedural right, that litigant has standing if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant."[60] In addition, the Court emphasized that only *one* petitioner needed to have standing in order for the court to review the issues.[61] Here, the Court recognized that Massachusetts as a petitioner had a special solicitude because of its status as a state with quasi-sovereign interests.[62]

With a focus on the "lead plaintiff," Massachusetts,[63] the Court determined that the EPA's refusal to regulate greenhouse gases presented an actual and imminent risk of harm that could be redressed by the Court. First, the injury in fact was clear to the Court, which said that "[t]he harms associated with climate change are serious and well recognized," as acknowledged by the EPA, and "rising seas have already begun to swallow Massachusetts' coastal land. . . . Remediation costs alone . . . could run well into the hundreds of millions of dollars."[64]

Second, the EPA's refusal to regulate GHG emissions caused Massachusetts' injuries. Although the United States only contributes to a portion of GHGs, the Court emphasized that incremental remedial steps on the part of the EPA should not be overlooked.[65]

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[57] *Id.* at 505.

[58] *Id. See* Farber, *supra* note 20, at 239 ("The plaintiffs sought review of EPA's denial of their petition for EPA to regulate greenhouse gas emissions from motor vehicles under the Clean Air Act.").

[59] *Massachusetts*, 549 U.S. at 519–20 (discussing 42 U.S.C. § 7607(b)(1)). "[T]he Court stressed that the test for standing is easier to meet where a procedural right is involved, in this case, the right to petition for a regulation. In such cases, standing requires only the existence of a genuine possibility that the outcome might be affected by correction of the procedural error." Farber, *supra* note 20, at 239.

[60] *Massachusetts*, 549 U.S. at 518.

[61] *Id.*

[62] *Id.* at 518–21 ("Massachusetts cannot invade Rhode Island to force reductions in greenhouse gas emissions, it cannot negotiate an emissions treaty with China or India, and in some circumstances the exercise of its police powers to reduce in-state motor-vehicle emissions might well be pre-empted. . . . These sovereign prerogatives are now lodged in the Federal Government, and Congress has ordered EPA to protect Massachusetts. . . ."). Farber, *supra* note 20, at 239 ("[B]ecause some of the plaintiffs were state governments, the Court suggested that their standing claim should be treated with particular generosity because of the state governments' quasi-sovereign interests. Of these general assertions about standing law, the point about the standing of state governments seemed the most novel, though it did have some historical antecedents.").

[63] Farber, *supra* note 20, at 239.

[64] *Massachusetts*, 549 U.S. at 521–23.

[65] *Id.* at 524–25 ("That a first step might be tentative does not by itself support the notion that federal courts lack jurisdiction to determine whether that step conforms to law."). And considering United States motor vehicle emissions in particular make a significant contribution to global concentrations of greenhouse gases, the EPA's regulation of such gases would be quite significant. *Id.*

Finally, the Court found the issues redressable: "While it may be true that regulating motor-vehicle emissions will not by itself *reverse* global warming, it by no means follows that we lack jurisdiction to decide whether EPA has a duty to take steps to *slow* or *reduce* it."[66] The Court also supported its conclusion by pointing to the government's strong support of voluntary efforts to reduce greenhouse gases, which exemplified the EPA's belief that such GHG emissions reductions would have an impact on climate change.[67]

It is worth recognizing that although *Massachusetts v. Environmental Protection Agency* has been regarded as an important and boundary-pushing case, it now stands on shaky grounds; the current Supreme Court recently questioned the strength of states' quasi-sovereign interests in *United States v. Texas*.[68] While the majority in *United States v. Texas* brushes *Massachusetts* aside in a footnote,[69] Justice Gorsuch expresses "doubts" about *Massachusetts* in his concurring opinion.[70] He suggests that lower courts should just "shelf" the idea of states enjoying "relaxed standing rules" and "special solitude" in future cases.[71]

E. West Virginia v. Environmental Protection Agency

Similar to *United States v. Texas*, *West Virginia v. Environmental Protection Agency* reinforces the idea that the Supreme Court has experienced a shift, or a conservative swing, in perspective.[72] *West Virginia v. Environmental Protection Agency* recently spurred discussion

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[66] *Id.* at 525.

[67] *Id.* at 526; Farber, *supra* note 20, at 240.

[68] 143 S. Ct. 1964 (2023).

[69] *Id.* at 1975 n.6 ("As part of their argument for standing, the States also point to *Massachusetts v. EPA*. Putting aside any disagreements that some may have with *Massachusetts v. EPA*, that decision does not control this case. The issue there involved a challenge to the denial of a statutorily authorized petition for rulemaking, not a challenge to an exercise of the Executive's enforcement discretion.") (citations omitted).

[70] *Id.* at 1977 (Gorsuch, J., concurring).

[71] *Id.*

> [I]f an exercise of coercive power matters so much to the Article III standing inquiry, how to explain decisions like *Massachusetts v. EPA*? There the Court held that Massachusetts had standing to challenge the federal government's decision not to regulate greenhouse gas emissions from new motor vehicles. . . . And what could be less coercive than a decision not to regulate? In *Massachusetts v. EPA*, the Court chose to overlook this difficulty in part because it thought the State's claim of standing deserved 'special solicitude.'. . . I have doubts about that move. Before *Massachusetts v. EPA*, the notion that States enjoy relaxed standing rules 'ha[d] no basis in our jurisprudence.' Nor has 'special solicitude' played a meaningful role in this Court's decisions in the years since. Even so, it's hard not to wonder why the Court says nothing about 'special solicitude' in this case. And it's hard not to think, too, that lower courts should just leave that idea on the shelf in future ones.

Id. (citing Massachusetts v. EPA, 549 U.S. 497, 520–36 (2007) (Roberts, C.J., dissenting)).

[72] West Virginia v. Env't Prot. Agency, 142 S. Ct. 2587 (2022).

surrounding not only its use of the major questions doctrine,[73] but also its application of standing. Importantly, this case suggests a lowered bar to surpassing standing barriers but, relatedly, the Supreme Court's willingness to depart from well-established procedural history.[74]

The dispute was initially sparked by the EPA's promulgation of the Clean Power Plan (CPP) rule in 2015 to address existing coal and natural gas-fired power plants' carbon dioxide emissions.[75] The same day the CPP was promulgated, "dozens of parties (including 27 States) petitioned for review in the D.C. Circuit."[76] However, the CPP ultimately never went into effect.[77] And in 2019, the EPA decided to repeal the CPP.[78] In response, states, as well as private parties, challenged this repeal of the CPP by filing petitions in the D.C. Circuit once again.[79] The D.C. Court of Appeals vacated the EPA's repeal of the CPP.[80] However, the Court of Appeals, in response to a motion made by the EPA, stayed its vacatur of the EPA's repeal of the CPP.[81] The plaintiffs then filed petitions for certiorari to defend the repeal of the CPP.[82]

The Supreme Court granted certiorari and found that "at least" the state petitioners had standing.[83] Before reaching this conclusion, the Court emphasized that, in instances with multiple stages of litigation, "Article III demands that an actual controversy persist throughout all stages of litigation."[84] The requirement of standing "must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance."[85] Furthermore, the Court clarified that in considering a

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[73] *Id. See e.g.*, Jonathan H. Adler, West Virginia v. EPA*: Some Answers About Major Questions*, *in* 2021–2022 CATO SUPREME COURT REVIEW 37 (2022) (discussing the decision reached in *West Virginia v. Env't Prot. Agency*); Louis J. Capozzi III, *The Past and Future of the Major Questions Doctrine*, 84 OHIO ST. L.J. 191 (2023) (discussing the holding of *West Virginia v. Environmental Protection Agency*).

[74] *See generally* Robert L. Glicksman & Richard E. Levy, *The New Separation of Powers Formalism and Administrative Adjudication*, 90 GEO. WASH. L. REV. 1088, 1107 n.87, 1109 n.144 (2022) (discussing Justice Gorsuch's approach in *West Virginia v. Environmental Protection Agency*).

[75] *West Virginia*, 142 S. Ct. at 2599.

[76] *Id.* at 2604.

[77] The D.C. Circuit declined to stay the Clean Power Plan, but the United States Supreme Court granted the stay and kept the rule from ever taking effect. And before the D.C. Circuit issued a decision, after hearing the argument on the merits, presidential administrations shifted. Donald Trump was elected and his "new administration requested that the litigation be held in abeyance so that EPA could reconsider the Clean Power Plan." *Id.* Following this request, the D.C. Circuit eventually dismissed the petitions as moot. *Id.* As a result, the Clean Power Plan never legitimately went into effect and, consequently, its impact and projections could not be evaluated. *Id.*

[78] *Id.*

[79] *Id.* at 2605. In addition, "[o]ther States and private entities—including petitioners . . . West Virginia, North Dakota, Westmoreland Mining Holdings LLC, and The North American Coal Corporation (NACC)—intervened to defend both actions." *Id.*

[80] *Id.* at 2605–06.

[81] *Id.* This was requested in part because the EPA was expecting to promulgate a new Section 111(d) rule. *Id.*

[82] *Id.*

[83] *Id.* at 2606.

[84] *Id.* (quoting Hollingsworth v. Perry, 570 U.S. 693, 705 (2013)).

[85] Arizonans for Off. English v. Arizona, 520 U.S. 43, 64 (1997).

party's standing to appeal, the question to be asked is whether it has experienced an injury "fairly traceable to the judgment below."[86] Here, the Court found the states experienced injury in fact because the states were the object of the CPP's requirements; the CPP required states to stringently regulate the emissions of power plants in their boundaries.[87] In vacating the Affordable Clean Energy (ACE) rule, which contained a *repeal* of the CPP, the Court of Appeals essentially re-implemented the CPP.[88] Resultingly, the D.C. Circuit's dismissal of the case as moot also inflicted an injury on the states.[89] Considering the CPP never went into effect and the lack of tangible harm to the plaintiffs, precedent would suggest the plaintiffs here did not have standing. In turn, *West Virginia v. Environmental Protection Agency* supports the idea that state plaintiffs can be powerful and demonstrates that the doctrine of standing may be more flexible than we think—depending on the issue at hand.

III. *JULIANA V. UNITED STATES*

This Part examines arguments and decisions made at both the District Court and Circuit Court levels in *Juliana v. United States*, a recent climate case that was struck down in the Ninth Circuit for lack of standing. This case sits as the centerpiece of this Note. In discussing *Juliana*, and why it is concerning for climate advocates, this Note aims to use the case to explore how plaintiffs might avoid the same issues as those faced by the *Juliana* plaintiffs.

A. *The Case*

Juliana v. United States is a high-profile climate change case that arguably narrowed the remedial capacity of federal courts in the Ninth Circuit.[90] The case was first brought to the United States District Court for the District of Oregon in 2015 by twenty-one young environmental activists, an environmental organization, and a "representative of future generations" ("Our Children's Trust" or "The Trust") against the United States, the President, and various federal agencies (collectively, "the United States").[91]

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[86] *West Virginia*, 142 S. Ct. at 2606 (quoting Food Mktg. Inst. v. Argus Leader Media, 139 S. Ct. 2356, 2362 (2019)) (emphasis omitted). If this is the case and a "favorable ruling" from the court below would redress the resulting injury, "then the appellant has a cognizable Article III stake." *Id.*

[87] *Id.*

[88] *Id.*

[89] *Id.*

[90] *See* Nathaniel Levy, Note, Juliana *and the Political Generativity of Climate Litigation*, 43 HARV. ENV'T. L. REV. 479, 500 (2019) (discussing how high-profile *Juliana v. United States* has been in recent years). *See generally* Recent Cases, *Ninth Circuit Holds that Developing and Supervising Plan to Mitigate Anthropogenic Climate Change Would Exceed Remedial Powers of Article III Court.* — Juliana v. United States, 134 HARV. L. REV. 1929 (2021) (discussing *Juliana v. United States*) [hereinafter, Case Comment].

[91] Juliana v. United States, 947 F.3d 1159, 1159 (9th Cir. 2020). *See* Levy, *supra* note 90, at 502 (discussing the parties in *Juliana*).

The plaintiffs claimed that the federal government violated their constitutional rights by allowing dangerous and harmful concentrations of carbon dioxide to be emitted into the air.[92] In turn, the plaintiffs requested declaratory and injunctive relief, including the request for an implementable plan from the government to "phase out" fossil fuel emissions and decrease excess atmospheric carbon dioxide to stabilize the climate system.[93]

The United States, as well as intervenors the National Association of Manufacturers, the American Fuel and Petrochemical Manufacturers, and the American Petroleum Institute ("the defendants"), moved to dismiss the case at the district court level, arguing, among other assertions, that the plaintiffs lacked Article III standing to sue.[94] Yet the district court disagreed, "[b]ecause an 'order' requiring the United States 'to swiftly phase out CO_2 emissions' would 'partially redress' the Trust's 'asserted injuries' from United States-caused climate change, the Trust had standing to sue."[95]

In two decisions, District Court Judge Ann Aiken not only held that the public trust doctrine[96] could apply to GHG emissions, but she also found the Due Process Clause of the United States Constitution applicable.[97] Judge Aiken turned to seminal cases to conclude the district court had the authority to declare that the plaintiffs' constitutional rights were violated,[98] as well as the broad scope to remedy past wrongs.[99] Importantly, Judge Aiken discussed redressability at length, emphasizing that "redressability does not require certainty" and "requires only a substantial likelihood that the Court

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[92] *Juliana*, 947 F.3d at 1165 ("The operative complaint accuses the government of continuing to 'permit, authorize, and subsidize' fossil fuel use despite long being aware of its risks, thereby causing various climate-change related injuries to the plaintiffs. . . . The complaint asserts violations of . . . the public trust doctrine.").

[93] *Id. See* Michael B. Gerrard, *Climate Change Litigation in the United States: High Volume of Cases, Mostly About Statutes*, *in* CLIMATE CHANGE LITIGATION: GLOBAL PERSPECTIVES 33, 41 (Ivano Alogna, Christine Bakker & Jean-Pierre Gauci eds., 2021) (discussing the plaintiffs' complaint in *Juliana*).

[94] *See Juliana*, 947 F.3d at 1168 ("The government also argues that the plaintiffs lack Article III standing to pursue their constitutional claims."); Case Comment, *supra* note 90, at 1930 ("[The United States] argued that the Trust had raised only political questions, lacked standing, and had not stated a claim for which relief could be granted.").

[95] Case Comment, *supra* note 90, at 1930 (quoting Juliana v. United States, 217 F. Supp. 3d 1224, 1235, 1247–48 (D. Or. 2016)). *See also* Gerrard, *supra* note 93, at 41 ("This finding surprised many legal scholars, as no previous federal court had found there to be a federal constitutional right to a clean environment. . . .").

[96] "In its broadest sense, the term 'public trust' refers to the fundamental understanding that no government can legitimately abdicate its core sovereign powers. . . . Plaintiffs' public trust claims arise from the particular application of the public trust doctrine to essential natural resources. With respect to these core resources, the sovereign's public trust obligations prevent it from 'depriving a future legislature of the natural resources necessary to provide for the well-being and survival of its citizens.'" *Juliana*, 217 F. Supp. at 1252–53.

[97] Case Comment, *supra* note 90, at 1929 (quoting *Juliana*, 217 F. Supp. 3d at 1235, 1247–48. *See also* Gerrard, *supra* note 93, at 41.

[98] Juliana v. United States, 339 F. Supp. 3d 1062, 1095 (D. Or. 2018) (citing Obergefell v. Hodges, 576 U.S. 644 (2015); Brown v. Bd. of Educ., 347 U.S. 483 (1954); Lawrence v. Texas, 539 U.S. 558 (2003)).

[99] *Id.* (quoting Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15 (1971)).

could provide meaningful relief."[100] In finding all three elements of standing satisfied, the district court denied the motion to dismiss in 2016.[101]

However, in 2020, on interlocutory appeal, the Ninth Circuit reversed Judge Aiken's decision on the plaintiffs' standing by a vote of 2-1.[102] The circuit court found that at least some of the plaintiffs exhibited injury-in-fact, as the plaintiffs provided "evidence that climate change is affecting them now in concrete ways and will continue to do so unless checked."[103] These plaintiffs had strong cases. Their injuries included, for example, a youth who had to leave her home and relatives on the Navajo Reservation as a result of water scarcity and another youth who was forced to evacuate his home on multiple occasions due to coastal flooding.[104] In addition, the circuit court concurred with the district court's finding that a clear causal chain between the plaintiffs' injuries and the United States' actions had been adequately established.[105] As an example, the circuit court pointed to the plaintiffs' evidence on how federal subsidies and leases have increased the country's carbon emissions.[106]

However, on the final element of standing—redressability—the circuit court ultimately disagreed with the district court and the plaintiffs.[107] The circuit court clarified that its ability to redress an injury is "animated by two inquiries, one of efficacy and one of power. First, as a causal matter, is a court order likely to actually remediate the plaintiffs' injury? If so, does the judiciary have the constitutional authority to levy such an order?"[108] The court answered "no" to both of these questions.

The Ninth Circuit focused on how "[the plaintiffs'] sole claim is that the government has deprived them of a substantive constitutional right to a 'climate system capable of sustaining human life.'"[109] Because of this deprivation, the plaintiffs sought declaratory relief; the plaintiffs requested that the government acknowledge and declare that it was violating the Constitution.[110] Aside from any psychological benefit, the court found that such a declaration would fail to legitimately remediate any of the plaintiffs' claimed injuries.[111] In addition, the plaintiffs demanded injunctive relief with the government both halting all "permitting, authorizing, and

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[100] *Juliana*, 217 F. Supp. 3d at 1247.

[101] *Id.* at 1261–63.

[102] *See generally* Juliana v. United States, 947 F.3d 1159, 1160, 1164–65 (9th Cir. 2020) ("[P]laintiffs failed to demonstrate that the injunctive relief they sought was within the power of an Article III court, as required for [the] redressability element for Article III standing."); Gerrard, *supra* note 93, at 41 (discussing the dismissal of the case by a vote of 2-1).

[103] *Juliana*, 947 F.3d at 1168.

[104] *Id.*

[105] *Id.* at 1169.

[106] *Id.*

[107] *Id.* at 1169–73.

[108] *Id.* at 1181 (Staton, J., dissenting) (citation omitted) (discussing the majority opinion).

[109] *Id.* at 1169 (majority opinion).

[110] *Id.* at 1170.

[111] *Id.*

subsidizing of fossil fuel use" and crafting a plan "subject to judicial approval to draw down harmful emissions."[112] The court found that this requested remedy failed because of its negligible impact on catastrophic climate change and the plaintiffs' injuries.[113] Even if the plaintiffs' suggested plan succeeded in mitigating the consequences of climate change, the court determined that such a plan would force a judge to decide upon and essentially approve of "a host of complex policy decisions."[114] In finding that it was "beyond the power of an Article III court to order, design, supervise, or implement the plaintiffs' requested remedial plan," the Ninth Circuit held that the plaintiffs failed to establish standing.[115] Instead, the court said that "the plaintiffs' case must be made to the political branches or to the electorate at large, the latter of which can change the composition of the political branches through the ballot box."[116]

In dissent, Judge Josephine L. Staton pushed back on this. First, she focused on the irreversibility of certain climate change impacts.[117] Specifically, Judge Staton clarified that the injury at issue was "not climate change writ large," but rather "climate change beyond the threshold point of no return."[118] Second, relying on *Massachusetts v. Environmental Protection Agency*, she urged that a "perceptible reduction" in climate change would undoubtedly redress the plaintiffs' climate-change induced injuries.[119] Unless the plaintiffs' claim conflicted with the political question doctrine, which it did not, the district court could grant the plaintiffs relief.[120]

Following the Ninth Circuit's decision, Judge Aiken allowed the plaintiffs to file a second amended complaint.[121] The United States then filed another motion to dismiss the case.[122] On December 29, 2023, over eight years after the case's initial filing, Judge Aiken denied the motion to dismiss and ruled that the plaintiffs could proceed to trial.[123]

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[112] *Id.*

[113] *Id.* at 1170–71.

[114] *Id.* at 1171, 1173 ("[I]n the end, any plan is only as good as the court's power to enforce it."). *See also* Case Comment, *supra* note 90, at 1932 n.34 (2021) (quoting the Ninth Circuit as saying that what the plaintiffs asked for "would entail a broad range of policymaking" on the part of judges).

[115] *Juliana*, 947 F.3d at 1171. *See* Gerrard, *supra* note 93, at 41–42 (discussing the majority opinion, which states "[t]hat the other branches may have abdicated their responsibility to remediate the problem does not confer on Article III courts, no matter how well-intentioned, the ability to step into their shoes").

[116] *Juliana*, 947 F.3d at 1175.

[117] *Id.* at 1182 (Staton, J., dissenting).

[118] *Id.*

[119] *Id.*; Massachusetts v. Env't Prot. Agency, 549 U.S. 497, 525–26 (2007).

[120] *Juliana*, 947 F.3d at 1189–90 (Staton, J., dissenting) ("[R]esolution of this action requires answers only to scientific questions, not political ones. And plaintiffs have put forth sufficient evidence demonstrating their entitlement to have those questions addressed at trial in a court of law.").

[121] Juliana v. United States, No. 6:15-cv-01517, 2023 WL 3764725 (D. Or. June 1, 2023).

[122] Motion to Dismiss Second Amended Complaint and Motion to Certify, Juliana v. United States, No. 6:15-cv-1517 (D. Or. June 22, 2023).

[123] Juliana v. United States, No. 6:15-cv-01517, 2023 WL 9023339 (D. Or. Dec. 29, 2023).

B. *The Concerns*

As elucidated by the dissenting Judge in *Juliana*, the Ninth Circuit's failure to find standing is troubling, considering its influence on courts and reliance on the political branches.[124]

First, the court's approach could impede future cases by narrowing the remedial authority of federal courts. Judge Staton herself stated: "Beyond the outcome of the instant case, I fear that the majority's holding strikes a powerful blow to our ability to hear important cases of widespread concern."[125] Observers similarly remarked that constraining Article III courts' power to "limited and precise" legal standards for injunctive relief would impact federal courts' ability to impose "structural-reform" injunctions.[126]

Second, the court's failure to discuss the plaintiff's issues on the merits—when those issues involve a social injustice ignored by the political branches—impedes the advancement of climate change policy. The *Juliana* majority's "deference-to-a-fault promotes separation of powers to the detriment of [the court's] countervailing constitutional mandate to intervene where the political branches run afoul of our foundational principles."[127] Furthermore, the court's recommendation that plaintiffs change the composition of the political branches through the ballot box is impractical.[128] The government is a critical vehicle through which climate change can be addressed.[129] And although the legislative and executive branches have the potential to address climate change, these branches are unreliable and unlikely to do so largely because they lack the speed, political will, and representation necessary to tackle climate change.[130]

With political polarization on climate change issues, it is unlikely that the already slow United States government systems will successfully develop long-term and effective goals. "Although a number of [United States] statutes govern human activities related to climate change, no

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[124] *Juliana*, 947 F.3d at 1191 (Staton, J., dissenting).

[125] *Id.* at 1190.

[126] Case Comment, *supra* note 90, at 1933 (describing "structural-reform" injunctions to include instances where "courts require schools, firms, and other social institutions to change their behavior in order to make amends for past lawbreaking, most notably racial discrimination") (citing *Juliana*, 947 F.3d at 1173 (majority opinion)).

[127] *Juliana*, 947 F.3d at 1184 (Staton, J., dissenting).

[128] *Id.* at 1175 (majority opinion).

[129] Sindico et al., *supra* note 14, at 4; COMPARATIVE CLIMATE CHANGE LITIGATION: BEYOND THE USUAL SUSPECTS 4 (Francesco Sindico & Makane Moïse Mbengue eds., 2021) ("Governments are perhaps best positioned to take action to address these urgent and severe challenges and must play a significant role in developing, adopting, and implementing policies and other measures to tackle the range of problems we face due to climate change."); IPCC Press Release, *supra* note 2, at 2 ("There are tried and tested policy measures that can work to achieve deep emissions reductions and climate resilience if they are scaled up and applied more widely. Political commitment, coordinated policies, international cooperation, ecosystem stewardship and inclusive governance are all important for effective and equitable climate action.").

[130] Kuh, *Government (In)Action*, *supra* note 16, at 109.

comprehensive climate change legislation exists."[131] Even while a recent historic and monumental act—the Inflation Reduction Act (IRA)[132]—is an important step for climate mitigation and resilience, "it inevitably reflects the compromises necessary to get holdouts . . . onboard."[133] Relatedly, federal programs aimed at mitigating the effects of climate change, such as the Obama administration's Climate Action Plan, have been easily and quickly suppressed.[134] The quick and constant turnarounds between different administrations is just one reason why the United States experiences an "absence of sustained political will" and federal law that explicitly and intentionally reduces GHG emissions.[135]

In addition, "chang[ing] the composition of the political branches through the ballot box,"[136] as suggested by the majority in *Juliana*, is difficult, especially considering the existence of disenfranchised groups, gerrymandering issues, and voter suppression.[137] Minors cannot elect leaders to represent their interests in the legislature and executive branch—yet minors and future generations are the ones who will be disparately and severely impacted by climate change.[138] Moreover, "[c]ourts, as a matter of relative institutional competence, can be expected to more consistently respect intergenerational equity than the legislative or executive branches, who have systematically undervalued intergenerational interests related to

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[131] Sindico et al., *supra* note 14, at 200.

[132] Inflation Reduction Act, Pub. L. No. 117-169, 136 Stat. 1818 (2022).

[133] Cinnamon P. Carlarne, *The Acceleration of Climate Creep: The Court Crashes, Congress Surges*, 52 ENV'T L. REP. 10778, 10782 (2022). For example, the Inflation Reduction Act, "mandates auctions of oil and gas leases on federal lands and in federal waters prior to auctions for renewable energy projects, as well as the completion of some 2022 fossil fuel lease auctions that were previously canceled. Moreover, despite historic investments in environmental justice (roughly $60 billion), . . . [some argue the IRA] continues to sacrifice many Black, Indigenous, People of Color, and frontline communities that will bear the brunt of continuing investments in fossil fuels and the neglect of legacy sites and systemic environmental harms." *Id.*

[134] Sindico et al., *supra* note 14, at 200 ("For example, President Trump revoked significant Obama-administration climate change policies, including the Climate Action Plan and related strategies. This revocation and others that followed will result in increased emissions and failure to meet climate targets.").

[135] Kuh, *Government (In)Action*, *supra* note 16, at 109.

[136] Juliana v. United States, 947 F.3d 1159, 1175 (2020).

[137] Relatedly,

> The mere fact that we have alternative means to enforce a principle, such as voting, does not diminish its constitutional stature. Americans can vindicate federalism, separation of powers, equal protection, and voting rights through the ballot box as well, but that does not mean these constitutional guarantees are not independently enforceable. By its very nature, the Constitution "withdraw[s] certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." When fundamental rights are at stake, individuals "need not await legislative action."

Id. at 1180 (Staton, J., dissenting) (internal citations omitted).

[138] *"This is About our Human Rights:" U.S. Youths Win Landmark Climate Case*, U.N. HUM. RTS. OFF. HIGH COMM'R (Aug. 29, 2023), https://www.ohchr.org/en/stories/2023/08/about-our-human-rights-us-youths-win-landmark-climate-case#.

climate change in the political process."[139] Relatedly, issues of gerrymandering leave Congress "untethered" from the "popular will" or the majority of the electorate.[140] Thus, the availability and accessibility of the judicial branch is essential in addressing climate change issues.[141]

Over ten years ago, scholars said that "[t]he story of climate change in the courts has not been one of forging a new jurisprudence, but rather one of operating under business as usual."[142] This continues to persist. Standing, although not explicitly mentioned in the Constitution, has been inferred by federal courts as a limit on their constitutional power.[143] The judiciary has applied the standing doctrine to maintain separation of powers and redirect issues to the political branches.[144] This creates a circular problem in climate cases: the legislative and executive branches fail to develop and execute climate-specific law, and without any law to rely on, the judicial branch chooses not to act.

Although *Juliana* breeds skepticism about federal courts and their processes, the broader context of standing in United States climate change cases, in addition to successes in climate change cases abroad, should be a cause for optimism. Furthermore, such reflections can provide helpful insights to aid climate case plaintiffs in satisfying standing requirements.

IV. APPROACHES TO CLIMATE LITIGATION IN GERMANY AND FRANCE

Since *Juliana*, courts in other parts of the world have found standing and redressed plaintiffs' injuries in climate change cases. These courts are using

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[139] Kuh, *Legitimacy*, *supra* note 37, at 749.

[140] Craig Holt Segall, *Democracy Defense as Climate Change Law*, 50 ENV'T L. REP. 10115, 10120 (2020).

> [T]he voice of Congress these days has been systematically distorted. . . . Whomever Congress is speaking for, it is not the majority of the country that is demanding climate action. Thus, we come to the crux of the problem: the Court, in one set of rulings, is limiting popular control of government in the name of democracy, and in another set of rulings also in the name of democracy, is insisting that administrative agencies may not exceed the will of Congress, even as Congress becomes ever more untethered from the majority of the electorate. As Justice Kagan in the gerrymandering case put it, regarding this creeping divorce between public and Congress, "someplace along this road, 'we the people' become sovereign no longer."

Id. (citing Rucho v. Common Cause, 139 S. Ct. 2484, 2513 (2019) (Kagan, J., dissenting)). Relatedly, "a lack of meaningful political opportunity perpetuates the poisoning of certain communities." Callia Téllez, *How Gerrymandering Contributes to Environmental Injustice*, BRENNAN CTR. JUST. (Dec. 6, 2021), https://www.brennancenter.org/our-work/analysis-opinion/how-gerrymandering-contributes-environmental-injustice.

[141] Kuh, *Legitimacy*, *supra* note 37, at 763 ("[E]ven if climate harms become apparent enough to prompt the voting in-generation to (finally) take meaningful legislative action, a judicial backstop to prevent backsliding and protect interests of future generations remains important.").

[142] Markell & Ruhl, *supra* note 19, at 85–86.

[143] *See* Bradford C. Mank, *Standing for Private Parties in Global Warming Cases: Traceable Standing Causation Does Not Require Proximate Causation*, 2012 MICH. STATE L. REV. 869, 875 (2012) (explaining how standing is used to ensure courts decide upon cases and controversies).

[144] Kuh, *Legitimacy*, *supra* note 37, at 732 ("[C]ourts have almost uniformly invoked threshold doctrines like standing, the political question doctrine, and displacement or preemption to avoid reaching the merits of common law and constitutional claims.") (citations omitted).

creative, yet accurate and logically sound, arguments when it comes to interpreting and implementing climate laws and establishing the court's authority. This Part explains and analyzes a few successes. Specifically, this Part discusses three recent cases—one in Germany and two in France—that pushed the envelope in climate litigation.[145] Further, this Part explicates the positive impacts of these recent decisions.

A. *Germany:* Neubauer

1. *The Decision*

Neubauer, et al. v. Germany,[146] a unanimous decision released in 2021, is a recent example of ground-breaking climate change litigation.[147] This case's success is particularly notable, because the court mentioned *Juliana* in its decision, after asserting that "[t]he state may not evade its responsibility here by pointing to greenhouse gas emissions in other states."[148]

In February 2020, the complainants, a group of German youths and other environmental activism groups, brought suit in the country's Federal Constitutional Court against the German government.[149] They alleged that Germany's GHG reduction goals, outlined in the country's Federal Climate Protection Act ("Bundesklimaschutzgesetz" or "KSG"),[150] violated their

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[145] Although both Germany and France are not common law jurisdictions, largely general principles will be pulled from these cases for the recommendations made in this Note. *See* Joseph Dainow, *The Constitutional and Judicial Organization of France and Germany and Some Comparisons of the Civil Law and Common Germany and Some Comparisons of the Civil Law and Common Law Systems*, 37 IND. L.J. 1, 1 (1961) (pointing to France and Germany as two of the most significant of the Romanist civil law systems). Furthermore, Article III standing can involve statutory interpretation that is similar to that used in civil law jurisdictions. "For example, many environmental statutes include 'citizen suit' provisions that give district courts jurisdiction over suits to enforce against violations of the statute." JOEL BEAUVAIS, STEVEN P. CROLEY & ELANA NIGHTINGALE DAWSON, *Judicial Challenges to Federal Agency Action*, *in* ENVIRONMENTAL LITIGATION: LAW AND STRATEGY 1, 8 (Kegan A. Brown & Andrea Hogan eds., 2d ed. 2019).

[146] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Mar. 24, 2021, 157 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 30 (Ger.) [hereinafter Neubauer, 157 BVerfGE 30].

[147] *See, e.g.*, André Nollkaemper, *Shell's Responsibility for Climate Change: An International Law Perspective on a Groundbreaking Judgment*, VERFBLOG (May 28, 2021), https://verfassungsblog.de/shells-responsibility-for-climate-change/; Louis J. Kotzé, Neubauer et al. versus Germany: *Planetary Climate Litigation for the Anthropocene?*, 22 GERMAN L.J. 1423, 1423–24 (2021).

[148] Neubauer, 157 BVerfGE 30, at ¶¶ 60, 203.

[149] *Id.* at ¶¶ 4–6, 38–39, 61–92. It is also worth noting that "[t]he position of the *Bundesverfassungsgericht* is of special significance because its decisions are binding upon the constitutional authorities of the federation, of the states, and upon all public authorities." Dainow, *supra* note 145, at 37.

[150] Neubauer, 157 BVerfGE 30, at ¶¶ 3, 6.

> The purpose of the Act is to afford protection against the effects of worldwide climate change by ensuring that the national climate targets are reached and the European targets are met (§ 1 first sentence KSG). Pursuant to § 1 third sentence KSG, the legal

human rights under the Basic Law, Germany's Constitution.[151] Specifically, they argued, among other complaints, that the Act's target of reducing GHGs by fifty-five percent from 1990 to 2030 was insufficient.[152]

Under German law, the admissibility of a complaint in the country's Federal Constitutional Court is determined based on whether an individual's fundamental right was "violated by the exertion of public power."[153] Judicial decisions and legislation have provided how the court can make such a determination.[154] To establish standing, complainants need to show that the exertion of public power in question influenced their "present," "personal," and "direct" concern (or harm).[155] In addition, complainants must demonstrate that other potential remedies have been exhausted.[156]

In assessing the "admissibility" of the constitutional complaints led by "individual applicants," the court explained how the complainants had standing.[157] The court first found that the potentially violated fundamental rights here included the rights to health (or "protection of life and physical integrity") and property.[158] Then, the court elucidated how those rights were personally, directly, and presently affected by the exertion of public power.[159] First, the court discovered a "present" harm caused by the GHGs permitted under KSG because, "[a]s things currently stand, global warming caused by anthropogenic greenhouse gas emissions is largely irreversible."[160] Second, although the complainants were addressing the court as groups, the court held that there existed a "personal" concern, each person of the group would be individually, and therefore personally, impacted.[161] Third, regarding "direct" concerns, the court stated that "the

> basis of the Act is the obligation under the Paris Agreement . . . to limit the increase in the global average temperature to well below 2°C and preferably to 1.5°C above pre-industrial levels so as to minimise the effects of worldwide climate change. . . .

Id.

[151] *Id.* at ¶¶ 38–39, 61–92.

[152] *Id.* at ¶ 60.

[153] Gerd Winter, *The Intergenerational Effect of Fundamental Rights: A Contribution of the German Federal Constitutional Court to Climate Protection*, 34 J. ENV'T L. 209, 210 (2021) (citing Art. 90(1) Act on the Federal Constitutional Court of 1993).

[154] *Id.*

[155] *Id.*

[156] *Id.*

[157] Neubauer, 157 BVerfGE 30, at ¶¶ 96–100. *See also* Winter, *supra* note 153, at 210–11 (describing the Court's assessment of the complainants' fundamental rights).

[158] Neubauer, 157 BVerfGE 30, at ¶¶ 96–100. *See also* Winter, *supra* note 153, at 210–11 (describing the Court's decision).

[159] Neubauer, 157 BVerfGE 30, at ¶ 129 ("The complainants are presently, individually and directly affected in their fundamental freedoms by § 3(1) second sentence and § 4(1) third sentence KSG . . . .").

[160] *Id.* at ¶ 108 ("The possibility of a violation of the Constitution cannot be negated here by arguing that a risk of future harm does not represent a current harm and therefore does not amount to a violation of fundamental rights."). Winter, *supra* note 153, at 211.

[161] Neubauer, 157 BVerfGE 30, at ¶ 110 (citations omitted) ("The mere fact that very large numbers of people are affected does not exclude persons from being individually affected in their own fundamental rights."). Relatedly, the court acknowledged that this concern did not involve the rights of unborn persons or those of future generations, but rather the complainants themselves. *Id.* at ¶¶ 108–11.

actual impairment of fundamental rights will only arise as a result of a future legal framework, . . . but since it is irreversibly built into the current legislation, the complainants are indeed directly affected today."[162] The court ultimately avoided any straightforward, detailed discussion on exactly which measure(s) were relevant to the constitutional challenge; the court found a direct concern so long as GHG emissions were permissible by law.[163] Finally, the court found that all other legal remedies for the complainants' constitutional concerns had been exhausted.[164]

By deciding that the individual complainants (adolescents and young adults in Germany) had standing,[165] the court could assess their claims regarding KSG. And the court held that "parts of the KSG [were] incompatible with fundamental rights for failing to set sufficient provisions for emission cuts beyond 2030."[166] Drawing from the Basic Law's requirement that the State protect "natural foundations of life," the court determined that the legislature was obligated to protect the climate for current and future generations by cutting GHG emissions.[167] The court articulated this interpretation in light of the need to spread environmental burdens between different generations; "fundamental rights—as intertemporal guarantees of freedom—afford protection against the greenhouse gas reduction burdens imposed by [Article] 20a of the Basic Law being unilaterally offloaded onto the future."[168]

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[162] *Id.* at ¶ 133.

[163] *Id.* at ¶¶ 119, 130.

> There is a direct causal link between anthropogenic climate change and concentrations of human-induced greenhouse gases in the Earth's atmosphere . . . . Any exercise of freedom directly or indirectly involving CO2 emissions after 2030 is jeopardised precisely because . . . [sections in] KSG . . . allow possibly excessive amounts of greenhouse gas emissions until 2030. Insofar as this causes the remaining CO2 budget to be used up, the effect is irreversible . . . .

Id. See Winter, *supra* note 153, at 210–11 (explaining the Court's view that there is no right to a "ecological minimum standard of living").

[164] Neubauer, 157 BVerfGE 30, at ¶ 138 ("The constitutional complaints satisfy the requirements of the exhaustion of legal remedies (§ 90(2) BVerfGG) insofar as they are directed against statutory provisions.").

[165] Regarding the complaints spearheaded by environmental associations acting as "advocates of nature," the court determined they did not have standing because the associations' complaints were considered "class actions," which are not provided for by German Law. Neubauer, 1 BvR 2656/18 (Ger.), at 40, 136.

> [T]he environmental associations . . . claim . . . that the legislator has failed to take suitable measures to limit climate change and has thereby disregarded binding requirements under EU law to protect the natural foundations of life. However, the Basic Law and constitutional procedural law make no provision for this kind of standing to lodge a constitutional complaint.

Id. Winter, *supra* note 153, at 211.

[166] Neubauer, et al. v. Germany, CLIMATE CASE CHART, http://climatecasechart.com/non-us-case/neubauer-et-al-v-germany/ (last visited, Apr. 9, 2024) [hereinafter *Neubauer*, CLIMATE CASE CHART]; Neubauer, 1 BvR 2656/18 (Ger.), at ¶¶ 12–14, 27–30.

[167] Neubauer, 157 BVerfGE 30, at ¶ 193.

[168] *Id.* at ¶¶ 4, 194 ("It is thus imperative to prevent an overly short-sighted and thus one-sided distribution of freedom and reduction burdens to the detriment of the future.").

Beyond the complainants' constitutional rights, the court discussed and relied upon the Paris Agreement.[169] Given that Germany ratified the Paris Agreement and implemented the country's commitment through KSG,[170] the court found that the nation's obligation to tackle climate change could not be merely rebutted by the government's argument that the complainants' requested relief would not stop climate change alone.[171] And the court reiterated that "[t]he Paris Agreement very much relies on mutual trust as a precondition for effectiveness."[172] Because of this, the court ordered the country's legislature to set more detailed and specific provisions to reduce GHG emissions from 2031 onward.[173] The court also clarified that, in order to respect and ensure separation of powers, it left the specific decisions on emissions frameworks and requirements for the legislature.[174]

2. *The Impacts*

This case caused both short and long-term impacts in Germany. In the short term, this decision mobilized the legislature and gave them a reason to reconsider the stringency of the Federal Climate Protection Act.[175] Even though the decision articulated that the German government had until the end of 2022 to implement the demanded changes,[176] the German government announced it would move quickly to address climate laws following the release of the decision.[177] The federal lawmakers passed a bill for an adapted

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[169] "The Paris Agreement is a legally binding international treaty on climate change." *The Paris Agreement*, U.N. CLIMATE CHANGE, https://unfccc.int/process-and-meetings/the-paris-agreement (last visited Mar. 24, 2024).

[170] Neubauer, 157 BVerfGE 30, at ¶ 180 ("Germany has ratified the Paris Agreement and the federal legislator—as declared in § 1 third sentence KSG—has based the Federal Climate Change Act upon the obligation to observe the Agreement and upon the commitment made by the Federal Republic of Germany to pursue the long-term goal of greenhouse gas neutrality by 2050.").

[171] *Id.* at ¶ 203 ("Creating and fostering trust in the willingness of the Parties to achieve the target is therefore seen as a key to the effectiveness of the Paris Agreement. Indeed, the Agreement is highly reliant on the individual states making their own contributions.").

[172] *Id.*

[173] *Id.* at 2 ("[T]ransparent specifications for the further course of greenhouse gas reduction must be formulated at an early stage, providing orientation for the required development and implementation processes and conveying a sufficient degree of developmental urgency and planning certainty."). *See also id.* at 73–77 (directing the legislature to conform with this opinion).

[174] *Id.* at 3 ("The legislator itself must set out the necessary provisions specifying the overall emission amounts that are allowed for certain periods. As regards the method by which the legal framework for the allowed emission amounts is adopted, the legislative process cannot be replaced by a reduced form of parliamentary involvement . . . .").

[175] Markus Burianski & Federico Parise Kuhnle, *Reshaping Climate Change Law*, WHITE & CASE LLP (July 14, 2021), https://www.whitecase.com/insight-alert/reshaping-climate-change-law (discussing the consequences to expect from *Neubauer*).

[176] ALEX WHITE & LUKE O. CALLAGHAN-WHITE, INST. INT'L & EUR. AFFS., TAKING GOVERNMENTS TO COURT: CLIMATE LITIGATION AND ITS CONSEQUENCES (2021), https://www.iiea.com/images/uploads/resources/Taking-Governments-to_Court_1.pdf.

[177] *Germany Pledges to Adjust Climate Law After Court Verdict*, ASSOCIATED PRESS (Apr. 30, 2021, 9:17 AM), https://apnews.com/article/germany-europe-climate-climate-change-environment-and-nature-191b8ffca5ba6994ebd402b04432e6c8; Kate Connolly, *'Historic' German Ruling Says Climate Goals Not Tough Enough*, THE GUARDIAN (Apr. 29, 2021, 11:44 AM), https://www.the

KSG that requires a reduction of at least sixty-five percent in GHG emissions from 1990 levels by 2030.[178] This adapted KSG, adopted on August 31, 2021, is still in effect.[179] While this case is relatively recent, scholars have projected how the decision will play out in the future. For example, this case likely created a pathway for claimants to challenge the sufficiency of federal climate change-related laws by presenting a violation of their fundamental human rights under the German Constitution in court.[180]

B. *France:* Notre Affaire à Tous *&* Commune de Grande-Synthe

1. Notre Affaire à Tous

One of the most highly publicized cases in France,[181] *Notre Affaire à Tous and Others v. France*, otherwise known as *l'Affaire du Siècle* (the Case of the Century), was decided in 2021[182] and inspired by *Juliana v. United States*.[183] This case has been acknowledged as "a historic ruling, [where] the court found the [French] state guilty of 'non-respect of its engagements' aimed at combating global warming" and, more broadly, a "historic win for climate justice."[184]

In December 2018, four non-profit organizations[185] initiated a legal proceeding known as *recours en carence fautive* (action for failure to act) by sending a *lettre préalable indemnitaire* (letter of formal notice) to the

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guardian.com/world/2021/apr/29/historic-german-ruling-says-climate-goals-not-tough-enough ("The government responded quickly to the ruling, promising a swift implementation of changes to the law. The finance minister, Olaf Scholz, said he would begin work immediately with the environment ministry to make the amendments, which would then be put to the government for approval.").

[178] Bundes-Klimaschutzgesetz [Federal Climate Change Act], Dec. 12, 2019, BUNDESGESETZBLATT, BGBL I at 2513, revised Aug. 18, 2021, BGBL I at 3905 (Ger.), https://www.gesetze-im-internet.de/englisch_ksg/englisch_ksg.html; *Neubauer*, CLIMATE CASE CHART, *supra* note 166.

[179] *Neubauer*, CLIMATE CASE CHART, *supra* note 166.

[180] Connolly, *supra* note 177 ("Claudia Kemfert, an energy expert at the German Institute for Economic Research, called the ruling 'trailblazing and historic.' In [the] future, decisions on all levels would have to be critically reviewed to see if they corresponded with long-term climate goals, she said."); Kotzé, *supra* note 147, at 1423.

[181] Marta Torre-Schaub, *Climate Change Litigation in France: New Perspectives and Trends*, *in* CLIMATE CHANGE LITIGATION, *supra* note 93, at 127 [hereinafter Torre-Schaub, *Climate Change Litigation*].

[182] Tribunal administratif [TA] [regional administrative court of first instance] Paris, Oct. 14, 2021, Rec. Lebon 1904967, 1904968, 1904972, 1904976/4-1 (Fr.). *See also Notre Affaire à Tous and Others v. France*, CLIMATE CASE CHART, http://climatecasechart.com/non-us-case/notre-affaire-a-tous-and-others-v-france/ (last visited Mar. 24, 2024) [hereinafter *Notre Affaire à Tous*, CLIMATE CASE CHART].

[183] Torre-Schaub, *Climate Change Litigation*, *supra* note 181, at 128.

[184] Kim Willsher, *Court Convicts French State for Failure to Address Climate Crisis*, THE GUARDIAN (Feb. 3, 2021, 10:18 AM), https://www.theguardian.com/environment/2021/feb/03/court-convicts-french-state-for-failure-to-address-climate-crisis.

[185] The four organizations that filed suit were: Association Oxfam France, Association Notre Affaire à Tous, Fondation pour la Nature et l'Homme, and Association Greenpeace France. TA Paris, Feb. 3, 2021, Rec. Lebon 1904967, 1904968, 1904972, 1904976/4-1, 24.

Prime Minister and members of the French government.[186] The plaintiffs challenged both the French state's inaction on climate change and its failure to meet goals for reducing GHG emissions, increasing renewable energy, and limiting energy consumption.[187] Specifically, the plaintiffs relied upon the "'general principle of law' providing a right to a 'preserved climate system' which they argue[d] stems from national law" as well as international law, including (but not limited to) the Paris Agreement and the United Nations Framework Convention on Climate Change.[188] And, in turn, the plaintiffs asked the French Administrative Court[189] to "issue an injunction for the government to take all necessary steps to contain global warming below 1.5 [degrees Celsius]," among other requests.[190]

Generally, standing in French Administrative Courts is easily fulfilled, and "the standing requirement is interpreted extensively, especially in comparison with the German conception based on right-violation."[191] This is in great part because the standing requirement is interest-based, looking at the "interest to act," and is not elucidated in a legal statute.[192] Applicants before the court are therefore required to demonstrate a link between the challenged act and their personal (or individual) situation.[193]

Here, the court had no issue deciding the plaintiffs had standing.[194] The court released an initial decision in February 2021, "finding partially in favour of the NGOs and accepting the State's liability on the basis of ecological climate prejudice."[195] Due to a lack of sufficient information, the court additionally ordered a factual investigation on the government's actions.[196]

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[186] *Id.* at 25. *See* Torre-Schaub, *Climate Change Litigation*, *supra* note 181, at 129. *See also Notre Affaire à Tous*, CLIMATE CASE CHART, *supra* note 182.

[187] TA Paris, Feb. 3, 2021, Rec. Lebon 1904967, 1904968, 1904972, 1904976/4-1, at 2–4.

[188] *Notre Affaire à Tous*, CLIMATE CASE CHART, *supra* note 182.

[189] This is a lower-level administrative court in France.

[190] Torre-Schaub, *Climate Change Litigation*, *supra* note 181, at 129. "The plaintiffs claimed from the State symbolic damages (a token amount of one euro) for non-material harm to their collective interests. In other words, the State was accused of having committed a fault by its legislative and regulatory 'failures' in climate matters." *Id.* at 129–31; *Notre Affaire à Tous*, CLIMATE CASE CHART, *supra* note 182.

[191] Emilie Chevalier, *Standing Before French Administrative Courts and Environmental Protection: Not Specific Enough for an Effective Access to Justice?*, P.A. PERSONA E AMMINISTRAZIONE 317–18 (2020) (citation omitted). *See also*, Simon Whittaker, *Legal Procedure*, *in* JOHN BELL, SOPHIE BOYRON & SIMON WHITTAKER, PRINCIPLES OF FRENCH LAW 84, 120–21 (2d ed. 2008).

[192] Chevalier, *supra* note 191, at 318.

[193] *Id.* at 317.

[194] *See* TA Paris, Feb. 3, 2021, Rec. Lebon 1904967, 1904968, 1904972, 1904976/4-1, at 26–27, 36–37. (discussing how the French State's failure to combat climate change has caused both ecological damage and "moral" harm to the plaintiffs).

[195] Torre-Schaub, *Climate Change Litigation*, *supra* note 181, at 130; TA Paris, Feb. 3, 2021, Rec. Lebon 1904967, 1904968, 1904972, 1904976/4-1, at 37.

[196] TA Paris, Feb. 3, 2021; TA Paris Oct. 14, 2021, Rec. Lebon 1904967, 1904968, 1904972, 1904976/4-1, at 37–38 Feb. 3, 2021; Maria Antonia Tigre, *A Look Back at Significant Decisions in Climate Litigation in 2021*, CLIMATE L.: SABIN CTR. BLOG (Dec. 23, 2021), https://blogs.law.columbia.edu/climatechange/2021/12/23/a-look-back-at-significant-decisions-in-climate-litigation-in-2021/.

A few months later, following the factual investigation, the court entered its final judgment.[197] The court found the government liable and ordered the government to take immediate action.[198] The court found support for its decision through the country's constitution, the United Nations Framework Convention on Climate Change, the Paris Agreement, and other national and international laws and agreements.[199] The court also relied upon the *Commune de Grande-Synthe* decision, which was released between the court's initial and final judgments.[200]

2. Commune de Grande-Synthe

Commune de Grande-Synthe was the first major climate case in France where the High Administrative Court (Conseil d'État) established its power to ensure the French government honors its reduction targets.[201] Unlike *Notre Affaire à Tous*, the *Grande-Synthe* case was brought by a municipal government and decided at the national level in a higher court.[202]

The government of Grande-Synthe, a coastal town in northern France, sent a request to the President, the Prime Minister, and other government officials, asking that they take action to reduce GHG emissions produced in France and respect the country's commitments on the national and international level (including the European Convention on Human Rights, the Paris Agreement, the French Environmental Code, and the French Environmental Charter).[203] After not receiving a response from the French government, which is considered an implicit rejection of the request, the mayor of Grande-Synthe filed suit in the Conseil d'État[204] against the State in February 2019.[205] The municipal government of Grande-Synthe "allege[d] that the French government's failure to take further action to reduce greenhouse gas emissions violate[d] domestic and international

[197] TA Paris, Oct. 14, 2021, Rec. Lebon 1904967, 1904968, 1904972, 1904976/4-1.

[198] *Id.* at 44–45. *See* Tigre, *supra* note 196 (explaining the court's decision); *Notre Affaire à Tous*, CLIMATE CASE CHART, *supra* note 182 ("On October 14, 2021, the administrative court of Paris ordered the State to take immediate and concrete actions to comply with its commitments on cutting carbon emissions and repair the damages caused by its inaction by December 21, 2022.").

[199] TA Paris, Oct. 14, 2021, Rec. Lebon 1904967, 1904968, 1904972, 1904976/4-1, at 37–38.

[200] *Id.* at 27, 30.

[201] Marta Torre-Schaub, *Climate Change Risk and Climate Justice in France: The High Administrative Court as Janus or Prometheus?*, 14 EUR. J. RISK REGUL. 213, 214 (2023).

[202] TA Paris, Oct. 14, 2021, Rec. Lebon 1904967, 1904968, 1904972, 1904976/4-1; Conseil d'État [CE Sect.] [highest administrative court sitting in section], July 1, 2021, Rec. Lebon 427301 (Fr.). For more information about the court system in France, see *French Legal Research Guide*, GEO. L. LIBR., https://guides.ll.georgetown.edu/francelegalresearch/legalsystem (last visited Mar. 24, 2024) (providing a guide for and background on French law and legal materials).

[203] CE Sect., July 1, 2021, Rec. Lebon 427301.

[204] This is the highest administrative court in France.

[205] Torre-Schaub, *Climate Change Litigation*, *supra* note 181, at 130; *Commune de Grande-Synthe v. France*, CLIMATE CASE CHART, https://climatecasechart.com/non-us-case/commune-de-grande-synthe-v-france/ (last visited Mar. 24, 2024) [hereinafter *Commune de Grande-Synthe*, CLIMATE CASE CHART].

law."[206] And they asked the court to enjoin the government to take both legislative and regulatory action to mitigate climate change.[207]

In *Grande-Synthe*, the High Court made two decisions. In its initial decision, the court found that the municipality of Grande-Synthe had standing.[208] This was particularly because the town, given its geographic location, is directly impacted by climate change and thus by climate policies.[209] The court also found the case justiciable in light of France's commitments nationally and internationally; discussing the legal scope of the United Nations Framework Convention on Climate Change and the Paris Agreement, the court acknowledged that "these international agreements leave on each signatory State to take national measures to ensure their implementation."[210] In its later decision, the court repealed the implicit rejection made by the French government.[211] The court further noted that the reduction in emissions in the past years were insufficient in meeting the Paris Agreement standards and gave the Council of State until March 31, 2022, to adjust the trajectory of greenhouse gas emissions.[212]

3. *The Impacts*

Both *Notre Affaire à Tous* and *Grande-Synthe* ultimately redefined the role of judges in France. Scholars believe "the probabilities of success do not lie so much in the existence or non-existence of a French law 'adapted' to climate change, but in the will of the judges to interpret and apply the law in a flexible way."[213] In these cases, the court adopted a more forward-looking function by evaluating the achievement of climate objectives through greenhouse gas trajectories.[214] As a result, judges can now more readily see their role as one preventing climate change when the State is taking insufficient action.[215] Furthermore, both cases exemplify how climate

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[206] *Commune de Grande-Synthe*, CLIMATE CASE CHART, *supra* note 205.

[207] CE Sect., Nov. 19, 2020, Rec. Lebon 427301.

[208] Press Release, Greenhouse Gas Emissions: The Government Must Justify Within 3 Months that the Reduction Path to 2030 can be Achieved, Conseil d'État (Nov. 19, 2020). *See* Torre-Schaub, *Climate Change Litigation*, *supra* note 181, at 130 (explaining the case's standing issue).

[209] *See* Press Release, Greenhouse Gas Emissions, *supra* note 208 ("The French supreme administrative court has first found that the petition of the city, a coastal municipality particularly exposed to the effects of climate change, was admissible."). Torre-Schaub, *Climate Change Litigation*, *supra* note 181, at 130 (explaining the direct climate impacts Grande-Synthe could show in order to prove to the court that it should have standing, "for example, [] its geographical location as a coastal municipality, which is particularly vulnerable to the risk of submersion linked to sea level rise").

[210] Press Release, Greenhouse Gas Emissions, *supra* note 208. *See* Torre-Schaub, *Climate Change Risk*, *supra* note 201, at 220–21 ("The High Court reminded in its 19 November 2020 decision that, 'although the [Paris] Agreement does not have direct effect, it must be taken into account in order to better orient and guide National Law.'") (footnote omitted).

[211] CE Sect., July 1, 2021, Rec. Lebon 427301, at 6.

[212] *Id.* at 2, 6.

[213] Torre-Schaub, *Climate Change Litigation*, *supra* note 181, at 134.

[214] *Id.* at 214.

[215] *Id.* at 225 ("The judges explained in this case that the remedy should take the form of compensation with the objective of 'preventing' and not 'aggravating' the damage caused to the

litigation in France now involves judges' interpretation of and adjudication on the country's international agreement obligations.[216]

A long-term outcome may include the country experiencing a change in its legislative processes, as well. To avoid litigation, the Parliament may push for more effective climate change-related laws and provisions.[217] For example, in June 2019, amidst the two cases, the France National Assembly[218] declared a "climate emergency."[219] The same month, the Parliament passed the country's first Climate-Energy Act with a main goal of carbon neutrality.[220] Such reactions from the legislature, to prevent further litigation, could continue.[221]

V. RECOMMENDATIONS

"Although the judiciary is 'a latecomer to the crisis that has worsened in the hands of the legislative and executive branches,' litigation can play a role in forcing government regulatory action and perhaps in providing remedies for harm from GHG emissions."[222] Climate litigants in the United States have already successfully surpassed standing hurdles in federal courts, and plaintiffs today should take advantage of what we have learned from those cases. Furthermore, while France and Germany have notably different court systems and government structures,[223] general principles drawn from these cases can assist litigants, and potentially courts, in getting past issues of redressability. Aside from what these international cases have demonstrated about choices in court, we can also get a better understanding of the executive and legislative-branch-created toeholds that litigants need.

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atmosphere because of the insufficient action of the State to reduce GHG emissions.") (footnotes omitted). *See also* Audrey Garric & Stéphane Mandard, *Top Court Keeps Pressure on French Government Over 'Climate Inaction*,*'* LE MONDE (May 10, 2023, 3:26 PM), https://www.lemonde.fr/en/france/article/2023/05/10/top-court-keeps-pressure-on-french-government-over-climate-inaction_6026192_7.html ("France's top administrative court pressed Prime Minister Elisabeth Borne on Wednesday, May 10, to take 'all additional useful measures' to ensure the 'coherence' of the rate of reduction of greenhouse gas emissions with the country's objectives.").

[216] Torre-Schaub, *Climate Change Litigation*, *supra* note 181, at 129.

[217] *Id.* at 134–35.

[218] This is one of the chambers of the bicameral French Parliament. *Welcome to the English Website of the French National Assembly*, ASSEMBLÉE NATIONALE, https://www2.assemblee-nationale.fr/langues/welcome-to-the-english-website-of-the-french-national-assembly#node_9511 (last visited Mar. 24, 2024).

[219] Torre-Schaub, *Climate Change Litigation*, *supra* note 181, at 134–35.

[220] *Id.*

[221] *See, e.g.*, Camille LeFrance & Juliette Portala*, France Awaits Key Legislation to Turn Climate Ambitions into Reality*, CLEAN ENERGY WIRE (Feb. 23, 2024, 9:30 AM), https://www.cleanenergywire.org/factsheets/clew-guide-france-moves-action-new-climate-plan-green-industry-makeover ("France adopted a green industry bill in autumn, which aims to increase finance for the green industry, facilitate and accelerate the setup of new industries, and develop brownfield sites, as well as making public procurement greener.").

[222] Grossman, *supra* note 19, at 201.

[223] *See French Legal Research Guide*, *supra* note 202 (providing a guide for and background on French law and legal materials); *German Legal Research Guide*, GEO. L. LIBR., https://guides.ll.georgetown.edu/germanlegalresearch/judicialdecisions (last visited Mar. 24, 2024) (providing a guide for and background on German law and legal materials).

This Part provides solutions plaintiffs should consider when filing their complaints in order to fulfill the redressability prong of standing. It offers three recommendations for plaintiffs: (1) understand the court's political leaning, as it may ultimately play a role in the court's decision on whether it can redress plaintiffs' injuries; (2) show the relief requested is within the court's power to reward by relying upon standards committed to by the political branches; and (3) bolster the likelihood that injury can be redressed by recruiting states as plaintiffs. Given the recency of *Juliana* and the claims asserted by the plaintiffs, the recommendations in this Part will be provided in light of the factual background and complaint filed in *Juliana*. Through the lens of *Juliana*, these recommendations provide a path forward to ensure plaintiffs demonstrate that their requested relief is "both (1) substantially likely to redress their injuries; and (2) within the district court's power to award."[224] In adopting these recommendations, future climate litigants will increase their chances of satisfying Article III standing and employ judicial mechanisms to address climate change.

A. *Recognize that the Court's Political Leaning May Ultimately Play a Role in the Court's Decision on Whether it can Redress Plaintiffs' Injuries*

Article III standing does not exist in a vacuum. The history of standing in United States climate litigation demonstrates that standing is malleable. Thus, whether a plaintiff has standing heavily depends on the political views of the court hearing the case. This concept is commonly accepted by scholars: "[a]t least in the federal trial courts, there is some evidence that outcomes in environmental litigation are strongly influenced by the political party of the president who appointed the judge, a proxy for the judge's political ideology."[225] This idea is particularly salient considering the Supreme Court's drastic shift in perspective from *Lujan* to *Laidlaw*; after *Laidlaw*, scholars observed that conservative judges were more inclined to narrowly interpret the standing doctrine.[226]

Plaintiffs can take several pre-emptive steps when crafting and filing their claims. This is particularly important as the malleability of the standing doctrine may be a grave issue for climate litigants because the current Supreme Court consists of a conservative majority.[227] Importantly, plaintiffs

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[224] Juliana v. United States, 947 F.3d 1159, 1170 (9th Cir. 2020) (citation omitted).

[225] Farber, *supra* note 20, at 238.

[226] *See, e.g.*, Hudson P. Henry, Note, *A Shift in Citizen Suit Standing Doctrine:* Friends of the Earth, Inc. v. Laidlaw Environmental Services, 28 ECOLOGY L.Q. 233, 240–41 (2001) ("More conservative judges who favor th[e] traditional [private] litigation model tend to interpret Article III standing doctrine narrowly.") (citing Richard J. Pierce, Jr., *Is Standing Law or Politics?*, 77 N.C. L. REV. 1741, 1759–60 (1999)).

[227] *See* Ron Elving, *How the Supreme Court's Conservative Majority Came to Be*, NPR (July 1, 2023, 10:00 AM) https://www.npr.org/2023/07/13/1185496055/supreme-court-conservative-majority-thomas-trump-bush (noting that the court's composition has taken a "dramatic swing to the right").

can and should strategically select which district to file their case in, especially because climate change impacts individuals nationwide.

Yet, forum shopping at the district court level, by itself, may be insufficient. This is largely because defendants themselves can control forum selection through, for example, appeals, removals to state courts, and challenges to personal jurisdiction, subject matter jurisdiction, or venue.[228] Furthermore, unexpected changes in the judge presiding over the case or the judge who could see the case on appeal may occur. As encountered by the *Juliana* plaintiffs, the Ninth Circuit experienced a significant shift in political leaning during their case.[229] So, not only should climate plaintiffs carefully select the forum in which to bring their case, but they should also attempt to frame their claims in ways that speak to conservative political interests. For example, climate litigants could try to request relief from courts because states' rights and individuals' religious rights were violated.[230] By leaning into certain political views and recharacterizing their complaints, climate case plaintiffs can increase their chances of avoiding issues establishing standing.

B. *Show the Relief Requested is Within the District Court's Power to Reward by Relying Upon Standards Committed to by the Political Branches*

Standing requires that the requested relief is within the court's power to award. The Ninth Circuit majority in *Juliana* was concerned with the separation of powers when it denied standing under a belief that the plaintiff's demands were better left to the political branches. The majority relied on *Rucho v. Common Cause*, a case the majority believed to confirm that a standard, from the political branch, is necessary in guiding federal courts.[231] In turn, the Court argued that asking an Article III court to (1) order the government to develop a plan and (2) "determine whether the plan is

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[228] Note, *Forum Shopping Reconsidered*, 103 HARV. L. REV. 1677, 1679 (1990).

[229] *See* Andrew Wallender & Madison Alder, *Ninth Circuit Conservatives Use Muscle to Signal Supreme Court*, BLOOMBERG L. (Dec. 8, 2021, 4:45 AM), https://news.bloomberglaw.com/us-law-week/ninth-circuit-conservatives-use-muscle-to-signal-supreme-court (explaining that "the Ninth Circuit had long been thought of as a liberal stronghold for its overwhelming majority of Democratic appointees" but President Trump's appointments "brought the court to a 16-13 split with Democratic appointees narrowly edging out their counterparts appointed by Republicans").

[230] *See, e.g.*, Nat'l Pork Producers Council v. Ross, 143 S. Ct. 1142, 1143 (2023) (holding "there is no per se rule under dormant Commerce Clause forbidding enforcement of state laws that have practical effect of controlling commerce outside the State, when those laws do not purposely discriminate against out-of-state economic interests" and, in turn, supporting environmental interests); Caroline Mala Corbin, *Religious Liberty for All? A Religious Right to Abortion*, 2023 WIS. L. REV. 475, 475 (noting that "the Supreme Court has privileged [the right to practice one's faith] over other equally critical ones" and in such cases, "the religious beliefs aligned with conservative Christianity").

[231] "'[A] constitutional directive or legal standards' must guide the courts' exercise of equitable power. . . . Absent those standards, federal judicial power could be 'unlimited in scope and duration,' and would inject 'the unelected and politically unaccountable branch of the Federal Government [into] assuming such an extraordinary and unprecedented role.'" Juliana v. United States, 947 F.3d 1159, 1173 (9th Cir. 2020) (citing Rucho v. Common Cause, 139 S. Ct. 2484, 2508 (2019)).

sufficient to remediate the claimed constitutional violation of the plaintiffs' right to a 'climate system capable of sustaining human life'" would be difficult to supervise and enforce.[232] Allocating political powers without guiding standards, in the majority's view, is too much.

In light of this, *Juliana* plaintiffs, as well as other climate case plaintiffs, should guide judges towards explicit and implicit "standards" that the political branches have agreed to. These standards include, for example, those set out in international agreements and federal law. By relying on such standards, plaintiffs could strengthen their defense against separation of powers concerns.

1. *International Agreements*

First, plaintiffs should encourage judges in the United States to recognize international agreements as the judges in the German and French cases did. Even though such agreements are not typically binding, they—at a minimum—provide standards a court may consider and follow when determining whether the government's plan sufficiently addresses climate change.

The findings, baselines, and targets of international agreements can be used to interpret international and domestic laws. Climate case plaintiffs could particularly attempt to rely on the Paris Agreement as a guiding standard. The Paris Agreement is considered extremely promising; "[i]ts nature is catalytic and facilitative and its processes iterative and coordinated in order to get states where they need to be."[233]

This idea is strengthened by the fact that the holdings in the three international cases discussed above all mentioned commitments each country made under the Paris Agreement and the United Nations Framework Convention on Climate Change.[234] For example, in *Neubauer*, the court

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[232] *Id.*

[233] Farber, *supra* note 20, at 5.

[234] Torre-Schaub, *Climate Change Litigation*, *supra* note 181, at 141–42.

> In general, the different climate change cases around the world and in France recall both the commitments made under the Paris Agreement as well as the data from the latest IPCC reports. These legal actions are also part of a favourable context, against the backdrop of the Dutch *Urgenda* decision of December 2019, the latest youth movements led by Greta Thunberg and other young activists, and the actions of supporters of civil disobedience.

Id. See *Neubauer*, 157 BVerfGE 30, at ¶ 208.

> The basis of the Act is the obligation according to the Paris Agreement, under the United Nations Framework Convention on Climate Change, to limit the increase in the global average temperature to well below two degrees Celsius and, if possible, to 1.5 degrees Celsius, above the pre-industrial level so as to minimise the effects of worldwide climate change, as well as the commitment made by the Federal Republic of Germany at the United Nations Climate Action Summit in New York on 23 September 2019 to pursue the long-term goal of greenhouse gas neutrality by 2050.

Id.; CE Sect., July 1, 2021, Rec. Lebon 427301 (referencing the Kyoto Protocol and the Paris Agreement).

discussed how the Paris Agreement ultimately provided a standard for the German Federal Government:

> The legislator is not entirely free in how it specifies the obligation to take climate action under [the Constitution Article] 20a GG. However, with the temperature target contained in the Paris Agreement and then explicitly chosen for the Federal Climate Change Act, the legislator is currently operating within the leeway to specify the law granted by Article 20a GG.[235]

Although the Paris Agreement is not directly binding on United States government actors through federal law, the plaintiffs can use the Agreement, and potentially other international agreements, to interpret the limits of the court's reach. In January 2021, President Biden accepted the Paris Agreement on behalf of the United States[236] And in its own most recent Nationally Determined Contribution (NDC), the United States committed itself to "setting an economy-wide target of reducing its net greenhouse gas emissions by 50–52 percent below 2005 levels in 2030."[237] In turn, plaintiffs could request relief in the form of an executive order or agency regulation, for example, that would be consistent with attaining this goal—instead of asking for a complete halt in permitting, authorizing, and subsidizing of fossil fuel use.[238] Such a demand would be stronger, given the NDC was formed "[a]fter a careful process involving analysis and consultation across the United States federal government and with leaders in state, local, and tribal governments" and "[t]he National Climate Advisor developed this NDC in consultation with the Special Presidential Envoy for Climate."[239]

2. *Federal Law*

Second, judges in the United States should rely on the ways in which the political branches have already acknowledged climate change. To ensure this, plaintiffs in positions similar to those in *Juliana* should argue and establish that current existing federal law, including congressional acts and

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[235] *Neubauer*, 157 BVerfGE 30, at ¶ 210 ("The chosen climate target is covered by the legislator's prerogative to specify the law, as established in Art. 20a GG. The Paris Agreement was adopted in December 2015 on the basis of scientific findings compiled in preparation for the Paris Climate Change Conference.").

[236] Press Release, Antony J. Blinken, Sec'y of State, U.S. Dep't. of State, The United States Officially Rejoins the Paris Agreement (Feb. 19, 2021), https://www.state.gov/the-united-states-officially-rejoins-the-paris-agreement/. *See also* JANE A. LEGGETT, CONG. RSCH. SERV., IF1 1746, UNITED STATES REJOINS THE PARIS AGREEMENT ON CLIMATE CHANGE: OPTIONS FOR CONGRESS 1 (2021) (explaining the United States' acceptance of the Paris Agreement).

[237] THE NAT'L CLIMATE ADVISOR, THE U.S.A. NATIONALLY DETERMINED CONTRIBUTION, REDUCING GREENHOUSE GASES IN THE UNITED STATES: A 2030 EMISSIONS TARGET 1 (2021) (providing the United States NDC, which was approved by President Biden).

[238] Juliana v. United States, 947 F.3d 1159, 1170 (9th Cir. 2020).

[239] THE NAT'L CLIMATE ADVISOR, *supra* note 237.

executive orders, demonstrate the political branches' desire to address climate change as well as provide standards.

Congress has passed various climate-motivated laws, including the National Environmental Policy Act,[240] the Clean Air Act,[241] the Infrastructure Investment and Jobs Act,[242] and—most recently and notably—the Inflation Reduction Act.[243] Similar to the three international cases, which drew upon domestic laws, United States climate case plaintiffs could pull language from these domestic acts when demanding injunctive relief. For example, the IRA provides the United States with a "legislative climate core."[244] Specifically, the IRA created a standard by setting a budget on how much Congress is willing and prepared to invest in clean energy and climate resilience: $369 billion.[245] Implicit in this, Congress has set an emissions reduction standard of reducing carbon emissions by approximately forty percent by 2030.[246]

Relatedly, President Biden has signed a significant number of executive orders to combat climate change including, but not limited to, the following orders: Revitalizing Our Nation's Commitment to Environmental Justice for All,[247] Catalyzing Clean Energy Industries and Jobs Through Federal Sustainability,[248] Strengthening American Leadership in Clean Cars and Trucks,[249] and Tackling the Climate Crisis at Home and Abroad.[250] For example, by signing Executive Order 14008, Tackling the Climate Crisis at Home and Abroad, President Biden set a nationwide standard by "put[ting] the United States on a path to achieve net-zero emissions, economy-wide, by no later than 2050."[251] Although there exists "an apparent judicial reluctance (and perhaps, at times, inability) to bind the executive to commitments made in executive orders,"[252] plaintiffs could still rely on

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[240] National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (1970).

[241] Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (1970).

[242] Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, 135 Stat. 429 (2021) (including a section addressing climate change policy).

[243] Inflation Reduction Act, Pub. L. No. 117-169, 136 Stat. 1818 (2022).

[244] Carlarne, *supra* note 133, at 10779.

[245] Inflation Reduction Act, Pub. L. No. 117-169, 136 Stat. 1818 (2022). *See also*, U.S. SENATE, COMM. ON FIN., SUMMARY: INFLATION REDUCTION ACT OF 2022 1 (2022) (explaining that the IRA "will invest approximately . . . $369 billion in Energy and Security and Climate Change programs over the next ten years").

[246] U.S. SENATE, COMM. ON FIN., *supra* note 245.

[247] Exec. Order No. 14096, 88 Fed. Reg. 25251 (Apr. 21, 2023).

[248] Exec. Order No. 14057, 86 Fed. Reg. 70935 (Dec. 8, 2021).

[249] Exec. Order No. 14037, 86 Fed. Reg. 43583 (Aug. 5, 2021).

[250] Exec. Order No. 14008, 86 Fed. Reg. 7619, 7619 (Jan. 27, 2021) ("The United States and the world face a profound climate crisis. We have a narrow moment to pursue action at home and abroad in order to avoid the most catastrophic impacts of that crisis and to seize the opportunity that tackling climate change presents.").

[251] *Id.* at 7622.

[252] Erica Newland, Note, *Executive Orders in Court*, 124 YALE L.J. 2026, 2037 (2015). *See generally* ABIGAIL A. GRABER, CONG. RSCH. SERV., R46738, EXECUTIVE ORDERS: AN INTRODUCTION (2021) (explaining the scope of executive orders); Lisa Manheim & Kathryn A. Watts, *Reviewing Presidential Orders*, 86 U. CHI. L. REV. 1743, 1743–44 (2019) (identifying the lack of existing framework in place to guide the judiciary's review of presidential orders).

executive orders to suggest the boundaries within which they are asking a court to redress their injuries.

Through the actions of both political branches, it is not only clear that they recognize the existence of the climate crisis and agree that action must be taken, but they also have already set standards they are apparently willing to commit to. Thus, climate case plaintiffs should capitalize on existing standards that the political branches have already implicitly or explicitly agreed to in order to convince courts that they have the power to grant the plaintiffs' requested relief.

C. *Bolster the Likelihood Injury Can be Redressed by Recruiting States as Plaintiffs*

The Ninth Circuit majority in *Juliana* held that the relief requested by the plaintiffs was not substantially likely to redress their injuries.[253] The court ultimately stated that controlling GHG emissions by the federal government would only make a negligible impact on global climate change.[254] However, this "drop in the ocean" type of argument could be surpassed by climate case plaintiffs if they include states as plaintiffs on their side of the "v."

As seen in *Georgia v. Tennessee Copper*, *Massachusetts v. Environmental Protection Agency*, and *West Virginia v. Environmental Protection Agency*, judges in the United States tend to be more lenient on standing requirements when a state files suit against the federal government. Even *Grande-Synthe* had a similar approach to and respect for the municipal government. All four cases demonstrate how much power an elected official, or a state, can have in suing the federal government. And states acting as plaintiffs can strengthen their argument when they demonstrate that the state's actual land, given its geographic location, is particularly vulnerable to and directly impacted by climate change—and thus climate policies. So, while enjoining federal government activity may not "by itself prevent further injury"[255] to climate case plaintiffs, like those in *Juliana*, doing so could prevent irreversible injury to states.

This argument is additionally supported by the fact that the Ninth Circuit majority itself cited *Massachusetts v. Environmental Protection Agency* and recalled that the case "involved a procedural right that the State of Massachusetts was allowed to assert 'without meeting all the normal

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[253] Juliana v. United States, 947 F.3d 1159, 1170–71 (9th Cir. 2020).

[254] "[T]he plaintiffs' experts make plain that reducing the global consequences of climate change demands much more than cessation of the government's promotion of fossil fuels. . . . The plaintiffs concede that their requested relief will not alone solve global climate change." *Id.*

[255] *Id.* at 1170.

standards for redressability.'"[256] Including a state plaintiff—which is entitled to *special solicitude* in the standing analysis—would potentially allow the court to gloss over major questions on redressability. Therefore, the climate case plaintiffs should enlist states as plaintiffs in their complaint.

Although *United States v. Texas* and other recent Supreme Court decisions[257] are a reasonable cause for concern, those cases only bolster the recommendations made in this Note. State plaintiffs in climate cases need to plead their claims creatively and in a strategic forum. In addition, such cases should not act as a deterrence to including state plaintiffs, among other plaintiffs, at the outset of a climate case.

CONCLUSION

"If plaintiffs' fears, backed by the government's *own studies*, prove true, history will not judge us kindly. When the seas envelop our coastal cities, fires and droughts haunt our interiors, and storms ravage everything between, those remaining will ask: Why did so many do so little?"[258] Climate change is impacting our lives and demands urgent action. Although courts cannot solve the issue of climate change alone, they play an important role in correcting the other branches' failure to act. Cases in the United States, as well as recent successful cases in Germany and France, provide powerful suggestions on how plaintiffs can overcome issues of standing in United States climate litigation. Through the recognition and use of national and international cases, agreements, and laws, plaintiffs in United States climate litigation can more readily convince courts they certainly have standing.

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[256] *Id.* at 1171 (In *Massachusetts v. Environmental Protection Agency*, "the Court found redressability because 'there [was] some possibility that the requested relief [would] prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant.'" (quoting Massachusetts v. Env't Prot. Agency, 549 U.S. 497, 517–18 (2007)).

[257] *See, e.g.*, Haaland v. Brackeen, 143 S. Ct. 1609, 1639–40 (2023) (holding that "it is the judgment, not the opinion, [of a federal court] that demonstrates redressability," and that states lack standing to sue the federal government).

[258] *Juliana*, 947 F.3d at 1191 (Staton, J., dissenting).