

# TAKING A STAND: CLIMATE CHANGE LITIGANTS AND THE VIABILITY OF CONSTITUTIONAL CLAIMS

*By Mina Juhn\**

*In response to the accelerating effects of global warming, individuals and citizen groups in the United States have brought suit against the federal government to challenge the adequacy of existing climate change policies. Though statutory and tort claims comprise the bulk of these actions, plaintiffs have begun alleging that government inaction on climate change violates constitutional and fundamental rights.*

*In these matters, the federal judiciary generally applies threshold justiciability doctrines, such as standing and the political question doctrine, to deny judicial review. This Note examines the reasoning behind the judiciary's application of these doctrines and evaluates the appropriate scope of judicial engagement in climate change litigation, arguing that broad invocation of these doctrines undermines the judiciary's role of protecting citizens' constitutional rights. It also argues for the recognition of the fundamental right to a stable climate implicit in the Constitution. The recent case of Juliana v. United States is as an illustrative example of the opportunities and difficulties inherent in climate change lawsuits.*

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\* J.D. Candidate, 2022, Fordham University School of Law; B.A., 2013, Wellesley College. I would like to thank Professor Paolo Galizzi for his valuable guidance, mentorship, and support of this project. Additional thanks to my editor, Daniel Meagher, and the members of the *Fordham Law Review* for their diligent feedback and editing. Finally, I would like to thank my parents, my sister, and my friends for enduring my many lectures on this topic and for their unwavering love and encouragement.

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#### INTRODUCTION

As the impacts of global warming on human and natural systems increase, so too do the number of lawsuits brought to mitigate them.<sup>1</sup> There is widespread scientific consensus that global warming is changing the global climate in a manner deleterious to both human and natural systems.<sup>2</sup> Eighteen of the nineteen warmest years on record have occurred since 2001, and even the staunchest climate change skeptics recognize the dynamics of the carbon cycle.<sup>3</sup> In 2018, the Intergovernmental Panel on Climate Change (IPCC) issued a report stating that if greenhouse gas emissions continued at their current rate, the resulting temperature increases could destroy coral reefs, exacerbate wildfires, jeopardize food supplies, and contribute to

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1. United Nations Env’t Programme, *Global Climate Litigation Report: 2020 Status Review*, U.N. Doc. DEL/2333/NA, at 4 (2020). According to the United Nations Environment Programme (UNEP), there has been a “rapid increase in climate litigation . . . around the world.” In 2017, UNEP identified 884 climate change cases brought in twenty-four countries. As of July 1, 2020, this number has nearly doubled to 1550 cases filed in thirty-eight countries. Of these, approximately 1200 cases are in the United States. *Id.*

2. See Michael Burger et. al., *The Law and Science of Climate Change Attribution*, 45 COLUM. J. ENV’T L. 57, 60 (2020).

3. See *id.*; Hari M. Osofsky, *Is Climate Change “International”?: Litigation’s Diagonal Regulatory Role*, 49 VA. J. INT’L L. 585, 587 (2009).

political instability in developing nations.<sup>4</sup> Climate change is “one of the key challenges of our lifetimes and future generations,”<sup>5</sup> and there is significant evidence linking extreme weather events and the onset of climate change to human activity.<sup>6</sup>

The velocity and permanency of global warming have become topics of increasing urgency in recent decades<sup>7</sup> but have been met in the United States by legislative stagnation and agency deregulation.<sup>8</sup> Congress’s failure in the last thirty years to enact any major legislation to regulate greenhouse gas emissions has coincided with a sharp increase in climate lawsuits.<sup>9</sup> This perceived inaction from the political branches has compelled some plaintiffs to turn to the judicial system to combat anthropogenic climate change via a growing class of environmental lawsuits known as “climate change

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4. See MYLES ALLEN ET AL., INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, SUMMARY FOR 8, 23–24 (2018); Benjamin T. Sharp, Comment, *Stepping into the Breach: State Constitutions as a Vehicle for Advancing Rights-Based Climate Litigation*, 14 DUKE J. CONST. L. & PUB. POL’Y SIDEBAR 39, 39–40 (2019).

5. President Barack Obama, Remarks by the President in Announcing the Clean Power Plan (Aug. 3, 2015), <http://go.wh.gov/4KvDkq> [<https://perma.cc/8P9B-XS4R>]; see also Eric A. Posner & Cass R. Sunstein, *Climate Change Justice*, 96 GEO. L.J. 1565, 1611 (2008) (noting that climate change implicates economic and social issues, particularly relating to “distributive and corrective justice”).

6. See Burger et al., *supra* note 2, at 62–64 (“[H]uman activities—especially fossil fuel combustion, land use change, and industrial production—have dramatically impacted earth’s climate. As a result of human activities, concentrations of radiatively important agents such as [greenhouse gases] and aerosols have increased significantly. Carbon dioxide (CO<sub>2</sub>) concentrations, for example, have increased by more than 40 percent to levels not seen in at least 3 million years.”); Osofsky, *supra* note 3, at 592 (describing anthropogenic climate change as the result of decisions made at the “individual, local, state, national, regional, and international” levels).

7. See Michael C. Blumm & Mary Christina Wood, “*No Ordinary Lawsuit*”: *Climate Change, Due Process, and the Public Trust Doctrine*, 67 AM. U. L. REV. 1, 12 (2017) (“Scientists warn that the world faces dangerous “tipping points,” which are capable of triggering irreversible and uncontrollable heating that would destroy the planet’s climate system.”).

8. See Nathaniel Levy, Note, *Juliana and the Political Generativity of Climate Litigation*, 43 HARV. ENV’T L. REV. 479, 479–80 (2019) (noting that the Trump administration’s deregulation of environmental protections also contributed to the rise of climate change litigation).

9. Congress has never passed legislation specifically controlling greenhouse gas emissions. It has passed two statutes to fund federal research on climate change science. See National Climate Program Act, 15 U.S.C. §§ 2901–2908; Global Change Research Act of 1990, 15 U.S.C. §§ 2921–2961. During the Obama administration, the EPA promulgated a rule in 2015, known as the Clean Power Plan (CPP), which established state guidelines for regulating carbon emissions from power plants and sought to reduce power sector emissions 32 percent below 2005 levels by the year 2030. In 2016, the U.S. Supreme Court stayed the implementation of the CPP and in 2019, the EPA under the Trump administration replaced the plan with the Affordable Clean Energy (ACE) rule. See Lisa Friedman, *E.P.A. Finalizes Its Plan to Replace Obama-Era Climate Rules*, N.Y. TIMES (June 19, 2019), <https://www.nytimes.com/2019/06/19/climate/epa-coal-emissions.html> [<https://perma.cc/KG4P-TREG>]. The ACE does not set limits on power plant carbon emissions and is expected to reduce national carbon emissions by 0.1 percent between 2021 and 2050 via efficiency improvements. See *id.* See generally Lisa Heinzerling, *The Supreme Court’s Clean-Power Power Grab*, 28 GEO. ENV’T L. REV. 425 (2016).

litigation.”<sup>10</sup> These litigants do not purport to supplant the political process, and there remains a general consensus that the political branches should address climate change via legislative or executive action.<sup>11</sup> Yet, in the absence of a large-scale or effective response to the growing climate crisis, plaintiffs have attempted to compel regulatory and political action through the courts.<sup>12</sup>

Climate change litigation encompasses many types of lawsuits that seek to hold certain actors accountable for their contributions to or failures to act on climate change.<sup>13</sup> Plaintiffs may bring litigation against federal and state governments, city administrations, and corporations; the most common claimants are environmental organizations, industry trade groups, local governments, and citizen groups.<sup>14</sup>

In the United States, climate change litigation has traditionally involved statutory claims or claims sounding in common-law tort doctrines.<sup>15</sup> In contrast to administrative or common-law claims, rights-based climate change lawsuits against governments and public authorities have recently gained traction.<sup>16</sup> These public law actions seek to compel federal, state, and local governments to escalate their efforts to address climate change by raising human rights and constitutional arguments.<sup>17</sup>

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10. See Hari M. Osofsky, *The Geography of Climate Change Litigation: Narratives of Massachusetts v. EPA* (pt. 2), 8 CHI. J. INT’L L. 573, 574 (2008) (noting that “[c]limate change litigation is one of many civil society and governmental initiatives that have emerged in response to the lack of effective international environmental regulation”); Hari M. Osofsky, *Litigation’s Role in the Path of U.S. Federal Climate Change Regulation: Implications of AEP v. Connecticut*, 46 VAL. U. L. REV. 447, 455 (2012) (arguing in favor of climate change lawsuits as “litigation provides a way for key stakeholders to address conflicts over how to move forward”). See generally United Nations Env’t Programme, *supra* note 1.

11. See Burger et al., *supra* note 2, at 228.

12. See, e.g., Jeff Todd, *A Fighting Stance in Environmental Justice Litigation*, 50 ENV’T L. 557, 570–73 (2020); Anna Christiansen, Note, *Up in the Air: A Fifty-State Survey of Atmospheric Trust Litigation Brought by Our Children’s Trust*, 2020 UTAH L. REV. 867, 868–73; Myanna Dellinger, *See You in Court: Around the World in Eight Climate Change Lawsuits*, 42 WM. & MARY ENV’T L. & POL’Y REV. 525, 525–28 (2018).

13. See Burger et al., *supra* note 2, at 62.

14. See Katrina Fischer Kuh, *The Legitimacy of Judicial Climate Engagement*, 46 ECOLOGY L.Q. 731, 734 (2019).

15. See *infra* Part I.A.

16. See, e.g., Megan Raymond, *A Hypothetical Win for Juliana Plaintiffs: Ensuring Victory Is More than Symbolic*, 46 ECOLOGY L.Q. 705, 705–07 (2019). Outside of the United States, plaintiffs have also brought climate lawsuits alleging constitutional and human rights claims. For example, judges in the Netherlands and Pakistan have delivered significant victories to climate change activists who argued, in part, on constitutional grounds. In the Netherlands, the Hague Court of Appeal held that the government’s emissions program was insufficient and thus violated the plaintiffs’ constitutional rights and the government’s treaty responsibilities. See MARIA BANDA, ENV’T L. INST., CLIMATE SCIENCE IN THE COURTS: A REVIEW OF U.S. AND INTERNATIONAL JUDICIAL PRONOUNCEMENTS 79 (2020); *infra* note 382–85. In Pakistan, the Lahore High Court held that the national government’s delay in implementing its climate change policy violated citizens’ fundamental rights. See *id.* at 96–97 (2020).

17. See Blumm & Wood, *supra* note 7, at 6–7.

To date, the most prominent climate change lawsuit<sup>18</sup> of this type—noteworthy both for the scope of its constitutional claims and the youth of its plaintiffs—is *Juliana v. United States*.<sup>19</sup> The twenty-one young plaintiffs allege that, despite the federal government’s obligation to reduce carbon emissions, the government has actively facilitated the country’s increased carbon emissions by supporting the fossil fuel industry.<sup>20</sup> The *Juliana* plaintiffs argue that the government’s actions have violated their “fundamental constitutional rights to life, liberty, and property.”<sup>21</sup>

In 2016, the case generated extensive media coverage when Judge Ann Aiken of the District Court of Oregon declared that “the right to a climate system capable of sustaining human life is fundamental to a free and ordered society.”<sup>22</sup> In January 2020, a panel of the Ninth Circuit reversed the lower court’s decision for lack of standing.<sup>23</sup> Although the Ninth Circuit acknowledged that federal policies contributed to sustaining high levels of carbon emissions, the court decided that carbon emissions policies presented political questions that required resolution by the political branches.<sup>24</sup> As a result, the panel held that the plaintiffs did not satisfy the requirements for Article III standing and reversed the lower court’s decision.<sup>25</sup>

The Ninth Circuit’s decision is emblematic of the judiciary’s typical response to climate change litigation, particularly to the cases in which plaintiffs advance constitutional or rights-based claims.<sup>26</sup> Often, the judiciary finds that policymaking discretion, class certification, or separation of powers concerns restrict their ability to grant relief and routinely dismisses suits for lack of standing.<sup>27</sup>

This Note examines federal climate change lawsuits in the United States alleging constitutional violations. Part I begins with a brief overview of statutory and common-law claims in climate change litigation and proceeds to a discussion of the legal rights and issues implicated by constitutional claims. Part I also introduces *Juliana* as a case study for evaluating the legal strategies and justiciability issues involved in rights-based arguments. Part II reviews the arguments for and against pursuing constitutional claims in climate change litigation, focusing on the procedural and substantive issues

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18. *Juliana v. United States (Juliana II)*, 947 F.3d 1159 (9th Cir. 2020), *reh’g denied*, 986 F.3d 1295 (9th Cir. 2021) (mem.).

19. 947 F.3d 1159 (9th Cir. 2020); *id.* at 1166.

20. *See Juliana v. United States (Juliana I)*, 217 F. Supp. 3d 1224, 1233 (D. Or. 2016), *rev’d and remanded*, 947 F.3d 1159.

21. *Id.* at 1264.

22. *Id.* at 1250.

23. *See Juliana II*, 947 F.3d at 1175.

24. *See id.* (“We reluctantly conclude, however, 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.”).

25. *Id.* After the plaintiffs’ petition for rehearing en banc was denied, they indicated that they would seek a writ of certiorari. *See infra* notes 212–14 and accompanying text.

26. *See infra* Part I.B.

27. *See, e.g., Animal Legal Def. Fund v. United States*, 404 F. Supp. 3d 1294 (D. Or. 2019); *Clean Air Council v. United States*, 362 F. Supp. 3d 237 (E.D. Pa. 2019); *see also* Kuh, *supra* note 14, at 734.

raised. Part III argues that constitutional claims in climate change litigation should be granted standing and that they merit judicial review.

## I. OVERVIEW OF CLIMATE CHANGE LITIGATION

Climate change litigation is unified in its focus on the harmful impacts of climate change, but plaintiffs have utilized an array of approaches, which has resulted in a range of litigation strategies.<sup>28</sup> Climate change litigation extends beyond the traditional confines of environmental litigation—which focuses largely on air and water pollution, the preservation of endangered species, and environmental impact statements<sup>29</sup>—to cases that argue for a constitutional right to a stable climate and the rights of future generations.<sup>30</sup>

This part establishes several necessary legal foundations. Part I.A reviews federal statutory and common-law causes of action. Part I.B discusses the sources of rights for constitutional claims and the justiciability issues involved. Part I.C introduces *Juliana*—this Note’s central case study of a constitutional climate change lawsuit—and reviews its procedural posture and legal arguments.

### A. Traditional Sources of Legal Rights

The legal bases for climate change lawsuits include statutory, common-law, and constitutional causes of action.<sup>31</sup> Statutory claims are the most common, followed by claims sounding in common-law tort doctrines, in particular public nuisance, private nuisance, and negligence.<sup>32</sup> Constitutional claims comprise a comparably smaller but growing subset of climate change litigation.<sup>33</sup> This Note focuses primarily on the strength and generativity of constitutional claims<sup>34</sup> brought by environmentalist plaintiffs but begins with an instructive overview of the other categories of climate litigation.

#### 1. Statutory Authority

A significant number of climate change lawsuits allege violations of federal statutes and regulations, including the Administrative Procedure

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28. See Levy, *supra* note 8, at 498–500.

29. See, e.g., *Lujan v. Defs. of Wildlife*, 504 U.S. 555 (1992).

30. See generally Maria L. Banda & Scott Fulton, *Litigating Climate Change in National Courts: Recent Trends and Developments in Global Climate Law*, 47 *Env’t L. Rep. News & Analysis* 10,121 (*Env’t L. Inst.* Feb. 2017).

31. See Levy, *supra* note 8, at 499.

32. See *id.*

33. See Lisa Heinzerling, *A Meditation on Juliana v. United States* (May 28, 2019) (unpublished manuscript), <https://ssrn.com/abstract=3395471> [<https://perma.cc/G27N-GGSU>]; see also John Schwartz, *Students, Cities and States Take the Climate Fight to Court*, *N.Y. TIMES* (Aug. 10, 2017), <https://www.nytimes.com/2017/08/10/climate/climate-change-lawsuits-courts.html> [<https://perma.cc/8P72-2F79>].

34. See Levy, *supra* note 8, at 482.

Act,<sup>35</sup> the National Environmental Policy Act,<sup>36</sup> the Clean Air Act of 1963<sup>37</sup> (CAA), the Clean Water Act of 1977,<sup>38</sup> and the Endangered Species Act of 1973<sup>39</sup>. Actions against private entities have also arisen under securities regulations or as requests under the Freedom of Information Act.<sup>40</sup> According to an analysis of the Sabin Center for Climate Change Law's climate change litigation database, which tracks lawsuits brought by environmental and citizen groups between 1990 and 2016, 65 percent of cases had a federal statutory cause of action.<sup>41</sup>

The most noteworthy climate lawsuits alleging statutory violations and challenging government efforts to regulate carbon emissions have been brought under the CAA. The U.S. Supreme Court's seminal decision in *Massachusetts v. EPA*<sup>42</sup> in 2007 arguably instigated the current proliferation of climate change lawsuits and is the preeminent example of an environmental lawsuit seeking to compel government action under a statutory scheme.<sup>43</sup> In *Massachusetts*, several U.S. states, cities, and environmental groups challenged the Environmental Protection Agency's (EPA) denial of a rulemaking petition to regulate greenhouse gas emissions from motor vehicles.<sup>44</sup> The plaintiffs alleged that the government's inaction would result in specific climate change-induced harms—including serious adverse effects on human health—and sought to compel the government to regulate carbon dioxide emissions pursuant to the CAA.<sup>45</sup> In response, the EPA argued that greenhouse gas emissions did not qualify as air pollutants and that the plaintiffs had not demonstrated a sufficient and particularized harm required to establish standing.<sup>46</sup> The EPA further argued that even if it had authority to regulate greenhouse gases, it would be unwise to do so at that time.<sup>47</sup>

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35. 5 U.S.C. §§ 551–559, 701–706.

36. 42 U.S.C. §§ 4321–4370; *see, e.g.*, *Indigenous Env't Network v. U.S. Dep't of State*, 347 F. Supp. 3d 561, 572 (D. Mont.), *order amended and supplemented*, 369 F. Supp. 3d 1045 (D. Mont. 2018), *appeal dismissed*, No. 18-36068, 2019 WL 2542756 (9th Cir. June 6, 2019); *Hapner v. Tidwell*, 621 F.3d 1239 (9th Cir. 2010); *Wildearth Guardians v. U.S. Forest Serv.*, 668 F. Supp. 2d 1314 (D.N.M. 2009).

37. 42 U.S.C. §§ 7401–7671; *see, e.g.*, *Sierra Club v. EPA*, 699 F.3d 530, 531 (D.C. Cir. 2012); *New York v. EPA*, 443 F.3d 880, 883 (D.C. Cir. 2006).

38. Pub. L. No. 95-217, 91 Stat. 1566 (codified as amended in scattered sections of 33 U.S.C.).

39. Pub. L. No. 93-205, 87 Stat. 884 (codified as amended in scattered sections of 7 and 16 U.S.C.); *see, e.g.*, *Ctr. for Biological Diversity v. Zinke*, 900 F.3d 1053, 1058 (9th Cir. 2018); *Colorado v. U.S. Fish & Wildlife Serv.*, 362 F. Supp. 3d 951, 959–60 (D. Colo. 2018).

40. 5 U.S.C. § 552; *see also* BANDA, *supra* note 16, at 53.

41. *See* Sabin Ctr. for Climate Change L. & Arnold & Porter, *U.S. Climate Change Litigation*, CLIMATE CHANGE LITIG. DATABASES, <http://climatecasechart.com/us-climate-change-litigation> [https://perma.cc/URJ4-E3SY] (last visited Apr. 14, 2021); *see also* Burger et al., *supra* note 2, at 171.

42. 549 U.S. 497 (2007).

43. *See id.*; BANDA, *supra* note 16, at 14.

44. *See* *Massachusetts v. EPA*, 549 U.S. 497, 497 (2007).

45. *See id.* at 510.

46. *Id.* at 511. *See also infra* notes 140–42 and accompanying text.

47. *See Massachusetts*, 549 U.S. at 511.

The Court found that greenhouse gas emissions qualified as air pollutants and consequently were subject to regulation by the EPA.<sup>48</sup> The Court further held that the EPA's refusal to regulate emissions constituted an actual and imminent harm and that the EPA was authorized and obligated under the CAA to regulate greenhouse gas emissions if the EPA determined that such emissions endanger public health and welfare.<sup>49</sup>

Writing in dissent, Chief Justice Roberts maintained that the claims constituted a nonjusticiable question and disputed the majority's finding that the plaintiffs had demonstrated sufficient causation and redressability.<sup>50</sup> Chief Justice Roberts also questioned whether the redress sought would alleviate a global problem like climate change, noting that approximately 80 percent of global emissions originate outside the United States.<sup>51</sup> Justice Antonin Scalia, in a separate dissent, criticized the majority for depriving the EPA of *Chevron* deference in favor of its own policy determinations.<sup>52</sup>

In addition to causes of action brought under environmental statutes, plaintiffs have also brought claims under federal securities laws.<sup>53</sup> These cases often allege that directors of oil and gas corporations violated their fiduciary duties to shareholders by misleading them as to the impact of the companies' carbon output on global warming.<sup>54</sup> For example, in *Ramirez v. Exxon Mobil Corp.*,<sup>55</sup> a group of shareholders brought a class action suit under the Private Securities Litigation Reform Act of 1995,<sup>56</sup> alleging that Exxon Mobil had defrauded investors by purposefully misrepresenting climate risks.<sup>57</sup> In 2018, a Texas federal district court found that the shareholders had adequately pleaded the alleged misstatements and met the standard for a securities fraud claim.<sup>58</sup> Current and former employees of Exxon Mobil advanced similar arguments in *Fentress v. Exxon Mobil Corp.*,<sup>59</sup> in which the employees sued the company for violations of the Employee Retirement Income Security Act of 1974<sup>60</sup> (ERISA). The plaintiffs alleged that Exxon Mobil's failure to disclose and consider the impact of environmental risks and its materially false statements about the health of the company constituted a breach of its fiduciary duties.<sup>61</sup> While

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48. *See id.* at 528.

49. *See id.* at 532.

50. *Id.* at 536 (Roberts, C.J., dissenting).

51. *Id.* at 545.

52. *Id.* at 560 (Scalia, J., dissenting) ("No matter how important the underlying policy issues at stake, this Court has no business substituting its own desired outcome for the reasoned judgment of the responsible agency.").

53. *See* BANDA, *supra* note 16, at 50.

54. *Id.*

55. 334 F. Supp. 3d 832 (N.D. Tex. 2018).

56. Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C.).

57. BANDA, *supra* note 16, at 51–52.

58. *See id.* at 52; *see also* Ramirez, 334 F. Supp. 3d at 859.

59. 304 F. Supp. 3d 569 (S.D. Tex. 2018).

60. Pub. L. No. 93-406, 88 Stat. 829 (codified as amended in scattered sections of the U.S.C.).

61. *See* Fentress, 304 F. Supp. 3d at 572.

the court did not question the elements of climate change argued by the plaintiffs, citing *Massachusetts*, it found that the plaintiffs failed to meet the pleading standard for ERISA claims and dismissed the case.<sup>62</sup> Plaintiffs in climate change litigation have had inconsistent degrees of procedural success when bringing claims under other federal statutes.

## 2. Common-Law Tort Doctrines

Plaintiffs in climate change litigation have also sought relief through tort claims by suing major carbon emitters.<sup>63</sup> These suits are based on common-law tort theories such as public nuisance, private nuisance, and negligence and are reminiscent of the mass tort strategies employed in tobacco and asbestos litigation.<sup>64</sup>

Proving causation is a universal difficulty facing plaintiffs who bring tort claims to address harms wrought by climate change.<sup>65</sup> Despite differences in the legal elements of public nuisance, private nuisance, and negligence, the duty and breach elements are explicitly central to negligence claims and are imported into nuisance claims via the concept of “unreasonable interference.”<sup>66</sup> Climate change litigation grounded in tort law struggles with the attenuation between the alleged causes and harmful effects of a defendant’s conduct because the harm may be delayed or not sufficiently particularized.<sup>67</sup> While courts have largely accepted that anthropogenic carbon emissions cause global warming, demonstrating that a defendant’s actions were the factual and proximate cause of the plaintiffs’ harms is considerably more difficult.<sup>68</sup>

In *Native Village of Kivalina v. Exxon Mobil*,<sup>69</sup> the Native Village of Kivalina, the governing body of an Iñupiat village in Alaska, and the City of Kivalina sued approximately two dozen fossil fuel companies for their contributions to climate change and the corresponding damage to the village, alleging a public nuisance under federal common law.<sup>70</sup> The District Court for the Northern District of California dismissed the case for lack of subject matter jurisdiction and standing, finding that the plaintiffs did not demonstrate that their injuries were “traceable” to the defendants’ actions, despite detailing how the defendants’ alleged practice of emitting 1.2 billion tons of greenhouse gases annually would lead to localized impacts on the village involving melting permafrost and rising sea levels.<sup>71</sup>

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62. *See id.* at 586; *see also* BANDA, *supra* note 16, at 50.

63. *See* Burger et al., *supra* note 2, at 191.

64. *See id.*; *see also* BANDA, *supra* note 16, at 18.

65. *See* BANDA, *supra* note 16, at 18.

66. *See* Burger et al., *supra* note 2, at 195.

67. *See* Douglas A. Kysar, *What Climate Change Can Do About Tort Law*, 41 ENV’T L. 1, 30 (2011).

68. *See id.* at 29; *see also* Burger et al., *supra* note 2, at 205.

69. 663 F. Supp. 2d 863 (N.D. Cal. 2009), *aff’d on other grounds*, 696 F.3d 849 (9th Cir. 2012).

70. *See Kivalina*, 696 F.3d at 865.

71. *Id.* at 878.

Similarly, in *Comer v. Murphy Oil USA, Inc.*,<sup>72</sup> residents of Mississippi filed a class action against energy, fossil fuel, and chemical companies based on state common-law claims of public and private nuisance, trespass, negligence, unjust enrichment, fraudulent misrepresentation, and civil conspiracy.<sup>73</sup> The plaintiffs alleged that the companies' carbon emissions output contributed to global warming and would exacerbate the effects of Hurricane Katrina on the Gulf Coast.<sup>74</sup> Though the District Court for the Southern District of Mississippi dismissed the case for lack of standing, the Fifth Circuit reversed and held that the plaintiffs had Article III standing to bring their nuisance, trespass, and negligence claims in federal court.<sup>75</sup>

Scholars express general hesitance about the efficacy of tort doctrines in climate change litigation, noting that the elements of tort law are insufficient to address climate change harms.<sup>76</sup> Professor Douglas Kysar explains that climate change claims are so "diffuse and disparate in origin, lagged and latticed in effect, [that] anthropogenic greenhouse gas emissions represent the paradigmatic anti-tort, a collective action problem so pervasive and so complicated as to render at once both all of us and none of us responsible."<sup>77</sup>

Tort law's inability to address climate change harms was amplified by the Supreme Court's holding in *American Electric Power Co. v. Connecticut*<sup>78</sup> (*American Electric II*), which reinforced the strategy of employing statutory claims in proregulatory environmental litigation.<sup>79</sup> Eight states and New York City sued five private utilities, alleging that the companies' carbon emissions outputs contributed to global warming and amounted to nuisance under state and federal common law.<sup>80</sup> The plaintiffs sought injunctive relief compelling the utility companies to reduce their emissions levels.<sup>81</sup> The Court unanimously held that "the Clean Air Act and the EPA actions it authorizes displace any federal common-law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired power plants."<sup>82</sup> The

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72. 839 F. Supp. 2d 849 (S.D. Miss. 2012), *aff'd*, 718 F.3d 460 (5th Cir. 2013).

73. *Id.* at 852–53.

74. *Id.*

75. See Patrick A. Woods, *Reversal by Recusal?: Comer v. Murphy Oil U.S.A., Inc. and the Need for Mandatory Judicial Recusal Statements*, 13 U.N.H. L. REV. 177, 180–83 (2015). The Fifth Circuit granted rehearing en banc shortly after issuing the decision, and subsequently lost its quorum to decide the case before hearing it. The court ultimately held that it must dismiss the appeal due to lack of quorum and thus, the vacatur of the original panel decision remained in place. When the plaintiffs refiled the tort action in 2011, the district court dismissed on res judicata grounds. The Fifth Circuit affirmed. See James S. Malloy & John M. Sylvester, *Insurance Coverage for Global Warming Liability Claims*, 45 TORT TRIAL & INS. PRAC. L.J. 811, 813–14 (2010).

76. Compare Kysar, *supra* note 67, and Victor E. Schwartz et. al., *Why Trial Courts Have Been Quick to Cool "Global Warming" Suits*, 77 TENN. L. REV. 803, 805 (2010), with Maxine Burkett, *Climate Justice and the Elusive Climate Tort*, 121 YALE L.J. ONLINE 115, 115–16 (2011).

77. See Kysar, *supra* note 67, at 4.

78. 564 U.S. 410 (2011).

79. See Osofsky, *supra* note 10, at 448.

80. See *American Electric II*, 564 U.S. at 418.

81. See *id.* at 419.

82. *Id.* at 424.

plurality in *American Electric II* upheld the *Massachusetts* Court's rationale for finding standing and based its decision on *Massachusetts*'s holding that greenhouse gas emissions qualify as air pollutants.<sup>83</sup> The Court determined that Congress had delegated the responsibility to determine how to regulate carbon emissions from power plants to the EPA and that such "delegation . . . displaces federal common law."<sup>84</sup>

Further, the Court found that the CAA would displace federal tort claims even if the EPA chose not to regulate greenhouse gas emissions.<sup>85</sup> Thus, *American Electric II* signaled the Court's preference for a regulatory-focused course for climate litigation.<sup>86</sup> In precluding the use of federal common-law nuisance actions to challenge EPA regulations, the Court identified regulatory suits as the appropriate vehicle for such actions.<sup>87</sup> It also deprived plaintiffs of another avenue for seeking redress for environmental injuries.<sup>88</sup> As a result, recent nuisance claims against energy companies have sounded in state common law, avoiding federal common-law tort doctrines altogether because it is unclear if the *American Electric II* decision displaces state common-law claims.<sup>89</sup>

The development of climate change torts thus remains largely stymied by the fundamentally binary conventions of tort law. As Professor Kysar notes, the nature of climate harms is difficult to square with the duty, breach, causation, and injury prongs of the traditional tort analysis.<sup>90</sup> As a result, courts addressing climate change harms often deem those harms to be "nontortious activities that nevertheless threaten core interests tort law claims to protect."<sup>91</sup> Though Kysar observes that climate change lawsuits—"the mother of all collective action problems"—may challenge the judiciary's view of tort claims as fundamentally distinct from regulatory claims, he also notes that this would require the courts to "stretch in plaintiffs' direction at nearly every stage of the traditional tort analysis."<sup>92</sup>

### B. Constitutional and Rights-Based Claims

Cases alleging constitutional rights violations diverge from the statutory or common-law claims traditionally brought by environmental litigants.<sup>93</sup>

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83. See Hari M. Osofsky, *AEP v. Connecticut's Implications for the Future of Climate Change Litigation*, 121 YALE L.J. ONLINE 101, 102 (2011).

84. *American Electric II*, 564 U.S. at 426.

85. "The Act itself thus provides a means to seek limits on emissions of carbon dioxide from domestic powerplants—the same relief the plaintiffs seek by invoking federal common law. We see no room for a parallel track." *Id.*

86. See Osofsky, *supra* note 83, at 102.

87. "If the plaintiffs in this case are dissatisfied with the outcome of E.P.A.'s forthcoming rulemaking, their recourse under federal law is to seek Court of Appeals review, and, ultimately, to petition for certiorari in this Court." *American Electric II*, 564 U.S. at 427.

88. See Burkett, *supra* note 76, at 115–16.

89. See Kuh, *supra* note 14, at 737.

90. See Kysar, *supra* note 67, at 10.

91. *Id.*

92. *Id.* at 44.

93. See BANDA, *supra* note 16, at 58.

These cases generally assert that government failures to adequately regulate the fossil fuel industry or reduce carbon emissions violate plaintiffs' fundamental or constitutional rights.<sup>94</sup>

### 1. Sources of Rights

The U.S. Constitution, unlike some state constitutions<sup>95</sup> or constitutions of foreign jurisdictions,<sup>96</sup> does not recognize the right to a stable environment, and courts have generally found that there is no constitutional environmental right.<sup>97</sup> Nevertheless, two legal sources are available to plaintiffs bringing fundamental rights claims to challenge government inaction.<sup>98</sup> First, the Due Process Clauses of the Fifth and Fourteenth Amendments may protect rights that are unenumerated yet considered fundamental under the theory of substantive due process.<sup>99</sup> Second, the public trust doctrine asserts that the government must act as a trustee of public natural resources and preserve such resources for future generations.<sup>100</sup>

#### *a. Substantive Due Process*

The Due Process Clauses of the Fifth and Fourteenth Amendments guarantee the right to life, liberty, and property.<sup>101</sup> Substantive due process stipulates that the government must protect fundamental rights or liberties

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94. See Burger et al., *supra* note 2, at 176.

95. State courts provide an alternative forum for climate litigants advancing rights-based claims. Unlike the U.S. Constitution, more than half of state constitutions include environmental provisions, and several recognize a fundamental right to a healthy environment. See, e.g., MONT. CONST. art. II, § 3, art. IX, § 1 (stating that the “right to a clean and healthful environment” is the first inalienable right for Montanans and that “[t]he state and each person shall maintain and improve a clean and healthful environment”); PA. CONST. art. I, § 27 (guaranteeing the citizens of Pennsylvania “a right to clean air, pure water, and to the preservation of the natural, scenic, historic, and esthetic values of the environment”); see also James R. May & William Romanowicz, *Environmental Rights in State Constitutions*, in PRINCIPLES OF CONSTITUTIONAL ENVIRONMENTAL LAW 305, 306 (James R. May ed., 2011).

96. See, e.g., KONGERIKET NORGES GRUNNLOV [CONSTITUTION] May 17, 1814, art. 112 (Nor.) (“Every person has the right to an environment that is conducive to health and to a natural environment whose productivity and diversity are maintained.”); CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 225 (Braz.) (“Everyone has the right to an ecologically balanced environment, which is a public good for the people’s use and essential for a healthy life . . . .”); CONSTITUCIÓN ESPAÑOLA [CONSTITUTION], B.O.E. n.45.2, Oct. 31, 1978 (Spain) (“Everyone has the right to enjoy an environment suitable for the development of the person, as well as the duty to preserve it.”). See generally DAVID R. BOYD, *THE ENVIRONMENTAL RIGHTS REVOLUTION: A GLOBAL STUDY OF CONSTITUTIONS, HUMAN RIGHTS, AND THE ENVIRONMENT* (2012).

97. See *Ely v. Velde*, 451 F.2d 1130, 1139 (4th Cir. 1971) (“While a growing number of commentators argue in support of a constitutional protection for the environment, this newly-advanced constitutional doctrine has not yet been accorded judicial sanction.”); BANDA, *supra* note 16, at 58.

98. See Burger et al., *supra* note 2, at 176.

99. See *id.*

100. See *id.*

101. U.S. CONST. amends. V, XIV.

that are “deeply rooted in this Nation’s history and tradition”<sup>102</sup> and “implicit in the concept of ordered liberty.”<sup>103</sup> After an early application of substantive due process in *Lochner v. New York*,<sup>104</sup> the doctrine was revitalized in the mid-twentieth century and initiated a “new paradigm of substantive due process decisionmaking”<sup>105</sup> that forbade the government from infringing on “‘fundamental’ liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.”<sup>106</sup>

After the Supreme Court’s decision in *Griswold v. Connecticut*,<sup>107</sup> in which it struck down state bans on contraception in violation of the right to marital privacy inherent in the “penumbras”<sup>108</sup> of rights guaranteed by the Constitution, the Court expanded substantive due process jurisprudence. In the following decades, the right to privacy expanded to include the right of interracial couples to marry,<sup>109</sup> the right to an abortion,<sup>110</sup> and the right to engage in intimate sexual conduct.<sup>111</sup> In *Obergefell v. Hodges*,<sup>112</sup> in which the Court recognized the right of same-sex couples to marry, Justice Anthony Kennedy asserted that “[t]he identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution.”<sup>113</sup>

Recognizing these fundamental rights is not a formulaic judicial process.<sup>114</sup> Instead, courts must “exercise reasoned judgment” in identifying rights so fundamental as to require the government’s respect.<sup>115</sup> Though history and tradition are the starting point for a substantive due process analysis, they “do not set its outer boundaries.”<sup>116</sup>

Still, climate change litigants advancing due process claims have achieved limited success with these arguments. In *Clean Air Council v. United States*,<sup>117</sup> an environmental organization and two plaintiffs sued the federal government asserting violations of due process and the public trust doctrine.<sup>118</sup> The plaintiffs alleged that the Trump administration’s rollbacks

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102. *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977)).

103. *Id.* (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

104. 198 U.S. 45 (1905). *Lochner* has since been considered a case of “economic substantive due process.” See, e.g., Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 *DUKE L.J.* 75, 76 (2001).

105. Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 *YALE L.J.* 408, 427 (2010).

106. *Reno v. Flores*, 507 U.S. 292, 302 (1993).

107. 381 U.S. 479 (1965).

108. *Id.* at 484 (finding that “specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance”).

109. See *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

110. See *Roe v. Wade*, 410 U.S. 113, 154 (1973).

111. See *Lawrence v. Texas*, 539 U.S. 558, 564 (2003).

112. 576 U.S. 644 (2015).

113. *Id.* at 663.

114. See *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).

115. *Obergefell*, 576 U.S. at 663–65.

116. *Id.*

117. 362 F. Supp. 3d 237 (E.D. Pa. 2019).

118. *Id.* at 243.

of environmental regulations violated the plaintiffs' rights to life, liberty, and property under the Fifth Amendment.<sup>119</sup> The district court held that the plaintiffs lacked standing because their particularized injuries were not imminent or traceable to the administration's regulatory scheme.<sup>120</sup> The court also declined to find a substantive due process right to a life-sustaining climate, noting that due process is "a limitation on the State's power to act, not . . . a guarantee of certain minimal levels of safety and security."<sup>121</sup>

Similarly, in *Animal Legal Defense Fund v. United States*,<sup>122</sup> two nonprofit organizations and six individuals sued the federal government, alleging that federal policies contributed to increased greenhouse gas emissions and violated their due process rights.<sup>123</sup> The plaintiffs sought declaratory and injunctive relief ordering the government to adopt plans to reduce fossil fuel extraction.<sup>124</sup> The district court dismissed the case, finding that the plaintiffs had not established the particularized harm required for standing and that the issue was nonjusticiable under the political question doctrine.<sup>125</sup>

### b. *The Public Trust Doctrine*

The public trust doctrine, another source of legal rights for environmental plaintiffs, is a foundational legal principle derived from ancient Roman law.<sup>126</sup> The doctrine contends that a sovereign's natural resources constitute an ecological trust or endowment and that the government is its trustee, responsible for maintaining and protecting these resources for the public welfare.<sup>127</sup> Some scholars argue that constitutional underpinnings justify the public trust doctrine, characterizing the public trust as based on the inherent and inalienable rights of the citizenry that the Constitution preserves through its social contract.<sup>128</sup>

American courts recognize that states have certain obligations under the public trust doctrine.<sup>129</sup> Recently, environmentalist plaintiffs and

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119. *See id.* at 243, 250.

120. *Id.* at 247.

121. *Id.* at 251 (quoting *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 195 (1989)).

122. 404 F. Supp. 3d 1294 (D. Or. 2019).

123. *See id.*; First Amended Complaint ¶¶ 269–72, *Animal Legal Def. Fund*, 404 F. Supp. 3d 1294 (No. 18-cv-01860).

124. *See id.* ¶ 288.

125. *See Animal Legal Def. Fund*, 404 F. Supp. 3d at 1301.

126. *See* Carolyn Kelly, *Where the Water Meets the Sky: How an Unbroken Line of Precedent from Justinian to Juliana Supports the Possibility of a Federal Atmospheric Public Trust Doctrine*, 27 N.Y.U. ENV'T L.J. 183, 187 (2019).

127. *See* Blumm & Wood, *supra* note 7, at 22.

128. *See, e.g.,* Randall S. Abate, *Atmospheric Trust Litigation in the United States: Pipe Dream or Pipeline to Justice for Future Generations?*, in CLIMATE JUSTICE: CASE STUDIES IN GLOBAL AND REGIONAL GOVERNANCE CHALLENGES 543 (Randall S. Abate ed., 2016). *See generally* MARY CHRISTINA WOOD, *NATURE'S TRUST: ENVIRONMENTAL LAW FOR A NEW ECOLOGICAL AGE* (2014).

129. *See, e.g.,* PPL Mont., LLC v. Montana, 565 U.S. 576, 603 (2012) ("[T]he public trust doctrine remains a matter of state law."); *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 283–84 (1997) ("[L]ands underlying navigable waters have historically been considered

commentators have argued that the states' responsibility to hold natural resources in trust, as well as the federal government's holding of public trust resources via its control over territories, the seas, and waters, justifies the extension of the public trust doctrine to the atmosphere.<sup>130</sup> This movement seeks to establish the recognition of an "atmospheric trust doctrine" that would impose a legal and fiduciary duty on governments to protect the atmosphere and implement policies to reduce carbon dioxide emissions.<sup>131</sup> Proponents of the atmospheric trust doctrine contend that the atmosphere is "a single public trust asset in its entirety" and seek a judicial remedy to compel governments to implement emissions policies that would ensure the preservation of this natural resource.<sup>132</sup>

Thus far, lawsuits brought under the public trust doctrine are often dismissed on procedural grounds.<sup>133</sup> For example, in *Clean Air Council*, the plaintiffs alleged that the Trump administration's regulatory rollbacks violated the public trust doctrine and constitutional due process.<sup>134</sup> The district court dismissed the plaintiffs' public trust argument for lack of standing and, in the alternative, for failure to state a claim.<sup>135</sup> Similarly, in *Sanders-Reed ex rel. Sanders-Reed v. Martinez*,<sup>136</sup> an environmental nonprofit and a minor plaintiff sued the state of New Mexico, seeking a judgment declaring that the public trust doctrine imposes a duty on the state to regulate greenhouse gas emissions.<sup>137</sup> The court granted summary judgment for the state and held that, despite the state's duty to protect the atmosphere under the New Mexico Constitution,<sup>138</sup> the case required a political, rather than a judicial, resolution.<sup>139</sup>

In other instances, courts have disputed the extension of a state's obligations under the public trust doctrine to the federal government. In *Alec*

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'sovereign lands.'). Note that the Court's use of "sovereign lands" in *Coeur d'Alene Tribe of Idaho* refers to state, not tribal, sovereignty. Illinois Cent. R.R. Co. v. Illinois, 146 U.S. 387, 453 (1892) ("The state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them . . . than it can abdicate its police powers in the administration of government and the preservation of the peace.").

130. See Kelly, *supra* note 126, at 218.

131. Abate, *supra* note 128, at 552.

132. Mary Christina Wood, *The Planet on the Docket: Atmospheric Trust Litigation to Protect Earth's Climate System and Habitability*, 9 FLA. A & M U. L. REV. 259, 270 (2014).

133. See Kuh, *supra* note 14, at 740.

134. *Clean Air Council v. United States*, 362 F. Supp. 3d 237, 242 (E.D. Pa. 2019).

135. *Id.* at 254. In particular, the court found that the organizational plaintiff, Clean Air Council, lacked standing as an organization and that the individual plaintiffs failed to meet the injury, causation, and redressability requirements for standing. *Id.* at 245–50. The court also held that there was "no legally cognizable due process right to environmental quality" and that plaintiffs' claims were unsupported by both the Ninth Amendment and the public trust doctrine. *Id.* at 250.

136. 350 P.3d 1221 (N.M. Ct. App. 2015).

137. See *id.* at 1222.

138. N.M. CONST. art. XX, § 21.

139. See *Sanders-Reed*, 350 P.3d at 1227 ("[T]he courts cannot independently regulate greenhouse gas emissions in the atmosphere as Plaintiffs have proposed, based solely upon a common law duty established under the public trust doctrine as a separate cause of action."); Kuh, *supra* note 14, at 740.

*L. v. Jackson*,<sup>140</sup> minor plaintiffs sued the federal government for violating the public trust doctrine and sought to compel stronger action to reduce greenhouse gas emissions.<sup>141</sup> The district court dismissed the suit, rejecting the existence of a federal public trust doctrine and holding that even if the doctrine existed, it was displaced under the CAA.<sup>142</sup> The court wrote that granting the plaintiffs' request for declaratory and injunctive relief would amount to the judicial branch making, implementing, and monitoring policy to regulate carbon dioxide emissions, a decision that the court held was better left to the political branches.<sup>143</sup> Thus, atmospheric trust litigation has often been stymied by justiciability doctrines and the general judicial consensus that the public trust doctrine only imposes state obligations.

## 2. Justiciability Doctrines

Overall, courts have demonstrated a general reticence about proceeding to review on the merits of cases relating to questions of climate change policy. The judiciary frequently applies justiciability doctrines to statutory, common-law, constitutional, and rights-based claims alike, deferring these issues to the political branches.<sup>144</sup> The doctrines most often cited in climate litigation are standing and the political question doctrine, both of which are founded in separation of powers concerns.<sup>145</sup>

### *a. Standing*

Since the 1940s, the Supreme Court has interpreted the “cases and controversies”<sup>146</sup> criterion of Article III jurisdiction to require that plaintiffs possess standing to file suit in federal court.<sup>147</sup> The conventional three-part test from *Lujan v. Defenders of Wildlife*<sup>148</sup> for evaluating whether there is standing—“a genuine interest and stake in [the] case”<sup>149</sup>—requires that: (1) the plaintiff has suffered an injury in fact that is concrete and particularized, (2) there is a causal connection between the injury and alleged conduct, and (3) there is a likelihood that the injury could be redressed by a favorable

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140. 863 F. Supp. 2d 11 (D.D.C. 2012), *aff'd sub nom. Alec L. ex rel. Loorz v. McCarthy*, 561 F. App'x 7 (D.C. Cir. 2014).

141. *See id.* at 12.

142. *Id.* at 17; *see also* Kuh, *supra* note 14, at 741.

143. *See Alec L.*, 863 F. Supp. 2d at 17. However, the court noted that even though it was denying plaintiffs relief, it “urge[d] everyone involved to seek (and perhaps even to seize) as much common ground” as possible to address policies aimed at preserving the environment, which it characterized as “a laudable goal.” *Id.*

144. *See* Kuh, *supra* note 14, at 732.

145. *See* Todd, *supra* note 12, at 574.

146. U.S. CONST. art. III, § 2, cl. 1.

147. Bradford C. Mank, *Standing for Private Parties in Global Warming Cases: Traceable Standing Causation Does Not Require Proximate Causation*, 2012 MICH. ST. L. REV. 869, 875.

148. 504 U.S. 555 (1992).

149. *See* Mank, *supra* note 147, at 875; *see also* U.S. CONST. art. III, § 2.

decision.<sup>150</sup> If a plaintiff fails to meet these requirements, a federal court must dismiss the case before reaching the merits.<sup>151</sup>

The nature of climate change harms complicates the first requirement that a plaintiff must specify a concrete, particularized injury.<sup>152</sup> Global warming, by definition, impacts individuals on a global scale and imposes a “generalized grievance” on all members of the public.<sup>153</sup> The diffuse, indiscriminate, and delayed impact of climate change is in conflict with the standing doctrine’s understanding of imminent or particularized harms, as noted by Professor Kysar in his discussion of climate torts.<sup>154</sup> Though courts readily accept scientific evidence demonstrating the ongoing nature of climate change, the question remains whether climate harms are concrete enough for judicial resolution.<sup>155</sup>

Federal district courts have dismissed climate change lawsuits on the basis of plaintiffs’ failure to satisfy the three prongs of the *Lujan* test.<sup>156</sup> In *Kivalina*, the district court held that the plaintiffs could not prove causation because the alleged harms were not traceable to the defendants’ carbon emissions practices.<sup>157</sup> The Ninth Circuit affirmed the ruling, although it did not specifically address standing.<sup>158</sup> In *Comer*, the district court similarly held that the plaintiffs did not have standing because their injuries were not traceable to the defendant.<sup>159</sup>

However, the Supreme Court’s decisions in *Massachusetts* and *American Electric II* are notable for their approach to standing. In *Massachusetts*, the Court held for the first time that, in some circumstances, states have a greater standing right than other litigants because of their quasi-sovereign interests in the health, welfare, and natural resources of their citizens and were thus entitled to “special solicitude” by the Court.<sup>160</sup> The *Massachusetts* plaintiffs argued that the EPA’s failure to regulate greenhouse gas emissions from motor vehicles contributed to climate change.<sup>161</sup> In its standing analysis, the Court found that Massachusetts met the tests for injury, causation, and

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150. *Lujan*, 504 U.S. at 560–61.

151. See Mank, *supra* note 147, at 875.

152. Jonathan H. Adler, *Warming Up to Climate Change Litigation*, 93 VA. L. REV. IN BRIEF 63, 66–67 (2007).

153. *Id.* at 67.

154. See Kysar, *supra* note 67, at 3–4.

155. See Adler, *supra* note 144, at 67.

156. See, e.g., *Comer v. Murphy Oil USA, Inc.*, No. 05-CV436, 2007 WL 6942285, at \*1 (S.D. Miss. Aug. 30, 2007), *rev’d*, *Comer v. Murphy Oil USA*, 585 F.3d 855 (5th Cir. 2009) (dismissing tort suit against energy companies for lack of standing); *Wash. Env’t Council v. Bellon*, 732 F.3d 1131, 1135 (9th Cir. 2013) (finding an insufficient causal nexus between defendants’ emissions and global warming).

157. See *Native Village of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 878 (N.D. Cal. 2009), *aff’d on other grounds*, 696 F.3d 849 (9th Cir. 2012).

158. See *Kivalina*, 696 F.3d at 858; see also Mank, *supra* note 147, at 873.

159. *Comer v. Murphy Oil USA, Inc.*, 839 F. Supp. 2d 849, 860–61 (S.D. Miss. 2012) (stating that “the EPA’s findings that greenhouse gases contribute to global warming . . . does not in and of itself support the contention that the plaintiffs’ property damage is fairly traceable to the defendants’ emissions”), *aff’d*, 718 F.3d 460 (5th Cir. 2013).

160. *Massachusetts v. EPA*, 549 U.S. 497, 520 (2007).

161. See *id.* at 526.

redressability, despite the EPA's arguments that the harms related to the agency's refusal to regulate carbon emissions were too minimal, remote, and insignificant—in light of emissions from developing countries—to grant standing.<sup>162</sup> The Court hinted that private parties might not be granted the same right as the Court granted Massachusetts in the case, noting the “considerable relevance that the party seeking review here is a sovereign State and not, as it was in *Lujan*, a private individual.”<sup>163</sup>

The Court's decision in *American Electric II* applied the concept of standing articulated in *Massachusetts*.<sup>164</sup> By an equally divided 4-4 vote, the Court affirmed the Second Circuit's decision that the plaintiffs had standing under *Massachusetts* in their public nuisance action against large electric utility providers.<sup>165</sup> Though the Court did not distinguish between the two classes of plaintiffs, which included eight states and three nonprofit land trusts, it arguably expanded the scope of *Massachusetts*'s standing principle by applying it outside a statutory context.<sup>166</sup>

The Court's recent jurisprudence involving climate change issues signals that the concept of standing in climate change suits need not be limited to statutory claims and that climate injuries—though generally diffuse—can satisfy the injury and causation elements of the standing test.<sup>167</sup> However, it remains unclear whether *Massachusetts*'s standing principles apply to private parties.<sup>168</sup>

In suits advancing constitutional or rights-based arguments, the standing determinations are nearly uniformly stalled at the redressability phase.<sup>169</sup> Often, though a court may recognize that a plaintiff satisfies the injury and causation requirements, it will refrain from finding that the climate injury and alleged constitutional violation is redressable in the courts.<sup>170</sup> At this juncture, the political question doctrine is often applied to determine that the case is not justiciable and to defer resolution to the political branches.

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162. *See id.* at 522–26. On injury, the Court commented: “That these climate-change risks are ‘widely shared’ does not minimize Massachusetts’ interest in the outcome of this litigation.” On causation, the Court noted: “At a minimum . . . EPA’s refusal to regulate such emissions ‘contributes’ to Massachusetts’ injuries.” On redressability, the Court observed: “Because of the enormity of the potential consequences associated with manmade climate change, the fact that the effectiveness of a remedy might be delayed . . . is essentially irrelevant.” *See also* Mank, *supra* note 147, at 884.

163. *Massachusetts*, 549 U.S. at 518.

164. *See* Bradford C. Mank, *Reading the Standing Tea Leaves in American Electric Power Co. v. Connecticut*, 46 U. RICH. L. REV. 543, 545 (2012).

165. *American Electric II*, 564 U.S. 410, 420 (2011). Justice Sotomayor recused herself from the case because she sat on the three-judge panel of the Second Circuit Court of Appeals that heard the case. *See Connecticut v. Am. Elec. Power Co. (American Electric I)*, 582 F.3d 309, 317 (2d Cir. 2009), *rev'd*, 564 U.S. 410; Mank, *supra* note 164, at 544.

166. *See* Mank, *supra* note 147, at 897.

167. *See* Burger et al., *supra* note 2, at 235.

168. *See* Mank, *supra* note 147, at 871.

169. *See* Burger et al., *supra* note 2, at 154–75.

170. *See infra* Part I.B.2.a.

*b. The Political Question Doctrine*

In climate lawsuits filed against both the government and fossil fuel companies, defendants have often successfully argued that the court lacked jurisdiction under the political question doctrine.<sup>171</sup> First articulated by Chief Justice John Marshall in *Marbury v. Madison*,<sup>172</sup> the doctrine precludes from judicial review issues that are more appropriately addressed by the political branches.<sup>173</sup> The parameters of the doctrine were solidified in *Baker v. Carr*,<sup>174</sup> the landmark redistricting case where Justice William J. Brennan identified six criteria by which courts could identify political questions.<sup>175</sup> The first three *Baker* factors are most often applied<sup>176</sup>: (1) a demonstrable commitment to a nonjudicial branch of government, (2) a lack of judicially manageable standards for resolving an issue, and (3) the impossibility of deciding the dispute without an initial policy choice clearly appropriate for nonjudicial discretion.<sup>177</sup>

Because climate change is a global phenomenon exacerbated by multiple anthropogenic sources of greenhouse gases, some judges and commentators characterize the issue as presenting a nonjusticiable political question.<sup>178</sup> For example, in *Comer*, the district court declined to find standing because the plaintiffs' tort claims presented a nonjusticiable political question under the second and third *Baker* factors.<sup>179</sup> The court concluded that the plaintiffs' requested relief would necessarily require the judiciary to make policy determinations that were better suited to the legislative branch.<sup>180</sup> Similarly, in *Connecticut v. American Electric Power Co.*<sup>181</sup> (*American Electric I*), the Southern District of New York dismissed the nuisance suit as invoking a

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171. See Blumm & Wood, *supra* note 7, at 31–32.

172. 5 U.S. (1 Cranch) 137 (1803).

173. See *id.* at 170 (“Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.”).

174. 369 U.S. 186 (1962).

175. See *id.* at 217; see also James R. May, *Climate Change, Constitutional Consignment, and the Political Question Doctrine*, 85 DENV. U. L. REV. 919, 933 (2008).

176. See, e.g., Zivotofsky *ex rel.* Zivotofsky v. Clinton, 566 U.S. 189, 204 (2012) (Sotomayor, J., concurring in part and concurring in the judgment) (describing the last three *Baker* factors, which were not cited by the majority, as addressing only prudential concerns); *Kadic v. Karadzic*, 70 F.3d 232, 249 (2d Cir. 1995) (“The fourth through sixth *Baker* factors appear to be relevant only if judicial resolution of a question would contradict prior decisions taken by a political branch.”).

177. *Baker*, 369 U.S. at 217. The three other criteria are: (4) “the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government,” (5) “an unusual need for unquestioning adherence to a political decision already made,” and (6) “the potentiality of embarrassment from multifarious pronouncements by various departments on one question.” *Id.*

178. See Jeff Todd, A “Sense of Equity” in *Environmental Justice Litigation*, 44 HARV. ENV’T L. REV. 169, 187 (2020).

179. *Comer v. Murphy Oil USA, Inc.*, 839 F. Supp. 2d 849, 865 (S.D. Miss. 2012), *aff’d*, 718 F.3d 460 (5th Cir. 2013).

180. See *id.*

181. 406 F. Supp. 2d 265 (S.D.N.Y. 2005).

nonjusticiable political question.<sup>182</sup> It applied the *Baker* factors to conclude that a suit seeking to compel utility companies to reduce their carbon emissions was not appropriate for judicial review, noting “the impossibility of deciding [the issue] without an initial policy determination of a kind clearly for nonjudicial discretion.”<sup>183</sup>

Yet, other commentators emphasize the limits of the political question doctrine as articulated in *Baker* and suggest that its use by federal courts to dismiss climate change cases constitutes a liberal application of the doctrine.<sup>184</sup> The Court in *Baker* acknowledged that some cases appearing to involve a nonjusticiable political question actually involve a “delicate exercise in constitutional interpretation” and recognized “the necessity for discriminating inquiry into the precise facts and posture of [a] particular case.”<sup>185</sup> More recently, the Court has recognized that the political question doctrine constitutes a “narrow exception” to the judiciary’s “responsibility to decide cases properly before it.”<sup>186</sup> Furthermore, because the Constitution does not assign authority over climate issues to the political branches, use of the first *Baker* factor to dismiss a climate change lawsuit would be premature.<sup>187</sup>

### C. Case Study: Juliana

Judges have been reticent to extend jurisdiction over climate change suits, citing the restrictions imposed by various justiciability doctrines and the inability of the judiciary to address something as complicated, unwieldy, and technical as climate policy.<sup>188</sup> However, a handful of recent cases have broken with this trend. Most notably, *Juliana* could signal a growing shift and recognition of the need to reevaluate the role of the judiciary in adjudicating climate lawsuits.<sup>189</sup>

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182. *Id.* at 272. Interestingly, the Supreme Court did not explicitly address the political question doctrine in *American Electric II*. Professor James R. May points out that the closest the Court came to engaging with the issue was when it noted that “[f]our members of the Court would hold that at least some plaintiffs have Article III standing under *Massachusetts* . . . and, further, that no other threshold obstacle bars review.” See James R. May, *AEP v. Connecticut and the Future of the Political Question Doctrine*, 121 *YALE L.J. ONLINE* 127, 129 (2011) (quoting *American Electric II*, 564 U.S. 410, 420 (2011)).

183. *Id.* (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004)).

184. See May, *supra* note 175, at 934–44.

185. *Baker v. Carr*, 369 U.S. 186, 211, 217 (1962).

186. *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 194–95 (2012).

187. See May, *supra* note 175, at 934, 939.

188. See, e.g., *Native Village of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 883 (N.D. Cal. 2009) (dismissing a climate nuisance suit as presenting a nonjusticiable political question), *aff’d on other grounds*, 696 F.3d 849 (9th Cir. 2012); *Kanuk ex rel. Kanuk v. State, Dep’t of Nat. Res.*, 335 P.3d 1088, 1097 (Alaska 2014) (dismissing three of the plaintiffs’ claims because they involved policy questions falling within the competence of the political branches of government); see also *infra* Part II.B.1.

189. *Juliana II*, 947 F.3d 1159, 1168 (9th Cir. 2020), *reh’g denied*, 986 F.3d 1295 (9th Cir. 2021) (mem.).

To date, the *Juliana* litigation is one of the highest-profile climate change lawsuits in the United States.<sup>190</sup> The twenty-one named individual plaintiffs, all between the ages of twelve and twenty-three, and two nonprofit organizations claim that the government's ongoing support of the fossil fuel industry violates their "fundamental constitutional rights to life, liberty, and property" and also "discriminate[s] against . . . young citizens, who will disproportionately experience the destabilized climate system in our country."<sup>191</sup> The plaintiffs' claims are indisputably ambitious and, as Judge Aiken of the District of Oregon noted in her denial of the government's motion to dismiss, "[t]his is no ordinary lawsuit."<sup>192</sup> The suit has received extensive publicity and has been referred to in the media as "the trial of the century."<sup>193</sup>

The case notably presents constitutional claims as the primary bases for relief. It implicates the same justiciability issues as those cases that involve statutory or tort claims but advances a bold and novel declaration that the federal government's support of fossil fuel companies and general inaction on climate change violates fundamental rights. The plaintiffs lean on the history of *Obergefell* to situate their argument within the modern expansion of substantive due process rights,<sup>194</sup> urging the judiciary to recognize their constitutional right to a stable climate.<sup>195</sup> The case is also notable because of the early victory its plaintiffs achieved at the trial court level; Judge Aiken found that the plaintiffs adequately met the standard for relief and recognized that climate change is an existential threat to the country that can be redressed by the courts.<sup>196</sup>

### 1. Procedural Posture

In 2015, the plaintiffs filed suit in the District Court of Oregon against the federal government, then President Barack Obama, and several federal agencies alleging that the federal government promoted the use of fossil fuels despite knowing for over fifty years that the industry produced significant amounts of atmospheric carbon dioxide that contributed to climate change.<sup>197</sup>

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190. See Levy, *supra* note 8, at 500.

191. First Amended Complaint for Declaratory & Injunctive Relief ¶ 8, *Juliana I*, 217 F. Supp. 3d 1224 (D. Or. 2016) (No. 15-cv-01517).

192. *Juliana I*, 217 F. Supp. 3d at 1234.

193. See Chelsea Harvey, *Trump Could Face the "Biggest Trial of the Century"—Over Climate Change*, WASH. POST (Dec. 1, 2016), <https://www.washingtonpost.com/news/energy-environment/wp/2016/12/01/trump-could-face-the-biggest-trial-of-the-century-over-climate-change> [<https://perma.cc/K4J6-ZS2T>].

194. See First Amended Complaint for Declaratory & Injunctive Relief, *supra* note 191, ¶ 13.

195. See *id.* ¶ 96 ("[Plaintiffs] have an interest in ensuring that the climate system remains stable enough to secure their constitutional rights to life, liberty, and property, rights that depend on a livable future.").

196. See *Juliana I*, 217 F. Supp. 3d at 1261–63.

197. See First Amended Complaint for Declaratory & Injunctive Relief, *supra* note 191, ¶ 130 ("[Defendants] are primarily responsible for authorizing, permitting, and incentivizing fossil fuel production, consumption, transportation, and combustion, causing the atmospheric CO<sub>2</sub> concentration to increase to at least 400 ppm and, thus, substantial harm to Plaintiffs.

The plaintiffs sought declaratory and injunctive relief and argued that the defendants' "deliberate indifference" and "dangerous interference with our atmosphere and climate system" violated their constitutional rights under the Fifth, Ninth, and Fourteenth Amendments and also violated the public trust doctrine.<sup>198</sup> The defendants, along with intervenors the National Association of Manufacturers, the American Fuel & Petrochemical Manufacturers, and the American Petroleum Institute, moved to dismiss for lack of standing and failure to state a claim.<sup>199</sup> They also argued that the case presented a nonjusticiable political question.<sup>200</sup>

Responding to the motion to dismiss, Judge Aiken adopted the magistrate judge's findings and recommendations and denied the motion on November 10, 2016, finding that there were "general factual allegations" in the case that were sufficient to establish Article III standing.<sup>201</sup> The defendants asked the court to certify an interlocutory appeal of the order, which Judge Aiken denied on June 8, 2017.<sup>202</sup> The government then applied twice to the Ninth Circuit for a writ of mandamus<sup>203</sup> and once to the Supreme Court, all of which were denied.<sup>204</sup> Judge Aiken subsequently denied a motion for summary judgment and again held that the plaintiffs had standing.<sup>205</sup> The court found that the affidavits and expert testimony submitted by the plaintiffs met the standard of review to survive summary judgment, whereby a plaintiff must establish that there is a "genuine question of material fact as to the standing elements."<sup>206</sup>

The defendants made a renewed appeal to the Supreme Court,<sup>207</sup> which stayed the case, only to vacate its own order nineteen days later.<sup>208</sup> The Ninth Circuit then stayed the case and directed the district court to reconsider its decision regarding the interlocutory appeal, which the court did in November 2018.<sup>209</sup> The Ninth Circuit accepted the interlocutory appeal, again denied

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Defendants have failed to preserve a habitable climate system for present and future generations, and instead have created dangerous levels of atmospheric CO<sub>2</sub> concentrations.").

198. *Id.* ¶¶ 8, 286.

199. See Federal Defendants' Memorandum of Points & Authorities in Support of their Motion to Dismiss at 1, *Juliana I*, 217 F. Supp. 3d 1224 (No. 15-cv-01517), 2015 WL 13850596.

200. See Memorandum in Support of Intervenor-Defendants' Motion to Dismiss at 11, *Juliana I*, 217 F. Supp. 3d 1224 (No. 15-cv-01517), 2015 WL 7587592.

201. *Juliana I*, 217 F. Supp. 3d at 1268.

202. *Juliana v. United States*, No. 15-cv-01517, 2017 WL 2483705 (D. Or. June 8, 2017).

203. *In re United States*, 884 F.3d 830, 836 (9th Cir. 2018); *In re United States*, 895 F.3d 1101, 1106 (9th Cir. 2018).

204. *United States v. U.S. Dist. Ct.*, 139 S. Ct. 1, 1 (2018). The Supreme Court found that "[t]he breadth of respondents' claims is striking . . . and the justiciability of those claims presents substantial grounds for difference of opinion." *Id.*

205. *Juliana v. United States*, 339 F. Supp. 3d 1062, 1086 (D. Or. 2018).

206. *Id.* at 1086–87.

207. *In re United States*, 139 S. Ct. 452, 453 (2018).

208. See Robin Kundis Craig, *Juliana, Climate Change, and the Constitution*, NAT. RES. & ENV'T, Summer 2020, at 53, 54.

209. *Juliana v. United States*, No. 15-CV-01517, 2018 WL 6303774, at \*3 (D. Or. Nov. 21, 2018).

mandamus, and heard oral argument in the case in June 2019.<sup>210</sup> A number of amicus briefs were filed in support of the plaintiffs and defendants, including one by members of both chambers of the U.S. Congress in support of the plaintiffs.<sup>211</sup>

In January 2020, the Ninth Circuit reversed the district court's summary judgment decision and concluded that the plaintiffs had not satisfied the redressability prong required to establish standing.<sup>212</sup> In February 2021, the Ninth Circuit denied plaintiffs' petition for rehearing en banc on the court's January 2020 ruling.<sup>213</sup> The plaintiffs have since indicated that they intend to seek a writ of certiorari.<sup>214</sup>

## 2. Arguments Presented

The plaintiffs present four grounds for relief.<sup>215</sup> First, the plaintiffs assert that the government's knowledge of and failure to regulate carbon pollution constitutes a violation of the Due Process Clause of the Fifth Amendment, as it deprives plaintiffs of "their fundamental rights to life, liberty, and property."<sup>216</sup> Second, the plaintiffs contend that the government's "aggregate acts" violate the equal protection principles found in the Fifth and Fourteenth Amendments.<sup>217</sup> The plaintiffs argue that they and future generations constitute a protected class and that the government's "*de facto* policy choice to favor influential and entrenched short-term fossil fuel energy interests" disproportionately discriminates against them.<sup>218</sup> Third, plaintiffs allege that a right to a stable climate system is inalienable and fundamental and is an implicit right under the Ninth Amendment.<sup>219</sup> Finally, the plaintiffs argue that the government has violated its duty of care as a sovereign trustee under the public trust doctrine.<sup>220</sup> Citing *Obergefell*, the plaintiffs seek a declaration that the government's support of carbon emissions violates their constitutional rights to life, liberty, and property and request injunctive relief in the form of an order directing the government to "prepare and implement an enforceable national remedial plan to phase out fossil fuel emissions and draw down excess atmospheric CO<sub>2</sub>."<sup>221</sup>

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210. See Craig, *supra* note 208, at 54.

211. See Brief of Members of the United States Congress in Support of Plaintiffs-Appellees, *Juliana v. United States*, 986 F.3d 1295 (9th Cir. 2021) (mem.) (No. 18-36082), 2019 WL 1072495.

212. See *Juliana II*, 947 F.3d 1159, 1171 (9th Cir. 2020), *reh'g denied* 986 F.3d 1295.

213. See *Juliana v. United States*, 986 F.3d 1295; see also Petition for Rehearing En Banc of Plaintiffs-Appellees, *Juliana*, 986 F.3d 1295 (No. 18-36082).

214. See Motion to Stay the Mandate Pending Filing & Disposition of a Petition for a Writ of Certiorari of Plaintiffs-Appellees at 1, *Juliana*, 986 F.3d 1295 (No. 18-36082).

215. See First Amended Complaint for Declaratory & Injunctive Relief, *supra* note 191, ¶¶ 286, 291, 303, 308.

216. *Id.* ¶ 280.

217. *Id.* ¶ 292.

218. *Id.* ¶ 298.

219. See *id.* ¶¶ 303–04.

220. See *id.* ¶ 310.

221. *Id.* ¶ 7.

In response, the government argues that the plaintiffs fail to satisfy all three standing requirements articulated in *Lujan*.<sup>222</sup> It contends that the alleged harms constitute generalized grievances rather than the requisite “personal and individual”<sup>223</sup> injury and that the alleged causal chain is similarly insufficient.<sup>224</sup> The government argues that the plaintiffs do not satisfy the redressability prong, as the requested relief “lies outside this [c]ourt’s competence and jurisdiction.”<sup>225</sup> The government further asserts that the plaintiffs fail to state a claim because there is no constitutional right to be free of carbon emissions and rejects the notion that plaintiffs constitute a protected class.<sup>226</sup> Finally, the government rejects the plaintiffs’ public trust claims and argues that the public trust doctrine is a function of state, not federal, law.<sup>227</sup>

### 3. The District Court’s Decision

On November 10, 2016, Judge Aiken found that the court had jurisdiction over the claims on the grounds that the plaintiffs satisfied the standing requirements and that the claims did not present nonjusticiable political questions.<sup>228</sup> In coming to this conclusion, Judge Aiken conducted a detailed analysis of the *Baker* factors.<sup>229</sup> As to the first factor, which dictates deferral of issues that are “textually committed to a coordinate political department,”<sup>230</sup> Judge Aiken noted that “climate change policy is not a fundamental power on which any other power allocated exclusively to other branches of government rests”<sup>231</sup> and found that “climate change policy is not *inherently*, or even primarily, a foreign policy decision.”<sup>232</sup> Judge Aiken proceeded to analyze the second and third *Baker* factors,<sup>233</sup> which “reflect circumstances in which a dispute calls for decisionmaking beyond courts’ competence.”<sup>234</sup> Noting that the plaintiffs sought declaratory relief directing agencies to prepare a national carbon emissions reduction plan, rather than “ad-hoc policy determinations” by the court to “pinpoint the ‘best’ emissions

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222. See Federal Defendants’ Memorandum of Points & Authorities in Support of Their Motion to Dismiss at 7–8, *Juliana I*, 217 F. Supp. 3d 1224 (D. Or. 2016) (No. 15-cv-01517), 2015 WL 13850596.

223. *Id.* at 10 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 n.1 (1992)).

224. *See id.* at 13.

225. *Id.* at 14–15.

226. *See id.* at 24 (“Plaintiffs are clearly not differently situated from any other person of any age when it comes to the alleged current impacts of climate change.”).

227. *See id.* at 28.

228. *See Juliana I*, 217 F. Supp. 3d 1224, 1235–48 (D. Or. 2016), *rev’d and remanded*, 947 F.3d 1159 (9th Cir. 2020).

229. *See id.* at 1237–42.

230. *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 203 (2012) (Sotomayor, J., concurring).

231. *Juliana I*, 217 F. Supp. 3d at 1237–38.

232. *Id.* at 1238.

233. *Id.* at 1238–39.

234. *Zivotofsky*, 566 U.S. at 203.

level,” Judge Aiken held that issuing the requested declaration was within the court’s ability.<sup>235</sup>

Judge Aiken acknowledged that the claims implicated political issues but held that the case rested “squarely within the purview of the judiciary” because it alleged a violation of constitutional rights.<sup>236</sup> Judge Aiken noted that though the courts “cannot intervene to assert ‘better’ policy . . . they can address constitutional violations by government agencies and provide equitable relief.”<sup>237</sup> The *Juliana* district court further found that the plaintiffs provided sufficient factual specificity to survive a motion to dismiss and concluded that such specificity was not diluted by the breadth of the plaintiffs’ claims.<sup>238</sup>

#### 4. The Ninth Circuit’s Decision

On January 17, 2020, by a 2-1 vote, a Ninth Circuit panel reversed the district court’s decision, finding that it was “beyond the power of an Article III court to order, design, supervise, or implement the plaintiffs’ requested remedial plan” and that the plaintiffs consequently lacked standing.<sup>239</sup> In the Ninth Circuit’s view, designing or ordering a plan sufficient to vindicate the plaintiffs’ claims would “implicate the separation of powers,” as it would require addressing questions better entrusted to the political branches.<sup>240</sup>

However, the Ninth Circuit affirmed the district court’s holding that the plaintiffs satisfied the injury and causation requirements for standing.<sup>241</sup> The court noted that the plaintiffs’ injuries were “not simply ‘conjectural’ or ‘hypothetical’” but that they constituted concrete and particularized injuries.<sup>242</sup> The court also found that “the causal chain here is sufficiently established” and that there was a “genuine factual dispute as to whether [the government’s] policies were a ‘substantial factor’ in causing the plaintiffs’ injuries.”<sup>243</sup>

The court of appeals acknowledged that the executive and legislative branches had arguably abdicated responsibility in the face of an “environmental apocalypse.”<sup>244</sup> Judge Andrew D. Hurwitz noted that the

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235. *Juliana I*, 217 F.Supp.3d at 1238–39 (“[T]he crux of th[e political question] inquiry is . . . not whether the case is unmanageable in the sense of being large, complicated, or otherwise difficult to tackle from a logistical standpoint . . . [but rather whether] a legal framework exists by which courts can evaluate . . . claims in a reasoned manner.” (alteration in the original) (quoting *Alperin v. Vatican Bank*, 410 F.3d 552, 555 (9th Cir. 2005))).

236. *Id.* at 1241.

237. *Id.* at 1270.

238. *Id.* at 1262 (“This lawsuit may be groundbreaking, but that fact does not alter the legal standards governing the motion to dismiss.”).

239. *Juliana II*, 947 F.3d 1159, 1171 (9th Cir. 2020), *reh’g denied*, 986 F.3d 1295 (9th Cir. 2021) (mem.).

240. *Id.* at 1173. “[T]he plaintiffs’ impressive case for redress must be presented to the political branches of government.” *Id.* at 1165.

241. *Id.* at 1168–69.

242. *Id.* at 1168 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)).

243. *Id.* at 1169 (quoting *Mendia v. Garcia*, 768 F.3d 1009, 1013 (9th Cir. 2014)).

244. *Id.* at 1164.

“substantial evidentiary record” demonstrated that the federal government promoted fossil fuel use despite knowing that it caused “catastrophic climate change.”<sup>245</sup> Although concluding that the plaintiffs’ “impressive case for redress” was beyond the purview of the court, the Ninth Circuit devoted a substantial portion of the opinion to affirming the alleged causal chain and recognizing that the plaintiffs suffered a particularized harm resulting from the federal government’s active and detrimental promotion of fossil fuel use.<sup>246</sup>

Writing in dissent, Judge Josephine L. Stanton argued that the majority’s deference to the political branches and application of the political question doctrine ran counter to the judiciary’s “constitutional mandate to intervene where the political branches run afoul of our foundational principles.”<sup>247</sup> Judge Stanton argued that the reprieve sought by the plaintiffs was similar to the “desegregation orders and statewide prison injunction the Supreme Court ha[d] sanctioned” in other cases and noted that, in the past, the judiciary’s adherence to constitutional values had initiated widespread changes in government.<sup>248</sup> Citing a consistency with historical practices, Judge Stanton asserted that plaintiffs’ request for relief was neither novel nor nonjusticiable and that scientific complexity did not place it beyond the bounds of the court’s jurisdiction.<sup>249</sup>

## II. THE VIABILITY OF CONSTITUTIONAL CLAIMS

Climate change plaintiffs alleging constitutional violations necessarily encounter procedural hurdles and substantive difficulties resulting from the novelty of these claims. The diffuse nature of global warming poses a challenge for plaintiffs attempting to meet the particularity requirement of federal standing requirements, and the lack of a federally recognized right to a stable environment may appear facially insurmountable.

Yet, the procedural posture of *Juliana* and recent scholarship evaluating these constitutional claims point to a growing consensus that constitutional claims brought by climate change plaintiffs are viable. Part II.A examines the arguments in support of constitutional claims. Part II.B reviews the arguments against bringing constitutional claims.

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245. *Id.*

246. *Id.* at 1165, 1169.

247. *Id.* at 1184 (Stanton, J., dissenting).

248. *Id.* at 1176, 1188–89 (“[O]ur history is no stranger to widespread, programmatic changes in government functions ushered in by the judiciary’s commitment to requiring adherence to the Constitution. . . . [C]onsistent with our historical practices, [plaintiffs’] request is a recognition that remedying decades of institutionalized violations may take some time.”).

249. *See id.* at 1189 (“Mere complexity, however, does not put the issue out of the courts’ reach. Neither the government nor the majority has articulated why the courts could not weigh scientific and prudential consideration—as we often do—to put the government on a path to constitutional compliance.”).

### A. Constitutional Claims Are Viable

Part II.A.1 evaluates the procedural arguments in favor of granting standing to climate change plaintiffs. Part II.A.2 reviews the argument that the constitutional right to a stable climate should be recognized as an unenumerated right inherent in the Constitution.

#### 1. In Support of Standing

Though the injury, causation, and redressability prongs of the *Lujan* test would appear fatal to climate change litigants, recent case law has demonstrated that plaintiffs are able to satisfy most, if not all, of these standing requirements even when alleging harms stemming from global warming.<sup>250</sup>

Courts have held that evidence of concrete climate change harms incurred by plaintiffs can satisfy the injury-in-fact prong of *Lujan*, which requires that the injury be “actual or imminent, not conjectural or hypothetical.”<sup>251</sup> In *Juliana*, for example, each of the thirty-three plaintiffs described in great detail the damage that climate change had wrought.<sup>252</sup> Plaintiff Xiuhtezcatl M. alleged that increased wildfires and floods jeopardized his and his family’s safety, plaintiff Sahara V. alleged that wildfires aggravated her asthma, and plaintiff Jayden F. detailed how her family’s home flooded as a result of floods exacerbated by climate change.<sup>253</sup> The district court held that all the plaintiffs were harmed personally and economically and that the harms were “concrete and particularized, not abstract or indefinite.”<sup>254</sup>

In addition, imminent climate injuries can also be a sufficient injury in fact. In *Massachusetts*, the Supreme Court recognized that projected greenhouse gas emissions would exacerbate global warming and result in the potential future loss of coastal lands in Massachusetts and held that this imminent harm qualified as a sufficient injury in fact.<sup>255</sup> The Court further explained that the generalized nature of the harm did not preclude Massachusetts’s interest in preventing such losses and was not a barrier to finding standing.<sup>256</sup>

Though the precedential effect of *Massachusetts* remains unclear due to the Court’s specific recognition that the state’s “quasi-sovereign interests” entitled it to “special solicitude” in the standing analysis, the Court’s holding demonstrates that the diffuse effects of climate harms do not preclude a finding of standing.<sup>257</sup> Indeed, the majority’s choice in *Massachusetts* to

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250. See *supra* Part I.B.2.a.

251. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)).

252. See First Amended Complaint for Declaratory & Injunctive Relief, *supra* note 191, ¶¶ 16–97.

253. See *Juliana I*, 217 F. Supp. 3d 1224, 1242–43 (D. Or. 2016), *rev’d and remanded*, 947 F.3d 1159 (9th Cir. 2020).

254. *Id.* at 1244.

255. See *Massachusetts v. EPA*, 549 U.S. 497, 523–25 (2007).

256. See *id.* at 522.

257. *Id.* at 520, 522 (“[W]here a harm is concrete, though widely shared, the Court has found ‘injury in fact.’” (quoting *FEC v. Akins*, 524 U.S. 11, 24 (1998))).

eschew the rigid formulations of *Lujan* and its findings elsewhere that “an injury . . . widely shared . . . does not, by itself, automatically disqualify an interest for Article III purposes”<sup>258</sup> demonstrate the willingness of the Court to loosen judge-made standing requirements in cases involving imminent and generalized climate threats.<sup>259</sup> Similarly, in *Juliana*, the district court found that the plaintiffs suffered both actual and imminent harms because the effects of global warming were likely to continue or accelerate over time.<sup>260</sup>

The diffuse impact of climate change has also been found to satisfy the causation requirement of standing. To show causation, plaintiffs must establish that the injury is “fairly traceable to the challenged action of the defendant.”<sup>261</sup> In cases brought against governments for failing to regulate or reduce carbon emissions adequately, the Supreme Court has held that causation is satisfied where the challenged emissions levels meaningfully contribute to global climate change.<sup>262</sup> In *Juliana*, the Ninth Circuit affirmed the district court’s findings that the plaintiffs satisfied injury and causation for the purposes of summary judgment because there existed a genuine dispute regarding whether or not federal policies were a “substantial factor” in the plaintiffs’ injuries.<sup>263</sup> The court noted that the causal chain between the plaintiffs’ injuries and fossil fuel industry activities was “sufficiently established” and that the plaintiffs had demonstrated that “federal subsidies and leases have increased those emissions.”<sup>264</sup>

Causation in cases involving future climate harms is largely dependent on scientific attribution.<sup>265</sup> Detection and attribution science links anthropogenic factors to climate change impacts and analyzes the extent to which human activity affects the chemical composition of the atmosphere, contributing to extreme weather events or local climates.<sup>266</sup> Though many courts have recognized that causation relating to potential harms requires a fact-specific inquiry, others have dismissed climate change plaintiffs for lack of standing based on cursory assessments that the causal chains are too attenuated.<sup>267</sup> As methods of attribution continue to improve, scientific evaluations of causation will remain pivotal to a courts’ standing analyses, particularly as they pertain to causation.<sup>268</sup>

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258. *FEC v. Akins*, 524 U.S. 11, 24 (1998).

259. See Ian R. Curry, Note, *Establishing Climate Change Standing: A New Approach*, 36 *PACE ENV’T L. REV.* 297, 318 (2019).

260. See *Juliana I*, 217 F. Supp. 3d 1224, 1244 (D. Or. 2016), *rev’d and remanded*, 947 F.3d 1159 (9th Cir. 2020).

261. *Juliana II*, 947 F.3d at 1181 (quoting *Spokeo, Inc. v. Robins*, 578 U.S. 330 (2016)).

262. See Burger et al., *supra* note 2, at 150.

263. *Juliana II*, 947 F.3d at 1169 (quoting *Mendia v. Garcia*, 768 F.3d 1009, 1013 (9th Cir. 2014)).

264. *Id.*

265. See Burger et al., *supra* note 2, at 153–54.

266. See *id.* at 78.

267. See *id.* at 226.

268. See *id.* at 239 (“[T]he recent waves of cases brought against national and subnational governments . . . have made the relationship between the science and law of climate change attribution all the more salient.”); see also United Nations Env’t Programme, *supra* note 1, at 44 (“Attributing a defendant’s emissions to climate change overall (‘source attribution’) and

Alternatively, some scholars argue that causation should be considered through a proximate cause analysis rather than a strict causation-in-fact inquiry.<sup>269</sup> Citing standing as playing a gatekeeping role, courts have generally applied a specific cause-in-fact inquiry that is at odds with the standing question being a mere threshold determination.<sup>270</sup> A proximate cause analysis, by contrast, would allow courts to ascertain whether an alleged violation was *a* cause—rather than the strictly interpreted “but for” cause—of the petitioner’s injuries.<sup>271</sup> Still other commentators assert that traceable standing does not require proximate causation but that only “plausible evidence of a link” between the defendant’s conduct and the plaintiff’s harm would suffice to serve the standing doctrine’s procedural role.<sup>272</sup>

Furthermore, the Court signaled in *Massachusetts* that causation of climate change harms could be satisfied by both parties’ acknowledgment of the causal chain.<sup>273</sup> The pliability of the causation analysis from *Lujan*, coupled with attribution science, may enable plaintiffs to satisfy this standing requirement more regularly.<sup>274</sup> The Supreme Court in *Massachusetts* and the Ninth Circuit and district court in *Juliana* all found that the plaintiffs had met the injury and causation requirements for standing.<sup>275</sup>

The third prong of *Lujan*—redressability—is generally the most difficult prong for climate litigants to satisfy. Courts often find that justiciability principles preclude the judicial review of cases involving climate claims, noting that regulation is the more appropriate response to climate change.<sup>276</sup> Courts often cite the political question doctrine in particular as the reason for dismissing climate lawsuits because democratically elected branches are

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linking climate change to specific climate change impacts (‘impact attribution’) plays a major role in many climate cases, including those seeking to compel national governments to take action on climate change.”).

269. See, e.g., Luke Meier, *Using Tort Law to Understand the Causation Prong of Standing*, 80 FORDHAM L. REV. 1241, 1245 (2011).

270. See *id.* at 1265.

271. *Id.* at 1249–51.

272. See Mank, *supra* note 147, at 925–26.

273. See Meier, *supra* note 269, at 1296 (“The Court noted that the ‘EPA does not dispute the existence of a causal connection between manmade greenhouse gas emissions and global warming.’” (quoting *Massachusetts v. EPA*, 549 U.S. 497, 523 (2007))).

274. See, e.g., *United States v. Students Challenging Regul. Agency Procs. (SCRAP)*, 412 U.S. 669, 686–87 (1973) (“[N]either the fact that the appellees here claimed only a harm to their use and enjoyment of the natural resources of the Washington area, nor the fact that all those who use those resources suffered the same harm, deprives them of standing.”).

275. See *Massachusetts v. EPA*, 529 U.S. 497, 521–25 (2007); *Juliana I*, 217 F. Supp. 3d 1224, 1265–69 (D. Or. 2016), *rev’d and remanded*, 947 F.3d 1159 (9th Cir. 2020); see also *Juliana II*, 947 F.3d at 1168–70; Burger et al., *supra* note 2, at 156, 165.

276. See, e.g., *City of Oakland v. BP P.L.C.*, 325 F. Supp. 3d 1017, 1024–25 (N.D. Cal. 2018), *vacated*, 960 F.3d 570 (9th Cir. 2020) (dismissing a public nuisance suit against fossil fuel emitters in favor of resolution by the political branches); *City of New York v. BP P.L.C.*, 325 F. Supp. 3d 466, 472–75 (S.D.N.Y. 2018) (holding that a presumption against extraterritoriality and displacement by the CAA barred a public nuisance and trespass suit against oil and gas companies).

better equipped to make policy determinations that involve scientific evidence, economic repercussions, and complex political calculations.<sup>277</sup>

Yet, the tendency of lower courts to defer climate change issues to the political branches involves a broad application of the political question doctrine.<sup>278</sup> Deferral based on the first of the six *Baker* factors—“a textually demonstrable constitutional commitment . . . to a coordinate political department”<sup>279</sup>—is complicated by the fact that climate issues are not textually committed to any branch.<sup>280</sup>

In the context of a standing analysis, the political question doctrine need not preclude redress for climate litigants. The *Juliana* district court applied the *Baker* factors in its analysis of the redressability prong and explained that “redressability does not require certainty” but rather the “substantial likelihood that the Court could provide meaningful relief.”<sup>281</sup> In considering the plaintiffs’ request for declaratory and injunctive relief to “swiftly phase out CO<sub>2</sub> emissions,” the court found that the plaintiffs had sufficiently demonstrated that the relief sought would at least partially alleviate their injuries, and it subsequently granted standing.<sup>282</sup> Some scholars have also noted that concerns about the political question doctrine’s “basic illegitimacy”<sup>283</sup> and its constitutional validity should preclude such a broad application.<sup>284</sup>

Finally, plaintiffs alleging a violation of constitutional rights present claims that are appropriate for judicial review. The *Juliana* district court found that a determination of whether the defendants had violated the plaintiffs’ constitutional rights was well within the judiciary’s authority.<sup>285</sup> In response to the defendants’ motion to dismiss, the district court observed that “federal courts retain broad authority ‘to fashion practical remedies when confronted with complex and intractable constitutional violations’” and that any “speculation about the difficulty of crafting a remedy could not support dismissal at this early stage.”<sup>286</sup> Writing in dissent to the Ninth Circuit’s decision, Judge Stanton argued that the court should “not otherwise abdicate [its] duty to enforce constitutional rights” and emphasized that there is “no

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277. See Kuh, *supra* note 14, at 754; see also *supra* Part I.B.2.b.

278. See Burger et al., *supra* note 2, at 228.

279. *Baker v. Carr*, 369 U.S. 186, 217 (1962).

280. See May, *supra* note 175, at 938–39.

281. *Juliana I*, 217 F. Supp. 3d 1224, 1247 (D. Or. 2016), *rev’d and remanded*, 947 F.3d 1159 (9th Cir. 2020).

282. *Id.* at 1247–48. The court also noted that determinations about the specific remedies were better addressed at the summary judgment stage, not the motion to dismiss stage, as they rely on scientific attribution and expert testimony. *Id.* at 1269.

283. See May, *supra* note 175, at 953.

284. See, e.g., John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1241 n.112, 1242 (1970); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 336 n.413 (1994); Fritz W. Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517, 536 (1966). See generally Louis Henkin, *Is There A “Political Question” Doctrine?*, 85 YALE L.J. 597 (1976).

285. See *Juliana I*, 217 F. Supp. 3d at 1241.

286. *Id.* at 1241–42 (quoting *Brown v. Plata*, 563 U.S. 493, 526 (2011)).

justiciability exception for cases of great complexity and magnitude.”<sup>287</sup> In response to allegations of climate harms, some judges and scholars note that the scientifically complex nature of climate change policy should not bar plaintiffs from a consideration of their rights-based claims on the merits.<sup>288</sup>

## 2. Recognizing Federal Environmental Rights

Fundamental rights are those enumerated in the Constitution or those that are either “deeply rooted in this Nation’s history and tradition”<sup>289</sup> or “fundamental to our scheme of ordered liberty.”<sup>290</sup> Though the Supreme Court has cautioned against a liberal application of the Due Process Clauses to recognize unenumerated rights, the Court also has a history of identifying implicit fundamental rights that are inherent in the Constitution.<sup>291</sup> These include the right to privacy, the right to travel interstate, and the right to vote.<sup>292</sup> When the Supreme Court recognized the constitutional right to same-sex marriage in *Obergefell*, it famously asserted that “[w]hen new insight reveals discord between the Constitution’s central protections and a received legal stricture, a claim to liberty must be addressed.”<sup>293</sup> There, the Court recognized the judiciary’s ability to “exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect.”<sup>294</sup>

The district court in *Juliana* is alone in recognizing the fundamental right to a stable climate.<sup>295</sup> The plaintiffs argued that the right to a stable climate system constituted an implicit liberty protected by the Ninth Amendment and that it was inalienable, natural, and “[f]undamental to our scheme of ordered liberty.”<sup>296</sup> Relying on the Supreme Court’s fundamental rights jurisprudence, the district court applied its “reasoned judgment” to find that “the right to a climate system capable of sustaining human life is fundamental to a free and ordered society” and is “a necessary condition to exercising

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287. *Juliana II*, 947 F.3d 1159, 1184–85 (9th Cir. 2020), *reh’g denied* 986 F.3d 1295 (9th Cir. 2021).

288. *See, e.g.*, Daniel A. Farber, *Standing on Hot Air: American Electric Power and the Bankruptcy of Standing Doctrine*, 121 YALE L.J. ONLINE 121, 122 (2011) (describing the “injection of merits issues into a supposedly jurisdictional determination” as one of the flaws of the standing doctrine).

289. *McDonald v. City of Chicago*, 561 U.S. 742, 767 (2010) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).

290. *Id.* at 764 (emphasis omitted) (quoting *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968)).

291. *See* Blumm & Wood, *supra* note 7, at 40.

292. *Id.*; *see also supra* Part I.B.1.a.

293. *Obergefell v. Hodges*, 576 U.S. 644, 664 (2015).

294. *Id.*

295. *Juliana I*, 217 F. Supp. 3d 1224, 1250 (D. Or. 2016), *rev’d and remanded*, 947 F.3d 1159 (9th Cir. 2020); *see also* Rourke Donahue, *Kids Take a Stand Against Climate Change, but Do They Have Standing?*, GEO. ENV’T L. REV. ONLINE (Jan. 25, 2019), <https://www.law.georgetown.edu/environmental-law-review/blog/kids-take-a-stand-against-climate-change-but-do-they-have-standing> [<https://perma.cc/L2KN-8DHY>].

296. First Amended Complaint for Declaratory & Injunctive Relief, *supra* note 191, ¶ 304.

other rights to life, liberty, and property.”<sup>297</sup> Judge Aiken rejected the notion of broadly constitutionalizing all environmental claims but explained that a claim alleging that government inaction would affirmatively cause death, shorten life spans, cause damage to property, undermine food sources, and substantially change the ecosystem qualified as a due process violation.<sup>298</sup>

Another potential source of environmental rights is the public trust doctrine.<sup>299</sup> Courts have understood the public trust doctrine as a state obligation, based on the interpretation that the Supreme Court, in *Illinois Central Railroad Co. v. Illinois*,<sup>300</sup> situated the doctrine in state law.<sup>301</sup> However, some commentators and judges have characterized these interpretations as dicta that erroneously reads the doctrine’s foundation in the law of *any* state to mean that it is limited to *only* state law.<sup>302</sup> Instead, scholars contend that the Supreme Court’s decision in *Illinois Central* was grounded in federal common law and that the public trust doctrine applies both to state and to federal governments in their capacities as sovereigns.<sup>303</sup>

The *Juliana* district court agreed with this interpretation of the doctrine, finding that safeguarding the environment was an inherent sovereign responsibility and could not be abdicated by the state.<sup>304</sup> The court explained that the plaintiffs’ claims regarding the impact of government inaction on ocean acidification and rising seas fell within the traditional scope of the public trust doctrine.<sup>305</sup> Finding that public trust rights, though unenumerated, are consistent with the country’s history and tradition and implicit in its scheme of ordered liberty, Judge Aiken held that plaintiffs’ public trust claims both predated the Constitution and properly sounded in the Ninth Amendment and the Due Process Clause of the Fifth Amendment.<sup>306</sup>

A modern iteration of the public trust doctrine extends its reach to include the atmosphere. The “atmospheric trust” theory characterizes the atmosphere as a public natural resource and a public trust asset for which governments

297. *Juliana I*, 217 F. Supp. 3d at 1250 (quoting *Obergefell*, 576 U.S. at 664).

298. *See id.*

299. *See* Blumm & Wood, *supra* note 7, at 22.

300. 146 U.S. 387 (1892).

301. *See* *Idaho v. Coeur d’Alene Tribe of Idaho*, 521 U.S. 261, 285 (1997) (“*Illinois Central* was ‘necessarily a statement of Illinois law.’” (quoting *Appleby v. City of New York*, 271 U.S. 364, 395 (1926))); *D.C. v. Air Fla., Inc.*, 750 F.2d 1077, 1083 (D.C. Cir. 1984) (“In this country the public trust doctrine has developed almost exclusively as a matter of state law.”); *see also supra* Part I.B.1.b.

302. *See, e.g.*, Blumm & Wood, *supra* note 6, at 51; Zachary L. Berliner, Note, *What About Uncle Sam?: Carving a New Place for the Public Trust Doctrine in Federal Climate Litigation*, 21 U. PA. J.L. & SOC. CHANGE 339, 348 (2018).

303. *See* Blumm & Wood, *supra* note 7, at 51; Crystal S. Chase, Comment, *The Illinois Central Public Trust Doctrine and Federal Common Law: An Unconventional View*, 16 HASTINGS W.-N.W. J. ENV’T L. & POL’Y 113, 147 (2010).

304. “There is no reason why the central tenets of *Illinois Central* should apply to another state, but not to the federal government.” *Juliana I*, 217 F. Supp. 3d 1224, 1257 (D. Or. 2016), *rev’d and remanded*, 947 F.3d 1159 (9th Cir. 2020); *see also* Blumm & Wood, *supra* note 7, at 51.

305. *See Juliana I*, 217 F. Supp. 3d at 1256.

306. *See id.* at 1261.

hold fiduciary duties in their capacities as trustees.<sup>307</sup> The *Juliana* plaintiffs advanced arguments under this theory by challenging the federal government's support of the fossil fuel industry and by seeking a judicial order requiring it to implement an enforceable carbon emission reduction plan.<sup>308</sup> In light of existing air pollution regulations, proponents of the atmospheric trust doctrine argue that adjudicating climate cases involving atmospheric trust violations necessitates the judiciary's engagement with expert testimony and scientific attribution.<sup>309</sup>

### B. Countervailing Arguments

Despite the recent successes discussed in Part II.A, federal courts have generally found that adjudicating climate harms exceeds the parameters of judicial review. Part II.B.1 reviews the arguments against standing, and Part II.B.2 examines the case against recognizing the right to a stable environment.

#### 1. Justiciable Barriers

The majority of climate change cases in federal court have been dismissed on procedural grounds without consideration of the merits.<sup>310</sup> Where courts have recognized that climate change can produce sufficient injuries in fact, they often find that plaintiffs fail to satisfy causation or, increasingly, dismiss those cases on justiciability grounds.

In *Washington Environmental Council v. Bellon*,<sup>311</sup> the Ninth Circuit dismissed an effort by nonprofit plaintiffs to hold Washington State accountable for its failure to regulate greenhouse gas emissions.<sup>312</sup> Though the plaintiffs' injuries were sufficiently specific to satisfy the injury-in-fact prong, the court of appeals found that the alleged causal chain "consist[ed] of a series of links strung together by conclusory, generalized statements of 'contribution,' without any plausible scientific or other evidentiary basis that the refineries' emissions are the source of their injuries."<sup>313</sup> The court cited the "limited scientific capability in assessing, detecting, or measuring the relationship between a certain [greenhouse gas] emission source and localized climate impacts" as a reason for finding the causal chain too tenuous to find standing.<sup>314</sup> Similarly, the district court in *Kivalina* found that the plaintiffs lacked standing because other factors, in addition to the activities of the defendant oil companies, contributed to the emissions levels

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307. See Wood, *supra* note 132, at 270–71; *supra* notes 129–32 and accompanying text.

308. See First Amended Complaint for Declaratory & Injunctive Relief, *supra* note 191, ¶¶ 12, 280.

309. See Blumm & Wood, *supra* note 7, at 72.

310. See Kuh, *supra* note 14, at 734.

311. 732 F.3d 1131 (9th Cir. 2013).

312. See *id.* at 1135.

313. *Id.* at 1142.

314. *Id.* at 1143.

that caused the plaintiffs' injuries.<sup>315</sup> The court did not specify a particular threshold of emissions necessary to find standing, but one scholar suggests that the court would have come to the same conclusion notwithstanding the quantity of the emissions.<sup>316</sup>

Courts have almost uniformly held that redress for climate change injuries presents a nonjusticiable political question.<sup>317</sup> Despite the district court's grant of standing to the *Juliana* plaintiffs, the Ninth Circuit held that the plaintiffs failed to satisfy the redressability requirement.<sup>318</sup> The Ninth Circuit explained that, to establish redressability, plaintiffs must demonstrate that the relief sought is "(1) substantially likely to redress their injuries, and (2) within the . . . court's power to award."<sup>319</sup> Though redress need not be guaranteed, it must be more than "merely speculative."<sup>320</sup> The court found that granting declaratory relief to the *Juliana* plaintiffs would not sufficiently redress their injuries and that an injunction would stymie both the executive and congressional branches from exercising their respective discretionary authority over environmental policy.<sup>321</sup> It explained that a comprehensive plan to decrease carbon emissions—though laudatory from a policy standpoint and as "a matter of national survival in particular"—would necessarily involve "complex policy decisions entrusted, for better or worse, to the wisdom and discretion of the executive and legislative branches."<sup>322</sup>

In his dissent in *Massachusetts*, Chief Justice Roberts also advocated for deference to the political branches.<sup>323</sup> Characterizing the plaintiffs' injuries first as a generalized grievance, Chief Justice Roberts criticized the majority's finding that the plaintiffs' alleged harms were sufficiently concrete and particularized.<sup>324</sup> Moving to redressability, he argued that dissatisfaction with the pace at which the political branches addressed global warming did not change the fact that Congress and the executive branch are better equipped than the judiciary to address the issue and that the majority's flexible adherence to the standing doctrine threatened the Constitution's tripartite allocation of power.<sup>325</sup>

The reticence of the judiciary to find standing of climate change plaintiffs rests on its discomfort with ruling on issues related to global warming. Democratically elected officials are deemed to be the more appropriate

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315. See *Native Village of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 880–81 (N.D. Cal. 2009), *aff'd on other grounds*, 696 F.3d 849 (9th Cir. 2012).

316. See Burger et al., *supra* note 2, at 160.

317. See *supra* Part I.B.2.b.

318. See *Juliana II*, 947 F.3d 1159, 1170–71 (9th Cir.), *reh'g denied*, 986 F.3d 1295 (9th Cir. 2021).

319. *Id.* at 1170.

320. *Id.* (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992)).

321. See *id.* at 1170–71.

322. *Id.* at 1171.

323. See *Massachusetts v. EPA*, 549 U.S. 497, 535 (2007) (Roberts, C.J., dissenting).

324. See *id.* at 541.

325. See *id.* at 547 ("The constitutional role of the courts . . . is to decide concrete cases—not to serve as a convenient forum for policy debates."); see also Adler, *supra* note 152, at 66 ("[*Massachusetts v. EPA*] . . . weakened the traditional requirements for Article III standing.").

promulgators of climate policy, better equipped to make decisions that implicate economic and social trade-offs.<sup>326</sup> In the words of the Ninth Circuit in *Juliana*, “[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.”<sup>327</sup>

## 2. The Lack of a Constitutional Right Is Preclusive

Regarding a fundamental environmental right, courts consistently cite the lack of an enumerated constitutional right to a stable environment as a reason for denying a constitutional claim.<sup>328</sup> There have been two attempts to amend the Constitution to include a right to a healthy environment, and both have failed.<sup>329</sup> In response to efforts to analogize climate change plaintiffs’ efforts to those of same-sex marriage advocates, scholars have disputed *Obergefell*’s concept of expanding due process rights and noted the case’s lack of precedential value in the realm of environmental rights.<sup>330</sup> Citing Chief Justice Roberts’s dissent in *Obergefell*, which criticized the majority for granting too much discretion to the judiciary to expand fundamental rights, one commentator argues that it is “inappropriate in a democratic system for judges to use injunctive relief to force the political branches to make policy choices that a federal judge prefers.”<sup>331</sup> Instead of seeking relief in the courts, proponents of this view note that constituents should instead make use of the electoral process.

In *Juliana*, the government similarly contested the plaintiffs’ invocation of *Obergefell*. It argued that comparisons to *Obergefell* were misplaced because the right to a stable climate system “has no relationship to ‘certain personal choices central to individual dignity’” or any right as “‘fundamental as a matter of history or tradition’ as the right to marry.”<sup>332</sup> The Ninth Circuit noted, however, that “[r]easonable jurists can disagree about whether the asserted constitutional right” to a climate system capable of sustaining human

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326. See Burger et al., *supra* note 2, at 228.

327. *Juliana II*, 947 F.3d 1159, 1175. (9th Cir. 2020), *reh’g denied*, 986 F.3d 1295 (9th Cir. 2021).

328. See, e.g., *Ely v. Velde*, 451 F.2d 1130, 1139 (4th Cir. 1971); *Clean Air Council v. United States*, 362 F. Supp. 3d 237, 250–51 (E.D. Pa. 2019); *S.F. Chapter of A. Philip Randolph Inst. v. EPA*, No. C 07-4936, 2008 WL 859985, at \*7 (N.D. Cal. Mar. 28, 2008).

329. See, e.g., H.R.J. Res. 1205, 91st Cong. (1970); H.R.J. Res. 1321, 90th Cong. (1968); see also Mary Ellen Cusack, *Judicial Interpretation of State Constitutional Rights to a Healthful Environment*, 20 B.C. ENV’T AFFS. L. REV. 173, 174 (1993).

330. See, e.g., Bradford C. Mank, *Can Judges Use Due Process Concepts in Obergefell to Impose Judicial Regulation of Greenhouse Gases and Climate Change?: The Crucial Case of Juliana v. United States*, 7 BELMONT L. REV. 277, 279 (2020) (“The *Obergefell* decision’s concept of evolving due process rights is problematic in many areas of law . . .”).

331. *Id.* at 306.

332. Defendants’ Motion for Summary Judgment at 25, *Juliana I*, 217 F. Supp. 3d 1224 (D. Or. 2016) (No. 15-cv-01517), 2018 WL 2441145 (quoting *Obergefell v. Hodges*, 576 U.S. 644, 663, 671 (2015)).

life exists but ultimately sidestepped the question by finding that the plaintiffs lacked standing.<sup>333</sup>

Scholars also argue that applying the public trust doctrine to climate change cases overextends the doctrine.<sup>334</sup> One commentator characterizes the doctrine as paradoxical, noting that it combines expectations about a government's role as a trustee of natural resources with "an incompletely theorized doctrinal foundation and anxiety about judicial policy-making on technically complex and socially important issues."<sup>335</sup> Expansion of the public trust doctrine beyond its traditional application to aquatic resources must also be reconciled with questions about its legal effect and the judiciary's competence in enforcing it.<sup>336</sup> While scholars generally recognize that reducing carbon emissions is a laudatory goal, many also warn against applying the public trust doctrine too broadly to compel climate change reform.<sup>337</sup>

Indeed, even the scholar whose landmark article arguably resuscitated the public trust doctrine in legal discourse simultaneously cautioned against its overextension.<sup>338</sup> In 1970, Professor Joseph Sax published "The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention," which suggested that the public trust doctrine could be applied more broadly to protect natural resources in the face of insufficient legislation.<sup>339</sup> Despite Professor Sax's thesis and the expansionist interpretations that followed, he also stressed that the doctrine should not engender direct confrontation between the legislative and judicial branches.<sup>340</sup> He noted that the doctrine should not be utilized to "displac[e] legislative bodies as the final authorities in setting resource policies."<sup>341</sup> Furthermore, in a discussion of regulatory takings, he noted that "a private action seeking more effective governmental action on . . . more extensive enforcement of air pollution laws would rarely be likely to reach constitutional limits."<sup>342</sup> Though his comments pertained to takings of private property, his skepticism that such claims would reach their "constitutional limits" suggests that he would be equally skeptical of the

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333. *Juliana II*, 947 F.3d 1159, 1169–71 (9th Cir. 2020), *reh'g denied*, 986 F.3d 1295 (9th Cir. 2021).

334. See Hope M. Babcock, *What Can Be Done, If Anything, About the Dangerous Penchant of Public Trust Scholars to Overextend Joseph Sax's Original Conception: Have We Produced A Bridge Too Far?*, 23 N.Y.U. ENV'T L.J. 390, 391 (2015).

335. William D. Araiza, *The Public Trust Doctrine as an Interpretive Canon*, 45 U.C. DAVIS L. REV. 693, 697 (2012).

336. See *id.* at 696.

337. See, e.g., Araiza, *supra* note 335, at 711; Babcock, *supra* note 334, at 404; J. Peter Byrne, *The Public Trust Doctrine, Legislation, and Green Property: A Future Convergence?*, 45 U.C. DAVIS L. REV. 915, 927 (2012).

338. See Babcock, *supra* note 334, at 394–95.

339. Joseph Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 475 (1970).

340. See *id.* at 544.

341. *Id.* at 559; see also Babcock, *supra* note 334, at 405.

342. Sax, *supra* note 339, at 557.

viability of “grandiose constitutional claims of the right to a decent environment.”<sup>343</sup>

### III. THE CASE FOR JUDICIAL ENGAGEMENT

This part argues that methodical judicial deference to the political branches on issues of climate change policy amounts to an abdication of responsibility. It proposes that courts find climate change litigants have standing, and it argues that their constitutional claims deserve review on the merits. This part also argues that an environmental right is inherent in enumerated constitutional liberties and should be recognized.

#### A. Constitutional Climate Claims Should Be Reviewed on the Merits

Until now, federal courts have almost uniformly invoked threshold principles such as standing and the political question doctrine to avoid reaching the merits on constitutional claims in climate change lawsuits.<sup>344</sup> Judicial unease about usurping the role of the political branches and displacing democratic processes, though valid, does not justify the blanket refusal to engage with climate change lawsuits that allege constitutional violations. As two commentators have noted, judges “have found ways to decline jurisdiction over extraordinary claims for relief. But the routinization of the hermeneutic of jurisdiction does not render it legitimate.”<sup>345</sup>

First, allegations that federal emissions practices violate constitutional rights fall directly within the scope of the judiciary’s authority and should not be dismissed for a lack of standing.<sup>346</sup> The standing doctrine acts as a procedural threshold for plaintiffs but is mired by several fundamental flaws, which results in its inconsistent application and overall pliability.<sup>347</sup> In addition, the standing analysis of climate change claims often appears to overlap with a premature merits analysis, even though standing should primarily be a jurisdictional question.<sup>348</sup> As a threshold doctrine, standing should not be utilized to bar review of claims that pertain to constitutional violations simply because of the difficult questions these claims present.<sup>349</sup>

Instead, courts should find that climate change plaintiffs satisfy the jurisdictional standing requirements as articulated in *Lujan*.<sup>350</sup> Climate change litigants’ ability to satisfy the first two prongs of standing has been well established.<sup>351</sup> With regard to the redressability requirement, the difficulty of fashioning an effective remedy that respects the separation of

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343. *See id.* at 474.

344. *See supra* Part I.B.2.

345. R. Henry Weaver & Douglas A. Kysar, *Courting Disaster: Climate Change and the Adjudication of Catastrophe*, 93 NOTRE DAME L. REV. 295, 356 (2017).

346. *See supra* Part II.A.1.

347. *See* Farber, *supra* note 288, at 122.

348. *See id.* at 122–23.

349. *See supra* note 269 and accompanying text.

350. *See supra* Part II.A.1.

351. *See supra* note 275 and accompanying text.

powers should not disqualify litigants at this procedural stage.<sup>352</sup> Plaintiffs are not required to show that judicial relief would completely or certainly ameliorate their injuries; rather, they need only show that there is a substantial likelihood that it would do so and that the redress would, at a minimum, reduce the alleged harm.<sup>353</sup> Arguments that declaratory or injunctive relief would not rectify the entirety of anthropogenic climate change are therefore unavailing.<sup>354</sup> Furthermore, the causation and redressability elements of standing were initially conceived of as two sides of the same coin or “two facets of a single causation requirement.”<sup>355</sup> The interconnectedness of these two prongs and the proven ability of climate change plaintiffs to demonstrate causation suggests that redressability should not be the preclusive measure that the courts have deemed it to be.<sup>356</sup>

Second, courts’ tendency to deny standing based on cursory scientific evaluations denies climate change plaintiffs the full quantitative analysis they deserve. Attribution science is crucial for demonstrating causation in climate cases and demands the extensive evidence, expert testimony, and full briefing that comes with discovery.<sup>357</sup> Questions of redressability, in particular, rely on detailed scientific attribution research, which courts can only adequately consider once plaintiffs have passed the standing threshold.<sup>358</sup> Dismissing a lawsuit that is dependent on attribution science without considering the science itself is inappropriately premature.

Third, rejecting a climate change complaint for presenting a nonjusticiable political question constitutes an overbroad application of the political question doctrine. In exercising judicial restraint on climate change matters, such that nearly all climate-related claims are deferred to the political branches, courts fail to exercise the appropriate extent of their constitutionally delegated authority.<sup>359</sup> One of the judiciary’s central roles is to ensure the protection of people’s rights, whether granted by statute, enumerated in the Constitution, or derived from substantive due process.<sup>360</sup>

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352. *See, e.g.*, *Baker v. Carr*, 369 U.S. 186, 198 (1962) (“Beyond noting that we have no cause at this stage to doubt the District Court will be able to fashion relief if violations of constitutional rights are found, it is improper now to consider what remedy would be most appropriate if appellants prevail at the trial.”).

353. *See, e.g.*, *Wash. Env’t Council v. Bellon*, 732 F.3d 1131, 1146 (9th Cir. 2013).

354. *See Massachusetts v. EPA*, 549 U.S. 497, 525–26 (2007) (“Because of the enormity of the potential consequences associated with manmade climate change, the fact that the effectiveness of a remedy might be delayed during the (relatively short) time it takes for a new motor-vehicle fleet to replace an older one is essentially irrelevant. Nor is it dispositive that developing countries such as China and India are poised to increase greenhouse gas emissions substantially over the next century: A reduction in domestic emissions would slow the pace of global emissions increases, no matter what happens elsewhere.”).

355. *Bellon*, 732 F.3d at 1146 (quoting *Allen v. Wright*, 468 U.S. 737, 753 n.19 (1984)).

356. *See supra* Part II.A.1.

357. *See Burger et al.*, *supra* note 2, at 226.

358. *See id.*

359. *See Kuh*, *supra* note 14, at 745.

360. *See Burger et al.*, *supra* note 2, at 228.

Courts are therefore well within their power to intervene when the government's actions or policies allegedly violate the rights of its citizens.<sup>361</sup>

Moreover, the political question doctrine itself is a permissive gatekeeping doctrine that enables judicial deference in cases that present a political issue. The difficulty in discerning what is too political, or not political enough, to justify the exercise of the doctrine enables its selective and arguably liberal application.<sup>362</sup> One scholar notes that “[f]or too many judges, the temptation to view especially delicate or controversial matters as ‘political,’ and therefore beyond their reach, can and has become seductive.”<sup>363</sup> In climate change cases, judges often note that the political complexity of addressing global warming requires its exclusive resolution by the executive and legislative branches.<sup>364</sup> Yet, the scale and complexity of the issue does not excuse the judiciary's systematic refusal to engage.<sup>365</sup> In *Juliana*, the Ninth Circuit acknowledged that the political branches had abdicated their responsibility to remediate the problem, but by refusing to find standing, the court arguably abdicated its own responsibility to serve as a check on the other coequal branches.<sup>366</sup> By declining to review cases on the merits, courts knowingly perpetuate what they acknowledge to be insufficient government reactions to climate change.

### B. *The Right to a Stable Climate System*

The *Juliana* district court recognized that the right to a stable climate system is “quite literally the foundation ‘of society, without which there would be neither civilization nor progress.’”<sup>367</sup> The court qualified this finding by clarifying that it was not identifying a right to be completely free from pollution or climate change but rather, recognizing that a claim that government policies contribute to climate change and thereby substantially threaten conditions necessary to enjoy life, liberty, and property is sufficient to allege an infringement of one's fundamental rights.<sup>368</sup>

The court's narrow holding regarding the right to a climate system capable of supporting human life demonstrates the possibility of recognizing an

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361. *See id.*

362. *See, e.g., Juliana I*, 217 F. Supp. 3d 1224, 1241 (D. Or. 2016), *rev'd and remanded*, 947 F.3d 1159 (9th Cir. 2020) (finding that although a “lawsuit challenging federal agencies’ surveillance practices ‘strikes at the heart of a major public policy controversy,’ claims were justiciable because they were ‘straightforward claims of statutory and constitutional rights, not political questions’” (quoting *Jewel v. Nat’l Sec. Agency*, 673 F.3d 902, 912 (9th Cir. 2011))).

363. MARTIN S. FLAHERTY, *RESTORING THE GLOBAL JUDICIARY: WHY THE SUPREME COURT SHOULD RULE IN U.S. FOREIGN AFFAIRS* 177 (2019) (“The trouble is that the label itself can become a handy excuse for judges who would rather avoid considering the relevant law in a complex or controversial case to do just that—duck the matter altogether as nonjusticiable.”).

364. *See Juliana II*, 947 F.3d 1159, 1171 (9th Cir. 2020), *reh’g denied*, 986 F.3d 1295 (9th Cir. 2021).

365. *See* Burger et al., *supra* note 2, at 228.

366. *See Juliana II*, 947 F.3d at 1175.

367. *See Juliana I*, 217 F. Supp. 3d at 1250 (quoting *Maynard v. Hill*, 125 U.S. 190, 211 (1888)).

368. *See id.*

environmental right of a limited scope.<sup>369</sup> Despite the lack of a federally recognized environmental right, it is undisputed that a stable climate is a necessary condition of the fundamental rights otherwise enshrined in the Constitution.<sup>370</sup> Such a right is also in line with Justice Kennedy's declaration in *Obergefell* that "[w]hen new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed."<sup>371</sup>

Furthermore, the public trust doctrine also secures this environmental right for plaintiffs. The naturally occurring connection between navigable waters and the atmosphere necessarily designates the latter as a public trust resource, and the government in its capacity as sovereign has a responsibility as a trustee of public natural resources.<sup>372</sup> The doctrine itself predates the United States and its institutions, and it is foundational to the social contract that exists between a government and its people.<sup>373</sup> In addition, despite the holding of several courts that the states are responsible for upholding the public trust doctrine, this is based on an erroneous reading of *Illinois Central*.<sup>374</sup> The public trust doctrine's interpretation of state law does not preclude its application on a federal level.<sup>375</sup> Indeed, delegating exclusive public trust responsibilities to the states undermines the doctrine's central tenet of designating sovereigns—both state and federal—as trustees of natural resources.<sup>376</sup>

### C. Judicial Intervention and a Normative Shift

This Note does not argue that the judiciary should be the primary arbiter of federal climate change policy or carbon emissions regulations. The executive and legislative branches are equipped with technical expertise and democratic mandates that are better suited to determining the intricacies of the federal government's response to climate change. In response to the global existential threat posed by a warming planet, the political branches can evaluate the economic, ethical, and social concerns inherent in climate policy better than the courts.<sup>377</sup>

Yet, this does not excuse the judiciary's routine practice of declining to review the merits of climate change cases, especially those cases that allege violations of fundamental rights. Such cases fall squarely within the jurisdiction of courts to address government's failures to protect citizens'

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369. *See id.*

370. *See supra* Part II.A.2.

371. *Obergefell v. Hodges*, 576 U.S. 644, 664 (2015); *see also* Mia Hammersley, Note, *The Right to a Healthy and Stable Climate: Fundamental or Unfounded?*, ARIZ. J. ENV'T L. & POL'Y, Fall 2016–Spring 2017, at 117, 145.

372. *See Kelly, supra* note 126, at 186–87.

373. *See supra* Part I.B.1.b.

374. *See supra* notes 301–03 and accompanying text.

375. *See supra* Part I.B.1.b.

376. *See supra* Part I.B.1.b.

377. *See Burger et al., supra* note 2, at 228.

rights.<sup>378</sup> Threshold justiciability doctrines and judicial restraint should not be so broadly applied as to deny adjudication of the merits to plaintiffs who demonstrate clear injuries in fact that result from government practices.<sup>379</sup> Though not all such plaintiffs will prevail on the merits, they deserve the full adjudication of their claims.

The U.S. judiciary would also not be alone in serving as a backstop for protecting fundamental interests related to climate change.<sup>380</sup> As is the case in *Juliana*, minor plaintiffs and citizen groups have filed suits against the governments of Australia, Belgium, Canada, France, Germany, India, the Netherlands, Norway, Pakistan, the Philippines, Uganda, Ukraine, and the United Kingdom, challenging their climate policies and carbon emissions programs.<sup>381</sup> In 2018 in the Netherlands, the Hague Court of Appeal in *Urgenda Foundation v. State of the Netherlands*<sup>382</sup> found that the government was acting unlawfully by failing to pursue a more ambitious carbon emissions reduction policy.<sup>383</sup> It rejected the government's argument that separation of powers principles precluded judicial involvement, and it instead held that the court's order for the further reduction of emissions respected the separation of powers by delegating the specifics of policy to the political branches.<sup>384</sup> In 2019, the Supreme Court of the Netherlands upheld the court of appeal's decision.<sup>385</sup>

Finally, judicial engagement with core climate issues would constitute a significant and effective normative shift. Judicial intervention would send a signal to governments and private entities about the urgency of remediating carbon emissions and could advance public knowledge about the topic through its engagement with attribution science.<sup>386</sup> Conversely, consistent denial of judicial review and abdication to the political branches<sup>387</sup>—even on an issue the courts have acknowledged is “existential in nature”<sup>388</sup>—risks

378. See *supra* notes 236–37 and accompanying text.

379. See Kuh, *supra* note 14, at 763–64.

380. See, e.g., United Nations Env't Programme, *supra* note 1, at 47 (“The growing amount of litigation and its global distribution suggests that litigants, courts, and international tribunals will be presented with many more opportunities to resolve the pressing dangers created by climate change in the coming years.”).

381. See John Schwartz, *In Novel Tactic on Climate Change, Citizens Sue Their Governments*, N.Y. TIMES (May 10, 2016), <https://www.nytimes.com/2016/05/11/science/climate-change-citizen-lawsuits.html> [<https://perma.cc/A7XS-ZUWF>]; see also Kelly, *supra* note 126, at 185–86.

382. Gerechtshof [Hof] Gravenhage 9 oktober 2018, Administratiefrechtelijke beslissingen [AB] 2018, 417 m.nt GA van der Veen, Ch.W. Backes (Staat der Nederlanden/Stichting Urgenda) (Neth.).

383. See *id.*

384. See *id.*

385. Hoge Raad der Nederlanden [HR] 20 december 2019, Nederlandse Jurisprudentie [NJ] 2020, 41 m.nt J.Spier (Staat der Nederlanden/Stichting Urgenda) (Neth.).

386. See Burger et al., *supra* note 2, at 228.

387. See, e.g., *Juliana II*, 947 F.3d 1159, 1175 (9th Cir. 2020), *reh'g denied*, 986 F.3d 1295 (9th Cir. 2021) (“We do not dispute that the broad judicial relief the plaintiffs seek could well goad the political branches into action. . . . We reluctantly conclude, however, that the plaintiffs' case must be made to the political branches or to the electorate at large.”).

388. *Id.* at 1173.

encouraging judicial timidity and discomfort with the adjudication of fundamental rights violations related to climate change.

#### CONCLUSION

Ultimately, the judicial restraint that judges have exercised in climate change lawsuits is untenable in light of the ongoing nature of global warming. The broad application of justiciability doctrines to decline merits adjudication undermines the judiciary's role of protecting citizens' constitutional and fundamental rights. Climate change plaintiffs should not be denied standing reflexively due to the difficulty of crafting appropriate remedies. Moreover, recognizing a fundamental right to a stable climate system aligns with the Supreme Court's historical due process jurisprudence and the public trust doctrine. Although courts should not be the architects of federal climate change policy, they can and must engage in its formation by serving as a check on the political branches. Judicial engagement on climate change issues is consistent with the traditional principles of separation of powers, and consistent abdication of the power of judicial review will become difficult to justify in the face of the impending climate catastrophe.