Standing on Weak Legs: How Redressability Has Become the Scapegoat in the Age of Climate Change Litigation

Joseph Ruggiero*

"It is as if an asteroid were barreling toward Earth and the government decided to shut down our only defenses. . . . the mere fact that this suit cannot alone halt climate change does not mean that it presents no claim suitable for judicial resolution."[1]

I. INTRODUCTION

Climate change litigation is on the rise with the majority of lawsuits taking place in the United States.[2] Despite the increased number of litigants in climate change cases, establishing standing in climate change litigation remains difficult.[3] Redressability for climate-related injuries is the central difficulty in determining standing.[4] Further, political leaders contribute to the general confusion about whether climate change is a resolvable crisis by questioning whether climate change is a pressing concern.[5]

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* J.D. Candidate, Suffolk University Law School, 2022; B.S. Trinity College, 2019. Special thanks to Professor Steven Ferrey, whose mentorship and guidance throughout law school has shaped my passion for this field of law, and to my partner, Sophia, for her patience and support. Finally, this Note is dedicated to the memory of my personal hero, Pauline Hunt.

1. *See* Juliana v. United States, 947 F.3d 1159, 1175-76 (9th Cir. 2020) (Staton, J. dissenting) (noting potential redress possible by following climate change precedent). Judge Staton, author of the dissent, argued climate change imposes an irreversible harm and courts should recognize litigants as presenting a proper constitutional interest that is more than some "moral responsibility." *See id.* at 1177, 1182.

2. *See* Elisa de Wit et al., *Climate Change Litigation Update*, NORTON ROSE FULBRIGHT (Feb. 2020), https://www.nortonrosefulbright.com/en/knowledge/publications/7d58ae66/climate-change-litigation-update [https://perma.cc/L83M-8WQE] (detailing recent global trends in climate change litigation). In 2019, there were over one hundred more climate change related cases globally than in 2018, with nearly 80% of the cases taking place in the United States. *See id.* Most cases occur in the United States, Australia, United Kingdom, European Union, New Zealand, and Canada. *See id.*

3. *See* Barry Kellman, *Standing to Challenge Climate Change Decisions*, 46 ENV'T. L. REP. NEWS & ANALYSIS 10116, 10117 (2016) (noting concept of redressability in environmental litigation runs against standing doctrine). It is difficult to determine whether a party has a legitimate redressable harm when the impact caused is attenuated from the source causing the harm. *See id.*

4. *See id.* (acknowledging redress for already-suffered harm inconsistent with standing principles).

5. *See* Nadja Popovich, *Climate Change Rises as a Public Priority. But It's More Partisan than Ever,* N.Y. TIMES (Feb. 20, 2020), https://www.nytimes.com/interactive/2020/02/20/climate/climate-change-polls.html [https://perma.cc/ZRG3-7PFK] (noting partisan polarization hindered efforts for effective climate change policy).

There has been an increase in the variety of legal techniques adopted over the years to create standing under Article III.[6] The standing doctrine is designed to quickly resolve disputes where the litigant lacks the basis in some source of law to sue.[7] To establish standing, the plaintiff must have suffered an injury-in-fact that is fairly traceable to the challenged conduct and redressable by a favorable decision.[8] Substantiating that a harm is redressable challenges climate change plaintiffs alleging a future harm; nevertheless, the Supreme Court recognized that a remedy does not need to redress every injury, paving the way for integral climate change cases.[9]

Despite progress in climate change litigation, a recent Ninth Circuit decision in *Juliana v. United States* denied standing to a group of youth plaintiffs challenging the government to institute more substantial climate change measures, a claim of relief that implicates legislative action.[10] The court held that Juliana did not suffer a redressable injury because the relief sought would not solve global climate change and was beyond the judiciary's constitutional power.[11] Although Juliana's unique legal position attempted to stretch the bounds of Article III standing, the question remains as to whether redressability was truly the issue in light of remedies granted to climate change litigants in the

6. *See generally* Bruce Myers et al., *Charting an Uncertain Legal Climate: Article III Standing in Lawsuits to Combat Climate Change*, 45 ENV'T L. REP. NEWS & ANALYSIS 10509 (2015) (describing legal techniques to procure standing).

7. *See* Linda Sandstrom Simard, *Standing Alone: Do We Still Need the Political Question Doctrine?*, 100 DICK. L. REV. 303, 308-09 (1996) (detailing development of standing doctrine and explaining plaintiff cannot sue without showing legal right).

8. *See id.* at 323 (describing modern standing doctrine). While the modern standing doctrine is comprised of three elements, causation and redressability are closely related due to their similar requirements. *See id.* at 329.

9. *See* Larson v. Valente, 456 U.S. 228, 243, 243 n.15 (1982) (holding relevant inquiry regarding standing concerns whether decision will likely redress injury); Massachusetts v. EPA, 549 U.S. 497, 525 (2007) (holding redressability does not need to reverse all global warming caused harm); *see also* Am. Elec. Power Co. v. Connecticut, 564 U.S. 410, 420 (2011) (affirming justiciability of state interest to challenge agency's refusal to regulate).

10. *See* Juliana v. United States, 947 F.3d 1159, 1175 (9th Cir. 2020) (noting judicial relief sought may encourage political branches to act). The group consisted of twenty-one young people seeking declaratory and injunctive relief against the United States, the President, and federal administrative officials; for clarity, the *Juliana* plaintiffs will collectively be referred to throughout this Note by the name of the lead plaintiff. *Id.* at 1164 (describing parties involved). The court did not believe the procedural injury alleged in *Massachusetts v. EPA* could be applied to a case alleging substantive injuries. *See id.* at 1171 (refusing to acknowledge satisfaction of redressability element).

11. *See id.* at 1175 (dismissing for lack of judiciary power to redress climate change). The court described Juliana's claims as lacking a statutory or regulatory violation. *See id.* at 1169. Without some procedural right, courts review the redressability element of the standing doctrine more stringently than the Court expressed in *Massachusetts v. EPA*. *See id.* at 1171; Lujan v. Defenders of Wildlife (*Lujan II*), 504 U.S. 555, 560-61 (1992) (describing test for standing). The majority held Juliana did not have standing, reasoning that without a procedural right like in *Massachusetts v. EPA*, Juliana's only claim is one of substantive due process. *See Juliana*, 947 F.3d at 1171 (distinguishing Juliana's claims from those asserting procedural right).

past.[12] Ultimately, the holding in *Juliana* reflects a larger, looming issue in climate change litigation: Courts tend to rely on the standing doctrine as a scapegoat for dismissing complex climate change litigation rather than discussing the merits of the plaintiff's claims.[13]

Though courts have begun to recognize private plaintiff standing in climate change litigation, they are hesitant to accept arguments that partial redressability is sufficient.[14] This Note examines the current state of redressability in climate change litigation and investigates the historical reasoning for skepticism about partial redress.[15] This Note also discusses the judiciary's attempts to avoid nonjusticiable questions by forfeiting on the issue of standing.[16] Finally, this Note analyzes the merits of the Ninth Circuit's *Juliana* decision and the implications it may have on future cases.[17]

II. HISTORY

A. History of the Standing Doctrine

1. Constitutional Standing

The purpose of the standing doctrine is to determine whether the party seeking adjudication is proper based on the alleged injury.[18] While the modern test for standing was not established until the twentieth century, the Supreme Court has

12. *See* Hillary Hoffman, Article, *Changing Tides: Article III Standing and Climate Change Litigation*, MINN. L. REV.: DE NOVO BLOG (Mar. 19, 2019), https://minnesotalawreview.org/2019/03/19/changing-tides/ [https://perma.cc/RJP5-SF96] (explaining *Massachusetts v. EPA* decision has translated poorly with some federal courts).

13. *See* Kellman, *supra* note 3, at 10117 (detailing illogical nature of standing in climate change cases); *see also* Wash. Env't Council v. Bellon, 732 F.3d 1131, 1146-47 (9th Cir. 2013) (denying Washington Environmental Council's (WEC's) request for relief based on lack of standing). The court held that a 5.9% reduction in greenhouse gas (GHG) emissions was not sufficient to establish standing. *See Bellon*, 732 F.3d at 1143-44 (noting expert finding); *cf.* WildEarth Guardians v. Jewell, 738 F.3d 298, 306-07 (D.C. Cir. 2013) (indicating in dicta global climate change cannot satisfy standing); Ctr. for Biological Diversity v. U.S. Dep't of the Interior, 563 F.3d 466, 478 (D.C. Cir. 2009) (determining possible future climate change harm insufficient); Sierra Club v. U.S. Def. Energy Support Ctr., 11-CV-41, 2011 WL 3321296, at *3 (E.D. Va. July 29, 2011) (denying standing where climate change harm speculative).

14. *See infra* Section II.E (detailing likely outcomes of future climate change litigation).

15. *See infra* Section II.A (describing history of climate change redressability).

16. *See infra* Section II.A.2 (addressing discrepancies in holdings without redress for climate-related harm).

17. *See infra* Section II.D (parsing *Juliana* holding); *infra* Part III (discussing implications arising from *Juliana* decision).

18. *See* Simard, *supra* note 7, at 304, 308 (noting evolution of standing doctrine). While Article III's case or controversy requirement dates from the Constitution's 1788 enactment, standing was not litigated until the twentieth century. *Id.* Parties who do not have a valid injury present a nonjusticiable issue because they do not possess Article III standing. *See* Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 485-86 (1982) (dismissing for failure to allege injury of any kind).

long recognized the importance of redressability.[19] Early cases like *Marbury v. Madison* mentioned the judiciary's role to curb acts that impede the "fundamental principles" of American life.[20] Other cases noted the judiciary's authority to regulate other branches of government, which in effect granted the power to redress a complainant's injuries.[21]

The Supreme Court's interpretation of the standing doctrine expanded over time, eventually establishing the three-part test in *Lujan v. Defenders of Wildlife* (*Lujan II*).[22] There, the Court determined that to have standing, a plaintiff must have suffered an injury-in-fact that is fairly traceable to the challenged conduct and that a favorable decision would likely redress.[23] The injury-in-fact must affect a concrete and particular interest that is actual or imminent.[24] The causal connection between the injury and the complaint must be traceable to the defendant, rather than an unmentioned third party.[25] Of the three-part test, the Court explained redressability in the least amount of detail, and simply mentioned that redress must be "likely" rather than "speculative."[26] As a result of *Lujan II*, causation requires the connection of unlawful conduct and alleged injury, while redressability examines the connection between injury and judicial

19. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163-64 (1803) (noting injury without legal redress warranted by distinct "composition" of circumstances); Simard, *supra* note 7, at 308 (explaining standing litigation developed within last century).

20. *See Marbury*, 5 U.S. (1 Cranch) at 177 (discussing Court's role to void legislation not complying with Constitution). Executive action is subject to judicial review. *See id.* at 138-39.

21. *See* Juliana v. United States, 947 F.3d 1159, 1184 (9th Cir. 2020) (Staton, J., dissenting) (acknowledging judiciary's history of providing redress). The power to grant redress "effectively place[s] upon those who would deny the existence of an effective legal remedy the burden of showing why their case was special." Ziglar v. Abbasi, 137 S. Ct. 1843, 1874 (2017) (Breyer, J., dissenting) (discussing history of standing doctrine).

22. *See* 504 U.S. 555, 560-61 (1992) (noting three minimum requirements to establish standing); David S. Green, Massachusetts v. EPA *Without Massachusetts: Private Party Standing in Climate Change Litigation*, 36 ENVIRONS ENV'T L. & POL'Y J. 35, 38 (2012) (noting Supreme Court's standing analysis largely attributable to *Lujan II*).

23. *See Lujan II*, 504 U.S. at 560-61 (describing standing test). An injury-in-fact must be "concrete and particularized." *See id.* at 560; Allen v. Wright, 468 U.S. 737, 751 (1984) (noting rule barring suits of "generalized grievances"). Secondly, a causal connection exists where the injury is "fairly . . . trace[able] to the challenged action of the defendant" and not an independent third-party act. *See* Simon v. E. Ky. Welfare Rts. Org., 426 U.S. 26, 41-42 (1976) (noting Article III of Constitution requires injury fairly traceable to defendant).

24. *See Lujan II*, 504 U.S. at 560 n.1 (stating injury constitutes particularized harm only if affecting plaintiff in "personal and individual way"); *see also Allen*, 468 U.S. at 760 (explaining injuries without actual or imminent threat do not satisfy standing).

25. *See Lujan II*, 504 U.S. at 560 (explaining case law related to causation).

26. *See id.* at 561 (mentioning requirements for redressability). The Court briefly reflected on the complexity of redressability in climate change litigation, noting "there is ordinarily little question" of redress when the action is caused by a singular party, but it is much more complex when causation and redressability rely on the response of a third party to government action. *See id.* at 561-62.

relief.[27] The Supreme Court has acknowledged traceability and redressability as "two facets of a single causation requirement."[28]

2. Constitutional Standing in Climate Change Litigation

Standing in climate change litigation is more complex than standing in other litigation because it is difficult to trace the origin of GHG emissions to a plaintiff's alleged harm.[29] Additionally, courts struggle to retrofit the actual and imminent injuries test in order to recognize harms related to the environment rather than the plaintiff.[30] Over time, these barriers became less apparent as courts began to recognize economic, recreational, and aesthetic interests as sufficient injuries in fact.[31] Thus, alleging a justiciable injury-in-fact for an environmental harm became more common; nevertheless, convincing courts that environmental harm is redressable remains difficult.[32]

Part of the difficulty in establishing redress in climate litigation is timing.[33] Procedural law guarantees a certain kind of process, whereas substantive law refers to the body of rules that determine an individual's statutory and constitutional rights.[34] Private citizens in climate change cases cannot allege a

27. *See id.* at 560-62 (noting importance of separation in cases of clear cause where no judicial remedy exists).

28. *See Allen*, 468 U.S. at 753 n.19 (discussing differences between causation and redressability). The Court notes that the distinction is especially important when the requested redress "goes well beyond the violation of law alleged." *See id.*

29. *See* Sierra Club v. Morton, 405 U.S. 727, 734-35 (1972) (holding injury-in-fact requires more than injury to cognizable interest). Under the requirements for standing in cases involving environmental concerns, a party seeking review must be among those injured and in use of the environmental resource at issue. *See id.* at 735 (requiring more than cognizable interest).

30. *See* Kellman, *supra* note 3, at 10117 (describing difficulties of climate change litigation). The problem with injury analysis in climate change litigation is the alleged injuries often affect future generations of humans and species. *See id.* at 10116 (noting environmental regulations designed to protect "not only the living"); *see also* Humane Soc'y v. Babbitt, 46 F.3d 93, 98 (D.C. Cir. 1995) (concluding lack of sleep, depression, and anger not valid injuries).

31. *See, e.g.*, Friends of the Earth, Inc. v. Laidlaw Env't Servs., 528 U.S. 167, 183 (2000) (explaining injury-in-fact satisfied where aesthetic and recreational values lessened); Sierra Club v. Morton, 405 U.S. at 734 (acknowledging aesthetic and environmental well-being may amount to injury-in-fact); Scenic Hudson Pres. Conf. v. Fed. Power Comm'n, 354 F.2d 608, 615 (2d Cir. 1965) (noting economic injury sufficient, though not required, to allege injury-in-fact). In some cases, future generations' aesthetic interest is recognized as a judicially cognizable interest. *See* Jones v. Thorne, No. 97-CV-1674, 1999 WL 672222, at *9 (D. Or. Aug. 28, 1999) (calling actions affecting or destroying scenery for future generations "judicially cognizable interest").

32. *See* Kellman, *supra* note 3, at 10117 (describing difficulty of alleging past environmental harms). Climate change is attributable to "the entirety of humanity" rather than a single polluter, complicating claims that pin the problem on a single polluter. *See id.* (noting difficulty in attributing climate change to one entity). The more difficult concept is determining how to redress an injury that spreads beyond the bounds of a single jurisdiction. *See id.* at 10117-18 (stating attribution of harm from one polluter impossible because individual tracing of GHGs unfeasible).

33. *See, e.g.*, Lujan v. Nat'l Wildlife Fed'n (*Lujan I*), 497 U.S. 871, 890 (1990) (distinguishing final agency action within meaning of statute).

34. *See* Myers, *supra* note 6, at 10509 (describing different theories of standing); Devin McDougall, Note, *Reconciling* Lujan v. Defenders of Wildlife *and* Massachusetts v. EPA *on the Set of Procedural Rights Eligible for Relaxed Article III Standing*, 37 COLUM. J. ENV'T. L. 151, 156 (2012) (noting procedural right does not

procedural right against a government agency until there is a final agency action that delays redress.[35] When agency action is final, the Supreme Court has held that the harm alleged must be "likely" redressable.[36] The burden of establishing the likeliness of redress lies with the plaintiff and varies based on the degree of evidence required at each stage of litigation.[37] Recent case law, however, has held that the phrase "likely redress" means redress does not need to relieve every injury, which increases the success of climate litigants if they can prove *any* injury is redressable.[38]

For example, in *Lujan II*, the Defenders of Wildlife alleged they had standing because they studied certain endangered species and would be harmed by the eradication of that species.[39] Although the Court described how it was conceivable for the inability to study a species to qualify as a particular harm, the Court held that the Defenders of Wildlife needed to allege a stronger, more specific connection to the claimed harm to establish standing.[40] The Supreme Court also discussed a separate aspect of standing for procedural-injury litigants.[41] Procedural-injury litigants may assert standing without meeting the "normal" standards for redressability.[42] The Court did not define what the lower

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guarantee favorable outcome). The *Lujan II* definition was unclear, and the Court expanded upon it in *Massachusetts v. EPA*. *See* McDougall, *supra*, at 161-62 (discussing history of redressability).

35. *See Lujan I*, 497 U.S. at 890 (requiring finalized agency order for standing). The National Wildlife Federation complained that the proposed "land withdrawal review program" was the source of its injuries, but the program had not yet taken final effect. *See id.* at 892 (noting individual actions not ripe for suit).

36. *See Lujan II*, 504 U.S. 555, 561 (1992) (stating redressability not met if "merely speculative"); *see also* Conservation L. Found. v. EPA, 964 F. Supp. 2d 175, 190 (D. Mass. 2013) (finding failure to show more than speculative injury). *But see* Wash. Env't. Council v. Bellon, 732 F.3d 1131, 1146 (9th Cir. 2013) (reasoning standing requires "substantial likelihood" of redressability).

37. *See Lujan II*, 504 U.S. at 561. Allegations at the pleading stage may be general facts, whereas a motion for summary judgment requires more than "mere allegations," but specific facts set forth in an affidavit or other evidence. *See id.*

38. *See* Larson v. Valente, 456 U.S. 228, 244 n.15 (1982) (rejecting dramatic redressability standard for "likely redress" standard). *But see Bellon*, 732 F.3d at 1147 (holding WEC lacked sufficient evidence for each injury to satisfy standing).

39. *See Lujan II*, 504 U.S. at 562-63. The Court referred to this form of harm as the "animal nexus," whereby anyone interested in studying an endangered species, regardless of location, has standing to sue. *See id.* at 566. The "vocational nexus" approach referred to a professional interest in studying a species. *See id.*

40. *See id.* at 578 (reversing Eighth Circuit's determination Defenders of Wildlife had standing). The Defenders of Wildlife did not allege sufficiently imminent harm, and their claim was not redressable. *See id.* at 565-66, 568 (rejecting Defenders of Wildlife's theories of standing under Endangered Species Act). The Defenders of Wildlife failed to show with any certainty that they would visit places where endangered species resided. *See* Kellman, *supra* note 3, at 10117.

41. *See Lujan II*, 504 U.S. at 572 n.7 (noting different standard for litigants with procedural right). Later climate litigation cases adopted the language in *Lujan II*. *See* Green, *supra* note 22, at 40 (describing effect of procedural injury on redressability).

42. *See Lujan II*, 504 U.S. 555, 572 n.7 (1992) (rejecting circuit court's determination Defenders of Wildlife had procedural right to challenge regulation). Courts afford these constitutional standing rights to litigants who seek to enforce a procedural obligation on an agency. *See* Jonathan H. Adler, *Warming up to Climate Change Litigation*, 93 VA. L. REV. BRIEF 63, 68 (2007) (comparing procedural interest in *Lujan II* Court to later environmental cases).

standard of redressability would be for litigants with a procedural right, leaving the door open for the integral cases to follow.[43]

B. Recent Supreme Court Standing Case Law

1. Massachusetts v. EPA

In *Massachusetts v. EPA*, several states, local governments, and environmental organizations petitioned for review of the Environmental Protection Agency's (EPA) decision to withhold rulemaking to regulate GHG emissions for motor vehicles under the Clean Air Act (CAA).[44] The EPA's order concluded the CAA did not mandate regulations to address global climate change and regulation at that time would be unwise.[45] Massachusetts alleged that section 202(a)(1) of the CAA, which regulates emissions standards, requires the EPA to regulate air pollutants from new motor vehicles that could endanger public health.[46]

The Court held that, when invoking federal jurisdiction, states are not normal litigants and seek review based on their quasi-sovereign interests.[47] The Court reasoned that a party seeking review as a sovereign state has "special solicitude" in the standing analysis.[48] Commonly referred to as the *parens patriae* doctrine, a state may intervene on behalf of its citizens to avoid harm to its "quasi-sovereign" interest.[49] Citing *Lujan II*, the Court additionally held that

43. *See* Adler, *supra* note 42, at 68-69 (noting *Lujan II* holding left room for later courts to determine standing inquiry).

44. *See* Clean Air Act § 202(a)(1), 42 U.S.C. § 7521(a)(1) (regulating emissions standards); Massachusetts v. EPA, 549 U.S. 497, 505 (2007) (noting allegations). Massachusetts initially filed for petition in 1999 arguing that 1998 was the "warmest year on record" and that four pollutants, including carbon dioxide, contributed to climate change. *See* Massachusetts v. EPA, 549 U.S. at 510.

45. *See* Massachusetts v. EPA, 549 U.S. at 511 (stating EPA denied rulemaking request). The EPA noted Congress was "well aware of the global climate change issue" when it adopted the 1990 amendments to the CAA but had declined to issue mandatory requirements. *See id.* at 511-12. The EPA argued that the CAA was meant to address local air pollutants, not global ones. *See id.* at 512.

46. *See* Clean Air Act § 202(a)(1) (requiring EPA Administrator to regulate air pollutants within "his judgment"); Massachusetts v. EPA, 549 U.S. at 505-06 (describing Massachusetts's claim). The Court analyzed the definitions of "air pollutant" when Congress enacted the CAA and acknowledged that Congress was uncertain of the complete impact of anthropogenic contributions to climate change at that time. *See* Massachusetts v. EPA, 549 U.S. at 507 n.8 (noting 1970 Council on Environmental Quality report).

47. *See* Massachusetts v. EPA, 549 U.S. at 518 (recognizing states "are not normal litigants"); *see also* California v. Bernhardt, 460 F. Supp. 3d 875, 885 (N.D. Cal. 2020) (discussing special interest of states); Jim Ryan & Don R. Sampen, *Suing on Behalf of the State: A* Parens Patriae *Primer*, 86 ILL. BAR J. 684, 684 (1998) (describing requirements for state to invoke "*parens patriae*"). The Supreme Court has recognized the *parens patriae* doctrine since at least the beginning of the twentieth century. *See* Louisiana v. Texas, 176 U.S. 1, 19 (1900) (noting Louisiana "presents herself in the attitude of *parens patriae*").

48. *See* Massachusetts v. EPA, 549 U.S. at 520 (designating Massachusetts's interests procedural and quasi-sovereign); *see also* Hoffman, *supra* note 12 (noting Supreme Court holding).

49. *See* Ryan & Sampen, *supra* note 47 at 684 (explaining *parens patriae* doctrine).

Massachusetts, as a state, had vested procedural rights and did not have to meet the normal standards for "redressability and immediacy."[50]

Despite noting procedural litigants have a lower threshold to establish standing, the Court applied the strict, three-part *Lujan II* test and held that Massachusetts had established standing.[51] The Court reasoned that the impact on Massachusetts coastlines was a proper injury suffered by the state adequately supported by evidence demonstrating motor vehicle emissions were causally linked to GHG concentrations, and that the EPA's failure to regulate GHG emissions led to rising sea levels.[52] A 6% reduction in domestic emissions constituted a "meaningful contribution" to GHG levels and created a redressable injury, despite the impression that reduction may not impact the pace of global emissions beyond U.S. territory.[53] Therefore, *Massachusetts v. EPA* solidified the ruling in *Lujan II* that, at least for procedural plaintiffs, the complaint only needed to demonstrate "some possibility" that a court could redress the alleged injury.[54]

In his dissenting opinion, Chief Justice Roberts argued that climate change was a nonjusticiable issue under the political question doctrine that the political branches—not the judicial branch—must resolve.[55] He argued that neither statutory authority nor case law supports the majority's use of the *parens patriae* doctrine.[56] Chief Justice Roberts determined the relief requested was unlikely to

50. *See* Massachusetts v. EPA, 549 U.S. 497, 517-18, 520 (2007) (noting Massachusetts does not need to meet normal standards for redressability and immediacy). There is an explicit distinction between the standing requirements for a private litigant compared to the "special position and interest of Massachusetts." *See id.* at 518 (stressing Massachusetts's special position and interest).

51. *See* Massachusetts v. EPA, 549 U.S. at 520-21 (holding Massachusetts "satisfied the most demanding standards of the adversarial process"); *see also* Green, *supra* note 22, at 45 (suggesting Court did not rely on quasi-sovereign interest or procedural rights for standing).

52. *See* Massachusetts v. EPA, 549 U.S. at 522-25 (describing magnitude of harm climate change caused). The fact that climate change risks are commonly shared "does not minimize Massachusetts' interest in the outcome of [the case]." *Id.* at 522. The severity of harm along Massachusetts coastal properties is an injury-in-fact that will only increase. *See id.* at 522-23.

53. *See id.* at 524-25 (holding global reduction in emissions significant). Even if global emissions continued to rise elsewhere, "a reduction in domestic emissions would slow the pace of global emissions increases." *See id.* at 526; *see also* Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin., 538 F.3d 1172, 1217 (9th Cir. 2008) (stating global phenomenon does not release Agency's duty to assess its contributions). *But see* Wash. Env't Council v. Bellon, 732 F.3d 1131, 1145-46 (9th Cir. 2013) (finding 5.9% of State of Washington's GHG emissions not "meaningful contribution" to global climate change).

54. *See* Massachusetts v. EPA, 549 U.S. at 518 (noting state not held to standard of private litigant); *see also* Green, *supra* note 22, at 45 (describing Court's standard of redressability for procedural interests).

55. *See* Massachusetts v. EPA, 549 U.S. at 535 (Roberts, C.J., dissenting) (arguing majority's standing analysis irrelevant to issue); Bradford C. Mank, *No Article III Standing for Private Plaintiffs Challenging State Greenhouse Gas Regulations: The Ninth Circuit's Decision in* Washington Environmental Council v. Bellon, 63 AM. U. L. REV. 1525, 1542-43 (2014) (discussing merits of Roberts's dissent).

56. *See* Massachusetts v. EPA, 549 U.S. 497, 537 (2007) (Roberts, C.J., dissenting). Chief Justice Roberts noted the difference between the statute in question and others that may support the use of special solicitude. *See id.* He added that the use of the *parens patriae* doctrine should be narrowly confined, and the majority's basis on century-old cases does not support the notion that Article III "implicitly treats public and private litigants differently." *See id.*

redress the injury because the majority's reasoning that any decrease sufficed was an inaccurate assessment of the *Lujan II* three-part test.[57]

Lower courts have struggled to interpret the test for standing since *Massachusetts v. EPA*.[58] Part of the confusion stems from the fact that the Court determined that the state was a procedural litigant and only needed to show "some possibility" of redress, but applied the *Lujan II* standard of redressability for normal litigants.[59] In fact, the Court stated that Massachusetts satisfied the "most demanding standards of the adversarial process"; therefore, the Court was unclear as to whether private litigants alleging a similar injury, but without a procedural right or special solicitude, were entitled to a similar, easier-to-satisfy test for redressability.[60] The Supreme Court's inconsistency in the redressability standards has resulted in differential treatment towards private litigants achieving standing in climate change cases.[61]

2. Summers v. Earth Island Institute

In *Summers v. Earth Island Institute*, the Supreme Court returned to a more restrictive approach to standing.[62] Earth Island Institute sought to prevent the Forest Service from enforcing regulations that would exempt logging on parcels less than 250 acres from the notice, comment, and appeal process.[63] The majority decision, written by Justice Scalia, held that Earth Island Institute did not

57. *See id.* at 546 (stating redressability means "likely" to redress injury-in-fact). Chief Justice Roberts asserted that the majority's determination requires too many inferences for any element of the *Lujan II* three-part test. *See id.* He also argued that, because GHG emissions could increase elsewhere, the regulations might not reduce global emissions. *See id.*

58. *See* Hoffman, *supra* note 12 (noting courts still struggling to find consistency in standing analysis). While injury-in-fact has become easier to prove, assertions of causation and redressability vary in success. *See id.* (discussing trend in lower court decisions). Lower courts especially struggle to apply *Massachusetts v. EPA*'s analysis to private litigants. *See* Green, *supra* note 22, at 57 (describing lower court decisions applying *Massachusetts v. EPA* redressability analysis to private litigants).

59. *See* Green, *supra* note 22, at 58 (observing repercussions of Court's *Massachusetts v. EPA* redressability analysis).

60. *See* Massachusetts v. EPA, 549 U.S. at 521 (determining Massachusetts's submissions satisfied all elements of standing including actual and imminent harm). The Court utilized a more stringent form of the redressability rule, requiring a "substantial likelihood" of redressability. *See id. But see Lujan II*, 504 U.S. 555, 560 (1992) (describing harm "likely" redressable).

61. *See, e.g.*, Juliana v. United States, 947 F.3d 1159, 1171 (9th Cir. 2020) (holding harm not redressable despite larger emissions percentage at issue than *Massachusetts v. EPA*); Summers v. Earth Island Inst., 555 U.S. 488, 497 (2009) (noting redressability has different standard than other standing requirements).

62. *See Summers*, 555 U.S. at 495 (holding Earth Island Institute did not have valid standing claim); *see also* Bradford C. Mank, *Informational Standing After* Summers, 39 B.C. ENV'T AFFS. L. REV. 1, 4-5 (2012) (detailing oscillation of Supreme Court's treatment of standing in environmental cases).

63. *See Summers*, 555 U.S. at 490-91 (discussing Earth Island Institute's action to enjoin Forest Service's actions). The Forest Service's exemption would exclude the Agency from filing either an Environmental Impact Statement or Environmental Assessment. *See id.*; *see also* William A. Fletcher, *Standing: Who Can Sue to Enforce a Legal Duty?*, 65 ALA. L. REV. 277, 285 (2013) (considering implications of Court's holdings on standing in statutory environmental suits).

demonstrate standing.[64] The Court reasoned that although Earth Island Institute possessed a procedural right, they failed to establish an imminent injury because they did not allege any particular site or time in which harm would befall the members.[65] In effect, the Court established that an imminent injury is required even if the petitioner establishes a procedural right.[66] While an imminent injury was a strict requirement, the Court noted that Congress could loosen the redressability prong.[67] The Court's belief that Congress could remove redressability appeared to go further than the *Massachusetts v. EPA* holding, and counterbalanced the Court's previous, restrictive interpretations for imminence in the injury-in-fact analysis.[68]

3. American Electric Power Co. v. Connecticut

If *Summers* limited the application of the *Massachusetts v. EPA* standing rule for procedural litigants, then *Connecticut v. American Electric Power Co.* (*AEP*) was the next push towards a more liberal application.[69] In this case, two groups of plaintiffs filed public nuisance claims against five electric power companies.[70] The first group of plaintiffs consisted of eight states and New York City, while the second group consisted of three nonprofit land trusts.[71] Both the states and the land trusts alleged that the power companies were the five largest contributors of carbon dioxide emissions in the United States and significantly accelerated

64. *See Summers*, 555 U.S. at 495 (determining no threatened imminent harm to Earth Island Institute's interest); Mank, *supra* note 62, at 5 (discussing Justice Scalia's interpretation of test for organized standing).

65. *See Summers*, 555 U.S. at 496 (reasoning deprivation of procedural right alone not enough for Article III standing). The Court emphasized that the "vague desire to return" to a location does not support a finding of actual or imminent injury. *See id.*; *see also* Mank, *supra* note 62, at 5 (discussing Court's focus on specific place and time).

66. *See* Mank, *supra* note 62, at 5 (summarizing implications of *Summers*).

67. *See* Summers v. Earth Island Inst., 555 U.S. 488, 497 (2009) (noting injury-in-fact requirement represents "hard floor").

68. *See* Green*, supra* note 22, at 40 (suggesting *Summers* applied more liberal standing test). Scholars note that because redressability could be curtailed, the standing test in *Summers* is "hardly more demanding" than previous tests for redressability. *See id.*

69. *See* Mank, *supra* note 55, at 1553, 1556 (noting Supreme Court equally divided). While the Court affirmed the decision, an equally divided vote does not set precedent outside the Second Circuit. *See id.* at 1554 (discussing limitations of Supreme Court decision). The strength of the decision comes from the explanation the Court provided that supports an inference about the direction the Court is moving toward in future cases. *See id.*

70. *See* Connecticut v. Am. Elec. Power Co., 406 F. Supp. 2d 265, 267 (S.D.N.Y. 2005) (describing background of case), *rev'd*, 582 F.3d 309 (2d Cir. 2009), *aff'd*, 564 U.S. 410 (2011).

71. *See id.* The eight states claimed to represent more than 77 million people and their environmental interest, while the land trusts alleged a federal common law public nuisance action for the impact of global warming. *See id.* at 268. The land trusts owned several "nature sanctuaries, outdoor research laboratories, wildlife preserves, recreation areas, and open spaces." *See* Connecticut v. Am. Elec. Power Co., 582 F.3d 309, 318 (2d Cir. 2009), *aff'd*, 564 U.S. 410 (2011). In the alternative to their federal common law nuisance claim, the land trusts alleged common law private and public nuisance claims for each state where the power companies operated fossil-fuel-fired, electric generating facilities. *See id.*

global climate change.[72] In total, the power companies accounted for 2.5% of global GHG emissions.[73] The district court treated the standing issue restrictively, finding that both suits presented nonjusticiable political questions.[74]

Both groups of plaintiffs appealed, and the U.S. Court of Appeals for the Second Circuit heard arguments in 2006, but withheld decision until after *Massachusetts v. EPA* in 2009.[75] The court rejected the district court's decision that the complexity of climate change and public nuisance claims created a nonjusticiable political question.[76] The court relied on the reasoning in *Massachusetts v. EPA* and held that the states had established *parens patriae* standing.[77] Additionally, the Second Circuit held the land trusts could establish Article III standing as property owners, despite the previous ambiguity in the *Massachusetts v. EPA* holding regarding whether private litigants could allege a redressable, climate-change-related injury.[78]

The Supreme Court affirmed the Second Circuit's decision for Article III standing.[79] Though the Court affirmed the decision, only four of the Justices believed "some" plaintiffs could have Article III standing under the lower

72. *See* Connecticut v. Am. Elec. Power Co., 564 U.S. 410, 418 (2011) (describing land trusts' claim for interstate nuisance or state tort law). The power companies annually contributed to 650 million tons of GHG emissions, amounting to 25% in the domestic electric power sector and 10% of all domestic human emissions. *See id.* (detailing magnitude of claims).

73. *See* Michael Burger et al., *The Law and Science of Climate Change Attribution*, 45 COLUM. J. ENV'T L. 57, 158 (2020) (discussing climate data attribution in standing analysis).

74. *See Am. Elec. Power Co.*, 406 F. Supp. 2d at 267 (describing complexity of requested relief). The court's policy decision considered "economic, environmental, foreign policy, and national security interests." *See id.* at 274; *see also* Baker v. Carr, 369 U.S. 186, 217 (1962) (discussing six nonjusticiable political question factors).

75. *See Am. Elec. Power Co.*, 582 F.3d at 320 (noting both plaintiff groups appealed); Mank, *supra* note 55, at 1548 (opining Supreme Court's pending decision in *Massachusetts* likely caused delay).

76. *See Am. Elec. Power Co.*, 582 F.3d at 329 (disagreeing with district court); *see also* Mank, *supra* note 55, at 1549 (summarizing Second Circuit's holding). The Second Circuit saw no reason to bar a public nuisance case simply because it presented a new issue. *See* Mank, *supra* note 55, at 1549 (noting climate change nuisance similar in nature to other public nuisance cases).

77. *See* Connecticut v. Am. Elec. Power Co., 582 F.3d 309, 338-39 (2d Cir. 2009) (addressing states' standing claim), *aff'd*, 564 U.S. 410 (2011). Like in *Massachusetts v. EPA*, the court held that the effect of current GHG emissions reduced California's snowpack, increased flooding harms, and reduced water supplies, in addition to other special state interests. *See id.* at 341-42 (noting harms related to climate change). The court reasoned that redressability was satisfied because reducing domestic emissions would slow the pace of global warming. *See id.* at 348 (providing some measure of relief creates redressable harm); Massachusetts v. EPA, 549 U.S. 497, 525 (2007) (recognizing harm redressable if remedy would "slow or reduce").

78. *See Am. Elec. Power Co.*, 582 F.3d at 340, 344 (holding land trusts' claim for future ecological and aesthetic harm to property sufficient); Mank, *supra* note 55, at 1543-44 (describing confusion resulting from *Massachusetts v. EPA* holding). Following *Massachusetts v. EPA*, the Second Circuit held AEP's contribution to domestic emissions satisfied causation. *See Am. Elec. Power Co.*, 582 F.3d at 347 (noting emissions sufficiently related to injury). *See generally* Bradford C. Mank, *Reading the Standing Tea Leaves in* American Electric Power Co. v. Connecticut, 46 U. RICH. L. REV. 543, 569-71 (2012) (discussing Second Circuit's "questionable" conclusion private litigants had standing).

79. *See* Am. Elec. Power Co. v. Connecticut, 564 U.S. 410, 420 (2011) (affirming by "equally divided Court"); *see also* Green, *supra* note 22, at 56 (describing Court's decision to resolve confusion after *Massachusetts v. EPA*).

redressability standard set out in *Massachusetts v. EPA*, while the remaining four Justices thought that none of the plaintiffs had standing.[80] Despite the limitations placed on the plurality's decision, scholars believe the Court's decision implicitly expanded the standing analysis in *Massachusetts v. EPA*.[81] In fact, with the split Court, some speculate that if Justice Sotomayor had not recused herself, the Court would have established a broader class of Article III standing.[82]

C. Lower Court Decisions

1. Native Village of Kivalina v. ExxonMobil

While some circuit courts have also become more receptive to standing arguments in climate change litigation, the Ninth Circuit has consistently taken a stricter approach to establishing standing under Article III in climate change cases.[83] Shortly after the Second Circuit decision in *AEP*, the Ninth Circuit approached a similar question in *Native Village of Kivalina* (*Kivalina*) *v. ExxonMobile Corp.*,[84] where an Inupiat village sued nearly two dozen private fossil fuel and energy generation companies for contributions to global warming, alleging public nuisance under federal common law.[85] Collectively, the companies created more than 1.2 billion tons of GHG emissions, significantly larger than those alleged in *AEP*.[86] Despite the similarities to *AEP*, the district court found that the Inupiat village did not satisfy Article III standing.[87] The

80. *See Am. Elec. Power Co.*, 564 U.S. at 420 (holding limited by divided court); Green, *supra* note 22, at 56 (discussing impact of Sotomayor's recusal).

81. *See* Mank, *supra* note 78, at 596, 598 (analyzing implications of Court's discussion of power companies' argument). At least one commentator has noted that four Justices implicitly expanded the standing rights set in *Massachusetts v. EPA* to common law cases. *See id.* at 596 (noting likelihood redressability prong read expansively).

82. *See* Green, *supra* note 22, at 56. Justice Sotomayor was a member of the three-judge panel of the Second Circuit that heard the case in 2006 before she became a Supreme Court Justice in 2009. *See* Mank, *supra* note 55, at 1548 (reviewing history of Second Circuit's decision). Statistical studies support the contention that voting patterns are affected by which political party appoints a federal judge, although that may be irrelevant here because Justice Sotomayor has generally endorsed a "permissive view of standing." *See* Mank, *supra* note 78, at 593-94 (discussing historical voting patterns compared to Justice Sotomayor's voting patterns).

83. *See, e.g.*, Juliana v. United States, 947 F.3d 1159, 1171 (9th Cir. 2020) (noting Native Alaskan village's request for injunction does not satisfy standing requirements); Wash. Env't Council v. Bellon, 732 F.3d 1131, 1147 (9th Cir. 2013) (denying standing for lack of causality and redressability); Connecticut v. Am. Elec. Power Co., 582 F.3d 309, 349 (2d Cir. 2009) (holding redress possible in air-pollution-nuisance case), *aff'd*, 564 U.S. 410 (2011).

84. 663 F. Supp. 2d 863 (N.D. Cal. 2009), *aff'd*, 696 F.3d 849 (9th Cir. 2012).

85. *See id.* at 868.

86. *See* Burger, *supra* note 73, at 159 (comparing GHG emissions of companies to those at issue in *AEP*). *See generally* Complaint for Damages and Demand for Jury Trial, *Kivalina*, 663 F. Supp. 2d 863 (No. 08-CV-1138) (attributing GHG emissions to companies).

87. *See Kivalina*, 663 F. Supp. 2d at 880-81. Private companies could not be at fault where no federal standards governed GHG emissions. *See id.* at 880. The court disagreed with the Inupiat village's contention they were entitled to special solicitude, as in *Massachusetts v. EPA*, because the village did not seek to enforce a procedural right. *See id.* at 882.

district court reasoned that the Inupiat village did not establish the causation element, regardless of the magnitude of emissions, because it was impossible to trace specific amounts of GHG emissions to the companies.[88] On appeal, the Ninth Circuit dismissed the case due to legislative displacement.[89]

2. Washington Environmental Council v. Bellon

Less than a decade after the Supreme Court decided *Massachusetts v. EPA* and *Summers*, and a year after *Kivalina*, the Ninth Circuit reconsidered the issue of standing in *Washington Environmental Council v. Bellon*.[90] In *Bellon*, the court denied standing to a group of environmental organizations seeking an injunction that would have required the State of Washington to enforce its State Implementation Plan.[91] WEC alleged that failing to promulgate RACT increased GHG emissions and caused recreational, aesthetic, economic, and health injuries.[92] The State argued that the RACT standards would not result in meaningful reduction of GHG emissions.[93] In a brief opinion, the district court granted WEC's motion for summary judgment, finding WEC had established standing and the agencies were required to establish RACT for GHG emissions.[94]

The Ninth Circuit agreed with WEC's argument that injury includes the risk that climate change will lessen future recreational and aesthetic values.[95] Nevertheless, the court disagreed with the district court's analysis of the second and third elements of the *Lujan II* three-part test, reasoning that WEC's injuries, in connection to the agency's lack of implementation of RACT on GHG

88. *See id.* at 880; Burger, *supra* note 73, at 168 (summarizing findings of district court).

89. *See* Native Vill. of Kivalina v. ExxonMobil Corp., 696 F.3d 849, 856 (9th Cir. 2012) (discussing limitations of federal common-law nuisance claims). Relying on the Supreme Court, the Ninth Circuit held that congressional action displaced federal common law addressing GHG emissions. *See id.* at 858.

90. *See* 732 F.3d 1131, 1146-47 (9th Cir. 2013) (lacking evidence to show injunction would decrease pollution); *see also* Massachusetts v. EPA, 549 U.S. 497, 521 (2007) (noting Massachusetts satisfied standing requirements); Summers v. Earth Island Inst., 555 U.S. 488, 497 (2009) (stating redressability prong malleable); *Kivalina*, 696 F.3d at 856 (dismissing due to legislative displacement).

91. *See Bellon*, 732 F.3d at 1135, 1141. WEC alleged that the implementation plan required the agencies to define reasonably available control technology (RACT) for GHG emissions and apply those standards to oil refineries. *See id.* at 1135.

92. *See id.* at 1140 (describing WEC's injury-in-fact).

93. *See id.* at 1146 (assessing whether implementation would result in "meaningful contribution"); Kellman, *supra* note 3, at 10120-21 (summarizing State's arguments).

94. *See* Wash. Env't Council v. Sturdevant, 834 F. Supp. 2d 1209, 1212 (W.D. Wash. 2011) (finding agencies required to "establish RACT for GHG emissions"), *vacated sub nom. Bellon*, 732 F.3d 1131 (9th Cir. 2013). Despite the defendant's arguments, the court held that the plain language of the state implementation plan required the agency to act. *See id.* at 1214; *see also* Mank, *supra* note 55, at 1569 (noting district court did not explain reasoning for standing).

95. *See Bellon*, 732 F.3d at 1140-41 (assuming WEC's injury-in-fact satisfactory without deciding). WEC's basis for future harm consisted of decreased snowpack for outdoor activities and increased flooding risk. *See id.*; *see also* Daniel A. Fiedler, Essay, *Standing Underwater*, 85 GEO. WASH. L. REV. 1554, 1577 (2017) (noting court construed injury-in-fact broadly).

emissions, were conclusory and failed to establish a causal link.[96] The Ninth Circuit held that, unlike the GHG emissions at issue in *Massachusetts v. EPA*, which contributed to 6% of domestic emissions, the 5.9% of emissions produced by oil refineries in Washington was not a "meaningful contribution" to global GHG emissions.[97] The court distinguished the Supreme Court's standing analysis in *AEP*, explaining that the Court's analysis did not clearly state which group of the *AEP* plaintiffs had Article III standing.[98]

3. Center for Biological Diversity v. EPA

Nearly two years after *Bellon*, in *Center for Biological Diversity v. EPA*,[99] an environmental group successfully established standing to challenge the EPA's approval of Washington and Oregon's decision not to identify any waters experiencing ocean acidification under section 303(d) of the Clean Water Act (CWA).[100] There, the district court found that the CBD's evidence sufficiently established that Washington and Oregon's coastline was particularly vulnerable to ocean acidification.[101] Despite the EPA's contention that *Bellon* precluded the CBD from establishing the EPA caused the members' injuries, the court held that causation and redressability were "two sides of the same coin."[102] The court reasoned that the injuries were traceable to EPA conduct and redressable by mitigating local actions.[103] Unlike in *Bellon*, where the Ninth Circuit's analysis rested on global human-caused drivers, the court noted that the CBD's claim for causation and redressability related to regional, human-caused drivers of ocean

96. *See* Wash. Env't Council v. Bellon, 732 F.3d 1131, 1142, 1146 (9th Cir. 2013) (noting lack of causation and redressability of WEC's alleged injuries). The court held there was an insufficient nexus between global GHG emissions and the State's actions. *See id.* at 1143-44.

97. *See id.* at 1145-46 (comparing WEC's claims to circumstances of *Massachusetts v. EPA*); *see also* Mank, *supra* note 55, at 1570 (discussing causal connection between WEC's injuries and agency misconduct); Kellman, *supra* note 3, at 10121 (summarizing Ninth Circuit's discussion of causation and redressability).

98. *See Bellon*, 732 F.3d at 1146 n.8 (distinguishing Supreme Court's *AEP* decision permitting standing only for states); Mank, *supra* note 55, at 1572-73 (describing Ninth Circuit's comparison to *AEP*). The GHG emissions in *Massachusetts v. EPA* and *AEP* were a greater percentage of cumulative domestic and global emissions. *See* Mank, *supra* note 55, at 1573.

99. 90 F. Supp. 3d 1177 (W.D. Wash. 2015).

100. *See id.* at 1181-82 (describing Center for Biological Diversity's (CBD's) claims); Clean Water Act § 303(d), 33 U.S.C. 1313(d) (requiring states to identify waters experiencing acidification). The CBD alleged that ocean acidification injured their aesthetic and recreational interest in Washington and Oregon coastlines. *See* Ctr. for Biological Diversity v. EPA, 90 F. Supp. 3d at 1187-88.

101. *See* Ctr. for Biological Diversity v. EPA, 90 F. Supp. 3d at 1191-93 (discussing how regional drivers influence localized ocean acidification). The CBD produced evidence to establish the Washington and Oregon coastlines were more susceptible to "important drivers of ocean acidification." *See id.* at 1191. Human pollutants in riverbeds disturbed nutrient distribution and caused increased acidification. *See id.*; *see also* Kellman, *supra* note 3, at 10121 (summarizing CBD's evidence).

102. *See* Ctr. for Biological Diversity v. EPA, 90 F. Supp. 3d at 1190 (noting similarities of causation and redressability).

103. *See id.* The court reasoned that the CBD presented ample evidence to prove further EPA action can mitigate regional climate change. *See id.* at 1192-93 (reviewing CBD's provided evidence).

acidification.[104] The specific harm to Washington and Oregon's unique coastline presented a redressable harm that the EPA could mitigate through regional regulation and protections.[105]

D. Constitutional Right to a Stable Climate

1. Procedural History of Juliana v. United States

While recent lower court cases appear to endorse a more liberal application of standing for climate change litigants, a group of children and young adults sought to stretch the standard further by suing the federal government and demanding formation of a constitutional right to a stable climate.[106] Juliana claimed the government had violated substantive due process and equal protection rights, the Ninth Amendment, and the public trust doctrine.[107] Juliana alleged that U.S. government agencies had authority over at least 14% of global GHG emissions, a much larger contribution than alleged in *Massachusetts v. EPA*.[108] After a series of procedural hurdles, the district court found that other courts had previously recognized that the right to a sustainable climate system was

104. *See id.* at 1190 (explaining parties' reasoning). The EPA emphasized that the parties stipulated that oceanic uptake of anthropogenic carbon caused ocean acidification on the global scale. *See id.* The CBD focused instead on the regional anthropogenic carbon influences on oceanic acidification, specifically along Washington and Oregon's coast. *See id.*; Wash. Env't Council v. Bellon, 732 F.3d 1131, 1137, 1142 (9th Cir. 2013) (noting EPA's approval of Washington's decision to regulate did not meet standing). The *Bellon* court focused on the global impact of GHGs as well as the holistic nature of contribution from independent sources intermingling. *See Bellon*, 732 F.3d at 1143-44.

105. *See* Ctr. for Biological Diversity v. EPA, 90 F. Supp. 3d 1177, 1194 (W.D. Wash. 2015). The scientific studies the CBD relied on established the Washington and Oregon coast as "unusually susceptible" to ocean acidification due to the nearby agricultural development fueling respiration and hypoxia. *See id.* at 1191. Washington's coast is especially impacted by an abundance of major rivers, which contain dissolved and organic carbon inputs that influence acidification by delivering large supplies of nutrients and particulates to the coast. *See id.*; *see also* Covington v. Jefferson Cnty., 358 F.3d 626, 654 (9th Cir. 2004) (Gould, J., concurring) (noting possibility of redress for increased risk).

106. *See* Juliana v. United States, 947 F.3d 1159, 1164 (9th Cir. 2020) (describing Juliana's claims). The case follows a string of climate change litigation across parts of Europe requesting government officials to do more to address climate change. *See* Nicholas Kusnetz, *A Surge of Climate Lawsuits Targets Human Rights, Damage from Fossil Fuels*, INSIDE CLIMATE NEWS (Jan. 4, 2019), https://insideclimatenews.org/news/04012019/climate-change-lawsuits-2018-year-review-exxon-fossil-fuel-companies-human-rights-children-government/ [https://perma.cc/4WNA-YJHV] (discussing novelty of modern climate change litigation). As a result, other climate change activists have filed similar cases in state courts. *See id.*

107. *See* Juliana v. United States, 339 F. Supp. 3d 1062, 1098, 1102 (D. Or. 2018), *rev'd*, 947 F.3d 1159 (9th Cir. 2020). Juliana alleged that the worsening effects of climate change will disproportionately harm future generations over time. *See Juliana*, 947 F.3d at 1165. Juliana's basis for the public trust doctrine claim was that failure to protect the environment would deprive future legislatures from the natural resources necessary to provide for U.S. citizens. *See* Juliana v. United States, 217 F. Supp. 3d 1224, 1253 (D. Or. 2016), *rev'd*, 947 F.3d 1159 (9th Cir. 2020).

108. *See* Burger, *supra* note 73, at 168 (comparing global GHG emissions from historic climate change cases).

fundamental.[109] The court denied the United States' motion to dismiss the public trust doctrine claim.[110] The United States argued that Juliana's request was a nonjusticiable issue, but the court concluded the Juliana had Article III standing.[111]

2. The Ninth Circuit's Disapproval

Before the Ninth Circuit heard oral arguments, several groups filed amicus briefs in support of Juliana.[112] Despite this support, the Ninth Circuit reversed the district court's ruling in a split decision and held that Juliana did not establish Article III standing.[113] While the Ninth Circuit agreed that Juliana satisfied the first two elements of standing, the court stated that Juliana's injuries did not establish redressability because the relief sought was substantially unlikely to redress and was not within the district court's power to award.[114] The court distinguished the facts of *Bellon* as irrelevant to the circumstances because Juliana challenged the government's inaction in general rather than specific, isolated agency decisions.[115]

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109. *See Juliana*, 339 F. Supp. 3d at 1103-04 (finding Juliana's due process and equal protection claims involved violation of fundamental right); Stop H-3 Ass'n v. Dole, 870 F.2d 1419, 1430 (9th Cir. 1989) (noting human life fundamental right); Hoffman, *supra* note 12 (discussing procedural barriers Juliana faced).

110. *See Juliana*, 339 F. Supp. 3d at 1101-02 (finding previous order not clearly erroneous); *see also* Anne Ustynoski, Comment, *Life Becoming Hazy: The Withdrawal of the United States from the Paris Agreement and How the Youth of America Are Challenging It*, 28 CATH. U. J.L. & TECH. 111, 125-26 (2019) (detailing court's discussion of public trust doctrine).

111. *See Juliana*, 217 F. Supp. 3d at 1244-48 (discussing Juliana's claim for Article III standing). Juliana alleged "personal, economic and aesthetic interests" that the court found were imminently harmed because of carbon dioxide. *See id.* at 1244. The United States argued that, like *Bellon*, there was no causal connection, but the court agreed that the GHG emissions at issue in the case were much greater. *See id.* at 1245-46. Relying on *Massachusetts v. EPA*, the court agreed the harm would be redressable because Juliana's request for injunctive relief would slow the pace of climate change. *See id.* at 1247 (comparing Juliana's claims to *Massachusetts v. EPA*).

112. *See* Juliana v. United States, OUR CHILD.'S TR., https://www.ourchildrenstrust.org/juliana-v-us [https://perma.cc/C8X3-XQQG] (providing timeline of *Juliana*). Among the parties submitting briefs were members of Congress, environmental groups, and an oil company. *See* Ustynoski, *supra* note 110, at 124 (summarizing key arguments groups filed in favor of Juliana).

113. *See* Juliana v. United States, 947 F.3d 1159, 1175 (9th Cir. 2020) (noting climate change not redressable by injunction).

114. *See id.* at 1168-71 (finding Juliana only met first two elements of standing). Regarding the injury requirement, the court concluded that some of the youth plaintiffs established that the harm affected them in tangible ways that would continue to do so in the future. *See id.* at 1168. Relying on *Massachusetts v. EPA*, the court reasoned that "it does not matter how many persons have been injured" for a harm to be "concrete and personal." *See id.* (quoting Massachusetts v. EPA, 549 U.S. 497, 517 (2007)).

115. *See id.* at 1169 (noting Juliana's contention injuries result from more than isolated agency decisions). The EPA claimed the causal chain was too attenuated because the claim relied partially on independent, third-party actors. *See id.* (stating "refineries had scientifically indiscernible impact on climate change"). Juliana's claim rested on federal policies over the past fifty years, such as subsidies to fossil-fuel-based programs. *See id.* (calling policies direct actions of government and substantial factor in Juliana injuries).

The Ninth Circuit concluded that it was insufficient for Juliana to allege an injunction would slow or reduce harm.[116] Rather, granting an injunction on future fossil fuel projects must be substantially likely to stop catastrophic events.[117] The Ninth Circuit reasoned that unlike the *Massachusetts v. EPA* plaintiffs, who had a procedural right, Juliana's harm was not redressable simply because an injunction would ameliorate her injuries to some extent.[118] While Juliana argued the request did not require a policy decision, the court held that injunctive relief would require federal courts to allocate political power, an influence beyond the separation of powers.[119]

In her dissent, Judge Josephine Staton argued Juliana presented sufficient evidence for trial.[120] Judge Staton argued that the perpetuity principle protected Juliana's constitutional right to a sustainable climate.[121] Further, Judge Staton argued that the majority cannot reject the perpetuity principle simply because the principle has not been applied to the government's actions surrounding climate change in the past.[122] While Juliana's injuries were complex, Judge Staton noted that there is no "justiciability exception for cases of great complexity."[123] Moreover, the fact that *Massachusetts v. EPA* involved a procedural inquiry does not mean the substantive right to redress is not applicable.[124] Judge Staton

116. *See id.* at 1170 (noting expert opinion injunction would slow but not eliminate climate change). The Ninth Circuit previously stated, "a plaintiff meets the redressability requirement if it is likely, although not certain, that his injury can be redressed by a favorable decision." Wolfson v. Brammer, 616 F.3d 1045, 1056 (9th Cir. 2010) (discussing Article III standing analysis); *see* Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin., 538 F.3d 1172, 1217 (9th Cir. 2008) (holding "global phenomenon" does not release government agency's responsibility).

117. *See Juliana*, 947 F.3d at 1170 (holding declaration Juliana sought would not mitigate climate change). The court noted that a declaration that the government is violating a constitutional right would "benefit the plaintiffs psychologically, is unlikely by itself to remediate their alleged injuries." *Id.*

118. *See id.* at 1171 (distinguishing procedural due process from substantive due process claims). Juliana's claim paralleled the successful argument raised in *Massachusetts v. EPA*, which the Ninth Circuit rejected. *See id.* (holding grant of injunction would not alleviate harm). The court expressed skepticism about whether the procedural injury framework in *Massachusetts v. EPA* could be applied to a case alleging substantive injuries. *See id.* (noting inconsistency in Supreme Court treatment of climate change redressability).

119. *See* Juliana v. United States, 947 F.3d 1159, 1172-73 (9th Cir. 2020) (noting limitations of federal courts to grant redress); *see also* Rucho v. Common Cause, 139 S. Ct. 2484, 2508 (2019) (explaining court has "no commission to allocate political power").

120. *See Juliana*, 947 F.3d at 1189 (Staton, J., dissenting) (summarizing Juliana's request). The dissent distinguished Juliana's request as a scientific question rather than political one. *See id.*

121. *See id.* at 1178-79 (describing history of perpetuity principle). The perpetuity principle is not an environmental right; it rather protects from willful dissolution of the Republic. *See id.* at 1179 (applying principle to Juliana's claims). The dissent argued the constitutional doctrine is nonetheless enforceable like other doctrines "historically rooted" in the history and structure of the Constitution. *See id.*; Franchise Tax Bd. of Cal. v. Hyatt, 139 S. Ct. 1485, 1498-99 (2019) (noting other constitutional doctrines not "spelled out in the Constitution").

122. *See Juliana*, 947 F.3d at 1180 (Staton, J., dissenting) (noting how perpetuity principle arises).

123. *Id.* at 1184-85 (distinguishing redressability from nonjusticiability). The dissent argued that the "inhospitable future" Juliana alleged was "the first small wave in an oncoming tsunami . . . that will destroy the United States as we currently know it." *Id.* at 1176. Judge Staton emphasized that scientists' belief the climate is approaching the point of no return reflects the imminent nature of the harm. *See id.* (detailing expert's predicted consequences of climate change).

124. *See Juliana*, 947 F.3d at 1182-83 (noting holding in *Massachusetts v. EPA*).

argued that beyond the relaxed procedural inquiry in *Massachusetts v. EPA*, the Court's remaining substantive inquiry was whether a reduction in GHG emissions would ameliorate climate change related injuries.[125]

Further, Judge Staton argued that the majority's emphasis on *Rucho v. Common Cause* was a misapplication of the *Baker v. Carr* test for political questions, a separate justiciability doctrine.[126] Judge Staton distinguished *Rucho* as a request to reallocate political power and noted that the issue before the majority in *Juliana* was not political in nature.[127] Judge Staton emphasized that there is no need for a definitive plan for relief at the current stage of the pleadings.[128] While the majority emphasized the second political question factor articulated in *Baker*—the need for a clear judicial standard—the dissent was less concerned, noting *Baker* only required a justiciable standard to grant "some meaningful relief."[129] Despite the majority's conclusion, Judge Staton noted the magnitude of reform generated by past government injustices superseded the majority's fear.[130]

125. *See* Juliana v. United States, 947 F.3d 1159, 1183 (9th Cir. 2020) (Staton, J., dissenting) (arguing *Massachusetts v. EPA*'s holding applies to instant facts). The dissent argued that the Supreme Court's conclusion—that a reduction in domestic GHG emissions constitutes redress—should apply even in absence of a procedural right. *Id.* Judge Staton noted that the majority's deference to a separation of powers argument "runs afoul of our foundational principles." *Id.* at 1184 (noting need for "something peculiar" to deny judicial relief).

126. *See id.* at 1187 (distinguishing facts of case); Rucho v. Common Cause, 139 S. Ct. 2484, 2508 (2019) (holding partisan gerrymandering constitutes nonjusticiable issue); Baker v. Carr, 369 U.S. 186, 217 (1962) (describing six political question factors).

127. *See Juliana*, 947 F.3d at 1190 (Staton, J., dissenting) (summarizing arguments against majority). The dissent argues that while *Rucho* was a question of political power and process, the present matter was not a question of politics but whether there is a discernible tipping point carbon dioxide has on climate change. *See id.* (discussing political question inherent in gerrymandering).

128. *See id.* at 1188 (discussing majority's focus on some future plan). The dissent argued that any plan required by the court is not inherently policy related if there is a judicially discoverable standard to serve as guidance. *See id.* (summarizing test articulated in *Baker*); *Baker*, 369 U.S. at 214 (discussing "judicially discoverable standards"). The dissent argued that even if Juliana's complaint is read as an affirmative scheme to address all drivers of climate change, the court may still redress the harm without granting the full scope of the request. *See Juliana*, 947 F.3d at 1189 (Staton, J., dissenting) (acknowledging Supreme Court precedent).

129. *See Juliana*, 947 F.3d at 1188 (noting majority's issue with Juliana's request). The issue was whether the scientific evidence proffered was sufficient to conclude there was a genuine dispute. *See id.* at 1187 (noting no definitive determination necessary to move forward). While the majority took issue with implications of Juliana's request on foreign energy, the dissent noted that the issue did not inherently require foreign policy decisions because there were overlapping concerns. *See id.* (indicating evidence of genuine dispute sufficient); *Baker*, 369 U.S. at 211 (noting not all cases "touching foreign relations" beyond judicial discretion).

130. *See Juliana*, 947 F.3d at 1188-89 (Staton, J., dissenting) (discussing historic Supreme Court decisions relating to complete government reformation). The dissent reasoned the Supreme Court was not concerned in prior cases about the difficulty of reforming government policies. *See id.* (recounting Court's explicit lack of concern with reviewing segregationist policies).

E. Climate Change Litigant's Concerns Leading to Juliana

Juliana is one of many cases that emerged within the past two decades attempting to push the boundaries of climate change litigation.[131] The recent increase in litigation reflects public criticism about the lack of comprehensive climate change legislation.[132] The Obama Administration strengthened legislation and agency directives that the Trump Administration subsequently reversed.[133] For example, the Trump Administration was widely criticized for dismantling many significant steps toward fighting climate change, such as the Paris Agreement on Climate Change.[134] Such rollbacks have inspired state and local governments, as well as ambitious citizens, to challenge federal inaction with aggressive litigation.[135] Nevertheless, these litigants face the same hurdles

131. *See supra* note 50 and accompanying text (detailing implications of *parens patriae* doctrine on climate change litigants); Green, *supra* note 22, at 40 (suggesting *Summers* analysis constitutes more liberal use of standing than past case law). Some critics considered the *Juliana* case a "long shot." *See* John Schwartz, *Court Quashes Youth Climate Change Case Against Government*, N.Y. TIMES (Jan. 17, 2020), https://www.nytimes.com/2020/01/17/climate/juliana-climate-case.html [https://perma.cc/J74K-Q48K] (considering merits of claim).

132. *See* Margaret Rosso Grossman, *Climate Change and the Individual*, 66 AM. J. COMPAR. L. (SUPPLEMENT) 345, 346 (2018) (summarizing government inactivity). The impact of climate change "has affected the practice of law" by fueling many high-profile, climate-related cases. *See id.* at 347-48 (commenting on importance of climate change litigation). The judiciary has recently seen an uptick in case law due to the national and international criticism of U.S. climate change legislation. *See id.*; Alan Buis, *A Degree of Concern: Why Global Temperatures Matter*, NASA: GLOB. CLIMATE CHANGE (June 19, 2019), https://climate.nasa.gov/news/2865/a-degree-of-concern-why-global-temperatures-matter/ [https://perma.cc/P46B-VHF2] (referencing impact of 1.5°C increase on human life); *e.g.*, *State Legal Actions Now Pending*, OUR CHILD.'S TR., https://www.ourchildrenstrust.org/pending-state-actions [https://perma.cc/C2ST-UQS5] (discussing Our Children's Trust's ongoing legal battles); *Active State Legal Actions: Alaska,* OUR CHILD.'S TR., https://www.ourchildrenstrust.org/alaska [https://perma.cc/98TQ-PQBD] (describing recent climate change litigation in Alaska); *Active State Legal Actions: Montana*, OUR CHILD.'S TR., https://www.ourchildrenstrust.org/montana [https://perma.cc/2CLP-GQSA] (detailing claims of climate change case in Montana).

133. *See* Nadja Popovich et al., *The Trump Administration Rolled Back More than 100 Environmental Rules. Here's the Full List*, N.Y. TIMES (Jan. 20, 2021), https://www.nytimes.com/interactive/2020/climate/trump-environment-rollbacks-list.html [https://perma.cc/AW9Q-VHU5] (updating Trump Administration's rollbacks on Obama-era environmental executive orders and legislation); MICHAL NACHMANY ET AL., GLOBE INT'L, THE GLOBE CLIMATE LEGISLATION STUDY 608-09 (4th ed. 2014), http://www.lse.ac.uk/GranthamInstitute/wp-content/uploads/2014/03/Globe2014.pdf [https://perma.cc/9S4J-ZVN9]. In sum, the Trump Administration attempted to rollback 112 environmental rules, 88 of which were completed by January 2021. *See* Popovich et al., *supra*. Many of the rollbacks related to air pollution and emissions, a sector often connected to coal and natural gas power plants. *See id.* (listing major changes in pollution regulation); MICHAL NACHMANY ET AL., *supra* (discussing lack of comprehensive climate change legislation).

134. *See Global Reaction: Trump Pulls US out of Paris Agreement on Climate Change*, CARBON BRIEF (June 2, 2017, 12:30 PM), https://www.carbonbrief.org/global-reaction-trump-pulls-us-out-paris-agreement-climate-change [https://perma.cc/A9UR-E9RC] (summarizing international reactions to withdrawal); Grossman, *supra* note 132, at 347 (noting withdrawal considered international disaster).

135. *See* Juliana v. United States, 947 F.3d 1159, 1191 (9th Cir. 2020) (Staton, J., dissenting) (citing efforts to implement constitutional rights in climate change litigation); *see also* Native Vill. of Kivalina v. ExxonMobil Corp., 663 F. Supp. 2d 863, 882 (N.D. Cal. 2009) (dismissing village claims of special solicitude against private entities), *aff'd*, 696 F.3d 849 (9th Cir. 2012); Grossman, *supra* note 132, at 347-49 (discussing efforts of cities, states, and businesses to meet Paris Agreement on Climate Change goals). As scientific data strengthened correlations between anthropogenic pollution and global warming, a "wave of litigation" relating to government

as in *Juliana*, because courts continue to dismiss climate change cases, citing standing and general nonjusticiability.[136] Many scholars critique courts like the Ninth Circuit for their unreliable climate change standing analysis, calling it a reflection of confusion; others regard the actions as a willful indifference towards challenges brought by climate change litigation.[137]

III. ANALYSIS

A. Juliana *Missed an Opportunity to Reconcile* Massachusetts v. EPA *and* AEP

Courts have rarely seen climate change litigation as justiciable.[138] Injury-in-fact and causation were seemingly unnavigable in terms of the traditional standing analysis, yet as climate change litigation increased in popularity, several groundbreaking decisions have cemented injuries to economic, recreational, and aesthetic interest as sufficient claims.[139] Additionally, as *Juliana* shows, the causation prong is less stringent than the Ninth Circuit required in *Kivalina* and *Bellon*.[140]

The same could be said for redressability analysis in climate change litigation following *Massachusetts v. EPA* for special solicitude litigants and *AEP* for

agency responsibility to restrict GHG emissions and ensure government compliance with environmental impact assessments followed. *See* Grossman, *supra* note 132, at 347-49 (describing climate change impact on practice of law).

136. *See* Alec L. v. Jackson, 863 F. Supp. 2d 11, 15 (D.C. Cir. 2012) (finding climate change plaintiffs cannot establish claim under public trust doctrine), *aff'd sub nom. per curiam* Alec L. *ex rel.* Loorz v. McCarthy, 561 F. App'x 7 (D.C. Cir. 2014) (mem.) (unpublished table opinion). *See generally* DAVID R. WOOLEY & ELIZABETH M. MORSS, CLEAN AIR ACT HANDBOOK § 10:37 (rev. 2020) (summarizing recent constitutional claims dismissed based on climate-based standing). An alleged violation of the public trust doctrine was dismissed for lacking jurisdiction; even if the doctrine applied, the CAA displaced the claim. *See Jackson*, 863 F. Supp. 2d at 15-16 (noting impact CAA and EPA actions have on federal common law right to seek abatement).

137. *See* Mank, *supra* note 55, at 1538 (noting *Massachusetts v. EPA* decision confused *parens patriae* with other arguments); Burger, *supra* note 73, at 168 (calling standing case law in United States inconsistent); Grossman, *supra* note 132, at 356 (arguing Supreme Court decisions relating to climate-change-based standing confusing).

138. *See supra* Section II.A.2 (noting difficulties of early climate change litigation). Climate change litigants struggled to establish a cognizable interest. *See supra* note 30 and accompanying text (discerning difficulty for climate change litigants).

139. *See supra* note 31 (describing case law leading to popular injury-in-fact claims). The main controversy involved distinguishing environmental harm from harm to the climate change plaintiffs. *See* Kellman, *supra* note 3, at 10116-17 (questioning who may advocate for climate change mitigation). Causation continues to present difficulties for climate change litigants. *See* Wash. Env't Council v. Bellon, 732 F.3d 1131, 1141-46 (9th Cir. 2013) (reasoning WEC's claim too attenuated to find causation).

140. *See Juliana*, 947 F.3d at 1169 (holding causation satisfied). The Ninth Circuit held that *Bellon* was not a defense against Juliana's claims because of the overwhelming, discernable scientific impact fossil fuel subsidies have on GHG emissions. *See id.* (noting causation element satisfied); *cf. Bellon*, 732 F.3d at 1141-46 (determining climate change related injuries too tenuous because they had "scientifically indiscernible" impact); Native Vill. of Kivalina v. ExxonMobil Corp., 663 F. Supp. 2d 863, 880-81 (N.D. Cal. 2009) (arguing Exxon's impact too far removed where third parties contributed to harm), *aff'd*, 696 F.3d 849 (9th Cir. 2012).

private litigants.[141] Thus, *Juliana* was an opportunity—in some regards, fulfilled—to expand upon the holdings in *Massachusetts* and *AEP*.[142] Yet the *Juliana* court's dismissal of *Massachusetts v. EPA* and avoidance of *AEP* is troublesome because it applied only the less-favorable parts of the *Massachusetts v. EPA* holding while excluding relevant aspects that supported Juliana's case.[143] The Ninth Circuit's discussion exemplified the confusing nature of *Massachusetts v. EPA* in holding Juliana's injury could not be redressed.[144] The majority distinguished *Massachusetts v. EPA* because the litigants were alleging fault on not only the EPA, but the *entire* United States government.[145]

There is considerable evidence to show that the *Juliana* decision focused on insignificant metrics.[146] Unlike in *Massachusetts v. EPA*, where the EPA controlled 6% of global GHG emissions, control over 14% of global GHG emissions were at issue in *Juliana*.[147] Even if the *Massachusetts v. EPA* implications of special solicitude were grounds for dismissing Juliana's claims, the court failed to consider the merits of the private litigants' claims in *AEP*, who had established standing to challenge GHG emissions amounting to 2.5% of global output.[148]

The *Juliana* court also inconsistently applied Justice Scalia's reasoning from *Lujan II*.[149] *Lujan II* rejected the Defenders of Wildlife's theory for redressability

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141. *See supra* note 51 (concluding *Massachusetts v. EPA* did not rely on *parens patriae* for standing); Am. Elec. Power Co. v. Connecticut, 564 U.S. 410, 420 (2011) (affirming standing for private litigants in equally divided court). Justice Stevens applied the more difficult test for standing to the special litigants in *Massachusetts v. EPA*, causing confusion as to the proper standard. *See* Mank, *supra* note 55, at 1538 (acknowledging multiple factors complicate standing analysis).

142. *See supra* note 115 and accompanying text (distinguishing case facts).

143. *See* Juliana v. United States, 947 F.3d 1159, 1171-72 (differentiating *Massachusetts v. EPA* from Juliana's case). The majority declined to mention more recent precedent such as *AEP*, except in a footnote solely for the purpose of dismissing Judge Staton's dissent. *See id.* at 1171 n.7.

144. *See supra* note 59 and accompanying text (discussing confusing nature of *Massachusetts v. EPA* holding); *Juliana*, 947 F.3d at 1171 (acknowledging procedural rights but denying redressability because "beyond the power of an Article III court"). Unlike in *Massachusetts v. EPA*, Juliana did not assert the denial of a procedural right. *See Juliana*, 947 F.3d at 1169.

145. *See Juliana*, 947 F.3d at 1165 (describing original complaint). Named defendants included federal agencies, the President, and the United States, whereas *Massachusetts v. EPA* petitioned for review of a singular federal agency order. *See id.*; Massachusetts v. EPA, 549 U.S. 497, 514 (2007) (describing procedural history).

146. *See Juliana*, 947 F.3d at 1171 (considering procedural posture). The *Massachusetts v. EPA* redressability analysis rested not on the procedural posture, but on the impact 6% of GHG emissions has on climate change. *See* Massachusetts v. EPA, 549 U.S. at 524 (noting impact of transportation sector along); Green, *supra* note 22, at 51 (stating *Massachusetts v. EPA* applied stringent standing test).

147. *See* Burger, *supra* note 73, at 168 (noting magnitude of emissions at issue). Juliana's claims against the U.S. government targeted all domestically permitted, authorized, and subsidized emissions. *See Juliana*, 947 F.3d at 1165.

148. *See* Burger, *supra* note 73, at 158 (discussing magnitude of emissions present in recent climate change cases); *supra* note 143 (noting Ninth Circuit's failure to discuss *AEP*). The GHG emissions in *Juliana* were over five times greater than in *AEP* and double those in *Massachusetts v. EPA*. *See* Burger, *supra* note 73, at 168 (comparing GHG emissions).

149. *See* Juliana v. United States, 947 F.3d 1159, 1170 (9th Cir. 2020). The court held redressability of an injury must be "more than 'merely speculative.'" *See id.* (quoting *Lujan II*, 504 U.S. 555, 561 (1992)) (discussing

as too attenuated because it relied on parties not before the court, whereas in *Juliana* all parties were named in the suit.[150] Additionally, *Massachusetts v. EPA* held—without conditioning the requirement on *parens patriae*—that reducing domestic emissions was enough to constitute redress, while the Ninth Circuit held a reduction was sufficient only for special-standing litigants.[151] The limited use of the *parens patriae* doctrine in *Massachusetts v. EPA* signifies the Court applied the more stringent test for standing without considering whether such a stringent test was required.[152]

The *Juliana* court's oversight of the reasoning in *Massachusetts v. EPA* and *AEP* and reliance on *Rucho v. Common Cause*, a three-decade-old case, exemplifies courts' difficulties in grappling with unilateral policy issues that have international implications.[153] Because GHG impacts are international in nature, U.S. emission reduction may not be sufficient to fully redress harm, even though scientific leaders have discerned that the world cannot exceed a 1.5˚C temperature rise.[154]

B. The Ninth Circuit Lacks a Discernable Standard of Review

After *Massachusetts v. EPA*, the Ninth Circuit issued a decision supporting climate change litigation, but subsequent cases challenging on the basis of a

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elements of standing). Although the meanings are similar, in *Bellon* the court held that *Lujan II* required the injury be "likely to be redressed." *See* Wash. Env't Council v. Bellon, 732 F.3d 1131, 1139-40 (9th Cir. 2013) (articulating elements of standing).

150. *See Lujan II*, 504 U.S. at 568-69 (reasoning redress requires responsible parties named in suit). *But see Juliana*, 947 F.3d at 1170 (noting Juliana sought to enjoin only government actions). The facts of *Juliana* align more closely with *Massachusetts v. EPA* because the federal agency responsible for regulation of GHG emissions was a named party in the suit. *See Juliana*, 947 F.3d at 1165 (naming several federal agencies in suit); Massachusetts v. EPA, 549 U.S. at 497 (alleging harm caused by EPA's decision).

151. *Compare* Massachusetts v. EPA, 549 U.S. 497, 524 (2007) (requiring emission reduction for redress), with *Juliana*, 947 F.3d at 1174 (holding limited amelioration of injury through emission reductions does not constitute full redress). Asking plaintiffs to prove that redress would relieve every injury "rests on the erroneous assumption that a small incremental step, because it is incremental, can never be attacked in a federal judicial forum." Massachusetts v. EPA, 549 U.S. at 524.

152. *See* Kellman, *supra* note 3, at 10120 (concluding *Massachusetts v. EPA* left unclear what level of redressability required for *parens patriae* doctrine). Despite acknowledging Massachusetts's special solicitude, the Court explained why Massachusetts met the requirement of traditional standing. *See* Green, *supra* note 22, at 51-52 (noting Court used more stringent standing test despite lower standard for procedural litigants).

153. *See supra* notes 123-24 (discussing justiciability of Juliana's case). The dissent articulated that the majority did not properly consider the redressability requirements and the implication of *Massachusetts v. EPA*. *See Juliana*, 947 F.3d at 1182-83 (Staton, J., dissenting). The court pointed to no evidence suggesting Juliana's case presented any more of a political question than cases such as *Bellon* or *AEP*, and the majority's use of *Rucho* was improper. *See id.* at 1187 (distinguishing Juliana's allegations from past decisions finding climate change injury redressable).

154. *See* Buis, *supra* note 132 (discussing climate change impacts after 1.5˚C increase). Over one-fifth of all humans have experienced a temperature increase of 1.5˚C in at least one season. *See id.* The most dramatic effects occur at lower latitudes, where heatwaves become more deadly. *See id.* Other dangers to human populations include droughts, water availability, extreme precipitation, and increased extinction rates. *See id.*

future harm have resulted in unpredictable outcomes.[155] Inevitably, the lack of conformity in the circuit led to the court's failure to differentiate *Juliana* from *Bellon*, reasoning the *Bellon* injury was too small to redress, but the *Juliana* injury was too large.[156] Further, unlike in *Bellon*, where the court acknowledged *Massachusetts* and *AEP*, the majority in *Juliana* dismissed *Massachusetts v. EPA* and seemingly ignored the implications of *AEP*—instead deciding the issue was nonjusticiable with little explanation.[157] As Judge Staton noted in *Juliana*, the majority failed to recognize the similarities of *Juliana* to *Massachusetts v. EPA* and should have let the case proceed to trial.[158]

Perhaps the greatest predictor of success in the Supreme Court relates to alleging a procedural rather than substantive right.[159] Unlike the *Massachusetts v. EPA* plaintiffs that benefitted from a procedural right, the Inupiat village in *Kivalina* did not receive the same results because the procedural rights they alleged are guaranteed only to sovereign states.[160] The use of Supreme Court precedent, however, becomes even murkier when plaintiffs allege substantive rights, as in *Juliana*.[161] Despite the varying application of controlling precedent,

155. *See, e.g.*, Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin., 538 F.3d 1172, 1216-17 (9th Cir. 2008) (concluding agency failure to regulate GHG emissions-related sources not arbitrary and capricious); Native Vill. of Kivalina v. ExxonMobil Corp., 696 F.3d 849, 856 (9th Cir. 2012) (dismissing climate change claims based on jurisdiction); Wash. Env't Council v. Bellon, 732 F.3d 1131, 1147 (9th Cir. 2013) (dismissing for lack of standing).

156. *See* Juliana v. United States, 947 F.3d 1159, 1169 (9th Cir. 2020) (distinguishing *Bellon*). While the government argued that Juliana should be treated like the WEC in *Bellon* for an injury too attenuated, the court held that the magnitude of GHG emissions was too great to be comparable for causation. *See id.* Although the Ninth Circuit decided causation was established, the court felt that there was no redress for an injury tied to political implications. *See id.* at 1172. The argument "run[s] afoul of . . . foundational principles" that the judiciary is designated as part of the "checks and balances" on legislative faults. *See id.* at 1184 (Staton, J., dissenting).

157. *See supra* note 119 (noting holding does not require policy decision).

158. *See Juliana*, 947 F.3d at 1189 (Staton, J., dissenting) (arguing merits of Juliana's request). Juliana's argument was "neither novel nor judicially incognizable" and consistent with important constitutional challenges in the past. *See id.* (relating to past constitutional challenges). The complexity of a justiciable issue is not grounds to defer to the legislature because the court can "grant plaintiffs less than the full gamut of requested relief." *Id.* (signaling importance of partial redressability).

159. *See* Burger, *supra* note 73, at 149 (suggesting problems associated with standing). The subjective nature of standing in climate change suits creates more difficulty to find standing on future harms. *See id.* (noting difficulty in discerning future impact of climate change). Whether a meaningful contribution satisfies causation is dependent on the facts at hand. *See id.* at 150 (acknowledging injury-in-fact closely linked to evidence regarding amount of pollution).

160. *See* Native Vill. of Kivalina v. ExxonMobil Corp., 663 F. Supp. 2d 863, 882 (N.D. Cal. 2009) (distinguishing *Kivalina* from *Massachusetts v. EPA*), *aff'd*, 696 F.3d 849 (9th Cir. 2012). The Ninth Circuit correctly applied *AEP*, stating that congressional action displaced the common law nuisance claim for damages. *See* Grossman, *supra* note 132, at 358-59 (distinguishing *Kivalina* from *AEP*).

161. *See Juliana*, 947 F.3d at 1171 (noting Juliana did not claim procedural rights). For one reason or another, courts have treated the two most difficult standing elements in climate change cases—causation and redressability—as "two sides of the same coin." *See* Ctr. for Biological Diversity v. EPA, 90 F. Supp. 3d 1177, 1190 (W.D. Wash. 2015) (noting closely related nature of causation and redressability); Burger, *supra* note 73, at 150 (summarizing case law).

it is clear that the Ninth Circuit continues to view the *Massachusetts v. EPA* and *AEP* decisions inconsistently.[162]

C. *Implications of* Juliana *on Future Climate Change Litigation*

Although Juliana lost based on standing, *Juliana* is, in many ways, groundbreaking.[163] Unlike *Bellon*, where the Ninth Circuit held that the WEC did not satisfy causation, the *Juliana* court showed little skepticism of the causal link between government inaction and climate change.[164] Notably, the court held that the "federal government has long promoted fossil fuel use despite knowing that it can cause catastrophic climate change, and that failure to change existing policy may hasten an environmental apocalypse."[165] The court acknowledged that climate change litigants could have a valid constitutional claim, which may influence future climate change suits against the U.S. government.[166] Since the district court decision in *Juliana*, a number of climate change cases challenging the government to act have unfolded across the country.[167] As successful challenges continue to mount in the district courts, like in *Center for Biological Diversity* and *Juliana*, the circuit courts—and eventually the Supreme Court—will be forced to revisit the constitutional right to a sustainable environment.[168]

IV. CONCLUSION

Cases like *AEP* and *Summers* exemplify future avenues for climate change litigants to argue for private plaintiffs' standing. The progression from *Bellon* to

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162. *See* Mank, *supra* note 55, at 1572-73 (considering Ninth Circuit resistant to GHG claims).

163. *See* Hoffman, *supra* note 12 (discussing strength of recent climate change cases in light of more detailed science). The "judicial tides may be changing" as the relationship between scientific data and climate change builds. *See id.* (noting climate-change-linked harm becoming more evident).

164. *Compare* Juliana v. United States, 947 F.3d 1159, 1168-70 (9th Cir. 2020) (dismissing government's contention climate change not injury-in-fact or traceable), *with* Wash. Env't Council v. Bellon, 732 F.3d 1131, 1141 (9th Cir. 2013) (holding causation element not satisfied). The Ninth Circuit reasoned that Juliana's injuries, caused by fossil fuel production, extraction, and transportation, take place domestically, and evidence shows federal subsidies increase emissions. *See Juliana*, 947 F.3d at 1169 (noting government's contributions). *Contra Bellon*, 732 F.3d at 1141-46 (noting regulation of government emissions too attenuated to satisfy causal chain).

165. *See Juliana*, 947 F.3d at 1164 (noting significance of Juliana's allegations).

166. *See id.* at 1164-65 (stating Juliana's argument and evidence compelling); *supra* note 2 and accompanying text (discussing litigation uptick in 2020). Climate change continues to rise as a priority in society despite polarizing political stances. *See* Popovich, *supra* note 5 (highlighting past difficulties of coherent climate legislation).

167. *See supra* note 132 (noting ongoing climate change litigation). Currently, the Our Children's Trust group from *Juliana* have pending actions in several state courts. *See State Legal Actions Now Pending*, *supra* note 132. In Alaska, sixteen minors sued Alaskan government agencies arguing the state's fossil fuel energy policy has contributed to the acceleration of climate change. *See Active State Legal Actions: Alaska*, *supra* note 132. Likewise, in Montana, another group of minors filed suit against the state for violating the constitutional right to a clean and healthful environment. *See Active State Legal Actions: Montana*, *supra* note 132.

168. *See* Juliana v. United States, 217 F. Supp. 3d 1224, 1241 (D. Or. 2016) (reasoning judiciary properly equipped to handle case), *rev'd*, 947 F.3d 1159 (9th Cir. 2020); Ctr. for Biological Diversity v. EPA, 90 F. Supp. 3d 1177, 1196 (W.D. Wash. 2015) (finding WEC alleged redressable harm).

Juliana shows that lower courts are increasingly receptive to these arguments. Even though the *Juliana* court continued to display reservations about redressability, the vigorous dissent put wind in the sails of several other climate change litigants fighting for the constitutional right to a stable climate.

As climate change litigation continues to grow, so does the pressure for the judicial branch to address private litigant standing. Previously, when skepticism toward climate change was high, a lack of redressability was an easy scapegoat when courts found themselves ill-equipped to reach a majority ruling. Now, as the correlation between GHG emissions and global warming is strengthened, it is only a matter of time before climate change appears not as a localized threat, but a global unifier that must be addressed.