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

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“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.”

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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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).

There has been an increase in the variety of legal techniques adopted over the years to create standing under Article III. The standing doctrine is designed to quickly resolve disputes where the litigant lacks the basis in some source of law to sue. 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. 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.

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. 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. 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

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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.
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).
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

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\(^{14}\) See infra Section II.E (detailing likely outcomes of future climate change litigation).

\(^{15}\) See infra Section II.A.2 (addressing discrepancies in holdings without redress for climate-related harm).

\(^{16}\) See infra Section II.D (paraphrasing *Juliana* holding); infra Part III (discussing implications arising from *Juliana* decision).

\(^{17}\) 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. Early cases like *Marbury v. Madison* mentioned the judiciary’s role to curb acts that impede the “fundamental principles” of American life. 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.

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).* 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. The injury-in-fact must affect a concrete and particular interest that is actual or imminent. The causal connection between the injury and the complaint must be traceable to the defendant, rather than an unmentioned third party. 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.” 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

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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).


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. The Supreme Court has acknowledged traceability and redressability as “two facets of a single causation requirement.”

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. Additionally, courts struggle to retrofit the actual and imminent injuries test in order to recognize harms related to the environment rather than the plaintiff. Over time, these barriers became less apparent as courts began to recognize economic, recreational, and aesthetic interests as sufficient injuries in fact. Thus, alleging a justiciable injury-in-fact for an environmental harm became more common; nevertheless, convincing courts that environmental harm is redressable remains difficult.

Part of the difficulty in establishing redress in climate litigation is timing. 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. Private citizens in climate change cases cannot allege a
procedural right against a government agency until there is a final agency action that delays redress.\textsuperscript{35} When agency action is final, the Supreme Court has held that the harm alleged must be “likely” redressable.\textsuperscript{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.\textsuperscript{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 \textit{any} injury is redressable.\textsuperscript{38}

For example, in \textit{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.\textsuperscript{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.\textsuperscript{40} The Supreme Court also discussed a separate aspect of standing for procedural-injury litigants.\textsuperscript{41} Procedural-injury litigants may assert standing without meeting the “normal” standards for redressability.\textsuperscript{42} The Court did not define what the lower
guarantee favorable outcome). The \textit{Lujan II} definition was unclear, and the Court expanded upon it in \textit{Massachusetts v. EPA}. See McDougall, supra, at 161-62 (discussing history of redressability).

\textsuperscript{35} See \textit{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. \textit{See id.} at 892 (noting individual actions not ripe for suit).


\textsuperscript{37} See \textit{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. \textit{See id.}

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

\textsuperscript{39} See \textit{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. \textit{See id.} at 566. The “vocational nexus” approach referred to a professional interest in studying a species. \textit{See id.}

\textsuperscript{40} See \textit{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. \textit{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. \textit{See Kellman, supra} note 3, at 10117.

\textsuperscript{41} See \textit{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 \textit{Lujan II}. \textit{See Green, supra} note 22, at 40 (describing effect of procedural injury on redressability).

\textsuperscript{42} See \textit{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. \textit{See Jonathan H. Adler, Warming up to Climate Change Litigation, 93 VA. L. REV. BRIEF 63, 68 (2007) (comparing procedural interest in \textit{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

I. 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.”

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. 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. 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. 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.

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. He argued that neither statutory authority nor case law supports the majority’s use of the parens patriae doctrine. 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).


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.  

Lower courts have struggled to interpret the test for standing since *Massachusetts v. EPA*. 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. 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. The Supreme Court’s inconsistency in the redressability standards has resulted in differential treatment towards private litigants achieving standing in climate change cases.

2. Summers v. Earth Island Institute

In *Summers v. Earth Island Institute*, the Supreme Court returned to a more restrictive approach to standing. 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. The majority decision, written by Justice Scalia, held that Earth Island Institute did not

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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).


62. See *Summers*, 555 U.S. at 495 (holding Earth Island Institute did not have valid standing claim); see also Bradford C. Manik, *Informational Standing After Summers*, 39 B.C. Env’t Aff’s 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. 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. In effect, the Court established that an imminent injury is required even if the petitioner establishes a procedural right. While an imminent injury was a strict requirement, the Court noted that Congress could loosen the redressability prong. 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.


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. In this case, two groups of plaintiffs filed public nuisance claims against five electric power companies. The first group of plaintiffs consisted of eight states and New York City, while the second group consisted of three nonprofit land trusts. 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

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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*).


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.


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).
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”).
redressability standard set out in *Massachusetts v. EPA*, while the remaining four Justices thought that none of the plaintiffs had standing. Despite the limitations placed on the plurality’s decision, scholars believe the Court’s decision implicitly expanded the standing analysis in *Massachusetts v. EPA*.

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.

## C. Lower Court Decisions

### I. 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. Shortly after the Second Circuit decision in *AEP*, the Ninth Circuit approached a similar question in *Native Village of Kivalina (Kivalina) v. ExxonMobile Corp.*, 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. Collectively, the companies created more than 1.2 billion tons of GHG emissions, significantly larger than those alleged in *AEP*. Despite the similarities to *AEP*, the district court found that the Inupiat village did not satisfy Article III standing.

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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).


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

85. See *Burger*, supra note 73, at 159 (comparing GHG emissions of companies to those at issue in *AEP*).

86. 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. On appeal, the Ninth Circuit dismissed the case due to legislative displacement.


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. 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. WEC alleged that failing to promulgate RACT increased GHG emissions and caused recreational, aesthetic, economic, and health injuries. The State argued that the RACT standards would not result in meaningful reduction of GHG emissions. 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.

The Ninth Circuit agreed with WEC’s argument that injury includes the risk that climate change will lessen future recreational and aesthetic values. 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 emissions, did not satisfy the redressability element of the test.

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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 (assigning 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).
emissions, were conclusory and failed to establish a causal link.\textsuperscript{96} The Ninth Circuit held that, unlike the GHG emissions at issue in \textit{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.\textsuperscript{97} The court distinguished the Supreme Court’s standing analysis in \textit{AEP}, explaining that the Court’s analysis did not clearly state which group of the \textit{AEP} plaintiffs had Article III standing.\textsuperscript{98}

3. Center for Biological Diversity v. EPA

Nearly two years after \textit{Bellon}, in \textit{Center for Biological Diversity v. EPA},\textsuperscript{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).\textsuperscript{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.\textsuperscript{101} Despite the EPA’s contention that \textit{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.”\textsuperscript{102} The court reasoned that the injuries were traceable to EPA conduct and redressable by mitigating local actions.\textsuperscript{103} Unlike in \textit{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 acidification.

\textsuperscript{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.

\textsuperscript{97} See id. at 1145-46 (comparing WEC’s claims to circumstances of \textit{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).

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

\textsuperscript{99} 90 F. Supp. 3d 1177 (W.D. Wash. 2015).

\textsuperscript{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.

\textsuperscript{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).

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

\textsuperscript{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).
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).


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).
The court denied the United States’ motion to dismiss the public trust doctrine claim. The United States argued that Juliana’s request was a nonjusticiable issue, but the court concluded the Juliana had Article III standing.

2. The Ninth Circuit’s Disapproval

Before the Ninth Circuit heard oral arguments, several groups filed amicus briefs in support of Juliana. 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. 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. 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.

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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. (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. Rather, granting an injunction on future fossil fuel projects must be substantially likely to stop catastrophic events. 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. 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.

In her dissent, Judge Josephine Staton argued Juliana presented sufficient evidence for trial. Judge Staton argued that the perpetuity principle protected Juliana’s constitutional right to a sustainable climate. 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. While Juliana’s injuries were complex, Judge Staton noted that there is no “justiciability exception for cases of great complexity.”

Moreover, the fact that Massachusetts v. EPA involved a procedural inquiry does not mean the substantive right to redress is not applicable. 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.\(^\text{125}\)

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.\(^\text{126}\) 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.\(^\text{127}\) Judge Staton emphasized that there is no need for a definitive plan for relief at the current stage of the pleadings.\(^\text{128}\) 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.”\(^\text{129}\) Despite the majority’s conclusion, Judge Staton noted the magnitude of reform generated by past government injustices superseded the majority’s fear.\(^\text{130}\)

\(^{125}\) 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).


\(^{127}\) 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. The recent increase in litigation reflects public criticism about the lack of comprehensive climate change legislation. The Obama Administration strengthened legislation and agency directives that the Trump Administration subsequently reversed. 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. Such rollbacks have inspired state and local governments, as well as ambitious citizens, to challenge federal inaction with aggressive litigation. Nevertheless, these litigants face the same hurdles.

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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. 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.

III. ANALYSIS

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

Courts have rarely seen climate change litigation as justiciable. 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. Additionally, as Juliana shows, the causation prong is less stringent than the Ninth Circuit required in Kivalina and Bellon.

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. MORRIS, 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. Thus, Juliana was an opportunity—in some regards, fulfilled—to expand upon the holdings in Massachusetts and AEP. 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. The Ninth Circuit’s discussion exemplified the confusing nature of Massachusetts v. EPA in holding Juliana’s injury could not be redressed. The majority distinguished Massachusetts v. EPA because the litigants were alleging fault on not only the EPA, but the entire United States government.

There is considerable evidence to show that the Juliana decision focused on insignificant metrics. 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. 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.

The Juliana court also inconsistently applied Justice Scalia’s reasoning from Lujan II. Lujan II rejected the Defenders of Wildlife’s theory for redressability

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.


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 alone); 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. 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. 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.

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. 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.

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

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

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).


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.