

A “SENSE OF EQUITY” IN ENVIRONMENTAL JUSTICE LITIGATION

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INTRODUCTION

In 2015, a group of young people supported by an environmental organization and a “guardian for future generations” filed suit against the United States, the President, and other federal entities.¹ The plaintiffs in *Juliana v.*

1. *Juliana v. United States*, 217 F. Supp. 3d 1224 (D. Or. 2016); *see also* Michael Blumm & Mary Christina Wood, “No Ordinary Lawsuit”: *Climate Change, Due Process, and the Public*

*United States*² alleged violations of constitutional due process rights and the public trust doctrine because the government's fossil-fuel policies contributed to climate change that in turn has caused and will continue to cause harmful effects like ocean acidification, rising sea levels, and damaged freshwater resources.³ The defendants, along with energy company association intervenors, moved to dismiss the suit under Rule 12(b)(1) for lack of standing, for presenting a political question, and under Rule 12(b)(6) for failure to state a claim.⁴ The district court denied the motions, finding first that the claims were justiciable and the plaintiffs had standing, and second that the plaintiffs articulated valid claims for a violation of their substantive due process right to a climate system capable of sustaining human life and of the government's duties under the public trust doctrine.⁵ Defendants then filed several unsuccessful motions, appeals, and petitions for writs of mandamus, though as of this writing, litigation has been stayed pending an interlocutory appeal.⁶

A few years earlier, the Alaska Native Village of Kivalina and Town of Kivalina (collectively "Kivalina") had filed a similarly bold lawsuit against numerous oil and energy companies.⁷ Climate change is projected to have the most severe impact in the Arctic and on the indigenous peoples who inhabit it because of a "cascade of effects" like "the melting of sea ice and permafrost,

Trust Doctrine, 67 AM. U. L. REV. 1, 25 (2017) ("The *Juliana* case was filed . . . on behalf of twenty-one youth plaintiffs from across the United States, challenging—quite literally—the entire fossil-fuel policy of the United States."); Rachel Jean-Baptiste et al., *Recent Developments in Climate Justice*, 47 ENVTL. L. REP. NEWS & ANALYSIS 11,005, 11,007 (2017) (characterizing *Juliana* as an "ambitious and creative use of a common-law theory").

2. *Juliana*, 217 F. Supp. 3d at 1224.
3. Blumm & Wood, *supra* note 1, at 25–26; *see generally* Randall S. Abate, *Atmospheric Trust Litigation in the United States: Pipe Dream or Pipeline to Justice for Future Generations?*, in CLIMATE JUSTICE: CASE STUDIES IN GLOBAL AND REGIONAL GOVERNANCE CHALLENGES 543 (Randall S. Abate ed., 2016) [hereinafter Abate, *ATL*] (describing the public trust doctrine and its application to climate change).
4. *Juliana*, 217 F. Supp. 3d at 1224, 1233; Myanna Dellinger, *See You in Court: Around the World in Eight Climate Change Lawsuits*, 42 WM. & MARY ENVTL. L. & POL'Y REV. 525, 540–41 (2018); Jean-Baptiste et al., *supra* note 1, at 11,007 (characterizing standing and the political question doctrine as obstacles that have "plagued" climate change plaintiffs).
5. *Juliana*, 217 F. Supp. 3d at 1252, 1261, 1263; *see also* R. Henry Weaver & Douglas A. Kysar, *Courting Disaster: Climate Change and the Adjudication of Catastrophe*, 93 NOTRE DAME L. REV. 295, 347 (2017) ("[A]t least one U.S. federal judge has—squarely and unblinkingly—recognized the possibility of an environmental due process claim.").
6. Order, *Juliana v. United States*, No. 18-80176 (9th Cir. Dec. 26, 2018) (granting interlocutory appeal); *Juliana v. United States*, No. 6:15-CV-01517-AA, 2018 WL 6303774, at *3 (D. Or. Nov. 21, 2018) (certifying case for interlocutory appeal and staying proceedings); *see also* Olivia Molodanof & Jessica Durney, *Hope Is a Song in a Weary Throat: An Interview with Julia Olson*, 24 HASTINGS ENVTL. L.J. 213, 214 (2018) (noting how some attorneys have marveled at the vitality of the case).
7. *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863 (N.D. Cal. 2009), *aff'd*, 696 F.3d 849 (9th Cir. 2012).

ocean acidification, rising sea levels and coastal erosion, and increased frequency and intensity of storm events.”⁸ Those affected include the Inupiat of Kivalina, who reside on the tip of a barrier reef that is becoming uninhabitable because of worsening winter storms and erosion of the sea ice that protects the reef from those storms.⁹ Kivalina therefore asserted federal and state nuisance claims to recover community relocation expenses because the defendants’ greenhouse gas (“GHG”) emissions have exacerbated climate change.¹⁰ Unlike in *Juliana*, the court granted the defendants’ motions to dismiss and found that the claims involved nonjusticiable political questions and that the court lacked Article III standing. The court did not consider the argument that the complaint failed to allege a claim upon which relief could be granted.¹¹

Both *Juliana* and *Kivalina* exhibit the characteristics of environmental justice litigation.¹² The plaintiffs are among the most marginalized and vulnerable while the defendants are rich and powerful.¹³ Their situations highlight the distributive injustice of companies profiting from environmentally-hazardous

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8. Peter Van Tuyn, *America’s Arctic: Climate Change Impacts on Indigenous Peoples and Subsistence*, in CLIMATE CHANGE AND INDIGENOUS PEOPLES: THE SEARCH FOR LEGAL REMEDIES 263, 263 (Randall S. Abate & Elizabeth Ann Kronk eds., 2013).
 9. Randall S. Abate, *Public Nuisance Suits for the Climate Justice Movement: The Right Thing and the Right Time*, 85 WASH. L. REV. 197, 206 (2010) [hereinafter Abate, *Public*]; see Marissa Knodel, *Conceptualizing Climate Justice in Kivalina*, 37 SEATTLE U. L. REV. 1179, 1185 (2014) (citing U.S. GEN. ACC. OFF., GAO-04-142, ALASKAN NATIVE VILLAGES: MOST ARE AFFECTED BY FLOODING AND EROSION, BUT FEW QUALIFY FOR FEDERAL ASSISTANCE 2–4 (2003)) (reporting that eighty-six percent of Alaska Native villages are “susceptible to flooding and erosion due in part to rising temperatures” and that four villages including Kivalina “are in imminent danger from flooding and erosion and are planning to relocate”).
 10. *Kivalina*, 663 F. Supp. 2d at 868–69.
 11. *Id.* at 868; compare Bradford C. Mank, *Standing for Private Parties in Global Warming Cases: Traceable Standing Causation Does Not Require Proximate Causation*, 2012 MICH. ST. L. REV. 869, 900 (2012) [hereinafter Mank, *Standing*] (arguing against the court’s finding that plaintiffs lacked standing in *Kivalina*), with Victor E. Schwartz et al., *Why Trial Courts Have Been Quick to Cool “Global Warming” Suits*, 77 TENN. L. REV. 803, 805–06 (2010) (arguing that climate change lawsuits, including *Kivalina*, were rightly dismissed because the suits advance plaintiffs’ political agendas rather than articulate “objectively wrongful conduct that gives rise to tort liability”).
 12. See Jean-Baptiste et al., *supra* note 1, at 11,006–07 (tracing the development of environmental justice litigation in the 1980s to climate nuisance suits like *Kivalina* and atmospheric trust litigation in *Juliana*).
 13. See, e.g., Maxine Burkett, *Behind the Veil: Climate Migration, Regime Shift, and a New Theory of Justice*, 53 HARV. C.R.–C.L. L. REV. 445, 447 (2018) (“In the United States, the field of climate justice has been concerned with the most vulnerable, as it explores the intersection of race, poverty, and climate change.”); David W. Case, *The Role of Information in Environmental Justice*, 81 MISS. L.J. 701, 707 (2012) (“[E]nvironmental justice communities are typically poor and substantially lacking in the political acumen and power enjoyed by business and industry interests that create environmental impacts and risks for surrounding communities.”).

operations that cause personal and property damage to communities.¹⁴ Tort theories, environmental statutes, and civil rights laws do not provide sufficient redress of the harm,¹⁵ so many plaintiffs argue for bold or creative interpretations of traditional environmental laws or the novel application of other sources of law, such as constitutional provisions.¹⁶ And the defendants invariably respond with a motion to dismiss that challenges the pleadings, jurisdiction, or forum.¹⁷

Despite these commonalities, the outcomes of these motions differ, not just in *Juliana* and *Kivalina* but across a variety of environmental justice cases. Sometimes the different results relate to justiciability doctrines. For example, political question and standing posed no bar to environmental groups' challenge under the National Historic Preservation Act¹⁸ to the construction of a new U.S. military base in Okinawa, Japan, which may harm the dugong, a marine mammal of value to the unique cultural identity of Okinawans.¹⁹ But in a case challenging a city council resolution to block a citizen initiative to ban the rail transportation of coal and oil through Spokane, Washington, the court dismissed on grounds of justiciability.²⁰ Court outcomes on Rule 12(b)(6) motions to dismiss for failure to state a claim also often differ in environmental justice cases. For example, when members of the Confederated Tribes of the Colville Reservation brought a citizen suit under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA")²¹ against a Canadian

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14. See Abate, *ATL*, *supra* note 3, at 548 (calling *Kivalina* the "essence of climate justice litigation" because "affected communities that alleged that they had been disproportionately burdened by climate change impacts . . . sought relief from private sector entities that contributed a significant percentage of GHG emissions"); see generally Jedediah Purdy, *The Long Environmental Justice Movement*, 44 *ECOLOGY L.Q.* 809, 818–21 (2018).
 15. See, e.g., Catherine Millas Kaiman, *Environmental Justice and Community-Based Reparations*, 39 *SEATTLE U. L. REV.* 1327, 1340–57 (2016); Jeff Todd, *Trade Treaties, Citizen Submissions, and Environmental Justice*, 44 *ECOLOGY L.Q.* 89, 100–03, 125–26 (2017) [hereinafter Todd, *Trade*].
 16. See, e.g., Luke W. Cole, *Environmental Justice Litigation: Another Stone in David's Sling*, 21 *FORDHAM URB. L.J.* 523, 525–26 (1994) [hereinafter Cole, *Litigation*]; Jacqueline Peel & Hari M. Osofsky, *Sue to Adapt?*, 99 *MINN. L. REV.* 2177, 2182 (2015) (referring to the "novelty" of climate change adaptation litigation).
 17. See, e.g., Maria L. Banda, *The Bottom-Up Alternative: The Mitigation Potential of Private Climate Governance after the Paris Agreement*, 42 *HARV. ENVTL. L. REV.* 325, 381–82 (2018); see also Walter W. Heiser, *Forum Non Conveniens and Retaliatory Legislation: The Impact on the Available Alternative Forum Inquiry and on the Desirability of Forum Non Conveniens as a Defense Tactic*, 56 *KAN. L. REV.* 609, 618–19 (2008).
 18. 54 U.S.C. § 300101 *et seq.* (2018).
 19. *Ctr. for Biological Diversity v. Mattis*, 868 F.3d 803, 808–10 (9th Cir. 2017).
 20. *Holmquist v. United States*, No. 2:17-CV-0046-TOR, 2017 WL 3013259, at *1, *4–5 (E.D. Wash. July 14, 2017). The court also held that the plaintiffs' claims were not ripe, and that they lacked standing. *Id.* at *4–5.
 21. 42 U.S.C. § 9601 *et seq.* (2018).

smelter whose hazardous slag flowed down the Columbia River to Washington State, the court denied the defendant's Rule 12(b)(6) challenge that CERCLA does not apply extraterritorially, on the grounds that "the presumption against extraterritorial application generally does not apply where conduct in a foreign country produces adverse effects within the United States."²² Yet when a minority plaintiff invoked Section 1983²³ to enforce the Lead-Based Paint Poisoning Prevention Act,²⁴ and the United States Housing Act of 1937²⁵ for lead-based paint in public housing in Detroit, the court granted the Rule 12(b)(6) motion to dismiss on the grounds that the statutes do not create an actionable right.²⁶

While these cases have different claims under different laws, they all focus on providing justice to communities for environmental harms. The different results of motions to dismiss in similar environmental justice lawsuits invite a critical assessment of why and how plaintiffs sometimes persuade judges to rule in their favor.²⁷ Drawing from a quarter-century of interest by humanities and social studies scholars in environmental rhetoric and ecocriticism,²⁸ many legal commentators have applied rhetoric, literary criticism, and narrative theory to analyze environmental disputes and their outcomes.²⁹ From this research, com-

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22. *Pakootas v. Teck Cominco Metals, Ltd.*, No. CV-04-256-AAM, 2004 WL 2578982, at *16 (E.D. Wash. Nov. 8, 2004), *aff'd*, 452 F.3d 1066 (9th Cir. 2006).
 23. 42 U.S.C. § 1983 (2018).
 24. 42 U.S.C. §§ 4821–4846 (2018).
 25. Pub. L. No. 75-412, 50 Stat. 888 (1937).
 26. *Johnson v. City of Detroit*, 446 F.3d 614, 629 (6th Cir. 2006).
 27. See Sabrina McCormick et al., *Strategies in and Outcomes of Climate Change Litigation in the United States*, 8 NATURE CLIMATE CHANGE 829, 831–32 (2018) (analyzing quantitative and qualitative data on U.S. climate change lawsuits to determine what strategies the successful litigants employed).
 28. Killingsworth and Palmer wrote the seminal book on environmental rhetoric. See generally M. JIMMIE KILLINGSWORTH & JACQUELINE S. PALMER, *ECOSPEAK: RHETORIC AND ENVIRONMENTAL POLITICS IN AMERICA* (1992). Some scholars have applied rhetoric and literary criticism to environmental justice disputes. See, e.g., Rick Carpenter, *Place-Identity and the Socio-Spatial Environment*, in ENVIRONMENTAL RHETORIC AND ECOLOGIES OF PLACE 200 (Peter N. Goggin ed., 2013); Phaedra C. Pezzullo, *Performing Critical Interruptions: Stories, Rhetorical Invention, and the Environmental Justice Movement*, 65 W.J. COMM. 1 (2001); Steven Schwarze, *Environmental Melodrama*, 92 Q.J. SPEECH 239 (2006).
 29. See, e.g., Jeff Todd, *Ecospeak in Transnational Environmental Tort Proceedings*, 63 KAN. L. REV. 335, 339 (2015) [hereinafter Todd, *Ecospeak*] (quoting Carl G. Herndl & Stuart C. Brown, *Introduction*, in GREEN CULTURE: ENVIRONMENTAL RHETORIC IN CONTEMPORARY AMERICA 3, 3–5 (Carl G. Herndl & Stuart C. Brown eds., 1996)) (claiming that "rhetoric and its analytic methods can help us understand the nature of our environmental debates and their outcomes," including in the context of legal practice); Lisa A. Binder, *Religion, Race, and Rights: A Rhetorical Overview of Environmental Justice Disputes*, 6 WIS. ENVTL. L.J. 1 (1999); Anne Bloom, "Milking the Cash Cow" and Other Stories: Media Coverage of Transnational Workers' Rights Litigation, 30 VT. L. REV. 179 (2006); Michael A. Livermore & Richard L. Revesz, *Interest Groups and Environmental Policy: Inconsistent Posi-*

mentators urge advocates to use different techniques, including revealing larger truths about the dangers of climate change by mastering both the technical and the poetic, tapping into the broader environmental justice narrative, and telling the court a story featuring sympathetic protagonists facing a villainous obstacle.³⁰ While institutional barriers and insufficient legal theories may prevent judges from accepting these stories over those of the opponent,³¹ an explication of the documents and opinions in environmental cases reveals that courts can respond favorably to these narratives. Courts usually employ neutral language about standing and policy when siding with defendants, but in some cases adopt the plaintiffs' environmental tropes and allegories.³² This phenomenon includes *Juliana*, where the plaintiffs structured their complaint as an environmental jeremiad that the court repeated.³³ The scholarship therefore suggests that, while existing laws may provide only a shaky ground upon which to stand, plaintiffs might nonetheless survive a motion to dismiss by framing their dispute in the language of environmental justice.

To explore this potential further, this Article turns to the new rhetoric of Chaim Perelman, which provides a unique framework for analyzing environmental justice litigation because it considers questions of justice and procedure in the adjudication of legal disputes.³⁴ In exceptional cases, a party lacks a legal

tions and Missed Opportunities, 45 ENVTL. L. 1 (2015); Mihaela Popescu & Oscar H. Gandy, Jr., *Whose Environmental Justice? Social Identity and Institutional Rationality*, 19 J. ENVTL. L. & LITIG. 141 (2004).

30. Yuchih Pearl Kan, *Towards a Critical Poiesis: Climate Justice and Displacement*, 33 VA. ENVTL. L.J. 23, 42–43, 51, 54 (2015); Laura King, *Narrative, Nuisance, and Environmental Law*, 29 J. ENVTL. L. & LITIG. 331, 348–49 (2014); Grace Nosek, *Climate Change Litigation and Narrative: How to Use Litigation to Tell Compelling Climate Stories*, 42 WM. & MARY ENVTL. L. & POL'Y REV. 733, 738–39 (2018).
31. See Kan, *supra* note 30, at 54 (“There is little room to ask the law, at least in Court, for a change in the status quo.”); King, *supra* note 30, at 349, 360–61 (writing that “judges facing climate change suits are institutionally handicapped” so that even stories with “sympathetic protagonists” will fail because there is no valid legal claim through which to present the facts).
32. See Michael Burger, *The Last, Last Frontier*, in ENVIRONMENTAL LAW AND CONTRASTING IDEAS OF NATURE: A CONSTRUCTIVIST APPROACH 303, 304–06 (Keith H. Hirokawa ed., 2014); Michael Burger, *Environmental Law / Environmental Literature*, 40 ECOLOGY L.Q. 1, 45–53, 56–57 (2013) (citing *Connecticut v. Am. Elec. Power Co.*, 406 F. Supp. 2d 265 (S.D.N.Y. 2005), *vacated and remanded*, 582 F.3d 309 (2d Cir. 2009), *rev'd*, 564 U.S. 410 (2011)).
33. Weaver & Kysar, *supra* note 5, at 350–53; see also JACQUELINE PEEL & HARI M. OSOFSKY, CLIMATE CHANGE LITIGATION: REGULATORY PATHWAYS TO CLEANER ENERGY 238 (2015) (claiming that “courts have shown an initial receptiveness to” public trust doctrine cases and their “novel, and potentially very powerful, framing of the climate change problem”).
34. See, e.g., GEORGE A. KENNEDY, CLASSICAL RHETORIC AND ITS CHRISTIAN AND SECULAR TRADITION FROM ANCIENT TO MODERN TIMES 295 (2d ed. 1999) (“Perelman was a student of jurisprudence and he approached rhetoric from a philosophical and legal position

entitlement to relief despite suffering injustice, thus raising a conflict of values between law and morals.³⁵ These parties therefore have their best chance of success by appealing to the judge's "sense of equity" and arguing that emerging norms and ineffective laws mean that the legal status quo does not afford justice.³⁶ Defendants respond by raising questions about pleadings, jurisdiction, and forum to shift the court's attention toward a procedural resolution that precludes consideration of the merits.³⁷ Assuming the plaintiffs provide sufficient reasons to justify the choice, however, a sympathetic judge may be persuaded to choose the novel application, interpretation, or extension of existing law over the more straightforward procedural argument.³⁸

Applying the new rhetoric, this Article describes how environmental justice litigation involves a choice of different values and argues that plaintiffs have their best chance of defeating a motion to dismiss by avoiding straightforward legal entitlements; instead, they should appeal to the judge's "sense of equity" by describing the distributive injustice of their situation and the inability of the legal status quo to correct that injustice. Part I frames the environmental justice

rather than as a purely linguistic and literary phenomenon."); Francis J. Mootz III, *Perelman's Theory of Argumentation and Natural Law*, 43 PHIL. & RHETORIC 383, 383 (2010) (referring to Perelman's "deep and abiding concern with justice"); see also Richard Graff & Wendy Winn, *Kenneth Burke's "Identification" and Chaim Perelman and Lucie Olbrechts-Tyteca's "Communion": A Case of Convergent Evolution?*, in THE PROMISE OF REASON: STUDIES IN THE NEW RHETORIC 103, 103–04 (John T. Gage ed., 2011) (calling Perelman, along with rhetorician Kenneth Burke, "the head[s] of the canon of twentieth-century rhetorical thought").

35. CHAIM PERELMAN, *THE IDEA OF JUSTICE AND THE PROBLEM OF ARGUMENT* 26 (John Petrie trans., 1963) [hereinafter PERELMAN, IDEA]; CHAIM PERELMAN, *JUSTICE, LAW, AND ARGUMENT: ESSAYS ON MORAL AND LEGAL REASONING* 38–39, 122, 124 (John Petrie et al. trans., 1980) [hereinafter PERELMAN, JUSTICE]; CHAIM PERELMAN, *THE NEW RHETORIC AND THE HUMANITIES* 115–16 (William Kluback trans., 1979) [hereinafter PERELMAN, HUMANITIES] (observing that legislation and judicial decisions may require settlement between two equally reasonable positions that do not have the same outcome).
36. PERELMAN, IDEA, *supra* note 35, at 32, 35; PERELMAN, JUSTICE, *supra* note 35, at 40–41, 93.
37. PERELMAN, JUSTICE, *supra* note 35, at 77–78 (stating that defendants could argue that precedent is inapplicable or the rule should have been applied in a different way); CHAIM PERELMAN & LUCIE OLBRECHTS-TYTECA, *THE NEW RHETORIC: A TREATISE ON ARGUMENTATION* 35–40 (John Wilkinson & Purcell Weaver trans., 1969) (claiming that an effective argumentative technique is to have the adjudicator stop short of the claims made by an opponent).
38. PERELMAN, HUMANITIES, *supra* note 35, at 115 (stating that a court "may have to choose between several equally reasonable eventualities" which are "coherent and philosophically justified point[s] of view"); PERELMAN, JUSTICE, *supra* note 35, at 40–41, 122; see also NEIL MACCORMICK, *RHETORIC AND THE RULE OF LAW: A THEORY OF LEGAL REASONING* 149 (2005) (explaining how the disputability of legal propositions "can be exploited . . . to try to expound equitable reformulations of, or adventurous new interpretations of, legal rules or principles").

story as encompassing distributive, corrective, and procedural injustices.³⁹ In particular, existing laws offer insufficient vehicles to obtain relief for the environmental harms done to vulnerable communities by powerful corporate and government actors. The grounds for dismissal give judges flexibility, have uncertain applicability, or impose favorable presumptions, however, so plaintiffs sometimes convince a judge to rule against a motion to dismiss despite asserting causes of action that push the boundaries of the status quo. Part II explains the importance of plaintiffs surviving dismissal: litigation is a tactic that supports several strategic movement goals like facilitating settlement, supporting a campaign, and changing the law, but only if the case survives the initial motions. To provide the theory and vocabulary of how plaintiffs can maximize their chance of success, Part II explains the rule of justice that forms part of the new rhetoric of Chaim Perelman.

Part III applies the new rhetoric to environmental justice litigation: given the conflict of values, plaintiffs might prevail in a motion to dismiss if they avoid claims to a legal entitlement and instead highlight the injustice of their situation and the need for bold action by the court to correct it. This framing explains the different outcomes in *Juliana* and *Kivalina*: the former embraced the language of justice with sufficient reasons for the judge to recognize a new constitutional right and creative interpretation of the public trust doctrine over the defendants' dry procedural arguments, while the latter framed an extraordinary application of nuisance law as a straightforward tort rather than provide reasons with which the court could justify an expansive and questionable imposition of liability.

I. THE STORY OF ENVIRONMENTAL JUSTICE LITIGATION

Environmental justice starts with distributive justice or, more accurately, distributive injustice.⁴⁰ The rich and powerful derive the most benefit while suffering the least harm from environmentally harmful activities; conversely, the

39. See Jonas Ebbesson, *Introduction: Dimensions of Justice in Environmental Law*, in ENVIRONMENTAL LAW AND JUSTICE IN CONTEXT 1, 3 (Jonas Ebbesson & Phoebe N. Okowa eds., 2009) (recognizing the focus by environmental justice scholars “on the procedural, distributive and/or corrective elements of justice”).

40. DENNIS C. CORY & TAUHIDUR RAHMAN, ENVIRONMENTAL JUSTICE AND FEDERALISM 1 (2012) (observing that the “central concern” of environmental justice is “that minority and low-income individuals, communities, and populations should not be disproportionately exposed to environmental hazards”); Colin Crawford, *Access to Justice for Four Billion: Urban and Environmental Options and Challenges*, 26 N.Y.U. ENVTL. L.J. 340, 382 (2018) (“The basic demand of the environmental justice movement . . . is to more fairly distribute—or, preferably, reduce in an equitable manner—the harms of industrial and military activities.”); Clifford Rechtschaffen, *Advancing Environmental Justice Norms*, 37 U.C. DAVIS L. REV. 95, 96 (2003) (“Broadly speaking, environmental justice refers to a political and social movement to address the disparate distribution of environmental harms and benefits in our society.”).

poor and minorities derive the least benefit but suffer the most harm.⁴¹ Further, those who benefit cause harm to the places where people “live, work, play, and go to school,” whereas the people who reside there do little or nothing to harm their community.⁴² To correct these injustices, communities have adopted and expanded upon the tactics of the U.S. civil rights movement: they organize at the local level while partnering with national and international environmental and human rights groups, build campaigns around street-level activism supported by traditional and digital media, and engage in protests like marches and sit-ins.⁴³

Litigation is another tactic.⁴⁴ As this Part explains, however, existing tort, constitutional, and statutory laws present a number of challenges that render them imperfect for correcting injustice. Accordingly, defendants often move to dismiss the claims on justiciability grounds or for failure to state a claim. Although challenges that end the lawsuit without a consideration of the merits might seem a type of procedural injustice because they keep the community’s voice from being heard,⁴⁵ these motions are more appropriately characterized as

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41. Carmen G. Gonzalez, *Environmental Justice and International Environmental Law*, in *ROUTLEDGE HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW* 77, 78 (Shawkat Alam et al. eds., 2013) [hereinafter Gonzalez, *EJ*]; Deepa Badrinarayana, *The “Right” Right to Environmental Protection: What We Can Discern from the American and Indian Constitutional Experience*, 43 *BROOK. J. INT’L L.* 75, 78 (2017).
 42. Robert D. Bullard, *Environmental Justice in the Twenty-First Century*, in *THE QUEST FOR ENVIRONMENTAL JUSTICE: HUMAN RIGHTS AND THE POLITICS OF POLLUTION* 19, 30 (Robert D. Bullard ed., 2005) (redefining the term environment from the natural world “to include the place where people live, work, play, and go to school”); see also Gonzalez, *EJ*, *supra* note 41, at 79 (“Despite their far smaller contribution to global environmental degradation, poor countries bear most of the harm due to their vulnerable geographic locations, lack of resources and limited administrative infrastructure.”); *id.* at 83 (reporting that corporations “produce half of the world’s greenhouse gas (GHG) emissions and control half of the global extraction of oil, gas, and coal.”); Purdy, *supra* note 14, at 821 (discussing the “local, self-protective, and immediate” threat felt by community members because of the dumping, concealment, and storage of hazardous waste as done or permitted by others).
 43. Jonathan C. Drimmer & Sarah R. Lamoree, *Think Globally, Sue Locally: Trends and Out-of-Court Tactics in Transnational Tort Actions*, 29 *BERKELEY J. INT’L L.* 456, 474–75, 486, 489–98, 503–08 (2011); Todd, *Trade*, *supra* note 15, at 119–21.
 44. Jonas Ebbesson, *Piercing the State Veil in Pursuit of Environmental Justice* 270, 277, in Ebbesson & Okawa, *supra* note 39 [hereinafter Ebbesson, *Piercing*]; Maxine Burkett, *Climate Justice and the Elusive Climate Tort*, 121 *YALE L.J. ONLINE* 115, 115–16 (2011) [hereinafter Burkett, *Elusive*]; Robert R. Kuehn, *A Taxonomy of Environmental Justice*, 30 *ENVTL. L. REP. NEWS & ANALYSIS* 10,681, 10,694 (2000).
 45. Although “procedural justice” is typically defined as the right for citizens to equal participation in political processes, it also relates to attempts by communities to obtain corrective justice. See Kenneth M. Ehrenberg, *Procedural Justice and Information in Conflict-Resolving Institutions*, 67 *ALB. L. REV.* 167, 189 (2003) (observing that a “conflict-resolving institution” can contribute to injustice if it “fail[s] in its procedure, by failing to use the correct means to settle the dispute”). Compare Kuehn, *supra* note 44, at 10,688 (procedural justice deals with the right “to equal concern and respect for the political decisions about how . . .

procedural hurdles because plaintiffs can overcome them. Each ground for dismissal has uncertain applicability, a balancing test, or a favorable presumption so that judges sometimes rule for the plaintiffs.

A. *Distributive Injustice: The Roots of Environmental Justice*

The environmental justice movement arose from grassroots challenges by low-income and minority persons against companies and the government for siting environmentally-hazardous activities in their communities but not in affluent, white neighborhoods.⁴⁶ The politically and economically powerful exploited environmental laws in ways that left “urban ghettos, barrios, ethnic enclaves, rural ‘poverty pockets,’ and Native American reservations” bearing a disproportionate burden of environmental harm from waste facilities, incinerators, and smelters.⁴⁷ For example, the earliest environmental justice case, *Bean v. Southwestern Waste Management Corp.*,⁴⁸ involved Houston residents suing to block the construction of a proposed waste facility in their primarily African-American neighborhood based upon studies that showed a correlation between waste siting and race.⁴⁹ Subsequent studies showed a correlation between minority and low-income communities and higher levels of exposure to industrial facilities, toxic waste disposal and incinerators, and toxic products like lead paint.⁵⁰ Despite the common argument that these developments bring benefits like job creation to communities alongside the environmental harm, studies have shown that the economic benefits go primarily to those outside the community.⁵¹

The environmental justice movement has globalized in response to trade and investment treaties that incentivize multinational corporations to engage in heavy manufacturing, mineral extraction, and chemical-intensive agriculture in

goods and opportunities are to be distributed”), with Ebbesson, *Piercing*, *supra* note 44, at 276 (discussing the need for “procedural opportunities . . . to prevent or remedy” harm, including “the acts and omissions by public authorities and private persons”).

46. LUKE W. COLE & SHEILA R. FOSTER, FROM THE GROUND UP: ENVIRONMENTAL RACISM AND THE RISE OF THE ENVIRONMENTAL JUSTICE MOVEMENT 10–18 (2001); Badrinarayana, *supra* note 41, at 83–85; Purdy, *supra* note 14, at 818–21.
47. Robert D. Bullard, *Environmental Racism and “Invisible” Communities*, 96 W. VA. L. REV. 1037, 1046 (1994); see also Luke W. Cole, *Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law*, 19 ECOLOGY L.Q. 619, 642, 646–47 (1992) [hereinafter Cole, *Empowerment*].
48. 482 F. Supp. 673 (S.D. Tex. 1979).
49. *Bean*, 482 F. Supp. at 678–79 (S.D. Tex. 1979); see also ROBERT BULLARD, DUMPING IN DIXIE: RACE, CLASS, AND ENVIRONMENTAL QUALITY 138–39 (1990).
50. COLE & FOSTER, *supra* note 46, at 10; Badrinarayana, *supra* note 41, at 83–84; David Monson, *Equal Rights, Governance, and the Environment: Integrating Environmental Justice Principles in Corporate Social Responsibility*, 33 ECOLOGY L.Q. 443, 451 (2006).
51. Alex Geisinger, *The Benefits of Development and Environmental Injustice*, 37 COLUM. J. ENVTL. L. 205, 207–08 (2012).

nations of the Global South.⁵² While the economic benefits flow primarily to the Global North, the resulting environmental harms remain concentrated in poor and indigenous communities of the Global South.⁵³ Arguments that the poor benefit from such development exist on the global scale as well, with claims that the creation of jobs on banana plantations in Central America outweigh the harms of workers being exposed to nematicides containing a chemical that caused sterility in men,⁵⁴ or the influx of development caused by maquiladora plants on the U.S.-Mexico border is a net benefit despite the emission of numerous pollutants.⁵⁵ Often, the affected communities have done nothing to contribute to the harm, but become victims merely by proximity. For example, U.S.-owned *Metales y Derivados* operated in Tijuana, Mexico, and improperly disposed of thousands of tons of lead and other metals, which posed a particular threat to the children in a nearby neighborhood.⁵⁶ And decades of oil extraction by a consortium of foreign oil companies have damaged the land and water of multiple indigenous tribes in the Ecuadorian Amazon rainforest.⁵⁷

Studies show that the richest companies in the world are the largest anthropogenic emitters of the GHGs that lead to climate change: almost two-thirds of industrial carbon pollution since 1854 can be traced to ninety entities, with forty-eight percent of all industrial carbon pollution coming from just twenty companies like Chevron, BP, Shell, and ExxonMobil.⁵⁸ Conversely, cli-

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52. J. Timmons Roberts, *Globalizing Environmental Justice*, in ENVIRONMENTAL JUSTICE AND ENVIRONMENTALISM: THE SOCIAL JUSTICE CHALLENGE TO THE ENVIRONMENTAL MOVEMENT 285, 285–87, 290–91 (Ronald Sandler & Phaedra C. Pezzullo eds., 2007); Madison Condon, *The Integration of Environmental Law into International Investment Treaties and Trade Agreements: Negotiation Process and the Legalization of Commitments*, 33 VA. ENVTL. L.J. 102, 106–07 (2015).
 53. Gonzalez, *EJ*, *supra* note 41, at 78–80; Carmen Gonzalez, *Environmental Justice, Human Rights, and the Global South*, 13 SANTA CLARA J. INT'L L. 151, 154–55 (2015); Carmen G. Gonzalez, *Beyond Eco-Imperialism: An Environmental Justice Critique of Free Trade*, 78 DENV. U. L. REV. 979, 985–87 (2001) [hereinafter Gonzalez, *Eco-Imperialism*]; Chelsea M. Keeton, *Sharing Sustainability: Preventing International Environmental Injustice in an Age of Regulation*, 48 HOUS. L. REV. 1167, 1171–73 (2012).
 54. Jeff Todd, *The Rhetoric of Recognition*, 45 MCGEORGE L. REV. 209, 241–42 (2013) [hereinafter Todd, *Recognition*].
 55. Chris Wold, *Evaluating NAFTA and the Commission for Environmental Cooperation: Lessons for Integrating Trade and Environment in Free Trade Agreements*, 28 ST. LOUIS U. PUB. L. REV. 201, 224–25 (2008).
 56. Tseming Yang, *The Effectiveness of the NAFTA Environmental Side Agreement's Citizen Submission Process: A Case Study of Metales y Derivados*, 76 U. COLO. L. REV. 443, 447–49 (2005).
 57. See generally Judith Kimerling, *Habitat as Human Rights: Indigenous Huaorani in the Amazon Rainforest, Oil, and Ome Yasuni*, 40 VT. L. REV. 445 (2016).
 58. Dellinger, *supra* note 4, at 530 (citing UNION OF CONCERNED SCIENTISTS, LARGEST PRODUCERS OF INDUSTRIAL CARBON EMISSIONS (Dec. 9, 2013), <https://perma.cc/9RNW-CX8P>); see Douglas A. Kysar, *What Climate Change Can Do about Tort Law*, 41 ENVTL. L.

mate justice advocates assert that “the global impacts of climate change will fall disproportionately on minority and low-income communities,” which in turn emit a comparatively insignificant amount of GHGs.⁵⁹ For example, New York intentionally located public housing on remote, low-priced coastal land, causing extreme weather events to have a greater impact on poorer people.⁶⁰ Small island nations often lack industrial capacity and therefore emit few GHGs, yet rising seas have begun to overwhelm their lands, leading to food insecurity and the loss of habitable area.⁶¹ The traditional lifestyles of indigenous peoples of the Arctic mean that they benefit little from oil and energy production and emit few GHGs, yet climate change destroys not only their land but their culture: decreased fishing and whaling from ocean acidification, fewer prey animals like caribou because of loss of habitat, dangerous travel because of unpredictable weather, and flooded villages from rising seas and melted sea ice and more intense storms.⁶² And consider the inequity of the government permitting energy and oil companies to profit for decades from the production and burning of fossil fuels while the powerless—the young and those not yet born—suffer the worst consequences.⁶³

1, 38 (2011) (quoting Matthew F. Pawa, *Global Warming: The Ultimate Public Nuisance*, 39 ENVTL. L. REP. 10,230, 10,238 (2009)) (reporting that fifty companies are responsible for seventy-five percent—and just five companies for twenty-five percent—of emissions in the U.S. power sector).

59. Rebecca Tsosie, *Indigenous Peoples and Environmental Justice: The Impact of Climate Change*, 78 U. COLO. L. REV. 1625, 1633, 1636 (2007) [hereinafter Tsosie, *Impact*]; see Randall S. Abate & Elizabeth Ann Kronk, *Commonality Among Unique Indigenous Communities: An Introduction to Climate Change and Its Impact on Indigenous Peoples*, 26 TULANE ENVTL. L.J. 179, 179 (2013) (“Indigenous peoples generally contribute very limited quantities of greenhouse gases to the global atmosphere.”); Nathalie J. Chalifour & Jessica Earle, *Feeling the Heat: Climate Litigation under the Canadian Charter’s Right to Life, Liberty, and Security of the Person*, 42 VT. L. REV. 689, 698 (2018) (“Research and experience increasingly shows that vulnerable populations bear more than their share of the climate-change burden—even though they have, in general, contributed less to the creation of the problem. This is climate injustice.”).
60. Michael B. Gerrard, *What Does Environmental Justice Mean in an Era of Global Climate Change?*, 19 J. ENVTL. & SUSTAINABILITY L. 278, 284–85 (2013).
61. Tsosie, *Impact*, *supra* note 59, at 1636–38; Marissa S. Knodel, *Wet Feet Marching: Climate Justice and Sustainable Development for Climate Displaced Nations in the South Pacific*, 14 VT. J. ENVTL. L. 127, 132–34 (2012).
62. Abate & Kronk, *supra* note 59, at 183–84; Knodel, *supra* note 9, at 1189–92; Rebecca Tsosie, *Climate Change and Indigenous Peoples: Comparative Models of Sovereignty*, 26 TUL. ENVTL. L.J. 239, 249 (2013) [hereinafter Tsosie, *Sovereignty*].
63. Molodanof & Durney, *supra* note 6, at 219–20.

B. *Corrective Injustice: The Challenges of Environmental Justice Litigation*

Communities often turn to litigation to prevent the siting of hazardous operations or to recover damages or obtain equitable relief.⁶⁴ Sometimes the court grants that relief, particularly when challenging a permit.⁶⁵ But in more complex cases, the laws are often insufficient to provide the remedies sought.⁶⁶

Environmental law traces its origins to tort law, so many plaintiffs seek a remedy by asserting claims for negligence, strict liability, trespass, and public and private nuisance.⁶⁷ Tort law was designed to remedy situations in which a single plaintiff can show a clear harm caused by a single, identifiable tortfeasor.⁶⁸ Modern environmental tort lawsuits typically lack all three because they involve a long latency period, diffuse harms affecting multiple victims, and diffuse origins from multiple tortfeasors.⁶⁹ Moreover, persons from poor and minority communities face additional difficulties.⁷⁰ For example, the harm might relate to operations that lasted for decades, so companies might no longer exist or cannot be identified.⁷¹ Further, persons of color and the poor are often exposed to numerous background hazards in their community, workplace, and food, all of which may be causally linked to the harm they have suffered.⁷² Accordingly, it is more difficult for them to show that the actions of any one defendant more likely than not caused any particular harm, which is required to prove causation.⁷³ Similarly, pollution-trespass claims can fail when several

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64. Robert D. Bullard, *Leveling the Playing Field Through Environmental Justice*, 23 VT. L. REV. 453, 454–55 (1999); April Hendricks Killcreas, *The Power of Community Action: Environmental Injustice and Participatory Democracy in Mississippi*, 81 MISS. L.J. 769, 770–71 (2012).
65. Catherine Millas Kaiman, *Environmental Justice and Community-Based Reparations*, 39 SEATTLE U. L. REV. 1327, 1342 (2016); see, e.g., Cole, *Litigation*, *supra* note 16, at 526 (arguing that courts are open to plaintiffs using environmental laws to make “credible challenges” to the permitting of a facility); Helen H. Kang, *Pursuing Environmental Justice: Obstacles and Opportunities—Lessons from the Field*, 31 WASH. U. J.L. & POL’Y 121, 130–32 (2009) (citing *Cmtys. for a Better Env’t v. City of Richmond*, No. N08-1429 (Cal. Super. Ct. June 4, 2009) (unreported minute order)) (setting aside the City of Richmond, California’s approved expansion of a Chevron refinery).
66. See Abate, *Public*, *supra* note 9, at 207–08 (noting how areas outside traditional environmental law have “encountered some obstacles” in federal courts).
67. Albert C. Lin, *The Unifying Role of Harm in Environmental Law*, 2006 WIS. L. REV. 897, 903–05 (2006); Todd, *Trade*, *supra* note 15, at 101.
68. Kysar, *supra* note 58, at 62 (“Classical tort is most comfortable with liability when A is shown to have directly and exclusively caused a discrete harm to B.”).
69. Adam D.K. Abelkop, *Tort Law as an Environmental Policy Instrument*, 92 OR. L. REV. 381, 399–407 (2013).
70. Kang, *supra* note 65, at 126–29.
71. Kathy Seward Northern, *Battery and Beyond: A Tort Law Response to Environmental Racism*, 21 WM. & MARY ENVTL. L. & POL’Y REV. 485, 555–56 (1997).
72. Cole, *Empowerment*, *supra* note 47, at 621–31, 647–48; Allan Kanner, *Environmental Justice, Torts and Causation*, 34 WASHBURN L.J. 505, 511–12 (1995).
73. Todd, *Trade*, *supra* note 15, at 101.

companies operate in the same area because plaintiffs cannot show that one company's trespass rather than the others' caused harm.⁷⁴

Both public and private nuisance claims are appealing because they have broad application and allow for money damages and equitable relief.⁷⁵ Under public nuisance, the plaintiffs must prove that the defendant's action constitutes an "unreasonable interference," while private nuisance involves balancing the social utility of the operation against the harm caused.⁷⁶ The social utility of environmentally-polluting activities is often quite high, however, and historical reliance on industry operations makes these activities seem reasonable. Therefore, the interference might be found reasonable and the plaintiff denied relief, or courts might award only money damages but decline equitable relief if the utility is high, or they might decline even money damages if the amount is so high that it forces the defendant to cease operations.⁷⁷ When added to the need for poor communities to pay for costly testing and experts to prove complex issues of causation and harm,⁷⁸ tort theories present a number of challenges.

Federal environmental statutes suffer from similar shortcomings. In situations where plaintiffs challenge discrete sources of pollution, they have had success.⁷⁹ Some of these environmental laws allow for a direct action against a corporate polluter: CERCLA empowers citizens to sue a responsible "person" to recover "response costs" resulting from any "release" of a "hazardous substance" from a "facility," and its statutory terms impose strict liability as well as retroactive joint and several liability.⁸⁰ While plaintiffs have obtained clean-up from private defendants under CERCLA, the EPA must first list sites on the National Priorities List, and CERCLA processes are very lengthy and complicated.⁸¹ Other times, plaintiffs attack the polluter indirectly with actions against governmental entities, such as by bringing suit against a regional or local permitting authority.⁸² The National Environmental Policy Act ("NEPA") requires an Environmental Impact Statement for "major Federal actions

74. Kyle W. La Londe, *Who Wants to Be an Environmental Justice Advocate?: Options for Bringing an Environmental Justice Complaint in the Wake of Alexander v. Sandoval*, 31 B.C. ENVTL. AFF. L. REV. 27, 44–45 (2004); Northern, *supra* note 71, at 544–45.

75. La Londe, *supra* note 74, at 43–44.

76. *Id.* at 43–44 (citing, *inter alia*, RESTATEMENT (SECOND) OF TORTS § 821(B)(1) (1979); HENRY N. BUTLER & JONATHAN R. MACEY, USING FEDERALISM TO IMPROVE ENVIRONMENTAL POLICY 8 (1996)).

77. *Id.* at 44–45; Northern, *supra* note 71, at 547–48.

78. Kaiman, *supra* note 65, at 1352–53; Todd, *Trade*, *supra* note 15, at 102–03.

79. Cole, *Litigation*, *supra* note 16, at 527–28.

80. See Abelkop, *supra* note 69, at 407–08 (citing 42 U.S.C. §§ 9601(1), 9607; JOHN S. APPLIGATE ET AL., THE REGULATION OF TOXIC SUBSTANCES AND HAZARDOUS WASTES 512–22 (2d ed. 2011)).

81. Kaiman, *supra* note 65, at 1347–48.

82. Kang, *supra* note 65, at 132; see, e.g., Nat. Res. Def. Council v. S. Coast Air Quality Mgmt. Dist., No. BS 110792, 2–4 (Super. Ct. L.A. Cty. July 29, 2008) (enjoining the South Coast

significantly affecting the quality of the human environment,” such as issuing federal permits.⁸³ A federal agency’s failure to follow even one of NEPA’s many procedural requirements—which includes analyzing the potential effects on environmental justice communities—could lead to the revocation of a permit.⁸⁴ Despite NEPA’s broad applicability, it offers little remedial power: plaintiffs are unlikely to halt an already-approved project, and the usual result is “the simple reissuance of environmental impact assessments with appropriate note and comment periods.”⁸⁵ Another major shortcoming is that, even if a plaintiff wins a case, environmental statutes typically do not allow for the recovery of money damages.⁸⁶ Finally, although the scientific understanding of complex phenomena like climate change has evolved rapidly in the last few decades, federal environmental statutes like NEPA and the Clean Air Act (“CAA”)⁸⁷ were designed “to deal with the environmental problems that were known at [the] time” they were enacted, in the late 1960s through the early 1980s.⁸⁸ Accordingly, they are “clunky tool[s]” for dealing with problems like climate change.⁸⁹

With the connection of the environmental justice movement to civil rights, plaintiffs have also turned to constitutional law and to civil rights statutes for relief. Studies had shown a correlation between minority communities and exposure to industrial and commercial environmental hazards.⁹⁰ These communities therefore have challenged the siting and operation of waste facilities as violating the equal protection clause.⁹¹ These claims have failed because

Air Quality District from selling pollution credits for the construction of eleven new power plants in the Los Angeles area).

83. 42 U.S.C. § 4332(C) (2018); *see also* Uma Outka, *NEPA and Environmental Justice: Integration, Implementation, and Judicial Review*, 33 B.C. ENVTL. AFF. L. REV. 601, 603–04 (2006) (citing 40 C.F.R. § 1508.18 (2005)).
84. Killcreas, *supra* note 64, at 799–800; *see also* COUNCIL ON ENVTL. QUALITY, ENVIRONMENTAL JUSTICE: GUIDANCE UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT 4 (1997).
85. Gregg P. Macey & Lawrence E. Susskind, *The Secondary Effects of Environmental Justice Litigation: The Case of West Dallas Coalition for Environmental Justice v. EPA*, 20 VA. ENVTL. L.J. 431, 435–36 (2001); *see also* La Londe, *supra* note 74, at 48; Todd, *Trade, supra* note 15, at 102.
86. *See* Kaiman, *supra* note 65, at 1346–48 (writing that the Clean Water Act, Clean Air Act, Resource Conservation Recovery Act, and Toxic Substances Control Act do not allow for money damages).
87. 42 U.S.C. § 7401 *et seq.* (2018).
88. Gerrard, *supra* note 60, at 280–82.
89. *Id.* at 281.
90. COLE & FOSTER, *supra* note 46, at 10; Binder, *supra* note 29, at 6–7.
91. *See e.g.*, R.I.S.E., Inc. v. Kay, 768 F. Supp. 1144 (E.D. Va. 1991), *aff’d*, 977 F.2d 573 (4th Cir. 1992); E. Bibb Twiggs Neighborhood Ass’n v. Macon-Bibb Cty. Planning & Zoning Comm’n, 706 F. Supp. 880 (M.D. Ga. 1989), *aff’d*, 888 F.2d 1576 (11th Cir. 1989), *opinion amended and superseded on denial of reh’g*, 896 F.2d 1264 (11th Cir. 1989).

plaintiffs must prove discriminatory intent, not merely discriminatory impact.⁹² Plaintiffs seemed to find a way around this high hurdle based on the Supreme Court's ruling in *Alexander v. Choate* that federal agency regulations promulgated under Section 602 of Title VI of the Civil Rights Act could address "actions having an unjustifiable disparate impact on minorities."⁹³ However, the Supreme Court later ruled that Title VI does not include an implied private right of action to enforce Section 602 regulations, nor does Section 602 create a private remedy,⁹⁴ and with no express private right of action, Section 602 claims became closed to environmental justice plaintiffs.⁹⁵ Similarly, plaintiffs cannot enforce Title VI by bringing a Section 1983 claim because this section requires not merely violation of a federal law but of a federal right, and Title VI does not create an actionable right.⁹⁶

Persons from many nations of the Global South face additional hurdles when suing multinational corporations in U.S. courts.⁹⁷ Defendants could argue that choice of law principles balance in favor of applying foreign statutes from the place where the harm occurred, rather than U.S. state common law tort theories, thus potentially limiting recovery.⁹⁸ Further, the presumption against extraterritoriality precludes application of U.S. statutes like CERCLA to activi-

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92. Cole, *Litigation*, *supra* note 16, at 538–39; Purdy, *supra* note 14, at 829; *see* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 270–71 (1977) (rejecting claims based upon discriminatory impact rather than discriminatory intent as “without independent constitutional significance”).
93. 469 U.S. 287, 293 (1985); *see, e.g.*, Chester Residents Concerned for Quality Living v. Seif, 132 F.3d 925, 927 (3d Cir. 1997), *vacated*, 524 U.S. 974 (1998) (ruling, in case brought by community group, that permit from Pennsylvania Department of Environmental Quality for soil remediation facility violated EPA regulations on disparate impact).
94. *Alexander v. Sandoval*, 532 U.S. 275, 288–89 (2001).
95. La Londe, *supra* note 74, at 34 (“[T]he decision in *Alexander v. Sandoval* closed the door to private individuals seeking to bring environmental justice claims under § 602 of Title VI.”).
96. *Id.* at 42; Jeremy Linden, Note, *At the Bus Depot: Can Administrative Complaints Help Stalled Environmental Justice Plaintiffs?*, 16 N.Y.U. ENVTL. L.J. 170, 186–87 (2008); *see* Gonzaga Univ. v. Doe, 536 U.S. 273, 283–84, 286–87 (2002) (holding that statutes that create no privately enforceable rights cannot be enforced under Section 1983 and restating the finding in *Sandoval* that there was no evidence of intent by Congress to create an implied right of action under Title VI).
97. Noah M. Sachs, *Beyond the Liability Wall: Strengthening Tort Remedies in International Environmental Law*, 55 UCLA L. REV. 837, 848 (2008) (“The hurdles include obtaining personal jurisdiction over foreign firms, extraterritorial service of process, the local action rule . . . , resolving choice of law questions, overcoming motions to dismiss on the grounds of forum non conveniens, deciding whether a defendant’s governmental permit is relevant to its tort liability, and enforcing judgments.”).
98. *See* John S. Baker, Jr. & Agustin Parise, *Conflicts in International Tort Litigation Between U.S. and Latin American Courts*, 42 U. MIAMI INTER-AM. L. REV. 1, 30–31 (2010) (writing that U.S. courts’ application of the traditional *lex loci* rule for torts would deny foreign plaintiffs the opportunity to recover the punitive damages they seek in US courts); *see also* Walter W. Heiser, *Forum Non Conveniens and Choice of Law: The Impact of Applying Foreign Law in*

ties and harms occurring in another country.⁹⁹ Some commentators had argued that the Alien Tort Statute (“ATS”) provided one option for relief,¹⁰⁰ but the Supreme Court’s ruling in *Kiobel v. Royal Dutch Petroleum Co.*¹⁰¹ restricted that statute to a narrow range of activities,¹⁰² making application of the ATS to environmental claims far less certain if not functionally “dead.”¹⁰³

C. *Procedural Injustice—or Merely a Hurdle?: The Motion to Dismiss*

In responding to these causes of action, defendants have a number of options to support a motion to dismiss, including those at issue in *Juliana* and *Kivalina*: justiciability doctrines like political question and standing, which are raised under Rule 12(b)(1), and the Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted.¹⁰⁴ In light of how environ-

Transnational Tort Actions, 51 WAYNE L. REV. 1161, 1183 (2005) (noting that Mexico has a \$2500 cap on liability for wrongful death of a child).

99. See, e.g., James L. Stengel & Kristina Pieper Trautmann, *Determining United States Jurisdiction over Transnational Litigation*, 35 REV. LITIG. 1, 35 (2016) (writing that statutory provisions like CERCLA are “fully subject to the presumption against extraterritoriality”).
100. See, e.g., Drimmer & Lamoree, *supra* note 43, at 465; John T. Suttles, Jr., *Transmigration of Hazardous Industry: The Global Race to the Bottom, Environmental Justice, and the Asbestos Industry*, 16 TUL. ENVTL. L.J. 1, 41–42 (2002).
101. 569 U.S. 108 (2013).
102. *Id.* at 124.
103. Roger P. Alford, *Human Rights After Kiobel: Choice of Law and the Rise of Transnational Tort Litigation*, 63 EMORY L.J. 1089, 1091 (2014); see also Stengel & Trautmann, *supra* note 99, at 18–19; cf. Myanna Dellinger, *Post-Jesner Climate Change Lawsuits under the Alien Tort Statute*, 44 COLUM. J. ENVTL. L. 241, 244 (2019) (urging plaintiffs to bring ATS claims for climate-change-related harms but concluding that “an ATS-based suit against American corporations for climate-change damages may be unlikely to succeed under the current Supreme Court composition”).
104. See Crawford, *supra* note 40, at 383 (writing that access to justice barriers like standing rules make it “difficult to vindicate rights claims for environmental harms and benefits”); compare FED. R. CIV. P. 12(b)(1) (providing for dismissal for “lack of subject matter jurisdiction”), with FED. R. CIV. P. 12(b)(6) (providing for dismissal for “failure to state a claim upon which relief can be granted”). This Part addresses only federal doctrines, because environmental justice advocates focus on federal courts. See Tracy D. Hester, *A New Front Blowing in: State Law and the Future of Climate Change Public Nuisance Litigation*, 31 STAN. ENVTL. L.J. 49, 50 (2012) (calling climate change litigation “an overwhelmingly federal affair” because of reliance on the federal common law tort of public nuisance); Robert J. Klee, *What’s Good for School Finance Should Be Good for Environmental Justice: Addressing Disparate Environmental Impacts Using State Courts and Constitutions*, 30 COLUM. J. ENVTL. L. 135, 137, 141 (2005) (claiming that “the majority of the environmental justice advocacy community” has “focus[ed] on the federal courts” and claims based on the U.S. Constitution, federal statutes, and federal regulations). A survey of state procedural laws is beyond the scope of this Article, but many states have some of the same bases for dismissal as those provided for by the Federal Rules of Civil Procedure. See, e.g., Roger Michael Michalski, *Tremors of Things to Come: The Great Split Between Federal and State Pleading Standards*, 120 YALE L.J.

mental justice plaintiffs must rely upon tenuous and uncertain theories of liability, dismissal might seem inevitable. As this Section explains, however, the justiciability doctrines have uncertain applicability and balancing tests while the Rule 12(b)(6) ground for failure to state a claim has presumptions in favor of plaintiffs; accordingly, judges often have sufficient flexibility to rule against dismissal.

1. *Justiciability Doctrines: Political Question and Standing*

Justiciability doctrines have their foundation in separation-of-powers concerns.¹⁰⁵ Because political question and standing relate to the court's constitutional authority under Article III, they raise threshold questions that the court must answer before considering other grounds for dismissal.¹⁰⁶ Although these doctrines can bring an early halt to federal cases,¹⁰⁷ the Supreme Court opinions articulating these doctrines give judges considerable leeway in interpretation. Accordingly, they sometimes rule in the plaintiffs' favor, including cases where the plaintiffs seek monetary or injunctive relief for environmental harms.

The Court in *Baker v. Carr*¹⁰⁸ listed six reasons why a case might present a nonjusticiable political question, with the first three treated as constitutional limits on the court's jurisdiction: (1) if it presents a "textually demonstrable constitutional commitment of the issue to a coordinate political department," (2) if it involves a "lack of judicially discoverable and manageable standards for

ONLINE 109, 110 (2010), <https://perma.cc/TJ33-NR8F> ("[T]wenty-six state courts . . . modeled their pleading standards after the federal rule.").

105. *Baker v. Carr*, 369 U.S. 186, 210 (1962) ("The nonjusticiability of a political question is primarily a function of the separation of powers."); *see also* *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 559–60 (1992) (recognizing that standing is a "landmark" of the constitutional separation of powers).
106. *See, e.g.*, Christina A. Lee, Comment, *Taliaferro v. Darby Township Zoning Board: Pretextual Recognition of § 1983 Standing to Mitigate Failure to Recognize Standing Under § 1981*, 41 U.C. DAVIS L. REV. 741, 749–50 (2007). Although defendants raise political question and standing challenges under Rule 12(b)(1), a court can have Article III jurisdiction but dismiss the case if it raises a nonjusticiable political question. *See* John Harrison, *The Political Question Doctrines*, 67 AM. U. L. REV. 457, 496 (2017) ("Justiciability is distinct from subject matter jurisdiction in that a court can have jurisdiction to decide a case that turns on nonjusticiability, and indeed a court can award relief in a case in which an issue is nonjusticiable.").
107. *See, e.g.*, *La Londe*, *supra* note 74, at 59 (citing *Mount Graham Coal. v. McGee*, 52 Fed. App'x 354, 355 (9th Cir. 2002)) (affirming dismissal as moot of claims by Apache peoples based on the National Historic Preservation Act to halt further construction of an observatory on land they considered sacred because the construction work was already complete). These justiciability doctrines do not apply to state courts. *See* John M. Greabe, *The Asymmetry Problem: Reflections on Calvin Massey's Standing in State Courts, State Law, and Federal Review*, 15 U.N.H. L. REV. 273, 281 & n.49 (2017) (citing cases) ("[S]tate courts are not required to heed federal justiciability doctrines.").
108. 396 U.S. 186 (1962).

resolving it,” and (3) the “impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion.”¹⁰⁹ The second and third factors can prevent a court from affording equitable relief, such as when doing so will require fashioning standards and enforcing them against other governmental actors.¹¹⁰ Consider *Gilligan v. Morgan*,¹¹¹ where the Court invoked the political question doctrine in a case arising from the Kent State University shootings about the training and operation of the Ohio National Guard: “The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject *always* to civilian control of the Legislative and Executive Branches.”¹¹² A trial court might apply this reasoning to dismiss environmental justice cases. For example, climate change is a complex global phenomenon that results from multiple natural and anthropogenic sources of GHGs, so some commentators argue that courts lack judicially manageable standards for fashioning GHG emissions caps; accordingly, this type of relief may be better left to the legislative or executive branches rather than a federal public nuisance lawsuit.¹¹³

In *Comer v. Murphy Oil USA, Inc.*,¹¹⁴ the district court extended this reasoning to dismiss a suit where the plaintiffs sought only money damages.¹¹⁵ Property owners from Mississippi who suffered losses in Hurricane Katrina sued several energy and oil companies for nuisance, trespass, and negligence, arguing that climate change caused by GHG emissions intensified the storm

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109. Nathan Howe, *The Political Question Doctrine's Role in Climate Change Nuisance Litigation: Are Power Utilities the First of Many Casualties?*, 40 ENVTL. L. REP. NEWS & ANALYSIS 11,229, 11,231 (2010) (quoting *Baker*, 369 U.S. at 217). The other three considerations are prudential: the “impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government,” an “unusual need for unquestioning adherence to a political decision already made,” and the “potentiality of embarrassment from multifarious pronouncements by various departments on one question.” *Baker*, 369 U.S. at 217; see also *Wang v. Masaitis*, 416 F.3d 992, 995–96 (9th Cir. 2005) (calling the first three *Baker* factors constitutional limits on the court’s jurisdiction and the other three prudential considerations against judicial intervention).
110. Harrison, *supra* note 106, at 481 (“Contemporary political question doctrine incorporates the principle that courts may not grant remedies that would control non-judicial decisions to an impermissible extent.”); see, e.g., *Koochi v. United States*, 976 F.2d 1328, 1332 (9th Cir. 1992) (“[B]ecause the framing of injunctive relief may require the courts to engage in the type of operational decision-making beyond their competence and constitutionally committed to other branches, such suits are far more likely to implicate political questions.”).
111. 413 U.S. 1 (1973).
112. *Id.* at 10 (emphasis in original).
113. See, e.g., Matthew Edwin Miller, Note, *The Right Issue, the Wrong Branch: Arguments Against Adjudicating Climate Change Nuisance Claims*, 109 MICH. L. REV. 257, 271–72, 275–76 (2010).
114. 839 F. Supp. 2d 849 (S.D. Miss. 2012).
115. *Id.* at 868.

and thus led to damages to their coastal property.¹¹⁶ The court found that the claims presented nonjusticiable political questions because of the second and third *Baker* factors.¹¹⁷ It concluded that “the plaintiffs are asking the Court, or more specifically a jury, to determine without the benefit of legislative or administrative regulation, whether the defendants’ emissions are ‘unreasonable,’” and thus that Mississippi tort law “would not provide sufficient guidance to the Court or a jury” in answering that question.¹¹⁸ The court likewise concluded that “[i]t is unclear how this Court or any jury, regardless of its level of sophistication, could determine whether the defendants’ emissions unreasonably endanger the environment or the public without making policy determinations that weigh the harm caused by the defendants’ actions against the benefits of the products they produce.”¹¹⁹

Other courts and commentators opine that these *Baker* factors should pose no bar to plaintiffs suing private actors for money damages, however.¹²⁰ Chief Justice Burger in *Gilligan* wrote that “we neither hold nor imply that the conduct of the National Guard is always beyond judicial review or that there may not be accountability in a judicial forum for violations of law or for specific unlawful conduct by military personnel, whether by way of damages or injunctive relief.”¹²¹ Indeed, in a later case where plaintiffs sought money damages for wrongful death arising from the events at Kent State, the Court ruled that the governmental defendants did not enjoy sovereign immunity.¹²² The *Baker* factors therefore seem inapplicable to tort claims for money damages, particularly if the defendants are non-governmental actors: torts, like nuisance, are well-recognized. Courts typically grant money damages as relief and should not deny the chance for money damages based upon future legislative action that may or may not provide relief.¹²³ For example, in *Bell v. Cheswick Generating Station*,¹²⁴ a putative class of plaintiffs who owned or inhabited property within one mile of the defendant’s coal-fired electrical generating plant sought money damages and equitable relief because of ash and contaminants settling on their prop-

116. *Id.* at 853–54.

117. *Id.* at 865.

118. *Id.* at 864.

119. *Id.*

120. Harrison, *supra* note 106, at 481–84.

121. *Gilligan v. Morgan*, 413 U.S. 1, 11–12 (1973).

122. *Scheuer v. Rhodes*, 416 U.S. 232, 234, 237–39 (1974).

123. Howe, *supra* note 109, at 11,230; Jill Jaffe, Note, *The Political Question Doctrine: An Update in Response to Recent Developments*, 38 *ECOLOGY L.Q.* 1033, 1047–53 (2011); see Harrison, *supra* note 106, at 512–13 (“[A] substantial number of lower court decisions have seriously misunderstood the Supreme Court’s political question doctrine” when they invoke it in cases where “the plaintiff was a private person seeking relief on the basis of principles of liability that apply between private persons.”).

124. 734 F.3d 188 (3d Cir. 2013).

erty.¹²⁵ In response to plaintiffs' assertion of several Pennsylvania common law torts, the defendant argued that it owed no extra duty under state law since it was subject to comprehensive regulation under the CAA.¹²⁶ Although the district court granted dismissal, the Third Circuit reversed.¹²⁷ The appellate court rejected the political question doctrine argument because "[n]o court has ever held that such a constitutional commitment of authority regarding the redress of individual property rights for pollution exists in the legislative branch."¹²⁸

Nor does the political question doctrine prevent all environmental suits against governmental defendants from going forward—even those where plaintiffs seek equitable remedies. To the contrary, *Baker* recognizes that some cases involve a "delicate exercise in constitutional interpretation" about the actions of another branch of government so that judges conduct a "discriminating inquiry into the precise facts and posture of the particular case."¹²⁹ The Supreme Court more recently wrote that the political question doctrine presents only a "narrow exception" to the judiciary's "responsibility to decide cases properly before it."¹³⁰ Accordingly, the Court in *Japan Whaling Association v. American Cetacean Society* ruled that the political question doctrine does not allow a court to "shirk" its responsibilities to interpret statutes, treaties, and executive agreements even if the case has political ramifications, as in a conservation group's challenge to the U.S. certification of Japanese whaling practices.¹³¹ Likewise, in *Center for Biological Diversity v. Mattis*,¹³² environmental organizations and residents brought a National Historic Preservation Act challenge against the Department of Defense for its proposed construction of a military base in Okinawa, Japan. They sought an injunction on the ground that construction would harm the dugong, a marine mammal of such significance to Okinawan culture that the dugong is protected as "cultural property" under Japanese law.¹³³ Although the district court dismissed for lack of standing and political question, the Ninth Circuit reversed, finding that the potential for injunctive relief did not raise political questions.¹³⁴ The appellate court ruled that forbidding courts from exercising

125. *Id.* at 189.

126. *Id.*

127. *Id.* at 189–90.

128. *Id.* at 198.

129. *Baker v. Carr*, 369 U.S. 186, 211, 217 (1962); *see also id.* at 198 ("In the instance of nonjusticiability, consideration of the cause is not wholly and immediately foreclosed; rather, the Court's inquiry necessarily proceeds to the point of deciding whether the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded.").

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

131. *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986).

132. 868 F.3d 803 (9th Cir. 2017).

133. *Id.*

134. *Id.* at 808–09, 827–29.

their equitable discretion just because security and foreign affairs were at stake “would introduce an overbroad rule in conflict with controlling precedent.”¹³⁵

Similarly, the requirement that plaintiffs have standing—“a genuine interest and stake in [the] case”—for each form of relief sought¹³⁶ does not necessarily preclude environmental justice cases from advancing. The Court in *Lujan v. Defenders of Wildlife*¹³⁷ announced a three-prong test for constitutional standing: plaintiff has suffered a concrete injury, causation that is “fairly traceable” to defendant’s conduct, and the injury can be redressed by a court order.¹³⁸ One commentator has characterized the second element as “a mirror in which the judge can perceive her own preferences—when an injury is ‘fairly traceable’ is simply a question of what a judge regards as fair.”¹³⁹ Given the difficulty facing environmental justice plaintiffs in proving tort causation, the traceable causation prong seems an impossible barrier to overcome.¹⁴⁰ For example, the *Comer* court found that the plaintiffs lacked standing to pursue the tort suit because they “[did] not allege[] injuries that are fairly traceable to the defendants’ conduct.”¹⁴¹ The court reasoned that a finding that GHG emissions are contributing to global warming and the resulting rising seas and extreme weather events “does not in and of itself support the contention that the plaintiffs’ property damage is fairly traceable to the defendants’ emissions.”¹⁴²

At most, the plaintiffs can argue that the types of emissions released by the defendants, when combined with similar emissions released over an extended period of time by innumerable manmade and naturally-occurring sources encompassing the entire planet, may have contributed to global warming, which caused sea temperatures to rise, which in turn caused glaciers and icebergs to melt, which caused sea levels to rise, which may have strengthened Hurricane Katrina, which damaged the plaintiffs’ property.¹⁴³

135. *Id.* at 829.

136. Mank, *supra* note 11, at 875 (citing, inter alia, U.S. CONST. art. III, § 2, cl. 1; *Stark v. Wickard*, 321 U.S. 288, 310 (1944)).

137. 504 U.S. 555 (1992).

138. *Id.* at 560–61; Michael E. Solimine, *Congress, Separation of Powers and Standing*, 59 CASE W. RES. L. REV. 1023, 1024 (2009).

139. Daniel A. Farber, *Standing on Hot Air: American Electric Power and the Bankruptcy of Standing Doctrine*, 121 YALE L.J. ONLINE 121, 122 (2011); see also *id.* (criticizing the “unpredictability and ideological nature of standing law”); F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275, 276 (2008) (arguing that the standing doctrine “has produced an incoherent and confusing law of federal courts”).

140. Mary K. Nagle, *Tracing the Origins of Fairly Traceable: The Black Hole of Private Climate Change Litigation*, 85 TUL. L. REV. 477, 480–81 (2010).

141. *Comer v. Murphy Oil USA, Inc.*, 839 F. Supp. 2d 849, 862 (S.D. Miss. 2012).

142. *Id.* at 861.

143. *Id.*

The court concluded that the causal connection was too difficult a showing because the plaintiffs had to connect the defendants' emissions specifically to Hurricane Katrina and prove that but for the defendants' GHG emissions, their injuries would not have occurred.¹⁴⁴

The causation prong of Article III standing is supposed to have a low threshold, however: courts "should simply look for plausible evidence of a causal relationship between the plaintiffs' injuries and the defendant's actions, rather than the proof necessary for proximate causation on the merits."¹⁴⁵ Yet the *Comer* court seems to have required the higher level of proof: it compared the "more tenuous . . . causal chain"¹⁴⁶ in the instant lawsuit with that in *Friends of the Earth, Inc. v. Crown Central Petroleum Corp.*¹⁴⁷—even though that case decided the standard of review at summary judgment rather than on a motion to dismiss.¹⁴⁸ Some courts considering environmental challenges recognize and apply the lower threshold, however. For instance, in *Mattis*, the court limited its consideration to "this stage of litigation" and whether the complaint alleges a "relationship between causation and adverse effects."¹⁴⁹ The court determined that the plaintiffs had standing for their allegations that the government had violated statutory procedural requirements based upon an analysis under the "relaxed" standard for the "fairly traceable" prong.¹⁵⁰

Some commentators argue that courts should not even conduct a standing analysis in cases like *Comer* where plaintiffs assert private rights.¹⁵¹ *Lujan* was a response to statutes in the 1960s and 1970s that empowered citizens to bring suit for public harms that had traditionally been reserved for the government.¹⁵²

144. *Id.* at 862.

145. Mank, *supra* note 11, at 900, 922–23 (citing *Bennett v. Spear*, 520 U.S. 154, 168–69 (1997)); see *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992) (quoting *Lujan v. Nat'l Wildlife Fed.*, 497 U.S. 871, 889 (1990)) ("At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim.');" Note, *Causation in Environmental Law: Lessons from Toxic Torts*, 128 HARV. L. REV. 2256, 2258 (2015) ("[C]ausation in environmental law cases has been forced into jurisdictional standing analysis, even where the inquiry is more appropriate for later determination on the merits, which results in a significant and sometimes inappropriate barrier for environmental plaintiffs.").

146. *Comer*, 839 F. Supp. 2d at 861.

147. 95 F.3d 358 (5th Cir. 1996).

148. See *id.* at 360.

149. *Ctr. for Biological Diversity v. Mattis*, 868 F.3d , 817–18 (9th Cir. 2017).

150. *Id.* at 817.

151. Hessick, *supra* note 139, at 277–78; Nagle, *supra* note 140, at 481–82.

152. Nagle, *supra* note 140, at 478–79; Solimine, *supra* note 138, at 1027 (quoting RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 74 (6th ed. 2009)) ("[T]he development of the regulatory state and the expansion of substantive constitutional rights . . . 'created diffuse rights shared by large groups and new legal relationships.'")

Courts applied standing to avoid being conscripted by the legislative branch to perform executive functions when the executive branch has chosen not to act.¹⁵³ Because there is no constitutional basis for applying a standing analysis to lawsuits when plaintiffs seek to vindicate personal injuries through common law tort, however, requiring these plaintiffs to show standing is categorized by some as “superfluous” and “historically unwarranted.”¹⁵⁴ Courts nevertheless recognize some prudential standing requirements, such as “the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches.”¹⁵⁵ At the very least, “courts should apply a more lenient standing test in common law private rights suits against private defendants than in public rights suits against the government that raise separation of powers concerns.”¹⁵⁶

2. *The Motion to Dismiss for Failure to State a Claim upon Which Relief Can Be Granted*

Similar to the justiciability doctrines, the Rule 12(b)(6) motion to dismiss for failure to state a claim gives judges enough leeway to rule in plaintiffs’ favor. In fact, this ground seems to favor plaintiffs because it requires courts to accept all facts in the complaint as true, so the allegations need only be plausible rather than probable.¹⁵⁷ Courts therefore view Rule 12(b)(6) motions with disfavor and rarely grant them, as with the recent example of *Taylor v. Denka Performance Elastomer LLC*.¹⁵⁸ Residents of Louisiana’s “Cancer Alley” brought a nuisance claim based on the production of neoprene that allegedly exposed them to concentrated levels of the carcinogen chloroprene.¹⁵⁹ The court originally

153. See Hessick, *supra* note 139, at 276–77 (“[A] desire to limit private individuals’ ability to invoke the judiciary to vindicate public rights has motivated the Court to limit the types of factual injuries that support standing.”); Nagle, *supra* note 140, at 478–80 (discussing the Supreme Court’s predication of the standing doctrine on the Separation of Powers).

154. Hessick, *supra* note 139, at 277; see Solimine, *supra* note 138, at 1026–27 (“Prior to the early decades of the twentieth century, most justiciability issues were resolved by asking whether the plaintiff had suffered an injury that would be recognized at common law.”); Nagle, *supra* note 140, at 480 (“[N]o court or academic has provided any constitutional justification for the doctrine’s drift into private law.”).

155. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004) (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)).

156. Mank, *supra* note 11, at 877.

157. FED. R. CIV. P. 12(b)(6); see *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (“The plausibility standard is not akin to a ‘probability requirement.’”); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (“Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact).”) (footnote omitted) (citations omitted).

158. 332 F. Supp. 3d 1039, 1048 (E.D. La. 2018) (citing *Lowrey v. Tex. A & M Univ. Sys.*, 117 F.3d 242, 247 (5th Cir. 1997)) (“Such motions are rarely granted because they are viewed with disfavor.”).

159. *Id.* at 1044.

granted dismissal without prejudice to defendant Denka under Rule 12(b)(6) because the plaintiffs lacked a factual predicate for their torts: they did not allege suffering symptoms of chloroprene exposure or any manifestation of physical injury, disease, or nuisance.¹⁶⁰ The plaintiffs then edited their complaint, and the court later denied dismissal of the Third Amended and Restated Class Action Complaint.¹⁶¹ Though recognizing that “defendant disputes the causation of these injuries and suggests that any number of sources could be responsible for the symptoms,” the court nevertheless concluded that “at this procedural stage, it is not the appropriate setting for dismissal.”¹⁶²

Despite the disfavor shown to Rule 12(b)(6), defendants have had some success with these motions. Knowing the difficulty they will face at trial having to prove causation, or given limited remedies with some environmental statutes, plaintiffs often urge a non-straightforward application of the law, or they assert claims based on other grounds such as the equal protection clause or civil rights statutes.¹⁶³ Defendants sometimes win dismissal in these cases through a Rule 12(b)(6) motion, as in *Johnson v. City of Detroit*,¹⁶⁴ where a mother alleged that her child was exposed to lead paint in Detroit public housing.¹⁶⁵ She attempted to hold public authorities liable under federal statutes by asserting violations of Section 1983, but the district court granted and the appellate court affirmed a Rule 12(b)(6) dismissal because the statute does not provide an enforceable right.¹⁶⁶

But even seemingly extreme applications of federal statutes can survive a Rule 12(b)(6) dismissal. Consider *Pakootas v. Teck Cominco Metals, Ltd.*,¹⁶⁷ where representatives of federally recognized tribes in Washington State brought a CERCLA citizen suit against a Canadian smelting company for depositing hazardous metal slag in the Columbia River.¹⁶⁸ Even though the slag ended up in Washington, all smelter operations were in British Columbia, so the smelter moved to dismiss under Rule 12(b)(6) on the grounds that CERCLA does not apply extraterritorially; the trial court ruled that CERCLA applied despite the presumption against extraterritoriality.¹⁶⁹ The Ninth Circuit affirmed, but for different reasons: it held that the presence of the slag leaching

160. *Id.* at 1053.

161. *Taylor v. Denka Performance Elastomer LLC*, Civil Action No. 17-7668, 2018 WL 5786051, *1, *5 (E.D. La. Nov. 5, 2018).

162. *Id.*

163. Carlton Waterhouse, *Abandon All Hope Ye That Enter? Equal Protection, Title VI, and the Divine Comedy of Environmental Justice*, 20 *FORDHAM ENVTL. L. REV.* 51, 63–76 (2009).

164. 446 F.3d 614 (6th Cir. 2006).

165. *Id.* at 617.

166. *Id.* at 616–19.

167. 452 F.3d 1066 (9th Cir. 2006).

168. *Id.* at 1068–70.

169. *Pakootas v. Teck Cominco Metals, Ltd.*, No. CV-04-256-AAM, 2004 WL 2578982, *1, *4–17 (E.D. Wash. Nov. 8, 2004). The court also denied Teck Cominco’s motions to dis-

hazardous substances in the United States meant that the case did not require an extraterritorial application of the statute.¹⁷⁰

Rather than the statute providing no basis for relief, sometimes federal or state statutes prohibit assertion of a common law claim.¹⁷¹ For example, the U.S. Supreme Court has held that the CAA displaces federal public nuisance claims for climate-change-related harms.¹⁷² This displacement is not absolute, however. The CAA does not displace claims brought by states because states as separate sovereigns have the “special solicitude” to sue on behalf of their citizens to protect natural resources and environmental health.¹⁷³ Commentators also argue that the CAA does not completely displace tort claims seeking money damages because the Act has gaps in its coverage of GHG emissions and does not provide for compensation, so plaintiffs seeking only money damages as opposed to equitable relief should not have their claims displaced.¹⁷⁴ Further, the CAA does not preempt nuisance claims based on state common law.¹⁷⁵ Accord-

miss for lack of personal and subject matter jurisdiction. *Id.* at *17; see FED. R. CIV. P. 12(b)(1)–(2).

170. *Pakootas*, 452 F.3d at 1072–79.

171. See *La Londe*, *supra* note 74, at 45 n.134 (citing cases that barred common law nuisance claims under the Clean Water Act, the Federal Insecticide, Fungicide, and Rodenticide Act, and a Washington “Right-to-Farm” statute.)

172. *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 424–25 (2011) (holding that the CAA provides “a means to seek limits on emissions of carbon dioxide from domestic powerplants” and thus displaces “parallel” federal common law claims); see also Jean-Baptiste, *supra* note 12, at 11,007 (calling displacement because of the CAA an “obstacle” that has led to climate justice cases being dismissed).

173. *Massachusetts v. EPA*, 549 U.S. 497, 520 (2007); see also *Georgia v. Tenn. Copper*, 206 U.S. 230 (1907); Elizabeth A. K. Warner & Randall S. Abate, *International and Domestic Law Dimensions of Climate Justice for Arctic Indigenous Peoples*, 43 OTTAWA L.J. 113, 147 n.146 (2013).

174. Burkett, *Elusive*, *supra* note 44, at 118; Zachary Hennessee, Note, *Resurrecting a Doctrine on Its Deathbed: Revisiting Federal Common Law Greenhouse Gas Litigation After Utility Air Regulatory Group v. EPA*, 67 DUKE L.J. 1073, 1114 (2018); cf. *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 489 & n.7 (2007) (distinguishing, in the context of the Clean Water Act, common law nuisance claims for economic injury from claims seeking to impose standards that would be at odds with regulatory goals).

175. In *Am. Elec. Power*, 564 U.S. at 429, the Supreme Court remanded for further consideration whether claims based on state law are preempted by the CAA. Subsequently, state and federal courts have held that state law claims are not preempted. See, e.g., *Freeman v. Grain Processing Corp.*, 848 N.W.2d 58, 64 (Iowa 2014); *Bell v. Cheswick Generation Station*, 734 F.3d 188, 189–90 (3d Cir. 2013) (reversing district court’s dismissal of putative class action based on preemption by the CAA because neither “the plain language of the Clean Air Act [nor] controlling Supreme Court precedent” support preemption); Abate, *ATL*, *supra* note 3, at 567–68 (discussing the *Am. Elec. Power* decision); Sam Kalen, *Policing Federal Supremacy: Preemption and Common Law Damage Claims as a Ceiling to the Clean Air Act Regulatory Floor*, 68 FLA. L. REV. 1597, 1602 (2016) (emphasis in original) (arguing that judges can award money damages and enter more stringent equitable relief than provided in

ingly, tort-based climate justice suits have at least some basis for prevailing against a Rule 12(b)(6) motion to dismiss.

II. THE STRATEGIC GOALS OF ENVIRONMENTAL JUSTICE LITIGATION

Even if plaintiffs win the motion to dismiss, they have little chance of prevailing on the merits.¹⁷⁶ It therefore seems to make no sense for environmental justice communities to invest time and money in complex litigation; however, the communities often have numerous strategic goals related to their activism. To the extent that litigation is a tactic that helps to achieve one or more of those goals, the community can still find success without winning a trial.¹⁷⁷

A. Leverage for Settlement

If the ultimate objective is to halt hazardous activities and remediate harms, settlement might be more effective than a money judgment or injunction. The companies that pollute are frequently deaf to the voices of the communities where they operate, so plaintiffs can take advantage of judicial processes to file suit and serve process, which gets attention and forces a response.¹⁷⁸ This response is not always limited to a court granting a motion to dismiss. Despite the array of potential obstacles, no two cases are the same: sometimes the plaintiffs can identify a single defendant as the source of harm, as with RSR Corporation owning a lead smelter in the African-American community of West Dallas.¹⁷⁹ Other times, the harm is a signature disease, as with sterility in men caused by the pesticide dibromochloropropane (“DBCP”).¹⁸⁰ Still other times, the plaintiffs can target one facet of corporate or governmental operations to bring a project to a halt, such as challenging the issuance of a

the CAA “if the state regulatory agency explicitly accepts the continued vitality of common law claims for regulated entities or if the CAA does not otherwise regulate the activity).

176. See Kuehn, *supra* note 44, at 10,698 (describing the many substantive problems facing environmental justice litigation); Monsma, *supra* note 50, at 467–68 (discussing both the procedural and substantive drawbacks of environmental justice litigation).
177. See Scott L. Cummings, *Movement Lawyering*, 2017 U. ILL. L. REV. 1645, 1696 (2017) (“The utility of litigation is judged relative to campaign goals [such as] maximiz[ing] political pressure and transform[ing] public opinion.”); Ellen Yaroshfsky, *Symposium Introduction*, 47 HOFSTRA L. REV. 1, 3 (2018) (“One fundamental lesson is that litigation is not an end in itself but can strengthen a movement for social change.”).
178. Todd, *Trade*, *supra* note 15, at 106; see PEEL & OSOFSKY, *supra* note 33, at 31 (“[L]itigation is unique in being able to harness the apparatus of the state (i.e., courts as the third branch of government) to achieve regulatory change.”).
179. See Macey & Susskind, *supra* note 85.
180. Hal S. Scott, *What to Do About Foreign Discriminatory Forum Non Conveniens Legislation*, 49 HARV. INT’L L.J. 95, 100 (2009).

necessary permit.¹⁸¹ Even without an airtight case, the plaintiffs can use the judicial process to introduce enough uncertainty and risk to provide the leverage to motivate defendants to settle,¹⁸² particularly when those defendants also weigh the time and expense of continued litigation.¹⁸³

Further, the plaintiffs might benefit more from settlement than a judicial resolution because the community has more say in fashioning its own remedy. One aim of corrective justice is compensation, such as the money received by plaintiffs like the West Dallas Coalition for Environmental Justice and the DBCP clients of the Provost-Umphrey law firm.¹⁸⁴ But environmental justice cases often feature sites that need remediation, people who require medical monitoring, or operations that will continue but with more restrictions and oversight.¹⁸⁵ Negotiated settlements can help achieve these objectives while empowering community members by allowing “greater participation in environmental decision making.”¹⁸⁶ For example, an environmental coalition’s settlement of a nuisance suit related to the North River Pollution Control Plant in West Harlem allowed them to be “co-enforcers” of an earlier consent order from the state and to administer the “North River Fund” into which defendants paid \$1.1 million.¹⁸⁷ Another coalition settled a suit that challenged the renewal of a permit for an industrial waste storage and processing facility that included a reduction in the gallons of waste the site would process, the incorporation of

181. La Londe, *supra* note 74, at 36.

182. Richard J. Lazarus, *Environmental Racism! That's What It Is*, 2000 U. ILL. L. REV. 255, 271–72 (2000).

183. PEEL & OSOFSKY, *supra* note 33, at 48 (writing that litigation might persuade courts to impose conditions on permits or licenses for activities, or they make obtaining insurance more expensive); La Londe, *supra* note 74, at 48–49 (discussing how a NEPA lawsuit can delay operation of a facility, which drives up costs).

184. Kuehn, *supra* note 44, at 10,696–97; see *Timeline of Smelter Operations*, DALLAS MORNING NEWS (Dec. 14, 2012), <https://perma.cc/7PDD-GDRY> (listing a \$20 million settlement of claims against RSR in the 1980s and another \$16.1 million settlement of similar claims in 1995); Nathan Koppel, *Dole Settles Pesticide Litigation*, WALL STREET J.: LAW BLOG (Oct. 4, 2011), <https://perma.cc/WAU4-MBS9> (discussing the confidential settlement of over 5,000 Latin American clients of Provost Umphrey with Dole Food Company related to DBCP cases).

185. See, e.g., Todd, *Ecospoke*, *supra* note 29, at 350 (citing *Aguinda v. Texaco, Inc.*, 303 F.3d 470 (2d Cir. 2002)) (discussing how the plaintiffs suing Texaco sought not only money damages but also “equitable relief like funding for environmental remediation, renovating or closing the trans-Ecuador pipeline, establishing standards for future oil development, and medical monitoring”).

186. Todd, *Trade*, *supra* note 15, at 107.

187. Vernice D. Miller, *Planning, Power and Politics: A Case Study of the Land Use and Siting History of the North River Water Pollution Control Plant*, 21 FORDHAM URB. L.J. 707, 720–21 (1994) (citing *W. Harlem Env'tl. Action v. N.Y.C. Dep't Env'tl. Prot.*, No. 92-45133 (Sup. Ct. N.Y. Cty. May 17, 1993); *Stipulation of Settlement 3–22*, *West Harlem Env'tl. Action*, No. 92-45133 (filed Jan. 4, 1994)).

clean-up and disposal services, and provisions for hiring a proportion of its workers from the surrounding neighborhood.¹⁸⁸

B. Community Outreach and Support

Every filing, hearing, and ruling has value outside of court. Filing suit gives plaintiffs the ability to tell their story to outsiders.¹⁸⁹ The plaintiffs can issue press releases and maintain websites that include litigation documents that inform the broader public, increase awareness of their situation, and assist with fundraising efforts.¹⁹⁰ Litigation can generate negative publicity that further increases the plaintiffs' leverage toward settlement—or at least motivates the defendant to adopt voluntary changes.¹⁹¹ Lawsuits thus raise awareness of environmental problems and potentially help shift public opinion or social norms, particularly about environmental impacts on vulnerable communities.¹⁹²

These filings and orders also play a key role within an environmental justice community. They bolster “efforts to build alliances with other affected groups and outsiders who share their concerns,” as with the indigenous people

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188. Macey & Susskind, *supra* note 85, at 466 (citing *Heat Energy Advanced Tech., Inc. v. W. Dall. Coal. For Envtl. Justice*, 962 S.W.2d 288, 290 (Tex. Ct. App. 1998)).
189. Maxine Burkett, *Litigating Climate Change Adaptation: Theory, Practice, and Corrective (Climate) Justice*, 42 ENVTL. L. REP. NEWS & ANALYSIS 11,144, 11,148–49 (2012) [hereinafter Burkett, *Litigating*] (citing Benjamin Ewing & Douglas A. Kysar, *Prods and Pleas: Limited Government in an Era of Unlimited Harm*, 121 YALE L.J. 350, 373 (2011)); Paola V. Calzadilla, *Climate Change Litigation: A Powerful Strategy for Enhancing Climate Change Communication*, in ADDRESSING THE CHALLENGES IN COMMUNICATING CLIMATE CHANGE ACROSS VARIOUS AUDIENCES 231 (Walter Leal Filho, Bettina Lackner, & Henry McGhie eds., 2019) (examining how cases can provide a vehicle to communicate about and raise awareness of climate change).
190. Drimmer & Lamoree, *supra* note 43, at 504 (describing how the ChevronToxico website contains information including court documents and thus operates as a vehicle for public relations and advocacy); Kang, *supra* note 65, at 124 n.5 (describing the pollution maps contained on an environmental justice group's website); *id.* at 132 n.28 (citing law school clinic websites that list cases challenging state air standards plans).
191. Roberts, *supra* note 52, at 293 (“Lawsuits also can be part of a broader ‘corporate campaign’ strategy of singling out one company to target and attack in as many ways as possible.”); Stephen J. Kobrin, *Oil and Politics: Talisman Energy and Sudan*, 36 N.Y.U. J. INT’L L. & POL. 425, 438–41, 444 (2004) (describing how media tactics and a lawsuit against Talisman for oil operations in Sudan caused negative publicity that resulted in Talisman shares losing value).
192. PEEL & OSOFSKY, *supra* note 33, at 47, 239; *id.* at 49 (writing that the decisions and publicity surrounding them can “influence social norms and values surrounding climate change”); Cummings, *supra* note 177, at 1695–96 (writing that movement lawyers use litigation along with other “modes of advocacy” to “transform public opinion”); Nosek, *supra* note 30, at 802 (describing how climate change litigation can generate media coverage and help shift public dialogue).

of Ecuador who saw litigation as part of a broader fight.¹⁹³ Lawsuits also help galvanize a campaign by giving the community something to rally around.¹⁹⁴ They provide topics of conversation for community members and thus build morale and maintain political momentum,¹⁹⁵ as with the Provost-Umphrey client information page or the inclusion of litigation documents on ChevronToxico.com.¹⁹⁶ Every litigation victory, however small, can therefore feed this goal of community outreach and support.

C. Engaging Courts to Change the Law

Litigation forces the judiciary to take an active role in environmental justice issues. Communities often find representation by academics, social movement lawyers, and environmental law clinics and organizations.¹⁹⁷ Beyond the short-term desire to get the best result, these advocates also have a long-term interest in changing the law itself.¹⁹⁸ Advocates might best effectuate this long-term change by framing their arguments as part of a larger environmental justice narrative.¹⁹⁹ They articulate norms and social values in filings and oral arguments not just to communicate to the public but also to act as “norm-

193. Judith Kimerling, *Transnational Operations, Bi-National Injustice: Chevrontexaco and Indigenous Huaorani and Kichwa in the Amazon Rainforest in Ecuador*, 31 AM. INDIAN L. REV. 445, 480 (2007); see also Binder, *supra* note 29, at 61 (discussing the difficulties in uniting community members who might have divergent views); Roberts, *supra* note 52, at 291 (writing how local communities, in their struggles against globalized corporations, attempt to capture the support of more recognized international social movements).

194. PEEL & OSOFSKY, *supra* note 33, at 236.

195. Cole, *Litigation*, *supra* note 16, at 541; Macey & Susskind, *supra* note 85, at 437.

196. Drimmer & Lamoree, *supra* note 43, at 475 (calling websites like ChevronToxico.com a means of “community organizing”); *DBCP Exposure Information*, PROVOSTUMPHREY.COM, <https://perma.cc/U3GD-5PF6> (providing information for clients about the status of litigation, including in Spanish).

197. For example, Luke Cole, whose articles and book are cited throughout this Article, was the lead attorney for plaintiffs in *Kivalina*. *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 867 (N.D. Cal. 2009). The attorney in *Juliana*, Julia Olson, called that case one part of a “global strategy” in a “campaign” that includes lawsuits against U.S. states as well as other countries. Molodanof & Durney, *supra* note 6, at 216–17. Another advocate claims that there are dozens of law school environmental justice clinics, organizations, and law firms. Kaiman, *supra* note 65, at 1338.

198. See, e.g., PEEL & OSOFSKY, *supra* note 33, at 30 (writing that “activists us[e] lawsuits to try to influence the shape of the law and regulation in addition to assisting their clients in a particular case”); Todd, *Trade*, *supra* note 15, at 130 (recognizing that a “longer-range goal” of litigation is “changing law and policy”); Cummings, *supra* note 177, at 1696 (“[I]ntegrated advocacy pursues reform across institutional domains. Depending on the dictates of specific campaigns, lawyers focus efforts in and across plural law-making and norm-generating institutions (courts, legislatures, agencies, and communities) and at multiple scales (local, state, federal, and international).”).

199. Kan, *supra* note 30, at 42–43, 51, 54; King, *supra* note 30, at 348–49.

entrepreneurs” to the court by persuading the judge to embrace an evolving norm and thus change standards.²⁰⁰ Judges depend on advocates for education about social issues, so briefs and arguments can educate the bench about how the law should respond to social needs.²⁰¹ Adjudication therefore allows advocates to give reasons to the judge to articulate new legal norms.²⁰²

For example, plaintiffs can bring “lawsuits to clarify an agency’s regulatory authority under a statute, to change how an agency exercises that authority, or to enforce that authority.”²⁰³ Courts sometimes highlight aspects of the community as part of the opinion, like mentioning the cultural significance of the marine mammal the dugong to Okinawans in a National Historic Preservation Act challenge to the construction of a new U.S. military base.²⁰⁴ While statutory interpretation might favor the defendant, even an unsuccessful suit can result in the court using “prods and pleas” to attempt to push the legislative and executive branches to act.²⁰⁵ Consider how commentators credit environmental justice cases with influencing President Clinton to issue Executive Order 12,898, which requires federal agencies to consider environmental justice principles in their decisions.²⁰⁶

While tort and constitutional theories have several shortcomings when applied to environmental justice cases, these cases simultaneously allow advocates to highlight those shortcomings and to argue for new interpretations and creative extensions of the law.²⁰⁷ Only by forcing courts to confront complex issues like climate change can there be “a reevaluation of the existing system for com-

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200. PEEL & OSOFSKY, *supra* note 33, at 49, 223 (“Courts themselves can be influenced by shifts in public opinion regarding climate change, and their decisions can at times reveal changing perceptions of the science.”); *see also* Banda, *supra* note 17, at 387.
201. Molodanof & Durney, *supra* note 6, at 221–22 (citing Justice Steven Breyer, Address at the 2016 Annual Meeting for the American Society of International Law (Mar. 30, 2016)).
202. Weaver & Kysar, *supra* note 5, at 314 (citing Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639, 643 (1981)).
203. PEEL & OSOFSKY, *supra* note 33, at 30; *see* Kang, *supra* note 65, at 136, 144–45 (claiming that lawsuits based on federal or state environmental statutes and regulations give courts the opportunity to interpret those rules to show whether governmental actors have acted properly).
204. Ctr. for Biological Diversity v. Mattis, 868 F.3d 803, 808–10 (9th Cir. 2017).
205. Ewing & Kysar, *supra* note 189, at 361.
206. *See, e.g.*, COLE & FOSTER, *supra* note 46, at 123; Shannon M. Roesler, *Challenging What Appears “Natural”: The Environmental Justice Movement’s Impact on the Environmental Agenda*, in ENVIRONMENTAL LAW AND CONTRASTING IDEAS OF NATURE: A CONSTRUCTIVIST APPROACH 230, 238–40 (Keith H. Hirokawa ed., 2014) (describing the executive order).
207. Ewing & Kysar, *supra* note 189, at 374–75; *see* Luke W. Cole, *Remedies for Environmental Racism: A View from the Field*, 90 MICH. L. REV. 1991, 1995 (1992) (emphasis in original) (highlighting the irony that the disproportionate siting of hazardous facilities in minority neighborhoods is not a failure of environmental law but instead a success because “[w]hile we may decry the *outcome*, the laws are working as they were designed to work”).

penalizing and deterring harm” by shifting “the bar for exoticism in tort.”²⁰⁸ A short-term loss thus has the potential to lead to victory in the long-term by molding the law’s ability to respond to what have previously been frustrating and intractable toxic and environmental harm cases,²⁰⁹ especially when nudged by a court decision that highlights the unjust situation of the plaintiffs and the inadequacy of the law to provide redress.²¹⁰ Consider *Bean v. Southwestern Waste Management Corp.*, where the district court criticized the decision of the Texas Department of Health to issue a waste facility permit as “insensitive and illogical” and stated that it would have denied the permit, but it declined to issue a preliminary injunction because it had “a different role to play” of assessing the likelihood of success on the merits.²¹¹ Thereafter, the Texas Department of Health enacted a requirement that landfill proponents provide demographic data, and the City of Houston restricted dumping of garbage near public facilities like schools and prohibited trucks owned by the city from dumping at the landfill.²¹²

Sometimes, a court’s language moves beyond mere sympathy with the plaintiffs to recognizing how their identity compels a favorable ruling. For example, the Hawaii Supreme Court sided with plaintiffs in a water rights case because the public trust doctrine applies specifically to native Hawaiian people.²¹³ Similarly, a federal court declined to permit a lower damage award based on the plaintiff’s race because of the perverse incentives for landlords not to remediate lead-based paint in their older buildings occupied by Hispanic and African-American children.²¹⁴

It is these opinions that favor the plaintiffs—even if the favorable language is merely dictum or written in dissent—that create at least persuasive authority to move the needle of the law toward environmental justice.²¹⁵ For climate

208. Kysar, *supra* note 58, at 4.

209. *See id.*; Todd, *Trade*, *supra* note 15, at 105.

210. *See* King, *supra* note 30, at 359, 361–62 (calling a lengthy circuit court ruling that was later overturned a “conventional success” and noting the possibility of “unconventional” victories).

211. *Bean v. Sw. Waste Mgmt. Corp.*, 482 F. Supp. 673, 681 (S.D. Tex. 1979).

212. Cole, *Litigation*, *supra* note 16, at 539 n.79.

213. La Londe, *supra* note 74, at 59 (citing *In re Water Use Permit Applications*, 9 P.3d 409, 439–50 (Haw. 2000)); *see* D. Kapua’ala Sproat, *An Indigenous People’s Right to Environmental Self-Determination: Native Hawaiians and the Struggle Against Climate Change Devastation*, 35 STAN. ENVTL. L.J. 157, 162 (2016) (“Hawaii’s legal regime now embraces, directly and indirectly, principles of restorative justice for Native Hawaiians [including] a generally expressed commitment to preserving that which remains and restoring what was wrongly taken or destroyed.”).

214. Ronen Avraham & Kimberly Yuracko, *Torts and Discrimination*, 78 OHIO ST. L.J. 661, 687–88 (2017) (citing *G.M.M. ex rel. Hernandez-Adams v. Kimpson*, 116 F. Supp. 3d 126, 143, 154 (E.D.N.Y. 2015)).

215. Todd, *Trade*, *supra* note 15, at 130 (citing Hari M. Osofsky, *Learning from Environmental Justice: A New Model for International Environmental Rights*, 24 STAN. ENVTL. L.J. 71, 129–30 (2005)) (“Litigation generates rulings, with each new court decision adding to a body

change in particular, engaging the judiciary to rule on creative theories is indispensable for testing and expanding the bounds of the law.²¹⁶ Climate justice suits therefore have the potential to follow the path blazed by litigation for lead paint and asbestos, which resulted not only in damage awards for plaintiffs but also spurred federal regulation.²¹⁷

III. PERELMAN'S NEW RHETORIC AND RULE OF JUSTICE

A lawsuit does little if anything to help plaintiffs achieve these strategic goals—let alone win a money judgment or equitable relief—if the court dismisses it immediately after filing. After all, defendants have no incentive to settle with plaintiffs when dismissal has eliminated the risk, time, and cost of litigation; nor will the suit have additional hearings that plaintiffs can use to inform and educate potential supporters or to recruit and motivate the community; nor will there be rulings with favorable language upon which advocates can build a jurisprudence of environmental and climate justice. Plaintiffs must therefore frame their lawsuit in a way that gives them the best chance to convince the judge to deny the motion to dismiss. This Part turns to the new rhetoric of Chaim Perelman to provide a theory for how environmental justice plaintiffs can maximize their chances that the court will rule in their favor: by appealing to a “sense of equity,” plaintiffs might persuade the judge to reject defendants’ procedural arguments because new interpretations and creative applications of the law are needed to avoid injustice.

A. *Competing Values and Emerging Norms: Legal Entitlement Versus Merit*

Philosophers, moralists, and jurists agree that underlying the notion of justice is a basic notion of equality: the administration of justice requires giving

of law that might have precedential or persuasive authority to promote change, however incremental.”); *id.* at 144 (citing Abate, *Public*, *supra* note 9, at 201; Sachs, *supra* note 97, at 900) (“Commentators argue that environmental justice lawsuits can have the long-term effect of laying a foundation for institutionalized international frameworks [and that] litigation can chip away at non-enforcement by creating persuasive authority.”); *see also* Banda, *supra* note 17, at 385 (“While litigation does not always move swiftly, where successful, it can have profound impacts on the domestic regulatory system.”).

216. *See* Maria L. Banda & Scott Fulton, *Litigating Climate Change in National Courts: Recent Trends and Developments in Global Climate Law*, 47 ENVTL. L. REP. NEWS & ANALYSIS 10,121, 10,134 (2017) (“[T]he number of climate lawsuits is unquestionably on the rise, positioning the courts for an increasingly vital role in ensuring climate-related accountability, enabling resiliency, and contributing to a sustainable future”); Kysar, *supra* note 58, at 2–7 (arguing that climate change litigation that pushes traditional tort boundaries can help the common law to develop in a way that more effectively responds to the problem); *see also* Weaver & Kysar, *supra* note 5, at 314–16 (describing the evolution of common law).

217. *See* Abate, *ATL*, *supra* note 3, at 566.

the same treatment to groups of people or to situations that are equal.²¹⁸ Perelman articulates a “rule of justice” as “a *principle of action in accordance with which beings of one and the same essential category must be treated in the same way.*”²¹⁹ Justice is a “confused notion,” however, because equality has many conceptual and often irreconcilable meanings.²²⁰ Consider these six different conceptions of justice:

1. To each the same thing.
2. To each according to his merits.
3. To each according to his works.
4. To each according to his needs.
5. To each according to his rank.
6. To each according to his legal entitlements.²²¹

While the first five are ethical, “to each according to his legal entitlements” is a juridical conception of justice.²²² “When the law itself furnishes the criteria of its application, the Rule of Justice becomes, explicitly, the Rule of Law, requiring that all those who are alike in the eyes of the law be treated in a fashion determined by law.”²²³ Judges are “bound to observe the established rules,” so rather than judge the law itself, they limit themselves to applying the law.²²⁴ Equality under this conception means that a judge should treat a current dispute like courts have treated previous cases that are similar.²²⁵ This concept manifests under the common law as *stare decisis*, where a judge relies upon settled precedent rather than crafting a new solution, although this “mental iner-

218. PERELMAN, IDEA, *supra* note 35, at 12, 16; PERELMAN & OLBRECHTS-TYTECA, *supra* note 37, at 218.

219. PERELMAN, IDEA, *supra* note 35, at 16 (emphasis in original); *see also* PERELMAN, JUSTICE, *supra* note 35, at 35 (“[T]he rule of justice posits the requirement of equal treatment for identical beings.”); PERELMAN & OLBRECHTS-TYTECA, *supra* note 37, at 218 (“The rule of justice requires giving identical treatment to beings or situations of the same kind.”).

220. PERELMAN, IDEA, *supra* note 35, at 4–6; *see also* JAMES CROSSWHITE, DEEP RHETORIC: PHILOSOPHY, REASON, VIOLENCE, JUSTICE, WISDOM 303 (2013) (“Although the formal rule of justice enjoins us to treat people in the same way, the idea of justice contains several incompatible notions of what the essential consideration should be.”).

221. PERELMAN, IDEA, *supra* note 35, at 7; *see also* FRANCIS J. MOOTZ III, RHETORICAL KNOWLEDGE IN LEGAL PRACTICE AND CRITICAL LEGAL THEORY 21 (2006) (stating that justice as a confused notion “cannot be clarified according to the test of absolute truth”).

222. PERELMAN, IDEA, *supra* note 35, at 24.

223. PERELMAN, JUSTICE, *supra* note 35, at 37.

224. PERELMAN, IDEA, *supra* note 35, at 9–10, 24; *see also* Gerald Wetlauffer, *Rhetoric and Its Denial in Legal Discourse*, 76 VA. L. REV. 1545, 1561–62 (1990) (arguing that the judge’s duty is to judicial institutions and the rule of law).

225. PERELMAN, IDEA, *supra* note 35, at 9–10; *see also* MACCORMICK, *supra* note 38, at 143 (linking adherence to precedent with justice because “if you ought to treat like cases alike and different cases differently, then new cases that are relevantly like ones previously decided ought . . . to be decided in the same or an analogous way to the previously decided ones”).

tia” is also part of applying previously established rules.²²⁶ “The impartial judge is just because he deals in the same way with all those to whom the same ruling applies, whatever the consequences may be.”²²⁷ The rule of justice contributes to important values like “legal security [and] the predictability and reliability of the law.”²²⁸ Adherence to authority therefore affords justice by attesting to the existence of a legal tradition based upon a coherent system of pre-announced rules in treaties, constitutions, statutes, and judicial precedents.²²⁹

The rote application of existing law loses its soundness when we move from ordinary to exceptional cases.²³⁰ Within a given society, certain acts, values, and beliefs are accepted without argument, so these furnish the precedents and other rules that create legal entitlements.²³¹ So long as the law “expresses public feeling adequately enough,” judges need not justify decisions that keep to the letter of the law.²³² Conditions change, however, so a rule that was considered reasonable when it was established may no longer be so.²³³ Public opinion

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226. PERELMAN, IDEA, *supra* note 35, at 63; *see also* PERELMAN, JUSTICE, *supra* note 35, at 37; PERELMAN & OLBRECHTS-TYTECA, *supra* note 37, at 306 (describing a legal tradition that “appears just as clearly in legal doctrine as in the actual holdings of courts”).
227. PERELMAN, JUSTICE, *supra* note 35, at 37; *see also id.* at 37 (“An act that conforms to the Rule of Law is just, because it is a correct application of the law.”); PERELMAN, IDEA, *supra* note 35, at 62–63 (arguing that, under this conception of justice, one judges justly by applying the same rule to the same situations); MACCORMICK, *supra* note 38, at 157 (“Consistency through time and across cases matters for the sake of law and matters for the sake of justice.”).
228. PERELMAN, JUSTICE, *supra* note 35, at 93; *see also* MACCORMICK, *supra* note 38, at 12 (“Values like legal certainty and legal security can be realized only to the extent that a state is governed according to pre-announced rules that are clear and intelligible in themselves.”); PERELMAN, JUSTICE, *supra* note 35, at 38 (claiming that the rule of justice “permits the coherent and stable functioning of a juridical order” and “leads to predictability and security”); PERELMAN & OLBRECHTS-TYTECA, *supra* note 37, at 219 (noting that reference to the rule of justice accounts for “consistency of a course of action”).
229. MACCORMICK, *supra* note 38, at 12 (“There cannot be a Rule of Law without rules of law.”); *id.* at 1557 (“Consistency through time and across cases matters for the sake of law and matters for the sake of justice.”); PERELMAN & OLBRECHTS-TYTECA, *supra* note 37, at 306 (“[T]he quest for justice and the maintenance of an equitable order, of social trust, cannot neglect considerations based on the existence of a legal tradition Recourse to argument from authority is inescapable if the existence of such a tradition is to be attested.”).
230. PERELMAN, JUSTICE, *supra* note 35, at 38.
231. PERELMAN, JUSTICE, *supra* note 35, at 61; *see* William A. Galston, *What Value Pluralism Means for Legal-Constitutional Orders*, 46 SAN DIEGO L. REV. 803, 811 (2009) (“[E]very system of law embodies a presumption in favor of past decisions.”).
232. PERELMAN, JUSTICE, *supra* note 35, at 28 (emphasis in original) (“*Change only must be justified*” because existing customs are implicitly accepted and thus need no justification (emphasis in original)); *id.* at 91 (“[A]dherence to particular principles or values will result in dispensing with justification for any rule or action which conforms to them.”).
233. *Id.* at 35 at 92–93; *see also* PERELMAN, IDEA, *supra* note 35, at 35 (recognizing that courts resort to equity when “the conditions that existed when the rules were laid down have changed so much that too great a gap is obvious between the rules formerly adopted and

may change as a society undergoes a period of transition where one scale of values replaces another.²³⁴ “[T]he evolution of moral sentiment may result in the fact that certain distinctions, neglected by legislators or judges, become essential in the present evaluation of the facts.”²³⁵ When the established law appears “lame” because its application to the case results in injustice to a party,²³⁶ then the law is unjust “because it is incompatible with one of the accepted values of the community.”²³⁷

Argumentative assertions arise from differences: “differences in individual experience, the different ways of drawing from an inherited tradition, the differences among traditions, and the different goods being sought.”²³⁸ Parties sometimes assert an injustice because of differential treatment compared to someone with more money, influence, or power, and in the particular situation, those differences should not matter.²³⁹ This claim that the party is equal in essential aspects with some other party is often based upon one of the moral conceptions of equality rather than an existing legal entitlement.²⁴⁰ Consider the second conception, “to each according to his merits,” which treats equality not as some universal right but instead as “treatment proportional to an intrinsic quality—the merit of the human person.”²⁴¹ The sole criterion of the judge is “the intrinsic moral worth of the individual.”²⁴² In the administration of justice, this category deals not only with merit but also demerit, so the judicial system must be capable of both giving reward and imposing penalties.²⁴³ When two or more of the six conceptions conflict with each other, the difficulty is determining which one should have priority.²⁴⁴

those that would in current circumstances have been accepted”); PERELMAN & OLBRECHTS-TYTECA, *supra* note 37, at 220 (stating that the rule of justice “requires, for its application, a foundation in the concrete, anchored to opinions and agreements which are rarely beyond argument”).

234. PERELMAN, IDEA, *supra* note 35, at 35; *see also* MACCORMICK, *supra* note 38, at 91 (arguing that a legal system based on precedent needs “an overall coherence of values and principles, enduring through time”).

235. PERELMAN, JUSTICE, *supra* note 35, at 39.

236. *Id.* at 38–39 (citing ARISTOTLE, NICHOMACHEAN ETHICS 1137bb (H. Rackham trans., 1912)).

237. *Id.* at 63.

238. CROSSWHITE, *supra* note 220, at 301.

239. PERELMAN, JUSTICE, *supra* note 35, at 35–36.

240. *Id.* at 37; *see id.* at 60 (“The criticism of a proposed or already enacted measure, decision, or action is usually directed against its morality . . .”).

241. PERELMAN, IDEA, *supra* note 35, at 7.

242. *Id.*

243. *Id.* at 19.

244. CROSSWHITE, *supra* note 220, at 303 (explaining that the six conceptions of justice “conflict with one another in regard to what consideration is the most important”); MACCORMICK, *supra* note 38, at 112 (“Justice has many aspects, and the problem is under which of its aspects it bears upon particular problems.”); Donald H. J. Hermann, *Legal Reasoning as*

Perelman turned to the “nonformal logic” of classical rhetoric and dialectical proofs “to elaborate a logic of value judgments based . . . on a detailed examination of how men actually reason about values.”²⁴⁵ In the practical realm of law, the judge makes a choice between claims based on competing values.²⁴⁶ The advocate must therefore justify her value over the others through “the practical use of reason.”²⁴⁷ “To reason is not merely to verify and to demonstrate, but also to deliberate, to criticize, and to justify, to give reasons for and against—in a word, to argue.”²⁴⁸ Instead of aiming at an impossible truth, argumentation arrives at justice by allowing the opponents to put forward the strongest justifications for their claims and thus gain the adherence of the judge.²⁴⁹ In a sense, Perelman affirms the adversary system as a means to allow the strongest claim to prevail.²⁵⁰

Argumentation, 12 N. KY. L. REV. 467, 487 (1985) (“Perelman suggests that the attainment of resolution of such incompatible positions is a major objective of legal reasoning.”).

245. PERELMAN, JUSTICE, *supra* note 35, at 57; *see also* PERELMAN, HUMANITIES, *supra* note 35, at 55–56; MOOTZ, *supra* note 221, at 18 (“[T]he ancient conception of rhetoric plays an explicit and central role [in Perelman’s elucidation of] the principles of justice.”); *id.* at 22 (“[A]rgumentation has its own logic or reasonableness that can foster reasonable action even in the face of undecidability.”).
246. PERELMAN, JUSTICE, *supra* note 35, at 55–59; *see also* MOOTZ, *supra* note 221, at 21 (claiming that justice “can only be developed in the course of responding to the practical demands of political action in a manner informed by reasonable belief”); Mootz, *supra* note 34, at 386 (arguing that justice is not “univocal” because “it always requires making choices between justifiable tenets that are in conflict”).
247. PERELMAN, JUSTICE, *supra* note 35, at 59.
248. *Id.*; *see also* CROSSWHITE, *supra* note 220, at 304 (“Argumentation provides the possibility of reasoning about justice.”).
249. CROSSWHITE, *supra* note 220, at 272 (“[A]n audience has a choice when presented with competing arguments, and must make a judgment about the strength of the arguments that are offered”); MOOTZ, *supra* note 221, at 19 (explaining that Perelman merged “the truth value of dialectic with the performance of rhetorical persuasion” to show how “reasoning about matters of justice has an epistemological status between formal deduction and fanatical, irrational adherence”); Hermann, *supra* note 244, at 471 (“This process of argumentation aims not at truth but at agreement.”).
250. *See* Jim Wilets & Areto Imoukhuede, *A Critique of the Uniquely Adversarial Nature of the U.S. Legal, Economic and Political System and Its Implications for Reinforcing Existing Power Hierarchies*, 20 U. PA. J.L. & SOC. CHANGE 341, 348–49 (2017) (summarizing supporters of the adversary system as arguing that it allows the parties and their attorneys to push “every possible fact of relevance” so that “American law can sometimes be more flexible, and open to the new legal and policy arguments set forth by the parties and their lawyers”).

B. *Procedure Stops an Argument Short*

Effective argumentation requires a chance to speak, an audience that listens, agreed-upon rules for the discourse, and a common language.²⁵¹ Legal institutions seemingly provide these in the form of rules of procedure and evidence.²⁵² All parties must isolate the issue and “insert it into a framework set up by law. . . .”²⁵³ Rules of procedure “oblige the parties to respond to each other so that adverse arguments and conclusions must be refuted and cannot be simply ignored.”²⁵⁴ Justice can only result when “argumentative positions are taken up freely in an arena that grants them a fair hearing. . . .”²⁵⁵ Perelman views the administration of justice as “inconceivable” without procedural rules.²⁵⁶

The court’s careful adherence to procedural rules does not guarantee a just outcome, however, because institutional frameworks introduce “hierarchies and asymmetries in communication that give privilege to expertise but that can also come into conflict with the demands for justice.”²⁵⁷ The parties may not speak a

251. See CROSSWHITE, *supra* note 220, at 279–83; MOOTZ, *supra* note 221, at 142 (Justice “is lodged in the interstices of the practice of re-creating the law through dialogic openness.”); PERELMAN, IDEA, *supra* note 35, 156 (“The effective exercise of argumentation assumes a means of communication, a common language, without which there can be no contact of minds.”); PERELMAN, JUSTICE, *supra* note 35, at 122 (arguing that conformity to legal procedures “is necessary if we are to arrive at a valid legislative, administrative or judicial decision”); PERELMAN & OLBRECHTS-TYTECA, *supra* note 37, at 17 (“It is not enough for a man to speak or write; he must also be listened to or read.”); *id.* at 18 (“For argumentation to develop, there must be some attention paid to it by those to whom it is directed.”).
252. PERELMAN, JUSTICE, *supra* note 35, at 122 (“[O]ne of the characteristics of law is that it provides procedures to which conformity is necessary if we are to arrive at a valid legislative, administrative or judicial decision.”); *id.* at 80 (Judicial institutions “provide agreed procedures for the . . . settlement of conflicts”); PERELMAN & OLBRECHTS-TYTECA, *supra* note 37, at 18 (noting that societies possess institutions to facilitate the meeting of parties in the administration of justice).
253. PERELMAN & OLBRECHTS-TYTECA, *supra* note 37, at 461; see also MACCORMICK, *supra* note 38, at 150–51 (arguing that the use of legal institutions “requires disputants to focus their dispute in terms of manageable issues of dispute, and at least restricts the range of legally justifiable resolutions that can conceivably be advanced”).
254. PERELMAN, JUSTICE, *supra* note 35, at 78.
255. MOOTZ, *supra* note 221, at 144; see *id.* at 143 (“[A] rhetorical account of justice insists that such laws are just if they are applied in an open and deliberative process that leads to rhetorical knowledge of the matter at hand.”); James Boyd White, *Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life*, 52 U. CHI. L. REV. 684, 697 (1985) (“The basic idea of the legal hearing is that two stories will be told in opposition or competition and a choice made between them. On the rhetorical view of law . . . you are entitled to have your story told in your own language . . . or the law is failing.”).
256. PERELMAN, IDEA, *supra* note 35, at 41; see also *id.* (“Justice . . . is fidelity to rule, obedience to system.”); CROSSWHITE, *supra* note 220, at 269 (characterizing “reasonable process” as “one that defines the realm of argumentation” for the resolution of disputes).
257. CROSSWHITE, *supra* note 220, at 286; see also Ehrenberg, *supra* note 45, at 189 (claiming that a court “can fail in the outcome, by reaching a result that is somehow manifestly unjust

common language if one urges a technical while the other a moral ground for the judgment.²⁵⁸ Indeed, an opponent might use a technical argument “to restrict the scope of the debate and to advance a conclusion that falls short of what might be anticipated from the writer or speaker.”²⁵⁹ For example, rules of procedure and evidence allow for argumentation by forcing responses, but they simultaneously restrict what is said and—just as importantly—when it can be said.²⁶⁰ Accordingly, a party can try to foreclose an opponent’s morals-based reason by ignoring it and counterarguing a procedural alternative to the judge.²⁶¹ The judge therefore determines the direction and significance of the arguments through her power to “choose which rule shall be accorded priority to settle the dispute in question.”²⁶² Reasons in support of choosing one over the other include the teleological—“appeals to the policy of the law”—or prag-

notwithstanding having used the correct procedure and having tackled the correct questions”).

258. PERELMAN, IDEA, *supra* note 35, at 156 (calling language “the product of a social tradition” that has “different rhythms” for social language and for “technical language common to the members of a discipline or profession”). Moreover, “the process could well be deficient in fairness” if one party speaks the technical language with a higher level of precision than the other. CROSSWHITE, *supra* note 220, at 280; *see also* MOOTZ, *supra* note 221, at 137 (recognizing that convention requires lawyers to argue their proposed solutions “under cover of highly rationalistic legal dogmatics”).
259. PERELMAN & OLBRECHTS-TYTECA, *supra* note 37, at 466; *see also* Hermann, *supra* note 244, at 496 (characterizing an argument that “recasts and restricts the discussion” as “powerful”).
260. PERELMAN, IDEA, *supra* note 35, at 156 (analogizing “customs and regulations” of argumentation to codes of civil procedure that restrict argumentation “as to its duration, its subject or the time at which it may be presented”); PERELMAN, JUSTICE, *supra* note 35, at 77 (“[I]n law a variety of presumptions regulates the question of the burden of proof and in different ways limits the admissibility of different kinds of evidence.”); Austin Sarat & Thomas R. Kearns, *Editorial Introduction*, in *THE RHETORIC OF LAW* 1, 12 (Austin Sarat & Thomas R. Kearns eds., 1996) (recognizing that, in law, “conventions and rules enable and, at the same time, constrain the opportunities for voice”).
261. Hermann, *supra* note 244, at 501 (“[A] counter argument may be based on reasons ignored or denied in the argument that presents the opposing view.”); *see also* MACCORMICK, *supra* note 38, at 50 (calling a hard case one “where some difficulty of interpreting the law has arisen, where there are strong arguments for each of the rival understandings or interpretations of the law put forward by or on behalf of the parties”); PERELMAN, JUSTICE, *supra* note 35, at 78.
262. PERELMAN, JUSTICE, *supra* note 35, at 78; *see also* JAMES A. HERRICK, *THE HISTORY AND THEORY OF RHETORIC* 206 (2009) (“The audience, then, plays a role equal to that of the orator in the testing of ideas publicly.”); PERELMAN & OLBRECHTS-TYTECA, *supra* note 37, at 30 (explaining that the audience “will determine to a great extent both the direction the arguments will take, and the character, the significance that will be attributed to them”); Jonathan Remy Nash, *Framing Effects and Regulatory Choice*, 82 NOTRE DAME L. REV. 313, 316–17 (2006) (explaining how one party can affect “the decisionmaker’s preference” by framing an option to “seem more or less desirable”).

matic—"the practical consequences of deciding one way or another."²⁶³ These reasons might seem to privilege the procedural over the moral. For example, some commentators have observed that judges prefer to avoid decisions based on controversial moral grounds as demonstrated through their lack of candor with jurisdictional statutes and abdication to other authority.²⁶⁴

C. *Appealing to the Judge's "Sense of Equity"*

The party with a moral claim can nevertheless prevail by appealing to the judge's "sense of equity."²⁶⁵ Perelman calls equity the "crutch of justice" because it can support a decision whenever the law appears "lame"—where it is too limited to afford an adequate remedy.²⁶⁶ This appeal can be one for recourse to equitable relief as typically understood in the Anglo-American tradition of an injunction or specific performance.²⁶⁷ For Perelman, the "sense of equity" is not limited to supplementing the law, however, because it also includes instances where a party contests the justness of a rule by arguing for the reconsideration of precedent or for new interpretation of a rule.²⁶⁸ The challenger can argue an exception to established precedent by offering moral reasons that are analogous enough to established law.²⁶⁹ For example, the party can contest application of

263. PERELMAN, JUSTICE, *supra* note 35, at 78; *see also id.* at 71–72 (explaining that the disputants "assume the existence of criteria, values, and norms recognized in advance by those who will have to judge the pertinence of the criticism or the soundness of the defense [so each party must] base his argumentation only on principles that his audience admits at the start").

264. Laura E. Little, *Hiding with Words: Obfuscation, Avoidance, and Federal Jurisdiction Opinions*, 46 UCLA L. REV. 75, 102–03, 135 (1998); *see* Todd, *Recognition*, *supra* note 54, at 221 ("Judges engage in a number of strategies to avoid deciding cases on the basis of controversial moral and political grounds.").

265. PERELMAN, IDEA, *supra* note 35, at 32, 36; *see also* PERELMAN, JUSTICE, *supra* note 35, at 39; ALLEN G. GROSS & RAY D. DEARIN, CHAIM PERELMAN 25 (2d ed. 2010) ("For Perelman, when values clash or simultaneous accounts must be taken of a plurality of 'essential characteristics' . . . another concept, equity, must come to the rescue.").

266. PERELMAN, JUSTICE, *supra* note 35, at 38–39 (citing ARISTOTLE, *supra* note 236, at 1137bb); *see* Samuel L. Bray, *The Supreme Court and the New Equity*, 68 VAND. L. REV. 997, 1005 (2015) (explaining that plaintiffs must first show that they have no adequate remedy at law to obtain equitable relief); John T. Valauri, *Confused Notions and Constitutional Theory*, 12 N. KY. L. REV. 567, 577 (1985) (establishing that equity "softens, in the name of justice, the harshness of the strict application of legal rules").

267. PERELMAN, JUSTICE, *supra* note 35, at 93.

268. PERELMAN, IDEA, *supra* note 35, at 65 (arguing that the justness of a rule can be contested in several ways, such as by isolating the precise rule applicable in the particular case, supplementing the law through recourse to equity, or opposing the positive law).

269. PERELMAN, JUSTICE, *supra* note 35, at 76; Galston, *supra* note 231, at 811, 815; *see* MAC-CORMICK, *supra* note 38, at 23 ("A solution offered must ground itself in some proposition that can be presented with at least some credibility as a proposition of law, and such a proposition must be shown to cohere in some way with other propositions that we take to state established law."); *id.* at 25 ("[T]he Rule of Law demands that there be some rule to

precedent by urging the judge to limit the scope of the prior cases to the *ratio decidendi*; thus limited, the judge can recognize distinctions between the old and new cases to rule differently.²⁷⁰ Or the party can urge the judge to qualify the facts and thereby include or exclude particular cases from the field of application, or to reinterpret the rule upon which a decision is based.²⁷¹

The party arguing that adhering to the status quo results in injustice has the burden of arguing for change.²⁷² Accordingly, the party arguing for some change to existing law must bring forward sufficient reasons so that the judge can justify modifying or setting aside accepted rules.²⁷³ After all, if the judge fails to explain conclusions, then she denies justice,²⁷⁴ but if the decision is supported by sufficient reasons, then that decision—though debatable—is nevertheless acceptable to the parties, appellate tribunals, and public opinion.²⁷⁵ More importantly, in the process of working through the advocates' reasoning, a judge predisposed to side with the status quo might convince herself that change is warranted.²⁷⁶

warrant the claim of one person against another if adjudication of the claim is liable to issue in an enforceable order against that other.”); Hans Hohmann, *The Dynamics of Stasis: Classical Rhetorical Theory and Modern Legal Argumentation*, 34 AM. J. JURIS. 171, 191 (1989) (indicating that appeals to moral norms can have persuasive force).

270. PERELMAN, JUSTICE, *supra* note 35, at 40, 93.

271. *Id.* at 40–41, 93; see MACCORMICK, *supra* note 38, at 149 (explaining that the disputability of legal propositions “can be exploited . . . to try to expound equitable reformulations of, or adventurous new interpretations of, legal rules or principles”).

272. Chaim Perelman & Lucie Olbrechts-Tyteca, *On Temporality as a Characteristic of Argumentation*, 43 PHIL. & RHETORIC 43, 315, 327 (Michelle K. Bolduc & Michael A. Frank trans., 2010) (“[T]he burden of proof always belongs to him who wants to change something, which in law produces rules for advocacy.”).

273. PERELMAN, JUSTICE, *supra* note 35, at 41 (“[I]n order to avoid arbitrariness, [a judge] will have to justify and give special reasons for those decisions that deviate from the precedents.”); PERELMAN, HUMANITIES, *supra* note 35, at 115 (“A decision is just if it can be justified by sufficient reasons.”); PERELMAN, IDEA, *supra* note 35, at 62 (“Change, and change alone, needs to be justified.”).

274. Todd, *Recognition*, *supra* note 54, at 214.

275. PERELMAN, JUSTICE, *supra* note 35, at 122, 124; see also Kurt M. Saunders, *Law as Rhetoric, Rhetoric as Argument*, 44 J. LEGAL EDUC. 566, 572 (1994) (“In reaching legal conclusions, the judge must choose among probabilities, not certainties, while focusing on the societal audience.”); Steven D. Smith, *Rhetoric and Rationality in the Law of Negligence*, 69 MINN. L. REV. 277, 293 (1984) (recognizing that litigants do not expect a “single, unquestionably correct result” but that they “nonetheless value rationality”).

276. PERELMAN & OLBRECHTS-TYTECA, *supra* note 37, at 40–45 (theorizing that one of the audiences that a writer addresses and seeks to persuade is herself).

IV. THE NEW RHETORIC APPLIED TO ENVIRONMENTAL JUSTICE LITIGATION

Perelman's new rhetoric and rule of justice provide theoretical bases to understand why motions to dismiss similar environmental justice lawsuits can have different results. This Part synthesizes Perelman's ideas with environmental justice principles to fashion a new rhetoric for environmental justice litigation. It then applies that rhetoric to the complaints, motions, and opinions in *Juliana* and *Kivalina* to show how the *Juliana* plaintiffs appealed to the judge's "sense of equity" and succeeded while the *Kivalina* plaintiffs portrayed a claim for extraordinary relief as a legal entitlement and failed.

A. *A New Rhetoric of Environmental Justice Litigation*

Doctrines like *stare decisis* prompt courts to apply settled law in a settled way because to do so treats current litigants like past ones,²⁷⁷ yet the status quo understanding of tort law, constitutional provisions, and environmental statutes renders them insufficient when applied to environmental justice cases.²⁷⁸ Those communities therefore have limited recourse to remediation and compensation because they lack a legal entitlement.²⁷⁹ If the communities nevertheless assert a legal entitlement, then the defendants will raise procedural obstacles in an attempt to have the court stop short of the plaintiffs' claim.²⁸⁰ Defendants can argue their own legal entitlement to dismissal through justiciability doctrines like political question and standing.²⁸¹ Or they can highlight the plaintiffs' lack of legal entitlement by arguing that the settled law does not allow for the relief sought.²⁸² Either way, the court can more easily side with the settled and neutral language of procedure because a judge needs little justification to adhere to the status quo.²⁸³

Justice is not purely juridical, however: the rule of justice considers values other than legal entitlements, such as merit and demerit, where the worth of the individual is contrasted with the harmful acts of another.²⁸⁴ The environmental justice narrative frames this as distributive injustice: companies profit from pollution with the permission of government, but vulnerable communities

277. See *supra* notes 216–26 and accompanying text.

278. See *supra* Part I.B.

279. See *supra* notes 66, 180–87 and accompanying text.

280. See *supra* Parts II.B, IV.B.

281. See *supra* Part I.C.1.

282. See *supra* Part I.C.2; see also Dinah Shelton, *Describing the Elephant: International Justice and Environmental Law*, in ENVIRONMENTAL LAW AND JUSTICE IN CONTEXT, *supra* note 39 ("Notions of entitlement uphold the existing distribution of goods if they were justly acquired according to the rules in force at the time of acquisition.").

283. See *supra* notes 219–31 and accompanying text.

284. See *supra* notes 197–204 and accompanying text.

of poor, minority, and indigenous persons do not benefit from those activities yet suffer the harmful consequences.²⁸⁵ Further, conditions change and social norms might shift as one set of values comes to replace an older one, as with greater recognition of hazardous activities being disproportionately sited near poor and minority neighborhoods and widespread acceptance of anthropogenic climate change.²⁸⁶ These transitions may reveal that laws that were reasonable when formulated might now be inadequate to correct injustice.²⁸⁷ Environmental statutes from 1969 or tort claims based on English common law worked well against certain types of pollutants and single defendants, but they do not respond to harms caused to neighborhoods by multiple factories or to vulnerable communities by GHG emissions.²⁸⁸

Rather than argue a legal entitlement, environmental justice advocates should appeal to the judge's sense of equity as the only way to remedy injustice.²⁸⁹ Framing the lawsuit as a clash of values means that the court cannot merely apply the status quo understanding of the law without justification, but must instead choose one value over another.²⁹⁰ To convince the judge to reject the defendants' procedural arguments, the environmental justice advocate must make claims that are analogous enough to existing law but that require a creative application, re-interpretation or broadening of that law to afford justice.²⁹¹ The typical grounds for dismissal give judges sufficient leeway to rule for plaintiffs—assuming that the plaintiffs furnish sufficient reasons for the judge to justify a departure from the status quo.²⁹² Making a claim based on the values and norms of environmental justice creates an opportunity to change the judge's

285. See *supra* Part I.A.

286. See *supra* notes 46–51, 180–84 and accompanying text; see also PEEL & OSOFSKY, *supra* note 33, at 228 nn. 23–24 (discussing polls showing that Americans are increasingly concerned about climate change and that there is more public support for mitigation measures); Jonathan Lovvorn, *Climate Change Beyond Environmentalism Part I: Intersectional Threats and the Case for Collective Action*, 29 GEO. ENVTL. L. REV. 1, 9 (2017) (calling the assumption “that human activities are either causing [climate] change, or are significantly contributing to it on a global scale . . . so well accepted within the scientific community that the arguments against them are . . . far-fetched”).

287. See *supra* notes 190–95 and accompanying text.

288. See *supra* Part I.B.

289. See *supra* Part III.C.

290. See *supra* notes 205–11 and accompanying text; see also Nosek, *supra* note 30, at 763 (“Employing a different substantive frame than the status quo frame is an important first step in [environmental advocacy].”).

291. See *supra* notes 229–36 and accompanying text; see also Molodanof & Durney, *supra* note 6, at 226 (interviewing environmental justice litigator Julia Olson, who asserts that the best lawyers understand “the rules in the box” but then build upon those fundamentals “to deconstruct the box, or move outside the box, or expand the box when justice so demands”).

292. See *supra* notes 198–200, 230–36 and accompanying text.

mind, infuse the law with environmental justice principles, and—of the most immediate concern—extend the lawsuit beyond the motion to dismiss.²⁹³

B. *Juliana and Kivalina: A New Rhetorical Explication*

Before applying Perelman's new rhetoric, it may be worth considering an a-rhetorical perspective, where one speculates that the success of the *Juliana* plaintiffs and the failure of the *Kivalina* plaintiffs have nothing to do with how they framed their cases but instead relate to nothing more than the differences between them: the youth plaintiffs seek equitable relief against the U.S. government based upon constitutional rights, while the Village and Town sought money damages from corporate defendants based on common law tort.²⁹⁴ These differences make it more likely that a judge would have dismissed *Juliana* rather than *Kivalina*, however. For example, the *Juliana* plaintiffs are young people claiming standing for vaguely defined "future generations,"²⁹⁵ while the Native Village of Kivalina is a federally recognized Alaska Native Village with a reasonable claim for *parens patriae* standing.²⁹⁶ Also, courts are more comfortable with cases involving money rather than equitable remedies, particularly where the court is asked to craft orders "that would control non-judicial decisions [of the legislative and executive branches] to an impermissible extent."²⁹⁷ Further, courts have hesitated to find that environmental harms give rise to constitutional rights claims,²⁹⁸ while environmental law traces its origins to tort law²⁹⁹ and many commentators recognize a continuing role for tort suits in helping to regulate complex environmental problems like climate change.³⁰⁰

293. See *supra* Part II; PERELMAN & OLBRECHTS-TYTECA, *supra* note 37, at 40–45; see also Burkett, *Evasive*, *supra* note 44, at 118 (stating that "the lower courts have a choice about how they treat the unresolved alternative avenues for tort relief" in climate justice litigation and can "recognize the corrective potential of compensation claims").

294. Compare *Juliana v. United States*, 217 F. Supp. 3d 1224, 1233 (D. Or. 2016), with *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 867 (N.D. Cal. 2009).

295. *Juliana*, 217 F. Supp. 3d at 1233.

296. Elizabeth Ann Kronk, *Effective Access to Justice: Applying the Parens Patriae Standing Doctrine to Climate Change-Related Claims Brought by Native Nations*, 32 PUB. LAND & RES. L. REV. 1, 24–25 (2011) (concluding "that the *parens patriae* standing doctrine applies to claims [for federal public nuisance] brought by Native Nations" like Kivalina).

297. Harrison, *supra* note 106, at 481.

298. See Purdy, *supra* note 14, at 829–30; see also *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 270–71 (1977).

299. See Lin, *supra* note 67, at 903–05; Todd, *Trade*, *supra* note 15, at 101.

300. See Abelkop, *supra* note 69, at 385 (calling tort litigation and public regulation "complements" for environmental policy); Ewing & Kysar, *supra* note 189, at 357 (arguing that adjudicating climate change nuisance suits "edges toward paradigmatically legislative and regulatory activity"); Doug Rendleman, *Rehabilitating the Nuisance Injunction to Protect the Environment*, 75 WASH. & LEE L. REV. 1859, 1862 (2018) (arguing "for more and more-detailed injunctions as environmental remedies" in private-law nuisance and trespass cases);

Yet despite their facially apparent differences, these cases share important features. For example, both address the “super-wicked problem” of climate change³⁰¹ by asserting legal theories that commentators characterize as unusual and creative.³⁰² Indeed, as discussed in more detail in Part IV.B.2, in addition to proclaiming a constitutional right to a climate system capable of sustaining human life, Judge Aiken in *Juliana* also found that the plaintiffs’ public trust doctrine claim could go forward.³⁰³ Similar to public nuisance, the public trust doctrine is common law, with courts over the decades expanding its reach beyond navigable waters (though never reaching recognition of a federal atmospheric public trust like that asserted in *Juliana*).³⁰⁴ Accordingly, both sets of plaintiffs tested the boundaries of common law doctrines to afford relief for climate-related harms,³⁰⁵ yet only the public trust doctrine and not the federal common law nuisance claim survived dismissal. This Subpart therefore applies the new rhetoric and rule of justice to explicate the pleadings, briefs, and opinions in *Juliana* and *Kivalina* to argue that appealing to the judge’s sense of equity—or the failure to do so—led to the different outcomes in the motions to dismiss.

1. Procedural Summary of *Juliana* and *Kivalina*

In *Juliana v. United States*, several young people between the ages of eight and nineteen, the environmental activist association Earth Guardians, and Dr.

see Abate, *ATL*, *supra* note 3, at 566 (noting that regulatory change and damage awards for tobacco, lead paint, and asbestos harms “were secured through the environmental common law”).

301. Richard J. Lazarus, *Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future*, 94 CORNELL L. REV. 1153, 1159 (2009) (asserting that the issue of climate change “defies resolution because of the enormous interdependencies, uncertainties, circularities, and conflicting stakeholders implicated by any effort to develop a solution”).
302. *See, e.g.*, Blumm & Wood, *supra* note 1, at 54 (calling *Juliana* “quite unusual in federal environmental law”); Jean-Baptiste et al., *supra* note 1, at 11, (calling atmospheric trust litigation like that in *Juliana* a “much more ambitious and creative use of a common-law theory”); King, *supra* note 30, at 333 (characterizing *Kivalina* as “an instance of creative claim making”); Kysar, *supra* note 58, at 28–29 (explaining that the *Kivalina* plaintiffs’ “theory of the case . . . is built upon a different conception of nuisance liability”).
303. *Juliana v. United States*, 217 F. Supp. 3d 1224, 1250, 1252–61 (D. Or. 2016).
304. *See* Carolyn Kelly, *Where the Water Meets the Sky: How an Unbroken Line of Precedent from Justinian to Juliana Supports the Possibility of a Federal Atmospheric Public Trust Doctrine*, 27 N.Y.U. ENVTL. L.J. 183 (2019) (discussing the history of the public trust doctrine and its expansion in U.S. courts and arguing for the recognition of a federal atmospheric public trust doctrine).
305. *See, e.g.*, Abate, *ATL*, *supra* note 3, at 522 (“[C]ourts have been reluctant to extend the public trust doctrine to include the atmosphere.”); Schwartz et al., *supra* note 11, at 825 (“Whether under state or federal law, if courts apply the core principles of public nuisance law, the global climate change and weather-related claims discussed in this article will not be able to overcome several immovable hurdles.”).

James Hansen as guardian for future generations sued the United States, President Barack Obama, and numerous executive agencies.³⁰⁶ The plaintiffs alleged that the defendants have known about the dangers of climate change yet “permitted, encouraged, and otherwise enabled continued exploitation, production, and combustion of fossil fuels,” thus putting the plaintiffs in danger.³⁰⁷ The plaintiffs sought a declaration that the government’s actions violate their substantive due process rights to life, liberty, and property as well as the government’s obligation to hold natural resources in trust for the people and for future generations.³⁰⁸ They also sought an order enjoining the government from violating those rights and directing the government to develop a plan to reduce carbon dioxide emissions.³⁰⁹ The defendants—along with intervenors the National Association of Manufacturers, the American Fuel & Petrochemical Manufacturers, and the American Petroleum Institute—moved to dismiss under the political question doctrine and for lack of standing.³¹⁰ They also argued that plaintiffs failed to state a claim, in particular that they did not identify a particular right and that the public trust doctrine does not apply to the case.³¹¹

Conducting a *de novo* review of the magistrate judge’s Findings and Recommendation to deny the motions to dismiss, District Court Judge Ann Aiken adopted and elaborated on the Findings and Recommendation and denied the motions.³¹² She acknowledged that the claims related to political issues and called for complex remedies, but “[a]t its heart,” the lawsuit asked for a determination of the violation of constitutional rights, a question “squarely within the purview of the judiciary.”³¹³ Judge Aiken likewise found that each factor from the *Lujan* standing test was satisfied because the plaintiffs alleged individualized harms, created a causal chain linking governmental policies to that harm, and requested injunctive relief that would at least partially redress their injuries.³¹⁴ Turning to the Rule 12(b)(6) challenges, Judge Aiken exercised her “reasoned judgment” to rule “that the right to a climate system capable of sus-

306. *Juliana*, 217 F. Supp. 3d at 1233.

307. First Amended Complaint for Declaratory and Injunctive Relief ¶¶ 1, 5, *Juliana v. United States*, 217 F. Supp. 3d 1224 (D. Or. 2016) (No. 6:15-CV-01517-TC) [hereinafter *Juliana* Complaint].

308. *Id.* The plaintiffs also sought relief for violation of equal protection principles under the Fifth Amendment and the unenumerated rights preserved for the people by the Ninth Amendment. *Id.* ¶¶ 290–306; see U.S. CONST. arts. V, IX.

309. *Juliana*, 217 F. Supp. 3d at 1233.

310. *Id.* at 1233, 1235.

311. *Id.* at 1233, 1248, 1254–55.

312. *Id.* at 1233–35 (citing FED. R. CIV. P. 72(b)(3); *McDonnell Douglas Corp. v. Commodore Bus. Machs., Inc.*, 656 F.2d 1309, 1313 (9th Cir. 1981)). The opinion reproduces Magistrate Judge Coffin’s Findings and Recommendation in full. *Id.* at 1263–76.

313. *Id.* at 1241.

314. *Id.* at 1242–49 (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)).

taining human life is fundamental to a free and ordered society.”³¹⁵ She also found that the atmosphere is a public trust asset, the federal government has public trust obligations, common law public trust claims have not been displaced by federal statutes, and the Fifth Amendment allows for enforcement of violations of the public trust.³¹⁶ The district and circuit courts later denied several motions brought by the defendants seeking, inter alia, interlocutory appeal, a writ of mandamus, and judgment on the pleadings and for summary judgment.³¹⁷ As of this writing, the Ninth Circuit had subsequently granted interlocutory appeal in a 2–1 decision, and trial proceedings are stayed.³¹⁸

In *Native Village of Kivalina v. ExxonMobil Corp.*, the Village and Town sued twenty-four oil and utility companies to recover money damages for the costs of relocation because of the loss of their barrier reef caused by climate change.³¹⁹ They alleged federal common law nuisance as well as state law public and private nuisance, civil conspiracy, and concert of action.³²⁰ The defendants filed five separate motions to dismiss that primarily targeted the federal common law nuisance claim: under Rule 12(b)(1), the claim raised nonjusticiable political questions, and the court lacked Article III standing; under Rule 12(b)(6), the plaintiffs failed to state a federal common law nuisance claim, and the CAA has displaced common law nuisance for climate-related claims.³²¹

Judge Sandra Brown Armstrong granted dismissal of the federal nuisance claim, finding that there were no judicially discoverable and manageable standards and that the court would have to make “an initial policy determination of a kind clearly for nonjudicial discretion.”³²² The court also found that the plaintiffs lacked standing because the harms alleged were not “fairly traceable” to the defendants.³²³ The court did not reach the Rule 12(b)(6) arguments; it also

315. *Id.* at 1250.

316. *Id.* at 1252–62.

317. *Juliana v. United States*, 339 F. Supp. 3d 1062, 1073–75, 1105 (D. Or. 2018).

318. Order, *Juliana v. United States*, No. 18-80176 (9th Cir. Dec. 26, 2018) (granting interlocutory appeal); *Juliana v. United States*, No. 6:15-CV-01517-AA, 2018 WL 6303774, at *3 (D. Or. Nov. 21, 2018) (certifying case for interlocutory appeal and staying proceedings).

319. *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 868–69 (2009).

320. *Id.* at 869.

321. *Id.* at 870. The defendants also challenged the state law claims. *See* Notice of Motion & Motion of Certain Oil Co. Defendants to Dismiss Plaintiffs’ Complaint Pursuant to Fed. R. Civ. P. 12(b)(1), 663 F. Supp. 2d 863 (D. Or. 2009) (4:08-CV-01138-SBA); Memorandum of Points & Authorities at 20–21, 663 F. Supp. 2d 863 (D. Or. 2009) (No. 08-CV-01138-SBA) [hereinafter Oil Co. 12(b)(6) Motion]; Utility Defendants’ Motion to Dismiss at 35–43, 663 F. Supp. 2d 863 (D. Or. 2009) (No. 08-CV-01138-SBA) [hereinafter Utility Defendants’ Motion].

322. *Kivalina*, 663 F. Supp. 2d at 870, 873–78 (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)) (citing *Alperin v. Vatican Bank*, 410 F.3d 532, 552 (9th Cir. 2005)).

323. *Kivalina*, 663 F. Supp. 2d at 877–82 (citing, inter alia, *Sprint Commc’n Co., L.P. v. APCC Servs., Inc.*, 554 U.S. 269 (2008); *Bennett v. Spear*, 520 U.S. 154, 167 (1997)).

declined to exercise supplemental jurisdiction over the remaining state law claims.³²⁴ Reviewing the dismissal *de novo*, the Circuit Court relied on the newly decided *American Electric Power Co. v. Connecticut*³²⁵ to hold that the nuisance claim was displaced by the CAA, and it did not address the other arguments.³²⁶ Judge Pro in a concurrence wrote that the dismissal also could have been affirmed based on the plaintiffs' lack of standing.³²⁷

2. "No Ordinary Lawsuit": *Juliana v. United States*

Given the identification of the environmental justice movement with the civil rights movement, the potential of constitutional law to link environmental harms with fundamental human rights has long tantalized plaintiffs.³²⁸ Yet courts have roundly rejected equal protection lawsuits and found no enforceable right when plaintiffs have invoked Title VI and Section 1983,³²⁹ including the Ninth Circuit where *Juliana* was filed.³³⁰ Judge Aiken even remarked how the absence of a right would mean dismissal under the deferential rational basis test.³³¹ Likewise, the public trust doctrine resembles nuisance in that both are centuries-old doctrines that have been applied in limited circumstances, so using the public trust doctrine to address "a decidedly modern—indeed unprecedented—global threat" seems a stretch.³³² The *Juliana* plaintiffs did not claim a straightforward legal entitlement, however, but instead told the court a detailed story of distributive injustice and argued that the court could correct that injustice only by recognizing a new constitutional right and expanding the public trust doctrine.

The complaint opens with a distributive injustice narrative of a powerful actor recklessly causing harm to the place where the most vulnerable live:

For over fifty years, the United States of America has known that carbon dioxide ("CO²") pollution from burning fossil fuels was causing global warming and dangerous climate change, and that continu-

324. *Kivalina*, 663 F. Supp. 2d at 882–83 (citing 28 U.S.C. § 1367(c)(3); *Imagineering, Inc. v. Kiewit Pac. Co.*, 976 F.2d 1303, 1309 (9th Cir. 1992)).

325. 564 U.S. 410 (2011).

326. *Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 855–58 (9th Cir. 2012); *see Am. Elec. Power*, 564 U.S. at 425 (holding that the CAA provides "a means to seek limits on emissions of carbon dioxide from domestic powerplants" and thus displaces "parallel" federal common law claims).

327. *Kivalina*, 696 F.3d at 868–69.

328. *See* Badrinarayana, *supra* note 41, at 83–87.

329. *See supra* notes 92–96 and accompanying text.

330. *See Save Our Valley v. Sound Transit*, 335 F.3d 932, 939 (9th Cir. 2003) ("[A]gency regulations cannot independently create rights enforceable through § 1983.>").

331. *Juliana v. United States*, 217 F. Supp. 3d 1224, 1248–49 (D. Or. 2016).

332. Blumm & Wood, *supra* note 1, at 42.

ing to burn fossil fuels would destabilize the climate system on which present and future generations of our nation depend for their well-being and survival.³³³

This sets up the demerit of the defendants, who, despite this knowledge, “continued their policies and practices of allowing the exploitation of fossil fuels.”³³⁴ The plaintiffs reinforce the power disparity throughout the complaint. For example, they call the U.S. “the sovereign trustee of national natural resources, including air, water, sea, shores of the sea, and wildlife.”³³⁵ They then open the next three sentences with the same phrasing: “In its sovereign capacity, the United States controls”³³⁶ This repetition of “controls” reinforces the power of the U.S. over the atmosphere, land, water, and foreign commerce—including the regulation of GHG-emitting fossil fuels.³³⁷ The plaintiffs further reinforce the power of the U.S. government by naming and describing other federal entities and persons, including President Obama and heads of executive departments and other agencies.³³⁸

Contrast this with how the plaintiffs portray themselves as “especially vulnerable to the dangerous situation that Defendants have substantially caused.”³³⁹ This sentence not only distinguishes the powerful defendants from the vulnerable plaintiffs, but it also reinforces distributive injustice in that the defendants have used their power to harm them.³⁴⁰ The plaintiffs further contrast themselves via detailed multi-paragraph descriptions that highlight individual merit: they refer to themselves by first name and include personal details like hobbies and plans; these personal details allow them to humanize what would otherwise be general harms related to climate change. For example, Kelsey Cascadia Rose Juliana “is 19 years old and was born and raised in Oregon, the state where she hopes to work, grow food, recreate, have a family, and raise children.”³⁴¹ Kelsey “drinks the freshwater that flows from the McKenzie River and drinks from springs in the Oregon Cascades on hiking, canoeing, and backpacking trips,” but the “current and projected drought and lack of snow caused by Defendants are already harming all of the places Kelsey enjoys visiting, as well as her drinking water.”³⁴² Another plaintiff, Xiuhtezcatl Tonatiuh

333. *Juliana* Complaint, *supra* note 307, ¶ 1.

334. *Id.*

335. *Id.* ¶ 98.

336. *Id.*

337. *Id.*

338. *Id.* ¶¶ 99–130 (listing as defendants, *inter alia*, President Barack Obama, the Department of Energy, the Department of State, Secretary of State John Kerry, the EPA, and Administrator of the EPA Gina McCarthy).

339. *Id.* ¶ 10.

340. *See, e.g., id.* ¶ 13 (“Defendants have placed Plaintiffs in a dangerous situation . . .”).

341. *Id.* ¶ 16.

342. *Id.* ¶¶ 16–17.

M., is a fifteen year old from Boulder, Colorado.³⁴³ Where Kivalina did not give a single detail about the Inupiat's traditional lifestyle, the *Juliana* plaintiffs foreground such stories: "Of Aztec descent, Xiuhtezcatl engages in sacred indigenous spiritual and cultural practices to honor and protect the Earth. Xiuhtezcatl has suffered harm to his spiritual and cultural practices from Defendants' actions."³⁴⁴ The other youth plaintiffs include similar details that strengthen their emotional appeal.³⁴⁵

Like the *Kivalina* complaint, the *Juliana* complaint devotes considerable attention to the science of climate change.³⁴⁶ Rather than claim that the science supports the elements of an established cause of action, however, the *Juliana* plaintiffs argue that the federal government's understanding since at least 1965 of the link between GHG emissions and climate change means that the court should fashion a new right and extend application of the public trust doctrine.³⁴⁷ Indeed, a paragraph on jurisdiction offers a compact example of the new rhetoric and the rule of justice by claiming changing social values that render existing law no longer sufficient to provide relief, but the appeal is linked sufficiently to that existing law so that the court can identify new rights to fashion a remedy. They argue they "have no adequate remedy at law" to address the "dangerous situation" that the defendants have placed them in.³⁴⁸ They quote the then-recently-decided *Obergefell v. Hodges*³⁴⁹ as empowering the court to afford relief by identifying a new right: "The identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution."³⁵⁰ They continue, "[t]hat grant of equitable jurisdiction requires Article III courts to apply the underlying principles of the Constitution to new

343. *Id.* ¶ 20.

344. *Id.* ¶ 21.

345. *See, e.g., id.* ¶ 24 (claiming that one plaintiff's great, great, great, great grandmother was one of the first women in Oregon to own a ranch after arriving via the Oregon trail); *id.* ¶ 37 (stating that an eleven-year-old plaintiff's allergies have worsened in severity and caused him to spend more time inside); *id.* ¶ 41 (describing how a ten-year-old's trips to Yellowstone are affected by "burned, beetle-killed forests" and an increase of hungry bears roaming the park); *see also* Kenneth D. Chestek, *Judging by the Numbers: An Empirical Study of the Power of Story*, 7 J. ASS'N LEGAL WRITING DIRECTORS 1, 3 (2010) (concluding that stories are persuasive to appellate judges and that they make claims seem more real and thus believable); Nosek, *supra* note 30, at 791 (describing how the complaint, in highlighting the youth of the plaintiffs, supported the frame of innocent victims having a dangerous situation imposed on them by other actors).

346. *Compare* Complaint for Damages Demand for Jury Trial ¶¶ 123–88, Native Vill. of Kivalina v. ExxonMobil Corp., 663 F. Supp. 2d 863 (N.D. Cal. 2009) (No. 08-cv-01138-SBA) [hereinafter *Kivalina* Complaint], *with* *Juliana* Complaint, *supra* note 307, ¶¶ 202–76.

347. *Juliana* Complaint, *supra* note 307, ¶¶ 277–310.

348. *Id.* ¶ 13.

349. 135 S. Ct. 2584 (2015).

350. *Juliana* Complaint, *supra* note 307, ¶¶ 277–310. (quoting *Obergefell*, 135 S. Ct. at 2598).

circumstances unforeseen by the framers, such as the irreversible destruction of the natural heritage of our whole nation.”³⁵¹

The response briefs to the motions to dismiss similarly highlight injustice and argue for expanding the law in a way that comports with existing law so that the judge can justify this expansion. For example, in opposing the federal defendants’ motion to dismiss, the plaintiffs repeat the distributive injustice of the government continuing with policies and practices that endanger young people and future generations.³⁵² They then turn to procedural and corrective injustice: because young people cannot vote and thus alter the political process, “judicial intervention” is the only way to protect their “health and personal security.”³⁵³ While conceding the “critical implications” of their lawsuit, they compare their claims and the relief sought to successful civil rights cases: “this action poses questions akin to those that the judiciary has considered throughout our country’s history, and seeks a remedy familiar to courts.”³⁵⁴ After all, the Constitution does not recognize a fundamental right to marry or non-segregated education, “yet our judiciary has declared them integral to our liberties and our democracy.”³⁵⁵ The plaintiffs quote *Obergefell* at length to argue that these new rights are necessary to correct injustice:

The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning. When new insight reveals discord between the Constitution’s central protections and a received legal stricture, a claim to liberty must be addressed.³⁵⁶

In the language of Perelman, the Constitution empowers courts to respond to changing norms and new situations by recognizing new rights to correct injustice.

In denying the Rule 12(b)(6) motion to dismiss the constitutional claims, Judge Aiken quoted this *Obergefell* passage and another requiring courts to use their “reasoned judgment” to find fundamental rights.³⁵⁷ She writes, “I have no doubt that the right to a climate system capable of sustaining human life is

351. *Juliana* Complaint, *supra* note 307, ¶¶ 277–310.

352. Plaintiffs’ Memorandum in Opposition to Federal Defendants’ Motion to Strike at 1, *Juliana v. United States*, 217 F. Supp. 3d 1224 (D. Or. 2016) (No. 6:15-cv-01517-TC).

353. *Id.* at 1–2.

354. *Id.* at 2.

355. *Id.*

356. *Id.* at 11 (quoting *Obergefell v. Hodges*, 135 S. Ct. 2584, 2598 (2015)).

357. *Juliana v. United States*, 217 F. Supp. 3d 1224, 1249 (quoting *Obergefell*, 135 S. Ct. at 2598).

fundamental to a free and ordered society.”³⁵⁸ She makes this holding not despite the enormity of the relief sought but because of it: “This is no ordinary lawsuit” because the assertions are pollution and climate change on a “catastrophic level,” yet “[t]o hold otherwise would be to say that the Constitution affords no protection against a government’s knowing decision to poison the air its citizens breathe or the water its citizens drink.”³⁵⁹ She likewise denies dismissal of the public trust doctrine claim because it too is grounded in the Constitution: “Although the public trust predates the Constitution, plaintiffs’ right of action to enforce the government’s obligations as trustee arises from the Constitution. I agree with Judge Coffin that plaintiffs’ public trust claims are properly categorized as substantive due process claims.”³⁶⁰ In other words, the plaintiffs appealed to both judges’ sense of equity by urging an extension of the law that comports enough with existing precedent so that she could justify her ruling.³⁶¹

Although both Judge Aiken and Magistrate Judge Coffin were willing to find substantive law that supported the plaintiffs, the justiciability doctrines presented a threshold hurdle that could have forced the judges to stop short of reaching them. The defendants argued the teleological, practical consequences of having the court fashion and oversee complex relief that would interfere with government regulation and the production and consumption of energy throughout the country.³⁶² Judge Aiken faulted the defendants several times for mischaracterizing the plaintiffs’ claims, raising an argument that “misses the point,” and exhibiting a “deep resistance to change” in their briefs.³⁶³ The plaintiffs’ foregrounding distributive and corrective injustice played a part in the courts rejecting the Rule 12(b)(1) motions to dismiss.

358. *Id.* at 1250.

359. *Id.* at 1234, 1250.

360. *Id.* at 1261.

361. See Molodanof & Durney, *supra* note 6, at 220 (discussing how the *Juliana* lead attorney used the expression “extraordinary case” to highlight the extraordinary harms being perpetrated by the government but characterizing as “not extraordinary” the constitutional arguments because they “are rooted in the history and traditions of our nation and rooted in Supreme Court precedent”).

362. Federal Defendants’ Memorandum of Points and Authorities in Support of Their Motion to Dismiss at 14, *Juliana v. United States.*, 217 F. Supp. 3d 1224 (D. Or. 2016) (No. 6:15-cv-01517-TC) (“Plaintiffs seek a comprehensive national climate policy, overseen by a single federal district court, that would require wholesale changes to energy production and consumption in this country.”); Memorandum in Support of Intervenor-Defendants’ Motion to Dismiss at 11, *Juliana v. United States.*, 217 F. Supp. 3d 1224 (No. 6:15-cv-01517-TC) (claiming that “[t]he complaint asks this Court to direct agencies of the executive branch . . . to promulgate specific regulations to achieve a particular goal” effectively “commandeering these agencies and placing them under its exclusive control for these purposes”).

363. *Juliana*, 217 F. Supp. 3d at 1261–62.

The plaintiffs used some of their boldest language in opposing the displacement and political question arguments:

The practical and political reality of applying either of these doctrines to dismiss this case would result in an incomparable injustice, heavily tipping the balance of power toward the legislature that is, at present, heavily controlled by fossil fuel corporations and their owners represented by Defendant Intervenors, and away from judicial protection of individual liberties.³⁶⁴

While Judge Aiken did not adopt this strong language, she did recognize that when the political branches do not act, then people can turn to the courts for relief.³⁶⁵ The courts are especially key for young people “who cannot vote and must depend on others to protect their political interests.”³⁶⁶ Further, plaintiffs’ election of “constitutional rather than statutory claims” means that the second and third *Baker* factors are not met: “Every day, federal courts apply the legal standards governing due process claims to new sets of facts. The facts in their case, though novel, are amenable to those well-established standards.”³⁶⁷ Judge Aiken even explains how the plaintiffs’ theory “is much broader” than “a typical environmental case”: “defendants’ *aggregate actions* violate their substantive due process rights and the government’s public trust obligations.”³⁶⁸ In other words, the court embraced rather than shied away from the bold nature of the lawsuit to justify judicial, rather than political, resolution.

The court similarly relied upon the plaintiffs’ framing of the case to reject the defendants’ standing challenge. For example, in finding that the plaintiffs had adequately pleaded injury in fact, Judge Aiken references several of the youths by name with examples of the injuries each has claimed.³⁶⁹ She describes

364. Memorandum of Plaintiffs’ in Opposition to Defendant Intervenors’ Motion to Dismiss at 2–3, *Juliana v. United States*, 663 F. Supp. 2d 863 (D. Or. 2016) (No. 6:15-cv-01517-TC).

365. *Juliana*, 217 F. Supp. 3d at 1262 (quoting Alfred T. Goodwin, *A Wake-Up Call for Judges*, 2015 WIS. L. REV. 788) (“The third branch can, and should, take another long and careful look at the barriers to litigation created by modern doctrines of subject-matter jurisdiction and deference to the legislative and administrative branches.”). Magistrate Coffin used similar language in recommending that the court deny the defendants’ standing challenge. Order and Findings & Recommendation at 8, *Juliana v. United States*, 217 F. Supp. 3d 1224 (D. Or. 2016) (No. 6:15-cv-01517-TC) (“But the intractability of the debates before Congress and state legislatures . . . necessitates a need for the courts to evaluate the constitutional parameters of the action or inaction taken by the government.”); see also Dellinger, *supra* note 4, at 541 (“[I]t is clear that plaintiffs are finding their way into new legal arenas rather than relying on traditional regulatory ones.”).

366. *Juliana*, 217 F. Supp. at 1241.

367. *Id.* at 1239; see also *id.* (“The science may well be complex, but logistical difficulties are immaterial to the political question analysis.”).

368. *Id.* at 1240.

369. See *id.* at 1242 (citing *Juliana* Complaint, *supra* note 307, ¶¶ 17–18, 21, 26, 32, 38, 46).

at length the supplemental declaration of Jayden F., a thirteen-year-old from Louisiana whose house was flooded with water and sewage.³⁷⁰ Those sympathetic young people contrast with the defendants, who “are responsible for a substantial share of worldwide greenhouse gas emissions.”³⁷¹ As the complaint alleges, “between 1751 and 2014, the United States produced more than twenty-five percent of global CO² emissions” and those emissions “continue to increase.”³⁷² These allegations, combined with a climate science that is “constantly evolving,” led Judge Aiken to conclude that the harms are “fairly traceable” to the defendants.³⁷³

3. *The Failure to Justify Justice: Native Village of Kivalina v. ExxonMobil Corp.*

An analysis of the complaint and briefings reveal that the *Kivalina* plaintiffs never told the court their story of distributive and corrective injustice but instead presented their claim as one of blackletter nuisance law. From the new rhetorical perspective laid out previously, they had their best chance of defeating the motion to dismiss by attacking the injustice of the status quo instead of trying to claim a legal entitlement. The plaintiffs should have told a story that set up a clash of values between merit and legal entitlement, connected their value to emerging social and legal norms, and appealed to Judge Armstrong’s sense of equity for the creative application of nuisance law in light of the policy of federal environmental statutes and emerging science. Instead, when political question and standing challenges raised issues of reasonableness and causation, she had no reasons from the plaintiffs with which to justify a ruling outside the status quo.

Kivalina has a compelling story, one of merit versus demerit that reflects the broader environmental justice narrative of distributive injustice. For many indigenous communities, core elements of cultural identity are formed by a connection to place.³⁷⁴ That place for some Inupiat is the Kivalina barrier reef, which has shaped traditions that go back millennia of taking boats into the sea to hunt whales and traveling across the region to hunt caribou.³⁷⁵ This subsis-

370. *Juliana*, 217 F. Supp. 3d at 1243 (citing Decl. Jayden F. ¶¶ 2, 5, 8, 10, 12, 15 (Sep. 7, 2016)).

371. *Id.* at 1245.

372. *Id.* (citing *Juliana* Complaint, *supra* note 307, ¶¶ 152).

373. *Id.* at 1244.

374. Tsosie, *Impact*, *supra* note 59, at 1635 (“The impacts of climate change on indigenous peoples are particularly visible . . . in the Arctic due to the great interdependence of the people with their local environments and the centrality of traditional lifeways to basic survival in these regions.”).

375. See Knodel, *supra* note 9, at 1180, 1190; Abate & Kronk, *supra* note 59, at 183 (explaining that the “daily activities” of people like the Inuit include traveling through the Arctic for whaling, sealing, fishing, and hunting).

tence lifestyle means that the Inupiat have not engaged in the types of activities that emit significant carbon dioxide.³⁷⁶ By contrast, major energy and oil companies have profited from the release of the majority of industrial carbon dioxide as well as other GHGs like methane, all while knowing for decades about their harmful effects.³⁷⁷ These effects are particularly severe in the Arctic, where average temperatures are climbing at twice the global rate.³⁷⁸ Climate change has already altered traditional practices of the Inupiat—the Village has not captured a whale since the 1990s, and caribou are becoming scarcer—and now harsher storms and the loss of sea ice threaten to destroy their town.³⁷⁹ As a result, the Village and Town must relocate if they are to preserve some semblance of their cultural identity.³⁸⁰

This story connects to an emerging norm about the right of indigenous peoples to corrective justice for damage to their land. Corrective justice requires that the costs of relocation should fall not on the Inupiat, whose subsistence culture means they lack the resources to pay the tens if not hundreds of millions of dollars for relocation, but instead on the defendants because they have done the most to cause the harm.³⁸¹ Shortly before the plaintiffs filed suit, the U.S. signed the United Nations Declaration on the Rights of Indigenous Peoples (“UNDRIP”), which contains several provisions about the importance of land

376. Abate & Kronk, *supra* note 59, at 179; Tsosie, *Sovereignty*, *supra* note 54, at 252–53.

377. Dellinger, *supra* note 4, at 530; see *Long-term climate changes and their effects*, Letter from Sir Solly Zuckerman, Chief Scientist, to Vice Chancellor, University of Bath, PRO ref CAB 163/272 12885, (May 9, 1970), (describing funding by BP and Shell of scientific research in England to examine climate change impacts from emissions of GHGs).

378. Hari M. Osofsky, *Complexities of Addressing the Impacts of Climate Change on Indigenous Peoples Through International Law Petitions: A Case Study of the Inuit Petition to the Inter-American Commission on Human Rights*, in CLIMATE CHANGE AND INDIGENOUS PEOPLES: THE SEARCH FOR LEGAL REMEDIES, *supra* note 8, at 313, 324 (citing Susan Joy Hassol, IMPACTS OF A WARMING ARTIC: ARCTIC CLIMATE IMPACT ASSESSMENT 8 (2004), <https://perma.cc/PR3H-J4Y2>).

379. Knodel, *supra* note 9, at 1180, 1192; Tsosie, *Impact*, *supra* note 59, at 1640 (describing the disappearance of aquatic and terrestrial prey of cultural significance to the indigenous of the Arctic and the dangers to hunters like falling through thin sea ice); see also Abate & Kronk, *supra* note 59, at 10 (“[A]s the effects of climate change ravage their environment, indigenous peoples may experience both a physical and spiritual loss as a consequence of the negative impact to the environment.”); Rebecca Tsosie, *Indigenous Peoples and Global Climate Change: Intercultural Models of Climate Equity*, 25 J. ENVTL. L. & LITIG. 7, 13 (2010) (“[I]ndigenous peoples [of Alaska] are losing their land base and way of life as a consequence of climate change.” (emphasis added)).

380. Knodel, *supra* note 9, at 1205 (“The articulation of climate justice in Kivalina reflects the struggle to maintain their subsistence culture in a place of their choosing.”).

381. Burkett, *Evasive*, *supra* note 44, at 116–17; see *id.* at 117 (reporting that relocation expense estimates range from \$95 million to \$400 million); Burkett, *Litigating*, *supra* note 189, at 11,148 (arguing that litigation places two parties that might otherwise have different power “on equal footing to address harms incurred by, for example, climate-related impacts”).

and culture for indigenous persons.³⁸² For example, “States shall give legal recognition and protection to [indigenous peoples’ traditional] lands, territories and resources.”³⁸³ If “the lands, territories and resources which they have traditionally owned or otherwise occupied or used . . . have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent,” then indigenous persons have a right to “just, fair and equitable compensation.”³⁸⁴ This emerging legal norm coincides with changing social mores: The suit was filed during the 2008 presidential election when political attitudes about climate change shifted in favor of action.³⁸⁵

Existing U.S. law is “lame” because it does not reflect these social values or provide adequate redress for indigenous rights: statutes like the CAA and Clean Water Act (“CWA”) do not allow for money damages, while federal common law nuisance never contemplated a problem so complex and diffuse as climate change.³⁸⁶ Yet the plaintiffs have an appeal to the judge’s sense of equity that is sufficiently close to the law: federal statutes and common law nuisance both regulate interstate pollution,³⁸⁷ so the policies of the former regarding attribution of causal liability could broaden the latter’s previously narrow applications to allow compensation to Kivalina and thus afford justice to the Inupiat residents.³⁸⁸ The CWA and CAA recognize the need to protect and restore water and air resources harmed by industrial activities.³⁸⁹ Accordingly, plaintiffs

382. Abate & Kronk, *supra* note 59, at 189–90 (citing , G.A. Res. 61/295, Declaration on the Rights of Indigenous Peoples, arts. 3, 8, 10, 26, 28 (Oct. 2, 2007) [hereinafter UNDRIP]) (listing several provisions of UNDRIP, which was signed by the United States, that provide the right of indigenous persons to their land and their culture).

383. UNDRIP, *supra* note 377, art. 26.

384. *Id.*, art. 28; *cf.* Warner & Abate, *supra* note 173, at 148–49 (arguing that “from an environmental justice perspective,” a court could hear the Kivalina plaintiffs’ federal common law nuisance claim “based on the trusteeship relationship that the federal government has with Indian tribes and because of the tribes’ special relationship to their land”).

385. PEEL & OSOFSKY, *supra* note 33, at 227.

386. Burkett, *Litigating*, *supra* note 189, at 11,150; Gerrard, *supra* note 60, at 280–84; King, *supra* note 30, at 349 (noting that, at the time *Kivalina* was filed, “there was no legal claim available to hold companies who were emitting methane in Texas or carbon dioxide in Arkansas responsible for permafrost melting in Alaska”); Nicole Johnson, Comment, Native Village of Kivalina v. ExxonMobil Corp: *Say Goodbye to Federal Public Nuisance Claims for Greenhouse Gas Emissions*, 40 *ECOLOGY L.Q.* 557, 561 (2013) (“The United States’ legal system does not have a way for communities like Kivalina to recover under current circumstances, as the CAA does not provide relief for damages.”).

387. *See* Abate, *Public*, *supra* note 9, at 210.

388. *See* King, *supra* note 30, at 359 (pointing out that environmental litigators do not quite allege public or private nuisance but instead a “hybrid nuisance doctrine”).

389. For the CWA, see 33 U.S.C. § 1251(a) (2018) (“The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”); *id.* § 1252(a) (requiring “due regard . . . be given to the improvements which are necessary to conserve . . . waters” and authorizing the administrator “to make joint investigations with any such agencies of the condition of any waters in any State or States, and of the discharges

in CWA cases that involve multiple sources of pollution might show that the actions of an individual defendant caused harm if that defendant contributes to the injuries or is the “seed” of the injury.³⁹⁰ Climate science can tie “companies’ historic emissions to a concrete share of the global total,” thus making it possible to “arrive at a more precise apportionment of responsibility for climate damages.”³⁹¹ This potential is strong given that the harm of climate change bears all the hallmarks of a “signature disease”: but for the outsized contributions to climate change by industrial defendants, the residents likely could have continued to live in Kivalina and practice their traditional lifestyle.³⁹² Finally, Judge Armstrong need not have dismissed based on displacement: the Supreme Court had not yet issued *American Electric Power Co. v. Connecticut*,³⁹³ and even if it had, that case is distinguishable because Kivalina sought only money damages and not equitable relief.³⁹⁴

However, Kivalina did not tell this story, or anything close to it, at least not to the court. The complaint merely identifies the Village of Kivalina as a federally recognized Indian tribe and notes that Inupiat make up ninety-seven

of any sewage, industrial wastes, or substance which may adversely affect such waters”). For the CAA, see 42 U.S.C. § 7401(a)(2) (stating the finding of Congress “that the growth in the amount and complexity of air pollution brought about by urbanization, industrial development, and the increasing use of motor vehicles, has resulted in mounting dangers to the public health and welfare,” which includes “damage to and the deterioration of property”); *id.* § 7401(b)(1) (declaring that a purpose of the CAA is “to protect and enhance the quality of the Nation’s air resources so as to promote the public health and welfare and the productive capacity of its population”).

390. See, e.g., *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 162 (4th Cir. 2000); *Pub. Interest Res. Grp. of N.J., Inc. v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64, 72 (3d Cir. 1990).
391. Banda, *supra* note 17, at 382–83; see Dellinger, *supra* note 103, at 285–86 (citing Nicholas Kusnetz, *How 90 Big Companies Helped Fuel Climate Change: Study Breaks It Down*, INSIDE CLIMATE NEWS (Sept. 11, 2017), <https://perma.cc/8RSZ-J5UN> (arguing that an individual defendant’s share of the total climate change problem can be shown through a study attributing over a quarter of sea level rise and half of global warming since 1854 to ninety companies); Kysar, *supra* note 58, at 36–37, 41 (considering the possibility that a judge facing difficult questions of causation in a climate change case may decline imposing “a crude all or nothing approach” and “instead treat[] the matter as one of rough justice for the factfinder to assess”).
392. See Kysar, *supra* note 58, at 31–32; see also *id.* at 28 (calling the harm of “infrastructural damage resulting from enhanced storm exposure due to decreased Arctic sea ice . . . more amenable to causal attribution than many other impacts of climate change”).
393. 564 U.S. 410, 424 (2011) (“[T]he Clean Air Act and the EPA actions it authorizes displace any federal common-law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired powerplants.”).
394. See, e.g., Burkett, *Elusive*, *supra* note 44, at 118 (writing that lower courts can “make the distinction between the injunctive relief sought in *Am. Elec. Power* and the compensatory relief sought in *Kivalina* and recognize the corrective potential of compensation claims and their role in administering the process”).

percent of the population of the Town of Kivalina.³⁹⁵ While it calls the Village of Kivalina “a traditional Inupiat village” and references their “culture,”³⁹⁶ the complaint offers no description of traditional practices or details about the culture, no reference to whales or caribou, and no use of the word “subsistence.” The complaint states that the entire community must be relocated because of the loss of land and buildings; however, it does not link that place with a unique cultural identity.³⁹⁷ Except for distinguishing their nuisance claims for money damages from cases where plaintiffs sought equitable relief,³⁹⁸ variants on the words “justice,” “equity,” and “fairness” appear in the complaint and the opposition to the motions to dismiss only in passing.³⁹⁹ The strongest reference to climate injustice in the complaint are these two markedly legalistic and dispassionate sentences: “Plaintiffs, due in part to their way of life, contribute very little to global warming. Defendants, individually and collectively, are substantial contributors to global warming and to the injuries and threatened injuries Kivalina claims in this action.”⁴⁰⁰

Nor do the plaintiffs reference emerging legal and social norms like UN-DRIP. To the contrary, rather than recognize the inadequacies of the status quo law to afford them a just remedy, they argue a legal entitlement based on federal and state nuisance law. They characterize the defendants’ actions as “a classic public nuisance” so that the defendants should be held jointly and severally liable “[u]nder blackletter law.”⁴⁰¹ They argue that the case is brought “under the well-established *federal* common law of public nuisance,” little different than the cases where one state challenged another for pathogens in sew-

395. *Kivalina* Complaint, *supra* note 346, ¶¶ 13–15.

396. *Id.* ¶ 15.

397. *Id.* ¶¶ 13–17.

398. Plaintiffs’ Consolidated Memorandum of Points and Authorities in Opposition to Defendants’ Motions to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6) at 29, *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863 (N.D. Cal. 2009) (No. 08-cv-01138-SBA) [hereinafter *Kivalina* Plaintiffs’ Opposition]; *see id.* at 38–39 (discussing nineteenth-century equity cases that led to development of modern joint-and-several liability principles).

399. *See Kivalina* Complaint, *supra* note 346, ¶ 160 (quoting Hearing before the House Committee on Energy and Commerce, 109th Cong. (July 27, 2006)) (“In fact, it is fair to say that global warming may be the most carefully and fully studied scientific topic in human history.”); *id.* ¶ 43 (referencing ExxonMobil’s output of carbon dioxide related to entities in which it has “equity ownership”); *Kivalina* Plaintiffs’ Opposition, *supra* note 398, at 92 (arguing that defendant Peabody Coal mischaracterizes a court’s holding that included the word “justice”).

400. *Kivalina* Complaint, *supra* note 346, ¶¶ 259–260; *see id.* ¶ 188 (“Plaintiffs are discrete and identifiable entities that have contributed little or nothing to global warming. The impact of global warming on Plaintiffs is more certain and severe than on others in the general population.”).

401. *Kivalina* Plaintiffs’ Opposition, *supra* note 398, at 2.

age or flooding attributable to activities in that other state.⁴⁰² The complaint recites basic facts to fit the elements of federal common law nuisance.⁴⁰³ The language does not differ from the rest of the complaint, the bulk of which describes the individual defendants and their emissions of carbon dioxide and methane as well as summarizes the science of GHGs and climate change.⁴⁰⁴ While Kivalina does draw upon cases that allow for liability for defendants whose activities contribute to an aggregation of substances that causes harm, the plaintiffs make no reference to the policies behind statutes like the CWA but instead disclaim the relevance of the CWA in those cases.⁴⁰⁵ Indeed, they lead their opposition to the motions to dismiss by arguing that their complaint “is grounded in a long line of multiple polluter cases” so that they have properly pled federal nuisance.⁴⁰⁶ Further, they argue that federal common law nuisance applicable to GHG emissions already exists, so there is no new law to create.⁴⁰⁷

This approach is fine for plaintiffs who have a recognized legal entitlement because courts do not need to justify rulings that align with status quo law. But even commentators who support Kivalina recognize that nuisance has historically been applied to a narrow range of cases, and in the cross-border pollution context, the cases have involved discrete sources of pollution.⁴⁰⁸ The defendants therefore argued that Kivalina had no legal entitlement: they moved to dismiss for failure to state a claim because federal common law “does not remotely encompass the extraordinary ‘nuisance’ claim plaintiffs assert.”⁴⁰⁹ The oil company defendants cite an established tort treatise to argue that the plaintiffs have not alleged facts sufficient to establish factual and proximate cause, characterizing the latter as a “policy-based inquiry.”⁴¹⁰ If their only ground for dismissal were failure to state a claim, the defendants might have lost their motion; after all, the standards for Rule 12(b)(6) dismissals favor the plaintiff, and federal common law nuisance recognizes injunctive and monetary relief as typical remedies.⁴¹¹

Justiciability doctrines are threshold questions,⁴¹² however, so the defendants also moved to dismiss for political question and lack of standing under

402. *Id.* at 3 (emphasis in original); *see also id.* at 30–32 (citing, *inter alia*, *Missouri v. Illinois*, 200 U.S. 496 (1906); *North Dakota v. Minnesota*, 263 U.S. 365 (1923)).

403. *Kivalina* Complaint, *supra* note 346, ¶¶ 250–261.

404. *See id.* ¶¶ 18–184.

405. *Kivalina* Plaintiffs’ Opposition, *supra* note 398, at 97–98.

406. *Id.* at 17.

407. *Id.* at 21.

408. *Abate, Public*, *supra* note 9, at 210; *Schwartz et al.*, *supra* note 11, at 817–18.

409. *Utility Defendants’ Motion*, *supra* note 321, at 21.

410. *Oil Co. 12(b)(6) Motion*, *supra* note 321, at 4–5 (citing *W. PAGE KEETON ET AL., PROSER & KEETON ON TORTS* § 42, at 273 (5th ed. 1984)).

411. *See supra* Part I.C.1.

412. *Native Vill. Of Kivalina v. Exxon Mobil Corp.*, 663 F. Supp. 2d. 863, 870 (N.D. Cal. 2009).

Rule 12(b)(1) to stop the court from even considering whether nuisance is broad and flexible enough to allow for damages related to GHG emissions.⁴¹³ Nuisance places two “immovable hurdles” before climate change plaintiffs: proving that the emissions “unreasonably interfered” with a public right and that the defendants’ emissions were the proximate cause of harm.⁴¹⁴ These hurdles tripped Kivalina at key parts of the political question and standing analysis because the plaintiffs did not tell the court a story of distributive and corrective injustice. As one commentator argues, treating GHG emissions “as just another common law nuisance” by forcing climate change into traditional tort law categories makes it more likely that courts will deem these activities nontortious.⁴¹⁵ Nothing in the complaint or the briefs created the conflict of values that would entice Judge Armstrong to sympathize with the plaintiffs and, more importantly, give her sufficient reasons to justify a ruling that upends the status quo.

Consider the second *Baker* factor for political question: whether there is a lack of discoverable and manageable standards.⁴¹⁶ Kivalina argued that the standards “are the same as they are in all nuisance cases.”⁴¹⁷ The court countered that public nuisance is defined as an “unreasonable interference,” which under the Restatement (Second) of Torts requires the factfinder to weigh “the gravity of the harm against the utility of the conduct.”⁴¹⁸ The jury would have to assess reasonableness by balancing the utility and benefit of energy- and transportation-related GHG emissions against the gravity of the harm.⁴¹⁹ The court

413. Notice of Motion and Motion of Certain Oil Co. Defendants to Dismiss Plaintiffs’ Complaint Pursuant to Fed. R. Civ. P. 12(b)(1)—Memorandum of Points and Authorities at 4, 663 F. Supp. 2d. 863, 870 (N.D. Cal. 2009) (No. 08-cv-01138-SBA) (“It is not the province of the courts to intermeddle in [political branch efforts to combat climate change] when the strictures of Article III are not met.”); Utility Defendants’ Motion, *supra* note 321, at 2 (“This Court cannot decide the question of fault that lies at the heart of this case without making normative policy decisions that courts have neither the constitutional authority, institutional competence, nor manageable standards to address.”); *see also* King, *supra* note 30, at 354–55 (characterizing nuisance as “capacious” and a “catchall” and a “miscellaneous category” that is “able to contain a wide range of annoyances” so that “nuisance law serves as an entrance for problems that are so new that they have no established place in the law”).

414. Schwartz et al., *supra* note 11, at 825–26; *see* Kysar, *supra* note 58, at 29–41 (discussing why “[t]he most significant challenge for climate change tort suits lies in proving causation”); Jan McDonald, *Paying the Price of Adaptation: Compensation for Climate Change Impacts*, in ADAPTATION TO CLIMATE CHANGE LAW AND POLICY 234, 242–43 (Tim Bonyhady, Andrew Macintosh & Jan McDonald eds., 2010) (recognizing two problems in tort lawsuits against greenhouse gas emitters as the number of defendants and proving the causal connection of emissions and harm).

415. Kysar, *supra* note 58, at 9–10.

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

417. *Kivalina* Plaintiffs’ Opposition, *supra* note 398, at 63.

418. *Native Vill. Of Kivalina v. Exxon Mobil Corp.*, 663 F. Supp. 2d. 863, 874 (N.D. Cal. 2009) (citing RESTATEMENT (SECOND) OF TORTS §§ 821(b)(1), 821 cmt. e (1979)).

419. *Id.* at 874–75; Schwartz et al., *supra* note 11, at 828.

wrote, “Plaintiffs ignore this aspect of their claim and otherwise fail to articulate any particular judicially discoverable and manageable standards that would guide a factfinder in rendering a decision that is principled, rational, and based upon reasoned distinctions.”⁴²⁰ The court found that application of the third *Baker* factor—whether the judiciary can decide the case “without an initial policy determination of a kind clearly for nonjudicial discretion”⁴²¹—warranted dismissal for the same reason: “the resolution of Plaintiffs’ nuisance claim requires balancing the social utility of Defendants’ conduct with the harm it inflicts.”⁴²² If the plaintiffs had told the story of distributive injustice, however, imagine this more straightforward balancing test: the social utility of industrial GHG emissions for indigenous peoples like the Inupiat who live a traditional subsistence lifestyle is zero, yet the harm is the loss of that culture and the destruction of their entire town.⁴²³ This framing as a clash of values comports with the Restatement, which recognizes that “the unreasonableness of intentional invasions is a *problem of relative values* to be determined by the trier of fact in each case in the light of all the circumstances of that case.”⁴²⁴ Accordingly, an appeal to the judge’s sense of equity is grounded in law and so could have been successful.

Attacking the status quo also might have persuaded Judge Armstrong to find that the plaintiffs had standing. The second *Lujan* factor requires that the alleged harm be “fairly . . . traceable” to the defendants.⁴²⁵ As discussed in Part I.B, environmental justice plaintiffs already have a difficult time proving causation when multiple entities operate in the same area. This problem is magnified for climate change cases: both industrial and non-industrial entities emit anthropogenic GHGs, and GHGs also come from natural sources like volcanoes and ocean-atmosphere exchange.⁴²⁶ The plaintiffs relied upon cases brought under the CWA to argue that they needed only to allege that the defendants contributed to their injuries in order to show the harm is fairly traceable to their

420. *Kivalina*, 663 F. Supp. 2d at 875.

421. *Id.* at 876 (quoting *Baker*, 369 U.S. at 217).

422. *Id.* at 876–77.

423. See Geisinger, *supra* note 51, at 229–30 (arguing that proposed developments should be held to the “reasonable benefit” standard under which community benefit must be proportional to the amount of increased harm caused by development, and if not, then the development should not be allowed).

424. RESTATEMENT (SECOND) OF TORTS § 826 cmt. b (emphasis added). Although this section of the *Restatement* deals with private nuisance, Judge Armstrong relied upon a California opinion citing this provision in a public nuisance case. *Kivalina*, 663 F. Supp. 2d at 874 (citing *People ex rel. Gallo v. Acuna*, 929 P.2d 596, 605 (Cal. 1997) (citing RESTATEMENT (SECOND) OF TORTS §§ 826–831 (1979))).

425. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992).

426. Schwartz et al., *supra* note 11, at 835.

emissions.⁴²⁷ The court ruled that these statutory water pollution cases did not apply because the CWA imposes statutory limits on discharges of effluents but no statute limits the emission of GHGs.⁴²⁸ Perhaps Judge Armstrong simply was not willing to go beyond the status quo, as suggested by her hypothetical that, even if the contribution theory applied, plaintiffs would still lose because they could not show that the “seed” of their injury can be traced to any one defendant.⁴²⁹ But Judge Pro in his concurrence affirming dismissal was similarly unmoved. After citing portions of the Complaint discussing how climate change is a multi-century issue with many sources, he writes, “Kivalina nevertheless seeks to hold these particular Appellees, out of all the greenhouse gas emitters who ever have emitted greenhouse gases over hundreds of years, liable for their injuries.”⁴³⁰

The problem is that, while the standing jurisprudence gives judges some flexibility to allow even quasi-dubious causes of action to proceed, the plaintiffs did not give Judge Armstrong and later Judge Pro sufficient justification to stretch the law. After characterizing their claim as settled black letter law in the Introduction to their Opposition brief, they later contradict themselves by having to borrow from cases applying federal statutes to establish causation.⁴³¹ If they had instead attacked current law as insufficient to correct injustice by providing the compensation mandated by emerging norms, then that would have at least acknowledged Judge Armstrong’s reservations about this being a “novel” case that “seeks to impose liability and damages on a scale unlike any prior environmental pollution case.”⁴³² Instead of contradicting themselves, the plaintiffs could have relied upon CWA statutes and the cases applying them for a federal policy that supports a broader conception of causation in federal common law nuisance.

427. *Kivalina* Plaintiffs’ Opposition, *supra* note 398, at 97–98 (citing, *inter alia*, P.I.R.G. v. Powell Duffryn Terminals, Inc., 913 F.2d 64, 72 (3d Cir. 1990)).

428. *Kivalina*, 663 F. Supp. 2d at 879–80. Similarly, Judge Armstrong also held that “the *Powell Duffryn* test simply has no application in this case given the remoteness of the injury claim.” *Id.* at 881.

429. *Id.* at 880–81 (citing *Tex. Indep. Producers & Royalty Owners Ass’n v. EPA*, 410 F.3d 964, 974 (5th Cir. 2005)); *see also* PEEL & OSOFSKY, *supra* note 33, at 262 (recounting the opinion of climate change advocates who recognize that some receptive judges engage with the scientific evidence while other judges seem “reluctant to embrace a new, and potentially difficult, area” and thus focus on standing and political question).

430. *Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 868–69 (9th Cir. 2012) (Pro, J., concurring).

431. *Compare Kivalina* Plaintiffs’ Opposition, *supra* note 398, at 2–3 (characterizing their federal common law nuisance claim as “blackletter law” and “well-established”), *with id.* at 98–99 (“Yet there is no reason to assume that the presence of a statutory scheme in those cases limits the rule that plaintiffs need only show contribution in CWA actions alone.”).

432. *Kivalina*, 663 F. Supp. 3d at 875–76.

The plaintiffs urged the trial court to take a “fresh look” to see the errors in the application of political question and standing in other climate change cases,⁴³³ yet they did not paint a picture that could alter the judge’s perspective.⁴³⁴ To the contrary, Judge Armstrong at several points in her analysis faults the plaintiffs for ignoring or overlooking important considerations or failing to articulate reasons with which she could rule differently.⁴³⁵ By claiming a legal entitlement that the status quo did not recognize, Kivalina failed to arm the judge with reasons to justify denying the motion to dismiss.

CONCLUSION

The new rhetoric and rule of justice from Chaim Perelman provide a theoretical vocabulary for explaining why some environmental justice cases are dismissed while other similar cases are not. Though it may seem counterintuitive, plaintiffs have their best chance by framing their lawsuit as part of the larger story of distributive and corrective injustice rather than as a straightforward legal entitlement. They may not win a money judgment or equitable order—the Ninth Circuit affirmed the *Kivalina* dismissal on displacement rather than political question and standing grounds,⁴³⁶ and the *Juliana* proceedings are stayed pending an interlocutory appeal.⁴³⁷ Prevailing in the motion to dismiss helps meet other strategic goals, however, so the success of litigation should be measured by how well it contributes to campaign goals.⁴³⁸ For example, the

433. *Kivalina* Plaintiffs’ Opposition, *supra* note 398, at 5.

434. See PEEL & OSOFSKY, *supra* note 33, at 250 (writing that briefings and arguments can affirm mainstream climate science and present information in a way that judges can comprehend); Kysar, *supra* note 58, at 68 (“[T]he reality of group-based cultural interests may become more tangible to courts precisely because their disappearance from the world makes their uniqueness and non-replicability more plain.”).

435. *Kivalina*, 663 F. Supp. 2d at 874 (“However, the flaw in Plaintiffs’ argument is that it overlooks that the evaluation of a nuisance claim is not focused entirely on the unreasonableness of the harm.”); *id.* at 875 (“Plaintiffs ignore this aspect of their claim and otherwise fail to articulate any particular judicially discoverable and manageable standards that would guide a factfinder in rendering a decision that is principled, rational, and based upon reasoned distinctions.”); *id.* at 876 (“[N]either Plaintiffs nor *Am. Elec. Power* offers any guidance as to precisely what judicially discoverable and manageable standards are to be employed in resolving the claims at issue.”); *id.* at 876–77 (“Plaintiffs also fail to confront the fact that resolution of their nuisance claim requires the judiciary to make a policy decision about who should bear the cost of global warming.”).

436. *Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 855, 858 (9th Cir. 2012).

437. Order, *Juliana v. United States*, No. 18-80176 (9th Cir. Dec. 28, 2018); *Juliana v. United States*, No. 6:15-CV-01517-AA, 2018 WL 6303774, at *3 (D. Or. Nov. 21, 2018); see John Schwartz, *Judges Give Both Sides a Grilling in Youth Climate Case Against the Government*, N.Y. TIMES (June 4, 2019), <https://perma.cc/5Y8D-Y4HU> (reporting on oral arguments before the Ninth Circuit).

438. Cummings, *supra* note 177, at 1696.

Kivalina plaintiffs sought only money damages, so reaching the discovery phase could have provided the leverage for settlement.⁴³⁹ Even if the *Juliana* plaintiffs are unsuccessful on appeal, their story has been told on CNN and in *Slate* and *National Geographic*, and every success over the last few years goes on their website to help inform a wide audience about the need for action in response to climate change.⁴⁴⁰ Perhaps most importantly, not one but two judges recognized a constitutional right and a federal public trust obligation related to climate change;⁴⁴¹ with other judges citing *Juliana* favorably,⁴⁴² this increases the potential to influence the development of the law.

The nature of rhetorical explication and analysis means that, because of space constraints, this Article limited itself to applying one rhetorician's theories to two cases.⁴⁴³ Accordingly, more research applying Perelman to the pleadings, briefs, and opinions of other cases is needed to see if the results of this analysis hold true over a larger number of cases as well as to yield additional insights about why some arguments are more successful than others.⁴⁴⁴ For example, in addition to Rule 12(b)(1) and 12(b)(6) motions, scholars could analyze motions to dismiss for forum non conveniens, a doctrine that has led to the dismissal of several high-profile cases and continues to affect suits filed by foreign plaintiffs.⁴⁴⁵ Rhetoricians consider the different views of multiple stake-

439. See Part II.A, *supra*.

440. Molodanof & Durney, *supra* note 6, at 216–17; OUR CHILDREN'S TRUST, LEGAL ACTIONS, *Juliana v. U.S.—Climate Lawsuit*, <https://perma.cc/WNX5-6YMB>; see Nosek, *supra* note 30, at 791–92 (writing how the framing of *Juliana* helps the case reach a general audience).

441. *Juliana v. United States*, 217 F. Supp. 3d 1224, 1250, 1252–61, 1272, 1276 (D. Or. 2016).

442. Matter of Conservation Dist. Use Application HA-3568, 431 P.3d 752, 801 n.12 (Haw. 2018) (Wilson, J., dissenting) (citing *Juliana*, 217 F. Supp. 3d at 1224, 1233, 1267); *Jowers v. S.C. Dep't of Health & Env'tl. Control*, 815 S.E.2d 446, 460 (S.C. 2018) (Hearn, J., concurring in part and dissenting in part) (citing *Juliana*, 217 F. Supp. 3d at 1254).

443. These cases were chosen for three reasons: they are both climate justice lawsuits, they had different results with the motions to dismiss, and they have received some academic attention.

444. For example, alternative explanations for different results could be the political leanings of judges or their levels of familiarity with climate change science. PEEL & OSOFSKY, *supra* note 33, at 261–64.

445. See, e.g., *Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d 534 (S.D.N.Y. 2001), *aff'd*, 303 F.3d 470 (2d Cir. 2002) (dismissing claims of indigenous persons from Ecuador and Peru against Texaco related to harms allegedly caused by decades of petroleum extraction activities in the Amazonian rainforest); *Delgado v. Shell Oil Co.*, 890 F. Supp. 1324 (S.D. Tex. 1995), *aff'd*, 231 F.3d 165 (5th Cir. 2000) (dismissing cases brought by plaintiffs from twelve different countries against chemical and agriculture companies for exposure to pesticides containing DBCP); *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India* in December 1984, 634 F. Supp. 842 (S.D.N.Y. 1986), *aff'd as modified by*, 809 F.2d 195 (2d Cir. 1987) (dismissing suit by government of India on behalf of persons affected by the cyanide gas leak from a plant owned by a subsidiary of Union Carbide); *Acuna-Atalaya v. Newmont Mining Corp.*, 308 F. Supp. 3d 812 (D. Del. 2018) (dismissing claims brought by Peruvian farmers

holders, so while this Article approached environmental justice litigation from the plaintiffs' perspective, scholars might also consider the perspectives of the defendants, the courts, or the general public.⁴⁴⁶ Future research might also draw from other rhetoricians, such as classical stasis theory or Kenneth Burke's dramatism; like Perelman, both consider questions of justice, law, and the resolution of disputes.⁴⁴⁷ This additional insight might help encourage advocates to adopt the findings of this Article: by telling their clients' stories of distributive and corrective injustice to courts, they have their best chance of using litigation to achieve the strategic goals of the environmental justice movement.

against a U.S. mining company for the harms attributed to the activities of its Peruvian subsidiary).

446. See Todd, *Ecospeak*, *supra* note 29, at 345–46; see Popescu & Gandy, *supra* note 29, at 152–57 (identifying “the main social actors likely involved in a typical environmental justice lawsuit” as the courts, administrative agencies, the federal administration, the agents of harm, and the aggrieved community).
447. See, e.g., KENNETH BURKE, *A GRAMMAR OF MOTIVES* 173 (Cal. ed., 1969) (discussing how the ideal of justice as manifested in legal proceedings can mask material injustice); HERRICK, *supra* note 262, at 104 (calling stasis a method developed specifically for thinking through a judicial case by identifying the likely issues of conflict); Hans Hohmann, *The Dynamics of Stasis: Classical Rhetorical Theory and Modern Legal Argumentation*, 34 *AM. J. JURIS.* 171, 182, 182 & n.43 (1989) (describing how the stasis of qualification applies to a situation “when we are confronted with unequivocal facts on the one hand and an unequivocal law indisputably applicable to those facts on the other,” yet from one party’s perspective, “the legal result of this conjunction is unequivocally unjust”).

