What we learned in *Held v. Montana*

Sam Bookman*

I Introduction

Courts have always played an important role in American climate governance. They determine statutory interpretation of existing pollution control laws, resolve conflicts between state and federal governments, and fix the limits of executive powers.[1] But many climate activists and lawyers imagine a more expansive role for courts. Rather than clarifying (or restricting)[2] governmental responses to climate change, these activists want courts to be an engine of climate action. They want courts to call state and federal governments out for their lack of action on climate change, and order them to do better.

The challenge for these activists is to find explicit legal authority which supports this role. And in the United States, such authority is hard to find. Most federal environmental legislation predates widespread concern about climate change.[3] The United States Constitution, unlike most of the world's constitutions, does not expressly protect environmental rights.[4] Innovative legal theories, such as the application of the public trust doctrine to the entire climate system, have failed to bear fruit.[5] In the absence of clear authority, courts have refused to take on a more ambitious role in climate policy, instead finding climate-ambitious claims to violate prudential rules of standing[6] and the political question doctrine.[7] Most notably, in *Juliana v. United States*, the Ninth Circuit in 2020 found that plaintiffs challenging federal climate policy lacked standing, because no remedy from the court could redress the plaintiffs' climate-related injuries.[8] These cases have seemed increasingly at a dead end.

But activists–especially youth-led activists–have not given up. In *Held v. Montana*, they turned to a largely untested source of authority: state constitutional law. They argued that state legislation violated Montana's state constitution, which protects a "right to a clean and healthful

---

* S.J.D. Candidate, Harvard Law School. Many thanks to Susan Kath, and to Hannah Perls and the Harvard Environmental & Energy Law Program, for helpful comments on an earlier draft and shorter version of this note.

[1] For recent examples of such judicial interventions, see Am. Elec. Power Co. v. Connecticut, 564 U.S. 410 (2011); Louisiana v. Biden, 64 F.4th 674 (5th Cir., Mar. 16, 2022); Massachusetts v. EPA, 549 U.S. 497 (2007); Utility Air Reg. Group v. EPA, 573 U.S. 302 (2014); West Virginia v. EPA, 597 U.S. ___.

[2] *See, e.g.*, West Virginia v. EPA, 597 U.S. ___.

[3] *See, e.g.*, the Clean Air Act, U.S.C. 42 § 7401 et seq., which was last substantially amended in 1990.

[4] For a survey of world constitutions, see DAVID BOYD, *GOOD PRACTICES ON THE RIGHT TO A HEALTHY ENVIRONMENT*, U.N. DOC. A/HRC/43/53 (2020); Sam Bookman, *Demystifying Environmental Constitutionalism*, 54 ENVT'L L. (forthcoming 2024).

[5] This approach has been most fully developed in MARY CHRISTINA WOOD, NATURE'S TRUST: ENVIRONMENTAL LAW FOR A NEW ECOLOGICAL AGE (2014). *But see* Aji P. v. State, 480 P.3d 438 ¶¶ 56-62 (Wa. Ct. App. 2021) (declining to expand the public trust doctrine to include the climate system).

[6] *See, e.g.*, Juliana v. United States, 947 F.3d 1159 (9th Cir. 2020) (denying standing because plaintiffs' injuries could not be redressed by the Court).

[7] *See, e.g.*, Kanuk v. Alaska, 335 P.3d 1088 (2014); Aji P. v. State, 480 P.3d 438, ¶ 13. (Wa. Ct. App. 2021) (declining to expand the public trust doctrine to include the climate system).

[8] *See, e.g.*, Juliana v. United States, 947 F.3d 1159 (9th Cir. 2020).

environment."[9] The Court agreed and struck down two offending laws.[10] The climate *rights* movement now has its clearest win in United States courts.

In one sense, the decision is narrow: it rests on a right found in only a handful of state constitutions[11] and relates only to two pieces of state legislation.[12] But in other respects, it is highly significant. In this Article, I contextualize and summarize the decision. I review what lessons the *Held* decision might offer for other climate suits. First, I highlight the limited but significant potential of state constitutional law as a basis for future claims. Secondly, I consider the *Held* decision's significance for standing and causation litigation barriers. In particular, I explore how the Court engaged with and applied climate science to establish a convincing chain of logic between the State's greenhouse gas emissions and particular, present harms experienced by the plaintiffs. Thirdly, I consider the significance of the *narrowness* of the claims. Though plaintiffs initially brought an ambitious challenge against the State, the court's narrowing of the claim to two pieces of legislation may have done the plaintiffs an enormous favor: it is a strategy that could be replicated by future litigants. And finally, I consider the effects of the decision beyond the courtroom, and in particular, the role played by rights discourse in political organizing efforts.

I conclude by asking what happens next. The decision is far from final: the State has already indicated that it will appeal to Montana's Supreme Court.[13] The ruling will undoubtedly spark countermobilization efforts by conservative groups. How the decision is framed within the political discourse of a deep-red state will likely influence whether it has a lasting impact on climate policy. The decision is only one step in a much broader battle over the future of the United States' response to climate change.

II The Decision

A Background

Held was filed in 2020 by a group of 16 young people, then aged between two and 18. The complaint was ambitious. It called on the court to declare unconstitutional a range of state laws and actions and to implement a remedial plan with ongoing court supervision to ensure compliance.[14] Much of this challenge was dismissed on mootness grounds–many of the challenged statutes were repealed, and the claims were therefore no longer relevant.[15] The extensive remedial plan was found to exceed the court's authority under the political question doctrine (in other words,

---

[9] MONT. CONST. art. II § 3.
[10] Held v. Montana, No. CDV-2020-307 (1st Dist. Ct. Mont., Aug. 14, 2023). The decision can be found online at: https://perma.cc/Q993-VYBC.
[11] The others are New York (N.Y. CONST., art I, § 19), Pennsylvania (PA. CONST. art. I, § 27), Illinois (ILL. CONST. art. XI, § 2), Massachusetts (MASS. CONST. art XLIX, *amended by* MASS. CONST. art. XCVII), and Hawaii (HAW. CONST. art. XI, § 9). *See* Amber Polk, *The Unfulfilled Promise of Environmental Constitutionalism*, 74 HASTINGS L.J. 123 (2022).
[12] H.R. 971, 2023 Leg., 68th Reg. Sess. (Mont. 2023) (HB 971); and Sen. 557, 2023 Leg., 68th Reg. Sess. (Mont. 2023) (SB 557).
[13] Blair Miller, *Judge sides with youth in Montana climate change trial, finds two laws unconstitutional*, DAILY MONTANAN (Aug. 14, 2023), https://perma.cc/GVD2-FSDB.
[14] *Held,* slip. op. at 2–3.
[15] *Id.* at 3–4, 8.

it was beyond the court's jurisdiction to develop and supervise an extensive plan to rectify the state government's climate policies).[16] Instead, by the time the case came to trial, the issue before the court was a relatively narrow one.

The case centered on a challenge to two provisions of Montana's Environmental Policy Act (MEPA). First, the plaintiffs challenged a provision known as the "MEPA Limitation."[17] The MEPA Limitation, enacted in 2011, prevented state agencies from considering environmental impacts outside of Montana's borders when conducting environmental reviews.[18] This amendment had significant implications for the approval of proposed energy projects in a coal-rich state. For example, rather than weighing the potential economic benefit of a coal mine against the costs associated with global greenhouse gas (GHG) emissions, the law appeared to allow consideration only of climate impacts within Montana–and arguably, only those fossil fuels burned within the state. In 2023, the MEPA Limitation was extended even further. After a judge rebuked a state agency for failing to consider even those limited climate impacts,[19] the state legislature responded with an even more restrictive measure. House Bill 971, enacted in May 2023, prevented consideration of *any* climate impacts unless "the United States congress amends the federal Clean Air Act to include carbon dioxide emissions as a regulated pollutant."[20] Second the plaintiffs challenged a second law passed by the Montana legislature, SB 557. SB 557, enacted a few days after the MEPA Limitation, provided that courts could not "vacate, void, or delay" proposed projects on climate grounds.[21]

The plaintiffs' challenged these two provisions under a provision of the Montana Constitution, which protects "the right to a clean and healthful environment."[22] Such a right is found only in a handful of other state constitutions.[23] Since this right was enacted in Montana in 1972, state courts have developed a body of law interpreting and applying the right. Most significantly, in 1999 the Montana Supreme Court held that the right is a "fundamental right" warranting strict scrutiny, meaning that the state must be able to point to particularly compelling interests in order to limit the right.[24] The right, however, had never been applied by Montana courts in the context of climate change. But the existence of the express constitutional rights meant that

---

[16] *Id.* at 3.
[17] MONT. CODE ANN. § 75-1-201 et seq. (2022).
[18] MONT. CODE ANN. 75-1-201(2)(a) (2022).
[19] Mont. Env't Info. Ctr. v. Dep't of Env't Quality, No. DV-56-2021-1307 (13th Dist. Ct., April 6, 2023) [hereinafter MEIC].
[20] MONT. CODE ANN. Sec 75-1-201(2)(a) (enacted My 10, 2023). Given the reality of congressional deadlock and disagreement on climate change, that prospect seems extremely unlikely.
[21] MONT. CODE ANN. Sec 75-1-201(6)(a)(ii) (signed May 19, 2023), *amended by* Sen. 557, 2023 Leg., 68th Reg. Sess. (Mont. 2023) (SB 557).
[22] MONT. CONST., Art. II § 3.
[23] *See generally* EMILY ZACKIN, LOOKING FOR RIGHTS IN ALL THE WRONG PLACES 146-196 (2013). The others are New York (N.Y. CONST., art I, § 19), Pennsylvania (PA. CONST. art. I, § 27), Illinois (ILL. CONST. art. XI, § 2), Massachusetts (MASS. CONST. art XLIX, *amended by* MASS. CONST. art. XCVII), and Hawaii (HAW. CONST. art. XI, § 9). For an overview of the history and intent of the framers at that convention, *see MEIC*, *supra* note 19, at ¶¶ 65-77; Held v. Montana, No. CDV-2020-307, 95–97 (1st Dist. Ct. Mont., Aug. 14, 2023).
[24] *See* Mont. Env't Info. Ctr. v. Dep't of Env't Quality, 1999 MT 248 ¶ 63, 296 Mont. 207, 988 P.2d 1236 (Mont. 1999).

the plaintiffs did not have to argue such a right was implied in other constitutional rights or in state common law.

Instead, the clear environmental right, and the relatively narrow statutory provisions being challenged, gave the case a sharp focus and avoided some of the political question and redressability obstacles faced elsewhere. In particular, the plaintiffs did not encounter some of the challenges encountered by plaintiffs in *Juliana v. United States*, a case brought against the federal government.[25] Unlike the Montana Constitution, the United States Constitution does not contain an express environmental right. In order to advance their claims, the *Juliana* plaintiffs had to demonstrate that a right to a "stable climate system" was implied in the Constitution and the common law.[26] Furthermore, plaintiffs requested an extensive plan to remedy alleged pervasive failures in federal climate policy.[27] Without considering the merits of the plaintiffs' claims concerning the existence of a climate right, the court in *Juliana* concluded that the plaintiffs' claims were too sweeping–they could not be adequately redressed by the court.[28] By seeking a narrow remedy, and by grounding their claims in an *express* environmental right, the *Held* plaintiffs were able to avoid many of the challenges experienced by the *Juliana* plaintiffs.

B The Evidence

The district court's decision sets out an extensive scientific record presented at trial, which was largely uncontested by the State. The court affirmed the reality of global warming caused by "anthropogenic changes in the environment, not natural variability"[29] and spelled out how climate change affects young people, the state of Montana, and the plaintiffs in particular. The court noted that children are particularly affected by climate change not just because they will live longer into a hotter future, but also because "climate change is already harming plaintiffs"[30] through changes to the local environment, as well as physical and mental health harms.[31] The court observed that many of the present effects of climate change, such as climate anxiety, are particularly harmful to children.[32] The court noted the particular cultural and environmental impacts on Native American children,[33] as well as the uneven impact of climate change produced by existing deprivation and inequality.[34] And Judge Seeley set out specific impacts of climate change on the State: glacial loss, reduced river flow, drought, wildfires, and biodiversity loss.[35] The court catalogued the unique injuries suffered by each of the plaintiffs, providing a powerful record of the already-manifest

[25] Juliana v. United States, 947 F.3d 1159 (9th Cir. 2020).
[26] *Id.* at 11–12, (summarizing plaintiffs' claims as being grounded in the Due Process Clause of the Fifth Amendment, the Ninth Amendment, and the public trust doctrine).
[27] *Id.* at 11.
[28] *Id.* at 25 ("[I]t is beyond the power of an Article III court to order, design, supervise, or implement the plaintiffs' requested remedial plan.").
[29]Held v. Montana, No. CDV-2020-307, 17–26 (1st Dist. Ct. Mont., Aug. 14, 2023).
[30] *Id.* at 46–64.
[31] *Id.* at 30.
[32] *Id.* at 30–33.
[33] *Id.* at 33 ("For indigenous youth, like Ruby, Lilian, and Sariel, extreme weather harms their ability to participate in cultural practices and access traditional food sources, which is particularly harmful to indigenous youth with their place-based cultures and traditions.").
[34] *Id.* at 33.
[35] *Id.* at 35–46.

impacts of climate change.[36] The court concluded that "because of their unique vulnerabilities, their stages of development as youth, and their average longevity on the planet in the future, Plaintiffs face lifelong hardships resulting from climate change."[37]

Next, the court considered Montana's contribution to global GHG emissions. The court accepted the evidence offered by the plaintiff expert witness while finding that testimony offered by the State's expert economist was "not well-supported, contained errors, and was not given weight by the Court."[38] Accounting for fossil fuel extraction, processing and transportation, and consumption by end users (including end users outside of Montana), the court concluded that in 2019, Montana was responsible for the emission of 166 million tons of carbon dioxide (not accounting for other greenhouse gases),[39] and was responsible for 3.7 billion tons of carbon dioxide emissions since 1960.[40] The court contextualized this footprint as being larger than that of many countries, noting that emissions resulting from fossil fuels extracted in Montana were larger than those of fuels derived from Brazil, Japan, Mexico, Spain, or the United Kingdom.[41] Crucially, the court noted that the State was still actively involved in permitting and licensing future projects and that "Montana's land contains a significant quantity of fossil fuels yet to be extracted."[42] Overall, concluded the court, "what happens in Montana has a real impact on fossil fuel energy systems, carbon dioxide emissions, and global warming."[43]

C The Legal Analysis

The court's decision included multiple holdings informed by these extensive factual findings. First, the court held that plaintiffs had established standing: they had demonstrated a cognizable injury, traceable to the defendant, which could be redressed by the court.[44] Emphasizing effects on plaintiffs' mental health, the court accepted that the harms experienced by the plaintiffs–harms that would be intensified by ongoing greenhouse gas emissions–amounted to cognizable injuries.[45] Furthermore, Judge Seeley found that the MEPA Limitation would contribute to plaintiffs' injuries because it "prevents the availability of vital information" that would allow the State to comply with its constitutional duty.[46] The Limitation "causes the State to ignore renewable energy alternatives,"[47] despite "abundant renewable energy resources" in the State.[48] In light of Montana's extensive and ongoing contribution to climate change, the court found that the state's actions were

---

[36] *Id.* at 46–64.
[37] *Id.* at 33.
[38] *Id.* at 66.
[39] *Id.* at 67.
[40] *Id.* at 68.
[41] *Id.* at 67.
[42] *Id.* at 69.
[43] *Id.* at 70.
[44] *Id.* at 86–90. This three-part standing test applied by the court follows the same structure as United States federal law. *See e.g.* Allen v. Wright, 468 U.S. 737 (1984).
[45] Held v. Montana, No. CDV-2020-307, 87 (1st Dist. Ct. Mont., Aug. 14, 2023) ("Plaintiffs' mental injuries stemming from the effects of climate change on Montana's environment, feelings like loss, despair, and anxiety, are cognizable injuries.").
[46] *Id.* at 75.
[47] *Id.* at 81.
[48] *Id.* at 84.

"not *de minimis* but are naturally and globally significant," and thus "cause and contribute to climate change and Plaintiffs' injuries and reduce the opportunity to alleviate Plaintiffs' injuries."[49] Plaintiffs' injuries were accordingly traceable to the State. Finally, the court found those injuries redressable. Because Montana still possesses significant coal reserves, and the consideration of climate impacts in permitting decisions could reduce the likelihood of future approvals, invalidating the MEPA Limitation would redress plaintiffs' ongoing injuries:[50] "every additional ton of greenhouse gas emissions exacerbates Plaintiffs' injuries and risks locking in irreversible climate injuries."[51]

In light of the fundamental constitutional nature of the environmental right, the court then applied strict scrutiny analysis to the challenged laws. In other words, having been found to infringe on the protected environmental right, the laws could only be upheld if they served a compelling state interest, and were narrowly tailored to effectuate that interest.[52] Relying on judicial precedent and the intent of the right's framers (including one convention delegate who testified at the trial),[53] the court found that the "clean and healthful environment" extended to the climate,[54] and that the state owed an affirmative duty "to take active steps to realize this right."[55] Contrary to that duty, the state had not offered a compelling government interest that would justify infringing upon that right, and no argument that the MEPA Limitation was sufficiently tailored to serve that interest.[56]

The court also found the second challenged law, SB 557, facially unconstitutional. SB 557 prevented courts from vacating, voiding, or delaying proposed projects on climate grounds.[57] In other words, SB 557 prevented courts from finding that environmental reviews were inadequate for failing to consider greenhouse gas emissions or climate impacts. Although SB 557 was passed after plaintiffs filed their initial complaint, the State relied on the provision in arguing the case should be dismissed, and both parties addressed the provision's constitutionality during later trial briefings.[58] Applying strict scrutiny, the court held that SB 557 violated Article IX, Sec. 1(3) of the Montana Constitution,[59] which obligates the legislature to provide "adequate remedies for the protection of the environmental life support system from degradation."[60] Specifically, the court

---

[49] Held v. Montana, No. CDV-2020-307, 88 (1st Dist. Ct. Mont., Aug. 14, 2023).
[50] *Id.* at 88–89.
[51] *Id.* at 87.
[52] *Id.* at 94, citing Park County Environmental Council v. Montana Department of Environmental Quality, 477 P.3d 288 (Mont. 2020) ¶ 94.
[53] *Id.* at 97–98 ("Based on the plain language of the implicated constitutional provisions, the intent of the Framers, and Montana Supreme Court precedent, climate is included in the 'clean and healthful environment' and 'environmental life support system.'").
[54] *Id.* at 102 ("Plaintiffs have a fundamental constitutional right to a clean and healthful environment, which includes climate as part of the environmental life-support system.").
[55] Held v. Montana, No. CDV-2020-307, 96 (1st Dist. Ct. Mont., Aug. 14, 2023).
[56] *Id.* at 101.
[57] MONT. CODE ANN. Sec 75-1-201(6)(a)(ii) (signed May 19, 2023), *amended by* Sen. 557, 2023 Leg., 68th Reg. Sess. (Mont. 2023) (SB 557).
[58] *Held,* No. CDV-2020-307 at 86.
[59] *Id.* at 91–92.
[60] Mont. Const. Art. IX, Sec. 1(3).

found that the provision violated plaintiffs' right to "preventative, equitable relief,"[61] and "fails to further a compelling state interest."[62]

III What We Learned

On the one hand, the decision has relatively limited scope. It is based on a constitutional provision found only in a handful of other states[63] and concerns an unusually egregious law: one which not only prevents consideration of global GHG emissions from extraction projects, but *all* GHG emissions, including those which will impact people living within the state. The court's order might require Montanan decision-makers to consider the climate impacts of greenhouse gas-emitting projects, but they will not be under any substantive obligation to withhold approvals.[64] And the State has already announced that it will appeal the decision.[65] The full practical impact of the decision is unclear.

On the other hand, the decision amounts to a long-sought victory for climate activists–and particularly youth climate activists–seeking a pathway for courts to play a more ambitious role in climate governance. For these movements and their lawyers, there are several lessons that can be learned.

A The Potential of State Constitutional Law

First, it suggests that state constitutional law might provide a vehicle worth exploring in future climate litigation, particularly in Montana, as well as the five other jurisdictions with existing environmental rights provisions. Many of those provisions have been historically underutilized in litigation,[66] but there are signs they could be reinvigorated. Pennsylvania's Supreme Court has recently found that the State's environmental rights provision imposes strict fiduciary obligations on the State.[67] Even more recently (and more explicitly related to the context of climate change), Hawaii's Supreme Court this year upheld the State's Public Utility's Commission's (PUC) to deny approvals based on climate grounds, finding that the PUC had acted to protect environmental rights guaranteed by the state constitution.[68] The NGO which litigated the *Held* claim, Our Children's Trust, has filed a similar claim in Hawaii, hoping to replicate *Held*'s success elsewhere.[69]

---

[61] *Held,* No. CDV-2020-307 at 102.
[62] *Id.* at 92.
[63] *See generally supra* note 11.
[64] MEPA is an expressly procedural, rather than substantive statute. *See* MONT. CODE ANN. § 75-1-102 (1) (2022) ("The Montana Environmental Policy Act is procedural"). Should the *Held* decision be upheld, however, it is possible that constitutional claims could be brought to challenge projects that are approved despite significant climate harms.
[65] Miller, *supra* note 13.
[66] *See generally* Amber Polk, *The Unfulfilled Promise of Environmental Constitutionalism*, 74 HASTINGS L.J. 123 (2023).
[67] *See* Pa. Env't Def. Found. v. Commonwealth, A.3d 911, 916 (Pa. 2017); *see also* Robinson Twp. V. Commonwealth, 83 A.3d 901, 956–57 (Pa. 2013); John C. Dernbach, *The Role of Trust Law Principles in Defining Public Trust Duties for Natural Resources*, 54 UNIV. MICH. J. OF L. REF. 77, 110–19 (2020).
[68] In re Hawai'i Elec. Light Co., 152 Haw. 352, 357 (Haw. 2023).
[69] *See* Navahine F. v. Hawaii Dep't of Transp., 1CCV-22-0000631 ¶ 2 (June 1, 2022). The complaint is available at: https://perma.cc/599L-Z2JZ.

Courts in those states with environmental rights provisions, but without a developed jurisprudence–Illinois, Massachusetts, and New York (where voters approved an environmental rights amendment in 2021)–might begin to develop similar doctrines. Activists in states whose constitutions have non-rights-based environmental provisions might also draw on *Held* in their litigation.[70] And climate activists across the country might work to amend their state constitutions to include additional rights, providing them with more solid footing in state courts. Proposals for state constitutional environmental rights provisions–known as "green amendments"–are already on the table in several states, supported by a national network of organizers.[71] The success of the *Held* plaintiffs will likely give these movements added impetus.

B A Model for Tackling Standing and Causation

Secondly, the *Held* judgment could serve as a model for litigants seeking to overcome interrelated standing and causation hurdles. Such hurdles arise in many different contexts in climate litigation, well beyond state constitutional suits such as *Held*.

In *Held*, the court generally followed the federal test for standing: plaintiffs must demonstrate cognizable injuries; fairly traceable to the defendant's conduct; and redressable through a favorable decision by the court.[72] These requirements have been notoriously difficult to prove in the climate context. First, courts generally require that injuries be "actual or imminent."[73] Historically, it has not always been easy for plaintiffs to demonstrate *imminent* harms resulting from climate change, as opposed to heightened future risk.[74] However, in *Held*, plaintiffs were able to construct an effective claim that they were already experiencing significant harm: not only because of climate-related changes to the Montana environment, but also because of mental health and anxiety challenges faced by them (and many other young people), as convincingly documented through expert evidence.

Secondly, attributing climate harms to the conduct of defendant states (or companies) has proven extremely difficult in many climate litigation contexts. This is a challenge not only for standing purposes, but in proving causation requirements across many doctrinal tests.[75] Greenhouse gases are emitted from an enormous range of sources located all over the world. Demonstrating that the actions of a single emitter or government "caused" injury to a particular

---

[70] *See e.g.* Sagoonick v. State, 503 P.3d 777 (Alaska) (where plaintiffs argued that Alaska's resource development plans were inconsistent with the natural resource provisions of the Alaska Constitution).

[71] *See e.g.* GREEN AMENDMENTS FOR THE GENERATIONS, https://perma.cc/R8XY-9UYU (detailing initiatives in 24 additional states).

[72] Held v. Montana, No. CDV-2020-307, 86–90 (1st Dist. Ct. Mont., Aug. 14, 2023).

[73] Lujan v. Defenders of Wildlife, 504 U.S. 555 at 560, citing Whitmore v. Arkansas, 495 U.S. 149, 155 (1990).

[74] For contrasting approaches to "imminence" in climate litigation, *see* Massachusetts v. EPA 549 U.S. 497, 521 (2007) (majority finding that "EPA's steadfast refusal to regulate greenhouse gas emissions presents a risk of harm to Massachusetts that is both 'actual' and imminent.'"). *But see contra* 542 (Roberts, C.J., dissenting) ("… there is nothing in petitioners' standing declarations and accompanying exhibits to support an inference of actual loss of Massachusetts coastal land from 20th-century global sea level increases. It is pure conjecture. The Court's attempts to identify 'imminent' or 'certainly impending' loss of Massachusetts coastal land fares no better.").

[75] *See e.g.* Douglas A. Kysar, *What Climate Change Can Do About Tort Law*, 41 ENVTL. L. 1, 29–41 (2011).

plaintiff is extremely challenging.[76] Defendants typically argue that their emissions have caused injury only by mixing together with those of many other emitters, including those located outside the state and country;[77] and if they hadn't extracted and burned fossil fuels (or approved such practices), someone else would have instead–sometimes referred to as "market substitution"[78] or "perfect substitute" argument.[79]

Despite these challenges, the *Held* court pieced together a persuasive causal chain leading from the state's authorization of fossil fuel projects to concrete injuries suffered by the plaintiffs. This chain relied extensively on plaintiff expert evidence, which the State's expert failed to persuasively contradict.[80] The injuries of each individual plaintiff derived from global fossil fuel emissions; the share of those emissions caused by Montanan fossil fuels was significant; and the MEPA Limitation made it more likely that Montana would continue to be a significant source of emissions, thus aggravating the plaintiffs' injuries. This final step in the causal chain helped to show that the plaintiffs' injuries (unlike those in *Juliana*[81]) were redressable: with the MEPA Limitation invalidated, the court reasoned the state would have better-quality information, and therefore would be less likely to approve GHG-emitting projects.[82] Once this simple causal narrative was assembled, it is hard to imagine how Montana could successfully defend the law.

Still, it should be noted that the court avoided some difficult issues, which could be raised on appeal. The court does not deal with the market or perfect substitution argument.[83] It does not offer a reason as to why "more than de minimis," or even "nationally and globally significant," is a sufficient standard for establishing causation.[84] It does not set out a test or threshold at which a contribution becomes "more than *de minimis*." It does not purport to quantity what share of the plaintiffs' injuries are caused by the State's emissions, let alone potential future emissions. It does not try to quantify the extent to which the plaintiffs' injuries would be alleviated if Montana kept its fossil fuels in the ground. Instead, the court (not unreasonably) observed that Montana's contribution to overall emissions is indeed significant and vastly disproportionate to the State's

---

[76] *See* Jacqueline Peel, *Issues in Climate Change Litigation*, CARBON & CLIMATE L. REV. 15, 16–17 (2011) (describing this as the "drop in the ocean" problem).
[77] *See e.g.* City of New York v. Chevron Corp. 993 F.3d 81, 92 (2019).
[78] See Laura Schuijers & Margaret Young, *Climate Change Litigation in Australia: Law and Practice in the Sunburnt Country*, *in* IVANO ALOGNA, CHRISTINE BAKKER & JEAN-PIERRE GAUCI, CLIMATE CHANGE LITIGATION: GLOBAL PERSPECTIVES 59–61, 12–13 (2021).
[79] Michael Burger & Jessica Wentz, *Downstream and Upstream Greenhouse Gas Emissions: The Proper Scope of NEPA Review* 109, 150–52 (2017).
[80] Held v. Montana, No. CDV-2020-307, 66 (1st Dist. Ct. Mont., Aug. 14, 2023).
[81] In *Juliana*, the court found that injuries were not redressable. This was in large part because the remedy requested by the plaintiff–the creation of a "remedial plan"–would involve complex policy decisions with difficult trade-offs, and without clear manageable standards. *Juliana v. US*, 947 F.3d 1159, 1173 (9th Cir.). The court "doubt[ed] that any such plan can be supervised or enforced by an Article III court. And, in the end, any plan is only as good as the court's power to enforce it." *Juliana* at 1173.
[82] *Held*, No. CDV-2020-307 at 75.
[83] In other words, the idea that restricting the extraction of fossil fuels will not reduce fossil fuel consumption, because foregone fuels will be offset by fuels extracted elsewhere. *See* Schuijers & Young, *supra* note 78; Burger & Wentz, *supra* note 79.
[84] *Held*, No. CDV-2020-307 at 88.

population.[85] While this is a plausible theory of causation and redress, it still leaves open several avenues that the State may address on appeal.

C Keeping it Narrow

Thirdly (and relatedly), the decision shows the value of narrow, targeted challenges. This was not the intention of the plaintiffs: as noted above, the initial complaint was far more wide-ranging. Several challenged provisions, however, were repealed before trial (rendering these claims moot), and the extensive remedies pursued by the plaintiffs were found to exceed the Court's authority under the political question doctrine.[86] But in narrowing the issue to the validity of the MEPA Limitation, the Court may have done the plaintiffs an immense favor.

Wide-ranging climate claims are risky. If plaintiffs win, then the payoff may potentially be bigger. But in order to win, plaintiffs need to overcome two major interrelated hurdles: redressability and political question concerns. The political question doctrine concerns whether the matter is appropriate for judicial, rather than political, consideration;[87] redressability concerns whether the claimed injury is something that courts are capable of remedying.[88] Courts will be reluctant to interfere with whole-of-government policies, which often involve complex polycentric decisions and trade-offs.[89] In particular, courts may feel that such decisions lack "judicially manageable standards," rendering such interventions inappropriate under the political questions doctrine.[90] Relatedly, judges might worry that their intervention in major government policies may simply be ineffective: a judicial order can only do so much. As observed by the Ninth Circuit in *Juliana*, ordering the development of a plan–and actively supervising such a plan–may simply be beyond the court's enforcement power.[91]

These issues did not prevent the *Held* court from finding in favor of the plaintiffs. Rather than having to devise a plan to guide the State's climate policy, the court simply had to determine whether two narrow legislative provisions conformed to the State Constitution. The form of relief

---

[85] *Id.* at 65–70.
[86] *Id.* at 3.
[87] *See* Juliana v. United States, 947 F.3d 1159, 1185–1186 (9th Cir. 2020).
[88] *Id.* at 1169–70.
[89] *See e.g.* City of New York v. Chevron Corp. 993 F.3d 81, 98 (2019) (finding that judge-made nuisance law is "ill-suited to address 'the technically complex area of environmental law', particularly since it would be administered by federal judges who 'lack the scientific economic and technological resources' to 'cop[e] with issues of this order" (citing New England Legal Found. v. Costle, 666 F.2d 30, 33 (2d Cir. 1981); Am. Elec. Power Co. v. Connecticut, 564 U.S. 410, 428 (2011); Kanuk v. Alaska, 335 P.3d 1088, 1099 (2014) ("The limited institutional role of the judiciary supports a conclusion that the science- and policy-based inquiry here is better reserved for executive-branch agencies or the legislature"); Aji P. v. State, 480 P.3d 438, ¶ 13. (Wa. Ct. App. 2021) ("the *Baker* factors lead to the conclusion that the question posed inevitably requires determination of a nonjusticiable political question"); Juliana v. United States, 947 F.3d 1159, 1171 ("As the opinions of their experts make clear, any effective plan would necessarily require a host of complex policy decisions entrusted, for better or worse, to the wisdom and discretion of the executive and legislative branches.").
[90] *See Juliana*, 947 F.3d at 1172–73 (citing Rucho v. Common Cause, 588 U.S. ___, S. Ct. 2484, 2508 (2019)) (stressing that "*Rucho* reaffirmed that redressability questions implicate the separation of powers, noting that federal courts 'have no commission to allocate political power and influence' without standards to guide in the exercise of such authority.").
[91] *Juliana*, 947 F.3d, at 1173 ("We doubt that any such plan can be supervised or enforced by an Article III court. And, in the end, any plan is only as good as the court's power to enforce it.").

was simple: striking down the challenged provisions, and injuncting the State from acting in accordance with the statutes.[92] While the impact of the decision may not have been as sweeping as the plaintiffs would have hoped, the narrow issue, and simple negative remedy, alleviated these other concerns.

D Beyond the Courtroom

Finally, the decision shows the power of legal mobilization through courts, by young people, through rights discourse.[93] The *Held* case did not emerge in a vacuum. Instead, it forms part of a broader strategy by young people and their supporters to highlight the urgency of the climate crisis, and to force action by governments. Our Children's Trust, the NGO litigating the claim, also backed the *Juliana* case as well as suits in all 50 states, and currently has cases pending in Florida, Hawai'i, Utah, and Virginia.[94] These American cases, in turn, comprise only part of the voluminous youth-led climate litigation movement around the world, many cases of which are based on constitutional and human rights claims.[95]

As noted above, the immediate implications of the decision are relatively narrow. But the political ramifications could be significant. The decision helps political campaigns craft a broader narrative, demonstrating that governments are failing to live up to the fundamental commitments that they owe to their citizens–and to young people in particular. The court's finding that the State is a significant cause of injuries to its own children is one that can be used in campaigns to argue that *all* governments have a duty–a moral, if not a legal one–to act more ambitiously on climate change, including by reducing the extraction and consumption of fossil fuels.

Litigation can help these broader political aims in several ways. Most obviously, litigation attracts significant media attention: it is unlikely that the *Held* plaintiffs would have received such significant national attention without having gone to trial.[96] But more subtly, litigation success can give these claims an imprimatur of legitimacy, cloaking their arguments in what Professor Stuart A. Scheingold influentially described as "the myth of rights."[97] These myths can be used as political resources, helping movements gain new followers and supporters, and persuade legislators to take stronger action. The causal pathways between cases such as *Held* are complex and uncertain, and many involve action well beyond the courtroom.

---

[92] Held v. Montana, No. CDV-2020-307, 102 (1st Dist. Ct. Mont., Aug. 14, 2023).
[93] For an overview of the concept of legal mobilization in the environmental context, *see generally* Lisa Vanhala, *Environmental Legal Mobilization*, 18 ANNU. REV. LAW SOC. SCI. 101 (2022).
[94] *State Legal Actions Now Pending*, OUR CHILDREN'S TRUST, https://perma.cc/BA2K-83ZH.
[95] *See e.g.* BVERFG, 1 BvR 2656/18, Mar. 24, 2021 [*Neubauer v. Germany*]; Corte Suprema de Justicia [C.S.J] [Supreme Court], Sala. Civ. abril 5, 2018, L.A. Tolosa Villabona, S.T.C. 4360-201 (Colom.) [*Future Generations v. President of Colombia*]; Mathur v. Ontario 2023 ONSC 2316.
[96] The case received coverage in many major U.S. newspapers. *See e.g.* David Gelles & Mike Baker, *Judge Rules in Favor of Montana Youths in a Landmark Climate Case*, N.Y. TIMES (Aug. 14, 2023), https://perma.cc/36G4-PN6J; Mariah Timms, *Montana Must DO More to Address Climate Change, Judge Rules*, WALL ST. J. (Aug. 14, 2023); Katie Selig, *Judge rules in favor of Montana youths in landmark climate decision*, WASH. POST (Aug. 14, 2023), https://perma.cc/5HN4-XJ3W.
[97] STUART A. SCHEINGOLD, THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE 13-22 (2D ED, 2004).

IV What Happens Next?

So what happens next? The court's decision in *Held* bars the state from enforcing either of the laws at issue. The Montana Attorney General's Office has harshly criticized the decision as "a week-long taxpayer publicity stunt."[98] Referring to some of the barriers experienced by other climate plaintiffs, a spokesperson claimed that "our state has no impact on the global climate."[99] The State will appeal the decision.[100]

Even if the ruling is upheld, its impact on future Montanan fossil fuel production and consumption will require political will and public support. Taking fossil fuel emissions into account in agency decision-making will make little difference if decision-makers are skeptical that these are real harms, or that they outweigh the economic benefits of continued extraction. And such benefits should not be understated: as of 2021, Montana holds 30% of total recoverable coal reserves in the United States, meaning that it remains a potentially lucrative source of revenue.[101] If political elites in the State are able to portray the *Held* decision as a judge forcing Montana to pay for an ultimately global (or even non-existent) problem, they could significantly undermine public legitimacy in the decision–even if it is upheld.

Montana, of course, is a deep-red state. Nevertheless, a 2021 national survey found that a majority of Montanans revealed that they are worried about climate change, and two-thirds of Montanans believed it will harm future generations.[102] These figures are lower than the national average, but not by much.[103] Certain renewable energy policies, such as tax rebates for energy-efficient vehicles or solar panels, are wildly popular in Montana.[104] And the very existence of the environmental rights amendment in the Montana Constitution shows that environmental concerns, and environmental organizing, can bear fruit. The challenge for in-state climate activists will be to demonstrate that cutting back on fossil fuel projects benefits not only the country and the world, but the people in the state itself. The difficulty of such a task should not be understated, but it is not impossible. Decisions like the one issued in *Held* may give the climate justice movement more ammunition in making that case to state agencies, legislators, and the public at large.

---

[98] Miller, *supra* note 13.
[99] *Id.*, quoting State Attorney-General Spokesperson Emily Flower ("Montanans can't be blamed for changing the climate – even the plaintiffs' expert witnesses agreed that our state has no impact on the global climate. Their same legal theory has been thrown out of federal court and courts in more than a dozen states.").
[100] *Id.*
[101] *Montana: State Profile and Energy Estimates*, U.S. ENERGY INFO. ADMIN. (April 20, 2023), https://perma.cc/9EBS-5NCV.
[102] Jennifer Marlon et al., *Yale Climate Opinion Maps 2023*, YALE PROGRAM ON CLIMATE COMMUNICATION (Jan. 23, 2024), https://climatecommunication.yale.edu/visualizations-data/ycom-us/.
[103] *Id.* (reporting that nationally, 64% of Americans are "[w]orried about global warming," and "70% believe that "[g]lobal warming will harm future generations.").
[104] *Id.* (attracting 74% support).