CONCEPTUALIZING U.S. STRATEGIC CLIMATE RIGHTS LITIGATION

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As climate lawsuits asserting rights-based claims have expanded in the United States over the last decade and a half, many scholars have analyzed their likelihood of success on the merits. Some have further considered the extrajudicial impacts of such cases on society more broadly. Yet a full-blown investigation into the advantages and disadvantages of this litigation approach in the context of the larger social movement to prevent climate change is absent from the academic literature. Assuming these cases have been filed in strategic effort to contribute to that movement, their strategic aspect has been undertheorized.

This Article seeks to fill that gap by exploring the full range of potential impacts and risks presented by U.S. rights-based climate cases, collectively referred to here as "strategic climate rights litigation." Theoretical analysis clarifies strategic litigation's potential to achieve impacts in four separate categories: direct changes to the law through (1) preliminary and (2) final judicial pronouncements; and indirect effects on society more broadly both (3) before and (4) after a case's ultimate conclusion. Then, comparative analysis reveals that judicial conservatism and restricted enforcement capabilities limit strategic climate rights litigation's ability to contribute to large-scale social progress through Category 1 and Category 2 courtroom rulings that directly alter the law.

Ultimately, this Article argues that even when climate rights cases result in favorable courtroom decisions, their largest contribution to the broader climate movement derives from their Category 3 and Category 4 impacts on society that increase awareness, reframe narratives, and galvanize action. Shifts in the law resulting from Category 1 and Category 2 impacts are playing an important but more modest role in promoting and entrenching climate progress. All four categories of impacts are more likely to continue contributing to the wider climate movement if ongoing and future strategic climate rights litigation intentionally mitigates key risks that threaten to undermine its larger goals.

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Table of Contents

Introduction 150
I. *A Primer on U.S. Strategic Climate Rights Litigation* 157
A. *Three Waves of Cases* 160
B. *Four Categories of Impacts* 164
II. *Evaluating Direct Impacts on the Law* 167
A. *Justifying the Comparative Analysis with* Brown 169
B. *Court Conservatism and Hesitancy* 173
C. *Judicial Limits on Ability to Enforce Rulings* 181
D. *Third-wave Strategic Climate Rights Litigation* 188
III. *Evaluating Indirect Impacts on Society* 190
A. *Raising Awareness* 191
B. *Reframing Climate Narratives* 194
C. *Galvanizing Climate Action* 197
D. *Category 4 Impacts* 201
IV. *Highlighting Risks* 205
A. *Courtroom Losses* 205
B. *Resource Misallocation* 208
C. *Advocate Complacency* 209
Conclusion 212
Appendix 214

Introduction

Identifying *Juliana v. United States* as "no ordinary lawsuit" is no extraordinary observation.[1] News media and legal academics alike have marveled at the

1. Juliana v. United States, 217 F. Supp. 3d 1224, 1234 (D. Or. 2016) ("This is no ordinary lawsuit."); Dana Neacşu, *The Aesthetic Ideology of* Juliana v. United States *and Its Impact on Environmentally Engaged Citizenship*, 12 J. Env't Stud. & Sci. 28, 33 (2022) ("What made Juliana 'no ordinary suit?'"); James R. May & Erin Daly, *Can the U.S. Constitution Encompass a Right to a Stable Climate? (Yes, It Can.)*, 39 UCLA J. Env't L. & Pol'y 39, 58 (2021) ("Called 'no ordinary lawsuit,' *Juliana v. U.S.* . . . .") (citation omitted); Patrick McGinley, *No Ordinary Lawsuit*, OxHRH Blog (July 23, 2019), https://perma.cc/HYD3-R863 ("Calling the [*Juliana*] case 'no ordinary lawsuit[,]' a federal district court judge rejected the federal government's request the case be dismissed[.]"); Steve Kroft, *The Climate Change Lawsuit That Could Stop the U.S. Government from Supporting Fossil Fuels*, CBS News: 60 Minutes (June 23, 2019), https://perma.cc/JHT2-4V7G (referring to *Juliana*, "To quote one federal judge, 'This is no ordinary lawsuit.'"); Randall S. Abate, *Atmospheric Trust Litigation: Foundation for a Constitutional Right to a Stable Climate System?*, 10 Geo. Wash. J. Energy & Env't L. 33, 33 (2019) ("[*Juliana*] has been characterized as 'no ordinary lawsuit' and the 'trial of the century.'") (citations omitted); Don C. Smith, *'No Ordinary Lawsuit': Will* Juliana v. United States *Put the Judiciary at the Centre of US Climate Change Policy?*, 36 J. Energy & Nat. Res. L. 259, 259 (2018) ("Judge Aiken has referred to [*Juliana*] as 'no ordinary lawsuit'); Barry E. Hill, *No Ordinary Lawsuit*, 35 Env't F. 27, 30 (2018) (quoting Judge Ann Aiken's decision on *Juliana*); Michael C. Blumm

twenty-one youth plaintiffs who sued the U.S. federal government on August 12, 2015, for violating their constitutional rights and the public trust doctrine[2] by perpetuating a fossil fuel-based energy system that causes them climate change-related harms.[3] Their requested remedy included judicial oversight and enforcement of a nationwide remedial plan to eliminate fossil fuels from the U.S. economy.

Yet, *Juliana* is notable for more than its bold, far-reaching complaint. One can experience whiplash tracking the case's ten-year roller coaster ride of motions flying back and forth from the Federal District Court of Oregon to the Ninth Circuit Court of Appeals to the U.S. Supreme Court, including *eight* petitions for writs of mandamus.[4] As of this writing, the Supreme Court has effectively dismissed the lawsuit by denying the plaintiffs' writ of mandamus petition, which asked the Supreme Court to reverse the Ninth Circuit's decision to grant the defendants' seventh writ of mandamus petition.[5] The plaintiffs have turned to their final option to keep the case alive by filing a petition for a writ of certiorari before the Supreme Court on December 9, 2024.[6]

& Mary Christina Wood, *"No Ordinary Lawsuit": Climate Change, Due Process, and the Public Trust Doctrine*, 67 Am. U. L. Rev. 1, 7 (2017) ("As the court recognized at the outset of its opinion, [*Juliana*] was 'no ordinary lawsuit.'); R. Henry Weaver & Douglas A. Kysar, *Courting Disaster: Climate Change and the Adjudication of Catastrophe*, 93 Notre Dame L. Rev. 295, 296 (2017) (quoting Judge Ann Aiken, "*This is no ordinary lawsuit*").

2. *See* First Amended Complaint for Declaratory and Injunctive Relief, Juliana v. United States, 217 F. Supp. 3d 1224 (D. Or. 2016) (No. 6:15-cv-01517-TC) [hereinafter *Juliana* Complaint]. The *Juliana* complaint alleged that government interference with a stable climate system undermined plaintiffs' rights to life, liberty, and property under the Fifth Amendment Due Process Clause and represented an intrusion on their implicit liberties under the Ninth Amendment. Plaintiffs further claimed that they represented a suspect classification of young people suffering discrimination under U.S. energy policy in violation of equal protection principles incorporated in the Fifth Amendment. Finally, they argued that the U.S. government violated its duty to safeguard the atmosphere as a public trust resource for them as beneficiaries.

3. *See, e.g.*, Kroft, *supra* note 1 ("Of all the cases working their way through the federal court system, none is more interesting or potentially more life changing than Juliana versus the United States.").

4. Our Children's Trust, *Juliana v. United States*, Our Children's Trust: Youth v. Gov, https://perma.cc/VW5N-FPSU. *See* Paul Rink, Andrea Rodgers, & Philip L. Gregory, *Children, Climate, and Constitutional Rights:* Juliana v. United States, 21 Pratt's Energy L. Rep. 334 (2021). *See generally* Blumm & Wood, *supra* note 1, at 29 n. 143 (quoting Professor Douglas Kysar as saying, "Writs of mandamus are reserved for the most extraordinary and compelling situations in which ordinary rules of appellate procedure must be overridden to avoid a manifest injustice. For the Trump Justice Department to even seek a writ of mandamus in [*Juliana*] is offensive to Judge Aiken, to the entire federal judiciary, and, indeed, to the rule of law itself.").

5. *In re* Juliana, No. 24-298, 2024 WL 4743166 (U.S. Nov. 12, 2024); *see* Petition for a Writ of Mandamus, *In re* Juliana, No. 24-298, 2024 WL 4227217 (U.S. Sept. 12, 2024).

6. Petition for a Writ of Certiorari, Juliana v. United States, No. 24-645, 2024 WL 5125252 (U.S. Dec. 9, 2024).

Regardless of its ultimate outcome in court, however, *Juliana* has served as the lodestar for a parade of similar rights-based complaints filed in U.S. courts (as well as other jurisdictions around the world). One state-level lawsuit, *Held v. Montana*, was the first rights-based climate case to go to trial in U.S. history. The plaintiffs achieved conclusive success in December 2024 when the Montana Supreme Court determined that a provision of the Montana Environmental Policy Act forbidding state agencies from considering climate impacts when conducting environmental reviews violated the youth plaintiffs' right to a clean and healthful environment under the Montana Constitution.[7] A similar case, *Navahine v. Hawai'i Department of Transportation*, alleged violations of plaintiffs' right to a clean and healthy environment under the Hawai'i Constitution, resulting in an unprecedented settlement signed by the thirteen youth plaintiffs, the director of Hawai'i's Department of Transportation, and Hawai'i Governor Josh Green in 2024. This agreement mandates the Hawai'i Department of Transportation to comply with interim targets in state law that lead to zero greenhouse gas emissions from the transportation sector by 2045.[8]

These cases are emblematic of an emerging genre of lawsuits which this Article refers to as "U.S. strategic climate rights litigation." The grouping includes all U.S. cases with rights-based claims attempting to protect the atmosphere as a common-use resource or to prevent climate change more generally as well as all U.S. cases claiming a right to governmental protection of the atmospheric "res" as a public trust resource.[9] Numerous legal scholars have commented on the likelihood or viability of successful courtroom outcomes in these climate rights cases[10] as well as the potential for corresponding impacts

7. Held v. Montana, 560 P.3d 1235, 1260–61 (Mont. 2024). In the same case, the Montana District Court declared unconstitutional another statutory provision forbidding any challenge to an agency decision based on inadequate consideration of climate change during environmental review, but the state did not appeal this particular district court decision for consideration by the Montana Supreme Court. *See* Findings of Fact, Conclusions of Law, and Order at 102, Held v. Montana, No. CDV-2020-307, 2023 WL 5229257 (Mont. Dist. Ct. Aug. 14, 2023).

8. *Historic Agreement Settles Navahine Climate Litigation*, Office of the Governor Press Releases (June 20, 2024), https://perma.cc/4FFK-ALZ8.

9. This Article limits its analysis to U.S. climate rights cases, turning to international climate rights cases only occasionally to inform that analysis. The author relied heavily on the Climate Law Accelerator, Human Rights and Climate Change Case Database of NYU Law as curated by César Rodriguez-Garavito, https://perma.cc/Y6JQ-FHMJ, and on Anna Christiansen's article, *Up in the Air: A Fifty-State Survey of Atmospheric Trust Litigation Brought by Our Children's Trust*, 2020 Utah L. Rev. 867 (2020) for assistance collating the cases included in this term. The author subsequently cross-referenced the Sabin Center U.S. Climate Change Litigation Database for accuracy and comprehensiveness, https://perma.cc/GBF9-9G6L.

10. *See, e.g.*, Brief for Children's Rights Advocates as Amici Curiae Supporting Appellees, Held v. Montana, 560 P.3d 1235 (2024) (No. DA 23-0575) (arguing for the plaintiffs' position in *Held*); John C. Dernbach & Patrick Parenteau, *Judicial Remedies for Climate Disruption*, 53 Env't L. Rep. 10574 (2023) (cataloguing and evaluating the requested remedies in various climate lawsuits); Robert Kemper, *Recognizing a Fundamental Right to a Clean Environment:*

on the law.[11] A smaller number have substantially considered the effects that *Juliana*, *Held*, *Navahine*, and similar cases have elicited outside the courtroom even before final judicial pronouncements.[12] This Article contends that, when

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Why the Juliana *Court Got It Wrong and How to Address the Issue Moving Forward*, 16 FIU L. Rev. 457 (2022); May & Daly, *supra* note 1; Mina Juhn, *Taking a Stand: Climate Change Litigants and the Viability of Constitutional Claims*, 89 Fordham L. Rev. 2731, 2756–67 (2021); Kevin Kennedy, *Watching the World Burn: Substantive Due Process and the Right to a Sustainable Climate*, Temp. L. Rev. Online 61, 85–94 (2021) (analyzing the merits of the substantive due process claims regarding the fundamental right to a sustainable climate); Bronson Pace, *The Children's Climate Lawsuit: A Critique of the Substance and Science of the Preeminent Atmospheric Trust Litigation Case*, 55 Idaho L. Rev. 85 (2019) (critically analyzing the claims presented in *Juliana*); Erin Ryan, Juliana v. United States: *Debating the Fundamentals of the Fundamental Right to a Sustainable Climate*, 45 Fla. St. L. Rev. Online 1 (2018); Bradford C. Mank, *Does the Evolving Concept of Due Process in* Obergefell *Justify Judicial Regulation of Greenhouse Gases and Climate Change:* Juliana v. United States, 52 U.C. Davis L. Rev. 855 (2018); Jacqueline Peel & Hari M. Osofsky, *A Rights Turn in Climate Change Litigation?*, 7 Transnat'l L. 37, 37 (2017) (noting "a growing receptivity of courts" to rights-based claims in climate litigation); Blumm & Wood, *supra* note 1 (analyzing *Juliana*'s constitutional rights and public trust doctrine claims in detail). *See generally* Andrew Ballentine, *Full of Hot Air: Why the Atmospheric Trust Litigation Theory Is an Unworkable Attempt to Expand the Public Trust Doctrine Beyond Its Common Law Foundations*, 12 Dartmouth L.J. 98 (2014); Caroline Cress, *It's Time to Let Go: Why the Atmospheric Trust Won't Help the World Breathe Easier*, 92 N.C. L. Rev. 236 (2013).

11. *See, e.g.*, Don Smith, Held v. Montana*: The Beginning of a Climate Change Lawsuit Trend in US State Level Courts or a One-Shot Wonder?* 41 J. Energy & Nat. Res. L. 369, 374–78 (2023) (highlighting the impacts of *Held* on Montana state law and on various forms of climate rights-based legal advocacy); Harvard Law Review, *Federal Courts—Justiciability—Ninth Circuit Holds that Developing and Supervising Plan to Mitigate Anthropogenic Climate Change Would Exceed Remedial Powers of Article III Court.*— Juliana v. United States *947 F.3d 1159 (9th Cir. 2020)*, 134 Harv. L. Rev. 1929 (2021) (analyzing the legal and practical implications of the Ninth Circuit dismissal of *Juliana*); Kacie Couch, *After* Juliana*: A Proposal for the Next Atmospheric Trust Litigation Strategy*, 45 Wm. & M. Env't L. & Pol'y Rev. 219 (2020) (noting federal preemption implications of a hypothetical win in *Juliana*); Megan Raymond, *A Hypothetical Win for* Juliana *Plaintiffs: Ensuring Victory Is More Than Symbolic*, 46 Ecology L. Quart. 705 (2019) (exploring what an effective national remedial plan for the energy sector would look like if *Juliana* were to win in court).

12. *See* Camila Bustos, *Movement Lawyering in the Time of the Climate Crisis*, 39 Pace Env't L. Rev. 1, 18 (2022) (briefly exploring the impact of *Juliana* on the climate movement); Chloe N. Kempf, *Why Did So Many Do So Little? Movement Building and Climate Change Litigation in the Time of* Juliana v. United States, 99 Tex. L. Rev. 1005, 1005 (2021) (noting that "climate change litigation has the potential to diminish some of the cognitive barriers that have, so far, rendered climate-related political action and movement building inadequate[]"); Daniel Levy, Juliana *and the Political Generativity of Climate Litigation*, 43 Harv. Env't L. Rev. 479 (2019) (analyzing *Juliana*'s indirect impacts through the lens of behavioral psychology); Erin Ryan, *From Mono Lake to the Atmospheric Trust: Navigating the Public and Private Interests in Public Trust Resource Commons*, 10 Geo. Wash. J. Energy & Env't L. 39, 62–64 (2019) (noting the attention the *Juliana* case has garnered and its impact on worldwide climate litigation and protest); Grace Nosek, *Climate Change Litigation and Narrative: How to Use Litigation to Tell Compelling Climate Stories*, 42 Wm. & Mary Env't L. & Pol'y Rev. 733 (2018) (examining the narrative-shifting potential of climate litigation).

considering the impact of such litigation on its higher-level objective of helping the climate movement prevent catastrophic climate change, this balance of scholarly attention should be reversed.[13]

The various potential effects of U.S. strategic climate rights litigation fit into four categories: direct impacts on the law resulting from a case's (1) preliminary or (2) final judicial decisions; and indirect impacts on wider society occurring (3) before or (4) after a case's final courtroom outcome.[14] This Article's analysis reveals that the more telling way to assess strategic climate rights litigation's success is by considering its Category 3 and Category 4 indirect impacts on society rather than its Category 1 and Category 2 direct effects stemming from jurisprudential results. Although Category 1 and Category 2 impacts on the law resulting from successful courtroom rulings are beginning to emerge, they are proving to be narrowly consequential as targeted applications of expressed environmental priorities in state law that clarify legally required climate action.

U.S. strategic climate rights litigation represents a set of similar complaints strategically filed in a wide swath of jurisdictions with ambitions that extend far beyond a favorable one-time court decision.[15] Many of these cases petition their respective courts for judicial oversight of a nationwide governmental decarbonization process.[16] Such expansive requests aim to change more than just the law; they aspire to modify deeply entrenched aspects of the U.S. economy.[17] Most of these cases also seek foundational declaratory judgments regarding fundamental rights or public trust obligations often as a stepping stone toward the more significant goal of system-wide climate action.[18] According to this logic, judicial recognition of the plaintiffs' right to "a climate system capable of sustaining human life[]"[19] requires corresponding governmental efforts to safeguard that right and ensure its ongoing viability.

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13. *But see* Hari M. Osofsky & Jacqueline Peel, *The Role of Litigation in Multilevel Climate Change Governance: Possibilities for a Lower Carbon Future?*, 30 Env't & Plan. L. J. 303, 324 (2013) (noting that climate change litigation broadly "may have its most significant impacts through indirect pathways that harness the activities of non-State actors[]"). *See generally* Sam Bookman, *The Puzzling Persistence of Nature's Rights*, Utah. L. Rev. (forthcoming in 2025) (identifying substantial indirect impacts from related litigation regarding nature's rights).

14. *See generally* Jacqueline Peel & Hari M. Osofsky, Climate Change Litigation: Regulatory Pathways to Cleaner Energy 26 (2015) (recognizing both the "direct and indirect impacts of [climate change] litigation on regulation") [hereinafter Peel & Osofsky, Climate Change Litigation].

15. Strategic climate rights litigation cases have been filed in federal court and in twenty state courts both independently and in response to administrative proceedings. *See* Appendix.

16. *See, e.g.*, *Juliana* Complaint, *supra* note 2, at 99; First Amended Complaint for Declaratory and Injunctive Relief at 81, Reynolds v. Florida, No. 2018-CA-819, 2020 WL 3410846 (Fla. Cir. Ct. June 10, 2020) [hereinafter *Reynolds* Complaint].

17. *See, e.g.*, *Juliana* Complaint, *supra* note 2, at 99 (requesting a court order for "a national remedial plan to phase out fossil fuel emissions" from U.S. society).

18. *Id.*; *Reynolds* Complaint, *supra* note 16, at 81.

19. Juliana v. United States, 947 F.3d 1159, 1169 (9th Cir. 2020).

Because strategic climate rights litigation aims not simply to achieve the judicial declaration of a right but also to guarantee that right's protection, final courtroom successes represent an iterative step toward advancing the more fundamental goal of instigating aggressive action to curtail climate change.[20] Yet, two key factors will likely curtail plaintiffs' ambition to promote climate action by way of Category 1 and Category 2 direct changes in the law: the conservative nature of U.S. courts and minimal judicial enforcement ability.[21] Comparative analysis with the roadblocks thwarting implementation of the monumental U.S. civil rights case, *Brown v. Board of Education*, reinforces this point.

Of course, Category 1 and Category 2 direct impacts from strategic climate rights litigation are by no means irrelevant or insignificant. The negotiated settlement in *Navahine v. Hawai'i Department of Transportation*, for example, has strong potential to force climate action from a recalcitrant state agency.[22] Even losses in court may stimulate meaningful social and political engagement, for example, by drawing attention to a cause and fomenting outrage that mobilizes constituents.[23]

At the same time, any such outcomes are likely to be much narrower in scope than strategic climate rights litigation's ongoing Category 3 and Category 4 indirect impacts, which have long been contributing to the larger climate advocacy movement beyond the courtroom. More specifically, strategic climate rights litigation (1) increases public awareness of climate change harms through numerous forms of media attention, (2) expands narrative conceptualizations of climate change to include moral concerns about the world we leave behind for future generations through scholarly and news commentary, and (3) mobilizes activism and advocacy coalition building for those involved in or inspired by the lawsuits.[24] These indirect impacts of strategic climate rights litigation represent key contributions to broader efforts to bring about the radical social shifts necessary to prevent the worst climate change outcomes.[25]

Like any legal approach, strategic climate rights litigation comes with its own set of challenges. For example, losses in court carry the downside risk

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20. *See Mission*, Our Children's Trust (2024), https://perma.cc/S6EV-TTAE (noting the mission of the climate law firm, Our Children's Trust, to represent young people in climate rights litigation that "aims to ensure systemic and science-based climate recovery planning and remedies at federal, state, and global levels[]").
21. *See infra* Part II.B and C.
22. *See* Joint Stipulation and Order Re: Settlement; Exhibit "A," Navahine v. Hawai'i Dep't of Transp., No. 1CCV-22-0000631 (Haw. 1st Cir. Ct. settled June 20, 2024) [hereinafter *Navahine* Settlement].
23. Douglas NeJaime, *Winning Through Losing*, 96 Iowa L. Rev. 941, 969 (2011).
24. *See generally* Peel & Osofsky, Climate Change Litigation, *supra* note 14, at 224 (outlining substantially similar categories for the extrajudicial impacts of climate change litigation more broadly).
25. *Id.* at 222 (describing litigation participants' recognition that climate change litigation more broadly has the ability "to shift social perceptions, influence the public debate, endorse the findings of climate science, and place or maintain the climate issue on the regulatory agenda").

of creating unfavorable precedent for future cases.[26] Contrary to stimulating increased engagement with the climate change issue, they could potentially disillusion plaintiffs and climate activists more broadly. Wins, on the other hand, could engender political backlash from the fossil fuel industry and communities negatively affected by resulting climate action implementation efforts. Overconfidence in the efficacy of monumental courtroom rulings to facilitate large-scale social change could lead to the diversion of resources from the urgent, massive climate action work required to mitigate global climate change. It could also lead to a false sense of security and resulting complacency that will prove detrimental to the higher-order cause, particularly given the attenuated timeframe for litigation. If meaningful efforts are made to manage these risks, however, strategic climate rights litigation remains a worthwhile tool when employed not as a savior but as a contributor to an expansive network of advocacy approaches within the larger climate movement.

This Article proceeds in four parts. Part I defines the term "U.S. strategic climate rights litigation" and clarifies its historical progression by creating a taxonomy of U.S. climate rights cases across three waves of development distinguishable by their legal claims and the scope of their sought remedies. The first wave kicked off with litigation aimed at initiating state-level rulemaking based on a legal approach known as "atmospheric trust litigation" in the early 2010s. The second wave included the filing of *Juliana v. United States* in 2015 as well as numerous state-level, constitutional rights-based cases similarly requesting expansive decarbonization plans as remedies. The third wave is gaining traction as recent climate rights cases have started seeking narrower, more judicially manageable relief.

Part I then describes the typical strategic litigation approach, which aims first to achieve courtroom victories and then to pursue further litigation to enforce and build upon those initial successes. Recognizing the need for more nuanced analysis to fully comprehend the effects of strategic climate rights litigation, Part I provides a theoretical framework for strategic litigation that accounts for direct impacts on the law and indirect impacts on wider society both before and after final judicial rulings.

Part II specifically evaluates the potential of U.S. strategic climate rights litigation to support the climate movement through direct changes to law from judicial rulings. The analysis is framed by a narrow comparison between the possible Category 1 and Category 2 effects of courtroom decisions in strategic climate rights litigation and the actual Category 2 impacts that *Brown v. Board of Education* had on the law relating to U.S. public school desegregation. The results of *Brown* are ripe for analogy because, like the expansive remedies frequently requested in first- and second-wave climate rights cases, *Brown*'s judicial mandate for the federal government to desegregate all public schools across the

26. *See infra* Part IV.A.

nation was massive in scope. Analyzing what happened to school desegregation following *Brown* helps inform expectations for what might result from successful climate rights cases seeking similarly expansive relief that requires nationwide changes in governmental functioning. This analysis reveals that final courtroom outcomes in strategic climate rights litigation will likely play a consequential but nonetheless limited role in supporting efforts to stabilize Earth's climate system.

Part III highlights the Category 3 and Category 4 indirect influences of strategic climate rights litigation on society more broadly as achieved through media attention, intellectual analysis, and involvement with the cases. Such impacts start before and continue after final courtroom outcomes. Although an empirical evaluation of these extrajudicial effects is beyond the scope of this Article, Part III provides evidence that such effects exist without attempting to quantify them precisely. Analysis reveals that these indirect impacts of climate rights cases represent a more substantial contribution to the furtherance of the climate movement than direct impacts to the law resulting from judicial pronouncements.

Finally, Part IV identifies three difficulties for strategic climate rights litigation: (1) the potential for losses in the courtroom that create legal precedent restricting future litigation opportunities, (2) the misallocation of resources toward litigation and away from other worthwhile advocacy approaches, and (3) overconfidence in courtroom-based outcomes' ability to achieve change that could lead to a sense of counterproductive complacency. Advocates engaging in strategic climate rights litigation should consider and mitigate these potential outcomes to maximize the effectiveness of lawsuits as an advocacy approach.

I. A Primer on U.S. Strategic Climate Rights Litigation

The term "U.S. strategic climate rights litigation" can be broken down into two separate elements: "strategic litigation" and "climate rights litigation," both of which are foundational to the analysis presented in this paper. The cases under consideration are strategic in that they incorporate a vision for achieving higher-level objectives. They are climate rights cases because they allege that governmental contributions to climate change constitute violations of constitutional rights or the public trust doctrine.[27]

27. The public trust doctrine, which is included in many climate rights case complaints, has been interpreted as a rights-based doctrine. *See* Erin Ryan, *Public Trust Principles and Environmental Rights: The Hidden Duality of Climate Advocacy and the Atmospheric Trust*, 49 Harv. Env't L. Rev. 225 (2025) (noting that governmental public trust duties and the environmental rights of citizens represent two sides of the same coin because state obligations necessarily entail citizens' rights); Blumm & Wood, *supra* note 1, at 22 ("the public trust doctrine presents a fundamental-rights framework for articulating climate obligations that transcend jurisdictions across the planet"); Juhn, *supra* note 10, at 2770 ("[T]he public trust doctrine . . . secures this environmental right for plaintiffs."). *See generally* Weaver & Kysar, *supra* note 1,

Analyzing strategic climate rights litigation requires first clarifying the term itself by way of its two core elements. Yet, the first, strategic litigation, is undertheorized conceptually,[28] subjecting it to scholarly criticism. In particular, Andreas Fischer-Lescano argues that the "strategic" element of the term often attaches either trivially (given that all litigation involves some element of strategic decision-making) or overconfidently (given the difficulty in strategically planning for the consequences of litigation, which are tricky to predict).[29]

To address these criticisms, this Article defines strategic litigation as the deliberate decision to file a lawsuit, as opposed to any other advocacy approach, with the intent to achieve a broader objective beyond the immediate outcome in the case by adaptively capitalizing on the litigation process or result.[30] This definition avoids the triviality critique by necessitating a specific intention in each particular situation both (1) to pursue litigation as opposed to other legal strategies[31] and (2) to use litigation results to pursue a higher-level goal beyond the specific resolution of the case. These strategic elements are distinct from the decision-making typically involved in private legal practice, which often responds to incentives to both turn toward judicial advocacy and to focus on obtaining monetary damages through success in the courtroom.[32] This definition also avoids the overconfidence critique by foregoing heavy reliance on a particular courtroom result, allowing instead for a post-hoc strategic response

at 354 ("The public trust doctrine is a hybrid creature that lives somewhere near the border of property and constitutional law.").

28. *See* Michael Ramsden & Kris Gledhill, *Defining Strategic Litigation*, 4 Civil Justice Quart. 407, 408 (2019) ("Much of the existing scholarship that references 'strategic litigation' does not set out to establish its key features[.]").

29. Andreas Fischer-Lescano, *From Strategic Litigation to Juridical Action*, *in* Transnational Legal Activism in Global Value Chains 300 (Markus Krajewski ed., 2021).

30. This definition is adapted from three distinct sources' overlapping definitional elements. The first source is Kris van der Pas' systematized meta-analysis of references to strategic litigation on twenty NGO websites and in academic literature pulled from three legal databases. *See* Kris van der Pas, *Conceptualising Strategic Litigation*, 11 Oñati Socio-Legal Series 116 (2021). The second source is the list of characteristic attributes of strategic litigation developed by Ramsden and Gledhill. *See* Ramsden & Gledhill, *supra* note 28. The third source notes that strategic human rights litigation as a term "is generally used to mean litigation that pursues goals—or which concerns interests—that are broader than only those of the immediate parties." Helen Duffy, Strategic Human Rights Litigation: Understanding and Maximising Impact 3 (2018).

31. This first component of the definition intends to distinguish strategic litigation from other approaches that turn to litigation reflexively without thinking through whether other legal advocacy strategies may be better-suited to the problem at hand.

32. *See, e.g.*, Sean Farhang & Douglas Spencer, *Legislating Incentives for Attorney Representation in Civil Rights Litigation*, 2 J. L. & Ct. 241, 242 (2014) ("Congress' reliance on economic incentives to mobilize private counsel to enforce statutory mandates cuts across virtually every area of regulatory policy and is a defining facet of the modern American state[.]").

to various potential outcomes of the litigation process in tactical pursuit of a broader objective.[33]

The second core element of strategic climate rights litigation is the climate rights litigation component. This Article defines climate rights litigation relatively narrowly[34] as those cases filed against governments that employ constitutional law and/or the public trust doctrine to vindicate plaintiffs' rights to enjoy a stable atmosphere and climate system. This restricted definition includes only climate rights cases that constitute "strategic litigation" as defined in the previous paragraph.[35] There are forty-seven cases falling under this strategic climate rights litigation classification to date.[36]

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33. *See, e.g.*, Gabriela Eslava et al., Strategic Litigation Manual: From Theory to Practice, Lessons from Colombia and Lebanon 67 (2021) ("As advocates, we are prepared to win or lose[.] . . . The results of a [litigation] process cannot be seen exclusively by the results of the judicial process."); NeJaime, *supra* note 23, at 969 ("[S]ocial movement advocates treat litigation loss as a routine part of their social-change campaigns. They plan for wins and losses and use losses to shape strategies in other venues."); Levy, *supra* note 12, at 496 ("[T]he value of a lawsuit is not found in its disposition alone. Win or lose in court, impact litigation can still advance the goals or interests of its constituencies.").
34. *See* César Rodríguez-Garavito, Litigating the Climate Emergency: How Human Rights, Courts, and Legal Mobilization Can Bolster Climate Action 10 (2022) (noting that the Climate Litigation Accelerator (CLX) at New York University School of Law compiles a database of climate rights cases based on a broader definition that includes all "cases in which litigants or judicial or quasi-judicial bodies explicitly referenced climate change and human rights in their submissions or decisions[]").
35. There are "non-strategic" climate rights cases that loosely rely on climate rights-based arguments but have a different primary motivation than reducing climate change-causing greenhouse gas emissions. *See, e.g.*, Marte v. City of New York, No. 159068/2022 (N.Y. Sup. Ct. Apr. 17, 2023) (using, in small part, the constitutional rights violations stemming from the climate impacts of a building project as a hook to seek an injunction against further construction on the project); Renew 81 for All v. Fed. Highway Admin., No. 5:22-CV-1244 (MAD/TWD), 2024 WL 3488407 (N.D.N.Y. July 19, 2024) (relying on constitutional rights violations resulting from climate change impacts of a viaduct project as a minor argument in support of halting the project); Verified Petition and Complaint, Neighbors for a True Oasis v. Port Washington North, No. 609509/2024, (N.Y. Sup. Ct. filed May 31, 2024) (incorporating climate-based constitutional rights claims and public trust claims with the primary intention to preserve a particular park area). Such lawsuits are irrelevant to the analysis in this Article, which aims to better understand the comprehensive effects of climate rights cases that are explicitly aimed at contributing to the broader climate movement.
36. Note that this number excludes rights-based climate cases (1) filed in opposition to climate protection initiatives; (2) filed in non-U.S. courts; (3) filed against private actors based on statutory rights or torts claims; and (4) filed based on rights not expressly connected to the preservation of a stable climate, a clean atmosphere, or a healthy environment in the complaint. This number also excludes all cases with public trust claims that reference climate change only tangentially or as an exacerbator of harm to navigable waterways rather than as a phenomenon requiring particularized attention under the public trust doctrine. The full catalogue of strategic climate rights litigation cases is included in the Appendix.

A. Three Waves of Cases

Strategic climate rights litigation cases appeared around a decade and a half ago, emerging in three waves. The first wave was set in motion on May 4, 2011[37] when children and young adults across thirty-six states filed petitions for rulemaking alleging that state governments had violated their duties under a novel legal concept known as the "atmospheric trust."[38] As explained by legal scholar Mary Wood, the atmospheric trust derives from the public trust doctrine, which identifies the government as a trustee tasked with protecting and regulating the use of public natural resources for the communal benefit of all citizens.[39] Atmospheric trust litigation aims to extend this principle to the atmosphere[40] by engaging in legal action at federal[41] and state levels in the U.S. and even in jurisdictions worldwide.[42] Although courts historically have applied the public trust doctrine to navigable waters of the United States, they have since expanded the principle to include, for example, federal land[43] and, in Pennsylvania, all public natural resources in the state, including the air.[44] Atmospheric trust litigation

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37. Note that the seeds of a right-based approach to legal efforts to combat climate change were initially planted when an Inuit woman filed a petition in 2005 before the Inter-American Court of Human Rights for relief from violations of her human rights resulting from U.S. greenhouse gas emissions. *See infra* text accompanying notes 255–60.
38. Christiansen, *supra* note 9, at 878; *see also What is Our Children's Trust?*, Bifrost (Oct. 26, 2018), https://perma.cc/PJH5-T9YM.
39. Mary Wood, *Atmospheric Trust Litigation*, *in* Adjudicating Climate Change: State, National, and International Approaches 99 (Burns and Osofsky eds., 2009); *see* State v. Cleveland & Pittsburgh R.R., 113 N.E. 677, 682 (Ohio 1916) ("The state as trustee for the public cannot, by acquiescence, abandon the trust property or enable a diversion of it to private ends different from the object for which the trust was created. . . . An individual may abandon his private property, but a public trustee cannot abandon public property.").
40. *See, e.g.*, Plaintiffs' Original Petition at ¶ 20, Bonser-Lain v. Texas Comm'n on Env't Quality, No. D-1-GN-11-002194 (Tex. Dist. Ct. July 21, 2011) ("The atmosphere, including the air, is one of the most crucial assets of our public trust and each sovereign government shares a co-tenant trustee duty to protect it.").
41. Although the public trust doctrine has historically been interpreted as a matter of state law, there is debate around whether the federal government might also have public trust obligations. *Compare* Zachary L. Berliner, *What About Uncle Sam? Carving a New Place for the Public Trust Doctrine in Federal Climate Litigation*, 21 U. Pa. J.L. & Soc. Change 339 (2018), *with* PLL Mont., LLC v. Montana, 565 U.S. 576, 603–04 (2012) (stating "the public trust doctrine remains a matter of state law[]" and its "contours . . . do not depend upon the Constitution[]").
42. *See* Mary Christina Wood, *"On the Eve of Destruction": Courts Confronting the Climate Emergency*, 97 Ind. L.J. 239, 259 (2022) ("The American [atmospheric trust litigation] campaign inspired efforts in many other nations.") [hereinafter Wood, *"On the Eve of Destruction"*].
43. *See* United States v. 1.58 Acres of Land, 523 F. Supp. 120, 124–25 (D. Mass. 1981). *See generally*, Erin Ryan, Holly Curry & Hayes Rule, *Environmental Rights for the 21st Century: A Comprehensive Analysis of the Public Trust Doctrine and Rights of Nature Movement*, 42 Cardozo L. Rev. 2447 (2021).
44. Pa. Const. art. I, § 27; Pa. Env't Def. Found. v. Commonwealth, 161 A.3d 911, 916 (Pa. 2017); *see also* Haw. Const. art. XI, § 1 (guaranteeing "[a]ll public natural resources are held in trust by the State for the benefit of the people").

looks to further expand the concept to include the atmosphere as a resource essential to "the survival and prosperity of present and future generations of citizen beneficiaries."[45] Many but not all of these cases request judicial supervision of large-scale decarbonization plans and rely on constitutional rights provisions to support their claims under the public trust doctrine.[46]

Although the May 2011 "atmospheric trust" petitions for rulemaking were not lawsuits themselves,[47] many of them led to the initial cases that constitute first-wave strategic climate rights litigation. Court cases against governmental agencies are often vulnerable to dismissal if they are not preceded by efforts to first exhaust administrative remedies, typically through the rulemaking process. These petitions thus represented an initial attempt to "resolve . . . claims through the executive arm of the law[,]" thereby removing a procedural obstacle to future review in court under state administrative procedure laws.[48] Indeed, when state governments respectively denied almost every single petition to initiate the rulemaking process,[49] some advocates specifically relied on those denials as the grounds for subsequent first-wave climate rights lawsuits in state courts.[50] Although most of these cases were ultimately dismissed, some were successful in pressuring the non-judicial branches to take action,[51] leading to, for example, an executive order requiring a comprehensive greenhouse gas emissions reduction plan from the governor of Massachusetts,[52] new greenhouse gas emission standards in Washington,[53] and even a new Colorado law requiring consideration of the environment as well as "public health, safety, and welfare[]" in fossil fuel development and production regulations.[54]

45. Mary Christina Wood, *Atmospheric Trust Litigation*, *in* Climate Change: A Reader 1, 47 (Carolina Academic Press, 2011).

46. *See, e.g.*, Complaint at ¶ 71, Blades v. California, No. CGC-11-510725 (Cal. Super. Ct. dismissed Feb. 7, 2012) (relying on numerous provisions of the California Constitution to support public trust doctrine claims).

47. Note that the term "strategic climate rights litigation" does not include these petitions for rulemaking, but it does incorporate any subsequent litigious appeals of administrative decisions denying the petitions for rulemaking.

48. Christiansen, *supra* note 9, at 874.

49. *Id.* at 877–80.

50. *See, e.g.*, Kain v. Dep't of Env't Prot., 49 N.E.3d 1124 (Mass. 2016); Turner v. North Carolina Env't Mgmt. Comm'n, No. 15-CVS-2488 (N.C. Wake Cnty. Ct. Nov. 25, 2015).

51. Christiansen, *supra* note 9, at 886–89.

52. Mass. Exec. Order No. 569 § 2 (Sept. 16, 2016); *id.* at 886–87. Note that a favorable decision on the merits for a strategic climate rights case led to this executive order. *See Kain*, 49 N.E.3d at 1142.

53. Wash. Admin. Code § 173-442-010 (2016); Christiansen, *supra* note 9, at 887. Note that the Washington legislature subsequently repealed these standards in 2023 because their "functions ha[d] been preempted and replaced by [the] . . . Climate Commitment Act[.]" 23-15 Wash. Reg. 084 (Aug. 18, 2023).

54. S.B. 19-181, ch. 120, § 6, 2019 Colo. Sess. Laws 502, 506; Christiansen, *supra* note 9, at 887–88.

A second, more gradual wave of cases arose with the filing of *Juliana v. United States* in the United States District Court for the District of Oregon in 2015. It then continued with the filing of additional cases steadily over the next decade.[55] Like in the first wave, children and young people have been the plaintiffs in most second-wave litigation.[56] These cases share another fundamental feature with first-wave cases: their broad allegations of legal violations by the fossil fuel-authorizing behavior of governments.[57] Most of them seek large-scale injunctive relief—either explicitly or implicitly[58]—as remedies. However, unlike first-wave cases, second-wave strategic climate rights litigation relies on claims that governments' fossil fuel promotion violates the plaintiffs' constitutional rights independent from any public trust doctrine violations.[59]

Aside from these underlying characteristics, there is significant diversity among second-wave strategic climate rights cases. Many additionally rely on the public trust doctrine (either as an independent claim or in support of their constitutional claims) but not all do.[60] Additionally, second-wave strategic climate rights litigation cases have appeared across a variety of state and federal district courts.[61]

The first wave of atmospheric trust cases was foundational for this second wave of climate claims. The law firm, Our Children's Trust—which was instrumental in coordinating the simultaneous legal action campaign on May 4, 2011 and has filed many second-wave climate rights cases[62]—incorporated elements

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55. *See* Appendix.
56. *See, e.g.*, Natalie R. v. Utah, No. 220901658, 2022 WL 20814755 (Utah Dist. Ct. Nov. 9, 2022).
57. *See, e.g.*, Komor v. United States I, No. 4:19-cv-00293-RCC (D. Ariz. Aug. 27, 2019).
58. *Compare* Complaint for Declaratory and Injunctive Relief, Aji P. v. Washington, No. 18-2-04448-1, 2018 WL 3978310 (Wash. Super. Ct. Aug. 14, 2018) (requesting the government to create an economy-wide climate recovery plan) *with* Complaint for Declaratory and Injunctive Relief, Layla H. v. Virginia, No. CL22000632-00 (Va. Cir. Ct. Sept. 16, 2022) (requesting declaratory relief and whatever injunctive relief the court deems necessary to rectify declared constitutional violations) [hereinafter *Layla H.* Complaint].
59. *Compare* public trust doctrine claims in first-wave case Chernaik v. Brown, 475 P.3d 68 (2020) *with* independent constitutional rights-based claims in second-wave case Animal Legal Def. Fund v. United States, No. 19-35708, 2022 WL 5241274 (9th Cir. Feb. 9, 2022).
60. *Compare Layla H.* Complaint, *supra* note 58 (making a public trust doctrine claim) *with* Complaint for Declaratory Relief, Atencio v. New Mexico, No. D-101-CV-202301038 (N.M. Dist. Ct. June 10, 2024) (not making a public trust doctrine claim).
61. *See, e.g.*, Complaint for Declaratory Relief and Further Relief as Warranted, Genesis B. v. U.S. EPA, No. 2:23-cv-10345 (C.D. Cal. May 8, 2024) [hereinafter *Genesis* Complaint]; Complaint for Declaratory and Injunctive Relief, Animal Legal Defense Fund v. United States, 404 F.Supp.3d 1294 (D. Or. 2018) (No. 6:18-cv-01860-MC).
62. Cinnamon P. Carlarne, *Climate Courage: Remaking Environmental Law*, 41 Stan. Env't L.J. 125, 136 (2022) ("One of the earliest and highest profile collective actions on the part of the U.S. youth climate movement is the Our Children's Trust Litigation."). Our Children's Trust filed or assisted in filing numerous second-wave climate rights cases, including the following: *Juliana v. United States*, *Turner v. North Carolina Env't Mgmt. Comm'n*, *Sagoonick v.*

and lessons learned from the first wave into those later filings. For example, second-wave plaintiffs have included constitutional rights-based allegations in addition to or instead of the public trust doctrine, given the lack of traction that public trust claims garnered in many first wave cases.[63]

Finally, a third wave of climate rights cases has emerged in the last few years. These case filings have overlapped with, and are fundamentally similar to, the legal complaints in the second wave with one important distinction: they have presented narrower requests for relief (perhaps in response to roadblocks encountered by the sweeping requests for relief in many second-wave cases). For example, instead of asking for a full-blown climate recovery plan as a remedy, the plaintiffs in *Fresh Air for the Eastside, Inc. v. New York* seek the closure of a particular landfill development that they allege violates their rights to clean air and a healthy environment under the New York Constitution, in part, because it contributes to climate change through its methane emissions.[64] Other cases have tightened their complaints by filing them against a specific government agency while still asking for broad, agency-wide changes as relief.[65] These narrower cases represent the emergence of a more targeted strategy to rely on broad allegations of constitutional rights abuses to stop particularized harm-causing projects and agency action rather than diffuse government activities or decision-making processes.

The category "strategic climate rights litigation," as defined in this Article, incorporates all three waves of cases, noting their general similarities: (1) governments as defendants and citizen advocates (often youth) as plaintiffs; (2) lawsuits founded on constitutional rights claims and/or public trust doctrine principles; and (3) requests for declaratory and/or injunctive relief recognizing plaintiffs' right to a stable climate, a clean atmosphere or a healthy environment.[66] Because these three waves of cases aim to contribute to the wider climate

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Alaska, *Reynolds v. Florida*, *Aji P. v. Washington*, *Held v. Montana*, *Navahine v. Hawai'i Dep't of Transp.*, *Natalie R. v. Utah*, *Layla H. v. Virginia*, and *Genesis B. v. EPA*. *See* Appendix.

63. *See, e.g.*, *Layla H.* Complaint, *supra* note 58, at 1–2 (bringing claims related to Virginia's *jus publicum* responsibilities in conjunction with constitutional rights claims).

64. Complaint at 27, 29, Fresh Air for the Eastside, Inc. v. New York, No. E2022000699, 2022 WL 18141022 (N.Y. Sup. Ct. Dec. 7, 2022) [hereinafter *Fresh Air for the Eastside* Complaint]; *see also* Complaint for Declaratory and Injunctive Relief, Sagoonick v. Alaska II, No. 3AN-24-06508CI (Al. Sup. Ct. filed May 22, 2024) (requesting closure of specific liquefied natural gas project) [hereinafter *Sagoonick II* Complaint].

65. *See* Complaint for Declaratory and Injunctive Relief at 4, 70, Navahine v. Hawai'i Department of Transportation No. 1CCV-22-0000631 (Haw. Cir. Ct. Apr. 6, 2023) [hereinafter *Navahine* Complaint]; *Genesis* Complaint, *supra* note 61, at 102–03.

66. Strategic climate rights litigation overlaps substantially with atmospheric trust litigation. *See supra* discussion accompanying notes 37–42. That said, the "strategic climate rights litigation" designation is more expansive in that it incorporates a number of cases that lack public trust claims.

movement's pursuit of a stable climate system, they neatly fit into the designation of "strategic litigation."[67]

B. *Four Categories of Impacts*

To analyze the intended strategy behind these three waves of climate rights cases, Part I.B relies on "theory of change" analysis. Theory of change analysis is a process that involves thoroughly outlining the anticipated causal roadmap that will likely lead to a desired advocacy goal.[68] By "'filling in' . . . the 'missing middle'"[69] between the *outcomes* of a particular initiative and the larger *objectives* it hopes to achieve, theory of change analysis interrogates any potentially unconsidered or unwarranted assumptions that could derail the effectiveness of a strategic campaign.[70]

Scholars Jacqueline Peel and Hari Osofsky have considered the theoretical change-making potential of climate change litigation as a broad category,[71] but theory of change analysis has yet to be applied specifically to strategic climate rights litigation. Chart I takes a step toward filling this gap by creating a conceptual framework for understanding how strategic climate rights litigation might achieve its objective of contributing to broader efforts to combat the climate crisis.[72] Chart I draws from and builds on Peel and Osofsky's theoretical model of the direct and indirect effects of climate change litigation generally,[73]

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67. *See* Mission, Our Children's Trust, https://perma.cc/EQP2-HCJD; *see also* Eden Stiffman, *Behind Landmark Climate Ruling in Mont., a Trailblazing Nonprofit Law Firm and an Army of Youth Activists*, The Chronicle of Philanthropy (Aug. 18, 2023), https://perma.cc/L97R-TLAS (quoting the co-executive director and chief legal counsel of Our Children's Trust, Julia Olson, as saying, "[O]ur political system alone is not going to address climate change in time. We need the courts involved in this issue.").
68. What is Theory of Change?, Ctr. for Theory of Change, https://perma.cc/LW2B-SSX2.
69. *Id.*
70. *Id.* ("Through [a theory of change] approach, the precise link between activities and the achievement of the long-term goals are more fully understood. This leads to better planning, in that activities are linked to a detailed understanding of how change actually happens."); *see also What is Theory of Change?*, Austl. Inst. of Fam. Stud., (Sept. 2021), https://perma.cc/DH2C-GDMV (noting the explanatory power of theory of change analysis to identify how "particular activities or actions will lead to particular outcomes[]").
71. Peel & Osofsky, Climate Change Litigation, *supra* note 14, at 36 (developing a conceptual model that accounts for direct and indirect impacts of climate change litigation); *see also* Hari Osofsky & Jacqueline Peel, *Litigation's Regulatory Pathways and the Administrative State: Lessons from U.S. and Australian Climate Change Governance*, 25 Georgetown Int'l Env't L. Rev. 207, 242–54 (2013).
72. Note that Chart I represents a first step toward a full theory of change analysis. Subsequent considerations regarding how the larger climate movement may or may not be able to successfully combat climate change by reducing atmospheric greenhouse gas emissions lie outside the scope of this Article.
73. *See* sources cited in note 71.

but it more specifically identifies four distinct categories of impacts that strategic climate rights litigation has achieved or has the potential to achieve.

Chart I: Impact Categories of Strategic Climate Rights Litigation[74]

	Pre-final Courtroom Outcome	Post-final Courtroom Outcome
Direct Impacts on Law	CATEGORY 1 Preliminary findings create dicta that influence future judicial decisions[75]	CATEGORY 2 Final rulings/dissents create dicta and holdings that influence future judicial decisions[76]
Indirect Impacts on Society	CATEGORY 3 Litigation process and preliminary findings foster engagement that influences advocacy approaches and outcomes[77]	CATEGORY 4 Final rulings/dissents foster engagement that influences advocacy approaches and outcomes[78]

Chart I provides a simplified model that aims not to precisely regiment specific effects of litigation into silos[79] but rather to outline the general parameters of strategic litigation's impacts in broad strokes. It purposefully avoids predictive or evaluative language about courtroom wins or losses creating good or

74. Note that Chart I comprehensively covers potential impacts from litigation. The "Direct Impacts on Law" row accounts for all changes to the law resulting directly from judicial decision-making. The "Indirect Impacts on Society" row covers all other potential impacts outside of the courtroom including indirect effects of litigation on changes to the law deriving from executive or legislative action.
75. *See, e.g.*, *infra* discussion accompanying notes 172–74.
76. *See, e.g.*, Obergefell v. Hodges, 576 U.S. 644 (2015) (determining that same-sex couples have a constitutional right to marry, thereby creating precedent for a constitutional challenge against any government official who violates that right).
77. *See, e.g.*, Lesley Clark, *5 Takeaways from the (Likely) Demise of the Juliana Climate Case*, E&E News (May 30, 2024), https://perma.cc/9C43-PMRB (noting that *Juliana* inspired other youth climate lawsuits in the U.S. and abroad and arguably contributed to "the push to bring more voices into reviews of the climate impacts of fossil fuel and infrastructure projects[]").
78. *See, e.g.*, Wendall Barnick, et al., *States' Legislative Reaction to Dobbs Impacts Consumer Health Data Privacy*, ReedSmith (March 22, 2024), https://perma.cc/5ACB-U6M4; Jess Bravin, *The Conservative Legal Push to Overturn Roe v. Wade Was 50 Years in the Making*, Wall St. J. (June 24, 2022), https://perma.cc/5LDW-HBEP (documenting how the *Roe v. Wade* decision spurred a half-century conservative movement to get the case overturned); Andrew P. Morriss, *Symbol or Substance: An Empirical Assessment of State Responses to Kelo*, 17 Sup. Ct. Econ. Rev. 237, 237 (2009) (noting that *Kelo, et al. v. City of New London, Connecticut* "provoked considerable legislative activity as 46 states adopted legislation on eminent domain" in direct response to the Supreme Court decision).
79. Many individual cases result in impacts that fall into more than one category.

bad outcomes. Parts II, III, and IV will engage with such normative considerations to the extent of their analytical usefulness.

The typical theory of change model for strategic litigation involves bringing a case, winning in court, and then filing additional cases aimed at either (1) enforcing the ruling[80] or (2) expanding the ruling further.[81] As a result, scholarly inquiry into strategic litigation's effects tends to focus on Category 2 impacts to the law through final rulings on the merits.[82]

Yet, strategic litigation approaches typically also aim to promote impacts beyond the courtroom.[83] Such Category 3 and Category 4 indirect effects include driving public debate,[84] articulating a normative narrative of injustice,[85] catalyzing further advocacy,[86] platforming marginalized voices,[87] increasing

80. *See* Strategic Litigation Toolkit, Digital Freedom Fund, https://perma.cc/7USF-3R3C ("Guideline 32: Strategic litigation does not always end with a judgement. . . . It may also involve further litigation to enforce the judgment."); Christopher W. Schmidt, *Social Movements, Legal Change, and the Challenges of Writing Legal History*, 65 Vand. L. Rev. En Banc 155, 168 (2012) [hereinafter Schmidt, *Social Movements*] ("The NAACP's campaign was predominantly focused on changing the law by getting the constitutional right declared and then convincing courts to issue orders to enforce that right.").

81. *See, e.g.*, Genna Rae McNeil Groundwork: Charles Hamilton Houston and the Struggle for Civil Rights, 133–36 (1983) (describing Charles Hamilton Houston's strategy to build precedent with smaller cases, chipping away at segregation rather than attacking it directly as unconstitutional in principle); *The NAACP Targets Higher Education*, Smithsonian Nat'l Museum of Am. Hist., https://perma.cc/SL3Q-PQKB (noting that the NAACP filed cases first on behalf of Black graduate and law students denied access to higher educational opportunities before relying on the legal precedent established by those successful cases to support further litigation challenging segregation in public schools).

82. Note that Category 1 impacts are less common and do not garner a lot of scholarly attention.

83. *See, e.g.*, NeJaime, *supra* note 23 (highlighting indirect impacts of losing cases in movements to promote both LGBT-rights and the Christian Right). *See generally* Open Society Justice Initiative, *Strategic Litigation Impacts: Insights from Global Experience*, Open Society Foundations 95 (2018), https://perma.cc/PND9-K4WZ (arguing for a multidimensional litigation model of strategic litigation that accounts for indirect impacts on society in addition to direct impacts on petitioners and the law); Kumaravadivel Guruparan & Harriet Moynihan, Climate Change and Human Rights-based Strategic Litigation 15–16 (Nov. 2021), https://perma.cc/P9DY-EJM6 (describing strategic litigation's indirect impacts, which extend further than the case's legal outcome).

84. Levy, *supra* note 12, at 496.

85. *Id.* at 497; Guruparan & Moynihan, *supra* note 83, at 17.

86. NeJaime, *supra* note 23, at 955; *see, e.g.*, Guruparan & Moynihan, *supra* note 83, at 16 ("[R]ights-based climate cases can have a mobilizing power beyond the individual case concerned, by building a narrative about the need for stronger action to tackle climate change, which increases public awareness.").

87. *See, e.g.*, Sonja Buckel et al., *Legal Struggles: A Social Theory Perspective on Strategic Litigation and Legal Mobilisation*, 33 Soc. & L. Stud. 21, 34 (2024) ("[W]hen lawyers include testimonies and reports by clients in their pleadings, they give weight to [their] perspectives. . .").

awareness, prioritizing or legitimizing an issue, and engaging other state and private actors.[88]

Strategic climate rights litigation has led to many of these Category 3 impacts for years, long before any cases have successfully achieved changes in substantive law.[89] Partly because of their novel and sprawling claims for relief as well as their sympathetic young plaintiffs, climate rights cases often garner substantial attention from the media, legal practitioners, scholars, and elected officials throughout the litigation process. This attention has escalated as cases like *Held v. Montana* and *Navahine v. Hawai'i Department of Transportation* have achieved success,[90] leading to potential Category 4 impacts on society as well.[91] Part III will explore these indirect impacts in more depth following Part II's consideration of the potential direct impacts on the law resulting from climate rights cases.

II. Evaluating Direct Impacts on the Law

Chart I's purpose is to provide a conceptual grounding for investigating the comprehensive contributions of U.S. strategic climate rights litigation to the fundamental theory of change driving the broader climate movement.[92] Relying on that framework, Part II focuses primarily on Category 2 direct impacts to the law following final courtroom outcomes.[93] Although numerous U.S. strategic climate rights cases have been dismissed on procedural grounds leading to minor direct impacts on the law, a few cases to date have achieved more

88. NeJaime, *supra* note 23, at 955; *see e.g.*, Eric A. Posner, *Climate Change and International Human Rights Litigation: A Critical Appraisal*, 155 U. Pa. L. Rev. 1925, 1944 (2007) ("[T]he main purpose of litigation may not be to persuade courts to determine greenhouse gas emission policy, but to attract public attention and pressure governments to reach political solutions, including treaties and domestic laws.[]"); Eslava et al., *supra* note 33, at 55 ("One of the defining features of strategic litigation is that the litigation is meant to galvanize public support to pressure policymakers to generate systemic social change.").

89. *See infra* Part III.

90. Note that a number of strategic climate rights litigation cases have received unfavorable procedural rulings. Part IV.A explores the impacts of such outcomes.

91. *Compare 2022 Media Coverage*, Our Children's Trust, https://perma.cc/GN2C-8WU6 (listing 97 news articles about climate rights cases filed by Our Children's Trust in 2022), *with 2023 Media Coverage*, Our Children's Trust, https://perma.cc/5EZX-AT55 (listing 479 news articles about climate rights cases filed by Our Children's Trust in 2023, the year that *Held v. Montana* went to trial and achieved a favorable district court decision).

92. That is, the impacts of U.S. strategic climate rights litigation on facilitating climate action that, theoretically, curtails climate change through reduced greenhouse gas emissions. Note that the latter component in this theory of change framework extends beyond the scope of this Article's investigation. *See supra* note 72.

93. Part II also briefly touches on Category 1 direct impacts to the law, giving less analytical attention to them because they are less common.

substantial direct impacts on the law through successful courtroom outcomes.[94] For example, the first-wave climate rights case, *Kain v. Massachusetts Department of Environmental Protection*, led to a judicial mandate for Massachusetts to set specific limits on greenhouse gas emissions to properly implement its Global Warming Solutions Act.[95] The second-wave climate rights case, *Held v. Montana*, more recently established that a statutory prohibition on considering climate change when conducting environmental review for development projects violated the right to a clean and healthful environment in the Montana Constitution.[96] In addition, the third-wave climate rights case, *Navahine v. Hawai'i Department of Transportation*, culminated in a negotiated settlement that both affirmed plaintiffs' constitutional rights to a life-sustaining climate and established judicial oversight of a management plan for implementing Hawai'i's legislatively prescribed mandate to reduce emissions from the transportation sector to zero by 2045.[97]

Part II considers the Category 2 impacts of these cases on the law. However, given the dearth of successful outcomes ripe for direct analysis, Part II uses a comparative analytical framework to conceptualize how such Category 2 impacts may feed into strategic climate rights litigation's higher-order objective of combatting climate change.

As a basis for comparison, Part II relies on the background of *Brown v. Board of Education* and how it ultimately impacted public school segregation in the United States.[98] This analysis reveals that law-altering courtroom outcomes are likely not the primary method of creating change for strategic climate rights litigation both because of judicial conservatism and enforcement limitations. Rather, Category 2 direct impacts on the law fit into strategic climate rights litigation's theory of change as an important but limited aspect of a larger impact portfolio. This conclusion holds both for the large-scale systemic remedies typically requested in first- and second-wave climate rights litigation and for the more targeted relief sought in third-wave cases.

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94. In addition to the examples provided in this paragraph, a line of climate rights lawsuits filed against the Hawai'i Public Utilities Commission have successfully ensured environmental groups' right to voice their opinions during power purchase agreement proceedings. *See* Appendix, cases 19, 26, and 29.

95. Kain v. Dep't of Env't Prot., 49 N.E.3d 1124, 1142 (Mass. 2016).

96. Held v. Montana, 560 P.3d 1235, 1260–61 (Mont. 2024).

97. *Navahine* Settlement, *supra* note 22.

98. Note that legal scholar Samuel Buckberry Joyce has conducted similar comparative analysis across multiple examples of structural injunctions in U.S. history to better conceptualize a viable injunctive remedy in *Juliana v. United States*. *See generally* Samuel Buckberry Joyce, *Climate Injunctions: The Power of Courts to Award Structural Relief against Federal Agencies*, 42 Stan. Env't L.J. 241 (2023). Part II uses a similar but not identical approach to elucidate the likely outcomes of a potential judicial ruling that grants the large-scale systemic remedies requested in first- and second- wave strategic climate rights litigation.

A. Justifying the Comparative Analysis with Brown

Analyzing the hotly contested impacts of *Brown v. Board of Education* on school desegregation and the civil rights movement more broadly provides insight into what success in strategic climate rights litigation cases may look like in terms of Category 2 changes to the law. Comparative analysis centers on the outcomes from *Brown v. Board of Education* for two primary reasons. First, many have already drawn parallels between *Brown v. Board of Education* and strategic climate rights litigation (particularly the *Juliana* case). For example, many of those engaged in strategic climate rights litigation have identified strongly with *Brown* and the civil rights movement more broadly.[99] The co-executive director and chief legal counsel of Our Children's Trust, Julia Olson, has explicitly stated, "Our work is very much modeled after the strategic litigation the NAACP has done historically, especially throughout the Civil Rights Movement."[100] Levi Draheim, a young plaintiff in the *Juliana* case, has similarly reinforced the connection, drawing a notable parallel between the youth who have filed most climate rights cases and those who served as litigants in the civil rights education cases that culminated in *Brown*.[101] Part III.B further discusses the sympathetic nature of youth litigants as a driving force behind strategic climate rights litigation's indirect impacts on narrative-building within broader society.

Numerous non-advocates have further reinforced the analogy. Various judges and scholars have affirmed the resemblance between the rights-based claims and expansive relief in both *Brown* and *Juliana*.[102] Even scholars who are

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99. *See* Maxine Burkett, *Litigating Separate and Equal: Climate Justice and the Fourth Branch*, 72 Stan. L. Rev. 145, 149 (2020) (noting how those involved in climate rights cases "have leveraged the rhetorical and substantive power in aligning with the storied [civil rights] movement[]").

100. Olivia Molodanof & Jessica Durney, *Hope Is a Song in a Weary Throat: An Interview with Julia Olson*, 24 Hastings Env't L.J. 213, 224 (2018).

101. Lee van der Voo, *Youth Activists Lose Appeal in Landmark Lawsuit Against US Over Climate Crisis*, The Guardian (Jan. 17, 2020), https://perma.cc/5ZSU-7YVA (quoting Levi as saying, "We brought this lawsuit to secure our liberties and protect our lives and our homes. Much like the civil rights cases, we firmly believe the courts can vindicate our constitutional rights and we will not stop until we get a decision that says so.").

102. Burkett, *supra* note 99, at 146 (exploring "the important parallels between the deprivation-of-rights claims of *Juliana* and those of *Brown v. Board of Education*"); Juliana v. United States, 947 F.3d 1159, 1188–89 (9th Cir. 2020) (Staton, J., dissenting) (noting that the *Juliana* plaintiffs' requested governmental remedial plan is similar to the request for relief of the plaintiffs in *Brown*); Carlarne, *supra* note 62, at 164 (highlighting Judge Staton's analogy between "the court's delay in stepping in to recognize fundamental rights in the climate context to the failures of the court to step in earlier than it did with respect to desegregation"); Catherine E. Smith, *Brown's Children's Rights Jurisprudence and How It Was Lost*, 102 B. U. L. Rev. 2297, 2301 (2022) (comparing the *Brown* court's recognition of children's rights with the dismissal of the *Juliana* youth plaintiffs' equal protection claim); Rachel Shuen, *Addressing A Constitutional Right to A Safe Climate: Using the Court System to Secure Climate Justice*, 24 J. Gender Race & Just. 377, 379 (2021) (noting the

skeptical of the foundational strategy behind these cases have relied on comparisons with *Brown* to frame their critiques.[103]

The second key reason to comparatively analyze the Category 2 direct impacts of *Brown* on the law is because of the large-scale systemic remedy the case engendered.[104] The judicial mandate set forth in *Brown II* (the Supreme Court decision implementing *Brown*) to desegregate all public schools across the United States "with all deliberate speed" is similar in scope and ambition to the massive emission reduction plans requested by plaintiffs in first- and second-wave strategic climate rights litigation.[105] It is this parallel between the federally mandated nationwide remedy obtained in *Brown* and the vast, economy-wide relief sought in *Juliana*[106] that elicits such frequent comparisons

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Ninth Circuit's recognition of parallels between *Juliana* and *Brown*); Blumm & Wood, *supra* note 1, at 86 ("[D]ecisions like Juliana can serve broad educative functions in society, inspiring waves of change beyond the courthouse doors, similar to the Supreme Court's historic decision in *Brown v. Board of Education*[.]"); Noa Ben-Asher, *Trauma-Centered Social Justice*, 95 Tul. L. Rev. 95, 130 (2020) (noting three ways in which *Juliana* is similar to racial justice movements generally).

103. Richard J. Lazarus, *Judicial Missteps, Legislative Dysfunction, and the Public Trust Doctrine: Can Two Wrongs Make It Right?*, 45 Env't L. 1139, 1155–56 (2015) (noting that *Brown* sought a judicial remedy based on enumerated rather than unenumerated rights and that courts have struggled for decades to implement the *Brown* decision despite it being less far-reaching than the remedy requested by the plaintiffs in atmospheric trust litigation cases). *But see* Quinn Yeargain, *Against Environmental Rights Supremacy*, 26 Univ. Penn. J. Con. L. 1323, 1349–54 (2024) (arguing that comparisons between the systemic remedial plans requested in *Juliana* and provided in *Brown v. Board of Education* and *Brown v. Plata* are misguided).

104. Charles J. Russo et al., *Brown v. Board of Education at 40: A Legal History of Equal Educational Opportunities in American Public Education*, 63 J. Negro Ed. 297, 299 (1994) (noting "the massive scope" of the Supreme Court's implementation order for *Brown*); *see also* Sam Bookman, *Catalytic Climate Litigation: Rights and Statutes*, 43 Oxford J. Leg. Stud. 598, 601 (2023) ("[Climate] rights claims are ambitious. They aim to intervene in political and policy processes across an entire government apparatus.").

105. Many strategic climate rights litigation cases ask for remedies overseen by either an administrative agency or a judicial body, leading to massive, rapid reductions in greenhouse gas emissions affiliated with government activities. Because most human activities involve some level of greenhouse gas release, such requested relief would unavoidably have widespread impacts on government operations and the general functioning of society. *See* Mary Christina Wood, Nature's Trust: Environmental Law for a New Ecological Age 249 (2013). (noting that the scientific standard for a judicial remedy in strategic climate rights litigation is a "minimum of 6 percent annual carbon emissions reduction" economy-wide to bring atmospheric levels of carbon dioxide back down to 350 parts per million) [hereinafter Wood, Nature's Trust].

106. The Ninth Circuit ultimately deemed *Juliana*'s request for a judicially managed remedial plan to be outside the scope of redressability for an Article III court. *Juliana*, 947 F.3d at 1171. (Note that the Montana District Court also dismissed plaintiffs' request for a judicially managed remedial plan in *Held v. Montana*. *See* Findings of Fact, Conclusions of Law, and Order at 3, Held v. Montana, No. CDV-2020-307, 2023 WL 5229257, (Mont. Dist. Ct. Aug. 14, 2023). In response, the *Juliana* plaintiffs submitted an amended complaint in the District Court of Oregon, limiting their requested relief to declaratory judgment of a rights violation as well as

between the two cases,[107] as opposed to other strategically filed fundamental rights cases.[108]

Scholars have devoted significant attention to *Brown* and the mammoth remedy it engendered.[109] The resulting, extensive academic literature on the topic provides significant insights into the feasibility of achieving the system-wide changes to widespread agency policies sought in second-wave climate rights cases. The comparison is particularly apt because the relief granted in *Brown* and requested in second-wave strategic climate rights litigation includes judicial oversight of enormous shifts in society to uphold the fundamental rights of young people in particular.[110] Such remedies stretch constitutionally recognized "negative" rights—which forbid or overturn violative government laws or actions[111]—toward requiring significant, affirmative government action to dismantle expansive, unconstitutional government programs or policies.

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any "further relief as the Court deems just and proper, to redress the constitutional violations so declared." Second Amended Complaint for Declaratory and Injunctive Relief at 148, Juliana v. United States, No. 6:15-cv-01517-AA, 2023 WL 902339 (D. Or. Dec. 29, 2023).

107. Aside from this parallel, there are substantial differences between the respective litigation approaches, legal claims, and social contexts for mid-twentieth century civil rights litigation and contemporary strategic climate rights litigation. As such, the comparative analysis in this section is narrowly framed around their starkest similarity: the large size of the relief achieved in *Brown* and sought in climate rights cases. The comparison seeks to address the specific question: what does the vast remedy engendered in *Brown* suggest about the likelihood and aftermath of a potential victory in a first- or second-wave climate rights case seeking a similarly expansive result?

108. Note that other Supreme Court cases declaring fundamental rights have not elicited a similar requirement for long-term judicial oversight of a large-scale social transition. *See, e.g.*, Obergefell v. Hodges, 576 U.S. 644 (2015) (forbidding legislative bans on same-sex marriage without requiring ongoing judicial oversight); Roe v. Wade, 410 U.S. 113 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022), (recognizing the right to an abortion but not requiring large-scale changes in governmental programs to ensure universal access to that right); D.C. v. Heller, 554 U.S. 570 (2008) (recognizing an individual right to bear arms but not prescribing systematic shifts in governmental behavior to guarantee comprehensive access to that right).

109. *See infra* Parts II.B and C.

110. *Compare Juliana* Complaint, *supra* note 2, at 99 (requesting long-standing judicial monitoring of an "enforceable national remedial plan to phase out fossil fuel emissions and draw down excess atmospheric CO_2 so as to stabilize the climate system"), *with* Complaint at 7, Brown v. Bd. of Educ. of Topeka, Shawnee Cnty., Kan., 98 F. Supp. 797 (D. Kan. 1951) (No. T-316), *rev'd sub nom.* Brown v. Bd. of Educ. of Topeka, Kan. II, 349 U.S. 294 (1955) (requesting an end to segregation in Topeka, Kansas public schools) [hereinafter *Brown* Complaint]. Note that although the combined Brown plaintiffs at the Supreme Court level requested desegregation in the school districts of five specific jurisdictions, the Supreme Court ruling recognized their constitutional rights-based arguments applied to public schooling more generally, thus necessitating the nationwide systemic change as laid out in *Brown II*.

111. Matthew D. Lassiter, *Does the Supreme Court Matter? Civil Rights and the Inherent Politicization of Constitutional Law*, 103 Mich. L. Rev. 1401, 1422 (2005) ("Instead of providing positive guarantees of substantive equality, 'constitutional rights are generally limited to negative constraints on government[]'") (citing Michael Klarman, From Jim Crow

To be sure, courts have taken on an administrative role to grant system-altering remedies before[112] but only in situations that were much smaller in scope compared to the massive scale of the remedies invoked by the line of cases implementing the *Brown* decision nationwide and by the requested remedy of multi-agency decarbonization in strategic climate rights litigation. Remedies resulting from *Brown* and requested in the federal strategic climate rights case, *Juliana*, are the most readily comparable. Each of these cases implicate massive changes to foundational aspects of society across the entire United States: the way we educate our children and the sources from which we derive our energy. First- and second-wave climate rights cases in state courts similarly request massive, economy-wide greenhouse gas emissions reductions within their respective states. Such requests would affect all aspects of government functioning at either the national or state level in a way that is more similar to the expansive remedy elicited in *Brown* than to other examples of court-mandated judicial oversight of systemic alterations to a particular prison system,[113] school funding scheme,[114] affordable housing zoning ordinance,[115] salmon recovery plan[116] or system of state regulations affecting Native Tribes' fishing rights.[117]

Even the remedy in *Brown* doesn't quite match the size of the economy-wide decarbonization plans requested in climate rights strategic litigation (which would touch on every aspect of government activity and beyond).[118] Yet, this distinction does not fundamentally undermine the comparative analysis in Part II which relies on the remedy provided in *Brown* not as a perfect analogy but as

to Civil Rights: The Supreme Court and the Struggle for Racial Equality, 461 (Oxford U. Press ed., 2004) [hereinafter Klarman, From Jim Crow to Civil Rights]).

112. *See* Wood, *"On the Eve of Destruction", supra* note 42, at 261 ("The envisioned judicial role [in *Juliana*] is supervisory, characteristic of structural injunctions arising from cases involving civil rights, treaty rights, education funding, prisoners' rights, and complex zoning situations."); Wood, Nature's Trust, *supra* note 105, at 241–47 (providing detailed examples of remedies involving judicial oversight of substantial agency operational alterations).

113. Coleman v. Schwarzenegger, 922 F. Supp. 2d 882 (E.D. Cal. 2009).

114. McCleary v. State, 269 P.3d 227 (Wash. 2012).

115. S. Burlington Cnty. NAACP v. Twp. of Mt. Laurel, 456 A.2d 390 (N.J. 1983).

116. Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv., 524 F.3d 917 (9th Cir. 2008).

117. Washington v. Washington State Com. Passenger Fishing Vessel Ass'n, 443 U.S. 658 *modified sub nom*. Washington v. United States 444 U.S. 816 (1979).

118. Yeargain, *supra* note 103, at 1349–53. Scholar Quinn Yeargain has argued that the remedial plan requested in *Juliana v. U.S.* would require broad regulatory structures that potentially impinge on the constitutional rights of private actors by, for example, requiring the cancelation of fossil fuel extraction leases on public lands in what could constitute a violation of the Takings Clause. Such relief would be different in kind to that provided in *Brown* which exclusively required a change in behavior from local and state governments. While this distinction is well-founded, the fact that relief requested by second-wave strategic climate rights litigation is even more expansive and potentially constitutionally problematic only further reinforces the key insight of the comparison in Part II: requests for climate remedial plans are unlikely to be granted wholesale owing to court conservatism and the judiciary's recognition of its limited enforcement capabilities.

the closest historical example of the judiciary taking on an extensive administrative oversight role that implicates actors across multiple jurisdictions. Despite Supreme Court efforts to mitigate disruption in the *Brown II* implementation order, *Brown* engendered massive social resistance to changes in the institution of public education, which represents one of the most tangible interfaces between citizens and the government. Similarly, if second-wave climate rights cases successfully obtain their requested large-scale, energy system-altering remedial plans, the lives of most citizens will be affected to some degree. The resulting reactions from society are more likely to emulate those stemming from *Brown* than those stemming from the more contained judicial administration remedies provided in, for example, prison reform or fishery rights cases.

Third-wave strategic climate rights litigation, on the other hand, has emerged recently with cases requesting much narrower relief. Part II.D discusses these cases while noting how they similarly reinforce the notion that wins in the courtroom serve as contributing rather than primary aspects of U.S. strategic climate rights litigation's impact portfolio.

B. Court Conservatism and Hesitancy

Courts are fundamentally conservative institutions.[119] Normatively, judges tend to refrain from rendering pronouncements with massive policy implications on topics such as climate change because they lack sufficient technical expertise and unilateral authority under separation of powers doctrine to do so legitimately.[120] On a more practical level, judges have strong incentives to make incremental rather than monumental decisions.[121] Prominent members of the judiciary have spoken out against "judicial overreaching and an imposition

119. Michael Mehling, *The Comparative Law of Climate Change: A Research Agenda*, 24 Rev. Eur. Comp. & Int'l Env't L., 341, 348 (2015) (identifying courts as an innately "conservative force in society, sustaining the normative patterns and understandings that precipitated the climate crisis in the first place[]"); *see* David E. Bernstein & Ilya Somin, *Judicial Power and Civil Rights Reconsidered*, 114 Yale L.J. 591, 642 ("[T]he Court's inherent conservatism has generally cut against its playing a leading role in recognizing and protecting the rights and interests of minority groups and women, as society has become increasingly sympathetic to these groups.").

120. *See, e.g.*, Heather Colby, et al., *Judging Climate Change: The Role of the Judiciary in the Fight Against Climate Change*, 7 Oslo L. Rev. 168, 181–83 (2020). *See generally* Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 Harv. L. Rev. 353, 395 (1978) (noting that it is the proper role of judges to decide on specific issues and that task becomes impossible for "polycentric" problems in which any chosen solution will have repercussions that redefine the issue and the parties involved).

121. NeJaime, *supra* note 23, at 949 ("Judges face political pressure to stay within the mainstream; as part of a dominant legal culture with an interest in maintaining the status quo, judges understand the political and professional risks of departing from accepted norms.[]").

of judges' personal policy preferences.[]"[122] The risk of having their decisions overturned by a higher court or being themselves labeled an "activist judge" often encourages judges to tread lightly in new legal territory, particularly in the area of expanding fundamental rights.[123] Recent U.S. Supreme Court jurisprudence has overturned longstanding unenumerated constitutional rights[124] and demonstrated a clear aversion to novel interpretations of legal authority,[125] likely reinforcing such worries for many federal judges.

Institutional and legal constraints facilitate a trend toward conservative constitutional interpretation.[126] In addition, legal principles such as the political question doctrine give judges discretion to dismiss cases that request broad constitutional remedies seen to impinge on other governmental branches.[127] These factors feed into generally restrained judicial rulings that are unlikely to fully grant economy-altering remedies like those sought by second-wave

122. Kennedy, *supra* note 10, at 70; *see, e.g.*, Obergefell v. Hodges, 576 U.S. 644, 687 (2015) (Roberts, C.J., dissenting) (referring to the majority decision that gay marriage bans are unconstitutional under the unenumerated right to privacy of the Due Process Clause as "an act of will, not legal judgment[]"); Lawrence v. Texas, 539 U.S. 558, 595 (2003) (Scalia, J., dissenting) (claiming the Court recognized the fundamental right to an abortion in *Roe v. Wade* based "on its own normative judgment that antiabortion laws were undesirable[]"); Loper Bright Enterprises v. Raimondo, 603 U.S. 369, 478–79 (2024) (Kagan, J., dissenting) (alleging that the sole justification for overturning *Chevron* deference is the personal opinions of the majority Justices about the wrong-headedness of established precedent).

123. *See generally* John Valery White, Brown v. Board of Education *and the Origins of the Activist Insecurity in Civil Rights Law*, 28 Ohio N. U. L. Rev. 303 (2002) (noting that Supreme Court Justices' desire to not be perceived as acting like activists had a pernicious effect on the development and interpretation of civil rights law); *see also* NeJaime, *supra* note 23, at 949. To be sure, the federal judiciary has arguably seemed less influenced by the perception that its decisions are motivated by personal policy preferences in recent years. In so far as such "activist judges" have felt comfortable interpreting constitutional rights and privileges expansively, however, they have largely done so in furtherance of conservative priorities that do not include combating climate change. *See, e.g.*, Trump v. United States, 603 U.S. 593 (2024) (determining that President Trump is immune from criminal liability for official acts conducted during his term of office); New York State Rifle & Pistol Association, Inc. v. Bruen, 597 U.S. 1 (2022) (broadly interpreting the second amendment as protecting citizens' right to carry handguns publicly); Victoria Bekiempis, *Meet Some of Trump's Most Conservative Judicial Picks*, The Guardian (Apr. 30, 2020), https://perma.cc/5B7G-U5ML (highlighting Trump-appointed judges who express clear right-wing ideology in their interpretations of constitutional rights).

124. *See, e.g.*, Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022) (overturning fifty years of precedent recognizing the fundamental privacy right of a woman to have an abortion).

125. *See* Thomas Niels, *The Presumption Against Novelty in the Roberts Court's Separation of Powers Caselaw*, 137 Harv. L. Rev. 2034, 2035 (2024).

126. Gerald N. Rosenberg, *Courting Disaster: Looking for Change in All the Wrong Places*, 54 Drake L. Rev. 795, 808 (2005) [hereinafter *Courting Disaster*].

127. Juhn, *supra* note 10, at 2769.

climate rights cases.[128] Indeed, courts have dismissed the majority of second-wave cases.[129]

Of course, the Supreme Court, in particular, has made foundational declarations of fundamental rights in the past on par with the requests for declaratory relief in strategic climate rights litigation.[130] The Court has even gone further to pair such declarations with expansive injunctive relief that required judicial oversight of fundamental alterations to substantial aspects of society (most notably in *Brown*).[131] Yet, the current Supreme Court has a complicated track record on the expansion of fundamental rights,[132] and recent additions to the Roberts Court suggest an increased reluctance to recognize new unenumerated rights,[133] at least those aligned with progressive values and a broad interpretation of substantive due process rights.[134]

In contrast, the set of Supreme Court Justices who decided *Brown* were generally much more open to liberal, rights-based argumentation.[135] Yet, even these more liberal-minded judges exhibited a certain level of hesitancy around their flagship civil rights decision. Some have argued that the Court was unlikely to issue a ruling like *Brown* until its members were reassured that it would receive

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128. To date, no court has granted a request by plaintiffs in a U.S. strategic climate rights case for a systemic remedial plan to eliminate fossil fuels from a given jurisdiction. The case that comes closest to achieving this goal is *Navahine v. Hawai'i Dep't of Transp.,* which led to a settlement requiring the Hawaiian government to abide by existing greenhouse gas emission elimination legislation in the state's transportation sector. *See Navahine* Settlement, *supra* note 22; *see* Appendix.

129. *See* Appendix. *But see* Held v. Montana, 560 P.3d 1235, 1244, 1260–61 (Mont. 2024) (obtaining a narrow injunctive victory after the district court dismissed its more grandiose, system-wide requests for relief).

130. Blumm & Wood, *supra* note 1, at 38–40; 92 N.J. 158 (1983).

131. *See* Brown v. Plata, 563 US 493 (2011) (requiring a reworking of California state prisons to reduce substantial overcrowding that violated prisoners' rights).

132. *Compare* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022) (eliminating the right to abortion), *with* New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1 (2022) (expanding private right to bear arms under the Second Amendment).

133. Benjamin T. Sharp, *Stepping into the Breach: State Constitutions as a Vehicle for Advancing Rights-Based Climate Litigation*, 14 Duke J. Const. L. & Pub. Pol'y Sidebar 39, 44 n.39 (2019); *see also* Jeffrey S. Sutton, 51 Imperfect Solutions: States and the Making of American Constitutional Law 21 (2018) (arguing that the Roberts Court has "been less likely to innovate new constitutional rights than [its] forebears").

134. *See* Seema Mohapatra, *An Era of Rights Retractions: Dobbs as a Case in Point*, ABA: Human Rights (July 26, 2023), https://perma.cc/V7FX-MDTG.

135. Bernstein & Somin, supra note 119, at 616 (noting that President Franklin Delano Roosevelt "sought to ensure that his [Supreme Court] appointees would be liberals who would vote to support broad presidential power[]" and that *Brown* was "decided by a Court still dominated by the five remaining FDR appointees[]").

broad public support.[136] Such commentators point to "the deep-seated political, social, economic, and ideological forces that were propelling the nation toward greater racial equality around mid-century[.]"[137] Indeed, Michael Klarman points out that "the overall extralegal context was as favorably disposed as it had ever been toward advances in civil rights[]" at the time of the *Brown* decision.[138]

The Supreme Court Justices were aware of this social momentum[139] and were influenced by it when deliberating the *Brown* decision.[140] For example, a Justice Department amicus brief introduced foreign policy arguments in favor of desegregation, specifically informing the Court of the impacts its *Brown* decision could have on U.S. Cold War diplomacy.[141] The U.S. heavily propagandized the Cold War as a moral struggle, distinguishing free institutions and liberties

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136. Michael J. Klarman, *Civil Rights Law: Who Made It and How Much Did It Matter?*, 83 Geo. L.J. 433, 455 (1994) [hereinafter Klarman, *Civil Rights Law*] ("Justice Frankfurter subsequently confirmed . . . that had the segregation cases reached the Court in the mid-1940s, he would have voted to uphold segregation because 'public opinion had not then crystallized against it.'"); *see also* Klarman, From Jim Crow to Civil Rights, *supra* note 111, at 310 ("*Brown* is not an example of the Court's resistance to majoritarian sentiment[] but rather of its conversion of an emerging national consensus into a constitutional command.").
137. Klarman, *Civil Rights Law*, *supra* note 136, at 456–57 (noting (1) the Great Migration of African Americans to northern states, which led to increased and consolidated political power; (2) corresponding economic advances that helped Black people confront the status quo by providing "the education, disposable income, and leisure time necessary for involvement in social protest activity"; and (3) increasing awareness of Nazi fascism, which "impelled many Americans to re-evaluate their racial preconceptions in an effort to clarify, as Justice Black told his colleagues at conference, how what 'Hitler preached' was different from 'what the South believed[]'"); Mary L. Dudziak, *The Court and Social Context in Civil Rights History*, 72 U. Chi. L. Rev. 429, 438 (2005) (noting (4) resistance of African American soldiers to being treated as inferior in U.S. society when foreigners treated them as equal to white Americans while they were fighting abroad in World War II; and (5) Cold War foreign policy, which "forced Americans to confront the enormous gulf that existed between the democracy that Americans described to other nations and the democracy practiced at home[]") [hereinafter Dudziak, *The Court and Social Context*]; *see also* Derrick A. Bell, *The Unintended Lessons in Brown v. Board of Education*, 49 N.Y.L. Sch. L. Rev. 1053, 1056 (2005); Mary Dudziak, Cold War Civil Rights 29–39 (2000) (providing a detailed account of how race discrimination threatened U.S. prestige and leadership internationally and was the frequent subject of Soviet propaganda during the Cold War period).
138. Klarman, From Jim Crow to Civil Rights, *supra* note 111, at 193.
139. Christopher W. Schmidt, *"Freedom Comes Only from the Law": The Debate Over Law's Capacity and the Making of* Brown v. Board of Education, 2008 Utah L. Rev. 1493, 1531 (2008) [hereinafter Schmidt, *"Freedom Comes Only from the Law"*] ("The Justices of the Court were paying careful attention to developments in race relations and the achievements of civil rights campaigns, and they were all impressed at the progress that was being made.").
140. *Id.* at 1537 ("All nine men were clearly aware of the changes in social attitudes and scientific findings on race. . . . On matters of civil rights, the Justices were constantly looking to social developments beyond the Court.").
141. Brief for the United States as Amicus Curiae at 6-8, Brown v. Bd. of Educ., 347 U.S. 483 (1954) (No. 8), https://perma.cc/KH3W-PEGJ; *see* Dudziak, *The Court and Social Context*, *supra* note 137, at 448, 452–53.

as uniquely American ideals. The glaring hypocrisy of segregation affronted this image and, thereby, U.S. international diplomacy objectives.[142] The topic was also prevalent in news media coverage about the positive effects a favorable ruling in *Brown* would provide to U.S. international diplomacy.[143]

Justice Jackson, in particular, was largely optimistic about the forward momentum of the civil rights movement.[144] Despite expressing severe skepticism in the court's ability to "eradicate . . . fears, prides and prejudices" propping up segregation,[145] he was convinced that the Supreme Court would eventually align itself with forward progress on civil rights whether in *Brown* or a later case.[146]

For their part, Justices Felix Frankfurter and Stanley Reed thoroughly analyzed extensive amounts of the latest research and news articles on civil rights reform and segregation when making their decision in *Brown*.[147] Many such materials—in addition to presenting a racial liberal ideology—argued that racial segregation in elementary schools could be declared unlawful without instigating enormous backlash.[148] Based on these reports and "[e]xtrapolating from integration success stories in the border states," Frankfurter in particular became convinced that the South was "moving in a promising direction[]" on integration.[149] He argued this point to newly appointed Chief Justice Warren, who eventually drafted the unanimous opinion in *Brown*.[150]

Despite such reassurances, the Court hobbled *Brown*'s enforcement in order to make it more palatable to the South by releasing the 1955 *Brown II* decision

142. Dudziak, *The Court and Social Context*, *supra* note 137, at 449.
143. *Id.* at 448.
144. Schmidt, *"Freedom Comes Only from the Law"*, *supra* note 139, at 1539.
145. Memorandum from Mr. Justice Jackson 2 (Mar. 15, 1954), (on file with Robert H. Jackson Papers, Container 184, Manuscripts Division, Library of Congress, Washington, D.C.) [hereinafter *Justice Jackson Memorandum*]; *see id.* at 1538.
146. Schmidt, *"Freedom Comes Only from the Law"*, *supra* note 139, at 1539; *see Justice Jackson Memorandum*, *supra* note 145, at 1 ("Whatever we might say today, within a generation [segregation] will be outlawed by decision of this Court because of the forces of mortality and replacement which operate upon it.").
147. Schmidt, *"Freedom Comes Only from the Law"*, *supra* note 139, at 1537–38.
148. *See, e.g.*, *Grade School Segregation: The Latest Attack on Racial Discrimination*, 61 Yale L.J. 730, 739 (1952) ("[A]n examination of the available evidence makes it doubtful that major violence would accompany educational desegregation."); Channing Tobias, *Implications of the Public School Segregation Cases*, 60 Crisis 612, 613 (1953) ("There is mounting evidence that a constantly growing segment of southern whites is ready to accept the end of segregation. . . . Church groups, units of the organized labor movement, students, youth organizations, and others in the South, of both races, have gone on record as opposed to the continuation of segregation."); *see also* Schmidt, *"Freedom Comes Only from the Law"*, *supra* note 139, at 1537 (noting that academic literature of the time largely supported the idea that racial animus "had shown significant improvement in recent years[] and that civil rights laws could be effective even in the face of initial popular resistance[]").
149. Schmidt, *"Freedom Comes Only from the Law"*, *supra* note 139, at 1541.
150. *Id.*

which set the notorious "all deliberate speed" guideline for compliance with *Brown*.[151] This standard led to limited to no progress on school desegregation in southern states in the subsequent decade.[152] Achieving unanimity in the Warren Court's *Brown* decision hinged on crafting a remedy that acknowledged the degree of difficulty in integrating schools across widely variable school districts throughout the country[153] as well as the Court's limited role in executing the endeavor.[154] Critics have thus insisted that "primary fault for the limited reach of [*Brown*] rested in the justices' constrained vision of enforcement."[155]

Judges are even more likely to cabin favorable decisions in first- and second-wave strategic climate rights litigation because the typical requested remedy in these cases is more expansive than that which *Brown* delivered. The plaintiffs in *Brown* requested desegregation of one particular function of the U.S. government: providing public education to schoolchildren. Although a massive ask in its own right, it pales in comparison to the requested economy-wide decarbonization plans solicited by the complainants in cases like *Held* and *Juliana*.[156] For example, the plaintiffs in *Held* requested numerous instances of sweeping equitable relief such as a statewide greenhouse gas reduction plan.[157] The Montana District Court ultimately dismissed most of these requests, instead ruling

151. David Kairys, *A Brief History of Race and the Supreme Court*, 79 Temp. L. Rev. 751, 763 (2006); Lassiter, *supra* note 111, at 1415 ("Decentralized desegregation enforcement on a timetable of 'all deliberate speed' appeared to be a pragmatic compromise between constitutional rights and political realities[.]").

152. Derrick Bell, Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 Harv. L. Rev. 518, 528–29 (1980); *see also* Rosenberg, *supra* note 126, at 809 ("A decade after *Brown* virtually nothing had changed for African-American students living in the eleven states of the former Confederacy that required race-based school segregation by law. For example, in the 1963–1964 school year, barely one in one hundred (1.2%) of these African-American children was educated in a non-segregated school.").

153. Katy J. Harriger, *The Civil Rights Act of 1964 and School Desegregation: A Double-Edged Sword?*, 6 Wake Forest J. L. & Pol'y 157, 167 (2016).

154. Alexander Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics Second Edition 254 (1986) (noting that the all deliberate speed implementation order "means only that the Court, having announced its principle, and having required a measure of initial compliance, resumed its posture of passive receptiveness to the complaints of litigants[]").

155. Lassiter, *supra* note 111, at 1402; *see also* David J. Garrow, *Hopelessly Hollow History: Revisionist Devaluing of* Brown v. Board of Education, 80 Va. L. Rev. 151, 158–59 (1994) (noting scholarly recognition that "the Supreme Court's relative moderation in its *Brown II* ruling of May 1955 was 'a victory for the white South[]").

156. Scholars have recognized that courts are generally poorly situated to command the level of change necessary to address massive social issues like climate change. *See, e.g.*, Douglas Kysar, *What Climate Change Can Do About Tort Law*, 41 Env't L. 1 (2011) (recognizing that the doctrinal contours of tort law are misaligned with the realities of climate change); Posner, *supra* note 88, at 1925 ("[T]here is little reason to believe that international human rights litigation would lead to a desirable outcome" in climate cases.).

157. Complaint for Declaratory and Injunctive Relief at 103, Held v. Montana, No. CDV-2020-307, 2023 WL 5229257 (Mont. Dist. Ct. Aug. 14, 2023).

for the plaintiffs with regard to narrower remedies. In particular, the court provided (1) declaratory relief that the Montana government violated their constitutional right to a clean and healthful environment and (2) a permanent injunction against two statutory provisions that, respectively, forbade the consideration of climate change in environmental review and prevented any challenge to agency decisions that neglected to consider climate change adequately during environmental review.[158] Similarly, the *Juliana* plaintiffs amended their complaint to remove requests for a judicially mandated "consumption-based inventory of U.S. CO_2 emissions[]" and "an enforceable national remedial plan to phase out fossil fuel emissions"[159] after the Ninth Circuit found such remedies to be "beyond the power of an Article III court to order, design, supervise[,] or implement."[160]

Non-U.S. climate rights cases that have elicited progressive, system-altering judgments have typically done so through incremental adjustments to legally enacted frameworks.[161] In *Urgenda v. Netherlands*, the Netherlands Supreme Court concluded that the Dutch government must abide by higher greenhouse gas emissions reduction targets than those set in national policy to come in line with its commitments under international law.[162] This ruling amounted to a ratcheting up of already existing climate policy.[163] Similarly, in *Leghari v. Pakistan*, the Lahore High Court ordered the creation of a new governmental body, the Climate Change Commission, in response to a complaint that lethargic governmental climate response was violating the rights of the named plaintiff.[164] Although a seemingly radical response to governmental inaction, the Court

158. Findings of Fact, Conclusions of Law, and Order at 102, Held v. Montana, No. CDV-2020-307, 2023 WL 5229257 (Mont. Dist. Ct. Aug. 14, 2023). *See generally* Bustos, *supra* note 12, at 28 ("[E]ven when these cases are shaking the status quo and pushing for higher climate ambition, the remedies can rarely seek structural change.").

159. *Compare Juliana* Complaint, *supra* note 2, at 99, with Second Amended Complaint for Declaratory and Injunctive Relief at 147, Juliana v. United States, No. 6:15-cv-01517-AA, 2023 WL 3750334 (D. Or. June 8, 2023).

160. Juliana v. United States, 947 F.3d 1159, 1171 (9th Cir. 2020).

161. Bookman, *supra* note 104, at 599 (noting that the existence of a framework climate statute increases the likelihood for rights-based climate cases filed in anglophone countries to catalyze social change). *But see Climate Change and Future Generations Lawsuit in Colombia: Key Excerpts from the Supreme Court's Decision*, DeJusticia, ¶ 14 (Apr. 13, 2018), https://perma.cc/5G4Y-H7CR [hereinafter Colombian Climate Rights Case] (noting the Colombian Supreme Court's declaration that the Colombian rainforest is a "subject of rights" and ordering government action to address deforestation). Part III.B analyzes this case in further detail.

162. State of the Netherlands v. Urgenda Foundation, HR 20 december 2019, NJ 2020, 41 m.nt van J. Spier (Staat der Nederlanden/Stichting Urgenda), ¶¶ 8.3.4–8.3.5 [hereinafter *Urgenda* Supreme Court Opinion].

163. *See also* Neubauer v. Germany, BVerfG, 1 BvR 2656/18, ¶¶ 255–56, Mar. 24, 2021 (Ger.), https://perma.cc/FG4Y-U2YD (determining that enacted climate legislation required revisions because the absence of interim greenhouse gas emissions reduction targets put an undue burden on future generations to address climate change).

164. Leghari v. Fed'n of Pakistan, (2015) W.P. No. 25501/2015 (LHC) ¶ 13 (Pak).

tasked the Commission with ensuring the implementation of the already existent National Climate Change Policy, essentially establishing an enforcement authority for Pakistan's legal commitments for climate action.[165]

The *Leghari* decision in particular bears a striking resemblance to two U.S. climate rights cases that have achieved final courtroom success. First, in *Kain v. Massachusetts Department of Environmental Protection*, the Massachusetts Supreme Judicial Court of Suffolk ordered the state to come into full compliance with its Global Warming Solutions Act by setting concrete limits on greenhouse gas emissions reductions.[166] Second, in *Navahine v. Hawai'i Department of Transportation*, the Hawai'i Circuit Court committed itself to a twenty-year oversight schedule for an expansive settlement requiring the state's transportation sector to completely decarbonize by 2045. Prior to the settlement decision, however, Hawai'i law already required the achievement of economy-wide carbon net neutrality by 2045,[167] including "zero emissions across all transportation modes within the State[.]"[168] The settlement established judicial oversight of this long-term legislative commitment in recognition of the fact that the Hawai'i Department of Transportation was not on track to achieve its interim greenhouse gas reduction targets.[169] Ultimately, the Massachusetts Supreme Court order and the Hawai'i negotiated agreement both represent judicial mandates for respective state governments to create a plan to come into compliance with their already established climate policy prescriptions.

Final courtroom decisions in other climate rights cases have been incremental despite incorporating expansive rights-based language. In *Held v. Montana*, the Montana Supreme Court declared that the right to a clean and healthful environment in the Montana Constitution includes a right to a stable climate system.[170] Yet, that unprecedented determination led to a relatively narrow overturning of two statutory provisions well after the Montana District Court had dismissed plaintiffs' requests for much more systemic injunctive relief.[171]

Similarly, in the case *In re Hawai'i Electric Light Company III*, Justice Wilson of the Hawai'i Supreme Court wrote a concurring opinion identifying expansive climate rights in the Hawaiian Constitution, but the impact of that decision was also incremental, carrying persuasive rather than binding authority. Notably, the ruling also signifies a relatively rare Category 1 direct impact on the law prior to a final courtroom outcome with regard to *Juliana v. United States*. (In his concurrence, Justice Wilson repeatedly cited the Oregon District Court decision denying a motion to dismiss the *Juliana* case as well as the

165. Weaver & Kysar, *supra* note 1, at 343–44; *see also Leghari* (2015) W.P. No. 25501/2015 at ¶ 8.
166. Kain v. Dep't of Env't Prot., 49 N.E.3d 1124, 1142 (Mass. 2016).
167. Haw. Rev. Stat. § 225P-5(a) (2023).
168. Haw. Rev. Stat. § 225P-8(a) (2023).
169. *See Navahine* Complaint, *supra* note 65, at 55–60.
170. Held v. Montana, 560 P.3d 1235, 1248–49 (Mont. 2024).
171. *Id*. at 1244, 1260–61.

dissenting opinion of Judge Josephine Staton in the 2020 Ninth Circuit decision dismissing the case.[172] Relying on the *Juliana* district court decision in particular, Justice Wilson took the opportunity to identify the "right to a life-sustaining climate system" in the Hawaiian Constitution's Due Process Clause.[173] In reaching this conclusion, Justice Wilson referenced arguments found in the pre-final outcome proceedings in *Juliana* to bolster his ruling,[174] thus establishing a Category 1 direct impact from *Juliana* in the case decision.) Yet, although getting this language incorporated into law represents a laudable Category 1 success, it remains dicta as a part of Justice Wilson's concurrence. As such, his endorsement of these arguments and claims does not carry the force of legally binding precedent.

C. Judicial Limits on Ability to Enforce Rulings

A likely reason we haven't seen more rulings like Justice Wilson's concurrence in climate rights cases is wide recognition of the judicial branch's limited ability to ensure the implementation of its rulings. This phenomenon is recognizable beyond the context of strategic climate rights litigation.[175] Courts have a complex relationship with the other two branches of government.[176] When judges take the rare step of making a decision that leads to a radical shift in society (as in *Brown*), they have limited ability to enact the required changes on their own.[177] As such, they are likely to instigate reforms in line with the level of support emanating from the executive and legislative branches.[178] Particularly at the national level, the U.S. system of federalism compounds difficulties in enforcing courtroom decisions that instigate social change.[179] When judicial decisions are out of step with broader public sentiment, many of the people tasked with

172. *In re* Haw. Elec. Light Co., Inc. III, 526 P.3d 329, 342–44 (Haw. 2023) (Wilson, J., concurring).

173. *Id.* at 369 (Wilson, J., concurring); *see also In re* Maui Elec. Co., Ltd. II, 506 P.3d 192, 206 (Haw. 2022) *as corrected* (Mar. 3, 2022) (Wilson, J., concurring in part) (also recognizing "the right to a life-sustaining climate system").

174. *In re* Haw. Elec. Light Co. Inc. III, 526 P.3d at 346 (Wilson, J., concurring) (citing Judge Ann Aiken's district court decision in *Juliana* denying a motion to dismiss in support of the idea that the right to due process of law "subsumes the right to a life-sustaining climate").

175. Rosenberg, *supra* note 126, at 808.

176. NeJaime, *supra* note 23, at 949.

177. *See id.* at 954 (citing Joel Handler and Stuart Scheingold's mutual observation that "courts generally lack the capacity to oversee policy implementation and to remedy enforcement problems.").

178. *Id.* at 949 (citing Gerald N. Rosenberg, The Hollow Hope: Can Courts Bring About Social Change? (U. Chi. Press, 2d ed.) (2008)).

179. *See* Harriger, *supra* note 153, at 208.

implementing the decision at federal, state, or local levels may oppose it and even look for ways to circumvent it.[180]

Indeed, Michael Klarman points out that successful civil rights cases of the 1910s had little to no direct impact on mitigating segregationist policies,[181] and this fact was not lost on later advocates, judges, and scholars of the mid-twentieth century civil rights era. Martin Luther King, Jr. appreciated the limits of courtroom-based legal change when he asserted, "The law tends to declare rights—it does not deliver them."[182] Justice Jackson was also aware of this limitation as articulated in his unpublished *Brown* concurrence: "in embarking upon a widespread reform of social customs and habits of countless communities, we must face the limitations on the nature and effectiveness of the judicial process."[183]

Ultimately, Justice Jackson's concerns were warranted. In many parts of the United States, "*Brown*'s constitutional mandate that racial segregation in public schools end confronted a[n] [opposition] culture" that courts were hard-pressed to overcome without hefty support from the political branches of government.[184] Notably, "*Brown* produced very little school desegregation until after the national political branches mobilized behind its enforcement through passage of the Civil Rights Act of 1964 and subsequent stringent executive agency enforcement guidelines."[185] Indeed, some scholars have argued that the Act added teeth to *Brown*, highlighting the weakness of the Supreme Court to ensure its decisions are implemented without legislative backing.[186]

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180. *See* Klarman, *Civil Rights Law*, *supra* note 136, at 450 ("[L]ow-level discretion in the application of legal standards posed a pervasive obstacle to enforcement of judicial civil rights decisions.").

181. Bernstein & Somin, *supra* note 119, at 618 ("Klarman adds that except insofar as they inspired civil rights activists, the Court's Progressive Era race decisions "proved inconsequential[.]" (citing Klarman, From Jim Crow to Civil Rights, *supra* note 111, at 62)).

182. Martin Luther King Jr., *The Time for Freedom Has Come*, N.Y. Times, Sept. 10, 1961, at 119, https://perma.cc/2Y2B-MNM3.

183. *Justice Jackson Memorandum*, *supra* note 145, at 12; Schmidt, *"Freedom Comes Only from the Law"*, *supra* note 139, at 1538.

184. Rosenberg, *Courting Disaster*, supra note 126, at 810.

185. Klarman, *Civil Rights Law*, *supra* note 136, at 433. *But see* Klarman, *Civil Rights Law*, *supra* note 136, at 452 (describing scholarly debate regarding whether *Brown* had indirect effects that "invigorated" direct civil rights action outside the courtroom and that contributed to the passage of the 1964 Civil Rights Act).

186. Harriger, *supra* note 153, at 158 ("The significance of the *Brown* decision would have been substantially reduced had it not been for the Civil Rights Act of 1964. The Act put the legislative and executive branches behind the power of the Court, which emboldened the Court to end 'all deliberate speed' and to support integrationist remedies that finally created real desegregation. Rather than being what Justice Breyer called the Court's 'finest hour,' *Brown* might be remembered instead as a clear example of its weakest hour, but for the Civil Rights Act of 1964.") (citations omitted); *see also* Klarman, From Jim Crow to Civil Rights, *supra* note 111, at 362–63 ("The federal judiciary, acting without any congressional or much presidential backing, had proved powerless to accomplish more[]").

While segregation laws did ultimately yield to the Constitution, the *Brown* decision faced massive resistance, and actual integration in public education proved a much more difficult goal to achieve.[187] In 1956, ninety-nine members of Congress released what came to be known as the "Southern Manifesto," which outlined explicit opposition to *Brown* and the civil rights movement.[188] Violent riots and protests accompanied many attempts at public school integration in the South for years and compliance with *Brown* was highly limited throughout much of the South into the early 1960s.[189] In the 1970s, court-ordered school integration programs requiring extensive school busing initiatives led to white flight away from city centers.[190] Political backlash to these busing policies led to a deep recalcitrance in enforcing judicially mandated school integration under the Nixon administration.[191]

To be sure, strategic civil rights litigation beyond *Brown* was not without its successes. Although *Brown* was met with immense resistance by Southern white people,[192] other judicial decisions in the civil rights movement were implemented without severe violent incidents.[193] Additionally, a series of Supreme Court decisions in the late 1960s and early 1970s[194]—including *Swann v. Charlotte-Mecklenburg*, which held school busing to be a valid way to integrate schools in highly segregated geographic regions[195]—led, belatedly, to a "dramatic surge in school desegregation that transformed southern public education in the early

187. *See* Schmidt, *"Freedom Comes Only from the Law," supra* note 139, at 1551 ("While the initial Brown decision was accompanied by considerable optimism, much of this hopefulness dissolved in the years following [*Brown II*].").

188. *See* John Kyle Day, The Southern Manifesto: Massive Resistance and the Fight to Preserve Segregation 3 (U. Press Miss. 2014).

189. Sumi Cho, *From Massive Resistance, to Passive Resistance, to Righteous Resistance: Understanding the Culture Wars from Brown to Grutter*, 7 U. Pa. J. Const. L. 809, 817–18 (2005).

190. *See* David J. Armor & Donna Schwarzbach, White Flight, Demographic Transition, and the Future of School Desegregation 40 (Rand Corp. 1978).

191. Harriger, *supra* note 153, at 198–99.

192. *See, e.g.*, *id.* at 170–71 ("nineteen Senators and seventy-seven House members from eleven states in the South introduced 'The Southern Manifesto' in Congress on March 12, 1956. This document decried the Court's 'abuse of judicial power' and insisted that the Court's decision in Brown violated a number of important constitutional principles . . . ."); William N. Eskridge, Jr., *Channeling: Identity-Based Social Movements and Public Law,* 150 U. Pa. L. Rev. 419, 500 (2001) ("Between 1955-1961, southern states adopted almost 200 statutes defying or seeking to evade *Brown*'s mandate.").

193. Schmidt, *"Freedom Comes Only from the Law", supra* note 139, at 1533 ("[Around] 1952 . . . [p]eaceful desegregation was already taking place, much of it by legal compulsion[] . . .[through] judicially led efforts to end white primaries and segregation in higher education[.]").

194. *See, e.g.*, *Alexander v. Holmes Cnty. Bd. of Educ.*, 396 U.S. 19, 20 (1969) (overturning the "all deliberate speed" standard for implementation of *Brown* in favor of immediate integration plans); *Green v. Cnty. Sch. Bd. of New Kent Cnty.*, 391 U.S. 430, 437–39 (1968) (ruling that minimalistic compliance with *Brown* must end in favor of active "root and branch" elimination of discrimination from schools).

195. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 30 (1971).

1970s[.]"[196] Of course, this surge was itself met with a backlash against school busing programs as resistance to school integration began to take on new forms over time.[197]

The push and pull characterizing the decades-long attempts to enforce *Brown* demonstrates that the effects of monumental court rulings on the ground are subject to shifting political and social sentiments outside the judiciary's control.[198] These changing tides can alternatively lead to dramatic acceleration of or obstructionism against the implementation of courtroom declarations.

Given that strategic climate rights litigation "has turned to the judiciary for eleventh-hour relief to force worldwide emissions reductions[,]"[199] it must grapple with the fundamental limitations on courts' enforcement abilities, which may be even more stark in the context of climate change.[200] Indeed, climate rights cases have already struggled with this issue given that a large number of these cases have been dismissed for lack of standing (often due to a lack of judicial redressability) or the political question doctrine.[201] Although Magistrate Coffin indicated that, if the *Juliana* plaintiffs were to prevail, the court has the power to "direct the federal defendants to prepare and implement a national plan which would stabilize the climate system and remedy the violation of plaintiff's rights,"[202] the oversight of that plan would be inherently politically complicated.[203] Not only would it require detailed and technical analysis of the projected greenhouse gas emission reductions resulting from various policy proposals, but it also would continuously extend across decades,[204] leaving enforcement

196. Lassiter, *supra* note 111, at 1420 ("The ratio of southern black students attending desegregated schools increased to about one-sixth in 1967 and to one-third in 1969 before skyrocketing to more than three-fourths by 1973 . . . .").

197. *See supra* text accompanying notes 190–191. There was significant backsliding on the ultimate effects of school busing programs in later decades. *See* Jared McMasters, *50 Years After Groundbreaking Swann Ruling, CMS Reverts to Resegregation*, Charlotte Post (May 5, 2021), https://perma.cc/2UMA-AJZ6 (highlighting that "segregation in *Charlotte-Mecklenburg* went up about by about 20 percent" between 1998 and 2006).

198. *See, e.g.*, Armor & Schwarzbach, *supra* note 190, at 41 ("[C]ourt-ordered mandatory plans [for school integration through busing], rather than desegregation per se, have been the primary causes of accelerated white flight . . . .").

199. Blumm & Wood, *supra* note 1, at 21.

200. Lazarus, *supra* note 103, at 1155–56 (noting that courts have struggled for decades to implement the *Brown* decision despite it being less far-reaching than the remedy requested by the plaintiffs in atmospheric trust litigation cases).

201. *See* Appendix.

202. Findings & Recommendations at 8, Juliana v. United States, 217 F. Supp. 3d 1224 (D. Or. 2016) (No. 6:15-cv-1517-TC), ECF No. 146.

203. *See* Nelson v. Warner, 472 F. Supp. 3d 297, 311 (S.D.W. Va. 2020) ("[R]educing fossil fuel emissions on a national scale involves myriad constitutional and policy considerations that make judicial review unmanageable").

204. *See* Blumm & Wood, *supra* note 1, at 72 ("In a tipping-point world, effective relief depends on close judicial supervision to ensure implementation of effective climate recovery plans within applicable time frames. . . . Close supervision by the courts involves two tasks: (1) requiring

vulnerable to obstructionist policies over time.[205] This same risk exists for the recent settlement in *Navahine v. Hawai'i Department of Transportation*. Although the outcome of *Navahine* more narrowly requires decarbonization of Hawai'i's transportation sector rather than the whole state's economy, judicial oversight of the decision's implementation will last for twenty years and will necessitate complex data and policy analysis by the judiciary. Resulting restrictions on the transportation sector could lead to political backlash and concerns about judicial legitimacy.

As seen in *Navahine*, courtroom wins that make the government requirement to reduce fossil fuels judicially binding can create accountability for actors that have already demonstrated a certain level of commitment to climate action. However, they are ill-equipped to eliminate value-based resistance from oppositional forces, particularly from those who are negatively impacted by the transition to a renewable energy system.[206] The backlash to strategic climate rights litigation has already started to take various forms, including countersuits from corporations[207] and historically marginalized communities negatively affected by climate action.[208] Well-funded and economically entrenched fossil fuel interests in particular will likely continue to resist a renewable energy

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a plan that includes measurable steps and (2) imposing continued oversight to ensure proper execution.").

205. *See generally* Harriger, *supra* note 153, at 159 ("The 'Southern Strategy' of the Republican Party . . . used race-neutral language to limit the reach of Brown and opposed remedies for segregation, like busing and racial balancing."); *id.* at 198 (President Nixon "strongly opposed forced busing for the purposes of 'racial balancing' and rejected the idea that integration was necessary for quality education.").

206. *See, e.g.*, Lawrence Susskind et al., *Sources of Opposition to Renewable Energy Projects in the United States*, 165 Energy Pol. 112922 (2022) (highlighting seven different sources of opposition to renewable energy projects in the United States despite policy requirements and economic incentives pushing for project development); Roger Riley, *Concerned Iowa Citizens Ask County Officials to Stop Building Wind Turbines*, SiouxLand Proud (Feb. 20, 2024), https://perma.cc/9Q64-DCCR (noting local opposition to wind farm development in Adams County, Iowa). *See generally* Harriger, *supra* note 153, at 209 ("Klinkner and Smith noted that change that disrupts the comfort level of even sympathetic whites has regularly led to backlashes that contribute to the unsteadiness of the march toward equality.").

207. *See, e.g.*, Katie Surma, *Climate Litigation Has Exploded, But Is It Making a Difference?*, Inside Climate News (July 27, 2023), https://perma.cc/5UQR-MKQ7 ("Between 2010 and 2014, there were at least 14 'backlash' cases filed against governments under international investment laws through a mechanism known as Investor-State Dispute Settlements (ISDS). The cases emanate from government acts that directly or indirectly affect investments of foreign companies, including regulations intended to address climate change.").

208. *See, e.g.*, Verified Complaint for Declaratory and Injunctive Relief; Petition for Writ of Mandate, The Two Hundred for Homeownership et al. v. California Air Resources Board et al., No. 1:22-cv-01474 (E.D. Cal. Nov. 14, 2022) (contesting a California regulation prohibiting the sale of non-zero-emission vehicles by 2035 as a violation of due process and equal protection for minority and low-income Californians).

transition[209] with or without favorable judicial rulings in strategic climate rights litigation.

Limitations on judicial enforcement accentuate the mismatch between climate change's dire timeframe and the timeframe for Category 2 impacts through changes in the law.[210] The implementation of *Brown*'s vision for social transformation was delayed, embattled, and never wholly fulfilled.[211] Not only that, but the monumental *Brown* decision itself was the product of decades of incremental precedent laying.[212] Unfortunately, climate change is escalating at a rate incompatible with a slow, contested rollout for climate action.[213] The Intergovernmental Panel on Climate Change, the body tasked with synthesizing international scientific consensus around climate change, has identified "a rapidly closing window of opportunity to secure a liveable and sustainable future for all[.]"[214] As a result, immediate and aggressive greenhouse gas emission reductions must be sustained across the global economy to limit locked-in, large-scale changes to Earth's climate system.[215] Meanwhile, the *Juliana* plaintiffs filed their case in 2015 and endured nearly a decade of procedural machinations.

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209. *See, e.g.*, Greg Alvarez, *Fossil-Fuel Funded Opposition Is Blocking America's Clean Energy Transition. Permitting Reform Can Help.*, Forbes (Nov. 30, 2022), https://perma.cc/G8TP-DZ83.

210. *See, e.g.*, Burkett, *supra* note 99, at 151 (noting that, "in the context of the climate crisis[] . . . we simply do not have the time. . . . [W]e are all at the eve of destruction[]"); Mank, *supra* note 10, at 898–99 ("Some commentators believe that the Earth is approaching an 'imminent' catastrophic tipping point where it will be impossible to stop a runaway train of climate disaster. They conclude that immediate judicial intervention is essential because the U.S. political system will not respond in time. . . . However, commentators also recognize that the *Juliana* decision is a preliminary decision that is a prelude to a lengthy trial on the merits, and that [Judge Aiken's] decision will eventually be scrutinized by the Ninth Circuit Court of Appeals and probably by the U.S. Supreme Court.") (citations omitted). *See generally* Maximillian Scott Matiauda, *Rising Tide: The Second Wave of Climate Torts*, 30 U. Miami Int'l & Compar. L. Rev. 194, 230 (2023) ("To wait for these claims to return to their appropriate venue, rise to the Supreme Court on other procedural issues, filter through to jury trials, pass through to higher courts on appeal, and so on, is an untenable and insulting delay. Every day we do not settle the seas, their rise will endanger another tomorrow.").

211. *See, e.g.*, Valerie Strauss, *65 Years After Supreme Court's Historic Brown v. Board of Education Ruling: 'We Are Right Back Where We Started'*, Wash. Post, (Apr. 30, 2019), https://perma.cc/35PZ-XJE9.

212. *See generally* Richard Kluger, Simple Justice: The History of Brown v. Board of Education and Black America's Struggle for Equality (Vintage Books 1st ed. 2004) (1975); *see* Mark V. Tushnet, The NAACP's Legal Strategy Against Segregated Education, 1925–1950 145 (2014) (noting that school segregation "became an increasingly attractive" target for litigation by the NAACP "as precedents dealing with schools accumulated").

213. *See* Bustos, *supra* note 12, at 12 (noting that "lawsuits often span across several years, and the fight against climate change is precisely, a fight against the clock[]").

214. Intergovernmental Panel on Climate Change, Climate Change 2023 Synthesis Report: Summary for Policymakers 24 (2023), https://perma.cc/NGH4-EJLJ ("The choices and actions implemented in this decade will have impacts now and for thousands of years . . . .").

215. *See id.* at 18.

Even if *Juliana* had achieved a sweeping injunctive remedy, enforcement of such a decision would almost certainly have invoked backlash, leading to further delays in implementation. Any judicially mandated fossil fuel reduction plan would necessitate simultaneous, massive buildouts of new energy infrastructure to fill the energy demand formerly met by carbon-based sources.[216] Although the federal government can change national policy on energy matters unilaterally, the siting and permitting processes for such a build-out would require significant engagement with state and local-level officials, a process that has already encountered significant resistance.[217] Indeed, between March 2022 and May 2023, the amount of newly adopted local restrictions on in-development renewable energy projects increased by 35% across the U.S.[218]

Resistant localities could potentially feign compliance with a judicial order to develop renewable energy while simultaneously undermining that objective and causing unreasonable delays. Such a result occurred in the civil rights movement as Southern states complied with the letter of *Brown* rather than with its spirit by devising complicated discretionary schemes like pupil placement laws and freedom of choice plans that provided "only the most token forms of desegregation well into the 1960s."[219] This same threat haunts the more targeted settlement decision in *Navahine*, albeit to a lesser extent. In some ways, the judicial outcome in *Navahine* is more manageable given that it was delivered by a state court and only relates to the operations of one governmental agency. On the other hand, its mandate will still entail substantial, rapid infrastructure build-out and policy change, requiring significant cooperation by local officials. Although some parties may participate wholeheartedly in the transition, others may be inclined to drag their feet.

Such recalcitrance will likely be reinforced by the fact that judicial oversight to implement successful second-wave strategic climate rights litigation decisions would necessarily take place over decades and could therefore run into political problems as administrations change. Comparatively, in the 1970s, the Nixon administration "walked the fine line between supporting *Brown* and rejecting [integration-based] busing by making the case that the goal of *Brown* was not integration, but simply the end of legal separation."[220] Similarly, the Reagan Administration in the 1980s was opposed to efforts to racially balance schools through forced busing programs.[221]

216. *See, e.g.*, Ben Haley et al., 350 PPM Pathways for the United States: U.S. Deep Decarbonization Pathways Project 38–51 (2019), https://perma.cc/23N4-A7NB.

217. *See* Matthew Eisenson, Opposition to Renewable Energy Facilities in the United States: May 2023 Edition 3 (Sabin Center for Climate Change Law ed., 2023); *see also* sources and text accompanying notes 206–09.

218. *See* Eisenson, *supra* note 217, at 3.

219. Klarman, *Civil Rights Law*, *supra* note 136, at 450.

220. Harriger, *supra* note 153, at 200.

221. *Id.* at 205.

Such a change in political tides threatens all judicial remedies that require many years of oversight and management to fully enforce. For example, although the governor of Hawaiʻi currently supports climate action, as exemplified by the negotiated settlement in *Navahine*, the political situation will almost certainly shift in the twenty years it takes to fully implement the agreement. Those changes could potentially lead to wavering enforcement like in the Nixon and Reagan administrations' implementation of *Brown*.

This is not to say Category 2 impacts from favorable court decisions in these cases will have no potentially positive effects. In fact, court rulings may ultimately be crucial to enforce or build upon climate action gains and to prevent progress from rolling back. For example, a favorable judicial ruling declaring the right to a stable climate system may ultimately serve as a crucial tool to fight back against political opposition to the renewable energy transition. In this way, impacts from final courtroom decisions in strategic climate rights litigation could serve as a supporting supplement, locking in and enhancing rather than driving the action necessary to prevent catastrophic climate change.[222]

D. Third-wave Strategic Climate Rights Litigation

Tactical approaches to filing strategic climate rights litigation are shifting beyond the second-wave requests for large-scale relief, likely in recognition of many of the concerns outlined in Parts II.B and C. For example, although *Held v. Montana* unsuccessfully requested broad systemic remedies, it was ultimately victorious in obtaining the more limited relief of having two statutory provisions declared unconstitutional and enjoined.[223] The lesson from this decision (as well as *Juliana*'s dismissal on redressability grounds) is that narrow requests for relief are more likely to see success in U.S. courts than broad ones.

Several late second-wave cases have started to take this lesson to heart, requesting more judicially manageable remedies even as they attempt to retain an opening for grander system-altering relief. The plaintiffs in *Held v. Montana*, for example, asked for a swath of both large-scale and particularized declaratory and injunctive relief.[224] Still other cases request declaratory relief and any other equitable relief as deemed necessary by the court, leaving it up to the judge to determine what kind of injunctive relief should be granted.[225]

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222. *See* Fischer-Lescano, *supra* note 29, at 302 (noting Gayatri Spivak's criticism of litigation strategy "as being potentially effective in the short term but, at best, only capable of accompanying rather than causing long-term change[]").

223. *See* Held v. Montana, 560 P.3d 1235, 1244, 1260–61 (Mont. 2024). Although the district court decision overturned two statutory provisions, its determination on only one of those provisions was raised to the Montana Supreme Court on appeal. The Montana Supreme Court decision affirmed the district court decision on both provisions. *Id.* at ¶ 73.

224. *Id.* at ¶¶ 5–7.

225. *See, e.g.*, *Layla H.* Complaint, *supra* note 58, at 71–72; Complaint for Declaratory Relief at 87–89, Natalie R. v. Utah, No. 220901658, 2022 WL 20814755 (Utah. Dist. Ct. Nov. 9, 2022).

Third-wave strategic climate rights litigation cases go a step further by focusing solely on specific, narrow injunctive remedies in conjunction with their requests for declaratory relief. Notably, these cases still rely on the same broad arguments about constitutional rights indicative of strategic climate rights litigation. For example, the plaintiffs in *Fresh Air for the Eastside, Inc. v. New York* seek the closure of a landfill which they claim violates their right to clean air and a healthful environment under the New York Constitution because it contributes to climate change through its substantial greenhouse gas emissions.[226] Similarly, after the Alaskan Supreme Court affirmed the dismissal of a case seeking a judicial order for a statewide greenhouse gas inventory and climate recovery plan,[227] several of the same plaintiffs filed a public trust and constitutional rights-based claim requesting an injunction for a specific Alaskan liquid natural gas project.[228] Even *Navahine*, which sought a full-blown emissions reduction plan, limited the scope of its complaint to one particular government agency (the Department of Transportation), substantially narrowing its request for relief from that requested by second-wave climate rights cases.[229] This more manageable remedy likely contributed to the case's ultimate success in settlement.[230]

These cases demonstrate climate rights advocates' willingness to alter their legal strategies based on courtroom outcomes. Doing so has likely increased their chances of achieving Category 2 impacts through courtroom wins. This is especially true for a number of these cases that aim to replicate the success of *Held* and *Navahine* by relying on a state constitutional provision declaring citizens' right to a healthy environment.[231]

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226. *Fresh Air for the Eastside* Complaint, *supra* note 64, at 16–17.
227. Sagoonick v. Alaska I, 503 P.3d 777, 805 (Alaska 2022), *reh'g denied* (Alaska 2022).
228. *Sagoonick II* Complaint, *supra* note 64, at 80–81.
229. *Navahine* Complaint, *supra* note 65, at 69–70.
230. Other aspects of the *Navahine* case made approving the settlement agreement even more judicially manageable for the Hawai'i Circuit Court: (1) the settlement was drawn up by the plaintiffs and the Hawaiian government rather than stemming from an independent merits determination by the court and (2) the settlement built upon the government's already established legal and political commitments for climate action. *See Navahine* Settlement, *supra* note 22.
231. *See, e.g.*, Verified Petition for Review in the Nature of an Action for Declaratory Relief, Clean Air Council v. Pennsylvania, No. 379 MD 2023 (Pa. Commw. Ct. filed Aug. 23, 2023); Riders Alliance v. Hochul, No. 156696/2024, 2024 WL 4349682 (N.Y. Sup. Ct. Sept. 30, 2024) (denying a motion to dismiss a third-wave climate case filed by a group of New Yorkers against Gov. Hochul for violating their right to clean air under the New York Constitution by indefinitely delaying implementation of the lower Manhattan congestion pricing plan). *But see* Fresh Air for the Eastside, Inc. v. New York, 229 A.D.3d 1217 (N.Y. App. Div. 2024) (dismissing a third-wave climate rights case relying on the right to clean air and a healthful environment in the New York Constitution to support a relatively narrow injunctive relief request for the closure of a landfill).

Like the early higher education cases in the civil rights movement, recent third-wave climate rights cases seek remedies that are arguably more judicially manageable than the sweeping systemic changes requested by first- and second-wave strategic climate rights litigation. As such, they are more likely to win, creating Category 2 impacts by way of changes in legal precedent. Although each individual win will provide a limited contribution to changing the law in favor of climate action, successful cases taken together can serve as building blocks toward further favorable court decisions to come.

This litigation approach replicates strategic litigation's typical theory of change as discussed in Part I.B: win in court, change legal precedent, file follow-up cases. As telegraphed in Part I.B, however, even if executed successfully, this litigation strategy will not serve as strategic climate rights litigation's primary contribution to the wider movement aimed at preventing catastrophic climate change. Following the incremental playbook of the NAACP in the civil rights movement would take decades, culminating long after massive shifts away from fossil fuel-based energy production would have needed to take place to avoid catastrophic climate change. In short, the timelines just don't match up.

That being said, if third-wave strategic climate rights litigation is able to achieve Category 2 impacts through narrow injunctive victories in court, it could simultaneously leverage Category 3 and Category 4 indirect impacts on society to amplify and optimize its contribution to the urgent action necessary to combat the climate crisis. By doing so, such cases could lay the groundwork for further incremental judicial decisions that support, entrench, and expand climate action in years to come even as the climate crisis is ongoing. Granted, Category 2 contributions to the climate movement from this litigation strategy would be more restricted than the potential systemic remedies requested by cases like *Juliana*, but achieving such broad remedies through the courts is unlikely in any case.[232] Seeking narrow judicial remedies represents a more pragmatic approach, recognizing the role of litigation as a supporting player rather than a silver bullet solution in the broader climate movement.[233]

III. Evaluating Indirect Impacts on Society

Although direct impacts from strategic climate rights litigation are likely to be narrow, indirect impacts of these cases can be expansive. Part III turns from Category 2 (and to a lesser extent Category 1)[234] direct impacts on the law discussed in Part II to the indirect impacts on society beyond the courtroom both before (Category 3) and after (Category 4) final judicial pronouncements.

232. Yeargain, *supra* note 103, at 1326.

233. *See* Lani Guinier & Gerald Torres, *Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements*, 123 Yale L.J. 2740, 2756 (2014) (critiquing "the tendency of litigation to migrate from tactics to strategic centrality in theories of change[]").

234. *See* text accompanying notes 172–74.

Part III will primarily analyze the Category 3 impacts of strategic climate rights litigation, which have been occurring for over a decade, although Part III.D will briefly examine Category 4 impacts of climate rights cases as well.

Unfortunately, indirect impacts of litigation are very hard to measure empirically with precision. Inferences of causal connections can rarely be pinned down in a concrete way. Even when causation is clear, such impacts rarely occur alone, typically contributing to social change as one of many factors. Isolating contributions to outcomes that may be as intangible as sparking an idea, encouraging an activist, or changing a mindset is often difficult if not impossible.

Just because such amorphous effects are tricky to isolate and measure, however, does not mean they are nonexistent or inconsequential. Available evidence strongly suggests that climate rights cases are impacting society even before reaching final courtroom outcomes. Such impacts are traceable through the engagement and attention that climate rights strategic litigation receives from scholars, practitioners, politicians, lawmakers, and the public more broadly. Given the limitations on strategic climate rights litigation's potential Category 1 and Category 2 direct impacts on the law outlined in Part II, Category 3 and Category 4 indirect impacts constitute the main contribution of strategic climate rights litigation to the wider climate movement.

Several scholarly articles have recognized and touched on the important Category 3 impacts of cases in the strategic climate rights litigation family.[235] These impacts broadly fall into one of three categories, each of which will be considered separately in this Part: raising awareness, reframing narratives, and galvanizing climate action.

A. Raising Awareness

Strategic climate rights litigation has elevated the salience of issues, garnering prominent attention at local, state, national, and even international levels.[236]

235. *See* Blumm & Wood, *supra* note 1, at 86 ("In addition to its effect in other courts, [preliminary] decisions like [the district court order on motion to dismiss in] *Juliana* can serve broad educative functions in society, inspiring waves of change beyond the courthouse doors[] . . . ."); Bustos, *supra* note 12, at 17–18 ("[T]he [pre-trial] court decisions in *Juliana* 'included statements that recognize the risks imposed by climate change, and that do not close the door on future successes in different circumstances.'" (quoting Joanna Setzer & Rebecca Byrnes, Global Trends in Climate Change Litigation: 2020 Snapshot 1 (2020))); Kempf, *supra* note 12, at 1027–35 (highlighting the ways in which strategic climate rights litigation can lower psychological and cognitive barriers to climate action). *See generally* Michael W. McCann, *How Does Law Matter for Social Movements?, in* How Does Law Matter? 76, 85 (Bryant G. Garth & Austin Sarat eds., 1998) (identifying how litigation can help movements develop a shared sense of group identity and a framework for articulating clear demands).

236. *See, e.g.*, Abate, *supra* note 1, at 33 (noting that, "[r]egardless of the outcome of the *Juliana* litigation, *Juliana* will continue to build public awareness and lay a strong conceptual foundation for climate justice initiatives in federal and state constitutional and legislative contexts[]"). *See generally* Kim Bouwer, *Lessons from a Distorted Metaphor: The Holy Grail of*

Media attention to the unique legal claims and sympathetic, young plaintiffs involved in climate rights cases has grown substantially over the last decade and a half, with numerous news articles published about the litigation brought by Our Children's Trust alone.[237] Such media attention has come from a wide variety of sources, including social media support from celebrity activists,[238] a Netflix documentary,[239] and a 60 Minutes special.[240] Such attention can drive change by increasing the salience of climate change as a political issue.[241] For example, in the Netherlands, "media attention for the [*Urgenda*] case led to parliamentary attention for the case[.]"[242]

In addition to media coverage, strategic climate rights litigation has the added benefit of providing a bulwark against climate disinformation when it goes to trial.[243] Climate science skepticism in the United States remains strikingly persistent[244] and more prevalent than in most other countries.[245] Aggressive disinformation campaigns led by profit-motivated fossil fuel companies helped to fuel this skepticism.[246] In the courtroom, such disinformation is subject to

Climate Litigation, 9 Transnat'l Env't L. 347, 358 (2020) (noting that private climate tort claims "introduc[e] climate issues into public debate and political culture[]").

237. *2024 Media Coverage*, Our Children's Trust: Youth v. Gov (2024), https://perma.cc/P4WR-85HU.
238. Leonardo DiCaprio (LeoDiCaprio), *Now This Impact Repost*, X (Feb. 21, 2019), https://perma.cc/KL6B-HA9K.
239. Youth v. Gov. (Barrelmaker Productions 2020).
240. Kroft, *supra* note 1.
241. Nosek, *supra* note 12, at 737 ("Scholars find that media coverage and mobilization by political elites and advocacy organizations are significant drivers of the American public's concern over climate change.").
242. Anna Kovács, Katharina Luckner, & Anna Sekula, *Beyond Courts: Legal Cueing Effects of Strategic Litigation* 18 (Aug. 31, 2022) (unpublished manuscript), https://perma.cc/ZEV3-SYTP (quoting Anke Wonneberger & Rens Vliegenthart, *Agenda-Setting Effects of Climate Change Litigation: Interrelations Across Issue Levels, Media, and Politics in the Case of Urgenda Against the Dutch Government*, 15 Env't Commc'n 699, 710 (2021)). *See infra* notes 298–99 and accompanying text for more information on the *Urgenda* case.
243. Yale Sustainability, *Yale Experts Explain Climate Lawsuits*, Yale Univ. (Aug. 16, 2023) (quoting Douglas Kysar: "When you put climate science through the rigor of the litigation process, people can't just make claims on Twitter. They actually have to prove claims based on reason and evidence and expert testimony."), https://perma.cc/WV4W-PBHE.
244. Anthony Leiserowitz et al., Climate Change in the American Mind: Beliefs & Attitudes 5 (Yale Univ. & George Mason Univ. eds., 2023) (demonstrating that the percentage of U.S. citizens who "think global warming is happening[]" has remained fairly steady at around 70% for fifteen years, while the percentage of U.S. citizens who don't think global warming is happening has stayed steady at around 15%).
245. Oliver Milman & Fiona Harvey, *US Is Hotbed of Climate Change Denial, Major Global Survey Finds*, The Guardian (May 8, 2019) ("Out of 23 big countries, only Saudi Arabia and Indonesia had higher proportion of doubters (than the United States)[.]"), https://perma.cc/48D8-NVWG.
246. René Marsh, *Big Oil Has Engaged in a Long-Running Climate Disinformation Campaign While Raking in Record Profits, Lawmakers Find*, CNN (Dec. 9, 2022), https://perma.cc/

cross-examination, allowing rigorous science to be separated out from junk science.[247] Climate rights strategic cases particularly benefit from such scrutiny given that governments are held to a level of persuasion beyond the judicial deference historically afforded them in administrative court challenges to rules promulgated through notice-and-comment rulemaking.[248] This lack of deference was on full display during the *Held v. Montana* trial in which Judge Seeley's Montana District Court decision referenced climate science almost 1,000 times, relying heavily on the plaintiffs' "informative" and "credible" expert witnesses.[249] Meanwhile, the testimony of the defendants' expert on Montana's contribution to climate change, Dr. Terry Anderson, was "not well-supported, contained errors, and was not given weight by the Court."[250]

Evidence produced and presented in strategic climate rights litigation can be used both to support further legal advocacy[251] and to "spur greater and more widespread climate awareness among the public."[252] This is especially crucial for climate change, a complex social problem requiring nuanced understanding of numerous concepts across various disciplines.[253] Our Children's Trust, the law firm that filed *Held*, has made full transcripts of the district court trial proceedings available to the public for broader dissemination.[254] The presented testimony facilitates wider exposure to crucial expert knowledge on a wide array of topics, including earth science, environmental economics, childhood psychology, and Indigenous culture.

Open access to courtroom proceedings can spur on-the-ground change even when cases are unsuccessful in court.[255] In what is often considered a pro-

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C7AN-Q8ZS; Amy Wetervelt, *How the Fossil Fuel Industry Got the Media to Think Climate Change Was Debatable*, Wash. Post (Jan. 10, 2019), https://perma.cc/7VE2-X48R.

247. Blumm & Wood, *supra* note 1, at 55 ("Unlike political forums, a court offers a deliberative fact-finding forum subject to the rules of evidence, so strategies of 'manufacturing doubt' (or facts) may be less effective in the courtroom.").

248. *Id.* at 55–56. *But see* Loper Bright Enters v. Raimondo, 603 U.S. 369 (2024) (overruling *Chevron* deference to agency interpretations of statutory authority).

249. Jarryd Page, *Unpacking the Headline: Climate Science and Held v. State of Montana*, Env't L. Inst. (Sept. 13, 2023), https://perma.cc/VQC9-XGTV.

250. *Id.*; Findings of Fact, Conclusions of Law, and Order at 66, Held v. Montana, No. CDV-2020-307, 2023 WL 5229257 (Mont. Dist. Ct. Aug. 14, 2023).

251. *See generally* Aisha Saad, *Attribution for Climate Torts*, 64 Bos. Coll. L. Rev. 870, 923 (2023) ("Public nuisance plaintiffs include information about climate mitigation and adaptation plans in their pleading, putting these strategies into a public record that regulators can reference when needed.").

252. Blumm & Wood, *supra* note 1, at 63.

253. Eslava et al., *supra* note 33, at 38 ("Given that strategic litigation seeks to solve complex social problems, neither the problem nor its solution can be understood from an exclusively legal perspective, often creating the need for non-lawyer participation.").

254. *Held v. Montana Trial Details*, Our Children's Trust (2024), https://perma.cc/9X5F-96PZ.

255. *See infra* Part IV.A.

genitive example of climate rights litigation,[256] Inuit activist Sheila Watt-Cloutier filed a petition in 2005 on behalf of herself and over 60 others in front of the Inter-American Commission on Human Rights alleging that U.S. greenhouse gas emissions violated the human rights of the Inuit people.[257] The Commission declined to issue a ruling on the petition, but it instead invited the petitioners to testify on the connection between their experience with climate change and human rights.[258] Mere months later, this widely publicized testimony motivated a coalition of leaders from Small Island Developing States to develop the Malé Declaration on the Human Dimension of Climate Change, which became the first international agreement to explicitly state that climate change threatens the full enjoyment of human rights.[259] The declaration further urged the U.N. to address climate change urgently and helped to spark the broader emphasis on rights-based approaches in climate law more broadly.[260]

B. Reframing Climate Narratives

Sheila Watt-Coulter's advocacy before the Inter-American Commission on Human Rights demonstrates that "the creation of a new legal claim has power wholly apart from the power of a litigation victory (or litigation loss) or a court decision."[261] Arguments presented in strategic climate rights litigation can shape meaning, construct identity, and clarify values for those directly involved and for the broader public even beyond simply raising awareness about the fundamental issue.[262] In particular, such cases can emphasize the rights violations at stake, helping marginalized communities hone their tactics and build solidarity based on communal grievance against a clearly defined wrongdoer.[263] Savvy advocates recognize and capitalize on this power of litigation to shape narrative construction, "seiz[ing] on the political nature of rights" by "decoupl[ing] success from

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256. *See, e.g.*, Lisa Marshall, *How a Human Rights Approach to Climate Change Can Spark Real Change*, Right Here, Right Now Global Climate Summit: Univ. Col. Boulder (2022), https://perma.cc/XJW9-NM79.
257. Carlarne, *supra* note 62, at 175.
258. *Id.* at 175.
259. Daniel Magraw & Kristina Wienhöfer, *The Malé Formulation of the Overarching Environmental Human Right, in* The Hum. Rt. to a Healthy Env't 221–22 (John H. Knox & Ramin Pejan eds., 2018).
260. *Id.* at 224, 229–30.
261. Laura King, *Narrative, Nuisance, and Environmental Law*, 29 J. Env't L. & Litig. 331, 333 (2014) (citation omitted).
262. *See generally* Robert M. Cover, *The Supreme Court 1982 Term—Foreword: Nomos and Narrative*, 97 Harv. L. Rev. 4, 6–10 (1983) (noting the constitutive function of legal institutions for social norms).
263. Eslava et al., *supra* note 33, at 12.

the implementation and enforcement of judicial orders and focus[ing] on the discursive and political power of courts' pronouncements."[264]

The young people who have filed climate rights cases in the United States have effectively harnessed this norm-shifting aspect of strategic litigation in numerous ways. For example, campaigns such as the simultaneous filing of first-wave atmospheric trust legal actions in multiple states fostered an impression of urgency and solidarity within the youth-climate movement.[265] As Executive Director of the Sabin Center for Climate Change Law at Columbia University, Michael Burger, puts it, young people's stories depicted in their legal complaints have "moved the discussion of climate change away from a technocratic problem that is far off in time and space to a very human problem that is felt immediately, that is happening now, and that needs to be addressed now[.]"[266] The narrative shifting power of these first-wave climate cases has led to tangible impacts on state law outside the courtroom in states such as Massachusetts, Washington, and Colorado.[267]

The framing of young people standing up against the government to ensure a stable climate system for their future prosperity is compelling. Various platforms and organizations have capitalized on this dramatic and sympathetic narrative to shift the way people think about the issue of climate change into a more ethical framework centered around justice for young people and future generations. For example, the Netflix documentary *Youth v. Gov* promotes a David v. Goliath depiction of the *Juliana* youth plaintiffs and their lawyers as they navigate numerous procedural hurdles in the case.[268] One religious coalition, Interfaith Power and Light, has emphasized the moral implications of the case at screenings of the documentary before 475 of its congregations, reaching approximately 13,000 viewers.[269] In addition, multiple curricular guides are available for high school teachers to incorporate the documentary into their English, government, environmental science, or economics lesson plans.[270] The diversity of content areas applicable to the case are indicative of its broad potential to reframe mindsets from a number of different perspectives.

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264. NeJaime, *supra* note 23, at 954; *see* Stuart A. Scheingold, The Politics of Rights: Lawyers, Public Policy, and Political Change 147 (1st ed. 1974); Peel & Osofsky, *supra* note 14, at 221 (noting that "[l]itigation on important social issues, such as climate change, is often initiated not just to advance regulation but also with the goal of influencing the public debate.").
265. *See supra* text accompanying notes 37–38; *see also* Blumm & Wood, *supra* note 1, at 21–22 ("The litigation campaign began in May 2011, when young people filed legal processes in every state in the United States, launched a federal suit, and began plans for lawsuits in other countries as well.") (citations omitted).
266. Stiffman, *supra* note 67.
267. *See supra* text accompanying notes 51–54.
268. Youth v. Gov., *supra* note 239.
269. *Featured Film Kit*, Interfaith Power & Light (2022), https://perma.cc/6KU4-Y6PY.
270. *Youth v. Gov.: Curriculum Guide*, Journeys in Film (2020), https://perma.cc/QE43-J6NB.

The Colombian lawsuit, *Future Generations v. Ministry of Environment and Others*, similarly illustrated the narrative shaping potential of youth climate rights cases. In *Future Generations*, twenty-five young people "inspired by *Juliana*"[271] successfully sued the Colombian government for failing to curb destruction of the Amazon rainforest.[272] In addition to bringing the "first [case] in Latin America to make a climate change argument for future generations' rights[,]" the youth plaintiffs implemented an extensive social media campaign, drawing attention to their case to change the narrative around climate change in Colombia.[273] These efforts helped elevate climate change from a largely academic concern to an issue implicating the rights of future generations that is worthy of significant national-level effort to address.[274]

Some members of the U.S. judiciary have begun to echo this normative shift toward urgency in relation to climate change. In particular, Judge Staton's dissent in the Ninth Circuit opinion dismissing *Juliana v. United States* on redressability grounds highlights the peril of climate change in no uncertain terms:

> Where is the hope in today's decision? Plaintiffs' claims are based on science, specifically, an impending point of no return. If plaintiffs' fears, backed by the government's *own studies*, prove true, history will not judge us kindly. When the seas envelop our coastal cities, fires and droughts haunt our interiors, and storms ravage everything between, those remaining will ask: Why did so many do so little?[275]

This conspicuous language has already demonstrated the ability to alter normative frameworks even for those deeply entrenched in the issue of climate change (thereby creating Category 3 impacts).[276] This dissent joins others[277] in creating a narrative template for facilitating both indirect impacts on society and direct impacts on the law.[278]

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271. Bustos, *supra* note 12, at 17.
272. Colombian Climate Rights Case, *supra* note 161.
273. Eslava et al., *supra* note 33, at 64, 66.
274. *Id.* at 66.
275. Juliana v. United States, 947 F.3d 1159, 1191 (9th Cir. 2020) (Staton, J., dissenting).
276. *See* Robinson Meyer, *A Climate-Lawsuit Dissent That Changed My Mind*, The Atlantic (Jan. 22, 2020), https://perma.cc/W65T-S5BJ. *See generally* Neacşu, *supra* note 1, at 35 (highlighting many scholars' "expectation that *Juliana* could catalyze a broader transformation in the national imagination of climate change[]").
277. *See, e.g.*, Sagoonick v. Alaska I, 503 P.3d 777, 805–11 (Alaska 2022) (Justice Maassen and Justice Carney both dissenting in part on the basis that youth climate plaintiffs should be allowed to go to trial to seek a declaratory remedy).
278. *In re* Hawai'i Elec. Light Co., Inc. III, 526 P.3d 329, 343–44 (Haw. 2023) (Wilson, J. concurring opinion) (quoting Judge Staton's Ninth Circuit dissenting opinion in *Juliana*). *See generally* Robert Post & Reva Siegel, *Originalism As a Political Practice: The Right's Living Constitution,* 75 Fordham L. Rev. 545, 568 (2006) (noting that Scalia's dissent in *Lawrence v. Texas* "mobilized conservative constituencies to bring political pressure to bear on the

For example, courtroom pronouncements and proceedings more generally in strategic climate rights litigation can encourage and motivate young people and other advocates both inside and outside the courtroom.[279] Simply having their voice heard by an impartial arbiter can be and has been a bolstering experience for numerous youth plaintiffs,[280] especially when it leads to powerful judicial language like that found in Judge Staton's dissent in *Juliana*[281] or to negotiated outcomes with powerful officials like in *Navahine*.[282] Forcing their government to come to court "to respond and present its arguments[] . . . [that] justify its actions through the language of rights" puts young plaintiffs in a position of power and moral authority even if the case is not ultimately successful.[283] Aside from empowering them, it can also provide personal catharsis both to the plaintiffs themselves and to other members of their generation who observe the case.[284] Given the deep prevalence of youth climate anxiety in the modern era,[285] the power of climate rights cases to inspire young people to engage in climate action can have substantial positive benefits for those who might otherwise feel hopeless.

C. Galvanizing Climate Action

Aside from increasing awareness and reframing narratives, strategic climate rights litigation has the power to catalyze climate action more broadly.[286] As described in other sections, such rights-based cases have demonstrated an ability to change law and policy extrajudicially.[287] In addition, *Juliana* has provided a rallying cry for building out the wider climate movement as many have felt inspired to support the case. In 2019, over 36,000 young people signed onto a brief filed in

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development of constitutional law[]"); *see* NeJaime, *supra* note 23, at 986 (quoting Jennifer Pizer as saying "[h]istory has shown that . . . the opinions of the dissenting justices later become the law of the land.").

279. *See* Guruparan & Moynihan, *supra* note 83, at 17.

280. *See, e.g.*, Alessandra Bergamin, *How Suing the US Government Can Empower the Climate Movement*, Waging Nonviolence (July 20, 2023), https://perma.cc/BX4G-CL5Q. *See generally* Eslava et al., *supra* note 33, at 12 (noting that "in many instances, plaintiffs may use strategic litigation solely for the opportunity to have a judge hear their personal narratives, an opportunity they may have long been denied").

281. *Press Release: Judge Rules in Favor of Juliana v. United States Youth Plaintiffs; Children's Constitutional Climate Case Can Proceed to Trial*, Our Children's Trust: Youth v. Gov. (June 1, 2023), https://perma.cc/86PX-CDMJ (highlighting *Juliana* plaintiff Nathan Baring who quotes language from Judge Staton's dissent in support of his defiant call to action).

282. Michael Tsai, *Green Announces Settlement in Navahine Suit*, Spectrum 1 News (June 21, 2024), https://perma.cc/LR27-HV8Q.

283. *See* Eslava et al., *supra* note 33, at 15.

284. *See* Weaver & Kysar, *supra* note 1, at 350 ("Litigation, in other words, can be therapeutic[.]").

285. Caroline Hickman et al., *Climate Anxiety in Children and Young People and Their Beliefs About Government Responses to Climate Change: A Global Survey*, 5 Lancet e863 (2021).

286. Posner, *supra* note 88, at 1931 (noting that "[l]itigation can generate press attention, mobilize public interest groups, [and] galvanize ordinary citizens[]").

287. *See supra* text accompanying notes 51–54; *see also infra* text accompanying notes 318–24.

the Ninth Circuit in support of *Juliana*.[288] Similarly, activists around the country held dozens of rallies to express solidarity with *Juliana* in October 2018 after its original trial date was postponed.[289] Thousands more volunteered, attended demonstrations, or provided consultancy or pro bono work for the case in its ten-year history.[290] In this way, *Juliana* fulfilled the potential of strategic litigation to "mobiliz[e] the community and public opinion around a particular matter[.]"[291]

The movement-building impact of U.S. strategic climate rights litigation has also extended beyond the United States in numerous ways, most notably by encouraging plaintiffs (often youth) to bring climate rights cases in various jurisdictions worldwide.[292] Many of these plaintiffs have taken inspiration from U.S. strategic climate rights cases as they attempt to transplant similar legal arguments into the courtrooms of their own countries,[293] including in the flagship case *Urgenda v. State of the Netherlands*.[294] In addition, lawyers who filed U.S. strategic climate rights cases have worked closely with foreign lawyers and plaintiffs to help bring lawsuits in Canada, Mexico, Uganda, India, and Pakistan.[295] This litigation progression continued onward to the level of international law when several young advocates relied in part on "the arguments used in *Urgenda*" as the basis for *Saachi v. Argentina*, a case submission before the U.N. Committee on the Rights of the Child.[296]

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288. Zero Hour, *Join the Youth Legal Action for a Safe Climate*, Join Juliana (Apr. 26, 2019), https://perma.cc/UP6S-QT3X.
289. Kelsey Crane, *Dozens of Environmental Advocates Rally in Support of Plaintiffs of Juliana v. United States*, Sierra Club Va. Chap. (Oct. 29, 2018), https://perma.cc/L4YV-VCLY (documenting rally in Virginia); *see also* Lee Van Der Voo, *Children, Activists Rally in Support of Climate Change Lawsuit*, Reuters (Oct. 30, 2018), https://perma.cc/J6FQ-KPWL (documenting rally in Oregon). As a disclosure, the author of this Article led an October 2018 rally for the *Juliana* case in Connecticut. *See* Aakshi Chaba, *Students, New Haveners Rally for Juliana v. US*, Yale Daily News (Oct. 30, 2018), https://perma.cc/HQ6C-UUPN.
290. *See* Maxine Bernstein, *'Climate Change Kids' Suit Draws Thousands of Supporters as Government Seeks Dismissal of Case*, Oregonian (May 31, 2019), https://perma.cc/2D7M-Z7VV.
291. Eslava et al., *supra* note 33, at 12.
292. Bustos, *supra* note 12, at 17 ("*Juliana* has sparked a national and international movement of youth using litigation as a tool to demand action on climate change."); *see, e.g.*, *supra* text accompanying notes 271–74.
293. Ryan, *supra* note 12, at 62–63. *See generally* Wood, *"On the Eve of Destruction"*, *supra* note 42, at 286 ("The original vision of the [atmospheric trust litigation] approach contemplated that, because the atmosphere is a shared planetary trust resource, the strategy would take hold in nations worldwide to create domestic judicial enforcement structures for climate obligations that eluded international processes.").
294. *Other Global Legal Actions: The Netherlands*, Our Children's Trust: Youth v. Gov. (2024), https://perma.cc/5QBF-7223.
295. *Active Global Cases*, Our Children's Trust: Youth v. Gov. (2024), https://perma.cc/7U2C-RDM8. As a disclosure, the author of this Article collaborated with the global partners filing these international cases as a former employee of Our Children's Trust.
296. Konadu Amoakuh, *Climate Change Litigation and Rights-Based Strategies: Why International Human Rights Approaches to Climate Change Are Not Easily Transplanted to the American Legal System*, 41 Stan. Env't L.J. 195, 210 (2022).

The global reach of U.S. strategic climate rights litigation is particularly significant given that courts outside the U.S. have often been more willing to allow rights-based claims in climate cases to proceed to the merits stage and to achieve successful courtroom outcomes.[297] There have been decisions in favor of the plaintiffs from courts of final review in numerous climate rights cases worldwide, including in the *Urgenda* case, which received a favorable decision from the Supreme Court of the Netherlands in 2019.[298] This decision required the Dutch government to achieve a 25% reduction in national greenhouse gas emissions compared to 1990 levels by 2020.[299] It also inspired follow-up cases, including the first-of-its-kind case, *Milieudefensie v. Royal Dutch Shell*, in which the Hague District Court held a private company responsible for rights-based violations owing to its contributions to the climate crisis.[300] Similarly, a favorable decision in *Neubauer et al. v. Germany* led to amended legislation that requires the German government to achieve greenhouse gas neutrality by 2045 (five years faster than the previous target) and to reduce 65% of national emissions by 2030.[301] Although most of these non-U.S. climate rights decisions have been predictably incremental,[302] they have nonetheless created significant substantive legal advancements toward increased ambitious action on climate change.

In addition to inspiring further lawsuits, U.S. strategic climate rights litigation has served as a jumping off point for a wider portfolio of climate advocacy and activism strategies to bring about the kind of action that needs to take

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297. *Id*. at 229 ("Outside of the United States, judges appear to be more inclined to support climate action, particularly in the Global South where human rights norms have been especially important for climate litigation."); Rachel Pemberton & Michael C. Blumm, *Emerging Best Practices in International Atmospheric Trust Litigation*, 2022 Utah L. Rev. 941, 941 (2022) (noting that international courts do not struggle with the same procedural hurdles as U.S. courts, "allowing them to reach the merits of public trust claims in the context of climate change[]")
298. *Urgenda* Supreme Court Opinion, *supra* note 162.
299. *Id*. at 8.3.4–8.3.5.
300. Rb. Den Haag 26 mei 2021, JOR 2021, 208 m.nt. Biesmans, SJM (Milieudefensie/Royal Dutch Shell PLC) (Neth). The Hague Court of Appeal overturned this decision on November 12, 2024 on the grounds that Shell cannot be held to a standard for emissions reduction that does not apply equally across all countries and businesses. Hof Den Haag 12 november 2024, M en R 2025, 12 m.nt. TR Bleeker (Shell PLC/Milieudefensie) (Neth.). The plaintiffs in the case have appealed the Hague Court of Appeal decision to the Netherlands Supreme Court. *See* Claudia de Meulemeester, *Shell's Emissions Reduction Lawsuit Heading to Dutch Supreme Court*, SustainableViews (Feb. 12, 2025), https://www.sustainableviews.com/shells-emissions-reduction-lawsuit-heading-to-dutch-supreme-court-9abf3f2a/.
301. Guruparan & Moynihan, *supra* note 83, at 16. *See Neubauer* case cited *supra* note 163. *Neubauer* was filed by a group of youth plaintiffs who contended that Germany's Federal Climate Change Act created inadequate measures to protect their human rights under the German Basic Law (i.e., Germany's Constitution).
302. *See supra* text accompanying notes 161–65.

place now to avoid catastrophic climate change.[303] For example, Zero Hour, the youth-led organization behind the "Young People's Brief" filed in support of *Juliana*,[304] also leads environmental awareness campaigns targeted at elected public officials.[305] Jamie Margolin, one of the founders of Zero Hour was also a plaintiff in the state-level climate rights lawsuit, *Aji P. v. State of Washington*.[306] More broadly, the group's "first call to action came to life after a careful review of the requirements in the groundbreaking Our Children's Trust lawsuit against the federal government[,]" *Juliana v. United States*.[307]

Another group of young people separately launched the Sunrise Movement in 2017. This organization aims to "build[] on the rich history of social protest in the United States to effect change[]" by singing protest songs and engaging in acts of civil disobedience for which many young activists have been arrested.[308] This group has organized in support of the *Juliana* case[309] while also engaging in political advocacy and organizing to champion urgent climate action,[310] leading to powerful tangible results, including an uphill electoral campaign to reelect climate-friendly Senator Ed Markey.[311]

Juliana plaintiffs often work closely with members of other climate groups in their wider climate advocacy efforts.[312] Indeed, plaintiffs in prominent climate

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303. Bustos, *supra* note 12, at 18 ("*Juliana* and its progeny have ignited a movement of young people fighting for a stable climate, inspiring action on multiple fronts and across national borders."); *see* Peel & Osofsky, Climate Change Litigation, *supra* note 14, at 236–37 (noting that "[a] number of successful campaigns have built community support for climate action from the ground up utilizing a mix of tools, but with litigation often serving as a focal point for local efforts.").

304. *See* Brief of Amicus Curiae Zero Hour on Behalf of Approximately 32,340 Children and Young People in Support of Plaintiffs-Appellees, Juliana v. United States, 947 F.3d 1159 (9th Cir. 2020) (No. 18-36082), ECF No. 68.

305. Erin Ryan, *An Evolving Doctrine: The Atmospheric Trust Project, in* The Public Trust Doctrine, Mono Lake, And a Quiet Revolution in Environmental Law 31 n.212 (forthcoming 2025).

306. *Jamie Margolin (she/her): Founder*, Zero Hour: Meet the Zero Hour Team (2023), https://perma.cc/4JTL-8M65.

307. *About Us*, Zero Hour, https://perma.cc/W7JQ-KU4Y.

308. Carlarne, *supra* note 62, at 166–67.

309. *See* Sunrise Movement, *TOMORROW Is A Nationwide Day of Action*, X (May 31, 2019) https://perma.cc/6FUJ-739Z; Lee van der Voo, *Youth Climate Activists Set for Nationwide Rallies Ahead of Landmark Case*, The Guardian (May 31, 2019), https://perma.cc/GX3C-LB2M; Julia Conley, *250+ Groups Call on Biden DOJ to Drop Fight Against Children's Climate Case,* Common Dreams (June 21, 2023), https://perma.cc/68UP-6G7J.

310. Sunrise Movement, *Our Fight for a Green New Deal*, Sunrise Movement (2024), https://perma.cc/9AWF-9FXX.

311. Gregory Krieg, *The Sunrise Movement Is an Early Winner in the Biden Transition. Now Comes the Hard Part.*, CNN (Jan. 2, 2021), https://perma.cc/2NC5-CJXM.

312. *See, e.g.,* Anny Martinez, *Youth Movements Changing Tactics in the Face of Climate Crisis*, Common Dreams (Feb. 12, 2019), https://perma.cc/3PZ4-ZBC8 (noting *Juliana* plaintiff Vic Barrett's involvement with the organization Alliance for Climate Education).

rights cases around the globe, such as Yujin Kim,[313] Luisa Neubauer,[314] and Delaney Reynolds,[315] engage in "multidimensional advocacy"[316] by "[o]perating across a range of institutional settings[]" and "deploy[ing] litigation as merely one of several available tactics."[317]

D. Category 4 Impacts

Strategic climate rights litigation has produced few Category 4 impacts (i.e., indirect impacts on society resulting from final courtroom outcomes) to date. The most prominent examples stem from courtroom losses in climate cases that nonetheless led to enhanced climate action from state-level executive or legislative branches of government.[318] Specifically, although the first-wave climate rights case *Foster v. Washington Department of Ecology* was unsuccessful in court,[319] it created substantial political pressure on the Washington Department of Ecology to pass greenhouse gas emission standards in 2016.[320] Similarly, a loss at the Supreme Court for the climate rights case *Martinez v. Colorado Oil and Gas Conservation Comm'n*[321] led to legislative action in 2019 requiring the Commission to consider public health and the environment when regulating oil and gas production.[322] A few years later, an appellate-level loss in the second-wave climate rights case, *Reynolds v. Florida*, led to a revised administrative campaign strategy in which several of the youth plaintiffs filed a petition for rulemaking

313. Yujin Kim, *OPINION: South Korea's Emissions Are Falling Too Slowly. That's Why We Went to Court*, Thomson Reuters Found. (June 25, 2021), https://perma.cc/3C2Z-W7DW (noting Yujin Kim's involvement in both the organization Youth 4 Climate Action and a climate rights case in South Korea); *see also* Do-Hyun Kim v. South Korea, Constitutional Court [Const. Ct.] 2020Hun-Ma389, 1264, 854, 846 (consol.), Aug. 29, 2024 (S. Kor.).

314. Luisa Neubauer, World Econ. Forum, https://perma.cc/SKD5-M5SK; *see also* Neubauer v. Germany, BVerfG, 1 BvR 2656/18, Mar. 24, 2021 (Ger.), https://perma.cc/M6H2-H5GQ.

315. Delaney Reynolds, *About Delaney*, https://perma.cc/24B8-23LJ; *see also* Reynolds v. Florida, 316 So. 3d 813 (Fla. Dist. Ct. App. 2021).

316. Scott Cummings & Douglas NeJaime, *Lawyering for Marriage Equality,* 57 UCLA L. Rev. 1235, 1241 (2010).

317. NeJaime, *supra* note 23, at 968. *See generally* Bustos, *supra* note 12, at 18 ("[P]laintiffs in *Juliana* and other cases have become politically empowered and thus, have gravitated towards and strengthened other forms of advocacy like community organizing throughout the litigation process.").

318. *See, e.g.*, Christiansen, *supra* note 9, at 886–88.

319. Foster v. Washington Dep't of Ecology, 200 Wash. App. 1035 (2017).

320. Christiansen, *supra* note 9, at 887; *see supra* note 53.

321. Martinez v. Colo. Oil & Gas Conservation Comm'n, No. 2014-CV-32637, 2014 WL 7474553 (Colo. Dist. Ct., Dec. 24, 2014), *rev'd*, 434 P.3d 689 (Colo. App. 2017), *rev'd*, 433 P.3d 22 (Colo. 2019).

322. Christiansen, *supra* note 9, at 887–88; *see* source cited *supra* note 54.

requesting state-level renewable energy targets for Florida utilities.[323] The petition was granted in April 2022 and went into effect the following August.[324]

These examples demonstrate that strategic climate rights litigation can lead to Category 4 impacts on state-level law even when a case fails to change the law through a favorable judicial decision. In addition, such cases can continue to raise awareness, reframe narratives, and galvanize action around climate change even after their courtroom conclusions. The petition for rulemaking filed in Florida state court after *Reynolds v. Florida*'s courtroom dismissal provides a notable example of galvanized climate action following a completed climate case.

Such ongoing indirect impacts will be particularly likely for successful cases like *Navahine v. Hawai'i Department of Transportation* that require judicial oversight of a decades-long plan for climate remediation. These case outcomes will undoubtedly garner intermittent media, scholarly, and practitioner attention as enforcement moves forward along the predetermined timeline. That attention creates the potential for Category 4 impacts from such cases over many years.

Based on comparative analysis with *Brown*, Part II argues that final judicial decisions in strategic climate rights litigation are likely to be incremental. For the reasons specified in Part II, U.S. courts have and will likely continue to restrict expansive requests for relief in second-wave climate rights cases (if they grant them at all), as was seen in *Held v. Montana*. However, assuming strategic climate rights litigation is able to successfully obtain a judicial ruling granting large-scale systemic relief in the form of a comprehensive plan to reduce greenhouse gas emissions, such a result would have enormous implications. The required restructuring of society around new energy sources would likely lead to significant social upheaval. Few cases provide context for what to expect from such a shift. Once again, the closest parallel to such a situation is the Category 4 impacts resulting from the *Brown* decision.

Of course, the social situations surrounding the climate movement and the civil rights movement are vastly different. Nevertheless, analyzing *Brown's* Category 4 impacts can provide useful insights into the potential Category 4 impacts of strategic climate rights litigation. Ultimately, comparative analysis reveals that favorable decisions granting systemic remedies in strategic climate rights litigation would likely lead to some Category 4 impacts, but what they might be and how they might contribute to or detract from the climate movement would be inherently unpredictable and difficult to pin down.

There is no consensus regarding the extent to which *Brown* impacted the U.S. civil rights movement. Scholarly debate has evolved over decades, spanning

323. Our Children's Trust, *Youth v. Gov: Florida*, Active State Legal Actions (2024), https://perma.cc/5925-WZH2. The author of this Article worked on this campaign as a former employee of Our Children's Trust.

324. *Id.*

from firm belief in courts' ability to meaningfully facilitate social change[325] to a sense that the effects of rights-based lawsuits have been over-valued.[326]

The rich scholarly literature on the Category 4 impacts of *Brown* and its surrounding civil rights cases complicates the notion of a straightforward causal connection between civil rights strategic litigation and social movement building.[327] Scholars have convincingly argued that the causal relationship between courtroom decisions and social forces is both bidirectional[328] and unpredictable.[329] While the contributions of litigation to progressive social movements are inherently limited and easily overstated, it is simultaneously possible to underestimate their importance.[330] This is particularly true for a monumental case like *Brown*. Just as scholars have debated the direct impacts of *Brown* on the law, they have similarly sparred over its less straightforward (and more difficult

325. Kluger, *supra* note 212, at 780–82 (arguing that *Brown* exemplifies the ability of a court decision to compel social progress by imposing a shift in national mindset); Garrow, *supra* note 155, at 152–53 (arguing that *Brown* helped galvanize civil rights activists).

326. *See, e.g.*, Kenneth W. Mack, *Rethinking Civil Rights Lawyering and Politics in the Era Before Brown*, 115 Yale L.J. 256, 263 (arguing for an abandonment of "the legal liberal assumption that the locus of civil rights lawyering lies in rights claims directed at the state and, in particular, at the Supreme Court"); Klarman, From Jim Crow to Civil Rights, *supra* note 111, at 5 (claiming that shifts in public opinion led to Supreme Court decisions in favor of civil rights rather than the other way around); Rosenberg, The Hollow Hope, *supra* note 178, at 77 (claiming that the Supreme Court ending segregation in public transportation was ineffective without executive and legislative support); Bell, *supra* note 137, at 1063 ("Brown gets undeserved credit for desegregating public facilities other than schools.").

327. *See* Schmidt, *Social Movements*, *supra* note 80, at 172–73 (noting that the long-standing litigation-based approach to analyzing the civil rights movement "idealizes the capacities of courts and legal remedies, marginalizes the possibility of alternative approaches to achieving racial equality, and tends to assume that all right-thinking African Americans were on board with the NAACP's litigation campaign[]"); Lassiter, *supra* note 111, at 1422 ("[T]he evidence and the arguments marshaled throughout this examination of seventy years of American history consistently point in the same direction: legislative actions matter far more than federal court decisions; the ability of judges to implement social change is quite limited; long-term historical processes shape the evolution of constitutional law far more than vice versa."); Klarman *Civil Rights Law*, *supra* note 136, at 433 ("It is unclear how instrumental Brown was in fostering the civil rights movement, which in turn inspired the momentous civil rights legislation of the mid-1960s. . . . The matter is less settled than one might have thought possible after several decades of reflection and research.").

328. *See* Dudziak, *The Court and Social Context*, *supra* note 137, at 444 (arguing that causality between social conditions and judicial action "is dialectic, not linear: that law and social context are mutually constitutive[]").

329. Tomiko Brown-Nagin, Courage to Dissent: Atlanta and the Long History of the Civil Rights Movement 250 (Oxford U. Press ed., 2011) ("Court action both mobilized and demobilized the civil rights movement."); Schmidt, *Social Movements*, *supra* note 80, at 176 (noting Brown-Nagin's conclusion "that there are few—and perhaps no—predictable patterns when it comes to the interplay between social activism and the legal system[]").

330. *See* Bernstein & Somin, *supra* note 119, at 595 ("While Klarman is right to reject the view that courts could, by themselves, eliminate Jim Crow and other forms of oppression, he underestimates both the willingness and the ability of courts to make a difference.").

to measure) indirect impacts on broader culture. Scholar David Garrow points out that the *Brown* decision reinvigorated weary civil rights activists, providing renewed determination in their pursuit of equal rights.[331] Others have suggested that frustration with the lack of implementation of cases like *Brown* helped fuel the student sit-ins and associated protests[332] that became instrumental in nationalizing the civil rights conversation and in bringing about the Civil Rights Act.[333] Michael Klarman contends that *Brown*'s primary impact came from a push for civil rights action as a response to national repulsion at the absurdly violent response from southern whites to efforts to implement the decision.[334] Beyond that, Klarman observes minimal causal connections between *Brown* and direct action in the civil rights movement,[335] whereas other scholars see a more complicated picture.[336]

In the end, the mass of conflicting outcomes that accompany and facilitate a decision as monumental as *Brown* can be challenging to untangle[337] beyond general recognition that "the relationship between law and culture [is]

331. Garrow, *supra* note 155, at 155–57.

332. *See* Schmidt, *"Freedom Comes Only from the Law," supra* note 139, at 1497–98 ("Disappointment at *Brown*'s failure to move the South to abandon segregation was a critical contributing factor in the emergence of a movement of direct-action protest against Jim Crow, a movement driven by the belief that legal proclamations alone would not change society."); *see also* Klarman, From Jim Crow to Civil Rights, *supra* note 111, at 380–81 (noting that, although *Brown* possibly reduced direct action in the short term by directing focus toward litigation, "over the long term, *Brown* may have encouraged direct action by raising hopes and expectations, which litigation then proved incapable of fulfilling. Alternative forms of protest arose to fill the gap."); Christopher W. Schmidt, *Divided by Law: The Sit-ins and the Role of the Courts in the Civil Rights Movement*, 33 Law & Hist. Rev. 93, 114 (2015) ("The sit-in tactic was at once an expression of [students'] frustration with the older generation and their approach to civil rights[.]").

333. Paulette Brown, *The Civil Rights Act of 1964*, 92 Wash. U. L. Rev. 527, 527 (2014) (noting that "1963 and 1964 saw sit-ins . . . [which] were televised and brought the Civil Rights movement in to the American home. . . . From this era of protest and violence was born the Civil Rights Act of 1964").

334. Michael J. Klarman, *Brown, Racial Change, and the Civil Rights Movement*, 80 Va. L. Rev. 7, 85 (1994); Lassiter, *supra* note 111, at 1401–02 (citing Michael J. Klarman, *How Brown Changed Race Relations: The Backlash Thesis*, 81 J. Am. Hist. 81 (1994)).

335. Lassiter, *supra* note 111, at 1404 (noting scholarly debate between Michael Klarman and David Garrow regarding whether "Brown directly inspired the civil rights demonstrations that followed"); *see also* Klarman, *Civil Rights Law*, *supra* note 136, at 436 ("Tushnet's implicit premise is that the litigation campaign was instrumental in the postwar transformation of American race relations, yet much of the evidence cited in the book seems to be in tension with that assumption.").

336. *See* Bernstein & Somin, *supra* note 119, at 601–02 (highlighting the necessity of an enforceable Jim Crow legal system to sustain racial hierarchies in the South and the power of judicial decisions threatening to upend that status quo); Dudziak, *supra* note 137, at 444 (arguing that social norms and the law constitute each other and that Brown had a large impact on U.S. foreign affairs).

337. Schmidt, *Social Movements*, *supra* note 80, at 176 (noting Brown-Nagin's conclusion "that there are few—and perhaps no—predictable patterns when it comes to the interplay between social activism and the legal system[]").

a dynamic, mutually constitutive one."[338] The same would almost certainly be true for a large-scale remedy granted in a climate rights case. The ways in which such a decision would indirectly impact society beyond the courtroom would be impossible to predict and inherently difficult to identify precisely.

IV. Highlighting Risks

So far, this Article has explored the potential upsides of strategic climate rights litigation regardless of whether it ultimately results in wins or losses in the courtroom. Yet, all legal strategies come with potential downsides, and strategic climate rights litigation is no exception. Part IV explores the risks inherent in this strategy and their potential for mitigation.

A. Courtroom Losses

Legal scholars have raised concerns that an unfavorable decision on the issue of standing in cases like *Juliana* could inhibit environmental plaintiffs' ability to establish standing in future cases.[339] Indeed, federal courts have already relied on the Ninth Circuit's dismissal of *Juliana* as persuasive precedent in decisions to dismiss other cases.[340] On the other hand, the Ninth Circuit dismissal contained determinations favorable to the plaintiffs upon which courts have also relied. In *Hueter v. Haaland*, the District Court of Hawai'i decided the governmental defendants' failure to regulate commercial fishing in a particular marine reserve was "fairly traceable" to plaintiffs' harms resulting from commercial fishing there.[341] To support this ruling, they applied the Ninth Circuit's articulated standard for evaluating the causation element of standing in *Juliana*: causation is established "even if there are multiple links in the [causal] chain, . . . as long as the chain is not hypothetical or tenuous."[342]

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338. Jane S. Schacter, *Skepticism, Culture, and the Gay Civil Rights Debate in a Post-Civil-Rights Era*, 110 Harv. L. Rev. 684, 719 (1997).

339. Julia Rosen, *Is It Our Constitutional Right to Live in a World Safe from Climate Change?*, L.A. Times (June 3, 2019), https://perma.cc/F5UY-QVP8 (quoting Ann Carlson's concern that a ruling in *Juliana* restricting standing could "leave the government essentially immune from being sued for policies involving climate change[]"); Lesley Clark, *Environmental Lawyers Are Worried About the New Youth Climate Case*, E&E News (Jan. 5, 2024), https://perma.cc/V2C8-BVXF (noting the same risk for the *Genesis v. EPA* case); Dan Farber, *The Children's Crusade*, Legal Planet (Dec. 14. 2023), https://perma.cc/XW5M-WMPF.

340. *See, e.g.*, Miller v. Hughs, 471 F. Supp. 3d 768, 778 (W.D. Tex. 2020) (relying on the *Juliana* decision to demonstrate that the reasoning behind the nonjusticiability determination in *Rucho v. Common Cause* extends beyond the context of political gerrymandering); Day v. Henry, 686 F. Supp. 3d 887, 894 (D. Ariz. 2023) (noting that plaintiffs' complaint runs up against similar redressability concerns as those faced in *Juliana*).

341. Hueter v. Haaland, No. CV 21-00344 JMS-KJM, 2022 WL 479794, at *10 (D. Haw. Feb. 16, 2022). This case was ultimately dismissed on other procedural grounds.

342. *Id.* (quoting Juliana v. United States, 947 F.3d 1159, 1169 (9th Cir. 2020)).

Despite the mixed precedential outcome of *Juliana*'s Ninth Circuit decision, potential exists for future rulings that are more uniformly unfavorable to the plaintiffs and to the potential standing of future litigants. For example, a federal court could dismiss a climate rights case in a way that fundamentally undermines the *Massachusetts v. EPA* ruling that granted standing to climate litigants against the U.S. government. This general risk is inherent to strategic litigation more broadly, but it is especially salient for strategic climate rights cases given their envelope-pushing legal claims as well as recent trends in the jurisprudence of federal courts as outlined in Part II.B.

At the same time, the constitutional rights and public trust doctrine claims at stake in strategic climate rights litigation are unique, mitigating the concern that they will create applicable negative precedent for more typical statutory and tort-based environmental lawsuits.[343] In addition, the majority of strategic climate rights litigation cases are taking place in state courts where concerns about modern trends in the federal judicial bench are less salient.

Still, it is undeniable that federal climate rights cases like *Genesis B. v. EPA* encounter increased risk of creating counterproductive precedent given the current makeup of the Supreme Court. At the same time, the urgency of climate change action counsels against holding back on legal advocacy approaches until the make-up of the federal judiciary is less antagonistic to unenumerated fundamental rights and the big government solutions that will be necessary to combat the climate crisis. It is possible that projected Category 1 and Category 3 impacts of strategic climate rights litigation in the near term may be significant enough to offset the downstream hazards of an adverse final courtroom decision. It is also possible that an adverse ruling could lead to significant Category 4 impacts on wider society. Climate advocates should carefully and strategically weigh these potential risks and benefits when deciding whether to bring climate rights cases and when determining how to approach them strategically.

Another risk is that courtroom losses for strategic climate rights litigation could have dampening indirect impacts on climate action more generally by disheartening climate activists. Judicial rulings that deride plaintiffs for contributing to their own harm or that sanction fossil fuel companies as providing a service to society could prove to be particularly demoralizing.[344] The risk that these losses could discourage future climate advocacy and even negatively affect the mental health of the often youthful plaintiffs in climate rights cases is important to consider and mitigate through realistic communication and responsible lawyering practices.

At the same time, an alternative potential outcome is that such courtroom losses have significant motivating indirect impacts. Youth plaintiffs in strategic climate rights litigation have already demonstrated an ability to take courtroom losses and craft them into a compelling advocacy narrative, particularly in the

343. Clark, *supra* note 339 (quoting Andrea Rodgers as saying that *Genesis B. v. EPA* "is not an environmental statutory case, . . . [but rather it] is a human rights and a children's rights case, and it needs to be viewed and analyzed through that lens[]").

344. Bouwer, *supra* note 236, at 374–75.

Juliana case.[345] When the Ninth Circuit dismissed *Juliana*, noting that "the plaintiffs' case must be made to the political branches or to the electorate at large, the latter of which can change the composition of the political branches through the ballot box[,]"[346] it neatly sidestepped the fact that many of the youth plaintiffs were too young to vote themselves and that the climate emergency will only grow more and more dire as they await their eighteenth birthdays. One of these plaintiffs, Nathan B., drew attention to this fact by asserting, "[T]he court has abandoned its role as the necessary constitutional balance for children, a voteless population. We are now left flailing in the rough seas of political expediency."[347] Several legal scholars have picked up on this catch-22 scenario as well. [348]

Such appeals against perceived judicial unfairness and neglect can stimulate further climate action.[349] In particular, advocates may use courtroom losses as a rallying cry for the climate cause in the face of a recalcitrant judiciary,[350] positioning themselves as defenders of justice against oppositional courts.[351] In this way, a loss in court has the potential "to highlight more intensely the injustice suffered by the group[,] . . . incentiviz[ing] more aggressive organization and advocacy."[352] Additionally, as discussed in Part III.D, losses in strategic climate rights litigation have motivated unsuccessful plaintiffs to shift their advocacy strategy to more favorable legal fora outside the courtroom.[353]

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345. *See supra* text accompanying notes 279–84.
346. Juliana v. United States, 947 F.3d 1159, 1175 (9th Cir. 2020).
347. *Press Release: 9th Circuit Denies* En Banc *Review for* Juliana v. United States*; Youth Plaintiffs Will Take Their Case to Supreme Court*, Our Children's Trust (Feb. 10, 2021), https://perma.cc/3TJM-KD6D [hereinafter *Press Release*].
348. Burkett, *supra* note 99, at 151 ("The political branches are inaccessible to the kids who cannot cast the ballots that have meaningful impact on near-term decisionmaking—decisionmaking that will have very long-term consequences."); May & Daly, *supra* note 1, at 60–61 ("Further, the court consoled, . . . the plaintiffs could appeal to the elected branches, the very branches the court agreed caused and refused to fix the problem in the first place . . . and the branches to which the plaintiffs, *as youths lacking the franchise*, have no recourse.").
349. Kempf, *supra* note 12, at 1035–36. *See generally* Bouwer, *supra* note 236, at 374 (noting the power of even failed climate tort cases to increase public awareness and harm transgressors' reputations, thereby changing their risk calculus). NeJaime, *supra* note 23, at 969 ("[S]ocial movement advocates treat litigation loss as a routine part of their social-change campaigns. They plan for wins and losses and use losses to shape strategies in other venues.").
350. Levy, *supra* note 12, at 482–83; NeJaime, *supra* note 23, at 980 (noting the ability of advocacy organizations to turn negative decisions into "a positive appeal for change").
351. *Press Release*, *supra* note 347 (quoting Julia Olson, lead attorney for the *Juliana* plaintiffs, as saying, "The Ninth Circuit has deprived people in that Circuit the ability to seek a resolution of a real controversy with their government[] and hear a controversy about harm to the health and safety of children. It goes against Supreme Court precedent and the precedent of every other Circuit. That travesty cannot stand.").
352. NeJaime, *supra* note 23, at 984.
353. *See supra* text accompanying notes 318–24. *See generally* NeJaime, *supra* note 23, at 989 ("Loss in the U.S. Supreme Court, or more generally in the federal courts, might prompt a reworked strategy that focuses on state-based venues."); *id.* at 998 ("[L]itigation loss, whether at the federal or state level, may prompt a shift to a more legislative or administrative strategy while also providing a useful way to communicate the need for action in these venues.").

B. Resource Misallocation[354]

A takeaway from the analysis in this Article is that climate advocacy resources should be allocated according to a recognition of strategic climate rights litigation's supportive rather than driving role in achieving social change. Doing so will maximize the contribution that climate rights cases can provide to the broader climate movement. Such litigation's primary role of facilitating awareness and advocacy through Category 3 and Category 4 impacts and its secondary role of changing the law through Category 1 and Category 2 impacts are both only influential in so far as they stimulate climate action on the ground. Skeptics such as Gerald Rosenberg worry that courtroom-based strategies may "act as 'fly-paper' for social reformers who succumb to the 'lure of litigation[]'"[355] at the expense of other crucial avenues for enacting change, such as more directly implementing the renewable energy transition.[356] From this perspective, "time, energy, and money that could be spent on mobilization, political organizing, and direct action are instead spent on attempting to convince an institution that ultimately has relatively little ability to bring about change."[357]

Lawyers, as disproportionately well-paid, high-status members of society who are therefore relatively insulated from the worst impacts of climate change, must guard against the moral hazard[358] of advocating for litigation strategies that are substantively in their wheelhouse but that may have a relatively low chance of meaningful success within an otherwise oppressive system.[359] Even well-intentioned legal advocates may hesitate to engage potentially more fruitful strategies that fail to favor their skill set or that extend beyond their legal imagination.[360]

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354. Note that this section, and the whole Article, specifically isolates and interrogates the "strategic" aspect of strategic climate rights litigation. Costs and benefits accruing to individual plaintiffs from the resources invested in such cases are very important to consider as well and should be weighed carefully, although they are outside the analytical scope of this Article.

355. Rosenberg, The Hollow Hope, *supra* note 178, at 572.

356. Bustos, *supra* note 12, at 12 ("[L]itigation requires significant resources, potentially drawing away time and money that could be devoted to more effective types of advocacy.").

357. NeJaime, *supra* note 23, at 951–52; Gerald Torres, *Legal Change*, 55 Clev. St. L. Rev. 135, 136 (2007) ("[E]xcessive belief in the efficacy of litigation leads to a misallocation of resources by social change activists."); Bernstein & Somin, *supra* note 119, at 593 (noting that *Brown*'s revisionist scholars see litigation as "largely unproductive" in bringing about social change and focusing too much on litigation strategies can "retard[] the progressive agenda").

358. *See* Paul Krugman, The Return of Depression Economics and the Crisis of 2008, 63 (2009) (defining moral hazard as "any situation in which one person makes the decision about how much risk to take, while someone else bears the cost if things go badly[]").

359. Rosenberg, *Courting Disaster*, *supra* note 126, at 813 ("Litigation is an elite, class-based strategy for change[,] . . . but without broad citizen support change will not occur."); Buckel et al., *supra* note 87, at 33 ("Law is indeed a privileged terrain of struggle.").

360. *See* Bustos, *supra* note 12, at 6 ("[A] recurring barrier in the legal sector is a lack of imagination that stymies innovation in the field, which has resulted in litigation-centered strategies dominating legal organizations.").

Fortunately, as it exists today, there are signs that strategic climate rights litigation has yet to fall into the resource misallocation trap.[361] Although it is impossible to determine the counterfactual of what might take place if all the advocates currently working on strategic climate rights litigation were working on other advocacy approaches instead, Part III (and to a smaller extent, Part II) highlights the substantial tangible benefits of their efforts. In addition, strategic climate rights litigation represents a relatively small segment of overall climate litigation in the United States, and climate litigation, in turn, is but a piece of the much larger climate movement. This movement incorporates numerous advocacy approaches that can complement and build off each other, as demonstrated by many strategic climate rights litigation plaintiffs who are deeply engaged beyond their involvement in a given case.[362] Rather than siphoning resources away from alternative climate advocacy strategies, Part III notes how such litigation has "serve[d] as a focal point for grassroots activism[,]" demonstrating that "[l]egal and political approaches to pursuing equality [are] not incompatible."[363]

C. Advocate Complacency

Strategic climate rights litigation has the power to make a significant but modest contribution to the climate movement though Category 2 courtroom wins.[364] Yet, media references that aggrandize climate rights cases can either inadvertently or intentionally frame such cases as a silver bullet for climate progress.[365] Advocates must not be lulled into thinking that filing lawsuits and winning in courts is the only necessary or even the most important strategy,[366] a

361. Aisha Saad, *Attribution for Climate Torts*, 64 Bos. Coll. L. Rev. 870, 926 (2023) (noting that the trade-off between litigation and policy advocacy in the climate movement "is not evidenced by the plurality of campaigns pursued by climate activists who support both legislative and legal action[]").

362. *See supra* text accompanying notes 312–17 (quoting Brown-Nagin, *supra* note 329, at 208).

363. Schmidt, *Social Movements*, *supra* note 80, at 177.

364. *See generally* Joshua Ulan Galperin & Douglas Kysar, *Uncommon Law: Judging in the Anthropocene*, *in* Climate Change Litig. in the Asia Pac. 15, 22 (Jolene Lin & Douglas A. Kysar eds., Cambridge Univ. Press 2020) (noting a scholarly consensus that although climate torts litigation has some strategic advantages for environmental advocacy, "a common law system alone could never be adequate to ensure environmental protection[]").

365. Bouwer, *supra* note 236, at 363 (noting that the "glamour" of the *Urgenda* case in the Netherlands "contributed to the expectation that litigation of this nature might 'save the world'") (citation omitted); *see, e.g.,* Michael Burger & Jessica Wentz, *"The Trial of the Century": A Preview of How Climate Science Could Play Out in the Courtroom, Courtesy of* Juliana v. United States, Climate L.: A Sabin Ctr. Blog (Jan. 7, 2019), https://perma.cc/WD49-KYYY; Louis Mason, *The French "Case of the Century" Ushers in New Era of Environmental Litigation*, Universal Rts. Grp. (Feb. 18, 2021), https://perma.cc/NB97-GVT9.

366. Purvi Shah, *Rebuilding the Ethical Compass of Law*, 47 Hofstra L. Rev. 11, 18 (2018) ("The work of all lawyers in this time is to walk the tightrope of doing our duty to engage valiantly and aggressively in the courts while simultaneously recognizing that law alone won't solve our communities' challenges.").

mindset to which other litigation advocacy efforts have succumbed in the past to their detriment.[367] Crucially, "heroic framing [of litigation efforts] risks contributing to a sense of complacency, an interpretation that the job is done, the grail is found, [and] the quest was successful[]" despite the fundamentally incremental nature of courtroom decisions.[368] As such, the frequent lionization of young people at the forefront of the climate advocacy movement as climate saviors[369] risks placing a debilitating burden on their shoulders.

Notably, Thurgood Marshall, the lead attorney behind *Brown,* thought school integration would be the case's inevitable and rapid result: a month after *Brown* was decided, Marshall predicted that outcome would be achieved within a year.[370] Subsequently, in what proved to be a premature declaration of victory, Marshall indicated his belief that the 1955 *Brown II* decision was "a damned good decision[]" that would successfully do away with legally mandated segregation: "the laws have got to yield! They've got to yield to the Constitution."[371] Numerous civil rights lawyers, scholars, and leaders associated with the NAACP, including Marshall himself as well as Martin Luther King Jr., would later acknowledge naivete and, in some circumstances, regret regarding the NAACP's general belief in the ability of the courts to instill social change in the context of U.S. race relations.[372]

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367. NeJaime, *supra* note 23, at 984 ("[I]n the wake of *Roe v. Wade*, the abortion-rights movement's activism declined, while the activity of opponents increased dramatically[,]" ultimately culminating in *Roe*'s reversal.); *see also* Harriger, *supra* note 153, at 169 ("After the [*Brown*] decision was announced, one account of the celebratory dinner said that the NAACP staffers at the party 'began saying the NAACP's work was done and it was just a matter of time before all of the nation's schools were integrated.'" (quoting Juan Williams, Thurgood Marshall: American Revolutionary 229 (1998))).

368. Bouwer, *supra* note 236, at 368.

369. *See, e.g.*, Matt Simon, *The Kids Suing to Save the World from Climate Change*, Wired (Nov. 8, 2019), https://perma.cc/R6EK-3VFD; Robin McKie, *Greta Thunberg: 'Only People Like Me Dare Ask Tough Questions on Climate'*, The Guardian (Oct. 11, 2020), https://perma.cc/8BAK-RCQB ("At the Vatican, [young climate activist Thunberg is] greeted by a huge crowd chanting, 'Go Greta, save the planet!'").

370. Harriger, *supra* note 153, at 169–70.

371. Kluger, *supra* note 212, at 750 (quoting Marshall in transcribed conversation with Carl Murphy).

372. Schmidt, *Freedom Comes Only from the Law*, *supra* note 139, at 1550 ("Years later Marshall would recall, 'I had thought, we'd all thought, that once we got the Brown case, the thing was going to be over.' Marshall's colleague Robert Carter would later regret the narrow focus of the NAACP on attacking de jure segregation rather than focusing on the more basic concerns of educational opportunity. 'In a sense, these men were profoundly naïve,' noted a scholar who worked with the NAACP lawyers. 'They really felt that once the legal barriers fell, the whole black-white situation would change.'") (citations omitted); King, Jr., *supra* note 182, at 118 ("When the United States Supreme Court handed down its historic desegregation decision in 1954, many of us, perhaps naively, thought that great and sweeping school integration would ensue.").

If the subsequent lengthy follow-up to the *Brown* decision serves as a template,[373] successful climate rights cases such as *Navahine* will almost certainly require ongoing litigation efforts not only to implement their favorable rulings but also to nip in the bud any attempts to backslide away from the judicial decision's mandate.[374] The relative difficulty in forcing unlawfully withheld agency action through judicial edict will likely frustrate and delay the implementation of these lawsuits. Such legal efforts would likely extend over decades as severe opposition from fossil fuel interests ensures that progress toward a renewable energy future is both slow and hard-fought, especially after policymakers exhaust the "low-hanging fruit" emission reduction strategies available in early years. Given these considerations, some lawyers engaged in strategic climate rights litigation are quick to acknowledge "that litigation isn't a silver bullet for ending the climate crisis[]" but rather one of several "levers that can be pulled to trigger necessary change[.]"[375]

A misguided belief in the power of courts to magically create change can lead to strategic neglect of the crucial tail-end work that must be done to foster and sustain the impacts of litigation efforts. For example, the "youth v. government" narrative used to describe many climate rights cases filed by young plaintiffs may help drive engagement and publicity, but it could also pose challenges to the larger climate movement. Dan Farber has argued that the *Genesis B. v. EPA* complaint in particular villainizes the very EPA officials who will be crucial actors in combatting the climate crisis and implementing the judicial remedies sought by the plaintiffs in climate rights cases.[376] Disparaging rhetoric that turns public opinion against governmental actors has the potential to limit how effective they can be in facilitating the renewable energy transition. Of course, the plaintiffs in the *Navahine* case demonstrated that this concern is likely overblown, given their success in negotiating a settlement with the Hawaiian government to come into compliance with its greenhouse gas emission reduction targets for the transportation sector.

Another risk is that strategic litigation might struggle to achieve its larger objectives in the absence of intentional planning efforts and meaningful community participation necessary to establish social legitimacy. Pushback from companies and communities negatively impacted by the renewable energy transition is likely and should be intentionally considered in litigation strategies. Failure to do so may marginalize these constituencies and limit the positive contribution

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373. *See supra* Part II.B and C.

374. Ramsden & Gledhill, *supra* note 28, at 435 ("[T]here is a need for ongoing struggle after a court decision because 'strategic litigation is concerned with the effects that these cases will have on society at large'." (quoting MALAYSIAN CENTRE FOR CONSTITUTIONALISM AND HUMAN RIGHTS, STRATEGIC LITIGATION TRAINING FOR LAWYERS: A FACILITATOR'S MANUAL, 26 (2014), https://perma.cc/6EG9-A7AZ)).

375. Jessica Bateman, *Why Climate Lawsuits Are Surging*, BBC (Dec. 7, 2021), https://perma.cc/9VHP-KB6T (quoting Brussels-based lawyer, Paul Benson).

376. Farber, *supra* note 339; *see also* Lazarus, *supra* note 103, at 1157–59.

of litigation to the broader climate movement. For example, the favorable decision in the case *Future Generations v. Ministry of the Environment* mandated the Colombian government to establish measures to prevent further deforestation of the Amazon. Unfortunately, the implementation of this ruling proceeded "with a simplistic policy path . . . criminalizing the people in the territory."[377] This approach led to the marginalization of many local *campesinos* (i.e., rural communities) as the judicial decree was imposed upon them without their input and without proper consideration of of the social context surrounding deforestation in the Amazon.[378] This implementation failure represents a substantial problem from an equity and engagement perspective. It is also indicative of a strategic blunder given the failure to plan for and properly manage potential roadblocks in pursuit of the larger climate action goal.

Conclusion

U.S. strategic climate rights litigation can contribute significantly to the broader climate movement, particularly if it heeds and addresses the risks presented in Part IV of this Article. Positive impacts of such litigation may occur both through litigation's primary mechanism of inspiring climate action through Category 3 and Category 4 indirect impacts on society and, secondarily, through Category 1 and Category 2 impacts on the law flowing from judicial rulings.

Although U.S. strategic climate rights litigation cases have seen successful outcomes in court in recent years, those successes have arisen in the form of narrow procedural[379] or injunctive[380] relief or in the form of judicial enforcement of previously established policy prescriptions.[381] Given the conservative nature and limited enforcement capacity of courts, future Category 1 and Category 2 impacts from strategic climate rights litigation's courtroom wins are likely to be similarly restricted, leading to meaningful but particularized relief. These atomized effects on the law alone do not fully capture the contribution of U.S. strategic climate rights litigation to the climate movement and the pursuit of a stabilized climate system.

Despite being difficult to precisely quantify, the Category 3 and Category 4 indirect impacts of U.S. strategic climate rights litigation on society outside the courtroom have been much more expansive. They have raised awareness on climate change through media attention on the cases themselves, and they have dispelled climate misinformation by providing public access to expert testimony

377. Eslava et al., *supra* note 33, at 74.

378. *Id.*

379. *See, e.g.*, *In re* Maui Elec. Co., Ltd. I, 408 P.3d 1 (Haw. 2017); *In re* Gas Co., LLC, 465 P.3d 633 (Haw. 2020); *In re* Hawai'i Elec. Light Co., Inc. III, 152 Haw. 352 (Haw. 2023).

380. *See, e.g.*, Held v. Montana, 560 P.3d 1235, 1260–61 (Mont. 2024).

381. *See, e.g.*, *Navahine* Settlement, *supra* note 22; Kain v. Dep't of Env't Prot., 49 N.E.3d 1124, 1142 (Mass. 2016).

delivered in trial proceedings. They have reframed the climate change narrative from a largely technocratic issue to one with a very human and youthful face. This reframing has impacted actors ranging from seasoned climate advocates to judges to political actors to everyday citizens. Category 3 and Category 4 indirect impacts have also empowered young people around the world to use their voice to advocate for a better future. Such advocacy has led to notable successes changing the law both through courtroom advocacy[382] and extrajudicially.[383]

Yet despite the relative prominence of these indirect impacts, litigators should still prioritize successful courtroom outcomes leading to direct impacts on the law. As strategic climate rights litigation moves into its third wave, narrower requests for relief are seeing higher levels of success in the courtroom.[384] Not only do these judicial wins create relatively narrow but nevertheless significant changes to the law but they also have the potential to increase attention to these cases, thereby maximizing any indirect effects deriving from that attention. By filing climate rights cases that are more likely to win in court, lawyers can optimize the potential for any resulting direct *and* indirect impacts on the wider climate movement.

The next frontier of strategic climate rights litigation extends toward intentional integration of these cases into the other advocacy approaches comprising the broader climate movement. By serving as a node through which "mobilized clients" can become involved in "integrated advocacy,"[385] climate rights cases can enhance their impacts (both direct and indirect) on climate change "demosprudence" as it continues to grow and evolve.[386]

The direct and indirect impacts of U.S. strategic climate rights litigation jointly represent an important component of the larger climate movement. Although they have potential pitfalls and cannot drive necessary climate action on their own, climate rights cases nevertheless have a significant role to play in aiding efforts to achieve a stable climate system.

382. *See, e.g.*, *Urgenda* Supreme Court Opinion, *supra* note 162; Colombian Climate Rights Case, *supra* note 161.

383. *See supra* text accompanying notes 51–54; 318–24.

384. *See* Joyce, *supra* note 98, at 290 (suggesting that climate rights litigation will be more successful if filed with narrow requests for relief).

385. Scott Cummings, *Movement Lawyering*, 27 Ind. J. Global L. Stud. 87, 98 (2020).

386. *See generally* Guinier & Torres, *supra* note 233 (defining demosprudence as "the study of the dynamic equilibrium of power between lawmaking and social movements").

Appendix: Catalogue of U.S. Strategic Climate Rights Litigation Cases[387]

#	Filing Year	Jurisdiction	Case	PTD Claim[388]	Indpt. Const. Rights Claim[389]	Expansive Relief Request[390]	Wave	Outcome as of 2024
1	2011	Alaska	Kanuk v. Alaska Dep't of Nat. Res., 335 P.3d 1088 (Alaska 2014)	Y	N	Y	First[391]	Dismissed
2	2011	Arizona	Butler v. Brewer, No. 1 CA-CV 12-0347, 2013 WL 1091209 (Ariz. Ct. App. Mar. 14, 2013)	Y	N	Y	First	Dismissed
3	2011	California	Blades v. California, No. CGC-11-510725 (Cal. Super. Ct. dismissed Feb. 7, 2012)	Y	N	Y	First	Voluntarily dismissed without prejudice

387. The author derived this catalogue of cases from three distinct sources: (1) Christiansen, *supra* note 9; (2) the Climate Law Accelerator, Human Rights and Climate Change Case Database of NYU Law as updated through November 25, 2024, https://perma.cc/W4WH-9PZ2; and (3) the Sabin Center U.S. Climate Change Litigation Database as updated through November 25, 2024, https://perma.cc/GBF9-9G6L.

388. "PTD" stands for public trust doctrine. "Y" stands for yes. "N" stands for no. Cases receive a "Y" designation when they include a legal claim based explicitly on the public trust doctrine.

389. Cases receive an "N" designation when they include no independent constitutional rights-based claims (even if they include rights-based claims embedded in their public trust doctrine claims).

390. Cases receive a "Y" designation if they include a relief request that requires substantial changes to government functioning across multiple agencies.

391. With one noted exception (case 15), "first-wave cases" are those that have a "Y" designation in the "PTD Claim" column, an "N" designation in the "Indpt. Const. Rights Claim" column, and a "Y" designation in the "Expansive Relief Request" column.

4	2011	Colorado	Martinez v. Colorado, No. 11CV4377, 2011 WL 11552495 (Colo. Dist. Ct. Nov. 7, 2011)	Y	N	Y	First	Dismissed
5	2011	Federal	Alec L. v. McCarthy, 561 Fed. App'x 7 (D.C. Cir. 2014)	Y	N	Y	First	Dismissed
6	2011	Iowa	Filippone v. Iowa Dep't of Nat. Res., 829 N.W.2d 589 (Iowa Ct. App. 2013)	Y	N	Y[392]	First	Decision for defendants on the merits
7	2011	Minnesota	Aronow v. Minnesota, No. A12-0585, 2012 WL 4476642 (Minn. Ct. App. Oct. 1, 2012)	Y	N[393]	Y	First	Dismissed
8	2011	Montana	Barhaugh v. Montana, 264 P.3d 518 (2011)	Y	N[394]	Y	First	Dismissed
9	2011	New Mexico	Sanders-Reed v. Martinez, 350 P.3d 1221 (N.M. Ct. App. 2015)	Y	N	Y	First	Summary judgment for defendants

392. Although the plaintiff limited the requested remedy to a judicial order mandating agency rulemaking, the underlying petition driving the litigation incorporated expansive requests for relief from the agency (e.g., the development of a comprehensive greenhouse gas reduction plan).
393. The plaintiff brought a public trust doctrine claim as codified in the Minnesota Environmental Rights Act but did not bring a separate rights-based argument in the case.
394. The plaintiffs invoked their right under the Montana Constitution to "a clean and healthful environment" but solely to support their claim under the public trust doctrine.

10	2011	Oregon	Chernaik v. Brown, 475 P.3d 68 (2020)[395]	Y	N	Y	First	Decision for defendants on the merits
11	2011	Texas	Texas Comm'n on Env't Quality v. Bonser-Lain, 438 S.W.3d 887 (Tex. App. 2014)	Y	N	Y[396]	First	Dismissed
12	2011	Washington	Svitak v. Washington, 178 Wash. App. 1020 (2013)	Y	N	Y	First	Dismissed
13	2012	Kansas	Farb v. Kansas, No. 12-C-1133 (Kan. Dist. Ct. June 4, 2013)	Y	N	Y	First	Dismissed
14	2012	Pennsylvania	Funk v. Commonwealth Dep't of Env't Prot., 71 A.3d 1097 (Pa. Commw. Ct. 2013)	Y	N[397]	Y[398]	First	Dismissed

395. Originally filed as Chernaik v. Kizthaber.
396. *See supra* text accompanying note 391.
397. The plaintiff invoked the right under the Pennsylvania Constitution to "clean air" and environmental preservation but in conjunction with a public trust doctrine claim.
398. *See supra* text accompanying note 392.

15	2014	Colorado	Colorado Oil & Gas Conservation Comm'n v. Martinez, 433 P.3d 22 (Colo. 2019)	N[399]	N	Y[400]	First	Decision for defendants on the merits
16	2014	Massachusetts	Kain v. Dep't of Env't Prot., 49 N.E.3d 1124 (Mass. 2016)	Y	N[401]	Y	First	Decision for plaintiffs on the merits
17	2014	Washington	Foster v. Washington Dep't of Ecology, 200 Wash. App. 1035 (2017)	Y	N[402]	Y[403]	First	Decision for defendants on the merits
18	2015	Federal	Juliana v. United States, 947 F.3d 1159 (9th Cir. 2020)	Y	Y	Y	Second[404]	Dismissed

399. Although a public trust doctrine claim did not appear in this complaint, the case centered on a rejected petition for rulemaking that incorporated arguments based on the public trust doctrine.
400. *See supra* text accompanying note 392.
401. The plaintiffs invoked their rights under the Massachusetts Constitution to "clean air" but in conjunction with their public trust doctrine claim.
402. The plaintiffs cite to Art. XVI § 1 of the Washington Constitution as a provision that expressly incorporates the public trust doctrine but does not make any other particularized rights-based claims.
403. *See supra* text accompanying note 392.
404. "Second-wave cases" are designated as those that have a "Y" designation in the "Indpt. Const. Rights Claim" column and a "Y" designation in the "Expansive Relief Request" column. Second-wave cases may have a "Y" or an "N" designation in the "PTD Claim" column.

19	2015	Hawai'i	*In re* Maui Elec. Co., Ltd. I, 408 P.3d 1 (2017)	N	Y	N	Third[405]	Decision for plaintiffs on the merits[406]
20	2015	North Carolina	Turner v. North Carolina Env't Mgmt. Comm'n, No. 15-CVS-2488 (N.C. Wake Cty. Ct. Nov. 25, 2015)[407]	Y	Y	Y[408]	Second	Dismissed
21	2015	Pennsylvania	Funk v. Wolf, 158 A.3d 642 (Pa. 2017)	Y	Y	Y	Second	Dismissed
22	2017	Alaska	Sagoonick v. Alaska I, 503 P.3d 777 (Alaska 2022)[409]	Y	Y	Y	Second	Dismissed
23	2017	Federal	Clean Air Council v. United States, 362 F. Supp. 3d 237 (E.D. Pa. 2019)	Y	Y	Y	Second	Dismissed

405. "Third-wave cases" are designated as those that have an "N" designation in the "Expansive Relief Request" column. Third-wave cases may have a "Y" or an "N" designation in the "PTD Claim" column and in the "Indpt. Const. Rights Claim" column.
406. While this case was successful for the plaintiffs, it largely represents a procedural victory, ensuring the plaintiffs had a meaningful opportunity to articulate their perspectives in Public Utilities Commission proceedings pursuant to their constitutional right to a clean and healthful environment.
407. Christiansen, *supra* note 9, at 908–09 indicates two distinct cases filed by Turner against the North Carolina Environmental Management Commission, citing a second June 6, 2018 petition for judicial review on the Our Children's Trust website. That second petition is no longer on the applicable webpage, and there is no other indication that Turner and co-plaintiffs ultimately filed the case.
408. *See supra* text accompanying note 392.
409. Originally filed as Sinnok v. Alaska.

24	2018	Federal	Animal Legal Def. Fund v. United States, No. 19-35708, 2022 WL 5241274 (9th Cir. Feb. 9, 2022)	N[410]	Y	Y	Second	Voluntary dismissal
25	2018	Florida	Reynolds v. Florida, 316 So. 3d 813 (Fla. Dist. Ct. App. 2021)	Y	Y	Y	Second	Dismissed
26	2018[411]	Hawai'i	*In re* Hawai'i Elec. Light Co., Inc. III, 526 P.3d 329 (Haw. 2023)[412]	N[413]	Y	N	Third	Decision for plaintiffs on the merits
27	2018	Washington	Aji P. v. Washington, 198 Wash. 2d 1025 (2021)	Y	Y	Y	Second	Dismissed
28	2019	Federal	Komor v. United States I, No. 4:19-cv-00293-RCC (D. Ariz. Aug. 27, 2019)	Y	Y	Y	Second	Case stayed pending resolution of *Juliana*

410. Although the complaint identifies the United States as "sovereign trustee of public lands" (at ¶ 34), it does not make an explicit public trust doctrine claim.
411. In 2018, Life of the Land, a Hawai'i non-profit organization, appealed a Hawai'i Public Utilities Commission decision to restrict their participation in proceedings related to a Power Purchase Agreement, arguing that this action denied them due process to advance their right to a clean and healthy environment under the Hawai'i Constitution. *See In re* Hawai'i Elec. Light Co., Inc. I, 145 Hawai'i 1 (2019).
412. This case came before the Hawaiian Supreme Court three different times. The first Court decision (*In re* Hawai'i Elec. Light Co., Inc. I) vindicated the due process rights of the Life of the Land appellants to have their views heard on utilities decisions that affect their constitutional right to a clean and healthful environment. The second decision (*In re* Hawai'i Elec. Light Co., Inc. II) clarified the initial ruling, and the third (*In re* Hawai'i Elec. Light Co., Inc. III) reinforced it.
413. Although a public trust doctrine claim does not appear in this appeal formally, the plaintiffs mention the public trust responsibilities of the state government as an aside.

29	2019	Hawai'i	*In re* Gas Co., LLC, 465 P.3d 633 (Haw. 2020)	Y	Y	N	Third	Decision for plaintiffs on the merits[414]
30	2020	Montana	Held v. Montana, 560 P.3d 1235 (Mont. 2024)	Y	Y	Y	Second	Decision for plaintiffs on the merits
31	2020	Washington	Conservation Nw. v. Comm'r of Pub. Lands, 514 P.3d 174 (Wash. 2022)	Y	N[415]	N	Third	Dismissed
32	2021	Federal	Komor v. US II, No. 1:21-cv-01560-GPG (D. Colo. filed June 9, 2021)	Y	Y	Y	Second	Filed (pending)
33	2021[416]	Hawai'i	*In re* Maui Elec. Co., Ltd. II, 506 P.3d 192, (Haw. 2022) *as corrected* (Mar. 3, 2022)	Y	N[417]	N	Third	Decision for defendants on the merits

414. *See supra* text accompanying note 406.
415. The plaintiffs cite to Art. XVI § 1 of the Washington Constitution as a provision that expressly incorporates the public trust doctrine, but they do not make any other particularized rights-based claims.
416. In 2021, the Pono Power Coalition (Pono Power) challenged the Hawai'i Public Utilities Coalition's approval of a power purchase agreement.
417. Although the Public Utility Commission allowed the Pono Power plaintiffs to participate in the power purchase agreement proceedings in recognition of its members' right to a clean and healthy environment under the Hawaiian Constitution, the Pono Power plaintiffs did not raise constitutional rights claims independent of the public trust doctrine claims in their case complaint.

34	2022	Federal	Komor v. United States III, No. 22-15851, 2023 WL 4313136 (9th Cir. July 3, 2023)	Y	Y	Y	Second	Dismissed
35	2022	Hawai'i	Navahine F. v. Hawai'i Dep't of Transp., No. 1CCV-22-0000631 (Haw. Cir. Ct. settled June 20, 2024)	Y	Y	N	Third	Settled
36	2022	New York	Fresh Air for the Eastside, Inc. v. New York, 217 N.Y.S.3d 381 (N.Y. App. Div. 2024)	N	Y	N	Third	Dismissed
37	2022	Utah	Natalie R. v. Utah, No. 220901658, 2022 WL 20814755 (Ut. Dist. Ct. Nov. 9, 2022)	N	Y	Y[418]	Second	On appeal at Utah Supreme Court
38	2022	Virginia	Layla H. v. Virginia, 902 S.E.2d 93 (Va. Ct. App. 2024)	Y	Y	Y[419]	Second	Dismissed
39	2023	Federal	Genesis B. v. EPA, No. 2:23-cv-10345 (C.D. Cal. May 8, 2024)	N	Y	N	Third	Dismissed with leave to amend

418. Requested relief in this case combines numerous petitions for expansive declaratory relief paired with a request for "further or alternative relief as the Court deems just and equitable." If the court were to grant the requested declaratory relief, it would flow logically that some form of expansive injunctive relief would be necessary to prevent further violations of the plaintiffs' rights.
419. *See supra* note 58.

40	2023	Federal	Atencio v. New Mexico, No. D-101-CV-2023-01038 (N.M. Dist. Ct. June 10, 2024)	N[420]	Y	Y	Second	Motion to dismiss denied
41	2023	Federal	Healthy Gulf v. Sec'y, Louisiana Dep't of Nat. Res. I, No. 2024-CA-0286, 2024 WL 5199231 (La. App. 4 Cir. Dec. 23, 2024)	Y	N[421]	N	Third	Decision for defendants on the merits
42	2023	Pennsylvania	Clean Air Council v. Pennsylvania, No. 379 MD 2023 (Pa. Commw. Ct. filed Aug. 23, 2023)	Y	Y[422]	N	Third	Filed (pending)
43	2024	Alaska	Sagoonick v. Alaska II, No. 3AN-24-06508CI (Al. Sup. Ct. filed May 22, 2024)	Y	Y	N	Third	Filed (pending)
44	2024	Federal	Healthy Gulf v. Sec'y, Louisiana Dep't of Nat. Res. II, No. 10-21077 (La. Dist. Ct. filed Apr. 11, 2024)	Y	N[423]	N	Third	Filed (pending)

420. Although public trust doctrine claims did not appear in this complaint formally, public trust responsibilities of the state government are mentioned briefly as an aside.
421. The plaintiffs cite to Art. IX § 1 of the Louisiana Constitution as a provision that expressly incorporates the public trust doctrine, but they do not make any other particularized rights-based claims.
422. Plaintiffs invoke Art. I, Sec. 27 of the Pennsylvania Constitution to support their public trust claims and, separately, to support claims based on citizens' environmental rights.
423. See *supra* text accompanying note 421.

45	2024	New York	W. New York Youth Climate Council v. New York State Dep't of Transp., No. 808662/2024, 2024 WL 5050061 (N.Y. Sup. Ct. Nov. 15, 2024)	N	Y	N	Third	Preliminary injunction granted[424]
46	2024	New York	Riders Alliance v. Hochul, No. 156696/2024, 2024 WL 4349682 (N.Y. Sup. Ct. Sept. 30, 2024)	N	Y	N	Third	Motion to dismiss denied
47	2024	Pennsylvania	Save Carbon County v. Pennsylvania, No. 240302915, 2024 WL 1311138 (Pa. Comm. Pl. filed Mar. 26, 2024)[425]	Y	N[426]	N	Third	Filed (pending)

424. The court granted the request for a preliminary injunction based on the plaintiffs' claims under the State Environmental Quality Review Act not their claims under the Green Amendment to the state constitution.
425. Note that although the complaint in this case does not explicitly mention climate change, its clear objective is to enjoin a cryptocurrency operation because of its greenhouse gas emissions and other environmental pollutants.
426. The plaintiffs cite to Art. I § 27 of the Pennsylvania Constitution as a provision that expressly incorporates the public trust doctrine but do not make any other particularized rights-based claims.