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# CLIMATE EXCEPTIONALISM IN COURT

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**ABSTRACT**—Across a range of cases, fossil fuel companies, government actors, and some judges have conceded that climate change is an exceptional phenomenon, only to argue that its exceptional nature is a reason to keep climate change out of court. These parties and judges thus seek to avoid the adjudication of climate cases on the merits, even when the neutral application of existing law would provide for jurisdiction in these cases. We term this phenomenon "climate jurisdiction exceptionalism."

This Article provides a comprehensive account of climate jurisdiction exceptionalism, focusing on two main threads: Article III standing and state court jurisdiction. First, parties (and some courts) make various arguments about why federal courts should deny standing to plaintiffs in cases related to climate change. These arguments tend to track three themes: that climate change is too general, too uncertain, and too political an issue to support jurisdiction. Second, defendants offer a range of novel and boundary-pushing arguments about federal jurisdiction to oust state courts of jurisdiction over climate cases with the ultimate goal of getting federal courts to dismiss.

This Article then offers the normative case against climate jurisdiction exceptionalism as practiced in the United States as well as in some foreign courts. We show that arguments for climate jurisdiction exceptionalism run counter to settled notions of access to justice, federalism, and the separation of powers—and they do so without providing any justification for such exceptional treatment. We further show that exceptional doctrine cannot be limited to any small, discernible category of cases but instead is likely to spill over into the law of jurisdiction more broadly. We also suggest that a particularly pernicious version of climate jurisdiction exceptionalism exists when judges and parties deny that they are being exceptional. This hidden exceptionalism has the same problems as more public exceptionalism while also undermining accountability and risking further harm to the rule of law.

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## INTRODUCTION

Climate change is an exceptional phenomenon—exceptional in its global scope, in the complexity of the solutions it demands, and in the slowness of governments and powerful private actors in confronting it head-on.[1] One might think that the exceptional urgency of climate change demands that courts stretch current jurisdictional doctrines to hear climate cases, bending constitutional and statutory rules as needed. At the very least, one might anticipate that courts would hear cases that meet the traditional justiciability standards on the merits. But as we explore in this Article, some courts have done—and many parties have requested—exactly the opposite: bending constitutional and statutory rules to ensure that climate cases are *not* heard on the merits. We term this phenomenon "climate jurisdiction exceptionalism."

What does climate jurisdiction exceptionalism look like? It looks like car companies and a federal judge deciding that calculating the damages from climate change is too complex and too political for a federal court, despite countless cases unrelated to climate change in which courts calculate complicated and politically controversial damages.[2] It looks like judges in

[1] As Hoesung Lee, then-chair of the United Nations Intergovernmental Panel on Climate Change, remarked, "The pace and scale of what has been done so far and current plans are insufficient to tackle climate change . . . . We are walking when we should be sprinting." Brad Plumer, *Climate Change Is Speeding Toward Catastrophe. The Next Decade Is Crucial, U.N. Panel Says*, N.Y. TIMES (last updated Sept. 13, 2023), https://www.nytimes.com/2023/03/20/climate/global-warming-ipcc-earth.html [https://perma.cc/B365-WHK7]. Indeed, global emissions from fossil fuels are now at or near record highs. Kate Abnett, *Global CO2 Emissions from Fossil Fuels to Hit Record High in 2023 -Report*, REUTERS (Dec. 5, 2023, 12:20 AM), https://www.reuters.com/business/environment/global-co2-emissions-fossil-fuels-hit-record-high-2023-report-2023-12-05/ [https://perma.cc/5LTA-D9R3].

[2] *E.g.*, California v. Gen. Motors Corp., No. C06-05755, 2007 WL 2726871, at *15–16 (N.D. Cal. Sept. 17, 2007) (finding no jurisdiction over a claim that climate change constitutes a nuisance).

the United States (and the European Union) concluding that plaintiffs have no standing to sue because, even though they can point to concrete and particular injuries, other parties also experience their own climate harms.[3] And it looks like defendants arguing that state courts should not be able to hear state law claims against oil companies because international issues are inappropriate for state courts[4]—an argument they seek to prove by observing that (we kid you not) plaintiffs call the phenomenon "global" warming.[5]

Climate jurisdiction exceptionalism has scored victories in courts such as the U.S. Courts of Appeals for the Second and Ninth Circuits and the U.S. District Court for the Northern District of California.[6] One could readily imagine it succeeding one day soon in the current Supreme Court.[7]

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[3] *See infra* Sections II.A.2.d–II.A.2.e (collecting cases); *see also* Appellant's Opening Brief at 14, Juliana v. United States, 947 F.3d 1159 (9th Cir. 2020) (No. 18-36082) ("Plaintiffs submit that they 'exemplify [the] vulnerabilities' resulting from global climate change, but that does not convert their generalized grievance into a sufficiently particularized one. Though climate change might injure the individual Plaintiffs in different ways, those differences are unresponsive to the generalized grievance problem." (alteration in original) (citations omitted)).

[4] *See, e.g.*, Petition for a Writ of Certiorari at 24, Am. Petroleum Inst. v. Minnesota, 144 S. Ct. 620 (2024) (No. 23-168), 2023 WL 5431546, at *24 (arguing that climate adaptation litigation filed "to date [is] intended 'effectively [to] override' the national-security, economic, and energy policy of the United States" (second alteration in original)), *denying cert. to* 63 F.4th 703 (8th Cir. 2023). In a different petition, oil companies acknowledged that "[t]he stakes in [these cases] could not be higher," but then explained that the high stakes were not about the effects of climate change but instead about the litigation's "serious threat to one of the Nation's most vital industries." Petition for a Writ of Certiorari at 31, Sunoco LP v. City & Cnty. of Honolulu, 2025 WL 76706 (2025) (No. 23-947), *denying cert. to* 537 P.3d 1173 (Haw. 2023).

[5] *See, e.g.*, Defendants-Appellants' Opening Brief at 24, City of Hoboken v. Exxon Mobil Corp., 45 F.4th 699 (3d Cir. 2022) (No. 21-2728), 2021 WL 5358853, at *24 ("The Complaint's repeated use of the term '*global* warming' makes clear that the alleged causes of Plaintiff's alleged injuries are not confined to particular sources, cities, counties, states, or even countries. Rather, the claims implicate inherently national and international activities and interests." (citations omitted)).

[6] *See, e.g.*, *Juliana*, 947 F.3d at 1175 (applying an exceptional test for redressability to justify dismissal of climate claims); City of New York v. Chevron Corp., 993 F.3d 81, 103 (2d Cir. 2021) (applying an exceptional test for preemption to justify dismissal of climate claims); City of Oakland v. BP P.L.C., 325 F. Supp. 3d 1017, 1025–29 (N.D. Cal. 2018) (declining to find federal common law and dismissing a climate case); *see also infra* Sections II.A–II.B (discussing a range of climate exceptionalism arguments and decisions).

[7] Just in January 2024, fossil fuel companies being sued by the State of Minnesota, although denied certiorari, garnered the support of one Justice (Justice Brett Kavanaugh) for Supreme Court review of their exceptionalist jurisdictional arguments. *See Am. Petroleum Inst.*, 144 S. Ct. 620 (2024), *denying cert. to* 63 F.4th 703 (8th Cir. 2023). In another effort by the fossil fuel industry to obtain Supreme Court review of their exceptionalist arguments, the Supreme Court requested the views of the Solicitor General on the question of certiorari, which may have signaled that the Court was seriously considering granting certiorari. Madeline Lyskawa, *DOJ Tells Justices Boulder Climate Suits Should Stay in Colo.*, LAW360 (Mar. 16, 2023, 8:58 PM), https://www.law360.com/articles/1586963 [https://perma.cc/GD9J-DFUJ] (discussing *Board of County Commissioners v. Suncor Energy (U.S.A.) Inc.*, 25 F.4th 1238 (10th Cir. 2022), *cert. denied*, 143 S. Ct. 1795 (2023)).

Climate jurisdiction exceptionalism also has long been a mainstay in the legal advocacy for the fossil fuel industry as well as the occasional government defendant.[8] If climate jurisdiction exceptionalism were to prevail, we would have a paradoxical (and undesirable) situation wherein an issue that arguably should receive exceptional attention will instead be excluded from consideration on the merits, while courts remain open to hear cases regarding less pressing, less exceptional issues. And importantly, climate jurisdiction exceptionalism is not some Thayerian bid to ensure that the Legislature decides important issues, but instead part of a broader agenda to stop all government action against climate change.[9]

This Article pulls together various defendants' arguments and judges' statements, covering a range of constitutional and statutory doctrines, to demonstrate how they constitute climate jurisdiction exceptionalism.[10] These arguments typically make one of two pitches. Either they seek dismissal of federal cases through standing or related justiciability doctrines,[11] or they seek to oust state courts of jurisdiction through broad interpretations of federal issues.[12] In practice, both arguments suggest that the exceptional nature of climate change should result in judicial avoidance. Scholarly literature has addressed these various doctrines sporadically;[13] by grouping and analyzing them together, we demonstrate that they constitute a general phenomenon of creating an exceptionally high bar to adjudicate climate claims.

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[8] *See infra* note 111 and accompanying text.

[9] *See* James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 155–56 (1893) (arguing that courts should defer to legislatures on constitutional interpretation).

[10] *See infra* Part II.

[11] *See infra* Section II.A.

[12] *See infra* Section II.B.

[13] For legal scholarship that urges the federal courts to be open to climate suits but that does not develop the exceptionalism argument we make here, see Albert C. Lin, *Dodging Public Nuisance*, 11 U.C. IRVINE L. REV. 489 (2020), which argues that courts should embrace public nuisance claims, including but not limited to climate claims, and Benjamin Ewing & Douglas A. Kysar, *Prods and Pleas: Limited Government in an Era of Unlimited Harm*, 121 YALE L.J. 350 (2011), which criticizes courts for assuming climate issues are too complex to adjudicate without taking evidence regarding specific climate disputes and without framing the cases in terms of the common law tradition of addressing complex social problems via tort law; and also see Mark Nevitt, *The Legal Crisis Within the Climate Crisis*, 76 STAN. L. REV. 1051 (2024), which argues that a range of legal rules, practices, and doctrines impede meaningful responses to the climate crisis and need to be reformed or altered; Rachel Rothschild, *The Jurisprudence of Justice Gorsuch and Future Efforts to Address Climate Change*, 122 MICH. L. REV. ONLINE 48 (2023), which discusses administrative law issues in climate litigation; Roger Michalski & Emily S. Taylor Poppe, *Civil Procedure for the Anthropocene*, 104 B.U. L. REV. 1729 (2024), which discusses procedural issues and climate change; and Andrew Hammond, *On Fires, Floods, and Federalism*, 111 CALIF. L. REV. 1067 (2023), which discusses welfare policy and climate change.

Furthermore, this Article explains why this climate jurisdiction exceptionalism is unacceptable on normative grounds.[14] One set of concerns relates to access to justice. Jurisdiction exceptionalism allows courts to avoid ruling on the substance of climate claims without giving the parties an opportunity for extensive argument or the development of any factual evidence. In so doing, exceptionalism deprives both the courts and the larger polity of potential gains from that argument and factual evidence.[15] Exceptionalism also allows judges who might be resolved to rule for climate defendants on the merits to avoid taking accountability for these potentially controversial holdings—for example, that tort law offers no financial redress to communities that must find a way to physically move to new locations lest they be swallowed by the rising seas.[16]

Not only does climate jurisdiction exceptionalism harm access to justice, it also disrupts the settled federal–state balance of judicial federalism. As we demonstrate, climate defendants seek to oust the jurisdiction of state courts they deem hostile by invoking increasingly attenuated theories of federal jurisdiction. Even if federal courts were right to dismiss climate cases as a matter of federal law, at least some climate cases sounding in state law should be heard by state courts—and those states should be able to make their own determinations about the proper scope of their own jurisdiction. Exceptionalism thus deprives those states of their authority on an issue of profound importance.[17]

Moreover, institutionally, climate jurisdiction exceptionalism shifts the balance—unjustifiably in our view—between the courts and Congress. Even if climate claims warrant special jurisdictional restrictions, Congress is the institution best positioned to make that determination and to ensure that any restrictions on access to justice and intrusions on federalism remain carefully circumscribed.[18] In sum, climate jurisdiction exceptionalism harms the performance and public accountability of our judiciary and the coherence of federal jurisdiction doctrine generally. It should not be allowed to prevail.

Climate defendants and allied judges, we should note, often claim that they are behaving unexceptionally—that the doctrines they support, when applied neutrally, keep climate change out of court. Descriptively, we show

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[14] *See infra* Part III.

[15] *See generally* ALEXANDRA D. LAHAV, IN PRAISE OF LITIGATION (2017) (arguing that litigation is key to a well-functioning democracy).

[16] *See* discussion of the *Kivalina* litigation *infra* Section II.A.2.d.

[17] *See* Zachary D. Clopton, *Catch and Kill Jurisdiction*, 121 MICH. L. REV. 171, 177–80, 210 (2022) (explaining the strategy of asserting federal jurisdiction to capture state claims only to dismiss them on nonmerits grounds).

[18] *See infra* Section III.B.

that these claims are false.[19] Just because parties and judges *say* that they are applying existing doctrine unexceptionally does not make it so. Normatively, we suggest that "hidden exceptionalism" is actually worse. It has all the negative consequences just described for access to justice, federalism, and the separation of powers, and it has added costs for transparency and the integrity of the law.[20]

The Article proceeds as follows. Part I briefly summarizes the current landscape of climate litigation. Part II analyzes the various components of climate jurisdiction exceptionalism and assesses its success to date. Part III develops the range of normative arguments against climate jurisdiction exceptionalism.

We conclude this Article with a discussion of the flip side of the phenomenon we critique: whether courts should apply lower- or laxer-than-usual jurisdictional requirements for climate claims. At least in the United States, current law already seems to allow for jurisdiction over even expansive climate claims.[21] But to the extent that is not true, the exceptional nature of the climate crisis and the need for informed public debate *may* support courts reaching to find that climate claims are justiciable. Ultimately, however, our primary conclusion is that current law—if applied unexceptionally—does a reasonably good job of allocating responsibility to and among courts. Making exceptions to that allocation would do more harm than good. Climate change is an exceptional, and exceptionally dangerous, phenomenon, but that does not mean that we should want judges to act exceptionally in response.

## I. CLIMATE CHANGE AND CLIMATE CHANGE LITIGATION: AN OVERVIEW

To situate this Article, we begin with a brief introduction to climate litigation in U.S. courts. Climate cases are too voluminous to review in

[19] *See infra* Part II.

[20] *See infra* Section III.A.

[21] *See, e.g.*, Massachusetts v. EPA, 549 U.S. 497, 526 (2007) (holding that the Court had jurisdiction over a petition to compel the EPA to determine whether greenhouse gas (GHG) emissions from automobiles endangered the public health and welfare); California v. EPA, 72 F.4th 308, 313 (D.C. Cir. 2023) (holding that the court had jurisdiction over a petition challenging airline-emissions regulations as insufficiently geared to curbing GHG emissions). Courts in other countries have also adjudicated a range of climate claims. *See, e.g.*, Mathur v. Ontario, 2020 ONSC 6918, paras. 2, 260–65 (Can.) (finding that the court had jurisdiction over claim that GHG emissions targets violated Canada's Charter); Case C-107/05, Comm'n v. Finland, 2006 E.C.R. I-00010 (finding the court had jurisdiction to determine whether Finland had met its climate obligations under an EU directive).

totality,[22] but they can be divided into two categories: "mitigation" and "adaptation."[23] Each type has its own structure, sources of law, and preferred remedies.

Mitigation claims seek to force government actors to take steps to limit or reduce the extent of climate change. These claims are further divisible based on whether the source of law is statutory or constitutional. In statutory mitigation claims, climate plaintiffs sue to compel government actors to implement stricter greenhouse gas (GHG) emissions standards on the basis of existing statutes and regulations.[24] An example of this type of case is *Massachusetts v. EPA*, in which states sued the EPA under the Clean Air Act seeking to compel the agency to regulate greenhouse gases.[25] The Supreme Court held that the plaintiffs had standing to bring their claims, and the Court remanded the issue to the EPA to reconsider its determination that it lacked jurisdiction to regulate greenhouse gas emissions.[26]

Plaintiffs also sue to compel stricter government mitigation based on constitutional or quasi-constitutional theories. For example, in *Juliana v. United States*, twenty-one young people sued the federal government, arguing it had a constitutional obligation to act against climate change.[27] Plaintiffs grounded their allegations in the Fifth and Ninth Amendments, as well as the public trust doctrine. The case has been ping-ponging between the district court and the Ninth Circuit, the latter of which held that the plaintiffs lacked standing to sue.[28]

Adaptation claims are brought by plaintiffs who have borne or will bear the harms of climate change, suing those who allegedly caused those

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[22] For an indispensable tracking of climate cases, see *U.S. Climate Change Litigation*, SABIN CTR. FOR CLIMATE CHANGE L., https://climatecasechart.com/us-climate-change-litigation [https://perma.cc/GW8C-UUH6].

[23] There is arguably a third category—the fight by nonstate entities and individuals to force federal agencies not to engage in mitigation per se but rather to assess and include climate impacts in their decision-making process. *See, e.g.*, Ctr. for Biological Diversity v. U.S. Dep't of the Interior, No. 22-01716, slip op. at 8–10 (D.D.C. Nov. 1, 2023) (denying standing to a nongovernmental organization (NGO) challenging permit decisions that allegedly did not include sufficient consideration of climate impacts). NGOs have sometimes elided the standing issues in such cases by focusing on an individual plaintiff's geographical nexus to the areas in question. *See, e.g.*, Diné Citizens Against Ruining Our Env't v. Bernhardt, 923 F.3d 831, 841–43 (10th Cir. 2019) (holding that an organization with members in a concentrated geographic area harmed by agency action had Article III standing).

[24] For a recent discussion of statutory climate change litigation regarding infrastructure, see Hari M. Osofsky, *Litigating Climate Change Infrastructure Impacts*, 118 NW. U. L. REV. ONLINE 149, 155–59 (2023).

[25] *Massachusetts*, 549 U.S. at 534–35.

[26] *Id.* at 526.

[27] Complaint for Declaratory and Injunctive Relief at 1–2, 84–94, Juliana v. United States, 339 F. Supp. 3d 1062 (D. Or. 2018) (No. 15-01517), *rev'd*, 947 F.3d 1159 (9th Cir. 2020).

[28] *See Juliana*, 947 F.3d at 1171–73.

harms. A recurrent version of the adaptation suit involves a state or local government suing fossil fuel companies for the harms from climate change.[29] Some of these suits respond to specific, discrete events, such as New York City's lawsuit following Hurricane Sandy.[30] Others seek to remedy more general effects of climate change, such as the suit by San Mateo, California against fossil fuel companies based on rising sea levels.[31]

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[29] For analyses of the climate change adaptation litigation, see generally Albert C. Lin & Michael Burger, *State Public Nuisance Claims and Climate Change Adaptation*, 36 PACE ENV'T L. REV. 49 (2018), and David A. Dana, *Public Nuisance when Politics Fails*, 83 OHIO ST. L.J. 62, 106–14 (2022). For a recent adaptation case, see, for example, City & Cnty. of Honolulu v. Sunoco LP, 39 F.4th 1101, 1106 (9th Cir. 2022), which involved allegations "that oil and gas companies knew about climate change, understood the harms energy exploration and extraction inflicted on the environment, and concealed those harms from the public" and that "[d]efendants' deception caused harms from climate change, like property damage from extreme weather and land encroachment because of rising sea levels." In contrast with adaptation suits against private oil companies, plaintiffs tend to frame suits about extreme weather and flooding against governments as a negligent taking of private property by mismanaging flood control infrastructure the government constructed; these suits can readily be understood as implicitly about government failure to adapt to climate change. *See, e.g.*, St. Bernard Par. Gov't v. United States, 887 F.3d 1354 (Fed. Cir. 2018) (involving allegations that the United States' failure to maintain a shipping channel it had constructed resulted in the taking of private property during Hurricane Katrina); David Dana, *Climate Change Adaptation Through the Prism of Individual Rights*, *in* CLIMATE LIBERALISM: PERSPECTIVES ON LIBERTY, PROPERTY AND POLLUTION (Jonathan H. Adler ed., 2023) (discussing litigation related to government failure to adapt to climate change). There have, however, been a few unsuccessful, essentially unnoticed efforts by U.S. litigants to argue explicitly that they have been harmed by the failure of governments to meet alleged duties to adapt to climate change. *See, e.g.*, Korsinsky v. EPA, No. 05-859, 2005 WL 2414744 (S.D.N.Y. Sept. 29, 2005) (denying plaintiff's claim that global warming may cause future injury).

[30] Although New York's suit built on its experience with Sandy, New York also expansively sought damages for climate change adaptation. Complaint at 5, 63, City of New York v. BP P.L.C., 325 F. Supp. 3d 466 (S.D.N.Y. 2018) (No. 18-182) ("[G]lobal warming is already causing the City to suffer increased hot days, flooding of low-lying areas, increased shoreline erosion, and higher threats of catastrophic storm surge flooding even more severe than the flooding from Hurricane Sandy. Because there is a lag between emission of greenhouse gases and global warming impacts, these harms will continue and worsen in coming years, as previously emitted greenhouse gases from Defendants' products further heat the atmosphere."). Arguably the most focused adaptation suit was one brought by private property owners, not a state, for property damage resulting specifically from Hurricane Katrina. Class Action Complaint at 11, 14, Comer v. Murphy Oil USA, Inc., 839 F. Supp. 2d 849, 864 (S.D. Miss. 2012) (No. 11-220-RHW); *see also Comer*, 839 F. Supp. 2d at 864 (dismissing suit as nonjusticiable), *aff'd*, 718 F.3d 460 (5th Cir. 2013).

[31] *See* Cnty. of San Mateo v. Chevron Corp., 960 F.3d 586, 593–94 (9th Cir. 2020). The adaptation suits brought by states and localities generally invoke the same theories of liability, but they focus in part on the distinctive problems and costs each state or locality has and will bear from climate change. For example, Rhode Island's suit addresses the risk of inundation to its low-lying coastal areas, whereas Minnesota's suit addresses the risk of tick-borne disease in wooded areas. *See* Complaint at 99, Rhode Island v. Chevron Corp., No. PC-2018-4716 (R.I. Super. Ct. July 2, 2018) (discussing models suggesting climate change will result in the inundation of seventeen miles of land, encompassing buildings and residences of over 10,000 people); Complaint at 67, Minnesota v. Am. Petroleum Inst., No. 62-20-3837 (Minn. 2d Jud. Dist. Ct. June 24, 2020) ("Climate change is expected to shift the geographic range and the distribution of disease-carrying insects and pests, exposing more Minnesotans to ticks that carry Lyme

Mitigation and adaptation claims differ in both form and function. The mitigation claims arguably seem to fit in the category of "public law" claims,[32] inasmuch as they seek to compel the government to adopt new regulation or (arguably) seek to compel large private actors to act as if new public regulation had been adopted. By contrast, the adaptation claims more closely resemble "private law claims," in that they seek damages for past harms and for future harms that result from the defendants' allegedly wrongful conduct.[33] The distinction between public and private resemblance, however, is disputed by many in the fossil fuel industry. These parties contend that adaptation claims are as public as mitigation claims because the payment of adaptation damages would have similar effects to the adoption of climate regulation by virtue of increasing the effective market cost of fossil fuels.[34] Although this argument does have a certain logic, the general structure of adaptation suits more closely reflects private law, and it is far from clear whether the payment of adaptation damages in practice would substantially raise fossil fuel prices and thereby substantially reduce fossil fuel consumption.

An additional distinction is whether the plaintiffs are governments. In the U.S. context, states and localities are frequent plaintiffs in climate change litigation.[35] As mentioned, states and localities are leading the way in

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disease and mosquitoes that transmit viruses such as West Nile. . . . In Minnesota, increasing temperatures and the expected accompanying changes in seasonal patterns are expected to result in earlier seasonal tick activity and an expansion in tick habitat range, increasing the risk of human exposure to ticks.").

[32] *See generally* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976) (defining public law as litigation focused on "the vindication of constitutional or statutory policies").

[33] *See, e.g.*, Ewing & Kysar, *supra* note 13, at 357 (describing adaptation suits for tort damages as building on "a classical liberal guarantee of official avenues for individuals to seek civil redress" and in that way "as conservative [even if] they may appear radical"); *see also* Jim Rossi & J.B. Ruhl, *Adapting Private Law for Climate Change Adaptation*, 76 VAND. L. REV. 827, 832 (2023) (emphasizing the key role of "doctrines and practices central to the private law of torts, property, and contracts" in understanding and managing adaptation claims).

[34] For example, oil companies and the American Petroleum Institute have characterized New Jersey's adaptation-cost lawsuit as an effort to regulate nation climate policy via the courts. Madeline Lyskawa, *Oil Companies Slam NJ's Remanded Climate Change Suit*, LAW360 (Oct. 17, 2023, 5:25 PM), https://www.law360.com/articles/1733476/oil-companies-slam-nj-s-remanded-climate-change-suit [https://perma.cc/9Q75-ANTA] ("[T]he companies and the API said although the state-law labels of [New Jersey's] claims may be familiar to the state court, their substance and reach are extraordinary, accusing the state of seeking to regulate the nationwide marketing and distribution of their fossil fuel products on which billions of people outside New Jersey rely on. 'Allowing such claims to proceed would . . . usurp the power of the legislative and executive branches (both federal and state) to set climate policy . . .' the companies and the API said.").

[35] Localities, as creatures of states, can be regarded as states for these purposes. *See, e.g.*, Pratheepan Gulasekaram, Rick Su & Rose Cuison Villazor, *Anti-Sanctuary and Immigration Localism*, 119 COLUM.

adaptation claims against the fossil fuel industry. States and localities also bring mitigation claims, principally relying on statutory or regulatory frameworks, that build on the successful model of *Massachusetts v. EPA*.[36] That said, we have seen few, if any, constitutional mitigation claims by states (against the United States) or localities (against states or the federal government), perhaps because the constitutional claims at the federal level may seem too unproven or "radical" for any state or locality to embrace. State suits against the federal government alleging constitutional harms to state citizens also face the doctrinal hurdle of *Massachusetts v. Mellon*,[37] a 1923 Supreme Court decision providing that, when it comes to protecting citizens' federal constitutional rights, "it is the United States, and not the state, which represents them as parens patriae."[38]

Private parties can bring both adaptation and mitigation claims. In practice, though, adaptation suits by nonstate plaintiffs are altogether absent in the current wave of lawsuits.[39] We think there are two reasons for this. First, as discussed below in Part II, nonstate plaintiffs have faced, and continue to face, greater standing hurdles than state plaintiffs. Second, many states and localities are already pursuing a litigation agenda of seeking to compel major energy companies to fund adaptation needs. Private party plaintiffs have been involved along with states and localities in statutory and administrative mitigation litigation, typically joining with a state or locality as a party and taking advantage of the rule that standing only requires that one of the plaintiffs in a lawsuit has met the Article III requirements.[40] And we have found some examples of private parties independently (without states or localities) filing constitutional mitigation claims, perhaps because they feel more willing to offer "radical" theories of government liability.[41]

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L. REV. 837, 853 (2019) ("[T]he 'state creature' idea . . . allows cities to become the state when contesting federal law . . . ."). *See generally* Zachary D. Clopton & Nadav Shoked, *The City Suit*, 72 EMORY L.J. 1351 (2023) (describing cities as plaintiffs, including in climate cases).

[36] 549 U.S. 497, 534–35 (2007).

[37] 262 U.S. 447 (1923).

[38] *Id.* at 486.

[39] *See U.S. Climate Change Litigation*, *supra* note 22.

[40] *See, e.g.*, California v. EPA, 72 F.4th 308 (D.C. Cir. 2023) (holding that petitioners had standing because California was one of the petitioners, but also holding on the merits that EPA had not acted arbitrarily or otherwise unlawfully); *see also Massachusetts*, 549 U.S. at 518 (holding that petitioners, including the state of Massachusetts, had standing to challenge EPA's decision not to regulate GHG emissions from automobiles because "[o]nly one of the petitioners needs to have standing to permit us to consider the petition for review.").

[41] *See, e.g.*, First Amended Complaint for Declaratory and Injunctive Relief at 1, G.P. *ex rel.* Genesis B. v. EPA, No. 23-10345-AGR (C.D. Cal. May 20, 2024) (alleging that EPA is violating children's constitutional rights by failing to take adequate mitigation measures); Juliana v. United States, 947 F.3d

## II. IDENTIFYING THE VERSIONS OF CLIMATE JURISDICTION EXCEPTIONALISM

Defendants, of course, resist climate litigation of all types. Among the various arguments made by defendants are ones that seek to oust jurisdiction because of something exceptional about climate change—what we call climate jurisdiction exceptionalism.

Climate jurisdiction exceptionalism has two main versions. The first entails imposing higher standing requirements on climate plaintiffs, such that their suits are or could be dismissed without a hearing on the merits, whereas non-climate claims would remain and be adjudicated.[42] Though standing exceptionalism is possible in federal and state court,[43] we focus here on the federal courts, which appear to be at the leading edge of this phenomenon.[44]

The second version of climate jurisdiction exceptionalism relates to the interaction between state and federal courts.[45] Climate plaintiffs often prefer to be in state court in part because they believe that state courts are more likely to reach the merits of their cases.[46] Defendants' responses argue that climate change justifies special rules—special constructions of federal statutes—such that the climate suits brought in state court alleging state law claims will be removable to federal court, even when non-climate state law claims would be adjudicated in state court.[47] Thus, both versions are about adopting exceptional takes on applicable law to prevent hearing climate claims on the merits.

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1159 (9th Cir. 2020) (involving allegations, *inter alia*, that oil and gas exploration and production policies of the United States violate the U.S. Constitution); Animal Legal Def. Fund v. United States, 404 F. Supp. 3d 1294 (D. Or. 2019), (dismissing claims that federal land-management policies are unconstitutional, due in part to their climate impacts), *appeal dismissed*, No. 19-35708, 2022 WL 5241274 (9th Cir. Feb. 9, 2022).

[42] *See infra* Section II.A.

[43] For more on standing in state courts, see generally Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833 (2001).

[44] *See, e.g.*, cases cited *infra* Section II.A.2. One reason federal courts are at the leading edge, we think, is that defendants pressing these arguments prefer to be in federal court. *See infra* Section II.B. Another, though we lack empirical support for it, is that anecdotally it appears that many state courts have been recently taking their cues from the federal courts on issues of standing and justiciability.

[45] For more on this interaction, see generally Clopton, *supra* note 17.

[46] *See* Tim McMahan & Jose Abarca, *Insight: State Courts Are a Proper Climate Change Battleground*, BLOOMBERG L. (June 12, 2024, 3:01 AM), https://news.bloomberglaw.com/environment-and-energy/insight-state-courts-are-a-proper-climate-change-battleground [https://perma.cc/PF9W-ZMEZ] (explaining that municipalities bringing climate claims against energy companies "feel much better having a perceived home-field advantage with state court judges applying state court laws, with judicial forums that may be more sympathetic to establishing remedies for climate related impacts").

[47] *See infra* Section II.A.2.b.

### *A. Standing Exceptionalism*

Article III standing is grounded in three legal elements: injury in fact, traceability, and redressability.[48] Climate standing exceptionalism is grounded in three polemical premises: that climate change claims are too general, too uncertain, and too political. This Section first reviews federal standing doctrine generally, explaining its three core elements and related doctrine. The Section then explains the ways in which exceptionally high standing requirements have been proposed for, and sometimes applied to, climate plaintiffs in federal court—tracking the three claims of too general, too uncertain, and too political.[49]

#### *1. Federal Standing Doctrine, in Brief*

Article III of the U.S. Constitution limits federal court jurisdiction to cases and controversies.[50] On the basis of a few words, the Supreme Court has built a complicated standing jurisprudence. Article III standing, as articulated by the Court, serves separation of powers purposes by ensuring courts do not encroach unduly upon the spheres of the other branches of government.[51] It also serves judicial economy and reliability purposes by ensuring courts are only tasked to decide claims they are genuinely equipped to evaluate and redress.[52] If a plaintiff fails to meet the Article III standing requirements, the court must dismiss the claim for lack of jurisdiction.

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[48] *See, e.g.*, Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992).

[49] We acknowledge the view of certain commentators that Supreme Court standing decisions are so inconsistent that they must be chalked up more to politics than anything like a faithful application of coherent doctrine. *See, e.g.*, Richard Pierce, *Standing Doctrine Is Inconsistent and Incoherent*, YALE J. ON REGUL.: NOTICE & COMMENT (Sept. 7, 2021), https://www.yalejreg.com/nc/standing-law-is-inconsistent-and-incoherent/ [https://perma.cc/FD4U-PU29] (arguing that the Justices use standing doctrine to further goals unrelated to standing). There is very limited empirical work to date considering Supreme Court standing decisions as a dataset, however, and what work there is does not necessarily support the view that those decisions are generally made contrary to plausible applications of established standing doctrine, instead merely reflecting the political ideology of the presidents who nominated the Justices. *See* Heather Elliott, *Does the Supreme Court Ignore Standing Problems to Reach the Merits? Evidence (or Lack Thereof) from the Roberts Court*, 23 WM. & MARY BILL RTS. J. 189, 194 (2014). Moreover, it seems highly plausible to us that lower federal courts—which are subject to reversal unlike the Supreme Court—generally consider themselves more bound to follow the standing doctrine in good faith.

[50] U.S. CONST. art. III, § 2, cl. 1.

[51] United States v. Texas, 143 S. Ct. 1964, 1969 (2023) ("Standing doctrine helps safeguard the Judiciary's proper—and properly limited—role in our constitutional system."); TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2203 (2021) (emphasizing the separation of powers purpose of standing); *see also* Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 890–93 (1983) (arguing that standing properly ought to exclude courts from ruling on issues of "public policy" due to the separation of powers).

[52] *See* Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459, 469–74 (2008).

On a purely formal level, there is no disagreement that Article III standing has three requirements.[53] First, a plaintiff must allege an injury in fact where the injury is concrete and particularized. Courts have understood this requirement to demand that the injury is "imminent."[54] Second, the injury alleged must be fairly traceable to the defendant's conduct.[55] Third, it must be likely that the court can redress the injury; "redressability . . . asks whether the requested relief is likely to redress the party's injury."[56] The "fairly traceable" and "redressability" components for standing are "two facets of a single causation requirement."[57] It is clear that the "fairly traceable" standard of causation is much less demanding than the "likely" standard of causation applicable to the redressability requirement.[58] Applying these prongs, there seems to be broad consensus that states have long had a special status with respect to standing ("special solicitude"), with the federal courts holding them to a less stringent standard than nonstate plaintiffs.[59]

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[53] As the Court explained in *Lujan v. Defenders of Wildlife*:

> [T]he plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is . . . concrete and particularized . . . . [T]here must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." [And] it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

504 U.S. 555, 560–61 (1992) (fourth and fifth alterations in original) (citations omitted).

[54] Whitmore v. Arkansas, 495 U.S. 149, 155 (1990).

[55] Murthy v. Missouri, 144 S. Ct. 1972, 1986 (2024).

[56] California v. Texas, 141 S. Ct. 2104, 2129 (2021).

[57] Allen v. Wright, 468 U.S. 737, 753 n.19 (1984) (quoting CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS § 13, at 68 n.43 (4th ed. 1983)). "The two are distinct insofar as [fair traceability] examines the connection between the alleged misconduct and injury, whereas redressability analyzes the connection between the alleged injury and requested judicial relief." Wash. Env't Council v. Bellon, 732 F.3d 1131, 1146 (9th Cir. 2013); *see also* FDA v. All. for Hippocratic Med., 144 S. Ct. 1540, 1555 (2024) (describing the two elements as "flip sides of the same coin" (quoting Sprint Commc'ns Co. v. APCC Servs., Inc., 554 U.S. 269, 288 (2008))); Juliana v. United States, 947 F.3d 1159, 1183 n.8 (9th Cir. 2020) (Staton, J., dissenting) (quoting *Wash. Env't Council*, 732 F.3d at 1146).

[58] A plaintiff need only show that it is plausible that the alleged injury is fairly traceable to the defendant's conduct at the motion-to-dismiss stage. *See Lujan*, 504 U.S. at 561 ("[E]ach element [of standing] must be supported in the same way as any other matter on which the plaintiff bears the burden of proof . . . ."); Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (holding that, in order to survive a motion to dismiss, a complaint must have "facial plausibility"); *see also* Humane Soc'y of the U.S. v. Vilsack, 797 F.3d 4, 8 (D.C. Cir. 2015) (relying on plaintiff's allegations, accepted as true for purposes of a motion to dismiss, being "plausible" in holding the plaintiff had alleged facts sufficient to support standing).

[59] Massachusetts v. EPA, 549 U.S. 497, 520 (2007); *see also* Bradford Mank, *Should States Have Greater Standing Rights than Ordinary Citizens?:* Massachusetts v. EPA*'s New Standing Test for States*, 49 WM. & MARY L. REV. 1701, 1771–72 (2008) (exploring special status of states and agreeing that states may bring suit when the "federal government has allegedly failed to perform a statutory or constitutional

Finally, though not a question of "standing" per se, the Supreme Court has held that certain claims involve political questions that are so clearly within the purview of the political branches of government that a court cannot constitutionally redress plaintiffs' injuries, even if an enforced court order could achieve that in theory.[60] But the Supreme Court has strongly suggested that the constitutional limits on justiciability on political question grounds are very narrow indeed.[61]

*2. Examples of Standing Exceptionalism*

Fossil fuel companies, some government allies, and a number of judges and Justices have suggested that plaintiffs lack standing to bring any claims based on their past, current, or possible future injuries from climate change. While these arguments are framed as the *unexceptional* application of standing rules to the *exceptional* phenomenon of climate change, we construe these arguments differently: as arguments implying that climate cases merit applying higher, more stringent standing rules than the norm. In other words, what is exceptional, in our terms, is not climate change as a phenomenon but rather the implicitly higher standing threshold that is being urged for all climate claims.

Standing exceptionalism reduces to three broad arguments—that climate claims are too general for there to be standing, that climate claims

duty"); William Baude & Samuel L. Bray, *Proper Parties, Proper Relief*, 137 HARV. L. REV. 153, 174–75 (2023) (criticizing normatively special state standing and suggesting some Justices may be less than fully enthusiastic about it, but acknowledging it remains part of formal standing doctrine); Calvin Massey, *State Standing After* Massachusetts v. EPA, 61 FLA. L. REV. 249, 276 (2009) (arguing that broad state standing "does no more than ensure that executive discretion is confined within the boundaries of the Constitution and federal law"); Jonathan Remy Nash, *Null Preemption*, 85 NOTRE DAME L. REV. 1015, 1073–74 (2010) (arguing that states are entitled to "special solicitude" to challenge an agency's failure to regulate when state law is preempted); Robert A. Weinstock, Note, *The Lorax State: Parens Patriae and the Provision of Public Goods*, 109 COLUM. L. REV. 798, 834 (2009) (asserting that states have special standing to object to the Executive's implementation of federal law); Sara Zdeb, Note, *From* Georgia v. Tennessee Copper *to* Massachusetts v. EPA*: Parens Patriae Standing for State Global-Warming Plaintiffs*, 96 GEO. L.J. 1059, 1067–70 (2008) (tracing the origins of the special solicitude idea). Professor Tara Leigh Grove has powerfully argued that states are entitled to special solicitude only when they seek to enforce or defend state law. If courts adopted Grove's view—though they have not to date—states would have special standing with respect to adaptation costs claims under state law but not with respect to statutory or constitutional mitigation claims under federal law. *See* Tara Leigh Grove, *When Can a State Sue the United States?*, 101 CORNELL L. REV. 851, 854–55 (2016).

[60] Baker v. Carr, 369 U.S. 186, 217 (1962) (creating a six-factor test to determine whether a case is a nonjusticiable political question, including consideration of whether there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department" and of "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion"); *see also* Nixon v. United States, 506 U.S. 224, 228–29 (1993).

[61] Zivotofsky *ex rel.* Zivotofsky v. Clinton, 566 U.S. 189, 194–95 (2012) (describing the political question doctrine as "a narrow exception to" the judiciary's general obligation "to decide cases properly before it").

are too uncertain for there to be standing, and that climate claims are too political for there to be standing. The too-general argument is channeled through the particularized-injury requirement. The too-uncertain argument is channeled both through the traceability requirement and the redressability requirement. The too-political argument is also channeled through the requirements of traceability and redressability, with the latter being used as a kind of proxy for political question consideration. In the current litigation landscape, it is the too-political arguments in both of its forms that have the most traction, and that, if accepted, could preclude any climate-related claims from receiving any meaningful consideration by the federal courts.

In each area, we show how courts are reviving arguments in recent climate cases that the Court raised and rejected in *Massachusetts v. EPA*. We also show how those arguments fall short of justifying a blanket bar on standing in climate cases. Where relevant, we also observe instances of these arguments, albeit in somewhat different doctrinal language, in climate litigation outside the United States.

*a. Too general: particularized injury*

A core element of standing is that the plaintiff must identify an injury in fact which must be both "concrete and particularized."[62]

It seems clear to us that plaintiffs in both mitigation and adaptation climate suits can plausibly allege that they have and will be concretely harmed by climate change. Such injuries are, almost inherently, particular: on every (injury) metric from property damage, to economic productivity, to health, to aesthetics, climate change has and reasonably can be predicted to have different effects from place to place, community to community, and population group to population group. In a suit for adaptation costs for the effects of the climate on the New Jersey seashore, such as *Platkin v. Exxon*, the injury is what happened and will happen in that particular geographic locale—a locale that is, by definition, not the same as all others or indeed perhaps any other.[63] This does not mean that any climate suit can go forward. The onus is on the plaintiff to identify the particularized injury. But our point here is that climate change causes many concrete and particularized injuries that would permit many potential plaintiffs to have standing.

Nonetheless, defendants in climate suits have opposed standing by building on the truism that climate change has and will affect all U.S. residents and communities to some degree. According to this argument, because climate change is a generalized, universal source of harm, no one

[62] *Lujan*, 504 U.S. at 560.

[63] Complaint and Jury Demand at 140–58, Platkin v. Exxon Mobil Corp., No. 001797-22 (N.J. Super. Ct. Law Div. Oct. 18, 2022) (detailing specific harms and adaptation needs in New Jersey).

victim can allege a particularized injury.[64] As the argument goes, it would be inappropriate for courts to hear cases brought by any specific, ostensible victims of climate change. Thus, every case should be thrown out.

This argument, though, contradicts well-established case law. According to decisions outside the climate context, it is clear that even when a phenomenon or illegal course of conduct injures a large number of people, plaintiffs can satisfy the particularized-injury requirement. As the Supreme Court explained in *FEC v. Akins*:

> This Court, the FEC adds, has often said that "generalized grievance[s]" are not the kinds of harms that confer standing. . . .
>
> The kind of judicial language to which the FEC points, however, invariably appears in cases where the harm at issue is not only widely shared, but is also of an abstract and indefinite nature—for example, harm to the "common concern for obedience to law." . . .
>
> Often the fact that an interest is abstract and the fact that it is widely shared go hand in hand. But their association is not invariable, and where a harm is concrete, though widely shared, the Court has found "injury in fact." . . . This conclusion seems particularly obvious where (to use a hypothetical example) large numbers of individuals suffer the same common-law injury (say, a widespread mass tort) . . . .[65]

Thus, Article III only keeps generalized grievances out of the courts if they are abstract (which the climate plaintiffs' alleged injuries certainly are not). Economic harm, such as the financial losses resulting from flooding

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[64] *See, e.g.*, Appellants' Opening Brief, *supra* note 3, at 13 ("Plaintiffs' asserted injuries are archetypal generalized grievances. They arise from a diffuse, global phenomenon that affects every person in their communities, in the United States, and throughout the world."); Defendants' Brief in Support of Motion for Summary Judgment at 4, Held v. State, No. 2020-307 (Mont. 1st Jud. Dist. Ct. Feb. 3, 2023) ("While Plaintiffs' alleged injuries need not be exclusive to them for standing purposes, the injuries 'must be distinguishable from the injury to the public generally[.]' . . . Plaintiffs have alleged a wide range of injuries—including physical, mental, emotional, aesthetic, cultural, and economic injuries—which they claim are attributable to climate change caused by the challenged statutes. However, if Plaintiffs' claims are true, every single member of the general public suffers those very same injuries." (citations omitted) (quoting Mont. Env't Info. Ctr. v. Dep't of Env't Quality, 988 P.2d 1236, 1242 (Mont. 1999)); *see also* Ctr. for Biological Diversity v. U.S. Dep't of the Interior, 563 F.3d 466, 478 (D.C. Cir. 2009) ("[C]limate change is a harm that is shared by humanity at large, and the redress that Petitioners seek—to prevent an increase in global temperature—is not focused any more on these petitioners than it is on the remainder of the world's population. Therefore, Petitioners' alleged injury is too generalized to establish standing.").

[65] 524 U.S. 11, 23–24 (1998) (alteration in original) (first quoting Brief for the Petitioner at 28, *Akins*, 524 U.S. 11 (No. 96-1590); and then quoting L. Singer & Sons v. Union Pac. R. Co., 311 U.S. 295, 303 (1940)); *see also* Jewel v. Nat'l Sec. Agency, 673 F.3d 902, 910 (9th Cir. 2011) (determining that even when an experience "was shared by virtually every American, th[e] widespread impact was not dispositive of standing because [plaintiff's] grievance was nonetheless concrete and particular").

and seashore loss due to climate change, is the "kind of economic harm" that is "at the core of injury in fact."[66]

Courts in the climate context have, so far, applied this unexceptional approach to standing. Consider the landmark case *Massachusetts v. EPA*.[67] After the EPA denied a petition to begin the process of regulating carbon dioxide and three other GHGs under the Clean Air Act,[68] plaintiffs sued. The agency vigorously contended that Plaintiffs lacked standing.[69] Judge David B. Sentelle on the D.C. Circuit agreed, articulating in a concurrence the universality argument against climate change standing.[70] In the Supreme Court, Chief Justice John Roberts, in dissent, echoed Judge Sentelle's argument: "The very concept of global warming seems inconsistent with this [particularized-injury] requirement," Chief Justice Roberts argued, because "[g]lobal warming is a phenomenon 'harmful to humanity at large.'"[71] The logical implication of Chief Justice Roberts's view is that no one—not state plaintiffs or private plaintiffs, not plaintiffs bringing mitigation or adaptation or any sort of climate change claim—could ever have standing.

But the *Massachusetts v. EPA* majority opinion rejects Chief Justice Roberts's universality arguments, explaining that the fact "[t]hat these climate-change risks are 'widely shared' does not minimize Massachusetts' interest in the outcome of this litigation."[72] Though *Massachusetts v. EPA* involved state plaintiffs, its logic was not necessarily limited to such cases. For example, the Ninth Circuit in *Juliana v. United States* recognized that the reasoning of *Massachusetts v. EPA* logically applied in a suit brought only by private plaintiffs, explaining that the young people who had filed suit adequately alleged particularized harms from climate change, even if everyone potentially faced some harm from climate change.[73] The *Juliana* court, striking an unexceptional note, relied on Ninth Circuit precedent and the majority opinion in *Massachusetts v. EPA*.[74]

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[66] Elliott, *supra* note 52, at 482.

[67] 549 U.S. 497 (2007).

[68] Brief for the Federal Respondent in Opposition at 3, *Massachusetts*, 549 U.S. 497 (No. 05-1120), 2006 WL 1358432, at *3.

[69] *Massachusetts*, 549 U.S. at 505–06, 517.

[70] Massachusetts v. EPA, 415 F.3d 50, 60 (D.C. Cir. 2005) (Sentelle, J., dissenting in part and concurring in the judgment) ("[Global warming] is harmful to humanity at large. Petitioners are or represent segments of humanity at large. This would appear to me to be neither more nor less than the sort of general harm eschewed as insufficient to make out an Article III controversy by the Supreme Court and lower courts."), *rev'd*, 549 U.S. 497.

[71] *Massachusetts*, 549 U.S. at 541 (Roberts, C.J., dissenting) (quoting 415 F.3d at 60 (Sentelle, J., dissenting in part and concurring in the judgment)).

[72] *Id.* at 522 (majority opinion).

[73] Juliana v. United States, 947 F.3d 1159,1168 (9th Cir. 2020).

[74] *Id.*

In this context, it is helpful to contrast the injury-in-fact discussion in *Juliana* with Justice Brett Kavanaugh's recent discussion of standing in *FDA v. Alliance for Hippocratic Medicine*. Seeking to cut back on generalized grievances, Justice Kavanaugh wrote that "Article III does not contemplate a system where 330 million citizens can come to federal court whenever they believe that the government is acting contrary to the Constitution or other federal law."[75] Or more elaborately, "a citizen does not have standing to challenge a government regulation simply because the plaintiff believes that the government is acting illegally. . . . Nor may citizens sue merely because their legal objection is accompanied by a strong moral, ideological, or policy objection to a government action."[76] Compare these descriptions of plaintiffs lacking standing with the Ninth Circuit in *Juliana*: "Jaime B., for example, claims that she was forced to leave her home because of water scarcity, separating her from relatives on the Navajo Reservation. Levi D. had to evacuate his coastal home multiple times because of flooding. These injuries are not simply conjectural or hypothetical[.]"[77]

Yet the briefing in *Juliana* shows that the exceptionalist claim that climate plaintiffs cannot have particularized standing continues and will continue to be part of legal advocacy and discourse in the United States. In that case, the United States, as defendant, squarely made this argument, relying in part on Chief Justice Roberts' dissent in *Massachusetts v. EPA*:

> Indeed, the "very concept of global warming seems inconsistent with" the "particularization requirement," because "[g]lobal warming is a phenomenon harmful to humanity at large." . . . Plaintiffs' concerns about global climate change are the exact sort of "generalized grievances" that are "more appropriately addressed in the representative branches." . . .
>
> Plaintiffs submit that they "exemplify [the] vulnerabilities" resulting from global climate change, but that does not convert their generalized grievance into a sufficiently particularized one. Though climate change might injure the individual Plaintiffs in different ways, those differences are unresponsive to the generalized grievance problem.[78]

In other words, climate exceptionalism lives.

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[75] FDA v. All. for Hippocratic Med., 144 S. Ct. 1540, 1556 (2024).

[76] *Id.*

[77] *Juliana*, 947 F.3d at 1168 (citations omitted) (internal quotation marks omitted). We could offer similar—i.e., concrete and particularized—descriptions of allegations from mitigation suits filed by state and local governments.

[78] Appellants' Opening Brief, *supra* note 3, at 14 (alterations in original) (citations omitted) (first quoting Massachusetts v. EPA, 549 U.S. 497, 541 (2007) (Roberts, C.J., dissenting); and then quoting Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 126 (2014)).

Finally, though our focus here is U.S. law, we pause to observe that this argument is not a uniquely American phenomenon. Recently, a similar argument prevailed in the EU's General Court and Court of Justice in the *Carvalho* case, a case that many commentators have condemned forcefully.[79] Ten families, including children, sought to compel the EU to adopt stricter, more ambitious targets for emissions reductions. In structure, the *Carvalho* case paralleled the U.S. *Juliana* litigation in that the plaintiffs were individuals arguing that the government's failure to act violated core legal rights of citizens vulnerable to the effects of climate change. In *Carvalho*, both the General Court of the European Union and the European Court of Justice dismissed the litigation without reaching the merits.[80] As the General Court explained, the plaintiffs' claims were too general for standing under EU law:

> It is true that every individual is likely to be affected one way or another by climate change . . . . However, the fact that the effects of climate change may be different for one person than they are for another does not mean that, for that reason, there exists standing to bring an action against a measure of general application. . . . [That] approach would have the result of . . . *locus standi* for all without the criterion of individual concern within the meaning of the case-law . . . .[81]

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[79] *See, e.g.*, Orla Kelleher, *Systemic Climate Change Litigation, Standing Rules and the Aarhus Convention: A Purposive Approach*, 34 J. ENV'T L. 107, 128–32 (2022) (critiquing the *Carvalho* decision).

[80] Case T-330/18, Carvalho v. Eur. Parliament, ECLI:EU:T:2019:324, para. 50 (May 8, 2019), *aff'd*, Case C-565/19, ECLI:EU:C:2021:252, para. 47 (Mar. 25, 2021) ("[A]s is noted by the Parliament, the appellants' reasoning, in addition to its generic wording, leads to the conclusion that there is *locus standi* for any applicant, since a fundamental right is always likely to be concerned in one way or another by measures of general application such as those contested in the present case.").

[81] *Id.* A different European court, the European Court of Human Rights (ECHR), deviated from *Carvalho*'s too-general-to-be-adjudicated approach to climate claims in *Verein KlimaSeniorinnen Schweiz v. Switzerland*, an action in which a group of elderly Swiss women argued that Switzerland is violating their rights to life under European law by taking insufficient climate action. The ECHR acknowledged the risk of an unlimited number of climate actions inasmuch as climate change affects everyone but then concluded that the elderly Swiss women faced particular and unusually great risks from climate change sufficient to render their claims justiciable—although the court articulated a very open-ended test as to when alleged injuries are specific and compelling enough for justiciability in the climate context. *See* Verein KlimaSeniorinnin Schweiz & Others v. Switzerland, App. No. 53600/20, paras. 483–88 (Apr. 9, 2024), https://hudoc.echr.coe.int/eng?i=001-233206 [https://perma.cc/L5LW-FBRU] ("In this connection, the Court will have due regard to circumstances such as the prevailing local conditions and individual specificities and vulnerabilities. The Court's assessment will also include, but will not necessarily be limited to, considerations relating to: the nature and scope of the applicant's Convention complaint, the actuality/remoteness and/or probability of the adverse effects of climate change in time, the specific impact on the applicant's life, health or well-being, the magnitude and duration of the harmful effects, the scope of the risk (localised or general), and the nature of the applicant's vulnerability.").

To put it simply, the EU courts seemed to accept the universality arguments that *Massachusetts v. EPA* rejected.

*b. Too uncertain, take one: uncertain as to traceability*

Climate change as a phenomenon is rife with factual uncertainties. There are factual uncertainties as to what extent current and future phenomena can be causally attributed to climate change.[82] Many factors may contribute to a hurricane, rising sea levels, flooding, or drought. There are serious questions as to how many climate-attributable events will occur and when and where.[83]

Seizing on the undeniable uncertainty inherent in climate change, defendants in climate suits have argued that there is just too much factual uncertainty for such suits to meet the standing requirement that a plaintiff's injuries be "fairly traceable" to a defendant's alleged conduct.[84] In making this argument, climate defendants naturally veer toward formulations of fair traceability that closely resembles the but-for or substantial-factor causation showing typically necessary for a plaintiff to prevail on the merits under substantive state tort law.[85] However, the federal courts have made clear that fair traceability is a substantially less demanding causality requirement—which makes sense, after all, as standing is merely a gateway to a merits determination, not a merits question itself.[86]

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[82] For a discussion of the difficulty of tying extreme weather events to anthropogenic climate change, see Rossi & Ruhl, *supra* note 33, which emphasizes the complexity and nonlinearity of natural systems, including climate.

[83] *See* JONATHAN D. HASKETT, CONG. RSCH. SERV., R47583, IS THAT CLIMATE CHANGE? THE SCIENCE OF EXTREME EVENT ATTRIBUTION (2023) summary, at 1 ("Attribution science is subject to uncertainty. Sources of uncertainty include uncertainty in the observational data, uncertainty in the scientific understanding of natural climate variability, and uncertainty in results produced by climate simulation models."); Renée Cho, *What Uncertainties Remain in Climate Science?*, COLUM. CLIMATE SCH.: STATE OF THE PLANET (Jan. 12, 2023), https://news.climate.columbia.edu/2023/01/12/what-uncertainties-remain-in-climate-science/ [https://perma.cc/GV53-AT8Z] (summarizing sources of uncertainty).

[84] *See* Appellant's Opening Brief, *supra* note 3, at 21–22; Defendants' Motion to Dismiss at 22, Bd. of Cnty. Comm'rs v. Suncor Energy (U.S.A.), Inc., No. 2018-cv-30349 (Dist. Ct. Colo. Boulder Cnty. Jan. 25, 2021) ("Plaintiffs do not and cannot allege that Defendants' fossil fuel activities are directly responsible for their alleged injuries. Instead, Plaintiffs allege that Defendants made it possible for billions of consumers—including Plaintiffs themselves—to consume fossil fuels, which, in turn, caused their alleged injuries.").

[85] Even in the context of substantive tort law, the applicable standard under some states' laws is less stringent than the but-for causation test. *See generally* Christopher L. Callahan, *Establishment of Causation in Toxic Tort Litigation*, 23 ARIZ. ST. L.J. 605 (1991) (overviewing the complexities of causality doctrine in toxic tort litigation).

[86] *See, e.g.*, Rothstein v. UBS AG, 708 F.3d 82, 92 (2d Cir. 2013) ("[W]e, like other courts, have noted that, 'particularly at the pleading stage, the "fairly traceable" standard is not equivalent to a requirement of tort causation . . . .'" (quoting Connecticut v. Am. Elec. Power Co., 582 F.3d 309, 346 (2d

Notably, climate is not the only complex or "uncertain" phenomenon with which courts have grappled. There are numerous other phenomena that raise exceedingly difficult factual causation issues, but with respect to which courts do not avoid reaching the merits of the legal claims based on standing doctrine. Consider toxic torts disasters, where the link between any exposure (the extent of which is often contestable) and any health outcomes decades later is extraordinarily complicated.[87] Or, as in the context of mass products and public nuisance cases such as the tobacco and opioid litigations, many parties, including regulators and consumers with their own particular circumstances, played some kind of role in the health outcomes: some people took prescription opioids to no harmful effect, while others had their lives destroyed through addiction.[88] Yet in these and other tort contexts, while it is true that plaintiffs' claims have faced obstacles and have not always succeeded by any measure, the federal courts have not used standing to close the courthouse doors solely on the basis of the plaintiffs' complaint without any opportunity for the parties to engage in meaningful argumentation and discovery regarding the known and unknown facts.[89]

For its part, the Supreme Court in *Massachusetts v. EPA* made clear that, at least with respect to climate suits brought by state plaintiffs, the fair-

Cir. 2009), *rev'd on other grounds*, 564 U.S. 410 (2011))); Averbach v. Cairo Amman Bank, No. 19-0004-GHW, 2020 WL 486860, at *10 (S.D.N.Y. Jan. 21, 2020) (noting the "low burden of establishing the 'fairly traceable' element of Article III standing"). This is not to say that *no* causation inquiry is appropriate, *see, e.g.*, Murthy v. Missouri¸ 144 S. Ct. 1972, 2006 (2024) (Alito, J., dissenting), but only that the kind of showing at the pleading stage should not be demanding. *Cf. id.* at 1997 (majority opinion) (reversing a decision granting a preliminary injunction on grounds that the pleaded causation was too attenuated for standing).

[87] Danielle Conway-Jones, *Factual Causation in Toxic Tort Litigation: A Philosophical View of Proof and Certainty in Uncertain Disciplines*, 35 U. RICH. L. REV. 875, 880 (2002) (describing the difficulty of establishing links between exposures and diseases). *See generally* Alexandra D. Lahav, *The Knowledge Remedy*, 98 TEX. L. REV. 1361 (2020) (suggesting that causal complexities and problems of proof do not leave courts without recourse because courts can order relief in the form of defendants' producing more information regarding their plausibly harmful conduct).

[88] *See generally* Richard C. Ausness, *Causation and Apportionment Issues in Opioid Litigation*, 49 CAP. U. L. REV. 535, 549 (2021) (exploring the complexities of opioid liability given that "so many" have "contributed to the opioid epidemic").

[89] *See* Note, *Causation in Environmental Law: Lessons from Toxic Torts*, 128 HARV. L. REV. 2256, 2257 (2015) (explaining that in toxic tort suits, which "are often based on cutting-edge research" and which have claims that "often require[] difficult factual or technical determinations, particularly in establishing a causal link between the offending substance and the claimed injury," dismissal for lack of causation "is typically based on whether the plaintiffs have presented sufficient evidence on causation, after standing has been established (or presumed)"). For an example of a case where a court refused to dismiss on proximate causation grounds based solely on pleadings alleging highly uncertain, complicated connections between the defendants and the alleged opioid addiction harms, see *In re* Opioid Litigation, No. 400000/2017 (N.Y. Sup. Ct. June 18, 2018), which states that "it is at least arguable that the manufacturer defendants were in a position to anticipate or prevent the claimed injuries; it does not seem unfair, therefore, to hold them potentially accountable."

traceability threshold requirements would not bar standing for climate suits any more than it has barred complex toxic tort, mass tort, and products liability actions. Justice John Paul Stevens, writing for the Court, explained that, for a state plaintiff such as Massachusetts, it was enough to allege that the defendant's decision not to regulate emissions contributed to some extent to climate change and thereby to the state's injuries.[90] States need not allege more to receive a hearing in federal court; as Justice Stevens explained, every state has "a well-founded desire to preserve its sovereign territory";[91] "[w]hen a State enters the Union, it surrenders certain sovereign prerogatives," but in return a state has the right to seek a hearing in federal court as to whether its sovereign territory is being harmed in violation of law.[92] Thus, "[g]iven . . . Massachusetts' stake in protecting its quasi-sovereign interests, the Commonwealth is entitled to special solicitude in our standing analysis."[93]

In his dissent, Chief Justice Roberts expressed the contrary (and exceptionalist) position clearly, arguing that there was no Article III standing because "[p]etitioners are never able to trace their alleged injuries back through this complex web to the fractional amount of global emissions that might have been limited with EPA standards."[94]

*Massachusetts v. EPA* was decided almost two decades ago, and the science of climate attribution has since improved to the point where, even without the special solicitude of which Justice Stevens spoke, a plaintiff, whether a state or nonstate actor, sometimes should be able to meet the relatively lax fair-traceability causality standard with respect to alleged

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[90] *See* Massachusetts v. EPA, 549 U.S. 487, 519–21 (2007).

[91] *Id.* at 519.

[92] *Id.* at 519–20.

[93] *Id.* at 520. In a recent decision seeking to limit standing to sue the government over the regulation of third parties (analogous to cases such as *Juliana*), the Supreme Court acknowledged that such suits may establish standing in a variety of ways:

> Consistent with that understanding of how standing principles can develop and solidify, the Court has identified a variety of familiar circumstances where government regulation of a third-party individual or business may be likely to cause injury in fact to an unregulated plaintiff. For example, when the government regulates (or under-regulates) a business, the regulation (or lack thereof) may cause downstream or upstream economic injuries to others in the chain, such as certain manufacturers, retailers, suppliers, competitors, or customers. When the government regulates parks, national forests, or bodies of water, for example, the regulation may cause harm to individual users. When the government regulates one property, it may reduce the value of adjacent property. The list goes on.

FDA v. All. for Hippocratic Med., 144 S. Ct. 1540, 1558 (2024) (citations omitted).

[94] *Massachusetts*, 549 U.S. at 544 (Roberts, C.J., dissenting).

particularized, concrete injuries.[95] Apparently consistent with this view, the D.C. Circuit suggested that nonstate plaintiffs had alleged enough fair traceability in a statutory mitigation suit.[96]

Nonetheless, it seems Chief Justice Roberts's dissenting view is making a comeback. Defendants have pressed the fair-traceability argument against nonstate plaintiffs in climate litigation and may even deploy it against state plaintiffs as more and more climate suits are filed. In the *Juliana* litigation, for example, the United States relied on the language in Chief Justice Roberts's dissent that seems to preclude all climate standing, arguing against standing on the grounds that "[n]either Plaintiffs nor the district court make any effort to untangle the tremendously complex web of who and what in fact has led to climate change."[97] Note, again, that defendants draw on the exceptional nature of climate change—"the tremendously complex web"—to argue against standing.[98]

To be sure, many hypothetical (and actual) climate suits could fail on factual-causation grounds at any stage of the litigation. Indeed, perhaps many should. Our point here is that, especially given increasingly strong attribution science, fair traceability should not categorically bar climate plaintiffs of all sorts for all sorts of climate claims—if the courts do not apply exceptionally strict requirements at the standing stage.

*c. Too uncertain, take two: uncertain as to redressability*

Uncertainty has also been channeled into the "redressability" prong of standing analysis. Anthropogenic climate change is a "wickedly" complex, global, collective, historical phenomenon.[99] As a result, it almost goes without saying that the exact extent to which any efforts at climate mitigation

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[95] On the role that better scientific attribution of climate effects could have on climate litigation, see Aisha I. Saad, *Attribution for Climate Torts*, 64 B.C. L. REV. 867 (2023), which argues that better attribution science should lessen adjudication objections to climate cases, and Michael Burger, Jessica Wentz & Radley Horton, *The Law and Science of Climate Change Attribution*, 51 ENV'T L. REP. 10646 (2021), which suggests that attribution science is highly relevant to ongoing litigation.

[96] *See* NRDC v. Wheeler, 955 F.3d 68, 77 (D.C. Cir. 2020) ("Petitioners then have adequately linked the [EPA's rule] to an injury-in-fact: the [rule] will lead to an increase in [hydrofluorocarbon] emissions, which will in turn lead to an increase in climate change, which will threaten petitioners' coastal property.").

[97] Appellant's Opening Brief, *supra* note 3, at 21; *see also* Defendants' Motion to Dismiss, *supra* note 84, at 23–25 (discussing the inability of plaintiffs to prove defendants' selling of oil constituted the requisite "but-for" cause for a claim under Colorado law).

[98] *E.g.*, Appellant's Opening Brief, *supra* note 3, at 21.

[99] *See generally* David Weaver, Brent D. Moyle, Char-Lee McLennan & Luca Casali, *Taming the Wicked Problem of Climate Change with "Virtuous Challenges": An Integrated Management Heuristic*, J. ENV'T MGMT., Dec. 1, 2023, at 1, 1 ("[T]he 'wicked problem' . . . describe[s] socio-environmental issues which seem intractable due to high levels of complexity, uncertainty, and contention. Currently, wicked problems such as climate change . . . attract public attention and compete for the allocation of scarce resources.").

will actually reduce climate change and avoid climate-related harms is inherently uncertain. Decreases in emissions in one country (for example, the United States) might be negated by increases elsewhere.

Fossil fuel advocates have latched onto the uncertainty of climate solutions to argue that there can never be standing for climate claims because plaintiffs cannot show that court-ordered relief would redress their injury. For mitigation claims, the argument is that no court-ordered relief can be deemed likely to substantially alter the course of climate change and thereby redress the plaintiffs' allegedly climate-related harms. In the adaptation context, the argument would be that no order for adaptation damages would necessarily cover a set fraction of actual adaptation needs, as the magnitude of those needs would depend on (as yet unknown) future global emissions and factors interacting with those emissions.

The United States leaned heavily on this argument in *Massachusetts v. EPA*, contending that even if the United States did adopt emissions standards for automobiles that the plaintiffs sought, it was far from likely that doing so would have enough impact on climate change to redress climate-related injuries.[100] Chief Justice Roberts, albeit in dissent, embraced this position, contending all the plaintiffs, including Massachusetts, lacked standing for lack of redressability.[101]

Writing for the majority, and again perhaps relying on the special status of states as plaintiffs, Justice Stevens explained that the causal standard for redressability actually was not that high: "Nor is it dispositive that developing countries such as China and India are poised to increase greenhouse gas emissions substantially over the next century: A reduction in domestic emissions would slow the pace of global emissions increases, *no matter what happens elsewhere*."[102]

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[100] Brief for the Federal Respondent at 13, 17–18, Massachusetts v. EPA, 549 U.S. 497 (2007) (No. 05-1120), 2006 WL 3043970, at *13, *17–18 ("[R]educing greenhouse gas emissions within the United States is unlikely, as a general matter, to have a significant long-term impact on climatic conditions in this country without reductions of greenhouse gas emissions in other parts of the world. . . . [I]t is neither feasible nor appropriate for a federal court to predict the likely response of a foreign sovereign to EPA regulation in the domestic sphere. . . . [T]hose forecasts are directly contrary to EPA's expressed concern that '[u]nilateral EPA regulation of motor vehicle [greenhouse gas] emissions could *weaken* U.S. efforts to persuade key developing countries to reduce the [greenhouse gas] intensity of their economies.' . . ."); *see also* Wash. Env't Council v. Bellon, 732 F.3d 1131, 1146 (9th Cir. 2013).

[101] *See Massachusetts*, 549 U.S. at 545–47 (Roberts, C.J., dissenting).

[102] *Id.* at 525–26 (majority opinion) (emphasis added). Just last year, in *Murthy v. Missouri*, a dissenting opinion joined by three conservative Justices called back to *Massachusetts v. EPA*'s view of redressability, 144 S. Ct. 1972, 2009 (2024) (Alito, J., dissenting). The majority opinion, joined by six Justices, including Chief Justice Roberts, reminded that *Massachusetts*'s holding turned on the "special solicitude" of states. *Id.* at 74 n.11 (majority opinion).

Chief Justice Roberts's exceptionalist view from *Massachusetts v. EPA*—that even states must establish that court orders actually will reduce total global climate change—would, in effect, render almost any climate suit related to mitigation nonjusticiable. The only possible exception would be where plaintiffs allege a procedural injury, such as the inability to have their public comments considered at an agency during a rulemaking.[103] Although Chief Justice Roberts's dissenting, exceptionalist view has not been adopted by a court to date, we suspect that it will appear again in response to climate litigation brought by state plaintiffs.

An unexceptional approach to climate suits would follow existing law. In the adaptation context, the analysis tracks other tort-like actions in complex problems, such as toxic torts. As in those cases, there is a potentially important distinction to be drawn between claims with respect to past damages and anticipated future damages. With respect to past damages, such as damages from a hurricane (as in the pending Puerto Rico litigation[104]), courts clearly have the power to redress the injury, in the sense that damages will compensate the plaintiffs for the past harms caused by the actions of the defendants. While there may be problems with actually proving the causal link, that *alleged* link is not too "attenuated" or "downstream."[105] Thus, these claims pose no special standing issue.

By contrast, with respect to open-ended future adaptation damages which could accrue decades from now, it will be difficult to know whether a court-ordered award of damages will be sufficient or even excessive to cover the percentage of future-related cost that can be causally attributed to any given defendant. After all, the defendant's share of global emissions (however calculated) may greatly increase or decrease post-litigation.[106]

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[103] A court order could redress such a procedural injury by compelling an agency to consider the plaintiff's comments. On the distinctive issues raised by alleged procedural injuries for standing and redressability, and the somewhat-relaxed standard for procedural injuries, see, for example, Kimberly N. Brown, *Justiciable Generalized Grievances*, 68 MD. L. REV. 221, 257–64 (2008), and Helen Hershkoff & Stephen Loffredo, *Standing for Democracy*: *Is Democracy a Procedural Right in Vacuo? A Democratic Perspective on Procedural Violations as a Basis for Article III Standing*, 70 BUFF. L. REV. 523, 535–36, 547–48 (2022).

[104] *See* Municipalities of Puerto Rico v. Exxon Mobil Corp., CLIMATE CHANGE LITIG. DATABASES, https://climatecasechart.com/case/municipalities-of-puerto-rico-v-exxon-mobil-corp/ [https://perma.cc/LY65-PUMU] (summarizing the complaint, which seeks "to hold coal, oil, and gas companies liable for losses resulting from storms during the 2017 hurricane season").

[105] FDA v. All. for Hippocratic Med., 144 S. Ct. 1540, 1557 (2024).

[106] For example, India's per capita emissions have been on a sharply upward trajectory, which, if it continues, certainly would mean that its future share of total historic emissions will differ from its current share. *See Per Capita Carbon Dioxide ($CO_2$) Emissions from Fossil Fuels in India from 1970 to 2023*, STATISTA, http://www.statista.com/statistics/606019/co2-emissions-india/ [http://perma.cc/73BV-ENTV] (depicting India's emissions over the last half century).

This "futures problem" is well known in the literature and case law outside of climate change, most prominently in mass torts.[107] In this context, one solution has been continuing court jurisdiction or a series of successive suits rather than, as climate jurisdiction exceptionalism would have it, simply closing access to the courts from the very start.[108]

A similar issue arises in the mitigation context. It is true that a court cannot know whether any ordered reduction in emissions by any given defendant will translate into lesser climate change and climate change-related harms for the plaintiffs. The defendant's actions (necessarily) are only a part of the contributors to climate change and any ordered mitigation could be offset by emissions from other actors. At the same time, if the redressability inquiry can be framed in terms of a procedural injury, such as the failure of regulators to follow legally requisite procedures that would allow for plaintiff input, redressability should be straightforwardly met even as to future mitigation claims.[109]

So too where the defendant's policy choices almost inevitably will have a big impact on aggregate emissions—such as a suit challenging U.S. policies across transportation and energy production—one perhaps could argue, but only perhaps, that a straightforward application of standing law would allow even private plaintiffs to satisfy the redressability requirement. The Ninth Circuit, for example, has suggested that a private suit against parties responsible for 6% or more of global emissions might conceivably meet the redressability threshold.[110]

The upshot of this analysis is that unexceptional Article III standing should be reasonably straightforward for past adaptation damages claims and at least contestable on redressability grounds for mitigation and future

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[107] On the futures problem in mass torts, see, for example, Howard M. Erichson, *Uncertainty and the Advantage of Collective Settlement*, 60 DEPAUL L. REV. 627, 633–34 (2011); Deborah R. Hensler, *Bringing* Shutts *into the Future: Rethinking Protection of Future Claimants in Mass Tort Class Actions*, 74 UMKC L. REV. 585, 589–96 (2006); Samuel Issacharoff & Richard A. Nagareda, *Class Settlements Under Attack*, 156 U. PA. L. REV. 1649, 1678–80 (2008); and Susan P. Koniak, *How Like a Winter? The Plight of Absent Class Members Denied Adequate Representation*, 79 NOTRE DAME L. REV. 1787, 1824–27 (2004).

[108] *See, e.g.*, Geoffrey C. Hazard Jr., *The Futures Problem*, 148 U. PA. L. REV. 1901, 1907–10 (2000) (discussing bankruptcy or in rem proceedings as solutions to the futures problem).

[109] *Cf.* Massachusetts v. EPA, 549 U.S. 497, 517–18 (2007) (indicating sufficiency of a procedural injury).

[110] Wash. Env't Council v. Bellon, 732 F.3d 1131, 1145–46 (9th Cir. 2013) (contrasting the situation in *Massachusetts v. EPA*, where "the Court observed that the GHG emission levels from motor vehicles were a 'meaningful contribution' to global GHG concentrations, given that the U.S. motor-vehicle sector accounted for 6% of *world-wide* carbon dioxide emissions," with the situation where "the GHG emissions are from five oil refineries in Washington, making up 5.9% of emissions in *Washington*" and "Plaintiffs do not provide any evidence that places this statistic in national or global perspective to assess whether the refineries' emissions are a 'meaningful contribution' to global GHG levels").

adaptation damages claims. The argument for private-plaintiff standing as to future mitigation, where the focus is court-ordered compliance with a legal procedure relevant to future mitigation, is also reasonably clear. Moreover, given the special status of states as plaintiffs in U.S. standing doctrine,[111] it would seem that even the more contestable allegations on all of these elements are sufficient.

But the exceptionalist position of Chief Justice Roberts's dissent in *Massachusetts v. EPA* at least provides an opening for the too-uncertain-redressability argument to be deployed by climate defendants.[112] And outside the United States, too, we see similar rhetoric, as in a submission by the Canadian government opposing the courts' jurisdiction over essentially constitutional climate claims, which emphasized that "Canada's efforts to combat climate change are not, on their own, sufficient to address global climate change. Rather, the full efficacy of any response to climate change is dependent on coordination and actions on a global scale."[113]

*d. Too political, take one: fair traceability in adaptation suits*

The next category of objections to climate suits can be summed up in two words: too political. We discuss here how defendants have argued that the political nature of climate change undermines plaintiffs' ability to establish traceability. In the next Section, we consider how this argument plays out under the redressability requirement.

The traceability argument has appeared in adaptation suits sounding in tort. Judges in these cases have argued (adopting positions of climate defendants) that it would be too political to assign financial responsibility to major emitters for climate- and property-related costs, and therefore the climate plaintiffs lack standing for failure to fairly trace their injury to specific defendant's conduct.

The *Kivalina* litigation is the most prominent example of this exceptionalist reasoning. The district court in the *Kivalina* case was faced with what was certainly pled as a vindication of private rights suit: the Inuit residents of the Kivalina Village needed money to relocate, as their village

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[111] *See, e.g.*, *Massachusetts*, 549 U.S. at 518–23.

[112] Chief Justice Roberts's argument remains a mainstay of organizations closely aligned with the interests of the fossil fuel industry, such as the Heritage Foundation. *Compare id.* at 536 (Roberts, C.J., dissenting), *with, e.g.*, Diana Furchtgott-Roth, *China Abandons Paris Agreement, Making U.S. Efforts Painful and Pointless*, THE HERITAGE FOUND. (July 26, 2023), https://www.heritage.org/global-politics/commentary/china-abandons-paris-agreement-making-us-efforts-painful-and-pointless [http://perma.cc/NRH8-5F8F] ("Even if the United States were to get rid of all fossil fuels, this would only make a difference of two-tenths of one degree Celsius in the year 2100 . . . .").

[113] Statement of Defence at 2, La Rose v. The Queen, [2020] FC 1008 (Can. Fed. Ct.) (No. T-1750-19).

was sinking due to climate change, and they sought to recover that money from fossil fuel companies that they alleged had caused the private wrong of deceiving the public about climate change, contributed to excessive emissions, and rendered their homes unlivable as a result of these unfettered emissions.[114] But the district court held that the case was too political to be heard. Extending the reasoning of the *Massachusetts v. EPA* dissent to an adaptation context, the district court contended that assigning financial responsibility was not the province of the courts, and hence the case was nonjusticiable:

> Plaintiffs also fail to confront the fact that resolution of their nuisance claim requires the judiciary to make a policy decision about *who* should bear the cost of global warming. . . . Plaintiffs ignore that the allocation of fault—and cost—of global warming is a matter appropriately left for determination by the executive or legislative branch in the first instance.[115]

The district court in *Kivalina* cites no precedent for the judicial allocation of tort liability being outside the scope of the judicial function or so inherently political as to be nonjusticiable. Although the Ninth Circuit majority did not adopt this reasoning, it did not criticize it either.[116] And the concurrence in *Kivalina* in the Ninth Circuit agreed with the district court that the plaintiffs lacked standing: a private party, in the view of the concurrence, simply has no standing "to pick and choose amongst all the greenhouse gas emitters . . . to hold liable for millions of dollars in damages."[117]

While *Kivalina* involved nonstate plaintiffs, the same reasoning has been applied by a court in a suit brought by the State of California seeking adaptation damages. In *California v. General Motors*, the district court deemed the case too political to be justiciable, in part because "[t]he Court is left without guidance in determining what is an unreasonable contribution to the sum of carbon dioxide in the Earth's atmosphere, or in determining who should bear the costs associated with the global climate change that admittedly result from multiple sources around the globe."[118]

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[114] Native Vill. of Kivalina v. ExxonMobil Corp., 663 F. Supp. 2d 863, 868–70 (N.D. Cal. 2009), *aff'd*, 696 F.3d 849 (9th Cir. 2012); *see also* Complaint for Damages and Demand for Jury Trial at 2, *Kivalina*, 663 F. Supp. 2d 863 (No. 08-1138) (describing a conspiracy between defendants to deceive the public about global warming).

[115] *Kivalina*, 663 F. Supp. 2d. at 876–77.

[116] *See Kivalina*, 696 F.3d at 856 (opting to dismiss the suit on grounds other than standing).

[117] *Id.* at 869 (Pro, J., concurring).

[118] California v. Gen. Motors Corp., No. 06-05755, 2007 WL 2726871, at *15 (N.D. Cal. Sept. 17, 2007).

These arguments do not meet plaintiffs' claims as pleaded. Building on lead-paint public nuisance precedents under California law,[119] the plaintiffs in many of these adaptation suits have argued that the products of the named defendants, major energy companies, are responsible for the cumulative effect of greenhouse gas emissions. Specifically, the plaintiffs allege that because these companies engaged in a course of deceptive conduct—failing to disclose what they knew about climate risks from these products, suppressing such information, disseminating misinformation, and creating a culture of doubt as to the reality of climate change and its consequences.[120] According to the plaintiffs' complaints, this conduct resulted in the public, regulators, and economic actors failing to adopt alternative forms of energy in time to fend off the effects of climate change for which the plaintiffs now seek damages.[121] It is, of course, arguable that these allegations cannot be proven, but without access to any discovery and no judicial fact-finding—a consequence of the "too political" nonjusticiable approach—we will never know.

More generally, defendants' arguments against standing run counter to the way courts have handled non-climate cases that could have been susceptible to similar claims—in other words, they are exceptional. Courts frequently parse whether it is reasonable to hold parties liable where they may be but-for causes of plaintiffs' harm, but the actual causal links seem attenuated. The Supreme Court has made clear that the fair traceability requirement for standing is simply not the same thing as proximate cause.[122] As already noted, in tort actions where proximate causation is a disputable element, courts do not deny standing because proximate causation is not obviously satisfied on the face of the complaint, but rather leave it for factual arguments and discovery.[123] The exceptionalist aspect of the case law is thus

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[119] *See, e.g.*, Cnty. of Santa Clara v. Atl. Richfield Co., 137 Cal. App. 4th 292, 300 (2006) (refusing to dismiss claims against lead-paint manufacturers that had allegedly misled the public and governments as to the dangers of lead paint).

[120] *See, e.g.*, Complaint at 47–62, Cnty. of San Mateo v. Chevron Corp., No. 17CIV03222 (Cal. Super. Ct. July 17, 2017).

[121] *See id.* at 65–72; *see also* Jessica Wentz & Benjamin Franta, *Liability for Public Deception: Linking Fossil Fuel Disinformation to Climate Damages*, 52 ENV'T L. REP. 10995, 10996 (2022) (explaining that the climate adaptation suits depend on establishing "a causal nexus between public deception and [climate] harm" and that plaintiffs will "need to provide evidence that the defendants' false or misleading communications influenced public understanding and/or conduct").

[122] Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 134 n.6 (2014) ("Proximate causation is not a requirement of Article III standing, which requires only that the plaintiff's injury be fairly traceable to the defendant's conduct.").

[123] *See generally* LAHAV, *supra* note 15 (describing benefits of litigation independent of an ultimate decision on the merits).

taking a real merits issue—proximate causation—and, by judicial fiat, using it to close the courthouse doors to those seeking climate-related justice.

Tort actions, whatever their political implications, have long been treated as an essential part of private law and the core purview of the judiciary.[124] As the Second Circuit in *AEP v. Connecticut* explained in a portion of the opinion undisturbed by the Supreme Court, there is nothing in the Constitution specifically directing that the political branches have sole authority over common law tort actions for recovery of damages in general or about environmental or climate in particular.[125] Quite the contrary, our entire legal tradition is based on a history and practice of courts taking the lead on common law tort actions.[126] Even Justice Clarence Thomas, a staunch critic of broad (what he would consider overbroad) standing,[127] agreed that standing rules should be more liberal for "private rights" claims such as common law torts.[128]

Further, one way to demonstrate that these admittedly complex cases are within the purview of courts is to observe, as the Second Circuit did in *AEP*, that courts already have a rich body of law to provide manageable standards for resolving the often complex issues raised in tort suits for damages.[129] The doctrine of proximate causation, for example, exists to resolve complex questions of attribution.[130] Of course, courts applying the doctrine of proximate causation often rule for defendants, but they do so (or should do so) after some consideration of the facts. That would be the unexceptional way to handle causation in climate cases. Similarly, courts sometimes struggle with questions of whether there is a reasonable way to allocate financial responsibility among defendants who all can be deemed

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[124] *See* Douglas A. Kysar, *The Public Life of Private Law: Tort Law as a Risk Regulation Mechanism*, 9 EUR. J. RISK REGUL. 48, 55–58 (2018) (arguing against public law accounts of "the private law of tort").

[125] Connecticut v. Am. Elec. Power Co., 582 F.3d 309, 325 (2d Cir. 2009) ("In this common law nuisance case, '[t]he department to whom this issue has been "constitutionally committed" is none other than our own—the Judiciary.'" (alteration in original) (quoting Klinghoffer v. S.N.C. Achille Lauro, 937 F.2d 44, 49 (2d Cir. 1991))), *rev'd on other grounds*, 564 U.S. 410 (2011).

[126] *See generally* KENNETH S. ABRAHAM & G. EDWARD WHITE, TORT LAW AND THE CONSTRUCTION OF CHANGE (2022) (tracing the central role of judges in the evolution and expansion of tort law over the past 175 years).

[127] *See, e.g.*, FDA v. All. for Hippocratic Med., 144 S. Ct. 1540, 1566–69 (2024) (Thomas, J., concurring) (writing separately to express his disagreement with the expansion of standing in a long line of Supreme Court precedents).

[128] *See* Spokeo, Inc. v. Robins, 578 U.S. 330, 343–46 (2016) (Thomas, J., concurring) (suggesting courts do, but should not, apply standing requirements "as rigorously" when plaintiffs seek to vindicate "private rights").

[129] *Am. Elec. Power Co.*, 582 F.3d at 327–29.

[130] For a thoughtful interrogation of proximate causation as a formal and functional element of tort, see generally Joshua Knobe & Scott Shapiro, *Proximate Cause Explained: An Essay in Experimental Jurisprudence*, 88 U. CHI. L. REV. 165 (2021).

to have contributed causally to a unitary harm,[131] but these considerations (outside the climate context) are taken up in the merits portion of litigation, after evidence regarding each defendant's actions can be assessed.[132] So treating these as merits questions, not standing questions, would be taking the unexceptional approach to climate litigation.

This talk of manageable standards might remind the reader of the political question doctrine. In the leading case on this doctrine, the Court identified the two most important factors in determining whether it applies as: (1) a textually demonstrable constitutional commitment of the issue to a coordinate political department; and (2) a lack of judicially discoverable and manageable standards for resolving it.[133] Dismissal on the basis of the political question doctrine is appropriate only if one of these formulations is "inextricable" from the case.[134]

We mention the political question doctrine here for two interrelated reasons. First, the availability of the political question doctrine as a standalone tool should undermine claims that the "political" nature of a suit should influence standing determinations. Second, the narrowness of the political question doctrine speaks to the more general view that claims of a case being "too political" should not be get-out-of-jail-free cards but instead should be applied carefully and narrowly and only in the separation-of-powers context. Indeed, in the last fifty years, the Supreme Court has found a political question nonjusticiable only three times, and two of those times were based on clear constitutional text assigning the matter at issue to a branch of government other than the judiciary.[135]

*e. Too political, take two: redressability in mitigation suits*

The "too political" argument also shows up in mitigation cases. In *Massachusetts v. EPA*, a statutory mitigation case, the United States vigorously argued that resolution of climate law and policy as to the

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[131] *See generally* 1 STUART M. SPISER, CHARLES F. KRAUSE & ALFRED W. GANS, AMERICAN LAW OF TORTS § 3:15 (Monique C.M. Leahy ed.), Westlaw AMLOT § 3:15 (database updated Feb. 2025) (describing apportionment of damages among multiple tortfeasors in instances of distinct harms or injuries or of single but divisible injuries).

[132] For example, if climate change adaptation suits were deemed justiciable, courts might well consider whether substantive state tort law allows each defendant to be held responsible for its share of aggregate global emissions in the fossil fuel market, which is exactly what the plaintiffs in these cases argue and some commentators have concluded is tenable. *See, e.g.*, Saad, *supra* note 95, at 919–21 (arguing for market share liability as a mechanism to allocate responsibility among climate defendants).

[133] Baker v. Carr, 369 U.S. 186, 217 (1962); Vieth v. Jubelirer, 541 U.S. 267, 277–78 (2004) ("These [Baker factors] are probably listed in descending order of both importance and certainty.").

[134] *Baker*, 369 U.S. at 217.

[135] Scott Dodson, *Article III and the Political Question Doctrine*, 116 NW. U. L. REV. 681, 696 (2021) (tracing the history of the political question doctrine).

emissions limits and controls was too political—too enmeshed in difficult value judgments; too much a matter of political trade-offs, debates, and calculations; too enmeshed with the inherently political domain of foreign affairs; and just too politically controversial.[136] The majority did not embrace these arguments, and neither did Chief Justice Roberts or Justice Antonin Scalia in dissent.[137]

*Massachusetts v. EPA*'s implicit rejection of the political question doctrine as a basis for denying jurisdiction in mitigation claims is consistent with U.S. courts' long history of wading headfirst into highly controversial, highly politicized, enormously complicated controversies. Trepidation is simply not the norm on the part of the federal courts in the face of highly political issues and debates, including when (as in the current constitutional climate mitigation suits) lawsuits implicate alleged constitutional rights whose very reality as well as their contours are debatable. Philosopher Alexis de Tocqueville famously remarked that all important issues in America find their way into the courts,[138] and that claim may be even stronger now than when it was made.

The Supreme Court has heard controversial, inherently political cases regarding everything from segregation, to abortion, to affirmative action, to perhaps the most political question imaginable: who won the presidential election.[139] Nor has the possibility of politically contentious, "messy" constitutional remedies—such as remedies to desegregate public schools (*Brown v. Board of Education*[140]), or remedies to protect the ownership of weapons that fall under the Second Amendment's constitutional protection (*New York State Rifle & Pistol Ass'n v. Bruen*[141])—led the Supreme Court to dodge cases by claiming "no standing." Indeed, the Court has recently invented a doctrine, the so-called "major questions doctrine," that allows the

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[136] *See* Brief for the Federal Respondent, *supra* note 100, at 21–22.

[137] *See* Massachusetts v. EPA, 549 U.S. 497, 516 (2007); *id.* at 535 (Roberts, C.J., dissenting); *id.* at 549 (Scalia, J., dissenting).

[138] *See* Mark A. Graber, *Resolving Political Questions into Judicial Questions: Tocqueville's Thesis Revisited*, 21 CONST. COMMENT. 485, 486 (2004) (quoting Tocqueville as asserting that "[s]carcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question" (alteration in original)).

[139] Vivienne Pismarov, *Why Conservatives Should Challenge the Redressability Decision in* Juliana, SECTION ENV'T ENERGY & RES. (Am. Bar Ass'n, Chi., Ill.) May 27, 2021, https://www.americanbar.org/groups/environment_energy_resources/resources/newsletters/climate-change/why-conservatives-should-challenge-redressability-decision-juliana/ [https://perma.cc/LDT7-4SED]; *see, e.g.*, Bush v. Gore, 531 U.S. 98, 100 (2000) (per curiam) (deciding the winner of the 2000 presidential election); Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141, 2176 (2023) (ending affirmative action).

[140] 347 U.S. 483, 495 (1954).

[141] 142 S. Ct. 2111, 2122 (2022).

court to issue a judgment against the government precisely because the issue is one of heightened political importance.[142]

Nonetheless, the idea that constitutional mitigation claims are simply too political to be adjudicated was endorsed in an expansive fashion by the Ninth Circuit in *Juliana*.[143] In response to arguments from the government about the political nature of climate policy, the Ninth Circuit imported aspects of political question reasoning into the redressability prong of standing. More specifically, according to the *Juliana* court, implementing an affirmative constitutional obligation to address climate change, if such an obligation exists, would be beyond the proper place and institutional capacities of the courts in our system of separation of powers.[144] According to the Ninth Circuit, there is no intelligible legal, as opposed to political, standard that could guide the court in fashioning and implementing relief for a violation of constitutional climate rights (if, again, such rights exist).[145] In this way, the Ninth Circuit suggested that a case might not be a nonjusticiable political question per se, but that similar considerations can reappear—in seemingly more muscular form—in the standing analysis.

Logically, at least, the kind of reasoning adopted by the *Juliana* majority would seem to call into question standing for *all* climate-related claims, even those brought by state plaintiffs, notwithstanding *Massachusetts v. EPA*'s implicit rejection of the political question argument. That is: if courts simply cannot fashion climate relief using a neutral legal standard because doing so involves unavoidable political balancing and political considerations that are the exclusive province of the political branches of government, as the *Juliana* court maintains, it logically should not matter whether the plaintiff is a state or (as in *Juliana*) a collection of young persons alleging various individual climate harms. If the reasoning of *Juliana* prevails, all climate mitigation and perhaps even climate adaptation claims (if the courts embrace the industry argument that adaptation claims are mitigation claims in disguise) could be dismissed for lack of Article III standing.[146]

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[142] West Virginia v. EPA, 142 S. Ct. 2587, 2608 (2022); Michael Barsa & David A. Dana, *The Major Questions Doctrine's Upside for Combatting Climate Change*, 32 N.Y.U. ENV'T L.J. 1, 2 (2024).

[143] Juliana v. United States, 947 F.3d 1159, 1173 (9th Cir. 2020).

[144] *Id.*

[145] *Id.*

[146] As the *Juliana* dissent noted, the Supreme Court regularly hears such cases:

> Global warming is certainly an imposing conundrum, but so are diversity in higher education, the intersection between prenatal life and maternal health, the role of religion in civic society, and many other social concerns. These issues may not have been considered within the purview of the

One might have expected the *Juliana* majority to discuss the leading political question case, *Baker v. Carr*, but it does not.[147] And one can see why. As noted, *Baker*'s first factor—"a textually demonstrable constitutional commitment of the issue to a coordinate political department"—would limit political question cases to ones where the Constitution itself indicated that the issue belonged exclusively within the jurisdiction of the Executive or Congress.[148] Both liberal and conservative legal commentators alike have been deeply troubled by the notion that the courts could avoid their constitutional responsibility to hear cases brought to them in the absence of any constitutional text that removes those cases from their presumptive jurisdiction.[149] But there is not a serious argument that any specific constitutional text commits the issue of global warming to the exclusive jurisdiction of the Executive or Congress. So perhaps *Juliana* avoided *Baker* because that case suggested the opposite result.[150]

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> judicial branch had the Court imported wholesale *Rucho*'s 'manageable standards' analysis even in the absence of *Rucho*'s inherently political underpinnings.

*Id.* at 1190 (Staton, J., dissenting) (citations omitted) (citing Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 360 (1978); then citing Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 871 (1992), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022); and then citing Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2094 (2019) (Kavanaugh, J., concurring)).

[147] *See id.* at 1173 (majority opinion) (discussing the political question doctrine without mentioning *Baker v. Carr*).

[148] Baker v. Carr, 369 U.S. 186, 217 (1962).

[149] *See, e.g.*, James R. May, *Climate Change, Constitutional Consignment, and the Political Question Doctrine*, 85 DENV. U. L. REV. 919, 933–34, 957 (2008) (arguing for a highly narrow application of the political question doctrine generally and for its inapplicability altogether to common law actions for damages); Robert J. Pushaw Jr., *Judicial Review and the Political Question Doctrine: Reviving the Federalist "Rebuttable Presumption" Analysis*, 80 N.C. L. REV. 1165, 1192–93, 1196 (2002) (emphasizing the importance of a strong presumption in favor of judicial review); *see also* Louis Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597, 624–25 (1976) (suggesting there is no constitutional grounding for the political question doctrine).

[150] The deeply problematic reasoning of the *Juliana* court is underscored by its reliance instead on the Supreme Court's recent, highly controversial opinion in *Rucho v. Common Cause*. *Juliana*, 947 F.3d at 1173. *Rucho* involved a challenge to the gerrymandering of congressional districts to favor Republican candidates, which the plaintiffs alleged was so extreme that it denied their constitutional rights. 139 S. Ct. 2484, 2491–92 (2019). Although the *Rucho* majority ultimately rested its decision on the grounds that there was no judicial, nonpolitical methodology available for a court to determine how electoral districts should be drawn to limit undue partisan advantages, the majority at least relied, by way of background, on the relevant constitutional clause: the Elections Clause. *Id.* at 2506 (citing U.S. CONST. art. 1, § 4, cl. 1). As Judge James Wynn explained in an extended critique of the *Rucho* majority opinion, the Court

> framed its opinion through the lens of the Elections Clause, arguing that "[a]t no point [in the drafting of the Constitution] was there a suggestion that the federal courts had a role to play [in disputes over gerrymandering]." Through this constitutional patina, the Court suggested that it "had no choice but to abdicate jurisdiction."

Moreover, the *Juliana* majority's reasoning rests on an assumption that could only be verified if the court had found the case justiciable and addressed the actual constitutional claims on the merits. That is, for standing purposes, the majority assumes that plaintiffs have the fullest possible, maximal constitutional rights with respect to the climate, and thus that the possible judicial remedy would be a sweeping, politically fraught restructuring of energy production and use throughout the country over the next decades.[151] But on merits review, the court could have found that, if any constitutional right existed, it is a much more limited, cabined right, and that a much more limited, cabined remedy would be sufficient.[152] And, indeed, courts in Hawaii and Montana did just that.[153] But by instead assuming a maximal constitutional right, the *Juliana* majority avoids engaging the arguments against the court, entertaining the question of whether there is any constitutional climate right of any dimension whatsoever.

The *Juliana* majority's take on climate and redressability, then, is not in line with prior jurisprudence but is rather exceptional. And the *Juliana* exceptionalism, as noted, has the potential to render this exceptionalism to most or all climate litigation. Rejecting this exceptionalism, we think it is clear that the existing political question doctrine should *not* be a bar to climate standing on the grounds that climate claims are too deeply "political," too evocative of separation of powers issues, too intertwined

James Andrew Wynn, *When Judges and Justices Throw Out Tools: Judicial Activism in* Rucho v. Common Cause, 96 N.Y.U. L. REV. 607, 658 (2021) (alterations in original) (first quoting *Rucho*, 139 S. Ct. at 2496; and then quoting *Article III—Justiciability—Political Question Doctrine*—Rucho v. Common Cause, 133 HARV. L. REV. 252, 258 (2019)). In that sense, *Rucho* is inapplicable to climate cases where there is no relevant constitutional text at all. Even more important, *Rucho* does not speak in broad political question doctrine or redressability terms but rather focuses throughout on the unique and uniquely political problem of drawing electoral district lines. As the majority emphasizes, any judicial resolution of a partisan gerrymandering claim would be received as favoring one political party or another and thus as nonjudicial. *Rucho*, 139 S. Ct. at 2501. Nonetheless, according to the *Juliana* majority, "[t]he Court found in *Rucho* that a proposed standard involving a mathematical comparison to a baseline election map is too difficult for the judiciary to manage," and, hence, so too with any climate mitigation plan. *Juliana*, 947 F.3d at 1173.

[151] *Juliana*, 947 F.3d at 1169–70.

[152] For example, the *Juliana* court could have concluded that the constitutional rights regarding climate only require that each major federal law, land-management provision, and program that bears on oil and gas exploration, imports, and exports include explicit consideration by Congress and the Department of the Interior of climate change impacts, justification, and alternatives with lesser impacts, in much the same way that some state law versions of the quasi-constitutional public trust doctrine require only that government continuously consider public trust values in its lands and water management, not that government necessarily prioritize such values. *See, e.g.*, Michael C. Blumm & Thea Schwartz, *Mono Lake and the Evolving Public Trust in Western Water*, 37 ARIZ. L. REV. 701, 707 (1995).

[153] *See* Navahine F. v. Haw. Dep't of Transp., No. 1CCV-22-0000631, at 10–12 (Haw. Cir. Ct. Apr. 6, 2023) (order denying motion to dismiss); Held v. State, 2024 MT 312 (Mont. 2024). For a brief summary of these cases, see *infra* note 230.

with potentially difficult remedial decisions, to be redressed. The political question bar to justiciability, whether channeled through fair traceability or otherwise, is generally very limited and, again, properly reserved for issues (unlike climate change) for which the Constitution allocates exclusive responsibility to Congress or the Executive. Here, we agree with an Ontario court hearing a case similar to *Juliana* when it wrote: "complexity alone, sensitivity of political issues, the potential for significant ramifications flowing from a court decision and a preference that legislatures alone deal with a matter are not sufficient on their own to permit a court to decline to hear a matter on the ground of justiciability."[154]

### *B. Federalism Exceptionalism*

The previous Section explored how some federal courts have altered bedrock principles of Article III standing in response to climate change to the disadvantage of climate plaintiffs and climate claims. In this Section, we shift to the question of the federal courts' relationship to state law and state courts.

As above, we begin with a brief description of the law of federal jurisdiction and how it might be applied unexceptionally to climate claims. Then, we turn to the various ways courts and defendants have attempted to stretch existing law in light of climate exceptionalism. Importantly, while these moves to expand federal jurisdiction may sound like they are in tension with standing exceptionalism (which contracts and limits federal jurisdiction), their aim is the same. The reason is that climate defendants believe that expanding federal jurisdiction to capture claims that should be litigated in state court systematically will result in more of those claims being dismissed. The premise is that federal courts—staffed by federal judges and applying federal procedure—are more likely to dismiss climate claims without reaching the merits than state courts—staffed by state judges and applying state procedure—even when the substance of the claim is the same.[155]

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[154] Mathur v. Ontario, 2020 ONSC 6918, para. 136 (Can.) (quoting Tanudjaja v. Canada (Att'y Gen.), 2014 ONCA 852, para. 35 (Can.)). To similar effect is the Dutch decision holding that the government was failing to meet its obligations to address climate change under European Convention on the Protection of Human Rights and Fundamental Freedoms. *See* HR 20 december 2019, NJ 2019, 135 m.nt. van der Veen en Backes (Stichting Urgenda/Staat der Nederlanden) (Neth.) (rejecting the too-political argument on the ground that the "mandate to the courts to offer legal protection [for human rights], even against the government, is an essential component of a democratic state under the rule of law"). By contrast, however, Quebec's highest court has embraced *Juliana*-like reasoning in holding that an analogous lawsuit brought by young Québécois based on Canada's Charter was nonjusticiable. Environnement Jeunesse c. Procureur Général du Can., 2021 QCCA 1871 (Can. Que.).

[155] Clopton, *supra* note 17, at 177–80 (discussing this strategy).

*1. The Law of Federal Jurisdiction*

Federal courts are courts of limited jurisdiction,[156] defined by Article III of the Constitution[157] and then by Acts of Congress.[158] Federal courts of limited jurisdiction operate against a background of state courts of general jurisdiction.[159] To oversimplify, the federal courts are a supplemental court system layered on top of an existing system of state courts, and so (almost) every case filed in federal court is one that could have been filed in state court. Indeed, it is this relationship sounding in federalism and comity that helps justify the principle of limited federal jurisdiction.

So federal cases are, for the most part, cases that *could have been filed* in state court. In some situations, federal cases are cases that *were filed* in state court. When a case is filed in state court that also could have been filed in a federal court (and other conditions are met), the defendant may "remove" the case to federal court, halting the state proceeding in its tracks and opening a case in federal court that replaces the state case.[160] Defendants filing notices of removal are thus making explicit what was implicit in federal jurisdiction—that the federal case usurps state court jurisdiction.

The constitutional and statutory law that allocates jurisdiction defines various categories of cases that qualify for federal jurisdiction. The two most prominent concern "federal questions" and "diversity of citizenship."[161] Under federal question jurisdiction, a federal court may take jurisdiction over a case that arises under federal law which, for the most part, means that the claim pleaded is one grounded in a federal right of action.[162] Under diversity of citizenship jurisdiction, a federal court may take jurisdiction over a case between citizens of different states.[163] Diversity must be "complete,"[164] meaning that no plaintiff and no defendant could be from the same state, and the claim must be for more than $75,000.[165]

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[156] Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994).

[157] U.S. CONST. art. III, §§ 1–2.

[158] 28 U.S.C. §§ 1330–1369.

[159] Mims v. Arrow Fin. Servs., LLC, 565 U.S. 368, 378 (2012); Tafflin v. Levitt, 493 U.S. 455, 458 (1990).

[160] 28 U.S.C. §§ 1441–1455. *See generally* 14C CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE §§ 3721–41 (rev. 4th ed. 2022), Westlaw FPP § 3721–41 (database updated June 2024) (describing removal requirements and procedures). Among the limits on removal is that the federal court would have had jurisdiction had the case been filed there originally. 28 U.S.C. § 1441(a).

[161] 28 U.S.C. §§ 1331–1332.

[162] *Id.* § 1331; Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149, 152 (1908); Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 312 (2005).

[163] 28 U.S.C. § 1332.

[164] *See* Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267, 267 (1806).

[165] 28 U.S.C. § 1332.

That brings us back to climate change litigation. In recent years, many climate plaintiffs have concluded that they would prefer to litigate in state court, and they have filed cases there.[166] In response, many climate defendants have removed, presumably because they think they will achieve a better outcome in federal court.[167]

An unexceptional approach to jurisdiction would allocate cases as just described. Cases with complete diversity would qualify for federal jurisdiction—though typically climate plaintiffs interested in avoiding federal court can select among plaintiffs and defendants to destroy complete diversity. In addition, cases that raise claims under federal law—such as the Clean Air Act[168] or the Administrative Procedure Act[169]—would qualify for federal jurisdiction. Even if plaintiffs in these cases preferred to be in state court and filed their cases there, defendants could still remove them to federal court. But for cases where there is no complete diversity, and the claims arise under state law, plaintiffs should be free to file cases in state court. If defendants removed, the federal court should remand such a case back to state court.[170] That is, of course, if these courts were acting unexceptionally.

Yet in many cases, defendants raise novel or boundary-pushing arguments about federal jurisdiction to support removal. We refer to this form of exceptionalism as federalism exceptionalism, as it directly implicates federalism values. So far, the federal courts have embraced the advocacy for this federalism exceptionalism to only a limited degree. But that could change.

*2. Examples of Federalism Exceptionalism*

In our discussion of standing exceptionalism, we identified a series of arguments deployed by defendants and judges that sought to twist standing doctrine to keep climate claims out of court. We do the same with respect to federalism exceptionalism, manifesting here as a series of exceptional

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[166] *See* Clark Mindock & Nate Raymond, *US Supreme Court Rebuffs Exxon, Chevron Appeals in Climate Cases*, REUTERS (Apr. 24, 2023, 10:51 AM), https://www.reuters.com/business/energy/us-supreme-court-rebuffs-exxon-chevron-appeals-climate-litigation-2023-04-24/ [https://perma.cc/2SW8-6S5Z].

[167] Dennis Anderson & Deepa Sutherland, *Big Oil Certiorari Denial May Alter Climate Change Litigation*, LAW360 (Apr. 26, 2023, 7:27 PM), https://www.law360.com/articles/1599957/big-oil-certiorari-denial-may-alter-climate-change-litigation [https://perma.cc/PC58-QWFT].

[168] 42 U.S.C. § 7604.

[169] 5 U.S.C. § 706.

[170] 28 U.S.C. § 1447.

doctrinal moves to get cases out of the plaintiffs' preferred forum of state court.[171]

### *a. Complete preemption of state claims by federal common law*

One way that climate defendants have sought exceptional treatment in federal court is through federal question jurisdiction. Recall that the Constitution and federal statutes provide that the federal courts have jurisdiction over civil actions arising under federal law. The federal question statute has been interpreted by the courts to require that a federal issue appears on the face of a well-pleaded complaint.[172]

If climate cases are filed in state court raising federal law claims, defendants can remove them on the basis of federal question jurisdiction. That's how it should be. But when climate cases are filed in state court raising state law claims, one defense strategy has been to remove cases on the theory that the state law claims in fact raise federal questions.

One version of this approach falls under the labels "artful pleading" and "complete preemption."[173] Preemption is the idea that supreme federal law can essentially replace state law.[174] So, for example, a federal environmental statute might preempt inconsistent state laws, creating a federal ceiling for

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[171] To give one example, in a lawsuit filed by Baltimore against fossil fuel companies, the defendants sought removal based on four theories of federal question jurisdiction as well as four other bases for jurisdiction or removal. Mayor & City Council of Baltimore v. BP P.L.C., 952 F.3d 452, 458 (4th Cir. 2020) ("In this case, Chevron asserted eight grounds for removal. Four of those grounds were premised on federal-question jurisdiction under 28 U.S.C. § 1331. Chevron argued that Baltimore's claims arose under federal law within the meaning of § 1331 because they (1) were governed by federal common law, rather than state law; (2) raised disputed and substantial issues of federal law under *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*; (3) were completely preempted by the Clean Air Act, 42 U.S.C. §§ 7401–7671q, as well as the foreign affairs doctrine; and (4) were based on conduct or injuries that occurred on federal enclaves. The remaining grounds relied on alternative jurisdictional and removal statutes, including: (1) the jurisdictional grant in the Outer Continental Shelf Lands Act ('OCSLA'), 43 U.S.C. § 1349(b); (2) the admiralty jurisdiction statute, 28 U.S.C. § 1333; (3) the bankruptcy removal statute, 28 U.S.C. § 1452; and (4) the federal officer removal statute, 28 U.S.C. § 1442." (citation omitted)).

[172] *See supra* note 162.

[173] *See generally* Arthur R. Miller, *Artful Pleading: A Doctrine in Search of Definition*, 76 TEX. L. REV. 1781, 1783–84 (1998) (describing the artful pleading doctrine); Ernest A. Young, *Stalking the Yeti: Protective Jurisdiction, Foreign Affairs Removal, and Complete Preemption*, 95 CALIF. L. REV. 1775, 1813–14 (2007) (describing the relationship between complete preemption and artful pleading); Gil Seinfeld, *The Puzzle of Complete Preemption*, 155 U. PA. L. REV. 537, 538–39 (2007) (noting that complete preemption is an exception to the well-pleaded complaint rule); 14C WRIGHT & MILLER, *supra* note 160, § 3722.2, Westlaw FPP § 3722.2 (same).

[174] *See* U.S. CONST. art. VI, cl. 2 (Supremacy Clause); Altria Grp., Inc. v. Good, 555 U.S. 70, 76 (2008) ("[W]e have long recognized that state laws that conflict with federal law are 'without effect.'" (quoting Maryland v. Louisiana, 451 U.S. 725, 746 (1981))).

emissions.[175] Federal preemption of a state law claim does not, in itself, create a federal question for purposes of federal jurisdiction. In "ordinary preemption," the federal law's preemptive effect serves as a defense to a state law claim, and federal defenses are not federal questions.[176] But the Supreme Court has acknowledged a small set of areas of "complete preemption," wherein federal law completely preempts all state law.[177] In these areas, a plaintiff cannot insulate a case from removal by suing in state court and citing only state law—because federal law essentially substitutes for state law, it is as if the plaintiff pleaded a federal question in the first place.[178] The only reason the federal law was not included in the complaint was "artful pleading" by the plaintiff.[179]

The Supreme Court has been very cautious in recognizing complete preemption, finding complete preemption under only three federal statutes.[180] Lower courts, too, have been circumspect, extending complete preemption to only a handful of additional statutes.[181] And, notably, all of these cases have involved federal statutes with congressional intent in favor of complete preemption being a touchstone of the analysis.[182]

Climate cases, though, present an opportunity to push complete preemption into uncharted waters. The jurisdictional exceptionalism here involves two steps. First, defendants argue that federal common law, that is, judge-made law, preempts state law related to climate change. Since at least *Erie Railroad Co. v. Tompkins*, federal courts have sought to cabin the role of federal common law.[183] Yet these defendants make the sweeping claim that any state law claims related to interstate pollution are preempted by federal common law. The Second Circuit accepted this argument in *City of New York v. Chevron Corp.*, holding that "[g]lobal warming presents a

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[175] 42 U.S.C. § 7543(a) ("No State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part.").

[176] *See supra* note 173 (collecting sources).

[177] *Id.*

[178] *Id.*

[179] 14C WRIGHT & MILLER, *supra* note 160, § 3722.1, Westlaw FPP § 3722.1 (artful pleading). There is at least a theoretical distinction between complete preemption and artful pleading, although, for the most part, the doctrines are coextensive. *See id.* For what it's worth, defendants in climate cases discussing "artful pleading" often do not use the term "complete preemption."

[180] Beneficial Nat'l Bank v. Anderson, 539 U.S. 1, 9–11 (2003) (National Bank Act); Metro. Life Ins. Co. v. Taylor, 481 U.S. 58, 63–66 (1987) (Employee Retirement Income Security Act); Avco Corp. v. Aero Lodge No. 735, Int'l Ass'n of Machinists & Aerospace Workers, 390 U.S. 557, 560–62 (1968) (Labor Management Relations Act).

[181] *See* 14C WRIGHT & MILLER, *supra* note 160, § 3722.2, Westlaw FPP § 3722.2.

[182] *Id.*

[183] 304 U.S. 64, 78 (1938); *see also* Rodriguez v. FDIC, 140 S. Ct. 713, 717 (2020).

uniquely international problem of national concern. It is therefore not well-suited to the application of state law."[184] (We should add that, after the court held that state law claims were preempted by federal common law, the same defendants argued that there is no actual federal common law to enforce, so the cases must be dismissed.)[185]

Having argued that federal common law preempts state law, the second step is to argue that the preemption at work here is complete, rather than ordinary. Because plaintiffs originally filed the *City of New York* case in federal court, defendants raised federal common law as an ordinary preemption defense.[186] But when climate suits are filed in state courts, defendants have sought removal arguing that preemptive federal common law substituted for state law and created a federal question.[187] Though defendants have disclaimed the label, they are essentially arguing for complete preemption. And double-exceptionally, they are doing so on the basis of federal judge-made law, not a federal statute as in the prior invocation of complete preemption.

So, defendants argued for an exceptional scope for federal common law combined with an exceptional application of complete preemption to get climate cases out of state court—an argument that would apply to any case related to climate. This exceptionalist argument is very well explained in the fossil fuel defendant's application for certiorari in the climate suit *Sunoco LP v. City of Honolulu*: "respondents' claims are necessarily governed by and 'arise under' federal law because they seek damages based on interstate—and international—greenhouse gas emissions . . . [and] seek damages for injuries allegedly caused by the cumulative impact of emissions emanating from every State in the Nation and every country in the world."[188] The Supreme Court has expressed at least some curiosity about this exceptionalist position and argument, as evinced by the Court's request for the Solicitor General's opinion on whether certiorari should be granted.[189]

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[184] 993 F.3d 81, 85–86 (2d Cir. 2021).

[185] City of New York v. BP P.L.C., 325 F. Supp. 3d 466, 470 (S.D.N.Y. 2018) ("The U.S.-based Defendants argue in their joint motion that . . . the City's claims arise under federal common law and should be dismissed . . . .").

[186] *Chevron Corp.*, 993 F.3d at 94.

[187] *Id.* at 93–94 (collecting cases).

[188] Petition for Writ of Certiorari at 26, Sunoco LP v. City and Cnty. of Honolulu, 143 S. Ct. 1795 (2023) (No. 22-523), *denying cert. to* 39 F.4th 1101 (9th Cir. 2022), 2022 WL 17487995, at *26.

[189] Sunoco LP v. City of Honolulu, 144 S. Ct. 2627 (2024). For our further commentary on this case and certiorari petition, see Zachary D. Clopton & David A. Dana, Opinion, *Climate Change Should Get Its Day in Court*, CHI. TRIB. (July 16, 2024), https://www.chicagotribune.com/2024/07/16/opinion-climate-change-fossil-fuel-companies-supreme-court-jurisdiction/ [https://perma.cc/RD8F-A8Y4].

*b. Foreign affairs jurisdiction*

Defendants also have sought to obtain federal question jurisdiction over cases arising under state law by arguing that foreign affairs concerns create a federal question, thus supporting removal. It is helpful to contrast this type of jurisdictional argument to complete preemption just described. Under a complete preemption theory, federal law substitutes for state law in an entire area of law, thus converting a state law claim into a federal law claim for purposes of federal question jurisdiction.[190] In contrast, defendants also have argued that even if the claim arises under state law—it is not completely preempted—then federal courts should take jurisdiction over the case because it implicates issues of foreign affairs, which are uniquely federal interests.[191] As evidence that climate litigation implicated foreign affairs, defendants in multiple climate cases have pointed out the fact that the phenomenon is called *global* warming.[192]

While at first blush, this argument seems reasonable—foreign affairs are, after all, primarily issues of federal policy[193]—closer scrutiny reveals how exceptional it really is. First, the entire argumentative structure is anathema to principles of federal jurisdiction. In no other area has the Court declared, without constitutional or statutory authority, that an entire topic of litigation inherently justifies federal jurisdiction.[194] Such jurisdiction would be exceptional.

Second, even if the courts were to do so, "foreign affairs" is an odd avenue to go down in the process. Countless cases implicating "foreign affairs" are litigated every day in state courts, including cases involving foreign sovereigns, foreign laws, and international law.[195] Defining "foreign affairs" is also exceedingly difficult—cases routinely involve a mix of foreign and domestic elements, including potential effects outside the United

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[190] *See supra* Section II.B.2.a.

[191] *See, e.g.*, Appellants' Opening Brief at 14–26, Rhode Island v. Shell Oil Prods. Co., L.L.C., 979 F.3d 50 (1st Cir. 2020) (No. 19-1818), 2019 WL 6463536, at *14–26 (making the case for foreign affairs federal jurisdiction), *vacated*, 144 S. Ct. 2666 (2021); Brief of Amicus Curiae Chamber of Commerce of the United States of America in Support of Appellants and Reversal at 10–11, *Shell Oil Prods. Co., L.L.C.*, 979 F.3d 50 (No. 19-1818), 2019 WL 7049052, at *10–11 (same).

[192] *See, e.g.*, Defendants-Appellants' Opening Brief, *supra* note 5, at 24 ("The Complaint's repeated use of the term '*global* warming' makes clear that the alleged causes of Plaintiff's alleged injuries are not confined to particular sources, cities, counties, states, or even countries. Rather, the claims implicate inherently national and international activities and interests." (citations omitted)).

[193] *See* United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 319 (1936).

[194] *See supra* Section I.B.1.

[195] *See* Clopton, *supra* note 17, at 181–90 (describing categories of cases related to foreign affairs that may be litigated in state court).

States.[196] Mere allegations of foreign effects should not justify federal jurisdiction.

Finally, foreign affairs are an area where Congress has attended to federal jurisdiction for more than two centuries. The Judiciary Act of 1789 included various grants of jurisdiction implicating foreign relations, disputes between U.S. and foreign citizens, admiralty and maritime claims, and alien tort claims.[197] Congress later added jurisdiction over civil actions against consular officials in 1948,[198] over certain claims related to international arbitration in 1970,[199] over suits against foreign sovereigns in 1976,[200] over international-trade counterclaims,[201] over certain cases related to terrorism in 2008 and 2016,[202] and over foreign defamation judgments in 2010.[203] This laundry list of statutes demonstrates that Congress has attentively managed the scope of federal jurisdiction over cases implicating foreign relations. It would be exceptional for judges to create new jurisdictional bases out of whole cloth, and it would be exceptionally exceptional to do so in areas where Congress has carefully calibrated federal jurisdiction.

*c. Federal officer removal*

Yet another way that climate defendants have sought to displace state courts is through federal officer removal.[204] Under the current law, removal is available regardless of the cause of action for claims against "any officer (or any person acting under that officer) of the United States or of any agency thereof, in an official or individual capacity, for or relating to any act under color of such office," if there is a colorable claim to a federal defense.[205] Federal officer removal is thus available not only to federal officers themselves but also to private parties acting under their direction.[206]

Federal officer removal has the potential for climate exceptionalism in two ways. First, climate defendants seeking to remove cases to federal court

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[196] There are entire doctrines developed to determine not whether a U.S. decision can have extraterritorial connections but how much. *See, e.g.*, Abitron Austria GmbH v. Hetronic Int'l, Inc., 143 S. Ct. 2522, 2527 (2023) (describing the presumption against extraterritoriality); Piper Aircraft Co. v. Reyno, 454 U.S. 235, 261 (1981) (describing forum non conveniens).

[197] 28 U.S.C. §§ 1332(a)(2), 1333, 1350; Judiciary Act of 1789, ch. 20, §§ 9, 11, 1 Stat. 73, 76–79.

[198] 28 U.S.C. § 1351.

[199] 9 U.S.C. § 205.

[200] 28 U.S.C. § 1330.

[201] *Id.* § 1368.

[202] *Id.* §§ 1605A–1605B.

[203] *Id.* § 4103.

[204] For a discussion of the history of federal officer removal, see Willingham v. Morgan, 395 U.S. 402, 405–06 (1969).

[205] 28 U.S.C. § 1442; 14C WRIGHT & MILLER, *supra* note 160, § 3726, Westlaw FPP § 3726.

[206] 28 U.S.C. § 1442.

routinely invoke federal officer removal as one possible basis.[207] For example, in a series of cases, oil-company defendants argued that they were operating at the direction of federal officers because they participated in the war effort in World War II by providing oil and gas to the military and because they have leases from the federal government to develop federal lands.[208] Stretching the concept of "direction" back eighty years and to a leasehold relationship would be exceptional. And, indeed, no court has endorsed this theory.

Second, climate defendants have succeeded in getting the Supreme Court's imprimatur on another type of exceptionalism—one for which the Court majority did not acknowledge the connection to climate litigation but for which climate litigation provided an important backdrop. As noted above, climate defendants removing cases to federal court routinely cite a litany of bases of federal jurisdiction, with federal officer removal being one of them.[209] Lower courts have rejected federal officer removal across the board in these cases.[210] Decisions to remand removed cases to state court are not appealable, but the federal officer removal statute provides for appeal in cases raising that basis of removal.[211] The question, then, is whether an appeal of the federal officer decision also permits the court of appeals to review other potential bases of federal jurisdiction. Every court of appeals to decide the issue concluded that the answer was no—only the federal officer decision could be reviewed.[212] But in a climate suit brought by the City of Baltimore, the Supreme Court went the other way, holding that appellate courts in these cases could look at all bases for federal jurisdiction.[213] In dissent, Justice Sonia Sotomayor noted the likely (and problematic effect) of such a rule:

> Unfortunately, I fear today's decision will reward defendants for raising strained theories of [federal officer removal] . . . by allowing them to circumvent the bar on appellate review entirely. Look no further than this case. In 2018, the Mayor and City Council of Baltimore sued petitioners for allegedly concealing the connection between fossil fuels and climate change. Petitioners listed eight grounds for removal to federal court, including [federal officer removal]. But petitioners now ask only for a ruling that removal was proper

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[207] *See, e.g.*, BP P.L.C. v. Mayor and City Council of Baltimore, 141 S. Ct. 1532, 1536 (2021) (describing plaintiff's argument for removal under the federal officer removal statute based on the fact that "some of their challenged exploration, drilling, and production operations took place at the federal government's behest").

[208] *Id.*; City of Hoboken v. Exxon Mobil Corp., 558 F. Supp. 3d 191, 207–08 (D.N.J. 2021).

[209] *See supra* Sections II.B.2.a–II.B.2.b.

[210] *Exxon Mobil*, 558 F. Supp. 3d at 208.

[211] 28 U.S.C. § 1447(d).

[212] *BP P.L.C.*, 141 S. Ct. at 1543 (Sotomayor, J., dissenting).

[213] *Id.* at 1543 (majority opinion).

> under [federal question jurisdiction]. Had petitioners relied solely on [federal question jurisdiction] before the District Court, as they do now, no one disputes their argument would be unreviewable on appeal.[214]

The Supreme Court majority did not say it was articulating a rule of climate change federal officer removal, but the climate context appeared in the briefing and again at oral argument.[215] Although the question presented related only to federal officer removal, defendant–petitioners spent roughly one-quarter of the argument section of their brief arguing that federal common law applies to climate cases.[216] At argument, counsel for defendants urged the Court to take up the federal common law question because "there are some 20 of these [climate] cases pending nationwide in courts around the country."[217] Perhaps, then, this decision on the appealability of removal is climate exceptionalism in disguise.

*d. Class Action Fairness Act*

Finally, defendants in climate suits have sought federal jurisdiction through an exceptional reading of the Class Action Fairness Act (CAFA).[218] As the name suggests, CAFA provides for federal jurisdiction over certain multistate class actions.[219] In *Mississippi ex rel. Hood*, the Supreme Court confirmed that a lawsuit filed by a state as parens patriae—with the state acting in a representative capacity on behalf of its citizens—is not a class action for purposes of CAFA removal.[220] And yet, climate defendants have sought to remove city and state lawsuits under CAFA, claiming that they are sufficiently class action-like to justify federal jurisdiction.[221] Notably, when making these arguments, defendants invoke climate exceptionalism:

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[214] *Id.* at 1546 (Sotomayor, J., dissenting).

[215] *See, e.g.*, Brief for the Chamber of Commerce of the United States of America as Amicus Curiae in Support of Petitioners at 3, 6, 25, *BP P.L.C.*, 141 S. Ct. 1532 (No. 19-1189), 2020 WL 7029228, at *3, *6, *25 (mentioning climate change); Transcript of Oral Argument at 30–31, *BP P.L.C.*, 141 S. Ct. 1532 (No. 19-1189), 2021 WL 177489, at *30–31 ("JUSTICE THOMAS: And I know you said that you're not going to take a position or the government is not taking a position on whether or not we should get to the—the federal common law issue, but do you have an opinion on where—whether or not such a—there is a federal common law principle on climate change injuries?").

[216] Brief for the Petitioners at 38–45, *BP P.L.C.*, 141 S. Ct. 1531 (No. 19-1189), 2020 WL 6930643, at *38–45.

[217] Transcript of Oral Argument, *supra* note 215, at 22.

[218] Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.).

[219] 28 U.S.C. § 1332(d).

[220] Mississippi *ex rel.* Hood v. AU Optronics Corp., 571 U.S. 161, 164 (2014).

[221] *See, e.g.*, Brief of Appellants at 51–53, Minnesota v. Am. Petroleum Inst., 63 F.4th 703 (8th Cir. 2023) (No. 21-1752), 2021 WL 2604711, at *51–53 (arguing for removal), *cert. denied*, 144 S. Ct. 620 (2024).

> One of CAFA's "primary purpose[s]" is to "open the federal courts to corporate defendants" to avoid damage to the "national economy" from the "proliferation of meritless class action suits." This lawsuit directly implicates that concern: the State is attempting to use its statutory enforcement power to bring an action on behalf of all Minnesota residents and fossil-fuel consumers to recover for alleged harms purportedly caused by global climate change from a handful of energy providers. In addition, to prevent removal of this suit would result in claims predicated on climate change—"a uniquely international problem of national concern" that "is simply beyond the limits of state law"—being litigated in state court, in direct contravention of CAFA's purpose of ensuring that cases of "national importance" are removable to federal court.[222]

In other words, these cases are not class actions, but defendants argue that climate litigation demands exceptional treatment under CAFA.

## III. THE NORMATIVE CASE AGAINST CLIMATE JURISDICTION EXCEPTIONALISM

As detailed above, some judges have embraced climate exceptionalism, which results in climate claims being denied without even the possibility of a hearing on the merits. This exceptionalism, moreover, continues to be advocated by climate defendants, including governments and especially the fossil fuel industry. It is thus worth asking: is this exceptionalism to the detriment of climate plaintiffs and to the advantage of climate defendants a good thing or a bad thing, and, if the latter, why precisely?

We think the normative case against both what we have termed standing and federalism exceptionalism is overwhelming. We begin by calling out the practice of courts applying exceptional treatment to climate cases while maintaining that they are being treated unexceptionally. This type of hidden exceptionalism is bad for all the reasons that exceptionalism is bad; in addition, it undermines accountability and risks spillovers to the detriment of legal doctrine more broadly. Next, we critique climate jurisdictional exceptionalism regardless of whether the courts and parties label it as such. Our normative case against climate exceptionalism is grounded in respect for access to justice, federalism, and the separation of powers. While we cannot build theories of these values from the ground up, we suggest that climate exceptionalism departs from settled principles that support these values without justification.

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[222] *Id.* at 52–53 (citations omitted) (first quoting Pirozzi v. Massage Envy Franchising, LLC, 938 F.3d 981, 983 (8th Cir. 2019); then quoting City of New York v. Chevron Corp., 993 F.3d 81, 85–86, 92 (2d Cir. 2021); and then quoting 28 U.S.C. § 1711 note (congressional finding (4)(a))).

### *A. The Problems of Hidden Exceptionalism*

As described throughout this Article, judges and advocates have made arguments for reducing court access based on climate change's exceptional status—its exceptional scope, uncertainty, or politics.[223] We critique this type of climate exceptionalism in the following Sections, but here we want to highlight an additional feature of some of the exceptional arguments described above. Sometimes courts and lawyers will argue for climate exceptionalism while disclaiming exceptional treatment. They will say that they are applying the typical rules of standing or jurisdiction, only to reach conclusions at odds with those usual rules.[224] This hidden exceptionalism presents special problems.

First, exceptionalism-posing-as-nonexceptionalism is undesirable from a normative standpoint simply because it lacks candor. By twisting or ignoring applicable precedents and authorities, this kind of exceptionalist argumentation devalues those precedents and authorities and calls into question the integrity of adjudication as a whole.[225] But we think that the lack of candor embodied in these arguments is particularly problematic because of its effects on accountability.[226] It is already hard enough for the public to parse legal decisions, especially legal decisions sounding in technical doctrines such as standing and subject matter jurisdiction.[227] By using

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[223] *See supra* Part II.

[224] *See supra* Part II (collecting cases).

[225] *See, e.g.*, Richard H. Fallon Jr., *A Theory of Judicial Candor*, 117 COLUM. L. REV. 2265, 2288–308 (2017) (describing judicial candor as both an obligation and an ideal for judges); David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 750 (1987) ("[T]he fidelity of judges to law can be fairly measured only if they believe what they say in their opinions and orders, and thus a good case can be made that the obligation to candor is absolute.").

[226] This is a central theme of Professors Stephen Burbank and Sean Farhang's *Rights and Retrenchment*. *See* STEPHEN B. BURBANK & SEAN FARHANG, RIGHTS AND RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION 219 (2017) ("[T]he ostensibly technical and legalistic qualities of [judicial] decisions on issues affecting private enforcement, and the gradual, evolutionary nature of case-by-case decision-making, opened a pathway of judicial retrenchment that was remote from public view . . . .").

[227] *See, e.g.*, George Rutherglen, *The Problem with Procedure: Some Inconvenient Truths About Aspirational Goals*, 56 SAN DIEGO L. REV. 1, 1–2 (2019) ("The dark side of due process has cast a long shadow over civil procedure, hiding technical legal doctrine within a forbidding aura of obscurity. . . . [P]rocedure can complicate and confuse enforcement of the law. This observation would come as no surprise to generations of law students, who confronted unfamiliar and esoteric issues of procedure just as they began law school."); JoEllen Lind, *"Procedural* Swift*": Complex Litigation Reform, State Tort Law, and Democratic Values*, 37 AKRON L. REV. 717, 720 (2004) ("[P]rocedural principles are technical and arcane; by their nature they limit the information to people to make good decisions about the policy issues that are at stake. This acts as a barrier to political participation and impedes transparency."); Clopton, *supra* note 17, at 206–07 ("The jurisdictional and procedural doctrines . . . are almost invariably more technical and obscure than the substantive claims at issue. . . . These features limit access by the public and press, making political accountability more difficult.").

exceptionalist standing and federalism arguments without admitting as much, judges can avoid accountability for denying advocates a day in court.[228] It thus allows the judges to avoid taking responsibility for their views on the merits—views that, one has to suppose, are much of what drives them to take exceptionalist stances in the first place. That way, if people are inclined to criticize the courts, judges can in effect blame procedure for not addressing substantive issues that the media would be more inclined to cover, that the general public could be more able to grasp, and that would therefore open up the judges to more actual (and normatively desirable) accountability.[229]

Any jurisdictional exceptionalism should require an explanation, and if the courts, as well as climate defendants, provided an explicit rationale for both standing and federalism exceptionalism, litigants and the public (as well as Congress) could directly consider that explanation. But, in the hands of judges, Justices, and climate defendants, both forms of exceptionalism have been purportedly nonexceptionalist—relying on established precedent, principles, and statutes and straightforwardly applying them to climate claims. To put it a little more bluntly, both standing and federalism exceptionalism appear dishonest, although of course no outside commentator can truly know what is in a judge or Justice's mind and heart.[230]

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[228] On the dangers of excessive judicial avoidance as a dodge to public accountability, see, for example, Gerald Gunther, *The Subtle Vices of the "Passive Virtues"—a Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1, 10 (1964), and Neil S. Siegel, *A Theory in Search of a Court, and Itself: Judicial Minimalism at the Supreme Court Bar*, 103 MICH. L. REV. 1951, 2015 (2005).

[229] Lin, *supra* note 13, at 533 ("[B]y determining common law claims on their substantive merits, rather than dodging them, courts would make clear the common law's limits as a gap-filler and thereby force or invite action by the political branches."). Climate jurisdiction exceptionalism, of course, is not the only context where courts have used devices of judicial avoidance to refrain from engaging in the merits of certain controversial issues. Much has been written on the Supreme Court's use of the so-called "shadow docket" to avoid issuing written decisions on highly controversial cases. *See generally* William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J.L. & LIBERTY 1 (2015) (discussing the lack of transparency for cases dealt with through the shadow docket). Perhaps the most notable usage of the shadow docket was the Court's 2021 order declining to stay a Texas law that banned abortion after cardiac activity could be detected. Charlie Savage, *Texas Abortion Case Highlights Concern over Supreme Court's 'Shadow Docket*,*'* N.Y. TIMES (last updated Sept. 4, 2021), https://www.nyt.com/2021/09/02/us/politics/supreme-court-shadow-docket-texas-abortion.html?smid=url-share [https://perma.cc/D83R-5E7P]; Adam Liptak, J. David Goodman & Sabrina Tavernise, *Supreme Court, Breaking Silence, Won't Block Texas Abortion Law*, N.Y. TIMES (last updated Nov. 1, 2021), https://www.nytimes.com/2021/09/01/us/supreme-court-texas-abortion.html [https://perma.cc/EE6M-N688].

[230] This hidden exceptionalism on the part of federal judges will also prevent state court judges from ever having an opportunity to consider the merits of state law adaptation claims. And the openness of some state judges to hearing the merits of state constitutional law climate mitigation suits, as in Hawaii and Montana, suggests that some state judges would be open to hearing the merits of state common law climate adaptation suits if afforded that opportunity. In the Hawaii action *Navahine F. v. Hawai'i*

Beyond accountability, exceptionalism-posing-as-nonexceptionalism risks creating problems for the law more generally. There is a well-known adage that bad cases make bad law.[231] One way to understand this idea is that when judges try to articulate legal principles of general applicability in cases that present unusual or exceptional facts, there is a greater risk that those general legal principles will have unintended bad consequences.[232]

We are worried about this effect in climate cases. If climate change were such an exceptional challenge that it demanded special rules of jurisdiction, then we think it would be important to be explicit that those exceptional rules were tied to exceptional circumstances.[233] Otherwise, there arises a risk that judges in future non-climate cases might mistakenly apply those exceptional rules as the norm. This kind of unintended spillover is, almost inevitably, more likely when exceptional treatment is disclaimed—that is, when the court insists it is applying rules in a nonexceptional manner even when it is not doing so. We take up below the spillover problem even when climate exceptionalism is explicit, but we mention this issue here because hidden exceptionalism only magnifies the problem.

### *B. Exceptionalism Versus Standing and Federalism Values*

We spent time earlier in this Article outlining the current and unexceptional law of standing and subject matter jurisdiction not only to give readers doctrinal context, but also to suggest that existing rules are not just plucked from the sky. Instead, they reflect, albeit imperfectly, important

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*Department of Transportation*, a group of children in Hawaii alleged that Hawaii state policies implicating fossil fuel emission violated constitutional guarantees in the Hawaii constitution. The Hawaii trial court denied a motion to dismiss and allowed declaratory judgment claims to proceed to trial, though the parties settled in June 2024. No. 1CCV-22-0000631 (Haw. Cir. Ct. Apr. 6, 2023); *see Timeline:* Navahine v. Hawai'i DOT, OUR CHILD.'S TR., https://navahinevhawaiidot.ourchildrenstrust.org/timeline/ [https://perma.cc/72AS-SVNZ] (providing a timeline of the litigation and links to relevant documents). In *Held v. State*, a suit brought by group of children in Montana, the Montana trial court held unconstitutional a Montana law prohibiting the consideration of climate impacts as part of Montana's environmental review statute and regulations. No. DV-25-2020-0000307-DK, at 102 (Mont. Dist. Ct. Aug. 14, 2023), *aff'd*, 2024 MT 312 (Mont. 2024); *see* David Gelles & Mike Baker, *Judge Rules in Favor of Montana Youths in a Landmark Climate Case*, N.Y. TIMES (last updated Aug. 16, 2023), https://www.nyt.com/2023/08/14/us/montana-youth-climate-ruling.html [https://perma.cc/JER4-LKV7].

[231] *See, e.g.*, Doggett v. United States, 505 U.S. 647, 659 (1992) (Thomas, J., dissenting) ("Just as 'bad facts make bad law,' so too odd facts make odd law."); Wyeth v. Levine, 555 U.S. 555, 604 (2009) (Alito, J., dissenting) ("[T]ragic facts make bad law.").

[232] *Doggett*, 505 U.S. at 659; *Wyeth*, 555 U.S. at 604. For example, in the context of international litigation, Professor Christopher Whytock warned that a very unusual case which included, among others, allegations of corruption and blackmail in an Ecuadorian court, might distort general principles of international litigation. Christopher A. Whytock, *Some Cautionary Notes on the "Chevronization" of Transnational Litigation*, 1 STAN. J. COMPLEX LITIG. 467, 468 (2013).

[233] We take up whether climate change demands jurisdictional exceptionalism in the other direction in the Conclusion of this Article.

values. Creating exceptions to those doctrines, therefore, must be justified by countervailing values that support a different balance.

Standing doctrine aims to strike a balance between providing access to justice to parties who may have valid claims and separation of powers concerns that imply limits on judicial power.[234] Likewise, the law of removal of state cases to federal court reflects a balancing among the value of allowing plaintiffs to choose to pursue state law claims in state courts, the value of allowing state courts to hear and thus shape their own substantive law, and the value of respecting distinctively federal interests that federal courts are best situated to protect.[235]

Standing exceptionalism and federalism exceptionalism alter the balance that the law has struck between these competing values—tipping the scales away from access to justice, choice of forum, and the role of state courts. Standing exceptionalism undermines access to justice by denying any hearing on the merits—whether the courts ultimately decide in favor of or against climate plaintiffs.[236] Regardless of the element of standing doctrine invoked, the goal is the same: no merits decision. Federalism exceptionalism runs counter to settled principles of federalism—both with respect to plaintiffs being able to choose their forum in cases of concurrent jurisdiction and with respect to federal courts respecting the distinctive domain of state courts and state law.[237] Federalism exceptionalism also compromises access-to-justice values because a central aim of exceptionalist removals of cases from state to federal court is so that the federal courts can summarily dismiss them.[238] The entire thrust of the exceptionalism project to remove state tort claims regarding climate to federal court is to achieve their dismissal before any merits consideration; in that sense, both standing exceptionalism and federalism exceptionalism are aimed at—and are in conflict with—the value of access to justice.

Moreover, the value of access to justice is not just about recognizing the worth of the plaintiffs and the importance that their claims of violation of law be heard; rather, the value is also about the importance of developing a full body of law that can guide everyone in society and that can also be the focal point of debates, cultural and political, about the need for legal and

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[234] *See supra* Section II.A.1.

[235] *See supra* Section II.B.1.

[236] *See supra* Section II.A.2.

[237] *See supra* Section II.B.2.

[238] *See supra* Section II.B; Clopton, *supra* note 17, at 173–74.

other reforms.[239] When access to justice is unduly limited, there are fewer, less complete, and less meaningful court decisions, and that in itself is normatively problematic.

In the climate context, for example, a state court decision that energy-company defendants bear even minimal financial responsibility for climate-related damages could inform and spark debate both within and outside federal, state, and local political institutions.[240] So, too, could a decision that such defendants bear absolutely no financial responsibility. But if climate jurisdiction exceptionalism prevails, there will simply be no substantive decisions about the legal responsibility of energy company defendants.

Likewise, it would be very useful for the public to have access to courts' reasoned decisions as to whether the Constitution creates any rights regarding climate change at all. A decision that no such right exists could prompt calls for new interpretations or stronger nonconstitutional rights, and certainly a decision that such a right exists would create an intense public debate as to what that would mean in practice.[241] Substantive law is axiomatically richer and more meaningful when courts reach substantive issues rather than hiding behind an exceptionalist version of standing doctrine.

One could, of course, argue that climate claims call for a different balance, one less geared to access to justice and federalism, but the courts do not offer such justifications, and we think they could not persuasively do so. As already suggested, the separation of powers concerns regarding climate claims filed in federal court seem no more compelling than the concerns that have been and could be raised by a wide range of claims for which the courts have found Article III standing and have delved headfirst into politically controversial terrain.[242] By the *Juliana* majority's reasoning, it is arguable

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[239] This idea is often discussed under the label of the "law declaration function" of adjudication. For examples from the voluminous literature, see HENRY M. HART JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 632–38 (William N. Eskridge Jr. & Philip P. Frickey eds., 1994), which discusses the appropriateness of the lawmaking power); RICHARD H. FALLON JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 73–75 (Robert C. Clark et al. eds., 7th ed. 2015), which describes the public function of the law declaration model; and Owen Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085–86 (1984), which criticizes settlements for preventing courts from fulfilling their law declaration function.

[240] For a parallel discussion in complex litigation, see Alexandra D. Lahav, *The Political Justification for Group Litigation*, 81 FORDHAM L. REV. 3193, 3193 (2013).

[241] *Cf.* Matthew R. Christiansen & William N. Eskridge Jr., *Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967–2011*, 92 TEX. L. REV. 1317, 1317–20 (2014) (discussing congressional–judicial dialogue).

[242] *See supra* Sections II.A.2.d–II.A.2.e.

that the Supreme Court should have declined to exercise jurisdiction in *Brown v. Board of Education* and other landmark, celebrated cases.[243]

As to federalism exceptionalism, were courts to provide an explicit justification, it would have to be a form of what courts and scholars have termed "protective jurisdiction," a speculative concept in which federal courts must declare certain areas within federal competence to protect them from unworthy or incompetent state courts.[244] But it is far from obvious that climate cases alleging state tort claims or violations of state consumer laws, or for that matter state constitutional provisions, are within the special expertise of federal judges and demand national solutions.

The other obvious counterargument sounds in the separation of powers—that the law of standing and federal jurisdiction should avoid judicial decisions on the merits because courts should leave these issues to Congress.[245] We reject this argument as a normative matter, but even if we did not, we think it is also wrong in practice. Standing and federalism exceptionalism are not only *not* justified by separation of powers concerns, but these arguments themselves intrude on the province of Congress.

While Congress arguably can only expand Article III jurisdiction by constitutional amendment,[246] it can always restrict federal jurisdiction by statute.[247] Likewise, Congress can expand the scope of claims that are removable to federal court from state court by statute.[248] Indeed, federal courts traditionally have read jurisdictional statutes narrowly for reasons of federalism, reasoning that if federal jurisdiction is to essentially usurp state jurisdiction, such usurpation should be at the direction of Congress.[249]

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[243] *See supra* Section II.A.2.e. *But see* Lawrence B. Solum, *Outcome Reasons and Process Reasons in Normative Constitutional Theory*, 172 U. PA. L. REV. 913, 916 (2024) (arguing that a theory of constitutional interpretation should not be based primarily on whether the outcomes of the interpretive approach are normatively attractive or unattractive).

[244] *See* Young, *supra* note 173, at 1793–806 (suggesting that protective jurisdiction would undermine federalism by undermining state courts); Carole E. Goldberg-Ambrose, *The Protective Jurisdiction of the Federal Courts*, 30 UCLA L. REV. 542, 609–14 (1983) (arguing that protective jurisdiction prevents states from developing substantive law and is unnecessary to protect federal interests); *see also* 13D WRIGHT & MILLER, *supra* note 160, § 3565 (3d ed.), Westlaw FPP § 3565 (reviewing the debate).

[245] *See, e.g.*, Zachary D. Clopton, *Justiciability, Federalism, and the Administrative State*, 103 CORNELL L. REV. 1431, 1453–57 (2018) (collecting sources).

[246] Raines v. Byrd, 521 U.S. 811, 820 n.3 (1997) ("It is settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing."); Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 100 (1979) ("In no event . . . may Congress abrogate the Art. III minima . . . ."); *see also* Spokeo, Inc. v. Robins, 578 U.S. 330, 337–39 (2016) (affirming *Raines*).

[247] *See* 28 U.S.C. § 1332.

[248] *See id.* § 1441.

[249] *See, e.g.*, Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994) (discussing the limits of federal jurisdiction).

Congress can also amend the substantive law to limit all sorts of federal climate claims, other than federal constitutional ones, and can preempt any state climate claims.[250] Thus, the current law seemingly allows Congress to make choices about when exceptionalism is justified—and, to date, Congress has not done so with respect to climate.

Indeed, we would go further to suggest that the best way to deal with climate claims would be exactly this type of congressional intervention. The case for exclusive federal jurisdiction is often premised on the notion that there are legal issues that demand uniform treatment under federal law.[251] And the best course for defining those areas is not by some abstract jurisdictional principle but instead through substantive law enacted by Congress. So if and when Congress passes a comprehensive federal climate statute, addressing the enormity of mitigation and adaptation challenges, federal jurisdiction will automatically follow.[252] But until then, climate cases should not be given special jurisdictional treatment.[253]

In sum, there is a strong normative case against both the standing exceptionalism and federalism exceptionalism in favor of climate defendants that we explore above. The normative arguments with respect to these two components of what we have coined "climate jurisdiction exceptionalism" differ somewhat, but the bottom line is the same: these exceptionalisms undermine core values that our legal system holds dear.

### *C. Line Drawing and Slippery Slopes*

Finally, we want to return to the issues of line drawing and slippery slopes.[254] The simple claim, which we elaborate below, is that standing

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[250] *See, e.g.*, 42 U.S.C. § 7543(a) ("No State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part.").

[251] Henry J. Friendly, *In Praise of* Erie*—and of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 405 (1964) ("*Erie* led to the emergence of a federal decisional law in areas of national concern that is truly uniform because, under the supremacy clause, it is binding in every forum . . . .").

[252] For a discussion of the role of civil litigation in potential climate legislation, see Zachary D. Clopton, *Civil Justice and the (Green) New Deal*, 69 DEPAUL L. REV. 335, 349–55 (2020).

[253] This is not to say, though, that Congress always operates this way. CAFA, mentioned above, is essentially a jurisdictional statute that attempted to work a change in substantive state law without saying so. Clopton, *supra* note 17, at 212–15. And for this reason, it has come under heavy criticism. *See id.* at 213 n.260, 214 nn.265–69 (collecting sources). As a normative matter, changes to the law through jurisdiction are problematic because they are less legible and thus more difficult to bring under public scrutiny. It may be, then, that Congress will face pressure to create climate jurisdiction to effect changes to the law that would not pass if done substantively. But those changes would be problematic, just as CAFA was.

[254] For a general description of the slippery slopes in the context of precedent, and why courts should take the risk of slippery slopes into account in their decisions and opinions, *see* Katharina Stevens,

exceptionalism and federalism exceptionalism, as embraced by advocates and some courts for climate cases, cannot plausibly be contained to the specific kinds of climate suits to which they have been applied. This is a problem if you agree with our normative case, because it means that such decisions have the potential to compromise important values in a broad and indeed indiscernible swath of cases.[255] But even for those who accept current arguments for climate exceptionalism, if it is truly something "exceptional" that justifies these decisions, then it should be concerning if there is no way to limit their future applications.

These problems stem in part from the fact that it is very difficult to define what counts as a "climate case," so if there is to be de facto climate exceptionalism, it may cover a great deal more than the mitigation and adaptation suits discussed above.[256] A wide range of issues—and claims and possible claims regarding these issues—implicate climate change in important ways, including claims related to land use planning, zoning, building standards, agricultural practices, infrastructure and transportation policy, trade policy, electricity regulation, natural resource and wildlife habitat protection, and conventional pollution regulation.[257] These sorts of

*Precedent Slippery Slopes*, *in* PHILOSOPHICAL FOUNDATIONS OF PRECEDENT 459, 474 (Timothy Endicott, Hafsteinn Dan Kristjánsson & Sebastian Lewis eds., 2023) ("Reasoning about whether to set a precedent, and how to present precedent decisions in opinions, should include consideration of slippery slopes and how to deal with them.").

[255] *See supra* Section III.B.

[256] *Cf.* Maggie Gardner, *"Foreignness,"* 69 DEPAUL L. REV. 469, 470 (2020) (discussing how the concept of "foreignness" should not be used to exclude or dismiss cases).

[257] *See, e.g.*, Alice Kaswan, *Climate Change Adaptation and Land Use: Exploring the Federal Role*, 47 J. MARSHALL L. REV. 509, 513–17 (2014) (describing climate change accommodation strategies through the field of land use); Kevin Perron, Note, *"Zoning Out" Climate Change: Local Land Use Power, Fossil Fuel Infrastructure, and the Fight Against Climate Change*, 45 COLUM. J. ENV'T L. 573, 577 (2020) (questioning whether zoning ordinances could be used to "zone out" fossil fuel operations to address climate change); Rachael Rawlins & Robert Paterson, *Sustainable Buildings and Communities: Climate Change and the Case for Federal Standards*, 19 CORNELL J.L. & PUB. POL'Y 335, 346 (2010) (describing the history of federal "green" building-code incentives); AquAlliance v. U.S. Bureau of Reclamation, 287 F. Supp. 3d 969, 1030 (E.D. Cal. 2018) (analyzing the impact of shifting precipitation patterns due to climate change and their impact on future water use in agriculture); Cleveland Nat'l Forest Found. v. San Diego Ass'n of Gov'ts, 397 P.3d 989, 995 (Cal. 2017) (discussing the statutorily mandated local "Climate Action Policy" set by the San Diego Association of Governments, an interregional governmental transportation body); Khalid Ahmed & Wei Long, *Climate Change and Trade Policy: From Legal Complications to Time Factor*, 12 J. INT'L TRADE L. & POL'Y 258, 260, 263–64 (2013) (discussing the tension between international trade frameworks and international climate protocol frameworks); Sierra Club v. Fed. Energy Regul. Comm'n, 867 F.3d 1357, 1367 (D.C. Cir. 2017) (describing environmental impact statements at the Federal Energy Regulatory Commission and their necessity in transmission regulation); Sagoonick v. State, 503 P.3d 777, 782, 790–91 (Alaska 2022) (analyzing climate litigants' challenges regarding the future impact on wildlife and destruction of culturally and environmentally significant lands); Daniel A. Farber, *Pollution Markets and Social Equity:*

claims and many others, by implicating climate policy, could be considered as falling within the scope of "too political" to be adjudicated by federal courts under the exceptionalist redressability test or (if they are state law claims) "too national" to be allowed to remain in state court.[258]

Concerns of defining "climate cases" mirror concerns discussed above about defining "foreign affairs."[259] Particularly, though not exclusively, in the context of foreign affairs removal, climate defendants have sought exceptional treatment by claiming that climate litigation implicated "foreign affairs." But what makes these cases about "foreign affairs"? Defendants argue, for example, that they implicate the global market for fossil fuels. But defendants cannot really mean that all lawsuits against companies that do business outside the United States implicate foreign affairs. Instead, the almost-silly insistence that these cases implicated foreign affairs because they discuss "global" climate change is closer to the point[260]—they want climate exceptionalism without even doing the work of defining what counts as a "climate case."

Moreover, by analogy, all the exceptionalist arguments against climate standing could apply to a range of claims that have absolutely nothing at all to do with climate change. Once courts establish climate as exceptionalist terrain, advocates will press to extend that (albeit implied) exceptionalism by way of analogical reasoning. For example, millions of Americans have been exposed to the "forever chemicals" that the EPA is just beginning to consider regulating.[261] These chemicals have affected nearly everyone, their effects are uncertain, the possible sources for any exposed person are many, and solutions to this massive exposure are likely to involve large sums of money and difficult trade-offs.[262]

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*Analyzing the Fairness of Cap and Trade*, 39 ECOLOGY L.Q. 1, 26–28 (2012) (discussing conventional pollution "hot spot" regulation through the context of cap-and-trade climate mitigation efforts); Ctr. for Biological Diversity v. EPA, 90 F. Supp. 3d 1177, 1187–88 (W.D. Wash. 2015) (examining the plaintiffs' claim alleging that climate-based ocean acidification, as addressed by the state, violated the Clean Water Act).

258 *See supra* Sections II.A.2.d–II.A.2.e, II.B.2.

259 *See supra* Section II.B.2.b.

260 *See, e.g.*, Defendants-Appellants' Opening Brief, *supra* note 5, at 24 (arguing that the global nature of climate change has national and international implications).

261 Michael Scaturro, *Proposed PFAS Rule Would Cost Companies Estimated $1B; Lacks Limits and Cleanup Requirement*, KFF HEALTH NEWS (July 10, 2023), https://kffhealthnews.org/news/article/epa-pfas-rule-disclosure-forever-chemicals/ [https://perma.cc/3QC4-XVNE] (explaining that "[t]he CDC estimates that 99% of Americans have PFAS in their blood," and that the Environmental Working Group estimates that "200 million Americans are exposed to PFAS in their drinking water right now" (quoting Melanie Benesh, Vice President of Governmental Affairs for the Environmental Working Group)).

262 *Id.* ("Just cleaning up PFAS waste at U.S. military bases could cost at least $10 billion. Removing it from U.S. drinking water supplies could add more than $3.2 billion annually to the bill, according to a report commissioned by the American Water Works Association.").

The same could be said, more or less, for other notable environmental hazards. Uncertainty and complicated causality are unavoidable with many toxic tort, products liability, and privacy cases.[263] Once the courts deem climate mitigation too uncertain or too political for Article III standing, the door is open for the same argument to be made about what are certainly non-climate issues. Indeed, we already have seen *Juliana*'s nonjusticiability reasoning invoked in the distinctively non-climate context of election law.[264]

## CONCLUSION

This Article shows how judges, fossil fuel defendants, and some government actors have sought to cut the courts out of climate change. They have argued for exceptional rulings on standing on the theory that the harms of climate change are not particularized, that they cannot be traced to defendants, and that the allocation of responsibility and relief is too political or too incomplete to be redressed. And they have argued for exceptional rulings on subject matter jurisdiction to take cases away from state courts that are more likely to hear them on the merits.

As we show, these exceptional decisions are not only exceptional, but problematic. They risk undermining important values such as access to justice, federalism, and the separation of powers. And they risk undermining the law more generally as they cannot be contained to climate change.

We want to close, though, by acknowledging a different type of climate exceptionalism. Unlike climate jurisdiction exceptionalism favoring climate defendants, which has purchase in high-profile, major court decisions and well-funded, elite, continuous legal advocacy, a few judges and advocates

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[263] *See, e.g.*, Michelle L. Richards, *Pills, Public Nuisance, and Parens Patriae: Questioning the Propriety of the Posture of the Opioid Litigation*, 54 U. RICH. L. REV. 405, 406 (2020) (explaining the enormous causality problems posed by the opioid epidemic and the ensuing litigation); Sandeep Kumar Dhiman & Harish Dureja, *Significance of and Challenges in Regulating Endocrine Disruptors – How Regulators and Industry Can Conquer?*, 20 ENDOCRINE METABOLIC & IMMUNE DISORDERS - DRUG TARGETS 1664, 1679 (2020) (discussing the complex harms of endocrine disruptors); Lydia DePillis, *Polluting Industries Say the Cost of Cleaner Air Is Too High*, N.Y. TIMES (Nov. 13, 2023), https://www.nytimes.com/2023/11/13/business/economy/smog-rules-economics.html [https://perma.cc/LBH4-MKCW] (explaining the difficult health and cost considerations in toughening air quality standards); Tyler G. Newby, *Chapter 9: Privacy Litigation*, *in* 1 DATA SECURITY AND PRIVACY LAW § 9:1, § 9:110 (2024–2025), Westlaw DATASPL § 9:10, § 9:110 (database updated Sept. 2024) (discussing when causation of harm in data breach suits can be demonstrated).

[264] The defendants in *Mecinas v. Hobbs*, a lawsuit challenging the constitutionality of Arizona's statute determining the order according to which candidates are listed on ballots, relied upon *Juliana*'s language that "a constitutional directive or legal standards must guide the courts' exercise of equitable power" in urging the Ninth Circuit to uphold the district court's ruling that the plaintiffs lacked standing. Defendant-Appellee's Answering Brief at 54, Mecinas v. Hobbs, 468 F. Supp. 3d 1186 (9th Cir. 2020) (No. 20-16301), 2021 WL 2302779, at *54 (quoting Juliana v. United States, 947 F.3d 1159, 1173 (9th Cir. 2020)).

have considered climate jurisdiction exceptionalism in favor of climate plaintiffs. Their argument, in brief, is that climate change is a world-ending crisis that demands a different set of rules.

As discussed above, we think climate exceptionalism of any kind raises line-drawing problems and is better dealt with through substantive legal reform by political institutions, such as Congress or (in the international context) the Conference of the Parties to major treaties or conventions.[265] Yet precisely because the climate crisis is so pressing, so overwhelming, we cannot help but express some sympathy with advocates and judges who would have courts openly stretch jurisdictional limits so that the judiciary can help focus the public and political institutions on a problem that desperately needs attention.

This kind of argument is likely to have the most bite with respect to constitutional or quasi-constitutional climate-mitigation claims, since it is not obvious that states or localities can bring these cases under current law. In the European context, similar cases raise claims that the EU is violating fundamental treaty rights, such as the right to life, by doing too little to tackle climate change.[266]

In both the U.S. and EU contexts, the argument has been made that, even if standard or nonexceptionalist justiciability doctrine does not allow such constitutional or quasi-constitutional claims, climate change is so exceptional that courts should themselves create new rules for justiciability. Dissenting on the Ninth Circuit in *Juliana*, Judge Josephine L. Staton made this argument, stressing that the very perpetuity of the Republic (and the world) is at stake:

> The perpetuity principle is not an environmental right at all, and it does not task the courts with determining the optimal level of environmental regulation; rather, it prohibits only the willful dissolution of the Republic. . . . Nor can the perpetuity principle be rejected simply because the Court has not yet had

[265] One concern that may animate climate jurisdiction exceptionalism is the floodgates concern—that there would simply be too many climate cases for courts to handle and to reconcile. *See* Michael B. Gerrard, *What the Law and Lawyers Can and Cannot Do About Global Warming*, 16 SE. ENV'T L.J. 33, 42 (2007) (noting the enormous number of potential plaintiffs and defendants in climate suits, given the ubiquity of climate change). *But see generally* Marin K. Levy, *Judging the Flood of Litigation*, 80 U. CHI. L. REV. 1007 (2013) (cataloging and critiquing the use of this argument). This concern, too, argues for legislative rather than judicial expansions of access to the courts on climate issues.

[266] In the European (especially ECHR) context, it is very much unclear whether (and if so, under what circumstances) current law allows for the adjudication of claims by nonstate actors that the EU or its member states violated individual rights by taking insufficient climate mitigation measures. For thorough discussions, see generally Giulia Claudia Leonelli, *Access to the EU Courts in Environmental and Public Health Cases and the Reform of the Aarhus Regulation: Systemic Vision, Pragmatism, and a Happy Ending*, 40 Y.B. EUR. L. 230 (2021); and Helen Keller & Corina Heri, *The Future Is Now: Climate Cases Before the ECtHR*, 40 NORDIC J. HUM. RTS. 153 (2022).

> occasion to enforce it as a limitation on government conduct. Only over time, as the Nation confronts new challenges, are constitutional principles tested. . . . As the last fifty years have made clear, telling plaintiffs that they must vindicate their right to a habitable United States through the political branches will rightfully be perceived as telling them they have no recourse. . . . Rather, plaintiffs have a constitutional right to be free from *irreversible and catastrophic climate change*.[267]

Similarly, in *Agostinho v. Portugal*, a group of individual applicants argued that they had the right to the adjudication of their claim that the EU was violating fundamental rights by doing too little to reduce emissions, even though they arguably did not meet the "individual concern" requirements for adjudication.[268] The plaintiffs argued that they should not have to meet the exhaustion requirement for adjudication, which would have required that they sue and lose in every EU member state. As they explained:

> In light of this urgency for climate action . . . "there is no adequate domestic remedy reasonably available" . . . because the alleged violation is caused cumulatively by the 33 respondents and domestic courts of one country could only find their own state in violation. . . . [I]t is financially, logistically, and most importantly—in light of the urgency of climate change—timewise impossible to bring actions in all 33 states.[269]

Likewise, an amicus from United Nations Special Rapporteurs supported their position, explaining that "[t]he time for action to address the climate emergency and prevent catastrophic impacts on human rights is rapidly running out. Climate justice delayed is climate justice denied."[270] As one commentator put it, invoking our terminology, "the applicants ask[ed] the [court] *exceptionally* to absolve them from the requirement to exhaust domestic remedies."[271]

The urgency of the climate crisis is beyond dispute and, in that sense, Judge Staton's dissent and the arguments in the ECHR *Agostinho* case are

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[267] *Juliana*, 947 F.3d at 1179–82 (Staton, J., dissenting).

[268] Application Form, § E paras. 10, 14–23, Agostinho v. Portugal, App. No. 39371/20 (Apr. 9, 2024), https://hudoc.echr.coe.int/?i=001-233261 [https://perma.cc/3YSX-BTAA].

[269] Christina Eckes, *Tackling the Climate Crisis with Counter-Majoritarian Instruments: Judges Between Political Paralysis, Science, and International Law*, 6 EUR. PAPERS. 1307, 1320 (2021) (quoting Application Form, *supra* note 268, § E para. 32).

[270] Amicus Brief Submitted by David R. Boyd, UN Special Rapporteur on Human Rights and the Environment & Marcos A. Orellana, UN Special Rapporteur on Toxics and Human Rights para. 42, *Agostinho*, App. No. 39371/20.

[271] Eckes, *supra* note 269, at 1320.

compelling.[272] But the case against exceptionalism as a general matter is also compelling, so we think that if courts are going to engage in climate jurisdiction exceptionalism in favor of climate plaintiffs, they should adhere to three limiting principles.

First, such exceptionalism should be both honest and explicit. As we detail above in connection with implicit, dishonest exceptionalism in favor of climate defendants, such exceptionalism undermines accountability and the rule of law.[273] The same is and would be true of implicit, dishonest exceptionalism in favor of climate plaintiffs.

Second, even as they engage in exceptionalism, the courts should try as much as possible to adhere to nonexceptionalist adjudication standards to minimize the cost to the regularity of the adjudication regime. For example, as the judges in Hawaii and Montana have done with state constitutional claims regarding climate mitigation, the courts can limit the adjudication to declaratory relief, rather than also adjudicating requests for expansive injunctive relief that arguably raise more redressability problems than requests for simple declaratory relief.[274] In an attempt to renew the *Juliana* litigation, the district court has allowed the filing of an amended complaint to the extent it seeks only declaratory, rather than injunctive, relief.[275] In the same limiting spirit, in a recent decision in an adaptation cost suit, a Delaware court has limited adaptation costs relief the plaintiff may seek to relief based solely on defendants' emissions within the State of Delaware itself.[276]

Third, and perhaps most important, the courts should consider whether the political branches are in fact seriously considering the problem of climate change or rather excluding diverse voices and debate about climate change and the urgency for action. The case for explicit exceptionalism in favor of

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[272] The ECHR, however, limited its consideration to the climate policy of Portugal alone and was unmoved by the arguments to waive the exhaustion requirement. *Agostinho*, App. No. 39371/20 paras. 216, 226–27.

[273] *Supra* Section III.A.

[274] *See supra* note 230 (discussing *Navahine F. v. Hawai'i Department of Transportation* and *Held v. State*).

[275] Juliana v. United States, No. 15-01517, 2023 WL 3750334 (D. Or. June 1, 2023). It remains to be seen, however, whether the Ninth Circuit will overrule the district court, citing the same reasoning as its opinion we discuss above. Even if the Ninth Circuit were to back off its reliance on *Rucho* and the political question doctrine, nonexceptionalist standing doctrine is a problem for the *Juliana* plaintiffs, as nonstate plaintiffs are held to a higher bar of showing that the relief sought, if granted, would redress their injuries.

[276] *See* State *ex rel.* Jennings v. BP Am. Inc., No. N20C-09-097, 2024 WL 98888, at *21 (Del. Super. Ct. Jan. 9, 2024) ("The Court finds that there must be a connection between Delaware-specific conduct and the alleged harm. . . . [T]here must be a relationship between Delaware activities and the cause of action and alleged damages. Advertising, selling products, operating gas stations, and/or operating a refinery in Delaware are connections sufficient to survive dismissal.").

climate plaintiffs would seem to be strongest in jurisdictions where climate change is being shut out of discussion, debate, and analysis in the political branches and regulatory agencies that ultimately report to those branches.[277] The case for exceptionalism is weaker where officials and regulators are seriously addressing climate change and embracing public input—even if they are taking less action than climate activists and many climate experts think necessary. These limits have intuitive appeal, and they have grounding in how the law frequently approaches common law development.[278] As discussed, the best course is for the political branches themselves to set out an exceptional standard for climate adjudication (if one is called for), but in jurisdictions where the political branches have effectively shut down even discussions of climate change, that is not a remotely realistic possibility.

In sum, although all judge-made jurisdictional exceptionalism is problematic, we think there may be a normative case for exceptionalism in favor of climate plaintiffs when it adheres to certain principles: when it is explicit, relatively limited in scope, and exercised against a background of political branch denialism and opposition to meaningful public input and debate.

[277] *See* Elliott, *supra* note 52, at 512 (arguing that courts should explicitly consider the performance and failures of the political branches in deciding whether to adjudicate).

[278] *See generally* Leslie Kendrick, *The Perils and Promise of Public Nuisance*, 132 YALE L.J. 702, 778–90 (2023) (exploring the impact of regulatory shortcomings on public nuisance law); Dana, *supra* note 29, at 106–14 (asserting the utility of public nuisance law in the climate and opioid-crisis contexts); Kysar, *supra* note 124, at 51 (arguing that tort law has come to be seen not only as a vehicle for private conflict dispute, as it has traditionally been seen, but also as a "risk regulation mechanism").