GIVING THE CLIMATE A VOICE: WHY ALLOWING SUITS OVER CLIMATE CHANGE TO BE HEARD IN COURT IS NOT ONLY CONSTITUTIONAL, BUT MAY BE OUR ONLY VIABLE OPTION

Elizabeth Kellar*

I. INTRODUCTION

It is October 2017 on the southeast coast of Florida. A familiar rust-colored cloud starts to bloom in the waters off the shore.[1] Normally starting around late summer or early fall and dissipating as the warm waters cool, Red Tide[2] is an almost annual event.[3] Except this year, it does not seem to be going away anytime soon. By the time August 2018 rolls around, residents have been experiencing the side effects of the bloom for ten months.[4] Come September, the tide has reached up into the Panhandle,[5] meaning that the bloom covers almost the entire Florida

 Juris Doctor Candidate, Stetson University College of Law, 2022; dual B.A. degrees in CLEG (Communications, Legal Institutions, Economics, and Government) and Law & Society, American University. The author serves as the Online Editor for the *Stetson Law Review* and as a member of the Stetson Moot Court team. Honors include: Stetson's Honors Colloquium 2020–21 Participant; *Stetson Law Review*'s Spring 2021 Scholarship Luncheon Presenter; Spring 2021 Spirit of Moot Court Award Recipient; and Criminal Procedure Book Award Recipient, Fall of 2019. Much thanks is owed to the many individuals that helped make this paper a reality.

1. Maya Wei-Hass, *Red Tide Is Devastating Florida's Sea Life. Are Humans to Blame?*, NAT'L GEOGRAPHIC (Aug. 8, 2018), https://www.nationalgeographic.com/environment/2018/08/news-longest-red-tide-wildlife-deaths-marine-life-toxins/#close.

2. "Red Tide" is the popular term for this phenomenon. However, it is important to note that not all red tides are actually red, and not all are caused by the same algal species. Lisa Krimsky et al., *Understanding the 2017-2018 Florida Red Tide*, U. FLA.: INST. FOOD & AGRIC. SCIS. BLOG (Dec. 4, 2018), http://blogs.ifas.ufl.edu/extension/2018/12/04/understanding-the-florida-red-tide/. While many species responsible for red algal blooms do not pose any threat, the particularly dangerous species, *Karenia Brevis*, causes Florida's "Red Tide," with such blooms referred to by the scientific community as Harmful Algal Bloom ("HAB"). *Id.* The author will continue to use the term "Red Tide," as it is most commonly used.

3. Nat'l Oceanic & Atmospheric Admin., *Fall 2018 Red Tide Event That Affected Florida and the Gulf Coast*, NAT'L OCEAN SERV. (Feb. 26, 2021), https://oceanservice.noaa.gov/hazards/hab/florida-2018.html.

4. Wei-Hass, *supra* note 1.

5. Karl Etters, *Red Tide Reaches the Panhandle*, TALLAHASSEE DEMOCRAT (Sept. 19, 2018, 6:03 PM), https://www.tallahassee.com/story/news/2018/09/19/red-tide-reaches-panhandle/1356058002/.

coastline, from Pensacola to West Palm Beach.[6] This bloom persists until approximately February 2019, for a total of sixteen months.[7] The 2018 bloom cost the state $14.5 million in emergency beach clean-up.[8] In just the first eleven months, Pinellas County businesses alone lost approximately $128 million, and 738 tons of debris washed up along county shores.[9] The bloom, which scientists have said is the worst Florida has seen in over a decade,[10] also killed more than 400 sea turtles and 100 manatees, approximately 150 dolphins, and hundreds of tons of fish.[11] The head veterinarian for Florida's Clinic for the Rehabilitation of Wildlife summed up the effected environment: "It's just like a ghost town. . . . Anything that can leave has, and anything that couldn't leave has died."[12] After researching the 2018 tide, scientists have declared that humans are to blame for these worsening algal episodes.[13] Despite this, those impacted by these worsening environmental episodes have had an extraordinarily difficult time finding redress from courts.[14]

Two years before the 2017 bloom, researchers began warning that the rising sea temperatures caused by climate change were specifically affecting Florida's ability to control the harmful algae; now a strong consensus exists among the scientific community that Florida has the

6. Paul P. Murphy, *Red Tide Just Spread to Florida's Atlantic Coast, Choking Some the Most Popular Beaches*, CNN (Oct. 5, 2018, 11:17 AM), https://www.cnn.com/2018/10/04/us/red-tide-florida-east-atlantic-coast-trnd/index.html.

7. Allison Eck, *A Year Ago, Toxic Red Tide Took Over Florida's Gulf Coast. What Would It Take to Stop It Next Time?*, PBS (July 19, 2019), https://www.pbs.org/wgbh/nova/article/florida-red-tide-gulf-coast/.

8. Rebecca Burton, *Red Tide is Expensive. Here's Why*, FLA. MUSEUM (May 29, 2019), https://www.floridamuseum.ufl.edu/earth-systems/blog/red-tide-is-expensive-heres-why/.

9. Shannon Valladolid, *Economic Impacts of Red Tide on Businesses in Pinellas County Worse than Expected*, 10 TAMPA BAY (Sept. 27, 2018, 6:34 PM), https://www.wtsp.com/article/news/red-tide/economic-impacts-of-red-tide-on-businesses-in-pinellas-county-worse-than-expected/67-598909555.

10. Wei-Hass, *supra* note 1.

11. Eck, *supra* note 7.

12. Wei-Hass, *supra* note 1.

13. Larry E. Brand & Angela Compton, *Long-Term Increase in Karenia Brevis Abundance Along the Southwest Florida Coast*, 6 HARMFUL ALGAE 232, 250 (2007); Karl E. Havens & Hans W. Paerl, *Climate Change at a Crossroad for Control of Harmful Algal Blooms*, 49 ENV'T SCI. & TECH. 12605, 12605 (2015); *Florida: Ground Zero in the Climate Crisis*, UNION OF CONCERNED SCIENTISTS (June 2019), www.ucsusa.org/florida-climate-crisis. Admittedly, these types of algal blooms are not merely modern phenomenon, with records of red tide forming along the Florida coast dating as far back as the as sixteenth century. Wei-Hass, *supra* note 1. However, there is no doubt among the scientific community that man-made pollution such as agricultural run-off and emissions have significantly exacerbated the blooms. David Biello, *Deadly Algae Are Everywhere, Thanks to Agriculture*, SCI. AM. (Aug. 8, 2014), https://www.scientificamerican.com/article/deadly-algae-are-everywhere-thanks-to-agriculture/.

14. Damian Carrington, *Can Climate Litigation Save the World?*, GUARDIAN (Mar. 20, 2018, 2:00 AM), https://www.theguardian.com/environment/2018/mar/20/can-climate-litigation-save-the-world.

most to lose if the United States continues to ignore the severity of climate change.[15] Worsening algal blooms is only one issue among an ever-increasing list that includes intensifying hurricanes, sea level rise, disappearing reefs,[16] and increased flooding.[17] All of these impacts lead to disastrous effects on the economy and threaten the livelihoods of many Floridians.[18] And there is no question among the scientific community that at the root of these vast economic damages lie a man-made cause.[19] Despite this consensus, the courts have continually held redress out of reach for injured parties.[20] One of the biggest issues blocking the courthouse steps has been seemingly a non-issue for every other area of law—standing.[21] The evolution of the standing doctrine suggests that the Supreme Court has shifted towards a broader interpretation of standing requirements.[22] This evolution, culminating in *Massachusetts v. Environmental Protection Agency*,[23] was a hopeful sign that climate change activists may soon be able to seek judicial relief. However, the recent decision of *Juliana v. United States*[24] tempered that hope, where the Ninth Circuit seemed to reject the progress of the Supreme Court.[25]

But why is a judicial solution so important for the climate? There are two main reasons. The first is that the legislative and executive branches, which would normally provide the route to address environmental concerns, have been compromised through the failure to hold elected officials accountable for environmental legislation (or a lack thereof).[26] The second reason, closely linked to the first, is that when the

15. Havens & Hans, *supra* note 13, at 12605; *see Florida: Ground Zero in the Climate Crisis*, *supra* note 13.

16. *Florida: Ground Zero in the Climate Crisis*, *supra* note 13.

17. Josh Rojas, *Tidal Flooding a Growing Problem for St. Pete Beach*, BAY NEWS 9 (Nov. 15, 2019, 5:45 AM), https://www.baynews9.com/fl/tampa/news/2019/11/15/city-officials--residents-want-answers-in-st--pete-beach-tidal-flooding.

18. Tatiana Borisova, Norman Breuer & Roy Carriker, *Economic Impacts of Climate Change on Florida: Estimates from Two Studies*, U. FLA. INST. FOOD & AGRIC. SCIS. EXTENSION 1, 1 (Nov. 2008), https://edis.ifas.ufl.edu/pdf/FE/FE787/FE787-4521889.pdf.

19. *See generally*, FRANK ACKERMAN & ELIZABETH A. STANTON, THE COST OF CLIMATE CHANGE: WHAT WE'LL PAY IF GLOBAL WARMING CONTINUES UNCHECKED (2008).

20. Carrington, *supra* note 14.

21. Holly Doremus, *The Persistent Problem of Standing in Environmental Law*, 40 ENV'T L. REP. NEWS & ANALYSIS 10956, 10956 (2010).

22. Sierra Club v. Morton, 405 U.S. 727, 738 (1972); Doremus, *supra* note 21, at 10956.

23. 549 U.S. 497 (2007).

24. 947 F.3d 1159 (9th Cir. 2020).

25. *See infra* pt. IV.

26. Sarah Kuta, *Research Asks: Do Voters Hold Elected Officials Accountable?*, COLO. ARTS & SCIS. MAG. (Apr. 25, 2019), https://www.colorado.edu/asmagazine/2019/04/25/research-asks-do-voters-hold-elected-officials-accountable. S*ee generally* Nicholas O. Stephanopoulos, *Accountability Claims in Constitutional Law*, 112 NW. U. L. REV. 989 (2018).

executive and legislative branches have effectively "checked out," the judicial is the only branch left and thus, must step up to hold the other two branches accountable—hence the essence of our system of checks and balances.[27]

This Article will argue that not only do courts have the power to decide climate change causes of action, but their intervention is necessary to protect our planet. Part II will briefly summarize the history and evolution of the standing doctrine. Part III will explain the importance of that history and how it affects the Court's determination of future standing doctrine cases. Part IV will compare the outcomes of the *Massachusetts v. Environmental Protection Agency* and *Juliana v. United States* cases and explain why they are at odds with one another. Part V will explain how the courts have the constitutional power to hear climate change cases. And finally, Part VI will discuss in detail why the judicial branch *must* hear these types of cases in order to fully protect our climate.

II. THE HISTORY AND EVOLUTION OF THE STANDING DOCTRINE

The modern standing doctrine arises out of the "case or controversy" clause from Article III, Section 2 of the Constitution,[28] which reads:

> The judicial Power shall extend to all *Cases*, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all *Cases* affecting Ambassadors, other public Ministers and Consuls;—to all *Cases* of admiralty and maritime Jurisdiction;—to *Controversies* to which the United States shall be a Party;—to *Controversies* between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.[29]

This clause is vague, and it grants the court great deference to define what exactly meets constitutional criteria for a case or

27. Thomas Frank, *Federal Government Is Failing on Climate Readiness, Watchdog Says*, SCI. AM. (Nov. 27, 2019), https://www.scientificamerican.com/article/federal-government-is-failing-on-climate-readiness-watchdog-says/.

28. U.S. CONST. art. III, § 2; Evan Tsen Lee & Josephine Mason Ellis, *The Standing Doctrine's Dirty Little Secret*, 107 NW. U. L. REV. 169, 171, 187 (2012).

29. U.S. CONST. art. III, § 2 (emphasis added).

controversy. Clearly, the Founders wished to limit the types of matters and parties that could be heard before federal courts.[30] No judicial system can operate without limitations as to who can sue and for what. However, only in the past fifty years has the Supreme Court started to interpret this clause to mean the rigid test for standing that is currently used.[31]

A. Standing as a Recent Development

Historically, the federal courts were more accessible than they are today because, until the last fifty years, no complete test for "standing" existed.[32] In fact, most judges before the last half century did not even view identification of proper parties as a duty required by Article III.[33] While early courts did still seek to identify the proper parties to a suit, they treated this act as separate from Article III and merely sought to determine if the court was acting within its authority.[34] This question became almost synonymous with the concept of the political question doctrine,[35] which seeks to "keep judges a safe distance from politics by confining them to disputes between parties pursuing their private interests."[36] Though this inquiry was not linked to Article III until the twentieth century, and political question was not formally cited until 1918,[37] in *Oetjen v. Central Leather Co.*,[38] the intent was the same—to ensure courts were only hearing cases or controversies that they had authority to enforce a judgment over. However, for the latter half of the eighteenth century, standing remained mostly an undefined concept.

By the nineteenth century, the Court began to more formally limit parties' access to the courts. The central question shifted only slightly from the original, with that new question being: "[W]hether the litigant asserted the kind of interest or right for which equity would provide a

30. Lee & Ellis, *supra* note 28, at 186–87.

31. *Id.*

32. Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1434 (1988).

33. Drew McLelland & Sam Walsh, *Litigating Challenges to Federal Spending Decisions: The Role of Standing and Political Question Doctrine* 3 (Harv. L. Sch. Fed. Budget Pol'y Seminar, Briefing Paper No. 33, 2006) [hereinafter Briefing Paper No. 33].

34. Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1422 (1988).

35. Briefing Paper No. 33, *supra* note 33, at 1.

36. *Id.*

37. *Political Question Doctrine*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/political_question_doctrine (last visited Jan. 29, 2022).

38. 246 U.S. 297 (1918).

remedy."[39] Subsequently, the phrase "standing in court" came about to refer to a party's ability to obtain such a remedy.[40] This phrase was originally meant to refer to the merits of the case. However, this soon became conflated with the phrase "standing up," a prerequisite to be heard in court, and so the concept of "standing" soon became synonymous with jurisdiction rather than regarding the merits.[41] Despite this shift in treatment, courts still did not link standing to Article III of the Constitution until 1939.[42]

Massachusetts v. Mellon[43] is largely recognized as the first case to start the modern discussion of standing, though *Fairchild v. Hughes*[44] formed the basis for the Court's opinion.[45] In *Mellon*, the Court rejected a taxpayer suit to enjoin a federal spending program.[46] The Court reached the conclusion that the plaintiff could not sue because she failed to show that she had "sustained . . . some direct injury . . . and not merely that [s]he suffers in some indefinite way in common with people generally."[47] This concept is now known today as a generalized grievance,[48] which, when brought to court, will automatically cause the party to lose standing by failing the first prong of the current test which will be addressed later on.[49]

However, a large gap remained between this generalized grievance and the current understanding of Article III standing in the modern era. In fact, it was not until sixteen years after *Mellon* that the Court explicitly connected standing to Article III in *Coleman v. Miller*.[50] Yet, even that connection was only made in a concurring opinion.[51] Twenty years after *Mellon*, *Baker v. Carr*[52] became the first case where the Supreme Court fully discussed the new standing doctrine outside the scope of a

39. Winter, *supra* note 34, at 1422.
40. *Id.* at 1425.
41. *Id.* at 1424–25.
42. Coleman v. Miller, 307 U.S. 433, 460 (1939) (Frankfurter, J., with Roberts, Black, & Douglas, J.J., concurring).
43. 262 U.S. 447 (1923) (although this case may also be referred to as *Frothingham v. Mellon* in other legal texts, as these two cases were consolidated).
44. 258 U.S. 126 (1922).
45. Winter, *supra* note 34, at 1376.
46. *Mellon*, 262 U.S. at 487.
47. *Id.* at 488.
48. A generalized grievance, also commonly referred to as a taxpayer grievance, is one that "seek[s] relief that no more directly and tangibly benefits [the plaintiff] than it does the public at large." Lujan v. Defs. of Wildlife, 504 U.S. 555, 573–74 (1992).
49. *See infra* pt. II.B.
50. 307 U.S. 433, 460 (Frankfurter, J., with Roberts, Black, & Douglas, J.J., concurring).
51. *Id.*
52. 369 U.S. 186 (1962).

generalized issue.[53] Then, in *Association of Data Processing Service Organizations v. Camp*,[54] the Court introduced the first of the modern standing elements: injury-in-fact.[55] But the cases that truly shaped the doctrine into the three-prong test currently used today are the same ones that slowly shifted the Court from tightening standing requirements to slowly loosening them.[56] Despite this trend towards greater access, the types of claims brought in these cases are also ironically the ones that are typically fighting for standing—environmental claims.

B. Modern Standing Doctrine as Shaped by Environmental Law

The most notable case in the modern era is *Sierra Club v. Morton*.[57] Even before the formal establishment of "injury-in-fact," the courts regularly determined that they could only hear claims for economic injuries.[58] In *Sierra Club*, the Supreme Court officially established that other types of injuries would meet the injury-in-fact requirement, specifically those injuries that were aesthetic in nature.[59]

Lujan v. Defenders of Wildlife created the next big development of the modern three-prong test.[60] The test includes: (1) injury-in-fact; (2) causation; and (3) redressability.[61] Injury-in-fact was then broken up into two separate requirements: the injury must be concrete and particularized, and then the injury must also be either actual or imminent.[62] Concrete and particularized means that the injury "must affect the plaintiff in a personal and individual way."[63] This requirement resembles the Court's earlier rejection of generalized grievances because such grievances were necessarily not personal.[64] Actual or

53. Winter, *supra* note 34, at 1397.

54. 397 U.S. 150 (1970).

55. Caleb Nelson, *"Standing" and Remedial Rights in Administrative Law*, 105 VA. L. REV. 703, 706 (2019).

56. *See, e.g.*, Massachusetts v. Env't Prot. Agency, 549 U.S. 497 (2007); Lujan v. Defs. of Wildlife, 504 U.S. 555 (1992); Sierra Club v. Morton, 405 U.S. 727 (1972); Juliana v. United States, 947 F.3d 1159 (9th Cir. 2020).

57. 405 U.S. at 734–35.

58. Alan R. Nettles, *Environment—Standing for Environmentalists:* Sierra Club v. Morton, 1973 URB. L. ANN. 379, 382 (1973) ("For many years economic injury alone was recognized as sufficient to confer standing.").

59. Scott W. Stern, *Standing for Everyone:* Sierra Club v. Morton*, Supreme Court Deliberations, and a Solution to the Problem of Environmental Standing*, 30 FORDHAM ENV'T L. REV. 21, 24 (2018).

60. 504 U.S. 555; *Political Question Doctrine*, *supra* note 37.

61. *Lujan*, 504 U.S. at 560–61.

62. *Id.* at 560.

63. *Id.* at 560 n.1.

64. Massachusetts v. Mellon, 262 U.S. 447, 488 (1923).

imminent merely means the injury has already happened or is going to happen with substantial certainty, hence, not conjectural or hypothetical.[65] The second element, causation, requires: "[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 . . . the result [of] the independent action of some third party not before the court."[66] And then the third prong, redressability, requires that "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'"[67] More simply, if the court finds for the plaintiff, the court must have the power to grant the relief the plaintiff is asking for, and that relief must actually help—but need not completely—alleviate the injury in some manner.[68] Finally, *Lujan* established the "procedural injury," which allows for the requirements of "actual or imminent" and redressability to be loosened if the alleged injury resulted from a violation of agency procedure.[69]

The final two cases pertinent to the development of the standing doctrine are *Massachusetts v. Environmental Protection Agency*[70] and *Juliana v. United States*.[71] *Massachusetts* is notable for not only declaring that climate change is a concrete and particularized injury, but also one that is both actual and imminent.[72] *Massachusetts* also continues the modern trend of peeling back restrictions of the standing doctrine by expanding upon the concepts of causation and redressability.[73] However, *Juliana*, decided by the Ninth Circuit, seems to go against this trend by severely limiting its concept of redressability, and seemingly undermining the expansion of causation hinted to in *Massachusetts*.[74] These cases will be discussed in greater depth in Part IV of this Article because they include important developments to the standing doctrine, pertinent to climate change litigation.

The Court's recent developments highlight the unworkability of the modern standing doctrine, specifically within the context of

65. *See Lujan*, 504 U.S. at 560.
66. *Id.* (internal quotations omitted).
67. *Id.* at 561 (internal quotations omitted).
68. *See* Juliana v. United States, 947 F.3d 1159, 1170 (9th Cir. 2020).
69. *Lujan*, 504 U.S. at 572 n.7.
70. 549 U.S. 497 (2007).
71. 947 F.3d 1159, 1170 (9th Cir. 2020).
72. Sam Evans-Brown, *How* Massachusetts v. EPA *Forced the U.S. Government to Take on Climate Change*, INSIDE CLIMATE NEWS (June 4, 2020), https://insideclimatenews.org/news/04062020/massachusetts-v-epa-emissions-pollution-climate-change.
73. *See infra* pt. III.C.
74. *See Juliana*, 947 F.3d. at 1159, 1177 (Staton, J., dissenting).

environmental law. These decisions demonstrate a solid trend that, at the very least, shows the doctrine of standing must be expanded to allow plaintiffs to recover from damages caused by climate change. However, the history of the standing doctrine clearly demonstrates the possibility of more drastic change. Whatever the case, it is clear the doctrine stands on the brink of progression.

III. THE DOCTRINE OF STANDING MOVING FORWARD

One can easily ascertain that the modern standing doctrine severely diminishes access to the courts as compared to most of history. This is especially true for environmental cases, which often have difficulty proving causation and redressability.[75] Yet "the horizon" is not so bleak; starting with *Sierra Club*, the Court has softened its increasingly stringent requirements by creating new exceptions to the standing doctrine.[76] Again, this is especially useful in the environmental litigation sphere—particularly those cases dealing with climate change. While each have their own drawbacks, *Sierra Club*, *Lujan*, and *Massachusetts* all offer unique benefits to climate change cases, specifically with overcoming the standing hurdle.

A. Sierra Club v. Morton

Sierra Club proved indispensable even before the Court created the current three-prong test. Without expanding the recognizable injuries to include non-economic damages, many environmental cases would never be able to "get off the ground."[77] By recognizing that a loss of aesthetic and recreational value can constitute concrete and particularized injuries,[78] *Sierra Club* opened the door for many modern-day environmental cases to take root, including the next two cases—*Lujan* and *Massachusetts*. This does not mean *Sierra Club* did not have its drawbacks; the case was still used to carve out the three-prong test later on, but it is undeniable that without *Sierra Club*, the concept of environmental law would be nothing like it is today.

75. Doremus, *supra* note 21, at 10956.
76. Sierra Club v. Morton, 405 U.S. 727, 738 (1972).
77. Stern, *supra* note 59, at 24.
78. *Id.*

B. Lujan v. Defenders of Wildlife

Despite developing the most rigid test for standing in the modern era, *Lujan* also crafted the concept of "procedural injury."[79] A procedural injury occurs when a government agency's failure "to follow a legally required procedure" causes a party's injury.[80] This failure then increases the risk of a future harm.[81] The Court in *Lujan* stated that now, alleging a procedural injury lessens the requirements for an "actual or imminent" injury and "redressability."[82] This was a necessary step because a procedural injury is often difficult, and sometimes impossible, to prove. One must show that the agency would not have reached the same result had they followed the procedure, so the standard for redressability must be lessened or a plaintiff would never be able to meet standing requirements.[83] Likewise, while an imminent harm may be difficult to prove, the Court did not want to bar parties from bringing suit when an agency fails to follow the law. In effect, the failure to follow procedure becomes the actual harm done to the parties. Procedural injuries are especially applicable to environmental cases and have helped allow many suits to move forward that otherwise would have been shut down from the start.[84]

However, these benefits come with significant drawbacks. In *Lujan*, the Court sent a devastating blow to environmental litigation by ruling that "an explicit congressional grant of standing to citizens to sue for a violation of an environmental statute was unconstitutional."[85] But there was still one more case on the horizon that would substantially change the doctrine of standing for environmental law.

C. Massachusetts v. Environmental Protection Agency

Massachusetts[86] established the ultimate expansion for environmental law litigation, with almost no drawbacks.[87] In *Massachusetts*, the Court explained that even if a favorable outcome

79. Lujan v. Defs. of Wildlife, 504 U.S. 555, 571, 572 n.7 (1992).
80. Christopher T. Burt, *Procedural Injury Standing After* Lujan v Defenders of Wildlife, 62 U. CHI. L. REV. 275, 276 (1995).
81. *Id.*
82. *Lujan*, 504 U.S. at 572 n.7.
83. Burt, *supra* note 80, at 276.
84. Miriam S. Wolok, *Standing for Environmental Groups: Procedural Injury as Injury-in-Fact*, 32 NAT. RES. J. 163, 164 (1992).
85. Stern, *supra* note 59, at 26 (internal quotations omitted).
86. Massachusetts v. Env't Prot. Agency, 549 U.S. 497 (2007).
87. Evans-Brown, *supra* note 72.

would only result in "a small incremental step," the fact that the injury will not be fully resolved should not be a bar to accessing the courts: "That a first step might be tentative does not by itself support the notion that federal courts lack jurisdiction to determine whether that step conforms to law."[88] This declaration broadened the scope of both causation and redressability. Redressability no longer meant alleviating the entire injury, or even partially alleviating it. Now, redressability only requires that the ruling would be a step in the right direction. And causation for climate change, specifically, was also expanded as the Court recognized the importance of holding one relatively small contributor accountable, even if that contributor alone was not a but-for cause.[89]

Even though *Lujan* remains the most restrictive standing case to date, there is no doubt that the Court has slowly begun to recognize the importance of allowing climate change litigation to move past the jurisdictional hurdles. The Court has evidenced this trend first, by recognizing non-economic damages; second, by creating the procedural injury; third, by broadening the scope of causation and redressability; and, most importantly, by officially recognizing the "harms associated with climate change [as] serious."[90] However, the Ninth Circuit has recently published a new opinion concerning climate change, *Juliana v. United States*,[91] which stands in stark contrast to the Supreme Court's decision in *Massachusetts*.

IV. COMPARING MASSACHUSETTS AND JULIANA

The holdings of *Massachusetts* and *Juliana* stand in stark contrast with how the Supreme Court and the Ninth Circuit, respectively, approached the factors of causation and redressability. The Supreme Court took a very broad approach to both causation and redressability, highlighting the importance of small incremental steps in achieving redress, even if holding a single party accountable would not alleviate

88. *Massachusetts*, 549 U.S. at 524.
89. *Id.* at 524.
90. *Id.* at 521.
91. 947 F.3d 1159 (9th Cir. 2020). In February 2021, the 9th Circuit denied a petition for a rehearing en banc. Juliana v. United States, 986 F.3d 1295, 1296 (9th Cir. 2021). After the denial of the en banc hearing, Our Children's Trust debated between filing petition for writ of certiorari with the Supreme Court or filing a petition to amend the original complaint. Ultimately, they chose to amend the complaint to adjust the remedy sought. Plaintiffs' Motion for Leave to Amend and File Second Amended Complaint for Declaratory and Injunctive Relief at 7–8, *Juliana*, 947 F.3d at 1170 (No. 6:15-cv-01517-AA). This decision was part of a pragmatic strategy that feared an unfavorable ruling now would do more harm than good to environmental legislation.

the entire injury, or even most of the injury. On the other hand, the Ninth Circuit took a much stricter approach, placing the requirements for causation at a seemingly higher bar and rejecting the idea that the court could offer any sort of remedy.

A. Causation

Both the Ninth Circuit and Supreme Court found the plaintiffs properly demonstrated causation between their injury and the defendants' action, and neither disputed the connection between man-made emissions/greenhouse gasses and climate change.[92] However, the two courts took very different stances on how connected the emissions had to be to climate change. The Supreme Court in *Massachusetts* took a broad approach to causation,[93] while the Ninth Circuit in *Juliana* suggested a black-and-white bar must be met.[94]

In *Massachusetts*, the State of Massachusetts sued the Environmental Protection Agency ("EPA") for its failure to regulate automobile emissions and the resulting contribution of those emissions to climate change.[95] There, the Court took the EPA's admission of the direct link between man-made greenhouse gas emissions and climate change as an admission that the EPA's failure to regulate automobile emissions contributed to the plaintiff's injuries.[96] The EPA claimed that regulating the amount of automobile emissions would not have a significant impact on halting the overall effects of climate change.[97] However, the Court stood in strong opposition to that statement, saying that when a plaintiff is harmed, they deserve to have their case heard in court, even if they may only seek to mitigate the harm instead of alleviating it in "one fell regulatory swoop."[98] While this language from the Court mainly applies to redressability, the importance of this message for the causation prong cannot be overstated. The Court recognized that even if a party merely contributes to climate change, and forcing them to stop would not end climate change, or even make a noticeable dent in the near future, that small contribution suffices to

92. *Massachusetts*, 549 U.S. at 523–24; *Juliana*, 947 F.3d at 1169.
93. *Massachusetts*, 549 U.S. at 523–24.
94. *Juliana*, 947 F.3d at 1169.
95. *Massachusetts*, 549 U.S. at 505.
96. *Id.* at 523 ("EPA does not dispute the existence of a causal connection between manmade greenhouse gas emissions and global warming. At a minimum, therefore, EPA's refusal to regulate such emissions 'contributes' to Massachusetts' injuries.").
97. *Id.* at 523–24.
98. *Id.* at 524.

hold the party liable.[99] The Court did present an argument for why the American automobile industry does not produce an insignificant portion of global greenhouse gas emissions.[100] But while the Court did highlight the impact of the automobile industry, it did not hold that only emissions cases on such a large scale could be heard. For example, the Court stated:

> But EPA overstates its case. Its argument rests on the erroneous assumption that a small incremental step, because it is incremental, can never be attacked in a federal judicial forum. Yet accepting that premise would doom most challenges to regulatory action. . . . That a first step might be tentative does not by itself support the notion that federal courts lack jurisdiction to determine whether that step conforms to law. *And* reducing domestic automobile emissions is hardly a tentative step.[101]

By the Court's use of "[a]nd" to begin the next sentence, and the structure of the paragraph before, it leaves open the possibility that even smaller impacts than the one described can still allow for an injured party to seek redress, despite being a tentative step.[102]

On the other hand, the court in *Juliana* did not grant such a broad determination. While it still found the plaintiffs met causation, it seemed to care less about the "tentative step" language from *Massachusetts* and focused entirely on the numbers.[103] The court looked to see if the United States contributed a "significant portion" of emissions,[104] a term the Supreme Court never used when determining the EPA's causation in *Massachusetts*, and one this court seemingly came up with on its own. The Ninth Circuit also seemed to place extraordinary meaning on the six percent of global emissions the American automobile industry causes.[105] There the Ninth Circuit seems to improperly treat six percent as a

99. *Id.* at 524–26.

100. *Id.* at 524–25.

> And reducing domestic automobile emissions is hardly a tentative step. Even leaving aside the other greenhouse gases, the United States transportation sector emits an enormous quantity of carbon dioxide into the atmosphere—according to the MacCracken affidavit, more than 1.7 billion metric tons in 1999 alone. That accounts for more than 6% of worldwide carbon dioxide emissions. To put this in perspective: Considering just emissions from the transportation sector, which represent less than one-third of this country's total carbon dioxide emissions, the United States would still rank as the third-largest emitter of carbon dioxide in the world, outpaced only by the European Union and China.

Id. (internal citations omitted).

101. *Id.* at 524 (emphasis added).

102. *Id.*

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

104. *Id.*

105. *Id.*

benchmark to meet, instead of merely the percentage of emissions caused in that specific case.[106] As mentioned above, the Supreme Court did not really care about the percentage of emissions—a lower percentage of emissions could suffice to hold a party accountable.[107]

Nowhere does the Ninth Circuit use the "tentative step" language, which was foundational to the Supreme Court's reasoning.[108] As shown in the excerpt below, the Ninth Circuit seemed to subsequently state that if the case before them was more like *Massachusetts*, where the plaintiffs were claiming that one agency decision was contributing to their injury, then the connection would be too attenuated to hold the defendants accountable:

> [T]he causal chain between local agencies' failure to regulate five oil refineries and the plaintiffs' climate-change related injuries was "too tenuous to support standing" because the refineries had a "scientifically indiscernible" impact on climate change. But the plaintiffs here do not contend that their injuries were caused by a few isolated agency decisions. Rather, they blame a host of federal policies, from subsidies to drilling permits, spanning "over 50 years," and direct actions by the government.[109]

The situation described in *Juliana* is almost identical to the situation in *Massachusetts*, making clear the Ninth Circuit's reasoning contradicts the reasoning used by the Supreme Court.[110] The court merely considered the numbers, instead of the actual ability of the plaintiff to attain some form of relief,[111] even if holding the current defendant accountable would be merely "a tentative step" towards full relief.[112] This is a crucial misstep in environmental litigation because there is no one cause to climate change. In fact, there are very few "substantial factor[s]," as the Ninth Circuit would say.[113] And so, it becomes even more important to take these tentative steps, holding each and every perpetrator accountable, because that is the only feasible way to truly protect the environment.

106. *Id.*
107. *Massachusetts*, 549 U.S. at 524.
108. *Id.*
109. *Juliana*, 947 F.3d at 1169.
110. *Id.*; *Massachusetts*, 549 U.S. at 524.
111. *Juliana*, 947 F.3d at 1169.
112. *Massachusetts*, 549 U.S. at 524.
113. *Juliana*, 947 F.3d at 1169 (internal quotations omitted).

B. Redressability

Redressability is where the Ninth Circuit undoubtedly splits from the Supreme Court; the same factor the Ninth Circuit claims the plaintiffs fail in *Juliana*.[114] In *Massachusetts*, the official ruling was "only that [the] EPA must ground its reasons for action or inaction in the statute."[115] While at first glance this might look like a normal conclusion to a case, and that this remedy could be very easily given by any court, the Supreme Court knew that with this one small sentence they were forcing a federal agency to take action.[116] And that was the remedy the plaintiffs truly sought—to force the EPA to regulate automotive emissions.[117] We can see this from how the Court addressed the remedy portion of the standing question: "[w]hile it may be true that regulating motor-vehicle emissions will not by itself reverse global warming " nothing precludes the Court from "decid[ing] whether EPA has a duty to take steps to *slow* or *reduce* it."[118] The Court knew this was what the plaintiffs wanted and would be the effect of whatever holding it gave in favor of the plaintiffs. Essentially, the Court knew that the remedy sought was to have the highest Court force a federal agency to action, and the Court *agreed* not only that it could, but that it should. Moreover, the Court stated it does not matter whether the remedy eliminates global warming, reverses global warming, or even completely alleviates the injury to the plaintiffs. The Court stated, "[b]ecause of the enormity of the potential consequences associated with manmade climate change, the fact that the effectiveness of a remedy might be delayed . . . is essentially irrelevant."[119] Moreover, "[a] reduction in domestic emissions would slow the pace of global emissions increases, no matter what happens elsewhere."[120]

However, the Ninth Circuit in *Juliana* seemed to disagree with that power. When addressing redressability, the Ninth Circuit stated that requesting an injunction of the government is not within their power and that a favorable decision would not "suffice to stop catastrophic

114. *Id.* at 1171–73.
115. *Massachusetts*, 549 U.S. at 535.
116. *Outside/In: How* Massachusetts v. EPA *Forced the U.S. Government to Take On Climate Change*, N.H. PUB. RADIO (Jan. 9, 2021), https://www.nhpr.org/post/outsidein-how-massachusetts-v-epa-forced-us-government-take-climate-change#stream/0.
117. *See Massachusetts*, 549 U.S. at 521 ("There is, moreover, a 'substantial likelihood that the judicial relief requested' will prompt EPA to take steps to reduce that risk.").
118. *Id.* at 525.
119. *Id.*
120. *Id.* at 526.

climate change or even ameliorate [their] injuries."[121] The Ninth Circuit explains its deviance from *Massachusetts* because, at its heart, the Supreme Court case was one regarding a procedural injury, and so the redressability standard was lessened.[122] The court also asserts that *Massachusetts* was a special circumstance because it was a sovereign state that brought suit.[123]

However, these are both erroneous assumptions. First, the Supreme Court never explained the "special position" a sovereign state has when it brings suit. States bring suits against parties all the time, and the only special status the Constitution seemingly affords them is an automatic grant into federal courts.[124] The Supreme Court in *Massachusetts* does not state that Massachusetts' status as a quasi-sovereign has any real effect on its standing analysis, or that the case would fail if the plaintiff were a private citizen. In noting Massachusetts' special interest, the Court cites *Georgia v. Tennessee Copper Co.*,[125] a case in which the State of Georgia filed suit against a company for discharging noxious gas over its territory, which had severely damaged forests, orchards, and other agricultural sectors.[126] The concern in *Tennessee Copper* was that Georgia actually owned very little of the affected land and the land that would be affected, and thus, very little monetary damage was done.[127] As a result, Georgia would not have been the proper party to bring suit.[128] To overcome this issue, the Court in *Tennessee Copper* states that Georgia has a special interest as a quasi-sovereign, meaning that even though Georgia may not own most, or even any of the land affected, it still has a right to sue to protect the integrity of any and all land within its territory—even if said land is owned by a private citizen.[129]

121. Juliana v. United States, 947 F.3d 1159, 1177 (9th Cir. 2020).
122. *Id.* at 1171.
123. *Id.*
124. U.S. CONST. art. III, § 2.
125. *Massachusetts*, 549 U.S. at 518 (citing Georgia v. Tenn. Copper Co., 206 U.S. 230 (1907)).
126. *Tenn. Copper Co.*, 206 U.S. at 236.
127. *Id.* at 237.
128. Recall, at this time the formal test for standing was not yet crafted by the Court. However, courts were still concerned with ensuring that the proper party was filing suit. *See supra* pt. II.A. The question then at the time would have been more akin to "whether the litigant asserted the kind of interest or right for which equity would provide a remedy." Winter, *supra* note 34, at 1422. And so, if Georgia was not the actual owner of the land, then theoretically the Court would never be able to remedy an injury the State never actually suffered themselves.
129. *Tennessee Copper Co.*, 206 U.S. at 237.

Take note however, the Court decided *Tennessee Copper* in 1907, almost seventy years prior to *Sierra Club*.[130] This is important because the issue in *Tennessee Copper* was that if Georgia did not own the affected land, Georgia would suffer little *economic* damage.[131] Before 1972 with *Sierra Club*, the Supreme Court had not recognized the viability of a recreational or aesthetic interest that a private citizen could sue to protect.[132] So, in order to allow a state to protect an environmental interest that provided no economic benefit directly to the state, the Court had to create a special distinction as to why Georgia was the proper plaintiff to bring suit. In this light, *Tennessee Copper* is much better understood as the original *Sierra Club*, granting a state in the capacity as a quasi-sovereign the ability to protect environmental interests absent economic damages;[133] *Sierra Club* then extended that right to citizens absent that special quasi-sovereign status.[134]

In *Massachusetts*, the Court linked the "considerable relevance" of Massachusetts's quasi-sovereign status in distinguishing the case from *Lujan*,[135] therefore implying Massachusetts' special status bolstered the injury-in-fact element that failed in *Lujan*. However, the plaintiffs in *Lujan* only failed one sub-element of the injury-in-fact requirement—actual or imminent.[136] In *Lujan*, there was no question that the injury would be concrete and particularized because the plaintiffs asserted a now-recognized, non-economic interest in the recreational and aesthetic value of the endangered species.[137] The only reason the Court did not find the injury-in-fact element satisfied was because the plaintiffs had no set plans to visit these animals in the future; thus, the injury was not actual or imminent.[138] In *Massachusetts*, there was no question whether the injury was actual or imminent; the Court stated that the "rising seas have already begun to swallow Massachusetts' coastal land," and that those levels will continue to rise along with other "severe and irreversible changes to natural ecosystems" that will

130. *Compare id.* (decided in 1907), *with* Sierra Club v. Morton, 405 U.S. 727 (1972) (decided nearly seventy years following the *Tennessee Copper Co.* decision).

131. *Tenn. Copper Co.*, 206 U.S. at 237.

132. *See supra* pt. III.A.

133. *Tennessee Copper Co.*, 206 U.S. at 237.

134. *Sierra Club*, 405 U.S. at 734–35.

135. Massachusetts v. Env't Prot. Agency, 549 U.S. 497, 518 (2007) ("It is of considerable relevance that the party seeking review here is a sovereign State and not, as it was in *Lujan*, a private individual.").

136. Lujan v. Defs. of Wildlife, 504 U.S. 555, 562–64 (1992)

137. *Id.*

138. *Id.* at 564.

occur.[139] Therefore, the special status granted to Massachusetts as a quasi-sovereign was not necessary at all in distinguishing *Lujan* from *Massachusetts*, and played no real role in the holding. This finding is supported again because the Court in no way mentioned how this status affected the holding, or that a private plaintiff would not have met standing in this suit. Thus, the quasi-sovereign language in *Massachusetts* serves as mere dicta and cannot be construed as precedent like the Ninth Circuit used in *Juliana* to deny plaintiffs standing.[140]

Secondly, while the Court in *Massachusetts* recognized this case as one of procedural injury—which therefore lessens redressability—the Court further recognized that procedural injury has no effect on causation; thus, it was in the causation section of the opinion that the Supreme Court made their grand statement about taking "small incremental step[s]."[141] The Court stated that even if greenhouse gases will not significantly decrease if the EPA regulates automobile emissions, that does not bar the Court from being able to tell the EPA to regulate the emissions.[142] Accepting the premise that the courts are not able to take small incremental steps in alleviating an injury "would doom most challenges to *regulatory* action."[143] Not procedural, not agency, but *regulatory* action. Both the executive and the legislative branches share regulatory action. The Supreme Court did not limit its statements to procedural injuries but made it clear that any and all incremental steps are worth fighting for.[144] This concept is crucial to climate change litigation, which again shares a unique position as an injury with thousands of perpetrators. Moreover, the Ninth Circuit itself admitted the United States accounts for fifteen percent of the world's *total* emissions.[145] To say there is no certainty the effects of climate change would slow if we forced the federal government to combat these emissions is asinine when the Supreme Court itself found that regulating six percent would undoubtedly reduce the effects of climate change, even if it did not alleviate the injury entirely.[146]

Based on precedent, the Ninth Circuit erred in denying plaintiffs standing in *Juliana*. But placing *Massachusetts* aside, there are three

139. *Massachusetts*, 549 U.S. at 521–22.
140. *Id.* at 520–21.
141. *Id.* at 524.
142. *Id.*
143. *Id.* (emphasis added).
144. *Id.*
145. Juliana v. United States, 947 F.3d 1159, 1169 (9th Cir. 2020).
146. *Massachusetts*, 549 U.S. at 524.

other key reasons why courts can hear litigation on climate change cases, specifically cases like *Juliana*, which call the federal government to action.[147]

V. THE JUDICIAL BRANCH HAS THE CONSTITUTIONAL POWER TO HEAR CLIMATE CHANGE LITIGATION

The judicial branch is not only more than capable of taking on climate change litigation, it also has the power to do so. First, the doctrine of standing is an entirely invented doctrine, the test for which the courts crafted in only the last thirty years—specifically to undermine environmental law.[148] The Court is more than capable of reinterpreting, amending, or even abolishing the test for standing if it so chooses. Second, the Supreme Court has the power to create policy and push the executive and legislative branches to action. It has done so on numerous other issues[149] and there is no reason it cannot do so for climate change. And finally, our system of checks and balances not only suggests, but requires, the judicial branch step up and hear these cases if the other branches have effectively ignored and refused to hear the issue.

A. The Standing Doctrine Was Entirely Created by the Court and Can Be Modified by the Court

As demonstrated in Part II of this Article, the doctrine of standing is a completely invented idea crafted by the Supreme Court.[150] Admittedly, most, if not all, tests that are used by the judicial branch are created by the Court—the Constitution very rarely spells out tests for itself.[151] However, standing is unique in the basis for its creation. Most other doctrines have strong footholds in the Constitution. For example, the Constitution grants Congress the power to regulate interstate commerce,[152] while also stating that the powers not delegated to the federal government belong to the states.[153] The Court clearly had to

147. *See infra* pt. V.

148. *See* Winter, *supra* note 34, at 1375–78; Doremus, *supra* note 21.

149. *See, e.g.*, Johnson v. Zerbst, 304 U.S. 458 (1938); Brown v. Bd. of Educ., 347 U.S. 483 (1954); Gideon v. Wainwright, 372 U.S. 335 (1963).

150. *See supra* pt. II.

151. *See, e.g.*, Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984) (creating the *Chevron* Deference test for determining when to grant deference to agency interpretations); Lemon v. Kurtzman, 403 U.S. 602 (1971) (creating the *Lemon* test to determine violations of the establishment clause); Korematsu v. United States, 323 U.S. 214 (1944) (creating the Strict Scrutiny test for fundamental rights).

152. U.S. CONST. art. I, § 8, cl. 3.

153. U.S. CONST. amend. X.

create a boundary to determine when Congress overstepped its Commerce Clause power and infringed on states' rights, and even then the Court still ultimately has the power to alter or amend that test if it determines there is a flaw in the analysis.[154] However, the leap from Article I, Section 8, Clause 3 to the current Commerce Clause test is a far shorter distance than interpreting "all cases . . . and . . . controversies"[155] to require the elements crafted in *Lujan*.[156]

The Court went approximately 150 years before even linking "standing" to Article III and almost 200 years before coming up with the definitive test.[157] But the most important distinction is how the Court has treated Article III's "requirement" that plaintiffs meet standing. If the Constitution requires an element to be met, there cannot be exceptions granted—that is the whole point of it being written in the Constitution. For example, there are no exceptions to the requirement for subject matter jurisdiction when removing a suit to federal court; a party must prove they meet the requirements for federal jurisdiction, or they cannot remove.[158] However, the Court has routinely made exceptions to the standing doctrine for specific circumstances. One exception has already been noted with procedural injury; when such an injury is claimed, the standards for imminence and redressability are relaxed.[159] However, the most drastic exception has been a "pass" on standing altogether. Take the Court's acceptance of the Freedom of Information Act ("FOIA"): if a suit is brought under the FOIA for an agency's refusal to disclose documents, standing does not even have to be proven at all.[160] Yet, as noted earlier, Justice Scalia entirely contradicted that reasoning in *Lujan* by determining that it would be unconstitutional for Congress to pass legislation granting automatic standing to all citizens to sue for the enforcement of an environmental statute.[161] This discrepancy was not

154. *See* Lainie Rutkow & Jon S. Vernick, *The U.S. Constitution's Commerce Clause, the Supreme Court, and Public Health*, 126 PUB. HEALTH REPS. 750 (2011) (explaining that the Court has revisited and amended the Commerce Clause test multiple times over the decades).

155. U.S. CONST. art. III, § 2.

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

157. Coleman v. Miller, 307 U.S. 433, 460 (1939) (Roberts, Black, & Douglas, J.J., concurring); *Lujan*, 504 U.S. at 560–61 (1992); *Political Question Doctrine*, *supra* note 37.

158. U.S. CONST. art. III, § 2.

159. *Lujan*, 504 U.S. at 572 n.7.

160. NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 220–21 (1978).

> FOIA . . . is broadly conceived, and its basic policy is in favor of disclosure. . . . [U]nless the requested material falls within one of the[] nine statutory exemptions, FOIA requires that records and material in the possession of federal agencies be made available on demand to *any member of the general public*.

Id. (emphasis added).

161. Stern, *supra* note 59, at 26.

lost on legal scholars. To many, it was not a coincidence that the largest restrictions placed on standing were done so within the context of environmental cases. In his dissent of *Lujan*, Justice Blackman accused Justice Scalia, the author of the *Lujan* majority, of going on a "slash-and-burn expedition through the law of environmental standing."[162] Other scholars agree, attributing Justice Scalia's opinions, in part, to his "undisguised hostility toward the purposes of the environmental laws."[163]

While the creation of the procedural injury[164] and the recognition of non-economic damages[165] were an advantage to environmental cases, environmental law would not need to rely on those small handouts had the Court not used *Lujan* and *Sierra Club* (both cases in which the plaintiffs were ultimately denied standing) to further restrict access to the courts. There is also no understating that environmental cases, and specifically those dealing with climate change, are one of the few areas of law where standing is a heavily contested issue.[166] It is completely within the Court's power to recognize that climate change is a unique topic, one with multiple contributors. This makes causation and redressability especially difficult, and as such redefine what causation and redressability mean. *Massachusetts* was an important step in doing so, but obviously other courts, such as the Ninth Circuit, still require a more overt message from the Supreme Court.

B. The Supreme Court Has Told the Executive and Legislative Branches to Take Action on Other Issues

One of the other issues surrounding environmental law is that lower courts persistently reject the redressability of climate change cases because they argue they do not have the power to force the legislative or executive branches to take action on the matter. However, this is simply not the case. The courts, and specifically the Supreme Court, have handed down decisions that require the federal government to take action.[167] These actions range from merely requiring a revision in policy to actually having the executive and legislature create grand

162. *Lujan*, 504 U.S. at 606 (Blackmun, J., dissenting).
163. Robert V. Percival & Joanna B. Goger, *Citizen Suits and the Future of Standing in the 21st Century: From* Lujan *and* Laidlaw *and Beyond: Escaping the Common Law's Shadow: Standing in the Light of* Laidlaw, 12 DUKE ENV'T. L. & POL'Y F. 119, 119–20 (2001).
164. *See supra* pt. III.B.
165. *See supra* pt. III.A.
166. Doremus, *supra* note 21, at 10956.
167. *See infra* pt. V.B.1–2.

programs that require immense amounts of time, man-power, and funding.[168] Below are two notable instances outside the realm of environmental law where the Court was comfortable forcing the federal and state governments to act.

1. Brown I*,* Brown II*, and* Cooper v. Aaron

In 1954, the Supreme Court made the landmark decision that would overturn *Plessy v. Ferguson*[169] and legally end segregation in the United States. *Brown v. Board of Education*,[170] or *Brown I*, would go down in history as one of the most important rulings of the nation's history, but it is also the greatest example of the judicial branch forcing action at a national and state level. The ruling of *Brown I* asked the Attorney General of the United States, and the Attorneys General of all fifty states, to create their own desegregation plans.[171] After the original decision, the Court released its second opinion of *Brown v. Board of Education*[172] in 1955, or *Brown II*, in which the Supreme Court detailed how to provide relief to the plaintiffs in the original suit. In this opinion, the Court *ordered* the states and their respective Attorney Generals to desegregate all segregated schools and to require all future admittance to be made in a racially nondiscriminatory manner.[173] In 1958, the Supreme Court decided *Cooper v. Aaron*,[174] in which the Court ruled that states were constitutionally required to implement the *Brown I* and *Brown II* desegregation orders and reaffirmed the Court's constitutional power to create such orders.[175]

At first glance, this ruling does not seem to be all that consequential to the issue at hand. Of course, the Supreme Court is allowed to tell the government whether certain laws are unconstitutional. But this ruling came with a necessary call to action. The Court *ordered* the desegregation of schools.[176] This required planning, manpower, and finances. The United States military had to become involved to protect

168. *See infra* pt. V.B.1–2.
169. 163 U.S. 537 (1896).
170. 347 U.S. 483 (1954).
171. *Brown*, 347 U.S. at 495–96.
172. 349 U.S. 294 (1955).
173. *Id.* at 300 ("While giving weight to these public and private considerations, the courts will require that the defendants make a prompt and reasonable start toward full compliance with our May 17, 1954, ruling.").
174. 358 U.S. 1 (1958).
175. Alex McBride, Brown v. Board of Education *(1954)*, THIRTEEN, https://www.thirteen.org/wnet/supremecourt/rights/landmark_brown.html (last visited Jan. 29, 2022).
176. *Id.*

students integrating certain districts.[177] To meet certain criteria to be deemed "desegregated" by the Court, some cities relied on busing options which cost substantial amounts of money.[178] The Court's decisions effectively ordered both the federal and state governments to take action, use resources, and spend their money to solve a systemic problem.

There are some who would say this constitutes a substantially different circumstance than the one we currently face. After all, how can racial segregation and civil rights be compared to climate change? Was the Court not pressured to act because of a Constitutional right? These two issues, climate change and civil rights, are more intertwined than one might presume at first glance. In fact, many activists have argued that environmental justice is a crucial step in achieving racial justice.[179] This is because those who feel the brunt of the harm resulting from climate change are often those who live in impoverished minority communities.[180]

According to the EPA, seventy-one percent of African Americans live in communities that are currently violating federal air pollution standards.[181] In total, "74 million people of color live in counties that received at least one failing grade for ozone and particle pollution."[182] The EPA has also found that wealth does not matter nearly as much as skin color, as African Americans who had higher incomes than average white families still faced greater risk from air pollution.[183] But air pollution is not the only concern. Researchers have also found "a consistent pattern over a 30-year period of placing hazardous waste

177. Doug Criss, *It Took Federal Troops to Help Desegregate Little Rock Schools 62 Years Ago. Some Fear a New State Plan Will Resegregate Them*, CNN (Oct. 10, 2019, 9:34 AM), https://www.cnn.com/2019/10/09/us/little-rock-schools-resegregation-trnd/index.html.

178. *See* Brown v. Board*: Timeline of School Integration in the U.S.*, TEACHING TOLERANCE (Spring 2004), https://www.tolerance.org/magazine/spring-2004/brown-v-board-timeline-of-school-integration-in-the-us (showing that cities turned to bussing to meet desegregation criteria); *Transportation*, NAT'L CTR. FOR EDUC. STAT., https://nces.ed.gov/fastfacts/display.asp?id=67 (last visited Feb. 12, 2022) (showing the cost of bussing per student going back to 1980).

179. Nina Lakhani & Jonathan Watts, *Environmental Justice Means Racial Justice, Say Activists*, GUARDIAN (June 18, 2020), https://www.theguardian.com/environment/2020/jun/18/environmental-justice-means-racial-justice-say-activists.

180. Douglas Fischer, *Climate Change Hits Poor Hardest in U.S.*, SCI. AM. (May 29, 2009), https://www.scientificamerican.com/article/climate-change-hits-poor-hardest/.

181. Saleem Chapman, *Environmental Justice, Climate Change, & Racial Justice*, ENV'T PROT. AGENCY (July 24, 2015), https://www.epa.gov/sites/production/files/2015-10/documents/post_2_-_environmental_justice_climate_change.pdf.

182. Anuradha Varanasi, *Over 14 Million People of Color in the U.S. Live in Counties with High Air Pollution*, FORBES (Apr. 27, 2020), https://www.forbes.com/sites/anuradhavaranasi/2020/04/27/over-14-million-people-of-color-in-the-us-live-in-counties-with-high-air-pollution/?sh=72048a645301.

183. *Id.*

facilities in neighborhoods where poor people and people of color live."[184] Specifically, they discovered that "[c]ontrary to earlier beliefs . . . [minority and low-income communities] may serve to attract noxious facilities, rather than the facilities themselves attracting people of color and low-income populations."[185] Because of these factors, many racial and environmental justice advocates have pushed to reframe these environmental issues as Fourteenth Amendment concerns.[186]

2. Johnson v. Zerbst *and* Gideon v. Wainwright

The second notable example of the Court forcing the federal government and states to take action concerns the right to an attorney. The Sixth Amendment to the Constitution guarantees the right to have "the assistance of counsel for [the defendant's] defense."[187] However, it was not until 1938 in *Johnson v. Zerbst*[188] that the Supreme Court interpreted the Sixth Amendment to guarantee counsel for all federal criminal trials,[189] and still not until 1963, with *Gideon v. Wainwright*,[190] that the Court guaranteed that right for all criminal trials, whether state or federal.[191] Again, while on the surface this might seem like the average constitutional law case, these rulings required an immense amount of time and money spent by both the federal and state governments. Both had to essentially revamp what used to be miniscule departments only dealing with defendants facing the worst charges, or worse, create entirely new structures within their justice system. This undertaking was no small feat. The United States federal government spent approximately $1.2 billion dollars in 2020 on funding their public

184. Jim Erikson, *Targeting Minority, Low-Income Neighborhoods for Hazardous Waste Sites*, U. MICH. NEWS (Jan. 19, 2016), https://news.umich.edu/targeting-minority-low-income-neighborhoods-for-hazardous-waste-sites/.

185. *Id.*

186. *See, e.g.*, David A. Dana & Deborah Tuerkheimer, *After Flint: Environmental Justice as Equal Protection*, 111 NW. U. L. REV. 879 (2017); Carlton Waterhouse, *Abandon All Hope Ye That Enter? Equal Protection, Title VI, and the Divine Comedy of Environmental Justice*, 20 FORDHAM L. REV. 51 (2017); Brian Faerstein, *Resurrecting Equal Protection Challenges to Environmental Inequity: A Deliberately Indifferent Optimistic Approach*, 7 J. CONST. L. 561 (2004); Michael Daniel, *Urging the Fourteenth Amendment to Improve Environmental Justice*, AM. BAR ASS'N (Oct. 1, 2003), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/human_rights_vol30_2003/fall2003/irr_hr_fall03_fourtheenthamendment/.

187. U.S. CONST. amend. VI.

188. 304 U.S. 458 (1938).

189. *Id.* at 469.

190. 372 U.S. 335 (1963).

191. *Id.* at 344–45.

defender services.[192] From 2008 to 2012, state governments spent approximately $2.2 to $2.4 billion on indigent defense expenditures.[193] This is all because of a Supreme Court ruling.

C. Our System of Checks and Balances Requires the Judicial Branch to Step Up if the Other Branches have Effectively "Checked Out"

The Framers of the U.S. Constitution built a system that divides power between the three branches of the U.S. government—legislative, executive, and judicial. They crafted the government to ensure that each branch would have a "check" on the other two branches, ensuring that one branch would not outweigh the others.[194] Despite being expressed nowhere in the Constitution, any civilian who took high school civics knows that this system of checks and balances is one of our government's founding principles.[195] The United States Courts' own website perfectly summed up the core function of the system of checks and balances: "Each branch has its own authority, but also must depend on the authority of the other branches for the government to function."[196] And thus, for the system to work, each branch must perform its duties. So, when a branch shirks its duty, it is up to the other two branches to hold it accountable. In this case, when two branches are avoiding their duty to address a threat not only to this country, but to the global community, it is up to the final branch to take action. A notable example of this was briefly mentioned in Part V of this Article—*Brown v. Board of Education*. In deciding *Brown*, the Supreme Court had effectively sparked the era known as the Civil Rights Movement.[197] That is not to say that a push for civil rights did not occur prior to 1954, but those seeking to change the law reached a standstill when attempting to navigate the standard channels of the legislative and executive

192. ADMIN OFF. OF THE U.S. CTS., THE JUDICIARY FISCAL YEAR 2020 CONGRESSIONAL BUDGET SUMMARY (2019), https://www.uscourts.gov/sites/default/files/fy_2020_congressional_budget_summary_0.pdf.

193. Erinn Herberman & Tracey Kyckelhahn*, State Government Indigent Defense Expenditures, FY 2008–2012*, U.S. DEPT. OF JUST. (Apr. 21, 2015), https://www.in.gov/publicdefender/files/Public-Defense-Expenditures-BJS.pdf.

194*. Separation of Powers Checks and Balances*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/separation_of_powers (last visited Jan. 29, 2022).

195*. Id.*

196*. Separation of Powers in Action* - U.S. v. Alvarez, U.S. CTS., https://www.uscourts.gov/educational-resources/educational-activities/separation-powers-action-us-v-alvarez (last visited Jan. 29, 2022).

197. Sarah Pruitt, Brown v. Board of Education*: The First Step in the Desegregation of America's Schools*, HISTORY (Mar. 16, 2021), https://www.history.com/news/brown-v-board-of-education-the-first-step-in-the-desegregation-of-americas-schools.

branches.[198] The Court had to effectively take the issue of civil rights upon its own shoulders because the other two branches had essentially checked out of the discussion.[199] It was up to the Court, and the Court alone, to push this movement forward. In the case of climate change, the legislative and executive have failed their duty to address an increasing threat, [200] and so it is the judicial branch's responsibility to hear these cases and ensure that the legislative and executive branches take proper action.

VI. THE ABILITY OF CITIZENS TO PROTECT THE ENVIRONMENT REQUIRES THE JUDICIAL BRANCH TO HEAR CLIMATE CHANGE LITIGATION

The judicial branch is constitutionally required to hold the executive and the legislative branches accountable to maintain the system of checks and balances. Because of this requirement, the judicial branch stands as the last resort for citizens seeking to protect the environment. This is due to numerous factors: the executive and legislative branches have failed to act appropriately; citizens' normal paths to redress have failed; and the urgency of the situation.

A. Executive and Legislative Failure to Act

Normally, the executive and legislative branches would be the channel through which climate change would be addressed, because it is obvious a solution will have to rely heavily on policy to regulate greenhouse gas emitting companies and manufacturers.[201] However, these two branches have long refused to take substantial action on the

198. *See Civil Rights Act of 1964*, HISTORY (Jan. 25, 2021), https://www.history.com/topics/black-history/civil-rights-act (discussing how civil rights legislation prior to the 1957 Civil Rights Act faced tremendous opposition from white supremacists in state and federal legislatures; the 1957 Act was the first civil rights legislation passed by the federal government since 1875).

199. James T. Patterson, Brown v. Board of Education *and the Civil Rights Movement*, 34 STETSON L. REV. 413, 414 (2005) ("No other institution of government at that time could have done what those nine men did.").

200. *See, e.g.*, Peter Stubley, *Trump Dismisses Need for Climate Change Action: 'We Have the Cleanest Water We've Ever Had, We Have the Cleanest Air*,' INDEPENDENT (June 29, 2019), https://www.independent.co.uk/news/world/americas/ trump-news-latest-g20-climate-change-global-warming-us-japan-a8980156.html; Tiffany Stecker & Abby Smith, *Paris Climate Bill Passes House, but Senate Won't Follow (2)*, BLOOMBERG L. (May 2, 2019), https://news.bloomberglaw.com/environment-and-energy/paris-climate-bill-passes-house-but-senate-not-following-suit.

201. *See Federal Action on Climate*, CTR. FOR CLIMATE & ENERGY SOLS., https://www.c2es.org/content/federal-action-on-climate/ (last visited Feb. 21, 2022); *Political Accountability Law and Legal Definition*, US LEGAL, https://definitions.uslegal.com/p/political-accountability/ (last visited Jan. 29, 2022).

matter and, most notably, the Trump Administration and Congress refused to address the issue at all.[202] In fact, the only actions the Trump Administration and Congress took have undermined or reversed the meager progress that had already been made.[203] As stated above, when this occurs and there is no other recourse for the people to turn to, it is the judicial branch's duty to step in, allow the people's voices to be heard, and hold the other branches accountable.

B. Normal Paths to Redress Have Been Blocked or Do Not Work

In the ideal system, when the legislative and executive branches refuse to represent the people, the normal cause of action would be to hold them accountable through the traditional "political process," where voters vote out the representatives, senators, and even the president when they fail to perform their duties.[204] In this ideal system, the judicial branch will never have to be involved. However, the many failures within the system that prevent holding the legislative and executive officials accountable exemplify the flaw in this belief.

The first flaw is created by voter suppression.[205] Today, voter suppression is not as overt as it used to be,[206] but that makes the issue even more dangerous. Modern suppression also comes in many more forms. A newer tactic being pushed in many states is voter ID laws.[207] Over 21 million Americans of voting age do not have a government issued ID.[208] This is due to limited accessibility because the location to retrieve government IDs is located far away from many rural and

202. Stubley, *supra* note 200; Stecker, *supra* note 200.

203. *See, e.g.*, Tyler Clevenger & Dan Lashof, *7 Ways the Biden Administration Can Reverse the Climate Rollbacks*, WORLD RES. INST. (Jan. 19, 2021), https://www.wri.org/blog/2020/04/7-ways-trump-administration-harming-climate; Timothy Puko, *New EPA Rules Could Raise Bar for Climate-Change Regulations*, WALL ST. J. (Aug. 13, 2020), https://www.wsj.com/articles/new-epa-rules-could-raise-bar-for-climate-change-regulations-11597323600.

204. *See generally Congress: The People's Branch?*, AM. GOV'T, https://www.ushistory.org/gov/6.asp (last visited Feb. 14, 2022).

205. Barbara Ortutay, *Facebook Braces for a Contested Election*, PBS (Oct. 7, 2020), https://www.pbs.org/newshour/politics/facebook-braces-for-a-contested-election; *Fighting Voter Suppression*, LEAGUE OF WOMEN VOTERS, https://www.lwv.org/voting-rights/fighting-voter-suppression (last visited Feb. 14, 2022).

206. Theodore R. Johnson, *The New Voter Suppression*, BRENNAN CTR. FOR JUST. (Jan. 16, 2020), https://www.brennancenter.org/our-work/research-reports/new-voter-suppression.

207. *See* Zach Montellaro, *State Republicans Push New Voting Restrictions After Trump's Loss*, POLITICO (Jan. 24, 2021), https://www.politico.com/news/2021/01/24/republicans-voter-id-laws-461707.

208. *Block the Vote: How Politicians are Trying to Block Voters from the Ballot Box*, AM. CIV. LIBERTIES UNION (Aug. 18, 2021), https://www.aclu.org/news/civil-liberties/block-the-vote-voter-suppression-in-2020/ [hereinafter *Block the Vote*].

impoverished communities.[209] Further, IDs are typically expensive and require showing multiple other government issued documents, all of which are also expensive and sometimes difficult to replace if lost.[210] Other voter suppression tactics include voter roll purges, where voters are stripped of their registration without being notified if they have not voted within a certain period of time, so they are turned away when they arrive to vote.[211] Between the 2016 presidential election and the 2018 mid-term elections, almost 17 million voters were purged from the rolls.[212] Additional tactics are as simple as closing polling locations, or not making enough polling locations available.[213] This results in ten-plus-hour-long lines and citizens traveling hundreds of miles to cast their ballots.[214]

However, one of the most notable voter suppression tactics is felony disenfranchisement.[215] After the war-on-drugs, millions of minorities received felonies, sometimes for mere possession of marijuana (which has since been legalized in some form in over thirty-seven states),[216] and now they are not able to vote.[217] Even in states that have reinstated felons' voting rights, felony disenfranchisement persists. Take the state of Florida, which recently passed Amendment 4 granting convicted felons the right to vote.[218] After the people of Florida overwhelmingly voted for the Amendment, the Florida legislature responded quickly by passing a law requiring convicted felons to pay off all fines owed before their voting rights may be reinstated.[219] Even though the Eleventh Circuit Court of Appeals for the United States

209. *Id.*
210. *Id.*
211. *Id.*
212. Kevin Morris, *Voter Purge Rates Remain High, Analysis Finds*, BRENNAN CTR. FOR JUST., https://www.brennancenter.org/our-work/analysis-opinion/voter-purge-rates-remain-high-analysis-finds (last updated Aug. 21, 2019).
213. Robin Levinson-King, *US election 2020: Why It Can Be Hard to Vote in the US*, BRITISH BROAD. CHANNEL (Oct. 20, 2020), https://www.bbc.com/news/election-us-2020-54240651.
214. *Id.*
215. *Block the Vote*, *supra* note 208.
216. Kenneth B. Nunn, *Race, Crime and the Pool of Surplus Criminality: Or Why the "War on Drugs" Was a "War on Blacks*,*"* 6 J. GENDER RACE & JUST. 381, 391–96 (2002); Jeremy Berke et al., *Marijuana Legalization Is Sweeping the US. See Every State Where Cannabis Is Legal*, BUS. INSIDER (July 9, 2021), https://www.businessinsider.com/legal-marijuana-states-2018-1.
217. *Block the Vote, supra* note 208.
218. Jenni Goldstein, *Florida Convicted Felons Allowed to Vote for 1st Time in Presidential Election After Completing Sentences*, ABC NEWS (Oct. 25, 2020), https://abcnews.go.com/Politics/convicted-florida-felons-allowed-vote-1st-time-presidential/story?id=73822173.
219. Connor Maxwell, *Florida's Modern-Day Poll Tax*, CTR. FOR AM. PROGRESS (June 28, 2019), https://www.americanprogress.org/issues/race/news/2019/06/28/471082/floridas-modern-day-poll-tax/.

determined that this did not constitute an unconstitutional "poll tax,"[220] the reality is that it operates exactly like a poll tax, affecting almost 900,000 of the 1.1 million felons in Florida.[221] Almost half a million of those disenfranchised are people of color,[222] the same target group of the original Jim Crow era poll taxes.[223] All of these issues combine to disenfranchise millions of voters each year, making them effectively unable to hold their legislatures and the executive accountable.

The second issue is similar. Many voters experience a different type of disenfranchisement resulting from the inadequate and unbalanced voting power. This occurs in two different ways. The first is a result from more populous states and counties having substantially less voting power than those that come from less populated states. Take California and Wyoming for example. California has a population of 39.53 million people, while Wyoming has roughly 577,000.[224] California gets 55 electoral votes, while Wyoming gets 3.[225] To put that in context, in California roughly 719,000 citizens make up one electoral vote, while in Wyoming approximately 193,000 citizens make up the same.[226] This makes the votes of those citizens in Wyoming almost four times more influential in the presidential election than those of the citizens living in California. This is essentially the systemic failure of the electoral college.[227]

The second type of unbalanced power results from gerrymandering. This can technically be classified as a form of voter suppression because redistricting is done specifically by parties to weaken the votes from the opposing party.[228] However, gerrymandering works in a very similar way to the problems of the electoral college. When redistricting, the majority in power will attempt to either "pack or

220. Martin Levine, *The Disturbing Effectiveness of Florida's Poll Tax*, NON-PROFIT Q. (Oct. 19, 2020), https://nonprofitquarterly.org/the-disturbing-effectiveness-of-floridas-poll-tax/.

221. *Id.*

222. Maxwell, *supra* note 219.

223. *Id.*

224. *State Population by Rank*, INFOPLEASE, https://www.infoplease.com/us/states/state-population-by-rank (last visited Feb. 14, 2022).

225. *Distribution of Electoral Votes*, NAT'L ARCHIVES, https://www.archives.gov/electoral-college/allocation (last updated Mar. 6, 2020).

226. This is because 39.53 million divided by 55 equates to approximately 718,727 per vote, rounded up to 719,000, and 577,000 divided by 3 equates to approximately 192,333 per vote, rounded up to 193,000. *Id.* (providing the number of electoral votes per state); *State Population by Rank*, *supra* note 224 (providing the state population numbers).

227. Emily Badger, *As American as Apple Pie? The Rural Vote's Disproportionate Slice of Power*, N.Y. TIMES (Nov. 20, 2016), https://www.nytimes.com/2016/11/21/upshot/as-american-as-apple-pie-the-rural-votes-disproportionate-slice-of-power.html.

228. Olga Pierce, Jeff Larson & Lois Beckett, *Redistricting, a Devil's Dictionary*, PROPUBLICA (Nov. 2, 2011), https://www.propublica.org/article/redistricting-a-devils-dictionary.

crack" districts.[229] Typically, district lines are drawn in order to "pack" as many voters of the minority party into just a few districts so the majority loses by an extremely large margin.[230] At the same time, the majority attempts to draw the other district lines to "crack" their voters, spreading them out so that the majority wins most of the districts by a very slim margin.[231] Because of the way America's elections work, parties are not rewarded for winning by large margins—a win by 90/10 results in the same amount of power as a win of 60/40 or even 51/49.[232] So, by spreading its voters the majority party may win each district by only fifty-one percent, but now the majority wins by fifty-one percent in over fifty percent of the districts allowing the party to remain in control of the state. Much like the electoral college, this redistricting results in unbalanced voting power because now the votes of the minority party are worth less than the votes of the majority.[233]

The third flaw with relying on political accountability comes from detrimental Supreme Court decisions that make it more difficult for voters to stay informed. *Unites States v. Alvarez*[234] was a decision by the Supreme Court finding that officials running for public office are legally allowed to lie during their campaign.[235] And *Citizens United* v. *FEC*[236] was a decision by the Supreme Court that held companies could essentially spend unlimited amounts of money on "campaign engineering" and refused to place regulation on "dark money," which is essentially money contributed to a campaign that cannot be traced back to the donor.[237] Both decisions incapacitate the voters' ability to hold officials accountable. To make informed decisions, voters must know who is paying for candidates' campaigns because parties do not fund campaigns that are at odds with their goals. Likewise, when candidates are permitted to lie regarding their campaign, a voter can almost never be

229. *Wondering How the Tests Work?*, PRINCETON GERRYMANDERING PROJECT, https://gerrymander.princeton.edu/info/ (last visited Jan. 29, 2022). There are actually other forms of gerrymandering such as "hijacking" and "kidnapping"; however, "packing" and "cracking" are the most common and most used. Pierce, *supra* note 228.

230. *Wondering How the Tests Work?*, *supra* note 229.

231. *Id.*

232. *See* Nate Cohn & Quoctrung Bui, *How the New Math of Gerrymandering Works*, N.Y. TIMES (Oct. 3, 2017), https://www.nytimes.com/interactive/2017/10/03/upshot/how-the-new-math-of-gerrymandering-works-supreme-court.html.

233. Dave Heller, *How Gerrymandering Can Make Your Vote Worthless*, WHYY (June 26, 2017), https://whyy.org/segments/how-gerrymandering-can-make-your-vote-worthless/.

234. 567 U.S. 709 (2012).

235. *Id.* at 729–30.

236. 558 U.S. 310 (2010).

237. Tim Lau, *Citizens United Explained*, BRENNAN CTR. FOR JUST. (Dec. 12, 2019), https://www.brennancenter.org/our-work/research-reports/citizens-united-explained.

fully informed regarding the candidates' backgrounds, records, and platforms.[238]

And finally, there is an ongoing debate as to whether, even in an environment without voter suppression, with equal voting power, and unlimited access to information about candidates, the American people are truly capable of holding the legislative and executive branches accountable through voting.[239] An analysis of voters published in Legislative Studies Quarterly found that voters were more likely to reward officials for good representation than to punish them for poor representation.[240] The biggest hurdle to accountability is the uninformed voter.[241] Even in the era of technology, where Google can seemingly answer any question with a simple search, only thirty-four percent of Americans can name the three branches of government.[242] The issue, researchers found, has less to do with inanity and more to do with ignorance.[243] Many people are willfully ignorant of politics because they genuinely believe their vote will not make a difference in an election; while this may be seen as a rational belief for individuals, it can have detrimental outcomes for the collective.[244] Unfortunately, there is no fix-all cure for the uninformed voter. The two most popular solutions being pushed are mandating civics classes to be taught within a K-12

238. While many advocates of the *Susan B. Anthony List* decision claimed that voters could easily parse out the truths from lies on their own, the reality has not been that simple. For example, a crucial aspect of an informed voter is being able to track the Congressional voting record of candidates. Many voters rely on the candidates for that information; however, as stated above, candidates are under no obligation to tell the truth about their voting record. And this information is not as easy to obtain as proponents of this opinion would want the public to believe. Congress.gov is the only online source of congressional voting records, but it does not allow the user to search by representative or senator, only by the name of the legislation. So not only would users have to search every piece of legislation separately, but the average voter does not know the technical names of many pieces of legislation. To actually see the voting record on the original Affordable Care Act, a user would have to type in "Affordable Health Care for America Act H.R. 3962." By only typing in "Affordable Care Act" a user would have to sift through 66,965 results. The only other free resource to look up congressional voting records is GovTrack.us. However, this is run by a non-profit, a nongovernmental entity, and often is missing information. Also, while more user friendly, you still cannot search by Congressional Member for their entire voting history. Instead, you will only find the results of their "key votes." *See generally* Victoria McGrane, *Online Voting Records User Unfriendly*, POLITICO (Apr. 27, 2009), https://www.politico.com/story/2009/04/online-voting-records-user-unfriendly-021726.

239. Kuta, *supra* note 26.

240. *Id.*

241. *See* Marko Klašnja, *Voters' Ignorance Means that Many Corrupt Politicians Get to Stay in Office*, LONDON SCH. OF ECON. U.S. CENTRE, https://blogs.lse.ac.uk/usappblog/2017/04/18/%ef%bb%bf-voters-ignorance-means-that-many-corrupt-politicians-get-to-stay-in-office/ (last visited Feb. 14, 2022).

242. Jared Meyer, *The Ignorant Voter*, FORBES (June 27, 2016), https://www.forbes.com/sites/jaredmeyer/2016/06/27/american-voters-are-ignorant-but-not-stupid/?sh=7e7f85d97ff1.

243. *Id.*

244. *Id.*

curriculum[245] and using civics tests to weed out uninformed voters.[246] However, both solutions are problematic. Regarding civics classes, there is pushback arguing that not only does this place an additional burden on students to graduate, but that requiring it during a school setting would only promote knowledge to receive a grade and not actually increase engagement.[247] It would also be an additional cost on an already struggling education system.[248] As for the civics tests, these can too easily fall into the category of the Jim Crow era literacy tests, where the parties in power evaluating the tests have an agenda to only "pass" those who match their ideological views.[249] Finally, both of these solutions would require legislative action, either on the state or federal level.

While the perfect solution does not yet exist, it remains that a legislature elected by uninformed voters is not fully motivated to make a change; this is where the judiciary steps in. The judicial branch plays a key role in balancing out issues resulting from uninformed voting.[250] For example, if the public is ignorant about the workings of the federal government, then many of the laws enacted by the federal government will not actually represent the will of the people. This is even more likely to be true of agency regulations enacted by officials who are not elected by the people. This means that challenges to these laws and agency decisions are even more important to protect the actual will of the people.[251]

C. Urgency

The most important reason the judicial branch must be willing to hear climate change litigation is the urgency of the issue. In 2019, the United Nations released a statement saying that the world has eleven years to drastically curb emissions before the climate reaches the point

245. Alan Ehrenhalt, *Will Civics Education Make People Better Voters?*, GOVERNING (Aug. 30, 2016), https://www.governing.com/archive/gov-civics-education-voters.html.

246. Ilya Somin, *Opinion: Should the Government Weed Out Ignorant Voters?*, WASH. POST (May 21, 2016), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/05/21/should-the-government-weed-out-ignorant-voters/.

247. *See* Sarah Shapiro & Catherine Brown, *The State of Civics Education*, CTRS. FOR AM. PROGRESS (Feb. 21, 2018), https://www.americanprogress.org/issues/education-k-12/reports/2018/02/21/446857/state-civics-education/.

248. *See* Linda Darling-Hammond, *America's School Funding Struggle: How We're Robbing Our Future by Under-Investing in Our Children*, FORBES (Aug. 5, 2019), https://www.forbes.com/sites/lindadarlinghammond/2019/08/05/americas-school-funding-struggle-how-were-robbing-our-future-by-under-investing-in-our-children/.

249. Somin, *supra* note 246.

250. Meyer, *supra* note 242.

251. *Id.*

of no return.[252] Moreover, the United States plays a larger role in climate change than the former administration would have liked to admit.[253] The United States ranked second among the twenty countries that emitted the most carbon dioxide in 2018, producing fifteen percent of the world's total emissions.[254] The United States also ranks second in emissions per capita, based on the country's share of the global population; essentially the United States emits more than three times it's fair share of CO2 based on its population size.[255] NASA also reported that climate change has already resulted in disastrous effects that will continue for years even if the entire world completely halted emissions today.[256] Some of the issues affecting the nation include rising temperatures, increased heat waves and droughts, changing precipitation patterns, stronger and more frequent hurricanes, sea-level rise, and melting ice-caps.[257] There are also certain areas of the country that will be impacted more than others, and Florida is one of those areas.[258] Specifically, climate change poses a substantial threat to the region's economy and environment due to sea level rise, and the rising temperatures will result in increased health issues as well as pose problems for energy and agricultural sectors.[259]

This threat is too urgent to wait any longer in hopes that Congress will act. As mentioned earlier, the proper path should in fact be the political avenue through legislative action,[260] allowing activists to educate voters that the environment must be a key voting issue, and then voters would in turn demand action from their officials. However, this process has already failed, and the environment cannot wait any longer as any action taken will need several months, if not years, to take full

252. *Only 11 Years Left to Prevent Irreversible Damage from Climate Change, Speakers Warn During General Assembly High-Level Meeting*, UNITED NATIONS (Mar. 28, 2019), https://www.un.org/press/en/2019/ga12131.doc.htm.

253. Alana Wise, '*I Don't Think Science Knows': Visiting Fires, Trump Denies Climate Change*, NPR (Sept. 14, 2020), https://www.npr.org/2020/09/14/912799501/i-don-t-think-science-knows-visiting-fires-trump-denies-climate-change.

254. *Each Country's Share of CO2 Emissions*, UNION OF CONCERNED SCIENTISTS (Aug. 12, 2020), https://www.ucsusa.org/resources/each-countrys-share-co2-emissions.

255. Hannah Ritchie, *Who Emits More Than Their Share of CO2 Emissions?*, OUR WORLD IN DATA (Dec. 4, 2018), https://ourworldindata.org/share-co2-emissions.

256. *The Effects of Climate Change*, NASA (Sept. 23, 2020), https://climate.nasa.gov/effects (last visited Feb. 14, 2022).

257. *Id.*

258. *Supra* pt. IV.

259. *The Effects of Climate Change*, *supra* note 256.

260. *See supra* pt. VI.A.

effect,[261] and the climate has only approximately eleven years left. We can see that this standard process has failed because the voters are already educated. According to a Pew Research poll, fifty-nine percent of Americans agree that stricter environmental laws and regulations are worth the cost.[262] In the 2020 election, forty-two percent of voters said that climate change is a very important factor in their vote, placing the environment at the eleventh most important issue in the country.[263] The fact is voters just do not have the power to hold their elected officials accountable for that education to make a difference in policy.[264]

Educating the officials has not worked either. The international community has known about the dangers of climate change, and man's role in causing it, since 1979 when the First World Climate Conference was held.[265] Since then, neither party has made any concerted effort to pass substantial environmental legislation.[266] This is also not due to partisanship. Since 1979, Democrats have had complete control of the federal government—White House, Senate, and House—which meant the ability to control the legislation and political agenda for a full six years.[267] Republicans have also had six full years of complete control since 1979.[268] The fact of the matter is that Congress and the Executive

261. The U.S. does not have statistics on how long the average duration is for a bill to become a law. As an example, though, during the 116th Congress, the longest period of time between a bill being introduced and being signed into law was the Special Envoy to Monitor and Combat Anti-Semitism Act, which took 731 days. H.R. 221, 116th Cong. (2021) (enacted). The bill was introduced on January 3, 2019, and was not signed until January 13, 2021. *Actions Overview H.R.221 — 116th Congress (2019-2020)*, LIBR. OF CONG., https://www.congress.gov/bill/116th-congress/house-bill/221/actions (last visited Jan. 31, 2022). However, this does not factor in the time it took to draft or the time it will take to implement. An individual took a sample of legislation from the 113th Congress and found that 96.7% of bills introduced did not become law, and of the 3.3% that did, the average period from introduction to signing was 263.57 days. Carter Moore, *How Long Does It Take to Pass a Bill in the US?*, QUORA (Feb. 23, 2015), https://www.quora.com/How-long-does-it-take-to-pass-a-bill-in-the-US/answer/Carter-Moore. This is just to demonstrate that the legislative process is long and uncertain.

262. Kristen Bialik, *Most Americans Favor Stricter Environmental Laws and Regulations*, PEW RSCH. CTR. (Dec. 14, 2016), https://www.pewresearch.org/fact-tank/2016/12/14/most-americans-favor-stricter-environmental-laws-and-regulations/.

263. *Important Issues in the 2020 Election*, PEW RSCH. CTR. (Aug. 13, 2020), https://www.pewresearch.org/politics/2020/08/13/important-issues-in-the-2020-election/.

264. *See supra* pt. VI.B.

265. Sarah Childress, *Timeline: The Politics of Climate Change*, PBS FRONTLINE (Oct. 23, 2012), https://www.pbs.org/wgbh/frontline/article/timeline-the-politics-of-climate-change/.

266. *Congress Climate History*, CTR. FOR CLIMATE & ENERGY SOLS., https://www.c2es.org/content/congress-climate-history/ (last visited Jan. 29, 2022); Amber Phillips, *Congress's Long History of Doing Nothing on Climate Change, in 6 Acts*, WASH. POST (Dec. 1, 2015), https://www.washingtonpost.com/news/the-fix/wp/2015/12/01/congresss-long-history-of-inaction-on-climate-change-in-6-parts/.

267. Charles Apple, *In Control*, SPOKESMAN-REV., https://www.spokesman.com/stories/2020/jun/25/control-house-and-senate-1900/ (last visited Feb. 14, 2022).

268. *Id.* This also does not include the concept of Reagan-Democrats, and similar manifestations of bipartisan opportunities.

have been given their chance. Both branches are educated on the issues, they oppose their constituents' stances, and they have failed. It is too late to wait any longer and the judicial branch must, at the very least, allow these cases to be heard before the courts.

VII. CONCLUSION

The history of the standing doctrine is both extensive and newly invented. Nowhere in the Constitution have the Founding Fathers required such an extensive and rigid test as the one put forth for the first time in *Lujan*. And it is no coincidence that the modern doctrine of standing was entirely built within cases of environmental law and is still used today to primarily bar environmental suits. But today, it is no exaggeration to say that humanity faces a junction. Down one path lay a precipice—a point in time where if reached cannot be escaped; a time that is quickly encroaching. Down the other lay a long and uneven road, but it is one that results in environmental justice. The legislative and executive branches have been slow to action, refusing to acknowledge how serious the predicament has become. And so, it is up to the judicial branch to kickstart this movement, much like it did in 1954 for the Civil Rights Movement in which the Supreme Court forced states to take action to desegregate schools. Whether it be through amending the standing doctrine, or abolishing it as it currently exists, the judicial branch has the power to remove this hurdle, as it is one that the Supreme Court entirely constructed on its own. It is beyond time for the Court to give the climate a voice.