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Establishing Climate Change Standing: A New Approach

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NOTE

Establishing Climate Change Standing: A New Approach

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Climate change is one of the thorniest political, legal, and economic issues of our time. Therefore, a new legal approach to the issue is required. This Note proposes a streamlined approach for climate change standing, one that assumes injury in fact and causation for a class of discernible climate change harms. A streamlined approach will enable litigants harmed by climate change to seek redress in court, providing an outlet for redress where there has previously been none. Part II of this Note discusses the constitutional doctrine of standing. It begins with a summary of Article III and the logic behind the case or controversy requirement, it then goes on to analyze each element of standing, (1) injury in fact, (2) causation, and (3) redressability. Part III analyzes the doctrine of standing in environmental cases, discussing notable cases such as Lujan v. Defenders of Wildlife *and* Juliana v. United States. *Part IV compares the American approach to judicial standing to other countries with more liberalized standing requirements, such as the*

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Philippines. Part V argues for a new, streamlined approach for climate change standing. This Note concludes with the hypothesis that establishing standing using the three-part test is largely an academic exercise, one with illogical constraints that can be overcome with simple fixes (such as the purchase of a plane ticket) and that a new, streamlined approach for climate change standing, should be adopted. A new, streamlined approach to standing, which assumes injury in fact and causation for a specific class of climate change injuries, will enable the American judicial system to effectively redress climate change.

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I. INTRODUCTION

The United States Constitution created the jurisdictional limits of the American judicial system. These limits were primarily articulated in broad terms, such as restricting justiciable claims to "cases" or "controversies." Among other doctrines, standing is used to discard seemingly meritless cases in which the parties seeking judicial resolution have not sufficiently plead an injury, or the injury is one which cannot be redressed by a court.

Although the doctrine of standing was drafted with the intention to the articulate the scope of the judicial system, it shifted an extremely high burden to a procedural stage in litigation proceedings. Standing requires that several elements be satisfied, such as causation, an element that is typically developed much further on in litigation. In environmental cases, plaintiffs bear this high burden at a preliminary stage.

This Note discusses the constitutional doctrine of standing as it pertains to climate change cases.[1] Part II begins with a summary of Article III and the logic behind the case or controversy requirement. Part III discusses the major environmental decisions on standing in the United States. Part IV compares the standing requirements in other countries to the American approach. Part V of this Note discusses the waning importance of judge-made decisions in environmental standing. Finally, Part VI of this Note concludes with the hypothesis that establishing standing using the three-part test is largely an academic exercise, one with illogical constraints that can be overcome with simple fixes (such as the purchase of a plane ticket), and that a new, streamlined approach for climate change standing should be adopted. A new, streamlined approach to standing that assumes injury in fact and causation for a specific class of climate change injuries will enable the American judicial system to effectively redress climate change and focus on the implementation of solutions.

II. CASE OR CONTROVERSY?

The United States Constitution was drafted with numerous safeguards to maintain checks and balances, and to ensure efficient governance. One of these efficiency measures is Article III's case or controversy requirement.[2] The framers of the Constitution

1. There are many ways to define "climate change cases," but this Note does not purport to answer that question. Just as with any piece of legislation and even the Constitution, words are often ambiguous. Judges will need to define that term, and the accepted injuries that accompany it, using whatever means necessary. The ambiguous nature of the term "climate change" does not detract from the need of this new streamlined approach nor in any way hinder its potential effectiveness. As the new streamlined approach is applied, judges will form the boundaries from which litigants will adjust accordingly.

2. U.S. CONST. art. III, § 2, cl. 1.

restricted the Supreme Court to hear bona fide "cases" or "controversies."[3] The vagueness of the Article III requirement spawned a plethora of litigation to articulate a precise definition of "cases" or "controversies."[4] The resulting judicial interpretations of this clause veered far from the original terms. The Supreme Court elucidated a strict, three-part test to satisfy this requirement. The test requires an injury in fact, causation, and redressability.[5] Each requirement "must persist at every stage of review, or else the action becomes moot."[6] This test tends to favor economic injuries because they are easily discernible as injuries in fact.[7] Nonetheless, the American judicial system was not created to administer justice solely for economic injuries, but social and political injuries as well.[8] In such cases against another branch of government, the Supreme Court rigorously conducts the standing inquiry.[9]

The doctrine of standing is rooted in sound logic. Scarce judicial resources are reserved for litigants with an actual stake in the

3. *Id.*

4. Over the past sixty years, the case law on standing developed and changed significantly. *See generally* Lujan v. Defs. of Wildlife, 504 U.S. 555 (1992); Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26 (1976); Sierra Club v. Morton, 405 U.S. 727 (1972); Ass'n of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150 (1970); Baker v. Carr, 369 U.S. 186 (1962).

5. *Lujan*, 504 U.S. at 560–61 (citations omitted).

6. Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 179 (2000) [hereinafter *Friends of the Earth II*].

7. *See generally Camp*, 397 U.S. at 152 (even a potential "future loss of profits" may satisfy an injury in fact for Article III purposes). The potential for future environmental damage is not viewed on par with future economic losses, despite strong similarities. *Lujan*, 504 U.S. at 564 (the future or "some day intentions" of the plaintiffs to visit an area that may face environmental damage was insufficient to establish an injury in fact).

8. *See* United States v. Windsor, 570 U.S. 744, 775 (2013) (holding the Defense of Marriage Act defining marriage as between a man and a woman violates the due process clause); Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 322 (2010) (holding that the Bipartisan Campaign Reform Act of 2002 barring independent corporate expenditures for electioneering communications violates the First Amendment); Brown v. Bd. of Ed. of Topeka, Shawnee Cty., Kan., 347 U.S. 483, 495 (1954) (holding segregated public schools violates the equal protection clause).

9. Clapper v. Amnesty Int'l USA, 568 U.S. 398, 408 (2013) (quoting Raines v. Byrd, 521 U.S. 811, 819–20 (1997)) ("'[O]ur standing inquiry has been especially rigorous when reaching the merits of the dispute would force us to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional.'").

controversy.[10] Additionally, litigants with an actual stake in the case will be more effective in their advocacy because they face the consequences of a decision.[11] There is a fear that without such a restriction, the judiciary would interfere in areas typically reserved for the executive or legislative branch.[12] As a result, standing works for well-defined, individualized injuries.[13] However, injuries and harms on a much larger, worldwide scale, such as climate change, do not fit within the historical justification of standing.[14]

For the most part, the Supreme Court bends the doctrine of standing to address sensitive political and social issues,[15] except with regards to the environment.[16] Environmental issues are not easily attributable to one source and the cross-boundary nature of climate change makes it difficult to address.[17] Further, it can be

10. *Baker*, 369 U.S. at 204 (quoting Liverpool, N.Y. & Phila. S.S. Co. v. Comm'rs of Emigration, 113 U.S. 33, 39 (1885)) ("A federal court cannot 'pronounce any statute, either of a State or of the United States, void, because irreconcilable with the constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies.'").

11. William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 222 (1988) ("The stated purposes and black-letter doctrine of standing are numbingly familiar. The purposes include ensuring that litigants are truly adverse and therefore likely to present the case effectively, ensuring that the people most directly concerned are able to litigate the questions at issue, ensuring that a concrete case informs the court of the consequences of its decisions, and preventing the anti-majoritarian federal judiciary from usurping the policy-making functions of the popularly elected branches.").

12. *Id.*

13. *Baker*, 369 U.S. at 204 (requiring a plaintiff to demonstrate "a personal stake in the outcome of the controversy").

14. "This state of affairs makes federal court an ill-fitting venue for any environmental groups or private citizens seeking to litigate a cause of action for climate change-related injuries." Niran Somasundaram, Note, *State Court Solutions: Finding Standing for Private Climate Change Plaintiffs in the Wake of Washington Environmental Council v. Bellon*, 42 ECOLOGY L. Q. 491, 493 (2015) (discussing the constraining doctrine of standing for environmental plaintiffs after the decision in Wash. Envtl. Council v. Bellon, 732 F.3d 1131 (9th Cir. 2013)).

15. *See* Texas v. United States, 86 F. Supp. 3d 591, 616–24 (S.D. Tex. 2015) (finding the State of Texas had standing to challenge the Deferred Action for Parents of Americans and Lawful Permanent Residents program because the program would permit a significant number of undocumented immigrants in Texas to apply for citizenship, which would cause a financial strain on state resources).

16. *See infra* Parts II–III.

17. INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE ("IPCC"), Climate Change 2014 Synthesis Report, *in* IPCC FIFTH ASSESSMENT REPORT 6 (2014), https://perma.cc/XQ2V-7BMW ("In recent decades, changes in climate have

difficult to show a concrete injury *directly* resulting from environmental degradation.

Climate change, one of the most omnipotent threats of our time, is not one issue that needs one solution. Rather, climate change requires sweeping societal, cultural, and political solutions that address nearly every aspect of modern civilization. The Industrial Revolution is generally regarded by scientists as the pivotal moment when humans began on the track to runaway carbon emissions.[18] Since that time, nearly every industry[19] and every person in developed countries have contributed to increased greenhouse gas emissions in some form or another.[20] Therefore, climate change involves solving an issue in which *we all share* responsibility. Forcing climate change cases into the confines of the historical Article III standing shows a clear misunderstanding of the larger issue at hand—that those actors who contributed to the harm may be hard to identify, and causation may be hard to prove. The doctrine of standing is not suited to handle an issue of this magnitude. As a result, the American judicial system is ill-equipped to contribute to the reduction or mitigation of the effects of climate change because of judge-made constraints imposed under the guise of the constitutional standing requirement. Nonetheless, that does not mean a new judicial doctrine cannot attempt to remedy environmental harms.

caused impacts on natural and human systems on all continents and across the oceans. Impacts are due to observed climate change, irrespective of its cause, indicating the sensitivity of natural and human systems to changing climate.").

18. IPCC, *Working Group 1: The Scientific Basis, App'x 1 – Glossary*, *in* SPECIAL REPORT: GLOBAL WARMING OF 1.5° (2018), https://perma.cc/2X2S-34CU (noting the Industrial Revolution marks the beginning of a strong increase in the use of fossil fuels); *see Climate Change Indicators: Atmospheric Concentrations of Greenhouse Gases*, U.S. ENVTL. PROT. AGENCY, https://perma.cc/S72W-TFUV ("Carbon dioxide concentrations have increased substantially since the beginning of the industrial era, rising from an annual average of 280 [parts per million] in the late 1700s to 401 [parts per million] as measured at Mauna Loa in 2015—a 43 percent increase.").

19. The major sectors contributing to the increase of GHGs are electricity, transportation, industry, commercial/residential, agriculture, and land use/forestry. *See Sources of Greenhouse Gas Emissions*, U.S. ENVTL. PROT. AGENCY, https://perma.cc/WH6B-K3KY.

20. Developed countries, and by association its citizens, are the largest contributors of GHGs. *See Each Country's Share of CO2 Emissions*, UNION OF CONCERNED SCIENTISTS (Oct. 11, 2018), https://perma.cc/H6R9-HEX7.

A. Injury in Fact

The first requirement in the three-part standing test is injury in fact. The actual phrase, "injury in fact," is not found in the Constitution.[21] This requirement evolved from *Baker v. Carr*, in which the Supreme Court stated standing is established if "such a personal stake in the outcome of the controversy" is presented.[22] Subsequent Supreme Court cases, discussed below, expanded the judicial requirements beyond this brief phrase. The language of the first requirement originated in *Association of Data Processing Service Organizations v. Camp*.[23] Petitioners, the Association of Data Processing Service Organizations, sought review of the Comptroller's ruling that allowed banks to offer competing data services.[24] Petitioners argued the ruling violated the Bank Service Corporation Act of 1962.[25] The Supreme Court held petitioners suffered an "injury in fact, economic or otherwise."[26] The Court found potential future losses, and the potential loss of two customers, sufficient to satisfy injury in fact.[27] Other than this brief analysis on injury in fact, the Court offered no guidance or direction on how to apply the injury in fact requirement to later cases.[28]

Only two years later, in *Sierra Club v. Morton*, the Supreme Court was faced with the issue of whether a noneconomic injury may satisfy the injury in fact requirement.[29] The Court held in the affirmative, stating noneconomic aesthetic damages may constitute an injury in fact, but only if "the party seeking review [is] . . . among the injured."[30] Sierra Club did not satisfy this requirement because it "failed to allege that it or its members would be affected

21. *See* Cassandra Barnum, *Injury in Fact, Then and Now (and Never Again): Summers v. Earth Island Institute and the Need for Change in Environmental Standing Law*, 17 MO. ENVTL. L. & POL'Y REV. 1, 7 (2009).

22. *Baker*, 369 U.S. at 204.

23. *See Camp*, 397 U.S. at 150.

24. *Id.* at 151.

25. *Id.* at 155 (citing 12 U.S.C. § 1864 (2018)).

26. *Id.* at 152.

27. *Id.*

28. *See id.* (there was a lack of conversation throughout the entire case regarding the application of the injury in fact requirement).

29. *Morton*, 405 U.S. at 734.

30. *Id.* at 735.

in any of their activities or pastimes by the [proposed] development."[31]

Further, in *Morton*, the Supreme Court alluded to the fact that an injury in fact must be a "particular, concrete injury."[32] The Court applied that requirement in *Warth v. Seldin*.[33] The *Warth* Court dismissed the case because plaintiffs failed to establish standing.[34] The Court stated "[a]bsent the necessary allegations of demonstrable, particularized injury, there can be no confidence of 'a real need to exercise the power of judicial review' or that relief can be framed 'no (broader) than required by the precise facts to which the court's ruling would be applied.'"[35]

Injury in fact was then further refined in *Lujan v. Defenders of Wildlife*.[36] Justice Scalia stated the injury had to be "concrete and particularized,"[37] not "conjectural or hypothetical."[38] In only a few years, the doctrine of standing evolved from requiring "a personal stake in the outcome"[39] to an injury in fact that is "concrete and particularized . . . actual or imminent, [not] conjectural or hypothetical."[40] Thus, these decisions have increased the burden that environmental plaintiffs must meet to establish standing.

B. Causation

Requiring causation ensures that defendants may only be held liable for actions which they "caused." There are two main types of causation: proximate cause and cause in fact. Proximate cause exists where there is a causal connection between the act and harm

31. *Id.*

32. *Id.* at 740 n.16 ("[J]udicial review is effective largely because it is not available simply at the behest of a partisan faction, but is exercised only to remedy a particular, concrete injury.").

33. Warth v. Seldin, 422 U.S. 490 (1975).

34. *Id.* at 518–19.

35. *Id.* at 508 (quoting Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 221–22 (1974)).

36. *Lujan*, 504 U.S. at 555.

37. *Id.* at 560.

38. *Id.* (citations omitted).

39. *Baker*, 369 U.S. at 204.

40. *Lujan*, 504 U.S. at 560.

that is not "too remote."[41] Cause in fact, or actual cause, typically uses the "but for" test; "but for" the defendant's conduct, the plaintiff's injury would not have occurred.[42] The causation required in a standing analysis is most akin to cause in fact, but the requirement is not entirely identical to either proximate cause or cause in fact.

The first reference to causation in the doctrine of standing occurred in *Simon v. Eastern Kentucky Welfare Rights Organization*.[43] The Supreme Court held the plaintiffs, an organization that represented indigents who were denied hospital care, could not prove the defendants, which were officials at the Department of Treasury, caused the plaintiff's injuries.[44] After finding an injury in fact, the Supreme Court concluded:

> [T]he "case or controversy" limitation of Art. III . . . requires that a federal court act only to redress injury that *fairly can be traced to the challenged action of the defendant*, and not injury that results from the independent action of some third party not before the court.[45]

Here, the Court determined that the Treasury officials were too far removed from the plaintiff's injuries to have caused them.

Certain jurisdictions recognize the hurdle of causation imposed upon environmental litigants.[46] For example, in *Natural Resource Defense Council v. Environmental Protection Agency*, a case from the Central District of California, the barriers to establish

41. Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 133 (2014) ("[T]he proximate-cause requirement generally bars suits for alleged harm that is 'too remote' from the defendant's unlawful conduct.").

42. Paroline v. United States, 572 U.S. 434, 444 (2014) ("[Cause in fact or actual cause] means the former event caused the latter."); *see* Burrage v. United States, 571 U.S. 204, 211 (2014).

43. *See Simon*, 426 U.S. at 43.

44. *Id*. at 42–43.

45. *Id.* at 41–42 (emphasis added).

46. The D.C. Circuit Court of Appeals accords significant deference to Congressional findings of causation. *See* Autolog Corp. v. Regan, 731 F.2d 25, 31 (D.C. Cir. 1984) ("[W]e must give great weight to this congressional finding [of causation] in our standing inquiry."); Animal Welfare Inst. v. Kreps, 561 F.2d 1002, 1010 (D.C. Cir. 1977) (causation is shown because the Marine Mammal Protection Act "established as a matter of law the requisite causal relationship between American importing practices and South African sealing practices.").

causation were lowered.[47] The court held plaintiffs established causation since "causation is sufficiently established by the congressional findings that prompted passage of the Clean Water Act."[48] Due to the variation among jurisdictions in determining causation, the requirements to establish this element are not entirely clear. Causation, which is historically often difficult to discern in common law tort cases,[49] is just, if not more, confusing for environmental plaintiffs.

C. Redressability

The third standing requirement, "'[r]edressability,'. . . does not appear anywhere in the text of the Constitution. Instead, it is a judicial creation[.]"[50] This requirement seeks to ensure that a judicial remedy will directly "redress" the injury in fact caused by the defendant.[51] Litigants are not required to prove a favorable decision will fully redress the issue to a high degree of certainty.[52] Rather, once causation and injury in fact are established, it must be shown that the injury is "*likely* to be redressed by a favorable decision."[53] The requirement of redressability ensures that scarce judicial resources are reserved for cases in which a judicial remedy effectively redresses the alleged injury.

Steel Company v. Citizens for a Better Environment refined the requirement of redressability.[54] Citizens for a Better Environment ("CBE") sent a notice of intent to file a citizen suit under the Emergency Planning and Community Right-to-Know Act ("EPCRA")[55] alleging Steel Company had not filed the statutorily required hazardous waste forms.[56] CBE used the information published under

47. Nat. Res. Def. Council v. Envtl. Prot. Agency, 437 F. Supp. 2d 1137, 1147 (C.D. Cal. 2006) (noting environmental plaintiffs did not need to establish causation with certainty to establish standing).

48. *Id.*

49. *See* CSX Transp., Inc. v. McBride, 564 U.S. 685, 692–93 (2011).

50. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 124 (1998) (Stevens, J., concurring).

51. *Warth*, 422 U.S. at 505 ("the indirectness of the injury . . . may make it substantially more difficult to meet the minimum requirement of Art. III.").

52. Wolfson v. Brammer, 616 F.3d 1045, 1056 (9th Cir. 2010).

53. *Simon*, 426 U.S. at 38 (emphasis added).

54. *Steel Co.*, 523 U.S. at 107–10.

55. 42 U.S.C. § 11046(a)(1) (2018).

56. *Steel Co.*, 523 U.S. at 83.

EPCRA for various purposes, such as the publication of "reports to its members and the public about storage and releases of toxic chemicals into the environment[.]"[57] CBE's members then used this information to protect their "safety, health, recreational, economic, aesthetic and environmental interests[.]"[58] Despite these facts, the Supreme Court did not determine whether an injury in fact was present, but instead jumped to the third requirement, redressability, in dismissing the case.[59]

After receiving the notice, Steel Company filed the overdue forms.[60] On certiorari, the Supreme Court dismissed the case, concluding CBE failed to establish the third requirement of standing, redressability.[61] Since the forms were already filed, the only remaining judicial remedies available were civil penalties, payable to the United States Treasury, not CBE.[62] CBE requested five forms of judicial relief, but the Supreme Court held "[n]one of the specific items of relief sought . . . would serve to reimburse [CBE] for losses caused by the late reporting, or to eliminate any effects of that late reporting upon [CBE]."[63]

In *Steel Co.*, the Supreme Court emphasized the necessity that the judicial remedy cures the injury.[64] A judicial remedy that has no remediating effect on the plaintiff's alleged injury would fail to establish the redressability requirement.[65] "In requesting [civil judicial penalties] . . . respondent seeks not remediation of its own injury—reimbursement for the costs it incurred as a result of the late filing—but vindication of the rule of law—the 'undifferentiated public interest' in faithful execution of EPCRA."[66] Although the reimbursement of attorney's fees is available in the EPCRA citizen

57. *Id.* at 104 (citations omitted).

58. *Id.* at 105.

59. *Id.* ("[A]ssuming injury in fact [because] the complaint fail[ed] the third test of standing, redressability.").

60. *Id.* at 88.

61. *Id.* at 105, 109–10.

62. *Id.* at 109 ("Because respondent allege[d] only past infractions of EPRCA, and not a continuing violation or the likelihood of a future violation, injunctive relief [would not have] redress[ed] its injury.").

63. *Id.* at 105–06.

64. *Id.* at 107. ("Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement.").

65. *Id.*

66. *Id.* at 106.

suit provision, "[a]n 'interest in attorney's fees is . . . insufficient to create an Article III case or controversy where none exists on the merits of the underlying claim.'"[67]

Additionally, the Supreme Court dismissed the notion that a "psychic satisfaction" with the faithful execution of the laws of the United States would suffice to establish redressability.[68] A "generalized interest in deterrence . . . is insufficient for purposes of Article III."[69] The essential inquiry is not whether plaintiffs believe their injury has been redressed, but whether the court determines the judicial remedy has more than just the effect of general deterrence.[70] In the concurring opinion, Justice John Paul Stevens disagreed, stating "[h]istory supports the proposition that punishment or deterrence can redress an injury . . . [g]iven this history, the Framers of Article III surely would have considered such proceedings to be 'Cases' that would 'redress' an injury even though the party bringing suit did not receive any monetary compensation."[71]

In 2000, the Supreme Court held civil penalties which served as a general deterrent to future violations sufficient to satisfy redressability in *Friends of the Earth v. Laidlaw Environmental Services*.[72] Laidlaw owned and operated a hazardous waste incinerator in Roebuck, South Carolina.[73] Laidlaw had a National Pollutant Discharge Elimination System ("NPDES") permit, but later violated the permit when it discharged an excess amount of mercury into the North Tyger River.[74] Friends of the Earth

67. *Id.* at 107 (quoting Lewis v. Cont'l Bank Corp., 494 U.S. 472, 480 (1990)).

68. *Id.* ("[A]lthough a suitor may derive great comfort and joy from the fact that the United States Treasury is not cheated, that a wrongdoer gets his just deserts, or that the nation's laws are faithfully enforced, that psychic satisfaction is not an acceptable Article III remedy because it does not redress a cognizable Article III injury.").

69. *Id.* at 108–09.

70. *Id.* at 127 ("[CBE] clearly believe[d] that the punishment of the Steel Company, along with future deterrence of the Steel Company and others, redresses its injury, and there is no basis in our previous standing holdings to suggest otherwise.") (Stevens, J., concurring).

71. *Id.* at 127–28 (Stevens, J., concurring).

72. *Friends of the Earth II*, 528 U.S. at 174 ("[Civil] penalties may serve, as an alternative to an injunction, to deter future violations and thereby redress the injuries that prompted a citizen suitor to commence litigation.").

73. *Id.* at 175.

74. *Id.* at 176.

("FOE") represented several of its members who alleged injuries due to the excess discharges.[75] FOE requested "declaratory and injunctive relief and an award of civil penalties."[76] However, the incinerator facility in Roebuck was "permanently closed, dismantled, and put up for sale, and all discharges from the facility permanently ceased" before the case reached the Supreme Court.[77] Civil penalties were the only appropriate judicial remedies that remained.[78] The district court assessed a civil penalty of $405,800 on Laidlaw.[79]

After a lengthy discussion analyzing whether there was an injury in fact, the Supreme Court turned to redressability and distinguished the present case from *Steel Co.* In discussing whether civil penalties satisfy redressability, the Supreme Court stated:

> It can scarcely be doubted that, for a plaintiff who is injured or faces the threat of future injury due to illegal conduct ongoing at the time of suit, a sanction that effectively abates that conduct and prevents its recurrence provides a form of redress. Civil penalties can fit that description. To the extent that they encourage defendants to discontinue current violations and deter them from committing future ones, they afford redress to citizen plaintiffs who are injured or threatened with injury as a consequence of ongoing unlawful conduct.[80]

The Supreme Court found the substantial deterrent effect, which Congress intended when drafting the Clean Water Act, sufficient to satisfy redressability.[81] After civil penalties were as-

75. *Id.* at 181–83.

76. *Id.* at 177.

77. *Id.* at 179.

78. *Id.* at 178 ("The court declined to grant FOE's request for injunctive relief, stating that an injunction was inappropriate because 'Laidlaw [was] in substantial compliance with all parameters in its NPDES permit since at least August 1992.'").

79. Friends of the Earth v. Laidlaw Envtl. Servs. (TOC), 956 F. Supp. 588, 612 (D.S.C. 1997) [hereinafter *Friends of the Earth I*].

80. *Friends of the Earth II*, 528 U.S. at 185–86.

81. *Id.* at 185 ("Congress has found that civil penalties in Clean Water Act cases do more than promote immediate compliance by limiting the defendant's economic incentive to delay its attainment of permit limits; they also deter future

sessed, Laidlaw ceased all operations, confirming the deterrent effect.[82] The absence of ongoing violations in *Friends of the Earth* was the distinguishing factor between *Friends of the Earth* and *Steel Co.*[83] Civil penalties are sufficient to establish redressability for ongoing violations, as the citizen suit provision is meant to remedy present or future violations, not wholly past violations.[84]

III. ESTABLISHING ENVIRONMENTAL STANDING: FROM *LUJAN* TO *JULIANA*

All three requirements were applied in conjunction by Justice Scalia in the infamous case, *Lujan v. Defenders of Wildlife*.[85] *Lujan* combined the common law requirements scattered throughout earlier cases.[86] Justice Scalia described the requirements of Article III:

> Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical[.]'" Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly . . . trace[able] to the challenged action of the

violations. This congressional determination warrants judicial attention and respect. 'The legislative history of the Act reveals that Congress wanted the district court to consider the need for retribution and deterrence, in addition to restitution, when it imposed civil penalties[.]'") (quoting Tull v. United States, 481 U.S. 412, 422–23 (1987)).

82. *Id.* at 187 ("[T]he civil penalties sought by FOE carried with them a deterrent effect that made it likely, as opposed to merely speculative, that the penalties would redress FOE's injuries by abating current violations and preventing future ones—as the District Court reasonably found when it assessed a penalty of $405,800.").

83. *Id*. ("*Steel Co.* established that citizen suitors lack standing to seek civil penalties for violations that have abated by the time of suit.") (citing *Steel Co*., 523 U.S. at 106–07).

84. *See* Gwaltney of Smithfield v. Chesapeake Bay Found., 484 U.S. 49, 59 (1987) ("[T]he harm sought to be addressed by the citizen suit lies in the present or the future, not in the past.").

85. *See generally Lujan*, 504 U.S. 555 (1992).

86. *See* Whitmore v. Arkansas, 495 U.S. 149, 154–55 (1990); Allen v. Wright, 468 U.S. 737, 756 (1984); Los Angeles v. Lyons, 461 U.S. 95, 102–03 (1983); *Simon*, 426 U.S. at 37–42; *Warth*, 422 U.S. at 508; *Morton*, 405 U.S. at 740–41 n.16; *Baker*, 369 U.S. at 204.

> defendant, and not . . . the result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."[87]

In *Lujan*, the Supreme Court dismissed Defenders of Wildlife's claim for failing to establish the first and third Article III standing requirements.[88] Defenders of Wildlife, a group of wildlife conservation and environmental organizations, sought an injunction and declaratory judgment requiring the Secretary of Interior to promulgate a new rule reverting to the initial interpretation of section 7(a)(2) of the Endangered Species Act.[89] The new interpretation required agency consultation for actions affecting endangered species in the United States or on the high seas, whereas the initial interpretation required consultation for actions taken in the United States, on the high seas, and in foreign nations.[90] Justice Scalia authored the majority opinion, finding the "novel" legal theories of Defenders of Wildlife unpersuasive.[91]

Justice Scalia found the affidavits submitted by Defenders of Wildlife insufficient to establish an "actual or imminent" injury in fact.[92] The affidavits described the future intentions of its members to travel to two regions, Sri Lanka and Egypt, where the United States Agency for International Development ("USAID") funding was supporting development projects which had the potential to

87. *Lujan*, 504 U.S. at 560–61 (citations omitted).

88. *See id.* at 562–78 (discussing injury in fact and redressability).

89. *Id.* at 557–58; *see also* 16 U.S.C. § 1536(a)(2) (2018).

90. *Lujan*, 504 U.S. at 557–58.

91. *Id.* at 565–66 ("The first, inelegantly styled 'ecosystem nexus,' proposes that any person who uses *any part* of a 'contiguous ecosystem' adversely affected by a funded activity has standing even if the activity is located a great distance away. . . . Respondents' other theories are called, alas, the 'animal nexus' approach, whereby anyone who has an interest in studying or seeing the endangered animals anywhere on the globe has standing; and the 'vocational nexus' approach, under which anyone with a professional interest in such animals can sue. Under these theories, anyone who goes to see Asian elephants in the Bronx Zoo, and anyone who is a keeper of Asian elephants in the Bronx Zoo, has standing to sue because the Director of [USAID] did not consult with the Secretary regarding the [US]AID-funded project in Sri Lanka. This is beyond all reason. Standing is not 'an ingenious academic exercise in the conceivable,' but as we have said requires, at the summary judgment stage, a factual showing of perceptible harm.") (citation omitted).

92. *Id.* at 564.

affect endangered species.[93] Justice Scalia noted that "some day" intentions to visit at an unspecified time in the future was not sufficient to establish an "actual or imminent injury."[94]

Furthermore, Justice Scalia reasoned Defenders of Wildlife failed to establish the third standing requirement, redressability.[95] Typically, federal agencies provide only a small fraction of the total funding for development projects, therefore a ruling in favor of Defenders of Wildlife would not sufficiently redress their grievances about the potential injury to any endangered species.[96]

Justice Harry Blackmun and Justice Sandra Day O'Connor dissented, finding the decision amounted to "a slash-and-burn expedition through the law of environmental standing."[97] Both affidavits submitted were found insufficient to establish an injury in fact because they did not have a "description of concrete" plans to return to the affected areas.[98] The dissent argued "a reasonable finder of fact could conclude from the information in the affidavits and deposition testimony that either [member] will soon return to the project sites, thereby satisfying the 'actual or imminent' injury standard."[99] The professional interest of both members was not disputed, but rather the imminence of their injuries.[100] The simple

93. *Id*. at 563–64.

94. *Id.* at 564 ("Such 'some day' intentions—without any description of concrete plans, or indeed even any specification of when the some day will be—do not support a finding of the 'actual or imminent' injury that our cases require.") (citation omitted).

95. *Id*. at 562–71.

96. *Id*. at 571 ("A further impediment to redressability is the fact that the agencies generally supply only a fraction of the funding for a foreign project. [US]AID, for example, has provided less than 10% of the funding for the Mahaweli [Sri Lanka] project. Respondents have produced nothing to indicate that the projects they have named will either be suspended, or do less harm to listed species, if that fraction is eliminated.").

97. *Id.* at 606 (Blackmun, J., dissenting).

98. *Id*. at 564.

99. *Id.* at 591 (Blackmun, J., dissenting).

100. *Id.* at 592 (Blackmun, J., dissenting) ("But those statements did not stand alone. A reasonable finder of fact could conclude, based not only upon their statements of intent to return, but upon their past visits to the project sites, as well as their professional backgrounds, that it was likely that Kelly and Skilbred would make a return trip to the project areas. Contrary to the Court's contention that Kelly's and Skilbred's past visits 'prove nothing,' the fact of their past visits could demonstrate to a reasonable factfinder that Kelly and Skilbred have the requisite resources and personal interest in the preservation of the species endangered by the Aswan and Mahaweli projects to make good on their intention to

purchase of a plane ticket would have satisfied this requirement.[101] This "empty formality" rendered the first requirement, injury in fact, unfulfilled.[102] Contrary to prior cases in which the imminence of an injury hinged upon the actions of some third party, the injury could become imminent with the purchase of a ticket by a party to the case.[103]

The dissent was unconvinced by the majority's theory that since neither the U.S. Fish and Wildlife Service ("FWS") or USAID were parties to the lawsuit, "there [wa]s no reason they should be obliged to honor an incidental legal determination the suit produced."[104] Although the agencies provided only a fraction of the funding, that fraction was $170 million.[105] That is "not so paltry a sum for a country of only 16 million people with a gross national product of less than $6 billion in 1986."[106] Defenders of Wildlife sought to compel consultation for actions in foreign nations affecting endangered species, not a revocation of funding.[107] According to the dissent, a genuine issue of material fact was raised with regards to redressability.[108]

The outcome of *Lujan* demonstrates the heavy, nuanced burden that environmental plaintiffs face in establishing standing;

return again. Similarly, Kelly's and Skilbred's professional backgrounds in wildlife preservation, also make it likely—at least far more likely than for the average citizen—that they would choose to visit these areas of the world where species are vanishing.") (citations omitted).

101. *Id.*

102. *Id.* at 592.

103. *Id.* at 593 ("To be sure, a plaintiff's unilateral control over his or her exposure to harm does not necessarily render the harm nonspeculative. Nevertheless, it suggests that a finder of fact would be far more likely to conclude the harm is actual or imminent, especially if given an opportunity to hear testimony and determine credibility.").

104. *Id.* at 569.

105. *Id.* at 599. (Blackmun, J., dissenting).

106. *Id.* (Blackmun, J., dissenting).

107. *Id.* at 559 ("[Defenders of Wildlife] filed this action against the Secretary of the Interior, seeking a declaratory judgment that the new regulation is in error as to the geographic scope of § 7(a)(2) and an injunction requiring the Secretary to promulgate a new regulation restoring the initial interpretation.").

108. *Id.* at 589 (Blackmun, J., dissenting). For two recent contrasting cases discussing redressability, *see generally* WildEarth Guardians v. USDA, 795 F.3d 1148, 1156 (2015) (applying a relaxed redressability requirement because the case involved a procedural right); Wash. Envtl. Council v. Bellon, 732 F.3d 1131 (2013) (holding plaintiffs failed to establish redressability because the requested pollution controls would not likely reduce the injury causing pollution).

however, recent case law exemplifies a trend towards relaxing these barriers. As previously mentioned, in *Friends of the Earth*, the Supreme Court applied the *Lujan* test and held standing was established.[109] The Court used several affidavits from FOE members in finding an injury in fact.[110] The affidavits demonstrated a clear injury, and could therefore not "be equated with the speculative 'some day intentions' to visit endangered species halfway around the world that we held insufficient to show injury in fact in [*Lujan v.*] *Defenders of Wildlife*."[111] According to the majority, whether there is an injury to the environment is not the proper inquiry, but rather, whether there is an injury to one of the human plaintiffs.[112] Thus, based on the affidavits, the Court held FOE suffered an injury in fact.[113]

The facts in *Friends of the Earth* are not entirely distinguishable from *Lujan*, in which the Court reached the opposite conclusion and dismissed the case due to a lack of standing.[114] In *Friends of the Earth*, Kenneth Lee Curtis submitted an affidavit on behalf of FOE.[115] Mr. Curtis lived downstream from the North Tyger River and expressed a desire to "fish camp, swim, and picnic in and near the river between 3 and 15 miles downstream from the [Laidlaw] facility[.]"[116] Mr. Curtis did not specify any dates in which he planned to fish, camp, or swim in the North Tyger River, yet the Supreme Court held his injury in fact was pled with sufficient detail.[117]

109. *Friends of the Earth II*, 528 U.S. at 181–82.

110. *Id.* at 184 (citing *Lujan,* 504 U.S. at 564).

111. *Id.*

112. *Id.* at 181 ("The relevant showing for purposes of Article III standing, however, is not injury to the environment but injury to the plaintiff. To insist upon the former rather than the latter as part of the standing inquiry (as the dissent in essence does, post, at 2-3) is to raise the standing hurdle higher than the necessary showing for success on the merits in an action alleging noncompliance with an NPDES permit. Focusing properly on injury to the plaintiff, the District Court found that FOE had demonstrated sufficient injury to establish standing.") (citations omitted).

113. *Id.* at 198–214 (Scalia, J., dissenting) (arguing that *Lujan* was not properly applied).

114. *Lujan,* 504 U.S. at 563–71.

115. *Friends of the Earth II*, 528 U.S. at 181–82.

116. *Id.*

117. *Id.* at 182.

The doctrine of standing expands and contracts without any discernible pattern. In 2009, the Supreme Court did not find standing in *Summers v. Earth Island Institute*[118] after Earth Island Institute, a group of environmental organizations, failed to show how regulations promulgated by the U.S. Forest Service exempting small fire remediation projects from environmental impact statements and environmental assessments would affect its members.[119] Standing was established for the Burnt Ridge remediation project, as Earth Island submitted affidavits exhibiting a members' interest in the area.[120] However, the Supreme Court found Earth Island lacked standing to challenge the regulation on its face, stating "respondents can demonstrate standing only if application of the regulations by the Government will affect *them*."[121] However, "[t]he regulations under challenge here neither require nor forbid any action on the part of [Earth Island]."[122]

Earth Island submitted various affidavits to show its members concrete interests in the Burnt Ridge Forest, which the Court found sufficient to establish standing.[123] However, the affidavit of Jim Bensman was determined to be insufficient because "he had [only] suffered injury in the past from development on Forest Service land."[124] The affidavit indicating a future intention to visit the

118. *See* Summers v. Earth Island Inst., 555 U.S. 488 (2009).

119. *Id.* at 490–91 ("[A]mendments to the Forest Service's manual of implementing procedures, adopted by rule after notice and comment, provided that fire-rehabilitation activities on areas of less than 4,200 acres, and salvage-timber sales of 250 acres or less, did not cause a significant environmental impact and thus would be categorically exempt from the requirement to file an EIS or EA."); *see also* National Environmental Policy Act Documentation Needed for Fire Management Activities; Categorial Exclusions, 68 Fed. Reg. 33,824 (June 5, 2003).

120. *Summers*, 555 U.S. at 494 ("Affidavits submitted to the District Court alleged that organization member Ara Marderosian had repeatedly visited the Burnt Ridge site, that he had imminent plans to do so again, and that his interests in viewing the flora and fauna of the area would be harmed if the Burnt Ridge Project went forward without incorporation of the ideas he would have suggested if the Forest Service had provided him an opportunity to comment. The Government concedes this was sufficient to establish Article III standing with respect to Burnt Ridge.").

121. *Id.*

122. *Id.* at 493.

123. *Id.* at 494.

124. *Id.* at 495.

Allegheny National Forest (an area subject to the regulations at issue) was not sufficiently specific nor imminent.[125]

The Supreme Court articulated an exception to the doctrine of standing in *Massachusetts v. Environmental Protection Agency*.[126] The Supreme Court held Massachusetts, as a sovereign state, should be given "special solicitude"[127] in the Article III standing determination. Massachusetts was amongst a group of states,[128] local governments,[129] and private organizations[130] requesting the Environmental Protection Agency ("EPA") regulate the release of carbon dioxide ("CO2") under the Clean Air Act ("CAA").[131] Massachusetts argued it would lose valuable coastal lands as a result of sea level rise from increased CO2 emissions.[132]

According to the Supreme Court, the sovereign status of Massachusetts entitled it to "special solicitude" in the Article III standing determination.[133] As such, the Court found Massachusetts established standing under an exception to the normal three

125. *Id.* at 495–96 ("The Bensman affidavit does refer specifically to a series of projects in the Allegheny National Forest that are subject to the challenged regulations. It does not assert, however, any firm intention to visit their locations, saying only that Bensman 'want[s] to' go there. . . . This vague desire to return is insufficient to satisfy the requirement of imminent injury[.]") (citation omitted).

126. Massachusetts v. Envtl. Prot. Agency, 549 U.S. 497, 520 (2007) (holding that Massachusetts, as a sovereign state, should be given "special solicitude," and therefore EPA's refusal to regulate greenhouse gases poses a risk of harm that is both actual and imminent).

127. *Id.*

128. *Id.* at 505 n.2 (California, Connecticut, Illinois, Maine, Massachusetts, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, and Washington).

129. *Id.* at 505 n.3 (District of Columbia, American Samoa, New York City, and Baltimore).

130. *Id.* at 505 n.4 (Center for Biological Diversity, Center for Food Safety, Conservation Law Foundation, Environmental Advocates, Environmental Defense, Friends of the Earth, Greenpeace, International Center for Technology Assessment, National Environmental Trust, Natural Resources Defense Council, Sierra Club, Union of Concerned Scientists, and U. S. Public Interest Research Group).

131. 42 U.S.C. § 7401(b)(1) (2018). The Clean Air Act requires EPA "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare." *Id.*

132. *Massachusetts*, 549 U.S. at 522–23.

133. *Id.* at 520.

requirements.[134] Since Congress statutorily authorized[135] a challenge to EPA action of this sort, the immediacy and redressability of the injury need not be fully satisfied.[136] The Court reasoned that an injury in fact was established because Massachusetts projected increased greenhouse gas emissions would exacerbate the problem of global warming resulting in a loss of coastal lands for Massachusetts.[137]

Contrary to prior cases, the Supreme Court found the *potential* injury to Massachusetts (i.e., the future loss of valuable coastal land) a sufficient injury in fact.[138] The Supreme Court did note that Massachusetts had already suffered some coastal land loss, but the focus was on the potential for future, catastrophic loss.[139] This analysis is not reconcilable with prior cases in which the Court dismissed cases that attempted to establish standing with future or potential environmental injuries. For example, in *Lujan*, the Supreme Court dismissed the case because the "some day intentions" (i.e., potential intentions) of Defenders of Wildlife members were insufficient to satisfy an injury in fact.[140] However, in *Massachu-*

134. *Id.* at 498.

135. 42 U.S.C. § 7607(b)(1).

136. *Massachusetts*, 549 U.S. at 517–18 ("[A] litigant to whom Congress has 'accorded a procedural right to protect his concrete interests,'—here, the right to challenge agency action unlawfully withheld,—'can assert that right without meeting all the normal standards for redressability and immediacy[.]' When a litigant is vested with a procedural right, that litigant has standing if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant.") (citations omitted).

137. *Id.* at 519 ("That Massachusetts does in fact own a great deal of the 'territory alleged to be affected' only reinforces the conclusion that its stake in the outcome of this case is sufficiently concrete to warrant the exercise of federal judicial power.").

138. *Id.* at 522–23 ("[G]lobal sea levels rose somewhere between 10 and 20 centimeters over the 20th century as a result of global warming. These rising seas have already begun to swallow Massachusetts' coastal land. . . . The severity of that injury will only increase over the course of the next century: If sea levels continue to rise as predicted, one Massachusetts official believes that a significant fraction of coastal property will be 'either permanently lost through inundation or temporarily lost through periodic storm surge and flooding events.'") (citations omitted).

139. *Id.* at 526 ("[T]he rise in sea levels associated with global warming has already harmed and will continue to harm Massachusetts. The risk of catastrophic harm, though remote, is nevertheless real.").

140. *Lujan*, 504 U.S. at 564 (citation omitted).

setts, the Court held the opposite, citing extensive research on climate change to support Massachusetts's contention that it *would* lose valuable coastal land.[141]

Due to the unique factual situation of *Massachusetts*, the precedential value it offers environmental organizations and private citizens is unclear. Additionally, the "special solicitude" granted to Massachusetts continues to be questioned.[142] While sovereign states may be granted "special solicitude" in a standing analysis, the citizens of those states, who will feel the same consequences as the sovereign states, may not receive the same preferential treatment. This exception carved out by the Supreme Court for sovereign states exemplifies that the Court might be willing to bend the judge-made requirements of standing to address climate change.

Juliana v. United States has the potential to further expand the federal interpretation of standing.[143] The plaintiffs, twenty-one minors, alleged injury as a result of the federal government's deliberate allowance of pollution and climate change on a "catastrophic level."[144] The plaintiffs brought an action for injunctive and declaratory relief against the President, the United States, and various executive agencies.[145] Plaintiffs allege greenhouse gas emissions, produced by burning fossil fuels, have destabilized the climate system and resulted in violations of their substantive due process rights and defendants' obligation to hold natural resources in the public trust.[146] Specifically, plaintiffs "seek (1) a declaration [stating] their constitutional and public trust rights have been violated and (2) an order enjoining defendants from violating those rights and directing defendants to develop a plan to reduce [CO2] emissions."[147]

141. *Massachusetts*, 549 U.S. at 507–10, 521–23 (discussing scientific reports which model the impacts of climate change).

142. Oklahoma ex rel. Pruitt v. Sebelius, No. CIV-11-30-RAW, 2013 U.S. Dist. LEXIS 113232, at *31–33 (E.D. Okla. 2013) (questioning the "special solicitude" status given to Massachusetts in *Massachusetts v. EPA*, emphasizing that a concrete injury is necessary to establish standing).

143. Juliana v. United States, 217 F. Supp. 3d 1224 (D. Or. 2016).

144. *Id.* at 1250.

145. *Id.* at 1233.

146. *Id.*

147. *Id.*

On defendants' motion to dismiss, the District Court of Oregon held (a) a non-justiciable political question was not raised;[148] (b) the constitutional question of standing was satisfied;[149] (c) "the right to a climate system capable of sustaining human life is fundamental to a free and ordered society[;]"[150] (d) plaintiffs sufficiently stated a substantive due process violation based on a danger creation theory;[151] (e) plaintiffs adequately alleged harm to public trust assets;[152] (f) the public trust doctrine can apply to the federal government;[153] and (g) plaintiffs had a right of action to enforce the public trust doctrine.[154] Not only has the District Court of Oregon stretched the doctrine of standing further than ever before, but it indicated a willingness to grant the requested injunctive relief: the establishment of a nationwide plan to reduce CO2 emissions.[155]

The decision in *Juliana* radically relaxed the constitutional barriers to establish standing for climate change related injuries. The District of Oregon held standing was properly established because "plaintiffs alleged injuries—harm to their personal, economic and aesthetic interests—are concrete and particularized, not abstract or indefinite."[156] The injuries alleged by the plaintiffs, that the government failed to properly address runaway greenhouse gas emissions, is one of the primary causes of climate change.[157]

148. *Id.* at 1241–42.

149. *Id.* at 1242–48.

150. *Id.* at 1250.

151. *Id.* at 1250–52.

152. *Id.* at 1252–55.

153. *Juliana*, 217 F. Supp. 3d at 1256–59.

154. *Id.* at 1261.

155. *Id.* at 1247 ("The declaratory and injunctive relief plaintiffs request meets this standard. Most notably, plaintiffs ask this Court to '[o]rder Defendants to prepare and implement an enforceable national remedial plan to phase out fossil fuel emissions and draw down excess atmospheric CO2[.]' If plaintiffs can show, as they have alleged, that defendants have control over a quarter of the planet's greenhouse gas emissions, and that a reduction in those emissions would reduce atmospheric CO2 and slow climate change, then plaintiffs' requested relief would redress their injuries.") (citation omitted).

156. *Id.* at 1244.

157. *Id.* at 1245–46.

Judge Ann Aiken of the United States District Court for the District of Oregon authored the groundbreaking decision in *Juliana*. In her decision, Judge Aiken laments at what she sees as a failing of the judicial system: the ability to redress environmental issues.[158] *Juliana* espouses novel legal theories which have the power to transform the way courts across the country address climate change injuries. The case was expected to proceed to trial in late 2018 but has been delayed several times.[159] Yet, Judge Aiken's decision could serve as valuable precedent or persuasion for climate change litigation to come.

IV. ENVIRONMENTAL STANDING AROUND THE WORLD

Other countries are not restricted by the requirements of Article III standing, so many countries have relaxed standing requirements. Some countries have even gone so far as to create special environmental courts, with procedural rules tailored to efficiently adjudicate environmental disputes.[160] Countries with more relaxed standing requirements for climate change injuries have done so effectively, without destroying their judicial systems.[161] The United States would be wise to take tested methods in other countries to develop its own approach to climate change cases.[162]

158. *Id.* at 1262 ("Federal courts too often have been cautious and overly deferential in the arena of environmental law, and the world has suffered for it.").

159. *See generally* Benjamin Hulac, *Climate Trial Halted as Trump Admin Seeks to Bar Witnesses*, CLIMATEWIRE (Nov. 26, 2018), https://perma.cc/EQ86-5NYU; Keith Goldberg, *9th Circ. Won't Shut Down Kids' Climate Suit Against Feds*, LAW 360 (Mar. 7, 2018), https://perma.cc/F82P-DPJ5; Chelsea Harvey, *A Landmark Climate Lawsuit Against Trump is Scheduled for Trial Next Year. Here's What To Expect.*, WASH. POST (July 5, 2017), https://perma.cc/LX5J-W9DK.

160. CATHERINE PRING & GEORGE PRING, GREENING JUSTICE: CREATING AND IMPROVING ENVIRONMENTAL COURTS AND TRIBUNALS 3–6 (2009), https://perma.cc/YB2H-U45Y (discussing methodology to study environmental courts in twenty-four countries).

161. *Id.* at 11 ("A number of prominent [environmental court] models have paved the way and provided successful examples for other nations. Environmental justice advocates have been persuasive that specialized [environmental courts] can be an efficient and effective way of achieving environmental goals.").

162. The United States considered establishing an environmental court in the 1970s. *See* Federal Water Pollution Control Act of 1948, Pub. L. No. 92-500,

Some of the most liberal standing requirements are utilized in India. Citizens can file environmental cases directly in the Supreme Court, even for minor or localized grievances.[163] Starting in the 1970s, Justice Bhagwati relaxed the barriers to standing, permitting publicly minded citizens to fight for causes on behalf of the poor and oppressed.[164]

Additionally, the Philippines proposed the "Draft Rule of Procedure for Environmental Cases," expressly granting future generations standing to sue for environmental degradation.[165] The draft rule was a result of *Oposa v. Factoran*,[166] in which well-known environmental attorney Tony Oposa won a lawsuit "on behalf of his own children's and future generations' rights to enjoy forests and a healthy environment."[167] In *Oposa*, the petitioners, a group of minors represented by their parents, claimed the resulting deforestation from the issuance of timber license agreements from the Department of Environment and Natural Resources damaged the environment and violated their constitutional right to a balanced and healthful environment.[168]

South Africa has a liberal standing requirement, similar to the one drafted in the Philippines:

§ 9, 86 Stat. 899 (1972) ("[T]he President, . . . shall make a full and complete investigation and study of the feasibility of establishing a separate court or court system, having jurisdiction over environmental matters[.]").

163. PRING & PRING, *supra* note 160, at 38.

164. *Id.*

165. Draft Rule of Procedure for Environmental Cases, Rule 2, § 5, A.M. No. 09-6-8-SC (S.C., April 13, 2010) (Phil.), https://perma.cc/V2GB-6X8S ("Any person or group of persons, by themselves or through duly-authorized representatives, or in representation of others, *including generations yet unborn*, in a class suit, may file a civil action involving a violation or enforcement of environmental laws and shall include: (a) Any citizen; (b) Minors with the assistance of their parents or guardians; (c) People's and non-governmental organizations and public interest groups; (d) Indigenous peoples and local communities; (e) Others similarly situated.") (emphasis added).

166. *See generally* Oposa v. Factoran, G.R. No. 101083, 224 S.C.R.A. 792 (July 30, 1993) (Phil.).

167. PRING & PRING, *supra* note 160, at 34.

168. CONST. (1987) art. II, §§ 15–16 (Phil.) (The Constitution of the Philippines contains the following clauses: "Section 15. The State shall protect and promote the right to health of the people and instill health consciousness among them. Section 16. The State shall protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature."); *Oposa*, 224 S.C.R.A. 792 (July 30, 1993) (Phil.).

> Legal standing to enforce environmental laws. – (1) Any person or group of persons may seek appropriate relief in respect of any breach or threatened breach of any provision of this Act, including a principle contained in Chapter 1, or any other statutory provision concerned with the protection of the environment or the use of natural resources – (a) in that person's or group of person's own interest; (b) in the interest of, or on behalf of, a person who is, for practical reasons, unable to institute such proceedings; (c) in the interest of or on behalf of a group or class of persons whose interests are affected; (d) in the public interest; and (e) in the interest of protecting the environment.[169]

Additionally, many other countries have liberal standing requirements through the application of an ancient Roman principle known as *actio popularis*.[170] Countries that follow this principle typically will allow "any person" to sue the government for its failure to uphold the law.[171] Netherlands, Portugal, Spain, Estonia, and Slovenia are a few of the countries that apply versions of this principle.[172]

The above examples from around the world exemplify the judicial trend towards relaxing barriers to adjudicate climate change injuries. The modification of the American doctrine of standing is not a farfetched academic idea, but is based on workable doctrines in use in other countries. There are many other factors which make the circumstances in the United States different from other countries, but that does not mean the United States cannot learn from other countries to increase the effectiveness of the judicial system with regards to climate change injuries.

169. South Africa National Environmental Management Act 107 of 1998 § 32 (S. Afr.).

170. PRING & PRING, *supra* note 160, at 37.

171. *Id.*

172. *Id.*

V. THE WANING IMPORTANCE OF THE JUDGE-MADE REQUIREMENTS TO ESTABLISH STANDING

A. Standing is a Reflection of the Political Inclination of Judges

Determining the three requirements of Article III's standing test is not straightforward or simple. Rather, it can be easily warped to a judge's liking, having a dramatic effect on which environmental cases are decided on the merits.[173] The inconsistent application of standing to environmental cases has been received harshly by many in the legal community.[174] Injury in fact is a normative analysis, resulting in illogical and inconsistent rulings.[175]

173. William A. Fletcher, *Standing: Who Can Sue to Enforce a Legal Duty?*, 65 ALA. L. REV. 277, 286–87 (2013) ("The environmental [standing] cases also respond to the Court's perception of political reality . . . [the Supreme Court] is narrowly construing statutes with whose policies it disagrees, *using a standing doctrine that it has developed for this purpose*.") (emphasis added).

174. *Id.* at 279 (The Court has been unable to provide satisfactory explanations for many of its standing decisions. "Justice Harlan complained in 1968 that standing is a 'word game played by secret rules.' Justice Harlan's complaint was, and continues to be, entirely justified if the Court's decisions are explained in the terms provided by its doctrine. Academic criticism has been even more harsh. Words such as 'manipulation,' 'dishonesty,' and 'hypocrisy' are not uncommon.").

175. *Id.* at 280 ("'Injury in fact' may appear to be a neutral factual concept. But it is not. It is a normative concept. If we put people who lie to one side, it is apparent that anyone who feels himself or herself to be injured is, in fact, injured. We may not ourselves feel injured in the same situation. We may not choose to recognize someone's injury as entitling that person to protection or compensation. But our refusal to recognize or provide a remedy is based on a normative rather than a factual judgment.").

An injury to one person may not be viewed as an injury to another.[176] Standing, as a normative analysis, is applied inconsistently[177] and is often decided based on implicit or explicit judicial biases.[178]

In the case in which the term "injury in fact" originated, it used a hypothetical or conjectural injury (i.e., future losses) as the basis to find standing had been established.[179] Thus, the injury in fact requirement was not created to be an obstacle, but a clarifying

176. *Id.*

177. S*ee* Me. People's Alliance v. Mallinckrodt., Inc, 471 F.3d 277, 284 (1st Cir. 2006) ("[A]n individual's decision to deny herself aesthetic or recreational pleasures based on concern about pollution will constitute a cognizable injury only when the concern is premised upon a realistic threat."); Baur v. Veneman, 352 F.3d 625, 637 (2d Cir. 2003) ("Because the evaluation of risk is qualitative, the probability of harm which a plaintiff must demonstrate in order to allege a cognizable injury-in-fact logically varies with the severity of the probable harm."); Ecological Rights Found. v. Pacific Lumber Co., 230 F.3d 1141, 1149 (9th Cir. 2000) ("[A]n individual can establish 'injury in fact' by showing a connection to the area of concern sufficient to make credible the contention that the person's future life will be less enjoyable—that he or she really has or will suffer in his or her degree of aesthetic or recreational satisfaction—if the area in question remains or becomes environmentally degraded."); Friends of the Earth, Inc. v. Gaston Copper Recycling Corp., 204 F.3d 149, 156–60 (4th Cir. 2000) (en banc) (holding injury in fact satisfied since the plaintiff "is a property owner whose lake lies in the path of Gaston Copper's toxic chemical discharge. He and his family swim and fish in this lake [and] he and his family swim less in and eat less fish from the lake because of his fears of pollution[.]"); *see also* Glenn D. Grant, *Standing Standing on Shaky Ground*, 57 GEO. WASH. L. Rev. 1408, 1408 (1989) ("Unquestionably, standing has become one of the most important and controversial issues to confront the D.C. Circuit in recent years. In its most recent standing cases, the D.C. Circuit has divided along ideological grounds, with the more recently appointed judges taking a narrower and more conservative view of the standing doctrine[.]"); *see supra* Parts II–III.

178. *See generally* Bradford Mank, *Standing and Statistical Persons: A Risk-Based Approach to Standing*, 36 ECOLOGY L.Q. 665, 727–29 (2009) (discussing the theory of "identifiability bias" in which the standing doctrine "favors [] suits that address harms to specific individuals, but disfavors suits where the victims are less specifically identifiable such as victims of broad diffuse environmental problems, including future generations."); Sam Kalen, *Standing on Its Last Legs: Bennett v. Spear and the Past and Future of Standing in Environmental Cases*, 13 J. LAND USE & ENVTL. L. 1, 29 (1997) ("Justice Scalia's analysis reflects a decided bias towards only conferring standing upon those persons asserting easily perceptible harm that occurs when one lives near or actually uses an allegedly affected area. This bias is further evidenced by his dismissal of the three nexus theories proposed by [Defenders of Wildlife in *Lujan*].").

179. *Camp*, 397 U.S. at 152.

standard,[180] until the decision in *Lujan*.[181] The requirement is judge-made law with no basis in the Constitution and can be eliminated or modified just as easily as it was created.[182] Moreover, the focus on a "concrete and particularized"[183] injury is illogical and has no constitutional origin.

As the dissent noted in *Lujan*, the purchase of a plane ticket by one of the members would have satisfied that requirement.[184] This subtle distinction is trivial. Similarly, in *Summers*, if the Bensman affidavit merely gave a specific date in which he intended to travel to the Allegheny National Forest, the Supreme Court would have been more likely to find that standing had been established.[185] These trivial and minute details do not accurately delineate a case or controversy from a non-justiciable claim, but merely require a substantive level of specificity to overcome a preliminary procedural hurdle which causes claims with merit to be dismissed.

B. The Impact of *Juliana*

Juliana v. United States broke open the boundaries that seemed to be in place to establish standing under Article III. *Juliana* has several potential impacts on the future of climate change litigation. There have been numerous cases filed since making similar arguments.[186] First, standing may become a minor hurdle in

180. *Id.* at 154–55 (discussing a trend to enlarge the class of people able to establish standing).

181. *Lujan*, 504 U.S. at 563–71.

182. *See* Barnum, *supra* note 21, at 7–25.

183. *Lujan*, 504 U.S. at 560; *see generally* Christopher L. Muehlberger, *One Man's Conjecture Is Another Man's Concrete: Applying the "Injury-in-Fact" Standing Requirement to Global Warming*, 76 UMKC L. REV. 177, 195 (2007) ("Assuming that the courts (and defendants) are able to redress global warming injuries through their decision, it should be sufficient if the plaintiffs simply have to assert an injury that is real (concrete) and affects them in a distinct and personal way (particularity).").

184. *Lujan*, 504 U.S. at 592 ("By requiring a 'description of concrete plans' or 'specification of when the some day [for a return visit] will be,' . . . in my view, demands what is likely an empty formality. No substantial barriers prevent Kelly or Skilbred from simply purchasing plane tickets to return to the Aswan and Mahaweli projects.").

185. *Summers*, 555 U.S. at 496.

186. *See* Clean Air Council v. United States, — F. Supp. 3d ——, No. CV 17-4977, 2019 WL 687873, at *11 (E.D. Pa. Feb. 19, 2019) (holding plaintiffs lacked standing to bring a public trust action against the federal government for the rollback of environmental regulations).

which all climate change related injuries, regardless of scale or significance, can overcome because of the consensus that further judicial remedies are necessary. Second, it may highlight the antiquated nature of the Article III test largely created by the Supreme Court in the 1970s. A new test may emerge, one specific for climate change litigation which enables climate change cases to be streamlined. Third, the opinion by Judge Aiken demonstrated judges are willing to address climate change in the judicial system. With no federal legislation to address climate change, environmentally inclined judges may see an opening to address these issues.

C. Streamlining Standing for Climate Change Cases

As the scientific consensus regarding the drastic human influence on the global ecosystem increases, the American judicial system should view parts of the Article III requirements as inherently satisfied because of the ubiquitous nature of the consequences of climate change. Courts should aim to streamline cases that allege scientifically supportable climate change injuries to a substantive level of the case.

Just as the Supreme Court articulated an exception for standing for a sovereign state in *Massachusetts v. Environmental Protection Agency*, an exception should be established for climate change related injuries.[187] With no federal legislation addressing climate change, the judicial system is one of the few areas in which injured citizens can find and pursue remedies.

A specialized test, which assumes injury in fact and causation, will greatly reduce the burden on plaintiffs. This will streamline a specific class of climate change cases, which will be determined by judges, to substantive levels of motion practice and/or trial. There should be no artificially high procedural burden on environmental plaintiffs to establish scientifically accepted principals of injury and causation.

Redressability can remain nearly the same; however, the bar to establish it should be lowered.[188] It should be sufficient for the

187. *Massachusetts*, 549 U.S. at 520.

188. The Ninth Circuit Court of Appeals applies a relaxed causation and redressability requirement when a procedural right is involved. A similar exception should be carved out for climate change cases. "Once plaintiffs seeking to enforce a procedural requirement establish a concrete injury, 'the causation and redressability requirements are relaxed.'" WildEarth Guardians v. USDA, 795 F.3d 1148,

remedy to redress the injury even slightly. This is crucial to address climate change because every little change furthers progress towards warding off the most dangerous consequences. If the attitude were taken that only a complete remedy, one that would entirely reverse the effects of climate change was sufficient to establish redressability, it would be impossible to establish standing. Further, focusing the analysis on redressability is a strategy focused on solutions, and a litany of solutions are needed in all areas impacted by climate change.

The idea that a litigant must have a personal stake in the litigation is inherently satisfied in climate change cases. As the public becomes increasingly aware of the effects of climate change, it will be accepted that actions which degrade the environment have an indirect impact on everybody in the world, including future generations. The concept "NIMBY," meaning "not in my backyard,"[189] will turn into "not on my planet," and litigants, regardless of a "personal stake" in a case, will vigorously fight to seek redress and prevent the most detrimental consequences of climate change. Climate change affects the entire world population, and it is unjust for litigants to be required to plead precise injuries just to enter the courtroom. If the American judicial system were to continue barring legitimate climate change cases from reaching a substantive trial or motion, the potential impacts of climate change will only worsen.

1154–56 (9th Cir. 2015) (quoting W. Watersheds Project v. Kraayenbrink, 632 F.3d 472, 485 (9th Cir. 2011)). "This [relaxed redressability] requirement is satisfied when 'the relief requested—that the agency follow the correct procedures—may influence the agency's ultimate decision.'" *WildEarth Guardians*, 795 F.3d at 1156 (quoting Salmon Spawning & Recovery All. v. Gutierrez, 545 F.3d 1220, 1226 (9th Cir. 2008)). *See also Salmon Spawning*, 545 F.3d at 1229 (holding that causation is satisfied under the relaxed requirements for procedural claims when "[t]he asserted injury is not too tenuously connected to the agencies' failure" to take action).

189. Susan Lorde Martin, *Wind Farms and NIMBYs: Generating Conflict, Reducing Litigation*, 20 FORDHAM ENVTL. L. REV. 427, 427 (2010) ("The term NIMBY (Not In My Backyard) is generally used pejoratively to refer to people who fight against the siting of public utilities, commercial enterprises, or new residential developments which may negatively affect nearby property values, local aesthetics, or the environment, but which might provide benefits to the larger community.").

D. The Judicial System is Not the Best, But One of the Few Mechanisms to Address Climate Change

Climate change is a highly complex, diffuse, and opaque global issue. It lacks nearly all the typical characteristics of a legal case, including a clear injury by one side against another, the solution of which may involve a monetary penalty. However, due to the absence of any federal legislation addressing climate change, the judicial system is one of the few arenas where climate change can be addressed. A new, streamlined approach for standing would alleviate many of the hurdles faced by environmental litigants.

If a standard such as this were implemented, it may spur legislative action to prevent a flood of litigation. Environmentally inclined state legislatures may act on this momentum and implement climate change legislation. There may be pushback in states that are not environmentally inclined, and legislation may be passed to prevent the application of this form of climate change standing. However, even if climate change cases are restricted by legislation, it will put climate change on the forefront of political issues and hopefully bring light to the inadequacies of the judicial system in this area.

If this change were to occur, there is the possibility that the "floodgates of litigation" would be opened. Across the country, litigants would flood the judicial system with climate change cases, alleging injuries due to things such as increased storm intensity and reduced air quality. However, the potential for more litigation should not be a decisive factor. If litigants have a constitutional right to be heard and their injuries redressed by a court, which climate change litigants do, the potential for an increased workload should be irrelevant.

The new, streamlined approach to climate change standing may appear overly burdensome to certain defendants who are likely to be named most often. The oil, natural gas, and coal industries, for example, may frequently be named as big contributors to climate change because of their large environmental impacts.[190] This litigation may put pressure on these industries and others in a similar position to lobby for federal climate litigation. These industries may be subjected to multiple lawsuits in multiple states,

190. *See Sources of Greenhouse Gas Emissions*, U.S. ENVTL. PROT. AGENCY, https://perma.cc/WT94-LSY2.

leading to different outcomes and different penalties. Similar to the birth of the CAA in which the automotive industry called for uniform federal regulation of vehicle emissions,[191] industry may lobby Congress for uniform federal climate legislation because it is a better alternative to consistently being dragged into court. It is almost an inevitable consequence, one that will be welcomed by environmentalists and industry alike.

The streamlined approach suggested would not completely discard the requirements of Article III. Rather, it calls for an exception to the judge-made requirements for an issue of paramount importance. Each climate change litigant would be required to plead with sufficiency all the elements, but increased deference would be afforded and, as mentioned earlier, injury in fact and causation would be assumed for the accepted and known effects of climate change. The goal of the streamlined approach is not to flood the courts with meritless litigation, but to use the American judicial system to redress public wrongs which have historically been difficult to address. The new, streamlined approach would have no bearing on other types of cases, only those that deal with climate change and specifically refer to such injuries as climate change related.

Although there are effective remedies available for many climate change related injuries through tort law, those are primarily retrospective. What this Note proposes would be both *retrospective* and *prospective*—permitting litigants to use injunctive and monetary relief to reduce and/or prevent the effects of climate change. The use of tort law, or other common law remedies, can and should remain an effective judicial remedy for various environmental injuries. However, standing remains an impediment for injuries that are more diffuse and opaque than traditional tort injuries, therefore a streamlined approach to standing will increase the ability of the courts to address climate change related injuries.

191. Elliot et al., *Toward a Theory of Statutory Evolution: The Federalization of Environmental Law*, 1 J.L. ECON. & ORG. 313, 330 (1985) ("Unlike most other industries, the automobile industry has strong reasons to prefer national legislation over state and local regulation of air pollution.").

E. Standing Remains a Necessary Doctrine

Although this Note advocates for a streamlined approach to establish standing for climate change cases, the doctrine of standing, or one like it, remains necessary in the American judicial system. Cases before the court system must remain restricted to "cases" or "controversies" as prescribed in the Constitution.[192]

It is imperative that the American judicial system is not burdened with meritless cases. The justification for the doctrine of standing is logical, but mainly for the types of cases common throughout history with one discernible injury by one party against another. Climate change cases pose an entirely new problem that disregards the simple dichotomy of the past. With this small modification to the three requirements of standing, litigants across the country will have access to justice unlike ever before. At the same time, the integrity of the courts, bolstered by the case or controversy requirement, will remain intact.

VI. CONCLUSION

The constitutional doctrine of standing established in Article III is a necessary and effective means to preserve judicial resources. The justifications for its inclusion in the American judicial system are well founded. However, its current application to environmental cases, particularly climate change cases, is disastrous. Litigants with legitimate and deserving claims are unable to establish the strict requirements of standing because of the nature of injuries caused by climate change. A new, streamlined approach is needed. Streamlining climate change cases by assuming injury in fact and causation for a specific class of climate change injuries will enable courts to focus on solutions—solutions that are desperately needed throughout the country. Without any federal climate legislation, the American public has few options to redress climate change. With a minor tweak to the current, judge-made requirements to establish standing, the American judicial system can become an effective platform to reduce the negative impacts of climate change.

The new, streamlined approach will begin to effectively address climate change in the American judicial system in a manner

192. U.S. CONST. art. III, § 2, cl. 1.

that is currently unattainable. Assuming injury in fact and causation for a specific class of climate change injuries will drastically improve the ability of the judicial system to redress climate change injuries. Streamlining climate change cases will increase the potential for quick solutions to address rapidly worsening situations. The new standards may lead to the creation of federal climate legislation, negating the need for streamlined standing, but in either scenario, the result will be the same—Americans will see concrete actions taken to address climate change.