A FIGHTING STANCE IN ENVIRONMENTAL JUSTICE LITIGATION

BY
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The poor, persons of color, and indigenous peoples often turn to the courts to correct the injustice of companies and governments causing environmental harms in their communities. Existing interpretations of tort, statutory, and constitutional law do not adequately fit the situations faced by environmental justice plaintiffs, however, so defendants often move to dismiss for justiciability reasons like lack of standing or the political question doctrine or for failure to state a claim. Plaintiffs therefore need to frame their lawsuit so it gives the best chance of surviving the motion to dismiss. One possibility is stasis theory from classical rhetoric, which provides a systematic strategy for identifying the most likely issue upon which a judge will rule and developing arguments and counterarguments around it. This Article explains how stasis theory can inform environmental justice litigation by explicating the pleadings, briefs, and opinions in two similar climate justice cases. Because the law upon which they rely is inapt or undeveloped, plaintiffs should avoid framing the case as one of disputed facts resting upon undisputed law because the defendants can shift the ground to the stasis of procedure. Having asserted that unsettled law is settled, the plaintiffs will lack convincing counterarguments to defendants' challenges that only the political rather than judicial branches can address complex harms or that the plaintiffs lack standing, so the court will likely break the stasis in the defendants' favor and order dismissal. The plaintiffs should therefore concede claims based on a legal entitlement and instead assume a fighting stance in the stasis of qualification where they can tap into the narrative of environmental justice to make appealing arguments. Those could be a request for equity because

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the law is not only ineffective but harmful, or because many common law torts or environmental or civil rights laws are close but imperfect fits for their situations, the plaintiffs could highlight rather than downplay this incongruity via recourse to one of the four legal stases. By conceding the higher grounds, the plaintiffs keep the fight away from arguments that are stronger for the adversary. The compelling stories of distributive and corrective injustice that plaintiffs can tell might create sufficient affective connections with the judge to persuade her to rule in plaintiffs' favor. Having recognized the need for judicial intervention in the face of inadequate law, the judge then has a basis for denying the procedural challenges.

I. INTRODUCTION

Common law torts, constitutional provisions, as well as civil rights and environmental statutes have limited efficacy for remedying the harms done to environmental justice communities.[1] Accordingly, their attorneys file suit not only to obtain relief but also to urge courts to modify the common law or to expand civil rights or to interpret a statute in new ways.[2] Defendants often respond by moving to dismiss, with one ground that the court does not have subject matter jurisdiction, such as the plaintiffs' lack of standing or because of the political question doctrine.[3] The defendants also assert that plaintiffs fail to state a claim, such as if common law causes of action are preempted or displaced or if the plaintiffs cannot enforce a statute.[4]

To avoid the catch-22 that highlighting corrective injustice creates the grounds to perpetuate it, plaintiffs must decide how they will frame

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[1] *E.g.*, Hope M. Babcock, *The Federal Government Has an Implied Moral Constitutional Duty to Protect Individuals from Harm Due to Climate Change: Throwing Spaghetti Against the Wall to See What Sticks*, 45 ECOLOGY L.Q. 735, 737 (2018) (concluding that the Constitution has no "single uncontested textual place" from which to infer "that the federal government has a moral duty to protect citizens from climate-induced harm"). *See generally* Catherine Millas Kaiman, *Environmental Justice and Community-Based Reparations*, 39 SEATTLE U.L. REV. 1327, 1340–57 (2016) (surveying environmental statutes, torts, and civil rights laws and their shortcomings).

[2] *E.g.*, JACQUELINE PEEL & HARI M. OSOFSKY, CLIMATE CHANGE LITIGATION: REGULATORY PATHWAYS TO CLEANER ENERGY 30 (2015) (writing that "activists us[e] lawsuits to try to influence the shape of the law and regulation in addition to assisting their clients in a particular case"); Douglas A. Kysar, *What Climate Change Can Do About Tort Law*, 41 ENVTL. L. 1, 2–7 (2011) (arguing that climate change litigation that pushes traditional tort boundaries can help the common law to develop in a way that more effectively answers the problem). *See* Scott L. Cummings, *Movement Lawyering*, 2017 U. ILL. L. REV. 1645, 1696 (2017) ("[I]ntegrated advocacy pursues reform across institutional domains. Depending on the dictates of specific campaigns, lawyers focus efforts in and across plural law-making and norm-generating institutions (courts, legislatures, agencies, and communities) and at multiple scales (local, state, federal, and international).").

[3] *E.g.*, Maria L. Banda, *The Bottom-Up Alternative: The Mitigation Potential of Private Climate Governance After the Paris Agreement*, 42 HARV. ENVTL. L. REV. 325, 381–82 (2018) (writing that climate change cases against private entities were dismissed because of standing and the political question doctrine); Rachel Jean-Baptiste et al., *Recent Developments in Climate Justice*, 47 ENVTL. L. REP. NEWS & ANALYSIS 11005, 11007 (2017) (characterizing standing and the political question doctrine as obstacles that have "plagued" climate change plaintiffs). *See* FED. R. CIV. P. 12(b)(1) (listing lack of subject matter jurisdiction as a ground to dismiss a lawsuit).

[4] *E.g.*, Kyle W. La Londe, *Who Wants to Be an Environmental Justice Advocate?: Options for Bringing an Environmental Justice Complaint in the Wake of* Alexander v. Sandoval, 31 B.C. ENVTL. AFF. L. REV. 27, 45 n.134 (2004) (discussing cases that held that federal and state environmental statutes preempted or prohibited common law claims); Jeff Todd, *A "Sense of Equity" in Environmental Justice Litigation*, 44 HARV. ENVTL. L. REV. 169, 193 (2020) [hereinafter Todd, *Sense*] (citing Johnson v. City of Detroit, 446 F.3d 614, 616–18 (6th Cir. 2006)) (writing that defendants can win a Federal Rule of Civil Procedure 12(b)(6) dismissal when a statute does not provide an enforceable right). *See* FED. R. CIV. P. 12(b)(6) (listing failure to state a claim upon which relief can be granted as a ground to dismiss a lawsuit).

their lawsuit.[5] If they fear that courts will not stray far from settled law when a case raises controversial political and moral issues,[6] plaintiffs might adopt a conservative strategy by employing neutral language and familiar causes of action.[7] Such language would reinforce a framing of the case as needing little more than application of established black-letter law.[8] Some commentators, however, urge plaintiffs to tap into the broader environmental justice narrative and to tell the court a story that features sympathetic protagonists facing a villainous obstacle.[9] After all, the story of environmental justice is compelling because it pits

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[5] *See* Jonathan Remy Nash, *Framing Effects and Regulatory Choice*, 82 NOTRE DAME L. REV. 313, 316–17 (2006) (explaining how one party can affect "the decisionmaker's preference" by framing an option to "seem more or less desirable").

[6] Laura E. Little, *Hiding with Words: Obfuscation, Avoidance, and Federal Jurisdiction Opinions*, 46 UCLA L. REV. 75, 102–03, 135 (1998) (observing that judges prefer to avoid decisions based on controversial moral grounds as demonstrated through their lack of candor with jurisdictional statutes and abdication to other authority); R. Henry Weaver & Douglas A. Kysar, *Courting Disaster: Climate Change and the Adjudication of Catastrophe*, 93 NOTRE DAME L. REV. 295, 329 (2017) (claiming that judges go "to extraordinary lengths to avoid jurisdiction over climate change suits").

[7] Michael Burger, *The Last, Last Frontier*, *in* ENVIRONMENTAL LAW AND CONTRASTING IDEAS OF NATURE: A CONSTRUCTIVIST APPROACH 303, 306 (Keith H. Hirokawa ed., 2014) [hereinafter Burger, *Last*] (observing that the courts in oil drilling permit litigation "invoke[d] technocratic, managerial legal regimes that deny any side has the best story"). *See* Austin Sarat & Thomas R. Kearns, *Editorial Introduction*, *in* THE RHETORIC OF LAW 1, 12 (Austin Sarat & Thomas R. Kearns eds., 1996) (claiming that the law prefers "repetitive . . . highly stylized" arguments); Gerald B. Wetlaufer, *Rhetoric and Its Denial in Legal Discourse*, 76 VA. L. REV. 1545, 1561–62 (1990) (arguing that judges repeat the rhetorical moves of the successful lawyer when they write with an impersonal voice from a neutral and objective vantage point to convey that "the matter has been decided and the right answer has been found").

[8] Luke W. Cole, *Environmental Justice Litigation: Another Stone in David's Sling*, 21 FORDHAM URB. L.J. 523, 526 (1994) [hereinafter Cole, *Litigation*] (creating a hierarchy of environmental justice legal tools that starts with environmental statutes argued in a traditional way followed by environmental statutes applied "with a twist"); William A. Galston, *What Value Pluralism Means for Legal-Constitutional Orders*, 46 SAN DIEGO L. REV. 803, 815 (2009) ("There is a presumption, stronger in some cases than others, but always powerful, in favor of applying the rules laid down."); *see* Hari M. Osofsky, *Learning from Environmental Justice: A New Model for International Environmental Rights*, 24 STAN. ENVTL. L.J. 71, 129–30 (2005) (writing that advocates seeking to expand environmental rights in international tribunals should "carefully" bring cases that "incrementally expand the existing jurisprudence").

[9] Pearl Kan, *Towards a Critical* Poiesis*: Climate Justice and Displacement*, 33 VA. ENVTL. L.J. 23, 54 (2015) ("The environmental poverty lawyer *must* be a poet and an advocate. We must acknowledge where the fulcrum of the law currently sits, but we must insist that history still pivots and that the force of law resides in those who get to tell the story, and tell it compellingly."); Laura King, *Narrative, Nuisance, and Environmental Law*, 29 J. ENVTL. L. & LITIG. 331, 348–49 (2014) (writing that environmental cause litigators must tell a "good story" with protagonists and an obstacle that "is easy to root against"); Grace Nosek, *Climate Change Litigation and Narrative: How to Use Litigation to Tell Compelling Climate Stories*, 42 WM. & MARY ENVTL. L. & POL'Y REV. 733, 738–39 (2018) (urging climate activists to use the structure of litigation to contrast the "innocent victims" and the defendants and thereby "make their climate change narratives as salient as possible").

minorities and the poor against rich and powerful adversaries.[10] Individual narratives include African-American communities disproportionately targeted for the siting of waste facilities and hazardous operations,[11] low-income residents of New York City public housing affected by mold and lead that the housing authority failed to address and remediate,[12] and indigenous peoples in the Arctic losing not only their land but their traditional way of life because of worsening winter storms and eroding sea ice related to anthropogenic climate change.[13] These stories provide the emotional basis for the plaintiffs to appeal to and persuade the judge to be bold and creative in applying the law to correct the injustice.[14]

While the second approach seems riskier, literary and rhetorical theory supports it as more effective, at least for plaintiffs asserting novel legal claims. For example, some commentators have analyzed the filings and opinions in environmental cases and concluded that courts sometimes respond favorably to plaintiffs' narratives, including by incorporating the plaintiffs' environmental tropes and allegories into

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10 Carmen G. Gonzalez, *Environmental Justice and International Environmental Law*, *in* ROUTLEDGE HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 77, 78 (Shawkat Alam et al. eds., 2013) [hereinafter Gonzalez, *EJ*] ("While the affluent reap the benefits of unsustainable economic activity, the burdens are borne disproportionately by . . . the world's most vulnerable communities, including indigenous peoples, racial and ethnic minorities, and the poor."); Deepa Badrinarayana, *The "Right" Right to Environmental Protection: What We Can Discern from the American and Indian Constitutional Experience*, 43 BROOK. J. INT'L L. 75, 78 (2017) ("Some Americans, primarily because of their race or economic status, bear a disparate burden of environmental problems and/or enjoy lesser benefits from environmental protection laws."); Maxine Burkett, *Behind the Veil: Climate Migration, Regime Shift, and a New Theory of Justice*, 53 HARV. CIV. RTS. CIV. LIBERTIES L. REV. 445, 447 (2018).

11 Bean v. Sw. Waste Mgmt. Corp., 482 F. Supp. 673, 675 (S.D. Tex. 1979); *see* ROBERT D. BULLARD, DUMPING IN DIXIE: RACE, CLASS, AND ENVIRONMENTAL QUALITY 138–39 (3rd ed. 2000).

12 Sarah Krakoff, *Environmental ~~In~~justice and the ~~Limits of~~ Possibilities for Environmental Law*, 49 ENVTL. L. 229, 240–41 (2019) (citing Baez et al. v. N.Y.C. Hous. Auth., 2018 WL 6242224 (S.D.N.Y. Nov. 29, 2018), Modified Amended Stipulation and Order of Settlement, July 24, 2018; Paige v. N.Y.C. Hous. Auth., No. 17 Civ. 7481, 2018 WL 3863451, at *1 (S.D.N.Y. Mar. 9, 2018); City Wide Council of Presidents v. N.Y.C. Hous. Auth., No. 100283/18, 2018 WL 1911926, at *1 (N.Y. Sup. Ct. Apr. 23, 2018)).

13 Marissa Knodel, *Conceptualizing Climate Justice in Kivalina*, 37 SEATTLE U.L. REV. 1179, 1189–92 (2014); *see* Rebecca Tsosie, *Indigenous Peoples and Global Climate Change: Intercultural Models of Climate Equity*, 25 J. ENVTL. L. & LITIG. 7, 13 (2010) [hereinafter Tsosie, *Intercultural*] (writing that indigenous peoples of Alaska "are losing their land base and *way of life* as a consequence of climate change") (emphasis added).

14 NEIL MACCORMICK, RHETORIC AND THE RULE OF LAW: A THEORY OF LEGAL REASONING 149 (2005) (explaining how the disputability of legal propositions "can be exploited . . . to try to expound equitable reformulations of, or adventurous new interpretations of, legal rules or principles"); *see* Natasha Geiling, City of Oakland v. BP*: Testing the Limits of Climate Science in Climate Litigation*, 46 ECOLOGY L.Q. 683, 684 (2019) (arguing that "any climate action through the judiciary must necessarily come from judges taking bold steps of their own").

their opinions.[15] Others detail cases where the plaintiffs' indigenous or minority identity was relevant to resolution of the claim.[16] Another builds upon these to describe how plaintiffs have a better chance of surviving a motion to dismiss by arguing environmental injustice rather than a legal entitlement.[17] That article applies the new rhetoric of Chaim Perelman—who considers questions of justice and procedure in the adjudication of legal disputes—to explicate the pleadings, motions, and opinions in two similar climate justice cases.[18] The plaintiffs in *Native Village of Kivalina v. ExxonMobil Corp.*[19] downplayed their status as indigenous peoples losing their cultural identity and instead framed a complex lawsuit against two dozen energy and utility companies as a straightforward nuisance, a portrayal that the court rejected when it dismissed for lack of standing and the political question doctrine.[20] By contrast, the plaintiffs in *Juliana v. United States*[21]

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15 Burger, *Last*, *supra* note 7, at 304–06, 319 (observing that courts in oil drilling permit litigation "sometimes respond to and reinforce the visions laid out before them and the environmentalities they reflect[,]" including one court tracking the plaintiffs' accounts in the recitation of facts); Michael Burger, *Environmental Law / Environmental Literature*, 40 ECOLOGY L.Q. 1, 45–53, 56–57 (2013) [hereinafter Burger, *Environmental*] (citing Connecticut v. Am. Elec. Power Co., 406 F. Supp. 2d 265 (S.D.N.Y. 2005), *vacated*, 582 F.3d 309 (2d Cir. 2009), *rev'd*, 564 U.S. 410 (2011)) (observing that the trial court in a climate change case granted the motion to dismiss on political question grounds but that the appellate court reversed and "largely adopted the [plaintiffs'] original, apocalyptic story"); Weaver & Kysar, *supra* note 6, at 350–53 (citing Juliana v. United States., 217 F. Supp. 3d 1224 (D. Or. 2016)) ("This narrative [the environmental jeremiad] structures the plaintiff's complaint and the judge's order in *Juliana*.").

16 *E.g.*, Ronen Avraham & Kimberly Yuracko, *Torts and Discrimination*, 78 OHIO ST. L.J. 661, 687–88 (2017) (citing G.M.M. *ex rel.* Hernandez-Adams v. Kimpson, 116 F. Supp. 3d 126, 143, 154 (E.D.N.Y. 2015)) (summarizing case where court declined to permit a lower damage award based on the plaintiff's race because of the perverse incentives for landlords not to remediate lead-based paint in their older buildings based on damage tables with lower awards to Hispanic and African-American children than to non-minorities); La Londe, *supra* note 4, at 59 (citing *In re* Water Use Permit Applications, 9 P.3d 409, 439–50 (Haw. 2000)) (summarizing water rights case where the court sided with plaintiffs because the public trust doctrine applies specifically to Hawaii native people).

17 Todd, *Sense*, *supra* note 4, at 201–09.

18 *Id.* at 201; *see* CHAIM PERELMAN, THE IDEA OF JUSTICE AND THE PROBLEM OF ARGUMENT 5–36 (John Petrie trans., 1963) (articulating a "rule of justice" that recognizes conflicting values and that promotes the role of argumentation as leading toward just results); CHAIM PERELMAN, JUSTICE, LAW, AND ARGUMENT: ESSAYS ON MORAL AND LEGAL REASONING 41 (John Petrie et al. trans., 1980) [hereinafter PERELMAN, *JUSTICE*] (writing that "the desire to avoid unjust consequences may lead a judge to reinterpret the law, to modify the conditions of its application"); CHAIM PERELMAN, THE NEW RHETORIC AND THE HUMANITIES 115 (William Kluback trans., 1979) (writing that "[a] decision is just if it can be justified by sufficient reasons"); *see also* GEORGE A. KENNEDY, CLASSICAL RHETORIC AND ITS CHRISTIAN AND SECULAR TRADITION FROM ANCIENT TO MODERN TIMES 295 (2d ed. 1999) [hereinafter KENNEDY, CLASSICAL] ("Perelman was a student of jurisprudence and he approached rhetoric from a philosophical and legal position rather than as a purely linguistic and literary phenomenon.").

19 663 F. Supp. 2d 863 (N.D. Cal. 2009), *aff'd*, 696 F.3d 849 (9th Cir. 2012).

20 Todd, *Sense*, *supra* note 4, 222–31; *see* Knodel, *supra* note 13, at 1179 (describing the community of Kivalina and how climate change has affected the residents).

21 217 F. Supp. 3d 1224 (D. Or. 2016), *rev'd* 947 F.3d 1159 (9th Cir. 2020).

created a conflict of values by embracing the novelty of their due process and public trust doctrine claims and highlighting the injustice of their situation, and the court denied the defendants' motions to dismiss even while recognizing that the case was "no ordinary lawsuit."[22]

Perelman may be "the head of the canon of twentieth-century rhetorical thought," but rhetoricians writing 2,000 years before him also considered the effect of arguments about justice and procedure in legal cases, so their works might provide additional insight into environmental justice litigation.[23] In classical Greek and Roman rhetoric, litigants relied upon the theory of stasis—or *status* in Latin—as a formulaic means to identify the likely issues in dispute and assume a fighting stance upon the strongest ground.[24] Stasis theory dominated rhetorical invention from the second century B.C. through the end of the Renaissance and continues to influence rhetorical studies,[25] such as

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[22] Todd, *Sense*, *supra* note 4, at 220; *see Juliana,* 217 F. Supp. 3d at 1234 ("This is no ordinary lawsuit."); Michael C. Blumm & Mary Christina Wood, *"No Ordinary Lawsuit": Climate Change, Due Process, and the Public Trust Doctrine*, 67 AM. U. L. REV. 1, 25 (2017) ("The *Juliana* case was filed in the U.S. District Court for the District of Oregon in September 2015, on behalf of twenty-one youth plaintiffs from across the United States, challenging—quite literally—the entire fossil-fuel policy of the United States."); Olivia Molodanof & Jessica Durney, *Hope Is a Song in a Weary Throat: An Interview with Julia Olson*, 24 HASTINGS ENVTL. L.J. 213, 220 (2018) (discussing how the lead attorney in Juliana used the expression "extraordinary circumstances" to highlight the extraordinary harms being perpetrated by the government).

[23] Richard Graff & Wendy Winn, *Kenneth Burke's "Identification" and Chaïm Perelman and Lucie Olbrechts-Tyteca's "Communion": A Case of Convergent Evolution?*, *in* THE PROMISE OF REASON: STUDIES IN THE NEW RHETORIC 103, 103–04 (John T. Gage ed., 2011) (calling Perelman along with rhetorician Kenneth Burke "the head of the canon of twentieth-century rhetorical thought"); *see, e.g.*, GEORGE A. KENNEDY, A NEW HISTORY OF CLASSICAL RHETORIC 97 (1994) [hereinafter KENNEDY, NEW] (writing that Aristotle distinguished between cases presenting an issue of fact versus an issue of law and that he "noted four possible questions in dispute: fact, injury, importance, and justice"); Matthijs Wibier, *Cicero's Reception in the Juristic Tradition of the Early Empire*, *in* CICERO'S LAW: RETHINKING ROMAN LAW OF THE LATE REPUBLIC 100, 118 (Paul J. Du Plessis ed., 2016) ("Thus the so-called *stasis* theory of the second-century BC rhetorician Hermagoras standardised an argumentative pattern that opposed the letter of the law and more universal considerations of justice.").

[24] *E.g.*, MICHAEL H. FROST, INTRODUCTION TO CLASSICAL LEGAL RHETORIC: A LOST HERITAGE 25 (2005) (describing stasis as a system for helping parties see which issue is in dispute so that they can develop arguments and counterarguments around that issue); JAMES A. HERRICK, THE HISTORY AND THEORY OF RHETORIC: AN INTRODUCTION 96 (5th ed. 2013) (calling stasis a method developed specifically for thinking through a judicial case by identifying the likely issues of conflict); Hanns Hohmann, *The Dynamics of Stasis: Classical Rhetorical Theory and Modern Legal Argumentation*, 34 AM. J. JURIS. 171, 171 (1989) (claiming that the word "stasis" derives from the "fighting stance" of boxers in a match).

[25] KENNEDY, CLASSICAL, *supra* note 18, at 99–100; Sarah Kornfield, *Fixating on the Stasis of Fact: Debating "Having It All" in U.S. Media*, 20 RHETORIC & PUB. AFF. 253, 256 (2017) (claiming that "the classical *stases* have a long history within rhetorical theory" and that stasis "is closely linked to the process of invention"); *see* H. Allen Brizee, *Stasis Theory as a Strategy for Workplace Teaming and Decision Making*, 38 J. TECH. WRITING & COMM. 363, 370–72 (2008) (describing a "renewed interest in stasis theory" among contemporary rhetoricians studying "invention, rhetorical analysis, and audience analysis").

with more nuanced understandings of the potential for the stasis of procedure to shift the argument away from substantive issues and of the role of the arbiter in choosing between disputed issues.[26]

This Article applies stasis theory to environmental justice litigation to argue that plaintiffs should fight their cases in the stasis of qualification because that gives them a better chance of prevailing in a motion to dismiss. Part II opens with environmental justice litigation, specifically how the inadequacy of existing substantive laws pushes environmental justice litigators to use lawsuits to change the law but also how that inadequacy creates grounds for defendants to move for dismissal. Part III summarizes stasis theory. Although stasis can seem complicated when writers use Greek and Latin rather than English terms[27] or when they go into detail with the recommended common arguments or *topoi* that formed a large part of the classical treatises,[28] a distillation of the major writers and their contemporary commentators reveals a compact structure and straightforward application.[29] In a

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[26] *See* Peter Cramer, *Stasis Four for Literate Jurisdictions: Writing for an Art World Referee*, 34 RHETORIC REV. 315, 316 (2015) ("The fourth stasis question is somewhat different as it shifts this perspective from a concern with the past context of the case to a concern with the present context of the deliberation about that case."); Kurt Zemlicka & Calum Matheson, *To Make a Desert and Call It Peace:* Stasis *and Judgment in the MX Missile Debate*, ARGUMENTATION & ADVOC., Summer 2014, at 34–35 (arguing that, although the parties put forward the arguments, the arbiter has the ultimate say in choosing the ground upon which to make a decision).

[27] For example, this Article uses conjecture, definition, qualification, and procedure for the four general stases rather than the Latin *conjecturalis*, *definitivus*, *generalis*, and *translativus* or the Greek *stochasmos*, *horos*, *poiotes*, and *metalepsis*. Janet B. Davis, *Stasis Theory*, *in* ENCYCLOPEDIA OF RHETORIC AND COMPOSITION: COMMUNICATION FROM ANCIENT TIMES TO THE INFORMATION AGE 693, 693–94 (Theresa Enos ed., 1996).

[28] Although a case might require arguments unique to the particular facts of the case, each stasis level also had numerous common arguments or *topoi*. Michael J. Hoppmann, *A Modern Theory of Stasis*, 47 PHILOSOPHY & RHETORIC 273, 274 (2014). Stasis and topical invention were complementary, with the former "a procedure for determining relevant issues" and the latter a way to adduce additional material to construct a "rhetorically valid argument" around those issues. Donovan J. Ochs, *Cicero's Rhetorical Theory. With a Synopsis of Cicero's Rhetorical Works*, *in* A SYNOPTIC HISTORY OF CLASSICAL RHETORIC 129, 132–33 (James J. Murphy & Richard A. Katula eds., 2d ed. 1995). Writers like Cicero examined the stases and the related *topoi* in their treatises. HERRICK, *supra* note 24, at 96–98.

[29] *See* Ryan Weber, *Stasis in Space! Viewing Definitional Conflicts Surrounding the James Webb Space Telescope Funding Debate*, 25 TECHNICAL COMM. Q. 87, 89 (2016) (calling "the exact phrasing of the questions . . . a bit murky owing to translation from Greek and Latin to English" but claiming that "the basic structure of the stasis questions has remained consistent from classical to contemporary times"); *id.* at 88 (writing that classical rhetoricians like Hermagoras, Cicero, Quintilian, and Hermogenes developed stasis). Treatises by Cicero, Quintilian, and Hermogenes have been translated into English. *E.g.*, MARCUS TULLIUS CICERO, *On Invention*, *in* CICERO: ON INVENTION, BEST KIND OF ORATOR, TOPICS 1 (H. M. Hubbell trans., 1949); 2 QUINTILIAN, THE ORATOR'S EDUCATION: BOOKS 3–5 (Donald A. Russell ed. & trans. 2002); Ray Nadeau, *Hermogenes'* On Stases: *A Translation with an Introduction and Notes*, 31 SPEECH MONOGRAPHS 361, 389, 396 (1964). Although the work of Hermagoras has been lost, many classical writers summarized him, so modern scholars have been able to reconstruct his theories. James J. Murphy, *The Codifi-*

lawsuit, a question needing judicial resolution raises potential issues of conjecture, definition, qualification, and procedure, so the advocate must identify the most likely issue upon which the judge will rule and then develop arguments and counterarguments around it.[30] If a party lacks strong arguments for an issue, then that identification might require conceding a preferred ground—such as one based only upon whether the evidence shows that the defendant did some act—and instead basing the argument in a lower stasis—such as whether the spirit, if not the letter, of the law supports the claim.[31] Though conceding the higher stases is not ideal, the advocate at least assumes a fighting stance upon a strong rather than shaky ground because an appeal to justice might better connect with the judge and thus lead to a favorable ruling.[32]

Part IV applies stasis theory to the pleadings, motions, and opinions in *Kivalina* and *Juliana*. The *Kivalina* plaintiffs framed the tort of federal common law nuisance as settled law when applied to climate change by grounding their case in the conjectural stasis as a dispute of facts, but the defendants prevailed in the motion to dismiss by shifting to procedural grounds and raising sufficient doubt that judicial action, as opposed to legislation, could provide the remedy.[33] By contrast, the *Juliana* plaintiffs framed their argument in the lower stasis of qualification by telling personal stories of injustice and demanding a new right to an environment capable of sustaining human life and a broad expansion of the public trust doctrine.[34] This impassioned plea for justice not only resonated with the judge, but it also gave the court a basis for denying the defendants' procedural challenges.[35] The Article concludes in Part V.

II. AN OVERVIEW OF ENVIRONMENTAL JUSTICE LITIGATION

The idea of environmental justice began with distributive injustice: the politically and economically powerful exploited environmental laws in ways that left "urban ghettos, barrios, ethnic enclaves, rural 'poverty pockets,' and Native American reservations" bearing the burdens from

cation of Roman Rhetoric. With a Synopsis of the Rhetorica ad Herennium, *in* Murphy & Katula, *supra* note 28, at 111, 114; *see, e.g.*, Nadeau, *supra*, at 373–78, 385–86 (summarizing the Hermagorean stasis system and then comparing and contrasting it with that of Hermogenes).

30 *See infra* Part III.A.

31 *See infra* Part III.B.

32 *Id.*; *see* Calum Matheson, *Stasis in the Net of Affect*, 52 PHIL. & RHETORIC 71, 72 (2019) (describing the importance to stasis theory of affect, of creating a connection between the audience and the issue).

33 *See infra* Part IV.A; *see* JIŘÍ KRAUS, RHETORIC IN EUROPEAN CULTURE AND BEYOND 57 (2014) (writing that the stasis of procedure addresses the "judge's doubts as to whether he is able to understand and decide the substance of the dispute").

34 *See infra* Part IV.B.

35 *See infra* Part IV.B.

waste facilities, incinerators, and smelters.[36] In response, the communities initiated grassroots challenges against companies that conducted, and governments that permitted, environmentally hazardous activities where they lived, worked, played, and went to school.[37] The movement spread to other countries because nations like the U.S. benefit from trade and investment treaties that incentivize multinational corporations to conduct heavy manufacturing, mineral extraction, and chemical-intensive agriculture in Latin America and Asia where the resulting environmental harms remain concentrated in poor and indigenous communities.[38] Similarly, climate justice advocates point to studies showing that the richest companies in the world are the largest anthropogenic emitters of greenhouse gases,[39] but "the global impacts of climate change will fall disproportionately on minority and

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[36] Robert D. Bullard, *Environmental Racism and 'Invisible' Communities*, 96 W. VA. L. REV. 1037, 1046 (1994). *See* Luke W. Cole, *Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law*, 19 ECOLOGY L.Q. 619, 642, 646–47 (1992) [hereinafter Cole, *Empowerment*] ("Environmental laws are not designed by or for poor people. The theory and ideology behind environmental laws ignores the systemic genesis of pollution."); Colin Crawford, *Access to Justice for Four Billion: Urban and Environmental Options and Challenges*, 26 N.Y.U. ENVTL. L. J. 340, 381–82 (2018) ("The basic demand of the environmental justice movement . . . is to more fairly distribute—or, preferably, reduce in an equitable manner—the harms of industrial and military activities."); Clifford Rechtschaffen, *Advancing Environmental Justice Norms*, 37 U.C. DAVIS L. REV. 95, 96 (2003) ("Broadly speaking, environmental justice refers to a political and social movement to address the disparate distribution of environmental harms and benefits in our society[.]").

[37] LUKE W. COLE & SHEILA R. FOSTER, FROM THE GROUND UP: ENVIRONMENTAL RACISM AND THE RISE OF THE ENVIRONMENTAL JUSTICE MOVEMENT 10–18 (2001); *see* Badrinarayana, *supra* note 10, at 83–85; *see* Jeddiah Purdy, *The Long Environmental Justice Movement*, 44 ECOLOGY L.Q. 809, 818–21 (2018); *see* Robert D. Bullard, *Environmental Justice in the Twenty-First Century*, *in* THE QUEST FOR ENVIRONMENTAL JUSTICE: HUMAN RIGHTS AND THE POLITICS OF POLLUTION 19, 30 (Robert D. Bullard ed., 2005) (redefining the term "environment" from the natural world "to include the place where people live, work, play, and go to school").

[38] J. Timmons Roberts, *Globalizing Environmental Justice*, *in* ENVIRONMENTAL JUSTICE AND ENVIRONMENTALISM: THE SOCIAL JUSTICE CHALLENGE TO THE ENVIRONMENTAL MOVEMENT 285, 287, 291, 300 (Ronald Sandler & Phaedra C. Pezzullo eds., 2007); Gonzalez, *EJ*, *supra* note 10, at 78–80; Madison Condon, *The Integration of Environmental Law into International Investment Treaties and Trade Agreements: Negotiation Process and the Legalization of Commitments*, 33 VA. ENVTL. L.J. 102, 106–07 (2015); Carmen G. Gonzalez, *Environmental Justice, Human Rights, and the Global South*, 13 SANTA CLARA J. INT'L L. 151, 154 (2015); Carmen G. Gonzalez, *Beyond Eco-Imperialism: An Environmental Justice Critique of Free Trade*, 78 DENV. U.L. REV. 979, 982–83 (2001).

[39] Myanna Dellinger, *See You in Court: Around the World in Eight Climate Change Lawsuits*, 42 WM. & MARY ENVTL. L. & POL'Y REV. 525, 530 (2018); *Largest Producers of Industrial Carbon Emissions*, UNION OF CONCERNED SCIENTISTS (Dec. 9, 2013), https://perma.cc/4PPX-ZQLV (reporting that almost two-thirds of industrial carbon pollution since 1854 can be traced to 90 entities, with 48 percent of all industrial carbon pollution coming from just 20 entities like Chevron, BP, Shell, and ExxonMobil); Matthew F. Pawa, *Global Warming: The Ultimate Public Nuisance*, 39 ENVTL. L. REP. 10230, 10238 (2009) (reporting that 50 companies in the U.S. power sector are responsible for 75 percent of emissions, and just five companies are responsible for 25 percent).

low-income communities" even though they emit a comparatively insignificant amount of greenhouse gases (GHGs).[40]

To challenge polluters and the governments that enable them, communities have built upon the tactics of the U.S. civil rights movement, such as organizing locally while partnering with environmental and human rights groups, building campaigns around grassroots activism supported by media outreach, and engaging in protests like marches and sit-ins.[41] Because the movement emerged from conflict and struggle, it makes sense that the adversarial process of litigation is another tactic.[42] As this Part explains, however, existing tort, statutory, and constitutional laws present several challenges that render them imperfect vehicles for correcting injustice. Accordingly, one goal of filing suit is legal change, such as by urging courts to modify the common law or to interpret a statute in a new way. In painting the law as inadequate, however, plaintiffs simultaneously arm the defendants with grounds to move for dismissal.

A. Corrective Injustice: The Challenges of Environmental Justice Litigation

Tort theories like negligence, strict liability, and nuisance have the potential to remedy environmental harm.[43] This potential often remains

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[40] Rebecca Tsosie, *Indigenous People and Environmental Justice: The Impact of Climate Change*, 78 U. COLO. L. REV. 1625, 1633 (2007) [hereinafter Tsosie, *Impact*]; *see* Randall S. Abate & Elizabeth A. Kronk, *Commonality Among Unique Indigenous Communities: An Introduction to Climate Change and Its Impact on Indigenous Peoples*, 26 TULANE ENVTL. L.J. 179, 179 (2013) ("Indigenous peoples generally contribute very limited quantities of greenhouse gases to the global atmosphere."); Nathalie J. Chalifour & Jessica Earle, *Feeling the Heat: Climate Litigation Under the Canadian Charter's Right to Life, Liberty, and Security of the Person*, 42 VT. L. REV. 689, 698 (2018) ("Research and experience increasingly shows that vulnerable populations bear more than their share of the climate-change burden—even though they have, in general, contributed less to the creation of the problem. This is climate injustice.").

[41] Jonathan C. Drimmer & Sarah R. Lamoree, *Think Globally, Sue Locally: Trends and Out-of-Court Tactics in Transnational Tort Actions*, 29 BERKELEY J. INT'L L. 456, 474–75, 486, 489–98, 503–08 (2011); Jeff Todd, *Trade Treaties, Citizen Submissions, and Environmental Justice*, 44 ECOLOGY L.Q. 89, 119–21 (2017) [hereinafter Todd, *Trade*].

[42] Jonas Ebbesson, *Piercing the State Veil in Pursuit of Environmental Justice*, *in* ENVIRONMENTAL LAW AND JUSTICE IN CONTEXT 270, 277 (Jonas Ebbesson & Phoebe N. Okowa eds., 2009); Maxine Burkett, *Climate Justice and the Elusive Climate Tort*, 121 YALE L.J. ONLINE 115, 115–16 (2011) [hereinafter Burkett, *Elusive*]; Robert R. Kuehn, *A Taxonomy of Environmental Justice*, 30 ENVTL. L. REP. 10681, 10693–94 (2000); *see* KEVIN M. DELUCA, IMAGE POLITICS: THE NEW RHETORIC OF ENVIRONMENTAL ACTIVISM 80 (1999) (discussing the "use of confrontational tactics" by environmental justice groups); Mihaela Popescu & Oscar H. Gandy, Jr., *Whose Environmental Justice? Social Identity and Institutional Rationality*, 19 J. ENVTL. L. & LITIG. 141, 143 (2004) (claiming that the "identity of this movement emerged gradually through interaction with the actors that contested it").

[43] Albert C. Lin, *The Unifying Role of Harm in Environmental Law*, 2006 WIS. L. REV. 897, 903–07 (2006); *see* Doug Rendleman, *Rehabilitating the Nuisance Injunction to Protect the Environment*, 75 WASH. & LEE L. REV. 1859, 1862 (2018) (arguing "for more and

unfulfilled, however. Some barriers are logistical. For example, poor communities typically lack the means to pay for the testing and experts that will be necessary to prove causation.[44] Also, if the harm relates to operations that lasted for decades, the companies might no longer exist or cannot be identified.[45]

A more fundamental problem is that environmental torts do not fit the optimal tort situation of a single plaintiff showing a clear harm caused by a single, identifiable defendant.[46] To the contrary, environmental tort lawsuits involve a long latency period, diffuse harms affecting multiple victims, and diffuse origins from multiple tortfeasors.[47] Persons from poor and minority communities are often exposed to numerous background hazards in their neighborhood, workplace, and food,[48] so the causation element fails because they cannot show that the actions of any one defendant more likely than not caused any particular harm.[49] Similarly, trespass claims can fail when several companies operate in the same area because plaintiffs cannot show that one company's trespass rather than the others' caused harm.[50]

The broad applicability of both public and private nuisance, combined with their potential for both money damages and equitable relief, make these appealing causes of action.[51] Yet, each of these tort theories falls short. Under public nuisance, the plaintiffs must prove that the defendant's action constitutes an "*unreasonable* interference," while private nuisance involves balancing the social utility of the operation against the harm caused.[52] Courts sometimes find the interference reasonable, or they award only money damages but decline equitable relief if the utility is high, or they might decline even money

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more-detailed injunctions as environmental remedies" in private-law nuisance and trespass cases).

44 Kaiman, *supra* note 1, at 1352 (writing that owners must arrange and pay for testing to bring property claims); Todd, *Trade*, *supra* note 41, at 102–03 (noting the need to pay for expensive expert testing and testimony to prove causation).

45 Kathy Seward Northern, *Battery and Beyond: A Tort Law Response to Environmental Racism*, 21 WM. & MARY ENVTL. L. & POL'Y REV. 485, 555–56 (1997); Helen H. Kang, *Pursuing Environmental Justice: Obstacles and Opportunities—Lessons from the Field*, 31 WASH. U.J.L. & POL'Y 121, 138 (2009).

46 Kysar, *supra* note 2, at 62 ("Classical tort is most comfortable with liability when *A* is shown to have directly and exclusively caused a discrete harm to *B*.").

47 Adam D.K. Abelkop, *Tort Law as an Environmental Policy Instrument*, 92 OR. L. REV. 381, 399–407 (2013).

48 Cole, *Empowerment*, *supra* note 36, at 621–31, 647–48; Allan Kanner, *Environmental Justice, Torts and Causation*, 34 WASHBURN L.J. 505, 511 (1995).

49 Todd, *Trade*, *supra* note 41, at 101.

50 La Londe, *supra* note 4, at 44–45; Northern, *supra* note 45, at 544–45.

51 La Londe, *supra* note 4, at 43–44.

52 *Id.* (citing, *inter alia*, RESTATEMENT (SECOND) OF TORTS § 821(B)(1) (1979); HENRY N. BUTLER & JONATHAN R. MACEY, USING FEDERALISM TO IMPROVE ENVIRONMENTAL POLICY 8 (1996)).

damages if the amount is so high it forces the defendant to cease operations.[53]

Federal environmental statutes can also be "clunky tool[s]," particularly when applied to complex issues like climate change.[54] The scientific understanding of climate change has evolved rapidly the last few decades, but federal environmental statutes like the National Environmental Policy Act (NEPA)[55] and the Clean Air Act (CAA)[56] were enacted fifty years ago "to deal with the environmental problems that were known at that time."[57] Nor are environmental statutes effective for addressing the multiple polluter problem: plaintiff success is limited to challenges of discrete sources of pollution.[58] The statutes also do not provide for money damages.[59] Bringing suit against a regional or local permitting authority allows only for an indirect attack on a polluter.[60] For example, NEPA requires an Environmental Impact Statement for "major Federal actions significantly affecting the quality of the human environment," such as issuing federal permits.[61] A federal agency's failure to follow one of NEPA's many procedural requirements—including the analysis of the potential effects on environmental justice communities—*could* lead to the revocation of a permit, but the usual remedy is "the simple reissuance of environmental impact assessments with appropriate notice and comment periods."[62] Though the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)[63] allows for a direct action against a corporate polluter to recover response costs for the release of hazardous substances, for the

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53 La Londe, *supra* note 4, at 44–45; Northern, *supra* note 45, at 547–48.

54 Michael B. Gerrard, *What Does Environmental Justice Mean in an Era of Global Climate Change?*, 19 J. ENVTL. & SUSTAINABILITY L. 278, 281 (2013).

55 National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4370h (2012).

56 Clean Air Act, 42 U.S.C. §§ 7401–7671q (2012).

57 Gerrard, *supra* note 54, at 281.

58 Cole, *Litigation*, *supra* note 8, at 527–28.

59 Kaiman, *supra* note 1, at 1346–48 (writing that the Clean Water Act, Clean Air Act, Resource Conservation Recovery Act, and Toxic Substances Control Act do not allow for money damages).

60 Kang, *supra* note 45, at 130–32; *see* Decision on Ruling on Respondent's Motion for Summary Adjudication at 32, Nat. Res. Def. Council, Inc. v. S. Coast Air Quality Mgmt. Dist. (Los Angeles Cty. Super. Ct. Jul. 28, 2008) (No. BS 110792) (enjoining the South Coast Air Quality District from selling pollution credits for the construction of eleven new power plants in the Los Angeles area).

61 NEPA, 42 U.S.C. § 4332(C) (2012); Uma Outka, *NEPA and Environmental Justice: Integration, Implementation, and Judicial Review*, 33 B.C. ENVTL. AFF. L. REV. 601, 604 (2006) (citing 40 C.F.R. § 1508.18 (2005)).

62 Gregg P. Macey & Lawrence E. Susskind, *The Secondary Effects of Environmental Justice Litigation: The Case of* West Dallas Coalition for Environmental Justice v. EPA, 20 VA. ENVTL. L.J. 431, 435–36 (2001); *see* April Hendricks Killcreas, *The Power of Community Action: Environmental Injustice and Participatory Democracy in Mississippi*, 81 MISS. L.J. 769, 799–800 (2012); *see* COUNCIL ON ENVTL. QUALITY, ENVIRONMENTAL JUSTICE: GUIDANCE UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT 4 (1997).

63 Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601–9675 (2012).

imposition of strict liability, and for retroactive joint and several liability,[64] its processes are lengthy and complicated, plus the EPA must first list sites on the National Priorities List (NPL) before a citizen suit is possible.[65]

Studies show a correlation between minority communities and exposure to industrial and commercial environmental hazards.[66] The communities therefore challenged the siting and operation of waste facilities as violating the equal protection clause.[67] These claims failed because plaintiffs must prove discriminatory intent, not merely discriminatory impact.[68] The Supreme Court's ruling in *Alexander v. Choate*[69] that federal agency regulations promulgated under Section 602 of Title VI of the Civil Rights Act could address "actions having an unjustifiable disparate impact on minorities" seemed to offer communities a workaround.[70] The Court later ruled, however, that Title VI does not include an implied private right of action to enforce Section 602 regulations, nor does Section 602 create a private remedy.[71] With no express private right of action, Section 602 provided no cause of action.[72]

B. Changing the Law Through Environmental Justice Litigation

Environmental justice plaintiffs sometimes obtain a judgment or equitable order,[73] but the substantive law is usually insufficient to

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64 Abelkop, *supra* note 47, at 407–08 (citing 42 U.S.C. §§ 4601(1), 4607 (2012); JOHN S. APPLEGATE ET AL., THE REGULATION OF TOXIC SUBSTANCES AND HAZARDOUS WASTES 512–22 (2d ed. 2011)).

65 *See* Kaiman, *supra* note 1, at 1347–48.

66 COLE & FOSTER, *supra* note 37, at 10; Lisa A. Binder, *Religion, Race, and Rights: A Rhetorical Overview of Environmental Justice Disputes*, 6 WIS. ENVTL. L.J. 1, 6–7 (1999).

67 *E.g.*, R.I.S.E., Inc. v. Kay, 768 F. Supp. 1144, 1145 (E.D. Va. 1991), *aff'd*, 977 F.2d 573 (4th Cir. 1992); East-Bibb Twiggs Neighborhood Ass'n v. Macon-Bibb Cty. Planning & Zoning Comm'n, 706 F. Supp. 880, 881 (M.D. Ga. 1989), *aff'd*, 888 F.2d 1573 (11th Cir. 1989), *opinion amended and superseded on denial of reh'g*, 896 F.2d 1264 (11th Cir. 1989).

68 Cole, *Litigation*, *supra* note 8, at 538–39; Purdy, *supra* note 37, at 829; *see* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 270–71 (1977) (rejecting claims based upon discriminatory impact rather than discriminatory intent as "without independent constitutional significance").

69 469 U.S. 287 (1985).

70 *Id.* at 293; *see, e.g.*, Chester Residents Concerned for Quality Living v. Seif, 132 F.3d 925, 927 (3d Cir. 1997), *vacated*, 524 U.S. 974 (1998) (ruling, in case brought by community group, that permit from Pennsylvania Department of Environmental Quality for soil remediation facility violated EPA regulations on disparate impact).

71 Alexander v. Sandoval, 532 U.S. 275, 288–89 (2001).

72 La Londe, *supra* note 4, at 34 (writing that "the decision in *Alexander v. Sandoval* closed the door to private individuals seeking to bring environmental justice claims under § 602 of Title VI"). Similarly, plaintiffs cannot enforce Title VI by bringing a 42 U.S.C. § 1983 claim because this section requires not merely violation of a federal law but of a federal right, and Title VI does not create an actionable right. *Id.* at 42.

73 Kang, *supra* note 45, at 130–32; *see* Unreported Minute Order at 2–3, Communities for a Better Env't v. City of Richmond (Contra Costa Cty. Super. Ct. June 4, 2009) (No. N08-1429) (setting aside the City of Richmond, California's approved expansion of a Chevron refinery); Decision on Ruling on Respondent's Motion for Summary Adjudication at 32,

provide the remedies sought.[74] It therefore seems to make no sense for environmental justice communities to invest time and money in complex litigation. The communities have numerous strategic goals related to their activism, however, so litigation can be a tactic that helps to achieve one or more of them.[75] For example, the lawsuit can provide the leverage to negotiate a settlement with corporate or governmental defendants for compensation and remediation.[76] In addition, every filing in a lawsuit is a public relations opportunity thus bringing awareness of the campaign to those outside the community and generating momentum and excitement within it.[77] Perhaps most important, bringing claims based upon ineffective laws engages those with the power to change those laws: judges, regulators, and other governmental actors.[78]

Nat. Res. Def. Council, Inc. v. S. Coast Air Quality Mgmt. Dist. (Los Angeles Cty. Super. Ct. July 29, 2008) (No. BS 110792) (enjoining the South Coast Air Quality Management District from selling pollution credits for the construction of eleven new power plants in the Los Angeles area).

74 Randall S. Abate, *Public Nuisance Suits for the Climate Justice Movement: The Right Thing and the Right Time*, 85 WASH. L. REV. 197, 207–08 (2010) [hereinafter Abate, *Public*]; Kuehn, *supra* note 42, at 10698; La Londe, *supra* note 4, at 34–35; David Monsma, *Equal Rights, Governance, and the Environment: Integrating Environmental Justice Principles in Corporate Social Responsibility*, 33 ECOLOGY L.Q. 443, 467–68 (2006).

75 *See* Cummings, *supra* note 2, at 1696 ("The utility of litigation is judged relative to campaign goals" such as "maximiz[ing] political pressure and transform[ing] public opinion."); Ellen Yaroshefsky, *Symposium Introduction*, 46 HOFSTRA L. REV. 1, 3 (2018) ("One fundamental lesson is that litigation is not an end in itself but can strengthen a movement for social change."); Candice Youngblood, *Put Your Money Where Their Mouth Is: Actualizing Environmental Justice by Amplifying Community Voices*, 46 ECOLOGY L.Q. 455, 473 (2019) (calling the "hammer" of litigation but "one tool in the toolbox" of environmental justice lawyering).

76 *E.g.*, Macey & Susskind, *supra* note 62, at 465–66 (citing Heat Energy Advanced Tech., Inc. v. W. Dallas Coal. for Envtl. Justice, 962 S.W.2d 288, 290 (Tex. Ct. App. 1998)) (describing settlement of a suit that challenged the renewal of a permit for an industrial waste storage and processing facility that included a reduction in the gallons of waste the site would process, the incorporation of clean-up and disposal services, and provisions for hiring a proportion of its workers from the surrounding neighborhood); Vernice D. Miller, *Planning, Power and Politics: A Case Study of the Land Use and Siting History of the North River Water Pollution Control Plant*, 21 FORDHAM URB. L.J. 707, 720–21 (1994) (citing W. Harlem Envtl. Action v. N.Y.C. Dep't Envtl. Protection, No. 92-45133 (N.Y. Sup. Ct. May 17, 1993); Stipulation of Settlement 3-22, W. Harlem Envtl. Action, No. 92-45133 (filed Jan. 4, 1994)) (describing how an environmental coalition's settlement of a nuisance suit related to the North River Pollution Control Plant in West Harlem allowed them to be "co-enforcers" of an earlier consent order from the state and to administer the "North River Fund" into which defendants paid $1.1 million).

77 Nosek, *supra* note 9, at 802; Todd, *Sense*, *supra* note 4, at 197–98; *see* Paola Villavicencio Calzadilla, *Climate Change Litigation: A Powerful Strategy for Enhancing Climate Change Communication*, *in* ADDRESSING THE CHALLENGES IN COMMUNICATING CLIMATE CHANGE ACROSS VARIOUS AUDIENCES 231 (Walter L. Filho et al. eds., 2019) (examining how cases like *Juliana* provide a vehicle to communicate about and raise awareness of climate change); Binder, *supra* note 66, at 61 (discussing the need to unite community members who might have divergent views).

78 *E.g.*, PEEL & OSOFSKY, *supra* note 2, at 30 (writing that "activists us[e] lawsuits to try to influence the shape of the law and regulation in addition to assisting their clients in

Communities often find representation by academics, social movement lawyers, and environmental law clinics and organizations.[79] Adjudication provides these advocates with a platform to give reasons to a judge to articulate new legal norms.[80] The advocates can explain changing social values in filings and oral arguments and thus act as "norm-entrepreneurs" by persuading judges to embrace evolving norms and change existing standards.[81] Judges depend on advocates for education about social issues so briefs and arguments can educate the bench about how the law should respond to social needs.[82] In addition, lawsuits based on environmental statutes and regulations allow courts to interpret those rules to show whether governmental actors have acted properly.[83] While tort and constitutional theories have several shortcomings when applied to environmental justice cases, these cases simultaneously allow advocates to highlight those shortcomings and to argue for new interpretations and creative extensions of the law.[84]

Only by forcing courts to confront complex suits like climate change can there be "a reevaluation of the existing system for compensating and deterring harm" and the creation of new constitutional protections.[85] Rulings and orders that favor the plaintiffs create at least persuasive authority that moves the needle of the law toward environmental justice issues.[86] After all, commentators credit environmental justice cases with

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a particular case"); Todd, *Trade*, *supra* note 41, at 130 (recognizing that a "longer-range goal" of litigation is "changing law and policy"); Nathaniel Levy, Juliana *and the Political Generativity of Climate Litigation*, 43 HARV. ENVTL. L. REV. 479, 481 (2019) (arguing "that novel climate lawsuits like *Juliana* can—*win or lose*—lead to constructive legal and political responses to climate change").

79 For example, Luke Cole, whose articles and book are cited throughout this Article, was the lead attorney for plaintiffs in *Kivalina. Native Vill. of Kivalina*, 663 F. Supp. 2d 863, 867 (N.D. Cal. 2009). The attorney in *Juliana*, Julia Olson, called that case one part of a "global strategy" in a "campaign" that includes lawsuits against U.S. states as well as other countries. Molodanof & Durney, *supra* note 22, at 216–17. Another advocate claims that there are dozens of law school environmental justice clinics, organizations, and law firms. Kaiman, *supra* note 1, at 1338.

80 Weaver & Kysar, *supra* note 6, at 314 (citing Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639, 643 (1981)).

81 PEEL & OSOFSKY, *supra* note 2, at 49, 223 ("Courts themselves can be influenced by shifts in public opinion regarding climate change, and their decisions can at times reveal changing perceptions of the science."); Banda, *supra* note 3, at 387.

82 Molodanof & Durney, *supra* note 22, at 221–22 (citing Justice Steven Breyer, Address at the 2016 Annual Meeting for the American Society of International Law (Mar. 30, 2016)).

83 Kang, *supra* note 45, at 136, 144–45.

84 Todd, *Sense*, *supra* note 4, at 199.

85 Kysar, *supra* note 2, at 4; *see* Babcock, *supra* note 1, at 737 (arguing that a court can hold the government responsible for climate-induced harms through a holistic reading of the Constitution).

86 Todd, *Trade*, *supra* note 41, at 130 (citing Osofsky, *supra* note 8, at 129–30) ("Litigation generates rulings, with each new court decision adding to a body of law that might have precedential or persuasive authority to promote change, however incremental."); *see*

influencing President Clinton to issue Executive Order 12,898,[87] which requires the EPA to consider environmental justice principles in its decisions.[88] Further, litigation for lead paint and asbestos resulted in damage awards for plaintiffs and also spurred federal regulation.[89] For complex environmental issues like climate change, litigation allows for testing and expanding the bounds of the law by engaging the judiciary to rule on creative theories of liability and relief.[90] These cases therefore mold the law's ability to respond to what have been frustrating and intractable toxic and environmental harm cases.[91]

C. Procedural Hurdles: The Motion to Dismiss

Judges have the direct ability to craft a jurisprudence of environmental justice through rulings that expand the common law, broaden the application of statutes, order regulators to act, and enunciate new environmental rights.[92] If courts instead grant the defendants' motions to dismiss, not only does that prevent plaintiffs from obtaining a judgment or settlement, but it also blunts the efficacy of litigation as a means to change the law.[93] Given how plaintiffs must rely upon tenuous and uncertain theories of liability, defendants have a number of options to support a motion to dismiss: justiciability doctrines

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Banda, *supra* note 3, at 385 ("While litigation does not always move swiftly, where successful, it can have profound impacts on the domestic regulatory system.").

87 ROBERT D. BULLARD ET AL., ENVIRONMENTAL JUSTICE MILESTONES AND ACCOMPLISHMENTS: 1964–2014, at 20 (2014).

88 COLE & FOSTER, *supra* note 37, at 123; *see* Shannon M. Roesler, *Challenging What Appears "Natural": The Environmental Justice Movement's Impact on the Environmental Agenda*, *in* ENVIRONMENTAL LAW AND CONTRASTING IDEAS OF NATURE: A CONSTRUCTIVIST APPROACH 230, 238–40 (Keith H. Hirokawa ed., 2014) (describing the executive order).

89 Ben Berkowitz, *Special Report: The Long, Lethal Shadow of Asbestos*, REUTERS (May 11, 2012), https://perma.cc/88LS-EJSL.

90 Weaver & Kysar, *supra* note 6, at 314–16; *see* Maria L. Banda & Scott Fulton, *Litigating Climate Change in National Courts: Recent Trends and Developments in Global Climate Law*, 47 ENVTL. L. REP. NEWS & ANALYSIS 10121, 10134 (2017) (writing that "the number of climate lawsuits is unquestionably on the rise, positioning the courts for an increasingly vital role in ensuring climate-related accountability, enabling resiliency, and contributing to a sustainable future"); Kysar, *supra* note 2, at 2–7 (arguing that climate change litigation that pushes traditional tort boundaries can help the common law to develop in a way that more effectively answers the problem).

91 Kysar, *supra* note 2, at 4; Todd, *Trade*, *supra* note 41, at 105; *see* Myanna Dellinger, *Post-*Jesner *Climate Change Lawsuits Under the Alien Tort Statute*, 44 COLUM. J. ENVTL. L. 241, 242 (2019) [hereinafter Dellinger, *ATS*] (arguing that "litigation spurs progress" despite the enormity of problems like climate change).

92 *See* PEEL & OSOFSKY, *supra* note 2, at 30 (writing that plaintiffs can bring "lawsuits to clarify an agency's regulatory authority under a statute, to change how an agency exercises that authority, or to enforce that authority"); Kysar, *supra* note 2, at 4 (discussing how bringing tort claims related to climate change forces judges to confront complex issues and thus helps tort law to evolve to address them); Molodanof & Durney, *supra* note 22, at 222 (discussing the environmental justice advocate's duty to educate courts so that they can make "important constitutional pronouncements").

93 Todd, *Sense*, *supra* note 4, at 201.

like political question and standing are raised under Rule 12(b)(1),[94] while Rule 12(b)(6)[95] allows dismissal for failure to state a claim upon which relief can be granted.[96] Though many cases are dismissed, this Subpart explains how it is not the inevitable result because each option rests upon a balancing test or has a standard of application that gives plaintiffs at least a reasonable chance to prevail.

1. Justiciability Doctrines: Political Question and Standing

Justiciability doctrines like political question, standing, ripeness, mootness, and advisory opinions are threshold questions that can end federal cases.[97] Both the political question doctrine and standing have presented obstacles in environmental and climate justice cases.[98] As this Subpart explains, however, these doctrines do not necessarily apply to every environmental cause of action or defendant—and if they do, they need not be fatal. Indeed, some commentators argue that courts seek refuge in these doctrines to avoid addressing complex cases[99] with the law of standing in particular being "incoherent and confusing."[100]

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94 FED. R. CIV. P. 12(b)(1).

95 FED. R. CIV. P. 12(b)(6).

96 *See* Crawford, *supra* note 36, at 383 (writing that access to justice barriers like standing rules make it "difficult to vindicate rights claims for environmental harms and benefits"). This Part addresses only federal doctrines because environmental justice advocates focus on federal courts. Tracy D. Hester, *A New Front Blowing In: State Law and the Future of Climate Change Public Nuisance Litigation*, 31 STAN. ENVTL. L.J. 49, 50 (2012) (calling climate change litigation "an overwhelmingly federal affair" because of reliance on the federal common law tort of public nuisance); Robert J. Klee, *What's Good for School Finance Should Be Good for Environmental Justice: Addressing Disparate Environmental Impacts Using State Courts and Constitutions*, 30 COLUM. J. ENVTL. L. 135, 137 (2005) (claiming that "the majority of the environmental justice advocacy community" has "focus[ed] on the federal courts" and claims based on the U.S. Constitution and federal statutes).

97 *See* La Londe, *supra* note 4, at 59 (citing Mount Graham Coal. v. McGee, 52 Fed. Appx. 354, 355 (9th Cir. 2002)) (affirming dismissal as moot the claims by Apache peoples based on the National Historic Preservation Act to halt further construction of an observatory on land they considered sacred because the construction work was already complete); Todd, *Sense*, *supra* note 4, at 186 (calling justiciability doctrines threshold questions that courts address before failure to state a claim).

98 *See* Victor E. Schwartz et al., *Why Trial Courts Have Been Quick to Cool "Global Warming" Suits*, 77 TENN. L. REV. 803, 813 (2010) (writing that judges in several climate nuisance cases dismissed based upon political question and standing).

99 *E.g.*, PEEL & OSOFSKY, *supra* note 2, at 262 (recounting the opinion of climate change advocates who recognize that some receptive judges engage the scientific evidence while other judges are "reluctant to embrace a new, and potentially difficult, area" and thus focus on standing and political question).

100 F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275, 276 (2008) (arguing that the standing doctrine "has produced an incoherent and confusing law of federal courts").

Even without a "textually demonstrable constitutional commitment of the issue to a coordinate political department,"[101] a case might present a political question based upon prudential considerations like a "lack of judicially discoverable and manageable standards for resolving" a case or the "impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion."[102] Take the example of climate change. Some commentators argue that courts lack judicially manageable standards for fashioning emissions caps because climate change is a complex global phenomenon that results from multiple natural and anthropogenic sources of GHGs; accordingly, this type of relief may be better left to the legislative or executive branches rather than via a federal public nuisance lawsuit.[103]

While the prudential considerations prevent courts from ordering governmental defendants to act or refrain from acting, they should not apply to non-governmental defendants, especially if the relief sought is limited to money damages.[104] For example, the Third Circuit rejected a political question challenge to plaintiffs seeking money damages and equitable relief based on several tort theories from a coal-fired electrical generating plant.[105] After all, torts like nuisance are well-recognized, and money damages are a type of relief that courts frequently grant.[106] Further, the political question doctrine does not necessarily prevent all environmental suits against governmental defendants from going forward. For example, the Ninth Circuit ruled that no political questions

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101 Nathan Howe, *The Political Question Doctrine's Role in Climate Change Nuisance Litigation: Are Power Utilities the First of Many Casualties?*, 40 ENVTL. L. REP. NEWS & ANALYSIS 11229, 11231 (2010) (quoting Baker v. Carr, 369 U.S. 186, 217 (1962)).

102 Howe, *supra* note 101, at 11231. Three other prudential considerations are the "impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government," an "unusual need for unquestioning adherence to a political decision already made," and the "potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Id.*

103 Matthew Edwin Miller, Note, *The Right Issue, the Wrong Branch: Arguments Against Adjudicating Climate Change Nuisance Claims*, 109 MICH. L. REV. 257, 271–72, 275–76 (2010); *see* Schwartz et al., *supra* note 98, at 835 (writing that sources of GHGs include industrial and non-industrial emitters as well as natural sources like volcanoes and the ocean-atmosphere exchange).

104 John Harrison, *The Political Question Doctrines*, 67 AM. U. L. REV. 457, 481–84 (2017); *compare* Gilligan v. Morgan, 413 U.S. 1, 11–12 (1973) (invoking the political question doctrine to decline considering a request for relief that would impose judicial review over the training and operation of the Ohio National Guard in a case arising from the Kent State University shootings), *with* Scheuer v. Rhodes, 416 U.S. 232, 250 (1974) (concluding that the governor and other Ohio civilian and military officials did not enjoy sovereign immunity in a damages action for wrongful death arising from the Kent State University shootings).

105 Bell v. Cheswick Generating Station, 734 F.3d 188, 189, 192–93, 198 (3d Cir. 2013).

106 *See* Howe, *supra* note 101, at 11230; *see* Jill Jaffe, Note, *The Political Question Doctrine: An Update in Response to Recent Case Law*, 38 ECOLOGY L.Q. 1033, 1047–53 (2011); *see* Harrison, *supra* note 104, at 512–13 (claiming that "lower court decisions have seriously misunderstood the Supreme Court's political question doctrine" when they invoke it in cases where "the plaintiff was a private person seeking relief on the basis of principles of liability that apply between private persons").

were raised in interpreting provisions of the National Historic Preservation Act[107] related to a challenge of the construction of a military base that threatened marine life of cultural significance to Okinawans.[108] The Supreme Court has ruled that the political question doctrine does not allow a court to "shirk" its responsibilities to interpret statutes, treaties, and executive agreements even if the case has political ramifications, as in a conservation group's challenge to the U.S. certification of Japanese whaling practices.[109]

Standing has its roots in the Constitution: the words "Cases" and "Controversies" in Article III mean that plaintiffs must have standing—"a genuine interest and stake in a case"—for each form of relief sought.[110] In *Lujan v. Defenders of Wildlife*,[111] the Supreme Court announced a three-prong test for constitutional standing: plaintiff has suffered a concrete injury, causation that is "fairly traceable" to defendant's conduct, and the injury can be redressed by a court order.[112] One commentator has criticized "[t]he unpredictability and ideological nature of standing law" and characterized the second element as "a mirror in which the judge can perceive her own preferences—when an injury is 'fairly traceable' is simply a question of what a judge regards as fair."[113] As discussed in Part II.A, *supra*, environmental justice plaintiffs face challenges in proving tort causation, which thus seem to make the traceable causation prong an impossible barrier.[114] For example, given the scientific complexity of climate change, trial courts in climate nuisance lawsuits have dismissed plaintiffs' claims for failing to establish standing.[115] To satisfy Article III standing, however, the causation prong is supposed to have a low threshold so that courts "should simply look for plausible evidence of a causal relationship between the plaintiff's injuries and the defendant's actions, rather than the proof necessary for proximate causation on the merits."[116] Some

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107 National Historic Preservation Act, 54 U.S.C. §§ 300101–307108 (2012).

108 Ctr. for Biological Diversity v. Mattis, 868 F.3d 803, 808–09, 821–30 (9th Cir. 2017).

109 Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221, 230 (1986).

110 Bradford C. Mank, *Standing for Private Parties in Global Warming Cases: Traceable Standing Causation Does Not Require Proximate Causation*, 2012 MICH. ST. L. REV. 869, 875 (2012) (citing, *inter alia*, U.S. CONST. art. III, § 2; Stark v. Wickard, 321 U.S. 288, 310 (1944)).

111 504 U.S. 555 (1992).

112 *Id.* at 560–61; Michael E. Solimine, *Congress, Separation of Powers, and Standing*, 59 CASE W. RES. L. REV. 1023, 1024 (2009).

113 Daniel A. Farber, *Standing on Hot Air:* American Electric Power *and the Bankruptcy of Standing Doctrine*, 121 YALE L.J. ONLINE 121, 122 (2011).

114 *See also* Mary Kathryn Nagle, *Tracing the Origins of* Fairly Traceable*: The Black Hole of Private Climate Change Litigation*, 85 TUL. L. REV. 477, 480–81 (2010).

115 *See* Comer v. Murphy Oil USA, Inc., 839 F. Supp. 2d 849, 858–62 (S.D. Miss. 2012) (finding that property damage resulting from rising sea levels is not "fairly traceable to the defendants' emissions").

116 Mank, *supra* note 110, at 900; *see* Note, *Causation in Environmental Law: Lessons from Toxic Torts*, 128 HARV. L. REV. 2256, 2258 (2015) (arguing "that causation in environmental law cases has been forced into jurisdictional standing analysis, even where the

courts considering environmental challenges do recognize this lower threshold, as in *Center for Biological Diversity v. Mattis*,[117] where the court limited its consideration to "this stage in the litigation" and whether the complaint alleges a "relationship between causation and adverse effects."[118]

2. Failure to State a Claim Upon Which Relief Can Be Granted

The Rule 12(b)(6) motion to dismiss for failure to state a claim requires courts to accept all facts in the complaint as true, so the allegations need only be plausible rather than probable.[119] Courts therefore view Rule 12(b)(6) motions with disfavor and rarely grant them.[120] These motions can have more success in environmental justice cases, however, because plaintiffs often urge a non-straightforward application of the law, or they seek relief outside of tort and environmental laws such as arguing equal protection or civil rights violations.[121] This tension between the court's disfavor with Rule 12(b)(6) and the plaintiffs' creativity in asserting causes of action means that the results are mixed.

For example, defendants might win dismissal through a Rule 12(b)(6) motion when the statute does not provide an enforceable right, such as the district court granting and the appellate court affirming dismissal of a case brought by a mother living in Detroit public housing attempting to hold public authorities liable under federal statutes using 42 U.S.C. § 1983[122] for exposure of her child to lead paint.[123] But in *Pakootas v. Teck Cominco Metals, Ltd.*,[124] representatives of federally-recognized tribes in Washington State brought a CERCLA citizen suit against a Canadian smelting company for depositing hazardous metal

inquiry is more appropriate for later determination on the merits, which results in a significant and sometimes inappropriate barrier for environmental plaintiffs.").

117 868 F.3d 803 (9th Cir. 2017).

118 *Id.* at 817–18 (analyzing the "relaxed" standard for the "fairly traceable" prong when plaintiffs allege violations of statutory procedural requirements by government).

119 FED. R. CIV. P. 12(b)(6); *see* Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) ("The plausibility standard is not akin to a 'probability requirement[]'"); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) ("Factual allegations must be enough to raise a right to relief above the speculative level . . . on the assumption that all the allegations in the complaint are true (even if doubtful in fact)") (citations and footnote omitted).

120 Taylor v. Denka Performance Elastomer LLC, No. 17-7668, 2018 WL 5786051, at *3 (E.D. La. Nov. 5, 2018) (citing Lowrey v. Tex. A & M Univ. Sys., 117 F.3d 242, 247 (5th Cir. 1997)) (such motions are "viewed with disfavor and [are] rarely granted"); *id.*, at *5 (recognizing that "defendant disputes the causation of these injuries and suggests that any number of sources could be responsible for the symptoms," but concluding that "at this procedural stage, it is not the appropriate setting for dismissal").

121 Cole, *Litigation*, *supra* note 8, at 526–31; Carlton Waterhouse, *Abandon All Hope Ye That Enter? Equal Protection, Title VI, and the Divine Comedy of Environmental Justice*, 20 FORDHAM ENVTL. L. REV. 51, 62–63 (2009).

122 Civil Action for the Depravation of Rights, 42 U.S.C. § 1983 (2012).

123 Johnson v. City of Detroit, 446 F.3d 614, 616–18 (6th Cir. 2006).

124 452 F.3d 1066 (9th Cir. 2006).

"slag" in the Columbia River.[125] Because all smelter operations were in British Columbia, the smelter moved to dismiss under Rule 12(b)(6) on the grounds that CERCLA does not apply extraterritorially, but the trial court ruled that CERCLA applied extraterritorially.[126] The Ninth Circuit affirmed, but for different reasons: it held that the presence of the slag leaching hazardous substances in the United States meant that the case did not require an extraterritorial application of the statute.[127]

Sometimes federal or state statutes prohibit assertion of a common law claim.[128] For example, the U.S. Supreme Court has held that the CAA displaces federal public nuisance claims for climate-change-related harms.[129] The CAA does not preempt nuisance claims based on state common law, however.[130] Nor does it displace federal common law claims brought by states because states as separate sovereigns have the "special solicitude" to sue on behalf of their citizens to protect natural

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125 *Id.* at 1068–69.

126 Pakootas v. Teck Cominco Metals, Ltd., No. CV–04–256–AAM, 2004 WL 2578982, at *1, *17 (E.D. Wash. Nov. 8, 2004). The court also denied Teck Cominco's motions to dismiss for lack of personal and subject matter jurisdiction. *Id.*; *see generally* FED. R. CIV. P. 12(b)(1)–(2).

127 *Pakootas*, 452 F.3d at 1079.

128 La Londe, *supra* note 4, at 45 (citing Middlesex Cty Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 21–22 (1981) (holding Clean Water Act preempted common law claim); Papas v. Upjohn Co., 926 F.2d 1019, 1026 (11th Cir. 1991) (holding Federal Insecticide, Fungicide, and Rodenticide Act prohibited common law remedy); Buchanan v. Simplot Feeders Ltd., 952 P.2d 610, 614 (Wash. 1998) (prohibiting a nuisance claim because of state "Right-to-Farm" statute)).

129 *Am. Elec. Power Co., Inc.*, 564 U.S. 410, 424–25 (2011) (citing 42 U.S.C. § 111(d) (1990)) (holding that the CAA provides "a means to seek limits on emissions of carbon dioxide from domestic powerplants" and thus displaces "parallel" federal common law claims); *see* Jean-Baptiste et al., *supra* note 3, at 11007 (citing 42 U.S.C. §§ 7401–7671q (2006); ELR STAT. CAA §§ 101–618) (calling displacement because of the CAA an "obstacle" that has led to climate justice cases being dismissed).

130 Randall S. Abate, *Atmospheric Trust Litigation in the United States: Pipe Dream or Pipeline to Justice For Future Generations?*, *in* CLIMATE JUSTICE: CASE STUDIES IN GLOBAL AND REGIONAL GOVERNANCE CHALLENGES 543, 567–68 (Randall S. Abate ed., 2016) (citing Freeman v. Grain Processing Corp., 848 N.W.2d 58, 63 (Iowa 2014) (describing decision by Iowa Supreme Court rejecting argument that CAA displaced state tort theories and allowing plaintiffs to seek damages under state nuisance theory)); Sam Kalen, *Policing Federal Supremacy: Preemption and Common Law Damage Claims as a Ceiling to the Clean Air Act Regulatory Floor*, 68 FLA. L. REV. 1597, 1602 (2016) (arguing that judges can award money damages and enter more stringent equitable relief than provided in the CAA "*if* the state regulatory agency explicitly accepts the continued vitality of common law claims for regulated entities *or if* the CAA does not otherwise regulate the activity"); *see*, *e.g.*, *Bell*, 734 F.3d 188, 189–90 (3d Cir. 2013) (reversing district court's dismissal of putative class action based on preemption by the CAA because neither "the plain language of the Clean Air Act [nor] controlling Supreme Court precedent" support preemption); *but see* Damien M. Schiff & Paul Beard II, *Preemption at Midfield: Why the Current Generation of State-Law-Based Climate Change Litigation Violates the Supremacy Clause*, 49 ENVTL. L. 853, 856 (2019) (arguing that the preemption law for the Clean Water Act should inform the CAA to preempt climate lawsuits based on "state-law-based climate cases").

resources and environmental health.[131] Plus, the CAA has gaps in its coverage of GHG emissions and does not provide for compensation; some commentators therefore argue that plaintiffs seeking only money damages, as opposed to equitable relief, should not have their claims displaced.[132] Accordingly, tort-based climate justice suits have at least some basis for prevailing against a Rule 12(b)(6) motion to dismiss.

III. A RHETORIC OF STASIS: CLASSICAL THEORY WITH CONTEMPORARY INSIGHTS

Environmental justice communities litigate in part to change the law, a strategic goal that depends upon obtaining favorable rulings. The potential irony is that highlighting the law's shortcomings gives defendants grounds to argue for dismissal, thus denying the plaintiffs a chance to move forward in litigation. The examples and commentary discussed in Part II.C, *supra*, show that success is at least possible, thus raising the question of the best approach to avoid dismissal: should plaintiffs foreground logical arguments to support a claim that relief requires only minimal extensions of the law, or should they rely upon emotional appeals to urge judges to entertain bold changes and creative applications? Rhetorical stasis theory can provide an answer. Drawing upon the major classical writers Hermagoras, Cicero, Quintilian, and Hermogenes, as well as their contemporary commentators, this Part summarizes how stasis theory works. In particular, it explains the issues raised in each of the four main stases, how grounding an argument in a lower stasis concedes the ones before it but also allows for a stronger fighting stance, the special nature of procedure in shifting the ground, and the role of the opponent and of the judge in choosing the ground.

A. The Basics of Stasis Theory

The term "stasis" comes from the stance that a boxer or wrestler assumes at the start of a fight, a stance that is both offensive because it must allow for a winning move and defensive because it must respond to

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131 *See* Elizabeth Ann Kronk Warner & Randall S. Abate, *International and Domestic Law Dimensions of Climate Justice for Arctic Indigenous Peoples*, 43 REVUE GÉNÉRALE DE DROIT 113, 147 n.146 (2013) (citing Massachusetts v. U.S. Envtl Prot. Agency, 549 U.S. 497, 518–20 (2007); Georgia v. Tenn. Copper, 206 U.S. 230, 237 (1907)).

132 Zachary Hennessee, Note, *Resurrecting a Doctrine on Its Deathbed: Revisiting Federal Common Law Greenhouse Gas Litigation after* Utility Air Regulatory Group v. EPA, 67 DUKE L.J. 1073, 1114 (2018); *see*, *e.g.*, Burkett, *Elusive*, *supra* note 42, at 117–18 (arguing that claims for compensatory damages should not be displaced even if claims for injunctive relief are); *see also* Exxon Shipping Co. v. Baker, 554 U.S. 471, 489 n.7 (2008) (distinguishing common law nuisance claim for economic injury with one seeking to impose standards that would differ from regulatory goals in the Clean Water Act).

the opponent's likely attack.[133] Similarly, each party in litigation must frame the case in a way that advances its best arguments but that also counters the opponent's likely arguments.[134] One party should not attempt to fight about those issues where the other has the stronger argument because the decision-maker will likely rule in favor of the opponent.[135] Further, making inconsistent or irrelevant arguments harms the advocate's credibility with the audience.[136] Accordingly, a party should prepare for litigation by discarding unwinnable issues until it reaches a stasis, an impasse, a stopping point where the controversy has sound arguments on both sides.[137] Adjudication then breaks the equilibrium of two forces standing opposed to one another by allowing a "contest over which force will win."[138]

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133 *See* KRAUS, *supra* note 33, at 56 ("Both the Greek term *stasis* and the entirety of agonistic rhetoric were based on wrestling and originally stood for the initial position of athletes in a boxing match."); Sarah Rivière, *Stasis: Charging the Space of Change*, FOOTPRINT, Autumn/Winter 2016, at 79, 86 ("[I]n the popular sport of boxing the state of poised readiness, of tension and awareness in both body and mind that came between active attacking and defensive moves during of the bout was called a *stasis*.").

134 Nadeau, *supra* note 29, at 375 ("Both ancients and moderns, however, are in substantial agreement that a stasis or issue, whenever, and however it occurs, takes the form of a question which focuses the contrary views of proponents and opponents."); Stephen E. Smith, *Defendant Silence and Rhetorical Stasis*, 46 CONN. L. REV. ONLINE 19, 23 (2013) (assessing the stasis points of a case helps the party "determine the strengths and weaknesses" of that case).

135 Nadeau, *supra* note 29, at 375 ("Those presenting the better answer to the question succeed in breaking down the stasiastic impasse *in their favor*, and the stasis disappears.") (emphasis added); Weber, *supra* note 29, at 89 ("Stasis helps avoid an asymmetry where opposing arguments cannot find resolution because they fail to ask and argue the same questions."); *see* CICERO, *supra* note 29, at 39 (writing that the case's "*foundation* is the strongest argument of the defence, and the one most relevant to the point for the judge's decision"); QUINTILIAN, *supra* note 29, at 25 (writing that a lack of judgment can lead an orator to make "inconsistent, ambivalent, or foolish arguments").

136 *See* Smith, *supra* note 134, at 23 (calling it "folly to join a case at every point of stasis"); Malcolm Heath, *The Substructure of Stasis-Theory from Hermagoras to Hermogenes*, 44 CLASSICAL Q. 114, 114 (1994) (claiming that "patterns of argument appropriate to a question of fact (did the defendant do what is alleged?) may be irrelevant in an evaluative dispute (was the defendant justified in doing that?)").

137 Mathew D. McCubbins & Mark Turner, *Concepts of Law*, 86 S. CAL. L. REV. 517, 542–43 (2013) (writing that stasis refers to two balanced opposing forces being in equilibrium); Nadeau, *supra* note 29, at 376 ("A stasis could occur . . . at any point in the proceedings at which the contesting parties met 'head-on' by taking opposing positions on a question at hand.").

138 McCubbins & Turner, *supra* note 137, at 543–44; *see also* MACCORMICK, *supra* note 14, at 123 (writing that the disputed issue is presented to the court as rival possible meanings, and the court concludes which is stronger to resolve the dispute); Antoine Braet, *The Classical Doctrine of* Status *and the Rhetorical Theory of Argumentation*, 20 PHIL. & RHETORIC 79, 90 (1987) (calling argumentation theory based on stasis more than dialogical because "the discussants are attempting to convince not one another, but a third, adjudicating party"); James Boyd White, *Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life*, 52 U. CHI. L. REV. 684, 697 (1985) ("The basic idea of the legal hearing is that two stories will be told in opposition or competition and a choice made between them.").

Arguments in the real world "can be amazingly complicated in their reach over time, space, causation, and agency," so stasis is a system for mapping disputes in more simplified terms of competing claims.[139] Take the example of a criminal defendant found near a dead body that had been stabbed, so the prosecutor charges him with murder. Resolution of the case hinges on one of four issues, depending upon the facts and how the defendant answers the charge[140]:

1. Conjecture deals with contentions of fact, such as whether the criminal defendant committed the act of killing the deceased;
2. Definition deals with contentions of how the facts should be characterized, such as whether the killing was murder, manslaughter, or accident;
3. Qualification deals with contentions about whether an act is justified or excused, such as if an intentional killing was made in self-defense;
4. Procedure or process deals with contentions about jurisdiction, such as whether the court has personal jurisdiction over the defendant.[141]

The parties work through each of these general stases to determine the likely issue upon which the court will rule,[142] and then they develop

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139 McCubbins & Turner, *supra* note 137, at 543; *see* KENNEDY, NEW, *supra* note 23, at 210 (explaining that the system developed by Hermogenes "links the various headings in a progression of alternatives"); Douglas Walton, *Argumentation Schemes: The Basis of Conditional Relevance*, 2003 MICH. ST. L. REV. 1205, 1221 (2003) (writing that the stasis or status of a speech deals with identifying the issue in that speech, such as the controversy the speech is meant to address or problem it is meant to solve).

140 CICERO, *supra* note 29, at 21 ("Every subject which contains in itself a controversy to be resolved by speech and debate involves a question about a fact, or about a definition, or about the nature of an act, or about legal processes. This question, then, from which the whole case arises, is called *constitutio* or the 'issue.' The 'issue' is the first conflict of pleas which arises from the defence or answer to our accusation").

141 *See* FROST, *supra* note 24, at 25; KENNEDY, CLASSICAL, *supra* note 18, at 92; McCubbins & Turner, *supra* note 137, at 543; *see also* Nadeau, *supra* note 29, at 373, 386 (writing that Hermagoras first states the four rhetorical stases and then showing the similarities of the stases of Hermagoras and Hermogenes).

142 KENNEDY, NEW, *supra* note 23, at 98 ("Thus the process can be viewed as one of elimination of each type successively"); CICERO, *supra* note 29, at 39 ("From this narrowing or limitation of the excuse the chief dispute arises, which we call *iudicatio* or point for the judge's decision."); Braet, *supra* note 138, at 81 (writing that stasis theory is a way for opponents to deduce "the crucial question that the judge must answer"); Charles Marsh, *The Syllogism of Apologia: Rhetorical Stasis Theory and Crisis Communication*, 32 PUB. REL. REV. 41, 42 (2006) ("When the rhetorical act involves a debate and a judgment by an audience, stasis theory helps identify the core issue—the key point of disagreement (stasis) upon which judgment must be rendered.").

arguments and counterarguments around those issues.[143] If there were no eyewitnesses to the killing, then the matter is one of conjecture because the facts are uncertain.[144] The defendant responds to the allegation "You killed him" with the simple denial "I did not kill him," and both sides will then prepare arguments and counterarguments accordingly.[145] If the matter is certain—such as if the only eyewitnesses all saw the defendant strike the decedent with a knife—then the parties ask whether the matter is undefined or defined.[146] The defendant might respond to the charge by asserting, "I killed him but by accident, so the act cannot be murder"; because the dispute is undefined, the parties will prepare arguments over the issue of whether the killing meets the legal elements for murder or a lesser charge like negligent homicide.[147] If the issue is defined—such as all eyewitnesses state that the defendant purposefully stabbed the victim—then the parties must ask whether the matter is qualified in some way.[148] The defendant might respond to the charge by stating, "I intended to kill him, but it was in self-defense," so the parties prepare arguments about whether the defendant should be excused from liability.[149] If all of these fail, then the defendant attempts

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143 Braet, *supra* note 138, at 81 (writing that parties "anticipate their opponent's arguments and decide on their reaction to them," and "then, with the aid of the topics, look specifically for the arguments to back up their position with regard to the *krinomenon* [issue]"); Hohmann, *supra* note 24, at 174 ("For each *status*, rhetorical treatises would list different arguments which could be used on either side of the issue by the opposing parties in a case.").

144 Braet, *supra* note 138, at 87; Hohmann, *supra* note 24, at 180; *see* Nadeau, *supra* note 29, at 393 (writing that, if the thing to be judged is "doubtful" rather than "obvious," the issue is one of conjecture).

145 KENNEDY, NEW, *supra* note 23, at 98 (writing that this level involves "'conjecturing' about the fact at issue, whether or not something had been done at a particular time by a particular person: e.g., Did X actually kill Y?"); KRAUS, *supra* note 33, at 56 ("The answer denying guilt (*non feci*) brings forth the question of whether the accused committed the act (*an fecerit?*).").

146 KENNEDY, CLASSICAL, *supra* note 18, at 122; *see* Nadeau, *supra* note 29, at 393 (writing that, if the thing to be judged is "obvious" rather than "doubtful," then "we must then consider whether it is perfect or imperfect," and an imperfect thing raises a definitional stasis).

147 KENNEDY, NEW, *supra* note 23, at 98 (writing that the definition stasis addressed "whether an admitted action falls under the legal 'definition' of a crime: e.g., Was the admitted killing of Y by X murder or homicide?"); KRAUS, *supra* note 33, at 57 (noting that this issue "follows a partial confession" and calling the goal "to find a different definition of the act," such as "manslaughter rather than murder" or "theft, not robbery").

148 KENNEDY, CLASSICAL, *supra* note 18, at 122; Nadeau, *supra* note 29, at 393 ("However, if the thing to be judged is both obvious and perfect (defined), the way is open to inquiry into the quality (*poiotēs*) of the act[.]").

149 KENNEDY, NEW, *supra* note 23, at 99 (explaining that this level involves "the issue of the 'quality' of the action, including its motivation and possible justification: e.g., Was the murder of Y by X in some way justified by the circumstances?").

to deny the court's jurisdiction.[150] The parties thus proceed down the list to determine whether and how the case can be undertaken.[151]

The stasis system involves a balancing. A case might raise several questions, but stasis provides a means to isolate a single issue upon which a judge will rule.[152] The issues do not have equal weight: the four general stases present a hierarchy because both parties at the conjectural level have equally strong arguments, but each succeeding stasis is weaker for the respondent, with the procedural being only a "formal refuge."[153] Further, moving down the list means that the respondent concedes the higher ground: for example, the defendant must concede that he killed the victim to argue that the killing was accidental or concede that the killing was intentional to argue that the killing should be excused because of self-defense.[154] If the party has weak arguments in the higher grounds, however, concession is necessary so that the party can assume a fighting stance on its strongest ground and develop those arguments which are most likely to persuade the judge.[155] After all, while the plaintiff's complaint sometimes sets the point of stasis that the parties will argue,[156] the defendant in responding to the complaint often determines the issue upon which the judge will

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150 KENNEDY, CLASSICAL, *supra* note 18, at 122; *see* CICERO, *supra* note 29, at 33 (writing that "in general" a controversy in the final stasis arises "when there is some argument about changing or invalidating the form of procedure").

151 KENNEDY, CLASSICAL, *supra* note 18, at 122; *see* Brizee, *supra* note 25, at 370 (calling stasis a "linear process" where "[l]egal contestants moved through the stases to argue disputes and settle claims").

152 QUINTILIAN, *supra* note 29, at 161; *see id.* at 53 (writing that the point of stasis is the issue that the speaker most wants "and the judge understand[s] to be the most worthy of his attention"); *see also* CICERO, *supra* note 29, at 29 ("A forensic argument can have any of the four issues, but each issue's argument is exclusive of the other issues.").

153 Braet, *supra* note 138, at 83–84; *see* KENNEDY, NEW, *supra* note 23, at 208, 210 (writing that the system of Hermogenes—the "most important Greek rhetorician of the Roman empire"—"links the various headings in a progression of alternatives"); QUINTILIAN, *supra* note 29, at 91 (claiming that the progression from conjecture to definition to qualification is in descending order of strength); Weber, *supra* note 29, at 89 (writing that "the stasis questions were intended to be taken in order").

154 Smith, *supra* note 134, at 22; *see* EDWARD CORBETT & ROSA EBERLY, THE ELEMENTS OF REASONING 57–58 (2d ed. 2000) (explaining that a defendant accused of stealing an urn moves to the stasis of definition by stipulating to only "borrowing" the urn); Harold Anthony Lloyd, *Raising the Bar, Razing Langdell*, 51 WAKE FOREST L. REV. 231, 236 (2016) ("If we start our debate at the stage of quality (for example, we agree that the debate is about whether a murder was justified), we have conceded the first two issue locations (i.e., that a killing occurred and that it was murder).").

155 CICERO, *supra* note 29, at 39 ("The *foundation* is the strongest argument of the defence, and the one most relevant to the point for the judge's decision[.]"); QUINTILIAN, *supra* note 29, at 53 (urging orators to argue the strongest issue in a case that raises multiple issues); *id.* at 51 (writing that "it often happens that we abandon the points in which we have less confidence").

156 QUINTILIAN, *supra* note 29, at 55–57 (writing that sometimes the plaintiff sets the stasis); *see* Brittany Occhipinti, *We the Militia of the United States of America: A Reanalysis of the Second Amendment*, 53 WILLAMETTE L. REV. 431, 439 (2017) (writing that "opposing parties in an argument must agree on a point of stasis or they will never reach a point of agreement on an issue").

rule.[157] The stasis scheme is therefore biased toward the defendant, who only needs "to win the judge over to his side for *one* of the four *status*" to prevail.[158]

B. Assuming a Fighting Stance

Sometimes the law is clear and clearly applicable, and either the relevant and undisputed facts all favor one party, or a party might not be able to adduce any evidence to support her argument.[159] Such disputes are so one-sided that one of the parties cannot make plausible arguments, so the question in these cases is *asystatic*—incapable of stasis.[160] In all other cases, the parties look for an impasse in one of the four general stases.

1. The Stases of Conjecture and Definition: The Higher Grounds

Classical theorists like Quintilian called the stasis of conjecture preferred because each party has strong grounds upon which to stand: each side has facts that support her argument, and there is no dispute as to the applicable law.[161] A conjectural issue arises whenever "the thing to be judged . . . is doubtful," such as whether a man discovered burying a body "is the one who committed the act of slaying."[162] The case thus deals with the ascertainment of which party's facts are sufficiently proven so that that party prevails under the proposed legal rule.[163]

Because the plaintiff or prosecutor must present the case by alleging the cause of action, the defendant might respond by disputing

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157 Sebastian T. McEvoy, *Issues in Common Law Pleading and Ancient Rhetoric*, 5 ARGUMENTATION 245, 257 (1991) (citing GEORGE KENNEDY, THE ART OF RHETORIC IN THE ROMAN WORLD 307 (1972)) (writing that "the stance of the defendant . . . determined the *status*"); *see* QUINTILIAN, *supra* note 29, at 55–57 (writing that often the defendant in responding determines the stasis); Braet, *supra* note 138, at 89 (writing that "[t]he actual *status* is (or are) determined by the defendant"); Murphy, *in* Murphy & Katula *supra* note 28, at 111, 115 ("The issue in a given case is identified as that point at which an opponent takes an opposite view to one of the implied questions.").

158 Braet, *supra* note 138, at 83–84.

159 Nadeau, *supra* note 29, at 378, 385.

160 KENNEDY, NEW, *supra* note 23, at 209 ("Questions are capable of stasis if there are persons and acts to be judged (or at least one of these), if plausible arguments are available, and if the decision is uncertain. Otherwise the case is *asystaton*, not capable of stasis."); Nadeau, *supra* note 29, at 378 (assuming that the question to be judged must be "debatable").

161 Stanislaw Śnieżewski, *Rhetorical Theory in the Third Book of Quintilian's* Institutio Oratoria, 16 CLASSICA CRACOVIENSIA 113, 122 (2013) ("The first and strongest method of self-defence is denying the accusation").

162 Nadeau, *supra* note 29, at 392–93.

163 HERRICK, *supra* note 24, at 96; Hohmann, *supra* note 24, at 173, 180–82; *see* Heath, *supra* note 136, at 115 (claiming that "the analysis has a simpler structure when the question is conjectural" because there are three components: the prosecutor's claim and the defendant's counterclaim combine for a question for the jury to resolve).

the application of that law to the case.[164] Rather than contest the evidence, the defendant argues that a different law applies to the acts charged, so resolution of the question depends upon the determination of which law is most apt.[165] Cicero gives the example of a sacred object purloined from a house; assuming the defendant has a weak challenge to the evidence that he committed the act, he shifts the question to whether the act should be adjudged as theft or sacrilege.[166] "For when this question is asked, it will be necessary to define both theft and sacrilege, and to show by one's own description that the act in dispute should be called by a different name from that used by the opponents."[167] In contesting the plaintiff's cause of action, the defendant must give "a brief, clear and conventional definition," back it with examples and arguments that show how the act does not align with the plaintiff's cause of action, and then follow that by invalidation of the definition proffered by the plaintiff.[168] In arguing definition, the defendant highlights those things which were omitted in pleading, thus forcing the plaintiff to respond with a counterdefinition.[169]

2. The Stasis of Qualification: Justice, Honor, and the Four Legal Sub-Stases

Sometimes, "the preferred practices of our discipline" necessitate arguing an issue in a lower stasis.[170] Consider a situation "when we are confronted with unequivocal facts on the one hand and an unequivocal law indisputably applicable to those facts on the other," yet, from one party's perspective, "the legal result of this conjunction is unequivocally unjust."[171] This conflict about justice is normally not resolved at the conjectural or definitional level but instead at the third level, qualification.[172] Cicero subdivides qualitative issues into two categories, the equitable and the legal: "The equitable is that in which there is a question about the nature of justice and right or the reasonableness of reward or punishment. The legal is that in which we examine what the law is according to the custom of the community and according to

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164 *See* Nadeau, *supra* note 29, at 404 (writing that the stasis of definition starts with presentation-of-the-case, definition, and counterdefinition).

165 KRAUS, *supra* note 33, at 57 ("The goal of this issue is to find a different definition of the act."); Hohmann, *supra* note 24, at 183–85 (discussing arguments appropriate to the stasis of definition).

166 CICERO, *supra* note 29, at 25.

167 *Id.* at 25.

168 *Id.* at 219.

169 Nadeau, *supra* note 29, at 404.

170 Jeanne Fahnestock & Marie Secor, *The Stases in Scientific and Literary Argument*, 5 WRITTEN COMMUNICATION 426, 431 (1988).

171 Hohmann, *supra* note 24, at 182, 182 n.43; *see* Nadeau, *supra* note 29, at 393 ("However, if the thing to be judged is both obvious and perfect (defined), the way is open to inquiry into the quality (poiotēs) of the act; for example, into whether it is just or expedient").

172 Hohmann, *supra* note 24, at 182.

justice."[173] Accordingly, those arguing justice challenge the law itself by attempting to justify some deviation from it, either by asking the court to exercise its equitable powers because the law provides no remedy,[174] or by seeking repeal of the law, revising the standard of interpretation, or challenging its constitutionality.[175]

These arguments are not based on legal standards but instead on moral values, so opponents respond by dismissing such demands as "'mere morality,' devoid of *legal* force[.]"[176] But the lack of legal force goes to the heart of this ground: claimants argue qualification in many situations where existing law does not recognize the justification or excuse as legally relevant.[177] Indeed, equity was often placed above the letter of the law to "remove[] legal harshness" by allowing "new possibilities in the interpretation of legal texts in unusual and extraordinary cases."[178] In offering *topoi* for dealing with adverse law, rhetoricians recommended basing arguments on justice. For example, Aristotle advised advocates to "'appeal . . . to the principles of equity as representing a higher order of justice[.]'"[179] And Quintilian writes that "we can still point out that many accidental circumstances in trials may lead to an unfair decision[.]"[180]

Further, some issues and the accompanying arguments within the qualitative stasis do have a connection to the law. Hermagoras conceived of four legal questions that later theorists treated as specific types of qualitative issues: letter and intent, conflict of laws, inference, and ambiguity.[181] When the dispute involved a written document like wills, contracts, or the law itself, the impasse or stopping point often

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173 Cicero, *supra* note 29, at 131; *see* FROST, *supra* note 24, at 25 (discussing Cicero's subdivision); *see* GEORGE A. KENNEDY, ARISTOTLE*,* ON RHETORIC: A THEORY OF CIVIC DISCOURSE 273 n.230 (George A. Kennedy trans., 1991) [hereinafter KENNEDY, ARISTOTLE] (calling "justice" a "subdivision[] of stasis of quality").

174 KENNEDY, ARISTOTLE, *supra* note 173, at 99 n.237 (discussing Aristotle's use of *epieikes* in the discussion of just and unjust topics as an appeal to equity or fairness).

175 Hohmann, *supra* note 24, at 182, 190.

176 *Id.* at 190–93.

177 *Id.* at 191.

178 KRAUS, *supra* note 33, at 59. This concept of equity differs little from the contemporary Anglo-American understanding. *See, e.g.*, Samuel L. Bray, *The Supreme Court and the New Equity*, 68 VAND. L. REV. 997, 1005 (2015) (writing that plaintiffs must first show that they have no adequate remedy at law to obtain equitable relief); Thomas O. Main, *Traditional Equity and Contemporary Procedure*, 78 WASH. L. REV. 429, 496 (2003) ("Since its beginnings, equity has been the extraordinary justice administered to enlarge, supplant, or override strict law that has become too narrow and rigid in its scope.").

179 FROST, *supra* note 24, at 31 (quoting ARISTOTLE, THE RHETORIC OF ARISTOTLE 80 (Lane Cooper trans., 1960)); *see* KENNEDY, CLASSICAL, *supra* note 18, at 86 (writing that Aristotle classifies just and unjust actions as part of his topics for judicial oratory).

180 QUINTILIAN, *supra* note 29, at 329; *see* FROST, *supra* note 24, at 29 (using the term "unjust decisions" when discussing Quintilian).

181 Nadeau, *supra* note 29, at 378, 385–86; *see* Cicero, *supra* note 29, at 35 (listing the four legal stases); QUINTILIAN, *supra* note 29, at 93 (writing that the legal stases letter-and-spirit of the law and inference are based in the qualification stasis).

arose in one of these four legal stases.[182] Note that questions of legal interpretation could potentially arise under two stases: an advocate could use a law as part of definition and counterdefinition, but if the issue is the applicability or justice of the laws, that falls under the rubric of one of the legal questions as part of the stasis of quality.[183]

In letter and intent, one party argues that the law should be applied according to its exact words while the other directs his pleading to what the original framers meant.[184] Hermogenes gives the example of a man charged under a law that imposes the death penalty for a foreigner who mounts the city walls, but that man had mounted the wall in defense of the city and won high honors.[185] A defender of the letter of the law, particularly a statute, should praise its writers and implore the judge to "regard nothing except what is written."[186] One arguing intent "will sometimes show that the intent of the writer always had the same end in view and desired the same result, at other times he will show that the writer's purpose has to be modified to fit the occasion as a result of some act or event."[187] For some theorists like Quintilian, this stasis was "a crucial contact point between rhetoric and jurisprudence."[188]

For conflict of laws, two (or more) laws that are clear in isolation lead to contradictory results when applied to the case.[189] Hermogenes gives the example of a disinherited son who remains aboard a storm-tossed ship owned by his father, where one law gives possession of a storm-tossed ship to whoever remains aboard and another law forbids disinherited sons from sharing in the possessions of the father.[190] Each advocate must praise the law supporting his position and attack the one that does not.[191] Cicero recommends contrasting the laws to show

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182 Nadeau, *supra* note 29, at 394 (explaining that the legal stases "deal with things stated in writing," like "laws, wills, decrees, letters, proclamations, and all those things generally considered to be among written documents"); *see* Emanuele Berti, *Law in Declamation: The* Status Legales *in Senecan* Controversiae, *in* LAW AND ETHICS IN GREEK AND ROMAN DECLAMATION 7, 31 (Eugenio Amato et al. ed., 2015) (calling the legal stases "a definite theoretical framework in which to insert the treatment of every conceivable legal and juridical question, supplying its users with as complete a system of rules as possible and with a rigorous argumentative method").

183 KENNEDY, NEW, *supra* note 23, at 99; *see* Cicero, *supra* note 29, at 35, 37 (listing five issues that could arise in a dispute about the nature of a written document: the four legal stases and definition).

184 Cicero, *supra* note 29, at 291.

185 Nadeau, *supra* note 29, at 395.

186 Cicero, *supra* note 29, at 293.

187 *Id.* at 291.

188 Berti, *supra* note 182, at 30.

189 Nadeau, *supra* note 29, at 395 ("Conflict-of-laws ensues when two or more written statements, or one divided, are not opposites by nature but are at odds because of circumstances.").

190 *Id.*

191 Cicero, *supra* note 29, at 313 ("[E]ach litigant will be under the necessity of supporting his own law and attacking the one that conflicts.").

"which one deals with the most important matters, that is, the most expedient, honourable or necessary."[192]

The third legal stasis, inference, subdivides into two types, one for cases where "there is a partially pertinent norm" so that the advocate can "infer what is uncertain from what is certain," and another for cases in which no law covers the situation raised in the case so that the advocate must resort to an existing law to argue that the current case is analogous.[193] Examples of the former include reasoning from whole to part or part to whole, such as arguing whether a law forbidding taking a plough in pledge is violated when the creditor takes only the ploughshare, or whether a law forbidding the importation of wool is violated when one imports sheep.[194] An example of the latter is a law forbidding a person born of a female prostitute from addressing the assembly, so a challenger argues that the law prevents a proposed speaker who was sired by a male prostitute from speaking.[195] The one in support of extending the law can reason from analogy by praising application of the law in its established circumstances, highlighting how the established and current circumstances are similar, and then arguing that it is fair to apply the law to the current circumstances.[196] The one opposing the extension attacks the similarity of the two cases.[197]

The final legal stasis of ambiguity arose when an issue of grammar, punctuation, or spelling made a written statement subject to two or more meanings.[198] The example of Hermogenes is a law that, when a courtesan wears gold ornaments in public, they become the property of the state; this odd phrasing is ambiguous about whether the law makes the courtesan or the gold the state's property.[199] This issue was more of a problem for ancient rather than contemporary disputants because they wrote "without punctuation or spaces between words."[200]

3. The Stasis of Procedure: The Defendant Creates Multiple Issues by Shifting the Ground, but the Judge Chooses the Issue

The defendant's power to choose the stasis might matter most with the stasis of procedure because the defendant can try to prevent the court from considering the merits of the plaintiff's claim. Though listed

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192 *Id.*

193 Berti, *supra* note 182, at 22.

194 3 QUINTILIAN, THE ORATOR'S EDUCATION: BOOKS 6–8, at 277, 279 (Donald A. Russell ed. & trans., 2001).

195 Nadeau, *supra* note 29, at 395.

196 Cicero, *supra* note 29, at 319; *see* Nadeau, *supra* note 29, at 395 ("For an inference is the placing of an act which is not specifically cited beside an act which is so cited through one's bringing the unwritten point to bear on the same point as the written").

197 Cicero, *supra* note 29, at 319.

198 Nadeau, *supra* note 29, at 395 ("Ambiguity is a controversy on the letter as a result of accent or of separation of syllables.").

199 *Id.*

200 Davis, *supra* note 27, at 695.

last among the four grounds, procedure does not follow the progressive order of the three substantive grounds, so a party concedes nothing by arguing it.[201] The Roman rhetoricians called this the translative ground because it requires a transfer from one court to another or "shifts the ground" from the substantive claims raised in the lawsuit to the procedural issues in bringing the suit.[202] Classical rhetoricians like Cicero recognized numerous procedural arguments, such as:

> when the case depends on the circumstance that it appears that the right person does not bring the suit, or that he brings it against the wrong person, or before the wrong tribunal, or at a wrong time, under the wrong statute, or the wrong charge, or with a wrong penalty, the issue is called translative because the action seems to require a transfer to another court or alteration in the form of pleading.[203]

The defendant thus has the potential to shift the court's attention from the substantive dispute between the parties to the minutiae of the adjudication process itself.[204] The court consequently deliberates about technicalities of the case rather than the conjectural, definitional, or qualitative issues.[205] After all, "once a procedural obstacle has been raised, the substantive issues need no longer be discussed."[206] Because the court must satisfy itself that jurisdiction and other procedural

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[201] Braet, *supra* note 138, at 83; Smith, *supra* note 134, at 22; *see* Charles Marsh, *A Legal Semiotics Framework for Exploring the Origins of Hermagorean Stasis*, 25 INT'L J. SEMIOTICS L. 11, 14 (2012) (characterizing only the first three stasis grounds as hierarchical).

[202] Hohmann, *supra* note 24, at 176; *see* KENNEDY, CLASSICAL, *supra* note 18, at 121–22 (calling this ground "transference"); QUINTILIAN, *supra* note 29, at 91 ("If all these fail us, the last (and now the only) hope of safety lies in escaping by some helpful device of law from a charge which can neither be denied nor defended, in such a way as to make it seem that the legal action is not justifiable."); Nadeau, *supra* note 29, at 388 (writing that transference "is an objection on technical grounds not directly related to the act or motion").

[203] Cicero, *supra* note 29, at 23; *see id.* at 33 ("In the fourth issue which we call the translative there is a controversy when the question arises as to who ought to bring the action or against whom, or in what manner or before what court or under what law or at what time, and in general when there is some argument about changing or invalidating the form of procedure."); *id.* at 219–21 ("When it seems necessary to transfer the action to another court, or to make a change in procedure because the proper person does not bring the action, or it is not brought against the proper person or before the proper court, or under the proper statute, or with a proper request for penalty, or with the proper accusation, or at the proper time, the issue is called translative (or procedural)."); QUINTILIAN, *supra* note 29, at 85 ("'Could *he* bring this action? Against this man? Under this law? In this court? At this time?'"); Nadeau, *supra* note 29, at 396 (writing that the procedural objection "is a motion against immediate trial because of exception (to indictment) on the basis of the letter about which there is inquiry").

[204] Braet, *supra* note 138, at 86–87; *see* KRAUS, *supra* note 33, at 57 ("While the previous three issues concerned the event as heard in court (concerning the committed act, circumstances of this act, the accused person), the fourth issue assesses the case itself.").

[205] Cramer, *supra* note 26, at 316 (writing that procedure "shifts this perspective from a concern with the past context of the case to a concern with the present context of the deliberation about that case").

[206] Hohmann, *supra* note 24, at 176.

prerequisites are met before issuing a sanction, a solid procedural argument might prevail regardless of the strength of the plaintiff's substantive arguments.[207] If the defendant creates enough doubt about the judge's authority to decide the case, then the judge must dismiss.[208] A plaintiff can therefore lose without the court reaching the plaintiff's proposed ground because the other party shifts the point of stasis from the substantive to the procedural, from a dispute of facts or applicable law or injustice to a straightforward question of legal norms.[209]

While the defendant has the potential to define the issue, some critics write that the adjudicator checks this potential because the judge plays a more active role than merely assessing the strengths and weaknesses of each claim and defense: "the judge critically selects the material for the parameters of the debate."[210] More precisely, when the parties argue alternative grounds, the court chooses the issue by ruling on one of them.[211] While each level of stasis helps an advocate to see where it has the strongest argument, each also functions as a device for audience analysis and identification: "The author may stay in just one or two stases because that is where he or she can meet the intended audience, because that is where the audience's needs and interests lie, or because that is where they can be reached."[212] An argument at a lower stasis might thus "move its audience to evaluation or even to

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[207] Braet, *supra* note 138, at 86–88 (describing how each status has to be proved before the judge "feels obliged to impose a sanction," with the first status considered the procedural questions like the validity of the pleading and the jurisdiction of the court); Alan G. Gross, *Why Hermagoras Still Matters: The Fourth Stasis and Interdisciplinarity*, 23 RHETORIC REV. 141, 142 (2004) (characterizing the procedural stasis as "a stubborn problem" because, though listed last, "it is first in priority in the law: Before we can try a case, we must select the proper court.").

[208] KRAUS, *supra* note 33, at 57 (claiming that the procedure stasis "is initiated by the judge's doubts as to whether he is able to understand and decide the substance of the dispute (*an iure intendatur?*)."); Nadeau, *supra* note 29, at 395–96 (writing that a procedural objection is not concerned with questions of conjecture, definition, or quality "but this alone is in question—whether it is appropriate to be inquiring into any of those stases.").

[209] Hohmann, *supra* note 24, at 191 (writing that arguments based on legal norms "may often prove *practically* more effective" than demands based on moral tenets); *see* QUINTILIAN, *supra* note 29, at 83 (writing that a procedural issue in a legal case usually occurs when another issue occurs as well).

[210] Zemlicka & Matheson, *supra* note 26, at 34.

[211] Matheson, *supra* note 32, at 73 (2019) ("Stasis is determined retroactively as a point of organization negotiated not by parties to a debate, but by an audience that determines what matters."); A. Theodorakakou, *What Is at Issue in Argumentation? Judgment in the Hellenistic Doctrine of* Krinomenon, 19 ARGUMENTATION 239, 249 (2005) ("Judgment is effected *after* the issue of contingency has been posed by the dialectical relation of alternative identities."); Zemlicka & Matheson, *supra* note 26, at 35 (recognizing that debates are constructed backwards, which "shifts the onus of rhetorical presentation from the debaters to the adjudicating party").

[212] Fahnestock & Secor, *supra* note 170, at 430–31; *see* Braet, *supra* note 138, at 89 (claiming that formal proceedings have an element of subjectivity because parties can focus their arguments "to the personal idiosyncrasy of the adjudicator"); Fahnestock & Secor, *supra* note 170, at 430 (writing that "the chosen stasis of an argument can be one of the arguer's rhetorical moves in response to the particulars of audience and situation").

action" because the audience "values an inquiry at that level."[213] Some critics suggest that courts prefer stylized and repetitive arguments like those based on procedural issues.[214] Classical theorists viewed procedural arguments with disfavor, however, conceiving of them as mere "device[s] of law,"[215] with some even pushing procedural arguments outside of the stasis framework.[216] Further, one contemporary critic writes that framing a topic "as a neutral prompt for discussion represses the broader network of discourse and the affective commitments that give rise to any particular enunciation."[217] By contrast, appeals to moral norms like those in the qualitative stasis have persuasive force, including with juries and even some judges who may be moved more by nonlegal rhetoric than by legalistic proofs.[218] An advocate who reflects "larger social discourses" can achieve cathexis, the "attachment or investment" that an audience feels to "connect[] to some point of decision in a debate."[219] Success may therefore depend more on the advocate's "art and energy" to engage the judge than on the "mechanical use of techniques[.]"[220]

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213 Fahnestock & Secor, *supra* note 170, at 431–32.

214 Sarat & Kearns, *supra* note 7, at 12 (claiming that the law prefers repetitive, stylized arguments); *see, e.g.*, PERELMAN, *JUSTICE*, *supra* note 18, at 122 (claiming that "one of the characteristics of law is . . . provid[ing] procedures to which conformity is necessary if we are to arrive at a valid . . . judicial decision "); King, *supra* note 9, at 361 (calling judges in climate change cases "institutionally handicapped"); Kysar, *supra* note 2, at 4 (claiming that courts have "ample . . . doctrinal weaponry" to keep complex climate change suits from going forward).

215 QUINTILIAN, *supra* note 29, at 91 ("If all these fail us, the last (and now the only) hope of safety lies in escaping by some helpful device of law for a charge which can neither be denied nor defended, in such a way as to make it seem that the legal action is not justifiable").

216 Berti, *supra* note 182, at 8 n.5 ("But the position of the *translatio* in *status*-theory was highly controversial, and it was sometimes incorporated into the *status legales*, whereas other rhetoricians brought into question its existence as an independent *status*.") (internal citations omitted)).

217 Matheson, *supra* note 32, at 72.

218 Hohmann, *supra* note 24, at 191; Wetlaufer, *supra* note 7, at 1592–93; *see* KENNEDY, NEW, *supra* note 23, at 100 (proclaiming that "the most important quality would be the justice or injustice of an action"); QUINTILIAN, *supra* note 29, at 91 (calling qualification the "most honorable" stasis).

219 Matheson, *supra* note 32, at 73; *see id.* at 74 ("An understanding of stasis in relation to affect and desire should then help to explain how audiences bind themselves to speakers in ways that a logical-propositional model of stasis might miss.").

220 James J. Murphy & Prentice A. Meador, Jr., *Quintilian's Educational and Rhetorical Theory. With a Synopsis of His* Institutio Oratoria, *in* A SYNOPTIC HISTORY OF CLASSICAL RHETORIC 177, 194 (James J. Murphy & Richard A. Katula eds., 2d ed. 1995); *see* Matheson, *supra* note 32, at 72 (writing that "affective attachments . . . bind [some] . . . audiences together and cause some signifiers to shine, while others recede into the dark"); *id.* at 75 (suggesting that stasis "might tell us something about the affective connections between audience and rhetor and the economy of desire that sustains them"); Theodorakakou, *supra* note 211, at 247 ("Judgment is *performed* by inquiry of an issue that manifests the manifest difference between a question and an answer.").

IV. STASIS THEORY APPLIED TO ENVIRONMENTAL JUSTICE LITIGATION

The identity of the environmental justice movement is one of conflict, both in the sense of a struggle against polluters and of opposition to the legal status quo that disempowers the poor, minorities, and indigenous peoples.[221] With its connection to boxing and wrestling, stasis theory shares this combative spirit.[222] Stasis does not approach the contest as a wild melee but instead as a sport that requires calculation before even entering the arena.[223] By considering not only offensive moves but also defensive counters to the opponent's most likely attack as well as the judge's perspective, a party can determine the fighting stance that gives the best odds of winning.[224] As this Part shows, for environmental justice plaintiffs in complex litigation, this often means conceding the preferred higher ground of conjecture and fighting on the lower ground of qualification.[225] As demonstrated by an explication of the motions to dismiss in two similar climate justice cases, the plaintiffs' failure to concede a weak conjectural ground in favor of qualification leaves a court little choice but to dismiss on procedural grounds, while framing the issue as qualification allows plaintiffs to tell their compelling story of injustice and thereby create a connection with the judge to correct it.

A. A Weak Conjectural Argument Lets Defendants Win Dismissal by Shifting the Ground to Procedure: Native Village of Kivalina v. ExxonMobil Corp.

Climate change is destroying the barrier reef that protects the Native Village of Kivalina and Town of Kivalina (collectively "Kivalina") from harsh winter storms.[226] Kivalina therefore sued twenty-four oil and utility companies that emit high levels of GHGs, seeking money damages to cover relocation costs.[227] They alleged federal common law nuisance, state law public and private nuisance, civil conspiracy, and concert of action.[228] The defendants filed five motions to dismiss that focused primarily on the federal common law nuisance claim: they argued that, under Rule 12(b)(1), this cause of action raised non-justiciable political questions and that the court lacked Article III standing; and that, under Rule 12(b)(6), the plaintiffs failed to state a

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221 *See supra* note 42 and accompanying text; Roesler, *supra* note 88, at 231 (writing that today's calls for environmental justice are shaped by a history of opposition to both law and mainstream environmentalism).

222 KRAUS, *supra* note 33, at 56; Hohmann, *supra* note 24, at 171.

223 *See* Rivière, *supra* note 133, at 86.

224 *See supra* notes 134–38 and accompanying text.

225 *See supra* notes 141–50 and accompanying text (describing the difference between conjecture and qualification).

226 *Native Vill. of Kivalina,* 663 F. Supp. 2d 863, 868–69 (N.D. Cal. 2009).

227 *Id.* at 868.

228 *Id.* at 869.

claim and that the CAA has displaced common law nuisance for climate-related claims.[229] Judge Saundra Brown Armstrong dismissed the federal nuisance claim under Rule 12(b)(1), finding that there were no judicially discoverable and manageable standards, and that the court would have to make "an initial policy determination of a kind clearly for nonjudicial discretion."[230] The court also found that it lacked standing because the harms alleged were not "fairly traceable" to the defendants.[231] The court did not reach the Rule 12(b)(6) arguments; further, it declined to exercise supplemental jurisdiction over the state law claims.[232]

Applying stasis theory shows that Kivalina did not give itself a chance to win because it assumed a fighting stance in the stasis of conjecture, a level where the dispute is factual, and the law is uncontested. Given the novelty of applying federal common law nuisance to a complex issue like climate change, this framing ignored the justiciability concerns of the judge. Justiciability questions arise in the stasis of procedure, so defendants conceded nothing by shifting the ground from the substantive issue of liability to the policy question of whether the political or judicial branches should address the problem. By assuming certainty in an uncertain law, Kivalina left Judge Armstrong with little choice but to dismiss.

Kivalina set the main issue as conjectural, as an evidentiary dispute about whether defendants should be held liable under settled law.[233] The near-seventy-page complaint appeals to logic rather than emotion by building an argument grounded in scientific data rather than human impacts. Kivalina devotes over a third of the complaint to listing each corporate defendant and its subsidiaries (if any), providing a statistic or two about the emissions of each entity, and then asserting that the emissions are managed or controlled by the entity and its agents.[234] Nine data-intensive pages about global warming follow.[235]

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229 *Id.* at 870. The defendants also challenged the state law claims. *See* Notice of Motion & Motion of Certain Oil Co. Defendants to Dismiss Plaintiffs' Complaint Pursuant to Fed. R. Civ. P. 12(b)(6), at 4–5, Native Vill. of Kivalina v. ExxonMobil Corp., 663 F. Supp. 2d 863 (N.D. Cal. 2009) (No. 08-cv-1138-SBA), 2008 WL 2675873; Memorandum of Points & Authorities at 20–21, Native Vill. of Kivalina v. ExxonMobil Corp., 663 F. Supp. 2d 863 (N.D. Cal. 2009) (No. 08-cv-1138-SBA) [hereinafter Oil Co. 12(b)(6) Motion]; Util. Defendants' Motion to Dismiss at 35–43, Native Vill. of Kivalina v. ExxonMobil Corp., 663 F. Supp. 2d 863 (N.D. Cal. 2009) (No. 08-cv-1138-SBA), 2008 WL 2675877 [hereinafter Utility Defendants' Motion].

230 *Native Vill. of Kivalina*, 663 F. Supp. 2d at 873–76 (quoting *Baker*, 369 U.S. 186, 217 (1962) (citing Alperin v. Vatican Bank, 410 F.3d 532, 552 (9th Cir. 2005)).

231 *Id.* at 877–82 (citing, *inter alia*, Sprint Commc'n Co., L.P. v. APCC Servs., Inc., 554 U.S. 269 (2008); Bennett v. Spear, 520 U.S. 154, 167 (1997)).

232 *Id.* at 882–83 (citing 28 U.S.C. § 1367(c)(3); Imagineering, Inc. v. Kiewit Paci. Co., 976 F.2d 1303, 1309 (9th Cir. 1992)).

233 *See supra* notes 141–42, 145–46 and accompanying text (explaining that conjecture is an evidentiary dispute).

234 Complaint for Damages Demand for Jury Trial at 5–30, Native Vill. of Kivalina v. ExxonMobil Corp., 663 F. Supp. 2d 863 (N.D. Cal. 2009) (No. 08-cv-01138-SBA), 2008 WL

This is part scientific treatise that explains how carbon dioxide and methane emissions cause warmer temperatures and sea-level rise.[236] It is also part history lesson, with a catalogue of scientific studies dating back to 1896 about the detrimental impacts of increased GHG emissions.[237] Percentages and statistics dominate the discussion: carbon dioxide levels have increased 35% since the industrial revolution, methane is 250% higher than pre-industrial levels, "[t]he eight warmest years in the instrumental record of global surface temperature . . . all occurred since 1998," the total temperature increase from the late 1800s to the early 2000s is 1.4 degrees Fahrenheit, and "Alaska warmed 3.4 degrees Fahrenheit during the period 1949 to 2006 and 6.3 degrees F in the wintertime."[238] Having painted the broad-strokes portrait of climate change and its effects, Kivalina then fills in the twenty-four defendants' outsized contributions with a similarly detailed recitation of their GHG emissions[239] and the specific harm that climate change will have on the Town and Village.[240]

This fact-intensive structure undergirds a straightforward claim that Kivalina can prove every element of federal common law nuisance: "Defendants' emissions of carbon dioxide and other greenhouse gases, by contributing to global warming, constitute a substantial and unreasonable interference with public rights, including, *inter alia*, the rights to use and enjoy public and private property in Kivalina."[241] The complaint continues, "Defendants' greenhouse gas emissions are a direct and proximate contributing cause of global warming and of the injuries and threatened injuries Plaintiffs suffer."[242] The injuries include "lost property value and revenue, including millions of dollars of funds necessary to relocate the entire community due to the harms caused by

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594713 [hereinafter *Kivalina* Complaint]; *see, e.g., id.* at 5–7 (listing BP p.l.c. entities that include BP America, Inc., which emitted 39.4 million tons of carbon dioxide in the U.S. in 2005 and 65 million tons of carbon dioxide equivalent greenhouse gases in 2006); *id.* at 7 (writing that Chevron U.S.A. Inc., a wholly owned subsidiary of Chevron Corporation, "emitted 68 million tons of carbon dioxide equivalent" in 2006); *id.* at 8–9 (claiming that ConocoPhillips Company's 2006 emissions were 62.3 million tons of carbon dioxide and subdividing that total into exploration and refining and marketing).

235 *Id.* at 31–39.

236 *Id.* at 31–32.

237 *Kivalina* Complaint, *supra* note 234, at 33–39 (referencing, *inter alia*, the 1896 calculations of Swedish chemist Svante Arrhenius, the 1956 paper from scientist Gilbert Plass in *American Scientist*, the First Annual Report of the U.S. Council on Environmental Quality in 1970, a 1979 report from the National Academy of Sciences predicting 2.7- to 8-degree Fahrenheit increase in global average temperature, the 1988 establishment of the Intergovernmental Panel on Climate Change and its subsequent reports, and the 2001 U.S. National Academy of Sciences report commissioned by the White House that confirmed that human activity was causing global warming).

238 *Id.* at 31–32.

239 *Id.* at 39–44 (describing the carbon dioxide emissions of the oil company defendants and power company defendants as well as the methane emissions of Peabody Coal).

240 *Id.* at 45–46.

241 *Id.* at 62–64.

242 *Id.* at 63.

global warming," so the defendants "are jointly and severally liable to Kivalina under the federal common law of public nuisance."[243]

This conjectural assertion requires that the law upon which Kivalina relies is both unquestionably settled and applicable.[244] For example, Kivalina opens the opposition to the motions to dismiss by calling the defendants' actions "a classic public nuisance" so that the defendants should be held jointly and severally liable "[u]nder blackletter law."[245] Kivalina continues that the case is brought "under the well-established *federal* common law of public nuisance" and similar to cases where one state challenged another for pathogens in sewage or flooding attributable to activities in that other state.[246] Further, the complaint "is grounded in a long line of multiple polluter cases" so that they have properly pled federal nuisance.[247] In short, Kivalina rejects the lower stasis of qualification—and the four legal substases—by claiming that, because there already exists a federal common law nuisance that applies to GHG emissions, "there is nothing new to create."[248]

This rejection is also reflected by what Kivalina does not say. Qualification is a stasis that includes appeals to justice,[249] yet variants on the words "justice" and "fairness" appear in the complaint and the opposition to the motions to dismiss only in passing.[250] Indeed, Kivalina seems intent on eschewing any emotional appeals and avoiding telling a story of distributive injustice. References to indigenous peoples are in the same dry language as the scientific data about climate change: the Native Village of Kivalina is a federally-recognized Indian tribe, and

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243 *Kivalina* Complaint, *supra* note 234, at 64.

244 *See supra* notes 162–64 and accompanying text (describing how a dispute of facts means that there should be no dispute as to the applicable law and that defendants can contest application of the plaintiffs' proposed legal rule to the facts as alleged).

245 Plaintiffs' Consolidated Memorandum of Points and Authorities in Opposition to Defendants' Motions to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6) at 2, Native Vill. of Kivalina v. ExxonMobil Corp., 663 F. Supp. 2d 863 (N.D. Cal. 2009) (No. 08-cv-01138-SBA) [hereinafter *Kivalina* Plaintiffs' Opposition].

246 *Id.* at 3; *see id.* at 30–32 (citing, *inter alia*, Missouri v. Illinois, 200 U.S. 496 (1906); North Dakota v. Minnesota, 263 U.S. 365 (1923)).

247 *Id.* at 17.

248 *Id.* at 21; *see supra* notes 163–89 and accompanying text (describing the stasis of qualification as raising issues about the law itself and detailing the four legal stases that are part of it).

249 *See supra* notes 161–64 and accompanying text.

250 *See Kivalina* Complaint, *supra* note 234, at 38 (quoting Hearing before the House Committee on Energy and Commerce, 109th Cong. (July 27, 2006)) ("In fact, it is fair to say that global warming may be the most carefully and fully studied scientific topic in human history."); *Kivalina* Plaintiffs' Opposition, *supra* note 245, at 92 (arguing that defendant Peabody Coal mischaracterizes a court's holding that included the word "justice"). The stasis of qualification is also where a party appeals to equity, but the plaintiffs distinguished nuisance cases for money damages versus those for equity as a strategy to avoid dismissal on justiciability grounds. *Id.* at 29; *see also id.* at 38–39 (discussing Nineteenth Century equity cases that led to development of modern joint-and-several liability principles).

Inupiat make up 97 percent of the population of the Town of Kivalina.[251] While it calls the Native Village of Kivalina "a traditional Inupiat village" and uses the term "culture,"[252] the complaint offers no description of traditional practices or details about that culture, no reference to whales or caribou, and no use of the word "subsistence." The complaint states that the entire community must be relocated because of the loss of land and buildings; however, it does not link that place with a unique cultural identity.[253] Even when Kivalina comes close to arguing climate injustice, the dispassionate phrasing reinforces, rather than challenges, the legal status quo: "Plaintiffs, due in part to their way of life, contribute very little to global warming. Defendants, individually and collectively, are substantial contributors to global warming and to the injuries and threatened injuries Kivalina claims in this action."[254]

In assuming a fighting stance in conjecture, Kivalina needed a solid ground upon which to stand: this issue had to be the one that the court was most likely to rule upon, and the defendants needed to think that their strongest arguments lay in rebutting the factual claims.[255] After all, plaintiffs typically do not set the stasis, but defendants do by their response to the complaint.[256] Rather than answer the complaint and thus agree to the stasis of conjecture, the defendants moved to dismiss for two alternate grounds. The first was that common law nuisance does not allow for recovery because, through the CAA, Congress has displaced federal common law nuisance for GHG emissions.[257] By asserting that a different law applies to the facts as alleged, this argument drops the issue from the stasis of conjecture to that of definition.[258] The second ground was that the doctrines of standing and political question deprive the court of jurisdiction.[259] Justiciability doctrines are threshold questions,[260] so the court had to rule on these before deciding displacement. The defendants therefore shifted the ground from substance to procedure by urging the court to rule that only the political, rather than the judicial, branch had authority to grant relief and therefore the court should stop short of even considering

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251 *Kivalina* Complaint, *supra* note 234, at 4.

252 *Id.*

253 *Id.* at 5.

254 *Id.* at 63–64; *see also id.* at 46 ("Plaintiffs are discrete and identifiable entities that have contributed little or nothing to global warming. The impact of global warming on Plaintiffs is more certain and severe than on others in the general population.").

255 *See supra* notes 118–60 and accompanying text.

256 *See supra* notes 156–59 and accompanying text.

257 Oil Co. Defendants' 12(b)(6) Motion, *supra* note 229, at 16–20; Utility Defendants Motion, *supra* note 229, at 27–28.

258 *See supra* notes 135–36, 153–58 and accompanying text.

259 Oil Co. 12(b)(6) Motion, *supra* note 229, at 2–4.; Utility Defendants Motion, *supra* note 229, at 9–11.

260 *Native Vill. of Kivalina*, 663 F. Supp. 2d 863, 870 (N.D. Cal. 2009).

whether nuisance is broad and flexible enough to allow for damages related to GHG emissions.[261]

While classical theorists and modern scholars share a disdain for procedural arguments,[262] they also recognize that courts hesitate to venture into controversial or political issues.[263] Climate change plaintiffs face two "immovable hurdles" when arguing nuisance: proving that the emissions "unreasonably interfered" with a public right, and that the defendants' emissions were the proximate cause of harm.[264] The plaintiffs tried to clear these hurdles by urging the court to take a "fresh look" at the errors in the application of political question and standing in other climate change cases.[265] A second look will not lead to a different result, however, if plaintiffs fail to provide the court sufficient reasons to justify departing from or changing the legal status quo.[266] Because they had asserted that the law was settled as part of making their conjectural arguments, the plaintiffs gave the court nothing to counter the doubts raised by the defendants.[267] Indeed, throughout the analysis, Judge Armstrong faults the plaintiffs for ignoring or overlooking important considerations or failing to articulate reasons for her to rule differently.[268]

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261 Oil Co. 12(b)(1) Motion, *supra* note 259, at 4, ("It is not the province of the courts to intermeddle in these efforts [political branch approaches to combatting climate change] when the strictures of Article III are not met."); Utility Defendants' Motion, *supra* note 229, at 2 ("This Court cannot decide the question of fault that lies at the heart of this case without making normative policy decisions that courts have neither the constitutional authority, institutional competence, nor manageable standards to address."); *see supra* notes 202–10 and accompanying text (explaining how the stasis of procedure shifts the ground away from plaintiffs' substantive claims to technical questions like jurisdiction); *see also* King, *supra* note 9, at 354–55 (characterizing nuisance as "capacious" and a "catchall" and a "miscellany category" that is "able to contain a wide range of annoyances" so that "nuisance law serves as an entrance for problems that are so new that they have no established place in the law").

262 *Compare supra* notes 92–94, 110 and accompanying text (describing the disfavor of courts and commentators toward justiciability doctrines and the Rule 12(b)(6) motion), *with supra* notes 204–05 and accompanying text (describing the disdain of classical theorists toward the stasis of procedure).

263 Little, *supra* note 6, at 102–03, 135; Weaver & Kysar, *supra* note 6, at 329.

264 Schwartz et.al., *supra* note 98, at 825–26; *see* Kysar, *supra* note 2, at 29–41 (discussing why "[t]he most significant challenge for climate change tort suits lies in proving causation"); Jan McDonald, *Paying the Price of Adaptation: Compensation for Climate Change Impacts*, *in* ADAPTATION TO CLIMATE CHANGE LAW AND POLICY 234, 242–43 (Tim Bonyhady, Andrew Macintosh, & Jan McDonald eds., 2010) (recognizing two problems in tort lawsuits against greenhouse gas emitters as the number of defendants and proving the causal connection of emissions and harm).

265 *Kivalina* Plaintiffs' Opposition, *supra* note 245, at 5.

266 *See* Todd, *Sense*, *supra* note 4, at 209.

267 *See* MACCORMICK, *supra* note 14, at 148–49 (writing that a ruling requires a justification); Todd, *Sense*, *supra* note 4, at 211 ("The typical grounds for dismissal give judges sufficient leeway to rule for plaintiffs—assuming that the plaintiffs furnish sufficient reasons for the judge to justify a departure from the status quo.").

268 *Native Vill. of Kivalina*, 663 F. Supp. 2d. 863, 874 (N.D. Cal. 2009) ("However, the flaw in Plaintiffs' argument is that it overlooks that the evaluation of a nuisance claim is not focused entirely on the unreasonableness of the harm."); *id.* at 875 ("Plaintiffs ignore

For the political question doctrine, the second *Baker* factor requires an inquiry into whether there is a lack of discoverable and manageable standards.[269] Kivalina argued that the standards "are the same as they are in all nuisance cases."[270] The court countered that public nuisance is defined as an "unreasonable interference," which under the *Restatement (Second) of Torts* requires the factfinder to weigh "'the gravity of the harm against the utility of the conduct.'"[271] The jury would have to assess reasonableness by balancing the utility and benefit of energy and transportation-related GHG emissions against the gravity of the harm.[272] The court wrote, "Plaintiffs ignore this aspect of their claim and otherwise fail to articulate any particular judicially discoverable and manageable standards that would guide a factfinder in rendering a decision that is principled, rational, and based upon reasoned distinctions."[273] The court found that application of the third *Baker* factor—whether the judiciary can decide the case "without an initial policy determination of a kind clearly for nonjudicial discretion"[274]—warranted dismissal for the same reason: "the resolution of Plaintiffs' nuisance claim requires balancing the social utility of Defendants' conduct with the harm it inflicts."[275]

Judge Armstrong also ruled that dismissal was appropriate because the plaintiffs lacked standing.[276] The second *Lujan* factor requires that the alleged harm be "fairly traceable" to the defendants.[277] Environmental justice plaintiffs already have a difficult time proving causation when multiple entities operate in the same area.[278] Climate change cases amplify the problem: GHG emissions come from natural sources like volcanoes and the ocean-atmosphere exchange, plus both industrial defendants as well as non-industrial entities emit anthropogenic GHGs.[279] The plaintiffs therefore cited cases brought under the Clean Water Act (CWA) to argue that they needed only to

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this aspect of their claim and otherwise fail to articulate any particular judicially discoverable and manageable standards that would guide a factfinder in rendering a decision that is principled, rational, and based upon reasoned distinctions."); *id.* at 876 (writing that "neither Plaintiffs nor *AEP* offers any guidance as to precisely what judicially discoverable and manageable standards are to be employed in resolving the claims at issue."); *id.* at 876–77 ("Plaintiffs also fail to confront the fact that resolution of their nuisance claim requires the judiciary to make a policy decision about *who* should bear the cost of global warming.").

269 *Baker*, 369 U.S. 186, 226 (1962).

270 *Kivalina* Plaintiffs' Opposition, *supra* note 245, at 63.

271 *Native Vill. of Kivalina*, 663 F. Supp. 2d at 874 (citing RESTATEMENT (SECOND) OF TORTS § 821(b)(1), § 821 cmt. e (1979)).

272 *Id.* at 874–75; *see* Alex Geisinger, *The Benefits of Development and Environmental Injustice*, 37 COLUM. J. ENVTL. L. 205, 207 (2012); Schwartz et al., *supra* note 98, at 828.

273 *Native Vill. of Kivalina*, 663 F. Supp. 2d at 875.

274 *Baker*, 369 U.S. at 217.

275 *Native Vill. of Kivalina*, 663 F. Supp. 2d at 876.

276 *Id.* at 883.

277 *Lujan*, 504 U.S. 555, 560 (1992).

278 *See supra* notes 46–50 and accompanying text.

279 Schwartz et al., *supra* note 98, at 835.

allege that the defendants contributed to their injuries to show that the harm is fairly traceable to their emissions.[280] The court ruled these water pollution cases inapplicable because the CWA imposes statutory limits on discharges of effluents while no statute limits the emission of GHGs.[281] Judge Armstrong may have had no desire to push the status quo, as suggested by her hypothetical that, even if the contribution theory applied, plaintiffs would still lose because they could not show that the "seed" of their injury can be traced to any one defendant.[282] But plaintiffs themselves did not go that far: after characterizing their nuisance claim as settled black-letter law in the Introduction to their opposition brief, they later contradict themselves by having to borrow from cases applying federal statutes to establish causation.[283] In other words, the plaintiffs tried to have it both ways: they framed their case as a factual issue resolvable under settled common law nuisance, but the only authority they cite for imposing liability on defendants whose activities contribute to an aggregation of substances that cause harm is caselaw applying environmental statutes.[284] Instead of reassuring the judge, this argument reinforced the defendants' contention that relief for Kivalina lay in the Congressional statutory scheme rather than with judicial action.[285]

B. Surviving and Thriving by Assuming a Fighting Stance in the Lower Stasis of Qualification: Juliana v. United States

Several young people, along with the environmental activist association, Earth Guardians, and Dr. James Hansen, as guardian for future generations, sued the United States, the President, and numerous executive agencies.[286] The plaintiffs alleged that the U.S. government has known about the dangers of climate change yet

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[280] *Kivalina* Plaintiffs' Opposition, *supra* note 245, at 98–99 (citing, *inter alia*, Pub. Interest Research Grp. Of N.J. v. Powell Duffryn Terminals, Inc., 913 F.2d 64, 72 (3d Cir. 1990)).

[281] *Native Vill. of Kivalina*, 663 F. Supp. 2d 863, 879–80 (N.D. Cal. 2009). Similarly, Judge Armstrong also held that "the *Powell Duffryn* test simply has no application in this case given the remoteness of the injury claim." *Id.* at 881.

[282] *Id.* at 880–81 (citing Texas Indep. Producers & Royalty Owners Ass'n v. U.S. Envtl. Prot. Agency, 410 F.3d 964, 974 (5th Cir. 2005)); *see* PEEL & OSOFSKY, *supra* note 2, at 262 (recounting the opinion of climate change advocates who recognize that some receptive judges engage the scientific evidence while other judges are "reluctant to embrace a new, and potentially difficult, area" and thus focus on standing and political question).

[283] *Compare Kivalina* Plaintiffs' Opposition, *supra* note 245, at 2–3 (characterizing their federal common law nuisance claim as "blackletter law" and "well-established), *with id.* at 98–99 ("Yet there is no reason to assume that the presence of a statutory scheme in those cases limits the rule that plaintiffs need only show contribution in CWA actions alone.").

[284] *Id.* at 97–98.

[285] *See* QUINTILIAN, *supra* note 29, at 25 (writing that a lack of judgment can lead an orator to make "inconsistent, ambivalent, or foolish arguments"); Smith, *supra* note 134, at 23 (writing that inconsistent arguments harm the advocate's credibility).

[286] *Juliana*, 217 F. Supp. 3d 1224, 1233 (D. Or. 2016).

"permitted, encouraged, and otherwise enabled continued exploitation, production, and combustion of fossil fuels," thus endangering the plaintiffs.[287] They sought a declaration and related equitable relief for the government's violation of their substantive due process rights to life, liberty, and property as well as the government's obligation to hold natural resources in trust for the people and for future generations.[288] The defendants, joined by trade association intervenors, moved to dismiss under the political question doctrine and for lack of standing as well as failure to state a claim because the plaintiffs did not identify a particular right and the public trust doctrine does not apply to the case.[289]

Reviewing *de novo* the magistrate judge's Findings and Recommendation ("F&R"), District Court Judge Ann Aiken adopted and elaborated on the F&R and denied the motions.[290] While the claims related to political issues and called for complex remedies, she concluded that, "[a]t its heart," the lawsuit asked for a determination of the violation of constitutional rights, a question "squarely within the purview of the judiciary."[291] Turning to standing, Judge Aiken found that each factor from *Lujan* was satisfied because the plaintiffs alleged individualized harms, created a causal chain linking governmental policies to that harm, and requested injunctive relief that would at least partially redress their injuries.[292] For the Rule 12(b)(6) challenges, Judge Aiken exercised her "reasoned judgment" to rule "that the right to a climate system capable of sustaining human life is fundamental to a free and ordered society."[293] She also found that the atmosphere is a public trust asset, the federal government has public trust obligations, common law public trust claims have not been displaced by federal statutes, and the Fifth Amendment allows for enforcement of violations of the public trust.[294]

If the *Juliana* plaintiffs had followed the *Kivalina* plaintiffs by framing the issue as conjectural—as a factual dispute based upon settled law—then their case likely would have ended with a similarly early dismissal. The due process and public trust doctrine causes of

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287 *Id.* (quoting First Amended Complaint for Declaratory and Injunctive Relief ¶¶ 1, 5, 217 F. Supp. 3d 1224 (D. Or. 2016) (No. 6:15-cv-1517-TC) [hereinafter *Juliana* Complaint]).

288 *Id.* The plaintiffs also sought relief for violation of equal protection principles under the Fifth Amendment and the unenumerated rights preserved for the people by the Ninth Amendment. *Juliana* Complaint, *supra* note 287, 88–92; *see* U.S. CONST. amends. V, IX.

289 *Juliana*, 217 F. Supp. 3d at 1233, 1235, 1248, 1254–55. The intervenors were the National Association of Manufacturers, the American Fuel & Petrochemical Manufacturers, and the American Petroleum Institute. *Id.* at 1233.

290 *Id.* at 1233–35 (citing FED. R. CIV. P. 72(b)(3); McDonnell Douglas Corp. v. Commodore Bus. Machs., Inc., 656 F.2d 1309, 1313 (9th Cir. 1981)). The opinion reproduces Magistrate Judge Coffins F&R in full. *Id.* at 1263–76.

291 *Id.* at 1241.

292 *Id.* at 1242–48 (citing *Lujan*, 504 U.S. 555, 560 (1992)).

293 *Id.* at 1250.

294 *Id.* at 1252–61.

action are both questionable. Environmental justice communities have often turned to the Constitution to link environmental harms with fundamental human rights,[295] but courts have rejected equal protection lawsuits and found no enforceable right when plaintiffs have invoked Title VI and § 1983,[296] including the Ninth Circuit where *Juliana* was filed.[297] Judge Aiken even remarked how the absence of a right would mean dismissal under the deferential rational basis test.[298] And the public trust doctrine, like nuisance, is centuries old, but it has been applied in limited circumstances, so using it to address "a decidedly modern—indeed unprecedented—global threat" is a stretch.[299] The government's attempt to shift the ground to the stasis of procedure therefore seemed as strong as the *Kivalina* defendants', yet the *Juliana* plaintiffs not only survived the motion to dismiss but managed to fight on for four years, with the trial and appellate courts rejecting multiple motions and petitions from the defendants,[300] until the Circuit Court in a split decision finally ruled that the case should be dismissed.[301] Along the way, the plaintiffs managed to land several key blows for their cause: the trial court recognized a new right to a climate system capable of sustaining human life,[302] the opinion denying dismissal has been cited favorably by other courts,[303] they have received extensive coverage in electronic and print media,[304] and Judge Josephine L. Staton's

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295 *E.g.*, Badrinarayana, *supra* note 10, at 83–87.

296 *See supra* notes 64–68 and accompanying text.

297 *See* Save Our Valley v. Sound Transit, 335 F.3d 932, 939 (9th Cir. 2003) (holding "that agency regulations cannot independently create rights enforceable through § 1983").

298 *Juliana*, 217 F. Supp. 3d 1224, 1248–49 (D. Or. 2016).

299 Blumm & Wood, *supra* note 22, at 42; *see* Carolyn Kelly, *Where the Water Meets the Sky: How an Unbroken Line of Precedent from Justinian to* Juliana *Supports the Possibility of a Federal Atmospheric Public Trust Doctrine*, 27 N.Y.U. ENVTL. L.J. 183 *passim* (2019) (discussing the history of the public trust doctrine and its expansion in U.S. courts and arguing for the recognition of a federal atmospheric public trust doctrine).

300 Juliana v. United States, 339 F. Supp. 3d 1062, 1073–75, 1105 (D. Or. 2018) (recounting the procedural history that includes the district and circuit courts denying several motions brought by the defendants seeking, *inter alia*, interlocutory appeal, a writ of mandamus, and judgment on the pleadings and for summary judgment).

301 Juliana v. United States, 947 F.3d 1159, 1175 (9th Cir. 2020). The appeal was the result of an interlocutory appeal that the Ninth Circuit granted in a 2-1 decision. Order at 4, Juliana v. United States, 947 F.3d 1159 (9th Cir. 2020), (No. 18-80176), at *4 (9th Cir. Dec. 28, 2018) (granting interlocutory appeal); Juliana v. United States (No. 6:15-cv-01517-AA) 2018 WL 6303774, at *3 (D. Or. Nov. 21, 2018) (certifying case for interlocutory appeal and staying proceedings); *see generally* John Schwartz, *Judges Give Both Sides a Grilling in Youth Climate Case Against the Government*, N.Y. TIMES (June 4, 2019), https://perma.cc/5Y9J-H7NT.

302 *Juliana*, 217 F. Supp. 3d at 1250.

303 *E.g.*, In the Matter of Conservation Dist. Use Application HA-3568, 431 P.3d 752, 801 n.12 (Haw. 2018) (Wilson, J., dissenting) (citing *Juliana*, 217 F. Supp. 3d at 1233, 1267); Jowers v. S.C. Dep't of Health & Envtl. Control, 815 S.E.2d 446, 460 (S.C. 2018) (Hearn, J., concurring in part and dissenting in part) (citing *Juliana*, 217 F. Supp. 3d at 1254).

304 Molodanof & Durney, *supra* note 22, at 216 (listing media coverage on CNN, *Slate*, and *National Geographic*). In addition, every filing and opinion in the lawsuit is posted on

emotional dissent from the Ninth Circuit opinion finding lack of standing not only highlights the need for justice but also explains the soundness of plaintiffs' standing, their articulation of the Constitutional claims, and the sufficiency of their evidence for trial.[305]

Unlike the *Kivalina* plaintiffs, the *Juliana* plaintiffs assumed a fighting stance in the stasis of qualification by telling the court about distributive injustice, replete with personal narratives that contrast how the action—and inaction—of the powerful U.S. government hurts those most vulnerable, children. This story sets up an appeal to the judge to correct the injustice, not by application of settled law but instead through the legal stasis of inference by drawing upon existing law to recognize new rights and ensure that the government preserves the environment. This story and appeal help achieve cathexis, a connection between the plight of the children and the judge's duty to correct it.[306] While defendants attempted to shift the dispute from substantive to procedural issues, they merely created a choice of stases for the judge, who was moved by affective appeals to resolve the motion as one of qualification. Further, because the plaintiffs' stasis conceded the higher grounds, the judge's finding of a new right and expanded public trust doctrine claim negated the defendants' procedural arguments.

Calls for justice accompanied by emotional appeals arise in the third stasis of qualification.[307] Distributive injustice has two sets of actors, a powerful few that benefit from causing great harm to the planet and the vulnerable many who suffer damages while receiving no benefit from that activity.[308] The first page of the complaint portrays the U.S. government as the former. The defendants have "continued their policies and practices of allowing the exploitation of fossil fuels" despite knowing for over fifty years "that carbon dioxide ('CO_2') pollution from burning fossil fuels was causing global warming and dangerous climate change, and that continuing to burn fossil fuels would destabilize the climate system on which present and future generations of our nation depend for their wellbeing and survival."[309] Later in the complaint, the plaintiffs label the government as "the sovereign trustee of national natural resources, including air, water, sea, shores of the sea, and wildlife."[310] They then open the next three sentences with the same

a web site for the public to see. *Juliana v. U.S. Youth Climate Lawsuit*, OUR CHILDREN'S TRUST (Nov. 13, 2019, 11:20 PM), https://perma.cc/WNX5-6YMB.

[305] *Juliana,* 947 F.3d at 1191 (Staton, J., dissenting) ("Where is the hope in today's decision? Plaintiffs' claims are based on science, specifically, an impending point of no return. If plaintiffs' fears, backed by the government's *own studies*, prove true, history will not judge us kindly. When the seas envelop our coastal cities, fires and droughts haunt our interiors, and storms ravage everything between, those remaining will ask: Why did so many do so little?").

[306] Matheson, *supra* note 32, at 73.

[307] *See supra* notes 160–62, 207–08 and accompanying text.

[308] *See supra* notes 36–40 and accompanying text.

[309] *Juliana* Complaint, *supra* note 287, at 1.

[310] *Id.* at 36.

phrasing—"In its sovereign capacity, the United States controls . . . "—to reinforce the power of the U.S. to regulate GHG-emitting fossil fuels because of its "control" over the atmosphere, land, water, and foreign commerce.[311]

By contrast, the plaintiffs portray themselves as "especially vulnerable to the dangerous situation that Defendants have substantially caused," thus placing them "in a dangerous situation."[312] The plaintiffs are not content merely to claim distributive injustice but go much further by showing it. For each plaintiff, the complaint devotes several paragraphs to personal details.[313] For example, Kelsey Cascadia Rose Juliana "is 19 years old and was born and raised in Oregon, the state where she hopes to work, grow food, recreate, have a family, and raise children."[314] She "drinks the freshwater that flows from the McKenzie River and drinks from springs in the Oregon Cascades on hiking, canoeing, and backpacking trips," but the "current and projected drought and lack of snow caused by Defendants are already harming all of the places Kelsey enjoys visiting, as well as her drinking water[.]"[315] Where Kivalina did not give a single detail about the Inupiat's traditional lifestyle, the *Juliana* plaintiffs foreground such stories, as with Xiuhtezcatl Tonatiuh M., a 15-year-old from Boulder, Colorado.[316] "Of Aztec descent, Xiuhtezcatl engages in sacred indigenous spiritual and cultural practices to honor and protect the Earth. Xiuhtezcatl has suffered harm to his spiritual and cultural practices from Defendants' actions."[317] The complaint contains similar details about the other youth plaintiffs, such as asserting that an 11-year-old plaintiff's allergies have worsened in severity and caused him to spend more time inside, and describing how a 10-year-old's trips to Yellowstone are affected by "burned, beetle-killed forests" and increasingly hungry bears roaming the park.[318]

These narratives combine with an extensive treatment of the science of climate change to humanize the harm caused by the government's policies toward GHG emissions.[319] This affective appeal creates a connection between the vulnerable children and the judge as an authority figure who can remedy the harm.[320] The stasis of

311 *Id.*
312 *Id.* at 4–5.
313 *Id.* at 6–33.
314 *Id.* at 6.
315 *Id.* at 6–7.
316 *Id.* at 10.
317 *Id.*
318 *Id.* at 16–17.
319 Nosek, *supra* note 9, at 791 (describing how the complaint, in highlighting the youth of the plaintiffs, supported the frame of innocent victims having the dangerous situation imposed upon them by other actors); see *Juliana* Complaint, *supra* note 287, 67–84 (providing facts and figures about the science of climate change and its effects).
320 *See supra* notes 201–02, 207–09 and accompanying text.

qualification subdivides into equitable and legal,[321] and the plaintiffs argue both. For the former, they claim to "have no adequate remedy at law" to address the "dangerous situation" that the defendants have placed them in.[322] They appeal directly to the court, "That grant of equitable jurisdiction requires Article III courts to apply the underlying principles of the Constitution to new circumstances unforeseen by the framers, such as the irreversible destruction of the natural heritage of our whole nation."[323] For the latter, they tie their claim for equitable relief to the court recognizing a new constitutional right and extending application of the public trust doctrine.[324] This request is grounded in the legal stasis of inference because the plaintiffs quote from the then-newly-decided *Obergefell v. Hodges*,[325] which recognized a right to marry based on the due process and equal protection clauses, to urge the court to identify a right to a healthy environment: "'The identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution.'"[326] They use similar language when describing the public trust doctrine as embodying rights found in the Ninth and Tenth Amendments and in the Vesting, Nobility, and Posterity clauses.[327] As the lead plaintiffs' attorney states, *Juliana* is an "extraordinary case" because of the great harms it addresses, but the constitutional arguments are "not extraordinary" because they "are rooted in the history and traditions of our nation and rooted in Supreme Court precedent."[328]

In their motions to dismiss, the defendants could not frame the issue in the stasis of definition because the plaintiffs had already conceded this ground: the defendants cannot argue that the plaintiffs' harms are resolvable under a different legal theory since the whole point of the plaintiffs' lawsuit is that the existing legal structure needs to change because it has allowed and indeed encouraged harmful GHG emissions.[329] To the extent that they respond to the substantive issues,

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321 Cicero, *supra* note 29, at 131.

322 *Juliana* Complaint, *supra* note 287, at 7.

323 *Id.*

324 *Id.* at 84–94.

325 Obergefell v. Hodges, 576 U.S. 2584 (2015).

326 *Juliana* Complaint, *supra* note 287, at 7 (quoting Obergefell v. Hodges, 576 U.S. at 2586); *see supra* notes 182–86 and accompanying text (describing the stasis of inference as drawing upon settled law to address analogous situations for which no law applies).

327 *Id.* at 93.

328 Molodanof & Durney, *supra* note 22, at 220.

329 *E.g.*, *Juliana* Complaint, *supra* note 287, at 3 ("Defendants also knew the harmful impacts of their actions would significantly endanger Plaintiffs, with the damage persisting for millennia. Despite this knowledge, Defendants continued their policies and practices of allowing the exploitation of fossil fuels."); *id.* at 5 ("Yet, rather than implement a rational course of effective action to phase out carbon pollution, Defendants have continued to permit, authorize, and subsidize fossil fuel extraction, development, consumption and exportation—activities producing enormous quantities of CO_2 emissions that have substantially caused the rise in the atmospheric concentration of CO_2."); *see supra* notes 141–

the government defendants merely counter that there is no constitutional right to be free from CO2 emissions—a weak argument because it reinforces the plaintiffs' appeal to the court to recognize one.[330] The closest thing to a definitional argument is the intervenors' assertion that federal statutes displace the public trust doctrine and constitutional claims, but even this argument is a subpart of their Rule 12(b)(1) challenge that the court lacks jurisdiction because the plaintiffs do not raise a federal question.[331] Indeed, every argument in both briefs is a variation on denying the court's jurisdiction and thus grounded in the stasis of procedure.[332] For example, both briefs argue that the public trust doctrine is state common law rather than federal law and lacks a constitutional basis, so it does not raise a federal question.[333] They both also assert that the plaintiffs lack standing under *Lujan*, with the government defendants in particular arguing that the court cannot grant relief and that only the political branches can.[334] The intervenors also raise this point but add that it warrants dismissal under the political question doctrine.[335]

Unlike the *Kivalina* plaintiffs, who locked themselves into an unwinnable conjectural argument because they could not respond to the defendants' challenges without contradicting themselves,[336] the *Juliana* plaintiffs could oppose the motions to dismiss by expanding their

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47 and accompanying text (describing how a party can avoid making weak and therefore losing arguments by conceding higher stases in favor of lower ones).

330 Federal Defendants' Memorandum of Points and Authorities in Support of Their Motion to Dismiss at 20–22, Juliana v. United States, 217 F. Supp. 3d 1224 (D. Or. 2016) (No. 6:15-cv-01517-TC), 2015 WL 13850596 [hereinafter Federal Defendants' Memorandum].

331 Memorandum in Support of Intervenor-Defendants' Motion to Dismiss at 8–9, 217 F. Supp. 3d 1224 (D. Or. 2015) (No. 6:15-cv-01517-TC), 2015 WL 7587592 [hereinafter Intervenor-Defendants' Memorandum] (arguing that the CAA and the EPA actions it authorizes have displaced claims that seek to regulate GHG emissions, even those that are constitutional in nature); *see id.* at 6–11 (arguing that "[t]he complaint cites no case or other authority that would provide them with a cognizable cause of action within the jurisdiction of the federal judiciary").

332 *See supra* notes 139, 190–98 and accompanying text.

333 Federal Defendants' Memorandum, *supra* note 330, at 27–29; Intervenor-Defendants' Memorandum, *supra* note 331, at 6–8.

334 Federal Defendants' Memorandum, *supra* note 330, at 7–19; *see id.* at 13 ("Plaintiffs also lack standing because the injuries they allege cannot be redressed by an order within this Court's authority to issue."); *id.* at 17–18 (arguing that the complaint "raises substantial separation of powers concerns because its resolution would transform the district court into a super-regulator setting national climate policy"); *see* Intervenor-Defendants' Memorandum, *supra* note 331, at 16–21 (arguing lack of standing and articulating reasons why each *Lujan* factor fails).

335 Intervenor-Defendants' Memorandum, *supra* note 331, at 11 (quoting *Baker*, 369 U.S. 186, 217 (1962)) (arguing that the political question doctrine "bars adjudication" of the plaintiffs' claims because they "(i) are 'textually . . . commit[ted]' to another branch by the Constitution; (ii) are not subject to 'judicially discoverable and manageable standards'; or (iii) could not be resolved without 'expressing lack of the respect due coordinate branches of government'").

336 *See supra* Part IV.A.

narrative of injustice and even turning defendants' justiciability arguments into support for their call for judicial action. They argued that applying either political question or standing "to dismiss this case would result in an incomparable injustice, heavily tipping the balance of power toward the legislature that is, at present, heavily controlled by fossil fuel corporations and their owners represented by Defendant Intervenors, and away from judicial protection of individual liberties."[337] Instead, "judicial intervention" is the only way to protect their "health and personal security," especially since young people cannot vote and thus alter the political process.[338]

They then invoke the origins of the environmental justice movement to frame the issue in the legal stasis of inference by praising existing authority, comparing their situation to civil rights cases where courts have extended legal protections, and then urging the court to do the same.[339] The Constitution does not recognize a fundamental right to marry or to non-segregated education, "yet our judiciary has declared them integral to our liberties and our democracy."[340] Their claims and the relief sought are similar to those in successful civil rights cases: "this action poses questions akin to those that the judiciary has considered throughout our country's history, and seeks a remedy familiar to courts."[341] To correct the injustice that climate change is causing them, *Obergefell* supports the court in recognizing new rights:

> The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning. When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed.[342]

While the stasis of procedure can prevent plaintiffs from obtaining a ruling on substantive issues, when the parties present the court with a choice, it is ultimately the judge who picks the stasis upon which to rule.[343] Further, the audience sometimes values an inquiry in a lower stasis like qualification, so assuming a fighting stance there gives the

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337 Plaintiffs' Memorandum in Opposition to Defendant Intervenors' Motion to Dismiss at 2–3, Juliana v. United States, 663 F. Supp. 2d 863 (D. Or. 2016) (No. 6:15-cv-01517-TC), 2016 WL 11663205.

338 Memorandum of Plaintiffs' in Opposition to Federal Defendants' Motion to Dismiss at 1–2, Juliana v. United States, 663 F. Supp. 2d 863 (D. Or. 2016) (No. 6:15-cv-01517-TC), 2016 WL 11663204 [hereinafter Plaintiffs' Federal Opposition].

339 *See* Cicero, *supra* note 29, at 319; Nadeau, *supra* note 29, at 395.

340 Plaintiffs' Federal Opposition, *supra* note 338, at 2.

341 *Id.*

342 *Id.* at 11 (quoting *Obergefell*, 576 U.S. 2584, 2598 (2015)).

343 *See supra* notes 199–200 and accompanying text.

judge an opportunity for evaluation.[344] The way that Judge Aiken treats the two justiciability questions reveals her choice of qualification over procedure based upon a desire to evaluate the question of climate-related rights. The political question doctrine presents a threshold issue,[345] so Judge Aiken must and does treat it first; however, her rulings from later in the opinion that the plaintiffs have a right to a healthy environment and that the public trust doctrine has a foundation in substantive due process provide the bases for rejecting this challenge.[346] In denying the Rule 12(b)(6) motion to dismiss the constitutional claims, Judge Aiken quoted from *Obergefell* and other authority that courts are required to use their "reasoned judgment" to find fundamental rights.[347] She writes, "I have no doubt that the right to a climate system capable of sustaining human life is fundamental to a free and ordered society."[348] She similarly denies dismissal of the public trust doctrine cause of action because "plaintiffs' right of action to enforce the government's obligations as trustee arises from the Constitution," so these "claims are properly categorized as substantive due process claims."[349] Prior to reaching these rulings, however, Judge Aiken first rejects the political question doctrine challenge because the plaintiffs elected "constitutional rather than statutory claims."[350] She therefore finds that the second and third *Baker* factors were not met: "Every day, federal courts apply the legal standards governing due process claims to new sets of facts. The facts in this case, though novel, are amenable to those well-established standards."[351] Despite her characterization that the standards are "well-established," no U.S. court had ever held that these rights existed until she does—and that is not until ten pages later in the opinion.[352] She nevertheless relies upon these rights when she explains that the plaintiffs' theory "is much broader" than a "typical environmental case": "defendants' *aggregate actions* violate their substantive due process rights and the government's public trust obligations."[353]

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344 Fahnestock & Secor, *supra* note 170, at 431–32.

345 *E.g.*, Todd, *Sense*, *supra* note 4, at 186.

346 *Juliana*, 217 F. Supp. 3d 1224, 1235 (D. Or. 2016).

347 *Id.* at 1250 (quoting *Obergefell*, 576 U.S. 2584, 2598 (2015)).

348 *Id.*

349 *Id.* at 1261.

350 *Id.* at 1239.

351 *Id.* She makes this ruling despite recognizing that the public trust doctrine predates our Constitution. *Id.* at 1261; *see* Kacy Manahan, Comment, *The Constitutional Public Trust Doctrine*, 49 ENVTL. L. 263, 267–68 (2019) (writing that the public trust doctrine originated in English common law and was brought to this continent by English colonists).

352 *Juliana*, 217 F. Supp. 3d at 1249–50; *see* Federal Defendants' Memorandum, *supra* note 330, at 21–22 (quoting Nat'l Sea Clammers Ass'n v. City of New York, 616 F.2d 1222, 1237–38 (3d Cir. 1980), *dismissed and vacated in part on other grounds,* 453 U.S. 1 (1981)) (arguing that no court has found a constitutional right to be free, but "courts have consistently held that 'there is no constitutional right to a pollution-free environment'").

353 *Juliana*, 217 F. Supp. 3d at 1240.

The plaintiffs' affective appeals played a key part in helping them connect with Judge Aiken so that she would prefer the stasis of qualification over that of procedure.[354] For example, in ruling on the standing challenge, Judge Aiken adopts and retells the plaintiffs' individual narratives of distributive injustice.[355] In finding that the plaintiffs had adequately pleaded injury in fact, Judge Aiken references several of the youths by name with examples of the injuries each has claimed.[356] She describes at length the supplemental declaration of Jayden F., a 13-year-old from Louisiana whose house was flooded with water and sewage.[357] She contrasts those sympathetic young people with the defendants, who "are responsible for a substantial share of worldwide greenhouse gas emissions[,]"[358] and cites the complaint that "between 1751 and 2014, the United States produced more than twenty-five percent of global CO_2 emissions," emissions that "continue to increase."[359] When combined with a climate science that is "constantly evolving," these allegations prompted Judge Aiken to conclude that the harms are "fairly traceable" to the defendants.[360]

The opinion reveals how well the plaintiffs' emotional appeals connected with Judge Aiken when she addresses the potential for new rights. She is unmoved by the defendants' legalistic proofs: while she grants that the defendants likely "are correct that plaintiffs likely could not obtain the relief they seek through citizen suits brought under the Clean Air Act, the Clean Water Act, or other environmental laws[,]" she counters that "that argument misses the point" because "[t]his action is of a different order than the typical environmental case."[361] Indeed, she seems almost annoyed because "[a] deep resistance to change runs through defendants' and intervenors' arguments for dismissal[.]"[362] By contrast, she reveals an attachment with the young plaintiffs by adopting their "art and energy," such as when she calls the courts especially key for young people "who cannot vote and must depend on others to protect their political interests."[363] When the political branches do not act, then people can turn to the courts for relief: "'The third branch can, and should, take another long and careful look at the barriers to litigation created by modern doctrines of subject-matter jurisdiction and deference to the legislative and administrative branches.'"[364] Indeed, sometimes the judge's phrasing sounds like it

354 *See supra* notes 201–09 and accompanying text.

355 *Juliana*, 217 F. Supp. 3d at 1265.

356 *Id.* at 1242 (citing *Juliana* Complaint, *supra* note 287, ¶¶ 17–18, 21, 26, 32, 38, 46).

357 *Id.* at 1243 (citing Decl. Jayden F. ¶¶ 2, 5, 8, 10, 12, 15 (Sept. 7, 2016)).

358 *Id.* at 1245.

359 *Id.* (citing *Juliana* Complaint, *supra* note 287, ¶¶ 151–52).

360 *Id.* at 1242, 1245.

361 *Id.* at 1261.

362 *Id.* at 1262.

363 *Id.* at 1241.

364 *Id.* at 1262 (quoting Alfred T. Goodwin, *A Wake-Up Call for Judges*, 2015 WIS. L. REV. 785, 785–86, 788 (2015); *see id.* at 1263 ("Even when a case implicates hotly contest-

came straight from the plaintiffs: "To hold otherwise would be to say that the Constitution affords no protection against a government's knowing decision to poison the air its citizens breathe or the water its citizens drink."[365]

V. CONCLUSION

As shown by the analyses of *Kivalina* and *Juliana*, stasis theory affirms the observations of commentators who have applied literary and rhetorical criticism to environmental justice litigation. For example, drawing from the broader narrative of environmental justice to tell the court a story not only highlights how the legal status quo perpetuates distributive injustice but also generates emotional appeals to connect with the judge as the person to correct that injustice.[366] In addition, detailing a marginalized identity can provide the basis for the court to find a new legal entitlement.[367] Further, while defendants sometimes prevail with their dry procedural arguments, when courts do rule for the plaintiffs, the judge will adopt and incorporate the plaintiffs' narratives and phrasing, suggesting that the language of environmental justice can be effective.[368] Finally, plaintiffs should avoid claims based upon legal entitlements that they do not possess and instead argue a conflict between those entitlements and values supported by emerging norms; given sufficient reasons, a sympathetic judge might rule to modify or reinterpret or extend the law in the interest of justice.[369]

Stasis theory expands upon these observations by articulating a systematic strategy for plaintiffs to survive a motion to dismiss in complex environmental justice litigation. The plaintiffs often have weak conjectural arguments because the law upon which they rely is inapt or

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ed political issues, the judiciary must not shrink from its role as a coequal branch of government."). Magistrate Judge Coffin used similar language in recommending that the court deny the defendants' standing challenge. *Id.* at 1267 ("But the intractability of the debates before Congress and state legislatures . . . necessitates a need for the courts to evaluate the constitutional parameters of the action or inaction taken by the government."); *see* Dellinger, *supra* note 39, at 541 ("[I]t is clear that plaintiffs are finding their way into new legal arenas rather than relying on traditional regulatory ones.").

365 *Compare Juliana*, 217 F. Supp. 3d at 1250, *with Juliana* Complaint, *supra* note 287, at 93 (characterizing "the affirmative aggregate acts of Defendants" as "unconstitutional and in contravention of their duty to hold the atmosphere and other public trust resources in trust. Instead, Defendants have alienated substantial portions of the atmosphere in favor of the interests of private parties so that these private parties can treat our nation's atmosphere as a dump for their carbon emissions."); *see, e.g.*, *Juliana*, 217 F. Supp. 3d 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.").

366 *See* Kan, *supra* note 9, at 54; King, *supra* note 9, at 349; Nosek, *supra* note 9, at 738–39.

367 *See* Avraham & Yuracko, *supra* note 16, at 688–89; La Londe, *supra* note 4, at 59.

368 Burger, *Last*, *supra* note 7, at 305–06; Burger, *Environmental*, *supra* note 15, at 45–53, 56–57; Weaver & Kysar, *supra* note 6, at 350–53.

369 Todd, *Sense*, *supra* note 4, at 199–200.

undeveloped, such as pushing tort theories for complex harms already addressed by environmental statutes or seeking to enforce a right that no court has explicitly recognized. If the plaintiffs nevertheless attempt to frame the case as one of disputed facts resting upon undisputed law, then the defendants can shift the ground to the fourth stasis of procedure without conceding counterarguments of conjecture or new arguments of definition (for example, that the facts as alleged have been displaced by statute so cannot be addressed via a tort cause of action). Having asserted that unsettled law is settled, the plaintiffs will lack convincing counterarguments to defendants' challenges that only the political rather than judicial branches can address complex harms or that the plaintiffs lack standing, so the court will likely break the stasis in the defendants' favor and order dismissal. The plaintiffs should therefore concede claims based on a legal entitlement and instead assume a fighting stance in the third stasis of qualification, where they can tap into the narrative of environmental justice to make appealing arguments. Those could be a request for equity because the law is not only ineffective but harmful, or because many common law torts or environmental or civil rights laws are close but imperfect fits for their situations, the plaintiffs could highlight rather than downplay this incongruity via recourse to one of the legal stases like inference. By conceding the higher grounds, the plaintiffs keep the fight away from arguments that are stronger for the adversary and instead limit the defendants to generating counterarguments about qualification and to shifting the ground to procedure. The compelling stories of distributive and corrective injustice that plaintiffs can tell might create sufficient affective connections with the judge to persuade her to rule in plaintiffs' favor. Having recognized the need for judicial intervention in the face of inadequate law, the judge then has a basis for denying the procedural challenges that are linked to policy questions and existing statutory schemes.

The *Kivalina* case might have had the same success as *Juliana* if the plaintiffs had told the court their stories of distributive and corrective injustice. The cultural identity for some Inupiat is formed by their connection to Kivalina barrier reef, which has shaped traditions that go back millennia of taking boats into the sea to hunt whales and traveling across the region to hunt caribou.[370] This subsistence lifestyle means that the Inupiat have not engaged in activities that emit significant carbon dioxide, while by contrast energy and oil companies have profited by releasing the majority of industrial carbon dioxide as well as other GHGs like methane, all while knowing for decades about

[370] Knodel, *supra* note 13, at 1180, 1189–90; *see* Abate & Kronk, *supra* note 40, at 183 (writing that the "daily activities" of people like the Inuit include traveling through the Arctic for whaling, sealing, fishing, and hunting); Tsosie, *Impact*, *supra* note 40, at 1635 ("The impacts of climate change on indigenous peoples are particularly visible . . . in the Arctic due to the great interdependence of the people with their local environments and the centrality of traditional lifeways to basic survival in these regions.").

their harmful effects.[371] Climate change has already altered the traditional practices of the Inupiat—the Village has not captured a whale since the 1990s, and caribou are becoming scarcer—and now harsher storms and the loss of sea ice threaten to destroy their town.[372] The plaintiffs have no settled law upon which to build a conjectural argument, however: statutes like the CAA and CWA do not allow for money damages, while federal common law nuisance never contemplated a problem so complex and diffuse as climate change.[373] But in the stasis of qualification, the plaintiffs could raise an issue of inference: both federal environmental statutes and common law nuisance regulate interstate pollution,[374] so the policies of the former to protect and restore water and air resources harmed by industrial activities could broaden the latter's previously narrow applications and thus allow compensation to Kivalina.[375] Combined with an evolving

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371 Abate & Kronk, *supra* note 40, at 179; Dellinger, *supra* note 39, at 530; Rebecca Tsosie, *Climate Change and Indigenous Peoples: Comparative Models of Sovereignty*, 26 TUL. ENVTL. L.J. 239, 252–53 (2013).

372 Knodel, *supra* note 13, at 1191; Tsosie, *Impact*, *supra* note 40, at 1640 (describing the disappearance of aquatic and terrestrial prey of cultural significance to the indigenous of the Arctic and the dangers to hunters like falling through thin sea ice); *see* Abate & Kronk, *supra* note 40, at 188 ("[A]s the effects of climate change ravage their environment, indigenous peoples may experience both a physical and spiritual loss as a consequence of the negative impact to the environment."); Tsosie, *Intercultural*, *supra* note 13, at 13 (writing that indigenous peoples of Alaska "are losing their land base and *way of life* as a consequence of climate change") (emphasis added).

373 Maxine Burkett, *Litigating Climate Change Adaptation: Theory, Practice, and Corrective (Climate) Justice*, 42 ENVTL. L. REP. 11,144, 11,150 (2012); Gerrard, *supra* note 54, at 280, 284; *see* King, *supra* note 9, at 349 (stating that, at the time *Kivalina* was filed, "there was no legal claim available to hold companies who were emitting methane in Texas or carbon dioxide in Arkansas responsible for permafrost melting in Alaska"); Nicole Johnson, Comment, Native Village of Kivalina v. ExxonMobil Corp*: Say Goodbye to Federal Public Nuisance Claims for Greenhouse Gas Emissions*, 40 ECOLOGY L.Q. 557, 561 (2013) ("The United States' legal system does not have a way for communities like Kivalina to recover under current circumstances, as the CAA does not provide relief for damages.").

374 Abate, *Public*, *supra* note 74, at 210.

375 *See* 33 U.S.C. § 1251(a) ("The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."); *id.* § 1252(a) (requiring "due regard . . . be given to the improvements which are necessary to conserve . . . waters" and authorizing the administrator "to make joint investigations with any such agencies of the condition of any waters in any State or States, and of the discharges of any sewage, industrial wastes, or substance which may adversely affect such waters."); 42 U.S.C. § 7401(a)(2) (stating the finding of Congress "that the growth in the amount and complexity of air pollution brought about by urbanization, industrial development, and the increasing use of motor vehicles, has resulted in mounting dangers to the public health and welfare," which includes "damage to and the deterioration of property"); *id.* at (b)(1) (stating that a purpose of the CAA is "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population"); *see* Friends of the Earth, Inc. v. Gaston Copper Recycling Corp., 204 F.3d 149, 162 (4th Cir. 2000) (holding that an individual polluter can be held responsible for contributing to the harm); *Pub. Interest Research Grp. Of N.J.*, 913 F.2d 64, 72 (3d Cir. 1990) (same).

climate science that makes it possible to apportion responsibility for climate damages along with the verifiable harm to Kivalina of infrastructural damage caused by eroding sea ice,[376] these appeals to justice might have connected with Judge Armstrong.

Such a framing would have also negated the defendant's challenges in the stases of definition and procedure. If she were to recognize the need to expand common law nuisance because the statutes do not provide for relief, Judge Armstrong cannot also find the cause of action displaced by those statutes.[377] Likewise, standing would not be a bar because the court would have accepted a broadening of common law nuisance based on environmental statutes that allow liability for polluters that contribute to aggregate harm, so the effects of climate change are "fairly traceable" to the largest historic emitters of GHGs.[378] Similarly, they could overcome the political question balancing test by arguing that reasonableness should be considered relative to the specific plaintiffs rather than society in general: the social utility of industrial GHG emissions for indigenous peoples like the Inupiat who live a traditional subsistence lifestyle is zero, yet the harm is the loss of that culture and the destruction of their entire town.[379]

This re-imagining of the lawsuit does not mean that Kivalina would have prevailed in the motion to dismiss; instead, the conclusion is a more modest assertion that they would have had a better shot at victory with a fighting stance in the stasis of qualification rather than on the shaky ground of conjecture. After all, Judge Aiken in *Juliana*

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376 Banda, *supra* note 3, at 383; Kysar, *supra* note 2, at 28; *see* Dellinger, *ATS*, *supra* note 91, at 285–86 (citing Nicholas Kusnetz, *How 90 Big Companies Helped Fuel Climate Change: Study Breaks It Down*, INSIDE CLIMATE NEWS (Sept. 11, 2017), https://perma.cc/8RSZ-J5UN (arguing that an individual defendant's share of the total climate change problem can be shown through a study attributing over a quarter of sea level rise and half of global warming since 1880 to 90 companies)); Kysar, *supra* note 2, at 28 (calling the harm of "infrastructural damage resulting from enhanced storm exposure due to decreased Arctic sea ice . . . amenable to causal attribution than many other impacts of climate change").

377 *See, e.g.*, Exxon Shipping Co. v. Baker, 554 U.S. 471, 489 n.7 (2008) (distinguishing common law nuisance claim for economic injury with one seeking to impose standards that would differ from regulatory goals in the Clean Water Act); Burkett, *Elusive*, *supra* note 42, at 118 (describing gaps in statutory coverage of GHG emissions); Hennessee, *supra* note 132, at 1114 (same). In addition, a complaint and opposition brief filled with details about their traditional indigenous lifestyle would bolster an argument that the Kivalina Inupiat as a federally recognized native tribe enjoy a quasi-sovereignty and thus can assert nuisance claims like the five U.S. states did in *Massachusetts v. EPA*. Kronk Warner & Abate, *supra* note 131, at 147 n.146 (2013) (citing Massachusetts v. U.S. Envtl. Prot. Agency, 549 U.S. 497, 518–20 (2007); Georgia v. Tenn. Copper, 206 U.S. 230, 237 (1907)).

378 *Lujan*, 504 U.S. 555, 560 (1992).

379 Geisinger, *supra* note 272, at 229–30 (arguing for a "reasonable benefit" standard where community benefit must be proportional to the amount of increased harm caused by development, and if not, then the development should not be allowed); *see* RESTATEMENT (SECOND) OF TORTS § 826 cmt. b (AM. LAW INST. 1977) (recognizing that "the unreasonableness of intentional invasions is a problem of *relative values* to be determined by the trier of fact in each case in the light of all the circumstances of that case") (emphasis added).

distinguished that constitutional case from those asserting common law and statutory causes of action,[380] and the Circuit Court in *Kivalina* ignored the justiciability doctrines and instead affirmed dismissal based on the defendants' stasis of definition by holding that the CAA displaced the nuisance claim.[381] Consider *Alaska Oil & Gas Ass'n v. Salazar*,[382] where Alaska Natives challenged a Fish and Wildlife Service critical wildlife designation for polar bears by asserting that the inclusion of their lands would "disproportionately harm Alaska Natives and other North Slope Borough residents, the people who share habitat with polar bears."[383] Despite the appeal to distributive injustice, the District Court dismissed the arguments.[384]

The outcome of *Salazar* underscores the need for additional scholarship that applies the humanities to environmental justice disputes. An explication of the pleadings, motions, and opinions in this and other cases could lead to a better understanding of which rhetorical stance is most effective for a given rhetorical situation.[385] In addition, drawing from other literary or rhetorical theory could enrich the current understanding offered by literary criticism, the new rhetoric, and stasis theory.[386] That additional research might support or even expand the

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380 *Juliana*, 217 F. Supp. 3d 1224, 1261 (D. Or. 2016) (distinguishing the claim based on "fundamental constitutional rights" in the instant case from "case law governing statutory and common-law environmental claims").

381 *Native Vill. of Kivalina*, 696 F.3d 849, 855, 858 (9th Cir. 2012); *see Am. Elec. Power Co.*, 564 U.S. 410, 425 (2011) (citing CAA, 42 U.S.C. § 7411(d) (2012)) (holding that the CAA provides "a means to seek limits on emissions of carbon dioxide from domestic powerplants" and thus displaces "parallel" federal common law claims).

382 Alaska Oil and Gas Ass'n v. Salazar, 916 F. Supp. 2d 974 (D. Alaska 2013), *rev'd sub nom.*, Alaska Oil and Gas Ass'n v. Jewell, 815 F.3d 544 (9th Cir. 2016).

383 Sarah E. Mackie, Comment, *Bearing the Burden: Environmental Injustice in the Protection of the Polar Bear* Alaska Oil & Gas Ass'n v. Jewell (9th Cir. 2016), 42 HARV. ENVTL. L. REV. 547, 565 (2018) (quoting Memorandum in Support of Alaska Native Plaintiffs' and North Slope Borough's Motion for Summary Judgment, 916 F. Supp. 2d 974 (No. 3:11-cv-00025-RRB), 2011 WL 6008558, at *1).

384 *Salazar*, 916 F. Supp. 2d at 994–95.

385 *See* Lloyd F. Bitzer, *The Rhetorical Situation*, 1 PHIL. & RHETORIC 1, 5–8 (1968) (calling the rhetorical situation "a natural context of persons, events, objects, relations, and an exigence which strongly invites utterance" and listing its three elements as an exigence in need of modification by discourse, the audience, and constraints on the rhetor); Wayne C. Booth, *The Rhetorical Stance*, 14 C. COMPOSITION & COMM. 139, 141, 144 (1963) (urging the speaker to avoid "clumsy poses" by assuming a "rhetorical stance" that balances arguments about the subject, the interests of the audience, and the voice of the speaker).

386 For example, one might draw from rhetoricians who, like Perelman and the classical stasis theorists, address issues of justice and dispute resolution. *See, e.g.*, KENNETH BURKE, A GRAMMAR OF MOTIVES 173 (Cal. ed. 1969) (discussing how the ideal of justice as manifested in legal proceedings can mask material injustice). Another possibility is to take rhetorical or tropological studies of environmental policy and law-making and apply those to litigation and other forms of dispute resolution. *See, e.g.*, J. Robert Cox, *Golden Tropes and Democratic Betrayals: Prospects for the Environment and Environmental Justice in Neoliberal "Free Trade" Agreements*, *in* ENVIRONMENTAL JUSTICE AND ENVIRONMENTALISM: THE SOCIAL JUSTICE CHALLENGE TO THE ENVIRONMENTAL MOVEMENT, *supra* note 38, at 225–50 (suggesting that neoliberal tropes have diverted at-

conclusion from this Article that environmental justice plaintiffs should embrace rather than suppress their stories of injustice and seek bold connections with the judge to be creative in correcting that injustice.

tention from both the negative environmental impacts of globalization and the undemocratic aspects of trade agreements); *see also* Michael A. Livermore & Richard L. Revesz, *Interest Groups and Environmental Policy: Inconsistent Positions and Missed Opportunities*, 45 ENVTL. L. 1 (2015) (evaluating the evolving rhetoric of competing interest groups as they have disputed the utility of cost-benefit analysis in shaping environmental policy).