State Court Solutions: Finding Standing for Private Climate Change Plaintiffs in the Wake of Washington Environmental Council v. Bellon

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For a shining second, the landmark Supreme Court decision in Massachusetts v. Environmental Protection Agency seemed to signal a new era for climate change litigation in the federal courts. Unfortunately, the prospects of such litigation in the years since the decision have become far bleaker. The recent Ninth Circuit decision in Washington Environmental Council v. Bellon is merely the latest in a string of federal court decisions that have reduced the Massachusetts v. EPA precedent to near irrelevancy. It is now clearly established that Article III standing, a necessary prerequisite to any claim in federal court, will not be granted to private plaintiffs seeking relief for climate change related harms by filing claims against greenhouse gas emitters or regulatory agencies that refuse to take action. As a result, private climate change plaintiffs must rely on alternative avenues to have their claims heard in court.

This Note highlights the importance of private plaintiffs in the history of environmental law and argues that the Washington Environmental Council v. Bellon decision was overbroad. In the wake of the Ninth Circuit’s decision, this Note suggests that private climate change plaintiffs who find themselves shut out of federal courts should consider seeking relief through the state court system.

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INTRODUCTION

The Polish poet Stanislaw Jerzy Lee once wrote, “No snowflake in an avalanche ever feels responsible.”1 Those words are unfortunately apt when attempting to capture the current attitude of federal courts toward climate change litigation. The recent Ninth Circuit decision in Washington Environmental Council v. Bellon demonstrates what seems to have become the federal court’s prevailing reasoning in cases concerning private citizens or citizen groups bringing citizen suits to hold accountable government agencies in charge of emission regulations for damages relating to the effects of climate change.2 The court found that the plaintiffs in Bellon had no Article III standing to bring their claims against the Washington Department of Environmental

2. 732 F.3d 1131, 1136 (9th Cir. 2013).
Quality. The plaintiffs could neither demonstrate that the five unregulated Washington-area refineries in question had a significant enough hand in causing the proverbial avalanche that is global climate change, nor that a favorable court decision and order to regulate the refineries would deter the effects of climate change enough to redress their injuries.

In the wake of Bellon, the Ninth Circuit’s stance on Article III standing makes it clear that it will not entertain cases that attempt to hold a group of emitters (or a government agency that neglects to regulate a group of emitters) responsible for climate change-related harms. This state of affairs makes federal court an ill-fitting venue for any environmental groups or private citizens seeking to litigate a cause of action for climate change-related injuries. However, this should not, and does not, foreclose the possibility of climate change litigation. This Note discusses alternative litigation methods for private plaintiffs hoping to circumvent the stringent Article III requirements and contest their case in court.

Part I of this Note will provide a brief background on the importance of citizen suits in environmental law and, in particular, a discussion of the Clean Air Act and its citizen suit provision. Part II will explain Article III standing and discuss the history of Article III standing as it applies to environmental plaintiffs, emphasizing cases involving climate change. Part III will analyze the Ninth Circuit’s recent ruling in Bellon, arguing that the decision was overbroad and seemingly ignored important precedent governing incremental changes set by the Supreme Court in Massachusetts v. EPA. Lastly, Part IV will consider some of the remaining legal avenues available to private climate change plaintiffs seeking to challenge agency action (or inaction), highlighting the prospect of citizen suits in state courts.

I. CITIZEN SUITS

A. Citizen Suits Generally

Citizen suits have long been a hallmark of federal environmental statutes and environmental litigation in general. They bestow power upon the private citizen to commence a civil action against any regulated party that violates legal requirements, or against any regulatory agency that fails to perform a nondiscretionary act or duty.

Citizen suit provisions are a manifestation of Congress’s attempt to create public oversight of government agencies. Citizen suits serve a myriad of

3. Id. at 1147.
4. Id. at 1146–47.
7. “Congress has never put complete faith in government agencies to protect public health and the environment. Instead, Congress has authorized public citizens to become directly involved in the
purposes: they provide a mechanism for agency accountability, strengthen representative democracy, and allow for environmental stewardship.\(^8\) Notably, citizen suits may deter regulatory agency “capture” by regulated entities, especially in matters that provide dispersed benefits to the general public but concentrated costs to regulated industries.\(^9\) Citizen suits also check against economic incentives to enforce environmental laws feebly.\(^10\) Furthermore, in an era of constrained agency resources, citizen suits allow the public to pick up the slack when agencies cannot act.\(^11\) Lastly, citizen suits can serve as the impetus for the enactment of regulations that would otherwise be politically impossible or unpalatable by providing agencies with a convenient cover or scapegoat for their actions.\(^12\)

Since their enactment, environmental citizen suits have played an increasingly important role in the enforcement of federal environmental statutes. More than two thousand citizen suits have been filed since 1970.\(^13\) In the six-year period between 1978 and 1983, private citizens filed, on average, less than 100 notices of intent to sue per year through citizen suit provisions, mostly under the Clean Water Act.\(^14\) Twenty years later, between 1995 and 2002, the average had grown to 550 per year.\(^15\) And between 2003 and 2010, about two thousand notices of intent to sue were filed under the citizen suit provision of the Clean Water Act.\(^16\)

Furthermore, the profile of the typical environmental plaintiff in a citizen suit has changed, with a more diverse range of plaintiffs bringing suits for both economic and environmental harms. While environmental groups brought nearly all actions in the early years of citizen suits, one in three citizen suits are now brought by “nontraditional citizens,” a group that encompasses everything

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11. May, supra note 8, at 5–6.
12. “Citizen suits can force agencies and the regulated community to comply with the terms of a statute in situations where political forces would permit the government to turn a blind eye. Furthermore, they can provide political cover, allowing agencies to deflect responsibility for controversial decisions or strong statutory interpretations, as the persistence of the harm regulation shows.” Holly Doremus, *Adaptive Management, the Endangered Species Act, and the Institutional Challenges of “New Age” Environmental Protection*, 41 WASHBURN L.J. 50, 65 (2001).
13. May, supra note 8, at 3.
14. Id. at 2.
15. Id.
from private companies and landowners to faith-based organizations and state governments.\textsuperscript{17}

Citizen suits have had a profound effect on the environmental movement in general, forcing compliance from both administrative agencies and regulated facilities, garnering heavy reductions in the amount of pollution produced in the United States, ensuring the protection of endangered species and ecologically important land, and saving billions in taxpayer spending and agency resources.\textsuperscript{18} Between 1993 and 2002, citizen suit claims were the impetus for three out of four judicial opinions concerning enforcement of national environmental laws.\textsuperscript{19} Of the 220 federal court environmental decisions in 2010, 160 were in cases brought under environmental citizen suit provisions.\textsuperscript{20} Successful citizen suits have been the driving force behind numerous important federal agency actions including the expansion of the regulation of toxic water pollutants,\textsuperscript{21} obtaining federal listing and protections for particular endangered species,\textsuperscript{22} and setting the time frame of implementation for total maximum daily load standards for polluted bodies of water.\textsuperscript{23} Additionally, the mere threat of citizen suits has induced agencies to take action on certain issues in anticipation of future claims.\textsuperscript{24}

However, environmental citizen suits are not immune to criticism. Some critics argue that citizen suit litigation can destroy the relationship of cooperative compliance between agencies and industries, thus decreasing overall compliance with environmental laws.\textsuperscript{25} Critics also argue that the availability of a citizen suit option can potentially disrupt wide-ranging Environmental Protection Agency (EPA) enforcement programs and force agencies to address relatively minute problems at the expense of more important issues.\textsuperscript{26} Lastly, some argue that, because regulatory agencies have far greater expertise in environmental issues than either the courts or the citizen plaintiffs, citizen suits serve little purpose or add no value.\textsuperscript{27}

\textbf{B. The Clean Air Act and Its Citizen Suit Provision}

The Clean Air Act citizen suit provision was enacted in 1970 as the first of its kind, meant to provide a basis for private citizens to sue in the courts to

\begin{thebibliography}{9}
\bibitem{17} \textit{May, supra note 8}, at 3.
\bibitem{18} \textit{Id. at 3–4}.
\bibitem{19} \textit{Id. at 8}.
\bibitem{20} \textit{May, supra note 16}, at 2.
\bibitem{21} \textit{Glicksman, supra note 10}, at 363–64.
\bibitem{22} \textit{Id. at 372}.
\bibitem{23} \textit{Id. at 373–74}.
\bibitem{24} \textit{Id. at 382–83}.
\bibitem{26} "Citizens may thus have the EPA chasing less significant violators, at the expense of agency action against more substantial problems." \textit{Id. at 68}.
\bibitem{27} Biber & Brosi, \textit{supra note 9}, at 346.
\end{thebibliography}
enforce the air pollution standards and requirements promulgated by the EPA.\textsuperscript{28} The purpose of including a citizen suit provision was twofold: (1) Congress hoped that the threat of citizen suits would scare agencies into engaged and vigorous enforcement of relevant sections of the Act and (2) in the event that agencies failed to adequately enforce the Act, citizens and citizen groups could serve as a strong backup enforcement mechanism.\textsuperscript{29} In practice, citizen suits under the original 1970 Act and the 1977 amendments proved somewhat ineffective due to restrictive and ambiguous language.\textsuperscript{30} In 1990, amendments to the Clean Air Act broadened the scope of the citizen suit provision by allowing citizens to sue for the enforcement of a wider variety of substantive standards.\textsuperscript{31} The citizen suit provision of the Clean Air Act now allows “any person” to commence a civil suit on his own behalf against any person who has violated an emissions standard promulgated under the Clean Air Act.\textsuperscript{32} The provision further grants “any person” the right to bring suit against an administrator or agency that failed to perform “any act or duty under this chapter which is not discretionary.”\textsuperscript{33} Lastly, the provision allows “any person” to bring suit against any party that constructs a new or modified major emitting facility without the permit required under the CAA.\textsuperscript{34}

CAA citizen suits have played an important role in forcing federal agency action to address air quality issues. The agency-forcing power of CAA citizen suits is exemplified by \textit{Sierra Club v. Ruckelshaus}\textsuperscript{35} and its creation of the prevention of significant deterioration program.\textsuperscript{36} In \textit{Ruckelshaus}, the Sierra Club challenged the EPA’s decision to not require state implementation plans that protect against significant deterioration of existing clean air areas.\textsuperscript{37} The court found in favor of Sierra Club and issued an injunction requiring EPA to comply with the CAA.\textsuperscript{38} In response, the EPA promulgated prevention of significant deterioration regulations, citing the court’s injunction as the primary motivator for this agency action.\textsuperscript{39} Citizen suits have also been instrumental in

\textsuperscript{28} David T. Buente, \textit{Citizen Suits and the Clean Air Act Amendments of 1990 Closing the Enforcement Loop}, 21 ENVTL. L. 2233, 2233 (1991); see also Nat. Res. Def. Council v. Train, 510 F.2d 692, 700 (D.C. Cir. 1974) (“The legislative history of the Clean Air Act Amendments reveals that the citizen suits provision reflected a deliberate choice by Congress to widen citizen access to the courts, as a supplemental and effective assurance that the Act would be implemented and enforced.”).


\textsuperscript{30} Id. at 88.

\textsuperscript{31} Buente, supra note 28, at 2238.

\textsuperscript{32} 42 U.S.C. § 7604(a)(1).

\textsuperscript{33} § 7604(a)(2).

\textsuperscript{34} § 7604(a)(3).


\textsuperscript{36} Glicksman, supra note 10, at 358–59.

\textsuperscript{37} 344 F. Supp. at 254.

\textsuperscript{38} Glicksman, supra note 10, at 360.

\textsuperscript{39} Id.
forcing the EPA to regulate ozone-depleting substances, list criteria pollutants, and develop national emission standards for hazardous air pollutants.

II. ARTICLE III STANDING

A. Article III Standing in General

Since the formation of the federal court system, Article III of the Constitution has nominally limited the jurisdiction of United States federal courts to deciding “cases” and “controversies.” However, the meaning of this limitation and the full range of factors that govern it have never been explicitly established. The purpose of this jurisdictional limitation is to ensure that the courts do not overstep their bounds or waste time and resources attempting to answer questions that are better left to either the legislative or executive branch. The most prominent Article III jurisdictional requirements is standing—whether a plaintiff is entitled to have his case heard by the court. Since Article III lacks substantive standards to define standing, the doctrine of standing has evolved through judicial opinions that require plaintiffs to fulfill increasingly stringent standards in order to establish standing.

The Supreme Court now applies a three-element test to determine whether a plaintiff has standing. The first of these elements, commonly referred to as “injury-in-fact,” requires that the injury be (1) concrete and particularized, affecting the plaintiff in a “personal and individual way,” and (2) actual or imminent, rather than conjectural or hypothetical. The second element requires the plaintiff to demonstrate a “causal link” between the injury and the conduct of the defendant to ensure that the injury has not resulted from a third party absent from court. Lastly, it must be likely that the injury is redressable.

40. Id. at 362.
41. Id. at 365.
42. Id. at 379.
43. See U.S. CONST. art. III, § 2, cl. 1.
46. See Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992) (“[T]he core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III.”).
47. These decisions have occurred in the relatively recent past (starting in the latter half of the twentieth century). See, e.g., id. at 555.
49. See Lujan, 504 U.S. at 560.
50. Id. at 560 & n.1.
51. Id.
by a court outcome in favor of the plaintiff. These three elements—injury-in-fact, causation, and redressability—are far from standardized; it is often unclear how extensively plaintiffs must demonstrate each factor.

**B. Article III Standing for Environmental Plaintiffs**

For environmental plaintiffs, Article III standing has been a particularly challenging bar to judicial relief for environmental grievances. The long and controversial case history of environmental plaintiffs encountering questions of standing has led some commentators to conclude that environmental injuries possess particular characteristics unsuited to the strict application of an Article III standing test. Other commentators have argued that the mixed results of such cases result from attempts to achieve environmental policy goals that are better left to the legislative branch than the judiciary.

During the 1970s and 1980s, the Supreme Court demonstrated a very accommodating disposition to questions of standing for environmental plaintiffs. In perhaps the most important decision, *Sierra Club v. Morton*, the Sierra Club challenged a plan for Walt Disney Enterprises to construct a park in the Sierra Nevada Mountains. The Club alleged that construction would harm its special interest in “the conservation and the sound maintenance of the national parks, game refuges and forests of the country.” The outcome of the case was not a victory for the particular plaintiffs, as the Court found that they lacked standing because they failed to adequately demonstrate the “injury-in-fact” prong. However, the decision was foundational in establishing favorable precedent for environmental plaintiffs, because the court explicitly recognized the validity of “aesthetic” and “recreational” injuries as cognizable bases for establishing Article III standing.

The Court further endorsed a low bar for Article III standing in *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*. In *SCRAP*, a group of law students challenged new Interstate Commerce Commission regulations setting freight train rates that they believed would hamper the market for recycled materials, thus discouraging recycling and promoting the use of new raw materials. The plaintiffs claimed that the rate

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52. Id. at 561.
54. See id. at 182.
55. Id.
56. Id.
59. Id. at 730.
60. Id. at 735.
61. Id.
63. Id. at 675–76.
order impaired their “use of forests and streams” through the unnecessary 
extractions of timber and raw materials and the “accumulation of otherwise 
recyclable solid and liquid waste materials.”

Yet, the 1990s brought a wave of judicial tightening of Article III standing 
for environmental plaintiffs. In the landmark standing case *Lujan v. Defenders 
of Wildlife*, environmental plaintiffs challenged the Secretary of the Interior’s 
interpretation of a provision of the Endangered Species Act. Specifically, the 
plaintiffs attempted to argue that federally supported actions in Egypt and Sri 
Lanka would threaten endangered species, thereby harming the plaintiffs’ 
enjoyment of those areas. Again, the Court held that the plaintiffs lacked 
standing because they failed to establish injury-in-fact. The Court did not 
dispute the holding from *Sierra Club* that environmental and aesthetic 
enjoyment injuries are cognizable harms. Instead, it found the alleged injury 
speculative because the plaintiffs lacked plane tickets to either country and thus 
lacked the true intent to return to the countries.

The Court again embraced a more stringent conception of Article III 
standing in *Steel Co. v. Citizens for a Better Environment*, in which an 
environmental group sought to bring a citizen suit against Steel Company’s 
numerous past violations of the Emergency Planning and Community Right-to- 
Know Act. *Citizens for a Better Environment* highlighted Steel Company’s 
past failure to file regular discharge reports with the EPA as required by the 
Act. The Court held that the plaintiffs had no standing because the injuries 
alleged were wholly in the past, and therefore could not be redressed by a 
favorable outcome. The Court explicitly rejected the argument that enforcing 
civil penalties against Steel Company would deter future violations of the Act, 
thus rendering redress impossible.

Since 2000, federal courts’ position on standing has been harder to 
describe. While the Supreme Court has largely moved away from the rigid 
framework established by *Lujan*, some decisions emphatically underscore 
portions of the *Lujan* reasoning.

In *Friends of the Earth v. Laidlaw*, plaintiffs sued a private company for 
violating the Clean Water Act by discharging pollutants into a river in excess of

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64. *Id.* at 676.
65. *Id.* at 690.
68. *Id.* at 578.
69. *Id.* at 562–63.
70. *Id.* at 563–64.
72. *Id.*
73. *Id.* at 105–06.
74. *Id.* at 108–09.
the established limits.\textsuperscript{75} The district court had determined that the unlawful emissions of the private company did not actually cause any measurable harm to the river’s ecology or pose a concrete threat to public health.\textsuperscript{76} The Supreme Court clarified that the standard to establish an injury-in-fact for purposes of Article III standing was to first establish (1) use of “the affected area,” and (2) personal injury to “aesthetic and recreational values of the area” due to the activity in question.\textsuperscript{77} In other words, the plaintiffs did not need to necessarily demonstrate concrete environmental harm; instead they merely needed to demonstrate that the fear of environmental harm had injured their aesthetic or recreational enjoyment of the river. Based on affidavits alleging loss of recreational value, the Court found that the injury-in-fact requirement was satisfied.\textsuperscript{78} In addition, the Court held that the enforcement of civil penalties for the discharges was sufficient to satisfy the redressability prong of standing because of the potential to deter future violations.\textsuperscript{79} Reconciling this decision with \textit{Steel Co.}, the Court explained that the violations in \textit{Steel Co.} were wholly in the past, while the violations here were ongoing and could potentially continue into the future if undeterred.\textsuperscript{80}

Though \textit{Laidlaw} was a significant move away from the \textit{Lujan} precedent, the foundational basis for \textit{Lujan} remains. In \textit{Summers v. Earth Island Institute}, environmental groups challenged the Burnt Ridge Project, a U.S. Forest Service timber sale in the Sequoia National Forest.\textsuperscript{81} The plaintiffs alleged that the Forest Service had failed to provide an adequate opportunity for notice and comment on certain regulations that had permitted the timber sale.\textsuperscript{82} Plaintiffs were successful in both the district court and the Ninth Circuit, resulting in injunctions against two provisions of the regulations.\textsuperscript{83} When the case came before the Supreme Court, the analysis turned to standing, and the Court concluded that there was not sufficient evidence that the regulations caused a site-specific injury to the plaintiffs.\textsuperscript{84} Specifically, the Court found that affidavits alleging that the plaintiffs would want to go to forests where timber sales would be conducted were not concrete enough to demonstrate “actual and imminent” injury from the timber sale regulations.\textsuperscript{85}

\begin{footnotes}
76. \textit{Id.} at 181.
77. \textit{Id.} at 182–83.
78. \textit{Id.} at 183–84.
79. \textit{Id.} at 185–86.
80. \textit{Id.} at 188.
82. \textit{Id.} at 491.
83. \textit{Id.} at 491–92.
84. \textit{Id.} at 495–96.
85. \textit{Id.} at 496.
\end{footnotes}
Plaintiffs seeking to bring claims alleging harms resulting from climate change have had particular trouble establishing Article III standing. While, in general, courts have been willing to accept the injury-in-fact alleged by the typical plaintiff, including property damage claims for rising sea levels and variable weather patterns, and loss of recreational or aesthetic value from changing environmental landscapes, courts have not been as willing to find causation and redressability. This stems from the unique problems posed by climate change, a global phenomenon with numerous contributors. As such, causation by a single source is nearly impossible to demonstrate, and remediation from the curtailment of a single source or even a series of sources is nearly impossible to achieve.

The Court’s most famous decision on climate change injury came in Massachusetts v. EPA, when the Court ruled on a state’s standing to sue for injuries related to the EPA’s failure to regulate greenhouse gas emissions from vehicles. Though the Court referenced the traditional three-part Lujan standing test, it also noted two important considerations particular to Massachusetts: (1) that litigants who have been accorded procedural rights can establish standing “without meeting all the normal standards for redressability and immediacy,” and (2) that the party bringing the suit was a sovereign state, as opposed to a private individual. As a result, the Court found that Massachusetts was entitled to “special solicitude” in standing analysis, but did not delineate how this special solicitude affected the Lujan test. The Court then applied the Lujan analysis to Massachusetts’s claim and found that EPA’s failure to regulate greenhouse gas emissions presented an “actual” and “imminent” risk of harm to the state as well as a “substantial likelihood” that judicial relief would “prompt EPA to take steps to reduce that risk.” As this Note will later discuss: in according Massachusetts standing, the Court also found that the state had “satisfied the most demanding standards of the adversarial process,” without specifically referencing the special solicitude or its role in fulfilling the requirements for standing.

Though Massachusetts v. EPA set a promising precedent for climate change plaintiffs, the federal courts were quick to limit the effect of the decision. In Native Village of Kivalina v. ExxonMobil, the Ninth Circuit heard a public nuisance claim brought by a native Alaskan village against multiple oil companies for those companies’ continued contributions to climate change leading to the erosion of sea ice around the village. As a result of the erosion,

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87. Id. at 517–18.
88. Id. at 520.
89. Id. at 521.
90. Id.
91. Native Vill. of Kivalina v. ExxonMobil Corp., 696 F.3d 849, 853 (9th Cir. 2012).
the village would have to relocate or risk destruction by coastal storms. Though the majority dismissed the case on other grounds with no mention of standing, Judge Philip Pro addressed standing in his concurrence, affirming the district court’s holding that the plaintiffs lacked standing. Judge Pro wrote that the plaintiffs had failed to establish causation traceable to the particular defendants for global warming, which by their own admission “has been occurring for hundreds of years and is the result of a vast multitude of emitters worldwide whose emissions mix.” Judge Pro concluded that there was a marked difference between allowing a state to “challenge the EPA’s failure to regulate greenhouse gas emissions which incrementally may contribute to future global warming,” as had occurred in Massachusetts v. EPA, and allowing a private party to “pick and choose amongst all the greenhouse gas emitters throughout history to hold liable for millions of dollars in damages.”

III. WASHINGTON ENVIRONMENTAL COUNCIL V. BELLON

A. Case Summary

In March 2011, plaintiffs Washington Environmental Council and Sierra Club filed suit in the District Court for the Western District of Washington under the citizen suit provision of the Clean Air Act (CAA) to compel the Washington State Department of Ecology and other regional regulatory agencies to enact regulations addressing the emissions from the State of Washington’s five oil refineries: BP Cherry Point, ConocoPhillips, Shell Oil, Tesoro, and U.S. Oil. The Western States Petroleum Association, whose membership includes the five refineries named in the suit, intervened on behalf of the defendant agencies. The plaintiffs claimed that the regulatory agencies had failed to define the “reasonable available control technology” (RACT) standard for the five oil refineries, thus violating two provisions of Washington’s Clean Air Act State Implementation Plan: the “RACT Standard” and the “Narrative Standard.” Plaintiffs sought declaratory relief and an injunction requiring the agencies to set RACT for greenhouse gas (GHG) emissions from the oil refineries.

The defendants conceded that GHG emissions were the cause of the climate-related changes detailed in the plaintiffs’ complaint, including “rising sea levels,” “impacts to snow pack and water supplies,” and “changes in forest
Defendants also conceded that the five oil refineries identified in the suit do emit three GHGs: carbon dioxide, methane, and nitrous oxide.\textsuperscript{101} In total, the GHG emission from these oil refineries make up approximately 5.9 percent of the total GHG emissions in Washington.\textsuperscript{102}

The district court granted the plaintiffs’ motion for summary judgment on the RACT claim, but dismissed the plaintiffs’ Narrative Standard claim.\textsuperscript{103} The court ordered the defendants to comply with the SIP by completing the RACT process for the refineries identified in the suit by May 2014.\textsuperscript{104} On appeal to the Ninth Circuit, the Western States Petroleum Association argued that the plaintiffs lacked Article III standing.\textsuperscript{105}

In its discussion of the merits of the plaintiffs’ standing, the court relied heavily on the precedent set by \textit{Lujan}: in order for the plaintiff to have Article III standing, the plaintiff must demonstrate (1) he or she suffered an injury-in-fact that is concrete, particularized, and actual or imminent; (2) the injury is fairly traceable to the challenged conduct; and (3) the injury is likely to be redressed by a favorable court decision.\textsuperscript{106}

The plaintiffs argued that the defendants’ failure to enact RACT standards to control GHG emissions caused its members to suffer “recreational, aesthetic, economic, and health injuries.”\textsuperscript{107} In particular, the plaintiffs claimed injury from diminished enjoyment of Washington’s outdoor areas due to “changes in precipitation patterns, reduction of glaciers, changes in wildlife habitat, [and] increased risk of forest fires,” as well as harms from negative health effects and property damage attributable to climate change.\textsuperscript{108} Since the defendants did not dispute the accuracy of these claims, the court assumed that the submitted declarations were sufficient to satisfy the “concrete” injury requirement of standing.\textsuperscript{109}

In order to satisfy the “fairly traceable” prong of Article III standing, plaintiffs must demonstrate that the injury is either “causally linked or ‘fairly traceable’ to the [a]gencies’ alleged misconduct,” as opposed to the misconduct of a third party not before the court.\textsuperscript{110} While the court accepted as true that man-made GHG emissions are causally linked to climate change, it ultimately determined that the plaintiffs offered no compelling demonstration that the department’s failure to regulate the five refineries in question had a causal

\textsuperscript{100} Id. at 1136.
\textsuperscript{101} Id.
\textsuperscript{102} Id.
\textsuperscript{103} Id. at 1135.
\textsuperscript{104} Id.
\textsuperscript{105} Id.
\textsuperscript{107} Bellon, 732 F.3d at 1139–40.
\textsuperscript{108} Id. at 1140–41.
\textsuperscript{109} Id. at 1141.
\textsuperscript{110} Id.
connection to the asserted injuries. The plaintiffs had failed to establish the “fairly traceable” prong because they could not establish that the five particular unregulated refineries emitted enough GHGs to meaningfully contribute to global GHG levels, or that the global climate change phenomenon was causally linked to their claimed injuries.

The court also found that the record was “devoid of any evidence that RACT standards would curb a significant amount of GHG emissions from the Oil Refineries.” The court specifically noted the possibility that the refineries may already have technology in place that satisfies the relatively low standard of RACT. It further noted that even if RACT standards eliminated all GHG emissions from the refineries in question, the global nature of climate change and its innumerable point sources would support the conclusion that “Plaintiffs’ injuries are likely to continue unabated.” The court concluded that any judicial relief it granted would not remedy the stated injury, and therefore the plaintiffs’ claim failed to satisfy the redressability prong of the Lujan test.

Plaintiffs argued that their claim was similar to that advanced in Massachusetts v. EPA. However, as Judge Milan Smith clarified in his denial of rehearing en banc, Massachusetts v. EPA applied a relaxed standing analysis because of its two distinguishable aspects: “(1) the asserted injury was an alleged procedural violation, and (2) the action was brought by a sovereign state.” Since neither of these factors was present in Bellon, the Ninth Circuit found plaintiffs’ invocation of Massachusetts v. EPA unpersuasive.

B. Analysis

The Ninth Circuit’s decision in Bellon is the latest case to demonstrate that the courts are cautious to set a precedent of compelling regulatory agencies to enact more stringent standards to remediate climate-based injuries. This is especially true when the plaintiff is a nongovernmental citizen group seeking a court order to instruct a government agency to enact a standard or regulation. Even though the Ninth Circuit has a deserved reputation for progressiveness,

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111. Id. at 1142. In support of its conclusion, the court cited the unchallenged declaration of the Western States Petroleum Association’s expert that stated, in part, that “it is not possible to quantify a causal link, in any generally accepted scientific way, between GHG emissions from any single oil refinery in Washington, or the collective emissions of all five oil refineries located in Washington, and direct, indirect or cumulative effects on global climate change in Washington or anywhere else.” Id. at 1143.
112. Id. at 1146.
113. Id.
114. Id.
115. Id. at 1147.
116. Id. at 1146–47.
117. Id. at 1144–46; see also Massachusetts v. EPA, 549 U.S. 497 (2007).
especially in cases involving environmental concerns and injuries, Bellon demonstrates an unwillingness to extend the holding in Massachusetts v. EPA beyond the narrow factual construction outlined in the denial of petition for rehearing.

The plaintiffs in Bellon faced a standing hurdle different from that faced by plaintiffs in previous citizen suits, such as Morton, Lujan, and Summers. Unlike those cases, the Ninth Circuit did not have trouble finding that an injury-in-fact had occurred, since the defendants had conceded these injuries. Instead, Bellon burdens environmental plaintiffs with an extremely stringent standard of “causation” and “redressability.” It is highly unlikely that a plaintiff would ever be able to achieve this high bar for Article III standing. After all, environmental plaintiffs would rarely be challenging an agency action significant enough to address a percentage of GHG emissions large enough to render the agency action “fairly traceable” to the global phenomenon of climate change. Similarly, it would be nearly impossible to then demonstrate that a court injunction directing an agency to take action would remediate the effects of climate change in a manner comprehensive enough to remedy the claimed injury and satisfy the redressability prong. This decision essentially forecloses the possibility of a private citizen suit to address climate change in a manner that neither the defendants nor the plaintiffs find appropriate.119

This decision stands in stark contrast to the Supreme Court’s decision in Massachusetts v. EPA. The majority in Massachusetts v. EPA was clear: Massachusetts had “satisfied the most demanding standards of the adversarial process.”120 Some commentators, including Robert Percival, have taken this statement to signal that the standing analysis in Massachusetts v. EPA applies to all plaintiffs, not just those with the “special solicitude” invoked by the Court.121 If so, and if Massachusetts’s claim was enough for the Supreme Court to find causation and redressability under the original Lujan test despite the global nature of climate change, then the plaintiffs in Bellon should be accorded the same leniency in the analysis of causation and redressability. This is especially true because the remedy sought by the plaintiffs in Bellon was an instruction to regulate emitting sources, as opposed to monetary damages like those sought by Kivalina’s plaintiffs.

Even if one were to conclude that Massachusetts’s special solicitude played a strong role in its standing, the Ninth Circuit still failed to reconcile


120. 549 U.S. at 521.

121. See Robert V. Percival, Massachusetts v EPA Escaping the Common Law’s Growing Shadow, 2007 SUP. CT. REV. 111, 133–34 (2007) (“[I]t is better understood as holding that the state would have standing without the need for any special rule.”); see also David S. Green, Note, Massachusetts v. EPA Without Massachusetts Private Party Standing in Climate Change Litigation, 36 ENVIRONS ENVTL. L. & POL’Y J. 35, 58 (2012).
portions of its reasoning with the precedent set by *Massachusetts v. EPA*. The court reached its decision on the plaintiffs’ standing by relying partly on a determination that the minimal benefit achieved from regulating five refineries in Washington would not redress or mitigate the overarching global problem of climate change.\(^{122}\) However, this reasoning is virtually identical to the argument advanced by the EPA in *Massachusetts v. EPA*.\(^ {123}\) In response to that argument, the Supreme Court decisively stated: the “assumption that a small incremental step, because it is incremental, can never be attacked in a federal judicial forum” is clearly erroneous.\(^ {124}\) In *Bellon*, the plaintiffs sought to compel an incremental change that, as the defendants conceded, would lead to a reduction in GHG emissions, which, also conceded by the defendants, contribute to climate change. In accordance with *Massachusetts v. EPA*, the relatively minimal impact of such a change on global GHG emissions and climate change should not have precluded the plaintiffs’ suit.

This point is further strengthened by the D.C. Circuit’s holding in *Natural Resources Defense Council v. EPA* (NRDC), in which the court found that a 1-in-200,000 increase in the lifetime risk of skin cancer from ozone depletion was significant enough to support standing to challenge a regulation.\(^ {125}\) There is one obvious difference between the two cases: where the court in *NRDC* examined the risk of an explicit (albeit miniscule) harm to individual health, the *Bellon* court dealt with the risk of harm to property and the more generalized claims of harm to health. However, comparing their results brings into question the appropriateness of using miniscule percentages that represent the possibility of harm as bases to deny standing. When a 0.000005 percent increase in risk of a specific health harm was significant enough for the D.C. Circuit to find standing in *NRDC*, it becomes hard to argue that a 5.9 percent contribution to state emissions by the refineries in *Bellon* that will contribute to general adverse health effects cannot support standing.

### IV. Solutions for Non-Article III Plaintiffs

As *Bellon* demonstrates, federal courts will not be friendly to citizen suits brought by private plaintiffs directly against state or federal agencies when the injury alleged derives from climate change. The current conception of the Article III standing doctrine is heavily unfavorable to address global climate change, and the current configuration of the Supreme Court renders any favorable changes to the doctrine highly unlikely in the foreseeable future.

The question then becomes: What, if any, judicial remedies remain for a private plaintiff suing to address damages related to climate change? This Part discusses potential avenues circumventing the lack of Article III standing for

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\(^ {122}\) *Bellon*, 741 F.3d at 1135–36.

\(^ {123}\) See 549 U.S. at 523.

\(^ {124}\) Id. at 524.

such citizen suits. One strategy is to sue under the National Environmental Policy Act (NEPA), addressing climate change concerns by alleging local pollution harms to establish Article III standing. Another strategy is to bring these suits in the state courts, which are not bound by the Article III standing doctrine. This can be accomplished in three ways: (1) bring a citizen suit under a federal statute in state court, (2) bring a suit under the environmental provisions of state constitutions, or (3) sue state agencies under existing state citizen suit statutes.

In discussing the possible judicial avenues available to a citizen suit plaintiff, this Note will analyze the hypothetical successes of plaintiffs who share many attributes with the plaintiffs in Bellon. This plaintiff (hereinafter Plaintiff H) is (1) a nonstate actor (either a citizen or citizen group) bringing a (2) citizen suit (or similar) claim (3) against a state or federal agency action (or inaction) (4) alleging climate change-related harms that (5) would not satisfy Article III standing for a federal court under the reasoning expressed in Bellon.

A. Using NEPA to Address Climate Change Harms

1. NEPA and Citizen Challenges

NEPA was enacted in 1969 as one of the nation’s first and most important environmental statutes. NEPA seeks to control the environmental impact of projects undertaken by the federal government by requiring that all federal agencies produce environmental impact statements (EISs) for all major “federal actions” that will significantly affect the environment. By forcing agencies to disclose this information, NEPA promotes informed decision making, public scrutiny of environmental effects of projects, and political incentives to both avoid environmentally destructive actions and enact mitigation measures when such harm is unavoidable. However, NEPA does not contain an explicit federal enforcement provision, so the primary sources of litigation are cases initiated by an injured party. Since NEPA is a purely procedural statute, plaintiffs in NEPA cases can challenge an agency’s failure to adequately follow the statute’s procedures (frequently by challenging the sufficiency and detail of an EIS), but cannot challenge an agency’s decision to move forward with a project.

126. The success of the environmental plaintiffs in WildEarth Guardians v. Jewell demonstrated this. See 738 F.3d 298 (D.C. Cir. 2013).
128. Id.
129. Id. at 904–05.
131. Id. at 636.
2. *Wild Earth Guardians v. Jewell*

Though not a perfect analogue to the wide-ranging judicial power of a citizen suit claim, a recent D.C. Circuit case demonstrates that NEPA procedural suits can be useful for Plaintiff H when he challenges federal agency actions that may result in unaccounted climate change harms.

In *WildEarth Guardians v. Jewell*, the D.C. Circuit heard arguments from three environmental citizen groups seeking to challenge the sufficiency of a Bureau of Land Management Final Environmental Impact Statement (FEIS) accompanying the agency’s decision to lease coal tracts in Wyoming to a strip mining operation.\(^\text{132}\) Though the environmental groups alleged numerous deficiencies in the FEIS, the D.C. Circuit chose to address only two: global climate change impacts and local pollution impacts.\(^\text{133}\) The court recognized that an agency’s “failure to prepare (or adequately prepare) an EIS before taking action” was an “archetypal procedural injury.”\(^\text{134}\) The court further found that the local pollution that would occur as a result of the mine leasing would indeed injure the plaintiffs’ aesthetic and recreational enjoyment of the area, and that injury was redressable by a favorable outcome.\(^\text{135}\)

Importantly, the court then found that once standing had been established for the challenge to the FEIS, the plaintiffs were entitled to raise other alleged inadequacies of the FEIS.\(^\text{136}\) Specifically, the court found that the plaintiffs’ “aesthetic injury follows from an inadequate FEIS whether or not the inadequacy concerns the same environmental issue that causes their injury.”\(^\text{137}\) In practice, this meant that the court had jurisdiction to hear the plaintiffs’ claims relating to the FEIS inadequately analyzing the climate change effects of the project even though the plaintiffs’ standing for the case was entirely based on the allegations of the FEIS inadequately analyzing local pollution harms.

Though the *WildEarth* court eventually ruled that the FEIS was adequate, the precedent established by the case creates a roadmap for environmental groups to have a subsection of their climate change-related grievances heard before a court.\(^\text{138}\) Essentially, the D.C. Circuit can now review any federal agency action that requires an EIS in the context of its failure to adequately analyze and mitigate potential climate change impacts if plaintiffs can establish another non-explicitly climate-related inadequacy in the EIS. This could give Plaintiff H a powerful tool to force federal agencies to consider climate change concerns when taking major actions.

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\(^{132}\) 738 F.3d 298, 302–04 (D.C. Cir. 2013).

\(^{133}\) *Id.* at 308.

\(^{134}\) *Id.* at 305.

\(^{135}\) *Id.* at 305–06.

\(^{136}\) *Id.* at 307-08.

\(^{137}\) *Id.* at 307.

\(^{138}\) *Id.* at 311–12.
However, this approach is not without limitations. First, this litigation strategy only works where NEPA creates a procedural right—only major federal agency actions in which an EIS is necessary. It would not necessarily cover a *Bellon*-type situation, in which an agency has merely neglected or refused to regulate a particular source or industry. Furthermore, as *WildEarth* demonstrates, the ability to bring a NEPA suit by no means guarantees a favorable outcome. The D.C. Circuit noted that the lack of specific science on climate change effects placed a ceiling on the amount of information required to make an EIS adequate, a ceiling that fell far short of the standard the plaintiffs demanded.\(^{139}\) Lastly, the actual outcome of a challenge to an FEIS leaves much to be desired. Even if the plaintiffs in *WildEarth* had succeeded, the remedy would have been an invalidation of the FEIS and a court order to produce a more adequate document. Though the agency action would have been on pause until the creation of an adequate FEIS, this strategy would be a costly and litigation-heavy method to induce, at best, modest environmental benefits.

### B. State Court Citizen Suits\(^ {140}\)

#### 1. Pros and Cons of State Court

The obvious advantage of bringing a claim in state court is that state courts need not be hampered by the same standing requirements as federal courts.\(^ {141}\) Immediately, state court is an attractive venue to Plaintiff H, who lacks Article III standing. Furthermore, if a claim based in federal law is brought in a state court that does not require Article III standing, a defendant cannot avoid the claim by removing the claim to federal court for the sole purpose of dismissal based on lack of Article III standing, as the proper response to a lack of Article III standing would be a remand to state court.\(^ {142}\)

However, limiting judicial relief to state courts severely restricts the types of actions Plaintiff H could bring. First, Plaintiff H could not sue the EPA. Second, the state court of choice would have jurisdiction only over in-state polluters and state agencies. Out-of-state polluters could not be targeted by Plaintiff H. Lastly, and perhaps less importantly, Plaintiff H would be bound by the state court’s decision, because Plaintiff H’s lack of Article III standing would preclude federal judicial review if the case resulted in an unsatisfactory ruling.\(^ {143}\) However, since Plaintiff H would be barred from bringing a suit in

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139. *Id.* at 309.
140. See Appendix 1, infra pp. 129–30 for a full table of state court options.
federal court anyways, lack of federal judicial review may be of little consequence.

There is also the question of whether state-level actions to cut emissions are actually valuable to the overall national or international strategy of combating climate change. Detractors of state-level climate change policy argue that federal regulation can more efficiently attain goals, and has the distinct advantage of enacting regulations across state borders and avoiding the influence of regionally strong industry lobbies. Other commenters argue that the decentralized “laboratory” effect of disparate state laws is ill-suited to address a global problem like GHG emissions, because the limited scope of state regulations would do little to reverse climate change. Additionally, stringent regulations in one state could actually cause increased emissions in states with less stringent regulations. Lastly, state policy makers may favor visible, politically popular plans that are not efficient or thorough options.

Advocates of local climate change policy argue that the advent of state-level (or local) regulations can stimulate regulation at higher jurisdictional levels through a “domino effect.” In many cases, interest groups fear that the enactment of state regulations would create a patchwork of inconsistent regulations throughout the nation, causing them to push preemptively for uniform federal regulation. Additionally, states are frequently referred to as “laboratories of democracy” that are able to serve as testing grounds for innovative approaches to regulation and law. When states develop successful regulatory models for addressing particular environmental problems, such models provide blueprints for future federal regulation.

146. Id. at 1419.
147. Id. at 1420.
148. “Indeed, many U.S. federal environmental laws and multilateral international environmental agreements came about only after the underlying environmental issue was already being addressed by a subset of lower-level jurisdictions.” Kirsten H. Engel & Scott R. Saleska, Subglobal Regulation of the Global Commons The Case of Climate Change, 32 ECOLOGY L.Q. 183, 223 (2005).
149. “On the domestic level, some of the most prominent examples of the domino effect are those where interest groups have pushed for preemptive federal regulation to eliminate a growing prospect of inconsistent regulation by individual states. For example, the campaign to include tailpipe emission limitations for motor vehicles under the Clean Air Act of 1965 was primarily the result of an industry lobbying campaign for national tailpipe standards that would preempt the tailpipe standards recently enacted by several individual states, including California.” Id. at 224.
150. See New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).
151. “In the environmental realm, the federal legislature embraced state-based models when it enacted the Clean Air Act, the Clean Water Act, the Surface Mining Reclamation Act, the Comprehensive Environmental Response Compensation and Liability Act, and the Toxics Release Inventory.” Carlarne, supra note 144, at 1358.
Even if Plaintiff H were to decide that bringing a suit in state court would be beneficial, there are some more practical considerations for him to keep in mind. State courts may be more biased than federal courts in their adjudication, especially when a suit involves a state agency or a major industry within the state.\footnote{152} Furthermore, many environmental lawyers have expressed that they are simply “most comfortable in the federal setting,” and may be less likely to take state-level cases as a result.\footnote{153}

2. A Note on State Court Standing Law

As previously mentioned, claims in state court are not required to adhere to the federal court Article III elements of injury, causation, and redressability.\footnote{154} However, there is obviously no rule prohibiting states from adopting Article III standing rules, nor is there a rule preventing state courts from adopting state standing doctrines even more restrictive than the federal Article III standards.\footnote{155} Plaintiff H should bring litigation only in states with less stringent rules for standing, thus allowing for the potential success of a climate change suit that does not satisfy the \textit{Bellon} court’s standards for causation and redressability. Therefore, in the following subparts, this Note will only discuss states in which rules on standing are either less stringent than federal standards, or may be relaxed for environmental citizen suits.\footnote{156}

As a result, many states with liberal environmental citizen suit statutes or provisions will not be discussed. For example, Illinois’s constitution provides: “Each person has the right to a healthful environment” and “may enforce this right against any party, governmental or private, through appropriate legal proceedings.”\footnote{157} Though this provision seems promising for Plaintiff H, case law indicates otherwise; Illinois state courts utilize a three-prong test for standing that is essentially identical to the \textit{Lujan} test.\footnote{158} Thus, were Plaintiff H to bring his suit in an Illinois state court, the same causation and redressability issues would be triggered. While the Illinois court may not necessarily resolve the issue in an identical manner as the \textit{Bellon} court, the mere presence of

\begin{itemize}
\item \footnote{153} \textit{Id.}
\item \footnote{154} “We have recognized often that the constraints of Article III do not apply to state courts . . . .” \textit{ASARCO}, Inc. \textit{v. Kadish}, 490 U.S. 605, 617 (1989).
\item \footnote{155} Elmendorf, \textit{supra} note 152, at 1008.
\item \footnote{156} \textit{See, e.g.}, Langford \textit{v. Superior Court}, 729 P.2d 822, 833 n.6 (Cal. 1987) (“California’s requirements are less stringent than those imposed by federal law.”); \textit{see also} Sierra Club \textit{v. Dep’t of Transp.}, 167 P.3d 292, 313 (Haw. 2007) (“[T]he appellate courts of this state have generally recognized public interest concerns that warrant the lowering of standing barriers in cases pertaining to environmental concerns.” (quoting another source)).
\item \footnote{157} \textit{ILL. CONST.}, art. XI, § 2.
\item \footnote{158} “More precisely, the claimed injury, whether ‘actual or threatened’, must be: (1) ‘distinct and palpable’; (2) ‘fairly traceable’ to the defendant’s actions; and (3) substantially likely to be prevented or redressed by the grant of the requested relief.” Greer \textit{v. Ill. Hous. Dev. Auth.}, 524 N.E.2d 561, 575 (Ill. 1998) (citations omitted).
\end{itemize}
identical Article III standing makes Illinois an undesirable venue for Plaintiff H to bring his claim.

Similarly, Wyoming’s Environmental Quality Act includes a citizen suit statute, providing that “any person” adversely affected by an agency action may commence a civil action to “compel compliance with this act,” but “only to the extent that such action could have been brought in federal district court.” Since the statute explicitly ties the availability of environmental citizen suit standing in state court to the potential for the suit to be brought in federal court, the statute provides no relief to Plaintiff H.

3. Federal Citizen Suits in State Court

Given that Article III standing is not necessarily required by state courts, the most intuitive solution to the standing problem in Bellon is to merely bring the same CAA citizen suit claim in a state court that has a relaxed bar for standing.

As a threshold issue, the Supreme Court has clearly held that state courts have the authority to adjudicate federal claims under state rules of justiciability. In theory, there is no overt bar to prevent a non-Article III plaintiff from bringing a citizen suit under a federal statute like the CAA in a state court. The venue clause of the CAA’s citizen suit provision restricts any action to be “brought only in the judicial district in which such a source is located.” This choice of language is distinguished from the “district courts of the United States” used elsewhere in the provision to refer specifically to federal district courts. Some scholars have argued that this distinction in language demonstrates that “district courts” was intended to require a federal district court as the venue, while “judicial districts” was intended to denote that the venue need not be federal, but must be convenient to the defendant. Unfortunately, the Court has not extensively addressed this distinction. Three state courts have adjudicated citizen suit claims arising under the Clean Water Act, which contains a similar venue clause requiring claims to be brought “only in the judicial district” in which the polluting source is located.

However, the greatest barrier to Plaintiff H in bringing a claim in this manner may be the discretion of the state court itself. While state courts may choose to address federal claims, they are under no obligation to hear claims

160. “[S]tate courts are not bound by the limitations of a case or controversy or other federal rules of justiciability even when they address issues of federal law, as when they are called upon to interpret the Constitution or, in this case, a federal statute.” ASARCO, Inc. v. Kadish, 490 U.S. 605, 617 (1989).
162. See, e.g., § 7604(a).
163. Elmendorf, supra note 152, at 1021.
involving solely federal statutes. Therefore, there is no guarantee that Plaintiff H would succeed in having his claim heard by a state court even if he has standing under the state’s rules.

All the potential pitfalls of this strategy do not necessarily render it inert. Bringing a federal claim in state court may still be Plaintiff H’s best option if he wants to target an agency in a state with standing requirements less stringent than federal court, but with no state statute or provision explicitly providing for citizen suits. For instance, Plaintiff H may want to bring a suit against a state agency in California, a state with a strong reputation for environmental progressiveness, but no explicit citizen suit statute or constitutional provision confers the right for a citizen to enforce environmental rights or laws in court. Plaintiff H may also be mindful of the fact that California courts have explicitly denied the existence of Article III standing barriers to any potential court claims.\textsuperscript{166} In such a case, Plaintiff H’s best strategy would be to attempt to bring a citizen suit under the CAA in a California state court, where his inability to meet Article III standing requirements is irrelevant. Of course, the California court may still decline to hear the case, but it still affords a greater chance of judicial relief than a federal court.

4. \textit{Citizen Suits under State Constitutions}

Many state constitutions contain provisions protecting the environment from harm. However, these provisions greatly vary from those that merely state that the legislature has authority to enact environmental legislation to those that establish substantive rights and the power to enforce those rights.\textsuperscript{167} For Plaintiff H, the only relevant constitutional provisions would be those that create an affirmative right to a clean environment separate from any federal statute, and then grant citizen groups the means to enforce that right in state court. As such, Plaintiff H could allege an agency violation of their constitutionally granted substantive right, then bring a claim against the agency in state court, facing only the barriers of state court standing.

The environmental provisions of four states generally fulfill the aforementioned conditions: Hawaii, Illinois, Montana, and Pennsylvania.\textsuperscript{168} However, there is variation in the strength of the language used among these states. And, given state standing barriers, not all four states promise a high chance of success for Plaintiff H.

\textsuperscript{166} “Article III of the federal Constitution imposes a case-or-controversy limitation on federal court jurisdiction, requiring the party requesting standing [to allege] such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues. There is no similar requirement in our state Constitution.” Grosset v. Wenaas, 175 P.3d 1184, 196 n.13 (Cal. 2008) (internal quotation marks omitted) (citations omitted).


\textsuperscript{168} See HAW. CONST. art. XI, §§ 1, 7, 9; ILL. CONST. art. XI, § 2; MONT. CONST. art. IX, §§ 1–3; PA. CONST. art. I, § 27.
Montana mandates that “each person shall maintain and improve a clean and healthful environment” and that the state “provide adequate remedies to prevent unreasonable depletion and degradation of natural resources.”\(^{169}\) While the right is theoretically enforceable in court,\(^{170}\) the Montana Supreme Court has been unwilling to recognize it as a cause of action between two private parties for monetary damages.\(^{171}\) Plaintiff H would likely be able to clear this hurdle because, by definition, his claim is one against a state agency for nonmonetary relief. In order to establish standing, Montana courts apply a two-prong standing test requiring (1) that the plaintiff allege a past, present, or potential injury to a property or right, and (2) that the injury be distinguishable from a general public injury (but not necessarily exclusive to him).\(^{172}\) Plaintiff H would likely be able to satisfy both prongs of this test.

Similarly, Pennsylvania recognizes a right to “clean air, pure water, and to the preservation of the . . . environment” and concludes that the state is the trustee of the resources and “shall conserve and maintain them for the benefit of all the people.”\(^{173}\) While the provision itself contains no explicit grant of power to citizens to enforce the right, case law demonstrates that concerned citizens may challenge Pennsylvania agency actions that violate the citizens’ constitutional interests of preserving and maintaining the environment.\(^{174}\) In general, standing in Pennsylvania to challenge government actions will be accorded to parties who have been aggrieved by having their rights invaded or infringed.\(^{175}\) Furthermore, courts have held that standing requirements under the citizen suit provision should be “broadly construed” when the plaintiff is a private citizen.\(^{176}\) Given this relaxed approach to standing in citizen suit cases

\(^{169}\) MONT. CONST. art. IX, § 1.

\(^{170}\) “[W]e conclude that the right to a clean and healthful environment is a fundamental right because it is guaranteed by the Declaration of Rights found at Article II, Section 3 of Montana’s Constitution, and that any statute or rule which implicates that right must be strictly scrutinized and can only survive scrutiny if the State establishes a compelling state interest and that its action is closely tailored to effectuate that interest and is the least onerous path that can be taken to achieve the State’s objective.” Mont. Envtl. Info. Ctr. v. Dep’t of Envtl. Quality, 988 P.2d 1236, 1246 (Mont. 1999).


\(^{172}\) “[T]he following criteria must be satisfied to establish standing: (1) the complaining party must clearly allege past, present, or threatened injury to a property or civil right; and (2) the alleged injury must be distinguishable from the injury to the public generally, but the injury need not be exclusive to the complaining party.” Mont. Envtl. Info. Ctr., 988 P.2d at 1246.

\(^{173}\) PA. CONST. art. I, § 27.


\(^{175}\) See Franklin Twp. v. Penn. Dep’t of Envtl. Res., 452 A.2d 718, 719 (Pa. 1982); Keystone Raceway Corp. v. State Harness Racing Comm’n, 173 A.2d 97, 100 (Pa. 1961) (“[T]he party must have a direct interest in the subject-matter of the particular litigation, otherwise he can have no standing to appeal. And not only must the party desiring to appeal have a direct interest in the particular question litigated, but his interest must be immediate and pecuniary, and not a remote consequence of the judgment. The interest must also be substantial.” (internal quotation marks omitted) (citation omitted)).

\(^{176}\) “The standing requirements of Section 27 are normally to be broadly construed, especially where a potentially affected locality or private citizen, or specifically empowered watchdog agency,
with private plaintiffs, Plaintiff H would likely be able to demonstrate standing in a Pennsylvania court.

Plaintiff H would also likely find success in Hawaii. The Hawaii constitution contains a provision that states: “Each person has the right to a clean and healthful environment” as defined by the laws of the state, and “[a]ny person may enforce this right against any party, public or private, through appropriate legal proceedings.” Importantly, though Hawaii does utilize a three-prong standing test similar to the one in Lujan, the Supreme Court of Hawaii has recognized that there is a public interest in relaxing standing barriers in cases that implicate environmental concerns. The court has expressed that it would not “foreclose challenges to administrative determinations through restrictive applications of standing requirements.” This precedent is extremely favorable to Plaintiff H. He is explicitly granted the ability to enforce his constitutional right to a “clean and healthful environment” in state court with the enhancement that his claim, as a challenge to an administrative decision, is entitled to a relaxed standing requirement to grant him his day in court.

5. State-Specific Citizen Suit Statutes

The majority of state-level citizen suits are governed by specific citizen suit provisions contained within state statutes. Michigan’s citizen suit provision, contained within the Michigan Environmental Protection Act (MEPA) is a good example of such a provision. The provision states that “any person” may maintain an action “for the protection of the air, water, and other natural resources . . . from pollution, impairment, or destruction” in a court with jurisdiction over the area where “the alleged violation occurred or is likely to occur.” The provision allows for both declaratory and equitable relief. Unfortunately, the Michigan courts have clearly stated that federal standing rules must apply to state court actions, including those brought under the MEPA statute.

177. HAW. CONST. art. XI, § 9.
178. “[T]he appellate courts of this state have generally recognized public interest concerns that warrant the lowering of standing barriers in cases pertaining to environmental concerns.” Sierra Club v. Dep’t of Transp., 167 P 3d 292, 313 (Haw. 2007) (citation omitted).
179. Id.
180. MICH. COMP. LAWS ANN. §§ 324.1701–.06 (West 2015).
181. § 324.1701.
182. Id.
183. “We begin our analysis with the observation that our Supreme Court has indeed repeatedly endorsed the test for standing articulated by the United States Supreme Court.” Mich. Educ. Ass’n v. Superintendent of Pub. Instruction, 724 N.W.2d 478, 481 (Mich. Ct. App. 2006).
184. Id. at 485 (stating that statutory provisions that confer standing broader than the limits imposed by Michigan’s constitution are unconstitutional and do not confer standing to bring suit in state court).
Though the MEPA citizen suit provision was the first of its kind, other states have mimicked both the language and the scope of relief present in MEPA. Minnesota and South Dakota both have similar provisions allowing for declaratory and equitable relief. However, the presence of similar language does not necessarily mean that the provision is beneficial to Plaintiff H. For instance, Louisiana allows any person who is adversely affected by an action to commence a civil suit against any person in violation of Louisiana’s Environmental Quality title. However, Louisiana case law clarifies that this provision does not grant citizens the right to challenge actions taken (or not taken) by the Louisiana Department of Environmental Quality; instead it only confers the right to bring suit against regulated entities in violation of permits or standards. This limitation makes Louisiana an undesirable venue for Plaintiff H, since governmental agency decisions would be outside his legal purview as a citizen.

Yet, there are promising opportunities for Plaintiff H to bring suit using state citizen suit statutes. The Connecticut Environmental Protection Act allows for declaratory and equitable relief for the protection of the environment from “unreasonable pollution, impairment, or destruction,” but the scope of the provision is limited to agencies of “the state or of a political subdivision thereof.” This limitation alone does not make the venue any less optimal for Plaintiff H. Connecticut case law reveals that the relevant inquiry in cases involving the state Environmental Protection Act is not based on classical standing; instead it is based on statutory aggrievement and zones of interest. In order to establish standing, a plaintiff must “set forth facts to support an inference that unreasonable pollution, impairment or destruction of a natural resource will probably result” from the action being challenged. If Plaintiff H were to bring a suit in Connecticut, he would have to demonstrate that an agency’s failure to regulate GHG emissions constitutes unreasonable pollution, impairment, or destruction of the environment. While this is hardly a self-evident proposition, it seems far easier to demonstrate than the nebulous questions of causation and redressability Plaintiff H would face in federal court.

The New Jersey Environmental Rights Act provides that “[a]ny person may commence a civil action . . . against any other person alleged to be in violation of any statute, regulation or ordinance which is designed to prevent or
minimize pollution, impairment or destruction of the environment.”\textsuperscript{194} Importantly, this statutory grant of power applies only in instances where no existing statute or regulation establishes a specific environmental control standard.\textsuperscript{195} Courts have construed this provision to allow plaintiffs to target regulated entities when the government has taken some action to regulate, but the agency in question has sought “less than the full relief available under relevant legislation.”\textsuperscript{196} Furthermore, courts have held that when a regulatory agency has “failed or neglected to act in the best interest of the citizenry,” then the courts should “permit interested persons to continue with enforcement under the Environmental Rights Act.”\textsuperscript{197} This precedent is advantageous to Plaintiff H. Assuming that no statute in New Jersey currently controls for GHG emissions, the New Jersey Environmental Rights Act gives Plaintiff H a legal hook to challenge either agency inaction or ineffective agency action, as long as he alleges that destruction of the environment has occurred because of the agency’s decision.

Potential venues for state-level climate change litigation are not limited to the northeast. Florida has a similar Environmental Protection Act\textsuperscript{198} that allows any citizen of the state to maintain an action for injunctive relief against a governmental agency “charged by law with the duty of enforcing laws, rules and regulations for the protection of the air, water, and other natural resources” in order to compel the agency to enforce the laws, rules, or regulations in question.\textsuperscript{199} Before bringing any such claim to court, however, a potential plaintiff must first file a complaint directly with the agency, alleging the facts of the complaint and how the complainant is affected.\textsuperscript{200} The agency can be sued in court only if it has not responded to the potential plaintiff who complied with these procedures.\textsuperscript{201} The Supreme Court of Florida has held that parties suing under the Act are not subject to the traditional rules of standing.\textsuperscript{202} Instead, the plaintiff must demonstrate that an injury has occurred, raise a real, not theoretical, question, and have a bonafide and direct interest in the result.\textsuperscript{203} While Plaintiff H’s ability to successfully navigate the procedural hurdles mandated by Florida’s Environmental Protection Act is not guaranteed, state-level litigation in Florida is, at the very least, far more promising than Plaintiff H’s prospects in federal court.

\begin{itemize}
\item \textsuperscript{194} § 2A:35A-4(a).
\item \textsuperscript{196} Id. at 27.
\item \textsuperscript{197} Id.
\item \textsuperscript{198} Fla. STAT. § 403.412 (2015).
\item \textsuperscript{199} § 403.412(2)(a).
\item \textsuperscript{200} Fla. Wildlife Fed’n v. State Dep’t of Envtl. Regulation, 390 So. 2d 64, 66 (Fla. 1980).
\item \textsuperscript{201} Id.
\item \textsuperscript{202} “This statute sets out an entirely new cause of action. By providing that the manner in which a potential plaintiff is affected must be set out, the statute ensures that the minimum requirements of standing[—]injury and interest in redress[—]will be met.” Id.
\item \textsuperscript{203} Id. at 67–68.
\end{itemize}
At first glance, the Ninth Circuit’s opinion in *Washington Environmental Council v. Bellon* seems to be the final nail in the coffin of meaningful private plaintiff climate change litigation. The federal courts have narrowed the situations in which a plaintiff can receive the lenient causation and redressability analysis present in *Massachusetts v. EPA* to the point of near irrelevancy. However, as this Note argues, that conclusion may be misleading and needlessly pessimistic.

It would be a mistake to so quickly foreclose on the future role of citizen suits in the battle to create a regulatory scheme to meaningfully address climate change. As history has clearly shown, citizen suits are an important facet of environmental law, often most useful in spurring agency action on relatively newfound issues and new environmental threats. Climate change fits the mold of such an environmental threat. Though courts, in general, are not the optimal venue in which to push for emissions regulations, there is little other choice at this point in time. The prospect of any congressional action on the subject in the foreseeable future is dim. Recent political developments have shown that executive orders may be a viable tool to push some regulation, but they cannot form the basis for a long-term climate-focused regulatory strategy. Citizen suits played a key role in spurring regulation of air pollutants and water pollutants; they can also play a role in the development of regulations to address climate change. Since there is no existing, wide-ranging, federal regulatory regime to address climate change, citizen suits would not disrupt any comprehensive regulation strategy. And given the urgency of the climate change problem, GHG emission regulations are not an unimportant distraction that would divert agency resources from more pressing issues.

However, this optimism is not to say that climate change citizen suits have a future in federal courts. With the exception of the NEPA options, *Bellon* has effectively ended meaningful climate change citizen suit litigation in federal court. In order for citizen suits to continue spurring environmental regulation effectively when faced with agency failure, plaintiffs must solve the problem of Article III standing. It would appear that, in at least some jurisdictions, this solution could be citizen suit litigation in state courts. State citizen suit statutes and constitutional provisions create a promising avenue for potential cases against state regulatory agencies that have neglected to enact GHG emission regulations. Furthermore, such statutes and provisions discussed in this Note are only the tip of the proverbial iceberg. There may be avenues to target these agencies through state Administrative Procedure Act analogue statutes, or citizen suit provisions available in more particular state regulatory statutes governing regulation of a particular industry or resource.

While state-level regulations may not be the most optimal strategy to target emissions, environmental groups must confront the reality that national regulations to specifically address climate change are few and far between. And
it is always possible that state regulation will induce more comprehensive federal regulations. In the end, state regulation, for all its flaws, is better than no regulation at all.

While *Bellon* is certainly a blow to climate change litigation, it is far from a death sentence. Environmental groups can still use citizen suits to force the hand of agencies on the state and local level. Absent access to federal courts, state courts can, and should, become the new battleground to spur regulatory change.

APPENDIX 1

<table>
<thead>
<tr>
<th>State</th>
<th>Citizen Suit Provision</th>
<th>Citation</th>
<th>Non-Article III Standing Standards in State Court</th>
</tr>
</thead>
<tbody>
<tr>
<td>Connecticut</td>
<td>Connecticut Environmental Protection Act of 1971</td>
<td>CONN. GEN. STAT. §§ 22a-14 to -20 (2015)</td>
<td>Yes*204</td>
</tr>
<tr>
<td>Florida</td>
<td>Florida Environmental Protection Act of 1971</td>
<td>FLA. STAT. § 403.412 (2015)</td>
<td>Yes*205</td>
</tr>
<tr>
<td>Hawaii</td>
<td>Constitutional Provision</td>
<td>HAW. CONST. art. XI, § 9</td>
<td>Yes*206</td>
</tr>
<tr>
<td>Illinois</td>
<td>Constitutional Provision</td>
<td>ILL. CONST. art. XI, § 2</td>
<td>No*207</td>
</tr>
<tr>
<td>Indiana</td>
<td>State Statute</td>
<td>IND. CODE §§ 13-30-1-1 to -12 (2015)</td>
<td>Yes*208</td>
</tr>
<tr>
<td>Iowa</td>
<td>State Statute</td>
<td>IOWA CODE § 455B.111 (2015)</td>
<td>Yes*209</td>
</tr>
<tr>
<td>Louisiana</td>
<td>State Statute</td>
<td>LA. STAT. ANN. §</td>
<td>N/A210</td>
</tr>
</tbody>
</table>

208. Standing will be granted to residents who bring suit, but must do so on behalf of the state, and only for declaratory and equitable relief. *See* Walling v. Appel Serv. Co., 641 N.E.2d 647, 652 (Ind. Ct. App. 1994).
209. No redressability requirement, but a causation requirement exists. *See* Gerst v. Marshall, 549 N.W.2d 810, 813–14 (Iowa 1996) (“[A] plaintiff must be able to prove he has been damaged as a result of the defendant’s conduct. We conclude the statutory language implicitly includes a causation requirement.” (emphasis in original)).
<table>
<thead>
<tr>
<th>State</th>
<th>Act/Provision</th>
<th>Statute &amp; Code</th>
<th>Standing/Compliance</th>
</tr>
</thead>
<tbody>
<tr>
<td>Maryland</td>
<td>Maryland Environmental Standing Act</td>
<td>MD. CODE ANN., NAT. RES. § 1-503 (2015)</td>
<td>Yes211</td>
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<tr>
<td>Minnesota</td>
<td>Minnesota Environmental Rights Act</td>
<td>MINN. STAT. §§ 116B.01–.13 (2015)</td>
<td>Yes213</td>
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<tr>
<td>Montana</td>
<td>Constitutional Provision</td>
<td>MONT. CONST. art. IX, § 1</td>
<td>Yes214</td>
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<tr>
<td>Nevada</td>
<td>State Statute</td>
<td>NEV. REV. STAT. §§ 41.540–.570 (2015)</td>
<td>N/A</td>
</tr>
<tr>
<td>Pennsylvania</td>
<td>Constitutional Provision</td>
<td>PENN. CONST. art. I, § 27</td>
<td>Yes217</td>
</tr>
<tr>
<td>South Dakota</td>
<td>State Statute</td>
<td>S.D. CODIFIED LAWS §§ 34A-10-1 to -17 (2015)</td>
<td>N/A218</td>
</tr>
</tbody>
</table>

210. See Sierra Club v. Givens, 710 So. 2d 249, 250 (La. Ct. App. 1997) (stating that the citizen suit provision does not allow for suits brought against the state’s Department of Environmental Quality).
216. Insufficient case precedent.
218. Insufficient case precedent.
219. “[C]ompel compliance with this act only to the extent that such action could have been brought in federal district court.” WYO. STAT. ANN. § 35-11-904 (2015).

We welcome responses to this Article. If you are interested in submitting a response for our online companion journal, Ecology Law Currents, please contact cse.elq@law.berkeley.edu. Responses to articles may be viewed at our website, http://www.ecologylawquarterly.org.