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Climate Rights in Brazil and the United States: A Convergence in Contrasts

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CLIMATE RIGHTS IN BRAZIL AND THE UNITED STATES: A CONVERGENCE IN CONTRASTS

James R. May,[#] Marcelo Buzaglo Dantas,⁺ and Luciana Bauer [>]

I.	INTRODUCTION	439
II.	CLIMATE RIGHTS IN THE UNITED STATES.....	444
	A. Juliana v. United States.....	446
	B. Held v. Montana	450
III.	CLIMATE RIGHTS IN BRAZIL	452
IV.	A COMPARISON OF CLIMATE RIGHTS IN BRAZIL AND THE U.S.	463
V.	CONCLUSION	466

I. INTRODUCTION

This Article* argues that jurisprudential developments in the United States and Brazil show that rights-based lawsuits to vindicate a right to a stable or healthy climate—that is, to “climate rights”—have potential to play an important interstitial role in addressing climate pollution in both countries—despite a world of differences in judicial systems, procedures, and traditions.

As a threshold matter, there is no denying climate change. Emissions of greenhouse gases have increased by about 90% in the last half-century alone.¹ Atmospheric concentrations of carbon dioxide have

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* Produced in the Postgraduate Program in Legal Science (PPCJ) at the University of Vale do Itajaí (SC), in partnership with Widener University Delaware Law School, in the research line “State, Transnationality and Sustainability” (SJD), and research project “Law, Transnationality and Compliance.”

increased by 50% in 100 years, from 290 to approximately 424 parts per million, far higher than any amount of the known geologic record of atmospheric CO₂ loadings (about 800,000 years).² Over this time, mean global temperatures have increased from 13.5°C to 14.51°C.³

The Earth is experiencing the warmest period in human history.⁴ New temperature records are set every day, week, month, and year.⁵ The months of June, July, and August 2023 are the hottest recorded in the 174-year global climate record.⁶ August 2023 is the 45th-consecutive August and the 534th-consecutive month of warmer than 20th-century average temperatures.⁷ Indeed, “the past eight years were warmest on record,” with almost every succeeding year warmer than the one preceding it.⁸ Worse still, global ocean surface temperatures are experiencing records too. Globally, August 2023 set a record for the highest monthly sea surface temperature anomaly of any month on record.⁹ The effects are felt everywhere, from Washington D.C. to Brasilia.

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1. *Global Greenhouse Gas Emission Data*, EPA (Feb. 15, 2023), <https://www.epa.gov/ghgemissions/global-greenhouse-gas-emissions-data> [https://perma.cc/Z9TR-BLYH].
 2. *Broken Record: Atmospheric Carbon Dioxide Levels Jump Again*, NOAA (June 5, 2023), <https://www.noaa.gov/news-release/broken-record-atmospheric-carbon-dioxide-levels-jump-again> [https://perma.cc/7AP4-UBNQ]; Joseph G. Canadell et al., *Global Carbon and Other Biogeochemical Cycles and Feedbacks*, in *CLIMATE CHANGE 2021: THE PHYSICAL SCIENCE BASIS* 676 (2021).
 3. *Earth Just Had Its Hottest June on Record*, NOAA (July. 13, 2023), <https://www.noaa.gov/news/earth-just-had-its-hottest-june-on-record> [https://perma.cc/W3NP-RB7J].
 4. *Earth Had Hottest Three-Month Period on Record, with Unprecedented Sea Surface Temperatures and Much Extreme Weather*, WMO (Sept. 6, 2023), <https://www.zmescience.com/ecology/earth-just-had-its-hottest-three-months-on-record/> [https://perma.cc/3YU9-GUW4].
 5. *See id.*
 6. *Record Shattering: Earth Had Its Hottest July in 174 Years*, NOAA (Aug. 14, 2023), <https://www.noaa.gov/news/record-shattering-earth-had-its-hottest-july-in-174-years> [https://perma.cc/W4TM-H3BS]; *August 2023 Global Report*, NOAA (Nov. 8, 2023), <https://www.ncei.noaa.gov/access/monitoring/monthly-report/global/202308> [https://perma.cc/2K7V-KBWS].
 7. *August 2023 Global Report*, *supra* note 6.
 8. *Past Eight Years Confirmed to be the Eight Warmest on Record*, WMO (Jan. 12, 2023), <https://public.wmo.int/en/media/press-release/past-eight-years-confirmed-be-eight-warmest-record> [https://perma.cc/BR9P-ZGGH].
 9. *The World Just Sweltered Through Its Hottest August on Record*, NOAA (Sept. 14, 2023), <https://www.noaa.gov/news/world-just-sweltered-through-its-hottest-august-on-record> [https://perma.cc/XLS5-LKC7].

The international legal order has not been able to reach agreement about what to do, who should pay, and how much to pay.¹⁰ Existing treaties—including the United Nations Framework Convention on Climate Change (UNFCCC),¹¹ the Kyoto Protocol,¹² and the Paris Agreement¹³ require implementation by signing nations to go into effect.¹⁴ None of these are enforceable, not to mention effective. Some countries have turned to constitutional reform to address climate change,¹⁵ including the Dominican Republic,¹⁶ Venezuela,¹⁷ Ecuador,¹⁸

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10. *See generally* James R. May & Patrick Kelly, *The Environment and International Society: Issues, Concepts, and Context*, in ROUTLEDGE HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW (Shawkat Alam, Jahid Hossain Bhuiyan, Tareq M.R. Chowdhury & Erika J. Techera, eds., 2012).
 11. *See* United Nations Framework Convention on Climate Change, May 9, 1992, 1771 U.N.T.S. 107 [hereinafter UNFCCC].
 12. *See* Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 11, 1997, 2303 U.N.T.S. 162.
 13. *See* Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, 3156 U.N.T.S. 79.
 14. UNFCCC, *supra* note 11, art. 4(1)(b); Kyoto Protocol to the United Nations Framework Convention on Climate Change, *supra* note 12, art. 10(b); Paris Agreement to the United Nations Framework Convention on Climate Change, *supra* note 13, art. 6(1).
 15. *See* James R. May & Erin Daly, *Can the U.S. Constitution Encompass a Right to a Stable Climate? (Yes, It Can)*, 39 UCLA J. ENV'T L. & POL'Y 39, 41 (2021); *The 11 Nations Heraldizing a New Dawn of Climate Constitutionalism*, LONDON SCH. OF ECON. & POL. SCI. (Dec. 2, 2021), <https://www.lse.ac.uk/granthaminstitute/news/the-11-nations-heralding-a-new-dawn-of-climate-constitutionalism/> [https://perma.cc/9CYZ-W2WL].
 16. REPÚBLICA DOMINICANA 2015 [CONSTITUTION] July 10, 2015, Tit. IX, Ch. 1, art. 194 (Dom. Rep.) (“The formulation and execution, through law, of a plan of territorial ordering that ensures the efficient and sustainable use of the natural resources of the Nation, in accordance with the necessity of adaptation to climate change, is a priority of the State.”).
 17. CONSTITUCIÓN DE LA REPUBLICA BOLIVARIANA DE VENEZUELA [CONSTITUTION] Feb. 19, 2009, Tit. III, Ch. IX, art. 127 (“It is a fundamental duty of the State, with the active participation of society, to ensure that the populace develops in a pollution-free environment in which air, water, soil, coasts, climate, the ozone layer and living species receive special protection, in accordance with law.”).
 18. CONSTITUCIÓN DE LA REPUBLICA DEL ECUADOR [CONSTITUTION], Oct. 20, 2008, Tit. VII, Ch. 2, § 7, art. 414 (“The State shall adopt adequate and cross-cutting measures for the mitigation of climate change, by limiting greenhouse gas emissions, deforestation, and air pollution; it shall take measures for the conservation of the forests and vegetation; and it shall protect the population at risk.”).

Vietnam,¹⁹ Tunisia,²⁰ Cote d'Ivoire,²¹ and Thailand.²² Yet, none of these constitutions afford climate rights. Advocates have turned to “climate rights,” litigation to enforce constitutional rights to address the climate crisis.

The United States and Brazil—which collectively account for more than fifteen percent of the world’s overall greenhouse gas emissions—provide a strong basis for comparison in climate rights.²³ In the last few months alone, a state court judge found that Montana’s policies violated youth plaintiffs’ state-recognized constitutional right to a healthy environment,²⁴ and a federal judge set for trial a parallel case alleging that the U.S. government’s climate policies violate plaintiffs’ fundamental right to a stable climate under the Due Process Clause of the U.S. Constitution.²⁵ Several cases in Brazil are also pushing the climate rights envelope.²⁶

Despite the differences between the U.S. and Brazilian legal systems, this movement is occurring in both countries. While neither

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19. HIẾN PHÁP [CONSTITUTION] Nov. 28, 2013, Ch. III, Art. 63, § 1 (Vietnam) (“The State has a policy to protect the environment; manages, and effectively and stably use natural resources; protects the nature and biodiversity; takes initiative in prevention and resistance against natural calamities and response to climate change.”).
 20. CONSTITUTION OF TUNIS [CONSTITUTION] Jan 26, 2014, Tit. 2, art. 45 (“The state guarantees the right to a healthy and balanced environment and the right to participate in the protection of the climate.”).
 21. CONSTITUTION DE LA REPUBLIQUE DE CÔTE D’IVOIRE [CONSTITUTION] Nov. 8, 2016, Pmbl (“Express our commitment to [. . .] contributing to climate protection and to maintaining a healthy environment for future generations.”).
 22. RATTHATHAMMANUN HAENG RATCHA-ANACHAK THAI [CONSTITUTION] July 22, 2017, Chapter XVI, § 258(g)(1) (“National reform in various areas shall be carried out to at least achieve the following results [. . .] having a water resource management system which is efficient, fair and sustainable, with due regard given to every dimension of water demand in combination with environmental and climate change.”).
 23. *CO2 Emissions by Country*, WORLDOMETER, <https://www.worldometers.info/co2-emissions/co2-emissions-by-country/> [<https://perma.cc/BWA6-YVL3>]; see generally Michon Scott, *Does it Matter How Much the United States Reduces its Carbon Dioxide Emissions if China Doesn't do the Same?*, CLIMATE.GOV (Aug. 30, 2023), <https://www.climate.gov/news-features/climate-qa/does-it-matter-how-much-united-states-reduces-its-carbon-dioxide-emissions> [<https://perma.cc/M9SU-5EVQ>].
 24. *Held v. Montana*, CDV-2020-307, ¶ 51 (Mont. 1st Jud. Dist. Ct. Aug. 14, 2023).
 25. *Juliana v. United States*, 217 F. Supp. 3d 1224, 1248 (D. Or. 2016).
 26. See Marcella Torres, *Brazilian Court Reaffirms the Power of Litigation to Strengthen Climate Action*, AIDA (Aug. 18, 2022), <https://aida-americas.org/en/blog/brazilian-court-reaffirms-the-power-of-litigation-to-strengthen-climate-action> [<https://perma.cc/JFF8-VAB8>].

country recognizes a constitutional right to a stable climate,²⁷ legal systems diverge widely thereon. First, Brazil and the United States operate under fundamentally different legal systems. Brazil is one of civil law, while the U.S. is based on common law.²⁸ Second, while Brazil's national constitution recognizes a right to a healthy environment,²⁹ the U.S. Constitution does not.³⁰ Third, subnationally, while twenty-five of the twenty-six Brazilian state constitutions recognize a right to a healthy environment, compared to only six in the United States, the subnational provisions in the United States are presumably enforceable, while those in Brazil are not.³¹ Fourth, Brazil's laws are enforceable by a "Public Prosecutor," whom anyone affected may petition, something lacking in the U.S. system.³² Last, the concept of "standing"—which has curtailed climate actions in the United States—does not exist in Brazil.³³ Despite these gaping differences, courts in both countries are finding their way to recognizing climate rights.

This Article compares "climate rights" in the United States and Brazil. Part II focuses on climate rights in the United States, including at the federal level in Oregon and the subnational level in Montana.³⁴ Part III turns to Brazil, where courts appear poised to recognize climate rights with similar treks toward the legal recognition of climate rights— notwithstanding vast differences in legal structures, traditions, and justiciability.³⁵ Part IV discusses how the differences in each legal system account for different outcomes.³⁶ Brazil recognizes a constitutional right to a healthy environment, while the U.S.

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27. See U.S. CONST.; see also CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION](Braz.).
 28. Lucas Gomes, *The Influences of Common Law on the Brazilian New Code of Civil Procedure*, 46 INT'L J. LEGAL INFO. 176, 176, 180 (Nov. 16, 2018); TONI M. FINE, *Basic Concepts of American Jurisprudence*, in AMERICAN LEGAL SYSTEMS (1997), <https://lexisnexis.com/en-us/lawschool/pre-law/intro-to-american-legal-system.page> [<https://perma.cc/M2HV-PRCL>].
 29. CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 225 (Braz.).
 30. Caleb Hall, *A Right Most Dear: The Case for a Constitutional Environmental Right*, 30 TUL. ENV'T L.J. 85, 86 (2016).
 31. *Enviro Rights Map*, ENVIRORIGHTSMAP, <https://envirorightsmap.org/> [<https://perma.cc/GK5X-BTHE>]; JAMES R. MAY & ERIN DALY, GLOBAL ENVIRONMENTAL CONSTITUTIONALISM 209–19 (2014); see generally James R. May, *The Case for Environmental Human Rights: Recognition, Implementation and Outcomes*, 42 CARDOZO L. REV. 983 (2021).
 32. CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 5(XXXIV) (Braz.).
 33. Keith S. Rosenn, *Civil Procedure in Brazil*, 34 AM. J. COMP. L. 487, 517 (1986).
 34. See *infra* Section II.
 35. See *infra* Section III.
 36. See *infra* Section IV.

Constitution does not.³⁷ The U.S. system requires a demonstration of standing, while Brazil does not.³⁸ Brazil appoints public ministers to bring human rights-based cases, while the U.S. does not.³⁹ The U.S. system contains a myriad of structural obstacles to litigation—including the political question and major questions doctrine—while Brazil faces different economic and political obstacles. This Article concludes that courts can play an instrumental role in addressing and redressing climate change. They can, for one, direct governments to enact and implement policies to address the effects of climate change in ways not accomplished through existing international and national laws. Courts can also impel action by enforcing these provisions even through progressive realization.⁴⁰

II. CLIMATE RIGHTS IN THE UNITED STATES

The increased popularity of climate rights-based litigation in the United States is in part due to the futility of other private causes of action. Attempts to advance private causes of action to address and redress climate change in the United States are replete with false starts and failures.⁴¹ In particular, common-law notions of public and private nuisance, trespass, negligence, and strict liability for abnormally dangerous activity have shown little capacity for advancing climate justice.⁴²

A leading example from the United States is *Native Village of Kivalina v. ExxonMobil*. In *Kivalina*, an Inuit community living on an island that was likely to be submerged by climate-change induced rising sea levels, filed a federal lawsuit against the world's largest producers of petroleum and natural gas, seeking \$400 million in damages to relocate to higher ground.⁴³ But the lawsuit failed when the Federal

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37. CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 225 (Braz.).
 38. Keith S. Rosenn, *Civil Procedure in Brazil*, 34 AM. J. COMP. L. 487, 517 (1986).
 39. *Id.* at 516.
 40. See Office of the U.N. High Comm'r for H.R., *Frequently Asked Questions on Economic, Social, and Cultural Rights: Fact Sheet No.33* 1, at 13 (2008).
 41. See WILLIAM C.G. BURNS & HARI M. OSOFSKY, ADJUDICATING CLIMATE CHANGE 20–22 (2009); see also James R. May, *Constitutional Climate Change in the Courts*, ENV'T. L., ALI-ABA COURSE STUDY, Feb. 6–8, 2008, at 345–46.
 42. See James R. May, *Civil Litigation as a Tool for Regulating Climate Change*, 46 VAL. U. L. REV. 357, 363 (2012); see also Richard A. Epstein, *From Common Law to Environmental Protection How the Modern Environmental Movement Has Lost Its Way*, 23 SUP. CT. ECON. REV. 141, 149–50 (2015).
 43. See *Native Village of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 853 (9th Cir. 2012); Complaint at 1, *Native Village of Kivalina v. ExxonMobil*

Court of Appeals for the Ninth Circuit found that the Clean Air Act displaces the federal common law tort system,⁴⁴ despite a savings clause that seems to preserve common law causes of action.⁴⁵ The result in *Kivalina* followed the U.S. Supreme Court's earlier dismissal of a similar action for injunctive relief against fossil-fuel burning electric utility companies in *American Electric Power (AEP) v. Connecticut*.⁴⁶ In *AEP*, the U.S. Supreme Court held that because the Clean Air Act regulates air pollutants through U.S. Environmental Protection Agency (EPA) action, federal statutory law "displaced" federal common law, leaving no margin for a parallel track for imposition of injunctive relief by federal courts.⁴⁷ The court in *Kivalina* extended this reasoning to preclude federal common law claims seeking monetary damages.⁴⁸ Together, these cases suggest that federal common law in the United States does not provide a basis for tort actions regarding climate change.⁴⁹

U.S. courts have also held that federal law preempts common law claims to advance climate justice under subnational law. For example, in *Comer v. Murphy Oil*, the plaintiffs alleged that the world's largest oil and natural gas-producing companies were jointly and severally liable for the effects of climate change which had contributed to the 2010 hurricane that had devastated New Orleans.⁵⁰ Yet, the U.S. Court of Appeals for the Fifth Circuit upheld the dismissal of the claims finding that they were preempted by federal law.⁵¹ Moreover, climate justice cases can also be thwarted by myriad constitutional defenses,

Corp., 696 F.3d 849 (9th Cir. 2012) (No. 4:08-cv-01138-SBA); Brief in Opposition at 2–3, *Native Village of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849 (9th Cir. 2012) (No. 12-1072).

44. *Native Village of Kivalina*, 696 F.3d at 853.
45. See Quin Sorenson, *Native Village of Kivalina v. ExxonMobil Corp.: The End of "Climate Change" Tort Litigation?*, 44 TRENDS 1, 3–4 (2013).
46. See *Am. Elec. Power Co., Inc. v. Connecticut*, 564 U.S. 410, 423–34 (2011); see also James R. May, *AEP v. Connecticut and the Future of the Political Question Doctrine*, 121 YALE L.J. ONLINE, 2011, at 129.
47. *Am. Elec. Power Co., Inc.*, 564 U.S. at 416.
48. *Native Village of Kivalina*, 696 F.3d at 853.
49. See Sorenson, *supra* note 45, at 1,6.
50. *Comer v. Murphey Oil U.S.A., Inc.* 839 F. Supp. 2d. 849, 852 (S.D. Miss. 2012); *Existing U.S. Coal Mines*, GLOBAL ENERGY MONITOR, https://gem.wiki/Existing_U.S._Coal_Mines [<https://perma.cc/4ZPA-DLU6>].
51. *Comer v. Murphy Oil U.S.A., Inc.* 585 F.3d 855, 878–79 (5th Cir. 2009); *Comer v. Murphy Oil U.S.A., Inc.* 839 F. Supp. 2d 849, 854, 865–68 (S.D. Miss. 2012).

including lack of justiciability,⁵² the standing doctrine,⁵³ and procedural and substantive due process, which can limit both the access to courts and the availability of damages to prevailing parties.⁵⁴

Increasingly, courts are hearing claims alleging infringement of a right akin to a stable climate, including in the Netherlands, Ireland, Pakistan, and Colombia.⁵⁵ But this is less the case in the United States, owing to a conservative tradition of judicial deference on issues thought best left to the political branches.⁵⁶ Yet this is slowly changing, as the cases of *Juliana v. United States* and *Held v. Montana* demonstrate.

A. *Juliana v. United States*

The U.S. Constitution does not recognize a right to a healthy environment or a stable climate. Yet, it does forbid the government from depriving an individual of a life, liberty, or property without due process.⁵⁷ The U.S. Supreme Court has interpreted the Due Process Clause as guaranteeing certain unenumerated rights found to be “fundamental,”—those that are deeply rooted in American jurisprudence or essential to ordered liberty.⁵⁸ The Court has recognized a handful of such fundamental rights, including to bear and beget children,⁵⁹ to family,⁶⁰ and in some respects, to privacy.⁶¹

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52. See James R. May, *Climate Change, Constitutional Consignment, and the Political Question Doctrine*, 85 DENV. U. L. REV. 919, 922–23 (2008).
53. See, e.g., 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, 871, 875–76 (2012).
54. See James R. May, *Fashioning Procedural and Substantive Due Process Arguments in Toxic and Other Tort Actions Involving Punitive Damages After Pacific Mutual Life Insurance Co. v. Haslip*, 22 ENV'T L. 573, 574 (1992).
55. John Schwartz, *In ‘Strongest’ Climate Ruling Yet, Dutch Court Orders Leaders to Take Action*, N.Y. TIMES (Dec. 20, 2019), <https://www.nytimes.com/2019/12/20/climate/netherlands-climate-lawsuit.html> [<https://perma.cc/6SQ3-HP4T>]; *Pakistan*, SABIN CTR. FOR CLIMATE CHANGE, <https://climatecasechart.com/non-us-jurisdiction/pakistan/> [<https://perma.cc/YN67-V9Z4>]; *Colombia*, SABIN CTR. FOR CLIMATE CHANGE, <https://climatecasechart.com/non-us-jurisdiction/colombia/> [<https://perma.cc/89PC-NLY9>].
56. See James R. May, *Climate Change, Constitutional Consignment, and the Political Question Doctrine*, 85 DENV. U. L. REV. 919, 922 (2008).
57. See U.S. CONST. amends. V, XVI.
58. Ronald Turner, *On Substantive Due Process and Discretionary Traditionalism*, 66 SMU L. REV. 841, 842, 844–45 (2013).
59. *Obergefell v. Hodges*, 576 U.S. 644, 666 (2015).
60. *Id.*
61. *Griswold v. Connecticut*, 318 U.S. 479, 486(1965).

In 2015, Our Children’s Trust and Earth Guardians filed a lawsuit on behalf of twenty-one children against the U.S. government, arguing that the federal government’s climate change policies violated their fundamental right to a stable climate. In the first case of its kind, the plaintiffs argued that a right to a stable climate is deeply rooted in American jurisprudence and essential to ordered liberty.⁶² “[N]o ordinary lawsuit,”⁶³ *Juliana* spawned abundant spools of scholarship and conference proceedings, similar and copycat cases, and tributes and critiques.⁶⁴ But it has not, so far, reached the merits.

The case has experienced numerous switchbacks and still awaits trial.⁶⁵ In 2016, the District Court agreed that plaintiffs properly pled a proper constitutional claim and set the case for trial: “Exercising my reasoned judgment, I have no doubt that a climate system capable of sustaining human life is fundamental to a free and ordered society.”⁶⁶

[W]here a complaint alleges governmental action is affirmatively and substantially damaging the climate system in a way that will cause human deaths, shorten human lifespans, result in widespread damage to property, threaten human food sources, and dramatically alter the planet’s ecosystem, it states a claim for a due process violation.⁶⁷

The trial, however, didn’t happen. Following two trips to the Supreme Court and three to the Ninth Circuit, the United States District Court for the District of Oregon certified the case for interlocutory appeal. The Ninth Circuit Court of Appeals granted it and hosted argument in 2017—and following Judge Alex Kozinski’s resignation from the court—again in 2019. It issued a decision in 2020.⁶⁸

It is fair to say that *all* five federal judges involved since the outset of the case—the three judges on the appellate panel, the district court judge, and the magistrate judge initially assigned to the case with the district court—agree with about most everything the plaintiffs sought to establish. This includes that: climate change is real “and occurring at an increasingly rapid pace;”⁶⁹ society is in the midst of a human-

62. First Amended Complaint at 91, *Juliana v. United States*, 217 F. Supp. 3d 1224 (D. Or. 2016) (No. 6:15-cv-1517-TC).

63. Barry. E. Hill, *No Ordinary Lawsuit*, 35 ENV’T F., Nov.–Dec. 2018, at 30

64. See May & Daly, *supra* note 15, at 58–63.

65. Samantha Hawkins, *Landmark Climate Case Sent to Trial by Oregon Federal Judge*, BLOOMBERG L. <https://news.bloomberglaw.com/environment-and-energy/landmark-climate-case-sent-to-trial-by-oregon-federal-judge> [<https://perma.cc/5VZQ-XABL>] (Jan. 2, 2024, 12:41 PM).

66. *Juliana v. United States*, 217 F. Supp. 3d 1224, 1250 (D. Or. 2016).

67. *Id.*

68. *Juliana v. United States*, 947 F.3d 1159, 1166 (9th Cir. 2020).

69. *Id.* at 1166.

induced ecological “apocalypse”;⁷⁰ the U.S. government knowingly caused and facilitated emissions of massive amounts of greenhouse gases for decades (“A substantial evidentiary record documents that the federal government has long promoted fossil fuel use despite knowing that it can cause catastrophic climate change, and that failure to change existing policy may hasten an environmental apocalypse.”);⁷¹ the government’s administrative policies and programs promote the use of fossil fuels, threatening the climate (“A significant portion of those emissions occur in this country; the United States accounted for over 25% of worldwide emissions from 1850 to 2012, and currently accounts for about 15%.”);⁷² the Government *knew* their actions could contribute to “catastrophic climate change, and that failure to change existing policy may hasten an environmental apocalypse”;⁷³ the youth plaintiffs have pled a constitutionally valid fundamental right to be free from actions of the Defendants that destroy the capability of the climate system to sustain human life;⁷⁴ the youth plaintiffs have suffered imminent, ongoing, concrete, and particularized injuries (“The plaintiffs’ alleged injuries are caused by carbon emissions from fossil fuel production, extraction, and transportation”);⁷⁵ the actions and inactions of the U.S. government caused these injuries;⁷⁶ there is a judicial role in administering justice (“We do not dispute that the . . . relief the plaintiffs seek could well goad the political branches into action”);⁷⁷ action is needed (“Absent some action, the destabilizing climate will bury cities, spawn life-threatening natural disasters, and jeopardize critical food and water supplies”);⁷⁸ and that the plaintiffs pled meritorious claims (“The plaintiffs have made a compelling case that action is needed; it will be increasingly difficult in light of that record for the political branches to deny that climate change is occurring, [and] that the government has had a role in causing it . . .”).⁷⁹

Nonetheless, in 2020 the Ninth Circuit dismissed the case for lack of standing, in a two-to-one decision.⁸⁰ Most of the opinion reads as though the plaintiffs prevail at every turn—the full panel assumed that

70. *Id.* at 1164.

71. *Id.*

72. *Id.* at 1169.

73. *Id.* at 1164.

74. *See id.* at 1171–72.

75. *Id.* at 1169.

76. *See id.* at 1167.

77. *Id.* at 1175.

78. *Id.* at 1166.

79. *Id.* at 1175.

80. *Id.*

the government had violated the plaintiffs' constitutionally protected liberty interest to live in a climate system capable of sustaining human life,⁸¹ that a "substantial evidentiary record documents that the federal government has long promoted fossil fuel use despite knowing that it can cause catastrophic climate change, and that failure to change existing policy may hasten an environmental apocalypse."⁸² It held that plaintiffs met their *prima facie* burden of proof that climate change is real, "apocalyptic," and caused in part by actions and inactions of the U.S. government, noting:

The plaintiffs have made a compelling case that action is needed; it will be increasingly difficult in light of that record for the political branches to deny that climate change is occurring, that the government has had a role in causing it, and that our elected officials have a moral responsibility to seek solutions. We do not dispute that the broad judicial relief the plaintiffs seek could well goad the political branches into action.⁸³

Two (of three) judges, however, still voted to dismiss the case on the ground that the plaintiffs lacked Article III standing to sue the federal government because they had failed to prove that a court could redress their actual and particular injuries.⁸⁴ The court was skeptical that the relief sought would reduce plaintiffs' injuries, and noted that any remedy would require judicial action in areas entrusted to the other two branches of the government.⁸⁵ The case made headlines worldwide, in part because it went against the tenor of the times, as courts are now increasingly finding judicial power to act in the face of climate change.⁸⁶

The Ninth Circuit agreed with plaintiffs about the importance of the rights at stake.⁸⁷ The court also agreed that plaintiffs have been specifically and personally injured by the government's conduct over decades and that such conduct has contributed to a worsening of the planet's climate, to the point where it may no longer be capable of sustaining human life. Nonetheless, it held that plaintiffs' injuries were not "redressable" by the court because there were not judicially

81. *Id.* at 1164, 1175; *Id.* at 1175–76 (Staton, J., dissenting).

82. *Id.* at 1164.

83. *Id.* at 1164, 1175.

84. *Id.* at 1173–74.

85. *Id.* at 1172–73.

86. *See, e.g.*, HR 13 Januari 2020, RvdW 2020, 19/00135 m.nt. (State of the Netherlands / Urgenda); *see also e.g.*, Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala. Civil. abril 5, 2018, M.P: Luis Armando Tolosa Villabona, 11011-22-03-000-2018-00319-01 (Colom.) https://elaw.org/resource/co_amazon [<https://perma.cc/7PNF-WZQ5>]; *see also e.g.*, Leghari v. Fed'n. of Pakistan (2015) W.P. No. 25501/2015.

87. *See Juliana v. United States*, 947 F.3d 1159, 1175 (9th Cir. 2020).

discoverable and manageable standards.⁸⁸ In dissent, Judge Josephine L. Staton complained,

My colleagues throw up their hands, concluding that this case presents nothing fit for the Judiciary. On a fundamental point, we agree: No case can singlehandedly prevent the catastrophic effects of climate change predicted by the government and scientists. But a federal court need not manage all the delicate foreign relations and regulatory minutiae implicated by climate change to offer real relief, and the mere fact that this suit cannot alone halt climate change does not mean that it presents no claim suitable for judicial resolution.⁸⁹

The Ninth Circuit then remanded the case to the district court for dismissal.⁹⁰ Yet, the plaintiffs filed a motion under Rule 15, requesting permission to amend their complaint to add a claim for declaratory relief, which presumably, the court could redress under Article III. In 2023, the district court granted the request and set a trial date.⁹¹ The court subsequently denied the government's motion to stay the case,⁹² after which the government filed a motion for mandamus relief with the Ninth Circuit,⁹³ which is pending.

B. Held v. Montana

The Montana Constitution provides that, “[a]ll persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment”⁹⁴ Moreover, “[i]n enjoying these rights, all persons recognize corresponding responsibilities.”⁹⁵ The Montana Constitution further provides, “[t]he state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations.”⁹⁶ It also protects human dignity, providing, “[t]he dignity of the human being is inviolable. No person shall be denied the equal protection of the laws.”⁹⁷

In March 2020, youth plaintiffs filed a lawsuit against the State of Montana, arguing that the state's Environmental Policy Act—which

88. *Id.* at 1174.

89. *Id.* at 1175 (Staton, J., dissenting).

90. *Id.* (majority opinion).

91. *Juliana v. United States*, Civ. No. 6:15-cv-01517-AA, 2023 U.S. Dist. LEXIS 95411, at *28 (D. Or. June 1, 2023).

92. *Id.* at 10.

93. *Id.* at 9–11.

94. MONT. CONST. art. II, § 3.

95. *Id.*

96. *Id.* art. IX, §1.

97. *Id.* art. II, § 4.

all but exempts consideration of the effects of climate change—violates the “rights to a clean and healthful environment” and “individual dignity” guaranteed by Montana’s constitution, among other provisions.⁹⁸ Montana filed a slew of motions, including challenging the court’s jurisdiction, the plaintiffs’ standing and whether the “right to a clean and healthy environment” incorporates a right to a stable climate.⁹⁹ Yet, the court allowed the claims to move forward.¹⁰⁰

Montana pulled out the stops to derail the trial, including emergency petitions asking the Montana Supreme Court to stop the case, which the court denied.¹⁰¹ Thereafter, the Governor of Montana signed into law an amendment to the Montana Energy Policy Act (MEPA) “to explicitly prohibit the State from considering greenhouse gases in MEPA decisions.”¹⁰² Montana argued that this “mooted” plaintiffs’ claims, and that the trial should not proceed.¹⁰³ The court disagreed, holding that the legislature could not abrogate the constitution: “Based on the plain language of the implicated constitutional provisions, the intent of the Framers, and Montana Supreme Court precedent, it would not be absurd to find that a stable climate system is included in the ‘clean and healthful environment’ and ‘environmental life-support system’ contemplated by the Framers.”¹⁰⁴ The court also denied its motion for summary judgment, and set the issues for trial as whether:

1. Plaintiffs’ injuries were mischaracterized or inaccurate;
2. Montana’s greenhouse gas emissions could be measured incrementally;
3. Climate change impacts on Montana’s environment could be measured incrementally;

98. Complaint at 97, *Held v. Montana*, No. CDV-2020-307 (Mont. Jud. Dist. Ct. Aug. 14, 2023).

99. *See, e.g.*, Order on Motion to Dismiss at 2, 6, 14, *Held v. Montana*, No. CDV-2020-307 (Mont. Jud. Dist. Ct. Aug. 14, 2023).

100. *Id.* at 25.

101. *State v. Montana* First Jud. Dist. Ct., OP-22-0315, 2022 Mont. LEXIS 558, at *4 (Mont. Sup. Ct. June 14, 2022).

102. *Montana Court Rules State Agencies Must Consider GHG/Climate Impacts in Fossil Fuel Approvals*, JD SUPRA (Aug. 16, 2023), [https://www.jdsupra.com/legalnews/montana-court-rules-state-agencies-must-7428281/\[https://perma.cc/JN5V-YGVQ\]](https://www.jdsupra.com/legalnews/montana-court-rules-state-agencies-must-7428281/[https://perma.cc/JN5V-YGVQ]); *Held v. Montana*, CDV-2020-307, 2 (Mont. 1st Jud. Dist. Ct. May 23, 2023).

103. *State v. Montana* First Jud. Dist. 2022 Mont. LEXIS 558, at *4.

104. Order on Summary Judgment at 17, *Held v. Montana*, No. CDV-2020-307 (Mont. Jud. Dist. Ct. Aug. 14, 2023).

4. Climate impacts and effects in Montana could be attributed to Montana's fossil fuel activities; and
5. A favorable judgment would influence Montana's conduct and alleviate Plaintiffs' injuries or prevent further injury.¹⁰⁵

In June 2023, the court then presided over the first climate rights trial in U.S. history.¹⁰⁶ It heard from experts on how the climate crisis impacts the State of Montana and disproportionately impacts the youth plaintiffs, and how Montana's climate policies contribute to the climate crises. It also heard from the youth plaintiffs themselves about how climate change has changed their lives for the worse.¹⁰⁷

On August 14, 2023, the court ruled in favor of the plaintiffs, finding that they had standing, and that Montana was violating their rights to a healthful environment and dignity.¹⁰⁸ Appeal is imminent. Other subnational climate rights cases are ongoing in Hawai'i,¹⁰⁹ Utah,¹¹⁰ Virginia,¹¹¹ and have been dismissed in Florida.¹¹²

III. CLIMATE RIGHTS IN BRAZIL

Structurally, one might conclude that climate rights would have greater utility in Brazil than in the United States for several reasons. For one, the Brazilian Constitution recognizes the right to an

105. *Id.* at 5–6.

106. Dharna Noor, *Young Montana Residents Bring Climate Change Case to Court for First Time Ever*, THE GUARDIAN (June 12, 2023, 6:00 AM), <https://www.theguardian.com/us-news/2023/jun/12/montana-young-residents-first-ever-climate-change-trial> [<https://perma.cc/9MNR-ELE4>].

107. *Held v. Montana*, Cause No. CDV-2020-307, at 87–89 (Mont. 1st. Jud. Dist. Aug. 14, 2023).

108. *Id.* at 101–03.

109. *See, e.g.*, Complaint, *Navahine F. v. Hawai'i Dep't of Transp.*, No. 1CCV-22-0000631 (Haw. Cir. Ct. Aug. 3, 2023).

110. *See, e.g.*, Appellant's Request for Retention at 2, *Natalie R. v. Utah*, No. 20230022-SC (Utah Sup. Ct. Jan. 20, 2023) (alleging that Appellees' policies and practices violate rights to life, liberty, and property guaranteed by the Constitution of Utah).

111. *See, e.g.*, Complaint at 1–2, *Layla H. v. Virginia*, No. CL22000632-00 (Va. Cir. Ct. Sept. 9, 2023) (arguing that Defendants' policies and practices violate "Plaintiffs' fundamental and inalienable *jus publicum* (public trust doctrine) and substantive due process rights, secured by Virginia's Constitution and the common law.>").

112. *See, e.g.*, *Reynolds v. Florida*, No. 2018-CA-819, 2020 Fla. Cir. LEXIS 5462, at *1–2 (Fla. Cir. Ct. May 18, 2021) (dismissing with prejudice Plaintiffs' Complaint "asserting injury because of '*Defendants' deliberate indifference to their fundamental rights of life, liberty and property, and the pursuit of happiness, which includes a stable climate system, in violation of Florida common-law and the Florida Constitution.*'").

“ecologically balanced environment,”¹¹³ which may be enforced by prosecutors, non-governmental organizations, or individuals with no need to demonstrate standing.¹¹⁴ The Constitution deems this a fundamental human right for present and future generations.¹¹⁵ Recent climate litigation cases complicate climate stability’s place within this constitutional framework.¹¹⁶ Yet, implementation depends on public policies that are neither in the interests of Congress nor the executive branch, both of which are driven by a dependence on commodity exports that often stimulate deforestation of key biomes.¹¹⁷

According to the scientific platform MapBiomas, Brazil has unique biomes with high carbon fixation power in the soil. This further increases the urgency of preserving them. In 2021, the country had a total of 37 billion gigatons of soil organic carbon (SOD).¹¹⁸ Approximately 63% of this carbon (around 23.4 gigatons of SOD) is stored in soils with stable native cover.¹¹⁹ Only 3.7 gigatons of SOD is stored in soils from areas that have been converted to human use since 1985.¹²⁰ The Amazon region holds more than half of the SOD, with nearly 20 gigatons stored there.¹²¹ However, when we analyze the average amount of carbon stored per hectare, the Atlantic Forest and Pampa regions stand out with the highest values: an average of 50 tons per hectare and 49 tons per hectare, respectively.¹²² Surprisingly, the Amazon region’s average carbon stock per hectare is slightly lower, at 48 tons per hectare.¹²³ On the other hand, the Caatinga region has the smallest carbon stocks, with an average of 31 tons per hectare.¹²⁴ But,

113. CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 225 (Braz.).

114. DANIELLE DE ANDRADE MOREIRA ET AL., RIGHTS-BASED CLIMATE LITIGATION IN BRAZIL: AN ASSESSMENT OF CONSTITUTIONAL CASES BEFORE THE BRAZILIAN SUPREME COURT 4, 10 (2023).

115. ANTONIO HERMAN BENJAMIN & NICHOLAS BRYNER, *Brazil*, in THE OXFORD HANDBOOK OF COMPARATIVE ENVIRONMENTAL LAW 82, 87 (Emma Lees & Jorge E. Vinuales eds., 2019).

116. MOREIRA ET AL., *supra* note 114, at 1, 5.

117. See MARCELO BUZAGLO DANTAS, *Implementing Environmental Constitutionalism in Brazil*, in IMPLEMENTING ENVIRONMENTAL CONSTITUTIONALISM 129, 130–31 (Erin Daly & James May eds., 2018).

118. MAPBIOMAS, MAPEAMENTO ANUAL DO ESTOQUE DE CARBONO ORGÂNICO DO SOLO (COS) NO BRASIL 1985–2021 (ANNUAL MAPPING OF SOIL ORGANIC CARBON STOCK (COS) IN BRAZIL 1985–2021) 2 (2023).

119. *Id.*

120. *Id.*

121. *Id.* at 6.

122. *Id.* at 3.

123. *Id.*

124. *Id.*

even the Caatinga,¹²⁵ a unique Brazilian biome with its own vegetation of highly resistant plants, is the one with the highest CO₂ conversion according to new research from the University of Rio Grande do Norte. The Caatinga region is a true carbon sink, and in some instances is more effective than the Amazon biome itself.¹²⁶

In the colonial past, developed nations first used slavery as a driving force, and then replaced it with a highly damaging carbon matrix.¹²⁷ Now, developed nations are not achieving their own carbon emissions goals.¹²⁸ Brazilian climatic litigation therefore focuses on cases for the preservation of these biomes that are highly effective in removing and fixing carbon.

Although the Brazilian Constitution clearly intends environmental protection, climate rights are a novelty that the Brazilian Supreme Constitutional Court (“Supremo Tribunal Federal” or “STF”) is only now beginning to recognize. In an unprecedented initiative, the STF has established a so-called Green Agenda—a trial agenda comprising of the largest and most paradigmatic cases with climate repercussions. The purpose of the Green Agenda is to implement the human right to a healthy environment and to protect future generations. The Green Agenda comprises seven cases related to environmental protection and sustainable development in Brazil. Three of these cases are climate cases¹²⁹ that concern the Federal Government and governmental actions allegedly infringing on the constitutional right to an ecologically balanced environment: the Fundamental Rights Direct Action—ADPF

125. *Caatinga Biosphere Reserve, Brazil*, UNESCO (May 2020), <https://en.unesco.org/biosphere/lac/caatinga> [<https://perma.cc/Y9QZ-7S7Y>].

126. Keila R. Mendes et al., *Seasonal Variation in Net Ecosystem CO₂ Exchange of a Brazilian Seasonally Dry Tropical Forest*, 10 SCIENCE REP. 1, 1–11 (2020).

127. See Christian B. Azar, *Bury the Chains and the Carbon Dioxide*, 85 CLIMATIC CHANGE 473, 474–75 (2007) (reviewing ADAM HOCHSCHILD, *BURY THE CHAINS: PROPHETS AND REBELS IN THE FIGHT TO FREE AN EMPIRE’S SLAVES* (2005)).

128. See, e.g., *USA*, CLIMATE CHANGE TRACKER (Aug. 16, 2022), <https://climateactiontracker.org/countries/usa> [<https://perma.cc/G2PD-5JWX>]; Stephanie Cheval et al., *Reaching Carbon Neutrality: Why France Lags Behind on its Environmental Goals*, FRANCE 24 (May 11, 2021, 6:40 PM), <https://www.france24.com/en/tv-shows/france-in-focus/20211105-reaching-carbon-neutrality-why-france-lags-behind-on-its-environmental-goals> [<https://perma.cc/7Q59-BG8S>].

129. MOREIRA ET AL., *supra* note 114, at 6.

708,¹³⁰ the ADPF 760¹³¹ (final judgement pending), and Declaratory Action of Unconstitutionality by Omission—ADO 59.¹³²

In these cases, the initial petition and the votes refer to climate impacts noted in the IPCC reports¹³³ and the Paris Agreement and are also associated with the Sustainable Development Goals (SDGs)¹³⁴ of the UN 2030 Agenda—a global action plan to address urgent issues such as climate change and social inequality. The STF, following the guidelines of the National Council of Justice—CNJ (“Conselho Nacional de Justiça”), classifies the cases in relation to the SDGs,¹³⁵ which allows the prioritizing of cases related to climatic and sustainable development. Most Brazilian climate litigation, and especially the constitutional Green Agenda, relates to deforestation and the deterioration of key Brazilian biomes¹³⁶—developments which have contributed significantly to Brazil’s record carbon dioxide emissions in recent years.

In this vein, the most significant case is ADPF 760, which addresses the Plan of Action for the Prevention and Control of Deforestation in the Amazon (PPCDAM). There, the petitioners call for compliance with the PPCDAM, linked to the National Policy on Climate Change, to limit deforestation in the Amazon to a maximum of 3,925 square kilometers in 2021.¹³⁷ And in the event of non-compliance, the

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130. Supremo Tribunal Federal [S.T.F.] [Supreme Federal Court], *Decisão de Julgamento*, Cível No. 0108521-52.2020.1.00.0000, Relator: Min. Luís Roberto Barroso, 04.07.2022, *Diario da Justica Electronico* [D.J.e], 28.09.2022 (Braz.), <https://portal.stf.jus.br/processos/detalhe.asp?incidente=5951856> [<https://perma.cc/8JUF-KPDW>].
131. S.T.F., *Decisão de Julgamento*, Cível No. 0108521-52.2020.1.00.0000, Relator: Min. Luís Roberto Barroso, 06.04.2022, D.J.e. 11.04.2022 (Braz.), 11.04.2022, <https://portal.stf.jus.br/processos/detalhe.asp?incidente=6049993> [<https://perma.cc/TD5C-M4D4>].
132. S.T.F. Cível No. 0094910-32.2020.1.00.000, Relatora: Min. Rose Weber, 11.3.2022, ADO 59/DF, 16/08/2023, (Braz.) <https://climatecasechart.com/non-us-case/psb-et-al-v-brazil/> [<https://perma.cc/EE8Q-T3NY>].
133. *Reports*, THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE [IPCC], <https://www.ipcc.ch/reports/> [<https://perma.cc/PN25-KQK8>].
134. *Tackling Climate Change*, U.N. SUSTAINABLE DEVELOPMENT GOALS, <https://www.un.org/sustainabledevelopment/climate-action/> [<https://perma.cc/6C6M-KCM6>]; *Sustainable Development Goals (SDGs)*, GOV.BR, <https://www.gov.br/mre/en/subjects/sustainable-development-and-the-environment/sustainable-development/sustainable-development-goals-sdgs> [<https://perma.cc/LH3J-HEBF>] (Aug. 18, 2021, 5:17 PM).
135. BRAZILIAN FEDERAL SUPREME COURT, CASE LAW COMPILATION COVID-19 8 (Alexandre R. S. Freire et al. eds., 2020).
136. *See generally* David M. Lapola et al., *The Drivers and Impacts of Amazon Forest Degradation*, 379 *SCI.*, Jan 27, 2023.
137. S.T.F., *Decisão de Julgamento*, Cível No. 0108521-52.2020.1.00.0000 [Braz.].

petitioners urge the STF to apply more rigorous measures, such as a moratorium on deforestation, to achieve this goal in 2022.¹³⁸ The petitioners also point to serious violations of the fundamental rights of indigenous peoples and traditional communities, beyond the need to preserve the rights of present and future generations:

Brazil emitted, in 2018 (most recent data available), 1.9 billion tons of carbon equivalent (GtCO₂eq), which makes it the seventh largest emitter on the planet. The sector that emits the most is land use change, 44% of the total, a concept directly linked to deforestation, forest degradation and fires. Next, emissions derived from agriculture represent 25% and the energy sector, 21%. The relevance of native forests, therefore, transcends the fundamental maintenance of ecological balance, to directly affect the climate balance, on which humanity depends.¹³⁹

The Brazilian federal government is being held responsible for its acts and omissions that have led to a significant increase in Amazon deforestation over the past four years. Justice Cármen Lúcia issued an opinion ordering the Brazilian government and relevant federal agencies present a specific plan within sixty days.¹⁴⁰ The plan must include a summary of measures to control environmental inspection and combat ecological crime, while safeguarding the rights of indigenous peoples.¹⁴¹

Justice Lúcia also addressed various issues presented in the lawsuits. First, she highlighted the reduction of environmental inspection and control by the Brazilian Institute of the Environment and Renewable Natural Resources (the Brazilian equivalent of the EPA) and noted that current environmental public policy has proven insufficient and inefficient, which violates the climate pacts to which Brazil has committed.¹⁴² Second, she expressed concern over the dismantling of the PPCDAM environmental plan and emphasized the need for new environmental planning to address the problem effectively. Mentioning that a “point of no return” may be approaching, she

138. S.T.F., Petição Inicial, Cível No. 0108521-52.2020.1.00.0000, Relator: Min. Luís Roberto Barroso, 11.11.2020, 153 (Braz.) <https://climatecasechart.com/non-us-case/brazilian-socialist-party-and-others-v-brazil/> [<https://perma.cc/S3N4-TR5D>].

139. *Id.* at 126, ¶ 354.

140. S.T.F., Decisão de Julgamento, Cível No. 0108521-52.2020.1.00.0000.

141. *Id.*

142. Luiz G. Bezerra & Gedham Gomes, *Poder Judiciário e Mudanças Climáticas: Contribuições do STF e da Ministra Cármen Lúcia para a Litigância Climática no Brasil* [Judicial Power and Climate Change: Contributions of the STF and Minister Cármen Lúcia for Climate Litigation in Brazil], in *O DIREITO AMBIENTAL NO SUPREMO TRIBUNAL FEDERAL: ESTUDOS EM HOMENAGEM À MINISTRA CÁRMEN LÚCIA* [Environmental Law in the Federal Supreme Court: Studies in Honor of Minister Cármen Lúcia] 227, 235, 241–42 (2023).

stressed the urgency of taking action to halt deforestation in the Amazon.¹⁴³ Third, Justice Lúcia explained the judiciary's role in ensuring the effectiveness of environmental protection standards, and identified the need for transnational jurisprudence to address global environmental issues.¹⁴⁴ Finally, Justice Carmen Lucia demanded immediate action to protect fundamental rights related to the environment.¹⁴⁵ Though not yet definitively judged, on March 13, 2024, and the court removed the mention of the unconstitutional state of affairs,¹⁴⁶ because the Lula government is reducing deforestation by 50%.¹⁴⁷ The process was sent to the Brazilian government for implementation of the reforestation plan within 210 days.¹⁴⁸

Importantly, Justices of the STF expressly recognize that global jurisprudence is valid and can be used by any Brazilian judge because the body of law is based on scientific truths and global treaties to which Brazil has adhered.¹⁴⁹ This recognition marks a wide divergence from American climate jurisprudence, which restricts its sources to domestic authorities. The STF not only openly cites precedents from various constitutional courts about the need to address climate change, but also holds up foreign paradigms as high standards of climate action to which Brazil must adhere.¹⁵⁰

143. S.T.F., Decision, Vote of Minister Cármen Lúcia, Cível No. 0108521-52.2020.1.00.0000, Relator: Min. Luís Roberto Barroso, 06.04.2022, 152, <https://climatecasechart.com/non-us-case/brazilian-socialist-party-and-others-v-brazil/> [<https://perma.cc/G9AJ-8R3R>].

144. *Id.* at 44–45.

145. *Id.* at 156; Bezerra & Gomes, *supra* note 142, at 235.

146. S.T.F., Cível No. 0108521-52.2020.1.00.0000, Relator: Min. Luís Roberto Barroso, 13.03.2024, (Braz.), <https://portal.stf.jus.br/processos/detalhe.asp?incidente=6049993> [<https://perma.cc/8G8Q-3QSB>].

147. *See Deforestation in Brazil's Amazon Down by 50% to Five-Year Low in 2023*, REUTERS, <https://www.reuters.com/world/americas/deforestation-brazils-amazon-down-by-50-five-year-low-2023-2024-01-12/> [<https://perma.cc/D6DK-MYHS>] (Jan. 12, 2024).

148. The Justices “A. Recognize the existence of a reconstitutionalization process, not yet completed, in terms of protecting the ecologically balanced environment in the Amazon biome, declared by the Minister Rapporteur, but without recognizing, at the moment, the unconstitutional state of affairs; B. Determine the presentation, within 120 (one hundred and twenty) days from the publication of the minutes of this trial session, of a schedule containing guidelines, objectives, deadlines and targets for the implementation of the Action Plan for the Prevention and Control of Deforestation in the Amazon Legal (PPCDAm).” S.T.F., Cível No. 0108521-52.2020.1.00.0000, *supra* note 146.

149. S.T.F., Vote of Minister Cármen Lúcia, Cível No. 0108521-52.2020.1.00.0000, at 148–152.

150. *Id.* at 146–49 (“Examples of these quotations that we take from the opinions of the Justices already recorded in the green agenda are: a) the case of *Bladet Tromso and Stensaas v. Norway* (European Court of

By adhering to the principles of global constitutional climate jurisprudence, the Brazilian Supreme Court has recognized the existence of a norm within intergenerational climate law.¹⁵¹ This recognition holds true even if the defense of a stable climate is not explicitly codified in the Brazilian Constitution. Even so, some Justices go further and argue that the defense of a stable climate can be inferred by broadly interpreting Article 225 against the backdrop of constitutional principles and the Constitution's preamble.¹⁵² This intergenerational climate right stems from the climate treaties to which Brazil has subscribed.

This conclusion was clearly articulated in the opinions issued in ADPF 708 by Justices Fachin and Barroso. In that case, the plaintiff Partido Socialismo e Liberdade (PSOL) and the Socialist Party argued that the Federal Union violated, by act and omission, the proper functioning of the National Fund on Climate Change Climate Fund and abridged the right of all Brazilians to a healthy environment.¹⁵³ The court agreed, reasoning that the executive has the constitutional duty to administer and allocate annually the resources of the Climate Fund, for the purpose of mitigating climate change. To implement this, the supreme court understood that it was impossible to limit values from the federal budget, to the point of making rights unfeasible, because the state has a constitutional duty to protect the environment.¹⁵⁴ All international rights and commitments assumed by Brazil were taken

Human Rights ruling on a question concerning access to information on environmental matters); b) *Ogoniland v. Nigeria* (African Commission on Human Rights, in 2001, condemned the Nigerian State for the offense to seven articles of the African Charter on Human and Peoples' Rights, notably Article 24); c) The case *Notre Affaire à Tous and others v. France* (Administrative Court of Paris ordered the French State to take concrete and immediate measures to comply with the commitments made to reduce carbon emissions and to repair the damage resulting from French inaction in this matter); d) And the case of *Indigenous Communities Members of the Association Lhaka Honhat (Nossa Terra) vs. Argentina*, (Inter-American Court of Human Rights has concluded that the Argentine State is internationally responsible for the violation of the rights to indigenous community property, cultural identity, a healthy environment, food and water.”).

151. *Id.* at 145–49.

152. *See, e.g.*, S.T.F., Concurring Decision, Cível No. 0108521-52.2020.1.00.0000, Relator: Min. Luís Roberto Barroso, 01.07.2022, 3–4 (Braz.), <https://climatecasechart.com/non-us-case/psb-et-al-v-federal-union/> [<https://perma.cc/VN3N-SVXG>].

153. S.T.F., Decision, Cível No. 0108521-52.2020.1.00.0000 (Braz.), Relator: Min. Luís Roberto Barroso, 01.07.2022, 1, <https://climatecasechart.com/non-us-case/psb-et-al-v-federal-union/> [<https://perma.cc/N5MU-AMCF>].

154. *Id.* at 12.

into account in the trial, as well as the constitutional principle of separation of powers.¹⁵⁵

A majority of the Court upheld the action to: (i) recognize the failure of the Brazilian government due to the incomplete allocation of Climate Fund resources allocated in 2019; (ii) order the Union to operate the Climate Fund or allocate its resources; and (iii) prohibit the contingency of the revenues that make up the Fund.¹⁵⁶ This holding established the following judgment thesis:

The Executive Branch has a constitutional duty to operate and annually allocate the resources of the Climate Fund, for the purposes of mitigating climate change, being its contingency is prohibited, due to the constitutional duty to protect the environment (article 225 of the Brazilian Constitution), international rights and commitments undertaken by Brazil, as well as the constitutional principle of separation of powers of the Republic.¹⁵⁷

Justices understand that the climate rule is directed to the maintenance of a stable climate system and, above all, the maintenance of life and future generations. Justices Edson Fachin and Roberto Barroso issued opinions recognizing that the Brazilian Constitution reaches the climate crisis.¹⁵⁸ For the Justices, the climate crisis demands immediate action. And similar occurrences can be found in courts around the world that have addressed environmental issues. Canada's high court supports carbon taxes,¹⁵⁹ while Germany's Supreme Court mandates stronger climate measures.¹⁶⁰ In the end, governments have a legal duty to protect the environment, as stated in their national constitutions and international commitments. The Climate Fund must

155. *Id.* at 19.

156. *Id.*

157. *Id.* at 19, ¶ 37.

158. S.T.F., Concurring Decision, Cível No. 0108521-52.2020.1.00.0000, 3–4 (Braz.); S.T.F., Decision, Cível No. 0108521-52.2020.1.00.0000 4, 8 (Braz.), Relator: Min. Luís Roberto Barroso, 01.07.2022, 1, <https://climatecasechart.com/non-us-case/psb-et-al-v-federal-union/> [<https://perma.cc/N5MU-AMCF>].

159. Ian Austen, *Canada Supreme Court Rules Federal Carbon Tax is Constitutional*, N.Y. TIMES (Sept. 20, 2021), <https://www.nytimes.com/2021/03/25/world/canada/canada-supreme-court-carbon-pricing.html> [<https://perma.cc/BCW6-ACLJ>].

160. Rachel Treisman, *German Court Orders Revisions to Climate Law, Citing 'Major Burdens' on Youth*, NPR (Apr. 29, 2021, 4:20 PM), <https://npr.org/2021/04/29/992073429/german-court-orders-revisions-to-climate-law-citing-major-burdens-on-youth> [<https://perma.cc/N3LX-QWJN>].

be used for climate mitigation without delay, as per constitutional obligations.¹⁶¹

Another important case that concerns the government's failure to fulfill its constitutional duty to protect the environment and combat climate change is ADO 59 (Amazon Fund).¹⁶² Amazon Fund concerns the protection of the Amazon rainforest and air quality standards.¹⁶³ The petitioners, four Brazilian parties (Partido Socialista Brasileiro, PSOL, Partido dos Trabalhadores, and Partido Rede Sustentabilidade) in this case alleged that the government was shirking its constitutional obligations to address climate change and protect the environment.¹⁶⁴ Further, they argued that the government was not taking sufficient measures to reduce greenhouse gas emissions and mitigate the impacts of climate change, which violate both constitutional principles and international agreements to which Brazil is a party. The petitioners filed in 2020 to challenge the Brazilian government's unconstitutional failure to adopt administrative measures related to the Amazon Fund.¹⁶⁵ The main objective of the action was to obtain recognition that the suspension of the Amazon Fund, promoted by the Brazilian government, violated the federative pact and the right of future generations to an ecologically balanced environment, guaranteed by Article 225 of the Federal Constitution.¹⁶⁶ The petitioners stated that the Legal Amazon Region has suffered an increase in deforestation since 2013—a trend that has accelerated since 2019—which followed a period of significant advances in combating deforestation, starting with the 2004 creation of the Action Plan for the PPCDAM. The petitioners argued that this plan would be crucial for the climate ambitions to which Brazil is committed.¹⁶⁷ The authors highlighted the importance

161. S.T.F., Decision (unofficial translation), Cível No. 0108521-52.2020.1.00.0000, Relator: Min. Luís Roberto Barroso, 01.07.2022, 4 (Braz.), <https://climatecasechart.com/non-us-case/psb-et-al-v-federal-union/> [<https://perma.cc/N5MU-AMCF>].

162. See S.T.F., Decision (unofficial translation), Civil No. 0108521-52.2020.1.00.0000, Relator: Min. Luís Roberto Barroso, 01.07.2022, 4 (Braz.), <https://climatecasechart.com/non-us-case/psb-et-al-v-federal-union/> [<https://perma.cc/N5MU-AMCF>]; Luiz O. Carneiro, *Por 10 Votos a 1, STF Determina Reativação do Fundo Amazônia* [By Votes 10 to 1, STF Determines Reactivation of the Amazon Fund], JOTA (Mar. 11, 2022, 3:50 PM), <https://www.jota.info/stf/do-supremo/por-10-votos-a-1-stf-determina-reativacao-do-fundo-amazonia-03112022> [<https://perma.cc/S5M4-RVWU>].

163. *What is the Amazon Fund?*, AMAZON FUND, <https://www.amazonfund.gov.br/en/home/> [<https://perma.cc/389E-CZYU>].

164. Petição Inicial [Initial Petition], Cível No. 0094910-32.2020.1.00.0000, at 13–14 (2020).

165. *Id.* at 2.

166. *Id.* at 27–28.

167. *Id.* at 3–4.

of the Amazon Fund, emphasizing its creation and main objective: to finance projects that combat deforestation and promote the conservation and sustainable use of natural resources in the Legal Amazon, including alternative land use.¹⁶⁸ The Amazon Fund is considered a pioneering initiative in financing the REDD+ concept (Reduction of Emissions from Deforestation and Forest Degradation), the well-known international incentive developed within the United Nations Framework Convention on Climate Change to reward countries in development for their efforts to reduce greenhouse gas emissions resulting from deforestation and forest degradation—valuing the conservation of forest carbon stocks and the sustainable management of forests.¹⁶⁹

The central opinion in this trial was written by Justice Rosa Weber and had a strong climate focus.¹⁷⁰ Justice Weber emphasized that the case focused on unconstitutionality by omission—it contested the government’s inaction in relation to the fulfillment of its environmental protection duties with a clear impact on the climate and for future generations.¹⁷¹ This purportedly unconstitutional omission could stifle effective enforcement of fundamental rights that the Brazilian Federal Constitution of 1988 establishes and obligates the State to protect.¹⁷² These duties are especially important when it comes to benefit rights, such as social and environmental rights, as they require both normative and practical actions for their realization. The first paragraph of Article 5 of the Brazilian Constitution requires that the executive create the necessary conditions to make these rights effective, through regulations and concrete measures.¹⁷³

Justice Weber stressed that the State, in fulfilling these duties, may exercise discretion to proactively protect fundamental rights.¹⁷⁴ The protection itself is not discretionary, but the forms of implementation are if they respect the principle of proportionality in relation to fundamental rights.¹⁷⁵ Turning to the merits of the case, Justice Weber analyzed four main premises: 1) the importance of the data presented

168. *Id.* at 7.

169. AMAZON FUND: ACTIVITY REPORT 2022 8 n. 1 (BNDES ed., 2023).

170. S.T.F., Decision, Cível No. 0094910-32.2020.1.00.0000, Relator: Min. Rosa Weber, 31.08.2020, 14 (Braz.), <https://climatecasechart.com/non-us-case/brazilian-socialist-party-and-others-v-brazil/> [https://perma.cc/366H-36ZD].

171. *See id.* at 1.

172. CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 22(vi) (Braz.).

173. *Id.* art. 5(1).

174. STF, Acórdão Cível No. 0094910-32.2020.1.00.0000, Relator: Min. Rosa Weber, 03.11.2022, 2 (Braz.), <https://jusclima2030.jfrs.jus.br/wp-content/uploads/2021/05/Acordao.pdf>.

175. *Id.*

in the public hearing on public policies in the Legal Amazon; 2) normative and factual frameworks in the region; 3) the Amazon Fund as a financial instrument to combat deforestation; and 4) the fundamental right to the environment and the corresponding protection duties.¹⁷⁶ She rejected the plea for dismissing the case and stated that the government's omission regarding environmental protection was unconstitutional.¹⁷⁷ Paralyzing the Amazon Fund was considered unconstitutional, and resulted in the suspension of approvals for new projects and the lack of adequate management to raise funds.¹⁷⁸ The opinion also stabilized the possibility of jurisdictional control over public policies on environmental and climate matters in Brazil.¹⁷⁹

Another important topic in Amazon Fund was the reaffirmation of the principle of non-retroactivity in terms of climate and environment, affirming that, although the public administration has freedom to act regarding environmental protection legislation, the level of protection cannot diminish.¹⁸⁰ When deciding the case, the STF declared unconstitutional the extinction of the Amazon Fund committees, funding stoppage and other provisions.¹⁸¹ The court also emphasized the importance of environmental and climate protection at the international level, in accordance with conventions and treaties ratified by Brazil.¹⁸² The court partially accepted the plaintiffs' pleas and held some provisions of the decrees unconstitutional, but it rejected other requests that fell outside its sphere of competence.¹⁸³ The Court ordered the Brazilian Government to reactivate the Amazon Fund within sixty days and to avoid new projects, which were deemed unconstitutional.¹⁸⁴ The court emphasized the importance of environmental protection and cooperation with international partners.¹⁸⁵

These climate-focused cases have proven very effective in raising the awareness of the Brazilian government. An example comes from a pending lawsuit filed by Conectas Human Rights Institute against the

176. *Id.* at 3–4.

177. *Id.* at 5.

178. *Id.* at 4–5.

179. *See* S.T.F., Recurso Extraordinário No. 627.189, Relator: Min. Dias Toffoli, 08.06.2016, 2 (Braz.), <https://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=12672680> [https://perma.cc/3HDL-A67Q].

180. S.T.F., Acórdão Cível No. 0094910-32.2020.1.00.0000, (2022) 2.

181. *Id.* at 4–5.

182. *Id.* at 3.

183. *Id.* at 5.

184. *Id.*

185. *See id.* at 2–3.

Brazilian development bank BNDES.¹⁸⁶ Conectas Human Rights Institute concisely argues that there is no possibility of financing projects that do not respect the Paris Agreement. This argument prevailed even before a final resolution of the case,¹⁸⁷ and the Brazilian Central Bank BACEN reformulated its public and private financing laws so standards of mitigation and adaptation of the Paris Agreement and the Brazilian Determined Notes would be respected in future projects and concessions.¹⁸⁸ The regulation of the Central Bank of Brazil in its National Monetary Council was conveyed by Resolution No. 5,081 of June 29, 2023,¹⁸⁹ which modified the social, environmental, and climatic impediments of Chapter 2 of the Rural Credit Manual (MCR).¹⁹⁰

IV. A COMPARISON OF CLIMATE RIGHTS IN BRAZIL AND THE U.S.

International and domestic responses to the climate crisis have floundered. There remains no enforceable international treaty. Few countries have enacted legislation with enforceable limits on greenhouse gas emissions.¹⁹¹ Legislatures have been slow to provide private causes of action to address climate change, and efforts that have been instituted are often derailed.

The United States and Brazil have lagged too. Neither have an enforceable federal climate law.¹⁹² State efforts are episodic and face a myriad of obstacles. For example, state efforts by state government agencies in the U.S. to impose carbon taxes, fuel efficiency requirements, or restrict greenhouse gas emissions, have been found to

186. S.J.D.F.-9, Petição Inicial [Initial Petition], Ação Civil Pública No. 1038657-42.2022.4.01.3400, 21.06.2022, 1, https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2022/20220621_1038657-42.2022.4.01.3400_petition.pdf [<https://perma.cc/6C9S-7T9A>].

187. See S.J.D.F.-9, Decisão [Decision], Ação Civil Pública No. 1038657-42.2022.4.01.3400, 21.06.2022, 29/08/2022, 3-4, <https://jusclima2030.jfrs.jus.br/wp-content/uploads/2022/06/Decisa%CC%83o-Tutela-Antecipada.pdf>.

188. Carolina Mandl, *Brazil's Banks to Incorporate Climate Change Risks into Stress Tests*, REUTERS, (Sept. 15, 2021, 1:18 PM), <https://www.reuters.com/business/sustainable-business/brazils-banks-incorporate-climate-change-risks-into-stress-tests-2021-09-15/> [<https://perma.cc/WT84-DFS6>].

189. BANCO CENTRAL DO BRASIL, CMN RESOLUTION NO. 5,081 (2023).

190. *Id.* art. 1.

191. See Dominic Carver, *Global net zero commitments*, UK PARLIAMENT HOUSE OF COMMONS LIBR. (Nov. 12, 2021), <https://commonslibrary.parliament.uk/global-net-zero-commitments/> [<https://perma.cc/9M7L-RL6Q>].

192. See *id.*

be preempted by federal law, or otherwise to run afoul of the Commerce Clause of the U.S. Constitution.¹⁹³

Given these shortcomings, states, communities, churches, non-profit entities, and affected individuals—including children and retirees—have turned to the courts.¹⁹⁴ The latest global count of climate-change related cases as of 2023 is 2,540, including 1,678 in the United States, not including administrative challenges to permits issued for fossil fuel burning electric generating stations (which are likely hundreds more).¹⁹⁵

Still, very few of these cases seek to enforce climate rights. In the United States for example, the number may be less than ten.¹⁹⁶ And of these, only one has proceeded to trial and reached the merits: *Held v. Montana*.¹⁹⁷

Yet, advocates—especially those representing youth plaintiffs and future generations—have turned to climate rights. In such cases, litigants ordinarily contend that the government’s actions or failures to act contravene a constitutional guarantee, such as a right to a healthy environment or a derivative right, such as to health or dignity.¹⁹⁸

Cases from Brazil show the STF recognition that Article 225 of the Federal Constitution reflects intergenerational equity. Therefore, the importance of Brazilian climate litigation relies on the interpretation that the Federal Constitution of 1988, in its set of objective values and in the wording of Article 225, which harbors fundamental rights and duties in terms of tackling climate change. In these cases, Brazilian courts have been recognizing the climate as a legal asset with constitutional and independent status.¹⁹⁹ They have drawn upon international jurisprudence, such as the *Urgenda*²⁰⁰ and *Neubauer*²⁰¹

193. See James R. May, *Of Happy Incidents, Climate, Federalism, and Preemption*, 17 TEMP. POL. & CIV. Rts. L. Rev. 465, 470–71 (2008).

194. See generally, MICHAEL BURGER & MARIA ANTONIA TIGRE, GLOBAL CLIMATE LITIGATION REPORT: 2023 STATUS REVIEW, SABIN CENTER FOR CLIMATE CHANGE LAW 13 (2023).

195. Maria Antonia Tigre & Margaret Barry, *Climate Change in the Courts: A 2023 Retrospective*, Dec. 2023, at 3.

196. See *id.* at 4–5.

197. Findings of Fact, Conclusions of Law, and Order, *Held v. State of Montana*, No. CDV-2020-307 (Mont. Dist. Ct. 2023).

198. See, e.g., *id.* at 2, 102.

199. LUCIANA BAUER, GLOBAL ENVIRONMENTAL CONSTITUTIONALISM: THE RULE OF INTERGENERATIONAL CLIMATE LAW IN BRAZILIAN CASES, 15 (2023).

200. See, e.g., HR 20 december 2019, NJ 2020, 41 m.nt. J. Spier (*Urgenda Foundation/State of the Netherlands*) (Neth.).

201. See, e.g., BVerfG, 1 BvR 2656/18, Mar. 24, 2021 (Ger.), https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2021/03/rs20210324_1bvr265618.html [<https://perma.cc/EV7T-ZVF2>].

cases, to support intergenerational climate law principles that reflect the judiciary's commitment to environmental protection and preservation of natural resources for future generations.

The task of implementing outcomes from courts in Brazil is left to lawmakers, who thus far have been reluctant to do much of anything. The opinion issued by Justice Cármen Lucia in ADPF 760 refers to Brazil as an Ecological Constitutional State, and emphasizes that the protection of the environment is a matter of planetary scope and that it is the duty of the State and society to ensure the ecological balance for present and future generations.²⁰² Nature does not forgive man-made damage, and it is necessary to act responsibly to avoid irreparable damage. Environmental dignity is seen—in this opinion—as a core element of contemporary constitutionalism and must consider not only the dignity of the human person, but also both the dignity of the human species and the preservation of the environment as a whole. Environmental ethics is seen as an essential principle to ensure respectful coexistence between human beings and nature.

The Brazilian constitution helps explain these outcomes. As Marcelo Buzaglo Dantas notes in *Implementing Environmental Constitutionalism in Brazil*, the state's duty to enforce the guarantee of environmental dignity is a direct consequence of the anthropocentric spirit of the Brazilian constitution.²⁰³ Indeed, the Brazilian constitution establishes the dignity of the human being as one of the essential foundations of the Brazilian Republic.²⁰⁴ And again, Article 225 includes the right to an ecologically balanced environment in the sphere of human dignity.²⁰⁵ This raises the protection of the ecosystems to a status of an elementary purpose of the Republic.²⁰⁶

Justice Carmen Lúcia's vote in the Green Agenda cases goes in that direction. In her view, Brazil set targets as an internal obligation to protect ecosystems, reduce deforestation, and control carbon emissions by adhering to and ratifying the various environmental commitments related to the climate agenda.²⁰⁷ As a still-developing nation, Brazil and

202. S.T.F., *Arguição de Descumprimento de Preceito Fundamental Cível No. 760*, Relator: Sen. Cármen Lúcia, 04.06.2022, 23 (Braz.), https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2022/20220406_ADPF-760_decision.pdf.

203. DANTAS, *supra* note 117, at 130.

204. *Id.*

205. *Id.*

206. *See id.*

207. S.T.F., *Arguição de Descumprimento de Preceito Fundamental, No. 760*, 04.06.2022, Relatora: Cármen Lúcia, 35–38, 67–69 (2022) (“Nature has the dignity that overcomes the primary question of what is assessable and reversed in money. The financial resources contributed by international agreements—and of which it is not unknown or undermined—is not the only determining factor of state action. Environmental dignity is combined with human solidarity that it lays as the formative basis of the

its role in limiting the greenhouse effect is much more about maintaining spaces for carbon fixation, and less about reducing emissions per se.

For Justice Lúcia, the following principles are inherent to the Brazilian environmental and climate constitutional subsystem: a) environmental dignity, b) environmental ethics, c) environmental solidarity, d) environmental efficiency, e) environmental responsibility, and f) environmental non-retrogression.²⁰⁸

In summary, the constitutional state described in the text refers to a legal and political system that values human dignity, environmental ethics, and environmental protection as fundamental elements for building a more just, balanced, and sustainable society.

V. CONCLUSION

This Article offers three quick takeaways. First is the utility of rights-based approaches to climate change. As evidence of climate change grows, international and domestic law are rushing to keep pace. While some advances have been made at the international level, most notably in the 2015 Paris Climate Accords, international law remains largely unenforceable and remote from those whose lives are most affected by changes in climate and weather patterns. Domestic constitutionalism therefore offers an avenue for the development of a body of law that is more accessible to people and possibly more enforceable. Constitutionalism's greatest attribute is that, while it concerns itself with similar and shared problems, it supports localized solutions tailored to each nation's particular circumstances. There need not be an express right to a stable climate to have a court recognize just that.

Second is the value of borrowing. Courts look and listen to other courts. As the political processes at both domestic and international levels have failed to protect against climate change, whether by action or inaction, a growing number of courts—led by those in Brazil, the United States, and elsewhere—have tried to catalyze more robust and effective government responses. Though generally staying within the bounds of interpretive conventions, courts are increasingly finding

system of planetary humanity, of interests of well-being and good in equal conditions of health, of humanistic formation and of preservation of living conditions for those who come in the future. (. . .) The great question posed is the planetary responsibility that the Forest lends to the care of the climatic condition of the Planet, because if its location submits it, indisputably, to national sovereignty, the emission of carbon enters the atmosphere, not subject to the sovereignty of anyone. It emerges from its Brazilian sovereign care corresponding duty to all humanity for the impact that its preservation represents in the survival of all beings of the Planet." Translated from Portuguese to English).

208. *Id.*

support for rights-based approaches in textual guarantees of life, liberty, dignity, health, and environmental quality—even where their constitutions do not expressly impose a governmental obligation to protect against climate change. In some cases, courts are using equitable remedial powers to establish processes—including putting ecosystems under protective tutelage—that are designed to produce ongoing and effective governmental and mixed private-public responses to protect those who are most vulnerable.

Last is implementation. Without a strategy for operationalizing these legal tools, they are pointless. Absent implementation, all thoughtful claims and causes of action are fool's gold. Thus far, the leading examples of implementation come from jurisdictions that recognize judicial independence, respect the rule of law, and allow some degree of judicial investment. Rights-based approaches can play an important role in addressing climate change, with much more to come. There is no time to waste.

