Settling for More in Climate Litigation

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As governments' climate policies fail to achieve the emission reductions that scientific targets demand, attention has turned to the courts. Activists worldwide and across all fifty U.S. states have filed lawsuits challenging government inaction on climate change. These suits are part of a modern trend towards rights-based climate litigation and are founded on principles of constitutional and human rights. Many courts are hesitant to grant broad relief implicating major policy decisions, which has led to mixed outcomes in court decisions.

In June 2024, however, climate litigants in Hawai'i leveraged a settlement, instead of pursuing a judicial decision, allowing them to extract concrete climate commitments from the state government defendants in Navahine F. v. Hawai'i Department of Transportation*. In the settlement agreement, enforced by the Hawai'i state court, the Department of Transportation agreed to implement an extensive list of actions to decarbonize the state transportation system on a specified time schedule, as well as establish a youth advisory council to oversee implementation. The settlement has rightfully been celebrated as a landmark agreement and lays a critical foundation for decarbonizing Hawai'i's transportation sector in a way that centers community participation and climate justice.*

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As one of the first instances of success in American climate litigation, Navahine *demonstrates the potential of settlement in a climate litigant's toolbox to maximize plaintiffs' goals. This Note argues that settlement may provide an opportunity for climate litigants to obtain more concrete commitments from defendants than would otherwise be available through judicial resolution. Settlement may also advance climate justice goals by empowering plaintiffs to participate in crafting those commitments. Climate advocates should therefore look to the* Navahine *settlement as a potential model for using litigation to compel governments to mitigate climate change through just and effective policies.*

INTRODUCTION

For more than ten generations, Navahine F.'s family has farmed on their lands in Kāne'ohe, Hawai'i.[1] In recent years, extreme weather fluctuations between heavy rains and long droughts have destroyed her family's crops and degraded native species' habitat.[2] Rising seas have infiltrated the groundwater and threaten to submerge her and her family's lands.[3] These climate change impacts threaten Navahine and her family's Native Hawaiian culture, livelihood, and very survival.[4] Indeed, as science shows, climate change will have dramatic

1. Complaint for Declaratory and Injunctive Relief at 6, Nahavine F. v. Haw. Dep't of Transp., No. 1CCV-22-0000631 (Haw. 1st Cir. Ct. June 1, 2022) [hereinafter Complaint].
2. *Id.* at 6-7.
3. *Id.*
4. *See id.* at 6-10.

impacts on Hawai‘i and other Pacific islands, from coastal erosion threatening built infrastructure to coral bleaching destroying critical habitat.[5] These impacts will "exacerbate already significant challenges to [Native Hawaiian] culture, identity, social welfare, and self-determination efforts" by threatening a range of Native Hawaiian practices.[6] As Native Hawaiian legal scholar D. Kapua‘ala Sproat has argued, forced dispossession of Kānaka Maoli[7] from their land and natural resources was central to the United States' illegal overthrow of the Kingdom of Hawai‘i.[8] Restoring and maintaining traditional relationships with land and natural resources is thus foundational to contemporary restorative justice initiatives,[9] but climate change threatens Native Hawaiians' ability to live on ancestral lands and engage in practices that have been passed down for countless generations.[10]

Navahine saw these realities firsthand, but, as a young person, she was unable to affect the political process through the ballot box.[11] After watching governments at all levels fail to adequately respond to climate change, she and twelve other Hawaiian youths took to the courts.[12] In 2022, in the case of *Navahine F. v. Hawai‘i Department of Transportation,* Navahine and her fellow co-plaintiffs sued the Hawai‘i Department of Transportation (HDOT) arguing that HDOT established and maintained a fossil fuel-based transportation system in violation of the Hawai‘i Constitution's right to a clean and healthy environment and state law setting a binding zero emissions target.[13] Then, in 2024, the youth plaintiffs and the State negotiated a groundbreaking settlement.[14]

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5. ISLAND PRESS, CLIMATE CHANGE AND PACIFIC ISLANDS: INDICATORS AND IMPACTS. REPORT FOR THE 2012 PACIFIC ISLANDS REGIONAL CLIMATE ASSESSMENT xi (Victoria W. Keener et al. eds., 2013).

6. D. Kapua‘ala Sproat, *An Indigenous People's Right to Environmental Self-Determination: Native Hawaiians and the Struggle against Climate Change Devastation*, 35 STAN. ENVT'L L. J. 157, 171-72 (2016).

7. Kānaka Maoli is used interchangeably with the term Native Hawaiian. *Id.* at 160 n.8.

8. *Id.* at 170-71.

9. *See id.* at 171.

10. *See, e.g.*, *id.* at 175 (describing the effects of climate change on ecosystems home to plants used for traditional healing and dance); *id.* at 179 (describing the effects of coastal erosion and sea level rise on the practice of burying ‘iwi kūpuna (ancestral bones) along Hawai‘i's shores and on ancient Hawaiian fishponds).

11. *See* Emily Cristobal, *The Debrief: Following Historic Youth Climate Settlement, Advocates Say the Work Is Far from Over*, HAW. NEWS NOW, at 2:05 (July 4, 2024) https://www.hawaiinewsnow.com/2024/07/05/debrief-following-historic-youth-climate-settlement-advocates-say-work-is-far-over ("[I]n the end, we can't vote, and if the senators don't decide to listen to us there's nothing really we can do about it.").

12. *See* Complaint, *supra* note 1, at 3-4.

13. *Id.* at 2-3.

14. Press Release, Our Children's Tr., Historic Agreement Reached in Hawai‘i Youth-Led Constitutional Climate Case 1 (June 20, 2024) https://static1.squarespace.com/static/655a2d016eb74e41dc292ed5/t/6674dd26098de77d6418a131/1718934822964/Press+Release+on+Navahine+Settlement+-OCT_EJ++-+FINAL.pdf.

In settling the case, the government agreed to a list of policy actions to eliminate greenhouse gas emissions from the transportation sector by 2045.[15]

Navahine and her co-plaintiffs are not alone: In the face of looming climate turning points and government inaction, youth climate activists and advocates across the world have sought to use the judiciary to advance climate goals.[16] The 2010s were characterized by a rise in climate litigation, with a particular increase in cases framing governments' insufficient response to climate change as violating constitutional rights.[17] However, such climate cases in the United States have largely been dismissed or tangled in lengthy procedural battles that delay or prevent adjudication.[18]

Against the backdrop of government inaction and legal dead ends, the *Navahine* settlement presents a major win for the climate movement because the agreement commits government actors to achieving actionable climate goals. In particular, the settlement commits HDOT to specific actions to eliminate transportation emissions by 2045, such as developing a comprehensive greenhouse gas reduction plan, investing a minimum of $40 million into electric vehicle charging infrastructure by 2030, and establishing a unit charged with climate change mitigation.[19] This settlement has the potential to bring about significant change in Hawai‘i by committing HDOT to rapid decarbonization in collaboration with affected communities.[20]

Navahine is also historic in the broader context of rights-based climate litigation, which this Note defines as litigation in which groups of private plaintiffs sue government defendants alleging that failure to set or meet climate

15. Settlement Agreement and Release, Navahine F. v. Haw. Dep't of Transp., Civil No. 1CCV-22-0000631 (Haw. 1st Cir. Ct. June 20, 2024) [hereinafter Settlement Agreement]. One reason the plaintiffs brought suit against HDOT is that greenhouse gas emissions from the transportation sector are projected to comprise nearly 60 percent of Hawai‘i's total greenhouse gas emissions by 2030. Complaint, *supra* note 1, at 4.

16. *See, e.g.*, *State Legal Actions*, OUR CHILDREN'S TR., https://www.ourchildrenstrust.org/state-legal-actions (last visited Sept 9, 2025); *Global Legal Actions*, OUR CHILDREN'S TR., https://www.ourchildrenstrust.org/global-legal-actions (last visited Sept. 9, 2025).

17. *See* Jacqueline Peel & Hari M. Osofsky, *Climate Change Litigation*, 16 ANN. REV. L. & SOC. SCI. 21, 21 (2020) [hereinafter Peel & Osofsky, *Climate Change Litigation*]; Annalisa Savaresi & Juan Auz, *Climate Change Litigation and Human Rights: Pushing the Boundaries*, 9 CLIMATE L. 244, 251-53 (2019); Benjamin T. Sharp, *Stepping into the Breach: State Constitutions as a Vehicle for Advancing Rights-Based Climate Litigation*, 14 DUKE J. CONST. L. & PUB. POL'Y SIDEBAR 39, 43 (2019); Jacqueline Peel & Hari M. Osofsky, *A Rights Turn in Climate Change Litigation?*, 7 TRANSNAT'L ENVT'L L. 37, 40 (2018) [hereinafter Peel & Osofsky, *A Rights Turn in Climate Change Litigation?*].

18. *See* L. Delta Merner, *Looking Ahead to Climate Litigation in 2025: Progress, Challenges, and Opportunities*, UNION OF CONCERNED SCIENTISTS (Dec. 16, 2024) https://blog.ucsusa.org/delta-merner/looking-ahead-to-climate-litigation-in-2025-progress-challenges-and-opportunities (describing climate litigation in the United States as being "tied up by the defendants in procedural wrangling that prevents them from being heard on their merits").

19. *See* Settlement Agreement, *supra* note 15, at 4-10.

20. *Id.* at 3-10 (describing substantive commitments "stipulate[d] and agree[d to]").

change mitigation goals is a violation of human or constitutional rights.[21] *Navahine* marks the first time a climate lawsuit in any jurisdiction has concluded in settlement and is also one of the first U.S. cases to result in tangible climate commitments from major government actors. Current and future climate litigants may therefore benefit from using the *Navahine* settlement as a blueprint for maximizing climate lawsuits' benefits.

Further, *Navahine* represents potential for climate settlements to advance climate justice. The climate justice movement seeks to "address[] the disproportionate burden of climate change impacts on poor and marginalized communities [and] to promote more equitable allocation of these burdens at the local, national, and global levels."[22] The movement seeks to do so through "proactive regulatory initiatives and reactive judicial remedies that draw on international human rights and domestic environmental justice theories."[23] Although not every climate advocate acts in line with climate justice goals, this Note argues that climate advocates should center climate justice in their advocacy. The *Navahine* settlement incorporates climate justice into the agreement by empowering youth plaintiffs, many of whom come from marginalized backgrounds, to participate in the design and implementation of the remedy. In so doing, the *Navahine* settlement illustrates one model that can inform the crafting of just climate remedies in future litigation.[24]

As climate litigation has grown exponentially, so has the scholarship analyzing climate cases' legal claims and social impacts.[25] However, most scholarship has focused on evaluating the litigants' strategy and legal arguments[26] and courts' (often unfavorable) decisions rather than the impacts these cases would have if the plaintiffs were to prevail.[27] This focus on strategy and procedure has created a gap in scholarly attention with regard to climate litigation remedies. This Note seeks to fill this gap by presenting the *Navahine* settlement as a model for future advocates.

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21. *See* Annalisa Savaresi & Joana Setzer, *Rights-Based Litigation in the Climate Emergency: Mapping the Landscape and New Knowledge Frontiers*, 13 J. HUM. RTS. & ENV'T 7, 8 (2022) ("These rights-based lawsuits typically seek to hold to account public authorities and private actors for not taking adequate climate action.").

22. Randall S. Abate et al., *Recent Developments in Climate Justice*, 47 ENVT'L L. REP. NEWS & ANALYSIS 11005, 11005 (2017).

23. *Id.*

24. *See infra* Part III.

25. Peel & Osofsky, *Climate Change Litigation*, *supra* note 17, at 21.

26. *Id.* at 29 (citing recently published scholarship that "focus[ed] overwhelmingly on the different kinds of legal arguments that might be made").

27. *See id.* at 27 (noting that most scholarship analyzing climate litigation focuses on high-profile cases, which "may create a selection bias in the literature's analysis of the phenomenon of climate litigation that obscures other case law developments, including cases that are settled . . . [and] generally attract less scholarly attention."). *But see generally* Jina J. Kim, *Leave No One Behind: Realizing Environmental Justice through Climate Litigation Remedies*, 48 ECOLOGY L. Q. 409 (2022); John C. Dernbach & Patrick Parenteau, *Judicial Remedies for Climate Disruption*, 53 ENVT'L L. REP. 10574 (2023).

This Note proceeds in four parts. First, Part I places *Navahine* within the context of climate litigation. Part II connects the *Navahine* settlement to a long history of strategic settlements in environmental litigation, noting that advocates have long recognized settlement as a way to influence agency regulatory action and maximize community benefits. Part III argues that settlements in climate cases provide an opportunity to advance climate justice and build community power by giving plaintiffs a seat at the table in developing and implementing climate mitigation actions. Finally, Part IV argues that settlement agreements like the one reached in *Navahine* may be practically beneficial by setting forth specific actions more likely to be implemented than vague judicial mandates.

Although each lawsuit is unique and litigants should adjust their strategy based on the specific dynamics of the case, settlements provide a strategic path for climate plaintiffs to "get more" out of climate lawsuits and utilize the legal system to attain specific, tangible government action.

I. *NAVAHINE* IN THE CONTEXT OF RIGHTS-BASED CLIMATE LITIGATION

A. Climate Litigation: An Overview

Climate-focused litigation has been on the rise, particularly since the mid-2010s.[28] As of December 2022, over 1,500 climate cases had been filed in the United States.[29] Of these, *Navahine* is one of the first to be resolved in an outcome favorable to the plaintiffs.[30]

Climate litigation spans a range of legal claims, and there is a credible argument that nearly any kind of lawsuit could be considered "climate litigation" because of the expansive nature of climate change.[31] One model for defining climate litigation comprises a series of concentric circles, beginning with a core of cases in which climate change is the central issue and expanding out to include litigation that is not explicitly framed around climate change, but that necessarily has implications for climate adaptation or mitigation.[32] This Note focuses on a limited, but significant, subset of these "core" climate cases, a category often

28. *See* MICHAEL BURGER & MARIA ANTONIA TIGRE, SABIN CTR. FOR CLIMATE CHANGE L., COLUMBIA L. SCH. & U.N. ENV'T PROGRAMME, GLOBAL CLIMATE LITIGATION REPORT: 2023 STATUS REVIEW 9 (2023) (graph showing that the total number of climate change-related lawsuits more than doubled from 2017 to 2023); Peel & Osofsky, *A Rights Turn in Climate Change Litigation?*, *supra* note 17, at 38-39.

29. *Id*. at xiv.

30. Youth climate plaintiffs also saw success in 2023 in *Held v. State*. *See infra* notes 49-52 and accompanying text.

31. *See, e.g.*, CHRIS HILSON, CLIMATE CHANGE LITIGATION: A SOCIAL MOVEMENT PERSPECTIVE 2 (2010) ("[A]ll manner of litigation could conceivably be characterized as related to climate change.").

32. Peel & Osofsky, *Climate Change Litigation*, *supra* note 17, at 23-24. For example, Peel & Osofsky describe litigation challenging fracking permits as an example of a case in the furthest circle of climate litigation.

referred to as "rights-based" climate litigation.[33] This category encompasses cases in which groups of private plaintiffs have sued alleging that governments have violated citizens' constitutional rights by failing to adequately respond to the climate crisis.[34] This Note focuses on this category of cases because they have received significant media attention,[35] are seeking high-impact remedies (such as a requirement for the U.S. federal government to restructure its nationwide climate policy approach),[36] employ similar arguments in a range of jurisdictions, and have received vastly different outcomes.[37] Further, plaintiffs in two such cases (*Navahine* and *Held v. State*) have recently seen wins in and out of the courtroom.[38] Climate litigants have brought cases against all levels of government, to varying degrees of success. Three such cases—*Urgenda Foundation v. State of the Netherlands*,[39] *Juliana v. United States*,[40] and *Held v. State*[41]—illustrate some of the common legal theories and recent trends in climate litigation.

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33. *See generally, e.g.*, Donna Minha, *Lights, Camera, (Climate) Action: Bringing Corporations into the Spotlight in Human Rights-Based Climate Litigation*, 60 STAN. J. INT'L L. 28 (2024); Margaretha Wewerinke-Singh, *The Rising Tide of Rights: Addressing Climate Loss and Damage through Rights-Based Litigation*, 12:3 TRANSNAT'L ENVT'L L. J. 537 (2023); CÉSAR RODRÍGUEZ-GARAVITO, LITIGATING THE CLIMATE EMERGENCY: HOW HUMAN RIGHTS, COURTS, AND LEGAL MOBILIZATION CAN BOLSTER CLIMATE ACTION (2022).

34. *See* Savaresi & Setzer, *supra* note 21, at 8 ("These rights-based lawsuits typically seek to hold to account public authorities and private actors for not taking adequate climate action.").

35. *See, e.g.,* Karen Zraick, *Youth Group Asks Supreme Court to Revive a Landmark Climate Lawsuit*, N.Y. TIMES (Sept. 12, 2024), https://www.nytimes.com/2024/09/12/climate/juliana-lawsuit-supreme-court.html; Victoria Bisset, *Youth Climate Activists Just Won a 'Historic' Settlement*, WASH. POST (June 21, 2024), https://www.washingtonpost.com/climate-environment/2024/06/21/hawaii-youth-climate-settlement-transport; Carolyn Kormann, *The Right to a Stable Environment is the Constitutional Question of the Twenty-First Century,* THE NEW YORKER (June 15, 2019), https://www.newyorker.com/news/dailycomment/the-right-to-a-stable-climate-is-the-constitutional-question-ofthe-twenty-first-century; John Shwartz, *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; Anke Wonneberger, *Climate Change Litigation in the News: Litigation as Public Campaigning Tool to Legitimize Climate-Related Responsibilities and Solutions*, 23 SOC. MOVEMENT STUD. 94 (2023) (analyzing media coverage of rights-based climate litigation in the Netherlands across over 500 news articles).

36. *See* Juliana v. United States*,* 947 F.3d 1159, 1171 (9th Cir. 2020) (describing plaintiffs' requested remedy as "the adoption of a comprehensive scheme to decrease fossil fuel emissions and combat climate change").

37. *See Legal Proceedings in All 50 States*, OUR CHILDREN'S TR., https://www.ourchildrenstrust.org/legal-proceedings-in-all-50-states (last visited Aug. 22, 2025) (describing legal actions seeking to "secur[e] the legal rights of youth to a healthy atmosphere and safe climate" that one organization has brought in all fifty U.S. states).

38. A focus on rights-based litigation is also appropriate, as some scholars have described a recent "rights turn" in climate litigation. *See, e.g.*, Peel & Osofsky, *A Rights Turn in Climate Change Litigation?*, *supra* note 17, at 40; Sharp, *supra* note 17, at 43; Savaresi & Auz, *supra* note 17, at 246-49.

39. Urgenda Foundation v. State of the Netherlands, Case No. C/09/456689, (D. Hague 24 June 2015), *aff'd* (Hague App. 9 October 2018), *aff'd* (20 December 2019) (S.C. Netherlands), https://elaw.org/wp-content/uploads/archive/urgenda_0.pdf.

40. *Juliana,* 947 F.3d 1159.

41. Held v. State, No. CDV-2020-307, 2023 Mont. Dist. LEXIS 2 (Mont. 1st Dist. Ct. Aug. 14, 2023).

One of the first cases alleging that a government's response to climate change violated plaintiffs' rights was brought by the Urgenda Foundation and 886 individuals against the Dutch government in 2015.[42] The plaintiffs alleged that, by weakening its greenhouse gas reductions target, the Dutch government violated the Dutch constitution, the European Convention on Human Rights (ECHR), and the Dutch Civil Code's establishment of the government's duty of care.[43] The Hague Court of Appeal ruled in favor of Urgenda, holding that the ECHR established a positive duty for governments to protect against environmental situations that would adversely affect rights to life, family life, and home, and that emissions reductions of at least 25 percent by 2020 were required to satisfy that duty of care.[44]

The most prominent climate lawsuit in the United States is arguably *Juliana v. United States*, brought by twenty-one youth plaintiffs alleging that the federal government's failure to respond to climate change has violated their constitutional rights to due process and equal protection under the Fifth, Ninth, and Fourteenth Amendments, which the plaintiffs argued include "the right to a livable climate system and healthy environment."[45] The *Juliana* plaintiffs requested a declaration that the federal public trust extends to the atmosphere and an injunction ordering the government to develop and implement a national plan to phase out fossil fuel emissions.[46] *Juliana* has been mired in procedural litigation: Motions challenging the plaintiffs' standing have "ping-ponged" the case between federal district courts, appellate courts, and the Supreme Court.[47] The case reached its final conclusion in March 2025, when the Supreme Court denied the plaintiffs' petition for writ of certiorari to review the Ninth Circuit's dismissal of the case.[48]

Finally, climate plaintiffs have seen recent success in state court in *Held v. State*, where a Montana state district court held that a provision of the Montana Environmental Protection Act prohibiting state agencies from considering greenhouse gas emissions or climate change in environmental review violated

42. Recent Case, State of the Netherlands v. Urgenda Foundation, 132 HARV. L. REV. 2090, 2091 (2019).

43. *Id.*

44. *Id.* at 2092. The Dutch government appealed the case to the Dutch Supreme Court, which upheld the Hague Court of Appeal's ruling. *Landmark Decision by Dutch Supreme Court*, URGENDA, https://www.urgenda.nl/en/themas/climate-case (last visited Sept. 9, 2025). Although the Netherlands has met the emissions reduction target ordered by the Court, the ruling's effect on emissions and climate policy overall has been questioned. *See infra* note 298.298. [298]

45. Megan Raymond, *A Hypothetical Win for* Juliana *Plaintiffs: Ensuring Victory Is More Than Symbolic*, 46 ECOLOGY L. Q. 705, 705, 708 (2019).

46. *Id.* at 708.

47. *Id.* at 709.

48. Press Release, Our Children's Tr., Supreme Court Denies Cert in *Juliana*; Legacy of Youth-Led Climate Lawsuit Lives On 1 (March 24, 2025), https://static1.squarespace.com/static/655a2d016eb74e41dc292ed5/t/67e16f3acf84c27786e9c14e/1742827322618/2025.24.03.JulianaCertDeniedPR.FINAL.pdf.

the Montana Constitution.[49] Montana's constitution includes a right to a "clean and healthful environment," and the district court held that this right extends to a healthful climate.[50] Because the regulation limiting environmental review limited the actions government officials could consider in responding to climate change, the court held that the regulation was unconstitutional.[51] The Montana Supreme Court upheld the district court's holding in a 6-1 decision issued in December 2024.[52]

These three cases provide a background for climate litigation generally, and serve as points of comparison with *Navahine,* highlighting its success among the greater universe of rights-based climate litigation. Specifically, *Urgenda* illustrates what a broad, favorable judicial ruling (as opposed to a settlement) could look like; *Juliana* illustrates the difficulty rights-based climate cases have faced in the United States; and *Held* provides an example of what a successful state court ruling could look like.

B. Navahine F. v. Hawai'i Department of Transportation

Of the hundreds of cases alleging that governmental inaction on climate change violates plaintiffs' constitutional rights, *Navahine* is one of the first cases in the United States where plaintiffs have seen success, and the only rights-based climate case that has resulted in a settlement with government defendants. This Subpart details the plaintiffs' arguments and the contents of the settlement they reached with HDOT.

Advocates bringing climate lawsuits have long viewed Hawai'i as a promising jurisdiction for litigation because of its expansive public trust doctrine.[53] The Hawai'i Constitution states that "[a]ll public natural resources are held in trust by the State for the benefit of the people," and mandates that the State "shall conserve and protect Hawaii's natural beauty and all natural resources, including land, water, air, minerals and energy sources" "[f]or the benefit of present and future generations."[54] It then obligates the State "to protect, control and regulate the use of Hawaii's water resources for the benefit of its people."[55] Finally, it states that "[e]ach person has the right to a clean and

49. Held v. State, No. CDV-2020-307, 2023 Mont. Dist. LEXIS 2 (Mont. 1st Dist. Ct. Aug. 14, 2023).

50. *Id.* at 47.

51. *Id.* at 48.

52. Micah Drew & Blair Miller, *Montana Supreme Court Affirms Decision in* Held*, Historic Youth Climate Case*, DAILY MONTANAN (Dec. 18, 2024), https://dailymontanan.com/2024/12/18/montana-supreme-court-affirms-decision-in-held-historic-youth-climate-case.

53. *See, e.g.*, Robin Kundis Craig, *A Comparative Guide to the Western States' Public Trust Doctrine: Public Values, Private Rights, and the Evolution Toward an Ecological Public Trust*, 37 ECOLOGY L. Q. 53, 86 (2010); Kylie Wha Kyung Wager, *In Common Law We Trust: How Hawai'i's Public Trust Doctrine Can Support Atmospheric Trust Litigation to Address Climate Change*, 20 UC L. SF W. NW. J. ENVT'L L. & POL'Y 55, 77 (2014).

54. HAW. CONST. art. 11, § 1.

55. HAW. CONST. art. 11, § 7.

healthful environment" and gives "[a]ny person" the ability to enforce this right against any party.[56] As a result, the Hawai'i Supreme Court has stated that "the public trust doctrine [is] a fundamental principle of constitutional law in Hawaii."[57]

In 2022, thirteen youth plaintiffs filed a lawsuit against the Hawai'i Department of Transportation (HDOT), claiming that HDOT "establish[ed], maintain[ed], and operate[d] a state transportation system that violated Hawai'i constitutional mandates to protect public trust resources and the environment by reducing greenhouse gas emissions and decarbonizing the transportation sector."[58] The plaintiffs claimed that the State's projected failure to meet decarbonization goals established by state law violated Hawai'i's constitutional public trust doctrine and the plaintiffs' right to a clean and healthy environment.[59] Specifically, the plaintiffs' complaint alleged that transportation emissions are a "major and increasing" source of greenhouse gas emissions and that HDOT "engaged in an ongoing pattern and practice of promoting, funding, and implementing transportation projects that lock in and escalate the use of fossil fuels, rather than projects that mitigate and reduce emissions."[60]

The plaintiffs sought declaratory relief that the state transportation system and the greenhouse gas emissions it produced violates the agency's constitutional and statutory duties as well as the plaintiffs' constitutional rights.[61] They also sought injunctive relief "to rectify Defendants' violations and bring the state transportation system into constitutional compliance based on the best available science."[62] Similarly to both *Juliana* and *Held*, the complaint requested broad, overarching declaratory and injunctive relief.[63] The *Navahine* plaintiffs paired their broad request for relief with narrower requests grounded in existing state statutory and constitutional law, a strategy the *Held* plaintiffs used but the *Juliana* plaintiffs did not.[64]

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56. HAW. CONST. art. 11, § 9.

57. *In re* Water Use Permit Applications (Waiāhole), 9 P.3d 409, 444 (Haw. 2000).

58. Complaint, *supra* note 1, at 1-2.

59. *Id.* at 3.

60. *Id.* at 4. The Complaint lists a number of examples of this alleged conduct, including prioritizing highway construction and expansion projects over transportation electrification and alternative fuel projects. *Id*.

61. *Id.* at 3.

62. *Id.*

63. *See* Complaint for Declaratory and Injunctive Relief at 84-94, Juliana v. United States, No. 6:15-cv-01517-TC (D. Or. 2015) [hereinafter *Juliana* Complaint] (seeking four claims for relief for alleged violations of the Due Process Clause, Equal Protection principles, the Ninth Amendment, and the public trust doctrine); Complaint for Declaratory and Injunctive Relief at 103, Held v. State, No. CDV-2020-307 (Mont. 1st Dist. Ct. 2023) [hereinafter *Held* Complaint] (seeking a declaration that the state constitutional right to a clean and healthful environment includes a stable climate system, as well as injunctive relief ordering the state to develop and implement a remedial plan to reduce greenhouse gas emissions).

64. *See* Complaint, *supra* note 1, at 3; *Held* Complaint, *supra* note 63, at 102-03 (requesting declaratory relief that a state statute violated the state constitution and that the state constitutional right to a clean and healthy environment included a right to a stable climate system); *Juliana* Complaint, *supra* note 63, at 84-94 (requesting only broad forms of relief).

In denying the defendants' motion to dismiss, the First Circuit Court of the State of Hawai'i held that the plaintiffs' allegations, if proven, would mean the defendants were "failing to preserve public trust resources by not doing enough, fast enough, to help reduce climate change by reducing GHG emissions."[65] It rejected the defendants' argument that the public trust doctrine does not apply to the climate because, in the court's opinion, it was uncontested that the defendants' actions and their climate effects impact public trust resources.[66] Critically, the court also rejected the defendants' argument that "it is not required to do anything because the problem is just too big" because the Hawai'i Constitution creates a positive obligation on the state to "reasonably monitor and maintain our natural resources by reducing our GHG emissions and planning alternatives to a fossil-fuel heavy transportation system. . . ."[67]

Citing state supreme court precedent that the Hawai'i constitutional right to a healthy environment requires "that express consideration be given to reduction of greenhouse gas emissions,"[68] the circuit court held that state laws required "timely planning and action, not meaningless or purely aspirational goals."[69] The court also held that the harms alleged by the plaintiffs were "current, ongoing, and getting worse,"[70] and that the Hawai'i Supreme Court had previously held that constitutional claims based on public trust duties were not political questions.[71] The court held open the possibility that political questions may arise if specific requests for injunctive relief raised political questions, but that this issue was premature at the pleading stage.[72]

The court set a trial date, but on June 20, 2024, after months of discovery, depositions, and exchange of expert reports, the parties announced a settlement agreement.[73] *Navahine* was the first rights-based climate lawsuit to end in a

65. Ruling on Motion to Dismiss at 1-2, Navahine F. v. Haw. Dep't of Transp., No. 1CCV-22-0000631 (Haw. 1st Cir. Ct. Apr. 6, 2023) [hereinafter *Navahine* Denial of Motion to Dismiss].

66. *Id.* at 3.

67. *Id.* at 3. In contrast, the relief requested in *Juliana* was not grounded in specific constitutional provisions creating positive duties the government must comply with. *See Juliana* Complaint, *supra* note 63, at 84-94 (claiming the United States government has a duty to reduce greenhouse gas emissions without identifying specific Constitutional provisions establishing this duty).

68. *Navahine* Denial of Motion to Dismiss, *supra* note 65, at 5 (citing *In re* Application of Maui Elec. Co., Ltd., 141 Haw. 249, 264-65 (2017)).

69. *Id.* at 7-8.

70. *Id.* at 9 (citing *In re* Hawai'i Elec. Light Co., Inc. (*HELCO*), 526 P.3d 329, 336 (2023): "Hawai'i faces immediate threats to our cultural and economic survival: sea level rise, eroding the coast and flooding the land; ocean warming and acidification, bleaching coral reefs and devastating marine life; more frequent and more extreme droughts and storms. For the human race as a whole, the threat is no less existential. With each year, the impacts of climate change amplify and the chances to mitigate dwindle." (internal citations omitted)).

71. *Id.* at 11.

72. *Id.*

73. Navahine v. Hawai'i DOT *Timeline,* OUR CHILDREN'S TR., https://navahinevhawaiidot.ourchildrenstrust.org/timeline (last visited Aug. 22, 2025).

settlement, and the plaintiffs and government defendants came together in a joint press conference to celebrate the "groundbreaking agreement."[74]

The settlement agreement begins with a recognition that Hawai'i jurisprudence has identified climate change as an "existential" and "immediate" threat[75] to which Hawai'i is "particularly vulnerable,"[76] and that state law "mandates that we reduce emissions now."[77] The parties also agreed that HDOT is constitutionally and statutorily mandated to affirmatively reduce transportation sector emissions.[78] The parties then affirmed that the plaintiffs' constitutional rights to a clean and healthful environment includes "a right to a life-sustaining climate system," and that HDOT has an affirmative public trust obligation that extends to "air and other trust resources affected by climate change."[79] As applied, HDOT has a constitutional obligation to "preserve, protect, and maintain" public trust resources and citizens' right to a clean and healthful environment through its establishment, operation, and maintenance of the state transportation system.[80] The parties agreed to resolve the lawsuit in exchange for HDOT's commitments to reduce transportation emissions.[81]

The negotiated terms in the settlement agreement center around ensuring that the transportation sector will meet a state law requiring the state achieve zero greenhouse gas emissions by 2045.[82] First, HDOT agreed to "develop and implement a concrete and comprehensive statewide [greenhouse gas reduction] plan" with specified interim benchmarks in consultation with the plaintiffs and other members of the public.[83] Second, HDOT agreed to revise its transportation programming and budgeting process by April 2025 to ensure sufficient funding, and to assess and report emissions impacts of each infrastructure project.[84] Third, HDOT agreed to create an internal unit charged with addressing climate change mitigation, a volunteer youth advisory council, and various other roles and standards.[85] Finally, HDOT agreed to a number of "Immediate Commitments," including investing a minimum of $40 million into electric vehicle infrastructure;

74. *A Historic Settlement*, OUR CHILDREN'S TR., https://navahinevhawaiidot.ourchildrenstrust.org/a-landmark-settlement (last visited Aug. 22, 2025); Historic Agreement Reached in Hawai'i Youth-Led Constitutional Climate Case, *supra* note 14, at 1; Hawai'i Governor Josh Green, *Historic Agreement Settles Navahine Climate Litigation*, OFF. OF THE GOVERNOR (June 20, 2024), https://governor.hawaii.gov/newsroom/office-of-the-governor-news-release-historic-agreement-settles-navahine-climate-litigation.

75. Settlement Agreement, *supra* note 15, at 2 (citing *HELCO*, 526 P.3d at 336).

76. *Id.* (citing S. Con. Res. 44, 31st Leg. (Haw. 2021)).

77. *Id.* (citing *HELCO*, 526 P.3d at 335).

78. *Id.* (citing *HELCO*, 526 P.3d at 336; HAW. REV. STAT. §§ 196-9; 225P-5, -7, -8; 226-17, -18; 264-142, -143 (2024)).

79. *Id.* at 3-4 (internal citations omitted).

80. *Id.* at 4.

81. *Id.* at 3.

82. *Id.* at 4. The state law establishing the zero emissions target is codified at HAW. REV. STAT. § 225P-8 (2024).

83. *Id.* at 5-7.

84. *Id.* at 7-8.

85. *Id.* at 8-9.

completing proposed pedestrian, bicycle, and transit networks within five years; implementing policies to reduce vehicle miles traveled, electrify transportation, increase alternative fuel use, and expand multimodal transportation options; and sequestering carbon by planting at least 1,000 trees per year.[86]

The Hawai'i Circuit Court retains continuing jurisdiction to enforce the terms of the settlement until December 31, 2045, or the date at which the State meets its Zero Emissions Target, whichever is earlier.[87] After that point, the case will be automatically dismissed.[88]

II. SETTLEMENTS IN ENVIRONMENTAL LITIGATION

Environmental advocates have long used settlement as an element of their litigation strategy.[89] This Part traces environmental activists' use of settlements through three types of environmental lawsuits. First, environmental advocates suing agencies over their regulations—or failure to regulate—have used settlement negotiations to shape the regulations agencies ultimately enact.[90] Second, environmental justice advocates have leveraged settlements in lawsuits against existing or new pollution sources in and near their communities.[91] Third and finally, the *Navahine* plaintiffs challenged government inaction by using settlements to achieve desired emissions reductions. In this third model, plaintiffs can negotiate with government defendants to establish judicially enforceable, specific climate actions. Ultimately, climate litigants' use of settlements may be a natural progression in their litigation strategy, as these plaintiffs have built off the environmental advocacy that came before them.[92]

As a general matter, scholars have debated the role of settlements in the legal system for decades.[93] In his iconic critique of settlements, Owen M. Fiss argued that the role of judges is to "explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes," not to "maximize the ends of private parties, nor simply to secure the peace. . . ."[94] When parties settle, Fiss argues, courts have failed to discharge this interpretive

86. *Id.* at 9-10. The policy steps set forth in the settlement are affirmative and specific, in contrast to the *Held* ruling which prevented the state government from acting under a state law but did not affirmatively require the state to take action to reduce emissions. *See infra* notes 275-279 and accompanying text.

87. *Id.* at 11.

88. *Id.*

89. *See, e.g.*, Jeffrey M. Gaba, *Informal Rulemaking by Settlement Agreement*, 73 GEO. L. J. 1241, 1242-43 (1985); Jeff Todd, *Trade Treaties, Citizen Submissions, and Environmental Justice*, 44 ECOLOGY L. Q. 89, 100 (2017).

90. *Infra* Part II.A.

91. *Infra* Part II.B.

92. *See* Randall S. Abate, *Public Nuisance Suits for the Climate Justice Movement: The Right Thing and the Right Time*, 85 WASH. L. REV. 197, 207 (2010).

93. *See generally, e.g.*, Owen M. Fiss, *Against Settlement*, 93 YALE L. J. 1073 (1984).

94. *Id.* at 1085. *But see* Carrie Menkel-Meadow, *Practicing in the Interests of Justice in the Twenty-First Century: Pursuing Peace as Justice,* 70 FORDHAM L. REV. 1761, 1763-64 (2002) (arguing that seeking peace between parties is an essential aspect of using the law for social good).

duty.[95] Although Fiss's article raises serious concerns with the pervasive use of settlements in litigation, it still runs counter to courts' broad acceptance of settlements and acknowledgement that overall they are socially beneficial from a public policy perspective.[96] For example, in administrative contexts, settlement benefits the public by allowing agencies to dedicate their resources to regulation rather than litigation, while relieving burdens on the judicial system.[97] More broadly, settlements have been defended as furthering values such as consent, participation, empowerment, dignity, respect, and empathy.[98] Others promote settlements as more adequately reflecting parties' preferences, saving judicial time and resources, providing better outcomes, and deterring wrongdoing.[99]

Further, as detailed in this Note, settlements may provide particularly beneficial outcomes in lawsuits between young climate activists and governments. For example, in lawsuits where the focus is on the sufficiency of a government's policy response to climate change, settlements may give force to constitutional and statutory values better than a judicial resolution would.[100] When the questions at hand require both legal and policy determinations, settlements provide an avenue for policymakers to work with the public to develop strategies to align government policy with more abstract values like the right to a clean and healthful environment.[101]

A. Strategic Settlements in Environmental Regulatory Litigation

Litigation and settlement have become part of regulatory agencies' standard practice in developing and enforcing regulations. Administrative agencies across subject matters settle lawsuits challenging their regulations (or

95. Fiss, *supra* note 93, at 1085.

96. *See* Samuel Issacharoff & Robert H. Klonoff, *The Public Value of Settlement*, 78 FORDHAM L. REV. 1177, 1178 n.10 (2009) (listing cases where courts described a judicial preference toward settlement).

97. *See* Robert V. Percival, *The Bounds of Consent: Consent Decrees, Settlements and Federal Environmental Policy Making,* 1987 U. CHI. LEGAL F. 327, 333 (1987).

98. Carrie Menkel-Meadow, *Whose Dispute is it Anyway? A Philosophical and Democratic Defense of Settlement (In Some Cases)*, 83 GEO. L. J. 2663, 2669-70 (1995).

99. *See* Marc Galanter & Mia Cahill, *"Most Cases Settle": Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1350-87 (1994); Issacharoff & Klonoff, *supra* note 96, at 1193-97.

100. The reason for this is that courts are often hesitant to rule on the sufficiency of climate policy goals, whereas they may be more likely to approve agreements reached by the parties that express such policy goals. *See* Shawn M. LaTourette, *Global Climate Change: A Political Question*, 40 RUTGERS L. J. 219, 284 (2008).

101. As described in Part II.A, parties affected by regulations often challenge those regulations in court but come to agreement about alterations to regulatory text with agencies through settlement. Judges may characterize such substantive policy discussions as nonjusticiable political questions. *See, e.g.*, Baker v. Carr, 369 U.S. 186, 217 (1962). Therefore, settlement provides an avenue for interested parties to work directly with regulators to shape policy.

lack thereof),[102] and settlements in challenges to environmental regulations are no different.[103]

Perhaps the most influential settlement agreement in environmental regulation was entered into by the Environmental Protection Agency (EPA) and the Natural Resources Defense Council (NRDC) in 1976.[104] This agreement, known as the "Flannery decree" after the judge who approved the agreement, resolved a lawsuit challenging the EPA's failure to promulgate water pollution standards and formed the basis for the EPA's regulation of toxic pollutants under the Clean Water Act (CWA).[105] The EPA agreed to regulate a specified list of chemical pollutants, conduct studies of those pollutants' effects, publish water quality criteria for the listed pollutants, and meet a schedule of completion dates.[106] The Flannery decree was challenged on the grounds that District Court Judge Flannery exceeded his authority to approve the agreement.[107] Specifically, industry groups alleged that the decree infringed upon the EPA's discretion in environmental policymaking by committing the agency to policy actions beyond what the CWA required.[108] However, the D.C. Circuit upheld the Flannery decree, finding that the settlement was consistent with the CWA's goals and the EPA's consent to its terms was an expression of the agency's regulatory discretion.[109]

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102. *See generally* Jim Rossi, *Bargaining in the Shadow of Administrative Procedure: The Public Interest in Rulemaking Settlement*, 51 DUKE L. J. 1015 (2001) (describing a general administrative practice of agencies settling regulatory litigation and describing settlements by agencies such as the Occupational Safety and Health Administration and U.S. Department of Agriculture).

103. *See* Courtney R. McVean & Justin R. Pidot, *Environmental Settlements and Administrative Law*, 39 HARV. ENVT'L L. REV. 191, 202 (2015) ("Based on the high volume of environmental litigation, it comes as no surprise that many cases in this context settle as well."); Percival, *supra* note 97, at 328 ("As in other areas of civil and criminal law, settlements have become a frequent, if not the predominant, mode for disposing of environmental litigation.").

104. *See* Rosemary O'Leary, *The Courts and the EPA: The Amazing "Flannery Decision,"* 5 NAT. RES. & ENV'T 18, 18 (1990) (noting that when thirty former EPA attorneys were asked which court decision had the greatest impact on EPA policy, twenty-eight said the decision upholding the Flannery Decree); Percival, *supra* note 97, at 339-40 (describing the Flannery Decree, noting that it was "unusually detailed" and that it has "produced significant results").

105. *See generally* Nat. Res. Def. Council et al. v. Train, No. 2153-73 (D.D.C. June 9, 1976), reprinted in 6 ENVT'L L. REP. 20588, https://www.elr.info/sites/default/files/litigation/6.20588.htm [hereinafter NRDC v. Train Settlement].

106. *Id.*

107. Citizens for a Better Env't v. Gorsuch, 718 F.2d 1117, 1120-21 (D.C. Cir. 1983). There does not appear to be one clear standard by which courts evaluate settlements, but the standard is more relaxed than the standards used to evaluate cases on the merits. *See id.* at 1126. Generally, courts look to the settlement's "overall fairness to beneficiaries and consistency with the public interest." *Id.* (quoting United States v. Trucking Employers, Inc., 561 F.2d 313, 317 (D.C. Cir.1977)). In evaluating the Flannery Decree, the D.C. Circuit reasoned that the terms of the settlement would help the EPA achieve its statutory objective, and that the settlement "represents a compromise for NRDC" while also providing it benefits. *Id.* at 1125. The court rejected challengers' claim that "each provision in the Agreement must be necessary to remedy a specific violation of the Act," instead evaluating the terms of the settlement for their consistency with the statute. *Id.*

108. *Id.* at 1120-21.

109. *Id.* at 1127-28, 1130.

Beyond prompting agencies to act in the first place, lawsuits and their resulting settlements create an iterative process through which agencies work with interest groups to develop the content of regulations.[110] The EPA enters into multiple different types of settlement agreements to resolve lawsuits initiated throughout the rulemaking process, including scheduling agreements (committing the agency to issue regulations by a particular date), process agreements (specifying a comprehensive course of action the agency will take in promulgating regulations), and substantive agreements (specifying the actual content, and sometimes the precise language, of regulations).[111] The range of potential settlement agreements reflects the range of strategic goals settlements can achieve. For example, court-enforced scheduling agreements can pressure "a sometimes sluggish bureaucracy" to act, but provide litigants with little influence over the content of the regulations.[112] On the other hand, substantive agreements may allow litigants to shape regulatory text or agency guidance documents, but may lack set deadlines an agency must meet.[113]

Settlements in challenges to environmental regulation are common: One analysis compiled eighty-eight cases in which the Obama EPA settled lawsuits challenging its regulation or failure to regulate.[114] This strategic use of settlement to obtain regulatory objectives has been termed "sue and settle," and its prevalence in environmental policymaking has been critiqued as overly opaque as it can be viewed as agencies relinquishing rulemaking power to interest groups[115] and as limiting meaningful public participation to just the parties involved in settlement negotiations.[116] However, scholars have defended environmental settlements as being consistent with environmental and administrative law, beneficial to agencies, and overall balanced in the types of interests they benefit. [117] Interest groups' power in settlement-driven rulemaking

110. *See* Gaba, *supra* note 89, at 1242 (arguing that "truly final regulations may be promulgated only after the government and affected parties have privately negotiated their contents").

111. *Id.* at 1243-46. Other scholars have grouped environmental settlements in similar categories. *See, e.g.*, McVean & Pidot, *supra* note 103, at 216 (describing environmental regulatory settlements as either "resource allocation settlements" where the agency agrees to commit resources toward a decision making process, "procedural settlements," or "substantive settlements.").

112. *See* Gaba, *supra* note 89, at 1244.

113. *See id*. at 1244-46.

114. Ben Tyson, *An Empirical Analysis of Sue and Settle in Environmental Litigation*, 100 VA. L. REV. 1545, 1556 (2014).

115. *See* WILLIAM L. KOVACS ET AL., SUE AND SETTLE: REGULATING BEHIND CLOSED DOORS 10-11 (2013), https://www.uschamber.com/assets/archived/images/documents/files/SUEANDSETTLEREPORT-Final.pdf.

116. Gaba, *supra* note 89, at 1256; *see also* Citizens for a Better Environment v. Gorsuch, 718 F.2d 1117, 1136 (D.C. Cir. 1983) (Wilkey, J., dissenting) (critiquing rules shaped by consent decrees because of their "potential to freeze the regulatory processes of representative democracy"); Rossi, *supra* note 102, at 1029 (describing the secretive nature of settlements as the subject of criticism).

117. One of the critiques of "sue and settle" is that it subverts the notice and comment process. *See* Tyson, *supra* note 114, at 1555 (noting "the ability of some consent decrees to subvert the intent (though admittedly not the law) of notice-and-comment rulemaking. . .."). However, Tyson argues that "sue and settle" ultimately does not impede public participation because the vast majority of such settlements see the EPA agreeing to a deadline to promulgate regulations, retaining industry's and the

may also be checked by courts' ability to step in if agencies unlawfully subvert notice and comment requirements when adopting rules negotiated in settlement talks.[118]

B. Strategic Settlements in Environmental Justice Litigation

Community advocates have also strategically used the settlement process to get more from environmental justice lawsuits than courts would otherwise provide. This Note uses "environmental justice litigation" to refer primarily to cases in which communities bring claims challenging their disproportionate exposure to pollution.[119] This category of litigation initially developed through communities challenging the siting of polluting industries in already overburdened[120] and marginalized communities.[121] However, it also encompasses challenges to disproportionate exposure to other pollutants from sources such as indoor toxins, drinking water contamination, or occupational exposure.[122] This Note does not use this categorization to suggest that

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public's ability to comment on proposed rules, and because industry parties would likely be able to intervene in litigation and contest any settlement agreement or consent decree. *Id.* at 1557-59. Further, scholars have responded to this critique by comparing the settlement process to the common practice of "private pre-rulemaking discussions" between agencies and affected parties that also arguably reduce democratic input. Gaba, *supra* note 89, at 1268. *See also* Percival, *supra* note 97, at 331 ("Agencies may agree to consider rule-making changes and to adopt regulations required by law, but they generally will not make substantive commitments concerning the content of regulations that are subject to APA requirements.").

118. *See, e.g.*, Minard Run Oil Co. v. U.S. Forest Serv., 670 F.3d 236 (3d Cir. 2011).

119. *See* Helen H. Kang, *Pursuing Environmental Justice: Obstacles and Opportunities—Lessons from the Field*, WASH. U. J. L. & POL'Y 121, 136 (2009) (describing environmental justice litigation as sharing a "common thread" of "EJ groups' decision that the level of pollution in their neighborhood is 'too much,' or that the pollution significantly interferes with their quality of life"); *cf.* Robert R. Kuehn, *A Taxonomy of Environmental Justice*, 30 ENVT'L L. REP. NEWS & ANALYSIS 10681, 10681 (2000) (referring to "local communities feeling overburdened by environmental hazards and left out of the decisionmaking process" in defining "environmental justice").

120. The EPA defines "overburdened community" as "the minority, low-income, tribal and indigenous populations or communities in the United States that potentially experience disproportionate environmental harms and risks due to exposures or cumulative impacts or greater vulnerability to environmental hazards. This increased vulnerability may be attributable to an accumulation of negative and lack of positive environmental, health, economic, or social conditions within these populations or communities." *What is the Definition of "Overburdened Community: That is Relevant for EPA Actions and Promising Practices?*, EPA, https://www.epa.gov/caa-permitting/what-definition-overburdened-community-relevant-epa-actions-and-promising-practices (last updated July 9, 2025).

121. *See* Luke W. Cole, *Environmental Justice Litigation: Another Stone in David's Sling*, 21 FORDHAM URB. L. J. 523, 524 (1994) ("[S]iting disputes have been the primary context for environmental justice litigation so far."); Kang, *supra* note 119, at 136 n.41 (stating that the fact that "EJ litigation results from neighborhood pollution is unsurprising because EJ groups typically are formed to address that particular problem"); Sheila Foster, *Justice from the Ground Up: Distributive Inequities, Grassroots Resistance, and the Transformative Politics of the Environmental Justice Movement*, 86 CALIF. L. REV. 775, 776 (1998) ("The [environmental justice] movement has emerged from a primarily local, grassroots response to the presence and continued siting of hazardous waste facilities in poor communities and communities of color.").

122. *See* Cole, *supra* note 121, at 527 (describing "suits to ban dangerous pesticides on behalf of farmworkers" as characteristic of environmental justice litigation despite occurring before the term was coined).

environmental justice litigation is a monolith, as a wide variety of lawsuits can be understood as environmental justice advocacy. However, for purposes of this comparison, this Note has chosen to focus on a subset of environmental justice litigation that reflects the environmental justice movement's origins and demonstrates its overlapping strategic goals and methods.

Litigation efforts against the City of Flint, Michigan and Michigan state officials following the city's drinking water contamination crisis provide an illustrative example of how settlements can remedy environmental injustices.[123] Following the discovery of the Flint water crisis in 2015, a group of local and national plaintiffs filed their initial lawsuit.[124] The suit requested declaratory relief that the City and State were in violation of Safe Drinking Water Act obligations, injunctive relief from ongoing Safe Drinking Water Act violations, a court order for city and state officials to replace all of Flint's lead water service lines without imposing costs on residents, and equitable relief to "mitigate the health and medical risks and harm resulting from Defendants' violations."[125] The parties entered into a settlement agreement in which the State agreed to provide Flint with $97 million to fund lead service line removal, a tap water monitoring program, a faucet filter installation and education program, bottled water access to residents, and guaranteed funding for health and medical programs.[126] The terms of the settlement are federally enforceable and go beyond what the defendants would otherwise be legally obligated to do.[127] For example, while plaintiffs could have achieved a ruling that Flint had to replace lead service lines in the city, a provision requiring Flint to do so at no cost to residents—as the plaintiffs achieved in the settlement agreement—could only have been obtained in a settlement agreement.[128]

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123. *See Concerned Pastors for Social Action v. Khouri*, NAT. RES. DEF. COUNCIL, https://www.nrdc.org/court-battles/concerned-pastors-social-action-v-khouri (last updated Feb. 7, 2025) [hereinafter NRDC, *Concerned Pastors for Social Action v. Khouri*].

124. *Id.* The plaintiffs were Concerned Pastors for Social Action (an association of religious leaders from over thirty predominantly African American churches in Flint and nearby communities), the American Civil Liberties Union (ACLU) of Michigan, Flint resident Melissa Mays, and the NRDC. *Concerned Pastors for Social Action v. Khouri: Safe Water for Flint*, ACLU OF MICH., https://www.aclumich.org/en/cases/concerned-pastors-social-action-v-khouri-safe-water-flint (last visited Aug. 22, 2025). Although the internal dynamics of the coalition are not publicly available, it is important that litigants attempt to represent community interests as accurately as possible, and for large national legal organizations to center community interests rather than substituting their own external judgment for those of community members'. This is in line with concepts from movement lawyering, where lawyers work in collaboration with social movements by treating clients as partners and seeking to advance community interests. *See generally, e.g., About Movement Lawyering*, MOVEMENT L. LAB, https://www.movementlawlab.org/about/movement-lawyering (last visited Aug. 22, 2025); Betty Hung, *Movement Lawyering as Rebellious Lawyering: Advocating with Humility, Love and Courage*, 23 CLINICAL L. REV. 663 (2017).

125. NRDC, *Concerned Pastors for Social Action v. Khouri*, *supra* note 123.

126. *Id.*

127. *See id.*

128. *Id.* The defendants' legal obligations, as reflected in the remedies sought in the complaint, center around replacing lead service lines and treating and monitoring the city's drinking water. *Id*. Elements of the settlement that went beyond these obligations include the provision that replacement

Plaintiff organizations have subsequently brought the City and State back to court and received orders holding them to their settlement obligations.[129] Importantly, it appears that plaintiffs who are part of the Flint community were present as the settlement was developed.[130] Pastor Allen C. Overton, a member of one of the plaintiff organizations, stated that he "was in the room when we negotiated the settlement" and that he thought the lawyers and city representatives "negotiated fairly to get it resolved."[131]

Although the Flint case stands out, in part for its national profile, the litigators and community groups they represent were not breaking new ground in settling the case.[132] Environmental justice lawsuits often functionally operate as leverage for settlements.[133] Environmental justice cases can be difficult for plaintiffs to win because drawing a causal chain between specific pollution sources and injuries suffered is challenging, many claims require proof of discriminatory intent (which is difficult to establish), and community groups are frequently unable to pay for experts to testify on complex scientific questions.[134] Despite the roadblocks to plaintiffs prevailing, defendants are incentivized to settle given the uncertainty and risk of protracted litigation, as well as the risk of bad publicity.[135] Litigation forces defendants to pay attention to environmental harms, and the incentive to settle places community members at the same table with polluters.[136] For example, Overton said he did not think the government

would be done at no cost to residents, the faucet filter installation and education program, bottled water access, and funding to programs not directly related to safe drinking water. *See id.*

129. *E.g.*, Concerned Pastors for Soc. Action v. Khouri, 658 F. Supp. 3d 495 (E.D. Mich. 2023) (granting plaintiffs' motion to enforce the settlement agreement); Concerned Pastors for Soc. Action v. Khouri, 720 F. Supp. 3d 522 (E.D. Mich. 2024) (same).

130. *See* Elisse Ramey, *Flint Water Crisis Hasn't Been Fixed, Pastor Says 10 Years Later*, WNEM, https://www.wnem.com/2024/04/25/flint-water-crisis-hasnt-been-fixed-pastor-says-10-years-later (last visited Aug. 22, 2025).

131. *See id.*

132. *See, e.g.*, Jeff Todd, *A "Sense of Equity" in Environmental Justice Litigation*, 44 HARVARD ENVT'L L. REV. 169, 195 (2020).

133. *See id.* at 195-97 (arguing that "Leverage for Settlement" is a way that environmental justice advocates "can still find success without winning a trial").

134. *See* Cole, *supra* note 121, at 531, 540 ("[A]llegations of Constitutional violations . . . require a group to prove discriminatory intent and are thus very difficult to win."); Todd, *supra* note 132, at 181, 184; Kang, *supra* note 119, at 138; Melissa Toffolon-Weiss & J. Timmons Roberts, *Toxic Torts, Public Interest Law, and Environmental Justice: Evidence from Louisiana*, 26 L. & POL'Y 259, 261-62 (2004) (describing reasons why "outcomes of private injury litigation for environmental justice cases vary tremendously"); April Hendricks Killcreas, *The Power of Community Action: Environmental Injustice and Participatory Democracy in Mississippi*, 81 MISS. L. J. 769, 804 (2012).

135. Todd, *supra* note 132, at 195-96 ("Even without an airtight case, the plaintiffs can use the judicial process to introduce enough uncertainty and risk to provide the leverage to motivate defendants to settle, particularly when those defendants also weigh the time and expense of continued litigation."); Kang, *supra* note 119, at 137 (arguing that lawsuits force corporate decisionmakers to consider "the merits and practicalities of their position at every stage of the case . . . [including when] devising positions for mandatory settlement conferences").

136. *See* Todd, *supra* note 132, at 195; *see also* Gavin Kentch, *A Corporate Culture - The Environmental Justice Challenges of the Alaska Native Claims Settlement Act*, 81 MISS. L. J. 813, 831 (2012) ("One Kivalina resident explained that they took legal action because they could not receive industry or government attention in any other manner.").

defendants would have negotiated the settlement agreement with community members without the NRDC and the American Civil Liberties Union (ACLU) stepping in to support community efforts.[137] Although Flint's drinking water crisis persists due to the City's slow pace of action, Overton reflected positively on his experience working through the suit and settlement: "The bad part, Flint was poisoned. The good part, there was outside forces that came in and tried to correct the problem. The better part, there's a judge who watches over the city of Flint and holds them accountable for what they do."[138]

Even if environmental justice plaintiffs are likely to succeed on the merits,[139] settlements may bring more benefits than a judge-designed remedy because the outcome is driven and designed by community needs and wants.[140] Remedies ordered through judicial resolution of enforcement actions, for example, are often money penalties.[141] These may be insufficient to capture the full damage of environmental injustices, and typically flow to the U.S. Treasury rather than to affected communities.[142] Even when courts grant injunctive relief,

137. Ramey, *supra* note 130.

138. *See id.*

139. Succeeding on the merits, and bringing a challenge in the first place, is often difficult for environmental justice advocates because most environmental statutes were not written with environmental justice in mind, and the Supreme Court has held that there is no private right of action to enforce regulations prohibiting disparate impact in federally funded programs under Title VI of the Civil Rights Act of 1964. *See* Alexander v. Sandoval, 532 U.S. 275 (2001); *see generally* Lisa S. Core, Alexander v. Sandoval*: Why a Supreme Court Case About Driver's Licenses Matters to Environmental Justice Advocates*, 30 B.C. ENVT'L AFF. L. REV. 191 (2002). Environmental justice advocates have brought Title VI claims under regulations promulgated by the EPA to implement the law, but judicial deference to agency determinations of facts makes these cases difficult for plaintiffs to win. *See generally, e.g.*, Rachel Calvert, *Reviving the Environmental Justice Potential of Title VI Through Heightened Judicial Review*, 90 U. COLO. L. REV. 867 (2019). Frequently, environmental justice advocates will petition federal agencies such as the EPA to investigate and take action against state and local agencies acting with discriminatory intent or effect. *See* Erin Fitzgerald, *EPA Updates Guidance on Title VI Civil Rights Safeguards*, EARTHJUSTICE (Aug. 22, 2024), https://earthjustice.org/press/2024/epa-updates-guidance-on-title-vi-civil-rights-safeguards. When petitions are successful, interim guidance from the EPA indicates that the agency may attempt to work with the state agency to "mitigate" the discriminatory effect, or to "move to suspend, deny, annul, or terminate federal funding to a state or local authority. . . ." *See* U.S. COMM'N ON CIVIL RIGHTS, NOT IN MY BACKYARD: EXECUTIVE ORDER 12,898 AND TITLE VI AS TOOLS FOR ACHIEVING ENVIRONMENTAL JUSTICE 33-34 (2003) https://www.usccr.gov/files/pubs/envjust/ej0104.pdf.

140. For example, a lawsuit against a source of air pollution in violation of its permitted emissions limits may result in a judge ordering the source to pay penalties or increase its emissions monitoring. Local communities may be displeased by this result, because the facility would still be polluting. Instead, in a settlement the source may agree to implement additional pollution control devices, or fund other community programs. *See* Todd, *supra* note 132*,* at 196-97.

141. *See, e.g.*, 42 U.S.C. § 7420(d)(1) ("All [Clean Air Act noncompliance] penalties . . . shall be paid to the United States Treasury. All penalties assessed by the State under this section shall be paid to such State."); Gwaltney of Smithfield v. Chesapeake Bay Found., 484 U.S. 49, 53 (1987) (describing the relief courts may order in Clean Water Act citizen suits as injunctive relief and/or civil penalties paid to the U.S. Treasury); Friends of Earth v. Archer Daniels Midland Co., 780 F. Supp. 95, 98 (N.D.N.Y. 1992) (rejecting a proposed consent decree for violating the Clean Water Act's requirement that civil penalties be paid to the U.S. Treasury).

142. *See* Todd, *supra* note 89, at 100; Thomas O. McGarity, *Supplemental Environmental Projects in Complex Environmental Litigation*, 98 TEX. L. REV. 1405, 1406 (2020).

"abatement of the problem is not a guaranteed remedy" because statutes typically allow for levels of pollution that communities consider too much.[143] Further, remedies for suits under environmental laws such as the National Environmental Policy Act are also often limited to "the simple reissuance of environmental impact assessments with appropriate notice and comment periods."[144] Instead, in settlement negotiations, communities can push for defendants to commit to tangible actions such as reduction of the harmful activity or remediation of polluted sites, instead of or alongside other forms of injunctive relief or monetary penalties.[145] In this way, resolving cases through negotiated settlements can both improve environmental and health issues[146] and build community power.[147]

Settlements have also offered broader understandings of what remedies to environmental injustices can look like, going beyond the solutions contemplated by environmental laws. For example, in 1998, the West Dallas Coalition for Environmental Justice settled a challenge to an industrial waste storage and processing facility's permit renewal in return for a decrease in the amount of hazardous waste processed, incorporation of cleanup and disposal servicing, and a commitment to hire a specified proportion of workers from the local neighborhood.[148]

Agencies also often encourage and facilitate community projects as tools to advance environmental justice when settling federal environmental law enforcement cases where civil penalties would flow to the U.S. Treasury rather than to affected individuals.[149] These settlements occur in proceedings between the agency and a defendant (i.e., in lawsuits not initiated by the affected community), but demonstrate the potential for settlements to expand the benefits of lawsuits. The EPA gives defendants the option to mitigate monetary penalties by committing to "in-kind" projects (or "supplemental environmental projects") in settlement packages where the alleged violation occurred that "go above and

143. Kang, *supra* note 119, at 143.

144. *See* Gregg P. Macey & Lawrence E. Susskind, *Secondary Effects of Environmental Justice Litigation: The Case of* West Dallas Coalition for Environmental Justice v. EPA, 20 VA. ENVT'L L. J. 431, 435-36 (2001).

145. *See* Todd, *supra* note 89, at 100; *see generally* Jeff Ganguly, *Environmental Remediation through Supplemental Environmental Projects and Creative Negotiation: Renewed Community Involvement in Federal Enforcement*, 26 B.C. ENVT'L AFF. L. REV. 189 (1998) (using a case study of a settlement involving pollution from improperly disposed of waste as a case study for a settlement providing more direct community benefits than would be available through a traditional enforcement action).

146. The health issues of lead exposure are permanent, so the settlement did not alleviate the harm that had been done. However, replacing the lead pipes makes it more likely that future residents do not suffer the same health outcomes. *See* Jon LaPook, *Doctors Explain the Long-Term Health Effects of Flint Water Crisis*, CBS EVENING NEWS (Jan. 19, 2016) https://www.cbsnews.com/news/doctors-explain-the-long-term-health-effects-of-flint-water-crisis ("Even after lead exposure stops, the effects can last for years or even be permanent.").

147. *See* Todd, *supra* note 132, at 196.

148. Todd, *supra* note 89, at 107.

149. *See* Pamela Campa & Lucija Muehlenbachs, *Addressing Environmental Justice through In-Kind Court Settlements* 2 (Res. For the Future, Working Paper No. 23-21, 2023), https://media.rff.org/documents/WP_23-21.pdf.

beyond what would be legally required. . . ."[150] Projects have included lead abatement, retrofitting school buses, updating the violating facility, and funding equipment for emergency response departments.[151]

Settlements are, of course, not a magic bullet, and their efficacy in advancing environmental justice can vary widely. For example, although the settlement for Safe Drinking Water Act violations in Flint, Michigan has led to progress (albeit slow) in replacing the city's lead water pipes,[152] a settlement in response to individual and class action lawsuits for damages over the same crisis has been more controversial.[153] In those lawsuits, the State of Michigan and the City of Flint ultimately agreed to a $626 million settlement fund.[154] However, while the fund is one of the largest in Michigan's history,[155] the individual payouts are likely insufficient to cover a lifetime of medical, physical, and psychological impacts to the approximately 99,000 Flint residents impacted by the water crisis.[156] Further, community organizers criticized the discrepancy between the amount of payments going to individual community members as compared to the attorneys who litigated the case.[157] A detailed analysis of why each settlement succeeded in some ways and fell short in others is beyond the scope of this Note, but one lesson is that attorneys must center community needs and priorities and attempt to maximize the benefits that flow to affected communities.[158]

C. Strategic Settlements in Rights-Based Climate Litigation

Climate litigation has in many ways built on the efforts of environmental justice litigation that came before it.[159] American environmental justice

150. *Id.* Although the projects must have a "nexus" with the violation (defined by medium and geography) and the EPA recommends defendants to reach out to the affected community, there is no community engagement requirement. *Id.* at 6-7.

151. *Id.* at 2.

152. *See* Ramey, *supra* note 130 (describing Flint residents' continued fear of drinking water safety).

153. *See In re* Flint Water Cases, 571 F. Supp. 3d 746 (E.D. Mich 2021); *see, e.g.*, Jessica Myers, *Flint's Water Settlement Is a Kick in the Face*, SIERRA CLUB (Dec. 17, 2021), https://www.sierraclub.org/sierra/flint-water-settlement-kick-face-lawsuit-environmental-justice.

154. *Flint Water Cases*, 571 F. Supp. 3d at 755.

155. *Id.*

156. *See* Myers, *supra* note 153.

157. *Id.* (quoting Gina Luster, cofounder of community organization Flint Rising). *See also* Ed White, *Judge Awards Millions to Lawyers in Flint Water Settlement*, GREATLAKESNOW (Feb. 8, 2022), https://www.greatlakesnow.org/2022/02/ap-lawyers-flint-settlement ("Flint residents are likely to net more than $400 million when [legal] fees are subtracted.").

158. For example, it does not appear that the settlement for individual claims involved any affected community members in the negotiation process, which could have contributed to community dissatisfaction with its terms. *See Flint Water Cases*, 571 F. Supp. 3d at 758-60 (describing the settlement negotiation process, which was led by lawyers and appears to have involved minimal community involvement).

159. *See* Abate, *supra* note 92, at 207-08 ("[T]he evolution of environmental justice in the United States helped lay a foundation for the climate justice field by recognizing an area outside of the

advocates worked to expand the public's understanding of injuries that could be remedied through environmental law, and international advocates brought awareness to the intersections of environmental law, human rights, unsustainable development, and cultural genocide of indigenous peoples.[160] In this way, the climate litigation movement's first settlement in *Navahine* is less a surprising win than it is a logical outgrowth consistent with prior movements' strategic developments. Lessons from advocates using litigation and settlement toward different environmental goals can be applied to existing and future climate lawsuits, with *Navahine* serving as an instructive first case study. This Subpart highlights some of the strategic benefits and challenges settlements create in climate litigation. Building on this Subpart's discussion, Parts III and IV of this Note then highlight two ways settlements in climate suits may help achieve outcomes that advance climate and intergenerational justice and efficient emissions reductions.

Settlement may provide specific strategic benefits for climate lawsuits, as in other areas of environmental litigation. First, settlements may alleviate some concerns that climate litigation places climate policymaking power in courts' hands that should instead be reserved for elected branches of government.[161] Second, although courts have been hesitant to grant sweeping remedies in climate cases, they may be more willing to approve settlements negotiated between governments and plaintiffs.[162]

1. The Impact of Settlements on Courts' Institutional Capacity and the Democratic Process

The rise of climate litigation was quickly followed by arguments that courts are improper venues for developing climate policy.[163] Critics generally argue that courts lack institutional capacity to competently adjudicate climate claims and because doing so undermines the democratic process.[164]

Regarding institutional capacity, critics contend that judges lack the scientific expertise of legislatures and administrative agencies, compromising their ability to adjudicate climate claims.[165] Judicial resolution requires

traditional boundaries of environmental law for which the law should provide a remedy—namely, the disproportionate impacts of environmental regulation on minority and low-impact communities.").

160. Abate et al., *supra* note 22, at 11006-07.

161. *Infra* Part II.C.i.

162. *Infra* Part II.C.ii.

163. *See generally* Donald G. Gifford, *Climate Change and the Public Law Model of Torts: Reinvigorating Judicial Restraint Doctrines*, 62 S.C. L. REV. 201 (2010); Lucas Bergkamp & Jaap C. Hanekamp, *Climate Change Litigation Against States: The Perils of Court-Made Climate Policies*, 24 EUR. ENERGY & ENVT'L L. REV. 102 (2015).

164. *See, e.g.*, Gifford, *supra* note 163, at 231 ("Climate change and the other public health problems prompting public interest tort actions are the society-wide harms our constitutional structures suggest the political branches should handle.").

165. *Id.* at 224.

"judicially discoverable and manageable standards for resolving" an issue.[166] Climate lawsuits break from traditional standards used to adjudicate legal claims, the argument goes, leading to inconsistent application of inadequate legal doctrines.[167] This reality, critics argue, points to the inadequacy of the law, and, more specifically, the courts, in resolving climate disputes.[168]

Some scholars also contend that the issues raised by climate litigants exceed courts' constitutional authority and should instead be addressed by the legislative branch.[169] The large number of contributors to climate change and the small proportional contribution of any one defendant to any specific climate impact, critics argue, place climate litigants' remedies outside of what courts have the power to grant.[170] Further, critics argue that climate cases inherently raise policy questions inappropriate for unelected judges with little public accountability to decide.[171] This separation of powers arguments centers around the idea that courts' roles are limited to hearing cases and controversies, and that climate cases raise nonjusticiable political questions that are outside of courts' constitutionally apportioned authority.[172]

Other scholars have pushed back on these separation-of-powers critiques, arguing that "courts act within their constitutional authority and in a democracy-enhancing manner when they engage, rather than sidestep, cases that intersect with climate policy."[173] For example, since climate change raises issues of intergenerational equity, judicial insulation from the political process (where actors typically consider policies in the timeframe of the next election cycle rather than at an intergenerational scale) may make courts better placed than legislatures to determine whether current climate policy is sufficient to achieve

166. *Id.* at 225-27 (citing Baker v. Carr, 369 U.S. 186, 217 (1962)). Gifford notes that the Second Circuit Court of Appeals applied traditional nuisance law standards to a climate context in *Connecticut v. American Electric Power Co., Inc.,* but that in *Native Village of Kivalina v. ExxonMobil Corp.* a federal district court held that standards that were judicially discoverable and manageable in traditional public nuisance comments were inapplicable in the climate context. *Id.* at 226-27 (citing 582 F.3d 309, 326-30 (2d Cir. 2009); 663 F. Supp. 2d 863, 875 (N.D. Cal. 2009)).

167. *Id.*

168. *Id.*

169. *Id.* at 224-48, 230-31; Bergkamp & Hanekamp, *supra* note 163, at 106-07. Others have critiqued government-driven climate "regulation by litigation" based the "misuse of [tobacco and opioid] settlement funds in prior government-led litigation and the lackluster results as to the underlying public issues these litigation movements sought to address," and warning that "perpetuating such litigation wrongly elevates litigants into policy-making roles." Natalie Marionneaux, *The Road to Hell Is Paved with Good Intentions (and Master Settlement Agreements): Alternatives to Climate Litigation Informed by Cautionary Tales of Tobacco and Opioid*, 12 LSU J. ENERGY L. & RES. 251, 255, 284 (2024).

170. Gifford, *supra* note 163, at 224.

171. *Id.* at 225, 231. Gifford notes that elected state judges are subject to some political accountability but argues that "it clearly would be improper for a candidate running for judicial office to make a campaign promise to reduce global warming." *Id.*

172. *Id.* at 230, 251.

173. Katrina Fischer Kuh, *The Legitimacy of Judicial Climate Engagement*, 46 ECOLOGY L. Q. 731, 746 (2019).

intergenerational justice.[174] Further, legal standards for admissibility of expert evidence and courts' expertise sifting through evidence may make them more effective than legislative bodies at discerning between valid scientific evidence and climate disinformation.[175]

Settlements in climate litigation relieve some, but not all, of the concerns raised by climate litigation skeptics. Resolving cases through a negotiated settlement relieves the court of its obligation to parse through complex and uncertain scientific information because it is the parties, not the court, that decide what information to consider and how to translate science to policy. Courts still have a role in overseeing negotiations and may review settlements for fairness,[176] and therefore can exercise their judicial expertise in evaluating evidence and experts.[177] However, the power ultimately lies in the parties negotiating the terms of the settlement, which insulates the settlement from the unilateral power of a body without specific expertise.[178] This shift in decision making reduces pressure on the courts' institutional capacity.

Designing remedies through negotiated settlements does less, however, to mitigate concerns about democratic process and separation of powers. Some critics of climate litigation have theorized that climate advocates seek judicial review so that they "are exposed to competition only from the state," rather than also from industry and other interest groups active in the political process.[179] These critics would likely be unsatisfied by settlements between advocates and governments, as settlements generally progress through closed-door negotiations between parties to the case.[180] However, although settlement negotiations are generally limited to the parties, the process can allow members of the public in

174. *See, e.g.*, *id.* at 749-54.

175. *See id.* at 760 ("Courts are . . . an *excellent* forum for weeding out pseudoscience that doesn't pass minimum standards of credibility. . . .") (emphasis in original). *But see generally* Sharon Mason & Demosthenes Lorandos, *High Cost of Scientific Ignorance: A Conceptual Foundation for Scientific Literacy in the Courts*, 81 J. SOC. ISSUES, no.1 (2025) (arguing that scientific literacy education is necessary to ensure judges can properly manage competing scientific information). The Climate Judiciary Project is one such initiative that seeks to inform judges on climate science and its intersection with the law. *Climate Judiciary Project*, ENVT'L LAW INST., https://cjp.eli.org (last visited Aug. 22, 2025).

176. *See* Fed. R. Civ. P. 16(a)(5) (allowing courts to order parties to appear at pretrial conferences in order to facilitate settlement); United States v. North Carolina, 180 F.3d 574, 581 (4th Cir. 1999) (describing standards used to review the fairness and adequacy of a proposed settlement); Rossi, *supra* note 102, at 1031 (describing judges' role in settling regulatory lawsuits). In *Navahine*, Hawai'i State Environmental Court Judge John Tonaki formally approved the settlement agreement, concluding the proceedings. Settlement Agreement, *supra* note 15, at 3.

177. *See* Kuh, *supra* note 173, at 761.

178. Of course, this assumes that the negotiating parties are well-placed to make scientific determinations. However, in the context of rights-based climate litigation challenging government action or inaction, the parties may agree on the overarching questions of climate science and disagree more on the government body's legal obligation to act in light of that evidence. *See, e.g.*, Defendants' Motion to Dismiss at 12, Nahavine F. v. Haw. Dep't of Transp., No. 1CCV-22-0000631 (Haw. 1st Cir. Ct. Aug. 22, 2022) (agreeing that "climate change impacts Hawaii's public trust resources," but arguing that HDOT has no obligation to act to protect such resources in the way the plaintiffs requested).

179. Bergkamp & Hanekemp, *supra* note 163, at 103.

180. *See* Rossi, *supra* note 102, at 1029.

their capacity as litigants greater input into designing the ultimate remedy than would allowing judges complete discretion over whether to adopt a plaintiff's requested relief or a different remedial plan in a final ruling on the merits.[181] Further, as in rulemaking settlements, government defendants may agree to policies that will be subject to further rounds of public engagement and that allow for more democratic input.[182] In *Navahine*, for example, the youth council established by the settlement agreement increases public oversight of the agency's activities, strengthening democratic processes.[183]

2. Impact of Settlements on Judicial Hesitance to Craft Climate Remedies that Implicate Policy Concerns

Courts may be more willing to approve a settlement that provides for extensive and specific climate policy actions than to design and order such remedies themselves.[184] Courts in rights-based climate cases have typically avoided broad declaratory relief or ordering governments to make specific, significant policy changes and appear more likely to rule in favor of climate plaintiffs when they request limited relief.[185] Thus, it may be strategically beneficial for plaintiffs to request narrow relief from courts and use the settlement process to negotiate broader agency action. Doing so may allow plaintiffs to survive motions to dismiss and procedural litigation contesting remedies that have delayed past climate litigation.

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181. *See* Todd, *supra* note 132, at 196 ("Negotiated settlements can help achieve these objectives while empowering community members by allowing 'greater participation in environmental decision making.'"). This assumes that members of the public have equal and open access to the judicial system, however. In reality, the public's ability to influence judicial decisions through settlement is limited by their ability to bring cases in the first place. This benefit also hinges on the parties actually present at the negotiating table: For plaintiffs to truly be empowered in designing remedies they must actually be present at settlement negotiations, not just represented by their attorneys. Few details are publicly available about the process of crafting the *Navahine* settlement, but one youth plaintiff said that she felt like she has been "at the table and listened to" due to the lawsuit and settlement. *See* Cristobal, *supra* note 11, at 37:36.

182. For example, the *Navahine* settlement builds in public participation in HDOT's implementation of its terms. *See, e.g.*, Settlement Agreement, *supra* note 15, at 7 (committing the agency to "develop and implement a program for public education, outreach and community engagement, and partnerships to support the GHG Reduction Plan and related transportation decarbonization work, emphasizing the role the public can play and maximizing awareness of clean transportation choices and opportunities").

183. *See id.* at 9.

184. *See, e.g.*, Citizens for a Better Env't v. Gorsuch, 718 F.2d 1117, 1126 (D.C. Cir. 1983) ("The court's duty when passing upon a settlement agreement is fundamentally different from its duty in trying a case on the merits."); Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights, 616 F.2d 1006, 1014 (7th Cir. 1980) ("The trial court in approving a settlement need not inquire into the precise legal rights of the parties nor reach and resolve the merits of the claims or controversy, but need only determine that the settlement is fair, adequate, reasonable and appropriate under the particular facts and that there has been valid consent by the concerned parties.").

185. *Compare* Held v. State, No. CDV-2020-307, 2023 Mont. Dist. LEXIS 2, at *129 (Mont. 1st Dist. Ct. Aug. 14, 2023) (granting plaintiffs' narrow plea for relief in holding that a state law violated the state constitution), *with* Juliana v. United States, 947 F. 3d 1159, 1162 (9th Cir. 2020) (dismissing the case for lack of standing based, in part, on the sweeping nature of the remedy requested).

First, rulings in cases where plaintiffs seek broad, sweeping remedies reveal courts' reluctance to step into the realm of climate policymaking.[186] Courts are hesitant to reach the merits of climate lawsuits when they view the cases as raising political questions or asking them to rule on issues of science and policy without judicially manageable standards to guide their decisions.[187] Despite scholarly arguments to the contrary,[188] courts still appear hesitant to reach the merits of climate lawsuits.

Juliana is an example of this. Although the case was filed ten years ago and received procedural rulings from district courts, appellate courts, and the Supreme Court, plaintiffs still ultimately failed to bring the case to trial. The plaintiffs' largest hurdle was establishing standing.[189] The Ninth Circuit was "skeptical" of whether the plaintiffs' requested relief could redress their stated injuries.[190] The court never reached that question, however, because its 2020 ruling granting the government's motion to dismiss for lack of standing was based on the plaintiffs' failure to "establish[] that the specific relief they seek is within the power of an Article III court."[191] The majority noted that, although other branches of government "may have abdicated their responsibility to

186. *See, e.g.*, *Juliana*, 947 F. 3d 1159; Samuel Buckberry Joyce, *Climate Injunctions: The Power of Courts to Award Structural Relief Against Federal Agencies*, 42 STAN. ENVT'L L. J. 241, 266 (2023) (arguing that courts' hesitance to grant broad structural injunctive relief against federal agencies in *Juliana* runs counter to prior judicial orders in other contexts).

187. *E.g.*, Scott Novak, *The Role of Courts in Remedying Climate Chaos: Transcending Judicial Nihilism and Taking Survival Seriously*, 32 GEO. ENVT'L L. REV. 743, 743, 762 (2020); R. Henry Weaver & Douglas A. Kysar, *Courting Disaster: Climate Change and the Adjudication of Catastrophe*, 93 NOTRE DAME L. REV. 295, 313, 325 (2017). Courts' concern for "judicially manageable standards" is rooted in the Supreme Court's political question doctrine as expressed in *Baker v. Carr*. 369 U.S. 186, 214 (1962). Courts' concern with judicially manageable standards is related to concerns that decisions on climate science and policy requires political, rather than legal, judgment that falls outside of judges' expertise. *See* Novak, *The Role of Courts in Remedying Climate Chaos*, at 762 ("In *General Motors Corporation*, the court determined it was 'left without guidance in determining what is an unreasonable contribution to the sum of carbon dioxide . . . or in determining who should bear the costs.'").

188. *See* Novak, *supra* note 187, at 743 (arguing that climate cases do not present political questions because "(1) no textually demonstrable commitment to other political branches bars courts from addressing the climate crisis, (2) tort and constitutional law, along with science, provide judicially manageable and discoverable standards, and (3) deciding such cases does not require the courts to make an initial policy decision inappropriate for judicial discretion"); Kuh, *supra* note 173, at 746 (arguing that "courts act within their constitutional authority and in a democracy-enhancing manner when they engage, rather than sidestep, cases that intersect with climate policy"); Weaver & Kysar, *supra* note 187, at 295 (arguing that "against the backdrop of a potentially existential threat, judges redeem the very possibility of law when they forthrightly confront the merits of climate lawsuits," but that by avoiding the merits of climate cases "judges reinforce a sense of law's disappearance into the maw of normative rupture.").

189. *See Juliana*, 947 F. 3d at 1175; *In re* United States, No. 24-684 (9th Cir. May 1, 2024) (granting the government's petition for mandamus after the district court allowed the *Juliana* plaintiffs to amend their complaint rather than dismissing the case, as the Ninth Circuit ordered, and reiterating the prior ruling that the plaintiffs lacked standing).

190. *Juliana*, 947 F. 3d at 1171.

191. *Id.*

remediate the problem," that did not mean the court had "the ability to step into their shoes."[192]

Similarly, plaintiffs in a rights-based climate lawsuit against the Pennsylvania state government requested injunctive relief ordering the State to promulgate and implement comprehensive regulations to reduce greenhouse gas emissions and declaratory relief that the Pennsylvania government had violated its constitutional duty to provide for environmental health with respect to greenhouse gas emissions.[193] The court granted the government's motion to dismiss because providing for the injunctive relief requested would have impermissibly "disturb[ed] the legislative scheme" and because "declaratory relief in this context would have no practical effect" in resolving the injuries claimed.[194]

In contrast, courts have ruled in favor of climate litigants that requested more limited remedies.[195] Scholars have distinguished *Juliana* from the seminal climate case *Massachusetts v. EPA* by looking at the requested remedies.[196] According to this view, one reason why Massachusetts succeeded at establishing standing may have been that Massachusetts requested a remedy under the Clean Air Act, an already existing statute, thus eliminating pressure on the court to prescribe particular policy action, something that "would be both technically complex and politically controversial."[197]

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192. *Id.* at 1175.

193. Funk v. Wolf, 144 A.3d 228, 237-39 (Pa. Commw. Ct. 2016), *aff'd*, 158 A.3d 642 (Pa. Super. Ct. 2017).

194. *Id.* at 250-51. The court did not analyze the redressability of the plaintiffs' claims in those terms, as Pennsylvania's standing requirement is satisfied if plaintiffs demonstrate a "substantial, direct[,] and immediate interest in the outcome of the litigation." *Id.* at 243 (citing Fumo v. City of Philadelphia, 972 A.2d 487, 496 (Pa. 2009)). *See also* Dernbach & Parenteau, *supra* note 27, at 10578 ("[A] great many of these [state-level climate] cases were dismissed under a variety of justiciability or procedural rules based on the sweeping nature of the injunctive relief that was sought.").

195. *See generally* Massachusetts v. EPA, 549 U.S. 497 (2007).

196. *E.g.*, Kim, *supra* note 27, at 419; Joyce, *supra* note 186, at 283-84. In *Massachusetts v. EPA*, the Court held that EPA had statutory authority under the Clean Air Act to regulate greenhouse gas emissions from motor vehicles, and that while it had discretion over whether to regulate, it had failed to provide a reasoned explanation for declining to decide whether greenhouse gases cause or contribute to air pollution that endangers public health. *Massachusetts v. EPA*, 549 U.S. at 528, 533-34. The petitioners' requested relief was limited: they sought review of the EPA's denial of a rulemaking petition. *Id.* at 514. Accordingly, the Court's remedy was limited: the EPA was not ordered to promulgate regulations addressing greenhouse gas emissions from mobile sources, but rather to make a determination on whether greenhouse gases endanger public health and to "ground its reasons for action or inaction in the statute." *See id.* at 534-35.

197. Kim, *supra* note 27, at 419. Others have highlighted the limited scope of the legal issue in *Massachusetts v. EPA* compared to its characterization as "the most significant environmental law decision of all time." David Markell & J.B. Ruhl, *An Empirical Assessment of Climate Change in the Court: A New Jurisprudence or Business as Usual?*, 64 FLA. L. REV. 15, 55, 62-63 (2012) (describing the ultimate decision in *Massachusetts v. EPA* as "a rather vanilla statutory interpretation decision" but noting its "exceptional" standing analysis).

Held v. State is another recent example demonstrating courts' higher likelihood to grant narrow relief over broad relief.[198] The *Held* plaintiffs requested: a declaration of law defining Montana constitutional environmental rights, a declaration that regulations limiting agencies' ability to consider climate impacts were unconstitutional, injunctive relief preventing the government from operating under the allegedly unconstitutional regulations, and injunctive relief requiring the government to develop an emissions reduction plan.[199]

The district court issued a declaration that the Montana Constitution includes a fundamental right to a clean and healthful environment that includes climate and enjoined the challenged regulations, but did not grant injunctive relief requiring the government to develop an emissions reduction plan.[200] This suggests that courts may be more willing to reach the merits of climate cases when plaintiffs request remedies courts are familiar with granting (e.g., enjoining governments from enforcing unconstitutional statutes and regulations) than when all of the remedies requested would require courts to direct governments to take specific policy action.

Navahine illustrates how plaintiffs can request limited relief, then extract significant climate commitments from governments through settlement. The *Navahine* plaintiffs requested a declaration that the Hawai'i Constitution's right to a clean and healthful environment includes a life-sustaining climate system and that the state defendants had violated that right by failing to satisfy a statutory zero-emissions target.[201] They also requested injunctive relief that enjoins HDOT from operating the state transportation system in a way that fails to meet constitutional and statutory obligations, and that requires HDOT to "take concrete action steps under prescribed deadlines to conform the state transportation system" to constitutional requirements.[202] In denying the defendants' motion to dismiss, the Hawai'i Circuit Court declined to rule on the issue of whether injunctive relief raised a political question issue, describing a decision "on the merits of injunctive relief" as "non-essential and premature" in deciding a motion to dismiss.[203]

This outcome at the pleading stage may represent either a strategic choice, a difference between courts' approach to similar issues, or both. If the Ninth Circuit panel that denied the *Juliana* plaintiffs standing ruled on the *Navahine* complaint, it might have found the plaintiffs did not have standing. However, the *Navahine* plaintiffs may have been successful in their general request for

198. Held v. State, No. CDV-2020-307, 2023 Mont. Dist. LEXIS 2 (Mont. 1st Dist. Ct. Aug. 14, 2023) (holding that greenhouse gas emissions in Montana have injured youth plaintiffs, that Montanans have a "fundamental constitutional right to a clean and healthful environment" including climate, and that state laws prohibiting consideration of greenhouse gas emissions in environmental reviews are unconstitutional).

199. *Id.* at *2.

200. *Id.* at *49.

201. Complaint, *supra* note 1, at 69.

202. *Id.* at 70.

203. *Navahine* Denial of Motion to Dismiss, *supra* note 65, at 11-12.

injunctive relief because it was paired with allegations that HDOT's actions violated not only constitutional obligations, but also statutory obligations under Hawai'i's Zero Emissions Clean Economy Target.[204] Further, the circuit court's denial of the government's motion to dismiss noted the State's argument that the case raised political questions, but concluded that "invoking the political question doctrine [was] premature" at the pleading stage.[205] However, the order left the door open for the defendants to raise the political question argument later in the litigation, "[d]epending on where the constitutional arguments and claimed relief end[ed] up."[206] Settling therefore may have been a wise strategic step by the plaintiffs because it allowed them to avoid defending the requested relief as not posing a political question.

In sum, courts have been reluctant to issue broad injunctive relief that would require governments to shift their climate policy priorities,[207] but have been more receptive to modest requests for relief or willing to delay resolving political questions issues until later stages of litigation.[208] Climate litigants may be able to respond to this judicial disposition by requesting forms of relief that courts are comfortable with granting—such as declaratory relief stating that a statute is unconstitutional or that an agency action violates the law—and seeking broader and more specific action in settlement negotiations. While defendants are unlikely to commit to actions a court would never impose, the costs of a

204. *See* Complaint, *supra* note 1, at 4-5 (alleging HDOT violated HAW. REV. STAT. § 225P-5, the state's Zero Emissions Clean Economy Target). This may have been the case because, although the *Navahine* plaintiffs would have ultimately requested the court to order HDOT to take concrete steps to reform the state transportation system, they included that request within the broader framework of a state statute specifying Hawai'i's zero emissions goals. Unlike in *Juliana*, where the plaintiffs requested courts to redirect the federal government's overarching climate policy goals, the *Navahine* plaintiffs requested the court to direct a state agency to realign its actions to be consistent with state objectives codified in statutory goals. The *Navahine* plaintiffs' focus on a single government agency may have also made success more likely: A comparison of the injunction requested in *Juliana* with other instances where courts have ordered broad injunctive relief against federal agencies notes that most instances where courts have granted broad injunctive relief have ordered action focused on one government agency, rather than "an enforceable national remedial plan. . . ." *See* Joyce, *supra* note 186, at 282 (quoting First Amended Complaint at Prayer for Relief ¶ 7, Juliana v. United States, 217 F. Supp. 3d 1224 (No. 15-cv-01517) (D. Or. Sept. 10, 2015), ECF No. 7).

205. *See Navahine* Denial of Motion to Dismiss, *supra* note 65, at 10-11.

206. *Id.* at 11.

207. The analysis in this Note is primarily based off of a comparison of rights-based climate cases but is consistent with members of the judiciary's claims to express "humility" in merely ruling on the cases before them rather than "legislating from the bench." For a description of this position, see generally Michael J. Gerhardt, *Constitutional Humility*, 76 U. CIN. L. REV. 23 (2007). However, as the plaintiffs in *Juliana* have argued, courts in other contexts have ordered "broad-based injunctive relief to remedy systemic constitutional violations." Brief for Respondents in Opposition to Petition for Writ of Mandamus at 27, *In re* United States, 139 S. Ct. 452 (2018) (No. 18-505), 2018 WL 6134241 (citing Brown v. Bd. of Educ., 349 U.S. 295 (1955); Hills v. Gautreaux, 425 U.S. 284 (1976); Brown v. Plata, 563 U.S. 493 (2011)).

208. *See Navahine* Denial of Motion to Dismiss, *supra* note 65, at 11 (rejecting the Department's argument that the case raises a nonjusticiable question, but noting that "the issue of a political question is not yet and likely will not be formed unless and until a specific motion for injunctive relief is filed" and that once such a request is filed "we will see if the requested relief improperly trespasses into political questions").

protracted legal battle, as well as the accompanying media scrutiny, could prompt defendants to make concessions that plaintiffs would not otherwise be able to attain.[209]

3. Additional Hurdles and Strategic Considerations

Notwithstanding the several benefits of settlements, there are three additional factors climate advocates should consider: the requested remedy must still withstand standing and justiciability challenges, settlements do not require defendants to admit fault,[210] and settlements create no formal precedent.[211] Advocates should evaluate these factors on a case-by-case basis to determine whether the limitations of settlements outweigh their benefits in each particular lawsuit.

First, even if the goal of bringing a climate lawsuit is settlement, plaintiffs still must request a remedy that will withstand standing and justiciability challenges at the motion to dismiss and summary judgment stage of litigation.[212] Such a remedy should not only be "within the power of the courts to grant," but also must center climate justice rather than replicating old, unjust forms of governance and policymaking.[213] For example, a hypothetical climate remedy that directs Congress to appropriate funds for electrical vehicle charging stations would maintain top-down power structures and dependence on personal vehicles rather than promoting community leadership and greater access to public transportation.[214]

Second, climate litigants should keep in mind the fact that when cases settle, defendants do not have to admit fault.[215] This may make strong settlement agreements more likely by motivating defendants to agree to a slate of actions rather than risking an adverse ruling.[216] However, settlement forecloses the

209. *See* Ganguly, *supra* note 145, at 205-06.

210. *See* Settlement Agreement, *supra* note 15, at 11 ("The Parties and their counsel understand that this Agreement does not constitute an admission by Defendants of any current or prior violation of the Hawai'i Constitution or other violation of any law, or of any wrongdoing of any kind.").

211. Leandra Lederman, *Precedent Lost: Why Encourage Settlement, and Why Permit Non-Party Involvement in Settlements*, 75 NOTRE DAME L. REV. 221, 221 (1999) (stating that "[s]ettlement and precedent are . . . in tension with each other" because precedent is, by definition, only created when cases are resolved without a settlement).

212. A detailed analysis of what such a remedy should include is beyond the scope of this Note. For a proposal for a remedy in rights-based climate lawsuits that courts may be willing to grant, see Kim, *supra* note 27.

213. *See id.* at 413; *infra* Part IV.

214. *See Transportation Electrification Strategies for a Just Transition*, FRONT & CENTERED (Feb. 15, 2024), https://frontandcentered.org/transportation-electrification-strategies-for-a-just-transition.

215. *See* Settlement Agreement, *supra* note 15, at 11 ("The Parties and their counsel understand that this Agreement does not constitute an admission by Defendants of any current or prior violation of the Hawai'i Constitution or other violation of any law, or of any wrongdoing of any kind.").

216. *See* McVean & Pidot, *supra* note 103, at 204 ("A federal agency may be willing to negotiate a deal that gives plaintiffs the lion's share of what they seek to avoid the effect that an adverse decision may have on future courts.").

symbolic victory of a favorable ruling where the defendant is found to be at fault.[217] For example, Gina Luster, a community organizer from Flint, expressed dissatisfaction with the level of accountability defendants had to accept: "No one really paid the price for what they've done to us."[218] And for plaintiffs like those in *Navahine* and similar cases who are using litigation as one aspect of a larger movement,[219] it is important to accompany settlement agreements with communications to affected communities and the general public that settlements represent a step toward climate policy progress rather than a sign that plaintiffs would not have prevailed at trial.[220]

Third, settlements do not produce precedent that binds future courts.[221] Since legal analysis and argument is largely founded on precedent, this raises questions about the longevity and transferability of wins in cases that settle.[222] What is the impact of a climate settlement if later suits cannot rely upon judicial reasoning and holdings to provide the basis for similar arguments? This is an aspect of settlements that is consistent whether the settlement occurs in a regulatory lawsuit, an environmental justice lawsuit challenging the siting of a new polluting facility, or a climate lawsuit. Climate litigants, like other environmental plaintiffs, will ultimately have to make the strategic calculation of whether the benefits of actions agreed to in settlement negotiations will outweigh the lack of precedential heft the lawsuit generates. On one hand, governments can begin implementing binding commitments more quickly, resulting in faster responses to climate change. On the other, there is value in building a universe of legal precedent guiding courts' decisions in future lawsuits.

However, even if settlements do not establish binding precedent, they may still advance legal doctrine. *Navahine* did not result in a ruling on whether the Hawai'i Department of Transportation violated Hawai'i's constitution, but the parties nonetheless chose to include a "Recognition of Rights" in the settlement agreement.[223] In this part of the settlement agreement, the parties affirmed that

217. This may be less of a concern when suing governments for their failure to respond to climate change than in cases where the legal claim is that the defendant caused or contributed to the problem itself. In the latter cases, assigning liability for climate injuries may be a central goal of the lawsuit.

218. *See* Myers, *supra* note 153.

219. *See* Hung, *supra* note 124, at 665.

220. Empirical research into the public perception of settlement is limited, but one analysis found that lay people more commonly attribute fault or responsibility to settling defendants. Jessica Bregant et al., *Perceptions of Settlement*, 27 HARV. NEGOT. L. REV. 93, 122, 145 (2021). However, as winning a declaration that a plaintiff or group of plaintiffs was harmed by a defendant's wrongdoing may have symbolic value, it is important that attorneys effectively communicate the implications of strategic decisions to settle and allow clients to make the ultimate decision.

221. Lederman, *supra* note 211, at 221 (stating that "[s]ettlement and precedent are . . . in tension with each other" because precedent is, by definition, only created when cases are resolved without a settlement).

222. *See id.* at 228 (describing the effects on precedent of cases settling and noting that "precedent has real power in forming the content of the law").

223. Settlement Agreement, *supra* note 15, at 3. Not all settlements in Hawaiian courts include recognitions of rights, suggesting that including this section was an affirmative choice by the parties.

Hawai‘i’s right to a clean and healthful environment includes a right to a “life-sustaining climate system” and the State’s public trust obligations require HDOT to operate its transportation system in a way that preserves, protects, and maintains public trust resources and vindicates citizens’ right to a clean and healthful environment.[224] Although these rights were based in existing state case law,[225] the application of state constitutional environmental rights and obligations to Hawai‘i’s transportation system appears to have originated in the settlement agreement. Thus, although the *Navahine* plaintiffs did not receive declaratory relief from a judge, they achieved the declaration of rights they sought from their government defendant. Though not binding precedent, this acknowledgement may still influence future legal proceedings and be symbolically meaningful.[226] Ultimately, plaintiffs will have to balance several variables: the odds of a favorable judicial ruling, a defendant’s willingness to negotiate and bind themselves to actions, and the tradeoff between the value of agreed-upon commitments and legal precedent.

This Part looked to the forms of environmental litigation that climate litigation has built on to observe that turning to strategic settlements may be a logical next step for climate litigants. Similarly to how litigants in these contexts have used settlements to advance their causes, settlements in climate lawsuits may provide procedural benefits to plaintiffs by easing courts’ concerns with making policy. Parts III and IV will turn to two practical benefits of the *Navahine* settlement: its alignment with climate justice objectives, and the potential for its terms to be effectively implemented. Ultimately, these two benefits show that settlement should be an important part of a climate litigant’s toolkit moving forward.

III. ADVANCING CLIMATE JUSTICE

As *Navahine* demonstrates, the use of settlements in climate litigation can provide a powerful mechanism to advance climate justice. This Part details three ways settlements can advance climate justice. First, while litigation in general empowers plaintiffs to play an active role in climate policy, settlement, in particular, advances climate justice even further by providing plaintiffs a direct opportunity to craft climate solutions. Doing so advances intergenerational and climate justice by empowering plaintiffs, who are typically youth and members

See, e.g., Settlement Agreement, *In re* Maui Wildfires (2024); Settlement and Release Agreement, A.B. v. Hawaii, No. 1:18-cv-00477-LEK-RT (2023); Settlement Agreement, Haw. State Tchrs. Ass’n v. Haw. State Ethics Comm’n, No. CV 15-1-2453-12 (2016).

224. Settlement Agreement, *supra* note 15, at 4.

225. *Id.* (citing *In re* Maui Elec. Co., 506 P.3d 192, 202 n.15 (2022); *In re* Haw. Elec. Light Co., 526 P.3d 329, 336 (2023); Ching v. Case, 449 P.3d 1146, 1175 (2019)).

226. *See* Menkel-Meadow, *supra* note 98, at 2681 (arguing that “both the precedential and publicity effects of settlements may well exceed those of reported decisions,” as significant settlements are often widely reported and used by attorneys in developing demands in subsequent cases).

of communities particularly vulnerable to climate change impacts,[227] to design and participate in the implementation of climate remedies. Second, settlement in climate cases allows for plaintiffs to get more out of a lawsuit than the law would otherwise provide. Similarly to environmental justice communities' use of settlements to obtain commitments from polluters that go beyond what would be legally required, climate plaintiffs may be able to achieve better climate outcomes through settlement than a court would otherwise order. Third and finally, settlement can create mechanisms that lay the groundwork for plaintiff empowerment and oversight, such as the case in *Navahine* by creating youth advisory councils.

First, while litigation in general may provide climate justice benefits by empowering members of young generations and other climate plaintiffs, settlement is an especially important tool for empowerment as it allows plaintiffs to actively draft climate remedies and solutions. Environmental justice advocates have historically valued litigation as "it may be the only way to get a seat at the table with the regulators and sources of pollution."[228] Indeed, communities overburdened by pollution tend to perceive environmental decision making as permeated with injustice, and scholars have noted that structural inequities suffuse the internal processes used to make decisions about siting pollution sources.[229] Since communities experiencing disproportionate environmental health hazards are typically racially and economically marginalized and politically disempowered,[230] regulators and industry rarely consider their needs and instead view them as "sacrifice zones."[231] The judicial system, therefore, provides a space in which polluters and government decisionmakers are forced to directly contend with and respond to affected communities.[232] This benefit may be even more pronounced in the climate context, due to the need to achieve intergenerational equity.[233] Individuals who are too young to vote are shut out of

227. The *Navahine* plaintiffs, for example, include Native Hawai'ians, caretakers of loko i'a (fish ponds cared for using traditional practices that are vulnerable to sea level rise and changing weather patterns), subsistence fishers, and children of rural farmers. *Youth Plaintiffs*, OUR CHILDREN'S TR., https://navahinevhawaiidot.ourchildrenstrust.org/people/navahine-f (last visited Aug. 22, 2025).

228. Kang, *supra* note 119, at 136.

229. Foster, *supra* note 121, at 776, 778 ("The siting process . . . relies upon, and replicates, structural inequalities in locating new facilities.").

230. *See id.* at 789, 807 (describing empirical research demonstrating that environmental hazards are disproportionately present in communities of color and low-income communities and arguing that this distributive effect is a product of an overarching unjust social structure).

231. *See id.* at 811-13 (describing government and industry's dismissive responses to one community's concerns about siting multiple sources of pollution); Ryan Juskus, *Sacrifice Zones: A Genealogy and Analysis of an Environmental Justice Concept*, 15 ENVT'L HUMANITIES 3, 10-11, 13 (2023) (tracing the development of the term "sacrifice zones" among environmental justice scholars and activists to describe how "systemic forces . . . created unequal environments").

232. *See* Kang, *supra* note 119, at 136-37.

233. *See* Kuh, *supra* note 173, at 746 ("There are strong legal and normative bases for recognizing and respecting intergenerational equity in the context of climate change.").

one of the most fundamental avenues for public participation in a democracy, so litigation is one of their only paths to influence policy.[234]

However, while litigation empowers climate plaintiffs to request relief that would redress their injuries, settlement provides them an arguably more powerful opportunity to directly craft climate solutions. Environmental justice movements have emphasized bottom-up organizing and community power as central theories of change,[235] which is in tension with an approach that pursues top-down reform driven by judicial rulings.[236] However, the settlement process gives plaintiffs a seat at the table and shifts power in designing remedies from judges to the people the remedies will affect.[237]

Had the parties in *Navahine* pursued final adjudication rather than settlement, the remedy ordered would have been in judges' hands. Although the plaintiffs had some control over the remedy by deciding what to request in their complaints, the precise contours of the relief ordered would have been designed by the court.[238] Judges designing a remedy would likely have considered all parties' interests, whereas the participatory nature of a negotiated settlement ensures that the plaintiffs are able to advocate for themselves, rather than rely on judges to center their priorities.[239] This is consistent with the environmental and climate justice frameworks' focus on grassroots power and decision-making

234. *See* Angela Hefti, *Intersectional Victims as Agents of Change in International Human Rights-Based Climate Litigation*, TRANSNAT'L ENVT'L L. 1, 20 (2024).

235. *See* JEMEZ PRINCIPLES FOR DEMOCRATIC ORGANIZING (1996), https://www.ejnet.org/ej/jemez.pdf.

236. *See* Kim, *supra* note 27, at 427.

237. For example, participation in settlement negotiations is consistent with the third Jemez Principle: "Let People Speak for Themselves." This principle highlights the need to "be sure that relevant voices of people directly affected are heard," which is reflected in the *Navahine* plaintiffs' participation in crafting the lawsuit's outcome and in the settlement's resulting youth council. *See* JEMEZ PRINCIPLES FOR DEMOCRATIC ORGANIZING, *supra* note 235.

238. Judges have discretion in the remedies they select, and different judges may allow or even encourage parties' participation in the remedial process. For example, in *United States v. Florida*, Judge Middlebrooks noted that the state defendant "had ample opportunity to address the United States' proposed injunction" before ordering a detailed order modeled after an initiative enacted by the state legislature. 682 F. Supp. 3d 1172, 1243-44 (S.D. Fla. 2023). This suggests that Judge Middlebrooks took parties' proposed remedies into consideration and welcomed parties' input in designing the ultimate order. However, ultimate discretion lay with the judge, who also noted that he was "wary of federal injunctions that are intrusive and last too long," and therefore entered a "much more limited" remedy than recommended by the federal government and its expert witness. *Id.* at 1243. Similarly, in *Gautreaux v. Chicago Housing Authority*, the district court judge directed the parties to negotiate a "comprehensive" remedial plan, but the defendant government agency declined to negotiate until the Supreme Court affirmed the district court's authority to issue broad relief. Joyce, *supra* note 186, at 272. The parties ultimately agreed to a consent decree. *Id.* at 273.

239. This process becomes more difficult when plaintiffs seek to represent entire communities comprised of people who may disagree on the best way to resolve issues. A full discussion of the ability of a single plaintiff or group of plaintiffs to represent the interests of a community as a whole is beyond the scope of this Note, but it is worth comparing the relative lack of procedural requirements for representing community interests with the Federal Rules of Civil Procedure's list of requirements before a settlement in a class action can be certified. *See* Fed. R. Civ. P. 23(e).

being led by the most impacted communities.[240] Having a seat at the settlement negotiating table can further empower plaintiffs.

Through lenses of both procedural justice and just outcomes, climate settlements thus advance intergenerational climate justice by giving underrepresented plaintiffs the power to direct solutions to problems disproportionately affecting them and increase the likelihood that remedies are targeted toward the needs they see as most pressing. State defendants may also find this dynamic favorable: Instead of being ordered to take certain actions by a judge and retaining an adversarial position against plaintiffs throughout the duration of a case, HDOT in *Navahine* had the opportunity to collaborate with plaintiffs and design a remedy that was satisfactory to both plaintiffs and regulators.[241]

It should be noted, however, that a critical consideration to ensure settlements actually advance climate justice is that the plaintiffs themselves must be at the negotiation table.[242] Some environmental justice advocates have critiqued litigation as disempowering communities by allowing lawyers, rather than community members themselves, to lead the representation.[243] Similarly, for climate settlements to empower groups particularly vulnerable to climate change, the plaintiffs, rather than their lawyers, must drive settlement negotiations.[244]

Second, settlements also allow for plaintiffs to "get more" out of a lawsuit than the law would otherwise provide. Environmental justice advocates have recognized that litigation victories often do not resolve the root causes of communities' environmental problems.[245] For example, a community may win a citizen enforcement suit against a facility that exceeds permit limits for an air

240. *See* PRINCIPLES OF ENVIRONMENTAL JUSTICE (1996), https://www.ejnet.org/ej/principles.html (adopted by the First National People of Color Environmental Leadership Summit, Oct. 24-27, 1991); BALI PRINCIPLES OF CLIMATE JUSTICE (2002), https://ejnet.org/ej/bali.pdf; *see generally* Foster, *supra* note 121. Scholars have also argued that negotiating settlements in environmental enforcement cases can be seen as a form of restorative justice, where affected communities both play a prominent role in selecting a remedy and may achieve reconciliation with the other parties to the settlement. *See* McGarity, *supra* note 142, at 1416.

241. *Cf.* Ganguly, *supra* note 145, at 205-06 (describing a settlement agreement in a hazardous waste enforcement case where the state Department of Environmental Protection took on responsibility for enforcing the agreement as well as agreed to goals to enhance compliance more broadly, and arguing that the department's participation both committed it to action and "allowed [it] to save face within the community by allowing it to appear to be taking the initiative in environmental protection").

242. Although the precise details of the *Navahine* negotiations are not publicly available, one of the youth plaintiffs, Mesina, stated in an interview that having "a seat at the table" and being listened to was a valuable part of her involvement with the lawsuit. *See* Cristobal, *supra* note 11, at 37:36.

243. Kang, *supra* note 119, at 140.

244. *Cf.* McGarity, *supra* note 142, at 1423-24 (critiquing the EPA's supplemental environmental project process as often not fully involving affected communities, or reaching out to affecting communities too late in the process for them to be meaningfully engaged). Further, regional and national legal organizations should ensure that they are representing communities and members of communities that are most directly impacted by the claims being brought and should structure their representation such that community members are driving decision making throughout the litigation process.

245. Kang, *supra* note 119, at 143.

pollutant, but the permitted emissions may still cause harm to members of the community.[246] However, in settlements with community groups and government regulators, polluters have agreed to take steps beyond what is legally required or what a judge could order.[247]

For example, in 2023 the U.S. Department of Housing and Urban Development and three environmental justice organizations settled a case against the City of Chicago alleging a history of zoning and land use policies that systemically overburdened communities of color with pollution.[248] The settlement established an Environmental Equity Working Group with a directive to develop a cumulative impact assessment to guide future environmental justice policies, and required the City establish a cross-departmental Environmental Justice Action Plan, make changes to zoning regulations, improve data collection, and fund community air monitoring.[249] As another example, in California, a 2023 settlement agreement between an Oakland environmental justice organization, the California Attorney General, and the Port of Oakland included commitments by the Port to implement specific protocols to control fugitive dust, take actions to electrify operations and reduce diesel emissions, and update air quality impact studies.[250] Since that lawsuit alleged that a Port environmental review violated the California Environmental Quality Act, a judicial order would have likely directed the Port to more thoroughly consider alternatives and mitigation measures, rather than taking affirmative steps to

246. *Id.* at 143-144 (describing an example of a facility that installed a system to reduce volatile organic compound (VOC) emissions to its permitted levels but was permitted to emit VOCs such that nearby residents continued to suffer from the facility's strong odor).

247. *See supra* Part II.B; Ganguly, *supra* note 145, at 207, 222 ("[D]ispute resolution can frequently go beyond the remedies available through traditional adjudicated enforcement actions."); McGarity, *supra* note 142, at 1407.

248. *Chicago's Historic Environmental Justice HUD Settlement*, NAT. RES. DEF. COUNCIL (Aug. 29, 2023), https://www.nrdc.org/bio/gina-ramirez/chicagos-historic-environmental-justice-hud-settlement.

249. *Id.* The Department of Housing and Urban Development had found that the City was violating Title VI of the Civil Rights Act and Section 109 of the Housing and Community Development Act of 1974, which prohibit discrimination under programs receiving federal financial assistance and funding under the Housing and Community Development Act of 1974, respectively. Letter of Findings of Noncompliance with Title VI and Section 109 at 16-19, Southeast Environmental Task Force, et al. v. City of Chicago, Case No. 05-20-0419-6/8/9 (U.S. Dep't of Hous. and Urb. Dev. 2022), https://news.wttw.com/sites/default/files/article/file-attachments/Letter%20of%20Finding%2005-20-0419%20%28City%20of%20Chicago%29.pdf. Title VI imposes on federal funding recipients "an obligation to take reasonable action to . . . overcome the consequences of . . . prior discriminatory practice . . . and to accomplish the purpose of [Title VI]." *Id.* at 16-17. Since the laws and enacting regulations at issue do not prescribe specific actions, cities must take to meet their legal burden of nondiscrimination, the exact details of Chicago's legal obligations are not immediately obvious.

250. *Attorney General Bonta Announces Settlement to Protect Environmental Justice Communities in West Oakland*, CAL. DEP'T OF JUST. OFF. OF THE ATT'Y GEN. (Sept. 28, 2023), https://oag.ca.gov/news/press-releases/attorney-general-bonta-announces-settlement-protect-environmental-justice.

reduce pollution.[251] In both of these settlements, the defendants committed themselves to take actions that go beyond their legal obligations.

Settlements in climate cases also allow plaintiffs to channel resources directly to communities themselves, similarly to how supplemental projects agreed to in settlements between enforcement agencies and alleged violators provide benefits to affected communities. While enforcement cases that reach a judicial decision see penalties for violations paid directly to the U.S. Treasury, through settlement, plaintiffs can direct these monetary penalties toward in-kind projects which deliver benefits straight to affected communities.[252] For example, in 2024 Marathon Oil Company settled an order enforcing Clean Air Act violations by agreeing to implement extensive compliance and emissions reductions measures at over two hundred facilities across North Dakota on top of paying a $64.5 million civil penalty.[253] This agreement to implement emissions reduction measures at their North Dakota facilities likely could only have been achieved in a settlement.[254] Likewise, in Washington, D.C., the Potomac Electric Power company recently agreed to pay $47 million to fund cleanup efforts on the Anacostia River on top of $10 million in penalties.[255] This cleanup project, like the emission reduction measures Marathon Oil agreed to, goes beyond the defendants' legal obligations in providing additional beneficial projects to the communities living near sources of pollution.

Similarly, the *Navahine* settlement saw HDOT commit to climate action beyond its legal obligations. In it, HDOT went beyond its generally defined constitutional and statutory duties by committing to a list of specific policy actions and timelines.[256] HDOT could have chosen to meet those obligations through any number of paths but instead made a specific commitment in the settlement agreement. For example, HDOT agreed to invest $40 million into

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251. *See Attorney General Bonta Intervenes in Lawsuit to Protect Environmental Justice Communities in West Oakland,* CAL. DEP'T OF JUST. OFF. OF THE ATT'Y GEN. (Aug. 4, 2022), https://oag.ca.gov/news/press-releases/attorney-general-bonta-intervenes-lawsuit-protect-environmental-justice.

252. Campa & Muehlenbachs, *supra* note 149, at 9. Although a survey of in-kind projects reported by the EPA revealed that the most likely communities to benefit from supplemental environmental projects were the whitest, richest communities, the second-most likely group was communities with the highest share of minority and poor community members. *Id.* at 16.

253. *Justice Department and EPA Announce $241.5M Settlement with Marathon Oil to Reduce Climate- and Health-Harming Emissions in North Dakota*, U.S. DEP'T OF JUST. OFF. OF PUB. AFFS. (July 11, 2024), https://www.justice.gov/opa/pr/justice-department-and-epa-announce-2415m-settlement-marathon-oil-reduce-climate-and-health. The settlement is estimated to result in over 2.3 million tons worth of air pollution reduction. *Id.*

254. Although this is not stated in any of the materials associated with the suit, it is suggested by the scope of the facilities covered by the settlement, which extended beyond the facilities subject to the enforcement action. *See id.*

255. *The Largest Environmental Settlement in DC History*, OFF. OF THE ATT'Y GEN. FOR D.C. (Oct. 31, 2023), https://oag.dc.gov/release/largest-environmental-settlement-dc-history.

256. The relevant state constitutional requirements are the right to a clean and healthy environment and the public trust obligation imposed on the state government. HAW. CONST. art. XI, §§ 1, 9. The relevant statutory obligations are Hawai'i's statutory zero emissions target. HAW. REV. STAT. § 225P-8 (2023).

electric vehicle infrastructure by 2030, complete work to expand multimodal transportation infrastructure within five years,[257] and increase natural carbon sequestration efforts.[258] This ambitious timeline goes beyond what would likely have been prescribed in a court-ordered remedy. Further, its commitment to involve the public and youth plaintiffs throughout the planning and implementation process surpasses what HDOT is legally required to do.[259]

Finally, settlements are uniquely suited to promote sustained plaintiff empowerment and oversight by creating advisory councils or other mechanisms for long-term plaintiff involvement. Environmental and climate justice advocates demand that individuals affected by environmental hazards and climate impacts "participate as equal partners at every level of decision-making,"[260] play a leading role in climate responses, and exercise their right to "represent and speak for themselves."[261] HDOT's agreement to establish a youth council to advise its climate mitigation and adaptation commitments is a step toward fulfilling these demands.[262] The inaugural Youth Council consisted of twenty Hawaiians between the ages of twelve and twenty-four, and included representatives from each island.[263] The council will meet quarterly to advise HDOT, along with special meetings in response to HDOT updates such as the presentation of a greenhouse gas reduction plan.[264] Members "will represent the priorities, values, and needs of the communities they are a part of and bring their own lived and learned experience to HDOT's work."[265]

One youth plaintiff, Mesina, was optimistic about the prospect of working alongside the government through the Youth Council: "For the first time in my life, I'm a part of something [where] I feel we can genuinely take steps forward. We've gone past the wall of just crying out for help. We're actually listened to and we're now being given a seat at the table . . . [to] work directly with the government."[266] By building into the agreement a continued role for plaintiffs and other similarly positioned Hawaiians, the settlement represents a

257. This transportation expansion will occur pursuant to a 2023 state statutory goal, but since the statute does not establish a timeline, HDOT is going beyond its existing legal obligations in committing to complete the work within a specified timeline. *See* Settlement Agreement, *supra* note 15, at 9; HAW. REV. STAT. § 264-142 (2021).

258. Settlement Agreement, *supra* note 15, at 9-10.

259. *See id.* at 5-7.

260. PRINCIPLES OF ENVIRONMENTAL JUSTICE, *supra* note 240.

261. BALI PRINCIPLES OF CLIMATE JUSTICE, *supra* note 240.

262. *See* Settlement Agreement, *supra* note 15, at 9. The Agreement also provides for regular updates to the public and the youth plaintiffs on HDOT's progress and opportunity to comment, and for a meeting between the plaintiffs and the Department Director where the plaintiffs will provide comments and feedback on HDOT's proposed greenhouse gas reduction measures. *Id.* at 5.

263. *Hawai'i Youth Transportation Council*, STATE OF HAW. DEP'T OF TRANSP., https://highways.hidot.hawaii.gov/stories/s/mggy-wa96 (last visited Aug. 22, 2025).

264. *See, e.g.*, STATE OF HAW. DEP'T OF TRANSP., HAWAI'I YOUTH TRANSPORTATION COUNCIL SUMMARY OF MEETING #2 PRESENTATIONS (2025), https://highways.hidot.hawaii.gov/stories/s/GHG-Reduction-Plan-Presentation/7r75-b9v6.

265. *Hawai'i Youth Transportation Council*, *supra* note 263.

266. *See* Cristobal, *supra* note 11, at 20:26.

commitment to intergenerational justice and grassroots governance that extends beyond the four corners of a lawsuit.[267]

As with other aspects of the settlement, this commitment goes beyond what HDOT is legally obligated to do and demonstrates the potential for settlements to bring individuals and groups disproportionately affected by climate change into a position of power and agency for the long term.[268] The Youth Council models how climate litigation settlements can establish ongoing community consultation and open participation to other similarly situated individuals beyond those involved in the initial litigation. This approach to community participation helps avoid the risk of climate policy being driven by those who sue first.[269] As with other benefits of settlements, ensuring that the Youth Council achieves its potential for community empowerment depends on HDOT engaging with the council in good faith and respecting the youth representatives' knowledge and input.[270] Future climate litigants could strengthen a youth council provision by requiring HDOT to obtain consent before implementing new policies.[271]

For the foregoing reasons, *Navahine* demonstrates ways settlements in climate lawsuits may be used as a tool for community empowerment and climate justice. Negotiations with government defendants give plaintiffs a role in crafting their remedy, parties to settlements can agree to actions beyond what defendants would be legally required to do, and settlements can create mechanisms—like advisory councils—for long-term plaintiff involvement. Taken together, well-negotiated settlements may ultimately have greater long-term benefits than judicial declarations alone; as in environmental justice litigation, "a short-term gain against a single bad actor means little if the community cannot change a

267. This is also consistent with theories of movement lawyering that see litigation as only one strategy to achieve movement goals: The youth council expands the reach of *Navahine* beyond the instant lawsuit and provides an avenue for participatory policymaking for the next two decades. *See* Hung, *supra* note 124, at 665 (arguing that movement lawyers should "recogniz[e] that legal strategies are but one of multiple strategies that can be implemented to achieve social change"); Killcreas, *supra* note 134, at 772-73 ("In order for a community to successfully fight instances of environmental injustice, residents cannot always rely on litigation alone.").

268. For example, the Hawai'i Environmental Policy Act requires agencies to provide public notice and comment for environmental impact statements. HAW. REV. STAT. § 343-3. The settlement goes further: HDOT agreed not only to provide plaintiffs with an opportunity to comment on its greenhouse gas reduction plans but sets the groundwork for quarterly meetings with the youth advisory council, annual opportunities for public engagement with the plan, and public outreach and engagement when implementing the settlement. *See* Settlement Agreement, *supra* note 15, at 6-7, 9.

269. This is similar to critiques of sue-and-settle that claim that groups that sue agencies and influence rulemaking through settlement subvert the democratic process. *See generally* KOVACS ET AL., *supra* note 115. Rather than the *Navahine* plaintiffs taking advantage of their being the first to sue to independently direct state climate policy, they leveraged their power in designing the agreement to open the door to greater community involvement in general.

270. The need for genuine, meaningful plaintiff involvement in settlement agreements runs parallel to critiques of community engagement actions under the National Environmental Policy Act. *See* Nicholas A. Fromhertz, *From Consultation to Consent: Community Approval as a Prerequisite to Environmentally Significant Projects*, 116 W. VA. L. REV. 109, 132-34 (2013) (arguing that NEPA has "failed to deliver" on its promises to democratize agency decision making due to agencies' failure to genuinely and meaningfully engage with affected communities during the planning process).

271. *See id.*

system that institutionalizes environmental harm."[272] The *Navahine* settlement's long-term policy commitments developed in collaboration with plaintiffs who are directly affected do just that by ultimately laying the groundwork for a more equitable policy response to climate change.

IV. ENSURING EFFECTIVE IMPLEMENTATION OF CLIMATE REMEDIES

Beyond the benefits articulated in Part III, negotiated settlements in climate litigation may be particularly useful when they commit government defendants to specific, legally enforceable actions. The *Navahine* settlement produced a holistic approach to climate policy where the executive branch has agreed to take judicially enforceable actions toward an emissions goal established by the legislature.[273] Such a holistic approach reflects the reality that mitigating and responding to climate change will require collaborative action across government branches.

As described in Part III, settlement provides an opportunity for plaintiffs to get commitments that go beyond defendants' legal obligations. Similarly, they also allow for more specific and affirmative government commitments than a court may be willing to order.[274] Comparing *Navahine* to *Held* illustrates this point. Although the ruling in *Held* is important in its own right and may bring about significant emissions reductions,[275] its impact is limited in that it merely prevents the state from not considering greenhouse gas emissions in environmental reviews.[276] The court did not require the state to take any action in its ruling, rejecting plaintiffs' request for an injunction requiring the state to develop an emissions reduction plan.[277] Although the court struck down a rule *preventing* consideration of greenhouse gas emissions, it did not require that the state *start* considering greenhouse gas emissions in environmental reviews.[278] In contrast, HDOT agreed to take a list of specific actions that went beyond its legal

272. Todd, *supra* note 89, at 103.

273. *See generally* Settlement Agreement, *supra* note 15.

274. Compare, for example, the specific policy commitments in the *Navahine* settlement with the Hawai'i Circuit Court's concern that later pleadings for injunctive relief may raise political questions and take the case out of the providence of the judicial branch. *See Navahine* Denial of Motion to Dismiss, *supra* note 65, at 11. If the case would have proceeded through the courts rather than through settlement, the plaintiffs may have had to request limited injunctive relief or risk the case being dismissed as presenting a nonjusticiable political question.

275. *See, e.g.*, David Gelles & Mike Baker, *Judge Rules in Favor of Montana Youths in a Landmark Climate Case*, N.Y. TIMES (Aug. 14, 2023) https://www.nytimes.com/2023/08/14/us/montana-youth-climate-ruling.html (describing the ruling in *Held* and its significance).

276. *See* Held v. State, No. CDV-2020-307, 2023 Mont. Dist. LEXIS 2, at *127 (Mont. 1st Dist. Ct. Aug. 14, 2023).

277. *See id.* at *3 (stating that in a prior Order on Motion to Dismiss "[t]he Court found that Plaintiffs' requests for the Court to order Defendants to develop a remedial plan . . . exceeded the Court's authority under the political question doctrine . . . Nevertheless, the Court held that prudential standing considerations did not merit dismissal because the Court 'may grant declaratory relief regardless of injunctive relief'").

278. *See id.* at *127.

obligations, with detailed plans for community involvement, following a specified time schedule.[279]

This specificity allowed for in settlements, as opposed to judicial rulings that impose vague declaratory or injunctive rulings, may increase the likelihood that the settlement's terms will be implemented and lead to emissions reductions.[280] Ensuring that judicially imposed remedies will be implemented effectively is an important and difficult task. Landmark environmental rulings in international courts demonstrate the challenges in translating judicial rulings without specific directives into beneficial environmental outcomes.[281]

For example, a series of decisions by Colombian High Courts recognizing a river basin and the Colombian Amazon as subjects of legal rights were lauded as groundbreaking steps forward in environmental jurisprudence but have since been plagued by implementation challenges.[282] For example, in one case, the court directed government defendants to develop plans to protect the rainforest from deforestation, but the ruling's lack of clear guidelines has led to a lack of coordination among agencies with different actors interpreting the ruling differently.[283] In another case, a court found that illegal mining in the Atrato River Basin violated the river basin's rights to be protected, conserved, maintained, and restored.[284] The ruling mandated specific actions by designated government authorities, which has made its implementation more successful than other, vaguer judicial mandates.[285] Even so, restoring of the river basin will take "generations," and a lack of government accountability or dedicated funding has led to a slower-than-ideal pace of progress.[286]

Scholars have drawn lessons for environmental advocates from these Colombian cases' successes and challenges.[287] Their incorporation of an

279. *See* Settlement Agreement, *supra* note 15, at 4-10.

280. *Cf.* Cesar Rodriguez-Garavito, *Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America*, 89 TEX. L. REV. 1669, 1676 (2011) (describing findings that court orders that paired "broad goals" with "clear implementation paths through deadlines and progress reports" that "[left] substantive decisions and detailed outcomes to government agencies," as well as those that provided for "participatory follow-up mechanisms" were most successful at fostering democratic deliberation and achieved more substantial impacts).

281. *See generally* Camila Bustos & Whitney Richardson, *Implementing Nature's Rights in Colombia: The Atrato and Amazon Experiences*, 54 REV. DERECHO DEL ESTADO 227 (2023); Niccolò Sarno, *Switzerland's Refusal to Accept the European Court of Human Rights' Climate Ruling: An Embarrassment for the Swiss Government*, CTR. FOR INT'L ENVT'L L. (Aug. 29, 2024), https://www.ciel.org/news/switzerlands-refusal-of-european-court-of-human-rights-climate-ruling-an-embarrassment.

282. Bustos & Richardson, *supra* note 281, at 230, 254 ("In December 2020, the Tribunal Superior de Bogoti again acknowledged that insufficient progress had been made.").

283. *Id.* at 249.

284. *Id.* at 237. This decision was the first time a Colombian court has designated an ecosystem as holding legal rights. The case was brought by a coalition of organizations representing Afro-descended, Indigenous, and mestizo farmer residents of the river basin who have historically been victimized by extractive industries throughout Colombia. *Id.*

285. *Id.* at 256-58.

286. *Id.* at 247.

287. *See id.* at 256.

environmental justice framework and "transversal legal approach" that motivates all government and private interests to consider ecological health should be applauded.[288] However, their practical challenges reflect the need to consider on-the-ground implementation when crafting remedies.

The *Navahine* settlement retains some of the benefits of the Colombian rulings while avoiding some of their pitfalls: it provides for community involvement, while identifying specific government actors, the actions they will take, and the timeline for those actions.[289] The *Navahine* settlement is therefore similar to the Flannery decree, mentioned in Part II, Subpart A which set the basis for how the EPA would regulate toxic pollutants under the Clean Water Act, in that both agreements prescribe a specific list of agency actions.[290] The Flannery decree's specific list of toxics the EPA agreed to regulate helped the agency overcome its prior failure to act.[291] Settlements in climate cases that include specific lists of climate policy actions and benchmarks may similarly drive governments to act by establishing an actionable set of steps forward.

This inclusion of specific terms may be more effective than the relief the plaintiffs may have received from a favorable judicial ruling. The *Navahine* plaintiffs requested declaratory relief and a broad injunction that HDOT "rectify [its] violations and bring the state transportation system into constitutional compliance based on the best available science."[292] If a court ordered this relief exactly as requested, implementation would have faced similar hurdles as in the Colombian rulings. "Constitutional compliance" and "best available science" are terms open to interpretation, and a general directive could result in continued inaction and regulatory foot-dragging.[293]

Another recent international climate lawsuit, *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*,[294] like some of the Colombian courts' decisions regarding the Colombina Amazon, serves as another contrast to *Navahine* when evaluating the effectiveness of different forms of legal resolution. In *KlimaSeniorinnen*, the European Court of Human Rights ruled in favor of a group of elderly Swiss women, finding that Switzerland's insufficient policy response to climate change violated the European Convention on Human

288. *See id.* at 256-57 ("[B]oth the ruling and the Follow-Up Committee emphasized that Atrato communities are equals in decision-making processes, seeking to advance the participatory and recognition elements of environmental justice.").

289. *See* Settlement Agreement, *supra* note 15, at 4-11.

290. *See generally* NRDC v. Train Settlement, *supra* note 105.

291. *See* O'Leary, *supra* note 104, at 18, 55 (stating that "the Flannery Decision shaped the EPA's water policy as it exists today" by motivating the agency to regulate and producing better regulations).

292. Complaint, *supra* note 1, at 3.

293. *See* Bustos & Richardson, *supra* note 281, at 249. While this Part has focused on the benefit of settlements bypassing the need for agencies to develop plans to implement judicial rulings, another timing benefit of settlement is that cutting down on lengthy litigation allows remedies to be implemented more quickly. *See* Ganguly, *supra* note 145, at 222.

294. Verein KlimaSeniorinnen Schweiz & Others v. Switzerland, App. No. 53600/20 (Apr. 2022), https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22002-13649%22]}.

Rights.[295] The court did not prescribe any specific remedial measures for the Swiss government to take "in the light of the complexity and the nature of the issues involved."[296] Instead, it merely directed the government to adopt measures to ensure compliance with the Convention as it pertains to climate change.[297] The case, although symbolically significant, has yet to translate to policy change.[298]

In contrast, a settlement like the one reached in *Navahine* may lead to a more successful outcome in the long term. Defining the steps an agency will take in a settlement agreement reduces the time between a ruling and policy change, because the policy steps are already laid out in the terms of the settlement rather than unknowns to be determined following the ruling. An agency is also less likely to reject its duties if it participated in their selection through settlement negotiations. Settlement therefore may lead to a more successful outcome in the long term, and *Navahine* provides a useful blueprint for future climate lawsuits.[299]

In the *Navahine* settlement, the court's role in overseeing the settlement agreement is also significant: The circuit court retains jurisdiction over the case until the zero emissions target has been met or until December 31, 2045, whichever is sooner.[300] This ensures that the plaintiffs will be able to rely on the judiciary's enforcement power as HDOT implements its commitments.[301]

The Flint settlement illustrates the benefit of continued judicial enforcement of settlements in ensuring that their terms are carried out. The City and State have continually missed agreed-upon deadlines, resulting in continued drinking water contamination issues.[302] However, since the district court maintains jurisdiction over the case and the terms of the settlement are judicially enforceable, the plaintiffs have brought the City and State to court several times to enforce their obligations to act.[303] Although continued litigation demonstrates

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295. EUR. CT. OF HUM. RTS., VIOLATIONS OF THE EUROPEAN CONVENTION FOR FAILING TO IMPLEMENT SUFFICIENT MEASURES TO COMBAT CLIMATE CHANGE 1 (2024).

296. *Id.* at 6.

297. *See id.* at 7.

298. *See* Sarno, *supra* note 281. Scholars have also questioned the impact of the holding in *Urgenda*. While the Dutch government did ultimately meet the emissions reduction target ordered by courts, implementation did not begin until years after the initial decision, and other emissions reduction measures were "not causally related to the judgment." *See* Benoit Mayer, *The Contribution of* Urgenda *to the Mitigation of Climate Change,* 35 J. ENVT'L L. 167, 170-72 (2023).

299. Advocates in other types of environmental litigation have also taken lessons from settlements in other lawsuits to develop their own legal strategies. *See* Macey & Susskind, *supra* note 144, at 464 ("Trial-and-error learning, including knowledge of previous legal settlements, encouraged local residents to coordinate their activities with those of the legal staff in order to access expected benefits from litigation.").

300. *See* Settlement Agreement, *supra* note 15, at 11.

301. *See* Rossi, *supra* note 102, at 1031 (describing the "promise" of courts "continu[ing] to play a monitoring role" once settlements are agreed to).

302. NRDC, *Concerned Pastors for Social Action v. Khouri*, *supra* note 123.

303. *See, e.g.*, Concerned Pastors for Soc. Action v. Khouri, 720 F. Supp. 3d 522 (E.D. Mich. 2024); Concerned Pastors for Soc. Action v. Khouri, 658 F. Supp. 3d 495 (E.D. Mich. 2023). Further, the district court has held that its enforcement authority over the consent decree allows it to impose

that settlements are not a silver bullet for achieving government action that fully satisfies community demands, litigation to enforce the terms of an existing settlement is likely less resource-intensive and less risky for community members than bringing the City and State back to court for fresh litigation. And the Flint settlement has led to real environmental health wins: By the end of 2024, Flint had replaced nearly 10,000 lead service lines, confirmed the material composition of more than 26,000 water service lines, and "committed to identifying and replacing any remaining galvanized steel and lead service lines in the city."[304]

The Flint settlement demonstrates that a settlement with specific, judicially enforceable terms that includes long-term judicial oversight can lead to real environmental and health benefits. Only time will tell, but the *Navahine* plaintiffs appear to have successfully applied the settlement strategy of communities like Flint to the climate context.

CONCLUSION

The *Navahine* plaintiffs may be correct in their assertion that "it will take each of our three branches of government to protect our children from the existential crisis of climate change."[305] Following in the footsteps of environmental advocates before them, the youth plaintiffs in *Navahine* resolved their lawsuit against the Hawai'i Department of Transportation with a settlement committing HDOT to specific, impactful policies to eliminate greenhouse gas emissions and fulfill its constitutional obligations to ensure a life-sustaining climate system. As plaintiffs continue the legal fight for climate action, they should recognize the potential for settlement to ease procedural hurdles, advance intergenerational climate justice by placing affected communities in seats of power, and increase the likelihood of successful implementation.

The *Navahine* settlement is a useful blueprint for advocates moving forward, but settlement opportunities in rights-based climate lawsuits may vary widely depending on the government defendant's willingness to negotiate, the jurisdiction in which the litigation is occurring, and the type of agency action or inaction being challenged. Litigants in other forms of climate cases may also benefit from considering settlement, but the benefits and drawbacks of settlement remain context dependent.

For example, state and municipal governments have brought lawsuits against fossil fuel companies seeking damages for alleged spreading of climate denial.[306] Settlements in such cases may provide a similar distributional benefit

"'additional affirmative conduct' not required by the underlying agreement" when ordering remedies for a breach of the agreement. *Concerned Pastors*, 658 F. Supp. 3d at 503.

304. NRDC, *Concerned Pastors for Social Action v. Khouri*, *supra* note 123.

305. Complaint, *supra* note 1, at 5.

306. *See generally* CTR. FOR CLIMATE INTEGRITY, BIG OIL ACCOUNTABILITY LAWSUITS (2024), https://climateintegrity.org/uploads/media/CCI-Climate-Accountability-Lawsuits.pdf.

as in-kind projects do to communities affected by environmental violations.[307] While money damages would flow to the government parties bringing the suits, settlement negotiations may provide an avenue for remedies to benefit communities more directly. Centering affected communities in litigation and settlement may also avoid some of the pitfalls of previous settlements in lawsuits brought by municipalities against tobacco and opioid companies, where damages ultimately did not flow to the individuals who had suffered injury from the companies' actions.[308] However, in cases against fossil fuel companies there may be a greater symbolic benefit from a judicial ruling holding the industries that have contributed to greenhouse gas emissions culpable for their climate impacts. Further study is needed to determine the strategic tradeoffs of settling these kinds of climate lawsuits.

Ultimately, as the government action to mitigate emissions continues to fall short of scientifically driven goals,[309] advocates like Navahine and her fellow youth plaintiffs must seek to commit governments to take rapid, extensive climate action. And, to remedy histories of injustice and to build a just and equitable future, cases brought and remedies sought must be consistent with the principles of climate and intergenerational justice. As Navahine noted in an interview following the settlement, her family has lived on their farm since time immemorial.[310] The land is part of "what [they] see as [their] way of life," and climate change is already impacting their interactions with the land.[311] Yet, when reflecting on her participation in the lawsuit, Navahine described her experience positively: "My mindset now is that no challenge is too big . . . you should just fight for what you believe in, no matter what it is."[312] As the youth of today continue to take action to protect the youth of tomorrow, they should consider settlements as a tool to place their communities in a position of power in their fight against climate change.

307. *See* Campa & Muehlenbachs, *supra* note 149, at 9.

308. *See generally* Marionneaux, *supra* note 169.

309. *See generally* U.N. ENV'T PROGRAMME, EMISSIONS GAP REPORT 2024 (2024), https://www.unep.org/resources/emissions-gap-report-2024.

310. *The Youth Advocates Behind* Navahine v. Hawai'i Dept. of Transportation, PBS HAW., at 6:29 (Aug. 21, 2024). https://www.youtube.com/watch?v=DPxacGEj28w.

311. *Id.* at 6:52.

312. *Id.* at 8:51, 9:58.