THE RIPPLE EFFECT: EXAMINING JUDICIAL ACTIVISM IN TWO LANDMARK CLIMATE CASES

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ABSTRACT

This article examines two landmark climate change litigation cases from the last decade: Massachusetts v. Environmental Protection Agency *in the United States and* Urgenda Foundation v. State of the Netherlands *in the Netherlands. By analyzing these cases and how they have impacted climate regulation and litigation, this article explores the evolving role of courts in addressing climate change, the different legal frameworks employed, and the implications for future climate litigation. The comparison highlights the potential for judicial activism to drive climate policy and regulation across nations.*

INTRODUCTION

Overwhelming evidence continues to demonstrate that the global climate system is changing due to human activities. Observational records from 2023 show that carbon dioxide, methane, and nitrous oxide—three of the main greenhouse gases (GHGs)—continue to reach record-high levels each year and that 2023 was the warmest year on record.[1] Other observations include record-high sea levels, record-low sea ice, and extreme weather events.[2] "Many lines of evidence demonstrate that human activities . . . are primarily responsible for the climate changes observed in the industrial era, especially over the last six decades."[3]

The consequences of climate change have proven to be devastating. Scientists have linked climate change to the increase in severe weather events that often prove deadly.[4] For example, the Mediterranean cyclone Storm Daniel produced extreme rainfall and flash flooding.[5] The largest impacts were in Libya, with at least 4,700 confirmed deaths.[6] As another example, Hawaii experienced the deadliest lone wildfire on the island of Maui, with at least 100 deaths reported.[7] While not every extreme weather event carries such heavy death tolls, they can also be incredibly costly. For instance, Mexico experienced losses of about 12 billion USD during Hurricane Otis.[8]

Unfortunately, climate change is not an easy issue to tackle. It has been described as a "super wicked" policy problem due to three features.[9] First, as more time passes, the problem compounds and gets more difficult to address.[10] As nations delay reducing GHGs, humans emit more GHGs and need larger technological advances to address the increased emissions.[11]

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1. WORLD METEOROLOGICAL ORG., WMO-No. 1347, STATE OF THE GLOB. CLIMATE 2023 ii (2024), https://library.wmo.int/idurl/4/68835.
2. *Id.*
3. Katharine Hayhoe et al., *Our Changing Climate*, *in* 2 IMPACTS, RISKS, AND ADAPTATION IN THE U.S.: FOURTH NAT'L CLIMATE ASSESSMENT 73, 76 (Linda O. Mearns ed., 2018), https://nca2018.globalchange.gov/chapter/2/.
4. *Based on Science: Global Warming is Contributing to Extreme Weather Events*, NAT'L ACADEMIES, https://www.nationalacademies.org/based-on-science/climate-change-global-warming-is-contributing-to-extreme-weather-events (Aug. 12, 2021); *see generally* WORLD METEOROLOGICAL ORG., *supra* note 1 (identifying deadly severe weather events).
5. WORLD METEOROLOGICAL ORG., *supra* note 1, at 23.
6. *Id.*
7. *Id.* at 24–25.
8. *Id.* at 24.
9. Richard J. Lazarus, *Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future*, 94 CORNELL L. REV. 1153, 1160 (2009).
10. *Id.* at 1160.
11. *Id.*

Second, those who are in the best position to address the problem are those who caused it and have little incentive to act.[12] The leading GHG emitters are those least susceptible to demands by other nations to reduce emissions and often the nations least likely to suffer the most intense climate change effects.[13] Finally, because climate change is a global problem, there is no clear framework for a government to be able to address climate change's scope.[14] Countries have attempted to address this third feature by measures such as the Kyoto Protocol, Nationally Determined Contributions, and the Paris Agreement, although none of these fully addressed the deficiency.[15]

The damages from climate change's impacts, in conjunction with the difficult policy problems, have led to an increase in climate change litigation. For instance, in the United States, state and local governments filed lawsuits against oil and gas producers, attempting to hold them accountable for knowingly contributing to climate change.[16] In other cases, governments are the defendants, being asked to defend their policies and decisions.[17] There have been five broad climate change litigation trends internationally: (1) holding governments accountable to their legislative and policy commitments; (2) linking resource extraction to climate change; (3) establishing particular emissions as the proximate cause of climate change impacts; (4) establishing liability for failures to adapt to climate change; and (5) applying the public trust doctrine to climate change.[18]

This article focuses on two significant cases in climate litigation from the last decade: *Massachusetts v. Environmental Protection Agency* (*Massachusetts*) and *Urgenda Foundation v. State of the Netherlands* (*Urgenda*). *Massachusetts* is a 2007 United States case that is significant because it was the first case dealing with climate change to go to the United States Supreme Court.[19] The case defined the United States Environmental Protection Agency's (EPA) responsibility to regulate GHG emissions.[20]

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12. Richard J. Lazarus, *Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future*, 94 CORNELL L. REV. 1153, 1160 (2009).

13. *Id.*

14. *Id.* at 1160–61.

15. U. N. ENV'T PROGRAMME, THE STATUS OF CLIMATE CHANGE LITIG.: A GLOBAL REVIEW 8-9 (2017), https://wedocs.unep.org/bitstream/handle/20.500.11822/20767/climate-change-litigation.pdf.

16. Michael Burger & Jessica Wentz, *Holding Fossil Fuel Companies Accountable for Their Contribution to Climate Change: Where Does the Law Stand?*, 74 BULL. ATOMIC SCIENTISTS 397, 397 (2018).

17. U.N. ENV'T PROGRAMME, *supra* note 15, at 14.

18. *Id.*

19. Jonathan Z. Cannon, *The Significance of* Massachusetts v. EPA, 93 VA. L. REV. IN BRIEF 53, 53 (2007).

20. *Id.* at 54.

Urgenda is a 2019 Netherlands case that is significant because it is the first time a court has ordered a government to limit GHG emissions.[21]

Part II of this article explains the key issues and legal frameworks underlying both the *Massachusetts* and *Urgenda* decisions. Then, Part III performs a comparative analysis of the cases to examine the key commonality—judicial activism. It explains judicial activism generally, then evaluates how judicial activism played a role in both decisions. The comparison highlights the potential for judicial activism to drive climate policy and regulatory action across nations. Finally, Part IV identifies cases after *Massachusetts* and *Urgenda* where plaintiffs and judges used the legal frameworks of these landmark cases to advance climate change mitigation. These select cases serve as an example of the possible far-reaching impacts of judicial activism as a positive force to combat GHG emissions and climate change.

I. KEY ISSUES & LEGAL FRAMEWORKS

This section summarizes the facts, key issues, and legal framework for *Massachusetts* and *Urgenda*. It provides the necessary background to understand the underlying bases of these cases. In the next section, this information is used to examine the role of judicial activism in each case.

A. Massachusetts v. Environmental Protection Agency

In *Massachusetts*, a group of 19 private organizations petitioned EPA to begin regulating GHG emissions, using the Clean Air Act as a basis for the petition.[22] The Clean Air Act requires that EPA "prescribe . . . standards applicable to the emission of any air pollutant from any class . . . of new motor vehicles . . . which in [the EPA Administrator's] judgment cause, or contribute to, air pollution . . . reasonably be anticipated to endanger public health or welfare."[23] EPA denied the petition on two grounds: (1) the Clean Air Act does not authorize it to issue mandatory regulations concerning climate change, and (2) even if it had authority, it would be unwise to do so because a causal link between GHGs and climate change had not been established with certainty.[24] EPA also raised concerns that a piecemeal

21. Jolene Lin, *The First Successful Climate Negligence Case: A Comment on* Urgenda Foundation v. The State of the Netherlands (Ministry of Infrastructure and the Environment), 5 CLIMATE L. 65, 66, 80–81 (2015).

22. Massachusetts v. EPA, 549 U.S. 497, 510 (2007).

23. Clean Air Act, 42 U.S.C. § 7521(a)(1).

24. Massachusetts, 549 U.S. at 511, 513 (2007).

approach to regulating climate change would conflict with the President's more comprehensive plan.[25]

The organizations, joined by 12 state and 4 local governments, sought review in the D.C. Circuit Court of Appeals.[26] Two judges at the Circuit Court held that EPA Administrator was within his discretion in denying the petition, and one of those judges raised concerns about standing.[27] Therefore, the court denied the petition for review.[28] One judge wrote a dissenting opinion that Massachusetts had established Article III standing, and the submitted affidavits supported the conclusion that failure to curb GHG emissions contributed to sea level changes threatening Massachusetts' coastal properties.[29]

The organizations and state and local governments appealed to the United States Supreme Court, asking two questions: "[1] [W]hether EPA has the statutory authority to regulate [GHGs] from new motor vehicles; [2] and if so, whether its stated reasons for refusing to do so are consistent with the statute."[30] EPA raised the additional issue of standing on appeal.[31]

Addressing the issue of standing first, the Court examined whether the petitioners had "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination."[32] The Court initially determined that the parties' dispute was properly before the federal court because it turned on a federal statute's construction.[33] It further reasoned that when a litigant has a procedural right, such as the right to challenge agency action, the litigant can assert that right if "there is some possibility that the request[ed] relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant."[34]

Only Massachusetts satisfied that standard.[35] The Court held that Massachusetts had a procedural right to challenge a rejected rulemaking petition.[36] Additionally, the state had an interest in protecting its territory, which was threatened by EPA's refusal to regulate GHGs.[37] Specifically,

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25. Massachusetts, 549 U.S. at 511, 513 (2007).
26. *Id.* at 505, 514.
27. *Id.* at 514–15.
28. *Id.* at 514.
29. *Id.* at 515.
30. *Id.*
31. Massachusetts, 549 U.S. at 511, 515 (2007).
32. *Id.* at 517 (quoting Baker v. Carr, 369 U.S. 186, 204 (1962)).
33. *Id.* at 516.
34. *Id*. at 518.
35. *Id.*
36. *Id.* at 519–20.
37. Massachusetts, 549 U.S. at 511, 521-22 (2007).

Massachusetts alleged particularized injuries to its coastline caused, at least in part, by EPA's failure to mitigate GHGs under the Clean Air Act.[38] Because the Court held that Massachusetts had standing, it continued to the case's merits.[39]

The Court next turned to whether the Clean Air Act authorized EPA to regulate GHGs.[40] EPA concluded, in its denial of the petition for rulemaking, that it lacked authority, to which the Court accorded *Chevron* deference.[41] However, the Court concluded that "[t]he statutory text foreclose[d] EPA's reading."[42] The Clean Air Act has a "sweeping definition" of air pollutant that, on its face, includes GHGs.[43] The Court held that the statute was unambiguous and GHGs fit well within the broad definition, meaning EPA has the authority to regulate GHG emissions within the context of the Clean Air Act.[44]

The Court's final issue was whether EPA's reasons for not regulating GHGs were consistent with the Clean Air Act.[45] The Court boiled down EPA's reasoning: "[E]ven if [EPA] does have statutory authority to regulate [GHGs], it would be unwise to do so at this time . . . ."[46] However, the Court was unconvinced. It noted that, while the Clean Air Act allows for judgment, this is "not a roving license to ignore the statutory text."[47] Under the Clean Air Act, EPA can only avoid acting if it determines GHGs do not contribute to climate change.[48] The "laundry list" of reasons EPA gave not to regulate GHGs did not comply with Congress's clear command.[49] EPA did not ground its reasons in the statute, making it arbitrary and capricious to refuse to act.[50]

Massachusetts was a key moment in environmental law. It clarified EPA's responsibility under the Clean Air Act while setting a foundation for future regulatory actions related to climate change in the United States. Additionally, the United States Supreme Court's decision underscored the importance of both regulatory agencies and the judiciary in addressing

38. Massachusetts, 549 U.S. at 511, 522-23 (2007).
39. *Id.* at 526.
40. *Id.* at 527.
41. *Id.* at 527–28. *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984) has since been overturned by the U.S. Supreme Court in *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024).
42. Massachusetts v. EPA, 549 U.S. 497, 528 (2007).
43. *Id.*
44. *Id.* at 532.
45. *Id.*
46. *Id.*
47. *Id.* at 533.
48. Massachusetts, 549 U.S. at 511, 533 (2007).
49. *Id.*
50. *Id.* at 534–35.

climate change; the judiciary's role is to ensure that federal agencies comply with statutory mandates regarding environmental protection.

B. Urgenda Foundation v. State of the Netherlands

In *Urgenda*, a Dutch environmental group, the Urgenda Foundation, and approximately 900 Dutch citizens sued the Dutch government, seeking to require it to do more to prevent climate change.[51] The controversy stemmed from the Netherlands' decision to decrease its emission reduction targets from 30% to 20%.[52] The Urgenda Foundation argued that the government's action violated provisions of the Dutch Constitution, the European Convention on Human Rights (ECHR), and the government's duty of care under the Dutch Civil Code.[53]

The trial court rejected the constitutional and human rights claims, but it agreed that the government had violated its duty of care.[54] The trial court relied on Intergovernmental Panel on Climate Change reports in finding that anything less than a 25% reduction in Dutch GHG emissions by 2020 would be insufficient to prevent climate change impacts.[55] That failure was a breach of the government's duty of care.[56] The court ordered the government to reduce GHG emissions by at least 25%, relative to 1990 levels, by the end of 2020.[57]

The Hague Court of Appeal upheld the judgment but on different grounds.[58] It held that the government violated the ECHR.[59] First, the court resolved a jurisdictional issue in the Urgenda Foundation's favor, finding that the "victim" requirement of Article 34 of the ECHR did not restrict access to Dutch courts.[60] Then, the court found that the Article 2 right to life and the Article 8 rights to a private life, family life, home, and correspondence placed an affirmative duty of care on the government to protect against risks that would adversely affect those rights, including climate change.[61] The court

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51. HR 20 december 2019, NJ 2020, 19/00135 m.nt. DJV (Urgenda/Nederland) (Neth.) [hereinafter Urgenda Supreme Court Opinion]; *Urgenda Foundation v. State of the Netherlands*, CLIMATE CHANGE LITIG. DATABASES, https://climatecasechart.com/non-us-case/urgenda-foundation-v-kingdom-of-the-netherlands/ (last visited Mar. 15, 2025) (summarizing the case).

52. *Id.* ¶ 2.1(27).

53. *Id.* ¶¶ 2.2.1, 2.2.2.

54. Rb. 24 juni 2015, NJ 2015, C/09/456689 m.nt. DHA (Urgenda/Nederland) (Neth.).

55. *Id.* ¶ 4.31(vi), 4.93.

56. *Id.*

57. *Id.* ¶ 5.1.

58. Rb. 9 oktober 2018, NJ 2018, 200.178.245/01 m.nt. GHDHA (Urgenda/Nederland) (Neth.) [hereinafter Urgenda Appellate Court Opinion].

59. *Id.* ¶ 76.

60. *Id.* ¶¶ 34–37.

61. *Id.* ¶ 43.

explained that climate change poses a known and imminent threat of loss of life and disruption of family life for Dutch citizens, and at least a 25% reduction in GHG emissions by 2020 is necessary to prevent climate change.[62] Therefore, the Dutch government has a duty to do so.[63]

The government consistently argued that an order to reduce emissions would violate the Dutch system of separation of powers. Specifically, the government argued that policy decisions regarding GHGs should be left solely to the elected government.[64] The Hague Court of Appeal rejected this argument because the human rights violations required protective measures, but the specifics on how to comply with those measures were left to the government's discretion.[65] It also held that its decision was not an "order to create legislation" because the government retained its discretion on the means it used to comply with the 25% GHG emissions reduction mandate.[66]

The Dutch government appealed to the Supreme Court of the Netherlands, which upheld the Court of Appeal decision.[67] The parties generally agreed on the effects of GHGs on climate change, making the key issue in front of the Court the pace and level of the state's mitigation rather than the need for it.[68] The Court grounded its decision to affirm the lower courts in the ECHR.[69] Like the appellate court, it held that Articles 2 and 8 placed a positive obligation on the Dutch government to take appropriate steps to safeguard its citizens.[70] The Court held that these obligations still applied, even though the risks may materialize in the long term.[71] While it noted that the human rights obligations should not place an undue burden or impossible task on the government, the Court ordered the Dutch government to reduce GHG emissions by 25% by 2020.[72] This marked the first time a court has ordered a government to curb GHG emissions.[73]

II. JUDICIAL ACTIVISM: THE COMMON THREAD

While *Massachusetts* and *Urgenda* rely on different legal frameworks, they both demonstrate how judicial activism can contribute to mitigating

62. Urgenda Appellate Court Opinion ¶¶ 43, 73–75.
63. *Id.* ¶¶ 45, 73–76.
64. *Id.* ¶¶ 67–69.
65. *Id.* ¶¶ 67–68.
66. *Id.* ¶ 68.
67. Urgenda Supreme Court Opinion ¶ 8.3.5, 9.
68. *Id.* ¶ 2.1 (summarizing facts the parties agree upon, including climate change and its consequences), *see also* ¶¶ 4.1–4.8 (discussing climate change dangers).
69. *Id.* ¶ 8.3.4.
70. *Id.*
71. *Id.*
72. *Id.* ¶¶ 5.3.4, 8.3.4.
73. Lin, *supra* note 21, at 66.

climate change. Both decisions highlight the judiciary's potential to enforce and expand climate policy even when presented with different underlying claims. In both cases, the nations' highest Courts stepped in to ensure government entities met their obligations. As a result, future judges may exhibit greater willingness to engage in judicial activism, especially in areas where governmental action is perceived as inadequate.

A. Understanding Judicial Activism

The term "judicial activism" has been used in different contexts. It is also used differently across countries because not every judiciary has the same core responsibilities.[74] At its core, judicial activism occurs when a judge makes a decision contrary to precedent or "strikes down an action of the popular branches, whether state or federal, legislative, or executive."[75] Generally speaking, if a judge invalidates a government action or goes against precedent, the judge is being an activist.[76] Some definitions, often used in the political sphere, extend the definition to mean that the judge is deciding on their own political viewpoints rather than a proper interpretation of the law.[77] However, most academic writing limits the usage to the willingness to either strike down a government action or overturn precedent, so this article embraces this definition.[78]

Many people criticize judicial activism, with separation of powers principles being a common concern.[79] Critics argue that judicial activism can lead to an overreach of judicial power.[80] United States Supreme Court Justice Antonin Scalia believed that judicial activism is bad for democracy.[81] He argued that judicial activism can undermine the democratic process by allowing unelected judges to make decisions ordinarily reserved for elected

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74. Kermit Roosevelt, *Judicial Activism,* BRITANNICA, https://www.britannica.com/topic/judicial-activism (Feb. 13, 2025).

75. Suzanna Sherry, *A Summary of Why We Need More Judicial Activism*, VAND. UNIV.: VAND. L. SCH. (Mar. 24, 2014, 8:31 AM), https://law.vanderbilt.edu/a-summary-of-why-we-need-more-judicial-activism/.

76. Fuad Zarbiyev, *Judicial Activism in International Law—A Conceptual Framework for Analysis*, 3 J. INT'L DISP. SETTLEMENT 247, 249–50 (2012).

77. Kermit Roosevelt, *Judicial Activism,* BRITANNICA, https://www.britannica.com/topic/judicial-activism (Feb. 13, 2025).

78. *Id.*

79. Jorieke Manenschijn, Defining and Defying Judicial Activism: Why Proceedings Based on Judicial Activism Should Always be Illegitimate 11–12 (2021) (Philosophy (M.A.) thesis, Leiden University) (on file with the Leiden University Library system).

80. *Debating 'Judicial Activism': How Far Should Judges Go*, BRANDEIS UNIV. (Nov. 2010), https://www.brandeis.edu/enact/archive/ethical-inquiry/2010/judicial-activism.html.

81. Douglas Belkin, *Scalia Decries Judicial Activism in Harvard Talk* (Sept. 29, 2004), https://archive.boston.com/news/nation/articles/2004/09/29/scalia_decries_judicial_activism_in_harvard_talk/.

officials.[82] Critics of judicial activism contend that this can destabilize legal and political systems.

The Dutch government in *Urgenda* raised these same concerns. The government argued that questions of climate change policy should be left to elected officials rather than the judiciary.[83] However, the Dutch Court was not concerned in *Urgenda* because elected officials still had control over the means to the mandated ends.[84] Yet, the Court's reasoning has not quieted critics. Since the judicial activism in the *Urgenda* case, a major Dutch political party proposed constitutional reforms that would restrict the judiciary's power.[85]

Critics also point out that judges do not have the necessary understanding and training to create new laws.[86] Multiple United States Supreme Court justices, including Justices Scalia, Kagan, and Roberts, have expressed hesitation toward making new law.[87] Judicial activism has also been criticized as running contrary to *stare decisis*, a core principle creating predictability in courts across the globe.[88] By skirting *stare decisis*, an activist judge may create injustice for a party currently before the court by holding them to a new, unexpected interpretation of the law.[89] Finally, judicial activism may also be used to deny rights to individuals.[90] Because judicial activism simply means ruling against a government's action or precedent, it does not mandate a particular result, meaning it may be used for various purposes.[91]

There are also many proponents of judicial activism who believe it is necessary to address injustices and adapt the law to contemporary needs. They argue that courts have a role in protecting individual rights and ensuring that laws are applied in a way that reflects evolving modern values.[92] First, an activist judiciary can help protect minorities.[93] For example, *Brown v. Board of Education* is a commonly cited United States decision reflecting judicial activism.[94] In *Brown*, the United States Supreme Court declared

82. Belkin, *supra* note 81.
83. Urgenda Appellate Court Opinion ¶¶ 68–69.
84. *Id.* ¶¶ 68–69.
85. Manenschijn, *supra* note 79, at 3.
86. *Debating 'Judicial Activism:' How Far Should Judges Go?, supra* note 80.
87. *Id.*
88. *Id.*; Manenschijn, *supra* note 79, at 10.
89. *Judicial Activism*, CORNELL L. SCH. LEGAL INFO. INST., https://www.law.cornell.edu/wex/judicial_activism (June 2023).
90. *Debating 'Judicial Activism:' How Far Should Judges Go?, supra* note 80.
91. *Id.*
92. *See* Sherry, *supra* note 75 (arguing for more judicial activism).
93. *Debating 'Judicial Activism:' How Far Should Judges Go?, supra* note 80.
94. *Id.* (identifying *Brown v. Board of Education* as a judicial activism case).

racial segregation in public schools unconstitutional, thus protecting the rights of racial minority students.[95]

Additionally, judicial activism can help shape the law to reflect where society currently is (or should be).[96] Throughout history, judges have endorsed a form of judicial activism by emphasizing the court's role in interpreting the United States Constitution considering modern views. For example, in the United States case *Trop v. Dulles*, Chief Justice Earl Warren stated: "The [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[97] Judge Richard Posner has further stated:

> If you look at the entire body of constitutional law, that body of law bears very little resemblance to the text of the Constitution in 1789, 1791, and 1868 . . . . That's the reality. The only useful way to advocate with regard to constitutional law is to give a good contemporary argument for or against a particular interpretation.[98]

There have been similar sentiments around the ECHR, with scholars examining whether the ECHR is a "living instrument."[99] Further, even judges who do not believe themselves to be activist judges likely allow their ideologies, experiences, and prejudices to influence their decisions, suggesting activism may be inevitable.[100]

Further, judicial activism interacts seamlessly with judicial review, which is the power of the court to interpret the law.[101] If a court were always too deferential on review, it could not provide the constitutional safeguard of the judicial branch.[102] Some cases decided by overly deferential courts have turned out to be the most condemned.[103] For example, in *Plessy v. Ferguson*,

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95. Brown v. Bd. of Educ. of Topeka, 347 U.S. 483, 483, 488, 493, 495 (1954).

96. *Debating 'Judicial Activism:' How Far Should Judges Go?, supra* note 80; s*ee also* Sherry, *supra* note 75.

97. Trop v. Dulles, 356 U.S. 86, 101 (1958).

98. Eric J. Segall, *The Constitution Means What the Supreme Court Says It Means*, 129 HARVARD L. REV. 176, 176 (2016).

99. *See, e.g.*, George Letsas, *The ECHR as a Living Instrument: Its Meaning and Legitimacy*, *in* CONSTITUTING EUROPE: THE EUROPEAN COURT OF HUMAN RIGHTS IN A NATIONAL, EUROPEAN AND GLOBAL CONTEXT 106 (Andreas Føllesdal et al. eds., 2013) (examining the nature of the ECHR as "a living instrument that must be interpreted according to present-day conditions").

100. Allison Kilkenny, *Every Judge is an "Activist Judge,"* HUFFPOST, https://www.huffpost.com/entry/every-judge-is-an-activis_b_230696 (May 25, 2011).

101. *See* Sherry, *supra* note 75 ("Judicial review . . . produces one of two possible results: if the court invalidates the government action it is reviewing, then it is being activist; if it upholds the action, it is not.").

102. *Id*.

103. *Id.*

the United States Supreme Court upheld Louisiana's Separate Car Act, which mandated separate train cars for Black and white Americans, thus validating and advancing the "separate but equal" doctrine.[104] While judicial activism may be controversial at times, it has the potential to right societal and environmental harms that a judgment limited to precedent would allow to persist.[105]

B. Judicial Activism & Climate Change Mitigation: Massachusetts *&* Urgenda

Both Courts in *Massachusetts* and *Urgenda* engaged in judicial activism by overturning or correcting government action. Both decisions reflected judicial activism informed by climate science, with the opinions relying heavily on scientific evidence to substantiate the risks posed by climate change and the need for government action. For instance, the *Massachusetts* Court gave a detailed explanation of the connection between human activity and the effects of climate change.[106] The Court also examined climate science and the effects of climate change when evaluating whether Massachusetts had standing.[107] The *Urgenda* case examined the Intergovernmental Panel on Climate Change reports to provide the scientific basis for the required emissions reductions.[108] The *Urgenda* Court also applied the precautionary principle, which advocates for proactive measures in the face of scientific uncertainty, to its decision to impose a 25% GHG reduction.[109]

Both Courts' inclusion and acceptance of climate science as the basis of their activist decisions may encourage other courts to do the same.[110] This approach could lead to more proactive judicial measures aimed at preventing environmental harm before it occurs.[111] Judicial activism, like in

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104. *See* Sherry, *supra* note 75 (identifying *Plessy v. Ferguson* as a universally condemned case of judicial deference); Plessy v. Ferguson, 163 U.S. 537, 540, 542, 548–49 (1896).

105. *See, e.g.*, Don C. Smith, *Environmental Court and Tribunals: Changing Environmental and Natural Resources Law Around the Globe*, 36 J. ENERGY & NAT. RES. L. 137, 137–38 (2018) (providing examples of how certain courts are uniquely positioned to engage in judicial activism to develop a "holistic" approach to climate change).

106. Massachusetts v. EPA, 549 U.S. 497, 507–10 (2007).

107. *Id.* at 521–24.

108. *See* Urgenda Supreme Court Opinion ¶ 2.1 (listing scientific bases for climate change science).

109. *Id.* ¶¶ 7.2.10–11, 8.3.5.

110. Some subsequent decisions similarly relied on climate science, demonstrating how activist judges can set examples for others. *See*, *e.g.*, KlimaSeniorinnen v. Switzerland, App. No. 53600/20, ¶¶ 64–74 (Apr. 9, 2024), https://hudoc.echr.coe.int/eng/?i=001-233206 (citing the Intergovernmental Panel on Climate Change report).

111. *See* Hari M. Osofsky, *Litigation's Role in the Path of U.S. Federal Climate Change Regulation: Implications of* AEP v. Connecticut, 46 VAL. U. L. REV. 447, 454 (2012) (noting the U.S. Supreme Court has presented itself as an arbiter "rather than as a forum for debating climate change science . . . .").

Massachusetts and *Urgenda*, can significantly impact climate change in many ways.[112]

First, like in *Massachusetts*, activist judges can help address regulatory gaps. When existing laws are inadequate to address climate issues, activist judges might interpret them in ways that fill these gaps.[113] This can include expanding the scope of existing environmental statutes to cover emerging climate challenges. The *Massachusetts* Court understood that the United States Congress did not specifically contemplate GHGs when the Clean Air Act was enacted, yet the Court read the definition of "pollutant" to include GHGs, a more contemporary concern.[114] Through engaging in judicial activism, courts can interpret environmental laws to enforce stricter pollution controls or broader conservation measures in light of contemporary concerns.[115] This can have significant impacts on national, and by extension, international GHG emissions.[116]

While activist judges will ideally act in the regulatory sphere to mitigate climate change, there may be concerns that judges may take an activist role against climate change mitigation measures. This concern is particularly felt in the United States following the 2024 *Loper Bright* decision that overruled the *Chevron* doctrine.[117] Although not the topic of this article, to summarize, *Loper Bright* eliminated *Chevron* deference to administrative agencies.[118] Instead, the Court directed judges to exercise their independent judgment to decide whether an agency has acted within its statutory authority.[119] This may open the door to more judicial activism, whether for or against climate change mitigation.[120] However, many fear that more judges will use this

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112. *See, e.g.*, Smith, *supra* note 105, at 137–38 (explaining how certain courts are poised to engage in what some would consider judicial activism to impact climate change).

113. *See* Osofsky, *supra* note 111, at 447–48 (discussing the U.S. Supreme Court's role in expanding EPA's authority to regulate GHGs).

114. Massachusetts v. EPA, 549 U.S. 497, 507, 532 (2007).

115. *Id.* at 532 (forcing EPA to examine GHG under the Clean Air Act).

116. *See, e.g., The Evidence is Clear: The Time for Action is Now. We Can Halve Emissions by 2030*, IPCC (Apr. 4, 2022), https://www.ipcc.ch/2022/04/04/ipcc-ar6-wgiii-pressrelease/ (explaining how targeting certain industries, cities, and neighborhoods can impact global GHG emissions).

117. Loper Bright Enterprises v. Raimondo, 603 U.S. 369, 412 (2024).

118. *Id.*

119. *Id.*

120. *See, e.g.*, *Supreme Court Eliminates Longstanding Legal Principle in Ruling About Fisheries Management*, EARTH JUST. (June 28, 2024), https://earthjustice.org/article/loper-bright-chevron-doctrine-relentless (noting the negative implications of the Loper Bright decision, specifically that it opens the door to judges ignoring agency decisions and replacing with their own judgment); *Environmental Law Implications of Loper Bright and the End of Chevron Deference*, SIDLEY (July 2, 2024), https://environmentalenergybrief.sidley.com/2024/07/02/environmental-law-implications-of-loper-bright-and-the-end-of-chevron-deference/ (noting more regulatory challenges may arise).

ruling to strike down climate change mitigation measures rather than promote them.[121]

Another opportunity for judicial activism is by protecting health and human rights. Judges generally do not have the authority to invent entirely new laws or rights without a legal basis.[122] Judges can, however, interpret existing legal frameworks to shape jurisprudence that is conducive to positive climate policies.[123] Therefore, judicial activism can lead to decisions that protect public health and individual rights in the context of climate change. The *Urgenda* decision falls into this category. By identifying and enforcing the ECHR, the *Urgenda* Court protected the rights of Dutch citizens related to climate change.[124] As discussed below, subsequent court decisions have followed this line of activism, and future courts might continue to rule that climate change impacts infringe on human rights. The European Court of Human Rights, in particular, has been viewed as inclined toward activism in this regard.[125]

Second, judicial rulings can shift public and political conversations about climate change.[126] High-profile judicial activism cases specifically bring greater attention to environmental issues, which may accelerate policy changes or inspire new legislation.[127] Both *Massachusetts* and *Urgenda* impacted public and political conversations. *Massachusetts*, on its face, affirmed EPA's regulatory authority; but more broadly, it enhanced awareness of how judges can impact regulatory practices and fueled debates over environmental regulation and policy.[128] Its impact influenced the 2015

121. *See, e.g., In the Wake of the Chevron Decision*, YALE SCH. OF THE ENV'T (July 16, 2024), https://environment.yale.edu/news/article/wake-chevron-decision (summarizing environmental law professors' reactions to *Loper Bright*).

122. *See, e.g.*, Am. Elec. Power Co., Inc. v. Connecticut, 564 U.S. 410, 415 (2011) (holding private corporations cannot be sued for GHG emissions under current U.S. law and declining to create new laws).

123. Heather Colby et al., *Judging Climate Change: The Role of the Judiciary in the Fight Against Climate Change*, 7 OSLO L. REV. 168, 180–81 (2020).

124. Urgenda Supreme Court Opinion ¶ 8.3.4.

125. *See generally* Marko Bosnjak & Kacper Zajac, *Judicial Activism and Judge-Made Law at the ECtHR*, 23 HUM. RTS. L. REV. 1, 2 (2023) (summarizing the European Court of Human Rights as an activist court).

126. *See generally* Joana Setzer & Lisa C. Vanhala, *Climate Change Litigation: A Review of Research on Courts and Litigants in Climate Governance*, 10 WIREs CLIMATE CHANGE, Mar. 4, 2019, at 7–8 (discussing the role of courts and litigation in political and public discourse).

127. *See* Diya Kraybill, *Global Climate Change Litigation: A New Class of Litigation on the Rise*, 3 PRINCETON LEGAL J. F., Winter 2023, at 23, 26, https://legaljournal.princeton.edu/wp-content/uploads/sites/826/2024/05/3-Prin.L.J.F.-23.pdf (noting that, although not always successful, climate litigation can spur government action).

128. Liz Mineo, *How and Why the Supreme Court Made Climate-Change History*, HARVARD GAZETTE (Apr. 22, 2020), https://news.harvard.edu/gazette/story/2020/04/massachusetts-v-epa-opened-the-door-to-environmental-lawsuits/.

Paris Accord, where 195 nations agreed to reduce GHG emissions.[129] *Urgenda* established a legal precedent that inspired similar lawsuits in other countries while increasing government accountability. The case generated significant media and academic attention, highlighting the intersection of law, politics, and environmental policy.[130] It certainly stimulated discussions within the Netherlands about the adequacy of governmental climate commitments across the globe.[131] After the first judgment, the idea that climate change is a governmental responsibility generally spread faster in the Netherlands than in the European Union.[132]

Finally, environmental groups and activists often use courts to push for climate actions, arguing that governments are failing to meet their obligations to address climate change.[133] Courts can then compel governments to act on climate change if they find that current policies or inaction violate constitutional or statutory mandates.[134] The *Massachusetts* Court held that EPA had not been complying with its statutory mandate, emphasizing an obligation under the Clean Air Act.[135] The *Urgenda* Court set a specific GHG emission-reduction mandate for the government to achieve.[136] The Dutch government fell just short of the *Urgenda* mandate, but that still represented an improvement in GHG emission reduction.[137] Both cases demonstrate that activist courts have the potential to compel governments to take action on climate change and could be used to advance climate goals.

Specifically, judicial activism can serve as a mechanism for advancing environmental goals when the legislative and executive branches are slow to act. It can also serve as a catalyst for additional litigation and future judicial activism. As discussed below, both *Massachusetts* and *Urgenda* inspired

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129. Mineo, *supra* note 128; Sam Evans-Brown, *Outside/In: How Massachusetts v. EPA Forced the U.S. Government to Take on Climate Change*, N.H. PUB. RADIO (May 8, 2021), https://www.nhpr.org/environment/2021-05-08/outside-in-how-massachusetts-v-epa-forced-the-u-s-government-to-take-on-climate-change.

130. *See e.g.*, Jacqueline Peel et al., *Shaping the "Next Generation" of Climate Change Litigation in Australia*, 41 MELBOURNE UNIV. L. R. 739, 805 (2017) (discussing how the *Urgenda* decision influenced Australia's perspective on climate change litigation).

131. Benoit Mayer, *The Contribution of* Urgenda *to the Mitigation of Climate Change*, 35 J. ENV'T L. 167, 180 (2022).

132. *Id.* at 180–81 (citing data compiled from Eurobarometer).

133. *See* Isabella Kaminski, *The Legal Battles Changing the Course of Climate Change*, BBC (April 10, 2024), https://www.bbc.com/future/article/20231208-the-legal-battles-changing-the-course-of-climate-change (discussing increasing lawsuits advocating for climate change mitigation).

134. *See* Louis J. Kotze & Anel du Plessis, *Putting Africa on the Stand: A Bird's Eye View of Climate Change Litigation on the Continent*, 50 ENV'T L. 615, 623 (2020) (explaining that some environmental litigation arises to compel government action).

135. Massachusetts v. EPA, 549 U.S. 497, 532–33 (2007).

136. Urgenda Supreme Court Opinion ¶ 8.3.4.

137. By the end of 2020, the Netherlands reduced its emissions by approximately 24.5% compared to 1990 levels. Mayer, *supra* note 131, at 170–71.

additional climate change actions. Some of the subsequent cases were instances of judicial activism themselves.[138] As of July 2024, there are over 2,500 climate lawsuits globally—many have the potential for judicial activism to positively impact climate change mitigation across the globe.[139]

III. THE RIPPLE EFFECT

Although the legal bases were distinct in *Massachusetts* and *Urgenda*, both helped set off a ripple effect that extended beyond their jurisdictions. *Massachusetts* demonstrated how to mobilize national regulatory frameworks to address climate change. *Urgenda* demonstrated how to apply international human rights law in domestic courts. Through inspiring future litigation, these cases could promote the harmonization of climate-related legal standards and the adoption of more rigorous climate policies internationally. This can lead to a more coordinated global response to climate change, facilitated through judicial channels. The widespread reach of each case also suggests they might influence future judges to engage in judicial activism, as defined and discussed below.

A. Massachusetts v. Environmental Protection Agency

The *Massachusetts* Court used the broad language of the Clean Air Act to mandate that EPA regulate GHGs unless EPA could justify its decision.[140] Broadly, this decision confirmed that existing environmental statutes like the Clean Air Act can be interpreted to include regulating GHGs. After *Massachusetts*, it seemed possible that courts could be more willing to interpret existing statutory provisions expansively to address climate change and other environmental challenges.[141] This could potentially lead to increased litigation to encourage regulatory action by agencies tasked with environmental protection.

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138. *See, e.g.*, KlimaSeniorinnen and Others v. Switzerland, App. No. 53600/20 (April 9, 2024) https://hudoc.echr.coe.int/eng?i=001-233206; *see also* KlimaSeniorinnen v. Switzerland, CLIMATE CHANGE LITIG. DATABASES, https://climatecasechart.com/non-us-case/union-of-swiss-senior-women-for-climate-protection-v-swiss-federal-council-and-others/# (last visited Feb. 28, 2025) (summarizing basis for case before the European Court of Human Rights).

139. JOANA SETZER & CATHERINE HIGHAM, GLOBAL TRENDS IN CLIMATE CHANGE LITIGATION: 2024 SNAPSHOT 10 (June 2024).

140. Massachusetts, 549 U.S. at 534–35.

141. *See, e.g.*, Johnathan H. Adler, *Massachusetts v. EPA Heats Up Climate Policy No Less than Administrative Law: A Comment on Professors Watts and Wildermuth*, 102 NORTHWESTERN UNIV. SCH. L. 32, 37 (2007) (highlighting EPA's likely obligation to reevaluate their regulations under the CAA to encompass GHGs).

However, more recent cases call into question this potential increase in courts encouraging regulatory action. For example, *West Virginia v. Environmental Protection Agency*, a 2022 United States Supreme Court case, limited agency authority.[142] This case focused on the scope of EPA's authority under the Clean Air Act to implement the federal Clean Power Plan.[143] The Clean Power Plan aimed to reduce carbon dioxide emissions from power plants by setting state-specific targets and encouraging a shift to renewable energy sources.[144] The Court addressed two key issues: (1) whether EPA has authority under the Clean Air Act to implement the Clean Power Plan's approach, which involved regulating emissions beyond individual power plants by setting state-level goals; and (2) whether EPA's regulatory actions constituted a major question requiring clear congressional authorization, given the economic and political significance of regulating power plant emissions.[145]

The Court held that EPA overstepped its authority under the Clean Air Act by attempting to regulate GHG emissions through the Clean Power Plan without explicit congressional authorization.[146] Specifically, the Court applied the major questions doctrine, emphasizing that significant regulatory decisions affecting the economy require clear authorization from Congress.[147] The ruling limited EPA's ability to use the Clean Air Act to enforce broad emissions reductions at a systemic level.[148]

West Virginia had a chilling effect on environmentalists' high hopes after *Massachusetts*. It restricted federal agencies' ability to interpret broadly-worded statutes to implement significant policy changes.[149] It also hindered the federal government's ability to address large-scale climate change through regulatory actions alone, potentially requiring new legislation from Congress to achieve substantial GHG reductions.[150] Additionally, it opened the door to more litigation aimed at reducing the government's regulatory authority.[151] The decision has profound implications for environmental regulation, climate policy, and the broader landscape of administrative law in the United States.

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142. West Virginia v. EPA, 597 U.S. 697 (2022).
143. *Id.* at 706.
144. *See id.* at 714–716 (discussing Clean Power Plan generally).
145. *Id.* at 706, 732.
146. *Id.* at 735.
147. *Id.* at 732.
148. Shay Dvoretzky et al., *West Virginia v. EPA: Implications for Climate Change and Beyond*, SKADDEN INSIGHTS (Sept. 2022), https://www.skadden.com/insights/publications/2022/09/quarterly-insights/west-virginia-v-epa.
149. *Id.* (relating to the major questions doctrine).
150. *Id.*
151. *Id.*

However, *Massachusetts* remains a viable option for future regulatory litigation. After *West Virginia*, EPA still has the authority to regulate GHGs on a more individual level.[152] *Massachusetts* remains an example of broad statutory language mandating agency action.[153] Several subsequent cases built on the themes and arguments in *Massachusetts* to reinforce EPA's authority to regulate GHGs.

For example, in *American Electric Power Co. v. Connecticut*, the United States Supreme Court heard a case in which eight states, New York City, and three land trusts sued four power companies and the federal Tennessee Valley Authority.[154] The plaintiffs in the case asserted federal common-law public nuisance claims.[155] The Court specifically considered whether the plaintiffs could maintain the claims or if EPA actions displaced common-law rights.[156] The Court held that the Clean Air Act displaced federal common law claims for GHGs and affirmed that EPA is the primary authority to regulate those emissions, noting: "*Massachusetts* made plain that emissions of carbon dioxide qualify as air pollution subject to regulation under the [Clean Air] Act."[157]

As another example, in *Utility Air Regulatory Group v. Environmental Protection Agency*, the United States Supreme Court considered a challenge to EPA's authority under the Clean Air Act's permit requirements.[158] Specifically, the Court examined whether it was permissible for EPA to determine that motor-vehicle GHG regulations automatically triggered Clean Air Act permitting requirements for stationary sources that emit GHGs.[159] Ultimately, the Court upheld EPA's authority to regulate GHGs from stationary sources, allowing the agency to consider GHGs in permitting as long as the source required a permit for other pollutants.[160]

The principles of *Massachusetts* can also be seen in international climate change litigation. Cases after *Massachusetts* used different legal frameworks to compel government action in the regulatory sphere. For example, in *Earthlife Africa Johannesburg v. Minister of Environmental Affairs and Others*, Earthlife Africa challenged the approval of a coal-fired power plant in South Africa, arguing that the environmental impact assessment failed to

152. Dvoretzky et al., *supra* note 148.

153. *Massachusetts v. EPA*, 549 U.S. 497, 532–35 (2007).

154. Am. Elec. Power Co., v. Connecticut, 564 U.S. 410, 415 (2011).

155. *Id.*

156. *Id.* at 415, 424.

157. *Id.* However, by using EPA's authority to preempt the nuisance claim, the Court also limited the types of cases that might be used to impact climate change mitigation.

158. Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 307 (2014).

159. *Id.*

160. *Id.* at 333–34. However, the Court also ruled that EPA could not require permits solely based on GHGs. *Id.*

consider climate change impacts.[161] The Gauteng Division of the High Court of South Africa agreed, ruling that the environmental impact assessment must include an evaluation of climate change impacts.[162] This case emphasized the importance of integrating climate considerations into regulatory approvals.

In *DUH and BUND v. Germany*, Friends of the Earth Germany submitted a claim with the Berlin-Brandenburg Higher Administrative Court because Germany missed its emission targets for the building and transport sectors.[163] The plaintiffs argued that the sectors exceeded their permissible emissions, meaning they are required to draft an emergency program to quickly reduce their emissions.[164] The Berlin-Brandenburg Higher Administrative Court ruled that the government must adopt an immediate action program to meet emission targets between 2024 and 2030.[165]

Ultimately, the activist Court in *Massachusetts* continues to have great potential to propel government action in the regulatory and regulatory-adjacent spheres. *Massachusetts* and subsequent decisions also illustrate the role of activist judges in shaping climate change policies. Although countries have different regulatory entities, many activist judges have the potential to compel regulatory action within the context of broad statutory language, like the *Massachusetts* Court.

B. Urgenda Foundation v. State of the Netherlands

While the Dutch government fell slightly short of the Court's mandate,[166] *Urgenda* underscored the legal responsibility of governments to protect their citizens from climate change effects. The decision set an influential precedent for climate litigation worldwide, particularly in the human rights sphere.[167] By grounding its decision in international human rights law, specifically the

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161. Earthlife Africa Johannesburg v. Minister of Env't Affs., 2017 (1) SA 519 (GNP) at para. 4 (S. Afr.).

162. *Id.* at paras. 98, 126.3.

163. Oberverwaltungsgericht [OVG] [Higher Administrative Court] Nov. 20, 2023, 11 A 11/22 (Ger.); *DUH and BUND v. Germany*, CLIMATE CHANGE LITIG. DATABASES, https://climatecasechart.com/non-us-case/bund-v-germany/ (summarizing case background and outcome).

164. *DUH and BUND v. Germany*, CLIMATE CHANGE LITIG. DATABASES, https://climatecasechart.com/non-us-case/bund-v-germany/ (summarizing case background and outcome).

165. *Id.*

166. Mayer, *supra* note 131, at 171. By the end of 2020, the Netherlands reduced its emissions by approximately 24.5% compared to 1990 levels. *Id.*

167. *See* Roger Cox*, A Climate Change Litigation Precedent Urgenda Foundation v The State of the Netherlands*, CIGI PAPERS, Nov. 2015, at 13 (discussing the potential for *Urgenda* to influence other courts). *But see* Mayer *supra* note 131 at 179-80 (acknowledging that courts of some other countries did not follow suit in imposing specific emissions reduction mandates on government actors).

ECHR, the Court emphasized the government's duty to protect the life and well-being of its citizens from the impacts of climate change.[168] This opened a legal pathway for climate litigation based on human rights violations. It could also expand the scope of judicial review to include evaluating the adequacy of governmental policies against human rights standards.

Since the Hague Court of Appeal decision in *Urgenda* in 2015, multiple human rights cases have been filed internationally. For example, in *Notre Affaire a Tous and Others v. France*, the Administrative Court of Paris considered a case where a coalition of NGOs filed against the French government.[169] Specifically, the plaintiffs argued that the French government failed to meet its climate change commitments, resulting in environmental and human rights violations.[170] The Court found the French government liable for failing to meet its climate commitments, ruling the government's inaction infringed upon the right to live in a healthy environment.[171]

In *Sacchi v. Argentina, Brazil, France, Germany, & Turkey*, 16 youth activists, including Greta Thunberg, filed a complaint arguing defendants' failure to take adequate action violated the youth activists' rights under the United Nations Convention on the Rights of the Child.[172] This included the rights to life, health, and culture.[173] The petitioners specified a number of harms, such as severe asthma attacks from smog, impacts to an indigenous community's traditional reliance on reindeer herding, and impacts of sea level rise on island culture.[174] The United Nations Committee on the Rights of the Child ruled that, while climate change is a children's rights issue, the case was inadmissible due to procedural errors.[175] Specifically, the youth activists had not exhausted their domestic remedies.[176]

Multiple cases have also used the same legal basis as *Urgenda* (ECHR Articles 2 and 8) with varying degrees of success. For instance, in *Greenpeace Nordic and Others v. Norway*, environmental organizations challenged the Norwegian government's decision to issue oil drilling licenses in the Barents Sea.[177] The plaintiffs argued the decision violated their

168. Urgenda Supreme Court Opinion ¶ 8.3.4.

169. Tribunal Administratif [TA] [Administrative Court] Paris, Feb. 3, 2021, No. 1904967, 1904968, 1904972, 1904976/4-1 (Fr.).

170. *Id.* at 24–25.

171. *Id.* at 37.

172. Brief for Petitioner ¶¶ 24–30, Sacchi et al. v. Argentina, Brazil, France, Germany, & Turkey, Comm. on the Rights of the Child, Communication No. 104/2019 (Sept. 23, 2019).

173. *Id.* ¶ 25–27.

174. *Id.* ¶¶ 112, 138, 121–25.

175. Sacchi et al. v. Argentina, Brazil, France, Germany, & Turkey, Communication 104/2019, Comm. on the Rights of the Child, ¶¶ 10.14, 10.21 (Sept. 22, 2021).

176. *Id.* ¶ 10.21.

177. Greenpeace Nordic Ass'n & Nature and Youth v. Ministry of Petroleum and Energy, HR-2020-2472-P, Case No. 20-051052SIV-HRET, ¶ 6 (Sup. Ct. of Nor., 2020).

constitutional rights to a healthy environment, Norway's commitments under the Paris Agreement, and Articles 2 and 8 of the ECHR.[178] The Norwegian Supreme Court ruled in favor of the government, finding the drilling licenses did not breach the constitution or the ECHR.[179] However, the plaintiffs have appealed to the European Court of Human Rights, narrowing their arguments to Articles 2 and 8 of the ECHR.[180] If the court takes the case, it could further clarify the relationship between resource extraction, climate change, and human rights.

Another case invoking the ECHR is *Carême v. France*.[181] In that case, Carême, the former mayor of Grande-Synthe, France, filed a case against the French government, arguing its inadequate climate policies violated his and his constituents' rights.[182] The Council of State accepted the application from the municipality but not from Carême as an individual.[183] It found for the municipality and ordered the government to take additional measures to reduce GHG emissions by 2022 to achieve the goal of reducing GHG emissions 40% by 2030.[184] Carême appealed his individual case to the European Court of Human Rights, arguing ECHR Article 8 violations had occurred.[185] In April 2024, the European Court dismissed his claim because he no longer lived in France or had relevant links with Grande-Synthe.[186]

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178. Greenpeace Nordic Ass'n & Nature and Youth v. Ministry of Petroleum and Energy, HR-2020-2472-P, Case No. 20-051052SIV-HRET, ¶¶ 3, 5 (Sup. Ct. of Nor., 2020).

179. *Id.* at ¶¶ 29–30.

180. Greenpeace Nordic Ass'n & Others v. Norway, App. No. 34068/21 (Eur. Ct. of Hum. Rts., filed June 8, 2021) (pending); *see also Greenpeace Nordic and Others v. Norway*, CLIMATE CHANGE LITIG. DATABASES, https://climatecasechart.com/non-us-case/greenpeace-nordic-assn-v-ministry-of-petroleum-and-energy-ecthr/ (last visited Feb. 18, 2025) (summarizing basis for case before the European Court of Human Rights).

181. Carême v. France, App. No. 7189/21, (Apr. 9, 2024), https://hudoc.echr.coe.int/eng?i=001-233174.

182. Conseil D'État [CE] [Council of State], July 1, 2021, No. 427301, ¶¶ 1, at 3–4 (Fr.); *see Commune de Grande-Synthe v. France*, CLIMATE CHANGE LITIG. DATABASES, https://climatecasechart.com/non-us-case/commune-de-grande-synthe-v-france/ (last visited Mar. 1, 2025) (summarizing basis for case presented to the French Council of State).

183. Carême v. France, App. No. 7189/21, ¶ 28 (Apr. 9, 2024), https://hudoc.echr.coe.int/eng?i=001-233174.

184. Conseil D'État [CE] [Council of State], July 1, 2021, No. 427301, at 4 (Fr.); Commune de Grande-Synthe v. France, CLIMATE CHANGE LITIG. DATABASES, https://climatecasechart.com/non-us-case/commune-de-grande-synthe-v-france/ (last visited Mar. 1, 2025) (providing English summary).

185. Carême v. France, App. No. 7189/21, ¶¶ 3–4 (Apr. 9, 2024), https://hudoc.echr.coe.int/eng?i=001-233174; *see also* Carême v. France, CLIMATE CHANGE LITIG. DATABASES, https://climatecasechart.com/non-us-case/careme-v-france/ (last visited Mar. 1, 2025) (summarizing basis for case before the European Court of Human Rights).

186. Carême v. France, App. No. 7189/21, ¶¶ 81–85, 88 (Apr. 9, 2024), https://hudoc.echr.coe.int/eng?i=001-233174.

In 2020, six Portuguese youth filed a lawsuit against 33 European countries in *Duarte Agostinho v. Portugal*.[187] Their complaint alleged that the countries violated Articles 2, 8, and 14 of the ECHR, which include the rights to life, privacy, and not to experience discrimination.[188] Specifically, they claimed their rights were violated by the failure to address climate change, causing adverse and dangerous effects.[189] The European Court of Human Rights dismissed the complaint on jurisdictional and procedural grounds.[190] It found that territorial jurisdiction was only proper with respect to Portugal, and the applicants did not exhaust their domestic remedies there.[191]

As a final example, another case argued before the European Court of Human Rights is *KlimaSeniorinnen [Senior Swiss Women for Climate Protection] v. Switzerland*.[192] The case involved a group of Swiss senior women who argued that the Swiss government's inadequate climate policies violated their rights under the ECHR.[193] The Swiss Supreme Court held in favor of the government.[194] Having exhausted all available national remedies, the petitioners filed the case in the European Court of Human Rights.[195] The women argued that climate change had a disproportionate impact on older women, potentially setting an important precedent for addressing age and gender impacts as they relate to climate change and human rights.[196]

In April 2024, the European Court of Human Rights found a violation of the women's Article 8 right to respect for private and family life.[197] Specifically, the Court found that Switzerland failed to comply with its

187. Duarte Agostinho v. Portugal, App. No. 39371/20, ¶ 1 (April 9, 2024), https://hudoc.echr.coe.int/eng?i=001-233261; *see Duarte Agostinho v. Portugal,* CLIMATE CHANGE LITIG. DATABASES, https://climatecasechart.com/non-us-case/youth-for-climate-justice-v-austria-et-al/ (summarizing basis for case before the European Court of Human Rights).

188. Duarte Agostinho v. Portugal, App. No. 39371/20, ¶ 3 (Apr. 9, 2024), https://hudoc.echr.coe.int/eng?i=001-233261.

189. *Id.* ¶¶ 13–14.

190. *Id.* ¶ 231(1)–(4).

191. *Id.* ¶ 231(3)–(4).

192. KlimaSeniorinnen v. Switzerland, App. No. 53600/20, 1, 8, 10 at ¶ 9 (Apr. 9, 2024), https://hudoc.echr.coe.int/eng?i=001-233206.

193. *Id.* ¶ 1, 3; *see KlimaSeniorinnen v Switzerland (ECtHR)*, CLIMATE CHANGE LITIG. DATABASES (2020), https://climatecasechart.com/non-us-case/union-of-swiss-senior-women-for-climate-protection-v-swiss-federal-council-and-others/# (summarizing basis for case before the European Court of Human Rights).

194. *Id.*

195. *KlimaSeniorinnen v. Switzerland (ECtHR)*, CLIMATE CHANGE LITIG. DATABASES, https://climatecasechart.com/non-us-case/union-of-swiss-senior-women-for-climate-protection-v-swiss-federal-council-and-others/# (last visited Feb. 18, 2025).

196. KlimaSeniorinnen v. Switzerland, App. No. 53600/20, ¶ 24.

197. *Id.* ¶ 481, 574.

affirmative duties under the ECHR concerning climate change.[198] The Court identified gaps in establishing a domestic regulatory framework and a failure to meet past GHG emission targets.[199]

Following the *Urgenda* Court of Appeal decision, these cases represent a growing trend of invoking human rights as a basis for demanding stronger climate action and holding governments accountable for their environmental responsibilities. Three years after the first *Urgenda* decision, the United Nations Human Rights Committee confirmed that the right to life listed in the International Covenant on Civil and Political Rights includes affirmative obligations for nations to act against climate change, further cementing *Urgenda*'s reasoning. [200] This, in addition to the subsequent cases, demonstrates the evolving global legal landscape, where human rights law increasingly intersects with environmental protection. The judicial activism in *Urgenda* and cases like it have helped solidify that connection.

CONCLUSION

Years later, the *Massachusetts* and *Urgenda* decisions remain landmark cases in climate litigation. While the legal frameworks behind each of these decisions differ, judicial activism links them. The idea of judicial activism is not new, but *Massachusetts* and *Urgenda* are examples of how far the influence of an activist judge can reach in setting climate policy. The cases that build on *Massachusetts* and *Urgenda* demonstrate the global impact of just two activist courts. Some of the resulting decisions are definitionally judicial activism themselves, illustrating the cascading effect a court can have on climate change mitigation.

To be clear, an activist court does not automatically mean that there will be a ruling in favor of climate change mitigation. However, *Massachusetts* and *Urgenda* demonstrate that there is a great opportunity for the judiciary to drive positive change in the climate change mitigation sphere. Environmental advocates can only hope that activist judges exercise their judgment responsibly to counteract humanity's impact on our planet.

198. KlimaSeniorinnen v. Switzerland, App. No. 53600/20, ¶¶ 573–74.

199. *Id.* ¶ 573.

200. United Nations Human Rights Committee, International Covenant on Civil and Political Rights, General Comment No. 36 Article 6: Right to Life, ¶ 62, CCPR/C/GC/36 (Sept. 3, 2019) (Comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights on the right to life).