

# Climate Change, Federal Paralysis, and the State Attorneys General: The Case for Establishing Climate Preservation Units

Dewey Warner\*

I. INTRODUCTION.....	986
II. THE CLIMATE CRISIS AND ITS RESPONSES .....	990
A. The Current State of the Climate Crisis .....	990
B. Abdication at the National Level .....	995
C. State and Local Climate Change Mitigation Efforts .....	1002
III. THE STATE ATTORNEY GENERAL .....	1005
A. History of the Office .....	1006
B. Authority, Duties, and Operations of State Attorneys General....	1007
C. State Attorneys General and Climate Change.....	1012
IV. THE PROMISE OF CLIMATE PRESERVATION UNITS .....	1013
A. Core Functions .....	1016
1. Litigation.....	1017
2. Intrastate Advising .....	1019
3. Engagement with Other Levels of Government.....	1020
4. Public Outreach.....	1023
B. Challenges and Benefits.....	1024
1. Logistical Considerations.....	1024
2. Political Considerations .....	1026
C. State Variation.....	1030
V. CONCLUSION.....	1032

---

\* J.D. Candidate, 2023; Note & Comment Editor, *Arizona State Law Journal*, 2022–23. Thank you to Professor Justin Weinstein-Tull for invaluable guidance and mentorship. Many thanks also to former Arizona Attorney General Terry Goddard for providing inspiration and teaching me about this fascinating office. I am especially grateful to the Staff Writers and Editors of the *Arizona State Law Journal* for their indispensable work preparing this piece for publication. For her endless patience and encouragement, I thank my partner Elizabeth.

## I. INTRODUCTION

“Our planet is a lonely speck in the great enveloping cosmic dark. In our obscurity, in all this vastness, there is no hint that help will come from elsewhere to save us from ourselves.”<sup>1</sup> Less than three decades after Carl Sagan penned this warning, the responsibility “to preserve and cherish . . . the only home we’ve ever known”<sup>2</sup> is illuminated in stark and tragic fashion by the effects of a rapidly changing climate. Extreme weather events are more frequent and severe.<sup>3</sup> A mass extinction is underway.<sup>4</sup> Tens of millions face

---

1. CARL SAGAN, PALE BLUE DOT: A VISION OF THE HUMAN FUTURE IN SPACE 7 (1994).

2. *Id.*

3. *See* INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2021: THE PHYSICAL SCIENCE BASIS, SUMMARY FOR POLICYMAKERS 8–11 (2021) [hereinafter IPCC SIXTH ASSESSMENT REPORT I], [https://www.ipcc.ch/report/ar6/wg1/downloads/report/IPCC\\_AR6\\_WGI\\_SPM\\_final.pdf](https://www.ipcc.ch/report/ar6/wg1/downloads/report/IPCC_AR6_WGI_SPM_final.pdf) [https://perma.cc/UUU5-LT8R]

(Working Group I’s Contribution to the Sixth Assessment Report of the IPCC, describing human-induced increases in the frequency and severity of “weather and climate extremes in every region across the globe,” including “heatwaves, heavy precipitation, droughts, and tropical cyclones”); *see also* INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2022: IMPACTS, ADAPTATION AND VULNERABILITY, SUMMARY FOR POLICYMAKERS (2022) [hereinafter IPCC SIXTH ASSESSMENT REPORT II], [https://www.ipcc.ch/report/ar6/wg2/downloads/report/IPCC\\_AR6\\_WGII\\_SummaryForPolicymakers.pdf](https://www.ipcc.ch/report/ar6/wg2/downloads/report/IPCC_AR6_WGII_SummaryForPolicymakers.pdf) [https://perma.cc/G3HE-HBVG] (Working Group II’s Contribution to the Sixth Assessment Report, focusing on climate change’s effects and possible adaptive measures).

4. *See generally* ELIZABETH KOLBERT, THE SIXTH EXTINCTION: AN UNNATURAL HISTORY (2014) (detailing the ongoing rapid and widespread loss of life on Earth—only the sixth such event in the planet’s history—due to effects of human activity, including climate change).

famine.<sup>5</sup> A heightened risk of disease threatens the entire human population.<sup>6</sup> The phrase “climate refugees” has entered the popular lexicon.<sup>7</sup>

Scientific evidence has for decades warned of the dire threat posed by human-induced climate change.<sup>8</sup> Consensus increasingly raises the alarm over the narrowing window of time available for humans to mitigate the effects of climate change.<sup>9</sup> Policymakers, private industry, and the American public understand this threat—both its causes and potential solutions.<sup>10</sup> Yet this broad awareness has not sparked national action in the United States

---

5. See, e.g., *Famine Knocking at the Door of 41 Million Worldwide, WFP Warns*, UN NEWS (June 22, 2021), <https://news.un.org/en/story/2021/06/1094472> [<https://perma.cc/92JY-MDX8>] (citing World Food Programme analysis that “[h]unger has risen due to conflict, climate change and economic shocks”); Wanjohi Kabukuru, *UN: Africa, Already Suffering from Warming, Will See Worse*, AP NEWS (Mar. 2, 2022), <https://apnews.com/article/climate-change-impacts-africa-f3ce8833ec7620d4d7fbca014981bf63> [<https://perma.cc/D9X2-NFM9>] (“If the world warms just another degree Celsius . . . by 2050, an additional 1.4 million African children will suffer severe stunting from malnutrition that limits growth and cognitive development . . .”).

6. See Abrahm Lustgarten, *How Climate Change Is Contributing to Skyrocketing Rates of Infectious Disease*, PROPUBLICA (May 7, 2020, 05:00 AM), <https://www.propublica.org/article/climate-infectious-diseases> [<https://perma.cc/K2XL-WHZQ>] (“Climate change is making outbreaks of disease more common and more dangerous.”).

7. See, e.g., Tim McDonnell, *The Refugees the World Barely Pays Attention to*, NPR (June 20, 2018, 11:25 AM), <https://www.npr.org/sections/goatsandsoda/2018/06/20/621782275/the-refugees-that-the-world-barely-pays-attention-to> [<https://perma.cc/4KQB-ML3E>] (“Climate refugees pose a number of unique challenges for international policymakers compared to those displaced by persecution . . . . While some people, like the Puerto Ricans displaced by Maria, are affected by a specific disaster, many others are forced to move because of slow-onset changes like sea level rise and desertification, which can make it hard to identify them as climate refugees.”); Abrahm Lustgarten, *The Great Climate Migration*, N.Y. TIMES MAG. (July 23, 2020), <https://www.nytimes.com/interactive/2020/07/23/magazine/climate-migration.html> [<https://perma.cc/ZRD2-QT4H>] (“Without a decent plan for housing, feeding and employing a growing number of climate refugees, cities on the receiving end of migration can never confidently pilot their own economic future.”).

8. See *infra* Section II.A.

9. See *id.*

10. See *infra* Part II and Section III.C; see also Alec Tyson, *On Climate Change, Republicans Are Open to Some Policy Approaches, Even as They Assign the Issue Low Priority*, PEW RSCH. CTR. (July 23, 2021), <https://www.pewresearch.org/fact-tank/2021/07/23/on-climate-change-republicans-are-open-to-some-policy-approaches-even-as-they-assign-the-issue-low-priority/> [<https://perma.cc/RS8H-7KDR>] (describing survey results that indicate significant concern about climate change among Americans identifying as Democrats, and, among Republicans, greater concern about climate change from younger and more moderate individuals).

commensurate with the crisis.<sup>11</sup> Urgently needed solutions remain elusive in the face of persistent obstacles.<sup>12</sup> With the notable exception of the Inflation Reduction Act of 2022 (IRA),<sup>13</sup> slim political majorities in Congress have proven unable or unwilling to enact meaningful climate legislation, in some cases pursuing courses of action more likely to worsen climate change.<sup>14</sup> Successive ideological swings in the executive branch have generated inconsistent approaches toward the crisis, with federal agencies embarking on dizzying shifts in their climate-related activities and priorities.<sup>15</sup> Underscoring this executive branch inconsistency, the U.S. joined, withdrew from, and rejoined the Paris Agreement within just five years.<sup>16</sup> Efforts to combat climate change through litigation have largely faced an unreceptive

---

11. See *infra* Section II.B.

12. See *id.*

13. Pub. L. No. 117-169 (2022). See also Jim Tankersley, *Biden Signs Expansive Health, Climate and Tax Law*, N.Y. TIMES (Aug. 16, 2022), <https://www.nytimes.com/2022/08/16/business/biden-climate-tax-inflation-reduction.html> [<https://perma.cc/H79T-VDAS>] (“[The IRA] passed the House and Senate . . . entirely along party lines, as Democrats employed a legislative process to bypass a Republican filibuster.”); Sarah Kuta, *What the Inflation Reduction Act Hopes To Do About Climate Change*, SMITHSONIAN MAG. (Aug. 18, 2022), <https://www.smithsonianmag.com/smart-news/us-to-invest-370-billion-to-tackle-climate-change-180980596/> [<https://perma.cc/54CT-XD6Q>] (“[T]he new statute represents the largest investment the U.S. has made toward combating climate change to date . . .”).

14. See *infra* Section II.B; see also Coral Davenport, *Senate Approves Keystone XL Pipeline Bill, Testing Obama*, N.Y. TIMES (Jan. 29, 2015), <https://www.nytimes.com/2015/01/30/us/politics/keystone-xl-pipeline-bill-senate-vote.html> [<https://perma.cc/D4G2-5V7M>]; Elizabeth Kolbert, *The G.O.P.’s War on Science Gets Worse*, NEW YORKER (May 6, 2015), <https://www.newyorker.com/news/daily-comment/gop-war-on-science-gets-worse> [<https://perma.cc/LSC5-KMDW>] (describing approvals by the House Science, Space, and Technology Committee for major funding cuts to NASA’s earth-science program, the National Science Foundation’s geosciences program, and Department of Energy programs researching new energy sources); Timothy Cama, *House Votes To Condemn Carbon Tax*, HILL (June 10, 2016), <https://thehill.com/policy/energy-environment/283029-house-condemns-carbon-tax> [<https://perma.cc/Y8UB-J24H>]; Scott Waldman, *House Science Committee Calls on Alt-Science To Drive Policy*, SCI. AM. (Mar. 29, 2017), <https://www.scientificamerican.com/article/house-science-committee-calls-on-alt-science-to-drive-policy/> [<https://perma.cc/VNU2-MKY7>] (“Today, the House Science, Space and Technology Committee will hold a hearing that will frame climate change as a debate, by including the field’s most prominent skeptics as witnesses.”).

15. See *infra* Section II.B.

16. See *infra* Section II.B.

judiciary.<sup>17</sup> Notwithstanding novel and creative legal theories,<sup>18</sup> plaintiffs bringing suits to compel climate action or hold emitters accountable struggle to prevail in federal courts while those accused of exacerbating the crisis fare considerably better.<sup>19</sup> Without enough meaningful national action to address climate change, state and local actors are increasingly left to fill the void.<sup>20</sup>

Because national measures combating the climate crisis are exceedingly rare, and are not yet sufficient to address the crisis,<sup>21</sup> this Comment will argue that state attorneys general should stake out a greater role in climate change mitigation by establishing Climate Preservation Units (CPUs) within their offices. Federalism's structure creates space for different actors to be agents of change as the need arises. When state and local actors fall short, the federal government often steps up in their stead. Conversely, when the federal government is paralyzed in the face of calamity, subnational actors have a greater opportunity to lead. State attorneys general—uniquely independent guardians of the public interest—should maximize their expansive authority to preserve the planet for future generations.

Part II provides background information on the climate crisis and national-level inaction. It then describes several environmental and climate action efforts at the state and local levels. Part III examines the office of state attorney general—the history, authority, and operations of that office and how these vary among states. Part IV makes the case that establishing CPUs within state attorney general offices can provide effective and enduring means for robust state-level climate action. Part V briefly concludes.

---

17. See *infra* Section II.B.

18. See, e.g., *Juliana v. United States*, 947 F.3d 1159, 1164–65 (9th Cir. 2020) (dismissing case for lack of standing where group of young plaintiffs sued federal government for, among other things, violation of claimed right under the Fifth Amendment to “climate system capable of sustaining human life”).

19. See, e.g., *BP P.L.C. v. Mayor of Baltimore*, 141 S. Ct. 1532, 1543 (2021) (holding that federal appellate review of remands to state court permit review of entire remand order, thereby expanding opportunities for climate defendants to remove actions from state courts).

20. See *infra* Sections II.C, III.C.

21. See Andrew Wetzler, *The Inflation Reduction Act: What's Now Possible*, NRDC (Aug. 18, 2022), <https://www.nrdc.org/experts/andrew-wetzler/inflation-reduction-act-whats-now-possible> [<https://perma.cc/M25N-WKNN>] (“The Inflation Reduction Act provides powerful incentives to advance the climate fight. It is, though, very much the starting point, not the end, for the work to be done to confront the climate crisis, the existential challenge of our time.”).

## II. THE CLIMATE CRISIS AND ITS RESPONSES

For context, this Part will survey the following: (1) the current state of the climate crisis; (2) the failures of Congress, the executive branch, and the judiciary to procure meaningful solutions to the crisis; and (3) state and local efforts to regulate in response to climate change.

### A. *The Current State of the Climate Crisis*

Reliable evidence of significant human-induced damage to Earth's atmosphere and climate dates back nearly fifty years.<sup>22</sup> From Wallace S. Broecker coining the term “global warming” in 1975,<sup>23</sup> to ExxonMobil's knowledge of the dangers of climate change as early as 1977,<sup>24</sup> to the 1985 discovery of ozone losses popularly dubbed a “hole” in the ozone layer,<sup>25</sup> the twentieth century's closing quarter unearthed a steady stream of evidence demonstrating human-caused harms to the planet.

The evidence of climate harm has become only more numerous and compelling in the twenty-first century—and far more visible. Extreme weather exhibits increasing severity and occurs with greater frequency.<sup>26</sup> The 2013 devastation of the Philippines from Typhoon Haiyan,<sup>27</sup> the 2017

---

22. See, e.g., Wallace S. Broecker, *Climatic Change: Are We on the Brink of a Pronounced Global Warming?*, 189 SCI. 460 (1975); Shannon Hall, *Exxon Knew About Climate Change Almost 40 Years Ago*, SCI. AM. (Oct. 26, 2015), <https://www.scientificamerican.com/article/exxon-knew-about-climate-change-almost-40-years-ago/> [<https://perma.cc/2FM2-LS92>]; J. C. Farman, B. G. Gardiner & J. D. Shanklin, *Large Losses of Total Ozone in Antarctica Reveal Seasonal ClOx/NOx Interaction*, 315 NATURE 207 (1985); Milt Freudenheim, James F. Clarity & Laura Mansnerus, *The World; Chemicals Linked to an Ozone 'Hole'*, N.Y. TIMES (Oct. 26, 1986), <https://www.nytimes.com/1986/10/26/weekinreview/the-world-chemicals-linked-to-an-ozone-hole.html?searchResultPosition=6> [<https://perma.cc/2SQZ-M9VD>].

23. Broecker, *supra* note 22.

24. See Hall, *supra* note 22.

25. See Farman, Gardiner & Shanklin, *supra* note 22; see also Freudenheim, Clarity & Mansnerus, *supra* note 22.

26. See IPCC SIXTH ASSESSMENT REPORT I, *supra* note 3.

27. See Kate Hodal, *Tacloban: A Year After Typhoon Haiyan*, GUARDIAN (Oct. 31, 2014), <https://www.theguardian.com/world/2014/oct/31/tacloban-a-year-after-typhoon-haiyan> [<https://perma.cc/T89C-TGFN>].

Atlantic hurricane season;<sup>28</sup> the 2019–2020 Australian bushfires;<sup>29</sup> the 2021 European floods;<sup>30</sup> the 2021 whiplash between heat wave, wildfires, and flooding in the Pacific Northwest;<sup>31</sup> the 2022 heat wave and wildfires across Europe;<sup>32</sup> and the 2022 floods that submerged much of Pakistan<sup>33</sup> are just a few notable examples of this global trend.<sup>34</sup>

At the same time, Earth is in the midst of only the sixth mass extinction<sup>35</sup> in its four-and-a-half billion-year lifetime.<sup>36</sup> This pervasive loss of life differs from prior extinctions in two important respects: it is human-caused and accelerated.<sup>37</sup> Typically gradual in nature, extinctions usually go unnoticed

28. See Willie Drye, *2017 Hurricane Season Was the Most Expensive in U.S. History*, NAT'L GEOGRAPHIC (Nov. 30, 2017), <https://www.nationalgeographic.com/science/article/2017-hurricane-season-most-expensive-us-history-spd> [<https://perma.cc/AGM6-QDXA>].

29. See Lisa Cox, 'Unprecedented' Globally: More than 20% of Australia's Forests Burnt in Bushfires, GUARDIAN (Feb. 24, 2020), <https://www.theguardian.com/australia-news/2020/feb/25/unprecedented-globally-more-than-20-of-australias-forests-burnt-in-bushfires> [<https://perma.cc/5KFE-VXJT>].

30. See Damian Carrington, *Climate Crisis Made Deadly German Floods 'Up to Nine Times More Likely'*, GUARDIAN (Aug. 23, 2021, 18:01), <https://www.theguardian.com/environment/2021/aug/23/climate-crisis-made-deadly-german-floods-up-to-nine-times-more-likely> [<https://perma.cc/AE7K-QP4T>].

31. See Kasha Patel et al., *First Fires, Now Floods: British Columbia and Washington Reeling from Atmospheric River*, WASH. POST (Nov. 18, 2021, 01:00 PM), <https://www.washingtonpost.com/weather/2021/11/18/british-columbia-washington-floods-climate/> [<https://perma.cc/YT8W-JYWJ>].

32. See Ashley Kirk et al., *Europe's Record Summer of Heat and Fires – Visualised*, GUARDIAN (July 26, 2022), <https://www.theguardian.com/environment/ng-interactive/2022/jul/26/how-europe-has-been-hit-by-record-fire-damage-and-temperatures#:~:text=Europe%20has%20already%20endured%20a,hit%20several%20countries%20across%20Europe.> [<https://perma.cc/VRB4-FPAF>].

33. See Christina Goldbaum & Zia ur-Rehman, *In Pakistan's Record Floods, Villages Are Now Desperate Islands*, N.Y. TIMES (Sept. 14, 2022), <https://www.nytimes.com/2022/09/14/world/asia/pakistan-floods.html> [<https://perma.cc/FKC6-97WA>].

34. To be sure, it is extraordinarily difficult to definitively link an individual extreme weather event to climate change, and experts typically refrain from doing so. The demonstrable increase in frequency and severity of these events, however, indicates a clear trend overwhelmingly pointing to climate change as the culprit. See IPCC SIXTH ASSESSMENT REPORT II, *supra* note 3, at 9.

35. See KOLBERT, *supra* note 4.

36. See Paul S. Braterman, *How Science Figured out the Age of Earth*, SCI. AM. (Oct. 20, 2013), <https://www.scientificamerican.com/article/how-science-figured-out-the-age-of-the-earth/> [<https://perma.cc/4XTF-78J5>].

37. See KOLBERT, *supra* note 4, at 265–66 (“The current extinction has its own novel cause: not an asteroid or a massive volcanic eruption but ‘one weedy species.’”); Damian

in real time,<sup>38</sup> but the speed and scale of the current annihilation of species renders it unusually visible—not just to scientists but also to everyday observers.<sup>39</sup> As this mass extinction picks up speed in an increasingly unstable climate, domino effects are expected to ravage biodiversity and threaten “the living systems on which we all depend.”<sup>40</sup>

Public health, too, faces disturbing implications from a damaged climate. The ongoing Covid-19 pandemic has cost millions of lives,<sup>41</sup> inflicted long-term health complications on untold millions more,<sup>42</sup> upended society’s routine functions,<sup>43</sup> heightened disparities among different groups of

Carrington, *Sixth Mass Extinction of Wildlife Accelerating, Scientists Warn*, GUARDIAN (June 1, 2020, 15:00), <https://www.theguardian.com/environment/2020/jun/01/sixth-mass-extinction-of-wildlife-accelerating-scientists-warn> [<https://perma.cc/YZ85-J5PB>]

(“More than 500 species of land animals were found to be on the brink of extinction and likely to be lost within 20 years. In comparison, the same number were lost over the whole of the last century. Without the human destruction of nature, even this rate of loss would have taken thousands of years . . . .”); Gerardo Ceballos, Paul R. Ehrlich & Peter H. Raven, *Vertebrates on the Brink as Indicators of Biological Annihilation and the Sixth Mass Extinction*, 117 PNAS 13596, 13596 (2020) (“The ongoing sixth mass extinction may be the most serious environmental threat to the persistence of civilization, because it is irreversible. Thousands of populations of critically endangered vertebrate animal species have been lost in a century, indicating that the sixth mass extinction is human caused and accelerating.”).

38. See KOLBERT, *supra* note 4, at 15, 17 (“In ordinary times . . . extinction takes place only very rarely, more rarely even than speciation . . . . [Y]ou’d expect one [mammal] species to disappear every seven hundred years. . . . [O]ne amphibian species should go extinct every thousand years or so. . . . [T]he odds of an individual’s witnessing such an event should be effectively zero.”).

39. See *id.* at 10 (“‘Even the regular people in El Valle, they notice it,’ he said. ‘They tell me, ‘What happened to the frogs? We don’t hear them calling anymore.’”).

40. Ceballos, Ehrlich & Raven, *supra* note 37.

41. See *Coronavirus World Map: Tracking the Global Outbreak*, N.Y. TIMES, <https://www.nytimes.com/interactive/2021/world/covid-cases.html> [<https://perma.cc/4QQT-8DHL>].

42. See, e.g., Bjørn Blomberg et al., *Long COVID in a Prospective Cohort of Home-Isolated Patients*, 27 NATURE MED. 1607, 1607 (2021) (“Long-term complications after coronavirus disease 2019 (COVID-19) are common in hospitalized patients, but the spectrum of symptoms in milder cases needs further investigation.”); Hannah E. Davis et al., *Characterizing Long COVID in an International Cohort: 7 Months of Symptoms and Their Impact*, 38 LANCET ECLINICALMED. 1, 1 (2021) (“A significant number of patients with COVID-19 experience prolonged symptoms, known as Long COVID. . . . [R]elatively little is known about symptom makeup and severity, expected clinical course, impact on daily functioning, and return to baseline health.”).

43. See Alexandra Hudson, *How COVID Upended Life as We Knew It in a Matter of Weeks*, REUTERS (Dec. 3, 2020, 04:51 AM), <https://www.reuters.com/article/us-global-poy-covid-widerimage/how-covid-upended-life-as-we-knew-it-in-a-matter-of-weeks-idUSKBN28D1K8> [<https://perma.cc/DMS6-LDJ2>].



people,<sup>44</sup> created enormous economic costs,<sup>45</sup> and stoked violent unrest.<sup>46</sup> Although no evidence directly implicates climate change in the emergence of this particular pathogen, climate change and the human activity fueling it do increase the risk of zoonotic spillovers like the one that transferred Covid-19 to humans.<sup>47</sup> As the likelihood of future spillover increases and pandemics possibly become more commonplace, air quality deterioration from the same sources of emissions causing climate change may increase the risk of adverse health outcomes.<sup>48</sup>

In what has become a bleak tradition, published portions of the Intergovernmental Panel on Climate Change's (IPCC) Sixth Assessment Report offer the direst warning yet about the catastrophic future that awaits

---

44. See Brea L. Perry, Brian Aronson & Bernice A. Pescosolido, *Pandemic Precarity: COVID-19 Is Exposing and Exacerbating Inequalities in the American Heartland*, 118 PNAS 1, 1 (2021) (finding “socioeconomic shocks disproportionately affecting vulnerable groups” as a result of the pandemic, “consistent with patterns of inequality observed following other disasters, including Hurricane Katrina, the Chicago Heatwave, the Buffalo Creek Flood, and the Great Recession”).

45. See JAMES K. JACKSON ET AL., CONG. RSCH. SERV., R46270, GLOBAL ECONOMIC EFFECTS OF COVID-19 1 (2021) (describing the pandemic as “a global public health and economic crisis that has affected the \$100 trillion global economy beyond anything experienced in nearly a century”).

46. See, e.g., Katie Shepherd, *Tensions over Restrictions Spark Violence and Defiance Among Protesters as Trump Pushes States To Reopen*, WASH. POST (May 13, 2020, 6:28 AM), <https://www.washingtonpost.com/nation/2020/05/13/protest-violence-coronavirus/> [<https://perma.cc/TQU8-VUKN>]; *Covid: Huge Protests Across Europe over New Restrictions*, BBC NEWS (Nov. 21, 2021), <https://www.bbc.com/news/world-europe-59363256> [<https://perma.cc/6LK5-PW64>]; Léontine Gallois, *Protesters in Martinique Fire at Police Officers and Journalists*, N.Y. TIMES (Nov. 26, 2021), <https://www.nytimes.com/2021/11/26/world/americas/martinique-covid-protests.html> [<https://perma.cc/U7F4-AM7X>].

47. See Xavier Rodó et al., *Changing Climate and the COVID-19 Pandemic: More than Just Heads or Tails*, 27 NATURE MED. 576, 576 (2021) (“Climate change can both facilitate zoonotic spillovers and have an effect on transmission chains.”); Lustgarten, *supra* note 6.

48. See Abhinav Karan, Kabeer Ali, Surujpal Teelucksingh, & Sateesh Sakhamuri, *The Impact of Air Pollution on the Incidence and Mortality of COVID-19*, GLOB. HEALTH RSCH. & POL'Y 1, 1 (2020) (“Thus far, history and science are directing towards an immense potential impact of air pollution on the COVID-19 pandemic. . . . [C]ountries must mobilize funding for mitigation of air pollution to benefit environmental health and ameliorate its potential effects on pandemics of the future.”); Stephen A. Mein, Isabella Annesi-Maesano, & Mary B. Rice, *COVID-19 Pandemic: A Wake-Up Call for Clean Air*, 18 ANNALS AM. THORACIC SOC'Y 1450, 1450 (2021) (arguing that, because “exposure to air pollution exacerbates viral respiratory infections and consequently widens health disparities,” “the COVID-19 pandemic highlights the urgent need to address the global problem of air pollution”).

if the status quo remains unchanged.<sup>49</sup> Among many alarming findings, the report describes a future marred by extreme weather,<sup>50</sup> global food supply shortages from drought and overheated crops,<sup>51</sup> and entire nations rendered uninhabitable by rising sea levels.<sup>52</sup> The IPCC no longer merely warns of the need to prevent future global temperature increases. Rather, it estimates that human activity has already warmed the planet by 1.1° C and that a highly dangerous rise to 1.5° C over the next two decades is virtually guaranteed—regardless of any mitigation efforts in the meantime.<sup>53</sup>

By comparison, the 2015 Paris Agreement aspired “to limit global warming to well below 2, preferably to 1.5 degrees Celsius, compared to pre-industrial levels.”<sup>54</sup> That goal represented a ceiling for global temperature rise, a point after which it was envisioned that temperatures would progressively decline as a result of the agreement’s measures.<sup>55</sup> However, with mitigation efforts among parties to the agreement falling well short of commitments and a 1.5° C rise already essentially locked in, the prospects

---

49. See IPCC SIXTH ASSESSMENT REPORT I, *supra* note 3; IPCC SIXTH ASSESSMENT REPORT II, *supra* note 3; see also Fiona Harvey, *IPCC Issues ‘Bleakest Warning Yet’ on Impacts of Climate Breakdown*, GUARDIAN (Feb. 28, 2022, 06:00), [https://www.theguardian.com/environment/2022/feb/28/ipcc-issues-bleakest-warning-yet-impacts-climate-breakdown?utm\\_term=6220adc231ec79f444a16279cc26a37f&utm\\_campaign=GreenLight&utm\\_source=esp&utm\\_medium=Email&CMP=greenlight\\_email](https://www.theguardian.com/environment/2022/feb/28/ipcc-issues-bleakest-warning-yet-impacts-climate-breakdown?utm_term=6220adc231ec79f444a16279cc26a37f&utm_campaign=GreenLight&utm_source=esp&utm_medium=Email&CMP=greenlight_email) [<https://perma.cc/63VF-CZZ3>].

50. See Fiona Harvey, *Global Food Supplies Will Suffer as Temperatures Rise – Climate Crisis Report*, GUARDIAN (Aug. 10, 2021, 13:04), <https://www.theguardian.com/environment/2021/aug/10/global-food-supplies-will-suffer-as-temperatures-rise-climate-crisis-report> [<https://perma.cc/C9DG-D4MB>].

51. See *id.*

52. See Kate Lyons, *IPCC Report Shows ‘Possible Loss of Entire Countries Within the Century’*, GUARDIAN (Aug. 9, 2021, 13:30), <https://www.theguardian.com/world/2021/aug/10/ipcc-report-shows-possible-loss-of-entire-countries-within-the-century> [<https://perma.cc/BU4T-MVVH>].

53. See Brad Plumer & Henry Fountain, *A Hotter Future Is Certain, Climate Panel Warns. But How Hot Is up to Us*, N.Y. TIMES (Aug. 9, 2021), <https://www.nytimes.com/2021/08/09/climate/climate-change-report-ipcc-un.html> [<https://perma.cc/A3AB-DCP7>].

54. *The Paris Agreement*, UN CLIMATE CHANGE, <https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement> [<https://perma.cc/F3PN-ZNSK>].

55. See *Understanding the Paris Agreement’s Long Term Temperature Goal*, CLIMATE ANALYTICS, <https://climateanalytics.org/briefings/understanding-the-paris-agreements-long-term-temperature-goal/> [<https://perma.cc/6WP2-EVQ9>] (“Achieving the Paris Agreement goals would mean that temperatures decline again after peak 21st century levels. These declining temperatures are essential for reducing the long-term impacts of climate change such as ocean acidification . . . , sea level rise, as well as reducing the risk of triggering tipping points of the earth system.”).

for achieving this 2015 goal are grim.<sup>56</sup> Even in a hypothetical best-case scenario of sudden dramatic climate action that is globally coordinated and well-executed (difficult as that is to imagine), global temperature rise could still slip past 1.5° C.<sup>57</sup> The current reality, however, is not remotely close to that best-case scenario.<sup>58</sup> The inaction of the present paints a far bleaker picture of a future with temperatures well above 1.5° C, perhaps reaching a suspected “tipping point” beyond which irreversible and catastrophic runaway climate effects develop.<sup>59</sup>

### B. Abdication at the National Level

Amid a backdrop of increasingly visible climate catastrophe and dire warnings from the scientific community about the urgent need for action, a national response in the United States has, with the exception of the 2022 passage of the IRA,<sup>60</sup> been conspicuously absent. Federal legislation is often discussed as a necessary and integral component of meaningful national climate action,<sup>61</sup> yet Congress has consistently failed to produce adequate legislation aimed at the problem. In 2009, as the severity of carbon dioxide emissions became too severe to ignore, Congress attempted to pass the American Clean Energy and Security Act.<sup>62</sup> The act sought a moderate free-market approach to limiting carbon dioxide emissions by creating a cap-and-trade scheme, which limited total carbon dioxide emissions and permitted

---

56. See Plumer & Fountain, *supra* note 53.

57. See *id.* (describing the IPCC Sixth Assessment Report’s conclusion that global coordination to stop adding carbon dioxide to the atmosphere, an immediate rapid shift away from fossil fuels, and removal of vast amounts of carbon from the air would “likely” slow global temperature rise “at around 1.5 degrees Celsius”).

58. See *id.* (“Experts have estimated that current policies being pursued by world governments will put the world on track for roughly 3 degrees Celsius of warming by the end of the century.”).

59. See Timothy M. Lenton et al., *Climate Tipping Points – Too Risky To Bet Against*, NATURE (Apr. 9, 2020), <https://www.nature.com/articles/d41586-019-03595-0#ref-CR11> [<https://perma.cc/2WY3-JHLB>] (“[T]he clearest emergency would be if we were approaching a global cascade of tipping points that led to a new, less habitable, ‘hothouse’ climate state. Interactions could happen through ocean and atmospheric circulation or through feedbacks that increase greenhouse-gas levels and global temperature.”).

60. Pub. L. No. 117-169 (2022).

61. See, e.g., Ella Nilsen, *Democrats Think Now Is Their Last, Best Chance To Pass a Big Climate Bill*, VOX (June 23, 2021, 10:10 AM), <https://www.vox.com/22537509/democrats-climate-bill-biden-waxman-markey> [<https://perma.cc/8ZVS-H7GE>].

62. See H.R. 2454, 111th Cong. (2009).

companies to trade emission permits among themselves.<sup>63</sup> The act narrowly passed in the House of Representatives before dying in the Senate in the face of immense industry pressure.<sup>64</sup>

In the decade-plus since the American Clean Energy and Security Act's failure, slim party majorities in Congress (particularly in the Senate) have meant a dearth of big, bold legislation, including laws directed at the climate crisis. Rare instances of substantial legislation have been directed at more acute priorities, such as the Great Recession,<sup>65</sup> health care reform,<sup>66</sup> and pandemic response.<sup>67</sup> Even after the Biden administration took office in 2021 with a Democratic-controlled Congress and significant national concern over climate change,<sup>68</sup> inaction persisted. Attempts to pass climate legislation on the order of magnitude that the crisis demands were quickly bogged down by rancorous negotiations that chipped away at important provisions.<sup>69</sup> After several months of inaction, President Biden signed into law the Infrastructure Investment and Jobs Act,<sup>70</sup> a bipartisan bill that contains some climate provisions but is far less aggressive in addressing climate change than its left-for-dead counterpart, the Build Back Better Act.<sup>71</sup> Without passage of the

---

63. See *id.*; see also John M. Broder, 'Cap and Trade' Loses Its Standing as Energy Policy of Choice, N.Y. TIMES (Mar. 25, 2010), <https://www.nytimes.com/2010/03/26/science/earth/26climate.html> [https://perma.cc/CHQ6-6URK].

The American Clean Energy and Security Act was modeled off the largely successful 1990 Clean Air Act's scheme to limit sulfur dioxide emissions known as "acid rain." See Broder, *supra* 63; S. 1630, 101st Cong. (1990).

64. See Nilsen, *supra* note 61; Broder, *supra* note 63.

65. See American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (omnibus stimulus package); Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (financial industry regulation).

66. See Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (otherwise known as the ACA or "Obamacare").

67. See, e.g., Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136 (otherwise known as the CARES Act).

68. See Tyson, *supra* note 10.

69. See, e.g., Coral Davenport, *Key to Biden's Climate Agenda Likely To Be Cut Because of Manchin Opposition*, N.Y. TIMES (Nov. 3, 2021), <https://www.nytimes.com/2021/10/15/climate/biden-clean-energy-manchin.html> [https://perma.cc/FG2T-W7VM].

70. See Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, 135 Stat. 429.

71. See H.R. 5376, 117th Cong. (2021) (passed by House of Representatives, not taken up by Senate); Barbara Sprunt, *Here's What's Included in the Bipartisan Infrastructure Law*, NPR (Nov. 15, 2021, 06:01 PM), <https://www.npr.org/2021/06/24/1009923468/heres-whats-included-in-the-infrastructure-deal-that-biden-struck-with-senators> [https://perma.cc/SM7N-M4CU] (noting the Infrastructure Investment and Jobs Act's aims to "[r]epair and rebuild roads and bridges with a focus on climate change mitigation" and "[p]repare more infrastructure for the impact of climate change, cyberattacks and extreme weather events").

latter bill, critics contended that the Infrastructure Investment and Jobs Act fell well short of providing remedies that the climate crisis demands.<sup>72</sup> Eventually, President Biden signed into law the Inflation Reduction Act in August of 2022.<sup>73</sup> Aimed at igniting the nation’s transition to a low-carbon economy by providing substantial funding for the development of new technologies and infrastructure, the IRA is the most ambitious federal climate legislation ever passed; yet, it garners some of the same criticisms as the Infrastructure Investment and Jobs Act.<sup>74</sup> The IRA’s ultimate impact on the climate crisis, and whether additional climate legislation will follow, remain to be seen.

While Congress has sputtered, the executive branch has been consistently inconsistent in its own approaches to climate change. The frequent pendulum swings in American electoral politics have produced substantial shifts among successive heads of state with respect to attitudes on climate change—from

---

72. See, e.g., Christina DeConcini & Jillian Neuberger, *US Infrastructure Bill Makes Headway on Climate, But More Is Needed*, WORLD RES. INST. (Nov. 15, 2021), <https://www.wri.org/insights/us-infrastructure-bill-makes-headway-climate-more-needed>; Aliya Haq, *The Bipartisan Infrastructure Bill Is a Win for Climate, But It’s Not Enough*, BREAKTHROUGH ENERGY (Nov. 17, 2021), <https://www.breakthroughenergy.org/articles/we-need-to-pass-build-back-better> [<https://perma.cc/4MFT-KNRA>]; Nathan Rott, *Critics Say Infrastructure Bill Doesn’t Have Enough Funds To Address Climate Change*, NPR (Nov. 15, 2021, 05:15 AM), <https://www.npr.org/2021/11/15/1055749078/critics-say-infrastructure-bill-doesnt-have-enough-funds-to-address-climate-chan> [<https://perma.cc/3FEL-GQS6>]; Coral Davenport & Lisa Friedman, *Bipartisan Infrastructure Deal Omits Big Climate Measures*, N.Y. TIMES (Nov. 6, 2021), <https://www.nytimes.com/2021/06/24/climate/biden-climate-infrastructure.html> [<https://perma.cc/B7XR-ACSE>].

73. See Pub. L. No. 117-169 (2022).

74. See, e.g., Wetzler, *supra* note 21 (describing aspects of the IRA as “the minimum of what’s needed,” and criticizing the law’s inclusion of provisions that “promote fossil fuels in ways that conflict with our climate aims” and “put some of the nation’s most vulnerable communities and ecosystems at needless risk”).

George W. Bush<sup>75</sup> to Barack Obama<sup>76</sup> to Donald Trump<sup>77</sup> to Joe Biden.<sup>78</sup> Executive branch policies have reflected these shifts. For example, in 2003 the Environmental Protection Agency (EPA) denied a rulemaking petition from nineteen environmental-oriented private organizations requesting that the agency regulate greenhouse gas (GHG) emissions from new motor vehicles.<sup>79</sup> In doing so, the Bush administration took the position that the EPA did not have authority to issue such regulations under the Clean Air Act and, even if the authority existed, that it would not regulate these emissions because they were insufficiently linked to climate change.<sup>80</sup> By contrast, the Obama administration unveiled the Clean Power Plan in 2015, which sought to reduce power plant carbon emissions and steer these plants to cleaner energy sources.<sup>81</sup> The following year, President Obama eagerly joined the

---

75. See, e.g., *Bush Gives Thumbs Down to Gore's New Movie*, NBC NEWS (May 23, 2006, 04:58 AM), <https://www.nbcnews.com/id/wbna12930351> [<https://perma.cc/6R47-U8RC>] (“‘New technologies will change how we live and how we drive our cars, which all will have the beneficial effect of improving the environment.’ . . . ‘And in my judgment we need to set aside whether or not greenhouse gases have been caused by mankind or because of natural effects and focus on the technologies that will enable us to live better lives and at the same time protect the environment.’”).

76. See, e.g., *Climate Change: Obama Unveils Clean Power Plan*, BBC NEWS (Aug. 3, 2015), <https://www.bbc.com/news/world-us-canada-33753067> [<https://perma.cc/JJ6M-7RXL>] (“‘I’m convinced no challenge provides a greater threat to the future of the planet.’”).

77. See, e.g., Mark Osborne, *Donald Trump Says US Could Use ‘Little Bit of that Good Old Global Warming’*, ABC NEWS (Dec. 29, 2017, 09:40 AM), <https://abcnews.go.com/Politics/donald-trump-us-bit-good-global-warming/story?id=52039623> [<https://perma.cc/5WGV-38T8>] (“‘In the East, it could be the COLDEST New Year’s Eve on record. Perhaps we could use a little bit of that good old Global Warming that our Country, but not other countries, was going to pay TRILLIONS OF DOLLARS to protect against. Bundle up!’”).

78. See, e.g., Ellen Knickmeyer & Seth Borenstein, *Biden Puts U.S. Back into Fight To Slow Global Warming*, AP NEWS (Jan. 20, 2021), <https://apnews.com/article/joe-biden-donald-trump-science-climate-climate-change-b434bca5d6baf7e38a212f4a0540a07> [<https://perma.cc/C6PZ-R7BQ>] (“‘A cry for survival comes from the planet itself.’ . . . ‘A cry that can’t be any more desperate or any more clear now.’”).

79. See *Massachusetts v. EPA*, 549 U.S. 497, 510–11 (2007). In their petition, these organizations specifically cited GHG emissions as major contributors to climate change. See *id.*

80. See *id.* at 511–14.

81. See Dan Roberts, *Obama Unveils Sweeping Cuts to Power Plant Emissions: ‘We Have To Get Going’*, GUARDIAN (Aug. 3, 2015, 16:05), <https://www.theguardian.com/environment/2015/aug/03/obama-epa-carbon-emissions-cuts-power-plants-climate-change> [<https://perma.cc/J5MM-VQQ8>].

Paris Agreement, which the United States played a major role in crafting.<sup>82</sup> Less than a year later, President Trump announced a United States withdrawal from that climate accord,<sup>83</sup> while also seeking to cut the EPA's budget by nearly a third and unravel Obama-era agency rules.<sup>84</sup> In 2019, the Trump administration replaced the Clean Power Plan with the Affordable Clean Energy Rule, a far weaker climate regulation.<sup>85</sup>

President Biden reversed the executive branch's course once again when, on his first day in office in early 2021, he signed an executive order to rejoin the Paris Agreement.<sup>86</sup> Additionally, the Biden administration opted to forego any efforts to salvage either the Clean Power Plan or the Affordable Clean Energy Rule, deciding instead to pursue its own emissions rules from scratch.<sup>87</sup> Over the span of more than two decades and four different presidential administrations, executive branch policy on climate change has resembled the planet's climate in its increasing instability.<sup>88</sup>

Meanwhile, the federal judiciary has consistently reached decisions in climate change suits that serve the interests of major emitters. In 2020, for

---

82. See Jean Chemnick, *U.S. and China Formally Commit to Paris Climate Accord*, SCI. AM. (Sept. 6, 2016), <https://www.scientificamerican.com/article/u-s-and-china-formally-commit-to-paris-climate-accord/> [<https://perma.cc/498Y-C22D>].

83. See Michael D. Shear, *Trump Will Withdraw U.S. from Paris Climate Agreement*, N.Y. TIMES (June 1, 2017), <https://www.nytimes.com/2017/06/01/climate/trump-paris-climate-agreement.html> [<https://perma.cc/4VZM-YD9W>].

84. See Brady Dennis & Juliet Eilperin, *Trump Signs Order at the EPA To Dismantle Environmental Protections*, WASH. POST (Mar. 28, 2017), [https://www.washingtonpost.com/national/health-science/trump-signs-order-at-the-epa-to-dismantle-environmental-protections/2017/03/28/3ec30240-13e2-11e7-ada0-1489b735b3a3\\_story.html](https://www.washingtonpost.com/national/health-science/trump-signs-order-at-the-epa-to-dismantle-environmental-protections/2017/03/28/3ec30240-13e2-11e7-ada0-1489b735b3a3_story.html) [<https://perma.cc/CUB4-DSLN>].

85. See *Affordable Clean Energy Rule*, EPA (Apr. 4, 2022), <https://www.epa.gov/stationary-sources-air-pollution/affordable-clean-energy-rule> [<https://perma.cc/R7DR-95C7>] (describing new rule as “replacing the prior administration’s overreaching Clean Power Plan”).

86. See Nathan Rott, *Biden Moves To Have U.S. Rejoin Climate Accord*, NPR (Jan. 20, 2021, 05:45 PM), <https://www.npr.org/sections/inauguration-day-live-updates/2021/01/20/958923821/biden-moves-to-have-u-s-rejoin-climate-accord> [<https://perma.cc/3ZVS-7GPT>].

87. See Lesley Clark, Niina H. Farah, Pamela King & E&E News, *As Biden Heads to Climate Talks, Supreme Court Move Could Stymie EPA Regulation*, SCI. AM. (Nov. 1, 2021), <https://www.scientificamerican.com/article/as-biden-heads-to-climate-talks-supreme-court-move-could-stymie-epa-regulation/> [<https://perma.cc/FQZ4-9KWS>]. At the time of writing, it is unclear what these new emissions rules might entail and how they might compare to the Clean Power Plan and the Affordable Clean Energy Rule.

88. Of course, this is not to suggest that environmental policy was consistent among administrations predating the Bush administration. Rather, these four administrations reveal divergent executive branch approaches to climate change after public awareness of the crisis greatly expanded.

example, the Ninth Circuit dismissed an unprecedented lawsuit brought against the federal government by a group of mostly young plaintiffs in what was widely referred to as the “Kids Climate Case.”<sup>89</sup> The suit challenged the government’s continuing reliance on, and subsidization of, fossil fuels despite the government’s own longstanding awareness of fossil fuels’ contributions to climate change.<sup>90</sup> The plaintiffs alleged that the government’s actions inflicted psychological harms, damaged property, aggravated medical conditions, and ultimately violated their right under the Fifth Amendment to a “climate system capable of sustaining human life.”<sup>91</sup> With reluctance, a sympathetic panel held that the plaintiffs’ requested remedy (an order compelling the federal government to generate a plan to phase out the use of fossil fuels and reduce atmospheric carbon dioxide) was beyond the power of an Article III court.<sup>92</sup>

In 2021, the United States Supreme Court issued a procedural ruling in another climate change suit that is likely to benefit defendants facing liability for the climate crisis.<sup>93</sup> That ruling held that federal appellate courts reviewing remands to state court may examine the entire remand order to reach their decision.<sup>94</sup> This broader review will enable defendants to more

---

89. See *Juliana v. United States*, 947 F.3d 1159, 1164–65 (9th Cir. 2020); Jonathan H. Adler, *Is Kids Climate Case Coming to an End?*, REASON: VOLOKH CONSPIRACY (Nov. 26, 2018), <https://reason.com/volokh/2018/11/26/is-kids-climate-case-coming-to-an-end/> [<https://perma.cc/ZE4N-DE6U>]; Ellen M. Gilmer, *Kids’ Climate Case Plaintiffs Aim To Recast Lawsuit After Defeat*, BLOOMBERG LAW (Mar. 9, 2021), <https://news.bloomberglaw.com/environment-and-energy/kids-climate-case-takes-first-step-toward-supreme-court-bid?context=article-related> [<https://perma.cc/36BS-6824>].

90. See *Juliana*, 947 F.3d at 1165.

91. *Id.*

92. See *id.* at 1165, 1173–75. Although unanimously sympathetic, the panel was divided in its holding, with the majority emphasizing that constitutional barriers precluded judicial intervention regardless of their desire to act. See *id.* at 1173–75. The majority noted the extreme complexity of the remedy sought and the judiciary’s poor suitability to meet that need, writing that the plaintiffs’ only available course of action was to make their case “to the political branches or to the electorate at large.” See *id.* at 1174–75. In dissent, Judge Staton saw things differently: “Plaintiffs bring suit to enforce the most basic structural principle embedded in our system of ordered liberty: that the Constitution does not condone the Nation’s willful destruction.” See *id.* at 1175. Rather than an instance of a court reaching an incorrect decision, *Juliana* may instead highlight the judiciary’s inherent limitations in proffering solutions to climate change, with precedent and current judicial frameworks rendering these types of suits unworkable before even the most sympathetic judges.

93. See *BP P.L.C. v. Mayor of Baltimore*, 141 S. Ct. 1532 (2021).

94. See *id.* at 1533.



easily remove actions from state courts often perceived to be less congenial toward them than federal courts.<sup>95</sup>

Later that year, the Supreme Court agreed to hear *West Virginia v. Environmental Protection Agency*.<sup>96</sup> That case, a consolidation of four cases brought by coal and energy companies and Republican-led states, was a challenge to the EPA's authority to mandate certain generation-shifting carbon emissions caps under the Clean Air Act—authority that is vital to reining in emissions.<sup>97</sup> The Court's decision to hear the case was monumental because the Biden administration had yet to even issue new regulations.<sup>98</sup> Just a few months later, the Supreme Court ruled in favor of the plaintiffs, holding that under the “major questions doctrine,” the EPA's potential (yet nonexistent) regulation of these carbon emissions “raise[d] an eyebrow” for the justices in the majority and did not pass constitutional muster.<sup>99</sup> The ruling significantly weakens the executive branch's ability to implement new climate regulations at a critical juncture.<sup>100</sup>

Across all three branches of the federal government, failure to adequately address climate change's existential threat persists. In Congress, dysfunctional gridlock rules the day: climate legislation remains virtually nonexistent, and rare exceptions are not yet adequate. In the executive branch, sharp ideological swings between administrations produce erratic, unpredictable climate policy. In the judiciary, courts dismiss lawsuits seeking to combat climate change, erect procedural hurdles, and grant sweeping

---

95. See Ellen M. Gilmer & Jennifer Hijazi, *Exxon, BP Lead Big Oil Victory in Supreme Court Climate Case*, BLOOMBERG LAW (May 17, 2021), <https://news.bloomberglaw.com/environment-and-energy/exxon-bp-lead-big-oil-victory-in-supreme-court-climate-case> [<https://perma.cc/8BNC-6CTP>] (describing the ruling as giving “oil and gas companies a fresh chance to steer litigation toward the federal court system, which is viewed as a more favorable venue than state courts for industry defendants”).

96. See *West Virginia v. EPA*, 142 S. Ct. 420 (2021).

97. See *id.*; Coral Davenport, *Supreme Court Will Hear Biggest Climate Change Case in a Decade*, N.Y. TIMES (Feb. 28, 2022), <https://www.nytimes.com/2022/02/27/climate/supreme-court-will-hear-biggest-climate-change-case-in-a-decade.html> [<https://perma.cc/E82G-9Z59>].

98. The Biden administration argued that the petitioners were urging the Supreme Court to “help guide the upcoming rule-making,” something “little more than a request for an impermissible advisory opinion.” Brief for the Federal Respondents in Opposition at 16, *West Virginia v. EPA*, 142 S. Ct. 420 (2021) (No. 20-1530).

99. See *West Virginia v. EPA*, 142 S. Ct. 2587, 2613 (2022).

100. See Jonathan Watts, *We Have 12 Years To Limit Climate Change Catastrophe, Warns UN*, GUARDIAN (Oct. 8, 2018), <https://www.theguardian.com/environment/2018/oct/08/global-warming-must-not-exceed-15c-warns-landmark-un-report> [<https://perma.cc/LC9D-JTMZ>].

challenges to environmental regulation. The federal government increasingly appears to be inhospitable to necessary climate action.

### C. State and Local Climate Change Mitigation Efforts

With the federal government largely abdicating on climate policy<sup>101</sup> and a lack of receptivity toward climate change claims in the federal judiciary, state and local actors have embraced the opportunity to assume greater leadership roles—both substantive and symbolic—in confronting climate change. This Comment does not exhaustively survey these actors’ efforts, but does note their myriad attempts to fill the void left by national-level climate inaction.

Environmental regulation tailored specifically to climate change is a common approach to state and local leadership on climate action. For instance, twenty-five states and the District of Columbia have economy-wide measures in place specifically crafted to reduce GHG emissions.<sup>102</sup> Thirty-three states have climate action plans or are developing them.<sup>103</sup> Twelve states utilize carbon pricing.<sup>104</sup> Thirty states and the District of Columbia require electricity suppliers to use renewable or clean energy sources for varying percentages of their portfolios.<sup>105</sup> Thirty-six states and the District of Columbia have clean vehicle policies, including emissions standards, zero-emission vehicle deployment, and rebates and incentives for zero-emission vehicles and infrastructure.<sup>106</sup>

Several state governments are especially active in pursuing climate action leadership. California, for example, passed the Global Warming Solutions

---

101. See Yanbai Andrea Wang & Justin Weinstein-Tull, *Pandemic Governance*, 63 B.C. L. REV. 1949, 1975 (2022) (defining “abdication” as occurring either “when one government has a legal obligation to act, and declines to,” or, more commonly, “when a problem can only be comprehensively addressed at one level of government, and that government declines to act”). For purposes of this Comment, the latter situation is most relevant.

102. *U.S. State Greenhouse Gas Emissions Targets*, CTR. FOR CLIMATE & ENERGY SOLS., <https://www.c2es.org/document/greenhouse-gas-emissions-targets/> [https://perma.cc/LC9D-JTMZ].

103. *U.S. State Climate Action Plans*, CTR. FOR CLIMATE & ENERGY SOLS., <https://www.c2es.org/document/climate-action-plans/> [https://perma.cc/T9DH-3WNA].

104. *U.S. State Carbon Pricing Policies*, CTR. FOR CLIMATE & ENERGY SOLS., <https://www.c2es.org/document/us-state-carbon-pricing-policies/> [https://perma.cc/3Z6Q-KCXE].

105. *U.S. State Electricity Portfolio Standards*, CTR. FOR CLIMATE & ENERGY SOLS., <https://www.c2es.org/document/renewable-and-alternate-energy-portfolio-standards/> [https://perma.cc/7DY7-VDWD].

106. *State Climate Policy Maps*, CTR. FOR CLIMATE & ENERGY SOLS., <https://www.c2es.org/content/state-climate-policy/> [https://perma.cc/R7US-JG95].

Act in 2006.<sup>107</sup> The state has long been a national leader in environmental policy (due in large part to the California Air Resources Board's relatively stringent air quality standards),<sup>108</sup> but this 2006 law was a notable early example of state legislation to limit GHG emissions in lieu of federal action. California's executive voiced similar, although less substantive, support for climate leadership when former Governor Jerry Brown responded to then-President Trump's decision to withdraw from the Paris Agreement by declaring that Trump did not "speak for the rest of America."<sup>109</sup> At the same time, Brown announced plans to host a Climate Action Summit in San Francisco the following year, intending to bring together parties committed to abiding by the international agreement.<sup>110</sup>

New York has similarly asserted itself where federal action is lacking. The state has enacted, among other policies, State Environmental Quality Review requirements,<sup>111</sup> the Community Risk and Resiliency Act of 2014,<sup>112</sup> and the

---

107. See Allison C.C. Hoppe, *State-Level Regulation as the Ideal Foundation for Action on Climate Change: A Localized Beginning to the Solution of a Global Problem*, 101 CORNELL L. REV. 1627, 1631 (2016). At a time when public awareness of the threat posed by climate change was much less developed than it is today, the act "acknowledged that global warming posed a serious threat to the state and set goals for emission reductions." See *id.*

108. See Tony Barboza & Anna M. Phillips, *California Sues Trump Again for Revoking State's Authority To Limit Auto Emissions*, L.A. TIMES (Nov. 15, 2019), <https://www.latimes.com/california/story/2019-11-15/california-trump-administration-lawsuit-auto-emissions-climate-change> [<https://perma.cc/L5T2-FXQL>] ("For decades, California has used its special status under the federal Clean Air Act to obtain waivers from the U.S. EPA to set its own, more stringent standards. . . ." That act required the EPA "to grant the state a waiver to set its own rules, provided they were at least as stringent as the federal ones. Other states could choose to follow either California's regulations or those set by the EPA.").

109. See Lisa Friedman, *Jerry Brown Announces a Climate Summit Meeting in California*, N.Y. TIMES (July 6, 2017), <https://www.nytimes.com/2017/07/06/climate/jerry-brown-california-climate-summit.html> [<https://perma.cc/42U3-DGHX>].

110. See *id.*

111. See Hoppe, *supra* note 107, at 1632. These requirements mandate that "all government actors conduct an environmental impact assessment before going forward with almost all state activities, projects, or permits." *Id.* Other states also have variations of environmental impact report requirements. See NAT'L ASS'N OF ATT'YS GEN., STATE ATTORNEYS GENERAL POWERS AND RESPONSIBILITIES 135 (Emily Myers ed., 3d ed. 2013) [hereinafter NAAG] (describing the California Environmental Quality Act and "mini-NEPA statutes" in Hawaii and Maryland).

112. See Hoppe, *supra* note 107, at 1633. This law provides "significant regulatory authority over climate change adaptation and mitigation measures" to certain state agencies and "requires that all state funds and permits take climate change risks, mitigation, and adaptation into account." *Id.*

Climate Leadership and Community Protection Act of 2019, the last of which sets a laudable goal of complete carbon neutrality by 2050.<sup>113</sup>

Cities, too, which often bear immense human and financial costs from extreme weather events,<sup>114</sup> have sought to lead in addressing climate change where the federal government has left a vacuum. This is particularly true in the areas of land use regulation and building codes—two of the most important powers held by local governments.<sup>115</sup> Recent examples of efforts to address climate change at the municipal level include: San Jose’s building “reach code;”<sup>116</sup> New York City’s Climate Mobilization Act;<sup>117</sup> Portland’s prohibition against building or expanding fossil fuel infrastructure and

---

113. See Anthony Moffa, *Uniform Climate Control*, 54 U. RICH. L. REV. 993, 993 (2020).

114. See, e.g., R.W. Kates et al., *Reconstruction of New Orleans After Hurricane Katrina: A Research Perspective*, 103 PROC. NAT’L ACAD. SCIS. 14653, 14655 (2006) (estimating Hurricane Katrina’s death toll for Louisiana at 1,570, “most of which were New Orleans residents,” and “an aggregate monetary loss of around \$40–50 billion in Orleans Parish”); Joel Rose, *Post-Sandy Fixes to NYC Subways to Cost Billions*, NPR (Dec. 6, 2012), <https://www.npr.org/2012/12/06/166672858/post-sandy-fixes-to-nyc-subways-to-cost-billions> [<https://perma.cc/GX2A-3QXM>].

115. See Sheila R. Foster, *Local Governments Lead on Climate Change*, STATE & LOC. GOV’T L. BLOG (Oct. 24, 2021), <https://www.sloglaw.org/post/local-governments-lead-on-climate-change-measures> [<https://perma.cc/BG9U-55XU>]. Many cities also hold considerable authority over roadways, solid waste management, and electricity—all areas where action bearing on climate change is possible. See *id.* These powers are especially valuable to local government climate leadership when considering the high degree of federal and state control over other local governance matters. See *id.* At the same time, the risk of state preemption of local climate initiatives is ever-present. See *id.* (noting preemptions in Kansas, Florida, and Arizona that voided local restrictions on fossil fuels).

116. See Pierre Delforge & Maria Stamas, *San José’s Proposed Building “Reach Code,” Explained*, NAT’L RES. DEF. COUNCIL (Sept. 4, 2019), <https://www.nrdc.org/experts/pierredelforge/san-joses-proposed-building-reach-code-explained> [<https://perma.cc/U8YG-YEF2>]. A “reach code” is a local energy code for buildings “reaching” beyond a state’s requirements, thus providing cities a ripe opportunity to “lead the way on clean air, climate solutions, and the renewable energy economy, while creating roadmaps for other local governments to take action as well.” *Id.* This particular “reach code” sought to make zero-emission electric buildings the default for the nation’s tenth largest city, in addition to boosting charging infrastructure for electric vehicles and requiring solar-readiness for all buildings. See *id.*

117. See Foster, *supra* note 115. This local law, the most restrictive of its kind nationally, directly limited GHG emissions from large buildings, the source of 71% of such emissions within the city. See *id.* The law set emissions reduction goals, capped annual emissions, and created an Office of Building Energy and Emissions Performance to monitor compliance and fine violators. See *id.*

operations;<sup>118</sup> equity-focused climate justice authorities in St. Louis and Boston;<sup>119</sup> and Los Angeles' LA100 initiative.<sup>120</sup> This leadership is not constrained to large metropolitan areas: the small college town of Ithaca, New York, passed a measure to decarbonize every single building—including retrofitting efforts.<sup>121</sup>

The absence of federal leadership in addressing climate change pushes subnational stakeholders to attempt to pick up the slack. Both at the municipal and state levels, governance increasingly includes substantive and symbolic efforts to confront climate change.

### III. THE STATE ATTORNEY GENERAL

Legislation and regulatory activity comprise much of the effort to abate climate change at subnational levels where federal leadership is missing. A less-discussed, yet highly important figure in speaking for states, is the attorney general, whose activities differ from state legislators' and regulators'. To better understand this influential office and its potential impact with respect to state leadership on climate change, this Part will examine the following: (1) the history of the office; (2) the state attorney general's unique authority, duties, and operations and how these vary among

---

118. See Foster, *supra* note 115. Portland, Oregon and South Portland, Maine are among at least eight U.S. cities with such zoning ordinances. See *id.* Moreover, both cities' ordinances have survived federal Dormant Commerce Clause challenges. See *id.* Common targets for fossil fuel restriction under these ordinances are harbors, ports, and terminals. See *id.*

119. See Sheila R. Foster & Chiara Pappalardo, *Scaling up State and Local Government Efforts To Ensure a Just Transition*, SATE & LOC. GOV'T L. BLOG (Oct. 29, 2021), <https://www.sloglaw.org/post/scaling-up-state-and-local-government-efforts-to-ensure-a-just-transition> [<https://perma.cc/38EY-2ST7>]. St. Louis and Boston, along with several other cities, have sought to incorporate equity considerations into efforts to reduce city emissions. See *id.* In St. Louis, a nine-member Building Energy Improvement Board, consisting of "local stakeholder groups such as utilities, labor, affordable housing owners and tenants, and commercial buildings," reviews and approves energy regulations. *Id.* In Boston, a Resident Advisory Group and a Review Board, both consisting of community members and community organizations focused on environmental justice, are involved with crafting and reviewing new regulations. See *id.*

120. See Foster, *supra* note 115. This plan seeks to transition Los Angeles to 100% clean energy by 2035 by abandoning its natural gas electricity generation in favor of wind, solar, and battery storage. See *id.*

121. See Tik Root, *This U.S. City Just Voted To Decarbonize Every Single Building*, WASH. POST (Nov. 3, 2021), <https://www.washingtonpost.com/climate-solutions/2021/11/03/ithaca-new-york-decarbonize-electrify/> [<https://perma.cc/KNH4-YWBK>].

states; and (3) the involvement by state attorneys general in climate change matters.

*A. History of the Office*

The state attorney general's origins date back several centuries.<sup>122</sup> Its roots extend through nearly 700 years of Anglo-American history, beginning when certain specially appointed lawyers began representing the legal interest of the King of England.<sup>123</sup> As the British Empire later seized land in North America, it established colonies with legal systems tied to the British Crown.<sup>124</sup> Just as in the Old World, specially designated lawyers in the colonies, serving as delegates of the attorney general of England, were tasked with representing their colonies' legal interests.<sup>125</sup> The notion of a lawyer representing the sovereign paved the way in the colonies for what would ultimately become a more expansive understanding of the state attorney general's role—one of representing the public interest rather than merely serving as government counsel.<sup>126</sup>

As independence transformed colonies into states, the revolutionary notion that sovereignty should be held by the people rather than a monarch became constitutional command.<sup>127</sup> This in time inspired a new conception of the state attorney general: if sovereignty was to be held by the people, the state attorney general's role as legal representative of the sovereign necessitated representing not just state government, but also the public.<sup>128</sup> Today, state attorneys general continue to occupy this unique (and occasionally conflicting) dual role—on one hand representing state officials

---

122. See NAAG, *supra* note 111, at 1.

123. *Id.*

124. *Id.* at 4, 31.

125. *Id.* at 1, 4–7.

126. *Id.* at 1–2.

127. *Id.* at 2; U.S. CONST. pmb. (“We the People of the United States . . . do ordain and establish this Constitution for the United States of America.”).

128. See NAAG, *supra* note 111, at 1–2, 27, 30–31; Commonwealth *ex rel.* Hancock v. Paxton, 516 S.W.2d 865, 867 (Ky. 1974) (“It is true that at common law the duty of the Attorney General was to represent the king, he being the embodiment of the state. But under the democratic form of government now prevailing the people are the king, so the Attorney General's duties are to that sovereign rather than to the machinery of government.”) (citations omitted).

and agencies, and on the other hand acting as an independent representative of the public's legal interests.<sup>129</sup>

*B. Authority, Duties, and Operations of State Attorneys General*

Contemporary state attorneys general, the large majority of whom are popularly elected,<sup>130</sup> each derive their authority from a combination of their state constitution, state statutes, and the common law.<sup>131</sup> How authority flows from each of these sources varies among attorneys general, and this can impact an attorney general's degree of authority and independence.<sup>132</sup> States and territories overwhelmingly establish the position of attorney general in their constitutions,<sup>133</sup> providing an authority starting point that can vary widely depending on the constitutional text and its level of detail.<sup>134</sup> From this baseline, laws enacted by the state legislature can further define the contours of an attorney general's authority; the starting point established in the state constitution, however, may permit or limit the legislature's ability to mold the attorney general's authority.<sup>135</sup> Thus, in two states with identical constitutional provisions establishing the office of the attorney general, each attorney general's level of authority and independence may nonetheless differ considerably. If, for example, legislatures in both states have discretion to expand or restrain the attorney general's power, one legislature may decide

---

129. See NAAG, *supra* note 111, at 10–11, 30–33. This dual loyalty among state attorneys general can create attorney-client dynamics unlike those found anywhere else. See, e.g., *Feeney v. Commonwealth*, 366 N.E.2d 1262 (Mass. 1977) (holding that the state attorney general could appeal a judgment over the expressed objections of state officers the attorney general represented if doing so would be in the public interest); *Frohnmayr v. State Accident Ins. Fund Corp.*, 660 P.2d 1061 (Or. 1983) (hearing lawsuit initiated by state attorney general against state client, which sought to prevent client from taking actions in violation of state statute); *State ex rel. Condon v. Hodges*, 562 S.E.2d 623 (S.C. 2002) (holding that state attorney general had authority to sue governor, whose legal interests attorney general also represented).

130. See NAAG, *supra* note 111, at 12. Attorneys general are popularly elected in forty-three states, Guam, and Northern Mariana Islands; appointed by the governor in five states, American Samoa, Puerto Rico, and the Virgin Islands; selected by secret ballot of the legislature in Maine; and selected by the state supreme court in Tennessee. *Id.*

131. *Id.* at 33.

132. *Id.*; see also discussion *infra* Section III.B regarding spectrum of attorney general authority and independence.

133. See NAAG, *supra* note 111, at 45 (noting that forty-four states and Puerto Rico follow this approach, while six states and three territories establish the office by statute).

134. See discussion *infra* Section III.B regarding spectrum of attorney general authority and independence.

135. See NAAG, *supra* note 111, at 33–36; see also discussion *infra* Section III.B regarding spectrum of attorney general authority and independence.

to further empower its attorney general while the other curbs its attorney general.

Courts, too, shape state attorneys general, often holding that they possess common law authority to act as chief legal officer of the state.<sup>136</sup> This conception of the office tends to be quite broad, covering the power to take action on behalf of the public when the attorney general deems it appropriate; the power to exercise complete discretion over litigation when representing state government; and the power to maintain primacy over any cases of purely public interest.<sup>137</sup>

The duties of state attorneys general are typically informed by their level of authority and independence. State attorneys general with substantial authority and independence tend to have a high degree of discretion in conducting their offices.<sup>138</sup> Conversely, those with greater limits on their authority and independence are usually more tightly bound by specific responsibilities, which often arise out of state legislation.<sup>139</sup> Mandated or not, state attorneys general assume an array of duties. Common duties include: representing and advising state agencies, state officials, and in some cases the legislature;<sup>140</sup> defending the constitutionality of state legislation;<sup>141</sup> defending

---

136. See NAAG, *supra* note 111, at 30.

137. See *id.* at 40 (“Perhaps the most important common law right of the attorney general is the control of litigation and appeals on behalf of the state.”).

138. See, e.g., *supra* note 129.

139. For example, the highly constrained Wisconsin attorney general sued the city of Oak Creek over a concrete channel on a navigable waterway, but the state legislature exempted the channel from state permit requirements; the state supreme court subsequently held that the attorney general was duty-bound to defend the state statute and thus lacked standing. See *State v. City of Oak Creek*, 605 N.W.2d 526, 528 (Wis. 2000); see also Christa Oliver Westerberg, *From Attorney General to Attorney Specific: How State v. City of Oak Creek Limited the Powers of Wisconsin’s Chief Legal Officer*, 2001 WIS. L. REV. 1207, 1208–09 (2001).

140. See NAAG, *supra* note 111, at 68; Scott M. Matheson, Jr., *Constitutional Status and Role of the State Attorney General*, 6 U. FLA. J.L. & PUB. POL’Y 1, 8–9 (1993) (“All state attorneys general render advisory opinions to the governor and executive departments, and many issue such opinions to the legislature and local prosecutors. Their opinions can shape policy and development of the law, in part because they may be the only guidance on state constitutional and statutory issues that are infrequently or never litigated.”); Thomas R. Morris, *State Attorneys General As Interpreters of State Constitutions*, 17 PUBLIUS 133, 133 (1987) (“While opinions are not binding on state courts, they are regularly sought and almost always followed by state officials.”).

141. See, e.g., *supra* note 137. However, state attorneys general who hold substantial authority and independence also often have discretion over whether to defend state statutes against constitutional challenges; indeed, some can even initiate such challenges themselves. See NAAG, *supra* note 111, at 89–91.



the state in liability suits;<sup>142</sup> enforcing consumer protection laws;<sup>143</sup> enforcing environmental regulations;<sup>144</sup> prosecuting criminal cases and defending criminal appeals;<sup>145</sup> and enforcing civil rights protections.<sup>146</sup>

To carry out these various duties, state attorney general offices typically contain a litany of different departments. Although individual offices vary, common departments within attorney general offices include those focused on criminal prosecution and appeals, environmental matters, civil litigation, consumer protection, and the solicitor general's appellate practice.<sup>147</sup> Many larger attorney general offices require the services of hundreds of

---

142. See NAAG, *supra* note 111, at 88 (“The vast majority of the attorneys general have a duty to litigate, affirmatively and defensively, on behalf of client agencies.”).

143. See Matheson, Jr., *supra* note 140, at 13 (“In areas such as . . . consumer protection, the attorney general . . . appears in such litigation as a result of enforcement discretion and acts as the legal representative of the state and the public interest.”).

144. See NAAG, *supra* note 111, at 121 (“In all but a handful of states, the attorney general is the public official charged with enforcing and prosecuting violations of state environmental laws in state courts.”).

145. See Note, *Appointing State Attorneys General: Evaluating the Unbundled State Executive*, 127 HARV. L. REV. 973, 980–81 (2014) (explaining that while most criminal law enforcement occurs at the local level, “the attorney general has a formal supervisory role, and, while it is rare, he can take control of individual cases and prosecute them”); Matheson, Jr., *supra* note 140, at 24 (“In many states, the majority of criminal investigation and prosecution through trial is carried out at the local government level with the state attorney general's office handling most of the criminal appeals.”). For an example of the type of complex criminal investigations that a state attorney general's office might conduct, see TERRY GODDARD, HOW TO FIX A BROKEN BORDER, THE SOLUTION: FOLLOW THE MONEY 2, 15 (2012) (detailing Arizona's decade-long effort to stymie cross-border drug cartel smuggling operations, which ultimately seized \$20 million and yielded a \$94 million settlement with Western Union).

146. See William P. Marshall, *Break up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 YALE L.J. 2446, 2452 (2006) (noting statutory authority for some state attorneys general to bring civil rights actions).

147. See, e.g., *Attorney General's Criminal Justice Division*, NEV. ATT'Y GEN.'S OFF., [https://ag.nv.gov/About/Criminal\\_Justice/Criminal\\_Justice/](https://ag.nv.gov/About/Criminal_Justice/Criminal_Justice/) [<https://perma.cc/CU4U-FZSS>]; *Natural Resources & Environment*, COLO. ATT'Y GEN., <https://coag.gov/office-sections/natural-resources-environment/> [<https://perma.cc/9EY3-KPFE>]; *Civil Litigation*, MISS. ATT'Y GEN., <https://www.ago.state.ms.us/divisions/civil-litigation/> [<https://perma.cc/ZE5W-QPHU>]; *Consumer Protection*, MICH. DEP'T OF ATT'Y GEN., <https://www.michigan.gov/ag/consumer-protection> [<https://perma.cc/UTG3-ZD6D>]; *Office of the Solicitor General*, TEX. ATT'Y GEN., <https://www.texasattorneygeneral.gov/divisions/office-solicitor-general> [<https://perma.cc/76YK-PU92>].

employees,<sup>148</sup> sometimes rendering these the largest law firm in their states (or at least their states' largest "public interest" law firm).<sup>149</sup>

The independence and authority of state attorneys general varies among the states, sometimes considerably. Because the exact combination of each attorney general's sources of authority is unique, there is a spectrum along which each official's power falls. That spectrum spans from the least constrained attorneys general (most powerful) to the most constrained (least powerful). Between these two ends of the spectrum lie many attorneys general who enjoy a fair amount of independence yet nonetheless face certain constraints.

The least constrained attorneys general possess the most authority and independence. This authority is maximized where state constitutions provide extensive grants of power, where state statutes strengthen that power, and where the attorney general has little or no duty to the governor. For example, the attorney general of Illinois retains "perhaps the broadest power of all the Attorneys General within the United States."<sup>150</sup> This power stems from the Illinois Constitution's declaration that the attorney general "shall be the legal officer of the State, and shall have the duties and powers that may be prescribed by law."<sup>151</sup> The state's supreme court has construed that language expansively to completely encompass the traditional common law authority to act as chief legal officer of the state and the "law officer of the people,"<sup>152</sup> as well as any additional power granted by the state legislature.<sup>153</sup> Significantly, Illinois' supreme court has held that this expansive common law authority—established as a baseline in the state constitution—cannot be limited by statute.<sup>154</sup>

---

148. See, e.g., *The Office*, PENN. ATT'Y GEN., <https://www.attorneygeneral.gov/the-office/> [<https://perma.cc/W7J6-G3NR>] ("The Attorney General is served by a staff of several hundred prosecutors, attorneys, investigators, agents and support staff in offices across the state . . .").

149. See Lacy H. Thornburg, *Changes in the State's Law Firm: The Powers, Duties and Operations of the Office of the Attorney General*, 12 CAMPBELL L. REV. 343, 361–62 (1990).

150. David Edward Dahlquist, *Inherent Conflict: A Case Against the Use of Contingency Fees by Special Assistants in Quasi-Governmental Prosecutorial Roles*, 50 DEPAUL L. REV. 743, 765 (2000).

151. ILL. CONST. art. V, § 15.

152. See *Fergus v. Russel*, 110 N.E. 130, 143 (Ill. 1915).

153. See *id.* at 143–44.

154. See *County of Cook ex rel. Rifkin v. Bear Stearns & Co.*, 831 N.E.2d 563, 570 (Ill. 2005) ("The legislature may add to those powers, but it cannot reduce the Attorney General's common law authority in directing the legal affairs of the state."). This implies that the only way to reduce the Illinois attorney general's power is by amending the state constitution, a considerably more difficult task.

On the other end of the spectrum, the most constrained attorneys general retain the least amount of authority and independence. This is especially the case in states whose constitutions provide fairly limited—sometimes even explicitly restricted—grants of power; where state statutes have limited or failed to expand that power; and where the attorney general has a duty to the governor. For example, Arizona substantially restrains its attorney general’s power. The Arizona Constitution provides only that “[t]he powers and duties of . . . [the] attorney-general . . . shall be as prescribed by law.”<sup>155</sup> The state’s supreme court has construed this text to be limiting, holding that the attorney general has no common law powers and instead possesses only those powers explicitly granted by statute.<sup>156</sup> In the absence of statutory authority, Arizona’s supreme court has held that the attorney general has no power or duty to initiate independent actions—regardless of the public interest.<sup>157</sup> Moreover, that court has determined that the attorney general has a duty of loyalty to state agencies and to the governor.<sup>158</sup>

Between these two poles lie many attorneys general whose power tends to be restrained in certain respects but who nonetheless wield independence and authority. For example, the attorney general of California has considerable authority conferred by the state constitution and is relatively free to pursue actions believed to be in the best interest of the public.<sup>159</sup> However, California’s supreme court has found an important limitation to this power. If a conflict exists between the governor and the attorney general over the faithful execution of the state’s laws, the governor retains supreme executive power to determine what is in the public interest and the attorney general may act only subject to the governor’s wishes.<sup>160</sup> The California attorney general holds considerable independence and authority but is ultimately restrained by a duty to the governor.

---

155. ARIZ. CONST. art. V, § 9.

156. *Shute v. Frohmiller*, 90 P.2d 998, 1003 (Ariz. 1939).

157. *See* *Ariz. State Land Dep’t v. McFate*, 348 P.2d 912, 918 (Ariz. 1960).

158. *See* *State ex rel. Brnovich v. Ariz. Bd. of Regents*, 476 P.3d 307, 312 (Ariz. 2020).

159. *See* CAL. CONST. art. V, § 13 (“[T]he Attorney General shall be the chief law officer of the State. It shall be the duty of the Attorney General to see that the laws of the State are uniformly and adequately enforced . . . . Whenever in the opinion of the Attorney General any law of the State is not being adequately enforced in any county, it shall be the duty of the Attorney General to prosecute any violations of law . . . .”).

160. *See* *People ex rel. Deukmejian v. Brown*, 624 P.2d 1206, 1209 (Cal. 1981). Specifically, the court found the California constitution’s description of the attorney general as “[s]ubject to the powers and duties of the Governor” to be conclusive on the matter. *See id.*; CAL. CONST. art. V, § 13.

### C. State Attorneys General and Climate Change

Like governors, state legislatures, and municipal governments, state attorneys general also increasingly seek to lead efforts to address the climate crisis in the federal government's absence. These efforts often involve high-profile multistate lawsuits,<sup>161</sup> and they often target the federal government.

For example, the Massachusetts attorney general, several other state attorneys general, and a group of environmental organizations prevailed in a landmark 2007 climate change case against the EPA.<sup>162</sup> That case, *Massachusetts v. EPA*, successfully forced the agency to regulate GHG emissions from new motor vehicles under the Clean Air Act.<sup>163</sup> The ramifications of *Massachusetts v. EPA* were monumental: the case recognized Article III standing for states impacted by climate change,<sup>164</sup> it obligated the EPA to regulate GHG emissions that contribute to climate change unless it could provide a "reasonable explanation" for not doing so,<sup>165</sup> and it opened the floodgates to more climate change litigation.<sup>166</sup>

In the years since *Massachusetts v. EPA*, climate change lawsuits challenging federal government policies have proliferated. In 2017, California, New Mexico, New York, and Washington sued the Trump administration in an effort to halt a resumption in coal leasing on federal lands.<sup>167</sup> These four states emphasized that GHG emissions from the production, transport, and consumption of coal from federal lands alone

---

161. Multistate litigation typically involves cooperation and coordinated action among state attorneys general that is intended to achieve larger legal victories than would otherwise be possible through independent action. See Thomas A. Schmeling, *Stag Hunting with the State AG: Anti-Tobacco Litigation and the Emergence of Cooperation Among State Attorneys General*, 25 L. & POL'Y 429, 430 (2003). Major examples of early success with this strategy include settlements reached with tobacco companies and lead paint manufacturers, as well as auto manufacturers and toy makers. See *id.*; see also *infra* note 194. These early successes paved the way for the continued use of multistate litigation to obtain large settlements. See Brian Mann, *State Attorneys General Reach a \$26 Billion National Opioid Settlement*, NPR (July 21, 2021), <https://www.npr.org/2021/07/21/1018881195/state-attorneys-general-26-billion-opioid-settlement> [<https://perma.cc/AN9T-4YGX>].

162. See *Massachusetts v. EPA*, 549 U.S. 497, 501–06, 535 (2007).

163. See *id.* at 532–33.

164. See *id.* at 516–26.

165. See *id.* at 533.

166. See NAAG, *supra* note 111, at 126 (“[Climate change] cases have mushroomed since the seminal decision. States are parties and intervenors in a wide variety of legal action surrounding greenhouse gases, most arising under the Clean Air Act, some under state statutes, and a few based on other statutes or the common law.”).

167. See Complaint for Declaratory and Injunctive Relief at 1–2, *California v. Zinke*, No. 4:17-cv-00042-BMM (D. Mont. May 9, 2017).

account for 11% of national GHG emissions and 1.5% of global GHG emissions.<sup>168</sup> In 2018, a group of eleven states and the District of Columbia sued the EPA, challenging the agency's relaxed restrictions on the use of hydrofluorocarbons, "powerful greenhouse gases that contribute to climate change."<sup>169</sup> In 2019, California, joined by twenty-two other states, twice sued the Trump administration after it revoked a waiver that permitted California to maintain higher auto emissions standards than the federal government.<sup>170</sup> These cases are just a few examples of state attorneys general displaying a growing willingness to use litigation to abate threats to the climate.<sup>171</sup>

The contemporary state attorney general is the result of a centuries-long process establishing a legal representative of the sovereign, whose mandate expanded to encompass legal representation of the public. This dual responsibility creates unique authority, duties, and operations, which vary among attorneys general depending on their states' constitutions, statutes, and common law. Despite variation among these officials, they are all charged with acting in the public interest.<sup>172</sup> Under this mandate, a growing number of them seek to lead in confronting climate change, primarily through litigation. As federal inaction on climate change persists, can state attorneys general strengthen their leadership role on this front?

#### IV. THE PROMISE OF CLIMATE PRESERVATION UNITS

The urgency of the climate crisis and the failure to adequately confront it at the national level increasingly compels state and local governments to assume greater responsibility for addressing the crisis. Among subnational actors leading on addressing climate change, state attorneys general play a notable role. State attorney general authority varies among states, but by and large these actors and their offices are tasked with serving the public, and they retain substantial authority and independence in fulfilling that mission.<sup>173</sup> In the face of a climate emergency, how can state attorneys general build on their previous efforts to lead where the federal government

---

168. *See id.* at 5.

169. *See* Nat. Res. Def. Council v. Wheeler, 955 F.3d 68, 72–73, 76 (D.C. Cir. 2020).

170. *See* Barboza & Phillips, *supra* note 108.

171. *But see* Eric Lipton, *Energy Firms in Secretive Alliance with Attorneys General*, N.Y. TIMES (Dec. 6, 2014), <https://www.nytimes.com/2014/12/07/us/politics/energy-firms-in-secretive-alliance-with-attorneys-general.html> [<https://perma.cc/B4QR-W5PX>] (documenting oil and gas companies' collusion with then-Oklahoma attorney general Scott Pruitt and other attorneys general to attack federal environmental regulations); *see supra* notes 96–98 and accompanying text.

172. *See supra* notes 126–129 and accompanying text.

173. *See supra* Section III.B; NAAG, *supra* note 111, at 27–44.

falls short? How can they maximize the potential of their unique authority and independence in service of climate change solutions?

In February 2018, California attorney general Xavier Becerra established a Bureau of Environmental Justice,<sup>174</sup> the first of its kind among attorney general offices. The new bureau's mission was "to protect people and communities that endure a disproportionate share of environmental pollution and public health hazards" by engaging in "oversight, investigation, and enforcement of the law."<sup>175</sup> Although housed within his office's Environment Section, Becerra announced that the new bureau would coordinate with the office's other sections and utilize their expertise.<sup>176</sup> Since its inception, the Bureau of Environmental Justice has quashed industrial projects deemed to be detrimental to vulnerable communities by informing project planners about uncovering their misleading air quality reports,<sup>177</sup> warning municipalities against approving land use permits without sufficient environmental review,<sup>178</sup> and intervening through the courts.<sup>179</sup> The accomplishments of just a handful of attorneys within this tiny intersectional operation<sup>180</sup> have inspired other attorneys general to pursue similar

---

174. See Press Release, California Att'y Gen. Xavier Becerra, Attorney General Becerra Establishes Bureau of Environmental Justice (Feb. 22, 2018), <https://oag.ca.gov/news/press-releases/attorney-general-becerra-establishes-bureau-environmental-justice> [<https://perma.cc/4EKJ-H99F>].

175. *Id.*

176. *Id.*

177. See Evelyn Nieves, *In 2018, the California AG Created an Environmental Justice Bureau. It's Become a Trendsetter*, INSIDE CLIMATE NEWS (Dec. 26, 2020), <https://insideclimatenews.org/news/26122020/california-attorney-general-xavier-becerra-environmental-justice-bureau/> [<https://perma.cc/N223-W9D3>].

178. See Yvette Cabrera, *This Tiny but Mighty California Bureau Is Taking on Polluters*, GRIST (Feb. 21, 2020), <https://grist.org/justice/this-tiny-but-mighty-california-bureau-is-taking-on-polluters/> [<https://perma.cc/LQE9-VUP5>].

179. *See id.*

180. *See id.*

initiatives: New Jersey in 2018,<sup>181</sup> Washington State in 2020,<sup>182</sup> and New Mexico in 2020.<sup>183</sup>

The California Bureau of Environmental Justice’s activities demonstrate the value in approaching issues of environmental harm through a broad lens, an approach that should be replicated and expanded specifically within the climate change context. State attorneys general increasingly commence high-profile environmental and climate litigation,<sup>184</sup> but emphasizing litigation alone undersells the potential impact of these officials in the realm of climate action. The authority and independence of state attorneys general permit a wider variety of meaningful activities other than litigation. This power should be embraced in the struggle against climate change, especially while national solutions remain so rare.

Specifically, state attorneys general should establish intersectional and holistic Climate Preservation Units within their offices—dedicated to the mission of preserving a livable climate. These CPUs should pursue this mission by all possible means within the state’s jurisdiction and the attorney general’s authority. State attorneys general should staff these units with attorneys possessing expertise in diverse areas of law, such as environmental, constitutional, financial, criminal, and consumer protection. Such diverse perspectives can capture the wide-ranging impacts of climate change. Creating a central hub of expertise and activity exclusively focused on climate change can maximize the attorney general’s office in service of climate action.

In an era burdened by political gridlock and other obstacles to meaningful climate action, state attorneys general occupy offices with the unique potential to make a considerable difference in combating climate change in the United States. Gone are the days where “[t]he attorney general served

---

181. See Press Release, New Jersey Att’y Gen. Gurbir S. Grewal, Attorney General, DEP File Lawsuits Across New Jersey Targeting Polluters in Lower-Income and Minority Communities (Dec. 6, 2018), <https://www.nj.gov/oag/newsreleases18/pr20181206a.html> [<https://perma.cc/TS6K-SHSM>].

182. See Press Release, Washington State Att’y Gen. Bob Ferguson, AG Ferguson Rolls out Environmental Justice Initiative in Honor of Earth Day (Apr. 21, 2020), <https://www.atg.wa.gov/news/news-releases/ag-ferguson-rolls-out-environmental-justice-initiative-honor-earth-day> [<https://perma.cc/KU5S-M7XA>].

183. See Press Release, New Mexico Att’y Gen. Hector Balderas, AG Balderas Announces Natural Resources and Environmental Equity Initiative, Appointment of Equity Advisory Council (Sept. 22, 2020), [https://www.nmag.gov/uploads/PressRelease/48737699ae174b30ac51a7eb286e661f/AG\\_Balderas\\_Announces\\_Natural\\_Resources\\_and\\_Environmental\\_Equity\\_Initiative.pdf](https://www.nmag.gov/uploads/PressRelease/48737699ae174b30ac51a7eb286e661f/AG_Balderas_Announces_Natural_Resources_and_Environmental_Equity_Initiative.pdf) [<https://perma.cc/9TAJ-EHEH>].

184. See *supra* Section III.C.

chiefly as a lawyer to state government.”<sup>185</sup> Today, many state attorneys general oversee offices with hundreds of employees,<sup>186</sup> and they engage in a litany of activities ranging from multistate litigation to advising state agencies on the legality of regulations.<sup>187</sup> Many state attorneys general operate under broad mandates to protect the public interest and have considerable latitude in selecting the methods by which to serve this mission. Climate change, which poses an existential threat to humanity’s survival, falls squarely within this authority. To meet the moment, state attorneys general should create Climate Preservation Units within their offices in the same way that their offices contain bureaus focused on matters such as consumer protection, criminal justice, and appellate litigation. Doing so would recognize the reality that necessary national climate action has not yet fully materialized.

This Comment proposes that state attorneys general can maximize their potential in service of climate change solutions by establishing Climate Preservation Units within their offices. In making this case, this Part discusses (1) core functions envisioned for Climate Preservation Units; (2) potential challenges and benefits of CPUs; and (3) how the structure and authority of CPUs might vary among states.

#### *A. Core Functions*

Climate Preservation Units should operate under a broad mandate in order to maximize their effectiveness and impact. The rationale for creating these units is rooted in the recognition that climate change is a problem of monumental scale certain to impact all areas of law. If state attorneys general are to fully exercise their offices’ authority in service of mounting a response to such a problem, the units tasked with responding must be intersectional, with the ability to act on the many matters with climate implications.

Within the broad range of activities that CPUs might endeavor to undertake, four core functions stand out: (1) litigation; (2) intrastate advising; (3) engagement with other levels of government; and (4) public outreach. This description of CPUs is not intended to be exhaustive; rather, it offers a high-level framework for conceptualizing them.

---

185. WALTER F. MONDALE WITH DAVID HAGE, *THE GOOD FIGHT: A LIFE IN LIBERAL POLITICS* 15 (2010).

186. *See supra* note 148.

187. *See supra* Section III.B.



## 1. Litigation

CPUs should function as a central hub for conducting and coordinating litigation on climate-change-related matters. This might entail, for example, determining ripe targets for litigation, such as energy companies, manufacturers, chemical companies, the federal government, or other states. CPUs could independently initiate actions against heavy GHG emitters or violators of state climate laws. They could also engage in multistate litigation with other states' CPUs against larger national entities, including the federal government.

Importantly, state attorneys general are limited to enforcing the laws available to them under the authority they possess; this bears directly on the ability of CPUs to pursue climate-related litigation. While state environmental statutes are ubiquitous,<sup>188</sup> climate-specific state laws are less common.<sup>189</sup> This limits CPU litigation potential. Passage of new state climate laws in conjunction with the creation of CPUs would make these units more potent litigators, arming them with more causes of action.<sup>190</sup>

In the absence of new state climate laws, CPUs may have to get creative in wielding existing statutes, state constitutional provisions, and traditional causes of action in service of confronting climate change. For example, some states have expansive environmental protections embedded in their constitutions.<sup>191</sup> These provisions have been used by attorneys general to bring common law nuisance actions to abate threats to the environment and climate.<sup>192</sup> This approach could be replicated and expanded by CPUs.

Additionally, the doctrine of *parens patriae*, which permits a state to litigate on behalf of its citizens to protect its quasi-sovereign interests in their

---

188. See 50 *STATE STATUTORY SURVEYS: Environmental Laws: Pollution: Toxic Torts*, 0070 SURVEYS 12 (Westlaw 2021).

189. See *State Climate Policy Maps*, *supra* note 106 (displaying several states lacking greenhouse gas emissions targets, state climate action plans, carbon pricing, clean and renewable electricity sector policies, and transportation emissions regulations).

190. See NAAG, *supra* note 111, at 45 (describing ongoing “trend toward expansion of the duties and powers of the attorney general as state legislatures have prescribed new responsibilities and functions for state governments”).

191. See, e.g., ILL. CONST. art. XI, §§ 1–2 (“The public policy of the State and the duty of each person is to provide and maintain a healthful environment for the benefit of this and future generations. . . . Each person has the right to a healthful environment. Each person may enforce this right against any party, governmental or private . . . .”); MONT. CONST. art. II, § 3 (“All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment . . . .”). These provisions appear to guarantee a fundamental state constitutional right, for current and future generations, to a healthy and clean environment—similar to the federal constitutional right the *Juliana* plaintiffs sought to establish. See *supra* notes 18, 89–92 and accompanying text.

192. See NAAG, *supra* note 111, at 134.

health, comfort, and welfare, may be particularly useful.<sup>193</sup> State attorneys general have successfully applied this doctrine in past litigation, most notably the groundbreaking multistate tort litigation in the 1990s against the tobacco industry, which produced an enormous settlement and forced industry change on a national scale.<sup>194</sup> The doctrine has already played a pivotal role in the development of climate change litigation, as it was key to Massachusetts' standing in *Massachusetts v. EPA*.<sup>195</sup>

Similar to *parens patriae*, many attorneys general hold a common law power to initiate litigation to protect and defend state property and revenue,<sup>196</sup> both of which are threatened by an unstable climate. Under the authority to guard these state interests and the doctrine of *parens patriae*, Climate Preservation Units could be well positioned to engage in multistate climate change litigation in the mold of the 1990s tobacco cases. Supported by the argument that climate change threatens the health and welfare of the public and threatens state property and revenue, this litigation could target high-emissions industries such as coal and oil, the federal government, and other entities.

CPUs might also litigate in the criminal context, either independently or in tandem with their offices' criminal justice units, embracing a prosecutorial role where criminal violations occur on matters implicating climate change. For example, some environmental laws impose criminal liability on violators.<sup>197</sup> CPUs could focus on prosecuting violations of environmental laws that are sufficiently related to climate change, such as those dealing with air quality and emissions. If legislatures enact new climate-specific laws that provide for criminal penalties, CPUs could be a natural fit to prosecute violations of those laws. The ability of a CPU to conduct criminal prosecutions, however, may hinge on how law enforcement authority is

---

193. See NAAG, *supra* note 111, at 95–97, 122 (noting that attorneys general are increasingly using their *parens patriae* authority to independently sue on behalf of their state's citizens in a variety of areas, including environmental law).

194. See NAAG, *supra* note 111, at 386 (describing national Master Settlement Agreement reached in tobacco litigation that recovered more than \$200 billion for states and imposed limits on tobacco advertising, marketing, and promotion).

195. See Robert A. Weinstock, *The Lorax State: Parens Patriae and the Provision of Public Goods*, 109 COLUM. L. REV. 798 (2009).

196. See, e.g., *Florida ex rel. Shevin v. Exxon Corp.*, 526 F.2d 266, 270–71 (5th Cir. 1976).

197. See, e.g., Hazardous Waste Management, N.H. REV. STAT. ANN. § 147-A:16 (Westlaw through Chapter 345 of the 2022 Reg. Sess.); Natural Resources and Environmental Protection Act, MICH. COMP. LAWS ANN. § 324.5531 (West, Westlaw through P.A.2022, No. 188, of the 2022 Regular Session, 101st Legislature); Air Pollution Control Act, N.J. STAT. ANN. § 26:2C-19 (West, Westlaw through L.2021, c. 101 and J.R. No. 3).

allocated within its state.<sup>198</sup> Especially active CPUs may also collaborate with criminal justice units to prepare for future prosecutions in the event that currently-legal (or at least not currently prosecuted) activities exacerbating climate change are criminalized in the future.<sup>199</sup>

## 2. Intrastate Advising

Climate Preservation Units should play an active role in advising different segments of state government on matters related to climate change. This includes advising other units within the attorney general's office, advising executive officials and state agencies, and advising the state legislature.

Similar to their litigation role, CPUs can operate as a central hub for climate change advisement within the attorney general's office. CPUs would work with other office units to ensure that potential climate change ramifications are appropriately understood and considered by those units before they initiate litigation, draft legal opinions, or engage in other routine duties. For example, a CPU might alert the unit advising the state department of corrections that a forthcoming state climate law requiring state government emissions reductions should be considered when the department of corrections selects a contractor for a major prison renovation. Attorneys within CPUs could also consult with other units' attorneys about whether and how those units should defend the state in cases where climate change issues are implicated.<sup>200</sup> In the criminal sphere, CPUs can notify their offices' criminal justice units when crimes those units might prosecute have climate change dimensions that should be considered.<sup>201</sup>

Because one of the core duties of a state attorney general is to provide legal counsel to state government, CPUs could offer a valuable climate

---

198. For example, Florida reserves to local district attorneys the authority to prosecute environmental crimes. *See* NAAG, *supra* note 111, at 137. Thus, a Florida CPU might ironically be permitted to pursue criminal prosecutions related to climate change only if it can do so under laws that are not deemed to be environmental.

199. *See* Laurie L. Levenson, *Climate Change and the Criminal Justice System*, 51 ENV'T L. 333, 362–65 (2021) (discussing disinformation and criminal negligence as potential climate change-related crimes in the future).

200. *See supra* notes 129, 141–142 for discussion of duties and discretion of attorneys general in defending their states. Importantly, not all attorneys general have an inflexible obligation to defend state clients; decisions on whether and how to do so could take climate change impacts into account.

201. This would often entail alerting criminal justice units about possible criminal violations of climate laws. Additionally, CPUs might highlight particular business practices of corporate defendants that contribute substantially to climate change, possibly proposing mitigation of these practices as terms to be included in a plea agreement.

change perspective when advising executive officials and state government agencies. A major component of this advisement would involve drafting legal opinions (which hold considerable weight)<sup>202</sup> for state officials and agencies regarding issues that implicate climate change. These legal opinions might, for example, provide an interpretation of state constitutional provisions guaranteeing a clean and healthy environment,<sup>203</sup> advise state agencies on whether to avoid certain activities that contribute to emissions and whether there might be any liability stemming from such activities, advise agencies on developing new climate regulations, or appraise the governor of any climate change ramifications from legislation awaiting signature.

CPUs also have a key role to play in advising the state legislature. Just as state attorneys general routinely advise state agencies and executive officials, so too do most advise their state's legislative body.<sup>204</sup> The degree to which this occurs varies by state, but such advisement may include providing legal opinions about legislative bills and their constitutionality or even drafting proposed bills.<sup>205</sup> Accordingly, CPUs might advise their legislatures about the legality and practicability of any new climate laws, provide guidance on the potential climate impacts of other legislation, or propose new state laws to combat climate change.

### 3. Engagement with Other Levels of Government

Climate Preservation Units should supply an effective vehicle for engaging with other levels of government on climate action. Specifically, CPUs can spearhead vertical and horizontal collaboration.<sup>206</sup>

Vertical collaboration by Climate Preservation Units would take two forms: (1) downward vertical collaboration with local governments;<sup>207</sup> and

---

202. See *supra* note 140.

203. See *supra* note 191.

204. See *supra* note 140.

205. See NAAG, *supra* note 111, at 68.

206. See Wang & Weinstein-Tull, *supra* note 101, at 37, 41. "Generally, horizontal networks are often regional in geography and include governments with similar political leanings, as adjacent jurisdictions take joint action to combat a common problem. But they may also form between far-flung jurisdictions that face similar challenges. These horizontal networks allow[] states to share knowledge and can help to equalize resource differences between them." *Id.* at 37. "Vertical collaboration occurs when authorities at different levels explicitly work together to share practices, align policies, and coordinate efforts." *Id.* at 41.

207. This is an especially important form of collaboration as large cities increasingly seek to exercise authority in areas of national importance. See Erin Adele Scharff, *Hyper Preemption: A Reordering of the State-Local Relationship?*, 106 GEO. L.J. 1469, 1471

(2) upward vertical collaboration with the federal government. Downward vertical collaboration might be either cooperative or adversarial. For example, CPUs could cooperate with cities by providing legal guidance on complying with state climate laws and regulations, and by encouraging them to implement their own climate initiatives tailored to local circumstances, such as building “reach codes,” equity-centered energy regulation, or limitations on fossil fuel use.<sup>208</sup> Conversely, CPUs could be adversarial toward local governments by suing those acting as safe havens for emitters or those skirting state climate regulations.<sup>209</sup> Upward vertical collaboration could similarly be cooperative or adversarial. For example, CPUs could cooperate with Congress and federal agencies in crafting climate legislation and regulations that take state needs and interests into account. CPUs could also work with the Department of Justice on joint enforcement of any such climate legislation and regulations.<sup>210</sup> Conversely, CPUs could strike an adversarial posture by suing the federal government when climate change conflicts arise.

---

(2018) (noting a growing willingness by large cities to engage with immigration and climate change policy after President Trump’s election).

208. *See supra* notes 116–121 and accompanying text. Cooperative downward vertical collaboration such as this is likely to be largely hands-off and advisory. *See* Justin Weinstein-Tull, *State Bureaucratic Undermining*, 85 U. CHI. L. REV. 1083, 1105 (2018) (“Despite being creations of the state in theory, local governments ‘function as representatives of local constituencies and not as field offices for state bureaucracies’ in practice.”) (footnote omitted).

209. This could create an interesting inverse of the sparring in recent years between politically red state governments and politically blue cities. *See, e.g.*, Ana Ceballos, *Federal Judge Blocks Florida Law Banning ‘Sanctuary Cities’*, TAMPA BAY TIMES (Sept. 22, 2021), <https://www.tampabay.com/news/florida-politics/2021/09/21/federal-judge-blocks-florida-law-banning-sanctuary-cities/> [<https://perma.cc/6QRA-4UKP>]; Richard Morin, *Rough Waters in Key West as City, Cruise Industry and State Lawmakers Tangle over Its Future*, WASH. POST (Mar. 27, 2021, 08:00 AM), [https://www.washingtonpost.com/national/rough-waters-in-key-west-as-city-cruise-industry-and-state-lawmakers-tangle-over-its-future/2021/03/26/6fedba3e-8ca3-11eb-a6bd-0eb91c03305a\\_story.html](https://www.washingtonpost.com/national/rough-waters-in-key-west-as-city-cruise-industry-and-state-lawmakers-tangle-over-its-future/2021/03/26/6fedba3e-8ca3-11eb-a6bd-0eb91c03305a_story.html) [<https://perma.cc/PSR5-ZFF6>]; Emma Platoff, *Texas Attorney General Ken Paxton Warns Austin, San Antonio, Dallas To Loosen Coronavirus Restrictions*, TEX. TRIB. (May 12, 2020, 05:00 PM), <https://www.texastribune.org/2020/05/12/Texas-attorney-general-warn-cities-coronavirus/> [<https://perma.cc/PLT4-RRUD>].

210. A framework for this type of enforcement collaboration already exists. *See* U.S. DEP’T OF JUST. & NAT’L ASS’N OF ATT’YS GEN., GUIDELINES FOR JOINT STATE/FEDERAL CIVIL ENVIRONMENTAL ENFORCEMENT LITIGATION (2017), <https://www.justice.gov/file/928531/download> [<https://perma.cc/BV4C-LLPZ>].

Horizontal collaboration would primarily take the form of cooperative engagement with other state attorneys general.<sup>211</sup> If state attorney general offices across the country seek to establish CPUs, opportunities will arise for interstate cooperation. Initially, this might involve idea sharing about best practices for establishing and operating an efficient and effective CPU. Such idea sharing can promote uniformity among states in combating climate change through these vessels, which should make interstate cooperation easier to accomplish. As more states establish these units, CPUs can more easily engage in concerted climate action such as multistate litigation, offering an increasingly potent stand-in for missing federal climate leadership.<sup>212</sup>

Horizontal collaboration among CPUs could also be formalized in the event that states forge interstate or regional climate compacts.<sup>213</sup> For example, a compact could require all member states to create CPUs tasked with a specific set of responsibilities. Such a compact could establish an

---

211. This could, of course, also be adversarial. For example, a CPU might wish to sue a neighboring state over policies toward emissions that hasten climate change and have cross-border spillover effects.

212. This may even provide the spark needed to ignite national action to address climate change if the federal government decides it does not wish to be undermined or that it desires the political benefits of climate action. *See Wang & Weinstein-Tull, supra* note 101, at 1986 (describing concept of “bandwagoning,” wherein government actors follow other government actors’ policy leads after sufficient momentum has developed). *See generally* PAUL NOLETTE, *FEDERALISM ON TRIAL: STATE ATTORNEYS GENERAL AND NATIONAL POLICYMAKING IN CONTEMPORARY AMERICA* (2015) (arguing that multistate litigation by state attorneys general has often inspired significant national policymaking beyond the actual litigation). Should national action materialize, CPUs could then engage in cooperative upward vertical collaboration with federal entities as they craft national climate legislation or regulations.

213. One such significant compact, the Regional Greenhouse Gas Initiative, has existed since 2005. *See Regional Greenhouse Gas Initiative (RGGI)*, CTR. FOR CLIMATE & ENERGY SOLS., <https://www.c2es.org/content/regional-greenhouse-gas-initiative-rggi/> [<https://perma.cc/KRR8-B9BB>]. Although modern interstate compacts are rare, the federal government’s persistent dysfunction, the federal judiciary’s growing skepticism toward the administrative state, and the limitations of individual state action have prompted at least two authors to advocate for a resurgence of these compacts. *See* Jon Michaels & Emme Tyler, *Just-Right Government* 1–6 (Working Paper, 2022), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3894046](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3894046) [<https://perma.cc/W42J-AJTX>]. If appropriately tailored to twenty-first century needs, they argue, interstate compacts and agreements offer an enticing alternative to the standard conception of a “binary federal constitutional system.” *See id.* at 1–6, 24–27. These authors further contend that modern compacts need not even be among contiguous states to be effective and desirable. *See id.* at 23–24. They propose four model interstate compacts, including a climate change agreement intended to internalize externalities and preempt the problem of races to the bottom. *See id.* at 27–28.

annual progress conference that each member state's CPU and attorney general must attend. A compact could also require that each member state's CPU be provided notice and opportunity to join any climate-related multistate lawsuit commenced by a member state.

#### 4. Public Outreach

CPUs should expend substantial effort to connect with the public about legal issues posed by climate change and remedies for those issues. In doing so, CPUs might consider public awareness campaigns, just as attorney general offices routinely provide information for their constituents on matters such as asserting civil rights claims<sup>214</sup> or protecting online privacy.<sup>215</sup> These campaigns could be conducted through a combination of press releases, annual reports, press conferences, and interviews with local media. The importance of social media in this context cannot be overstated: platforms like Twitter, Instagram, Facebook, and TikTok are essential to reaching a very online public and are regularly underutilized or inefficiently employed by government entities.

Such outreach efforts can provide state residents with valuable legal information about issues they might encounter stemming from climate change. For example, CPUs could publish guidance on properly approaching insurance claims following wildfires or hurricanes, information about new climate change regulations and how individuals and businesses can comply with them, and warnings about scams that might target vulnerable individuals after natural disasters.

CPUs should operate as centralized, intersectional climate change authorities within state attorney general offices. The scope of their activities should be broad, including coordinating and conducting climate litigation; advising other office units, state officials and agencies, and the legislature on climate matters; collaborating—both horizontally and vertically—with other

---

214. See, e.g., *Civil Rights Workshops*, OHIO ATT'Y GEN., <https://www.ohioattorneygeneral.gov/Training-and-Education/Civil-Rights-Workshops> [<https://perma.cc/VKQ5-8J8M>]; *Office of Civil Rights*, ATT'Y GEN. OF VA., <https://www.oag.state.va.us/programs-initiatives/civil-rights> [<https://perma.cc/Q2P4-MHPY>].

215. See, e.g., Press Release, Georgia Att'y Gen. Chris Carr, Carr Recognizes Data Privacy Week, Offers Online Security Tips (Jan. 24, 2022), <https://law.georgia.gov/press-releases/2022-01-24/carr-recognizes-data-privacy-week-offers-online-security-tips> [<https://perma.cc/EKE5-KMQA>]; *Online Scams: Phishing*, CONN. ATT'Y GEN., <https://portal.ct.gov/AG/Consumer-Issues/Identity-Theft/Phishing> [<https://perma.cc/Y8WN-R384>].

levels of government regarding climate action; and developing public awareness campaigns.

### *B. Challenges and Benefits*

To be sure, there are significant barriers to establishing CPUs, and potential costs and tradeoffs that must be considered. At the same time, CPUs offer substantial advantages and rewards that outweigh these considerations.

#### 1. Logistical Considerations

Forming an unprecedented unit that combines intersectional expertise with a broad mandate to confront an enormous and extremely complex issue is no small undertaking. For all the attention paid in this Comment to legal authority and independence, the biggest obstacle facing CPUs may be more fundamental: bureaucratic infighting. Even if CPUs have small staffs (at least initially),<sup>216</sup> the task of getting them off the ground will still entail navigating a great deal of intraoffice logistics.

For example, in the event that an attorney general seeks to establish a CPU without obtaining a budget increase from the legislature to do so (perhaps the likeliest outcome in most states given the contentiousness of budget battles), resources must be shuffled within the office and priorities rearranged. From which units does an attorney general decide to reassign staff attorneys to this nascent unit? How does an attorney general make this decision? When attorneys are transferred from units, who replaces them? Are there positions left vacant? Relatedly, who should lead this unit? And this is to say nothing of the issue of drawing boundaries among the units' purviews.<sup>217</sup> Where do the CPU's responsibilities begin and the responsibilities of other units end? Which state government agencies, if any, will be represented directly by this new unit? How is this determined, and will those agencies be amenable to this? State attorneys general do not often establish new units in their offices; perhaps these questions reveal something about why that is.

There are also serious resource issues to consider in establishing CPUs, particularly among offices not receiving a budget increase. Even if reshuffling staff attorneys from other units, an impactful CPU will generate

---

216. The California Bureau of Environmental Justice, for example, comprises only a handful of attorneys. *See* Cabrera, *supra* note 178 and accompanying text to note 180.

217. This could be seen as a variation of "role confusion," wherein state actors are unclear on who holds responsibility for administering the law and that lack of clarity leads to inaction, overlapping action, and a lack of accountability. *See* Weinstein-Tull, *supra* note 208, at 1115.



costs, especially from any increase in litigation. Because of this, many offices will face serious limitations on their ability to operate a CPU, even if there is substantial enthusiasm for it. This means that CPUs are likeliest to take hold (at least at first) in the largest states with the greatest funding. The earliest versions of these units may therefore appear in California, New York, Illinois, or Massachusetts rather than in Maine, Iowa, Delaware, or Hawaii.

Because of these resource considerations, it is easy to imagine CPUs being greeted with skepticism. Some may accuse attorneys general of creating inefficiency and erecting unnecessary and wasteful red tape. Some may criticize CPUs as redundant and no different from existing state environmental authorities—already ripe targets for budget cuts in many states.<sup>218</sup> If climate change is an environmental issue, why does it need its own department, and why does that department need to pull from the resources of other departments? Those questions should be addressed by noting that CPUs are not intended simply to be environmental regulators. Rather, they are to be holistic, intersectional, and centralized command centers to confront *all* issues within the attorney general’s jurisdiction related to the innumerable impacts of a changing climate, not just those that an environmental unit might traditionally embrace. Attorneys general intent on establishing CPUs will need to clearly explain this distinction to their constituents, who have a right to demand that explanation—especially in light of state government opaqueness.<sup>219</sup>

In fact, CPUs can actually promote efficiency. The intersectional nature of CPUs—embodied by attorneys with a wide range of expertise in environmental, consumer protection, civil rights, financial, and other matters—offers an all-hands-on-deck approach to a multifaceted threat. Gathering attorneys with such a diverse array of specializations within a single unit fosters a versatile collective perspective commensurate with the challenge facing CPUs. It also reduces the likelihood that an office will make mistakes in its climate actions due to a failure to consider the perspective of

---

218. See, e.g., *During a Time of Cutbacks at EPA, 30 States Also Slashed Funding for State Environmental Agencies*, ENV’T INTEGRITY PROJECT (Dec. 5, 2019), <https://environmentalintegrity.org/news/state-funding-for-environmental-programs-slashed/> [<https://perma.cc/5PV6-WP75>]; Siri Carpenter, *How Scott Walker Dismantled Wisconsin’s Environmental Legacy*, SCI. AM. (June 17, 2015), <https://www.scientificamerican.com/article/how-scott-walker-dismantled-wisconsin-s-environmental-legacy/> [<https://perma.cc/8FDU-9QCK>].

219. See Weinstein-Tull, *supra* note 208, at 1122 (“Because state government is overall less transparent than the federal government, state residents are less aware of how states allocate power internally than they are of how power is allocated at the federal level. . . . And state media has contracted in recent years, leaving the inner workings of state government less scrutinized and understood than other levels of government.”) (footnotes omitted).

other units or state agencies whose alienated interests may be implicated.<sup>220</sup> This should bolster efficiency by avoiding disjointed and possibly conflicting actions from different office units because climate change conceivably affects the work of every unit.<sup>221</sup>

## 2. Political Considerations

The broad scope of authority under which CPUs should operate may also leave some attorneys general vulnerable to accusations that they are power-hungry, intent on concentrating a dangerous amount of power in one unit within one office. However, this is not a proposal to create any new powers in the attorney general or to supersede the duties of separate branches of state government. It is simply an appeal for state attorneys general to wield their existing and well-established legal authority and reallocate resources within their offices to turn attention more acutely toward a major present threat. This is not a new phenomenon; state attorneys general regularly prioritize critical issues by shifting office attention and resources toward those issues, and by embracing additional responsibilities to address them.<sup>222</sup> Indeed, this is particularly true regarding environmental issues.<sup>223</sup>

Creating an entirely new unit within a state attorney general's office dedicated solely to staving off climate change conveys to the public the severity of the crisis and the urgency of addressing it. Rather than leaving

---

220. See *id.* at 1108–10 (describing the problem of agency alienation).

221. See Hana Vizcarra, *Climate Change Is Changing the Practice of Law*, HARV. L. SCH. ENV'T & ENERGY L. PROGRAM (July 30, 2020), <https://eelp.law.harvard.edu/2020/07/climate-change-is-changing-the-practice-of-law-beyond-environmental-law/> [<https://perma.cc/5L7Y-LEXQ>] (describing how environmental law “touches every part of the economy, every industry, and engages the full spectrum of lawyering skills,” and how climate change “is already impacting areas of law not strictly considered environmental”).

222. See, e.g., *Opioids*, NAT'L ASS'N OF ATT'YS GEN., <https://www.naag.org/issues/opioids/> [<https://perma.cc/7QRK-JKX2>] (“Attorneys general across the country have filed lawsuits against parties that have helped cause the opioids crisis. In addition, the attorneys general are working together to take advantage of shared resources, bringing maximum pressure on all participants who created and have benefited from the epidemic.”); *Excellence in Policing Initiative*, N.J. OFF. OF THE ATT'Y GEN., <https://nj.gov/oag/excellence/> [<https://perma.cc/TAE2-NU87>] (describing 2019 “comprehensive package of policy initiatives” for “statewide reforms” of New Jersey law enforcement).

223. See NAAG, *supra* note 111, at 121 (“As state environmental programs matured and federal resources devoted to environmental protection shrank or remained flat, additional responsibilities were (and continue to be) devolved to the states, and as a consequence, to state attorneys general.”).

these matters to be dealt with by a segment of an environmental unit, establishing a distinct and intersectional CPU elevates climate change to a position of prominence within the office on par with high-interest matters like consumer protection, criminal justice, and appellate litigation.<sup>224</sup>

It is also worth noting the possible political benefits that CPUs may offer for attorneys general. Attorneys general without a doubt occupy the role of the people's lawyer and guardian of the public interest, but they are also politicians, often seeking reelection or election to another office.<sup>225</sup> The ability of a politician to highlight something significant and tangible that differentiates that person during a campaign is of immense value; elevating climate change matters to a position of prominence within the state's largest public law firm could very well provide this. State attorneys general, like many politicians, may often have a vested interest in leaving a lasting legacy on the office they occupy.

Because of this, critics might wonder whether CPUs encourage greater politicization of state attorney general offices. After all, these offices are staffed with ostensibly impartial staff attorneys. This is a fair critique, and there may be some truth to the notion that this initiative will heighten activities of state attorney general offices that may be deemed "political." However, these offices—led by politicians—have never been isolated from politics. Further, any trend toward greater politicization of these offices is by no means a new development, as demonstrated by lawsuits brought by state attorneys general challenging the Affordable Care Act,<sup>226</sup> the Trump

---

224. Consumer protection and appellate litigation were not always activities widely emphasized within attorney general offices; these developed and expanded with time, just as climate preservation might. See Henry N. Butler & Joshua D. Wright, *Are State Consumer Protection Acts Really Little-FTC Acts?*, 63 FLA. L. REV. 163, 167–73 (2011); Kevin C. Newsom, *The State Solicitor General Boom*, ABA (Mar. 14, 2013), <https://www.americanbar.org/groups/litigation/committees/appellate-practice/articles/2013/winter2013-0313-state-solicitor-general-boom/> [<https://perma.cc/DS43-SH9V>].

225. See Newsom, *supra* note 224; Colin Provost, *When Is AG Short for Aspiring Governor? Ambition and Policy Making Dynamics in the Office of State Attorney General*, 40 PUBLIUS 597, 597 (2010) (“[T]he office of state attorney general . . . is increasingly recognized as a prominent springboard into various higher offices, most frequently, governor or U.S. senator.”) (citation omitted). Fifty-four percent of attorneys general beginning their terms between 1988 and 2003 later ran for governor or senator.

226. See, e.g., Warren Richey, *Attorneys General in 14 States Sue To Block Healthcare Reform Law*, CHRISTIAN SCI. MONITOR (Mar. 23, 2010), <https://www.csmonitor.com/USA/Justice/2010/0323/Attorneys-general-in-14-states-sue-to-block-healthcare-reform-law> [<https://perma.cc/9XYV-QMXL>].

administration's immigration actions,<sup>227</sup> and the 2020 presidential election results,<sup>228</sup> to name just a few. Most importantly, efforts to mitigate climate change—an existential threat to humanity—should not be considered “political.” Just as attorney general offices pursue liability for toxic spills<sup>229</sup> and lead poisoning,<sup>230</sup> action to combat climate change benefits general public safety and health. Moreover, to the extent that climate change is considered a “political” issue, that perception is likely to diminish with time,<sup>231</sup> especially as extreme weather persists and worsens.<sup>232</sup>

Considering the interests at stake and the nature of contemporary political discourse, it is not difficult to imagine backlash to CPUs. For example, the large majority of attorneys general are popularly elected in their states.<sup>233</sup> Accordingly, there is a risk that potential efforts to paint CPUs as radical and controversial could succeed in threatening the electoral prospects of attorneys general. This is especially true in politically moderate states where candidates from both major parties are regularly elected.<sup>234</sup> An attorney general facing reelection under such attacks might struggle; voters may share those concerns or may prioritize other issues over climate change. Without a doubt, this is a risk. However, attorneys general concerned about political backlash need not

---

227. See, e.g., Matt Zapotosky, *Attorneys General from 15 States, D.C. Sue To Save DACA*, WASH. POST (Sept. 6, 2017), [https://www.washingtonpost.com/world/national-security/attorneys-general-from-15-states-dc-sue-to-save-daca/2017/09/06/98bca3b2-930f-11e7-aace-04b862b2b3f3\\_story.html](https://www.washingtonpost.com/world/national-security/attorneys-general-from-15-states-dc-sue-to-save-daca/2017/09/06/98bca3b2-930f-11e7-aace-04b862b2b3f3_story.html) [<https://perma.cc/ZK44-YFJD>].

228. See, e.g., Jeremy W. Peters & Maggie Haberman, *17 Republican Attorneys General Back Trump in Far-Fetched Election Lawsuit*, N.Y. TIMES (Dec. 9, 2020), <https://www.nytimes.com/2020/12/09/us/politics/trump-texas-supreme-court-lawsuit.html> [<https://perma.cc/DJ9Q-FPLE>].

229. See, e.g., Press Release, Attorney General Raoul Files Lawsuit Against Marathon Pipe Line LLC over Oil Spill (Mar. 18, 2022), [https://illinoisattorneygeneral.gov/pressroom/2022\\_03/20220318d.html](https://illinoisattorneygeneral.gov/pressroom/2022_03/20220318d.html) [<https://perma.cc/6QB7-MMBN>].

230. See, e.g., Amy Russo, *RI Attorney General Takes Action Against Providence Landlords over Lead Poisoning in Kids*, PROVIDENCE J. (Feb. 3, 2022, 04:55 PM), <https://www.providencejournal.com/story/news/local/2022/02/03/providence-landlords-lead-poisoning-violations-rhode-island-attorney-general/6648932001/> [<https://perma.cc/Q6BF-7Q3P>].

231. See Tyson, *supra* note 10.

232. See IPCC SIXTH ASSESSMENT REPORT I, *supra* note 3; see also *supra* notes 49–59 and accompanying text.

233. See NAAG, *supra* note 111, at 12.

234. This Comment assumes that progressive attorneys general with safe electoral prospects are likeliest to establish CPUs, at least initially. Action by these officials may free up more politically vulnerable officials to later follow suit. See Wang & Weinstein-Tull, *supra* note 101, at 1986 (describing “bandwagoning,” wherein “earlier actors ma[k]e it easier for subsequent actors to follow”).

choose between establishing CPUs and losing reelection; CPUs can be implemented incrementally. Attorneys general can create small CPUs (similar to California's Bureau of Environmental Justice), gauge political support, and expand accordingly. States will need to respond to climate change's impacts at some point, and they owe a duty to their citizens to prepare. If a state's political climate is not yet amenable to a fully active CPU, the process can and must be gradual. At the same time, with the stakes so high, it is vital to make the case to voters.

Attorneys general establishing CPUs might also face backlash from hostile state legislatures. In many states, the legislature is free to limit the scope of the attorney general's authority.<sup>235</sup> Indeed, in 2018 the Republican-controlled Wisconsin legislature sought to do just that after a Democrat was elected attorney general.<sup>236</sup> It is possible that state legislatures could similarly retaliate over CPUs. This would weaken attorneys general, possibly hurting their ability to pursue other agenda items. However, the states most likely to first establish CPUs are also likely to have politically aligned legislatures.<sup>237</sup> Moreover, in less politically cohesive states, even where there may be desire within the legislature to punish the attorney general by stripping authority, doing so could instigate prolonged litigation,<sup>238</sup> which itself may deter legislatures from attempting to weaken their attorneys general. Such a strong reaction from legislators may also invite political costs for them for so zealously opposing climate action.

Backlash could also emanate from other jurisdictions. A majority of states' attorneys general are Republicans,<sup>239</sup> and are unlikely to support, let alone create, CPUs.<sup>240</sup> It is plausible that these officials could seek to counteract the

---

235. See *supra* Section III.B.

236. See Miriam Seifter, *Judging Power Plays in the American States*, 97 TEX. L. REV. 1217, 1226–27 (2019) (describing the legislature's attempt to “change[] institutional power” by subjecting the attorney general's control over state litigation to a permanent legislative committee veto).

237. See *supra* note 234.

238. Just a few months after the Wisconsin legislature seized for itself the attorney general's authority to control litigation, a state trial court found the law unconstitutional, in part because it violated separation of powers and the constitutional power of the attorney general. See Seifter, *supra* note 236, at 1232–33. A year later, however, the state supreme court upheld the law, finding that it was not facially unconstitutional. See *Serv. Emps. Int'l Union, Loc. 1 v. Vos*, 946 N.W.2d 35, 42 (Wis. 2020).

239. See *Meet the AGs*, REPUBLICAN ATT'YS GEN. ASS'N, <https://republicanags.com/ags/> [<https://perma.cc/467P-RJPE>] (displaying twenty-seven Republican state attorneys general).

240. See Tyson, *supra* note 10 (documenting gaps between Republicans and Democrats regarding concern about climate change and support for actions to address climate change);

impact of CPUs, possibly through greater action on behalf of the fossil fuel industry.<sup>241</sup> Additionally, greater pressure from CPUs on high-emission industries in some states may simply lead those industries to shift operations to more lenient states, possibly even creating a perverse net increase in climate harm that offsets the work of CPUs. Although possible, fear of an indirect reaction from officials in other jurisdictions cannot justify failure to combat climate change where possible. Moreover, strongly opposing CPUs in this manner may prove surprisingly difficult politically. The example of consumer protection units is potentially revealing: critics have grumbled about state consumer protection laws and their enforcement by state attorneys general,<sup>242</sup> but these laws remain ubiquitous today,<sup>243</sup> with Republican attorneys general quite active in enforcing them.<sup>244</sup>

Climate Preservation Units might pose logistical and resource challenges, possibly inviting criticism and backlash, but the efficiency and concentration of expertise that they bring to bear against an existential crisis outweighs these risks.

### C. State Variation

A state attorney general's independence and authority will impact the creation of CPUs and influence their operations. The degree of power and discretion that an attorney general holds will dictate whether and to what extent the attorney general might need to collaborate on this initiative with other state officials. As an initial matter, however, most state attorneys general should face no legal obstacle when establishing CPUs (as long as there are no impacts to the legislature's budget), as the authority to shape office organization is widely held.<sup>245</sup> Where differences may arise is the manner in which CPUs operate.

---

West Virginia v. EPA, 142 S. Ct. 2587 (2022) (challenge to the EPA's authority to regulate certain carbon emissions brought by several Republican attorneys general).

241. See *supra* notes 96–98 and accompanying text; see also Lipton, *supra* note 171.

242. See Butler & Wright, *supra* note 224, at 177–78.

243. *Id.* at 169.

244. See, e.g., *Arizona Attorney General Mark Brnovich's Office To Receive Consumers' Champion Award*, PR NEWSWIRE (Dec. 15, 2021), <https://www.prnewswire.com/news-releases/arizona-attorney-general-mark-brnovichs-office-to-receive-consumers-champion-award-301445565.html> [<https://perma.cc/M7GN-GFUA>] (noting that, since taking office in 2015, Brnovich has obtained over \$200 million in financial relief for Arizona consumers, more than double the total amount obtained from 2000–2014).

245. See NAAG, *supra* note 111, at 46 (detailing how a range of new responsibilities for state attorneys general have led many of them to “establish[] specialized units or officewide task forces . . . to handle these responsibilities”).

The most powerful attorneys general—those least constrained by their state constitutions and state statutes, and who owe little or no duty to the governor—will unsurprisingly have the greatest capacity to establish impactful CPUs. Attorneys general falling into this category, such as Illinois’ attorney general, are entrusted with an immense amount of discretion in acting as the public’s lawyer and determining what actions may qualify as serving the public interest. As such, these attorneys general could without question decide on their own that the scale and severity of climate change’s existential threat demands the creation of CPUs that will aggressively pursue all possible actions within their offices’ jurisdictions. These attorneys general could surge resources to their new units and even make CPUs their offices’ top priority without facing legal impediments (as unlikely as that level of prioritization may be). Whether these officials would face political backlash—either from voters or the legislature—would depend on their particular states’ political characteristics. In short, these attorneys general are unlikely to have any difficulty in establishing and operating CPUs as long as they do not break other laws in the process.

Conversely, the least powerful attorneys general will have the least amount of agency to establish effective CPUs. These are the attorneys general most constrained by limiting or restrictive language in their state constitutions and state statutes, and who may owe a duty to the governor. They may face important limitations on these units’ power, perhaps being unable to commence litigation on matters of interest,<sup>246</sup> cooperate with similar units in other states, or police certain state agencies that are significantly contributing to climate change.<sup>247</sup> CPUs in these offices may find themselves reduced to issuing legal opinions or public communications on climate change matters—undoubtedly valuable contributions but a far cry from the broad authority that CPUs in other states could exercise.

For attorneys general situated between these two extremes, there is a high degree of variation in their particular combinations of independence and authority. Accordingly, it is difficult to make generalizations about the type

---

246. If established in Arizona, for example, a CPU might lack explicit statutory authority to initiate independent actions on many climate matters. *See supra* notes 155–157 and accompanying text. Moreover, the Arizona attorney general’s office currently does not have a substantial environmental unit, instead housing “Environmental Enforcement” within its State Government Division. *See Organizational Chart*, ARIZ. ATT’Y GEN., [https://www.azag.gov/sites/default/files/docs/office/AZAGO\\_Org\\_Chart\\_Eff\\_07-2021.pdf](https://www.azag.gov/sites/default/files/docs/office/AZAGO_Org_Chart_Eff_07-2021.pdf) [<https://perma.cc/LJ6F-4N3R>]. Whether that would bode well or ill for the establishment of a CPU is unclear.

247. This could occur, for example, if an attorney general owes a duty to state agencies (such that the attorney general cannot sue them) or owes a duty to the governor and the governor opposes such a suit. *See supra* Section III.B.

of endeavors CPUs in these states might be able to pursue. Some attorneys general may possess a presumption of common law authority to act in the public interest but nevertheless find their authority constrained in certain respects by statute. In these instances, the strength of a CPU will depend on the nature of these statutes and their relevance to matters of climate change that these units may wish to pursue. Others, such as the California attorney general, may have fairly robust authority, subject to the one caveat that the governor's wishes supersede those of the attorney general.

Whatever constraints may exist on the authority of individual state attorneys general, in some cases these may in practice be rendered meaningless. In states where the actions of attorneys general are significantly constrained by law but there are supportive legislatures and governors, those entities may forego exercising their power to limit an attorney general's actions. In those states, attorneys general seeking to establish CPUs would face no objection. Legislatures and governors in those states could even expressly grant the attorney general the power needed to establish and operate CPUs.

CPUs present no legal barriers to most state attorneys general interested in establishing them. An attorney general's level of independent authority, however, will dictate how CPUs might permissibly operate.

## V. CONCLUSION

Climate change is an existential threat to humanity, posing hazards to all life on Earth. No individual nation or U.S. state—let alone state attorney general—can adequately address the threat. A proper response to climate change will require a concerted national and global effort that substantially alters or replaces many of the ways in which society operates. Nevertheless, even limited solutions are valuable and necessary because the need for action is so great; every opportunity to combat a threat of this magnitude must be seized.

This is particularly true in the United States, where some of the world's most significant emissions have been accompanied by an inexplicable lack of commensurate remedies. In this setting, state and local actors increasingly seize the opportunity to lead the way on climate action rather than the federal government, illustrating federalism's many entry points for change.

Among these subnational actors, state attorneys general are uniquely independent and powerful. They have the potential to make a substantial and enduring positive impact on climate change by prioritizing the crisis through the establishment of CPUs within their offices. That potential will grow as CPUs are adopted by attorneys general across the country, creating



opportunities for collective action that can increasingly offset some of the federal government's abdication and possibly even spark greater efforts at national action. To be sure, there is a risk that CPUs might be greeted with skepticism or even backlash. That potential cost, however, pales in comparison to the certain cost of continued inadequate efforts in the United States to confront the climate crisis. Advantageously situated and holding substantial power, state attorneys general should establish CPUs.