Climate Adaptation Lawsuits: Navigating the Primary Jurisdiction Problem

INTRODUCTION

Climate change litigation is the adjudication of cases involving material issues of law or fact related to climate change mitigation, adaptation, and science.[1] These cases are a growing trend globally and in the United States.[2] A significant number of prominent cases have been focused on climate mitigation[3]—cases disputing measures that limit the magnitude and rate of future climate change.[4] However, as climate change impacts become more frequent and extreme, communities, governments, and industries will have to adapt to the changes that will follow, and therefore, adaptation litigation will increase.[5] Climate adaptation means "taking action to prepare for and adjust to both the current and projected impacts of climate change."[6] Thus, climate adaptation lawsuits can be categorized as those challenging existing or planned measures as inadequate to confront consequences of climate change and those seeking new adaptation measures.[7]

Several of the adaptation cases filed in the United States are against fossil fuel companies.[8] Due to a lack of specific legislation aimed at addressing climate

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1. UNITED NATIONS ENV'T PROGRAMME & SABIN CTR. FOR CLIMATE CHANGE L., COLUM. L. SCH. GLOBAL CLIMATE LITIGATION REPORT: 2020 STATUS REVIEW 6 (2020), https://wedocs.unep.org/bitstream/handle/20.500.11822/34818/GCLR.pdf?sequence=1&isAllowed=y.

2. *See id.* at 2; SABIN CTR. FOR CLIMATE CHANGE L., COLUM. L. SCH. & ARNOLD & PORTER KAYE SCHOLER LLP, U.S. CLIMATE CHANGE LITIGATION, http://climatecasechart.com/us-climate-change-litigation/ (last visited May 11, 2023).

3. JACOB ELKIN, SABIN CTR. FOR CLIMATE CHANGE L., COLUM, L. SCH., CLIMATE SCIENCE IN ADAPTATION LITIGATION IN THE U.S. 2 (2022), https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=1193&context=sabin_climate_change.

4. EPA, *Climate Adaptation and EPA's Role*, https://www.epa.gov/climate-adaptation/climate-adaptation-and-epas-role (last visited May 20, 2023).

5. ELKIN, *supra* note 3.

6. EPA, *supra* note 4.

7. JACOB, *supra* note 3 at 3.

8. SABIN CTR. FOR CLIMATE CHANGE L., COLUMBIA L. SCH. & ARNOLD & PORTER KAYE SCHOLER LLP, *Actions Seeking Adaptation Measures*, U.S. CLIMATE CHANGE LITIGATION: ADAPTATION, http://climatecasechart.com/case-category/actions-seeking-adaptation-measures (last visited May 11, 2023).

adaptation, these cases have their claims rooted in federal and state environmental statutes.[9] The adjudication of these cases involves complexities including establishing which courts have jurisdiction, which parties have standing, awarding damages, and assigning liability.

A string of climate lawsuits have been filed against Exxon Mobil Corporation ("Exxon"), one such fossil fuel company. Exxon faces a number of allegations ranging across the spectrum of climate litigation cases, including climate adaptation cases, and these cases appropriately accentuate the difficulties that courts face in resolving these disputes.[10] One prominent adaptation lawsuit has been brought by Conservation Law Foundation ("CLF") alleging that Exxon's failure to prepare its marine facility to withstand impacts of climate change is a violation of federal environmental statutes.[11]

In these types of climate litigation cases, defendants often use different strategies to block trials from taking place by using delay tactics or by attempting to shift the dispute to a favorable jurisdiction or decision-making authority. One tactic that has been used by Exxon and other similar defendants to potentially delay court proceedings and avoid liability is the Doctrine of Primary Jurisdiction ("DPJ").[12]

The DPJ raises an important legal issue faced by courts in climate adaptation lawsuits, which is deciding which authority has the appropriate jurisdiction to resolve disputes at every stage of the lawsuit.[13] The DPJ can be invoked in lawsuits where both the court and administrative agency share jurisdiction. Defendants can invoke the DPJ to request the court to stay proceedings and allow the relevant agency to resolve the matter. This implicates "agency deference," in which courts must decide if they should defer the matter to the appropriate administrative agency.[14] Several doctrines have been developed by courts to guide these determinations, and the DPJ is one such doctrine that has been rarely invoked.[15] If the courts decide the DPJ is applicable and defer the matter to the agency, this could have the practical effect of indefinitely delaying lawsuits and effectively keeping plaintiffs out of court.[16]

This article discusses *CLF v. Exxon Mobil*, and the legal rule in conflict before the court: the Doctrine of Primary Jurisdiction. In *CLF v. Exxon Mobil*,

9. *Yale Experts Explain Climate Lawsuits*, YALE SUSTAINABILITY (August 23, 2023), https://sustainability.yale.edu/explainers/yale-experts-explain-climate-lawsuits.

10. Chris D'Angelo, *Exxon Mobil Sued Over Climate Change Cover-Up*, HUFFPOST (last updated Sept. 30, 2016), https://www.huffpost.com/entry/exxonmobil-lawsuit-conservation-law-foundation-climate-change_n_57ec1512e4b024a52d2c5ae5.

11. Conservation L. Found., Inc. v. Exxon Mobil Corp., 3 F.4th 61, 65 (1st Cir. 2021).

12. Bruce R. Runnels, *Primary Jurisdiction in Environmental Cases Suggested Guidelines for Limiting Deferral*, 48 IND. L.J. 676, 681–82 (1973).

13. *Id*. at 679.

14. Nicholas A. Lucchetti, *One Hundred Years of the Doctrine of Primary Jurisdiction: But What Standard of Review Is Appropriate For It?*, 59 ADMIN. L. REV. 849, 860 (2007).

15. Richard J. Pierce Jr., *Primary Jurisdiction: Another Victim of Reality*, 69 ADMIN. L. REV. 431, 437 (2017).

16. *Conservation L. Found.*, 3 F.4th at 69.

the DPJ was applied by the district court and a stay order was initially granted in favor of Exxon, deferring the matter to the Environmental Protection Agency ("EPA").[17] On CLF's appeal, the First Circuit reversed the stay and held that the DPJ was inapplicable.[18] This article will closely examine the standard of review employed by the First Circuit in reviewing the District Court's decision to stay the proceedings. Thereafter, it will critically analyze the First Circuit's reasoning on its determination regarding the non-application of the DPJ which led to the removal of the stay order. The article will argue that the First Circuit did not adequately analyze certain factors, the *Blackstone* factors, while rightly concluding that the stay was improper. It will further discuss the relevance of the decision within the development of legal jurisprudence on the appellate standard of review. It will also discuss the DPJ's use and application under the citizen suit provisions in federal environmental statutes, particularly the potential misuse of the DPJ by defendants. It will further examine the overall impact of the case, identify emerging judicial trends around limiting agency deference, and discuss how the potential impact of this lawsuit fits into the broader narrative.

I. CLIMATE ADAPTATION LAWSUIT: OVERVIEW

A. Background of CLF v. Exxon Mobil

Exxon, the defendant, received a permit issued by the EPA to legally "discharge stormwater, groundwater, and certain other waters" from one of its petroleum storage and distribution terminals into the Island End River[19] under the Clean Water Act ("CWA"). A requirement under the permit was to develop, design, and implement a storm-water pollution prevention plan ("SWPPP") to reduce discharge of pollutants.[20] The defendant applied for a renewal of the permit after it expired on January 1, 2014, which has been pending with the EPA ever since.[21]

CLF, the plaintiff, filed a suit in the United States District Court for the District of Massachusetts in September 2016, alleging that the Defendant's terminal was in violation of the CWA and the Resource Conservation and Recovery Act ("RCRA").[22] The suit was filed under citizen suit provisions of the CWA and RCRA.[23] CLF claimed *inter alia* in its complaint that Exxon did not make changes to its SWPPP to reduce pollution from excessive flooding during severe weather events, which have been worsened by climate change.[24] By failing to prepare its terminal to withstand the potential impacts of climate

17. *Id*. at 70.
18. *Id*. at 75.
19. *Id*. at 65; 33 U.S.C. § 1251 et seq. (1972).
20. *See Conservation L. Found.*, 3 F.4th at 65–66.
21. *Id.* at 65.
22. *Id*. at 65; 42 U.S.C. § 6901 et seq. (1976).
23. *Conservation L. Found*., 3 F.4th at 65, 70.
24. *Id.* at 65–66.

change, CLF alleged that Exxon did not account for climate change factors and this was in violation of the permit, CWA, and RCRA.[25]

Exxon filed a motion to stay the proceedings pursuant to the DPJ, arguing that the EPA had primary jurisdiction and the district court was required to defer the matter until the EPA issued a new permit.[26] The district court held that the DPJ was applicable and granted a stay.[27] CLF appealed to the First Circuit on the grounds that the DPJ was inapplicable and because this was a citizen suit, courts were barred from deferring to an agency.[28] The primary issue before the First Circuit was whether the district court erred in granting a stay applying the DPJ until the EPA issued a new permit for Exxon's terminal.

B. Legal Background – Doctrine of Primary Jurisdiction Doctrine

The DPJ applies in cases in which both the courts and an administrative agency share jurisdiction and concurrent proceedings can take place.[29] The DPJ also applies when "a claim is originally cognizable in the courts but involves issues that fall within the special competence of an administrative agency."[30] In these cases, the courts have authority under the DPJ to either refer the case to the agency and dismiss the case or to refer the issue to the agency and stay the litigation pending a decision from the agency.[31] The court is not deprived of jurisdiction if it decides to delay the case by referring it to the agency. Rather, the court maintains jurisdiction and can resume litigation once the agency has made a decision.[32]

Invocation of the doctrine requires a careful determination by courts because the Supreme Court has stated that there is no fixed formula to apply the DPJ.[33] The circuit courts have come up with different tests to make this determination.[34] The First Circuit's test is laid down in the *Blackstone* case which recognizes three principal factors: "(1) whether the agency determination l[ies] at the heart of the task assigned the agency by Congress; (2) whether agency expertise [i]s required to unravel intricate, technical facts; and (3) whether, though perhaps not determinative, the agency determination would materially aid the court."[35]

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25. *Id.* at 65–66.
26. *Id.* at 66.
27. *Id*. at 70.
28. *Id*. at 71.
29. *See* Michael Penney, Note, *Application of the Primary Jurisdiction Doctrine to Clean Air Act Citizen Suits*, 29 B.C. ENV'T AFF. L. REV. 399, 400–01 (2002); Lucchetti, *supra* note 14 at 853.
30. Bryson Santaguida, *The Primary Jurisdiction Two-Step*, 74 U. CHI. L. REV. 1517, 1517 (2007).
31. *Id.*; *see* Lucchetti, *supra* note 14 at 853.
32. Lucchetti, *supra* note 14 at 864; Penney, *supra* note 29 at 401.
33. Santaguida, *supra* note 30 at 1517.
34. *Id.* at 1533–34.
35. Diana R. H. Winters, *Restoring the Primary Jurisdiction Doctrine*, 78 OHIO ST. L.J. 541, 569 (2017) (quoting Mass. v. Blackstone Valley Elec. Co., 67 F.3d 981, 992 (1st Cir. 1995)).

Once a district court has decided whether to apply the DPJ, an appellate court can review its decision. There are two commonly adopted standards of review, and the federal courts of appeals are currently split between the two. The de novo standard is used by the Second, Eight, and Ninth Circuits, and the abuse of discretion standard is used by the Third, Fourth, Fifth, Tenth, and D.C. Circuits.[36] The standard used by the First, Sixth, and Eleventh Circuit is unclear.[37] No single standard is correct, and depending on the jurisdiction in which an appeal is filed, the burden of proof substantially differs.[38]

C. First Circuit Decision

The First Circuit held that the DPJ was inapplicable in the present case and the District Court therefore erred in granting the stay pending the issuance of a new permit by the EPA.[39] The First Circuit analyzed the District Court's application of the three *Blackstone* factors. It concluded that the first and second factors were correctly decided by the District Court in favor of deference to the EPA.[40] However, the First Circuit disagreed with the District Court's analysis of the third factor, material aid to the court.[41] The District Court had determined this factor in favor of a stay for two reasons.[42] First, the EPA's determinations on the new permit would render any grant of injunctive relief as moot.[43] Second, the administrative record created would help the District Court discern the meaning of certain ambiguous terms in the permit, which were relevant to determining violations of the permit.[44] The First Circuit partially agreed with this second reason, however, it found that this administrative record would still not "materially" aid the District Court.[45]

The First Circuit emphasized the importance of the third *Blackstone* factor, stating that it had the potential to outweigh the other two factors.[46] It held that although the first two factors favored agency deference, deference to the EPA was not required because it would not "materially" aid the District Court in deciding the case.[47] The third factor outweighed the other two factors, and

36. Lucchetti, *supra* note 14 at 850–51.
37. *Id*. at 851.
38. *Id*. at 851.
39. Conservation L. Found. v. Exxon Mobil Corp., 3 F.4th 61, 75 (1st Cir. 2021).
40. *Id*. at 72–73. The task of issuing a permit and determining its terms lies at the heart of the task assigned to the EPA by Congress. Agency expertise can be relied on to determine which climate models would be appropriate to capture the impact of climate change and could be helpful. *Id*.
41. *Id*. at 74.
42. Conservation L. Found. v. Exxon Mobil Corp., 448 F.Supp.3d 7, 23 (D. Mass. 2020), *vacated and remanded sub nom.* Conservation L. Found., Inc. v. Exxon Mobil Corp., 3 F.4th 61 (1st Cir. 2021).
43. *Id*. at 24.
44. *Id.* at 23.
45. Conservation L. Found. v. Exxon Mobil Corp., 3 F.4th 61, 74 (1st Cir. 2021).
46. *Id*. at 73.
47. *Id*. at 74.

therefore the First Circuit concluded that the *Blackstone* factors "do not weigh in favor of the stay."[48]

Thereafter, the First Circuit attempted to balance the *Blackstone* factors against any potential for delay which is inherent in referring an issue to an administrative agency. The First Circuit stated that *any* potential delay would further their view that the stay was improper because the *Blackstone* factors weighed against a stay.[49] Because there had already been significant delay in this case, the District Court's order deferring to the EPA "until at least October 2021" would only further delay the beginning of discovery.[50] The First Circuit therefore held that the District Court erred in granting a stay order until the EPA issued a new permit under the Doctrine of Primary Jurisdiction.[51]

II. ANALYSIS OF THE FIRST CIRCUIT'S DECISION

A. Determination on the Issue of Appropriate Authority and Agency Deference

1. Standard of Review Adopted by the First Circuit to Review the District Court's Decision

The First Circuit began its discussion by stating that it would review the district court's application of the doctrine under the "abuse of discretion standard."[52] This required greater deference to the district court unless there was abuse by that court. An appellate court would find abuse when "a material factor deserving significant weight is ignored, when an improper factor is relied upon, or when all proper and no improper factors are assessed, but the court makes a serious mistake in weighing them."[53] Since the First Circuit did not defer to the district court's decision, it can be inferred that the First Circuit concluded that the district court abused its discretion due to its incorrect *Blackstone* factors analysis. The First Circuit's decision on abuse of discretion provides guidance regarding how it made its determination of appropriate authority within the judicial branch based on the reasoning of the district court.

Although the First Circuit set out to conduct an abuse of discretion review, it arguably reviewed the decision under the de novo standard of review. The district court conducted a thorough analysis of how it believed the *Blackstone* factors should be weighed. The First Circuit seems to have substituted its own judgment in place of the district court, with no deference to the district court's determination. The First Circuit presented its conclusion for each factor without

48. *Id.* at 74–75.
49. *Id.* at 75.
50. *Id.*
51. *Id.*
52. *Id.* at 72.
53. *Id.* (quoting Indep. Oil & Chem. Workers of Quincy v. Procter & Gamble Mfg. Co., 864 F.2d 927, 929 (1st Cir. 1988)).

discussing in detail the concerns raised and considerations undertaken by the district court in its reasoning. Moreover, the district court was arguably better suited to evaluate how agency delay might affect the timelines in the case and the material aid it required to reasonably decide the merits. This makes it difficult to understand how the district court's reasoning constituted abuse, suggesting more strongly that this was a de novo review.

Given that prior case law from the First Circuit on the application of the DPJ provides little clarity on the applicable standard of review,[54] *CLF v. Exxon Mobil* is significant in the development of jurisprudence on the DPJ. The decision indicates that the First Circuit has no strict preference for one standard of review and will continue to evaluate the applicability of the DPJ on a case-by-case basis. However, it is not clear what factors this would depend on and under what circumstances the First Circuit would adopt a specific standard. The First Circuit possibly allowed this uncertainty to persist intentionally so that it could retain flexibility in deciding the standard. In citizen suits, courts rarely allow the invocation of the DPJ,[55] especially when the suit is against the agency itself.[56] Since this lawsuit was brought under citizen suit provisions against the agency itself, it may be plausible that the First Circuit has subtly suggested that it will apply a strict standard of review, irrespective of which specific standard it formally adopts. This could be interpreted to have set a precedent against the application of the DPJ in citizen suits, with the "materiality" factor carrying disproportionately greater weight within the *Blackstone* analysis to ensure agency deference is limited. Whether the First Circuit places any weight on the novelty of a legal issue when determining both materiality and deference to the District Court's decision remains unclear.[57]

2. The DPJ: Did the First Circuit Incorrectly Apply the Blackstone *Factors on Review?*

In its application of the *Blackstone* factors, the First Circuit weighed the third factor more heavily than the other two. However, its analysis under the third factor was arguably tied to its determination on agency expertise under the second factor. The First Circuit seemed to suggest that the EPA's expertise would be helpful only to decide scientific questions like how weather patterns are changing, and how engineers can respond to this.[58] However, such a narrow reading of agency expertise undermines the concerns raised by the district court. These concerns include (1) difficulties in legally incorporating climate change

54. Lucchetti, *supra* note 14, at 851.

55. *See* Conservation L. Found., 448 F.Supp.3d 7, 12 (D. Mass. 2020), *vacated and remanded sub nom.* Conservation L. Found., Inc. v. Exxon Mobil Corp., 3 F.4th 61 (1st Cir. 2021); Conservation L. Found. v. Exxon Mobil Corp., 3 F.4th 61, 67 (1st Cir. 2021).

56. Penney, *supra* note 29 at 424.

57. Aaron J. Lockwood, *The Primary Jurisdiction Doctrine: Competing Standards of Appellate Review*, 64 WASH. & LEE L. REV. 707, 737 (2007).

58. *Conservation L. Found.*, 3 F.4th at 72–73.

factors, and establishing the scope and extent to which they have to be accounted for while assessing violations under CWA and RCRA; and (2) determining the extent to which these scientific determinations have to be read into the permit's conditions to prepare for immediate or foreseeable harm from climate change.[59] The district court's analysis appears to conduct a broader inquiry than what the First Circuit suggests. It is this determination under factor two that should have been weighed by the First Circuit to balance it against factor three. Because the First District did not adequately analyze the second factor, any comparison with the third factor could not be holistic and balanced.

Regarding the third factor, material aid, the First Circuit does not adequately articulate the complications involved in this adjudication and failed to address the categorical concerns raised by the district court. Claims in CLF's complaint can be categorized into two broad groups. Group one includes: claims involving direct violation of the permit and laws, such as excess pollution discharge over the permissible limit, including violations that have already occurred or are presently occurring.[60] Group two includes: claims involving allegations of violations due to Exxon's failure to make changes to its SWPPP and permit, and its failure to prepare the terminal for extreme weather events that may occur in the future due to climate change.[61] The second group makes up the bulk of the allegations.[62] The district court granted standing only for "severe weather events" that create a "substantial risk" of pollution discharge in the "near future,"[63] i.e. short-term foreseeable climate change impacts. The analysis of group two claims thus likely excluded the consideration of any long-term climate change impacts.[64] Confusion also persisted in comprehending when the lines between group one claims and the short-term climate change impact claims under group two would blur and merge. Claims under group one appeared to be the focus of the First Circuit, while the district court seemed to be more focused on group two claims, while also attempting to balance both types of claims. Regarding group one claims, the argument that the district court would not receive material aid by deferring to the EPA seemed reasonable because the District Court could sufficiently determine if there were violations of existing laws and permit clauses. Regarding group two claims, there was arguably a reasonable question for the District Court to decide about whether deferring to the EPA would have materially aided its analysis. There was an element of novelty when it came to determining claims related to future climate change impacts, and the relevant weight assigned to novelty was unclear in the law. Therefore, the District Court could have reasonably believed that it would

59. *See* Conservation L. Found., 448 F.Supp.3d 7, 21 (D. Mass. 2020), *vacated and remanded sub nom.* Conservation L. Found., Inc. v. Exxon Mobil Corp., 3 F.4th 61 (1st Cir. 2021).

60. *See id.* at 20.

61. *See id.* at 16–17, 21.

62. *Id.* at 17, 21.

63. *Id.* at 16.

64. *See id.*

receive material aid from deferring the matter to the EPA and from the issuance of the new permit.[65] The First Circuit did not adequately recognize and address this distinction between group one and two claims in its reasoning when it discussed the *Blackstone* factors, and more specifically, when it determined materiality.

After the *Blackstone* analysis, the First Circuit accounted for the potential for delay, but did not discuss it in detail, because it concluded that *Blackstone* factors already weighed against a stay. Additionally, the First Circuit did not factor in the nature of the suit in its analysis when it weighed any potential delay against the *Blackstone* factors. As discussed earlier, the DPJ is sparingly invoked in citizen suits,[66] particularly in suits brought against the agency itself.[67] In suits against private parties, courts have to balance the *Blackstone* factors.[68] Although the First Circuit acknowledged that the DPJ should be rarely invoked in citizen suits,[69] it did not explain when it should or should not be invoked and how the assessment of the *Blackstone* factors would consequently vary. Given that this was a citizen suit against a private party, the First Circuit could have undertaken a different analysis emphasizing the potential for delay as a major or determining factor, while deferring to the district court's *Blackstone* analysis. Under such an approach, the outcome would have potentially remained the same while holding that agency deference should be more strictly restricted when considerations of significant delay are involved in citizen suits. Moreover, the fact that an agency may have resource and time constraints that bar it from prioritizing litigation claims should also have been relevant under the delay factor.[70] Since the EPA had a massive backlog of permits,[71] this could have strongly weighed against granting a stay order because of the resulting probable delay.[72] The type of relief involved should have also played a role. Courts generally do not apply the DPJ when cases involve injunctive or monetary relief because courts can grant relief independent of the agency, but it's more complicated when there is a compliance with law issue, requiring a more detailed analysis.[73] Therefore, these considerations could have been expressly stated as important factors.

65. *Id*. at 23–24.

66. *Id.* at 12; Conservation L. Found. v. Exxon Mobil Corp., 3 F.4th 61, 67 (1st Cir. 2021).

67. Penney, *supra* note 29 at 424.

68. *Id*. at 425.

69. *Conservation L. Found*., 3 F.4th at 71.

70. *See* Pierce Jr., *supra* note 15 at 437; Runnels, *supra* note 12 at 688; Winters, *supra* note 35 at 543, 593–94; *see also* Penney, *supra* note 29 at 422.

71. *See* Conservation L. Found., 448 F.Supp.3d 7, 18 (D. Mass. 2020), *vacated and remanded sub nom.* Conservation L. Found., Inc. v. Exxon Mobil Corp., 3 F.4th 61 (1st Cir. 2021).

72. Penney, *supra* note 29 at 415.

73. *See id.*

B. Impact of the First Circuit's Decision

The DPJ developed within specific subject areas which did not traditionally include environmental disputes.[74] Its application has been expanded over time, consistent with the Supreme Court's decision in *Chevron*, generally increasing deference to agencies.[75] However, there are commentators who believe it should be sparingly applied and its use by courts should be confined and significantly reduced.[76] Some commentators argue that in the context of environmental controversies, the guidelines for the DPJ are inadequate and ill-suited.[77] To strike a delicate balance between adverse effects of deferral and the DPJ's utility, the development of clear guidance is required to define the scope of its application.[78] This case can be interpreted to establish some useful precedential principles. Since scholarly literature on the DPJ application is limited, *CLF v. Exxon Mobil* usefully expands jurisprudence on the DPJ.[79]

With courts facing more and more climate adaptation cases, *CLF v. Exxon Mobil* can be read to strongly signal to federal district courts to limit their deference to the EPA under the DPJ. Because the decision's scope is narrow, covering only short-term climate change impacts, and these climate change factors are not discussed in great detail in the reasoning, its potential impact to guide successful climate action is significant, but still very limited. CLF has, because of this decision, filed subsequent lawsuits in other jurisdictions on similar issues and claims.[80]

Invoking the DPJ has a major disadvantage for plaintiffs: the potential to delay the resolution of a dispute and give the appearance of a ruling in favor of the defendant.[81] Courts have expressed their concerns and reluctance to invoke the doctrine due to this.[82] Sometimes this deference to the agency can effectuate shifting the case out of the court's purview because of significantly long delays in agency adjudication.[83]

The DPJ should be sparingly applied in citizen suits because defendants can use it as a tool to prevent lawsuits from going to trial, and eventually to avoid judicial liability and oversight.[84] Moving a lawsuit to the agency's adjudicatory process could potentially allow defendants to avoid facing adverse legal action. The DPJ can function as a weapon in defendants' hands that can be used to delay

74. *See* Winters, *supra* note 35 at 542.
75. Lockwood, *supra* note 57 at 749.
76. Winters, *supra* note 35 at 543–45.
77. Runnels, *supra* note 12 at 678–79.
78. *Id*. at 682.
79. Winters, *supra* note 35 at 543.
80. *Court clears way for CLF's lawsuit against Exxon to go to trial*, CONSERVATION L. FOUND. (July 1, 2021), https://www.clf.org/newsroom/court-clears-way-for-clfs-exxonmobil-lawsuit-to-go-to-trial.
81. Runnels, *supra* note 12 at 681–82.
82. Pierce Jr., *supra* note 15 at 436–37.
83. Conservation L. Found. v. Exxon Mobil Corp., 3 F.4th 61, 69 (1st Cir. 2021).
84. *See* Winters, *supra* note 35 at 543.

or entirely avoid judicial liability. The First Circuit set a precedent by denying Exxon's motion to apply the DPJ, sending the case back to trial and limiting the applicability of the DPJ. Similar motions by other defendants could also be dismissed relying on this decision, consequently reducing defendants' reliance on the DPJ. Therefore, precedent from this lawsuit potentially hinders defendants' ability to weaponize the DPJ and to rely on it as a tool to indefinitely delay legal proceedings, bringing lawsuits a step closer to providing relief to plaintiffs.

The larger trend to limit agency deference is visible when placed alongside the recent Supreme Court decision in *West Virginia v. EPA*.[85] The invocation of the Major Questions Doctrine in *West Virginia* to limit deference to the EPA can be interpreted as placing significant bounds on the EPA's authority to enact climate-friendly regulations.[86] This could also have a potential limiting impact on the EPA's ability to eventually place stringent conditions on permits requiring climate adaptation measures. If stringent conditions are imposed by the EPA, there is a possibility that this would lead to a clash between all three branches of the government. In this sense, the EPA's involvement in similar cases in the future could potentially undermine the relief that courts may be able to grant to plaintiffs. This may also be one of the reasons why courts have been increasingly inclined to limit deference to agency decisions.

Growing skepticism against agency deference is silently reflected in *CLF v. Exxon Mobil* as observed in the First Circuit's reasoning. Since deference to an agency is more likely under the first two *Blackstone* factors, placing greater weight on the third factor creates a mechanism for courts to retain jurisdiction and avoid the application of the DPJ. This would allow for the avoidance of significant delay due to agency deference, and courts would be in a position to provide relief to the extent possible under existing laws, even if that relief may be limited.

CONCLUSION

Climate adaptation lawsuits bring to light several legal issues which are only going to increase with the passage of time as the impacts of climate change become more severe. *CLF v. Exxon Mobil*, which limited agency deference by restricting the DPJ's scope of application, exposes issues beyond the simple adjudication of disputes. It raises broader administrative and constitutional law questions. Courts are increasingly inclining towards reevaluating the principle of agency deference, exercising caution in their reliance on agencies. Coupled with

85. Randolph J. May, *A Major Ruling on Major Questions*, THE REGUL. REV. (July 15, 2022), https://www.theregreview.org/2022/07/15/may-major-questions; *see What Does West Virginia v. EPA Mean for Climate Action?*, EARTHJUSTICE (July 6, 2022), https://earthjustice.org/article/what-does-west-virginia-v-epa-mean-for-climate-action; *see* West Virginia v. EPA, 142 S.Ct. 2587 (2022).

86. *Climate Change and the Supreme Court: West Virginia v. EPA*, RES. FOR THE FUTURE, https://www.rff.org/events/rff-live/climate-change-and-the-supreme-court-west-virginia-v-epa (last visited May 17, 2023).

the Major Questions Doctrine's potential to limit the EPA's authority, it may turn courts into battlegrounds where climate lawsuits lead to protracted and burdensome decades-long trials. Within this broader context, what remains predictable is the continual reliance of defendants on the DPJ to improperly delay trials. *CLF v. Exxon Mobil* has arguably limited such a possibility. However, solutions such as institutional reform need to be explored within administrative agencies to prevent excessive delays that serve as a barrier to resolve climate adaptation lawsuits. This is important to eliminate the possible misuse or weaponization of the DPJ and to protect its existence to serve its intended purpose, while ensuring agencies materially aid the judiciary in granting adequate relief.

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