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Juliana v United States of America: The Final Frontier for Climate Litigation in America?

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Summary: This article analyses the protracted climate change case of Juliana v United States of America. We consider the history of the case as well as the most recent judgment of the Federal Court of Appeals, which seems to be the final judgment in this case as it is not foreseen that the case will be appealed with any success. The Juliana case provided hope for many people in the United States that the case would be able to succeed and possibly alter climate change policy in the country. Although the latest judgment will be disappointing to climate change activists and those affected by climate change, we agree with the ruling of the majority opinion in the Court of Appeals case and believe that it is a sound legal decision despite its general disapprobation.

Keywords: Climate Change, Fossil Fuels, Juliana v United States, Climate Change Litigation, Youth Plaintiffs.

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1 Introduction

In August 2015, twenty one children and young adults filed a lawsuit in the United States District Court for the District of Oregon against agencies of the United States federal government, alleging that the industrial-scale burning of fossil fuels was causing catastrophic and destabilising impacts to the global climate, and threatening the plaintiffs' right to a healthy, habitable living environment.[1] The plaintiffs, aged between 8 and 22 at the time of filing, were represented by the non-profit organisation, Earth Guardians, and assisted by climatologist James Hansen, acting as a "guardian for future generations."[2] The named defendants included the President of the United States[3] and the heads of multiple executive agencies.[4] Three fossil fuel industry groups[5] initially intervened in the case as defendants, joining the Department of Justice in seeking to have the case dismissed.[6]

The plaintiffs sought a ruling to the effect that the United States government violated their fundamental right to "a climate system capable of sustaining human life."[7] This right, the plaintiffs contended, arose under the Due Process Clause of the United States Constitution, which states that no person shall, due to the interference of the federal government, "be deprived of life, liberty, or property, without due process."[8] In addition, the plaintiffs alleged that the federal government violated its duty to protect trust resources from the consequences of climate change.[9]

1 *Juliana v United States of America* 217 F Supp 3d, D Or 2016, p. 1224

2 Hansen is the former director of the NASA Goddard Space Center in New York, and his granddaughter, Sophie Kivlehan, is a named plaintiff in the lawsuit. HARTMAN, Steven. *Juliana v United States: The unresolved case already making a difference.* [online] Available at: <https://bifrostonline.org/juliana-v-united-states-the-unresolved-case-already-making-a-difference> Accessed: 22 January 2020).

3 President Trump replaced President Obama as a defendant when the former assumed the presidency in January 2017.

4 *Juliana v United States of America* 217 F Supp 3d, D Or 2016, p. 1224.

5 The American Petroleum Institute, American Fuel and Petrochemical Manufacturers, and the National Association of Manufacturers

6 However, after the District Court denied the motion to dismiss, these industry groups reconsidered their involvement in the case as interveners. In his order granting their release, Coffin J stated: "Interveners presented a motion to dismiss before the District Court that was unsuccessful, and now have reconsidered their desire to participate further with the attendant burdens of discovery and trial. Although the adage 'look before leaping' comes to mind, I find nothing sanctionable in any of their conduct." *Juliana v United States of America* Case 6:15-cv-01517-TC Document 182, 28 June 2017, p. 5.

7 *Juliana v United States of America* 217 F Supp 3d, D Or 2016, p. 1250.

8 Fifth Amendment to the United States Constitution.

9 The "public trust doctrine" obligates sovereign governments to protect and manage the public resources that are part of the public trust, to wit: territorial seas and submerged lands, and, according to the plaintiffs in *Juliana*, also the atmosphere. See POWERS, Melissa. Juliana v United States: The Next Frontier in US Climate Mitigation. *Review of European, Comparative & International Environmental Law*, 2018, vol. 27, pp. 199–204 at pp. 200, 202.

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Pre-trial hearings were held in March 2016. In support of its motions to dismiss the case, the Department of Justice argued that there was "no constitutional right to a pollution-free environment," and that the plaintiffs lacked constitutional standing to sue because the case involved non-justiciable political questions.[10]

On 10 November 2016, two days after a minority of Americans elected Donald Trump as president, the District Court in Oregon rejected the government's arguments, and ruled that the plaintiffs in *Juliana* could take their case to trial. In denying the government's motions to dismiss, Aiken J noted: [11]

> This lawsuit is not about proving that climate change is happening or that human activity is driving it. For the purposes of this motion, those facts are undisputed. The questions before the Court are whether defendants are responsible for some of the harm caused by climate change, whether plaintiffs may challenge defendants' climate change policy in court, and whether this Court can direct defendants to change their policy without running afoul of the separation of powers doctrine.

Aiken J continued:[12]

> A deep resistance to change runs through defendants' and interveners' arguments for dismissal: they contend a decision recognizing plaintiffs' standing to sue, deeming the controversy justiciable, and recognizing a federal public trust and a fundamental right to climate system capable of sustaining human life would be unprecedented, as though that alone requires its dismissal. This lawsuit may be ground-breaking, but that fact does not alter the legal standards governing the motions to dismiss. Indeed, the seriousness of plaintiffs' allegations underscores how vitally important it is for this Court to apply those standards carefully and correctly. Federal courts too often have been cautious and overly deferential in the arena of environmental law, and the world has suffered for it.

Climate change advocates heralded this decision as ground-breaking. According to Michael Gerard, director of the Sabin Centre for Climate Change Law at Columbia Law School, this decision went further than any U.S. court has ever done in declaring a fundamental obligation of government to prevent dangerous climate change.[13] Moreover, Judge Aiken's pronouncement that there

10 *Juliana v United States of America* 217 F Supp 3, D Or 2016, pp. 1235–1246.

11 *Juliana v United States of America* No. 6:15-CV-01517-TC, 2016 WL 6661146, D. Or., 10 November, 2016, par 4.

12 id, 52.

13 KORMANN, Carolyn. T*he Right to a Stable Climate is the Constitutional Question of the Twenty-First Century*. [online]. Available at: < https://www.newyorker.com/news/daily-comment/the-right-to-a-stable-climate-is-the-constitutional-question-of-the-twenty-first-century> Accessed: 23 January 2020.

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might exist a constitutional right to a sound environment was the first of its kind by a federal court.[14]

2 A Procedural Quagmire

The District Court's decision should have paved the way for the case to proceed to the trial phase. However, the government was determined not to let that happen. A hearing on the merits was impeded by vigorous and extensive motion practice by the Department of Justice.[15] Numerous courts held multiple procedural hearings and delivered various orders arising from defendants' vigorous motion practice in this case, causing the District Court to express exasperation with defendants' rehashing of arguments previously raised and disposed of in prior stages of litigation.[16]

The case first took a detour to the Ninth Circuit Court of Appeals when the government asked this court to intervene prematurely in the case by issuing a writ of mandamus – a legal writ that would usurp the typical appellate processes and allow the appellate court to quash the case.[17] In its petition, the government argued that the Ninth Circuit needed to act to correct "multiple and clear errors of law in refusing to dismiss an action that sought wholesale changes in federal government policy based on utterly unprecedented legal theories."[18] In March 2018 the Ninth Circuit unanimously rejected the government's request for a writ of mandamus.[19] The trial was scheduled to commence on 29 October 2018.

The Department of Justice then petitioned the United States Supreme Court, requesting a stay to delay the trial. In July 2018 the Court issued a brief order denying the government's request for a stay as premature, but – significantly –

14 O'ROURKE, Ciara. *The 11-Year Old Suing Trump Over Climate Change*. [online]. Available at: < https://www.theatlantic.com/science/archive/2017/02/trump-climate-lawsuit/516054/> Accessed: 23 January 2020.

15 For the sake of brevity, this analysis omits some of the legal skirmishes that are not germane to the discussion.

16 *Juliana v United States of America* 339 F Supp 3d 1062, D Or 2018, p. 1068

17 Federal civil procedure rules normally prohibit interlocutory appellate review of district court decisions, unless a district court judge certifies that the case is appropriate for review and the appellate court agrees. WEAVER, R. Henry, KYSAR, Douglas. A. Courting Disaster: Climate Change and the Adjudication of Disaster. *Notre Dame Law Review*, 2017, vol. 93, pp. 295, 322, 348.

18 GALLUCCI, Maria. *Trump Administration Takes a 'Drastic' Step to Stop Youth Climate Lawsuit*. [online]. Available at: <https://mashable.com/2017/06/11/trump-climate-lawsuit-drastic-step/> Accessed: 23 January 2020. The government also argued that the discovery phase would cause the government harm because of the volume of data and evidence that it would need to provide. Id.

19 Opinion of the Ninth Circuit Court of Appeals (7 March 2018). [online]. Available at: <http://cdn.ca9.uscourts.gov/datastore/opinions/2018/03/07/17-71692.pdf > Accessed: 23 January 2020.

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also expressed scepticism about the case, noting that the breadth of plaintiff's claims was "striking."[20]

Following the Supreme Court order, the government again filed two motions seeking dismissal of the case and summary judgment in the District Court for the District of Oregon. The government raised a host of legal arguments, including plaintiffs' failure to state a case under the Administrative Procedure Act ("APA"), the dismissal – with prejudice – of President Trump as a named defendant, and that the plaintiffs lacked Article III standing to sue,[21] because they could not prove injury-in-fact, causation, or redressability.[22] Plaintiffs' claims survived mostly intact.

On 15 October 2017 Aiken J dismissed President Trump as a defendant, but contrary to the government's wishes, she did so without prejudice,[23] because "[t]he Court [could] not conclude with certainty that President Trump [would] never become essential to affording complete relief."[24] One of defendants' other arguments focused on plaintiffs' challenges to the actions and inactions of several federal agencies, arguing that the only proper avenue of relief was by way of the APA.[25] In rejecting this motion, the District Court held that plaintiffs had not – and need not have – brought their claims under the APA, because their claims involved constitutional arguments that placed them outside of the APA's scope.[26]

The court next addressed the three elements of Article III standing – injury in fact, causation and redressability – in turn.[27] On the question of injury in fact, the court referred to plaintiffs' sworn declarations, attesting to a range of personal injuries as a result of climate change.[28] Plaintiffs' expert witnesses drew connections between these injuries and global warming because of the use of

20 Opinion of the United States Supreme Court (30 July 2018). [online]. Available at: <https://www.supremecourt.gov/docket/docketfiles/html/public/18a65.html> Accessed: 23 January 2020. See also DOORI, Song. Judicial approaches to political questions: A comparative study of the United States and South Korea. *International and Comparative Law Review*, 2019, vol. 19, no. 1, pp. 234–260 where the author demonstrates the general reluctance of the US Supreme Court to adjudicate issues that have political undertones.

21 The constitutional requisites under Article III for the existence of standing are that the plaintiff must personally have: (i) suffered some actual or threatened injury; (ii) that injury can fairly be traced to the challenged action of the defendant; and (iii) that the injury is likely to be redressed by a favourable decision. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, US Case Law, vol. 504, 1992, pp. 560– 561.

22 *Juliana v United States of America* 339 F Supp 3d, D Or 2018, pp. 1062, 1076, 1080, 1086.

23 The Department of Justice asserted that anything less than dismissal *with* prejudice would violate separation of powers principles. Id at p. 1076.

24 *Juliana v United States of America* 339 F Supp 3d, D Or 2018, pp. 1062, 1080.

25 id.

26 id, p. 1084.

27 Id, pp. 1087–1094.

28 id, p. 1087. One plaintiff's home was flooded multiple times as a result of extreme weather, another suffered injuries caused by sea level rise, and yet another suffered trauma and health effects as a result of the increased frequency of wildfires.

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fossil fuels. Noting that defendants did not attempt to refute these assertions, the court held that "[p]laintiffs and their experts ha[d] provided 'specific facts' of immediate and concrete injuries."[29]

As to causation, the District Court commented on the fact that defendants admitted that the United States was responsible for more than 25% of cumulative global CO2 emissions between 1850 and 2012, that such emissions could be tied to climate change, and that climate change could be shown to be causally connected to plaintiffs' alleged injuries.[30]

Citing the lower standard of review required to survive a motion for summary judgment, the District Court rejected the government's contention that redress was impossible because the remedies that plaintiff requested were beyond the court's authority.[31] Plaintiffs' burden was not to show that "a favourable decision is certain to redress their injuries," but rather plaintiffs needed only to show a "substantial likelihood" that the court could provide meaningful relief.[32]

In response, in October 2018 the Department of Justice filed an emergency motion to the Supreme Court, again seeking a stay of the trial.[33] The government claimed that:[34]

> Absent relief from this court, the government immediately [would] be forced to participate in a 50-day trial that would violate bedrock requirements for Agency decision making and judicial review imposed by the [Administrative Procedure Act] and the separation of powers.

The next day, Chief Justice Roberts granted the stay, pending receipt of plaintiffs' response to the government's motion.[35] This action by the Supreme Court prompted an environmental law scholar to opine that "[i]t's certainly a signal that the court is uncomfortable with the underlying legal theory of the *Juliana* case."[36]

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29 id, p. 1090.

30 id, p. 1093.

31 ibid.

32 id, pp. 1093, 1096.

33 *Application for a Stay of Proceedings by the United States Department of Justice* (18 October 2018) [online]. Available at: < https://www.scotusblog.com/wp-content/uploads/2018/10/18A410.pdf> Accessed: 24 January 2020.

34 ibid.

35 Associated Press. *US temporarily stops youth climate lawsuit days before trial in Oregon. [online]. Available at: <https://www.oregonlive.com/environment/index.ssf/2018/10/us_temporarily_stops_youth_cli.html> Accessed: 24 January 2020.*

36 IRFAN, Umair. *The Supreme Court Stepped in to Stall a Climate Lawsuit. That's Really Weird.* [online]. Available at: <https://www.vox.com/energy-and environment/2018/10/23/18010582/childrens-climate-lawsuit-supreme-court> Accessed: 24 January 2020.

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On 2 November 2018, by a vote of seven to two, the Supreme Court vacated the stay, holding that the government could still be granted relief by the Ninth Circuit.[37] On 8 November 2018, consistent with the Order of the Supreme Court, the Ninth Circuit granted an indefinite stay of the trial, and required the District Court to rule on the government's renewed motion for interlocutory appeal.[38] On 21 November 2018 Judge Aiken granted the government's motion for interlocutory appeal, which put the entire case on hold until higher courts had ruled on this appeal.[39]

In December 2018 the Ninth Circuit granted interlocutory appeal by a vote of two to one.[40] The government's appeal brief again challenged the District Court's unique constitutional and statutory rulings on standing, fundamental rights and the public trust doctrine.[41] On 4 June 2019, the Ninth Circuit, consisting of three judges, all of whom were Obama appointees, heard the appeal case. On 17 January 2020, by a two-to-one vote, the Ninth Circuit dismissed the case for lack of standing.

3 The Plaintiffs' Case

In the original brief the plaintiffs claimed that the United States government has, since the mid-1960s, been aware of the fact that carbon dioxide pollution from burning fossil fuels has caused climate change and global warming to occur, and that continuing this practice will further disrupt the climate system that future generations are dependent on for their survival.[42]

Not only was insufficient action taken to address these concerns, but the government has continued to propagate policies that support the utilisation of fossil fuels. The plaintiffs were concerned about the continuation of these policies,

37 Order of the United States Supreme Court (2 November 2018) [online]. Available at: https://www.supremecourt.gov/orders/courtorders/110218zr2_8ok0.pdf> accessed: 24 January 2020.

38 Order of the Ninth Circuit Court of Appeals (8 November 2018) [online]. Available at: <http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2018/20181108_docket-18-73014_order.pdf> accessed: 24 January 2020.

39 Order of the United States District Court for the District of Oregon (21 November 2018) [online]. Available at: < https://www.documentcloud.org/documents/5219185-Juliana-v-US-Interlocutory-Appeal-Order-112118.html> accessed: 24 January 2020.

40 Order of the Ninth Circuit Court of Appeals (26 December 2018) [online]. Available at: <http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2019/20190107_docket-18-36082_order.pdf> accessed: 24 January 2020.

41 See Appellant's Opening Brief (1 February 2019) [online]. Available at: <http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2019/20190201_docket-18-36082_brief.pdf> accessed: 24 January 2020.

42 *Juliana et al v United States of America et al*, US District Court, D Or, First Amended Complaint for Declaratory and Injunctive Relief; Case No.: 6:15-cv-01517-TC, 9 October 2015, par 1. The plaintiffs also cite reports from the 1990s in which the government had agreed on certain measures to reduce emissions but never implemented these plans, see paras 2–4.

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specifically a project approved by the Department of Energy involving the export of liquefied natural gas from a terminal in Oregon, the state in which the suit was filed. The plaintiffs claimed that the harms were of a continuing nature and if not addressed will have irreversible consequences.[43] According to the plaintiffs:[44]

Defendants have acted with deliberate indifference to the peril they knowingly created. Defendants have infringed on Plaintiffs' fundamental constitutional rights to life, liberty, and property. Defendants' acts also discriminate against these young citizens, who will disproportionately experience the destabilized climate system in our country.

The plaintiffs asked the court to order the government to cease the further authorization and subsidization of fossil fuels, and to take action to ensure that CO2 emissions are reduced to a certain level by 2100, and to develop and implement a national plan to ensure a more stable climate system.[45]

The original complaint set out the specific harms that each plaintiff had suffered as a result of the actions and inaction of the government.[46] The effects of climate change have greatly impacted on the plaintiffs' lives by negatively affecting their food and water sources, as well as their usual recreational activities and the safety of their homes and health.[47] Other plaintiffs of indigenous descent have suffered harm to the exercise of their cultural and spiritual rights as a result of the harm caused to natural resources used as part of their cultural practices.[48]

Most of the plaintiffs were involved in some form of climate activism, such as establishing and being involved in climate advocacy groups, advocating before domestic and international governmental bodies for a reduction in emission levels, and working on community projects to reduce carbon emissions in their neighborhoods.[49] They also had incorporated various adaptive measures into

43 id, par 13.

44 id, par 8.

45 id, par 12.

46 id, paras 16–95.

47 Several of the plaintiffs cited health concerns in the form of asthma and allergies mainly caused by decreased air quality and an increase in wild fires in Oregon during the past few years. Two of the plaintiffs live on farms, one being a family farm which has been in their family for several decades. Their livelihood and the future of their continued occupation of these farms is being threatened. The proposed gas pipeline will also be constructed within a 30-mile radius of both farms which could greatly affect the land not only aesthetically, but also threaten the wildlife and water sources in these areas. Some of the plaintiffs living in other areas have been displaced from their homes due to water scarcity and flooding respectively. See *Juliana et al v United States of America et al*, US District Court, D Or, First Amended Complaint for Declaratory and Injunctive Relief; Case No.: 6:15-cv-01517-TC, 9 October 2015, paras 16–90.

48 *Juliana et al v United States of America et al*, US District Court, D Or, First Amended Complaint for Declaratory and Injunctive Relief; Case No.: 6:15-cv-01517-TC, 9 October 2015, paras 20, 21, 65–70.

49 id, paras 16–90.

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their daily lives in order to reduce their own carbon footprint,[50] for example by buying local produce and supporting local farmers, recycling, cleaning up local recreation areas, biking and walking instead of driving, and establishing their own gardens to produce food.[51]

Dr James Hansen, as the guardian of future generations, claimed that future generations should "retain the legal right to inherit well-stewarded public trust resources and to protection of their future lives, liberties, and property – all of which are imminently threatened by the actions of Defendants…"[52]

The gist of plaintiffs' claim was that they:[53]

> [R]epresent the youngest living generation, beneficiaries of the public trust…have a substantial, direct, and immediate interest in protecting the atmosphere, other vital natural resources, their quality of life, their property interests, and their liberties. They also have an interest in ensuring that the climate system remains stable enough to secure their constitutional rights to life, liberty, and property, rights that depend on a liveable future. A liveable future includes the opportunity to drink clean water, to grow food, to be free from direct and imminent property damage caused by extreme weather events, to benefit from the use of property, and to enjoy the abundant and rich biodiversity of our nation. Youth Plaintiffs are suffering both immediate and threatened injuries as a result of actions and omissions by Defendants alleged herein and will continue to suffer life-threatening and irreversible injuries without the relief sought. Youth Plaintiffs have suffered and will continue to suffer harm to their health, personal safety, bodily integrity, cultural and spiritual practices, economic stability, food security, property, and recreational interests from the impacts of climate change and ocean acidification caused by Defendants.

The complaint described the defendants – agencies of the United States federal government –as the "sovereign trustee of national natural resources" with an obligation to manage these resources, including fossil fuels, in such a way that it does not threaten the integrity of the climate system.[54]

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50 ibid.

51 ibid.

52 id, paras 92–94. Dr Hansen is an Adjunct Professor at Columbia University's Earth Institute directing a program in Climate Science, Awareness and Solutions. He is a physicist and astronomer by training, formerly working as the Director of the NASA Goddard Institute for Space Studies. He has testified to Congress on climate change during the 1980s and provided evidence in the current suit on the danger of climate change and the steps to be taken to stabilize the climate system.

53 *Juliana et al v United States of America et al*, First Amended Complaint for Declaratory and Injunctive Relief; US District Court, D Or, Case No.: 6:15-cv-01517-TC, 9 October 2015, par 96.

54 id, par 98.

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The plaintiffs claimed that the defendants had failed to limit and phase out carbon emissions, and consequently had contributed to dangerous levels of emissions in the atmosphere which threatens the stability of the climate system and "impairs essential national public trust resources required by [them] and future generations."[55] Accordingly, the government had breached its duty of care to protect the plaintiffs' constitutional rights.[56] The plaintiffs sought to hold the defendants jointly and severally liable for violating the plaintiffs constitutional rights because they had:[57]

> [P]ermitted, authorized, and subsidized the extraction, production, transportation, and utilization of fossil fuels across the U.S. (and beyond) ... [and] ... retain authority to limit or to deny that extraction, production, transportation, and utilization of fossil fuels, and otherwise to limit or prohibit their emissions.

The defendants' acts and omissions had caused dangerous levels of carbon emissions, leading to the negative effects of climate change, as experienced by the plaintiffs, and thereby violating their constitutional rights to freedom from deprivation of life, liberty, property and equal protection, their "unenumerated inherent and inalienable natural rights" and their "rights as beneficiaries of the federal public trust."[58]

Regarding the constitutional right to equal protection, the plaintiffs claimed that the government had discriminated against the current youth and future generations, by exercising its sovereign authority over the country's natural resources for the economic benefit of the present adult generation.[59] Moreover, the plaintiffs, as well as other youth and future generations, have no voting rights and limited political influence over the actions of the government regarding the management and use of natural resources.[60] The effects of the past and current governmental policies, and the increase in carbon emissions which these policies have caused will also be disproportionately borne by future generations.[61] Therefore, plaintiffs' argument was that there remained no other possible remedy but

55 ibid.

56 ibid.

57 *Juliana et al v United States of America et al*, First Amended Complaint for Declaratory and Injunctive Relief; US District Court, D Or, Case No.: 6:15-cv-01517-TC, 9 October 2015, par 129.

58 id, par 130.

59 id, par 294.

60 *Juliana et al v United States of America et al*, First Amended Complaint for Declaratory and Injunctive Relief; US District Court, D Or, Case No.: 6:15-cv-01517-TC, 9 October 2015, par 295.

61 id, par 299. See par 297 where the plaintiffs argue for protected class status: 'As Plaintiffs include citizens presently below the voting age and future generations, this Court should determine they must be treated as protected classes, and federal laws and actions that disproportionately discriminate against and endanger them must be invalidated.'

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to approach the courts to address their concerns, and to prevent further rights abuses from occurring.[62]

This approach of utilising common law remedies to address environmental concerns seems to be preferred, especially in case where a country's domestic environmental or climate policies are considered to be insufficient to address concerns such as climate change or other environmental threats. For example, during the George W Bush presidency, and because of his administration's lack of sufficient policies to address certain environmental issues, various cases[63] were filed on the basis of common law remedies seeking to force the government to act with regard to environmental concerns such as carbon emissions and climate change.[64]

During the Obama administration, policy makers made a concerted effort to address the issue of climate change through, for example, its participation in the Paris Agreement.[65] However, the Trump administration was now abandoning such reforms, and, therefore, aggrieved parties were once again forced to turn to the common law to seek a remedy to address environmental concerns.

The "unenumerated inherent and inalienable natural rights" claimed by the plaintiffs as relief, is a right that is guaranteed in the Ninth Amendment to the US Constitution. This Amendment states: "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."[66] It guarantees rights that are not necessarily enumerated in the Constitution, in effect stating that the Constitution should not be regarded as a closed list of rights. The plaintiffs alleged in this regard that:[67]

> Our nation's founders intended that the federal government would have both the authority and the responsibility to be a steward of our country's essential natural resources… Among the implicit liberties protected from government intrusion by the Ninth Amendment is the right to be sustained by our country's vital natural systems, including our climate system…Fundamental to our scheme of ordered liberty, therefore, is the implied right to a stable climate system and an atmosphere and oceans

62 id, par 296.

63 See *Native Village of Kivalina v. ExxonMobil Corp*., 663 F. Supp. 2d 863, N.D. Cal., 2009.; *California v. Gen. Motors Corp*., No. C06-05755, 2007 WL 2726871, N.D. Cal., Sept. 17, 2007.; *Comer v. Murphy Oil USA*, No. 1:05-CV-436, 2007 WL 6942285, S.D. Miss. Aug., 30, 2007.; *Connecticut v. Am. Elec. Power Co*., 406 F. Supp. 2d 265, S.D.N.Y., 2005.; See also WEAVER & KYSAR (note 17) p. 322.

64 POWERS (note 9) p. 199; See also WEAVER & KYSAR (note 17) p. 322.

65 POWERS (note 9) p. 199.

66 US Constitution, amend. IX.

67 *Juliana et al v United States of America et al*, First Amended Complaint for Declaratory and Injunctive Relief; US District Court, D Or, Case No.: 6:15-cv-01517-TC, 9 October 2015, paras 303, 304.

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> that are free from dangerous levels of anthropogenic CO2. Plaintiffs hold these inherent, inalienable, natural, and fundamental rights.

In terms of the public trust doctrine, which is a common law remedy, the plaintiffs averred that defendants had a duty to protect, and not to impair, natural resources, such as the air, water, wildlife and seas and the "overarching public trust resource" which is the "country's life-sustaining climate system."[68] The plaintiffs claimed that the defendants had failed in exercising this duty of care as trustees of the country's natural resources for the benefit of present and future generations.[69]

The government argued vehemently that a judicial claim was not appropriate, and that the issue of climate change and reducing emissions should be left to the other two branches of government to address in terms of legislation or executive action.[70] In answer, the plaintiffs quote the now famous Supreme Court case of *Obergefell v Hodges*[71] in which the court stated:[72]

> [W]hen the rights of persons are violated, 'the Constitution requires redress by the courts,' notwithstanding the more general value of democratic decisionmaking.

The Supreme Court further stated:[73]

> There may be an initial inclination in these cases to proceed with caution—to await further legislation, litigation, and debate… The dynamic of our constitutional system is that individuals need not await legislative action before asserting a fundamental right. The Nation's courts are open to injured individuals who come to them to vindicate their own direct, personal stake in our basic charter. An individual can invoke a right to constitutional protection when he or she is harmed, even if the broader public disagrees and even if the legislature refuses to act. The idea of the Constitution "was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.

68 id, par 310.

69 ibid.

70 *United States of America et al v United States District Court for the District of Oregon and Kelsey Cascadia Rose Juliana et al* (Petition for a Writ of Mandamus to the United States District Court for the District of Oregon and Request for Stay of Proceedings in District Court) Case No 6:15-cv-01517-TC-AA, D. Or., 9 June 2017, p. 12.

71 *Obergefell v Hodges* 135 S. Ct. 2584, 2015, p. 24.

72 *Juliana et al v United States of America et al*, First Amended Complaint for Declaratory and Injunctive Relief; US District Court, D Or, Case No.: 6:15-cv-01517-TC, 9 October 2015, p. 99.

73 *Obergefell v Hodges* 135 S.Ct. 2584, 2015, pp. 24–25.

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Even though the *Obergefell* case deals with the issue of same sex marriage, one can draw a distinct parallel between this case and *Juliana* in terms of the plaintiffs' frustration with the lack of recognition of their rights by the legislative and executive branches of government. To a large extent, social justice cases in the United States, such as *Obergefell*, have paved the way for the *Juliana* case in establishing a judicial platform to challenge inaction by the government to recognise and respect certain fundamental rights.

4 The Final Frontier: Juliana v United States Court of Appeals Judment

In June 2019 the Ninth Circuit heard submissions on the interlocutory appeal.[74] On 17 January 2020 – in a devastating blow to the plaintiffs and climate activists around the world – the Ninth Circuit, in a two-to-one majority judgment, dismissed the case for lack of Article III standing, and remanded the case back to the District Court with an order to dismiss the case based on lack of standing.[75] The court did not dispute the plaintiffs' evidence regarding the catastrophic effect of fossil fuels and carbon dioxide emissions on our climate.[76] Instead, the court focused its attention on whether the requirements for Article III standing had been satisfied in this case in order for the case to continue to be heard by the Federal courts.[77] The Ninth Circuit concurred with the District Court that the first two requirements of Article III standing – particularized injury and causation – had been satisfied.[78] However, the court found that the third requirement – redressability – had not been met, because the plaintiffs' claim was not remediable by an Article III court.[79] In particular, the court stated that it was beyond the authority of an Article III court to:[80]

> [O]rder, design, supervise, or implement the plaintiffs' requested remedial plan where any effective plan would necessarily require a host of complex policy decisions entrusted to the wisdom and discretion of the executive and legislative branches.

In a dissenting opinion, Staton J affirmed the District Court's decision, and held that the plaintiffs had met all three requirements for standing under Article III.[81]

74 *Kelsey Rose Juliana vs USA United States Court of Appeals for the Ninth Circuit*, Portland Oregon, case no 18-36082, 4 June 2019.

75 *Kelsey Rose Juliana vs USA United States Court of Appeals for the Ninth Circuit*, Portland Oregon case no. 18-36082 Opinion, 17 January 2020, p. 4.

76 ibid.

77 ibid, p. 5.

78 ibid.

79 ibid, pp. 5, 12. The plaintiffs sought an order from the court compelling the government to develop a plan to "phase out fossil fuel emissions and draw down excess atmospheric CO2."

80 ibid.

81 ibid, pp. 5–6.

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It is important to bear in mind that the plaintiffs in this case did not assert the violation of a specific regulation, statute or procedural right.[82] Rather, the claim was based on the alleged violation of a constitutional right to a "climate system capable of sustaining human life," which, although the majority in this case accepted to exist, is still disputed by many jurists in the United States.[83] Nevertheless, the Ninth Circuit judges still had to determine whether the plaintiff's requested relief was (i) "substantially likely to redress their injuries; and (ii) within the district court's power to award."[84]

According to the majority, the relief sought by the plaintiffs was:[85]

> [A]n injunction requiring the government not only to cease permitting, authorizing, and subsidizing fossil fuel use, but also to prepare a plan subject to judicial approval to draw down harmful emissions. The plaintiffs thus seek not only to enjoin the Executive from exercising discretionary authority expressly granted by Congress ... but also to enjoin Congress from exercising power expressly granted by the Constitution over public lands ...

However, as the majority opinion made clear, even according to plaintiffs' own expert evidence, it is not certain whether such measures would even prevent or decrease the growth of carbon emissions in the atmosphere – a goal which would require much more drastic action such as a complete transformation of the country's energy sector.[86] The plaintiffs claimed that although the requested relief would not completely address the negative effects of climate change impacting their lives, it would provide some relief.[87]

The District Court, relying on *Massachusetts v EPA*[88]*,* found that the redressability requirement would be satisfied because the requested measures would reduce emissions even if not eliminating them completely.[89] The majority of the Ninth Circuit did not agree fully, because *Massachusetts v EPA* involved a procedural right, whereas the plaintiffs in *Juliana* asserted violation of a substantive due process right.[90]

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82 ibid, p. 21.
83 ibid.
84 ibid.
85 id, p. 22.
86 id, p. 23.
87 id, pp. 24, 45. Judge Staton in her minority opinion supports this line of argument.
88 *Massachusetts v Environmental Protection Agency,* 22 Ill.549 U.S. 497, 127 S. Ct. 1438, 167 L. Ed. 2d 248, 63 ERC 2057, 2007.
89 *Kelsey Rose Juliana vs USA United States Court of Appeals for the Ninth Circuit*, Portland Oregon, case no. 18-36082 Opinion, 17 January 2020, p. 24.
90 ibid, pp. 24, 47. Judge Staton disagrees, stating that it is irrelevant to the present dispute whether a procedural or substantive right is involved.

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Despite the redressability issue, which the court perhaps still could have conceded, it found that the final requirement had not been satisfied, namely the power of the court to provide the requested relief.[91] The court found that it was beyond its authority to "order, design, supervise or implement the plaintiffs' requested remedial plan," because it would involve numerous complicated policy considerations and decisions which fall within the exclusive authority of the legislative and executive branches of government.[92] Moreover, even if the court merely ordered injunctive relief ordering the government to implement such an order, the court would still have to observe and scrutinize the government's implementation measures on a long term basis, which would ultimately also entail ongoing policy decisions by the judicial branch.[93]

According to the majority opinion:[94]

> Although the plaintiffs' invitation to get the ball rolling by simply ordering the promulgation of a plan is beguiling, it ignores that an Article III court will thereafter be required to determine whether the plan is sufficient to remediate the claimed constitutional violation of the plaintiffs' right to a "climate system capable of sustaining human life." We doubt that any such plan can be supervised or enforced by an Article III court. And, in the end, any plan is only as good as the court's power to enforce it.

Furthermore:[95]

> The dissent correctly notes that the political branches of government have to date been largely deaf to the pleas of the plaintiffs and other similarly situated individuals. But, although inaction by the Executive and Congress may affect the form of judicial relief ordered when there is Article III standing, it cannot bring otherwise nonjusticiable claims within the province of federal courts.
>
> The plaintiffs have made a compelling case that action is needed; it will be increasingly difficult in light of that record for the political branches to deny that climate change is occurring, that the government has had a role in causing it, and that our elected officials have a moral responsibility to seek solutions. We do not dispute that the broad judicial relief the plaintiffs seek could well goad the political branches into action… We reluctantly conclude, however, that the plaintiffs' case must be made to the political branches or to the electorate at large, the latter of which can change the composition of the political branches through the ballot box. That the other branches may have abdicated their responsibility to

91 id, p. 25.
92 id, p. 25.
93 id, p. 26.
94 id, p. 27.
95 id, pp. 31, 32.

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> remediate the problem does not confer on Article III courts, no matter how well-intentioned, the ability to step into their shoes.

Staton J's dissenting opinion was a passionate plea for judicial action, based more on frustration with the ever-challenging issue of climate change, than sound legal argument justifying the judiciary's involvement in addressing this issue:[96]

> [A] federal court need not manage all of the delicate foreign relations and regulatory minutiae implicated by climate change to offer real relief, and the mere fact that this suit cannot alone halt climate change does not mean that it presents no claim suitable for judicial resolution. 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 wilful destruction. So viewed, plaintiffs' claims adhere to a judicially administrable standard. And considering plaintiffs seek no less than to forestall the Nation's demise, even a partial and temporary reprieve would constitute meaningful redress.

A supposed Constitutional principle not to "condone the Nation's wilful destruction" does not constitute a justiciable right under United States law. Also, managing the "regulatory minutiae" would involve sweeping policy decisions which would have long-lasting impacts on the energy industry and various other sectors of the economy. Staton J continued to compare the relief sought in this case to that granted in cases such as *Brown v Board of Education* and other civil rights cases:[97]

> [R]emedying decades of institutionalized violations may take some time. Here, too, decelerating from our path toward cataclysm will undoubtedly require "elimination of a variety of obstacles." Those obstacles may be great in number, novelty, and magnitude, but there is no indication that they are devoid of discernible standards. Busing mandates, facilities allocation, and district-drawing were all "complex policy decisions" faced by post-*Brown* trial courts…I have no doubt that disentangling the government from promotion of fossil fuels will take an equally deft judicial hand.

Despite this fervent plea, it is naïve to compare the civil rights movement with climate change regarding the level of policy reform necessary, and its domestic as

96 id, pp. 33, 40. Judge Staton also refers to the 'perpetuity principle' which according to her is a principle underscoring the Constitution because without the existence or continued existence of the country, Constitutional rights cannot be enforced. The continued existence of the country is threatened by climate change and therefore the perpetuity principle justifies a response to this crisis. However, later in her opinion she states that 'the perpetuity principle is not an environmental right at all, and it does not task the courts with determining the optimal level of environmental regulation; rather, it prohibits only the wilful dissolution of the Republic.'

97 id, p. 60.

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well as global impacts. The process of school integration, to use the judge's example, could have been more easily addressed judicially, as it was limited to a specific concern, namely racial segregation in schools. The policy changes to address this concern were relatively simple to apply once the ideological barrier had been overcome by the state and society as a whole (which, although it took many years, eventually did occur). In the case of segregation, for example, difference of ideology is probably the biggest challenge and once it is surmounted it is merely a question of implementing policy measures to ensure formal integration.

However, in the case of climate change, we are dealing with an inherently global problem where possible solutions will have not only a domestic, but also a global impact. On a domestic level, any plan or policy decision would affect an array of US industries and the economy as a whole. On a global scale, it is no exaggeration to state that any domestic policy decision that affects the United States economy, would necessarily affect the economies of most other countries in the world. It is therefore clear that such decisions affecting not only the United States, but also communities around the globe, should be taken with care and cannot be directed by US courts, not only because of the complexity of these decisions, but also because of their political dimension, and the fact that such decisions fall wholly outside of any court's jurisdiction.

5 Conclusion

This case clearly demonstrates the current frustration with governments', particularly the US government's, perceived lack of action to address the causes of climate change. As a result of citizens' frustration with this lack of action by the legislative and executive branches of government, plaintiffs are now seeking redress from the courts in hopes that judicial institutions will somehow force action by the other two branches of government. Similar climate change cases, such as *Urgenda*[98], *Leghari*[99], *Ali*[100], *Greenpeace Nordic Ass'n*[101] and *Barragán*[102] to name a few, have been heard in other domestic jurisdictions around the world

98 *Stichting Urgenda v Government of the* Netherlands (Ministry of Infrastructure and the Environment), ECLI:NL:RBDHA:2015:7145, Rechtbank Den Haag, C/09/456689/HA ZA 13-1396.

99 *Ashgar Leghari v Federation of Pakistan*, WP No 25501, 2015, Lahore High Court Green Bench, Orders of 4 and 14 September 2015.

100 *Rabab Ali v Federation of Pakistan & Another*, 4 April 2016, Supreme Court of Pakistan.

101 *Greenpeace Nordic Ass'n and Nature and Youth v Ministry of Petroleum and Energy*, Case no. 16166674TVI-OTIR/06, Oslo District Court, 4 January 2018.

102 See case summary and translation of STC4360-2018 de la Corte Suprema de Justicia, Sala de Casacion Civil, M.P. Luis Armando Tolosa Villabona (2018) by Environmental Law Alliance Worldwide. [online]. Available at: <https://www.elaw.org/CO_Amazon> Accessed: 20 May 2019; see also *Climate Change and Future Generations Lawsuit in Colombia: Key Excerpts from the Supreme Court's Decision*. [online]. Available at: <https://www.dejusticia.org/en/climate-change-and-future-generations-lawsuit-in-colombia-key-excerpts-from-the-supreme-courts-decision/> Accessed: 20 May 2019.

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illustrating that this dissatisfaction with slow government progress in addressing the issue of climate change and the desire to find judicial solutions to force government action, is a global sentiment. Suffice to say that there are substantial differences between these cases, and despite success in climate cases in other jurisdictions, the US situation is quite unique. Firstly, the US Constitution, unlike that of many other countries, does not contain a right to a healthy environment. Secondly, in the *Juliana* case no other specific right was claimed to be violated, rather a vague right which is open to interpretation and not widely recognised in the US legal system. Lastly, the majority opinion, although not popular among climate activists, was legally correct in stating that even if we accept this right as having been violated it is not within the court's authority to provide a remedy or sanction a plan of action that will have wide ranging and long lasting effects on the US energy system and the US economy.

It is encouraging to see successful climate cases in other jurisdictions and an increasing trend towards bringing such cases in domestic courts.[103] However, it seems unlikely that any further climate litigation in the United States will be successful after the precedent established by the Court of Appeals judgment in *Juliana.*

Not all climate cases are justiciable and one cannot circumvent judicial rules even for important issues such as climate change. However unpopular this decision may prove to be, it does not detract from its legal soundness. To be sure it will require an array of innovative solutions to address the causes of climate change, but undermining a country's judicial integrity cannot be one of these solutions however dire the situation may be.

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103 This could be a much more effective strategy to address the causes of climate change than international instruments and agreements which often seem ineffective.

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