

Juliana v. United States: The Ninth Circuit’s Opening Salvo for a New Era of Climate Litigation

I. OVERVIEW	341
II. BACKGROUND	342
III. COURT’S DECISION.....	346
IV. ANALYSIS	353
V. CONCLUSION	356

I. OVERVIEW

Until the Industrial Revolution, the average concentration of carbon dioxide in the atmosphere hovered between 180 and 280 parts per million for hundreds of thousands of years.¹ Today, thanks to a century of large-scale human combustion of fossil fuels such as coal and oil,² the concentration of carbon dioxide in the atmosphere has now climbed past 410 parts per million—a concentration that the Earth has not seen for almost three million years.³ This dramatic increase, which has already warmed the planet by 0.9 degrees Celsius beyond pre-industrial levels,⁴ threatens to “wreak havoc on the Earth’s climate” if left unabated, “bury[ing] cities, spawn[ing] life-threatening natural disasters, and jeopardiz[ing] critical food and water supplies.”⁵ Yet despite knowing the risks of continued fossil fuel use since at least 1965,⁶ the U.S. government—through ten Presidential administrations and more than two

1. *Juliana v. United States*, 947 F.3d 1159, 1166 (9th Cir. 2020).

2. *Id.*

3. *Id.* At that time, global average temperatures were between two and three degrees Celsius higher than pre-industrial averages, and sea level was approximately twenty-five meters higher than it is today. M. M. Robinson, H. J. Dowsett, and M.A. Chandler, *Pliocene Role in Assessing Future Climate Impacts*, 89 EOS, TRANSACTIONS, AMERICAN GEOPHYSICAL UNION 501, 501 (2008).

4. *Juliana*, 947 F.3d at 1166.

5. *Id.* The author would like to note that he composed portions of this case note without electricity in his apartment due to local damage from Hurricane Zeta, the record-setting eleventh named tropical cyclone to make landfall in the continental United States during the 2020 Atlantic hurricane season. Chloe Johnson, *Hurricane Zeta Breaks Records for Gulf and 2020 Season. The Original Zeta Was Far Stranger.*, THE POST & COURIER (last updated Nov. 30, 2020), https://www.postandcourier.com/hurricanewire/hurricane-zeta-breaks-records-for-gulf-and-2020-season-the-original-zeta-was-far-stranger/article_bcea05a2-189c-11eb-90a5-ef835b865a61.html [<https://perma.cc/CY8F-YNM2?type=image>].

6. *Juliana*, 947 F.3d at 1166.

dozen Congresses—has not only failed to take meaningful action to curb carbon emissions, but continues to “affirmatively promote” fossil fuel use through subsidies, favorable taxation regimes, and a “host” of other policies.⁷

After suffering various climate-caused injuries—such as separation from relatives after being forced to leave an Indian reservation due to water scarcity and reduction in home property value due to repeated flooding⁸—twenty-one young plaintiffs filed suit against the United States, the President, and numerous federal agencies, accusing the federal government of violating their Constitutional rights to a habitable climate and seeking declaratory and injunctive relief, including an order that the government “implement a plan to ‘phase out fossil fuel emissions and draw down excess atmospheric [carbon dioxide].’”⁹ In a landmark opinion, the U.S. District Court for the District of Oregon denied the government’s motion to dismiss the case on the grounds that plaintiffs had successfully stated a claim for a violation of a substantive due process right to a “climate system capable of sustaining human life” under the Fifth Amendment.¹⁰ The government then unsuccessfully sought to appeal the decision through a variety of avenues—including petitioning the Supreme Court for a stay of proceedings—before ultimately moving for summary judgment and judgment on the pleadings in the district court, which the court denied.¹¹ After the district court “reluctantly” certified that order for interlocutory appeal, the government appealed to the U.S. Court of Appeals for the Ninth Circuit.¹² In a 2-1 decision, the Ninth Circuit *held* that the plaintiffs lacked standing to bring the case because the injury for which they sought relief was not redressable by an Article III court. *Juliana v. United States*, 947 F.3d 1159, 1171 (9th Cir. 2020).

II. BACKGROUND

Juliana was by no means the first lawsuit seeking to abate climate change brought in an American court. The U.S. Supreme Court decided

7. *Id.* at 1166-67.

8. *Id.* at 1168.

9. *Id.* at 1165 (modification in original). An environmental organization, Earth Guardians, and an organization representing “future generations” also joined the suit as co-plaintiffs. *Id.*

10. *Id.*

11. *Id.* The court did, however, dismiss the President as a defendant and granted summary judgment to the government on the plaintiffs’ Ninth Amendment claim and in part on their Equal Protection claim, holding that their status as youths did not constitute a suspect class but that it could continue on a theory of violation of a fundamental right. *Id.* at 1165 & n.3.

12. *Id.* at 1166.

arguably the most well-known climate change-related suit in 2007, *Massachusetts v. EPA*.¹³ In that case, Massachusetts and other states attempted to compel the EPA to use its statutory authority under the Clean Air Act to regulate greenhouse gas emissions from motor vehicles in order to reduce potential climate harms.¹⁴ After finding that the petitioners had constitutional standing to bring the challenge,¹⁵ the Court held that carbon dioxide and other greenhouse gases were “air pollutants” within the meaning of the Clean Air Act and that the EPA therefore had authority to regulate greenhouse gas emissions from vehicles.¹⁶ The Court ultimately disposed of the case by remanding to EPA to re-evaluate whether greenhouse gases “cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare”¹⁷ and therefore require regulation under the mobile source provisions of the Clean Air Act.¹⁸

While subsequent legal developments eventually hindered the EPA’s ability to aggressively regulate greenhouse gas emissions from stationary sources¹⁹ (in addition to mobile ones), some advocates have attempted to seek emission reductions through suits to hold industrial sources and fossil fuel producers liable for climate injuries under nuisance and other private law theories with mixed success.²⁰ Others sought to directly compel the government to reduce emissions outside the framework of the Clean Air Act, instead seeking declaratory and injunctive relief against the United States and federal agencies for their alleged infringement on Americans’ constitutional right to a habitable climate and failure to protect the atmosphere as a shared public trust resource. *Juliana* has been the highest

13. *Massachusetts v. EPA*, 549 U.S. 497 (2007).

14. *See id.* at 506-14 (discussing 42 U.S.C. § 7521(a)(1) (2006)).

15. *Id.* at 516-26.

16. *Id.* at 528-29.

17. 42 U.S.C. § 7521(a)(1) (2006).

18. *Massachusetts v. EPA* at 532-35. The Obama Administration, which took office soon after this decision was made, promptly made the requisite endangerment finding and promulgated emission standards for “light-duty” vehicles. *See* Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496 (Dec. 15, 2009); Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule, 75 Fed. Reg. 25,324 (May 7, 2010).

19. *See* Robert Barnes and Steven Mufson, *Supreme Court Freezes Obama Plan to Limit Carbon Emissions*, WASH. POST (Feb. 9, 2016), https://www.washingtonpost.com/politics/courts_law/supreme-court-freezes-obama-plan-to-limit-carbon-emissions/2016/02/09/ac9dfad8-cf85-11e5-abc9-ea152f0b9561_story.html [<https://perma.cc/3FZC-8TW4?type=image>] (reporting on the Supreme Court’s 5-4 stay of the EPA’s Clean Power Plan, which would have required states to reduce their carbon emissions from electricity generation).

20. *See* section IV, *infra*.

profile case among the latter camp of lawsuits, perhaps in large part because other similar suits were dismissed in district court. In *Alec L. v. Jackson*, for example, another suit brought by children against the EPA and other federal agencies under an atmospheric public trust theory, the U.S. District Court for the District of Columbia dismissed the plaintiffs' case for lack of subject matter jurisdiction, holding that public trust doctrine was a matter of state law.²¹ In *Animal Legal Defense Fund, Inc. v. United States*, the District of Oregon dismissed plaintiffs' suit alleging a violation of a fundamental "right to wilderness" for lack of standing, finding that the plaintiffs had failed to articulate a particularized injury.²² Similarly, in *Clean Air Council v. United States*, the Eastern District of Pennsylvania likewise dismissed a suit brought by children challenging the Trump Administration's rollback of environmental regulations as violating their fundamental right to "a life-sustaining climate system."²³ Although the court did acknowledge that some of the plaintiffs sufficiently alleged concrete physical injuries,²⁴ it ultimately held that the plaintiffs failed to clear all three prongs of the Supreme Court's test for constitutional standing.²⁵ It was thus clear that questions of standing would be crucial to the success of the *Juliana* plaintiffs and anyone else bringing similar actions.

Under the Supreme Court's current jurisprudence, in order for a case to be suitable for judicial resolution under the "case or controversy" requirement of Article III of the Constitution, a plaintiff must show that it "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a

21. *Alec L. v. Jackson*, 863 F. Supp. 2d 11, 15 (D.D.C. 2012). The court went on to hold that even if such a cause of action existed under federal common law, Congress had displaced it by enacting the Clean Air Act under the Supreme Court's decision in *American Elec. Power Co. v. Connecticut*. *Id.* at 15-16 (citing *Am. Elec. Power Co. v. Conn.*, 564 U.S. 410, 423-25 (2011)).

22. *Animal Legal Def. Fund v. United States*, 404 F. Supp. 3d 1294, 1300 (D. Or. 2019). The court further declined to recognize the "right to wilderness" that the plaintiffs asserted under the Constitution's substantive due process protections, distinguishing the case from the same court's earlier decision in *Juliana*, which recognized a right to be free not from just any pollution or climate change but only from "catastrophic levels" of the same. *Id.* at 1302 (citing *Juliana v. United States*, 217 F. Supp. 3d 1224, 1250 (D. Or. 2016) (emphasis in original)).

23. *Clean Air Council v. United States*, 362 F. Supp. 3d 237, 250-52 (E.D. Pa. 2019). That court also held that the plaintiffs' asserted right to a life-sustaining climate system was not cognizable under the Constitution's substantive due process protections. *Id.* at 253.

24. *Id.* at 246.

25. *Id.* at 244-50.

favorable judicial decision.”²⁶ The Court further defines the injury-in-fact requirement as one that is “‘an invasion of a legally protected interest’ that is ‘concrete and particularized’ and ‘actual and imminent, not conjectural or hypothetical.’”²⁷ Notably, while the *Clean Air Council* court did recognize that the minor plaintiffs’ climate-related physical harms such as exacerbated asthma symptoms and the “frightening impact” of hurricanes were concrete and particularized, it held that they were not “actual or imminent” because the chain of events between the challenged regulatory rollbacks and the aggravation of those injuries was too “attenuated” and “contingent.”²⁸ It further held that those injuries failed the “fairly traceable” prong of the standing analysis because they were allegedly first inflicted in 2011, long before the defendants’ challenged regulatory rollbacks began in 2017.²⁹

But perhaps the most difficult hurdle the *Juliana* plaintiffs would have to clear was the final ‘redressability’ prong of the standing test—namely, the courts’ extreme reluctance to step into the sphere of policymaking in order grant any sort of sweeping relief that would meaningfully cut national greenhouse gas emissions.³⁰ As the Ninth Circuit has interpreted this requirement, in order for a plaintiff to meet the redressability bar, the plaintiff must demonstrate that its requested relief is likely to be redressed by a favorable decision *within a federal court’s power to grant*.³¹ The *Clean Air Council* court held that the plaintiffs in that case failed the first prong of this test because their proposed injunction against the Trump Administration’s regulatory rollbacks would not by itself meaningfully redress their climate injuries.³² The *Animal Legal Defense Fund* court did not even reach the issue of redressability because it found the plaintiffs failed to meet the injury test.³³ Thus, crucially for the *Juliana* plaintiffs, courts had yet to speak directly to the question of

26. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992); *Friends of the Earth, Inc. v. Laidlaw Env’t Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000)).

27. *Id.* at 1548 (quoting *Lujan*, 504 U.S. at 560).

28. *Clean Air Council*, 362 F. Supp. 3d at 243, 247.

29. *Id.* at 247.

30. *See id.* at 242 (“Because I have neither the authority nor the inclination to assume control of the Executive Branch, I will grant Defendants’ Motion [to dismiss.]”); *Animal Legal Def. Fund v. United States*, 404 F. Supp. 3d 1294, 1298 (D. Or. 2019) (“[T]he lower courts—bound by rule of law—are not the forum for the ‘revolutionary’ thinking that Plaintiffs articulately espouse in their briefing.”).

31. *M.S. v. Brown*, 902 F.3d 1076, 1083 (9th Cir. 2018) (citing *Lujan*, 504 U.S. at 561; *Republic of Marshall Islands v. United States*, 865 F.3d 1187, 1199 (9th Cir. 2017)).

32. *Clean Air Council*, 362 F. Supp. 3d at 249.

33. *Animal Legal Def. Fund*, 404 F. Supp. 3d at 1300.

whether broad relief against the government was within a federal court's power to award in these types of cases asserting a constitutional right to a stable climate.

III. COURT'S DECISION

In the noted case, the U.S. Court of Appeals for the Ninth Circuit found that the plaintiffs failed to satisfy the redressability prong of the standing analysis because they did not show that the relief they sought was both substantially "likely to redress their injuries" and "within the district court's power to award."³⁴ However, the court took care to emphasize that it made this decision "reluctantly," acknowledging that the plaintiffs made an "impressive case for redress" and "a compelling case that action is needed," even conceding that the judicial remedies they were seeking "could well goad the political branches into action."³⁵ In a thorough and blistering dissent, Judge Josephine Staton characterized this reluctant dismissal in harsh terms, accusing the majority of "throw[ing] up their hands" by "concluding that this case present[ed] nothing fit for the Judiciary" despite the government's "blunt[] insist[ence] that it has the absolute and unreviewable power to destroy the Nation."³⁶

Indeed, the majority opinion notes that the government "by and large [did] not dispute[] the factual premises of the plaintiffs' claims," instead arguing that the plaintiffs (and presumably anyone else similarly injured by the government's actions with respect to climate change) lacked standing to challenge the government's alleged deprivation of their constitutional rights.³⁷ In just a few paragraphs, the court gave a pithy recitation of this vast factual territory that the government declined to challenge: that "climate change is occurring at an increasingly rapid pace," that the "unprecedented rise [in atmospheric carbon concentration] stems from fossil fuel combustion," that "[t]emperatures have already risen 0.9 degrees Celsius above pre-industrial levels," that the changing climate threatens to "bury cities, spawn life-threatening natural disasters, and jeopardize critical food and water supplies," and that the problem is

34. *Juliana v. United States*, 947 F.3d 1159, 1168-71 (9th Cir. 2020).

35. *Id.* at 1165, 1175.

36. *Id.* at 1175 (Staton, J., dissenting).

37. *Id.* at 1167-68 (majority opinion). The government also argued that plaintiffs' exclusive remedy was under the Administrative Procedure Act, but the court swiftly rejected this argument because the plaintiffs were challenging the "totality of various government actions" that, taken together, amounted to a violation of their constitutional rights, rather than a discrete agency action. *Id.* at 1167 (citing *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 890-91 (1990)).

“approaching ‘the point of no return.’”³⁸ Perhaps most stunning of all, the court also found that the record “conclusively establishe[d] that the federal government has long understood the risks of fossil fuel use and increasing carbon dioxide emissions”³⁹ while continuing to “affirmatively promote[] fossil fuel use in a host of ways,” such as favorable taxation rules, subsidies for foreign and domestic projects, and leases for oil and gas production on federal lands.⁴⁰ Aside from an objection that the plaintiffs were required to bring their claims under the Administrative Procedure Act (which the court promptly dispatched),⁴¹ the government staked its whole case for dismissal not on a refutation of the underlying science or of its own culpability, but on the argument that no ordinary citizen has constitutional standing to challenge the government’s discretion to address, ignore, or exacerbate the climate crisis as it saw fit.⁴²

The court began its discussion of the standing analysis by upholding the district court’s finding that the plaintiffs had satisfied the “concrete and particularized injury” requirement.⁴³ Naming two specific examples—a plaintiff that was separated from her relatives after being forced to leave the Navajo Reservation due to water scarcity and another that was repeatedly forced to evacuate his home due to chronic flooding—the court emphasized that at least some of the plaintiffs’ injuries were not “‘conjectural’ or ‘hypothetical’” but instead were examples of how “climate change is affecting them now in concrete ways and will continue to do so unless checked.”⁴⁴ Nonetheless, the government contended that the plaintiffs’ alleged injuries were not particularized because “climate change affects everyone.”⁴⁵ The court rejected this argument by citing the proposition from the Supreme Court’s decision in *Massachusetts v. EPA* that “‘it does not matter how many persons have been injured’ if the plaintiffs’ injuries are ‘concrete and personal,’” thus placing the plaintiffs’ claims outside the bar against generalized grievances.⁴⁶

The court then turned to the question of causation, upholding the district court’s finding that the plaintiffs had sufficiently demonstrated that

38. *Id.* at 1166.

39. *Id.*

40. *Id.* at 1167.

41. *See supra* note 37.

42. *See Juliana*, 947 F.3d at 1168.

43. *Id.*

44. *Id.* (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)).

45. *Id.*

46. *Id.* (quoting *Massachusetts v. EPA*, 549 U.S. 497, 517 (2007)). The court also noted that only one plaintiff needed to prove a cognizable injury in order to clear the injury prong of the standing analysis. *Id.* at 1168-69 (citing *Trump v. Hawaii*, 138 S. Ct. 2392, 2416 (2018)).

their injuries were caused by the government's conduct.⁴⁷ The majority affirmed that the plaintiffs' injuries were "caused by carbon emissions from fossil fuel production, extraction, and transportation," and that, with the active support of the federal government, the United States was responsible for twenty-five percent of historical global emissions between 1850 and 2012, and fifteen percent of current global emissions.⁴⁸ The court then distinguished the plaintiffs' case from *Washington Environmental Council v. Bellon*, on which the government relied to assert that the causal chain between its actions and the plaintiffs' injuries was "too attenuated" because the plaintiffs' climate-related injuries were also caused in large part by the independent actions of private and foreign parties.⁴⁹ In that case, the Ninth Circuit held that there was not a sufficient causal link between the local regulatory agencies' failure to regulate emissions from five oil refineries and the plaintiffs' climate injuries because those specific refineries at issue made a "scientifically indiscernible" contribution to climate change.⁵⁰ Here, however, plaintiffs were not challenging specific agency decisions (e.g., to regulate or not regulate specific emission sources) but rather the "host" of federal policies encouraging fossil fuel use, including tax benefits, subsidies, and the permitting of drilling on public lands and waters, which the government maintained over decades.⁵¹ For this reason, the court held that the plaintiffs had demonstrated "at least a genuine factual dispute" as to whether this totality of policies was a "substantial factor" in causing their injuries.⁵²

Thus, the crux of the case turned on the final prong of the standing analysis: whether the plaintiffs' injuries were redressable by an Article III court. The court began its examination of the issue by stipulating that, for the purpose of analyzing redressability, it would assume the existence of the substantive constitutional right to a "climate system capable of sustaining human life," which the plaintiffs claimed the government violated, while noting that "reasonable jurists can disagree about whether

47. *Id.* at 1169.

48. *Id.* (citing *Massachusetts*, 549 U.S. at 524-25, which held that carbon dioxide emissions from the U.S. transportation sector comprising only six percent of the global total at the time was a "meaningful contribution" to global warming and thus created a sufficient causal link between EPA's refusal to regulate those emissions and the petitioners' alleged climate injuries for the purposes of standing).

49. *Id.* (referencing *Wash. Env't Council v. Bellon*, 732 F.3d 1131, 1141-46 (9th Cir. 2013)).

50. *Id.* (citing *Bellon*, 732 F.3d at 1143-44).

51. *Id.*

52. *Id.* (citing *Mendia v. Garcia*, 768 F.3d 1009, 1013 (9th Cir. 2014)).

the asserted constitutional right exists.”⁵³ But the plaintiffs would have to demonstrate that the relief they sought was “both (1) substantially likely to redress their injuries[] and (2) within the district court’s power to award” under the Ninth Circuit’s formulation of the redressability test.⁵⁴ The court ruled that one of the remedies the plaintiffs were seeking—a declaration that the government was violating the Constitution—failed the first prong of this test because it was unlikely to redress their injuries “absent further court action,” even though it would almost certainly provide a “psychological” benefit.⁵⁵

The heart of the plaintiffs’ requested relief, however, was “an 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.”⁵⁶ The court was ultimately “skeptical” as to whether such an injunction would be substantially likely to redress the plaintiffs’ injuries.⁵⁷ Even if it were able to stop the government from engaging in any activities that affirmatively supported fossil fuel use, the court observed that, according to the plaintiffs’ own experts, total cessation would not “suffice to stop catastrophic climate change or even ameliorate the[plaintiffs’] injuries” because so much of the carbon emissions causing climate change come from historic, foreign, or non-governmental sources.⁵⁸ In the court’s reading, those expert opinions made clear that mitigating the consequences of climate change would require nothing less than “a fundamental transformation of this country’s energy system, if not that of the industrialized world.”⁵⁹ It was also not satisfied by the plaintiffs’ argument that under the Supreme Court’s decision in *Massachusetts*, even a partial reduction in emissions would satisfy the redressability

53. *Id.* at 1169-70 (citing *M.S. v. Brown*, 902 F.3d 1076, 1083 (9th Cir. 2018)). The district court, in its historic order denying the government’s motion to dismiss the case, held that such a right was “fundamental to a free and ordered society” and therefore protected by substantive due process under the Constitution. *Juliana v. United States*, 217 F. Supp. 3d 1224, 1248-50 (D. Or. 2016). The majority also noted that the Supreme Court, in its unanimous order denying the government’s first request for a stay of proceedings, remarked that the “striking breadth” of the plaintiffs’ claims “presents substantial grounds for difference of opinion.” *Juliana*, 947 F.3d at 1169-70 (quoting *United States v. U.S. Dist. Ct. for Dist. of Or.*, 139 S. Ct. 1 (2018)).

54. *Id.* at 1170 (citing *M.S.*, 902 F.3d at 1083).

55. *Id.* (citing *Clean Air Council v. United States*, 362 F. Supp. 3d 237, 246 (E.D. Pa. 2019)).

56. *Id.*

57. *Id.* at 1171.

58. *Id.* at 1170.

59. *Id.* at 1171.

requirement.⁶⁰ The court distinguished that case on the basis that Massachusetts was given “special solicitude” in the redressability analysis as a sovereign asserting violation of a procedural right by the EPA, unlike this case where private plaintiffs were bringing “a substantive due process claim.”⁶¹

But even if the requested injunction would in fact redress the plaintiffs’ injuries, the court held that it was not within the power of an Article III court to award.⁶² No matter the wisdom or urgency of a comprehensive plan to draw down national carbon emissions, such a plan would “necessarily require a host of complex policy decisions”⁶³ requiring “consideration[s] of ‘competing social, political, and economic forces’”⁶⁴ that the court felt were best left to the executive and legislative branches.⁶⁵ The plaintiffs attempted to point out that the district court did not need to concern itself with the minutiae of specific policy decisions—it could order “broad injunctive relief” while leaving the “details of implementation” to the political branches’ judgment⁶⁶—but the court reasoned that even this arrangement would require the court to engage in “policymaking” in order to evaluate whether the government was complying with the order.⁶⁷ The fact that such supervision of the government’s compliance would necessarily last “many decades” also weighed against injunctive relief in the court’s view.⁶⁸

The court concluded its dispensation of the issue by drawing heavily on the Supreme Court’s recent decision about partisan gerrymandering in *Rucho v. Common Cause* to reason that separation of powers considerations—implicated by the redressability question—required the presence of clear constitutional or legal standards to “guide the courts’ exercise of equitable power,” which were absent here as they were in *Rucho*.⁶⁹ In that case, the Supreme Court held that even though partisan gerrymandering could very well violate the Constitution,⁷⁰ claims challenging such practices were “political questions beyond the reach of

60. *Id.*

61. *Id.* (citing *Massachusetts*, 549 U.S. at 517-18) & n.7 (citing *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2664 n.10 (2015)).

62. *Id.* at 1171.

63. *Id.* (citing *M.S.*, 902 F.3d at 1086).

64. *Id.* at 1172 (quoting *Collins v. City of Harker*, 503 U.S. 115, 128-29 (1992)).

65. *Id.* at 1171 (citing *M.S.*, 902 F.3d at 1086).

66. *Id.* at 1172 (quoting *Brown v. Plata*, 563 U.S. 493, 537-38 (2011)).

67. *Id.*

68. *Id.* (citing *Nat. Res. Def. Council, Inc. v. EPA*, 966 F.2d 1292, 1300 (9th Cir. 1992)).

69. *Id.* at 1173 (citing *Rucho v. Common Cause*, 139 S. Ct. 2484, 2508 (2019)).

70. *Id.* (citing *Rucho*, 139 S. Ct. at 2506).

Article III courts”⁷¹ because there was no “‘limited and precise’” Constitutional standard for fixing the problem.⁷² Without such standards, the Court warned, federal judicial power could potentially be “‘unlimited in scope and duration’ . . . inject[ing] ‘the unelected and politically unaccountable branch of the Federal Government [into] assuming . . . an extraordinary and unprecedented role.’”⁷³

According to the plaintiffs’ experts, reducing atmospheric carbon concentration to 350 parts per million was necessary to stabilize the climate.⁷⁴ But the court rejected this number as a potential bright-line judicial standard to guide its crafting of injunctive relief because those same experts did not spell out how exactly a court order would achieve that level of reductions, aside from simply requiring the government make and implement a plan to get there.⁷⁵ It was therefore “‘impossible [for the court] to reach a different conclusion’” than the *Rucho* court—that any potential formula or plan to remedy the problem would be “‘too difficult for the judiciary to manage.’”⁷⁶

In her extensive dissenting opinion, Judge Staton excoriated the majority’s redressability analysis, in particular its reliance on *Rucho* to categorize the case as one presenting a nonjusticiable political question.⁷⁷ Judge Staton emphasized that “‘political question’” is not a euphemism for a controversial or complicated question—it is a narrow justiciability exception defined by the “‘well-worn multifactor test’” the Supreme Court outlined in *Baker v. Carr* that is supposed to be applied “‘shrewdly and sparingly.’”⁷⁸ Yet, in her view, the court broadly and vaguely invoked the *Rucho* decision—a case about “‘political representatives drawing political maps to elect other political representatives’”⁷⁹—to conclude that climate change is “‘too political’” (in the ordinary sense of the word) for a court to touch.⁸⁰ Instead of methodically applying the six *Baker* factors to the facts at hand, as the district court initially did, the majority “‘blur[red] any meaningful distinction between the doctrines of standing and political

71. *Id.* (citing *Rucho*, 139 S. Ct. at 2506-07).

72. *Id.* (quoting *Rucho*, 139 S. Ct. at 2500).

73. *Id.* (quoting *Rucho*, 139 S. Ct. at 2507 (second modification in original)).

74. *Id.*

75. *Id.*

76. *Id.* (citing *Rucho*, 139 S. Ct. at 2500-02).

77. *Id.*, at 1186 (Staton, J., dissenting).

78. *See id.* at 1185-86 (citing *Baker v. Carr*, 369 U.S. 186, 217).

79. *Id.* at 1186.

80. *Id.*

question,⁸¹ basing its whole decision (albeit implicitly) on the second *Baker* factor—a lack of clear judicial standards for crafting relief.⁸²

Judge Staton maintained that there was an obvious standard for relief in this case.⁸³ Unlike in *Rucho*, where the Court determined that there was no standard that could measure when partisan gerrymandering became so extreme it constituted a rights violation, here the right asserted by the plaintiffs sat squarely on one side of a discernable standard: “the amount of fossil-fuel emissions that [would] irreparably devastate our Nation.”⁸⁴ This might be an atmospheric carbon concentration of 350 parts per million, as the plaintiffs’ experts said was necessary to stabilize the climate, but at this stage the court did not need to name a specific standard.⁸⁵ It only needed to conclude that the plaintiffs’ carried their burden of establishing a genuine dispute as to whether such a standard *could* be determined scientifically, a bar they “easily clear[ed]” in Judge Staton’s estimation.⁸⁶

Judge Staton also took issue with the majority’s preoccupation with the potential scope and complexity of any “plan” to reduce fossil-fuel emissions that the court would have to oversee, since those questions are irrelevant to the second *Baker* factor.⁸⁷ Citing examples such as the Supreme Court’s recent decision in *Brown v. Plata*, where the Court affirmed a population limit on California’s prison system originally imposed by a district court, and the Court’s famous decision in *Brown v. Board of Education II*, where it explicitly recognized that desegregating schools would require review of thousands of local policies at the trial level, she emphasized that “[m]ere complexity . . . does not put [an] issue out of the courts’ reach.”⁸⁸ Judge Staton noted that federal courts routinely made “complex policy decisions” about busing, facilities allocation, and district-drawing to ensure that schools were desegregated in accordance with Constitutional standards.⁸⁹ Nor should it be relevant, in her view, that courts would likely have to supervise the government’s compliance with any order for an extended period of time—it took post-*Brown* courts

81. *Id.* at 1185 n.10.

82. *Id.* at 1187.

83. *See id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *See id.* at 1188.

88. *Id.* at 1188-89 (first citing *Brown v. Plata*, 563 U.S. 493, 511 (2011); then citing *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294, 300-01 (1955)).

89. *Id.* at 1189.

decades to make headway in desegregating schools, and just because it may take decades to correct the government’s “institutionalized violations” in the climate context does not mean that courts should shy away from providing any relief.⁹⁰ Such a broad reading of *Rucho*, Judge Staton warned, would “threaten[] to eviscerate judicial review in a swath of complicated but plainly apolitical contexts,” such as affirmative action, abortion, and the free exercise of religion.⁹¹

IV. ANALYSIS

During oral argument, lead counsel for the plaintiffs Julia Olson firmly maintained that the plaintiffs were not asking the court to do anything new or radical, but rather to simply apply “bedrock” constitutional principles to prevent the government from infringing on a basic, fundamental right, as courts have always done.⁹² Judge Hurwitz was skeptical that the issue was really that simple:

OLSON: This Court does need to say that there’s a constitutional right at stake, but Your Honor doesn’t need to find it because it’s in the Constitution in the Fifth Amendment that the plaintiffs have fundamental rights to life and liberty. And the Supreme Court has already recognized that the liberties that we all hold include our right to bodily integrity and personal security and family autonomy, so this court doesn’t need to step out of bounds and recognize any kind of new right. It can stick with the bedrock fundamental rights that we all—

HURWITZ, J.: Actually, to be fair, look, you’re arguing for us to break new ground. The Supreme Court said as much in its non-stay stay order, its ‘surprising breadth of the arguments’—you may be right! I’m sympathetic to the problems you point out, but you shouldn’t minimize, you shouldn’t say this is just an ordinary suit and all we have to do is follow A, B, and C and we get there. You’re asking us to do a lot of new stuff, aren’t you?⁹³

It’s hard to disagree with Judge Hurwitz’s characterization of the case. A single district court issuing an injunction against the federal government as sweeping as the one sought by the plaintiffs in this case would indeed be radical new ground for a court to break. But given the potential severity—and *irreversibility*—of the climate crisis, it is tough to swallow the majority’s insistence that there is nothing a court can do in the face of

90. *Id.*

91. *Id.* at 1190.

92. See Oral Argument at 54:55, *Juliana v. United States*, 947 F.3d 1159 (9th Cir. 2020) (No. 18-36082), <https://www.youtube.com/watch?v=6PGCSWm86OI&t=2570s>.

93. *Id.*

the government's utter failure to meaningfully abate carbon emissions. As Judge Staton forcefully argued in her dissent, telling the plaintiffs that their only remedy is to beg and plead with Congress and the Executive Branch to preserve a minimally habitable climate—which they have failed to do for decades⁹⁴—is tantamount to telling the plaintiffs that they have no remedy.⁹⁵

After the Ninth Circuit denied their subsequent petition for a rehearing *en banc*,⁹⁶ the plaintiffs filed a motion in the district court asking for leave to amend their complaint in order to seek primarily declaratory relief and hopefully avoid the redressability pitfalls described in the panel opinion.⁹⁷ At the time of printing, the parties are currently set for a settlement conference just a few days before oral argument on the motion to amend the complaint, a prospect that alarmed fossil fuel interests and prompted seventeen Republican AGs to file a motion to intervene.⁹⁸ Though many legal scholars have expressed cautious optimism about the plaintiffs' chances for success as the case wound its way through the courts,⁹⁹ it is hard to be optimistic about how much further this case could go. Especially given the recent conservative turn in the federal judiciary,¹⁰⁰ the Supreme Court would probably not be sympathetic to the plaintiffs' case if it were to hear an appeal, just as it or any other federal court would be unlikely to rule favorably for a group of similarly situated plaintiffs. In

94. The plaintiffs' original complaint was filed in 2015 and named President Obama and his cabinet members as defendants. First Amended Complaint for Declaratory and Injunctive Relief, *Juliana v. United States*, No. 6:15-cv-01517-TC (D. Or. Sept. 10, 2015).

95. *Juliana v. United States*, 947 F.3d at 1181 (Staton, J., dissenting).

96. *Juliana v. United States*, 986 F.3d 1295 (9th Cir. 2021).

97. See Plaintiff's Motion for Leave to Amend and File Second Amended Complaint for Declaratory and Injunctive Relief, *Juliana v. United States*, No. 6:15-cv-01517-AA (D. Or. Mar. 9, 2021), ECF No. 462.

98. See Maxine Joselow, *17 States Seek to Block Juliana Settlement*, E&E News (June 9, 2021), <https://www.eenews.net/greenwire/2021/06/09/stories/1063734545> [<https://perma.cc/945F-P6WB?type=image>].

99. See generally Professors Erin Ryan, Mary Wood, Jim Huffman, Irma Russell, and Richard Frank, *Juliana v. United States: Debating the Fundamentals of the Fundamental Right to a Sustainable Climate*, Florida State University Law Review Rehearing (Transcript) (Apr. 3, 2018), https://www.fslawreview.com/article/juliana-v-united-states-debating-the-fundamentals-of-the-fundamental-right-to-a-sustainable-climate/#*.

100. In just one term, President Trump has seated almost one quarter of the total number of Article III judges, including three Supreme Court justices. See Matthew Impelli, *Trump Has Appointed 216 Federal Judges and It Could Be 230 by Election Day*, NEWSWEEK (Sept. 18, 2020), <https://www.newsweek.com/trump-has-appointed-216-new-federal-judges-it-could-230-election-day-1532901> [<https://perma.cc/B52G-GHA2?type=image>]; John Gramlich, *How Trump Compares with Other Recent Presidents in Appointing Federal Judges*, PEW RSCH. CTR. (July 15, 2020), <https://www.pewresearch.org/fact-tank/2020/07/15/how-trump-compares-with-other-recent-presidents-in-appointing-federal-judges/> [<https://perma.cc/J58V-R525?type=image>].

fact, there is a distinct possibility that such cases could set the law back for climate plaintiffs, perhaps by raising the bar for standing impossibly high or by declaring, as the *Juliana* court declined to do, that all claims challenging the government's handling of the climate crisis must proceed under the Administrative Procedure Act. A different crop of climate lawsuits directed at large emitters and fossil fuel producers under state-law nuisance claims are probably more likely to enjoy success for the time being, especially given a string of recent victories in fending off defendants' attempts to remove those cases to federal court.¹⁰¹

But even if the plaintiffs' do not ultimately reach trial or obtain a favorable settlement, it is important to recognize the successes this case has achieved. District Judge Ann Aiken's extensive order denying the government's motion to dismiss marked the first time a U.S. court had ever declared a constitutional right to a climate system capable of sustaining human life.¹⁰² The Ninth Circuit's recognition that plaintiffs articulated concrete climate injuries traceable to the government's conduct is surely also a landmark ruling that climate advocates will be able to cite favorably in support of future cases. And even putting aside legal considerations, the intense public and media interest that the case generated¹⁰³ may well have a galvanizing effect far beyond the federal courts' actual disposition of the case. In fact, high courts in other countries have given favorable rulings in similar climate "human rights" cases brought by their own citizens,¹⁰⁴ and with any luck the *Juliana* case will

101. See, e.g., *City of Oakland v. BP PLC*, 969 F.3d 895, 905-07 (9th Cir. 2020) (remanding back to state court on the grounds that the case did not raise a federal question and did not fall within either of the two exceptions to the well-pleaded complaint rule that defendants cited); *Rhode Island v. Chevron Corp.*, 393 F. Supp. 3d 142, 147 (D.R.I. 2019) (holding that removal was not permissible since plaintiffs' complaint relied entirely on state law and did not raise a federal question).

102. Michael C. Blumm & Mary Christina Wood, "No Ordinary Lawsuit": Climate Change, Due Process, and the Public Trust Doctrine, 67 AM. U. L. REV. 1, 7-8 (2017) <https://ssrn.com/abstract=2954661>.

103. See, e.g., Carolyn Kormann, The Right to a Stable Climate Is the Constitutional Question of the Twenty-First Century, NEW YORKER (June 15, 2019) <https://www.newyorker.com/news/daily-comment/the-right-to-a-stable-climate-is-the-constitutional-question-of-the-twenty-first-century> [<https://perma.cc/4Y97-3VTS?type=image>]; John Schwartz, *Young People Are Suing the Trump Administration Over Climate Change. She's Their Lawyer.*, N.Y. TIMES (Oct. 23, 2018), <https://www.nytimes.com/2018/10/23/climate/kids-climate-lawsuit-lawyer.html> [<https://perma.cc/H4C8-8PFL?type=image>]; 60 Minutes: *Juliana v. United States: The Climate Lawsuit* (CBS television broadcast Mar. 3, 2019), <https://www.youtube.com/watch?v=Nm3EAPIT89I>.

104. See, e.g., HR 12 December 2019, ECLI:NL:HR:2019:2007 (Stichting Urgenda/De Staat Der Nederlanden) (Dutch Supreme Court decision ordering the government to reduce national greenhouse gas emissions by at least twenty-five percent compared to 1990 levels by the end of 2020); *Friends of the Irish Env't CLG v. Gov't of Ireland, Ir. and the Att'y Gen.* [2020]

mark an inflection point for this broader international movement agitating for judicial intervention in the climate crisis.

V. CONCLUSION

While the Ninth Circuit gave high-profile recognition to the ongoing harms climate change is inflicting on Americans and the U.S. government's complicity in exacerbating those harms, the Ninth Circuit ultimately balked at the prospect of granting any sort of meaningful relief. Leaning hard on the Supreme Court's decision in *Rucho v. Common Cause*, it gestured toward prudential concerns regarding the separation of powers between the judicial and "political branches" of government in order to avoid having any court reach the merits of the case after a full trial and (most frighteningly) potentially holding the government accountable for its actions spanning decades by creating a sweeping injunctive scheme arguably unseen since the days when courts actively involved themselves in school desegregation. As Judge Staton wrote in her dissent, this decision was nothing less than an abdication of the courts' responsibility to protect perhaps the most fundamental right there is—one to a climate that allows human beings to live—from government infringement. With such precious time left before the most catastrophic consequences of a changed climate are effectively "locked in," bold action is urgently needed at every level of government. In this author's humble view, the court failed to make a compelling case that the judiciary is somehow exempt from this obligation to act.

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IESC 49 (unanimous Irish Supreme Court decision vacating the government's National Mitigation Plan for reducing carbon emissions because it did not detail with enough specificity how the government would meet the statutory emissions targets by 2050).

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