Case No. 18-36082

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KELSEY CASCADIA ROSE JULIANA, et al.,
Plaintiffs-Appellees

v.

UNITED STATES OF AMERICA, et al.,
Defendants-Appellees.

Appeal From The United States District Court
For The District Of Oregon,
Judge Ann Aiken, Case No. 6:15-cv-01517-AA

BRIEF OF AMICUS CURIAE INTERNATIONAL LAWYERS FOR INTERNATIONAL LAW IN SUPPORT OF PLAINTIFFS-APPELLEES JULIANA, ET AL., AND URGING REMAND TO THE DISTRICT COURT FOR TRIAL

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STATEMENT PURSUANT TO FED. R. APP. P. 29

Amicus has received the consent of **all parties** to file this brief. Counsel for the parties did not author this brief. Neither the parties nor their counsel have contributed money intended to fund preparing or submitting the brief. No person – other than *amicus*, their members, or their counsel – contributed money that was intended to fund preparing or submitting this brief.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitutional Provisions

Cases

United States Supreme Court Cases

Other Cases

Statutes

Treatises

Other Authority

STATEMENT OF INTEREST OF *AMICUS CURIAE*

The *amicus*, International Lawyers for International Law, are legal professionals and organizations from around the world who are experts in international law. They are **Inder Comar**, Member of the bars of California and New York; **Farhana Yamin**, Associate Fellow, Chatham House and former Visiting Professor, Laws, University College London; **Dr. Margaretha Wewerinke-Singh**, Assistant Professor of International Law, Leiden University and Adjunct Senior Lecturer in Environmental Law; **Professor Curtis F.J. Doebbler**, Member of the bars of the Supreme Court of the United States, the Ninth, Fifth, Fourth and D.C. Circuit Courts of Appeals, the U.S. District Court of Western District of Texas, the bars of Texas and the District of Columbia, Research Professor of Law at University of Makeni and visiting Professor of Law at Webster University; and **Just Atonement Inc.**, an order of legal professionals who defend democracy and fight for a peaceful, sustainable world.[1]

This brief is submitted by *amicus* in the interest of ensuring the proper understanding and application of both domestic and international law on the right to a judicial remedy when fundamental rights are infringed. The legal professionals who compose *amicus* hail from a variety of international legal backgrounds, but

[1] The following law students at Just Atonement Inc. also contributed to the editing and drafting of this brief: Claudia Bennett, Fordham University School of Law (J.D. 2020); Vaughn Rajah, University of Pretoria, Faculty of Law (L.L.B. 2019); Ariana Smith, City University of New York School of Law (J.D. 2020).

they are united in their understanding that when fundamental rights are threatened, a court must scrutinize those claims, and provide a remedy if an infringement is proven.

The source of *amicus'* authority to file this brief is Fed. R. App. P. 29, which permits any amicus curiae the ability to file a brief in support of a party no later than 7 days after the principal brief of the party being supported is filed. Here, *amicus* makes this filing within 7 days of the filing of plaintiffs-appellees' brief (the "***Juliana Plaintiffs***"), filed on February 22, 2019.

SUMMARY OF ARGUMENT

The District Court held that the Juliana Plaintiffs had stated a claim under the Fifth Amendment's Due Process Clause for deprivation of a fundamental "right to a climate system capable of sustaining human life." 1. E.R. 94. The District Court also described "its belief that this case would be better served by further factual development at trial," and set a trial so that the Juliana Plaintiffs could advocate for, and defend, the rights at issue. *Juliana v. United States*, No. 6:15-cv-01517-AA, 2018 WL 6303774, at *3 (D. Or. Nov. 21, 2018). The Due Process Clause enshrines some of the most ancient protections afforded to individuals in the Anglo-American legal tradition. Because fundamental rights are potentially threatened, and in light of a judicial determination that a trial was and is warranted,

the Juliana Plaintiffs should be permitted to defend their fundamental rights and argue their case at that trial before the District Court.

International law is incorporated into United States law by the Constitution and must be applied by the courts. International law provides the right for individuals who have had their civil or human rights violated to a remedy in a court of law. Because Plaintiffs allege infringement of fundamental rights, their claims must be heard under principles of domestic and international law.

ARGUMENT

I. BECAUSE FUNDAMENTAL RIGHTS ARE POTENTIALLY THREATENED, THE COURT SHOULD ALLOW THE JULIANA PLAINTIFFS TO PROVE THEIR CASE AT THE TRIAL ORDERED BY THE DISTRICT COURT.

The Fifth Amendment's guarantee of due process of law is meant to "secure the citizen against any arbitrary deprivation of his rights, whether relating to his life, liberty, or his property." *Dent v. West Virginia,* U.S. 114, 123-124 (1889).

"The origin of the Due Process Clause is Chapter 39 of Magna Carta which declares that 'No free man shall be taken, outlawed, banished, or in any way destroyed, nor will We proceed against or prosecute him, except by the lawful judgment of his peers and by the *law of the land*.'" *Duncan v. Louisiana,* 391 U.S. 145, 169 (1968) (Black, J. concurring) (emphasis in original).

The Fifth Amendment's protections defend against arbitrary government action imposed by the Legislative Branch and enforced by the Executive. "The guaranties of due process, though having their roots in Magna Carta's 'per legem terrae' and considered as procedural safeguards 'against executive usurpation and tyranny,' have in this country 'become bulwarks also against arbitrary legislation.'" *Planned Parenthood v. Casey*, 505 U.S. 833, 847 (1992) (citing *Poe v. Ullman,* 367 U. S. 497*,* 541 (1961) (Harlan, J., dissenting from dismissal on jurisdictional grounds) (quoting *Hurtado v. California*, 110 U. S. 516, 532 (1884)).

As social conditions change, new infringements of "due process of law" by the sovereign will make themselves known from time to time. Consistent with ancient Anglo-American principles, the American constitutional framework permits a plaintiff to allege, and to prove at trial, that a Fifth Amendment right or set of rights has been infringed.

Thus, the promise of the Due Process Clause of the Fifth Amendment is that a court will give consideration to new allegations of infringements as society progresses, or regresses (as the case may be). *See*, *e.g.*, William Howard Taft, *The Administration of Criminal Law*, 15 YALE L.J. 1, 3 (1905) ("Run through the Magna Carta of 1215, the Petition of Right of 1625, and the Bill of Rights of 1688, the great charters of English liberty, and find in them an insistence not on general principles, but on procedure. Take the most comprehensive—'No man shall be

deprived of life, liberty, or property without due process of law'—this does not attempt to define the cases in which a man shall be entitled to life, liberty and property, but points to, and insists upon the necessity for a legal procedure by which it shall be done.").

The Juliana Plaintiffs have alleged the infringement of a fundamental right or rights to a climate system that is capable of sustaining human life, a right they say is protected by the Due Process Clause of the Fifth Amendment. The District Court agreed that such a right existed, and agreed that the Juliana Plaintiffs' allegations warranted a trial. If the Juliana Plaintiffs are correct, their right to a climate system that is capable of sustaining human life (a prerequisite to other enumerated fundamental rights, such as life, liberty and property) has been subject to a decades-long pattern and practice of infringement by the sovereign: the very evil the Fifth Amendment is designed to protect against. *See*, e.g., *Dent*, 129 U.S. at 124 (noting that due process is intended "to secure the citizen against any arbitrary deprivation of his rights, whether relating to his life, his liberty or his property."); *Meyer v. Nebraska*, 262 U.S. 390, 399-400 (1922) (noting that liberty protected by due process is more than "freedom from bodily restraint" but also the liberty "to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.").

When fundamental rights are at stake, the judiciary must give weight and

consideration not only to the alleged infringement, but also to the harm caused by judicial inaction, or the denial of an appropriate remedy. As noted by Justice Frankfurter:

> The requirement of "due process" is not a fair-weather or timid assurance. It must be respected in periods of calm and in times of trouble; it protects aliens as well as citizens. But "due process," unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. Expressing as it does in its ultimate analysis respect enforced by law for that feeling of just treatment which has been evolved through centuries of Anglo-American constitutional history and civilization, "due process" cannot be imprisoned within the treacherous limits of any formula … Due process is not a mechanical instrument. It is not a yardstick. It is a process. It is a delicate process of adjustment inescapably involving the exercise of judgment by those whom the Constitution entrusted with the unfolding of the process.

Joint Anti-Fascist Refugee Comm. v. McGrath, 341 US 123, 162-163 (1951) (Frankfurter, J. concurring). Judicial protection of fundamental rights is the last bulwark against tyranny by the sovereign, and the manner in which liberty is protected. *United States v. Carolene Products Company*, 304 U.S. 144, 152, fn. 4 (1938) (noting that judicial scrutiny is particularly warranted where fundamental rights are at stake).

The substantive protection of fundamental rights, and the ability of a party to protect and defend those rights through the legal process, are the twin siblings of due process. This relationship weighs heavily in permitting the Juliana Plaintiffs to defend their claims at trial—something the District Court apparently thought was

the appropriate procedure in determining the rights at stake. "Whether acting through its judiciary or through its legislature, a State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it." *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 683 (1930).

Put another way, rigorous judicial process of the Juliana Plaintiffs' claims is warranted in light of their allegations regarding an infringement of a fundamental right to a climate system that is capable of sustaining human life, which the District Court agreed was protected by the Due Process Clause. Plaintiffs should be afforded the opportunity to prove the nature of this right at a trial, and to prove their case that the sovereign has infringed on this fundamental right.

Due process ties together the ordered liberty that the federal Constitution promotes. Without due process, inalienable, fundamental rights lose their meaning, and the rule of law is replaced by the state of Nature. As noted by Chief Justice Hughes, in ending the *Lochner* era:

> The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law. In prohibiting that deprivation, the Constitution does not recognize an absolute and uncontrollable liberty. Liberty in each of its phases has its history and connotation. But the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals and welfare of the people. Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is

> reasonable in relation to its subject and is adopted in the interests of the community is due process.

West Coast Hotel Co. v. Parrish, 300 U.S. 379, 391 (1937). If the Juliana Plaintiffs are correct, then the "menace" of uncontrolled greenhouse gas emissions (which they allege has been condoned by the sovereign) threatens the lives of every single American, and beyond that, every single person alive today and hereafter. Due process surely protects the ability of Americans, and the human race more generally, to subsist and survive. And at minimum, due process surely protects the ability of the Juliana Plaintiffs to defend and protect such fundamental rights at a trial before an impartial judge.

II. INTERNATIONAL LAW REQUIRES THAT THE COURT HEAR CLAIMS OF INFRINGEMENT OF FUNDAMENTAL RIGHTS.

Both international treaties and customary international law provide a right for individuals to access a court for redress of fundamental claims. This Court should apply international law as part of its obligation to uphold the rule of law and permit the Juliana Plaintiffs to protect their fundamental rights, including their alleged right to a climate system that is capable of sustaining human life.

First, the Constitution of the United States and the precedents of this Court interpreting the U.S. Constitution indicate that international law—both treaties and customary international law—are part of United States law. The U.S. Constitution expressly declares treaties ratified by the United States to be part of U.S. law, and

this Court has repeatedly recognized that customary international law is part of the laws of the United States that must be applied by the courts. *See*, e.g., *The Paquete Habana*, 175 U.S. 677 (1900).

Second, the United States has represented to its own people that it will respect international law by ratifying treaties in which it undertakes to guarantee certain rights to all individuals under its jurisdiction, such as the rights to be free from discrimination based on nationality and religion. The United States has ratified treaties that protect fundamental rights from infringement and that guarantee access to the courts. See article 2, subparagraph 3, of the International Covenant on Civil and Political Rights (ICCPR), 999 UNTS 171 (1966) and article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), 660 UNTS 195 (1969).

Third, respect for international law is essential to the United States good reputation in the international community. By ratifying treaties and participating in international affairs the United States represents to the international community that it will respect international law. As Professor Louis Henkin wrote almost forty years ago, and is still true today, "almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time." Henkin, L., *How Nations Behave: Law and Foreign Policy* 47 (2d ed., 1979). Nations that do not respect international law open themselves to ridicule, or expose

themselves to the charge that they are rogue States. As the final arbiter of the extent to which international law should apply in the U.S. courts, this Court should safeguard the reputation of the United States by ensuring the application of international law, including the protections of fundamental rights guaranteed by the Fifth Amendment to the Constitution.

Fourth, disrespect for international law imposes significant restrictions on the ability of future administrations to be able to conduct international affairs in the best interest of the American people. Regardless of domestic law, the United States may face the consequences of having committed an internationally wrongful act. These consequences are summarized in the International Law Commission's Draft Articles on State Responsibility, *Yearbook of the International Law Commission,* annexed to U.N.G.A. Res. 56/83 of December 12, 2001, and corrected by U.N. Doc. A/56/49(Vol. I)/Corr. 4., as including an obligation to cease the wrongful conduct (if it is ongoing), and to make full reparations for injuries resulting from the wrongful act. Reparations may include restitution, compensation, satisfaction, and interest on any principal sum due. *Id*. at arts. 35-38. Moreover, if the internationally wrongful acts are serious, such as infringement of the fundamental rights guaranteed by a domestic charter such as the Fifth Amendment, all States in the international community "shall cooperate to bring to an end through lawful means any serious breach." *Id.* at art. 41. These negative consequences are likely to

affect the foreign relations of the U.S. government for many years. They are also reasoning why this Court should, whenever possible, as in this case, ensure respect for international law.

A. The Court should apply Treaties Applicable to the United States

Treaties are expressly made part of U.S. law by Article IV, Clause 2, of the U.S. Constitution that states "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land."

During the founding of the United States, two of the most prominent founders, Alexander Hamilton and John Jay expressed the opinion that treaties were binding and should be applied by U.S. courts. *The Federalist* No. 22 at 197 (Hamilton); No. 80 at 501-503 (Hamilton); and No. 64 423-424 (Jay). This Court has recognized that treaties are part of U.S. law that must be applied by the Court in numerous cases. *See, e.g., Missouri v. Holland*, 252 U.S. 416 (1920); *Cook v. United States*, 288 U.S. 102 (1933); *Kolovrat v. Oregon*, 366 U.S. 187 (1961); and *Water Splash, Inc. v. Menon*, 581 U.S. ___ (2017), 137 S. Ct. 1504 (2017). This is especially the case where application of the treaty carries significance for the United States in international affairs.

As Justice James Iredell stated long ago, and is equally valid today, "a treaty, when executed pursuant to full power, is valid and obligatory, in point of moral obligation, on all, as well on the Legislative, Executive, and Judicial

departments . . . as on every individual of the nation, unconnected officially with either; because it is a promise in effect by the whole nation to another nation, and if not in fact complied with, unless there be valid reasons for noncompliance, the public faith is violated. *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 272 (1796).

B. The Court should apply Customary International Law Applicable to the United States

The international law applicable to the United States includes customary international law, which according to Article III of the U.S. Constitution must be applied as "Laws of the United States." *Id.* at § 2, cl. 1. The Court has repeatedly and consistently over time recognized that customary international law is part of U.S. law that it will apply. This Court has stated that "[f]or two centuries we have affirmed that the domestic law of the United States recognizes the law of nations [i.e. customary international law]." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 729 (2004). Indeed, the first Chief Justice of this Court, Chief Justice John Jay, expressly charged Grand Juries "that the laws of nations make part of the laws of this and of every other civilized nation. They consist of those rules for regulating the conduct of nations towards each other; which, resulting from right reason, receive their obligations from that principle and from general assent and practice." John Jay, C.J., *Charge to Grand Juries: The Charges of Chief Justice Jay to the Grand Junes on the Eastern circuit at the circuit Courts held in the Districts of*

New York on the 4th, of Connecticut on the 22d days of April, of Massachusetts on the 4th, and of New Hampshire on the 20th days of May, 1790 in The Correspondence and Public Papers of John Jay, Vol. III, 387, 393 (Henry P. Johnston, ed., 1891). Justice Gray, writing the opinion for the Court expressly stated that "[t]he most certain guide . . . [to the applicable international law] is a treaty or a statute . . . when . . . there is no written law upon the subject, the duty still rests upon the judicial tribunals of ascertaining and declaring what the law is . . . ." *Hilton v. Guyot*, 159 U.S. 113, 163 (1895). The opinion of the United States Supreme Court in *Hilton v. Guyot* states that "[i]nternational law, in its widest and most comprehensive sense . . . is part of our law, and must be ascertained and administered by the courts of justice as often as such questions are presented in litigation between man and man, duly submitted to their determination." *Id*. In *The Paquete Habana*, 175 U.S. 677 (1900), Justice Gray again writing the opinion for the Court where states that "[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination." 175 U.S. 677, 700 (1900). Justice Gray further clarified that "[t]his rule of international law is one which . . . [this Court] . . . administering the law of nations are bound to take judicial notice of, and to give effect to . . . ." *Id.* at 708. This Court has again recently recognized that customary international law is part of

U.S. law that must be applied by the U.S. courts. *Bolivarian Republic of Venezuela, et al., v. Helmerich & Payne International Drilling Co., et al.*, 581 U. S. ____ (2017), 137 S. Ct. 348 (2017). This view is shared by the *Restatement (Third) of the Foreign Relations Law of the United States* (1987), that reads "[i]nternational law and international agreements of the United States are law of the United States . . . [c]ases arising under international law or international agreements of the United States are within the Judicial Power of the United States . . ." *Id.* at § 111.

Moreover, customary international law cannot be derogated from by later legislation. Unlike treaty law that is created at a fixed time—i.e. when the United States becomes a party to a treaty that it has ratified—and which may be superseded by later in time legislation, customary international law remains in force at all times. Customary international law is of universal obligation, and no statute of one or two nations can create obligations for the world. Like all the laws of nations, it rests upon the common consent of civilized communities. It is of force not because it was prescribed by any superior power, but because it has been generally accepted as a rule of conduct by the general community of civilized nations. *The Scotia*, 81 U.S. (14 Wall.) 170, 187 (1871).

It is law that once created, functions as an ongoing process whereby its validity is renewed according the continuing *opinio juris* and practice of States.

Even good faith efforts by States to change a rule, are violations of the rule of customary international law until that rule has been changed through the consensus of States expressed through their *opinio juris* and practice.

C. International Law Provides for Access To a Court

The United States is bound by both customary international law and international treaty to provide access to an effective remedy when an individual claims a violation of his or her fundamental rights.

The right to a remedy is recognized in article 2, subparagraph 3, of the International Covenant on Civil and Political Rights (ICCPR), 999 UNTS 171 (1966). This treaty was ratified by the United States on June 8, 1992. While the United States entered a reservation against the self-executing nature of this treaty—a treaty whose sole purpose is to create rights for individuals and groups and corresponding legal obligations for States—the ICCPR remains a legally binding treaty. Moreover, this right to a remedy applies to all other rights as well, whether found in international law or created by domestic law.

This treaty obligation is also recognized as customary international law. Evidence of this is article 8 of the Universal Declaration of Human Rights, which expressly states that "[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights.…" The fact that one hundred sixty five (165) States have expressly agreed to the legally

binding nature of this obligation by ratifying the ICCPR is in itself strong evidence that the overwhelming majority of States recognize this obligation as customary international law.

Moreover, the right to a remedy is further found in several legally binding treaties in various regions of the world: for example, in articles 5(1) and 13 of the European Convention on Human Rights, in 213 UNTS 222 (1953); article 25 of the American Convention on Human Rights, 1144 UNTS 123 (1978); article 7 and 25 of the African Charter on Human and Peoples' Rights, 1520 UNTS 217 (1980); and articles 14 and 23 of the Arab Charter on Human Rights, adopted by Council of the League of Arab States, 102nd Session, Resolution 5437 (1993). It is also recognized in human rights instruments, which often reflect customary international law, such as articles 8 and 9 of the Universal Declaration of Human Rights, U.N.G.A. Res. 217A (III), U.N. Doc A/810 at 71 (1948); the U.N. General Assembly's "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law." U.N.G.A. Res 60/147 (16 Dec 2005); and the U.N. Human Rights Committee's "General Comment No. 31 on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant, U.N. Doc CCPR/C/21/Rev.1/Add.13 (2004) at para 16. *See also Velásquez Rodríguez v Honduras*, Inter-Am. Ct.H.R., Ser. C No. 7 (21 July 1989)

at para 25, and *Vélez Loor v Panama*, Ser. C, No. 218 (23 Nov 2010) at para 255 [the Court stating that the right to remedy "reflects a customary norm that constitutes one of the fundamental principles of contemporary international law on a State's responsibility"].

These provisions provide that every right that an individual has under domestic or international law be provided a remedy—a process that can redress a violation of the rights—by his or her State. The right to a remedy applies not only *ex post facto* but also when there is a threat of a human rights violation. Shelton, D., *Remedies in International Human Rights Law*, 104ff (2d ed., 2010).

In this case, the District Court determined that a fundamental right was at stake. 1. E.R. 94. The District Court also stated that "its belief that this case would be better served by further factual development at trial." *Juliana*, No. 6:15-cv-01517-AA, 2018 WL 6303774, at *3. The Government then, instead of arguing its case at trial, launched a series of interlocutory appeals using every effort to delay or end the case on procedural and other grounds. While the Government has procedural rights and is free to exercise them, the manner in which they have been exercised here appear to be a means of delaying the trial the District Court believed was necessary to provide a potential remedy to the Juliana Plaintiffs. The applicable procedural statute, 28 U.S.C. § 1292(b), which permits interlocutory appeals, should be interpreted in accordance with the United States' international

legal obligations, which prevent the court from allowing this provision of law to be used to deny the Juliana Plaintiffs access to a remedy. *See, e.g., Murray v. The Schooner Charming Betsy*, 6 U.S. 64 (1804) (noting that an act of Congress should be interpreted not to violate the law of nations, if another construction is possible). The Government is an entity that does and should exercise the authority of the public's trust in its good faith. When a government exercises its authority in apparent bad faith, it violates that trust and consequently denies the Juliana Plaintiffs a meaningful day in court or remedy for the violation of their rights. Efforts to block a trial on grounds that are best described as delay tactics are offensive to the notion of judicial due process and are inconsistent with treaty obligations and the customary international law of a right to a remedy.

CONCLUSION

For the reasons stated above, the Court should permit the Juliana Plaintiffs the opportunity to defend and protect their alleged fundamental rights, and the alleged infringement of those fundamental rights, at the trial ordered by the District Court.

DATED: February 28, 2019 Respectfully submitted,

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CERTIFICTE OF COMPLIANCE WITH RULE 32(g)(1)

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I hereby certify that on February 28, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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