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PRATT'S

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## REPORT



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# Children, Climate, and Constitutional Rights: *Juliana v. United States*

By Paul Rink, Andrea Rodgers, and Philip L. Gregory\*

*The authors discuss the lawsuit filed by 21 youth plaintiffs alleging that the federal government defendants have continuously and unconstitutionally authorized, permitted, and subsidized the development and burning of fossil fuels despite knowing for over 50 years that doing so will destabilize the climate system and threaten their wellbeing and survival.*

## BACKGROUND<sup>1</sup>

In 2015, *Juliana v. United States* was filed by 21 youth plaintiffs along with the institutional plaintiff Earth Guardians, a global organization of young people, and Dr. James Hansen in his capacity as designated guardian of Future Generations. The complaint names the following defendants:

- (1) The United States of America as the sovereign trustee of the nation's natural resources;
- (2) The Office of the President of the United States, including the Council on Environmental Quality, the Office of Management and Budget, and the Office of Science and Technology Policy as well as the managing directors of these three divisions;
- (3) The U.S. Department of Energy and the Secretary of Energy;
- (4) The U.S. Department of the Interior and the Secretary of Interior;
- (5) The U.S. Department of Transportation and the Secretary of Transportation;
- (6) The U.S. Department of Agriculture and the Secretary of Agriculture;
- (7) The U.S. Department of Commerce and the Secretary of Commerce;
- (8) The U.S. Department of Defense and the Secretary of Defense;

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\* Paul Rink is a Climate Law Fellow at Our Children's Trust who earned his J.D. from Yale Law School and his Masters of Environmental Management from Yale School of Forestry and Environmental Studies. Andrea Rodgers is Senior Litigation Attorney at Our Children's Trust, where she serves as co-counsel on *Juliana v. United States* and as lead counsel on *Aji P. v. State of Washington* and *Reynolds v. State of Florida*. Philip L. Gregory has a business and environmental litigation practice with the Gregory Law Group, in Redwood City, California. Since 2010, he has been actively involved with Our Children's Trust on a pro bono basis, serving as co-lead counsel in *Juliana v. United States*. The authors may be contacted at paul.rink@ourchildrenstrust.org, andrea@ourchildrenstrust.org, and pgregory@gregorylawgroup.com, respectively.

<sup>1</sup> All court docket page number citations throughout this article refer to the official ECF page number stamp at the top of the document.

- (9) The U.S. Department of State and the Secretary of State; and
- (10) The U.S. Environmental Protection Agency (“EPA”) and the EPA Administrator.<sup>2</sup>

The President of the United States was also originally named as a defendant, but the district court ultimately dismissed the president from the case without prejudice.<sup>3</sup>

## PLAINTIFFS’ ALLEGATIONS AND ARGUMENTS

The youth plaintiffs in *Juliana* allege that the federal government defendants have continuously and unconstitutionally authorized, permitted, and subsidized the development and burning of fossil fuels despite knowing for over 50 years that doing so will destabilize the climate system and threaten their wellbeing and survival. The complaint challenges the constitutionality of Energy Policy Act Section 201 both on its face and also as it has affected the plaintiffs’ lives by authorizing the Department of Energy to permit liquefied natural gas exports from the Jordan Cove export terminal in Coos Bay, Oregon. The plaintiffs point to the enhanced cumulative danger resulting from the significant CO<sub>2</sub> emissions associated with this export authorization as one specific illustration of the negative impacts they experience from the government’s systemic fossil fuel promotion.<sup>4</sup>

A scientific report presented to President Lyndon B. Johnson in 1965 warned that greenhouse gases such as CO<sub>2</sub> released from the burning of fossil fuels threaten “the health, longevity, livelihood, recreation, cleanliness and happiness of citizens[.]”<sup>5</sup> The plaintiffs argue that the government defendants’ knowledge of the impacts of greenhouse gas-induced climate change only expanded further in the following decades. For example, the complaint alleges the defendants were aware since 1990 of scientific confirmation demonstrating that CO<sub>2</sub> levels in the atmosphere must return to 350 parts per million by 2100 in order to restore a stable climate system.<sup>6</sup> According to the plaintiffs, the defendants continued to perpetuate a fossil fuel-based energy system despite this knowl-

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<sup>2</sup> First Amended Complaint for Declaratory and Injunctive Relief at ¶¶ 98–130, *Juliana v. United States*, 217 F.Supp.3d 1224 (D. Or. 2016) (No. 6:15-cv-01517-TC), ECF No. 7.

<sup>3</sup> *Juliana v. United States*, 339 F.Supp.3d 1062, 1080 (D. Or. 2018).

<sup>4</sup> First Amended Complaint for Declaratory and Injunctive Relief at ¶ 1, *Juliana v. United States*, 217 F.Supp.3d 1224 (D. Or. 2016) (No. 6:15-cv-01517-TC), ECF No. 7.

<sup>5</sup> Donald Hornig, et al., *Restoring the Quality of Our Environment: Report of the Environmental Pollution Panel President’s Science Advisory Committee*, WHITE HOUSE 1 (1965), [https://legacy-assets.eenews.net/open\\_files/assets/2019/01/11/document\\_cw\\_01.pdf](https://legacy-assets.eenews.net/open_files/assets/2019/01/11/document_cw_01.pdf).

<sup>6</sup> U. S. ENVTL. PROTECTION AGENCY, POLICY OPTIONS FOR STABILIZING GLOBAL CLIMATE: REPORT TO CONGRESS MAIN REPORT 8, 28 (Daniel Lashof and Dennis Tirpak eds., Dec. 1990),

edge, thereby contributing to present-day levels of atmospheric CO<sub>2</sub> over 416 parts per million (and rising) that expose the youth plaintiffs to extreme danger from climate change.<sup>7</sup> The government documents show that over 25 percent of cumulative CO<sub>2</sub> emissions has come from the United States, making the U.S. government more culpable for these dangerous atmospheric CO<sub>2</sub> concentrations and subsequent climate change impacts than any other nation or entity.<sup>8</sup>

Based on these allegations, the plaintiffs first claim the defendants have violated their constitutional rights to life, liberty, and property under the Due Process Clause of the Fifth Amendment, including their right to a stable climate system that sustains human life.<sup>9</sup> Second, the plaintiffs claim the defendants have violated their constitutional right to equal protection under the law by disproportionately discriminating against them as a protected class of minors and future generations.<sup>10</sup> Third, the plaintiffs claim the defendants have violated their implied constitutional right under the Ninth Amendment to a viable atmosphere capable of facilitating the enjoyment of their enumerated constitutional rights.<sup>11</sup> Finally, the plaintiffs claim the defendants have failed to uphold their duties as sovereign trustees under the public trust doctrine.<sup>12</sup>

In their complaint, all of the plaintiffs identify individual and particularized harms resulting from climate change. For example, many plaintiffs have experienced a loss of personal safety as climate change causes extreme weather events to increase in frequency and severity. When his hometown of Fairbanks, Alaska, was declared to be in a state of disaster after a violent ice storm in 2014, Nathan Baring and his family were forced to survive without power for almost a week in temperatures around 18 degrees Fahrenheit.<sup>13</sup> Such extreme ice storms will become more and more common in Alaska as climate change

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<https://nepis.epa.gov/Exe/ZyPDF.cgi/91014BJ0.PDF?Dockkey=91014BJ0.PDF>.

<sup>7</sup> Holly Shaftel, et al., *Global Climate Change Vital Signs of the Planet: Carbon Dioxide*, NASA (May 14, 2021), <https://climate.nasa.gov/vital-signs/carbon-dioxide/>.

<sup>8</sup> First Amended Complaint for Declaratory and Injunctive Relief at ¶ 7, *Juliana v. United States*, 217 F.Supp.3d 1224 (D. Or. 2016) (No. 6:15-cv-01517-TC), ECF No. 7.

<sup>9</sup> First Amended Complaint for Declaratory and Injunctive Relief at ¶¶ 277–89, *Juliana v. United States*, 217 F.Supp.3d 1224 (D. Or. 2016) (No. 6:15-cv-01517-TC), ECF No. 7.

<sup>10</sup> First Amended Complaint for Declaratory and Injunctive Relief at ¶¶ 290–301, *Juliana v. United States*, 217 F.Supp.3d 1224 (D. Or. 2016) (No. 6:15-cv-01517-TC), ECF No. 7.

<sup>11</sup> First Amended Complaint for Declaratory and Injunctive Relief at ¶¶ 302–06, *Juliana v. United States*, 217 F.Supp.3d 1224 (D. Or. 2016) (No. 6:15-cv-01517-TC), ECF No. 7.

<sup>12</sup> First Amended Complaint for Declaratory and Injunctive Relief at ¶¶ 307–10, *Juliana v. United States*, 217 F.Supp.3d 1224 (D. Or. 2016) (No. 6:15-cv-01517-TC), ECF No. 7.

<sup>13</sup> First Amended Complaint for Declaratory and Injunctive Relief at ¶ 74, *Juliana v. United*



progresses. Jayden F. also lost power and water for a week in 2008 when Hurricane Gustav descended on her town of Rayne, Louisiana. She has been forced to endure<sup>14</sup> three hurricanes and many more tropical storms in only the span of a decade due to warming Atlantic waters.<sup>15</sup> In recent years, smoke from increasingly intense wildfires in the Pacific Northwest has threatened the physical health and safety of several plaintiffs, including Isaac V. and Sahara V. whose asthma has been exacerbated by the resulting hazardous air quality.<sup>16</sup>

Climate change impacts are eroding some plaintiffs' ability to freely connect with their heritage. In 2011, Jaime B. was forced to move with her mother from the Navajo Nation Reservation to Flagstaff, Arizona, because the natural springs upon which they depended for drinking water were running dry. She fears that her extended family members who still live on the reservation will be displaced as well, further fraying her cultural ties and limiting her ability to participate in traditional ceremonies.<sup>17</sup> Similarly, Miko V., who was born on the Marshall Islands, worries about whether she will have a homeland to return to at all as sea level rise threatens to submerge her low-lying home island.<sup>18</sup>

Climate change also reduces many plaintiffs' economic security and their ability to enjoy the unencumbered use of their property. Alex Loznak's family owns Maupin Century Farm along the Umpqua River in Oregon. He wants to raise a family and eventually retire there, but record-setting heat waves in recent years have reduced the farm's revenue because of lower crop yields, particularly in the hazelnut orchard.<sup>19</sup> More frequent wildfires and increasing drought conditions threaten the multi-decade investment of Jacob Lebel's family in Rose

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*States*, 217 F.Supp.3d 1224 (D. Or. 2016) (No. 6:15-cv-01517-TC), ECF No. 7.

<sup>14</sup> First Amended Complaint for Declaratory and Injunctive Relief at ¶¶ 86–87, *Juliana v. United States*, 217 F.Supp.3d 1224 (D. Or. 2016) (No. 6:15-cv-01517-TC), ECF No. 7.

<sup>15</sup> Less than a year after *Juliana v. United States* was filed, most of Jayden's family home was destroyed by floodwaters from historically torrential rainfall that the U.S. government admitted was caused by climate change. See Our Children's Trust, *Jayden F.*, OUR CHILDREN'S TRUST: YOUTH v. GOV (2019), <https://www.ourchildrenstrust.org/jayden/>; see also, Elizabeth Fleming, et al., *Coastal Effects*, in IMPACTS, RISKS, AND ADAPTATION IN THE U. S.: FOURTH NAT'L CLIMATE ASSESSMENT, VOLUME II 322, 329 (U.S. Global Climate Research Program ed., 2018) (citing K. van der Wiel, et al., *Rapid Attribution of the August 2016 Flood-inducing Extreme Precipitation in South Louisiana to Climate Change*, 21 HYDROLOGY AND EARTH SYS. SCI. 897 (2017)).

<sup>16</sup> First Amended Complaint for Declaratory and Injunctive Relief at ¶¶ 46, 56, *Juliana v. United States*, 217 F.Supp.3d 1224 (D. Or. 2016) (No. 6:15-cv-01517-TC), ECF No. 7.

<sup>17</sup> First Amended Complaint for Declaratory and Injunctive Relief at ¶ 66, *Juliana v. United States*, 217 F.Supp.3d 1224 (D. Or. 2016) (No. 6:15-cv-01517-TC), ECF No. 7.

<sup>18</sup> First Amended Complaint for Declaratory and Injunctive Relief at ¶ 58, *Juliana v. United States*, 217 F.Supp.3d 1224 (D. Or. 2016) (No. 6:15-cv-01517-TC), ECF No. 7.

<sup>19</sup> First Amended Complaint for Declaratory and Injunctive Relief at ¶ 26, 28, *Juliana v.*

Hill Farms, particularly its approximately 250 acres of sustainably managed mixed conifer forests.<sup>20</sup> Levi D. lives on a barrier island in Satellite Beach, Florida, where his family's property is severely threatened by sea level rise, and its value is decreasing as a result. In addition, higher ocean temperatures have led to increased amounts of smelly Sargassum seaweed on the beaches near his house, and in recent years, he has had to be careful where he swims because of an increased incidence of flesh-eating bacteria in the Atlantic Ocean and in nearby Indian River Lagoon.<sup>21</sup>

In light of these and many other injuries, the plaintiffs' first amended complaint includes requests for the following remedies:

- (1) Declaratory judgment recognizing that the defendants have violated and are violating the plaintiffs' constitutional rights to life, liberty, and property by substantially contributing to climate change;
- (2) Injunctive relief from further constitutional violations by the defendants;
- (3) Declaratory judgment that Section 201 of the Energy Policy Act (the legislation allowing the Department of Energy to authorize imports and exports of natural gas) is unconstitutional;
- (4) Declaratory judgment that the Department of Energy order authorizing liquefied natural gas exports from the Jordan Cove export terminal in Coos Bay, Oregon, is unconstitutional;
- (5) Declaratory judgment recognizing that the defendants have violated and are violating the public trust doctrine;
- (6) Injunctive relief from further public trust violations by the defendants;
- (7) A judicial order requiring defendants to create an inventory of consumption-based CO<sub>2</sub> emissions in the United States;
- (8) A judicial order requiring the defendants "to prepare and implement an enforceable national remedial plan to phase out fossil fuel emissions and draw down excess atmospheric CO<sub>2</sub>";
- (9) Judicial retention of jurisdiction to ensure the defendants' compliance with the requested judicial orders; and

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*United States*, 217 F.Supp.3d 1224 (D. Or. 2016) (No. 6:15-cv-01517-TC), ECF No. 7.

<sup>20</sup> First Amended Complaint for Declaratory and Injunctive Relief at ¶ 32, *Juliana v. United States*, 217 F.Supp.3d 1224 (D. Or. 2016) (No. 6:15-cv-01517-TC), ECF No. 7.

<sup>21</sup> First Amended Complaint for Declaratory and Injunctive Relief at ¶¶ 83–84, *Juliana v. United States*, 217 F.Supp.3d 1224 (D. Or. 2016) (No. 6:15-cv-01517-TC), ECF No. 7.

(10) Such further relief as “the [c]ourt deems just and proper.”<sup>22</sup>

## PROCEDURAL HISTORY

The procedural history of *Juliana* is complicated, involving numerous motions to dismiss and to stay the proceedings, often filed concurrently at different levels within the federal court system. The defendants have additionally filed six writs of mandamus in the case, four in the U.S. Court of Appeals for the Ninth Circuit and two before the U.S. Supreme Court, all of which have been denied.<sup>23</sup> Because various courts have had to consider so many pre-trial motions in *Juliana*, the case has not yet gone to trial despite having been filed years ago. The following summary highlights the key pre-trial arguments and developments.

On November 12, 2015, three trade organizations representing the fossil fuel industry (the National Association of Manufacturers, the American Fuel & Petrochemical Manufacturers, and the American Petroleum Institute) jointly moved to intervene in *Juliana* and then moved to dismiss the case. The government defendants moved to dismiss the case a few days later on November 17, 2015. Although some overlap existed between the arguments of the intervenors and the government defendants on the issue of Article III standing, most of their motion to dismiss arguments were distinct.

The intervenors presented three main arguments in their motion to dismiss the case. First, they presented several claims supporting their contention that the *Juliana* complaint does not articulate an appropriate federal cause of action. For one, the intervenors claimed the plaintiffs’ public trust claim should not

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<sup>22</sup> First Amended Complaint for Declaratory and Injunctive Relief at 99-100, *Juliana v. United States*, 217 F.Supp.3d 1224 (D. Or. 2016) (No. 6:15-cv-01517-TC), ECF No. 7.

<sup>23</sup> See Notice of Filing Petition for Writ of Mandamus, *Juliana v. United States*, 339 F.Supp.3d 1062 (D. Or. 2018) (No. 6:15-cv-01517-AA), ECF No. 177; Notice of Filing of Petition for Writ of Mandamus, *Juliana v. United States*, 339 F.Supp.3d 1062 (D. Or. 2018) (No. 6:15-cv-01517-AA), ECF No. 308; Application for a Stay Pending Disposition by the U.S. Court of Appeals for the Ninth Circuit of a Petition for a Writ of Mandamus to the United States District Court for the District of Oregon and Any Further Proceedings in This Court and Request for an Administrative Stay at 9, *Juliana v. United States*, 339 F.Supp.3d 1062 (D. Or. 2018) (No. 6:15-cv-01517-AA), ECF No. 321-1(“[T]he government respectfully submits that the Court may wish to construe this application as a petition for a writ of mandamus. . . .”); Notice of Filing Petition For Writ of Mandamus Requesting a Stay of District Court Proceedings Pending Supreme Court Review, *Juliana v. United States*, 339 F.Supp.3d 1062 (D. Or. 2018) (No. 6:15-cv-01517-AA), ECF No. 365; Notice of Filing of Petition for a Writ of Mandamus, *Juliana v. United States*, 339 F.Supp.3d 1062 (D. Or. 2018) (No. 6:15-cv-01517-AA), ECF No. 390; Notice of Filing Petition for Writ of Mandamus and Emergency Order Under Ninth Circuit Rule 27-3, *Juliana v. United States*, 339 F.Supp.3d 1062 (D. Or. 2018) (No. 6:15-cv-01517-AA), ECF No. 420.

have been brought in federal court because the public trust doctrine is solely a principle within state law.<sup>24</sup> Even if the public trust doctrine was federally applicable, the intervenors argued the doctrine does not apply to the atmosphere despite the plaintiffs' claims to the contrary.<sup>25</sup> For another, the intervenors contended the plaintiffs' constitutional arguments do not support a cause of action for the following three reasons:

- (1) The Due Process Clause does not compel government action except in rare circumstances that are not present in this case;
- (2) The Equal Protection Clause does not apply in this case because there are no allegations of intentional discrimination; and
- (3) The Ninth Amendment does not confer independent, substantive rights enforceable in federal court.<sup>26</sup>

Finally, the intervenors argued any valid cause of action that the plaintiffs might have asserted is displaced by the Clean Air Act which requires the Environmental Protection Agency to contemplate appropriate greenhouse gas emissions standards.<sup>27</sup>

The second main argument in the intervenors' motion to dismiss the case was that the plaintiffs' claims are barred by the political question doctrine under *Baker v. Carr*.<sup>28</sup> The intervenors' claimed the case is not justiciable because of the following:

- (1) The plaintiffs' request for a judicially enforceable climate stabilization plan violates the separation of powers principle;
- (2) There are no judicially discoverable or manageable standards with which to resolve the plaintiffs' claims;<sup>29</sup> and
- (3) Adjudicating the plaintiffs' claims would signify a lack of respect for the Legislative and Executive branches of government that have

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<sup>24</sup> Memorandum in Support of Intervenor-Defendants' Motion to Dismiss at 12, *Juliana v. United States*, 217 F.Supp.3d 1224 (D. Or. 2016) (No. 6:15-cv-01517-TC), ECF No. 20.

<sup>25</sup> Memorandum in Support of Intervenor-Defendants' Motion to Dismiss at 16, *Juliana v. United States*, 217 F.Supp.3d 1224 (D. Or. 2016) (No. 6:15-cv-01517-TC), ECF No. 20.

<sup>26</sup> Memorandum in Support of Intervenor-Defendants' Motion to Dismiss at 13–14, *Juliana v. United States*, 217 F.Supp.3d 1224 (D. Or. 2016) (No. 6:15-cv-01517-TC), ECF No. 20.

<sup>27</sup> Memorandum in Support of Intervenor-Defendants' Motion to Dismiss at 15, *Juliana v. United States*, 217 F.Supp.3d 1224 (D. Or. 2016) (No. 6:15-cv-01517-TC), ECF No. 20.

<sup>28</sup> *Baker v. Carr*, 369 U.S. 186, 217 (1962).

<sup>29</sup> Memorandum in Support of Intervenor-Defendants' Motion to Dismiss at 18, *Juliana v. United States*, 217 F.Supp.3d 1224 (D. Or. 2016) (No. 6:15-cv-01517-TC), ECF No. 20.

already acted to assess climate change impacts and risks.<sup>30</sup>

The intervenors' third and final argument for dismissing the case was a challenge to the plaintiffs' ability to bring their claims based on the three-prong test for Article III standing established in *Lujan v. Defenders of Wildlife*: injury in fact; causation; and redressability.<sup>31</sup>

In their November 17, 2015 motion to dismiss, the government defendants reiterated the intervenors' arguments against the plaintiffs' Article III standing.<sup>32</sup> They additionally claimed the members of the "Future Generations" plaintiff group, as represented by Dr. Hansen, do not have standing to sue because they have not yet experienced any actual injuries and they, as unborn, hypothetical "non-persons," do not have justiciable rights.<sup>33</sup> The government defendants further contended the plaintiffs collectively lack standing because they assert generalized grievances that implicate the separation of powers doctrine and that are better addressed by the Executive and Legislative branches rather than by the federal judicial system.<sup>34</sup>

The government defendants reasserted several other arguments presented in the intervenors' motion to dismiss, including the claim that the plaintiffs' public trust claims cannot be decided in federal court because the public trust doctrine is restricted to state law.<sup>35</sup> Like the intervenors, the government defendants also argued the plaintiffs failed to state justiciable constitutional claims, using the same reasoning as the intervenors to contest the plaintiffs' Ninth Amendment claim.<sup>36</sup> Their reasoning differed from that of the interve-

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<sup>30</sup> Memorandum in Support of Intervenor-Defendants' Motion to Dismiss at 20, *Juliana v. United States*, 217 F.Supp.3d 1224 (D. Or. 2016) (No. 6:15-cv-01517-TC), ECF No. 20.

<sup>31</sup> *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).

<sup>32</sup> Federal Defendants' Memorandum of Points and Authorities in Support of Their Motion to Dismiss at 14–22, *Juliana v. United States*, 217 F.Supp.3d 1224 (D. Or. 2016) (No. 6:15-cv-01517-TC), ECF No. 27-1.

<sup>33</sup> Federal Defendants' Memorandum of Points and Authorities in Support of Their Motion to Dismiss at 23, *Juliana v. United States*, 217 F.Supp.3d 1224 (D. Or. 2016) (No. 6:15-cv-01517-TC), ECF No. 27-1.

<sup>34</sup> Federal Defendants' Memorandum of Points and Authorities in Support of Their Motion to Dismiss at 24–25, *Juliana v. United States*, 217 F.Supp.3d 1224 (D. Or. 2016) (No. 6:15-cv-01517-TC), ECF No. 27-1.

<sup>35</sup> Federal Defendants' Memorandum of Points and Authorities in Support of Their Motion to Dismiss at 34–35, *Juliana v. United States*, 217 F.Supp.3d 1224 (D. Or. 2016) (No. 6:15-cv-01517-TC), ECF No. 27-1; see *supra* note 24 and accompanying text.

<sup>36</sup> Federal Defendants' Memorandum of Points and Authorities in Support of Their Motion to Dismiss at 33, *Juliana v. United States*, 217 F.Supp.3d 1224 (D. Or. 2016) (No. 6:15-cv-01517-TC), ECF No. 27-1.

nors when arguing against the justiciability of the plaintiffs' other constitutional claims, however. For example, the government defendants argued the court should reject the plaintiffs' due process claims not because the Due Process Clause does not compel government action but because the Due Process Clause does not guarantee a fundamental constitutional right to a non-polluted environment.<sup>37</sup> The government defendants also offered a different justification than the intervenors for their objection to the plaintiffs' equal protection claims: namely, the plaintiffs do not constitute a protected class requiring heightened scrutiny under the Equal Protection Clause.<sup>38</sup>

The government defendants' motion to dismiss differed from that of the intervenors in other ways as well. For example, it presented an argument that is not mentioned in the intervenors' motion to dismiss: the court must apply rational basis review to the case because the plaintiffs' fundamental rights have not been infringed and because the plaintiffs do not constitute a protected class under the Equal Protection Clause.<sup>39</sup> Also, although the government defendants raised separation of powers concerns when contesting the plaintiffs' standing,<sup>40</sup> they did not argue the plaintiffs' claims present nonjusticiable political questions.

In early 2016, the plaintiffs filed a response in the district court, opposing the government defendants' motion to dismiss.<sup>41</sup> In this response, the youth plaintiffs asserted they satisfy all three elements of standing. In particular, they argued the "Future Generations" plaintiff group has standing because the defendants' actions have greatly impaired the public trust resources that future generations will inherit.<sup>42</sup>

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<sup>37</sup> Federal Defendants' Memorandum of Points and Authorities in Support of Their Motion to Dismiss at 28, *Juliana v. United States*, 217 F.Supp.3d 1224 (D. Or. 2016) (No. 6:15-cv-01517-TC), ECF No. 27-1; *see supra* note 26 and accompanying text.

<sup>38</sup> Federal Defendants' Memorandum of Points and Authorities in Support of Their Motion to Dismiss at 31–33, *Juliana v. United States*, 217 F.Supp.3d 1224 (D. Or. 2016) (No. 6:15-cv-01517-TC), ECF No. 27-1; *see supra* note 26 and accompanying text.

<sup>39</sup> Federal Defendants' Memorandum of Points and Authorities in Support of Their Motion to Dismiss at 34, *Juliana v. United States*, 217 F.Supp.3d 1224 (D. Or. 2016) (No. 6:15-cv-01517-TC), ECF No. 27-1.

<sup>40</sup> *See supra* note 34 and accompanying text.

<sup>41</sup> Memorandum of Plaintiffs' in Opposition to Federal Defendants' Motion to Dismiss, *Juliana v. United States*, 217 F.Supp.3d 1224 (D. Or. 2016) (No. 6:15-cv-01517-TC), ECF No. 41.

<sup>42</sup> Memorandum of Plaintiffs' in Opposition to Federal Defendants' Motion to Dismiss at 42–58, *Juliana v. United States*, 217 F.Supp.3d 1224 (D. Or. 2016) (No. 6:15-cv-01517-TC), ECF No. 41.

The plaintiffs also provided in-depth arguments for the justiciability of their various claims.

First, the plaintiffs claimed the government defendants are knowingly and deliberately enhancing the climate change threat, thereby establishing an elevated duty of care toward the plaintiffs under the state-created danger doctrine.<sup>43</sup> They further claimed the defendants' actions undermine the stable climate system necessary for them to freely enjoy their fundamental rights to life, liberty, and property. For these reasons, the plaintiffs' contended their substantive due process claim are viable in court.<sup>44</sup>

Second, regarding the viability of their equal protection claim, the plaintiffs claimed future generations and young people without suffrage together represent a suspect class that needs enhanced safeguarding under the Equal Protection Clause.<sup>45</sup>

Finally, the plaintiffs argued the following three points:

- (1) The public trust doctrine exists;
- (2) The public trust doctrine properly applies to the federal government; and
- (3) The scope of the public trust doctrine can be tried in court.

Around the same time, the plaintiffs also responded to the intervenors' motion to dismiss, focusing on three main counterarguments.

First, the plaintiffs' response asserted the Clean Air Act does not displace the plaintiffs' claims because (1) the public trust doctrine is specifically attributable to the federal government's sovereignty and cannot be displaced<sup>46</sup> and (2) no

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<sup>43</sup> The language of the Due Process Clause does not impose an affirmative obligation on the government to ensure the plaintiffs are protected from all harm. However, there is an exception where government action creates the danger. *See L. W. v. Grubbs*, 974 F.2d 119, 121–22 (9th Cir. 1992). In such cases, deliberate indifference may suffice to establish a due process violation. *See L. W. v. Grubbs*, 92 F.3d 894, 896 (9th Cir. 1996). Deliberate indifference requires creation of a dangerous situation with actual knowledge or willful ignorance of impending harm. *L. W. v. Grubbs*, 92 F.3d 894, 899–900 (9th Cir. 1996).

<sup>44</sup> Memorandum of Plaintiffs' in Opposition to Federal Defendants' Motion to Dismiss at 22, *Juliana v. United States*, 217 F.Supp.3d 1224 (D. Or. 2016) (No. 6:15-cv-01517-TC), ECF No. 41.

<sup>45</sup> Memorandum of Plaintiffs' in Opposition to Federal Defendants' Motion to Dismiss at 27, *Juliana v. United States*, 217 F.Supp.3d 1224 (D. Or. 2016) (No. 6:15-cv-01517-TC), ECF No. 41.

<sup>46</sup> Plaintiffs' Memorandum in Opposition to Defendant Intervenors' Motion to Dismiss at



statute can adequately vindicate the plaintiffs' constitutional rights because that responsibility is exclusively entrusted to the judicial system.<sup>47</sup>

Second, the plaintiffs argued the equal protection doctrine does not solely apply to cases involving discriminatory intent, and even if it did, their first amended complaint alleges intentional discrimination by the government defendants.<sup>48</sup>

Third, the plaintiffs argued the political question doctrine does not apply to constitutional or public trust causes of action. Even if it did, they further contended the factors in *Baker v. Carr* do not apply in their case for several reasons:

- (1) The Constitution does not textually commit the issues in the case to the political branches of government;
- (2) The issue of determining constitutionally compliant CO<sub>2</sub> emission levels can be resolved with judicially discoverable and manageable standards; and
- (3) Such issue resolution by the judiciary would not disrespect the other branches of government.<sup>49</sup>

After hearing oral arguments from all parties on these issues, Magistrate Judge Thomas Coffin recommended on April 8, 2016 that the district court deny the motions to dismiss. A second round of oral arguments was held before District Judge Ann Aiken in September 2016.

On November, 10, 2016, the district court denied both motions to dismiss, affirmed the plaintiffs' standing, and recognized that the plaintiffs' constitutional claims lie "squarely within the purview of the judiciary."<sup>50</sup> Judge Aiken expressed "no doubt that the right to a climate system capable of sustaining

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11, *Juliana v. United States*, 217 F.Supp.3d 1224 (D. Or. 2016) (No. 6:15-cv-01517-TC), ECF No. 56.

<sup>47</sup> Plaintiffs' Memorandum in Opposition to Defendant Intervenors' Motion to Dismiss at 15, *Juliana v. United States*, 217 F.Supp.3d 1224 (D. Or. 2016) (No. 6:15-cv-01517-TC), ECF No. 56.

<sup>48</sup> Plaintiffs' Memorandum in Opposition to Defendant Intervenors' Motion to Dismiss at 34–36, *Juliana v. United States*, 217 F.Supp.3d 1224 (D. Or. 2016) (No. 6:15-cv-01517-TC), ECF No. 56.

<sup>49</sup> Plaintiffs' Memorandum in Opposition to Defendant Intervenors' Motion to Dismiss at 24–34, *Juliana v. United States*, 217 F.Supp.3d 1224 (D. Or. 2016) (No. 6:15-cv-01517-TC), ECF No. 56.

<sup>50</sup> *Juliana v. United States*, 217 F.Supp.3d 1224, 1241 (D. Or. 2016).



human life is fundamental to a free and ordered society.”<sup>51</sup> Following an in-depth analysis of the relevant case law, she determined the “[p]laintiffs’ federal public trust claims are cognizable in federal court.”<sup>52</sup> Judge Aiken further acknowledged that, although the district court “would no doubt be compelled to exercise great care to avoid separation-of-powers problems in crafting a remedy[,] . . . speculation about the difficulty of crafting a remedy could not support dismissal at this early stage.”<sup>53</sup>

By January 2017, the intervenors and the government defendants had each filed answers to the complaint in the district court. The intervenors largely denied the plaintiffs’ allegations in their answer.<sup>54</sup> The government defendants, on the other hand, admitted many key facts alleged by the plaintiffs, including the following:

- (1) Increased atmospheric CO<sub>2</sub> levels are causing climate change;
- (2) The United States has produced over 25 percent of total global CO<sub>2</sub> since 1850; and
- (3) Federal government officials had knowledge for over 50 years of scientific research regarding the potential impacts of increasing atmospheric CO<sub>2</sub> concentrations on human well-being.<sup>55</sup>

Both the district court and the plaintiffs made numerous attempts to reconcile the discrepancies between the intervenors’ and the government defendants’ admissions in order to determine the scope of issues for discovery and trial. On February 15, 2017, the plaintiffs served the intervenors’ counsel with a draft Rule 11 motion, alleging the intervenors violated Rule 11’s requirements in their answer by denying nearly all of plaintiffs’ factual allegations without a reasonable inquiry into the knowledge of the intervenors and their members. The plaintiffs also served numerous requests for admissions on the intervenors in March 2017.

In the same month, the intervenors and the government defendants separately requested the district court to certify the denial of their motions to

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<sup>51</sup> *Juliana v. United States*, 217 F.Supp.3d 1224, 1250 (D. Or. 2016).

<sup>52</sup> *Juliana v. United States*, 217 F.Supp.3d 1224, 1259 (D. Or. 2016).

<sup>53</sup> *Juliana v. United States*, 217 F.Supp.3d 1224, 1241–42 (D. Or. 2016).

<sup>54</sup> Intervenor-Defendants’ Answer to First Amended Complaint for Declaratory and Injunctive Relief, *Juliana v. United States*, 339 F.Supp.3d 1062 (D. Or. 2018) (No. 6:15-cv-01517-AA), ECF No. 93.

<sup>55</sup> Federal Defendants’ Answer to First Amended Complaint for Declaratory and Injunctive Relief (ECF No. 7) at ¶¶ 1, 7, 151, *Juliana v. United States*, 339 F.Supp.3d 1062 (D. Or. 2018) (No. 6:15-cv-01517-AA), ECF No. 98.

dismiss for interlocutory appeal. Two months later, however, all three intervening organizations moved to withdraw from the case on the eve of being ordered to respond to the plaintiffs' discovery requests. Magistrate Judge Coffin granted the intervenors' motions to withdraw, and Judge Aiken denied the two requests for interlocutory appeal certification in June 2017.

The defendants filed a motion for judgment on the pleadings on May 9, 2018 and a motion for partial summary judgment on May 22, 2018. Both of these motions largely repeated the defendants' earlier arguments on the motion to dismiss, but the motion for judgment on the pleadings included a few additional arguments. In this motion, the defendants argued for the first time that the president specifically should be dismissed as a defendant because the judiciary generally cannot provide injunctive or declaratory relief for official acts of a U.S. president.<sup>56</sup>

They also argued for the first time that the plaintiffs' claims should have been brought under the Administrative Procedures Act ("APA") "which provides the sole mechanism for [p]laintiffs to challenge the administrative decisions that underlie this action."<sup>57</sup>

The defendants further contended that, even if the plaintiffs had brought their claims under the APA, their programmatic grievances fail to comply with the APA's judicial review requirement that claims must challenge discrete and finalized agency actions.<sup>58</sup>

In June 2018, the plaintiffs responded to both the motion for judgment on the pleadings and the motion for partial summary judgment. In these responses, the plaintiffs argued (1) the APA does not provide the sole avenue for bringing constitutional challenges against agency actions, and (2) requiring the plaintiffs to bring their claims under the APA would violate their procedural due process rights.<sup>59</sup> They also argued the president should not be dismissed from the case because the constitutionality of presidential behavior is justiciable and judicial relief for such behavior is available in certain circumstances, including those

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<sup>56</sup> Defendants' Motion for Judgment on the Pleadings at 15–17, *Juliana v. United States*, 339 F.Supp.3d 1062 (D. Or. 2018) (No. 6:15-cv-01517-AA), ECF No. 195.

<sup>57</sup> Defendants' Motion for Judgment on the Pleadings at 18, *Juliana v. United States*, 339 F.Supp.3d 1062 (D. Or. 2018) (No. 6:15-cv-01517-AA), ECF No. 195.

<sup>58</sup> Defendants' Motion for Judgment on the Pleadings at 24, *Juliana v. United States*, 339 F.Supp.3d 1062 (D. Or. 2018) (No. 6:15-cv-01517-AA), ECF No. 195.

<sup>59</sup> Plaintiffs' Response in Opposition to Defendants' Motion for Judgment on the Pleadings at 18–27, *Juliana v. United States*, 339 F.Supp.3d 1062 (D. Or. 2018) (No. 6:15-cv-01517-AA), ECF No. 241; Plaintiffs' Response in Opposition to Defendants' Motion for Summary Judgment at 40–48, *Juliana v. United States*, 339 F.Supp.3d 1062 (D. Or. 2018) (No. 6:15-cv-01517-AA), ECF No. 255.

surrounding this case. Soon after this filing, the district court held oral arguments on the motion for judgment on the pleadings and the motion for partial summary judgment.

In the lead up to the scheduled trial date of October 29, 2018, the plaintiffs and the defendants engaged in a whirlwind discovery schedule, taking and defending approximately 50 depositions in the span of a couple months. In addition, the plaintiffs served 18 expert reports and several additional rebuttal reports from world-renowned scientists, economists, and physicians such as Dr. James Hansen, Dr. Joseph Stiglitz, Dr. Ove Hoegh-Guldberg, Dr. Howard Frumkin, and Dr. Lise Van Susteren.<sup>60</sup> These expert reports touched on topics ranging from climate science to energy policy to children's health and legal rights. The defendants also submitted eight expert reports and two rebuttal reports largely challenging the testimony of the plaintiffs' medical and energy experts.

On October 15, 2018, exactly two weeks before *Juliana* was originally scheduled to go to trial, the district court issued an opinion regarding both the motion for judgment on the pleadings and the motion for partial summary judgment. In this opinion, Judge Aiken made the following decisions:

- (1) Declined to certify the district court's ruling on the defendants' motion to dismiss for interlocutory appeal;
- (2) Granted the defendants' request to dismiss the president from the case without prejudice;
- (3) Granted summary judgment in favor of the defendants regarding the plaintiffs' Ninth Amendment claim;
- (4) Rejected the plaintiffs' argument that children represent a suspect classification under the Equal Protection Clause; and
- (5) Rejected all of the defendants' other motions and underlying arguments.<sup>61</sup>

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<sup>60</sup> See, e.g., Expert Report of James E. Hansen, Ph.D, *Juliana v. United States*, 339 F.Supp.3d 1062 (D. Or. 2018) (No. 6:15-cv-01517-AA), ECF No. 274-1; Expert Report of Joseph E. Stiglitz, Ph.D, *Juliana v. United States*, 339 F.Supp.3d 1062 (D. Or. 2018) (No. 6:15-cv-01517-AA), ECF No. 266-1; Expert Report of Ove Hoegh-Guldberg, Ph.D, *Juliana v. United States*, 339 F.Supp.3d 1062 (D. Or. 2018) (No. 6:15-cv-01517-AA), ECF No. 260-1; Expert Report of Howard Frumkin, M.D., M.P.H., Dr.P.H., *Juliana v. United States*, 339 F.Supp.3d 1062 (D. Or. 2018) (No. 6:15-cv-01517-AA), ECF No. 259-1; Expert Report of Lise Van Susteren, M.D, *Juliana v. United States*, 339 F.Supp.3d 1062 (D. Or. 2018) (No. 6:15-cv-01517-AA), ECF No. 271-1.

<sup>61</sup> *Juliana v. United States*, 339 F.Supp.3d 1062 (D. Or. 2018).

The court specifically determined the plaintiffs are not required to assert their claims under the APA because the APA does not govern constitutional claims seeking equitable relief.<sup>62</sup> She also found the plaintiffs satisfy all three elements of standing for the purposes of avoiding summary judgment.<sup>63</sup> In making these determinations, Judge Aiken continuously reiterated that final rulings on these issues “will benefit from a fully developed factual record where the court can consider and weigh evidence from both parties.”<sup>64</sup>

Mere days after the district court released its decision, the defendants filed a petition for writ of mandamus in the Supreme Court.<sup>65</sup> They also asked the Supreme Court to issue a stay of the district court proceedings pending consideration of the petition. On October 19, 2018, Chief Justice Roberts granted the temporary stay, thereby postponing the trial start date.<sup>66</sup> Two weeks later, the full Supreme Court lifted the temporary stay,<sup>67</sup> after the original trial date of October 29, 2018 had already passed. The Supreme Court ultimately denied the defendants’ petition for a writ of mandamus on July 29, 2019.<sup>68</sup>

On November 5, 2018, the defendants filed a motion in the district court for reconsideration of the court’s interlocutory appeal certification denial.<sup>69</sup> On November 21, 2018, despite “stand[ing] by . . . its belief that this case would be better served by further factual development at trial[,]” the district court granted this reconsideration, certifying the case for interlocutory appeal.<sup>70</sup> The defendants promptly filed a request for interlocutory appeal which the Ninth Circuit granted on December 26, 2018, in a 2-1 decision.<sup>71</sup> Judge Michelle Friedland, writing in dissent, explained she would have denied the government’s request for interlocutory appeal because “allowing this appeal now effectively rewards the Government for its repeated efforts to bypass normal litigation

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<sup>62</sup> *Juliana v. United States*, 339 F.Supp.3d 1062, 1084 (D. Or. 2018).

<sup>63</sup> *Juliana v. United States*, 339 F.Supp.3d 1062, 1095–96 (D. Or. 2018).

<sup>64</sup> *Juliana v. United States*, 339 F.Supp.3d 1062, 1093 (D. Or. 2018).

<sup>65</sup> Petition for a Writ of Mandamus, *Juliana v. United States*, 339 F.Supp.3d 1062 (D. Or. 2018) (No. 6:15-cv-01517-AA), ECF No. 390-1.

<sup>66</sup> *In re U.S., et al.*, 139 S. Ct. 16 (mem) (2018), *vacated*, 139 S. Ct. 452 (2018).

<sup>67</sup> *In re U.S., et al.*, 139 S. Ct. 452 (2018).

<sup>68</sup> *In re U.S., et al.*, 140 S. Ct. 16 (mem) (2019).

<sup>69</sup> Defendants’ Motion to Reconsider Denial of Requests to Certify Orders for Interlocutory Review, *Juliana v. United States*, 339 F.Supp.3d 1062 (D. Or. 2018) (No 6:15-cv-01517-AA), ECF No. 418.

<sup>70</sup> Interlocutory Appeal Certification Order at 5, *Juliana v. United States*, 339 F.Supp.3d 1062 (D. Or. 2018) (No. 6:15-cv-01517-AA), ECF No. 444.

<sup>71</sup> *Juliana v. United States*, 949 F.3d 1125 (9th Cir. 2018).

procedures by seeking mandamus relief in our court and the Supreme Court. If anything has wasted judicial resources in this case, it was those efforts.”<sup>72</sup>

After briefing and oral argument, the three-judge panel of the Ninth Circuit issued its decision on January 17, 2020.<sup>73</sup> The opinion primarily considered two issues: (1) whether the plaintiffs are required to bring their claims under the APA and (2) whether the plaintiffs have met the Article III standing requirements necessary to overcome the defendants’ motion to dismiss and motion for summary judgment.

Regarding the first issue, all three judges on the panel determined the plaintiffs need not bring their constitutional claims under the APA, affirming the district court.<sup>74</sup>

As for the second issue, all three judges also agreed with the district court’s determination that the plaintiffs sufficiently satisfied the first two prongs of standing (injury in fact and causation) for the case to proceed to trial.<sup>75</sup> Among the panel’s statements were the following affirmations:

- (1) The record introduced by the plaintiffs conclusively demonstrates the stability of Earth’s climate is threatened by fossil fuel combustion;<sup>76</sup>
- (2) The federal government “has long understood the risks of fossil fuel use and increasing carbon dioxide emissions;”<sup>77</sup> and
- (3) The government “affirmatively promotes fossil fuel use in a host of ways[.]”<sup>78</sup>

In more explicit terms, the panel noted that:

In the mid-1960s, a popular song warned that we were “on the eve of destruction.”[] The plaintiffs in this case have presented compelling evidence that climate change has brought that eve nearer. A substantial evidentiary record documents that the federal government has long promoted fossil fuel use despite knowing that it can cause catastrophic climate change, and that failure to change existing policy may hasten

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<sup>72</sup> *Juliana v. United States*, 949 F.3d 1125, 1127 n.1 (9th Cir. 2018); see *supra* note 23 and accompanying text.

<sup>73</sup> *Juliana v. United States*, 947 F.3d 1159 (9th Cir. 2020).

<sup>74</sup> *Juliana v. United States*, 947 F.3d 1159, 1167–68 (9th Cir. 2020).

<sup>75</sup> *Juliana v. United States*, 947 F.3d 1159, 1168–69 (9th Cir. 2020).

<sup>76</sup> *Juliana v. United States*, 947 F.3d 1159, 1166 (9th Cir. 2020).

<sup>77</sup> *Juliana v. United States*, 947 F.3d 1159, 1166 (9th Cir. 2020).

<sup>78</sup> *Juliana v. United States*, 947 F.3d 1159, 1167 (9th Cir. 2020).

an environmental apocalypse.<sup>79</sup>

Nevertheless, the Ninth Circuit ruled the plaintiffs did not meet the third prong of standing, redressability, because “it is beyond the power of an Article III court to order, design, supervise, or implement the plaintiffs’ requested remedial plan.”<sup>80</sup> The decision did not refer to the plaintiffs’ other forms of requested relief in any detail, mentioning only briefly that declaratory relief “is unlikely by itself to remediate their alleged injuries absent further court action.”<sup>81</sup> Based on this failure to meet the redressability element of standing, the Ninth Circuit reversed and remanded the case, sending it back to the district court for dismissal.

In her blistering dissent to the redressability portion of the opinion, District Judge Josephine Staton noted “the government has directly facilitated an existential crisis to the country’s perpetuity.”<sup>82</sup> Her objection to the government’s behavior was explicit and emphatic.

In these proceedings, the government accepts as fact that the United States has reached a tipping point crying out for a concerted response—yet presses ahead toward calamity. It is as if an asteroid were barreling toward Earth and the government decided to shut down our only defenses. Seeking to quash this suit, the government bluntly insists that it has the absolute and unreviewable power to destroy the Nation.<sup>83</sup>

Regarding her disagreement with her colleagues’ decision that the plaintiffs lack Article III standing, Judge Staton further stated that “determining when a court must step in to protect fundamental rights is not an exact science. In this case, my colleagues say that time is ‘never’; I say it is now.”<sup>84</sup> On this matter, she used equally sobering language:

Were we addressing a matter of social injustice, one might sincerely lament any delay, but take solace that “the arc of the moral universe is long, but it bends towards justice.” The denial of an individual, constitutional right—though grievous and harmful—can be corrected in the future, even if it takes 91 years. And that possibility provides hope for future generations.

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<sup>79</sup> *Juliana v. United States*, 947 F.3d 1159, 1164 (9th Cir. 2020).

<sup>80</sup> *Juliana v. United States*, 947 F.3d 1159, 1171 (9th Cir. 2020).

<sup>81</sup> *Juliana v. United States*, 947 F.3d 1159, 1170 (9th Cir. 2020).

<sup>82</sup> *Juliana v. United States*, 947 F.3d 1159, 1177 (9th Cir. 2020).

<sup>83</sup> *Juliana v. United States*, 947 F.3d 1159, 1175 (9th Cir. 2020).

<sup>84</sup> *Juliana v. United States*, 947 F.3d 1159, 1191 (9th Cir. 2020).

Where is the hope in today's decision? Plaintiffs' claims are based on science, specifically, an impending point of no return. If plaintiffs' fears, backed by the government's *own studies*, prove true, history will not judge us kindly. When the seas envelop our coastal cities, fires and droughts haunt our interiors, and storms ravage everything between, those remaining will ask: Why did so many do so little?<sup>85</sup>

Following the Ninth Circuit decision, the plaintiffs promptly petitioned the Ninth Circuit for an *en banc* rehearing. Despite being supported by 10 amicus briefs, the petition was denied on February 10, 2021.

### **PLAINTIFFS' MOTION FOR LEAVE TO AMEND THEIR COMPLAINT**

Noting the Ninth Circuit did not indicate it was dismissing the case “with prejudice,” the plaintiffs filed a motion for leave to amend their first amended complaint on March 9, 2021.<sup>86</sup> Oral argument on the motion took place on June 25, 2021.<sup>87</sup> With this motion, the plaintiffs aimed to cure the redressability issue identified by the Ninth Circuit in its decision on interlocutory appeal. The plaintiffs' corresponding second amended complaint altered the relief originally sought in the first amended complaint by removing the request for a remedial plan that the Ninth Circuit found exceeded the scope of Article III authority. Pursuant to the Declaratory Judgment Act, plaintiffs' second amended complaint requested the following forms of relief from the district court:

- Declaratory judgment that the U.S. national energy system creates harmful conditions for the plaintiffs in violation of their substantive and procedural due process rights as well as their rights to equal protection under the law;
- Declaratory judgment that the U.S. national energy system creates harmful conditions for the plaintiffs in violation of the public trust doctrine;
- Declaratory judgment that Section 201 of the Energy Policy Act

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<sup>85</sup> *Juliana v. United States*, 947 F.3d 1159, 1191 (9th Cir. 2020).

<sup>86</sup> Plaintiffs' Motion for Leave to Amend and File Second Amended Complaint for Declaratory and Injunctive Relief; Motion to Lift the Stay Pursuant to Fed. R. Civ. P. 15; Request for Oral Argument, *Juliana v. United States*, 339 F.Supp.3d 1062 (D. Or. 2018) (No. 6:15-cv-01517-AA), ECF No. 462.

<sup>87</sup> Minutes of Proceedings: Telephonic Motion Hearing Held Before Judge Ann L. Aiken, *Juliana v. United States*, 339 F. Supp. 3d 1062 (D. Or. 2018) (No. 6:15-cv-01517-AA), ECF No. 502.

violates the plaintiffs' substantive and procedural due process rights as well as their rights to equal protection under the law; and

- Any appropriate injunctive or other further relief that the court deems necessary and proper after issuing the requested declaratory relief.<sup>88</sup>

In order to determine whether to grant a petition for leave to amend a complaint, courts consider the following factors:

- (1) Whether the amendment would be futile to establish a valid and sufficient claim;
- (2) Whether the amendment causes prejudice to the opposing party;
- (3) Whether the petitioner acted in bad faith; and
- (4) Whether the petitioner has caused undue delay in the case.<sup>89</sup>

In their response to the plaintiffs' petition, the government defendants only directly addressed the first consideration, arguing that the proposed amendment to the complaint would be futile. Specifically, the defendants contended the second amended complaint doesn't cure the first amended complaint's failure to sufficiently satisfy the redressability prong of Article III standing.

In their motion for leave to amend, the plaintiffs argued that, far from being futile, the second amended complaint's narrowed request for a judicial declaration of the U.S. national energy system's unconstitutionality is sufficient for establishing Article III standing. Courts have routinely determined that declaratory judgments provide adequate redress for the purposes of meeting Article III standing requirements, particularly in constitutional cases,<sup>90</sup> even when such relief only provides a partial remedy.<sup>91</sup> The Declaratory Judgment Act, which the Ninth Circuit panel never addressed in its interlocutory

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<sup>88</sup> Plaintiffs' Motion for Leave to Amend and File Second Amended Complaint for Declaratory and Injunctive Relief; Motion to Lift the Stay Pursuant to Fed. R. Civ. P. 15; Request for Oral Argument at 15–16, *Juliana v. United States*, 339 F.Supp.3d 1062 (D. Or. 2018) (No. 6:15-cv-01517-AA), ECF No. 462.

<sup>89</sup> *Foman v. Davis*, 371 U.S. 178, 182 (1962).

<sup>90</sup> See, e.g., *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 798, 807 (2021) (noting that declaratory relief for ongoing as opposed to past injuries suffices for Article III redressability); *Utah v. Evans*, 536 U.S. 452, 463–64 (2002) (noting that declaratory relief changes the legal status of the challenged conduct and is sufficient for redressability); *Powell v. McCormack*, 395 U.S. 486, 499 (1969) (“A court may grant declaratory relief even though it chooses not to issue an injunction or mandamus.”); *Evers v. Dwyer*, 358 U.S. 202, 202–04 (1958) (in which ongoing governmental enforcement of segregation laws created an actual controversy for declaratory judgment).

<sup>91</sup> See, e.g., *Meese v. Keene*, 481 U.S. 465, 476–77 (1987) (determining that requested relief's ability to provide at least partial redress is sufficient to establish standing); *Church of Scientology*



decision, expressly permits courts to grant declaratory relief even when other forms of relief may be unavailable.<sup>92</sup> Although the Ninth Circuit expressed skepticism as to whether a declaratory judgment could provide adequate relief to the plaintiffs,<sup>93</sup> it did not expressly foreclose the possibility, thus leaving the question open to the discretion of the district court.<sup>94</sup>

The district court has wide discretion to give leave to amend if justice so requires,<sup>95</sup> particularly when the appellate court does not explicitly preclude amendment.<sup>96</sup> Throughout this case, the district court has repeatedly expressed its belief “that permitting this case to proceed to trial will produce better results[,]”<sup>97</sup> suggesting that, in the view of the district court, allowing the plaintiffs to amend their complaint and proceed to trial is in the best interests of justice. Both the Ninth Circuit and the district court agree the plaintiffs adequately demonstrate injury in fact and causation at this stage in the case. As such, justice is arguably best served by allowing the plaintiffs to alter the only identified deficiency preventing them from establishing Article III standing and proceeding to trial: the Ninth Circuit’s relatively narrow decision on redressability.

During a telephone status conference hearing on May 13, 2021, Judge Aiken ordered the plaintiffs and the defendants to try in good faith to reach a

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*of Cal. v. United States*, 506 U.S. 9, 13 (1992) (“[A] court does have power to effectuate a partial remedy”).

<sup>92</sup> Declaratory Judgment Act, 28 U.S.C. § 2201 (1948); see also, Plaintiffs’ Motion for Leave to Amend and File Second Amended Complaint for Declaratory and Injunctive Relief; Motion to Lift the Stay Pursuant to Fed. R. Civ. P. 15; Request for Oral Argument at 22, *Juliana v. United States*, 339 F.Supp.3d 1062 (D. Or. 2018) (No. 6:15-cv-01517-AA), ECF No. 462.

<sup>93</sup> *Juliana v. United States*, 947 F.3d 1159, 1170 (9th Cir. 2020).

<sup>94</sup> Plaintiffs’ Motion for Leave to Amend and File Second Amended Complaint for Declaratory and Injunctive Relief; Motion to Lift the Stay Pursuant to Fed. R. Civ. P. 15; Request for Oral Argument at 19, *Juliana v. United States*, 339 F.Supp.3d 1062 (D. Or. 2018) (No. 6:15-cv-01517-AA), ECF No. 462.

<sup>95</sup> Plaintiffs’ Motion for Leave to Amend and File Second Amended Complaint for Declaratory and Injunctive Relief; Motion to Lift the Stay Pursuant to Fed. R. Civ. P. 15; Request for Oral Argument at 13, *Juliana v. United States*, 339 F.Supp.3d 1062 (D. Or. 2018) (No. 6:15-cv-01517-AA), ECF No. 462.

<sup>96</sup> See, e.g., *San Francisco Herring v. Dep’t of the Interior*, 946 F.3d 564, 574 (9th Cir. 2019) (holding the district court can grant a motion to amend the pleadings upon remand from order of dismissal that did not indicate whether it was with or without prejudice when issue not conclusively decided by higher court and cautioning not to read appellate decisions too broadly); *Hall v. City of Los Angeles*, 697 F.3d 1059, 1067 (9th Cir. 2012) (holding the district court is limited by the remand order only when the scope of the remand is clear).

<sup>97</sup> Letter from U.S. District Court, District of Oregon, to the Ninth Circuit Court of Appeals, *In re United States*, 884 F.3d 830 (9th Cir. 2018) (No. 17-71692), ECF No. 12.

settlement agreement. Judge Aiken specifically said, “I would hope that you are grateful and are appreciative of having this opportunity to look globally at how this case may be resolved [in a way] that moves forward what we understand and what I refer to . . . as a crisis.”<sup>98</sup> Settlement negotiations started on June 23, 2021 before Magistrate Judge Thomas M. Coffin.

Despite never previously expressing interest in *Juliana* throughout its six-year existence in federal court, 18 U.S. states, led by the state of Alabama, responded to Judge Aiken’s order for a settlement conference by seeking “limited intervention” in the case. The 18 states expressly do not want to “intervene to litigate the merits of Plaintiffs’ claims[.]”<sup>99</sup> Instead, they want to have a seat at the table during the settlement negotiations and to oppose the plaintiffs’ motion for leave to amend their complaint. In particular, the states seek to “object[] to any proposed settlement (if necessary)” based on the contention that the district court does not have authority to require a settlement conference in a case that the Ninth Circuit has remanded to it for dismissal.<sup>100</sup> Like the federal government, the 18 states argue the district court does not have jurisdiction over *Juliana* at all following the Ninth Circuit’s order to dismiss the case, and for this reason, the district court cannot grant the plaintiffs’ motion to amend their complaint.<sup>101</sup>

The plaintiffs opposed the 18 states’ intervention motion, and on July 6, 2021, six different U.S. states, led by the state of New York, filed an amicus

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<sup>98</sup> Minutes of Proceedings: Telephonic Status Conference Held Before Judge Ann L. Aiken, *Juliana v. United States*, 339 F.Supp.3d 1062 (D. Or. 2018) (No. 6:15-cv-01517-AA), ECF No. 472.

<sup>99</sup> Motion for Limited Intervention and Memorandum in Support by Proposed Defendant-Intervenors States of Alabama, Alaska, Arkansas, Georgia, Indiana, Louisiana, Mississippi, Missouri, Montana, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, Texas, Utah, and West Virginia at 6, *Juliana v. United States*, 339 F.Supp.3d 1062 (D. Or. 2018) (No. 6:15-cv-01517-AA), ECF No. 475; *see also*, Proposed Defendant-Intervenor State of Kansas’s Motion for Limited Intervention and Memorandum in Support, *Juliana v. United States*, 339 F.Supp.3d 1062 (D. Or. 2018) (No. 6:15-cv-01517-AA), ECF No. 499.

<sup>100</sup> Motion for Limited Intervention and Memorandum in Support by Proposed Defendant-Intervenors States of Alabama, Alaska, Arkansas, Georgia, Indiana, Louisiana, Mississippi, Missouri, Montana, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, Texas, Utah, and West Virginia at 5–6, *Juliana v. United States*, 339 F.Supp.3d 1062 (D. Or. 2018) (No. 6:15-cv-01517-AA), ECF No. 475.

<sup>101</sup> Motion for Limited Intervention and Memorandum in Support by Proposed Defendant-Intervenors States of Alabama, Alaska, Arkansas, Georgia, Indiana, Louisiana, Mississippi, Missouri, Montana, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, Texas, Utah, and West Virginia at 10, *Juliana v. United States*, 339 F.Supp.3d 1062 (D. Or. 2018) (No. 6:15-cv-01517-AA), ECF No. 475.

brief in support of the plaintiffs' position.<sup>102</sup> The Natural Resources Defense Council also filed an amicus brief supporting the plaintiffs' opposition to intervention.<sup>103</sup> Judge Aiken has taken the 18 states' motion to intervene under advisement but has not yet ruled on it.

The plaintiffs now have two potential paths forward for their litigation. They could achieve settlement directly with the government defendants (and possibly with the 18 state intervenors as well depending on Judge Aiken's ruling regarding their intervention motion). Alternatively, if the district court grants the plaintiffs' motion to amend their complaint, they could be put back on track for trial more than half a decade after they originally filed their case.

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<sup>102</sup> Brief for the States of New York, Delaware, Hawai'i, Minnesota, Oregon, and Vermont as Amici Curiae, *Juliana v. United States*, 339 F.Supp.3d 1062 (D. Or. 2018) (No. 6:15-cv-01517-AA), ECF No. 507-1.

<sup>103</sup> Brief of Natural Resources Defense Council as Amicus Curiae in Support of Plaintiffs, *Juliana v. United States*, 339 F. Supp. 3d 1062 (D. Or. 2018) (No. 6:15-cv-01517-AA), ECF No. 511-1.

