

# A Hypothetical Win for *Juliana* Plaintiffs: Ensuring Victory Is More Than Symbolic

## INTRODUCTION

*Juliana v. United States* is “no ordinary lawsuit.”<sup>1</sup> Twenty-one Youth Plaintiffs from the United States have alleged that the federal government has knowingly abetted the fossil fuel industry in activities that have caused significant carbon dioxide (CO<sub>2</sub>) pollution for over fifty years.<sup>2</sup> The continuation of policies and practices the government knows to be harmful to the environment is, according to plaintiffs, an infringement on their “constitutional rights to life liberty, and property.”<sup>3</sup> The plaintiffs seek remedies on a scale appropriate to the problem of climate change: a declaration of a constitutional right to a climate system capable of sustaining life;<sup>4</sup> affirmative federal protection of the atmosphere, waters, oceans, and biosphere under an expanded public trust doctrine;<sup>5</sup> and implementation of “a national remedial plan to phase out fossil fuel emissions and draw down excess atmospheric carbon dioxide so as to stabilize the climate system and protect the vital resources on which Plaintiffs now and in the future will depend.”<sup>6</sup>

Given the urgency of action and extent of prayed-for relief, it is useful to begin considering how a court-ordered remedial plan would be implemented, even though the legal future of *Juliana* is unclear.<sup>7</sup> If the court orders the government to implement a national remedial plan, it must impose requirements

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DOI: <https://doi.org/10.15779/Z38JW86N55>

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1. 217 F. Supp. 3d 1224, 1234 (D. Or. 2016).
2. Complaint at ¶ 1, *Juliana v. United States*, 217 F. Supp. 3d 1224, 1234 (D. Or. 2016) (No. 6:15-cv-01517-TC).
3. *Id.* at ¶ 8.
4. *Id.* at ¶ 279.
5. *See infra* note 25.
6. Prayer for Relief at ¶ 7, *Juliana v. United States*, 217 F. Supp. 3d 1224 (D. Or. 2016) (No. 6:15-cv-01517-TC).
7. As of February 2019, *Juliana*’s legal future is unclear: while the district court judge, Judge Aiken, held in 2016 that the plaintiffs did have the right to sue, multiple motions have culminated in an interlocutory appeal in the Ninth Circuit to determine whether the case will go to trial. *See* Order Granting Government’s Petition for Interlocutory Appeal, *Juliana v. United States*, No. 18-80176 (9th Cir. Dec. 26, 2018).

that strike the right balance of deadlines, scope, and accountability to ensure that a positive holding in *Juliana* is more than a symbolic environmental victory.

## I. BACKGROUND

### A. *Brief History of the Failure of the Executive and Legislative Branches to Deal with Climate Change*

Groups and individuals are increasingly turning to the courts to address climate change concerns because of the failure of the executive and legislative branches to take effective action to address the issue.<sup>8</sup> Over forty years ago, the scientific community recognized that the global temperature would rise by one to three degrees Celsius within a century if affirmative steps were not taken to curb carbon emissions.<sup>9</sup> Yet the political branches have failed to develop a comprehensive plan to address the issue.<sup>10</sup> Even President Obama's Clean Power Plan, according to the *Juliana* plaintiffs, was not an "adequate or appropriate response to the climate crisis."<sup>11</sup>

Since *Juliana* was filed in 2015, its import has only grown because of the increasingly urgent need for governmental action to curb CO<sub>2</sub> emissions and the federal government's failure to propose solutions. While the recent introduction of the (nonbinding) "Green New Deal" suggests that at least some members of Congress support climate change legislation, a divided government, helmed by a president who continues to challenge or reduce environmental protections, is unlikely to generate necessary action.<sup>12</sup> Given the current futility of pursuing solutions in the political branches, the plaintiffs in *Juliana* and similar climate change cases see the courts as the "last, best hope at this moment of irreversible

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8. Sabrina McCormick et al., *Strategies in and Outcomes of Climate Change Litigation in the United States*, 8 NATURE CLIMATE CHANGE, 829, 829–30 (2018).

9. Mia Hammersley, *The Right to a Healthy and Stable Climate: Fundamental or Unfounded?* 7 ARIZ. J. ENVTL. L. & POL'Y 117, 123–24 (2017).

10. Nicole Rushovich, *Climate Change and Environmental Policy: An Analysis of the Final Guidance on Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews*, 27 B.U. PUB. INT. L.J. 327, 339–41 (2018). Some examples of failed Congressional bills include: The McCain-Lieberman Stewardship Act, which would have capped emissions, which died on the floor in 2003 and 2005. S. 139, 108th Cong. (2003); S. 1151, 109th Cong. (2005). The Global Warming Pollution Reduction Act failed in the Senate in 2007. S. 309, 110th Cong. (2007). The American Clean Energy and Security Act passed the House and was not brought to the Senate Floor. H.R. Res. 2454, 111th Cong. (2009). The 2013 Sustainable Energy Act died in committee. S. 329, 113th Cong. (2013). The Climate Protection Act failed in committee the same year. S. 332, 113th Cong. (2013)

11. Complaint, *supra* note 2, at ¶ 127.

12. H.R. Res. 109, 116th Cong. (2019). For up-to-date information on the President's environmental rollbacks, see Michael Greshko, *A running list of how President Trump is changing environmental policy*, NAT'L GEOGRAPHIC (Jan. 17, 2019), <https://news.nationalgeographic.com/2017/03/how-trump-is-changing-science-environment/>. As of February 2019, some recent updates include: an executive order to increase logging of forests on federal lands, the Environmental Protection Agency hitting a thirty-year low of criminal prosecutions due to a decreased budget, and the lifting of restrictions on greenhouse gas emissions for coal power plants. *Id.*

harm to our planet and life on it.”<sup>13</sup> Indeed, in February 2019, eight members of Congress filed an amicus brief in support of the *Juliana* plaintiffs, agreeing with plaintiffs that “the intractability of the debates before Congress and state legislatures . . . necessitates a need for the Courts to evaluate the constitutional parameters of the action or inaction taken by the government.”<sup>14</sup>

### B. Brief History of Climate Change Litigation

Addressing government inaction on climate change through litigation is a relatively new strategy. Plaintiffs seeking enforcement and enhancement of climate change regulation have brought claims involving federal statutory, constitutional, state law, and common law claims with varying success.<sup>15</sup> One 2018 study analyzing all domestic climate lawsuits in the United States from 1990–2016 found that antiregulatory outcomes outweigh proregulatory outcomes by a margin of 1.4 to 1.<sup>16</sup> Proregulatory plaintiffs have been most successful in federal statutory litigation, especially under the Clean Air Act (CAA) (in which 54 percent of outcomes favor a proregulatory position).<sup>17</sup> Indeed, it was under the CAA that the Supreme Court decided that the government had the authority to regulate greenhouse gas emissions in *Massachusetts v. EPA*.<sup>18</sup> But proregulatory litigants have been particularly unsuccessful in public trust claims, winning a favorable outcome only 12 percent of the time;<sup>19</sup> the Supreme Court has declined to apply the doctrine broadly and has ruled public trust “remains a matter of state law.”<sup>20</sup> Additionally, while the data suggest proregulatory outcomes in U.S. constitutional claims at a rate of 56 percent, many such victories occur in cases brought by antiregulatory plaintiffs against states for implementation of new regulatory standards, in alleged violation of the Commerce Clause.<sup>21</sup> In no cases have courts recognized a constitutional right to a healthy and stable climate.<sup>22</sup>

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13. Jeromy Hodges et al., *Climate Change Warriors’ Latest Weapon of Choice is Litigation*, BLOOMBERG (May 24, 2018), <https://www.bloomberg.com/graphics/2018-climate-change-lawsuits/> (quoting Julia Olson, attorney for Our Children’s Trust).

14. *Amici Curiae* Brief of Members of the U.S. Congress in Support of the Plaintiffs-Appellees at 6, *Juliana v. United States*, No. 18-36082 (9th Cir. Mar. 1, 2019).

15. See generally *U.S. Climate Change Litigation Database*, SABIN CENTER FOR CLIMATE CHANGE L. (2019), <http://columbiaclimatelaw.com/resources/u-s-litigation-database/>.

16. Sabrina McCormick et al., *supra* note 8, at 829. The authors defined “proregulatory” goals as “forc[ing] government regulators to take steps to reduce GHGs, chang[ing] corporate behaviour, assign[ing] responsibility for impacts and chang[ing] public debate about climate change issues.” *Id.*

17. See *id.* at 830–31 tbl.3.

18. See *Mass. v. EPA*, 549 U.S. 497, 532 (2007).

19. See Sabrina McCormick et al., *supra* note 8, at 831 tbl.4.

20. See *PPL Mont., LLC v. Mont.*, 565 U.S. 576, 603 (2012).

21. See Sabrina McCormick et al., *supra* note 8, at 832.

22. *Id.* at 832.

## II. OVERVIEW OF JULIANA

## A. Relief Sought by Plaintiffs

Given the executive and legislative branches' inaction on climate change, the *Juliana* plaintiffs seek relief from the violation of their constitutional and common law rights.<sup>23</sup> Instead of focusing on violations under a specific federal statute, such as the CAA, Clean Water Act, Comprehensive Environmental Response, Compensation, and Liability Act, or the National Environmental Protection Act (NEPA), they assert that the federal government has not "take[n] obvious steps to address" and ameliorate the known, serious risk of climate change to which they have exposed plaintiffs.<sup>24</sup> The *Juliana* plaintiffs argue that the due process clause of the Fifth Amendment, the equal protection clause of the Fifth and Fourteenth Amendments, and the Ninth Amendment include the right to a livable climate system and healthy environment.<sup>25</sup>

Additionally, plaintiffs seek recognition of an expanded federal public trust doctrine to include atmospheric protection.<sup>26</sup> Granting such relief would require the court to recognize a federal, as opposed to state, public trust doctrine that would protect resources within the public trust from government interference.<sup>27</sup> The plaintiffs also seek a declaration that the federal public trust extends beyond waterways and coastal lands—the traditional scope of state public trust doctrine—to include the atmosphere.<sup>28</sup>

In addition to declaration of these rights and an injunction from further rights violations, plaintiffs most notably seek development and implementation of "a national remedial plan to phase out fossil fuel emissions and draw down

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23. Complaint, *supra* note 2, at ¶ 127.

24. *Id.* at ¶ 285.

25. *Juliana*, 217 F. Supp. 3d at 1262; *See also* Hammersley, *supra* note 9, at 139–42 for a more robust discussion on the *Juliana* plaintiffs' claims to a fundamental right to a healthy climate. Based on Fifth Amendment Due Process Rights, plaintiffs claim that the nation's climate system "including the atmosphere and oceans, is critical to Plaintiffs' rights to life, liberty, and property," and the federal government continues to knowingly harm that climate system in violation of the plaintiffs' and future generation's rights. Complaint, *supra* note 2, at ¶ 279. The second constitutional source of rights plaintiffs look to is equal protection under the Fifth and Fourteenth Amendments, claiming that because they have fundamental rights to a livable climate system, and the government is failing to provide for them and future generations "the same protection of fundamental rights afforded to prior and present generations of adult citizens." *Id.* at ¶ 292. Third and relatedly, the plaintiffs allege further intrusion of their rights under the Ninth Amendment, claiming the right "to be sustained by our country's vital natural systems, including our climate system" is protected from government intrusion under the Ninth Amendment. *Id.* at ¶ 303.

26. Complaint, *supra* note 2, at ¶¶ 307–10. *See* Eric Pearson, *The Public Trust Doctrine in Federal Law*, 24 J. LAND RESOURCES & ENVTL. L. 173, 175 (2004). In state law, the public trust doctrine has been used to restrict legislative and executive action in protection of the resources courts deem as part of the public trust, including marine life, wildlife, navigable and nonnavigable waterways, and other resources. *Id.* However, it has yet to be used by federal courts as a means to restrict federal executive and congressional action "The federal public trust doctrine, in other words, to the extent it has force and effect in federal law at all, supplements federal power rather than restricts it." *Id.*

27. Complaint, *supra* note 2, at ¶ 92.

28. *Id.* at ¶ 96.

excess atmospheric carbon dioxide so as to stabilize the climate system and protect the vital resources on which Plaintiffs now and in the future will depend.”<sup>29</sup> The government has focused its opposition on this proposed remedy, arguing that “the Plaintiffs have not even begun to articulate a remedy within a federal court’s authority to award that could meaningfully address the complex phenomenon of global climate change, much less likely redress their alleged injuries.”<sup>30</sup> The government pointed out that a district court order to the federal government to implement such a plan would “essentially plac[e] a single district court in Oregon . . . in charge of directing American energy and environmental policy,” in a “unprecedented usurpation” of an Article III court’s authority.<sup>31</sup> While Judge Aiken, the district court judge presiding over the case, recognized that the court would have to “exercise great care to avoid separation-of-powers problems in crafting a remedy” if the plaintiffs prevail, she disagreed that such a remedy would be categorically beyond the authority of the court.<sup>32</sup>

### B. Procedural History

On August 12, 2015, the Youth Plaintiffs, Earth Guardians, and Dr. James Hansen filed their complaint against the United States, then President Barack Obama, and eight federal agencies. After the fossil fuel industry intervened on behalf of the defendants, the federal government filed a motion to dismiss.<sup>33</sup> A magistrate judge denied the motions, and Judge Aiken upheld the recommendation in November 2016.<sup>34</sup> Since then, multiple motions by the government to dismiss and delay the case have ping-ponged the case between the district, appellate, and U.S. Supreme Court.<sup>35</sup> While numerous trial dates were set—originally for February and then October 2018—Judge Aiken ultimately certified the case for an interlocutory appeal to the Ninth Circuit before trial to resolve whether the claim involves a nonjusticiable political question.<sup>36</sup> The plaintiffs face serious challenges to their standing and to their

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29. Prayer for Relief, *supra* note 6, at ¶ 7.

30. Appellants’ Opening Brief, *Juliana v. United States*, No. 18-36082, 22 (9th Cir. Feb. 1, 2019).

31. *Id.* at 23.

32. *Juliana*, 217 F. Supp. 3d at 1241.

33. Defendant’s Motion to Dismiss, *Juliana v. United States*, 217 F. Supp. 3d 1224 (D. Or. Nov. 17, 2015) (No. 6:15-cv-1517-TC) (Doc. 27); Order Granting Motion to Intervene, *Juliana v. United States*, No. 6:15-cv-01517-TC

(D. Or. Jan. 14, 2016) (Doc. 15) (order granting the motion to intervene by the National Association of Manufacturers (NAM), the American Fuel & Petrochemical Manufacturers (AFPM), and the American Petroleum Institute (API)).

34. *Juliana*, 217 F. Supp. 3d at 1233–34 (opinion and order denying motion to dismiss). In June, the district court granted the intervenors motion to withdraw. Order Granting Intervenors’ Motion to Withdraw, *Juliana v. United States*, 6:15-cv-1517-TC (D. Or. June 28, 2017).

35. See generally *Juliana v. United States*, CLIMATE CASE CHART (last visited Jun. 4, 2019), <http://climatecasechart.com/case/juliana-v-united-states/>.

36. Certification of Interlocutory Appeal, *Juliana v. United States*, No. 6:15-cv-01517-AA (D. Or. Nov. 21, 2018).

claims that their suit raises justiciable issues.<sup>37</sup> As of March 2019, both parties and numerous amici have filed briefs with the Ninth Circuit to determine whether the case will be remanded back to the district court for trial or end with a dismissal.<sup>38</sup>

### III. SUGGESTIONS FOR CRAFTING A MEANINGFUL REMEDY

If the plaintiffs succeed on the merits of their claim, significant hurdles remain in ensuring the government complies with the court's order to prepare, implement, and enforce a national remedial plan. When courts order government agencies to take actions against which they have litigated, there is likely to be significant "agency foot-dragging."<sup>39</sup> Because the Trump administration continues to demonstrate hostility toward environmental regulation and climate change interventions, it is all but certain that the administration would delay, resist, and obstruct development and execution of a resource-intensive remedial plan to reduce CO<sub>2</sub>. Nevertheless, there is helpful precedent that illustrates how the court might proceed in crafting a sufficient remedy that respects separation of powers concerns and limits the effect of agency foot-dragging. To facilitate real and timely action, the court should consider retaining jurisdiction to monitor progress, holding the government to a realistic but aggressive timeline, and keeping open the prospect of a contempt order if compliance fails.

#### A. Precedent for the Suggested Remedial Strategies

The relief requested by the *Juliana* plaintiffs would be unprecedented. However, the overarching issues likely to arise in compliance with court orders by agencies will not be novel. Although "negotiating agency compliance is a common and wearying task for federal judges,"<sup>40</sup> the urgent need for climate action means that the *Juliana* court must strive to avoid delays in implementation. Given the level of effort that would be required to produce a

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37. *Juliana*, 217 F. Supp. 3d at 1242. On the issue of standing, see, e.g., *Sierra Club v. EPA*, 292 F.3d 895, 902 (D.C. Cir. 2002) (holding that environmental groups challenging the storage and disposal of hazardous sludge did not have standing because they "failed to demonstrate a substantial probability of injury to a single member."); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 (1992) (dismissing because "[r]espondents had not made the requisite demonstration of (at least) injury and redressability."); *Friends of the Earth v. Crown Cent. Petroleum Corp.*, 95 F.3d 358, 362 (5th. Cir. 1996) (holding that the plaintiff's alleged injury, water pollution eighteen miles from a petroleum company's plant was not "fairly traceable" to the company). On the political question issue, see, e.g., *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863 (N.D. Cal. 2009) (questioning how best to address climate change); *People of State of Cal. v. Gen. Motors Corp.*, No. C06-05755 MJJ, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007) (holding that issues raised were political questions); *Comer v. Murphy Oil USA, Inc.*, 839 F. Supp. 2d 849 (S.D. Miss. 2012) (noting a nonjusticiable political question).

38. See generally CLIMATE CASE CHART, *supra* note 35.

39. Michael D. Sant'Ambrogio, *Agency Delays: How a Principal-Agent Approach Can Inform Judicial and Executive Branch Review of Agency Foot-Dragging*, 79 GEO. WASH. L. REV. 1381, 1384 (2011).

40. See Nicholas R. Parrillo, *The Endgame of Administrative Law: Governmental Disobedience and the Judicial Contempt Power*, 131 HARV. L. REV. 685, 689 (2018).

remedial plan, implementation would likely be challenging. But lessons from past cases will help the court enforce any order it issues.

*1. Strategy #1: Retaining Jurisdiction*

First, retaining jurisdiction can prove a useful tool in compelling development and implementation of a complex remedial plan to remedy rights violations. One area where jurisdiction retention occurs with some frequency is in court-ordered school reform plans.<sup>41</sup> In a recent example, the Washington State Supreme Court's retention of jurisdiction was instrumental in enforcing a legislature-designed plan to fulfill its constitutional duty to fully fund schools.<sup>42</sup> There, the court reasoned that retaining jurisdiction "str[uck] the appropriate balance between deferring to the legislature to determine the precise means for discharging its [constitutional] duty, while also recognizing th[e] court's constitutional obligation."<sup>43</sup> It was not until 2018, six years after the Washington Supreme Court's decision to retain jurisdiction, that the state finally complied with the order and implemented a plan to fully fund schools.<sup>44</sup>

Trial courts also often retain jurisdiction in claims under NEPA when plaintiffs have successfully sued to compel defendants to prepare or revise environmental impact statements (EIS).<sup>45</sup> Under NEPA, a federal agency must file an EIS before undertaking "major Federal actions significantly affecting the quality of the human environment."<sup>46</sup> In *Sierra Club v. Penfold*, the Sierra Club sued the Alaska Bureau of Land Management (BLM), arguing that certain mining projects violated federal environmental laws and required EISs.<sup>47</sup> The district court granted partial summary judgement for Sierra Club, ordering BLM to prepare an EIS on the projects.<sup>48</sup> After the district court retained jurisdiction to review the EIS's adequacy, BLM appealed, arguing it was within its competency, not the court's, to evaluate the adequacy of the EIS.<sup>49</sup> On appeal, the Ninth Circuit held that the district court had properly retained jurisdiction to evaluate the adequacy of the EIS without first requiring administrative review.<sup>50</sup>

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41. See, e.g., *McCleary v. State*, 269 P.3d 227 (Wash. 2012) (discussing funding); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (discussing segregation); *Green v. Cty. Sch. Bd.*, 391 U.S. 430 (1968) (discussing segregation); *Roosevelt Elementary Sch. Dist. No. 66 v. Bishop*, 877 P.2d 806, 812 (Ariz. 1994) (discussing funding).

42. See *McCleary*, 269 P.3d at 261.

43. *Id.* at 546.

44. Order Lifting Sanctions at 4, *McCleary v. State*, 173 Wash.2d 477 (Wash. 2012) (No. 84362-7).

45. See 42 U.S.C. § 4332(2)(C) (2012).

46. *Id.*

47. 857 F.2d 1307, 1319 (9th Cir. 1988).

48. *Id.* at 1320.

49. *Id.* at 1320–21.

50. *Id.* at 1322.

### 2. Strategy #2: Court-Imposed Timelines

Second, in developing timelines for compliance, judges often “refrain from imposing hard deadlines . . . but then grant repeated extensions while monitoring the agency’s progress in an attempt to keep from being suckered.”<sup>51</sup> But judicially-imposed deadlines can provide a court with greater opportunity to ensure agency progress through the required rulemaking stages.<sup>52</sup> Accordingly, courts often strike a balance between the potentially drawn-out timelines proposed by reluctant agencies and the unrealistically short proposals of eager plaintiffs. In *California Communities Against Toxics v. Pruitt*, the court held that EPA was overdue in rulemaking mandated by the CAA.<sup>53</sup> The plaintiff, who prevailed in litigation, proposed a one- to two-year timeline for implementation; the EPA proposed a five-year timeline.<sup>54</sup> The Court decided on three years, “a schedule in between that requested by the Plaintiffs and that proposed by the agency.”<sup>55</sup>

Similarly, in *Sierra Club v. Johnson*, another lawsuit under the CAA in which the plaintiff prevailed, the court implemented a regulatory schedule that was “slightly more relaxed than that proposed by plaintiff, but significantly more expedited than that sought by the defendant.”<sup>56</sup> Allowing agencies the opportunity to establish a plan and deadline “in the first instance,”<sup>57</sup> subject to adjustment in view of plaintiffs’ needs or other circumstances, allows courts to reconcile separation of power concerns with the reality of agency foot-dragging.

### 3. Strategy #3: Threats of Contempt

Courts sometimes use the threat of contempt orders which are, on average, “somewhat more effective than statutory deadlines at compelling agency action.”<sup>58</sup> Between 1990 and 2018, a study of U.S. district court dockets found over 1400 suits in which a “contempt motion was made (or a contempt proceeding otherwise initiated) against a federal agency . . . .”<sup>59</sup> However, while federal courts are willing to issue contempt findings against nonperforming agencies, they rarely attach monetary sanctions, since sanctions against agencies are “of uncertain legal availability, due to sovereign immunity.”<sup>60</sup> Instead, the

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51. Parrillo, *supra* note 40, at 689.

52. *Id.* at 776 n.546.

53. 241 F. Supp. 3d 199 (D.D.C. 2017).

54. *Id.* at 202–03.

55. *Id.*

56. 444 F. Supp. 2d 46, 59 (D.D.C. 2006).

57. *Juliana*, 217 F. Supp. 3d at 1241 (quoting *S. Burlington Cty. N.A.A.C.P. v. Mt. Laurel Twp.*, 67 N.J. 151, 336 (1975)).

58. See Sant’Ambrogio, *supra* note 39, at 1432.

59. Parrillo, *supra* note 40, at 696.

60. *Id.* at 697.



contempt orders on their own tend to function as “shame inducing” mechanisms somewhat effective at spurring compliance.<sup>61</sup>

*B. Considerations for the Juliana Court in Remedial Plan Implementation*

How much oversight the district court retains over any remedial phase of the *Juliana* litigation will depend on what role the court views as “appropriate for the judiciary in influencing important environmental, social and economic policy questions.”<sup>62</sup> On the one hand, the *Juliana* defendants argue that ordering the government to prepare and implement the requested remedial plan is beyond the court’s authority.<sup>63</sup> But the court has signaled that it holds a more robust view of the appropriate role of the federal courts, noting that when “confronted with complex and intractable constitutional violations,” federal courts retain “broad authority to fashion practical remedies.”<sup>64</sup> Still, the court acknowledged potential separation of powers concerns which might limit its ability to delineate specific courses of action for each agency.<sup>65</sup>

Given the exigency of the requested relief, the court should provide as much oversight as necessary to ensure implementation of a sufficient government plan if the plaintiffs prevail. Agency foot-dragging in the implementation of statutory or judicial mandates delays the relief owed to plaintiffs. Delayed implementation would have a negative impact on public and private entities that need to adjust their operations to new regulations. For them, delayed agency decision making creates uncertainty and difficulty in defining how impending changes will affect their businesses.<sup>66</sup>

But delayed or ineffective remediation for the *Juliana* plaintiffs would also be dire for people across the country and the world. If global emissions are not slashed by 45 percent below 2010 levels by 2030, the Earth’s temperature will surpass the 1.5 degree rise that will trigger worldwide devastation.<sup>67</sup> The existential threats inherent in the plaintiffs’ suit require immediate action by the federal government. Given the fraught political landscape, responsibility for adequate action may well fall in large part on the judiciary.

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61. *Id.* at 700 (as the Environmental Law Institute put the issue in discussing a case of sanctionless contempt: “Top management [at EPA] takes the threat of contempt quite seriously and personally, even though the threat is not real”).

62. *See* Sabrina McCormick et al., *supra* note 8, at 829.

63. *See* Defendant Motion to Dismiss, *supra* note 33, at 22.

64. *Juliana*, 217 F. Supp. 3d. at 1241–42 (quoting *Brown v. Plata*, 563 U.S. 493 (2011)).

65. *Id.* at 1241 (noting that “this Court would no doubt be compelled to exercise great care to avoid separation-of-powers problems in crafting a remedy. The separation of powers might, for example, permit the court to direct defendants to ameliorate plaintiffs’ injuries but limit its ability to specify precisely how to do so”).

66. *See* Sant’Ambrogio, *supra* note 39, at 1400.

67. *See generally* Masson-Delmotte et al., *Summary for Policymakers*, INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE (2018), [https://www.ipcc.ch/site/assets/uploads/sites/2/2019/05/SR15\\_SPM\\_version\\_report\\_LR.pdf](https://www.ipcc.ch/site/assets/uploads/sites/2/2019/05/SR15_SPM_version_report_LR.pdf).

The district court could consider retaining jurisdiction to monitor progress and quickly resolve any uncertainty regarding the adequacy of plans and implementation. Some climate change advocates might hope the Court takes an active role in delineating the duties of agencies. However, the court has suggested its role would be limited, out of respect for separation of powers concerns, in “specify[ing] precisely” how defendants should ameliorate plaintiffs’ concerns.<sup>68</sup> Additionally, it is beyond the court’s expertise and administrative capacity to direct numerous agencies in addressing the complex regulatory problem of CO<sub>2</sub> emissions.<sup>69</sup> But retaining jurisdiction to review agency responses to a court order would allow the *Juliana* court to “strike[] the appropriate balance” between deference to agencies and recognizing the court’s own duty to protect the plaintiffs’ constitutional rights.<sup>70</sup>

The court could adopt a similar balancing approach in setting deadlines and milestones to ensure compliance in remedial plan implementation. The court would likely hear very different timeline proposals from the plaintiffs and the government. While the court should respect agency estimates of the time needed to comply with a court order, it must take into account the urgent need for the plaintiffs’ remedy in combating climate change.<sup>71</sup> Accordingly, while the court is likely to set a schedule between the two proposals, it should consider setting a more aggressive schedule given the context of climate change.

Finally, the Court should not rule out issuance of contempt orders for agency failures. While a contempt order may not result in monetary sanctions, governmental agencies are responsive to public assessments of their performance, and the shame of being held in contempt has been shown to aid in compliance.<sup>72</sup> Furthermore, a court order may be useful in signaling to Congress when “delays have become unreasonable” and Congress should consider applying its sanctions.<sup>73</sup>

#### CONCLUSION

Each day the *Juliana* case survives in the federal court system is a win for climate activists, including the Youth Plaintiffs. Media coverage of the suit’s progress is elevating the voices of youth as a powerful force in the political process. Judge Aiken declared “the right to a climate system capable of

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68. *Juliana*, 217 F. Supp. 3d at 1241.

69. Parrillo, *supra* note 40, at 765 (“[m]any of the suits that involve fraught compliance negotiations involve a plaintiff trying to force an agency to do something complex that requires expertise (like formulate a regulation), and in those cases, the court will not know what outcome to tell the agency to reach”).

70. See *McCleary v. State*, 173 Wash. 2d 477, 546 (Wash. 2012).

71. See Reidmiller et al., *Impacts, Risks, and Adaptation in the United States: Fourth National Climate Assessment, Volume II*, U.S. GLOBAL CHANGE RESEARCH PROGRAM 26 (“Future risks from climate change depend primarily on decisions made today.”); see generally Masson-Delmotte et al., *supra* note 67. (summarizing the U.N.’s Intergovernmental Panel on Climate Change’s 2018 findings).

72. See Sant’Ambrogio, *supra* note 39, at 1432.

73. See *id.* at 1431.

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sustaining human life is fundamental to a free and ordered society.” Even if the appellate court denies that such a right exists, the decisions and the reasoning supporting it would provide useful information for future litigation strategies.<sup>74</sup> If the case makes it to trial, the federal government would for the first time be required to litigate its policy history and preferences and have them judged not by politics but against scientific evidence.<sup>75</sup> The trial could be a singular opportunity to “demonstrate culpability by the federal government and major fossil fuel producers” for climate change, “thereby paving a way for an effective climate policy in the United States.”<sup>76</sup>

But if the plaintiffs ultimately succeed, it will be imperative that the judge implements the remedy through a realistic, ambitious, and forceful order. If the remedy is granted, enactment will take time, coordination among numerous agencies, a watchful court, and perhaps, the threat of contempt as well as public condemnation. Given constitutional and political constraints on judges in overseeing agency action, even strong judicial oversight is likely to produce relief that is frustrating, bumpy, and slow. Perhaps, by the time the *Juliana* plaintiffs succeed, the makeup of the executive and congressional branches will be more sympathetic to their cause and committed to playing an active role in climate change mitigation. But given the current gridlock of the political branches, an involved and assertive court may offer the best hope for beginning to build the climate system future generations deserve.

*Megan Raymond*

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74. See *Juliana*, 217 F. Supp. 3d at 1250.

75. See Melissa Powers, *Juliana v United States: The Next Frontier in US Climate Mitigation?* 27 REV. OF EUR. COMP. & INT’L ENVTL. L. 1, 2 (2018) (“Now that a federal court has accepted jurisdiction, it could be the first time in the United States that climate science is directly adjudicated before a federal court.”).

76. *Id.* at 2.

**We welcome responses to this In Brief. If you are interested in submitting a response for our online journal, Ecology Law Currents, please contact [cse.elq@law.berkeley.edu](mailto:cse.elq@law.berkeley.edu). Responses to articles may be viewed at our website, <http://www.ecologylawquarterly.org>.**

