Climate Change – Stay Tuned
Juliana v. United States: A Most Unique Lawsuit

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While there is some doubt amongst the political community as to the veracity of global climate change[1] and whether or not the changing climate has been caused by human activities or to what degree, there seems to be little doubt amongst the scientific community about its legitimacy and the harm it is causing the environment, our economy[2], and the health of future generations. That is the basis for a lawsuit that has been brought against the Federal Government, seeking to compel the government to take further action to protect future generations against the harmful effects of climate change.

In August 2015, a group of 21 young plaintiffs (ages 8 to 19) brought a lawsuit, Juliana, et al v United States of America, et al[3], in the United States District Court for the District of Oregon alleging violations of their Civil Rights. This is certainly not the first and only climate case to have been pursued in our court system, as there are other state and federal court cases that have sought, for example, to force the government to take certain statutory or regulatory actions, such as actions authorized under the Clean Air Act to regulate greenhouse gas emissions. However, this case is

[1] "Brutal and Extended Cold Blast could shatter ALL RECORDS - Whatever happened to Global Warming?" – President Donald Trump via Tweet, @realDonaldTrump, 11/21/18. See also The Washington Post, 11/27/18. "The president said that "I don't see" climate change as man-made and that he does not believe the scientific consensus. 'One of the problems that a lot of people like myself, … we're not necessarily such believers,' Trump said. See **Washington Post**, *Trump slams Fed chair, questions climate change and threatens to cancel Putin meeting in wide-ranging interview with The Post*, Philip Rucker, Josh Dawsey, and Damian Paletta)

[2] (See generally the report called the FOURTH NATIONAL CLIMATE Volume II: Impacts, Risks, and Adaptation in the United States, issued by a multi-Executive Agency group, U.S. Global Change Research Program (USGCRP), issued under The Global Change Research Act of 1990, which mandates that the USGCRP deliver a report to Congress and the President no less than every four years. https://nca2018.globalchange.gov/.)

[3] Case No. 6:15-cv-01517-TC

groundbreaking because the Plaintiffs are making certain Constitutional claims and Public Trust Doctrine claims regarding the rights of our youngest generation to enjoy an environment free from the potential harms wrought by climate change.

Juliana, one of the 21 plaintiffs and the lead plaintiff in this case, is also known by her full name Kelsey Cascadia Rose Juliana. Kelsey, 19 years old, is an interesting and inspiring young adult. A citizen of the U.S. and a resident of Eugene, Oregon and was born and raised in Oregon, Kelsey walked 1,600 miles from Nebraska to Washington D.C. in the Great March for Climate Action to raise awareness about the climate crisis during the fall of 2014. Kelsey alleges real harm caused "by the Defendants' actions and inactions regarding carbon pollution and the resulting climate destabilization and ocean acidification. Specifically, Defendants' actions have caused damage to and continue to threaten the resources on which she relies for her survival and wellbeing. Kelsey depends on the freshwaters of Oregon for drinking, hygiene, and recreation. She drinks the freshwater that flows from the McKenzie River and drinks from springs in the Oregon Cascades on hiking, canoeing, and backpacking trips. Kelsey also depends upon the marine and estuarine waters of Oregon as a food source and a place of recreation and vacationing[4]."

The other plaintiffs are from diverse locations all over the United States. Many are from Oregon or have some direct connection to the state, while others are from states including Alaska, Arizona, Colorado, New York, etc. Some plaintiffs are of Native American heritage, and all of them allege some direct harm caused by, and that is expected to be exacerbated by, climate change. Finally, one plaintiff, a 16-year-old citizen from Pennsylvania, is represented by her guardian and Grandfather, Dr. James Hansen, the former director of the NASA Goddard Institute for Space

[4] First Amended Complaint, ¶ 16

Studies and a well-known Climatologist, Astrophysicist, and Adjunct Professor at Columbia University[5]. Interestingly, Dr. Hansen is also a plaintiff, acting as a Guardian for future generations of Americans that will potentially be harmed by climate change.

The Plaintiffs contend that federal defendants' policy on fossil fuels infringes upon "Plaintiffs' fundamental constitutional rights to life, liberty, and property[4]" without due process of law; the policy impermissibly discriminates against "young citizens, who will disproportionately experience the destabilized climate system in our country[6];" and it fails to live up to federal defendants' obligations to hold certain essential natural resources in trust for the benefit of all citizens. These complaints are framed as a constitutional argument, the claim being that the government has violated the youngest and our future generation's fundamental rights, a violation of the Due Process Clause of the Fifth Amendment.

The Plaintiffs alleged at the outset of their complaint that the U.S. government has known about the damaging effects of climate change for over fifty years, stating "that carbon dioxide ("CO_2") pollution from burning fossil fuels was causing global warming and dangerous climate change, and that continuing to burn fossil fuels would destabilize the climate system on which present and future generations of our nation depend for their wellbeing and survival[7]." The Plaintiffs further alleged that the federal government continued policies that were detrimental and destabilizing to the climate, stating "Defendants [the Federal Government] also knew the harmful impacts of their actions would significantly endanger Plaintiffs, with the damage

[5] http://www.columbia.edu/~jeh1/
[6] Id. at ¶ 8
[7] Id. at ¶ 1.

persisting for millennia. Despite this knowledge, [the Federal Government] continued [its] policies and practices of allowing the exploitation of fossil fuels[8]."

The Plaintiffs have outlined a number of ways in which they seek the court to redress their complaints. First and primary among their claims for relief is that the Plaintiffs hope to persuade the court to declare that the "Defendants have violated and are violating Plaintiffs' fundamental constitutional rights to life, liberty, and property by substantially causing or contributing to a dangerous concentration of CO_2 in the atmosphere, and that, in so doing, Defendants dangerously interfere with a stable climate system required by our nation and Plaintiffs alike[9]."

Furthermore, the Plaintiffs would like the court to order "Defendants to prepare a consumption-based inventory of U.S. CO_2 emissions; and to prepare and implement an enforceable national remedial plan to phase out fossil fuel emissions and draw down excess atmospheric CO_2 so as to stabilize the climate system and protect the vital resources on which Plaintiffs now and in the future will depend[10]." More specifically, the Plaintiffs would also like the court to declare a section of the Energy Policy Act facially unconstitutional, and to invalidate a DOE contract to export Liquid Natural Gas from the planned Coos Bay terminal in Oregon, to be operated by Jordan Cove Energy, as unconstitutional.

In summary, the Plaintiffs hope for the court to issue an order requiring the president, through his Executive Agencies, policies, and other powers, to immediately implement a national plan to decrease atmospheric concentrations of carbon dioxide to a safe level. The benchmark safer CO_2 level is 350 ppm, which the Plaintiffs hope to achieve by the year 2100 and is based on

[8] Id.
[9] Id. at "Prayer for Relief," ¶ 1.
[10] Id. at "Prayer for Relief," ¶ 7-8.

commonly accepted climate science as a legitimately safer level[11], but also a number that seems like it will be very difficult to achieve, given our society's dependence on carbon-based fuels for transportation and energy needs, in addition to the rapid increase in the use of those fuels in developing and growing countries such as China and India.

Thus far, the federal government has very persistently, yet so far unpersuasively, tried to prevent this case from ever going to trial. While a review of the entire case record would take up considerable length, a review of the key points on the timeline will be highlighted. The fossil fuel industry initially intervened in the case as defendants, joining the U.S. government in trying to have the case dismissed, but later requested to withdraw from the case, after initial motions to dismiss the case were denied. The first motions to dismiss were decided in April 2016, when U.S. Magistrate Judge Thomas Coffin ruled in favor of the climate plaintiffs, recommending denial of both motions. Magistrate Judge Coffin characterized the case as an "unprecedented lawsuit" addressing "government action and inaction" resulting "in carbon pollution of the atmosphere, climate destabilization, and ocean acidification."

U.S. District Court Judge Ann Aiken upheld Magistrate Judge Coffin's recommendation, with the issuance of an historic November 10, 2016 opinion and order denying the motions. Judge Aiken wrote: "**This is no ordinary lawsuit. This lawsuit is not about proving that climate change is happening or that human activity is driving it. For the purposes of this motion, those facts are undisputed**. The questions before the court are whether defendants are responsible for some of the harm caused by climate change, whether plaintiffs may challenge defendants'

[11] A recent CO_2 atmospheric level was 409.18 ppm as of 12/3/18, compared to 407.04 ppm on 12/3/17.

climate change policy in court, and whether this court can direct defendants to change their policy without running afoul of the separation of powers doctrine."

When the government sought an interlocutory appeal of that order, Judge Aiken denied their motions. In July, 2017, the government promptly filed a writ of mandamus to the Ninth Circuit Court of Appeals to dismiss the case. After oral arguments at the Ninth Circuit the court on March 7, 2018 issued an opinion rejecting the Trump administration's "drastic and extraordinary" petition for writ of mandamus. Shortly thereafter, U.S. Magistrate Judge Thomas Coffin set October 29, 2018 as the trial date for Juliana v. United States, and then the Judge followed that with an order denying the Trump Administration's motion for protective order and a stay of all discovery. Next, in mid-July U.S. District Court Judge Ann Aiken heard oral arguments and considered the government's next effort to end the lawsuit, a motion for summary judgment and motion for judgment on the pleadings. Two days later, the Ninth Circuit Court rejected the Trump administration's second petition for writ of mandamus.

On July 30, 2018 the U.S. Supreme Court unanimously denied the Trump administration's application for stay, preserving the U.S. District Court's trial start date of October 29, 2018. The Court also denied the government's "premature" request to review the case before the district court had the opportunity to hear all of the facts that support the youth's claims at trial. Later then, in October 2018, the Trump administration filed another motion with the U.S. District Court for the District of Oregon to stay discovery and a third writ of mandamus petition with the Ninth Circuit Court of Appeals.

On October 15, 2018, U.S. District Court Judge Ann Aiken denied the motions brought by the Trump administration, but granted the motions in part by limiting the scope of the plaintiffs' claims and dismissed the President from the case. Three days later, the Trump administration filed

a second writ of mandamus petition and application for stay with the U.S. Supreme Court, asking it to circumvent the ordinary procedures of federal litigation and stop the constitutional case Juliana v. United States. On October 19, 2018, the U.S. Supreme Court ordered a temporary, administrative stay while it considered the federal government's petition and asked plaintiffs to respond to it.

However, this response by the Court was possibly due the fact that Justice Anthony Kennedy, the Circuit Justice who had been responsible for the Ninth Circuit prior to his retirement, had retired at the end of July. His successor, Justice Brett Kavanaugh was confirmed to the Court only a short time prior to this point on October 6, 2018, and Chief Justice John Roberts had been temporarily acting as the Circuit Justice for the Ninth Circuit. On October 19, new Circuit Assignments were released by the Court, and now Justice Elena Kagan was assigned as the Circuit Justice of the Ninth Circuit. Circuit Justices are primarily responsible for dealing with certain types of applications that, under the Court's rules, may be addressed by a single justice, such as emergency requests[12], and therefore it seems that the temporary stay issued by the U.S. Supreme Court may have been related to these changes. With additional time for review, however, the Court remained true to previous rulings, as U.S. Supreme Court again denied the Trump administration's application for stay on November 2, 2018.

On November 5, the Department of Justice was back to the District Court, having failed to win over the Supreme Court, and it filed a motion for stay with the U.S. District Court for the District of Oregon and hours later filed an application for stay and another petition for a writ of

[12] Amy Howe, Court issues new circuit assignments, SCOTUSblog (Oct. 19, 2018, 2:21 PM), http://www.scotusblog.com/2018/10/court-issues-new-circuit-assignments/

mandamus with the Ninth Circuit Court of Appeals. On November 8, a panel of the Ninth Circuit Court of Appeals granted, in part, the Trump administration's motion for a temporary stay of District Court proceedings. Then, on November 21, 2018 Judge Aiken reluctantly certified the case for an Interlocutory Appeal to the Ninth Circuit Court of Appeals. Therefore, the trial has been put on hold pending further review by the Ninth Circuit Court, but the court only placed a temporary stay on the trial, so trial preparations are continuing. It is not clear when the Ninth Circuit will rule on the case now, but Judge Aiken indicated she would promptly issue a trial date once the Ninth Circuit lifts the temporary stay it placed on trial.

If, or when, the case does eventually proceed to trial, it is expected that there will be significant media coverage of the trial. It is also safe to expect continued appeals by the federal government in this matter, given their history of challenges and appeals at nearly every possible juncture of this case thus far, especially if trial continues all the way through to a verdict. The main issue here for the plaintiffs will be "Convincing a jury in the federal courtroom that (a constitutional right to a stable climate system) has been abrogated by the government as trustee in ignoring greenhouse gas emissions and changing atmospheric conditions while supporting the fossil-fuel industry will be the job of the plaintiffs." Opinions in this case are likely to hinge upon whether the issue is viewed as a political question, which the courts generally leave to the political (legislative/executive) branches of government, or whether it is viewed as a legitimate Constitutional right and issue. Other cases, particularly in state courts, are likely to proceed as well.

This case is certainly a most-unique and groundbreaking one, and recently released scientific reports and other news reports seem to support the plaintiff's position, including the recently released National Climate Assessment report. This Assessment is a requirement of

legislation signed during the administration of the late-President George H.W. Bush, the Global Change Research Act of 1990. Stay tuned, we will keep you informed.