

“On the Eve of Destruction”: Courts Confronting the Climate Emergency*

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In the dim and smokey twilight, with only bare necessities in tow, a family rushes to escape the wildfire racing toward them. Elsewhere, a household evacuates just ahead of a category five hurricane, perhaps not for the first time. Along the coastlines, countless others are resigned to looking on as their homesites erode into the inexorably rising surf. At this moment, millions of Americans are forced to reckon with the horrors of the climate catastrophe, and the number of such people who now viscerally grasp our grim climate reality grows every day. Even the judges of this nation prove no exception to this trend. Enveloped by smoke from a recent wildfire, a Washington appellate court judge remarked to a government attorney in an atmospheric trust litigation case: “I can’t go outside. If I go outside, I’m threatening my life. I have asthma, so I have to stay inside with the windows shut—I don’t have an air conditioner. Why isn’t that affecting my life and my liberty?”¹ Amidst a full-blown climate emergency in which the fate of Humanity rests, this article argues that our judiciary system is equipped—and is Constitutionally duty bound—to provide the people of our nation a remedy for the extraordinary government malfeasance that has brought our nation, and indeed the world, this climate calamity.

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1. Opening remarks at the Fuchs Lecture, University of Indiana (October 30, 2020), available at <https://www.youtube.com/watch?v=WaHUQ5e1SBw> (quoting from the Oral Argument at 16:28, *Aji P. by & through Piper v. State*, 480 P.3d 438 (Wash. Ct. App. 2021) (No. 80007-8), <https://www.tvw.org/watch/?clientID=9375922947&eventID=2020091079&autoStartStream=true>).

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INTRODUCTION

This article explores the role of the courts in our climate emergency. It begins by appraising our climate reality and then illuminating the governmental malfeasance that delivered our nation this existential threat. It will suggest that the climate crisis worsened to the point of all-out emergency due to an imbalance of power between the three branches of government and a colossal failure of constitutional checks and balances. Essentially unbridled discretion grew in the executive branch, which used environmental laws to advantage fossil fuel corporations even as the mounting peril of their products was patently clear. Over the course of several presidential administrations, a dispassionate and ineffective judiciary failed to protect the country from a mounting ecological tyranny wielded by environmental agencies—to the point that little restraint existed when the Trump administration floored the accelerator on fossil fuel development, speeding the nation, and the entire world, toward the climate cliff.² The World Meteorological Organization has predicted that

2. See Expert Report of James E. Hansen, Ph.D. 7, *Juliana v. United States*, 217 F. Supp. 3d 1224, 1260 (D. Or. 2016), rev’d & remanded, 947 F.3d 1159 (9th Cir. 2020) (No. 6:15-cv-01517-TC), available at http://climatecasechart.com/wp-content/uploads/sites/16/case-documents/2019/20190207_docket-18-36082_declaration-15.pdf (“The present Defendants under the Trump Administration – building upon the actions of prior administrations in allowing, permitting, and subsidizing fossil fuel interests to exploit our reserves and treat the atmosphere as a dumping ground for waste carbon dioxide (CO₂) and

the earth will blow past the key temperature target of 1.5 degrees Celsius in the next five years.³

Against such climate reality, this article then examines the leading American climate case, *Juliana v. United States*.⁴ The lawsuit was brought in 2015 against the Obama administration on behalf of twenty-one youth plaintiffs who challenged the entire American fossil fuel system.⁵ The young plaintiffs sought a declaration that their government, by controlling the fossil fuel energy system responsible for destroying the climate system upon which all life, liberty, and property depends, was violating their fundamental rights under the due process clause of the Constitution and the venerable public trust principle. They further sought injunctive relief ordering government defendants to develop a remedial plan to decarbonize the energy system and take actions to restore the climate system according to scientifically developed standards—before society passes points of no return that would trigger uncontrollable, runaway heating that is not survivable. The ambition of these twenty-one plaintiffs, combined with the rank urgency of stopping climate destabilization, evoked a characterization of this lawsuit as “the biggest case on the planet.”⁶

The plaintiffs secured a decisive and sweeping victory in the U.S. District Court for the District of Oregon, which announced for the first time ever a constitutionally

other greenhouse gases (GHGs) – has flooded the emissions accelerator and thus hurdles Plaintiffs, their progeny, and the natural world as we have come to know it, towards climate points of no return.”); *see also* *Juliana v. United States*, 947 F.3d 1159, 1176 (9th Cir. 2020) (dissenting opinion of J. Staton, describing the climate emergency).

3. Press Release, World Meteorological Org., New Climate Predictions Increase Likelihood of Temporarily Reaching 1.5 °C in Next 5 Years (May 27, 2021), <https://public.wmo.int/en/media/press-release/new-climate-predictions-increase-likelihood-of-temporarily-reaching-15-c-next-5>. A draft report by the UN Intergovernmental Panel on Climate Change (IPCC) released to the press in June 2021 underscores the gravity of the climate crisis. *See* Marlow Hood, *Crushing Climate Impacts to Hit Sooner than Feared: Draft UN Report*, PHYSORG (June 23, 2021), <https://phys.org/news/2021-06-climate-impacts-sooner.html> (summarizing the report as concluding that “dangerous thresholds are closer than once thought, and dire consequences stemming from decades of unbridled carbon pollution are unavoidable in the short term,” and “[s]pecies extinction, more widespread disease, unliveable heat, ecosystem collapse, cities menaced by rising seas—these and other devastating climate impacts are accelerating and bound to become painfully obvious before a child born today turns 30.”).

4. 947 F.3d 1159 (9th Cir. 2020). For a detailed analysis of the case, see Michael C. Blumm & Mary Christina Wood, “*No Ordinary Lawsuit*”: *Climate Change, Due Process, and the Public Trust Doctrine*, 67 AM. U. L. REV. 1 (2017).

5. *Juliana*, 947 F.3d at 1165.

6. Laura Parker, ‘*Biggest Case on the Planet*’ Pits Kids v. Climate Change, NATIONAL GEOGRAPHIC (Nov. 9, 2018), <https://www.nationalgeographic.com/science/article/kids-sue-us-government-climate-change>; John D. Sutter, *Meet the Mom Litigating the ‘Biggest Case on the Planet*, CNN (Sept. 16, 2013), <https://www.cnn.com/2016/09/12/opinions/sutter-julia-olson-climate-kids-profile/index.html>; *see also* Chelsea Harvey, *Trump Could Face the ‘Biggest Trial of the Century’—Over Climate Change*, WASH. POST (Dec. 1, 2016), <https://www.washingtonpost.com/news/energy-environment/wp/2016/12/01/trump-could-face-the-biggest-trial-of-the-century-over-climate-change/>.

grounded right to a “climate system capable of sustaining human life.”⁷ But this remarkable case did not proceed to trial. Instead, it was taken by the Ninth Circuit on an interlocutory appeal and dismissed by a bitterly divided appellate panel of three judges. The majority and dissenting opinions articulate two profoundly different judicial roles—paradigms explored in this article. The majority opinion dismissing the case, penned by Judge Andrew Hurwitz and joined by Judge Mary Murguia, suggests that the judiciary has no conceivable role addressing the climate crisis and that the matter must be left to the two political branches—the very branches that delivered this emergency to the American public in the first place. The opinion solidifies the imbalance of power by casting courts in what this article calls a “passive umpire” role. This role typifies the court’s function in simpler cases brought under narrow environmental statutes—cases that end in clear wins or losses and, in the case of victories for plaintiffs, usually result in straightforward remands to the agency. Such rulings characteristically terminate judicial involvement altogether.

The dissent by Judge Staton positions the court to squarely confront the reality of the climate emergency and avail itself of a last chance at forcing government to slam the brakes on the fossil fuel system before our agencies push the nation (and indeed the world) over the climate precipice. Judge Staton’s vision of judicial involvement falls directly in line with that of other civil rights cases dealing with constitutional rights violations: desegregation, treaty rights, and prisoners’ rights cases. In these cases, government’s violations reflect longstanding, baked-in, institutional disregard for constitutional protections, and the remedy is not a simple remand. Instead, the court serves what this article calls an “engagement role” in which the judge uses problem-solving tools as well as skilled mediation techniques to arrive at broad declaratory relief and remedial plans designed to correct the dysfunction that caused the agency to violate the plaintiffs’ constitutional rights. These cases may entail extended judicial involvement, sometimes lasting over many decades, to correct the course of the defendants’ institutional malfeasance and establish safeguards to ensure the agencies will not slip into recidivism. To Judge Staton, this judicial role, requested by the plaintiffs, was reasonable and feasible, grounded in ample precedent, with tools readily applicable to the climate crisis despite its unprecedented and daunting complexity.⁸ As this article later explains, the clear momentum of international cases is in line with Judge Staton’s view, as more and more courts are holding their governments accountable for climate action.

After an unsuccessful petition for *en banc* review before the Ninth Circuit, the groundbreaking *Juliana* case is back in the Oregon district court where plaintiffs are engaged in settlement conferences with the new presidential administration and also await a decision on a motion to amend their complaint to adjust the remedy they are seeking. The article ends by suggesting the climate-specific parameters of a judicial role in this next phase of the *Juliana* litigation and, more broadly, in cases around the globe.

7. *Juliana v. United States*, 217 F. Supp. 3d 1224, 1250 (D. Or. 2016), *rev’d & remanded*, 947 F.3d 1159 (9th Cir. 2020).

8. *Juliana*, 947 F.3d at 1175-1190 (Staton, J., dissenting).

I. ALIGNING A LEGAL APPROACH WITH THE LAWS OF NATURE AND THE
FOUNDATIONAL PUBLIC TRUST

The climate crisis puts human life in grave peril. Laws that fail to fully confront this reality will prove to be irrelevant, abstract, and ineffectual. As Oren Lyons, educator and faithkeeper of the Onondaga Nation, puts it: “The thing that you have to understand about nature and natural law is, there’s no mercy . . . There’s only Law.”⁹ In other words, Nature, not Congress, wields the supreme laws by which we must abide.¹⁰ Our edifice of environmental law, immense as it is and operative for over half a century, has come altogether unhinged from the arrangement that Nature established to keep our climate system in balance. For decades, the U.S. government has commandeered statutory law to actually repudiate those supreme laws of Nature by invoking permit systems to legalize colossal landscape damage and unfathomable amounts of pollution—contaminating the waters, poisoning the soils, and flooding the atmosphere with greenhouse gas emissions. Journalist Elizabeth Kolbert sums it up: “It may seem impossible to imagine that a technologically advanced society could choose, in essence, to destroy itself, but that is what we’re now in the process of doing.”¹¹

Any discussion of government’s role in climate crisis must be framed by the deepest obligations of sovereignty itself as tied to those laws of Nature. While many foundational rights exist in specific form in constitutions designed to organize democracies, the ecological rights of all sovereigns toward their citizens reside most anciently in the public trust principle, a primordial doctrine with roots tracing to the Roman *Institutes of Justinian*.¹² This principle animates legal systems throughout the world.¹³ It characterizes vital natural resources as a “trust,” a lasting ecological endowment meant to sustain society into perpetuity. The ecological wealth comprises the “*res*” of the trust and is owned in common by the citizens as present and future beneficiaries. Government is the trustee of this invaluable commonwealth and must manage it strictly for the benefit of its citizens. As many courts have held, the trust principle prohibits government (with narrow exceptions) from allowing “substantial impairment” of the trust.¹⁴ Because the trust principle conceives of

9. Tim Knauss, *Onondaga Faithkeeper Oren Lyons Speaks Out on the Environment: ‘Business as Usual is Over’*, SYRACUSE.COM (Mar. 23, 2019, 10:02 AM), https://www.syracuse.com/progress/2008/02/onondaga_faithkeeper_oren_lyon.html.

10. Throughout this article, the words “Nature” and “Humanity” are capitalized to reflect the universal instrumentality of each as bearing on the climate crisis.

11. Elizabeth Kolbert, *The Climate of Man—III*, THE NEW YORKER (May 1, 2005), <https://www.newyorker.com/magazine/2005/05/09/the-climate-of-man-iii>.

12. See Justinian I, *The Institutes of Justinian* 603–30 (Thomas C. Sandars trans., Chicago, Callaghan & Co. 5th ed. 1876) (533 AD). The principles set forth in this section are explained in detail in MARY CHRISTINA WOOD, *NATURE’S TRUST: ENVIRONMENTAL LAW FOR A NEW ECOLOGICAL AGE* 143-229 (2013) [hereinafter WOOD, *NATURE’S TRUST*]. This article summarizes and does not repeat that discussion.

13. See MICHAEL C. BLUMM & MARY CHRISTINA WOOD, *THE PUBLIC TRUST DOCTRINE IN ENVIRONMENTAL AND NATURAL RESOURCES LAW* Ch. 11 (3d ed. 2021) (surveying international decisions).

14. *Id.* at 8.

rivers, wildlife, streambeds, and the atmosphere itself as discernable components of the “*res*,”¹⁵ it requires legal systems to align environmental mandates with the laws of Nature.

The public trust principle’s macro approach, geared to the holistic requirements of sustaining a resource in its totality, differs greatly from the compartmentalized, fractured procedural requirements of environmental statutes that come to bear in myopic fashion on singular actions.¹⁶ The Clean Air Act, Clean Water Act, Endangered Species Act, and National Environmental Policy Act (NEPA), for example, will be triggered by individual harmful actions—such as a proposed oil lease, a proposed industrial plant, or a proposed discharge of pollution,—and their legal force scopes only to those discrete actions, shutting out the big picture of resource health. By contrast, the public trust scrutinizes the trustee’s overall management of the natural asset—the river, wetland, species, or atmosphere—and stays unyielding on this point: government has a fiduciary obligation to sustain this endowment to support a flourishing society into the future.¹⁷ In this framework, survival resources remain quintessential public property belonging to posterity, and government’s clear responsibility is to manage such ecological wealth strictly for the endurance of society itself, for the benefit of both present and future citizens—not for the advantage of private parties or profiteers who may seek to despoil the trust and appropriate it for their own purposes.¹⁸

Grounded in the logic of survival and inter-generational justice, the principle has been operational in the United States since the nation’s beginning and continues to influence cases worldwide (though many courts in other nations simply express the principle as a duty to future generations).¹⁹ Many judges, scholars, and lawyers find that the doctrine has constitutional underpinnings as an attribute of sovereignty itself.²⁰ Professor Gerald Torres and Nathan Bellinger describe the trust as a slate “on which the constitution is written,”²¹ embracing “inherent rights that pre-date[] the United States Constitution.”²² At its core, the principle remains essentialist and democratic, securing “inherent and inalienable” public property rights²³ originally reserved through the people’s social contract with their sovereign government.

15. *Id.* at Chapters 3-9.

16. For discussion, see WOOD, NATURE’S TRUST, *supra* note 12, at 54-57, 143-44.

17. For discussion, see *id.* at 167-75.

18. For discussion, see *id.* at 179-81.

19. See BLUMM & WOOD, *supra* note 13, at 449.

20. See *Juliana v. United States*, 217 F. Supp. 3d 1224, 1260 (D. Or. 2016), *rev’d & remanded*, 947 F.3d 1159 (9th Cir. 2020) (“Public trust claims are unique because they concern inherent attributes of sovereignty.”). See also WOOD, NATURE’S TRUST, *supra* note 12, at Ch. 6.

21. Gerald Torres & Nathan Bellinger, *The Public Trust: The Law’s DNA*, 4 WAKE FOREST J. L. & POL’Y 281, 288 (2014).

22. *Id.*

23. *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 947-48 (Pa. 2013) (further describing such rights as “of such ‘general, great and essential’ quality as to be enconced as ‘inviolable’”); see also Order Affirming the Department of Ecology’s Denial of Petition for Rule Making, *Foster v. Wash. Dep’t of Ecology*, No. 14-2-25295-1 SEA (Wash. Super. Ct. Nov. 19, 2015); *Juliana v. United States*, 217 F. Supp. 3d 1224, 1260 (D. Or. 2016), *rev’d & remanded*, 947 F.3d 1159 (9th Cir. 2020).

Public trust rights thus function as a restraint exercised by citizens against their government.

In the United States, these rights are fundamentally American, as they originate in the sovereign compact, but they are less familiar than rights focused on the individual—such as the freedom of religion or equal protection. Public trust rights materialize as collectively-held property rights. As the U.S. Supreme Court decided in the landmark public trust case, *Illinois Central Railroad Co. v. Illinois*,²⁴ a state legislature could not convey away to a private railroad corporation the lakebed of Lake Michigan in which “the whole people are interested.”²⁵ Justice Field proclaimed, “The sovereign power itself, therefore, cannot, consistently with the principles of the law of nature and the constitution of a well-ordered society, make a direct and absolute grant of the waters of the state, divesting all the citizens of their common right. It would be a grievance which never could be long borne by a free people.”²⁶

By enforcing a trust over crucial resources, courts prevent any present set of legislators from wielding so much power over ecology as to cripple future legislatures in meeting their citizens’ needs. Moreover, courts make clear that the legislature cannot abdicate the trust because it remains an “attribute of sovereignty,” a constitutive principle that government cannot shed. As a federal district court explained: “The trust is of such a nature that it can be held only by the sovereign, and can only be destroyed by the destruction of the sovereign.”²⁷ Holding constitutional force, the principle is perpetually binding on legislatures and agencies.²⁸

The public trust doctrine can only serve its fundamental purpose if enforced by the courts.²⁹ In this way, the public trust falls in step with a recursive theme throughout history: courts embody a unique role in our constitutional democracy, assigned the duty to enforce the fundamental and inherent rights of citizens against their own government. If the Court in *Illinois Central* was the manifestation of this constitutional role in 1892, the *Juliana* case is the manifestation of this same role today, though the stakes are exponentially greater than in earlier times, likely greater than the *Illinois Central* Justices could possibly have imagined. Never in America’s history has the underlying prospect of political environmental tyranny in our democratic system been brought to the fore so dramatically in the form of a court proceeding. While Justice Field said it “would not be listened to” that the great shoreline of Lake Michigan could fall into private hands,³⁰ the question today is whether it will “be listened to”—and indeed judicially affirmed—that the climate

24. 146 U.S. 387 (1892).

25. *Id.* at 453.

26. *Id.* at 456 (quoting *Arnold v. Mundy*, 6 N.J.L. 1, 78 (1821)).

27. *United States v. 1.58 Acres of Land*, 523 F. Supp. 120, 124 (D. Mass. 1981).

28. See WOOD, NATURE’S TRUST, *supra* note 12, at Chapter 6.

29. See *Stix v. Comm’r*, 152 F.2d 562, 563 (2d Cir. 1945); see also *United States v. Mitchell*, 463 U.S. 206, 226 (1983) (noting, in the context of Indian trust doctrine, that a “fundamental incident” of the trust relationship is “the right of an injured beneficiary to sue the trustee for damages resulting from a breach of the trust”).

30. *Illinois Cent. R.R. Co.*, 146 U.S. at 455.

system sustaining all life on Earth will collapse, largely at our government's own doing³¹ in its ambition to deliver short-term advantages to the fossil fuel industry.

II. THE CLIMATE IMPERATIVE

Justice Holmes wrote that the common law embodies “the felt necessities of the time.”³² To evaluate any legal approach to the climate emergency, we must first determine what Nature requires to maintain society's stability and to perpetuate the ecological endowment for present and future generations. In this regard, leading scientists emphasize the need to bring atmospheric carbon dioxide back down to 350 parts per million—the highest level at which the planet and its inhabitants can remain generally safe.³³ Present levels soar above that, at 418 parts per million, as fossil fuel emissions continue to spew carbon dioxide and methane gas into our atmosphere.³⁴ It is projected that the current “business as usual” trajectory will lock in a temperature rise of eleven degrees Fahrenheit over pre-industrial temperatures by the end of the century, and possibly much earlier.³⁵ Such heating is not broadly survivable.³⁶ Children born today will face a world in cataclysmic collapse if Humanity fails to rapidly change course.³⁷ Indeed, courts across the world are now grasping the

31. See Complaint at 1, *Juliana v. United States*, 217 F. Supp. 3d 1224, 1260 (D. Or. 2016), *rev'd & remanded*, 947 F.3d 1159 (9th Cir. 2020) (No. 6:15-cv-01517-TC) (compiling evidence of U.S. government's affirmative fossil fuel policy over decades); *id.* at 7 (“[T]he United States is responsible for 25.5% of global historic cumulative CO2 emissions.”). See also Tim Dickerson, *U.S. Becomes Net Oil Exporter As World Burns*, ROLLING STONE (June 7, 2021), <https://www.rollingstone.com/politics/politics-news/u-s-becomes-net-oil-exporter-as-world-burns-1179815/> (describing “America's emergence as a petroleum superpower”).

32. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 3 (Harv. Univ. Press 2009) (1881).

33. See *infra* note 253 and accompanying text; James Hansen et al., *Assessing “Dangerous Climate Change”: Required Reduction of Carbon Emissions to Protect Young People, Future Generations and Nature*, 8 PLOS ONE 1, 4 (2013), <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0081648>.

34. Nat'l Oceanic & Atmospheric Admin., *Trends in Atmospheric Carbon Dioxide*, GLOB. MONITORING LAB'Y, <https://gml.noaa.gov/ccgg/trends/> (Aug. 5, 2021).

35. Steven C. Sherwood & Matthew Huber, *An Adaptability Limit to Climate Change Due to Heat Stress*, 107 PNAS 9552, 9552 (2010).

36. See DAVID WALLACE-WELLS, *THE UNINHABITABLE EARTH: LIFE AFTER WARMING* (2019); Andrew Freedman & Jason Samenow, *Humidity and Heat Extremes Are on the Verge of Exceeding Limits of Human Survivability, Study Finds*, WASHINGTON POST (May 8, 2020) (reporting study that warns that highly populated regions of the world will be rendered uninhabitable sooner than previously thought for parts of the year); Nafeez Ahmed, *New Report Suggests ‘High Likelihood of Human Civilization Coming to an End’ Starting in 2050*, VICE (June 3, 2019).

37. See Sherwood & Huber, *supra* note 36. As a climate scientist put it recently, “[I]t is impossible to just engineer our way out of this” Oliver Milman, *Global Heating Pace Risks ‘Unstoppable’ Sea Level Rise as Antarctic Ice Sheet Melts*, GUARDIAN, <https://www.theguardian.com/environment/2021/may/05/antarctica-ice-sheet-melting-global-heating-sea-level-rise-study> (Aug. 25, 2021, 9:43 AM).

severity of our climate emergency.³⁸ As an Australia court recently declared in a case challenging an approved coal mine:

It is difficult to characterise in a single phrase the devastation that the plausible evidence presented in this proceeding forecasts for the Children. As Australian adults know their country, *Australia will be lost and the World as we know it gone as well* . . . [This] will largely be inflicted by the inaction of this generation of adults, in what might fairly be described as the greatest inter-generational injustice ever inflicted by one generation of humans upon the next.³⁹

Climate tipping points⁴⁰ infuse this situation with an urgency never before confronted by the law. Society faces the very real and imminent prospect of uncontrollable, runaway heating if it pushes global temperatures beyond a point of no return: Nature’s own positive feedback loops would drive up the heating more and render it impossible to return to safety (barring risky, untried, very expensive, and potentially disastrous geoengineering solutions).⁴¹ One such tipping point lurks in the permafrost, covering the northern latitudes, containing a colossal amount of carbon dioxide and methane.⁴² When permafrost melts, it releases those greenhouse gases into the atmosphere.⁴³ Vast tracts of permafrost have already begun to melt, and scientists warn that we are on the verge of “massive” permafrost collapse.⁴⁴ In late 2019, the United Nations Secretary-General, António Guterres, explained: “The point of no-return is no longer over the horizon. It is in sight and hurtling towards

38. See *Juliana v. United States*, 947 F.3d 1159, 1166 (9th Cir. 2020); see also *infra* Part XV.

39. *Sister Marie Brigid Arthur v. Minister for the Env’t* [2021] FCA 560 (27 May 2021) (Austl.) (emphasis added).

40. See generally FRED PEARCE, WITH SPEED AND VIOLENCE: WHY SCIENTISTS FEAR TIPPING POINTS IN CLIMATE CHANGE xxiv–vi (2007) (describing “unstoppable planetary forces” beyond tipping points and the end of climatic stability). A recent draft report released by UN scientists underscored the danger of such tipping points. See Hood, *supra* note 3 (summarizing report: “the report outlines the danger of compound and cascading impacts, along with point-of-no-return thresholds in the climate system known as tipping points, which scientists have barely begun to measure and understand. . . . A dozen temperature trip wires have now been identified in the climate system for irreversible and potentially catastrophic change.”).

41. See Hood, *supra* note 3; Nafeez Ahmed, *James Hansen: Fossil Fuel Addiction Could Trigger Runaway Global Warming*, GUARDIAN (July 10, 2013, 6:44 AM), <https://www.theguardian.com/environment/earth-insight/2013/jul/10/james-hansen-fossil-fuels-runaway-global-warming>.

42. Fred Pearce, *As Climate Change Worsens, a Cascade of Tipping Points Looms*, YALE ENV’T 360 (Dec. 5, 2019), <https://e360.yale.edu/features/as-climate-changes-worsens-a-cascade-of-tipping-points-looms>.

43. *Id.*

44. Chelsea Harvey, *If Past Is a Guide, Arctic Could Be Verging on Permafrost Collapse*, SCI. AM. (Oct. 19, 2020), <https://www.scientificamerican.com/article/if-past-is-a-guide-arctic-could-be-verging-on-permafrost-collapse/>.

us.”⁴⁵ More recently, he pronounced: “[T]he state of the planet is broken . . . Humanity is waging war on nature. This is suicidal.”⁴⁶

Three touchstones define the massive decarbonization effort necessary to avoid these tipping points. First, looking back, global society had to start bending down the curve of greenhouse gas emissions by 2020.⁴⁷ By all logical measure, at the end of 2019, President Trump’s frenzied and reckless promotion of fossil fuels seemed to make that key requirement unattainable.⁴⁸ But the COVID-19 pandemic that disabled the world caused a wholly unexpected, abrupt eight percent drop of carbon emissions, perhaps keeping open a slim window of opportunity to stave off tipping points.⁴⁹ The remaining requirements announced by U.N. scientists are to curtail emissions by forty-five percent by 2030, and to achieve full decarbonization by 2050.⁵⁰ Feasible as these may appear on paper, these numbers will ruthlessly probe the depths of Humanity’s collective resolve in the decades to come. The International Energy Agency forecasts, in 2023, a COVID economic rebound that will produce the largest annual output of carbon dioxide emissions in human history.⁵¹

Emerging from these climate imperatives is an inescapable reckoning: there is no way to continue wholesale reliance on fossil fuels, even for a few more years, and still remain on the safe side of those tipping points.⁵² In spite of this long-known

45. António Guterres, Secretary-General, U.N., Opening Remarks at Pre-COP25 Press Conference (Dec. 1, 2019), <https://www.un.org/sg/en/content/sg/speeches/2019-12-01/remarks-pre-cop25-press-conference>.

46. António Guterres, Secretary-General, U.N., Address at Columbia University: The State of the Planet (Dec. 2, 2020), <https://www.un.org/sg/en/content/sg/speeches/2020-12-02/address-columbia-university-the-state-of-the-planet>.

47. Edith M. Lederer, UN Chief: *World Must Prevent Runaway Climate Change by 2020*, ASSOCIATED PRESS NEWS (Sept. 10, 2018), <https://apnews.com/article/floods-united-nations-antonio-guterres-us-news-climate-71ab1abf44c14605bf2dda29d6b5ebcc>.

48. Ashley Parker & Coral Davenport, *Donald Trump’s Energy Plan: More Fossil Fuels and Fewer Rules*, N.Y. TIMES (May 26, 2016), <https://www.nytimes.com/2016/05/27/us/politics/donald-trump-global-warming-energy-policy.html>.

49. Josh Gabbatiss, *IEA: Coronavirus Impact on CO2 Emissions Six Times Larger Than 2008 Financial Crisis*, CARBONBRIEF (Apr. 30, 2020, 5:00 AM), <https://www.carbonbrief.org/iea-coronavirus-impact-on-co2-emissions-six-times-larger-than-financial-crisis>.

50. António Guterres, Secretary-General, U.N., Remarks to 25th Conference of Parties to the United Nations Climate Change Convention (Dec. 2, 2019), <https://unfccc.int/sites/default/files/resource/UN%20Secretary-General%27s%20remarks%20at%20opening%20ceremony%20of%20UN%20Climate%20Change%20Conference%20COP25.pdf>.

51. Fiona Harvey, *Emissions Will Hit Record High by 2023 if Green Recovery Fails, Says IEA*, THE GUARDIAN (JULY 20, 2021), <https://www.theguardian.com/environment/2021/jul/20/emissions-record-high-by-2023-if-green-recovery-fails-says-iea>. On September 17, 2021, the UN warned that the aggregate climate pledges of the world’s nations would increase global greenhouse gas emissions by 16% rather than slash them by 45% as UN scientists have warned is necessary. William Booth & Tyler Pager, *As Climate Pledges Fall Short, U.N. Predicts Globe Could Warm by Catastrophic 2.7 Degrees Celsius*, WASHINGTON POST (Sept. 17, 2021), <https://www.washingtonpost.com/climateenvironment/2021/09/17/un-climate-2030-biden/>.

52. Sarah Schonhardt, *Fossil Fuel Development to Exceed Global Climate Targets*, SCIENTIFIC AMERICAN (Oct. 20, 2021), <https://www.scientificamerican.com/article/fossil-fuel-development-to-exceed-global-climate-targets/#> (summarizing 2021 report by UN

reality, the U.S. government has deliberately organized this nation's energy system around oil, coal, and natural gas.⁵³ Moreover, it has supplied the world with these dangerous fossil fuels.⁵⁴ The Ninth Circuit *Juliana* panel acknowledged that “the federal government has long promoted fossil fuel use despite knowing that it can cause catastrophic climate change” and that (at the time the case was decided in 2019) “the country is now expanding oil and gas extraction four times faster than any other nation.”⁵⁵

Ninth Circuit Judge Andrew Hurwitz strung together a stepwise outline of our present situation, even as he dismissed the youths' case: (1) “since the dawn of the Industrial Age, atmospheric carbon dioxide has skyrocketed to levels not seen for almost three million years”; (2) “[t]his unprecedented rise stem[ming] from fossil fuel combustion will wreak havoc on the Earth's climate if unchecked”; (3) “climate change is affecting [plaintiffs] now in concrete ways and will continue to do so unless checked”; (4) “this growth [of emissions] shows no signs of abating”; and 5) this trend “may hasten an environmental collapse.”⁵⁶

The haunting prospect of such encompassing, irreparable harm sets this case apart from any other precedent in terms of the human interests at stake and the expediency with which court rulings must issue in a time of urgency. Because no crisis is as ominous, imminent, and far reaching, the climate emergency must be considered *sui generis*, which is a Latin term meaning “in a class of its own,” or “unique.” The legal approach must rise to the emergency rather than repeat a failed past paradigm.

III. “GOODBYE NEW YORK. GOODBYE WASHINGTON”: WHAT OUR GOVERNMENT KNEW

As fully recognized by the *Juliana* majority, the American government is not a passive bystander to the climate crisis: it controls and fervently promotes the fossil fuel energy system through subsidies, tax exemptions, permits for fossil fuel development projects at home and abroad, leases on federal lands and offshore areas, permits for imports and exports, and permits for energy facilities.⁵⁷ For extensive evidence of government's longstanding awareness that sustained reliance on fossil fuels would unleash calamity on its own citizens, the *Juliana* docket provides ample reading material.⁵⁸ Compiling voluminous documents spanning the past half century

Environment Programme and other research organizations) (“coal production would need to decline each year by 11 percent on average by 2030 to limit warming to 1.5 C. Oil and gas would need to fall by 4 and 3 percent, respectively, over that period.”).

53. See U.S. Energy Info. Admin., *Fossil Fuels Account for the Largest Share of U.S. Energy Production and Consumption*, TODAY IN ENERGY (Sept. 14, 2020) <https://www.eia.gov/todayinenergy/detail.php?id=45096>.

54. See *infra*, note 32.

55. *Juliana v. United States*, 947 F.3d 1159, 1164, 1166 (9th Cir. 2020).

56. *Id.*

57. *Id.* at 1167 (“The government affirmatively promotes fossil fuel use in a host of ways, including beneficial tax provisions, permits for imports and exports, subsidies for domestic and overseas projects, and leases for fuel extraction on federal land.”).

58. As Judge Hurwitz observed, “The record also conclusively establishes that the federal government has long understood the risks of fossil fuel use and increasing carbon dioxide

over several administrations—Democrat and Republican alike—the *Juliana* plaintiffs alleged in their fifty-two-page complaint that the government had demonstrated “deliberate indifference to the peril they knowingly created.”⁵⁹ The accusation finds dramatic example in a letter by a top aide to President Nixon’s domestic policy adviser, underscoring the potential impact of rising sea levels in 1969, stating: “Goodbye New York. Goodbye Washington, for that matter.”⁶⁰ In 1986, a Senate subcommittee observed that “there is a very real possibility that man—through ignorance or indifference, or both—is irreversibly altering the ability of our atmosphere to perform basic life support functions for the planet.”⁶¹ A particularly vivid description of the situation was provided to the press in 2009 by Steven Chu, secretary of energy under President Obama: “I don’t think the American public has gripped in its gut what could happen. . . . We’re looking at a scenario where there’s no more agriculture in California. . . . I don’t actually see how they can keep their cities going either.”⁶² Instead of steadily transitioning the full energy infrastructure from a dangerous dependence upon fossil fuels to alternative renewable sources, the American government squandered decades while the window of opportunity to restore the climate system inexorably closed.

Even as the universal peril of climate disruption was triggering widespread global alarm, President Trump came into office in 2016 on a platform of developing fifty trillion dollars worth of domestic fossil fuels—and pursued that goal with vengeance against the American children and future generations sentenced to suffer unspeakable harm as their lives unfold.⁶³ As a sitting president with control over the world’s largest energy system just as the window of opportunity to stave off tipping points was closing, Trump held unfathomable power over the fate of our planet.

The nation has since witnessed a substantial changing of the guard, as President Biden pledges actions aimed at halting oil, coal, and gas development on federal public lands.⁶⁴ But President Biden’s administration has also made decisions regarding leasing and stances in lawsuits that could lock in drilling and burning of fossil fuels for decades.⁶⁵ Moreover, despite his announced climate agenda, President Biden only oversees the executive branch. Congress, though presently controlled by

emissions.” *Id.* at 1166. For a devastating expose’ of the federal government’s role, see JAMES GUSTAVE SPETH, *THEY KNEW: THE US GOVERNMENT’S 50-YEAR ROLE IN CAUSING THE CLIMATE CRISIS* (2021).

59. Complaint, *supra* note 32, at 8.

60. Memorandum from Daniel P. Moynihan, Assistant to the President for Domestic Pol’y, to John Ehrlichman, Assistant to the President for Domestic Affs. (Sept. 17, 1969), <https://www.nixonlibrary.gov/sites/default/files/virtuallibrary/documents/jul10/56.pdf>.

61. *Ozone Depletion, the Greenhouse Effect, and Climate Change: Hearing Before the Subcomm. on Env’t Pollution of the Comm. on Env’t & Pub. Works*, 99th Cong. 2 (1986) (opening statement of Sen. John H. Chafee, Chairman, Subcomm. on Env’t Pollution).

62. Jim Tankersley, *Climate Change Imperils Farming*, L.A. TIMES (Feb. 4, 2009, 12:00 AM), <https://www.latimes.com/archives/la-xpm-2009-feb-04-me-warming4-story.html>.

63. Annie Sneed, *Trump’s First 100 Days: Climate and Energy*, SCI. AM. (Nov. 29, 2016), <https://www.scientificamerican.com/article/trumps-first-100-days-climate-and-energy/>.

64. See Lisa Friedman, *Biden’s Fossil Fuel Moves Clash with Pledges on Climate Change* N. Y. TIMES (May 28, 2021), <https://www.nytimes.com/2021/05/28/climate/biden-fossil-fuels-climate-Willow.html>.

65. *See id.*

democrats, may not sufficiently fund the Biden climate agenda.⁶⁶ Finally, executive actions are not “durable” laws, because they remain vulnerable to reversal by the next administration. Four years of even the most climate-protective action remain a fleeting period when juxtaposed with the likely century-long project required to restore an atmospheric CO₂ balance safe for human habitation; the glaring proximity of tipping points for the foreseeable future magnifies the chance of fatal error. Only a rigorous and durable institutional apparatus - not simply a rerun of past governance approaches and frameworks - bears hope of achieving long-term recovery of the climate system. This article argues that a judicial remedy remains necessary to provide the stability and accountability needed to sustain a protracted climate recovery effort.⁶⁷ But charting a course forward first requires understanding the failed governance that led us to where we are. The next section probes the dysfunction of statutory law that, over the course of a half century, delivered the climate crisis to the doorstep of the world.

IV. LED ASTRAY: THE FAILURE OF ENVIRONMENTAL STATUTORY LAW⁶⁸

In the wake of Earth Day, 1970, Congress passed a multitude of statutes, such as the Clean Air Act,⁶⁹ the Clean Water Act,⁷⁰ the Endangered Species Act,⁷¹ the National Environmental Policy Act,⁷² and others. These new laws, and others that followed on the state and local levels, spawned a huge environmental bureaucracy that exerted dominion over Nature. Victorious Earth Day reformers reasonably believed that such agencies would carry out the protective goals of the statutes citizens had fought so hard for, but instead, government quickly commandeered environmental statutes to veer far afield from the public trust.⁷³ Many agencies ended up co-opted and manipulated by industry interests and used the statutes to favor industry over the public’s interest in managing the ecological endowment they were charged with protecting. The systemic dysfunction pervading most environmental agencies today traces to a triangulation of dynamics.⁷⁴ First, nearly every statute has

66. See Oliver Milman & Lauren Gambino, ‘This Is Our Last Chance’: Biden Urged to Act as Climate Agenda Hangs by a Thread, THE GUARDIAN (Oct. 18, 2021), https://www.theguardian.com/environment/2021/oct/18/joe-biden-climate-crisis-legislation?CMP=oth_b-aplnews_d-1. The problem is greatly magnified due to the glaring conflict of interests some members of Congress have when voting on climate legislation. See Bryan Metzger, *Joe Manchin, Who is Holding up Crucial Climate Change Initiatives in Biden's Reconciliation Bill, Collects \$500,000 a Year from Coal Stocks Dividends: Report*, BUSINESS INSIDER (Sept. 30, 2021), <https://www.businessinsider.com/senator-joe-manchin-half-million-year-coal-stocks-climate-crisis-2021-9>.

67. See Part XIV, XV (discussing the role of courts in climate crisis).

68. For a thorough explanation of the assertions in this section, see WOOD, NATURE’S TRUST, *supra* note 12, Part I.

69. 42 U.S.C. §§ 7401–7671q.

70. 33 U.S.C. §§ 1251–1387.

71. 16 U.S.C. §§ 1531–1544.

72. 42 U.S.C. §§ 4321 *et seq.*

73. These conclusions are developed in WOOD, NATURE’S TRUST, *supra* note 12, and will not be reiterated in depth here.

74. For discussion, see WOOD, NATURE’S TRUST, *supra* note 12, at Chapters 2-4.

permit or other provisions that empower an agency to allow the very type of destruction the statute was designed to prevent.⁷⁵ Agencies characteristically use the statutes to legalize unfathomable amounts of destruction, permit by permit. Permits for water pollution, air pollution, wetlands destruction, and other harms are rarely denied.⁷⁶ The authorizing statutory provisions were never intended to swallow the protective purposes of the laws, but they have.

Second (and relatedly), environmental statutes give agencies breathtaking discretion to carry out the laws—to enact regulations, issue permits, and enforce (or not) violations.⁷⁷ This power came justified by one simple assumption: officials will invoke their technical expertise on behalf of the public interest. The conferral of vast discretion was one grand experiment in administrative law and presented the means for agencies to gain enormous power over the nation’s ecology.

Third, industry soon figured out that discretion sets an open season to lobby officials into bending the law to their favor. As soon as the agencies created new regulations, industry started eroding them.⁷⁸ Big money rides on an agency’s environmental decisions, so the major corporations devote resources to influencing agencies. The system of campaign contributions greases the wheels of such influence.⁷⁹ Presidents and governors often appoint agency heads with loyalty to the industries that funded their campaigns.⁸⁰ These political operatives use their discretion to indulge their industry from inside the agency.⁸¹ Government officials in a captured agency look at the industry in a different light—as a client the agency must serve.

Despite its original goals, environmental law came to institutionalize a marriage of government and industry. Collectively, environmental agencies rule over America’s natural resources, making decisions that are politically good for themselves but bad for society and future generations—and this has been true for both Democrat and Republican administrations (though some have proven far worse than others). Fully in line with this failed statutory syndrome, government actors deployed American environmental law to permit and promote a massive fossil fuel industry despite its known peril to Humanity.⁸² Behind all of the coal fire plants, coal strip mines, off-shore and on-shore oil drilling leases, fracking operations, oil and gas pipelines, coal trains, “bomb trains” containing Bakken crude oil, and every export facility, lies affirmative permits, leases, and/or regulations allowing the

75. For discussion, see *id.* at 57-63.

76. For discussion, see *id.* at 64, 74-77 (explaining how agencies bankrupt ecological wealth using environmental law).

77. For discussion, see *id.* at Chapter 3 (describing three “portals of discretion”).

78. For discussion, see *id.* at 51-52.

79. For discussion, see *id.* at 84-5.

80. For discussion, see *id.* at Ch. 1, and pp. 84-89. For reporting on the Trump administration’s appointment of industry operatives, see David Roberts, *Donald Trump is Handing the Government Over to the Fossil Fuel Interests*, VOX (June 14, 2017), <https://www.vox.com/energy-and-environment/2017/6/13/15681498/trump-government-fossil-fuels>.

81. For discussion, see WOOD, NATURE’S TRUST, *supra* note 12, at 85-87.

82. For a full account, see SPETH, *supra* note 59.

destructive activity.⁸³ This diagnosis also suggests why, fifty years after its enactment, the Clean Air Act⁸⁴ still has not been used to comprehensively regulate greenhouse gas emissions. Behind the thick shroud of environmental law, the executive branch of government commits massive generational theft that pushes the entire world toward collapse.

The Founders carefully devised three branches of government with dispersed power and robust checks and balances to prevent a despotic ruler. American democracy relies on each branch carrying out its role to keep power from aggrandizing in one branch. Congress is supposed to make the law. Agencies are supposed to carry out that law. And courts are supposed to enforce the law—not only statutory law, but constitutional protections and fundamental rights. The 1970s reform and growth of agencies fundamentally restructured the balance of power that underpins American environmental democracy, allowing power to swell without meaningful constraint in the executive branch.⁸⁵ In the statutory framework, neither Congress nor the courts have provided a meaningful check on the Executive’s colossal environmental destruction.

Congress has long failed to confront broad-scale problems such as biodiversity loss, climate disruption, and ocean pollution, even as all worsened into a state of emergency. Professor Richard Lazarus characterizes the neglect as “congressional descent,” stating that, since the 1970s, Congress’ role in environmental lawmaking has “virtually disappeared.”⁸⁶ Campaign contributions, soaring to unprecedented heights after the Supreme Court’s 2010 *Citizens United v. Federal Election Commission*⁸⁷ decision, incentivize individual legislators to make decisions to benefit their private contributors rather than the public at large. Essentially, the branch that is supposed to take the lead in national environmental policy has been paid off to stay in the corner. A feeble and compromised Congress endangers democracy by removing a significant governing branch from the equation of checks and balances necessary to prevent totalitarian government.⁸⁸

As to the crucial constitutional check and balance provided by the judicial branch, that too diminished during the past half century as the statutory framework of environmental law took hold. The next section explains the passive role that continues as the dominant paradigm of judging environmental cases. It is imperative to understand this passive role, because it defines the *Juliana* majority’s hands-off

83. In their complaint, the *Juliana* plaintiffs chronicle the governmental permitting and leasing schemes that promote these aspects of the fossil fuel energy system. *See* Complaint, *supra* note 32, at 5-7, 38-51, 59-67.

84. 42 U.S.C. §§ 7401–7671q.

85. *See* WOOD, NATURE’S TRUST, *supra* note 12, at Ch. 5.

86. Richard J. Lazarus, *Congressional Descent: The Demise of Deliberative Democracy in Environmental Law*, 94 GEO. L. J. 619, 621-22 (2006).

87. 558 U.S. 310 (2010). *See* Ian Vandewalker, *Since Citizens United, A Decade of Super PACs*, Brennan Center For Justice (Jan. 14, 2020), <https://www.brennancenter.org/our-work/analysis-opinion/citizens-united-decade-super-pacs>.

88. WOOD, NATURE’S TRUST, *supra* note 12, at 105-08.

approach to climate destruction, even as those judges acknowledged that the world sits on the “‘eve of destruction.’”⁸⁹

V. THE ANTIQUATED JUDICIAL ROLE IN ENVIRONMENTAL CASES: COURTS AS PASSIVE UMPIRES

Courts remain uniquely positioned to force broad agency protection of environmental resources. Standard trials consist of rigorous, adversarial fact-finding proceedings that can penetrate complex questions of science. Courts can actively and expeditiously formulate injunctive remedies to address the harm.⁹⁰ Adept judges can often use their leverage to bring parties to productive settlements that would not otherwise occur. But this effective judicial power is not characteristically tapped by suits brought within the statutory frame, for four reasons.⁹¹ First, most statutory claims are exceedingly narrow, focusing on one discrete agency action (such as one permit or regulation). Such lawsuits work as blinders to the judges, hiding the growing environmental catastrophe and pervasive agency dysfunction underlying the challenged action. Second, the harm alleged in statutory cases is often procedural,

89. *Juliana v. United States*, 947 F.3d 1159, 1164 (9th Cir. 2020) (quoting Barry McGuire, *Eve of Destruction, on Eve of Destruction* (Dunhill Records, 1965)).

90. Examples of structural injunctions are discussed at WOOD, NATURE’S TRUST, *supra* note 12, at 250-57. A recent example of a detailed injunction is found in *Nw. Env’t Def. Ctr. v. United States Army Corps of Engineers*, No. 3:18-CV-00437-HZ, 2021 WL 3924046 (D. Or. Sept. 1, 2021), where the U.S. District Court of Oregon found the U.S. Army Corps of Engineers in continued violation of the ESA in its management of hydro facilities that harmed listed salmon species. Judge Marco A. Hernández devised an interim injunction with detailed measures requiring the Corps to implement drawdown, spill, and specific fish management actions at its facilities. He also established an Expert Panel “in which the parties’ technical experts will confer and flesh out the implementation details of numerous interim mitigation measures.” Such “implementation plans” developed by the Expert Panel were incorporated into the Court’s Interim injunction, which required Corps’ compliance with the plans. *See id.*, slip op at 29-32. Judge Hernández further required the Corps to provide the court with status reports on the implementation every six months. *Id.*, slip op at 32. These kinds of measures reflect elements of a structural injunction crafted to correct an agency that has demonstrated longstanding violations. In an earlier Draft Order, the court observed:

Despite the requirements of the 2008 BiOp, the Corps has fought tooth and nail to resist implementing interim fish passage and water quality measures that it was supposed to begin implementing a decade ago, and that NMFS has been recommending for years. The Court is disheartened by the fact that, when compared to how the Corps should have proceeded had it complied with the BiOp, much of the injunctive relief that the Court is now ordering can be considered, in many respects, a giant leap backward. Consequently, *the Court has no patience for further delay or obfuscation in this matter* and expects nothing short of timely implementation of the injunctive measures and the experts’ proposal outlining the parameters for those measures. Draft Order, *Nw. Env’t Def. Ctr. v. United States Army Corps of Engineers & Nat’l Marine Fisheries Serv.*, No. 3:18-CV-00437-HZ, slip op at 12 (emphasis added), https://storage.courtlistener.com/recap/gov.uscourts.ord.135786/gov.uscourts.ord.135786.194.0_2.pdf.

91. The propositions in this section are developed in WOOD, NATURE’S TRUST, *supra* note 12, at 108-13, and will not be iterated in depth here.

like an agency's failure to do an Environmental Impact Statement or failure to list a species under the Endangered Species Act. Procedural inquiries fail to address head-on the substantive damage perpetrated by agencies using permit and lease provisions to dispense public trust resources to private profiteers. Third, courts invoke a strong "deference doctrine" to play a self-appointed wallflower role in statutory cases. Long ago, judges decided that environmental law should be different than other matters coming before them. Because the agencies were the keepers of vast technical expertise, and because judges uncritically presumed that agencies faithfully carried out the public interest as commanded by the statutes, courts decided to give agency regulations and technical decisions a grand presumption of validity or "deference." The deference doctrine all but immunizes politicized agency action because courts repress their standard scrutiny. Fourth, when environmental litigants score statutory wins in court, the victories tend to result in narrow procedural remands that simply return the decision to the offending agency with orders to repeat the analysis and make the decision over again. This creates a simplistic "win-loss" end to statutory environmental cases: the judge is finished with the matter. But quite often, the same entrenched, politicized forces within the agency typically produce another flawed decision—which will often again be challenged in court. This is the spin cycle of environmental statutory law.

Over time, these dynamics, working fully in tandem, have caused all too many judges to view environmental policy as the prerogative of the executive branch, yielding little in the way of a judicial check. This entrenched, self-assigned judicial view could be described as a "passive umpire" role for courts, and it has caused a judicial retreat so dramatic as to subvert the courts' assigned role in a checks-and-balances system of government. Crippled by judicial deference and meager remedies, statutory environmental cases have largely failed to thwart the incessant ecological barrage legalized by government and agencies. In the article "A Wake-Up Call for Judges," Ninth Circuit Judge Alfred Goodwin lamented that the judicial branch has "enfeebled itself," contributing to a current state of affairs that "reveals a wholesale failure of the legal system to protect Humanity from the collapse of finite natural resources by the uncontrolled pursuit of short-term profits."⁹²

This history shows a failure of constitutional checks and balances leading to the gravest and most urgent of threats. Accorded nearly full dominion over the nation's vital ecology, and yet captured by one of the nation's most powerful industries,⁹³ agencies breached, with impunity, their sovereign public trust obligations to protect the atmospheric trust—the linchpin of survival across all Earth. Absent meaningful congressional or judicial restraint, agencies allowed the fossil fuel industry to flood the atmosphere with carbon emissions. President Trump, taking office at the 11th hour of this climate crisis, wielded a power never imagined by the Framers—to bring the

92. Alfred T. Goodwin, *A Wake-Up Call for Judges*, 2015 Wis. L. Rev. 785, 785–86 (2015).

93. See, e.g., STEVE COLL, *PRIVATE EMPIRE: EXXONMOBIL AND AMERICAN POWER* (2012); RACHEL MADDOW, *BLOWOUT: CORRUPTED DEMOCRACY, ROGUE STATE RUSSIA, AND THE RICHEST, MOST DESTRUCTIVE INDUSTRY ON EARTH* (2019); ROBERT F. KENNEDY, JR., *CRIMES AGAINST NATURE: HOW GEORGE W. BUSH AND HIS CORPORATE PALS ARE PLUNDERING THE COUNTRY AND HIJACKING OUR DEMOCRACY* (2004); HADYN WASHINGTON & JOHN COOK, *CLIMATE CHANGE DENIAL: HEADS IN THE SAND* (2011).

destruction of the nation and the world by accelerating fossil fuel development past tipping points capable of pushing Earth irrevocably into a state of runaway heating. With no meaningful constitutional rein, President Donald Trump and his political appointees, including those at the Department of Justice, crusaded a heedless executive branch blindly towards Humanity's annihilation.

VI. THE "BIGGEST CASE ON THE PLANET": JULIANA V. UNITED STATES

The *Juliana v. United States* case, filed in 2015 when Barack Obama occupied the Oval Office, sought to break the climate crisis out of the destructive statutory paradigm that had fueled it in the first place. *Juliana* was part of a wave of Atmospheric Trust Litigation (ATL) that sought to enlist meaningful judicial review and remedial action before it was too late to save the planet. The greatest challenge of this campaign was confronting the mindset of government officials, judges, and even environmental lawyers who had become mentally locked into a view of environmental law as consigned to agency discretion operating within statutes. To many, environmental cases were statutory cases, period.

The ATL climate strategy was conceived in 2007⁹⁴ and materialized in the form of U.S. administrative petitions and lawsuits launched by the organization Our Children's Trust, in May, 2011.⁹⁵ Brought on behalf of young people against agencies in every state (and one lawsuit against the federal government), these cases and petitions were premised on the public trust principle. They made the following assertions: (1) the air and atmosphere, along with other vital natural resources, are within the *res* of the public trust; (2) the legislature and its implementing agencies are public trustees with inalienable sovereign obligations; (3) both present and future generations of the public are beneficiaries of the public trust; (4) the government trustees owe a fiduciary duty to protect the air, atmosphere, and climate system; and

94. This litigation approach was originated by the author. See Randall S. Abate, *Atmospheric Trust Litigation in the United States: Pipe Dream or Pipeline to Justice for Future Generations?* in CLIMATE JUSTICE: CASE STUDIES IN GLOBAL AND REGIONAL GOVERNANCE CHALLENGES 543, 552 (Randall S. Abate ed., 2016), available at file:///Users/mwood/Downloads/20%20Climate%20Justice%20ch%2020_copyright.pdf. For the foundational framework; Mary Christina Wood, *Atmospheric Trust Litigation*, in ADJUDICATING CLIMATE CHANGE: STATE, NATIONAL, AND INTERNATIONAL APPROACHES 99, 99 (William C. G. Burns & Hari M. Osofsky eds., 2009) [hereinafter *Wood, ATL 2009 chapter*], which "outlines the contours of potential 'atmospheric trust litigation.'"; Mary Christina Wood, *Atmospheric Trust Litigation Across the World*, in FIDUCIARY DUTY AND THE ATMOSPHERIC TRUST 99, 102 (Ken Coghill et al. eds., 2012) [hereinafter *Wood, 2012 ATL chapter*], which explains the legal strategy of ATL.

95. See Matthew Brown & Associated Press, *Climate Activists Target States with Lawsuits*, HARTFORD COURANT (May 4, 2011, 4:31 AM), <https://www.courant.com/sdut-climate-activists-target-states-with-lawsuits-2011may04-story.html>; see also *Juliana v. United States: The Climate Lawsuit*, CBSNEWS.COM (May 4, 2011, 5:39 AM), <https://www.cbsnews.com/video/juliana-v-united-states-the-climate-lawsuit>, trailer available at <https://www.ourchildrenstrust.org/>; Gabriel Nelson, *Young Activists Sue U.S., States over Greenhouse Gas Emissions*, N.Y. TIMES (May 5, 2011), <http://www.nytimes.com/gwire/2011/05/05/greenwire-young-activists-sue-us-states-over-greenhouse-64366.html> (reporting that fifty-two ATL lawsuits were filed almost simultaneously across the country).

(5) courts have authority to enforce these trust obligations.⁹⁶ Recognizing that looming tipping points necessitated a rapid and decisive response to the planet's atmospheric crisis, the ATL campaign turned to the judiciary for eleventh-hour relief. Calibrating the requested remedy to the actual requirements of the atmosphere, the ATL petitions and lawsuits demanded enforceable climate recovery plans from government trustees to reduce carbon emissions at the rate called for by the best available science, which had been iterated through a prescription developed by a team of scientists led by the chief U.S. climate scientist, Dr. James Hansen.⁹⁷

While some cases had early victories—including a Washington case in which the judge declared a constitutional public trust and moved swiftly into the remedy stage, emphasizing the “kids can't wait” because climate chaos threatened their very survival⁹⁸—the thrust of the judicial approach over time largely reflected the passive umpire model of judicial review. Without exception, state attorneys general vehemently disclaimed any public trust obligation to their citizens and maintained that the government defendants retained complete discretion to fashion a climate response: in other words, courts should stay out of climate issues. Invoking a variety of procedural grounds, including the political question doctrine, standing, deference, and displacement, nearly all courts avoided involvement in the climate crisis. Accordingly, several cases resulted in dismissal, some after painfully long and protracted appeals.⁹⁹ A statement by the judge overseeing the early federal case was indicative of an overriding judicial sentiment: agencies were “better equipped” than courts to handle the climate crisis.¹⁰⁰

Nevertheless, as a full-scale, coordinated movement with multiple suits connected by a common base of both science and law, the ATL campaign steadfastly forged a new path for environmental law: one premised on fundamental rights. As the climate

96. For an example of a complaint in a state ATL case, see Complaint, *Chernaik v. Oregon*, Case No. 16-11-09273 (Cir. Ct. Lane County, Or., May 19, 2011), available at <https://static1.squarespace.com/static/571d109b04426270152febe0/t/5760ca3022482e47e27482ef/1465961010550/OregonAmendedComplaint.pdf> (seeking declaration that “State of Oregon, as trustee, has a fiduciary obligation to protect the atmosphere as a commonly held public trust resource from the impacts of climate change for Plaintiffs and for present and future generations of Oregonians.”). For discussion of the ATL campaign, see Abate, *supra* note 95, at 543-69; *id.* at 552 (“ATL attempts to impose a legal duty on governments to protect the atmosphere, and seeks to require governments to execute that duty based on scientific data and implement a policy of shared responsibility with regard to reducing CO2 emissions.”).

97. For the prescription, see Hansen *et al.*, *supra* note 34. Dr. James Hansen served as Director of NASA's Goddard Institute for Space Studies. *Dr. James Hansen*, COLUM. CLIMATE SCH.: THE EARTH INST., <https://www.earth.columbia.edu/users/profile/james-e-hansen>.

98. *Youths Secure Win in Washington State Climate Lawsuit: Judge Chastises State, Rules from Bench Ordering State to Reduce Carbon Emissions*, OUR CHILDREN'S TRUST (Apr. 29, 2016), <http://ourchildrenstrust.org/sites/default/files/2016.04.29WAFinalRulingPR.pdf>.

99. See Blumm & Wood, *supra* n. 4, at 68 n.367 (2017) (citing *Alec L. v. Jackson*, 863 F. Supp. 2d 11, 17 (D.D.C. 2012) (dismissing ATL federal suit on the basis of displacement by Clean Air Act)). See also *Chernaik v. Brown*, 367 Or. 143 (2020) (affirming dismissal of youths' case).

100. *Alec L.*, 863 F. Supp. 2d at 17; see also *Chernaik v. Brown*, No. 16-11-09273, 2015 WL 12591229, at *9 (Or. Cir. May 11, 2015) (stating that the climate recovery plan sought by plaintiffs would ask the “[c]ourt to substitute its judgment for that of the Legislature”).

crisis grew obviously worse and more dangerous, the campaign took hold in the legal field and across civil society, gaining substantial press¹⁰¹ and reframing the climate obligations of the government as protecting young people's fundamental right to survive.¹⁰² In the fall of 2021, attorneys for youth plaintiffs were preparing for the first ATL trial, in the Montana case (the second filed in that state), *Held v. Montana*. Judge Kathy Seeley had earlier denied the state's motion to dismiss the case, finding that the youth could pursue their claims for declaratory relief.¹⁰³ Moreover, in two other cases that lost at the state supreme court level, vigorous dissents penned by the Chief Justices in Oregon¹⁰⁴ and Washington¹⁰⁵ suggested a roadmap for what could

101. See, e.g., *Juliana v United States: The Climate Lawsuit*, *supra* note 96.

102. Professor Abate observed in 2016, even before the recent wave of international ATL victories, "ATL has been a primary focus of climate justice litigation and it has made significant progress in advancing its theory in U.S. and foreign domestic courts." Abate, *supra* note 95, at 561. ATL cases have gained widespread support in the form of amicus briefs from law professors, scientists, non-profit organizations, businesses, religious organizations, and Congressional leaders. Many of these are posted on the website of Our Children's Trust. See <https://www.ourchildrenstrust.org/juliana-v-us>; <https://www.ourchildrenstrust.org/state-legal-actions>.

103. *Held v. Montana*, Order on Motion to Dismiss, Civil Action CDV-2020-307 (Mont. First Jud. D. Ct. Lewis and Clark County, Aug. 4, 2021), slip op at 22, available at <https://static1.squarespace.com/static/571d109b04426270152febe0/t/6112b9d83cde100cb673f36e/1628617176778/CDV-2020-307+-+Order+on+Motion+to+Dismiss+%281%29.pdf> (but dismissing plaintiffs' claims for injunctive relief).

104. See *Chernaik v. Brown*, 367 Or. 143 (2020). Chief Justice Walters comprehensively addressed the issues in the case and wrote:

The complexity of an issue may make a judicial decision more difficult, but it does not permit this court to abdicate its role. . . . Courts also must not shrink from their obligation to enforce the rights of all persons to use and enjoy our invaluable public trust resources. How best to address climate change is a daunting question with which the legislative and executive branches of our state government must grapple. But that does not relieve our branch of its obligation to determine what the law requires. . . . We should not hesitate to declare that our state has an affirmative fiduciary duty to act reasonably to prevent substantial impairment of our public trust resources. I respectfully dissent. *Id.* at 186-87.

105. *Aji P. v. State of Washington* (Civ. Action 99564-8) (Wash. S. Ct. Oct. 6, 2021), <https://static1.squarespace.com/static/571d109b04426270152febe0/t/6165c0dc2503246a8bc30ec9/1634058460504/38%29+Order+-+Denying+Review+-+10-6-2021.pdf> Justice. (Chief Justice Steven C. González and Justice G. Helen Whitener dissenting to the Washington Supreme Court's refusal to review a court of appeal's decision dismissing the youths' case). Chief Justice González wrote,

This case is an opportunity to decide whether Washington's youth have a right to a stable climate system that sustains human life and liberty. We recite that we believe the children are our future, but we continue actions that could leave them a world with an environment on the brink of ruin and no mechanism to assert their rights or the rights of the natural world. This is our legacy to them described in the self-congratulatory words of judicial restraint. Today, the court declined the important responsibility to seriously examine their claims. Slip op. at 2.

Both Justices found that declaratory relief would have provided a meaningful remedy, and that the Court shirked its obligations to review the youths' constitutional claims: "Even though an 'issue is complex and no option may prove wholly satisfactory,' the judiciary should not 'throw

be future majority opinions discerning a role for courts to hold government accountable for its role in destroying the climate system.

The American ATL campaign inspired efforts in many other nations, some led by OCT and others in collaboration with OCT.¹⁰⁶ The global litigation framed the question of judicial involvement in a glaring context of moral responsibility. Courts of other nations repudiated the deferential stance typical of the American judiciary and engaged deeply in the task of holding their governments accountable, as this article later recounts.¹⁰⁷

In 2015, after the ATL campaign was well underway, *Juliana v. United States* broke onto the climate scene. Filed in the U.S. District Court of Oregon against the Obama administration on behalf of twenty-one youth plaintiffs, this was the first federal civil rights case ever brought in the United States to allege that the climate crisis was infringing on youth plaintiffs' fundamental constitutional rights. The plaintiffs asserted constitutional claims to a stable climate system based on both the public trust principle and substantive due process protections of the Fifth Amendment that secure rights to life, liberty, and property. Punctuating the remarkable course of the *Juliana* litigation is the pathbreaking opinion by federal district court judge, Hon. Ann Aiken, a stunning dissent by Judge Staton in the Ninth Circuit appeal, and the undaunted perseverance of the young plaintiffs and their attorneys in the face of relentless, unprecedented tactics by U.S. Department of Justice attorneys who have continually aligned public legal resources with industry interests. Despite legal setbacks, the moral force of this case has undoubtedly moved the arc of litigation across the world toward climate justice.

Characteristic of ATL strategy, *Juliana* mounted a system-wide challenge. Plaintiffs collectively sued all federal agencies responsible for U.S. energy policy, including the Department of Agriculture, Department of Transportation, Environmental Protection Agency, Department of Interior, the State Department, Council on Environmental Quality, Department of Defense, and Department of Commerce.¹⁰⁸ The complaint comprehensively inventoried the U.S. fossil-fuel energy system and chronicled its affirmative governmental support over decades through massive subsidies, regulatory permits, export permits, and approvals for

up its hands and offer no remedy at all.' *McCleary v. State*, 173 Wn.2d 477, 546, 269 P.3d 227 (2012)." Slip op at 5. Prior to the Court's ruling, former King County Superior Court Judge Hollis Hill urged the Washington Supreme Court to take review of the case, writing in an opinion editorial, "When the government denies the rights of the public, courts must step in, declare the law and order the political branches to comply with the constitution." Hollis Hill, *Let Youth Have Day in Court Over Climate Change*, SEATTLE TIMES (Oct. 1, 2021), <https://www.seattletimes.com/opinion/let-youth-have-day-in-court-over-climate-change/>.

106. *Global Legal Actions*, OUR CHILDREN'S TRUST: YOUTH V. GOV., <https://www.ourchildrenstrust.org/global-legal-actions>.

107. *See infra* section XV.

108. The Sabin Center for Climate Change Law of Columbia University has assembled the docket for public access. *Climate Change Litigation Databases*, COLUM. L. SCH.: SABIN CTR. FOR CLIMATE CHANGE L., <http://climatecasechart.com>. Our Children's Trust also maintains a website chronicling the litigation, which is sometimes called "Youth v. Gov.," <https://www.ourchildrenstrust.org/juliana-v-us>.

leasing, drilling, and mining on public lands and offshore areas.¹⁰⁹ Describing a pattern that “shock[s] the conscience,”¹¹⁰ the youth plaintiffs alleged:

For over fifty years, the United States of America has known that [CO₂] 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. Defendants also knew the harmful impacts of their actions would significantly endanger Plaintiffs, with the damage persisting for millennia. Despite this knowledge, Defendants continued their policies and practices of allowing the exploitation of fossil fuels *Defendants have acted with deliberate indifference to the peril they knowingly created.*¹¹¹

Detailing grave and irreparable harm from climate disruption, the plaintiffs charged that “[t]he present level of [greenhouse gas emissions] and [associated] warming, both realized and latent, are already in the zone of danger,” and asserted that “our country is now in a period of ‘carbon overshoot,’ with early consequences that are already threatening and that will, in the short term, rise to unbearable unless [the government] take[s] immediate action.”¹¹² Further, they contended, the government has no plan to control GHG emissions to protect the life systems crucial to plaintiffs’ survival. The *Juliana* plaintiffs thus sought, in addition to declaratory relief, a judicial order requiring government defendants “to prepare and implement . . . an enforceable national remedial plan” to stabilize the climate system in accordance with the best available science.¹¹³

Carefully crafted to avoid separation of powers concerns while impelling an effective, broad-scale judicial remedy, *Juliana v. United States* adopted an approach characteristic of past civil rights institutional litigation. The *Juliana* attorneys sought to harness a lineage of historic decisions developing meaningful remedial plans that forced errant and oppressive government actors into constitutional compliance. Such a remedy structure could bring unparalleled judicial leverage to the climate emergency and compel government defendants to address the crisis with all deliberate speed. A judicially-forced remedy scaled to the systemic causes of harm—the fossil fuel energy system—would obviate the need for endless “Whac-A-Mole” challenges to the many thousands of scattered actions implementing government’s energy policy.¹¹⁴ It is seemingly the only judicial measure that, at this crucial

109. *See* Complaint, *supra* note 32, at 51–63.

110. *Id.* at 86.

111. *Id.* at 3, 5 (emphasis added).

112. *Id.* at 5–6.

113. *Id.* at 95.

114. Transcript of Sept. 13, 2016 Oral Argument at 59, *Juliana v. United States*, 217 F. Supp. 3d 1224, 1260 (D. Or. 2016) (No. 6:15-cv-0517-TC), *rev’d & remanded*, 947 F.3d 1159 (9th Cir. 2020), available at <https://static1.squarespace.com/static/571d109b04426270152febe0/t/57e4b56fe58c624b613c92da/1474606448428/09-13-2016+Aiken+civil+Juliana.pdf>. In the hearing on the government’s motion to dismiss, Judge Aiken expressed frustration at the government’s position that would require plaintiffs to bring separate statutory actions to address the climate crisis. *See id.* at 69 (comments of Judge Aiken to DOJ attorney

moment, responds to the reality of tipping points. As scientists explained in an amicus brief supporting ATL cases: “Judicial relief may be the best, the last, and, at this late stage, the only real chance to preserve a habitable planet for young people and future generations.”¹¹⁵

The envisioned judicial role is supervisory, characteristic of structural injunctions arising from cases involving civil rights, treaty rights, education funding, prisoners’ rights, and complex zoning situations.¹¹⁶ By supervising, but not devising, remedial plans, courts may carefully observe their constitutionally appointed role. While a court would not itself devise the pathways to decarbonization, it could force the other branches to do so. This article terms such a judicial posture as exercising “comity deference,” in that the court’s engagement finds precise limits in the constitutionally defined roles vested in the three branches of government. Reevaluating the judicial role constantly as the remedial process takes shape, courts invoke comity deference to calibrate a remedy to the basic constitutional delineation of power. Department of Justice lawyers in *Juliana*, however, utterly disregard the constitutionally tailored comity deference and perpetuate a misleading characterization of courts taking over policy.¹¹⁷ The next section briefly describes the well-established judicial exercise of comity deference in the history of American jurisprudence.

VII. THE ENGAGEMENT ROLE OF COURTS ENFORCING FUNDAMENTAL RIGHTS IN INSTITUTIONAL LITIGATION

As expressed by Justice Marshall in *Marbury v. Madison*: “It is emphatically the province and duty of the judicial department to [s]ay what the law is.”¹¹⁸ Over the

Sean Duffy) (“So aren’t you asking [plaintiffs], instead of appreciating that they are helping to deconstruct complexity and relook systemically at how to address a complex problem, aren’t you instead asking them to continue to waste their resources and go chasing small agency actions with no way to get at the broader complexity mosaic of the damage being done as we speak?”). Judge Aiken also expressed dismay at the Duffy’s failure to appreciate a court’s ability to force agencies to work “more in concert outside their silos” and oversee a “complex, multiagency, multi-responsibility problem” that has thus far eluded the government. *Id.* She emphasized the ability of a court to take a more systemic look at the crisis and voiced surprise that the defendants would not be “asking for the courts to help you move [a solution] forward” but instead were conjuring “imaginary horrors about what we might do by intervening,” that ignored the court’s ability to “fundamentally play a role without intervening over the boundaries of . . . our third branch obligation.” *Id.* at 69-70.

115. Brief for Dr. James Hansen as Amici Curiae Supporting Plaintiffs-Appellants at 7, *Alec L. v. Jackson* (No. C-11-2203 EMC) 2011 WL 8583134 (N.D. Cal. Dec. 6, 2011) [hereinafter Hansen, Amici Curiae Brief], cited in Mary Christina Wood & Charles W. Woodward, IV, *Atmospheric Trust Litigation and the Constitutional Right to a Healthy Climate System: Judicial Recognition at Last*, 6 WASH. J. ENV’T L. & POL’Y 633, 658 n.105 (2016).

116. For discussion, see WOOD, NATURE’S TRUST, *supra* note 12, at 230-57.

117. See, e.g., Appellants’ Reply Brief at 24, *Juliana*, 947 F.3d 1159 (No. 6:15-cv-0517-AA) (“In derogation of these normal workings of democracy, Plaintiffs seek to put a single district court, at the behest of a handful of litigants, in charge of directing American energy and environmental policy.”).

118. *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

course of American history, our courts have repeatedly corrected longstanding, systemic wrongs of political branches that infringe on the fundamental rights of citizens. The judiciary has the unique and singular duty to both declare constitutional rights and prevent such political acts that would curb or violate those rights.¹¹⁹ Familiar instances of large-scale institutional litigation in modern American history include the cases that achieved busing to desegregate schools,¹²⁰ the treaty rights cases that assured a fair share of fish for Indian treaty fishers,¹²¹ cases instituting prison condition reform,¹²² and cases relating to land use and low-income housing.¹²³

Unlike typical statutory suits against government agencies that end in a simple, binary “win-loss” result, institutional litigation characteristically engages the court in a complex multi-faceted remedy which may last decades.¹²⁴ Such remedies aim to break down, scrutinize, and reform those institutional dynamics and practices that cause the government to repeatedly violate fundamental rights of citizens. These cases are designed to address long-standing violations baked into an entire institution’s system and forge new ground in bringing about enduring constitutional and civil rights compliance. Institutional judicial remedies can aim prospectively, sweep broadly, and respond to a myriad of scientific and management challenges. The Supreme Court has gone so far as to describe these engagements as occasions for “mercy and practicality.”¹²⁵

The severe breakdown of agencies has spurred this form of judicial intervention in a number of contexts. The desegregation cases of the 1950s and 1960s displayed the most notorious judicial administrative role as courts undertook detailed management of entire school busing systems. But an ensemble of other U.S. cases dealing with prison overcrowding, treaty fishing rights, dam operations, school funding, and land use issues also exemplifies judicial vigor and innovation in addressing bureaucratic delinquency.¹²⁶ In a climate case, the court must perforate the legal dysfunction that hurls society toward ecological collapse and force the government to design a remedial plan aimed towards rapid decarbonization and drawdown. Institutional litigation shows several features that mark the court’s role in devising a remedy for government violations of constitutional rights.¹²⁷

119. *See id.* at 167.

120. *See, e.g.*, *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971); *Milliken v. Bradley*, 418 U.S. 717 (1974); *Green v. Cnty. Sch. Bd. of New Kent Cnty.*, 391 U.S. 430 (1968).

121. *See, e.g.*, *United States v. Washington*, 520 F.2d 676 (9th Cir. 1975); *Washington v. Washington State Com. Passenger Fishing Vessel Ass’n*, 443 U.S. 658 (1979).

122. *See, e.g.*, *Brown v. Plata*, 563 U.S. 493 (2011); *Hudson v. McMillian*, 503 U.S. 1 (1992); *Hutto v. Finney*, 437 U.S. 678 (1978).

123. *See Hills v. Gautreaux*, 425 U.S. 284, 298 (1976).

124. For discussion, *see* WOOD, *NATURE’S TRUST*, *supra* note 12, Ch. 11; *see also* Mary Christina Wood, *The Tribal Property Right to Wildlife Capital (Part II): Asserting a Sovereign Servitude to Protect Habitat of Imperiled Species*, 25 VT. L. REV. 355, section V (2001).

125. *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 15 (1971) (quoting *Hecht Co. v. Bowles*, 321 U.S. 321, 329–30 (1944)).

126. For detailed discussion of these cases, *see* WOOD, *NATURE’S TRUST*, *supra* note 12, at 230–57.

127. *See id.*

The anchoring sidewalls to a remedy lie in a declaratory judgment, which precisely describes and often quantifies government's obligations. For example, in the landmark treaty fishing cases, courts declared the tribes' right to take up to 50% of the harvestable quantities of fish—a clear and quantifiable interpretation of the relevant treaty language that secured the right.¹²⁸ Declaratory judgments may also develop a series of goals tied to detailed timeframes to carry out specified obligations. Such “benchmarks” arise out of a court's practical recognition that agencies otherwise will tend to procrastinate indefinitely in achieving compliance.

A next stage requires the government defendants to develop a remedial plan containing measures to bring the agencies into constitutional compliance. This stage often entails scientific and technical analysis and more data, along with rigorous exploration of various alternatives. In order to prevent these complex remedial issues from clouding the predicate task of defining the plaintiffs' basic rights and government's consequent obligations, courts often bifurcate institutional cases into a “liability” stage and a “remedy” stage. The liability stage allows the court to specify legal obligations in a declaratory judgment, while the remedy stage demands a more innovative judicial role to supervise the parties in crafting a plan. During this stage, the court invokes comity deference to delineate the continuing judicial role as constrained by the Constitution's separation of powers.

Institutional litigation often involves ongoing court supervision to ensure proper execution of the plan and to bring the remedy to fruition over time. The case remains open under the ongoing jurisdiction of the court so that parties can challenge aspects of the remedy implementation without bringing an entirely new lawsuit. Judges usually require periodic reports to the court (at regular intervals of three or six months, for example) to ensure that the government meets defendants' benchmarks in timely fashion.

Courts managing institutional cases often drill down into deep levels of complexity. Accordingly, a court may appoint a special master to handle thorny factual issues, make determinations on reoccurring matters arising within the case, and recommend how the court should rule in particular circumstances. Courts, for example, used special masters to administer structural injunctions in the California prison litigation and in the Pacific Northwest treaty fishing cases.¹²⁹

During the course of institutional litigation, courts will often provide partial relief to stop ongoing violations or damage through targeted orders. These could be thought of as “backstop injunctions” to keep the damage from getting worse. Usually tailored as narrowly as possible, these orders nevertheless respond to the urgency of the situation. For example, in the California prison cases, a backstop injunction issued after years of litigation to require release of thousands of prisoners in order to prevent dire consequences of overcrowding.¹³⁰

One of the most promising aspects of institutional litigation is the opportunity for meaningful agreement between the plaintiffs and defendant agencies to drive forward a solution—one that otherwise might not occur outside of the litigation context. If

128. *United States v. Washington*, 520 F.2d 676, 687 (9th Cir. 1975).

129. *See, e.g., Brown v. Plata*, 563 U.S. 493 (2011); *Washington*, 520 F.2d at 676; *see also* WOOD, NATURE'S TRUST, *supra* note 12, at 250.

130. *Brown*, 563 U.S. at 545.

the parties can agree on management parameters, these details can be wrapped into a consent decree that carries the ongoing force of a court order. Consent decrees can provide relief that exceeds the scope of relief the court could have awarded after a trial.¹³¹

Consent decrees are used in multiple contexts of longstanding government violations. One notable example in the environmental context arose from the treaty fishing case, *U.S. v. Oregon*, handled by Judge Belloni, U.S. District Court of Oregon. The litigation culminated in a consent decree and Columbia River Fish Management Plan (CRFMP)—a model of judicial administration that gained nationwide acclaim.¹³² The CRFMP, which has undergone various iterations over the course of several decades, established a system of co-management between nine sovereigns (states, tribes, and the federal government) managing treaty fisheries in the Columbia River Basin.¹³³ The CRFMP set forth detailed management criteria for each fishery, established technical and policy committees, and created a dispute resolution process that involved the court only as a last resort. The court appointed an expert advisor to inform the judge on scientific matters and to help ensure the scientific integrity of the process. By allowing the sovereign parties to identify points of agreement and work out the details of a remedy using their own administrative and scientific expertise, the consent decree process can create an enduring remedy structure to fit complex institutional and biological circumstances.

These notable examples of institutional litigation underscore the substantial range and flexibility courts have to remedy systemic injustice. This remedy structure brings vital government accountability that is otherwise lost when courts wholly abdicate their role in enforcing fundamental rights. While the scope and complexity of the climate emergency may be without precedent, it embodies the same danger and autocracy that motivated this nation's Founders to create a balanced government with a firm role for the courts to protect life, liberty, and property. After decades of unchecked political annexation by the executive branch in the environmental realm, the *Juliana* case once again forces the judiciary to stake out its exact place in American democracy.

VIII. "NO ORDINARY LAWSUIT": JUDGE AIKEN'S PATHBREAKING OPINION

Judge Aiken's opinion in the *Juliana* case opened a new era of American environmental law. It was the first federal U.S. decision that pronounced a constitutional right of climate stability. While courts of other nations were well along the path of framing environmental rights as fundamental rights with constitutional force, American environmental law, as described earlier, had been shoved into long and narrow tunnels of statutory commands. Endorsing the plaintiffs' framing of the

131. See *Citizens for a Better Env't v. Gorsuch*, 718 F.2d 1117 (D.C. Cir. 1983).

132. See *United States v. Oregon*, 699 F. Supp. 1456, 1469 (D. Or. 1988) (describing and approving Columbia River Fish Management Plan). For a detailed discussion, see Wood, *supra* note 125, at 427–37.

133. See *U.S. v. Oregon*, 699 F. Supp. at 1469 (describing and approving Columbia River Fish Management Plan); see also *Sohappy v. Smith (United States v. Oregon)*, 302 F. Supp. 899 (D. Or. 1969) (original litigation). The CRFMP is described and analyzed in Wood, *supra* note 125, at 427–37.

lawsuit, the court called this a “civil rights action”¹³⁴ in the first sentence of the opinion, and recognized early in the analysis, “This is no ordinary lawsuit.”¹³⁵ The government attorneys sought hard to force this lawsuit back into the statutory realm, claiming there was no relief outside of statutes; Department of Justice (DOJ) attorneys held firm that courts should have no role in the climate crisis and should leave the nation’s energy policy to the unsupervised discretion of the Executive Branch—the same branch that had created the catastrophe in the first place.¹³⁶ Judge Aiken rejected this framing, writing:

Throughout their objections, defendants and intervenors attempt to subject a lawsuit alleging constitutional injuries to caselaw governing statutory and common-law environmental claims. They are correct that plaintiffs likely could not obtain the relief they seek through citizen suits brought under the Clean Air Act, the Clean Water Act, or other environmental laws. But that argument misses the point. This action is of a different order than the typical environmental case. It alleges that defendants’ actions and inactions—whether or not they violate any specific statutory duty—have so profoundly damaged our home planet that they threaten plaintiffs’ fundamental constitutional rights to life and liberty A deep resistance to change runs through defendants’ and intervenors’ arguments for dismissal¹³⁷

Later in the opinion, the court again signaled departure from the dominant frame of environmental law by observing: “Federal courts too often have been cautious and overly deferential in the arena of environmental law, and the world has suffered for it.”¹³⁸ Denying the government’s motion to dismiss, Judge Aiken found that the plaintiffs had set forth viable claims to fundamental rights under both the Due Process Clause of the Constitution and the public trust principle, which she recognized as an attribute of sovereignty itself, predating the Constitution, applicable to the federal government, and enforceable through the Due Process Clause.¹³⁹ In words that would sweep the world, Judge Aiken declared, “I have no doubt that the right to a climate system capable of sustaining human life is fundamental to a free and ordered society.”¹⁴⁰

There are many aspects of this decision worthy of analysis, but this article will focus on the role of the court as embraced by Judge Aiken. By squarely positioning this case as a civil rights case, she drew forth a judicial function that had characterized decades of institutional litigation as described above. Emphasizing the

134. *Juliana v. United States*, 217 F. Supp. 3d 1234, 1234 (D. Or. 2016).

135. *Id.*

136. *See Argument for Federal Defendants by Sean Duffy*, Transcript of Sept. 13, 2016 Oral Argument, *supra* note 115, at 67-68.

137. *Juliana*, 217 F. Supp. 3d at 1261–62.

138. *Id.* at 1262.

139. *Id.* at 1260 (“Public trust claims are unique because they concern inherent attributes of sovereignty. The public trust imposes on the government an obligation to protect the *res* of the trust. A defining feature of that obligation is that it cannot be legislated away.”); *id.* (“[P]laintiffs’ public trust rights both predated the Constitution and are secured by it.”).

140. *Id.* at 1250.

court's duty to enforce constitutional rights, the court stated, "Even when a case implicates hotly contested political issues, the judiciary must not shrink from its role as a coequal branch of government."¹⁴¹

Among many other procedural defenses asserted in the case, the industry intervenors raised the political question doctrine, which holds that some questions are more appropriate for resolution by the political branches without court intervention.¹⁴² The political question doctrine was purposed to help courts navigate the sometimes amorphous boundaries separating the constitutional roles of the three branches of government.¹⁴³ The intervenors argued that this doctrine formed an absolute bar to the *Juliana* case because, in their view (perhaps a result of circular reasoning), climate harm fell within the sole purview of the executive branch, not the courts. As previously explained, this had long been the government's framing of all environmental issues, designed to justify unchecked power in the executive branch. Recognizing that the political question doctrine calls upon courts to balance "profoundly" important interests to protect both the constitutional separation of power structure, on one hand, and preserve the role of courts in adjudicating valid disputes, on the other hand, Judge Aiken rejected the bar-all approach of the intervenors, stating, "A court cannot simply err on the side of declining to exercise jurisdiction when it fears a political question may exist; it must instead diligently map the precise limits of jurisdiction."¹⁴⁴

Judge Aiken carefully parsed through the governing factors declared in the seminal case, *Baker v. Carr*, and determined that none of the factors precluded judicial engagement. The most important of these criteria are: (1) a demonstrable commitment to a non-judicial branch of government; (2) a lack of judicially manageable standards for resolving an issue; and (3) the impossibility of deciding the dispute without an initial policy choice clearly appropriate for non-judicial discretion.¹⁴⁵ With respect to the first, the court catalogued decisions showing the rarity of cases decided under this factor. She determined that climate, while certainly a subject of executive action, was not textually committed to that branch under the Constitution. As to the second factor, attorneys for the intervenors had argued that courts lacked standards to apply to a climate case arising outside of the narrow confines of express statutory provisions. Judge Aiken wrote, "[p]laintiffs could have brought a lawsuit predicated on technical regulatory violations, but they chose a

141. *Id.* at 1263.

142. *Id.* at 1236 (grouping defenses asserted by government defendants and intervenors). While the government defendants did not explicitly raise the political question argument in their briefs supporting their motion to dismiss, they raised it later in a Motion for Summary Judgment and Motion for Judgment on the Pleadings, and Judge Aiken found that those arguments largely reiterated the ones the court had earlier rejected in denying the defendants' Motion to Dismiss. *Juliana v. United States*, 339 F. Supp. 3d 1062, 1085 (D. Or. 2018).

143. *Baker v. Carr*, 369 U.S. 186, 217 (1962).

144. *Juliana*, 217 F. Supp. 3d at 1236.

145. *Id.* Other criteria Justice Brennan identified were (1) the impossibility of a court's resolving an issue without expressing a lack of respect to coordinate branches; (2) an unusual need to adhere to a political decision already made; and (3) the potential of embarrassment from multifarious pronouncements by various branches to the same issue. *Id.* The intervenor-defendants in *Juliana* argued only the first three of the *Baker* factors.

different path. . . . Every day, federal courts apply the legal standards governing due process claims to new sets of facts.”¹⁴⁶

The third *Baker* factor squarely addresses the judicial role in fashioning relief for any violations declared by the court. In this regard, it is important to recognize the distinctions between declaratory relief and a structural injunction that may require a remedial plan and engage the court in supervising the plan. The court found neither role categorically excludes the *Juliana* case from judicial review. As to the declaratory relief, the court explained:

Plaintiffs do not seek to have this Court direct an individual agency to issue or enforce any particular regulation. Rather, they ask the Court to declare the United States’ current environmental policy infringes their fundamental rights, direct the agencies to conduct a consumption-based inventory of United States CO₂ emissions, and use that inventory to “prepare and implement an enforceable national remedial plan to phase out fossil fuel emissions and draw down excess atmospheric CO₂ so as to stabilize the climate system and protect the vital resources on which Plaintiffs now and in the future will depend.” This Court could issue the requested declaration without directing any individual agency to take any particular action.¹⁴⁷

As to the judicial role in fashioning remedial relief, attorneys for the fossil fuel intervenors argued that the court could not devise an injunctive remedy without violating the separation of powers. The court rejected that argument, signaling a process of ongoing evaluation and exercise of what this article calls “comity deference,” as discussed above. Judge Aiken wrote:

Should plaintiffs prevail on the merits, 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. *Cf. S. Burlington Cnty. N.A.A.C.P. v. Mt. Laurel Twp.*, 336 A.2d 713, 734 (N.J. 1975) (leaving to municipality “in the first instance at least” the determination of how to remedy the constitutional problems with a local zoning ordinance). That said, federal courts retain broad authority “to fashion practical remedies when confronted with complex and intractable constitutional violations.”¹⁴⁸

“In any event,” Judge Aiken noted, “speculation about the difficulty of crafting a remedy could not support dismissal at this early stage.”¹⁴⁹

Judge Aiken’s conception of the court’s role positions the *Juliana* case in line with the institutional litigation that is a formative part of this country’s judicial history. As earlier noted, American jurisprudence shows many examples of

146. *Id.* at 1239.

147. *Id.*

148. *Id.* at 1241–42.

149. *Id.* at 1242.

“structural-reform” injunctions requiring institutions to change behavior.¹⁵⁰ In an encompassing statement, Judge Aiken declared, “There is no need to step outside the core role of the judiciary to decide this case. At its heart, this lawsuit asks this Court to determine whether defendants have violated plaintiffs’ constitutional rights. That question is squarely within the purview of the judiciary.”¹⁵¹ Moreover, rather than positioning this case as a “win-loss” case (typical of statutory cases) in which the court plays a passive umpire role, Judge Aiken signaled the court’s role as one of ongoing engagement, carrying out its duties as a coequal branch of government. During oral arguments on the motion to dismiss, the Obama administration’s DOJ attorney, Sean Duffy, continually urged dismissal on the basis that plaintiffs’ only remedy was statutory.¹⁵² Judge Aiken asked why the government would not welcome judicial involvement to help push climate action “with all deliberate speed,” suggesting that the court’s institutional pressure as a “third branch of government . . . [with] shared responsibility”¹⁵³ could advance the climate solutions in the other branches. Distinguishing this litigation, which challenges the system as a whole, from the statutory approach urged by Duffy, Judge Aiken expressed the need to “break down silos” and stated,

I understand your compartmentalized arguments. This poses a different situation, and that is having a mosaic approach to the way the agencies work in conjunction with one another. . . . I think there is an opportunity because there is so much common ground [to] recognize the problem, and you can help fashion your own solution that’s a broader solution and welcome that other people are keeping the pressure on you.¹⁵⁴

Indicating the productive potential for a court-supervised settlement, Judge Aiken referred to a consent decree negotiated with the Portland Police Department and the Justice Department, observing that the court had brought together the parties and, rather than directing the actions to be taken, supervised the process to make sure that all parties moved forward with “all deliberate speed”¹⁵⁵ to resolve the problem.

With this vision of judicial involvement, Judge Aiken rejected the government’s motion to dismiss and later set a trial date. A process of massive discovery ensued for a year, leading to a final trial date of October 29th, 2018. In preparation, plaintiffs gained declarations from their 21 experts on topics including: (1) the government’s knowledge of the danger of the fossil fuel system; (2) the climate reality requiring massive and urgent decarbonization to avoid tipping points; and (3) the viable decarbonization pathways that would be economically feasible; and (4) the significant impacts of the climate crisis on youth plaintiffs physical and mental health. The evidence assembled by the attorneys comprises many thousands of pages

150. *Recent Case, Juliana v. United States, Ninth Circuit Holds that Developing and Supervising Plan to Mitigate Anthropogenic Climate Change Would Exceed Remedial Powers of Article III Court*, 134 HARV. L. REV. 1929, 1933 (2021).

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

152. Transcript of Sept. 13, 2016 Oral Argument, *supra* note 115, at 13-20.

153. *Id.* at 14-15.

154. *Id.* at 12, 15-16.

155. *Id.* at 13.

and remains available to litigants around the world through the Sabin Center's Climate Chart.¹⁵⁶ A trial in a federal district court would have marked the first time in American history that the U.S. government's fossil fuel agenda would have been—quite literally—put on trial; the opportunity to expose governmental malfeasance was momentous. No other forum—certainly not the narrow and cumbersome agency processes, nor the politicized, distracted forums of Congress—could provide the rigorous, evidence based, structured process of a court trial for getting at the truth. Many referred to the upcoming proceeding as the “Trial of the Century.”¹⁵⁷

The district court planned to conduct *Juliana* as a standard bifurcated trial (characteristic of institutional litigation), separating the trial into a liability phase and a remedial phase.¹⁵⁸ Given the evidence already in the record prior to trial, there seemed a strong likelihood that a liability phase would end in a declaratory judgment outlining the constitutional due process and/or public trust violations and illuminating the science defining the right to a stable climate system capable of supporting life on Earth.¹⁵⁹ Specific elements of the government's climate obligation would likely emerge from this phase, setting the sidewalls for a remedial phase, which would follow. The opportunity for climate progress in this phase was profound, as a trial on the remedy would provide the forum for scrutinizing alternative pathways towards decarbonization and carbon drawdown, defined by experts. Judge Thomas M. Coffin, as the magistrate judge in the case, was positioned to vet the proposed remedies, hone in on exactly what the plaintiffs proffered, find areas of agreement, and sift out any remedies that fell outside of the court's Constitutional purview. Had DOJ attorneys dedicated their office and public resources to solving the climate problem rather than to take a litigious defensive posture (more characteristic of private attorneys), the nation may have commenced on a productive path towards climate safety at this critical juncture.

But instead, the DOJ attorneys launched a barrage of unprecedented motions in what seemed a desperate attempt to derail the trial. Their need to do so was obvious: the scientific evidence produced at trial would prove devastating to an administration bent on flooring the accelerator on fossil fuel production. Over the course of the next four years, the case went four times to the Ninth Circuit and twice to the Supreme Court on various motions, petitions for writs of mandamus, and requests for interlocutory appeal, a procedure described as “hen's-teeth rare.”¹⁶⁰ These efforts

156. See *supra* note 109.

157. Jessica Wentz, *The Trial of the Century: A Preview of How Climate Science Could Play Out in the Courtroom, Courtesy of Juliana v. United States*, COLUM. CLIMATE L. BLOG, <http://blogs.law.columbia.edu/climatechange/2019/01/07/the-trial-of-the-century-a-preview-of-how-climate-science-could-play-out-in-the-courtroom-courtesy-of-juliana-v-united-states/> (Jan. 7, 2019); David Solnit, *The Climate Trial of the Century*, 350 BLOG, <https://350.org/youthgov-juliana-climate-trial-of-century/> (Nov. 2, 2018).

158. See discussion at Blumm & Wood, *supra* note 4, at n. 143.

159. *Juliana*, 217 F. Supp. 3d at 1250.

160. See, e.g., *Camacho v. P.R. Ports Auth.*, 369 F.3d 570, 573 (1st Cir. 2004) (“Section 1292(b) is meant to be used sparingly, and appeals under it are, accordingly, hen's-teeth rare.”). The procedural history of the case is iterated in the opinion of Judge Friedland, dissenting to the Ninth Circuit's order certifying appeal. This barrage of petitions filed by DOJ attorneys exemplifies the massive use of public legal funds and expertise to derail trial rather

culminated in a premature appeal to the Ninth Circuit Court of Appeals.¹⁶¹ In retrospect, given the need for urgent climate action and the prospect of irrevocable destruction to society from delaying solutions, these DOJ attorneys' personal roles and ethical choices in defending the Trump administrations' ruinous decisions should not be overlooked.

The trial of the century did not happen.

IX. THE DERAILMENT OF *JULIANA* AND THE NINTH CIRCUIT'S ABSTRACT APPEAL

Appellate review is ordinarily available only after a district court has entered a final judgment, which usually follows a trial.¹⁶² Interlocutory (premature) appeals are disfavored, because they interrupt the normal sequence of litigation. The role of a trial court is to build a body of evidence, create an evidentiary record, and issue findings of fact and law. It is a robust process that entails weighing significant evidence and making discerning judgements. Appellate judges rely on this work of the district court in order to inform their review. Without an evidentiary basis, the

than forge a solution to the urgent climate crisis within a judicially supervised framework proposed by the plaintiffs. *See also* n. 166. Judge Friedland's account of the DOJ motions is quoted in full below to provide a sense of the government's relentless efforts to derail this case:

See Petition for Writ of Mandamus to the United States District Court for the District of Oregon and Request for Stay of Proceedings in District Court, *United States v. U.S. District Court*, No. 17-71692, Dkt. 1 (9th Cir. June 9, 2017) (requesting a stay of district court proceedings and relief from the Ninth Circuit); Petition for a Writ of Mandamus and Emergency Motion for a Stay of Discovery and Trial Under Circuit Rule 27-3, *United States v. U.S. District Court*, No. 18-71928, Dkt. 1 (9th Cir. July 5, 2018) (same); Application for a Stay Pending Disposition by the United States 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, *United States v. U.S. District Court*, No. 18A65 (U.S. July 17, 2018) (requesting a stay from the Supreme Court pending Ninth Circuit review of mandamus petition); Petition for a Writ of Mandamus Requesting a Stay of District Court Proceedings Pending Supreme Court Review, Emergency Motion Under Circuit Rule 27-3, *United States v. U.S. District Court*, No. 18-72776, Dkt. 1 (9th Cir. Oct. 12, 2018) (requesting a stay of district court proceedings from the Ninth Circuit pending Supreme Court review of mandamus petition); Application for a Stay Pending Disposition 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, *In re United States, Applicants*, No. 18A410 (U.S. Oct. 18, 2018) (bypassing the Ninth Circuit and requesting mandamus relief from the Supreme Court); Petition for a Writ of Mandamus and Emergency Motion Under Circuit Rule 27-3, *United States v. U.S. District Court*, No. 18-73014, Dkt. 1 (9th Cir. Nov. 5, 2018) (requesting a stay of district court proceedings and relief from the Ninth Circuit).

Juliana v. United States, No. 18-80176, slip op. at 6 n.1 (9th Cir. Dec. 26, 2018) (Friedland, J., dissenting).

161. *Id.* at 1.

162. 28 U.S.C. § 1291.

case arrives on appeal as an abstract hypothetical, devoid of the facts that would give the legal questions practical context and grounding. In the words of Judge Coffin, recommending denial of a government motion, early appeals “put the cart before the horse.”¹⁶³

The process of a trial in the district court is particularly important to an appellate court discerning whether a remedy is within the judicial branch’s appropriate purview. Without a vetted, tangible remedy structure, the matter is all but “dead on arrival” to an appellate court, because the case opens up a parade of hypothetical wonderings and endless what-ifs. It is worth noting that two of the most far-reaching and involved judicial remedies in institutional litigation—those involving desegregation and treaty rights cases—were upheld on appeal, but only upon a well-developed record at the trial court level. Without the process of a trial judge carefully discerning the court’s role and making judgments as to how the various remedial components calibrate to the functions of each branch, the appellate court is left with a case that is utterly vacuous and categorical—inviting an infinite scope of possible remedy scenarios which could exceed judicial power. In other words, deviating from the regular course of judicial process eliminates the opportunity for the trial judge to exercise comity deference. This was the unfortunate posture of the *Juliana* case when it arrived on appeal to the Ninth Circuit.

In granting the government’s premature appeal, the Ninth Circuit was obliged to issue what amounted to an advisory opinion without the benefit of a trial court record. The dissenting judge who objected to the order granting interlocutory appeal before the Ninth Circuit, Judge Friedland, believed the case should have proceeded to trial because “the district court—having, among other things, direct experience with the parties, knowledge of the status of discovery, and the ability to sequence issues for trial—is far better positioned to assess how to resolve the litigation most efficiently.”¹⁶⁴ She was outnumbered by her two colleagues, Judges Thomas and Berzon, both of whom approved of the premature appeal.

As the *Juliana* plaintiffs were awaiting oral argument, they filed a motion on February 7, 2019, for an emergency preliminary injunction in the Ninth Circuit to prevent approvals for 100 new fossil fuel infrastructure projects that the Trump administration was poised to execute—encompassing pipelines, export facilities, and coal and liquefied natural gas terminals. The plaintiffs stated:

The evidence shows that these systemic activities must be enjoined immediately to preserve Plaintiffs’ ability to obtain a remedy in this case that redresses their injuries The record shows Plaintiffs are already suffering concrete harm to their persons, and these harms will worsen

163. Findings and Recommendations at 15, *Juliana v. United States*, 217 F. Supp. 3d 1224, 1260 (D. Or. 2016), rev’d & remanded, 947 F.3d 1159 (9th Cir. 2020) (No. 6:15-cv-01517-TC).

164. *Juliana v. United States*, No. 18-80176, slip op. at 6 (9th Cir. Dec. 26, 2018) (Friedland, J., dissenting). Judge Friedland also objected to the interlocutory appeal because it “now effectively rewards the Government for its repeated efforts to bypass normal litigation 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.” *Id.* at 6, n.1 (citing the serial motions by the DOJ seeking to thwart trial).

and likely become irreversible in the absence of a preliminary injunction. . . . Defendants made every effort to prevent Plaintiffs' case from being decided, all while accelerating fossil fuel development and increasing GHG emissions to the point where it will become impossible for Plaintiffs to protect themselves from the climate danger Defendants have had a substantial role in causing.¹⁶⁵

Scientists supported the motion with expert declarations expressing the all-out urgency of stopping more fossil fuel development, stating, "Continuing U.S. emissions at the present level for even two years will make it progressively more difficult to stabilize the climate system in this century in order to preserve the critical components for human life on this planet as we know it today"¹⁶⁶ and explaining that, if we pass the point of no return, "climate change becomes irreversible for centuries to millennia."¹⁶⁷ The emergency motion came in the wake of devastation caused by one of the deadliest, most destructive, and most expensive wildfires in recent U.S. history.¹⁶⁸ The November 2018 Paradise Fire in California destroyed over 18,000 structures, burned 2 towns to the ground, and left over 80 people dead—leaving no doubt that the climate crisis was gaining ferocity as the *Juliana* case sat in the Ninth Circuit, headquartered just 172 miles away from Paradise, California.¹⁶⁹

X. ON THE "EVE OF DESTRUCTION": THE MAJORITY'S OPINION

On January 17, 2020, the three-judge panel of the Ninth Circuit split into a majority (Judge Hurwitz writing for himself and Judge Murguia) and a dissent (Judge

165. Urgent Motion Under Circuit Rule 27-3(b) for Preliminary Injunction at 11–12, *Juliana v. United States*, No. 18-36082 (9th Cir. Feb. 7, 2019), available at http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2019/20190207_docket-18-36082_motion.pdf. "GHG" refers to greenhouse gas.

166. Declaration of Steve W. Running in Support of Plaintiffs' Urgent Motion Under Circuit Rule 27-3(B) for Preliminary Injunction at 10, *Juliana v. United States* (9th Cir. Feb. 7, 2019), available at http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2019/20190207_docket-18-36082_declaration-10.pdf.

167. Declaration of Dr. James E. Hansen In Support of Plaintiffs' Urgent Motion Under Circuit Rule 27-3(B) for Preliminary Injunction, at 6, *Juliana v. United States*, No. 18-36082 (9th Cir. Feb. 7, 2019), available at http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2019/20190207_docket-18-36082_declaration-15.pdf. Scientists outside the litigation had strenuously warned that the United States needed to leave most remaining fossil fuels "in the ground." GREG MUTTITT, OIL CHANGE INT'L, THE SKY'S LIMIT: WHY THE PARIS CLIMATE GOALS REQUIRE A MANAGED DECLINE OF FOSSIL FUEL PRODUCTION 15 (2016), https://priceofoil.org/content/uploads/2016/09/OCI_the_skys_limit_2016_FINAL_2.pdf ("We see that for a likely chance of keeping warming below 2°C, 68% of reserves must remain in the ground. For a medium chance of limiting warming to 1.5°C, 85% of reserves must remain underground.").

168. Alene Tchekmedyian, *California Fires Live Updates: Camp Fire Death Toll at 86; 3 People Still Missing*, L.A. TIMES (Dec. 11, 2018), <https://www.latimes.com/local/california/la-me-california-fires-woolsey-hill-camp-griffith-park-live-updates-htlstory.html>; Jack Nicas & Thomas Fuller, *Wildfire Becomes Deadliest in California History*, N.Y. TIMES (Nov. 12, 2018), <https://www.nytimes.com/2018/11/12/us/california-fires-camp-fire.html>.

169. Tchekmedyian, *supra* note 172.

Staton) in the *Juliana* case. Judge Hurwitz began his majority opinion by announcing that the world is nearing “the ‘eve of destruction,’”¹⁷⁰ and that the United States is being pushed towards environmental “apocalypse” by its own government pursuing a fossil fuel policy with full knowledge of the catastrophic consequences.¹⁷¹ Atmospheric carbon dioxide levels, he observed, have “skyrocketed”¹⁷² to levels not seen for almost three million years. Quite simply, according to “copious expert evidence,” emissions from fossil fuel combustion will “wreak havoc on the Earth’s climate if unchecked.”¹⁷³ Recognizing that “[t]he problem is approaching ‘the point of no return,’” Judge Hurwitz wrote, “[a]bsent some action, the destabilizing climate will bury cities, spawn life-threatening natural disasters, and jeopardize critical food and water supplies.”¹⁷⁴ Convinced by the extensive factual showings by the plaintiffs, Hurwitz also took notice of the government’s general acceptance of the factual claims: “The government by and large has not disputed the factual premises of the plaintiffs’ claims.”¹⁷⁵

Despite all of this, Judge Hurwitz dismissed the children’s case, finding no conceivable role for the judiciary though he endorsed the framing of the case as a civil rights lawsuit. The DOJ attorneys tried hard to keep the case in a statutory frame, arguing that the plaintiffs would need to bring their claims under the Administrative Procedure Act. Judge Hurwitz rejected that argument, writing that plaintiffs’ constitutional claims could “proceed independently of the review procedures mandated by the APA.”¹⁷⁶ He also assumed the existence of the constitutional rights asserted by plaintiffs under the Due Process Clause and the public trust principle and found that important elements of standing were met in that the plaintiffs suffered a concrete and particularized injury that was caused by the government conduct.¹⁷⁷ All of these findings, while not explored in any depth in this article, were momentous and represented substantial advances in climate litigation.

Remarkably, however, in an almost surreal detachment from the reality of the climate emergency largely perpetrated by the government defendants, Judge Hurwitz found that the plaintiffs failed to meet the last element of standing: a showing that the injuries are likely redressable by a favorable judicial decision.¹⁷⁸ He set the stage for the discussion by saying that, to establish redressability, plaintiffs must show the requested relief (1) is substantially likely to redress their injuries and (2) is within the district court’s power to award.¹⁷⁹ He divided the discussion into the request for declaratory relief and the request for a broad structural injunction ordering a remedial plan to decarbonize.¹⁸⁰ But with no discussion at all, Judge Hurwitz simply denied in

170. *Juliana v. United States*, 947 F.3d 1159, 1164 (9th. Cir. 2020).

171. *Id.* at 1166 (“The record also conclusively establishes that the federal government has long understood the risks of fossil fuel use and increasing carbon dioxide emissions.”).

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.* at 1167.

176. *Id.* at 1168.

177. *Id.*

178. *Id.* at 1171.

179. *Id.* at 1170.

180. *Id.* at 1169.

a footnote¹⁸¹ the plaintiffs' request for an emergency injunction to stop 100 new fossil fuel projects—an injunction that surely seemed to meet both factors in that it would have redressed plaintiffs' alleged injuries by slowing the rate of carbon emissions from the United States and was well within the traditional competency of the court to award. Targeted injunctions are used to stop the building of oil pipelines and halt coal leases, for example.¹⁸² Ominously, this relief was utterly ignored.

As to the request for a declaratory judgment -- a staple of judicial relief used to determine the rights of the parties -- Judge Hurwitz expressed, seemingly in non-dispositive *dicta*, that under the first redressability factor, he was “skeptical” that declaratory judgment would redress plaintiffs' injuries.¹⁸³ Of course, as noted above, the court did not have a full factual record before it (as there had been no trial); thus, the majority lacked a basis to evaluate whether declaratory relief would provide at least partial redress.

As to the “crux of the plaintiffs' requested remedy,”¹⁸⁴ an injunction ordering a remedial plan to decarbonize and draw down excess carbon in the atmosphere, Judge Hurwitz recoiled at the prospect, barring all scenarios of judicial involvement.¹⁸⁵ He stated, “Reluctantly, we conclude that such relief is beyond our constitutional power.”¹⁸⁶ While the court expressed skepticism that the first redressability prong would be satisfied, because international sources of emissions remained beyond the United States' control, the focus of his analysis landed on the second factor. Judge Hurwitz pinned his dismissal on a finding that the relief sought was not “within the power of an Article III court . . . [as] any effective plan would necessarily require a host of complex policy decisions entrusted, for better or worse, to the wisdom and discretion of the executive and legislative branches.”¹⁸⁷ Oddly, having endorsed the fundamental rights framework of the case, Judge Hurwitz reflexively reverted to the passive, nonengagement role that has so upset the balance of power over the last half century since the environmental statutes were enacted. With this case of profound gravity before the court, Judge Hurwitz yielded completely to the executive branch—giving agency defendants unfettered discretion, even power, to destroy the nation itself. Judge Hurwitz wrote: “[S]ome questions—even those existential in nature—are the province of the political branches.”¹⁸⁸

Judge Hurwitz found as a fatal shortcoming the lack of “limited and precise”¹⁸⁹ standards for redressing the asserted violation. For this, he cited *Rucho v. Common Cause*, a case that dismissed a partisan gerrymandering claim as presenting a political question beyond the reach of the courts.¹⁹⁰ Judge Hurwitz's insistence on a “limited

181. *Id.* at 1175, n. 10.

182. *See, e.g.*, Tim Ryan, *High Court Keeps Block on Keystone Pipeline Work*, COURTHOUSE NEWS SERV. (July 6, 2020), <https://www.courthousenews.com/high-court-keeps-block-on-keystone-pipeline-work/>.

183. *Juliana*, 947 F.3d at 1170.

184. *Id.*

185. *Id.* at 1165.

186. *Id.*

187. *Id.* at 1171 (citing *M.S. v. Brown*, 902 F.3d 1076, 1086 (9th Cir. 2018)).

188. *Id.* at 1173.

189. *Id.*

190. 139 S. Ct. 2484, 2500 (2019).

and precise” legal standard as a predicate to fashioning remedial relief has been roundly criticized as imposing a new and unfounded limitation on the ability of courts to fashion remedial relief through structural reform injunctions.¹⁹¹ Courts regularly devise standards, based on the evidence, to define the boundaries of constitutional compliance. Landmark treaty fishing cases, for example, devised variations of a 50:50 harvest allocation. The California prison cases imposed a standard to reduce populations to 137.5% of the buildings’ design capacity to mitigate overcrowding.¹⁹² The *Mount Laurel* land use litigation defined a fair housing standard using formulas calibrated to an urban population.¹⁹³ The standard envisioned by the *Juliana* plaintiffs was tied to climate requirements: as emphasized by climate scientists, the atmosphere must return to a pollution level below 350 ppm CO₂.¹⁹⁴ The role of the trial court would be to consider expert scientific testimony defining this as the appropriate standard by which to protect “a climate system capable of sustaining human life.”¹⁹⁵ Judge Aiken seemed prepared to do this, stating, “[P]laintiffs do not ask this Court to pinpoint the ‘best’ emissions level; they ask this Court to determine what emissions level would be sufficient to redress their injuries. That question can be answered without any consideration of competing [policy and economic] interests.”¹⁹⁶

Beyond requiring a preexisting “limited and precise” legal standard, Judge Hurwitz took issue with the court’s role in designing a remedial scheme, saying “it is beyond the power of an Article III court to order, design, supervise, or implement the plaintiffs’ requested remedial plan.”¹⁹⁷ His analysis rested on a mischaracterization of the process, for a trial court would not itself, of course, “design” a plan. That is up to the government defendants to do – as plaintiffs have argued throughout the case. Judge Hurwitz could not imagine any scenario in which a judicial role would be appropriate. His position emerged, almost undoubtedly, from the posture of the case arriving in the Ninth Circuit as a totally abstract hypothetical case. Had the trial court engaged in the effort of devising remedial relief, the panel would have had a tangible judicial role to review—a record that likely would have reflected a process of a trial judge exercising comity deference to observe appropriate constitutional boundaries. Instead, stripping courts of any role, Judge Hurwitz declared: “Not every problem posing a threat—even a clear and present danger—to the American Experiment can be solved by federal judges.”¹⁹⁸ He said recourse must

191. *See supra* note 152.

192. WOOD, NATURE’S TRUST, *supra* note 12, at 248–49 (discussing cases).

193. *Id.* at 249.

194. *Juliana*, 947 F.3d at 1173 (“The plaintiffs’ experts opine that atmospheric carbon levels of 350 parts per million are necessary to stabilize the global climate.”). *See supra* note 34.

195. *Juliana v. United States*, 217 F. Supp. 3d 1224, 1250 (D. Or. 2016), *rev’d & remanded*, 947 F.3d 1159 (9th Cir. 2020).

196. *Id.* at 1239 (citing *Coleman v. Schwarzenegger*, No. C01-1351, 2010 WL 99000, at *1 (E.D. Cal. Jan. 12, 2010)).

197. *Juliana*, 947 F.3d at 1171.

198. *Id.* at 1174.

be through the political branches, even though they “have to date been largely deaf to the pleas of the plaintiffs and other similarly situated individuals.”¹⁹⁹

Judge Hurwitz’s opinion, penned at this profoundly consequential moment in human history, perpetuated the antiquated “passive umpire” view of the court system that had come to define the courts’ role in environmental statutory cases.²⁰⁰ The logic of this view would fold against the force of the dissenting opinion and, later, against the clear thrust of cases from other countries in which judges rose to their axiomatic duty of holding governments accountable—even in, or especially in, the climate crisis.²⁰¹ A statement by Hawaii Supreme Court Justice Wilson would prove prescient: “As the archetypal peril of earth with collapsing ecosystems approaches, legal narratives limiting judicial review. . . of carbon-caused global warming will become anachronisms.”²⁰²

XI. “MY COLLEAGUES THROW UP THEIR HANDS”: JUDGE STATON’S DISSENT

Judge Josephine Staton authored an unsparing dissent that probed the judicial obligations cast aside by the majority. Describing the current situation, she noted: “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 . . . insists it has the absolute . . . unreviewable power to destroy the Nation.”²⁰³ Declaring, “My colleagues throw up their hands, concluding that this case presents nothing fit for the

199. *Id.* at 1175.

200. Professor Ann Carlson points out that Judge Hurwitz must have had in mind a probable reversal by the U.S. Supreme Court if he delivered a victory to the plaintiffs. Ann Carlson, *Deciding a Climate Case in the Shadow of the Supreme Court*, LEGALPLANET (Jan. 23, 2020), <https://legal-planet.org/2020/01/23/deciding-a-climate-case-in-the-shadow-of-the-supreme-court/> (“One can’t read the Ninth Circuit decision without this context in mind. And when read in that context, the decision is, in my view, as much of a victory for the plaintiffs as they could have hoped for.”). Yet there may have been other ways to craft the opinion, focusing on the premature nature of the appeal and the vacuous context in which the Ninth Circuit was operating. This ground, while not immune from Supreme Court reversal, would have put the case in a much different posture for higher scrutiny. As previously noted, in the normal progression of lawsuits, district courts have a trial, weigh evidence, and make findings. *See supra* notes 164–65 and accompanying text. The full evidentiary record goes to the appellate court on review. By stepping out of this well-established sequence, the Ninth Circuit disrupted the litigation process as a whole, precedent that the Supreme Court could have weighed apart from the merits of the *Juliana* case. In fact, twice the Court had refused to grant the government’s petition for writ of mandamus seeking premature review. *See United States v. Juliana*, 884 F.3d 830, 833–34 (9th Cir. 2018) (detailing procedural history of case). Professor Patrick Parenteau said of the Hurwitz decision, “Throwing the case out without hearing a single bit of evidence is outrageous.” Mark Kaufman, *The Kids’ Climate Lawsuit Just Got Thrown Out*, MASHABLE (Jan. 17, 2020), <https://mashable.com/article/kids-climate-lawsuit-thrown-out/>.

201. *See infra* Part XVI.

202. Michael D. Wilson, *Climate Change and the Judge as Water Trustee*, 48 ENV’T LAW REP. 10235, 10240 (2018).

203. *Juliana*, 947 F.3d at 1175 (Staton, J., dissenting).

Judiciary,”²⁰⁴ Judge Staton invoked the separation of powers to emphasize the courts’ role and constitutional duty to stop the executive branch from perpetuating “the Nation’s willful destruction.”²⁰⁵ Unlike her colleagues, Judge Staton recognized a sovereign duty to “preserve the Nation”²⁰⁶ and asserted that courts “serve as the ultimate backstop”²⁰⁷ and remain singularly vested with the duty to enforce a “perpetuity principle”—the right to an enduring America.²⁰⁸

Judge Staton marched steadily through an analysis of redressability and the appropriate role of a court in institutional litigation, bringing the full civil rights frame to this climate case. She invoked the same two-factor test that the majority used—“First, as a causal matter, is a court order likely to actually remediate the plaintiffs’ injury? If so, does the judiciary have the constitutional authority to levy such an order?”²⁰⁹—then portrayed the glaring reality of the situation to deride both the government’s arguments for unrestricted power and the hesitation of her colleagues to carry out their judicial role.

Judge Staton found that the requested remedy would likely address the plaintiff’s injuries, even though it would not stop climate change altogether.²¹⁰ Focusing on the court’s ability to stop “*irreversible . . . climate change*,” she wrote:

[P]ractical redressability is not measured by our ability to stop climate change in its tracks and immediately undo the injuries that plaintiffs suffer today—an admittedly tall order; it is instead measured by our ability to curb by some meaningful degree what the record shows to be an *otherwise inevitable march to the point of no return*. Hence, the injury at issue is not climate change writ large; it is climate change beyond the threshold point of no return. . . .
The majority portrays any relief we can offer as just a drop in the bucket. . . . But [we are perilously close to an overflowing bucket. These final drops matter. *A lot*.²¹¹

Judge Staton found a definable standard to guide the case: “Here, the right at issue is fundamentally one of a discernable standard: the amount of fossil-fuel emissions that will irreparably devastate our Nation. That amount can be established by scientific evidence like that proffered by the plaintiffs.”²¹²

204. *Id.*

205. *Id.*

206. *Id.* at 1177.

207. *Id.* at 1181.

208. *Id.* at 1178 (citing *Alden v. Maine*, 527 U.S. 706, 713 (1999)). While Judge Staton did not invoke language of the public trust in recognizing a perpetuity principle, that principle, embedded in sovereignty itself, requires the same protection of a sustaining ecological endowment to support the nation through the generations. As fiduciary, government lacks the sovereign power to bankrupt the nation’s natural wealth in service of private profiteers.

209. *Id.* at 1181.

210. *Id.*

211. *Id.* (first emphasis added) (second emphasis in original).

212. *Id.* at 1187.

Judge Staton proceeded to address the court's role and authority, positioning the majority's detached reluctance as both extreme and a violation of the separation of powers that imposes duties on the court to vindicate constitutional rights. She wrote:

The majority laments that it cannot step into the shoes of the political branches, but appears ready to yield even if those branches walk the Nation over a cliff. This deference-to-a-fault promotes separation of powers to the detriment of our countervailing constitutional mandate to intervene where the political branches run afoul of our foundational principles.²¹³

Referring to the long history of institutional litigation necessary to remedy constitutional infringement, Judge Staton noted the need of federal courts

[t]o fashion and effectuate relief to right legal wrongs. . . . Indeed, sometimes “the [judicial and governance] roles briefly and partially coincide when a court, in granting relief against actual harm that has been suffered, . . . orders the alteration of an institutional organization or procedure that causes the harm.”²¹⁴

Ultimately, the demolishing force of Judge Staton's opinion came from bringing truth to power in stating, “In short, the government has directly facilitated an existential crisis to the country's perpetuity.”²¹⁵ Iterating what the majority did not contest, she said, “Plaintiffs submit ample evidence that there is a discernable ‘tipping point’ at which the government's conduct turns from facilitating mere pollution to inducing an unstoppable cataclysm in violation of plaintiffs' rights.”²¹⁶ Diminishing the majority's “go to the political branches” approach, Judge Staton emphasized that democratic processes “cannot override the laws of nature”: “[I]n this *sui generis* circumstance, waiting is not an option. Those alive today are at perhaps the singular point in history where society (1) is scientifically aware of the impending climate crisis, and (2) can avoid the point of no return.”²¹⁷

XII. REJECTION OF THE EN BANC PETITION

After the fateful Ninth Circuit ruling, the plaintiffs filed, on March 2, 2020, a petition for an en banc review, which calls for a full rehearing and review by a panel of eleven judges.²¹⁸ To gain en banc review, a majority of Ninth Circuit judges must vote in favor of the petition. Significant wrangling among judges over these petitions can transpire behind the scenes even in ordinary cases. Given the stakes in this case and a presidential election in (then) less than a year's time—an election that foreshadowed dramatic change in U.S. climate policy if Trump were defeated—it

213. *Id.* at 1183–84 (internal citation omitted).

214. *Id.* at 1184 (second and third alterations in original) (quoting *Lewis v. Casey*, 518 U.S. 343, 350 (1996)).

215. *Id.* at 1177.

216. *Id.* at 1187.

217. *Id.* at 1180–81.

218. 9TH CIR. R. 35-3.

may be reasonable to surmise that strategic cogitations marked discussion between judicial chambers during the drama-filled months leading up to November 3, 2020 (U.S. Election Day), and perhaps too even during the three months beyond, as the subversive posture of the Trump administration in assaulting the legitimacy of the election erupted in the violent insurrection at the Nation's capital on January 6 and continued to cast a pall of uncertainty over the inauguration of President Biden on January 20.

On February 10, 2021, nearly a year after the petition for en banc review had been filed, the Ninth Circuit denied it without a word of explanation.²¹⁹ It may have seemed that, after more than five years after the initial filing, the *Juliana* case had reached a crossroads that would force the youth to either drop their case or make an appeal to the U.S. Supreme Court. But the timing of the Ninth Circuit's denial of en banc portended another tangible possibility. Having not issued a denial until President Biden was elected *and firmly installed as President*,²²⁰ the Ninth Circuit kept the case alive into a new administration, such that it could provide a platform for settlement with the Biden agencies (which replaced the Trump administration defendants in the case) in a manner that could create a framework for enduring climate policy. Due to the COVID pandemic, the U.S. Supreme Court's normal deadlines for appeal (through a petition for certiorari) had been extended to July 12, 2021, giving plaintiffs a window of time to consider whether to file for certiorari. Just hours after the petition denial issued, Our Children's Trust announced that it would ask the Biden administration to engage in settlement discussions.²²¹

President Biden entered office with a top priority of confronting climate change and decarbonizing the energy sector, while at the same time promoting environmental justice. Whereas President Trump had floored the accelerator on fossil fuels, President Biden claimed he was intent on slamming on the brakes. On his first day, he signed an executive order, "Tackling the Climate Crisis at Home and Abroad," declaring: "We have a narrow moment to pursue action at home and abroad in order to avoid the most catastrophic impacts of that crisis and to seize the opportunity that tackling climate change presents."²²² The order halted the drilling and leasing of public lands and offshore waters for fossil fuel development.²²³ The Biden policy initiatives, however, would be fleeting if not anchored by an enduring

219. Order Denying Petition for Rehearing En Banc, *Juliana v. United States* (9th Cir. 2021) (No. 6:15-cv-01517-AA), available at http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2021/20210210_docket-18-36082_order.pdf.

220. Commentators have noted the "extraordinary amount of time" that it took for the Ninth Circuit to deny review with no opinion. Richard Frank, *The End of Juliana Litigation—Or Is It?*, LEGALPLANET (Feb. 15, 2021), <https://legal-planet.org/2021/02/15/the-end-of-the-juliana-litigation-or-is-it/>. We will likely never know whether this period of languishment was due to circumstances unrelated to the posture of the case, or whether the judges held the opinion that long to keep the case alive into a new administration and thereby provide an opportunity for settlement.

221. Press Release, Our Children's Trust, 9th Circuit Denies *En Banc* Review for *Juliana v. United States*; Youth Plaintiffs Will Take Their Case to Supreme Court (Feb. 10, 2021).

222. Executive Order 14008 of January 27, 2021: Tackling the Climate Crisis at Home and Abroad, 86 Fed. Reg. 7619 (Feb. 1, 2021).

223. *Id.* at 7624–25, section 208.

legal obligation and enforcement framework that could withstand the political tornados of subsequent elections that could potentially reinstall Trump himself or another fossil fuel ally as President. Even member nations of the G7 doubted Biden's ability to forge climate commitments that would stick amidst the wild pendulum of American politics.²²⁴ The project of decarbonization and drawdown of excess carbon requires decades and is expected, even in a best-case scenario, to last to the end of the century. Executive orders, while symbolic and useful to guide internal leadership, have little force and can easily be unraveled by the next administration (as Biden demonstrated in his first week in office by reversing many Trump executive orders and as Trump also demonstrated, reversing many of Obama's executive orders).²²⁵ A settlement wrapped in a consent decree with ongoing court jurisdiction would allow the Biden administration to architect an enduring framework for the decades-long project of restoring the climate system. Perhaps, as Judge Aiken remarked to DOJ attorney Sean Duffy in the *Juliana* hearing that launched the court's engagement so long ago, the government should welcome the court as a co-equal branch of government putting the pressure on to create solutions.²²⁶

But, despite obvious benefit to the Biden administration of entertaining a settlement, there remains the potential for an obstructive logjam on the defendants' side. The case was still being handled by the very same attorney who defended the Obama and Trump administrations—an attorney who took a defensive, rather than problem-solving, posture.²²⁷ In settlement negotiations, representatives of the client agencies, not the DOJ attorneys, must make the calls as to measures that the government may or may not agree to. Of all of the defendant agencies, the Council of Environmental Quality (CEQ) may be best positioned to take the lead in organizing the other defendant agencies in a settlement structure, as CEQ is charged with formulating national environmental policy.²²⁸ The other agency with unique responsibility in the negotiations is the Department of Interior due to its independent trust obligation to the native nations, an obligation that is not institutionally captured by the CEQ. But, absent any indication of agency involvement at this juncture, it is unclear whether the DOJ is carrying out its obligation to bring those client agencies

224. See generally Ashley Parker & Anne Gearan, *Biden Asks G-7 to Take a Tougher Line on China, but Not All Allies Are Enthusiastic*, WASH. POST (June 12, 2021 1:54 P.M.), https://www.washingtonpost.com/politics/g7-biden-china/2021/06/12/532a0bb2-cb66-11eb-a11b-6c6191ccd599_story.html.

225. See Susan Milligan, *Two Steps Backward, One Step Forward*, US NEWS & WORLD REPORT (Jan. 29, 2021), <https://www.usnews.com/news/the-report/articles/2021-01-29/biden-spends-first-week-issuing-orders-reversing-trumps-orders>; Huma Kahn, *In First 100 Days, Obama Flips Bush Admin's Policies*, ABC NEWS (Mar. 6, 2009), <https://abcnews.go.com/Politics/Obama100days/story?id=7042171&page=1>.

226. See *supra* notes 155-57 (citing transcript of oral argument).

227. See *supra* notes 162, 166 and accompanying text (describing tactics of DOJ attorneys).

228. The White House, Council on Environmental Quality ("The Council on Environmental Quality (CEQ) within the Executive Office of the President coordinates the federal government's efforts to improve, preserve, and protect America's public health and environment."), <https://www.whitehouse.gov/ceq/>.

into settlement discussions.²²⁹ The apparent impasse provides a basis for the court to probe DOJ attorneys' ethical obligations to involve their client agencies.²³⁰

XIII. JULIANA REVIVED: THE *UZUEGBUNAM* DECISION AND THE MOTION TO FILE AN AMENDED COMPLAINT

Just after the Ninth Circuit's timely denial of en banc review, the U.S. Supreme Court handed down a case that affirmed plaintiffs' arguments about the importance of declaratory relief as a basis for standing. The case involved a student, Chike Uzuegbunam, at a public college in Georgia who was prevented by university police from distributing flyers carrying a religious message on campus.²³¹ Arguing that this policy violated his First Amendment rights, Uzuegbunam sued the school seeking both nominal damages and an injunction to stop the college from enforcing the policy.²³² While the litigation was pending, the school decided to abandon its prohibitive policy, ultimately delivering the Supreme Court this question: could a suit be entertained on the basis of nominal damages alone for an occurrence that had occurred entirely in the past?²³³

By a vote of 8-1, the Court held that such a remedy satisfied the redressability element of Article III standing. The majority opinion, authored by Justice Thomas, traced the common law practice of awarding nominal damages even when actual damages were not claimed, noting that such a practice offered plaintiffs who were

229. Multiple national organizations have drafted a letter to Attorney General Merrick Garland urging DOJ to "stop fighting the youth and meet with them at the settlement table in good faith" and noting that DOJ has not responded to plaintiffs' request for settlement. ORGANIZATIONAL LETTER TO THE DOJ SUPPORT JULIANA V. UNITED STATES (Sept. 2021), <https://docs.google.com/document/d/12UAHGcNQzNrV5iPmPNHhYikW95RVZahRN5T1e6lTTNo/edit>; see also Bill McKibben, *We Need the "Whole-of-Government" Climate Fight that Biden Promised*, NEW YORKER (July 14, 2021), <https://www.newyorker.com/news/annals-of-a-warming-planet/we-need-the-whole-of-government-climate-fight-that-biden-promised> (urging DOJ to enter into settlement negotiations and bring a full executive branch strategy to the table).

230. A combination of ethical rules indicates that lawyers have the duty to consult with their clients on settlement scenarios. See Model Rules of Pro. Conduct r. 1.2(a) (adopted by all states) ("Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter." (emphases added)); see also *id.* r. 1.4(a)(1) ("A lawyer shall: (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules . . ."); *id.* r. 1.4(b) ("A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."). The totality of these rules indicates the lawyer's ethical obligation to communicate with clients on settlement potential so that the client may make an informed decision.

231. *Uzuegbunam v. Preczewski*, 141 S.Ct. 792, 794 (2021).

232. *Id.*

233. *Id.*

otherwise unharmed financially to receive a kind of declaratory judgment.²³⁴ In this way, as the Court noted, “the common law avoided the oddity of privileging small-dollar economic rights over important, but not easily quantifiable, nonpecuniary rights.”²³⁵ Ultimately, the Court held that a request for nominal damages satisfies the redressability element necessary for Article III standing where a plaintiff’s claim is based on a completed violation of a legal right. By characterizing nominal damages as essentially a proxy for a declaratory judgment, the opinion indicates that a declaratory judgment alone suffices to support the redressability requirement of Article III.²³⁶ Judge Hurwitz’s skepticism of the declaratory judgment relief requested by the *Juliana* plaintiffs seemingly runs counter to this recent U.S. Supreme Court direction.

Without delay, on March 9, 2021 (the day after the *Uzuegbunam* opinion was issued), the attorneys for the *Juliana* plaintiffs filed a motion with the District Court of Oregon requesting leave to file an amended complaint.²³⁷ Attorneys fashioned the motion to assert declaratory relief that would fit the mold set by the *Uzuegbunam* opinion.²³⁸ Specifically, plaintiffs sought a judicial remedy declaring the plaintiffs’ rights, the defendants’ wrongdoing, and the standard for climate protection. The motion also asked for further injunctive relief.²³⁹ Such modified relief, by eliminating a request for a remedial plan, would avoid the Ninth Circuit majority’s primary objection to a court getting entangled with what it considered to be policy decisions. By keeping the case alive in the District Court of Oregon through a motion for amended complaint (if granted), the reshaped remedy centering on declaratory relief could support a trial probing the science and decarbonization/drawdown pathways consistent with protecting plaintiffs’ constitutional rights. And importantly, the case could serve as the vehicle for robust settlement negotiations that could end in a court-approved consent decree. Because consent decrees can provide a broader scope of relief than that awarded by a court after trial,²⁴⁰ the turn of events brought the case

234. *Id.*

235. *Id.* at 800.

236. *Id.* at 798.

237. Plaintiffs’ Proposed Second Amended Complaint for Declaratory and Injunctive Relief, *Juliana v. United States*, 217 F. Supp. 3d 1224, 1260 (D. Or. 2016), *rev’d & remanded*, 947 F.3d 1159 (9th Cir. 2020) (No. 6:15-cv-01517-TC), available at http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2021/20210309_docket-615-cv-1517_complaint.pdf.

238. At the hearing on the motion to amend the complaint, Judge Aiken suggested the plaintiffs could seek nominal damages as well to align the relief closely with that in the *Uzuegbunam* case. *See* Transcript of June 25, 2021 Oral Argument at 21, *Juliana v. United States* (D. Or. 2016) (No. 6:15-cv-01517-AA), *rev’d & remanded*, 947 F.3d 1159 (9th Cir. 2020), available at <https://static1.squarespace.com/static/571d109b04426270152febe0t/616f4e71a2a6445ed3308fc7/1634684529407/2021.06.25+Oral+Argument+on+Motion+to+Amend+Transcript+w+Index.pdf>.

239. *See* Proposed Second Amended Complaint, *supra* note 243, at 5 (“If the constitutional controversy is resolved in their favor by declaratory judgment, Plaintiffs intend to seek further relief as deemed appropriate and consistent with the separation of powers between the three branches of government.”).

240. *See generally* *Citizens for a Better Env’t v. Gorsuch*, 718 F.2d 1117 (D.C. Cir 1983).

uncannily close to its longstanding original vision of positioning the court as an engaged institution overseeing a climate remedy.

XIV. FINALLY, A PATH TO SETTLEMENT

On May 13, the district court set a hearing date on the plaintiffs' motion to amend their complaint and also ordered the parties to engage in settlement discussions prior to the hearing.²⁴¹ Judge Aiken recalled Magistrate Judge Thomas Coffin (who had earlier presided as magistrate over the case) from his full retirement to oversee such negotiations. Judge Aiken emphasized the gravity of the moment and urged the government defendants to take seriously this opportunity, stating:

[E]veryone should take a look at what this case is about and . . . the best way to move it forward and how to take advantage of . . . a couple of branches of government—maybe all three—working together to resolve disputes . . . 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 manner] that moves forward what we understand [is] a crisis. So do not—do not see that as just a ministerial step in what you need to do to make the next legal decision. Take a step back from it and take a look at what you need to do to move forward on what you all know are issues in this case that can be resolved [and] that will best address the rights that have been acknowledged in the Ninth Circuit's opinion.²⁴²

Judge Aiken set the date for oral arguments on the motion for amended complaint out far enough—June 25—to allow the settlement process to commence. On June 8, 2021, attorneys general from seventeen “red” states moved to intervene in the settlement negotiations.²⁴³ On July 7, 2021, attorneys general from “blue” states of New York, Oregon, Delaware, Hawaii, Minnesota, and Vermont filed an amicus brief supporting the plaintiffs in this new phase of the litigation and opposing the “red” states' attempted intervention in the case.²⁴⁴

241. Press Release, Our Children's Trust, Judge Orders Settlement Conference in Landmark Youth Climate Case, *Juliana v. United States*; Schedules Oral Arguments for June, (May 13, 2021), <https://static1.squarespace.com/static/571d109b04426270152febe0/t/609d98700002ab3ea339fc91/1620940912551/PressRelease051321.pdf>.

242. Transcript of May 13, 2021 Telephonic Status Conf. at 9–10, *Juliana v. United States*, 217 F. Supp. 3d 1224, 1260 (D. Or. 2016) (No. 6:15-cv-0517-TC), *rev'd & remanded*, 947 F.3d 1159 (9th Cir. 2020), available at <https://static1.squarespace.com/static/571d109b04426270152febe0/t/616f4de5d2ae9b088b828890/1634684389922/2021.05.13+Status+Conference+Transcript.pdf> and at <https://fingfx.thomsonreuters.com/gfx/legaldocs/ygdvzobmapw/environment-climate-juliana-settlement-MINUTES.pdf>.

243. Press Release, Our Children's Trust, Attorneys General in 17 'Red' States Seek to Insert Themselves as Adversaries to *Juliana v. United States* Plaintiffs, (June 8, 2021), <https://static1.squarespace.com/static/571d109b04426270152febe0/t/60c009c6e3d1e2124ce38d22/1623198150973/Intervention+PR+060821.pdf>.

244. Press Release, Our Children's Trust, Attorneys General in New York & Five Other States File Brief in Support of *Juliana v. United States* While Plaintiffs Oppose Attempt By Republican Coalition to Intervene (July 7, 2021), <https://static1.squarespace.com/static/571d109b04426270152febe0/t/60e5d1d17bcaa4dc6adcd35/1625674193606/Response+to+I>

A consent decree in the *Juliana* case holds enormous potential to steer and accelerate U.S. climate action. One of the most important aspects of it would be a specified standard to carry out the declared constitutional right to a “stable climate system capable of sustaining human life.”²⁴⁵ As noted earlier, the plaintiffs’ scientific experts emphasize a need to return the atmospheric concentration of CO₂ to 350 ppm by century’s end and to stabilize the planetary heating to one degree Celsius over pre-industrial temperatures.²⁴⁶ This is significantly more stringent than the Paris Accord’s goal of two degrees (above pre-industrial levels), and its aspirational goal of 1.5C.²⁴⁷ Those goals frame the commitments of European nations yet are deemed by some of the world’s leading climate scientists as catastrophic, and not even the IPCC considers them safe.²⁴⁸ Because *Juliana* remains the chief American case mounting a systemic challenge to the entire U.S. fossil fuel system and draws upon top climate scientists as experts, this case is singularly positioned to lead nations of the world in converging on a scientifically credible standard to bring the planet back to a safe temperature zone by the end of the century. A consent decree becomes the vehicle for forging agreement between government scientists and the plaintiffs’ experts—and it can display consensus and urgency to the world.

Second, a consent decree can set forth a procedural framework for accomplishing the decarbonization and drawdown goals necessary to avert runaway heating. This process does not usurp the regulatory functions of the executive branch but rather can create a broad scaffolding that will guide and hold agencies accountable in their innumerable undertakings. The framework is vital to keep planetary rescue on task and moving forward at a pace that has a chance of beating the climate tipping points. It should incorporate standards, benchmarks, and timetables to move the project along with “all deliberate speed.”²⁴⁹ As most consent decrees do, this framework

ntervention+PR+070721.pdf.

245. *Juliana v. United States*, 217 F. Supp. 3d 1224, 1250 (D. Or. 2016), rev’d & remanded, 947 F.3d 1159 (9th Cir. 2020).

246. See *supra* note 34. For a summary of temperature impacts and the imperative of capping Earth’s heating at one degree Celsius over the long term, see OUR CHILD.’S TR., GOVERNMENT CLIMATE AND ENERGY ACTIONS, PLANS, AND POLICIES MUST BE BASED ON A MAXIMUM TARGET OF 350 PPM ATMOSPHERIC CO₂ AND 1°C BY 2100 TO PROTECT YOUNG PEOPLE AND FUTURE GENERATIONS (2019), <https://static1.squarespace.com/static/571d109b04426270152febe0/t/5cbf9b1a8165f50477f3d191/1556060958104/2019.04.11.OCTWhy350.Final.pdf>. For discussion of a special IPCC report on the consequences of heating 1.5 C., see Brad Plumer and Iris Gottlieb, *Why Half a Degree of Global Warming is a Big Deal*, NEW YORK TIMES, (Oct. 7, 2018), <https://www.nytimes.com/interactive/2018/10/07/climate/ipcc-report-half-degree.html>.

247. Paris Agreement to the United Nations Framework Convention on Climate Change art. 2, § 1(a), Dec. 12, 2015, T.I.A.S. No. 16-1104.

248. See Hood, *supra* note 3 (summarizing IPCC June 2021 draft report as warning that “prolonged warming even beyond 1.5 degrees Celsius could produce ‘progressively serious, centuries’ long and, in some cases, irreversible consequences” and that 2 degrees C. warming could trigger tipping points including “the melting of ice sheets atop Greenland and the West Antarctic—with enough frozen water to lift oceans 13 metres (43 feet)—past a point of no return.”).

249. See Transcript of Sept. 13, 2016 Oral Argument, *supra* note 115, at 59 (remarks of J. Aiken).

should include compliance procedures, enforcement mechanisms, and conflict resolution processes.

Due to the highly technical nature of climate recovery, the process may benefit from a structure similar to that used by the District Court of Oregon in the Columbia River Fish Management Plan (CRFMP).²⁵⁰ This Plan—executed among three states, the federal government, and five treaty tribes overseeing fish management in the Columbia River Basin—was forged to provide a framework within which the parties may exercise their sovereign powers in a coordinated and systematic manner to rebuild fisheries and manage harvests of salmon.²⁵¹ It features a scientific advisor to the court, a technical committee, a separate policy committee, a regulatory coordination committee, and strategic work groups to tackle some of the more wicked problems that require intense focus and vision. It contains dispute resolution provisions and envisions a role for the court as a supervising check on the parties (particularly in the case of a dispute among them or in the event of an emergency) but does not position the court as a leader of the effort. The process of establishing a consent decree in the *Juliana* case could not only greatly accelerate and organize the U.S. climate effort but could also provide a model for other ATL cases around the world, steering them back toward a 350 ppm safety goal.

XV. GREEN JUDICIAL DOMINOS: ATMOSPHERIC TRUST LITIGATION AROUND THE WORLD

The original vision of the ATL approach contemplated that, because the atmosphere is a shared planetary trust resource, the strategy would take hold in nations worldwide to create domestic judicial enforcement structures for climate obligations that eluded international processes.²⁵² Treaty negotiations such as the Kyoto Protocol and the Paris Climate Accord gravitate to the lowest common denominator of political consensus (which, in the climate context, remains far astray from Nature's own imperatives for a balanced climate system).²⁵³ Moreover, international commitments are not self-enforcing and are all too often repudiated by domestic decisions of agencies and legislatures.²⁵⁴ For example, President Donald Trump withdrew the United States entirely from the Paris Climate Accord that President Barack Obama had previously agreed to. While international law mechanisms remain unenforceable, Professors Jim May and Erin Daly observe that

250. The 1987 CRFMP is available at <https://usace.contentdm.oclc.org/digital/collection/p16021coll3/id/420/>.

251. For a detailed analysis of the CRFMP, see Wood, *supra* note 125, at 427–37.

252. See generally Wood, 2009 ATL chapter, *supra* note 95, at 95; see also William S. Becker, *Giving Legal Teeth to Climate Change*, COMMENTARY BY WILLIAM BECKER (June 8, 2021), <https://the-real-biocene.net/f/giving-legal-teeth-to-climate-action> (referring to original ATL concept).

253. See Booth & Pager, *supra* note 52 (current climate pledges by nations would result in 2.7 C. catastrophic heating).

254. See James R. May & Erin Daly, *Global Climate Constitutionalism and Justice in the Courts*, in RESEARCH HANDBOOK ON GLOBAL CLIMATE CONSTITUTIONALISM 235, 235–45 (Jordi Jaria-Manzano & Susana Borràs eds., 2019), SSRN version available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3251620.

cases advancing constitutional theories of climate obligation are swiftly gaining ground in the world's domestic courts, and are "likely reflective of an emerging worldwide phase in constitutional litigation."²⁵⁵

Inspired by the twenty-one youth plaintiffs in *Juliana*, citizens in many other countries have taken their governments to court to enforce a fundamental right to a stable climate system.²⁵⁶ These cases draw upon various legal grounds specific to the particular nation, often including express constitutional rights. Ultimately, all of the claims of right to a sustained environment for future generations emanate from a core legal trunk that is the public trust. Mentioned explicitly or not, a sovereign duty to present and future citizens to protect vital ecology traces back most anciently and essentially to Roman law safeguarding crucial resources in common for posterity. Thus, broadly defined, atmospheric trust cases involve these common elements: (1) citizen plaintiffs (often youth), (2) suing their government, (3) alleging violation of fundamental rights to protect the climate system for present and future generations, and (4) seeking relief that forces expedient climate action on the part of government.

While Ninth Circuit Judges Hurwitz and Murguia rejected a judicial role of enforcing fundamental rights in the climate context, a growing number of courts in ATL cases from other nations are delivering victories to plaintiffs. Recognizing that government actions perpetuating fossil fuel energy systems deliver an existential threat to our climate system, they decide the courts must step in. While this article does not provide a comprehensive discussion of decisions from other nations, a brief inventory shows the beginning of what may soon accelerate into a global ATL jurisprudence.

In Pakistan's case, *Leghari v. State*, a farmer alleged that climate inaction (both with respect to emissions reduction and adaptation) violated his fundamental constitutional rights to life, dignity, and the public trust doctrine.²⁵⁷ The Lahore High Court agreed, finding such fundamental rights (including the public trust doctrine) violated by the "delay and lethargy" of the government agencies.²⁵⁸ The court fashioned a classic structural injunction remedy to correct the government's recalcitrance. The court created an administrative judicial apparatus to supervise a climate response, ordering the establishment of a Climate Change Commission (CCC) comprised of high cabinet officials.²⁵⁹ Directing the commission to carry out the climate measures forged through a framework formulated by the government but never implemented, the court's order contemplated ongoing reports and judicial

255. *Id.* at 235.

256. See Richard Frank, *The End of the Juliana Litigation—Or Is It?*, LEGALPLANET (Feb. 15, 2021), <https://legal-planet.org/2021/02/15/the-end-of-the-juliana-litigation-or-is-it/>; see also Bobby Magill, *Another Youth Climate Lawsuit Turns to Crowdfunding in Portugal*, THE CLIMATE DOCKET (Sept. 27, 2017), <https://www.climatedocket.com/2017/09/27/youth-climate-lawsuit-portugal-wildfires/> (noting that the Portuguese litigation was inspired by the *Juliana* case).

257. *Leghari v. Fed'n of Pakistan*, (2015) W.P. No. 25501/2015 (Lahore High Ct. Green Bench) *1–2, *4 (Pak.), translation available at http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2015/20150404_2015-W.P.-No.-25501201_decision.pdf.

258. *Id.* at *3, par. 7–8.

259. *Id.* at *6–7.

supervision.²⁶⁰ The effort was so successful that, in 2018, the Court dissolved the CCC and established a Standing Committee to provide an ongoing bridge between the Court and the Executive Branch and to support the latter in implementing the climate goals.²⁶¹

In the Netherlands, in *Urgenda Foundation v. State of the Netherlands*, the Hague Court of Appeal and later the nation's Supreme Court affirmed a lower court's finding that the Dutch government failed to address climate change with the speed and scope required to protect current and future generations of its citizens.²⁶² The trial court flatly rejected the government's claim that judicial intervention was an unwarranted intrusion on the political branches of government.²⁶³ Noting that the risks associated with climate change are severe and that the state's obligations to its people require immediate and strenuous action to achieve significant reductions in carbon emissions, the trial court concluded that the state was obligated to reduce emissions by a minimum of twenty-five percent by 2020 relative to 1990 emissions levels.²⁶⁴ The *Urgenda* decision successfully pushed the government to issue a broad emissions reduction regulation in April 2020.²⁶⁵

In Colombia, in 2018, that nation's supreme court found in favor of plaintiffs in a case, *Future Generations v. Ministry of the Environment*, brought by twenty-five

260. *Id.* This case is discussed in detail in Jacqueline Peel & Hari M. Osofsky, *A Rights Turn in Climate Change Litigation?*, 7 *TRANSNAT'L ENV'T L.* 37, 48–49, 52–55 (2018).

261. James R. May & Erin Daly, *Six Trends in Global Environmental Constitutionalism*, in *ENVIRONMENTAL CONSTITUTIONALISM: WHAT IMPACT ON LEGAL SYSTEMS?* 46, 52 (Jochen Sohnle ed., 2018).

262. Rb. Den Haag June 24, 2015, par. 5.1 ECLI:NL:RBDHA:2015:7196 (State of the Neth./Urgenda Found.) (The Hague District Court's (trial court's) decision), translation available at http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2015/20150624_2015-HAZA-C0900456689_decision-1.pdf; Hof Den Haag Oct. 9, 2018, ECLI:NL:GHDHA:2018:2610 (State of the Neth./Urgenda Found.) (Hague Court of Appeals' decision), translation available at http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2018/20181009_2015-HAZA-C0900456689_decision-4.pdf; Dec. 12, 2019, ECLI:NL:HR:2019:2007 (Supreme Court of the Netherlands' decision), translation available at http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2020/20200113_2015-HAZA-C0900456689_judgment.pdf. The Urgenda Foundation filed the suit as a citizens' organization, whose purpose is to develop measures to prevent climate change, and on behalf of 900 Dutch citizens. The rulings and a summary of the case are compiled by the Sabin Center at Columbia University. See <http://climatecasechart.com/climate-change-litigation/non-us-case/urgenda-foundation-v-kingdom-of-the-netherlands/>. For discussion of this litigation, see *State of the Netherlands v. Urgenda Foundation*, 132 *HARV. L. REV.* 2090 (2019).

263. Rb. Den Haag 24 juni 2015, ECLI:NL:RBDHA:2015:7196, paras. 4.94–4.98 (“It is an essential feature of the rule of law that the actions of (independent, democratic, legitimised [,] and controlled) political bodies, such as the government and parliament can[—]and sometimes must[—]be assessed by an independent court.”).

264. *Id.* at para. 5.1, <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2015:7196>.

265. Jonathan Watts, *Dutch Officials Reveal Measures to Cut Emissions After Court Ruling*, *THE GUARDIAN*, (Apr. 24, 2020, 12:10 PM), www.theguardian.com/world/2020/apr/24/dutch-officials-reveal-measures-to-cut-emissions-after-court-ruling.

youth between the ages of seven and twenty-six to end deforestation of the Amazon that was contributing to climate disruption.²⁶⁶ The court declared a fundamental right held by youth and future generations to protection of the Amazon due to its significant role in the planet's climate regulation,²⁶⁷ writing, “[W]hile sea level rise and ocean acidification derived from deforestation-induced regional and global warming conflicts with the fundamental rights and interests of the present generation, it will impact and thus violate the rights of future generations more severely still.”²⁶⁸ But lacking a remedy structure to implement the ruling, the court's order has been roundly ignored by the Colombian government.²⁶⁹

In France, in February 2021, a Paris administrative court delivered a victory to citizens of the coastal community Grande-Synthe in their suit filed against the French State for failing to adequately address climate change. The Court of Paris found the French State guilty of failing to meet its own goals as set forth in the Paris Agreement and ordered the state to “fulfil its general and specific obligations in the fight against climate change or to mitigate its effects, to put an end to the ecological damage, and in particular, within the shortest possible time, to . . . take the necessary measures to reduce greenhouse gas emissions . . . to a level consistent with the objective of containing the rise in global average temperature below 1.5°C.”²⁷⁰ The court also ordered the state to pay a symbolic sum of one euro to each plaintiff for “the ecological damage” and “moral prejudice” resulting from the state's failure to meet its targets.²⁷¹ Reflecting elements of a structural injunction, the court enjoined the French state from worsening the ecological damage while the court and “all competent ministers to all the parties” would formulate, within two months' time, further measures to rectify the situation.²⁷²

In Ireland, a 2020 Supreme Court decision in *Friends of the Irish Environment CLG v. Ireland*, also reflects judicial willingness to review state climate action plans.²⁷³ The plaintiff organization asserted that the government's plan to cut carbon emissions was insufficient and a violation of the fundamental right to life as

266. Samvel Varvastian, *The Human Right to a Clean and Healthy Environment in Climate Change Litigation*, in MPIL RESEARCH PAPER SERIES 11 (Max Planck Inst., Ser. No. 2019-09, 2019); Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala. Casacion Civil. abril 4, 2018, M.P: L. Villabona, Expediente STC4360-2018.

267. See May & Daly, *supra* note 262, at 9-10 (SSRN version).

268. *Climate Change and Future Generations Lawsuit in Colombia: Key Excerpts from the Supreme Court's Decision*, DEJUSTICIA (Apr. 13, 2018), <https://www.dejusticia.org/en/climate-change-and-future-generations-lawsuit-in-colombia-key-excerpts-from-the-supreme-courts-decision/>.

269. *The Colombian Government Has Failed to Fulfill the Supreme Court's Landmark Order to Protect the Amazon*, DEJUSTICIA (April 5, 2019), <https://www.dejusticia.org/en/the-colombian-government-has-failed-to-fulfill-the-supreme-courts-landmark-order-to-protect-the-amazon/>.

270. [Admin. Ct.] Paris, 1st Chamber, Feb. 3, 2021, N°1904967, 1904968, 1904972, 1904976/4-1, art. IV § 3.

271. *Id.*

272. *Id.*

273. Appeal No. 205/19 (Sup. Ct. of Ir. 2020), available at http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2020/20200731_2017-No.-793-JR_opinion.pdf.

guaranteed in the nation's Constitution and the European Convention on Human Rights. While concluding that the plaintiff, as a corporate entity, lacked standing with respect to questions implicating a right to life or bodily integrity, the court decided that the plaintiff's assertions concerning the climate plan were valid and justiciable—and, importantly, emphasized that the Court's ruling did not constitute an “impermissible impingement by the courts into areas of policy.”²⁷⁴ The Court overturned the climate plan, which it found insufficiently comprehensive and too vague to carry out the goals of national climate legislation, and it ordered the government to develop a more ambitious policy.²⁷⁵

In Germany, April 2021, in a case brought on behalf of nine young people against the German Government challenging the federal climate law as too weak, the Federal Constitutional Court overturned the government's climate plan on the basis that it infringed the rights of future generations.²⁷⁶ The plan had called for elimination of GHG emissions by midcentury but failed to set emissions targets beyond 2030. Finding that the government had “offloaded” the burden of emissions reduction on future generations, the court wrote that young people would be “‘forced to engage in radical abstinence’ to preserve the ‘natural foundations of life.’”²⁷⁷ As the lead attorney for the German plaintiffs said, the lawsuit succeeded in gaining judicial recognition “for the first time that freedom must be guaranteed not only here and now, but also intertemporally and globally—that is, across generations and across state borders.”²⁷⁸ In a directive characteristic of a structural injunction with clearly timed benchmarks, the court ordered the German government to set binding emission targets by 2022 (within a year) to allocate emissions reduction beyond 2030.²⁷⁹ Shortly after the ruling, the German government responded with a new draft law increasing the emissions reduction target for the end the decade (from fifty-five percent to sixty-five percent below 1990 levels) and advancing (by five years) the net-zero target date.²⁸⁰

274. *Id.* § 9.1.

275. *Id.* § 9.3. See also Isabella Kaminski, *Ireland Forced to Strengthen Climate Plan, in Supreme Court Win for Campaigners*, CLIMATE CHANGE NEWS (July 31, 2020), <https://www.climatechangenews.com/2020/07/31/ireland-forced-strengthen-climate-plan-supreme-court-victory-campaigners/>.

276. Eric Heymann, *Climate Change Ruling by the German Federal Constitutional Court: Calling for Technological Progress*, DEUTSCHE BANK (May 11, 2021), https://www.dbresearch.com/servlet/reweb2.ReWEB;REWEBSESSIONID=8D2A01287B6685237337780B2C0C9A4D?rwsite=RPS_EN-PROD&rwobj=ReDisplay.Start.class&document=PROD000000000518283; Press Release, Germanwatch, *Historic Win for Climate Constitutional Complaint* (Apr. 29, 2021), <https://germanwatch.org/en/node/20134>.

277. Press Release, *Constitutional Complaints Against the Federal Climate Change Act Partially Successful* (Mar. 24, 2021), <https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2021/bvg21-031.html> (No. 31/2021).

278. Evan Dyer, *Young Climate Activists Beat Germany's Government in Court. Could it Happen Here?*, CBC NEWS (May 23, 2021, 4:00 AM), <https://www.cbc.ca/news/politics/climate-change-emissions-carbon-canada-germany-youth-1.6029642>.

279. Becker, *supra* note 260.

280. Dyer, *supra* note 287.

In Australia, May, 2021, in *Sharma v. Minister for the Environment*,²⁸¹ a class action brought by youth challenging Australian coal extraction, the Federal Court of Australia ruled that the government holds a legal duty of care to not cause climate harm to the young people of Australia through approval of coal extraction.²⁸² While declining to enjoin coal extraction at that time, the judge emphasized that the government must take into account this duty in deciding whether to allow the challenged coal mine.²⁸³ The decision builds on a prior notable decision from Australia in 2019 in which a court enjoined a coal mine partly on the basis of likely harm to present and future generations.²⁸⁴

Other ATL cases brought by citizens against their governments are proceeding apace in India,²⁸⁵ Mexico, South Korea, Czech Republic, Canada, Norway, Uganda, Brazil, and Belgium.²⁸⁶ As judges around the world rise to the climate emergency and hold their governments accountable, it is increasingly clear that the *Juliana* Ninth Circuit majority's hands-off approach is becoming more and more of an outlier. It will be important for ATL judges in all of these nations to recognize their shared role

281. (2021) 391 ALR 1, 113–15, <https://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2021/2021fca0560>.

282. See Michael Slezak & Penny Timms, *Australian Teenagers' Climate Change Class Action Case Opens 'Big Crack in the Wall,' Expert Says*, ABC NEWS (May 26, 2021), <https://www.abc.net.au/news/2021-05-27/climate-class-action-teenagers-vickery-coal-mine-legal-precedent/100169398>.

283. *Sharma*, 391 ALR at 116 (“[The minister] will now appreciate, contrary to the submissions made on her behalf at trial, that in deciding whether or not to approve the Extension Project she must take into account, as a mandatory relevant consideration, the avoidance of personal injury to people.”); see also Slezak & Timms, *supra* note 291.

284. See *Gloucester Res. Ltd. v Minister for Planning* (Unreported, Land and Environment Court of New South Wales, Preston CJ, 8 Feb. 2019) ¶ 669; See also Karen Savage, *Australian Judge Rejects Coal Mine on Climate Grounds*, THE CLIMATE DOCKET (Feb. 8, 2019), <https://www.climatedocket.com/2019/02/08/australia-coal-mine-climate/>.

285. Press Release, Our Children's Trust, Youth Files Climate Case with India's Environmental Court (Mar. 30, 2017), <https://static1.squarespace.com/static/571d109b04426270152febe0/t/58dd798a1e5b6c41e0da4cc0/1490909578851/2017.03.30+India+Climate+Case+PR.pdf>.

286. See *Other Global Actions*, OUR CHILDREN'S TRUST, <https://www.ourchildrenstrust.org/other-global-actions>; see also *Active Global Cases*, OUR CHILDREN'S TRUST, <https://www.ourchildrenstrust.org/active-global-cases>. For discussion of the Canada lawsuit, see Dyer, *supra* note 287. The Czech Republic litigation is summarized in the Sabin Center's Climate Case Chart, <http://climatecasechart.com/climate-change-litigation/non-us-case/klimaticka-zaloba-cr-v-czech-republic/> and is described at Ines Ribas, *Activists File Climate Lawsuit Against the Czech Government*, BRNO DAILY (APRIL 23, 2021), <https://brnodaily.com/2021/04/23/news/politics/activists-file-climate-lawsuit-against-the-czech-government/>. See also Dana Drugmand, *Latest Youth Climate Lawsuit Filed Against 33 European Countries Over Human Rights*, DESMOG (SEPT. 30, 2020), <https://www.desmog.com/2020/09/03/youth-climate-lawsuit-portugal-33-european-countries/> (reporting climate suit by Portuguese children against governments of 33 European nations in the European Court of Human Rights). For an article on Brazil ATL, see Joana Setzer & Délon Winter de Carvalho, *Climate Litigation to Protect the Brazilian Amazon: Establishing a Constitutional Right to a Stable Climate*, RECIEL, (July 28, 2021), available at <https://onlinelibrary.wiley.com/doi/full/10.1111/reel.12409>.

in planetary rescue by: (1) arriving at a globally coherent scientific standard of climate recovery tied to safe levels of atmospheric CO₂; (2) quantifying emission reduction obligations; and (3) creating practical enforcement mechanisms. The collaborative and synergistic potential of functionally intertwined climate court decisions is perhaps unprecedented in global legal history. The International Court of Justice (ICJ), a judicial arm of the UN, stands positioned to play a cardinal role in defining, through an advisory opinion, the climate fiduciary duties of all nations – nations which stand as co-tenant sovereign trustees of the planetary atmospheric trust.²⁸⁷

Judge Aiken’s pathbreaking opinion, declaring a right to a “climate system capable of sustaining human life” forms the basis of ATL decisions worldwide.²⁸⁸ The combination of (1) scientific evidence in the voluminous *Juliana* docket showing the need to return the atmospheric CO₂ to below 350 ppm, (2) the evidence in the case showing decarbonization and drawdown pathways, and (3) the established judicial framework of consent decrees long ago forged by the District Court of Oregon in the Columbia River Treaty fishing context, all have much to contribute—by reference and example—to the emerging global climate jurisprudence. Just as clearly, the unvarnished message of moral responsibility emanating from so many courts of other nations must stir the American appellate judiciary to hold its own government accountable.

CONCLUSION: THE JUDICIAL ROLE IN PLANETARY RESCUE

Ending her momentous dissent in *Juliana*, Judge Staton asked a question that forces judges in the United States, and across the world, to reckon with their sovereign role as well as their own personal responsibility—as judges empowered at this singularly fateful moment. She wrote, “[H]istory 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?”²⁸⁹

287. See Michael B. Gerrard, *Taking Climate Change to the International Court of Justice: Legal and Procedural Issues*, COLUM. CLIMATE L. BLOG (Sept. 29, 2021), <http://blogs.law.columbia.edu/climatechange/2021/09/29/taking-climate-change-to-the-international-court-of-justice-legal-and-procedural-issues/>, explaining the ICJ process of rendering advisory opinions and noting:

An increasing number of domestic courts around the world are considering the issue of climate change and citing to international agreements and to the decisions of the courts of other countries. An ICJ opinion, if it got to the merits, would surely become the leading authority to which these domestic courts would look in framing their own decisions.

With the aim of framing a global ATL jurisprudence emerging from domestic courts worldwide, a sequel to this article is underway to propose the elements of such an advisory opinion and to inventory tools used by courts to enforce domestic climate obligations.

288. *Juliana v. United States*, 217 F. Supp. 3d 1224, 1250 (D. Or. 2016), rev’d & remanded, 947 F.3d 1159 (9th Cir. 2020).

289. *Juliana*, 947 F.3d at 1191 (Staton, J., dissenting).

This article has suggested that courts bring an essential and obligatory constitutional role to the climate emergency. The judicial branch remains uniquely constituted to respond to this urgent and grave situation by holding government actors accountable. Courts can declare rights, enforce sidewalls, and issue backstop injunctions to stop government agencies and their allied fossil fuel industries from pushing the planet over the climate threshold of no return. Courts can further provide a problem-solving mechanism for climate recovery through a rigorous, fact based remedial process that imposes strict timeframes for action. Indeed, there is no equivalent process in the other branches. As Justice Martha Walters wrote in her dissenting opinion in the Oregon ATL case: “This court can and should determine the law that governs the other two branches as they undertake their essential work.”²⁹⁰

But as the climate crisis worsens, judges face a crossroads. One approach is flat-out denial of any conceivable role—what Professor Douglas Kysar of Yale Law School and R. Henry Weaver term judicial nihilism.²⁹¹ This mindset characterizes the majority’s opinion in *Juliana* (as well as many state ATL rulings in America) wherein the judges, powerfully vested with authority to act, instead “cower[r] before catastrophe.”²⁹² Such judges willingly remain stuck in the old paradigm of judicial review. The other approach is typified by the opinions of Judge Aiken and Judge Staton, wherein the judiciary acts as a coequal branch of government, enforcing fundamental rights of citizens, and providing a forum for institutional problem-solving through the use of traditional and established legal methods.

As Judge Coffin—the magistrate judge who first heard the *Juliana* case and presently presides over settlement discussions—wrote,

Do the Courts have a role in providing a forum for litigation wherein those injured by climate change may seek relief against parties allegedly causing or contributing to this phenomenon? My answer is: How could they not? These are the civil rights cases of the 21st Century. Civil rights cases have historically invoked the authority of all three branches of government, with each having an important and vital part in promoting and protecting the rights and liberties of the people. . . . In the end, a trial in the public forum of a court is an extremely important tool of Democracy.²⁹³

When Judge Belloni concluded the arduous multi-sovereign settlement process leading to his approval of the Columbia River Fish Management Plan in 1977, he remarked on the significance of the agreement and the magnitude of the judicial role:

The extreme importance of this settlement and this consent decree is difficult to express. Every person in the Northwest gains by it. It’s the most important development involving Columbia River Indian Treaty

290. *Chernaik v. Brown* 475 P.3d 68, 84 (Or. 2020).

291. See R. Henry Weaver & Douglas A. Kysar, *Courting Disaster: Climate Change and the Adjudication of Catastrophe*, 93 NOTRE DAME L. REV. 295, 329 (2017).

292. *Id.*

293. Thomas M. Coffin, *American Courts in Climate Emergency*, IUCN (2019), https://www.iucn.org/sites/dev/files/content/documents/2019/american_courts_in_climate_emergency.pdf.

Fishing Rights and Responsibilities since the treaties became effective in 1855. The settlement will have a meritorious effect not only upon Indian and non-Indian fishermen, but on many of our other major industries

. . . .
The past few years have been traumatic ones. Fishermen have been disappointed and angry, justifiably so. The economic loss has hurt badly. The responsible state officials must have . . . felt frustrated many times. It has been equally traumatic to me. Yet I have had to be firm and apply the law as it is. It was my Constitutional duty. Had I yielded to the strong temptation to bend a little to relieve some of the pressure, this agreement would never have been reached, and the trauma would have continued. *Not only was the integrity of the law at stake, but so was the very survival of the salmon resource in the Columbia River.*²⁹⁴

Much has changed since a half century ago when this Oregon district court judge forged a multi-sovereign agreement to save the salmon that had made their way up the Columbia River to their natal waters since time immemorial. Today, the U.S. District Court of Oregon has the climate system on its docket, and the survival of the world's children and future generations hinges in large part on whether the American government will be held accountable for climate recovery. Judge Aiken recently urged the parties in *Juliana v. United States* to recognize that the court may serve as “the galvanizer or the convener” of the multiple agency defendants and plaintiffs in a solution-driven process that falls wholly in line with the path forged by Judge Belloni decades ago.

Certainly courts do not provide a panacea for this crisis, and, had the government functioned as intended, the courts would not be involved today. But now courts hold the crucial last legal lever to force the government defendants to focus with all deliberate speed on this urgent matter, operate in concert with each other outside of agency silos, consult with scientific experts, and accomplish what they should have all along: construct and carry out a climate protection strategy that secures the fundamental rights of young Americans to life, liberty, and property.

Inevitably, those who defend a suicidal Business As Usual will roundly criticize any role the courts may play. To them, the matter must be left entirely to the political branches—those that delivered us all this existential threat in the first place.²⁹⁵ This article has argued that a failure of checks and balances in the three branches of government was the root cause of government's catastrophic energy policy, and, at this eleventh hour, the courts must step in to avert runaway planetary heating before Nature's own laws render the legal issues entirely moot by overwhelming the world with climate mayhem.

294. Transcript of Feb. 28, 1977 Hearing at 4–6, *U.S. v. Oregon*, Civil 68-513 (D. Or. Feb. 28, 1977) (No. 295), (emphasis added), available at https://law.uoregon.edu/sites/law1.uoregon.edu/files/transcript_feb_28_1977.pdf. See generally Order Approving the 1977 Plan, *U.S. v. Oregon*, Civil 68-513 (D. Or. Feb. 28, 1977) (No. 294) (unpublished motion on file with the *Indiana Law Journal* and available at https://law.uoregon.edu/sites/law1.uoregon.edu/files/1977_plan.pdf).

295. See James L. Huffman, *Is a Federal Judge Trying to Set Climate Policy with the 'Juliana' Case?* THE HILL (July 1, 2021, 10:30 AM) <https://thehill.com/opinion/judiciary/560941-is-a-federal-judge-trying-to-set-climate-policy-with-the-juliana-case>.

One thing is clear. Against an unspeakably cruel prospect of massive global death and misery underwritten by world leaders in their continued promotion of fossil fuels, judges of any nation may no longer avoid choosing their side of history—for judicial passivity is as much a clear choice as judicial intervention. As Dr. James Hansen, formerly the nation’s chief climate scientist at NASA, has warned, “[F]ailure to act with all deliberate speed . . . functionally becomes a decision to eliminate the option of preserving a habitable climate system.”²⁹⁶

If, in ten years, the planet is well on the path to climate recovery, it may be because the judges of this world realized that their time to act is right now.

296. Blumm & Wood, *supra* note 4, at 6 (alterations in original) (quoting Brief for Dr. James Hansen as Amicus Curiae at 7, *Alec L. v. Jackson*, 863 F. Supp. 2d 11 (D.D.C. 2012) (No. 4:11-cv-02203 EMC), ECF No. 108).