

4-14-2020

## Can Judges Use Due Process Concepts in *Obergefell* to Impose Judicial Regulation of Greenhouse Gases and Climate Change?: The Crucial Case of *Juliana v. United States*

Bradford C. Mank

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### Recommended Citation

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Available at: <https://repository.belmont.edu/lawreview/vol7/iss2/3>

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CAN JUDGES USE DUE PROCESS CONCEPTS  
IN *OBERGEFELL* TO IMPOSE JUDICIAL  
REGULATION OF GREENHOUSE GASES AND  
CLIMATE CHANGE?: THE CRUCIAL CASE OF  
*JULIANA V. UNITED STATES*

BRADFORD C. MANK\*

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*In the Supreme Court’s Obergefell opinion, which held that same-sex marriage is a fundamental right under the Constitution’s Due Process Clause, Justice Kennedy reasoned that substantive due process rights may*

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*evolve because of changing societal views of what constitutes “liberty” under the clause, and that judges may recognize new liberty rights in light of their “reasoned judgment.” In Juliana v. United States, United States District Judge Ann Aiken invoked the “reasoned judgment” principle of substantive due process in the Obergefell decision to conclude that there is a liberty right to a livable climate system capable of sustaining human life. However, the concept of evolving due process rights is contrary to the traditional view that fundamental due process rights must be rooted in the nation’s history and traditions. Furthermore, the evolving due process rights invoked in the Juliana decision give judges too much discretion to invent new due process rights and usurp the role of the legislature. By contrast, other district court decisions have recognized that the political branches, Congress and the Executive Branch, should decide climate change policy rather than the federal courts. Just before this article was about to be published,<sup>1</sup> a divided panel of the Ninth Circuit reversed the decision of the district court and held that the plaintiffs did not have standing to sue in the federal courts because their claimed injuries were not redressable by an Article III court. In particular, the panel determined that it was beyond the power of an Article III court to order the plaintiffs’ requested remedial plan because it would require a federal judge to make complex policy choices that the Constitution assigns to the judgment and discretion of the executive and legislative branches. The Ninth Circuit correctly concluded that climate change issues are policy decisions for Congress and the President to decide, and therefore, either the en banc Ninth Circuit or the Supreme Court should reject any further appeals by the plaintiffs.*

## INTRODUCTION

In *Juliana v. United States*,<sup>2</sup> the plaintiffs included a number of young people who filed suit arguing that the United States and various federal agencies had disrupted the Earth’s climate system by promoting burning fossil fuels for energy, thereby allowing the release of huge amounts of carbon dioxide (“CO<sub>2</sub>”) and other greenhouse gases (“GHGs”) such as methane.<sup>3</sup> The plaintiffs contended that the defendants’ actions promoting fossil fuels and contributing to rising GHGs violated their substantive due process rights to life, liberty, and property.<sup>4</sup> The plaintiffs also maintained that the defendants had violated the federal government’s common law duty to hold certain resources in a “public trust” for present and future generations

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1. This article is based in part on my prior article, Bradford C. Mank, *Does the Evolving Concept of Due Process in Obergefell Justify Judicial Regulation of Greenhouse Gases and Climate Change?*: *Juliana v. United States*, 52 U.C. DAVIS L. REV. 855 (2018), but reflects events in the case since August 2018.

2. 217 F. Supp. 3d 1224 (D. Or. 2016).

3. *Id.* at 1233.

4. *Id.*

of Americans.<sup>5</sup> In 2016, United States District Court Judge Ann Aiken of the United States District of Oregon denied the United States government's motions to dismiss by concluding that the right to a stable climate system capable of supporting human life is a fundamental substantive due process right and, additionally, is a right under the public trust doctrine.<sup>6</sup>

In determining that the plaintiffs had a substantive due process right to a livable climate system, Judge Aiken relied upon the Supreme Court's 2015 decision in *Obergefell v. Hodges*,<sup>7</sup> which held that same-sex marriage is a fundamental right under the Constitution's Due Process Clause.<sup>8</sup> Justice Anthony Kennedy's majority opinion in *Obergefell* reasoned that the principles of substantive due process may evolve because of changing societal views of what constitutes "liberty" under the clause, and accordingly, that judges may recognize new liberty rights in light of their "reasoned judgment."<sup>9</sup> In *Juliana*, Judge Aiken applied her "reasoned judgment" to hold that evolving principles of substantive due process in the *Obergefell* decision authorized the court to establish that the plaintiffs were entitled to a liberty right to a livable climate system capable of sustaining human life.

The *Obergefell* decision's concept of evolving due process rights is problematic in many areas of law and could have been avoided by using an equal protection analysis instead. In his dissenting opinion in *Obergefell*, Chief Justice John Roberts criticized Justice Kennedy's concept of evolving due process for giving judges too much discretion to strike down legislation that they dislike.<sup>10</sup> To avoid judicial usurpation of democratic legislative power, Chief Justice Roberts argued for a return to determining when due process rights are fundamental through the history and tradition analysis used by the Supreme Court in *Washington v. Glucksberg*.<sup>11</sup> Furthermore, Judge Jeffrey Sutton of the Sixth Circuit reasoned in *DeBoer v. Snyder* that using an evolving substantive due process analysis to invalidate state laws

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5. *Id.*

6. *Id.* at 1234, 1250–52, 1260–63. My prior article addressed the public trust issues in the case. Mank, *supra* note 1, at 879–86. Because of space limitations, this article will not address public trust issues.

7. 135 S. Ct. 2584 (2015).

8. *Juliana*, 217 F. Supp. 3d at 1249–50 (discussing *Obergefell*, 135 S. Ct. at 2598–99). The Due Process Clause of the Fifth Amendment to the United States Constitution bars the federal government from depriving a person of "life, liberty, or property" without "due process of law." *Id.* at 1248; *see also* U.S. CONST. amend. V. The same due process principles apply to state governments under the Fourteenth Amendment to the United States Constitution. U.S. CONST. amend. XIV; *Duncan v. Louisiana*, 391 U.S. 145, 147–49 (1968).

9. *Obergefell*, 135 S. Ct. at 2598.

10. *See generally Obergefell*, 135 S. Ct. at 2611–12, 2616–23 (Roberts, C.J., dissenting). *See also* Adam Lamparello, *Justice Kennedy's Decision in Obergefell: A Sad Day for the Judiciary*, 6 HOUS. L. REV. OFF THE REC. 45, 47–52 (2015) (criticizing Justice Kennedy's overly expansive due process analysis for usurping legislative authority and transferring it to judges).

11. *See Obergefell*, 135 S. Ct. at 2615–18 (discussing the identification of fundamental rights through history and tradition in *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) and similar cases).

prohibiting same-sex marriage would have profoundly anti-democratic implications because the same type of reasoning could be used by judges to strike down other types of legislation.<sup>12</sup> Based on both Chief Justice Roberts and Judge Sutton's criticism of evolving substantive due process, the *Juliana* decision erred by inventing new due process rights to a livable climate and usurping the role of Congress in making new laws.<sup>13</sup> Instead of inventing new substantive due process rights, the *Obergefell* Court should have followed lower federal court decisions using a narrower equal protection analysis to achieve the result of judicial recognition of same-sex marriage and avoided giving judges the discretion to re-write the meaning of the Due Process Clause.<sup>14</sup>

More appropriately, in 2018, in *City of Oakland v. BP P.L.C.*, Judge William Alsup of the United States District Court of the Northern District of California granted the defendants' motion to dismiss for failure to state a claim regarding a public nuisance suit by the City of Oakland against the largest oil companies with operations in the United States.<sup>15</sup> He determined that Congress and the Executive Branch should decide climate change policy rather than federal courts even though he accepted the plaintiff's argument that the burning of fossil fuels has a major impact on the Earth's climate.<sup>16</sup> A 2019 district court decision in the Eastern District of Pennsylvania reached the same conclusion.<sup>17</sup> Additionally, Judge Alsup observed that climate change affects other nations and that policy decisions affecting foreign relations should be decided by the political branches rather than by the federal courts.<sup>18</sup>

Just before this article was published, a divided panel of the Ninth Circuit reversed the decision of the district court in *Juliana* and held that the

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12. See *DeBoer v. Snyder*, 772 F.3d 388, 416–18 (6th Cir. 2014), *overruled by Obergefell*, 135 S. Ct. 2584 (2015).

13. See Howard Slugh, *Obergefell's Toxic Judicial Legacy*, NAT'L REV. (Apr. 10, 2017, 8:00 AM), <https://www.nationalreview.com/2017/04/obergefell-judges-invent-rights/> [<https://perma.cc/TA6J-XNEZ>] (criticizing *Juliana* for using *Obergefell's* flawed evolving due process rationale to invent a new constitutional due process right to a stable climate).

14. See *infra* Part II.

15. Order Granting Motion to Dismiss Amended Complaints at 15–16, *City of Oakland vs. BP P.L.C.*, No. C17-06011 WHA, 2018 WL 3609055 (N.D. Cal. July 27, 2018). On July 19, 2018, Judge John Kennan of the U.S. District Court for the Southern District of New York dismissed a similar lawsuit brought by the City of New York against the major oil companies. See Opinion and Order Dismissing Amended Complaint at 3–8, 23, *City of New York v. BP P.L.C.*, 325 F. Supp. 3d 466, 475–76 (S.D.N.Y. 2018) (No. 18 Civ. 182 (JFK)); John Schwartz, *Judge Throws Out New York Climate Lawsuit*, N.Y. TIMES (July 19, 2018), <https://www.nytimes.com/2018/07/19/climate/climate-lawsuit-new-york.html> [<https://perma.cc/B39Z-NPTA>].

16. Order Granting Motion to Dismiss Amended Complaints, *supra* note 15, at 14.

17. *Clean Air Council v. United States*, 362 F. Supp. 3d 237, 250–51 (E.D. Pa. 2019).

18. See *id.* Judge Keenan raised similar foreign policy and separation of powers concerns in dismissing New York City's climate suit against the major oil companies because of their global operations and sales. See Opinion and Order Dismissing Amended Complaint, *supra* note 15, at 20–23.

plaintiffs did not have standing to sue in the federal courts because their claimed injuries were not redressable by an Article III court.<sup>19</sup> In particular, the panel determined that it was beyond the power of an Article III court to order the plaintiffs' requested remedial plan because it would require a federal judge to make complex policy choices that the Constitution assigns to the judgment and discretion of the executive and legislative branches.<sup>20</sup> The Ninth Circuit correctly concluded that climate change issues are policy decisions for Congress and the President to decide,<sup>21</sup> and therefore, either the en banc Ninth Circuit or the Supreme Court should reject any further appeals by the plaintiffs.<sup>22</sup>

Some readers may be skeptical that the current President or Congress will be able to agree on positive steps to reduce the threat of climate change. Positively, there is evidence that some Republican members of Congress who had opposed taking legislative action to solve climate change issues are now open to technological solutions to reducing carbon dioxide emissions, such as advanced nuclear power or carbon capture technologies.<sup>23</sup> Accordingly, there is more hope that Congress can reach bipartisan solutions to climate change issues.<sup>24</sup>

Part I examines Judge Aiken's novel conclusion in *Juliana* that the evolving principles of substantive due process in *Obergefell* permitted her to determine that there is a liberty right to a livable climate system capable of sustaining human life. Part I then examines the persistent and ultimately successful efforts by the Department of Justice to convince the Ninth Circuit to take the rare step of allowing an interlocutory appeal before the trial in the case scheduled by Judge Aiken. Part I next discusses the briefs filed in the Ninth Circuit by the plaintiffs and the defendant Department of Justice. Finally, Part I addresses the Ninth Circuit's divided panel decision denying standing, and the dissenting decision by Judge Staton. Part II briefly critiques the *Obergefell* decision's use of evolving principles of substantive due process to decide whether there is a constitutional right to same-sex marriage and argues that the *Obergefell* court instead should have used an equal protection approach to reach the same holding in favor of the right to same-sex marriage. Then, Part II shows that Judge Aiken could not have found a liberty right to a livable climate system capable of sustaining human life

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19. See *Juliana v. United States*, No. 18-36082, 2020 WL 254149 at \*2, \*8–11 (9th Cir. Jan. 17, 2020), *rev'g* *Juliana v. United States*, 217 F. Supp. 3d 1224 (D. Or. 2016); *infra* Section I.G.

20. See *Juliana*, 2020 WL 254149, at \*2, \*8–10.

21. See Part II and Conclusion.

22. See *infra* Section I.G and Conclusion.

23. Mark Trumbull, *GOP Warms to Idea of a Climate Change Policy*, CHRISTIAN SCI. MONITOR (May 3, 2019), [https://www.csmonitor.com/Environment/2019/0503/GOP-warms-to-idea-of-a-climate-change-policy?j=175339&sfmc\\_sub=13808686&l=1215\\_HTML&u=6188453&mid=10979696&jb=19&cmpid=ema:Weekender:20190511&src=newsletter](https://www.csmonitor.com/Environment/2019/0503/GOP-warms-to-idea-of-a-climate-change-policy?j=175339&sfmc_sub=13808686&l=1215_HTML&u=6188453&mid=10979696&jb=19&cmpid=ema:Weekender:20190511&src=newsletter) [<https://perma.cc/QGV2-X6K3>].

24. *Id.*

using an equal protection analysis, as she acknowledged in the *Juliana* decision. Part III and the Conclusion contend that the *Juliana* decision's approach of giving federal judges control over energy policy decisions is inappropriate because the political branches should make such policies, renewable energy and energy efficiency are increasingly replacing fossil fuels that contribute to climate change, and there is hope for bipartisan solutions to climate change.

## I. JULIANA

### A. Introduction to the *Juliana* Decision

In *Juliana*, the plaintiffs included a group of young persons between the ages of eight and nineteen that the District Court referred to as the "youth plaintiffs."<sup>25</sup> The age demographics of the plaintiffs were significant to Judge Aiken because the court observed that "the majority of youth plaintiffs are minors who cannot vote and must depend on others to protect their political interests."<sup>26</sup> The plaintiffs sued the United States, then-President Obama, and several federal executive agencies on the basis that the federal government had known for more than fifty years that burning fossil fuels produces significant amounts of CO<sub>2</sub> and other GHGs that destabilize the Earth's climate system, and thereby, endangered the plaintiffs.<sup>27</sup> The plaintiffs argued that the defendants had promoted the use of fossil fuels despite their knowledge that the resulting high levels of CO<sub>2</sub> caused climate change and other harmful impacts.<sup>28</sup> The plaintiffs argued that the defendants' actions regarding fossil fuel burning violated the plaintiffs' substantive due process rights to life, liberty, and property.<sup>29</sup> Furthermore, the plaintiffs claimed that in order to avert an impending environmental catastrophe, they should be entitled to declaratory relief regarding their due process and public trust rights, and injunctive relief ordering the defendants to develop a plan to reduce CO<sub>2</sub> emissions.<sup>30</sup>

The defendants and certain intervenors<sup>31</sup> moved to dismiss the action for lack of subject matter jurisdiction and failure to state a claim.<sup>32</sup> United States District Court Magistrate Judge Thomas Coffin issued a Findings and Recommendation ("F & R") regarding the plaintiffs' claims and recommended that the district court deny the defendants' motions to

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25. *Juliana v. United States*, 217 F. Supp. 3d 1224, 1233 (D. Or. 2016).

26. *Id.* at 1241.

27. *Id.* at 1233.

28. *Id.*

29. *Id.*

30. *Id.*

31. Intervenors the National Association of Manufacturers, the American Fuel & Petrochemical Manufacturers, and the American Petroleum Institute moved to dismiss on the same grounds as the defendants. *See Juliana*, 217 F. Supp. 3d at 1233.

32. *Id.*

dismiss.<sup>33</sup> Judge Aiken adopted Judge Coffin's F & R, and also denied the defendants' motions to dismiss.<sup>34</sup>

Judge Aiken acknowledged the ramifications of the plaintiffs' theories by observing that "[t]his is no ordinary lawsuit."<sup>35</sup> Furthermore, she stated:

This lawsuit challenges decisions defendants have made across a vast set of topics—decisions like whether and to what extent to regulate CO<sub>2</sub> emissions from power plants and vehicles, whether to permit fossil fuel extraction and development to take place on federal lands, how much to charge for use of those lands, whether to give tax breaks to the fossil fuel industry, whether to subsidize or directly fund that industry, whether to fund the construction of fossil fuel infrastructure such as natural gas pipelines at home and abroad, whether to permit the export and import of fossil fuels from and to the United States, and whether to authorize new marine coal terminal projects. Plaintiffs assert defendants' decisions on these topics have substantially caused the planet to warm and the oceans to rise. They draw a direct causal line between defendants' policy choices and floods, food shortages, destruction of property, species extinction, and a host of other harms.<sup>36</sup>

Judge Aiken observed that the federal government during the Obama Administration did not dispute that climate change was a serious threat to the planet Earth caused by human beings.<sup>37</sup> Judge Aiken explained that her decision would focus on the following questions: "whether defendants are responsible for some of the harm caused by climate change, whether plaintiffs may challenge defendants' climate change policy in court, and whether this Court can direct defendants to change their policy without running afoul of the separation of powers doctrine."<sup>38</sup>

Magistrate Judge Coffin recommended denying the defendants' and intervenors' motions to dismiss because he concluded that the plaintiffs' public trust and due process claims were viable.<sup>39</sup> The defendants and intervenors objected to his recommendations and argued that the plaintiffs' claims must be dismissed for lack of jurisdiction because the case presented non-justiciable political questions, the plaintiffs lacked standing to sue, and

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33. *Id.*

34. *Id.* at 1234.

35. *Id.*

36. *Id.*

37. *Id.* at 1234 n.3.

38. *Id.* at 1234.

39. *Id.* at 1235.



federal public trust claims could not be asserted against the federal government.<sup>40</sup> They additionally claimed that the plaintiffs had failed to state a claim on which relief can be granted.<sup>41</sup> This article will just address the due process issues, but the other issues were examined in my prior article on *Juliana*.<sup>42</sup>

## B. Due Process Claims

The Due Process Clause of the Fifth Amendment to the United States Constitution prohibits the federal government from depriving a person of “life, liberty, or property” without “due process of law.”<sup>43</sup> The plaintiffs in the *Juliana* case alleged that the federal government defendants had violated their due process rights by approving fossil fuel projects and promoting their development.<sup>44</sup> Judge Aiken acknowledged that it was clear and undisputed that the government’s actions approving various types of fossil fuel extraction and burning would pass rational basis review,<sup>45</sup> so the crucial issue in resolving the motion to dismiss was whether the plaintiffs had asserted the violation of a fundamental right subject to strict scrutiny review.<sup>46</sup>

The *Juliana* decision explained that fundamental due process liberty rights include both rights enumerated elsewhere in the United States Constitution and rights and liberties which are either (1) “deeply rooted in this Nation’s history and tradition” or (2) “fundamental to our scheme of ordered liberty.”<sup>47</sup> In *Washington v. Glucksberg*, the Supreme Court warned that federal courts must “exercise the utmost care whenever . . . asked to break new ground in this field, lest the liberty protected by the Due Process Clause be subtly transformed into [judicial] policy preferences.”<sup>48</sup> However, Judge Aiken observed that the traditional cautious approach to creating new due process rights in *Glucksberg* was substantially changed in Justice Kennedy’s *Obergefell* decision, which recognized a new fundamental due process right to same-sex marriage.<sup>49</sup> The *Obergefell* decision gave federal judges far more discretion to establish new fundamental due process rights than *Glucksberg*’s history and tradition test.<sup>50</sup> Justice Kennedy stated that courts must:

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40. *Id.*

41. *Id.*

42. Mank, *supra* note 1, at 866–70 (addressing political question issues in *Juliana*), 870–74 (reviewing standing issues in *Juliana*), 879–86 (examining public trust doctrine issues in *Juliana*).

43. U.S. CONST. amend. V.

44. *Juliana*, 217 F. Supp. 3d at 1248.

45. *Id.* at 1249.

46. *Id.*

47. *Id.* (quoting *McDonald v. City of Chicago*, 561 U.S. 742, 767 (2010)); *accord* *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997).

48. *Id.* (quoting *Glucksberg*, 521 U.S. at 720) (internal quotations omitted).

49. *Id.* (discussing *Obergefell v. Hodges*, 135 S. Ct. 2584, 2598 (2015)).

50. *See Obergefell*, 135 S. Ct. at 2589.

[E]xercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect . . . . History and tradition guide and discipline the inquiry but do not set its outer boundaries . . . . When new insight reveals discord between the Constitution’s central protections and a received legal stricture, a claim to liberty must be addressed.<sup>51</sup>

In his dissenting opinion in *Obergefell*, Chief Justice Roberts attacked Justice Kennedy’s majority opinion for “break[ing] sharply with decades of precedent” in effectively overruling “the importance of history and tradition” in how the Court had defined the fundamental rights inquiry in *Glucksberg*.<sup>52</sup> He noted that “many other cases both before and after have adopted the same approach.”<sup>53</sup> Chief Justice Roberts reasoned that *Obergefell*’s “aggressive application of substantive due process” would provide judges too much discretion in deciding issues which properly belong in democratic legislative decisions.<sup>54</sup> As will be demonstrated in the following few paragraphs, Judge Aiken’s newly created substantive due process right to a livable environment is appropriate only under *Obergefell*’s evolving approach to due process and not under *Glucksberg*’s narrower history and tradition analysis.<sup>55</sup>

Relying on the “reasoned judgment” standard for fundamental due process rights in *Obergefell*, Judge Aiken concluded that “I have no doubt that the right to a climate system capable of sustaining human life is fundamental to a free and ordered society.”<sup>56</sup> Relating to *Obergefell*’s view that “marriage is the ‘foundation of the family,’” she reasoned that “a stable climate system [was] quite literally the foundation ‘of society, without which there would be neither civilization nor progress.’”<sup>57</sup> She cautioned that the due process right to a livable and stable climate system did not mean that plaintiffs could sue regarding “the government’s role in producing *any* pollution or in causing *any* climate change.”<sup>58</sup> Judge Aiken explained, “[i]n framing the fundamental right at issue as the right to a climate system capable of sustaining human life, I intend to strike a balance and to provide some

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51. *Id.*

52. *See id.* at 2618–19 (Roberts, C.J., dissenting).

53. *Id.* at 2618.

54. *See also* Lamparello, *supra* note 10, at 47–52 (criticizing Justice Kennedy’s expansive due process analysis for usurping traditional legislative authority and transferring it to judges); *infra* Part II. *See generally* *Obergefell*, 135 S. Ct. at 2611–12, 2616–23 (Roberts, C.J., dissenting).

55. *See* Juliana v. United States, 217 F. Supp. 3d 1224, 1249–50 (D. Or. 2016) (implicitly acknowledging that plaintiffs’ due process claims were viable under *Obergefell*’s new expansive reading of the Due Process Clause, but not under the prior history and tradition standard of interpretation); *see also* *infra* Part II.

56. *Juliana*, 217 F. Supp. 3d at 1250 (quoting *Obergefell*, 135 S. Ct. at 2598).

57. *Id.* (quoting *Obergefell*, 135 S. Ct. at 2598).

58. *Id.*

protection against the constitutionalization of all environmental claims.”<sup>59</sup> She held that a valid due process claim regarding climate change required a plaintiff to assert that the “governmental action [was] affirmatively and substantially damaging the climate system in a way that will cause human deaths, shorten human lifespans, result in widespread damage to property, threaten human food sources, and dramatically alter the planet’s ecosystem.”<sup>60</sup>

Yet even these serious allegations would not have violated due process under *Glucksberg*’s narrower history and tradition approach, and Judge Aiken’s livable climate standard is only possible under *Obergefell*’s evolving approach to substantive due process.<sup>61</sup> In particular, courts have traditionally avoided making the judiciary the leading policymaker on climate change until Judge Aiken’s decision.<sup>62</sup> For example, two recent district decisions that are discussed below have refused to recognize a due process right to a healthy environment.<sup>63</sup>

The *Juliana* decision explained that the Due Process Clause usually does not create an affirmative duty on the part of the government to act.<sup>64</sup> However, the court concluded that the plaintiffs had alleged sufficient facts at the motion to dismiss stage of litigation that the government defendants had violated the “danger creation” exception because the federal government had possibly acted with deliberate indifference to the safety of the plaintiffs by failing to take steps to address and ameliorate serious risks from climate change.<sup>65</sup> Judge Aiken summarized the plaintiffs’ allegations as follows:

Plaintiffs have alleged that defendants played a significant role in creating the current climate crisis, that defendants acted with full knowledge of the consequences of their actions, and that defendants have failed to correct or mitigate the harms they helped create in deliberate indifference to the injuries caused by climate change.<sup>66</sup>

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59. *Id.*

60. *Id.*

61. *See infra* Part II. *See generally Juliana*, 217 F. Supp. 3d at 1249–50.

62. *See* David Markell & J.B. Ruhl, *An Empirical Assessment of Climate Change in the Courts: A New Jurisprudence or Business as Usual?*, 64 FLA. L. REV. 15, 22, 77–78, 85–86 (2012) (arguing that most court decisions have treated climate change cases as business as usual rather than as opportunity to make new law).

63. *Clean Air Council v. United States*, 362 F. Supp. 3d 237, 250–51 (E.D. Pa. 2019); *Lake v. City of Southgate*, No. 16-10251, 2017 WL 767879, at \*3–4 (E.D. Mich. Feb. 28, 2017).

64. *Juliana*, 217 F. Supp. 3d at 1250–51.

65. *Id.* at 1251–52.

66. *Id.* at 1252.

### C. Judge Aiken's Conclusions and the Future of the Case

In *Juliana*, Judge Aiken acknowledged that the defendants were “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.”<sup>67</sup> However, she responded that existing limitations on statutory remedies did not apply to the case because the threat of “imminent” catastrophic climate change violated the plaintiffs’ fundamental due process rights to life and liberty.<sup>68</sup> Judge Aiken did not explain why she presumed federal judges were more competent than members of Congress or the President to address climate change issues.<sup>69</sup>

On the other hand, citing *Glucksberg*’s history and tradition due process analysis, United States District Judge Nancy G. Edmunds of the Eastern District of Michigan in her 2017 decision *Lake v. City of Southgate*<sup>70</sup> determined that there was no Supreme Court or Sixth Circuit precedent establishing a fundamental liberty interest and constitutional right to a person’s health or freedom from bodily harm due to environmental harms, and, therefore, concluded that there was no substantive due process right to health or freedom from bodily harm as defined in *Glucksberg*.<sup>71</sup> Judge Edmunds cited the recent *Juliana* decision but implicitly disagreed with that decision by concluding that the *City of Southgate* plaintiffs must rely upon statutory protections rather than newfound constitutional “rights.”<sup>72</sup>

Judge Aiken would likely disagree with the reasoning of the *City of Southgate* decision rejecting a constitutional right to health or freedom from bodily harm stemming from environmental harms because the *Juliana* decision disagreed with the defendants’ similar argument that the due process argument for a right to a stable and livable climate should be dismissed because it was “unprecedented” and “groundbreaking.”<sup>73</sup> Judge Aiken rejected the cautious approach of cases such as *City of Southgate* when she observed in obiter dicta that “[f]ederal courts too often have been cautious and overly deferential in the arena of environmental law, and the world has suffered for it.”<sup>74</sup> Her *Juliana* decision argued, “Even when a case implicates hotly contested political issues, the judiciary must not shrink from its role as a coequal branch of government.”<sup>75</sup>

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67. *Id.* at 1261.

68. *See id.* at 1261, 1267, 1272 (assuming that plaintiffs’ allegations of imminent harm are true at this stage of litigation).

69. *See id.* at 1249–50 (assuming judges have a right under the due process clause to protect fundamental rights even if the legislature disagrees).

70. No. 16-10251, 2017 WL 767879 (E.D. Mich. Feb. 28, 2017).

71. *Lake*, 2017 WL 767879, at \*3–4, \*5 n.4 (citing *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997)).

72. *See Lake*, 2017 WL 767879, at \*3–4, \*4 n.3.

73. *Juliana*, 217 F. Supp. 3d at 1262.

74. *Id.* at 1262.

75. *Id.* at 1263.

On the other hand, the District of Columbia District Court's *Alec L. v. Jackson* decision,<sup>76</sup> the Alaska Supreme Court's *Kanuk ex rel. Kanuk v. State, Department of Natural Resources* decision,<sup>77</sup> and the New Mexico Court of Appeals' *Sanders-Reed ex rel. Sanders-Reed v. Martinez* decision<sup>78</sup> concluded that administrative agencies and legislatures were better equipped than the judiciary to address climate change issues.<sup>79</sup> Thus, these cases cast doubt regarding the *Juliana* court's conclusion that courts must solve the problem of climate change.<sup>80</sup> Additionally, Judge Alsup in his *City of Oakland* decision dismissed a public nuisance suit against major oil companies because he concluded that Congress and the Executive Branch should decide climate change policy questions instead of federal courts because these issues should be decided by the political branches.<sup>81</sup> A 2019 district court decision reached similar conclusions.<sup>82</sup>

#### D. The Road to an Interlocutory Appeal in the Ninth Circuit

After Judge Aiken published her *Juliana* decision, the Trump Administration pursued protracted and convoluted litigation in the Ninth Circuit and Supreme Court to dismiss the case or to obtain an interlocutory appeal in the Ninth Circuit.<sup>83</sup> After the Ninth Circuit and Supreme Court suggested that an interlocutory appeal was appropriate, Judge Aiken reluctantly agreed to allow an interlocutory appeal in the Ninth Circuit.<sup>84</sup>

On June 9, 2017, one day after Judge Aiken denied the United States Government's initial request for an interlocutory appeal,<sup>85</sup> the United States Department of Justice ("DOJ") filed a Ninth Circuit Petition for a Writ of Mandamus and a Request to Stay the proceedings in the *Juliana* case on behalf of the United States Government.<sup>86</sup> The DOJ sought to dismiss the case and to stay the District Court's broad discovery orders that would require the Government to provide a wide range of documents concerning

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76. *Alec L. v. Jackson*, 863 F. Supp. 2d 11, 15–16 (D.D.C. 2012) (discussing *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 424 (2011)), *aff'd*, *Alec L. ex rel. Loorz v. McCarthy*, 561 Fed. App'x 7, 8 (D.C. Cir. 2014).

77. *Kanuk ex rel. Kanuk v. State, Dep't of Nat. Res.*, 335 P.3d 1088, 1097–99 (Alaska 2014).

78. *Sanders-Reed ex rel. Sanders-Reed v. Martinez*, 350 P.3d 1221, 1226–27 (N.M. Ct. App. 2015).

79. *Jackson*, 863 F. Supp. 2d at 16–17 (D.D.C. 2012); *Kanuk*, 335 P.3d at 1097–99; *Sanders-Reed*, 350 P.3d at 1226–27.

80. See *supra* Section I.B; *infra* I.E & Conclusion.

81. Order Granting Motion to Dismiss Amended Complaints at 14, *City of Oakland vs. BP P.L.C.*, No. C17-06011 WHA, 2018 WL 3609055 (N.D. Cal. July 27, 2018).

82. *Clean Air Council v. United States*, 362 F. Supp. 3d 237, 250–51 (E.D. Pa. 2019).

83. See *infra* Section I.F.

84. See *infra* Section I.F.

85. Order Denying Interlocutory Appeal at 2, *Juliana v. United States*, 217 F. Supp. 3d 1224 (D. Or. 2016) (No. 6:15-cv-01517-TC-AA).

86. Petition for Writ of Mandamus at 1–2, 43, *Juliana v. United States*, 217 F. Supp. 3d 1224 (D. Or. 2016) (No. 6:15-cv-01517-TC-AA).

government energy policy decisions related to fossil fuels for the past fifty years.<sup>87</sup>

After the Government filed its petition for a writ of mandamus and stay in the Ninth Circuit, Magistrate Judge Coffin issued some rulings preparing for a trial in the case. On June 28, 2017, he authorized the industry intervenors to withdraw from the case over the plaintiffs' objections.<sup>88</sup> Furthermore, he scheduled a February 2018 trial date,<sup>89</sup> which was subsequently postponed until October 2018.<sup>90</sup>

On December 11, 2017, the Ninth Circuit held oral argument on whether to stay the case and the trial date set by Judge Coffin.<sup>91</sup> The three-judge panel hearing the case consisted of Chief Judge Sidney Thomas, Judge Marsha Berzon, and Judge Alex Kozinski.<sup>92</sup> On December 18, 2017, Judge Kozinski announced his immediate retirement in the wake of alleged sexual misconduct.<sup>93</sup> Judge Friedland was randomly selected to replace Judge Kozinski when the latter retired from the federal courts.<sup>94</sup>

On March 7, 2018, the Ninth Circuit denied the United States Government's Petition for a Writ of Mandamus without prejudice.<sup>95</sup> The Ninth Circuit determined that the United States Government's petition was premature because the Government had failed to demonstrate the "extraordinary circumstances" required for mandamus relief when a party asks an appellate court to review a case before the trial court proceedings have concluded, and that the district court could address the Government's

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87. *Id.* at 1.

88. *9th Circuit Temporarily Pauses Youth Climate Trust Suit*, INSIDE EPA (July 26, 2017), <https://insideepa.com/daily-feed/9th-circuit-temporarily-pauses-youth-climate-trust-suit> [<https://perma.cc/2AZZ-KPH9>].

89. *Id.*

90. *Court Slates October Trial Date for Youth Climate Suit*, INSIDE EPA (Apr. 13, 2018), <https://insideepa.com/daily-feed/court-slates-october-trial-date-youth-climate-suit> [<https://perma.cc/2AZZ-KPH9>]; Kartikay Mehrotra, *Justice Department Says Trump Should Be Immune from Teens' Climate Lawsuit*, BLOOMBERG (May 10, 2018, 1:32 PM), <https://www.bloomberg.com/news/articles/2018-05-10/u-s-says-suing-teens-can-t-force-trump-to-fix-climate-change> [<https://perma.cc/n9BT-7B9F>].

91. Abby Smith, *Kids' Lawsuit over Climate Change Faces Big Test in Federal Court*, BLOOMBERG BNA (Dec. 8, 2017), [https://www.bloomberglaw.com/document/XDFK94PC000000?bna\\_news\\_filter=environment-and-energy&jcsearch=BNA%25200000016027b9d262af6437f9e68f0001#jcite](https://www.bloomberglaw.com/document/XDFK94PC000000?bna_news_filter=environment-and-energy&jcsearch=BNA%25200000016027b9d262af6437f9e68f0001#jcite) [<https://perma.cc/D7LU-DQEY>].

92. *Id.*

93. See Debra Cassens Weiss, *Kozinski Announces His Immediate Retirement After More Women Accuse Him of Sexual Misconduct*, ABA J. (Dec. 18, 2017, 10:19 AM), [http://www.abajournal.com/news/article/kozinski\\_announces\\_his\\_immediate\\_retirement\\_after\\_more\\_women\\_accuse\\_him\\_of](http://www.abajournal.com/news/article/kozinski_announces_his_immediate_retirement_after_more_women_accuse_him_of) [<https://perma.cc/NA57-SLKX>].

94. Abby Smith & Kartikay Mehrotra, *Youths Defeat Trump's Move to Kill Climate Lawsuit*, BLOOMBERG ENV'T (Mar. 7, 2018, 3:45 PM), <https://bnaews.bna.com/environment-and-energy/youthsdefeattrumpsmove-to-kill-climate-lawsuit-1> [<https://perma.cc/S72A-J6JT>].

95. *In re United States v. U.S. Dist. Court for Dist. of Or.*, 884 F.3d 830, 838 (9th Cir. 2018).

concerns about the plaintiffs' allegedly overly broad discovery requests.<sup>96</sup> Thus, the district court could proceed to hold a trial on the plaintiffs' claims, but the Ninth Circuit possibly suggested that the district court should consider narrowing the claims before it.<sup>97</sup> Chief Judge Thomas observed that the court of appeals was "mindful that some of the plaintiffs' claims as currently pleaded [were] quite broad, and some of the remedies the plaintiffs seek may not be available as redress."<sup>98</sup> The Ninth Circuit further explained, "Claims and remedies often are vastly narrowed as litigation proceeds; we have no reason to assume this case will be any different."<sup>99</sup>

On July 17, 2018, the DOJ filed a motion in the United States Supreme Court seeking to stay discovery and halt the trial in the *Juliana* case.<sup>100</sup> In an order dated July 30, 2018, the Supreme Court denied the Government's motion without prejudice.<sup>101</sup> However, the Court cautioned the District Court:

The breadth of respondents' claims is striking, however, and the justiciability of those claims presents substantial grounds for difference of opinion. The District Court should take these concerns into account in assessing the burdens of discovery and trial, as well as the desirability of a prompt ruling on the Government's pending dispositive motions.<sup>102</sup>

In view of the Supreme Court's order, attorney Philip Gregory of the Gregory Law Group, who served as co-counsel for the youth plaintiffs in the *Juliana* case, praised the Court for allowing the case to go forward, but conceded that the District Court would likely need to "promptly address narrowing the claims so that the trial can go forward" as then scheduled on October 29, 2018 in Eugene, Oregon.<sup>103</sup>

After the Government renewed its efforts to dismiss the case through a petition for a writ of mandamus, on November 2, 2018, the Supreme Court denied the Government's request for a stay of proceedings in the district court

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96. *Id.*; Smith & Mehrotra, *supra* note 94.

97. *See In re United States*, 884 F.3d at 838; Smith & Mehrotra, *supra* note 94.

98. *In re United States*, 884 F.3d at 837; *see* Smith & Mehrotra, *supra* note 94.

99. *In re United States*, 884 F.3d at 838.

100. Notice of Filing of Application to the Supreme Court for Stay at 2, *Juliana v. United States*, 217 F. Supp. 3d 1224 (D. Or. July 17, 2018) (No. 6:15-cv-01517-TC); Dawn Reeves, *Trump Administration Asks Supreme Court to Stay Youth Climate Case*, INSIDE EPA (July 19, 2018), <https://insideepa.com/daily-news/trump-administration-asks-supreme-court-stay-youth-climate-case> [https://perma.cc?BWS5-C95Z].

101. *United States v. U.S. Dist. Court for Dist. of Or.*, No. 18A65, 2018 U.S. LEXIS 4112 (July 30, 2018).

102. *Id.*

103. *Supreme Court Rejects DOJ Bid to Halt Youths' Climate Case*, INSIDE EPA (July 30, 2018), <https://insideepa.com/daily-feed/supreme-court-rejects-doj-bid-halt-youths-climate-case> [https://perma.cc?W4SF-GNME].

without prejudice.<sup>104</sup> After repeating its observation from July 2018 regarding the “‘striking’ breath” of the plaintiffs’ claims, the Court noted, “At this time, however, the Government’s petition for a writ of mandamus does not have a ‘fair prospect’ of success in this Court because adequate relief may be available in the United States Court of Appeals for the Ninth Circuit.”<sup>105</sup> Justice Thomas and Justice Gorsuch would have granted the Government’s application for a stay.<sup>106</sup>

On November 8, 2018, the Ninth Circuit decided the Government’s renewed Motion for a Temporary Stay of the district court proceedings pending the court of appeals consideration of the Government’s petition for a writ of mandamus.<sup>107</sup> The three-judge panel was the same as had denied the Government’s similar motion in March 2018: Chief Judge Thomas, Judge Berzon, and Judge Friedland.<sup>108</sup> In November 2018, the panel granted the motion for a stay in part, delaying the then-scheduled trial before Judge Aiken’s court in Eugene, Oregon.<sup>109</sup> Furthermore, the Ninth Circuit found that the petition for a writ of mandamus deserved an answer from the parties and also from the district court if it elected to file an answer or issue an order.<sup>110</sup> Finally, the court of appeals “requested” that the district court “promptly resolve” the Government’s motion to reconsider its denial of the United States’ request to certify orders for interlocutory review.<sup>111</sup> The Ninth Circuit cited both the Supreme Court’s July 30th and November 2nd orders in the case, “noting that the justiciability of plaintiffs’ claims ‘presents substantial grounds for difference of opinion.’”<sup>112</sup>

On November 21, 2018, Judge Aiken reluctantly granted the Government’s motion to reconsider its denial of the United States’ request to certify orders for interlocutory review in light of the Ninth Circuit’s “extraordinary” November 8th order, as well as the Supreme Court’s July 30th and November 2nd orders in the case.<sup>113</sup> Judge Aiken made it clear that she would have preferred a bifurcated trial procedure dividing the trial into a

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104. Order in Pending Case, *In re Juliana v. United States*, 217 F. Supp. 3d 1224 (D. Or. July 17, 2018) (No. 6:15-cv-01517-TC), 586 U.S. 1–3 (Nov. 2, 2018), [https://www.supremecourt.gov/orders/courtorders/110218zr2\\_8ok0.pdf](https://www.supremecourt.gov/orders/courtorders/110218zr2_8ok0.pdf) [<https://perma.cc/3YRQ-XEZ6>].

105. *Id.* at 2.

106. *Id.* at 3.

107. Order, Petition for Writ of Mandamus, *United States v. USDC-ORE, Juliana v. United States*, 217 F. Supp. 3d 1224 (D. Or. July 17, 2018) (No. 6:15-cv-01517-TC) (9th Cir. Nov. 8, 2018).

108. *Id.*; see *In re United States v. U.S. Dist. Court for Dist. of Or.*, 884 F.3d 830, 838 (9th Cir. 2018).

109. Order, Petition for Writ of Mandamus, *United States v. USDC-ORE, Juliana v. United States*, 217 F. Supp. 3d 1224 (D. Or. July 17, 2018) (No. 6:15-cv-01517-TC) (9th Cir. Nov. 8, 2018).

110. *Id.*

111. *Id.*

112. *Id.*

113. Order, *United States’ Request to Certify Orders for Interlocutory Review*, 5–6, *Juliana v. United States*, 217 F. Supp. 3d 1224 (D. Or. July 17, 2018) (No. 6:15-cv-01517-TC) (D. Or. Nov. 21, 2018).



liability phase and a remedy phase pursuant to Federal Rule of Civil Procedure 42(b).<sup>114</sup> If the district court found liability, Judge Aiken would have allowed the Government to appeal the liability finding before the district court proceeded to the remedy phase of the case.<sup>115</sup> After reviewing case law concluding that interlocutory appeals are only allowed in exceptional cases and at the discretion of the district court, Judge Aiken observed, “This Court stands by its prior rulings on jurisdictional and merits issues, as well as its belief that this case would be better served by further factual development at trial.”<sup>116</sup> Nevertheless, she felt compelled by the Ninth Circuit’s November 8th order and the Supreme Court’s July 30th and November 2nd orders in the case to certify the case for interlocutory appeal.<sup>117</sup>

On December 26, 2018, the Ninth Circuit in a divided two to one panel decision granted the Government permission to take an interlocutory appeal to that court pursuant to 28 U.S.C. § 1292(b).<sup>118</sup> Chief Judge Thomas and Judge Berzon were in the majority.<sup>119</sup> Judge Friedland filed a dissenting opinion because she read Judge Aiken’s order authorizing an interlocutory appeal as actually arguing that such an appeal was inappropriate under 28 U.S.C. § 1292(b) and that the district court had only granted the order certifying an interlocutory appeal under compulsion from statements in orders by the Ninth Circuit and the Supreme Court, which has an element of truth even if one thinks that an interlocutory appeal was appropriate in the case.<sup>120</sup> Accordingly, Judge Friedland would have allowed the case to proceed to trial in the district court.<sup>121</sup>

## E. Briefs in the Ninth Circuit

### 1. *Government-Appellants’ Opening Brief*

On February 1, 2019, the Government-Appellants filed their opening brief.<sup>122</sup> First, the United States argued that the plaintiffs could not establish Article III standing, which is required for any suit in federal court, because they asserted a “generalized grievance and not the required particularized injury because global climate change affects everyone in the world.”<sup>123</sup>

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114. *Id.* at 2, 5.

115. *Id.* at 2.

116. *Id.* at 3–5.

117. *Id.* at 5–6.

118. Order, Petition for Permission to Appeal Pursuant to 28 U.S.C. § 1292(b), *Juliana v. United States*, 2017 F. Supp. 3d 1224 (D. Or. July 17, 2018) (No. 6:15-cv-01517-TC) (9th Cir. Dec. 26, 2018).

119. *Id.*

120. *Id.* at 1–4.

121. *Id.*

122. Government-Appellants’ Opening Brief, *Juliana v. United States*, 9th Cir. No. 18-36082 (No. 6:15-cv-01517-AA) (Feb. 1, 2019).

123. *Id.* at 9.

Furthermore, the Government argued that Plaintiffs' alleged injuries are not redressable because "a single district judge may not (consistent with Article III and the equitable authority of federal courts) seize control of national energy production, energy consumption, and transportation in the ways that would be required to implement Plaintiffs' demanded remedies."<sup>124</sup> Second, the DOJ maintained that the federal Administrative Procedure Act<sup>125</sup> requires the plaintiffs to file challenges to each individual energy or environmental decision they objected to rather than bring a sweeping constitutional challenge to every federal policy affecting climate change.<sup>126</sup> Fourth, the Government claimed that there is "no federal public trust doctrine that binds the federal government. Even if such a doctrine did apply to the federal government, any common-law federal public trust doctrine is displaced by statute. In any event, the Atmosphere is not within any public trust"<sup>127</sup> because "[p]ublic trust cases have historically involved state ownership of specific types of natural resources, usually limited to submerged and submersible lands, tidelands, and waterways."<sup>128</sup>

This article will focus on the third issue in the Government's brief, whether there is a substantive due process right to a stable climate system.<sup>129</sup> The United States argued that the district court's invocation of a recognition of a novel "unenumerated fundamental right" to a "climate system capable of sustaining human life" failed to meet the traditional requirement that due process rights must be rooted in this Nation's history or tradition.<sup>130</sup> The Government argued that it was inappropriate for Judge Aiken to apply the due process analysis used to create a personal right to same-sex marriage in *Obergefell* to the quite different issue of climate change.<sup>131</sup> The Department of Justice reasoned:

There is, to understate the point considerably, no meaningful analogy between a distinctly personal and circumscribed right to same-sex marriage and a purported right to particular climate conditions that apparently would run indiscriminately to every individual in the United States and the judicial recognition of which would affect every person in this country and the world. Moreover, the climate-related right recognized by the district court bears no relationship to any right as "fundamental as a matter of history and tradition" as the right to marry that the Supreme Court

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124. *Id.*

125. 5 U.S.C. § 551 *et seq.* (1946); Government-Appellants' Opening Brief, *Juliana v. United States*, 9th Cir. No. 18-36082 (No. 6:15-cv-01517-AA) (Feb. 1, 2019).

126. Opening Brief, *supra* note 122, at 10.

127. *Id.* at 11.

128. *Id.* at 54–55.

129. *Id.* at 10–11, 35.

130. *Id.* at 35.

131. *Id.* at 36.

recognized in *Obergefell*. Nor was *Obergefell*'s extension of that right an invitation to lower courts to abandon the cautious approach to recognizing new fundamental rights that is demanded by the Supreme Court's prior decisions.<sup>132</sup>

The author of this article agrees with the Government's brief that the constitutional right to same-sex marriage that the Supreme Court recognized in *Obergefell* is quite different from Judge Aiken's proposed right to a livable climate system because a central focus of Justice Kennedy's *Obergefell* decision was on "correct[ing] inequalities in the institution of marriage [and] vindicating precepts of liberty and equality under the Constitution" that have no similar basis in addressing climate change issues.<sup>133</sup> Professor Kenji Yoshino has argued that the *Obergefell* decision should be interpreted as a vision of liberty that he calls "antisubordination liberty" that protects "historically subordinated groups."<sup>134</sup> But climate change issues do not raise the same type of liberty and equality issues as same-sex marriage because climate change affects all human beings and does not single out minority groups for disproportionate harms, even if poor people may have less means to adapt to climate change's impacts.<sup>135</sup>

The Government's brief emphasized that prior court decisions had consistently rejected a constitutional right to a healthy environment and therefore that the district court's decision in *Juliana* was a radical change in the law.<sup>136</sup> Nor was it appropriate, according to the DOJ, for Judge Aiken's decision to extend the narrow state-created danger doctrine that allows courts to act if a government official poses an imminent risk of harm to the personal security or bodily integrity of a specific individual to an expansive doctrine that requires the federal government to protect the entire United States population from potential harms from climate change.<sup>137</sup>

## 2. *Plaintiffs-Appellees' Answering Brief*

On February 1, 2019, the Plaintiff-Appellees filed their answering brief.<sup>138</sup> First, the plaintiffs argued that they had Article III standing because

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132. *Id.*

133. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604 (2015). *See generally id.* at 2602–05 (emphasizing that marriage equality for same-sex couples is based upon both liberty and equality concepts in the Constitution's Due Process and Equal Protection Clauses).

134. Kenji Yoshino, *A New Birth of Freedom?: Obergefell v. Hodges*, 129 HARV. L. REV. 147, 174 (2015).

135. Mank, *supra* note 1, at 860, 898 (arguing that climate change affects all people rather than singling out minority groups and hence does not raise the same liberty interests as same-sex marriage or discrimination against LGBTQ individuals, although acknowledging that climate change may raise more difficult problems for poor people than rich individuals).

136. Opening Brief, *supra* note 122, at 37–38.

137. *Id.* at 38–42.

138. Plaintiffs-Appellees' Answering Brief, *Juliana v. United States*, 9th Cir. No. 18-36082 (No. 6:15-cv-01517-AA) (Feb. 22, 2019).

several of their members were suffering from personal injuries from flooding and other natural disasters caused by climate change, that these injuries were fairly traceable to the federal government's affirmative promotion of fossil fuels for energy use, and that federal courts could redress their injuries by ordering the executive branch to take steps to reduce fossil fuel usage.<sup>139</sup> Second, the plaintiffs contended that their right to procedural due process under the Fifth Amendment of the United States Constitution overrode any limitations on suits against the federal government in the Administrative Procedure Act.<sup>140</sup> Fourth, the plaintiffs maintained that the public trust doctrine was binding on the federal government and that various federal statutes and regulations, including the Clean Air Act,<sup>141</sup> did not displace the doctrine's applicability to the United States Government.<sup>142</sup> Furthermore, the plaintiffs disagreed with the Department of Justice's assertion that the district court had asserted that the public trust doctrine applies to the atmosphere when that court had not yet decided that issue and had instead concluded that the United States' promotion of fossil fuels had caused harm to ocean resources that are clearly within the scope of the doctrine.<sup>143</sup>

Of central importance, the plaintiffs argued that the district court had properly established "an unenumerated climate right underpinning other recognized substantive due process rights" under the Constitution.<sup>144</sup> They argued that the district court properly found that the right "'to a climate system capable of sustaining human life,' (hereinafter 'climate right') is both fundamental to ordered liberty and deeply rooted in our Nation's history and traditions."<sup>145</sup> The plaintiffs contended a stable climate was a fundamental right because the children plaintiffs and other Americans could not exercise other fundamental rights unless they enjoyed the right to a safe environment in which to live.<sup>146</sup> The plaintiffs tried to demonstrate that the right to a safe environment was recognized by political philosophers and legal theorists at the United States' founding in the eighteenth century as a natural right<sup>147</sup> and, in particular, that the Declaration of Independence and the United States Constitution, through two of its leading authors, Thomas Jefferson and James Madison, both future United States Presidents, recognized a natural law right to live in a healthy environment.<sup>148</sup> The plaintiffs maintained that the right to a livable climate was therefore rooted in this historic tradition of a natural right to a healthy environment.<sup>149</sup>

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139. *Id.* at 9–32.

140. *Id.* at 32–40.

141. 42 U.S.C. § 7401 *et seq.* (1970 as amended through 1990).

142. Plaintiffs-Appellees' Answering Brief, *supra* note 138, at 52–59.

143. *Id.* at 59–60.

144. *Id.* at 40.

145. *Id.* at 41–42 (footnotes omitted).

146. *Id.* at 42–50.

147. *Id.*

148. *Id.*

149. *Id.*

Furthermore, the right to marry in *Obergefell* was fundamental to a person's survival just as is the plaintiffs' proposed fundamental right to a livable climate.<sup>150</sup> Finally, the plaintiffs argued that they had properly asserted a state-created danger claim because the Government had deliberately disregarded the known risks of burning fossil fuels and the ensuing harm to the climate and that the Government's request for summary judgment should be denied until the plaintiffs had the opportunity to present evidence to support their claims.<sup>151</sup>

### 3. *Government-Appellants' Reply Brief*

On March 8, 2019, the Government-Appellants filed their reply brief.<sup>152</sup> The Department of Justice continued its argument that the district court's creation of a fundamental right under the Due Process Clause of a stable or livable climate was completely unlike previous fundamental rights related to personal autonomy or dignity.<sup>153</sup> The Government criticized the "snippets" of quotes that the plaintiffs had assembled from the political philosopher John Locke and two prominent framers of the Declaration of Independence and Constitution, Presidents Thomas Jefferson and James Madison, as failing to provide concrete examples of fundamental rights to a healthy environment.<sup>154</sup> The Government's reply brief argued that even if the plaintiffs were correct that our nation's Framers "appreciated the natural world," the Framers also "appreciated many things" that are not fundamental rights so that a snippet from Jefferson's writings appreciating the world of nature did not mean that there was a history and tradition of treating nature as a fundamental right.<sup>155</sup>

The Department of Justice noted that a district court in the Eastern District of Pennsylvania in *Clean Air Council v. United States*<sup>156</sup> had recently rejected *Juliana's* due process analysis and concluded that there was no fundamental right to a life-sustaining climate system.<sup>157</sup> In the *Clean Air Council* decision, United States District Judge Paul S. Diamond observed that "the *Juliana* Court certainly contravened or ignored longstanding authority," finding there is no fundamental right or tradition of recognizing a due process right to a healthy environment.<sup>158</sup> Furthermore, the *Clean Air Council*

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150. *Id.* at 48.

151. *Id.* at 50–54.

152. Government-Appellants' Reply Brief, *Juliana v. United States*, 9th Cir. No. 18-36082 (No. 6:15-cv-01517-AA) (March 8, 2019).

153. *Id.* at 23–24.

154. *Id.* at 24.

155. *Id.* at 24–25.

156. 362 F. Supp. 3d 237 (E.D. Pa. 2019).

157. *Id.* at 250–51; Defendant's Memorandum in Support of Supplemental Motion to Dismiss and Reply to Plaintiff's Response, at 25, *Clean Air Council v. United States*, 362 F. Supp. 3d 237 (E.D. Pa. 2019) (No. 2:17-cv-04977-PD).

158. *Clean Air Council*, 362 F. Supp. 3d at 250–51.

decision criticized *Juliana* for recognizing a “right” without apparent limits.<sup>159</sup> The *Clean Air Council* decision concluded that “Plaintiffs’ disagreement with Defendants is a policy debate best left to the political process.”<sup>160</sup>

#### F. *Juliana* Oral Argument in the Ninth Circuit

On June 4, 2019, a three-judge panel of the Ninth Circuit held oral arguments in the *Juliana* case.<sup>161</sup> President Barack Obama appointed all three judges hearing the case.<sup>162</sup> They were Judge Mary Helen Murguia, appointed in 2011; Judge Andrew Hurwitz, appointed in 2012; and Judge Josephine Stanton of the United States District Court for the Central District of California, who was appointed in 2010 and was sitting on the panel by designation.<sup>163</sup>

The three-judge panel appeared sympathetic to the plaintiffs’ arguments that burning fossil fuels was causing significant climate change harms and that the federal government ought to do more to reduce the Nation’s use of fossil fuels for energy, but the judges struggled with whether courts had the authority to impose broad policy changes on the executive branch.<sup>164</sup> Judge Hurwitz questioned whether the court could broadly intervene even if Congress and the president appeared to be failing to address real harms from climate change and asked the plaintiffs’ attorney, Julia Olson, whether the plaintiffs must instead challenge individual government actions such as approving fossil fuel leases.<sup>165</sup> Olson answered that the Fifth Amendment’s Due Process Clause allowed the plaintiffs to seek broad relief and, therefore, that the plaintiffs were not limited to individual suits about discrete government actions under the Administrative Procedure Act.<sup>166</sup> In response, Jeffrey Clark, the DOJ’s assistant attorney general for environment and natural resources, argued that separation of powers principles barred

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159. *Id.* at 251.

160. *Id.*

161. Dawn Reeves, *9th Circuit Poised To Hear Early DOJ Appeal Of Youth Climate Lawsuit*, INSIDE EPA (June 3, 2019), <https://insideepa.com/daily-news/9th-circuit-poised-hear-early-doj-appeal-youth-climate-lawsuit> [<https://perma.cc/3N64-AYPG>].

162. *Id.*

163. *Id.*

164. Dawn Reeves, *Judges Appear Sympathetic To Youth Climate Case But Query Jurisdiction*, INSIDE EPA (June 4, 2019), <https://insideepa.com/daily-news/judges-appear-sympathetic-youth-climate-case-query-jurisdiction> [<https://perma.cc/PC2M-5GWL>]; Abby Smith, *Kids’ Climate Claims ‘Compelling,’ But Judges Question Court’s Role*, BLOOMBERG L. ENV’T & ENERGY REP. (June 5, 2019, 10:52 AM), [https://www.bloomberglaw.com/document/XA05UTG8000000?bna\\_news\\_filter=environment-and-energy&jcsearch=BNA%25200000016b2363d5bea57be7efe4630000#jcite](https://www.bloomberglaw.com/document/XA05UTG8000000?bna_news_filter=environment-and-energy&jcsearch=BNA%25200000016b2363d5bea57be7efe4630000#jcite) [<https://perma.cc/5JV9-2FNU>].

165. Reeves, *supra* note 164; *see also* Smith, *supra* note 164 (reporting Jeffrey Clark argued that it was inappropriate under the separation of powers for judges to make broad policy decisions that amount to a takeover of the government and instead that the plaintiffs should file challenges to individual agency actions).

166. Reeves, *supra* note 164; *see also* Smith, *supra* note 164.

federal courts from making broad policy decisions that are within the purview of the political branches, but instead the plaintiffs had the right under the APA to challenge individual government actions that might affect climate change.<sup>167</sup>

According to one reporter, Judge Murguia appeared during the oral argument to be the judge on the panel most favorable to the government's argument.<sup>168</sup> By contrast, the same reporter thought that Judges Hurwitz and Stanton were more sympathetic to the plaintiffs' arguments, but were concerned whether recognizing a constitutional right to a stable climate was too radical a break with existing precedent.<sup>169</sup> Professor Sean Hecht at UCLA Law School suggested that the three-judge panel did not give a clear indication of how they would decide the case,<sup>170</sup> and there is also the possibility that the case will be appealed to the Supreme Court.<sup>171</sup> Accordingly, it may take a long time before the case is finally decided.<sup>172</sup>

### G. The Ninth Circuit's Decision

On January 17, 2020, a divided panel of the Ninth Circuit reversed the decision of the district court in *Juliana* and held that the plaintiffs did not have standing to sue in the federal courts because their claimed injuries were not redressable by an Article III court.<sup>173</sup> Judge Hurwitz wrote the majority opinion and was joined by Judge Murguia.<sup>174</sup> Judge Staton wrote a dissenting opinion arguing that there was a constitutional right for judges to act if the political branches through action or inaction were causing the destruction of the United States and that the climate change crisis qualified as an emergency justifying judicial action.<sup>175</sup> Because the Ninth Circuit's decision was issued just prior to this article's publication, the author will only briefly describe the decision; a full discussion will have to wait until another publication.

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167. Reeves, *supra* note 164.

168. *Id.*

169. *Id.*

170. Julia Rosen, *Lawyers Are Optimistic That the Youths' Climate Change Lawsuit Will Go to Trial*, L.A. TIMES (June 4, 2019, 8:02 PM), <https://www.latimes.com/science/la-sci-youth-climate-trial-juliana-court-20190604-story.html> [<https://perma.cc/5DAP-W8BR>]

(reporting "others said the judges didn't give any clear sign as to which way they were leaning. 'They were tough on both sides,' said Sean Hecht, a law professor at UCLA.").

171. Geoff Dembicki, *Inside the Courtroom Where Teens Are Suing the Government Over the Climate Crisis*, VICE (June 5, 2019, 3:50 AM), [https://www.vice.com/amp/en\\_us/article/xwn5vq/juliana-v-united-states-arguments-heard-in-oregon](https://www.vice.com/amp/en_us/article/xwn5vq/juliana-v-united-states-arguments-heard-in-oregon) [<https://perma.cc/E52V-66JX>].

172. *Id.*

173. See *Juliana v. United States*, No. 18-36082, 2020 WL 254149, \*8–11 (9th Cir. 2020), *rev'g* *Juliana v. United States*, 217 F. Supp. 3d 1224 (D. Or. 2016); *infra* Section I.G.

174. *Juliana*, 2020 WL 254149, at \*1–11.

175. *Id.* at \*1–11.

The majority decision was quite favorable to the plaintiffs in many respects, which will be discussed below.<sup>176</sup> Ultimately, however, the panel majority concluded that it was beyond the authority of an Article III judge to order the plaintiffs' requested remedial plan because it would require a federal court to make complex policy choices that the Constitution assigns to the judgment and discretion of the executive and legislative branches.<sup>177</sup> As discussed in Part II, the Ninth Circuit could have instead concluded that the Due Process Clause does not create a substantive right to a stable climate.<sup>178</sup> Yet the Ninth Circuit through its redressability analysis came to the same conclusion, although by a somewhat different legal argument, as the author in determining that climate change issues are policy decisions for Congress and the President to decide.<sup>179</sup> Accordingly, both the en banc Ninth Circuit or the Supreme Court should reject any further appeals by the plaintiffs, who might be worse off if the Supreme Court or the en banc Ninth Circuit writes an even less favorable decision that could bar future climate suits more clearly than the Ninth Circuit's panel decision.<sup>180</sup>

The Ninth Circuit panel decision in *Juliana* made several favorable conclusions in favor of the plaintiffs. First, the court determined that “[a] substantial evidentiary record documents that the federal government has long promoted fossil fuel use despite knowing that it can cause catastrophic climate change, and that failure to change existing policy may hasten an environmental apocalypse.”<sup>181</sup> Second, disagreeing with the Department of Justice, the Ninth Circuit concluded that the APA does not bar all constitutional claims and, therefore, that the plaintiffs could potentially raise constitutional claims outside of the APA's boundaries.<sup>182</sup>

Additionally, the government contended that “the plaintiffs lack Article III standing to pursue their constitutional claims.”<sup>183</sup> The Ninth Circuit concluded that the plaintiffs had met the injury and causation prongs of the standing test, but that the plaintiffs' claims were not redressable by Article III federal courts.<sup>184</sup> First, the court found that “[a]t least some plaintiffs claim concrete and particularized injuries” because of such issues as water shortages or flooding that harmed individual plaintiffs and that these

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176. See Jonathan Adler, *Ninth Circuit Dismisses Kids Climate Case for Lack of Standing (Updated)*, REASON (Jan. 17, 2020), <https://reason.com/2020/01/17/ninth-circuit-dismisses-kids-climate-case-for-lack-of-standing/> [<https://perma.cc/QTP5-9NHT>] (arguing that the Ninth Circuit majority decision in *Juliana* was favorable to the plaintiffs in many ways).

177. See *Juliana*, 2020 WL 254149, at \*8–10.

178. See *infra* Part II.

179. See *infra* Section I.G and Conclusion.

180. See *infra* Section I.G and Conclusion; Adler, *supra* note 176 (arguing that the plaintiffs are foolish to appeal because the Supreme Court or the en banc Ninth Circuit will write an even less favorable decision that could bar future climate suits more clearly than the Ninth Circuit's panel decision).

181. *Juliana*, 2020 WL 254149, at \*2–4.

182. *Id.* at \*4.

183. *Id.* at \*5.

184. *Id.* at \*5–10.



injuries were caused by climate change.<sup>185</sup> Furthermore, the panel determined that several federal government policies promoting fossil fuels had exacerbated climate change and had caused these injuries.<sup>186</sup>

The majority's findings on the government's responsibility for worsening climate change, the ability of the plaintiffs to raise constitutional claims despite the APA, and standing injury and causation were quite favorable to the plaintiffs.<sup>187</sup> The plaintiffs have announced that they will appeal the panel decision to the Ninth Circuit for possible en banc review.<sup>188</sup> Professor Jonathan Adler argues that the plaintiffs should probably not appeal the decision to the en banc Ninth Circuit or Supreme Court because either court might reverse some of the panel's rulings in favor of the plaintiffs and, therefore, make it harder for subsequent plaintiffs to bring climate change suits.<sup>189</sup> Other legal scholars and practitioners have agreed with Adler's analysis that the en banc Ninth Circuit is unlikely to overrule the panel majority and that the Supreme Court would likely render a less favorable decision than the panel majority.<sup>190</sup>

The panel majority did not decide whether there is a substantive due process right to a stable climate capable of sustaining human life.<sup>191</sup> The Ninth Circuit observed that "[r]easonable jurists can disagree about whether the asserted constitutional right exists."<sup>192</sup> Instead, the court focused on whether federal courts had the authority to implement the plaintiffs' proposed remedies.<sup>193</sup> The Ninth Circuit first rejected the plaintiffs' proposed remedy of a declaration that the United States government was violating the Constitution because that symbolic gesture would have no practical benefit for the plaintiffs and, therefore, could not redress their injuries.<sup>194</sup>

The majority then explained that the plaintiffs essentially sought an injunction to force the Executive and Congress to reduce carbon emissions, but that such a sweeping remedy would require federal courts to assert unconstitutional powers to override the constitutional authority of the political branches' ability to make policy choices for better or worse.<sup>195</sup> The majority observed, "The plaintiffs thus seek not only to enjoin the Executive from exercising discretionary authority expressly granted by Congress . . .

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185. *Id.* at \*5.

186. *Id.* at \*5–6.

187. *Id.* at \*2–6; see Adler, *supra* note 176.

188. See Adler, *supra* note 176.

189. *Id.*

190. Ellen M. Gilmer, *Youth Climate Plaintiffs Face Continued Legal Risks After Defeat*, BLOOMBERG L. ENV'T & ENERGY REP. (Jan. 23, 2020, 4:01 AM), <https://news.bloombergenvironment.com/environment-and-energy/youth-climate-plaintiffs-face-continued-legal-risks-after-defeat> [<https://perma.cc/TX8A-PJ4K>] (reporting the views of several legal experts).

191. *Juliana*, 2020 WL 254149, at \*6.

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.* at \*6–10.

but also to enjoin Congress from exercising power expressly granted by the Constitution over public lands.”<sup>196</sup> While clearly sympathetic to the plaintiffs’ concerns about the potentially harmful effects of climate change, the Ninth Circuit held that federal courts do not have the authority to override or order the energy policy choices of the political branches.<sup>197</sup> The court stated:

We reluctantly conclude, however, that the plaintiffs’ case must be made to the political branches or to the electorate at large, the latter of which can change the composition of the political branches through the ballot box. That the other branches may have abdicated their responsibility to remediate the problem does not confer on Article III courts, no matter how well-intentioned, the ability to step into their shoes.<sup>198</sup>

Accordingly, the majority reversed the decision of the district court and ordered it to dismiss the case for lack of standing.<sup>199</sup>

The dissenting opinion by Judge Staton argued that there is an implied constitutional Due Process Clause right to preserve the “perpetuity of the Republic” and that federal judges have the authority to recognize due process suits to prevent “the willful dissolution of the Republic.”<sup>200</sup> Additionally, she contended that the plaintiffs had Article III standing to sue in federal courts in light of *Massachusetts v. EPA*,<sup>201</sup> which had authorized climate change suits by state governments against the federal government.<sup>202</sup> Judge Staton criticized the majority for deferring to the political branches when such deference would result in catastrophic harms from climate change.<sup>203</sup> Furthermore, she argued that the political question doctrine did not bar the suit and that the district court could order meaningful relief even if it would be infeasible for a single judicial decision to solve the entire problem of global climate change.<sup>204</sup>

Judge Hurwitz’s majority opinion sharply criticized the reasoning in Judge Staton’s dissenting opinion.<sup>205</sup> Even assuming that the plaintiffs had a constitutional right to preserve the nation’s perpetuity, the majority observed that “we doubt that the plaintiffs would have Article III standing to enforce

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196. *Id.* at \*6.

197. *Id.* at \*6–10.

198. *Id.* at \*10.

199. *Id.* at \*11.

200. *Id.* at \*11–15 (Staton, J., dissenting).

201. *Id.* at \*15–17 (discussing Article III standing in general and *Massachusetts v. EPA*, 549 U.S. 497 (2007)).

202. *See Massachusetts*, 497 U.S. at 517–26.

203. *Juliana*, 2020 WL 254149, at \*18–24 (Staton, J., dissenting).

204. *Id.*

205. *Id.* at \*9–10.

them” because such a right would be general to “all citizens equally” and, therefore, not an individual injury necessary for Article III standing.<sup>206</sup> Additionally, Judge Hurwitz charged that “the dissent offers no metrics for judicial determination of the level of climate change that would cause ‘the willful dissolution of the Republic,’” and did not provide a meaningful formula “for measuring a constitutionally acceptable ‘perceptible reduction in the advance of climate change.’”<sup>207</sup> Additionally, the majority noted that the Supreme Court had never approved anything similar to Judge Staton’s proposed perpetuity test as a basis for the judicial branch to override the political branches.<sup>208</sup> Judge Hurwitz cautioned that federal judges could not solve every danger to the American nation or government, that federal judges must respect their limited roles outlined in Article III of the U.S. Constitution, but instead must hope that the political branches will address problems that pose catastrophic risks to the nation such as climate change.<sup>209</sup> Judge Hurwitz’s decision appropriately deferred to the political branches to make important policy decisions, even if a federal judge might be dissatisfied with their solutions.

## II. A CRITIQUE OF *OBERGEFELL*’S DUE PROCESS ANALYSIS

Part II criticizes Judge Aiken’s evolving due process analysis in *Juliana* because it relied primarily upon the flawed *Obergefell* decision.<sup>210</sup> Justice Kennedy’s theory of judges using their “reasoned judgment” to invent new fundamental due process rights<sup>211</sup> is profoundly anti-democratic.<sup>212</sup> Judge Sutton has contended that “[a] principled jurisprudence of constitutional evolution turns on evolution in *society’s* values, not evolution in *judges’* values.”<sup>213</sup> He explicated in *DeBoer v. Snyder*, “[t]he theory of the living constitution rests on the premise that every generation has the right to govern itself. If that premise prevents judges from insisting on principles that society has moved past, so too should it prevent judges from anticipating principles that society has yet to embrace.”<sup>214</sup>

Judge Sutton cautioned that the judicial establishment of a constitutional right to same-sex marriage would lead to other interest groups demanding constitutional rights in numerous other areas. He inferred that

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206. *Id.* at \*9.

207. *Id.* at \*10.

208. *Id.*

209. *Id.*

210. *See Juliana v. United States*, 217 F. Supp. 3d 1224, 1249–50 (D. Or. 2016) (implicitly acknowledging that plaintiffs due process claims were viable under *Obergefell*’s new expansive reading of the Due Process Clause, but not under the prior history and tradition standard of interpretation); *infra* Part II.

211. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2598 (2015).

212. *See generally id.* at 2616–23 (Roberts, C.J., dissenting).

213. *DeBoer v. Snyder*, 772 F.3d 388, 416 (6th Cir. 2014) (emphasis in original), *overruled by Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

214. *Id.*

“[t]he more the Court innovates under the Constitution, the more plausible it is for the Court to do still more—and the more plausible it is for other advocates on behalf of other issues to ask the Court to innovate still more.”<sup>215</sup> Judge Sutton warned that the judicial expansion of constitutional rights would place judges in a legislative role and, as a consequence, deepen political warfare over the confirmation of judges.<sup>216</sup> Judge Aiken’s invocation of *Obergefell*’s broad “reasoned judgment” methodology<sup>217</sup> of creating fundamental constitutional rights demonstrates that Judge Sutton was correct that a decision establishing a constitutional right to same-sex marriage would encourage advocates to push for the development of constitutional rights in other areas.<sup>218</sup>

Yet, if the Supreme Court in *Obergefell* had instead issued a decision creating a constitutional right to same-sex marriage through a rational basis test under the Equal Protection Clause, that approach would have posed less danger of future judicial legislation than Justice Kennedy’s “reasoned judgment” due process analysis.<sup>219</sup> Judge Posner’s Seventh Circuit decision in *Baskin v. Bogan* struck down two state statutes defining marriage as exclusively heterosexual by applying a rational basis analysis under the Equal Protection Clause and by deliberately avoiding the question of whether such marriages are a fundamental right under the Due Process Clause.<sup>220</sup> Judge Posner determined that there was no rational basis for Indiana and Wisconsin to forbid same-sex marriage based upon tradition because there was no evidence that authorizing same-sex marriage would change the marriage decisions of heterosexual persons.<sup>221</sup> Having decided that discrimination against same-sex marriage was irrational and invalid under the Equal Protection Clause, Judge Posner concluded that he need not address the problem of whether same-sex marriage is a fundamental right under the Due Process Clause.<sup>222</sup>

Judge Aiken in *Juliana* implicitly conceded that she could not have applied a rational basis analysis under the Equal Protection Clause to create a new constitutional right to a livable climate system.<sup>223</sup> She acknowledged that current environmental and energy statutes and regulations addressing climate change meet a rational basis test under the Equal Protection Clause

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215. *Id.* at 418.

216. *Id.*

217. *See Juliana v. United States*, 217 F. Supp. 3d 1224, 1249–50 (D. Or. 2016) (quoting *Obergefell*, 135 S. Ct. at 2598).

218. *DeBoer*, 772 F.3d at 418.

219. *See Juliana*, 217 F. Supp. 3d at 1249–50 (quoting *Obergefell*, 135 S. Ct. at 2598).

220. *See, e.g., Baskin v. Bogan*, 766 F.3d 648, 654–57, 671–72 (7th Cir. 2014); Lamparello, *supra* note 10, at 59–60; *see also Obergefell*, 135 S. Ct. at 2623 (Roberts, C.J., dissenting) (arguing Justice Kennedy’s majority opinion in *Obergefell* failed to use the modern Equal Protection Clause’s means-end methodology in favor of a vague argument that there is “synergy” between that Clause and the Due Process Clause).

221. *See Baskin*, 766 F.3d at 654–72.

222. *Id.* at 656–57.

223. *See Juliana*, 217 F. Supp. 3d at 1249–50 (discussing *Obergefell*, 135 S. Ct. at 2598).

and are only invalid if they are reviewed under a strict scrutiny standard pursuant to Justice Kennedy's evolving due process analysis in *Obergefell*.<sup>224</sup> Judge Aiken admitted that that the United States Government's actions approving permits for various types of fossil fuel extraction and burning would pass rational basis review.<sup>225</sup> Thus, Judge Aiken in the *Juliana* decision could not have used a rational basis analysis under the Equal Protection Clause to create a new constitutional right to a livable climate system.<sup>226</sup>

### III. ALTERNATIVES TO ADDRESSING CLIMATE CHANGE WITHOUT JUDICIAL INTERVENTION

Some commentators suggest that the human activities promoting climate change are pushing the Earth's environment to an "imminent" catastrophic tipping point in which human society will be unable to prevent catastrophic climate disaster.<sup>227</sup> Some legal scholars argue that immediate judicial intervention in climate policy is necessary because the United States political system is unlikely to act in time.<sup>228</sup> Thus, they support Judge Aiken's *Juliana* decision.<sup>229</sup>

Another view is that while climate change presents significant policy issues, there is still time for new technologies such as renewable energy to limit the total amount of possible global warming caused by fossil fuels.<sup>230</sup> For example, a group of scientists led by Richard Millar of the University of Oxford has determined that human society has roughly twenty years, until about 2038, to limit global warming to a total increase of 1.5 degrees Celsius, which would restrain the potential consequences of climate change.<sup>231</sup> By

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224. *Id.* at 1248–50.

225. *Id.* at 1248–49.

226. *See id.* at 1249–50.

227. *See* Michael Blumm & Mary Christina Wood, "No Ordinary Lawsuit," *Climate Change, Due Process, and the Public Trust Doctrine*, 67 AM. U. L. REV. 1, 39–41, 87 (2017); R. Henry Weaver & Douglas A. Kysar, *Courting Disaster: Climate Change and the Adjudication of Catastrophe*, 93 NOTRE DAME L. REV. 295, 296–97, 304–12, 355–56 (2017); *see also* David Wallace-Wells, *The Uninhabitable Earth*, NYMAG.COM: DAILY INTELLIGENCER (July 9, 2017), <http://nymag.com/daily/intelligencer/2017/07/climate-change-earth-too-hot-for-humans.html> [<https://perma.cc/8KEY-BVDH>] (arguing catastrophic climate change has already begun to affect the Earth and will worsen).

228. Weaver & Kysar, *supra* note 227, at 296–97, 304–12, 354–56; Blumm & Wood, *supra* note 227, at 87.

229. Weaver & Kysar, *supra* note 227, at 348; Blumm & Wood, *supra* note 227, at 62.

230. *See* Mank, *supra* note 1, at 862–63, 900.

231. Chris Mooney, *New Climate Change Calculations Could Buy the Earth Some Time — If They're Right*, WASH. POST (Sept. 18, 2017, 12:36 PM), [https://www.washingtonpost.com/news/energy-environment/wp/2017/09/18/new-climate-calculations-could-buy-the-earth-some-time-if-theyre-right/?utm\\_term=.ce38c6bb48ff](https://www.washingtonpost.com/news/energy-environment/wp/2017/09/18/new-climate-calculations-could-buy-the-earth-some-time-if-theyre-right/?utm_term=.ce38c6bb48ff) [<https://perma.cc/DA27-ETHR>] (Millar's study "finds that we have more than 700 billion tons [of carbon dioxide] left to emit to keep warming within 1.5 degrees Celsius, with a two-thirds probability of success. 'That's about 20 years [from 2017] at present-day emissions.'").

contrast, in October 2018, the Intergovernmental Panel on Climate Change issued a special report suggesting that global warming would reach a total increase of 1.5 degrees Celsius by 2030, although acknowledging that the date could be as late as 2052.<sup>232</sup> Because “climate is not so simple as to give us a neat cutoff date for action,”<sup>233</sup> there is a plausible argument for giving Congress and the President the opportunity to address the problem of climate change instead of giving courts novel and unprecedented authority in energy policy questions that violates essential separation of powers doctrines in the United States Constitution.<sup>234</sup>

Some readers may be sympathetic regarding Judge Aiken’s *Juliana* opinion because of their concerns about the potential impacts of climate change. Furthermore, some readers may strongly disapprove President Trump’s 2017 disavowal of the Paris Climate Accord and think that judicial intervention is required to avoid “imminent”<sup>235</sup> climate catastrophe.<sup>236</sup> Yet there is great menace in permitting the judiciary to invoke an “evolving” Due Process Clause to arrogate political and legislative powers to decide energy policy questions.<sup>237</sup> Rather, those who oppose President Trump’s withdrawal from the Paris Climate Accord or general energy policies should exercise their voting rights in the 2020 presidential election.

There are alternatives to judicial control of energy policy that are legitimate under the United States Constitution. States and cities may exercise their authority in our federalist system to adopt policies reducing CO<sub>2</sub> and GHGs to minimize the impacts of climate change. Numerous states, cities, and private companies have announced plans for significant climate change reduction actions in response to President Trump’s Paris Climate Accord withdrawal.<sup>238</sup> Furthermore, there is substantial evidence that

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232. INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, GLOBAL WARMING OF 1.5 DEGREES 6, 20 (2018), [https://report.ipcc.ch/sr15/pdf/sr15\\_spm\\_final.pdf](https://report.ipcc.ch/sr15/pdf/sr15_spm_final.pdf) [<https://perma.cc/3JWD-7L2EJ>].

233. Michael Marshall, *Why It’s Misleading to Say We Only Have 12 Years to Avert Dangerous Climate Change*, FORBES (Oct. 8, 2018, 12:19 PM), <https://www.forbes.com/sites/michaelmarshalleurope/2018/10/08/why-its-misleading-to-say-we-only-have-12-years-to-avert-dangerous-climate-change/#345ec0977806> [<https://perma.cc/Q92J-Y53X>].

234. *See generally* Massachusetts v. EPA, 549 U.S. 497, 535–36 (2007) (Roberts, C.J., dissenting) (arguing that climate change is a global political problem that should be decided by the political branches and, therefore, is a nonjusticiable general grievance unsuitable for resolution by the federal courts).

235. Imminent is a relative term. For the author, Bradford Mank, a human activity that may cause harm to the environment is not imminent for the purposes of judicial intervention if a current or future legislative or executive branch might take action to address climate change issues without the need for an immediate judicial decision.

236. *See, e.g.*, Michael Biesecker & Paul Wiseman, *AP Fact Check: Trump’s Shaky Claims on Climate Accord*, AP NEWS (June 1, 2017), <https://apnews.com/d4836217fa7b4d3eadea33dd20ceff3c> [<https://perma.cc/4M34-9VQW>] (“Announcing that the U.S. will withdraw from the Paris climate accord, President Donald Trump misplaced the blame for what ails the coal industry and laid a shaky factual foundation for his decision.”).

237. *See supra* Part II.

238. Mank, *supra* note 1, at 862.

renewable energy efforts and more efficient electricity technologies are significantly reducing and replacing carbon-intensive fossil fuels.<sup>239</sup> If renewable energy and more efficient electricity technologies are on a long-term direction to substitute carbon-intensive fossil fuels, it is unwise for the Supreme Court to allow federal judges the discretion under the Due Process Clause to grab the authority to make energy policies from the political branches.<sup>240</sup>

### CONCLUSION

In *Juliana*, the Ninth Circuit properly concluded that federal courts may not usurp the policy judgments and discretion of the political branches even if federal judges have doubts about the decisions of the Executive and Congress.<sup>241</sup> By holding that federal courts do not have the power to redress the plaintiffs' proposed remedy and that the plaintiffs therefore lacked standing to sue, the Ninth Circuit was able to avoid addressing whether there is a due process right to a livable climate system capable of sustaining human life.<sup>242</sup> Using a standing redressability analysis, the panel majority was able to reach the same conclusion of the author that it is inappropriate in a democratic system for judges to use injunctive relief to force the political branches to make policy choices that a federal judge prefers.<sup>243</sup>

Similar to the Ninth Circuit's decision, both Judge Alsup in the *City of Oakland* decision and Judge Diamond in the *Clean Air Council* decision recognized that the political branches, Congress and the Executive Branch, should decide climate change policy rather than federal courts.<sup>244</sup> Additionally, the *Alec L.* decision, the *Kanuk* decision, and the *Sanders-Reed* decision each appropriately acknowledged that administrative agencies have more expertise than courts in addressing environmental issues, including climate change.<sup>245</sup> Furthermore, those three decisions all implied that the separation of powers principles in the United States Constitution and state constitutions assign executive agencies the authority to enforce environmental laws and remedies rather than courts.<sup>246</sup> While well meaning,

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239. Mank, *supra* note 1, at 862–63, 900.

240. *See supra* Part II and Conclusion.

241. *See supra* Section I.G.

242. *See supra* Section I.G.

243. *See supra* Section I.G.

244. *Clean Air Council v. United States*, 362 F. Supp. 3d 237, 250–51 (E.D. Pa. 2019); Order Granting Motion to Dismiss Amended Complaints at 15–16, *City of Oakland v. BP P.L.C.*, No. C17-06011 WHA, 2018 WL 3609055 (N.D. Cal. July 27, 2018).

245. *Alec L. v. Jackson*, 863 F. Supp. 2d 11, 15–16 (D.D.C. 2012), *aff'd sub nom*, *Alec L. ex rel. Loorz v. McCarthy*, 561 Fed. Appx. 7, 8 (D.C. Cir. 2014)); *Kanuk ex rel. Kanuk v. State, Dep't of Nat. Res.*, 335 P.3d 1088, 1097–103 (Alaska 2014); *Sanders-Reed ex rel. Sanders-Reed v. Martinez*, 350 P.3d 1221, 1226–27 (N.M. Ct. App. 2015).

246. *Sanders-Reed*, 350 P.3d at 1226–27; *see Kanuk*, 335 P.3d at 1097–103 (citing prudential grounds for dismissing public trust suit where political branches are better capable than courts in deciding environmental policy questions).

Judge Staton’s dissenting opinion in *Juliana* would authorize federal judges to override the policy choices of the Executive and Congress whenever a federal judge in their personal discretion decided that an “emergency” existed and the judge was dissatisfied with the policy decisions of the political branches.<sup>247</sup> Rather than relying on judge-made law, we must place our hope in our elected officials to reach bipartisan solutions to the issue of climate change.<sup>248</sup>

This article uses a different analysis than the Ninth Circuit in concluding that there is no due process right to a livable climate system capable of sustaining human life in our country’s history and traditions, although the article reaches the same end result that federal courts may not override or impose energy policy choices against the wishes of the political branches.<sup>249</sup> Both Judge Edmunds in *Lake v. City of Southgate* and Judge Diamond in the *Clean Air Council* decision pointed out that all courts but the *Juliana* decision have consistently rejected a due process right to a healthy environment.<sup>250</sup> The essential reason for limiting the scope of substantive due process to protecting the historically fundamental rights of individuals and vulnerable minority groups is that a broad view of substantive due process, such as Judge Aiken’s or Judge Staton’s, allows federal judges to override the policy choices of the political branches if substantive due process is malleable enough to reach every major policy decision such as climate and energy policies.<sup>251</sup> However, the Ninth Circuit’s use of standing redressability to overrule Judge Aiken’s decision might have been the easier way to preserve the separation of powers than the arguably more controversial issue of how far Justice Kennedy’s evolving doctrine of substantive due process in *Obergefell* extends beyond the issue of same-sex marriage to quite different issues such as climate policy.<sup>252</sup> The author supports the Ninth Circuit’s decision even if the court avoided the due process issue because the majority protected the separation of powers principles in the U.S. Constitution and the policy choices of the political branches.<sup>253</sup>

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247. See *supra* Part I.G.

248. See Trumbull, *supra* note 23.

249. See *supra* Part II.

250. *Clean Air Council v. United States*, 362 F. Supp. 3d 237, 250–51 (E.D. Pa. 2019); *Lake v. City of Southgate*, No. 16-10251, 2017 WL 767879, at \*3–4 (E.D. Mich. Feb. 28, 2017).

251. See *supra* Section I.G and Part II.

252. See *supra* Section I.G and Part II.

253. See *supra* Section I.G.