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Lawsuit Seeking to Hold Federal Government Accountable for Climate Change Likely to Advance to Trial

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Plaintiffs have continued to hope that they may have an opportunity to advance the merits of their case through discovery, potential summary judgment, and ultimately, at trial—i.e., that the federal government's historical promotion of fossil fuels and regulatory inaction on climate change violates Plaintiffs' and future generations' fundamental right to a stable climate system, whose protection is necessary to secure their fundamental rights to life, liberty, and property.[4] Though it "well may be" that Plaintiffs' claims "are too broad to be legally sustainable,"[5] *Juliana*'s recent success could motivate additional lawsuits as U.S. states, cities, and civil society seek to force federal action and reparations for climate change damage.

Background

Juliana parallels similar efforts by Our Children's Trust to shape climate policy at the state-level via the "public trust doctrine,"[6] which provides that state and federal governments, as trustees of "vital natural resources" such as "air (atmosphere), water, seas, the shores of the sea, and wildlife," have a duty to preserve and protect such resources for its beneficiaries.[7] In *Juliana*, Plaintiffs allege that the federal government violated the public trust and Plaintiffs' and future generations' fundamental rights to life, liberty, and property by "deliberately allow[ing] . . . CO_2 concentrations to escalate to levels unprecedented in human history," the severity of which necessitates "immediate action": a court-mandate directing the government to "phase-out fossil emissions and draw down excess atmospheric CO_2."[8]

The Government's[9] first attempt to dismiss the case was denied in 2016 by the district court, which held that the federal government is not immune to the public trust doctrine. Distinguishing *Juliana* from previous cases—which implied that the doctrine was a matter of state law—the judge concluded that "[t]he federal government, like the states, holds public assets . . . in trust for the people."[10] The judge therefore found that Plaintiffs adequately alleged harm to a federal public trust asset, the territorial sea (i.e., the federal government's alleged actions resulted in ocean acidification and rising ocean temperatures).[11] As the judge concluded, Plaintiffs' "right to a climate system capable of sustaining human life is fundamental to a free and ordered society" that must be protected by the Government,[12] thereby allowing *Juliana* to proceed towards discovery.

The district court also denied the Government's motion to certify the court's order for interlocutory appeal,[13] prompting the Government's mandamus Petition in a "'drastic and extraordinary'" attempt to dismiss the case.[14] The Government's Petition sought relief on three grounds: (1) continuance of the case will lead to "intrusive and inappropriate discovery" that threatens the separation of powers; (2) the district court's order was based on clear error; and (3) *Juliana* raises important issues of first impression that may evade appellate review.

9th Circuit Decision

The 9th Circuit denied each of the Government's claims, finding that they are "better addressed through the ordinary course of litigation."[15] First, the court explained that the Government's fear of "burdensome discovery obligations" is premature since the district court had not issued a single discovery order.[16] Second, because the Government is not exempt "from the normal rules of appellate procedure," the court found that a threat to the separation of powers does not exist.[17] Finally, while "there is little doubt" that *Juliana* raises issues of first impression, the court declined to "opine" on the merits or review "preliminary legal decisions made by the district court," concluding that the Government has "ample opportunity to raise legal challenges . . . on a more fully developed record."[18]

Implications

The 9th Circuit's decision affords Plaintiffs the right to conduct discovery and proceed to a trial originally scheduled for early February 2018. Trial is not *guaranteed*, of course, as a 9th

Circuit panel review or Supreme Court intervention are remaining options for the Government as is undoubtedly an additional motion seeking to dismiss the matter following discovery.[19]

Should the case proceed, a March 21, 2018 climate change tutorial held by the 9th Circuit in *People of the State of California v. BP P.L.C.* likely foreshadows what is in store for the Government in *Juliana*: a battle between Plaintiffs and the Government over climate science.[20] While Plaintiffs' claims concern the federal government's "aggregate actions" dating back to 1965,[21] the Trump Administration's inheritance of *Juliana* from the Obama Administration puts it in the uncomfortable position of defending its climate change agenda in the face of an overwhelming body of scientific evidence and a heightened sense of urgency for climate action by U.S. states, cities, and the international community.

Juliana ultimately will need to overcome a number of legal and technical issues likely to be scrutinized on the merits, including the causal nexus between Plaintiffs' alleged harms and the Government's actions, or the potential displacement of Plaintiffs' claims by the Government's vested authority to regulate emissions under the Clean Air Act.[22] No matter the outcome, the 9th Circuit's decision suggests that courts previously "cautious and overly deferential in the arena of environmental law"[23] may be willing to give *Juliana* and future plaintiffs a fair shot at success.

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[1] Opinion at 16, In re United States, No. 17-71692 (9th Cir. Mar. 7, 2018) ("9th Circuit Decision").

[2] Petition for Writ of Mandamus to the United States District Court for the District of Oregon and Request for Stay of Proceedings in District Court, In re United States, No. 17-71692 (9th Cir. June 9, 2017) ("Petition").

[3] First Amended Complaint for Declaratory and Injunctive Relief, Juliana v. U.S., No. 6:15-cv-01517-TC (D. Or. Sept. 10, 2015) ("Complaint").

[4] *Id.* at 89.

[5] 9th Circuit Decision at 14.

[6] The Trust has pending public trust claims in Colorado, Maine, North Carolina, and Washington, as well as a separate federal lawsuit filed by the Trust in late 2017, which seeks to prevent the Government from repealing environmental regulations. *See State Judicial Actions Now Pending*, Our Children's Trust, https://www.ourchildrenstrust.org/pending-state-actions (last accessed Mar. 22, 2018); Complaint for Declaratory Relief, Clean Air Council v. U.S., No. 2:17-cv-04977 (E.D. Pa. Nov. 6, 2017).

[7] Complaint at 81, 92-93 (citing 42 U.S.C. § 4331(b)(1)).

[8] *Id.* at 2, 4, 94.

[9] The "federal government" here refers to the Obama Administration, the original defendant. The Trump Administration inherited the lawsuit upon taking office.

[10] *Juliana v. U.S.*, 217 F. Supp. 3d 1224, 1256-59 (D. Or. 2016) (distinguishing *Juliana* from *PPL Montana, LLC v. Montana*, 565 U.S. 576 (2012) and *Alec L. v. Jackson*, 863 F. Supp. 2d 11 (D.D.C. 2012), *aff'd sub nom. Alec L. ex rel. Loorz v. McCarthy*, 561 F. App'x 7 (D.C. Cir. 2014)).

[11] *Juliana*, 217 F. Supp. 3d at 1255-57. As to whether or not the "atmosphere" is a public trust asset of which the federal government has an obligation to protect, the judge found such question irrelevant for the purposes of ruling on a motion to dismiss given Plaintiffs alleged harm to the territorial sea. However, the judge did not preclude the possibility that the atmosphere is a public trust asset held by the federal government. *Id.* at 1255, n.10.

[12] *Id.* at 1250.

[13] Order Denying Motions to Certify and Request for Stay, Juliana v. U.S., No. 6:15-cv-01517-TC (D. Or. June 8, 2017).

[14] 9th Circuit Decision at 8 (quoting In re Van Dusen, 654 F.3d 838, 840 (9th Cir. 2011)).

[15] *Id.* at 14.

16 *Id.* at 10, 17.

[17] *Id.* at 13-14.

[18] *Id.* at 15-17.

[19] *See* Defendants' Response to Motion for Hearing Status Conference, Juliana v. U.S., No. 6:15-cv-01517-TC (D. Or. Mar. 19, 2018) (informing the district court that it is exploring its options for further review).

[20] *See* Warren Cornwall, *In a San Francisco courtroom, climate science gets its day on the docket*, Science Mag (Mar. 22, 2018, 4:00 PM), http://www.sciencemag.org/news/2018/03/san-francisco-court-room-climate-science-gets-its-day-docket.

[21] Complaint at 1-4.

[22] *See, e.g.*, *Am. Elec. Power Corp. v. Connecticut*, 564 U.S. 410 (2011) (holding that claims for court-mandated emissions reductions from power plants are preempted by the Clean Air Act); *Native Village of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849 (9th Cir. 2012) (holding that the Clean Air Act displaced federal common law nuisance claims for damages caused by global warming).

[23] *Juliana,* 217 F. Supp. 3d at 1262.

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