

The presently-constituted U.S. Supreme Court doesn't seem to care for climate change litigation *or* regulation.

On Friday the Supreme Court took the extraordinary step of freezing pending discovery and the scheduled October 29th trial date in the closely-watched *Juliana v. United States* litigation. In a brief [order](#), Chief Justice Roberts stayed all district court proceedings in the *Juliana* case and ordered the plaintiffs to file a response by October 24th to the Trump Administration's just-filed petition to the Supreme Court seeking to dismiss the case.



Chief Justice Roberts

I've previously written about the *Juliana* case in [a 2015 post](#) when the litigation was first filed in U.S. District Court in Oregon and more recently [here](#) and [here](#). Briefly, in 2015 21 children from around the United States--acting under the auspices of the non-profit organization [Our Children's Trust](#)--filed suit against the United States in U.S. District Court for the District of Oregon. They contend that the federal government has violated the children's legal rights by failing to take far more dramatic steps to reduce the nation's greenhouse gas emissions and address urgent climate change concerns.

After U.S. District Court Judge Anne Aiken denied the federal government's motion to dismiss and scheduled the *Juliana* case for trial later this month, the Trump Administration's Justice Department mounted repeated efforts in the appellate courts to stay or dismiss the district court proceedings. The Ninth Circuit rejected those attempts in separate opinions issued in May and July of this year. The federal government appealed the Ninth Circuit's July 2018 decision to the Supreme Court, but in a brief July 30th order Justice Anthony Kennedy rejected the government's appeal as premature while noting that the breadth of

the *Juliana* plaintiffs' constitutional and public trust-based claims were "striking." In his capacity as the Supreme Court justice serving as "Circuit Justice" for the Ninth Circuit, Justice Kennedy in his order urged Judge Aiken to "take those concerns into account in assessing the burdens of discovery and trial..." (Notably, Kennedy's July 30th order in the *Juliana* case was his last official act as a U.S. Supreme Court justice before retiring the next day.)

Justice Kennedy is now gone, replaced by Brett Kavanaugh, who can be expected to be relatively less sympathetic to "impact" climate change litigation exemplified by the *Juliana* case. But today's remarkable order in the *Juliana* case is the product of a far less publicized transition at the Supreme Court: Chief Justice Roberts replaced Justice Kennedy as the Circuit Justice assigned to the Ninth Circuit with...himself. (In recent years, statistics show that the Ninth Circuit is the most frequently-reversed federal circuit court in the nation; this trend may well account for Roberts' particular interest in the Ninth Circuit's decision-making.) That's why Roberts' name was on today's order staying proceedings in the *Juliana* case pending consideration by all nine justices of the Trump Administration's petition to stay or dismiss the case.

And with the conservatives justices now commanding a solid five-member majority on the Court, I'm not optimistic that the *Juliana* plaintiffs will ever see the trial of their claims come to pass.

Of course, this is not the first time the U.S. Supreme Court has taken extraordinary and previously-unprecedented steps to sidetrack efforts to address climate change concerns. In February 2016, the Supreme Court by a 5-4 vote ordered the U.S. Environmental Protection Agency to halt enforcement of the Clean Power Plan promulgated by the Obama Administration in late 2015—the first time the Court had ever stayed a federal regulation before a decision by the lower federal courts.

So it would appear that these days the U.S. Supreme Court isn't hospitable to either innovative climate change litigation or major climate change regulatory initiatives by the Executive Branch. That leaves Congress.

Yikes.