



Plaintiffs and supporters in *Juliana v. United States*

Last Friday, as Rick Frank previously [blogged](#), Chief Justice Roberts put a temporary [halt](#) to the *Juliana v. United States* trial -the *Juliana* case was brought by a group of children alleging that the United States has violated the public trust doctrine and various provisions of the US. Constitution in failing to protect them from the ravages of climate change. Chief Justice Roberts also stopped the parties from conducting further discovery. His order is in place “pending receipt of a response, due on or before Wednesday, October 24, 2018, by 3 p.m., and further order of the undersigned or of the Court.” The obvious question that follows is what happens next?

Rick has explained the Juliana litigation in more detail [here](#) and appropriately called Justice Roberts’ order “extraordinary.” I have more to say about that below but it’s first worth noting the basics of the litigation and its status prior to Chief Justice Roberts’ order. To date, the federal district judge hearing the case, Judge Ann Aiken (District of Oregon), has refused to dismiss the case and has found that the plaintiffs — 21 children, famed scientist Jim Hansen acting as guardian for future generations, and Earth Guardians - have stated a claim to proceed. Very generally, the plaintiffs argue that the federal government has an obligation under the public trust doctrine to protect the earth’s atmosphere, oceans, wildlife and other assets from the effects of climate change and has failed to do so; additionally, plaintiffs argue - and the court has [tentatively agreed](#) in allowing the case to go forward - that the public trust claim is grounded in the due process clause of the Fifth Amendment of the U.S. Constitution. Judge Aiken also found that the plaintiffs have standing to sue.

The Ninth Circuit Court of Appeals has twice [rejected](#) motions from the United States to halt (in legal parlance, to “stay”) the *Juliana* case. The Ninth Circuit has not ruled on the merits of the plaintiffs’ claims but instead simply held that the trial proceedings should be allowed

to go forward and that any dispute over the validity of the plaintiffs' claims can be appealed after trial. Before he left the Supreme Court, Justice Anthony Kennedy also rejected an application to halt the trial, though in his order denying the motion he [noted](#) that the "breadth of [Plaintiffs'] claims is striking," and that "the justiciability of those claims presents substantial grounds for difference of opinion."

So why has Chief Justice Roberts now come along and at least temporarily stopped the case from going forward? First it's worth noting that each Supreme Court Justice [is assigned](#) one of the 13 judicial circuits. The Justice that is assigned to a particular circuit is typically assigned an application for a stay of a lower court order and can decide on his or her own to issue the order. When Justice Kennedy retired, Chief Justice Roberts [temporarily](#) took over the assignment for the Ninth Circuit; as of October 19th, Justice Elena Kagan [is now assigned](#) to the Ninth Circuit. Chief Justice Roberts issued his stay order the same day he assigned Justice Kagan to the Ninth Circuit. Whether the timing of the issuance of the stay order and the timing of the assignment of Justices to their circuits is coincidental is unclear.

As for what's next, although a single Justice can issue a stay, a Justice [may also refer](#) a request for a stay to the whole Court. This typically happens in controversial cases. If Chief Justice Roberts decides not to lift the stay upon receipt of the plaintiffs' brief, he is very likely to refer the *Juliana* case to the entire Court. For example, in another high-visibility climate change case involving the Obama Administration's Clean Power Plan, the whole Court decided the application for a stay and [issued an order](#) freezing the implementation of the CPP on a 5-4 vote.

How does the Supreme Court decide whether to issue a stay? The Court has [explained](#) that it only grants applications for stays if four criteria are met:

1. that there is a "reasonable probability" that four Justices will grant certiorari, or agree to review the merits of the case;
2. that there is a "fair prospect" that a majority of the Court will conclude upon review that the decision below on the merits was erroneous;
3. that irreparable harm will result from the denial of the stay;
4. finally, in a close case, the Circuit Justice may find it appropriate to balance

the equities, by exploring the relative harms to the applicant and respondent, as well as the interests of the public at large.

Because these criteria are so demanding — requiring the Court essentially to decide in advance the merits of the case without any significant briefing or oral argument from the parties and without the benefit of a trial and the evidence it produces — stays are highly unusual. With the elevation of Brett Kavanaugh to the high court, however, the likelihood that five Justices will decide in advance of trial that the children in the Juliana case have no basis in law for their claim is high. It's hard to imagine the five conservative Justices on the Court deciding that the federal government, under the due process clause of the U.S. Constitution, has an obligation under the public trust doctrine to prevent climate change from damaging or destroying the global atmosphere, the oceans, wildlife and other assets.

My prediction, then, is that Chief Justice Roberts will refer the United States' application to stay the *Juliana* trial to the entire Court and that four members of the Court will join him in issuing a stay; they will further allow the U.S. to seek a ruling in advance of trial that the plaintiffs have no claim to be in federal Court.