

[\*Juliana v. United States\*](#), often called the “children’s case,” is an imaginative effort to make the federal government responsible for its role in promoting the production and use of fossil fuels and its failure to control carbon emissions. They ask the court to “declare the United States’ current environmental policy infringes their fundamental rights, direct the agencies to conduct a consumption-based inventory of United States CO<sub>2</sub> emissions,” and use that inventory to “prepare and implement an enforceable national remedial plan to phase out fossil fuel emissions and draw down excess atmospheric CO<sub>2</sub> so as to stabilize the climate system and protect the vital resources on which Plaintiffs now and in the future will depend.” More specifically, they ask the court to “order Defendants to cease their permitting, authorizing, and subsidizing of fossil fuels and, instead, move to swiftly phase out CO<sub>2</sub> emissions, as well as take such other action necessary to ensure that atmospheric CO<sub>2</sub> is no more concentrated than 350 ppm by 2100, including to develop a national plan to restore Earth’s energy balance, and implement that national plan so as to stabilize the climate system.”

Although the District Judge has ruled thus far in favor of the plaintiffs, the Supreme Court has already signaled its skepticism about the case in [disposing](#) of a stay motion. The plaintiffs seem unlikely to surmount the legal obstacles before them. But there is an important insight at the heart of their case, and there may be other ways to operationalize that idea.

## A Series of Legal Hurdles

I should make a couple of things clear before I start. My focus isn’t going to be on how the case *should* come out, but rather on how I think it’s likely to be resolved. And I won’t address other possible benefits or risks connected with the litigation, other than winning or losing. On the positive side, even a losing lawsuit might help educate the public, uncover more facts about government policy, or make incremental progress toward better doctrine. On the other hand, a losing lawsuit might also create bad precedent on an issue like standing in climate change cases. But I’m only going to look at the “win or lose” issue.

### Standing.

To get into court, the plaintiffs need to prove that they have standing. The plaintiffs allege that they have suffered a variety of harms from climate change, such as algal blooms affecting their drinking water and local flooding. To provide a basis for standing, these impacts must count as injuries, which they probably do; be caused by the defendant; and be remediable by a court. The best precedent for the plaintiffs is *Massachusetts v. EPA*, where the Supreme Court gave the state standing in a climate change case based on harm from

sea level rise. That case might be distinguishable because the “children’s case” plaintiffs don’t have the quasi-sovereign status that states enjoy and because sea level rise is much easier to tie to climate change than most other injuries. And there may or may not be five Supreme Court votes to overrule *Massachusetts v. EPA* on the standing issue, after Kennedy’s replacement by Kavanaugh.

### **Legal Theories.**

The plaintiffs have two legal theories. Their first theory is that the climate change will harm public land and coastal waters that the federal government holds in trust for the public. Therefore, the government has a duty to refrain from promoting fossil fuels and to take actions to reduce emissions. Various federal actions, such as subsidizing fossil fuels, are said to violate the public trust because climate change will damage those resources. But the conventional view is that, while the federal government is subject to public trust obligations, they aren’t enforceable in court. (For that reason, there might be better odds of winning such a case against a state government.)

The plaintiffs’ second theory is that, by fostering climate change, the government is depriving them of their right to a safe climate without due process by law. There are two counter-arguments. First, no court has recognized such a right; and second, due process cases generally don’t involve risks that affect the public at large and are not targeted toward an individual. In addition, the Court has generally rejected claims that the government has a duty to take action, even when it knows about the existence of imminent danger. The plaintiffs argue that the government’s public trust duty provides a basis for finding an exception to the “no affirmative duty” rule, so their two legal theories are interlinked.

On both these theories, the District Court was willing to go along with the plaintiffs’ efforts to make new law. But it’s very hard to imagine that any of the conservative Justices on the Supreme Court would buy these arguments, and not even clear that any of the four liberal Justices would do so because of the possible implications for judicial oversight of government policy decisions that are discussed below.

### **Remedy.**

The plaintiffs are asking for wholesale changes in government programs. The Supreme Court has been very resistant to such efforts, even in cases where far less was at stake. The District Judge suggested that the separation of powers might “permit the Court to direct defendants to ameliorate plaintiffs’ injuries but limit its ability to specify precisely how to do

so.” But even so, the court would have to determine the adequacy of the plan and then monitor whether it was being properly implemented. Having a court intervene on such a broad front of environmental and energy policy seems at odds with the way we generally think about the separation of powers. Again, it’s hard to see much chance that the Supreme Court would go along.

### **Litigation odds.**

Despite our deeply conservative Supreme Court, it’s not impossible that the plaintiffs might win. Stranger things have happened. But you’d have to say this is the longest of long-shots. And even putting aside current judicial politics, the suit really does seem to push the courts very much into the arena of national policy making.

### **And yet . . .**

As I’ve suggested, it seems very unlikely that the plaintiffs will win at the end of the day. But there is also something about their theories that resonates with the American vision of the role of government. Despite its problematic legal prospects, at the core of the plaintiff’s case is a powerful insight. The government really does have an obligation to preserve our lands and sea for the benefit of all Americans – including future generations. And climate change really is a dire threat to the future.

Although I find it hard to connect this moral insight with a judicially enforceable obligation to regulate, there is nevertheless a link with broad concepts of constitutionalism. The theory of the social compact is that people give government their allegiance and obedience, and in return the government provides them protection. And don’t forget that the Constitution was adopted “for ourselves and our posterity.” The Constitutional presupposes a bargain between generations, in which each generation is willing to defer to decisions of past generations and watch out for the interests of future generations. Selling out future generations in the interest of short-term oil and coal profits is a betrayal of that intergenerational compact.

I remain dubious about the idea that courts can directly enforce these obligations. But short of that, it would not be inappropriate to construe statutes broadly where doing so furthers the government’s ability to protect future generations, and to subject regulatory actions that impinge on the rights of future generations to closer judicial scrutiny. In short, maybe courts should try looking at the world through green-tinted lenses.

Persuading the increasingly conservative federal courts to adopt this approach would be no

easy matter, though it is worth a try. There may be a better chance of persuading state courts to move in this direction, establishing some momentum that might carry over into federal court.

I share the trial judge's obvious alarm about the situation that now confronts us, a situation the Trump Administration is determined to make worse. The courts have too often stood in the way when EPA or other agencies have attempted to take action or when citizens seek to challenge counterproductive government policies, helping to contribute to the climate crisis that now confronts us. But the Juliana strategy, however useful it may be in rallying support outside the courtroom, seems unlikely to succeed. We need to explore other legal pathways for pushing the government to live up to its obligations under the social compact. Those other legal theories may also be long-shots given the increasingly conservative Supreme Court, but they do not face quite such formidable odds.