Juliana has been a valiant effort by a group of young people to force the federal government to plan for stringent reductions in U.S. carbon emissions. As I wrote in a previous post, several well-regarded foreign courts have upheld claims that are similar in concept to the *Juliana* case. The U.S. legal system, however, provided a less hospitable setting. Although the case is still being considered on remand by the District Court, the Supreme Court has already signaled its displeasure with the litigation.

Besides the strongly conservative tilt of today's Supreme Court, the plaintiffs faced serious legal hurdles. Given previous developments in U.S. law over past decades, some of the basic foundations they needed weren't there or were very shaky. Here are some of the key missing ingredients.

Limited conceptions of the judicial role. In refusing to embark on a broad revamp of government climate policy, the Ninth Circuit t was following a tradition established by the Supreme Court over the past fifty years. The Court has repeatedly used doctrines of standing, ripeness, statutory interpretation, and judicial remedies to limit programmatic oversight by the judiciary. Instead, the Court has a strong tendency to limit judges to reviewing specific decisions within programs, rather than the program itself. That tradition meant that the *Juliana* plaintiffs were trying to swim upstream against a very strong current.

Lack of legislated support. Foreign courts have often been able to work with constitutional provisions expressing protecting the environment. Such constitutional provisions are commonplace in newer constitutions, but the U.S. Constitution is very old and very hard to amend. There is also no legislation in the U.S. explicitly setting forth a climate goal against which government programs could be measured.

Absence of affirmative duties. In many countries, the government has an affirmative duty to protect its citizens. The U.S. Supreme Court has held, however, that our Constitution protects people from the government but *doesn't* require the government to protect their rights, even the right to life. The Juliana plaintiffs tried to fill this gap using the "public trust doctrine," but were faced with two difficulties. First, the conventional wisdom is that judges cannot enforce the public trust doctrine against the federal government. Second, the public trust doctrine had never been applied by U.S. courts to the global climate system. The plaintiffs had some counterarguments on these points, but again, they were fighting an uphill battle.

An inward-looking legal system. Many other legal systems are much more attentive to international law, and their judges are also much more interested in rulings by foreign tribunals. In our legal system, international agreements — whether in the form of human

rights treaties or climate agreements — are usually not subject to enforcement by courts unless Congress has passed implementing legislation. The Supreme Court also pays little attention to rulings by foreign courts. Foreign courts that have upheld *Juliana*- type claims are often more internationally oriented.

Hostility to implied rights. The *Juliana* plaintiffs wanted the courts to recognize an implied constitutional right to a livable climate system. The idea of implied rights has been increasingly controversial, with many conservative judges arguing that the whole idea was illegitimate. In a world in which existing implied rights like abortion are imperiled, bold arguments for recognizing new implied rights are tough to sell. That's particularly true given that climate policy is such a divisive issue in American politics, so there's no national consensus to use as a basis for recognizing the new right.

It's certainly possible to imagine the law evolving in a direction more favorable to the *Juliana* plaintiffs, perhaps with different judicial appointments or the country having taken a more liberal turn. But the past five decades of judicial evolution created an unwelcoming legal landscape for the bold arguments made in *Juliana.* It is a tribute to the *Juliana* lawyers that they were able to persuade several federal judges to support them, but their odds of ultimately prevailing were never good.

The 6-3 conservative makeup up of the Supreme Court would mean that the Juliana plaintiffs would need to persuade the two swing voters, Roberts and Kavanaugh, to side with their innovative claims. It's hard to imagine how that could happen, given that both have been skeptical of EPA's efforts to regulate greenhouse gases.