

Climate Change in the Courtroom: The constitutional responsibility of the state for climate change hazards

3rd Dispute Resolution Forum:
2nd webinar on
Wind of Change –
How climate change
shapes the law

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*Juliana, et al. v. United States of
America, et al.*

WHAT IS THE *JULIANA* CASE?

21 young Plaintiffs from around the U.S. are suing the Federal Government seeking a remedy to protect from the climate crisis.





Juliana v. United States

21 Youth brought this case in August 2015 against the Obama Administration because Defendants' affirmative acts violate Plaintiffs' Constitutional Due Process Rights

- Affirmative, ongoing conduct, persisting over decades
- In creating, controlling, and perpetuating a national fossil fuel-based energy system
- Despite long-standing knowledge of the resulting destruction to our Nation and profound harm to these young Plaintiffs

DEVELOPMENT OF CONSTITUTIONAL CLAIMS IN *JULIANA*

The 5th amendment is a limitation on the powers of the federal government and the 14th amendment is directed at actions of the states, rather than those of individuals. Therefore, it is ordinarily necessary to determine whether the requisite governmental action is present in order to assert a constitutional right.

NIXON'S WHITE HOUSE

MEMORANDUM

THE WHITE HOUSE
WASHINGTON

(E)

September 17, 1969

FOR JOHN EHRLICHMAN

As with so many of the more interesting environmental questions, we really don't have very satisfactory measurements of the **carbon dioxide problem**. On the other hand, this very clearly **is a problem**, and, perhaps most particularly, is one that can seize the imagination of persons normally indifferent to projects of **apocalyptic change**.

The process is a simple one. Carbon dioxide in the atmosphere has the effect of a pane of glass in a greenhouse. The CO₂ content is normally in a stable cycle, but recently man has begun to introduce instability through the burning of fossil fuels. At the turn of the century several persons raised the question whether this would change the temperature of the atmosphere. Over the years the hypothesis has been refined, and more evidence has come along to support it. It is now pretty clearly agreed that the CO₂ content will rise 25% by 2000. This could increase the average temperature near the earth's surface by 7 degrees Fahrenheit. **This in turn could raise the level of the sea by 10 feet. Goodbye New York. Goodbye Washington**, for that matter. We have no data on Seattle.

Damage from delay and dire urgency of claims

“Further delay in the commencement of rigorous, systemic, comprehensive, and sustained action to phase out CO₂ emissions and draw down atmospheric CO₂ risks imminent catastrophe—a conclusion shared by most climate scientists.”

Dr. James Hansen, renowned former long-time NASA climatologist (shown here with his granddaughter Sophie, a plaintiff)



THE CHILDREN'S REMEDIES

- Declare
 - The children's fundamental rights and equal protection under law
 - Government climate destruction unconstitutional
 - A constitutional standard of protection of life
- Order
 - A remedial plan, prepared, and implemented by government
- Enjoin
 - New fossil fuel leasing of federal public lands
 - Federal approvals for new fossil fuel infrastructure
 - Economic discounting of children's lives
- Retain jurisdiction
 - To monitor compliance
 - To refine remedy as needed

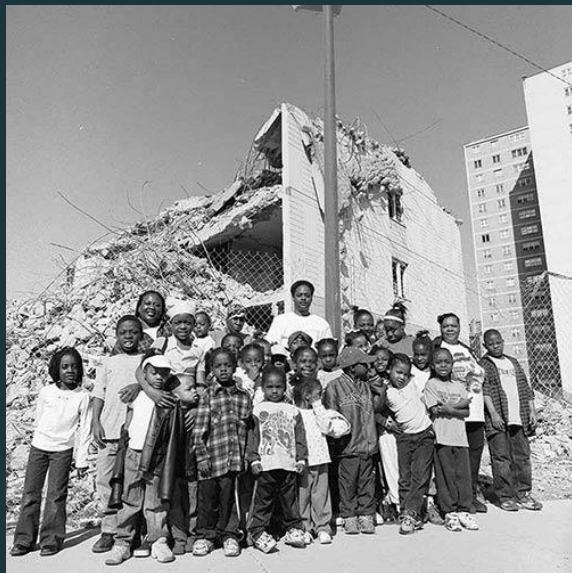


Examples of U.S. Litigation with Broad Structural and Systemic Judicial Remedies



Civil Rights: School Desegregation
(*Brown v. Bd. of Ed.*, 1955– Present)

Pacific Northwest
Treaty Rights Litigation
(1969 – Present)



Public Housing Desegregation
(*Gautreaux v. Hill* – 1976)

The California Prison Litigation
(*Brown v. Plata*, 1990 – Present)



Brown v. Board (1954)



“[T]he consideration of appropriate relief was necessarily subordinated to the primary question—the constitutionality of segregation in public education. We have now announced that such segregation is a denial of the equal protection of the laws. In order that we may have the full assistance of the parties in formulating decrees, the cases will be restored to the docket ...” p. 495

Brown v. Board II (1955)

“[T]he [lower] courts will require that the defendants make a prompt and reasonable start toward full compliance with our [declaratory relief] ruling . . .”

“The courts may consider . . . administration . . . transportation . . . personnel . . . attendance . . . a system of determining admission . . . revision of local laws and regulations . . . [and] adequacy of any plans the defendants may propose.”

“During this period of transition, the courts will retain jurisdiction of these cases.” p. 300-301

REMEDIES IN *JULIANA*

The claims are not that the government must eliminate changes in the climate, but that it must refrain from actions that exacerbate the climate crisis to the point of causing actual injuries to Plaintiffs.

Plaintiffs do not ask courts to write the policies. They ask courts establish the boundaries of the constitutional right and ensure the government takes actions that stay within those boundaries.



U.S. District Court Judge Aiken, Nov. 10, 2016,
denying Motions to Dismiss

“I have no doubt that the right to a climate system capable of sustaining human life is fundamental to a free and ordered society”

U.S. District Court Judge Aiken, Nov. 10, 2016, denying Motions to Dismiss

“Where a complaint alleges governmental action is affirmatively and substantially damaging the climate system in a way that will cause human deaths, shorten human lifespans, result in widespread damage to property, threaten human food sources, and dramatically alter the planet’s ecosystem, it states a claim for a due process violation.”

U.S. District Court Judge Aiken, Nov. 10, 2016, denying Motions to Dismiss

“To hold otherwise would be to say that the Constitution affords no protection against a government’s knowing decision to poison the air its citizens breathe or the water its citizens drink.”



Interlocutory Appeal

- Article III standing
- Separation of powers
- Whether the Youth have 5th Amendment constitutional rights at stake that can be litigated outside of the statutory law context

WHAT IS ARTICLE III STANDING?

To have standing under Article III, a plaintiff must have:

- (1) a concrete and particularized injury that
- (2) is traceable to the challenged conduct and
- (3) is likely redressable by a favorable judicial decision.

A plaintiff need only establish a genuine dispute as to these requirements to survive summary judgment.

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WHAT IS A DECLARATORY JUDGMENT?

- The federal Declaratory Judgments Act (28 U.S.C. § 2201)
- A binding judgment from a court which defines the legal relationship between parties and their rights in the matter before the court.
- Declaratory judgments do not provide any enforcement.
- Declaratory judgments are considered a type of preventive justice by informing the parties of their rights.

The Trump DOJ's Position

Rather than argue whether governmental action causing the climate crisis can constitute a constitutional deprivation of liberty, the Trump DOJ's position is the courts are not available to a litigant who seeks the protection of the Constitution

- even when that litigant is a child who has no political recourse,
- even when the undisputed evidence is the government has endangered the litigant's life, and
- even when the undisputed evidence is the government's actions must be restricted.

The Position of the Ninth Circuit Court of Appeals

Issued on January 17, 2020, the decision set forth several important legal rulings before concluding the court lacked jurisdiction to hear the case under the third prong of standing.

“A substantial evidentiary record documents that the federal government has long promoted fossil fuel use despite knowing that it can cause catastrophic climate change, and that failure to change existing policy may hasten an environmental apocalypse.”



The Full Panel's Opinion on the YOUTHS' INJURIES

**“Exacerbated medical
conditions”**

“Damage to property”

“Psychological harm”

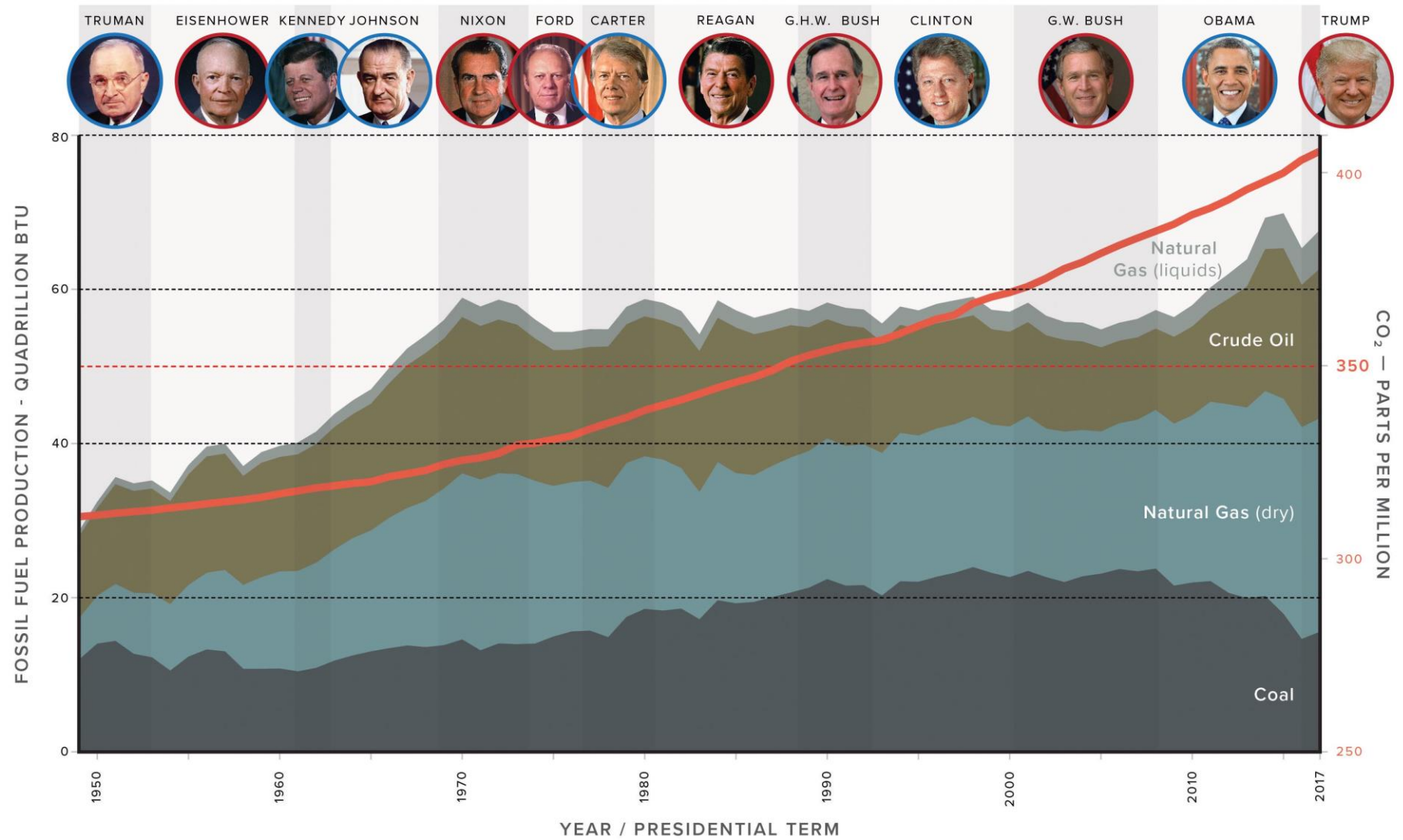
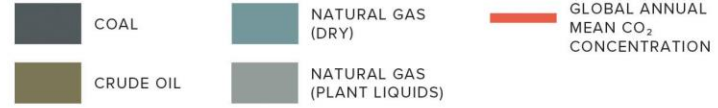
The Position of the Full Panel

Plaintiffs met their burden of proof that the climate crisis is caused in part by actions and inactions of the U.S. Government.

“The plaintiffs have made a compelling case that action is needed.”

U.S. FOSSIL FUEL PRODUCTION AND GLOBAL CO₂ CONCENTRATION

1949-2017



CO₂ concentration data source: 1959-Present: NOAA; pre-1959: NASA. Fossil fuel consumption data source: U.S. Energy Information Administration, Monthly Energy Review, May 2018. <https://www.eia.gov/totalenergy/data/monthly>



The Majority Opinion

“[I]t is beyond the power of an Article III court to order . . . the plaintiffs’ requested remedial plan.”

“The [children’s] impressive case for redress must be presented to the political branches of government.”

“or to the electorate at large . . . through the ballot box.”

The Dissent

“Such relief, much like the desegregation orders and statewide prison injunctions the Supreme Court has sanctioned, would vindicate plaintiffs’ constitutional rights without exceeding the Judiciary’s province.”

On February 10, 2021, Plaintiffs' Petition for *En Banc* Review was Denied by the Ninth Circuit. On to the Supreme Court!



The Biden-Harris Administration has become the third administration to be defendants in *Juliana*.

Instead of fighting the youth, the Biden-Harris Administration should stand for the constitutional rights of children and environmental justice, and work with the youth to come to a sensible resolution based on technically and economically feasible solutions to the climate crisis.



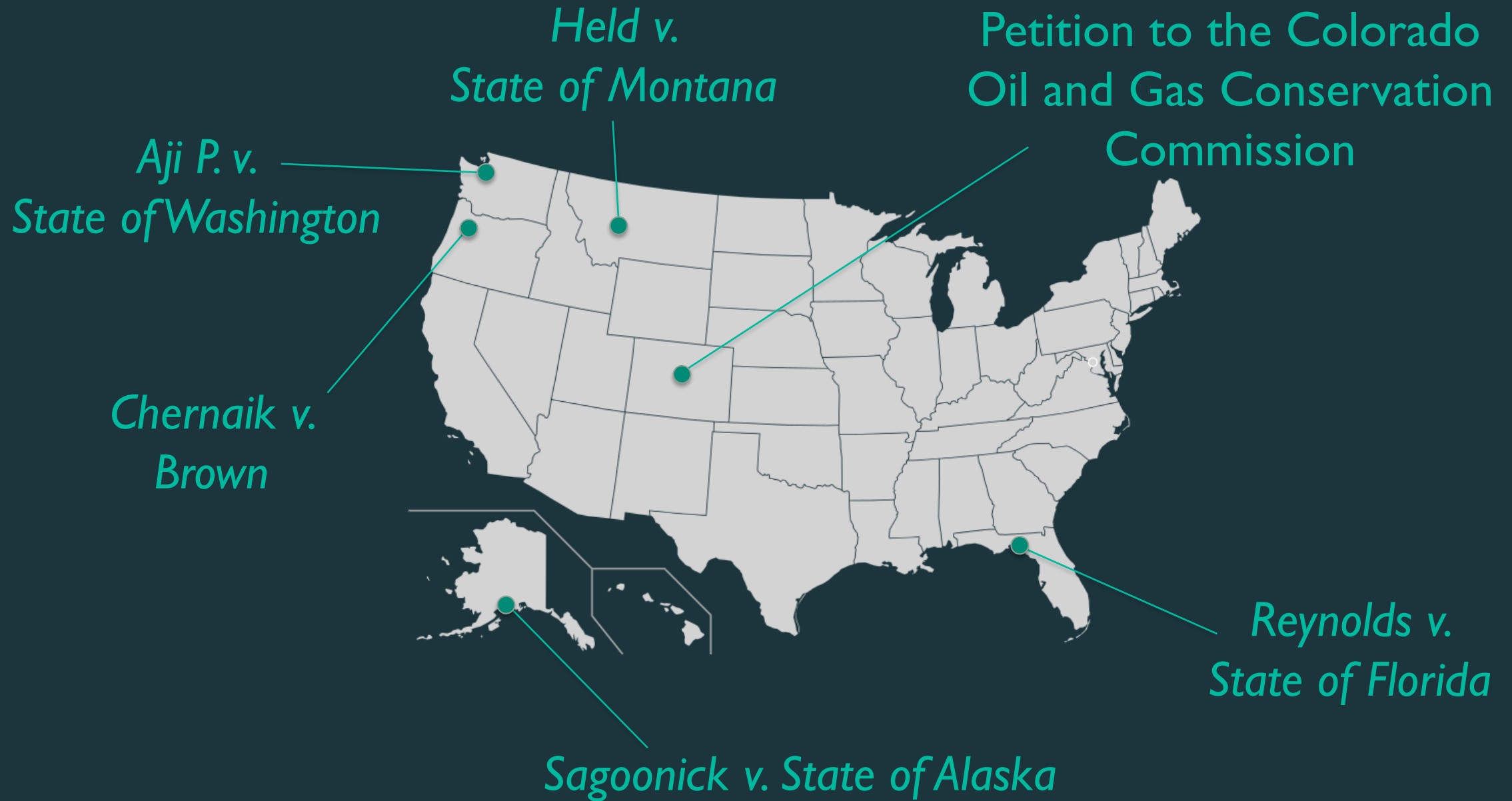
Settlement Talks?

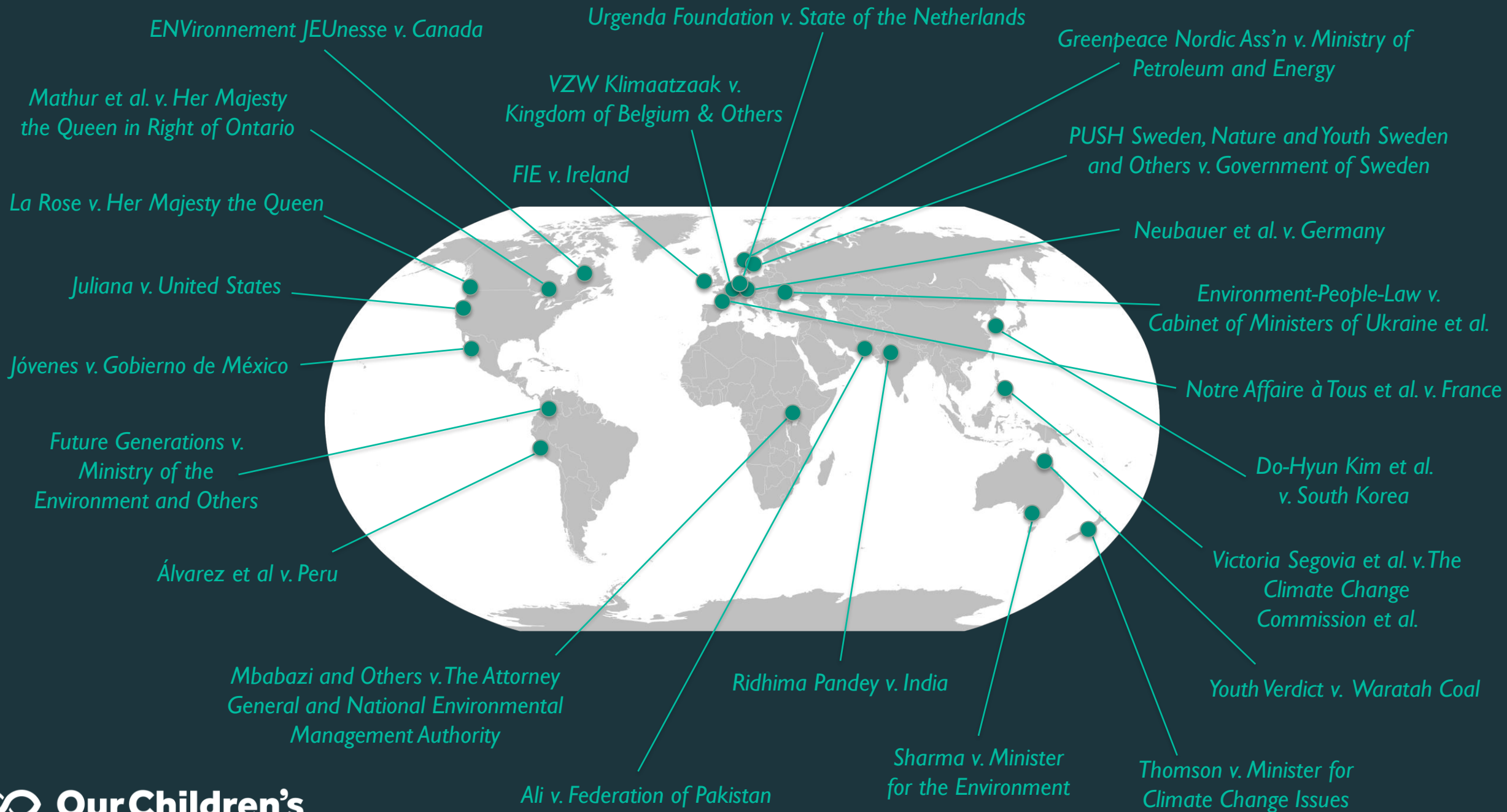
File a brief in the Supreme Court reversing the legal position of Trump's DOJ on Article III standing and separation of powers?

Given the Position of the Biden-Harris Administration, Is *Juliana* Still Necessary?

The number of climate litigation cases has more than doubled since 2015, according to a recent report by the UN Environment Program.

As of July 2020, at least 1,550 climate change cases had been filed in 38 countries.





Given the Position of the Biden-Harris Administration, Is *Juliana* Still Relevant?

Four organizations (Notre Affaire à Tous, la Fondation Nicolas Hulot, Greenpeace France, and Oxfam France) launched the self-described “Case of the Century” (L’Affaire du Siècle) against the French State on December 17, 2018. This case contests France’s inaction on climate change, more specifically France’s noncompliance with its obligations to address climate change under international, European, and French law.

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The primary remedy sought is a court order mandating the French government to develop measures that will “reduce greenhouse gas emissions ... to a level compatible with the objective of containing the rise in global average temperature to below 1.5°C above pre-industrial levels[.]” Over two million French citizens have signed an online petition in support of the case.

Given the Position of the Biden-Harris Administration, Is *Juliana* Still Relevant?

The city of Grande-Synthe in northern France filed a separate but complementary case in France's highest administrative court. The Grande-Synthe case presents similar legal arguments to *Notre Affaire à Tous*. On November 19, 2020, the administrative court in the Grande-Synthe case ordered the French State to produce information on how it plans to meet its 2030 GHG emissions reduction targets by mid-February.

Given the Position of the Biden-Harris Administration, Is *Juliana* Still Relevant?

On January 14, 2021, the public Rapporteur ruled on Notre Affaire à Tous (or as she called it, “the first major climate trial in France”). Her decision

- Recognized the French state is liable for not taking adequate measures to reduce its GHG emissions trajectory;
- Declared the French state is culpable for part of the climate change-based ecological damage that has resulted from its inaction;
- Awarded nominal damages, thereby acknowledging the “moral prejudice” that the French state had inflicted on the plaintiffs; and
- Ordered further investigation before requiring French state action.

Given the Position of the Biden-Harris Administration, Is *Juliana* Still Relevant?

The French government acknowledged its own climate action shortcomings. France's High Council for Climate 2020 indicates France exceeded its 2015-2019 carbon budgets by almost 4% and France's April 2020 National Low-Carbon Strategy decrees increased the carbon caps for 2019-2023 above the acceptable level for staying on its GHG emissions reduction trajectory. Furthermore, France has failed to achieve climate change action targets in several key sectors.

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By this decision, the state is being held responsible for its climate commitments. The cases in France follow similar rulings in the Netherlands (the Urgenda Foundation and 900 citizens), Ecuador, Columbia, Pakistan, Nigeria, and the Philippines holding both governments and private parties to account for violating environmental principles or falling short of sustainability requirements.

Youth v Gov Documentary Film





Support Youth and their Climate Rights



www.ourchildrenstrust.org #youthvgov