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Does the Evolving Concept of Due Process in Obergefell Justify Judicial Regulation of Greenhouse Gases and Climate Change?: Juliana v. United States

Bradford Mank

University of Cincinnati College of Law, brad.mank@uc.edu

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Does the Evolving Concept of Due Process in *Obergefell* Justify Judicial Regulation of Greenhouse Gases and Climate Change?: *Juliana v. United States*

Bradford C. Mank*

Justice Kennedy's *Obergefell* opinion, which held that same sex marriage is a fundamental right under the Constitution's due process clause, reasoned that the principles of substantive due process may evolve because of changing societal views of what constitutes "liberty" under the clause, and that judges may recognize new liberty rights in light of their "reasoned judgment." In *Juliana v. United States*, Judge Aiken used her "reasoned judgment" to conclude that evolving principles of substantive due process in the *Obergefell* decision allowed the court to find that the plaintiffs were entitled to a liberty right to a stable climate system capable of sustaining human life, and, furthermore, that these same evolving principles of substantive due process led the court to interpret the public trust doctrine to now include a similar right to a sustainable climate system. Relying on Chief Justice Robert's dissenting opinion in *Obergefell* and a decision by Judge Sutton of the Sixth Circuit, one may criticize the *Juliana* decision for giving judges too much discretion to invent new due process rights and usurp the role of the legislature. More appropriately, Judge William Alsup of the U.S. District Court of the Northern District of

* Copyright © 2018 Bradford C. Mank. James Helmer, Jr. Professor of Law and Associate Dean for Academic Affairs, University of Cincinnati College of Law, P.O. Box 210040, University of Cincinnati, Cincinnati, Ohio 45221-0040, Telephone 513-556-0094, Fax 513-556-1236, e-mail: brad.mank@uc.edu. I thank my faculty colleagues for their comments at a summer 2017 workshop. I especially thank Michael Solimine for his comments. In March 2018, I presented the paper at the Shapiro Symposium on Public Trust Law, at the George Washington Law School. I appreciate the debate and questions at the Symposium. All errors or omissions are my responsibility.

California dismissed a public nuisance suit against major oil companies because Congress and the Executive Branch should decide climate change policy rather than federal courts. Professor Kenji Yoshino has argued that the *Obergefell* decision should be interpreted as “antisubordination liberty” that protects “historically subordinated groups.” Following the “antisubordination liberty” principle, alleged victims of climate change are arguably not entitled to special protection from the judiciary because the impacts of such harms affect every person in the United States rather than singling out under-represented minority groups, even if certain “historically subordinated groups” are affected to a greater degree by climate change. Instead of judicial intervention against President Trump’s climate policies, states and cities should exercise their right in our federalist system to adopt policies reducing the impacts of climate change. Furthermore, renewable energy appears to be on an unstoppable trajectory to replace fossil fuels, so there is no need for judges to usurp political policy decisions about future energy choices.

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INTRODUCTION

In *Juliana v. United States*,¹ a group of young people filed suit arguing that the United States, then President Barack Obama, and various federal agencies failed to regulate carbon dioxide (“CO²”) produced by burning fossil fuels, and that the resulting increased levels of CO² disrupted the Earth’s climate system in a manner threatening the plaintiffs with serious risks.² The plaintiffs argued that the defendants’ actions contributing to rising greenhouse gases (“GHGs”) violated their substantive due process rights to life, liberty, and property.³ The plaintiffs also argued that the defendants had also violated the federal government’s common law duty to hold certain resources in a “public trust” for present and future generations of Americans.⁴ In 2016, U.S. District Court Judge Ann Aiken of the U.S. District of Oregon denied defendants’ motions to dismiss by concluding that the right to a stable climate system capable of supporting human life is a fundamental substantive due process right, and, additionally, is a right under the public trust doctrine.⁵

In concluding that the plaintiffs had a substantive due process right to a stable climate system, Judge Aiken relied upon the Supreme Court’s 2015 decision in *Obergefell v. Hodges*,⁶ which held that same sex marriage is a fundamental right under the Constitution’s due process clause.⁷ Justice Anthony Kennedy’s *Obergefell* opinion reasoned that the principles of substantive due process may evolve because of changing societal views of what constitutes “liberty” under the clause, and, therefore, that judges may recognize new liberty rights in light of their “reasoned judgment.”⁸ In *Juliana*, Judge Aiken used her “reasoned judgment” to conclude that evolving principles of substantive due process in the *Obergefell* decision allowed the court to

¹ 217 F. Supp. 3d 1224 (D. Or. 2016).

² *Id.* at 1233.

³ *Id.*

⁴ *Id.*

⁵ *Id.* at 1234, 1250-52, 1260-63.

⁶ 135 S. Ct. 2584 (2015).

⁷ *Juliana*, 217 F. Supp. 3d at 1249-50 (discussing *Obergefell*, 135 S. Ct. at 2598-99). The Due Process Clause of the Fifth Amendment to the United States Constitution bars the federal government from depriving a person of “life, liberty, or property” without “due process of law.” *Id.* at 1248; *see also* U.S. CONST. amend. V. The same due process principles apply to state governments under the Fourteenth Amendment to the United States Constitution. U.S. CONST. amend. XIV; *Duncan v. Louisiana*, 391 U.S. 145, 147-49 (1968).

⁸ *Obergefell*, 135 S. Ct. at 2598.

find that the plaintiffs were entitled to a liberty right to a stable climate system capable of sustaining human life. Furthermore, these same evolving principles of substantive due process led the court to interpret the public trust doctrine to now include a similar right to a sustainable climate system.⁹

The *Obergefell* decision's concept of evolving due process rights raises a number of concerns and objections. In his dissenting opinion in *Obergefell*, Chief Justice John Roberts criticized Justice Kennedy's majority opinion for giving judges too much discretion in deciding which unenumerated due process rights are fundamental, thereby giving judges unprecedented authority to strike down legislation that they disfavor.¹⁰ To avoid judicial usurpation of legislative power, Chief Justice Roberts urged a return to an analysis of history and tradition in determining which due process rights are fundamental, as the Court had in *Washington v. Glucksberg*.¹¹ Similarly, Judge Jeffrey Sutton of the Sixth Circuit reasoned in *DeBoer v. Snyder* that using a substantive due process analysis to strike down state laws prohibiting same sex marriage would have profoundly anti-democratic impacts because that type of reasoning could be used by judges to strike down other types of legislation.¹² Relying on Chief Justice Robert's critique of substantive due process analysis in *Obergefell* and Judge Sutton's similar arguments, one may criticize the *Juliana* decision for inventing new due process rights and usurping the role of the legislature.¹³

⁹ *Juliana*, 217 F. Supp. 3d at 1250-52, 1260-63.

¹⁰ See generally *Obergefell*, 135 S. Ct. at 2611-12, 2616-23 (Roberts, C.J., dissenting); see also Adam Lamparello, *Justice Kennedy's Decision in Obergefell: A Sad Day for the Judiciary*, 6 HOUS. L. REV. OFF REC. 45, 47-52 (2015) (criticizing Justice Kennedy's overly expansive due process analysis for usurping legislative authority and transferring it to judges).

¹¹ See *Obergefell*, 135 S. Ct. at 2615-18 (discussing the identification of fundamental rights through history and tradition in *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) and similar cases).

¹² See *DeBoer v. Snyder*, 772 F.3d 388, 416-18 (6th Cir. 2014), *overruled by Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

¹³ See Howard Slugh, *Obergefell's Toxic Judicial Legacy*, NAT'L REV. (Apr. 10, 2017, 8:00 AM), (criticizing *Juliana* for using *Obergefell's* flawed evolving due process rationale to invent a new constitutional due process right to a stable climate). However, Judge Aiken tried to place some limitations on when pollution issues trigger due process rights. She stated:

In framing the fundamental right at issue as the right to a climate system capable of sustaining human life, I intend to strike a balance and to provide some protection against the constitutionalization of all environmental claims [A]cknowledgment of this fundamental right does not transform

Another argument is that the *Obergefell* Court could have followed lower federal court decisions using a narrower equal protection analysis to achieve the result of judicial recognition of same sex marriage without transforming the meaning of the Due Process Clause. For example, Judge Richard Posner, in his Seventh Circuit decision *Baskin v. Bogan*,¹⁴ struck down the prohibitions of two states against same sex marriage under the Equal Protection Clause without addressing the issue of whether such marriages are a fundamental right under the Due Process Clause, and his narrower equal protection approach to addressing the question of marital rights could serve as a model to addressing other fundamental rights issues, including climate change.¹⁵ Judge Posner's narrower approach to fundamental rights issues using a rational basis analysis under the Equal Protection Clause would have precluded Judge Aiken in *Juliana* from establishing a new constitutional right to a stable climate system because she acknowledged that current environmental and energy laws addressing climate change are rational and only fail if they are examined pursuant to strict scrutiny review under Justice Kennedy's evolving due process approach in *Obergefell*.¹⁶

More appropriately, in 2018, in *City of Oakland vs. BP P.L.C.*, Judge William Alsup of the U.S. District Court of the Northern District of California, granted the defendants' motion to dismiss for failure to state a claim regarding a public nuisance suit by the City of Oakland against the largest oil companies with operations in the United States.¹⁷ He concluded that Congress and the Executive Branch should

any minor or even moderate act that contributes to the warming of the planet into a constitutional violation.

Juliana, 217 F. Supp. 3d at 1250.

¹⁴ 766 F.3d 648 (7th Cir. 2014).

¹⁵ See *id.* at 654-57, 671-72; Lamparello, *supra* note 10, at 59-60; see also *Obergefell*, 135 S. Ct. at 2623 (Roberts, C.J., dissenting) (arguing that Justice Kennedy's majority opinion failed to use the modern Equal Protection Clause's "means-end methodology" in favor of a vague argument that there is "synergy" between that Clause and the Due Process Clause).

¹⁶ *Juliana*, 217 F. Supp. 3d at 1249-50 (discussing *Obergefell*, 135 S. Ct. at 2598).

¹⁷ Order Granting Motion to Dismiss Amended Complaints at 15-16, *City of Oakland vs. BP P.L.C.*, No. C17-06011 WHA, 2018 WL 3609055 (N.D. Cal. July 27, 2018). On July 19, 2018, Judge John Kennan of the U.S. District Court for the Southern District of New York dismissed a similar lawsuit brought by the City of New York against the major oil companies. See Opinion and Order Dismissing Amended Complaint at 3-8, 23, *City of New York v. BP P.L.C.*, 325 F. Supp. 3d 466, 475-76 (S.D.N.Y. 2018) (No. 18 Civ. 182 (JFK)); John Schwartz, *Judge Throws Out New York Climate Lawsuit*, N.Y. TIMES (July 19, 2018), <https://www.nytimes.com/2018/07/19/climate/climate-lawsuit-new-york.html>.

decide climate change policy rather than federal courts even though he accepted the plaintiffs' argument that the burning of fossil fuels has a major impact on the Earth's climate.¹⁸ Judge Alsup also emphasized that climate change affects other nations, and that policy decisions affecting foreign relations should be decided by the political branches rather than by the federal courts.¹⁹

For those not convinced by arguments in favor of *Glucksberg's* more limited historical and tradition based conception of fundamental due process rights, Professor Kenji Yoshino has supported an evolving conception of due process, but also argued that the *Obergefell* decision should be interpreted as a vision of liberty that he calls "antisubordination liberty" that protects "historically subordinated groups."²⁰ Pursuant to Professor Yoshino's "antisubordination liberty" principle, alleged victims of climate change are arguably not entitled to special protection from the judiciary because the impacts of such harms affect every person in the United States.²¹ It might be possible to try to argue that certain "historically subordinated groups" are affected to a greater degree by climate change,²² but that is primarily the result of poverty rather than a deliberate attempt by government officials to deny a stable climate system to certain groups.²³ Because certain "historically subordinated groups" are affected to a greater degree by climate change than others because of their poverty rather than deliberate government action in most cases, these groups are not

¹⁸ Order Granting Motion to Dismiss Amended Complaints, *supra* note 17, at 14.

¹⁹ See *id.* Judge Keenan raised similar foreign policy and separation of powers concerns in dismissing New York City's climate suit against the major oil companies because of their global operations and sales. See Opinion and Order Dismissing Amended Complaint, *supra* note 17, at 20-23.

²⁰ Kenji Yoshino, *A New Birth of Freedom?: Obergefell v. Hodges*, 129 HARV. L. REV. 147, 174 (2015).

²¹ See *id.*

²² See, e.g., Samantha Cooney, *How Climate Change Specifically Harms Women*, TIME (May 31, 2017), <http://motto.time.com/4799747/climate-change-women-paris-climate-deal/> (contending climate change disproportionately affects women); Mathew Rodriguez, *5 Ways Trump's Paris Climate Accord Decision Will Hurt People of Color the Most*, MIC DAILY (May 31, 2017), <https://mic.com/articles/178503/paris-climate-accord-trumps-decision-will-hurt-people-of-color-the-most#.P11ywJW8y> (arguing President Trump's withdrawal from Paris Climate Accord will "especially [harm] people of color, who often unfairly bear the brunt of climate change's effects").

²³ See Suzanne Goldenberg, *Climate Change: The Poor Will Suffer Most*, GUARDIAN (Mar. 30, 2014, 8:01 PM), <https://www.theguardian.com/Environment/2014/mar/31/climate-change-poor-suffer-most-un-report> (discussing a UN Report on Climate Change and reporting that poor people are most likely to suffer from effects of natural disasters exacerbated by climate change, although victims of discrimination are vulnerable as well).

entitled to protection under the Equal Protection Clause unlike, for example, LGBT individuals whose rights were violated by state governments that selectively enforced antisodomy laws against them.²⁴

Some readers may be sympathetic to Judge Aiken's *Juliana* opinion because of their fears about the impacts of climate change. Additionally, some readers may strongly disagree with President Trump's 2017 disavowal of the Paris Climate Accord and believe that judicial intervention is necessary to prevent an "imminent"²⁵ climate catastrophe.²⁶ But there is greater danger in allowing the judiciary to usurp the political and legislative process when one remembers that the *Juliana* suit was initially directed at President Obama, the President who advocated for the Paris Climate Accord.²⁷ Instead, critics of President Trump's withdrawal from the Paris Climate Accord should

²⁴ See *DeBoer v. Snyder*, 772 F.3d 388, 416 (6th Cir. 2014) (observing that gay individuals were subject to prejudice and unequal enforcement of antisodomy laws compared to straight sexual partners), *overruled on other grounds by Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

²⁵ Imminent is a relative term. Some of the differences in how readers and judges respond to the issue of judicial intervention in climate change issues may depend upon their understanding of the word "imminent." For some scientists, human activities that may affect the global climate may appear imminent if they are likely to cause changes in the Earth's environment in twenty years. For the purposes of this article, however, the question of what is "imminent" is intertwined with whether judges must act now or may wait for the legislative and executive branches to take action. For the author, Bradford Mank, a human activity that may cause harm to the environment is not imminent for the purposes of judicial intervention if a current or future legislative or executive branch might take action to address climate change issues without the need for an immediate judicial decision.

²⁶ See Glenn Kessler & Michelle Ye Hee Lee, *Fact-checking President Trump's Claims on the Paris Climate Change Deal*, WASH. POST (June 1, 2017), <https://www.washingtonpost.com/news/fact-checker/wp/2017/06/01/fact-checking-president-trumps-claims-on-the-paris-climate-change-deal/> (criticizing President Trump's factual claims about Paris Climate Accord); see, e.g., Michael Biesecker & Paul Wiseman, *AP Fact Check: Trump's Shaky Claims on Climate Accord*, AP NEWS (June 1, 2017), <https://apnews.com/d4836217fa7b4d3eadea33dd20ceff3c> ("Announcing that the U.S. will withdraw from the Paris climate accord, President Donald Trump misplaced the blame for what ails the coal industry and laid a shaky factual foundation for his decision.").

²⁷ See *Juliana v. United States*, 217 F. Supp. 3d 1224, 1234 n.3 (D. Or. 2016) ("In the 2015 State of the Union address, defendant President Barack Obama declared '[n]o challenge . . . poses a greater threat to future generations than climate change.'" (citing President Barack Obama, Remarks in State of the Union Address (Jan. 20, 2015), www.whitehouse.gov/the-press-office/2015/01/20/remarks-president-state-union-address-january-20-2015)); Dave Boyer, *Obama Says Paris Climate Agreement Almost Complete*, WASH. TIMES (Oct. 3, 2016), <http://www.washingtontimes.com/news/2016/oct/3/obama-says-paris-climate-agreement-almost-complete/> (reporting that President Obama held a White House event supporting the Paris Climate Change agreement).

exercise their voting rights in the 2018 congressional elections and 2020 presidential election.

A more immediate alternative is relying on states and cities to exercise their right in our federalist system to adopt policies reducing CO₂ and GHGs to reduce the impacts of climate change. A number of states, cities, and private companies have announced efforts for further climate change reduction actions in the wake of President Trump's Paris Climate Accord withdrawal.²⁸ Furthermore, there is evidence that renewable energy and more efficient electricity technologies are on an unstoppable path of replacing carbon-intensive fossil fuels.²⁹ For example, new U.S. Environmental Protection Agency ("EPA") data shows that in 2017, the U.S. electricity sector emitted twenty-five percent less carbon dioxide than in 2005. This is three-fourths of the way towards meeting the thirty-two percent reduction by 2030 from the same baseline that the Obama Administration had sought through the Clean Power Plan rule that the Trump Administration rescinded.³⁰ Meanwhile, Bloomberg New Energy Finance ("BNEF") estimated an even larger twenty-eight percent reduction in power-sector carbon emissions from 2005 levels by 2017.³¹ Even if the United States does

²⁸ Gerald B. Silverman, *States Bet on Green Economy as Trump Dumps Climate Programs*, BLOOMBERG NEWS (June 19, 2019), <https://www.bna.com/states-bet-green-n73014453584> ("States and cities are doubling down on the green economy despite President Donald Trump's dismissal of the Paris climate accord as a bad deal for the U.S."); Abby Smith, *Coalitions Redouble Paris Support but Face Challenge to Achieve GHG Pledge*, INSIDEEPA.COM (June 6, 2017), <https://insideepa.com/daily-news/coalitions-redouble-paris-support-face-challenge-achieve-ghg-pledge> (reporting twelve states led by the Governors of California, New York, and Washington State have formed U.S. Climate Alliance to support the Paris Climate Accord to reduce GHGs); WE ARE STILL IN, <http://wearestillin.com/signatories> (last visited Nov. 3, 2018) (listing ten states including California, New York, North Carolina, Virginia, and Washington State as supporting the Paris Accord).

²⁹ See, e.g., Jess Shankleman & Hayley Warren, *Solar Power Will Kill Coal Sooner Than You Think*, BLOOMBERG (June 15, 2017, 10:08 AM PDT) <https://www.bloomberg.com/news/articles/2017-06-15/solar-power-will-kill-coal-sooner-than-you-think>; Joseph P. Tomain, *A U.S. Clean Energy Transition and the Trump Administration* 1, 4-5, 14-31 (May 22, 2017) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2983231 (arguing private sector investments and state regulators are creating a clean energy transition that cannot be stopped by Trump Administration's withdrawal from Paris or promotion of fossil fuels).

³⁰ Lee Logan, *Ongoing Power Sector GHG Cuts Could Frustrate Pruitt's CPP Agenda*, INSIDEEPA.COM (Feb. 8, 2018), <https://insideepa.com/daily-news/ongoing-power-sector-ghg-cuts-could-frustrate-pruitts-cpp-agenda>.

³¹ According to Bloomberg New Energy Finance ("BNEF"), "[p]ower-sector emissions now sit 28% below their 2005 peak, which puts the U.S. only 4 percentage points away from achieving its former Clean Power Plan target of 32% below 2005 levels by 2030. The rapid emissions reduction in the power sector has also helped to

not support climate change mitigation efforts, current legal efforts in other nations to decrease carbon emissions could lead to significant decreases in future demand for fossil fuels by 2035 that could result in losses of between \$1 trillion and \$4 trillion in asset values for fossil fuel companies even if there are no additional new climate policies taxing or regulating carbon dioxide.³² If renewable energy and more efficient electricity technologies are on a clear trajectory to replace carbon-intensive fossil fuels, there is no good reason to give federal judges the power under the Due Process Clause to usurp the authority to make energy policies from the political branches.³³

I. JULIANA

A. Introduction to the Juliana Decision

In *Juliana*, the plaintiffs included a group of young persons between the ages of eight and nineteen that the District Court referred to as the “youth plaintiffs”; Earth Guardians, an association of young environmental activists; and Dr. James Hansen, who claimed to act as a guardian for future generations.³⁴ The age demographics of the plaintiffs were significant because the court observed that “the majority of youth plaintiffs are minors who cannot vote and must

bring the U.S. halfway to its abandoned Paris Agreement target of slashing economy-wide emissions to 26% below 2005 levels by 2025.” BLOOMBERG NEW ENERGY FIN., SUSTAINABLE ENERGY IN AMERICA: 2018 FACTBOOK EXECUTIVE SUMMARY 4 (2018), http://www.bcse.org/wp-content/uploads/2018-Sustainable-Energy-in-America-Factbook_Executive-Summary.pdf.

³² Jean-Francois Mercure et al., *Macroeconomic Impact of Stranded Fossil Fuel Assets*, 8 NATURE: CLIMATE CHANGE 588, 588 (2018), <http://www.nature.com/articles/s41558-018-0182-1>; see also Mathew Carr, *Fossil Fuels Seen Heading for \$4 Trillion Crash, Cambridge Says*, BLOOMBERG ENV'T (June 6, 2018, 7:44 AM), <https://news.bloombergenvironment.com/environment-and-energy/fossil-fuels-seen-heading-for-4-trillion-crash-cambridge-says> (discussing Nature: Climate Change study); Jeff Glorfeld, “Stranded” Fossil Fuel Assets May Prompt \$4 Trillion Crisis, COSMOS (June 5, 2018), <https://cosmosmagazine.com/climate/stranded-fossil-fuel-assets-may-prompt-4-trillion-crisis> (same).

³³ See *infra* Part III and Conclusion.

³⁴ *Juliana v. United States*, 217 F. Supp. 3d 1224, 1233 (D. Or. 2016). Judge Aiken did not address the standing of future generations to sue because she found at least one plaintiff had standing to sue, and therefore did not have to determine whether other plaintiffs had standing. *Id.* at 1248 n.5, 1260 n.13. Additionally, she did not “address whether youth or future generations are suspect classifications for equal protection purposes.” *Id.* at 1249 n.7. However, the *Juliana* decision was “mindful of the intergenerational dimensions of the public trust doctrine in issuing this opinion.” *Id.* at 1260 n.13.

depend on others to protect their political interests.”³⁵ The plaintiffs sued the United States, then President Obama, and several federal executive agencies on the grounds that the federal government had known for more than fifty years that burning fossil fuels produces significant amounts of CO² that destabilize the Earth’s climate system, and, thereby, endangered the plaintiffs.³⁶ The plaintiffs argued that defendants had encouraged the use of fossil fuels despite their knowledge that the resulting high levels of CO² caused climate change and other harmful impacts.³⁷

The plaintiffs contended that the defendants’ actions regarding fossil fuel burning violated the plaintiffs’ substantive due process rights to life, liberty, and property.³⁸ Furthermore, the plaintiffs asserted that the defendants’ action violated the federal government’s duty to hold certain natural resources in the public trust for the American public and future generations of Americans; Part I.E will explore the definition of and precedent related to the “public trust” doctrine.³⁹ Finally, the plaintiffs assert that in order to avert an impending environmental catastrophe, they should be entitled to declaratory relief of their due process and public trust rights, and injunctive relief ordering the defendants to develop a plan to reduce CO² emissions.⁴⁰

The defendants and certain intervenors⁴¹ moved to dismiss the action for lack of subject matter jurisdiction and failure to state a claim.⁴² U.S. District Court Magistrate Judge Thomas Coffin issued Findings and Recommendation (“F & R”) regarding the plaintiffs’ claims and recommended that the district court deny the defendants’ motions to dismiss.⁴³ Judge Aiken adopted Judge Coffin’s F & R, and also denied the defendants’ motions to dismiss.⁴⁴

Judge Aiken acknowledged the ramifications of the plaintiffs’ theories by observing that “[t]his is no ordinary lawsuit.”⁴⁵ Furthermore, she stated:

³⁵ *Id.* at 1241.

³⁶ *Id.* at 1233.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*; see *infra* Part I.E.

⁴⁰ *Juliana*, 217 F. Supp. 3d at 1233.

⁴¹ Intervenors the National Association of Manufacturers, the American Fuel & Petrochemical Manufacturers, and the American Petroleum Institute moved to dismiss on the same grounds as the defendants. *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at 1234.

⁴⁵ *Id.*

This lawsuit challenges decisions defendants have made across a vast set of topics — decisions like whether and to what extent to regulate CO₂ emissions from power plants and vehicles, whether to permit fossil fuel extraction and development to take place on federal lands, how much to charge for use of those lands, whether to give tax breaks to the fossil fuel industry, whether to subsidize or directly fund that industry, whether to fund the construction of fossil fuel infrastructure such as natural gas pipelines at home and abroad, whether to permit the export and import of fossil fuels from and to the United States, and whether to authorize new marine coal terminal projects. Plaintiffs assert defendants' decisions on these topics have substantially caused the planet to warm and the oceans to rise. They draw a direct causal line between defendants' policy choices and floods, food shortages, destruction of property, species extinction, and a host of other harms.⁴⁶

Judge Aiken explained that the federal government defendants did not dispute that climate change was a serious threat to the planet Earth caused by human beings.⁴⁷ Then President Obama in his 2015 State of the Union address declared that “[n]o challenge . . . poses a greater threat to future generations than climate change.”⁴⁸ The private industry intervenors “declined to take a clear position” on whether human-caused climate change posed a serious threat to the Earth.⁴⁹ Judge Aiken explained that her decision would focus on the following questions: “[W]hether defendants are responsible for some of the harm caused by climate change, whether plaintiffs may challenge defendants' climate change policy in court, and whether this Court can direct defendants to change their policy without running afoul of the separation of powers doctrine.”⁵⁰

Magistrate Judge Coffin recommended denying the defendants' and intervenors' motions to dismiss because he concluded that the plaintiffs' public trust and due process claims were viable.⁵¹ The defendants and intervenors objected to his recommendations because they argued that the plaintiffs' claims must be dismissed for lack of

⁴⁶ *Id.*

⁴⁷ *Id.* at 1234 n.3.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* at 1234.

⁵¹ *Id.* at 1235.

jurisdiction because the case presented non-justiciable political questions, the plaintiffs lacked standing to sue, and federal public trust claims could not be asserted against the federal government.⁵² They additionally claimed that the plaintiffs had failed to state a claim on which relief can be granted.⁵³

B. Political Question Doctrine

The federal government defendants and the private industry intervenors argued that the district court lacked jurisdiction because the case presented non-justiciable political questions.⁵⁴ The Supreme Court first recognized in Chief Justice Marshall's landmark *Marbury v. Madison* decision that some questions are better resolved by the political branches, the Executive Branch and Congress, than by the federal courts.⁵⁵ In *Baker v. Carr*, the Supreme Court observed that the political question doctrine is based on the separation of powers doctrine, which gives the branches of government largely separate functions with some overlap.⁵⁶ The *Baker* decision established six criteria, each of which by itself might be sufficient to raise a political question barrier to judicial resolution of a case.⁵⁷ The three most important criteria are as follows: first, a textually demonstrable constitutional commitment of the issue to a coordinate political department; second, a lack of judicially discoverable and manageable standards for resolving it; and, third, the impossibility of deciding

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* (discussing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803)).

⁵⁶ *Baker v. Carr*, 369 U.S. 186, 210-11 (1962).

⁵⁷ The *Baker* Court applied the political question doctrine using the following six factors:

- (1) textually demonstrable constitutional commitment of the issue to a coordinate political department; (2) a lack of judicially discoverable and manageable standards for resolving it; (3) the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; (4) the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; (5) an unusual need for unquestioning adherence to a political decision already made; or (6) the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. at 217; *Juliana*, 217 F. Supp. 3d at 1236 (quoting the six-part *Baker* test).

without an initial policy determination of a kind clearly for nonjudicial discretion.⁵⁸

Judge Aiken noted the importance of the political question doctrine in preserving the crucial separation of powers in our constitutional system.⁵⁹ However, she argued that the doctrine was inappropriate in this case's circumstances because "a court cannot simply err on the side of declining to exercise jurisdiction when it fears a political question may exist; it must instead diligently map the precise limits of jurisdiction."⁶⁰ She observed that climate change, energy policy and environmental regulatory issues had been the subject of political debate, but concluded that courts could address politically charged issues as long as an issue was not "inextricable" with a *Baker* criterion.⁶¹

Judge Aiken found that the first *Baker* factor did not apply because climate change was "not *inherently*, or even primarily, a foreign policy decision."⁶² Additionally, she determined that the second and third *Baker* criteria did not apply because the plaintiffs' substantive due process and the government's public trust obligations were in the scope of the court's competence.⁶³ The court rejected the defendants' and intervenors' arguments that the court would improperly inject itself into the political process by setting a permissible emissions level, choosing which agencies or industrial sectors would have to reduce emissions, or which agencies would have to enforce specific regulations.⁶⁴ Judge Aiken reasoned that the "Court could issue the requested declaration without directing any individual agency to take any particular action."⁶⁵ In the event that the plaintiffs won on the merits, she acknowledged that the court "would no doubt be

⁵⁸ See *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004) (plurality opinion) (explaining that the *Baker* factors "are probably listed in descending order of both importance and certainty"); *Juliana*, 217 F. Supp. 3d at 1236 (same); Michael C. Blumm & Mary Christina Wood, "No Ordinary Lawsuit": *Climate Change, Due Process, and the Public Trust Doctrine*, 67 AM. U. L. REV. 1, 32 (2017).

⁵⁹ See *Juliana*, 217 F. Supp. 3d at 1235-36.

⁶⁰ *Id.*

⁶¹ *Id.* (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

⁶² *Id.* at 1238; Blumm & Wood, *supra* note 58, at 32.

⁶³ *Juliana*, 217 F. Supp. 3d at 1238-40; Blumm & Wood, *supra* note 58, at 32-33.

⁶⁴ *Juliana*, 217 F. Supp. 3d at 1238-39.

⁶⁵ *Id.* at 1239; Blumm & Wood, *supra* note 58, at 33. *But see* *Kanuk ex rel. Kanuk v. State, Dep't of Nat. Res.*, 335 P.3d 1088, 1097-1103 (Alaska 2014) (finding prudential grounds barred relief because a declaration that the atmosphere is subject to the public trust doctrine would not resolve which specific steps Alaska should take to reduce GHG emissions).

compelled to exercise great care to avoid separation-of-powers problems in crafting a remedy. The separation of powers might, for example, permit the Court to direct defendants to ameliorate plaintiffs' injuries but limit its ability to specify precisely how to do so."⁶⁶ Accordingly, Judge Aiken concluded that the court could decide the plaintiffs' suit without violating any of the *Baker* criteria or "to step outside the core role of the judiciary to decide this case."⁶⁷

A better approach to the question of applying the *Baker* criteria to climate change issues than the *Juliana* case is found in a decision by the Supreme Court of Alaska. In *Kanuk ex rel. Kanuk v. State, Dept. of Natural Resources*, the Supreme Court of Alaska took a different approach to the political question doctrine and the appropriateness of judicial remedies by concluding that the executive and legislative branches are better suited to making climate policy than the courts.⁶⁸ The plaintiffs' claims in *Kanuk* were similar to the public trust portion of the complaint in *Juliana*. In *Kanuk*, the plaintiffs were six children who sued the State of Alaska, claiming that the State violated its duties under the Alaskan Constitution and the public trust doctrine by failing to take actions to protect the atmosphere.⁶⁹ They sought declaratory judgment on the nature of the State's duty to protect the atmosphere and specific reductions in carbon dioxide emissions in the state.⁷⁰ An Alaskan superior court judge dismissed the complaint, finding that the claims were not justiciable.⁷¹ The plaintiffs appealed to the Alaskan Supreme Court.⁷²

Applying *Baker's* six factor political question test, the Alaska Supreme Court in *Kanuk* concluded that the plaintiffs' requests for a declaratory judgment that the State was obliged to reduce CO² emissions by at least six percent per year from 2013 through 2050 violated *Baker's* third factor that the legislature or the executive branch should make public policy decisions rather than the judiciary.⁷³ It observed that the U.S. Supreme Court in *American Electric Power v. Connecticut* ("AEP") had dismissed federal common law nuisance claims filed against major electric utilities emitting large quantities of CO² because the EPA was better equipped to regulate

⁶⁶ *Juliana*, 217 F. Supp. 3d at 1241; Blumm & Wood, *supra* note 58, at 33.

⁶⁷ *Juliana*, 217 F. Supp. 3d at 1241.

⁶⁸ *Kanuk*, 335 P.3d at 1097-1103.

⁶⁹ *Id.* at 1091.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* at 1097-98.

major emitters of GHGs under environmental statutes such as the Clean Air Act rather than judges.⁷⁴ In addition, the *Kanuk* Court determined that the plaintiffs' request for declaratory relief under the public trust doctrine of the Alaskan state constitution did not violate the political question doctrine.⁷⁵ The Court, however, on prudential grounds barred relief because a declaration that the atmosphere is subject to the public trust doctrine would not resolve which specific steps Alaska should take to reduce GHG emissions.⁷⁶

While state court decisions are not binding upon federal courts, the Ninth Circuit or the Supreme Court should learn from the reasoning of the *Kanuk* decision, and bar suits like *Juliana* either under factor three of the *Baker* decision or more general prudential grounds. Courts should reject climate change suits seeking redress because such suits would require courts to either issue detailed directives that interfere with the legislative or executive branches, or, in the alternative, to issue vague declarations that climate change is "bad" that cannot meaningfully guide the actions of the government. Additionally, while not formally invoking the political question doctrine, Judge Alsup dismissed a public nuisance suit against major oil companies because he determined that Congress and the Executive Branch should decide climate change policy rather than federal courts, especially because such policy decisions affect international relations issues that should be decided by the political branches.⁷⁷ Contrary to Judge Aiken's approach to the political question doctrine, the better approach is to let the legislative and executive branches decide climate policy as suggested by *Kanuk ex rel. Kanuk* and Judge Alsup.

Justice Sotomayor in a concurring opinion has suggested that it is inappropriate for judges to wade into controversial policy decisions, which arguably include how to address climate change. In *Zivotofsky ex rel. Zivotofsky v. Clinton*,⁷⁸ Justice Sotomayor in an opinion concurring in part and concurring in the judgment, which was joined by Justice Breyer, observed that the traditional role of English and American courts:

⁷⁴ *Id.* at 1098-99 (citing *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 415-29 (2011)).

⁷⁵ *Id.* at 1099-1103.

⁷⁶ *Id.*

⁷⁷ See Order Granting Motion to Dismiss Amended Complaints at 14, *City of Oakland vs. BP P.L.C.*, No. C17-06011 WHA, 2018 WL 3609055, (N.D. Cal. July 27, 2018).

⁷⁸ 566 U.S. 189 (2012).

[I]nvolves the application of some manageable and cognizable standard within the competence of the Judiciary to ascertain and employ to the facts of a concrete case. When a court is given no standard by which to adjudicate a dispute, or cannot resolve a dispute in the absence of a yet-unmade policy determination charged to a political branch, resolution of the suit is beyond the judicial role envisioned by Article III.⁷⁹

Justice Sotomayor's opinion further explained,

This is not to say, of course, that courts are incapable of interpreting or applying somewhat ambiguous standards using familiar tools of statutory or constitutional interpretation. But where an issue leaves courts truly rudderless, there can be "no doubt of [the] validity" of a court's decision to abstain from judgment.⁸⁰

The difficult policy choices involving climate change and energy policy are such an issue where there is no "manageable and cognizable standard within the competence of the Judiciary."⁸¹ Therefore, in light of the analysis in *Kanuk*, Judge Alsup's opinion and Justice Sotomayor's concurring opinion, federal courts should invoke either the political question doctrine, prudential reasons, or, jurisdictional reasons such as standing to avoid cases seeking a fundamental political decision about how to achieve a stable climate system.

C. *Standing to Sue*

Pursuant to Article III's "Case" and "Controversies" language in the U.S. Constitution defining the jurisdiction of federal courts,⁸² at least

⁷⁹ *Id.* at 203-04 (Sotomayor, J., concurring in part and concurring in the judgment) (citations omitted).

⁸⁰ *Id.* at 204.

⁸¹ *Id.* at 203-04.

⁸² The constitutional standing requirements are derived from Article III, Section 2, which provides:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; — to all Cases affecting Ambassadors, other public Ministers and Consuls; — to all Cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two or more States; — between a State and Citizens of another State; between Citizens of different States; — between Citizens of the same State claiming Lands under

one plaintiff in every federal court suit must have “standing” to sue to demonstrate that the plaintiff is pursuing an actual case or controversy and is not simply seeking an advisory opinion about a hypothetical case.⁸³ To demonstrate Article III standing, a plaintiff must show that (1) she has suffered an injury in fact that is concrete, particularized, and actual or imminent; (2) the injury is fairly traceable to the defendant’s challenged conduct; and (3) the injury is likely to be redressed by a favorable court decision.⁸⁴ A plaintiff has the burden of demonstrating each element of the standing test at each stage of the litigation.⁸⁵ The *Juliana* court observed that because the defendants had filed a motion to dismiss, the plaintiffs were simply required to make general allegations sufficient to prove standing.⁸⁶ At the motion to dismiss stage of litigation, a plaintiff’s conclusory allegations are presumed to be true because the plaintiffs have not yet had the chance to present evidence.⁸⁷

The government argued that the plaintiffs’ alleged injuries from climate change were nonjusticiable generalized grievances because climate change affects every person on the planet Earth.⁸⁸ The *Juliana* court, however, concluded that widely shared injuries can be sufficient injuries as long as a plaintiff suffers a concrete injury as opposed to an abstract injury.⁸⁹ The court concluded that at least some of the individual plaintiffs had proven an injury from flooding and high temperatures that appeared to be related to climate change.⁹⁰

Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. CONST. art. III, § 2; *see also* *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 340-42 (2006) (explaining why Supreme Court infers that Article III’s case and controversy requirement necessitates standing limitations).

⁸³ *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016); *Juliana v. United States*, 217 F. Supp. 3d 1224, 1242 (D. Or. 2016); Bradford C. Mank, *No Article III Standing for Private Plaintiffs Challenging State Greenhouse Gas Regulations: The Ninth Circuit’s Decision in Washington Environmental Council v. Bellon*, 63 AM. U. L. REV. 1525, 1532-33 (2014).

⁸⁴ *Spokeo*, 136 S. Ct. at 1547; *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *Juliana*, 217 F. Supp. 3d at 1242; Mank, *supra* note 83, at 1534.

⁸⁵ *Spokeo*, 136 S. Ct. at 1547; *Lujan*, 504 U.S. at 561; *Juliana*, 217 F. Supp. 3d at 1242; Mank, *supra* note 83, at 1534.

⁸⁶ *Juliana*, 217 F. Supp. 3d at 1242, 1245-46.

⁸⁷ *Id.*; *Lujan*, 504 U.S. at 561.

⁸⁸ *Juliana*, 217 F. Supp. 3d at 1243.

⁸⁹ *Id.* at 1243-44.

⁹⁰ *See id.* at 1242-44.

Yet the *Juliana* decision failed to address whether non-state plaintiffs are entitled to sue the federal government. The leading case involving climate change is *Massachusetts v. E.P.A.*,⁹¹ which only recognized that the state government of Massachusetts had Article III standing to sue the federal government for its failure to regulate climate change because states were “entitled to special solicitude in our standing analysis.”⁹² *Massachusetts* did not directly address whether private parties have similar standing rights to bring climate change suits against the federal government.⁹³ However, the Court implied that private parties might have lesser standing rights when it declared that “[i]t is of considerable relevance that the party seeking review here is a sovereign State and not, as it was in *Lujan*, a private individual.”⁹⁴ It is not clear whether the Supreme Court would be as willing to recognize private party standing against the federal government in climate suits as in the *Massachusetts* decision,⁹⁵ and, accordingly, the *Juliana* decision should have at least flagged the distinction between state standing and private standing as a potential issue in its standing analysis. Applying a rule that only states have standing to challenge the federal government’s alleged failure to address climate change would have required a court to dismiss a case like *Juliana*. However, California and other states have strongly supported the Paris Climate Accord despite President’s Trump’s announcement indicating his desire to withdraw from the Accord.⁹⁶ Accordingly, a precedent limiting climate suits against the federal government to state plaintiffs would not prevent state challenges to his Administration’s climate policies.

Addressing the second prong of the standing test, causation, the *Juliana* decision concluded that the plaintiffs had established that their injuries were fairly traceable to the government’s actions.⁹⁷ The

⁹¹ 549 U.S. 497 (2007).

⁹² *Massachusetts*, 549 U.S. at 518-20; Mank, *supra* note 83, at 1528, 1536-38.

⁹³ See *Massachusetts*, 549 U.S. at 518-20; Mank, *supra* note 83, at 1528.

⁹⁴ *Massachusetts*, 549 U.S. at 518-20; Mank, *supra* note 83, at 1528. In *Lujan v. Defenders of Wildlife*, several environmental groups brought an action against the Secretary of Interior challenging the agency’s interpretation of a regulation. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 557-59 (1992).

⁹⁵ See Mank, *supra* note 83, at 1556-57, 1584-85.

⁹⁶ Javier C. Hernández & Adam Nagourney, *As Trump Steps Back, Jerry Brown Talks Climate Change in China*, N.Y. TIMES (June 6, 2017), <https://www.nytimes.com/2017/06/06/world/asia/xi-jinping-china-jerry-brown-california-climate.html> (reporting the State of California strongly supports the Paris Climate Accord despite President Trump’s announced withdrawal); Smith, *supra* note 28; WE ARE STILL IN, *supra* note 28.

⁹⁷ *Juliana v. United States*, 217 F. Supp. 3d 1224, 1246 (D. Or. 2016).

government defendants had argued that the plaintiffs had failed to prove causation in light of the Ninth Circuit's decision in *Washington Environmental Council v. Bellon*,⁹⁸ which dismissed a climate change suit both because it determined that the five Washington State oil refineries at issue had only a small impact on worldwide GHG emissions and because it was too difficult to measure the impact of those refineries on the local climate in one state.⁹⁹ The *Juliana* decision, however, distinguished the standing causation facts and outcome in its case from *Bellon* in "two important respects."¹⁰⁰ First, Judge Aiken observed that the procedural posture was different because the appeal in *Bellon* was from a grant of summary judgment relying on expert declarations, but the *Juliana* decision involved a motion to dismiss before the plaintiff had a chance to present evidence.¹⁰¹ She observed that "climate science is constantly evolving," therefore, she could not "interpret *Bellon* — which relied on a summary judgment record developed more than five years ago — to forever close the courthouse doors to climate change claims."¹⁰² In a 2014 article, this author, Bradford Mank, predicted that future lower courts could disregard the Ninth Circuit's analysis in *Bellon* that science is not capable of measuring local climate change impacts based upon the argument that new scientific methods enabled scientists to make a causal link between local GHG sources and local climate change impacts that was not possible at the time of *Bellon*'s decision in 2014.¹⁰³ Second, the *Juliana* decision determined that causation in its case was different from the *Bellon* decision. *Juliana* involved the impact of all U.S. emissions affected by the federal government's actions, a significant portion of both national and worldwide GHG emissions, whereas only five refineries were at issue in *Bellon*, a tiny portion of global CO₂ emissions.¹⁰⁴ Accordingly, Judge Aiken in the *Juliana* decision found that the plaintiffs had established standing causation.¹⁰⁵

⁹⁸ 732 F.3d 1131 (9th Cir. 2013).

⁹⁹ *Id.* at 1143-44, 1146; *Juliana*, 217 F. Supp. 3d at 1244-45 (discussing the Ninth Circuit's standing analysis in *Bellon*); see Mank, *supra* note 83, at 1569-72.

¹⁰⁰ *Juliana*, 217 F. Supp. 3d at 1245.

¹⁰¹ *Id.*

¹⁰² *Id.* (citing Kirsten Engel & Jonathan Overpeck, *Adaptation and the Courtroom: Judging Climate Science*, 3 MICH. J. ENV'T & ADMIN. L. 1, 25 (2013)).

¹⁰³ Mank, *supra* note 83, at 1570-71 & n.295.

¹⁰⁴ *Juliana*, 217 F. Supp. 3d at 1245.

¹⁰⁵ *Id.* at 1246.

Finally, the *Juliana* decision concluded that the plaintiffs had proven standing redressability.¹⁰⁶ Judge Aiken rejected the government's argument that a favorable judgment by her court could not guarantee an overall reduction in GHG emissions because "redressability does not require certainty, it requires only a substantial likelihood that the Court could provide meaningful relief."¹⁰⁷ She observed that the U.S. Supreme Court's *Massachusetts* decision had only required plaintiffs to demonstrate that a "requested remedy would 'slow or reduce' the harm."¹⁰⁸ Furthermore, the *Juliana* decision distinguished the redressability analysis in its case from *Bellon* because the five refineries in that case had far smaller impacts on global climate change.¹⁰⁹ Therefore, both the causation and redressability analysis in the *Bellon* Ninth Circuit case was inapplicable to the *Juliana* case.¹¹⁰ Additionally, the *Juliana* decision reasoned that "the possibility that some other individual or entity might later cause the same injury does not defeat standing — the question is whether the injury *caused by the defendant* can be redressed."¹¹¹ While acknowledging that the redressability issue raised many scientific questions, Judge Aiken determined that the plaintiffs did not have to answer those questions at the motion to dismiss stage of the proceedings.¹¹² She concluded, "Construing the complaint in plaintiffs' favor, they allege that this relief would at least partially redress their asserted injuries. Youth plaintiffs have adequately alleged they have standing to sue."¹¹³

D. Due Process Claims

The Due Process Clause of the Fifth Amendment to the U.S. Constitution prohibits the federal government from depriving a person of "life, liberty, or property" without "due process of law."¹¹⁴ The plaintiffs in the *Juliana* case alleged that the federal government defendants had violated their due process rights by approving and promoting fossil fuel development.¹¹⁵ For example, they argued that

¹⁰⁶ *Id.* at 1247-48.

¹⁰⁷ *Id.* at 1247.

¹⁰⁸ *Id.* (quoting *Massachusetts v. EPA*, 549 U.S. 497, 525 (2007)).

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 1245-47.

¹¹¹ *Id.* at 1247.

¹¹² *See id.*

¹¹³ *Id.* at 1248.

¹¹⁴ U.S. CONST. amend. V.

¹¹⁵ *Juliana*, 217 F. Supp. 3d at 1248.

the government's extraction and burning of such fuels resulted in rising atmospheric CO₂ levels "that dangerously interfere with a stable climate system" required for the health and safety of the plaintiffs and the entire U.S. population.¹¹⁶ The federal government defendants and private party intervenors objected to the plaintiffs' due process claims on two grounds.¹¹⁷ First, they contended that the plaintiffs' challenge to the defendants' affirmative actions in leasing land or issuing permits was inappropriate because the plaintiffs had failed to assert an infringement of a fundamental due process right or improper discrimination against a suspect class of persons.¹¹⁸ Second, they argued that the plaintiffs could not challenge the defendants' alleged inaction to prevent private third parties from emitting CO₂ at dangerous levels because the defendants did not have an affirmative duty to protect the plaintiffs from the impacts of climate change.¹¹⁹

The *Juliana* decision initially examined the plaintiffs' claim that the government had violated their rights through affirmative acts in permitting fossil fuel development.¹²⁰ The court observed that the default level of judicial scrutiny is whether there is a rational basis for the government's actions.¹²¹ However, a court applies a much more demanding strict scrutiny review if the government violates a "fundamental right" of the plaintiff.¹²² Judge Aiken acknowledged that it was clear and undisputed that the government's actions approving various types of fossil fuel extraction and burning would pass rational basis review.¹²³ So the crucial issue in resolving the motion to dismiss was whether the plaintiffs had asserted the violation of a fundamental right.¹²⁴

The *Juliana* decision explained that fundamental due process liberty rights include both rights enumerated elsewhere in the U.S. Constitution and rights and liberties which are either (1) "deeply rooted in this Nation's history and tradition" or (2) "fundamental to our scheme of ordered liberty."¹²⁵ In *Washington v. Glucksberg*, the

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *See id.*

¹²¹ *Id.*

¹²² *See id.*

¹²³ *Id.* at 1249.

¹²⁴ *Id.*

¹²⁵ *Id.* (quoting *McDonald v. City of Chicago*, 561 U.S. 742, 767 (2010)); accord *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997).

Supreme Court warned that federal courts must “exercise the utmost care whenever . . . asked to break new ground in this field, lest the liberty protected by the Due Process Clause be subtly transformed into [judicial] policy preferences.”¹²⁶ However, Judge Aiken observed that the cautious approach to creating new due process rights in *Glucksberg* was significantly changed in Justice Kennedy’s *Obergefell* decision, which recognized a new fundamental due process right to same sex marriage.¹²⁷ The *Obergefell* decision gave federal judges more discretion to establish new fundamental due process rights than *Glucksberg*’s history and tradition test.¹²⁸ Justice Kennedy stated that courts must:

“[E]xercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect History and tradition guide and discipline the inquiry but do not set its outer boundaries When new insight reveals discord between the Constitution’s central protections and a received legal stricture, a claim to liberty must be addressed.¹²⁹

In his dissenting opinion in *Obergefell*, Chief Justice Roberts attacked Justice Kennedy’s majority opinion for “break[ing] sharply with decades of precedent” in effectively overruling “the importance of history and tradition” in how the Court had defined fundamental rights inquiry in *Glucksberg*.¹³⁰ He noted that “many other cases both before and after have adopted the same approach.”¹³¹ Chief Justice Roberts reasoned that *Obergefell*’s “aggressive application of substantive due process” would provide judges too much discretion in deciding issues which properly belong to legislative decisions.¹³² As the next few paragraphs will demonstrate, Judge Aiken could have only found a substantive due process right under *Obergefell*’s broad

¹²⁶ *Id.* (quoting *Glucksberg*, 521 U.S. at 720) (internal quotations omitted)).

¹²⁷ *Id.* (discussing *Obergefell v. Hodges*, 135 S. Ct. 2584, 2598 (2015)).

¹²⁸ See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2589 (2015).

¹²⁹ *Id.*

¹³⁰ See *id.* at 2618-19 (Roberts, C.J., dissenting).

¹³¹ *Id.* at 2618.

¹³² See also Lamparello, *supra* note 10, at 47-52 (criticizing Justice Kennedy’s expansive due process analysis for usurping traditional legislative authority and transferring it to judges); *infra* Part II. See generally *Obergefell*, 135 S. Ct. at 2611-12, 2616-23 (Roberts, C.J., dissenting).

and evolving approach to due process and not under *Glucksberg's* narrower history and tradition approach.¹³³

Relying on the “reasoned judgment” standard for fundamental due process rights in *Obergefell*, Judge Aiken concluded that “I have no doubt that the right to a climate system capable of sustaining human life is fundamental to a free and ordered society.”¹³⁴ Analogizing to *Obergefell's* view that “marriage is the ‘foundation of the family,’” she reasoned that “a stable climate system [was] quite literally the foundation ‘of society, without which there would be neither civilization nor progress.”¹³⁵ She cautioned that the due process right to a stable climate system did not mean that plaintiffs could sue regarding “the government’s role in producing *any* pollution or in causing *any* climate change.”¹³⁶ Judge Aiken explained, “In framing the fundamental right at issue as the right to a climate system capable of sustaining human life, I intend to strike a balance and to provide some protection against the constitutionalization of all environmental claims.”¹³⁷ She held that a valid due process claim regarding climate change required a plaintiff to assert that the “governmental action [was] 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.”¹³⁸ Yet even such serious allegations would not have violated due process under *Glucksberg's* narrower history and tradition approach, and is only possible under *Obergefell's* broader and evolving approach to due process.¹³⁹ In particular, courts have traditionally avoided making the judiciary the direct or innovative policymaker of climate change policy until Judge Aiken’s decision.¹⁴⁰

¹³³ See *Juliana v. United States*, 217 F. Supp. 3d 1224, 1249-50 (D. Or. 2016) (implicitly acknowledging that plaintiffs’ due process claims were viable under *Obergefell's* new expansive reading of the Due Process Clause, but not under the prior history and tradition standard of interpretation); see also *infra* Part II.

¹³⁴ *Juliana*, 217 F. Supp. 3d at 1250 (quoting *Obergefell*, 135 S. Ct. at 2598 (majority opinion)).

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ See *infra* Part II. See generally *Juliana*, 217 F. Supp. 3d at 1249-50.

¹⁴⁰ See David Markell & J.B. Ruhl, *An Empirical Assessment of Climate Change in the Courts: A New Jurisprudence or Business as Usual?*, 64 FLA. L. REV. 15, 22, 77-78, 85-86 (2012) (arguing that most court decisions have treated climate change cases as business as usual rather than as opportunity to make new law).

Judge Aiken in the *Juliana* decision next explained that the Due Process Clause usually does not create an affirmative duty on the part of the government to act.¹⁴¹ However, she explained that government inaction can be subject to the Due Process Clause in two circumstances: “(1) [T]he ‘special relationship’ exception; and (2) the ‘danger creation’ exception.”¹⁴² The special relationship exception applies when the government takes an individual into custody against his or her will such as through imprisonment, and was not relevant to the plaintiffs.¹⁴³ However, the court concluded that the plaintiffs had successfully alleged sufficient facts at the motion to dismiss stage of litigation that the government defendants had violated the “danger creation” exception because the federal government had possibly acted with deliberate indifference to the safety of the plaintiffs by failing to take steps to address and ameliorate serious risks from climate change.¹⁴⁴

The *Juliana* decision rejected the governments’ argument that the “danger creation” exception should not be applied in the context of climate change litigation.¹⁴⁵ Judge Aiken noted that several “rigorous proof requirements” limited such claims.¹⁴⁶ She stated:

A plaintiff asserting a danger-creation due process claim must show (1) the government’s acts created the danger to the plaintiff; (2) the government *knew* its acts caused that danger; and (3) the government with *deliberate indifference* failed to act to prevent the alleged harm. These stringent standards are sufficient safeguards against the flood of litigation concerns raised by defendants — indeed, they pose a significant challenge for plaintiffs in this very lawsuit.¹⁴⁷

Judge Aiken observed that she was bound to accept the plaintiffs’ factual allegations at the motion to dismiss stage, and that they would have to prove their case at trial.¹⁴⁸ She reasoned that the plaintiffs’ allegations, if true, were sufficient to state a substantive due process

¹⁴¹ *Juliana*, 217 F. Supp. 3d at 1250-51.

¹⁴² *Id.* at 1251 (citation omitted).

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 1251-52.

¹⁴⁵ *See id.* at 1252.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* (footnote omitted).

¹⁴⁸ *Id.*

challenge for the defendants' failure to adequately regulate CO² and GHG emissions.¹⁴⁹ She summarized those allegations as follows:

Plaintiffs have alleged that defendants played a significant role in creating the current climate crisis, that defendants acted with full knowledge of the consequences of their actions, and that defendants have failed to correct or mitigate the harms they helped create in deliberate indifference to the injuries caused by climate change.¹⁵⁰

By denying the defendants' motions to dismiss, Judge Aiken allowed the plaintiffs to go forward with their "substantive due process challenge to defendants' [alleged] failure to adequately regulate CO₂ emissions."¹⁵¹ As is discussed in Part II of this Article, the *Juliana* plaintiffs' substantive due process challenge is viable in the light of *Obergefell's* evolving due process standard, but would likely have failed under *Glucksberg's* history and tradition standard.¹⁵²

E. Public Trust Claims

In Part IV of her *Juliana* opinion, Judge Aiken addressed the plaintiffs' claim that the federal government plaintiffs had violated their duty under the public trust doctrine ("PTD") to protect air and other natural resources from the government's failure to regulate greenhouse gases that threaten "imminent" catastrophic climate change.¹⁵³ She characterized the PTD as an inherent limit on sovereignty of government because the current government may not destroy important natural resources that should be available to future legislatures.¹⁵⁴ The *Juliana* decision observed that the PTD predated the United States, with roots in Roman law and the English common law.¹⁵⁵ The protection of submerged lands under tidal and navigable waters is at the core of the PTD.¹⁵⁶ However, Judge Aiken quoted a

¹⁴⁹ *See id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Obergefell v. Hodges*, 135 S. Ct. 2584, 2611-12, 2616-23 (Roberts, C.J., dissenting) (criticizing the majority opinion for departing from *Glucksberg's* history and tradition standard, and, thereby giving judges too much discretion to overrule legislative decisions); see Lamparello, *supra* note 10, at 47-52 (same); *infra* Part II.

¹⁵³ *Juliana*, 217 F. Supp. 3d at 1252-61, 1267, 1272 (assuming that plaintiffs' allegations of imminent harm are true at this stage of litigation).

¹⁵⁴ *See id.* at 1252-53, 1260-61.

¹⁵⁵ *Id.* at 1253, 1260-61.

¹⁵⁶ *See Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 284 (1997)

broader definition of the PTD in the sixth century Institutes of Justinian,¹⁵⁷ which declared that “the following things are by natural law common to all — the air, running water, the sea, and consequently the seashore.”¹⁵⁸

Judge Aiken noted that “the seminal [U.S.] Supreme Court case on the public trust is *Illinois Central Railroad Company v. Illinois*.”¹⁵⁹ The Supreme Court held that the Illinois legislature had violated the PTD when it conveyed title to “part of the submerged lands beneath the harbor of Chicago, with the intent to give the company control over the waters above the submerged lands against any future exercise of power over them by the state.”¹⁶⁰ Despite the Institutes of Justinian’s reference to air resources, the *Illinois Central* decision and other Supreme Court decisions cited in *Juliana* demonstrate that the protection of public access to navigation and submerged lands are at the core of the PTD.¹⁶¹ Professor James Huffman has argued that the vast majority of American public trust decisions have followed the English common law in “narrowly apply[ing]” the PTD “to navigable waters for the purposes of navigation, commerce, fishing and sometimes bathing” rather than “the broad and sweeping language of Justinian.”¹⁶² Thus, the government defendants and private intervenors appropriately questioned whether the scope of the PTD could be expanded beyond submerged lands to include the

(“American law adopted as its own much of the English law respecting navigable waters, including the principle that submerged lands are held for a public purpose.”); *Phillips Petrol. Co. v. Mississippi*, 484 U.S. 469, 473 (1988) (“At common law, the title and dominion in lands flowed by the tide water were in the King for the benefit of the nation. . . . Upon the American Revolution, these rights, charged with a like trust, were vested in the original States within their respective borders” (quoting *Shively v. Bowlby*, 152 U.S. 1, 57 (1894))); Austin W. Probst, Note, *Go With the Flow: The Public Trust Doctrine and Standing*, 62 WAYNE L. REV. 535, 537-40 (2017).

¹⁵⁷ The Institutes of Justinian codified Roman law and “is the foundation for modern civil law systems” in many nations. *Juliana*, 217 F. Supp. 3d at 1253 (citing Timothy G. Kearley, *Justice Fred Blume and the Translation of Justinian’s Code*, 99 LAW LIBR. J. 525, ¶ 1 (2007)).

¹⁵⁸ *Id.* (citing J. Inst. 2.1.1 (J.B. Moyle trans.)); see also Michael O’Loughlin, *Understanding the Public Trust Doctrine Through Due Process*, 58 B.C. L. REV. 1321, 1331-32 (2017) (discussing the Public Trust Doctrine in Roman Law and Justinian Institutes).

¹⁵⁹ *Juliana*, 217 F. Supp. 3d at 1254 (citing *Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387 (1892)).

¹⁶⁰ See *id.* (quoting *Ill. Cent. R.R. Co.*, 146 U.S. at 452-54) (internal quotation marks omitted).

¹⁶¹ See sources cited *supra* note 160.

¹⁶² James L. Huffman, *Speaking of Inconvenient Truths — A History of the Public Trust Doctrine*, 18 DUKE ENVTL. L. & POL’Y F. 1, 96-97 (2007).

atmosphere.¹⁶³ Judge Aiken ultimately did not decide whether the PTD included air resources, but instead found that plaintiffs had properly alleged violations of the PTD in connection with the territorial sea and submerged tidal lands affected by ocean acidification and rising ocean temperatures linked to climate change.¹⁶⁴

The government defendants and private intervenors argued that the “federal government, unlike the states, has no public trust obligations.”¹⁶⁵ Alternatively, they contended that any common law public trust claims applicable to the plaintiffs’ alleged climate change impacts have been displaced by federal environmental statutes such as the Clean Air Act.¹⁶⁶ Finally, they maintained that even if there is a federal public trust, that the plaintiffs lacked a right to enforce it because any enforcement actions by a federal court would conflict with, and be displaced by, federal statutory law.¹⁶⁷ Judge Aiken disagreed with all three of these arguments.¹⁶⁸

Judge Aiken concluded that the argument of the defendants and intervenors that the PTD applied only to states and not to the federal government was wrongly based on dictum in *PPL Montana, LLC v. Montana*, which was a case focusing on the “equal footing doctrine” and not a PTD case.¹⁶⁹ In *PPL Montana*, the Court stated that the equal-footing doctrine, which gives new states title to tidal or navigable riverbeds within its boundaries, is a federal constitutional doctrine, but that “the [PTL] remains a matter of state law.”¹⁷⁰ In *Juliana*, Judge Aiken reasoned that *PPL Montana*’s phrase treating the PTD as state law was mere dictum that did not prevent federal courts from recognizing “the viability of federal public trust claims with respect to federally-owned trust assets” because the *PPL Montana*

¹⁶³ *Juliana*, 217 F. Supp. 3d at 1254-55.

¹⁶⁴ *Id.* at 1255-56; Blumm & Wood, *supra* note 58, at 45. In footnote 10, Judge Aiken suggested that she thought that the PTD includes air resources, and observed that the “dearth of litigation focusing on atmosphere may reflect the limited state of scientific knowledge rather than signal a determination that the air is outside the scope of the public trust.” *Id.* at 1255 n.10 (“[H]ypothesizing that the atmosphere does not appear in early public trust case law because air was long thought to be indestructible and incapable of privatization.” (citing Mary C. Wood, *Atmospheric Trust Litigation Across the World*, in *FIDUCIARY DUTY AND THE ATMOSPHERIC TRUST* 113 (Ken Coghill et al. eds., 2012))).

¹⁶⁵ *Juliana*, 217 F. Supp. 3d at 1255-59.

¹⁶⁶ *Id.* at 1255, 1259-60.

¹⁶⁷ *Id.* at 1255, 1260-61.

¹⁶⁸ *Id.* at 1256-61.

¹⁶⁹ *See id.* at 1256-58 (discussing *PPL Montana, LLC v. Montana*, 565 U.S. 576 (2012)).

¹⁷⁰ *PPL Montana, LLC v. Montana*, 565 U.S. 576, 603 (2012).

Court never addressed whether a federal PTD obligation exists.¹⁷¹ She acknowledged that the U.S. Supreme Court has partially treated the crucial *Illinois Central* decision as an interpretation of Illinois law.¹⁷² However, she interpreted the Court's decision in *Idaho v. Coeur d'Alene Tribe of Idaho*¹⁷³ to treat the *Illinois Central* decision and PTD as a more general "American [PTD], which has diverged from the English public trust doctrine in important ways."¹⁷⁴ If there is an "American [PTD]," Judge Aiken reasoned that "[t]here is no reason why the central tenets of *Illinois Central* should apply to another state, but not to the federal government."¹⁷⁵

Judge Aiken explicitly disagreed with the *Alec L.* decision¹⁷⁶ by the federal district court for the District of Columbia, which held that the PTD did not apply to the federal government.¹⁷⁷ The *Alec L.* case was "substantially similar" to the *Juliana* action, with youth plaintiffs suing a number of federal agency heads seeking declaratory and injunctive relief for their failure to reduce GHGs and to meet their public trust obligations to protect the Earth's atmosphere.¹⁷⁸ The *Alec L.* decision dismissed the suit with prejudice because it relied on *PPL Montana's* treatment of the PTD as state law as binding even if that statement was

¹⁷¹ *Juliana*, 217 F. Supp. 3d at 1257. *But see* Matthew Schneider, *Where Juliana Went Wrong: Applying the Public Trust Doctrine to Climate Change Adaptation at the State Level*, 41 ENVIRONS ENVTL. L. & POL'Y J. 47, 58 (2017) (disagreeing with Judge Aiken's reasoning that *PPL Montana's* phrase treating the PTD as state law was mere dictum because "lower courts still generally treat it as precedent-setting").

¹⁷² *Juliana*, 217 F. Supp. 3d at 1257.

¹⁷³ 521 U.S. 261 (1997).

¹⁷⁴ *Juliana*, 217 F. Supp. 3d at 1257 (discussing *Coeur d'Alene Tribe*, 521 U.S. at 285-86).

¹⁷⁵ *Id.*

¹⁷⁶ *Alec L. v. Jackson*, 863 F. Supp. 2d 11 (D.D.C. 2012).

¹⁷⁷ *Juliana*, 217 F. Supp. 3d at 1258.

¹⁷⁸ *Compare Id.* at 1233-34 (describing "youth plaintiffs" and their argument that the government defendants' actions promoting fossil fuels caused climate change violating their due process rights and rights under the public trust doctrine), 1258 (stating "*Alec L.* was substantially similar to the instant action: five youth plaintiffs and two environmental advocacy organizations sued a variety of heads of federal agencies, alleging the defendants had 'wasted and failed to preserve and protect the atmosphere Public Trust asset.' 863 F.Supp.2d at 12.") with *Alec L.*, 863 F. Supp. 2d at 12 ("Five young citizens and two organizations, Kids vs. Global Warming and Wildearth Guardians, bring this action seeking declaratory and injunctive relief for Defendants' alleged failure to reduce greenhouse gas emissions. The Plaintiffs allege that Defendants have violated their fiduciary duties to preserve and protect the atmosphere as a commonly shared public trust resource under the public trust doctrine.") (footnotes omitted).

technically dictum.¹⁷⁹ In the alternative, the *Alec L.* court concluded that the PTD should be treated as state law in light of the doctrine's historical development even if the *PPL Montana* decision was not binding on lower courts.¹⁸⁰

Furthermore, the *Alec L.* decision concluded that the Clean Air Act had displaced the PTD relying upon the displacement analysis in the *AEP* decision, which held that the Act displaced federal common law public nuisance claims.¹⁸¹ The court concluded that the *AEP* decision had clearly intended to bar "any" federal common law claims and not just public nuisance claims.¹⁸² Additionally, the *Alec L.* decision interpreted the *AEP* decision as determining that federal judges may not set limits on GHGs and CO₂ when Congress has delegated those policy decisions to a federal agency via statute.¹⁸³ Thus, the district court in *Alec L.* concluded that decisions regarding reductions in GHGs and CO₂ emissions "are determinations that are best left to the federal agencies that are better equipped, and that have a Congressional mandate, to serve as the 'primary regulator of greenhouse gas emissions.'"¹⁸⁴ Accordingly, the *Alec L.* court found that "even if Plaintiffs allege a public trust claim that could be construed as sounding in federal common law, the court [found] that that cause of action [was] displaced by the Clean Air Act."¹⁸⁵

Similar to the *Alec L.* decision, the Court of Appeals of New Mexico in *Sanders-Reed ex rel. Sanders-Reed v. Martinez* concluded that the New Mexico Air Quality Control Act had incorporated and displaced any public trust obligations by the State for the protection of New Mexico's natural resources. Consequently, the *Sanders-Reed* court held that the New Mexico law precluded a separate common law cause of action under the state PTD.¹⁸⁶ The state law provided for judicial review of decisions of the New Mexico Environmental Improvement Board, including those related to regulation of GHGs.¹⁸⁷ Furthermore, under separation-of-powers principles, the Court of Appeals of New

¹⁷⁹ *Alec L.*, 863 F. Supp. 2d at 15. The *Alec L.* decision did not address either standing or the political question doctrine. *See id.* at 12-17.

¹⁸⁰ *See id.* at 15.

¹⁸¹ *Id.* at 15-16 (discussing *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 425 (2011)).

¹⁸² *Id.* at 16.

¹⁸³ *Id.* at 16-17.

¹⁸⁴ *Id.* at 17 (quoting *Am. Elec. Power Co.*, 564 U.S. at 428).

¹⁸⁵ *Id.*

¹⁸⁶ *Sanders-Reed ex rel. Sanders-Reed v. Martinez*, 350 P.3d 1221, 1225-27 (N.M. Ct. App. 2015).

¹⁸⁷ *Id.* at 1226.

Mexico concluded that administrative agencies were the proper branch to decide policy questions relating to regulation of GHGs and climate change rather than courts.¹⁸⁸ Moreover, the Court of Appeals held that courts lacked the technical expertise possessed by environmental agencies.¹⁸⁹ Accordingly, the New Mexico Court of Appeals affirmed a district court order granting the State's motion for summary judgment against the plaintiffs' complaint seeking a declaratory judgment that the common law PTD imposed a duty on the State to regulate GHG emissions in New Mexico.¹⁹⁰

In *Juliana*, Judge Aiken disagreed with the reasoning of the *Alec L.* court that the *PPL Montana's* phrase treating the PTD as state law was binding, because she reasoned that the Supreme Court's language was merely dicta.¹⁹¹ She instead relied on two district court decisions from the 1980s that had found that the federal government's acquisition of submerged land beneath navigable rivers or tidelands was not dependent on state law public trust obligations, but was instead subject to federal public trust limitations.¹⁹² She distinguished the *AEP* decision, which held that federal common law public nuisance claims were displaced by the Clean Air Act, because unlike the nuisance claims in *AEP*, the public trust claims "concern[ed] inherent attributes of sovereignty" that could not be legislated away. Therefore, a displacement analysis simply did not apply.¹⁹³ In her earlier discussion of whether the plaintiffs' claims raised a nonjusticiable political question, she had rejected the view that the dispute would require a federal court to dictate to federal agencies how to reduce GHG and CO² emissions.¹⁹⁴

Although it was an unpublished per curiam memorandum decision, it is notable that the D.C. Circuit's decision in *Alec L.* affirming the district court's decision in the same case was written by three noted appellate judges.¹⁹⁵ The first member of the panel was Chief Judge Merrick B. Garland, a distinguished jurist who was unsuccessfully nominated by President Obama to serve as a Justice on the Supreme

¹⁸⁸ See *id.* at 1227.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 1222, 1227.

¹⁹¹ See *Juliana v. United States*, 217 F. Supp. 3d 1224, 1258 (D. Or. 2016).

¹⁹² *Id.* at 1258-59 (first citing *United States v. 1.58 Acres of Land*, 523 F. Supp. 120, 124 (D. Mass. 1981); and then citing *City of Alameda v. Todd Shipyards Corp.*, 635 F. Supp. 1447, 1450 (N.D. Cal. 1986)).

¹⁹³ *Id.* at 1259-60.

¹⁹⁴ *Id.* at 1239, 1260.

¹⁹⁵ See *Alex L. ex rel. Loorz v. McCarthy*, 561 Fed. App'x. 7, 7 (D.C. Cir. 2014).

Court.¹⁹⁶ The second judge was Judge Sri Srinivasan, who was one of three judges interviewed by President Obama for the Supreme Court nomination that went to his colleague, Chief Judge Garland.¹⁹⁷ The third judge, Senior Judge Douglas H. Ginsburg, served as Chief Judge of the D.C. Circuit from 2001 until 2008 and was a former Professor of Law at the Harvard Law School.¹⁹⁸ Judge Ginsburg was unsuccessfully nominated by President Reagan in 1987 to serve as a Justice on the Supreme Court.¹⁹⁹ It is possible that these three distinguished judges misinterpreted the *PPL Montana* decision as Judge Aiken argued.²⁰⁰ However, their differing interpretation of the *PPL Montana* decision raises doubts whether the public trust portion of the *Juliana* decision will be affirmed by the Ninth Circuit or by the U.S. Supreme Court.²⁰¹

F. Judge Aiken's Conclusions and the Future of the Case

The defendants argued that even if the PTD applies to the federal government it is unenforceable either because no cause of action exists or any action to enforce the doctrine is displaced by federal statutes such as the Clean Air Act.²⁰² Judge Aiken's *Juliana* decision rejected the defendants' non-enforcement arguments by "locat[ing] the source

¹⁹⁶ Sarah Lyall, *Liberals Are Still Angry, but Merrick Garland Has Reached Acceptance*, N.Y. TIMES (Feb. 19, 2017), <https://www.nytimes.com/2017/02/19/us/politics/merrick-garland-supreme-court-obama-nominee.html> (discussing Chief Judge Garland's unsuccessful nomination to the Supreme Court and his return to the D.C. Circuit).

¹⁹⁷ Karthick Ramakrishnan & Sono Shah, *Three Reasons Why Nominating Sri Srinivasan for the Supreme Court Could Change U.S. Elections*, WASH. POST (Mar. 14, 2016), <https://www.washingtonpost.com/news/monkey-cage/wp/2016/03/14/three-reasons-that-nominating-sri-srinivasan-for-the-supreme-court-could-change-u-s-elections/> (arguing that Judge Srinivasan should receive nomination to serve on Supreme Court).

¹⁹⁸ Douglas H. Ginsburg, U.S. CT. APPEALS FOR D.C. CIR., <https://www.cadc.uscourts.gov/internet/home.nsf/Content/VL+-+Judges+-+DHG> (last visited Nov. 1, 2018); see Steven V. Roberts, *Ginsburg Withdraws Name As Supreme Court Nominee, Citing Marijuana "Clamor,"* N.Y. TIMES (Nov. 8, 1987), <http://www.nytimes.com/1987/11/08/us/ginsburg-withdraws-name-as-supreme-court-nominee-citing-marijuana-clamor.html?pagewanted=all>.

¹⁹⁹ Roberts, *supra* note 198.

²⁰⁰ See *Juliana v. United States*, 217 F. Supp. 3d 1224, 1258 (D. Or. 2016).

²⁰¹ Compare *id.* at 1257-58 (arguing the Court's *PPL Montana* decision phrase treating the PTD as state law was mere dictum), with Alec L. *ex rel.* Looz v. McCarthy, 561 F. App'x. 7, 8 (D.C. Cir. 2014) (interpreting the *PPL Montana*'s phrase treating the PTD as state law as binding law that rejected any federal public trust doctrine).

²⁰² *Juliana*, 217 F. Supp. 3d at 1259-60.

of plaintiffs' public trust claims" and concluding that the "plaintiffs' public trust rights both predated the Constitution and are secured by it."²⁰³ She observed that the PTD "defines inherent aspects of sovereignty" that predate the Constitution just as the founders of the United States relied upon Social Contract theory for the propositions that "people possess certain inalienable [r]ights and that governments were established by consent of the governed for the purpose of securing those rights."²⁰⁴ Judge Aiken explained that "the Declaration of Independence and the Constitution did not *create* the rights to life, liberty, or the pursuit of happiness — the documents are, instead, vehicles for protecting and promoting those already-existing rights."²⁰⁵ Citing *Illinois Central*, she reasoned that that the PTD was similar to "police power" in that state and federal governments "possess certain powers that permit them to safeguard the rights of the people; . . . powers [that] are inherent in the authority to govern and cannot be sold or bargained away."²⁰⁶

However, even though the PTD predates the U.S. Constitution, Judge Aiken determined that the enforcement of the doctrine was based upon the Constitution's substantive due process rights.²⁰⁷ She relied upon one of *Glucksberg's* progeny cases for the proposition that "the Due Process Clause's substantive component safeguards fundamental rights that are 'implicit in the concept of ordered liberty' or 'deeply rooted in this Nation's history and tradition.'"²⁰⁸ Judge Aiken reasoned that the "Plaintiffs' public trust rights, related as they are to inherent aspects of sovereignty and the consent of the governed from which the United States' authority derives, satisfy both tests."²⁰⁹ Because the public trust is not enumerated in the Constitution, she saw the PTD as deriving from the Constitution's Ninth Amendment.²¹⁰

²⁰³ *Id.* at 1260.

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 1260-61.

²⁰⁶ *See id.* at 1261.

²⁰⁷ *Id.*

²⁰⁸ *Id.* (citing *McDonald v. City of Chicago*, 561 U.S. 742, 767 (2010) (citations, quotations, and emphasis omitted)). The Supreme Court's *McDonald* opinion quoted *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) for the principle that fundamental due process must be based on rights "deeply rooted in this Nation's history and tradition." *McDonald v. City of Chicago*, 561 U.S. 742, 767 (2010).

²⁰⁹ *Juliana*, 217 F. Supp. 3d at 1261.

²¹⁰ *Id.*; *see* U.S. CONST. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.").

However, Judge Aiken grounded the enforcement of the PTD directly in the Due Process Clause of the Constitution's Fifth Amendment.²¹¹

In *Juliana*, Judge Aiken concluded by acknowledging that the defendants were "correct that plaintiffs likely could not obtain the relief they seek through citizen suits brought under the Clean Air Act, the Clean Water Act, or other environmental laws."²¹² However, she reasoned that existing limitations on statutory remedies did not apply because the threat of "imminent" catastrophic climate change violated the plaintiffs' fundamental due process rights to life and liberty.²¹³ Judge Aiken did not address why she presumed federal judges were more competent than members of Congress or the President to address climate change issues.²¹⁴ By contrast, relying in part on *Glucksberg's* history and tradition standard, U.S. District Judge Nancy G. Edmunds of the Eastern District of Michigan in her 2017 decision for *Lake v. City of Southgate*²¹⁵ concluded that there was no Supreme Court or Sixth Circuit precedent establishing a fundamental liberty interest and constitutional right to her health or freedom from bodily harm from environmental harms, and, therefore, concluded that there was no substantive due process right to health or freedom from bodily harm as defined in *Glucksberg*.²¹⁶ Judge Edmunds was aware of the recent *Juliana* decision because she cited the case, but implicitly disagreed with that decision by concluding that the *City of Southgate*

²¹¹ *Juliana*, 217 F. Supp. 3d at 1261. A recent commentator has argued that courts should recognize the public's interest in the PTD as a due process right under the U.S. Constitution because it is a "protected property interest," fits within the police power, and is consistent with precedent. O'Loughlin, *supra* note 158, at 1340-53. His argument assumes the "PTD's longstanding tradition." *Id.* at 1339-41, 1344, 1351-53. But Judge Aiken's approach of applying the PTD to climate change is arguably a radical change. *See Juliana*, 217 F. Supp. 3d at 1249-50 (implicitly acknowledging that plaintiffs' due process claims were viable under *Obergefell's* new expansive reading of the Due Process Clause, but not under the prior history and tradition standard of interpretation).

²¹² *Juliana*, 217 F. Supp. 3d at 1261.

²¹³ *See id.* at 1261, 1267, 1272 (assuming that plaintiffs' allegations of imminent harm are true at this stage of litigation).

²¹⁴ *See id.* at 1249-50 (assuming judges have a right under the due process clause to protect fundamental rights even if the legislature disagrees).

²¹⁵ No. 16-10251, 2017 WL 767879 (E.D. Mich. Feb. 28, 2017).

²¹⁶ *Id.* at *3-4 & *4 n.4 (citing *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997)). Judge Aiken might distinguish public trust claims from a constitutional right to health or freedom from bodily harm from environmental harms because of the long history of PTD predating the U.S. Constitution. *See Juliana*, 217 F. Supp. 3d at 1260-61. Part III of this Article will address why *Glucksberg* precludes climate change challenges under a due process fundamental rights theory. *See infra* Part III.

plaintiffs must rely upon statutory protections rather than new found constitutional “rights.”²¹⁷

Judge Aiken rejected the defendants’ argument that the case should be dismissed because it was “unprecedented” and “groundbreaking.”²¹⁸ Presumably, she would respond in the same way to Judge Edmunds’ *City of Southgate* decision rejecting a constitutional right to health or freedom from bodily harm stemming from environmental harms because it was unprecedented.²¹⁹ Judge Aiken opined in dicta that “[f]ederal courts too often have been cautious and overly deferential in the arena of environmental law, and the world has suffered for it.”²²⁰ Her *Juliana* decision concluded, “[e]ven when a case implicates hotly contested political issues, the judiciary must not shrink from its role as a coequal branch of government.”²²¹

However, the *Alec L.* decision, the Alaska Supreme Court’s *Kanuk* decision, and the New Mexico Court of Appeals’ decision in *Sanders-Reed ex rel. Sanders-Reed* concluded that administrative agencies and legislatures were better suited than the judiciary to addressing the impacts of GHGs and CO₂.²²² Therefore, these cases call into question the *Juliana* court’s view that courts must solve the problems relating to climate change.²²³ Similarly, Judge Alsup dismissed a public nuisance suit against major oil companies because he concluded that Congress and the Executive Branch should decide climate change policy questions instead of federal courts because of the significant foreign affairs and international relations implications of energy policy.²²⁴

Professors Blumm and Wood, who are strong supporters of PTD suits challenging the federal government for failing to prevent climate change, argue that Judge Aiken’s *Juliana* decision will enable her to put the federal government and the fossil fuel industry on trial for causing “imminent” catastrophic climate change.²²⁵ Days before President Obama left office, the federal defendants submitted an answer to the complaint that admitted that fossil fuels contribute to

²¹⁷ See *City of Southgate*, 2017 WL 767879 at *3-4 & *4 n.4.

²¹⁸ *Juliana*, 217 F. Supp. 3d at 1262.

²¹⁹ *City of Southgate*, 2017 WL 767879 at *3-4.

²²⁰ *Juliana*, 217 F. Supp. 3d at 1262.

²²¹ *Id.* at 1263.

²²² *Alec L. v. Jackson*, 863 F. Supp. 2d 11, 16-17 (D.D.C. 2012); *Kanuk ex rel. Kanuk v. State, Dep’t of Nat. Res.*, 335 P.3d 1088, 1097-99 (Alaska 2014); *Sanders-Reed ex rel. Sanders-Reed v. Martinez*, 350 P.3d 1221, 1226-27 (N.M. Ct. App. 2015).

²²³ See *supra* Parts I.B & I.E; *infra* Conclusion.

²²⁴ Order Granting Motion to Dismiss Amended Complaints at 12, *City of Oakland vs. BP PLC*, 2018 WL 3609055 No. C17-06011 WHA, (N.D. Cal. July 27, 2018).

²²⁵ Blumm & Wood, *supra* note 58, at 54-55.

potentially dangerous CO₂ emissions.²²⁶ Professors Blumm and Wood contend that these admissions will make it difficult for the Trump Administration to contest the plaintiffs' climate change claims at trial.²²⁷ Accordingly, the Trump Administration may need to wait until an appeal to the Ninth Circuit or to the U.S. Supreme Court to a panel of appellate judges like in the *Alec L.* case, the *Kanuk* case, or the *Sanders-Reed* case that are more skeptical of public trust climate change challenges against the federal government or state governments than Judge Aiken.²²⁸

G. *Trump Administration Seeks Mandamus and Stay in Ninth Circuit*

After Judge Aiken published her *Juliana* decision, the Trump Administration pursued lengthy and complicated litigation in the Ninth Circuit and Supreme Court to dismiss the case, or at least to stay the discovery and scheduled trial, but those efforts have so far been unsuccessful.²²⁹ The Ninth Circuit and Supreme Court appeared to be reluctant to stop all discovery or prevent the trial altogether before the plaintiffs can have an opportunity to present their case.²³⁰ However, both the Ninth Circuit and Supreme Court have separately suggested, but not required, that the trial court narrow the scope of the discovery and scheduled trial.²³¹

On June 9, 2017, one day after Judge Aiken denied the U.S. Government's request for an interlocutory appeal,²³² the U.S. Department of Justice ("DOJ") filed a Ninth Circuit Petition for a Writ of Mandamus and a Request to Stay the proceedings in the *Juliana* case on behalf of the U.S. Government.²³³ The DOJ sought to dismiss the case, and to stay the District Court's broad discovery orders that

²²⁶ *Id.* at 58.

²²⁷ *Id.* Professors Blumm and Wood state, "The Trump Administration lawyers could offer an amended answer disputing the climate science but, as Professor Michael Burger has observed, 'The last thing a Trump Administration [D]epartment of [J]ustice actually wants is to have the science of climate change go on trial.'" *Id.* at 58 (quoting Megan Darby, *Obama Ties Trump Admin into Accepting CO2 Dangers*, CLIMATE CHANGE NEWS (Jan. 19, 2017, 4:04 PM), <http://www.climatechangenews.com/2017/01/19/obama-ties-trump-admin-into-accepting-co2-dangers>).

²²⁸ See *supra* Parts I.B & I.E; *infra* Conclusion.

²²⁹ See *infra* Part I.G.

²³⁰ *Id.*

²³¹ *Id.*

²³² Order Denying Interlocutory Appeal at 2, *Juliana v. United States*, 217 F. Supp. 3d 1224 (D. Or. 2016) (No. 6:15-cv-01517-TC-AA).

²³³ Petition for Writ of Mandamus at 1-2, 43, *Juliana v. United States*, 217 F. Supp. 3d 1224 (D. Or. 2016) (No. 6:15-cv-01517-TC-AA).

require the Government to provide a wide range of documents concerning government energy policy decisions for the past fifty years.²³⁴ In the Writ Petition, the DOJ brought similar challenges to the suit as those unsuccessfully discussed above in Part I, except the Writ did not address the political question doctrine.²³⁵ The DOJ argued that the plaintiffs lacked standing because their “alleged injuries were widely shared by every member of Society.”²³⁶ Furthermore, the DOJ argued that the *Juliana* decision’s expansive interpretation of the PTD was wrong in light of the reasoning of the *Alec L.* decision, which concluded that there was either no federal PTD because the public trust doctrine is a state and not a federal doctrine, or that the Clean Air Act displaced any federal trust obligations.²³⁷

Additionally, the DOJ argued that there was no history, tradition or precedent for a due process right to a stable climate system.²³⁸ “No court ha[d] ever recognized an implied Fifth Amendment cause of action directly against the federal government itself that would allow plaintiffs to seek, through injunctive and declaratory relief, a fundamental re-ordering of national priorities to address an environmental problem.”²³⁹ Judge Aiken would likely acknowledge that her due process analysis was unprecedented, but would reason that a groundbreaking approach was needed to address what she saw as the threat of “imminent” catastrophic climate change.²⁴⁰ The DOJ criticized the district court’s constitutional rights approach to climate change policies for usurping the authority of Congress, the President, and federal agencies “to determine national policy regarding energy development, use of public lands, and environmental protection.”²⁴¹ Thus, the due process analysis in this case is interrelated to the broader question addressed in Parts I and II of whether judges or the political branches should make energy and environmental policy choices.²⁴²

²³⁴ *Id.* at 1.

²³⁵ *Id.* at 10-31; *supra* Parts I.C-E.

²³⁶ Petition for Writ of Mandamus, *supra* note 233, at 10; *see id.* at 11-21 (arguing plaintiffs failed to prove standing, injury, causation, and redressability).

²³⁷ *Id.* at 28-31.

²³⁸ *Id.* at 22-28.

²³⁹ *Id.* at 27.

²⁴⁰ *See Juliana*, 217 F. Supp. 3d at 1233-34, 1250-52, 1261-63, 1267, 1272 (assuming that plaintiffs’ allegations of imminent harm are true at this stage of litigation).

²⁴¹ Petition for Writ of Mandamus, *supra* note 233, at 31-32.

²⁴² *See supra* Parts I.B, I.D & I.E; *infra* Part II.

The Government argued that a writ of mandamus and stay was necessary to prevent “onerous and disruptive” discovery seeking huge numbers of documents compiled over decades, and to avoid an infringement upon the President’s confidential communications with both federal agencies and foreign governments.²⁴³ The DOJ relied on Judge Aiken’s own admission that the relief sought in the *Juliana* case was “unprecedented” to argue that immediate appellate review was essential.²⁴⁴ Furthermore, the Government argued that a stay of proceedings would not harm the plaintiffs because any further emissions during the duration of the stay would be small compared to “the cumulative effects of CO₂ emissions from every source in the world over decades.”²⁴⁵

After the Government filed its petition for a writ of mandamus and stay in the Ninth Circuit, there were some developments in the case. On June 28, 2017, Magistrate Judge Coffin allowed the industry intervenors to withdraw from the case over the plaintiffs’ objections.²⁴⁶ Additionally, he scheduled a February 2018 trial date,²⁴⁷ which was subsequently postponed until October 2018.²⁴⁸ On July 25, 2017, a three-judge panel of the Ninth Circuit issued a temporary stay order.²⁴⁹ The Ninth Circuit’s July 25th order also announced, “[t]he petition for a writ of mandamus and all other pending motions will be addressed by separate order.”²⁵⁰

On December 11, 2017, the Ninth Circuit held oral argument on whether to stay the case and the trial date set by Judge Coffin.²⁵¹ The three-judge panel hearing the case consisted of Chief Judge Sidney

²⁴³ Petition for Writ of Mandamus, *supra* note 233, at 32-37, 39.

²⁴⁴ *Id.* at 37-38.

²⁴⁵ *Id.* at 39.

²⁴⁶ *9th Circuit Temporarily Pauses Youth Climate Trust Suit*, INSIDEEPA.COM (July 26, 2017), <https://insideepa.com/daily-feed/9th-circuit-temporarily-pauses-youth-climate-trust-suit>.

²⁴⁷ *Id.*

²⁴⁸ *Court Slates October Trial Date for Youth Climate Suit*, INSIDEEPA.COM (Apr. 13, 2018), <https://insideepa.com/daily-feed/court-slates-october-trial-date-youth-climate-suit>; Kartikay Mehrotra, *Justice Department Says Trump Should Be Immune from Teens’ Climate Lawsuit*, BLOOMBERG (May 10, 2018, 1:32 PM), <https://www.bloomberg.com/news/articles/2018-05-10/u-s-says-suing-teens-can-t-force-trump-to-fix-climate-change>.

²⁴⁹ “The Court stays district court proceedings, temporarily, pending further order from this court.” Temporary Stay Order at 1, *United States v. U.S. District Court for the Eastern District of Oregon*, No. 17-71692 (D. Or. July 25, 2017).

²⁵⁰ *Id.*

²⁵¹ Abby Smith, *Kids’ Lawsuit over Climate Change Faces Big Test in Federal Court*, BLOOMBERG BNA (Dec. 8, 2017), <https://www.bna.com/kids-lawsuit-climate-n73014472918/>.

Thomas, an appointee of President Clinton; Judge Marsha Berzon, also appointed by President Clinton; and Judge Alex Kozinski, an appointee of President Reagan.²⁵² Commentators interpreted the tenor of questions during the oral argument to suggest that Judges Berzon and Thomas would reject the DOJ's request to dismiss the case, although they might vote to narrow the scope of the case.²⁵³ By contrast, Judge Kozinski's questions appeared more sympathetic to the DOJ's position on the ultimate resolution of the case against the plaintiffs, but it was not clear that he is willing to grant the mandamus petition because it is an extraordinary remedy.²⁵⁴ On December 18, 2017, Judge Kozinski announced his immediate retirement in the wake of alleged sexual misconduct.²⁵⁵

²⁵² *Id.*

²⁵³ See Joyce E. Cutler, *Appeals Judges Hear Effort to Knock out Children's Climate Lawsuit*, BLOOMBERG ENV'T (Dec. 11, 2017, 3:28 PM), <https://bna.news.bna.com/environment-and-energy/appeals-judges-hear-effort-to-knock-out-childrens-climate-lawsuit> (suggesting that Chief Judge Thomas and Judge Berzon are likely to deny the U.S. Government's mandamus motion to block the *Juliana* trial); Dawn Reeves, *9th Circuit Judges Appear Likely to Let Novel Youth Climate Case Proceed*, INSIDEEPA.COM (Dec. 11, 2017), <https://insideepa.com/daily-news/9th-circuit-judges-appear-likely-to-let-novel-youth-climate-case-proceed> [hereinafter *9th Circuit Judges*] (suggesting that Chief Judge Thomas and Judge Berzon might narrow the scope of the *Juliana* case, but are unlikely to stop the trial); Abby Smith, *Judge from Kids' Climate Suit Retires amid Harassment Claims*, BLOOMBERG ENV'T (Dec. 22, 2017), <https://news.bloombergenvironment.com/environment-and-energy/judge-from-kids-climate-suit-retires-amid-harassment-claims?context=article-related> [hereinafter *Judge from Kids' Climate Suit*] (suggesting that Chief Judge Thomas and Judge Berzon are likely to rule in favor of the plaintiffs).

²⁵⁴ See *Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 34 (1980) (per curiam) (“[T]he remedy of mandamus is a drastic one, to be invoked only in extraordinary situations.”); R. Henry Weaver & Douglas A. Kysar, *Courting Disaster: Climate Change and the Adjudication of Catastrophe*, 93 NOTRE DAME L. REV. 295, 348 (2017) (observing that U.S. Government faces an uphill battle in winning mandamus petition from the Ninth Circuit in the *Juliana* case because such writs are difficult to obtain, but acknowledging the possibility that the court of appeals could grant the request); Reeves, *9th Circuit Judges*, supra note 253 (suggesting Judge Kozinski would ultimately deny the U.S. Government's mandamus request because it is an extraordinary remedy); see also Smith, *Judge from Kids' Climate Suit*, supra note 253 (suggesting that Judge Kozinski was skeptical of plaintiffs' claims, but reporting that Professor Michael Gerrard was uncertain whether Kozinski would have voted for the plaintiffs or Government).

²⁵⁵ See Debra Cassens Weiss, *Kozinski Announces His Immediate Retirement After More Women Accuse Him of Sexual Misconduct*, ABA J. (Dec. 18, 2017, 10:19 AM), http://www.abajournal.com/news/article/kozinski_announces_his_immediate_retirement_after_more_women_accuse_him_of_sexual_misconduct. Chief Justice Roberts referred Chief Judge Thomas's complaint regarding those charges to the Second Circuit Court of Appeals for review and disposition. *Id.* In February 2018, the Second Circuit's judicial council

On March 7, 2018, the Ninth Circuit denied the U.S. Government's Petition for a Writ of Mandamus without prejudice.²⁵⁶ The Ninth Circuit concluded that the U.S. Government's petition was premature, that the Government had failed to demonstrate the "extraordinary circumstances" required for mandamus relief when a party asks an appellate court to review a case before the trial court proceedings have concluded, and that the District Court could remedy the Government's concerns about overly broad discovery requests by the plaintiffs.²⁵⁷ Accordingly, the district court could proceed to hold a trial on the plaintiffs' claims, but the Ninth Circuit perhaps suggested that the district court should consider narrowing the claims before it.²⁵⁸ As Chief Judge Thomas noted, the court was "mindful that some of the plaintiffs' claims as currently pleaded [were] quite broad, and some of the remedies the plaintiffs seek may not be available as redress."²⁵⁹ The Ninth Circuit further observed, "[c]laims and remedies often are vastly narrowed as litigation proceeds; we have no reason to assume this case will be any different."²⁶⁰

In May 2018, the DOJ filed a Motion for Judgment on the Pleadings with Magistrate Judge Coffin arguing that President Trump was immune from suit in the *Juliana* case because the Constitution's separation of powers doctrine prohibited federal courts from forcing the president into taking action on any policy issue, including climate change.²⁶¹ Specifically, the DOJ contended that long standing precedent forbade federal courts from issuing an injunction against the President of the United States for official acts.²⁶² The federal government's motion sought to block a scheduled October 2018 trial

dismissed the grievance because Kozinski had retired. Joan Biskupic, *Judicial Council Takes No Action Against Former Judge Alex Kozinski*, CNN POL. (Feb. 5, 2018, 6:44 PM), <https://www.cnn.com/2018/02/05/politics/alex-kozinski-sexual-misconduct-case-dropped/index.html>.

²⁵⁶ *In re United States v. U.S. Dist. Court for Dist. of Or.*, 884 F.3d 830, 838 (9th Cir. 2018). Following the retirement of Judge Kozinski, Judge Friedland was randomly drawn to replace him on the panel. Abby Smith & Kartikay Mehrotra, *Youths Defeat Trump's Move to Kill Climate Lawsuit*, BLOOMBERG ENV'T (Mar. 7, 2018, 3:45 PM), <https://bnaenews.bna.com/environment-and-energy/youthsdefeattrumpsmove-to-kill-climate-lawsuit-1>.

²⁵⁷ *In re United States*, 884 F.3d at 838; Smith & Mehrotra, *supra* note 256.

²⁵⁸ *See In re United States*, 884 F.3d at 838; Smith & Mehrotra, *supra* note 256.

²⁵⁹ *In re United States*, 884 F.3d at 837; *see* Smith & Mehrotra, *supra* note 256.

²⁶⁰ *In re United States*, 884 F.3d at 838.

²⁶¹ Defendants' Motion for Judgment on the Pleadings at 7-10, *Juliana v. United States*, 217 F. Supp. 3d 1224 (D. Or. May 9, 2018) (No. 6:15-cv-01517-TC).

²⁶² *Id.* at 7-8.

in Oregon on the merits of the plaintiff's climate change claims.²⁶³ Additionally, the DOJ filed a separate motion for a Protective Order and for a Stay of All Discovery arguing that the Administrative Procedure Act ("APA")²⁶⁴ and constitutional separation of power principles barred all discovery because federal courts are limited to reviewing the record of the applicable agencies rather than creating a new record through discovery requests.²⁶⁵

On May 25, 2018, Magistrate Judge Coffin denied the defendants' motion for a protective order and for a stay of discovery because the court concluded that the Government's claim that the case should be reviewed under the APA was false because "the plaintiffs' complaint [did] not contain an APA claim," and "the defendants [had] no ability to edit the complaint to cobble the claim into one of their choosing to derail discovery."²⁶⁶ He suggested that the DOJ's motion for a protective order and for a stay of discovery was essentially an attempt to re-litigate the Government's failed effort to dismiss the case before Judge Aiken and then the Ninth Circuit.²⁶⁷ Finally, Judge Coffin determined that the Government's separation of powers arguments for denying all discovery were "based on wholly hypothetical scenarios that may implicate matters of privilege during the discovery process."²⁶⁸ Instead, the DOJ should have sought a protective order when the plaintiffs sought specific information that the Government asserted is privileged.²⁶⁹

On July 17, 2018, the Department of Justice filed a motion in the U.S. Supreme Court seeking to stay discovery and halt the trial in the *Juliana* case.²⁷⁰ In an order dated July 30, 2018, the Supreme Court

²⁶³ See *id.* at 5.

²⁶⁴ See 5 U.S.C. § 500 *et seq.* (2018).

²⁶⁵ See Defendants' Motion for a Protective Order and for a Stay of All Discovery at 8-20, *Juliana v. United States*, 217 F. Supp. 3d 1224 (D. Or. May 9, 2018) (No. 6:15-cv-01517-TC); *DOJ Seeks to Avoid Discovery in Youth Climate Case*, INSIDEEPA.COM (May 14, 2018), <https://insideepa.com/daily-feed/doj-seeks-avoid-discovery-youth-climate-case>.

²⁶⁶ Order Denying Defendants' Motions for a Protective Order and Stay at 1-2, *Juliana v. United States*, 217 F. Supp. 3d 1224 (D. Or. May 25, 2018) (No. 6:15-cv-01517-TC).

²⁶⁷ *Id.* at 2.

²⁶⁸ *Id.* at 2-3.

²⁶⁹ *Id.* at 3.

²⁷⁰ Notice of Filing of Application to the Supreme Court for Stay at 10, *Juliana v. United States*, 217 F. Supp. 3d 1224 (D. Or. July 17, 2018) (No. 6:15-cv-01517-TC); Dawn Reeves, *Trump Administration Asks Supreme Court To Stay Youth Climate Case*, INSIDEEPA.COM (July 19, 2018), <https://insideepa.com/daily-news/trump-administration-asks-supreme-court-stay-youth-climate-case>.

denied the Government's motion without prejudice.²⁷¹ Nevertheless, the Court warned the District Court:

The breadth of respondents' claims is striking, however, and the justiciability of those claims presents substantial grounds for difference of opinion. The District Court should take these concerns into account in assessing the burdens of discovery and trial, as well as the desirability of a prompt ruling on the Government's pending dispositive motions.²⁷²

In light of the Supreme Court's order, lawyer Philip Gregory of the Gregory Law Group, who is serving as co-counsel for the youth plaintiffs in the *Juliana* case, thanked the Court for allowing the case to go forward, but also acknowledged that the District Court would need to "promptly address narrowing the claims so that the trial can go forward" as scheduled on October 29, 2018 in Eugene, Oregon.²⁷³

II. A CRITIQUE OF OBERGEFELL'S DUE PROCESS ANALYSIS

Part II will criticize the due process analysis in Justice Kennedy's *Obergefell* decision.²⁷⁴ Accordingly, this article will challenge Judge Aiken's approach to due process in *Juliana* because it relied heavily upon his *Obergefell* decision.²⁷⁵ Justice Kennedy's theory of judges using their "reasoned judgment" to create an evolving number of fundamental due process rights²⁷⁶ is profoundly anti-democratic.²⁷⁷ Judge Sutton has argued that "[a] principled jurisprudence of constitutional evolution turns on evolution in *society's* values, not evolution in *judges'* values."²⁷⁸ He explained, "[t]he theory of the living constitution rests on the premise that every generation has the

²⁷¹ *United States v. U.S. Dist. Court*, No. 18A65, 2018 U.S. LEXIS 4112 (July 30, 2018).

²⁷² *Id.*

²⁷³ *Supreme Court Rejects DOJ Bid to Halt Youths' Climate Case*, INSIDEEPA.COM (July 30, 2018), <https://insideepa.com/daily-feed/supreme-court-rejects-doj-bid-halt-youths-climate-case>.

²⁷⁴ See *infra* Part II.

²⁷⁵ See *Juliana*, 217 F. Supp. 3d at 1249-50 (implicitly acknowledging that plaintiffs' due process claims were viable under *Obergefell's* new expansive reading of the Due Process Clause, but not under the prior history and tradition standard of interpretation); *infra* Part II.

²⁷⁶ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2598 (2015).

²⁷⁷ See generally *Obergefell*, 135 S. Ct. at 2611-12, 2616-23 (Roberts, C.J., dissenting).

²⁷⁸ *DeBoer v. Snyder*, 772 F.3d 388, 416 (6th Cir. 2014), *overruled by Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

right to govern itself. If that premise prevents judges from insisting on principles that society has moved past, so too should it prevent judges from anticipating principles that society has yet to embrace.”²⁷⁹ Like Chief Justice Robert’s dissenting opinion in *Obergefell*,²⁸⁰ Judge Sutton’s opinion in *DeBoer v. Snyder*²⁸¹ argued that courts should defer to state legislatures in deciding whether to accept same sex marriage. His opinion was overruled by *Obergefell*.²⁸²

Judge Sutton warned that the judicial creation of a constitutional right to same sex marriage would open the door to other groups demanding constitutional rights in other areas. He reasoned that “[t]he more the Court innovates under the Constitution, the more plausible it is for the Court to do still more — and the more plausible it is for other advocates on behalf of other issues to ask the Court to innovate still more.”²⁸³ Judge Sutton cautioned that the expansion of constitutional rights would make judges more like legislators and, as a result, intensify battles over the confirmation of judges.²⁸⁴ Judge Aiken’s use of *Obergefell*’s expansive “reasoned judgment” model²⁸⁵ of establishing fundamental constitutional rights shows that Judge Sutton was right that a decision establishing a constitutional right to same sex marriage would lead advocates to seek the expansion of constitutional rights in other areas.²⁸⁶

However, a decision establishing a constitutional right to same sex marriage through a rational basis test under the Equal Protection Clause would have posed less dangers of future judicial law-making than Justice Kennedy’s “reasoned judgment” due process analysis.²⁸⁷ Judge Posner, in his Seventh Circuit decision of *Baskin v. Bogan*, invalidated two state statutes defining marriage as exclusively heterosexual by using a rational basis analysis under the Equal Protection Clause while deliberately avoiding the issue of whether such marriages are a fundamental right under the Due Process

²⁷⁹ *Id.*

²⁸⁰ See generally *Obergefell*, 135 S. Ct. at 2611-12, 2616-23 (Roberts, C.J., dissenting).

²⁸¹ See *DeBoer*, 772 F.3d at 416-18.

²⁸² *Id.*

²⁸³ *Id.* at 418.

²⁸⁴ *Id.*

²⁸⁵ See *Juliana v. United States*, 217 F. Supp. 3d 1224, 1249-50 (D. Or. 2016) (quoting *Obergefell*, 135 S. Ct. at 2598 (majority opinion)).

²⁸⁶ *DeBoer*, 772 F.3d at 418.

²⁸⁷ See *Juliana*, 217 F. Supp. 3d at 1249-50 (quoting *Obergefell v. Hodges*, 135 S. Ct. 2584, 2598 (2015)).

Clause.²⁸⁸ Judge Posner concluded that there was no rational or reasonable basis for Indiana and Wisconsin to forbid same-sex marriage based upon tradition, when there was no proof that allowing same-sex marriage would change the marriage decisions of heterosexual persons.²⁸⁹ Because he concluded that discrimination against same sex marriage was irrational and invalid under the Equal Protection Clause, Judge Posner determined that he could avoid the issue of whether same-sex marriage is a fundamental right under the Due Process Clause.²⁹⁰

Judge Aiken in *Juliana* implicitly acknowledged that she could not have used a rational basis analysis under the Equal Protection Clause to establish a new constitutional right to a stable climate system.²⁹¹ She conceded that present environmental and energy statutes and regulations regulating climate change are rational and only fail if they are subjected to strict scrutiny under Justice Kennedy's evolving due process approach in *Obergefell*.²⁹² Judge Aiken accepted that it was clear and undisputed that the government's actions approving various types of fossil fuel extraction and burning would pass rational basis review.²⁹³ Accordingly, it would have been impossible for Judge Aiken in *Juliana* to apply a rational basis analysis under the Equal Protection Clause to establish a new constitutional right to a stable climate system.²⁹⁴

²⁸⁸ See, e.g., *Baskin v. Bogan*, 766 F.3d 648, 654-57, 671-72 (7th Cir. 2014); *Lamparello*, *supra* note 10, at 59-60; see also *Obergefell v. Hodges*, 135 S. Ct. 2584, 2623 (2015) (Roberts, C.J., dissenting) (arguing Justice Kennedy's majority opinion in *Obergefell* failed to use the modern Equal Protection Clause's means-end methodology in favor of a vague argument that there is "synergy" between that Clause and the Due Process Clause).

²⁸⁹ See *Baskin*, 766 F.3d at 654-72. Judge Sutton in *DeBoer* disagreed that rational basis analysis under the Equal Protection Clause necessitated the invalidation of bans on same-sex marriage because he reasoned that a state could distinguish between heterosexual couples who are potentially capable of sexual procreation from same sex couples who need assisted reproduction to have children, and because he gave more deference to the traditional definition of marriage as being heterosexual in nature, although he acknowledged societal costs to same sex couples and their children. *Cf. DeBoer*, 772 F.3d at 404-08. Whether Judge Posner or Judge Sutton was correct in reaching different conclusions about whether bans on same-sex marriage are valid under rational basis review is beyond the scope of this article.

²⁹⁰ *Baskin*, 766 F.3d at 656-57.

²⁹¹ See *Juliana*, 217 F. Supp. 3d at 1249-50 (discussing *Obergefell*, 135 S. Ct. at 2598).

²⁹² *Id.* at 1248-50.

²⁹³ *Id.* at 1248-49.

²⁹⁴ See *id.* at 1249-50.

Another possible way to cabin the *Obergefell* decision is Professor Kenji Yoshino's argument that Justice Kennedy's evolving conception of due process should be interpreted as a vision of liberty that he calls "antibsubordination liberty" that protects "historically subordinated groups."²⁹⁵ While racism or sexism may in some cases exacerbate the impacts of climate change,²⁹⁶ the phenomenon of climate change generally affects the entire U.S. population.²⁹⁷ Poor people may be affected more than others depending upon their location and their means to adapt to climate change.²⁹⁸ By contrast, gay individuals were subject to directed prejudice by both public officials and some of their fellow citizens in the enforcement of antisodomy laws that much more easily qualifies as illegal discrimination under Yoshino's "antibsubordination liberty" interpretation of fundamental rights under the Due Process Clause.²⁹⁹ Under both the Equal Protection Clause and Professor Yoshino's "antibsubordination liberty" due process analysis, courts should defer to the political branches in addressing the impacts of climate change on the poor and minority groups unless clear examples of intentional bias can be proven.³⁰⁰

III. ALTERNATIVES TO ADDRESSING CLIMATE CHANGE WITHOUT JUDICIAL INTERVENTION

Some commentators believe that the Earth is approaching an "imminent" catastrophic tipping point where it will impossible to stop a runaway train of climate disaster.³⁰¹ They conclude that immediate

²⁹⁵ Yoshino, *supra* note 20, at 174.

²⁹⁶ See, e.g., Cooney, *supra* note 22 (contending climate change disproportionately affects women); Rodriguez, *supra* note 22 (arguing President Trump's withdrawal from the Paris Climate Accord will "especially [harm] people of color, who often unfairly bear the brunt of climate change's effects").

²⁹⁷ Petition for Writ of Mandamus at 10, *Juliana v. United States*, 217 F. Supp. 3d 1224 (D. Or. 2016) (No. 6:15-cv-01517-TC-AA) (arguing impacts of climate change "are widely shared by every member of Society").

²⁹⁸ See generally Goldenberg, *supra* note 23.

²⁹⁹ See *DeBoer v. Snyder*, 772 F.3d 388, 416 (6th Cir. 2014), *overruled by* *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); Yoshino, *supra* note 20, at 174.

³⁰⁰ See *Alexander v. Sandoval*, 532 U.S. 275, 293 (2001) (holding Title VI of the Civil Rights Act does not include private right of action based upon disparate impact, and, therefore, requiring plaintiffs to prove government officials committed intentional acts of racial or other prohibited discrimination).

³⁰¹ See Blumm & Wood, *supra* note 58, at 39-41, 87; Weaver & Kysar, *supra* note 254, at 296-97, 304-12, 355-56; see also Ashley Strickland, *Earth to Warm 2 Degrees Celsius by the End of This Century*, *Studies Say*, CNN (July 31, 2017, 9:37 PM), <http://www.cnn.com/2017/07/31/health/climate-change-two-degrees-studies/index.html>

judicial intervention is essential because the U.S. political system will not respond in time.³⁰² Accordingly, they applaud Judge Aiken's *Juliana* decision.³⁰³ However, commentators also recognize that the *Juliana* decision is a preliminary decision that is a prelude to a lengthy trial on the merits, and that her decision will eventually be scrutinized by the Ninth Circuit Court of Appeals and probably by the U.S. Supreme Court.³⁰⁴

Not all commentators would agree that climate change likely poses "imminent" catastrophic consequences because human society is already adapting to changes and because new technologies can limit the total amount of possible global warming caused by fossil fuels.³⁰⁵ New research by scientists, led by Richard Millar of the University of Oxford, concludes that human beings have approximately twenty years until 2038 to limit global warming to a total increase of 1.5 degrees Celsius, which would avoid further worsening the consequences of climate change.³⁰⁶ If the Earth is not facing an "imminent" climate change catastrophe, there is a strong argument for allowing Congress and the President to resolve the issue rather than

("By the end of the century, the global temperature is likely to rise more than 2 degrees Celsius, or 3.6 degrees Fahrenheit. This rise in temperature is the ominous conclusion reached by two different studies using entirely different methods published in the journal *Nature Climate Change* on [July 31, 2017] . . ."); David Wallace-Wells, *The Uninhabitable Earth*, NYMAG.COM: DAILY INTELLIGENCER (July 9, 2017), <http://nymag.com/daily/intelligencer/2017/07/climate-change-earth-too-hot-for-humans.html> (arguing catastrophic climate change has already begun to affect the Earth and will worsen).

³⁰² Blumm & Wood, *supra* note 58, at 87; Weaver & Kysar, *supra* note 254, at 296-97, 304-12, 354-56.

³⁰³ Blumm & Wood, *supra* note 58, at 84-87; Weaver & Kysar, *supra* note 254, at 356.

³⁰⁴ Blumm & Wood, *supra* note 58, at 62; Weaver & Kysar, *supra* note 254, at 348.

³⁰⁵ See Oren Cass, *Truth Is Just a Detail*, CITY J. (July 11, 2017), <https://www.city-journal.org/html/truth-just-detail-15316.html> (criticizing New York Magazine article predicting catastrophic climate change because it "ignores humanity's capacity for adapting to changes that will occur slowly over decades or centuries"); Andrew Freedman, *No, New York Mag: Climate Change Won't Make The Earth Uninhabitable by 2100*, MASHABLE (July 10, 2017), <http://mashable.com/2017/07/10/new-york-mag-climate-story-inaccurate-doomsday-scenario/#u2OodZ1QXPqI> (criticizing New York Magazine article predicting catastrophic climate change and reporting "climate scientists nearly universally say that there is still time to avert the worst consequences of global warming").

³⁰⁶ Chris Mooney, *New Climate Change Calculations Could Buy the Earth Some Time — If They're Right*, WASH. POST (Sept. 18, 2017), https://www.washingtonpost.com/news/energy-environment/wp/2017/09/18/new-climate-calculations-could-buy-the-earth-some-time-if-theyre-right/?utm_term=.ce38c6bb48ff (Millar's study "finds that we have more than 700 billion tons [of carbon dioxide] left to emit to keep warming within 1.5 degrees Celsius, with a two-thirds probability of success. 'That's about 20 years [from 2017] at present-day emissions.'").

through unprecedented judicial intervention in energy policy issues that is contrary to fundamental separation of powers principles in the U.S. Constitution.³⁰⁷

According to Bloomberg New Energy Finance (“BNEF”), rapid technological developments in solar power, wind power and battery storage will force coal and even natural gas fossil fuel power plants out of business faster than previously forecast.³⁰⁸ As a result of the growth of cheaper renewable energy, the amount of energy from coal burning plants in the U.S. will be roughly half of what it is in 2017 by 2040, despite President Trump’s efforts to promote fossil fuels.³⁰⁹ In Europe, coal power capacity will fall by eighty-seven percent in the same time period.³¹⁰ By 2021, solar power should cost roughly the same as new coal power plants in developing countries such as China and India.³¹¹ In 2016, China installed so many solar panels that it made up close to half of the global market, and the International Energy Agency estimates that 1000 gigawatts of renewables will be installed in the five years from 2018 through 2022.³¹² While President Trump’s policies favoring fossil fuels will have some impact on energy outcomes,³¹³ the surge of cheaper renewable energy and rising investments in renewables suggest that CO² emissions from fossil fuels may decline after 2026, which is a sharp contrast with previous forecasts that predicted rising emissions for decades to come.³¹⁴ Judge Aiken refused to dismiss the *Juliana* case because she found the plaintiffs’ predictions of “imminent” catastrophic climate change plausible at that stage of litigation.³¹⁵ However, their claims may be based on out dated CO² emissions predictions.³¹⁶

³⁰⁷ See generally *Massachusetts v. EPA*, 549 U.S. 497, 535-36 (2007) (Roberts, C.J., dissenting) (arguing that climate change is a global political problem that should be decided by the political branches, and, therefore, is a nonjusticiable general grievance unsuitable for resolution by the federal courts).

³⁰⁸ Shankleman & Warren, *supra* note 29.

³⁰⁹ *Id.*

³¹⁰ *Id.*

³¹¹ *Id.*

³¹² Anna Hirtenstein, *Renewable Energy: Dawn of Solar Age Declared as Sun Power Beats All Others*, BLOOMBERG ENV’T (Oct. 4, 2017, 5:49 AM), <https://bna.news.bna.com/environment-and-energy/dawn-of-solar-age-declared-as-sun-power-beats-all-others>.

³¹³ See Salena Zito, *Don’t Be So Quick to Dismiss Trump’s Coal Mining Initiative*, N.Y. POST (June 17, 2017, 7:31 PM), <http://nypost.com/2017/06/17/dont-be-so-quick-to-dismiss-trumps-coal-mining-initiative/> (arguing President Trump’s favorable policies have helped to revive coal mining industry).

³¹⁴ Shankleman & Warren, *supra* note 29.

³¹⁵ *Juliana v. United States*, 217 F. Supp. 3d 1224, 1244, 1250-52, 1261, 1272 (D. Or. 2016) (assuming that plaintiffs’ allegations of imminent harm are true at this stage

While climate change is an important and concerning issue, federal courts should follow *Glucksberg's* history and tradition standard for deciding which challenges are pursuant to the Due Process Clause.³¹⁷ As Judge Aiken implicitly acknowledged, newly articulated claims to right to a stable climate system could only qualify under *Obergefell's* evolving due process analysis and not under *Glucksberg's* history and tradition standard.³¹⁸ Courts should apply a rational basis review standard, and, as Judge Aiken conceded, federal environmental and energy laws and policies are rational and not a violation of due process rights as they are defined in *Glucksberg*.³¹⁹

The *Alec L.* decision made a strong argument that the PTD has been defined by state decisions, and that it is not clear that a separate federal PTD exists.³²⁰ Furthermore, the *Alec L.* decision reasoned that any possible federal PTD regarding climate change is displaced by the Clean Air Act in the same manner as the analysis in *AEP*.³²¹ Judge Aiken made a plausible counter-argument that the PTD defines the rights of the federal government and not just state governments because it predates and informs the meaning of the Constitution.³²² But even if the Clean Air Act does not completely displace all possible federal PTD claims, courts should look to the history of how the PTD has been applied by American courts to determine the scope of the PTD under either state or federal law. Pursuant to *Glucksberg's* history and tradition standard for determining which challenges are fundamental rights under the Due Process Clause,³²³ the public interest in submerged lands in *Illinois Central* might possibly qualify as a fundamental right or at least raise serious constitutional questions.³²⁴

of litigation).

³¹⁶ See Shankleman & Warren, *supra* note 29.

³¹⁷ *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (stating that fundamental due process rights should be recognized only if they are based on rights “deeply rooted in this Nation’s history and tradition”).

³¹⁸ See *Juliana*, 217 F. Supp. 3d at 1249-50.

³¹⁹ *Id.* at 1248-49.

³²⁰ *Alec L. v. Jackson*, 863 F. Supp. 2d 11, 15-16 (D.D.C. 2012) (discussing *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 424 (2011)).

³²¹ *Id.* at 15-16.

³²² See *Juliana*, 217 F. Supp. 3d at 1255-61.

³²³ *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (concluding that fundamental due process rights should be limited to rights “deeply rooted in this Nation’s history and tradition”).

³²⁴ See *Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 452-54 (1892) (holding State of Illinois could not alienate submerged lands under Chicago harbor to a private corporation); Order and Findings and Recommendation at 23, *Juliana v. United States*, 217 F. Supp. 3d 1224 (D. Or. Apr. 8, 2016) (No. 6:15-cv-01517-TC)

Creating a new constitutional right to climate stability is different from recognizing that the PTD has traditionally limited the right of governments to alienate title or control of submerged lands under tidal or navigable waters that was the central holding of the Supreme Court's *Illinois Central* decision.³²⁵ Accordingly, the *Alec L.* decision correctly determined that the EPA's interpretation of the Clean Air Act should decide climate change policy questions, and not judges applying the PTD to novel questions of climate change.³²⁶ Accordingly, both Judge Aiken's substantive due process analysis and her understanding of the PTD are flawed because they depart too greatly from the history and traditions of the Clause and the PTD.³²⁷

CONCLUSION

The *Alec L.* decision in the District Court of the District of Columbia, Judge Alsup's *City of Oakland* decision, the Alaska Supreme Court's *Kanuk* decision, and the New Mexico Court of Appeals' decision in *Sanders-Reed ex rel. Sanders-Reed*, all offer a more appropriate delineation between the roles of the judiciary and the political branches in addressing the problems relating to climate change than the *Juliana* decision.³²⁸ Furthermore, the *Alec L.* decision, the *Kanuk* decision, and the *Sanders-Reed* decision each aptly recognized that administrative agencies have more expertise than courts in addressing environmental challenges, including climate change.³²⁹ The separation of powers principles in the U.S. Constitution and state constitutions give executive agencies the authority to enforce environmental laws and remedies rather than courts.³³⁰ Instead of

(questioning in the hypothetical whether the federal government could alienate the territorial waters off the West Coast to a private corporation).

³²⁵ *Ill. Cent.*, 146 U.S. at 452-54.

³²⁶ *Alec L. v. Jackson*, 863 F. Supp. 2d 11, 15-16 (D.D.C. 2012).

³²⁷ See *supra* Parts I.D, II.

³²⁸ See generally *Alec L.*, 863 F. Supp. 2d at 15-16 (deferring to the political branches on policy question of addressing climate change and regulation of greenhouse gases); *Kanuk ex rel. Kanuk v. State, Dep't of Nat. Res.*, 335 P.3d 1088, 1097-1103 (Alaska 2014) (same); *Sanders-Reed ex rel. Sanders-Reed v. Martinez*, 350 P.3d 1221, 1226-27 (N.M. Ct. App. 2015) (same); Order Granting Motions to Dismiss Amended Complaints at 10-16, *City of Oakland vs. BP P.L.C.* (N.D. Cal. June 28, 2018) (No. 3:17-cv-06011-WHA & No. 3:17-cv-06012-WHA) (same); *supra* Parts I.B, I.E (discussing the argument that the political branches are better equipped to address policy questions of climate change and regulation of greenhouse gases).

³²⁹ *Alec L.*, 863 F. Supp. 2d at 15-16; *Kanuk*, 335 P.3d at 1097-1103; *Sanders-Reed*, 350 P.3d at 1226-27.

³³⁰ *Sanders-Reed*, 350 P.3d at 1226-27; see *Kanuk*, 335 P.3d at 1097-1103 (citing

usurping executive power under the guise of substantive due process, courts should limit their role in environmental and energy cases to reviewing the administrative actions of executive agencies to determine their compliance with the law.³³¹

Despite Judge Aiken's attempt to distinguish between common law tort and common law PTD claims,³³² the *Alec L.* decision provides strong reasoning that the Clean Air Act has displaced any claims regarding climate change under a possible federal PTD in a similar way as the Supreme Court had determined that the Act displaced federal common law public nuisance claims against large GHG and CO₂ emitters in *AEP*.³³³ The district court in the *Alec L.* decision rightly concluded that decisions regarding reductions in GHGs and CO₂ emissions "are determinations that are best left to the federal agencies that are better equipped, and that have a Congressional mandate, to serve as the 'primary regulator of greenhouse gas emissions.'"³³⁴ Accordingly, the *Alec L.* decision appropriately determined that any possible federal PTD claims regarding climate change are displaced by the Clean Air Act.³³⁵ The problems of climate change are primarily the responsibility of the political branches, and the ancient PTD cannot be reworked to justify judicial supremacy even if one does not agree with the environmental policies of the current President or Congress.³³⁶

prudential grounds for dismissing public trust suit where political branches are better capable than courts in deciding environmental policy questions).

³³¹ *Sanders-Reed*, 350 P.3d at 1226-27; see *Kanuk*, 335 P.3d at 1097-1103.

³³² See *Juliana v. United States*, 217 F. Supp. 3d 1224, 1259-60 (D. Or. 2016).

³³³ *Alec L.*, 863 F. Supp. 2d at 15-16 (discussing *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 426-428 (2011)).

³³⁴ *Id.* at 17 (quoting *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 428 (2011)).

³³⁵ *Id.*

³³⁶ Professor Kysar and two co-authors in two different articles have argued that climate change suits could serve as prods or pleas to encourage the political branches to consider climate change legislation rather than as a judicial fiat ordering them to do so. See Benjamin Ewing & Douglas A. Kysar, *Prods and Pleas: Limited Government in an Era of Unlimited Harm*, 121 *YALE L.J.* 350, 350, 355-57, 359-67, 423-24 (2011); Weaver & Kysar, *supra* note 254, at 342-56. However, Judge Aiken's use of substantive due process to deny the U.S. Government's motion to dismiss threatens to serve as the type of anti-democratic judicial fiat that Judge Sutton warned against in *DeBoer v. Snyder*, because using a substantive due process analysis to strike down a statute has profoundly anti-democratic impacts. *DeBoer v. Snyder*, 772 F.3d 388, 416-18 (6th Cir. 2014), *overruled by Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); Slugh, *supra* note 13 (criticizing the *Juliana* decision for using *Obergefell's* substantive due process approach to create a new constitutional due process right to a stable climate).
