

Ninth Circuit Hears Oral Argument in Youth Climate Change Litigation

By: Mark L. Greenfogel, *The Legal Intelligencer*

Depending on who you ask, the kids might not be alright. Last week, the United States Court of Appeals for the Ninth Circuit heard oral argument in the case *Juliana v. United States*, No. 18-36082, popularly referred to as the youth climate change litigation. In this case, initially filed in the United States District Court for the District of Oregon in August 2015, a group of 21 children allege that the federal government defendants, including the United States, the President, and the heads of several executive agencies, have denied them their constitutional rights to life, liberty, or property without due process of law. Plaintiffs assert that the federal government has long been aware of the dangerous climate effects of burning fossil fuels, and nevertheless has and continues to promote a fossil fuel-based energy system.

District court judge Ann Aiken denied the government's motion to dismiss in November 2016, and more recently denied the federal defendants' motions for judgment on the pleadings and for summary judgment in October 2018. In December 2018, the Ninth Circuit granted the government's petition for an interlocutory appeal.

In briefing and at oral argument, the plaintiff youths advance several novel theories of constitutional law, which they characterize as applying bedrock constitutional law principles to a new set of facts. The federal government, in response, raises concerns about standing, constitutionalizing administrative law, and posits that there is no fundamental constitutional right to a stable climate system. Whether the Ninth Circuit reverses the district court and dismisses the case, or remands to the district court for trial on the merits, could have tremendous implications for litigants harmed not only by extreme weather, but also by regulated industry.

The court may decide whether injuries caused by extreme weather events confer standing

As a threshold matter, the government asserts that the district court lacked jurisdiction because the plaintiffs lack Article III standing. This argument highlights one of the critical challenges facing climate change plaintiffs.

To demonstrate Article III standing, plaintiffs must establish they have "suffered an injury in fact" which is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992). Further, the injury must have resulted from the conduct of the defendant, and the injury must be redressable by a favorable opinion. *Id.*

The government argues that an abstract grievance cannot constitute the basis for standing, and because plaintiffs' asserted injuries "arise from a diffuse, global phenomenon that affects every other person in their communities, in the United States, and throughout the world," the plaintiffs have alleged "archetypal generalized grievances." Appellants' Opening Br. at 13.

To meet their burden, plaintiffs identify their particular injuries that are allegedly caused by human induced climate change. For example, plaintiffs submitted affidavits about how they have been displaced as a result of their schools and homes flooding, their nightmares and

emotional trauma caused by concern about worsening climate conditions, exacerbated asthma and allergies as a result of wildfires, and impaired recreational interests.

A critical hurdle for the plaintiffs at trial would be demonstrating causation between these injuries and the government's conduct. While it can be difficult, or even impossible, to demonstrate that any particular storm, for example, is a result of climate change, plaintiffs argue their injuries are "signature" injuries associated with climate change which resulted from the federal government's "affirmative conduct in promoting and perpetuating the use of fossil fuels as part of the Nation's energy system." Plaintiff-Appellees' Answering Br. at 16.

In its October 2018 opinion, the district court identified genuine issues of material fact to be resolved at trial. If the Ninth Circuit remands this case to the district court for a trial, and the court finds plaintiffs have established standing despite the government's insistence that "[t]he constitutional structure cannot be ignored because Plaintiffs have identified individual manifestations of obviously universal impacts," Appellants' Opening Br. at 15, this case could open the door for anyone affected by extreme weather to bring a lawsuit against the government or even private energy companies.

Plaintiffs contend they have a fundamental right to a life-sustaining climate system

At oral argument, the court of appeals was keenly interested in whether the plaintiffs have asserted a valid substantive due process claim. The district court found that the "right to a climate system capable of sustaining human life is fundamental to a free and ordered society." *Juliana v. United States*, 217 F. Supp. 3d 1224, 1250 (D. Or. 2016).

The federal government, to the contrary, argues that such a right is without basis. By way of example, the government distinguishes a right to a life-sustaining climate system from the right to same-sex marriage to which the district court analogizes. *Id.* at 1249 (discussing *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015)). In that context, the defendants refer to the "distinctly personal and circumscribed right to same-sex marriage" to distinguish from a "purported right to particular climate conditions that apparently would run indiscriminately to every individual in the United States and the judicial recognition of which would affect every person in this country and the world." Appellants' Opening Br. at 36. In the government's view, climate is not a right involving deeply personal choices central to dignity and autonomy. Further, the state of the climate is "a public and generalized issue having no connection to personal liberty or personal privacy."

Plaintiffs characterize the nature of the right differently. Rather than asserting a right to some hypothetical "particular" climate as the government does, plaintiffs contend specifically that they have a right to a "life-sustaining climate system, *the very foundation of all life.*" Plaintiff-Appellees' Answering Br. at 42 (emphasis in original). In other words, the children have a right to an unaltered climate system free from "government-sanctioned destruction." Plaintiffs assert that the government's contention that the climate right would run indiscriminately to every individual is itself evidentiary of the fundamental nature of the right. Because a fundamental right is one which, by definition, extends to every individual, that every individual would be able to claim a right to a life-sustaining climate system should not in this sense counsel against a finding of a fundamental right.

The government maintained that plaintiffs should have pursued their claims through the Administrative Procedure Act (“APA”) which is designed to adjudicate actions of federal agencies. At oral argument, the government explained, “Plaintiffs are essentially trying to constitutionalize administrative law.” As a result, the government warns that any administrative regime dealing with health and safety could become subject to a constitutional challenge “outside the parameters of the specialized statutes that Congress has set up for review.”

Plaintiffs emphasize that they are not challenging any one act of the federal government, the types of challenges for which the APA was designed; rather, they seek to disrupt the government’s systematic promotion of a fossil fuel energy system. As the plaintiffs’ counsel offered at oral argument, “When the federal government controls the system, facilitates it, subsidizes it, promotes it as it does, that creates a claim for substantive due process violation.”

Precedential effects of a favorable judgment for Plaintiffs

When asked at oral argument what a favorable judgment for the plaintiffs would entail, counsel explained they seek a declaration that the federal government has violated the plaintiffs’ right to life and personal security, and an injunctive decree for defendants to use existing authority to prepare a national energy plan that transitions the nation away from fossil fuels. If the court of appeals remands to the district court for trial, and the district court grants plaintiffs the relief they seek, this case would clearly have far-reaching implications. For example, if this case establishes precedent for finding that fossil fuel-based energy production is a proximate cause of a given extreme weather event, it may provide a template for those impacted by a storm to bring a claim against energy companies. On the other hand, it is unclear whether even if the United States completely eliminated all fossil fuel production, that would be enough to protect the alleged fundamental right in a stable environment when other carbon emission-generating countries would not be subject to such a decree.

Further, although plaintiffs maintain that they are not challenging the federal government’s failure to act to avert climate change, this case could influence future claims seeking to impose an affirmative duty on the government. While the Due Process Clause generally does not impose an affirmative duty on the government to act, this rule is subject to a state-created danger exception which arises where “the state affirmatively places the plaintiff in danger by acting with ‘deliberate indifference’ to a ‘known or obvious danger.’” Whether such a holding could be extended to the government’s acquiescence in the creation of an unhealthy food system, for example, is worthy of consideration. Because of the importance of the issues at stake in this litigation and future lawsuits it may inspire, the judgment from the Ninth Circuit should be highly anticipated and closely watched.

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