

# Addressing a Constitutional Right to a Safe Climate: Using the Court System to Secure Climate Justice

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## I. INTRODUCTION

All around the world, a growing number of youth, states, cities, and environmental activists are fighting back against climate change—the greatest challenge of our generation and the “great[est] threat to future generations.”<sup>1</sup> They are using their voices, political power, and the courts to demand their right to a stable climate system capable of sustaining life, liberty, and property.<sup>2</sup> Proponents use climate change litigation as a tool to strengthen climate action and influence legislation.<sup>3</sup> The climate justice movement seeks to extend the principles of human rights and environmental justice to climate change.<sup>4</sup> Attempts to establish a legal connection between climate change and human rights have been a part of the international agenda since 2005.<sup>5</sup> Currently, proponents have filed 359 climate change litigation lawsuits internationally in at least forty countries against governments.<sup>6</sup>

In the United States, federal courts have not yet been able to establish a legal right to a healthy environment.<sup>7</sup> In a groundbreaking case, *Juliana v. United States*, a group of twenty-one youth (supported by Our Children’s Trust) sued the federal government for its role in creating and perpetuating a “dangerous climate system” that violates their Fifth Amendment right to life, liberty, and property.<sup>8</sup> The lawsuit concerns the government’s affirmative actions (instead of a failure to act on climate change) in creating a national

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<sup>1</sup> Rebecca Jacobson, *President Calls Climate Change the ‘Greatest Threat to Future Generations’ in State of the Union*, PBS NEWS HOUR (Jan. 21, 2015, 6:35 PM), [https://perma.cc/JKV7-F3H8] (citing Barack Obama, President of the United States, State of the Union Address (Jan. 20, 2015)). See also JOANA SETZER & REBECCA BYRNES, LONDON SCH. OF ECON. & POL. SCI., GLOBAL TRENDS IN CLIMATE CHANGE LITIGATION: 2019 SNAPSHOT 1 (2019), [https://perma.cc/2EE6-NSH2].

<sup>2</sup> Laura Parker, *Kids Suing Governments About Climate: It’s a Global Trend*, NAT’L GEOGRAPHIC (June 26, 2019), [https://perma.cc/7YRU-RTE7].

<sup>3</sup> SETZER & BYRNES, *supra* note 1.

<sup>4</sup> See Chitresh Saraswat & Pankaj Kumar, *Climate Justice in Lieu of Climate Change: A Sustainable Approach to Respond to the Climate Change Injustice and an Awakening of the Environmental Movement*, 1 ENERGY, ECOLOGY, & ENV’T 67, 68 (2016).

<sup>5</sup> JONATHAN C. CARLSON & GEOFFREY W.R. PALMER, INTERNATIONAL ENVIRONMENTAL LAW: A PROBLEM-ORIENTED COURSEBOOK 857 (4th ed. 2019).

<sup>6</sup> *Suits Against Governments*, SABIN CTR. FOR CLIMATE CHANGE L., [https://perma.cc/JBL7-G4RE] (last visited June 9, 2021); *Non-U.S. Jurisdiction*, SABIN CTR. FOR CLIMATE CHANGE L., [https://perma.cc/8T2A-2T4E] (last visited June 9, 2021).

<sup>7</sup> While United States federal courts have not established a legal right, many state courts have held that their state constitutions contain an enforceable substantive right to a clean and healthy environment. This Note focuses on federal lawsuits rather than decisions made at the state court level because it is evaluating federal decisions as compared to similar international lawsuits. See BARRY E. HILL, ENVIRONMENTAL JUSTICE: LEGAL THEORY AND PRACTICE 913 (4th ed. 2019).

<sup>8</sup> Complaint for Declaratory & Injunctive Relief at 38, 42-43, 45, 88, 91, *Juliana v. United States*, 217 F. Supp. 3d 1224 (D. Or. 2016) (No. 6:15-cv-01517-TC), *rev’d*, 947 F.3d 1159 (9th Cir. 2020) [hereinafter *Juliana*].

energy system that contributes to climate change.<sup>9</sup> The plaintiffs claim that the government is a trustee of the atmosphere and, as such, the government has breached its duty to limit fossil fuel use and cut greenhouse gas emissions, despite knowing for at least the last fifty years that fossil fuel combustion adds carbon dioxide (CO<sub>2</sub>) to the planet and changes the climate.<sup>10</sup> They ask that the courts declare federal energy policy that contributes to climate change as unconstitutional, order the government to phase out carbon dioxide emissions to 350 parts per million (ppm) by 2100, and mandate a national climate recovery plan.<sup>11</sup>

*Juliana* raises an important question that has no precedent in the United States: Are the federal government's national energy policies, which promote the use of fossil fuels and cause climate change, a violation of the rights of young people? This lawsuit is a new type of climate litigation because it bases its claims against the federal government on constitutional grounds rather than statutory disputes.<sup>12</sup> The Federal District Court of Oregon and the Ninth Circuit Court of Appeals both recognize that this case is groundbreaking in the same way that *Roe v. Wade*, *Brown v. Board of Education*, and *Obergefell v. Hodges* were, in that they guaranteed abortion rights, ended racial segregation, and guaranteed same-sex marriage, respectively.<sup>13</sup>

This Note evaluates whether the United States should recognize children's constitutional right to a safe climate. Part II begins by looking at landmark United States Supreme Court cases, such as *Griswold v. Connecticut*, in which the Court recognized a new fundamental right. This Note also takes an international approach by looking to countries and courts that have already recognized such a right. The Netherlands, Colombia, and Pakistan have already recognized the fundamental right of children to demand that their governments reduce greenhouse gas emissions.<sup>14</sup> Next, in Part III, this Note analyzes cases in which the Supreme Court is willing to recognize an unenumerated fundamental right and how the Court arrives at that decision. This

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<sup>9</sup> *Id.* at 37, 38, 51, 86.

<sup>10</sup> *Id.* at 1, 51-52, 53, 85, 87-90, 92-93.

<sup>11</sup> *Id.* at 4-5.

<sup>12</sup> Michael C. Blumm & Mary Christina Wood, "No Ordinary Lawsuit": *Climate Change, Due Process, and the Public Trust Doctrine*, 67 AM. UNIV. L. REV. 1, 7 (2017).

<sup>13</sup> *Juliana v. United States*, 217 F. Supp. 3d 1224, 1249-50 (D. Or. 2016) (No. 6:15-cv-01517-TC); *Juliana v. United States*, 947 F.3d 1159, 1168-70, 1173, 1177 (9th Cir. 2020) (No. 18-36082) [hereinafter *Juliana II*].

<sup>14</sup> Hof's-Gravenhage 9 oktober 2018, AB 2018, 417 m.nt. GA van der Veen, Ch.W.Backes (Staat der Nederlanden/Stichting Urgenda) (Neth.) [hereinafter *Urgenda Appellate Court Judgment*], [<https://perma.cc/JCN9-CBVJ>] (unofficial English translation); Corte Suprema de Justicia [C.S.J.] [Supreme Court], abril 5, 2018, M.P: L. Villabona, Expediente 11001-22-03-000-2018-00319-01 (Colom.) [hereinafter *Demanda Generaciones Futuras v. Minambiente*], [<https://perma.cc/SLP8-VJUA>] (unofficial English translation); Ashgar Leghari v. Federation of Pakistan, (2015) W.P. No. 25501/2015 (Pak.), [hereinafter *Leghari v. Pakistan* (Apr. 4, 2015 Decision)].

Part also analyzes how the Netherlands, Colombian, and Pakistani courts held their governments responsible for recognizing the right to a healthy climate as a constitutional right and as a means for getting their governments to act on reducing greenhouse gas emissions.

This Note argues that children should have a constitutional right against government-sanctioned climate disruption. These domestic cases are instructive because the U.S. Supreme Court has historically recognized new constitutional rights when the Court finds a tradition supporting the notion that the asserted interest is a fundamental right, and that the asserted interest is important to life and society. While the Federal District Court of Oregon recognized “the right to a climate system capable of sustaining human life is fundamental to a free and ordered society,”<sup>15</sup> the Ninth Circuit later issued a ruling that instructed the district court to dismiss *Juliana* because “such relief is beyond our constitutional power.”<sup>16</sup> Although children’s constitutional right to a safe climate has not yet been recognized in the United States, that does not preclude it from ever being granted.

## II. BACKGROUND

This Part provides the legal and historical context for understanding why the United States should recognize a fundamental constitutional right to a healthy environment. Section A offers a brief overview of climate change, science, and the impact of climate change on our global environment. This Section takes an environmental justice approach. Section B reviews cases in which the Supreme Court has decided to recognize (or not recognize) new fundamental rights to understand how the Court evaluates the recognition of a new fundamental right. Section C looks to successful international climate change cases, in which those governments have recognized a constitutional right to a healthy environment. Section D discusses the United States climate change case *Juliana*, in which the youth plaintiffs claimed a fundamental right to a stable climate.

### *A. Brief Discussion of Climate Change Science & Environmental Impacts*

Although the United States’ most recent former President denies climate change,<sup>17</sup> the global scientific community has demonstrated that climate change is real.<sup>18</sup> Studies have shown that human production of energy through the burning of fossil fuels serves as the biggest contributor to climate

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<sup>15</sup> *Juliana*, 217 F. Supp. 3d at 1250.

<sup>16</sup> *Juliana II*, 947 F.3d at 1165.

<sup>17</sup> Akshit Sangomla, *US Elections 2020: A History of Trump’s Climate Change Denial*, DOWN TO EARTH (Nov. 3, 2020), [<https://perma.cc/MN9N-5BUV>].

<sup>18</sup> See, e.g., Brief for Public Health Experts, Public Health Organizations, and Doctors as Amici Curiae Supporting Plaintiff-Appellees, *Juliana v. United States*, 217 F. Supp. 3d 1224 (D. Or. 2016) (No. 6:15-cv-01517-TC).

change.<sup>19</sup> The burning of fossil fuels emits greenhouse gases like carbon dioxide (CO<sub>2</sub>), methane, nitrous oxide, ozone, halocarbons, and water vapor.<sup>20</sup> While greenhouse gases, which trap heat, are an important component of life on Earth, the increasing concentration of greenhouse gases in Earth's atmosphere creates a deleterious effect.<sup>21</sup> Rising sea levels, the acidification of oceans, extreme heat, drought, and greater extreme weather conditions are just some of the ways in which increasing levels of greenhouse gases are altering climatic patterns and ecosystems.<sup>22</sup>

The United States is currently the second-largest greenhouse gas emitter in the world.<sup>23</sup> Its atmospheric CO<sub>2</sub> emissions comprise 25 percent of cumulative global emissions from 1850 to 2013.<sup>24</sup> Pre-industrial CO<sub>2</sub> concentration was about 280 ppm molecules.<sup>25</sup> As global CO<sub>2</sub> emissions continue to rise, the average atmospheric concentration of CO<sub>2</sub> reached 411 ppm in May 2018.<sup>26</sup> Failure to take immediate action to address and reverse the increase in greenhouse gas emissions will inevitably result in continued global temperature increases.<sup>27</sup>

The international scientific community asserts that, if left unaddressed, climate change will continue to destabilize our ecosystems and cause catastrophic harm.<sup>28</sup> Events like increased mortality, a growing refugee population, destruction of property, and global food insecurity will not only continue, but will increase.<sup>29</sup> A report by the Intergovernmental Panel on Climate Change in 2014 confirmed that the increase in extreme weather events was due to climate change.<sup>30</sup> Human-driven climate change directly and indirectly threatens the full and “effective enjoyment of a range of human rights . . . including the rights to life, safe drinking water and sanitation, food, health,

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<sup>19</sup> CARLSON & PALMER, *supra* note 5, at 737.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 738.

<sup>23</sup> Mengpin Ge & Johannes Friedrich, *4 Charts Explain Greenhouse Gas Emissions by Countries and Sectors*, WORLD RESOURCES INST. (Feb. 6, 2020), [<https://perma.cc/6TVE-NRW9>].

<sup>24</sup> CARLSON & PALMER, *supra* note 5, at 739.

<sup>25</sup> *Id.* at 739.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 755.

<sup>29</sup> *Id.* at 744–746, 770.

<sup>30</sup> INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2014 SYNTHESIS REPORT 1, 7, 18, 19, 53, 72 (2015) [hereinafter CLIMATE CHANGE 2014 SYNTHESIS REPORT], [<https://perma.cc/L7PL-58XM>].

housing, self-determination, culture, work and development.”<sup>31</sup> The Paris Agreement, adopted by the 21st session of the United Nations Framework Convention on Climate Change Conference of the Parties on December 12, 2015, identifies that “holding the increase in the global average temperature to well below 2° C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5° C above pre-industrial levels . . . would significantly reduce the risks and impacts of climate change.”<sup>32</sup>

As an environmental justice issue, climate change disproportionately affects marginalized communities.<sup>33</sup> Climate change touches on all aspects of life, including housing, food, health, education, and access to clean air and water.<sup>34</sup> The environmental justice movement fights for “the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income, with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.”<sup>35</sup> Historically, low-income communities and communities of color are most affected by polluted environments in the United States.<sup>36</sup> Known as environmental racism, these communities are often targeted as sites for building landfills, chemical plants, power plants, and oil refineries—sites that have negative environmental health impacts and are environmentally hazardous.<sup>37</sup> Polluters often target these communities because they lack the political power and/or economic resources to defend the intrusions.<sup>38</sup>

Indigenous communities, women, elderly individuals, the poor, and those with disabilities are the groups most impacted by climate change.<sup>39</sup> Some of these groups face issues like lacking economic resources to relocate or rebuild after a natural disaster, living in low-income communities that do

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<sup>31</sup> *The Impacts of Climate Change on the Effective Enjoyment of Human Rights*, U.N. HUM. RTS. OFF. OF THE HIGH COMM’R, [https://perma.cc/JM5Y-Z333] (last visited June 10, 2021) [hereinafter UNOHCHR].

<sup>32</sup> U.N. FRAMEWORK CONVENTION ON CLIMATE CHANGE, REPORT OF THE CONFERENCE OF THE PARTIES ON ITS TWENTY-FIRST SESSION, HELD IN PARIS FROM 30 NOV. TO 13 DEC. 2015 22 (Jan. 29, 2016), [https://perma.cc/SC66-GDWV].

<sup>33</sup> See U.S. ENVTL. PROT. AGENCY, CLIMATE CHANGE, HEALTH, AND ENVIRONMENTAL JUSTICE 1 (May 2016), [https://perma.cc/KBR3-X2WU].

<sup>34</sup> Lesley Jantarasami, *Climate Change, Public Health and Environmental Justice: Caring for Our Most Vulnerable Communities*, EPA BLOG (Jan. 5, 2017), [https://perma.cc/3HQB-V4CG].

<sup>35</sup> See *Environmental Justice*, U.S. ENVTL. PROT. AGENCY, [https://perma.cc/4RNV-DYYA] (last visited June 8, 2021).

<sup>36</sup> Renee Skelton & Vernice Miller, *The Environmental Justice Movement*, NAT. RES. DEF. COUNCIL (Mar. 17, 2016), [https://perma.cc/6HSM-JMM9].

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> Katharina Rall, et al., *COP21: The Impact of Climate Change on the World’s Marginalized Populations: Turkana County, Kenya*, HARV. T.H. CHAN SCH. PUB. HEALTH (Oct. 27, 2015), [https://perma.cc/3NR6-WZT5].

not have access to healthcare services, or living along coasts or rivers that are vulnerable to climate change.<sup>40</sup> For example, a low-income person living on a coastline may not have the resources to find temporary living accommodations, rebuild, or move after a hurricane destroys their home. Adapting to, or recovering from, climate change can prove to be economically difficult for these communities.

The effects of climate change also disproportionately affect the poorest countries.<sup>41</sup> International environmental law scholars note that “[c]limate change is a grave threat to the developing world and a major obstacle to continued poverty reduction.”<sup>42</sup> Developing countries are geographically disadvantaged because they are already located in warmer regions than developed countries and will be more greatly affected by global temperature rises.<sup>43</sup> Additionally, these developing regions also suffer from high rainfall variability.<sup>44</sup> Many developing countries are highly dependent on agriculture, which is climate-sensitive.<sup>45</sup> This means that their economic livelihood—growing crops—is dependent on something as variable as the weather. Furthermore, their access to food is largely dependent on their agricultural production.<sup>46</sup>

Climate change is both a direct and indirect cause of migrations.<sup>47</sup> Climate change is altering migration patterns as rising temperatures, flooding, or other extreme weather events, and resource scarcity forces people in countries mostly south of the equator to embark on large-scale migration.<sup>48</sup> A decrease in income increases poverty and decreases the ability of people to improve their situations because their survival efforts consume their attention.<sup>49</sup> Climate change can exacerbate vulnerabilities and increase illness, death rates, and poverty in developing countries.<sup>50</sup> The United Nations released a report recommending that governments implement policies to address the root causes of structural inequalities as a means of addressing the impacts of

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<sup>40</sup> U.S. ENVTL. PROT. AGENCY, *supra* note 33, at 1-4.

<sup>41</sup> CARLSON & PALMER, *supra* note 5, at 752.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> Jayla Lundstrom, *Climate Change is Altering Migration Patterns Regionally and Globally*, CTR. FOR AM. PROGRESS (Dec. 3, 2019, 9:04 AM), [<https://perma.cc/J2VM-H6BS>].

<sup>47</sup> *Id.*

<sup>48</sup> John Podesta, *The Climate Crisis, Migration, and Refugees*, BROOKINGS INST. (July 25, 2019), [<https://perma.cc/RVA7-8L4D>].

<sup>49</sup> CARLSON & PALMER, *supra* note 5, at 752.

<sup>50</sup> *Id.*

climate change.<sup>51</sup> Notably, the developing countries that are the most affected and have the fewest resources to adapt to climate change are also the countries that are least responsible for the world's greenhouse gas emissions.<sup>52</sup>

*B. The United States Supreme Court's History of Recognizing New Fundamental Rights*

While the United States Constitution enumerates certain fundamental rights, the United States Supreme Court has expanded these by recognizing new, unenumerated, fundamental constitutional rights.<sup>53</sup> Although the Court does not often do this, it has recognized a few new, unenumerated fundamental rights.<sup>54</sup> For example, the Court recognized the right to an abortion in *Roe v. Wade* and the individual right to bear arms in *D.C. v. Heller*.<sup>55</sup> In determining new fundamental rights, the Court looks to tradition and importance.<sup>56</sup> If the asserted interest has historically been understood as a fundamental right in the Constitution, then the Court may interpret the right as something that was presupposed or implied by the Constitution.<sup>57</sup> If the asserted interest is important in the context of living and functioning in society, the Court may also understand the right to be fundamental.<sup>58</sup> This Section analyzes three cases: one in which the Court recognized a fundamental right to privacy in *Griswold v. Connecticut*, one in which the Court did *not* recognize a fundamental right to suicide in *Washington v. Glucksberg*, and one in which the Court recognized the right to same-sex marriage in *Obergefell v. Hodges*.

1. Recognizing the Right to Marital Privacy in *Griswold v. Connecticut*

In *Griswold v. Connecticut*, the Court recognized the right to marital privacy, which established the basis for the broader right to privacy, by holding that a Connecticut law banning the use of contraceptives unconstitutionally intruded upon the right of marital privacy.<sup>59</sup> The Court viewed its reference in *Mapp v. Ohio* to the Fourth Amendment as creating a “right to privacy, no

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<sup>51</sup> Report: *Inequalities Exacerbate Climate Impacts on Poor*, U.N. (Oct. 3, 2016), [https://perma.cc/46EQ-747W].

<sup>52</sup> *Climate Justice*, U. COLO. ENV'T'L. CTR., [https://perma.cc/Y37J-M89A] (last visited June 9, 2021).

<sup>53</sup> Eric Segall, *A Modest Proposal: Why the Supreme Court Should Enforce Unenumerated Fundamental Rights*, HARV. L. REV. BLOG (Mar. 26, 2019), [https://perma.cc/9CS3-Z6BZ].

<sup>54</sup> *Id.*

<sup>55</sup> *District of Columbia v. Heller*, 554 U.S. 570 (2008); *Roe v. Wade*, 410 U.S. 113 (1973). See also *Lochner v. New York*, 198 U.S. 45 (1905) (establishing substantive due process as a means of recognizing unenumerated fundamental rights).

<sup>56</sup> Segall, *supra* note 53.

<sup>57</sup> See *id.*

<sup>58</sup> See *id.*

<sup>59</sup> *Griswold v. Connecticut*, 381 U.S. 479 (1965).



less important than any other right carefully and particularly reserved to the people,”<sup>60</sup> although the Fourth Amendment only “explicitly affirms the ‘right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.’”<sup>61</sup> The Court concluded that, in *Griswold*, the asserted right “concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees.”<sup>62</sup> Writing that the “right of privacy [is] older than the Bill of Rights,” the Court recognized that marriage is “an association that promotes a way of life” and that the degree of intimacy in marriage is sacred.<sup>63</sup> In *Griswold*, the Court laid out the test for recognizing a new fundamental right by looking at how the proposed right fits in with other constitutionally guaranteed rights.<sup>64</sup> The Court’s recognition of the right to privacy in *Griswold* has been the foundation for other reproductive rights cases recognizing the right to abortion, like *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*.<sup>65</sup> Similarly, this test could be applied in order to recognize a constitutional right to a clean climate by situating this proposed right in concert with constitutionally guaranteed rights like the Fifth Amendment right to life, liberty, and property.

## 2. Not Recognizing a Right to Assisted Suicide in *Washington v. Glucksberg*

In *Washington v. Glucksberg*, the Court held that the right to assisted suicide is “not a fundamental liberty interest protected by the Due Process Clause.”<sup>66</sup> The Court upheld the State of Washington’s prohibition on assisted suicide and did not recognize an unenumerated fundamental right.<sup>67</sup> In arriving at this decision, the Court laid out its established method of substantive due process analysis: “[f]irst, the Court has regularly observed that the Clause specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation’s history and tradition . . . Second, the Court has required a ‘careful description’ of the asserted fundamental liberty interest.”<sup>68</sup> The Court held that “the right to choose a humane, dignified death” or the “right to die” interests at issue in this case did not meet the second requirement.<sup>69</sup> The Court explained: “this asserted right has [no] . . . place in our Nation’s traditions . . . [W]e are confronted with a consistent and almost

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<sup>60</sup> *Id.* at 485 (quoting *Mapp v. Ohio*, 367 U.S. 643, 656 (1961)).

<sup>61</sup> *Id.* at 484 (quoting U.S. CONST. amend. IV, § 1).

<sup>62</sup> *Id.* at 485.

<sup>63</sup> *Id.* at 486.

<sup>64</sup> *Id.* at 484–86.

<sup>65</sup> Cary Franklin, *Griswold and the Public Dimension to the Right to Privacy*, 124 YALE L.J. F. 332, 332 (2015), [<https://perma.cc/KS79-87EQ>].

<sup>66</sup> *Washington v. Glucksberg*, 521 U.S. 702, 728 (1997).

<sup>67</sup> *Id.* at 705.

<sup>68</sup> *Id.* at 703.

<sup>69</sup> *Id.* at 722.

universal tradition that has long rejected the asserted right, and continues explicitly to reject it today, even for terminally ill, mentally competent adults.<sup>70</sup> The Court chose not to recognize the right to assisted suicide, because doing so would have required the Court “to reverse centuries of legal doctrine and practice, and strike down the considered policy choice of almost every State.”<sup>71</sup> Contrasting this asserted interest in *Glucksberg* with the “constitutionally protected right to refuse lifesaving hydration and nutrition” it recognized in *Cruzan*, the Court noted that the right in *Cruzan* was “grounded in the Nation’s history and traditions, given the common-law rule that forced medication was a battery, and the long legal tradition protecting the decision to refuse unwanted medical treatment.”<sup>72</sup> Thus, because the right to assisted suicide was determined to be inconsistent with the nation’s history and practice, the Court did not recognize the right to assisted suicide as a new fundamental right.<sup>73</sup> *Glucksberg* is significant because it shows that the Court is not inclined to recognize a right when the proposed right appears to go against legal tradition or a long-protected liberty interest. When interpreted in the context of recognizing a proposed constitutional right to a clean climate, it would not appear that doing so would reverse centuries of legal tradition.

### 3. Recognizing the Right to Same-Sex Marriage in *Obergefell v. Hodges*

In *Obergefell v. Hodges*, the Court recognized the right to same-sex marriage.<sup>74</sup> The Court held that “[t]he right to marry is a fundamental right inherent in the liberty of the person,” and that under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, same-sex couples may not be deprived of that right and liberty.<sup>75</sup> To define this new fundamental right, the Court looked to the history of marriage, which was traditionally a union between two persons of the opposite sex, and instead acknowledged that “[t]he history of marriage is one of both continuity and change.”<sup>76</sup> The Court wrote that “changed understandings of marriage are characteristic of a Nation where new dimensions of freedom become apparent to new generations.”<sup>77</sup> In reaching its decision, the Court stated that the “fundamental liberties protected by the Fourteenth Amendment’s Due Process Clause extend

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<sup>70</sup> *Id.* at 703, 723.

<sup>71</sup> *Id.*

<sup>72</sup> *Washington v. Glucksberg*, 521 U.S. 702, 723 (1997) (quoting *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 279 (1990)). *See generally Cruzan*, 497 U.S. at 261 (finding it acceptable to require “clear and convincing evidence” of a patient’s wishes for removal of life support in the Court’s first “right to die” case).

<sup>73</sup> *Glucksberg*, 521 U.S. at 703.

<sup>74</sup> *Obergefell v. Hodges*, 576 U.S. 644 (2015).

<sup>75</sup> *Id.* at 675.

<sup>76</sup> *Id.* at 659.

<sup>77</sup> *Id.* at 660.

to certain personal choices central to individual dignity and autonomy, including intimate choices defining personal identity and beliefs.”<sup>78</sup> While “[h]istory and tradition guide and discipline the inquiry,” it is “[w]hen new insight reveals discord between the Constitution’s central protections and a received legal stricture, [that] a claim to liberty must be addressed.”<sup>79</sup> Citing to the Court’s precedent in interpreting the right to marry as protected by the Constitution in cases like *Loving v. Virginia*, the Court stated: “[i]n assessing whether the force and rationale of its cases apply to same-sex couples, the Court must respect the basic reasons why the right to marry has been long protected.”<sup>80</sup> Similarly, climate change is another area ripe for novel insight because new understandings of fundamental rights have developed over time. Innovative scientific research and progress on climate change are both reshaping our understanding of the right to life and how a clean climate is intertwined with public health and the ability to live a healthy life.

In *Obergefell*, the Court analyzed four principles and traditions to support its conclusion that marriage is a fundamental constitutional right.<sup>81</sup> First, the Court recognized the right to same-sex marriage by relating it to the Court’s recognition of marriage as a fundamental right under the Constitution, declaring that it must “apply with equal force to same-sex couples.”<sup>82</sup> The connection between marriage and liberty (the individual autonomy allowed in the personal choice of marriage) “is true for all persons, whatever their sexual orientation.”<sup>83</sup> Second, the fundamental right to marry is part of the “intimate association” the Court acknowledged in *Griswold*, which recognized the fundamental right of married couples to use contraception.<sup>84</sup> Third, the right to marry also “safeguards children and families” because, by not recognizing same-sex marriage, the Court did not want children to feel stigmatized by knowing or feeling that their families were in some way lesser.<sup>85</sup> Fourth, the Court stated that “the Nation’s traditions make clear that marriage is a keystone of the Nation’s social order.”<sup>86</sup> Furthermore, the Court acknowledged the “interlocking nature” of the Due Process and Equal Protection Clauses because the “[r]ights implicit in liberty and rights secured by equal protection

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<sup>78</sup> *Id.* at 645.

<sup>79</sup> *Id.*

<sup>80</sup> *Obergefell v. Hodges*, 576 U.S. 644, 665 (2015).

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 666.

<sup>84</sup> *Id.* at 666-67.

<sup>85</sup> *Id.* at 667-68.

<sup>86</sup> *Obergefell v. Hodges*, 576 U.S. 644, 669 (2015).

may rest on different precepts and are not always co-extensive, yet each may be instructive as to the meaning and reach of the other.”<sup>87</sup>

*C. Successful Global Climate-Change Related Lawsuits Where Courts Have Recognized a Government’s Duty to its Citizens for Addressing Climate Change*

Outside of the United States, rights-based climate change litigation is rooted in discussions about human rights. In 1972, the United Nations (U.N.) made the first express connection between human rights and the environment.<sup>88</sup> The U.N. Stockholm Declaration of 1972 expressed that the environment is “essential to [human] well-being and to the enjoyment of basic human rights—even the right to life itself.”<sup>89</sup> However, the international community is divided on whether that relationship is derived from other human rights or if it is its own fundamental right.<sup>90</sup> A human rights-based approach to climate change is still generally met with resistance, but has also evolved in ways that can impact environmental law and policy.<sup>91</sup>

Additionally, the U.N. Office of the High Commissioner for Human Rights has completed a number of studies on the connection between climate change and human rights.<sup>92</sup> Its Fifth Assessment Report in 2014 concluded that the primary cause of climate change is human-made greenhouse gas emissions and identified that the increasing frequency of extreme weather events and natural disasters threaten the rights to life, water and sanitation, food, health, housing, and self-determination.<sup>93</sup> Furthermore, the U.N. Office of the High Commissioner for Human Rights has stated that the “[f]ailure to take affirmative measures to prevent human rights harms caused by climate change, including foreseeable long-term harms” would be a breach of the legal obligation of states to “respect, protect, fulfil [sic] and promote all human rights for all persons without discrimination.”<sup>94</sup> The U.N. Office of the High Commissioner for Human Rights and the Human Rights Council

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<sup>87</sup> *Id.* at 672.

<sup>88</sup> U.N. Conference on the Human Environment, *Declaration of the United Nations Conference on the Human Environment*, U.N. Docs A/CONF.48/14/Rev.1 (1973), [<https://perma.cc/6K8P-6WLC>].

<sup>89</sup> *Id.* at 3.

<sup>90</sup> Barry E. Hill et al., *Human Rights and the Environment: A Synopsis and Some Predictions*, 16 GEO. INT’L ENVTL. L. REV. 359, 374-75 (2004).

<sup>91</sup> *Id.* at 377-87.

<sup>92</sup> See, e.g., UNOHCHR, *supra* note 31.

<sup>93</sup> *Climate Change 2014 Synthesis Report*, *supra* note 30 (reporting on an integrated view of climate change based on scientific understanding).

<sup>94</sup> OFF. HIGH COMM’R FOR HUM. RTS., UNDERSTANDING HUMAN RIGHTS AND CLIMATE CHANGE 2 (2015), [<https://perma.cc/U4BL-4RUU>].

advocate for a human rights approach to climate change, which means focusing on protecting the rights of those most vulnerable to climate change.<sup>95</sup>

The climate justice movement recognizes the inherent connection between human rights and climate change.<sup>96</sup> Since every government has a duty to protect its citizens from harm, the legal system serves as a means by which citizens can demand protection when the government fails to meet this duty.<sup>97</sup> However, courts have generally been slow in responding to the protection of basic human rights by applying existing laws in new ways.<sup>98</sup> These lawsuits either ask courts to implement new legislation or challenge existing legislation that is not helping to ensure a healthy climate.<sup>99</sup> As John Knox, an environmental law professor at Wake Forest School of Law and former special rapporteur for Human Rights at the U.N., stated:

One of the valuable aspects of human rights is that they set out certain basic protections that we think are necessary for human dignity, equality and freedom . . . . And so while the challenges may change and evolve, the need to protect people's basic human rights should remain a constant. The courts need to be able to respond to the new challenges by applying the law in new ways.<sup>100</sup>

The United States is not alone in attempting to confront climate change through the courts.<sup>101</sup> Citizens worldwide are filing climate litigation lawsuits against their governments.<sup>102</sup> Judicial rulings in three countries, the Netherlands, Colombia, and Pakistan (among others), have ordered government authorities to implement remedies to reduce carbon emissions.<sup>103</sup> The common

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<sup>95</sup> UNOHCHR, *supra* note 31.

<sup>96</sup> Saraswat & Kumar, *supra* note 4, at 67-68.

<sup>97</sup> HILL, *supra* note 7, at 915.

<sup>98</sup> Samvel Varvastian, *The Human Right to a Clean and Healthy Environment in Climate Change Litigation*, MAX PLANCK INST. COMP. PUB. L. & INT'L L. 1, 6 (Sept. 2019).

<sup>99</sup> *Id.* at 4.

<sup>100</sup> Kaitlin Sullivan, *Human Rights Claims Show Promise, Report Says*, CLIMATE DOCKET (Apr. 30, 2019), [<https://perma.cc/3XXS-NPKZ>].

<sup>101</sup> Varvastian, *supra* note 98, at 6.

<sup>102</sup> Parker, *supra* note 2.

<sup>103</sup> While Section II.C of this Note focuses on the three cases in the Netherlands, Colombia, and Pakistan, numerous other cases outside of the United States also demonstrate how international courts are dealing with environmental issues, illustrating the increasing willingness by litigants to seek environmental protection through the courts. For example, an appellate court in the United Kingdom blocked an expansion of a third runway at London's Heathrow International Airport, holding that the British government needed to consider its commitments to reduce global warming. *Plan B Earth and Others v. Secretary of State for Transport et al.* [2020] EWCA (Civ) 214 (Eng.). However, the United Kingdom Supreme Court overturned

thread among these arguments is that governments have an obligation to protect their citizens from climate change.<sup>104</sup> In 2015, a citizen's group called the Urgenda Foundation won its lawsuit against the Dutch government because the court recognized the government's duty of care to "provide protection from the hazards of dangerous hazards of climate change."<sup>105</sup> The Dutch government was ordered to cut its greenhouse gas emissions to at least 25 percent below 1990-levels by 2020.<sup>106</sup> In Colombia, youth sued the government for their right to a healthy environment in *Demanda Generaciones Futuras v. Minambiente*.<sup>107</sup> The Colombian Supreme Court ordered the government to take action to reduce deforestation and climate change.<sup>108</sup> The Lahore High Court in Pakistan held in *Leghari v. Federation of Pakistan* that, because the Pakistani government failed to adequately address climate change, the government "offend[ed] the fundamental rights of the citizens," and the High Court ordered the establishment of a Climate Change Commission.<sup>109</sup>

### 1. The Netherlands: *Urgenda v. The State of the Netherlands*

In 2015, *Urgenda* became the first case in the world where "citizens established that their government has a legal duty to prevent dangerous climate change."<sup>110</sup> The Urgenda Foundation is a Dutch environmental group whose purpose is "to stimulate and accelerate the transition processes to a more sustainable society, beginning in the Netherlands."<sup>111</sup> Joined by 886 Dutch citizens, Urgenda sued the Dutch government to compel the state to do more to prevent global climate change.<sup>112</sup>

The plaintiffs argued that, under Article 21 of the Dutch Constitution, which provides that "[i]t shall be the concern of the authorities to keep the country habitable and to protect and improve the environment," the Dutch

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the appellate court's decision, which allows the approval process for a third runway at Heathrow International Airport to proceed. *Friends of the Earth & Plan B Earth v. Heathrow Airport Ltd. et al.* [2020] UKSC 52 (appeal taken from Eng.).

<sup>104</sup> Jacqueline Peel & Hari M. Osofsky, *A Rights Turn in Climate Change Litigation?*, 7 *TRANSNAT'L ENVTL. L.* 37, 42-45 (2018).

<sup>105</sup> *Urgenda Appellate Court Judgment*, *supra* note 14, at para. 62.

<sup>106</sup> *Id.* at para. 3.8, 53.

<sup>107</sup> *Demanda Generaciones Futuras v. Minambiente*, *supra* note 14, at 1-3.

<sup>108</sup> *Id.* at 10.

<sup>109</sup> *Leghari v. Pakistan* (Apr. 4, 2015 Decision), *supra* note 14, at 6; Jessica Wentz, *Lahore High Court Orders Pakistan to Act on Climate Change*, *COLUM. L. SCH.: CLIMATE L. BLOG* (Sept. 26, 2015), [https://perma.cc/5DUJ-QKN8].

<sup>110</sup> *Landmark Decision by Dutch Supreme Court*, URGENDA, [https://perma.cc/W773-NZN4] (last visited June 9, 2021).

<sup>111</sup> *Urgenda Appellate Court Judgment*, *supra* note 14, at para. 3.1.

<sup>112</sup> *Landmark Decision by Dutch Supreme Court*, *supra* note 110.

government has a constitutional obligation to take stronger measures to mitigate climate change.<sup>113</sup> Urgenda claimed that the Netherlands' current greenhouse gas emission levels were excessive, particularly the CO<sub>2</sub> level, and was leading to or threatening to lead to a global warming of over two degrees Celsius, which is "contrary to the . . . duty of care."<sup>114</sup> The plaintiffs argued that the risk of dangerous climate change is "serious and irreversible damage to human health and the environment."<sup>115</sup> In particular, they argued that:

[T]he State has an individual obligation and responsibility to ensure a reduction of the emission level of the Netherlands in order to prevent dangerous climate change . . . [which] *principally* means that a reduction of 25% to 40%, compared to 1990, should be realised [sic] in the Netherlands by 2020.<sup>116</sup>

They also contended that, because "the State, as a sovereign power, has the capability to manage, control and regulate these emissions[,] . . . the State has 'systemic responsibility' for the total greenhouse gas emission level of the Netherlands."<sup>117</sup> Because the Netherlands' climate policy at the time failed to meet this duty of care to Urgenda, and more broadly to Dutch society, the State acted unlawfully.<sup>118</sup> Essentially, Urgenda argued that the State should be held responsible for the Netherlands' contribution to hazardous climate change due to its high emission levels and was thereby legally obligated to reduce the country's greenhouse gas emissions.<sup>119</sup>

While the plaintiffs based their central claims on the government's duty of care, they also invoked a human rights argument, citing Articles 2 and 8 of the European Convention on the Protection of Human Rights and Fundamental Freedoms.<sup>120</sup> Article 2 recognizes that "[e]veryone's right to life shall be protected by law," and Article 8 states that "[e]veryone has the right to respect for his private and family life, his home and his correspondence. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a

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<sup>113</sup> Rb.'s-Gravenhage 24 juni 2015, AB 2015, 336 m.nt. Ch.W. Backes para. 2.69 (Stichting Urgenda/Staat der Nederlanden) (Neth.) [hereinafter *Urgenda District Court Judgment*], [<https://perma.cc/U39P-6T37>] (unofficial English translation).

<sup>114</sup> *Urgenda Appellate Court Judgment*, *supra* note 14, at para. 29.

<sup>115</sup> *Id.* at para. 4.1.

<sup>116</sup> *Id.* at para. 3.2.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at para. 3.1.

<sup>119</sup> *Id.*

<sup>120</sup> *Urgenda Appellate Court Judgment*, *supra* note 14, at para. 4.45.

democratic society.”<sup>121</sup> These two provisions require the state to act to avert imminent harm. “The European Convention on the Protection of Human Rights and Fundamental Freedoms . . . requires the states which are parties to the convention to protect the rights and freedoms established in the convention for their inhabitants.”<sup>122</sup> It is compelling that the plaintiffs cited to the European Convention on Human Rights because the case law of the European Court of Human Rights holds that “a contracting state is obliged by these provisions to take suitable measures if a real and immediate risk to people’s lives or welfare exists and the state is aware of that risk,” including if the risk is an environmental hazard that will develop over a period of time.<sup>123</sup> Article 13 of the European Convention of Human Rights states that national law must offer an “effective remedy” against a violation of the rights that are safeguarded by the convention.<sup>124</sup>

The State argued that the Netherlands “pursues an adequate climate policy” and “cannot be forced at law to pursue another climate policy.”<sup>125</sup> As there is no way to separate current and future climate policies from international agreements or from the standards and emission targets set by the European Union, the State claimed it has no legal obligation (from national or international law) to take measures to achieve Urgenda’s stated reduction targets.<sup>126</sup> Furthermore, doing so would “interfere with the system of separation of powers and harm the State’s negotiating position in international politics.”<sup>127</sup> Additionally, the State claimed that Dutch climate policy is not in breach of Articles 2 and 8 of the European Convention on Human Rights.<sup>128</sup>

On June 24, 2015, the District Court of The Hague ruled that the Dutch government must cut its greenhouse gas emissions by at least twenty-five percent of its 1990 levels by the end of 2020.<sup>129</sup> The District Court held that “[d]ue to the severity of the consequences of climate change and the great risk of hazardous climate change occurring,” the State has a duty to take more effective climate change mitigation measures.<sup>130</sup> In its decision, the court

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<sup>121</sup> Convention for the Protection of Human Rights and Fundamental Freedoms art. 2, 8, Nov. 4, 1950, 213 U.N.T.S. 221, [<https://perma.cc/8WLN-S34M>].

<sup>122</sup> HR 13 januari 2020, NJ 2020, ECLI:NL:HR:2019:2007, 4 (Staat der Nederlanden/Stichting Urgenda) (Neth.) [hereinafter *Urgenda Supreme Court Judgment*], [<https://perma.cc/GDK6-ZCYL>] (unofficial English translation).

<sup>123</sup> *Id.*

<sup>124</sup> *Urgenda Supreme Court Judgment*, *supra* note 122, at 4; Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 121, at art. 13.

<sup>125</sup> *Urgenda District Court Judgment*, *supra* note 113, at para. 4.2.

<sup>126</sup> *Id.* at para. 3.3.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at para. 4.1. The District Court of the Hague is a Dutch national trial court. *Id.*

<sup>130</sup> *Id.* at para. 4.83.



cited various sources, including Article 21 of the Dutch Constitution, EU emissions reduction targets, and principles under the European Convention on Human Rights.<sup>131</sup> The State appealed the case, and the decision was upheld by the Hague Court of Appeal on October 9, 2018.<sup>132</sup> The Hague Court of Appeal concluded that “the State is acting unlawfully . . . by failing to pursue a more ambitious reduction.”<sup>133</sup> Because the government was “acting unlawfully” by not reducing emissions, the district court’s order requiring the State to reduce of greenhouse gas emissions was in line with the State’s duty of care.<sup>134</sup> The State appealed to the Supreme Court of the Netherlands, which heard the case on May 24, 2019.<sup>135</sup>

The Supreme Court of the Netherlands issued a decision on December 20, 2019, which ordered the government to cut the nation’s greenhouse gas emissions by at least 25 percent from 1990-levels by the end of 2020.<sup>136</sup> It is likely that the government will need to take additional actions like closing down some of its coal-fired power plants to reach this level of reduction.<sup>137</sup> This is a groundbreaking decision, as this is the first time a court has ordered a country to decrease its greenhouse gas emissions.<sup>138</sup> As the first international decision to establish that a government’s domestic obligations of care, interpreted in a human rights context, can extend to the protection of the planet’s climate, *Urgenda* “demonstrates that the judgment forms part of a tidal wave of judicial enquiry into the accountability of governments for their climate action on the basis of human rights.”<sup>139</sup> As seen in *Urgenda*, the European Convention on the Protection of Human Rights and Fundamental Freedoms requires the national courts to provide effective legal protection.<sup>140</sup> Since the State was not doing enough to mitigate climate change, the Court decided that the State needed to take action to prevent further harm.<sup>141</sup>

<sup>131</sup> *Urgenda District Court Judgment*, *supra* note 113, at para. 2.67-2.70, 4.45-4.50.

<sup>132</sup> *Climate Case Explained*, URGENDA, [https://perma.cc/YY6J-2JN2] (last visited June 8, 2021).

<sup>133</sup> *Urgenda Appellate Court Judgment*, *supra* note 14, at para. 76; *see also* Varvastian, *supra* note 98.

<sup>134</sup> John Schwartz, *In ‘Strongest’ Climate Ruling Yet, Dutch Court Orders Leaders to Take Action*, N.Y. TIMES (Dec. 20, 2019) [hereinafter Schwartz *Climate Ruling*] (quoting *Urgenda Appellate Court Judgment*, *supra* note 14, at para. 76), [https://perma.cc/7ZMQ-SXNF]. *See also* *State Must Achieve Higher Reduction in Greenhouse Gas Emissions in Short Term*, DE RECHTSPRAAK (Oct. 9, 2018), [https://perma.cc/8Y4T-2C83].

<sup>135</sup> *Climate Case Explained*, *supra* note 132.

<sup>136</sup> *Urgenda Supreme Court Judgment*, *supra* note 122, at 2.

<sup>137</sup> Schwartz *Climate Ruling*, *supra* note 134.

<sup>138</sup> *Id.*

<sup>139</sup> Petra Minnerop, *Integrating the ‘Duty of Care’ Under the European Convention on Human Rights and the Science and Law of Climate Change: The Decision of The Hague Court of Appeal in the Urgenda Case*, 37 J. ENERGY & NAT. RESOURCES L. 149, 149 (2019).

<sup>140</sup> *Urgenda Supreme Court Judgment*, *supra* note 122, at 3.

<sup>141</sup> Blumm & Wood, *supra* note 12, at 80-81.

## 2. Colombia: *Demanda Generaciones Futuras v. Minambiente*

Modeled after the *Juliana* lawsuit, twenty-five youth plaintiffs sued the Colombian government for failing to honor its commitment to mitigate the effects of climate change by reducing deforestation in the Amazon.<sup>142</sup> The plaintiffs sought to require the government to comply with a zero-net deforestation target by the year 2020, per Colombia's agreement under the Paris Agreement and its National Development Plan of 2014-2018.<sup>143</sup> The plaintiffs utilized a special constitutional claim—a “tutela”—to enforce their fundamental rights to a healthy environment, life, health, food, and water.<sup>144</sup> Although a lower court ruled against the plaintiffs, the Supreme Court reversed the lower court's decision.<sup>145</sup> Notably, the Supreme Court recognized “fundamental rights of life, health, the minimum subsistence, freedom, and human dignity are substantially linked and determined by the environment and the ecosystem.”<sup>146</sup> This decision was also groundbreaking because, for the first time, the Court recognized the Colombian Amazon Basin as a “subject of rights,” and as such, it was entitled to protection, conservation, maintenance, and restoration.<sup>147</sup> As of April 2018, the Court ordered the government to implement action plans to address deforestation in the Amazon.<sup>148</sup>

The core issue in the case concerned addressing the fundamental human rights to a healthy environment, life, health, food, and water.<sup>149</sup> In challenging the Colombian government's inaction with regard to deforestation in the Amazon, the plaintiffs successfully invoked a constitutionally recognized right to a healthy environment, life, health, food, and water, and the Court observed that they are “substantially linked and determined by the

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<sup>142</sup> Emma Marris, *Historic Kids' Climate Lawsuit Gets Green Light*, 563 NATURE 163, 164 (2018), [https://perma.cc/85TM-DZK6].

<sup>143</sup> *Demanda Generaciones Futuras v. Minambiente*, *supra* note 14, at 1-2.

<sup>144</sup> *Id.* at 2-3. See Everaldo Lamprea & Daniela García, *Recent Trends in Climate Change Litigation: Colombia's Amazon and Juliana v. U.S.*, OXFORD HUM. RTS. HUB (Apr. 13, 2018), [https://perma.cc/4PN2-ZS8T]. A “tutela” is “a constitutional injunction that aims to protect fundamental constitutional rights when they are violated or threatened by the action or omission of any public authority.” Eduardo Zuleta & María Camila Rincón, *Colombia's Constitutional Court Declares that Constitutional Injunctions (Tutela) Can be Upheld Against Awards in International Arbitration*, WOLTERS KLUWER: KLUWER ARB. BLOG (Nov. 4, 2019), [https://perma.cc/J4X3-X4K4].

<sup>145</sup> *Future Generations v. Ministry of the Env't and Others*, SABIN CTR. FOR CLIMATE CHANGE L., [https://perma.cc/2JRW-YKPR] (last visited June 8, 2021).

<sup>146</sup> *Demanda Generaciones Futuras v. Minambiente*, *supra* note 14, at 2.

<sup>147</sup> *Id.* at 9.

<sup>148</sup> *Id.* at 9 (discussing the Court's order requiring the municipalities of the Amazon to update their Land Management Plans within five months and to develop an active plan to reduce deforestation). See also *In Historic Ruling, Colombian Court Protects Youth Suing the National Government for Failing to Curb Deforestation*, DEJUSTICIA (Apr. 5, 2018) [hereinafter *Historic Ruling by Colombian Court*], [https://perma.cc/6YHU-6AXG].

<sup>149</sup> *Demanda Generaciones Futuras v. Minambiente*, *supra* note 14, at 9.

environment and the ecosystem.”<sup>150</sup> The Court emphasized “the connectedness of the environment with fundamental rights,” writing: “The increasing deterioration of the environment is a serious attack on current and future life and on other fundamental rights; . . . The inability to exercise the fundamental rights to water, to breathe pure air, and to enjoy a healthy environment is making Colombians sick.”<sup>151</sup> The plaintiffs were able to link the government’s inaction regarding deforestation to an increase in greenhouse gas emissions in Colombia and, ultimately, climate change.<sup>152</sup> The Court acknowledged that deforestation of the Amazon was causing “imminent and serious damage to the children, adolescents and adults who filed this lawsuit . . . including both present and future generations” due to “emissions of carbon dioxide (CO<sub>2</sub>) into the atmosphere, producing the greenhouse gas effect, which in turn transforms and fragments ecosystems.”<sup>153</sup> Notably, this decision not only protects the fundamental rights of individuals but implicates the “other,” including the unborn.<sup>154</sup>

This ruling is also significant on both national and international levels. The director and lawyer for Dejusticia, the organization that supported the youth plaintiffs, stated that “[a]t the national level, it categorically recognizes that future generations are subject to rights, and it orders the government to take concrete actions to protect the country and planet in which they live.”<sup>155</sup> Acknowledging this case’s part in an era of global climate change lawsuits, he stated that “the ruling is a fundamental step in the direction that other courts have been taking worldwide, ordering governments to fulfill and increase their commitments to address climate change.”<sup>156</sup> *Demanda Generaciones* is significant and relevant to the United States because it shows how a court could possibly make the connection between the climate and a fundamental right to a healthy environment, and thereby take action to ensure appropriate steps are taken by the state to protect those rights. The Lahore High Court accepted a similar rights-based argument in a 2015 case in Pakistan.<sup>157</sup>

### 3. Pakistan: *Leghari v. Federation of Pakistan*

In *Asghar Leghari v. Federation of Pakistan*, the plaintiff—an agriculturalist—filed a lawsuit against the Pakistani government for violating his human

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<sup>150</sup> *Id.* at 2.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at para 11.1.

<sup>153</sup> *Id.* at para 34.

<sup>154</sup> *Id.* at para 5.2.

<sup>155</sup> *Historic Ruling by Colombian Court*, *supra* note 148.

<sup>156</sup> *Id.*

<sup>157</sup> *Leghari v. Pakistan* (Apr. 4, 2015 Decision), *supra* note 14, at 5-6.

rights by failing to address the impacts of climate change.<sup>158</sup> His family owned a sugar-cane farm in the Punjab region in the south of Pakistan that was negatively impacted by water scarcity and temperature changes.<sup>159</sup> He feared that if the Pakistani government did not act to conserve water or move to heat-resilient crops, he would no longer be able to support himself through his farm.<sup>160</sup> In his lawsuit, he claimed that Pakistan failed to implement both its 2012 National Climate Change Policy and its Framework for the National Climate Change Policy.<sup>161</sup> He also alleged that Pakistan is a victim of climate change, and as such, the government needs to take immediate remedial adaptation measures to cope with the disruptive climatic patterns.<sup>162</sup> He argued that his fundamental right to life (as guaranteed in Article 9 of Pakistan's Constitution), including his right to a healthy and clean environment and the right to human dignity (as protected in Article 14 of Pakistan's Constitution), were breached by the government's failure to adapt to climate change.<sup>163</sup>

The Lahore High Court found that the Pakistani government's failure to address climate change by not implementing its climate policy framework violated the plaintiff's fundamental rights.<sup>164</sup> It ordered the establishment of a Climate Change Commission to make sure that Pakistan "moves towards climate resilient development."<sup>165</sup> Interestingly, the Lahore High Court related its holding to the issues of environmental justice and climate justice in its judgment.<sup>166</sup> The judgment discusses how Pakistan has "weaved our constitutional values and fundamental rights with the international environmental principles."<sup>167</sup> It concludes that its remedies to climate change can be found in adaptation—"a response to global warming and climate change, that seeks to reduce the vulnerability of social and biological systems to relatively sudden change and thus offset the effects of global warming"—and mitigation—"actions to limit the magnitude or rate of long-term climate change . . . [and can] substantially reduce the risks associated with human-induced

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<sup>158</sup> Sandra Laville, *Governments and Firms in 28 Countries Sued Over Climate Crisis - Report*, GUARDIAN (July 4, 2019, 1:00 AM), [<https://perma.cc/6JU5-SY46>].

<sup>159</sup> Anam Gill, *Farmer Sues Pakistan's Government to Demand Action on Climate Change*, REUTERS (Nov. 13, 2015, 6:33 AM), [<https://perma.cc/BYZ2-T3EF>].

<sup>160</sup> *See id.*

<sup>161</sup> Ashgar Leghari v. Federation of Pakistan, (2015) W.P. No. 25501/2015, 4 (Pak.) [hereinafter *Leghari v. Pakistan* (Supplemental Decision)], [<https://perma.cc/79P6-TCHN>].

<sup>162</sup> *Id.* at 3-4.

<sup>163</sup> *Id.* at 7.

<sup>164</sup> Ashgar Leghari v. Federation of Pakistan, (2015) W.P. No. 25501/2015, 10 (Pak.) [hereinafter *Leghari v. Pakistan* (Jan. 25, 2018 Judgment)], [<https://perma.cc/HGZ9-Q586>]. *See also* Peel & Osofsky, *supra* note 104 (discussing an increasing trend for petitioners to employ rights claims in climate change lawsuits).

<sup>165</sup> *Leghari v. Pakistan* (Jan. 25, 2018 Judgment), *supra* note 164, at 21.

<sup>166</sup> *Id.* at 1, 21-24.

<sup>167</sup> *Id.* at 20.

global warming.”<sup>168</sup> *Leghari*, along with *Urgenda* and *Demanda Generaciones*, together show that at least some international courts are willing to employ rights-based claims and hold their governments accountable in climate change lawsuits.

*D. The Ground-Breaking Climate Change Litigation in the United States: Juliana v. United States*

*Juliana* has a complex procedural history, as the Department of Justice (DOJ) did whatever it could to prevent the case from going to trial. This case was originally filed in 2015 in the United States District Court for the District of Oregon.<sup>169</sup> The Obama Administration filed a motion to dismiss the case, which the federal district court denied, and the court set a trial date for February 2018.<sup>170</sup> The Trump Administration unsuccessfully tried again, in June 2017, to dismiss the case by appealing the decision.<sup>171</sup> The case was scheduled to go to trial in October, 2018, but just eleven days before the trial was scheduled, the Supreme Court granted the Department of Justice’s second writ of mandamus petition and application for stay, which temporarily put the trial on hold.<sup>172</sup> A panel of three judges on the Ninth Circuit eventually heard oral arguments on June 4, 2019.<sup>173</sup>

The Ninth Circuit Court of Appeals ruled that the youth plaintiffs needed to look to the executive and legislative branches to take action, rather

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<sup>168</sup> *Id.* at 22-23.

<sup>169</sup> *Juliana I*, *supra* note 8, at 1. See generally *Juliana v. US*, OUR CHILDREN’S TR., [https://perma.cc/A4QT-AT8J] (last visited Apr. 3, 2021) [hereinafter *Juliana I Timeline*] (providing a timeline of the case, court orders, and major filings).

<sup>170</sup> Federal Defendants’ Motion to Dismiss, *Juliana v. United States*, 217 F. Supp. 3d 1224 (D. Or. 2016) (No. 6:15-cv-01517-TC); Motion to Dismiss Denied, *Juliana v. United States*, 217 F. Supp. 3d 1224 (D. Or. 2016) (No. 6:15-cv-01517-TC); Order Granting Fossil Fuel Industry’s Motions to Withdraw and Setting Trial Date, *Juliana v. United States*, 217 F. Supp. 3d 1224 (D. Or. 2016) (No. 6:15-cv-01517-TC).

<sup>171</sup> Order Denying Defense’s Motion for Interlocutory Appeal, *Juliana v. United States*, 217 F. Supp. 3d 1224 (D. Or. 2016) (No. 6:15-cv-01517-TC).

<sup>172</sup> The procedural history of *Juliana* is complex, so this is a high-level simplification that only summarizes the key moments of litigation. Following the DOJ’s October 18, 2018 writ of mandamus petition and application for stay, the Supreme Court issued a temporary administrative stay on October 19, 2018 and asked the plaintiffs to respond. *Juliana I Timeline*, *supra* note 169. On November 2, 2018, the Supreme Court denied the government’s application for stay. *Id.* The DOJ subsequently filed another motion for stay with the U.S. District Court of Oregon and another petition for a writ of mandamus with the Ninth Circuit Court of Appeals on November 5, 2018. *Id.* The Ninth Circuit Court of Appeals partially granted the DOJ’s motion on November 8, 2018. *Id.* District Court Judge Aiken certified the case for interlocutory appeal to the Ninth Circuit Court of Appeals and stayed the case pending the decision. *Id.* Eventually, the plaintiffs filed an emergency motion with the Ninth Circuit Court of Appeals to request that the court lift the stay from its November 8, 2018 order, which the court granted on January 7, 2019. *Id.*

<sup>173</sup> Oral Argument at 0:35, *Juliana v. United States*, 947 F.3d 1159 (9th Cir. 2020) (No. 18-36082), [https://perma.cc/U4KN-S8HF].

than to seek a solution through the courts.<sup>174</sup> This two-to-one ruling acknowledged that “[t]he plaintiffs have made a compelling case that action is needed” and that, in time, it will be “increasingly difficult . . . for the political branches to deny that climate change is occurring, that the government has had a role in causing it, and that our elected officials have a moral responsibility to seek solutions.”<sup>175</sup> However, the majority’s decision largely drew on the notion of separation of powers, stating that just because “the other branches may have abdicated their responsibility to remediate the problem does not confer on Article III courts . . . the ability to step into their shoes.”<sup>176</sup> While seemingly sympathetic to the arguments and personal stories of the plaintiffs, the court held that redress must be achieved through the political branches of the government.<sup>177</sup> The Ninth Circuit Court of Appeals’ ruling reversed the district court ruling that would have allowed the case to go forward and instructed the district court to dismiss the case.<sup>178</sup>

While this ruling unfortunately did not achieve the desired result, simply because the Ninth Circuit did not find a constitutionally recognized right to a healthy environment does not mean that a court will not grant it in another case. In her dissenting opinion, Judge Josephine Staton criticized the government for ignoring the climate crisis.<sup>179</sup> She lambasted the government, stating that climate change “has the absolute and unreviewable power to destroy the Nation.”<sup>180</sup> She writes: “[i]n these proceedings, the government accepts as fact that the United States has reached a tipping point crying out for a concerted response—yet presses ahead toward calamity. It is as if an asteroid were barreling toward Earth and the government decided to shut down our only defenses.”<sup>181</sup> When the issue of a fundamental right to a healthy environment is raised again in the future, the dissenting opinion demonstrates the

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<sup>174</sup> *Juliana II*, 947 F.3d at 1171. See also Dan Berman, *Appeals Court Throws Out Lawsuit By Children Seeking to Force Action on Climate Crisis*, CNN (Jan. 17, 2020, 5:11 PM), [https://perma.cc/XU5V-9CGV]; John Schwartz, *Court Quashes Youth Climate Change Case Against Government*, N.Y. TIMES (Jan. 17, 2020), [https://perma.cc/WY49-QXN2] [hereinafter Schwartz *Court Quashes*].

<sup>175</sup> *Juliana II*, 947 F.3d at 1175.

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* at 1165.

<sup>178</sup> *Id.* at 1159. However, the plaintiffs are appealing the Ninth Circuit’s ruling, and have submitted a petition for rehearing *en banc*. *Youth Plaintiffs in Juliana v. United States File Petition with Ninth Circuit Court of Appeals Seeking Full Court Review of Their Case*, OUR CHILDREN’S TR. (Mar. 3, 2020), [https://perma.cc/A9Z4-PP1L]; Petition for Rehearing *En Banc* for Plaintiff-Appellees, *Juliana v. United States*, 947 F.3d 1159 (9th Cir. 2020) (No. 18-36082); Schwartz *Court Quashes*, *supra* note 174.

<sup>179</sup> *Juliana II*, 947 F.3d at 1176-77 (Staton, J., dissenting).

<sup>180</sup> *Id.* at 1175.

<sup>181</sup> *Id.*

idea that such a right is already embedded in our “system of liberty” because the Constitution does not allow the willful destruction of our nation.<sup>182</sup>

The DOJ claimed that there is no “historical basis for a fundamental right to a stable climate system or any other constitutional right related to the environment.”<sup>183</sup> However, many health organizations, scientists, and doctors filed amicus briefs in support of the disproportionate adverse health effects of climate change on youth and future generations.<sup>184</sup> Some consider climate change to be the greatest public health emergency of our time, and the adverse effects of continued CO<sub>2</sub> emissions and other fossil-fuel-related pollutants threaten children’s right to a healthy existence in a safe environment.<sup>185</sup>

*Juliana* represents “the first time a [U.S.] court has held that there might be a constitutional right to a clean environment.”<sup>186</sup> The twenty-one youth plaintiffs claimed that they have a constitutional right to inherit a stable climate system capable of sustaining human life and liberty.<sup>187</sup> The remedy sought is for the federal government to prepare and implement an enforceable national plan to phase out the use of greenhouse gases that cause climate change by ensuring that the level of CO<sub>2</sub> in the atmosphere falls below 350 ppm by 2100, down from an average of 405 ppm in 2017.<sup>188</sup> The novelty of this case is that the right the plaintiffs seek to establish would be based in the Constitution, and therefore protected from congressional infringement.<sup>189</sup> The plaintiffs asserted four main claims:

1. Due Process Violation of the Fifth Amendment. The plaintiffs claim that the government is infringing on their fundamental rights to life, personal security, family autonomy, and the right to have their property be safe. Climate change is grounds for a state-created danger claim because the federal government has known for at least fifty years

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<sup>182</sup> *Juliana v. United States: Summary*, U.S. COURTS FOR THE NINTH CIRCUIT, 6 (Jan. 17, 2020), [https://perma.cc/5ABU-SS2X].

<sup>183</sup> Andrew Selsky, *Young Americans’ Lawsuit on Climate Change Faces Big Hurdle*, AP NEWS (June 4, 2019), [https://perma.cc/D9TH-XVW3].

<sup>184</sup> See generally *Juliana v. United States*, SABIN CTR. FOR CLIMATE CHANGE L., [https://perma.cc/8RVH-CF9S] (last visited Apr. 23, 2021) (containing a list and links to all the amicus briefs filed in *Juliana*).

<sup>185</sup> See generally *id.* (compiling above-mentioned amicus brief arguments).

<sup>186</sup> Julia Felenthal, *Do Americans Have a Constitutional Right to a Livable Planet? Meet the 21 Young People Who Say They Do*, VOGUE (Mar. 21, 2019), [https://perma.cc/X5GC-TD8L] (quoting Michael Gerrard, Director of the Sabin Center for Climate Change Law at Columbia Law School) (alteration in original).

<sup>187</sup> *Juliana I*, *supra* note 8, at 35, 50.

<sup>188</sup> *Id.* at 4-5.

<sup>189</sup> *Id.* at 40-41, 44, 88, 90-91.

that its policies were putting its citizens in harm's way and threatening their personal security, yet remained indifferent to that harm.<sup>190</sup>

2. Equal Protection Claim Embedded in the Fifth Amendment. The youth plaintiffs claim that the government is discriminating against children in its policies because it discounts their lives and treats them as less valuable in the future (than adults today) when it does economic analysis.<sup>191</sup> The youth of today are being born into and inheriting the problems that come with climate change, and as such, are well-positioned to seek governmental action for climate change.<sup>192</sup>

3. Unenumerated Rights in the Ninth Amendment. The implied right to a stable climate system and an atmosphere free from dangerous levels of CO<sub>2</sub> is among the implicit liberties protected by the Ninth Amendment.<sup>193</sup>

4. Public Trust Doctrine. The public trust doctrine is a legal principle that can compel the government to preserve natural resources for public use.<sup>194</sup> The atmosphere is protected by the public trust doctrine, and as such, the federal government is constitutionally obligated to hold, in trust, the nation's natural resources and protect the health and well-being of its citizens.<sup>195</sup> When common resources are shared, the government has to act as a trustee to protect it for future generations.<sup>196</sup>

The plaintiffs asserted that government officials have known about the effects of burning fossil fuels on climate change for the past fifty years.<sup>197</sup> The government claimed that a lawsuit is not the proper method for correcting alleged government inaction on climate change. It asserted three main defenses:

1. Standing. The plaintiffs lack standing to bring this action because the plaintiffs' claims are generalized and not particularized, there is no causation, and the claims are not

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<sup>190</sup> *Id.* at 84-88.

<sup>191</sup> *See id.* at 77-89.

<sup>192</sup> *Id.* at 88-91.

<sup>193</sup> *Id.* at 91-92.

<sup>194</sup> Schwartz *Court Quashes*, *supra* note 174.

<sup>195</sup> *Juliana I*, *supra* note 8, at 92-93.

<sup>196</sup> *Id.*

<sup>197</sup> *Id.* at 1.



redressable. The plaintiffs “cannot identify any injury to a concrete and particularized legally protected interest because their grievance is universally shared and generalized” and because their injuries are not caused by the government’s actions.<sup>198</sup> The plaintiffs’ alleged injuries are not redressable by a single district judge, and “[n]o federal court has the power to perform such a sweeping policy review.”<sup>199</sup>

2. No fundamental right to a “livable climate.” The government refutes plaintiffs’ claims that there is a fundamental right to a “stable climate system.”<sup>200</sup> The defendants find “no basis in this Nation’s history or tradition” for such a right that “is not even close to any other fundamental right recognized by the Supreme Court.”<sup>201</sup>

3. Public trust doctrine. The atmosphere does not fall within any public trust, and no federal public trust doctrine creates a right to particular climate conditions.<sup>202</sup>

### III. ANALYSIS

The following three Sections address a new fundamental right to a stable and healthy climate and argue that the United States Supreme Court should grant this right in the future. Section A analyzes why the Court should recognize this new right, based on how the Court has previously analyzed similar questions recognizing new fundamental rights. Section B advocates that the Court look to the rulings and opinions from foreign jurisdictions. Section C discusses the future of climate change litigation in the United States after *Juliana*.

#### *A. The United States Supreme Court Should Recognize a Constitutional Right to a Climate System Capable of Sustaining Human Life*

The claim to a constitutional right to a safe and livable climate is a unique and original legal claim in the United States. As many legal scholars have noted, *Juliana* is bold, new, uncharted territory.<sup>203</sup> The plaintiffs’ lawyers went to the judicial branch to compel the unresponsive executive and

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<sup>198</sup> Opening Brief for Appellants at 13, *Juliana v. United States*, 947 F.3d 1159 (9th Cir. 2020) (No. 18-36082).

<sup>199</sup> *Id.* at 10.

<sup>200</sup> *Id.* at 1.

<sup>201</sup> *Id.* at 10.

<sup>202</sup> *Id.* at 11.

<sup>203</sup> See, e.g., Steve Kroft, *The Climate Change Lawsuit that Could Stop the U.S. Government from Supporting Fossil Fuels*, CBS NEWS: 60 MINUTES (June 23, 2019), [<https://perma.cc/48P4-7D7B>].

legislative branches to implement policies that would curb the United States' use of fossil fuels. In her *Juliana* opinion, United States District Court Judge Aiken wrote: "I have no doubt that the right to a climate system capable of sustaining human life is fundamental to a free and ordered society."<sup>204</sup> This was the first-ever holding from a United States federal court that there might be a constitutional right to a safe climate and healthy environment.<sup>205</sup>

The Ninth Circuit Court of Appeals ultimately dismissed the lawsuit for lack of standing and ruled that it could neither recognize such a claim nor compel the government to act, as it would be overstepping its boundaries under the separation of powers.<sup>206</sup> The concern that judicial compulsion of the government would make the executive a subsidiary of the judiciary and wholly ignore the separation of powers is valid.<sup>207</sup> Historically, the Supreme Court has been reluctant to legislate on environmental issues. For instance, in *American Electric Power Co. v. Connecticut*, several states asked the federal court to order electric utility companies to reduce emissions from coal-fired power plants.<sup>208</sup> The Supreme Court held that it was not a matter for the courts, as Congress assigned the task of setting air pollution levels to the Environmental Protection Agency.<sup>209</sup>

However, the Court needs to move away from this type of precedent because the circumstances surrounding the state of the environment have changed and are becoming more dire. As Michael B. Gerrard, the director of the Sabin Center for Climate Change Law at Columbia University, states: "for now, all three branches of the federal government are sitting on their hands as the planet burns."<sup>210</sup> Traditionally, the Constitution has limited United States judges to enforcing environmental laws already established by Congress because that honors the political process. The Ninth Circuit's ruling in *Juliana* leaves climate action to the political branches, but what happens when

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<sup>204</sup> *Juliana v. United States*, 217 F.Supp. 3d 1224, 1250 (D. Or. 2016).

<sup>205</sup> However, Michael Gerrard, the Director of the Sabin Center for Climate Change Law at Columbia University, believes that even if the plaintiffs in *Juliana* prevail, the decision would not survive a Supreme Court review, especially because the bench is comprised of three Trump-appointed Justices. Ciara O'Rourke, *The 11-Year-Old Suing Trump Over Climate Change*, THE ATLANTIC (Feb. 9, 2017), [https://perma.cc/2XZ9-JQ88]. The Supreme Court opinion on the stay motion indicated that the justices' opinions differ on whether the case is justiciable (e.g., standing, political question). *Id.*

<sup>206</sup> *Juliana II*, 947 F.3d 1159, 1174 (9th Cir. 2020).

<sup>207</sup> See Carolyn Kormann, *The Right to a Stable Climate is the Constitutional Quest of the Twenty-First Century*, NEW YORKER (June 15, 2019), [https://perma.cc/893X-ELRY]; see also Arun Gupta, *Life, Liberty and a Stable Climate: These Kids Are Arguing for a New Constitutional Right*, IN THESE TIMES (June 24, 2019), [https://perma.cc/9KLG-7QFN]; John Schwartz, *Judges Give Both Sides a Grilling in Youth Climate Case Against the Government*, N.Y. TIMES (June 4, 2019), [https://perma.cc/6WMX-S3H7].

<sup>208</sup> *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 415 (2011).

<sup>209</sup> *Id.*

<sup>210</sup> Schwartz *Court Quashes*, *supra* note 174.

the political branches do not act? The Ninth Circuit acknowledges not only that Congress has failed to act to slow global warming, but also that Congress has affirmatively caused the climate crisis, writing:

The record also establishes that the government’s contribution to climate change is not simply a result of inaction. The government affirmatively promotes fossil fuel use in a host of ways, including beneficial tax provisions, permits for imports and exports, subsidies for domestic and overseas projects, and leases for fuel extraction on federal land.<sup>211</sup>

Not only has the United States government failed to act to try to relinquish its position as one of the world’s largest greenhouse gas emitters, but its government agencies continue to revoke or push policies that contribute to fossil fuel use. Given the imminent and continually growing threat of climate change and the lack of political will to address the problem, perhaps turning to the courts will be the only way to solve the problem, like in *Urgenda*, *Demanda Generaciones*, and *Leghari*. As the Supreme Court wrote in its opinion for *Obergefell*,

[t]he dynamic of our constitutional system is that individuals need not await legislative action before asserting a fundamental right . . . . An individual can invoke a right to constitutional protection when he or she is harmed, even if the broader public disagrees and even if the legislature refuses to act.<sup>212</sup>

In a case like *Juliana*, in which only half of the youth plaintiffs can vote, telling the plaintiffs to turn to the “very branches of government that are violating their rights” seems futile given the immediacy of the effects of climate change.<sup>213</sup> While the plaintiffs’ requested relief in *Juliana* might have been too broad to survive political question review, instead of dismissing the case outright, the Court could have addressed certain parts of what the plaintiffs sought instead of a sweeping denial.

Courts have asked the government to do bold and dramatic things, but *Juliana*—“the trial of the century”—might be the biggest.<sup>214</sup> The role of the judiciary in *Juliana* is similar to the court-supervised remedies sought in *Brown v. Board of Education* ending school segregation, *Roe v. Wade* guaranteeing

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<sup>211</sup> *Juliana II*, 947 F.3d at 1167.

<sup>212</sup> *Obergefell v. Hodges*, 576 U.S. 644, 677 (2015).

<sup>213</sup> Schwartz *Court Quasbes*, *supra* note 174 (quoting Julia Olson, lead lawyer for the plaintiffs).

<sup>214</sup> Michael Burger & Jessica Wentz, “The Trial of the Century”: A Preview of How Climate Science Could Play Out in the Courtroom, *Courtesy of Juliana v. United States*, COLUM. L. SCH.: CLIMATE CHANGE BLOG (Jan. 7, 2019), [<https://perma.cc/HX2B-3V55>].

abortion rights, and *Obergefell v. Hodges* guaranteeing same-sex marriage.<sup>215</sup> University of Oregon environmental law professor Mary Christina Woods notes:

[t]hroughout history there have been extraordinary times when judges have been called upon to apply logic to unprecedented cases, and that's really what we're talking about . . . . What they're doing is not extraordinary as a jurisprudential matter. They're drawing within the lines, but this time they're seeking to make the law relevant to the greatest crisis humanity has ever known.<sup>216</sup>

Regarding the right to a climate system capable of sustaining human life, legal scholar Samvel Varvastian believes that “if we get more and more calls to recognize this right and to fulfil [sic] it, then it's highly likely that it would make a difference.”<sup>217</sup>

When recognizing an unenumerated right as a fundamental right, the Court has looked to history and tradition.<sup>218</sup> A person's right to live in an environment with a safe climate that protects their right to life is rooted in history and tradition. In *Cruzan*, the Court did not recognize the right to assisted suicide as a fundamental right under the due process clause because it was not a right rooted in our nation's history and tradition; our nation has consistently rejected that right even for terminally ill, mentally competent adults.<sup>219</sup> Yet, in *Griswold*, the Court recognized the right to marital privacy, rooted in part in the Fourth Amendment right against search and seizure.<sup>220</sup> In *Obergefell*, the Court acknowledged the changed understandings of marriage and concluded that the fundamental liberties protected by the due process clause extended to personal intimate choice, holding that the fundamental right to marry is based on the understanding that marriage is a right that supports other recognized liberties.<sup>221</sup> The Court looked to history and tradition and found that the right to marital privacy fell within the zone of privacy that the Fourteenth Amendment expressly allows.<sup>222</sup>

Similarly, in *Juliana*, the evolving and changed understanding of climate change demands that the Supreme Court expand the constitutional right to

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<sup>215</sup> See *Brown v. Board of Education*, 349 U.S. 294 (1955); *Roe v. Wade*, 410 U.S. 113 (1973); *Obergefell*, 576 U.S. at 644.

<sup>216</sup> Sullivan, *supra* note 100.

<sup>217</sup> *Id.*

<sup>218</sup> See, e.g., *Obergefell v. Hodges*, 576 U.S. 644 (2015); *Washington v. Glucksberg*, 521 U.S. 702 (1997); *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261 (1990).

<sup>219</sup> *Cruzan*, 497 U.S. at 261.

<sup>220</sup> *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965).

<sup>221</sup> *Obergefell*, 576 U.S. at 675-76.

<sup>222</sup> *Id.* at 665-66.

life to include the right to a safe climate. The right to a safe climate is fundamental to society, just like how the Court reasoned that marriage is fundamental to family in *Obergefell*. While some other constitutions around the world expressly include environmental rights, the United States Constitution does not; thus, courts need to tie the right to a safe climate to the right to due process or the public trust doctrine. The Fifth Amendment protects a person's right to life, and it is well-rooted in the historical interpretation of the public trust doctrine's protection of the health and well-being of its citizens as part of the doctrine's protection of shared resources for the benefit of all.<sup>223</sup> The interlocking nature of the Fifth Amendment and the public trust doctrine "may be instructive as to the meaning and reach of the other."<sup>224</sup> District Court Judge CJ Aiken accepted a novel application of the public trust doctrine that is consistent with international cases like *Urgenda*, *Demanda Generaciones Futuras*, and *Leghari* in which litigants have utilized the same doctrine to challenge inadequate governmental climate change mitigation or adaptation.<sup>225</sup> By putting the rights and lives of young people at risk, through knowingly engaging in and promulgating reliance on fossil fuels that contribute to climate change, the government is denying those young people the right to life that is enumerated in the Constitution. As in *Griswold*, the right to a safe climate system falls within the zone of right to life that the Fifth Amendment expressly allows.

#### *B. The United States Should Look to the Rules of Foreign Jurisdictions*

While *Urgenda*, *Demanda Generaciones Futuras*, and *Leghari* are distinct from *Juliana* because *Juliana* asserts a duty of care established by the Constitution and the public trust doctrine, these international cases already point to a global movement pushing courts to consider the human rights implications of climate change.<sup>226</sup> As of June 2019, environmental rights are recognized in the constitutions of 112 countries.<sup>227</sup> Professor Mary Wood, a leading scholar in the use of the public trust doctrine in climate change litigation, stated, "[e]ven though the constitutions of each country are different, judges around the world are announcing a human rights imperative that the climate system supports human survival and therefore the government must protect the climate system."<sup>228</sup> This idea that judges around the world should recognize a

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<sup>223</sup> See Michael O'Loughlin, *Understanding the Public Trust Doctrine Through Due Process*, 58 B.C. L. REV. 1321, 1328-29 (2017).

<sup>224</sup> See *Obergefell v. Hodges*, 576 U.S. 644, 672 (2015) (stating that "[r]ights implicit in liberty and rights secured by equal protection may rest on different precepts," but may inform one another).

<sup>225</sup> U.N. ENV'T PROGRAMME, *THE STATUS OF CLIMATE CHANGE LITIGATION: A GLOBAL REVIEW* 15-16, 18-19 (May 2017), [<https://perma.cc/UU3C-MKT8>].

<sup>226</sup> Parker, *supra* note 2.

<sup>227</sup> *Id.*

<sup>228</sup> Sullivan, *supra* note 100.

human right in protecting the climate is one that the United States Supreme Court could draw upon in considering the right to a healthy, stable environment as part of the constitutionally recognized right to life.

While the use of foreign law in United States constitutional cases has been a source of contention among justices, Justice Stephen Breyer and the late Justice Ruth Bader Ginsburg have spoken out in support of the use of foreign law for the reasoning it holds.<sup>229</sup> More conservative justices like Chief Justice John Roberts are hesitant to cite to foreign law because they do not want to rely on the decision of a foreign judge (who has no accountability to the American people) to shape United States law.<sup>230</sup> However, the United States Supreme Court has a long history of relying on foreign law in its decisions.<sup>231</sup> Still, these references to foreign law tended to only note that a certain rule was common in other countries and did not elaborate on the foreign jurisdiction's reasoning or enactment.<sup>232</sup> One way in which the Court has referenced foreign law is as "consensus identification," in which the Court "reference[s] foreign law to support the application of a rule for which there is not already an American consensus on the rule."<sup>233</sup> However, referring to foreign decisions can also increase the United States' influence in the global arena.<sup>234</sup> In the way that courts already look to amicus briefs and scholarly articles from law professors, looking to foreign law and practices shapes ideas and allows judges to engage with other cases that have international implications.<sup>235</sup>

In this era of globalization, it is necessary for our domestic courts to look to international laws. The undeniable reality is that "local law is increasingly affected by what happens abroad."<sup>236</sup> Justice Breyer has noted that:

[t]wenty years ago, out of the 70 or so cases that the Supreme Court fully considers each year, perhaps 3 or 4 percent required us to look beyond our own shores in

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<sup>229</sup> Robert Barnes, *Breyer Says Understanding Foreign Law is Critical to Supreme Court's Work*, WASH. POST (Sept. 12, 2015), [https://perma.cc/88XJ-FEYH]; Stephen Breyer, *America's Courts Can't Ignore the World*, THE ATLANTIC (Oct. 2018), [https://perma.cc/G34Y-M7ER]; Adam Liptak, *Ginsburg Shares Views on Influence of Foreign Law on Her Court, and Vice Versa*, N.Y. TIMES (Apr. 11, 2009), [https://perma.cc/TUY9-DYJG]. *See also* STEPHEN BREYER, *THE COURT AND THE WORLD: AMERICAN LAW AND THE NEW GLOBAL REALITIES* (1st ed. 2015) (examining the work of the United States Supreme Court in an increasingly interconnected world).

<sup>230</sup> Liptak, *supra* note 229.

<sup>231</sup> Stephen A. Simon, *The Supreme Court's Use of Foreign Law in Constitutional Rights Cases: An Empirical Study*, 1 J.L. & CTS. 279, 282 (2013).

<sup>232</sup> *Id.*

<sup>233</sup> *Id.* at 290.

<sup>234</sup> Liptak, *supra* note 229.

<sup>235</sup> Barnes, *supra* note 229.

<sup>236</sup> *See* Breyer, *supra* note 229.

order to understand the legal problems involved and find the appropriate solution. Today that figure is closer to 20 percent, and is sometimes greater.<sup>237</sup>

Reviewing foreign law cases may improve a judge's analysis and reasoning because by considering the vantage point of foreign judges in similar issues, the judge can better understand how that analysis and reasoning might apply to United States law.<sup>238</sup> By relying on foreign law, the Court can gain new insights and ideas. The Court should look to foreign law cases like *Urgenda*, *Demanda Generaciones Futuras*, and *Leghari*, in which Dutch, Colombian, and Pakistani courts have recognized that their governments owe their citizens a duty of care to a stable environment, which demonstrate a developing international consensus regarding climate change cases.<sup>239</sup>

Climate change is an international issue. While a case like *Juliana* cites to specific injuries the plaintiffs have faced domestically, the environmental problems extend beyond the United States' borders.<sup>240</sup> As it is an international issue, it would seem pertinent—daresay necessary—for courts to think globally about the implications of the United States' actions as one of the world's leading greenhouse gas emitters. While the Constitution controls American government and court decisions, the changing circumstances of the world and globalization require United States courts to consider what happens abroad and the repercussions of the United States' actions.

### C. *The Future of Climate Change Litigation in the United States After Juliana*

People will perhaps remember *Juliana* as one of our generation's landmark lawsuits. While it had the potential to hold the United States government accountable for contributing to climate change, the legal fight against climate change does not end with this case. The government argued that the plaintiffs do not have standing to sue, as the plaintiffs have not shown how the government has harmed them by its inaction.<sup>241</sup> Despite this claim by the government, the plaintiffs' attorney has shown how each and every single youth plaintiff has been personally injured by climate change.<sup>242</sup> From psychological distress and respiratory problems to displacement from their family homes, the plaintiffs' injuries are connected to climate change.<sup>243</sup>

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<sup>237</sup> *Id.*

<sup>238</sup> Simon, *supra* note 231, at 282.

<sup>239</sup> See *Urgenda Appellate Court Judgment*, *supra* note 14; *Demanda Generaciones Futuras v. Minambiente*, *supra* note 14; *Leghari v. Pakistan* (Apr. 14, 2015 Decision), *supra* note 14.

<sup>240</sup> *Juliana I*, *supra* note 8, at 11-38.

<sup>241</sup> Petitioners' Reply in Support of Petition for Writ of Mandamus at 2-8, *Juliana v. United States*, 947 F.3d 1159 (9th Cir. 2020) (No. 18-36082).

<sup>242</sup> *Juliana I*, *supra* note 8, at 11-38.

<sup>243</sup> *Id.*

The majority in the Ninth Circuit Court of Appeals was reluctant to issue a court order to the federal government to reduce its greenhouse gas emissions because it did not want to overstep the political branches.<sup>244</sup> However, the issue presented is not in violation of the separation of powers. As Judge Staton wrote, “the mere fact that this suit cannot alone halt climate change does not mean that it presents no claim suitable for judicial resolution.”<sup>245</sup> Put simply, the plaintiffs asked the court to intervene because “the Constitution does not condone the Nation’s willful destruction,” as the government is doing.<sup>246</sup> As such, the plaintiffs are “adher[ing] to a judicially administrable standard.”<sup>247</sup> Even partial relief for what the plaintiffs seek would be a form of redress for their injuries; “[a]t this stage, we need not promise plaintiffs the moon (or, more apropos, the earth in a habitable state).”<sup>248</sup> Judge Staton analogized this situation to when the Supreme Court issued desegregation orders that upheld the plaintiff’s constitutional rights, but did not exceed the role of the judiciary.<sup>249</sup>

While the majority claims that it cannot step into the shoes of the political branches, its deference to the political question doctrine is “to the detriment of [the court’s] countervailing constitutional mandate to intervene where the political branches run afoul of our foundational principles.”<sup>250</sup> Although the system of checks and balances is precisely meant to maintain balance among the three branches of government, the doctrine of judicial review allows federal courts to “right legal wrongs, even when . . . it requires that [they] instruct the other branches as to the constitutional limitations on their power.”<sup>251</sup> So, while the Ninth Circuit cites separation of powers as support for why climate action should be left to the political branches, the Court should establish that the right to a safe climate system and healthy environment is fundamental to society and the rights of citizens, which would allow it to instruct government agencies to take affirmative action to combat climate change.

Of course, the standing doctrine ensures balance among the three branches by ensuring that a party has a “sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy.”<sup>252</sup> Standing keeps issues about general governance separate from those of legal

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<sup>244</sup> *Juliana II*, 947 F.3d at 1165.

<sup>245</sup> *Id.* at 1175 (Staton, J., dissenting).

<sup>246</sup> *Id.*

<sup>247</sup> *Id.*

<sup>248</sup> *Id.* at 1188.

<sup>249</sup> *Id.* at 1176.

<sup>250</sup> *Juliana II*, 947 F.3d 1159, 1184 (9th Cir. 2020) (Staton, J., dissenting).

<sup>251</sup> *Id.*

<sup>252</sup> *Id.* at 1181 (quoting *Sierra Club v. Morton*, 405 U.S. 727, 731 (1972)).



entitlement.<sup>253</sup> This Note agrees with Judge Staton's dissent in *Juliana II* that the case is suitable for judicial determination because the plaintiffs have: "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision."<sup>254</sup> The plaintiffs have concrete, particularized injuries that are fairly traceable to the government's conduct. Their claims for redressability are enough to invoke the adjudicative powers of the Court.<sup>255</sup>

In a future case, a court could correct course and recognize a constitutional right to a stable, healthy environment.<sup>256</sup> What is significant about the Ninth Circuit's two-to-one decision is that the Court recognized that "the federal government has long understood the risks of fossil fuel use and increasing carbon dioxide emissions" and that climate change is becoming an increasingly large and more urgent problem.<sup>257</sup> The reasoning Judge Staton provides in her dissent gives future generations a reason to hope that a future case will result in a different outcome.<sup>258</sup> By acknowledging that the youth plaintiffs have suffered injuries, this opens the door to future litigation that might make a similar argument, claiming that the United States government caused an injury by violating children's constitutional rights by pursuing policies that contribute to climate change.<sup>259</sup> In *Obergefell*, the Court recognized that the Due Process Clause also protects "interests of the person so fundamental that the [government] must accord them its respect."<sup>260</sup> "Some rights serve as the necessary predicate for others" because they are needed to preserve other fundamental constitutional protections.<sup>261</sup> Judge Staton notes that "when fundamental rights are at stake, individuals 'need not await legislative action."<sup>262</sup> When the government's conduct reaches a "tipping point," in terms of its actions having an irreversible effect on the climate, the courts will become the "ultimate backstop" because telling plaintiffs to seek

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<sup>253</sup> *Id.* at 1184.

<sup>254</sup> *Id.* at 1181 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)).

<sup>255</sup> *Id.*

<sup>256</sup> Madeleine Carlisle, *A Federal Court Threw Out a High Profile Climate Lawsuit. Here's What it Might Mean for the Future of Climate Litigation*, TIME (Jan. 17, 2020, 8:07 PM), [<https://perma.cc/4TS5-HYCL>] (last updated Jan. 19, 2020, 1:43 PM).

<sup>257</sup> *Juliana II*, 947 F.3d 1159, 1166 (9th Cir. 2020).

<sup>258</sup> *Id.* at 1175-76 (Staton, J., dissenting).

<sup>259</sup> Carlisle, *supra* note 256.

<sup>260</sup> *Juliana II*, 947 F.3d at 1177 (Staton, J., dissenting) (citing *Obergefell v. Hodges*, 576 U.S. 644, 645 (2015)).

<sup>261</sup> *Id.* (citing *cf., e.g., Timbs v. Indiana*, 139 S. Ct. 682, 689 (2019)) (deeming a right fundamental because its deprivation would "undermine other constitutional liberties").

<sup>262</sup> *Id.* at 1180 (citing *Obergefell v. Hodges*, 576 U.S. 644, 677 (2015)).

recourse through the political branches is the same as telling them they have no recourse.<sup>263</sup>

#### IV. CONCLUSION

Given the lack of political consensus on climate change in the United States, courts are one of the last avenues available to address the issue. Under the Trump Administration, there was no meaningful legislation on climate change; rather, there were numerous EPA rollbacks and the United States' withdrawal from the Paris Agreement.<sup>264</sup> The Court needs to recognize a fundamental right to a stable climate as part of the constitutionally guaranteed right to life.

The *Juliana* lawsuit, like the Colombia and the Netherlands cases, is notable for its use of litigation as a mechanism to demand government action against global warming. *Urgenda* resulted in the court ordering the Dutch government to cut carbon emissions by 25 percent, the court in *Demanda Generaciones* ordered the government to reduce its deforestation to net zero, and a Pakistani court ordered the government to establish a Climate Change Commission in *Leghari*. By accepting the youth plaintiffs' claims in *Juliana*, the Court could enforce a remedy that will ensure a safer environment and climate by protecting a constitutionally guaranteed right to life.

Just because the Ninth Circuit Court of Appeals has dismissed *Juliana* does not mean that the ruling is just or correct. Our country's courts have often issued rulings (e.g., segregation) and upheld laws (e.g., slavery) that were neither correct contemporaneously nor in hindsight. There is hope that a future climate change case brought in the United States might result in the recognition of a fundamental right to a healthy, stable environment that protects the constitutional right to life.

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<sup>263</sup> *Id.* at 1181.

<sup>264</sup> Nadja Popovich et al., *The Trump Administration Rolled Back More Than 100 Environmental Rules. Here's the Full List*, N.Y. TIMES, [https://perma.cc/P2CL-7K8D] (last updated Jan. 20, 2021). See also Berman, *supra* note 174.