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# Saving the Earth One Suit at a Time: Juliana and Atmospheric Trust Litigation

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**Saving the Earth One Suit at a Time: *Juliana* and Atmospheric Trust Litigation**

**Lesley Nash**

The secret's out: anthropogenic climate change is not only occurring,[1] (applewebdata://472B228E-8FE2-4442-84AE-75B470DCED16#\_edn1) but its potential effects may be worse than previously thought.[2] (applewebdata://472B228E-8FE2-4442-84AE-75B470DCED16#\_edn2) Long a topic of social and political debate, the question of what to do about anthropogenic climate change has also entered in the courts in what has been called "the biggest lawsuit on the planet,"[3] (applewebdata://472B228E-8FE2-4442-84AE-75B470DCED16#\_edn3) otherwise known as *Juliana v. United States*.

Filed in 2015, *Juliana v. U.S.*, alleges that the United States committed to policies that contributed to climate change, while knowing of the negative effects of both its policies and of climate change itself.[4] (applewebdata://472B228E-8FE2-4442-84AE-75B470DCED16#\_edn4) The complaint focuses on the government's involvement in the production and use of fossil fuels, which, the plaintiffs claim, the government was well aware contributed to climate change and threatened the future of the global environment.[5] (applewebdata://472B228E-8FE2-4442-84AE-75B470DCED16#\_edn5)

Climate change litigation is not a new concept for the courts, but past lawsuits have traditionally been premised on violations of state and federal environmental statutes or common law claims.[6] (applewebdata://472B228E-8FE2-4442-84AE-75B470DCED16#\_edn6) The plaintiffs in *Juliana*, however, have taken a more ambitious approach, lodging claims for relief under the Fifth Amendment Due Process Clause;[7] (applewebdata://472B228E-8FE2-4442-84AE-75B470DCED16#\_edn7) the Fifth Amendment equal protection principles;[8] (applewebdata://472B228E-8FE2-4442-84AE-75B470DCED16#\_edn8) the Ninth Amendment unenumerated rights;[9] (applewebdata://472B228E-8FE2-4442-84AE-75B470DCED16#\_edn9) and the public trust doctrine.[10] (applewebdata://472B228E-8FE2-4442-84AE-75B470DCED16#\_edn10)

Unlike most earlier climate change cases, *Juliana* is espousing a fundamental and constitutional right to a healthy environment.[11] (applewebdata://472B228E-8FE2-4442-84AE-75B470DCED16#\_edn11) This theory is the driving force behind atmospheric trust litigation (ATL), which is itself a novel theoretical expansion of the common law public trust doctrine.[12] (applewebdata://472B228E-8FE2-4442-84AE-75B470DCED16#\_edn12) The public trust doctrine holds that certain shared natural resources so essential that they cannot be privately owned but must be held in trust by the sovereign for the public interest.[13] (applewebdata://472B228E-8FE2-4442-84AE-75B470DCED16#\_edn13) ATL is a litigation strategy that emerges from and extends the reach of the public trust doctrine, calling upon courts across the world to force governments to reduce the emission of greenhouse gases based on the government's fiduciary duty to protect public trust resources, including the atmosphere.[14] (applewebdata://472B228E-8FE2-4442-84AE-75B470DCED16#\_edn14)

*Juliana* overcame its first major hurdle in November 2016 when the federal District Court in Oregon denied the government's motion to dismiss.[15] (applewebdata://472B228E-8FE2-4442-84AE-75B470DCED16#\_edn15) Its future is still unsure, however: though the Supreme Court denied the United States' 2018 application for a stay of trial, it also called the claims in *Juliana* "striking" in their breadth and uncertain in their justiciability.[16] (applewebdata://472B228E-8FE2-4442-84AE-75B470DCED16#\_edn16) The Ninth Circuit Court of Appeals heard oral arguments for the case on June

4, 2019, and seemed skeptical of both sides of the argument.[17] (applewebdata://472B228E-8FE2-4442-84AE-75B470DCED16#\_edn17) Though Juliana and the ATL have a high bar to pass, if successful, they could create a compelling precedent in future climate change litigation.[18] (applewebdata://472B228E-8FE2-4442-84AE-75B470DCED16#\_edn18)

[1] (applewebdata://472B228E-8FE2-4442-84AE-75B470DCED16#\_ednref1) See NASA Global Climate Change, *Scientific Consensus: Earth's Climate is Warming*, Nat'l Aeronautics and Space Ass'n, (last visited Jun. 23, 2019), <https://climate.nasa.gov/scientific-consensus/> (https://climate.nasa.gov/scientific-consensus/)(providing a partial list of national and international scientific organizations that have come out in support of the scientific theory of anthropogenic climate change).

[2] (applewebdata://472B228E-8FE2-4442-84AE-75B470DCED16#\_ednref2) See, e.g., Intergovernmental Panel on Climate Change, Special Report: Global Warming of 1.5 °C, IPCC (Oct. 8, 2018), at <https://www.ipcc.ch/sr15/> (https://www.ipcc.ch/sr15/); United States Global Climate Research Group, Fourth National Climate Assessment Volume II: Impacts, Risks, and Adaptation in the United States, USGCRP (Nov. 2018), at <https://nca2018.globalchange.gov/> (https://nca2018.globalchange.gov/).

[3] (applewebdata://472B228E-8FE2-4442-84AE-75B470DCED16#\_ednref3) University of Oregon School of Law, *The Biggest Lawsuit on the Planet: Juliana v. U.S. moves forward*, U. of Oregon School of L. (last visited Jun. 24, 2019), <https://law.uoregon.edu/explore/juliana-v-us> (https://law.uoregon.edu/explore/juliana-v-us).

[4] (applewebdata://472B228E-8FE2-4442-84AE-75B470DCED16#\_ednref4) Umair Ifran, *Pay attention to the growing wave of climate change lawsuits*, Vox (Jun. 4, 2019), <https://www.vox.com/energy-and-environment/2019/2/22/17140166/climate-change-lawsuit-exxon-juliana-liability-kids> (https://www.vox.com/energy-and-environment/2019/2/22/17140166/climate-change-lawsuit-exxon-juliana-liability-kids).

[5] (applewebdata://472B228E-8FE2-4442-84AE-75B470DCED16#\_ednref5) See Complaint at 51-64, *Juliana v. United States*, 217 F.Supp.3d 1224 (D. Ore. 2016)[hereinafter "Juliana Complaint"].

[6] (applewebdata://472B228E-8FE2-4442-84AE-75B470DCED16#\_ednref6) See U.S. Climate Change Litigation Database, Columbia L. School Sabin Center for Climate Change L. (last visited Jun. 24, 2019), <http://climatecasechart.com/us-climate-change-litigation/> (http://climatecasechart.com/us-climate-change-litigation/)(noting 659 federal statutory claims cases, 304 state statutory claims cases, and 21 common law cases).

[7] (applewebdata://472B228E-8FE2-4442-84AE-75B470DCED16#\_ednref7) *Juliana Complaint*, *supra* note 5 at 84-9.

[8] (applewebdata://472B228E-8FE2-4442-84AE-75B470DCED16#\_ednref8) *Id.* at 89-92.

[9] (applewebdata://472B228E-8FE2-4442-84AE-75B470DCED16#\_ednref9) *Id.* at 92-3.

[10] (applewebdata://472B228E-8FE2-4442-84AE-75B470DCED16#\_ednref10) *Id.* at 93-4.

[11] (applewebdata://472B228E-8FE2-4442-84AE-75B470DCED16#\_ednref11) Michael C. Blumm & Mary Christina Wood, "No Ordinary Lawsuit": *Climate Change, Due Process, and the Public Trust Doctrine*, 67 *American U. L. Rev.* 1, 22 (2017).

[12] (applewebdata://472B228E-8FE2-4442-84AE-75B470DCED16#\_ednref12) *Id.* at 43-44.

[13] (applewebdata://472B228E-8FE2-4442-84AE-75B470DCED16#\_ednref13) See Patrick C. McGinley, *Climate Change and the Public Trust Doctrine*, 65 *Planning and Envtl L.* 7, 8 (2013).

[14] (applewebdata://472B228E-8FE2-4442-84AE-75B470DCED16#\_ednref14) Mary Christina Wood, *Chapter 6: Atmospheric Trust Litigation Across the World*, 99, 102, in *Fiduciary Duty and the Atmospheric Trust* (Coghill, Sampford, & Smith, eds. 2012).

[15] (applewebdata://472B228E-8FE2-4442-84AE-75B470DCED16#\_ednref15) Melissa Scanlan, *Juliana v. United States: Does the Constitution Guarantee a Livable Planet for Our Kids?*, Vermont J. of Envtl L. (last visited Jun. 25, 2019), <http://vjel.vermontlaw.edu/topten/juliana-v-united-states-constitution-guarantee-livable-planet-kids/> (http://vjel.vermontlaw.edu/topten/juliana-v-united-states-constitution-guarantee-livable-planet-kids/).

[16] (applewebdata://472B228E-8FE2-4442-84AE-75B470DCED16#\_ednref16) *United States v. United States District Court for the District of Oregon*, Docket No. 18A65 (U.S.).

[17] (applewebdata://472B228E-8FE2-4442-84AE-75B470DCED16#\_ednref17) John Schwartz, *Judges Give Both Sides a Grilling in Youth Climate Case Against the Government*, N.Y. Times (Jun. 4, 2019), <https://www.nytimes.com/2019/06/04/climate/climate-lawsuit-juliana.html> (https://www.nytimes.com/2019/06/04/climate/climate-lawsuit-juliana.html).

[18] (applewebdata://472B228E-8FE2-4442-84AE-75B470DCED16#\_ednref18) Ifran, *supra* note 4.

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