Leave No One Behind: Realizing Environmental Justice through Climate Litigation Remedies

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In 2015, twenty-one youth plaintiffs and environmental activists caught global attention when they sued the United States government for its complicity in perpetuating climate change. Juliana v. United States *was likely the highest-profile climate case yet, and the next year, a federal district court judge ruled that the lawsuit could proceed. But in 2020, the plaintiffs lost in the Ninth Circuit where the court held that the plaintiffs lacked standing.*

Despite this loss, Juliana *remains a remarkable case, if anything for the inspiration it provided for potential and future litigants. Indeed, climate litigation has only increased since the* Juliana *plaintiffs first filed their case, both domestically and internationally. With the proliferation of climate litigation comes both an opportunity and an ethical imperative: the chance and the need to include environmental justice in climate litigation strategy.*

Climate change is an environmental justice issue, and as such, our collective response to climate change must be one that not merely recognizes but actively acts on environmental justice principles. Juliana *provides insight as to how—and where—environmental justice can play a key role in climate litigation strategy. The Ninth Circuit asserted that plaintiffs failed to demonstrate the redressability element of standing, implicitly signaling that future climate litigants must focus on an effective request for relief. This Note thus focuses on how to incorporate environmental justice into the remedy stage of climate litigation.*

Part I provides background information on environmental justice and climate litigation, the Juliana *case, and the doctrine of standing as it relates to both* Juliana *and future climate litigation. Part II describes the history and characteristics of structural injunctions, as well as a proposal for structural*

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injunctions in climate litigation, specifically incorporating environmental justice into the remedy. Finally, the Note concludes with a discussion of our collective moral imperative to address climate change in both an expedient and equitable fashion.

INTRODUCTION

Climate change is likely the greatest existential threat that humanity faces today. As the world collectively grapples with the enormous task of responding to climate change, society will have to attack the problem from every angle possible, in a wide variety of fields, and at all levels of governance. Across the legal profession, climate litigation has sprung up globally with plaintiffs demanding corporate and governmental accountability for the present and impending climate-related harms they face.[1]

1. Earlier cases include *American Electric Power Co. v. Connecticut* (*AEP*), 564 U.S. 410, 415 (2011), in which plaintiffs sought abatement of carbon dioxide emissions from fossil fuel-fired power plants, and *Native Village of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 853 (9th Cir. 2012), in which plaintiffs sought damages from oil, energy, and utility companies for severe erosion of their land. More recently, in *County of San Mateo v. Chevron Corp.*, 960 F.3d 586, 593 (9th Cir. 2020), *vacated and remanded*, No. 20-884, 2021 WL 2044534 (U.S. 2021) (mem.), two counties and a city sued over thirty oil and gas companies for climate change-related injuries. Similarly, in *City of Oakland v. BP PLC*, 969 F.3d 895, 901 (9th Cir. 2020), two cities sued five of the world's largest energy companies regarding their promotion and production of fossil fuels. Cases also abound outside of the United States. In 2017, an organization and individual plaintiffs in the United Kingdom sought to compel the government to raise the country's target for cutting emissions. Sara Stefanini, *End of the Road' for UK Citizens' Climate Case Rejected by Appeals Court*, CLIMATE HOME NEWS (Jan. 30, 2019, 2:23 PM), https://www.climatechange news com/2019/01/30/end-road-uk-citizens-climate-case-rejected-appeal-court/. In 2018, environmental organization Greenpeace and three German families sued the German government to cut emissions at a faster rate. *German Court Rejects Farmers' Climate Change Challenge*, REUTERS (Oct. 31, 2019), https://www.reuters.com/article/us-climate-change-germany-lawsuit/german-court-to-rule-on-farmers-climate-change-challenge-idUSKBN1XA1AG. In 2020, the Dutch Supreme Court ordered the government to cut emissions. *Landmark Decision by Dutch Supreme Court*, URGENDA, https://www.urgenda.nl/en/themas/climate-case/ (last visited June 15, 2021). Later that year, six Portuguese young people filed the first climate change case to be filed with the European Court of Human

Climate change is an existential threat to all of us, but the impacts of climate change will not be the same for all of us. "Climate justice" involves viewing climate change not merely as a physical phenomenon, but also as "a civil rights movement with the people and communities most vulnerable to climate impacts at its heart."[2] Thus, climate justice can be interpreted as the environmental justice component of climate change.[3] Within this framework, climate justice is not a "new" concept. It simply invokes the Principles of Environmental Justice,[4] which have been defined since at least 1991, in the climate context. Doing so implies that society's multifaceted approach to mitigating climate change must consider environmental justice in each pathway pursued. One of these pathways is litigation that seeks to comprehensively address the consequences of climate change.

In the United States, the most famous recent climate case to date is arguably *Juliana v. United States*.[5] In *Juliana*, youth plaintiffs and environmental activists sued the United States government for knowingly increasing and exacerbating the detrimental effects of climate change.[6] The plaintiffs alleged that the federal government violated their constitutional right to a "climate system capable of sustaining human life" by "continuing to 'permit, authorize, and subsidize' fossil fuel use despite long being aware of its risks, thereby causing various climate-change related injuries."[7] Plaintiffs' alleged climate-related injuries included medical conditions, property damage, and impairment of recreational interests.[8]

The Ninth Circuit held that the *Juliana* plaintiffs failed to meet the requirements of "standing," which a plaintiff must demonstrate for a case to survive in federal court. Standing ensures that parties to litigation have sufficient skin in the game to litigate robustly. One of the requirements of standing is demonstrating that the relief sought is "within the district court's power to award."[9] The Ninth Circuit determined that the *Juliana* plaintiffs' failure to meet

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Rights. Chloé Farand, *Six Portuguese Youth File Unprecedented' Climate Lawsuit against 33 Countries*, CLIMATE HOME NEWS (Sept. 3, 2020, 12:13 PM), https://www.climatechangenews.com/2020/09/03/six-portuguese-youth-file-unprecedented-climate-lawsuit-33-countries/.

2. *Climate Justice*, SUSTAINABLE DEV. GOALS (May 31, 2019) (quoting Mary Robinson, Chair of the Elders, and former President of Ireland), https://www.un.org/sustainabledevelopment/blog/2019/05/climate-justice/. The UN Sustainable Development Goals include a pledge to "leave no one behind." UNITED NATIONS COMM. FOR DEV. POL'Y, LEAVING NO ONE BEHIND (2018), *available at* https://sustainabledevelopment.un.org/content/documents/2754713_July_PM_2._Leaving_no_one_behind_Summary_from_UN_Committee_for_Development_Policy.pdf (discussing the pledge in principle versus the complexity in its practical implementation).

3. See *infra* Part I for a more detailed description of environmental justice.

4. PRINCIPLES OF ENVIRONMENTAL JUSTICE, EJNET.ORG, https://www.ejnet.org/ej/principles.html (last updated Apr. 6, 1996) (adopted by the First National People of Color Environmental Leadership Summit, Oct. 24–27, 1991).

5. Juliana v. United States (*Juliana II*), 947 F.3d 1159 (9th Cir. 2020).

6. *Id.* at 1165; Juliana v. United States (*Juliana I*), 217 F. Supp. 3d 1224, 1233 (D. Or. 2016), *rev'd*, *Juliana II*, 947 F.3d 1159.

7. *Juliana II*, 947 F.3d at 1164–65 (quoting Plaintiffs' Complaint).

8. *Id.* at 1165.

9. *Id.* at 1170.

this requirement was fatal to their claims.[10] The court assumed, without deciding, that the plaintiffs' assertion of a constitutional right to a "climate system capable of sustaining human life" under the Due Process Clause of the Fifth Amendment involved a legitimately existent "right."[11] However, having decided that the plaintiffs sought relief that the court was unable to grant,[12] the court did not address the legitimacy of the aforementioned constitutional right.

Although the Ninth Circuit's decision dealt a serious blow to climate litigation and climate justice more broadly, the court's focus on the requested relief may present an opportunity and guidance for future climate litigants. By deciding the appeal based on standing, the court left open the question of whether the Constitution supports the fundamental right to a climate system capable of sustaining human life. Standing is a stricture that already limits environmental plaintiffs' ability to "have their day in court" and which circuit courts cannot easily alter or circumvent. In essence, the court relied on doctrine that is already unfavorable to many environmental plaintiffs for its decision, rather than tackling the substantive due process question implicated in *Juliana*.[13] In doing so, the court left open the possibility of developing a constitutional claim that could be very favorable to environmental plaintiffs. If future plaintiffs are able to successfully develop this claim, it seems that the remaining part of the equation is requesting relief that the court can actually grant.

The success of *any* remedy depends on the success of the underlying claim. In *Juliana*, a successful claim may have required plaintiffs to demonstrate to the court that they have a fundamental right to a stable climate system. The assertion of this right raises questions of both constitutional law and judicial philosophy. Although these are important questions, this Note does not address those questions. Rather, this Note assumes the establishment of such a right and questions how a court can respond to the violation of such a right within the strictures of the U.S. legal system.[14]

This Note focuses on the remedy that future climate litigants can craft to surpass the standing hurdle that undermined plaintiffs' arguments in *Juliana*. In this Note, I explore the courts' historical use of structural injunctions to protect fundamental rights, and how a structural injunction could be used in the case of

10. *Id.* at 1171.

11. *Id.* at 1169–70 (The court noted that "[r]easonable jurists can disagree about whether the asserted constitutional right exists," but for purposes of the redressability analysis, the court assumed the right's existence).

12. *Id.* at 1164–65.

13. *See, e.g.*, Benjamin Douglas, *Antisocial Justice Pathologies of the Standing Doctrine*, 15 CHARLESTON L. REV. 37, 119 (2020) (stating that "environmental litigation is stillborn due to procedural obstacles, including standing. . . . The doctrine preventing the suits from going forward is premised on the type of individual and the type of society that does not worry about the distant and diffuse effects of accumulation."). The elements of standing, discussed *infra*, disadvantage environmental plaintiffs who seek relief from large-scale environmental damage that (1) harms many people, (2) is caused by many actors across time, and (3) requires remedial efforts from many actors for effective resolution.

14. This Note takes on this assumption because (1) the court in *Juliana II* made this assumption for purposes of its analysis, and (2) a growing body of literature addresses the substantive due process claim.

climate change to protect our fundamental right to a climate system capable of sustaining human life. I use this information to craft a remedy that balances the legal requirements of separation of powers with the ethical imperative of environmental justice. Such a remedy could be narrowly tailored enough to satisfy courts that are wary of overstepping their boundaries, while incorporating environmental justice into a climate remedy. The success of such a remedy could inspire innovative formulations of requested relief and act as a launching pad for climate justice litigation.

A *Juliana*-like climate justice case could have immense significance for environmental justice, like *Brown v. Board of Education* did for the civil rights movement.[15] But without an artfully crafted remedy, such a case could also replicate the impressive symbolism but unrealized promise of *Brown v. Board of Education*.[16] To prevent this regrettable outcome, plaintiffs must request a remedy that is within the courts' power to grant. A remedy that upholds climate justice and is within the power of the courts to grant can further climate litigation by both helping litigants overcome the standing barrier and by fashioning a meaningful remedy should the litigation succeed.

In Part I, this Note provides background information on environmental justice and climate litigation, the *Juliana* case, and the doctrine of standing as it relates to both *Juliana* and future climate litigation. Part II describes the history and characteristics of structural injunctions in detail. Part II also discusses a proposal for a structural injunction in climate litigation, specifically incorporating environmental justice into a remedy that would potentially be feasible for Article III courts to grant. Finally, the Note closes with a brief conclusion as to our collective moral imperative to address climate change in both an expedient and equitable fashion.

I. SETTING THE FRAMEWORK: CLIMATE LITIGATION AND *JULIANA*

A. Environmental Justice in Climate Litigation

The Principles of Environmental Justice are a guiding set of principles for environmental justice advocates. They were adopted at the First National People of Color Environmental Leadership Summit in 1991, a seminal moment for the environmental justice movement.[17] There are seventeen principles which

15. Brown v. Board of Education of Topeka, Kansas (*Brown I*), 347 U.S. 483 (1954); Brown v. Board of Education of Topeka, Kansas (*Brown II*), 349 U.S. 294 (1955). Because *Brown II* is essentially the completion of the *Brown I* case, I refer to both cases together as *Brown v. Board of Education*.

16. In *Brown II*, the Court remanded cases back to the district courts to "enter such orders and decrees consistent with this opinion as are necessary and proper to admit to public schools on a racially nondiscriminatory basis *with all deliberate speed*." *Brown II*, 349 U.S. at 301 (emphasis added). The inclusion of the phrase "with all deliberate speed" contributed to decades of intransigent districts slow-walking integration.

17. *See* PRINCIPLES OF ENVIRONMENTAL JUSTICE, *supra* note 4.

uphold, among others,[18] the right to responsible resource use and freedom from ecological destruction,[19] public policy that is "free from any form of discrimination or bias,"[20] and an assertion that "governmental acts of environmental injustice" are unacceptable.[21] Although the prevailing definition of environmental justice in the United States tends to be the U.S. Environmental Protection Agency's (EPA) definition—"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"[22]—this definition lacks the holistic view of the Principles of Environmental Justice, which affirm full equality and condemn all sources of environmental oppression.[23] This Note relies on a conception of environmental justice as defined by the Principles of Environmental Justice.[24]

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18. *Id.* (listing all seventeen Principles of Environmental Justice).

19. *Id.*

20. *Id.* (quoting part of the second principle).

21. *Id.* (quoting part of the tenth principle).

22. *Environmental Justice*, EPA, https://www.epa.gov/environmentaljustice (last visited Dec. 17, 2020). Other entities, including government entities, have recognized that EPA's definition is lacking. For example, the California Public Utilities Commission expanded the definition of environmental and social justice as the following:

> Environmental and social justice seeks to come to terms with, and remedy, a history of unfair treatment of communities, predominantly communities of people of color and/or low-income residents. These communities have been subjected to disproportionate impacts from one or more environmental hazards, socio-economic burdens, or both. Residents have been excluded in policy setting or decision-making processes and have lacked protections and benefits afforded to other communities by the implementation of environmental and other regulations, such as those enacted to control polluting activities.

Environmental and Social Justice Action Plan, CAL. PUB. UTIL. COMM'N (2019), https://www.cpuc.ca.gov/esjactionplan/.

23. *See generally* Principles of Environmental Justice, *supra* note 4.

24. *Id.* The Principles of Environmental Justice, as well as their Preamble, are as follows:

> **WE, THE PEOPLE OF COLOR**, gathered together at this multinational People of Color Environmental Leadership Summit, to begin to build a national and international movement of all peoples of color to fight the destruction and taking of our lands and communities, do hereby re-establish our spiritual interdependence to the sacredness of our Mother Earth; to respect and celebrate each of our cultures, languages and beliefs about the natural world and our roles in healing ourselves; to ensure environmental justice; to promote economic alternatives which would contribute to the development of environmentally safe livelihoods; and, to secure our political, economic and cultural liberation that has been denied for over 500 years of colonization and oppression, resulting in the poisoning of our communities and land and the genocide of our peoples, do affirm and adopt these Principles of Environmental Justice:
>
> **Environmental Justice** affirms the sacredness of Mother Earth, ecological unity and the interdependence of all species, and the right to be free from ecological destruction.
>
> **Environmental Justice** demands that public policy be based on mutual respect and justice for all peoples, free from any form of discrimination or bias.
>
> **Environmental Justice** mandates the right to ethical, balanced and responsible uses of land and renewable resources in the interest of a sustainable planet for humans and other living things.

The goals of climate litigation can meaningfully align with environmental justice values. For example, the concept of a fundamental right to a climate system capable of sustaining human life is strongly aligned with the Principles of Environmental Justice.[25] However, there are also ways to address climate change that do not pursue environmental justice; indeed, the urgency of mitigating climate change could easily lend itself to doing so however possible, quite possibly at the *expense* of environmental justice.[26] But if climate litigants

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> **Environmental Justice** calls for universal protection from nuclear testing, extraction, production and disposal of toxic/hazardous wastes and poisons and nuclear testing that threaten the fundamental right to clean air, land, water, and food.
>
> **Environmental Justice** affirms the fundamental right to political, economic, cultural and environmental self-determination of all peoples.
>
> **Environmental Justice** demands the cessation of the production of all toxins, hazardous wastes, and radioactive materials, and that all past and current producers be held strictly accountable to the people for detoxification and the containment at the point of production.
>
> **Environmental Justice** demands the right to participate as equal partners at every level of decision-making, including needs assessment, planning, implementation, enforcement and evaluation.
>
> **Environmental Justice** affirms the right of all workers to a safe and healthy work environment without being forced to choose between an unsafe livelihood and unemployment. It also affirms the right of those who work at home to be free from environmental hazards.
>
> **Environmental Justice** protects the right of victims of environmental injustice to receive full compensation and reparations for damages as well as quality health care.
>
> **Environmental Justice** considers governmental acts of environmental injustice a violation of international law, the Universal Declaration On Human Rights, and the United Nations Convention on Genocide.
>
> **Environmental Justice** must recognize a special legal and natural relationship of Native Peoples to the U.S. government through treaties, agreements, compacts, and covenants affirming sovereignty and self-determination.
>
> **Environmental Justice** affirms the need for urban and rural ecological policies to clean up and rebuild our cities and rural areas in balance with nature, honoring the cultural integrity of all our communities, and provided fair access for all to the full range of resources.
>
> **Environmental Justice** calls for the strict enforcement of principles of informed consent, and a halt to the testing of experimental reproductive and medical procedures and vaccinations on people of color.
>
> **Environmental Justice** opposes the destructive operations of multi-national corporations.
>
> **Environmental Justice** opposes military occupation, repression and exploitation of lands, peoples and cultures, and other life forms.
>
> **Environmental Justice** calls for the education of present and future generations which emphasizes social and environmental issues, based on our experience and an appreciation of our diverse cultural perspectives.
>
> **Environmental Justice** requires that we, as individuals, make personal and consumer choices to consume as little of Mother Earth's resources and to produce as little waste as possible; and make the conscious decision to challenge and reprioritize our lifestyles to ensure the health of the natural world for present and future generations.

25. For example, the third principle in the Principles of Environmental Justice: "Environmental Justice mandates the right to ethical, balanced and responsible uses of land and renewable resources in the interest of a sustainable planet for humans and other living things." *Id.*

26. Take, for example, a system in which investment in protections from climate impacts is proportional to the property value of an area. In such a system, low-income communities that are already

are committed to operating under the paradigm of climate issues as a civil and human rights crisis, and not merely as a scientific quandary, then environmental justice must be ubiquitous in these advocates' response to climate change. And within such a paradigm, climate litigation, which is just one of many avenues to address climate change and support climate justice, must consider the Principles of Environmental Justice.

There are many ways to pursue environmental litigation within the framework of environmental justice principles[27]—for example, by the type of plaintiff an attorney chooses to represent and/or elevate,[28] or by the types of legal claims the plaintiff brings,[29] even if a claim is ultimately unsuccessful.[30] But one of the most long-term ways a lawsuit can impact an environmental justice community is through the efficacy (and enforcement) of the requested remedy.[31] As litigants continue to craft more innovative lawsuits addressing climate change, they must be strategic in crafting a remedy that is not only effective at mitigating climate change, but also includes environmental justice as a key element.

Despite *Juliana*'s failure to proceed at the circuit court stage, climate litigation continues. In the event that a compelling plaintiff is able to successfully establish the constitutional right to a sustainable climate system, the plaintiff will also need to have an appropriate remedy prepared to request of the court. To fully support climate justice and environmental justice principles, such requested relief must take into consideration the environmental justice aspects of the remedy.

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subjected to disproportionate and cumulative environmental, health, economic, social, and other harms would receive less climate protection, exacerbating the effects of climate change on an already vulnerable system.

27. There are different legal models or approaches to using the law to attain social justice. For example, the impact litigation model "believes that systemic social change can result from carefully targeted class action litigation." *Purvi & Chuck Community Lawyering*, CMTY. JUST. PROJECT (June 15, 2010), http://communityjusticeproject.com/media/2014/9/24/purvi-chuck-community-lawyering. This model believes in the fairness of the legal system and its ability to create "justice," if only an attorney or judge could properly enforce or interpret the law. *Id.* Conversely, community lawyering involves a more holistic view of the effects of systemic oppression and inequality, and this model aims to build community power to challenge such systems. *Id.* While impact litigation can and has resulted in important legal victories, the focus on self-determination and self-empowerment that underlies environmental justice principles most lends itself to the community lawyering model.

28. *See generally* Candice Youngblood, Note, *Put Your Money Where Their Mouth Is Actualizing Environmental Justice by Amplifying Community Voices*, 46 ECOLOGY L.Q. 455 (2019), for a discussion on the different lawyering methods for the social justice lawyer, the environmental lawyer, and the environmental justice lawyer.

29. *See id.*

30. For example, consider a lawsuit regarding detrimental environmental impacts in which issues of language access or discrimination may not ultimately prevail, but are nonetheless important to raise as part of the community's narrative.

31. *See, e.g.*, Mike Pearl, *The Town Erin Brockovich Rescued Is Basically a Ghost Town Now*, VICE (Apr. 15, 2015, 4:00 PM), https://www.vice.com/en/article/xd7qvn/the-town-erin-brockovich-rescued-is-now-almost-a-ghost-town-992 (detailing the poverty and lack of community development after the famous Erin Brockovich case, despite winning a historic settlement for residents).

One major issue that environmental justice communities have faced as a consequence of certain climate change policies is a phenomenon known as "hot spots." Hot spots are localized increases in toxic air pollution that may be caused by increased emissions from local facilities.[32] While greenhouse gases do not constitute air toxics in the traditional sense because they do not pose acute health risks, processes that emit greenhouse gas emissions frequently emit toxic "co-pollutants." For example, fossil fuel combustion releases not only carbon dioxide—a potent greenhouse gas—but also toxic co-pollutants, such as mercury, which have serious acute health impacts.[33] Fossil fuel combustion also releases criteria air pollutants, such as sulfur dioxide, nitrogen oxides, and fine particulate matter, which are geographically common across the country and also have acute and chronic health impacts, such as asthma.[34]

As will be discussed in this Note, sometimes, solutions that reduce greenhouse gas emissions on one scale can increase harmful emissions on another scale, oftentimes in environmental justice communities that are already subjected to disproportionate pollution from these types of facilities. Climate justice would ensure that the formulation of the fundamental right could enable an informed remedy considering such phenomena, which could be helpful for combatting climate change in some ways, but detrimental to communities in other ways.

B. Juliana

Juliana involved twenty-one youth plaintiffs and an organizational plaintiff.[35] Plaintiffs alleged that the President, the United States, and federal agencies (collectively, "the government") violated their constitutional right to a "climate system capable of sustaining human life" by permitting, authorizing, and subsidizing fossil fuel use despite long being aware of its risks, thereby causing climate change-related injuries.[36] Plaintiffs' alleged climate-related injuries included psychological harm, impairment to recreational interests, exacerbated medical conditions, and damage to property.[37]

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32. *California Hot Spots Program*, BAY AREA AIR QUALITY MGMT. DIST., https://www.baaqmd.gov/community-health/california-hot-spots-program (last updated Aug. 20, 2014).

33. *Mercury and Air Toxics Standards Cleaner Power Plants*, EPA, https://www.epa.gov/mats/cleaner-power-plants (last updated Oct. 23, 2020) ("Power plants are currently the dominant emitters of mercury (50 percent), acid gases (over 75 percent) and many toxic metals (20-60 percent) in the United States.").

34. *See generally Criteria Air Pollutants*, EPA, https://www.epa.gov/criteria-air-pollutants (last updated Mar. 22, 2021) ("The Clean Air Act requires EPA to set National Ambient Air Quality Standards (NAAQS) for six common air pollutants (also known as 'criteria air pollutants').").

35. Youth plaintiffs were too young to vote at the time they filed their complaint. Thus, their claims were "rooted in a debasement of their votes and an accompanying diminishment of their voice in representational government." *Juliana I*, 217 F. Supp. 3d 1224, 1241 (D. Or. 2016) (quoting Brief for the League of Women Voters in the United States et al. as Amici Curiae at 19–20, *Juliana I*, 216 F. Supp. 3d 1224 (No. 6:15–cv–01517–TC), ECF No. 79–1), *rev'd*, *Juliana II*, 947 F.3d 1159 (9th Cir. 2020).

36. *Juliana II*, 947 F.3d at 1165 (quoting Plaintiffs' Complaint).

37. *Id*.

Juliana put the public spotlight on a wide variety of climate harms that young people will face. The plaintiffs were diverse and compelling. For example, for plaintiff Journey Zephier, a federally enrolled member of the Yankton Sioux Tribe who lived in Hawaii, the government's actions affected his food security, access to drinking water, participation in cultural activities, and even personal safety, when he and his family were displaced by flooding and evacuated.[38] Still others, like plaintiff Isaac Vergun, suffer from worsening asthma as temperatures and air pollution increase.[39] The wide range of harms the *Juliana* plaintiffs experienced spoke to the immense, overarching havoc that climate change wreaks on the ecosystems on which we depend—a global harm that manifests in hyper-localized ways. Similarly, environmental justice cases can spotlight underappreciated harms that communities face. Climate litigants should focus not just on the diversity of their plaintiffs, but also in how the remedies they seek will impact a wide array of communities.

In line with this broad set of harms, the *Juliana* plaintiffs sought a broad set of remedies. The plaintiffs requested that the court, inter alia: "[o]rder Defendants to prepare a consumption-based inventory of U.S. CO_2 emissions"; "[o]rder Defendants to prepare and implement [an] enforceable national remedial plan to phase out fossil fuel emissions and draw down excess atmospheric CO_2 so as to stabilize the climate system and protect the vital resources on which Plaintiffs now and will depend"; and "[r]etain jurisdiction over this action to monitor and enforce Defendants' compliance with the national remedial plan and all associated orders of this Court."[40]

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38. Complaint for Declaratory and Injunctive Relief at ¶¶ 68–70, *Juliana II*, 947 F.3d 1159 (No. 6:15-cv-01517-TC) [hereinafter *Juliana II* Complaint]; *see also Journey Zephier*, OUR CHILDREN'S TRUST YOUTH V. GOV, https://www.ourchildrenstrust.org/journey (last visited June 28, 2021).

39. *Juliana II* Complaint, *supra* note 38, at ¶ 56; *see also Isaac V.*, OUR CHILDREN'S TRUST YOUTH V. GOV, https://www.ourchildrenstrust.org/isaac (last visited June 28, 2021).

40. *Juliana II* Complaint, *supra* note 38, at Prayer for Relief. For purposes of this Note, items 6, 7, and 8 of *Juliana*'s requested relief are most relevant and are discussed most thoroughly in the Note. The other requests are that the court:

> (1) Declare that Defendants have violated and are violating Plaintiffs' fundamental constitutional rights to life, liberty, and property by causing dangerous CO2 concentrations in the atmosphere and dangerous government interference with a stable climate system; (2) Enjoin Defendants from further violations of the Constitution underlying each claim for relief; (3) Declare the Energy Policy Act, Section 201, unconstitutional on its face; (4) Declare DOE/FE Order No. 3041, granting long-term multi-contract authorization to Jordan Cove Energy, unconstitutional as applied and set it aside; (5) Declare Defendants' public trust violations and enjoin Defendants from violating the public trust doctrine underlying each claim for relief; . . . and (9) Grant such other and further relief as the Court deems just and proper.

Id.

Also note, in relation to item 3 above, that section 201 of the Energy Policy Act authorizes the United States Department of Energy to issue short-term and long-term authorizations of the import and export of natural gas. *Id.* at ¶ 105. With respect to item 4 above, the Jordan Cove project allows the export of liquefied natural gas from the Jordan Cove LNG Terminal in Oregon and would be the largest projected source of carbon dioxide emissions in the state. *Id.* at ¶ 198.

Juliana asks for remedies even more sweeping than those of other high-profile climate cases.[41] In *Native Village of Kivalina v. ExxonMobil Corp.*, an Inupiat Eskimo village had become uninhabitable due to climate change-related erosion and sought damages from twenty-four oil, energy, and utility companies for their role in producing emissions that caused climate change.[42] In *American Electric Power Co. v. Connecticut* (*AEP*), eight states, New York City, and three land trusts sued electrical power corporations for abatement due to defendants' contribution to climate change.[43] Both cases ultimately failed due to the displacement of any federal common law rights by the Clean Air Act and EPA's regulatory authority.[44] *AEP* did ask for a cap to be imposed on the defendants' emissions.[45] Meanwhile, *Juliana* asked the government to radically change how it approaches greenhouse gas emissions and also asked for sections of federal law to be ruled unconstitutional. The requested relief in the aforementioned cases was also much narrower and more focused on damages.

A key case that "succeeded" with its remedy is *Massachusetts v. EPA*, but its remedy—and applicability—could be severely restricted. For example, in *Massachusetts v. EPA*, when plaintiff states challenged EPA's decision not to regulate greenhouse gases, the Supreme Court held both that: (1) the federal Clean Air Act authorized the agency to regulate greenhouse gases, and (2) if EPA did not want to regulate greenhouse gases in this regard, it had to provide a reasonable explanation for this exercise of discretion.[46] This decision was important because it established a pathway for regulating greenhouse gases under an already existent statute. Using an already existent statute removed the need for Congress to legislate a new statute—something that would be both technically complex and politically controversial. However, even immediately after the ruling, jurists and scholars debated the strength of the legal underpinnings in the case,[47] as well as its practical implications, including with

41. Note that some of these cases involve defendants who are not the government, but the purpose of this Subpart is to consider the breadth of the requested remedy and how it may impact the court's ability (or willingness) to grant it.

42. Native Vill. of Kivalina v. ExxonMobil Corp., 663 F. Supp. 2d 863, 868 (N.D. Cal. 2009), *aff'd*, 696 F.3d 849 (9th Cir. 2012).

43. *AEP*, 564 U.S. 410, 418–19 (2011).

44. *Id.* at 415; Native Vill. of Kivalina v. ExxonMobil Corp., 696 F.3d 849, 858 (9th Cir. 2012).

45. *AEP*, 564 U.S. at 415.

46. Massachusetts v. EPA, 549 U.S. 497 (2007).

47. *See, e.g.*, Jody Freeman & Adrian Vermeule, Massachusetts v EPA *From Politics to Expertise*, SUP. CT. REV. 51 (2007); Kathryn A. Watts & Amy J. Wildermuth, Massachusetts v. EPA: *Breaking New Ground on Issues Other than Global Warming*, 102 NW. U. L. REV. 1029 (2008). For later work commenting on the impact of the case, *see, e.g.*, David Markell & J.B. Ruhl, *An Empirical Assessment of Climate Change in the Courts A New Jurisprudence or Business as Usual?*, 64 FLA. L. REV. 15 (2012); Jonathan Z. Cannon, *The Significance of* Massachusetts v. EPA, 93 VA. L. REV. BRIEF 53 (2007); *see also* Elizabeth Fisher, *Climate Change Litigation, Obsession and Expertise Reflecting on the Scholarly Response to* Massachusetts v. EPA, 35 L. & POL'Y 236 (2013) (discussing several articles and their assessments of *Massachusetts v. EPA*).

regard to the role of states as plaintiffs.[48] Additionally, its functioning under the Clean Air Act, an already existent statute clearly implemented by an already existent agency, still enabled a remedy that was more limited in its legal scope as compared to what plaintiffs requested in *Juliana*. In *Juliana*, plaintiffs sought both the declaration of a "new" right and very specific actions to be performed by very non-specific government actors.

C. Standing

The judicial requirement of standing derives from Article III of the Constitution, which limits the role of federal courts to adjudicating actual "cases" and "controversies."[49] Standing is an essential part of the case-or-controversy requirement of Article III.[50] Meeting the "irreducible constitutional minimum of standing" requires establishing three elements: (1) the plaintiff has suffered an "injury in fact," which is (a) concrete and particularized, and (b) actual or imminent; (2) there is a "fairly traceable" causal connection between the injury and the challenged action of the defendant; and (3) it is "likely," and not "merely speculative," that a favorable decision would redress the injury.[51] Thus, to establish standing, plaintiffs must demonstrate that defendants have caused harm to their legally protected interest, and that a court order would be able to rectify this harm.

In *Juliana*, the district court allowed the case to proceed at the pleading stage, holding that the plaintiffs adequately alleged standing to survive a motion to dismiss.[52] The court rejected the government's claims that plaintiffs' climate-related injuries were not particular to plaintiffs, rendering them "nonjusticiable generalized grievances," and held that plaintiffs had adequately demonstrated concrete, particularized, and actual or imminent injuries.[53] The court also noted that while the causal chain between plaintiffs' injuries and the government's conduct would be difficult to prove, plaintiffs had adequately alleged the causal link for this stage.[54] Finally, the court held that the requested relief for a national remedial plan "would at least partially redress [plaintiffs'] asserted injuries," thus

48. *See, e.g.*, Kathryn A. Watts & Amy J. Wildermuth, Massachusetts v. EPA: *Breaking New Ground on Issues Other than Global Warming*, 102 NW. U. L. REV. 1029, 1029–30 (2008) (asserting that *Massachusetts v. EPA* did not force EPA to regulate greenhouse gases, and that the "true significance of the case" was its impact on (1) state standing, and (2) the standard of review applied to denials of petitions for rulemaking). *But see* Jonathan Z. Cannon, *The Significance of* Massachusetts v. EPA, 93 VA. L. REV. BRIEF 53, 59 (2007) (proposing that the Court in *Massachusetts v. EPA* left EPA "little room in dealing with climate change," "limited EPA's ability to postpone regulation," and signaled its view that the science on climate change supported an endangerment finding from the agency).

49. U.S. CONST. art. III.

50. *See* Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992).

51. *Id.* at 560–61.

52. *Juliana I*, 217 F. Supp. 3d 1224, 1248 (D. Or. 2016) ("Youth plaintiffs have adequately alleged they have standing to sue.").

53. *Id.* at 1243–44.

54. *Id.* at 1246.

meeting the requirement that there was "a substantial likelihood that the Court could provide meaningful relief" for the injury caused by the defendant.[55]

The Ninth Circuit agreed with the district court that the plaintiffs met the injury-in-fact and causation elements of Article III standing. However, the Ninth Circuit reversed and remanded the case on the grounds that the plaintiffs failed to meet the redressability element. "To establish Article III redressability, the . . . relief [sought must be] both (1) substantially likely to redress [plaintiffs'] injuries; and (2) within the district court's power to award."[56] The circuit court decided the relief that the plaintiffs sought was not within the purview of an Article III court to grant.[57]

The Ninth Circuit expressed skepticism as to whether the plaintiffs could satisfy the first prong that the requested relief is "substantially likely" to redress their injuries.[58] Plaintiffs' requested remedy was an injunction requiring the government to cease affirmative activities that furthered fossil fuel use.[59] The court believed that the cessation of the government's affirmative activities would not remedy plaintiff's injuries because many emissions "happened decades ago or c[a]me from foreign and non-governmental sources."[60] The court also noted that reducing the impacts of climate change would require "a fundamental transformation" of the industrialized world's energy system.[61]

However, the court ultimately did not decide whether plaintiffs had adequately satisfied the first prong of redressability. It determined that plaintiffs' failure to satisfy the second prong—that the relief sought is "within the district court's power to award"—was fatal to their claims.[62] The court stated that "it is beyond the power of an Article III court to order, design, supervise, or implement the plaintiffs' requested remedial plan," reasoning that "any effective plan would necessarily require a host of complex policy decisions entrusted, for better or worse, to the wisdom and discretion of the executive and legislative branches."[63]

The court was unwilling to engage in such "complex policy decisions." Plaintiffs argued that these complex policy decisions could be left to the political branches within the context of their suggested remedial plan. Conversely, the court opined that such a plan would "require the judiciary to pass judgment on the sufficiency of the government's response to the order, which necessarily would entail a broad range of policymaking."[64] However, one sentence before, the court declared that "courts may order broad injunctive relief while leaving

55. *Id.* at 1247–48.
56. *Juliana II*, 947 F.3d 1159, 1170 (9th Cir. 2020) (citing M.S. v. Brown, 902 F.3d 1076, 1083 (9th Cir. 2018)).
57. *Id.* at 1171.
58. *Id.* at 1170–71.
59. *Id.* at 1170.
60. *Id.*
61. *Id.* at 1171.
62. *Id.* at 1170.
63. *Id.* at 1171.
64. *Id.* at 1172.

the 'details of implementation' to the government's discretion."[65] While the court made several statements indicating its belief that "some questions . . . are the province of the political branches,"[66] this Note argues that a structural injunction need not overstep the province of the judiciary.

Notably, the district court considered separation-of-powers issues separate and apart from the redressability inquiry, as part of its preceding section on the political question doctrine and justiciability. In that section, the court stated that "[t]here is no need to step outside the core role of the judiciary to decide this case."[67] The district court asserted that the core issue to address was whether defendants had violated plaintiffs' constitutional rights—a question that fell "squarely within the purview of the judiciary."[68] Then, assuming prevailing merits claims, the court specifically mentioned the importance of avoiding separation-of-powers issues in crafting a remedy. The court provided an example, suggesting that "[t]he separation of powers . . . might permit the Court to direct defendants to ameliorate plaintiffs' injuries but limit its ability to specify precisely how to do so."[69]

II. A PROPOSAL FOR A STRUCTURAL INJUNCTION

A. Structural Injunctions: History and Characteristics

Structural injunctions involve institutional reform to remedy institutional violations of rights. For a court to grant an injunction, a plaintiff must demonstrate the following: (1) the plaintiff has suffered an irreparable injury; (2) legal remedies, such as monetary damages, are inadequate to compensate for the injury; (3) the balance of hardships between the plaintiff and the defendant warrants an injunction; and (4) an injunction would serve the public interest.[70]

When a fundamental right is at risk, courts have been willing to take strong measures to protect such rights, including, if not especially, for the protection of the right against other branches of government. As District Court Judge Ann Aiken noted in *Juliana*, the Supreme Court has stated that "[s]ubstantive due process 'forbids the government [from infringing] certain "fundamental" liberty interests . . . unless the infringement is narrowly tailored to serve a compelling state interest.'"[71] Analogizing the recognition of a "new" fundamental right to a climate system capable of sustaining human life to the Supreme Court's relatively recent recognition of the constitutional right to same-sex marriage,

65. *Id.* (quoting Brown v. Plata, 563 U.S. 493, 538 (2011)).
66. *Id.* at 1173.
67. *Juliana I*, 217 F. Supp. 3d 1224, 1241 (D. Or. 2016).
68. *Id.*
69. *Id.*
70. Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139, 156–57 (2010).
71. *Juliana I*, 217 F. Supp. 3d at 1248–49 (quoting Reno v. Flores, 507 U.S. 292, 302 (1993)).

Judge Aiken noted that "[t]he identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution . . . ."[72]

There have been past instances in which the Supreme Court established that an unconstitutional violation of a fundamental right was occurring and then deferred to the political branches of government to implement the policy implications of its conclusion—perhaps most notably with regard to racial segregation in *Brown v. Board of Education*.[73] The Court's injunction in *Brown v. Board of Education* prohibiting racial segregation in public education required reform across public school systems to remedy a systemic violation of equal protection.[74] Indeed, the dissenting circuit judge in *Juliana* noted the court's necessary role in "step[ping] in to protect fundamental rights" as in *Brown v. Board of Education*.[75] Similarly, legal counsel for plaintiffs in *Juliana* has described the case as "this generation's *Brown vs Board of Education*."[76]

In *Brown v. Board of Education*, the Supreme Court consolidated multiple cases regarding school segregation and held that racial segregation in public education violated the Equal Protection Clause of the Fourteenth Amendment. Chief Justice Earl Warren stated that "[a]ll provisions of federal, state, or local law requiring or permitting such discrimination must yield to th[e fundamental] principle" that "racial discrimination in public education is unconstitutional."[77] He further remanded the cases to the district courts to proceed in compliance with this principle, essentially ordering public educational entities to desegregate.[78] Such an order inherently involved complex policy decisions, which are in the purview of the political branches of government.

Despite the requirement of complex policy decisions, the Court found that it could order public schools to desegregate, because maintaining the current state of segregation was unconstitutional. The Court went so far as to say that even if desegregation is unpopular in a particular locality, "the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them."[79] Such a statement implies that even though the political branches are in charge of policy, when a policy is unconstitutional, the judiciary's role is to uphold the Constitution and prohibit such policies. In considering how to accord relief, the Court deferred to the district courts to create

72. *Id.* at 1249 (quoting Obergefell v. Hodges, 576 U.S. 644, 663 (2015)).

73. *Brown II*, 347 U.S. 483 (1954).

74. The Court declared in *Brown I*, 347 U.S. at 495, that segregated public education violated the Equal Protection Clause, but it heard arguments regarding the implementation of school integration the following term in *Brown II*.

75. *Juliana II*, 947 F.3d 1159, 1191 (9th Cir. 2020).

76. Tony Sirna, *This Generation's* Brown vs. Board of Education *' Climate Kids Appear in Court*, CITIZENS' CLIMATE LOBBY (Dec. 11, 2017), https://citizensclimatelobby.org/generations-brown-vs-board-education-climate-kids-appear-court/.

77. *Brown II*, 347 U.S. at 298.

78. *Id.* at 301.

79. *Id.* at 300.

and implement appropriate decrees.[80] In doing so, the Court explicitly established that the courts would have to consider whether an action "constitutes good faith implementation of the governing constitutional principles."[81]

The Court stood by the proposition that the judiciary is responsible for ensuring the protection of constitutional rights. Indeed, such a task not only fell incidentally within the purview of the judiciary, but failing to perform this task was a failure of judicial duty—a duty arising from equitable principles and the "traditional attributes of equity power."[82] After *Brown v. Board of Education*, the Court continued to refine—and narrow—the breadth of structural injunctions. A key part of this refinement was the application of the "rightful position" doctrine to injunctions, or returning the plaintiff to their original position as if their injury had never occurred.

In *Milliken v. Bradley*, the Supreme Court applied the rightful position standard for individuals seeking relief from persistent racial segregation in the Detroit public school system.[83] At least partially in response to desegregation, White families had left Detroit for the surrounding suburbs, in effect racially segregating Detroit from its suburbs.[84] Because the vast majority of students in Detroit were Black, as compared to students in the city's suburbs, the district court and appellate court asserted that a multidistrict metropolitan plan was necessary to desegregate the public school system.[85] However, the Supreme Court asserted that any racial segregation was not the effect of de jure segregation—laws or policies that fostered racial segregation—but rather, was de facto segregation, or segregation that occurred via voluntary actions and associations.[86] Therefore, the Court held that it was improper to impose the multidistrict remedy.

Operating off of the idea of de jure segregation intimated that the legal harm of racial segregation lay in legal mandates of segregation. Thus, returning plaintiffs to their rightful position simply meant ensuring that they were not subjected to racially discriminatory laws. The Court refused to take steps against de facto segregation, which it suggested involved merely personal choice rather than a matter of law, and thus presumably fell outside the Court's jurisdiction.

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80. *Id.* at 299–300.

81. *Id.* at 299.

82. *Id.* at 300. "Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs." *Id.* (internal citations omitted).

83. Milliken v. Bradley, 418 U.S. 717, 746 (1974).

84. E.J.K. III, Note, *White Flight as a Factor in Desegregation Remedies A Judicial Recognition of Reality*, 66 VA. L. REV. 961, 964–65 n.29 (1980) (discussing the relationship between school desegregation and White flight). *See also id.* at 976, which notes how the "specter of [W]hite flight had been a principal force behind the lower courts' approval" of a multidistrict remedy in Detroit in the *Milliken v. Bradley* line of cases.

85. Bradley v. Milliken, 345 F. Supp. 914 (E.D. Mich. 1972), *aff'd in part, vacated in part*, 484 F.2d 215 (6th Cir. 1973).

86. *Milliken*, 418 U.S. at 717–18.

Missouri v. Jenkins, another school desegregation case, further narrowed the capacity of structural injunctions.[87] In *Missouri v. Jenkins*, the Supreme Court assessed the constitutionality of a district court's orders that aimed to remove remaining "vestiges" of school segregation, demonstrated by White flight to the suburbs and interdistrict racial segregation.[88] The district court had required the state of Missouri to use certain methods to attract White students from outside a school district into the school district.[89] The Supreme Court struck down the district court's orders, holding that *inter*district orders exceeded the *intra*district constitutional violation. Thus, the interdistrict orders were not "tailored to remedy the injuries suffered by the victims of prior *de jure* segregation."[90]

A more recent example of a Supreme Court-issued structural injunction is that of *Brown v. Plata*.[91] In *Coleman v. Brown* and *Plata v. Brown*, the two consolidated cases preceding *Brown v. Plata*, California prisoners sued the governor of California for violation of the Eighth Amendment's prohibition on cruel and unusual punishment.[92] The prisoners alleged that they received inadequate mental health care due to overcrowding of the prison system, which was at almost double its capacity.[93] After years of continued overcrowding, the lower court ordered California to reduce its prison population to 137.5 percent of capacity within two years, requiring a reduction of up to 46,000 people.[94] *Brown v. Plata* concerned the legality of this court-ordered remedy for reducing the prison population.

At issue was the inherent tension between the court order and state officials' authority to decide how to reduce overcrowding. A federal statute indicates that state officials have preliminary discretion to decide how to reduce overcrowding,[95] such as by new construction, out-of-state transfers, or prisoner release. However, imposing the lower court's limitation on prison population meant that the state would necessarily have to release some prisoners before they had fully served their sentences.[96] And yet, the Court noted that the lower court had sufficiently respected state officials' preliminary discretion to choose how to reduce overcrowding before the lower court finally ordered its limitation on prison population.[97]

87. Missouri v. Jenkins, 515 U.S. 70 (1995).
88. *Id.* at 70.
89. *Id.* at 75.
90. *Id.* at 102.
91. Brown v. Plata, 563 U.S. 493 (2011).
92. *Id.*
93. *Id.* at 501.
94. *Id.* at 510.
95. *See id.* at 532–33; *see also* 18 U.S.C. §§ 3626(a)(1)(A), (a)(3).
96. *Plata*, 563 U.S. at 500–01.
97. *Id.* at 512 (explaining how, before ordering a reduction in prison population, a district court must first enter an order for less intrusive relief that failed to remedy the constitutional violation and must have given the defendant a reasonable time to comply with the prior order).

The Court also noted that although courts must be sensitive to the complexities of prison administration, they "nevertheless must not shrink from their obligation to 'enforce the constitutional rights of all "persons," including prisoners.'"[98] The Court was also deeply skeptical that a method other than reducing overcrowding could remedy the constitutional violations that were occurring. On top of the "substantial evidence of overcrowding's deleterious effects on the provision of care," California had a "long history of failed remedial orders."[99] In *Coleman v. Brown*, the district court had appointed a special master to oversee remedial efforts; twelve years later, the special master reported that increased overcrowding was worsening mental health care in the prisons.[100] In *Plata v. Brown*, after years of the state's noncompliance with an injunction concerning medical care, the district court had appointed a receiver to oversee remedial efforts; the receiver also reported that overcrowding was causing continuing deficiencies in mental health care.[101] *Brown v. Plata* can provide guidance for courts facing the prospect of a constitutional violation that would require policy change to rectify the violation. The next Subpart details a possible remedy and the steps courts could take in granting such a remedy within the constitutional limits of their judicial authority.

B. Proposal

For future litigants hoping to address climate justice through the legal system, I propose requesting the following relief: (1) a plan to remedy the constitutional violation, with monitoring and reporting requirements, and (2) narrowly-tailored standards regarding hot spots for the monitoring and reporting portion of the government's plan. Although there is critical need for action on climate change, U.S. courts have also increasingly narrowed their standards for structural injunctions. This Subpart provides details about the proposal, why the proposal is legally sound, and how the proposal can also further environmental justice.

I begin by noting that while this Subpart inherently assesses the boundary between the judiciary and the political branches, it does not present a detailed analysis of the political question doctrine.[102] Moreover, it does not attempt to advocate for particular political measures in response to climate change. It is true that incorporating environmental justice into climate change mitigation will likely be a largely political and policy-making endeavor.[103] In reality, critical, if

98. *Id.* at 511 (quoting Cruz v. Beto, 405 U.S. 319, 321 (1972) (per curiam)).

99. *Id.* at 529.

100. *Id.* at 506–07.

101. *Id.* at 507.

102. The political question doctrine refers to how political issues do not fall within the purview of the purportedly apolitical judiciary. *See Political Question Doctrine*, CORNELL L. SCH.: LEGAL INFO. INST., https://www.law.cornell.edu/wex/political_question_doctrine (last visited June 24, 2021).

103. A notable example is that of a "just transition." *See Just Transition A Framework for Change*, CLIMATE JUST. ALL., https://climatejusticealliance.org/just-transition/ (last visited Dec. 17, 2020) (stating

not the most important, components of environmental justice movements are political organizing and power shifting.[104] People power and bottom-up organizing are central theories of change for environmental justice,[105] and the top-down approach of institutional reform litigation is sorely deficient for truly achieving environmental justice. However, this Subpart explores progress that might be feasible within a legal system that has become increasingly hostile to institutional reform.

In *Juliana*, items six through eight of the requested relief proposed specific governmental actions. Plaintiffs requested that the government "prepare a consumption-based inventory of U.S. CO_2 emissions";[106] "prepare and implement [an] enforceable national remedial plan to phase out fossil fuel emissions and draw down excess atmospheric CO_2 so as to stabilize the climate system and protect the vital resources on which Plaintiffs now and will depend";[107] and "monitor and enforce Defendants' compliance with the national remedial plan."[108] The proposal in this Note is fundamentally similar in that it would require the government to formulate a plan to remedy the constitutional violation.

Importantly, however, the proposal here purposefully provides for the government—not the courts—to determine the appropriate plan and policies for addressing greenhouse gas emission levels based on scientific evidence and agency expertise. This distinction addresses a major issue that the Ninth Circuit found in *Juliana*. This Note's proposal requires the political branches, rather than an Article III court, to "determine whether the plan is sufficient to remediate the claimed constitutional violation of the plaintiffs' right to a 'climate system capable of sustaining human life.'"[109]

But how would the courts ensure that the government's decisions are "appropriate"? The appellate court in *Juliana* expressed the concern that such enforcement would require a court to assess the sufficiency of the government's plan, thereby rendering such a remedy unenforceable.[110] One could argue that the court exaggerates the unenforceability of the *Juliana* plaintiffs' requested

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that "[t]ransition is inevitable," but "[j]ustice is not."). Another important characteristic of equitable adaptation might be implementing policies that attempt to equalize adaptation across historical injustices and imbalances, rather than exacerbating historically rooted disparities. For example, one might consider that in apportioning resources for mitigation, a decisionmaker cannot consider an area's current fair market value; such a policy could help reduce the perpetuation of disenfranchisement based on historical wealth.

104. *See* Luke W. Cole, *Macho Law Brains, Public Citizens, and Grassroots Activists Three Models of Environmental Advocacy*, 14 VA. ENV'T L.J. 687 (1995) (describing the professional, participatory, and power models of environmental advocacy).

105. *See* Jemez Principles for Democratic Organizing (1996), https://www.ejnet.org/ej/jemez.pdf. In particular, consider the second principle, "Emphasis on Bottom-Up Organizing," for a brief discussion as to the importance of bottom-up organizing for successful movement work in this space. *Id.*

106. *See Juliana II* Complaint, Prayer for Relief at ¶ 6, *supra* note 38.

107. *Id.* at Prayer for Relief ¶ 7.

108. *Id.* at Prayer for Relief ¶ 8.

109. *Juliana II*, 947 F.3d 1159, 1173 (9th Cir. 2020).

110. *See id.* ("[A]ny plan is only as good as the court's power to enforce it.").

relief.[111] After all, courts are regularly required to assess complex and technical subject matter; relinquishing the responsibility to perform this intellectual task, especially in light of a constitutional violation, seems particularly egregious.[112] Regardless, if the court indeed deems itself unable to make such an assessment, slightly finetuning the requested remedy could result in a desirable remedy that the court is still capable of enforcing. As in *Brown v. Plata*, the requested remedy could involve a tiered approach that gives deference to the political branches. For an approach that is more narrowly tailored to address the constitutional violation in climate cases, litigants—and the courts—should consider the trajectory of events in *Brown v. Plata*.

C. A Plan to Remedy the Constitutional Violation

Brown v. Plata provides a road map for enforcing protection of a constitutional right while maintaining respect for the policy-making purview of the political branches. Although it takes place in the context of a state prison system, it shares some key elements with *Juliana*, such as the violation of a constitutional right and a long history of governmental inaction.[113] In *Brown v. Plata*, the Court issued a sweeping injunction to reduce the state's prison population, but it only did so after years of recurring constitutional violations and the state's continued failure to remedy the violations. The basic sequence of events in the *Brown v. Plata* line of cases was as follows: First, the lower court identified and asserted that a constitutional violation was occurring.[114] Then, the court gave the governmental defendant the ability to decide how to remedy the violation and a reasonable amount of time to remedy the violation.[115] Additionally, the court appointed a special master or receiver to assess and report back on the situation.[116] Finally, only after years of noncompliance and highly discouraging reports from the special master or receiver, did the court issue the injunction.[117] Plainly put, the court started with the assertion that the government was violating a constitutional right and expected the political branches to fashion an appropriate remedy of their choice. However, the court also ultimately stepped in to ensure the protection of the constitutional right when the government failed.

Courts can do for climate change what they did for prison administration in *Brown v. Plata*. Prison administration is a complex task, fraught with not only

111. *See* Matt Lifson, Camila Bustos, & Natasha Brunstein, *Redressability of Climate Change Injuries after Juliana*, LEGAL PLANET (June 12, 2020), https://legal-planet.org/2020/06/12/guest-contributors-matt-lifson-camila-bustos-and-natasha-brunstein-redressability-of-climate-change-injuries-after-juliana/.

112. *See* Kirsten Engel & Jonathan Overpeck, *Adaptation and the Courtroom Judging Climate Science*, 3 MICH. J. ENV'T & ADMIN. L. 1, 3 (2013) (describing principles that judges can use to assess climate science and science-based decisions).

113. *See* Brown v. Plata, 563 U.S. 493, 499 (2011).

114. *Id.* at 499–500.

115. *Id.* at 514–16.

116. *Id.* at 506–07.

117. *See generally id.* at 516–45.

logistical difficulties, but also questions of public safety and even federalism. Yet the courts managed to assess the situation with the assistance of a special master or receiver with more expertise to advise the court. Expertise regarding climate change lies not only in the scientific community more broadly, but within federal agencies such as EPA and the National Oceanic and Atmospheric Administration.

If the court concedes that the government is violating plaintiffs' constitutional right to a stable climate system, the first step the government must take to remedy this constitutional violation is to devise its response plan. As noted, federal agencies contain the technical expertise to craft the appropriate response; they should be given the first try at coming up with such a plan. As in *Brown v. Plata*, once a court has identified a constitutional violation and ordered the government to remedy the violation, the initial assumption should be that the government will take action accordingly. By questioning whether the government might prioritize economic or other factors over climate impacts and thus fail to act, the Ninth Circuit in *Juliana* seemed to suggest that the government might *choose* not to remedy the constitutional violation.[118] This reasoning does not comport with an initial assertion that a constitutional violation exists. For purposes of its standing analysis, courts should not assume that the government would willingly permit an ongoing constitutional violation. Rather, the analysis should assume appropriate governmental compliance with the court's orders. The intentional failure to comply in implementing a remedy is a separate issue from the likelihood that the remedy, adequately implemented, would redress the alleged harm.

Indeed, the usual processes of our representative democracy can and should play a role in the government's creation of an effective plan. These processes should also ameliorate the judiciary's concerns as to whether it is overstepping its bounds and treading into improper policy making. The political branches can best decide how to address the ongoing constitutional violation. The people have spoken by electing a president and congressional representatives who are expected to represent their interests. The president can set policies and the direction of their administration, and presidentially appointed federal officials can implement these policies. Congress can pass legislation that people implicitly or explicitly voted for. Ideally, the court ruling could spur Congress to write new legislation befitting the complexities of climate change.

Moreover, agencies could promulgate regulations under existing statutes, such as the Clean Air Act, which the Supreme Court interpreted as giving EPA authority to regulate greenhouse gases in *Massachusetts v. EPA*.[119] Finally, the usual channels of judicial review remain for agency action, such as the

118. *See Juliana II*, 947 F.3d 1159, 1172 (9th Cir. 2020).

119. Massachusetts v. EPA, 549 U.S. 497 (2007). Note that the current judicial climate may be apprehensive about agency action, so here, too, litigants will have to act strategically so as not to create unfavorable law. This is a practical aspect of litigation that all holistic public interest litigants must face.

Administrative Procedure Act.[120] When the relevant agencies, utilizing their expertise, promulgate relevant regulations, people can respond by participating in notice-and-comment rulemaking, hearings, and more.

Of course, as in *Brown v. Plata*, there is the possibility that despite a court's orders, the constitutional violation will continue. Thus, to determine whether the violation is continuing, the plan must necessarily include a monitoring and reporting requirement. And as in *Brown v. Plata*, the court can gain the guidance of a special master to assess (1) whether the constitutional violation is ongoing, and (2) the cause of the ongoing violation. The Ninth Circuit has held that as long as the technical advisor does not "unilaterally issue[] findings of fact or conclusions of law regarding . . . compliance," a district court can properly use a technical advisor.[121] A technical advisor can thus provide an informed perspective for a judge to consider in assessing the sufficiency of the government's plan in remedying the violation.[122]

D. Narrowly Tailored Emissions Standards: Eliminating Hot Spots

The second, more ambitious suggestion of this Note's proposal is to fashion narrowly tailored emissions standards and to fold them into the monitoring and reporting requirements of the government's plan, as discussed above. A broad provision of the monitoring and reporting program could include a requirement to watch—or ideally prohibit—any increases in emissions linked to governmental emissions reduction strategies. This facially neutral order could benefit environmental justice communities, because implementing the order could prevent a government strategy that would increase localized emissions. In turn, this would eliminate new or exacerbated hot spots arising from the toxic co-pollutants that frequently accompany the production of greenhouse gas emissions. This could then reduce the risk that environmental justice communities will disproportionately bear the detrimental health and environmental impacts associated with hot spots. A technical advisor could play an important role here as well by assessing the emissions impacts of the government's strategies.

However, even if such an order were deemed to be outside the judiciary's purview, the information gained from a robust monitoring and reporting program could be useful for environmental justice communities. Knowing that emissions are increasing in their communities can help community members better protect themselves or organize against such actions. These actions could include using such information as leverage against local leadership or local industry players in

120. 5 U.S.C. §§ 551–559.

121. A&M Recs., Inc. v. Napster, Inc., 284 F.3d 1091, 1097 (9th Cir. 2002).

122. *See* Engel & Overpeck, *supra* note 112, at 104 (discussing how judges can evaluate climate science in "actions for injunctive relief or damages attributable to climate change.").

public campaigns.[123] Additionally, the involvement of a technical advisor could provide environmental justice communities with written record of these increasing emissions from an impartial and legitimated source. Such written record could provide important evidence to disseminate information to and mobilize support from both community members and outside interested parties, and may even be relevant for future litigation.

If, indeed, plaintiffs can demonstrate a governmental violation of a constitutional right, advocates could shape the substantive due process claim such that the occurrence of hot spots would necessarily be considered a violation of that constitutional right. Then, judicial protection of that right would accordingly prevent the government from adopting strategies and programs that result in hot spots. For example, hot spots are an easily foreseeable consequence of cap-and-trade programs.[124] Cap-and-trade was originally pitched as an innovative climate solution that can reduce greenhouse gas emissions over large geographical areas. However, it does not account for localized emissions increases. Without an overlay of protection for environmental justice communities, cap-and-trade exacerbates environmental disparity by increasing emissions in already overburdened communities.[125] More specifically, cap-and-trade programs enable emissions increases at facilities where paying for credits is more economical than reducing emissions. Thus, judicial protection of a constitutional right that prohibits hot spots would have the added benefit of disincentivizing the purchase of emissions credits in excess of previous years. If emitters cannot rely on increasing emissions in environmental justice communities, where their facilities are located, the attractiveness of buying one's way out of emissions reduction is weakened.

Finally, in theory, there is always the "escape hatch" of injunction modification under Rule 60, Relief From a Judgment or Order, of the Federal Rules of Civil Procedure.[126] For better or for worse, if a party believes the injunction is no longer equitable, the court has the power to modify or vacate the injunction. Although Rule 60 frequently does not benefit plaintiffs because it can alter or restrict a plaintiff's legal victory, invoking it could be useful in climate

123. *See, e.g.*, Cmtys. for a Better Env't v. City of Richmond, 108 Cal. Rptr. 3d 478 (Ct. App. 2010) (in which an environmental justice organization submitted technical comments regarding a proposed refinery project's pollution effects, ultimately resulting in halting Chevron's project development and also requiring Chevron to dismantle construction it had already started); *see also* Luke W. Cole, *Empowerment as the Key to Environmental Protection The Need for Environmental Poverty Law*, 19 ECOLOGY L.Q. 619, 674–79 (1992) (discussing how community members in Kettleman City gained more detailed information about a proposed toxic waste incinerator with the aid of translators and responded with a successful organizing campaign and a California Environmental Quality Act claim).

124. Cap-and-trade is a market mechanism for reducing emissions by providing economic incentives for reduction. It involves emissions trading schemes through which producers can "trade" permits that allow a certain amount of emissions discharge for a certain time period. *See What Is Emissions Trading?*, EPA (Dec. 17, 2019), https://www.epa.gov/emissions-trading-resources/what-emissions-trading.

125. *See* CAL. ENV'T JUST. ALL., ENVIRONMENTAL JUSTICE ISSUES IN CALIFORNIA'S CAP AND TRADE SYSTEM (2017), https://caleja.org/wp-content/uploads/2017/04/EJissuesinCAcapandtrade.pdf.

126. Fed. R. Civ. P. 60.

litigation in one principal way. The existence of an "escape hatch" may make previously hesitant judges and possibly defendants more willing to take steps to address plaintiffs' concerns. Judges and defendants may be less fearful of being locked into an infeasible order because they know that there is a possibility of modifying or even suspending the order if it is ultimately deemed to be unjustified. However, Rule 60 specifically "does not affect the judgment's finality or suspend its operation," and the spirit of the rule is not to use it as a backstop for effectively litigating a case to finality.[127] Thus, using it in such a manner could frustrate the purpose of finality in judgements.

CONCLUSION

Widespread change sometimes cannot be achieved by pursuing individual actors or even individual industries. When there is a need for overarching reform, there is frequently also a need for government involvement.[128] Obtaining money damages from individual utilities is important and necessary, but it is fundamentally different from the protection of a constitutional right. Although the political branches of government hold responsibility for legislating and deciding policy objectives, the judiciary is responsible for ensuring the protection of constitutional rights. The judiciary can, and must, uphold this duty in the context of climate change.

In the legal profession, one of the places in which questions of equity will arise in the context of climate change is in the consequences of environmental litigation. The remedies that attorneys seek must actively ensure and promote environmental justice. While this suggestion may seem insignificant in the grand scheme of things, every pathway toward environmental justice matters. Indeed, members of the legal profession have a unique responsibility to uphold justice.[129] Although determining the technical contours of requested relief may seem detached from the lofty goal of upholding environmental justice, translating this goal into action includes pursuing a thoughtful legal strategy in litigation.

A seemingly small but important factor of this strategy will involve providing the court with an actionable remedy that it feels comfortable granting. This Note hopes to contribute to discussions of what such an actionable remedy might look like against governmental defendants, and how it could also address the environmental justice implications of climate change. Additionally, while this Note does not explore climate litigation against non-governmental entities,

127. *Id.*

128. Other countries' governments are getting involved and identifying these rights already. In *State of the Netherlands v. Urgenda Foundation*, the Dutch Supreme Court affirmed that reducing emissions was necessary for the Dutch government to protect human rights. *See Landmark Decision by Dutch Supreme Court*, URGENDA, https://www.urgenda.nl/en/themas/climate-case/ (last visited June 24, 2021).

129. While justice is the purported goal of the legal system and the legal profession, I maintain some skepticism about the legal system's ability to deliver justice. However, that conversation is mostly outside the scope of this Note.

the remedies discussed here could also play a role in formulating cases against private defendants.[130]

In putting together their case, environmental plaintiffs should consider the environmental justice considerations and implications of their requested relief, such as who will be harmed or benefited, and how much decision-making power affected communities will have. The environmental movement has a long history of advocating for the environment at the expense of oppressed communities.[131] No more. A climate change solution that upholds climate justice is a solution that protects environmental justice communities. Climate litigation presents an opportunity to reflect on systemic injustices and ensure that we do not reproduce them.

Addressing climate change will require decisions to be made across sectors, fields, and geography. Many aspects of the U.S. legal system render it challenging for use in addressing wide-scale problems like climate change and government accountability. And yet, part of the aforementioned collective effort in combating climate change means that we must try. Each decision presents another opportunity to work together or to leave people behind. The consequences of incorporating—or failing to incorporate—environmental justice into climate solutions are more salient now than ever. Now is the time to decide: Will society continue to perpetuate its sordid legacy of environmental injustice and discrimination? Or during this time of global calamity, will we commit to collaboration, an economy that values people over profits, and the creation of a more just society? As a member of the legal profession, I hope we use our abilities and privileges to advocate for the latter.

130. Note that while the claims would not be the same, because constitutional claims against private litigants are barred by the state action doctrine, the remedies could be similar. *See*, *e.g.*, *Master Settlement Agreement*, CAL. DEP'T OF JUST., OFF. OF THE ATT'Y GEN., https://oag.ca.gov/tobacco/msa (last visited June 28, 2021) (describing multiple remedies in a master settlement agreement with seven tobacco companies found to have "conspired to conceal damaging research from the public.").

131. *See* LUKE W. COLE & SHEILA R. FOSTER, FROM THE GROUND UP: ENVIRONMENTAL RACISM AND THE RISE OF THE ENVIRONMENTAL JUSTICE MOVEMENT 30 (2001).