Legal Backgrounder

Vol. 33 No. 5 April 20, 2018

Washington Legal Foundation
Advocate for Freedom and Justice®
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Ninth Circuit Panel Punts U.S. Climate-Change Litigation Back to Trial Court—But for How Long?

by Andrew R. Varcoe

Last month, a panel of judges of the U.S. Court of Appeals for the Ninth Circuit declined an opportunity to bring an early end to *Juliana v. United States*, a potentially pathbreaking lawsuit seeking to force the federal government to take more aggressive action to prevent and mitigate climate change. The United States government had filed a rare mandamus petition in the Ninth Circuit, asking the court of appeals to order dismissal of the case. After argument, the panel denied the petition.

Although the Ninth Circuit carefully abstained from deciding any ultimate merits or justiciability questions, the court's opinion does give some significant hints about the key issues that will almost certainly dictate the outcome of the case.

Background

Juliana was filed in the U.S. District Court for the District of Oregon in 2015. The plaintiffs (children and young people, for the most part) allege that over the years, various federal officials and agencies, including the President, have violated the plaintiffs' constitutionally guaranteed right to a stable climate system, and have violated the federal government's duties as a public trustee for the atmosphere and the oceans.[1] These are novel theories. Unsurprisingly, the Department of Justice (DOJ) moved to dismiss the case for lack of jurisdiction and for failure to state a claim.

In November 2016, U.S. District Judge Ann Aiken denied DOJ's motion to dismiss. *Juliana v. United States*, 217 F. Supp. 3d 1224 (D. Or. 2016). A few months later, she denied DOJ's request for an interlocutory appeal from her decision. *Juliana v. United States*, No. 15-cv-01517, 2017 WL 2483705 (D. Or. June 8, 2017). DOJ immediately filed a petition for a writ of mandamus in the court of appeals.

In its mandamus petition, DOJ requested dismissal of the case, citing the burdens of the discovery process and emphasizing the unprecedented character of the lawsuit—and the threat it poses, in DOJ's view, to constitutional separation of powers. Filing a mandamus petition of this kind was an unusual move, but not completely surprising, given the stakes. After full briefing (including eight *amicus* briefs supporting the plaintiffs), the Ninth Circuit held oral argument in December 2017.

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[1] For more background, *see* Andrew R. Varcoe, *Does the Constitution Provide a Substantive Due-Process Right to a Stable Climate System?*, WLF Legal Backgrounder (Oct. 6, 2017), https://bit.ly/2v9p8NB.

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At oral argument, it became apparent that the court was unlikely to grant DOJ's mandamus petition. The majority of the members of the panel of judges assigned to the appeal—Chief Judge Sidney Thomas and Judges Alex Kozinski and Marsha Berzon—were very skeptical of DOJ's arguments for invoking the court's authority to grant the extraordinary writ of mandamus. Although Chief Judge Thomas and Judge Berzon seemed concerned about the viability of various aspects of the plaintiffs' claims, they seemed even more troubled that granting DOJ's request in *Juliana* would open up mandamus as a vehicle for parties to routinely seek appellate review of a district court's decision denying a motion to dismiss. Only Judge Kozinski seemed seriously interested in the possibility of granting the petition and ordering dismissal of the suit.

It is not known how Judge Kozinski would have voted on the mandamus request. He abruptly retired from the court of appeals shortly after the argument and was replaced by Judge Michelle Friedland on the panel.

The Ninth Circuit's Opinion

In a unanimous decision authored by Chief Judge Thomas, the court of appeals panel denied DOJ's mandamus petition without prejudice. *In re: United States*, 884 F.3d 830 (9th Cir. Mar. 7, 2018). The court emphasized that a writ of mandamus is a drastic and extraordinary remedy, reserved for exceptional cases. *Id.* at 834. The court proceeded to apply the five guidelines identified in *Bauman v. U.S. District Court*, 557 F.2d 650 (9th Cir. 1977), as relevant to deciding whether to grant the writ. The court concluded that the federal defendants had satisfied none of the five factors "at this stage of the litigation," and that the issues raised in the petition "are better addressed through the ordinary course of litigation." *Ibid.* The court thus declined to exercise its discretion to grant mandamus relief.

The court's analysis of the five *Bauman* factors is relatively straightforward, and can be summarized as follows. First, the government had not shown that it lacked other means to obtain relief from potentially burdensome discovery. The district court had not issued any discovery orders; the plaintiffs had not moved to compel discovery; and DOJ had not sought any discovery-related relief from the district court. In short, the mandamus petition was "entirely premature." *Id.* at 835.

Second, the government had not shown that it would be damaged or prejudiced in some way that could not be corrected on later appeal. The pendency of a lawsuit that violates separation of powers does not, by itself, amount to prejudice in this sense. The ordinary rules of litigation "anticipate that sometimes defendants will incur burdens of litigating cases that lack merit but still must wait for the normal appeals process to contest rulings against them." *Id.* at 836. Moreover, "the defendants still have the usual remedies before the district court for nonmeritorious litigation, for example, seeking summary judgment on the claims." *Ibid.*

Third, the government had not shown that the district court's order was clearly erroneous. For one thing, the absence of controlling precedent "weighs strongly against a finding of clear error." *Id.* at 837. For another thing, "this case is at a very early stage;" "the defendants have ample opportunity to raise legal challenges to decisions made by the district court on a more fully developed record, including decisions as to whether to focus the litigation on specific governmental decisions and orders." *Ibid.*

Fourth, in the absence of controlling precedent, the district court's order was not "an oft repeated error." *Ibid.* Moreover, DOJ had not argued that the district court had violated any federal rules. *Ibid.*

Finally, the district court's order did raise "issues of first impression"—but the order did not present the possibility that those issues would "evade appellate review." *Ibid*.

At the end of its opinion, the court of appeals made clear that it was fundamentally concerned about the practical consequences of granting the government's mandamus petition: "If appellate review could be invoked whenever a district court denied a motion to dismiss, we would be quickly overwhelmed with such requests, and the resolution of cases would be unnecessarily delayed." *Ibid.* At the same time, the court identified several issues that the parties, and indeed the district and magistrate judges, will almost certainly consider carefully, to the extent that the litigation proceeds toward trial:

1. *The claims and remedies may need to be sharply pruned*: "We are mindful that some of the plaintiffs' claims as currently pleaded are quite broad, and some of the remedies the plaintiffs seek may not be available as redress. However, the district court needs to consider those issues further in the first instance. Claims and remedies often are vastly narrowed as litigation proceeds; we have no reason to assume this case will be any different." *Id.* at 837-38.

2. *Standing remains a major issue*: "Nor would the defendants be precluded from reasserting a challenge to standing, particularly as to redressability, once the record is more fully developed[.]" *Id.* at 838.

3. *Future mandamus petitions are possible*: "Nor would the defendants be precluded … from seeking mandamus in the future, if circumstances justify it." *Ibid.*

4. *Future interlocutory appeals are also possible*: "[T]he defendants retain the option of asking the district court to certify orders for interlocutory appeal of later rulings, pursuant to 28 U.S.C. § 1292(b)." *Ibid.*

Likely Next Steps in the Litigation

The magistrate judge presiding over the *Juliana* case held a status conference on March 26, 2018, and set a schedule for the exchange of expert witness statements. Trial memoranda are due in September. Our Children's Trust, whose chief legal counsel represents the *Juliana* plaintiffs, has reported that the magistrate judge wants trial to be held by the end of 2018.[2]

On March 19, 2018, DOJ represented in a district court filing that the United States was "still assessing its options for further review of the Ninth Circuit panel's decision." It would be unusual for the United States to seek further review here, whether before the full Ninth Circuit or the Supreme Court. But the Trump Administration has made aggressive moves in Ninth Circuit litigation in the recent past, and the importance of the *Juliana* case suggests that such a move is not out of the question here.

If DOJ does not seek (or does not obtain) further appellate review, then one or more of the four issues identified by the court of appeals at the end of its opinion will likely become very salient as the case progresses. For example, quite a few statements in the district court's opinion denying DOJ's motion to dismiss make clear that that court was certainly not prejudging the merits of any motion for summary

[2] *See* Our Children's Trust, https://bit.ly/2GMYzmT (Mar. 26, 2018) (Twitter post).

ISBN 1056 3059

judgment that DOJ might later file on redressability or on other grounds.[3] And even a decision denying summary judgment could be a very strong candidate for an interlocutory appeal that would expedite the ultimate resolution of the litigation.

One variable to keep in mind is that a very similar case, *Clean Air Council v. United States*, No. 17-cv-04977 (filed Nov. 11, 2017), is now pending in the U.S. District Court for the Eastern District of Pennsylvania. On March 29, 2018, the United States moved to dismiss that case. A quick decision in *Clean Air Council*, not to mention any appellate proceedings in the case, could possibly have an impact, at least indirectly, on the resolution of *Juliana*.

Conclusion

The plaintiffs and their counsel are right to celebrate their win in the Ninth Circuit. A loss, after all, would have terminated the case. Yet they should not be (and probably are not) unreasonably sanguine about their long-term prospects of success. Now as before, it seems likely that the Ninth Circuit—and for that matter the Supreme Court—will find some way to avoid endorsing the claim that the U.S. Constitution affords private individuals a fundamental right to be protected against climate change. The same goes for the lower-profile—but still very important—claim that the public-trust doctrine can be used to force the federal government to take specific actions to fight climate change.[4] If so, the larger significance of *Juliana* may lie in the extent to which it serves to exert pressure on the political branches of government to take action on climate change—even if the case does not make it to a full trial.

[3] *See Juliana*, 217 F. Supp. 3d at 1245 ("Plaintiffs have alleged a causal relationship between their injuries and defendants' conduct. At this stage, I am bound to accept those allegations as true. [A]t the motion to dismiss stage, a federal court is in no position to say it is impossible to introduce evidence to support a well-pleaded causal connection."); *id.* at 1246-47, 1267; *id.* at 1268 ("At this pleading stage, the court need not sort out the necessity or propriety of all the various agencies and individuals to participate as defendants, at least with respect to issues of standing."); *id.* at 1269 ("[T]he court cannot say, without the record being developed, that it is speculation to posit that a court order to undertake regulation of greenhouse gas emissions to protect the public health will not effectively redress the alleged resulting harm. The impact is an issue for the experts to present to the court after the case moves beyond the pleading stage. [R]egulation by this country, in combination with regulation already being undertaken by other countries, may very well have sufficient impact to redress the alleged harms. The effect may or may not be scientifically indiscernible, but that is an issue better resolved at summary judgment or trial rather than on a motion to dismiss.").

[4] Perhaps the courts will simply sidestep the constitutional and public-trust questions. They could do so by holding that the plaintiffs lack standing, or that the case is otherwise outside the Article III jurisdiction of the federal courts (e.g., because it presents a political question that is not justiciable). *See generally* Dan Farber, *Climate Change in the Courts*, LEGAL PLANET (Apr. 2, 2018), https://bit.ly/2GrpVid; Varcoe, *supra* note 1.

  ISBN 1056 3059