

POLICY. SCIENCE. BUSINESS.

LAW

Juliana lawyers eye 'high-risk' Supreme Court gambit

Maxine Joselow, E&E News reporter • Published: Thursday, February 11, 2021



Kelsey Juliana, a lead plaintiff in the global warming lawsuit against the federal government, speaks outside the U.S. Supreme Court in this 2019 file photo. Kevin Lamarque/REUTERS/Newscom

Young challengers in the historic kids' climate case suffered a setback yesterday, but they face even greater legal risk if their case reaches the Supreme Court, environmental lawyers say.

The 21 young plaintiffs in *Juliana v. United States*, who are calling on the federal government to phase out fossil fuels, were dealt a blow yesterday when the 9th U.S. Circuit Court of Appeals declined to reconsider its decision to scrap their case ([Greenwire](#), Feb. 10).

Our Children's Trust, the Oregon-based nonprofit group representing the youths, said it plans to ask the Supreme Court to overturn the 9th Circuit's ruling.

"It's now up to the U.S. Supreme Court to protect the ability of our federal courts to interpret the U.S. Constitution and resolve controversies through a declaration of law," Julia Olson, executive director and chief legal counsel of Our Children's Trust, said in a statement yesterday.

But if the nation's highest bench agrees to take up the case, the 6-3 conservative majority would likely be unsympathetic toward the youths' claims, environmental lawyers said.

The conservative justices, they said, could also take the opportunity to limit who can sue the government over harms from global warming — a decision that could have a chilling effect on a slew of other climate lawsuits across the country.

"I think pursuing Supreme Court review is a very high-risk strategy for the plaintiffs," said Jonathan Adler, a professor at the Case Western Reserve University School of Law.

"Were the court to take the case, it's likely that defendants in other climate litigation would try to encourage the court to rule more broadly than necessary as a way of putting the kibosh on climate litigation more broadly," Adler said.

The *Juliana* challengers, who are between the ages of 13 and 24, allege that the government violated their constitutional right to a stable climate system by promoting fossil fuels and causing harmful carbon dioxide emissions.

Their case is premised in part on the public trust doctrine, which holds that the government must preserve natural resources for public use.

'Nontrivial risk'

A *Juliana* petition could give the Supreme Court's newly bolstered conservative majority the chance to revisit certain elements of *Massachusetts v. EPA*, legal experts said.

The 2007 case found that EPA could regulate greenhouse gases as pollutants under the Clean Air Act — and that Massachusetts could sue the government over its alleged failure to rein in such planet-warming emissions.

Michael Gerrard, director of Columbia Law School's Sabin Center for Climate Change Law, said that while he doesn't expect the Supreme Court to rehash EPA's authority over greenhouse gases, the justices could revisit the question of standing.

Gerrard noted that Chief Justice John Roberts penned a **dissent** in *Massachusetts v. EPA* that argued the state lacked standing to bring the case, and he was joined by Justices Clarence Thomas and Samuel Alito.

"We already have three votes that we know are favorable to that," he said. "So the *Juliana* case could provide an opportunity for the Supreme Court to speak broadly about citizens' standing in climate change cases. I think that's a nontrivial risk."

William Buzbee, a professor at Georgetown Law, said the Supreme Court would be discarding decades of precedent if it scrapped that portion of *Massachusetts v. EPA*.

Buzbee added that the decision would be a "disaster" for other lawsuits aimed at holding governments and corporations accountable for their inaction on global warming.

"It would be not just bad for this case but would pose major risks for any future climate litigation," he said.

Begging Biden to settle

The *Juliana* challengers began their battle in 2015, when former President Obama was still in office.

They persisted in their fight under former President Trump, whose administration was widely viewed as hostile to aggressive action on global warming.

Today, the challengers are hoping to find an ally in President Biden, who has promised to take a whole-of-government approach to combating climate change.

In addition to petitioning the Supreme Court, lawyers for the *Juliana* challengers are asking Biden's Department of Justice to come to the settlement table.

"Our youth plaintiffs are also requesting that the Biden-Harris administration defendants and the Department of Justice agree to meet with the plaintiffs to discuss settling their claims through a decree of the court, and thereby protect their rights and the rights of all children to come," Our Children's Trust said in a statement yesterday.

Still, environmental lawyers believe the change in administration is unlikely to boost the prospects of the kids' climate case.

"The Obama Administration and the Trump Administration took the same position in these cases, arguing that they should be dismissed out of hand. To the extent that more of these cases are filed, I would expect the Biden Administration to take the same position," Jeff Holmstead, a partner at Bracewell LLP and a former energy lobbyist, previously told E&E News ([Climatewire](#), Nov. 18, 2020).

Buzbee of Georgetown Law said he would advise the *Juliana* challengers to pursue a settlement rather than risk an adverse Supreme Court ruling that could hurt climate litigation more broadly.

"I think they will be counseled by lawyers and others who may be sympathetic to their cause that you have to look at the risk that you would end up getting a bad ruling at the court ... and logically look at the settlement," he said.

Twitter: [@maxinejoselow](#) | Email: mjoselow@eenews.net

The essential news for energy & environment professionals

© Politico, LLC [Privacy and Data Practices Policy](#) [Site Map](#) [Contact Us](#)