
FEDERAL COURTS — JUSTICIABILITY — NINTH CIRCUIT HOLDS THAT DEVELOPING AND SUPERVISING PLAN TO MITIGATE ANTHROPOGENIC CLIMATE CHANGE WOULD EXCEED REMEDIAL POWERS OF ARTICLE III COURT. — *Juliana v. United States*, 947 F.3d 1159 (9th Cir. 2020).

“[W]here there is a legal right, there is also a legal remedy”¹ — unless there isn’t. “The remedial powers of an equity court . . . are not unlimited,”² and “traditional principles of equity jurisdiction” sometimes leave rightsholders without remedies for legal injuries.³ Recently, in *Juliana v. United States*,⁴ the Ninth Circuit held that ordering the federal government to adopt “a comprehensive scheme to decrease fossil fuel emissions and combat climate change” would exceed a federal court’s remedial authority.⁵ The result in *Juliana* is not surprising. But *Juliana*’s reasoning, which suggests that “limited and precise” legal standards must always constrain a court in issuing equitable relief, subtly but significantly narrows the remedial capacity of courts adjudicating large-scale “structural reform” cases.⁶

Environmental groups have long sought to enlist the federal courts in their fight against anthropogenic climate change.⁷ Most of these attempts have drawn on common law tort theories⁸ or federal statutory law, in particular the 1970 Clean Air Act.⁹ In 2015, however, one environmental group — Our Children’s Trust, a coalition of young people

¹ 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *23 (1765); accord *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (quoting Blackstone).

² *Whitcomb v. Chavis*, 403 U.S. 124, 161 (1971).

³ *Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 319 (1999) (quoting 11A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 2941 (2d ed. 1995)); see also RICHARD H. FALLON JR., THE NATURE OF CONSTITUTIONAL RIGHTS: THE INVENTION AND LOGIC OF STRICT JUDICIAL SCRUTINY 156 (2019) (similar observation).

⁴ 947 F.3d 1159 (9th Cir. 2020).

⁵ *Id.* at 1171.

⁶ Structural-reform injunctions “seek[] to effectuate the reorganization of an ongoing social institution” in order to safeguard a legal right on a continuing basis. OWEN M. FISS, THE CIVIL RIGHTS INJUNCTION 7 (1978) (defining the concept); see, e.g., Jason Parkin, *Aging Injunctions and the Legacy of Institutional Reform Litigation*, 70 VAND. L. REV. 167, 176–82 & nn.26–28 (describing such injunctions and attributing “structural-reform” characterization to Fiss and others).

⁷ 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, 30–37 (2012) (taxonomizing cases); RICHARD J. LAZARUS, THE RULE OF FIVE: MAKING CLIMATE HISTORY AT THE SUPREME COURT (2020) (recounting history of one such attempt).

⁸ See, e.g., *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 418–20 (2011); *City of Oakland v. BP PLC*, 960 F.3d 570, 575–76 (9th Cir. 2020) (providing examples).

⁹ 42 U.S.C. §§ 7401–7671q; see, e.g., *Massachusetts v. EPA*, 549 U.S. 497, 533–34 (2007) (holding that Clean Air Act requires EPA to regulate greenhouse gas emissions unless it determines that such emissions do not endanger the “public health or welfare,” *id.* at 533 (quoting 42 U.S.C. § 7521(a)(1)).

and environmental lawyers¹⁰ — took a more aggressive approach. Contending that the Constitution guarantees an unenumerated fundamental right to a “stable climate system,”¹¹ the Trust filed suit against the United States in the U.S. District Court for the District of Oregon.¹² The Trust argued that the United States had “continued to permit, authorize, and subsidize fossil fuel extraction . . . [and] consumption” despite these activities’ contributions to global warming.¹³ This choice, it continued, had “infringed on” the Trust’s “constitutional rights to life, liberty, and property.”¹⁴ As relief, the Trust demanded (inter alia) an “[o]rder” requiring the United States “to prepare and implement an enforceable national remedial plan to phase out fossil fuel emissions and . . . stabilize the climate system.”¹⁵

In the district court, the United States moved to dismiss. It argued that the Trust had raised only political questions, lacked standing, and had not stated a claim for which relief could be granted.¹⁶ The district court disagreed and denied the motion.¹⁷ According to the district court, although climate policy was “politically charged,” the Trust’s suit did not raise political questions.¹⁸ Because an “order” requiring the United States “to swiftly phase out CO₂ emissions” would “partially redress” the Trust’s “asserted injuries” from United States–caused climate change, the Trust had standing to sue.¹⁹ And because “a climate system capable

¹⁰ See *Our Team*, OUR CHILDREN’S TRUST, <https://www.ourchildrenstrust.org/our-team> [<https://perma.cc/A9FE-STXJ>] (listing organization’s leadership); First Amended Complaint for Declaratory and Injunctive Relief at 1, *Juliana v. United States*, 217 F. Supp. 3d 1224 (D. Or. 2016) (No. 15-cv-01517) [hereinafter First Amended Complaint]. The suit was brought in the names of eighteen individual young people and their guardians, a nonprofit organization called “Earth Guardians,” and “future generations” of Americans on behalf of their putative “guardian,” scientist James Hansen. *Id.* at 2. For ease of reference, this comment refers to the plaintiffs collectively as “the Trust.”

¹¹ First Amended Complaint, *supra* note 10, ¶ 279. The Trust couched this claim in four separate ways: as a substantive due process right arising under the Fifth Amendment’s Due Process Clause, *see id.* ¶¶ 277–89; as a claim for “violation” of “the equal protection principles of the Fourteenth Amendment, embedded in the Due Process Clause of the Fifth Amendment,” *id.* ¶ 291; as a claim for a violation of the Ninth Amendment, *see id.* ¶¶ 302–06; and as a claim rooted in “rights under the public trust doctrine” as “secured by the Ninth Amendment and embodied in the reserved powers doctrines of the Tenth Amendment and the Vesting, Nobility, and Posterity Clauses of the Constitution,” *id.* ¶ 308. Following the district court’s lead, this comment groups these claims together. *See Juliana v. United States*, 217 F. Supp. 3d at 1248–61 (analyzing one claim for “infringement of a fundamental right,” *id.* at 1248 & n.6, and another public-trust claim “rest[ing] directly on the Due Process Clause of the Fifth Amendment,” *id.* at 1261 (quoting *Davis v. Passman*, 442 U.S. 228, 243 (1979))).

¹² First Amended Complaint, *supra* note 10, at 1.

¹³ *Id.* ¶ 7.

¹⁴ *Id.* ¶ 8.

¹⁵ *Id.* ¶ 7.

¹⁶ *Juliana*, 217 F. Supp. 3d at 1235.

¹⁷ *Id.* at 1263.

¹⁸ *Id.* at 1236; *see id.* at 1237–42.

¹⁹ *Id.* at 1247–48.

of sustaining human life” was “fundamental to a free and ordered society,” the Trust had “state[d] a claim for a due process violation.”²⁰ “This lawsuit may be ground-breaking,” the District Court concluded, but that was not the Trust’s fault.²¹ Rather, “[f]ederal courts too often [had] been cautious” in adjudicating environmental law cases, “and the world [had] suffered for it.”²² The United States sought an interlocutory appeal.²³

After some procedural wrangling,²⁴ the Ninth Circuit reversed on standing grounds.²⁵ Writing for the panel, Judge Hurwitz²⁶ began with the basics: “To have standing under Article III, a plaintiff must have (1) a concrete and particularized injury that (2) is caused by . . . challenged conduct and (3) is likely redressable by a favorable judicial decision.”²⁷ Agreeing with the district court, Judge Hurwitz found that “[a]t least some plaintiffs” had claimed “particularized injuries,” since climate change threatened to harm certain plaintiffs in “concrete and personal” ways if left unchecked.²⁸ And some plaintiffs had also established causation, since there was “at least a genuine factual dispute as to whether” U.S. climate policy was a “substantial factor” in exacerbating the plaintiffs’ climate change–related injuries.²⁹ Thus, the Trust’s standing turned on redressability: “whether the plaintiffs’ claimed injuries [were] redressable by an Article III court.”³⁰

²⁰ *Id.* at 1250 (suggesting that climate change would cause large-scale social harms). The district court also found that the Trust had stated a claim under a constitutionalized version of the public trust doctrine. *See id.* at 1261.

²¹ *Id.* at 1262.

²² *Id.*

²³ *See Juliana*, 947 F.3d at 1166 (describing procedural history).

²⁴ The district court originally denied the United States’ request that it certify the appeal. *Juliana v. United States*, No. 15-cv-01517, 2017 WL 2483705, at *2 (D. Or. June 8, 2017). After unsuccessfully petitioning the Ninth Circuit for mandamus and the Supreme Court for a stay, *see In re United States*, 884 F.3d 830, 833 (9th Cir. 2018); *United States v. U.S. Dist. Ct. for Dist. of Or.*, 139 S. Ct. 16 (2018), the United States returned to the district court and sought summary judgment. The district court denied the United States’ summary judgment motion, but this time — under pressure from the Ninth Circuit and Supreme Court — “reluctantly” agreed to certify. *See Juliana*, 947 F.3d at 1166; *Juliana v. United States*, 949 F.3d 1125, 1126 (9th Cir. 2020) (recounting this history).

²⁵ The panel first considered and rejected an argument that the government had made for the first time on summary judgment: that plaintiffs were required to bring their challenge under the Administrative Procedure Act. *Juliana*, 947 F.3d at 1167; *see* 5 U.S.C. § 706(2)(A), (C). According to the panel, “[b]ecause the APA only allows challenges to discrete agency decisions,” plaintiffs would not have been able to “effectively pursue their constitutional claims . . . under that statute.” *Juliana*, 947 F.3d at 1167 (citations omitted). “Because denying any judicial forum for a colorable constitutional claim presents a serious constitutional question, Congress’s intent through a statute to do so must be clear.” *Id.* (citations and internal quotation marks omitted). And “[n]othing in the APA,” the panel concluded, “evinced such an intent.” *Id.*

²⁶ Judge Hurwitz was joined by Judge Murguia.

²⁷ *Juliana*, 947 F.3d at 1168.

²⁸ *Id.* (describing plaintiff forced “to evacuate his coastal home”).

²⁹ *Id.* at 1169.

³⁰ *Id.*

“Reluctantly,” the panel found “such relief . . . beyond [its] constitutional power.”³¹ To establish redressability, it explained, the Trust needed to identify relief that was both “(1) substantially likely to redress [its] injuries” and “(2) within the district court’s power to award.”³² On the first prong, “plaintiffs’ experts” had established that only a comprehensive, government-led plan to reduce U.S. greenhouse gas emissions could mitigate “the global consequences of climate change” and thereby bring the Trust redress.³³ But, turning to the second prong, supervising such a plan “would necessarily require” judges to make “a host of complex policy decisions.”³⁴ How quickly, for example, should the United States transition to renewable energy? How much should it invest in public transit?³⁵ “[A] constitutional directive or legal standards’ must guide the courts’ exercise of equitable power,” the panel concluded, and “limited and precise” legal rules simply could not answer these kinds of questions.³⁶ And because no remedy subject to limited and precise definition could redress the Trust’s injuries, issuing such relief was not within the district court’s power. The Trust thus lacked standing.

Judge Staton dissented.³⁷ “Plaintiffs bring suit,” she lamented, “to enforce the most basic structural principle embedded in our system of ordered liberty: that the Constitution does not condone the Nation’s willful destruction.”³⁸ In Judge Staton’s view, a district court had the power to award the Trust relief unless its claims ran afoul of the political question doctrine.³⁹ Since the Trust’s claims did not pose political questions, she continued, they should have proceeded.⁴⁰ “[O]ur history is no stranger to widespread, programmatic changes . . . ushered in by the judiciary[,]” Judge Staton concluded, and the “slow churn” of institutional-reform litigation “should not dissuade us here.”⁴¹

³¹ *Id.* at 1165.

³² *Id.* at 1170.

³³ *Id.* The panel expressed some skepticism that even such a plan would redress the Trust’s injuries, but did not need to reach that question given its ultimate holding. *Id.* at 1171–72.

³⁴ *Id.* at 1171. The Trust had argued that “the district court need not itself make policy decisions, because if their general request for a remedial plan [were] granted, the political branches” could have “decide[d] what policies [would] best . . . draw down excess atmospheric CO₂.” *Id.* at 1172. But, the panel replied, “even under such a scenario,” the judiciary would be required to “subsequently . . . pass judgment on the sufficiency of the government’s response to the order, which necessarily would entail a broad range of policymaking.” *Id.*

³⁵ *Id.*

³⁶ *Id.* at 1173 (quoting *Rucho v. Common Cause*, 139 S. Ct. 2484, 2500, 2508 (2019)) (“*Rucho* found partisan gerrymandering claims presented political questions . . . [because] there was no ‘limited and precise’ standard discernable in the Constitution for redressing [them] It is impossible to reach a different conclusion here.”).

³⁷ Judge Staton, of the Central District of California, was sitting by designation.

³⁸ *Id.* at 1175 (Staton, J., dissenting).

³⁹ *See id.* at 1185.

⁴⁰ *Id.* at 1185–86.

⁴¹ *Id.* at 1189.

Although *Juliana*'s result was predictable, its reasoning sweeps more broadly than one might think. By suggesting that Article III courts cannot order injunctive relief unless constrained by "limited and precise" legal standards,⁴² *Juliana* subtly but significantly narrows the remedial authority of federal courts sitting in equity. In particular, it is not clear how "structural-reform" injunctions — in which courts require schools, firms, and other social institutions to change their behavior in order to make amends for past lawbreaking, most notably racial discrimination⁴³ — fit within *Juliana*'s vision of the judiciary's remedial powers.

As many outside observers noted, *Juliana* was always a "long shot."⁴⁴ Doctrinally, among other problems, the Supreme Court has mostly gotten "out of the business" of recognizing new unenumerated fundamental rights.⁴⁵ And more practically, climate change is the kind of complex, multistakeholder issue that Anglo-American common law has historically left for politicians rather than judges to solve.⁴⁶ *Juliana*'s outcome may therefore have been overdetermined, both as a doctrinal and as a sociological matter. The question was less whether the Trust might win, and more how it would lose.⁴⁷

That said, the specific doctrinal path that the Ninth Circuit chose in *Juliana* may have significant legal and practical implications. First, *Juliana*'s central doctrinal suggestion — that courts lack the Article III authority to issue injunctions implicating "complex policy decisions"⁴⁸

⁴² *Id.* at 1173 (majority opinion) (quoting *Rucho v. Common Cause*, 139 S. Ct. 2484, 2500 (2019)).

⁴³ See FISS, *supra* note 6, at 6–7.

⁴⁴ John Schwartz, *Court Quashes Youth Climate Change Case Against Government*, N.Y. TIMES (Jan. 17, 2020), <https://nyti.ms/2Tya7j1> [<https://perma.cc/TL7Q-5EL5>] (quoting Professor Ann Carlson); see *id.* (quoting Professor David Uhlmann describing *Juliana* as "a case where your heart says yes but your mind says no"); Jonathan H. Adler, *Is Kids Climate Case Coming to an End?*, REASON: VOLOKH CONSPIRACY (Nov. 26, 2018, 6:09 PM), <https://reason.com/2018/11/26/is-kids-climate-case-coming-to-an-end> [<https://perma.cc/XN28-AYP2>] (similar) [hereinafter Adler, *Kids Climate Case*]; Ronald Collins, *Ask the Author: Lawyers' Law — Those Who Helped the Supreme Court Shape the Environmental Law of the Land*, SCOTUSBLOG (Mar. 13, 2020, 10:08 AM), <https://bit.ly/2Z4mzZS> [<https://perma.cc/D342-ZG7E>] (quoting Professor Richard Lazarus describing *Juliana* theory as "strikingly far-reaching").

⁴⁵ See, e.g., Jonathan Adler, *Divided Sixth Circuit Panel Discovers Constitutional Right to a "Basic Minimum Education,"* REASON: VOLOKH CONSPIRACY (Apr. 23, 2020, 2:49 PM), <https://reason.com/volokh/2020/04/23/divided-sixth-circuit-panel-discovers-constitutional-right-to-a-basic-minimum-education> [<https://perma.cc/W27Q-7252>] ("For the past two decades, the Supreme Court has been out of the business of recognizing or discovering new constitutional rights . . ."); see also *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (adopting narrow test for recognition of unenumerated fundamental rights).

⁴⁶ For a canonical statement of this view, see Lon L. Fuller & Kenneth I. Winston, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 394–404 (1978) (describing such "polycentric" problems).

⁴⁷ Cf. Adler, *Kids Climate Case*, *supra* note 44 (so suggesting).

⁴⁸ *Juliana*, 947 F.3d at 1171.

unless “limited and precise”⁴⁹ “legal principles”⁵⁰ require as much — is novel. To be sure, “[e]quitable relief in a federal court” has always been “subject to restrictions.”⁵¹ One line of cases, closely connected with the development of the political question doctrine, has limited courts’ remedial authority where the Constitution’s text “commits” certain issues to “the political branches of government.”⁵² And another line, describing prudential limitations on judicial discretion, has emphasized that courts must respect the separation of powers and “principles of federalism” when they craft equitable remedies.⁵³ But *Juliana* does not rest on a textual commitment of climate policy to another branch of government, although the *Juliana* majority did note (almost in passing) that the Constitution expressly grants Congress the “Power to dispose of” public lands and thus the fossil fuels beneath them.⁵⁴ And *Juliana* did not hold that the district court had abused its discretion in imposing a particular remedy in light of separation of powers principles; it held that Article III categorically rules out injunctive relief where no “constitutional directive or legal standard[]” can constrain “the courts’ exercise of equitable power.”⁵⁵ *Juliana*’s rationale thus departs from, and extends beyond, the reasoning of prior Supreme Court cases setting the boundaries of federal district courts’ remedial capabilities.⁵⁶

⁴⁹ *Id.* at 1173 (quoting *Rucho v. Common Cause*, 139 S. Ct. 2484, 2500 (2019)).

⁵⁰ *Id.* at 1175 (quoting *Gill v. Whitford*, 138 S. Ct. 1916, 1928 (2018)).

⁵¹ *Guar. Tr. Co. v. York*, 326 U.S. 99, 105 (1945).

⁵² *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973) (holding that district court injunction imposing “continuing judicial surveillance,” *id.* at 2, on a state National Guard unit conflicted with the Constitution’s vesting of the authority to “organiz[e], arm[], and discipline[]” . . . the National Guard” with Congress, *id.* at 6 (quoting U.S. CONST. art. I, § 8, cl. 16)); *see, e.g.*, *Smith & Lee Assocs., Inc. v. City of Taylor*, 102 F.3d 781, 797 (6th Cir. 1996) (explaining that courts cannot promulgate laws directly, because that authority is committed to Congress); *cf. M.S. v. Brown*, 902 F.3d 1078, 1087–88 (9th Cir. 2017) (broadly agreeing with *Smith & Lee*, but suggesting that “in certain circumstances,” “structural constitutional limits” may not “prevent federal courts from ordering government officials to enact or implement a bill that has not completed a lawfully prescribed legislative process,” *id.* at 1087). The cases are merely “related” to the political question doctrine because, Judge Staton’s dissent notwithstanding, there is a difference between deciding that a *right* involves a political question and deciding that a *remedy* does. *See infra* pp. 1935–36.

⁵³ *Rizzo v. Goode*, 423 U.S. 362, 380 (1976) (holding that district court injunction imposing continuing supervision on city police department was abuse of discretion in light of, *inter alia*, “principles of federalism”); *see, e.g.*, *O’Shea v. Littleton*, 414 U.S. 488, 501 (1974) (holding that analogous injunction against state criminal court system was abuse of discretion in light of “established principles of [federal-state] comity”); *Spallone v. United States*, 493 U.S. 265, 277–80 (1990) (holding that injunction requiring municipal legislators to enact voted-on ordinance was abuse of discretion in light of importance of their legislative function); *Missouri v. Jenkins*, 495 U.S. 33, 50–51 (1990) (holding that courts cannot directly levy state or municipal taxes, although they may compel other entities to do so).

⁵⁴ *Juliana*, 947 F.3d at 1170 (quoting U.S. CONST. art. IV, § 3, cl. 2).

⁵⁵ *Id.* at 1173 (quoting *Rucho v. Common Cause*, 139 S. Ct. 2484, 2508 (2019)).

⁵⁶ Judge Staton, making a broadly analogous argument in dissent, appears to have assumed that the political question doctrine supplies the *sole* constraint on redressable injuries. *See id.* at 1185–89 (Staton, J., dissenting) (“I readily concede that courts must on occasion refrain from answering

Second, more practically, *Juliana*'s focus on "limited and precise" legal standards⁵⁷ could conceivably disrupt longstanding judicial practice in large-scale structural-reform cases. Structural-reform litigation is often long on judicial "flexibility" and short on specific doctrinal rules.⁵⁸ In developing school desegregation remedies, for example, federal courts immerse themselves in the details of public school logistics: which schools to open and which to close, which teachers to hire and which to fire, and so on.⁵⁹ Some legal principles "guide[] [the] exercise" of this "equitable power"⁶⁰ — the plans must "eliminate the vestiges" of prior "*de jure* segregation"⁶¹ — but translating these principles into practice leaves much to individual jurists' discretion.⁶² Climate change policy and school desegregation are probably distinguishable; among other things, desegregating a single school system, though complicated, is vastly less complex than decarbonizing an entire country. But the *Juliana* panel did not offer any explicit guidance on how to distinguish desegregation cases (or their analogs) from climate change.⁶³ As a result, at

questions that are truly reserved for the political branches This deference is known as the 'political question doctrine.'" *Id.* at 1185.). But this position goes too far as well. Sometimes a plaintiff's injury is not redressable, not because his case raises political questions, but because the plaintiff does not seek damages and prudential factors weigh heavily against granting injunctive relief. Suppose, for example, that a plaintiff seeks relief requiring continuing supervision of a state court system. *Cf. Rizzo*, 423 U.S. at 379–80. Per *Rizzo*, such supervision might amount to an abuse of discretion independent of the merits of the plaintiff's claim. *See id.* This would leave the plaintiff without a redressable injury and thus without standing. But this is not a result of the political question doctrine. Rather, permanent injunctions are always discretionary, *eBay Inc. v. Mercexchange*, 547 U.S. 388, 391 (2006), and a court that has already decided not to grant an injunction on discretionary grounds has no reason to reach the merits of a plaintiff's legal theory unless that plaintiff seeks more than an injunction.

⁵⁷ *Juliana*, 947 F.3d at 1173.

⁵⁸ *See, e.g.*, *Brown v. Bd. of Educ.*, 349 U.S. 294, 300 (1955) (describing "practical flexibility" of equity). Some scholars celebrate this manner of judicial problem-solving; others do not. *Compare, e.g.*, Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1288–90 (1976), and FISS, *supra* note 6, chs. 3–4 (arguing in favor of structural-reform litigation), with William A. Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635, 635–45 (1982), and Frank Easterbrook, *Justice and Contract in Consent Agreements*, 1 U. CHI. L.F. 19, 33–41 (1987) (arguing against).

⁵⁹ *See, e.g.*, *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 18–32 (1971); *Missouri v. Jenkins*, 515 U.S. 70, 78–79 (1995); *Morgan v. Kerrigan*, 401 F. Supp. 216, 250–69 (D. Mass. 1975), *aff'd*, 530 F.2d 401 (1st Cir. 1976) (representative examples of school desegregation plans).

⁶⁰ *Juliana*, 947 F.3d at 1173.

⁶¹ *Freeman v. Pitts*, 503 U.S. 467, 518 (1992).

⁶² *See, e.g.*, Wendy Parker, *The Supreme Court and Public Law Remedies: A Tale of Two Kansas Cities*, 50 HASTINGS L.J. 482–507 (1999) (describing how two district courts handled desegregation of similar cities very differently); *see also* Gerald E. Frug, *The Judicial Power of the Purse*, 126 U. PA. L. REV. 715, 718–32 (1976) (providing examples outside the desegregation context).

⁶³ Despite Judge Staton's citation to the school desegregation cases in her dissent. *See Juliana*, 947 F.3d at 1188 (Staton, J., dissenting).

minimum, defendants in future structural-reform suits will have plausible arguments that *Juliana* imposes new limits on district courts' remedial authority.

Rucho v. Common Cause,⁶⁴ which the *Juliana* panel seemed to believe compelled *Juliana*'s result,⁶⁵ in fact confirms the novelty of *Juliana*'s reasoning. *Rucho*, from which *Juliana* derives its key "limited and precise"⁶⁶ and "constitutional directive"⁶⁷ language, held that suits challenging the constitutionality of partisan gerrymanders present nonjusticiable political questions because no "limited and precise" legal standard can separate good gerrymanders from bad ones.⁶⁸ But this kind of indeterminacy involves rules governing primary conduct — "How much [partisan gerrymandering or climate change] is too much?"⁶⁹ — rather than remedies — "Having decided that partisan gerrymandering or climate change is unlawful, what do we *do* about it?" And the Supreme Court has long acknowledged that courts enjoy a "broad power to formulate" equitable remedies, one which extends beyond their power to recognize and parameterize new rights.⁷⁰ *Juliana*, however, assumes that *Rucho*'s discussion of rights applies equally to remedies. By collapsing this distinction between flexible rights-recognition and flexible remedy-implementation, *Juliana* thus narrows the remedial powers of Article III courts.

Justice Thomas has suggested that large-scale structural injunctions are "at odds with the history and tradition of the equity power and the Framers' [constitutional] design."⁷¹ *Juliana* does not go quite that far, at least on its face. But although *Juliana*'s holding is limited to climate change litigation, its reasoning may prove hard to cabin. Ultimately, at least in the Ninth Circuit, *Juliana* may come to stand for broad and significant limitations on the powers of federal district courts sitting in equity.

⁶⁴ 139 S. Ct. 2484 (2019).

⁶⁵ See *Juliana*, 947 F.3d at 1173 (arguing that "it is impossible to reach a different conclusion" than the one the Supreme Court reached in *Rucho*).

⁶⁶ *Id.* (quoting *Rucho*, 139 S. Ct. at 2508).

⁶⁷ *Id.* (quoting *Rucho*, 139 S. Ct. at 2500).

⁶⁸ *Rucho*, 139 S. Ct. at 2500.

⁶⁹ *Id.* at 2501.

⁷⁰ See, e.g., *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 36 (1976) (contrasting judicial authority "absent a finding of a constitutional violation" with such authority after a violation is found); *Hutto v. Finney*, 437 U.S. 678, 687 & n.9 (1978) (invoking *Swann* in the prison-litigation context).

⁷¹ *Missouri v. Jenkins*, 515 U.S. 70, 126 (1995) (Thomas, J., concurring); accord, e.g., *Lewis v. Casey*, 518 U.S. 343, 365 (1996) (Thomas, J., concurring).