From School Boards to a Sustainable Future: How the Right to a Clean Environment Could Be Declared and Enforced Using the *Brown II* Framework

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I. INTRODUCTION

Facing the perils of climate change more than ever, young people are looking for new strategies to hold the United States government accountable for decades of policy that has contributed to global warming.[1] One of these

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[1] Global warming is caused when harmful pollutants, such as Carbon Dioxide (CO2), collect in the atmosphere and absorb sunlight and radiation which reflect from the earth's surface. Amanda MacMillan & Jeff Turrentine, *Global Warming 101*, NRDC (Apr. 7, 2021), http://www.nrdc.org/stories/global-warming-101#causes [https://perma.cc/C7MA-4VL2]. Today, global warming has been primarily tied to human activity, such as the burning of fossil fuels, electricity production, and industrial activity. *Id.* Climate change causes heat waves, droughts, and extreme weather events, which have direct impacts on the lives of people and wildlife. *Id.* The people who will face the most drastic effects of climate change are children and future generations, as children will have to spend their entire life dealing

strategies is to utilize the courts in order to achieve this goal. In 2015, a group of 21 youth filed a lawsuit against the United States government in the United States District Court for the District of Oregon.[2] These children, alongside organizational plaintiff Earth Guardian, were boldly making an argument for their lives – they asserted that the U.S. government has violated their right to life, liberty, and property through its affirmative actions that have caused or contributed to climate change.[3] In other words, the primary argument in the lawsuit that would become *Juliana v. United States* was that the government violated the youngest generation's substantive due process right to a "climate system capable of sustaining human life."[4] The plaintiffs sought both declaratory and injunctive relief.[5] They sought a declaration of a fundamental right to a clean environment, which has been violated by the government, and an order requiring the federal government to create and implement a national plan to "phase out fossil fuel emissions and draw down excess atmospheric CO2."[6] Connected to the second part of the plaintiff's proposed relief was the request that the district court monitor and enforce governmental compliance with the plan to reduce carbon emissions.[7]

The government responded to the lawsuit by filing motions to dismiss, arguing that the plaintiffs lacked standing under Article III of the Constitution.[8] However, the district court, in an opinion and order by District Judge Anne Aiken, rejected the motions.[9] In her opinion, Judge Aiken supported the declaration of a fundamental right to a clean environment and asserted that the

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with the effects of climate change and will be more likely to face undernourishment and the need to migrate from areas facing severe weather crises. *Effects of Climate Change on Future Generations*, SAVE THE CHILD., https://www.savethechildren.org/us/what-we-do/emergency-response/climate-change [https://perma.cc/X54G-3VCW] (last visited Jan. 11, 2024).

[2] Juliana v. United States, OUR CHILD.'S TR., https://www.ourchildrenstrust.org/juliana-v-us [https://perma.cc/B7YG-MH6L] (last visited Jan. 11, 2024) [hereinafter OUR CHILD.'S TR.].

[3] *Id.*

[4] *Id.*; *see generally* Sadie Minjares Odom, Note, Juliana v. United States*: Standing on the 'Eve of Destruction'*, 52 GOLDEN GATE U. L. REV. 79, 80 (2022).

[5] Juliana v. United States, 217 F. Supp. 3d 1224, 1247 (D. Or. 2016), *rev'd and remanded*, 947 F.3d 1159 (9th Cir. 2020).

[6] Juliana v. United States, 947 F.3d 1159, 1172 (9th Cir. 2020); Odom, *supra* note 4, at 82. The *Juliana* plaintiffs' request for relief was primarily concerned with bringing atmospheric CO2 levels down to 350 parts per million– the level which is generally agreed within the scientific community to be the highest level at which the planet can remain safe. *Juliana*, 947 F.3d at 1173; Mary Christina Wood, *"On the Eve of Destruction": Courts Confronting the Climate Emergency*, 97 IND. L.J. 239, 246 (2022).

[7] *Juliana*, 947 F.3d at 1170 ("The crux of the plaintiffs' requested remedy is an injunction requiring the government not only to cease permitting, authorizing, and subsidizing fossil fuel use, but also to prepare a plan subject to judicial approval to draw down harmful emissions.").

[8] OUR CHILD.'S TR., *supra* note 2; *see Juliana*, 217 F. Supp. 3d at 1242.

[9] *Juliana*, 217 F. Supp. 3d at 1224, 1263.

plaintiffs did in fact meet the requirements of Article III standing.[10] Judge Aiken's reasoning was based on analogies to other cases and precedent in which the Court has declared fundamental rights and the concept that certain rights must be given respect due to the fact that they are essential to the preservation of other rights.[11]

However, this all changed in the Ninth Circuit Court of Appeals. After a number of motions from the government, the case finally reached the Ninth Circuit, which disagreed with the District Court's holding on Article III standing.[12] The Ninth Circuit, in an opinion written by Judge Andrew D. Hurwitz, held that the *Juliana* plaintiffs lacked Article III standing due to the fact that any decision from the Court would be inadequate to provide a meaningful remedy to the damages endured by the plaintiffs.[13] Specifically, the court reasoned that declaring a fundamental right to a clean environment alone would not suffice as a meaningful remedy for the plaintiffs' injuries and that it, as an Article III Court, does not have the power to enforce the remedy requested by the plaintiffs without overstepping the role of the legislative branch, therefore violating the separation of powers doctrine.[14] Accordingly, the case was remanded to the district court with instructions to dismiss for lack of standing.[15]

However, this wasn't the end for *Juliana*. On June 1, 2023, Judge Ann Aiken granted a motion by the Juliana plaintiffs to amend their complaint.[16] In their amended complaint, filed on June 8, 2023, the Juliana plaintiffs largely revised their prayer for relief, dropping several requests that the Ninth Circuit found to be outside of the court's Article III authority.[17] Among other changes, the plaintiffs dropped their request that the court require the U.S. government to develop and implement a national plan to address climate change.[18] In her

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[10] *Id.* at 1250. ("Exercising my 'reasoned judgment'… I have no doubt that the right to a climate system capable of sustaining human life is fundamental to a free and ordered society." (quoting Obergefell v. Hodges, 576 U.S. 644, 664 (2015))).

[11] *See infra* Part IV.A.

[12] *Juliana*, 947 F.3d at 1173–74.

[13] *Id.* at 1164, 1171–73.

[14] *See id.* at 1173 ("We doubt that any such plan can be supervised or enforced by an Article III court.").

[15] *Id.* at 1175.

[16] OUR CHILD.'S TR., *supra* note 2; *Oregon Youths' Climate Lawsuit Against US Government Can Proceed to Trial, Judge Rules*, ASSOCIATED PRESS (June 1, 2023), https://apnews.com/article/youth-climate-lawsuit-trial-oregon-7ad2fa18f5276f12c64c0ce775aba2f6[https://perma.cc/ZK57-TGXQ].

[17] *Juliana v. United States*, CLIMATE CASE CHART, https://climatecasechart.com/case/juliana-v-united-states/#:~:text=United%20States%20lacked%20standing%20for,attempt%20to%20cure%20what%20the [https://perma.cc/UE9T-EXLL] (last visited Jan. 11, 2024) [hereinafter, Litigation Database, *Juliana*]; *see generally* Second Am. Compl. for Declaratory and Injunctive Relief, June 8, 2023, Juliana v. United States, No. 6:15-cv-01517-AA, (D. Or. amended June 8, 2023).

[18] Litigation Database, *Juliana*, *supra* note 17; Second Am. Compl. for Declaratory and Injunctive Relief, June 8, 2023 at 133–44, Juliana v. United States, No. 6:15-cv-01517-AA,

opinion and order on the amended complaint, Judge Aiken expressed belief that the complaint "can be saved" by the amendments.[19] Judge Aiken stated that the request for declaratory relief "would at least partially, and perhaps wholly, redress plaintiff's ongoing injuries caused by federal defendants' ongoing policies and practices."[20] Both Judge Aiken and the plaintiffs expressed optimism that even a granting of declaratory relief alone would suffice to provide relief.[21]

This Note argues that not only do federal courts have the authority to declare a constitutional right to a clean environment, but they also have the ability to enforce such a right without violating the separation of powers doctrine by using an enforcement framework of the type utilized in *Brown v. Board of Education II* (*Brown II*).[22] Part II will provide an overview of Atmospheric Trust Litigation, in which plaintiffs make arguments in court based on the Public Trust. Part III will examine *Juliana* and the issue of Article III standing. Part IV will analyze the ability of the courts to declare a fundamental right to a clean environment and argue that the federal judiciary can, and should, declare and enforce the right. Based on the idea that the court has the authority to declare a fundamental right to a clean environment, Part V will argue that the court should declare that right, granting the Juliana plaintiffs their request for declaratory relief, and will analyze how federal courts could go about utilizing the *Brown II* Framework to enforce the right. Finally, Part VI will briefly conclude.

II. ATMOSPHERIC TRUST LITIGATION AS A POTENTIAL SOLUTION TO THE CLIMATE CRISIS

Alongside alleging a violation of their Fifth Amendment Due Process and Equal Protection rights, the plaintiffs in *Juliana* also alleged that the federal

(D. Or. amended June 8, 2023); Opinion and Order, June 1, 2023 at 13, Juliana v. United States, No. 6:15-cv-01517-AA, (D. Or. amended June 8, 2023).

[19] Opinion and Order, June 1, 2023 at 19, Juliana v. United States, No. 6:15-cv-01517-AA (D. Or. amended June 8, 2023).

[20] *Id.*

[21] *Id.* at 13, 19; Litigation Database, *Juliana*, *supra* note 17. In light of the changes made to the Juliana complaint, this Note proposes that, following future litigation, the court should enter a judgment declaring that the federal government's actions and the national energy system violate the Constitution. Further, this Note argues that doing so alone would provide the plaintiffs with sufficient redressability, while also falling within the scope of the court's Article III authority. This Note will also propose an enforcement solution derived from *Brown v. Board of Education II* that would allow the court to enforce a right to a clean environment without being blocked by the hurdle of Article III and the separation of powers doctrine. *See infra* Parts IV, V. Further, the arguments made in this Note are easily applicable to other litigation involving the constitutional right to a clean environment.

[22] *See generally* Brown v. Bd. of Educ. of Topeka, Kan., 349 U.S. 294 (1955) [hereinafter *Brown II*]. This framework has been and will be referred to in this Note, as the *Brown II* Framework.

government violated the public trust doctrine.[23] This puts *Juliana* within the realm of what has become known as Atmospheric Trust Litigation (ATL).[24] ATL is a litigation strategy that asks courts to compel the legislative and executive branches of government to enact policy that devises a solution to climate change.[25] The end goal of ATL is to compel the government to reduce carbon dioxide levels in the atmosphere to below 350 parts per million, the level which is generally believed in the scientific community to be necessary for minimizing the effects of climate change.[26] ATL aims to achieve its goals through application of the public trust doctrine by alleging that the government has a duty, based on the public trust, to protect the atmosphere for the benefit of future generations.[27] Using this approach, ATL changed the landscape of climate litigation by taking the focus away from suits brought under statutory or nuisance laws and shifting it to a focus on the entire atmosphere as a single "public trust asset."[28]

The Public Trust Doctrine encompasses the idea of natural resources being public trust assets. The Public Trust Doctrine is a common law principle that states that certain natural resources are held in trust for the benefit of the public.[29] With roots in Roman civil law, the doctrine is based on the concept that natural resources such as land, air, and water are not subject to private ownership and belong to everyone as a whole.[30] In general, states are considered the trustees of these natural resources, and the people are the beneficiaries.[31] Therefore, states are required to manage and preserve natural resources for the benefit of the people.[32] In the United States, some states have pulled the public trust doctrine from the common law, ratifying it in constitutions and statutory law.[33] This means that the doctrine can vary greatly from state to state, in which

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[23] Juliana v. United States, 947 F.3d 1159, 1165 (9th Cir. 2020); Mary Christina Wood & Charles Woodward, IV, *Atmospheric Trust Litigation and the Constitutional Right to a Healthy Climate System: Judicial Recognition at Last*, 6 WASH. J. ENVTL. L. & POL'Y 634, 646–47 (2016).

[24] *See* Ipshita Mukherjee, *Atmospheric Trust Litigation – Paving the Way for a Fossil-Fuel Free World*, SLS BLOGS (July 5, 2017), https://law.stanford.edu/2017/07/05/atmospheric-trust-litigation-paving-the-way-for-a-fossil-fuel-free-world/ [https://perma.cc/H2VM-4A2D].

[25] *Id.*

[26] Kacie Couch, Note, *After* Juliana*: A Proposal for the Next Atmospheric Trust Litigation Strategy*, 45 WM. & MARY ENVTL. L. & POL'Y REV. 219, 220–21 (2020).

[27] Wood & Woodward, IV, *supra* note 23, at 642–44.

[28] *Id.* at 645.

[29] Brigit Rollins, *The Public Domain: Basics of the Public Trust Doctrine*, NAT'L AGRIC. L. CTR. (Apr. 6, 2021), https://nationalaglawcenter.org/the-public-domain-basics-of-the-public-trust-doctrine/ [https://perma.cc/5888-3L3A].

[30] *Id.*

[31] *Id.*

[32] *See id.*

[33] Erin Ryan, Holly Curry, & Hayes Rule, *Environmental Rights for the 21st Century: A Comprehensive Analysis of the Public Trust Doctrine and Rights of Nature Movement*, 42 CARDOZO L. REV. 2447, 2462 (2021). For example, the state of Hawaii has incorporated the

resources it protects and how it protects those resources.[34] It has only been since the introduction of ATL in the past several years that the idea of a federal public trust has emerged, in which the federal government owes a duty grounded in the public trust to preserve the atmosphere for the United States population.[35]

III. *JULIANA V. UNITED STATES*: THE NINTH CIRCUIT'S REASONING

The main holding in *Juliana* was that the plaintiffs lacked Article III standing to sue the federal government.[36] There are three prongs to the standing requirement – injury, causation, and redressability.[37] The first prong is the requirement that the plaintiff has suffered an injury-in-fact; there must be an "invasion of a legally-protected interest which is (a) concrete and particularized . . . and (b) 'actual or imminent . . . .'"[38] The second prong requires that the injury be traceable to the defendant's actions.[39] Finally, the third prong is the requirement that it must be likely "that the injury will be 'redressed by a favorable decision.'"[40]

The Ninth Circuit held that the *Juliana* plaintiffs met the first two prongs of the Article III standing requirement – injury and causation.[41] The plaintiffs showed evidence of injury through personal testimony of how climate change has impacted their lives.[42] For example, one plaintiff was separated from her relatives on a Navajo Reservation after being forced to evacuate due to water scarcity, while another plaintiff was repeatedly forced to evacuate his home due to coastal flooding.[43] The Court also found causation in roughly fifty years of

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public trust doctrine into its constitution, which states that "[a]ll public natural resources are held in trust by the State for the benefit of the people." HAW. CONST. art. XI, § 1 (amended 1978).

[34] *See generally* Ryan, Curry, & Rule, *supra* note 33, at 2457.

[35] Rollins, *supra* note 29. For other examples of climate change and ATL cases, see generally Massachusetts v. E.P.A., 549 U.S. 497 (2007); Sanders-Reed *ex rel.* Sanders-Reed v. Martinez, 350 P.3d 1221 (N.M. Ct. App. 2015); Chernaik v. Brown, 475 P.3d 68 (Or. 2020); Robinson Twp., Washington Cnty. v. Com., 83 A.3d 901 (Pa. 2013).

[36] Juliana v. United States, 947 F.3d 1159, 1175 (9th Cir. 2020).

[37] Odom, *supra* note 4, at 79 ("In essence, plaintiffs must show that they have suffered an injury-in-fact that is fairly traceable to the defendant's conduct, and that a decision in their favor is likely to redress their injuries.").

[38] Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).

[39] *Id.*

[40] *Id.* at 561.

[41] *Juliana*, 947 F.3d at 1168–69.

[42] *Id.* at 1168.

[43] *Id.*; Odom, *supra* note 4, at 85. Other plaintiffs were also able to show injuries they have suffered directly as a result of climate change. Juliana v. United States, 217 F. Supp. 3d 1224, 1242 (D. Or. 2016), *rev'd and remanded*, 947 F.3d 1159 (9th Cir. 2020). Lead plaintiff Kelsey Juliana alleged that her water and food sources were harmed, as algae blooms and low water levels caused by draught contaminated her drinking water and killed the wild salmon she depends on for food. *Id.* One plaintiff alleged that high temperatures have impacted his family's business by harming the hazelnut trees in his family's orchard, while

the government's policies and actions that have resulted in the United States accounting for about 15% of global carbon emissions.[44] The court found a causal chain in the fact that the plaintiffs' injuries are caused by carbon emissions, and government actions – such as subsidies, leases, and governmental authorization for fossil fuel extraction – have directly increased those emissions.[45] However, it ultimately found that the third prong of the standing requirement – the likelihood that a favorable judicial decision will redress the plaintiffs' injuries – was not met.[46] Because the *Juliana* court felt that the plaintiffs did not meet this third prong, it declared that the plaintiffs did not have Article III standing, and therefore had no standing to sue the government in federal court.[47]

A. *Why* Juliana *Failed: The Issue of Redressability*

The *Juliana* Court found that the third prong of the Article III standing requirement was not met for two reasons. First, the Court argued that the declaration of a fundamental right to a clean environment by itself cannot remedy the plaintiffs' injuries without some kind of court action.[48] Because of this, the court refused to recognize such a right, although not necessarily denying that one may exist.[49] Second, the court argued that, even assuming that the fundamental right exists, the federal courts do not have the power to enforce

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another plaintiff alleged that high temperatures have caused forest fires where she lives, which aggravate her asthma. *Id.* One of the most impactful stories came in the supplemental declaration of a thirteen-year-old plaintiff, who described how her Louisiana home was flooded and destroyed by a storm which "ordinarily would happen once every 1,000 years, but is happening now as a result of climate change." *Id.* at 1243. This plaintiff was forced to live in a flooded house for weeks, with ankle-deep water and carpeting soaked with sewage water. *Id.*

[44] *Juliana*, 947 F.3d at 1169; Odom, *supra* note 4, at 86. The percentage of the United States' contribution to global carbon emissions, 15%, is based on statistics prior to the COVID-19 pandemic, which caused a reduction in carbon emissions across the globe. However, emission levels are expected to continue increasing post-pandemic. *Carbon Footprint by Country 2024*, WORLD POPULATION REV., https://worldpopulationreview.com/country-rankings/carbon-footprint-by-country [https://perma.cc/ Y5YY-5XWX].

[45] *Juliana*, 947 F.3d at 1169. This differs from previous climate change litigation suits, where the major obstacle to standing has been the first two prongs: identifying an individual plaintiff(s) with an injury that can be traced to a defendant's actions. *See* Sierra Club v. Morton, 405 U.S. 727, 735–36 (1972) (holding that plaintiff lacked standing because it failed to show that its members would be injured by recreational development in the Mineral King Valley of the Sierra Nevada Mountains).

[46] *Juliana*, 947 F.3d at 1169–75.

[47] *Id.* at 1175.

[48] *Id.* at 1170.

[49] *Id.* at 1171.

a remedy without overstepping the role of the legislative branch, violating the separation of powers doctrine.[50]

In respect to the declaration of a fundamental right, the court refused to make any definitive assertion on whether or not there exists a fundamental right to a clean environment.[51] The Court began by simply acknowledging that the issue of whether the right to a clean environment exists is largely up for debate.[52] Then, the court navigated around the task of assessing whether the right exists by proceeding with its redressability analysis assuming its existence.[53] This is because, unless the plaintiffs have Article III standing, the Court does not have to undergo the laborious task of a true substantive Due Process analysis.[54] Ultimately, the court decided that, even assuming that the right to a clean environment exists, an Article III court does not have the power to provide the type of injunctive relief sought by the plaintiffs.[55]

In their second amended complaint, the Juliana plaintiffs have attempted to repair the shortcomings of the original complaint in the area of redressability. Specifically, the original complaint requested that the court "order Defendants to prepare and implement an enforceable national remedial plan . . . " and "retain jurisdiction over this action to monitor and enforce Defendants' compliance with the national remedial plan . . . ."[56] In the amended complaint, along with asking for a declaration that the national energy system violates the Fifth Amendment, the plaintiffs modified their request for injunctive relief.[57] The prayer for injunctive relief now asks that the court, "pursuant to this Court's declaratory judgment . . . and this Court's Article III authority, if deemed necessary, just and proper, issue an appropriate injunction restraining Defendants from carrying out policies, practices, and affirmative actions that render the national energy system unconstitutional in a manner that harms Plaintiffs."[58] These changes put the discretion in the court's hands to provide

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[50] *Id.* at 1171–72.

[51] *See* Juliana v. United States, 947 F.3d 1159, 1169, 1175 (9th Cir. 2020).

[52] *Id.* at 1169 ("Reasonable jurists can disagree about whether the asserted constitutional right exists.").

[53] *Id.* at 1170.

[54] *See id.* When determining a court's remedial power for redressability purposes, the court assumes that a plaintiff's claim has legal merit, but "not all meritorious legal claims are redressable in federal court." M.S. v. Brown, 902 F.3d 1076, 1083 (9th Cir. 2018).

[55] *Juliana*, 947 F.3d at 1171–72. The court rested its reasoning that the plaintiffs' request for injunctive relief would require the court to mandate that the federal government take affirmative legislative action to reverse the effects of climate change, a power which is outside judicial control. *Id.* "[A]ny 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." *Id.* at 1171.

[56] Compl. For Declaratory and Injunctive Relief, Aug. 12, 2015 at 94, Juliana v. United States, No. 6:15-cv-01517-AA, (D. Or. amended June 8, 2023).

[57] Second Am. Compl. for Declaratory and Injunctive Relief, June 8, 2023 at 143–44, Juliana v. United States, No. 6:15-cv-01517-AA, (D. Or. amended June 8, 2023).

[58] *Id.* at 143.

relief that falls within its constitutional authority. The court may now provide declaratory relief for the plaintiffs, and, contrary to the Ninth Circuit's opinion, doing so alone would provide redressability for the plaintiffs' injuries.[59]

IV. THE COURTS CAN AND MUST DECLARE AND ENFORCE THE RIGHT TO A CLEAN ENVIRONMENT

Despite the Ninth Circuit's reasoning, the court could still undergo a Due Process and Equal Protection analysis and declare a fundamental right to a clean environment, even if it chooses not to grant any kind of injunctive relief. First, it is the role of the judicial branch to declare new fundamental rights, and decades of precedent support a declaration of a fundamental right to a clean environment from substantive Due Process and Equal Protection perspectives.[60] Second, courts can enforce a fundamental right to a clean environment without violating the separation of powers doctrine due to the nature of the system of checks and balances, and because courts can take action against legislative and executive actions that violate the Constitution.[61] Therefore, now that the *Juliana* plaintiffs have amended their complaint to focus on declaratory relief with a modified request for an injunction, the court may now declare a fundamental right to a clean environment and enforce that right by holding the government accountable for actions that violate the right.[62]

A. *Declaring the Right: The Historical and Precedential Role of the Court in Declaring Fundamental Rights*

The first part of the *Juliana* majority's reasoning as to why the plaintiffs lacked Article III standing involved the declaration of a fundamental right to a clean environment. The court avoided declaring the right by saying that to do so would be irrelevant – it reasoned that it didn't need to address the issue of whether the right exists without the plaintiffs having met the redressability prong.[63] Furthermore, the court reasoned that, even if it chose to declare such a right, doing so alone would not provide any relief to the plaintiffs.[64] However, declaring such a fundamental right would, in fact, provide some relief to the plaintiffs. Without the declaration of a fundamental right to a clean environment under the constitution, there is no way to apply pressure on the government to

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[59] *See infra* Parts IV(B), V.
[60] *See infra* Part IV.A.
[61] *See infra* Part IV.B.
[62] The idea that the courts could enforce the right to a clean environment by holding the government accountable for its actions comes from the concept of the *Brown II* Framework. *See infra* Part V.B.
[63] *See supra* Part III.A.
[64] *See supra* Part III.A.

address its own climate change-causing actions.[65] To effectuate change, courts must create a constitutional basis to act against harmful government actions.

Furthermore, there is historical and precedential grounding for declaring the right to a clean environment.[66] The Due Process and Equal Protection Clauses of the Fifth and Fourteenth Amendments support the existence of a fundamental right to a clean environment, even though this right is not textually ingrained into the Constitution.[67] Just because a right is not textually ingrained in the Constitution does not mean it isn't supported by the Constitution's text.[68] The Due Process and Equal Protection clauses make clear that some rights are "so fundamental that the State must accord them its respect."[69] This concept implies that certain interests, such as the right to a clean environment, must be protected, even though they are not explicitly mentioned in the Constitution.

In her dissent to the Ninth Circuit opinion, Judge Josephine L. Staton saw the declaration of the fundamental right to a clean environment to be supported by the Constitution because such a right is intertwined with the perpetuity of the nation.[70] "Some rights serve as the necessary predicate for others; their fundamentality therefore derives, at least in part, from the necessity to preserve other fundamental constitutional protections."[71] Essentially, Judge Staton used the concept that there is no Republic without a clean environment and asserted that a clean environment is essential to the preservation of all other constitutionally-protected rights.[72] Therefore, the right to a clean environment is ingrained in the protections offered by the Constitution.[73]

On this note, the declaration of a fundamental right to a clean environment can be supported by an immense volume of past substantive Due Process precedent. In her opinion for the District Court for the District of Oregon, Judge

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[65] *See supra* Part III.A.

[66] *See supra* Part III.A.

[67] The Fifth Amendment states that "no person shall be… deprived of life, liberty, or property, without due process of law…" U.S. CONST. amend. V. The Fourteenth Amendment states that no state may "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

[68] Robert Kemper, *Recognizing a Fundamental Right to a Clean Environment: Why the* Juliana *Court Got It Wrong and How to Address the Issue Moving Forward*, 16 FIU L. REV. 457, 465 (2022); Obergefell v. Hodges, 576 U.S. 644, 663–64 (2015) (describing how new fundamental rights can be derived from the Constitution's text based on injustices in the modern world). "When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed." Juliana v. United States, 217 F. Supp. 3d 1224, 1249 (D. Or. 2016), *rev'd and remanded*, 947 F.3d 1159 (9th Cir. 2020) (quoting *Obergefell*, 576 U.S. at 664). ("This does not mean that 'new' fundamental rights are out of bounds, though.").

[69] Kemper, *supra* note 68, at 465; *Obergefell*, 576 U.S. at 664.

[70] Juliana v. United States, 947 F.3d 1159, 1177–79 (9th Cir. 2020) (Staton, J., dissenting).

[71] *Id.* at 1177 (Staton, J., dissenting).

[72] *See id.* at 1177–79 (Staton, J., dissenting); Kemper, *supra* note 68, at 467–68.

[73] *See* Kemper, *supra* note 68, at 467–68.

Aiken analogized the right to a clean environment to the right to marriage, which has long been recognized as a fundamental right in the United States.[74] "Just as marriage is the 'foundation of the family,' a stable climate system is quite literally the foundation 'of society, without which there would be neither civilization nor progress.'"[75] In accordance with Judge Aiken's reasoning, this concept of the fundamentality of certain rights was in fact used to declare the right to marriage in *Loving v. Virginia* and the right to same-sex marriage in *Obergefell v. Hodges*.[76] Additionally, *Obergefell* established the precedent that the Court need only exercise a "reasoned judgement" in identifying fundamental rights.[77] Using this approach, alongside the idea that a clean environment is necessary for the survival of the nation, it is easy to see how a "reasoned judgement" could lead to the conclusion that the right to a clean environment is so fundamental that it must be afforded respect by the State. Based on this concept, the right to a clean environment should be declared in federal court as a fundamental right.

B. *Enforcement: It is the Judiciary's Responsibility to Enforce a Fundamental Right to a Clean Environment*

Beyond the Court's hesitance to declare a fundamental right to a clean environment under a Due Process analysis was its assertion that enforcing such a right in the manner of injunctive relief requested by the plaintiffs is beyond the power of an Article III court.[78] The *Juliana* majority concluded that the remedy proposed by the plaintiffs, an order requiring the federal government to eliminate fossil fuels in order to reduce carbon emissions, stepped into

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[74] Juliana v. United States, 217 F. Supp. 3d 1224, 1250 (D. Or. 2016), *rev'd and remanded*, 947 F.3d 1159 (9th Cir. 2020); *see also* Loving v. Virginia, 388 U.S. 1, 12 (1967) ("Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival."); Maynard v. Hill, 125 U.S. 190, 198 (1888); United States v. Windsor, 570 U.S. 744, 774 (2013).

[75] *Juliana*, 217 F. Supp. 3d at 1250. Judge Aiken also analogized the right to a clean environment to the right to privacy, which acted as the backbone to declaring the right to an abortion in *Roe v. Wade*. *Id.* at 1249. Judge Aiken looked to the fact that certain unenumerated rights can come from a number of sources in the Constitution, and from the fact that such rights are necessary to protect other rights. *Id.* at 1249–50.

[76] Kemper, *supra* note 68, at 465–66; *see generally Loving*, 388 U.S. 1; Obergefell v. Hodges, 576 U.S. 644 (2015).

[77] Kemper, *supra* note 68, at 467; *see generally Obergefell*, 576 U.S. at 664. The "reasoned judgment" approach to identifying fundamental rights, as described by Kennedy, involves a process guided by the nation's history and tradition of protecting certain rights, but not limited by it. The goal of this approach is to allow the Court to look to the concept of history and tradition while making fundamental rights decisions, while not holding the Court to the past and allowing it to consider factors of injustice in the modern world. *Id.* Applied to the right to a clean environment, the reasoned judgment approach allows the court to declare a fundamental right to a clean environment without being limited by a lack of historical and traditional precedent for environmental rights.

[78] *See supra* Part III.A.

legislative decision-making, therefore violating the separation of powers doctrine.[79] This is because an order of the type the *Juliana* plaintiffs requested would inevitably involve complex policy decisions, including a complete transformation of the United States' entire energy system, which ultimately is the job of the legislative branch.[80] However, the amended complaint, by eliminating the request for a national remedial plan, allows the court to act within its Article III authority.[81] Now, even if the court chooses not to provide any kind of injunctive relief, it can still provide relief to the plaintiffs through declaratory relief alone.

Courts have an obligation to declare and enforce a fundamental right to a clean environment. Just as the Ninth Circuit found that the *Juliana* plaintiffs' request for injunctive relief and method of enforcement did not meet the Article III redressability prong, it is unlikely that a future court will provide injunctive relief in the form originally requested by the *Juliana* plaintiffs.[82] In the future, the court should therefore provide the declaratory relief requested by the *Juliana* plaintiffs in their amended complaint by entering a judgment that the government's actions have violated the plaintiffs due process and equal protection rights, as well as the public trust.[83] Even if the court chooses not to provide injunctive relief, the declaration would allow the courts to declare acts by the government unconstitutional and enforce the right to a clean environment using a framework of the type used in *Brown II*, largely through supervision and correction by the lower courts.[84] This way, the court could stay within its Article III authority while enforcing the fundamental right to a clean environment without violating the separation of powers doctrine.

The judiciary's authority to enforce fundamental constitutional rights rests primarily in the Constitution itself. Article VI of the Constitution lays out what is known as the Supremacy Clause – that the Constitution is the "supreme law of the Land."[85] Further, in *Marbury v. Madison*, the Supreme Court expressed that "[i]t is emphatically the province and duty of the judicial department to say what the law is."[86] This principle means that the judicial branch, as the

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[79] *See supra* Part III.A.

[80] *See supra* Part III.A.

[81] *See* Second Am. Compl. for Declaratory and Injunctive Relief, June 8, 2023 at 143, Juliana v. United States, No. 6:15-cv-01517-AA, (D. Or. amended June 8, 2023).

[82] Juliana v. United States, 947 F.3d 1159, 1175 (9th Cir. 2020). This is why the amended complaint offers a higher likelihood of success for the *Juliana* plaintiffs.

[83] *See* Second Am. Compl. for Declaratory and Injunctive Relief, June 8, 2023 at 133–41, Juliana v. United States, No. 6:15-cv-01517-AA, (D. Or. amended June 8, 2023); *see supra* Part II.

[84] This type of framework would largely depend on the lower courts supervising government actions and deconstruction of policy that contributes to climate change, rather than mandating an order for the federal government to follow. *See generally Brown II*, 349 U.S. 294.

[85] U.S. CONST. art. VI; Cooper v. Aaron, 358 U.S. 1, 18 (1958).

[86] Marbury v. Madison, 5 U.S. 137, 177 (1803); Cooper v. Aaron, 385 U.S. 1, 18 (1958) ("Chief Justice Marshall, speaking for a unanimous Court, referring to the Constitution as

interpreter of the Constitution, has the supreme authority in the "exposition of the law of the Constitution," and the duty to declare constitutional rights and prevent governmental acts that would violate those rights.[87] By interpreting the Constitution to include a fundamental right to a clean environment, the fundamental right would become the supreme law of the land, and the judiciary would then be supreme in exposition of such a right.[88] Stated another way, the plaintiffs would be redressed by a declaration of a fundamental right to a clean environment because it would give the courts power to declare governmental actions that contribute to an unsustainable environment unconstitutional.

The court's enforcement power also relies on the constitutional system of checks and balances. Fundamental to the system of checks and balances is the concept that each branch depends on the other branches in order to maintain the sense of "balance" implicit in the name.[89] Put another way, in order for the system of checks and balances to work – for each branch to be able to continue performing their own duties – each other branch must also be performing its own duties.[90] When one or more branch fails to adequately perform its duties, the other branches must step in and hold the faltering branch accountable.[91] In this case, both the executive and legislative branches have failed to prevent climate change, and have even taken affirmative actions to accelerate the catastrophic effects of climate change.[92]

> [T]he American government is not a passive bystander to the climate crisis: it controls and fervently promotes the fossil fuel energy system through subsidies, tax exemptions, permits for fossil fuel development projects at home and abroad, leases on federal lands and offshore areas, permits for imports and exports, and permits for energy facilities.[93]

Further, the government has long been aware of the effects these actions would have.[94] "As early as 1965, the Johnson Administration cautioned that

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'the fundamental and paramount law of the nation,' declared in the notable case of Marbury v. Madison… that '[i]t is emphatically the province and duty of the judicial department to say what the law is.'" (quoting Marbury v. Madison, 1 Cranch 137, 177 (1803))); Wood, *supra* note 6, at 262.

[87] *Cooper*, 358 U.S. at 18; Wood, *supra* note 6, at 262 ("Over the course of American history, our courts have repeatedly corrected longstanding, systemic wrongs of political branches that infringe on the fundamental rights of citizens.").

[88] *See Cooper*, 358 U.S. at 18.

[89] Elizabeth Kellar, *Giving the Climate a Voice: Why Allowing Suits Over Climate Change to be Heard in Court is Not Only Constitutional But May Be Our Only Viable Option*, 51 STETSON L. REV. 375, 399–400 (2022).

[90] *Id.* at 399.

[91] *Id.*

[92] *Id.* at 400; *see* Wood, *supra* note 6, at 249–50 (discussing how the United States government has been aware of how its actions have contributed to climate change since as far back as the 1960s).

[93] Wood, *supra* note 6, at 249.

[94] Juliana v. United States, 947 F.3d 1159, 1166 (9th Cir. 2020).

fossil fuel emissions threatened significant changes to climate, global temperatures, sea levels, and other stratospheric properties."[95] The affirmative actions taken by the legislative and executive branches, despite the government's knowledge that these actions were contributing to climate change, show that the executive and legislative branches have failed to fulfill their duties, and the judicial branch must now step in.[96]

Given these circumstances, it is only necessary that the judicial branch must now take action to hold the legislative and executive branches accountable. Because of the legislative and executive failures to properly address climate change, it is now up to the judicial branch to ensure that, moving forward, the other two branches of government cease actions that contribute to climate change.[97] By amending their complaint to put their request at the Court's discretion and within its Article III authority, the *Juliana* plaintiffs have already made it easier for a court to provide relief by declaring actions of the government unconstitutional, rather than mandating that the government make an affirmative plan to request climate change.[98] The court must now declare the fundamental right to a clean environment. Through such declaratory relief, the judicial system can exercise its checking power on the executive and judicial branches without violating the separation of powers doctrine.[99]

V. FUTURE COURTS SHOULD ENFORCE THE FUNDAMENTAL RIGHT TO A CLEAN ENVIRONMENT USING A *BROWN II* FRAMEWORK

[95] *Id.* The court goes on to describe warnings from the Environmental Protection Agency (EPA) in the 1980s and '90s. In the 1980s, the EPA projected a 2 degrees Celsius increase by 2040 and warned about the risks of a "wait and see" carbon emissions policy. *Id.* In the 1990s, the EPA "implored the government to act before it was too late." *Id.*

[96] Judge Staton also addressed the idea of a judicial duty to hold the legislative and executive branches accountable in her dissent to the Ninth Circuit Decision. "The majority laments that it cannot step into the shoes of the political branches . . . but appears ready to yield even if those branches walk the Nation over a cliff. This deference-to-a-fault promotes separation of powers to the detriment of our countervailing constitutional mandate to intervene where the political branches run afoul of our foundational principles." *Juliana*, 947 F.3d at 1183–84 (Staton, J., dissenting). Judge Staton largely used the doctrine of judicial review to back up her argument, describing how "judicial review compels federal courts to fashion and effectuate relief to right legal wrongs, even when . . . it requires that we must instruct the other branches as to the constitutional limitations on their power." *Id.* at 1184.

[97] Kellar, *supra* note 89, at 400; *Juliana*, 947 F.3d at 1184 (Staton, J., dissenting).

[98] *See* Second Am. Compl. for Declaratory and Injunctive Relief, June 8, 2023 at 143, Juliana v. United States, No. 6:15-cv-01517-AA, (D. Or. amended June 8, 2023).

[99] *See Juliana*, 947 F.3d at 1184 (Staton, J., dissenting) ("Few would contest that '[i]t is emphatically the province and duty of the judicial department' to curb acts of the political branches that contravene those fundamental tenants of American life so dear as to be constitutionalized and thus removed from political whims." (quoting Marbury v. Madison, 1 Cranch 137, 177-78 (1803))).

The *Juliana* litigation was given a breath of new life with the filing of an amended complaint, and the plaintiffs now head to litigation once again.[100] After further litigation on the case, the court should grant the plaintiffs' declaratory relief requests, ultimately declaring that the fundamental right to a clean environment exists. Then, the courts should shift the burden of enforcement to the lower courts, following a framework of the type utilized in *Brown II*. This framework enables federal courts to enforce the right to a clean environment by declaring certain acts by the government unconstitutional, which would allow them to require that the government cease taking the unconstitutional action.[101] This would overcome the Article III standing hurdle because the court would be able to provide redressability without violating separation of powers.

A. Brown v. Board of Education II

In 1954, the Supreme Court ruled on *Brown v. Board of Education* (*Brown I*), a landmark case that declared the doctrine of "separate but equal" to be unconstitutional, requiring both the United States Attorney General and state Attorneys General to create plans for school desegregation.[102] A year later, the court released its decision in *Brown II*, which laid out the method in which the *Brown I* decision could be enforced.[103] In *Brown II*, the Court ordered that state Attorneys General "make a prompt and reasonable start toward full compliance with" the desegregation order put forward in *Brown I*.[104] Additionally, the Court put the authority to monitor and enforce these orders in the hands of the lower courts, giving the lower courts the authority to "consider problems related to administration . . . and revision of local laws and regulations which may be necessary in solving the foregoing problems," and to "consider the adequacy of any plans the defendants may propose . . . ."[105] Ultimately, the court decided that "the courts will retain jurisdiction of these cases."[106]

In 1958, the Court released yet another decision in *Cooper v. Aaron*.[107] This case came in response to actions by the Arkansas legislature and Governor which made it difficult for the Arkansas School Board to take desegregation

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[100] OUR CHILD.'S TR., *supra* note 2; *see also* Second Am. Compl. for Declaratory and Injunctive Relief, June 8, 2023 at 143, Juliana v. United States, No. 6:15-cv-01517-AA, (D. Or. amended June 8, 2023).

[101] *See supra* Part I.

[102] *Brown II*, 349 U.S. 294, 300 (1955); Kellar, *supra* note 89, at 396 ("*Brown [I]* would go down in history as one of the most important rulings of the nation's history, but it is also the greatest example of the judicial branch forcing action at a national and state level.").

[103] Kellar, s*upra* note 89, at 396; *see generally Brown II*, 349 U.S. 294.

[104] *Brown II*, 349 U.S. at 300.

[105] *Id.* at 300–01.

[106] *Id.* at 301.

[107] Cooper v. Aaron, 358 U.S. 1, 1 (1958).

actions in accordance with the *Brown II* decision.[108] The Court held that the actions of the Arkansas state officials violated the Constitution by interfering with the fundamental right of students not to be segregated on racial grounds declared in *Brown I*.[109] Further, the Court held that state legislatures and officials may not nullify constitutional rights declared by the Court.[110] This opinion had the effect of subjecting state action to the mandates of the courts in constitutional matters.[111]

B. *Leaving It Up to the Lower Courts: The* Brown II *Framework Applied to ATL Cases*

Enforcement of the constitutional right to a clean environment can be done in a similar fashion to the enforcement method of *Brown II*. The enforcement strategy of *Brown II*, a civil rights case, can also be easily applied to a climate change case. This is because climate change and civil rights are often closely intertwined and connected, as both civil rights and climate change litigation are concerned with protecting the rights of those powerless to act against the government.[112] After all, climate change tends to have the most drastic effects on vulnerable, impoverished, and minority communities who often lack political control.[113] With this in mind, the *Brown II* framework can be easily applied to developing a strategy for enforcement of climate change action.

The Supreme Court's practical approach in *Brown II* was to allow the lower federal courts to slowly enforce the remedy over time.[114] As far as enforcement and supervision, the courts were given the power to generally oversee various aspects of desegregation, including monitoring admission to schools, transportation systems, school personnel, and revision of local laws and regulations.[115] The courts were also given the power to evaluate the adequacy

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[108] For example, the day before nine African American students were supposed to gain admission to a high school, the Governor dispatched units of the Arkansas National Guard to the school grounds to prevent their admission. *Cooper*, 358 U.S. at 8–9.

[109] *Id.* at 15.

[110] *Id.* at 17.

[111] *See generally id.* at 18 ("No state legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it.").

[112] Kellar, *supra* note 89, at 397.

[113] *Id.* For more on the intersectionality between civil rights and the climate justice movements, see generally Alice Kaswan, *Environmental Justice: Bridging the Gap Between Environmental Laws and "Justice"*, 47 AM. U.L. REV. 221 (1997).

[114] Kemper, *supra* note 68, at 472.

[115] *See supra* Part V.A. The court justified leaving implementation in the hands of the lower courts because of their relative proximity to the issues. *Brown II*, 349 U.S. 294, 299 (1955). "[C]ourts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles. Because of their proximity to local conditions and the possible need for further hearings, the courts which originally heard these cases can best perform this judicial appraisal." *Id.* Applied to environmental situations, lower courts may be better equipped to handle local environmental

of any plans proposed for transitioning to a desegregated school system.[116] *Cooper* expanded on this enforcement strategy by holding that states are constitutionally required to comply with the desegregation orders, and that lower courts can require states to comply with such orders.[117] Essentially, this meant that state governments were subject to the courts' supervision, and were required to take desegregation action in accordance with the Court's orders, such as removing barriers to desegregation in schools.[118]

Applied to the *Juliana* litigation and other environmental rights issues in the courts, the lower federal courts could identify actions taken by the federal and state governments that have contributed to climate change and, after declaring these actions unconstitutional, oversee deconstruction or modification of these policies.[119] Just as *Brown II* required state and local governments to revise their policies in order to promote desegregation of schools, an environmental decision could require governments to revise existing laws and regulations that currently allow for excessive pollution and carbon emissions, based on the idea that the laws and regulations as they currently exist are unconstitutional.[120] The first step would be the identification of specific industries and governmental policies that directly contribute to climate change. Examples include fossil fuel production, electricity generation, and the industry sector.[121] In the fossil fuel industry, for example, the court could oversee the federal government in modifying and

problems, such as local superfund sites and issues effecting local air and water quality. *See generally Environmental Information by Location*, U.S. EPA (last updated Dec. 21, 2023), https://www.epa.gov/environmental-topics/environmental-information-by-location [https://perma.cc/3FG4-FWHN].

[116] *Brown II*, 349 U.S. at 300.

[117] Kellar, *supra* note 89, at 396; Cooper v. Aaron, 358 U.S. 1, 18 (1958).

[118] *Brown II*, 349 U.S. at 300–301; *Cooper*, 358 U.S. at 7 ("State authorities were thus duty bound to devote every effort toward initiating desegregation and bringing about the elimination of racial discrimination in the public school system.").

[119] *See* Emily Morgan, Comment, *Too Hot to Handle: Scientific Evidence and the Abdication of the* Juliana *Court*, 52 SETON HALL L. REV. 249, 271–72 (2021). The Brown court made it clear that the authority for eliciting specific desegregation actions rested in the hands of the local school authorities. *Id.* at 272. The *Juliana* court could take a similar approach by leaving the actual lawmaking actions up the state and simply acting as an assessor as to the adequacy of such actions.

[120] *Id.* at 273–75. The injunctive relief originally requested by the *Juliana* plaintiffs focused on carbon emissions and would have required the federal government to create a national remedial plan to phase out fossil fuel emissions. *Id.* at 273. Instead of simply giving the court authority to monitor governmental actions for constitutionality, the plaintiffs' original request would have required the federal government to devise an entirely new plan and given the court authority to monitor its implementation. *See Id.*

[121] *Id.* at 273–75. Burning fossil fuels for electricity, heat, and transportation is the largest source of greenhouse gas emissions in the United States from human activity, according to 2021 statistics. *Sources of Greenhouse Gas Emissions*, U.S. EPA, https://www.epa.gov/ghgemissions/sources-greenhouse-gas-emissions [https://perma.cc/T7JH-YZUK] (Aug. 5, 2022). In 2021, transportation accounted for 28% of greenhouse gas emissions in the United States, electricity accounted for 25%, and industry accounted for 23%. *Id.*

creating regulations relating to transportation.[122] Government agencies which oversee transportation, including the EPA and the National Highway Traffic Safety Administration, could develop tighter emissions standards for vehicles and modify regulations on operating practices and travel demand.[123] Electricity generation, which primarily falls under state authority, could be improved by expanding regulations on the use of renewable energy while simultaneously tightening allowances on the use of coal.[124] The courts could oversee these actions and determine whether or not they are adequate to comply with the constitutional requirement of creating a clean and sustainable environment.

That way, the actual legislation is left to the legislatures and the courts are simply there to ensure that the legislatures are doing their part.[125] Such a strategy would take the pressure off the court to propose some kind of legislative strategy for the federal government to follow, and instead leave it up to the federal government and individual state legislatures to make decisions for themselves. Therefore, the court should declare and enforce a fundamental right to a clean environment using the *Brown II* framework and allow the lower courts to supervise actions by federal and state legislatures.

VI. CONCLUSION

The world as we know it is, quite literally, changing. Global carbon dioxide levels have reached a point where, unless drastic and immediate action is taken by governments around the world, future generations may not have a functionable and sustainable environment to live in.[126] That is why the youngest generation has utilized Atmospheric Trust Litigation as an approach to compel the government to act.[127] *Juliana* may have met a discouraging standstill in the Ninth Circuit, but the battle is not over. Now that the Juliana plaintiffs have amended their requests for declaratory and injunctive relief, they have an opportunity to convince a federal court that there exists a fundamental right to a clean environment engrained in the Constitution, and that it is up to the judiciary to enforce such a right. In order to take the first steps in creating a clean, sustainable future in the United States with the Constitution as a basis, the federal court should declare a fundamental right to a clean environment, and declare that the federal government's energy system as it currently exists

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[122] *See* Morgan, *supra* note 119, at 273.

[123] *See id.* Transportation was the largest source of CO2 emission in the United States in 2019. *Id.*

[124] *See id.* at 274. The authority to regulate state activity falls under *Cooper* and the mandate that state governments comply with constitutional orders. *See generally* Cooper v. Aaron, 358 U.S. 1 (1958).

[125] This would maintain the balance necessary under the separation of powers doctrine, where the judicial branch could hold the legislative branch accountable without actually partaking in legislative decision making. *See supra* Part IV.B.

[126] *See* Juliana v. United States, 947 F.3d 1159, 1166 (9th Cir. 2020).

[127] *See supra* Part II.

violates the Constitution.[128] Doing so would allow the courts to enforce the fundamental right to a clean environment by declaring certain governmental acts unconstitutional and utilize a *Brown II* framework to oversee governmental action.[129]

[128] *See supra* Parts IV(B), V.
[129] *See supra* Parts IV, V.