COMPARATIVE LAW — CLIMATE CHANGE — HAGUE COURT OF APPEAL REQUIRES DUTCH GOVERNMENT TO MEET GREENHOUSE GAS EMISSIONS REDUCTIONS BY 2020. — Hof's-Gravenhage 9 oktober 2018, AB 2018, 417 m.nt. GA van der Veen, Ch.W. Backes (Staat der Nederlanden/Stichting Urgenda).

The United States legal system has been struggling with how to address climate change. Faced with inadequate regulatory incentives[1] and a lack of available tort claims,[2] plaintiffs in the United States and across the globe have employed a creative new tactic: suing their governments for failing to take sufficient measures to reduce greenhouse gas emissions. These cases raise separation of powers questions about a court's ability to order a government to reduce emissions. In other words, does climate change present a nonjusticiable political question? The U.S. District Court for the District of Oregon recently answered no in *Juliana v. United States*,[3] but the Ninth Circuit is hearing an interlocutory appeal under pressure from the Supreme Court.[4] Given the case's rocky procedural history, the fate of the district court's holding is anything but certain.[5] Plaintiffs may find comfort by looking abroad, however. Recently, in *State of the Netherlands v. Urgenda Foundation*,[6] the Hague Court of Appeal upheld an order issued by the Hague District Court requiring the Dutch government to reduce its greenhouse gas emissions by at least 25%, relative to 1990 levels, by the end of 2020.[7] *Urgenda*'s separation of powers analysis parallels the political question inquiry U.S. courts are grappling with in cases like *Juliana*, and may provide an administrable framework for U.S. courts regarding the justiciability of climate change.

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[1] *See* Jonathan Remy Nash & Richard L. Revesz, *Grandfathering and Environmental Regulation: The Law and Economics of New Source Review*, 101 NW. U. L. REV. 1677, 1708–12 (2007) (explaining how the Clean Air Act's differential treatment of new and existing sources of air pollution "creates a disincentive to modernization," *id.* at 1708).

[2] *See* Am. Elec. Power Co. v. Connecticut, 564 U.S. 410, 424 (2011) (holding that the Clean Air Act "displace[s] any federal common-law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired powerplants").

[3] 217 F. Supp. 3d 1224, 1242 (D. Or. 2016), *appeal docketed*, No. 18-36082 (9th Cir. Dec. 27, 2018).

[4] *See* Order in Pending Case at 2–3, *In re* United States, No. 18A410 (U.S. Nov. 2, 2018) ("[A]dequate relief may be available in the United States Court of Appeals for the Ninth Circuit. . . . Although the Ninth Circuit has twice denied the Government's request for mandamus relief, it did so without prejudice."); Order, Juliana v. United States, No. 15-cv-01517 (D. Or. Nov. 21, 2018) (certifying case for interlocutory appeal and staying case pending a decision by the Ninth Circuit).

[5] *See, e.g.*, Jonathan H. Adler, *Is Kids Climate Case Coming to an End?*, REASON: VOLOKH CONSPIRACY (Nov. 26, 2018, 6:09 PM), https://reason.com/volokh/2018/11/26/is-kids-climate-case-coming-to-an-end [https://perma.cc/DGK4-UPYS].

[6] Hof's-Gravenhage 9 oktober 2018, AB 2018, 417 m.nt. GA van der Veen, Ch.W. Backes (Staat der Nederlanden/Stichting Urgenda) [hereinafter *Urgenda* Court of Appeal Opinion].

[7] *Id.* ¶¶ 3.9, 76.

The *Urgenda* decision arrived on the heels of international scientific and political recognition that climate change is an urgent issue. In 2007, the Intergovernmental Panel on Climate Change (IPCC) released its Fourth Assessment Report. The report concluded that by 2020, greenhouse gas emissions from developed countries, including the Netherlands, must be 25–40% lower than they were in 1990 to achieve a greater-than-50% chance of avoiding dangerous and irreversible global warming (warming of more than 2°C).[8] The IPCC's 2014 Fifth Assessment Report stated that these reductions would have a 66% chance of keeping warming below 2°C.[9] Global climate conferences have produced international agreements to reduce greenhouse gas emissions,[10] and the European Union has committed to emissions reductions of 20% by 2020, 40% by 2030, and 80–95% by 2050, each relative to 1990.[11] Until 2011, the Netherlands maintained a reduction target of 30% for 2020, but the State later adjusted this target to align with the European Union's 20% reduction target.[12] Urgenda Foundation (Urgenda), a citizens' platform focused on preventing climate change,[13] sued the Dutch government on behalf of itself and 886 individuals,[14] contending that this lowered target violated provisions of the Dutch Constitution, the European Convention on Human Rights (ECHR), and the government's duty of care under the Dutch Civil Code.[15]

The Hague District Court rejected Urgenda's claims brought under the Dutch Constitution[16] and the ECHR,[17] but agreed with Urgenda that the government had violated its duty of care under the Dutch Civil

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[8] *See Urgenda* Court of Appeal Opinion, *supra* note 6, ¶ 12; INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2007: MITIGATION OF CLIMATE CHANGE 775–76 (Bert Metz et al. eds., 2007), https://www.ipcc.ch/report/ar4/wg3/ [https://perma.cc/PY3Q-67L4]. A more recent IPCC report concluded that a warming of even 1.5°C would have severe and potentially irreversible impacts. OVE HOEGH-GULDBERG ET AL., INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, *Impacts of 1.5°C of Global Warming on Natural and Human Systems*, *in* SPECIAL REPORT: GLOBAL WARMING OF 1.5°C, at 175, 177–81 (Valérie Masson-Delmotte et al. eds., 2018), https://www.ipcc.ch/sr15/chapter/chapter-3/ [https://perma.cc/DMW9-69T5].

[9] *Urgenda* Court of Appeal Opinion, *supra* note 6, ¶ 12; INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2014: MITIGATION OF CLIMATE CHANGE 10–13 (Ottmar Edenhofer et al. eds., 2014), https://www.ipcc.ch/report/ar5/wg3/ [https://perma.cc/U56P-62SX].

[10] *See, e.g.*, *Urgenda* Court of Appeal Opinion, *supra* note 6, ¶ 11 (listing climate conferences).

[11] *Id.* ¶ 18.

[12] *Id.* ¶¶ 19–20.

[13] Rb.'s-Gravenhage 24 juni 2015, AB 2015, 336 m.nt. Ch.W. Backes ¶ 2.1 (Stichting Urgenda/Staat der Nederlanden) [hereinafter *Urgenda* District Court Opinion].

[14] *Id.* ¶ 2.4.

[15] *Id.* ¶ 4.35. Urgenda's lawsuit has inspired many similar lawsuits across the globe. *See, e.g.*, UNITED NATIONS ENV'T PROGRAMME, THE STATUS OF CLIMATE CHANGE LITIGATION 14–21 (2017), https://wedocs.unep.org/handle/20.500.11822/20767 [https://perma.cc/N6B2-E3H9] (providing a nonexhaustive sample of the many nations across the globe where such lawsuits have been brought).

[16] *Urgenda* District Court Opinion, *supra* note 13, ¶¶ 4.36, 4.52 (emphasizing the government's discretion in implementing Article 21 of the Dutch Constitution).

[17] *Id.* ¶ 4.45 (holding that Urgenda is not a "victim" as required by Article 34 of the ECHR).

Code.[18] Relying primarily upon IPCC reports, the court found that anything short of a 25–40% reduction in Dutch greenhouse gas emissions by the end of 2020 would be insufficient "to prevent dangerous climate change,"[19] in breach of the State's duty of care.[20] The court therefore ordered the State to reduce its greenhouse gas emissions by at least 25% relative to 1990 levels by the end of 2020.[21]

The Hague Court of Appeal[22] upheld the judgment on the grounds that the State had violated Articles 2 and 8 of the ECHR.[23] Overruling the district court on the jurisdictional issue, the appellate court held that the "victim" requirement of Article 34 of the ECHR restricts admissibility only to the European Court of Human Rights; it had no bearing on Urgenda's access to Dutch courts.[24] The court found that the right to life in Article 2 and the right to private life, family life, home, and correspondence in Article 8 placed a positive duty of care on the government to protect against environmental situations that would adversely affect those rights.[25] Because climate change poses a known, real, and imminent threat of loss of life and disruption of family life to Dutch citizens,[26] and because "at least a 25–40% reduction of $CO_2$ emissions as of 2020 is required to prevent dangerous climate change,"[27] the court agreed that the State must reduce emissions by at least 25% by the end of 2020 to satisfy its duty of care.[28]

Both courts rejected arguments by the State that the order to reduce emissions violated the *trias politica* — the Dutch system of separation of powers.[29] The appellate court first addressed the State's argument that policy decisions regarding the significant financial and other

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[18] *Id.* ¶ 4.86.

[19] *Id.* ¶ 4.31(vi).

[20] *Id.* ¶ 4.86.

[21] *Id.* ¶ 5.1.

[22] The judgment was passed by Justices Tan-de Sonnaville, Boele, and Glazener.

[23] *Urgenda* Court of Appeal Opinion, *supra* note 6, ¶ 76. Because the court ruled on human rights grounds, it did not discuss the civil law grounds relied upon by the district court. *Id.*

[24] *Id.* ¶ 35.

[25] *Id.* ¶¶ 40–41.

[26] *Id.* ¶¶ 44–46.

[27] *Id.* ¶ 51.

[28] *Id.* ¶¶ 53, 76. Although the Dutch government plans to appeal the decision before the Supreme Court of the Netherlands, it has committed to achieving 25% carbon emissions reductions by the end of 2020. *See State to Bring Cassation Proceedings in Urgenda Case*, GOV'T NETH. (Nov. 16, 2018, 3:00 PM), https://www.government.nl/latest/news/2018/11/16/state-to-bring-cassation-proceedings-in-urgenda-case [https://perma.cc/4BWW-UHBV]. *But see* Janene Pieters, *Netherlands' 2020 Climate Goals "Out of Reach," Planning Office Says*, NLTIMES (Jan. 25, 2019, 4:10 PM), https://nltimes.nl/2019/01/25/netherlands-2020-climate-goals-reach-planning-office-says [https://perma.cc/68ZS-STMW].

[29] *See Urgenda* Court of Appeal Opinion, *supra* note 6, ¶¶ 67–69; *Urgenda* District Court Opinion, *supra* note 13, ¶ 4.102. Like the United States, the Netherlands has a separation of legislative, administrative, and judicial powers. *See* Jan ten Kate & Peter J. van Koppen, *Judicialization of Politics in the Netherlands: Towards a Form of Judicial Review*, 15 INT'L POL. SCI. REV. 143, 144 (1994).

sacrifices required to reduce greenhouse gas emissions should be left solely to the democratically elected government.[30] The court reasoned that the State's violation of human rights demanded that protective measures be taken and that the open-ended nature of the order left the government sufficient discretion to make policy choices as to how to comply.[31] The court then considered the State's argument that the order constituted an "order to create legislation" that the court could not impose on the government.[32] The court disagreed, emphasizing the State's complete discretion as to the methods of compliance and the content of any legislation.[33] Finally, the court rejected the State's argument that the *trias politica* prevented the court from imposing an order on the State, pointing to the judicial obligation to apply human rights provisions.[34]

*Urgenda* provides a framework for U.S. courts to adjudicate rights-based climate cases brought against the government without violating separation of powers principles. While the specific constitutional structures of the Netherlands and the United States are different, the principles articulated in *Urgenda* are transferable at a high level of generality to the U.S. political question doctrine, which is "essentially a function of the separation of powers."[35] In the United States, public attention is focused on *Juliana v. United States*, in which youth plaintiffs sought declaratory and injunctive relief against various executive actors, alleging that the defendants' failure to adequately address climate change violated the plaintiffs' due process, equal protection, Ninth Amendment, and public trust rights.[36] Despite the Oregon district court's ruling that the claims were justiciable under the political question doctrine,[37] the matter is far from settled.[38] The Dutch courts' separation of powers reasoning in *Urgenda*

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[30] *Urgenda* Court of Appeal Opinion, *supra* note 6, ¶ 67.

[31] *Id.*

[32] *Id.* ¶ 68.

[33] *See id.*

[34] *See id.* ¶ 69; *see also* GW. [Constitution] art. 94 (stating that Dutch law shall not be applicable if it is in conflict with provisions of treaties "binding on all persons"); Nick S. Efthymiou & Joke C. de Wit, *The Role of Dutch Courts in the Protection of Fundamental Rights*, 9 UTRECHT L. REV. 75, 78 (2013) (noting that the Dutch Supreme Court considers provisions of treaties binding on all persons under Article 94 if they are immediately applicable to the Dutch legal system without the need for legislative intervention).

[35] Baker v. Carr, 369 U.S. 186, 217 (1962). For an argument that the most effective way to learn from comparative constitutional law is through looking at foreign experience "in rather general terms," see Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225, 1308 (1999).

[36] *See* Juliana v. United States, 217 F. Supp. 3d 1224, 1233, 1248 n.6 (D. Or. 2016), *appeal docketed*, No. 18-36082 (9th Cir. Dec. 27, 2018).

[37] *Id.* at 1242.

[38] *See* Petition for a Writ of Mandamus at 20–22, *In re* United States, No. 18-505 (U.S. Oct. 18, 2018) (arguing that the district court's reasoning usurps legislative and executive power); Order, Juliana v. United States, No. 15-cv-01517 (D. Or. Nov. 21, 2018) (certifying case for interlocutory appeal and staying case pending a decision by the Ninth Circuit); Matthew Schneider, *Where* Juliana *Went Wrong:*

may provide a pathway for U.S. courts to conclude that constitutional climate change cases do not raise nonjusticiable political questions.[39]

In the United States, a case is nonjusticiable under the political question doctrine if one of six "formulations" set out in *Baker v. Carr*[40] is "inextricable" from the case.[41] Political question analysis in the climate context has focused primarily on the first three formulations[42]: "[(1)] a textually demonstrable constitutional commitment of the issue to a coordinate political department; [(2)] a lack of judicially discoverable and manageable standards for resolving it; [and (3)] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion."[43] *Urgenda* illustrates why cases like *Juliana* avoid all three of these formulations: the first, because the subject matter is not exclusively the concern of another branch and the requested relief leaves the political branches sufficient policymaking discretion; the second, because determining whether federal action violates constitutional rights is standard practice for the judiciary; the third, because deciding the case does not require making policy determinations regarding the "best" level of emissions or who should bear the cost of emissions reductions.

While *Urgenda* cannot speak to specific constitutional provisions, its reasoning suggests how U.S. courts might conclude that neither deciding whether the plaintiffs' constitutional rights have been violated nor issuing a remedy would infringe upon another branch's constitutional commitments. There is no doubt that the power to legislate lies with Congress and the power to regulate pursuant to legislative authority lies with the Executive.[44] However, ensuring that those powers are exercised in a constitutional manner is "a function ultimately the responsibility of [the courts],"[45] just as adjudicating the Netherlands' violation of human rights falls to the Dutch courts.[46] The U.S. Constitution does not absolve courts of this duty in climate cases; it "does not mention

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*Applying the Public Trust Doctrine to Climate Change Adaptation at the State Level*, 41 ENVIRONS: ENVTL. L. & POL'Y J. 47, 62 n.114 (2017) (suggesting that *Juliana* may be nonjusticiable under the political question doctrine); Adler, *supra* note 5 (predicting that plaintiffs will lose in the Ninth Circuit).

39 Indeed, the *Juliana* district court took comfort in the fact that its Dutch counterpart ruled in favor of Urgenda. *See Juliana*, 217 F. Supp. 3d at 1269 (citing *Urgenda* District Court Opinion).

40 369 U.S. 186.

41 *Id.* at 217.

42 *See, e.g.*, Comer v. Murphy Oil USA, Inc., 839 F. Supp. 2d 849, 865 (S.D. Miss. 2012) (second and third), *aff'd*, 718 F.3d 460 (5th Cir. 2013); Native Vill. of Kivalina v. ExxonMobil Corp., 663 F. Supp. 2d 863, 873–77 (N.D. Cal. 2009) (second and third), *aff'd*, 696 F.3d 849 (9th Cir. 2012); California v. Gen. Motors Corp., No. C06-05755, 2007 WL 2726871, at *6–16 (N.D. Cal. Sept. 17, 2007) (first, second, and third).

43 *Baker*, 369 U.S. at 217.

44 *See* U.S. CONST. art. I, § 1; *id.* art. II, § 1, cl. 1.

45 Elrod v. Burns, 427 U.S. 347, 352 (1976); *see also* INS v. Chadha, 462 U.S. 919, 940–41 (1983) ("The plenary authority of Congress over aliens . . . is not open to question, but what is challenged here is whether Congress has chosen a constitutionally permissible means of implementing that power.").

46 *Urgenda* Court of Appeal Opinion, *supra* note 6, ¶¶ 67, 69.

environmental policy, atmospheric emissions, or global warming,"[47] let alone commit these issues to another branch.

Similarly, judicial scrutiny of the government's approach to climate change would not interfere with the Executive's constitutionally committed control over foreign policy. Although climate change is "sometimes the subject of international agreements,"[48] *Juliana* concerns only domestic emissions.[49] This leaves the argument that an order to reduce U.S. emissions would undermine the Executive's constitutional role of negotiating international climate treaties.[50] However, the district court in *Urgenda* reasoned that the Dutch government may not disregard constitutional rights in order to strengthen its bargaining position for international negotiations.[51] Analogously, the U.S. political branches may not violate constitutional rights under authority of a treaty;[52] a fortiori, they may not do so in order to negotiate a treaty.

Neither would the *Juliana* plaintiffs' requested remedies impinge upon issues constitutionally committed to another branch. Declaratory relief would not entail any judgment beyond deciding the merits of the case, which falls squarely within the federal judiciary's role of deciding constitutional questions. While injunctive relief would require executive agencies to take action (plaintiffs sought an order "directing defendants to develop a plan to reduce $CO_2$ emissions"[53]), granting such relief is well within a court's capacity.[54] Furthermore, this would not be the first time a court has ordered the Executive to act on constitutional grounds.[55] Crucially, the order would not "direct[] any individual

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[47] Juliana v. United States, 217 F. Supp. 3d 1224, 1237 (D. Or. 2016), *appeal docketed*, No. 18-36082 (9th Cir. Dec. 27, 2018).

[48] *Id.* at 1238.

[49] *Id.* at 1233; *cf.* Connecticut v. Am. Elec. Power Co., 582 F.3d 309, 325 (2d Cir. 2009) ("A decision by a single federal court concerning a common law of nuisance cause of action, brought by domestic plaintiffs against domestic companies for domestic conduct, does not establish a *national* or *international* emissions policy . . . ."), *rev'd on other grounds*, 564 U.S. 410 (2011).

[50] *See* Petition for Permission to Appeal Pursuant to 28 U.S.C. § 1292(b) at 20, *Juliana*, 217 F. Supp. 3d 1224.

[51] *Urgenda* District Court Opinion, *supra* note 13, ¶ 4.100.

[52] *See* Reid v. Covert, 354 U.S. 1, 16–19 (1957).

[53] *Juliana*, 217 F. Supp. 3d at 1233.

[54] While courts generally refrain from reviewing agency refusals to initiate enforcement proceedings, *see* Heckler v. Chaney, 470 U.S. 821, 838 (1985), failures to regulate are "susceptible to judicial review," Massachusetts v. EPA, 549 U.S. 497, 527 (2007). Moreover, *Heckler* explicitly left open *constitutional* challenges to agency inaction. *See* 470 U.S. at 838; *see also* Cass R. Sunstein, *Reviewing Agency Inaction After* Heckler v. Chaney, 52 U. CHI. L. REV. 653, 676 (1985) (arguing that constitutionally impermissible agency inaction is reviewable).

[55] *See, e.g.*, Brown v. Bd. of Educ., 349 U.S. 294, 301 (1955) (requiring the Board of Education of the District of Columbia (among other defendants) to desegregate public schools "with all deliberate speed"); Ms. L v. ICE, 310 F. Supp. 3d 1133, 1149–50 (S.D. Cal. 2018) (ordering ICE to "reunify all Class Members with their minor children," *id.* at 1149, "facilitate regular communication between Class Members and their children," *id.* at 1149–50, and "facilitate regular communication between and

agency to take any particular action."[56] Like in *Urgenda*, compliance with the order may not require any regulatory action and, even if regulation would be necessary, the order would "in no way prescribe[] the content of such [regulation]."[57] Because the agencies would retain complete discretion as to how to reduce emissions to a level consistent with the plaintiffs' constitutional rights, *Juliana* avoids judicial encroachment on executive regulatory power while fulfilling courts' obligation to decide cases and grant appropriate judicial relief.[58]

*Urgenda* similarly provides reasoning for U.S. courts to apply when assessing the second *Baker* formulation. In particular, *Urgenda* emphasizes the courts' role in protecting rights and offers a model for judicial management of scientifically complex cases. U.S. jurisprudence has established clear tests for evaluating constitutional rights claims,[59] and the scientific complexity of climate change does not alleviate the courts' obligation to protect constitutional rights.[60] In fact, *Urgenda* provides a fairly straightforward method for dealing with scientific complexity: Trust the scientists! The Dutch courts' use of IPCC reports to determine what level of emissions reductions would be required to protect plaintiffs' rights demonstrates how scientific evidence can assist courts in constructing judicially discoverable and manageable standards for complex issues.[61]

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among all executive agencies responsible for the custody, detention or shelter of Class Members and the custody and care of their children," *id.* at 1150), *appeal docketed*, No. 18-56151 (9th Cir. Aug. 27, 2018).

56 *Juliana*, 217 F. Supp. 3d at 1239. *Compare id.*, *with* Gilligan v. Morgan, 413 U.S. 1, 6 (1973) (holding nonjusticiable plaintiffs' request that the court "establish standards for the training, kind of weapons and scope and kind of orders to control the actions of the National Guard" and "assume and exercise a continuing judicial surveillance over the Guard to assure compliance with whatever training and operations procedures may be approved by that court").

57 *Urgenda* Court of Appeal Opinion, *supra* note 6, ¶ 68.

58 There is a wrinkle here, which is that when a court orders an executive agency to take action on constitutional, rather than statutory, grounds, it is not always clear that the agency has statutory authority to comply. For example, reducing greenhouse gas emissions to a level consistent with plaintiffs' constitutional rights may require action beyond the scope of the EPA's regulatory authority under the Clean Air Act. However, this question is not before the court in *Juliana* and should be resolved only after the agencies take action to implement the order. Courts cannot feasibly examine each imaginable method of implementation to determine whether one of them is authorized under relevant statutes, and restricting the courts' ability to enjoin unconstitutional executive action in these circumstances would severely hamper the judiciary's check on the Executive.

59 *See, e.g.*, *Juliana*, 217 F. Supp. 3d at 1239 ("Every day, federal courts apply the legal standards governing due process claims to new sets of facts.").

60 *See* Alperin v. Vatican Bank, 410 F.3d 532, 552 (9th Cir. 2005) ("The crux of this inquiry is thus not whether the case is unmanageable in the sense of being large, complicated, or otherwise difficult to tackle from a logistical standpoint. Rather, courts must ask whether they have the legal tools to reach a ruling that is 'principled, rational, and based upon reasoned distinctions.'" (quoting Vieth v. Jubelirer, 541 U.S. 267, 278 (2004))); *cf. Urgenda* Court of Appeal Opinion, *supra* note 6, ¶ 69 (noting that the court is "obliged to apply provisions" of human rights treaties); sources cited *supra* note 34 (discussing the self-executing nature of international treaties in Dutch law).

61 *See Urgenda* Court of Appeal Opinion, *supra* note 6, ¶ 51.

Finally, by ordering the minimum emissions reductions consistent with plaintiffs' human rights and leaving it to the political branches to decide how to get there, *Urgenda* demonstrates how *Juliana* avoids the third *Baker* formulation. Concerns raised in climate change tort litigation over *what* constitutes an unreasonable amount of greenhouse gas emissions[62] and *who* should be held responsible[63] are inapposite in climate suits brought against the federal government on constitutional grounds.[64] The Dutch courts limited their order to only the bare minimum of the 25–40% reduction required "to prevent dangerous climate change"[65] and did not consider whether a higher standard would be more appropriate. Similarly, the plaintiffs in *Juliana* "do not ask [the c]ourt to pinpoint the 'best' emissions level; they ask [the c]ourt to determine what emissions level would be sufficient to redress their injuries."[66] The court therefore avoids weighing the costs of emissions against the benefits of emissions-producing activity to determine what is "reasonable."[67] Neither does *Juliana* require the court to identify a scheme for who should be held responsible for climate change. Because the agencies would retain complete discretion as to how to implement the order — which oil and gas leases to discontinue, which polluters to regulate, and so on — the court need not determine which actors should bear the cost of global warming.

Climate change plaintiffs face a multitude of obstacles at each stage of the litigation process, not the least of which is getting into court. Fitting a problem as unique and complex as climate change into existing legal structures is a challenge that will take time, creativity, and significant trial and error. While navigating this process must appear a daunting task to any court, U.S. courts may find solace and reaffirmation in the analogous reasoning of their Dutch counterparts in *Urgenda*.

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[62] *See, e.g.*, Comer v. Murphy Oil USA, Inc., 839 F. Supp. 2d 849, 864 (S.D. Miss. 2012) ("It is unclear how this Court or any jury, regardless of its level of sophistication, could determine whether the defendants' emissions unreasonably endanger the environment or the public without making policy determinations that weigh the harm caused by the defendants' actions against the benefits of the products they produce."), *aff'd*, 718 F.3d 460 (5th Cir. 2013).

[63] *See, e.g.*, Native Vill. of Kivalina v. ExxonMobil Corp., 663 F. Supp. 2d 863, 876–77 (N.D. Cal. 2009) ("[R]esolution of [plaintiffs'] nuisance claim requires the judiciary to make a policy decision about *who* should bear the cost of global warming."), *aff'd*, 696 F.3d 849 (9th Cir. 2012).

[64] *Cf. Urgenda* Court of Appeal Opinion, *supra* note 6, ¶ 67 (rejecting the argument that adjudicating the case would involve the weighing of factors best left to democratically elected branches of government "because the State violates human rights").

[65] *Id.* ¶ 51.

[66] Juliana v. United States, 217 F. Supp. 3d 1224, 1239 (D. Or. 2016), *appeal docketed*, No. 18-36082 (9th Cir. Dec. 27, 2018).

[67] Of course, determining the scope of a constitutional right frequently involves some balancing, *see* T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 963–72 (1987), but weighing individual rights against the interests of the federal government is squarely within the court's wheelhouse, *see, e.g.*, Mathews v. Eldridge, 424 U.S. 319, 334 (1976) ("[R]esolution of the issue whether the administrative procedures provided here are constitutionally sufficient requires analysis of the governmental and private interests that are affected.").