FEDERAL PRECEDENTS AND STATE CONSEQUENCES: TRACING THE IMPACT OF RECENT FEDERAL ENVIRONMENTAL DECISIONS ON ILLINOIS LAW

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I. INTRODUCTION

In recent years, the landscape of environmental law has been reshaped by a series of landmark federal court decisions.[2] With environmental law at a pivotal juncture, this Article examines the influence of significant federal environmental decisions such as *Juliana v. United States*,[3] *Board of County Commissioners of Boulder County v. Suncor Energy, Inc.*,[4] and *Sackett v. Environmental Protection Agency*,[5] specifically focusing on the implications these decisions have on environmental law in Illinois. These cases collectively challenge boundaries and raise critical questions about federal government accountability for climate change, corporate environmental liability, and the delicate balance between federal and state governance over environmental issues.[6] This Article first examines the important rulings from each case, dissecting the legal arguments, decisions, and broader environmental implications. Next, this Article explores the collective impact of these federal precedents on Illinois state law and policy, contemplating the potential influence on Illinois' environmental legal landscape. Finally, by examining these federal decisions and their implications for Illinois, this Article offers a forward-looking perspective and comprehensive analysis of the current trends and future directions of Illinois environmental law.

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[2] *See* Juliana v. United States, 947 F.3d 1159 (9th Cir. 2020)*;* Bd. of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc., 25 F.4th 1238, 1271-72 (10th Cir. 2022); Sackett v. EPA, 566 U.S. 120, 121 (2012) [hereinafter Sackett I]; Sackett v. EPA 598 U.S. 651, 662 (2023) [hereinafter Sackett II].

[3] *Juliana*, 947 F.3d 1159.

[4] *Bd. of Cnty. Comm'rs of Boulder Cnty*., 25 F.4th at 1271-72.

[5] *Sackett I*, 566 U.S. at 124.

[6] *See Juliana*, 947 F.3d at 1159; *Bd. of Cnty. Comm'rs of Boulder Cnty*., 25 F.4th at 1271-72; *id*. at 124; *Sackett II*, 598 U.S. at 662.

II. CASE ANALYSES OF SIGNIFICANT ENVIRONMENTAL DECISIONS

A. *Juliana v. United States*

1. Factual Background

In 2015, the plaintiffs, "twenty-one young citizens, an environmental organization, and a 'representative of future generations'" filed their complaint in the United States District Court for the District of Oregon, naming the United States, the Office of the President of the United States, and the heads of numerous executive agencies (collectively, "federal defendants") as defendants.[7] Twenty-one plaintiffs asserted that the United States government had violated their constitutional rights and breached constitutional public trust obligations by promoting the production of fossil fuels, destabilizing the climate.[8] "Some plaintiffs claim psychological harm, others impairment to recreational interests, others exacerbated medical conditions, and others damage to property."[9]

Specifically, the plaintiffs alleged that the federal defendants knew for more than fifty years that carbon dioxide produced by the industrial-scale burning of fossil fuels was "causing global warming and dangerous climate change."[10] They further alleged that the federal defendants knew that destabilization would occur with the continued burning, depriving current and future citizens of the "climate system . . . [they] depend on for their wellbeing and survival."[11] The plaintiffs contended that the federal defendants' policy on fossil fuels deprived the plaintiffs of life, liberty, and property without due process of law and impermissibly discriminated against "young citizens, who will disproportionately experience the destabilized climate system . . . ."[12] The plaintiffs' second amended complaint asserted violations of (1) their substantive rights under the Due Process Clause of the Fifth Amendment;[13] (2) their rights under the Fifth Amendment to equal protection of the law;[14] (3) their rights under the Ninth Amendment;[15] and (4) the public trust doctrine.[16] "The plaintiffs [sought] declaratory relief and an

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7 *Id*. at 1165.
8 *Id*.
9 *Id*.
10 Second Amended Complaint at 5, Juliana v. United States, No. 6:15-CV-01517 (D. Or. June 8, 2023), ECF No. 542.
11 *Id*.
12 *Id*. at 7.
13 *Id*. at 137.
14 *Id*. at 141.
15 *Id*. at 144.
16 *Id*. at 145.

injunction ordering the government to implement a plan to 'phase out fossil fuel emissions and draw down excess atmospheric [carbon dioxide].'"[17]

2. Whether climate-change-related injuries afford standing?

After months of procedural wrangling, on January 17, 2020, a divided panel of the Ninth Circuit dismissed the case on standing grounds.[18] Writing for the panel, Judge Andrew Hurwitz 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 the challenged conduct and (3) is likely redressable by a favorable judicial decision."[19] Agreeing with the district court, the panel of judges found that at least some plaintiffs had particularized injuries since climate change threatened to harm certain plaintiffs in concrete and personal ways if left unchecked.[20] In addition, some plaintiffs had established causation since there was a dispute on whether U.S. climate policy was a "substantial factor" in exacerbating the plaintiffs' climate change-related injuries.[21] Ultimately, the court struggled to determine whether it could redress the alleged injuries.[22]

To establish redressability, it explained, the plaintiffs needed to identify relief that was both "(1) substantially likely to redress [its] injuries" and "(2) within the district court's power to award."[23] On the first prong, "the crux of [the] plaintiffs' requested remedy [was] an injunction requiring the government to . . . cease permitting, authorizing, and subsidizing fossil fuel use . . . ."[24] The plaintiffs' experts had established that only a comprehensive, government-led plan to reduce U.S. greenhouse gas emissions could mitigate the effect on the climate and thereby bring the plaintiffs redress.[25] Turning to the second prong, the court noted that supervising such a plan would compel judges to decide many difficult policy issues.[26] Further, it held that ordering the federal government to adopt "a comprehensive scheme to decrease fossil fuel emissions and combat climate change" under the public trust doctrine would exceed any federal court's remedial authority.[27]

In requesting such relief, the plaintiffs sought an extensive remedy outside the scope of judicial supervision; these complex policy decisions are

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17 Juliana v. United States, 947 F.3d 1159, 1165 (9th Cir. 2020).
18 *Id*. at 1175.
19 *Id*. at 1168.
20 *Id*.
21 *Id*. at 1169.
22 *Id*.
23 *Id*. at 1170.
24 *Id*.
25 *Id*. at 1170-71.
26 *Id*. at 1171.
27 *Id*.

reserved for the executive and legislative branches.[28] Accordingly, the Ninth Circuit found the requested relief outside the scope of its power and dismissed the case.[29] In response, the plaintiffs filed a motion to amend their complaint, seeking a declaration that the U.S. "energy system" violated the U.S. Constitution and the public trust doctrine.[30] The plaintiffs' amended complaint removed previously proposed remedies that exceeded the judiciary's power.[31] On June 1, 2023, their motion to amend was granted.[32]

3. Renewed Attempt to Dismiss on Standing Grounds

Shortly after that, the federal defendants moved to dismiss, asserting that the plaintiffs lacked standing.[33] They insisted that the plaintiffs again asked the court to exercise authority that exceeded the scope of its power under Article III of the Constitution, and that all of the plaintiffs' claims lacked merit.[34] On December 29, 2023, the district court denied the motion in part.[35] In addressing the plaintiffs' standing, the district court noted that, although the plaintiffs had "scaled back" their request for injunctive relief by removing their request requiring the federal defendants to "prepare a remedial plan;" they now sought to restrain the federal defendants "from carrying out policies, practices, and affirmative actions" that rendered the energy system unconstitutional in a manner that harmed the plaintiffs.[36] The court found that even the narrower request for injunctive relief "tread[ed] on ground over which [the] Ninth Circuit cautioned the [c]ourt not to step" because the relief "would be more expansive than any case of which the [c]ourt [wa]s aware."[37] While the court dismissed the plaintiffs' claim for injunctive relief,[38] the court found that the plaintiffs' requested declaratory relief "[might have been] enough to bring about relief by changed conduct"[39] and that the defendants failed to show that such relief was outside the court's authority.[40] The court also found that the plaintiffs stated a claim for due process, finding "that the right to a climate system that can sustain human

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28 *Id*. at 1171-72.
29 *Id*. at 1165.
30 Second Amended Complaint, *supra* note 10, at 6.
31 *Id*.
32 *Id*. at 1, Juliana v. United States, No. 6:15-CV-01517, 2023 WL 3750334, at *9 (D. Or. June 1, 2023).
33 *Juliana*, 947 F.3d at 1166.
34 Juliana v. United States, No. 6:15-CV-01517-AA, 2023 WL 9023339, at *6 (D. Or. Dec. 29, 2023).
35 *Id*. at *1.
36 *Id*. at *9.
37 *Id*. at *12.
38 *Id*.
39 *Id*. at *13.
40 *Id*. at *15.

life is fundamental to a free and ordered society."[41] Accordingly, the court permitted the plaintiffs to proceed with their claims for violating the public trust doctrine and those related to the plaintiffs' due process rights.[42]

Overall, Judge Ann Aiken's opinion represents judicial recognition of the court's roles in addressing climate change and supporting the involvement of younger generations, who are too young to vote or effect change through political processes, in using legal avenues to urge the government to take action on climate change.[43]

B. *Board of County Commissioners of Boulder County. v. Suncor Energy (U.S.A.) Inc.*

1. Factual Background

The Board of County Commissioners of Boulder County, the Board of County Commissioners of San Miguel County, and the City of Boulder (collectively, the "Municipalities") filed common law and statutory claims in Colorado state court, claiming that the consequences of climate change were to blame for harm to their property and persons living in their jurisdictions.[44] The Municipalities contended that Suncor Energy Sales, Inc., Suncor Energy, Inc., and Exxon Mobil (collectively, the "Energy Companies") had contributed significantly to the changing climate in Colorado by producing, marketing, and selling fossil fuels while misleading the public and concealing their knowledge that these products would contribute to global warming.[45] Specifically, the plaintiffs asserted six state law claims: (1) public nuisance, (2) private nuisance, (3) trespass, (4) unjust enrichment, (5) violation of the Colorado Consumer Protection Act, and (5) civil conspiracy.[46] The Municipalities did not allege any federal claims.[47] The plaintiffs sought past and future compensatory damages, as well as remediation or abatement of climate-related harms in their communities.[48]

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41 *Id*. at *17.
42 *Id*. at *17, 21.
43 *Id*. at *1.
44 Bd. of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc., 405 F. Supp. 3d 947, 954 (D. Colo. 2019).
45 Bd. of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc., 25 F. 4th 1238, 1247 (10th Cir. 2022).
46 *Id*. at 1248.
47 *Id*.
48 *Id*.

2. What is the Proper Jurisdiction for Injuries Allegedly Caused by the Effect of Greenhouse-Gas Emissions on the Global Climate?

Following the Municipalities' filing of their amended complaint in Colorado state court, the Energy Companies filed to remove the case to federal court.[49] The Energy Companies specifically argued that original jurisdiction was granted by 28 U.S.C. § 1331 because "(1) the Municipalities' claims arose only under federal common law; (2) the Clean Air Act ('CAA') completely preempted the state-law claims; (3) the claims implicated disputed and substantial 'federal issues' under *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*;[50] (4) the claims arose from incidents that occurred in federal enclaves within the Municipalities' borders; and (5) original federal jurisdiction exists under the Outer Continental Shelf Lands Act ('OCSLA')."[51] The Municipalities moved to remand.[52] In its opinion, the district court rejected all asserted grounds for removal and remanded the action back to state court.[53]

The Energy Companies appealed the district court's remand order to the United States Court of Appeals for the Tenth Circuit on six grounds, including the federal officer removal statute, 28 U.S.C. § 1142, pursuant to 28 U.S.C. § 1447(d).[54] While such remands are generally unreviewable by higher courts, there was a statutory exception for one claim: federal officer jurisdiction.[55] The Energy Companies claimed that the oil companies' long-term government leases to mine the Outer Continental Shelf (OCS) for fossil fuels made them federal officers for the purpose of federal court jurisdiction.[56] On plenary review, the Tenth Circuit disagreed with the Energy Companies' argument that it could consider all grounds for removal, holding instead that its jurisdiction was limited to the federal officer removal question.[57] After concluding that the conditions for the removal of a federal officer had not been met, the Tenth Circuit upheld the district court's remand decision, disregarding the other grounds for removal.[58]

The Supreme Court then granted certiorari, vacated the Tenth Circuit's opinion, and remanded to the Tenth Circuit for reconsideration.[59] Upon reconsideration, the Tenth Circuit ruled that none of the six grounds asserted

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49 *Id*.
50 Grable & Sons Metal Prod, Inc. v. Darue Eng'g & Mfg., 545 U.S. 308 (2005).
51 Bd. of Cnty. Comm'rs of Boulder County, 25 F.4th 1248-49 (10th Cir. 2022).
52 *Id*. at 1249.
53 *Id*.
54 *Id*.
55 Bd. of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc., 965 F.3d 792, 799 (10th Cir. 2020), *vacated*, 141 S. Ct. 2667, (2021).
56 *Id*. at 820-21.
57 *Id*. at 819.
58 *Id*. at 827.
59 Suncor Energy (U.S.A.) Inc. v. Bd. of Cnty. Comm'rs of Boulder Cnty., 141 S. Ct. 2667 (2021).

supported federal removal jurisdiction and affirmed the district court's order remanding the action to the state court.[60] The Tenth Circuit again reconsidered and rejected federal officer removal as a basis for federal jurisdiction, concluding that the Energy Companies did not establish that one of the defendants, ExxonMobil Corporation, acted under a federal officer pursuit to its OCS leases.[61]

Second, the Energy Companies asserted that under 28 U.S.C. §1441, there was original federal jurisdiction over the Municipalities' claims because the claims arose under federal common law.[62] The district court concluded federal common law did not create the cause of action because a federal common law claim was not alleged on the face of the complaint.[63] The Tenth Circuit affirmed.[64]

Additionally, the district court considered whether the Clean Air Act (CAA) preempted the Municipalities' state law claims.[65] The district court held that it did not, reasoning that the CAA does not govern the sale of fossil fuels, and it "expressly preserves many state common law causes of action."[66] Based on this, the district court determined that "Congress did not intend the CAA to provide exclusive remedies in these circumstances, or to be a basis for removal under the complete preemption doctrine."[67] The Tenth Circuit affirmed and held that the CAA was "designed to provide a floor upon which state law [could] build, not a ceiling to stunt complementary state-law actions,"[68] and the CAA expressly did not vindicate the same basic right or interest as the Municipalities' state law claims.[69] As such, the Tenth Circuit concluded that the CAA could not completely preempt the state law claims.[70]

Next, the Energy Companies argued that the claims raised substantial federal issues suitable for federal court resolution—"both because the claims relate to the federal government's conduct of foreign affairs and because they 'amount to a collateral attack on cost-benefit analyses committed to, and already performed by, the federal government.'"[71] The Tenth Circuit concluded that the "federal issues asserted [were] neither necessary to the Municipalities' claims nor substantial to the federal system."[72] As a result,

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60 Bd. of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc., 25 F.4th 1238, 1275 (10th Cir. 2022).
61 *Id*. at 1250, 1254.
62 *Id*. at 1254.
63 *Id*. at 1257-58.
64 *Id*. at 1262.
65 *Id*. at 1263.
66 *Id*. at 1263.
67 *Id*.
68 *Id*.
69 *Id*. at 1264.
70 *Id*.
71 *Id*. at 1265.
72 *Id*. at 1265-66.

the case did not fall within the "slim category" of state-law disputes meriting removal because of a substantial federal question.[73]

In addition, the Tenth Circuit rejected the Energy Companies' contention that there was federal enclave jurisdiction.[74] Specifically, the Energy Companies attempted to point to allegations in the complaint of an insect infestation across Rocky Mountain National Park, increased flood risk to San Miguel River in Uncompahgre National Forest, and "heat waves, wildfires, droughts, and floods" in both locations.[75] Finally, the Tenth Circuit found that the OCSLA was not grounds for federal jurisdiction because there was not a sufficient connection between the Municipalities' claims and Exxon's operations on the OCS to provide a basis for jurisdiction under the OCLSA.[76]

On June 8, 2022, the Energy Companies filed another petition for writ of certiorari seeking the Supreme Court's review of the Tenth Circuit's decision affirming the remand to state court of climate change cases brought against the companies by Colorado local governments.[77] The petition presented two questions: (1) "whether federal common law necessarily and exclusively governs claims seeking redress for injuries allegedly caused by the effect of interstate greenhouse-gas emissions on the global climate; and (2) whether a federal district court has jurisdiction under 28 U.S.C. 1331 over claims necessarily and exclusively governed by federal common law but labeled as arising under state law."[78] On April 24, 2023, the petition for writ of certiorari was denied.[79]

While there are no dispositive cases from the Supreme Court, the Tenth Circuit, or other United States Courts of Appeal, federal district courts throughout the country are divided on whether federal courts have jurisdiction over state law claims related to climate change, such as raised in this case.[80] The decision in *Board of County Commissioners of Boulder County* underscores that state courts can be appropriate venues for

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73 *Id*.

74 *Id*. at 1271-72.

75 *Id*.

76 *Id*. at 1274-75; *see also id.* at 1272 (quoting 43 U.S.C. § 1349(b)(1) (The OCSLA provides that federal courts "shall have jurisdiction of cases and controversies arising out of, or in connection with . . . any operation conducted on the [OCS] which involves exploration, development, or production of [OCS] minerals.").

77 Petition for Writ of Certiorari, Bd. of Cnty. Comm'r of Boulder Cnty v. Suncor Energy (U.S.A.) Inc., 25 F.4th 1238 (2022) (No. 21-1550).

78 *Id*.

79 Suncor Energy (U.S.A.) Inc. v. Bd. of Cnty. Comm'r of Boulder Cnty., 143 S. Ct. 1795 (2023).

80 *Compare* City of Oakland v. BP PLC, 969 F.3d 895, 912-13 (9th Cir. 2020); City of N.Y. v. Chevron Corp., 993 F.3d 81 (2d Cir. 2021) *with* State of Rhode Island v. Chevron Corp., 393 F.Supp.3d 142 (D. R.I. 2019); Shell Oil Products Co., LLC v. Rhode Island, 141 S. Ct 2666 (2021); Mayor & City Council of Baltimore v. BP P.L.C., 31 F.4th 178 (4th Cir. 2022); *and* Cnty. of San Mateo v. Chevron Corp., 32 F.4th 733 (9th Cir. 2022); City of Hoboken v. Chevron Corp., 45 F.4th 699 (3d Cir. 2022).

environmental lawsuits, even those with broader implications for climate change.[81] This could influence how similar cases against "Big Oil" companies are approached and similarly litigated in Illinois.

C. *Sackett v. Environmental Protection Agency*

1. Factual Background and Procedural History

Plaintiffs Michael and Chantall Sackett bought a residential lot north of Priest Lake in Bonner County, Idaho, and began backfilling the lot with dirt and rock in preparation for building a home.[82] The federal Environmental Protection Agency (EPA) sent the Sacketts a compliance order informing them that their property contained wetlands and their backfilling violated the Clean Water Act (CWA),[83] which prohibits the discharge of pollutants into "waters of the United States" (WOTUS) without a permit.[84] According to the EPA, the Sacketts' property contained wetlands that qualified as "navigable waters" regulated by the CWA.[85] The EPA's compliance order demanded the Sacketts remove the dirt and restore the property to its natural state.[86] The order threatened the Sacketts with civil penalties of more than $40,000 per day if they did not comply.[87]

In 2008, the Sacketts sued the EPA in the United States District Court for the District of Idaho, arguing that the wetlands should not qualify as WOTUS,[88] but the case was dismissed for a lack of subject matter jurisdiction.[89] The Sacketts appealed to the Ninth Circuit,[90] then the Supreme Court.[91] In the first case before the Supreme Court (*Sackett I*), the court held that the Sacketts could bring a civil action under the Administrative Procedures Act (APA) because the EPA's action constituted a final agency action, for which there was no other adequate remedy in a state court.[92] Thus, the court remanded the case, allowing it to proceed on its merits.[93] On remand, the district court upheld EPA's determination that the wetlands on the Sacketts' property were WOTUS because the wetlands were adjacent to navigable water, and their property was connected by jurisdictional water

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81 Bd. of Cnty. Comm'rs 25 F.4th 1266.2).
82 Sackett v. EPA, 566 U.S. 120, 124 (2012) [hereinafter *Sackett I*].
83 Sackett v. EPA, 598 U.S. 651, 662 (2023) [hereinafter *Sackett II*].
84 33 U.S.C. § 1362(7), 1311.
85 *Sackett II*, 598 U.S. at 662.
86 *Id*.
87 *Id*.
88 *Id*. at 663.
89 Sackett v. EPA, No. 08-cv-185-N-EJL, 2008 WL 3286801 (D. Idaho Aug. 7, 2008).
90 Sackett v. EPA, 622 F.3d 1139 (9th Cir. 2010).
91 *See Sackett I*, 566 U.S. 120 (2012).
92 *Id*. at 127.
93 *Id*. at 131.

that flowed into an adjacent lake.[94] The Ninth Circuit affirmed the district court's opinion.[95]

In *Sackett II*, recently decided by the Supreme Court, the issue presented was whether the Ninth Circuit set forth the proper test for determining whether wetlands were WOTUS under the CWA.[96]

2. Definition and History of WOTUS

The CWA was enacted in 1972 to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[97] The CWA regulates discharges of pollutants from point sources to "navigable waters," with "navigable waters" defined as WOTUS, including territorial seas."[98] The CWA does not define WOTUS.[99] As such, the meaning of WOTUS has long been the subject of controversy.[100] The task of defining WOTUS has been undertaken by the Obama administration,[101] the Trump administration,[102] and now the Biden administration is working to clarify which waters are protected under the CWA.[103] Despite these repeated efforts to clarify the definition of WOTUS, each successive definition has led to a geographic patchwork of applicability that has only increased uncertainty and confusion over the proper test for determining whether wetlands are WOTUS under the CWA.[104]

Against this backdrop, it is important to understand the tension between two past opinions authored by Supreme Court Justices Antonin Scalia and Anthony Kennedy in an earlier 2006 opinion, *Rapanos v. United States*.[105] Like *Sackett*, *Rapanos* involved someone filling wetlands without a permit.[106] In their individual opinions, Justices Scalia and Kennedy defined two contrasting methods of recognizing which waters warranted protection under the CWA.[107] For Justice Scalia, WOTUS encompassed permanent, standing, or continuously flowing bodies of water (i.e., streams, oceans,

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94 *See* Sackett v. EPA, No. 2:08-cv-00185-EJL, 2019 WL 13026870 (D. Idaho Mar. 31, 2019).
95 Sackett v. EPA, 8 F.4th 1075, 1079 (9th Cir. 2021).
96 *Sackett II*, 598 U.S. 651, 663 (2023).
97 33 U.S.C. § 1251(a).
98 *Id*. at §§ 1311(a), 1362(7), 1362(12).
99 *Sackett I*, 566 U.S. 120, 133 (2012).
100 *Id*.
101 Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37, 053 (Jun. 29, 2015).
102 The Navigable Waters Protection Rule: Definition of "Waters of the United States," 85 Fed. Reg. 22, 250 (Apr. 21, 2020).
103 Revised Definition of "Waters of the United States," 88 Fed. Reg. 61, 964 (Sept. 8, 2023).
104 Rapanos v. United States, 547 U.S. 715, 725-29 (2006).
105 *See generally id*. at 715.
106 *Id*. at 719-20.
107 *See generally id*. at 715.

rivers, lakes) or wetlands—so long as those wetlands had a continuous surface connection to a body of water that already enjoyed federal protection.[108] Conversely, Justice Kennedy found that wetlands constituted "navigable waters" under the CWA if there was a "significant nexus between the wetlands" and traditionally navigable waters such that the "wetlands, either alone or in combination with similarly situated lands in the region, significantly affect[ed] the chemical, physical, and biological integrity" of traditionally navigable waters.[109]

3. Sackett's Refined Definition of WOTUS

On May 25, 2023, the Supreme Court issued its decision in *Sackett II*, clarifying and narrowing the reach of the proper test for WOTUS.[110] The *Sackett II* majority opinion immediately acknowledged that the "uncertain" meaning of the definition of WOTUS has been a persistent problem, sparking decades of agency action and litigation.[111]

Writing for the majority, Justice Samuel Alito asserted that Justice Scalia's definition of WOTUS from *Rapanos* was the proper one.[112] The Court held that to establish CWA jurisdiction over a wetland, a party must first establish that the adjacent body of water constitutes a WOTUS and, second, that the wetland has a continuous surface connection with that water, making it difficult to determine where the "water ends" and the "wetlands" begin.[113] The majority clarified two critical aspects of the jurisdictional scope of the CWA.[114] First, the term WOTUS encompasses "only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic[al] features'" like "streams, oceans, rivers, and lakes."[115] Second, some wetlands qualify as WOTUS,[116] but only those wetlands that have a "continuous surface connection"[117] with one of the relatively permanent bodies of water, such that the wetland is "indistinguishably part of a body of water that itself constitutes 'waters' under the [Clean Water Act]."[118]

The court's decision first established that "waters," as used in the CWA, pertain to geographical features commonly referred to as "streams, oceans,

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108 *Id*. at 742 (Scalia, J., plurality).
109 *Id*. at 779-80 (Kennedy, J., concurring).
110 *Sackett II*, 598 U.S. 651, 663 (2023).
111 *Id*. at 658.
112 *Id*. at 671.
113 *Id*. at 678.
114 *Id*. at 671-78.
115 *Id*. at 671.
116 *Id*. at 678.
117 *Id*.
118 *Id*. at 676.

rivers, and lakes."[119] This interpretation aligns with the plurality in *Rapanos*, which relied on dictionary definitions to understand "waters" in its ordinary meaning.[120] The court also reconciled the CWA's meaning of "navigable" waters, emphasizing that "waters" pertain to navigable bodies of water like rivers, lakes, and oceans.[121]

Concerning wetlands, the court focused on another section of the CWA, "which authorizes [s]tates to apply to the EPA for permission to administer programs to issue permits for the discharge of dredged or fill material into some bodies of water."[122] This provision acknowledges that states can regulate discharges into "waters of the United States," but excludes traditional navigable waters and adjacent wetlands.[123] The court concluded that since § 1344(g)(1) includes "wetlands" within WOTUS, the wetlands covered "must qualify as WOTUS in their own right."[124] Therefore, only wetlands with a continuous surface connection to these navigable waters are considered part of the WOTUS under the CWA.[125]

In reaching these holdings, the majority rejected the EPA's contention that the "significant nexus" test was sufficient to establish jurisdiction over adjacent wetlands.[126] The Court concluded the EPA's interpretation was inconsistent with the text and structure of the CWA.[127] In disposing of the significant nexus test, the *Sackett II* majority held that Congress must use "exceedingly clear language" for the EPA to exercise authority over private property.[128] Additionally, the court noted that the EPA's interpretation of WOTUS gave rise to serious vagueness concerns in light of the CWA's criminal penalties.[129]

Finally, the court rejected EPA's argument that Congress "implicitly ratified" its interpretation of "adjacent" wetlands when it adopted § 1344(g)(1).[130] The EPA attempted to argue that WOTUS covers any wetlands that are "bordering, contiguous, or neighboring" to covered waters.[131] The majority concluded that an "adjacent" wetland has to be a part of the

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119 *Id*. at 671.

120 Rapanos v. United States, 547 U.S. 715, 739 (2006) (plurality opinion) (quoting WEBSTER'S NEW INTERNATIONAL DICTIONARY 2882 (2d ed. 1954)).

121 *Sackett II*, 598 U.S. 671-75.

122 *Id*. at 675 (citing to 33 U.S.C. § 1344(g)(1)).

123 *Id*. (quoting 33 U.S.C. § 1344(g)(1)).

124 *Id*. (quoting 33 U.S.C. § 1362(7)).

125 *Id*.

126 *Id*. at 679.

127 *Id*.

128 *Id*.

129 *Id*. at 680-81.

130 *Id*. at 682.

131 *Id*.

"covered" waters, which means that a continuous surface connection is required.[132]

The *Sackett II* decision's narrow interpretation of what constitutes WOTUS constrains the types of waterways that administrative agencies, like the EPA, have the authority to regulate.[133] While *Sackett*[134] provides further clarity on the scope of CWA jurisdiction, some areas of disagreement and uncertainty are likely to persist.

III. IMPLICATIONS FOR ILLINOIS STATE COURTS

As noted above, the decisions in *Juliana v. United States*,[135] *Board of County Commissioners of Boulder County v. Suncor Energy, Inc.*,[136] and *Sackett v. EPA*[137] represent significant milestones in environmental law, highlighting the evolving landscape. These cases, while distinct in their legal contexts and implications, collectively signal a pivotal shift in how environmental issues will be approached in Illinois.[138]

A. Implications of *Juliana*

Juliana emphasized how individuals may initiate lawsuits as a tool for environmental activism.[139] At the heart of *Juliana* lies a compelling narrative: a group of young plaintiffs challenging the federal government for its alleged failure to prevent fossil fuel emissions and, thus, safeguard their constitutional right to a "climate system capable of sustaining human life."[140] *Juliana*'s potential implications are multifaceted and profound.

First, the case reinforces the concept of judicial review in environmental policy, a role traditionally perceived as reserved for the executive and legislative branches.[141] For instance, the decision states that "as part of a coequal branch of government, the court cannot shrink from its role to decide on the rights of the individuals duly presenting their case and controversy."[142] Illinois courts may find themselves increasingly called upon to decide

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132 *Id*.

133 *See id* (rejecting EPA's policy arguments about the ecological consequences of defining adjacent wetlands narrowly because the Clean Water Act did not define the EPA's jurisdiction based on ecological importance).

134 *Id*. at 651.

135 Juliana v. United States, 947 F.3d 1159 (9th Cir. 2020).

136 Bd. of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc., 25 F.4th 1238 (10th Cir. 2022).

137 *Sackett II*, 598 U.S. 651 (2023).

138 *See Juliana*, 947 F.3d 1159; *Bd. of Cnty. Comm'rs of Boulder Cnty*., 25 F.4th 1238; *id*.

139 *See Juliana*, 947 F.3d 1159.

140 *Id* at 1164.

141 Juliana v. United States, No 6:15-CV-01517, 2023 WL 9023339, at *2 (D. Or. 2023).

142 *Id*.

environmental or climate change-related cases that are scrutinized through the lens of constitutional rights.

Second, this could inspire similar actions in Illinois,[143] especially among younger generations who are too young to vote or ignite change through political processes.[144] The Ninth Circuit has not yet decided whether private plaintiffs have a constitutional right to a "climate system capable of sustaining human life," which may spur additional litigation by plaintiffs attempting to assert such a right.[145] As such, individuals and advocacy groups might be more inclined to pursue judicial remedies for perceived environmental injustices or to ensure governmental accountability on climate change.[146]

Moreover, *Juliana*'s focus on the rights of younger generations introduces a new dimension to environmental litigation.[147] This decision highlights the state's responsibility to consider future generations in its environmental policymaking.[148] For instance, the young plaintiffs' allegations highlight that "collective resolve at every level and in every branch of government is critical to reducing fossil fuel emissions and vital to combating climate change."[149] With this perspective in mind, this could lead to a more forward-thinking environmental legal philosophy, ensuring that today's decisions do not compromise the health and safety of future generations.

In conclusion, *Juliana* is poised to have a substantial impact on the Illinois environmental legal landscape.[150] Elevating climate change to a constitutional issue challenges Illinois courts to rethink traditional boundaries of environmental law, where once these issues were deferred to other political branches of government.[151]

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143 *See generally* Jeffrey Kluger, *Climate Get its Day in Court*, TIME (Jan. 4, 2024, 2:52 PM), https://time.com/6552129/juliana-vs-us-climate-case (highlighting the uptick in climate change lawsuits domestically and internationally).

144 *Juliana*, 2023 WL 9023339, at *1.

145 *Juliana*, 947 F.3d at 1164.

146 *See id*.

147 *Juliana*, 2023 WL 9023339, at *1. ("While facts remain to be proved, lawsuits like this highlight young people's despair with the drawn-out pace of the unhurried, inchmeal, bureaucratic response to our most dire emergency.").

148 *See id*. at *17 ("In this opinion, this Court simply holds that where a complaint alleges governmental action is affirmatively and substantially damaging the climate system in a way that will cause human deaths, shorten human lifespans, damage property, threaten human food sources, and dramatically alter the planets ecosystem, it states a claim for a due process violation. To hold otherwise would be to say that the Constitution affords no protection against a government's knowing decision to poison the air its citizens breathe or the water its citizens drink.").

149 *Id*. at *2.

150 *See generally* Kluger, *supra* note 14#.

151 *See* Juliana, 2023 WL 9023339, at *1.

B. Implications of *Board of County Commissioners of Boulder County*

As noted above, the judiciary has historically been reluctant to act on climate change for a multitude of reasons due to the speculative nature of injuries, the numerous potentially responsible parties, and the complexities that courts face when fashioning a remedy.[152] *Board of County Commissioners of Boulder County* could have major implications for how state and federal courts may allow climate-change-related cases to proceed.[153] This case focused on the jurisdictional question of whether state or federal courts should decide environmental lawsuits against major oil companies.[154] However, given that the Supreme Court declined to determine whether federal courts have jurisdiction over claims governed by federal common law framed as state law claims, this created ambiguity as to the proper jurisdictional forum for these cases.[155] The Tenth Circuit's decision in *Board of County Commissioners of Boulder County* underscored that state-level environmental claims, even those intertwined with global issues like climate change, are within the jurisdiction of state courts.[156] This has significant implications for Illinois, where state courts may increasingly find themselves as the primary venues for this type of litigation.[157] This shift will require Illinois courts to be adept in navigating the legal complexities between state and environmental laws, ensuring that their interpretations of the law do not conflict with either federal or state authority.[158]

Furthermore, the decision will require a potential reevaluation of state jurisdiction in environmental lawsuits, suggesting that state courts may become more involved in addressing environmental wrongs and policy failures.[159] This could signal a trajectory for Illinois courts to impact global climate change and environmental litigation greatly. While courts typically refrain from policy making, their decisions inevitably influence policy direction.[160] In Illinois, rulings in cases similar to *Board of County Commissioners of Boulder County* could guide state legislators and

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152 *See id.*

153 *See* Bd. of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc., 25 F.4th 1238 (10th Cir. 2022).

154 Petition for Writ of Certiorari, Suncor Energy (U.S.A.) Inc., v. Bd. of Cnty. Comm'rs of Boulder Cnty, No. 21-1550, 2022 WL 2119473 at *3.

155 *See* Suncor Energy (U.S.A.) Inc. v. Bd. of Cnty. Comm'rs of Boulder Cnty., 143 S. Ct. 1795 (2023).

156 *See Bd. of Cnty. Comm'rs of Boulder Cnty*., 25 F.4th at 1249-75.

157 *See id*. at 1275.

158 *See id*. at 1238.

159 *See id*. at 1249-75 (analyzing why the federal court lacked subject matter jurisdiction for removal).

160 *See* Irem B. A. Orsel, *How Does the Supreme Court Impact US Laws Without Changing Them?*, POL. SCI. NOW (Dec. 4, 2023), https://politicalsciencenow.com/how-does-the-supreme-court-impact-us-laws-without-changing-them/ ("[T]he highest court, through its decisions, can subtly but crucially change existing policies without altering their wording.").

regulators in shaping environmental policies that concern corporate accountability and environmental protection standards.[161]

As such, *Board of County Commissioners of Boulder County* redefines the role of Illinois courts in global climate-change-related issues and places the court in a position to influence environmental policy.[162]

C. The Consequences and Implications of *Sackett*

With its redefinition of WOTUS under the CWA, *Sackett* initiates the pivotal shift in how environmental issues will be approached in Illinois.[163] The decision effectively shrinks federal oversight, specifically over wetlands, by narrowing the scope to include only those bodies of water with a continuous surface connection to navigable water.[164] For instance, the *Sackett* decision "effectively reduced the CWA's coverage of the nation's streams by as much as 80%, and of the nation's wetlands by at least 50%."[165] This regulatory reduction places a substantial burden on Illinois, which may find itself compelled to enhance its environmental regulatory framework.[166] Illinois, having lost a significant portion of its wetlands since the early 1800s, does not have state-level protections for wetlands on private property.[167] Prior to this decision, Illinois depended on federal regulations to protect wetlands.[168] With the upending of federal protections, Illinois will have to consider enacting new state-level regulations and legislation to protect wetlands and water quality.[169] The Illinois Environmental Council has already called on Illinois Governor J.B. Pritzker to issue an executive order protecting as many wetlands as possible.[170]

While Illinois does have wetland laws, these protections only protect some of its wetlands from adverse impacts caused by state-funded

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161 *See generally* M. Logan Campbell, *BOARD OF COUNTY COMMISSIONERS OF BOULDER COUNTY V. SUNCOR ENERGY (U.S.A.) INC: A FUTURE FOR CLIMATE CHANGE LITIGATION?*, 47 HARV. ENV'T L. REV. 605, 619 (2023) ("State and local governments are the most knowledgeable and best equipped to tailor local solutions to their local problems.").

162 *See generally id*. at 619-21 ("In the absence of federal action on climate change, leaving these decisions to states empowers them to innovate ideas on how best to combat climate change.").

163 *See Sackett II*, 598 U.S. 651, 684 (2023).

164 *See id*.

165 Richard J. Lazarus, *Judicial Destruction of the Clean Water Act: Sackett v. EPA*, U. Chi. L. Rev., https://lawreview.uchicago.edu/judicial-destruction-clean-water-act-sackett-v-epa#heading-0 (last visited July 4, 2024).

166 Karina Atkins, *Illinois environmentalists push for state action to protect wetlands after Supreme Court ruling rolls back federal rules*, PHYS ORG (June 6, 2023), https://phys.org/news/2023-06-illinois-environmentalists-state-action-wetlands.html.

167 *Id*.

168 *Id*.

169 *Id*.

170 *Id*.

activities.[171] For instance, the Illinois Interagency Wetland Policy Act of 1989 requires "that there be no overall net loss of the State's existing wetland acres or their functional value due to State supported activities" but imposed an affirmative duty that "State agencies shall preserve, enhance and create wetlands where necessary in order to increase the quality and quantity of the State's wetland resource base."[172] As such, Illinois does not have a comprehensive law affording protection to wetlands and instead relies primarily on Section 401 of the CWA.[173] Unless Illinois expands its protections of wetlands, the *Sackett* decision leaves wetlands even more vulnerable, especially those without a continuous surface connection to navigable waters.[174]

Illinois courts and policymakers will also need to navigate the legal complexities of determining the extent of state versus federal authority in environmental protection.[175] For instance, a critical aspect will be understanding the interplay between state and federal law post-*Sackett*.[176] Illinois lawmakers must ensure that state laws complement rather than contradict federal environmental laws to avoid jurisdictional conflicts.[177] Even so, Illinois may see an increase in litigation, particularly water and wetland management cases.[178] To avoid increased litigation and uncertainty regarding jurisdictional authority, Illinois will be pushed to adopt a more proactive role in regulating wetlands not covered under the CWA.[179]

IV. CONCLUSION

The trio of cases, *Sackett v. EPA*,[180] *Juliana v. US*,[181] and *Board of County Commissioners of Boulder County v. Suncor Energy*,[182] collectively underscore the evolving dynamics of environmental law. These decisions highlight a shift toward more state-level responsibility in environmental protection, the capability of states to address complex environmental

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171 20 ILL. COMP. STAT. 830/1-4 (1993).

172 Robert E. Beck, *The Movement in the United States to Restoration and Creation of Wetlands*, 34 NAT. RESOURCES J.781, 802 (1994) (citing 20 ILL. COMP. STAT. 830/1-4 (1993)).

173 *401 Water Quality Certification*, ILLINOIS GOV, https://epa.illinois.gov/topics/forms/water-permits/401-water-quality-certification.html (last visited Mar. 2, 2024); *see also* 20 ILL. COMP. STAT. 830/1-6 (the Interagency Wetland Policy Act adopting the federal definition of wetlands).

174 *See generally Sackett II*, 598 U.S. 651 (2023).

175 *See generally* Atkins, *supra* note 16#.

176 *Id*.

177 *See generally id*.

178 *See generally id*.

179 *See id*.

180 *See generally Sackett II*, 598 U.S. 651 (2023).

181 *See generally* Juliana v. United States, 947 F.3d 1159 (9th Cir. 2020).

182 *See generally* Bd. of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc., 25 F.4th 1238 (10th Cir. 2022).

litigation, and the growing recognition of climate change as a policy issue.[183] *Sackett* will challenge Illinois to expand its regulatory horizons to protect wetlands that have lost federal protections under the CWA.[184] *Boulder County* endorses that state courts may have to handle complex environmental litigation with broader policy impacts.[185] *Juliana* further cements the judiciary's role in examining the constitutional implications of climate change in its rulings.[186] This evolving landscape suggests that Illinois will have to adapt its legal and regulatory frameworks to balance state and federal guidelines.[187] The implications of these decisions will undoubtedly shape and influence the state's legal responses to environmental challenges.

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183 *See Sacket II*, 598 U.S. 651; *Juliana*, 947 F.3d 1159; *Bd. of Cnty. Comm'rs of Boulder Cnty.,* 25 F.4th 1238.

184 *See generally Sacket II*, 598 U.S. 651.

185 *See generally Bd. of Cnty. Comm'rs of Boulder Cnty*., 25 F.4th 1238.

186 *Juliana*, 947 F.3d 1159.

187 *See generally id.* at 1159.