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# UP IN THE AIR: A FIFTY-STATE SURVEY OF ATMOSPHERIC TRUST LITIGATION BROUGHT BY OUR CHILDREN'S TRUST

Anna Christiansen\*

## *Abstract*

*Frustrated by government inaction in response to the threats posed by anthropogenic climate change, the advocacy organization Our Children's Trust (OCT) is pursuing legal reform in every state in the United States. These efforts include petitioning state environmental agencies for rulemaking and filing lawsuits against those agencies and the states. The legal claims have generally been rooted in the public trust doctrine. This Note surveys OCT's efforts and the evolution of the organization's legal strategy, as OCT has recently based its lawsuits on violations of substantive due process, and in some cases, violations of the states' own environmental laws. This Note summarizes the results of OCT's lawsuits thus far and the possible significance of their outcomes.*

## I. INTRODUCTION

For decades, scientists have sounded the alarm on climate change and the global need to change our ways.<sup>1</sup> Despite grim warnings, our planet continues on a slow and steady march toward irreversible anthropogenic climate change.<sup>2</sup> As a result of

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<sup>1</sup> See *History of the IPCC*, INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, <https://www.ipcc.ch/about/history/> [<https://perma.cc/P4QY-BF9V>] (last visited Oct. 5, 2019). The Intergovernmental Panel on Climate Change (IPCC) has been reporting on the global consequences of climate change in 1990. “The First IPCC Assessment Report . . . underlined the importance of climate change as a challenge with global consequences and requiring international cooperation.” *Id.* The IPCC reviews the state of knowledge on the science of climate change and provides policy recommendations. IPCC’s reporting and recommendations are the work of scientists reviewing thousands of scientific papers published each year. *About the IPCC*, INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, <https://www.ipcc.ch/organization/organization.shtml> [<https://perma.cc/L97A-BS39>] (last visited Jan. 25, 2019).

<sup>2</sup> See Brian Kahn, *The World Passes 400 PPM Threshold. Permanently*, CLIMATE CENT. (Sept. 27, 2016), <http://www.climatecentral.org/news/world-passes-400-ppm-threshold-permanently-20738> [<https://perma.cc/5W2R-G4QM>]; see also Earl J. Ritchie, *Have We Passed the Climate Change Tipping Point?*, FORBES (Mar. 16, 2017), <https://www.forbes.com/sites/uhenergy/2017/03/16/have-we-passed-the-climate-change-tipping-point/#4ee600e7e123> [<https://perma.cc/D9TH-Q8L8>]. Discussions about changes in Earth’s climate system have used a number of terms, including “anthropogenic climate

increasingly polarized public views on climate change,<sup>3</sup> the political system has delivered few solutions.<sup>4</sup> Frustrated with government inaction, individuals and organizations have begun turning to the courts in an effort to compel governments to regulate.<sup>5</sup> These environmental lawsuits, known as atmospheric trust litigation (ATL), have popped up in both state and federal courtrooms across the country.<sup>6</sup> ATL draws on the public trust doctrine, “a legal doctrine that limits governmental authority entity to transfer or develop natural resources that they hold in trust for the public . . . .”<sup>7</sup> Our Children’s Trust (OCT) is a nonprofit, advocacy organization leading the way in litigation efforts against governments in the United States and abroad.<sup>8</sup> OCT’s mission is to compel governments to enact climate recovery policies.<sup>9</sup> The OCT campaign has pursued policy reform in every state in the United States.<sup>10</sup>

This Note examines the current shape of OCT’s legal efforts to force climate policy reform through the state courts. OCT has also brought lawsuits in federal

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change,” “climate change,” and “global warming.” *FAQ: What Is the Difference Between Global Warming and Climate Change?*, U. S. GEOLOGICAL SURV., [https://www.usgs.gov/faqs/what-difference-between-global-warming-and-climate-change-1?qt-news\\_science\\_products=0#qt-news\\_science\\_products](https://www.usgs.gov/faqs/what-difference-between-global-warming-and-climate-change-1?qt-news_science_products=0#qt-news_science_products) [<https://perma.cc/Q5SW-YKFE>] (last visited Oct. 5, 2019). Though laypeople may use these terms synonymously, scientists consider these terms to carry different meanings. *Id.* This Note uses “Anthropogenic climate change” to describe the change in Earth’s climate system as a result of human activities. *Id.* Hereinafter, this Note will shorten the term to “climate change.”

<sup>3</sup> Stuart Capstick et al., *International Trends in Public Perceptions of Climate Change over the Past Quarter Century*, 6 *WIREs CLIMATE CHANGE* 35, 45–46 (Nov. 12, 2014) (noting an increase in skepticism and polarization of public opinion on climate change during the mid to late 2000s).

<sup>4</sup> INT’L ENERGY AGENCY, *WORLD ENERGY OUTLOOK: EXECUTIVE SUMMARY 2018*, 5 (2018), <https://webstore.iea.org/download/summary/190?fileName=English-WEO-2018-ES.pdf> [<https://perma.cc/8UYV-4FPB>] (“Countries are, in aggregate, set to meet the national pledges made as part of the Paris Agreement. But these are insufficient to reach an early peak in global emissions. The projected emissions trend represents a major collective failure to tackle the environmental consequences of energy use.”).

<sup>5</sup> Michael C. Blumm & Mary Christina Wood, *No Ordinary Lawsuit: Climate Change, Due Process, and the Public Trust Doctrine*, 67 *AM. U. L. REV.* 1, 6 (2017).

<sup>6</sup> *Id.* at 21; see *infra* Appendix: Table A [hereinafter Table A]. Table A tracks OCT’s petitions for rulemaking, lawsuits, and the outcomes of those lawsuits in all 50 states.

<sup>7</sup> Ipshita Mukherjee, *Atmospheric Trust Litigation—Paving the Way for a Fossil-Fuel Free World*, STAN. L. SCH. 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/5QRZ-U44A>].

<sup>8</sup> *Our Mission*, OUR CHILDREN’S TRUST, <https://www.ourchildrenstrust.org/mission-statement> [<https://perma.cc/9C9V-8P4C>] (last visited Oct. 5, 2019).

<sup>9</sup> *Id.*

<sup>10</sup> *Other Proceedings in All 50 States*, OUR CHILDREN’S TRUST, <https://www.ourchildrenstrust.org/other-proceedings-in-all-50-states> [<https://perma.cc/QN5Z-FKF6>] (last visited Oct. 5, 2019) [hereinafter CHILDREN’S]. See *infra* Table A.

courts. The most notable case is *Juliana v. United States*, which was dismissed by the Ninth Circuit Court in January 2020 on standing (redressability) and political question grounds, in a split-panel decision.<sup>11</sup> Given the significant attention *Juliana* has already received,<sup>12</sup> this Note focuses on OCT's lesser-discussed efforts in state courts. Building on prior studies of ATL,<sup>13</sup> this Note surveys and summarizes OCT's methods and progress in all fifty states. Other articles have examined specific OCT cases or general challenges that OCT faces.<sup>14</sup> To date, however, there is no comprehensive survey of OCT lawsuits, the substantive claims they are based on, and their outcomes; this Note remedies that void. Part II provides a brief overview of the issue of climate change before exploring the methods OCT employs in its environmental reform efforts. These steps include filing a petition for rulemaking with the relevant state environmental agency and subsequently filing a lawsuit against the state or its environmental agency. Part III examines the current status of OCT's state-by-state efforts, organizing the analysis of these efforts into petitions for rulemaking and lawsuits. The lawsuits are then classified as unsuccessful, successful, or pending, with special attention given to cases that are still pending. This survey notes challenges, trends, changes, and the outlook for ATL across the United States. Though OCT has not received many successful rulings, this Note finds that failed lawsuits can serve as a form of judicial feedback that can help environmental advocates shape their claims to bring stronger lawsuits in the future.

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<sup>11</sup> *Juliana v. United States*, 947 F.3d 1159, 1171 (9th Cir. 2020) ("Any effective plan would necessarily require a host of complex policy decisions entrusted to the wisdom and discretion of the executive and legislative branches."); *see also* *Juliana v. United States*, 217 F. Supp. 3d 1224 (D. Or. 2016), an earlier decision in the *Juliana* case declining to dismiss the action and holding that the case did not present a nonjusticiable political question, finding that the plaintiffs did not lack standing, and recognizing that the public trust doctrine is incorporated in the Due Process Clause of the U.S. Constitution.

<sup>12</sup> The scholarly attention has mostly been directed at the significance of the landmark 2016 decision. *See, e.g.,* Zachary L. Berliner, *What About Uncle Sam? Carving a New Place for the Public Trust Doctrine in Federal Climate Litigation*, 21 U. PA. J.L. & SOC. CHANGE 339, 354–56 (2018) (opining on the political and policy implications of *Juliana*, 217 F. Supp. 3d 1224, regardless of the final outcome of the case). *See generally* Blumm & Wood, *supra* note 5 (discussing the significance of *Juliana*, 217 F. Supp. 3d 1224); Melissa Powers, *Juliana v. United States: The Next Frontier in U.S. Climate Mitigation?*, 27 REV. EUROPEAN COMP. & INT'L ENVTL. L. 199 (2018) (exploring the political climate and potential usefulness of *Juliana*, 217 F. Supp. 3d 1224).

<sup>13</sup> *See generally* Blumm & Wood, *supra* note 5 (exploring OCT's legal strategies and *Juliana*, 217 F. Supp. 3d 1224).

<sup>14</sup> *See* Berliner, *supra* note 12, at 354–56. *See generally* David S. Rubinton, *Save Yourself, Kids: The Atmospheric Trust Litigation*, 32 NAT. RES. & ENVIR. 13 (2017) (exploring the significance of *Juliana*, 217 F. Supp. 3d 1224, and the judicial hurdles to ATL); Jenna Lewis, *In Atmosphere We Trust: Atmospheric Trust Litigation and the Environmental Advocate's Toolkit*, 30 COLO. NAT. RES. ENERGY & ENVTL. L. REV. 361 (2019) (examining selected OCT administrative and judicial efforts in Alaska, Colorado, New Mexico, Oregon, and Washington).

## II. BACKGROUND

Volumes of scientific studies and empirical data have drawn attention to the dramatic increase in carbon pollution since the Industrial Revolution.<sup>15</sup> The amount of carbon dioxide in the Earth's atmosphere is particularly significant because it is "the most important gas for controlling Earth's temperature."<sup>16</sup> As a result of the increase in carbon dioxide and other pollutants that chemically cause atmospheric warming, collectively known as greenhouse gases (GHGs), the Earth has experienced a corresponding increase in global average temperatures.<sup>17</sup> The rise in temperatures has indirectly resulted in an increase in natural disasters across the globe.<sup>18</sup> Increasing atmospheric pollution will ultimately lead to more frequent and prolonged droughts, more frequent and prolonged heatwaves, stronger hurricanes, higher sea levels and larger storm surges, and other changes in temperature and precipitation patterns.<sup>19</sup> Moreover, scientists predict that these impacts will only get worse with additional pollution over time.<sup>20</sup> In 2016, global emissions surpassed 400 parts per million (ppm) of carbon dioxide in the atmosphere, a threshold that scientists believe is a tipping point from which the planet might be unable to return.<sup>21</sup>

The United States is the world's second largest emitter of GHGs,<sup>22</sup> yet the United States has done little to curb the growth of its GHG emissions.<sup>23</sup> Political

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<sup>15</sup> Kahn, *supra* note 2.

<sup>16</sup> *Effects of Changing the Carbon Cycle*, NASA (June 16, 2011), <https://earthobservatory.nasa.gov/features/CarbonCycle/page5.php> [<https://perma.cc/XG5C-T8GX>].

<sup>17</sup> Kahn, *supra* note 2.

<sup>18</sup> See Chelsea Harvey, *Scientists Can Now Blame Individual Natural Disasters on Climate Change*, SCI. AM. (Jan. 2, 2018), <https://www.scientificamerican.com/article/scientists-can-now-blame-individual-natural-disasters-on-climate-change/> [<https://perma.cc/U9BT-YAYV>] (exploring the developing science attributing extreme events to climate change).

<sup>19</sup> *The Effects of Climate Change*, NASA, <https://climate.nasa.gov/effects/> [<https://perma.cc/2PXR-FC9Y>] (last visited Oct. 5, 2019).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*; see also Ritchie, *supra* note 2 ("A few years ago, 400 parts per million for carbon dioxide was widely cited as the tipping point for climate change.").

<sup>22</sup> *Historical GHG Emissions*, CLIMATE WATCH, <https://www.climatewatchdata.org/ghg-emissions> [<https://perma.cc/QQ35-RSJW>] (last visited Oct. 5, 2019) (listing the United States as the world's second largest GHG-producing country in 2014, both in total and per capita).

<sup>23</sup> *The U.S. Domestic Response to Climate Change: Key Elements of a Prospective Program*, PEW CTR. ON GLOBAL CLIMATE CHANGE (2001), [https://www.c2es.org/site/assets/uploads/2001/08/policy\\_inbrief\\_1.pdf](https://www.c2es.org/site/assets/uploads/2001/08/policy_inbrief_1.pdf) [<https://perma.cc/GK9V-9DDP>] (finding that "to address global climate change effectively, the United States must actively pursue real reductions in GHG emissions at home and abroad.").

resistance to regulation,<sup>24</sup> coupled with recent deregulation actions by the Trump Administration,<sup>25</sup> have prompted individuals, as well as state and local governments, to turn to the courts for relief.<sup>26</sup> Through lawsuits, these stakeholders are attempting to hold governments and major polluters accountable for causing, facilitating, or failing to respond to climate change.<sup>27</sup> These lawsuits are of two basic types. The first type consists of lawsuits that seek to use tort law against major corporate GHG emitters and fossil fuel producers. These actions have been largely unsuccessful thus far.<sup>28</sup> The second type of lawsuit is targeted at government institutions. These lawsuits seek to compel governments to affirmatively address climate change using their environmental statutes or hold them accountable for a failure to halt climate change.

This Note focuses on the second type of lawsuit, where stakeholders sue governments to force regulation that would mitigate the causes and impacts of climate change. The first major wave of environmental lawsuits brought against government institutions started in the 1970s.<sup>29</sup> *Massachusetts v. EPA*<sup>30</sup> was the first major U.S. Supreme Court decision in this category, wherein state and local

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<sup>24</sup> JUDITH A. LAYZER, *OPEN FOR BUSINESS: CONSERVATIVES' OPPOSITION TO ENVIRONMENTAL REGULATION* 134 (MIT Press, 2012) (discussing the conservative influence on environmental protections).

<sup>25</sup> For example, the U.S. Environmental Protection Agency under President Trump repealed and is replacing President Obama's Clean Power Plan. *See Affordable Clean Energy Rule*, U.S. ENVTL. PROT. AGENCY, <https://www.epa.gov/stationary-sources-air-pollution/affordable-clean-energy-rule> [<https://perma.cc/C4ET-ZXQG>] (last visited Oct. 5, 2019). President Trump also pulled the United States out of the global climate Paris Accord, which President Obama signed. *Paris Climate Deal: Trump Pulls U.S. Out of 2015 Accord*, BBC (June 1, 2017), <https://www.bbc.com/news/world-us-canada-40127326> [<https://perma.cc/A4BM-8DAP>]; Michael Greshko et al., *A Running List of How President Trump Is Changing Environmental Policy*, NAT'L GEOGRAPHIC (May 3, 2019), <https://news.nationalgeographic.com/2017/03/how-trump-is-changing-science-environment/> [<https://perma.cc/VV8E-4BJY>].

<sup>26</sup> Mukherjee, *supra* note 7.

<sup>27</sup> *Id.*

<sup>28</sup> *See, e.g., City of N.Y. v. BP P.L.C.*, 325 F. Supp. 3d 466, 476 (S.D.N.Y. 2018) (granting motion to dismiss and holding the Clean Air Act displaced the City's federal common law nuisance claims when the City of New York filed suit against oil and gas companies in an effort to recover from damages sustained due to rising sea levels, the cause of which the City attributed to greenhouse gas emissions), *appeal pending*, No. 18-2188 (2d Cir. argued Nov. 22, 2019; *City of Oakland v. BP P.L.C.*, 325 F. Supp. 3d 1017, 1024 (N.D. Cal. 2018) (holding that the Clean Air Act displaces federal common law nuisance claims, and the claims violated separation of powers policy, when the City of Oakland brought suit alleging emissions from defendants' fossil fuel production had created a public nuisance), *appeal pending*, No. 18-16663 (9th Cir. argued Feb. 5, 2020).

<sup>29</sup> *See* David Sive, *The Litigation Process in the Development of Environmental Law*, 19 PACE ENVTL. L. REV. 727, 732–39 (2002) (discussing the environmental law and policy movement of the early 1970s).

<sup>30</sup> 549 U.S. 497 (2007).

governments challenged the EPA's refusal to regulate automobile GHG emissions.<sup>31</sup> *Massachusetts v. EPA*, decided in 2007, came at the tail end of the first major. OCT is leading the second wave of these kinds of lawsuits attempting to hold governments accountable for their failure to protect the environment and respond to climate change.<sup>32</sup>

OCT is litigating a series of cases against governments across the U.S.—and the world—for failure to implement policies that will adequately address anthropogenic climate change.<sup>33</sup> OCT files these lawsuits on behalf of children, whom OCT argues have a “legal right to a stable climate and healthy atmosphere.”<sup>34</sup> Unlike the tort-based climate lawsuits, OCT typically invokes the public trust doctrine<sup>35</sup> and governments' duties as trustees over public resources.<sup>36</sup> The organization's goal is to compel governments to enact legislation that will provide comprehensive strategies to decrease GHG emissions and GHG concentrations in the atmosphere, with the ultimate goal of stabilizing the planet's climate.<sup>37</sup>

Environmental scholars have been closely monitoring these lawsuits. Commentary on OCT's campaign ranges from high praise<sup>38</sup> to critiquing the effort as ineffective and unworkable.<sup>39</sup> Despite criticisms levied against the viability of its

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<sup>31</sup> *Id.* at 505 (holding that the EPA had authority to regulate GHG emissions from automobiles under the Clean Air Act and that any refusal to regulate required grounding within the reasoning of the Act).

<sup>32</sup> See, e.g., Complaint for Declaratory and Injunctive Relief at 22, *Aronow v. State*, No. 62-CV-11-3952, 2012 Minn. Dist. LEXIS 171 (Minn. Dist. Ct. 2012) [hereinafter *Aronow* Plaintiffs' Complaint for Declaratory and Injunctive Relief]; Petition for Original Jurisdiction at 16, *Barhaugh v. State*, 264 P.3d 518 (Mont. 2011) (No. OP11-0258) [hereinafter *Barhaugh* Plaintiffs' Petition for Original Jurisdiction].

<sup>33</sup> *Our Mission*, OUR CHILDREN'S TRUST, *supra* note 8.

<sup>34</sup> *Id.*

<sup>35</sup> See *infra* Section II.B.

<sup>36</sup> See, e.g., 2011 WL 9933983; *Martinez v. Colorado*, No. 11CV4377, 2011 WL 11552495, (Colo. Dist. Ct., Denver Cnty., Nov. 07, 2011); Petition for Judicial Review at 4, *Filippone ex rel. Filippone v. Iowa Dep't of Nat. Res.*, No. 12-0444, 2013 WL 988627 (Iowa Ct. App. 2013) (No. 12-0444); Plaintiffs' Original Petition at 7, *Texas Comm'n on Env'tl. Quality v. Bonser-Lain*, 438 S.W.3d 887 (Tex. App. 2014) (No. 11-002194).

<sup>37</sup> Mukherjee, *supra* note 7.

<sup>38</sup> For example, Professor Blumm explains:

Perhaps the most important aspect of the *Juliana* decision is that it took a courageous and historic step into . . . a gulf between normative law and climate catastrophe, turning a judicial tide of other climate cases—cases that evaded the calls of justice through procedural maneuvers—to address the climate reality unflinchingly and to accept the institutional “grace of responsibility” with exacting jurisprudential care and considerable doctrinal mooring.

Blumm & Wood, *supra* note 5, at 87.

<sup>39</sup> See generally Andrew Ballentine, *Full of Hot Air: Why the Atmospheric Trust Litigation Theory Is an Unworkable Attempt to Expand the Public Trust Doctrine Beyond Its*

efforts, the campaign is nevertheless pressing forward and challenging legal precedent. Given the extensive existing discussions about the public trust doctrine and the significance of ATL,<sup>40</sup> this Note only briefly discusses that doctrine in Section B of this Part and largely refrains from opining on the wisdom of ATL. The focus of this Note is to track both OCT's methods for reform and the state-by-state outcomes of these efforts. Before discussing OCT's specific actions and outcomes in Part III, this Part details the mechanics of the process. As Section A explains, before filing a lawsuit, the first step in OCT's process is generally filing a petition for rulemaking with the respective state environmental agency.

### A. *Petitions for Rulemaking*

In 2011, OCT began its reform efforts with a sweeping campaign of petitions for rulemaking in nearly every state in the United States.<sup>41</sup> OCT petitioned state environmental agencies to enact rules that would reduce statewide GHG emissions to a level consistent with scientific projections for the global emissions reductions needed to achieve climate stability.<sup>42</sup>

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*Common Law Foundations*, 12 DARTMOUTH L.J. 98 (2014) (examining obstacles to the atmospheric trust theory); Caroline Cress, *It's Time to Let Go: Why the Atmospheric Trust Won't Help the World Breathe Easier*, 92 N.C. L. REV. 236, 241–42 (2013) (exploring theoretical concerns with and limitations of the atmospheric trust theory).

<sup>40</sup> See generally Blumm & Wood, *supra* note 5; Berliner, *supra* note 12; Ballentine, *supra* note 39; Cress, *supra* note 39.

<sup>41</sup> Press Release, Our Children's Trust, Youth Sue the Government to Preserve the Future & Halt Climate Change (May 4, 2011), [https://static1.squarespace.com/static/571d109b04426270152febe0/t/576d76cb3e00bec5631952d1/1466791631209/iMatter\\_Legal\\_Release\\_11.05.01.pdf](https://static1.squarespace.com/static/571d109b04426270152febe0/t/576d76cb3e00bec5631952d1/1466791631209/iMatter_Legal_Release_11.05.01.pdf) [<https://perma.cc/33DA-9N5U>]. The exceptions are Arizona, California, Kansas, Minnesota, Montana, New Jersey, and Oregon. It is not clear why OCT excepted these states from its nationwide campaign. The difficulty of coordinating petitions across fifty states is presumably one reason. See *Our Mission*, OUR CHILDREN'S TRUST, *supra* note 8. In three states—Alaska, Colorado, and New Mexico—OCT filed lawsuits as an initial step and later filed petitions for rulemaking. See *infra* Table A.

<sup>42</sup> See, e.g., Petition of Youth Petitioners and Alaska Youth for Env'tl. Action to the Alaska Dep't of Env'tl. Conservation at 3–5 (Aug. 28, 2017), [https://static1.squarespace.com/static/571d109b04426270152febe0/t/59a491ee3e00beb9e2449170/1503957493116/ALASKA+PETITION.08-28-17\\_Redacted.pdf](https://static1.squarespace.com/static/571d109b04426270152febe0/t/59a491ee3e00beb9e2449170/1503957493116/ALASKA+PETITION.08-28-17_Redacted.pdf) [<https://perma.cc/2EPR-P34V>]; Petition of Xiuhtezcatl Martinez et al. to the Colo. Oil & Gas Conservation Comm'n & Colo. Dep't of Nat. Res. at 3–4 (Nov. 15, 2013), <https://static1.squarespace.com/static/571d109b04426270152febe0/t/5760d25fab48de66f7214e4d/1465963105219/COFrackingPetition.pdf> [<https://perma.cc/JMK8-PVBX>]; Petition of Kim Twist and Kids vs Global Warming to the R.I. Dep't of Env'tl. Mgmt. & Off. of Air Res. at 2–3 (May 4, 2011), <https://static1.squarespace.com/static/571d109b04426270152febe0/t/57858c974402432759d17789/1468370073984/Rhode+Island+Petition.pdf> [<https://perma.cc/2FKY-K2EG>]; see also *infra* Table A.



Administrative petitions are generally a prudent first step for activists for several reasons. First, state and federal laws typically grant interested persons the right to petition an agency for the creation of a rule.<sup>43</sup> Every state employs an administrative agency to manage its environmental affairs,<sup>44</sup> giving activists an identifiable authority to petition. If all goes well for the petitioner, the agency will promulgate and enforce the rule. However, petitions for rulemaking are not a guaranteed method for success. Agencies may deny petitions without so much as a hearing, depending on the particular agency's enabling statute.<sup>45</sup> For example, the only legal requirement imposed on federal agencies by the Administrative Procedure Act is that agencies give prompt notice of denial along with a brief statement of grounds.<sup>46</sup>

Though petitions for rulemaking seldom result in new law,<sup>47</sup> the process is nevertheless an important first step and may, in fact, be a threshold that must be met for a complaint to proceed in court. In instances where OCT has skipped petitioning for rulemaking and proceeded directly to filing lawsuits, the courts have sometimes dismissed actions for failure to exhaust administrative remedies.<sup>48</sup> Thus, by filing a petition first, claimants demonstrate that they have tried to resolve their claims through the executive arm of the law and may eliminate a statutory barrier to review.<sup>49</sup> After a petition for rulemaking is denied, OCT next files a claim in court, as detailed in the next section.

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<sup>43</sup> See, e.g., 5 U.S.C. § 553(e) (2018); ALASKA STAT. § 44.62.220 (2018); GA. CODE ANN. § 50-13-8 (2018); IND. CODE § 13-14-8-5 (2018); UTAH CODE ANN. § 63G-3-601(3) (West 2018); see also *Petitions for Rulemaking*, U.S. ENVTL. PROT. AGENCY, <https://www.epa.gov/aboutepa/petitions-rulemaking> [<https://perma.cc/VZ9A-JQ2Z>] (last visited Oct. 5, 2019) (“Any regulatory action that follows as a result of a petition for rulemaking would still be shaped by the typical outreach used by the agency to gather stakeholder input, and is still subject to any applicable notice and comment requirements.”).

<sup>44</sup> *Health and Environmental Agencies of the U.S. States and Territories*, U.S. ENVTL. PROT. AGENCY, <https://www.epa.gov/home/health-and-environmental-agencies-us-states-and-territories> [<https://perma.cc/49X2-9PM8>] (last visited Oct. 5, 2019).

<sup>45</sup> ADMIN. CONF. OF THE U.S., RECOMMENDATION 2014-6: PETITIONS FOR RULEMAKING 1 (2014), <https://www.acus.gov/sites/default/files/documents/Final%2520Petitions%2520for%2520Rulemaking%2520Recommendation%2520%255B12-9-14%255D.pdf> [<https://perma.cc/EZK5-JFUR>] (“The statute generally does not establish procedures agencies must observe in connection with petitions for rulemaking.”).

<sup>46</sup> *Id.* at 1–2 (citing 5 U.S.C. § 555(e)).

<sup>47</sup> See generally ADMIN. CONF. OF THE U.S., *supra* note 45, at 2 (describing the administrative petition process and noting that few agencies even have an official procedure in place for evaluating petitions); see also *infra* Table A.

<sup>48</sup> See *Barhaugh v. State*, 264 P.3d 518, 518 (Mont. 2011); *Farb v. Kansas*, No. 12-C-1133, slip op. at 3 (Kan. Dist. Ct. June 4, 2013).

<sup>49</sup> Administrative procedure laws generally require that there be “final agency action” before an agency action is reviewable in court, and therefore serve as a barrier to lawsuits that would otherwise be brought following tentative agency proceedings. See, e.g., 5 U.S.C. § 704 (“Agency action made reviewable by statute and final agency action for which there

*B. Claims for Relief: Public Trust, Due Process, and Equal Protection*

OCT's claims are rooted in the traditional doctrine of the public trust.<sup>50</sup> These claims are progressive, however, in how they ask the courts to apply the doctrine.<sup>51</sup> The public trust doctrine is a common law principle which dictates that the state is responsible for protecting the public's rights in commonly held natural resources.<sup>52</sup> The doctrine has historically been applied to protect the public's rights to use navigable waterways for fishing, commerce, and navigation.<sup>53</sup> The U.S. Supreme Court and many states trace this doctrine back to the Roman Empire,<sup>54</sup> and it has been recognized in the U.S. since the early years of the nation.<sup>55</sup> In 1892, the U.S. Supreme Court in *Illinois Central Railroad Co. v. Illinois* confirmed that the public trust doctrine is a responsibility of the states that state governments cannot abdicate.<sup>56</sup>

Around the 1970s, some states began expanding the public trust doctrine to protect additional natural resources beyond water,<sup>57</sup> but until recently the courts had never interpreted the Earth's atmosphere to be within the scope of the doctrine.<sup>58</sup>

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is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action.”).

<sup>50</sup> *Barhaugh* Plaintiffs' Petition for Original Jurisdiction, *supra* note 32, at 16; *Aronow* Plaintiffs' Complaint for Declaratory and Injunctive Relief, *supra* note 32, at 22.

<sup>51</sup> *See id.*

<sup>52</sup> *Public Trust Doctrine*, BLACK'S LAW DICTIONARY (11th ed. 2015).

<sup>53</sup> Robin Kundis Craig, *A Comparative Guide to the Western States' Public Trust Doctrines: Public Values, Private Rights, and the Evolution Toward an Ecological Public Trust*, 37 *ECOLOGY L.Q.* 53, 57 (2010) (discussing the basic protections of the public trust doctrine and the differences between eastern and western states' public trust).

<sup>54</sup> *Id.* at 59; *Martin v. Waddell's Lessee*, 41 U.S. 367, 413 (1842) (holding public trust doctrine applies in the U.S.).

<sup>55</sup> *Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 455–56 (1892).

<sup>56</sup> *Id.* at 453 (“The state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them . . . than it can abdicate its police powers in the administration of government and the preservation of the peace.”).

<sup>57</sup> William D. Araiza, *The Public Trust Doctrine as an Interpretive Canon*, 45 *U.C. DAVIS L. REV.* 693, 704 (2012).

<sup>58</sup> *See* *Butler v. Brewer*, No. 1 CA-CV 12-0347, 2013 WL 1091209, at \*2 (Ariz. Ct. App. Mar. 14, 2013) (noting the petitioner's own arguments acknowledged there was no judicial precedent extending the public trust doctrine to the atmosphere as a public trust resource); *Aronow v. State*, No. A12-0585, 2012 WL 4476642, 2012 Minn. App. Unpub. LEXIS 961, at \*6 (Minn. App. Ct. Oct. 1, 2012) (“[W]e are aware of no case law from Minnesota, or any other jurisdiction, in which a court has expanded the scope of the public-trust doctrine to include the atmosphere.”). *But see* *Bonser-Lain v. Tex. Comm'n on Env'tl. Quality*, No. D-1-GN-11-002194, 2012 WL 3164561, at \*1 (Tex. Dist. Ct. Aug. 2, 2012) (holding the Texas Constitution protects all natural resources), *vacated*, *Texas Comm'n on Env'tl. Quality v. Bonser-Lain*, 428 S.W.3d 887 (Tex. App. 2014) (vacating on other grounds).

OCT's claims seek to expand the scope of the public trust. OCT's prayers for relief ask the courts to declare that: (1) the air and atmosphere are included in the public trust doctrine; (2) the government has an affirmative duty to protect the atmosphere under the public trust doctrine; and (3) the government has violated its duty under the public trust doctrine.<sup>59</sup>

### C. Grounds for Dismissal: Justiciability

The initial major hurdles that OCT's claims face are justiciability requirements,<sup>60</sup> which limit courts' authority to hear certain types of complaints. Federal justiciability rules originate from Article III of the U.S. Constitution, which limits federal courts to hearing "cases" and "controversies."<sup>61</sup> The U.S. Supreme Court has interpreted Article III as prohibiting federal courts from hearing claims of generalized grievances,<sup>62</sup> from issuing advisory opinions,<sup>63</sup> and from hearing claims that are moot or not ripe.<sup>64</sup> Most importantly, Article III prevents federal courts from hearing cases where the parties do not have standing<sup>65</sup> and cases that present a political question.<sup>66</sup> Where courts have dismissed OCT lawsuits, the grounds have most commonly been because the core issues presented political questions or there was a lack of standing.<sup>67</sup>

Justiciability requirements of state courts can vary. While Article III does not govern state courts, the majority of states have chosen to adopt the federal constitutional standing requirements.<sup>68</sup> About half of the states have adopted the standing requirements that the U.S. Supreme Court articulated in *Lujan v. Defenders of Wildlife*.<sup>69</sup> *Lujan* requires that, in order to establish constitutional standing in federal court, a plaintiff must have suffered injury in fact, the defendant must have

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<sup>59</sup> *Barhaugh Plaintiffs' Petition for Original Jurisdiction*, *supra* note 32, at 16; *Aronow Plaintiffs' Complaint for Declaratory and Injunctive Relief*, *supra* note 32, at 22.

<sup>60</sup> See Ballentine, *supra* note 39, at 127–33.

<sup>61</sup> U.S. CONST. art. III, §2.

<sup>62</sup> See, e.g., *Sierra Club v. Morton*, 405 U.S. 727, 740–41 (refusing to hear a claim alleging a generalized grievance without alleging harm to an individual).

<sup>63</sup> See, e.g., *De Funis v. Odegaard*, 416 U.S. 312, 319–20 (1974) (refusing to hear moot claim where any holding would effectively be an advisory opinion).

<sup>64</sup> See, e.g., *id.* at 316–17 (refusing to hear a claim where the controversy between the parties had ceased to be definite and concrete).

<sup>65</sup> See, e.g., *Sierra Club v. Morton*, 405 U.S. 727, 739–41 (1972) (holding that the plaintiff lacked standing because it failed to show that its members specifically were "adversely affected"); *Baker v. Carr*, 369 U.S. 186, 204 (1962) (requiring a plaintiff to allege a personal stake in the outcome of a controversy).

<sup>66</sup> *Baker*, 369 U.S. at 210 ("The nonjusticiability of a political question is primarily a function of the separation of powers.").

<sup>67</sup> See *infra* Table A.

<sup>68</sup> Wyatt Sassman, *A Survey of Constitutional Standing in State Courts*, 8 KY. J. EQUINE AGRIC. & NAT. RES. L. 349, 353 (2015).

<sup>69</sup> 504 U.S. 555 (1992).

caused the injury, and the injury must be such that a favorable holding will be able to provide the plaintiff relief.<sup>70</sup>

Justiciability is further constrained by the U.S. Supreme Court doctrine that prohibits federal courts from deciding political questions.<sup>71</sup> As the Court explained in *Baker v. Carr*, a claim is deemed to be a nonjusticiable political question if the question involves any of the following factors:

[1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.<sup>72</sup>

Political questions are issues deemed to be fundamentally political—not legal—and therefore should be left to the political process.<sup>73</sup> Like the limits on standing discussed above, the political question doctrine is a limit on federal courts which not all states have adopted.<sup>74</sup> In state courts that have adopted the *Baker* factors, ATL is often felled by these requirements.<sup>75</sup>

### III. OCT ACTIONS AND OUTCOMES

This Part provides a breakdown of OCT's reform methods, activities, and the present status of these efforts in each state. OCT has primarily used two methods to pursue legal reform: petitions for rulemaking and lawsuits. These approaches are neither mutually exclusive nor wholly interdependent—although, as noted above, a petition can benefit a lawsuit while the absence of a petition can harm a lawsuit.<sup>76</sup> Most often, OCT has pursued rulemaking without filing a lawsuit.<sup>77</sup> Among states

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<sup>70</sup> *Id.* at 573.

<sup>71</sup> *See Baker*, 369 U.S. at 210.

<sup>72</sup> *Id.* at 217.

<sup>73</sup> *Zivotofsky v. Clinton*, 566 U.S. 189, 206 (2012) (stating that federal courts should “stay their hand in cases implicating question concerning the distribution of political authority between coordinate branches” unless a dispute is incapable of resolution by the political process).

<sup>74</sup> Helen Hershkoff, *State Courts and the Passive Virtues: Rethinking Judicial Function*, 114 HARV. L. REV. 1833, 1837, 1863–68 (2001).

<sup>75</sup> *See infra* Section II.B.1.a.

<sup>76</sup> *See supra* note 49 and accompanying text.

<sup>77</sup> *See infra* Table A.

where OCT has filed suit, the actions were preceded by a petition for rulemaking in about half of the states.<sup>78</sup> OCT has made focused, repeated attempts at reform in states like Washington and Alaska.<sup>79</sup> In states where OCT has made more than one effort for reform (a single effort being a lawsuit or petition), OCT has generally pursued both a petition and a lawsuit.<sup>80</sup>

Figure 1 displays a map of the states where OCT has pursued petitions for rulemaking. On May 4, 2011, OCT filed petitions for rulemaking in thirty-six states.<sup>81</sup> The states that were part of this initial campaign are labeled “May 2011 Petition for Rulemaking.” States in which OCT first pursued a lawsuit and later filed a petition for rulemaking are classified as “Secondary Action” states. “Delayed Petition” indicates states in which OCT filed a petition after the organization’s initial May 2011 campaign. States in which OCT has not filed a petition for rulemaking are identified as “No Petition.” These labels do not reflect states where OCT initiated lawsuits. OCT lawsuits are mapped in Figure 2 in Section III.B.

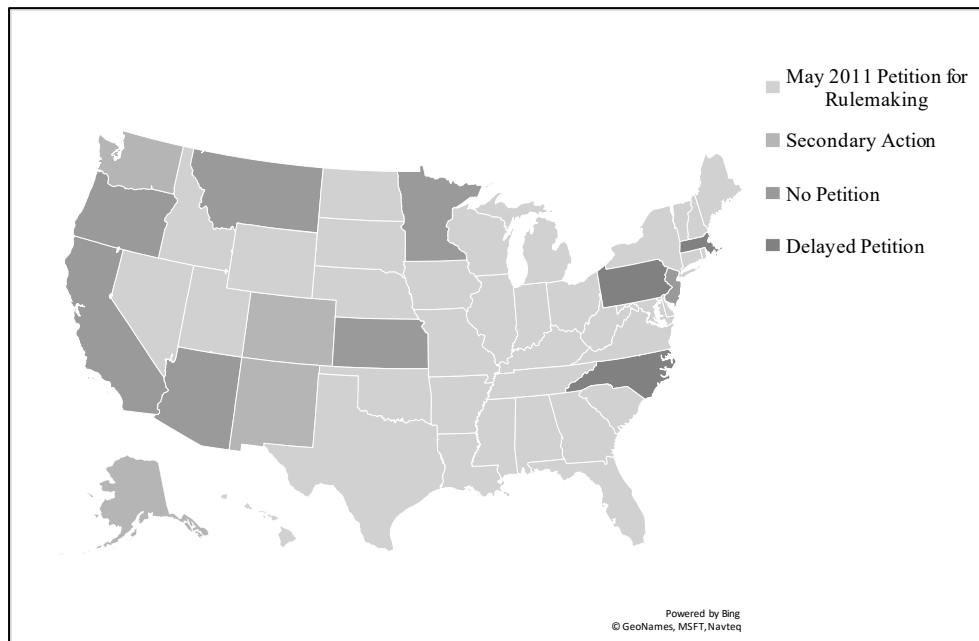
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<sup>78</sup> See *infra* Table A.

<sup>79</sup> See *infra* Sections III.B.2.b and III.B.3.d, respectively; see also *infra* Table A.

<sup>80</sup> See *infra* Table A.

<sup>81</sup> The thirty-six states where OCT filed rulemaking petitions during its May 4, 2011 campaign were Alabama, Arkansas, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Maryland, Michigan, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New York, North Dakota, Ohio, Oklahoma, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, West Virginia, Wisconsin, and Wyoming. See *infra* Table A.

**Figure 1: OCT Petitions for Rulemaking**<sup>82</sup>*A. Petitions for Rulemaking*

In total, OCT has filed petitions for rulemaking in forty-three states.<sup>83</sup> In thirty-three of these, OCT's efforts have not gone beyond a petition for rulemaking.<sup>84</sup> Not one state has granted an OCT petition for rulemaking.<sup>85</sup> States' common reasons for petition denial include inability, inefficacy, and redundancy.<sup>86</sup> More specifically,

<sup>82</sup> See *infra* Table A. This map reports Alabama as having not filed a petition. In Alabama, OCT filed a petition but then withdrew the petition before the Environmental Management Commission could make a decision on it. *Id.*

<sup>83</sup> See *infra* Table A.

<sup>84</sup> See *supra* Figure 1. The thirty-three states with no further OCT actions are Alabama, Arkansas, Connecticut, Delaware, Georgia, Hawaii, Idaho, Illinois, Indiana, Kentucky, Louisiana, Maine, Maryland, Michigan, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New York, North Dakota, Ohio, Oklahoma, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Virginia, West Virginia, Wisconsin, and Wyoming. See *infra* Table A.

<sup>85</sup> See *infra* Table A.

<sup>86</sup> See, e.g., Letter from John Corra, Dir., Wyo. Dep't of Env'tl. Quality, to Alec Loorz (June 8, 2011), <https://static1.squarespace.com/static/571d109b04426270152febe0/t/576821f9197aea07289080f2/1466442233893/WY+Denial.pdf> [https://perma.cc/MZ3Y-9FUW] (regarding Carbon Dioxide Rulemaking Petition Dated May 4, 2011); Letter from Robert Hodanbosi, Chief, Div. of Air Pollution Control, Ohio Env'tl. Protection Agency, to Lynne Nickol 2-4 (Sept. 1, 2011), <https://static1.squarespace.com/static/571d109b04426270152fe>

agencies' denials often cite one or more of the following contentions: that the agency lacks the authority to do what the petition asks; that the state, as a solo regulator, could not accomplish the goal of the rule (i.e., to stop or slow climate change); or that other agency activities are already addressing the petition's concerns.<sup>87</sup>

Maine is the only state that did not all-out deny every OCT petition for rulemaking, but the state has nevertheless declined to grant OCT's petitions. OCT filed its first petition for rulemaking with the Maine Department of Environmental Protection (MEDEP) as part of OCT's 2011 campaign.<sup>88</sup> The MEDEP denied OCT's first petition, as well as a second petition filed in 2016.<sup>89</sup> In January 2018, OCT filed a third petition with the MEDEP.<sup>90</sup> In contrast to the prior pattern of quick denial, the MEDEP extended the time for public comments, but the petition ultimately died when the MEDEP failed to act on the petition before the end of the statutory rulemaking deadline.<sup>91</sup> A state report noted the petition failed to recommend GHG limits, implying this omission contributed to the MEDEP's inaction.<sup>92</sup>

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be0/t/57681baae3df28ef7406a966/1466440619015/Ohio+Denial.pdf [https://perma.cc/28CU-3AAD] (denying petition for rulemaking); DEP'T OF ENVTL. QUALITY STATE OF OKLA., TRANSCRIPT OF PROCEEDINGS OF THE AIR QUALITY COUNCIL MEETING HELD ON JULY 20, 2011 64–67, 93 (July 20, 2011) [hereinafter AIR QUALITY COUNCIL MEETING TRANSCRIPT] (discussing and denying petition for rulemaking).

<sup>87</sup> Letter from John Corra to Alec Loorz, *supra* note 86; Letter from Robert Hodanbosi to Lynne Nickol, *supra* note 86.

<sup>88</sup> In the Matter of Gabrielle Beth Bellegarde & Kids vs Global Warming, Request for the Adoption of a Rule, Me. Dep't of Env'tl. Protection (May 4, 2011), <https://static1.squarespace.com/static/571d109b04426270152febe0/t/57859c1d579fb3892cabaa05/1468374047224/Maine.pdf> [https://perma.cc/MZ5Q-AFXM].

<sup>89</sup> Citizen Petition to Initiate Rulemaking, Me. Dept. of Env'tl. Protection (Sept. 27, 2016), <https://static1.squarespace.com/static/571d109b04426270152febe0/t/57eae08d482e9f4d4755628/1475013386026/2016.09.27%2C+Maine+Petition+FINAL.pdf> [https://perma.cc/VPD3-42SB]; *Proceedings in All 50 States: Maine*, OUR CHILDREN'S TRUST, <https://www.ourchildrenstrust.org/maine> [https://perma.cc/7KKL-5MLT] (last visited Oct. 5, 2019) [hereinafter *Proceedings in All 50 States: Maine*] (noting the denial of the petitions for rulemaking).

<sup>90</sup> Citizen Petition to Initiate Rulemaking Pursuant to 5 M.R.S.A. § 8055, 693 Voters Registered in the State of Maine and 33 Youth Petitions, to Maine Dep't of Env'tl. Protection (Jan. 24, 2018), <http://maine-climate-protectors.org/uploads/Petition%201-23-18%20FINAL.pdf> [https://perma.cc/JUP2-3KD8] [hereinafter Maine Citizen Petition].

<sup>91</sup> Weekly Notices of State Rulemaking: Public Input for Proposed & Adopted Rules, Me. Dep't of the Sec'y of State (June 27, 2018), <https://www.maine.gov/sos/cec/rules/notices/2018/062718.html> (noting the extension of the period for public comment on the OCT petition for rulemaking); MAINE INTERAGENCY CLIMATE ADAPTATION WORK GROUP, MAINE PREPARES FOR CLIMATE CHANGE 2019 UPDATE 5 (Jan. 2019), <https://www.maine.gov/dep/sustainability/climate/MainePreparesforClimateChange2019Update.pdf> [https://perma.cc/3ND3-JEAG]; see also ME. REV. STAT. ANN. 5 § 8052(7)(A) (2011) (stating that a rule may not take effect unless an agency adopts it within 120 day(s)).

<sup>92</sup> MAINE INTERAGENCY CLIMATE ADAPTATION WORK GROUP, *supra* note 91, at 5 (2019) (“[T]he Petitioners proposed language establishing emissions limits for GHGs, but

OCT's efforts in Maine are unique in that OCT has filed three petitions for rulemaking, but no lawsuit.<sup>93</sup> OCT likely focused its efforts in Maine on petitions for rulemaking because Maine has a unique statute that outlines specific goals for reducing Maine's GHG emissions.<sup>94</sup> This statute gives OCT substantial grounds for advancing a petition because the environmental goals, such as a "clean energy economy transition plan,"<sup>95</sup> are already legislatively enacted. OCT should continue to learn from its prior petitions and file a fourth petition that specifies GHG limits that will accomplish these goals.

### B. Litigation

OCT has filed twenty-one lawsuits against a total of sixteen states.<sup>96</sup> This Section breaks down the outcomes of these cases into categories of dismissed, successful, or pending actions. The actual outcomes of the litigation in some states, such as Washington and Colorado, resist such simplified classifications; nevertheless, this Section attempts to organize the cacophony of decisions.<sup>97</sup> Notably, OCT has filed suit twice in the states of Alaska,<sup>98</sup> Colorado,<sup>99</sup> and North Carolina,<sup>100</sup> and three times in Washington.<sup>101</sup> These repeat lawsuits exemplify the

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left blank the actual numerical limits. [ME]DEP did not receive recommendations for the numerical limits, and did not adopt the proposed rules prior to expiration of the statutory rulemaking period.").

<sup>93</sup> See *infra* Table A.

<sup>94</sup> See ME. REV. STAT. ANN. tit. 38, §§ 576-A–579 (2018).

<sup>95</sup> *Id.* § 577(4).

<sup>96</sup> The states are Alaska, Arizona, California, Colorado, Florida, Iowa, Kansas, Massachusetts, Minnesota, Montana, New Mexico, North Carolina, Oregon, Pennsylvania, Texas, and Washington. See *infra* Table A.

<sup>97</sup> *Id.*

<sup>98</sup> See *Kanuk ex rel. Kanuk v. State Dep't of Nat. Res.*, 335 P.3d 1088 (Alaska 2014); *Sinnok v. State*, No. 3AN-17-09910 CI, 2018 WL 7501030 (Alaska Super. Ct., Anchorage Oct. 30, 2018), *appeal docketed*, No. S-17297 (Alaska filed Nov. 29, 2018).

<sup>99</sup> See *Martinez v. Colorado*, No. 11CV4377, 2011 WL 11552495, (Colo. Dist. Ct., Denver Cnty., Nov. 07, 2011) (dismissing the first case); *Martinez v. Colo. Oil & Gas Conservation Comm'n*, No. 2014-CV-32637, 2014 WL 7474553 (Colo. Dist. Ct., Denver Cnty., Dec. 24, 2014), *rev'd*, 434 P.3d 689 (Colo. App. 2017), *rev'd*, 433 P.3d 22 (Colo. 2019) (ruling for defendant in second case).

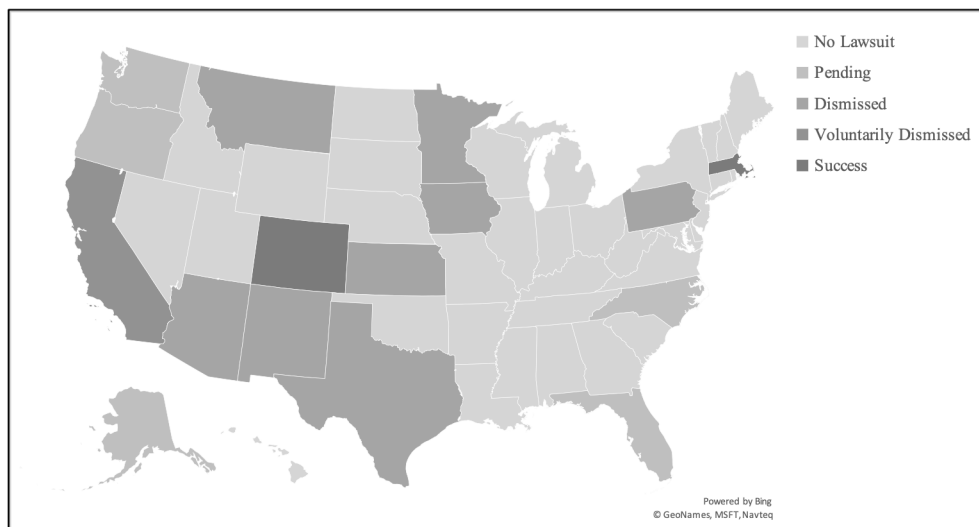
<sup>100</sup> See Petitioner's Brief, *Turner v. N.C. Env'tl. Mgmt. Comm'n*, No. 15-CVS-2488 (N.C. Wake Cty. Ct. May 29, 2015) [hereinafter *Turner* Petitioner's Brief]; *Active State Legal Actions: North Carolina*, OUR CHILDREN'S TRUST, <https://www.ourchildrenstrust.org/north-carolina> [<https://perma.cc/CWH4-PAS2>] (last visited Nov. 15, 2019) [hereinafter *Active State Legal Actions: North Carolina*] (noting filing of petition for Judicial Review on June 6, 2018).

<sup>101</sup> *Svitak v. Washington*, No. 11-2-16008-4 SEA, 2011 WL 12686902 (Wash. Super. Ct., Kings Cty. Mar. 2, 2012), *aff'd*, *Svitak ex rel. Svita v. State*, No. 69710-2-I, 2013 WL 6632124 (Wash. Ct. App. Dec. 16, 2013); *Foster v. Washington Dep't of Ecology*, No. 14-2-25295-1SEA, 2015 WL 7721362 (Wash. Super. Ct., Kings Cty. Nov. 19, 2015), *partially*



evolution of OCT's complaints as the organization responds to judicial feedback. The most recent lawsuits have advanced additional claims and issues, the significance of which is discussed in Part IV.

**Figure 2: OCT Lawsuits Filed**<sup>102</sup>



### 1. Dismissed Lawsuits

Of the twenty-one lawsuits OCT filed, courts have dismissed eight.<sup>103</sup> The state courts dismissed these claims on similar and interrelated grounds—including standing, the political question doctrine, failure to exhaust administrative remedies, and statutory reasons. Four out of the eight dismissals involved justiciability issues.<sup>104</sup> Six cases encountered hurdles involving substantive environmental statutes.<sup>105</sup>

*overruled by* 2016 WL 11359472 (Wash. Super. Ct., Kings Cty. May 16, 2016), *rev'd*, No. 75374–6–I, 2017 WL 3868481 (Wash. Ct. App. Sept. 5, 2017); *Aji P. v. State*, No. 18-2-04448-1 (Wash. Super. Ct., Kings Cty. Aug. 14, 2018), *appeal docketed*, No. 80007-8 (Wash. Ct. App. June 5, 2019).

<sup>102</sup> Figure 2: OCT Claims Filed is a simplified representation of the present status of OCT's active litigation. States such as Alaska, Colorado, North Carolina, and Washington have had mixed results that are not fully reflected in Figure 2.

<sup>103</sup> The total of twenty lawsuits includes the second lawsuits filed in Alaska, Colorado, North Carolina, and Washington in the count, as well as the voluntarily dismissed California lawsuit.

<sup>104</sup> Arizona, Montana, New Mexico, and Washington. *See infra* Section III.B.1(a).

<sup>105</sup> Kansas, New Mexico, Pennsylvania, Texas, Iowa. *See infra* Section III.B.1(b).

*a) Justiciability*

As Professor Blumm observes, it is “often the case in climate lawsuits against the government, [that the] defendants [raise] procedural defenses involving the political question doctrine and the doctrine of standing.”<sup>106</sup> As a result, justiciability—specifically, standing and the political question doctrine—was a substantial contributor to the dismissal of claims in Arizona,<sup>107</sup> New Mexico,<sup>108</sup> and Washington.<sup>109</sup>

In 2013, the Arizona Court of Appeals found that the plaintiff did not provide the court any constitutional basis on which to find a state violation based on government inaction, and consequently held that the plaintiff lacked standing because there was no basis on which relief might be granted.<sup>110</sup> The New Mexico Court of Appeals held in 2015 that the separation of powers doctrine would be violated by a decision favorable to the plaintiff’s atmospheric trust claim.<sup>111</sup> The court ruled that, although the State of New Mexico has a public trust duty to protect the atmosphere under the state constitution, the executive branch provides adequate procedures for implementing regulations, and the courts cannot independently regulate GHG emissions.<sup>112</sup> In 2013, the Washington Court of Appeals held that the plaintiffs did not have standing because the claims failed to challenge an affirmative action of the state and presented political questions.<sup>113</sup>

*b) Environmental Statutory Hurdles*

While justiciability has been a major hurdle, the hurdle which has felled the most ATL claims has been the states’ respective environmental statutes. At first glance, it might seem that states with comprehensive environmental laws would provide stronger grounds for ATL, but the statutory schemes often cut both ways.

Comprehensive state environmental laws can undermine reform efforts by displacing common law public trust claims. Indeed, courts in Kansas and New

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<sup>106</sup> Blumm & Wood, *supra* note 5, at 30.

<sup>107</sup> *Butler v. Brewer*, No. 1 CA-CV 12-0347, 2013 WL 1091209, at \*5–7 (Ariz. Ct. App. Mar. 14, 2013).

<sup>108</sup> *Sanders-Reed ex rel. Sanders-Reed v. Martinez*, 350 P.3d 1221, 1227 (N.M. Ct. App. 2015).

<sup>109</sup> *Svitak v. Washington*, No. 11-2-16008-4 SEA, 2011 WL 12686902 (Wash. Super. Ct., Kings Cty. Mar. 2, 2012), *aff’d*, *Svitak ex rel. Svita v. State*, No. 69710-2-I, 2013 WL 6632124, at \*2–3 (Wash. Ct. App. Dec. 16, 2013); *Aji P. v. State*, No. 18-2-04448-1, slip op. at 3 (Wash. Super. Ct., Kings Cty. Aug. 14, 2018), *appeal docketed*, No. 80007-8 (Wash. Ct. App. June 5, 2019).

<sup>110</sup> *Butler*, 2013 WL 1091209, at \*5–7.

<sup>111</sup> *Sanders-Reed*, 350 P.3d at 1227.

<sup>112</sup> *Id.*

<sup>113</sup> *Svitak*, 2013 WL 6632124, at \*2–3. This holding was the first outcome among three lawsuits OCT brought in the state of Washington. *See infra* Table A.

Mexico dismissed OCT's common law public trust claims for just this reason.<sup>114</sup> The foreclosure of a common law claim requires would-be environmental reformers to look to the statute itself for relief. Unfortunately, environmental statutes do not always provide the substantive means to bring a cause of action. Courts in Pennsylvania and Texas held that each state's statutory scheme did not grant the petitioners any right to relief or review, respectively.<sup>115</sup> In 2013, the Arizona Court of Appeals held that a state environmental statute expressly precluded the Arizona Department of Environmental Quality from granting OCT's petition for rulemaking.<sup>116</sup> The statute that the court cited precludes the agency from adopting or enforcing a GHG regulatory program "without express legislative authorization."<sup>117</sup>

Even if a petitioner can bring a claim under a state environmental law, the reach of the agency's discretion thereunder can be too broad to give petitioners any actionable recourse. In 2013, the Iowa Court of Appeals held that Iowa's Department of Natural Resources (DNR) acted within its statutory discretion when it denied OCT's petition for rulemaking.<sup>118</sup> The court held that the DNR had given fair consideration to the petition.<sup>119</sup> After declining to extend the meaning of the public trust doctrine beyond navigable water beds, citing the "narrow scope" of the doctrine in Iowa, the court held that the DNR did not have a public trust duty to protect the atmosphere.<sup>120</sup> Because the DNR's "denial of the petition was not unreasonable, arbitrary, capricious, or an abuse of discretion," the court upheld the denial.<sup>121</sup> This ruling essentially foreclosed judicial review as an avenue for GHG reform in Iowa.

*c) Failure to Exhaust Administrative Remedies*

Lawsuits filed in Montana and Kansas have faced similar grounds for dismissal. In both states, OCT filed suit without first filing petitions for rulemaking. As a result,

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<sup>114</sup> *Farb v. Kansas*, No. 12-C-1133, slip op. at 5 (Kan. Dist. Ct. June 4, 2013); *Sanders-Reed*, 350 P.3d at 1225.

<sup>115</sup> *Funk v. Wolf*, 144 A.3d 228, 250–251 (Pa. Commw. Ct. 2016), *aff'd*, 158 A.3d 642 (Pa. 2017); *Texas Comm'n on Env'tl. Quality v. Bonser-Lain*, 438 S.W.3d 887, 895 (Tex. App. 2014).

<sup>116</sup> *Butler v. Brewer*, No. 1 CA-CV 12-0347, 2013 WL 1091209, at \*7 (Ariz. Ct. App. Mar. 14, 2013).

<sup>117</sup> ARIZ. REV. STAT. ANN. § 49-191 (2019); *see also Butler*, 2013 WL 1091209, at \*7–8.

<sup>118</sup> *Filippone ex rel. Filippone v. Iowa Dep't of Nat. Res.*, No. 12-0444, 2013 WL 988627 (Iowa Ct. App. 2013).

<sup>119</sup> *Id.* at \*3.

<sup>120</sup> *Id.* at \*2–3.

<sup>121</sup> *Id.*

the courts in both states dismissed the lawsuits for failure to exhaust administrative remedies.<sup>122</sup>

OCT's legal activities in Montana were unusual in that OCT began its reform efforts in that state by petitioning the Supreme Court of Montana for original jurisdiction.<sup>123</sup> The Montana Supreme Court will grant original jurisdiction on constitutional issues of statewide importance for issues that involve purely legal questions and issues of such urgency that the standard litigation and appeal process are determined to be inadequate.<sup>124</sup> In responding to OCT's petition for certiorari, the Supreme Court of Montana held that it was ill-equipped to resolve the factual assertions of the claim.<sup>125</sup> The court gave no reasoning for its belief that it was ill-suited to the task, only concluding that because it found no urgency to the litigation and OCT's suits in other states had begun at the trial level, there was no reason the Montana suit should not also follow the normal process of trial and appeal.<sup>126</sup> The Supreme Court of Montana denied the petition for original jurisdiction, finding that the claims lacked sufficient urgency.<sup>127</sup>

*d) Status Following Dismissals*

Of the twelve states where courts dismissed OCT lawsuits, OCT's efforts have fallen dormant in eight; as of October 2019, OCT is not actively pursuing reform in Arizona, Iowa, Kansas, Minnesota, Montana, New Mexico, Pennsylvania, and Texas.<sup>128</sup> While OCT may someday revive its legal efforts in these states, it has taken no action since the unfavorable judgments discussed above. However, in Alaska, Colorado, and North Carolina, OCT filed secondary lawsuits following the dismissal of its initial complaints in those states.<sup>129</sup> Washington has seen the most iterations of OCT lawsuits, where the third action in that state is currently pending before the Washington Court of Appeals.<sup>130</sup> In states where OCT's lawsuits were dismissed for

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<sup>122</sup> See *Barhaugh v. State*, 264 P.3d 518, 519 (Mont. 2011); *Farb v. Kansas*, No. 12-C-1133, slip op. at 3 (Kan. Dist. Ct. June 4, 2013) ("not only did the Plaintiff not exhaust her administrative remedies, but she did not even initiate them.").

<sup>123</sup> See *Barhaugh* Plaintiffs' Petition for Original Jurisdiction, *supra* note 32, at 16.

<sup>124</sup> MONT. CONST. art VII, § 2; MONT. CODE ANN. § 25-21-1 14(4) (2017); *Confederated Salish and Kootenai Tribes of the Flathead Reservation v. Stults*, 59 P.3d 1093, 1096 (Mont. 2002).

<sup>125</sup> *Barhaugh*, 264 P.3d at 519.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> OCT's website reports that it is appealing dismissal in Oregon but has reported no activities in Oregon since 2016. See *Active State Legal Actions: Oregon*, OUR CHILDREN'S TRUST, <https://www.ourchildrenstrust.org/oregon> [<https://perma.cc/2DWH-X9V4>] (last visited Nov. 18, 2019) [hereinafter *Active State Legal Actions: Oregon*].

<sup>129</sup> See *infra* Table A.

<sup>130</sup> Appellant's Opening Brief, *Aji P. v. State of Washington*, No. 80007-8, *appeal docketed*, No. 80007-8 (Wash. Ct. App. June 5, 2019).

filing litigation without first petitioning for rulemaking,<sup>131</sup> the next clear step is to file petitions for rulemaking in those states. At best, a rulemaking petition opens the door for regulatory reform; at worst, denial can provide grounds for new litigation.

## 2. *Successful Outcomes*

OCT's ultimate goal has been to compel governments to enact regulations for the reduction of GHGs. OCT has achieved varying degrees of success in this endeavor. Where the future stability of the Earth's climate is at stake,<sup>132</sup> it is perhaps an overreach to label only a small improvement as a 'success.' Nevertheless, OCT has achieved success—to some degree—in three states: Massachusetts, Washington, and Colorado.

### a) *Massachusetts*

The outcome of a claim brought in Massachusetts has been OCT's greatest ATL success thus far. When the Massachusetts Department of Environmental Protection (MADEP) denied a petition for rulemaking in 2013,<sup>133</sup> OCT filed suit.<sup>134</sup> The complaint did not ask the court to declare the atmosphere a resource within the public trust because the Massachusetts Constitution already recognizes the atmosphere as a government-protected resource.<sup>135</sup> Instead, the complaint drew on the state's Global Warming Solutions Act of 2008 (GWSA), which obligated the MADEP to reduce GHG emissions.<sup>136</sup> In 2016, the Massachusetts Supreme Court found in favor of OCT, declaring that the GWSA required the MADEP to promulgate regulations limiting sources of GHG emissions and the MADEP had failed to fulfill its statutory duty.<sup>137</sup> In response to this decision, the Governor of

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<sup>131</sup> The states in which OCT has yet to file a petition for rulemaking are Kansas, Minnesota, and Montana. *See* Table A.

<sup>132</sup> *See supra* notes 18, 19 and accompanying text.

<sup>133</sup> Mass. Dep't of Env'tl. Prot., *The Mass. Dep't of Env'tl. Protections' Action on the Kids vs. Global Warming* Petition 12–13 (2013), <https://static1.squarespace.com/static/571d109b04426270152febe0/t/57609155c6fc08526047381b/1465946454076/MassDEPDDecision.pdf> [<https://perma.cc/ZZ8Y-AME8>].

<sup>134</sup> *Kain v. Mass. Dep't of Env'tl. Prot.*, 32 Mass. L. Rep. 668 (2015).

<sup>135</sup> *See* Complaint at 9–10, *Kain v. Mass. Dep't of Env'tl. Prot.*, 32 Mass. L. Rep. 668 (2015) (No. 14-2551); MASS CONST. art. XCVII (“The people shall have the right to clean air and water . . . the protection of the people in their right to the conservation, development and utilization of the agricultural, mineral, forest, water, air and other natural resources is hereby declared to be a public purpose.”).

<sup>136</sup> Complaint at 5, *Kain v. Mass. Dep't of Env'tl. Prot.*, 32 Mass. L. Rep. 668 (2015) (No.14-2551); *see* Mass. Gen. Laws ch. 21N, § 3(d) (2018) (“The department shall promulgate regulations establishing a desired level of declining annual aggregate emission limits for sources or categories of sources that emit greenhouse gas emissions.”).

<sup>137</sup> *Kain v. Dep't of Env'tl. Prot.*, 49 N.E.3d 1124, 1127, 1142 (Mass. 2016).

Massachusetts issued an executive order establishing a climate change strategy that would bring Massachusetts into compliance with the GWSA.<sup>138</sup>

*b) Washington*

Although OCT did not receive favorable verdicts in Washington and Colorado,<sup>139</sup> OCT's lawsuits had impacts that can still be labeled as successes. In 2017, the Washington Court of Appeals ultimately declined to order rulemaking.<sup>140</sup> During the course of litigation, however, pressure resulting from the lawsuit pushed the state to act more aggressively in regulating GHGs.<sup>141</sup> Washington's Department of Ecology promulgated a clean air rule in 2016, establishing GHG emission standards.<sup>142</sup>

*c) Colorado*

Likewise, OCT's claims in Colorado did not succeed in the courts but resulted in legislative progress. In OCT's first Colorado complaint, *Martinez v. Colorado*, OCT asked the court to recognize the public trust doctrine in Colorado, recognize that the State has a fiduciary duty under the trust, declare that the State's fiduciary duty includes a duty to protect the atmosphere, and declare that the State has been neglecting its duty.<sup>143</sup> The court dismissed the case, contending that Colorado courts have never recognized the public trust doctrine, and therefore the plaintiff had failed to state a claim.<sup>144</sup>

Following this dismissal, OCT filed a petition for rulemaking with the Colorado Oil and Gas Conservation Commission (COGCC).<sup>145</sup> After the COGCC denied the

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<sup>138</sup> Mass. Exec. Order No. 569 at 2 (Sept. 16, 2016).

<sup>139</sup> *Martinez v. Colo. Oil & Gas Conservation Comm'n*, 433 P.3d 22, 33 (Colo. 2019); *Aji P. v. State*, No. 18-2-04448-1, slip op. at 3 (Wash. Super. Ct., Kings Cty. Aug. 14, 2018), *appeal docketed*, No. 80007-8 (Wash. Ct. App. June 5, 2019).

<sup>140</sup> *Foster v. Washington Dep't of Ecology*, No. 75374-6-I, 2017 WL 3868481 (Wash. Ct. App. Sept. 5, 2017).

<sup>141</sup> *See id.*

<sup>142</sup> WASH. ADMIN. CODE § 173-442-010 (2018).

<sup>143</sup> Amended Complaint for Declaratory Judgement at 30, *Martinez v. Colorado*, No. 11CV4377, 2011 WL 11552495 (Colo. Dist. Ct., Denver Cty., Nov. 7, 2011).

<sup>144</sup> *Martinez v Colorado*, No. 11CV4377, 2011 WL 11552495, at \*2 (Colo. Dist. Ct., Denver Cnty., Nov. 07, 2011).

<sup>145</sup> Petition of Xiuhtezcatl Martinez et al. to the Colo. Oil & Gas Conservation Comm'n & Colo. Dep't of Nat. Res. (Nov. 15, 2013), <https://static1.squarespace.com/static/571d109b04426270152febe0/t/5760d25fab48de66f7214e4d/1465963105219/COFrackingPetition.pdf> [<https://perma.cc/JMK8-PVBX>]; *see also* Table A.

petition in 2014,<sup>146</sup> OCT brought a new suit challenging the denial.<sup>147</sup> This new complaint asked the court to interpret the Colorado Oil and Gas Conservation Act (COGCA) to require the COGCC to protect public health, safety, and welfare.<sup>148</sup> The District Court sided with COGCC, affirming the agency's denial of OCT's petition for rulemaking.<sup>149</sup> OCT appealed to the Colorado Court of Appeals, which reversed, finding the COGCA required the COGCC to regulate oil and gas in a manner that protects public health and safety.<sup>150</sup> This remarkable holding was overturned in January 2019, when the Colorado Supreme Court reversed in favor of the COGCC.<sup>151</sup> The disappointing outcome, however, was not the end of the line for OCT's goals. In April 2019, just three months after the Colorado Supreme Court verdict, the Colorado Governor signed SB 19-181 into law.<sup>152</sup> SB 19-181 requires the COGCC to consider the protection of "public health, safety, and welfare, including protection of the environment" in regulating the development and production of the natural resources of oil and gas.<sup>153</sup>

*d) Expanded Judicial Definitions*

Aside from accomplishing improved GHG regulations, a lesser but still noteworthy marker of ATL success is the expansion of states' legal definitions of environmental protections. For example, in New Mexico, OCT's lawsuit did not directly advance government regulation of GHGs, but it did result in the New Mexico Court of Appeals declaring that the public trust doctrine provides for the protection of the atmosphere.<sup>154</sup> Also noteworthy is the Arizona Court of Appeals holding where the court did not extend the applicability of Arizona's public trust

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<sup>146</sup> Colo. Oil & Gas Conservation Comm'n, No. 1-187, In the Matter of the Petition for Rulemaking Filed with the Colo. Oil & Gas Conservation Comm'n by Xiuhtezcatl Martinez (May 29, 2014), <https://static1.squarespace.com/static/571d109b04426270152febe0/t/5760d2011d07c0ae98353947/1465963010349/COGCCWrittenDecision14.5.29.pdf> [https://perma.cc/7E8B-8ZH8] (denying the petition).

<sup>147</sup> Complaint, Martinez v. Colo. Oil & Gas Conservation Comm'n at 2, No. 2014-CV-32637, 2014 WL 7474553 (Colo. Dist. Ct., Denver Cnty., Dec. 24, 2014), 2014 WL 12888729 (filed July 3, 2014).

<sup>148</sup> *Id.*

<sup>149</sup> Martinez v. Colo. Oil & Gas Conservation Comm'n, No. 2014-CV-32637, 2014 WL 7474553 (Colo. Dist. Ct., Denver Cnty., Dec. 24, 2014), *rev'd*, 434 P.3d 689 (Colo. App. 2017), *rev'd*, 433 P.3d 22 (Colo. 2019).

<sup>150</sup> Martinez, 434 P.3d at 691–92.

<sup>151</sup> Martinez, 433 P.3d 22, at 33.

<sup>152</sup> See S.B. 19-181, ch. 120, 2019 Colo. Sess. Laws 502 (codified as amended at COLO. REV. STAT. §§ 34-60-101 to 131 (2019)).

<sup>153</sup> *Id.* ch. 120, § 6, 2019 Colo. Sess. Laws 502, 506 (amending COLO. REV. STAT. § 34-60-102(I) (2019)).

<sup>154</sup> Sanders-Reed *ex rel.* Sanders-Reed v. Martinez, 350 P.3d 1221, 1225–26 (N.M. Ct. App. 2015).

doctrine to the atmosphere, but expressly did not rule out the possibility either.<sup>155</sup> The court held that the public trust was not limited only to lands underlying navigable watercourses, but precedent did not address “measures by which a resource may be determined to be part of the public trust.”<sup>156</sup>

Although neither of the two aforementioned lawsuits achieved an entirely favorable judgment in terms of OCT’s ideal relief, there are ancillary benefits from the final outcomes. The expanded interpretations of public trust protections in New Mexico may provide a legal foundation for future ATL claims. The Arizona Court of Appeals, by recognizing the judiciary’s ability to expand the doctrine, likewise pried open the door and left it ajar just enough for future litigants to potentially make their way through. In time, these holdings may also serve as persuasive authority for other jurisdictions.

### 3. *Pending Litigation*

As of January 2020, OCT is engaged in active lawsuits in five states: Alaska, Florida, North Carolina, Oregon, and Washington.<sup>157</sup> In Alaska and North Carolina, OCT is pursuing its second round of litigation, and in Washington its third.<sup>158</sup> As detailed below, the more recent lawsuit in Alaska differs from OCT’s initial litigation in important ways that should, at the least, help the suit withstand dismissal.<sup>159</sup>

#### a) *North Carolina*

In North Carolina, OCT is challenging the state Environmental Management Commission’s (EMC) denial of a petition for rulemaking.<sup>160</sup> In 2015, the court denied OCT’s first complaint challenging the EMC’s denial of a petition to

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<sup>155</sup> *Butler v. Brewer*, No. 1 CA-CV 12-0347, 2013 WL 1091209, at \*5–6 (Ariz. Ct. App. Mar. 14, 2013) (declaring in response to the State’s argument that the public trust doctrine applies only to navigable waters, “Arizona courts have never made such a pronouncement nor have the courts determined that the atmosphere, or any other particular resource, is not a part of the public trust.”) (emphasis omitted).

<sup>156</sup> *Id.*

<sup>157</sup> Appellants’ Brief, *Sinnok v. State*, No. S-17297 (Alaska Mar. 26, 2019) [hereinafter *Sinnok* Appellants’ Brief]; First Amended Complaint, *Reynolds v. Florida*, No. 18-CA-000819 (Leon Cty. Ct. Dec. 26, 2018) [hereinafter *Reynolds* Plaintiffs’ First Amended Complaint]; *Active State Legal Actions: North Carolina*, *supra* note 100 (noting filing of petition for Judicial Review on June 6, 2018 for OCT’s case in North Carolina); Order Allowing Review, *Chernaik v. Brown*, No. S066564 (Or. May 23, 2019), <https://static1.squarespace.com/static/571d109b04426270152febe0/t/5ce7051eee6eb01beb1a9e5f/1558643999329/Review+-+Allow.pdf> [<https://perma.cc/D544-CEYJ>] [hereinafter *Chernaik* Order Allowing Review].

<sup>158</sup> See *infra* Table A.

<sup>159</sup> See *infra* Section III.B.3.d.

<sup>160</sup> *Turner* Petitioner’s Brief, *supra* note 100, at 1.



promulgate rules to limit carbon emissions.<sup>161</sup> In November 2017, OCT renewed its efforts by filing a new petition for rulemaking.<sup>162</sup> Once again, EMC denied this petition in May 2018, and OCT has reported that it petitioned the court for review of the latest denial.<sup>163</sup>

*b) Oregon*

The Oregon case, *Chernaik v. Brown*,<sup>164</sup> has generated six decisions in the Oregon state courts, the most recent of which is a January 2019 decision by the Oregon Court of Appeals.<sup>165</sup> In 2015, the circuit court (Oregon's state trial courts) granted the defendants' motion for partial summary judgment, holding that the public trust doctrine does not apply to the atmosphere.<sup>166</sup> In January 2019, the Oregon Court of Appeals affirmed the trial court's holding that the state's public trust doctrine does not impose an affirmative obligation on the state to protect public trust resources from the effects of climate change.<sup>167</sup> The case is now pending for the second time before the Oregon Supreme Court.<sup>168</sup> The Oregon Supreme Court heard oral argument in November 2019 over whether the public trust doctrine includes protection of the state's natural resources beyond submerged and

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<sup>161</sup> *Turner v. N.C. Env'tl. Mgmt. Comm'n*, No. 15-CVS-2488 (N.C. Wake Cty. Ct. May 29, 2015); see *Active State Legal Actions: North Carolina*, *supra* note 100.

<sup>162</sup> Petition for Rulemaking to Limit N.C. Carbon Dioxide Emissions to Protect a Stable Climate System & Preserve the Nat. Res. of N.C. to Michael Abraczinskas, Dir., Division of Air Quality, N.C. Dep't of Env'tl. Quality 1, 4–5 (Nov. 14, 2017), [http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2017/20171114\\_docket-na\\_petition-for-rulemaking.pdf](http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2017/20171114_docket-na_petition-for-rulemaking.pdf) [<https://perma.cc/FJM7-B7DW>].

<sup>163</sup> See *Active State Legal Actions: North Carolina*, *supra* note 100.

<sup>164</sup> See *Active State Legal Actions: Oregon*, *supra* note 128. The Oregon case was originally filed as *Chernaik v. Kitzhaber* against former Governor John Kitzhaber in his official capacity. Amended Complaint for Declaratory Judgement and Equitable Relief, *Chernaik v. Kitzhaber*, No. 16-11-09273, 2012 WL 10205018 (Or. Cir. Apr. 5, 2012), *rev'd*, 328 P.3d 799 (Or. Ct. App. 2014). After the trial court initially dismissed the case for lack of subject matter jurisdiction and the Oregon Court of Appeals reversed, 328 P.3d at 481, Kate Brown replaced Kitzhaber as governor in 2015 while the case was pending before the trial court, and the case name changed to *Chernaik v. Brown*. *Chernaik v. Brown*, No. 16-11-09273, 2015 WL 12591229, at \*11, n.1 (Or. Cir. May 11, 2015), *aff'd in part, vacated in part*, 436 P.3d 26 (Or. Ct. App. 2019), *appeal pending*, No. S066564 (Or. argued Nov. 13, 2019).

<sup>165</sup> *Chernaik v. Brown*, 436 P.3d 26 (Or. Ct. App. 2019).

<sup>166</sup> *Chernaik*, 2015 WL 12591229, at \*10.

<sup>167</sup> *Chernaik*, 436 P.3d 26, 35–36 (Or. Ct. App. 2019) (affirming the trial court's public trust doctrine holding, but vacating and remanding for the trial court to issue a declaratory judgement of the parties' rights, rather than dismissing the case), *appeal pending*, No. S066564 (Or. argued Nov. 13, 2019).

<sup>168</sup> *Chernaik v. Brown*, No. S066564 (Or. argued Nov. 13, 2019).

submersible lands and whether the public trust doctrine imposes an affirmative duty upon the state to protect public trust resources from climate change.<sup>169</sup>

*c) Florida*

The Florida lawsuit, filed in 2018, is OCT's first legal activity in that state since the denial of its 2011 rulemaking petition.<sup>170</sup> Though this litigation is just beginning, the complaint reflects the lessons OCT has learned thus far.<sup>171</sup> OCT has alleged not only a breach of the public trust doctrine but also violations of substantive due process rights under the Florida Constitution.<sup>172</sup> As expected, the state has moved for dismissal, arguing, among other things, that the claim presents nonjusticiable political questions.<sup>173</sup> The Florida Constitution, however, gives the OCT complaint a stronger chance of success than claims in other states have not had.<sup>174</sup> Article II, Section Seven of the Florida Constitution states:

It shall be the policy of the state to conserve and protect its natural resources and scenic beauty. Adequate provision shall be made by law for the abatement of air and water pollution and of excessive and unnecessary noise and for the conservation and protection of natural resources.<sup>175</sup>

The exact meaning of this clause might have been left open to interpretation but for a Florida Supreme Court advisory opinion.<sup>176</sup> Twenty years prior to OCT's lawsuit, the Florida Supreme Court, acting at the request of the Governor, interpreted Article II to require affirmative legislative action.<sup>177</sup> The constitutional provision, advisory opinion, and subsequent case law<sup>178</sup> may guide the court to find that the environmental protection is not a political question, and potentially supports OCT's

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<sup>169</sup> *Id.*; see also Oregon Supreme Court Calendar Entry Form for Chernaik v. Brown, No. S066564, OREGON JUDICIAL BRANCH, <https://web.courts.oregon.gov/records/sccalendar.nsf/b29dd44d01dffa088256c91005b3a5b/e98c1d19ad329420882584110062a601?OpenDocument> [<https://perma.cc/MP85-Z3SB>] (last updated Oct. 30, 2019).

<sup>170</sup> See *infra* Table A.

<sup>171</sup> See Complaint Seeking Declaratory and Injunctive Relief, Reynolds v. Florida, No. 18-CA-000819 (Leon Cty. Ct. Apr. 16, 2018); Reynolds Plaintiffs' First Amended Complaint, *supra* note 157, at 69–81.

<sup>172</sup> Reynolds Plaintiffs' First Amended Complaint, *supra* note 157, at 69–81.

<sup>173</sup> See Plaintiffs' Consolidated Response to the Defendant's Motion to Dismiss at 31, Reynolds v. Florida, No. 18-CA-000819 (Leon Cty. Ct. Sept. 17, 2018) [hereinafter Reynolds Plaintiffs' Consolidated Response].

<sup>174</sup> See FLA. CONST. art II, § 7.

<sup>175</sup> *Id.*

<sup>176</sup> Advisory Op. to the Governor, 706 So. 2d 278 (Fla. 1997).

<sup>177</sup> *Id.* at 281–82.

<sup>178</sup> See Barley v. S. Fla. Water Mgmt. Dist., 823 So. 2d 73, 82 (Fla. 2002) (affirming a district court decision based on the 1997 advisory opinion).

push for state action. As of January 2020, the State's motion to dismiss, filed on July 6, 2018, was still pending before the court.<sup>179</sup>

*d) Washington*

In the state of Washington, OCT is appealing its third round of litigation. OCT filed its first lawsuit, *Svitak v. State*, before filing a petition for rulemaking.<sup>180</sup> *Svitak* was dismissed in the lower court without an opinion explaining the decision.<sup>181</sup> The Washington Court of Appeals affirmed the dismissal on the grounds that the complaint failed to challenge an affirmative action of the State and presented a nonjusticiable political question.<sup>182</sup>

Two years after *Svitak*'s dismissal, OCT filed a petition for rulemaking with the Washington Department of Ecology (DEC).<sup>183</sup> The DEC denied the petition and OCT promptly sued to challenge the denial.<sup>184</sup> This second lawsuit, *Foster v. Washington Department of Ecology*, initially engendered a promising but mixed holding when the trial court found that climate change impacts public trust resources and that the State had a mandatory duty to protect the public trust resources.<sup>185</sup> In spite of these findings, the trial court declined to review OCT's petition in November 2015 because the DEC had already initiated rulemaking to reduce GHGs pursuant to a directive from Governor Jay Inslee.<sup>186</sup> While OCT alleged that the DEC's rulemaking was inadequate because the agency did not sufficiently utilize "current science," the court found that it lacked statutory "authority to exclude non-science related considerations" from the rulemaking.<sup>187</sup>

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<sup>179</sup> Order Authorizing Supplemental Pleading at 2, *Reynolds v. Florida*, No. 18-CA-000819 (Leon Cty. Ct. Jan. 6, 2020) (order granting OCT's motion to supplement their first amended complaint and noting the defendants' motions to dismiss as still pending) [hereinafter *Reynolds* Order Authorizing Supplemental Pleading].

<sup>180</sup> See *infra* Table A.

<sup>181</sup> *Svitak v. Washington*, No. 11-2-16008-4 SEA, 2011 WL 12686902 (Wash. Super. Ct., King Cty. Mar. 2, 2012).

<sup>182</sup> *Svitak ex rel. Svitak v. State*, No. 69710-2-I, 2013 WL 6632124, at \*2 (Wash. Ct. App. Dec. 16, 2013).

<sup>183</sup> Petition of Our Children to the Wash. State Dep't of Ecology (June 17, 2014), [https://static1.squarespace.com/static/571d109b04426270152febe0/t/5785909d9de4bb340b8b75df/1468371110844/Petition.Final\\_.6.17.14.pdf](https://static1.squarespace.com/static/571d109b04426270152febe0/t/5785909d9de4bb340b8b75df/1468371110844/Petition.Final_.6.17.14.pdf) [<https://perma.cc/7XV2-H98P>].

<sup>184</sup> Letter from Maia D. Bellon, Dir., Wash. State Dep't of Ecology, to Andrea Rogers Harris (Aug. 14, 2014), <https://static1.squarespace.com/static/571d109b04426270152febe0/t/576081a01d07c05bf208e7c7/1465942439363/WA.EcologyDecision.pdf> [<https://perma.cc/2ED9-BBV6>] (denying petition for rulemaking); Petition for Review, *Foster v. Washington Dep't of Ecology*, No. 14-2-25295-1 SEA, 2015 WL 7721362 (Wash. Super. Ct., King Cty. Nov. 19, 2015).

<sup>185</sup> *Foster*, 2015 WL 7721362, at \*3-4.

<sup>186</sup> *Id.* at \*2.

<sup>187</sup> *Id.*

However, the case came before the same Washington Superior Court judge a few months later based on OCT's motion that "extraordinary circumstances" compelled the court to ensure that DEC completed its GHG rule in 2016.<sup>188</sup> The court agreed and ordered the DEC to issue a rule regulating GHGs by the end of 2016,<sup>189</sup> but the Washington Court of Appeals reversed.<sup>190</sup> In an unpublished opinion, the Court of Appeals first held that the case was not moot because the outcome of its decision will impact the ongoing litigation.<sup>191</sup> In reaching the merits, the Court of Appeals held that the trial court abused its discretion by granting relief under the Washington Administrative Procedure Act (WAPA) without actually finding that the DEC had violated WAPA.<sup>192</sup> The trial court, in its original 2015 order, found that the DEC's rulemaking satisfied the agency's statutory and constitutional duties and that denial of the plaintiffs' rulemaking petition was not arbitrary and capricious.<sup>193</sup> The trial court's 2016 order vacating the 2015 order did not revisit any of these findings, and therefore the appellate court held that it did not have a legally sufficient basis to grant relief under WAPA.<sup>194</sup> Secondly, and perhaps more significantly, the Court of Appeals held that climate change was not the type of "extraordinary circumstance" that authorized the trial court to revisit its earlier judgment.<sup>195</sup> The Court of Appeals noted that the cases where Washington courts "found extraordinary circumstances all involve circumstances previously unknown to the court or that[] changed since the earlier judgment," and the trial court had considered the urgency and seriousness of climate change in its 2015 order.<sup>196</sup> Therefore, the plaintiffs' did not allege the type of extraordinary circumstances that would allow the trial court to vacate portions of its earlier ruling.<sup>197</sup>

OCT brought its third Washington lawsuit, *Aji P. v. State*, in 2018.<sup>198</sup> In this complaint, OCT took a fundamental rights approach, asking the court to declare that the plaintiffs had a fundamental constitutional right to equal protection and a healthy environment, including a stable climate system.<sup>199</sup> The lower court dismissed the lawsuit, holding that the claims asked the court to decide non-justiciable political

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<sup>188</sup> *Foster v. Washington Dep't of Ecology*, No. 14-2-25295-1 SEA, 2016 WL 11359472, at \*1 (Wash. Super. Ct., King Cty. May 16, 2016).

<sup>189</sup> *Id.*

<sup>190</sup> *Foster v. Wash. Dep't of Ecology*, No. 75374-6-I, 2017 WL 3868481, at \*3, 6-7 (Wash. Ct. App. Sept. 5, 2017).

<sup>191</sup> *Id.* at \*3.

<sup>192</sup> *Id.* at \*4 (citing WASH. REV. CODE § 34.05.570(4)(c) (2015)).

<sup>193</sup> *Foster*, 2017 WL 3868481, at \*4.

<sup>194</sup> *Id.*

<sup>195</sup> *Id.* at \*5-6.

<sup>196</sup> *Id.*

<sup>197</sup> *Id.* at \*6.

<sup>198</sup> Complaint for Declaratory and Injunctive Relief, *Aji P. v. State*, No. 18-2-04448-1 (Wash. Super. Ct., King Cty. Aug. 14, 2018), *appeal docketed*, No. 80007-8 (Wash. Ct. App. June 5, 2019).

<sup>199</sup> *Id.* at 70.

questions, there is no fundamental constitutional right to a clean environment, and OCT had not raised a cognizable claim under the Equal Protection Clause of the Washington State Constitution.<sup>200</sup> The case is now pending before the Washington Court of Appeals on these issues.<sup>201</sup>

*e) Alaska*

In March 2019, OCT filed an appeal to the Supreme Court of Alaska in *Sinnok v. State*.<sup>202</sup> This is OCT's second lawsuit against the state of Alaska.<sup>203</sup> In *Sinnok*, the complaint asked the Court to declare the State's Climate and Energy Policy to be in violation of the plaintiff's due process and equal protection rights under the state constitution, as well as a violation of the state's public trust doctrine, federal equal protection clause, and substantive due process.<sup>204</sup> The Alaska Superior Court held that the plaintiffs' claims presented a question of whether to act on climate change as a matter of public policy.<sup>205</sup> The court ruled that it could not resolve the dispute through legal analysis, but rather a resolution would require a policy judgment of a legislative nature—a violation of the third factor of the political questions doctrine established in *Baker v. Carr*<sup>206</sup>—and therefore granted dismissal.<sup>207</sup>

When the Alaska Supreme Court dismissed OCT's first lawsuit in 2014, *Kanuk ex rel. Kanuk v. State Department of Natural Resources*, the court noted that “if the plaintiffs are able to allege claims for affirmative relief in the future that are justiciable under the political question doctrine, they appear to have a basis on which to proceed even absent a declaration that the atmosphere is subject to the public trust doctrine.”<sup>208</sup> The second time around, OCT tried to build its claim to better satisfy justiciability demands. The important differences between *Sinnok* and *Kanuk* are the

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<sup>200</sup> *Aji P.*, No. 18-2-04448-1, slip op. at 6–9 (Wash. Super. Ct., King Cty. Aug. 14, 2018).

<sup>201</sup> Appellant's Opening Brief at 2, *Aji P. v. State of Washington*, No. 80007-8 (Wash. Ct. App. docketed June 5, 2019).

<sup>202</sup> *Sinnok* Appellants' Brief, *supra* note 157, at 1–2.

<sup>203</sup> *Active State Legal Actions: Alaska*, OUR CHILDREN'S TRUST, <https://www.ourchildrenstrust.org/alaska> [<https://perma.cc/H3PZ-YEVZ>] (last visited Dec. 18, 2019).

<sup>204</sup> Complaint for Declaratory and Equitable Relief at 92–94, *Sinnok v. State*, No. 3AN-17-09910 CI, 2018 WL 7501030 (Alaska Super. Ct., Anchorage Oct. 30, 2018) [hereinafter *Sinnok* Complaint].

<sup>205</sup> *Sinnok*, 2018 WL 7501030, at \*3.

<sup>206</sup> See *Baker v. Carr*, 369 U.S. 186, 216 (1962) (stating that the “impossibility of deciding [an issue] without an initial policy determination of a kind clearly for nonjudicial discretion” is a factor indicating a non-justiciable political question).

<sup>207</sup> Order Granting State's Motion to Dismiss at 8, 15, *Sinnok v. State*, 3AN-17-0991909910 CI, 2018 WL 7501030 (Alaska Super. Ct., Anchorage Oct. 30, 2018) (quoting *State, Dep't of Nat. Res. v. Tongass Cons. Soc.*, 931 P.2d 1016, 1018 (Alaska 1997)).

<sup>208</sup> *Kanuk ex rel. Kanuk v. State Dep't of Nat. Res.*, 335 P.3d 1088, 1103 (Alaska 2014).

claims forming the bases of the complaints. The *Kanuk* complaint alleged only a violation of the public trust doctrine.<sup>209</sup> The *Sinnok* complaint alleges violations of due process, equal protection, and the public trust.<sup>210</sup> Furthermore, *Sinnok* focuses on the State's September 2017 denial of OCT's petition for rulemaking, a claim not available in *Kanuk* because OCT had not yet pursued a petition for rulemaking when it filed *Kanuk* in 2011.<sup>211</sup> After *Kanuk*'s dismissal in 2014, OCT filed a petition for rulemaking with Alaska's Department of Environmental Conservation (DEC).<sup>212</sup> *Sinnok* challenges the DEC's denial of this petition.<sup>213</sup>

In spite of its evolved efforts, OCT's lawsuits continue to struggle with the issue of justiciability, especially the political question doctrine. The appeal to the Alaska Supreme Court in *Sinnok* challenges that, despite the substantive differences in the *Sinnok* and *Kanuk* complaints, the trial court in *Sinnok* dismissed the complaint on the same grounds upon which *Kanuk* was dismissed.<sup>214</sup> OCT's appeal seeks to succeed on the added due process, equal protection, and public trust claims by arguing that the Superior Court conflated *Sinnok*'s causes of action into a single due process claim.<sup>215</sup>

OCT is presumably redoubling its efforts in Alaska because the jurisdiction holds distinct potential for success. The Alaska Constitution expressly provides for the protection of natural resources, stating: "[t]he legislature shall provide for the utilization, development, and conservation of all natural resources belonging to the

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<sup>209</sup> First Amended Complaint for Declaratory and Equitable Relief at 26–27, *Kanuk v. Alaska Dep't of Nat. Res.*, No. 3AN-11-07474 CI (Alaska Super. Ct., Anchorage July 21, 2011).

<sup>210</sup> *Sinnok* Complaint, *supra* note 204, at 92–94.

<sup>211</sup> *See id.*, at *passim*; *see also* Larry Hartig, Comm'r, Alaska Dep't of Env'tl. Conservation, Letter to Brad De Nobel regarding Petition for Regulations Concerning Greenhouse Gas Emissions (Sept. 27, 2017), <https://static1.squarespace.com/static/571d109b04426270152febe0/t/59cd27454c326d0af3369f02/1506617158151/ADEC+Response+Letter+re+Youth+Climate+Change+Petition+September+27+2017.pdf> [<https://perma.cc/3R99-PXLM>] (denying petition for rulemaking); *see also infra* Table A.

<sup>212</sup> Petition of Youth Petitioners & Alaska Youth for Env't Action to the Alaska Dep't of Env't Conservation (Aug. 28, 2017), <https://static1.squarespace.com/static/571d109b04426270152febe0/t/59a491ee3e00beb9e2449170/1503957493116/ALASKA+PETITION.08-28-17-Redacted.pdf> [<https://perma.cc/2EPR-P34V>].

<sup>213</sup> *Sinnok* Complaint, *supra* note 204, at 94.

<sup>214</sup> *See* Order Granting State's Motion to Dismiss, at 7–9, 13–14, *Sinnok v. State*, 3AN-17-0991909910 CI, 2018 WL 7501030 (Alaska Super. Ct., Anchorage Oct. 30, 2018); *Sinnok* Appellants' Brief, *supra* note 157, at 3 (disputing the trial court's dismissal due to nonjusticiable political questions and the trial court's determination that a declaratory judgement would not redress the Plaintiff's injuries); *Kanuk ex rel. Kanuk v. State Dep't of Nat. Res.*, 335 P.3d 1088, 1097–99, 1101, 1103 (Alaska 2014) (dismissing case because the claims involve policy questions that fall within the purview of other branches of government and because a declaratory judgement would require the court to answer a political question and would not avoid further litigation).

<sup>215</sup> *Sinnok* Appellants' Brief, *supra* note 157, at 1–2.

State, including land and waters, for the maximum benefit of its people.”<sup>216</sup> The Alaska constitutional provision is not as specific as the Massachusetts statute obligating the Commonwealth to reduce GHG emissions,<sup>217</sup> or the Florida constitutional provision compelling legislative action on pollution abatement,<sup>218</sup> but it still expresses an affirmative obligation of the Alaska Legislature to protect the state’s natural resources. Prior case law has interpreted this provision of Alaska’s Constitution, among other Alaska laws, to impose an obligation that state agencies consider the cumulative environmental impacts of their actions.<sup>219</sup> *Sinnok*’s Complaint expressly alleges harms to Alaska’s land and waters.<sup>220</sup> These specific allegations could bring the complaint within the purview of the Alaska Constitution, even without recognition of the atmosphere as a public trust resource.

#### IV. CONCLUSION

Though ATL claims have seen few successes, OCT is learning from experience and evolving its strategies to become increasingly effective. A predictable hurdle to OCT’s lawsuits has been the political question doctrine.<sup>221</sup> The ATL campaign began with complaints relying almost exclusively on the public trust doctrine. Over time, OCT has found various means of expanding the legal basis for its claims, thereby carving a path toward justiciability.

One of the early lessons learned has been that, although a public trust claim may not be able to stand alone due to a number of factors—including statutory displacement of the common law and courts’ refusals to recognize the atmosphere as part of the public trust—one means of strengthening a lawsuit’s chances is to first file a petition for rulemaking. Though petitions are consistently denied, a denied petition for rulemaking may eliminate a statutory barrier to judicial review. OCT has also strengthened its causes of action by invoking the due process and equal protection clauses of the federal and respective state constitutions.<sup>222</sup> OCT has begun

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<sup>216</sup> ALASKA CONST. art VIII, § 2 (2018).

<sup>217</sup> See *supra* Section III.B.2.a., notes 133–139 and accompanying text.

<sup>218</sup> See *supra* Section III.B.3.c., notes 172–179 and accompanying text.

<sup>219</sup> See *Sullivan v. REDOIL*, 311 P.3d 625, 636–37 (Alaska 2013); *Hammond v. North Slope Borough*, 645 P.2d 750, 763 (Alaska 1982).

<sup>220</sup> *Sinnok* Complaint, *supra* note 204, at 3–33.

<sup>221</sup> See, e.g., Order Granting State’s Motion to Dismiss at 8, 15, *Sinnok v. State*, 3AN-17-0991909910 CI, 2018 WL 7501030 (Alaska Super. Ct., Anchorage Oct. 30, 2018) (dismissing plaintiffs’ claims as political questions); *Sanders-Reed ex rel. Sanders-Reed v. Martinez*, 350 P.3d 1221, 1227 (N.M. Ct. App. 2015); *Svitak ex rel. Svitak v. State*, No. 69710-2-I, 2013 WL 6632124, at \*2 (Wash. Ct. App. Dec. 16, 2013); *Aji P.*, No. 18-2-04448-1, slip op. at 6–7 (Wash. Super. Ct., King Cty. Aug. 14, 2018), *appeal docketed*, No. 80007-8 (Wash. Ct. App. June 5, 2019).

<sup>222</sup> See, e.g., *Sinnok* Complaint, *supra* note 204, at 79–87; *Reynolds* Plaintiffs’ First Amended Complaint, *supra* note 157, at 56–58; Complaint for Declaratory and Injunctive Relief at 56–60, 65–67, *Aji P. v. State*, No. 18-2-04448-1, slip op. at 3 (Wash. Super. Ct., King Cty. Aug. 14, 2018) [hereinafter *Aji P. Complaint*].

asking the courts to recognize a habitable climate as a substantive, fundamental right under these due process clauses.<sup>223</sup> Judicial recognition of a right to a habitable climate is still an open question. In OCT's suit against the federal government, *Juliana v. United States*,<sup>224</sup> one of the questions the Ninth Circuit was asked to resolve was whether a fundamental right to a stable climate system exists under the Due Process Clauses of the Fifth and Fourteenth Amendments to the U.S. Constitution.<sup>225</sup> A split panel decision side-stepped the merits of this issue, however, determining that the plaintiffs lacked standing based on an absence of redressability or, alternatively, that the remedies requested involved nonjusticiable political questions.<sup>226</sup>

These substantive due process allegations should theoretically place claims more clearly within the purview of the courts, as requests to recognize new fundamental rights are classic questions that courts have historically entertained.<sup>227</sup> On the other hand, courts are often reluctant to expand the concept of substantive due process.<sup>228</sup> Nevertheless, if OCT is able to accomplish the lofty task of establishing judicial recognition of a new fundamental right, OCT's lawsuits will stand a much better chance of overcoming justiciability hurdles in the future.

The most significant hurdle to ATL claims has been states' environmental statutory schema. As noted in Section III.B.1., existing environmental protections in certain states may cut against ATL plaintiffs' attempts to bring common law actions, such as public trust claims. Cases in Pennsylvania and Minnesota are examples of instances in which existing state environmental protection statutes created barriers to ATL because the courts found that the statutes displaced common law claims.<sup>229</sup>

In contrast, outcomes in Massachusetts illustrate how some states' environmental protection laws can serve as anchors for successful statute-based claims.<sup>230</sup> OCT is presently testing the statutory frameworks of Alaska and Florida.<sup>231</sup> There are still more states with statutory and constitutional environmental protection provisions where OCT has yet to pursue litigation. Such states with ATL

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<sup>223</sup> *Sinnok* Complaint, *supra* note 204, at 79–87; *Aji P.* Complaint, *supra* note 222, at 70–72.

<sup>224</sup> *Juliana v. United States*, 217 F. Supp. 3d 1224 (D. Or. 2016), *rev'd*, 947 F.3d 1159, 1171 (9th Cir. Jan. 17, 2020).

<sup>225</sup> See Appellants' Opening Brief at 10–11, *Juliana v. United States*, No. 18-36082 (9th Cir. Feb. 1, 2019).

<sup>226</sup> *Juliana v. United States*, 947 F.3d 1159, 1171 (9th Cir. Jan. 17, 2020) (“[A]ny effective plan would necessarily require a host of complex policy decisions entrusted to the wisdom and discretion of the executive and legislative branches.”).

<sup>227</sup> *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997).

<sup>228</sup> *Id.* at 720; see also *Juliana*, 947 F.3d at 1171.

<sup>229</sup> *Funk v. Wolf*, 144 A.3d 228, 250–251 (Pa. Commw. Ct. 2016), *aff'd*, 158 A.3d 642 (Pa. 2017); *Aronow v. State*, No. A12-0585, 2012 Minn. Dist. LEXIS 171, at \*13 (Minn. Dist. Ct. Jan. 20, 2012), *aff'd*, No. A12-0585, 2012 WL 4476642, 2012 Minn. App. Unpub. LEXIS 961, at \*6 (Minn. App. Ct. Oct. 1, 2012).

<sup>230</sup> See *supra* Section III.B.2.

<sup>231</sup> See Section III.B.3.



potential include Hawaii, Illinois, and Rhode Island.<sup>232</sup> For example, Article XI of Hawaii's Constitution includes two environmental protection provisions. Section 1 provides:

For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawaii's natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State. All public natural resources are held in trust by the State for the benefit of the people.<sup>233</sup>

Even more compelling is Section 9 of Article XI, which provides:

Each person has the right to a clean and healthful environment, as defined by laws relating to environmental quality, including control of pollution and conservation, protection and enhancement of natural resources. Any person may enforce this right against any party, public or private, through appropriate legal proceedings, subject to reasonable limitations and regulation as provided by law.<sup>234</sup>

Hawaii is a particularly promising jurisdiction because the Hawaii Supreme Court has already recognized that Section 9 confers standing to "use the courts to enforce laws intended to protect the environment."<sup>235</sup> By strategically choosing to litigate in states like Hawaii first, OCT can begin to establish favorable legal precedent before moving on to states whose appellate courts might be more resistant to ATL.

OCT's efforts at environmental reform through state rulemaking petitions and litigation have been met with slow progress and high rates of failure. Nevertheless, the campaign has made headway. Thus far, OCT has filed suit in only sixteen states, and most of its claims in these cases were not decided on the merits. That leaves thirty-four states wherein OCT has yet to test the waters of judicial review and others wherein OCT can renew its efforts. Successful test cases that establish favorable precedent may encourage other courts to follow. Though OCT's strategy initially sought to expand the public trust, the organization's ultimate goal is to compel states to adopt GHG regulations that will help address climate change. This goal may be realized using multiple techniques, and OCT has wisely and effectively evolved its strategy by broadening its claims to include other legal theories.

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<sup>232</sup> See HAW. CONST. art. XI, §§ 1, 9; ILL. CONST. art. XI; R.I. CONST. art. I.

<sup>233</sup> HAW. CONST. art. XI, § 1.

<sup>234</sup> *Id.* at art. XI, § 9.

<sup>235</sup> *Kahana Sunset Owners Ass'n v. Maui County Council*, 948 P.2d 122, 124 (Haw. 1997).

APPENDIX: TABLE A  
Our Children's Trust Rulemaking Petitions, Lawsuits, and Outcomes by State

| State   | Petition for Rulemaking <sup>236</sup>   | Litigation                            | Outcome  |
|---------|--|---------------------------------------|--|
| Alabama | Petitioned <sup>237</sup>  |                                       | Petition withdrawn. <sup>238</sup>   |
| Alaska  | Petition filed August 28, 2017 after <i>Kanuk</i> was dismissed <sup>239</sup> | <i>Kanuk v. State</i> <sup>240</sup>  | Dismissed, holding that claims related to the State's obligation to protect the atmosphere violate the political question doctrine and declaratory relief on the scope of the public trust doctrine would not provide plaintiffs relief sufficient to avoid further litigation. <sup>241</sup>   |
|         |  | <i>Sinnok v. State</i> <sup>242</sup> | Pending before the Alaska Supreme Court on whether the State's energy policy violates the plaintiffs' rights under the Alaska Constitution, whether the claim is a nonjusticiable political question of the State's energy policy, whether the Superior Court misconstrued recognized constitutional rights as a single claim under the public trust doctrine, and whether the denial of rulemaking petition |

<sup>236</sup> Unless otherwise noted, petitions for rulemaking were filed as part of OCT's May 4, 2011 nation-wide campaign.

<sup>237</sup> Agenda: Meeting of the Ala. Env'tl. Mgmt. Comm'n (May 25, 2011), <http://www.adem.state.al.us/commission/agenda/6-24-11EMC%20MeetingAGENDA5-25-11.pdf> [<https://perma.cc/QXC8-MZG7>].

<sup>238</sup> Ala. Env'tl. Mgmt. Comm'n, Meeting Minutes, Transcript at 13 (June 24, 2011) <http://www.adem.state.al.us/commission/minutes/6-24-11EMCMeetingFinal%20Minutes8-19-11.pdf> [<https://perma.cc/CLK8-QDUB>].

<sup>239</sup> Petition of Youth Petitioners & Alaska Youth for Env't Action to the Alaska Dep't of Env't Conservation (Aug. 28, 2017), [https://static1.squarespace.com/static/571d109b04426270152febe0/t/59a491ee3e00beb9e2449170/1503957493116/ALASKA+PETITION.08-28-17\\_Redacted.pdf](https://static1.squarespace.com/static/571d109b04426270152febe0/t/59a491ee3e00beb9e2449170/1503957493116/ALASKA+PETITION.08-28-17_Redacted.pdf) [<https://perma.cc/2EPR-P34V>]; Hartig, *supra* note 211.

<sup>240</sup> *Kanuk ex rel. Kanuk v. State Dep't of Nat. Res.*, 335 P.3d 1088, 1103 (Alaska 2014).

<sup>241</sup> *Id.* at 1098, 1101–02.

<sup>242</sup> *Sinnok v. State*, 3AN-17-0991909910 CI, 2018 WL 7501030 (Alaska Super. Ct., Anchorage Oct. 30, 2018), *appeal pending*, No. S-17297 (Alaska Mar. 26, 2019).

| State      | Petition for Rulemaking <sup>236</sup>                    | Litigation                                 | Outcome  |
|------------|---|--|--|
|            |   |  | was arbitrary and unconstitutional. <sup>243</sup>   |
| Arizona    | No petition   | <i>Butler v. Brewer</i> <sup>244</sup>     | Dismissed for failure to show violation of a specific constitutional provision or law and preclusion under the state's environmental statute. <sup>245</sup> |
| Arkansas   | Petitioned <sup>246</sup>                                 |  | Petition denied <sup>247</sup>   |
| California | No petition   | <i>Blades v. California</i> <sup>248</sup> | Plaintiffs voluntarily requested the case be dismissed without prejudice. <sup>249</sup>   |
| Colorado   | Petition filed November 15, 2013 after <i>Martinez v.</i> | <i>Martinez v. Colorado</i> <sup>251</sup> | Dismissed with prejudice on grounds that the public trust doctrine has never been recognized in Colorado and therefore there is no legal                     |

<sup>243</sup> *Sinnok Appellants' Brief*, *supra* note 157, at 3.

<sup>244</sup> *Butler v. Brewer*, No. 1 CA-CV 12-0347, 2013 WL 1091209 (Ariz. Ct. App. Mar. 14, 2013).

<sup>245</sup> *Id.* at \*5–7.

<sup>246</sup> Petition of Kids vs Global Warming to the Ark. Pollution Control & Quality Comm'n & Ark. Dep't of Env'tl. Quality (May 4, 2011), [http://www.adeq.state.ar.us/downloads/commission/agenda/previous%20meeting\\_agendas/2007-2012%20meeting%20agendas/2011-06-24\\_commission\\_agenda\(with\\_attachments\).pdf](http://www.adeq.state.ar.us/downloads/commission/agenda/previous%20meeting_agendas/2007-2012%20meeting%20agendas/2011-06-24_commission_agenda(with_attachments).pdf) [<https://perma.cc/2MVV-4KCY>].

<sup>247</sup> Arkansas Pollution Control & Ecology Commission, Minute Order No. 11-003-MISC (June 24, 2011), [http://www.adeq.state.ar.us/downloads/commission/agenda/previous%20meeting\\_agendas/2007-2012%20meeting%20agendas/2011-06-24\\_commission\\_agenda\(with\\_attachments\).pdf](http://www.adeq.state.ar.us/downloads/commission/agenda/previous%20meeting_agendas/2007-2012%20meeting%20agendas/2011-06-24_commission_agenda(with_attachments).pdf) [<https://perma.cc/8AHY-A8W3>].

<sup>248</sup> *Blades v. California*, No. CGC-11-510725 (Cal. Super. Ct., S.F. Cty. May. 4, 2011).

<sup>249</sup> Request for Dismissal, *Blades v. California*, No. CGC-11-510725 (Cal. Super. Ct., S.F. Cty. May. 4, 2011); *see also Proceedings in All 50 States: California*, OUR CHILDREN'S TRUST, <https://www.ourchildrenstrust.org/california> [<https://perma.cc/P8ED-J4BA>] (last visited Nov. 15, 2019) (noting voluntary dismissal).

<sup>251</sup> *Martinez v. Colorado*, No. 11CV4377, 2011 WL 11552495 (Colo. Dist. Ct., Denver Cnty., Nov. 07, 2011).

| State       | Petition for Rulemaking <sup>236</sup> | Litigation   | Outcome  |
|-------------|--|--|--|
|             | Colorado was dismissed <sup>250</sup>  |  | basis on which to grant relief. <sup>252</sup>   |
|             |  | <i>Martinez v. Colorado Oil and Gas Conservation Commission</i> <sup>253</sup> | The Colorado Supreme Court reversed the Court of Appeals, granting deference to the COGCC, finding that other COGCC efforts addressed the Plaintiffs' underlying concerns and the agency acted within its discretion by not adopting the proposed rule in favor of other regulatory priorities. <sup>254</sup> |
| Connecticut | Petitioned <sup>255</sup>              |  | Petition denied. <sup>256</sup>  |
| Delaware    | Petitioned <sup>257</sup>              |  | Petition denied. <sup>258</sup>  |

<sup>250</sup> Petition of Xiuhtezcatl Martinez et al. to the Colo. Oil & Gas Conservation Comm'n & Colo. Dep't of Nat. Res. (Nov. 15, 2013), <https://static1.squarespace.com/static/571d109b04426270152febe0/t/5760d25fab48de66f7214e4d/1465963105219/COFrackingPetition.pdf> [<https://perma.cc/JMK8-PVBX>]; Colo. Oil & Gas Conservation Comm'n, No. 1-187, In the Matter of the Petition for Rulemaking Filed with the Colo. Oil & Gas Conservation Comm'n by Xiuhtezcatl Martinez (May 29, 2014), <https://static1.squarespace.com/static/571d109b04426270152febe0/t/5760d2011d07c0ae98353947/1465963010349/COGCCWrittenDecision14.5.29.pdf> [<https://perma.cc/7E8B-8ZH8>] (denying the petition).

<sup>252</sup> *Martinez*, No. 11CV4377, 2011 WL 11552495, \*2–3.

<sup>253</sup> *Martinez v. Colo. Oil & Gas Conservation Comm'n*, No. 2014-CV-32637, 2014 WL 7474553 (Colo. Dist. Ct., Denver Cnty., Dec. 24, 2014), *rev'd*, 434 P.3d 689 (Colo. App. 2017), *rev'd*, 433 P.3d 22 (Colo. 2019).

<sup>254</sup> *Martinez*, 433 P.3d at 33.

<sup>255</sup> Petition of David Fisher & Kids vs Global Warming to the Conn. Dep't of Env'tl. Prot. (May 4, 2011), <https://static1.squarespace.com/static/571d109b04426270152febe0/t/57859bd7cd0f68284f6589c3/1468373977380/Connecticut+Petition+OL.pdf> [<https://perma.cc/G64D-VV8V>].

<sup>256</sup> *Proceedings in All 50 States: Connecticut*, OUR CHILDREN'S TRUST, <https://www.ourchildrenstrust.org/connecticut> [<https://perma.cc/T3FM-ZWR5>] (last visited Nov. 15, 2019) (noting denial of petition for rulemaking).

<sup>257</sup> Petition of Kids vs Global Warming to the Del. Dep't of Nat. Res. & Env'tl. Control & Div. of Air Quality (May 4, 2011), <https://static1.squarespace.com/static/571d109b04426270152febe0/t/57859646414fb5a47a54b6cd/1468372552130/Delaware+Petition+.pdf> [<https://perma.cc/Z7XP-VN4M>].

<sup>258</sup> *Proceedings in All 50 States: Delaware*, OUR CHILDREN'S TRUST, <https://www.ourchildrenstrust.org/delaware> [<https://perma.cc/GV5P-H88W>] (last visited Nov. 15, 2019) (noting denial of petition for rulemaking).

| State    | Petition for Rulemaking <sup>236</sup> | Litigation                                | Outcome  |
|----------|--|---|--|
| Florida  | Petitioned <sup>259</sup>              | <i>Reynolds v. Florida</i> <sup>260</sup> | The defendants' motions to dismiss are currently pending before the Florida Second Circuit Court. <sup>261</sup> |
| Georgia  | Petitioned <sup>262</sup>              |   | Petition denied. <sup>263</sup>  |
| Hawaii   | Petitioned <sup>264</sup>              |   | Petition denied. <sup>265</sup>  |
| Idaho    | Petitioned <sup>266</sup>              |   | Petition denied. <sup>267</sup>  |
| Illinois | Petitioned <sup>268</sup>              |   | Petition denied. <sup>269</sup>  |

<sup>259</sup> Petition for Rulemaking of Grace Halladay-Glynn et al. to the Fla. Dep't of Env'tl. Prot. (May 4, 2011), <https://static1.squarespace.com/static/571d109b04426270152febe0/t/57859cadebbd1aedaf8d6f70/1468374192020/Florida+Petition+.pdf> [<https://perma.cc/2UZ8-5SJS>].

<sup>260</sup> *Reynolds* Plaintiffs' First Amended Complaint, *supra* note 157.

<sup>261</sup> *Reynolds* Order Authorizing Supplemental Pleading, *supra* note 180, at 2.

<sup>262</sup> Petition of Kids vs Global Warming to the Ga. Dep't of Nat. Res. (May 4, 2011), <https://static1.squarespace.com/static/571d109b04426270152febe0/t/5762041e44024394189d0ec9/1466041377116/Georgia+Petition+.pdf> [<https://perma.cc/YB83-PS33>].

<sup>263</sup> *Proceedings in All 50 States: Georgia*, OUR CHILDREN'S TRUST, <https://www.ourchildrenstrust.org/georgia> [<https://perma.cc/E4DV-LCQX>] (last visited Nov. 15, 2019) (noting denial of petition for rulemaking).

<sup>264</sup> Petition of Joshua Scott & Kids vs Global Warming to Haw. Dep't of Health (May 4, 2011), <https://static1.squarespace.com/static/571d109b04426270152febe0/t/5762055c2e69cfaaa6d2afff/1466041694397/HAWAII+CITIZEN+PETITION+OL.pdf> [<https://perma.cc/AUG9-CU7H>].

<sup>265</sup> Letter from Gary Gill, Deputy Dir. of Health, Haw. Dep't of Health, to Alec Loorz & Virginia Loorz, Kids vs Global Warming (June 8, 2011), <https://static1.squarespace.com/static/571d109b04426270152febe0/t/5762053044024394189d1508/1466041650141/HawaiiPetitionDenial.pdf> [<https://perma.cc/ST7J-Z8SP>] (denying petition for rulemaking).

<sup>266</sup> Petition of Emily Smith & Kids vs Global Warming to Idaho Dep't of Env'tl. Quality (May 4, 2011), <https://static1.squarespace.com/static/571d109b04426270152febe0/t/57858d21e3df28a96816036e/1468370211706/Idaho+Petition+OL.pdf> [<https://perma.cc/37TB-QE6Y>].

<sup>267</sup> Meeting Minutes, Idaho Board of Env'tl. Quality 17 (June 29, 2011), <https://www.deq.idaho.gov/media/764076-board-meeting-minutes-062911.pdf> [<https://perma.cc/F8YS-TH2S>].

<sup>268</sup> Petition of Ena Kumar & Kids vs Global Warming to Ill. EPA (May 4, 2011), <https://static1.squarespace.com/static/571d109b04426270152febe0/t/57858adc9f7456a7046daae2/1468369630856/Illinois+Petition+OL.pdf> [<https://perma.cc/F4DZ-8J3W>].

<sup>269</sup> Letter from Lisa Bonnett, Interim Director, Ill. EPA, to Alec Loorz, Founder, Kids vs Global Warming (May 27, 2011), <https://static1.squarespace.com/static/571d109b04426270152febe0/t/576206e2beba7ba70d4b21b2/1466042083540/IL+Denial.pdf> [<https://perma.cc/7YD2-TG5Q>] (denying petition for rulemaking).

| State    | Petition for Rulemaking <sup>236</sup> | Litigation   | Outcome  |
|----------|--|--|--|
| Indiana  | Petitioned <sup>270</sup>              |  | Petition denied. <sup>271</sup>  |
| Iowa     | Petitioned <sup>272</sup>              | <i>Filippone ex rel. Philippone v. Iowa Department of Natural Resources</i> <sup>273</sup> | The court declined to extend the public trust doctrine to include the atmosphere and held that DNR's denial of the proposed rule was not unreasonable or an abuse of discretion. <sup>274</sup>                      |
| Kansas   | No petition                            | <i>Farb v. Kansas</i> <sup>275</sup>   | Dismissed for failure to exhaust administrative remedies before seeking judicial review; the court held that the public trust doctrine-based common law claim is displaced by Kansas Air Quality Act. <sup>276</sup> |
| Kentucky | Petitioned <sup>277</sup>              |  | Petition denied. <sup>278</sup>  |

<sup>270</sup> Petition of Kids vs Global Warming to Ind. Dep't of Env'tl. Mgmt. (May 4, 2011), [https://static1.squarespace.com/static/571d109b04426270152febe0/t/57858b55f7e0abc825cd9194/1468369751271/Indiana+Petition+\\_0.pdf](https://static1.squarespace.com/static/571d109b04426270152febe0/t/57858b55f7e0abc825cd9194/1468369751271/Indiana+Petition+_0.pdf) [https://perma.cc/QGD3-CL2V].

<sup>271</sup> *Proceedings in All 50 States: Indiana*, OUR CHILDREN'S TRUST, <https://www.ourchildrenstrust.org/indiana> [https://perma.cc/47BT-W2Q2] (last visited Nov. 15, 2019) (noting denial of petition for rulemaking).

<sup>272</sup> Petition by Kids vs Global Warming to Iowa Dep't of Nat. Res. (May 4, 2011), [https://static1.squarespace.com/static/571d109b04426270152febe0/t/57859684e3df28a968165190/1468372614791/Iowa+Petition+\\_0.pdf](https://static1.squarespace.com/static/571d109b04426270152febe0/t/57859684e3df28a968165190/1468372614791/Iowa+Petition+_0.pdf) [https://perma.cc/4ZGJ-QDPY]; cf. Letter from Roger L. Lande, Director, Iowa Dep't of Nat. Res., to Kids vs Global Warming et al. (June 22, 2011), <https://static1.squarespace.com/static/571d109b04426270152febe0/t/57620b06beba70d4b3b67/1466043142937/Iowa+Denial+OL.pdf> [https://perma.cc/FBB2-5Y9Z] (denying petition for rulemaking).

<sup>273</sup> *Filippone ex rel. Philippone v. Iowa Dep't of Nat. Res.*, No. 12-0444, 2013 WL 988627 (Iowa Ct. App. 2013).

<sup>274</sup> *Id.* at \*2-3.

<sup>275</sup> *Farb v. Kansas*, No. 12-C-1133 (Kan. Dist. Ct. June 4, 2013).

<sup>276</sup> *Id.*, slip op. at 3, 5.

<sup>277</sup> Petition of Jackson Bauer, Emery Elkinson, WildEarth Guardians, & Kids vs Global Warming to Gov. Steve Beshear & Len Peters, Sec'y, Ky. Energy & Env't Cabinet (May 4, 2011), [https://static1.squarespace.com/static/571d109b04426270152febe0/t/57858f9ad482e95467ebcaa8/1468370845575/KY\\_5\\_4\\_11.pdf](https://static1.squarespace.com/static/571d109b04426270152febe0/t/57858f9ad482e95467ebcaa8/1468370845575/KY_5_4_11.pdf).PdfCompressor-294337.pdf [https://perma.cc/AL9Y-JKT6].

<sup>278</sup> *Proceedings in All 50 States: Kentucky*, OUR CHILDREN'S TRUST, <https://www.ourchildrenstrust.org/kentucky> [https://perma.cc/93FB-UDQC] (last visited Nov. 15, 2019) (noting denial of petition for rulemaking).

| State     | Petition for Rulemaking <sup>236</sup>                  | Litigation | Outcome   |
|-----------|---|------------|---|
| Louisiana | Petitioned <sup>279</sup>                               |            | Petition denied. <sup>280</sup>   |
| Maine     | Petitioned <sup>281</sup>                               |            | Petitions denied. <sup>282</sup>  |
|           | Second petition filed September 27, 2016 <sup>283</sup> |            |   |
|           | Third petition filed June 27, 2018 <sup>284</sup>       |            | The third petition for rulemaking expired under the statutory rulemaking period; the MEDEP did not adopt the proposed rules before the expiration. <sup>285</sup> |
| Maryland  | Petitioned <sup>286</sup>                               |            | Petition denied. <sup>287</sup>   |

<sup>279</sup> Petition of Kezia Kamenetz & Kids vs Global Warming to La. Dep't of Env'tl. Quality (May 4, 2011), <https://static1.squarespace.com/static/571d109b04426270152febe0/t/57858d8f579fb3892cab2adf/1468370321737/Louisiana+Petition+OL.pdf> [https://perma.cc/69M2-XQ82].

<sup>280</sup> Letter from Peggy M. Hatch, Secretary, La. Dep't of Env'tl. Quality, to Keizia Kamenetz & Alan Looz, Kids vs Global Warming (July 28, 2011) (on file with author) (denying petition for rulemaking).

<sup>281</sup> In the Matter of Gabrielle Beth Bellegarde & Kids vs Global Warming, Request for the Adoption of a Rule, Me. Dep't of Env'tl. Protection (May 4, 2011), <https://static1.squarespace.com/static/571d109b04426270152febe0/t/57859c1d579fb3892cabaa05/1468374047224/Maine.pdf> [https://perma.cc/MZ5Q-AFXM].

<sup>282</sup> *Proceedings in All 50 States: Maine*, OUR CHILDREN'S TRUST, <https://www.ourchildrenstrust.org/maine> [https://perma.cc/7KKL-5MLT] (last visited Oct. 5, 2019) (noting denial of petitions for rulemaking).

<sup>283</sup> Citizen Petition to Initiate Rulemaking, Me. Dept. of Env'tl. Protection (Sept. 27, 2016), <https://static1.squarespace.com/static/571d109b04426270152febe0/t/57eae08d482e9f4d4755628/1475013386026/2016.09.27%2C+Maine+Petition+FINAL.pdf> [https://perma.cc/VPD3-42SB].

<sup>284</sup> Maine Citizen Petition, *supra* note 90.

<sup>285</sup> MAINE INTERAGENCY CLIMATE ADAPTATION WORK GROUP, *supra* note 91, at 5.

<sup>286</sup> Katherine A. Meyer et al., Petition for Rulemaking to Restrict Deforestation in the State of Md. to Mitigate Climate Change, Md. Dept. of Nat'l. Resources (May 4, 2011), <https://static1.squarespace.com/static/571d109b04426270152febe0/t/57858d61579fb3892cab287d/1468370276564/MD+Petition.pdf> [https://perma.cc/MCC7-RBLD].

<sup>287</sup> *Proceedings in All 50 States: Maryland*, OUR CHILDREN'S TRUST, <https://www.ourchildrenstrust.org/maryland> [https://perma.cc/M3FQ-ZWQT] (last visited Nov. 15, 2019) (noting denial of petition for rulemaking).

| State         | Petition for Rulemaking <sup>236</sup>         | Litigation   | Outcome   |
|---------------|--|--|---|
| Massachusetts | Petition filed November 1, 2012 <sup>288</sup> | <i>Kain et al., v. Massachusetts Department of Environmental Protection</i> <sup>289</sup> | The Supreme Judicial Court of Massachusetts found in favor of OCT, declaring that state law requires MADEP to regulate sources of GHGs. <sup>290</sup>  |
| Michigan      | Petitioned <sup>291</sup>                      |  | Petition denied. <sup>292</sup>   |
| Minnesota     | No petition                                    | <i>Aronow v. State</i> <sup>293</sup>  | The trial court dismissed, declining to extend the public trust doctrine to the atmosphere <sup>294</sup> and holding that the statute allowing citizen suits against the state only allows challenges of promulgated standards not legislative inaction. <sup>295</sup> The Minnesota Court of Appeals affirmed for failure to state a claim. <sup>296</sup> |

<sup>288</sup> Petition of Eshe Sherley et al., Mass. Dep't of Env'tl. Prot. (Nov. 1, 2012), <https://static1.squarespace.com/static/571d109b04426270152febe0/t/57609324356fb0f59a89b317/1465946918296/> [https://perma.cc/H784-KKFB]; see also Mass. Dep't of Env'tl. Prot., The Mass. Dep't of Env'tl. Prot. Action on the *Kids vs. Global Warming* Petition (June of 2013), <https://static1.squarespace.com/static/571d109b04426270152febe0/t/57609155c6fc08526047381b/1465946454076/MassDEPDecision.pdf> [https://perma.cc/5BTP-FAPH] (denying petition for rulemaking).

<sup>289</sup> *Kain v. Mass. Dep't of Env'tl. Prot.*, 49 N.E.3d 1124 (2016).

<sup>290</sup> *Id.* at 1142.

<sup>291</sup> Petition of David Akinpelu & Kids vs Global Warming, Mich. Dep't of Env'tl. Quality & the Air Quality Div. (May 4, 2011), <https://static1.squarespace.com/static/571d109b04426270152febe0/t/57858b14e3df28a96815f0c9/1468369686387/Michigan+Petition.pdf> [https://perma.cc/WMB2-7HW7].

<sup>292</sup> *Proceedings in All 50 States: Michigan*, OUR CHILDREN'S TRUST, <https://www.ourchildrenstrust.org/michigan> [https://perma.cc/8PPQ-F86E] (last visited Nov. 15, 2019) (noting denial of petition for rulemaking).

<sup>293</sup> *Aronow v. State*, No. A12-0585, 2012 Minn. Dist. LEXIS 171 (Minn. Dist. Ct. Jan. 20, 2012), *aff'd*, No. A12-0585, 2012 Minn. App. Unpub. LEXIS 961 (Minn. App. Ct. Oct. 1, 2012).

<sup>294</sup> *Aronow*, No. A12-0585, 2012 Minn. Dist. LEXIS 171, at \*6.

<sup>295</sup> *Id.* at \*7-17.

<sup>296</sup> *Aronow*, 2012 Minn. App. Unpub. LEXIS 961, at \*1.



| State       | Petition for Rulemaking <sup>236</sup> | Litigation                              | Outcome   |
|-------------|--|---|---|
| Mississippi | Petitioned <sup>297</sup>              |   | Petition denied. <sup>298</sup>   |
| Missouri    | Petitioned <sup>299</sup>              |   | Petition denied. <sup>300</sup>   |
| Montana     | No petition                            | <i>Barhaugh v. State</i> <sup>301</sup> | The Montana Supreme Court denied original jurisdiction because the case did not involve purely legal questions, and instead alleged unresolvable factual questions, “such as the role of Montana in the global problem of climate change and how emissions created in Montana ultimately affect Montana’s climate”; <sup>302</sup> the court also cited plaintiffs’ failure to establish urgency or emergency. <sup>303</sup> |
| Nebraska    | Petitioned <sup>304</sup>              |   | Petition denied. <sup>305</sup>   |

<sup>297</sup> Petition of Derek Watkins & Kids vs Global Warming, Miss. Dep’t of Env’tl. Quality (May 4, 2011), <https://static1.squarespace.com/static/571d109b04426270152febe0/t/57858c45d482e95467eba40e/1468369991843/Mississippi+Petition.pdf> [https://perma.cc/FKJ5-E4ZC].

<sup>298</sup> *Proceedings in All 50 States: Mississippi*, OUR CHILDREN’S TRUST, <https://www.ourchildrenstrust.org/mississippi> [https://perma.cc/JRH3-DTMN] (last visited Nov. 15, 2019) (noting denial of petition for rulemaking).

<sup>299</sup> Petition for Agency Rulemaking on Behalf of Nicholas Cady & Kids vs Global Warming, Mo. Dep’t of Nat. Res. (May 4, 2011), <https://static1.squarespace.com/static/571d109b04426270152febe0/t/57859025cd0f68284f651ee7/1468370983455/Missouri+Petition.pdf> [https://perma.cc/R76N-N3TK].

<sup>300</sup> *Proceedings in All 50 States: Missouri*, OUR CHILDREN’S TRUST, <https://www.ourchildrenstrust.org/missouri> [https://perma.cc/4M9K-9FVS] (last visited Nov. 15, 2019) (noting denial of petition for rulemaking).

<sup>301</sup> *Barhaugh v. State*, No. 11-0258, 2011 Mont. LEXIS 477 (Mont. June 15, 2011).

<sup>302</sup> *Id.* at \*2–3.

<sup>303</sup> *Id.* at \*3.

<sup>304</sup> Petition of Erik S. Mellgren, Neb. Env’tl. Quality Council (May 4, 2011), <https://static1.squarespace.com/static/571d109b04426270152febe0/t/57859b968419c25970a9a429/1468373912277/Nebraska+Petition.pdf> [https://perma.cc/2LWX-AJ3G].

<sup>305</sup> *Proceedings in All 50 States: Nebraska*, OUR CHILDREN’S TRUST, <https://www.ourchildrenstrust.org/nebraska> [https://perma.cc/S946-FKXD] (last visited Nov. 15, 2019) (noting denial of petition for rulemaking).

| State         | Petition for Rulemaking <sup>236</sup>  | Litigation  | Outcome   |
|---------------|---|---|---|
| Nevada        | Petitioned <sup>306</sup>   |   | Petition denied. <sup>307</sup>   |
| New Hampshire | Petitioned <sup>308</sup>   |   | Petition denied. <sup>309</sup>   |
| New Jersey    | No petition   | Filed a letter of intent to sue the New Jersey Department of Environmental Protection in 2011 but OCT has yet to file a complaint. <sup>310</sup> |   |
| New Mexico    | Petition filed June 27, 2017 after <i>Sanders-Reed</i> was dismissed <sup>311</sup> | <i>Sanders-Reed ex rel. Sanders-Reed v. Martinez</i> <sup>312</sup>   | The New Mexico Court of Appeals declared that the public trust doctrine protects the atmosphere, citing a state constitutional provision that |

<sup>306</sup> Petition for Commission of Regulation on Behalf of Alec Loorz & Victoria Loorz, Nev. State Env'tl. Commission (May 4, 2011), <https://static1.squarespace.com/static/571d109b04426270152febe0/t/57859607d2b857c40a619959/1468372489209/Nevada+Petition+.pdf> [<https://perma.cc/W64D-TYNQ>].

<sup>307</sup> *Proceedings in All 50 States: Nevada*, OUR CHILDREN'S TRUST, <https://www.ourchildrenstrust.org/nevada> [<https://perma.cc/6LSD-Z8MN>] (last visited Nov. 15, 2019) (noting denial of petition for rulemaking).

<sup>308</sup> Petition of Nicholas S. Devonshire & Kids vs Global Warming, N.H. Dep't of Env'tl. Serv. (May 4, 2011) <https://static1.squarespace.com/static/571d109b04426270152febe0/t/578596bf3e00be94f037f35a/1468372673130/New+Hampshire+Petition.pdf> [<https://perma.cc/2RM4-ZKE3>].

<sup>309</sup> Thomas S. Burack, Response to Petition of Nicholas S. Devonshire & Kids, N.H. Dep't of Env'tl. Serv. (July 28, 2011) <https://static1.squarespace.com/static/571d109b04426270152febe0/t/576813a4e3df2894a2de92c8/1466438566728/New+Hampshire+Denial.pdf> [<https://perma.cc/3WYP-7M4R>] (denying petition for rulemaking).

<sup>310</sup> Letter from Michael L. Pisauo, Jr., Re: Notion of Intention to Commence Action Pursuant to the Env'tl. Rights Act Regarding the State's Failure to Comply with the Global Warming Response Act & Public Trust Obligations, to Robert Martin, Comm'r, N.J. Dep't of Env'tl. Prot. (May 6, 2011), <https://static1.squarespace.com/static/571d109b04426270152febe0/t/57859d56e4fcb510ac2580e2/1468374358704/New+Jersey+Letter+of+Intent+.pdf> [<https://perma.cc/VH74-DF5T>].

<sup>311</sup> Petition of Alicia S. et al., In the Matter of Proposed New Regulation, 20.2.351 NMAC—Greenhouse Gas Reduction Program, No. EIB 17-01(R), to Environmental Improvement Board, State of New Mexico (June 27, 2017), <https://static1.squarespace.com/static/571d109b04426270152febe0/t/5952b8642e69cf02dd5fc13e/1498593381574/17.06.26+NM+Petition.pdf> [<https://perma.cc/NKZ6-Y8LL>].

<sup>312</sup> *Sanders-Reed ex rel. Sanders-Reed v. Martinez*, 350 P.3d 1221 (N.M. Ct. App. 2015).

| State          | Petition for Rulemaking <sup>236</sup>         | Litigation   | Outcome  |
|----------------|--|--|--|
|                |  |  | includes “the air”; <sup>313</sup> yet held that state courts cannot independently force the State to regulate GHGs because existing constitutional and statutory framework has adopted and implemented the common law public trust doctrine. <sup>314</sup> |
| New York       | Petitioned <sup>315</sup>                      |  | Petition denied. <sup>316</sup>  |
| North Carolina | Petition filed December 5, 2014 <sup>317</sup> | <i>Turner v. North Carolina Environmental Management Commission</i> <sup>318</sup> | Affirmed the Commission’s dismissal of the petition as incomplete <sup>319</sup>   |

<sup>313</sup> *Id.* at 1225 (citing N.M. CONST. art XX, § 21).

<sup>314</sup> *Sanders-Reed*, 350 P.3d at 1225–27.

<sup>315</sup> Petition of Eliza Sherpa et al. & Kids vs Global Warming, to the N.Y. Dep’t of Env’tl. Conservation (May 4, 2011), <https://static1.squarespace.com/static/571d109b04426270152febe0/t/57859cd44402432759d1fff8/1468374229775/New+York+Petition.pdf> [https://perma.cc/SR2B-XH6N].

<sup>316</sup> *Proceedings in All 50 States: New York*, OUR CHILDREN’S TRUST, <https://www.ourchildrenstrust.org/new-york> [https://perma.cc/WET9-MTKA] (last visited Nov. 15, 2019) (noting denial of petition for rulemaking).

<sup>317</sup> Petition of Gayle Goldsmith Tuch, Petition for Rule-making, on Behalf of Hallie Turner, for the Promulgation of a Rule Based on the Best Available Climate Science to Limit N.C.’s Carbon Dioxide Emissions, to Sheila Holman, Dir., N.C. Div. of Air Quality (Dec. 5, 2014), <https://static1.squarespace.com/static/571d109b04426270152febe0/t/576817ef03596eeee8eaa6af/1466439671499/2014.12.05NCPetitionforRuleMaking.pdf> [https://perma.cc/7USH-3SFQ].

<sup>318</sup> *Turner v. N.C. Env’tl. Mgmt. Comm’n*, No. 15-CVS-2488 (N.C. Wake Cty. Ct. Nov. 27, 2015).

<sup>319</sup> *Id.*

| State        | Petition for Rulemaking <sup>236</sup>                 | Litigation   | Outcome   |
|--------------|--|--|---|
|              | Second petition filed November 14, 2017 <sup>320</sup> | <i>Turner v. North Carolina Environmental Management Commission</i> <sup>321</sup> | <i>Turner</i> is pending with no updates since the judicial review petition was filed. <sup>322</sup> |
| North Dakota | Petitioned <sup>323</sup>                              |  | Petition denied. <sup>324</sup>   |
| Ohio         | Petitioned <sup>325</sup>                              |  | Petition denied. <sup>326</sup>   |
| Oklahoma     | Petitioned <sup>327</sup>                              |  | Petition denied. <sup>328</sup>   |

<sup>320</sup> Petition of Duke Env'tl. Law & Policy Clinic, Petition for Rulemaking to Limit N.C.'s Carbon Dioxide Emissions to Protect a Stable Climate System & Preserve the Nat. Res. of N.C., to Michael Abraczinskas, Dir., N.C. Dep. Of Env'tl. Quality (Nov. 14, 2017), [https://static1.squarespace.com/static/571d109b04426270152febe0/t/5a0b158cf9619a1bb07c71fe/1510675883103/11.13.17\\_Rulemaking+Petition\\_Clean+Final.pdf](https://static1.squarespace.com/static/571d109b04426270152febe0/t/5a0b158cf9619a1bb07c71fe/1510675883103/11.13.17_Rulemaking+Petition_Clean+Final.pdf) [<https://perma.cc/828K-HBWX>]; Phillip T. Reynolds, Special Deputy Attorney General, N.C. Dep't of Just., Letter to James P. Longest regarding Petition for Rulemaking by Hallie Turner, Arya Pontula, and Emily Liu Env'tl. Mgmt. Comm'n, Final Agency Decision, (May 7, 2018) (denying petition for rulemaking).

<sup>321</sup> Petition for Judicial Review, *Turner v. N.C. Env'tl. Mgmt. Comm'n*, No. 15-CVS-2488 (N.C. Super. Ct., Wake Cty. June 6, 2018); *see also Active State Legal Actions: North Carolina*, *supra* note 100 (noting filing of petition for Judicial Review on June, 6, 2018).

<sup>322</sup> *See Active State Legal Actions: North Carolina*, *supra* note 100.

<sup>323</sup> Petition of Kids vs Global Warming, to the N.D. Dep't of Health & N.D. Env'tl. Health Sec'y (May 4, 2011), <https://static1.squarespace.com/static/571d109b04426270152febe0/t/57858fd37c581e72464c562/1468370913657/North+Dakota+Petition+.pdf> [<https://perma.cc/L4NJ-JSMD>].

<sup>324</sup> Letter from L. David Glatt, N.D. Dep't of Health, Re: Regulation of Carbon Dioxide Emissions, to Kids vs Global Warming (Aug. 24, 2011), <https://static1.squarespace.com/static/571d109b04426270152febe0/t/57681b25ebbd1afe2f2fc81e/1466440487343/ND+Denial.pdf> [<https://perma.cc/987C-ZBJD>] (denying petition for rulemaking).

<sup>325</sup> Petition of Lynne Nickol & Kids vs Global Warming, to the Ohio Env'tl. Prot. Agency & the Div. of Air Pollution Control (May 4, 2011), <https://static1.squarespace.com/static/571d109b04426270152febe0/t/57858f51c534a5ef75f9db64/1468370771733/Ohio+Petition+OL.pdf> [<https://perma.cc/GE6H-FYBR>].

<sup>326</sup> Letter from Robert Hodanbosi, Ohio Env'tl. Prot. Agency, denying petition for rulemaking, to Lynn Nicjol (Sept. 1, 2011), <https://static1.squarespace.com/static/571d109b04426270152febe0/t/57681baae3df28ef7406a966/1466440619015/Ohio+Denial.pdf> [<https://perma.cc/Q4D2-ZTEH>].

<sup>327</sup> Petition of Kids vs Global Warming, to the Okla. Dep't of Env'tl. Quality (May 4, 2011), <https://static1.squarespace.com/static/571d109b04426270152febe0/t/57859d9ed2b857c40a61d7e0/1468374431509/Oklahoma+Petition+.pdf> [<https://perma.cc/5BZM-LMDR>].

<sup>328</sup> AIR QUALITY COUNCIL MEETING TRANSCRIPT, *supra* note 86, at 18–32.

| State        | Petition for Rulemaking <sup>236</sup>      | Litigation  | Outcome   |
|--------------|---|---|---|
| Oregon       | No petition                                 | <i>Chernaik v. Brown</i> <sup>329</sup><br>(originally filed as <i>Chernaik v. Kitzhaber</i> <sup>330</sup> ) | After finding that the issues were justiciable in an earlier decision, <sup>331</sup> the Oregon Court of Appeals ruled against OCT on the merits. <sup>332</sup> An appeal is pending before the Oregon Supreme Court on the issues of whether the common law public trust doctrine includes additional natural resources beyond submerged lands and whether the doctrine imposes a fiduciary duty on the state to protect trust resources from climate change. <sup>333</sup> |
| Pennsylvania | Petition filed July 23, 2012 <sup>334</sup> | <i>Funk v. Wolf</i> <sup>335</sup>  | Dismissed because the Pennsylvania Environmental Rights Amendment (ERA) does not provide a right or impose a duty on the State to perform the specific acts requested by the petitioners; <sup>336</sup> declined to  |

<sup>329</sup> *Chernaik v. Brown*, No. 16-11-09273, 2015 WL 12591229 (Or. Cir. May 11, 2015), *aff'd in part, vacated in part*, 436 P.3d 26 (Or. Ct. App. 2019), *appeal pending*, No. S066564 (Or. argued Nov. 13, 2019).

<sup>330</sup> See *Chernaik v. Kitzhaber*, No. 16-11-09273, 2012 WL 10205018 (Or. Cir. Apr. 5, 2012), *rev'd*, 328 P.3d 799 (Or. Ct. App. 2014); see also *supra* note 164 and accompanying text.

<sup>331</sup> *Chernaik v. Kitzhaber*, 328 P.3d 799 (Or. Ct. App. 2014).

<sup>332</sup> *Chernaik*, 436 P.3d 26, 35–36 (Or. Ct. App. 2019), *appeal pending*, No. S066564 (Or. argued Nov. 13, 2019).

<sup>333</sup> *Chernaik* Order Allowing Review, *supra* note 157; Oregon Supreme Court, Entry Form: Olivia Chairnaik v. Kate Brown, <https://web.courts.oregon.gov/records/sccalendar.nsf/b29dd44d01dffa088256c91005b3a5b/e98c1d19ad329420882584110062a601?OpenDocument> [<https://perma.cc/4ASY-3323>] (last updated Oct. 30, 2019).

<sup>334</sup> Petition of Ashley Funk & Kids vs Global Warming to the Pa. Env'tl. Quality Board et al. (July 23, 2012), [https://static1.squarespace.com/static/571d109b04426270152febe0/t/5760cd964d088e411ed535a3/1465961879976/PA\\_PETITION.web\\_.pdf](https://static1.squarespace.com/static/571d109b04426270152febe0/t/5760cd964d088e411ed535a3/1465961879976/PA_PETITION.web_.pdf) [<https://perma.cc/UQ6N-8DCU>]; Petition of Ashley Funk & Kids vs Global Warming to the Pa. Dep't of Env'tl. Prot. (Oct. 2, 2012), <https://static1.squarespace.com/static/571d109b04426270152febe0/t/5760cd1040261d1b7dfcefcfb/1465961746868/PA.Petition.10.2.12.pdf> [<https://perma.cc/C97D-AQJU>].

<sup>335</sup> *Funk v. Wolf*, 144 A.3d 228 (Pa. Commw. Ct. 2016), *aff'd*, 158 A.3d 642 (Pa. 2017).

<sup>336</sup> *Funk*, 144 A.3d at 250–51.

| State          | Petition for Rulemaking <sup>236</sup> | Litigation | Outcome  |
|----------------|--|------------|--|
|                |  |            | declare that the right to certain levels of GHGs is protected by the ERA. <sup>337</sup> |
| Rhode Island   | Petitioned <sup>338</sup>              |            | Petition denied. <sup>339</sup>  |
| South Carolina | Petitioned <sup>340</sup>              |            | Petition denied. <sup>341</sup>  |
| South Dakota   | Petitioned <sup>342</sup>              |            | Petition denied. <sup>343</sup>  |
| Tennessee      | Petitioned <sup>344</sup>              |            | Petition denied. <sup>345</sup>  |

<sup>337</sup> *Id.* at 251.

<sup>338</sup> Petition of Kim Twist & Kids vs Global Warming to the R.I. Dep't of Env't Mgmt. & Off. of Air Res. (May 4, 2011), <https://static1.squarespace.com/static/571d109b04426270152febe0/t/57858c974402432759d17789/1468370073984/Rhode+Island+Petition.pdf> [https://perma.cc/2FKY-K2EG].

<sup>339</sup> Answer from State of R.I. & Providence Plantations Dep't of Env'tl. Mgmt. Off. of Air Res., RE: Petition of Kim Twist & Kids vs Global Warming 3 (June 6, 2011), <https://static1.squarespace.com/static/571d109b04426270152febe0/t/57681c94be65940921aedd04/1466440853945/RI+Denial.pdf> [https://perma.cc/5RZA-QTPJ].

<sup>340</sup> Petition of Kids vs Global Warming to the S.C. Dep't of Health & Env'tl. Control (May 4, 2011), <https://static1.squarespace.com/static/571d109b04426270152febe0/t/5785906815d5dbb0fab41e07/1468371050515/South+Carolina+Petition+.pdf> [https://perma.cc/MSZ3-YXHZ].

<sup>341</sup> *Proceedings in All 50 States: South Carolina*, OUR CHILDREN'S TRUST, <https://www.ourchildrenstrust.org/south-carolina> [https://perma.cc/RV4G-E4VG] (last visited Nov. 15, 2019) (noting denial of petition for rulemaking).

<sup>342</sup> Petition of Kids vs Global Warming to the S.D. Dep't of Env't & Nat. Res. (May 4, 2011), <https://static1.squarespace.com/static/571d109b04426270152febe0/t/57859dc55016e1bd48669b9b/1468374470677/South+Dakota+Petition.pdf> [https://perma.cc/PGU9-YZ8D].

<sup>343</sup> Letter from S.D. Dep't of Env't & Nat. Res., RE: Petition for the promulgation of rules to limit atmospheric concentration of CO<sub>2</sub> to no greater than 350 ppm by 2100 to Alec Loorz et al. (June 1, 2011), <https://static1.squarespace.com/static/571d109b04426270152febe0/t/57681d61725e25259d831cfc/1466441058949/SD+Denial.pdf> [https://perma.cc/FP48-C7GR].

<sup>344</sup> Petition of Burgin Estel Dossett IV et al., to the Tenn. Dep't of Env't & Conservation & Div. of Air Pollution Control (May 4, 2011), <https://static1.squarespace.com/static/571d109b04426270152febe0/t/578590dfe3df28a968162123/1468371169423/Tennessee+Petition.pdf> [https://perma.cc/B9VJ-VH3K].

<sup>345</sup> *Proceedings in All 50 States: Tennessee*, OUR CHILDREN'S TRUST, <https://www.ourchildrenstrust.org/tennessee> [https://perma.cc/PR28-5DAK] (last visited Nov. 15, 2019) (noting denial of petition for rulemaking).

| State    | Petition for Rulemaking <sup>236</sup> | Litigation   | Outcome  |
|----------|--|--|--|
| Texas    | Petitioned <sup>346</sup>              | <i>Bonser-Lain v. Texas Commission on Environmental Quality</i> <sup>347</sup> | Texas Court of Appeals dismissed case for lack of subject matter jurisdiction, holding that an agency's refusal to promulgate a rule is not reviewable by Texas courts. <sup>348</sup> |
| Utah     | Petitioned <sup>349</sup>              |  | Petition denied. <sup>350</sup>  |
| Vermont  | Petitioned <sup>351</sup>              |  | Petition denied. <sup>352</sup>  |
| Virginia | Petitioned <sup>353</sup>              |  | Petition denied. <sup>354</sup>  |

<sup>346</sup> Petition for Rulemaking of Angela Bonser-Lain et al., before the Tex. Comm'n on Env'tl. Quality (May 5, 2011), [https://static1.squarespace.com/static/571d109b04426270152febe0/t/5768200bff7c50d3ce830864/1466441741242/Texas+Petition\\_0.pdf](https://static1.squarespace.com/static/571d109b04426270152febe0/t/5768200bff7c50d3ce830864/1466441741242/Texas+Petition_0.pdf) [https://perma.cc/HD8B-EAST]; Decision of the Comm'n Regarding the Petition for Rulemaking, Docket No. 2011-0720-RUL, Texas Comm'n on Env'tl. Quality (June. 27, 2011), <https://static1.squarespace.com/static/571d109b04426270152febe0/t/57681ff3ff7c50d3ce8307ac/1466441716435/Texas+Denial.pdf> [https://perma.cc/S52P-5NQG].

<sup>347</sup> *Bonser-Lain v. Tex. Comm'n on Env'tl. Quality*, No. D-1-GN-11-002194, 2012 WL 3164561 (Tex. Dist. Ct. Aug. 2, 2012), *vacated*, 438 S.W.3d 887 (Tex. App. 2014).

<sup>348</sup> *Bonser-Lain*, 438 S.W.3d at 895.

<sup>349</sup> Petition for a Rule Change of Sierra Adler et al., to the State of Utah (May 4, 2011), <https://static1.squarespace.com/static/571d109b04426270152febe0/t/57859d2df5e2318aa2ee07cd/1468374318604/Utah.pdf> [https://perma.cc/ZNB4-3X5F].

<sup>350</sup> Utah Air Quality Board, Denial of Petition for Rulemaking (July 18, 2011), <https://static1.squarespace.com/static/571d109b04426270152febe0/t/5768207446c3c4e74c53e690/1466441846934/Utah+Denial+.pdf> [https://perma.cc/DN9U-AW99].

<sup>351</sup> Petition of Page Atcheson, Jenna Witson, & Kids vs Global Warming to the Vt. Agency of Nat. Res. (May 4, 2011) (on file with author).

<sup>352</sup> *Proceedings in All 50 States: Vermont*, OUR CHILDREN'S TRUST, <https://www.ourchildrenstrust.org/vermont> [https://perma.cc/X3JS-4FDD] (last visited Nov. 18, 2019) (noting denial of petition for rulemaking).

<sup>353</sup> Petition of Emma Serrels & Kids vs Global Warming to the Va. Dep't of Env'tl. Quality & Va. Air Pollution Control Board (May 4, 2011), <https://static1.squarespace.com/static/571d109b04426270152febe0/t/57859e44ff7c502ee854e06e/1468374598246/Virginia+Petitions.pdf> [https://perma.cc/T48G-Y5U5].

<sup>354</sup> Air Pollution Control Board, *Petition Information: Regulation of Carbon Dioxide Emissions & Effective Reduction Strategy* (Sept. 12, 2011), <http://townhall.virginia.gov/ViewPetition.cfm?petitionid=149> [https://perma.cc/7L42-4GPT].

| State      | Petition for Rulemaking <sup>236</sup>  | Litigation   | Outcome  |
|------------|---|--|--|
| Washington | Petition filed June 17, 2014 after <i>Svitak</i> was dismissed <sup>355</sup> | <i>Svitak v. State</i> <sup>356</sup>                            | The Washington Court of Appeals affirmed the trial court's dismissal on grounds the complaint did not challenge an affirmative state action or failure of a duty to act; <sup>357</sup> the court also found the legislature had already recognized the dangers of climate change and enacted emissions limits. <sup>358</sup>   |
|            |   | <i>Foster v. Washington Department of Ecology</i> <sup>359</sup> | In 2015, the trial court held that the public trust doctrine obligates DEC to establish GHG limits because of the impacts of climate change on navigable waters; <sup>360</sup> yet denied petition to review after finding that the DEC's rulemaking satisfied the agency's statutory and constitutional duties. <sup>361</sup> In 2016, the trial court partially reversed its earlier ruling and ordered DEC to issue a rule by the end of the calendar |

<sup>355</sup> Petition of Our Children to the Wash. State Dep't of Ecology (June 17, 2014), [https://static1.squarespace.com/static/571d109b04426270152febe0/t/5785909d9de4bb340b8b75df/1468371110844/Petition.Final\\_.6.17.14.pdf](https://static1.squarespace.com/static/571d109b04426270152febe0/t/5785909d9de4bb340b8b75df/1468371110844/Petition.Final_.6.17.14.pdf) [<https://perma.cc/7XV2-H98P>]; Letter from Maia D. Bellon, Dir., Wash. State Dep't of Ecology, to Andrea Rogers. Harris (Aug. 14, 2014), <https://static1.squarespace.com/static/571d109b04426270152febe0/t/576081a01d07c05bf208e7c7/1465942439363/WA.EcologyDecision.pdf> [<https://perma.cc/2ED9-BBV6>] (denying petition for rulemaking).

<sup>356</sup> *Svitak v. Washington*, No. 11-2-16008-4 SEA, 2011 WL 12686902 (Wash. Super. Ct., Kings Cty. Mar. 2, 2012), *aff'd*, *Svitak ex rel. Svitek v. State*, No. 69710-2-I, 2013 WL 6632124 (Wash. Ct. App. Dec. 16, 2013).

<sup>357</sup> *Svitak ex rel. Svitek v. State*, 2013 WL 6632124, at \*2–3.

<sup>358</sup> *Id.* at \*1–2.

<sup>359</sup> *Foster v. Washington Dep't of Ecology*, No. 14-2-25295-1SEA, 2015 WL 7721362 (Wash. Super. Ct., Kings Cty. Nov. 19, 2015), *partially overruled by* 2016 WL 11359472 (Wash. Super. Ct., Kings Cty. May 16, 2016), *rev'd*, No. 75374–6–I, 2017 WL 3868481 (Wash. Ct. App. Sept. 5, 2017).

<sup>360</sup> *Foster*, 2015 WL 7721362, at \*3–4.

<sup>361</sup> *Id.* at \*4.



| State         | Petition for Rulemaking <sup>236</sup> | Litigation                            | Outcome   |
|---------------|--|---------------------------------------|---|
|               |  |                                       | year. <sup>362</sup> Washington Court of Appeals reversed the trial court's order requiring rulemaking, finding that the court abused its discretion, <sup>363</sup> but did not overturn trial court's earlier recognition that public trust resources are impacted by climate change. <sup>364</sup>  |
|               |  | <i>Aji P. v. State</i> <sup>365</sup> | The trial court held that the State Constitution did not furnish fundamental right to a clean environment, people under 18 are not a protected class under the Washington Equal Protection Clause, and that the claims presented nonjusticiable political questions. <sup>366</sup> The case is currently pending before the Washington Court of Appeals on determination of these issues. <sup>367</sup> |
| West Virginia | Petitioned <sup>368</sup>              |                                       | Petition denied. <sup>369</sup>   |

<sup>362</sup> *Foster*, 2016 WL 11359472, at \*1.

<sup>363</sup> *Foster*, 2017 WL 3868481, at \*3–7.

<sup>364</sup> *See* 2015 WL 7721362, at \*3–4.

<sup>365</sup> *Aji P. v. State*, No. 18-2-04448-1 (Wash. Super. Ct., Kings Cty. Aug. 14, 2018).

<sup>366</sup> *Aji P.*, No. 18-2-04448-1, slip op. at 6–10.

<sup>367</sup> Appellant's Opening Brief at 2, *Aji P. v. State of Washington*, No. 80007-8 (Wash. Ct. App. docketed June 5, 2019).

<sup>368</sup> Petition of Kids vs Global Warming to W. Va. Dep't of Env'tl. Prot. & Div. of Air Quality (May 4, 2011) <https://static1.squarespace.com/static/571d109b04426270152febe0/t/57859e6fcd0f68284f659f65/1468374641752/West+Virginia+Petition+.pdf> [<https://perma.cc/KP93-NYL4>].

<sup>369</sup> *Proceedings in All 50 States: West Virginia*, OUR CHILDREN'S TRUST, <https://www.ourchildrenstrust.org/west-virginia> [<https://perma.cc/3SZ5-7XZP>] (last visited Nov. 15, 2019) (noting denial of petition for rulemaking).

| State     | Petition for Rulemaking <sup>236</sup> | Litigation | Outcome                         |
|-----------|--|------------|---------------------------------|
| Wisconsin | Petitioned <sup>370</sup>              |            | Petition denied. <sup>371</sup> |
| Wyoming   | Petitioned <sup>372</sup>              |            | Petition denied. <sup>373</sup> |

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<sup>370</sup> Petition of Kids vs Global Warming to the Wis. Dep't of Nat. Res. (May 4, 2011) <https://static1.squarespace.com/static/571d109b04426270152febe0/t/57858ee5e6f2e141827db1a4/1468370663219/Wisconsin+Petition+.pdf> [https://perma.cc/T5KF-Q4WT].

<sup>371</sup> *Proceedings in All 50 States: Wisconsin*, OUR CHILDREN'S TRUST, <https://www.ourchildrenstrust.org/wisconsin> [https://perma.cc/R5X4-7LQ9] (last visited Nov. 15, 2019) (noting denial of petition for rulemaking).

<sup>372</sup> Petition of Kids vs Global Warming to the Wyo. Dep't of Env'tl. Quality & Wyo. Env'tl. Quality Control (May 4, 2011), <https://static1.squarespace.com/static/571d109b04426270152febe0/t/57858cd1ff7c502ee8544f19/1468370131824/Wyoming+Petition+.pdf> [https://perma.cc/RM5S-N35X].

<sup>373</sup> Letter from John Corra, Dir., Wyo. Dep't of Env'tl. Quality, to Alec Looz regarding Carbon Dioxide Rulemaking Petition Dated May 4, 2011 (June 8, 2011), <https://static1.squarespace.com/static/571d109b04426270152febe0/t/576821f9197aea07289080f2/1466442233893/WY+Denial.pdf> [https://perma.cc/N9Y8-7V6R] (denying petition for rulemaking).