

The Government's Duty to Protect the Public Interest

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In [The Wheels of Justice](#) I argued that a multi-front strategy is essential in the fight to stabilize climate and preserve our planet for young people and future generations. One front is provided by our legal system.

The United States was founded on the “self-evident” concept that all people have equal rights. Our Constitution’s purpose to “provide the blessings of liberty to ourselves and our posterity” implies obligations to the young and unborn. The Constitution assures that all people have “equal protection of the laws” and cannot be deprived of property without “due process” of law. These basic rights have global relevance because of substantial commonality of our Constitution with the UN Universal Declaration of Human Rights.

We aim to file a case against the government based squarely on these fundamental rights.

However, an important alternative tack is being pursued by [Our Children’s Trust](#) (OCT), headed by Julia Olson. Yesterday OCT took to the U.S. Supreme Court, in an exceptionally elemental form, the demand for effective federal action on climate change.

Specifically, a *petition for certiorari* in the matter *Alec L., et al v. Gina McCarthy et. al.* was filed on behalf of youth and future generations. It challenges a June 2014 decision by the D.C. Circuit Court of Appeals that there is no public trust doctrine in federal law. In this petition OCT is joined by a renowned constitutional attorney, Erwin Chemerinsky.

OCT claims that government has a duty to preserve and restore the atmosphere as a fundamental natural resource. Colloquially, the OCT lawsuits are called “atmospheric trust litigation” and pursue a theory developed by Professor Mary Wood of the University of Oregon Law School that builds upon the long foundation of public trust law.

Hopefully the Supreme Court will decide to review, rather than duck, the central issue, namely that the federal government has an affirmative duty to protect, as the Institutes of Justinian put it in the Sixth Century, the “things [that] are common to all mankind [including] the air, running water [and] the sea.” Back then, incidentally, the atmospheric CO₂ concentration was about 280 ppm.

The full story is [here](#). In brief, the D.C. Circuit Court decided that federal courts have no authority to adjudicate any claim that the federal government violates the public trust. According to my legal counsel, that is an astounding position that should be challenged. How can it be that federal courts have no inherent authority to require the government to protect natural resources that undergird our nation’s survival?

The OCT petition indicates that the D.C. Circuit Court based its reasoning on a loose aside (in legal terms, mere “dicta”) found in a 2012 US Supreme Court case, a case in which the justices were not even confronted with the question of whether the public trust ever proscribes or requires specific action by the U.S. government.

Several colleagues and I submitted a friend of the court (Amicus) brief in the D.C. Circuit case that OCT now appeals. We argued “failure to commence CO₂ emissions reduction without further delay...would consign our children and their progeny to a very different planet, one far less conducive to their survival.” We suggested that, at minimum, the court should require the federal government to report on whether its plans reduce CO₂ to a level conducive to a viable climate system required by present and future generations.

That advice is still valid. We intend to raise similar points in an Amicus Brief to the Supreme Court in support of the OCT petition. I will report on that in a few weeks.