No. _____

In The
Supreme Court of the United States

ALEC L., *et al*.,

Petitioners,

v.

GINA McCARTHY, *et al*.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This Court and other Circuits of the United States Court of Appeals have previously determined that the public trust doctrine applies to the federal government. Petitioners' Complaint alleged that the federal Respondents violated obligations imposed by the public trust doctrine. The Court of Appeals, however, held the public trust doctrine does not apply to the federal government and therefore it had no jurisdiction to consider Petitioners' claims. This holding was based on an incorrect interpretation of this Court's opinion in *PPL Montana, LLC v. Montana*, 132 S. Ct. 1215 (2012), and is in direct conflict with the decisions of this Court and the Eighth, Ninth, and Tenth Circuits.

The questions presented are:

1. Does the public trust doctrine apply to the federal government?

2. Do Article III courts have jurisdiction to enforce the public trust against the federal government?

PARTIES TO THE PROCEEDING

Petitioners (appellants below) are Alec L., by and through his Guardian *Ad Litem* Victoria Loorz; Victoria Loorz; Madeleine W., by and through her Guardian *Ad Litem* Janet Wallace; Janet Wallace; Garrett S., by and through his Guardian *Ad Litem* Valerie Serrels; Grant S., by and through his Guardian *Ad Litem* Valerie Serrels; Valerie Serrels; Zoe J., by and through her Guardian *Ad Litem* Nina Grove; Nina Grove; Kids vs. Global Warming, a project of Earth Island Institute, a non-profit organization; and WildEarth Guardians, a non-profit organization.

Respondents (appellees below) are Gina McCarthy in her official capacity as Administrator of the United States Environmental Protection Agency; Sally Jewell in her official capacity as Secretary of the United States Department of the Interior; Thomas James Vilsack in his official capacity as Secretary of the United States Department of Agriculture; Penny Pritzker in her official capacity as Secretary of the United States Department of Commerce; Ernest Moniz in his official capacity as Secretary of the United States Department of Energy; Chuck Hagel in his official capacity as Secretary of the United States Department of Defense; the United States Environmental Protection Agency; the United States Department of Interior; the United States Department of Agriculture; the United States Department of Commerce; the United States Department of Energy; and the United States Department of Defense.

PARTIES TO THE PROCEEDING – Continued

Intervenors in support of Respondents are National Association of Manufacturers; Delta Construction Company, Inc.; Dalton Trucking, Inc.; Southern California Contractors Association, Inc.; California Dump Truck Owners Association; and Engineering & Utility Contractors Association.

Amici curiae in support of appellants below are Law Professors: William H. Rodgers, Jr., Joseph Sax, Erwin Chemerinsky, Michael Blumm, John Davidson, Gerald Torres, Mary Christina Wood, Burns Weston, Kevin J. Lynch, Maxine Burkett, Erin Ryan, Timothy P. Duane, Deepa Badrinarayana, Stuart Chinn, Ryke Longest, Jacqueline P. Hand, Zygmunt Plater, James Gustave Speth, Charles Wilkinson, Patrick C. McGinley, Eric T. Freyfogle, Craig Anthony Arnold, Patrick Parenteau, Federico Cheever, Mark S. Davis, James R. May, Denise Antolini, Edith Brown Weiss, Alyson C. Flournoy, David Takacs, Michael Robinson-Dorn, Karl Coplan, Oliver Houck, Douglas L. Grant, Randall Abate, Lorie Graham, Diane Kaplan, Sarah Krakoff, Colette Routel, and Elizabeth Kronk Warner; Climate Scientists and Experts: James Hansen, David Beerling, Paul J. Hearty, Ove Hoegh-Guldberg, Pushker Kharecha, Valérie Masson-Delmotte, Camille Parmesan, Eelco J. Rohling, Makiko Sato, Pete Smith, Lise Van Susteren, and Michael MacCracken; Brigadier General Steve Anderson, USA (ret.); Vice Admiral Lee Gunn, USN (ret.); Rear Admiral David W. Titley, USN (ret.); National Congress of American

PARTIES TO THE PROCEEDING – Continued

Indians; Alaska Inter-Tribal Council; Forgotten People, Inc.; Indigenous Peoples Climate Change Working Group; National Native American Law Student Association; Akiak Native Community; Texas State Representative Lon Burnam; Montgomery County Councilman Marc Elrich; Missoula Mayor John Engen; Eugene Mayor Kitty Piercy; Interfaith Moral Action on Climate; Interfaith Power and Light; The Green Zionist Alliance; Institute Leadership Team of the Sisters of Mercy of the Americas; The Sisters of Mercy of the Americas Northeast Community Leadership Team; The Sisters of Mercy Northeast Justice Council; WITNESS; Global Kids, Inc.; Earth Guardians; Boston Latin School Youth Climate Action Network; Kids Against Fracking; 350.org; Labor Network for Sustainability; Granny Peace Brigade; International Council of Thirteen Indigenous Grandmothers; HelpAge International; HelpAge USA; Protect Our Winters; and Kent Environment and Community Network.

Amici curiae in support of appellees below is the American Tort Reform Association.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Sup. Ct. R. 29.6, Petitioners state:

(a) WildEarth Guardians is a 501(c)(3) non-profit corporation that has no parent corporation. There are no publicly held companies that have a 10 percent or greater ownership interest in WildEarth Guardians.

(b) Kids vs. Global Warming ("KvGW") is a project of Earth Island Institute, a 501(c)(3) non-profit corporation. KvGW has no parent corporation, and there are no publicly held companies that have a 10 percent or greater ownership interest in KvGW.

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the D.C. Circuit.

OPINIONS BELOW

The opinion of the D.C. Circuit (App. 1-4) is reported at *Alec L. v. McCarthy*, 561 F. App'x 7 (D.C. Cir. 2014). The opinion of the United States District Court for the District of Columbia granting Respondents' and Intervenor Respondents' motions to dismiss (App. 20-34) is published at *Alec L. v. Jackson,* 863 F. Supp. 2d 11 (D.D.C. 2012). The opinion of the United States District Court for the District of Columbia denying Petitioners' motion for reconsideration (App. 5-19) is reported at *Alec L. v. Perciasepe,* 2013 WL 2248001 (D.D.C. 2013).

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on June 5, 2014. App. 1-4. On August 21, 2014, The Chief Justice extended the time within which to file a petition for certiorari to and including October 3, 2014. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

"The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331.

INTRODUCTION

The public trust doctrine imposes obligations on sovereign entities to protect essential public resources and has long been recognized in American law and in the laws of nations around the world. Petitioners alleged in their Complaint that the federal government is a sovereign entity subject to the public trust doctrine. Petitioners further alleged that the federal Respondents violated their obligations under that doctrine. Petitioners sought declaratory and injunctive relief ordering Respondents to protect the atmosphere, an essential national public resource, by developing a comprehensive climate recovery plan. Petitioners asserted federal question jurisdiction under 28 U.S.C. § 1331.

Respondents argued that the federal government, unlike other sovereign entities, is not subject to the public trust doctrine. Respondents further argued that *PPL Montana, LLC v. Montana*, 132 S. Ct. 1215 (2012), held that the public trust doctrine does not apply to the federal government and, therefore, the Complaint failed to present a federal question under

28 U.S.C. § 1331. Respondents moved for dismissal for lack of subject matter jurisdiction.

The district court recognized "this is a very important case, this is an important issue, and it raises serious questions." Tr. of Mot. Hearing at 89: 12-14, No. 11-2235 (D.D.C. May 11, 2012). The district court, however, granted Respondents' and Intervenor Respondents' motions to dismiss, finding this Court had determined in *PPL Montana* that the public trust doctrine does not apply to the federal government. App. 27-28. The D.C. Circuit affirmed. App. 2-3.

The question of whether the public trust doctrine applies to the federal government was not before the Court in *PPL Montana*. In *PPL Montana,* the State of Montana argued that denying the State title to certain riverbeds would undermine the public trust doctrine as applied to the State. 132 S. Ct. at 1234. In rejecting this argument, *PPL Montana* held that the State did not hold title to the riverbeds at issue. The Court also stated that whether the public trust doctrine applied to the State under the circumstances of that case was not a federal law issue. *Id.* at 1234-35. *PPL Montana* did not hold or imply that the public trust doctrine does not apply to the federal government. To the contrary, *PPL Montana* vigorously affirmed the common law underpinnings for imposing trust obligations on all sovereigns. 132 S. Ct. at 1234-35. In the course of this affirmation the Court specifically cited David C. Slade, *Putting The Public Trust Doctrine To Work* 3-8, 15-24 (1990), which states that

the public trust doctrine applies both to state governments and to the federal government. *Id.* at 4.

This Court has long recognized the public trust doctrine applies to sovereigns, including the States. *Ill. Cent. R.R. v. Illinois*, 146 U.S. 387, 453, 457-58 (1892). This Court has also recognized that the federal government has trust obligations with respect to public domain resources. *United States v. Beebe*, 127 U.S. 338, 342 (1888) ("The public domain is held by the government as part of its trust. The government is charged with the duty, and clothed with the power, to protect it from trespass and unlawful appropriation. . . ."). The Court of Appeals for the Ninth Circuit has also recognized that the federal government has trust obligations with respect to public domain resources. *United States v. CB & I Constructors, Inc.,* 685 F.3d 827, 836 (9th Cir. 2011) ("In the public lands context, the federal government is more akin to a trustee that holds natural resources for the benefit of present and future generations. . . ."). This Court should grant certiorari to resolve the conflict between the D.C. Circuit's decision and the rulings of this Court and of other Circuits in this nationally important case.

STATEMENT OF THE CASE

A. Factual Background

Petitioners alleged that Respondents' actions and inactions with respect to global climate change are

causing harm to public trust resources, including the atmosphere upon which Petitioners depend for their life, liberty, and property. Am. Compl. ¶¶ 3, 27-65, No. 11-2203 (N.D. Cal. July 27, 2011). Respondents have both permitted and participated in carbon emissions to the atmosphere that are causing the earth to heat at a pace that is accelerating towards a "tipping point," which threatens human existence as we know it. *Id*. ¶¶ 6, 10. Ocean acidification, melting icecaps and ice sheets, biodiversity loss, and extreme weather events all impact essential public resources that Respondents have a duty to protect under the public trust doctrine. *Id*. ¶¶ 10, 94-103, 111, 114. Climate change also threatens land-based food systems and has multiple, severe implications for human health. *See id.*, ¶¶ 109, 112, 113.

Unless Respondents are ordered to comply with their obligations as public trustees and prepare a comprehensive climate recovery plan to protect the atmosphere from global climate change, Petitioners (and future generations) will suffer catastrophic and irreparable harm. *Id*. ¶¶ 3, 6, 9-22, 53-65, 72, 145-50.

Respondents did not dispute these facts below. Rather, Respondents argued that, even if these facts are true, Article III courts do not have jurisdiction to consider claims against Respondents because Respondents are not subject to the public trust doctrine.

In the three years since Petitioners filed their complaint, atmospheric carbon dioxide levels have risen from 390 parts per million (ppm) to 397 ppm,

and those levels are still rising. *See* Am. Compl. ¶ 76. The maximum level of carbon dioxide the earth's atmosphere can tolerate if there is to be any hope of reversing catastrophic global warming is 350 ppm. Am. Compl. ¶¶ 8, 15, 17, 122-24.[1]

The world's top climate scientists advised the D.C. Circuit that "the best available current science establishes that today's atmospheric CO_2 level is already into the 'dangerous zone.'" Br. of Amici Curiae Scientists at 18, No. 13-5192 (D.C. Cir. Nov. 12, 2013). These experts concluded that further delay "would consign our children and their progeny to a very different planet, one far less conducive to their survival." *Id.* at 25; *see also id.* at 8-9.

According to the World Bank, "[c]limate change has direct implications for the right to life."[2] The United Nations Human Rights Council confirms this conclusion: "A number of observed and projected effects of climate change will pose direct and indirect

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[1] "Atmospheric CO_2 concentrations passed the level that Amici Scientists consider a safe initial target [of 350 ppm] in, approximately, 1988." Br. of Amici Curiae Scientists at 8, No. 13-5192 (D.C. Cir. Nov. 12, 2013). Pre-industrial CO_2 concentrations were 280 ppm Am. Compl. ¶ 76.

[2] Siobhán McInerney-Lankford, et al., *Human Rights and Climate Change: A Review of the International Legal Dimensions*, 13 (2011); *see also* UN Human Rights Council Resolution 10/4, *Human Rights and Climate Change*, UN Doc. A/HRC/10/L.11 (May 12, 2009) ("[C]limate change-related impacts have a range of implications, both direct and indirect, for the effective enjoyment of human rights including, inter alia, the right to life . . . .").

threats to human lives[,]" including "an increase in people suffering from death, disease and injury from heat waves, floods, storms, fires and droughts."[3] The 2014 International Panel on Climate Change Report confirmed the tremendous and increasing threat of harm from global climate change.[4]

B. The District Court Proceedings

On July 27, 2011, Petitioners filed an Amended Complaint in the United States District Court for the Northern District of California, claiming the federal government has public trust obligations with respect to the atmosphere pursuant to its sovereignty and several provisions of the U.S. Constitution. Am.

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[3] UN Human Rights Council, *Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship Between Climate Change and Human Rights*, UN Doc. A/HRC/10/61, ¶ 22 (Jan. 15, 2009).

[4] Intergovernmental Panel on Climate Change ("IPCC"), *IPCC Fifth Assessment Report: Climate Change 2013*, 1.3.3, 17 (2013) ("Warming of the climate system is unequivocal . . . ."); *see also* U.S. Global Change Research Program, *Climate Change Impacts in the United States*: *Third National Climate Assessment* 7 (2014), *available at* http://nca2014.globalchange.gov/downloads ("Evidence for climate change abounds . . . . Taken together, this evidence tells an unambiguous story: the planet is warming, and over the last half century, this warming has been driven primarily by human activity."); Am. Assn. for the Advancement of Sci. ("AAAS"), *What We Know: The Reality, Risks and Response to Climate Change*, The AAAS Climate Science Panel 3 (March 2014), *available at* http://whatweknow.aaas.org/wp-content/uploads/2014/07/whatweknow_website.pdf.

Compl., ¶¶ 137-41 (Due Process, Equal Protection, and Commerce). The Amended Complaint stated that the district court had federal question subject-matter jurisdiction under 28 U.S.C. § 1331.

Petitioners submitted expert declarations in support of their allegations from Pushker Kharecha, Ph.D.; Kevin Trenberth, Ph.D.; Ove Hoegh-Guldberg, Ph.D.; Sivan Kartha, Ph.D.; Camille Parmesan, Ph.D.; Steven Running, Ph.D.; Jonathan T. Overpeck, Ph.D.; Stefan Rahmstorf, Ph.D.; David B. Lobell; Paul Epstein, M.D.; Lise Van Susteren, M.D.; Arjun Makhijani, Ph.D.; and James Gustave Speth.

On December 6, 2011, the District Court for the Northern District of California ordered that the case be transferred to the District of Columbia because of the national scope of the case and for the convenience of Respondents.

On November 14, 2011, Climate Scientist James Hansen, then-director of NASA Goddard Institute for Space Studies, filed a motion to file an *amicus curiae* brief in support of Petitioners. On December 7, 2011, twenty-two law professors filed a motion to file an *amicus curiae* brief in support of Petitioners. The district court never ruled on these motions.

On April 2, 2012, the district court heard and granted motions to intervene filed by National Association of Manufacturers and Delta Construction Company, *et al*.

On May 31, 2012, the district court granted Respondents' and Intervenor Respondents' motions to dismiss, holding that *PPL Montana* determined the public trust doctrine does not apply to the federal government and therefore the district court had no jurisdiction to consider Petitioners' claims. App. 27-29.

On June 28, 2012, Petitioners moved for reconsideration, arguing that *PPL Montana* does not foreclose federal question jurisdiction in this case and that Petitioners alleged a claim under the Constitution.

On May 22, 2013, the district court issued its decision denying Petitioners' motion for reconsideration, holding that the standard for reconsideration had not been met. App. 19.

C. Appellate Court Proceedings

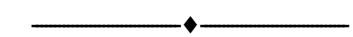
Petitioners appealed the district court's decisions to the United States Court of Appeals for the D.C. Circuit. Petitioners argued that the district court erred in relying on *PPL Montana*. Petitioners also argued the district court did not address Petitioners' constitutional claim.

On November 12, 2013, law professors, scientists, faith groups, government leaders, national security experts, supporters of Native Nations and human rights, youth, and conservation organizations filed seven *amicus curiae* briefs in support of Petitioners.

On June 5, 2014, the D.C. Circuit affirmed the district court's orders dismissing the case and denying

Petitioners' motion for reconsideration based on *PPL Montana*. App. 2-3.

This Petition followed.



REASONS FOR GRANTING THE WRIT OF CERTIORARI

The D.C. Circuit's ruling that the public trust doctrine does not apply to the federal government creates a deep conflict with opinions of this Court and other Circuits of the United States Court of Appeals. As explained below, had the appeal in this case been decided in the Eighth, Ninth, or Tenth Circuits, the outcome would have been markedly different because each of these Circuits has recognized that the public trust doctrine applies to the federal government. A writ of certiorari should be granted to resolve this conflict among the Circuits, and to correct the D.C. Circuit's misreading of *PPL Montana*.

A writ of certiorari also should be granted because this case involves issues of the utmost national importance. Global climate change threatens the economy, national security, and general welfare of the United States. Global climate change is accelerating at an alarming pace that will soon escape the reach of corrective measures. The Complaint alleges Respondents have the power and obligation to address this catastrophic deterioration of the nation's atmosphere, but have refused to do so.

It is the unique role of the judiciary to enforce trust obligations. The D.C. Circuit's opinion that the public trust doctrine does not apply to the federal government has great national consequences in limiting the power of the United States government in the future. Moreover, the opinion forecloses all public trust claims, regardless of facts, and ensures that there will be no check by Article III courts upon the federal government's power as trustee over national public domain resources.

The D.C. Circuit's opinion that Article III courts do not have jurisdiction to consider public trust claims against the federal government did not address the opinions of this Court and other Circuits recognizing that the federal government has trust powers and responsibilities over public domain resources. The D.C. Circuit also did not address the fact that only Article III courts can enforce the public trust doctrine.

I. The D.C. Circuit's Opinion Conflicts With Decisions Of This Court And Those Of The Eighth, Ninth And Tenth Circuits.

This Court has recognized that the public trust clothes the federal government with the power and authority to protect the public's natural resources from trespass and unlawful appropriation. *United States v. Missouri, K. & T. Ry. Co*., 141 U.S. 358, 381 (1891); *Beebe*, 127 U.S. at 342. The federal government, in turn, has affirmatively employed the public

trust in this nation's courts to protect public lands, wildlife, and timber resources and to recover damages for losses to those resources. *See, e.g.*, *CB & I Constructors, Inc.*, 685 F.3d 827; *Conner v. U.S. Dep't of Interior*, 73 F. Supp. 2d 1215, 1219 (D. Nev. 1999); *United States v. Burlington N. R.R.*, 710 F. Supp. 1286 (D. Neb. 1989); *In re Steuart Transp. Co.*, 495 F. Supp. 38 (E.D. Va. 1980). The D.C. Circuit's opinion, and its misreading of *PPL Montana*, is fundamentally contrary both to this Court's opinions recognizing federal trust powers and to the federal government's own past use of those powers.

A. The Public Trust Doctrine's Contract Between Citizens And Sovereign Has Long Been Recognized By This Court.

The Institutes of Justinian described the basic concept of the public trust between citizen and sovereign as early as the sixth century:

> By the law of nature these things are common to all mankind – the air, running water, the sea, and consequently the shores of the sea. No one, therefore, is forbidden to approach the seashore, provided that he respects habitations, monuments, and the buildings . . .

J. Inst. 2.1.1 (T. Sanders trans., 4th ed. 1867). This ancient recognition of the public nature of certain natural resources emerged in English common law after the passage of the Magna Charta. Michael C. Blumm & Mary Christina Wood, *The Public Trust*

Doctrine in Environmental and Natural Resources Law 12-13 (2013); *see also* Matthew Hale, De Jure Maris, Harg. Law Tracts, reprinted in Stuart Moore, *A History of the Foreshore and the Law Relating Thereto* (3d ed. 1888); 2 William Blackstone, Commentaries on the Laws of England 4 (1766) ("[T]here are some few things which, notwithstanding the general introduction and continuance of property, must still unavoidably remain in common . . . . Such (among others) are the elements of light, air, and water. . . .").

In the United States, early Supreme Court jurisprudence established that "ownership" of public resources by the original states remained burdened with the same public rights and government fiduciary duties to protect those rights that burdened the King's ownership. *Martin v. Waddell's Lessee*, 41 U.S. (16 Pet.) 367, 413-14 (1842) ("[I]n the judgment of the court, the lands under the navigable waters passed to the grantee as one of the royalties incident to the powers of government, and were to be held by him in the same manner and for the same purposes that the navigable waters of England, and the soils under them are held by the Crown.").

Subsequently admitted states acquired this same ownership and fiduciary duty under the "equal footing" doctrine. *Pollard v. Hagan*, 44 U.S. (3 How.) 212 (1845). The governments of the states held title to these properties not for their own beneficial use, but in trust for present and future generations. Except for very limited types of property, such as government

vehicles and buildings, governments continue to hold public property in trust for its citizens and not for itself. *See CB & I Constructors, Inc.*, 685 F.3d at 836 (rejecting litigants' attempts to analogize the federal government to a private corporation) (citing *Beebe,* 127 U.S. at 342).

In the foundational public trust case, *Illinois Central R.R. v. Illinois*, the Court described the nature of the sovereign's obligation over public trust resources as one that cannot be abdicated. 146 U.S. at 453. The Court found that the navigable waters of the Chicago harbor, and the land under them, is "a subject of concern to the whole people of the state" and must be "held by the people in trust for their common use and of common right, as an incident of their sovereignty." *Id.* at 455, 459-60. The Court, therefore, invalidated any legislative attempt to cede sovereignty and dominion over public trust resources to private parties and at the same time validated the legislature's repudiation of a contract with a private railroad company conveying property "in disregard of a public trust, under which he was bound to hold and manage it." *Id*. at 459-60 (citing *Newton v. Commissioners*, 100 U.S. 548 (1879)).

The public trust doctrine has evolved over time to include, not only public lands and submerged lands, but also wildlife, wetlands, water rights, beaches, groundwater, and the atmosphere. *See* Gerald Torres & Nathan Bellinger, *The Public Trust: The Law's DNA*, 4 Wake Forest J. L. & Pol'y 281, 286-87 (2014); David C. Slade, *The Public Trust Doctrine in Motion:*

Evolution of the Doctrine 1997-2008 23 (2008); *see generally* Michael C. Blumm & Mary Christina Wood, *The Public Trust Doctrine in Environmental and Natural Resources Law* (2013). The unifying thread running through American public trust jurisprudence, however, is that it is the role of the judiciary to enforce the trust relationship between sovereign and citizen as to essential natural resources.

B. Judicial Opinions From This Court, As Well As Courts Across The Country And Around The World Confirm That The Federal Government Is Subject To The Public Trust Doctrine.

This Court has long recognized that the federal government is subject to public trust obligations. *See, e.g.*, *Beebe*, 127 U.S. at 342 ("The public domain is held by the government as part of its trust. The government is charged with the duty, and clothed with the power, to protect it from trespass and unlawful appropriation."). This Court has also recognized that the federal government has both the authority and the obligation as a trustee of public resources to protect public property from trespass and unlawful appropriation. *See, e.g., Light v. United States*, 220 U.S. 523, 537 (1911); *Missouri, K. & T. Ry. Co.*, 141 U.S. at 381; *United States v. Trinidad Coal & Coking Co.*, 137 U.S. 160, 170 (1890); *Beebe*, 127 U.S. at 342; *Germania Iron Co. v. United States*, 58 F. 334, 336 (8th Cir. 1893), *aff'd*, 165 U.S. 379 (1897). Although

some opinions applying the public trust doctrine have approved of federal activities protecting trust resources, as *Beebe* makes clear, the doctrine is a source of both sovereign power and sovereign obligation.

The D.C. Circuit's decision conflicts with this principle, which is well established by this Court. Moreover, the decision conflicts with numerous rulings in other Circuits. The Eighth, Ninth and Tenth Circuits have also recognized that the federal government acts as a trustee with respect to public domain resources.

Following *Beebe*, the Eighth Circuit held that the United States had an absolute right to recover for theft or damages to the public domain "in pursuance of the trust reposed in it as a sovereign to preserve and protect the public domain for the people." *United States v. Miller*, 28 F.2d 846, 850-51 (8th Cir. 1928). The Eighth Circuit concluded: "The right asserted is solely in the public interest, is an attribute of governmental sovereignty, and cannot be defeated by the general statutes of limitation of a state." *Id.* at 851; *see also Germania Iron Co.*, 58 F. at 336 ("As has been frequently declared, in substance, the government is clothed with a trust in respect to the public domain. It is charged with the duty of protecting it from trespasses and unlawful appropriation . . . .").

The Ninth Circuit similarly held that the United States' status as a trustee over natural resources

"held in trust for this and future generations" gave it a right to recover for damages to those resources. *CB & I Constructors, Inc.*, 685 F.3d at 836 (internal quotations omitted). "In the public lands context, the federal government is more akin to *a trustee that holds natural resources for the benefit of present and future generations*." *Id.* (emphasis added).

The Ninth Circuit has described the constitutional underpinnings to the federal government's trust responsibility:

> This [equity-policy] principle is a corollary to *the constitutional precept that public lands are held in trust by the federal government for all of the people*. U.S. Const. art. IV, § 3. Thus, while one may be sympathetic with the landowners in this case, we must not be unmindful that the land involved belongs to all the people of the United States. Therefore, even if the landowners had proven all the elements necessary for estoppel, they would additionally need to demonstrate such equities which, on balance, ***outweigh those inherent equitable considerations which the government asserts as the constitutional trustee on behalf of all the people***.

United States v. Ruby Co., 588 F.2d 697, 704-05 (9th Cir. 1978) (emphasis added) (internal citations omitted).

The Tenth Circuit has recognized that "[a]ll public lands of the United States are held by it in trust for the people of the United States." *Davis v.*

Morton, 469 F.2d 593, 597 (10th Cir. 1972) (citing *Utah Power & Light v. United States*, 243 U.S. 389, 409 (1916)); *see also Massachusetts v. Andrus,* 594 F.2d 872, 890 (1st Cir. 1979) (recognizing that the Secretary of Interior is "the guardian of the people of the United States").

The D.C. Circuit's decision is in direct conflict with the rulings in these other Circuits. In fact, the D.C. Circuit's decision even conflicts with its own precedent. In *United Church of Christ v. FCC*, 707 F.2d 1413, 1427-28 (D.C. Cir. 1983), the D.C. Circuit held that federal awards of air broadcasting permits were subject to a "public trust," consistent with this Court's decision in *United States v. Causby*, 328 U.S. 256, 261, 266 (1946), holding that there can be no private ownership of the air space, over which "only the public has a just claim." *See also United Church of Christ*, 707 F.2d at 1428 n.38 ("Certainly the 'public trust' model has long been accepted by this court.").

None of these courts would have categorically refused to consider claims that the federal government violated its public trust obligations, as did the D.C. Circuit in this case. The panel of the D.C. Circuit that addressed Petitioners' claims below held there is no federal public trust doctrine, quoting this Court's statement that "'the public trust doctrine remains a matter of state law' and that 'the contours of that public trust do not depend upon the Constitution.'" App. 2 (quoting *PPL Mont., LLC v. Montana*, 132 S. Ct. 1215, 1235 (2012)). The D.C. Circuit based

its decision solely on this Court's opinion in *PPL Montana*, and concluded that this Court "directly and categorically rejected any federal constitutional foundation for that [public trust] doctrine, without qualification or reservation." App. 3.

The D.C. Circuit's opinion also conflicts with the public trust principles expressed in decisions by State Courts of last resort and by High Courts of other nations. These courts have all consistently held that public trust obligations inhere to the sovereign and cannot be abdicated absent the destruction of the sovereign. In fact, Petitioners' research has found no high court in any country that has determined the public trust doctrine does not apply to a sovereign entity.

In *Robinson Township v. Commonwealth*, the Supreme Court of Pennsylvania recently explained "'the concept that certain rights are inherent to mankind, and thus secured rather than bestowed by the Constitution, has a long pedigree in Pennsylvania that goes back at least to the founding of the Republic.'" 83 A.3d 901, 948 n.36 (Pa. 2013) (plurality opinion) (quoting *Driscoll v. Corbett*, 69 A.3d 197 (Pa. 2013)). The *Robinson* court went on to clarify that the people's public trust rights "are inherent in man's nature and *preserved rather than created* by the Pennsylvania Constitution." *Id.* at 948 (emphasis added). These rights include the right to natural resources:

> The Commonwealth, prior to the adoption of Article I, Section 27 [Pennsylvania's Environmental Rights Amendment] "possessed the inherent sovereign power to protect and preserve for its citizens the natural and historic resources now enumerated in Section 27. The express language of the constitutional amendment merely recites the 'inherent and independent rights' of mankind relative to the environment. . . ."

Id. at 947 n.35 (quoting *Commonwealth v. Nat'l Gettysburg Battlefield Tower, Inc.*, 311 A.2d 588 (Pa. 1973)).

Other state courts of last resort have held or affirmed that a public trust responsibility attaches to the sovereign and extends beyond navigable waters to other public natural resources like wildlife and air. *See, e.g.*, *In re Water Permit Applications*, 9 P.3d 409, 443 (Haw. 2000) (The public trust is "an inherent attribute of sovereign authority that the government 'ought not, and ergo, . . . cannot surrender.'"); *San Carlos Apache Tribe v. Superior Court*, 972 P.2d 179, 199 (Ariz. 1999) ("The public trust doctrine is a constitutional limitation on legislative power to give away resources held by the state in trust for its people. . . . The Legislature cannot by legislation destroy the constitutional limits on its authority."); *Parks v. Cooper*, 676 N.W.2d 823, 837 (S.D. 2004) ("History and precedent have established the public trust doctrine as an inherent attribute of sovereign authority."); *Nat'l Audubon Soc'y v. Superior Court of Alpine Cnty.*, 658 P.2d 709, 712 (Cal. 1983) ("[T]he

core of the public trust doctrine is the state's authority as sovereign to exercise a continuous supervision and control over the navigable waters of the state and the lands underlying those waters."); *State v. Cent. Vt. Ry.*, 571 A.2d 1128, 1132 (Vt. 1989), *cert. denied*, 495 U.S. 931 (1990) ("[T]he state's power to supervise trust property in perpetuity is coupled with the ineluctable duty to exercise this power.").

International agreements and the laws and practices of other nations, while not binding, are relevant to this Court's inquiry here. *Graham v. Florida*, 560 U.S. 48, 81-82 (2010). In another case about the rights of young people, this Court considered international law on the "inherent right to life" of every human being as instructive on the constitutional rights of children and stated:

> The *opinion of the world community*, while not controlling our outcome, *does provide respected and significant confirmation for our own conclusions*. . . . It does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom.

Roper v. Simmons, 543 U.S. 551, 578 (2005) (emphasis added). International opinion on the sovereign trust obligation, while not controlling, underscores the importance of the public trust.

The 1992 United Nations Framework Convention on Climate Change ("UNFCCC"), ratified by the United States Senate and 194 other nations, was executed to "protect the climate system *for the benefit of present and future generations of humankind*," and evidences an "overwhelming weight" of support for protection of the atmosphere under the norms and principles of intergenerational equity, the same principles recognized in U.S. law by the public trust doctrine. UNFCCC, Art. 3 (emphasis added). *See Roper*, 543 U.S. at 576-78 (noting the "overwhelming weight of international opinion" evidenced by international agreements).

High courts around the world affirm the trust obligations of sovereigns to preserve essential natural resources for the benefit of present and future generations. The Supreme Court of India, for example, has repeatedly held that the public trust doctrine is part of the law of the land.

> [India's] legal system – based on English common law – includes the public trust doctrine as part of its jurisprudence. The [Nation-]State is the trustee of all natural resources, which are by nature meant for public use and enjoyment. Public at large is the beneficiary of the seashore, running waters, airs, forests, and ecologically fragile lands. The [Nation-]State as a trustee is under a legal duty to protect the natural resources.

M.C. Mehta v. Kamal Nath, (1997) 1 S.C.C. 388 (Dec. 13, 1996) (India); *see also Fomento Resorts & Hotels Ltd. v. Minguel Martins*, (2009) 3 S.C.C. 571, ¶ 40 (India) (Natural resources are "held by the [Nation-]-State as a trustee on behalf of the people and especially the future generations . . . and the Court can invoke the public trust doctrine and take affirmative action for protecting the right of people to have access to light, air and water and also for protecting rivers, sea, tanks, trees, forests and associated natural ecosystems.").

The Supreme Court of the Philippines has explained public trust rights and the sovereign trust obligation as the highest natural law belonging to "a different category of rights altogether for it concerns nothing less than self-preservation and self-perpetuation . . . the advancement of which may even be said to predate all governments and constitutions. As a matter of fact, these basic rights need not even be written in the Constitution for they are assumed to exist from the inception of humankind." *Oposa v. Factoran*, G.R. No. 101083, 224 S.C.R.A. 792, 805 (July 30, 1993) (Phil.); *see also Metro. Manila Dev. Auth. v. Concerned Residents of Manila Bay*, G.R. Nos. 171947-48, 574 S.C.R.A. 661 (Dec. 18, 2008) (Phil.).

The High Court of Kenya has stated that the "essence of public trust is that the state, as trustee, is under a fiduciary duty to deal with trust property, being the common natural resources, in a manner that is in the interests of the general public." *Waweru*

v. Republic, (2006) 1 K.L.R. 677 (Kenya). Relying on two Pakistani cases concerning that country's right to life provision, the High Court declared that implicit in the Kenyan constitutional right to life was the public trust doctrine.

> In our view the right to life is not just a matter of keeping body and soul together because in this modern age that right could be threatened by many things including the environment. The right to a clean environment is primary to all creatures, including man. It is inherent from the act of creation, the recent restatement in the Statutes and Constitutions of the world notwithstanding.

Id.

The Supreme Court of Sri Lanka held that "[h]uman kind of one generation holds the guardianship and conservation of the natural resources in trust for future generations, a sacred duty to be carried out with the highest level of accountability." *Watte Gedera Wijebanda v. Conservator General of Forests,* (2009) 1 S.L.R. 337, 358 (Apr. 5, 2007) (Sri Lanka). Opinions of the high courts of Pakistan, Uganda, and Canada articulate similar holdings on the sovereign public trust. *See In re Human Rights Case (Environment Pollution in Balochistan*), (1994) 46 PLD (SC) 102 (1992) (Pak.); *Shehla Zia v. WAPDA*, (1994) 46 PLD (SC) 693 (Pak.) (implicit application of the public trust doctrine); *Advocates Coal. for Dev. & Env't v. Att'y Gen.*, Misc. Cause No. 0100 of 2004 (July 11, 2005) (Uganda); *British Columbia v. Canadian Forest Prods., Ltd.*, [2004] 2 S.C.R. 74 (Can.).

The D.C. Circuit's absolute statement that the federal government is not subject to the public trust doctrine does not even address, much less distinguish, the opinions of this Court, other Circuits, State Supreme Courts, and the highest Courts of other countries, all recognizing that the public trust doctrine applies to sovereign entities. This Court should grant review to resolve the conflict between the D.C. Circuit's decision and the rulings of this Court and of other Circuits.

C. The D.C. Circuit's Opinion Misinterprets *PPL Montana, LLC v. Montana* And Significantly Departs From Relevant Decisions Of This Court.

The D.C. Circuit based its opinion below on a misconstruction of *PPL Montana, LLC v. Montana*, 132 S. Ct. 1215 (2012). The D.C. Circuit stated: "*PPL Montana*, however, repeatedly referred to 'the' public trust doctrine and directly and categorically rejected any federal constitutional foundation for that doctrine, without qualification or reservation." App. 3 (citing *PPL Mont., LLC*, 132 S. Ct. at 1234-35).

The question of whether the public trust doctrine applies to the federal government was not at issue in *PPL Montana*. In *PPL Montana,* the State of Montana argued that denying the State title to certain riverbeds would undermine the State's public trust doctrine. 132 S. Ct. at 1234. In rejecting this argument, this Court noted that, unlike the equal footing

doctrine: "the public trust doctrine remains a matter of state law"; and "the contours of *that* public trust do not depend upon the Constitution." *Id.* at 1235 (emphasis added). While the Court thus held that *states* were not subject to a *federal* public trust doctrine, it did not hold that the *federal* government was not subject to the federal public trust doctrine.

To the contrary, the Court's decision in *PPL Montana* affirmed the doctrine's underpinnings for imposing trust obligations on all sovereigns. 132 S. Ct. at 1234-35. In the course of this affirmation, the decision specifically cited David C. Slade, *Putting The Public Trust Doctrine To Work* 3-8, 15-24 (1990). 132 S. Ct. at 1235. The Slade treatise discusses both the state public trust doctrine and the federal public trust doctrine. David C. Slade, *Putting The Public Trust Doctrine To Work* 4 (1990).

The *PPL Montana* opinion also affirmed the foundational public trust decision of *Illinois Central R.R. v. Illinois.* 132 S. Ct. at 1234-35. While this Court has explained that *Illinois Central* was "necessarily a statement of Illinois law," it has also emphasized that "the general [sovereign public trust] principle and the exception have been recognized the country over." *Appleby v. City of New York*, 271 U.S. 364, 395 (1926); *see also Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 285 (1997). This Court has long and consistently recognized that the public trust doctrine is an adjunct of sovereignty. *See*, *e.g.*, *Ill. Cent. R.R.*, 146 U.S. at 455-60.

In *Shively v. Bowlby*, for example, this Court held that states were vested with all the rights from the crown, including the public trust, subject to the rights surrendered to the national government, which includes public trust rights over national resources:

> The various charters granted by different monarchs of the Stuart dynasty for large tracts of territory on the Atlantic coast conveyed to the grantees both the territory described and the powers of government, including the property and the dominion of lands under tide waters; and, upon the American Revolution, all the rights of the crown and of parliament vested in the several states, subject to the rights surrendered to the national government by the constitution of the United States.

152 U.S. 1, 14-15 (1894); *see also Ill. Cent. R.R.*, 146 U.S. at 456.

This Court's jurisprudence also makes clear the propriety and necessity of Article III courts assuming jurisdiction to decide which natural resources are subject to state sovereignty, federal sovereignty, or dual sovereignty. *Causby*, 328 U.S. at 261, 266; *United States v. California*, 332 U.S. 19, 29-30, 34-36 (1947); *see also Coeur d'Alene Tribe*, 521 U.S. at 283-84 (State sovereignty arises out of the Constitution itself, and the ancient principles of public trust are uniquely tied to sovereign interests and the rights of the people to access, use, and have their public

resources protected by their sovereign.); *United States v. Oregon*, 295 U.S. 1, 14 (1935) (Since the admission of a state to the Union is a federal act, it is a federal question as to what lands and waters were transferred into the sovereign dominion of the state.).

When it comes to the atmosphere, there can be no question that the federal government has control over that resource, and therefore carries public trust obligations with respect to the atmosphere. This Court has held and Congress has codified that "[t]he United States Government has exclusive sovereignty of airspace of the United States." 49 U.S.C. § 40103(a)(1); *see also Causby*, 328 U.S. at 260-61 ("[T]he air is a public highway" of which the U.S. government is sovereign.). In the 1958 Air Commerce and Safety Act, Congress defined the "United States" as "the several States, the District of Columbia, and the several Territories and possessions of the United States, ***including*** the territorial waters and ***the overlying airspace thereof***." Pub. L. No. 85-726, § 101(33), 72 Stat. 731, 740 (1958) (emphasis added). A writ of certiorari should issue to resolve the conflict among the Circuits and to correct the D.C. Circuit's misreading of *PPL Montana*.

II. Whether The Public Trust Doctrine Applies To The Federal Government Is A Nationally Important Issue That Needs To Be Resolved By This Court.

This petition presents the critical issue of whether the federal government is subject to the public trust doctrine. The issue is uniquely presented here as entirely a question of law, making it the ideal vehicle to resolve the question. The narrow window of time left to address global climate change and the significant consequences to the welfare of our nation's children and future generations add urgency to the legal issue. The D.C. Circuit's complete refusal to recognize the public trust doctrine turns a blind eye to the federal government's responsibility to future generations *and* undermines the federal government's ability to assert its public trust authority in the future to conserve public resources.

The public trust doctrine, as enforced by courts, is an important check on how the political branches of government manage public trust assets. As the district court stated, "[u]ltimately, this case is about the fundamental nature of our government and our constitutional system, just as much – if not more so – than it is about emissions, the atmosphere or the climate." App. 33. Intervenor Respondents also argued before the D.C. Circuit that its "opinion resolved a question of nationwide importance by calling attention to the fact that there is no such thing as a federal public trust doctrine – let alone a public trust in the

atmosphere." Mot. to Publish at 1, No. 13-5192 (D.C. Cir. July 3, 2014).

According to one court, "Just as private trustees are accountable to their beneficiaries for dispositions of the res, so the legislative and executive branches are judicially accountable for their dispositions of the public trust. . . . The check and balance of judicial review provides a level of protection against improvident dissipation of an irreplaceable res." *Ariz. Ctr. for Law in the Pub. Interest v. Hassell*, 837 P.2d 158, 169 (Ariz. Ct. App. 1991) (citation omitted). By holding that there is no federal public trust doctrine, the D.C. Circuit eliminated the ability of Article III courts to act as a check on the fiduciary actions of the political branches and to address abuses of executive power.

Seven years ago, this Court acknowledged "the unusual importance" of global climate change in *Massachusetts v. EPA*, 549 U.S. 497, 506 (2007). In the intervening years, the unusual importance has increased and the urgency and quality of the federal government's response has reached a new threshold of significance, warranting this Court's grant of certiorari. Our nation's best climate scientists warn that urgent action to reduce carbon emissions is crucial and the failure to act will consign our youngest generation to a very different planet, far less conducive to their survival. Br. of Amici Curiae Scientists at 24-25, No. 13-5192 (D.C. Cir. Nov. 12, 2013).

In *American Electric Power v. Connecticut*, 131 S. Ct. 2527 (2011), the Court also acknowledged the

importance of global warming, but found that Congress, through the Clean Air Act, had displaced common law rules regulating private conduct that contributed to global warming. Here, of course, the federal government is not a regulated-party defendant but a trustee charged with violating its obligations under the public trust doctrine. Only Article III courts can enforce that doctrine as to the federal government.

In denying the federal public trust authority and obligation, the D.C. Circuit's decision runs contrary to previous legislative declarations that the federal government is a trustee. In the National Environmental Policy Act, for example, Congress declared that the federal government has an obligation to "fulfill the responsibilities of each generation as trustee of the environment for succeeding generations." 42 U.S.C. § 4331(b)(1). In the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), Congress declared that the federal government, the fifty States, and Indian Tribes are "trustees for natural resources" and directed these sovereigns to act on behalf of the public beneficiaries of natural resources under their management and control. 42 U.S.C. § 9607(f)(1); *see also* 33 U.S.C. § 2706 (Oil Pollution Act).

Pursuant to congressional direction, the President designated agencies of the United States, including the Departments of Agriculture, Commerce, Defense, Energy, and Interior, "to act on behalf of the public as trustees for natural resources. . . . ***Natural***

resources means land, fish, wildlife, biota, ***air***, water, ground water, drinking water supplies, and other such resources belonging to, managed by, ***held in trust by***, appertaining to, ***or otherwise controlled (referred to as 'managed or controlled') by the United States*** (including the resources of the exclusive economic zone)." 40 C.F.R. § 300.600(a) (emphasis added); *see* 42 U.S.C. § 9607(f)(2)(A).

In circumstances with concurrent sovereignty and trusteeship, Congress has directed: "Where there are multiple trustees, because of coexisting or contiguous natural resources or concurrent jurisdictions, they should coordinate and cooperate in carrying out these responsibilities." 40 C.F.R. § 300.615(a).[5]

The federal government argued in *In re Steuart Transportation Co.* that it has public trust authority to protect wildlife, including migratory birds. 495 F. Supp. at 39-40. The district court agreed, holding: "Under the public trust doctrine, the State of Virginia and the United States have the right and the duty to protect and preserve the public's interest in natural wildlife resources. Such right does not derive from ownership of the resources but from a duty owing to the people" under the public trust doctrine. *Id.* at 40.

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[5] "State trustees shall act on behalf of the public as trustees for natural resources, including their supporting ecosystems, within the boundary of a state or belonging to, managed by, controlled by, or appertaining to such state." 40 C.F.R. § 300.605.

Other federal courts have held that where there is dual sovereignty over a resource, the federal and state governments have concurrent public trust authority and duties as co-trustees. *United States v. 1.58 Acres of Land*, 523 F. Supp. 120, 123-25 (D. Mass. 1981) (affirming the "paramount rights of the federal government to administer its trust with respect to matters within the federal power," *id.* at 124). In instances where "the trust impressed upon [ ] property is governmental and administered jointly by the state and federal governments by virtue of their sovereignty, neither sovereign may alienate this [property] free and clear of the public trust." *Id.* at 124.

Similarly, in *United States v. Burlington Northern Railroad*, the court found that the United States' public trust obligations appear similar to the States, allowing the sovereign to maintain an action to recover for damages to its natural resources, including wildlife. 710 F. Supp. at 1287 (denying defendants motion for summary judgment).

While limiting the federal government's authority to protect public resources, the lower court's opinion also eliminates an important limitation on the federal government's actions not to alienate or allow for the substantial impairment of essential national public resources.

This case arises in a particularly critical context, but ultimately it is about a basic legal issue: does the public trust doctrine apply to the United States

government? This is an issue of great national significance and requires resolution by this Court.

CONCLUSION

For the foregoing reasons, this Court should grant the writ of certiorari.

Respectfully submitted,

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United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13-5192 **September Term, 2013**
FILED ON: JUNE 5, 2014

ALEC L., BY AND THROUGH HIS GUARDIAN AD LITEM VICTORIA LOORZ, ET AL.,

APPELLANTS

v.

GINA MCCARTHY, IN HER OFFICIAL CAPACITY AS ADMINISTRATOR OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.,

APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 1:11-cv-02235)

Before: GARLAND, *Chief Judge,* SRINIVASAN, *Circuit Judge,* and GINSBURG, *Senior Circuit Judge*

JUDGMENT

This appeal was considered on the record from the United States District Court for the District of Columbia and the briefs filed by the parties. *See* FED. R. APP. P. 34(a)(2); D.C. CIR. R. 34(j). The court has afforded the issues full consideration and has

determined that they do not warrant a published opinion. *See* D.C. CIR. R. 36(d). It is

ORDERED and ADJUDGED that the district court's orders filed May 31, 2012 and May 22, 2013 be affirmed.

Relying on the public trust doctrine, the plaintiffs in this case filed a one-count complaint alleging that the federal defendants are trustees of essential natural resources pursuant to various provisions of the Constitution, and that the defendants have abdicated their trust duty to protect the atmosphere from irreparable harm. The plaintiffs invoked the federal question statute, 28 U.S.C. § 1331, as the basis for subject matter jurisdiction over their claim.

The plaintiffs point to no case, however, standing for the proposition that the public trust doctrine – or claims based upon violations of that doctrine – arise under the Constitution or laws of the United States, as would be necessary to establish federal question jurisdiction. *See id.* To the contrary, the Supreme Court recently reaffirmed that "the public trust doctrine remains a matter of state law" and that "the contours of that public trust do not depend upon the Constitution." *PPL Mont., LLC v. Montana,* 132 S. Ct. 1215, 1235 (2012); *see also Idaho v. Coeur d'Alene Tribe of Idaho,* 521 U.S. 261, 284-88 (1997) (treating the public trust doctrine as a matter of state law); *Phillips Petroleum Co. v. Mississippi,* 484 U.S. 469, 473-76 (1988) (similar). The plaintiffs contend that *PPL Montana* contemplated only the *state* public

trust doctrine and thus casts no doubt on the potential existence of any *federal* public trust doctrine. The Supreme Court in *PPL Montana,* however, repeatedly referred to "the" public trust doctrine and directly and categorically rejected any federal constitutional foundation for that doctrine, without qualification or reservation. *See PPL Montana,* 132 S. Ct. at 1234-35; *see also United States v. 32.42 Acres of Land, More or Less, Located in San Diego Cnty., Cal.,* 683 F.3d 1030, 1037-38 (9th Cir. 2012) (relying on *PPL Montana* in holding that "the contours of [the public trust doctrine] are determined by the states, not by the United States Constitution"). Accordingly, the district court correctly dismissed the plaintiffs' suit for lack of subject matter jurisdiction. *See Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 89 (1998) ("Dismissal for lack of subject-matter jurisdiction because of the inadequacy of [a] federal claim is proper . . . when the claim is 'so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy.'") (quoting *Oneida Indian Nation of N.Y. v. Cnty. of Oneida,* 414 U.S. 661, 666 (1974)).

Pursuant to D.C. CIR. R. 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or rehearing en banc. *See* FED. R. APP. P. 41(b); D.C. CIR. R. 41(a)(1).

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Jennifer M. Clark
Deputy Clerk

SUMMARY MEMORANDUM OPINION; NOT FOR PUBLICATION IN THE OFFICIAL REPORTERS

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ALEC L., *et al.*, Plaintiffs, v. **BOB PERCIASEPE, *et al.*,** Defendants, and **NATIONAL ASSOCIATION OF MANUFACTURERS, *et al.*,** Intervenors.	Civil Action No. 11-cv-2235 (RLW)

MEMORANDUM OPINION[1]

The Plaintiffs in this lawsuit – five teenage citizens and two non-profit organizations, "Kids vs.

[1] This unpublished memorandum opinion is intended solely to inform the parties and any reviewing court of the basis for the instant ruling, or, alternatively, to assist in any potential future analysis of the *res judicata,* law of the case, or preclusive effect of the ruling. The Court has designated this opinion as "not intended for publication," but this Court cannot prevent or prohibit the publication of this opinion in the various and sundry electronic and legal databases (as it is a public document), and this Court cannot prevent or prohibit the citation of this opinion by counsel. *Cf.* FED. R. APP. P. 32.1. Nonetheless, as stated in the operational handbook adopted by our Court of Appeals, "counsel are reminded that the Court's decision to issue an unpublished disposition means that the Court sees no precedential value in that disposition." D.C. Circuit Handbook of Practice and Internal Procedures 43 (2011).

Global Warming" and "WildEarth Guardians" – brought this action seeking declaratory and injunctive relief based on the defendants' alleged failure to reduce greenhouse gas emissions. Plaintiffs advanced a novel theory in support of the relief they sought, arguing that each of the defendants, as the heads of various federal agencies and as officers of the federal government, violated their supposed fiduciary obligations "to protect the atmosphere" under the so-called federal public trust doctrine.[2] (Am. Compl. at ¶ 18; *see*

[2] Specifically, Plaintiffs sued: (1) Lisa P. Jackson in her official capacity as Administrator of the U.S. Environmental Protection Agency ("EPA"), (2) Kenneth L. Salazar in his official capacity as Secretary of the Interior, (3) Thomas J. Vilsack in his official capacity as Secretary of Agriculture, (4) Gary L. Locke in his official capacity as Secretary of Commerce, (5) Steven Chu in his official capacity as Secretary of Energy, and (6) Leon Panetta in his official capacity as Secretary of Defense. (*See generally* Am. Compl.). By operation of law, however, the following individuals have been automatically substituted as defendants in this action pursuant to Federal Rule of Civil Procedure 25(d): Bob Perciasepe as Acting Administrator of the EPA, Sally Jewell as Secretary of the Interior, Rebecca Blank as Acting Secretary of Commerce, Ernest Moniz as Secretary of Energy, and Chuck Hagel as Secretary of Defense. *See* FED. R. CIV. P. 25(d). As Secretary Vilsack remains in office, he remains a defendant in this action. The Court collectively refers to these defendants as the "Federal Defendants."

The Court also allowed two groups to intervene in this action: the National Association of Manufacturers ("NAM"), as well as a collection of several California companies and trade associations. The California entities, all of which owned and operated (or had members who owned and operated) vehicles and/or equipment that emitted greenhouse gases into the atmosphere, included: California Dump Truck Owners Association, Dalton

(Continued on following page)

id. at ¶¶ 136-153). On May 31, 2012, the Court dismissed this case with prejudice, concluding that Plaintiffs failed to establish a basis for federal jurisdiction because the public trust doctrine, upon which their claims hinged, is a creature of state common law and not federal law. *See Alec L. v. Jackson,* 863 F. Supp. 2d 11, 15-17 (D.D.C. 2012). In so holding, the Court relied substantially on the U.S. Supreme Court's then-recent decision in *PPL Montana, LLC v. Montana,* wherein Justice Kennedy, writing for a unanimous Court, explained that "the public trust doctrine remains a matter of state law" and that its "contours . . . do not depend upon the Constitution." *See id.* at 15 (quoting PPL Montana, ___ U.S. ___, 132 S. Ct. 1215 (2012)). This Court also explained that, even if the public trust doctrine had been grounded in federal common law at some point in time, Congress plainly displaced any such doctrine, at least in this context, through its passage of the comprehensive and field-occupying Clean Air Act. *Id.* at 15-16 (quoting *Am. Elec. Power Co. v. Connecticut,* ___ U.S. ___, 131 S. Ct. 2527, 2537 (2011)). Consequently, following full briefing and lengthy argument from the parties during a three-hour hearing, the Court ultimately concluded that it lacked jurisdiction over Plaintiffs' claims and dismissed this action as a result.

Trucking, Inc., Delta Construction Company, Inc., Southern California Contractors Association, Inc., and United Contractors f/k/a Engineering Utility Contractors Association (the "CA Intervenors").

Plaintiffs now seek reconsideration of the Court's decision pursuant to Federal Rule of Civil Procedure 59(e). (Dkt. No. 175 ("Pls.' Mem.")). Through this motion, Plaintiffs press three arguments that they insist warrant the extraordinary relief they seek: (1) that the Court failed to provide Plaintiffs with a sufficient opportunity to address the Supreme Court's decision in *PPL Montana*; (2) that the Court wrongly found that Plaintiffs' complaint "[did] not allege that the defendants violated any specific federal law or constitutional provision"; and (3) that the Court improperly construed and applied the Supreme Court's decision in *American Electric Power Co.* (*Id.*). Defendants and Intervenors oppose Plaintiffs' motion for reconsideration, rejoining that "Plaintiffs' response to the Court's decision – a Rule 59(e) motion rearguing their flawed legal theories and attempting to raise new ones – must be rejected." (Dkt. No. 177 ("Fed. Defs.' Opp'n") at 2; *see also* Dkt. No. 178 ("Intervenors' Opp'n")). The Court concurs.

Therefore, upon review of Plaintiffs' motion and the parties' respective briefing, along with the entire record in this action, the Court concludes that Plaintiffs' Motion for Reconsideration must be **DENIED** for the reasons set forth herein.

ANALYSIS

A. Standard of Review

Motions to alter or amend under Rule 59(e) are disfavored, "and relief from judgment is granted

only when the moving party establishes extraordinary circumstances." *Niedermeier v. Office of Max S. Baucus,* 153 F. Supp. 2d 23, 28 (D.D.C. 2001) (citing *Anyanwutaku v. Moore,* 151 F.3d 1053, 1057 (D.C. Cir. 1998)). As our Circuit has explained, a Rule 59(e) motion "need not be granted unless the district court finds that there is an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." *Messina v. Krakower,* 439 F.3d 755, 758 (D.C. Cir. 2006); *Firestone v. Firestone,* 76 F.3d 1205, 1208 (D.C. Cir. 1996). Consequently, "a losing party may not use a Rule 59 motion to raise new issues that could have been raised previously." *Kattan by Thomas v. District of Columbia,* 995 F.2d 274, 276 (D.C. Cir. 1993). Nor is a Rule 59 motion a means by which to "reargue facts and theories upon which a court has already ruled," *New York v. United States,* 880 F. Supp. 37, 38 (D.D.C. 1995), or "a chance . . . to correct poor strategic choices," *SEC v. Bilzerian,* 729 F. Supp. 2d 9, 15 (D.D.C. 2010).

B. Plaintiffs Establish No Entitlement To Relief Under Rule 59(e)

As summarized above, Plaintiffs advance three arguments in seeking reconsideration under Rule 59(e). Notably, however, Plaintiffs do not point to any intervening change in law, or any newly-discovered evidence, that they contend compels a different result. Instead, Plaintiffs strictly argue that the Court committed several "clear errors" in its prior analysis.

In so arguing, however, Plaintiffs either repackage arguments the Court already considered and rejected, or they attempt to mount new attacks that they could and should have raised previously.

First, Plaintiffs insist they are entitled to relief because they were not afforded the opportunity to address the Supreme Court's decision in *PPL Montana*. They argue that "[t]he fact that this Court based its decision to dismiss Plaintiffs' claims on the very case the Court refused to let Plaintiffs brief constitutes a manifest injustice." (Dkt. No. 175 at 28). This line of argument is wholly unconvincing, and, in suggesting that they were denied a chance to brief or otherwise address the impact of PPL Montana on their claims, Plaintiffs distort the procedural history of this case. While true that the Court denied Plaintiffs' request to submit additional briefing in response to the Amicus Brief of Law Professors, (*see* Dkt. No. 165), that hardly served as their one and only opportunity to address PPL Montana. The Supreme Court handed down its decision in that case on February 22, 2012. Several weeks later – as Plaintiffs themselves point out – the Court held a telephonic status conference on March 5, 2012, and asked the parties whether they felt the need to submit any supplemental briefing on the Federal Defendants' or NAM's motions to dismiss, which were both fully-briefed before the case was transferred to the undersigned from the Northern District of California. While Plaintiffs now fault Defendants and Intervenors for not mentioning *PPL Montana* during that status conference, Plaintiffs fail

to recognize that they bypassed the same opportunity and did not ask to submit any additional briefing themselves; to the extent they felt the need to distinguish a newly-issued Supreme Court decision dealing with the public trust doctrine, Plaintiffs could and should have sought to do so at that time. Thereafter, Plaintiffs squandered another opportunity to brief their views on *PPL Montana* in opposing the Delta Intervenors' dismissal motion on April 16, 2012. (*See* Dkt. No. 160). The *PPL Montana* decision was nearly two months old at that point, and Plaintiffs indisputably could have addressed the case and argued that – at least in their view – it had no bearing on this matter. But they failed to discuss or even mention *PPL Montana* in their briefing altogether. Accordingly, Plaintiffs' suggestion that "the first opportunity [they] had to address *PPL Montana*" was through their proposed brief on May 2, 2012, (*see* Dkt. No. 175 at 3), is disingenuous and lacks merit.[3]

[3] Of course, along with the Supreme Court's discussion in *PPL Montana,* the Court's conclusion that the public trust doctrine sounds in state, and not federal, law was also based upon persuasive dicta from the D.C. Circuit in *District of Columbia v. Air Florida, Inc.,* 750 F.2d 1077 (D.C .Cir. 1984), wherein the Court of Appeals explained that "the public trust doctrine has developed *almost exclusively as a matter of state law,*" and expressed concerns that a federal common-law public trust doctrine would be displaced by federal legislation. *Id.* at 1082, 1085, n.43 (emphasis added). Plaintiffs cannot credibly complain that they had no opportunity to address the *Air Florida* case, given that their earlier briefing expressly urged this Court to discount

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Furthermore, and perhaps more significantly, Plaintiffs also had ample opportunity to present their arguments regarding *PPL Montana* during the Court's three-hour hearing on May 11, 2012, and Plaintiffs took full advantage of that opportunity, making many of the same arguments to the Court that they attempt to re-litigate now – i.e., that the *PPL Montana* Court did not characterize the public trust doctrine as a purely state-law issue, and that the discussion regarding the public trust doctrine therein was dicta in any event. (*See generally* Dkt. 171 ("5/11/12 Transcript")). This fact alone undercuts the notion that Plaintiffs were somehow stymied from responding to or otherwise addressing Defendants and Intervenors' arguments regarding *PPL Montana. Cf. Acumed LLC v. Stryker Corp.,* 551 F.3d 1323, 1331-32 (Fed. Cir. 2008) (finding no abuse of discretion in denial of motion to strike reply brief that assertedly contained new arguments and evidence, where "it [was] clear that the court gave [defendant] an opportunity to present its rebuttal arguments to [the plaintiff's] new evidence orally" during the subsequent hearing); *CIBC World Mkts., Inc. v. Deutsche Bank Sec., Inc.,* 309 F. Supp. 2d 637, 645 n.21 (D.N.J. 2004) ("In citing [new authority] in a Reply Brief to support a position clearly taken in the Moving Brief . . . the Moving Defendants did not make a newly minted argument, but rather merely explained a position in the initial

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the D.C. Circuit's statements as dicta. (*See, e.g.,* Dkt. No. 106 at 5).

brief that the respondent had refuted. Furthermore, because oral argument was heard on this motion, Plaintiff had sufficient opportunity to respond. . . .”). Therefore, as shown, Plaintiffs clearly had many opportunities to present their views on *PPL Montana* and to respond to any arguments to the contrary, and the Court already considered Plaintiffs’ arguments and found them unconvincing. As such, their contention that the Court committed “clear error” in denying their request to submit additional briefing on *PPL Montana* is thus unavailing and does not warrant relief under Rule 59(e).[4]

Second, Plaintiffs argue that the Court “committed clear legal error by summarily discounting [their] constitutional claims.” (Pls.’ Mem. at 15). They assert that the so-called federal public trust doctrine is “constitutionally enshrined” and “embodied in the sovereign’s reserved powers, as well as the due process, equal protection, and commerce clauses of the Constitution.” (*Id.* at 12-13). But throughout their briefing

[4] It also bears noting that, since this Court handed down its decision and dismissed Plaintiffs’ action, at least two other courts have similarly interpreted the *PPL Montana* Court’s discussion of the public trust doctrine as affirmation that the doctrine is one of state law, and not federal law. *See United States v. 32.42 Acres of Land,* 683 F.3d 1030, 1038 (9th Cir. 2012) (“ ‘[T]he public trust doctrine remains a matter of state law,’ the contours of which are determined by the states, not by the United States Constitution.”); *Brigham Oil & Gas, L.P. v. N.D. Bd. of Univ. & Sch. Lands,* 866 F. Supp. 2d 1082, 1088 (D.N.D. 2012) (“The United States Supreme Court recently made clear that the public trust doctrine is a matter of state law.”).

in this case, Plaintiffs staunchly maintained that the public trust doctrine, in and of itself, provided the basis for federal jurisdiction. (*See* Dkt. No. 106 ("Pls.' Opp'n to Fed. Defs.' Mtn.") at 2-7; Dkt. No. 160 ("Pls.' Opp'n to CA Intervenors' Mtn.") at 12-22). More specifically, Plaintiffs previously made clear that their "claim in this case is *based solely on the Public Trust Doctrine,* which exists independent of statutes, finding its foundation in an inherent and inalienable attribute of sovereignty and imposing a fiduciary obligation on the trustee that cannot be abdicated." (Pls.' Opp'n to CA Intervenors' Mtn. at 20) (emphasis added). Now, however, Plaintiffs appear to be arguing that, through their alleged violations of their so-called federal public trust obligations, the Federal Defendants committed freestanding, independent violations of the Constitution under the Due Process Clause, the Equal Protection Clause, and the Commerce Clause. (*Id.* at 15-24). According to Plaintiffs, they were deprived of an opportunity to fully brief these theories before the Court dismissed their case, and they insist that they are entitled to Rule 59(e) relief as a result. The Court disagrees.

To be sure, Plaintiffs had plenty of chances to clearly delineate the nature and extent of their claims – both through the many rounds of briefing and during the three-hour hearing the Court held on the various motions to dismiss. While Plaintiffs suggest that the constitutional aspects of their claims were never raised or fleshed out during the briefing process, this assertion is belied by the record. At a minimum, as

NAM points out, these issues were squarely teed up through its motion to dismiss, wherein NAM argued as follows:

> Plaintiffs do not and cannot claim any violations of the constitutional provisions they cite in their complaint other than through the asserted violations of the public trust doctrine. The Commerce Clause is a grant of power authorizing Congress to regulate, not a requirement that Congress enact particular regulations. *See Gonzales v. Raich,* 545 U.S. 1, 17 (2005). The Fourteenth Amendment "applies only to the states," not to the federal government. *Bolling v. Sharpe,* 347 U.S. 497, 499 (1954). The Due Process clause is a limitation on the government's power to act, and does not impose affirmative duties. *Collins v. City of Harker Heights,* 503 U.S. 115, 126 (1992) (language of the Due Process Clause "cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm.").

(*See* Dkt. No. 67 ("NAM Mtn.") at 17 n.9). Indeed, NAM made these arguments before Plaintiffs filed any briefing whatsoever on the various motions to dismiss. So even setting aside the fact that Plaintiffs could and should have clearly spelled out the contours of their claims independently, to the extent they sought to assert constitutional claims, Plaintiffs certainly had an obligation to respond to these direct arguments – i.e., that the conclusory constitutional references in their Amended Complaint did not provide

an independent jurisdictional hook for this action. Plaintiffs failed to do so. And to the extent that Plaintiffs now wish they had briefed these issues differently, or otherwise presented their arguments more directly, they cannot take refuge under Rule 59(e).

In addition, Plaintiffs' present argument on this point runs completely counter to their position during the hearing, when counsel confirmed – in response to direct questioning from the Court on this precise issue – that Plaintiffs were not alleging any specific constitutional violations through their claims:

> THE COURT: All right. Here you're saying that there's no constitutional violation that's found first, though. Right?
>
> MS. OLSON: We argue that the Public Trust Doctrine is – because it's an attribute of sovereignty and it vested when the federal government was created, that it is constitutionally embedded in the vesting clauses that give the legislature and the executive branch authority over national interests.
>
> THE COURT: I understand that. But you're not saying that somehow what the federal government is doing is unconstitutional, are you?
>
> MS. OLSON: We argue that –
>
> THE COURT: Why didn't you bring a Section 1983 claim or a *Bivens* claim or whatever?

> MS. OLSON: Yes, Your Honor, we argue that they are violating their fundamental duties as trustees of the federal Public Trust resources. That is the claim. So it's not brought under a Section 1983 claim, that's correct.
>
> THE COURT: So yes or no, are you arguing that there's a constitutional violation or not?
>
> MS. OLSON: Not in the sense that you're speaking of, Your Honor.

(5/11/12 Transcript at 65:15-66:12). Thus, at best, Plaintiffs failed to cleanly present these arguments when they had the chance. At worst, in doubling back on their theory, Plaintiffs are completely contradicting their prior representations to the Court.[5] But in

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[5] Indeed, another exchange with Plaintiffs' counsel confirms that Plaintiffs are now pressing an entirely different theory than they argued previously. In an effort to ascertain Plaintiffs' basis for invoking federal question jurisdiction under 28 U.S.C. § 1331, the Court asked counsel during the hearing to identify the specific law or laws of the United States upon which their claims were premised:

> THE COURT: If I were to find that [your claim] arose under the laws of the United States, under what laws would I look to to find that it arises under?
>
> MS. OLSON: Your Honor, I think you can go to the Supreme Court decisions in *Geer* and *Illinois Central* that establish that the Public Trust Doctrine is a fundamental attribute of sovereignty, and then look to the fact that when the states created the U.S. Constitution, they gave sovereignty to a federal government over natural resources. And the Public Trust case law from the Supreme Court, through state law and

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either event, Plaintiffs are not entitled to relief under Rule 59(e).

Third, Plaintiffs argue that the Court misinterpreted and misapplied the Supreme Court's decision in *American Electric Power Co. v. Connecticut.* Simply stated, however, this line of attack completely rehashes arguments that Plaintiffs advanced previously, and the Court already considered and rejected Plaintiffs' efforts to distance this case from *American Electric Power Co.* as "distinctions without a difference." *Alec L.,* 863 F. Supp. 2d at 16. The Court will not indulge Plaintiffs' improper reliance on Rule 59(e) by devoting any additional analysis to these recycled arguments at this stage.

Finally, along with their request for relief under Rule 59(e), Plaintiffs also ask the Court for leave to amend their complaint under Federal Rule of Civil Procedure 15(a)(2). As the D.C. Circuit has repeatedly held, however, "once a final judgment has been entered, a court cannot permit an amendment unless the plaintiff 'first satisfies Rule 59(e)'s more stringent

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> federal case law, all consistently finds that the Public Trust obligation and duty is a fundamental attribute of sovereignty that cannot be abridged. It can't be abdicated by the sovereign, whether it's a federal sovereign or a state sovereign.

(Dkt. No. 171 at 46:21-47:10). Other than their generalized reliance on the so-called federal public trust doctrine, Plaintiffs failed to invoke – or even reference – any particular constitutional provision or law underpinning their claims.

standard' for setting aside that judgment." *Ciralsky v. CIA,* 355 F.3d 661, 673 (D.C. Cir. 2004) (quoting *Firestone,* 76 F.3d at 1208. Insofar as Plaintiffs fail to establish any entitlement to relief under Rule 59(e), their request for leave to amend under Rule 15(a) is therefore denied.

CONCLUSION

For the foregoing reasons, Plaintiffs' Motion for Reconsideration is **DENIED**. Plaintiffs either presented all of these arguments previously, or they failed to seize the opportunity to do so when they should have. And despite Plaintiffs' apparent misconceptions, Rule 59(e) does not operate as a judicial mulligan. Rule 59(e) offers relief only in narrowly-circumscribed and extraordinary circumstances – circumstances that cannot be found here. At this juncture, Plaintiffs' recourse, if any, lies with the Court of Appeals.

An appropriate Order accompanies this Memorandum Opinion.

Date: May 22, 2013 /s/ Robert L. Wilkins
ROBERT L. WILKINS
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ALEC L., *et al*., Plaintiffs, v. Lisa P. JACKSON, *et al*., Defendants, and National Association of Manufacturers, *et al*., Intervenors.	Civil Action No. 1:11-cv-02235 (RLW)

MEMORANDUM OPINION

Five young citizens and two organizations, Kids vs. Global Warming[1] and Wildearth Guardians[2], bring this action seeking declaratory and injunctive relief

[1] Kids vs Global Warming is a non-profit organization whose membership includes thousands of youth from around the country "who are concerned about how human-made climate change is affecting and will continue to affect them and their future." (Am. Compl. at ¶ 48). Kids vs Global Warming has brought this action on behalf of its members. *Id.*

[2] Wildearth Guardians is a non-profit conservation organization that is dedicated to "protecting and restoring wildlife, wild rivers, and wild places in the American West, and to safeguarding Earth's climate and air quality." (Am. Compl. at ¶ 49). Wildearth Guardians has brought this action on its own behalf and on behalf of its adversely affected members. *Id.*

for Defendants' alleged failure to reduce greenhouse gas emissions. The Plaintiffs allege that Defendants have violated their fiduciary duties to preserve and protect the atmosphere as a commonly shared public trust resource under the public trust doctrine. Plaintiffs' one-count complaint does not allege that the defendants violated any specific federal law or constitutional provision, but instead alleges violations of the federal public trust doctrine.

Plaintiffs bring this suit against Lisa P. Jackson in her official capacity as Administrator of the U.S. Environmental Protection Agency ("EPA"), Kenneth L. Salazar in his official capacity as Secretary of the U.S. Department of the Interior, Thomas J. Vilsack in his official capacity as Secretary of the U.S. Department of Agriculture, Gary F. Locke in his official capacity as Secretary of the U.S. Department of Commerce, Steven Chu in his official capacity as Secretary of the U.S. Department of Energy, and Leon E. Panetta in his official capacity as Secretary of the U.S. Department of Defense. Plaintiffs allege that each of the Defendants, as agencies and officers of the federal government, "have wasted and failed to preserve and protect the atmosphere Public Trust asset." (Am. Compl. ¶¶ 138, 146). Two parties claiming an interest in this action have intervened.[3]

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[3] Two groups have been allowed to intervene in this action: The National Association of Manufacturers, who represents small and large manufacturers in industrial sectors around the country; and several California companies and trade associations

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This matter is before the Court on Defendants' and the Defendant-Intervenors' Motions to Dismiss for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1) and failure to state a claim for which relief can be granted pursuant to Fed. R. Civ. P. 12(b)(6). Defendants and Defendant-Intervenors move for dismissal arguing, *inter alia,* that because Plaintiffs' lone claim is grounded in state common law, the complaint does not raise a federal question to invoke this Court's jurisdiction and, therefore, warrants dismissal on jurisdictional grounds. Having considered the full briefing on these motions, and for the reasons set forth below, Defendants and Defendant-Intervenors' motions are granted and Plaintiffs' Amended Complaint is dismissed with prejudice.

I. BACKGROUND

A. Public Trust Doctrine

The public trust doctrine can be traced back to Roman civil law, but its principles are grounded in English common law on public navigation and fishing rights over tidal lands. *PPL Montana, LLC v. Montana,* 565 U.S. ___, 132 S. Ct. 1215, 1234 (2012). "At common law, the title and dominion in lands flowed

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who own and operate, or whose members own and operate, numerous vehicles, engines and equipment that emit greenhouse gases into the atmosphere. Both groups claim that the relief requested by Plaintiffs would adversely affect them and their constituents and were permitted to intervene pursuant to Fed. R. Civ. P. 24(a).

by the tide water were in the King for the benefit of the nation . . . Upon the American Revolution, these rights, charged with a like trust, were vested in the original States within their respective borders." *Phillips Petroleum v. Mississippi,* 484 U.S. 469, 473 (1988) (quoting *Shively v. Bowlby,* 152 U.S. 1 (1894)). Upon entry into the Union, the states received ownership of all lands under waters subject to the ebb and flow of the tide. *Id.* at 476. The states' right to use or dispose of such lands, however, is limited to the extent that it would cause "substantial impairment of the interest of the public in the waters," and the states' right to the water is subject to "the paramount right of [C]ongress to control their navigation so far as may be necessary for the regulation of commerce with foreign nations and among the states." *Ill. Cent. R.R. Co. v. Illinois,* 146 U.S. 387, 435 (1892). Thus, traditionally, the doctrine has functioned as a restraint on the states' ability to alienate submerged lands in favor of public access to and enjoyment of the waters above those lands.

More recently, courts have applied the public trust doctrine in a variety of contexts. *See e.g. District of Columbia v. Air Florida, Inc.,* 750 F.2d 1077, 1083 (D.C. Cir. 1984) (noting that "the doctrine has been expanded to protect additional water-related uses such as swimming and similar recreation, aesthetic enjoyment of rivers and lakes, and preservation of

flora and fauna indigenous to public trust lands.").[4] And while Plaintiffs have cited authority for the application of the doctrine in numerous natural resources, including "groundwater, wetlands, dry sand beaches, non-navigable tributaries, and wildlife" (Pls.' Opp. at 17-18), they have cited no cases, and the Court is aware of none, that have expanded the doctrine to protect the atmosphere or impose duties on the federal government. Therefore, the manner in which Plaintiffs seek to have the public trust doctrine applied in this case represents a significant departure from the doctrine as it has been traditionally applied.

B. The Relief Requested by Plaintiffs

Plaintiffs seek a variety of declaratory and injunctive relief for their public trust claim.[5] First, Plaintiffs ask the Court to declare that the atmosphere is a public trust resource and that the United

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[4] Some states have recognized the doctrine as imposing an affirmative duty on the state. *See e.g. National Audubon Soc'y v. Superior Court of Alpine Cnty.,* 33 Cal.3d 419, 441, 189 Cal.Rptr. 346, 360-61, 658 P.2d 709, 725 (1983) (noting that the public trust doctrine "is an affirmation of the duty of the state to protect the people's common heritage of streams, lakes, marshlands and tidelands . . . ").

[5] Based upon the scope of the relief requested by Plaintiffs, Defendants have raised separation of powers and political question doctrine defenses. These defenses are clearly implicated by the totality of the relief sought by the Plaintiffs. However, to the extent that the Court, in its equitable discretion, may fashion a less expansive remedy, these doctrines would not be implicated. Therefore, the Court rules on alternative grounds.

States government, as a trustee, has a fiduciary duty to refrain from taking actions that waste or damage this asset. Plaintiffs also ask the Court to declare that, to date, Defendants have violated their fiduciary duties by contributing to and allowing unsafe amounts of greenhouse gas emissions into the atmosphere. In addition, Plaintiffs ask the Court to further define Defendants' fiduciary duties under the public trust by declaring that the six Defendant federal agencies have a duty to reduce global atmospheric carbon dioxide levels to less than 350 parts per million during this century.

With respect to injunctive relief, Plaintiffs have asked this Court to issue an injunction directing the six federal agencies to take all necessary actions to enable carbon dioxide emissions to peak by December 2012 and decline by at least six percent per year beginning in 2013. Plaintiffs also ask the Court to order Defendants to submit for this Court's approval: annual reports setting forth an accounting of greenhouse gas emissions originated by the United States and its citizens; annual carbon budgets that are consistent with the goal of capping carbon dioxide emissions and reducing emissions by six percent per year; and a climate recovery plan to achieve Plaintiffs' carbon dioxide emission reduction goals.[6]

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[6] Plaintiffs also request that the Court retain jurisdiction over the action to ensure Defendants' compliance with the injunctive relief requested.

II. LEGAL STANDARD

Federal courts are courts of limited jurisdiction, with the ability to hear only the cases entrusted to them by a grant of power contained in either the Constitution or in an act of Congress. *See, e.g., Beethoven.com LLC v. Librarian of Congress,* 394 F.3d 939, 945 (D.C. Cir. 2005); *Hunter v. District of Columbia,* 384 F. Supp. 2d 257, 259 (D.D.C. 2005). On a motion to dismiss for lack of subject matter jurisdiction, the plaintiff bears the burden of establishing that the Court has jurisdiction. *See Brady Campaign to Prevent Gun Violence United with the Million Mom March v. Ashcroft,* 339 F. Supp. 2d 68, 72 (D.D.C. 2004). Under Rule 12(b)(1) of the Federal Rules of Civil Procedure, the Court may dispose of the motion on the basis of the complaint alone, or it may consider materials beyond the pleadings "as it deems appropriate to resolve the question whether it has jurisdiction to hear the case." *Scolaro v. D.C. Board of Elections & Ethics,* 104 F. Supp. 2d 18, 22 (D.D.C. 2000); *see Lopez v. Council on American-Islamic Relations Action Network, Inc.,* 741 F. Supp. 2d 222, 231 (D.D.C. 2010).

When determining whether a district court has federal question jurisdiction pursuant to Article III and 28 U.S.C. § 1331, the jurisdictional inquiry "depends entirely upon the allegations in the complaint" and asks whether the claim as stated in the complaint "arises under the Constitution or laws of the United States." *Carlson v. Principal Fin. Group,* 320 F.3d 301, 306 (2d Cir. 2003); *see also Caterpillar*

Inc. v. Williams, 482 U.S. 386, 392 (1987). If a federal claim has been alleged, the district court has subject matter jurisdiction unless the purported federal claim is clearly "immaterial and made solely for the purpose of obtaining jurisdiction" or is "wholly insubstantial and frivolous." *Carlson,* 320 F.3d at 306 (quoting *Bell v. Hood,* 327 U.S. 678, 682-83 (1946)).

III. ANALYSIS

Plaintiffs assert that this Court has jurisdiction to review this case under the federal question statute, 28 U.S.C. § 1331, because the public trust doctrine arises from federal law. Defendants contend that the public trust doctrine does not provide a federal cause of action and, therefore, this Court lacks subject matter jurisdiction to adjudicate Plaintiffs' claim. Thus, the key question here is whether Plaintiffs' public trust claim is a creature of state or federal common law.

The central premise upon which Plaintiffs rely to invoke the Court's jurisdiction is misplaced. Plaintiffs contend that the public trust doctrine presents a federal question because it "is not in any way exclusively a state law doctrine." (Pl.'s Opp. at 13). The Supreme Court's recent decision in *PPL Montana, LLC v. Montana,* appears to have foreclosed this argument. *PPL Montana, LLC v. Montana,* 565 U.S. ___, 132 S. Ct. 1213, 1235 (2012). In that case, the Court while distinguishing the public trust doctrine from the equal footing doctrine, stated that "the

public trust doctrine *remains a matter of state law*" and its "contours . . . *do not depend upon the Constitution.*" *Id.* at 1235 (emphasis added). The Court went on to state that the public trust doctrine, as a matter of state law, was "subject as well to the federal power to regulate vessels and navigation under the Commerce Clause and admiralty power." *Id.*

The parties disagree as to whether the Supreme Court's declaration regarding the public trust doctrine is part of the holding or, as Plaintiffs urge, merely dictum. The Court, however, need not resolve this issue because "'carefully considered language of the Supreme Court, even if technically dictum, generally must be treated as authoritative.'" *Overby v. Nat'l Ass'n of Letter Carriers,* 595 F.3d 1290, 1295 (D.C. Cir. 2010) (quoting *United States v. Dorcely,* 454 F.3d 366, 375 (D.C. Cir. 2006)). Thus, dicta or not, the Court's statements regarding the public trust doctrine would nonetheless be binding on this Court.

Even if the Supreme Court's declaration was not binding, the Court finds it persuasive. Likewise, dictum from this Circuit is also persuasive. The D.C. Circuit has had occasion to state, albeit in dictum, that "[i]n this country the public trust doctrine has developed *almost exclusively as a matter of state law*" and that "the doctrine has functioned as a constraint on states' ability to alienate public trust lands." *District of Columbia v. Air Florida, Inc.,* 750 F.2d 1077, 1082 (D.C. Cir. 1984) (emphasis added). The Court also expressed its concerns that a *federal*

common-law public trust doctrine would possibly be displaced by federal statutes. *Id.* at 1085 n.43.

Thus, it appears that Plaintiffs have not raised a federal question to invoke this Court's jurisdiction under § 1331.[7] As Plaintiffs' complaint alleges no other federal cause of action to invoke this Court's original jurisdiction, there is no basis to exercise the Court's supplemental jurisdiction over Plaintiffs' state-law common law claim under 28 U.S.C. § 1367.

Alternatively, even if the public trust doctrine had been a federal common law claim at one time, it has subsequently been displaced by federal regulation, specifically the Clean Air Act. In *American Electric Power Company v. Connecticut,* the Supreme Court held that: "the Clean Air Act and the EPA actions it authorizes displace *any* federal common law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired power plants." *Amer. Elec. Power Co. v. Connecticut,* 131 S. Ct. 2527, 2537 (2011) (emphasis added).

The Plaintiffs attempt to escape the holding in the *Amer. Elec. Power Co.* by arguing that its holding

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[7] Where no federal question is pleaded, the federal court may nevertheless have diversity jurisdiction. However, the Court lacks diversity jurisdiction in this case, as "[i]t is well established . . . that the United States is not a citizen for diversity purposes and that 'U.S. agencies cannot be sued in diversity.'" *Commercial Union Ins. v. U.S.,* 999 F.2d 581, 584 (D.C. Cir. 1993) (quoting *General Ry. Signal Co. v. Corcoran,* 921 F.2d 700, 703 (7th Cir. 1991)).

should be limited to common law nuisance claims, while Plaintiffs are proceeding here under a common law public trust theory. Plaintiffs also attempt to distinguish the *Amer. Elec. Power Co.* case because that case was brought against four private companies and the Tennessee Valley Authority, a federally owned corporation, as opposed to the federal agency defendants in this case. Plaintiffs argue that this distinction is significant because, in Plaintiffs' view, the fiduciary duties of the public trust doctrine can only be imposed on the states and the federal government. According to Plaintiffs, because the plaintiffs in the *Amer. Elec. Power Co.* case could not bring a public trust claim against the defendants in that case, the holding in that case should be limited to those facts.

The Court views these as distinctions without a difference. The particular contours of the public nuisance doctrine did not in any way affect the Supreme Court's analysis in *Amer. Elec. Power Co.,* Indeed, the Court's holding makes no mention of the public nuisance doctrine at all, as the Court clearly stated that *any* federal common law right was displaced. *Id.* Further, there is nothing in the Court's holding to indicate that it should be limited to suits against private entities. Indeed, the Court described in great detail the process under which federal courts may review the action, or inaction, of federal agencies with respect to their statutory obligations under the Clean Air Act. *Id.* at 2539.

Moreover, the question at issue in the *Amer. Elec. Power Co.* case is not appreciably different from the

question presented here – whether a federal court may make determinations regarding to what extent carbon-dioxide emissions should be reduced, and thereafter order federal agencies to effectuate a policy of its own making. The *Amer. Elec. Power. Co.* opinion expressed concern that the plaintiffs in that case were seeking to have federal courts, in the first instance, determine what amount of carbon-dioxide emissions is unreasonable and what level of reduction is practical, feasible and economically viable. *Amer. Elec. Power Co.,* 436 U.S. at 2540. The Court explained that "the judgments the plaintiffs would commit to federal judges . . . cannot be reconciled with the decisionmaking scheme Congress enacted." *Id.* The Court further explained that Congress designated the EPA as an agency expert to "serve as primary regulator of greenhouse gas emissions" and that this expert agency "is surely better equipped to do the job than individual district judges issuing ad hoc, case-by-case injunctions." *Id.* at 2539. The Court, in holding that the federal common law cause of action was displaced by the Clean Air Act, concluded that federal judges may not set limits on greenhouse gas emissions "in the face of a law empowering EPA to set the same limits, subject to judicial review only to ensure against action arbitrary, capricious, . . . or otherwise not in accordance with the law." *Id.*

In the present case, Plaintiffs are asking the Court to make similar determinations regarding carbon dioxide emissions. First, in order to find that there is a violation of the public trust – at least as the

Plaintiffs have pled it – the Court must make an initial determination that current levels of carbon dioxide are too high and, therefore, the federal defendants have violated their fiduciary duties under the public trust. Then, the Court must make specific determinations as to the appropriate level of atmospheric carbon dioxide, as determine whether the climate recovery plan sought as relief will effectively attain that goal. Finally, the Court must not only retain jurisdiction of the matter, but also review and approve the Defendants' proposals for reducing greenhouse gas emissions. Ultimately, Plaintiffs are effectively seeking to have the Court mandate that federal agencies undertake specific regulatory activity, even if such regulatory activity is not required by any statute enacted by Congress.

These are determinations that are best left to the federal agencies that are better equipped, and that have a Congressional mandate, to serve as the "primary regulator of greenhouse gas emissions." *Id.* at 2539. The emissions of greenhouse gases, and specifically carbon dioxide, are subject to regulation under the Clean Air Act. *Massachusetts v. E.P.A.,* 549 U.S. 497, 528-29 (2007). Thus, a federal common law claim directed to the reduction or regulation of carbon dioxide emissions is displaced by the Act. *Id.* at 2537 (noting that the test for legislative displacement is whether the statute "speaks directly to the question at issue"). Therefore, even if Plaintiffs allege a public trust claim that could be construed as sounding in

federal common law, the Court finds that that cause of action is displaced by the Clean Air Act.

IV. CONCLUSION

Ultimately, this case is about the fundamental nature of our government and our constitutional system, just as much – if not more so – than it is about emissions, the atmosphere or the climate. Throughout history, the federal courts have served a role both essential and consequential in our form of government by resolving disputes that individual citizens and their elected representatives could not resolve without intervention. And in doing so, federal courts have occasionally been called upon to craft remedies that were seen by some as drastic to redress those seemingly insoluble disputes. But that reality does not mean that every dispute is one for the federal courts to resolve, nor does it mean that a sweeping court-imposed remedy is the appropriate medicine for every intractable problem. While the issues presented in this case are not ones that this Court can resolve by way of this lawsuit, that circumstance does not mean that the parties involved in this litigation – the plaintiffs, the Defendant federal agencies and the Defendant-Intervenors – have to stop talking to each other once this Order hits the docket. All of the parties seem to agree that protecting and preserving the environment is a more than laudable goal, and the Court urges everyone involved to seek (and perhaps even seize) as much common ground as courage, goodwill and wisdom might allow to be discovered.

For the foregoing reasons, the Defendants' and Defendant-Intervenors' motions to dismiss are granted. The Plaintiffs' First Amended Complaint is hereby dismissed.

SO ORDERED.[8]

Date: May 31, 2012 /s/ Robert L. Wilkins
ROBERT L. WILKINS
United States District Judge

[8] An order will be issued contemporaneously with this memorandum opinion granting the Defendants' and Defendant-Intervenors' motions to dismiss Plaintiffs' Amended Complaint.