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14 **The National Association of Manufacturers**

15
16 UNITED STATES DISTRICT COURT
17 NORTHERN DISTRICT OF CALIFORNIA
18 SAN FRANCISCO DIVISION

19 ALEC L., et al.) Case No. 3:11-cv-02203-EMC
20 Plaintiffs,)
21 vs.) **REPLY IN SUPPORT OF**
22 LISA P. JACKSON, et al.,) **INTERVENOR’S MOTION TO**
23 Defendants.) **DISMISS PLAINTIFFS’ FIRST**
24) **AMENDED COMPLAINT**
25) Date: December 15, 2011
26) Time: 3:00 p.m.
27) Place: Courtroom 5, 17th Floor
28)

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REPLY BRIEF

1
2 The complaint in this case seeks to commandeer and control, through judicial fiat, legislative
3 and executive authority over issues relating to greenhouse gas (GHG) emissions. It asks this Court
4 to order the six named federal agencies to take whatever actions are “necessary” to drastically reduce
5 GHG emissions in the United States in order to lower *global* atmospheric GHG concentrations to
6 levels Plaintiffs deem acceptable. Compl. at 39-40. These agencies share regulatory responsibility
7 over millions of enterprises, across every sector of the economy, and restrictions of the type
8 Plaintiffs seek—which would effectively forbid the use of conventional energy in this country—
9 would have unpredictable but profound consequences for the Nation’s economic development and
10 productivity, social policies, security interests, and international standing. And it would put this
11 Court in the position of monitoring these agencies, possibly for decades, and attempting to judge on
12 an ongoing basis whether their efforts are “satisfactory” and, if not, what measures they should or
13 should not take to meet whatever emissions targets are deemed “appropriate” in light of changing
14 environmental conditions and industrial development in this and other countries.

15 This extraordinary claim for relief, presented under the guise of the “public trust doctrine,”
16 cannot proceed for a number of reasons, as explained in the opening brief of Intervenor The National
17 Association of Manufacturers in support of its motion to dismiss. Intervenor’s Mot. To Dismiss
18 (NAM Mot.) 2-3. While Plaintiffs maintain that their claim is judicially manageable, they do not
19 provide any reasonable standard that might guide its adjudication and cannot deny that the relief they
20 seek would have this Court assuming control over the Legislative and Executive Branches, rendering
21 this case non-justiciable under the political question doctrine. *See* Pls. Opp. To Intervenor’s Mot. To
22 Dismiss (Pls. Resp. NAM) 7-8, 13-17. They also never explain, as would be required to establish
23 standing under Article III of the Constitution, how the risks of injury they allege, from climate
24 change, are different from those faced by society as a whole or how those risks might be “redressed”
25 by an injunction against these particular agencies. *See id.* at 14-22. And, although they maintain
26 that the novel version of the public trust doctrine they assert exists under federal common law, they
27 point to no case supporting that proposition and offer no basis to conclude that a claim seeking GHG
28 regulations may be upheld in the absence of supporting statutory authority, *see id.* at 2-7, 17-21,

1 particularly when Congress has enacted statutes expressly “designat[ing] an expert agency, ... EPA,
2 as ... primary regulator of [GHG] emissions.” *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527,
3 2539-40 (2011) (“*AEP*”). Dismissal is warranted.¹

4 **I. THIS CASE PRESENTS NON-JUSTICIABLE POLITICAL QUESTIONS.**

5 The political question doctrine bars adjudication of issues that: (i) are “textually
6 commit[ted]” to another branch by the Constitution; (ii) are not subject to “judicially discoverable
7 and manageable standards”; or (iii) could not be resolved without “expressing lack of the respect due
8 coordinate branches of government.” *Baker v. Carr*, 369 U.S. 186, 217 (1962). The claim in this
9 case, as explained in Intervenor’s opening brief, implicates all of these concerns.

10 Plaintiffs respond that their claim should be allowed because it invokes the “public trust
11 doctrine,” which they say has been recognized “since the founding of our country.” Pls. Resp. NAM
12 3. But “[t]he requirements of Art[icle] III are not satisfied merely because a party ... has couched
13 [its] request for ... relief ... in terms that have a familiar ring to those trained in the legal process.”
14 *Valley Forge Christian Coll. v. Am. United for Separation of Church & State, Inc.*, 454 U.S. 464,
15 474-75 (1982). The question for these purposes is not whether the claim bears a recognizable title;
16 after all, virtually *all* cases—including those that have been held to present non-justiciable political
17 questions—come to the court clothed in some recognized cause of action. *E.g.*, *Corrie v.*
18 *Caterpillar, Inc.*, 503 F.3d 974, 979-80 (9th Cir. 2007) (nuisance). Rather, the question is whether,
19 upon a “discriminating inquiry into the precise facts and posture of the particular [claim],” *Baker*,
20 369 U.S. at 217, its adjudication would require the court to address an issue that should be reserved
21 for the representative branches. That is indisputably the situation here.

22 **A. The Complaint Raises Issues Constitutionally Committed To Other Branches.**

23 While Plaintiffs attempt to downplay the scope of the remedy they seek, characterizing it as
24

25 ¹ Sovereign immunity provides an independent basis for dismissal of this claim, as noted in both
26 Intervenor’s and Defendants’ opening briefs. NAM Mot. 14; Defendants’ Mot. To Dismiss (Defs.
27 Mot.) 20-22. Notably, the principal opinion upon which Plaintiffs rely to argue that immunity has
28 been waived, *Veterans for Common Sense v. Shinseki*, 644 F.3d 845 (9th Cir. 2011), is being reheard
by the Ninth Circuit *en banc* and may no longer “be cited as precedent by or to any court of the
Ninth Circuit.” No. 08-16728, 2011 WL 5574937 (9th Cir. Nov. 16, 2011).

1 “simply ... [an] order [directing] the Federal Defendants ... to perform an accounting and to create,
2 implement, and maintain a Climate Recovery Plan,” Pls. Resp. NAM 10, they cannot mask the truly
3 extraordinary nature of their request. It would require each of the named agencies not only to
4 perform an annual “accounting” of GHG emissions but also to promulgate specific regulations to
5 meet drastic emissions reductions and to submit to continued monitoring by the Court. Compl. at
6 39-40. The Court would, in effect, commandeer these agencies and place them under its exclusive
7 control for these purposes. NAM Mot. 5. That relief would clearly “embrace critical areas of
8 responsibility vested by the Constitution in the Legislative and Executive Branches of the
9 Government,” *Gilligan v. Morgan*, 413 U.S. 1, 5-7 (1973), and renders this case non-justiciable
10 under a long line of precedent (ignored by Plaintiffs) proscribing courts from directing agencies to
11 take regulatory action not mandated by statute. *See, e.g., Webster v. Doe*, 486 U.S. 592, 601 (1988);
12 *Heckler v. Chaney*, 470 U.S. 821, 829 (1985); *Gilligan*, 413 U.S. at 5-7.

13 That the complaint does not dictate the precise regulations required to meet Plaintiffs’
14 emissions goals does not, as Plaintiffs contend, lessen the intrusion into the agencies’ discretion.
15 Pls. Resp. NAM 10. The injunction Plaintiffs request would require the agencies to coordinate their
16 regulations to meet a very specific goal—“to reduce [CO₂] emissions in the United States by at least
17 six percent per year beginning in 2013,” Compl. at 39-40—and thus would undoubtedly involve the
18 Court telling the agencies “how” to regulate. NAM Mot. 6-7; *see, e.g., Koohi v. United States*, 976
19 F.2d 1328, 1332 (9th Cir. 1992) (noting that requests for injunctive relief against a government
20 agency raise unique justiciability concerns). Moreover, even if the complaint could be read as
21 seeking only an order instructing the agencies to adopt GHG regulations or to “account” for GHG
22 emissions in the spheres of the agencies’ jurisdiction, without any other benchmarks or directives,
23 that would not obviate the political question. After all, the decision of *whether* to regulate is, if
24 anything, more dependent on policy judgments than the decision of *how* to do so. *Massachusetts v.*
25 *EPA*, 549 U.S. 497, 533-34 (2007).

26 The requested relief in this case bears no resemblance to that granted in the cases cited by
27 Plaintiffs, in which “courts have ordered parties to create a plan to remedy the problem being
28 litigated.” Pls. Resp. NAM 10-11. In all of those cases, courts entered the relevant remedial orders

1 pursuant to express *statutory* authority and mandates. *Brown v. Plata*, 131 S. Ct. 1910, 1928 (2010)
2 (Prison Litigation Reform Act); *United States v. Mass. Maritime Acad.*, 762 F.2d 142, 147 (1st Cir.
3 1985) (Civil Rights Act); *Health Care for All, Inc. v. Romney*, No. 00-110833, 2005 WL 1660677, at
4 *15 (D. Mass. July 14, 2005) (Social Security Act). The complaint here, by contrast, asks the Court
5 to create and impose on these agencies new, judicially crafted obligations and standards—which are
6 not only unsupported by, but contrary to, statutory requirements. NAM Mot. 6-7. It takes no
7 “stretch of the imagination,” Pls. Resp. NAM 11, but only an objective analysis of the nature and
8 consequences of the remedy sought, to conclude that this relief would represent an unprecedented,
9 and plainly unconstitutional, exercise of legislative and executive power by the judiciary.²

10 **B. There Are No “Judicially Discoverable And Manageable Standards” For**
11 **Resolving Plaintiffs’ Claim.**

12 The claim also fails because, as explained in Intervenor’s opening brief, there are no
13 “judicially discoverable and manageable standards” for resolving it. *Baker*, 369 U.S. at 217. The
14 response brief, far from offering any such standard, confirms that none exists.

15 The only explanation Plaintiffs offer for how to resolve their claim is that the Court should
16 “us[e] its sound judgment” to determine what is best for “the good of the citizens.” Pls. Resp. NAM
17 12. This is, however, hardly the “manageable” type of rule required to render a cause of action
18 justiciable. *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004) (plurality). It provides no objective
19 standard by which a court could determine whether relief is warranted in this or any given case, and
20 it offers no basis for a court to make “reasoned distinctions” in choosing among different forms of
21 relief. *Id.* The only way for a court to resolve the claim would be through “*ad hoc*” policy
22 judgments concerning the public welfare, writ large, in light of innumerable socioeconomic and

23 _____
24 ² This is particularly true here, as discussed in Intervenor’s opening brief, in light of the intrusion
25 into the fields of foreign relations and national defense. NAM Mot. 6. While Plaintiffs argue that
26 the injunction they request will not force the United States “to make any particular agreement or
27 United Nations mandate,” Pls. Resp. NAM 11, they elsewhere argue that Defendants should be
28 ordered to comply with emissions reductions under the United Nations Framework Convention on
Climate Change, *id.* at 12, even though those targets are by their terms non-binding, NAM Mot. 6.
The issue here is, thus, not that the United States would be forced to enter into new agreements or
accept new mandates, but that it would be forced to adhere to mandates to which it never agreed.

1 security considerations. NAM Mot. 7-8; *see also, e.g., AEP*, 131 S. Ct. at 2539-40 (“The appropriate
2 amount of [GHG] regulation ... cannot be prescribed in a vacuum: as with other questions of national
3 or international policy, informed assessment of competing interests is required ... [including] the
4 environmental benefit potentially achievable, our Nation’s energy needs and the possibility of
5 economic disruption.”). Indeed, the “standard” Plaintiffs propose describes not the role of the
6 judiciary in our constitutional structure, but rather that of the *legislature*—the body tasked by our
7 Constitution with appraising the public need and making policy judgments to advance the “good of
8 the citizens.” *See, e.g., O’Melveny & Myers v. FDIC*, 512 U.S. 79, 89 (1994) (addressing public
9 policy questions is a task for “those who write the laws, [not] those who interpret them”).
10 Particularly in an area as complex as GHG controls, the other branches are “surely better equipped to
11 do the job than individual district judges,” who “lack the scientific, economic, and technological
12 resources an agency can utilize in coping with issues of this order.” *AEP*, 131 S. Ct. at 2540; *see*
13 *Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948) (“[Decisions that affect
14 the safety or security of the Nation] should be undertaken only by those directly responsible to the
15 people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary
16 has neither aptitude, facilities nor responsibility.”).

17 These problems will become only more acute as this litigation proceeds, if this Court
18 assumes the responsibility of monitoring agency compliance with the emissions targets demanded by
19 Plaintiffs. The regulatory reach of the agencies named as Defendants in this case could encompass
20 scores of different economic and industrial sectors, and literally millions of individual sources that
21 emit GHGs, *see* Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule,
22 75 Fed. Reg. 31,514, 31,526, 31,597 (June 3, 2010) (noting sectors and sources potentially subject to
23 EPA regulation); any “climate recovery plan” approved by this Court would therefore necessarily
24 require some allocation of reductions across these segments and entities. But there is no apparent
25 way—and Plaintiffs offer none—for this Court to assess whether any particular allocation is
26 “appropriate” or “suitable” (the terms used in the complaint) or whether that allocation would satisfy
27 the overall reduction Plaintiffs seek, particularly in light of possible future changes in domestic
28 economic and infrastructure development and foreign industrial expansion, which may result in

1 substantial increases in GHG emissions by other countries and which, in turn, may require these
2 agencies to re-allocate their proposed reductions in order to maintain compliance with overall GHG
3 targets. *See* NAM Mot. 7-8. Addressing these issues on a sector-by-sector basis is among the most
4 complex and difficult, and policy-laden, tasks that these agencies perform. For a court to undertake
5 this responsibility for not only a particular sector or industry, but the entire United States economy,
6 would present an entirely unprecedented and wholly unworkable challenge.

7 **C. The Claim Could Not Be Resolved Without “Expressing Lack Of The Respect**
8 **Due Coordinate Branches Of Government.”**

9 There is also no doubt, and Plaintiffs raise none, that adjudication of their claim would
10 “express[] lack of the respect due” other branches of government. *Baker*, 369 U.S. at 217. The
11 order they seek would require the Court to find that the Legislative and Executive Branches have
12 failed “do [their] job”—despite the extensive domestic and international measures they have taken to
13 address GHG emissions and climate change—and direct them to take particular action to meet
14 Plaintiffs’ goals, retaining jurisdiction thereafter to ensure (somehow) that the agencies follow their
15 obligations. NAM Mot. 5-10. It is hard to conceive, as noted in Intervenor’s opening brief, of an
16 order that would show a greater “lack of ... respect” for coordinate branches than this one. *Id.*

17 This relief would also, contrary to Plaintiffs’ assertions, undoubtedly “strip the other
18 branches of their right and ability to decide the approach to be taken ... to protect the atmosphere.”
19 Pls. Resp. NAM 13. An injunction in this case, if issued, would require the named agencies to
20 follow the plan approved by this Court, promulgating regulations and taking other actions to meet
21 the drastic GHG emissions reductions Plaintiffs seek. NAM Mot. 5-6. Neither the Executive nor
22 Legislative Branch could direct the agencies to withhold those regulations, or to adopt targets
23 different than those prescribed by this Court, even if those branches deem the regulations
24 inconsistent with the public interest. *Id.* Far from reflecting “the genius of the democratic system,”
25 Pls. Resp. NAM 13, this relief would subvert that system—and eliminate one of the essential checks
26 and balances inherent in it—by allowing courts to exercise “general oversight of the elected
27 branches of government.” *United States v. Richardson*, 418 U.S. 166, 188 (1974) (Powell, J.,
28 concurring). Courts addressing similar “climate change” claims have properly dismissed them as

1 non-justiciable on this basis. *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863
2 (N.D. Cal. 2009) (appeal pending, No. 09-17490, 9th Cir.); *California v. Gen. Motors Corp.*, No. 06-
3 5755, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007). The same result should apply in this case.

4 **II. PLAINTIFFS LACK STANDING TO PURSUE THEIR CLAIM.**

5 Intervenor’s opening brief demonstrated that the complaint does not satisfy Plaintiffs’ burden
6 to show, as necessary to support standing under Article III, that their asserted injuries are
7 (i) “imminent” and “particularized,” (ii) “fairly traceable to the challenged action of the defendant”
8 and (iii) “likely ... redressable by a favorable decision.” *Lujan v. Defenders of Wildlife*, 504 U.S.
9 555, 560-61 (1992). Plaintiffs’ brief lends no further support to their position.

10 **A. The Alleged Injuries Are Too Speculative And Generalized.**

11 Plaintiffs’ response on standing focuses on only one of the Plaintiffs, Alec L., and argues that
12 he has suffered “aesthetic harms” from damage to the environment allegedly caused by climate
13 change. Pls. Resp. NAM 13-15. However, even assuming those harms qualify as a cognizable
14 “injury-in-fact,” Plaintiffs never link the harms, as they must, to the challenged conduct of the
15 named Defendants or show that the harms would result “imminently” or “immediately” from that
16 conduct. *See Lujan*, 504 U.S. at 560-61 & n.2, 574. To the contrary, according to the complaint
17 itself, climate change has already commenced and is attributable to GHG emissions from
18 innumerable third parties over the course of centuries—not the failure of these Defendants to
19 regulate in the manner Plaintiffs demand. *See Compl.* ¶¶ 12, 15, 75-79, 104, 123-28. Because
20 Plaintiffs do not (and cannot) identify a harm that is an “imminent” consequence of the challenged
21 conduct, they cannot establish standing. *See, e.g., Lujan*, 504 U.S. at 560-61.

22 The alleged harms also do not suffice for standing purposes because they are not
23 “particularized.” *See id.* Although the individuals named as Plaintiffs may experience the alleged
24 effects of climate change in different ways (for example, depending on their location), all of them
25 trace those effects to the same ultimate “harm”—that is, to the global atmosphere, allegedly caused
26 by GHG emissions. Such harm, moreover, would be shared by each and every other citizen in the
27 Nation, and indeed every person on the planet. *E.g., Compl.* ¶ 147. This is precisely the type of
28 “generalized grievance” that the Supreme Court has held inadequate to support standing under

1 Article III. *Lujan*, 504 U.S. at 573-74.³

2 **B. The Alleged Injuries Are Not Fairly Traceable To These Defendants Or Likely**
 3 **Redressable By The Relief Sought.**

4 Plaintiffs also fail to show that the alleged risks of climate change are “fairly traceable” to
 5 these Defendants or “likely redressable” by the emissions reductions Plaintiffs seek. *See id.* at 560-
 6 61. While Plaintiffs assert that “[t]here is no question these injuries are likely to be redressed by a
 7 favorable decision of this Court,” Pls. Resp. NAM 17, that is plainly not true. The bulk of GHG
 8 emissions are from sources outside the United States, which would not and could not be reached by a
 9 decree in this case, and as such there is no reason to believe that reductions ordered here would lead
 10 to *any* overall reduction in global GHG levels, much less the reduction allegedly needed to prevent
 11 or even slow the ongoing global warming effect that Plaintiffs allege. NAM Mot. 13; *see also* Defs.
 12 Mot. 20-22. Redressability is particularly doubtful in this case, given that Plaintiffs acknowledge in
 13 their complaint that the requested relief will not have any immediate effect on the rate of climate
 14 change. Compl. ¶¶ 12, 15, 75-79, 104, 123-28. It may be for this reason that Plaintiffs do not offer
 15 any response to this point in their briefs—there is simply no response to give. Other courts have,
 16 notably, dismissed similar climate change claims for this very reason. *See Kivalina*, 663 F. Supp. 2d
 17 at 879-80; *Amigos Bravos v. U.S. Bureau of Land Mgmt.*, No. 6:09-0037, 2011 WL 3924489, at *11-
 18 13 (D.N.M. Aug. 3, 2011); *Sierra Club v. U.S. Def. Energy Supp. Ctr.*, No. 11-41, 2011 WL
 19 3321296, at *5 (E.D. Va. July 29, 2011); *see Ctr. for Bio. Diversity v. Dep’t of Int.*, 563 F.3d 466,
 20 478-79 (D.C. Cir. 2009).

21
 22 ³ In their separate response to Defendants’ motion to dismiss, Plaintiffs assert that the Supreme
 23 Court rejected similar “generalized grievance” objections to the climate change tort claims in *AEP*.
 24 Pls. Opp. To Federal Defs. Mot. To Dismiss (Pls. Resp. Defs.) 16. That is incorrect. The *AEP*
 25 opinion raised, but did not resolve, the issue of whether the plaintiffs had standing to bring their
 26 claims. 131 S. Ct. at 2535 (noting four-to-four split; affirming exercise of jurisdiction “by an
 27 equally divided Court”). Indeed, insofar as the opinion can be read to suggest that the four Justices
 28 who would have upheld standing would have done so only for the State plaintiffs in that case, and
 not for the private-party plaintiffs, *see id.* (noting four Justices would have approved standing for
 “some” of the plaintiffs in light of holding in *Massachusetts* “permitt[ing] a *State* to challenge EPA’s
 refusal to regulate greenhouse gas emissions”) (emphasis added), it strongly implies that standing
 could not be found in a climate change case, like this one, that is brought solely by *private* parties.

1 *Massachusetts v. EPA* does not, contrary to Plaintiffs’ argument, Pls. Resp. NAM 15-16,
 2 support standing here. The claims in that case were allowed to proceed *only* because they were
 3 brought (i) by a State to address injuries to its sovereign interests and (ii) pursuant to express
 4 statutory authorization. 549 U.S. at 516-21. Those injuries were not deemed “generalized
 5 grievances,” because they related to the State’s unique sovereign interests, and the presence of a
 6 statutory right of action meant the State could assert the claims “without meeting all the normal
 7 standards for redressability.” *Id.* These two factors were “critical” to the standing inquiry in
 8 *Massachusetts, id.* at 516, and because neither is present here these Plaintiffs lack standing.

9 **III. PLAINTIFFS HAVE PLED NO CAUSE OF ACTION WITHIN THE SUBJECT**
 10 **MATTER JURISDICTION OF THIS COURT.**

11 Dismissal is also warranted because Plaintiffs have not pled a cause of action within this
 12 Court’s federal-question jurisdiction. The public trust doctrine is a creature of state law, and
 13 provides no federal cause of action. Nor is there any basis for creating a federal common law
 14 version of the public trust doctrine, much less a cause of action for enforcing that doctrine.⁴

15 **A. The Public Trust Doctrine Is A State Law Doctrine, And Imposes No Duties**
 16 **Upon The Federal Government.**

17 There is no doubt, notwithstanding Plaintiffs’ insistence that “there is a federal Public Trust
 18 Doctrine,” Pls. Resp. NAM 4, that the doctrine is a matter of state law. “[R]epeated and unequivocal
 19 holdings” of the Supreme Court establish that it is a limited *state* common law principle governing
 20 rights in lands submerged under tidal and navigable waterways. *Jones v. Rose*, No. CV 00-1795
 21 2005 WL 2218134, at *26 (D. Or. Sept. 9, 2005). For example, *Phillips Petroleum Co. v.*
 22 *Mississippi*, 484 U.S. 469 (1988), declares that “it has been long established that the individual
 23 *States* have the authority to define the limits of the lands held in public trust and to recognize private
 24 rights in such lands as they see fit.” *Id.* at 475; *see also Montana v. United States*, 450 U.S. 544, 551
 25 (1981) (“After a State enters the Union, title to [public trust] land is governed by state law.”); *Shively*

26 ⁴ Plaintiffs again assert that their claim is “grounded in several clauses of the Constitution,” Pls.
 27 Resp. NAM 4, but, tellingly, they offer no support for that position. *See id.* That is because, as
 explained in Intervenor’s opening brief, NAM Mot. 17 n.9, there is none.

1 v. *Bowlby*, 152 U.S. 1, 26 (1894) (“each State has dealt with the lands under the tide waters within its
2 borders according to its own views of justice and policy”).

3 *Illinois Central R.R. Company v. Illinois*, 146 U.S. 387 (1892), on which Plaintiffs rely, is
4 not to the contrary. To be sure, that opinion includes a reference to a federal statute, upon which
5 Plaintiffs seize, Pls. Resp. NAM 3, but that statute had nothing to do with the public trust issue in the
6 case and cannot be viewed as transforming that issue into a matter of federal law.⁵ Indeed, the
7 Supreme Court has expressly declared that *Illinois Central* “was necessarily a statement of Illinois
8 law.” *Appleby v. City of New York*, 271 U.S. 364, 395 (1926). And the *Illinois Central* opinion
9 itself notes that, although the public trust doctrine restricts the transfer of land owned by the State,
10 the doctrine does not apply to “the title which the United States hold in the public lands which are
11 open to pre-emption and sale.” 146 U.S. at 452.

12 The three district court decisions Plaintiffs cite are also not to the contrary. Both *City of*
13 *Alameda v. Todd Shipyards*, 635 F. Supp. 1447 (N.D. Cal. 1986), and *United States v. 1.58 Acres of*
14 *Land*, 523 F. Supp. 120 (D. Mass. 1981), hold that a land conveyance from a State to the federal
15 government does not extinguish public trust restrictions that burdened the State’s title. NAM Mot.
16 17. Those cases are inapplicable here because Plaintiffs’ claim is not based on a conveyance of land
17 from a State to the federal government. *Id.* The only judicial statements that Plaintiffs cite in
18 support of their position, from *In re Steuart Transportation Co.*, 495 F. Supp. 38 (E.D. Va. 1980),
19 are plainly dicta and cannot justify recognition of a federal version of the public trust doctrine given
20 the opposing authority discussed above. NAM Mot. 17.

21 Even the law review articles Plaintiffs cite fail to support their argument. The first notes that
22 “federal public lands were not impressed with a trust at common law,” and that “the obligations of
23 Congress and federal agencies are *plainly different* from the duties of states when they act as trustees

24 _____
25 ⁵ The act of Congress mentioned in the opinion related to a conveyance of federal land to Illinois,
26 unrelated to the public trust doctrine issue. 146 U.S. at 439-40. The statutes relevant to that issue
27 were two Illinois laws, the first granting submerged lands in the harbor of Chicago to a railroad, and
28 the second repealing the grant. *Id.* at 453-54. The Court upheld the repeal under Illinois’ public
trust doctrine, because “there always remains with the state the right to revoke” a private grant of
submerged lands found not to be in the public interest. *Id.*

1 of navigable waterways.” Charles L. Wilkinson, *The Public Trust Doctrine in Public Land Law*, 14
 2 U.C. Davis L. Rev. 269, 274, 278 (1980) (emphasis added). Another concedes that “[t]he Supreme
 3 Court’s doctrine has, to date, arisen solely in the context of states’ rights to public trust assets” and
 4 that “application of public trust doctrine to limit federal action would be a judicial innovation ... [as]
 5 federal courts have yet to strike down any federal legislative or regulatory action as a violation of
 6 public trust principles.” Karl S. Coplan, *Public Trust Limits on Greenhouse Gas Trading Schemes:
 7 A Sustainable Middle Ground*, 35 Colum. J. Envtl. L. 287, 312, 315 (2010). Plaintiffs also grasp at
 8 two statements from a website operated by the National Oceanic and Atmospheric Administration,
 9 which they say “acknowledges the existence of a federal public trust obligation,” Pls. Resp. Defs. 6,
 10 but a website does not constitute binding or persuasive authority.⁶ There is, in short, no even
 11 arguable basis for recognition of a public trust claim under federal law.

12 **B. There Is No Federal Common Law Cause Of Action Under The Public Trust**
 13 **Doctrine, Nor Is There Any Basis For Creating Such A Cause Of Action.**

14 Numerous cases from the Supreme Court, including *AEP*, confirm that federal courts do not
 15 have authority to create a federal common law cause of action to address climate change. *NAM*
 16 *Mot.* 17-22. Recognition of the claim in this case would be flatly inconsistent with that precedent.

17 **1. There Is No Basis For Creating A Federal Common Law Cause Of Action**
 18 **For Claims Under The Public Trust Doctrine.**

19 The Supreme Court has repeatedly admonished, in cases cited in Intervenor’s brief but not
 20 mentioned by Plaintiffs, that federal courts (unlike state courts) are generally prohibited from
 21 recognizing common law causes of action. *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S.

22
 23 ⁶ In any event, the relevant statements do not support Plaintiffs’ position. The first, stating that
 24 “federal and state governments exercise concurrent authorities over Public Trust interests,” *see*
 25 www.csc.noaa.gov/ptd/module08/lesson01/0801.htm, refers to the unremarkable proposition that the
 26 United States has power to regulate waterways under the Commerce Clause, and can preempt state
 27 public trust law in doing so. *See Ill. Cent.*, 146 U.S. at 435 (state control of navigable waterways is
 “subject always to the paramount right of congress). The second, while describing the public trust
 doctrine as “a fundamental safeguard,” also explains that, “[a]fter the American Revolution, both the
 ownership and trust responsibility for Public Trust lands was bestowed upon state legislatures.” *See*
<http://www.csc.noaa.gov/ptd/module08/lesson01/0801.htm>.

1 630, 647 (1981). Those decisions emphasize that, even in a case in which federal common law
2 might properly be applied to supply the relevant “rule of decision,” federal courts may not create or
3 expand an affirmative common law right of action unless clearly authorized by Congress or
4 necessitated by the Constitution. *Bush v. Lucas*, 462 U.S. 367, 388-90 (1983); *United States v.*
5 *Standard Oil Co.*, 332 U.S. 301, 316 (1947).

6 These precedents bar the claim in this case. Even if federal common law had been applied in
7 some cases addressing the public trust doctrine, in no case has it been construed to supply private
8 parties with an affirmative right of action of the kind Plaintiffs assert. *See* NAM Mot 16-17. That
9 claim, if it is to be recognized, would thus have to be created by this Court, as a new (and
10 unprecedented) species of federal common law cause of action. However, to do so would violate
11 virtually every precept governing the judiciary’s highly “restricted” authority to create federal
12 common law, *Tex. Indus.*, 451 U.S. at 647, particularly in areas (as here) involving “question[s] of
13 federal ... policy” that would be “a proper subject for congressional action.” *Standard Oil*, 332 U.S.
14 at 314-16. This Court should decline Plaintiffs’ invitation “to create a new substantive legal liability
15 without legislative aid and as at the common law,” *id.*, and dismiss their claim. *See AEP*, 131 S. Ct.
16 at 2537 (“[I]t is primarily the office of Congress, not the federal courts, to prescribe national policy
17 in areas of special federal interest.”).

18 **2. Any Federal Common Law Cause Of Action For Claims Under The**
19 **Public Trust Doctrine Has Been Displaced.**

20 This claim also cannot proceed as a matter of federal common law because, even if some
21 justification for its creation might otherwise have been found, it is now without doubt displaced by
22 federal statute. NAM Mot. 20-22. The Supreme Court in *AEP* held unequivocally “that the Clean
23 Air Act [CAA] and the EPA actions it authorizes” displace federal common law claims seeking
24 restrictions on GHG emissions. 131 S. Ct. at 2536. That decision squarely forecloses the claim in
25 this case. NAM Mot. 20-22.

26 Plaintiffs attempt to avoid this result through the bold assertion that “public trust claims are
27 not subject to displacement.” Pls. Resp. NAM 17. That argument is not only unprecedented (as
28 suggested by the lack of supporting citation), but plainly wrong. To be sure, Congress cannot

1 “displace the Constitution,” *id.* at 18, but it certainly can—and often does— displace rights of action
2 created by the federal courts, including those intended to remedy a constitutional violation. *See, e.g.,*
3 *Hui v. Castaneda*, 130 S. Ct. 1845, 1852 (2010); *Bush*, 462 U.S. at 385-86; *Milwaukee v. Illinois*,
4 451 U.S. 304, 314-15 (1981). Public trust claims are no different. Indeed, in *Illinois Central*, the
5 “public trust” case upon which Plaintiffs principally rely, the Supreme Court reiterated that any
6 rights recognized would be “subject always to the paramount right of congress.” 146 U.S. at 434.

7 The decision in *AEP* is therefore, contrary to Plaintiffs’ contention, *see* Pls. Resp. NAM 18,
8 not only “applicable” to this case but controlling. Plaintiffs argue that *AEP* is distinguishable
9 because it addresses common law nuisance claims against individual sources of GHG emissions,
10 whereas this case concerns a public trust claim against the federal government. *Id.* at 18-19.
11 However, although the claims in *AEP* and in this case bear different common law titles and are
12 brought against different parties, they are both based on the same alleged harm, from climate change
13 attributed to GHG emissions, and they both seek the same relief to address that harm, in the form of
14 court-imposed reductions on those emissions. NAM Mot. 20-22. Indeed, if anything, the case for
15 displacement is even more compelling in this case than in *AEP*, given that this claim would require
16 federal agencies to adopt regulatory standards for the entire Nation, while the emissions restrictions
17 in *AEP* would have applied by their terms only to the select group of private parties named as
18 defendants there. *Cf. Koohi*, 976 F.2d at 1332 (noting that claims for injunctive relief against
19 government agencies raise unique justiciability concerns).

20 Finally, Plaintiffs argue that the CAA, even if it displaces claims seeking to impose
21 emissions reductions, does not displace a claim—like Plaintiffs’—asking whether the statute and the
22 regulations it authorizes “are *adequate* to protect the atmosphere.” Pls. Resp. NAM 19-20 (emphasis
23 added). This reflects a fundamental misapprehension of federal common law and displacement.
24 Common law claims are displaced whenever a statute “speaks directly” to the relevant issues,
25 without regard to whether Congress’s approach is deemed “adequate” or not from a policy
26 perspective. *AEP*, 131 S. Ct. at 2537-40; *see Illinois v. Outboard Marine Corp.*, 680 F.2d 473, 478
27 (7th Cir. 1982) (to “hold[] that the solution Congress chose is not adequate,” and therefore should
28 not have displacing effect, is something a court “cannot do”). The Supreme Court addressed this

1 precise issue in *AEP*, holding that the claims in that case were displaced even if EPA refused (in its
 2 statutory discretion) to impose any limits on GHG emissions. 131 S. Ct. at 2537-40. Whether or not
 3 Plaintiffs agree with the approach Congress and these agencies have taken to regulating GHG
 4 emissions—under not only the CAA but numerous other statutes (including several addressed
 5 specifically to climate change and atmospheric conditions, NAM Mot. 21)—there is no doubt that
 6 those statutes speak directly to the issues raised by the claim in this case, and thus displace any right
 7 of action that might have been recognized under federal common law. *AEP*, 131 S. Ct. at 2537-40.

8 **IV. PLAINTIFFS HAVE FAILED TO STATE ANY CLAIM FOR RELIEF UNDER THE**
 9 **PUBLIC TRUST DOCTRINE.**

10 Even if Plaintiffs could establish that their claim is justiciable and that this Court has subject
 11 matter jurisdiction, the Court should dismiss the claim under Federal Rule of Civil Procedure
 12 12(b)(6) for failure to state a valid claim for relief. That is because the public trust doctrine (i) does
 13 not apply to the atmosphere and (ii) imposes no affirmative duty to regulate.⁷

14 *First*, Plaintiffs do not cite any case, from any court, that extends the public trust doctrine to
 15 the atmosphere. Rather, they ask this Court to go beyond the bounds of precedent and “declare
 16 that ... the atmosphere is a public trust resource over which the Federal Defendants are trustees.”
 17 Pls. Resp. NAM 1-2. But, as discussed above, federal courts lack the power to create new causes of
 18 action under federal common law. *Supra* p. 12. The common law public trust doctrine protects the
 19 public’s right to use only resources that the State controls, such as submerged lands. NAM Mot. 23-
 20 24. The global atmosphere is fundamentally unlike these public trust assets, because a government

21 _____
 22 ⁷ Plaintiffs mistakenly assert that dismissal under Rule 12(b)(6) is inappropriate “unless it
 23 appears to a certainty that Plaintiffs cannot prove any set of facts that would entitle Plaintiffs to
 24 relief.” Pls. Resp. NAM 1. Actually, to “survive a motion to dismiss, a complaint must contain
 25 sufficient factual matter, accepted as true, to state a claim to relief that is *plausible* on its face.”
 26 *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (emphasis added); *see also Caviness v. Horizon*
 27 *Cnty. Learning Ctr., Inc.*, 590 F.3d 806, 812 (9th Cir. 2010). They also incorrectly assert that, “[t]o
 28 decide a motion to dismiss, this Court need not reach whether natural resources such as the
 atmosphere fall within the federal Public Trust, whether the Federal Defendants have violated their
 fiduciary duties as trustees, or whether EPA’s actions under the [CAA] displace its fiduciary duty to
 protect the atmosphere.” Pls. Resp. NAM 2. To the contrary, these legal issues are precisely of the
 type suitable for resolution on a motion to dismiss. *See, e.g., AEP*, 131 S. Ct. at 2536-40 (on motion
 to dismiss, holding climate change claims displaced).

1 cannot reduce the atmosphere to possession, sell it to private parties, or prevent members of the
2 public from using it. *Id.* The only case that Plaintiffs cite for the proposition that “the sovereign
3 trustee must protect the *function* of the public property” by preventing pollution, *Just v. Marinette*
4 *County*, 201 N.W.2d 761 (Wis. 1972), is not on point. Pls. Resp. NAM 6. *Just* did not interpret a
5 common law public trust doctrine, but rather a state statute seeking to “prevent and control water
6 pollution.” 201 N.W.2d at 10 n.1. That opinion cannot support the asserted right of action.

7 *Second*, Plaintiffs also cannot establish that the public trust doctrine imposes an affirmative
8 duty upon governments to regulate trust resources in any particular manner. Again, they cite only
9 one case for this proposition, *Geer v. Connecticut*, 161 U.S. 519 (1896). Pls. Resp. NAM 5.
10 However, the Supreme Court “expressly overrule[d]” *Geer* decades ago. *Hughes v. Oklahoma*, 441
11 U.S. 322, 335 (1979). And, even when *Geer* was good law, it did not involve a judicially imposed
12 duty requiring a State to enact regulations, but rather held that a State “had the power to regulate the
13 killing of game within her borders so as to ... forbid its transmission outside of the state.” 161 U.S.
14 at 522. The two law review articles Plaintiffs cite also do not assist them: the first does not even
15 discuss the issue of courts imposing affirmative duties to regulate under the public trust doctrine,
16 Robert Haskell Abrams, *Walking the Beach to the Core of Sovereignty*, 40 U. Mich. J.L. Reform 861
17 (2007), and the second, although arguing in favor of a judicially enforceable duty to regulate GHGs,
18 concedes that this would represent a “radical movement away from the status quo,” Mary Christina
19 Wood, *Advancing the Sovereign Trust of Government To Safeguard the Environment for Present*
20 *and Future Generations (Part I): Ecological Realism and the Need for a Paradigm Shift*, 39 *Envtl.*
21 *L.* 43, 63, 69, 87 (2009). This Court is bound by precedent, however, and cannot institute the
22 “radical” changes to federal law that Plaintiffs seek.

23 Dated: November 21, 2011

Respectfully submitted,

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