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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

ALEC L., et al. Plaintiffs, vs. LISA P. JACKSON, et al., Defendants.	Case No. 3:11-cv-02203-EMC Assigned to: Edward M. Chen **INTERVENOR'S NOTICE OF MOTION AND MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT; AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF** [Proposed] Order Granting Intervenor's Motion To Dismiss Filed Concurrently Herewith Date: November 28, 2011 Time: 2:30 p.m. Place: Courtroom 5, 17th Floor

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NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that, on November 28, 2011, at 2:30 p.m. or as soon thereafter as it may be heard, in the above-entitled Court located at 450 Golden Gate Avenue, San Francisco, California, before the Honorable Edward M. Chen, Courtroom 5, 17th floor, Intervenor The National Association of Manufacturers will and hereby does move this Court, pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), to dismiss Plaintiffs' claim.

The grounds for this motion are that no court has jurisdiction over Plaintiffs' claim as Plaintiffs' suit raises non-justiciable political questions and Plaintiffs lack standing; and additionally that the complaint fails to state a claim upon which relief can be granted as Plaintiffs lack a federal cause of action, and they do not and cannot plead the required elements of a valid cause of action. This motion is based on this notice of motion, the accompanying memorandum of points of authorities, the pleadings and other papers on file in this action, and on such other argument as may be presented to the Court on reply and at the time of hearing.

MEMORANDUM OF POINTS AND AUTHORITIES

STATEMENT OF ISSUES

Through this extraordinary lawsuit, a group of private citizens asks this Court to commandeer six federal agencies and order them to "take bold," "immediate," and "extraordinary" actions to drastically reduce greenhouse gas (GHG) emissions.[1] Amended Complaint for Declaratory and Injunctive Relief (Compl.) ¶¶ 6, 9 (Dkt. #4). Claiming that the entire federal government has failed "to do its job," *id.* ¶ 3, Plaintiffs openly seek to circumvent the legislative and regulatory processes through which social, economic, and national security policies are established under our Constitution, and to use the federal judiciary to compel the massive technological and economic changes that they believe are necessary to address this problem. They ask this Court to issue an injunction forcing these agencies to take "all necessary actions to reduce CO_2 emissions in the United States by at least six percent per year beginning in ***2013***," *id.* ¶ 21(emphasis in original)—notwithstanding the absence of any statute authorizing such a fundamental alteration of our economy. Indeed, Plaintiffs apparently seek, among other goals, to eliminate all use of conventional energy in the United States. *Id.* ¶¶ 133-34.

Plaintiffs predicate these unprecedented—as well as undemocratic and judicially unmanageable—demands on the public trust doctrine, a little known and rarely used state law doctrine that has no application to the federal government. In fact, for over two centuries, the principle purpose of the public trust doctrine has been the modest one of governing state-law property rights in lands submerged beneath tidal and navigable waterways. Even the few states that have expanded the doctrine in modern times have never applied it to a resource as amorphous and widespread as the earth's atmosphere, nor have they deemed it the source of a judicially enforceable affirmative obligation to regulate activities that allegedly cause environmental harm. Intervenors know of no case in which a court has ever invoked the doctrine to compel regulatory action by the

[1] The phrase "greenhouse gases" refers to a broad group of substances present in the atmosphere, including both man-made chemicals like chloro-fluorocarbons and many naturally occurring substances. *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2529-31 (2011) ("*AEP*"). The most pervasive greenhouse gas emitted by anthropogenic activities is carbon dioxide. *Id.*

federal government.

Not surprisingly, a host of well-settled legal principles mandates dismissal of Plaintiffs' extraordinary lawsuit. First, their public trust claim raises a series of non-justiciable political questions: adoption of the sweeping societal changes Plaintiffs seek is committed by the Constitution to the political branches; there are no judicially manageable or discoverable standards for resolving their claim; and it is impossible to resolve that claim without openly expressing a lack of respect for the coordinate branches. Second, Plaintiffs lack Article III standing. Their alleged injuries—every imaginable harm purportedly associated with climate change—are shared by everyone on the planet, and the relief they seek (though drastic and devastating to our economy) will not redress those injuries.

Third, Plaintiffs have pled no cause of action as to which the federal government has waived sovereign immunity or that falls within the subject matter jurisdiction of this Court. Because, as the Supreme Court has repeatedly held, the public trust doctrine is a creature of state law, it provides no cause of action against the federal government. Nor is there any basis for creating a federal common law version of the public trust doctrine, or an accompanying federal common law cause of action for enforcing that doctrine. Indeed, it would violate virtually every precept governing the judiciary's limited authority to create federal common law to recognize an extra-constitutional basis for courts to override the lawmaking prerogatives of the political branches and compel them to enforce environmental protection standards that they themselves have not adopted. In all events, any such federal common law cause of action is displaced by the series of laws, treaties, and regulations the political branches have adopted in response to climate change.

Finally, even if Plaintiffs could clear all of these insuperable barriers, they have failed to state any valid claim for relief under any version of the public trust doctrine recognized by state courts.

STATEMENT OF FACTS

The complaint in this case, filed on May 4, 2011, and amended on July 27, 2011, alleges that the federal government has violated its obligation to protect the global atmosphere under the "Public Trust Doctrine." Compl. at 1, 36-37. It asserts that "[t]he United States, as a sovereign nation, has a duty as trustee to protect natural resources," including "the atmosphere," and it claims that the six

federal agencies named as Defendants in this case—the Department of Agriculture, Department of Commerce, Department of Defense, Department of Energy, Department of Interior, and Environmental Protection Agency—have "failed to preserve and protect ... the atmosphere[ ] by allowing it to become polluted with high levels of human-caused CO_2." *Id.* As relief, the complaint demands that the Court direct these agencies to develop and submit within four months a "climate recovery plan" under which they would commit to "[t]aking all necessary actions to reduce CO_2 emissions in the United States by at least six percent per year beginning in 2013," with the goal of "phas[ing] out fossil fuels by about 2050" and reducing "atmospheric CO_2 levels ... by December 1, 2099." *Id.* at 7-8, 35; Plaintiffs' Motion for Preliminary Injunction (PI Motion) at 1 (Dkt. #24). This plan would be subject to review and approval by the Court, with input from Plaintiffs (but no other members of the public), and the complaint requests that the Court retain jurisdiction over the case until Defendants satisfy their obligations, potentially until 2099. *Id.*[2]

ARGUMENT

The complaint in this case should be dismissed under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). Dismissal is required under Rule 12(b)(1) when a complaint fails to satisfy the plaintiffs' burden of pleading facts demonstrating that the claims are justiciable and otherwise within the jurisdiction of the court. *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000). Dismissal is appropriate under Rule 12(b)(6) when the complaint does not allege facts setting forth a claim that is "facially plausible" and upon which relief could be granted. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949-51 (2009); *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001); *see also Iqbal*, 129 S. Ct. at 1949-51 ("A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."). When ruling on a motion to dismiss under either Rule 12(b)(1) or Rule 12(b)(6), the court should generally accept as true all properly pleaded factual allegations in the complaint, but should not accept "conclusory" allegations, *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754-55 (9th Cir.

[2] Plaintiffs initiated similar suits or administrative petitions in all fifty states and the District of Columbia against those jurisdictions. *See* http://ourchildrenstrust.org/sites/default/files/iMatter_Legal_Release_11.05.01.pdf.

1994), and it may consider matters of public record, such as formal pronouncements by agencies and officials. *Barron v. Reich*, 13 F.3d 1370, 1377 (9th Cir. 1994).

I. THIS CASE PRESENTS NON-JUSTICIABLE POLITICAL QUESTIONS.

Certain claims, by virtue of their subject matter, are not cognizable in the courts because they present "political questions." *Baker v. Carr*, 369 U.S. 186, 217 (1962). A political question is present if, upon a "discriminating inquiry into the precise facts and posture of the particular [claims]," *id.*, their adjudication would require the court to address an issue that (i) is "textually commit[ted]" to another branch by the Constitution, (ii) lacks "judicially discoverable and manageable standards" or requires an "initial policy determination of a kind clearly for nonjudicial discretion," or (iii) could not be resolved without "expressing lack of the respect due coordinate branches of government." *Id.*; *see also Alperin v. Vatican Bank*, 410 F.3d 532, 545 (9th Cir. 2005). The claim in this case implicates all of these concerns.

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

Adjudication of Plaintiffs' claim would, without doubt, involve the judiciary in issues that are "committed by the text of the Constitution to [the] coordinate branch[es] of Government." *Wang v. Masaitis*, 416 F.3d 992, 995 (9th Cir. 2005). The complaint asks the Court to direct agencies of the Executive Branch to promulgate specific regulations to achieve a particular goal, without regard to the agencies' own expert determinations regarding the need for or suitability of those regulations and without regard to statutory prerequisites and directives enacted by Congress. Compl. at 39. The Court would, in essence, be commandeering these agencies and placing them under its exclusive control for these purposes—issuing an order directing each of them to develop and implement a "climate recovery plan," requiring them to "take all necessary actions to reduce [CO_2] emissions in the United States by at least six percent per year beginning in 2013," and "[r]etaining jurisdiction over [them] for purposes of enforcing and effectuating [that] order." *Id.* at 39-40.

There could hardly be a clearer violation of the constitutional principle of separation of powers than commandeering the federal government in the manner Plaintiffs propose. The Constitution by its terms commits legislative power—in particular, authority "To regulate Commerce"—to Congress, U.S. Const. art. I, §§ 1, 8, and executive power to the President, *see* U.S.

Const. art. II, § 1. There is simply no basis and no allowance in the Constitution for a court to control or supervise the internal operations of agencies or direct their regulatory discretion in the absence of any statute authorizing such judicial intervention; Plaintiffs certainly identify no such statute. *See, e.g.*, *Webster v. Doe*, 486 U.S. 592, 601 (1988); *Heckler v. Chaney*, 470 U.S. 821, 829 (1985); *see also Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 891 (1990). The Supreme Court has previously rejected as non-justiciable claims that would, like Plaintiffs', require the judiciary to craft particular "standards" for governmental operations and monitor compliance thereafter. *Gilligan v. Morgan*, 413 U.S. 1, 5-7 (1973) ("The relief sought ... would embrace critical areas of responsibility vested by the Constitution in the Legislative and Executive Branches of the Government.").

The problem becomes all the more pronounced where, as here, the agency operations at issue relate to foreign relations or national defense, fields that the Constitution plainly commits to the political branches. *Id.*; *see, e.g.*, *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 980 (9th Cir. 2007) ("The conduct of the foreign relations of our government is committed by the Constitution to the executive and legislative [branches] ... and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision."). Indeed, in this case, the interference with the conduct of foreign affairs could not be plainer. The complaint requests, for example, that the Court declare that "the United States government has an obligation ... under the UNFCCC [United Nations Framework Convention on Climate Change, *adopted* May 9, 1992, 1771 U.N.T.S. 107, S. Treaty Doc. No. 102-38] to take action" to reduce greenhouse gas emissions. Compl. at 39. But the emissions targets in the UNFCCC are by their terms non-binding, S. Treaty Doc. No. 102-38, Art. 2, p. 5; notably, the United States subsequently refused to ratify the Kyoto Protocol, which would have called for mandatory reductions in GHG emissions by developed nations. S. Res. 98, 105th Cong. (1997). The complaint thus asks this Court to transform agreements that were negotiated by the President and approved by the Senate as non-binding into non-discretionary mandates.

This case is wholly unlike those in which courts have directed executive agencies to take, or refrain from taking, particular action pursuant to *statutory* requirements. In those instances the courts were not imposing policy decisions on the agencies, or otherwise directing how the agency should exercise its regulatory discretion, but were instead interpreting and enforcing obligations

imposed on the agency by Congress through statute. *E.g.*, *Massachusetts v. EPA*, 549 U.S. 497, 516 (2007); *see also id.* at 533 ("[Under the Clean Air Act,] EPA no doubt has significant latitude as to the manner, timing, content, and coordination of its regulations with those of other agencies."). The complaint in this case, by contrast, asks the Court to create new standards to govern the agencies, and then direct them to adopt particular regulations to advance those new standards. Compl. at 39-40. Such an order would represent nothing more than a bald—and unconstitutional—exercise of legislative and executive power by the judiciary.

B. There Are No "Judicially Discoverable And Manageable Standards" For Resolving Plaintiffs' Claim.

Plaintiffs' claim is also non-justiciable because there are no "judicially discoverable and manageable standards" for resolving it, and its resolution would require an impermissible "initial policy determination." *Baker*, 369 U.S. at 217. The complaint asks the Court to issue "appropriate equitable relief" directing the agencies to develop a "satisfactory remedial plan" to address the risks of climate change. Compl. at 1, 6, 38. But there are no discoverable or manageable standards by which this Court could assess what relief would be "satisfactory" or "appropriate" in light of the myriad interests implicated by regulation of greenhouse gas emissions and climate change.

To determine the level of emissions reductions, if any, that may be warranted in light of the alleged future risks of climate change, a court would need not only to resolve the scientific likelihood of those risks, and their likely impact on the Nation, but also to weigh those risks against the possible benefits of emissions-producing activities and associated reduction measures and then make a comparative judgment to determine which industries and sectors should be required to reduce their emissions and by how much. *AEP*, 131 S. Ct. at 2539-40 (stating that GHG emissions regulations "cannot be prescribed in a vacuum" but must take account of "competing interests" relating to "national or international policy"). Thus, even if one accepts (as Plaintiffs allege) that reducing CO_2 emissions by six percent starting in 2013 would abate some of the future risks of climate change, Compl. ¶¶ 15-21, those reductions would nevertheless not be "appropriate" if the future potential benefits would be outweighed by, for instance, immediate losses in productivity and economic development.

There is simply no way to make these determinations without relying on "ad hoc" policy judgments of the type prohibited by the political question doctrine. In *Massachusetts v. EPA*, for example, after holding that the Clean Air Act authorized EPA to consider whether to regulate GHG emissions under certain circumstances, the Supreme Court refused to address whether the agency should actually exercise that discretion on grounds that it would implicate "policy judgments" that the federal judiciary has "neither the expertise nor the authority to evaluate." 549 U.S. at 533-34. Likewise, in *AEP*, the Court refused to address the "appropriate amount of regulation in any particular greenhouse gas-producing sector" because that inquiry, "as with other questions of national or international policy," would require balancing a number of "competing interests," including among other things "the environmental benefit potentially achievable, our Nation's energy needs and the possibility of economic disruption." 131 S. Ct. at 2539-40. Only the legislative and executive branches have the capacity and authority under our Constitution to assess and weigh these questions of "high policy" and decide whether regulations such as those Plaintiffs seek are appropriate. *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 647 (1981); *see also Gilligan*, 413 U.S. at 8 ("It would be inappropriate for a district judge to undertake this responsibility in the unlikely event that he possessed [the] requisite technical competence to do so.").

C. The Claim Could Not Be Resolved Without "Expressing Lack Of The Respect Due Coordinate Branches Of Government."

The complaint should also be dismissed because this case cannot be adjudicated without "expressing lack of the respect due" other branches of government. *Baker*, 369 U.S. at 217. The Legislative and Executive Branches have taken steps to assess the potential impacts and risks of climate change, and the possible benefits and costs associated with available emissions-reduction measures, *see infra* pp. 21-22 (discussing statutes and regulations), and they have decided based on those assessments that the appropriate approach to addressing these issues is through regulation by expert agencies, guided by statutory directives and benchmarks, *see AEP*, 131 S. Ct. at 2539-40 ("It is altogether fitting that [in the Clean Air Act] Congress designated an expert agency, ... EPA, as best suited to serve as primary regulator of greenhouse gas emissions."). Similarly, in international negotiations, the President and Congress have adopted an incremental approach, joining with other

nations in pursuing a multilateral response to climate change issues, *see* UNFCCC, S. Treaty Doc. No. 102-38—and pledging to move toward certain emissions-reduction benchmarks over the next decade if shared with reductions by other nations, *see* Letter from Todd Stern, U.S. Special Envoy for Climate Change, to UNFCCC (Jan. 28, 2010)—but deferring mandatory commitments at this time, *see* Kyoto Protocol, 37 I.L.M. 22.

The order Plaintiffs seek would reject these steps as inadequate and ask the Court to insert its judgment for that of the Legislative and Executive Branches. It would hold that the political branches have failed to exercise their discretion and authority properly and that, as a result, the judiciary must take over that responsibility and tell those branches how to legislate, how to regulate, and how to negotiate. The complaint is, indeed, remarkably candid in its purpose: to secure a declaration instructing the "federal government to do its job," as Plaintiffs would define it. Compl. ¶ 3. The complaint, moreover, specifically requests that the Court "[r]etain jurisdiction over this action" (potentially until 2099) in order to ensure that the named agencies follow their obligations under the approved recovery plan. *Id.* ¶ 22. It is hard to imagine how the judiciary could show a greater "lack of respect" for the other branches than by issuing, as Plaintiffs request, an order that not only supersedes their considered judgment concerning the proper response to matters within their constitutional authority, but also suggests that they are incapable of exercising that authority without continuing supervision by this Court for the rest of this century. *See Gilligan*, 413 U.S. at 8 (claims calling upon court "to assume continuing regulatory jurisdiction" over governmental department constitute non-justiciable political questions).

"[A]llowing courts to oversee legislative or executive action," as Plaintiffs in this case request, "would significantly alter the allocation of power ... away from a democratic form of government." *Summers v. Earth Island Institute*, 129 S. Ct. 1142, 1149 (2009) (citation omitted); *see United States v. Richardson*, 418 U.S. 166, 188 (1974) (Powell, J., concurring) ("We should ever be mindful of the contradictions that would arise if a democracy were to permit general oversight of the elected branches of government by a nonrepresentative, and in large measure insulated, judicial branch"). The claim in this case implicates non-justiciable political questions and must, for that reason, be dismissed. *See Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863 (N.D.

Cal. 2009) (appeal pending, No. 09-17490, 9th Cir.) (dismissing climate change claims); *California v. Gen. Motors Corp.*, No. C06-05755, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007) (same).

II. PLAINTIFFS LACK STANDING TO PURSUE THEIR CLAIM.

To satisfy the "irreducible constitutional minimum of standing," a plaintiff must plead facts showing an "injury in fact" that is "imminent" and "particularized," "fairly traceable to the challenged action of the defendant," and "likely … redressable by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (alterations and citations omitted). Plaintiffs in this case cannot meet that standard.

A. The Alleged Injuries Are Too Speculative And Generalized.

The allegations in the complaint fail to satisfy the "core" constitutional requirement of an injury that is "imminent" and "particularized." *Id.* Most of the adverse impacts alleged in the complaint are to the environment or the public generally, rather than the Plaintiffs personally,[3] or concern events in the past, which could not support claims for prospective injunctive relief.[4] *See id.* at 504 ("Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief ...."). Other alleged harms are to the *interests* for which Plaintiffs advocate, not actual injuries to Plaintiffs themselves, and are likewise inadequate.[5] *Sierra Club v. Morton*, 405 U.S. 727, 740 (1972) (refusing "to authorize judicial review at the behest of organizations or individuals who seek to do no more than vindicate their own value preferences

[3] *See, e.g.*, Compl. ¶¶ 29-30 (to forests and glaciers), ¶ 31 (to "county"), ¶ 35 (in Africa), ¶¶ 39-40 (to forests and waterways), ¶ 44 (to "infrastructure" and "ecosystem"), ¶¶ 45-46 (in Africa and Florida), ¶ 81 (to "human civilization").

[4] *See, e.g.*, Compl. ¶¶ 29-30 (Alec L. previously "lived in [Colorado,] where he enjoyed hiking and walking in forests," and "traveled to Iceland in the summer of 2010"), ¶¶ 35-37 (Madeleine W. "saw a photograph of an African mother holding her child who had died from starvation" and "traveled ... to Patagonia, Chile."), ¶ 39 (Garrett and Grant S. "experienced the consequences of global warming in the various geographic locations they have lived"), ¶¶ 44-46 (Zoe J. "had the opportunity to visit East Africa" and "the Florida Panhandle.").

[5] *See, e.g.*, Compl. ¶¶ 33 (Alec L. "is passionately driven to 'stop global warming'"), ¶ 37 (Medline W. has a "passion, desire and need to advocate for those people and natural resources without a voice"), ¶ 41 (Garrett and Grant S. "care deeply about the environment ... and expect others also to take responsibility for the environment"), ¶ 43 (Zoe J. "has actively been involved in protecting ... the safety of her environment ").

through the judicial process"). The few allegations that do arguably assert an ongoing or continuing harm—such as an asthmatic condition, Compl. ¶ 32, or a polluted local waterway used routinely by a Plaintiff, *id.* ¶ 40—link those harms generally to climate change but not to the challenged conduct itself (*i.e.*, the agencies' purported *current* failure to regulate), as would be required to establish standing. *See, e.g., Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 771-73 (2000); *Allen v. Wright*, 468 U.S. 737, 750-56 (1984).

Other allegations conclusively demonstrate that no such link could reasonably be drawn. According to Plaintiffs' complaint, climate change has already commenced and will continue, even if the named agencies regulate in the manner demanded by Plaintiffs. Compl. ¶¶ 12, 15, 75-79, 123-28; *see, e.g.*, *id.* ¶ 104 ("Earth will continue to warm in reaction to … past emissions"), ¶ 126 ("Even if [carbon dioxide] emissions were instantaneously halted ... it would still take until around 2060 before [the rate of climate change would be demonstrably slowed.]"). While the complaint alleges that the requested emissions reductions are necessary "[t]o return Earth's energy balance and protect its natural resources," *id.* ¶ 15, it does not explain how the particular harms to be faced in the future by these Plaintiffs result from the current absence of the regulations that Plaintiffs seek, and does not (and could not) state that Plaintiffs would not face the same harms if those regulations were adopted. Indeed, rather than seeking to redress "imminent" or "actual" harms, the complaint acknowledges that its purpose is "to *investigate* the effectiveness of federal authorities in planning and managing our nation's response to human-induced global energy imbalance." *Id.* ¶ 16 (emphasis added). Whether or how these particular Plaintiffs will be impacted in the future by the challenged conduct is thus, by Plaintiffs' own admission, a matter of conjecture, and cannot establish the "imminent" and "particularized" injury necessary to support standing. *See Lujan*, 504 U.S. at 560-61.

This fundamental deficiency is reflected in the fact that, if these allegations could support standing for these Plaintiffs, they could support standing for *anyone*. The complaint asserts that Plaintiffs have standing to sue because they will in the future experience effects of climate change, and it identifies as those effects nearly every climatological, meteorological, and epidemiological (and, it seems, nearly every geopolitical) occurrence on the planet, including "rising sea levels," "biodiversity loss," increased "frequency of forest fires" and "severe storms, flooding, and

droughts," as well as "lost timber and tourism revenue," "an increase in asthma[,] allergies[, and other] diseases and disorders," and even "failed states" and "radicalization." *Id.* ¶¶ 10-11, 94, 109, 112, 115. Under Plaintiffs' theory, anyone who may in the future suffer from any of those effects—in other words, anyone on the planet—could bring suit to force adoption of regulations that, in that person's view, are reasonably warranted to address those risks.

This is not a valid theory of standing. It is not enough for a plaintiff to allege that the defendant's conduct may generally contribute to a risk to "society" or to some group of parties of which the plaintiff is a part. *Gladstone Realtors v. Vill. of Bellwood*, 441 U.S. 91, 111-14 (1979); *see Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 106-07 (1998). Indeed, these claims are precisely the type of "generalized grievance" that the Supreme Court has held in numerous cases, *see Lujan*, 504 U.S. at 573-74 (citing cases), inadequate to support standing: those cases, like this one, involved claims by citizen-plaintiffs to prevent alleged waste or misuse of an asset held in trust for the public at large, and they were deemed non-justiciable because the claims addressed "essentially a matter of public and not of individual concern." *Massachusetts v. Mellon*, 262 U.S. 447, 487 (1923) ("If one [citizen] may champion and litigate such a cause, then every other [citizen] may do the same."). Whatever differences might exist in the way these and other parties may in the future experience any effects of climate change, the essential legal injury asserted here—that is, damages to a natural resource, the atmosphere, allegedly held in trust for the public, Compl. ¶ 147—is shared equally by each and every other citizen. It is the archetypal example of an "abstract" and "generalized grievance" that cannot support standing. *See Lujan*, 504 U.S. at 573-74.

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

Nor can Plaintiffs show that their injuries are "fairly traceable" to these Defendants, or "likely redressable" by the requested relief, because the alleged chain of causation depends "on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict." *Id.* at 562. The complaint asserts that the six named federal agencies should be directed to "take all necessary actions to reduce emissions in the United States by at least six percent beginning in 2013." Compl.

at 39-40. But the bulk of GHG emissions are from sources that are outside the United States, which would not and could not be reached by a decree in this case. *See, e.g.*, *North Carolina ex rel. Cooper v. TVA*, 615 F.3d 291, 302 (4th Cir. 2010). Indeed, the complaint acknowledges that the reductions sought by Plaintiffs would constitute only the United States' "share" of necessary global reductions. Compl. ¶ 151.[6]

There is thus no basis to believe that reductions ordered here would lead to *any* overall reduction, much less the reduction allegedly needed to achieve Plaintiffs' goal of 350 ppm CO_2 globally, or prevent or even slow the ongoing global warming effect that Plaintiffs allege. To the contrary, it is just as likely that GHG emissions in other nations would *increase* if severe limits were imposed in the United States, thereby negating the purported benefit achieved by the emissions reductions sought in this case. *See, e.g.*, *North Carolina*, 615 F.3d at 302. And, even under an extreme hypothetical scenario where emissions from foreign sources might not increase—so that a decree in this case might result in some overall reduction in worldwide greenhouse gases—that possibility and its scope are "too uncertain to satisfy the redressability prong of federal standing requirements." *ASARCO Inc. v. Kadish*, 490 U.S. 605, 615 (1989) (opinion of Kennedy, J.). Other courts have, indeed, dismissed similar "climate change" claims for precisely this reason. *Kivalina*, 663 F. Supp. 2d at 879-80; *Amigos Bravos v. U.S. Bureau of Land Mgmt.*, No. 6:09-0037, 2011 WL 3924489, at *11-13 (D.N.M. Aug. 3, 2011); *Sierra Club v. U.S. Defense Energy Support Ctr.*, No. 01:11–41, 2011 WL 3321296, at *5 (E.D. Va. July 29, 2011); *see Ctr. for Biological Diversity v. Dep't of Interior*, 563 F.3d 466, 478-79 (D.C. Cir. 2009) (rejecting similar causation theory).

That these Plaintiffs lack standing is confirmed by *Massachusetts v. EPA*. In that case, in upholding a state's standing to sue to compel EPA to consider greenhouse gas emissions limits for

[6] To the extent that other nations and states are, as the complaint alleges, "co-tenant sovereign trustee[s] of the atmosphere" with the United States and "share[ ] a duty with [the United States] to protect the atmosphere as the trust asset," Compl. ¶ 143, those nations and states may be deemed indispensible parties under Federal Rule of Civil Procedure 19, which (as to be explained in Intervenor's Opposition to Plaintiffs' Motion for Preliminary Injunction) could present independent grounds for dismissal. *See, e.g.*, *Keweenaw Bay Indian Cmty. v. Michigan*, 11 F.3d 1341, 1343-44 (6th Cir. 1993) (affirming dismissal of an Indian Tribe's claims regarding fishing rights in Lake Superior because other Tribes had competing claims and were not joined).

motor vehicles pursuant to the Clean Air Act, the Supreme Court explicitly relied on two factors unique to that case. 549 U.S. at 516-21. *First*, the Court explained that "[i]t is of considerable relevance that the party seeking review here is a sovereign State and not … a private individual." *Id.* at 518-20. In light of their distinctive position in the federal union, the Court said, states are entitled to "special solicitude in [the] standing analysis." *Id.* *Second*, the Court stressed that federal law explicitly grants a "procedural right" to challenge in federal court EPA's denial of a petition for rulemaking action under the Clean Air Act. *Id.* at 516-18. In light of that statutory right of action, and because Congress "has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before," the state was entitled to bring its claims "without meeting all the normal standards for [standing]." *Id.*; *see also Lujan*, 504 U.S. at 572 n.7 (discussing importance of "procedural rights"). Neither of these factors, which were described by the Court in *Massachusetts* as "of *critical* importance to the standing inquiry," 549 U.S. at 516 (emphasis added), is present here, and the private Plaintiffs in this case therefore lack standing to bring their climate change claim.

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

To bring a lawsuit against the federal government, Plaintiffs must also plead a cause of action as to which the government has waived sovereign immunity and that falls within the Court's subject matter jurisdiction under 28 U.S.C. § 1331.[7] Plaintiffs' asserted claim fails on both counts. They identify no waiver of the federal government's sovereign immunity for claims asserted under the public trust doctrine, nor any federal cause of action for asserting such claims. That is not surprising, as the public trust doctrine is a creature of state law that imposes duties on state governments, not the federal government. *See supra* note 2 (noting parallel petitions and lawsuits filed by these plaintiffs in all states and District of Columbia).

[7] For obvious reasons, a claim cannot be brought against the federal government under diversity jurisdiction. *See* 28 U.S.C. § 1332; *McMillan v. Dep't of Interior*, 907 F. Supp. 322, 326 (D. Nev. 1995) (Section 1332 "neither confers upon the Court jurisdiction of a dispute between [a plaintiff] and an agency or entity of the United States, nor does it state an unequivocal waiver of the sovereign immunity of the United States.").

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

The public trust doctrine is an arcane and limited state common law principle governing rights in lands submerged under navigable and tidal waters. According to the Supreme Court, "the seminal case in American public trust jurisprudence" is *Shively v. Bowlby*, 152 U.S. 1 (1894), which explained that, "[a]t common law, the title and the dominion in lands flowed by the tide 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*, 152 U.S. at 57). Because states hold such lands "in public trust," *id.* at 475, sales of such land must be compatible with the public interest. *See, e.g.*, *Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 451, 453 (1892) (irrevocable sale of nearly all submerged lands in Chicago harbor was void, because it would "impair[] the public interest" by allowing a private entity to "control the harbor").

In their complaint, Plaintiffs claim, without citation to any authority, that the public trust doctrine is grounded in the Commerce Clause, the Fourteenth Amendment Equal Protection and Due Process Clauses, and the Fifth Amendment Due Process Clause. Compl. ¶¶ 139–41. That claim is utterly groundless. Plaintiffs describe *Illinois Central* as the "lodestar public trust opinion." PI Motion at 12. But the Supreme Court has made clear that *Illinois Central* "was necessarily a statement of Illinois law," not federal law. *Appleby v. City of New York*, 271 U.S. 364, 395 (1926). Indeed, one of the law review articles Plaintiffs cite acknowledges that, in "post-*Illinois Central* cases spanning more than a century, the Supreme Court has steadfastly treated the public trust doctrine as a matter of state law not federal law." Douglas L. Grant, *Underpinnings of the Public Trust Doctrine: Lessons from Illinois Central Railroad*, 33 Ariz. St. L. J. 849, 870 (2001); *see also Jones v. Rose*, No. CV 00-1795, 2005 WL 2218134, at *26 (D. Or. Sept. 9, 2005) (referring to the "Supreme Court's repeated and unequivocal holdings" that the public trust doctrine is "a matter of state law"); Robin K. Craig, *A Comparative Guide to the Western States' Public Trust Doctrines: Public Values, Private Rights, and the Evolution Toward an Ecological Public Trust*, 37 Ecology L.Q. 53, 58 (2010) ("Public trust law, in other words, is very much a species of state common law.").

The public trust doctrine does have a tangential relationship to federal common law, but that relationship serves only to underscore its state-law nature. The equal footing doctrine, which is a part of federal common law, provides that each state, upon admission to the United States, obtains the same rights over submerged lands within its borders as did the original thirteen states. *Shively*, 152 U.S. at 57. Once statehood is attained, however, the equal footing doctrine "d[oes] not operate after that date," and the development of the public trust doctrine is a matter of state law. *Oregon v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 371 (1977) (rejecting contention that "federal common law could supersede state law in the determination of land titles" under public trust doctrine).

In their motion for a preliminary injunction, Plaintiffs try, unsuccessfully, to identify other bases for a federal public trust doctrine. PI Motion at 12. The law review article they cite, however, relies on the reserved powers doctrine and the vesting clauses of the ***Illinois*** constitution to explain why the Illinois legislature could not irrevocably transfer rights to public trust land. Grant, *supra*, at 871-77. These principles of Illinois law do not transform the public trust doctrine into a federal cause of action applicable to the federal government.[8] The federal statutes and agency mission statements Plaintiffs cite, PI Motion at 13-14, reflect Congress's ***authority*** to address matters of federal concern, such as protection of the nation's environment or security. These enactments are not evidence that Congress is subject to a judicially enforceable obligation to address such matters at the behest of private citizens.

Finally, the three district court cases Plaintiffs cite, *id.* at 12, do not establish such a novel and sweeping proposition. Two of these cases, *City of Alameda v. Todd Shipyards*, 635 F. Supp. 1447 (N.D. Cal. 1986), and *United States v. 1.58 Acres of Land*, 523 F. Supp. 120 (D. Mass. 1981), concluded that, when the United States obtains title to submerged state lands, the mere transfer of the land to the United States does not extinguish the public trust restrictions that had burdened the state

[8] Moreover, to the extent Congress is subject to the "reserved powers" principle that one legislature cannot bind a future legislature, the principle is irrelevant here: Plaintiffs do not challenge any federal law in which Congress has purported to prohibit future Congresses from taking any action with respect to greenhouse gas emissions; to the contrary, plaintiffs' suit is based on the alleged "failure by Defendants, and each of them, to reduce United States' carbon emissions by the amount" plaintiffs deem necessary. Compl. ¶ 149.

title. *See Todd Shipyards*, 635 F. Supp. at 339–340; *1.58 Acres of Land*, 523 F. Supp. at 121, 124–25. That narrow situation is inapplicable here. And the stray comment in *In re Steuart Transportation Co.*, 495 F. Supp. 38 (E.D. Va. 1980), that the public trust doctrine imposes upon the United States "the duty to protect and preserve the public's interest in natural wildlife resources," *id.* at 40, is dicta. The "sole issue" in the case was whether, under the public trust doctrine and other theories, the United States had the right to sue a private company that had spilled oil into the Chesapeake Bay. *Id.* at 39. The court's dicta rests on "virtually no analysis," *District of Columbia v. Air Fla., Inc.*, 750 F.2d 1077, 1083 (D.C. Cir. 1984), and is at odds with consistent Supreme Court precedent establishing that the public trust doctrine is a creature of state law.

In short, because the public trust doctrine is a state-law doctrine governing property rights, it does not and cannot provide a cause of action against federal agencies or actors. Plaintiffs' complaint, filed in federal court solely against federal Defendants, should therefore be dismissed. *See Jones*, 2005 WL 2218134, at *26 (dismissing public trust doctrine claim on the ground that it did not raise a federal question under 28 U.S.C. §1331).[9]

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

Because they cite one of the seminal federal common law public nuisance cases, *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907), in their complaint, Compl. at 1, and their motion for a preliminary injunction, PI Motion at 1, 15, Plaintiffs appear to suggest that the public trust doctrine is a feature of federal common law, and thus enforceable through a federal common law cause of action. Any such theory is fundamentally mistaken: it would be inappropriate for this Court to create a federal common law public trust doctrine cause of action, and any such cause of action

[9] 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").

would necessarily be displaced.

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

As we have just shown, the public trust doctrine is a creature of state, not federal, law. Nor is there any legitimate basis for creating a federal common law cause of action to permit private citizens to assert public trust doctrine claims against the United States. There is "no federal general common law," *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938), and since *Erie*, the Supreme Court has identified only a few, highly "restricted" circumstances in which courts can properly create federal common law, *Tex. Indus.*, 451 U.S. at 647. There are two distinct types of federal common law. One consists of "rules of decision" necessary to resolve matters that arise in cases that are otherwise cognizable in court, but where application of "the law of a particular State would be inappropriate." *AEP*, 131 S. Ct. at 2535. The other involves creation of a federal common law cause of action itself, which involves an even greater exercise of lawmaking power, and is thus far rarer. *See id.* Recognition of a federal common law basis for the public trust doctrine claim Plaintiffs purport to assert would require this Court to create a cause of action where the exercise of power is plainly inappropriate.

Federal common law is developed for the purpose of *advancing* the interests and goals of Congress, for instance to fill "interstices" in a statutory scheme, and is always subordinate to Congress's constitutional authority to create federal law. *See, e.g., Milwaukee v. Illinois*, 451 U.S. 304, 314-15 (1981). The complaint in this case, by contrast, would have the Court apply federal common law in a way that not only is inconsistent with federal statute—directing agencies to promulgate regulations not contemplated by statutory standards—but would bind Congress itself, precluding it from enacting statutes that direct the agencies to operate otherwise. Rather than the legislature controlling federal common law, federal common law would control the legislature. This result is unsupported by any prior decision of the Supreme Court. *See O'Melveny & Myers v. FDIC*, 512 U.S. 79, 89 (1994) (weighing and appraising policy considerations is a task "for those who write the laws, rather than for those who interpret them").

Indeed, the Constitution enumerates various limits on the powers of Congress and the federal

government through, for example, the Bill of Rights and clauses of Article I, such as the Ex Post Facto and Bill of Attainder Clauses. Plaintiffs are effectively asking this Court to create a federal common law rule of a quasi-constitutional nature—one that imposes an obligation on the federal government to protect private citizens from alleged environmental harms. Such a wholly unprecedented exercise of lawmaking power by a federal court is insupportable under any accepted view of federal common law.

Creation of an extraordinary federal common law cause of action to enforce this rule is, if anything, even more unthinkable. For more than a quarter of a century, the Supreme Court has consistently refused to imply new causes of action or to expand existing ones, *Carlson v. Green*, 446 U.S. 14 (1980), even where a statute invites such an exercise, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), or such a cause of action would remedy a violation of existing constitutional rights. *Bush v. Lucas*, 462 U.S. 367 (1983). The Court has "decline[d] 'to create a new substantive legal liability without legislative aid and as at the common law,' because ... Congress is in a better position to decide whether or not the public interest would be served by creating it." *Id.* at 388-90 (quoting *United States v. Standard Oil Co.*, 332 U.S. 301, 316 (1947); *see also Sosa*, 542 U.S. at 727-28. Indeed, the Court has refused to create a cause of action at the behest of the federal government itself, in a situation that would have benefitted the public fisc, because doing so would "intrud[e] within a field properly within Congress' control." *Standard Oil*, 332 U.S. at 316. Thus, in *Standard Oil* the Court concluded that, even though federal common law must govern claims by the United States seeking recovery of costs relating to the negligent injury of a soldier, judicial recognition of such a cause of action was improper, because the claim concerned "question[s] of federal fiscal policy" that were "a proper subject for congressional action, not for any creative power of ours." *Id.* at 314.

Here, the claim asserted by Plaintiffs would, without question, intrude upon matters of substantial public policy concern that are "a proper subject" for Congress. The asserted justification for such an intrusion, however, is not that it is one Congress would likely welcome, *cf. Sosa*, 542 U.S. at 727-28; *Standard Oil*, 332 U.S. at 316, or is necessary to vindicate an express constitutional right, *cf. Bush*, 462 U.S. at 388-90, but rather that the courts must act because Congress and the rest

of the federal government have allegedly failed to discharge a "duty" that has no footing in the Constitution itself and is instead a creature of state law. Recognition of such a federal common law cause of action would subvert our constitutional scheme of separation of powers.

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

Even if there might otherwise have been a federal common law cause of action to address issues relating to climate change, that claim has been displaced. Federal common law is relied upon only as a "necessary expedient" in the "absence of an applicable act of Congress." *Milwaukee*, 451 U.S. at 314-15. For that reason, when Congress "addresse[s] the problem" previously governed by federal common law, "the need for such an unusual exercise of lawmaking by federal courts disappears." *Id.* In other words, when a federal statute "speak[s] directly to [the] question" previously addressed by a federal common law claim, that claim is displaced by the statute, and no longer available. *AEP*, 131 S. Ct. at 2537.

There is no doubt, in light of *AEP*, that the federal common law climate change claim asserted in this case are displaced by the Clean Air Act. That opinion held unequivocally "that the Clean Air Act and the EPA actions it authorizes" displace federal common law claims seeking restrictions on greenhouse gas emissions. *Id.* As the Supreme Court has held, the Act vests in EPA authority, when properly exercised, to regulate emissions of carbon dioxide, and "provides multiple avenues for enforcement" through not only "civil actions against polluters in federal court" but also petitions for review by both "States and private parties." *Id.* at 2537-38 (citing *Massachusetts*, 549 U.S. at 528-33). These provisions, the Court concluded, "ma[k]e plain that ... the Act 'speaks directly'" to the issue of regulating greenhouse gas emissions to address climate change, and thus displaces federal common law claims addressing those issues. *Id.*

The claim asserted in this case implicates the same issues as those in *AEP*, and is displaced for the same reasons. The claims in *AEP* would have required a court to "determine, in the first instance, what amount of carbon-dioxide emissions is 'unreasonable,'" and the emissions reductions, if any, the defendants should implement. *Id.* at 2540. The claim here, likewise, would have the Court decide whether current emissions levels are "unsafe," Compl. at 38, and the emissions

reductions, if any, Defendants should implement, *id.* Because Plaintiffs' claim addresses the same type of conduct and involves the same kind of issues as those in *AEP*, it is "equally plain that the [Clean Air] Act 'speaks directly'" to it and displaces any cause of action that might have been available under federal common law. 131 S. Ct. at 2537; *see also id.* at 2537-39 (rejecting argument "that federal common law is not displaced until EPA actually exercises its regulatory authority," and holding that federal common law would be displaced even "were EPA to decline to regulate carbon-dioxide emissions altogether").

Other statutes and federal programs, specifically addressing matters relating to climate change, further confirm that Congress has spoken to these issues. As early as 1978, Congress established a "national climate program," with the purpose of improving understanding of global climate change through research and international cooperation. National Climate Program Act of 1978, Pub. L. No. 95-367, 92 Stat. 601. Through the 1980s and 1990s, Congress enacted a series of statutes mandating further study of the impact of greenhouse gases and trends in climate change, Energy Policy Act of 1992, Pub. L. No. 102-486, tit. XVI, § 1601, 106 Stat. 2776, 2999; Global Change Research Act of 1990, Pub. L. No. 101-606, 104 Stat. 3096; Energy Security Act of 1980, Pub. L. No. 96-294, tit. VII, § 711, 94 Stat. 611, 774-75, and directing executive officials to coordinate international negotiations concerning global climate change, Global Climate Protection Act of 1987, Pub. L. No. 100-204, tit. XI, 101 Stat. 1407. *See also supra* p. 6 (noting Senate rejection of mandatory emissions reductions set forth in Kyoto Protocol). In the Energy Independence and Security Act of 2007, Congress established nationwide GHG reduction targets to be satisfied through modified biofuel production methods and increased fuel efficiency standards on cars and certain trucks, as implemented by EPA and the Department of Transportation. Pub. L. No. 110-140, 121 Stat. 1492. In 2008, Congress formally directed EPA to "develop and publish a … rule … to require mandatory reporting of GHG emissions above appropriate thresholds in all sectors of the economy of the United States," Consolidated Appropriations Act of 2008, Pub. L. No. 110-161, tit. II, 121 Stat. 1844, 212, which EPA did in 2009, 74 Fed. Reg. 56260 (Oct. 30, 2009).

To hold, as Plaintiffs request, that this Court should allow this public trust doctrine claim in order to supplement—or supplant—the regulatory schemes established by Congress is "no different

from holding that the solution Congress chose is not adequate," which is something a court "cannot do." *Illinois* v. *Outboard Marine Corp.*, 680 F.2d 473, 478 (7th Cir. 1982). Yet that is indisputably what Plaintiffs seek here. Compl. ¶ 3 (alleging "failure of our federal government to confront this human-induced global energy imbalance" and seeking "an order requiring our federal government to do its job"). The claim in this case is displaced by these acts of Congress and must be dismissed.

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

Even if Plaintiffs could clear the insuperable barriers of establishing standing, justiciability, the existence of a cause of action, a waiver of sovereign immunity, and subject matter jurisdiction, their complaint would still have to be dismissed. Taking all of their factual allegations as true, they fail to state a claim under even the broadest common law version of the public trust doctrine recognized by any state. Indeed, Plaintiffs' claim for relief bears virtually no resemblance to the public trust doctrine as it has been recognized in any court.

A. The Public Trust Doctrine Does Not Apply To The Atmosphere.

Plaintiffs fail to state a claim under the public trust doctrine because they allege that federal agencies violated the doctrine by not "protect[ing] the atmosphere." Compl. ¶ 18. The public trust doctrine does not apply to the atmosphere. The traditional common law doctrine applies only to lands submerged beneath tidal and navigable waterways, and focuses primarily upon the public's interests in navigation and commerce. *United States v. Mission Rock Co.*, 189 U.S. 391, 407 (1903).

Some states have, as Plaintiffs argue, "expanded" their public trust doctrines to encompass additional waterways and additional interests in such waterways. PI Motion at 15. However, even states with the broadest common law public trust doctrines have not extended them beyond "the planning and allocation of water resources." *Envtl. Prot. Info. Ctr. v. Cal. Dep't of Forestry & Fire Prot.*, 187 P.3d 888, 926 (Cal. 2008); *see Kelly v. 1250 Oceanside Partners*, 140 P.3d 985, 1002 (Haw. 2006) (Hawaii's "public trust doctrine applies to all water resources without exception or distinction"); *Matthews v. Bay Head Improvement Assoc.*, 471 A.2d 355 (N.J. 1984) (state's public trust doctrine gives the public a right to cross beaches to access submerged tidelands for recreation).

Some states have enacted statutes and constitutional provisions that establish a "public trust"

in those states in other natural resources, such as wildlife. *See* Cal. Fish & Game Code § 1801 ("[T]he policy of the state [is] to encourage the preservation, conservation, and maintenance of wildlife resources under the jurisdiction and influence of the state"); Haw. Const. art. XI, § 1 ("[T]he State and its political subdivisions shall conserve and protect Hawaii's natural beauty and all natural resources, including land, water, air, minerals and energy sources .... All public natural resources are held in trust by the State for the benefit of the people."). But these positive state legislative enactments are not part of the common law public trust doctrine and can have no bearing on federal common law.

Finally, even the most expansive conceptions of the public trust doctrine have remained tethered to a principle that is notably absent here—*i.e.*, the doctrine protects the public's use of the resource subject to the public trust. *See State v. Cent. Vt. Ry.*, 571 A.2d 1128, 1130 (Vt. 1989) (resource subject to public trust is "held by the people in their character as sovereign in trust for ***public uses*** for which they are adapted") (citation omitted; emphasis added). Thus, in the "lodestar" case of *Illinois Central*, the doctrine was used to override the legislature's sale of a huge swath of Chicago's harbor to a private entity. And, even when the California Supreme Court expanded the types of uses protected by the doctrine to include recreation and aesthetic appreciation, it did so with respect to an actual diversion and thus diminution of the resource itself. *Nat'l Audubon Soc'y v. Superior Court*, 658 P.2d 709, 712 (Cal. 1983) (diversion of streams feeding a navigable lake).

Unlike water and submerged lands, the atmosphere cannot be sold, leased, diverted, or reduced to private possession. Unsurprisingly, therefore, Plaintiffs do not allege that the federal government has impermissibly sold, leased, or licensed any portion of the atmosphere to others, or that it is permitting others to use the atmosphere in a manner that is depleting it or preventing Plaintiffs from using it.[10] Instead, they allege that GHG emissions have caused an increase in atmospheric temperatures, and that this increase is causing a series of alleged harms that they seek to forestall. Intervenor is unaware of any case that has so completely divorced the public trust doctrine

[10] Even the allegation that the burning of fossil fuel contributes to one Plaintiff's asthma, Compl. ¶ 32, is not and indeed could not be an allegation that the carbon dioxide released by such burning has deprived that Plaintiff of use or access to the atmosphere.

from its fundamental purpose of ensuring the public use of the very resource that is the subject of the public trust.[11] There is no basis for this Court to recognize such an unwarranted expansion of the doctrine in this case.

B. The Public Trust Doctrine Imposes No Affirmative Duty To Regulate.

Plaintiffs fail to state a claim under the public trust doctrine for the additional reason that their claim rests on Defendants' alleged failure to regulate in a particular manner. *E.g.*, Compl. ¶ 57 (USDA "continues to fail to preserve and protect the atmospheric trust from greenhouse gases from farming, agricultural practices, and fossil fuel extraction"), ¶ 61 ("DOE has failed to preserve and protect the atmosphere by advancing clean, reliable, and affordable energy to replace fossil fuel sources of energy"). The traditional common law public trust doctrine imposes no duties upon states to regulate in any manner; it only restricts transfers of title to state-owned submerged lands. *See Ill. Cent.*, 146 U.S. at 45-53. Courts can review the validity of such transfers under the public trust doctrine but, contrary to Plaintiffs' assertions, the doctrine gives courts no authority to order government agencies to enact particular regulations that Plaintiffs believe would best serve the public interest. *See id.*; *Ariz. Ctr. for Law in the Public Interest v. Hassell*, 837 P.2d 158 (Ariz. App. Ct. 1991) (reviewing legislation relinquishing state title in submerged lands).

The broadest state public trust doctrines allow for review of state permits, as well as transfers, that affect submerged lands. Before approving diversions of water over submerged public trust lands, California agencies "should consider the effect of such diversions upon interests protected by the public trust, and attempt, so far as feasible, to avoid or minimize any harm to those interests." *Nat'l Audubon*, 658 P.2d at 712. But even this expanded doctrine gives courts no authority to order agencies to enact particular regulations. And it leaves the agencies very broad discretion to balance competing interests, recognizing that they "may have to approve applications despite foreseeable harm to public trust uses." *Id.* at 728.

Plaintiffs cite *Kelly v. 1250 Oceanside Partners* for the proposition that the public trust doctrine creates an affirmative duty to regulate. PI Motion at 11. *Kelly* does hold that Hawaiian

[11] As explained below, *Kelly v. 1250 Oceanside Partners* is not such a case.

counties have "an affirmative duty to preserve and protect the State's water resources" from pollution through soil erosion. But that holding is based upon the "plain language of article XI, section 1" of the Hawaii constitution and upon a section of the Hawaii Code providing that counties "shall enact ordinances for the purpose of controlling soil erosion and sediment"—*not* upon a common law public trust doctrine. 140 P.3d at 1004.

Thus, the public trust doctrine provides no basis for Plaintiffs' extraordinary request that the Court order multiple federal agencies to "take all necessary actions to reduce CO_2 emissions in the United States" by the amount and at the rate that Plaintiffs believe adequate. Compl. at 39. Any such order would plainly exceed judicial power. Federal agencies can regulate greenhouse gas emissions only as Congress authorizes; their regulations are reviewable in court only through the procedures that Congress has established. There is "no room for a parallel track." *AEP*, 131 S. Ct. at 2531.

Dated: October 31, 2011

Respectfully submitted,

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

ALEC L., et al. Plaintiffs, vs. LISA P. JACKSON, et al., Defendants.	Case No. 3:11-CV-02203-EMC Assigned to: Edward M. Chen **[PROPOSED] ORDER GRANTING INTERVENOR'S MOTION TO DISMISS** Date: November 28, 2011 Time: 2:30 p.m. Place: Courtroom 5, 17th Floor

The Intervenor's Motion To Dismiss plaintiffs' claim, under Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, came on for hearing before this Court on November 28, 2011. All parties were represented by counsel.

Having considered the moving and opposition papers and heard the oral arguments of counsel, the Court HEREBY ORDERS that the Intervenor's Motion to Dismiss under Rules 12(b)(1) and 12(b)(6) is GRANTED; and Plaintiff's Complaint is DISMISSED WITH PREJUDICE.

Dismissal is required under Rule 12(b)(1) of the Federal Rules of Civil Procedure when a complaint fails to satisfy the Plaintiffs' burden of pleading facts demonstrating that the claims are justiciable and otherwise within the subject matter jurisdiction of the court. *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000). Dismissal is appropriate under Rule 12(b)(6) when the complaint does not allege facts setting forth a claim that is "facially plausible" and upon which relief could be granted. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949-51 (2009); *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001); *see also Iqbal*, 129 S. Ct. at 1949-51 ("A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."). When ruling on a motion to dismiss, under either Rule 12(b)(1) or Rule 12(b)(6), although the court should generally accept as true all properly pleaded factual allegations in the complaint, it should not accept "conclusory" allegations, *e.g.*, *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754-55 (9th Cir. 1994), and may also consider matters of public record, such as formal pronouncements by agencies and officials, *Barron v. Reich*, 13 F.3d 1370, 1377 (9th Cir. 1994). These standards mandate dismissal of plaintiffs' claim.

Rule 12(b)(1): First, plaintiffs' claim raises non-justiciable "political questions." *Baker v. Carr*, 369 U.S. 186, 217 (1962). The complaint asks the Court to direct agencies of the Executive Branch to promulgate specific regulations targeting a particular goal, without regard to the agencies' own expert determinations regarding the need for or suitability of those regulations and without regard to statutory prerequisites and directives enacted by the Legislative Branch, based on plaintiffs views as to what regulations would be "appropriate" and "satisfactory" to address the risks of climate change. Adjudication of Plaintiffs' claim would thus involve the judiciary in issues that are "committed by the text of the Constitution to [the] coordinate branch[es] of Government," and

would "express[a] lack of the respect due" other branches of government. *Baker*, 369 U.S. at 217; *Wang v. Masaitis*, 416 F.3d 992, 995 (9th Cir. 2005); *see also Gilligan v. Morgan*, 413 U.S. 1, 5-7 (1973). Moreover, because there are no standards by which this Court could assess what relief would be "satisfactory" or "appropriate" in light of the myriad interests implicated by regulation of greenhouse gas emissions and climate change, there is no way to make these determinations without relying on "ad hoc" policy judgments of the type prohibited by the political question doctrine. *Massachusetts v. EPA*, 549 U.S. 497, 533-34 (2007) (refusing to address whether EPA should exercise its discretion to regulate greenhouse gas emissions on grounds that that would implicate "policy judgments" that the federal judiciary has "neither the expertise nor the authority to evaluate"); *Am. Elec. Power Co., Inc. v. Connecticut*, 131 S. Ct. 2527, 2539-40 (2011) ("*AEP*") (refusing to address the "appropriate amount of regulation in any particular greenhouse gas-producing sector" because that inquiry, "as with other questions of national or international policy," would require the court to balance "competing interests," including "the environmental benefit potentially achievable, our Nation's energy needs and the possibility of economic disruption").

Second, plaintiffs lack standing. To satisfy the "irreducible constitutional minimum of standing," a plaintiff must plead facts showing an "injury in fact" that is "imminent" and "particularized," "fairly traceable to the challenged action of the defendant," and "likely … redressable by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (alterations and citations omitted). The allegations in the complaint fail to satisfy the "core" constitutional requirement of an injury that is "imminent" and "particularized": to the contrary, because these claims allege harms to a resource allegedly held in trust for the general public, they are the type of "generalized grievance" that the Supreme Court has held in numerous cases, *see Lujan*, 504 U.S. at 573-74 (citing cases), inadequate to support standing. Nor can Plaintiffs show that their injuries are "fairly traceable" to these Defendants, or "likely redressable" by the requested relief, because the bulk of greenhouse gas emissions are from sources that are outside the United States, which would not and could not be reached by a decree in this case. *See, e.g.*, *North Carolina ex rel. Cooper v. TVA*, 615 F.3d 291, 302 (4th Cir. 2010).

Third, Plaintiffs have pled no cause of action within this court's subject matter jurisdiction.

To bring a lawsuit against the federal government, Plaintiffs must plead a cause of action as to which the government has waived sovereign immunity and that falls within the Court's subject matter jurisdiction under 28 U.S.C. § 1331. Plaintiffs identify no waiver of the federal government's sovereign immunity for claims asserted under the public trust doctrine, nor any federal cause of action for asserting such claims. Because the public trust doctrine is a state law-doctrine governing property rights, it does not and cannot provide a cause of action against federal agencies or actors. *Appleby v. City of New York*, 271 U.S. 364, 395 (1926). Nor is there any legitimate basis for creating a federal common law cause of action to permit private citizens to assert public trust doctrine claims against the United States. *See O'Melveny & Myers v. FDIC*, 512 U.S. 79, 89 (1994). In any event, even if there might otherwise have been a federal common law cause of action to address issues relating to climate change, that claim has been displaced, as the Supreme Court held in *AEP*. 131 S. Ct. at 2537.

12(b)(6): Although the complaint is properly dismissed for lack of jurisdiction under Rule 12(b)(1), the Court deems it appropriate to dismiss the claim provisionally under Rule 12(b)(6) as well. Plaintiffs fail to state a claim under the public trust doctrine because they allege that federal agencies violated the doctrine by not protecting the atmosphere. The public trust doctrine does not apply to the atmosphere. *See, e.g., United States v. Mission Rock Co.*, 189 U.S. 391, 407 (1903). Plaintiffs' claim fails for the additional reason that the traditional common law public trust doctrine imposes no duties upon states to regulate in any manner; it only restricts transfers of title to state-owned submerged lands. *See Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 451, 453 (1892). Courts can review the validity of such transfers under the public trust doctrine but have no authority to order government agencies to enact particular regulations.

Thus, the public trust doctrine provides no basis for Plaintiffs' extraordinary request that the Court order multiple federal agencies to "take all necessary actions to reduce CO_2 emissions in the United States" by the amount and at the rate that Plaintiffs believe is adequate. Any such order would plainly exceed judicial power. Federal agencies can regulate greenhouse gas emissions only as Congress authorizes; their regulations are reviewable in court only through the procedures that Congress has established. There is "no room for a parallel track." *AEP*, 131 S. Ct. at 2531.

For all of the foregoing reasons, the Intervenor's Motion to Dismiss is GRANTED. Because leave to amend would here be futile, *Schreiber Distributing Co. v. Serv-Well Furniture Co., Inc.*, 806 F. 2d 1393, 1401 (9th Cir. 1986), *Albrecht v. Lund*, 845 F. 2d 193, 195-96 (9th Cir. 1988), Plaintiff's Complaint is DISMISSED WITH PREJUDICE.

IT IS SO ORDERED.

DATED:

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Honorable Edward M. Chen
United States District Judge