**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

| | | |
|---|---|---|
| ALEC L., *et al.*, | ) | |
| Plaintiffs, | ) | |
| v. | ) | Civil Action No. 1:11-cv-02235 (RLW) |
| LISA P. JACKSON, *et al.*, | ) | |
| Defendants. | ) | |

**CONSOLIDATED REPLY MEMORANDUM IN SUPPORT OF MOTIONS TO DISMISS OF INTERVENOR-DEFENDANTS**

**TABLE OF CONTENTS**

## TABLE OF AUTHORITIES

**Page(s)**

**CASES**

**STATUTES AND REGULATIONS**



**OTHER AUTHORITIES**

Pursuant to this Court's order of April 2, 2012, Intervenor-Defendants the National Association of Manufacturers ("NAM") and Delta Construction Company, Inc., Dalton Trucking, Inc., Southern California Contractors Association, Inc., California Construction Trucking Association, formerly known as the California Dump Truck Owners Association, and Engineering & Utility Contractors Association (collectively, "Delta") submit this consolidated reply memorandum in response to Plaintiffs' Memorandum of Points and Authorities in Opposition to Intervenors' Motions To Dismiss (Dkt. 160) (Pls. Opp.).

## INTRODUCTION

Plaintiffs ask this Court to take control over legislative and executive authority involving extraordinarily complex scientific and policy issues relating to greenhouse gas (GHG) emissions. They would have this Court direct the six named federal agency Defendants to take whatever actions are "necessary" to drastically reduce GHG emissions in the United States in order to lower *global* atmospheric GHG concentrations to levels Plaintiffs deem acceptable. Compl. at 39-40 (Dkt. 4). These agencies share regulatory responsibilities over millions of enterprises, across every sector of the economy, such that restrictions of the type Plaintiffs seek—which could substantially eliminate the use of conventional energy in this country—would have profound consequences for the Nation's economic development and productivity, social policies, security interests, and international standing. And it would put this Court in the position of monitoring these agencies, possibly for many decades, and attempting to determine on an ongoing basis whether their efforts are "satisfactory" and, if not, what measures they should or should not take to meet whatever emissions targets are deemed "appropriate" in light of changing environmental conditions and economic development in this and other countries.

This extraordinary claim for relief, presented under the guise of the "public trust doctrine," cannot proceed for a number of reasons, as explained in the motions to dismiss of Intervenor-Defendants Delta and NAM. Delta Mot. To Dismiss 1-3 (Dkt. 159) (Delta Mot.); NAM Mot. To Dismiss 2-3 (Dkt. 67) (NAM Mot.). While Plaintiffs maintain that their claim is judicially manageable, they do not provide any reasonable standard that might guide its adjudication and cannot deny that the relief they seek would have this Court assuming control over the Legislative and Executive Branches, rendering this case non-justiciable under the political question doctrine. *See* Pls. Opp. 24-26. Similarly, while they claim to have standing under Article III, they never explain how the risks of injury they allege from climate change are different from those faced by society as a whole or how those risks might be "redressed" by an injunction against these particular agencies. *See id.* at 22-23. And, although they maintain that the novel version of the public trust doctrine they assert exists under federal law, and is indeed "constitutionally enshrined," *id.* at 12, they ignore Supreme Court precedent stating precisely the opposite. *E.g.*, *PPL Montana, LLC v. Montana*, 132 S. Ct. 1215, 1235 (2012) (the public trust doctrine "do[es] not depend upon the Constitution" but "remains a matter of state law"). Nor do they offer any other basis to conclude that a claim seeking GHG regulations may be upheld in the absence of supporting statutory authority, particularly when Congress has enacted statutes expressly "designat[ing] an expert agency, ... EPA, as ... primary regulator of [GHG] emissions." *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2539-40 (2011) ("*AEP*"). Dismissal is warranted for all of these reasons.[1]

[1] Sovereign immunity provides an independent basis for dismissal. NAM Mot. 14; Defendants' Mot. To Dismiss 20-22 (Dkt. 64) (Defs. Mot.). While Plaintiffs boldly assert that "sovereign immunity does not apply in a [public trust] suit," Pls. Opp. 23, courts have consistently held to the contrary that sovereign immunity applies to *all* suits brought against the United States or its agencies. *E.g.*, *Consejo de Desarrollo Economico de Mexicali, A.C. v. United States*, 482 F.3d 1157, 1173 (9th Cir. 2007); *accord Pflueger v. United States*, 121 F.2d 732, 735 (D.C. Cir. 1941) ("The sovereign's immunity from suit exists whatever the character of

## I. THIS CASE PRESENTS NON-JUSTICIABLE POLITICAL QUESTIONS.

The political question doctrine bars adjudication of issues that: (i) are "textually commit[ted]" to another branch by the Constitution; (ii) are not subject to "judicially discoverable and manageable standards"; or (iii) could not be resolved without "expressing lack of the respect due coordinate branches of government." *Baker v. Carr*, 369 U.S. 186, 217 (1962). The claim in this case, as explained in Intervenors' opening briefs, implicates all of these concerns. Delta Mot. 13-17; NAM Mot 5-10.

Plaintiffs respond that the political question doctrine is "inapplicable" because their claim invokes "public trust" principles, and is thus unlike prior cases—including those seeking GHG restrictions under a "nuisance" theory—that have been deemed non-justiciable. Pls. Opp. 24-29. That is incorrect. The justiciability limitations imposed by the political question doctrine flow from Article III of the Constitution and therefore apply to *all* causes presented in the federal judiciary, whatever the title appended to the claim or its asserted doctrinal basis. *Baker*, 369 U.S. at 214, 216. The doctrine's application in a particular case cannot be resolved by mere "semantic cataloguing" of prior decisions in which a political question has been found. *Id.* at 214, 216; *see also El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 841-42 (D.C. Cir. 2010) ("The political question doctrine bars our review of claims that, regardless of how they are styled, call into question the prudence of the political branches in matters ... constitutionally

---

the proceeding or the source of the right sought to be enforced."). Nor should the United States be deemed to have "waived" immunity in this case through section 702 of the Administrative Procedure Act (APA): although the D.C. Circuit held in *Trudeau v. FTC*, 456 F.3d 178 (D.C. Cir. 2006), that section 702's limited waiver of immunity encompasses certain "nonstatutory" claims under *federal* law, *id.* at 185-87, the claims in this case (as discussed in greater detail below, *infra* pp. 13-16) do not arise under *federal* law, and thus *Trudeau* is inapposite. *See United Tribe of Shawnee Indians v. United States*, 253 F.3d 543, 550 (10th Cir. 2001) (rejecting application of section 702's waiver when claim was not based on federal law) (citing *Clark v. Library of Congress*, 750 F.2d 89, 102 (D.C. Cir. 1984)); *see also Gros Ventre Tribe v. United States*, 469 F.3d 801, 808-13 (9th Cir. 2006) (section 702's waiver does not apply to common law claims with no basis in federal law).

committed to their discretion."). However framed, a claim presents a non-justiciable political question if, upon a "discriminating inquiry into the precise facts and posture of the [case]," *Baker*, 369 U.S. at 217, its adjudication would require the court to address an issue that should be reserved for the representative branches. That is the situation here.

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

While Plaintiffs attempt to downplay the scope of the remedy they seek, repeatedly characterizing it as "*only* requir[ing] the Federal Defendants to protect the atmosphere consistent with their preexisting duties as trustees of the public trust," *e.g.*, Pls. Opp. 34 (emphasis in original), they cannot mask the truly extraordinary nature of their request. It would require each of the named agencies not only to perform an annual "accounting" of GHG emissions but also to promulgate specific regulations to meet drastic emissions reductions and to submit to continued monitoring by the Court. Compl. at 39-40. The Court would, in effect, become engaged in rulemaking by promulgating standards of general applicability and future effect, and would place these agency Defendants under its exclusive control for purposes of enforcing those standards. Delta Mot. 14-15; NAM Mot. 5. That relief would clearly "embrace critical areas of responsibility vested by the Constitution in the Legislative and Executive Branches of the Government," *Gilligan v. Morgan*, 413 U.S. 1, 5-7 (1973), and renders this case non-justiciable under a long line of precedent (ignored by Plaintiffs) proscribing federal courts from directing agencies to take regulatory action not mandated by statute. *E.g.*, *Webster v. Doe*, 486 U.S. 592, 601 (1988); *Heckler v. Chaney*, 470 U.S. 821, 829 (1985); *Gilligan*, 413 U.S. at 5-7.

That the complaint does not dictate the precise regulations required to meet Plaintiffs' emissions goals does not, as Plaintiffs contend, Pls. Opp. 31-32, 34-35, negate or lessen the intrusion into the agencies' discretion. The injunction Plaintiffs request would require the

agencies to coordinate their regulations to meet a very specific goal—"to reduce [$CO_2$] emissions in the United States by at least six percent per year beginning in 2013," Compl. at 39-40—and thus would necessarily involve the Court telling the agencies "how" to regulate. Delta Mot. 14-15; NAM Mot. 6-7; *see, e.g.*, *Koohi v. United States*, 976 F.2d 1328, 1332 (9th Cir. 1992) (noting that requests for injunctive relief against a government agency raise unique justiciability concerns). In any event, the decision of *whether* to regulate is, if anything, more dependent on policy judgments than the decision of *how* to do so. *Massachusetts v. EPA*, 549 U.S. 497, 533-34 (2007). Contrary to Plaintiffs' characterization, the complaint in this case would have this Court "substitute its judgment for that of the legislature," Pls. Opp. 32—as well as the executive agencies operating under congressional directive—in matters relating to GHG regulation and climate change.

The requested relief in this case bears no resemblance to that granted in the decisions cited by Plaintiffs, in which "courts ordered parties to create a plan with judicial oversight to remedy the problem being litigated." Pls. Opp. 44. In all of those cases, courts entered the relevant remedial orders pursuant to express statutory authority and to address violations of express federal statutory and constitutional mandates. *Brown v. Plata*, 131 S. Ct. 1910, 1928 (2010) (Prison Litigation Reform Act); *United States v. Mass. Maritime Acad.*, 762 F.2d 142, 147 (1st Cir. 1985) (Civil Rights Act); *Health Care for All, Inc. v. Romney*, No. 00-110833, 2005 WL 1660677, at *15 (D. Mass. July 14, 2005) (Social Security Act); *Landow v. Sch. Bd. of Brevard County*, No. 6:97-cv-1463, 2001 WL 311307, at *1 (M.D. Fla. Mar. 7, 2001) (Equal Opportunity in Education Act).[2] The complaint here, by contrast, asks the Court to create and

[2] *See also Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 17 (1971) (citing Civil Rights Act of 1964); *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, No. 01-640, 2005 WL 2488447, at *1-3 (D. Or. Oct. 7, 2005) (citing Endangered Species Act). The two state housing discrimination cases Plaintiffs cite, *Southern Burlington County N.A.A.C.P. v. Twp. of Mount*

impose on these agencies new, judicially crafted obligations and standards—which are not only unsupported by, but contrary to, statutory requirements. *See* Delta Mot. 14-15; NAM Mot. 6-7. This relief would represent an unprecedented, and unconstitutional, exercise of legislative and executive power by the federal judiciary.

This is particularly true here in light of the intrusion into the fields of foreign relations and national defense. *See* Delta Mot. 15-16; NAM Mot. 6. While Plaintiffs argue that the injunction they seek will not "interfere with the making of foreign policy," Pls. Opp. 29, they elsewhere expressly frame their request for relief as an order requiring the named agencies "to protect the atmosphere consistent with ... the UNFCCC [United Nations Framework Convention on Climate Change]," *id.* at 34, even though the emission-reductions targets of the UNFCCC are by their terms non-binding, NAM Mot. 6. In other words, Plaintiffs ask this Court to transform a non-binding treaty agreement, negotiated by the President and approved by the Senate as discretionary, into a binding mandate. *Id.* It is thus hardly a "misrepresent[ation]"—much less a "clear[ ] and intentional[ ]" one, as Plaintiffs charge, Pls. Opp. 29—to describe the complaint as seeking to "involve this court in making foreign policy decisions in connection with greenhouse gas issues." Delta Mot. 15. Numerous cases, including *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836 (D.C. Cir. 2010), and *Corrie v. Caterpillar, Inc.*, 503 F.3d 974 (9th Cir. 2007), recognize that this is precisely the type of claim—"call[ing] into question the prudence of the political branches in matters of foreign policy"—that the federal courts cannot address. *El-Shifa*, 607 F.3d at 842; *accord Corrie*, 503 F.3d at 980.

---

*Laurel*, 336 A.2d 713 (N.J. 1975), and *Southern Burlington County N.A.A.C.P. v. Mount Laurel Twp.*, 456 A.2d 390 (N.J. 1983), addressed state law claims prosecuted in state courts—which are not subject to the same justiciability and separation of powers requirements imposed on federal courts under Article III—and are thus inapposite.

### B. There Are No "Judicially Discoverable And Manageable Standards" For Resolving Plaintiffs' Claim Without An Impermissible "Initial Policy Determination."

The claim also fails because, as explained in Intervenors' opening briefs, there are no "judicially discoverable and manageable standards" for resolving it without an "initial policy determination" of the type Article III forbids. *Baker*, 369 U.S. at 217. The opposition brief, far from offering any such standard, confirms that none exists.

The only "standard" Plaintiffs offer for their claim is that "[s]ome use of the resource is acceptable, but substantial impairment is not." Pls. Opp. 32. A proposed distinction between "some" and "substantial" impairment is hardly the "manageable" type of rule required to render a cause of action justiciable. *See, e.g.*, *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004) (plurality) ("[J]udicial action must be governed by standard, by rule."). It provides no objectively measurable guidelines by which a court could determine whether relief is warranted in this or any given case, and it offers no basis for a court to make "reasoned distinctions" in choosing among different forms of relief. *Id.* The only way for a court to resolve the claim would be through "*ad hoc*" policy judgments regarding, *inter alia*, what global level of GHG emissions is acceptable (whether the 350 ppm suggested by Plaintiffs, or some other concentration), in light of the asserted risks of climate change and costs of emission-reduction measures; which nations and sources of GHG emissions worldwide should be expected to reduce their emissions and by what amounts; and whether, when, and how reductions should be initiated, maintained, and measured. All of these determinations, in turn, would require consideration of the myriad socioeconomic, engineering, and security considerations potentially implicated by GHG regulation and climate change. Delta Mot. 13-14; 16-17; NAM Mot. 7-8. Particularly in an area as complex as GHG controls, the other branches are "surely better equipped to do the job than individual district judges," who "lack the scientific, economic, and technological resources an

agency can utilize in coping with issues of this order." *AEP*, 131 S. Ct. at 2540; *see Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948) (decisions that affect the safety or security of the Nation "should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility.").[3]

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

[3] That Congress previously ratified the UNFCCC does not, contrary to Plaintiffs' assertions, Pls. Opp. 33-34, somehow obviate the need for an "initial policy determination" to resolve their claim. The UNFCCC does not impose upon the United States *any* binding obligation to reduce GHG emissions, much less the specific targets sought by Plaintiffs, *see supra* p. 6, and in fact Congress subsequently rejected treaties that would have called for mandatory reductions. NAM Mot. 6. Thus, to grant the relief requested in this case, the Court would not only need to make the "initial policy decision" that mandatory GHG emissions reductions are appropriate and necessary, but one that is contrary to the earlier judgment expressed by Congress.

proposed reductions in order to maintain compliance with overall GHG targets. *See* Delta Mot. 13-17; NAM Mot. 7-8. Addressing these issues on a sector-by-sector basis is among the most complex, difficult, and policy-laden tasks that these agencies perform. For a court to undertake this responsibility for not only a particular sector or industry, but the entire United States economy, would present an entirely unprecedented and wholly unworkable challenge.[4]

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

There is also little doubt, and Plaintiffs raise none, that adjudication of their claim would "express[ ] lack of the respect due" other branches of government. *Baker*, 369 U.S. at 217. The order they seek would require the Court to find that the Legislative and Executive Branches have failed "to do [their] job," Compl. ¶ 3—despite the extensive domestic and international measures they have taken to address GHG emissions and climate change[5]—and direct them to take

[4] Whatever the historical validity of Plaintiffs' assertion that "the Supreme Court has never relied upon the third *Baker* factor [an "initial policy determination"] exclusively to dismiss a case on political question grounds," Pls. Opp. 33, the point is legally irrelevant. The Supreme Court has repeatedly described the six *Baker* "formulations" as "independent tests," *Vieth*, 541 U.S. at 277, and held that "a political question may arise when any *one* of the[m] is present," *INS v. Chadha*, 462 U.S. 919, 941 (1983) (emphasis added). For this reason (among others), Plaintiffs' criticism of *California v. Gen. Motors Corp.*, No. 06-5755, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007), is misplaced. While that decision stated, as Plaintiffs note, Pls. Opp. 33, that the third *Baker* factor was "most relevant" in addressing the particular claims at issue, it did not rest its holding "exclusively" on that factor—even though it certainly could have done so, consistent with the precedent cited above. 2007 WL 2726871, at *6-16. Instead, it concluded that the "nuisance" claims in that case (which also sought court-ordered restrictions on GHG emissions) implicated several of the *Baker* factors, including a "textually demonstrable commitment to the political branches" and a "lack of judicially discoverable or manageable standards." *Id.* Other courts have reached similar conclusions. *E.g.*, *Comer v. Murphy Oil USA, Inc.*, No. 1:11-CV-220, 2012 WL 933670, at *11-14 (S.D. Miss. Mar. 20, 2012) (appeal pending); *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 874-77 (N.D. Cal. 2009) (appeal pending). While Plaintiffs understandably disagree with these holdings, the objections they lodge against them—including that they addressed claims framed under the common law of "nuisance" and that some are "unpublished," Pls. Opp. 32-33 & n.30—provide no basis to distinguish those cases from this one.

[5] Several of the many legislative and executive efforts regarding GHG regulation and climate change are outlined in the motions to dismiss. *See* Defs. Mot. 24-25; Delta Mot. 11; NAM Mot. 8-9, 20-22. These efforts are ongoing. For example, EPA recently released a proposed rule that would regulate GHG emissions from electric utility generating units. Standards of Performance

particular action to meet Plaintiffs' goals, retaining jurisdiction thereafter to ensure (somehow) that the agencies follow their obligations. It is, as noted previously, difficult to conceive of an order that would show a greater "lack of ... respect" for coordinate branches than this one. *Id.*; *see also* Delta Mot. 14-16.

Such an order would, on its face, "strip the [agencies] of their right and ability to [decide upon the proper approach] to protect the atmosphere." Pls. Opp. 34. It would require them to follow the regulatory plan approved by this Court, on penalty of contempt, even if the agencies deem the prescribed regulations inconsistent with the public interest or their statutory responsibilities. Delta Mot. 14-16; NAM Mot. 5-6. Far from maintaining the essential "checks and balances" of the democratic system, Pls. Opp. 35, this relief would subvert that system by allowing courts to exercise "general oversight of the elected branches of government." *United States v. Richardson*, 418 U.S. 166, 188 (1974) (Powell, J., concurring).

The problem in this case is not the "difficult[y]" of the issues, their "political overtones," or the "weighty [consequences]" of a decision. Pls. Opp. 36. It is, rather, that the claim presented would have this Court assume direct control over executive agencies and order them to act in a manner inconsistent with legislative mandates, based not on objective and manageable standards but its own policy judgments regarding the "appropriate" and "suitable" response to issues of climate change and GHG regulation. Delta Mot. 13-17; NAM Mot. 5-10. There is no basis and no allowance in the Constitution for the judiciary to arrogate to itself such authority over discretionary decisions of the other branches, particularly when the basis for the claim is a state common law doctrine with no grounding in the U.S. Constitution or statutes. *See infra* pp. 13-16. Courts addressing similar "climate change" claims have properly dismissed them as

---

for Greenhouse Gas Emissions for New Stationary Sources: Electric Utility Generating Units, 77 Fed. Reg. 22,392 (Apr. 13, 2012).

non-justiciable on this basis. *Comer*, 2012 WL 933670, at *11-14; *Kivalina*, 663 F. Supp. at 874-77; *Gen. Motors*, 2007 WL 2726871, at *6-16. The same result should apply here.

## II. PLAINTIFFS LACK STANDING TO PURSUE THEIR CLAIM.

The complaint also does not satisfy Plaintiffs' burden to show, as necessary to establish standing under Article III, that their asserted injuries are (i) "imminent" and "particularized," (ii) "fairly traceable to the challenged action of the defendant," and (iii) "likely ... redressable by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Plaintiffs' brief lends no support to their position.

Plaintiffs' primary contention appears to be that, because NAM and Delta were allowed to intervene in this case, "[by] the same rationale, Plaintiffs have standing to bring their claims against the Federal Defendants." Pls. Opp. 22-23. This is a *non sequitur* of the first order. That NAM and Delta have shown that they would suffer cognizable harm to their business interests if the relief requested by Plaintiffs is *granted*, thus supporting NAM's and Delta's right to intervene, does not in any way demonstrate that Plaintiffs are suffering or will suffer injuries to their own separate interests if the relief they request is *denied*, as is required to establish standing under Article III. *Lujan*, 504 U.S. at 560-61. The inquiries into the standing of a plaintiff and a defendant (or an intervenor-defendant) are distinct and independent, as courts have recognized, with one having no necessary bearing on the other. *See, e.g.*, *City of Cleveland v. Nuclear Regulatory Comm'n*, 17 F.3d 1515, 1517-18 (D.C. Cir. 1994) (addressing standing of intervenor-defendant separately from standing of plaintiff).[6] Thus, to proceed with their claim, Plaintiffs must show that they are themselves exposed to an "imminent" and "particularized" harm that is

[6] *See also, e.g.*, *Bond v. United States*, 131 S. Ct. 2355 (2011) (addressing defendant's standing); *ASARCO Inc. v. Kadish*, 490 U.S. 605, 622-23 (1989) (noting that state-court plaintiffs could not have satisfied federal standing requirements, but upholding federal jurisdiction on petition brought by state-court defendants subject to adverse judgment).

both traceable to Defendants' conduct and "likely redressable" by the relief requested. *Lujan*, 504 U.S. at 560-61; *see also Ctr. for Biological Diversity v. Dep't of Interior*, 563 F.3d 466, 478-79 (D.C. Cir. 2009).

That showing has not been made. While the complaint attributes a host of current and future environmental impacts to climate change, it never links those effects to the challenged conduct of the named Defendants or shows that the harms would result "imminently" or "immediately" from that conduct. *See Lujan*, 504 U.S. at 560-61 & n.2, 574. To the contrary, according to the complaint itself, climate change has already commenced and is attributable to GHG emissions from innumerable third parties over the course of centuries—not the failure of these Defendants to regulate in the manner Plaintiffs demand. *See* Compl. ¶¶ 12, 15, 75-79, 104, 123-28. Nor are the asserted injuries "particularized" to these Plaintiffs: the impacts of climate change (as described by Plaintiffs) are shared in some form by each and every person on the planet, and their claim thus constitutes precisely the type of "generalized grievance" that the Supreme Court has held inadequate to support standing under Article III. *Lujan*, 504 U.S. at 573-74.[7] Finally, the alleged risks of climate change are not "likely redressable" by the emissions reductions Plaintiffs seek. *See id.* at 560-61. Because the bulk of GHG emissions are from sources outside the United States, which would not and could not be reached by a decree in

[7] In their separate response to Defendants' motion to dismiss, Plaintiffs assert that the Supreme Court rejected similar "generalized grievance" objections to the climate change tort claims in *AEP*. Pls. Opp. To Federal Defs. Mot. To Dismiss 16 (Dkt. 106). That is incorrect. The *AEP* opinion raised, but did not resolve, the issue of whether the plaintiffs had standing to bring their claims. 131 S. Ct. at 2535 (noting four-to-four split; affirming exercise of jurisdiction "by an equally divided Court"). Indeed, the opinion suggests that the four Justices who would have upheld standing would have done so only for the state governmental 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 thus strongly implies that standing could not be found in a climate change case brought solely by *private* parties.

this case, there is no reason to believe that reductions ordered here would lead to *any* overall reduction in global GHG levels, much less the reduction allegedly needed to prevent or even slow the ongoing global warming effect that Plaintiffs allege. NAM Mot. 13; *see also* Defs. Mot. 20-22.[8]

The complaint, quite simply, provides no support for a finding that Plaintiffs have standing to proceed. It may be for this reason that Plaintiffs do not offer any real response to this point in their brief—there is simply none to give. Numerous other federal courts have, notably, dismissed similar climate change claims for this very reason. *E.g.*, *Comer*, 2012 WL 933670, at *7-11; *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. Def. Energy Supp. Ctr.*, No. 01:11-cv-41, 2011 WL 3321296, at *5 (E.D. Va. July 29, 2011); *see also Ctr. for Biological Diversity*, 563 F.3d at 478-79 (finding alleged causal link between Department of Interior's land management program and climate change "too tenuous" to support standing). There is no reason for a different outcome here.

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

Dismissal is also warranted because Plaintiffs have not pled a cause of action within this Court's federal question jurisdiction. Delta Mot. 8-10; NAM Mot. 14-22. The public trust doctrine is a creature of *state* law and, as the Supreme Court recently reaffirmed in *PPL Montana, LLC v. Montana*, 132 S. Ct. 1215 (2012), provides no federal cause of action. Nor is

[8] Plaintiffs also assert that they have standing because they "have alleged direct injury, as well as the elements of causation and redressability." Pls. Opp. 23. But, as courts have consistently recognized, conclusory legal assertions of this sort need not and should not be accepted. *E.g.*, *Maljack Prods. v. Motion Picture Ass'n of Am.*, 52 F.3d 373, 375 (D.C. Cir. 1995). The complaint must, instead, plead *facts* that (if true) could plausibly support a finding that Plaintiffs have standing, *e.g.*, *Ctr. for Biological Diversity*, 563 F.3d at 478-79—which, as discussed above, the complaint in this case does not.

there any basis for creating a federal common law version of the public trust doctrine, much less a cause of action for enforcing that doctrine.

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

The central premise on which Plaintiffs justify both their claim for relief and the Court's exercise of federal question jurisdiction under 28 U.S.C. § 1331 is that the public trust doctrine "is not in any way 'exclusively a state law doctrine'" but is instead "constitutionally enshrined" and binding on Congress and federal officials. Pls. Opp. 12-13. That premise has, however, been decisively rejected by the Supreme Court. Citing a series of earlier cases, the Court declared unambiguously in *PPL Montana* (decided in February 2012) that "the public trust doctrine remains a matter of state law" and its "contours ... do not depend upon the Constitution." 132 S. Ct. at 1235 (citing, *inter alia*, *Appleby v. City of New York*, 271 U.S. 364, 395 (1926); *Shively v. Bowlby*, 152 U.S. 1, 49 (1894)). It reaffirmed, further, that the doctrine, as an issue of state law rather than federal constitutional mandate, is always subject to federal legislative authority, including "the federal power to regulate vessels and navigation under the Commerce Clause and admiralty power." *Id.* Thus, regardless of whether the roots of the public trust doctrine can "be traced back to [Roman civil law] and the Magna Carta," Pls. Opp. 13, the decision in *PPL Montana* (never mentioned in Plaintiffs' brief) confirms that the doctrine is not one of federal law—either constitutional, statutory, or common—and cannot support federal jurisdiction over their claim.

It is irrelevant that the opinion in *Illinois Central R.R. Company v. Illinois*, 146 U.S. 387 (1892), "cite[s] no state law" in addressing the relevant public trust issues. *See* Pls. Opp. 16. The Court has now re-confirmed that *Illinois Central* "was necessarily a statement of Illinois law." *PPL Montana*, 132 S. Ct. at 1235 (quoting *Appleby*, 271 U.S. at 395). And, in light of

*PPL Montana*, Plaintiffs' extensive reliance on lower court decisions, state and foreign authorities, and law review articles, Pls. Opp. 13-22, is misplaced.

Moreover, even without *PPL Montana*, Plaintiffs' claims lacked any credible basis. Both *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), held only that a land conveyance from a State to the federal government does not extinguish public trust restrictions that burdened the State's title, but did not recognize a free-standing federal version of the public trust doctrine. NAM Mot. 17. Plaintiffs also cite (Pls. Opp. 19) statements in *In re Steuart Transportation Co.*, 495 F. Supp. 38 (E.D. Va. 1980), that are plainly dicta; opinions from foreign courts (Pls. Opp. 14-15) that are clearly not binding, or even relevant; and descriptions offered in some state court opinions (*id.* at 17-18) that are likewise inapposite. Even the law review articles they cite (*id.* at 13-15) largely undermine their argument. One notes, for example, that "federal public lands were not impressed with a trust at common law," and that "the obligations of Congress and federal agencies are *plainly different* from the duties of states when they act as trustees of navigable waterways." Charles L. Wilkinson, *The Public Trust Doctrine in Public Land Law*, 14 U.C. Davis L. Rev. 269, 274, 278 (1980) (emphasis added). Plaintiffs also cite two statements from a website operated by the National Oceanic and Atmospheric Administration, which they say "acknowledge[s] ... a Public Trust ... duty," Pls. Opp. 16, but a website is not persuasive, let alone binding, authority.[9]

[9] In any event, even the cited statements do not support Plaintiffs' position. The first, stating that "federal and state governments exercise concurrent authorities over Public Trust interests," *see* www.csc.noaa.gov/ptd/module08/lesson01/0801.htm, refers to the unremarkable proposition that the United States has power to regulate waterways under the Commerce Clause, and can preempt state public trust law in doing so. *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://csc.noaa.gov/ptd/module02/lesson01/0201b.htm.

In short, there was no basis for recognition of a public trust claim under federal law prior to *PPL Montana*, and that decision squarely forecloses any such claim now. Because the public trust doctrine "remains a matter of state law," 32 S. Ct. at 1235, Plaintiffs' claim does not "aris[e] under the Constitution, laws, or treaties of the United States," 28 U.S.C. § 1331, and must be dismissed.[10]

### B. There Is No Basis For Creating A New Federal Common Law Cause Of Action Based Upon Principles Of Public Trust.

While Plaintiffs base their claim principally on the argument (rejected by *PPL Montana*) that public trust claims "already exist" as a matter of federal constitutional law, Pls. Opp. 12, they suggest at one point that, even if not, federal courts may be empowered to recognize a public trust claim as a matter of federal common law. *Id.* at 19. That suggestion is mistaken.

#### 1. A Federal Common Law Cause Of Action For Claims Under The Public Trust Doctrine Cannot Be Created By A Court.

The Supreme Court has admonished, in cases cited in Intervenors' briefs but largely ignored by Plaintiffs, that federal courts (unlike state courts) are generally prohibited from recognizing common law causes of action. *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 647 (1981). Only in a few specific instances, for example in cases addressing "the rights and duties of the United States as a sovereign," Delta Mot. 9, may federal common law be applied to supply the "rule of decision" to address discrete issues that cannot properly be resolved by state law. *AEP*, 131 S. Ct. at 2535. However, even in those limited situations, where courts may develop the relevant rule of decision, they still may not create or expand an affirmative common law cause of action unless clearly authorized by Congress or necessitated by

[10] Plaintiffs also cite three federal statutes that, they assert, reflect the federal government's public trust obligations. Pls. Opp. 16 n.14 (citing Comprehensive Environmental Response, Compensation, and Liability Act; Oil Pollution Act; and Clean Water Act). None remotely purports to authorize suits by private parties to sue the federal government over public trust issues; and, in any event, none of them address GHG regulation.

the Constitution. *Bush v. Lucas*, 462 U.S. 367, 388-90 (1983); *United States v. Standard Oil Co.*, 332 U.S. 301, 316 (1947).

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

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

This claim also cannot proceed as a matter of federal common law because, even if some justification for its creation might otherwise have been found, it is now without doubt displaced by federal statute. Delta Mot. 10-12; NAM Mot. 20-22. The Supreme Court in *AEP* held unequivocally "that the Clean Air Act [CAA] and the EPA actions it authorizes" displace federal common law claims seeking restrictions on GHG emissions. 131 S. Ct. at 2536. That decision forecloses the claim in this case. Delta Mot. 10-12; NAM Mot. 20-22.

Plaintiffs attempt to avoid this result through the bold assertion that public trust claims are "not susceptible to legislative displacement." Pls. Opp. 38, 41. That argument is not only unprecedented (as suggested by the lack of supporting citation), but plainly wrong. To be sure, Congress cannot "displace the Constitution," *id.* at 42, but it certainly can—and often does—displace rights of action created by the federal courts, including those intended to remedy a constitutional violation. *See, e.g.*, *Hui v. Castaneda*, 130 S. Ct. 1845, 1852 (2010); *Bush*, 462 U.S. at 385-86; *Milwaukee v. Illinois*, 451 U.S. 304, 314-15 (1981). Public trust claims are no different, as the Supreme Court recently reaffirmed in *PPL Montana*. 132 S. Ct. at 1235. Indeed, even in *Illinois Central*, the public trust case upon which Plaintiffs principally rely, the Supreme Court reiterated that any rights recognized would be "subject always to the paramount right of congress." 146 U.S. at 434.

The decision in *AEP* is therefore, contrary to Plaintiffs' contention, *see* Pls. Opp. 38-43, not only "applicable" to this case but controlling. Plaintiffs argue that *AEP* is distinguishable because it addresses common law nuisance claims against individual sources of GHG emissions, whereas this case concerns a public trust claim against the federal government. *Id.* However, although the claims in *AEP* and in this case bear different common law titles and are brought against different parties, they are both based on the same alleged harm, from climate change attributed to GHG emissions, and they both seek the same relief to address that harm, in the form of court-imposed reductions on those emissions. Delta Mot. 10-12; NAM Mot. 20-22. Indeed, the case for displacement is even more compelling in this case than in *AEP*, given that this claim would require federal agencies to adopt regulatory standards for the entire Nation, while the emissions restrictions in *AEP* would have applied by their terms only to the select group of private parties named as defendants there. *Cf. Koohi*, 976 F.2d at 1332 (noting that claims for

injunctive relief against government agencies raise unique justiciability concerns). While the CAA does not use common law terms such as "nuisance" or "public trust," *see* Pls. Opp. 39-40, it directly addresses the issues raised in the complaints in both *AEP* and this case—regulation of GHG emissions—and thus displaces the claims raised in both cases.

Finally, Plaintiffs argue that the CAA, even if it displaces claims seeking to impose emissions reductions, does not displace a claim—like Plaintiffs'—asking whether the statute and the regulations it authorizes "are *adequate* to protect the [atmosphere]." *Id.* at 39 (emphasis added). This reflects a fundamental misapprehension of federal common law and displacement. Common law claims are displaced whenever a statute "speaks directly" to the relevant issues, without regard to whether Congress's approach is deemed "adequate" or not from a policy perspective. *AEP*, 131 S. Ct. at 2537-40; *see Illinois v. Outboard Marine Corp.*, 680 F.2d 473, 478 (7th Cir. 1982) (to "hold[ ] that the solution Congress chose is not adequate," and therefore should not have displacing effect, is something a court "cannot do"). The Supreme Court addressed this precise issue in *AEP*, holding that the claims in that case were displaced even if EPA refused (in its statutory discretion) to impose any limits on GHG emissions. 131 S. Ct. at 2537-40. Whether or not Plaintiffs agree with the approach Congress and these agencies have taken to regulating GHG emissions—under not only the CAA but numerous other statutes, including several addressed specifically to climate change and atmospheric conditions, NAM Mot. 21—there is no doubt that those statutes speak directly to the issues raised by the claim in this case. Any right of action that might have been recognized under federal common law has, for this reason, been displaced. *AEP*, 131 S. Ct. at 2537-40.

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

Even if Plaintiffs could establish that they have a cause of action, that their claim is justiciable, and that this Court has subject matter jurisdiction, the Court should dismiss the claim under Federal Rule of Civil Procedure 12(b)(6) for failure to state a valid claim for relief. Delta Mot. 8-10; NAM Mot. 22-25. That is because the public trust doctrine (i) does not apply to the atmosphere and (ii) imposes no affirmative duty to regulate.[11]

*First*, Plaintiffs do not cite any case, from any court, that extends the public trust doctrine to the atmosphere. They cite numerous state cases that they claim "expand[ ]" the doctrine beyond submerged lands to additional water resources and wildlife, but notably fail to provide any support for their contention that the doctrine "likewise applies to the atmosphere."[12] Pls. Opp. 18. Plainly, Plaintiffs are not "request[ing] this Court apply *precedent*," Pls. Opp. 18, but asking the Court to fashion new common law. However, as discussed above, federal courts lack the power to create new causes of action under federal common law. *Supra* pp. 16-17. The global atmosphere is, moreover, fundamentally unlike those assets that have previously been recognized as within the public trust doctrine, such as submerged waters, because a government cannot reduce the atmosphere to possession, sell it to private parties, or prevent members of the

[11] Plaintiffs mistakenly assert that their complaint can survive dismissal under Rule 12(b)(6) if this Court "find[s] plausible" their legal conclusions, including that "there is a federal Public Trust Doctrine that extends to the atmosphere as res of the trust." Pls. Opp. 37. Actually, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions," *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009), even if those legal conclusions are "couched as factual allegations," *id.* (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Questions of law are entirely 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); *Browning v. Clinton*, 292 F.3d 235, 242 (D.C. Cir. 2002) ("A Rule 12(b)(6) motion tests the legal sufficiency of a complaint.").

[12] In addition, many of the state cases Plaintiffs cite do not interpret a common law public trust doctrine, but rely upon state statutes or state constitutional amendments, and are thus inapposite. *See, e.g., Just v. Marinette County*, 201 N.W.2d 761, 765 & n.1 (Wis. 1972) (interpreting a state statute seeking to "prevent and control water pollution").

public from using it. NAM Mot. 23-24; *see also* Delta Mot. 10. There is no basis to hold that a complaint alleging "the atmosphere as *res* of the trust" states a valid claim for relief under the public trust doctrine.

*Second*, Plaintiffs also cannot establish that the public trust doctrine imposes an affirmative duty upon governments to regulate trust resources in any particular manner. They cite only one case for this proposition, *Geer v. Connecticut*, 161 U.S. 519 (1896). Pls. Opp. 21. However, the Supreme Court "expressly overrule[d]" *Geer* decades ago. *Hughes v. Oklahoma*, 441 U.S. 322, 335 (1979). And, even when *Geer* was good law, it did not involve a judicially imposed duty requiring a State to enact regulations, but rather held that a State "had the power to regulate the killing of game within her borders so as to ... forbid its transmission outside of the state." 161 U.S. at 522. Plaintiffs' extraordinary complaint has no support in precedent, and must be rejected.

## CONCLUSION

For all of these reasons, and those set forth in the motions to dismiss of Intervenor-Defendants NAM and Delta, Plaintiffs' complaint should be dismissed.

Dated: April 23, 2012

Respectfully submitted,

/s/ Theodore Hadzi-Antich (with permission)
Theodore Hadzi-Antich (D.C. No. 251967)
tha@pacificlegal.org

PACIFIC LEGAL FOUNDATION
930 G Street
Sacramento, CA 95814
916) 419-7111
916) 419-7747 (fax)

*ATTORNEY FOR INTERVENOR-DEFENDANTS DELTA CONSTRUCTION COMPANY, INC., DALTON TRUCKING, INC., SOUTHERN CALIFORNIA CONTRACTORS ASSOCIATION, INC., CALIFORNIA CONSTRUCTION TRUCKING ASSOCIATION, FORMERLY KNOWN AS CALIFORNIA DUMP TRUCK OWNERS ASSOCIATION, AND ENGINEERING & UTILITY CONTRACTORS ASSOCIATION*

/s/ Quin M. Sorenson
David T. Buente Jr. (D.C. No. 429503)
dbuente@sidley.com
Joseph R. Guerra (D.C. No. 418532)
jguerra@sidley.com
Roger R. Martella Jr. (D.C. No. 976771)
rmartella@sidley.com
Quin M. Sorenson (D.C. No. 501292)
qsorenson@sidley.com
James R. Wedeking (D.C. No. 500033)
jwedeking@sidley.com

SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
(202) 736-8711 (fax)

*ATTORNEYS FOR INTERVENOR-DEFENDANT THE NATIONAL ASSOCIATION OF MANUFACTURERS*

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing CONSOLIDATED REPLY MEMORANDUM IN SUPPORT OF MOTIONS TO DISMISS OF INTERVENOR-DEFENDANTS was served this 23rd day of April 2012, electronically through the Court's CM/ECF system on all registered counsel, and by first-class mail on those counsel not registered, as listed below:

Martin F. McDermott
U.S. Department of Justice
Environment & Natural Resources Division
Environmental Defense Section
P.O. Box 23986
Washington, D.C. 20026-3986

Paige M. Tomaselli
Center for Food Safety
303 Sacramento Street, 2nd Floor
San Francisco, CA 94111

Julia Ann Olson
Wild Earth Advocates
2985 Adams Street
Eugene, OR 97405

Joseph W. Cotchett
Paul N. McCloskey, Jr.
Philip L. Gregory
Cotchett Pitre & McCarthy LLP
840 Malcolm Road, Suite 200
Burlingame, CA 94010

Thomas J. Beers
Beers Law Offices
234 E. Pine Street
P.O. Box 7968
Missoula, MT 59807-7968

/s/ Quin M. Sorenson
Quin M. Sorenson (D.C. Bar No. 501292)