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**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

ALEC L., et al.,

Plaintiffs,

v.

LISA JACKSON, et al.,

Defendants.

No. 3:11-cv-02203 EMC

**BRIEF FOR AMICUS CURIAE
LAW PROFESSORS – EXHIBIT A**

(Hon. Edward Chen)

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IDENTITY AND INTERESTS OF THE AMICI CURIAE

Amicus curiae are law professors and scholars (listed on the signature page) who teach, research and write about environmental law, climate law, and the public trust doctrine, including two who teach courses devoted solely to the public trust. Amici have an interest in informing the Court about the role of the public trust doctrine in defining federal legal obligations to protect the atmosphere from greenhouse gas pollution. Amici file this brief solely as individuals and not on behalf of the institutions with which they are affiliated.

SUMMARY OF THE ARGUMENT

The public trust doctrine is an inalienable attribute of sovereignty that requires government to act to prevent irrevocable harm to crucial natural resources owned in trust on behalf of the people. The federal government is a sovereign co-trustee of the nation's atmosphere and bears the fiduciary obligation to take expedient action to protect the atmosphere from dangerous greenhouse gas pollution so that it will continue to support the survival and welfare of present and future generations of citizens. A court's role under the public trust doctrine is to require agencies to protect the trust asset over which they exercise management authority. In this case, the scientific prescription for greenhouse gas reduction necessary to preserve a habitable planet is set forth in the Declaration of Pushker Kharecha in support of Plaintiff's motion for preliminary injunction.

ARGUMENT

I. INTRODUCTION

Amicus law professors submit this brief to explain the fiduciary obligations of the federal government under the public trust doctrine as they pertain to greenhouse gas pollution threatening the planet's climate system. The public trust is one of the oldest principles known to civilized government. It requires protection of vital natural assets that belong in common to present and

1 future generations of citizens. In this brief, amicus law professors offer a framework explanation of
 2 the public trust as a fundamental attribute of sovereignty embedded in the Constitution itself,
 3 applicable to both the federal and state governments. As formulated by the U.S. Supreme Court in
 4 one of the early landmark cases, the trust applies to protect resources of “special character” and
 5 “public concern” in which the citizens have a crucial interest. *Illinois Central Railroad Co. v.*
 6 *Illinois*, 146 U.S. 387, 454-55 (1892). The central rationale and purpose of the public trust doctrine
 7 could hardly find a more compelling application than to the air and atmosphere which support the
 8 planetary climate system upon which all life on Earth depends.

9
 10 Judicial enforcement of fiduciary obligations is necessary when the political branches
 11 abdicate their responsibility to protect the *res* of the trust. The Obama administration has yet to
 12 issue any encompassing rule regulating greenhouse gas emissions under clear authority provided in
 13 the Clean Air Act. *See Massachusetts v. EPA*, 549 U.S. 497 (2007). In face of this inaction, carbon
 14 dioxide emissions are climbing dangerously, last year by an unprecedented six percent.¹ Continued
 15 emissions threaten to push the planet past a “tipping point” in which dangerous feedback loops will
 16 unravel the planet’s climate system despite any subsequent carbon reductions achieved by
 17 humanity. As the court said in *Ctr. for Biological Diversity v. Nat’l Highway Traffic Safety Admin.*,
 18 508 F.3d 508, 523 (9th Cir. 2007), “Several studies also show that climate change may be non-
 19 linear, meaning that there are positive feedback mechanisms that may push global warming past a
 20 dangerous threshold (the ‘tipping point’).” Respected authorities emphasize the immediacy of this
 21 crisis. In 2007, the head of the United Nation’s Intergovernmental Panel on Climate Change
 22 (IPCC) unequivocally told the world: “What we do in the next two to three years will determine our
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26 ¹ Seth Borenstein, *Biggest Jump Ever Seen in Global Warming Gases*, ASSOCIATED PRESS, Nov. 4, 2011, available at <http://news.yahoo.com/biggest-jump-ever-seen-global-warming-gases-183955211.html>.

1 future. This is the defining moment.”²

2 The role of judicial enforcement is a crucial element of any trust. As the Hawaiian Supreme
3 Court emphasized in a leading public trust case involving water resources: “The check and balance
4 of judicial review provides a level of protection against improvident disposition of an irreplaceable
5 res.” *In re Water Use Permit Applications, Waihole Ditch Combined Contested Case Hearing*
6 [hereinafter *Waihole Ditch*], 94 Haw. 97, 120, 9 P.3d 409, 455 (Haw. 2000). *See also* *Ariz. Ctr. for*
7 *Law in Pub. Interest v. Hassell*, 837 P.2d 158, 169 (Az. Ct. App. 1991), *petition dismissed* 1992
8 *Ariz. LEXIS* 82 (Ariz. 1992) (“Just as private trustees are judicially accountable to their
9 beneficiaries for dispositions of the res, so the legislative and executive branches are judicially
10 accountable for their dispositions of the public trust.”) (citation omitted). Though the modern
11 climate crisis would have been unimaginable when the U.S. Supreme Court first articulated the
12 public trust as a sovereign obligation, its rationale and purpose speaks as clearly now as back then.
13 The courts are called forth in much the same manner as they always have been in public trust cases
14 – not to exercise direct management over the *res* of the trust, but to ensure that the political
15 branches fulfill their trust obligation to avoid irreparable harm to an asset that must sustain
16 generations of citizens to come.

19 II. THE PUBLIC TRUST DOCTRINE AS AN ATTRIBUTE OF SOVEREIGNTY

20 The public trust doctrine holds that certain crucial natural resources are the shared, common
21 property of all citizens, cannot be subject to private ownership, and must be preserved and protected
22 by the government. *See* Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970). As sovereign trustee of such
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26 ² Elizabeth Rosenthal, *U.N. Chief Seeks More Climate Change Leadership*, N.Y. TIMES.COM (Nov. 18, 2007), *available at* <http://www.nytimes.com/2007/11/18/science/earth/18climatenew.html?scp=1&sq=UN%20Panel:%>

resources, government has a fiduciary obligation to protect these natural assets for the beneficiaries of the trust, which include both present and future generations of citizens. *See Illinois Central*, 146 U.S. at 455 (“The ownership of the navigable waters of the harbor, and of the lands under them, is a subject of public concern to the whole people of the state. . . The trust with which they are held, therefore, is governmental, and cannot be alienated . . .”); *Geer v. Connecticut*, 161 U.S. 519, 533–34 (1896) (“[t]he ownership of the sovereign authority is in trust for all the people of the state; and hence, by implication, it is the duty of the legislature to enact such laws as will best preserve the subject of the trust, and secure its beneficial use in the future to the people of the state.”) *quoting Magner v. People*, 97 Ill. 320, 334 (Ill. 1881)); *Waihole Ditch*, 94 Haw. at 120, 9 P.3d at 455 (“The beneficiaries of the public trust are not just present generations but those to come.”). The legislature is the primary trustee, and the executive branch, as an agent of the trustee, is vested with the same public trust obligation. *See Ctr. for Biological Diversity v. FPL Grp.*, 166 Cal.App.4th 1349, 1365-66 (Cal. App. 1 Dist. 2008) (discussing public trust obligations of “public agencies”); *Waihole Ditch*, 94 Haw. 97, 9 P.3d 409 (applying public trust obligations to state agency).

The public trust doctrine speaks to one of the most essential purposes of government: protecting natural resource assets for the common benefit of the citizenry. As Professor Joseph Sax suggested over four decades ago, the public trust responsibility underpins democracy itself, demarcating a society of “citizens rather than of serfs.” *See Sax, supra*, at 484. The courts of the United States have traced the origins of the public trust back through the English legal system to Roman law and to natural law, identifying it as one of the pillars of ordered civilization. *Geer*, 161 U.S. at 526 (the sovereign trust over wildlife resources is manifest “through all vicissitudes of governmental authority”); *Illinois Central*, 146 U.S. at 456 (declaring that a state legislature

20avert%20climate%20disaster&st=cse (statement of Rajendra Pachauri).

1 “cannot, consistently with the principles of the law of nature and the constitution of a well-ordered
 2 society, make a direct and absolute grant of the waters of the state, divesting all the citizens of their
 3 common right. It would be a grievance which never could be long borne by a free people.”) *citing*
 4 *Arnold v. Mundy*, 6 N.J.L. 1, 78 (N.J. 1821); *United States v. 1.58 Acres of Land*, 523 F. Supp. 120,
 5 122–23 (D. Mass. 1981) (finding trust over submerged lands evident in all forms of government in
 6 developed western civilization). Not surprisingly, the public trust is also a central principle in legal
 7 systems of many other countries throughout the world. Professor Michael Blumm concludes that
 8 the doctrine is “close to becoming considered customary law” on an international scale.³

10 The public trust doctrine is as an attribute of sovereignty itself. *See, e.g., Geer*, 161 U.S. at
 11 527 (describing the sovereign trust over wildlife resources as an “attribute of government”); *Illinois*
 12 *Central*, 146 U.S. at 455; *Arnold*, 6 N.J.L. at 76-77; *Waihole Ditch*, 94 Haw. at 131, 9 P.3d at 443
 13 (“[H]istory and precedent have established the public trust as an inherent attribute of sovereign
 14 authority. . . .”). *See also* Karl S. Coplan, *Public Trust Limits on Greenhouse Gas Trading*
 15 *Schemes: A Sustainable Middle Ground?* 35 COLUM. J. ENVTL. L. 287, 311 (2010) [hereinafter
 16 *Public Trust Limits*] (“[t]he idea that public trust limits and powers inhere in the very nature of
 17 sovereignty is one consistent thread in public trust cases.”); Mary Christina Wood, *Advancing the*
 18 *Sovereign Trust of Government to Safeguard the Environment for Present and Future Generations*
 19 *(Part I): Ecological Realism and the Need for a Paradigm Shift*, 39 ENVTL. L. 43, 69 (2009)
 20 (describing trust as “fundamental, organic attribute of sovereignty itself.”). As a limitation on
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 24 ³ Michael C. Blumm & Rachel D. Guthrie, *Internationalization of the Public Trust Doctrine: Natural Law and Constitutional and Statutory Approaches to Fulfilling the Saxion Vision*, 44 U.C.
 25 DAVIS L. REV. _____ (forthcoming, 2012) (manuscript at 8, available at
 26 <http://ssrn.com/abstract=1816628>). *See also* Mary Turnipseed, Raphael Sagarin, Peter Barnes, Michael C. Blumm, Patrick Parenteau, & Peter H. Sand, *Reinvigorating the Public Trust Doctrine: Expert Opinion on the Potential of a Public Trust Mandate in U.S. and International Environmental Law*, ENV'T, Sept./Oct. 2010, at 12 (functional equivalents of public trusteeship are evident in many

1 sovereignty, the trust “can only be destroyed by the destruction of the sovereign.” *1.58 Acres of*
 2 *Land*, 523 F. Supp. at 124. In its seminal public trust case, *Illinois Central*, the Supreme Court
 3 emphasized that, like the police power, the public trust doctrine is a foundational principle of
 4 government. It declared that legislatures may not repudiate, abridge, or surrender their trust
 5 obligation: “The state can no more abdicate its trust over property in which the whole people are
 6 interested . . . than it can abdicate its police powers in the administration of government and the
 7 preservation of the peace. . . . Every legislature must, at the time of its existence, exercise the power
 8 of the state in the execution of the trust devolved upon it.” 146 U.S. at 454, 460. Thus the Court
 9 recognized that the trust doctrine imposed governmental duties as well as governmental authority.
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11 The public trust doctrine assumes Constitutional force as an inherent attribute of
 12 sovereignty. By analogy, courts have made clear that the police power is an essential Constitutional
 13 element, whether explicitly expressed or not. *State ex. rel. City of Minot v. Gronna*, 59 N.W.2d
 14 514, 531–32 (N.D. 1953) (“The police power is an attribute of sovereignty inherent in the states of
 15 the American union, and exists without any reservation in the constitution, being founded on the
 16 duty of the state to protect its citizens and provide for the safety and good order of society. The
 17 constitution supposes the pre-existence of the police power, and must be construed with reference to
 18 that fact.”) (citation omitted)(internal quotations omitted); *see also City of New Orleans v. Bd. of*
 19 *Comm’rs of Orleans Levee Dist.*, 640 So.2d 237, 249 (La. 1994) (“The principle of constitutional
 20 law that a state cannot surrender, abdicate, or abridge its police power has been recognized without
 21 exception by the state and federal courts.”).
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24 Professor Grant has observed that the public trust, wholly distinct from the police power,
 25 represents an iteration of the Constitutional reserved powers doctrine, which prevents any one
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civil law systems); David Takacs, *The Public Trust Doctrine, Environmental Human Rights, and*

1 legislature from taking acts that would compromise a future legislature's ability to exercise
 2 sovereignty on behalf of the people. *See generally* Douglas L. Grant, *Underpinnings of the Public*
 3 *Trust Doctrine: Lessons from Illinois Central Railroad*, 48 ARIZ. ST. L.J. 849 (2001). Allowing
 4 damage to, or privatization of, crucial trust resources needed for public welfare impairs the ability
 5 of future legislatures in violation of the reserved powers doctrine. The Supreme Court made this
 6 clear when it held that the Illinois legislature could not convey title to the harbor of Lake Michigan
 7 to a private railroad corporation: "The legislature could not give away nor sell the discretion of its
 8 successors in respect to matters, the government of which, from the very nature of things, must vary
 9 with varying circumstances. The legislation which may be needed one day for the harbor may be
 10 different from the legislation that may be required at another day. Every legislature must, at the
 11 time of its existence, exercise the power of the state in the execution of the trust devolved upon it."
 12 146 U.S. at 454, 460. *Illinois Central*, 146 U.S. at 460. Failure to protect a functioning climate for
 13 future generations would obviously impair future legislatures in their exercise of sovereignty to
 14 provide for basic needs of the public.

17 The essence of the trust responsibility is the sovereign fiduciary duty to protect the public's
 18 crucial assets from irrevocable damage. *See Geer*, 161 U.S. at 534 ("[I]t is the duty of the
 19 legislature to enact such laws as will best preserve the subject of the trust, and secure its beneficial
 20 use in the future to the people of the state.") *quoting Magner*, 97 Ill. at 334; *see also State v. City of*
 21 *Bowling Green*, 313 N.E.2d 409, 411 (Ohio 1974) ("[W]here the state is deemed to be the trustee of
 22 property for the benefit of the public it has the obligation to bring suit . . . to protect the corpus of
 23 the trust property."); *Nat'l Audubon Soc'y v. Superior Court of Alpine Cnty.*, 658 P.2d 709, 724
 24 (Cal. 1983) (expressing the "duty of the state to protect the people's common heritage of streams,

26 *the Future of Private Property*, 16 N.Y.U. ENVTL. L. J. 711, 746 (2008).

lakes, marshlands and tidelands.”). Under well-established core principles of trust law, trustees have a basic duty not to sit idle and allow damage to the trust property. As one leading treatise explains, “[t]he trustee has a duty to protect the trust property against damage or destruction.” George G. Bogert, et al., *BOGERT’S TRUSTS AND TRUSTEES*, § 582 (2011); *see also City of Milwaukee v. State*, 214 N.W. 820, 830 (Wis. 1927) (“The trust reposed in the state is not a passive trust; it is governmental, active, and administrative [and] requires the lawmaking body to act in all cases where action is necessary, not only to preserve the trust, but to promote it. . . .”); *Just v. Marinette County*, 201 N.W.2d 761, 768-70 (1972) (emphasizing “active public trust duty” on the part of the state that requires the eradication of pollution and the preservation of the natural resource held in trust). Notably, these obligatory fiduciary duties differ from the permissive nature of administrative discretion under statutory law. By sitting idle in the face of calamitous planetary ecological crisis, the federal government is abdicating its Constitutional responsibility as sovereign trustee to protect the climate for today’s citizens and for future generations.

III. THE AIR AND ATMOSPHERE AS PUBLIC TRUST ASSETS

The history, principles, and intent of the public trust doctrine compel this Court’s recognition of the atmosphere as one of the crucial assets of the public trust. The public trust doctrine requires the state to protect those ecological resources necessary for public survival and welfare. Stemming from the “public character of the property,” *Illinois Central*, 146 U.S. at 455-56, these resources are owned in common by the people and must be maintained, protected, and preserved by the state for the public interest. The resources that fall within the protective scope of the public trust are traditionally those that “are so central to the well-being of the community that

1 they must be protected by distinctive, judge-made principles.”⁴ Rather than restrictively delimiting
 2 the covered assets, courts have articulated principles that have guided the evolution of public trust
 3 property over time.

4 In *Illinois Central*, the Supreme Court established the analytical framework with its seminal
 5 characterization of public trust assets as those that present “a subject of concern to the whole
 6 people of the state.” 146 U.S. at 455. Describing public trust assets as “public property, or property
 7 of a special character,” the Court said they “cannot be placed entirely beyond the direction and
 8 control of the state” and, for the sake of public welfare, should not be subject to private ownership.
 9 *Id.* at 454. Courts look to the needs of the public in defining the scope of the trust resources.

10 In the late 1800s, at the time of *Illinois Central*, the natural resources deemed to be of
 11 greatest threat and in scarcest supply were principally water-based – ones implicating fishing,
 12 navigation, and commerce interests at the economic heart of a westward-expanding American
 13 economy. The specter of corporate privatization of the Chicago harbor led Justice Field in *Illinois*
 14 *Central* to characterize submerged lands as “a subject of concern to the whole people” clothed with
 15 sovereign trust interests compelling protection. *Id.* at 455.

16 Consistent with *Illinois Central*, over time courts have expanded the reach of the public trust
 17 doctrine to protect other categories of public resources as their integrity has come under threat.⁵ In
 18 the 19th century, courts expanded public navigation rights from tidal waters to inland waters that
 19 were navigable-in-fact. See *The Genessee Chief v. Fitzhugh*, 53 U.S. 443, 457 (1851); see also
 20 Michael C. Blumm, *The Public Trust Doctrine – A Twenty-First Century Concept*, 16 HASTINGS
 21 WEST-NORTHWEST 105 (2010) available at
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 26 ⁴ Charles F. Wilkinson, *The Public Trust Doctrine in Public Land Law*, 14 U.C. Davis L. Rev. 269, 315 (1980).

⁵ Charles Wilkinson, *The Headwaters of the Public Trust: Some of the Traditional Doctrine*, 19

1 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1468601 (describing evolution of the trust). As
 2 the New Jersey Supreme Court noted, the doctrine of the public trust is not “‘fixed or static,’ but
 3 one to be ‘molded and extended to meet changing conditions and needs of the public it was created
 4 to benefit.’” *Matthews v. Bay Head Improvement Ass’n*, 471 A.2d 355, 365 (N.J. 1984) (citation
 5 omitted); *see also Marks v. Whitney*, 491 P.2d 374, 380 (1971) (“In administering the trust the state
 6 is not burdened with an outmoded classification favoring one mode of utilization over another.”).
 7 Courts have mobilized the doctrine to respond to new sets of societal concerns, including ecological
 8 and recreational interests. *See Nat’l Audubon Soc’y*, 658 P.2d at 724. In the process, they have
 9 recognized public trust assets beyond the navigable waterways at issue in *Illinois Central* to protect
 10 resources as diverse as non-navigable tributaries, groundwater, wetlands, dry sand areas, and
 11 wildlife.⁶

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 14 As scientific consensus and daily experience increasingly reflect, the atmosphere – and the
 15 air that composes it – is the critical natural resource under threat in our time that demands
 16 protection within the traditional framework of the public trust. Indeed, our rapidly heating
 17 atmosphere *is* the submerged lakebed of *Illinois Central* and much more. The critical difference,
 18 which makes recognition of the atmosphere all the more imperative, is that its degradation poses a
 19 catastrophic threat to human society of a magnitude unimaginable in the day when Justice Field
 20 invoked the doctrine. The shoreline of Lake Michigan pales in importance to the ambient
 21 atmosphere that sustains life itself across the planet.⁷

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 24 ENVTL. L. 425 (1989) (noting expansion of the public trust doctrine).

25 ⁶ *See, e.g., Nat’l Audubon Soc’y*, 658 P.2d at 719 (non-navigable tributaries); *Owsichuk v. State*
 26 *Guide Licensing and Control Bd.*, 763 P.2d 488, 493 (Alaska, 1988)(wildlife); *Matthews*, 471 A.2d
 at 358 (dry sand area); *Robinson v. Ariyoshi*, 658 P.2d 287, 311 (Haw. 1982) (groundwater); *Just v.*
Marinette Cnty., 201 N.W.2d 761, 769 (Wis. 1972) (wetlands).

⁷ Commentators increasingly point out the logic and necessity of a public trust approach to the
 climate crisis. *See, e.g., Gerald Torres, Who Owns the Sky?*, 19 PACE ENVTL. L. REV. 515, 533

1 Despite the sheer novelty of climate change as an imminent threat to human survival -- and
 2 ultimately, to civilization itself -- the notion of air as a public trust resource is as old as the ancient
 3 foundations of our legal system. The Roman originators of the public trust doctrine classified air --
 4 along with water, wildlife, and the sea -- as “res communes,” or “things which remain common.”
 5 *Geer*, 161 U.S. at 525 (“These things are those which the juris consults called ‘res communes’ -- the
 6 air, the water which runs in the rivers, the sea and its shores...[and] wild animals.”). Roman law
 7 recognized that “individual control of some resources would run counter to what [they] conceived
 8 of as their natural purpose, and this property could not therefore be subject to public ownership.”⁸
 9 In *Geer*, the Court relied on this ancient Roman law classification of “res communes” to find the
 10 public trust doctrine applicable to wildlife. 161 U.S. at 523-525. Just a few years later, the Court
 11 similarly recognized the states’ sovereign property interests in air and found such interests supreme
 12 to private title. In *Georgia v. Tennessee*, the Court upheld an action by the State of Georgia against
 13 Tennessee copper companies for transboundary air pollution, declaring that “the state has an
 14 interest independent of and behind the titles of its citizens, in all the earth *and air* within its
 15 domain.” 206 U.S. 230, 237 (1907) (emphasis added).

18 The notion of the atmosphere as a quintessentially public resource subject to government
 19 stewardship is a settled feature of American law. For example, Congress articulated the public
 20 nature of the air resource in the Air Commerce Act of 1926, which recognized that the United
 21 States “has complete and exclusive national sovereignty in [its] air space.” 49 U.S.C.A. § 176(a).

24 (2002) (“Properly understood . . . the traditional rationale for the public trust doctrine provides a
 25 necessary legal cornerstone . . . to protect the public interest in the sky.”); Joseph L. Sax, *supra*, at
 26 556-57 (urging application of doctrine to “controversies involving air pollution”); Wood,
Advancing the Sovereign Trust of Government, *supra*, at 80-81; Patrick Parenteau, *Come Hell And
 High Water: Coping with the Unavoidable Consequences of Climate Disruption*, 34 VT. L. REV.
 957, 963-64 (2010); Robin Kundis Craig, *Adapting to Climate Change: The Potential Role of State
 Common-Law Public Trust Doctrines*, 34 VT. L. REV. 781 (2010).

1 Like waterways, air lends itself to navigability, which presents a classic trust interest articulated in
 2 the original public trust decisions of this nation. *See Illinois Central*, 146 U.S. at 452 (“It is a title
 3 held in trust for the people of the state, that they may enjoy the navigation of the waters, carry on
 4 commerce over them, and have liberty of fishing therein . . .”). Absent public ownership of
 5 navigable airspace, this critical resource could have been the subject of private monopolies. In
 6 *United States v. Causby*, the Supreme Court warned, “To recognize private claims to the airspace
 7 would clog these highways, seriously interfere with their control and development in the public
 8 interest, and transfer into private ownership that to which *only the public has a just claim*.” 328 U.S.
 9 256, 261 (1946) (emphasis added). Not surprisingly, given the crucial public interest in air,
 10 numerous state constitutions and codes explicitly recognize air as part of the *res* of the public trust.⁹
 11 Moreover, federal statutory law already includes air as a trust asset for which the federal
 12 government, states, and tribes may gain recovery of natural resource damages.¹⁰

13
 14
 15 Never before has the nation’s climate system been threatened. But throughout history, law
 16 has evolved as courts respond to unforeseen, often urgent, circumstances. The same fiduciary
 17 principles that have informed all historic public trust cases apply with force to protect the
 18 atmosphere. As the Supreme Court said in applying the public trust to an unprecedented set of
 19

20 ⁸ Torres, *Who Owns the Sky?*, *supra*, at 529.

21 ⁹ *See, e.g., Her Majesty v. City of Detroit*, 874 F.2d 332, 337 (6th Cir. 1989) (citing a Michigan
 22 statute that codifies the public trust to include “air, water, and other natural resources” and Mich.
 23 Const. art. IV, stating, “The conservation and development of the natural resources of the state are
 24 hereby declared to be of paramount public concern in the interest of the health, safety and general
 25 welfare of the people.”); Haw. Const., art. XI, § 1 (stating, “All public natural resources are held in
 26 trust by the State for the benefit of the people,” and “the State and its political subdivisions shall
 conserve and protect Hawaii’s . . . natural resources, including land, water, air, minerals and energy
 resources . . .”); R.I. Const., art. I, § 17 (duty of legislature to protect air), interpreted as
 codification of Rhode Island’s public trust doctrine in *State ex. Rel. Town of Westerly v. Bradley*,
 877 A.2d 601, 606 (R.I. 2005); *Nat’l Audubon Soc’y v. Superior Ct. of Alpine Cty.*, 658 P.2d 709, at
 718-720 (“purity of the air” protected by the public trust).

¹⁰ *See* 42 U.S.C. § 9601 (CERCLA)(2006) (defining air as among the natural resources subject to
 trust claims for damages).

1 circumstances in *Illinois Central*:

2 We cannot, it is true, cite any authority where a grant of this kind has been held
3 invalid, for we believe that no instance exists where the harbor of a great city and its
4 commerce have been allowed to pass into the control of any private corporation. But
the decisions are numerous which declare that such property is held by the state, by
virtue of its sovereignty, in trust for the public.

5 *Illinois Central*, 146 U.S. at 455. Although conditions change with time, the basic task and the
6 principles that inform judicial discretion remain constant. This court possesses solid legal rationale
7 upon which to base recognition of the atmosphere as a vital and appropriate asset falling within the
8 scope of the public trust doctrine.

9 IV. THE FEDERAL TRUST RESPONSIBILITY

10 As an inherent attribute of sovereignty, the public trust doctrine applies to both the state and
11 federal governments. It is true that most of the public trust cases in the United States have involved
12 states, but that is because states have historically been the primary managers of waters, wildlife, and
13 other resources.¹¹ The doctrine is not in any way exclusively a state law doctrine; indeed, the
14 Supreme Court's lodestar *Illinois Central* decision cited no state law in concluding the Chicago
15 harbor was a subject of the public trust.

16 History demonstrates that the trusteeship over lands inherited by the states was
17 quintessentially national in character. The English Crown, a national sovereign, originally held the
18 submerged lands in trust for the people under English common law, as recognized by the Supreme
19 Court:
20
21

22 When the 13 Colonies became independent from Great Britain, they claimed title to
23 the lands under navigable waters within their boundaries as the sovereign successors
24 to the English Crown. Because all subsequently admitted States enter the Union on
25 an 'equal footing' with the original 13 states, they too hold title to the land under
26 navigable waters within their boundaries upon entry into the Union.

¹¹ See Tunipseed, *et al.*, *supra*, at 10 ("[N]o one has forced the issue at the national level in the way that it has been pushed at the state level.") (remarks of Patrick Parenteau).

1 *Division of State Lands v. United States*, 482 U.S. 193, 195-96 (1987). Because the states created
 2 the federal government through delegation, the federal role under the public trust doctrine cannot
 3 yield “greater rights and fewer limitations (towards the management and protection of trust
 4 resources) than the entities that created it.” Zygmunt J.B. Plater *et al.*, ENVIRONMENTAL LAW AND
 5 POLICY: NATURE, LAW, AND SOCIETY 1103 (Erwin Chemerinsky *et. al.*, eds., 3rd ed. 2004).

6
 7 In the most extensive modern analysis of the federal trust role to date, the federal district
 8 court of Massachusetts unequivocally found the trust applicable to the federal government.
 9 Exploring the dual federal and state roles in the context of tidelands, the court concluded: “Since the
 10 trust impressed upon this property is governmental and administered jointly by the state and federal
 11 governments by virtue of their sovereignty, neither sovereign may alienate this land free and clear
 12 of the public trust. . . .” *1.58 Acres of Land*, 523 F. Supp. at 124. The court made clear that the
 13 federal and state governments are “co-trustees” of resources, and that the “dual sovereignty”
 14 envisioned by the Constitution gives rise to distinct, but co-existing, roles:
 15

16 This formulation recognizes the division of sovereignty between the state and federal
 17 governments [of] those aspects of the public interest in the tideland and the land below the
 18 low water mark[.] [sic] [Those] that relate to the commerce and other powers delegated to
 19 the federal government are administered by Congress in its capacity as trustee of the *jus*
 publicum, while those aspects of the public interest in this property that relate to
 nonpreempted subjects reserved to local regulation by the states are administered by state
 legislatures in their capacity as co-trustee of the *jus publicum*.

20 *Id.* at 123.

21 The federal trust comes into play where there are distinctly national interests in a resource,
 22 as there decidedly are in the case of air and atmosphere, a resource that transcends state borders.
 23 The national character of the resources under the public trust obliges the sovereign to administer
 24 this trust “for the benefit of the whole people.” *Utah Division of State Lands*, 482 U.S. 193, 196
 25 (1987). Early cases clearly identify the atmosphere as a part of the public trust property over which
 26

1 the federal government has implied sovereign duties. For example, in *United States v. Causby*, the
 2 Supreme Court identified Congress as creating a “public right of freedom of transit in air
 3 commerce.” 328 U.S. at 260. The majority characterized the air as a “public highway” and stated:

4 Were that not true, every transcontinental flight would subject the operator to countless
 5 trespass suits. Common sense revolts at the idea. To recognize such private claims to the
 6 airspace would clog these highways, seriously interfere with their control and development
 7 in the public interest, and transfer into private ownership that to which only the public has a
 8 just claim.

9 *Id.* at 268. Justice Black in dissent similarly affirmed the public’s interest in the airways, noting its
 10 similarity to the public easement in navigable waters held by the United States. *Causby*, 328 U.S. at
 11 271, n.3. And indeed, the national interest in atmospheric resources is plainly obvious by the
 12 federal government’s own ratification of the United Nations Framework Convention on Climate
 13 Change in 1992, which declared a universal trust responsibility among nations on Earth to “protect
 14 the climate system for the benefit of present and future generations of humankind.”¹²

15 The atmosphere is a natural resource similar in kind to others the federal government has a
 16 trust obligation to protect. In *Alabama v. Texas*, Justice Douglas explained the federal sovereign
 17 trust involving the nation’s coastline in words that equally well describe the trust over the nation’s
 18 air and atmosphere:

19 [W]e are dealing here with incidents of national sovereignty. The marginal sea is not
 20 an oil well; it is more than a mass of water; it is a protective belt for the entire Nation
 21 over which the United States must exercise exclusive and paramount authority. The
 22 authority over it can no more be abdicated than any of the other great powers of the
 23 Federal Government. It is to be exercised for the benefit of the whole. . . . Could
 24 Congress cede the great Columbia River or the mighty Mississippi to a State or a
 25 power company? I should think not. For they are arteries of commerce that attach to
 26 the national sovereignty and remain there until and unless the Constitution is
 changed. What is true of a great river would seem to be even more obviously true of
 the marginal sea. For it is not only an artery of commerce among the States but the
 vast buffer standing between us and the world.

374 U.S. 272, 282 (1954).

¹² United Nations Framework Convention on Climate Change, S. Treaty Doc. No. 102–38, art. 3,

1 Some years later, in *In re Complaint of Steuart Transportation Co.*, a federal district court
 2 recognized the right of the federal government to recover damages for destroyed migratory
 3 waterfowl under a public trust theory. 495 F. Supp. 38, 40 (E.D. Va. 1980). Congress, in a number
 4 of federal statutes, also affirmed the federal government as trustee of natural resources. For
 5 example, the National Environmental Policy Act, applicable to all federal agencies, declares in its
 6 opening section a national duty to “fulfill the responsibilities of each generation as trustee of the
 7 environment for succeeding generations.” 42 U.S.C. § 4331(b)(1). Other statutes impose a duty on
 8 federal agencies to seek compensation for damage to public trust assets.¹³

10 The Government’s relies on inapposite cases. *New York v. DeLyser*, for example, primarily
 11 held that the State of New York failed to state a federal claim under the public trust doctrine. 759 F.
 12 Supp. 982, 990 (W.D.N.Y. 1991). This is hardly surprising: the states have historically been the
 13 primary managers of waters, wildlife, and other resources, and most of the public trust cases in the
 14 United States have involved the states.¹⁴ However, this is no jurisprudential bar to extending the
 15 obligations and duties inherent in the sovereign to the federal government.

17 CONCLUSION

18 The public trust doctrine plainly applies to protect the nation’s air and atmosphere, both of
 19 which are crucial resources needed for the survival and welfare of present and future generations.
 20 The federal government thus owes a fiduciary obligation under the public trust doctrine to take
 21 immediate action to abate dangerous greenhouse gas pollution that threatens the air, atmosphere,
 22


24 p. 1 (1992), available at <http://unfccc.int/resource/docs/convkp/conveng.pdf>.

25 ¹³ See, e.g., CERCLA, 42 U.S.C. § 9607(f)(1) (2004) (liability for natural resources “shall be to the
 26 United States Government, and to any State . . . and to any Indian tribe for natural resources
 belonging to, managed by, controlled by, or appertaining to such tribe, or held in trust for the
 benefit of such tribe . . .”); Oil Pollution Act of 1990 (OPA), 33 U.S.C. § 2706(a) (2004) (similar);
 Clean Water Act, 33 U.S.C.A. § 1319 (2004) (similar); Marine Protection, Research and
 Sanctuaries Act (MPRSA), 16 U.S.C.A. § 1375 (2004) (similar).

and climate system.

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¹⁴ See Turnipseed, *et al.*, *supra* note 17.

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