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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

EUGENE DIVISION

KELSEY CASCADIA ROSE JULIANA; **XIUHTEZCATL TONATIUH M.**, through his Guardian Tamara Roske-Martinez; et al.

Plaintiffs,

v.

The UNITED STATES OF AMERICA; **BARACK OBAMA**, in his official capacity as President of the United States; et al.,

Federal Defendants.

Case No.: 6:15-cv-01517-TC

AMICI CURIAE BRIEF IN SUPPORT OF PLAINTIFFS

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AMICI CURIAE BRIEF IN SUPPORT OF PLAINTIFFS

I. IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

The Global Catholic Climate Movement (GCCM) is an international network of over 250 Catholic organizations and thousands of individuals that, in union with and in support of the pope and bishops, seeks to raise a strong Catholic voice in global climate change discussions. GCCM's goal, underpinned by Catholic teachings, embodied in the recent papal encyclical, *Laudato Si': On Care for Our Common Home*,[2] is to fulfill the scriptural obligation to care for God's creation, for the poor who are the most vulnerable to extreme weather events, for the young children alive today who face destabilizing climate forces in their lifetimes, and for future generations who will encounter increasing catastrophes brought on by climate disruption.

The Leadership Council of Women Religious (LCWR) represents leaders of more than 40,000 women religious across the United States and around the world. Catholic sisters have an abiding concern for the wellbeing of children. They continue to protect children in need, care for children in clinics and hospitals, and educate America's youth in schools and universities. LCWR and its members care deeply about the environment we are creating for future generations and women religious fully appreciate their responsibility to care for all of God's creation. As people of faith and as citizens of the United States, we are deeply concerned about the policies, plans,

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[1] The Federal Defendants take no position on whether *amici curiae* should be allowed to participate in this case. The Intervenor Defendants do not oppose *amici curiae*'s participation. Plaintiffs consent. No counsel for any party authored this brief in whole or in part, no such counsel or party made a monetary contribution to fund the preparation or submission of this brief, and no one other than the *amici curiae* and their counsel made any monetary contribution.

[2] Francis, Encyclical Letter, *Laudato Si': On Care for Our Common Home,* May 24, 2015, *available at* http://w2.vatican.va/content/francesco/en/encyclicals/documents/papa-francesco_20150524_enciclica-laudato-si.html.

and practices of the federal government which do far too little to achieve the reduction in fossil fuel emissions necessary to ensure the health and wellbeing of our children and our planet home, now and into the future.

When lawsuits have touched upon central Roman Catholic tenets like these, Catholic organizations have filed amicus curiae briefs to make their views clear. This is such a suit. This litigation seeks to establish precisely what Pope Francis has urged in *Laudato Si'*: a "legal framework which can set clear boundaries" for greenhouse gas reduction—before it is too late.[3] Moreover, in raising the public trust doctrine, plaintiffs invoke the same moral imperative that motivates the GCCM and LCWR. The public trust principle of law mirrors a *sacred trust* based on deep covenants of obligation towards future generations and to all Creation. Pope Francis described a sacred trust when he said, "Creation is not some possession that we can lord over for our own pleasure; nor even less, is it the property of only some people . . . . [C]reation is the marvelous gift that God has given us, so that we will take care of it and harness it for the benefit of all."[4] At a time when the climate crisis threatens the future survival of civilization, the principle could hardly have a more compelling application. *Amici* file this brief in support of the Youth Plaintiffs in this case.

II. SUMMARY OF ARGUMENT

The foundational U.S. Supreme Court public trust cases hold that government has no authority to substantially impair or alienate resources crucial to the public welfare. The Nation's public trust over these resources remains an attribute of sovereignty that government cannot shed.

[3] *Laudato Si'* ¶ 53.

[4] Francis, *General Audience*, St. Peter's Square, May 21, 2014, *available at* https://w2.vatican.va/content/francesco/en/audiences/2014/documents/papa-francesco_20140521_udienza-generale.html.

The constitutional reserved powers doctrine in conjunction with the public trust prevents any one legislature from depriving a future legislature of the natural resources[5] necessary to provide for the well-being and survival of its citizens. Not only is the public trust doctrine firmly grounded in legal precedent, it also reflects the shared reasoning of humankind as expressed in the moral values and religious teachings of many faiths.

The public trust doctrine imposes sovereign duties on the federal government to protect the atmosphere necessary for human survival. Government agencies allowing massive amounts of carbon dioxide to imperil the climate system jeopardize the future life, liberty and property of the Youth Plaintiffs in this case and future generations. If fossil fuel emissions are not systematically and rapidly abated, then Youth and Future Generations Plaintiffs will confront an inhospitable future, marked by rising seas, inundated coastal cities, mass migrations, resource wars, food shortages, heat waves, mega-storms, soil depletion and desiccation, freshwater shortage, public health system collapse, and the extinction of increasing numbers of species.[6] Government's failure to address impending catastrophic harm violates the basic constitutional public trust duty applicable to the federal government through the reserved powers doctrine and other constitutional provisions, to protect resources crucial for future human survival and welfare.

III. ARGUMENT

A. Introduction

In the papal encyclical, *Laudato Si'*, Pope Francis issued a clarion call for "the

[5] The use of the term "natural resources" does not imply that these aspects of Creation are to be valued only in terms of their benefits to humankind. Pope Francis warns us against thinking of different species and ecological systems "merely as potential 'resources' to be exploited, while overlooking the fact that they have value in themselves." *Laudato Si'*, ¶ 33. *Laudato Si'* specifically rejects such a "misguided anthropocentrism." *See Laudato Si'*, ¶¶ 115-18.
[6] Declaration of Dr. James E. Hansen in Support of Plaintiffs, ¶ 74.

establishment of a legal framework which can set clear boundaries and ensure the protection of ecosystems."[7] The ancient yet enduring public trust principle, which safeguards crucial natural resources as common property of all citizens, offers just such a legal framework. Under the public trust doctrine, citizens stand as beneficiaries holding a clear public property interests in these natural resources, rather than as weakened political constituents with increasingly desperate environmental appeals to bring to their public officials. As Professor Joseph Sax observed more than four decades ago, the public trust demarcates a society of "citizens rather than serfs."[8] Such a framework is, in the words of Pope Francis, "indispensable; otherwise, the new power structures based on the techno-economic paradigm may overwhelm not only our politics but also freedom and justice."[9]

B. The Public Trust Doctrine Imposes Sovereign Duties on the Federal Government to Protect the Atmosphere Necessary for Human Survival

In the broadest sense, the term "public trust" refers to a fundamental understanding that no legislature can legitimately abdicate its core sovereign powers. In *Stone v. Mississippi*, the Supreme Court held:

> No legislature can bargain away the public health or the public morals . . . . The supervision of both these subjects of governmental power is continuing in its nature . . . . [T]he power of governing is a trust committed by the people to the government, no part of which can be granted away.[10]

This broad trust principle is commonly referred to as the "reserved powers doctrine."

However, as used in this brief, the terms "public trust" and "Public Trust Doctrine" refer

[7] *Laudato Si'*, ¶ 53.
[8] Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich. L. Rev. 471, 484 (1970).
[9] *Laudato Si'*, ¶ 53.
[10] 101 U.S. 814, 819-20 (1879). *See also Butchers' Union v. Crescent City*, 111 U.S. 746, 766 (1884) (Justice Field, concurring).

to the application of the reserved powers doctrine to sovereign natural resources critical to the public welfare. The reserved powers doctrine and the Public Trust Doctrine prohibit complete privatization of sovereign resources because privatization would constitute an impermissible transfer of governmental power into private hands, wrongfully impinging upon the powers of later legislatures and the rights of the public to safeguard crucial societal interests. Frequently recognized sovereign trust resources include air, water, and wildlife.

The landmark case is *Illinois Central R.R. Co. v. Illinois,*[11] where the Supreme Court applied the constitutional reserved powers doctrine to crucial natural resources. Relinquishing sovereign control over such resources would impair the ability of future legislatures to provide for public needs, thereby violating the reserved powers doctrine. The Court therefore held that such resources were in trust and could not be fully privatized.

At issue was control of Chicago's Harbor, which the Illinois legislature had granted to a private railroad company. The Court explained the rationale of the public trust doctrine, and its explanation extends beyond submerged lands:

> The state can no more abdicate its trust over property in which the whole people are interested, *like* navigable waters and soils under them, so as to leave them entirely under the use and control of private parties . . . than it can abdicate its police powers in the administration of government and the preservation of the peace . . . . Any grant of the kind is necessarily revocable, and the exercise of the trust by which the property was held by the state can be resumed at any time . . . . The trust with which they are held, therefore, is *governmental*, and cannot be alienated . . . .[12]

Illinois Central made it clear that alienating or destroying essential resources would amount to relinquishing sovereign powers in violation of the Constitution's reserved powers

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[11] 146 U.S. 387 (1892).
[12] *Id*. at 453-55 (emphasis added).

doctrine.[13] As that Court admonished, allowing the legislature to convey submerged lands "would place every harbor in the country at the mercy of a majority of the legislature of the state in which the harbor is situated."[14]

Subsequent Courts have applied the public trust doctrine to other crucial resources implicating joint federal and state interests. For instance, wild game is recognized as a trust resource in virtually all of the states.[15] In *Geer v. Connecticut*, the Court stated, "[T]he ownership of the sovereign authority [over wild game] 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."[16] The Court recognized a parallel federal interest associated with migratory birds in *Missouri v. Holland*:

> Here a national interest of very nearly the first magnitude is involved. It can be protected only by national action in concert with that of another power. The subject matter is only transitorily within the State, and has no permanent habitat therein. But for the treaty and the statute there soon might be no birds for any powers to deal with.[17]

Similarly, the ocean and coastline present federal trust interests. In *Alabama v. Texas,* Justice Douglas explained the federal trust involving the nation's coastline in words that equally well describe the trust over the nation's air and atmosphere:

> [W]e are dealing here with incidents of national sovereignty. The marginal sea is

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[13] *See* Michael C. Blumm & Mary Christina Wood, *The Public Trust Doctrine in Environmental and Natural Resources Law* 72, 234 (2013); Mary Christina Wood, *Nature's Trust: Environmental Law for a New Ecological Age* 131 (2013); *see also* Karl S. Coplan, *Public Trust Limits on Greenhouse Gas Trading Schemes: A Sustainable Middle Ground?* 35 Colum. J. Envt'l L. 287, 311 (2010).
[14] *Ill. Cent. R.R.*, 146 U.S. at 455.
[15] *See* Michael C. Blumm & Aurora Paulsen, *The Public Trust in Wildlife*, 2013 Utah L. Rev. 1437, 1439-40 (2013).
[16] *Geer v. Connecticut*, 161 U.S. 519, 533-34 (1896).
[17] *Missouri v. Holland,* 252 U.S. 416, 435 (1920).

> . . . more than a mass of water; it is a protective belt for the entire Nation over which the United States must exercise exclusive and paramount authority. The authority over it can no more be abdicated than any of the other great powers of the Federal Government. It is to be exercised for the benefit of the whole . . . . Could Congress cede the great Columbia River or the mighty Mississippi to a State or power company? I should think not. For they are arteries of commerce that attach to 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.[18]

The federal trust protects national interests in resources that transcend state borders. To entrust the management and preservation of such resources solely to the states would invite ineffective, piecemeal management on the part of the various state legislatures and judiciaries. As the Court explained in *Missouri v. Holland*, "It is not sufficient to rely upon the States. The reliance is vain . . . ."[19]

The same reasoning applies to the atmosphere. In *United States v. Causby*, for example, the Court held that the traditional common law doctrine recognizing private rights to airspace had "no place in the modern world," explaining, "To recognize such private claims to the airspace would transfer into private ownership that to which only the public has a just claim."[20] Implicitly designating the atmosphere as a sovereign trust resource, the Court declared: "The airspace apart from the immediate reaches above the land, is part of the public domain."[21] Like the trust arising as to navigable waters and migratory wildlife, the atmospheric trust is inherently federal, as it requires management at the national level, and as was the case in *Missouri v. Holland*, cooperation with other nations. And indeed, the national interest in atmospheric resources is

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[18] *Alabama v. Texas,* 347 U.S. 272, 282 (1954) (Douglas J., dissenting).
[19] *Missouri v. Holland,* 252 U.S. at 435.
[20] *United States v. Causby*, 328 U.S. 256, 261 (1946).
[21] *Id*. at 261, 266.

plainly obvious by the federal government's own ratification of the United Nations Framework Convention on Climate Change in 1992 which declared a universal trust responsibility among the nations on Earth to "protect the climate system for the benefit of present and future generations of humankind."[22]

It is this interest that the Plantiffs here seek to protect. As a Washington state court recently found when it applied the public trust as a constitutional obligation to protect the atmosphere, the children's very survival "depends upon the will of their elders to act, now, decisively and unequivocally, to stem the tide of global warming by accelerating the reduction of emission of GHGs [greenhouse gases] before doing so becomes first too costly and then too late."[23]

C. The Role of the Courts in Preserving the Public Trust

The essence of the trust responsibility is the sovereign fiduciary duty to protect the public's crucial assets from irrevocable damage.[24] 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."[25] These obligatory fiduciary duties impose a higher standard of care than the

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[22] United Nations Framework Convention on Climate Change, S. Treaty Doc. No. 102-38. Art. 3, p. 1 (1992).
[23] *Foster, et al. v. Washington Department of Ecology*, No. 14-2-25295-1 SEA, 15 WL 7721362 (Wash. Sup. Ct. Nov. 19. 2015).
[24] *See Geer*, 161 U.S. at 534 ("[I]t 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.")
[25] George G. Bogert, et al., Bogert 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.*

permissive nature of administrative discretion under statutory law.

While the protection of the public trust is initially the responsibility of the legislature, the judiciary has a key role to play. Judicial enforcement is a crucial element of any trust. As the Hawaiian Supreme Court emphasized in a leading public trust case involving water resources: "the checks and balances of judicial review provides a level of protection against improvident disposition of an irreplaceable res."[26] Judicial enforcement of fiduciary obligations becomes necessary when the political branches abdicate their responsibility to protect the *res* of the trust.

Speaking on behalf of the Holy See at the United Nations Climate Change Conference (COP 21) in Paris on December 8, 2015, Cardinal Peter Turkson, president of the Pontifical Council for Justice and Peace, called for a "fair, legally binding, and truly transformational agreement" and stated:

> [W]hen the environment is assaulted, the poor, least able to defend themselves, suffer most. We cannot remain blind to the grave damage done to the planet, nor can we remain indifferent to the plight of the millions of people who most bear the burden of such destruction. While no one has the right to condemn people to hopelessness and misery, this all too frequently occurs through destructive actions or culpable indifference. *And while no one has the right to deprive future generations of the chance to live on our planet, this, unfortunately, is a horrible and ever more likely possibility.*[27]

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).

[26] *In re Water Use Permit Applications, Waihole Ditch Combined Contested Case Hearing*, 94 Haw. 97, 120, 9 P.3d 409, 455 (Haw. 2000). *See also Ariz. Ctr. for Law in Pub. Interest v. Hassell*, 837 P.2d 158, 169 (Az. Ct. App. 1991), petition dismissed 1992 Ariz. LEXIS 82 (Ariz. 1992) ("Just as private trustees are judicially accountable to their beneficiaries for dispositions of the res, so the legislative and executive branches are judicially accountable for their dispositions of the public trust.").

[27] Catholic World News, *Vatican Cardinal Speaks at Climate Conference, Calls for "Transformational" Agreement*, https://www.catholicculture.org/news/headlines/index.cfm?storyid=26901 (emphasis added).

Recently, Alfred T. Goodwin, Circuit Judge for the U.S. Court of Appeals for the Ninth Circuit, observed that there has been "a wholesale failure of the legal system to protect humanity from the collapse of finite natural resources [brought about] by the uncontrolled pursuit of short-term profits."[28] Noting that "recent events in coal-producing states provide strong evidence that state legislatures and regulating commissions have become captives of the industries they were formed to regulate," Judge Goodwin suggests that "only the judges are equal to the task of protecting the people's rights to clean air and safe drinking water" by enforcing the legislature's obligation to preserve the public trust.[29]

The courts are being called upon here as they have always been in public trust cases—not to exercise direct management over the res of the trust, but to ensure that the political branches fulfill their trust obligation to avoid destruction or irreparable harm to an asset that must be sustained for generations of citizens to come.

D. The Moral Foundations of the Public Trust Doctrine

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.[30] Ancient Roman law held that "[b]y the law of nature, the following are

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[28] Alfred T. Goodwin, *A Wake-up Call for Judges,* 4 Wisc. L. Rev. 785 (2015), available at http://wisconsinlawreview.org/wp-content/uploads/2015/11/7-Goodwin-Final.pdf (reviewing *Nature's Trust: Environmental Law for a New Ecological Age* by Mary Christina Wood).
[29] *Id.* at 788.
[30] *See 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 "cannot, consistently with the principles of the law of nature and the constitution of a well-ordered society, make a direct and absolute grant of the waters of the state, divesting all the citizens of their common right. It would be a grievance which never could be long borne by a free people."), *citing Arnold v. Mundy*, 6 N.J.L. 1, 78 (N.J. 1821); *United States v. 1.58 Acres of Land*, 523 F.Supp. 120, 122-23 (D. Mass. 1981) (finding trust over submerged lands evident in all

common to all mankind–the air, running water, the sea, and consequently the shores of the sea."[31] Blackstone confirmed that within the English legal system, certain categories of things must remain in common ownership, unsusceptible to full privatization: "Such are the elements of light, air and water . . . also animals *ferae naturae*, or of untamable nature . . . ."[32] Not surprisingly, the public trust is also a central principle in legal systems of many other countries throughout the world. Professor Michael Blumm concludes that the doctrine is "close to becoming considered customary law" of an international scale.[33]

This enduring nature and universality of the public trust doctrine reflects its origins in the common understandings of humankind. The concept of the public trust is based on multiple moral understandings including: (1) an ethic toward future generations; (2) an affirmation of public rights to natural assets; and (3) a condemnation of waste. These values are deeply rooted in this nation's history and tradition. As moral precepts they reach not only to the foundations of human experience, but are mirrored in the religious teachings of many faiths.[34] They were forcefully reiterated again by Pope Francis this year in his encyclical addressed to every person living on

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forms of government in developed western civilization).

[31] *Institutes of Justinian*, J. Inst., 2.1.1-2.1.6 at 55 (P. Birks & G. McLeod trans. 1987); *see also Geer*, 161 U.S. at 522-23.

[32] William Blackstone, II, *Commentaries on the Laws of England*, Ch. 1, 222 (1769).

[33] Michael C. Blumm & Rachel D. Guthrie, *Internationalization of the Public Trust Doctrine: Natural Law and Constitutional and Statutory Approaches to Fulfilling the Saxion Vision,* 45 U.C. Davis L. Rev. 741 (2012). *See also* Mary Turnipseed, et al., *Reinvigorating the Public Trust Doctrine: Expert Opinion on the Potential of a Public Trust Mandate in U.S. and International Environmental Law*, Ent'l, Sept./Oct. 2010, at 12 (functional equivalents of public trusteeship are evident in many civil law systems); David Takacs, *The Public Trust Doctrine, Environmental Human Rights and the Future of Private Property*, 16 N.Y.U. Envtl. L. J. 711, 746 (2008).

[34] *See*, *e.g.*, *Islamic Declaration on Global Climate Change*, International Islamic Climate Change Symposium, August 2015, *available at* http://islamicclimatedeclaration.org/islamic-declaration-on-global-climate-change; *Hindu Declaration on Climate Change*, November 23, 2015, *available at* http://www.hinduclimatedeclaration2015.org.

this planet.

1. The Covenant Between Generations

Scores of public trust cases declare that future generations are legal beneficiaries with entitlement to the *res* of the public trust. For example, the Massachusetts Supreme Court said in a tidewater case, "[T]he public trust doctrine stands as a covenant between the people of the Commonwealth and their government, a covenant to safeguard our tidelands for all generations for the use of the people."[35] Pope Francis has eloquently restated this covenant between generations:

> The notion of the common good also extends to future generations. The global economic crises have made painfully obvious the detrimental effects of disregarding our common destiny, which cannot exclude those who come after us. We can no longer speak of sustainable development apart from intergenerational solidarity. Once we start to think about the kind of world we are leaving to future generations, we look at things differently; we realize that the world is a gift which we have freely received and must share with others. Since the world has been given to us, we can no longer view reality in a purely utilitarian way, in which efficiency and productivity are entirely geared to our individual benefit. *Intergenerational solidarity is not optional, but rather a basic question of justice, since the world we have received also belongs to those who will follow us.*[36]

The Framers recognized each generation's fundamental obligation to *preserve* the value and integrity of natural resources for later generations. The most succinct, systematic treatment of intergenerational principles is that provided by Thomas Jefferson to James Madison:

> The question [w]hether one generation of men has a right to bind another . . . is a question of such consequence as not only to merit decision, but place among the fundamental principles of every government . . . . I set out on this ground, which I suppose to be self-evident, 'that the earth belongs in usufruct to the living' . . . .[37]

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[35] *Alliance to Protect Nantucket Sound, Inc. v. Energy Facilities Siting Board*, 457 Mass. 663, 702 (Mass. S. Ct. 2010) (Marshall C.J., concurring in part and dissenting in part).
[36] *Laudato Si', ¶* 159 *(emphasis added).*
[37] Jefferson to James Madison, September 6, 1789, *Papers of Thomas Jefferson*, Julian Boyd ed., XV at 392-98 (1950).

Strikingly, Jefferson based his theory of intergenerational political sovereignty on a prior "self-evident" concept of intergenerational rights and obligations in the Earth. In Jefferson's time as now, "usufruct" referenced the rights and responsibilities of tenants, trustees, or other parties temporarily entrusted with an asset—usually land. Usufructuary rights-holders were prohibited from committing waste (lasting damage) to the property.[38] These dual concepts of usufruct and waste, applied to entailed estates over the course of centuries, eventually fostered a principle of intergenerational stewardship that had become ethical bedrock by the late 1700s. This sense of intergenerational responsibility was widely shared,[39] shaping the early "traditions and conscience of our people."[40]

The writings of Theodore Roosevelt also furnish powerful expressions of the duty to future generations as the foundation of the American conservation ethic:

> The "greatest good of the greatest number" applies to the number within the womb of time, compared to which those now alive form but an insignificant fraction. Our duty to the whole including the unborn generations, bids us restrain an unprincipled present-day minority from wasting the heritage of these unborn generations. The movement for the conservation of . . . all our natural resources [is] essentially democratic in spirit, purpose, and method.[41]

The trust approach provides tangible legal backing to the concept of intergenerational equity. The same public trust principles continue to find expression in state constitutions[42] and federal

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[38] *See* Blackstone, *supra* note 32, at 281.
[39] *See* Herbert Sloan, *Principles and Interest: Thomas Jefferson on the Problem of Public Debt* 5 (1995).
[40] *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934).
[41] Theodore Roosevelt, *A Book-lover's Holidays in the Open* 299-300 (1916).
[42] *See, e.g.*, Pa. Const. art. I, § 27; Mont. Const. art. IX, § 1; Haw. Const. art. IX, § 1; Ill. Const. art XI, § 1.

statutes[43] today, supporting their recognition as a matter of federal substantive due process.

2. The Commonwealth Ethic

The other dimension of the trust protects property rights to crucial natural resources held in common by present citizens. In the words of Justice Field in *Illinois Central*, these are resources which are "a subject of concern to the whole people" clothed with sovereign trust interests compelling protection.[44] This aspect reinforces a societal value that could be termed the "commonwealth ethic." As noted above, for centuries legal commentators have said that natural law designates certain resources as common to all humankind and not susceptible to private ownership—these include the air, the running water, the sea and wildlife. In the United States, the idea of the "commonwealth" formed a central part of the identity of states. Even today, Massachusetts, Kentucky, Pennsylvania, and Virginia still bear the "commonwealth" title.

The commonwealth ethic mirrors the religious teachings of many faiths which view the earth as a sacred endowment created for the benefit of all humanity. Pope Francis repeatedly refers to this sacred trust in *Laudato Si',* describing the natural environment as "a collective good, the patrimony of all humanity and the responsibility of every one."[45] He recognizes that "[t]he climate is a common good, belonging to all and meant for all."[46]

Within the religious tradition, desecration of the sacred trust is a sin, as Pope Francis points out, quoting the Ecumenical Patriarch Bartholomew I:

> Patriarch Bartholomew has spoken in particular of the need for each of us to repent of the ways we have harmed the planet, for "inasmuch as we all generate

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[43] *See*, *e.g.*, National Environmental Policy Act of 1969, § 101(b)(1), 42 U.S.C. § 4331(b)(1).
[44] 146 U.S. at 455.
[45] *Laudato Si'*, ¶ 95; *see also* ¶ 93 ("Whether believers or not, we are agreed today that the earth is essentially a shared inheritance, whose fruits are meant to benefit everyone.").
[46] *Id.* at ¶ 23.

> small ecological damage," we are called to acknowledge "our contribution, smaller or greater, to the disfigurement and destruction of creation." He has repeatedly stated this firmly and persuasively, challenging us to acknowledge our sins against creation: "For human beings . . . to destroy the biological diversity of God's creation; for human beings to degrade the integrity of the earth by causing changes in its climate, by stripping the earth of its natural forests or destroying its wetlands; for human beings to contaminate the earth's waters, its land, its air, and its life—these are sins."[47]

The public trust principle is wholly consistent with this religious duty of care for Creation by protecting the community rights to the commonwealth from those that would harm it.

3. The Injunction Against Waste

Another core principle of public trust law compels using highest and most beneficial public use, and rejects waste. In the trust context, this often refers to protecting future interests by prohibiting trustees from raiding the trust inheritance, thereby reducing the wealth available to future beneficiaries. Here too, religious teachings reject wasteful living. Pope Francis decries the fact that each year hundreds of millions of tons of waste are generated from homes, businesses, construction and demolition sites, and from clinical, electronic and industrial sources, with much of this waste linked to a "throwaway culture."[48] That wastefulness comes at the expense of future generations: "We may well be leaving to coming generations debris, desolation and filth. The pace of consumption, waste and environmental change has so stretched the planet's capacity that our contemporary lifestyle, unsustainable as it is, can only precipitate catastrophes, such as those which even now periodically occur in different areas of the world."[49]

4. The Moral Imperative for Action

Our rapidly heating atmosphere implicates public trust principles to a far greater degree

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[47] *Laudato Si'*, ¶ 8 (citations omitted).
[48] *Id*. at ¶¶ 21-22.
[49] *Id*. at ¶ 161.

than did the submerged lakebed of *Illinois Central*. The critical difference, making recognition of the atmospheric trust all the more imperative, is that its degradation poses a threat to human society of a magnitude unimaginable in the day when Justice Field invoked the doctrine to protect Chicago Harbor. As the preeminent climatologist, Dr. James Hansen, has warned, "Failure to act with all deliberate speed in the face of the clear scientific evidence of the long term dangers posed is the functional equivalent of a decision to eliminate the option of later generations and their legislatures to preserve a habitable climate system."[50] Speaking at the White House in September of this year, Pope Francis urged action: "[C]limate change is a problem which can no longer be left to a future generation. When it comes to the care of our 'common home,' we are living at a critical moment in history."[51] At this critical juncture, the Youth Plaintiffs in this case have petitioned this Court for relief. They, like young people all over the planet, demand change; "[t]hey wonder how anyone can claim to be building a better future without thinking of the environmental crisis."[52] At the same time, Pope Francis has urged people of the older generation to ask themselves, "What kind of world do we want to leave to those who come after us, to children who are now growing up?" The Pope's answer is clear:

> It is no longer enough, then, simply to state that we should be concerned for future generations. We need to see that what is at stake is our own dignity. Leaving an inhabitable planet to future generations is, first and foremost, up to us . . . . *The effects of the present imbalance can only be reduced by our decisive action, here and now*… We know that technology based on the use of highly polluting fossil fuels—especially coal, but also oil and, to a lesser degree, gas—needs to be

[50] James E. Hansen et al., *Scientific Case for Avoiding Dangerous Climate Change to Protect Young People and Nature*, NASA (Jul. 9, 2012), *available at* http://pubs.giss.nasa.gov/abs/ha08510t.html.
[51] Transcript of Pope Francis White House Welcoming Ceremony, *available at* http://www.popefrancisvisit.com/pope-francis-u-s-visit-speech-transcripts/#whitehouse.
[52] *Laudato Si'*, ¶ 13.

progressively replaced without delay.[53]

With so little time remaining to curb carbon dioxide emissions before the planet crosses irrevocable climate thresholds, this Court should enforce government's duty to protect the children's atmospheric trust before it is too late to salvage a habitable planet.

IV. CONCLUSION

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

Respectfully submitted this 15th day of January, 2016.

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[53] *Laudato Si'*, ¶¶ 160, 161, 165 (emphasis added).

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief complies with the applicable word-count limitation under LR 7-2(b) because it contains less than 35 pages and 6,564 words, including headings, footnotes, and quotations, but excluding the caption, table of contents, table of cases and authorities, signature block, exhibits, and any certificates of counsel.

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