

# WHAT ABOUT UNCLE SAM? CARVING A NEW PLACE FOR THE PUBLIC TRUST DOCTRINE IN FEDERAL CLIMATE LITIGATION

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*The window to combat global climate change is rapidly closing. Yet, the Trump Administration and Republican-controlled Congress have made clear that the federal government will do little on this front. In response, citizens have taken to the courts, invoking the ancient public trust doctrine (“PTD”)—the idea that a government holds resources in trust for its citizens’ welfare—to compel government action on climate change. Although modestly successful at the state level, the PTD has thus far failed to establish a public trust on the part of the federal government. Namely, the D.C. Circuit in its 2014 decision *Alec L. v. Jackson* held that such a federal public trust is both displaced by the Clean Air Act and foreclosed by a Supreme Court statement that the PTD is a matter of state law unaffected by the U.S. Constitution. Yet *Juliana v. United States*, a November 2016 decision by the U.S. District Court for the District of Oregon, may have turned the tide. In *Juliana*, Judge Ann Aiken denied a motion to dismiss the plaintiffs’ claims against the U.S. government, framing the PTD’s role in climate change as an issue of Constitutional Due Process. This Note argues that the *Juliana* court got it right: the PTD does apply to the federal government. It limits the federal government’s power such that it cannot be legislated away in statutes such as the Clean Air Act. *Alec L.* thus misinterpreted the Supreme Court statement on the PTD, and the statement is unsupported by the Court’s own precedent. Moreover, this Note argues that the PTD predates and is preserved by the U.S. Constitution, which guarantees the substantive due process right to a clean environment via the Fifth, Ninth, and Fourteenth Amendments. If the plaintiffs succeed at trial and on an expected appeal to the U.S. Supreme Court, *Juliana* will surely be worthy of its recent title of “the case of the century.”*

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## INTRODUCTION

Global climate change has been recognized as a priority in the international community, as indicated by 195 of the world’s 197 nations that signed on to the 2016 Paris Agreement.<sup>1</sup> Yet in the United States, efforts on the part of the federal and state governments to combat climate change have been scattershot and slow to materialize. Moreover, given Republicans’ victory in the November 2016 elections, it seems improbable that any climate-related legislation will be enacted by President Donald Trump or the governors of many states, let alone considered by Congress or such state legislatures.

In response, American citizens have taken to the courts to hold their governments accountable for climate change action.<sup>2</sup> One basis for citizens’ arguments has been the public trust doctrine (“PTD”). This strategy has not enjoyed uniform success in state courts.<sup>3</sup> At the federal level, the PTD has similarly not fared well in efforts to compel action on the part of the United States government. Yet the recent decision on a motion to dismiss in *Juliana v. United States* (“*Juliana*”) may illuminate a path forward by reframing the PTD as an issue of constitutional rights.<sup>4</sup> Framing the PTD in this way offers a potential means to hold the federal government accountable for climate change impacts.

The result of *Juliana* may significantly influence United States climate change policy in the twenty-first century, given the Trump administration’s resistance to federal climate change action. If successful, *Juliana* will establish for the first time in American jurisprudence that the United States has an obligation—under the PTD and reinforced by the U.S. Constitution—to protect the rights of its current and future citizens to a clean environment and stable climate system. This would be a more efficient alternative to the current strategy of suing in state courts;

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<sup>1</sup> *Paris Agreement – Status of Ratification*, U.N. FRAMEWORK CONVENTION ON CLIMATE CHANGE (last visited Apr. 2, 2018), [http://unfccc.int/paris\\_agreement/items/9444.php](http://unfccc.int/paris_agreement/items/9444.php).

<sup>2</sup> Patrick C. McGinley, *Climate Change and the Public Trust Doctrine*, 65 PLAN. & ENVTL .L. 7, 7 (2013).

<sup>3</sup> *Compare Sanders-Reed ex rel. Sanders-Reed v. Martinez*, 350 P.3d 1221 (N.M. Ct. App. 2015) (holding that courts cannot intervene to impose a common-law public-trust duty on the state to regulate atmospheric greenhouse gases), *with Foster v. Wash. Dep’t of Ecology*, No. 14-2-25295-1 SEA (Wash. Super. Ct. Nov. 19, 2015) (recognizing that the state has a public-trust duty to protect natural resources from climate change).

<sup>4</sup> *Juliana v. United States*, 217 F. Supp. 3d 1224, 1263 (D. Or. 2016).

the effects of climate change know no state borders, so neither should climate policy.

This Note analyzes the legal viability of using the PTD to compel the United States government to mitigate climate change, focusing on two decisions by federal courts on the issue. The first is *Alec L. v. Jackson* (“*Alec L.*”), a 2012 decision in which the U.S. District Court for the District of Columbia rejected the argument that the federal government has a public trust obligation to combat climate change.<sup>5</sup> The second is *Juliana*, a November 2016 decision in which Judge Ann Aiken of the U.S. District Court for the District of Oregon denied a motion to dismiss the plaintiffs’ claims that the federal government *does* have such an obligation.<sup>6</sup>

This Note begins with a summary of the theoretical and historical underpinnings of the PTD. Following is an overview of federal cases which have considered the PTD—originally with respect to the states, but recently with respect to the federal government. Next, this Note argues that the *Juliana* court was correct and the *Alec L.* court incorrect: the federal government has an unmistakable obligation to the nation’s citizens under the PTD to combat climate change. Concluding is a commentary on how the PTD may fare in future federal climate change litigation.

## I. LEGAL BACKGROUND

### A. What is the Public Trust Doctrine (“PTD”)?

The PTD embodies the notion that a sovereign entity such as a state government cannot grant away its core sovereign powers.<sup>7</sup> In the natural resources context, this concept has been interpreted to mean that a sovereign holds title to property—“public trust resources”—in trust for the benefit of its citizens, the beneficiaries.<sup>8</sup> The sovereign owes an equal duty to future generations of beneficiaries as well.<sup>9</sup> This arrangement restrains the sovereign’s ability to alienate and degrade such resources to ensure public access to and enjoyment of them.<sup>10</sup>

The PTD originates from the Institutes of Justinian, the ancient body of Roman law that is the “foundation for modern civil law systems.”<sup>11</sup> The Institutes of Justinian stated that “the following things are by natural law common to all—the air, running water, the sea, and consequently the seashore.”<sup>12</sup> The PTD then made its way to the United States through English common law governing public navigation and fishing in tidal lands, which granted title to such lands to the King.<sup>13</sup> After the American Revolution, these rights were vested in the original states of the United States within their respective borders.<sup>14</sup> The states’ right to use or dispose of these

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<sup>5</sup> *Alec L. v. Jackson*, 863 F. Supp. 2d 11, 11 (D.D.C. 2012), *aff’d sub nom. Alec L. ex rel. Loorz v. McCarthy*, 561 F. App’x 7 (D.C. Cir. 2014), *cert denied*, 135 S. Ct. 774 (2014).

<sup>6</sup> *Juliana*, 217 F. Supp. 3d at 1233–34.

<sup>7</sup> *Stone v. Mississippi*, 101 U.S. 814, 820 (1880).

<sup>8</sup> *Ill. Cent. R. Co. v. Illinois*, 146 U.S. 387, 452 (1892).

<sup>9</sup> RESTATEMENT (SECOND) OF TRUSTS § 232 (AM. LAW INST. 1959).

<sup>10</sup> *Alec L.*, 863 F. Supp. 2d at 13 (citing *PPL Mont., L.L.C. v. Montana*, 565 U.S. 576 (2012)).

<sup>11</sup> *Juliana*, 217 F. Supp. 3d at 1253 (quoting Timothy G. Kearley, *Justice Fred Blume and the Translation of Justinian’s Code*, 99 L. LIBR. J. 525, ¶ 1 (2007)).

<sup>12</sup> *Id.* (quoting J. Inst. 2.1.1 (J.B. Moyle trans.)).

<sup>13</sup> *Alec L.*, 863 F. Supp. 2d at 13.

<sup>14</sup> *Idaho v. Coeur d’Alene Tribe of Idaho*, 521 U.S. 261, 284 (1997); *Phillips Petroleum v. Mississippi*, 484

tidal lands has since been limited to the extent that it would cause “substantial impairment of the interest of the public in the waters.”<sup>15</sup> In addition, the states must yield to “the paramount right of [C]ongress to control . . . navigation [in tidal waters] so far as may be necessary for the regulation of commerce with foreign nations and among the states.”<sup>16</sup> The PTD thus finds its conceptual roots in the states’ historical obligation to ensure public access to and enjoyment of tidal waters.<sup>17</sup>

### B. State Public Trust – Illinois Central

The seminal U.S. Supreme Court case recognizing state public trust obligations is *Illinois Central Railroad Co. v. Illinois* (“*Illinois Central*”).<sup>18</sup> In that case, the Illinois legislature granted Illinois Central title to submerged lands beneath the Chicago Harbor, intending to give the railroad company control over the waters above the submerged lands “against any future exercise of power over them by the state.”<sup>19</sup> The Court held that this attempted legislative conveyance was void: “[t]he state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them . . . than it can abdicate its police powers in the administration of government and the preservation of the peace.”<sup>20</sup> Given that Chicago’s harbor was “of immense value to the people of . . . Illinois,” the “idea that its legislature can deprive the state of control over its bed and waters, and place the same in the hands of a private corporation” could not “be defended.”<sup>21</sup> In short, the Court felt that the harbor’s natural resources were so vital that the state could not simply legislate away its public trust obligations to protect them for its citizens’ welfare.

### C. Federal Public Trust

*Illinois Central* made clear that the states have obligations under the PTD. Whether such obligations exist for the federal government is not so clear, however, as evidenced by two recent federal cases on the issue. The first case, *Alec L.*,<sup>22</sup> foreclosed the existence of a federal public trust as preempted by the Clean Air Act (“CAA”). Yet the second, *Juliana*,<sup>23</sup> rejects the reasoning of *Alec L.*, holding that the PTD inheres in and restrains a government’s sovereignty—and thus cannot be legislated away.

#### i. Two Recent Cases – *Alec L.* & *Juliana*

One effort to extend the PTD in this manner with respect to climate change failed in *Alec*

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U.S. 469, 473 (1988).

<sup>15</sup> Ill. Cent. R. Co. v. Illinois, 146 U.S. 387, 435 (1892).

<sup>16</sup> *Id.*

<sup>17</sup> *Alec L.*, 863 F. Supp. 2d at 13.

<sup>18</sup> *Illinois Central*, 146 U.S. at 433.

<sup>19</sup> *Id.* at 452.

<sup>20</sup> *Id.* at 453.

<sup>21</sup> *Id.* at 454.

<sup>22</sup> *Alec L.*, 863 F. Supp. 2d. at 11.

<sup>23</sup> *Juliana v. United States*, 217 F. Supp. 3d 1224, 1258–59 (D. Or. 2016).

*L.*<sup>24</sup> *Alec L.* was a 2012 decision in which the U.S. District Court for the District of Columbia rejected the plaintiffs' argument that the PTD imposes a duty on the federal government to prevent the release of atmospheric greenhouse gases.<sup>25</sup> The plaintiffs in *Alec L.*, five young citizens and two advocacy organizations, sued the Administrator of the Environmental Protection Agency ("EPA") and the heads of five other federal agencies.<sup>26</sup> They alleged that each agency, representing the federal government and through permitting and approval actions, allowed the atmosphere to become polluted with high levels of human-caused carbon dioxide ("CO<sub>2</sub>").<sup>27</sup> As such, the defendants "wasted and failed to preserve and protect the atmosphere Public Trust asset" in violation of their "fiduciary duties under the Public Trust Doctrine as trustee of the natural resources of the United States."<sup>28</sup> The plaintiffs sought both declaratory and injunctive relief for their claim—specifically, a declaration of the federal government's fiduciary role in preserving the atmosphere and an injunction of its actions which contravene that role.<sup>29</sup>

Since *Alec L.* was decided, there has been a successful attempt to not only rekindle the PTD argument but incorporate constitutional claims to compel the federal government to combat climate change. Such a victory (albeit a procedural one) occurred in *Juliana*, in which Judge Ann Aiken of the U.S. District Court for the District of Oregon denied a motion to dismiss the plaintiffs' claims that the federal government, as represented by the agency defendants, willfully and knowingly acted or failed to act so as to accelerate climate change.<sup>30</sup> The plaintiffs also allege that the government violated several of the plaintiffs' constitutional rights as well as the PTD.<sup>31</sup> The plaintiffs in this suit include individuals aged eight to nineteen, associations of activists, and Dr. James Hansen, the well-known climatologist, on behalf of "future generations."<sup>32</sup>

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<sup>24</sup> See *Alec L.*, 863 F. Supp. 2d.

<sup>25</sup> See *id.* at 11.

<sup>26</sup> The plaintiffs joined as defendants the respective heads of the U.S. Departments of the Interior, Agriculture, Commerce, Energy, and Defense. See *id.* at 12.

<sup>27</sup> Am. Compl. ¶¶ 10, 138, 146. First Amended Complaint for Declaratory and Injunctive Relief at ¶¶ 10, 138, 146. *Alec L. v. Jackson*, 863 F. Supp. 2d (D.D.C. 2012) (No. 1:2011CV022), 2011 WL 11547727.

<sup>28</sup> *Id.* The plaintiffs did not highlight any *specific* acts on the part of any of the five defendant agencies which led to a violation of their public trust obligations to protect the atmosphere and subsequently injured the plaintiffs in the manner they alleged. See *id.*

<sup>29</sup> The plaintiffs sought, *inter alia*, a declaration that the atmosphere is a public trust resource that the federal government, as a trustee, has a fiduciary duty to refrain from damaging. *Id.* at ¶ 13. They also requested that the court issue an injunction directing the defendant agencies to act to ensure that CO<sub>2</sub> emissions peak by December 2012 and then decline by six percent annually beginning in 2013 until the global atmospheric concentration of CO<sub>2</sub> is 350 parts per million. *Id.* at ¶ 14.

<sup>30</sup> *Juliana v. United States*, 217 F. Supp. 3d 1224, 1224 (D. Or. 2016).

<sup>31</sup> *Id.* at 1233. Specifically, the plaintiffs allege that the federal government's actions and omissions have increased CO<sub>2</sub> emissions in a manner that "shocks the conscience" and infringes the plaintiffs' right to life and liberty in violation of their substantive due process rights. Complaint for Declaratory and Injunctive Relief at 85, 87, *Juliana v. United States*, 217 F. Supp. 3d (D. Or. 2016) (No. 6:15-cv-01517-TC). The plaintiffs also allege an equal protection violation under the Fifth Amendment due to the defendants' denying the plaintiffs and their generation protections afforded to earlier generations. *Id.* at 89. Lastly, the plaintiffs allege two violations of the Ninth Amendment, the first based on their right to a stable climate and an atmosphere free of excessive CO<sub>2</sub>, and the second on the federal government's denying future generations the enjoyment of vital natural resources in violation of the PTD. *Id.* at 92–93.

<sup>32</sup> *Juliana*, 217 F. Supp. 3d at 1233–34.

ii. Supreme Court Statement in *PPL Montana*

Central to the holdings in *Alec L.* and *Juliana* on the PTD was a statement by the U.S. Supreme Court in *PPL Montana, LLC v. Montana* (“*PPL Montana*”) that “the public trust doctrine remains a matter of state law” whose “contours . . . do not depend upon the Constitution.”<sup>33</sup> In *PPL Montana*, the State of Montana sought rent from the plaintiff power company for the use of riverbeds, arguing that it had acquired title to the rivers via the “equal footing doctrine” upon its statehood in 1889.<sup>34</sup> The Supreme Court held that Montana state courts had applied an incorrect methodology in determining whether the rivers were “navigable,” as required under the equal footing doctrine.<sup>35</sup>

In addition to its navigability argument, Montana asserted that denying it title to the riverbeds would “undermine the public trust doctrine.”<sup>36</sup> The Supreme Court rejected this, responding with the statement interpreted in *Alec L.* and *Juliana*: the PTD, unlike the equal footing doctrine, is a matter of Montana law unaffected by the U.S. Constitution.<sup>37</sup> Rather, in the Court’s view, “[t]he States retain residual power to determine the scope of the public trust over waters within their borders, while federal law determines riverbed title under the equal-footing doctrine.”<sup>38</sup>

The *Alec L.* court found this language to be unambiguous and binding, concluding that it foreclosed the plaintiffs’ public trust claim.<sup>39</sup> Moreover, the court stated that it is irrelevant that the statement was dictum, citing its prior holding that Supreme Court language—including dictum—“must be treated as authoritative.”<sup>40</sup> The court even felt that the statement was persuasive, as it held in a previous case that “[i]n this country the public trust doctrine has developed *almost exclusively as a matter of state law.*”<sup>41</sup>

Conversely, in *Juliana*, Judge Aiken asserted that *PPL Montana* said nothing about the viability of federal public trust claims.<sup>42</sup> Instead, in her view, *PPL Montana* was about the equal footing doctrine, not the PTD.<sup>43</sup> The Supreme Court was only clarifying that “federal law, not state law, determined whether Montana has title to the riverbeds,” and that “if Montana had title, state law would define the scope of Montana’s public trust obligations.”<sup>44</sup> This was logical to Judge Aiken, as the *PPL Montana* court was tasked with applying the PTD to a state rather than to

<sup>33</sup> *PPL Mont., LLC v. Montana*, 565 U.S. 576, 603–04 (2012) (emphasis in original).

<sup>34</sup> *Id.* at 580. The “equal footing doctrine” is embedded in the U.S. Constitution, *see* U.S. Const. art. IV, § 3, c1. 1, and provides that a state takes title to all riverbeds of navigable waters upon statehood, *United States v. Holt State Bank*, 270 U.S. 49, 55, 59 (1926).

<sup>35</sup> *PPL Montana*, 565 U.S. at 589–90.

<sup>36</sup> *Id.* at 1221.

<sup>37</sup> *Id.* at 1235.

<sup>38</sup> *Id.*

<sup>39</sup> *Alec L. v. Jackson*, 863 F. Supp. 2d. 11, 15 (D.D.C. 2012).

<sup>40</sup> *Id.* (quoting *Overby v. Nat’l Ass’n of Letter Carriers*, 595 F.3d 1290, 1295 (D.C. Cir. 2010)).

<sup>41</sup> *Id.* (quoting *District of Columbia v. Air Fla., Inc.*, 750 F.2d 1077, 1082 (D.C. Cir. 1984)) (emphasis in original).

<sup>42</sup> *Juliana v. United States*, 217 F. Supp. 3d 1224, 1256 (D. Or. 2016).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 1257.

the federal government.<sup>45</sup> She saw no reason why the PTD, given its deep roots in our nation's civil law system, would apply only to the states and not to the United States government.<sup>46</sup>

### iii. Displacement by Federal Statute

*Alec L.* and *Juliana* also came to differing conclusions on the issue of whether the CAA displaces plaintiffs' common law rights under the PTD given the Supreme Court's decision in *American Electric Power Co. v. Connecticut* (“*AEP*”).<sup>47</sup> In *AEP*, the plaintiffs alleged that the five defendant power companies' CO<sub>2</sub> emissions constituted a public nuisance under federal common law.<sup>48</sup> The Supreme Court struck down the claim, holding that “the [CAA] and the EPA actions it authorizes displace any federal common law right to seek abatement of [CO<sub>2</sub>] emissions from fossil-fuel fired power plants.”<sup>49</sup>

From this, the *Alec L.* court concluded that the plaintiffs' public trust claim was similarly displaced by the CAA.<sup>50</sup> The court also noted that *AEP* does not only apply to common law nuisance claims but rather to *any* federal common law right associated with the CAA.<sup>51</sup> Additionally, the court echoed the *AEP* court's concerns that “the judgments the plaintiffs would commit to federal judges . . . cannot be reconciled with the decision-making scheme Congress enacted,”<sup>52</sup> and that Congress designated EPA as the primary regulator of greenhouse gas emissions because it “is surely better equipped to do the job than individual district judges issuing ad hoc, case-by-case injunctions.”<sup>53</sup> In essence, the court believed that it was beyond the scope of its power to direct a federal agency to regulate when Congress has already delegated such authority to an agency with greater expertise on the matter.<sup>54</sup>

In *Juliana*, Judge Aiken disagreed with the *Alec L.* court, reasoning that the Supreme Court did not consider a public trust claim in *AEP*.<sup>55</sup> Displacement analysis, in her view, does not apply to public trust claims because “they concern inherent attributes of sovereignty”—imposing obligations on the government that “*cannot be legislated away*” in statutes such as the CAA.<sup>56</sup>

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<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 1259.

<sup>47</sup> 564 U.S. 410 (2011).

<sup>48</sup> *Id.* at 415.

<sup>49</sup> *Id.* at 424.

<sup>50</sup> *Alec L. v. Jackson*, 863 F. Supp. 2d.11, 16 (D.D.C. 2012).

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* (quoting *AEP*, 564 U.S. at 429).

<sup>53</sup> *Id.* at 428. In further support of its conclusion that the CAA displaces public trust claims, the court cited the prior Supreme Court holding under *Massachusetts v. EPA*, 549 U.S. 497, 528–29 (2007) that EPA has the authority under the CAA to regulate greenhouse gas emissions from new motor vehicles.

<sup>54</sup> *Alec L.*, 863 F. Supp. 2d. at 17.

<sup>55</sup> *Juliana v. United States*, 217 F. Supp.3d 1224, 1260 (D. Or. 2016).

<sup>56</sup> *Id.* Judge Aiken also concluded that the court's fashioning of a proper remedy here would not implicate nonjusticiable political concerns better left to the political branches of government, citing her thorough discussion in an earlier part of the opinion. *See id.* at 1236–42. In her analysis, she applied the six factors laid out by the Supreme Court in *Baker v. Carr*, 369 U.S. 186, 210 (1962). She thereafter concluded that there are no political questions here because, “[a]t its heart, this lawsuit asks this Court to determine whether defendants have violated plaintiffs' constitutional rights,” which is “squarely within the purview of the judiciary.” *Juliana*, 217 F. Supp.3d at 1241 (citing *INS v. Chadha*, 462 U.S. 919,

#### iv. *Juliana* Due Process Considerations

*Juliana* also situated the plaintiffs' public trust claim as a matter of substantive due process under the U.S. Constitution, rendering it enforceable in federal court. Earlier in her opinion, Judge Aiken recognized a fundamental right under the Due Process Clause of the Fifth Amendment to the Constitution to a stable climate system.<sup>57</sup> In so holding, she cited the landmark *Obergefell v. Hodges* decision and its reasoning that marriage is a right underlying other vital liberties already recognized in the Constitution.<sup>58</sup> From this she concluded that, like marriage, "the right to a climate system capable of sustaining human life is fundamental to a free and ordered society . . . [and] is quite literally the foundation of society, without which there would be neither civilization nor progress."<sup>59</sup>

Judge Aiken subsequently held that the plaintiffs have a cognizable cause of action to enforce federal public trust obligations because "plaintiffs' public trust rights both predated the Constitution and are secured by it."<sup>60</sup> First, Judge Aiken stated that public trust rights are related to "inherent aspects of sovereignty and the consent of the governed from which the United States' authority derives"—in other words, the Constitution enshrines already-existing rights under the ancient PTD, and the government's power to protect those rights under the Social Contract theory "cannot be sold or bargained away."<sup>61</sup> She concluded from this that the plaintiffs' public trust rights are also protected under the Ninth Amendment, as they are not enumerated in the Constitution.<sup>62</sup> Second, as noted above, such rights are contained in the Due Process Clause of the Fifth Amendment.<sup>63</sup> In combination, these findings led Judge Aiken to hold that the plaintiffs' public trust claims, as a matter of due process, are cognizable in federal court.<sup>64</sup>

## II. ARGUMENT FOR APPLYING THE PTD TO CLIMATE IMPACTS

In this section, this Note argues that the *Juliana* court correctly recognized that the United States government is, like the states, obliged under the PTD to provide a stable climate system for its current and future citizens. This section begins by discussing why the Supreme Court's statement in *PPL Montana* that the PTD is a matter of state law is unreliable—it is based on a string of prior cases which have misinterpreted *Illinois Central* as a statement of state law,

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941 (1983)). Moreover, there are no constitutional provisions or acts of Congress which reserve all decision-making authority relating to climate change to any one political branch. *Id.* at 1238. She also explained that the court can order the defendants to implement a plan that would redress the plaintiffs' injuries without specifying exactly what methods that plan would contain. *Id.* at 1242.

<sup>57</sup> See *id.* at 1248–52 for Judge Aiken's analysis of the plaintiffs' due process claims.

<sup>58</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584, 2599 (2015).

<sup>59</sup> *Juliana*, 217 F. Supp.3d 3d at 1250.

<sup>60</sup> *Id.* at 1260 (citing Gerald Tones & Nathan Bellinger, *The Public Trust: The Law's DNA*, 4 WAKE FOREST J.L. & POL'Y 281, 288–94 (2014)).

<sup>61</sup> *Id.* at 1261.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 1259; see also *Carlson v. Green*, 446 U.S. 14, 18 (1980) ("[T]he victims of a constitutional violation by a federal agent have a right to recover damages against the official in federal court despite the absence of any statute conferring such a right.").

when it is in fact premised on federal law. Next, this Note cites numerous holdings by the Supreme Court and other federal courts that have recognized a federal public trust. It then argues that federal statute does not displace the PTD because it is an inherent limit on sovereignty that cannot be legislated away. Following is a discussion of how the PTD both predates and is preserved by the U.S. Constitution as a matter of substantive due process under the Fifth, Ninth, and Fourteenth Amendments. This section concludes by considering the practical, political, and public policy implications of *Juliana*.

#### A. Existence of a Federal Public Trust

##### i. Supreme Court Statement in *PPL Montana*

The Supreme Court's passing statement in *PPL Montana* that "the public trust doctrine remains a matter of state law" cannot be read to foreclose the existence of a federal public trust. Judge Aiken's treatment of this language in *Juliana* is therefore correct, whereas the *Alec L.* court's is misguided. The *Juliana* court correctly concluded that *PPL Montana* has no bearing on whether the PTD binds the federal government. *PPL Montana* only concerned whether the State of Montana owned riverbeds within its borders—a claim against a *state* government. In response to Montana's public trust argument, the Supreme Court stated that Montana was conflating its rights under the equal footing doctrine—determined by *the U.S. Constitution*—with its rights under the PTD—in that case, determined by *Montana law*. *Juliana* and *Alec L.*, on the other hand, concern claims against the *federal* government. Thus, the *Alec L.* court misconstrued the Supreme Court's statement in *PPL Montana* to limit the scope of the PTD to states *only*. There is nothing in *PPL Montana* indicating that the Supreme Court felt that the PTD applies *exclusively* to the states. Rather, the Court was simply evaluating the claims before it; it did not have occasion to consider the existence of a *federal* public trust. There is little sense in a court concluding from *PPL Montana* that the PTD applies to only the states and not to the United States when the Supreme Court did not have before it a claim against a federal actor. Such a conclusion seems even less wise considering the PTD's ancient roots.<sup>65</sup>

It appears that the district court in *Alec L.* even misinterpreted its own circuit's precedent on the matter. It is true that the D.C. Circuit stated in *Air Florida* that "[i]n this country the public trust doctrine has developed almost exclusively as a matter of state law."<sup>66</sup> However, the court later made it a point to emphasize that "we imply no opinion regarding either the applicability of the public trust doctrine to the federal government or the appropriateness of using the doctrine to afford trustees a means for recovering from tortfeasors the cost of restoring public waters to their pre-injury condition."<sup>67</sup> This statement is undeniably clear. It was erroneous for the *Alec L.* court to rely on *Air Florida* in concluding there is no federal public trust when the *Air Florida* court expressly declined to inquire into that matter. Courts should thus not construe *Air Florida* to preclude the existence of a federal public trust; in fact, they can cite the D.C. Circuit's statement *in support of* the existence of a federal public trust in a wholly new context such as climate change.

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<sup>65</sup> See *supra* Part II.A.

<sup>66</sup> 750 F.2d at 1082.

<sup>67</sup> *Id.* at 1084.

ii. Misinterpretations of *Illinois Central*

In a string citation supporting its statement that the PTD is a matter of state law, the *PPL Montana* court cited two Supreme Court cases, *Appleby v. City of New York* (“*Appleby*”)<sup>68</sup> and *Coeur d’Alene*,<sup>69</sup> which stated—without explanation—that *Illinois Central* “was necessarily a statement of Illinois law.”<sup>70</sup> However, as explained below, *Illinois Central* was based in federal law, not Illinois law. *Coeur d’Alene* and *Appleby* thus misinterpreted *Illinois Central*, which in turn led the *PPL Montana* and *Alec L.* courts astray.

Contrary to subsequent judicial interpretation, *Illinois Central* was grounded in federal law<sup>71</sup> and thus does not foreclose the existence of a federal public trust. The Supreme Court in *Illinois Central* held that the Illinois legislature could not grant a private company title to the waters of the entire Chicago Harbor, as such would violate the state’s public trust obligations.<sup>72</sup> However, the Court cited no state law as the origin of this trust.<sup>73</sup> It also went on to expand such public trust obligations to *any* state<sup>74</sup>—again, without mentioning state law.<sup>75</sup> Additionally, earlier in the opinion, the Court stated that “[i]t is the settled law of this country that the ownership of and dominion and sovereignty over lands covered by tide waters, within the limits of the several states, belong to the respective states within which they are found. . . .”<sup>76</sup>

Due to this lack of reference to state law and broad-reaching language, commentators have looked to federal law as the basis for *Illinois Central*. For example, some suggest that Justice Field, the author of the *Illinois Central* decision, was relying on the reserved powers doctrine of the Tenth Amendment to the Constitution, which, like the PTD, recognizes inherent limits on sovereignty that both state legislatures and Congress cannot supersede.<sup>77</sup> Others believe that the public trust is an implied condition of statehood imposed by the federal government, the purpose being to keep crucial navigable waterways free from obstruction.<sup>78</sup> Irrespective of which source is correct, one thing remains clear: *Illinois Central* is not premised on state law.

Despite *Illinois Central*’s federal basis, the Supreme Court thereafter stated in *Appleby* that *Illinois Central* was premised on Illinois law. This assertion is misguided, as the claim before the *Appleby* court did not involve the PTD. Rather, the Court enjoined the City of New York’s dredging on *Appleby*’s tidal property, holding that it unconstitutionally interfered with his

<sup>68</sup> 271 U.S. 364, 395 (1926).

<sup>69</sup> 521 U.S. at 285.

<sup>70</sup> *PPL Mont., LLC v. Montana*, 565 U.S. 576, 604 (2012).

<sup>71</sup> Charles F. Wilkinson, *The Headwaters of the Public Trust: Some of the Traditional Doctrine*, 19 ENVTL. L. 453 (1989); Michael C. Blumm & Lynn S. Schaffer, *The Federal Public Trust Doctrine: Misinterpreting Justice Kennedy and Illinois Central Railroad*, 45 ENVTL. L. 399, 410–15 (2015).

<sup>72</sup> *Id.* at 410; see *supra* pp. 4–5 for a summary of the facts and holding of *Illinois Central*.

<sup>73</sup> See *Illinois Central*, 146 U.S. at 455 (“We cannot, it is true, cite any authority where a grant of this kind has been held invalid. . . .”).

<sup>74</sup> See *id.* at 453 (“A grant of all the lands under the navigable waters of a state has never been adjudged to be within the legislative power . . . “ and is against its public trust obligations.) (emphasis added).

<sup>75</sup> See *id.* at 453–56 (citing no state law imposing public trust obligations).

<sup>76</sup> See *id.* at 435 (emphasis added).

<sup>77</sup> See BLUMM & SCHAFFER, *supra* note 71, at 412–13.

<sup>78</sup> See WILKINSON, *supra* note 71, at 453, 458.

contract rights granted to him by the City.<sup>79</sup> In reaching its conclusion, the Court did not consider whether the state's original grant of the submerged land to the city implicated the PTD; the suit only involved Appleby's request for injunctive relief.<sup>80</sup> Despite this, the Court puzzlingly stated in passing that "the conclusion reached [in *Illinois Central*] was necessarily a statement of Illinois law."<sup>81</sup> The Court did not cite any state law or otherwise include any analysis in support of this statement. It then *in the same sentence* contradicted itself: "but the general principle [from *Illinois Central*] . . . ha[s] been recognized the country over"<sup>82</sup>—seemingly a recognition of *Illinois Central*'s federal nature. If not, this at least demonstrates that the Court's treatment of the PTD in *Appleby* is flawed and therefore unreliable.

The Supreme Court subsequently cited this misguided conclusion from *Appleby* in *Coeur d'Alene*, although that case did not elaborate on the terse statement or even involve the federal government.<sup>83</sup> Moreover, the Court again downplayed the *Appleby* statement's state-law focus, adding (also in the same sentence) that "[*Illinois Central*] invoked *the principle in American law* recognizing the weighty public interests in submerged lands."<sup>84</sup>

It is thus clear that the *PPL Montana* court was imprudent in relying on *Appleby* and *Coeur d'Alene* for its assertion that the PTD is a matter of state law. It invokes a line of Supreme Court cases which misconstrue *Illinois Central*'s federal basis as a state one. Those decisions also were unrelated to the PTD and qualified the doctrine's supposed grounding in state law immediately after stating it. These cases therefore do not stand against the existence of a federal public trust, contrary to what the *Alec L.* courts believed.

### iii. Federal Cases Recognizing a Federal Public Trust

Multiple federal courts, including the Supreme Court, have recognized the existence of federal public trust obligations throughout American history. Such decisions, by logical extension, support the *Juliana* and *Alec L.* plaintiffs' assertion that the federal government has a public trust duty to combat climate change.

The Supreme Court on numerous occasions has acknowledged a federal public trust. For example, in *United States v. Trinidad Coal & Coking Co.* (decided two years before *Illinois Central*), the Court held that, with respect to the disposal of abandoned coal lands, "the government should not be regarded as occupying the attitude of a mere seller of real estate for its market value . . ." because "[the lands] were *held in trust for all the people*. . ."<sup>85</sup> In 1911, the Court subsequently reiterated this holding, stating that "[a]ll public lands of the nation are held in trust for the people of the whole country" in a case upholding the Forest Service's authority to impose criminal sanctions for violations of grazing regulations.<sup>86</sup> The Court saw private

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<sup>79</sup> *Appleby v. City of New York*, 271 U.S. 364, 402–03 (1926).

<sup>80</sup> *Id.* at 399–403.

<sup>81</sup> *Id.* at 395.

<sup>82</sup> *Id.*

<sup>83</sup> *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 285 (1997).

<sup>84</sup> *Id.* (emphasis added).

<sup>85</sup> 137 U.S. 160, 170 (1890) (emphasis added).

<sup>86</sup> *Light v. United States*, 220 U.S. 523, 537 (1911) (quoting *United States v. Trinidad Coal & Coking Co.*, 137 U.S. 160 (1890)).

proprietary ownership of the public lands, on the other hand, as reminiscent of the English aristocracy and felt that “the United States do[es] not and cannot hold property as a monarch may, for private and personal purposes.”<sup>87</sup> Similarly, as Judge Aiken discussed in *Juliana*, two federal courts have acknowledged the existence of federal public trust obligations when the federal government reacquired tidelands through eminent domain from a state.<sup>88</sup> The District Court for the District of Massachusetts in *United States v. 1.58 Acres of Land Situated in City of Boston, Suffolk County, Mass.* explained that “[t]he trust is of such a nature that it can be held only by the sovereign, and can only be destroyed by the destruction of the sovereign.”<sup>89</sup> In other words, as the District Court for the Northern District of California put it, “[b]y condemnation, the United States simply acquires the land subject to the public trust as though no party had held an interest in the land before.”<sup>90</sup>

These cases are also consistent with the Ninth Circuit’s holding in *United States v. 32.42 Acres of Land, More or Less, Located in San Diego County, Cal.*, although that court cited the *PPL Montana* language that the “the public trust doctrine remains a matter of state law.”<sup>91</sup> In *32.42 Acres of Land*, the federal government, through its eminent domain power, acquired tidelands originally granted to California by the equal footing doctrine upon obtaining statehood in 1850.<sup>92</sup> In upholding the acquisition, the court held that the federal government obtains land from the states free of state public-trust obligations.<sup>93</sup> This is because federal takings, via the Supremacy Clause of the U.S. Constitution, necessarily supersede any public trust obligations under state law.<sup>94</sup> Yet the court did not address the lower court’s finding that the tidelands at issue had been taken subject to a *federal* public trust.<sup>95</sup> The Ninth Circuit thus left open the possibility of there being a federal public trust despite its opportunity to hold otherwise.

The above precedents demonstrate that the Supreme Court and numerous lower federal courts have recognized public trust obligations on the part of the federal government. At the very least, courts can leverage the Supremacy Clause in federal takings cases to extinguish the state public trust and invoke in its place a *federal* public trust to restrict the federal government’s actions with respect to tidelands. This all, in turn, further supports *Juliana*’s recognition of a similar federal trust obligation to mitigate climate change.

### B. Displacement

The *Alec L.* court also incorrectly relied on *AEP* in its mistaken conclusion that federal statute—namely the CAA—displaces public trust claims. Congress has, to be sure, permissibly

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<sup>87</sup> *Id.* at 536 (quoting *Van Brocklin v. Tennessee*, 117 U.S. 151, 158 (1886)).

<sup>88</sup> *See* *Juliana v. United States*, 217 F. Supp. 3d 1224, 1258 (D. Or. 2016).

<sup>89</sup> *United States v. 1.58 Acres of Land Situated in City of Boston, Suffolk County, Mass.*, 523 F. Supp. 120, 124 (D. Mass. 1981).

<sup>90</sup> *City of Alameda v. Todd Shipyards Corp.*, 635 F. Supp. 1447, 1450 (N.D. Cal. 1986).

<sup>91</sup> *United States v. 1.58 Acres of Land, More or Less, Located in San Diego County, Cal.*, 683 F.3d 1030, 1038 (9th Cir. 2012).

<sup>92</sup> *Id.* at 1032–33.

<sup>93</sup> *Id.* at 1039.

<sup>94</sup> *Id.* at 1038.

<sup>95</sup> *Id.* at 1033, 1039 n.2.

legislated multiple common law rights and remedies into environmental statutes, extinguishing their effect in federal courts.<sup>96</sup> Accordingly, the inquiry in *AEP* required that the court determine whether the statute “speaks directly” to the common-law nuisance question at issue.<sup>97</sup>

The PTD, however, is fundamentally different from the common-law nuisance claims considered in *AEP*. As stated in *Juliana* and echoed in multiple Supreme Court cases, the PTD implicates inherent limitations on sovereign power.<sup>98</sup> As such, “the power of governing is a trust committed by the people to the government, no part of which can be granted away”<sup>99</sup>—that is, without destroying the sovereign itself.<sup>100</sup> The PTD, given its unique nature as a *limit* on legislative power, is therefore not subject to displacement analysis, whereas common-law environmental rights typically are.<sup>101</sup> Rather, the only inquiry for a public trust claim is “whether the sovereign is protecting trust assets sufficiently to safeguard the interest of present and future beneficiaries.”<sup>102</sup> This is entirely different from the inquiry in *AEP* stated above.

Several state supreme courts agree that the PTD invokes inherent matters of sovereignty that cannot be legislated or granted away. For example, the Hawai’i Supreme Court described its constitutionally grounded PTD as “an inherent attribute of sovereign authority that the government . . . ‘cannot surrender.’”<sup>103</sup> It went on to reason that the “suggestion that such a statute could extinguish the public trust . . . contradicts the doctrine’s basic premise, that the state has certain powers and duties which it cannot legislatively abdicate.”<sup>104</sup> The Arizona Supreme Court came to a similar conclusion: “[t]he public trust doctrine is a constitutional limitation on legislative power to give away resources held by the state in trust for its people. . . .”<sup>105</sup> The court then added that “[t]he Legislature cannot by legislation destroy the constitutional limits on its authority.”<sup>106</sup>

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<sup>96</sup> See, e.g., *AEP*, 564 U.S. 410, 416 (2011) (holding that the CAA displaces federal common-law public-nuisance claims); *Int’l Paper Co. v. Oulette*, 479 U.S. 481, 500 (1987) (holding that the Clean Water Act pre-empts state nuisance common-law claims against out-of-state sources of water pollution); *City of Milwaukee v. Illinois*, 451 U.S. 304, 317–19 (1981) (holding that the Clean Water Act displaces federal common law of nuisance as applied to claims brought by a state.); *Middlesex Cty. Sewerage Auth. v. Nat’l Sea Clammers Ass’n*, 453 U.S. 1, 21–22 (1981) (applying *City of Milwaukee* in finding that the Clean Water Act pre-empts federal common-law nuisance claims made by individuals); *Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 858 (9th Cir. 2012) (relying on *AEP* in holding that the CAA displaces federal common-law public nuisance claim against energy companies for climate-change-related land erosion); *Anderson v. Teck Metals, Ltd.*, No. CV-13-420-LRS, 2015 WL 59100, at \*10, 28 (E.D. Wash. Jan. 5, 2015) (applying *Kivalina* in holding that CERCLA displaces federal common-law public nuisance claim).

<sup>97</sup> *AEP*, 564 U.S. at 424.

<sup>98</sup> See *Juliana v. United States*, 217 F.Supp.3d 1224, 1252 (D. Or. 2016); *Idaho v. Coeur d’Alene Tribe of Idaho*, 521 U.S. 261, 284 (1997) (“[N]avigable waters uniquely implicate sovereign interests.”); *Montana v. United States*, 450 U.S. 544, 551 (1981) (“[T]he ownership of land under navigable waters is an incident of sovereignty.”).

<sup>99</sup> *Stone v. Mississippi*, 101 U.S. 814, 820 (1879).

<sup>100</sup> *United States v. 1.58 Acres of Land*, 523 F. Supp. 120, 124 (D. Mass. 1981).

<sup>101</sup> In several environmental cases, federal common-law nuisance claims have failed due to being displaced by federal statutes. See cases cited *supra* note 96.

<sup>102</sup> *BLUMM & SCHAFFER*, *supra* note 71, at 419.

<sup>103</sup> *In re Water Use Permit Applications*, 9 P.3d 409, 443 (Haw. 2000).

<sup>104</sup> *Id.* at 442–43.

<sup>105</sup> *San Carlos Apache Tribe v. Superior Court*, 972 P.2d 179, 199 (Ariz. 1999).

<sup>106</sup> *Id.*

There is broad judicial support for the notion that the PTD is inherent in sovereignty and is thus immune from statutory displacement. This makes public trust claims innately different from common law claims, such as that considered in *AEP*, which can be, and often are, legislated away in environmental statutes like the CAA.<sup>107</sup> The *Alec L.* court was therefore incorrect in its conclusion; Judge Aiken correctly stated in *Juliana* that the CAA—and any statute, for that matter—does not and cannot displace the plaintiffs’ public trust claim.<sup>108</sup>

### C. The PTD and Constitutional Due Process

Framing the PTD as a right predating and secured by the Due Process Clauses of and Ninth Amendment to the U.S. Constitution further fortifies the idea of a federal public trust. In this way, the *Juliana* court was correct in finding that the plaintiffs’ public trust claim may be asserted in federal court.

Public trust rights are enforceable against the federal government because, as Judge Aiken stated, “public trust rights both predated the Constitution and are secured by it.”<sup>109</sup> As one commentator puts it, the PTD “is the chalkboard on which the Constitution is written.”<sup>110</sup> It implicates the Constitution’s grounding in the Social Contract theory; this nation’s citizens granted the federal government sovereignty over its commonly held natural resources in exchange for the government’s promise to protect those resources in trust for the nation’s benefit.<sup>111</sup> In other words, the government’s obligations to protect public trust resources for its citizens’ welfare are so old that they were *preserved*, rather than *created*, by the U.S. Constitution.

It is because the Supreme Court and many other American courts recognize the PTD as a restraint on a government’s sovereignty (as discussed above) that it must have been preserved by the Constitution. At the time of the nation’s founding, the federal government obtained its land, waters, and air from the King of England—which were, even then, recognized as bound by the PTD. If public trust rights were not enshrined in the Constitution when it was drafted, then the PTD’s core purpose—to *restrict* state sovereignty—would be meaningless.

In addition to predating the Constitution, public trust rights are preserved by the Due Process Clauses of the Fifth and Fourteenth Amendments as well as the Ninth Amendment. Framing public trust rights as a matter of due process provides further support for the plaintiffs in *Alec L.* and *Juliana*.

Although this Note does not fully analyze Judge Aiken’s recognition of a substantive due process right to a stable climate system, the PTD, as a preliminary matter, has basis in the Due Process Clauses. First, Judge Aiken was correct in equating the fundamental importance of a stable climate system with that of the institution of marriage, as recognized in *Obergefell*. Justice Kennedy in *Obergefell* quoted the Court’s prior holding that marriage is the “foundation of the family and of society, without which there would be neither civilization nor progress.”<sup>112</sup> If this was the basis on which he recognized a fundamental right to marry regardless of sexual

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<sup>107</sup> See cases cited *supra* note 96.

<sup>108</sup> See *Juliana*, 217 F.Supp.3d at 1260.

<sup>109</sup> *Id.* at 1260.

<sup>110</sup> TONES & BELLINGER, *supra* note 61, at 288.

<sup>111</sup> See *Juliana*, 217 F.Supp.3d. at 1253.

<sup>112</sup> 135 S. Ct. at 2601 (quoting *Maynard v. Hill*, 125 U.S. 190, 211 (1888)).

orientation, then a fundamental right to a functioning climate system must surely exist as well. A stable global climate is too, and perhaps more so than marriage, the “foundation of the family and of society”;<sup>113</sup> it ensures that American citizens have enough water to drink, food to eat, and air to breathe. Without such basic human necessities, “there would be neither civilization nor progress.”<sup>114</sup> To grip the truth of this statement, one need only ponder the catastrophic harm that could ensue if our climate system was *unstable*—the tragedy of Hurricane Katrina and its aftermath is one of many examples of this threat.

Moreover, rights guaranteed under the PTD are fundamental liberties protected as a matter of due process because they are “deeply rooted in this Nation’s history and tradition.”<sup>115</sup> As discussed above, the PTD predates the Constitution; it is a vestige of ancient Roman law that was firmly implanted into American law with this nation’s independence from England.<sup>116</sup> For over a century, it has been recognized as an inherent limit on the sovereignty of both numerous states and the federal government. If this does not qualify as rooted in this nation’s jurisprudential history, then little else does.

Another source of constitutional protection for the PTD is the Ninth Amendment, which provides that “[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”<sup>117</sup> The Constitution does not expressly grant rights traditionally preserved under the PTD. Yet, as explained, a court may interpret the Due Process Clauses of the Fifth and Fourteenth Amendments to provide protection of public trust rights. Therefore, the Ninth Amendment lends further constitutional basis for the right to a stable climate system.

In further support of the *Juliana* court’s holding, Judge Aiken made it a point to restrict the scope of the right she recognized to “provide some protection against the constitutionalization of all environmental claims”<sup>118</sup>:

This Court simply holds that where a complaint alleges governmental action is affirmatively and substantially damaging the climate system in a way that will cause human deaths, shorten human lifespans, result in widespread damage to property, threaten human food sources, and dramatically alter the planet’s ecosystem, it states a claim for a due process violation.<sup>119</sup>

This is reasonable because it does not allow plaintiffs to assert that minor acts of environmental degradation or climate instability violate their constitutional rights. Rather, it provides protection against *substantial* damage and *global* harm. “To hold otherwise would be to say that the Constitution affords no protection against a government’s knowing decision to poison the air its citizens breathe or the water its citizens drink.”<sup>120</sup>

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<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> McDonald v. City of Chicago, 561 U.S. 742, 767 (2010).

<sup>116</sup> See *supra* Part II.A.

<sup>117</sup> U.S. CONST. amend. IX.

<sup>118</sup> *Juliana v. United States*, 217 F. Supp. 1224, 1250. (D. Or. 2016).

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

*D. Why is Juliana Important? – Public Policy Considerations*

Important matters of judicial efficiency, public policy, and political reality further support the *Juliana* court's conclusions. For one thing, federal courts' erroneous failure to recognize a federal public trust will engender inconsistent case law at the state level. This is a paltry solution to an issue as universal in scope as climate change. Additionally, given the clear anti-environmental stance of the Trump administration and Republican-controlled Congress, the judiciary is likely the only branch of government that will spur federal action on climate change in the near term. Yet, regardless of the outcome of the *Juliana* litigation, public exposure of the evidence the plaintiffs will likely request during discovery will be impactful, given the current political climate.

i. Increased State-Level Litigation

There is a strong incentive for climate-change plaintiffs to bring public-trust climate change suits in the courts of certain states than in federal court.<sup>121</sup> If the claims in *Juliana* are ultimately dismissed in line with *Alec L.*, the incentive to sue in state courts will intensify, generating a potentially inconsistent string of litigation around the nation. Yet precedents and remedies varying from state to state would be a piecemeal, insufficient solution to an issue as global as climate change. The effects of climate change do not stop at state borders, so why should the obligations under the PTD? Rather, a more effective approach would be one unifying precedent that allows federal courts to declare the United States a trustee in protecting its citizens from climate change. *Juliana* can serve as this unifying precedent.

ii. Political Concerns

Additionally, given the November 2016 elections, *Juliana* perhaps represents the sole front on which there is potential for federal action on climate change for the foreseeable future. President Donald Trump appointed Oklahoma Attorney General Scott Pruitt, a climate change skeptic who led numerous legal attacks against the EPA, as the Agency's current Administrator.<sup>122</sup> The President has also vowed to scrap EPA's landmark Clean Power Plan ("CPP") (which would

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<sup>121</sup> See, e.g., PA. CONST. art. I, § 27 ("Pennsylvania's public natural resources are the common property of all the people. . . . As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people."); King v. Oahu Railway & Land Co., 11 Haw. 717, 725 (1899) ("The people of Hawaii hold the absolute rights to all its navigable waters and the soils under them for their own common use. The lands under the navigable waters in and around the territory of the Hawaiian Government are held in trust for the public uses of navigation."); Foster v. Wash. Dep't of Ecology, No. 14-2-25295-1 SEA (Wash. Super. Ct. Nov. 19, 2015) (recognizing that the state has a public trust duty to protect natural resources from climate change).

<sup>122</sup> Chris Mooney et al., *Trump names Scott Pruitt, Oklahoma Attorney General Suing EPA on Climate Change, to Head the EPA*, WASH. POST (Dec. 8, 2016), [https://www.washingtonpost.com/news/energy-environment/wp/2016/12/07/trump-names-scott-pruitt-oklahoma-attorney-general-suing-epa-on-climate-change-to-head-the-epa/?utm\\_term=.2337f4599503](https://www.washingtonpost.com/news/energy-environment/wp/2016/12/07/trump-names-scott-pruitt-oklahoma-attorney-general-suing-epa-on-climate-change-to-head-the-epa/?utm_term=.2337f4599503) [<https://perma.cc/PCK2-2SF8>]. Pruitt was confirmed by the U.S. Senate on February 17, 2017, by a vote of 52 to 46. Coral Davenport, *Senate Confirms Scott Pruitt as E.P.A. Head*, N.Y. TIMES (Feb. 17, 2017), [https://www.nytimes.com/2017/02/17/us/politics/scott-pruitt-environmental-protection-agency.html?\\_r=0](https://www.nytimes.com/2017/02/17/us/politics/scott-pruitt-environmental-protection-agency.html?_r=0) [<https://perma.cc/6Z2T-VKX3>].

regulate greenhouse gas emissions from existing power plants), among other regulations,<sup>123</sup> as well as to withdraw the United States from the Paris Climate Agreement.<sup>124</sup> He even famously stated on Twitter in 2012 that “[t]he concept of global warming was created by and for the Chinese in order to make U.S. manufacturing non-competitive.”<sup>125</sup> Based on the President’s actions thus far, it is safe to assume that a Trump-led executive branch will do little to nothing in terms of creating policy or enacting legislation to combat climate.

Republicans also control both houses of Congress and have consistently stalled all attempts for passing federal climate change legislation during both Obama administrations. Thus, it is likely that Congress will pass legislation to both undo climate progress made under the Obama administrations and prevent future action. Within the context of the CPP, as one of multiple examples, Congress may pass legislation repealing the CPP, or it could amend the CAA to remove both EPA’s authority to implement the CPP and citizens’ right to enforce the CAA on their own.<sup>126</sup> Congress could also cut EPA’s enforcement budget in the annual appropriations process, rendering the CPP essentially ineffective.<sup>127</sup>

*Juliana* is therefore crucial for those who desire swifter action on climate change for the coming few years. If it proceeds, *Juliana* would potentially render the judiciary the sole source across the federal government of a push for action on climate change. If *Juliana* fails, then all federal climate change activities may fail along with it under the Trump administration and Republican-controlled Congress.

Regardless of the eventual outcome of the case, however, putting the evidence the *Juliana* plaintiffs seek on trial would be monumental in its own right. During discovery, the *Juliana* plaintiffs will likely request from multiple federal agencies records of climate change research, collusion with industry to conceal or refute it, and other efforts which indicate either knowing acceleration of or failure to combat climate change. At trial, this evidence may compel the U.S. government to acknowledge human-induced climate change, and its contributing role in it, in federal court—an impactful admission in the Trump era.

The evidence may further suggest that the federal government for decades had an unethical relationship with private industry, favoring business over the public in breach of its fiduciary public trust duty. This could implicate former Secretary of State Rex Tillerson, as before joining the Trump cabinet, he chaired the American Petroleum Institute—one of the intervenors on behalf of the government in *Juliana*.<sup>128</sup> In this way, evidence from this case may bolster other

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<sup>123</sup> Kyle Feldscher, *Trump would Repeal Clean Power Plan, Other Big EPA Regs*, WASH. EXAM’R (Sept. 15, 2016), <http://www.washingtonexaminer.com/trump-would-repeal-clean-power-plan-other-big-epa-regs/article/2601931> [<https://perma.cc/ADT6-THZP>].

<sup>124</sup> Matt McGrath, *Donald Trump would ‘Cancel’ Paris Climate Deal*, BBC NEWS (May 27, 2016), <http://www.bbc.com/news/election-us-2016-36401174>. [<https://perma.cc/24SQ-66KN>].

<sup>125</sup> German Lopez, *Donald Trump Absolutely Did Say Global Warming is a Chinese Hoax*, VOX (Sept. 26, 2016), <http://www.vox.com/policy-and-politics/2016/9/26/13067910/presidential-debate-clinton-trump-global-warming-hoax> [<https://perma.cc/R2WD-9FWJ>].

<sup>126</sup> Thomas A. Lorenzen & Sherrie A. Armstrong, *Change in Administrations, Change in Course? The Staying Power of Obama’s Clean Power Plan and Possible Avenues for Change (Part 1 of 2)*, ABA TRENDS, Sept./Oct. 2016, <http://www.americanbar.org/publications/trends/2016-2017/september-october-2016/change-in-administrations.html> [<https://perma.cc/4WNQ-LB4K>].

<sup>127</sup> *Id.*

<sup>128</sup> See Emily Flitter, *U.S. State Department Nominee Tillerson Fights Climate Deposition*, REUTERS (Jan.

related suits around the nation. For example, the Attorneys General of New York and Massachusetts are both investigating Exxon Mobil Corp.—of which Rex Tillerson was formerly the CEO—for potentially concealing from investors the financial risks of climate change.<sup>129</sup>

Even if the plaintiffs cannot prove their claims by a preponderance of the evidence, public scrutiny of such evidence would be crucial. In the name of holding former public officials such as Rex Tillerson accountable, citizens—the beneficiaries of the public trust—ought to be aware of the government’s performance in executing its duties as trustee. The discovery in *Juliana* may thus do much in the way of government transparency, irrespective of whether the *Juliana* plaintiffs ultimately prevail.

### III. CONCLUSION – THE FUTURE OF THE PTD IN FEDERAL CLIMATE LITIGATION

As it currently stands, the PTD faces an uncertain future in federal court. The Supreme Court statement in *PPL Montana* and its accompanying precedents, however misguided they may be, are clear—for now—that the PTD is not based in federal law. *Juliana*’s holding that public trust rights are Due Process rights under the U.S. Constitution is unprecedented in American law.<sup>130</sup> This leaves a reviewing court with little precedent to guide its inquiry. Yet *Juliana* may have a strong chance of survival due to its novel constitutional elements and other key practical concerns.

One crucial determinant of the PTD’s future success in federal court will be the Supreme Court’s re-evaluation of the statement in *PPL Montana* that the PTD is a state-law matter. If challenged, the Court will be required to analyze the language in *Appleby* interpreting *Illinois Central*, which was subsequently quoted in *Coeur d’Alene* and then again in *PPL Montana*. Despite the consistency of the line of cases, future plaintiffs can make a compelling case for its reversal: these cases were based on a scant analysis, and none explicitly considered the existence of a federal public trust.<sup>131</sup> If nothing else, the novelty of the issue should convince the Supreme Court to grant certiorari to such a suit.

However, the Court may require a vote from Justice Anthony Kennedy to overturn this precedent—potentially an insurmountable task. Given President Trump’s appointment of Neil Gorsuch—a fourth conservative justice—to fill the spot vacated by the late Justice Antonin Scalia,<sup>132</sup> Justice Kennedy will represent the Court’s fifth swing vote. Yet Justice Kennedy authored both majority opinions in *Coeur d’Alene* and *PPL Montana*. Given this, it will likely be difficult to convince him to vote for a reversal of his reasoning in those cases.

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13, 2017), <http://www.reuters.com/article/us-usa-environment-tillerson-idUSKBN14X2KF> [<https://perma.cc/796P-993M>].

<sup>129</sup> Erik Larson, *Exxon Dealt a Blow as Texas Judge Sends Climate Suit to N.Y.*, BLOOMBERG (Mar. 29, 2017), <https://www.bloomberg.com/news/articles/2017-03-29/exxon-dealt-a-blow-as-texas-judge-sends-climate-suit-to-new-york> [<https://perma.cc/5BT9-YCJB>].

<sup>130</sup> Keith Goldberg, *Landmark Climate Suit Likely to be Tested on Appeal*, LAW360 (Nov. 15, 2016), <http://www.law360.com/articles/862482/landmark-climate-suit-likely-to-be-tested-on-appeal> [<https://perma.cc/Q8UE-8Y8D>].

<sup>131</sup> See *supra* Parts III.A.i–ii.

<sup>132</sup> Ryan Black & Ryan Owens, *Neil Gorsuch Could Be the Most Conservative Justice on the Supreme Court*, WASH. POST (Mar. 20, 2017), [https://www.washingtonpost.com/news/monkey-cage/wp/2017/02/15/neil-gorsuch-could-be-the-most-conservative-justice-on-the-supreme-court/?tid=a\\_inl&utm\\_term=.0fbc0c46bd81](https://www.washingtonpost.com/news/monkey-cage/wp/2017/02/15/neil-gorsuch-could-be-the-most-conservative-justice-on-the-supreme-court/?tid=a_inl&utm_term=.0fbc0c46bd81) [<https://perma.cc/J975-UDXR>].

Moreover, the Supreme Court denied a writ of certiorari to the plaintiffs in *Alec L.* after their argument for a federal public trust was struck down without a formal opinion by the D.C. Circuit.<sup>133</sup> This could bode poorly for a suit containing the assertion of a federal public trust, as the Supreme Court has already once rejected an opportunity to opine on the matter—and it has no obligation to decide any differently come a second opportunity.

Framing public trust claims as a matter of substantive due process may, however, provide a more successful path forward for *Juliana* plaintiffs and others like them. *Juliana*'s unprecedented recognition of a constitutional right to a stable climate system<sup>134</sup> may provide the impetus needed for the Supreme Court to grant certiorari. *Juliana* is among the first suits to have recognized a fundamental due process right in the wake of the landmark *Obergefell* decision, and the Supreme Court will thus desire to provide further clarification on the new framework. Also, the Court's body of cases on environmental public trust rights is rather small and, as discussed earlier, does not directly consider the existence of a federal public trust, despite the doctrine's long history in American law. These legal issues in combination make *Juliana* ripe for Supreme Court consideration.

It is true that *Juliana* may be a legal long shot; it is essentially the only federal case of its kind and contains significant constitutional implications.<sup>135</sup> However, the substantive due process right recognized in *Juliana* ought to be upheld even if appealed to the Supreme Court (which is predicted)<sup>136</sup> and given the confirmation of Neil Gorsuch as the Court's fourth conservative justice. The *Juliana* court's due process analysis relied extensively on *Obergefell*, which was authored by Justice Kennedy—the likely fifth swing vote for the *Juliana* plaintiffs. The gravity of *Obergefell* could be enough to compel Justice Kennedy to side with the *Juliana* plaintiffs and repudiate the language he included in *Coeur d'Alene* and *PPL Montana* rejecting the existence of a federal public trust. The notion that the government maintains a healthy environment in trust for the benefit of its citizens at its core is so “deeply rooted in this Nation's history and tradition” that without it, “there would be neither civilization nor progress.”<sup>137</sup> It would be plainly illogical to preclude the federal government from protecting such crucial rights when the states have been obliged to do so for over a century.

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<sup>133</sup> *Alec L. ex rel. Loorz v. McCarthy*, 135 S. Ct. 774 (2014).

<sup>134</sup> See Goldberg, *supra* note 130.

<sup>135</sup> See *id.*

<sup>136</sup> *Id.*

<sup>137</sup> *McDonald v. City of Chicago*, 561 U.S. 742, 767 (2010); *Obergefell v. Hodges*, 135 S. Ct. 2584, 2601 (2015) (quoting *Maynard v. Hill*, 125 U.S. 190, 211 (1888)).