No. 18-36082

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KELSEY CASCADIA ROSE JULIANA, et al.,
Plaintiffs-Appellees,

v.

UNITED STATES OF AMERICA, et al.,
Defendants-Appellants.

On Appeal from the United States District Court
for the District of Oregon (No. 6:15-cv-01517-AA)

BRIEF OF AMICI CURIAE NUCKELS OIL CO., INC. DBA MERIT OIL COMPANY, LIBERTY PACKING COMPANY LLC, WESTERN STATES TRUCKING ASSOCIATION, AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER IN SUPPORT OF DEFENDANTS-APPELLANTS UNITED STATES OF AMERICA

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Amici provide the following disclosures:

Nuckels Oil Co., Inc. dba Merit Oil Company ("Merit Oil") is a California corporation Merit Oil has no parent companies. No publicly held corporation has 10% or greater ownership in Merit Oil.

Liberty Packing Company LLC ("Liberty") is a California limited liability company. Liberty has no parent companies. No publicly held corporation has 10% or greater ownership in Liberty.

Western States Trucking Association, Inc. ("WSTA") is a nonprofit California trade association. WSTA has no parent companies. No publicly traded corporation has 10% or greater ownership in WSTA.

National Federation of Independent Business Small Business Legal Center ("NFIB Small Business Legal Center") is a California nonprofit mutual benefit corporation. NFIB has no parent companies. No publicly traded corporation has 10% or greater ownership in NFIB.

STATEMENT PURSUANT TO FED. R. APP. P. 29

Amici have received the consent of all parties to file this brief. No party or counsel thereof authored this brief in whole or in part, and no person other than Amici, their members, or their counsel have contributed money that was intended to fund the preparation or submittal of this brief.

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STATEMENT OF INTEREST OF AMICI CURIAE

Amici submit this amicus curiae brief pursuant to Fed. R. App. P. 29 in support of Defendants-Appellants United States of America, *et al*. The interests of amici Nuckels Oil Co., Inc. dba Merit Oil Company ("Merit Oil"), Liberty Packing Company LLC ("Liberty"), Western States Trucking Association, Inc. ("WSTA"), and the National Federation of Independent Business Small Business Legal Center ("NFIB Small Business Legal Center") (collectively, the "Amici") are as follows:

Merit Oil is a California corporation and is a petroleum jobber, wholesaler, and distributor. Merit Oil stores, transports, and wholesales a variety of petroleum products, including gasoline, diesel fuels, solvents, and kerosene, and operates a number of delivery trucks. Its operations emit greenhouse gases.

Liberty is a bulk processor of tomato products. Located in California, Liberty relies on natural gas boilers for production of its tomato products. Burning natural gas creates carbon dioxide, a greenhouse gas, as a byproduct.

WSTA is a nonprofit California trade association representing the interests of over 1,000 members involved in a variety of business throughout California whose members own and operate on-road and non-road vehicles, engines, and equipment. The operations of WSTA's members emit greenhouse gases. WSTA's predecessor organization, California Dump Truck Owners Association, was an intervenor-appellee in the case of *Alec L., et al., v. Environmental Protection Agency, et al.*, in

the United States Court of Appeals for the District of Columbia (Case No. 13-5192), as well as an intervenor-defendant in the lower court iteration of that case, *Alec L, et al. v. Lisa P. Jackson, et al.*, (D.C. D.C. Case No. 1:11-cv-2235). WSTA's predecessor succeeded in its motion to dismiss, arguing that there is no common law public trust doctrine in air resources under which a federal court could require the federal government to regulate greenhouse gas emissions.

NFIB Small Business Legal Center is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. The National Federation of Independent Business ("NFIB") is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses. NFIB represents small businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member employs 10 people and reports gross sales of about $500,000 a year. The NFIB membership is a reflection of American small business. To fulfill its role as the voice for small business, the NFIB Small Business Legal Center frequently files amicus briefs in

cases that will impact small businesses. The operations of many of NFIB's members emit greenhouse gases.

As emitters of greenhouse gases or organizations representing such emitters, Amici are keenly interested in the issue of whether there is a federal common law public trust doctrine in air resources under which the federal government could regulate greenhouse gas emissions. This brief argues that there is no such federal common law public trust doctrine. Accordingly, Amici respectfully request the Court to reverse the District Court's denial of the motion to dismiss, motion for judgment on the pleadings, and motion for summary judgment of Defendants-Appellants United States of America, *et al*.

SUMMARY OF ARGUMENT

Plaintiffs-Appellees Kelsey Cascadia Rose Juliana, et al., (collectively, "Juliana") ask this Court to order the federal government to comprehensively regulate greenhouse gas emissions nationwide based upon a purported federal common law public trust doctrine that in fact does not exist. Although some federal courts have applied ancient, state-based public trust common law principles to resolve property rights conflicts regarding lands submerged beneath tidal and navigable waterways, *see, e.g.*, *Phillips Petroleum v. Mississippi*, 484 U.S. 469, 473-74 (1988), no court has ever invoked any such state doctrine to compel regulatory action by the federal government. Moreover, no court has ever recognized a federal

common law public trust doctrine in natural resources, let alone air resources. In fact, the sweeping new regulatory agenda for greenhouse gas emissions sought by Juliana is unprecedented in federal jurisprudence.

A number of well-settled legal principles should have led the trial court to dismiss this extraordinary lawsuit as a matter of law. As the Supreme Court held in *PPL Montana, LLC v. Montana*, the public trust doctrine does not arise under federal law but instead "remains a matter of state law," 132 S.Ct. 1215, 1235 (2012), and therefore provides no cause of action against the federal government and presents no "federal question" within the jurisdiction of the federal judiciary under 28 U.S.C. § 1331. *PPL Montana* flatly precludes recognition or adoption of a federal common law public trust doctrine. Moreover, even had the Supreme Court not addressed this issue in *PPL Montana*, establishing a new federal common law along the lines suggested by Juliana would violate constitutional precepts established by the Supreme Court limiting federal court jurisdiction. *See, e.g., Ziglar v. Abbasi*, 137 S.Ct. 1843, 1855 (2017) (creation of implied causes of action for constitutional violations "now a disfavored judicial activity"). Finally, the Clean Air Act displaced any conceivable federal public trust doctrine in greenhouse gases, thereby precluding a non-statutory cause of action along the lines suggested by Juliana. *See AEP v. Connecticut*, 131 S.Ct. 2527, 2537-38 (2011).

ARGUMENT

I. There is no Federal Public Trust Doctrine

The claim asserted by Juliana in this case, based on the "public trust doctrine," should have been dismissed by the district court in response to any one of the motions subject to this appeal. A key threshold question is whether the "public trust doctrine" is a matter of state or federal law.

The power to create new federal law rests with the legislature, and there is "no federal general common law." *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). There are very few exceptions to this time honored principle. "[A]bsent some congressional authorization to formulate substantive rules of decision, federal common law exists only in such narrow areas as those concerned with the rights and obligations of the United States,[1] interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases." *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981) (citations omitted). None of these limited exceptions apply here.

The specific issue of whether there is any room under federal common law for regulating greenhouse gas emissions has been settled by the Supreme Court. The

[1] Federal common law regarding "obligations" refers to, for example, the substantive legal rules applicable to contractual obligations where the United States is a party. *See* Caleb Nelson, *The Persistence of General Law*, 106 Colum. L. Rev. 503, 510 (2006) ("To determine the federal government's contractual rights and obligations, courts use 'standard principles of contract law' accepted in most states.") (citations omitted).

Court declared in *PPL Montana* that "the public trust doctrine remains a matter of state law" and its "contours . . . do not depend upon the Constitution." 132 S.Ct. at 1234-35. The doctrine affects the rights and powers of *states*, but has no application to the federal government. *Id.* *PPL Montana* confirms that the public trust doctrine is not one of federal law—either constitutional, statutory, or common—but is instead exclusively a "matter of state law." *Id.*

This discussion in *PPL Montana* cannot be viewed as mere "dicta," or somehow not binding on federal courts, as the district court asserted. (Opinion and Order denying motion to dismiss at pp. 44) (characterizing *PPL Montana*'s discussion as "a string citation"). In that case, Montana had argued, in support of its claim to title over certain riverbeds in dispute, that "denying the State title to the riverbeds . . . w[ould] undermine the public trust doctrine" by interfering with its rights over navigable waters within its borders. 132 S.Ct. at 1234. The State asserted that the public trust doctrine is grounded in the U.S. Constitution, as part of the "equal footing doctrine," Br. for Resp. 53, 132 S.Ct. 1215 (No. 10-218), and was therefore binding as a matter of federal law, *id.* at 25 & n.11.

The equal footing doctrine has indeed long been recognized as a principle derived from the Constitution, providing that each State, upon its admission to the Union, "gains title within its borders to the beds of waters then navigable . . . or tidally influenced." 132 S.Ct. at 1228. By contrast, however, any obligation to

maintain those lands for the "public trust" arises only *after* the lands have passed to the State, and then solely as a matter of state law. *Id.* at 1234-35; *see also Phillips Petroleum v. Mississippi*, 484 U.S. 469, 473-74 (1988). The Supreme Court in *PPL Montana* recognized precisely this point, rejecting Montana's position and explaining that, "[w]hile equal-footing cases have noted that the State takes title to the navigable waters and their beds in trust for the public, the contours of that public trust do not depend upon the Constitution" but "remains a matter of state law." 132 S.Ct. at 1234-35. That conclusion—that the public trust doctrine does not apply as a matter of federal law and therefore could not support Montana's claim to title—was plainly necessary to the result in *PPL Montana* and must be deemed part of the Court's "holding," binding in future cases.[2] *See, e.g.*, *Seminole Tribe of Florida v.*

[2] Even if the Court's discussion of the public trust doctrine might somehow be deemed unnecessary to the result, it should be given its due weight. *See, e.g.*, *Siskiyou Regional Educ. Project v. U.S. Forest Service*, 565 F.3d 545, 549 n. 1 (9th Cir. 2009) ("While that statement in *Pace* may have been dictum, it was a part of the Supreme Court's analysis, and lower federal courts "'do not treat considered dicta of the Supreme Court lightly.'") (quoting *United States v. Choudhry*, 461 F.3d 1097, 1102 n. 4 (9th Cir. 2006)); *Lemoge v. United States*, 587 F.3d 1188, 1193 (9th Cir. 2009) ("Although Barton contends that the Court's statement in *Coastal Commission* should be ignored as dicta, we are told that we are to pay close attention even to Supreme Court dicta") (citing *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121, 1129 (9th Cir. 2006) (en banc) ("'as a lower federal court, we are advised to follow the Supreme Court's considered dicta'"); citation and internal punctuation omitted)); *al-Kidd v. Ashcroft*, 580 F.3d 949, 987 n. 8 (9th Cir. 2009) (Bea, J., concurrence and dissent) ("Even if the Supreme Court's statements on the issue are dicta, they have considerable weight here. In part because we cannot 'lightly' disregard any Supreme Court precedent[.]'") (citation omitted); *Mueller v. Auker*, 576 F.3d 979, 990 n. 2

Florida, 517 U.S. 44, 66-67 (1996) ("When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound.").

The PPL Montana holding, as well as its reasoning, did not depart from long-settled law. The Supreme Court and other courts have, in decisions stretching back for more than a century, consistently interpreted and applied the public trust doctrine as an exclusively state-law principle that governs only state actors. *See, e.g.*, *Phillips Petroleum*, 484 U.S. at 473; *Appleby v. City of N.Y.*, 271 U.S. 364, 395 (1926); *Shively v. Bowlby*, 152 U.S. 1 (1894); *Dist. of Columbia v. Air Fla., Inc.*, 750 F.2d 1077 (D.C. Cir. 1984); *see also* Douglas L. Grant, *Underpinnings of the Public Trust Doctrine: Lessons from Illinois Central Railroad*, 33 Ariz. St. L.J. 849, 870 (2001) ("[T]he Supreme Court has steadfastly treated the public trust doctrine as a matter of state law not federal law."). Recent cases have recognized that this conclusion is now unambiguously mandated by *PPL Montana*. *See, e.g., Alec L. ex rel. v. McCarthy*, 561 Fed.Appx. 7 (Mem) (D.C. Cir. 2014), *Brigham Oil & Gas, L.P. v. N. Dakota Bd. Of Univ. & Sch. Lands*, 866 F.Supp.2d 1082, 1088 (D.N.D. 2012) ("The United States Supreme Court recently made clear that the public trust doctrine is a matter of state law."); *see also Sansotta v. Town of Nags Head*, 724 F.3d 533, 537

(9th Cir. 2009) ("Dicta it may be, but it suggests that the Supreme Court and the law on the subject may be open to this principle.").

n.3 (4th Cir. 2013) (same); *United States v. 32.42 Acres of Land*, 683 F.3d 1030, 1038 (9th Cir. 2012) (same).

In no prior case, despite two district court decisions cited by the district court, Doc. 83 (Opinion and Order denying motion to dismiss at pp. 46-47), has a federal court held that the public trust doctrine arises as a matter of federal law or applies directly to the federal government. Those cases, *City of Alameda v. Todd Shipyards Corp.*, 635 F.Supp. 1447 (N.D. Cal. 1986), and *United States v. 1.58 Acres of Land*, 523 F.Supp. 120 (D. Mass. 1981), concluded that a land conveyance from a state to the federal government did not extinguish public trust restrictions burdening a *state's* title, but neither case recognized a free-standing federal public trust doctrine of the type advanced here. An additional case from this Court that the district court struggled against, *United States v. 32.42 Acres of Land*, 683 F.3d 1030 (9th Cir. 2012), held—quoting *PPL Montana*—that "the public trust doctrine remains a matter of state law" and "the federal government's [regulatory] power [cannot be subjugated to] state law public trust doctrine." *Id.* at 1038. These decisions cannot be interpreted—particularly post-*PPL Montana*—to establish a federal public trust doctrine binding on federal officials.[3]

[3] That is particularly true since the version of the public trust doctrine asserted here reflects a vast expansion of the doctrine's traditional application to lands submerged beneath tidal and navigable waterways, and its traditional function of restricting transfers of title or alienation of those lands. *See, e.g., Ill. Cent. R. Co. v. State of Illinois*, 146 U.S. 387 (1892). Although state courts have sometimes relied

The district court went even further afield by holding that federal law not only embodies the public trust doctrine but also creates an implied cause of action to enforce it. The Supreme Court has for decades admonished that federal courts should not imply new causes of action or expand existing ones in the absence of express statutory authorization. *Carlson v. Green*, 446 U.S. 14 (1980). To do so, the Court has explained, would "intrud[e] within a field properly within Congress' control," *U.S. v. Standard Oil Co. of Cal.*, 332 U.S. 301, 316 (1947), because Congress "is in a better position to decide whether or not the public interest would be served by creating [the cause of action]," *Bush v. Lucas*, 462 U.S. 367, 388-90 (1983). Recognizing the claim in this case would undoubtedly—and impermissibly—"intrud[e] within a field properly within Congress' control," *Standard Oil*, 332 U.S. at 316—the regulation of greenhouse gas emissions across the Nation.

II. Even if there were a Federal Public Trust Doctrine, it has been Displaced by the Clean Air Act.

The fact that there is no actionable federal public trust doctrine of the type suggested by Juliana is further confirmed by the fact that Congress has already legislated on these issues, directing in the Clean Air Act that EPA consider (as appropriate under statutory requirements) nationwide standards for greenhouse gas

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on specific state constitutional or statutory provisions to extend the state doctrines to certain other natural resources within a State's jurisdiction, the atmosphere, as such, is not a resource that can be owned in any cognizable form of ownership.

emissions. *See AEP v. Connecticut*, 131 S.Ct. 2527, 2537-38 (2011). It is well-settled that, when Congress enacts a federal statute that "speak[s] directly to [the] question" previously addressed by a non-statutory cause of action, the cause of action is displaced and can no longer be recognized. *Id.* at 2537. Indeed, in *AEP*, the Supreme Court addressed the specific issue presented here—whether the Clean Air Act precludes non-statutory claims seeking restrictions on greenhouse gas emissions—and held unambiguously "that the Clean Air Act and the EPA actions it authorizes" displace any such claims. *Id.*

Congress has addressed greenhouse gas emissions with an extensive regulatory scheme in the Clean Air Act, which authorizes EPA to regulate greenhouse gas emissions such as carbon dioxide. *Massachusetts v. EPA*, 549 U.S. 497, 528-529 (2007)). Indeed, the "Act 'speaks directly' to emissions of carbon dioxide." *AEP*, 131 S.Ct. at 2537. The Clean Air Act even specifies the obligations that the Defendant Administrator of the Environmental Protection Agency has with respect to the regulation of carbon dioxide emissions. 42 U.S.C. § 7411(b)(1)(B) (describing the required rulemaking process); 42 U.S.C. § 7411(f)(2) (describing the considerations EPA should address in crafting regulations); *see also Massachusetts v. EPA*, 549 U.S. at 533 ("If EPA makes a finding of endangerment [regarding greenhouse gases], the Clean Air Act requires the agency to regulate emissions of the deleterious pollutant from new motor vehicles."). Accordingly, "[t]he Act itself

thus provides a means to seek limits on emissions of carbon dioxide from domestic power plants – the same relief the plaintiffs seek by invoking federal common law. We see no room for a parallel track."). *AEP*, 131 S.Ct. at 2538

The district court maintained that *AEP* is distinguishable because it did not specifically address public trust claims; instead it addressed another federal common law claim of public nuisance. (Doc. 83, Opinion and Order denying motion to dismiss, at p. 49). But this misapprehends displacement. Claims are displaced whenever a statute "speaks" to the relevant issues, even if it does not offer "precisely" the relief sought and regardless of the parties against which the claims might be brought. For example, the Court held in *AEP* that the claims there were displaced even though the statute did not provide the plaintiffs with an equivalent form of relief against the named defendants. *See* 131 S.Ct. at 2537-40. That holding applies here and forecloses Juliana's claim.

There is no reason to differentiate between the greenhouse gas common law nuisance claims rejected in *AEP* and the greenhouse gas common law public trust claims brought here. Either the Clean Air Act displaces federal common law regarding greenhouse gas emissions or it does not. If the common law nuisance claims fall because of displacement by the Clean Air Act, so too must these common law public trust claims.

The Supreme Court has indeed stated that the public trust doctrine in particular is "subject always to the paramount right of congress." *Ill. Cent.*, 146 U.S. at 435. The claim in this case, even if it might otherwise have been recognized, has been displaced by the Clean Air Act.

In short, there is no basis in federal law—whether the Constitution, statute, or common law—for recognition of a federal public trust claim. Because the public trust doctrine "remains a matter of state law," *PPL Montana*, 132 S.Ct. at 1235, Juliana's claim should have been dismissed by the district court.

CONCLUSION

For the foregoing reasons, this Court should reverse the District Court's denial of the motion to dismiss, motion for judgment on the pleadings, and motion for summary judgment of Defendants-Appellants United States of America, *et al*.

DATED: February 7, 2019

Respectfully submitted,

/s/Theodore Hadzi-Antich

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CERTIFICATE OF SERVICE

I hereby certify that on February 7, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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