No. 14-405

In The
Supreme Court of the United States

ALEC L., By and Through His Guardian Ad Litem Victoria Loorz, et al.,

Petitioners,

v.

GINA MCCARTHY, Administrator, Environmental Protection Agency, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

AMICUS CURIAE BRIEF OF LAW PROFESSORS IN SUPPORT OF GRANTING WRIT OF CERTIORARI

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IDENTITY AND INTERESTS OF AMICI CURIAE

Amici law professors, listed below, teach and write in the area of property and natural resources law and maintain a professional interest in the Court's public trust doctrine jurisprudence. Collectively, they have over 1,100 years of teaching experience. They file this brief as individuals, not on behalf of their institutions.[1]

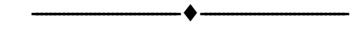
SUMMARY OF ARGUMENT

In the underlying decision, the public trust doctrine has been misunderstood as purely a matter of state common law. The doctrine is in fact an inherent limit on sovereignty which antedates the U.S. Constitution and was preserved by the Framers as a reserved power restriction on both the federal and state governments. Nothing in the Court's recent decision in *PPL Montana v. Montana*, 132 S.Ct. 1215 (2012), which the lower court misinterpreted, indicates otherwise.

[1] Pursuant to this Court's Rule 37.6, amici certify that no counsel for any party authored this brief in whole or in part, and that no one other than amici and their counsel made any monetary contribution intended to fund the preparation or submission of this brief. Furthermore, pursuant to Rule 37.2(a), counsel of record for all parties received timely notice of the amici's intention to file this brief. Petitioners, Respondents, and Intervenors have provided consent to the filing of this brief.

The federal nature of the public trust doctrine was recognized over a century ago by this Court in *Illinois Central Railroad v. Illinois*, 146 U.S. 387 (1892). That decision has functioned as binding federal law and is so understood by the vast majority of states. It would be erroneous to interpret that decision as expressing state law.

As a constitutionally recognized limit on sovereignty, the public trust doctrine is not subject to displacement by congressional statutes. Numerous opinions of this Court have recognized the doctrine's applicability to the federal government, reinforcing the notion that the Constitution recognizes the public trust doctrine as a reserved power withheld from both the federal and state governments.



ARGUMENT

The decision of the District of Columbia Circuit Court of Appeals in the case below created a split among the circuit courts, which the Court should resolve. *See* Pet. at 4, 15-18. We leave that argument to Petitioners. Here, we wish to emphasize that the public trust doctrine has been misunderstood as merely a state common law principle. It is in fact an inherent limit on all sovereign power – a fetter on the monopolistic tendencies of all governments, never more necessary than in the 21st century – which we explain below. This ancient doctrine – widely recognized to have pre-dated the federal Constitution – has

imposed limits on the discretion of sovereigns worldwide.[2] There is ample precedent to apply the doctrine to the federal government,[3] and there is no reason to interpret the Court's recent *dicta* related to the public trust doctrine, as the court below did, to limit the doctrine's application to *only* state governments. Such an interpretation would leave this critically important limit on all sovereign power to the vagaries of state courts, would deprive Article III courts of jurisdiction over non-statutory resource damage claims, and would allow the federal government unfettered discretion to create and maintain monopolies concerning federal public land and ocean resources.

I. THE LOWER COURT MISINTERPRETED *PPL MONTANA V. MONTANA*

The Court of Appeals' memorandum decision below erroneously interpreted *PPL Montana v. Montana*, 132 S.Ct. 1215 (2012), to deny "any federal constitutional foundation" for the public trust doctrine "without qualification or reservation." *Alec L. v. McCarthy*, 561 F. Appx. 7, 8 (2014). But the applicability of the public trust doctrine to the federal government was not at issue in *PPL Montana*, which

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[2] *E.g.*, *M.C. Mehta v. Kamal Nath*, 1 S.C.C. 388 (1997) (India); *Oposa v. Factoran*, G.R. No. 101083, 224 S.C.R.A. 792, 805 (1993) (Philippines); *Waweru v. Republic*, 1 K.L.R. 677 (2006) (Kenya).

[3] *See infra* discussion of *In Re Steuart Transportation Co.* and *1.58 Acres of Land* and the cases examined in section V.

concerned whether the state owned certain riverbeds in Montana. In *PPL Montana*, reversing the Montana Supreme Court's interpretation of the federal rule of state riverbed ownership, Justice Kennedy traced the roots of the public trust doctrine to Roman and English law and cited foundational cases such as *Arnold v. Mundy,* 6 N.L.J. 1 (1821) (the public trust doctrine was inherited from the English sovereign); *Illinois Central Railroad v. Illinois*, 146 U.S. 387 (1892) (the public trust doctrine prohibits large-scale privatization of public trust resources); and *National Audubon Society v. Superior Court*, 33 Cal. App. 419 (1983) (the public trust doctrine requires the trustee to continuously supervise public trust resources to ensure their use for public trust purposes).

This Court's opinion in *PPL Montana* recognized the federal government's trust obligation to convey bedland title to admitted states upon statehood as a federal constitutional duty. *PPL Montana*, 132 S.Ct. at 1227. This trust prevents the federal government from making pre-statehood conveyances of trust lands except in unusual circumstances. *Shively v. Bowlby*, 152 U.S. 1, 49-50 (1894) (sanctioning pre-statehood grants of trust lands only in cases of "international duty" or "public exigency"); *Utah Div. of State Lands v. United States,* 482 U.S. 193 (1987) (deciding that two pre-statehood grants did not meet the *Shively* standard).

The *PPL Montana* Court's statement that "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," is unassailable. But the Court of Appeals misinterpreted this language to limit the scope of any public trust to states alone. There is nothing in the *PPL Montana* statement to suggest that the Supreme Court thought the public trust doctrine, in its entirety, applied *exclusively* to the states, or that the federal government was exempt from public trust obligations in its management of trust resources. The Court simply did not have the issue of the public trust doctrine's application to the federal government before it.

It is true that *dicta* in some Supreme Court opinions have suggested that the public trust doctrine is a matter of state law. *See, e.g.*, *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 285 (1997); *Phillips Petroleum Co. v. Mississippi,* 484 U.S. 469, 474-75 (1989). Those cases rely on *Appleby v. City of New York*, 271 U.S. 364, 395 (1926), for the proposition that the public trust doctrine is "necessarily a statement of [state] law." However, none of these cases involved a claim of the applicability of the public trust doctrine to the federal government. In fact, both *Phillips* and *Appleby* were initially brought in state courts, and the federal government was not even involved in the litigation of those cases. *Appleby* concerned an allegation that the City of New York had unconstitutionally impaired the petitioner's right to contract, and in *Phillips* the issue was whether the state owned submerged tidal lands that were not navigable-in-fact. Moreover, all of these cases involved

disputes over the ownership of submerged lands, just as in *PPL Montana*, so even if the *Appleby dictum* was accurate, its application must necessarily be limited to those facts. As discussed below in section III, however, the *Appleby* Court clearly misinterpreted *Illinois Central Railroad v. Illinois*, 146 U.S. 387 (1892), a case which, as shown in section II below, cannot be interpreted to be a product of state law.

Other courts have expressly applied the public trust doctrine to the federal government where responsibility for managing trust resources is shared with the states. For example, in *In Re Steuart Transportation Co.,* 495 F.Supp. 38 (E.D. Va. 1980), the federal government, along with the state, invoked the public trust doctrine in a claim for damages for loss of migratory waterfowl from an oil spill in Chesapeake Bay. The court upheld both the federal and state claims, stating that "[u]nder the public trust doctrine" both governments "have the right and the duty to protect and preserve the public's interest in natural wildlife resources." *Id.* at 40. Similarly, in *United States v. 1.58 Acres of Land,* 523 F.Supp. 120, 122 (D. Mass. 1981), the court stated that the public trust "is administered by both the federal and state sovereigns." Applying the public trust doctrine to submerged land that the federal government condemned in Boston Harbor, the court explained that "[t]hose aspects of the public interest . . . that relate to the commerce and other powers delegated to the federal government are administered by Congress in its capacity as trustee of the jus publicum," along with

the state "as co-trustee of the jus publicum." *Id.* at 123.

These cases demonstrate that the state and federal governments are co-trustees, each responsible for maintaining the *jus publicum* within their spheres of responsibility. As the *1.58 Acres of Land* court explained, "[s]ince the trust impressed upon this property is governmental and administered jointly by the state and federal governments by virtue of their sovereignty, neither sovereign may alienate this land free and clear of the public trust." *Id.* at 124. Indeed, this concept of cotenancy has guided the judicial interpretation of property rights in a range of contexts in the federal courts. *E.g.*, *Idaho ex rel. Evans v. Oregon*, 462 U.S. 1017, 1031 n. 1 (1983) (O'Connor, J., dissenting) (migratory wildlife); *Arizona v. California*, 373 U.S. 546, 601 (1963) (correlative water rights); *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 676-79 (1979) (shared state and tribal fishing rights). As noted by Justice Kennedy, "[t]he principles of a cotenancy apply to the legal relation among parties who share a right of possession in real or personal property." *Puget Sound Gillnetters Ass'n v. U.S. Dist. Court for W. Dist. of Wash.*, 573 F.2d 1123, 1134 (9th Cir. 1978) (citing 2 W. Blackstone, Commentaries *180 ("For indeed tenancies in common differ in nothing from sole estates but merely in the blending and unity of possession.")), *vacated sub nom. Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979) modified sub nom.

Washington v. United States, 444 U.S. 816 (1979). There is in short no inherent conflict with applying the public trust doctrine to both sovereigns.

II. *ILLINOIS CENTRAL RAILROAD V. ILLINOIS* WAS GROUNDED ON FEDERAL LAW

The lodestar case of the public trust doctrine is *Illinois Central Railroad. See* Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich. L. Rev. 471, 489 (1970). The case concerned the state's large-scale conveyance of Chicago's inner harbor to a railroad, an attempt by the state to rescind the grant, and the railroad company's ensuing suit challenging the rescission. *See* Joseph D. Kearney & Thomas W. Merrill, *The Origins of the American Public Trust Doctrine: What Really Happened in* Illinois Central, 71 U. Chi. L. Rev. 799 (2004) (explaining the politics that influenced the original 1869 grant, including likely bribery).

The Court, in an opinion by Mr. Justice Field, upheld the state, ruling that while the state held title to the land underlying Lake Michigan, that title was qualified – and largely inalienable. The state's title to lands submerged beneath navigable waters, the Court decided, was "different in character from that which the state holds in lands intended for sale." *Illinois Central*, 146 U.S. at 452. Although the state might privatize submerged lands to foster navigation

or other public purposes, it could not "abdicat[e]" its control over the navigable waters of an entire harbor.

> Such abdication is not consistent with the exercise of that trust which requires the government of the state to preserve such waters for the use of the public. The trust devolving upon the state for the public, and which only can be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property.

Id. at 453. The opinion did not identify any source of state law that imposed this trust obligation on the state.

The Court proceeded to explain that:

> [a] grant of all the lands under navigable waters of a state and has never been adjudged to be within the legislative power; and any attempted grant of the kind would be held, if not absolutely void on its face, as subject to revocation. The state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and the soils under them . . . than it can abdicate its police powers. . . . [4]

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[4] The Court did identify two exceptions to its non-alienability rule: 1) where "for the improvement of the navigation and use of the waters," or 2) "when parcels can be disposed of without impairment of the public interest in what remains. . . ." *Illinois Central,* 146 U.S. at 453.

Id. at 453. Again, the Court cited no state law that imposed this trust obligation.

With no state law upon which to rely, the Court must have been applying federal law. That source of federal law lies embedded in the U.S. Constitution. The Court relied heavily on *Newton v. Commissioners*, 100 U.S. 548 (1879). That case concerned an 1846 Ohio statute awarding a county seat to the town of Canfield that was reversed by subsequent legislation enacted in 1874. Canfield citizens challenged this legislative reversal, but the Court rejected their challenge, stating that there could be no irrepealable public laws because, as the *Illinois Central* Court explained, "every succeeding legislature possesses the same jurisdiction and power as its predecessors . . . [and] it is vital to the public welfare that each one should be able at all times to do whatever the varying circumstances and present exigencies attending to the subject may require; and that a different result would be fraught with evil." *Illinois Central*, 146 U.S. at 459; *see also Newton*, 100 U.S. at 559. This statement of the Constitution's reserved powers doctrine recognizes inherent limits on sovereignty. As the Court recognized a century ago, "it is settled that neither the 'contract' clause nor the 'due process' clause has the effect of overriding the power of the state to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community; that this power can neither be abdicated nor bargained away, and is inalienable even by express grant; and

that all contract and property rights are held subject to its fair exercise." *Atl. Coast Line R. Co. v. City of Goldsboro*, 232 U.S. 548, 558 (1914).

The reserved powers principle applies to the federal government, as this Court has recognized. "[T]he will of a particular Congress . . . does not impose itself upon those to follow in succeeding years." *Reichelderfer v. Quinn*, 287 U.S. 315, 318 (1932). More recently, in *United States v. Winstar Corp.*, 518 U.S. 839, 888-89 (1996) (plurality opinion), the Court acknowledged, without deciding, that the logic of the reserved powers doctrine should apply equally to the federal government.[5] *See also Lockhart v. United States*, 546 U.S. 142, 147-48 (2005) (J. Scalia, concurring) ("[O]ne legislature, . . . cannot abridge the powers of a succeeding legislature.") (quoting *Fletcher v. Peck*, 6 Cranch 87, 135, 3 L.Ed. 162 (1810)). Only ten years ago, Justice Scalia observed that the Supreme Court's cases "have uniformly endorsed this principle." *Lockhart*, 546 U.S. at 147.

The *Illinois Central* Court embraced the reserved powers doctrine when it concluded that "[a] grant of all the lands under the navigable waters of a state has never been adjudged to be within the legislative

[5] The reserved powers doctrine largely evolved through the litigation of claims against States, where litigants had brought suit for violations of the Contract Clause. *United States v. Winstar Corp.*, 518 U.S. 839, 873-76, 888-89 (1996).

power. . . ." 146 U.S. at 453. As Justice Field explained, the reserved powers doctrine prevents one legislature from privatizing submerged lands, because otherwise "every harbor in the country [would be] at the mercy of a majority of the legislature of the state in which the harbor is situated." *Id.* at 455. The doctrine forbids a legislature from bargaining away essential sovereign powers and thus protects the authority of future legislatures – and future generations – to take action on what the *Illinois Central* opinion referred to as issues "of public concern to the whole people." *Id.* at 455.

The *Illinois Central* Court cited no state law authority in applying the reserved powers doctrine. A majority of state courts citing the decision have considered it binding upon them, presumably due to its federal nature. *See* Crystal Chase, *The* Illinois Central *Public Trust Doctrine and Federal Common Law: An Unconventional View*, 16 Hastings W.-Nw. J. Envtl. L. & Pol'y 113, 151-53 (2010) (of thirty-five state courts relying on *Illinois Central*, twenty-nine consider it to be controlling). To the extent that it has been assumed applicable only to state sovereigns, the *Illinois Central* opinion has been misinterpreted.

In fact, just two years after *Illinois Central*, the Court continued to solidify the federal framework concerning submerged lands and the public trust obligation that inheres in their sovereign control. In *Shively v. Bowlby,* 152 U.S. 1 (1894), the Court rendered an important interpretation of the constitutional equal footing doctrine as it applied to circumstances

involving tidelands in Oregon.[6] The Court upheld a state court decision favoring a state tidelands grantee over a federal grantee who received a land patent under the federal Oregon Donation Land Claim Act, Ch. 76, 9 Stat. 496 (1850).

Declaring that lands beneath navigable waters passed in trust for the public from the King of England to colonial proprietors and eventually to states as "incident to the powers of government," *id*. at 16 (quoting *Martin v. Waddell's Lessee*, 41 U.S. 367, 413 (1842)), apparently by federal rule, the *Shively* opinion also acknowledged the diversity of state tidelands rules – "there is no universal and uniform law." *Id.* at 26. The Court distinguished between the *jus publicum* (the title underpinning the sovereign's trust obligation) and the *jus privatum* (the private interest) in tidal waters without reference to any state law, relying only on Lord Mathew Hale's treatise and a long line of federal cases. *Id.* at 11-13, 17-18, 48-49.

The limits imposed by the trust were not at issue in *Shively.* Instead, the case concerned whether a pre-statehood federal grant included submerged lands. The *Shively* opinion established the rule allowing such pre-statehood federal grants only in unusual circumstances: 1) to carry out an "international duty,"

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[6] The Supreme Court has characterized *Shively v. Bowlby* as the "seminal case in American public trust jurisprudence." *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 473 (1988) (internal quotation omitted).

and 2) where justified by "public exigency." *Id.* at 49-50, 59. These limits clearly were not imposed by state law. Applying this rule of narrow construction, the Court found that the pre-statehood federal grant did not include submerged lands; instead, those were subsequently conveyed to the state under the equal footing doctrine.[7] Although the state grantee prevailed in *Shively*, that result followed from the Court's interpretation of federal law.

III. *ILLINOIS CENTRAL* HAS BEEN MISINTERPRETED BY ENSUING CASES

Despite the federal law basis of *Illinois Central*, as unaltered and in fact underscored in cases such as *Shively*, some later Supreme Court decisions have inexplicably morphed *Illinois Central*'s landmark pronouncement of the public trust into a presentation of state law – notwithstanding a complete lack of reliance on state law in *Illinois Central*.

In *Appleby v. City of New York*, 271 U.S. 364, 380 (1926), a case that did not involve the public trust, the Court injected an erroneous conclusion in the form of dicta that "the extent of the power of the State and city to part with property under the navigable waters . . . is a state question." *Appleby* concerned two submerged land lots in the navigable Hudson River that had been previously granted to

[7] The state's subsequent conveyance to a private landowner presumably was only the *jus privatum*, not the *jus publicum*.

Appleby by the City in fee simple. Prior to Appleby's grant from the City, the State had granted the entire tideway of Manhattan to the City. *Id.* at 369-71. Appleby sought to enjoin the City's ongoing dredging of his submerged lands (to accommodate proposed docks and mooring spaces), alleging that the City's actions unconstitutionally impaired his right to contract.

The Court ruled that the City's dredging of Appleby's lots unconstitutionally impaired his contract rights. The case never raised the issue of whether the State's initial grant to the City was valid under the public trust. *Appleby* involved only an action for injunctive relief against the City's dredging of submerged lands; the City did not defend its actions on public trust grounds, and thus, the Court never took up the issue.[8] Nonetheless, the Court proceeded to proclaim – without analysis – that "the

[8] To distinguish the circumstances in *Appleby* from the land grant rejected by the Court in *Illinois Central*, the *Appleby* Court relied on a New York opinion, *People v. Steeplechase Park Co.*, 113 N.E. 521 (N.Y. 1916). In *Steeplechase Park*, New York State sought removal of certain encroaching structures from the foreshore of Coney Island, asserting that the structures interfered with the public's right of passage over and usage of the foreshore. In affirming the lower court's grant of injunctions over some of the lands and reversing others, the *Steeplechase* court noted that "[w]hatever we may think of the wisdom of [the] grant, the propriety or validity of the grant is not attacked in this action. Although the action is brought in the name of the people it is not brought to review . . . nor to set aside or amend the grant. It is, as stated, an action for an injunction." *Id.* at 526.

conclusion reached [in *Illinois Central*] was necessarily a statement of Illinois law. . . ." *Id.* at 395. There remains no indication of what state law governed the decision in *Illinois Central*. And contrasting its own statement, the *Appleby* decision noted that "the general principle and exception [of *Illinois Central*] have been recognized the country over. . . ." – indicating the federal sweep and seemingly binding nature of *Illinois Central* on the states. *Id.*

Unfortunately, the *Appleby dictum* about state law governing the public trust doctrine has been lifted without any careful analysis in ensuing Supreme Court decisions. For example, in *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 475 (1988), the Court relied on *Appleby* in concluding that "it has been long established that the individual States have the authority to define the limits of the lands held in public trust and to recognize private rights in such lands as they see fit." That statement, if interpreted as recognizing the states' ongoing role in applying the public trust, does accurately describe existing law, but it certainly cannot be taken to imply the utter absence of a federal public trust doctrine.

Phillips had nothing to do with the existence of the federal public trust doctrine. The case concerned Mississippi's claim that non-navigable tidelands were owned by the state under the public trust doctrine, a conclusion which the state courts affirmed. The Court's decision upheld the state courts. The federal government played no role in the litigation, and no

one raised the issue of the federal public trust doctrine.

IV. CONGRESSIONAL STATUTES DO NOT DISPLACE FEDERAL PUBLIC TRUST LIMITS ON SOVEREIGNTY

As a constitutionally-based inherent attribute of sovereignty, the relationship between the public trust doctrine and federal statutes is fundamentally different from the relationship between common law and federal statutes. As Justice Kennedy observed in *Idaho v. Coeur d'Alene Tribe,* 521 U.S. 261, 284 (1997), "navigable waters uniquely implicate sovereign interests." This unique sovereign role in trust resources implies limits as well as powers and is not based on common law that is reversible by statutes. If the public trust were merely a common law doctrine, the statutory grant in *Illinois Central* would not have been reversed by the Supreme Court.

Federal statutes may of course displace common law remedies, and this Court has concluded that the Clean Air Act has done so in certain contexts. *American Electric Power Co. (AEP) v. Connecticut*, 131 S.Ct. 2527 (2011). But as a sovereign obligation to protect public trust assets not only for the present but also for future generations, the public trust doctrine is not displaceable by a statute, even when that statute "'speak[s] directly to [the] question' at issue." *Id.* at 2530, 2537. Instead, a sovereign trustee – like a private trustee – is judged on the effectiveness of its

acts in achieving trust asset protection. In other words, the public trust provides the ultimate measure of a legislature's fiduciary performance in enacting statutes.

Unlike the public nuisance claim at issue in *AEP*, which asked the judiciary to determine a reasonable level of emissions for the particular defendants before the court,[9] a public trust claim inquires as to whether the sovereign is protecting the trust assets sufficiently to safeguard the interests of the present and future beneficiaries. *See, e.g.*, Gerald Torres & Nathan Bellinger, *The Public Trust: The Law's DNA*, 4 Wake Forest J. L. & Pol'y 281, 305-10 (2014); Lynn S. Schaffer, *Pulled from Thin Air: The (Mis)Application of Statutory Displacement to a Public Trust Claim in* Alec L. v. Jackson, 19 Lewis & Clark L. Rev. (forthcoming 2015). As the Supreme Court suggested in *Illinois Central*, the doctrine protects against "substantial impairment" of trust resources allowed by the sovereign. That Court explained that the public trust cannot be lost or extinguished, except when small conveyances promote trust purposes or do not produce "substantial impairment of the public interest in the lands and waters remaining." *Illinois Central*, 146 U.S. at 453. Applying this standard involves a fundamentally different (and much simpler) judicial calculus than attempting to determine

[9] The plaintiffs in *AEP* asked the court to determine a "practical, feasible, and economically viable" level of emissions reduction. *AEP*, 131 S.Ct. at 2540.

whether a particular emitter of pollution is acting reasonably under the circumstances – as demanded by the nuisance standard that was the basis of the *AEP* litigation.

Justice Kennedy has described equal footing lands – conveyed under federal trust to the states as part of statehood and now subject to the public trust doctrine – as "uniquely implicat[ing] sovereign interests." *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 284 (1987). *See also Montana v. United States,* 450 U.S. 544, 551 (1981) ("[T]he ownership of land under navigable waters is an incident of sovereignty"). Several state supreme courts have agreed that the public trust doctrine implicates unique and inherent sovereign interests. For example, the Washington Supreme Court has repeatedly declared that the public trust doctrine "has always existed in Washington." *Caminiti v. Boyle*, 732 P.2d 989, 994 (Wash. 1987); *Orion Corp. v. State*, 747 P.2d 1062, 1072 (Wash. 1987). The Pennsylvania Supreme Court's recent decision in *Robinson Township v. Commonwealth*, 83 A.3d 901, 948 (Pa. 2013) (plurality opinion), expressed similar sentiments, construing that state's constitutional amendment that codified the public trust doctrine: "The Declaration of Rights assumes that the rights of the people articulated in Article I of our Constitution – vis-à-vis the government created by the people – are inherent in man's nature and preserved rather than created by the Pennsylvania Constitution." *See also id.* at 948 n. 35 ("The express language of the constitutional amendment

merely recites the 'inherent and independent rights' of mankind relative to the environment which are 'recognized and unalterably established' by Article I, Section 1 of the Pennsylvania Constitution.") (quoting *Commonwealth v. Nat'l Gettysburg Battlefield Tower, Inc.*, 311 A.2d 588 (Pa. 1973) (Roberts, J., concurring).

The Hawaii Supreme Court expressed similar sentiments in *In Re Water Use Permit Applications*, 9 P.3d 409 (Haw. 2000). Although grounded in the state's modern public trust principles in the Hawaiian constitution, it explicitly recognized that the origin of the trust was "an inherent attribute of sovereign authority that the government ought not, and ergo, . . . cannot surrender." *Id.* at 443 (internal quotations omitted). Just as in *Illinois Central*, the court rejected the notion that the public trust could be abdicated by the legislature: "The further suggestion that such a statute could extinguish the public trust, however, contradicts the doctrine's basic premise, that the state has certain powers and duties which it cannot legislatively abdicate." *Id.* at 442-43.

Many state courts have expressly articulated this basic understanding of the public trust doctrine – that it is an inherent attribute of sovereignty that cannot be legislatively abrogated. *See, e.g.*, *Lawrence v. Clark Cnty.*, 254 P.3d 606, 613 (Nev. 2011) ("The public trust doctrine is thus not simply common law easily abrogated by legislation; instead, the doctrine constitutes an inseverable restraint on the state's sovereign power."); *Parks v. Cooper*, 676 N.W.2d 823,

837 (S.D. 2004) ("History and precedent have established the public trust doctrine as an inherent attribute of sovereign authority."); *San Carlos Apache Tribe v. Superior Court*, 972 P.2d 179, 199 (Ariz. 1999) ("The public trust doctrine is a constitutional limitation on legislative power to give away resources held by the state in trust for its people. . . . The Legislature cannot by legislation destroy the constitutional limits on its authority."); *Karam v. Dep't of Envtl. Protection*, 705 A.2d 1221, 1228 (N.J. Super. Ct. 1998) ("The sovereign never waives its right to regulate the use of public trust property."), *aff'd*, 723 A.2d 943, *cert. denied*, 528 U.S. 814 (1999), *abrogated in part on other grounds in Panetta v. Equity One, Inc.*, 920 A.2d 638, 646 (N.J. 2007); *State v. Central Vt. Ry.*, 571 A.2d 1128, 1132 (Vt. 1989) ("The state [has] power to supervise trust property in perpetuity. . . ."), *cert. denied*, 495 U.S. 931 (1990); *Nat'l Audubon Soc'y v. Superior Court of Alpine Cnty.*, 658 P.2d 709 (Cal. 1983) ("[T]he core of the public trust doctrine is the state's authority as sovereign to exercise a continuous supervision and control over the navigable waters of the state and the lands underlying those waters."). As the court stated in *United States v. 1.58 Acres of Land*, 523 F.Supp. 120, 124 (D. Mass. 1981), when recognizing the trust as applicable to both the federal and state governments, the trust "can only be destroyed by the destruction of the sovereign." And more than a century ago, this Court, in *Geer v. Connecticut*, 161 U.S. 519, 527-28 (1896), *overruled on other grounds by Hughes v. Oklahoma*, 441 U.S. 322 (1979), characterized sovereign control over the

taking of wildlife as an "attribute of government . . . which was thus recognized and enforced by the common law of England . . . passed to the States with separation from the mother country, and remains in them to the present day. . . ." The *Geer* Court did not hesitate to recognize a public trust in such common resources:

> Whilst the fundamental principles upon which the common property in game rest have undergone no change, the development of free institutions had led to the recognition of the fact that the power or control lodged in the State, resulting from this common ownership, is to be exercised, like all other powers of government, as a trust for the benefit of the people.

Geer, 161 U.S. at 529.

V. THERE IS AMPLE PRECEDENT RECOGNIZING A FEDERAL PUBLIC TRUST DOCTRINE

Several Supreme Court decisions recognize a public trust obligation in the federal government's management of public lands. The Court first acknowledged the applicability of the public trust doctrine in 1890, four years before its seminal decision in *Illinois Central*. In *United States v. Trinidad Coal Co.,* 137 U.S. 160, 170 (1890), a case involving public coal lands in Colorado, the Court stated that "[i]n the matter of disposing of the vacant coal lands of the United States, the government should not be regarded

as occupying the attitude of a mere seller of real estate for its market value. . . . They were held in trust for the all the people." The following year the Court referred to the Secretary of the Interior as the "guardian of the people of the United States over the public lands," noting that the "[o]bligations of his oath of office oblige him to see that the law is carried out, and that none of the public domain is wasted. . . ." *Knight v. United Land Ass'n,* 142 U.S. 161, 181 (1891). In *Camfield v. United States*, 167 U.S. 518, 524 (1897), in upholding a law preventing the private enclosure of public lands, the Court observed that Congress "would be recreant in its duties as trustee for the people of the United States to permit any individual or private corporation to monopolize them for private gain. . . ."

The Court quoted from its *Trinidad Coal* decision in *Light v. United States,* 220 U.S. 523, 537 (1911) ("All public lands of the nation are held in trust for the people of the whole country"), a case in which the Court upheld the federal Forest Service's authority to impose criminal sanctions against violators of its grazing regulations, even when inconsistent with state law. The *Light* Court viewed the alternative to federal trust management – proprietary management – as unpalatable in a nation that had rejected the special privileges associated with Royal management of public lands in aristocratic England: "[T]he United States do[es] not and cannot hold property as a monarch may, for private and personal purposes." *Id.* at 536 (quoting *Van Brocklin v. Tennessee*, 117 U.S.

151, 158 (1886)). Thus, the federal public land trust is the vehicle to ensure that federal land management reflects the republican values that animated the American Revolution, not the monopolistic practices that characterized Royal public land management. As the Court stated in *Alabama v. Texas*, 347 U.S. 272, 273 (1954):

> [t]he United States holds [public lands] . . . in trust for its citizens in one sense, but not in the sense that a private trustee hold for [a beneficiary]. The responsibility of Congress is to utilize the assets that come into its hands as sovereign in the way that it decides is best for the future of the nation.

Creating the kind of monopolies characteristic of Royal management would presumably violate this congressional "responsibility," and trigger judicial oversight.

CONCLUSION

The D.C. Circuit's assumption that the public trust doctrine does not apply to the federal government is erroneous, based on isolated statements in cases that simply did not have the federal issue before them. None of those cases even attempted to explain how the result in *Illinois Central* could be a reflection of state law, and most state courts have interpreted *Illinois Central* to be binding federal authority. Many well-considered federal court opinions have assumed

the existence of a federal public trust, and many state courts have interpreted the doctrine to have always existed, meaning that constitutional codifications of the public trust merely reflect a pre-existing sovereign duty. The public trust doctrine imposes an inherent limit on sovereignty – whether that sovereignty is exercised by the state or federal governments. In much the same fashion as the federal Constitution recognizes but did not create state police powers, the Constitution reflects the public trust doctrine as a reserved power withheld from all legislatures and executives, regardless of whether they are state or federal.

For these reasons, we urge the Court to review the error committed by the D.C. Circuit in the decision below.

Respectfully submitted,

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