Team #14

No. 18-000123

IN THE UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

ORGANIZATION OF DISAPPEARING ISLAND NATIONS, APA MANA, and NOAH FLOOD,

Plaintiffs-Appellants,

v.

HEXONGLOBAL CORPORATION,

Defendant-Appellee,

and

THE UNITED STATES OF AMERICA,

Defendant-Appellee.

ON APPEAL FROM

THE UNITED STATES DISTRICT COURT FOR NEW UNION ISLAND

BRIEF OF THE UNITED STATES OF AMERICA, Appellee

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JURISDICTIONAL STATEMENT

The lower court had jurisdiction over Plaintiff Mana's claims under the Alien Tort Statute (ATS), 28 U.S.C. § 1350, which gives the federal district courts original jurisdiction "of any civil action by an alien for a tort only, committed in violation of the law of nations[.]" Plaintiff Mana is an alien suing in tort under an asserted norm of the law of nations. R. at 8. The lower court had jurisdiction over Plaintiff Flood's Fifth Amendment Due Process claims under 28 U.S.C. § 1331, as claims "arising under the Constitution . . . of the United States." Plaintiff Flood is a U.S. citizen of the New Union Islands, a U.S. possession, who claims a fundamental due process right to a health and stable climate system under the public trust doctrine as incorporated by the Fifth Amendment protection against deprivations of life, liberty, and property. R. at 3, 10.

This appellate Court has jurisdiction pursuant to 28 U.S.C. § 1291 over this appeal from a "final decision[] of the district court[]."A final judgment is an order that effectively "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin v. United States*, 324 U.S. 229, 233 (1945). The District Court's dismissal of all of Plaintiffs' claims ended the litigation on the merits below and may be appealed as a final decision. R. at 4 (granting both defendants' motions to dismiss); *id.* at 10, 11.

STATEMENT OF ISSUES

I. Can Mana bring an Alien Tort Statute, 28 U.S.C. § 1350, claim against a domestic corporation?

II. Is the *Trail Smelter* principle a recognized principle of customary international law enforceable as the "Law of Nations" under the Alien Tort Statute?

III. Assuming the *Trail Smelter* principle is customary international law does it impose obligations enforceable against non-governmental actors?

IV. If otherwise enforceable, is the *Trail Smelter* principle displaced by the Clean Air Act?

V. Is there a cause of action against the United States Government, based on the Fifth Amendment substantive due process protections for life, liberty, and property, for failure to protect the global atmospheric climate system due to the production, sale, and burning of fossil fuels?

VI. Do Plaintiffs' law of nations claim under the Alien Tort Statute and public trust claim present a non-justiciable political question?

STATEMENT OF THE CASE

The Plaintiffs

The Plaintiffs in this action are Apa Mana, Noah Flood, and Organization of Disappearing Island Nations (ODIN), suing HexonGlobal Corporation and the United States. R. 3. Apa Mana is an alien national is the island nation of A'Na Atu. *Id.* Noah Flood is a United States citizen and a resident of the New Union Islands, a U.S. possession. *Id.* Both Mana and Flood are members of the organizational plaintiff, ODIN, which is a nonprofit devoted to protecting the interests of island nations threatened by sea level rise. *Id.* Defendant HexonGlobal is the surviving corporation resulting from the merger of all major U.S. oil producers. R. at 5. It is incorporated in the State of New Jersey and has its principal place of business in Texas. *Id.*

Plaintiff Mana asserts a claim against HexonGlobal under the Alien Tort Statute (ATS), 28 U.S.C. § 1350, asserting that HexonGlobal's fossil fuel related business activities constitute a violation of the law of nations, or customary international law, which holds that emissions into the environment within the territory of one nation must not be allowed to cause substantial harms in the territory of other nations. R. at 4, 8. Mana seeks damages and injunctive relief. R. at 4. Plaintiff Flood asserts that the failure of the United States government to take effective action to control greenhouse gas emissions, together with its historical support for fossil fuel production, violates its obligations under the public trust doctrine, as incorporated by the Fifth Amendment substantive due process guarantee against government action that deprives persons of their rights to life, liberty, and property. R. at 10.

Greenhouse Gases

Greenhouse gases are so named because of the insulating effect that they have when present in the atmosphere. R. at 4. Carbon dioxide and methane are two such gases. *Id.* Earth's climate depends on the balance between the amount of solar radiation that reaches the Earth and the amount of heat that the Earth radiates back into space. *Id.* Greenhouse gases reflect heat back to Earth; too much greenhouse gas results in higher global temperatures as more heat is reflected back to Earth than leaves it. *Id.* The heat-retention properties of carbon dioxide and methane have been established by scientific facts since the nineteenth century. R. at 5. Emission of substantial amounts of carbon dioxide is the expected and inevitable result of the normal combustion of petroleum products as fuel. *Id.*

Human burning of fossil fuels for energy production has substantially increased the concentrations of both carbon dioxide and methane in the atmosphere. R. at 4. These emissions, combined with greenhouse gas emissions from agricultural and industrial activity, are causing a change in global climate, resulting in increasing temperatures, changing rainfall patterns, and rising sea levels. *Id.* If global emissions of greenhouse gases continue at current rates, global temperatures will rise by over four degrees Celsius compare to pre-industrial global temperatures, and average sea level will likely rise by between one-half and one meter by the end of the twenty-first century. *Id.*

A'Na Atu and New Union Islands are both low-lying islands with a maximum height above sea level of less than three meters. *Id.* The populated areas of both islands are below one meter in elevation. *Id.* Sea level rise of one-half to one meter would render both islands uninhabitable due to waves washing over the islands during storms. *Id.* Both Apa Mana and Noah Flood own homes and reside in communities with an elevation of less than one-half meter above sea level and have suffered seawater damage to their homes during several storms over the past three years. R. at 4-5. Both individuals have incurred, and will continue to incur, substantial expenses to repair past damage and prevent future damage to their homes due to sea level rise. *Id.* The complaint alleged that such damage would not have occurred in the absence of the greenhouse gas induced sea level rise which has already occurred. *Id.*

Both plaintiffs have experienced seawater intrusion into their drinking water wells. *Id.* Both plaintiffs rely on locally caught seafood as an important part of their diet, and ocean acidification, warming, and loss of coastal wetlands caused by climate change will reduce ocean productivity and reduce the availability of Plaintiffs' food source. *Id.*

Their health will also be at increased risk from heat stroke and mosquito borne diseases due to increased temperatures. *Id.* Limits on fossil fuel production and combustion would reduce further damage to plaintiffs' properties, reduce their health risks, and maintain the habitability of their communities. *Id.*

Historically, the greenhouse gas emission from products sold by HexonGlobal and its predecessors are responsible for thirty-two percent of U.S. cumulative fossil-fuel related greenhouse gas emissions, or six percent of global historical emissions. *Id.* HexonGlobal's cumulative worldwide sales of fossil fuels constitute nine percent of global fossil fuel related emissions. *Id.* Based on their own scientific research, HexonGlobal and its predecessors have been aware that continued global sale and combustion of fossil fuel products would result in substantial harmful global climate change and sea level rise since the 1970s. *Id.* Despite this knowledge, HexonGlobal persisted in its profitable business activities. *Id.* HexonGlobal operates refineries throughout the world, including one located on New Union Island. *Id.*

The United States is historically the largest single national contributor to emissions of greenhouse gases. R. to 6. The U.S. has been responsible for twenty percent of cumulative global anthropogenic greenhouse gas emissions to date. *Id.* Until relatively recently, the U.S. government has not limited fossil fuel production, distribution, or combustion. *Id.* Rather, the U.S. has, through various agency policies and programs, promoted the production and combustion of fossil fuels. *Id.* These programs include tax subsidies for fossil fuel production, leasing of public lands and seas under its jurisdiction for coal, oil, and gas production, creation of the interstate highway system, and the

development of fossil fuel power plants by public agencies such as the Tennessee Valley Authority. *Id.*

In more recent decades, the United States has acknowledged the threat of climate change. *Id.* In 1992, the U.S. signed and the Senate ratified the United Nations Framework Convention on Climate Change (UNFCCC). The UNFCCC acknowledged the potential for dangerous anthropogenic climate change and stated an objective "to achieve . . . stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system." *Id.* (quoting United Nations Framework Convention on Climate Change, May 9, 1992, 1771 U.N.T.S. 107, 169 [hereinafter UNFCCC]). The UNFCCC also committed developed nation parties to "adopt national policies and take corresponding measures on the mitigation of climate change, by limiting its anthropogenic emissions of greenhouse gases and protecting and enhancing its greenhouse gas sinks and reservoirs." *Id.* (citing UNFCCC at 171). To date, no legislation implementing this commitment has been adopted. *Id.*

The United States has taken several steps towards the regulation of domestic greenhouse gas emissions in the past decade. *Id.* In 2007, the Supreme Court held that greenhouse gases were "pollutants" potentially subject to regulation under the Clean Air Act, 42 U.S.C. § 7521 (2018). *Id.* (citing *Mass. v. EPA*, 549 U.S. 497 (2007)). After the holding in *Massachusetts v. EPA*, the United State Environmental Protection Administration (EPA) made a finding that the emission of greenhouse gases and resulting climate change had the potential to endanger the public health and welfare, setting the

regulatory predicate for regulation of greenhouse gas emissions under the Clean Air Act. R. at 6-7 (citing 74 Fed. Reg. 66,496 (Dec. 15, 2009)).

In 2010, EPA, jointly with the National Highway Transportation Agency, adopted a rule establishing both fuel economy standards and greenhouse gas emissions rates for passenger cars and light trucks for model years 2012-2016. R. at 7 (citing 75 Fed. Reg. 25,324 (May 7, 2010)). These regulations were extended in 2012 to require increasingly stringent emissions limitations through model year 2025. *Id.* (citing 77 Fed. Reg. 62,623 (Oct. 15, 2012)). The same year, EPA issued a rule under the Clean Air Act regulating major new sources of greenhouse gas emissions. *Id.* (citing 75 Fed. Reg. 31,514 (June 3, 2010)).

In 2015, EPA issued regulations establishing carbon dioxide emissions standards for new power plants and requiring states to implement controls on greenhouse gas emissions from existing power plants, the so-called "Clean Power Plans." *Id.* (citing 80 Fed. Reg. 64,510 (Oct. 23, 2015; 80 Fed. Reg. 64,662 (Oct. 23, 2015). Also in 2015, President Barack Obama signed the Paris Agreement, an international executive agreement that committed the United States and other nations to reduce their future greenhouse gas emissions by an amount to be determined independently by each signatory nation. *Id.* (citing Paris Agreement to the United Nations Framework Convention on Climate Change, *opened for signature* Apr. 22 2016, U.N. Doc. FCCC/CP/2015/L.9 (Dec. 12, 2015)). The United States committed to reduce greenhouse gas emissions by twenty-six to twenty-eight percent by 2025 compared to 2005 levels. *Id.* (citing USA First NDC (Sept. 3, 2016),

http://ww4.unfcc.int/ndcregistry/PublishedDocuments/United%20States%20of%20America%20First/U.S.A.%20First%20NDC%20Submission.pdf.).

Despite these preliminary regulatory actions over the past decade, United States greenhouse gas emissions have decreased only slightly, and global greenhouse gas emissions have increased. *Id.* The Trump administration has proposed to reverse these regulatory measures and commitments. *Id.* President Donald Trump has announced an intention to withdraw from the Paris Agreement at the earliest opportunity allowed by its terms, which would be effective in the year 2020. *Id.* Similarly, EPA has proposed regulations freezing emissions reductions under the greenhouse gas based fuel economy standards and repealing the Clean Power Plan. R. at 7-8 (citing The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks, 83 Fed. Reg. 42,986 (proposed Aug. 24, 2018) (to be codified at 49 C.F.R. pts. 523, 531, 533, 536 & 537, and 40 C.F.R. pts. 85-86); 83 Fed. Reg. 44,746 (Aug. 31, 2018).

Procedural History

The District Court granted both defendants' motions to dismiss and dismissed Plaintiffs' claims for failure to state a claim for relief. R. at 4, 9, 11. The District Court found that any action Mana might have under the ATS has been displaced by greenhouse gas regulation under the Clean Air Act, R. at 9, and likewise, that failure of the United States to take effective action to control greenhouse gas emissions did not constitute a violation of the Plaintiffs' due process rights, R. at 10-11.

HexonGlobal has consented to general personal jurisdiction in all courts in the Territory of New Union Islands as a condition to doing business on New Union Island. R. at 5.

SUMMARY OF THE ARGUMENT

There is no reason that federal courts should not allow suits to be brought against domestic corporations under the Alien Tort Statute, 28 U.S.C. § 1350. Nothing in the text of the statute bars suits against corporations or specifies who may properly be a defendant in such an action. *Cf. id.* There is also a large existing body of law holding corporations liable for civil tort liability, particularly in the United States. Several opinions of the United States Attorney General also suggest that ATS suits can be brought against corporations. *See* 1 Op. Att'y Gen. 57 (1795); 26 Op. Att'y Gen. 250, 252-54 (1907). Unlike *Jesner v. Arab Bank, PLC* and *Kiobel v. Royal Dutch Petroleum Co.*, there is no extraterritoriality question in the present suit that would justify barring corporate liability, because the corporate defendant in the present case is a citizen of the United States. R. at 5; *but see Jesner*, 138 S. Ct. 1386 (2018); *Kiobel*, 569 U.S. 108 (2012). The United States has a strong interest in regulating the conduct of its corporate citizens, as that conduct may impact its international reputation.

The *Trail Smelter* Principle is a recognized principle of international law and is enforceable as the Law of Nations under the Alien Tort Statute because it is sufficiently universal, specific and obligatory. Although private actors are not usually liable under the ATS, HexonGlobal acted under color of law due to the benefits received from the United States in their fossil fuel sales and production. Therefore the *Trail Smelter* Principle is Enforceable against non-governmental actors in this instance. Ultimately the *Trail Smelter* Principle has been replaced by Section 115 of the Clean Air Act, because federal

statutes preempt customary international law, and and so the rohibition of Transboundary Harm has been replaced by Section 115 of the Clean Air Act, because it speaks directly to the issue of transboundary harm.

The Plaintiffs' claims of a public trust right incorporated through the Fifth Amendment Due Process Clause must fail, because no plaintiff has a "legitimate claim of entitlement" to a healthy and stable climate system. *Cf. Goldberg v. Kelly*, 397 U.S. 254, 262 (1970). There cannot be a remedy under the Due Process Clause "when there has been no 'deprivation' of a protected interest." *Davidson v. Cannon*, 474 U.S. 344, 348 (1986). The public trust is a matter of state, not federal law. The government's discretion in administering the public trust right is not so limited as to give rise to a claim of entitlement. *Ky. Dep't of Corrs. v. Thompson*, 490 U.S. 454, 463-65 (1989). Furthermore, the traditionally recognized public trust right applies only to submerged lands and could not apply to the global climate system, even if protected by federal law. *See Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469 (1988). And, even if the plaintiffs could prove a right to a healthy and stable climate system, the due process clause does not compel government action or confer the affirmative right to government aid. *DeShaney v. Winnebago Cnty. Dept. of Soc. Servs.*, 489 U.S. 189, 195 (1989).

Plaintiffs' law of nations claims present a nonjusticiable political question based on the factors established by the Supreme Court in *Baker v. Carr*, 369 U.S. 186, 217. Many of those factors are "inextricable from the case at bar." *See id.* The regulation of greenhouse gas emissions is a responsibility that has already been undertaken by the political branches; it is within their textual powers over commerce and foreign policy, respectively, and properly remains within their management because it involves fact-

finding and risk-balancing that federal courts are "ill-equipped" to do. *See Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 427 (2011).

ARGUMENT

To pass the motion to dismiss stage, a complaint must plead "sufficient factual matter . . . to state a claim for relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Factual allegations in a complaint need not be detailed, but "must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Iqbal*, 556 U.S. at 678.

The lower court accepted the facts in Plaintiffs' complaint as true for the purposes of the motion to dismiss. R. 4. Likewise, this court must also take those facts as true, and therefore pass judgment only on the sufficiency of Plaintiffs' legal claims. Decisions on questions of law are reviewed *de novo*. *Pierce v. Underwood*, 487 U.S. 552, 558 (1988).

I. MANA MAY BRING AN ALIEN TORT STATUTE CLAIM AGAINST A DOMESTIC CORPORATION.

Mana may, generally, bring an Alien Tort Statute claim against a domestic corporation; however, the Plaintiffs' specific law of nations claims under the Alien Tort Statute (ATS), 28 U.S.C. § 1350, are nonjusticiable because they require determination of a political question reserved to the other branches of government. For the reasons stated in the subsections below, this court should decide the question left open by the Supreme Court in *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386 (2017) and hold that aliens may assert ATS claims against domestic corporations, breaking with the Second Circuit's

determination on the remand of *Kiobel*. *See Kiobel v. Royal Dutch Petroleum Co.* 621 F.3d 111, 145 (2d. Cir. 2010) (holding that corporate liability is not a rule of customary international law and dismissing plaintiffs' claims against corporate defendants under the ATS for lack of subject matter jurisdiction).

A. Nothing in the Text of the Alien Tort Statute Bars Suits Against Corporations or Other "Juridical Persons."

The Alien Tort Statute provides, simply, that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350 The text of the ATS specifies who may properly be a plaintiff in an ATS suit, but it is notably silent on who may properly be a defendant. *See id.*; *Argentine Republic v. Amerada Hess Shipping Corp*, 488 U.S. 428, 438 (1989) (observing that the text of the ATS "does not distinguish among classes of defendants.").

B. Corporate Liability for Alien Tort Statute Claims is Supported by Existing Law.

1. The Modern Doctrine of Civil Liability Commonly Imposes Liability on Corporations, Especially in Tort.

A "civil action" under the ATS is a claim defined by federal common law, which has long recognized corporations as proper defendants in tort suits. *See Phila., Wilmington, & Balt. R.R. Co. v. Quigley*, 62 U.S. (21 How.) 202, 210 (1859) ("At a very early period, it was decided in Great Britain, as well as in the United States, that actions might be maintained against corporations for torts; and instances may be found, in the judicial annals of both countries, of suits for torts arising from the acts of their agents, of nearly every variety."); *see also Cook County v. United States ex. rel. Chandler*, 538 U.S. 119, 125 (2003) (detailing the common understanding "that corporations were "persons"

with "the capacity to sue and be sued."); WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 4, 19 (2d. ed., 1955) ("The defendants in tort cases are to a large extent public utilities, industrial corporations, commercial enterprises, . . . and others who . . . are best able to distribute to the public at large the risks and losses which are inevitable in a complex civilization.").

Vicarious liability for corporate defendants is also a well-recognized feature of the common law of torts. *See, e.g.*, *Philadelphia & Reading R.R. v. Derby*, 55 U.S. (14 How.) 468, 485-87 (1853) (applying principles of *respondeat superior* to a railroad company); PROSSER § 12. A plaintiff can name a corporation as a defendant in an action against a natural person acting as that corporation's agent or employee under the common law, so the same must be true in ATS suits based on the federal common law.

2. Previous Decisions of United States Courts and Opinions of the Attorney General Indicate that Alien Tort Statute Suits May Be Brought Against Corporations.

In piracy cases, United States courts frequently treated the offending vessel as the offender without regard to the individual personal misconduct or responsibility of its owner. *See Harmony v. United States (The Malek Adhel)*, 43 U.S. (2 How.) 210, 233 (1844). This was done out of "the necessity of the case, as the only adequate means of suppressing the offence or wrong, or insuring an indemnity to the injured party." *Id.* Likewise, the only adequate means of addressing a wrong in modern times is to impose liability upon a corporation rather than a natural person.

Besides the cases noted in the subsection above, which hold that tort claims may be brought against corporations, other pre-existing law specifically holds that corporations may be parties to an ATS suit. As long ago as 1795, the Attorney General of the United States issued an opinion advising that foreign citizens and companies who

were injured by the actions of American citizens abroad could sue in United States court under the ATS. 1 Op. Att'y Gen 57 (1795) ("[T]here can be no doubt that the *company or individuals* who have been injured by these acts of hostility have a remedy by a civil suit in the courts of the United States; jurisdiction being expressly given to these courts in all cases where an alien sues for a tort only, in violation of the laws of nations[.]") (emphasis added) (original emphasis omitted). It would be a strange contradiction for this Court to hold that corporations can be plaintiffs in ATS actions, but not defendants. Similarly, in 1907, the Attorney General of the United States issued an opinion advising the United States that it could file a bill against the American Rio Grande Land and Irrigation Company for tortious diversion of the waters of the Rio Grande under the ATS. 26 Op. Att'y Gen. 250, 252-54 (1907). This opinion clearly indicates that suits against corporations are within the jurisdiction conferred by the ATS. *Cf. id.*

3. International Law Limitations on Corporate Liability Pertain to Criminal, Not Civil, Liability.

On remand, the Second Circuit in *Kiobel* made much of the fact that corporations have not been held liable at any of the international criminal tribunals held to date. *See Kiobel v. Royal Dutch Petroleum Co.* 621 F.3d 111, 118-20 (2d. Cir. 2010). However, the Kiobel court overlooked the fact that each international tribunal is specially negotiated and limitations are placed on their jurisdiction for reasons which may be wholly unrelated to whether they are required by or reflective of customary international law. *See, e.g.*, Rome Statute of the International Criminal Court (Rome Treaty), art. 10, *opened for signature* July 17, 1998, 2187 U.N.T.S. 90, 98 ("Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute."). Limitations on the jurisdiction of international

criminal tribunals to natural persons are based on reasons unique to criminal punishment, in essence the view that corporations are incapable of criminal intent and largely immune to the punitive goals of criminal punishment. *See Kiobel*, 621 F.3d at 132-37 (Leval, J., concurring only in the judgment).

C. Recognizing Claims Against Domestic Corporations for Violations of International Law Does Not Raise the Same Foreign Policy Concerns as Claims Against Foreign Corporations, and May Even Strengthen the United States' Relationships with Foreign States.

Courts should be guided by the legislative purpose of the ATS, which was to provide a tort remedy in federal court for law-of-nations violations for which the aggrieved foreign nation could hold the United States accountable. *See* Gwynne L. Skinner, *Roadblocks to Remedies: Recently Developed Barriers to Relief for Aliens Injured by U.S. Officials, Contrary to the Founders' Intent*, 47 U. RICH. L. REV. 555, 621 (2013) ("[T]he founders of the United States . . . believed it was important, if not critical, to ensure that the United States provide access to judicial remedies to aliens whose rights under international law are violated, including when they are violated by U.S. officials and citizens.").

Plaintiffs Mana and Flood's claims have a much stronger nexus to United States territory than the claims in *Jesner v. Arab Bank,* where the Court was confronted with deep extraterritoriality concerns. *See* 138 S. Ct. 1386 (2018). In *Jesner*, the only domestic connection identified was the alleged routing of dollar-denominated foreign transactions through defendant Arab Bank's New York branch. 138 S. Ct. at 1394. The rest of the alleged conduct occurred in the Middle East. *Id.* Likewise, the alleged primary tortfeasor in *Kiobel v. Royal Dutch Petroleum Co.* was a foreign sovereign and the defendant was a foreign corporation of a third party. 569 U.S. at 111-12. Under those circumstances, the

United States was not likely to be thought responsible to provide the plaintiff a remedy for the defendants' actions. *Cf.* Br. for the United States as Amicus Curiae, p. 5, *Kiobel*, 569 U.S. 108 ("Especially in these circumstances – where the alleged primary tortfeasor is a foreign sovereign and the defendant is a foreign corporation of a third country – the United States cannot be thought responsible in the eyes of the international community for affording a remedy for the company's actions[.]").

In the present case, the corporate defendant is a domestic corporation of the United States, R. at 5, and its actions necessarily impact, and may even injure, the international reputation of the United States. *Cf.* 1 Op. Att'y Gen. at 58 ("[A]cts of hostility committed by American citizens against such as are in amity with us, being in violation of a treaty, and against the public peace, are offences against the United States, so far as they were committed within the territory or jurisdiction thereof[.]").

Again, this is in keeping with the original purpose of the Alien Tort Statute, which was to comply with international law, demonstrate legitimacy in the eyes of the rest of the world, and avoid embroiling the United States in unnecessary foreign and international conflicts. *See* Skinner, *Roadblocks to Remedies*, 47 U. RICH. L. REV. at 621 (citing Anthony D'Amato, *The Alien Tort Statute and the Founding of the Constitution*, 82 AM. J. INT'L L. 62, 63 (1988)). Not only is the United States the proper party to bear the responsibility of providing citizens of foreign nations a means to sue for the actions of its corporate citizens; it has a legitimate international relations interest in doing so. *Id.* at 625 ("[I]t continues to be in the interest of the foreign policy of the United States to ensure that the United States to ensure that . . . aliens have access to a remedy.").

II. THE *TRAIL SMELTER* PRINCIPLE IS A RECOGNIZED PRINCIPLE OF CUSTOMARY INTERNATIONAL LAW ENFORCEABLE AS THE "LAW OF NATIONS" UNDER THE ATS.

The *Trail Smelter* Principle, originating from the *Trail Smelter* arbitration between the United States and Canada, established the prohibition of transboundary harm as customary international law. R. at 8. This maxim provides that the emissions in the environment within the territory of one nation must not be allowed to cause substantial harm in the territory of other nations. *Id*. *The Trail Smelter* Principle has been crystallized as customary international law through binding treaties, both regional and trans-regional agreements, and state practices, showing that the prohibition of transboundary harm has been adopted to sufficiently meet the requirements of universality, specificity, and obligatory.

A. The *Trail Smelter* Principle is Sufficiently Universal.

For a norm to be sufficiently universal, plaintiffs do not need to prove that every nation adheres to the principle asserted, but only show "a general recognition among states that a specific practice is prohibited." *Filartiga v. Pena-Irala*, 630 F.2d 876, 888 (2d Cir. 1980). The "international norm at issue must have the "general assent of civilized nations." *Id* at 881; *The Paquete Habana*, 175 U.S. 677. 694 (1900).

Most famously, Principle 21 of the Stockholm Declaration of 1972 articulates that states have "the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or Areas beyond the limits of national jurisdiction." Stockholm Declaration of the United Nations, June 16, 1972, Conference on the Human Environment, 11I.L.M 1416 (1972). Similarly, Principle 2 of the 1992 RIO Declaration on Environment and Development

establishes that states have "the sovereign right to exploit their own resources…and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction." While these declarations are nonbinding, the principles here have been echoed in other facets of international law.

In 1992, the UNFCCC acknowledged the potential for dangerous anthropogenic climate change and stated an objective "to achieve . . . stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system." United Nations Framework Convention on Climate Change, May 9, 1992, 1771 U.N.T.S. 107, 169 [hereinafter UNFCCC]. The UNFCCC also committed developed nation parties to "adopt national policies and take corresponding measures on the mitigation of climate change, by limiting its anthropogenic emissions of greenhouse gases and protecting and enhancing its greenhouse gas sinks and reservoirs." UNFCCC, at 171. In 2015, the President of the United States signed the Paris Agreement, an international executive agreement that committed the United States and 195 other nations to reduce their greenhouse gas emissions by a nationally determined contribution. United Nations Framework Convention on Climate Change, *opened for signature* Apr. 22 2016, U.N. Doc. FCCC/CP/2015/L.9 (Dec. 12, 2015). The United States committed to reduce greenhouse gas emissions by 26-28% by 2025, compared with 2005 levels. USA First NDC (Sept. 3, 2016), http://www4.unfccc.int/ndcregistry/PublishedDocuments/United% 20States%20of%20America%20First/U.S.A.%20First%20NDC%2 0Submission.pdf.

Numerous multilateral environmental agreements have adopted the prohibition against transboundary harm. In 1979, the United States signed the Convention on Long- Range Transboundary Air Pollution, which reiterated Principle 21, expressing that "that States have, …the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States…".

The United States is also a provisional member of the United Nations Law of the Sea, ratified by 135 other member countries, and incorporates the prohibition of transboundary harm:

> "States shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other state and their environment," and that "pollution arising from incidents or activities under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights in accordance with this Convention."

United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 3

Many others including the Convention on Biological Diversity ([adopted 5 June 1992, entered into force 29 December 1993] 1760 UNTS 79; *Biological Diversity, International Protection*), *Vienna Convention for the Protection of the Ozone Layer* ([adopted 22 March 1985, entered into force 22 September 1988] 1513 UNTS 324, Convention on the Law of the Non-Navigational Uses of International Watercourses ([adopted and opened for signature 21 May 1997, not yet entered into force] (1997) 36 ILM 700 show that the *Trail Smelter* Principle has been well established in customary international law.

Strong evidence for the universality of transboundary pollution as customary international law is also found within the jurisprudence of the United States itself. In

2007, the United States Supreme Court held, in *Massachusetts v. EPA*, that greenhouse gases, including carbon dioxide, were "pollutants" that were potentially subject to regulation under section 202(a)(1) of the Clean Air Act, 42 U.S.C. § 7521 (2018).*Massachusetts v. EPA*, 549 U.S. 497 (2007).

There are a combined twenty-seven multilateral environmental agreements, two draft multilateral environmental agreements, twenty-six regional environmental agreements, and twenty-six national laws, that impose liability for transnational pollution. In addition, the United States recognizes the *Trail Smelter Principle*, as evidenced by transboundary harm's incorporation into national statutes. Ajmel Quereshi, *The Search for Environmental Filartiga: Trans-Boundary Harm and the Future of International Environmental Litigation*, 56 How. L.J. 13, 159. (2012). The breadth with which the *Trail Smelter* Principle is found in various environmental contexts points to its universality.

B. The *Trail Smelter Principle* is Sufficiently Specific.

An international norm is cognizable under the law of nations as sufficiently specific if "there are sufficient criteria to determine whether a given action amounts to the prohibited act and thus violates the norm." *Xuncax v. Gramajo*, 886 F. Supp. 162, 184 (D. Mass. 1995). Quereshi, *The Search for Environmental Filartiga*, at 153. The *Trail Smelter* Principle is distinguishable from other environmental customs that have been asserted, in that there are two specific requirements. *Trail Smelter*, 3 R.I.A.A. at 1933. A source state may not "permit the use of its territory" for injurious transboundary pollution, however liability will only attach when (1) "the case is of serious consequence" and (2) "the injury is established by clear and convincing evidence." *Id*; Thomas W. Merrill, *Golden Rules for Transboundary Pollution*, 46 Duke L.J. 949, 950

(1997).

C. The *Trail Smelter Principle* is Sufficiently Obligatory

In determining whether a norm qualifies as obligatory, the *Sosa* court looked to see whether the materials provided to support a norm's universality and specificity were legally binding when assessing the weight each should be given. *Sosa v. Alvarez- Machain*, 542 U.S. 692, 732 (2004). An examination of a range of legal sources, including international human rights treaties, binding trans-regional agreements, and state practices show that the prohibition of transboundary harm has been adopted to sufficiently prove the obligatory weight of the *Trail Smelter* Principle.

III. THE *TRAIL SMELTER* PRINCIPLE OF CUSTOMARY INTERNATIONAL LAW IMPOSES OBLIGATIONS ENFORCEABLE AGAINST NON-GOVERNMENTAL ACTORS.

Traditionally, the law of nations has been applied to states, not private actors. *Kadic v. Karadzic*, 70 F.3d 232, 239-241 (2d. Cir. 1995). While , the majority of customary international law under the ATS require some type of involvement by the state in order to be actionable. liability for certain behavior including genocide, torture, and war crimes are extended beyond states to individuals and private actors Hari M. Osofsky, *Environmental Human Rights under the Alien Tort State: Redress for Indigenous Victims of Multinational Corporations*, 20 Suffolk Transnat'l L. Rev. 335, 391. Environmental norms, the prohibition of transboundary harm included, has historically not created liability for private actors by themselves. *Michie v. Great Lakes Steel Div., Nat Steel. Corp.*, 495 F.2d 213 (6th Cir. 1974). However, the law of nations is "dynamic and should be considered as part of an evolutionary process." *Filartiga v. Pena*, 577 F. Supp. 86, 867 (E.D.N.Y 1984).

A. Customary International Law Traditionally Holds States Liable.

In order to sue a private party under the ATS, plaintiffs must demonstrate that liability is such that it is imbedded in the customary international norm, or that the private actor has acted under color of state law. 28 U.S.C. § 1308. Plaintiffs may show that the state has provided such significant encouragement to it that its private decision was in fact the state's. *Blum v. Yaretsky*, 457, U.S. 991, 1004 (1982); *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 725 (1961).

B. Under the ATS Color of Law Analysis, Liability for the Trail Smelter Arbitration Extends to Defendant HexonGlobal

"A private individual acts under the color of law within the meaning of Section 1983 when he acts together with state officials or with significant state aid." *Kadic*, 70 F.3d at 245. While the United States has taken action in more recent years, R. at 6 it has been responsible for twenty percent of cumulative global anthropogenic greenhouse gas emissions to date, and has historically been the largest single national contributor to emissions of greenhouse gases. R. at 5.

HexonGlobal has historically been responsible for a staggering 32% of the United States' cumulative greenhouse gas emissions through the sale of fossil fuel products, *Id*. The United States has assisted HexonGlobal in their fossil-fuel related business endeavors of production, distribution, and combustion through a range of agency policies and program. *Id*. These include tax subsidies for fossil fuel production, leasing of public lands and seas under its jurisdiction for coal, oil, and gas production, creation of the interstate highway system, and the development of fossil fuel power plants by public agencies. R. 6. Without the help of the United States, HexonGlobal would not have been able to emit the amount of greenhouse gases that have caused the

Plaintiffs such grave injury.

IV. THOUGH OTHERWISE ENFORCEABLE, THE *TRAIL SMELTER* PRINCIPLE IS DISPLACED BY THE CLEAN AIR ACT.

The position that customary international law is part of the United States' post-*Erie* federal common law has become entrenched over the last twenty years. Curtis A. Bradley; Jack L. Goldsmith, *Customary International Law As Federal Common Law: A Critique of the Modern Position*, 110 Harv. L. Rev 815, 876 (1997). There is much critique of this perspective, with those in opposition stating that this would allow customary international law the status of federal law without the authorization of the federal political branches. *Id*. However, *Filartiga v. Pena-Iralta* established the law of nations as part of federal common law. 630 F.2d at 886-87. In addition, it has been recognized that federal environmental regulatory statutes displace federal common law remedies for interstate pollution. *Milwaukee v. Illinois*, 451 U.S. 304 (1981); See e.g., *American Elec. Power Co., Inc. v. Connecticut*, 131 S. Ct. 2527 (2011).

The Clean Air Act displaces federal common law because it speaks directly to the issue of transboundary harm, and occupies the field of law. The Clean Air Act addresses international transboundary pollution through section 115, as it is based on international reciprocity, and applies to any foreign country that provides "essentially the same rights" to the United States. When the Administrator of the EPA receives a report from a "duly constituted international agency" that emissions of air pollution from the United States "may reasonably be anticipated to endanger public health or welfare in" a reciprocating foreign country, the Administrator "shall" notify the governor of the state in which such emissions originate of the need to revise the applicable state implementation plan so as to "prevent or eliminate the endangerment." 42 U.S.C. § 7415(a), (b).

In *American Electric Power Co. v. Connecticut*, 564 U.S. 410 (2011), the United States Supreme Court held that the Clean Air Act displaced federal common law regarding the regulation of greenhouse gas emissions where states brought a public nuisance claim against six large power companies for their contributions to climate change. Here, Plaintiffs similarly seek to bring a customary international law claim against HexonGlobal where a federal statute, the CAA has already provided for a mechanism to address this cause of action.

V. THERE IS NO CAUSE OF ACTION AGAINST THE UNITED STATES GOVERNMENT BASED ON THE FIFTH AMENDMENT SUBSTANTIVE DUE PROCESS PROTECTION FOR LIFE, LIBERTY, AND PROPERTY, FOR FAILURE TO PROTECT AGAINST THE GLOBAL ATMOSPHERIC CLIMATE SYSTEM FROM DISRUPTION DUE TO THE PRODUCTION, SALE, AND BURNING OF FOSSIL FUELS.

As the lower court said, "[n]ot every threat to human well-being constitutes a violation of Due Process rights[.]" R. at 11. There is simply no interpretation of the Fifth Amendment Due Process Clause that can provide the Plaintiffs with their desired relief, because the clause does not require a remedy "when there has been no 'deprivation' of a protected interest." *Davidson v. Cannon*, 474 U.S. 344, 348 (1986) (interpreting the Fourteenth Amendment Due Process Clause).

A. The Plaintiff Does Not Have a "Legitimate Claim of Entitlement" to a Healthy and Stable Climate System.

Courts have identified property interests beyond private real and personal property that warrant due process protection through "entitlement theory." *See Goldberg v. Kelly*, 397 U.S. 254, 262 (1970) (stating that a recipient's interest in welfare benefits is protected by due process). Entitlement theory essentially dictates that a protected interest exists where pre-existing law limits governing discretion towards a particular right to the point where a person can reasonably expect a certain outcome or possess legitimate

expectations of the government's treatment of that right. *See Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748, 756 (2005); *Bd. of Regents v. Roth*, 408 U.S. 564, 578 (1972). To have a protected property interest in a right or benefit, a person must have "a legitimate claim of entitlement to it[,]" not merely an "abstract need or desire" or "unilateral expectation." *Roth*, 408 U.S. at 577. Here, Flood has no legitimate claim of entitlement to a public trust right to a healthy and stable climate system because the public trust doctrine does not apply to the climate system and there are no sufficient limitations on government discretion to confer a right to due process protection.

For a "property" interest in a right or benefit to be protected under the entitlement theory, the government's discretion must be so limited by existing law that an individual can reasonably expect a certain outcome or treatment. *See Ky. Dep't of Corrs. v. Thompson*, 490 U.S. 454, 463-65 (1989) (dismissing an action for deprivation under the Fourteenth Amendment Due Process Clause because the language of the regulations in question was not sufficiently mandatory to create a liberty interest). There is no such limitation on official discretion in the present case. In fact, the decision of whether and how to establish regulations on greenhouse gas emissions has already been delegated to a federal agency, the EPA, according to the "considered judgment" of Congress. *AEP*, 564 U.S. 410, 426.

1. The Public Trust is a Matter of State, Not Federal, Law.

It is well-settled that the public trust doctrine is a matter of state, not federal law. *See PPL Mont., LLC v. Montana*, 565 U.S. 576, 604 (2012) ("While the State takes title to navigable waters and their beds in trust for the public, . . . the contours of that public trust do not depend upon the Constitution."); *id.* at 603 ("[T]he public trust doctrine remains a matter of state law[.]"). The Supreme Court has held that the touchstone case defining the public trust doctrine, *Illinois Central Railroad*, was "necessarily a statement

of Illinois law," not federal law. *Idaho v. Couer d'Alene Tribe*, 521 U.S. 261, 285 (1997). As such, there is no right of action against the federal government for violations of the public trust doctrine. *See Alec L. v. McCarthy*, 561 Fed. Appx. 7, 8 (D.C. Cir. 2014) ("The plaintiffs point to no case . . . standing for the proposition that the public trust doctrine – or claims based upon violations of that doctrine – arise under the Constitution or laws of the United States[.]").

2. Even if Incorporated Into the Fifth Amendment Due Process Clause, the Public Trust Doctrine Applies to Submerged Lands Beneath Navigable Waterways, Not the Atmosphere.

The public trust doctrine applies only to certain classes of resources, such as navigable waters, tidal waters, river banks, and submerged land beneath waterways; it does not apply to the atmosphere. *See, e.g., Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469 (1988) (holding that the public trust doctrine extends to lands submerged under both navigable-in-fact and tidally influenced waters); *United States v. Mission Rock*, 189 U.S. 391, 407 (1903); *Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 433 (1892) (articulating the public trust doctrine as a limitation on the state's power to abdicate control over the lands submerged beneath navigable waterways). While state courts have recognized a public trust right to a broad range of things, the incorporation of the public trust doctrine at the federal level "has generally followed the doctrine's application to navigable and tidal water, and not its broader statements." R. at 10 (citing *Phillips*, 484 U.S. at 476). State law holdings among the many states, all varying in degree of protection of public trust assets, cannot reasonably be thought to give rise to a federal cause of action for citizens of a state where such public trust protections do not exist.

B. The Plaintiffs' Asserted Public Trust Right to a Health and Stable Climate System is Not A Fundamental Right Entitled to Substantive Due Process Protections.

The Due Process Clause of the Fifth Amendment provides that "No person shall . . . be deprived of life, liberty, or property, without due process of law[.]" U.S. Const. amend. V, §1. It provides heightened protection against government interference with certain fundamental rights and liberty interests. *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997).

However, courts "have always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." *Id.* (citing *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992)). A court's decision to extend constitutional protection to an asserted right or liberty interest places the matter "outside the arena of public debate and legislative action," and courts must, therefore "exercise the utmost care whenever [they] are asked to break new ground in this field[.]" *Id.* The Due Process Clause protects only those fundamental rights and liberties which are objectively "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty[.]" *Id.* at 720-21 (citations omitted).

1. Unlike the Alleged Public Trust Right to a Healthy and Stable Climate System, Rights Considered Sufficiently Fundamental to Afford Due Process Protections Have Clear Bases in Tradition, Case Law, Or the Text of the Constitution.

Unlike rights considered fundamental enough to afford due process protections, the public trust right to a healthy and stable climate system has no clear basis in tradition, case law, or the text of the Constitution. It is neither enumerated in the Constitution nor supported by existing case law or national tradition. Compare, for instance, the other

rights traditionally protected by the Due Process Clause, which includes the right to physical liberty as well as the rights to marry, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *Loving v. Virginia*, 388 U.S. 1 (1967), to have children, *Skinner v. Oklahoma ex. rel. Williamson*, 316 U.S. 535 (1942), to direct the education and upbringing of one's children, *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925), and the related rights of marital privacy, *Griswold v. Connecticut*, 381 U.S. 479 (1965), contraception and abortion, *Planned Parenthood v. Casey*, 505 U.S. 833 (1992); *Roe v. Wade*, 410 U.S. 113 (1973), and bodily integrity, *Rochin v. California*, 342 U.S. 165 (1952).

Freedom from bodily restraint is a fundamental right that "has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action." *Hamdi v. Rumsfeld*, 542 U.S. 507, 529 (2004) (quoting *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992)). Likewise, the right to education has a strong basis in history and tradition. *See Pierce v. Soc'y of Sisters*, 268 U.S. at 535; *Meyer*, 262 U.S. at 400 ("The American people have always regarded education and acquisition of knowledge as matters of importance which should be diligently promoted."). The right to marriage is equally as venerated in our culture. *See Obergefell*, 135 S. Ct. at 2593-94 ("From their beginning to their most recent page, the annals of human history reveal the transcendent importance of marriage."). The right to privacy stems from the text of the Constitution in the form of the penumbras of the Bill of Rights, the Ninth Amendment, and the Fourteenth Amendment. *Roe*, 410 U.S. at 152.

All of these rights have been gradually built upon a long foundation of federal case law and are considered "fundamental as a matter of history and tradition."

Obergefell, 135 S. Ct. at 2602. By contrast, a claim for a public trust right to a health and stable climate system has not been widely accepted among federal courts, so recognizing a claim against HexonGlobal and the United States government would actually violate the defendant's due process right to "notice of the demands . . . impose[d] on the conduct of its business." *See BMW v. Gore,* 517 U.S. 559, 585 (1996).

2. The Due Process Clause Does Not Compel Government Action Or Confer the Affirmative Right to Government Aid.

Even if the public trust right to a stable and healthy climate was recognized, any due process protections afforded to that right would be against government action, not the actions of private actors, for which the due process clause offers no remedy. *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.,* 489 U.S. 189, 195 (1989). In *DeShaney*, the Supreme Court stated that "the Due Process clauses generally confer no right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual." *Id.* at 196. "Although the liberty protected by the Due Process Clause affords protection against unwarranted *government* interference . . . , it does not confer an entitlement to such governmental aid as may be necessary to realize all the advantages of that freedom." *Id.* (citing *Youngberg v. Romeo*, 448 U.S. 307, 317-18 (1982)). While climate change may impact the Plaintiffs' ability to exercise their personal liberties by impacting their homes, health, and lifestyles, R. at 4-5, they are still not entitled to governmental aid.

The Ninth Circuit has created two exceptions to the *DeShaney* rule that the due process clause does not impose an affirmative obligation to act on the government: "special relationship" and "state-created danger." *L.W. v. Grubbs,* 974 F.2d 119, 121 (9th Cir. 1992). The "special relationship" exception applies to situations where the

government takes an individual into custody against his or her will, and is inapplicable here. *Id.* But even if the second exception for "danger creation," which permits a substantive due process claim when government conduct "places a person in peril in deliberate indifference to their safety," would be applicable here, this circuit is under no obligation to follow Ninth Circuit precedent. *But see Penila v. City of Huntington Park*, 115 F.3d 707, 709 (9th Cir. 1997). This reviewing court, in affirming the district court's decision below, should take the opportunity to affirm the lower court's rejection of the Ninth Circuit exceptions to *DeShaney*. *See* R. at 11.

VI. PLAINTIFFS' LAW OF NATIONS CLAIMS UNDER THE ALIEN TORT STATUTE AND PUBLIC TRUST CLAIM PRESENT A NON-JUSTICIABLE POLITICAL QUESTION.

There is no justiciable controversy under Article III when the parties seek adjudication of a political question. *Gilligan v. Morgan*, 413 U.S. 1, 9 (1973). Unlike other issues of justiciability, determining whether a claim is nonjusticiable because it implicates a political question requires a "case-by-case inquiry" and "a discriminating analysis of the particular question posed" in terms of the history of its management by the political branches, its susceptibility to judicial handling in the light of its nature and posture in the specific case, and the possible consequences of judicial action. *Baker v. Carr*, 369 U.S. 186, 211-12 (1962).

A. Based on the Factors Established by the Supreme Court in *Baker v. Carr*, Plaintiffs' Law of Nations and Public Trust Claims Implicate a Nonjusticiable Political Question.

The *Baker* court articulated six factors which are found in a case involving a political question: (1) a textually demonstrable constitutional commitment of the issue to a coordinate political department, (2) a lack of judicially discoverable and manageable standards for resolving it, (3) the impossibility of deciding without an initial policy

determination of a kind clearly for nonjudicial discretion, (4) or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government, (5) an unusual need for unquestioning adherence to a political decision already made, or (6) the potentiality of embarrassment from multifarious pronouncements by various departments on one question. 369 U.S. at 217. At least three of those factors are "inextricable from the case at bar," justifying dismissal for nonjusticiability on the ground of a political question's presence. *Cf. id.* at 217.

1. Whether and How Much to Regulate of the Greenhouse Gas Emissions of Domestic Corporations is a Question Textually Committed to the Legislative and Executive Branches of the United States Government.

The Constitution commits the authority "to regulate Commerce with foreign Nations . . . and among the several States" to Congress. U.S. Const. art. I, §8. Likewise, it commits the executive power to the President, U.S. Const. art. II, §1, and gives the President the power to make treaties and appoint ambassadors in concert with Congress, U.S. Const. art. II, § 2.

The political question doctrine restrains courts from reviewing exercises of foreign policy judgment by the political branches to which authority is constitutionally committed. *See Goldwater v. Carter*, 444 U.S. 996, 1007 (1979). According to the Supreme Court in *Zivotofsky v. Clinton*, the proper inquiry is whether Congress or the President acted within their powers. *See* 566 U.S. 189, 200-01 (2012).

2. Regulation of Greenhouse Gas Emissions is a Question Not Subject to Judicially Discoverable and Manageable Standards.

As the Supreme Court observed in *United States v. Nixon*, the presence of a textual commitment to a coordinate political department is not completely separate from a lack of judicially discoverable and manageable standards. 506 U.S. 224, 228 (1993). In

fact, "the lack of judicially manageable standards for resolving" a question "may strengthen the conclusion that there is a textually demonstrable commitment to a coordinate branch." *Id.* at 229.

The appropriate amount of greenhouse gas regulation for a producing sector "cannot be prescribed in a vacuum[.]" *Am. Elec. Power Co. v. Connecticut,* 564 U.S. 410, 427 (2011) [hereinafter AEP]. As with other questions of national or international policy, "informed assessment of competing interests is required," and "our Nation's energy needs and the possibility of economic disruption must weigh in the balance." *Id.* Deciding Plaintiffs' claims would require this Court to weigh the risks and benefits of emissions-causing activities in a manner that it is ill-equipped to do. *See id.* at 427-28; *Native Village of Kivalina v. ExxonMobil Corp.*, 663 F.Supp. 2d. 863, 874-77 (2009), *aff'd on other grounds*, 696 F.3d 849 (2012). Greenhouse gas regulations require policy judgments that the federal judiciary has "neither the expertise nor the authority to evaluate." *Mass. v. EPA*, 549 U.S. 497, 533-34 (2006); *see also Comer v. Murphy Oil*, 839 F.Supp. 2d. 849, 862-63, *aff'd on other grounds*, 718 F.3d 460 (5th Cir. 2010).

In *Massachusetts v. EPA*, the Court was evaluating whether EPA had discharged its obligations under a specific statute, section 202(a)(2) of the Clean Air Act. *See Mass. v. EPA*, 549 U.S. at 505, a common province of the judiciary. *See id.* at 516 ("The parties' dispute turns on the proper construction of a congressional statute, a question eminently suitable to resolution in federal court."); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177-78 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."); *see also Zivotofsky v. Clinton*, 566 U.S. 189, 196 (2012). The *Massachusetts* Court, as in other cases where no political question was

found, was not being asked to supplant a decision of the political branches "with the courts' own unmoored determination of what United States policy . . . should be." *Zivotofsky,* 566 U.S. at 196. However that is certainly what Plaintiffs ask here. *Cf.* R. at 3.

As the Supreme Court observed in *AEP*, Congress has designated an expert environmental agency, EPA, to serve as primary regulator of greenhouse gas emissions. 564 U.S. at 428. The Court went on to observe that "[t]he expert agency is surely better equipped to do the job than individual district judges issuing ad hoc, case-by-case injunctions." *Id.* The injunction that Plaintiffs pray for would be precisely the kind of case-by-case, ad hoc relief that the *AEP* court sought to avoid. As the *AEP* Court said, "[f]ederal judges lack the scientific, economic, and technological resources at an agency's disposal." *Id.* They cannot commission scientific studies, convene groups of experts for advice, or issue rules under notice-and-comment procedures, or seek the counsel of regulators in the states where defendants are located. *Id.* In addition, district court decisions are not binding precedent, even in the same district, and therefore cannot form a uniform body of law. *See id.*

The Court must address "specifically identifiable Government violations of law," not the constitutionality of the entirety of federal policies. *Allen v. Wright,* 468 U.S. 737, 759 (1984). It cannot hear suits seeking "broad-scale investigation" into government functions or allow courts to become the "virtually continuing monitors of the wisdom and soundness of Executive action[.]" *Allen,* 468 U.S 737 (quoting *Laird v. Tatum,* 408 U.S. 1, 14-15 (1972)); *see also Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 891 (1990)**Error! Bookmark not defined.**. Allowing such general claims to be brought would deal a huge blow to judicial economy. In the present case, "[s]imilar suits could be mounted against .

. . ‘thousands or hundreds or tens’ of other defendants fitting the description [of] ‘large contributors to carbon-dioxide emissions,’” conflicting irreconcilably with the decision-making scheme that Congress enacted when it passed the Clean Air Act. *See* AEP, 564 U.S. at 428-29.

3. This Question Cannot Be Resolved Without Expressing Lack of Respect Due to Coordinate Branches of Government.

The nonjusticiable political question doctrine, like the law of Article III standing, is built upon separation-of-powers principles, and prevents the judicial process “from being used to usurp the powers of the political branches.” *Cf. Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 408 (2013) (discussing standing principles). In the present case, the political branches have managed the regulation of domestic greenhouse gas emissions for years, R. at 6. The current presidential administration has proposed to reverse United States greenhouse gas regulations and EPA has proposed regulations freezing emissions reductions under greenhouse gas based fuel economy standards, R. at 7, announcing the political branches’ clear intention to withdraw slightly from the regulation of greenhouse gas emissions. This is a matter up to the discretion of the political branches, for which the court cannot supplant its own judgment. *Cf. AEP*, 564 U.S. at 449. (“The Clean Air Act is no less an exercise of the Legislature’s considered judgment because it permits, rather than restricts, emissions until EPA acts.”).

B. Recognizing Plaintiff’s Public Trust Claim Would Usurp Congress’s Power to Control the Use and Disposition of Federal Lands Under the Property Clause.

The public trust doctrine is a state protection, and the Court has held that state laws must yield to Congress’s plenary power over federal lands. *See Kleppe v. New Mexico*, 426 U.S. 529, 543 (1976) (“[A] State undoubtedly retains jurisdiction over

federal lands within its territory, but Congress equally surely retains the power to enact legislation respecting those lands pursuant to the Property Clause.") (citations omitted); *see* U.S. Const., art. IV, § 3, cl. 2. Though states retain jurisdiction over the public lands, "state laws must recede" where they conflict with legislation passed by Congress pursuant to the Property Clause. *Kleppe*, 426 U.S. at 543.

Navigation of federal waters for the necessary regulation of commerce with foreign nations and among the several states is also a paramount right of Congress (presumably under the Commerce Clause), capable of subjecting state public trust law. *Ill. Cent. R.R. Co.*, 146 U.S. at 435. If Congressional power under the Property and Commerce Clauses is superior to the power of state legislatures and the state's interest in the use and preservation of the public trust, it follows that Congress has the power to pass legislation affecting public trust rights. *See* U.S. Const. art. VI, cl. 2; *Kleppe*, 426 U.S. at 543; *Ill Cent. R.R. Co.*, 146 U.S. at 435; *see also United States v. 32.42 Acres of Land*, 683 F.3d. 1030, 1032 (9th Cir. 2012) (holding that the United States can extinguish California's public trust rights when exercising its federal power of eminent domain).

CONCLUSION

For the foregoing reasons, the United States respectfully requests that this court affirm the judgment of the District Court.

Respectfully Submitted,

Counsel for Defendant-Appellee