Team No. 48

Case No. 18-000123

IN THE UNITED STATES COURT OF APPEALS FOR THE TWELFTH CIRCUIT

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

Appellants,

- v. -

HEXONGLOBAL CORPORATION,

Appellee,

and

THE UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for New Union Island in No. 66-CV-2018,
Judge Romulus N. Remus

BRIEF OF THE UNITED STATES OF AMERICA,
Appellee

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STATEMENT OF JURISDICTION

The district court had jurisdiction of this case pursuant to 28 U.S.C. §§ 1331 and 1350 (2018). The case was dismissed under a Rule 12(b)(6) motion. Appellants filed a timely appeal to this Court for review.

STATEMENT OF THE ISSUES

I) Whether Mana can bring a claim under the Alien Tort Statute, relying on the *Trail Smelter Principle*, against a domestic corporation.

II) Whether the Trail Smelter Principle is displaced by the Clean Air Act.

III) Whether there is a cause of action under a Fifth Amendment substantive due process from failure to protect the global climate system from disruption due to the production, sale, and burning of fossil fuels.

IV) Whether the plaintiffs' law of nations claim under the Alien Tort Statute and public trust present a non-justiciable political question.

V) Whether there is an enforceable Fifth Amendment substantive due process right to a global atmospheric climate system protected from disruption by fossil fuels.

VI) Whether the plaintiffs' claims present non-justiciable political questions.

PROCEDURAL BACKGROUND

Plaintiffs Organization of Disappearing Island Nations (ODIN), Apa Mana, and Noah Flood brought an action against HexonGlobal Corporation and the United States. R. at 3. ODIN

is a not-for-profit organization aimed at protecting the interests of island nations threatened by rising sea levels. *Id.* Mana asserted a claim against HexonGlobal under the Alien Tort Statute (ATS), alleging that HexonGlobal's fossil fuel emissions are a violation of the Law of Nations. Alien Tort Statute, 28 U.S.C § 1350. Flood asserts a constitutional claim against the United States alleging violations of the public trust obligations to protect the global climate ecosystem incorporated through the Due Process Clause of the Fifth Amendment to the United States Constitution. U.S. Const. amend. V.

FACTUAL BACKGROUND

Apa Mana is an alien national of A'Na Atu, while Noah Flood is a U.S. Citizen resident of the New Union Islands, a U.S. possession. R. at 3. Both Mana and Flood are members of ODIN. *Id.* A'Na Atu and the New Union Islands are located in the East Sea and will be primarily underwater, and therefore uninhabitable, due to rising seas by the end of this century. *Id.* The district court granted both defendants' motions to dismiss for failure to state a claim. *Id.* at 4.

The Earth's climate depends upon a balance between the amount of solar radiation that reaches the earth and the amount of heat that is radiated from Earth back into space. *Id.* Atmospheric greenhouse gases play important roles in regulating this balance. *Id.* Colder global temperatures result from too little greenhouse gas, while too much greenhouse gas results in higher global temperatures. *Id.* Carbon dioxide and methane are atmospheric gases called greenhouse gases because they have an insulating effect leading the Earth to retain heat. *Id.* The heat-retention properties of carbon dioxide and methane have been established by scientific fact since the nineteenth century. *Id.* Human burning of fossil fuels for energy and distribution of

fossil fuels, particularly natural gas, has resulted in an increase in the concentration of methane in the atmosphere. *Id.* The emissions of greenhouse gases from agricultural and industrial activity are causing global climate change, resulting in rising temperatures, changing rainfall patterns, and rising sea levels. *Id.* If global emissions of greenhouse gases continue to rise at the current rates, global temperatures will rise by over four degrees Celsius, and average sea level will likely rise by between one-half and one meter by the end of this century. *Id.*

A'Na Atu and New Union Islands are low-lying islands with a maximum height above sea level of approximately three meters. *Id.* The residents of both islands reside in sections that are below one meter above sea level. *Id.* Sea level rise of one-half to one meter would make the islands uninhabitable due to the rising temperatures and storms. *Id.* Both Apa Mana and Noah Flood, the Plaintiffs in this case, reside on the islands in communities with elevations of less than one-half meter above sea level. *Id.* at 4-5. In the past three years, both Plaintiffs have suffered damage to their homes due to rising seawater during storms. *Id.* at 5. The damage would not have occurred had the sea levels remained the same. *Id.* Both Apa Mana and Noah Flood have incurred monumental costs to repair the damages to their homes, and in attempts to prevent future damage from the rising sea level. *Id.* Additionally, the increasing temperatures will cause an increased risk of heat stroke and mosquito borne diseases. *Id.* Both Plaintiffs have also experienced seawater intrusion into their drinking water wells, and reduced ocean productivity which limits the availability of locally caught seafood, the main food source which both plaintiffs rely on. *Id.* Placing limits on fossil fuel production and combustion would limit further damage to plaintiffs' properties, reduce the already incurred health risks, and allow the populations to continue living on the islands. *Id.*

HexonGlobal is the single remaining oil producer in the United States, with refineries throughout the world. *Id.* Though based in New Jersey, HexonGlobal operates a refinery on

New Union Island and has consented to personal jurisdiction in all courts in the Territory of New Union Islands. *Id.* The corporation is responsible for 32% of the United States cumulative fossil fuel-related greenhouse gas emissions, which is 6% of total global emissions. *Id.* HexonGlobal continued to profit, despite the knowledge that substantial emission of carbon dioxide is expected and inevitable during the normal combustion of petroleum products as a fuel. *Id.*

The United States is historically the largest single national contributor to emissions of greenhouse gases and is responsible for 20% of human caused greenhouse gas emissions to date. *Id.* at 6. In recent years, the United States has acknowledged the harms caused by greenhouse gas emissions and has taken steps to reduce the emissions of these harmful gases. *Id.* In 1992, the United States signed and the Senate ratified the United Nations Framework Convention on Climate Change (UNFCCC). *Id.* The UNFCCC acknowledged the dangers of climate change and states its intention to stabilize greenhouse gas concentrations. *Id.* Additionally, the UNFCCC 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.*; United Nations Framework Convention on Climate Change, May 9, 1992, 1771 U.N.T.S. 107, 171.

Since 2007, the United States has taken drastic measures to regulate domestic greenhouse gas emissions. R. at 6. The United States Supreme Court held that greenhouse gases were pollutants that were subject to regulation under the Clean Air Act. *Massachusetts v. EPA*, 549 U.S. 497 (2007); Clean Air Act, 42 U.S.C. § 7521 (2018). In 2009, following this monumental case, the United States Environmental Protection Administration (EPA) found that the emission of greenhouse gases and climate change were dangerous to the public health and welfare which solidified greenhouse gas emissions regulation under the Clean Air Act. 74 Fed. Reg. 66,496

(Dec. 15, 2009). Additionally, the EPA joined forces with the National Highway Transportation Agency adopting standards for both fuel economy and greenhouse gas emissions for passenger cars and trucks manufactured between 2012 and 2016. 75 Fed. Reg. 25,324 (May 7, 2010). These regulations were later extended to require increasingly stringent limitations through 2025. 77 Fed. Reg. 62,623 (Oct. 15, 2012). Since 2010, the EPA has issued a rule requiring sources of greenhouse gases to establish technology-based limits on greenhouse gas emissions, regulations establishing carbon dioxide emissions standards for new power plants, and requiring states to implement controls on greenhouse gas emissions from existing power plans. 75 Fed. Reg. 31,514 (June 3, 2010); 80 Fed. Reg. 64,510 (Oct. 23, 2015); 80 Fed. Reg. 64,662 (Oct. 23, 2015). In 2015, the President of the United States signed the Paris Agreement, an international agreement committing the United States to reduce future greenhouse gas emissions. United Nations Framework Convention on Climate Change, opened for signature Apr. 22, 2016, U.N. Doc. FCCC/CP/2015/L.9 (Dec. 12, 2015). Due to its strong commitment to the environment, United States greenhouse gas emissions have decreased over the past decade. R. at 6.

STANDARD OF REVIEW

The Court reviews de novo a district court's dismissal of a complaint for failure to state a claim. *Brown v. Simmons*, 478 F.3d 922, 923 (8th Cir. 2007). Under Fed. R. Civ. P. 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The Court takes all factual allegations as true, but need not credit legal conclusions or unwarranted factual allegations. *Morgan v. Church's Fried Chicken*, 829 F.2d 10, 12 (6th Cir. 1987). This is "not akin to a 'probability requirement,' but it asks for

more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557). The pleading must be of such factual content that it allows the Court to reasonably infer the cause of action, and merely alleging facts consistent with the claims is insufficient. *Id.* at 678.

SUMMARY OF ARGUMENT

Mana can bring a claim under the Alien Tort Statute relying on the *Trail Smelter* Principal. The Alien Tort Statute states that "the district courts shall have original jurisdiction of any civil action by an alien for tort only, committed in violation of the law of nations or a treaty of the United States." Bradford Mank, *Can Plaintiffs Use Multinational Environmental Treaties as Customary International Law to Sue Under the Alien Tort Statute?*, 2007 Utah L. Rev. 1085, 1085 (2007). Though originally enacted to give federal courts jurisdiction to hear atrocities directed at aliens, interference with ambassadors, and piracy, the courts have expanded its scope. The Alien Tort Statute is a jurisdictional statute and does not create a cause of action. Because it does not create a cause of action, the Alien Tort Statute relies on customary international law.

The *Trail Smelter* Principle is accepted customary international law. Customary international law arises from the customs and practices "among civilized nations...gradually ripening into a rule of international law." *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 146 (2d Cir. 2010). It is where nations have demonstrated that the wrong is mutual and recognized by the nations of the world. The *Trail Smelter* Principle qualifies as customary international law because it was a bilateral treaty between the United States and Canada, which evolved into both Principle 21 of the Stockholm Declaration and Principle 2 of Rio Declaration on Environment and Development. U.N. Conference on Environment and Development, June 3-

4, 1992, Rio de Janeiro, Braz., Rio Declaration on Environment and Development, 3, U.N. Doc. A/CONF.151/26/REV.1 (VOL.I) (1992). Because the *Trail Smelter* Principle is customary international law, Mana can bring a claim under the Alien Tort Statute relying on the *Trail Smelter* Principle.

As a customary international law, the *Trail Smelter* Principle imposes obligations enforceable against non-governmental actors, and specifically a corporation. There is conflicting case law surrounding whether a claim can be brought against a corporation, but we contend that based on the precedent, it can be done. *Jesner v. Arab Bank* held that foreign corporations cannot be defendants in suits brought under the Alien Tort Statute, while *Kiobel v. Royal Dutch Petroleum Co.* held that the Alien Tort Statute does not provide courts subject matter jurisdiction over corporations. *Jesner v. Arab Bank*, 138 S.Ct. 1386, 1407 (2018); *Kiobel*, 621 F.3d. These decisions are not based on any precedent of international law, and therefore cannot stand.

Though otherwise enforceable, the *Trail Smelter* Principle is displaced by the Clean Air Act in this case. Congress passed the Clean Air Act and gave the EPA safeguards and avenues to punish those who violate its standards. Mana's claims fall under an international tort and therefore must be considered to be claims arising under federal common law. The Supreme Court held that the Clean Air Act displaces the federal common law of air pollution in *American Electric Power v. Connecticut*. 131 S. Ct. 2527 (2011) [*AEP*]. Because the *Trail Smelter* Principle is federal common law and deals directly with air, it is displaced by the Clean Air Act.

There is no judicially enforceable substantive due process right to protect the global atmospheric climate system from climate change disruption. The right to a healthy climate system is not "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty," nor supported by the ruling in *Juliana v. United States*, 217 F. Supp. 3d 1224 (D. Ore. 2016). *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997). The Due Process Clause

does not compel government protection against harm by private actors in which the government is not complicit. *DeShaney v. Winnebago Cnty Dep't of Social Services*, 489 U.S. 189 (1989). Governmental action against climate change also cannot be enforced through the public trust doctrine, because the public trust doctrine does not comprehend the atmosphere, exists only in state law, and has been displaced by the Clean Air Act.

Plaintiffs' claims are nonjusticiable as political questions. Federal courts have determined the contentious issue in climate change torts to be a matter of determining the reasonableness of greenhouse gas emissions. *See Native Village of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 874 (N.D. Cal. 2009), aff'd, 696 F.3d 849 (9th Cir. 2012). Each of the six Baker factors is present, in particular the first, second, and third. *Baker v. Carr*, 369 U.S. 186, 217 (1962).

ARGUMENT

I. MANA CAN BRING A CLAIM AGAINST HEXONGLOBAL UNDER THE ALIEN TORT STATUTE, RELYING ON THE TRAIL SMELTER PRINCIPLE, BECAUSE IT IS CUSTOMARY INTERNATIONAL LAW.

A. Mana Can Bring a Claim Under the Alien Tort Statute.

The Judiciary Act of 1789 included what is known as the Alien Tort Statute. The Alien Tort Statute states that "the district courts shall have original jurisdiction of any civil action by an alien for tort only, committed in violation of the law of nations or a treaty of the United States". Mank, *supra*, at 1085. Congress originally enacted the Alien Tort Statute to give federal courts jurisdiction to hear violations of safe conduct extended to aliens, interference with ambassadors, and piracy, all three of which were already embedded in English common law. *Jesner*, 138 S.

Ct. at 1392. The Alien Tort Statute is a jurisdictional statute creating no new causes of action. "The jurisdictional grant is best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time." *Sosa v. Alvarez-Machain*, 542 U.S. 725, 2761 (2004). Courts have generally read this narrowly to protect the most fundamental human rights and look exclusively to international law as the source of law.

Originally, the Alien Tort Statute was limited to rights recognized in 1789, until *Filartiga v. Pena-Irala* when the Second Circuit held that "it is clear that courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today." *Filartiga v. Pena-Irala*, 630 F.2d 876, 881 (2d Cir. 1980). In *Filartiga v. Pena-Irala*, a Paraguayan family brought a suit under the Alien Tort Statute against a Paraguayan police chief for torturing and murdering a member of the family. The court held that the plaintiffs could sue under the Alien Tort Statute because torture by a state official violates the law of nations. Id. Courts require a plaintiff to prove that a defendant violated a widely recognized principle of customary international law for it to fall under the law of nations.

The most significant case brought under the Alien Tort Statute in recent years is *Sosa v. Alvarez-Machain*. The *Sosa* court decides that "courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world". *Sosa*, 542 U.S. at 2761. The court limited the scope of the Alien Tort Statute while refusing to rule out any specific types of cases. The court stated that "the door is still ajar subject to vigilant doorkeeping, and thus open to a narrow class of international norms today". *Id.* at 2764. The *Sosa* court set a two-part test: (1) whether a plaintiff can demonstrate that the alleged violation is of a norm that is specific, universal and obligatory; and (2) whether the judiciary must defer to Congress to determine in the first instance whether that universal norm has been

recognized and enforced in ATS suits. *Jesner*, 138 S. Ct. at 1391. "International human-rights norms prohibit acts repugnant to all civilized peoples—crimes like genocide, torture, and slavery, that make their perpetrators enemies of all mankind". *Sosa*, 542 U.S. at 732. For the foregoing reasons, Mana can bring a claim under the Alien Tort Statute.

B. The Trail Smelter Principle is Customary International Law Under the Law of Nations.

Mana can bring a claim under the Alien Tort Statute under the *Trail Smelter* Principle because it is customary international law enforceable under the law of nations. "The law of nations sets worldwide norms of conduct, prohibiting certain universally condemned heinous acts." *Kiobel*, 621 F.3d at 153. Customary international law arises from the customs and practices "among civilized nations…gradually ripening into a rule of international law." *Id.* at 146. Judge Friendly explained customary international law includes "only those standards, rules or customs (a) affecting the relationship between states or between an individual and a foreign state, and (b) used by those states for their common good and/or in dealings inter se." *Id.* at 118. "It is only where the nations of the world have demonstrated that the wrong is of mutual, and not merely several, concern, by means of express international accords, that a wrong generally recognized becomes an international law violation within the meaning of the Alien Tort Statute". *Id.*

There are three main sources of international law: (1) international agreements, including bilateral treaties; (2) customary international law seen as general consistent practice of states followed by them from a sense of legal obligation; and, (3) general principles of international law common to the major legal systems. Restatement (Third) Foreign Relations § 102 (1987).

The *Trail Smelter* Arbitration qualifies as customary international law because it was a bilateral treaty, which evolved into further international agreements and treaties. The 1938 and 1941 *Trail Smelter* Arbitration between the United States and Canada held Canada liable for compensation for transboundary pollution from a smelter in Trail, British Columbia owned by Consolidated Mining and Smelter Company. Mank, *supra* at 1085. Smoke from the lead and zinc smelter traveled across the international boundary causing damage to crops and forests in Washington State. 1 John D. Wirth, *The Trail Smelter Dispute* 34-5 (1996). The dispute escalated to the highest levels of the United States and Canadian governments, with the two countries becoming parties first through the International Joint Commission and then through an Arbitral Commission. *Id.* The panel concluded that "no state has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein." Mank, *supra*, at 1085. The Trail Smelter conclusion that States are liable for their transboundary pollution is now recognized as customary international law.

The Trail Smelter Principle is so embedded in international law that it was the genesis of Principle 21 in the Stockholm Declaration and has been followed by the International Court of Justice. Principle 21 states,

> States have, in accordance with the Charter of the United Nations and the principles of international law, 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 or of areas beyond the limits of national jurisdiction.

U.N. Conference of the Human Environment, Stockholm, June 5-16, 1972, Declaration of the United Nations Conference on the Human Environment, 5, U.N. Doc A/CONF.48/14/Rev. 1 (June 16, 1972). The principle was solidified in Principle 2 of the 1992 Declaration on Environment and Development, endorsed by 190 nations. U.N. Conference on Environment and Development, June 3-4, 1992, Rio de Janeiro, Braz., Rio Declaration on Environment and

Development, 3, U.N. Doc. A/CONF.151/26/REV.1 (VOL.I) (1992). A treaty will sufficiently show proof of a norm of customary international law if an overwhelming majority of states have ratified the treaty. *Kiobel*, 621 F.3d at 113. With 190 nations signing onto Principle 2, it is clear that the Trail Smelter Principle has become customary international law.

Mana can bring a claim against HexonGlobal under the Alien Tort Statute, relying on the Trail Smelter Principle, because it is customary international law. The greenhouse gases emitted from HexonGlobal have heinous consequences for all people, not unlike the effects of piracy or genocide. The emissions are having destructive consequences on citizens across the world, and the severity is exemplified through the numerous nations who have attached themselves to The Rio Declaration. Mana can bring a claim under the Alien Tort Statute because the Trail Smelter Principle is customary international law, and the emission of greenhouse gases in this magnitude is repugnant to all civilizations.

II. BECAUSE THE TRAIL SMELTER PRINCIPLE IS CUSTOMARY INTERNATIONAL LAW, IT IMPOSES OBLIGATIONS ENFORCEABLE AGAINST NON-GOVERNMENTAL ACTORS.

Customary international law imposes two standards, rules or customs (1) affecting the relationship between states or between an individual and a foreign state, and (2) used by those states for their common good and/or in dealings inter se. *Jesner*, 138 S. Ct. at 1407. The subjects of international law are those that, to varying extents, have legal status, personality, rights, and duties under international law and whose acts and relationships are principal concerns in international law. In this case, the Trail Smelter Principle imposes obligations on HexonGlobal because it has a legal status, rights, and duties under international law. Additionally, its actions affect the relationships between states, as indicated by this very suit. In

this ever-globalizing world, corporations such as HexonGlobal play a key role in international relations and are often used in international bargaining.

Jesner v. Arab Bank held that foreign corporations cannot be defendants in suits brought under the Alien Tort Statute. *Id.* "The principle objective of the statute was to avoid foreign entanglements by ensuring the availability of a federal forum where the failure to provide one might cause another nation to hold the United States responsible for an injury to a foreign citizen." *Id.* at 1397. Given this original intent, the Court is concerned about whether it has authority and discretion to impose liability on a corporation without the direction from Congress. This case can be distinguished from *Jesner* for a few main reasons. *Jesner v. Arab Bank* dealt with an international corporation and went directly against the wishes of the original drafters. In this case, HexonGlobal is a United States corporation, and allowing a United States court to hear this case would not create an international dispute. The *Jesner* litigation "causes considerable diplomatic tensions with Jordan, a critical ally that considers the litigation an affront to its sovereignty". *Id.* at 1390. "The ATS was intended to promote harmony in international relations by ensuring foreign plaintiffs a remedy for international-law violations in circumstances where the absence of such a remedy might provoke foreign nations to hold the United States accountable." *Id.* at 1406.

Kiobel v. Royal Dutch Petroleum Co. answers the question whether the jurisdiction granted by the Alien Tort Statute extend to civil actions brought against corporations under the law of nations. *Kiobel,* 621 F.3d. The court holds that the Alien Tort Statute does not provide courts subject matter jurisdiction over corporations. *Id.* at 149. In his concurrence to *Kiobel,* Judge Leval vehemently disagrees with the logic used to reach the holding. He states "no precedent of international law endorses this rule." *Id.* at 151. There is no rule of custom of international law to award civil damages to either natural persons or juridical ones because

international law leaves all aspects of civil liability to individual nations. *Id.* at 152. Though the majority states that corporations were not involved prior cases brought under the Alien Tort Statute, Judge Leval argues that corporations were behind slavery, genocide, and aiding and abetting. Because corporations were behind human rights atrocities authorized by the Alien Tort Statute, corporations should be liable as well as natural persons.

The *Kiobel* case is additionally significant because it discusses the further inclusiveness of the ATS and customary international law. The court discusses the Nuremberg trials and the defining legal achievement that explicitly recognized individual liability for violations of customary international law. *Id.* at 127. The Nuremberg Trials expanded the Alien Tort Statute to allow suits against individuals, as opposed to just countries. "Beginning with the Nuremberg trials, the focus of international law thus broadened beyond practical concerns of sovereign nations toward universally shared moral objectives." *Id.* at 154. The expansion is key when turning to the facts of this case. The environment has become the key moral objective for nations around the world. Protecting the world from greenhouse gas emissions is a universal issue, and not one that is limited to one particular country. As time has progressed, there has been consensus that "genocide by private actors violates international law". *Kadic v. Karadzi,* 70 F.3d 232, 239-241 (2d Cir. 1995). The actions of HexonGlobal, a private corporation, can be analogized to genocide because the emission of greenhouse gases is killing people around the world and destroying homes.

III. THE TRAIL SMELTER PRINCIPLE IS DISPLACED BY THE CLEAN AIR ACT.

Though otherwise enforceable, the *Trail Smelter* Principle is displaced by the Clean Air Act in this case. Because Congress has passed legislature on the subject, it is not up to the United

States courts to decide greenhouse gas regulations. The legislature has given the EPA safeguards and avenues to punish those who violate its standards. Mana's claims fall under an international tort and therefore must be considered to be claims arising under federal common law. "When we deal with air and water in their ambient or interstate aspects, there is a federal common law." *Illinois v. Milwaukee*, 406 U.S. 91, 93 (1972). The Supreme Court held that the Clean Air Act displaces the federal common law of air pollution in *American Electric Power v. Connecticut*. The Clean Air Act authorizes federal regulation of emissions of carbon dioxide and other greenhouse gases. *Massachusetts v. EPA*, 549 U.S. 497 (2007). At the Court's rule, the EPA took over all greenhouse gas regulation. In *AEP*, two groups of plaintiffs filed complaints against five major electric power companies. *AEP*, 131 S. Ct. at 2529 . The defendants were the largest carbon dioxide emitters in the United States. The plaintiffs stated a claim under "federal common law of nuisance, relying on this Court's holding that States may maintain suits to abate air and water pollution produced by other States or by out-of-state industry." *Id.* The Plaintiffs alleged that climate change was directly affecting public lands, infrastructure, and health in the negative. *Id.* at 2534.

The test for legislative displacement of federal common law is simply whether the statute "speaks directly to the question at issue". *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 628, 625 (2010). The Court held that the Clean Air Act provides a means to seek limits on emissions of carbon dioxide from domestic power plants, and therefore displaces the Plaintiff's claim. "There is no room for a parallel track." *AEP*, 131 S. Ct. at 2531. The Court believes that the Environmental Protection Agency, an expert in the field, is better equipped to regulate greenhouse gas production than federal judges who "lack the scientific, economic, and technological resources an agency can utilize in coping with issues of this order". *Id.* at 2531.

Because the *Trail Smelter* Principle is federal common law and deals directly with air, it is displaced by the Clean Air Act.

IV. NO CAUSE OF ACTION EXISTS AGAINST THE UNITED STATES GOVERNMENT TO COMPEL PROTECTION OF A SUBSTANTIVE DUE PROCESS RIGHT TO A HEALTHY GLOBAL CLIMATE SYSTEM.

The Due Process Clause of the Fifth Amendment states that no person shall "be deprived of their life, liberty, or property" by the federal government "without due process of law." U.S. Const. amend. V. Relying upon a recent district court opinion in the Ninth Circuit, Plaintiff Flood contends that citizens of the United States have a "fundamental due process right to a healthy and stable climate system." R. at 10; *Juliana*, 217 F. Supp. at 1250 ("I have no doubt that the right to a climate system capable of sustaining human life is fundamental to a free and ordered society."). Based upon that contention, Flood alleges a due process deprivation through historical support from the United States Government for fossil fuel production and a failure under the public trust doctrine to protect the global atmospheric climate system. R. at 10. Plaintiffs have no enforceable claim under the Due Process Clause because their right to a healthy climate system is neither fundamental, nor compelled by any obligations of the United States Government under the Due Process Clause or the public trust doctrine.

A. There Is No Judicially Enforceable Fundamental Due Process Right To A Healthy Climate System.

Plaintiffs argue that the United States is obligated to protect their right to a healthy and stable climate system from greenhouse gases under an enforceable due process right. Substantive due process rights are those "which are, objectively, deeply rooted in this Nation's history and

tradition and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Washington*, 521 U.S. at 721. Due process rights pertain only to deprivations by state actors of "life, liberty, and property," as well as accompanying "personal choices central to individual dignity and autonomy." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2597 (2015). Plaintiff Flood's argument inflates the significance of the right to a healthy climate system and misapplies the Due Process Clause to the activities of private actors.

1. The Right To A Healthy And Stable Climate System Is Not Fundamental.

Fundamental rights present a "threshold requirement," necessitating a finding of being "deeply rooted in our legal tradition." *Washington*, 521 U.S. at 722; *see also Obergefell*, 135 S. Ct. at 2598 ("[I]t requires courts to exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect."). Such fundamental rights receive particular protection under the Due Process Clause, allowing government infringement to survive judicial review only when providing the narrowest means to a legitimate interest, or possibly being so fundamental as to never permit government interference at all. *See Juliana*, 217 F. Supp. at 1248. Those rights which are substantive but not fundamental only require a reasonable relation to a legitimate state interest. *Washington*, 521 U.S. at 722. Plaintiffs argue that the Due Process Clause enshrines such a fundamental right to a healthy climate system as to render any support by the United States for the activities of fossil fuel companies to be unconstitutional.

While individuals logically have a right to a climate system capable of sustaining life, at the least due to necessity, it is not fundamental and enforceable under the Due Process Clause. The district court in *Juliana* relies on the notion that a free and ordered society fundamentally

requires a healthy climate system to exist. 217 F. Supp. at 1250. The court also compares the enumeration of that right to the Supreme Court's understanding in *Obergefell* that a fundamental right may be found where it is "underlying and supporting other vital liberties." *Id.* It is not outlandish to argue that an unenumerated right exists which is fundamental to civil liberties. *See Obergefell*, 135 S. Ct. at 2598 ("When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed."). However, a broad view of the Due Process Clause and jurisprudence dictates that we do not take the conclusion in *Juliana* lightly.

It is fundamentally true that our society requires "a climate system capable of sustaining human life," although that is not what the plaintiffs are asking the Court to recognize. Plaintiffs are seeking a declaration of a right to a climate system protected from disruption, articulated in the lower court's decision as a "healthy and stable climate system." R. at 10. While the very existence of a suitable atmospheric system is fundamental to our survival, it is not necessary for the Court to recognize and articulate a standard of healthiness for our climate. The Due Process Clause does not guarantee certain levels of necessities, but only limits the actions of the State when unreasonably infringing upon a fundamental right. *DeShaney*, 489 U.S. at 195 ("The Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security."). Because the right which plaintiffs have articulated is not reflected in other fundamental liberties, and because the ruling in Juliana does not apply to this case, no right to a healthy climate system can be strictly construed as a fundamental right that grants a cause of action against the United States.

2. Under Deshaney, The United States Cannot Be Compelled To Protect Individuals Under The Due Process Clause.

The Due Process Clause compels the United States government to remedy its own unconstitutional intrusions upon the rights and property of individuals. *See Washington*, 521 U.S. at 720. However, regardless of whether a fundamental due process right to a healthy climate system exists, it does not compel the United States to protect individuals from private actors. *DeShaney*, 489 U.S. at 195 ("[N]othing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors."). *DeShaney* illustrates this bedrock principle of the Due Process Clause, where county social service workers had notice of the consistent abusive habits of a father and failed to remove a child from the home before the father had caused permanent brain damage. *Id.* at 192-93. But in the absence of "special relationships," the Due Process Clause does not compel the government to provide individuals with a certain level of services or protection - and those relationships are limited to when the State has taken an individual into its custody. *Id.* at 197-98.

Plaintiff's allegation that the United States Government has not taken effective action against climate change is not an enforceable claim under the Due Process Clause. The harm that Plaintiff Flood has alleged is not a result of the deprivation of rights by the United States Government, but by the activities of private actors. The Due Process Clause "forbids the State itself to deprive individuals of life, liberty, or property . . . but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means." *Id.* at 195. Since the plaintiffs are not engaged in a special relationship exception as recognized by the Court, the United States has no affirmative obligation to maintain a right to a healthy climate system.

3. The Danger Exception Does Not Apply.

Although the Due Process Clause does not impose an affirmative obligation upon the State to protect individuals from private harm, the Ninth Circuit has acknowledged an exception to the *DeShaney* rule where individuals have an enforceable Due Process right when the danger has been created by the government. *Penila v. City of Huntington Park*, 115 F.3d 707, 710 (9th Cir. 1997) ("[I]f affirmative conduct on the part of a state actor places a plaintiff in danger, and the officer acts in deliberate indifference to that plaintiff's safety, a claim arises."). The "danger exception" requires that the state actor place an individual in a "danger which he or she would not have otherwise faced," and that there be "proof of deliberate indifference to a known or obvious danger." *Campbell v. Washington Dept. of Social and Health Services*, 671 F.3d 837, 845 (9th Cir. 2011) (internal quotations omitted).

This exception cannot be appropriately applied to this case. The standards for finding a danger exception to *DeShaney* are far more significant than the circumstances of the case before this Court. The affirmative conduct requirement refers to a state actor putting an individual in direct harm. *See Campbell*, 671 F.3d at 847 (not finding affirmative conduct when a social worker permitted a developmentally-delayed woman to take a bath unattended and subsequently drowned); *Penila*, 115 F.3d at 710 (finding affirmative conduct when police officers deprived a man of medical assistance and locked him alone inside a house). The conduct of the United States Government clearly does not rise to the level of affirmative conduct that has been articulated by the Ninth Circuit - the United States Government has not created climate change, or taken any action to ensure that plaintiffs' homes are harmed by rising sea levels.

Likewise, the "deliberate indifference" requirement is inapplicable to the circumstances of the historical support for fossil fuel production from the United States, requiring that the actor

"recognize an unreasonable risk and actually intend to expose the plaintiff to such risks without regard to the consequences to the plaintiff." *Campbell*, 671 F.3d at 846. The record simply does not support such a claim. The record demonstrates that the United States recognized the risk of climate change when it signed and ratified the UNFCCC in 1992, indicating a relatively recent recognition of the harm compared to the history of fossil fuel production. R. at 6. Since that time, the United States has applied the Clean Air Act to the regulation of greenhouse gases, adopted fuel economy and technology standards, and signed the Paris Agreement. R. at 6-7. Those facts contradict any assertion that the United States has intended to expose the plaintiff to the harms of climate change and rather indicate that the United States Government has worked to reduce the risk.

The district court in *Juliana* found the "danger exception" to be applicable to the United States' historical support for fossil fuel production - however, the opinion makes no finding of fact that the United States was aware of the dangers of climate change during the history of fossil fuel production. 217 F. Supp. at 1251 ("Plaintiffs allege defendants acted 'with full appreciation' of the consequences of their actions."). The record in this case cannot support any such assertion, and the "danger exception" is entirely inapplicable.

B. Protection Of The Global Atmospheric Climate System Is Not Compelled By The Public Trust Doctrine.

Plaintiff argues that the public trust doctrine imposes an obligation upon the United States to protect the global atmospheric climate system. R. at 3. The public trust is a historic principle dating to Roman times and incorporated into United States law by way of Great Britain. R. at 10; *PPL Montana, LLC v. Montana*, 565 U.S. 576, 603 (2012). Under the public trust doctrine, states own property in trust for the public, wielding the right to use and dispose of the

land so long as it does not "cause substantial impairment of the interest of the public" in that land. *Alec L. v. Jackson*, 863 F. Supp. 2d 11, 13 (D.D.C. 2012) (citations omitted). When applied as a common law cause of action, the public trust doctrine can compel a government to maintain public access, ownership, and use of property. *See Juliana*, 217 F. Supp. at 1254. Although the public trust doctrine can impose an obligation upon a sovereign to protect a property or natural resources, Plaintiff errs in several ways by alleging that it can require the United States Government to protect the global climate from greenhouse gas emitters.

1. The Public Trust Doctrine Does Not Comprehend The Global Atmospheric Climate System.

The public trust doctrine has been inherited by and incorporated into United States law in the context of lands beneath navigable and tidal waters. R. at 10; *see Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 476 (1988) ("[T]he States, upon entry into the Union, received ownership of all lands under waters subject to the ebb and flow of the tide."). A landmark case on the topic, *Illinois Central Railroad Company v. Illinois*, articulated the public trust right to the lands beneath the Great Lakes, after a determination that the freshwater lakes were characteristically similar in navigability and public utility to the open seas. 146 U.S. 387, 435 (1892). The expansion of the public trust doctrine to new forms of property has been highly limited, advancing only in the last few decades to recognize tidelands that are not navigable in fact. *Phillips*, 484 U.S. at 484.

The atmosphere has not been recognized as a public trust asset. Plaintiff's claim to a cause of action falters by virtue of failing to plead harm to any property covered by the public trust doctrine. Even the district court's ruling in *Juliana*, upon which the plaintiff leans so heavily, failed to make a determination upon whether the global atmosphere falls within the

scope of the public trust doctrine. 217 F. Supp., at 1255 ("I conclude that it is not necessary at this stage to determine whether the atmosphere is a public trust asset because plaintiffs have alleged violations of the public trust doctrine in connection with the territorial sea."). Although *Juliana* contains an extensive discussion within a footnote of the theoretical possibility of applying the public trust doctrine to the atmosphere based upon state cases, *id.* at fn 10, the cases cited by the court provide broad suggestions that air as a general resource could be historically included within the doctrine based upon legal sources found within those states, not the general public trust doctrine. *See Robinson Township v. Commonwealth*, 623 Pa. 564, 652 (2013) (suggesting that "ambient air" could be defined as a public resource under the Environmental Rights Amendment found in Pennsylvania's constitution). A finding that the global atmosphere qualifies as a public trust asset would be an unprecedented expansion of the doctrine without legal basis in the federal system.

2. The Public Trust Doctrine Does Not Apply To The Federal Government.

Applying the public trust doctrine to the federal government would suggest that the United States has an obligation to preserve the lands it owns in the public trust and cannot "abdicate its trust over property in which the whole people are interested" except for when the land is transferred for the improvement of navigation "or when parcels can be disposed of without impairment of the public interest in what remains." *Illinois Central Railroad*, 146 U.S. at 453. This reasoning fails in the face of the Constitution's Property Clause, which states that "[t]he Congress shall have power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const. art. IV, § 3, cl. 2. The United States Supreme Court has "repeatedly observed that '(t)he power over the public land thus

entrusted to Congress is without limitations.'" *Kleppe v. New Mexico*, 426 U.S. 529, 539 (1976) (quoting *United States v. San Francisco*, 310 U.S. 16, 29-30 (1940)).

Even if the Court were to find that the public trust doctrine could be extended to the atmosphere, the Supreme Court's interpretation of the Property Clause would bar any public trust action against the United States. This conclusion is consistent with federal court rulings on the public trust doctrine, which have applied the doctrine pursuant to an interpretation of state and not federal law. *See PPL Montana*, 565 U.S. at 603-04 (in determination of title ownership to riverbeds in Montana, Court ruled "the public trust doctrine remains a matter of state law" subject to federal power under the Commerce Clause); *Phillips*, 484 U.S. at 474 (affirming that public trust lands "were reserved to the several States" upon their admission to the Union and subsequently ruling upon the case as an interpretation of Mississippi law); *Appleby v. City of New York*, 271 U.S. 364, 395 (1926) (describing the landmark Illinois Central Railroad case as "necessarily a statement of Illinois law").

Plaintiff relies upon *Juliana*, which found the public trust doctrine to be applicable to the federal government largely because "I can think of no reason why [it] would apply to the states but not to the federal government." 217 F. Supp. at 1259 (relying upon a lack of explicit Supreme Court language stating that the public trust doctrine does not apply to the federal government). The more persuasive case is *Alec L. v. Jackson*, which held the Supreme Court's repeated references to the public trust doctrine as a matter of state law to be determinative. 863 F. Supp. 2d 11, 15 (D.D.C. 2012), aff'd, 561 Fed. Appx. 7, 8 (Mem) (D.C. Cir. 2014) (finding the Supreme Court "categorically rejected any federal constitutional foundation for [the public trust] doctrine, without qualification or reservation"). The application of the public trust doctrine to the United States Government would, like the expansion of the doctrine to include the atmosphere, have no persuasive basis in federal law.

3. Any Application Of The Public Trust Doctrine To The Atmosphere On The Federal Level Has Been Displaced By The Clean Air Act.

Even if the public trust doctrine was once applicable to the United States Government, it has been displaced by the Clean Air Act, pursuant to the Supreme Court's decision in *AEP v. Connecticut*. 564 U.S. 410 (2011) (holding that all federal common law claims arising from greenhouse gas emissions are displaced by the Clean Air Act). Legislative displacement of federal common law claims occurs when a federal statute "speaks directly to the question at issue." *Id.* at 424 (quoting *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978)). In *Massachusetts v. EPA*, the Court interpreted the Clean Air Act as granting "statutory authority to regulate the emission of [greenhouse] gases." 549 U.S. at 532. Two years later, the EPA issued an "Endangerment Finding," describing the threat of greenhouse gas-induced climate change and requiring regulation of greenhouse gases under the Clean Air Act. 74 Fed. Reg. 66,496 (Dec. 15, 2009). In light of those rulings, the Court in *AEP* held that any "federal common law claim directed to the reduction or regulation of carbon dioxide emissions is displaced by the Act." *Alec L.*, 863 F. Supp. at 17; *AEP*, 564 U.S. at 424 ("We hold that the Clean Air Act and the EPA actions it authorizes displace any federal common law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired power plants."). Despite the questioning in *Juliana* of whether "any federal common law right" includes a theoretical federal public trust common law right, 217 F. Supp. at 1260 ("[T]he Court did not have public trust claims before it and so it had no cause to consider the differences between public trust claims and other types of claims."), the cause of action claimed by Plaintiff Flood does not exist, even if it had previously.

V. PLAINTIFFS PRESENT A NONJUSTICIABLE POLITICAL QUESTION THAT CANNOT BE RESOLVED BY THE JUDICIAL BRANCH.

Political questions concern those issues requiring "policy choices and value determinations constitutionally committed for resolution" to the legislative and executive branches and which "[t]he Judiciary is particularly ill suited to make." *Japan Whaling Ass'n v. American Cetacean Soc.*, 478 U.S. 221, 230 (1986). The Supreme Court established in *Baker v. Carr* that a political question is "inextricable" from one or more of the following factors:

> a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

369 U.S. at 217. These factors must be applied to the details of this particular case in consideration of the political issues that it raises, not simply in the context of the cause of action filed. *Id.* at 217 ("The doctrine of which we treat is one of 'political questions,' not one of 'political cases.'). Application of these factors requires an analysis of how the political question jeopardizes the separation of powers. *Id.* at 211. Plaintiffs here present two claims in which relief requires the Court to determine how the United States will regulate greenhouse gas emissions, amounting to "a policy judgment of a legislative nature, rather than resolving the dispute through legal and factual analysis." *E.E.O.C. v. Peabody Western Coal Co.*, 400 F.3d 774, 784 (9th Cir. 2005).

A. Adjudicating Plaintiffs' Claims Requires A Policy Determination Of How To Regulate Greenhouse Gas Emissions.

Applying the *Baker* formulations to plaintiffs' claims first requires identifying the nature of the issue being presented to the Court. *Planned Parenthood Federation of America, Inc. v. Agency for Intern. Development*, 838 F.2d 649, 655 (2d Cir. 1988) ("In determining whether a case presents a non-justiciable question, the court must first make a 'discriminating inquiry into the precise facts and posture of the particular case.'" (quoting *Baker*, 369 U.S. at 217)). Plaintiffs present two claims to the Court: one seeking damages against a fossil fuel company for emitting greenhouse gases and one claiming a constitutional deprivation by the United States for not regulating greenhouse gas emissions. R. These claims are properly analyzed in the context of federal climate change jurisprudence.

Federal courts have largely found that tort claims arising from greenhouse gas emissions and climate change are grounded in nonjusticiable political questions. *See Comer v. Murphy Oil USA, Inc.*, 839 F. Supp. 2d 849 (S.D. Miss. 2012), aff'd, 718 F.3d 460 (5th Cir. 2013); *Native Village of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863 (N.D. Cal. 2009), aff'd, 696 F.3d 849 (9th Cir. 2012); *California v. General Motors Corp.*, No. C06-05755 MJJ, 2007 WL 2726871 (N.D. Cal. Sep. 17, 2007) [General Motors]. In *Comer*, where the plaintiffs were seeking damages from greenhouse gas emitters for contributing to the increased intensity of Hurricane Katrina, the court determined that the plaintiffs' claims hinged on a finding "that the defendants' levels of emissions are 'unreasonable.'" 839 F. Supp, at 864. In *Kivalina* and *General Motors*, the courts discerned that the plaintiffs' nuisance claims for damages required that the court not only determine "unreasonableness" but that it "also balance the utility and benefit of the alleged nuisance against the harm caused." *Kivalina*, 663 F. Supp. at 874; *General Motors*, No. C06-05755 MJJ at 8. Technically, a circuit split exists between the Fifth and Ninth Circuits, and the Second Circuit, which had vacated a district court's finding that a nuisance claim seeking injunctive relief presented a nonjusticiable political question. *Connecticut v. Amer. Elec. Power*

Co., 582 F.3d 309 (2d Cir. 2009). However, the United States Supreme Court's reversal of *AEP* two years later failed to substantively address the political question threshold, leaving the circuit split intact, although tenuously based upon the reversed Second Circuit decision. *AEP*, 564 U.S.

The claims presented by the plaintiffs in this case are of a similar nature to those addressed in the above cases. Plaintiffs are seeking a determination from the Court that the activities of private greenhouse gas emitters are unreasonable and that the restraint of the United States is unconstitutional. Simply because the bulk of federal climate change jurisprudence has barred judicial consideration of climate suits under the political question doctrine does not mean that the present matter is automatically barred as well. *See Planned Parenthood*, 838 F.2d at 655 ("The fact that this case involves foreign affairs, an area constitutionally committed to the executive and legislative branches, does not end the court's inquiry as to whether the action presents a political question."). Application of the six Baker factors will reveal that the "precise facts and posture of the particular case" render it constitutionally unsuitable for judicial review.

B. The Political Question Raised Is Inextricably Tied To Six Of The Baker Factors.

The Court need recognize that the matter at hand implicates only one of the *Baker* factors to determine the plaintiffs' claims are nonjusticiable. *Baker*, 369 U.S., at 217 ("Unless one of these formulations is inextricable from the case at bar, there should be no dismissal for non-justiciability on the ground of a political question's presence."); *see also United States v. Mandel*, 914 F.2d 1215, 1222 (9th Cir. 1990) ("Implicating any one of these factors renders a question 'political' and thus nonjusticiable.") and *Comer*, 839 F. Supp. at 862 ("The United States Supreme Court has held that application of any one of the following elements renders a claim non-justiciable."). Each of the factors are to be treated as "'independent tests' for determining the

existence of a political question" which are generally arranged "in 'descending order of both importance and certainty.'" *Id.* at 863 (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 277-78 (2004)). Among the six *Baker* factors, the political question presented by plaintiffs' claims implicates all six, clearly qualifying as a nonjusticiable political question.

1. Judicial Resolution Of Plaintiffs' Claims Would Require Exercising Authority Constitutionally Reserved For The Executive And Legislative Branches.

The determinations that plaintiffs request the Court make require a usurpation of authority from the legislative and executive branches which is not subject to judicial review. By seeking relief from the activities of HexonGlobal and alleging constitutional harm by the United States, they are asking for a judgment of the reasonableness of greenhouse gas producing activities. *Kivalina*, 663 F. Supp., at 874. The Constitution grants authority to the legislative branch of government to regulate the activities of fossil fuel companies through the Commerce Clause and the vesting of foreign policy in the executive. An imposition of damages against HexonGlobal for their lawful activities would exercise undue influence over interstate commerce that is reserved for the Congress. *General Motors*, 2007 WL 2726871, at 14 ("[R]ecognizing such a new and unprecedented federal common law nuisance claim for damages would likely have commerce implications in other States by potentially exposing automakers, utility companies, and other industries to damages flowing from a new judicially-created tort.").

Plaintiffs' claims also call for an undue intrusion into the highly-political foreign relations powers reserved for the executive branch. U.S. Const. art. II. The mere fact that the claims presented in this case revolve around global emissions of greenhouse gases does not necessarily present a political question. *Baker*, 369 U.S., at 211 ("Yet it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."). However the

executive branch has already acted in the realm of climate change foreign policy, through the signing of the UNFCCC and the Paris Agreement. R. at 6-7. The Paris Agreement made commitments to the reduction of greenhouse gas emissions in the United States, which would be contradicted by the granting of injunctive relief to the plaintiffs.

2. The Judiciary Has No Manageable Standards To Apply And Cannot Resolve The Political Question Without Making A Policy Determination.

The claims presented by the plaintiffs require not only a ruling upon the reasonableness of the emissions activities alleged to have caused the climate change-related harm, but "weighing the gravity of the harm against the utility of the conduct." *Kivalina*, 663 F. Supp. at 874. In this case, like in other climate tort cases, the Court would be faced with the prospect of balancing "the competing interests of reducing global warming emissions and the interests of advancing and preserving economic and industrial development." *Id.* (quoting *Cook v. Rockwell Int'l Corp.*, 580 F. Supp. 2d 1071, 1166 (D. Colo. 2006)). Although the United States Government has made commitments to reducing greenhouse gas emissions, no comprehensive policy has been promulgated for the Court to follow. Without any manageable standards available for courts to resolve climate change torts, they lack the "legal tools" to reach rational rulings without having to make their own policy determinations. *General Motors*, 2007 WL 2726871 at 15.

Issues which are "of a sort familiar to the courts" concern matters of statutory interpretation, whereas "[a] nonjusticiable political question exists when, to resolve a dispute, the court must make a policy judgment of a legislative nature, rather than resolving the dispute through legal and factual analysis." *E.E.O.C.*, 400 F.3d at 784. There are no policy judgments to interpret in this matter. The plaintiffs' ATS claim presents a common law tort seeking damages from a fossil fuel company, which would require the Court to make an unreasonableness finding

in the context of greenhouse gases. The political branches are best equipped to make that finding, which would concern issues of how to balance competing interests and who should bear the cost of climate change. *Kivalina*, 663 F. Supp. at 877-77. Courts might be better equipped to interpret the due process claim if it did not also require a balancing of economic interests and the crafting of equitable relief. While the United States Government has promulgated regulations to protect the global climate system, plaintiffs have not presented claims which can be resolved by interpreting existing statute.

3. A Ruling Upon The Plaintiffs' Claims Would Undermine The Separation Of Powers.

Given that the concerns leading to the political question doctrine stem from upholding the separation of powers, it is vital that a judicial ruling not implicate the last three *Baker* factors by embarrassing or undermining a fellow branch of government. *Baker*, 369 U.S. at 210 ("The nonjusticiability of a political question is primarily a function of the separation of powers."). Yet it is impossible for the Court to come to a ruling in this case without harming the separation of powers. Making a determination concerning whether the United States is adequately responding to climate change would express a lack of respect for the political branches. Establishing a new greenhouse gas policy, whether through awarding damages or mandating a course of political action, would infringe upon the deliberate decisions of the political branches. And a ruling upon the due process claim would embarrass the political branches by mandating a new political course for them.

CONCLUSION

For the foregoing reasons, the United States requests that this Court affirm the district court's motion to dismiss for failure to state a claim.