TEAM NUMBER 13

CA. No. 18-000123

United States Court of Appeals

FOR THE TWELFTH CIRCUIT

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

Plaintiff – Appellants

v.

HEXONGLOBAL CORP. *and*

THE UNITED STATES OF AMERICA,

Defendant – Appellees

On Appeal from the United District Court for the District of New Union Island (No. 66-CV-2018)

OPENING BRIEF OF APPELLEE THE UNITED STATES OF AMERICA

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STATEMENT OF JURISDICTION

The Organization of Disappearing Island Nations (ODIN), Ms. Apa Mana, and Mr. Noah Flood appeal the district court's order granting summary judgment in *Org. of Disappearing Island Nations v. HexonGlobal Corp.*, No. 66-CV-2018 (D.N.U.I. Aug. 15, 2018). The district court had jurisdiction under 28 U.S.C. § 1331 (federal question), § 1332 (diversity), and § 1350 (alien tort statute). This Court has jurisdiction to hear this appeal under 28 U.S.C. § 1291.

STATEMENT OF ISSUES PRESENTED

1. Corporate civil liability was established at common law when the Alien Tort Statute was enacted, and is now common across jurisdictions. Can a domestic corporation be held civilly liable under the Alien Tort Statute?
2. A norm of international law is enforceable under the Alien Tort Statute when it is universal, obligatory, specific, and definable, and would reduce diplomatic friction. The *Trail Smelter* principle has been defined and applied in numerous international cases and treaties, and affords plaintiffs relief for environmental harms suffered abroad. Does the *Trail Smelter* principle support Mana's claim for relief?
3. International law primarily governs obligations between States but recognizes certain norms enforceable against private parties. International treaties and cases have imposed private liability for transboundary environmental harm. Is HexonGlobal liable under *Trail Smelter*?
4. Congress displaces common law when it enacts legislation on point. As customary international law, the *Trail Smelter* Principle is an aspect of federal common law. Given the Clean Air Act regulates ambient air emissions, does it displace *Trail Smelter* here?
5. Under due process, the U.S. has no affirmative duty to protect citizens from private harms except where the U.S. has actively placed citizens in danger. Individuals in island

nations are threatened by the conduct of U.S. oil producers, over whom the U.S. government assumes regulatory authority. May the U.S. Government be held liable under the Fifth Amendment Due Process Clause for a failure to protect in trust the global atmospheric climate system from any fossil fuel disruption?

6. A claim which raises issues that are political in nature is inappropriate for judicial resolution. Regulation of production and sale of fossil fuels is committed to Congress' interstate commerce power. Are Plaintiffs' claims concerning production and sale of fossil fuels non-justiciable political questions?

STATEMENT OF THE CASE

Human production and distribution of fossil fuels has led to global warming and an increase of atmospheric "greenhouse gases" (GHGs). Record at 4. Historic GHG emissions have increased global temperatures, altered patterns of rainfall, and caused the sea level to rise. *Id*. At current GHG emission rates, the sea level is likely to rise between ½ and 1 meter by the end of the 21st century. *Id*.

Apa Mana and Noah Flood (collectively "Plaintiffs") reside less than ½ meter above sea level on A'Na Atu and New Union Islands, respectively. *Id*. at 4-5. A rise in sea level of ½ to 1 meters will render these islands uninhabitable. *Id*. at 5. Plaintiffs allege current and future damages resulting from climate change, including seawater infiltration of their drinking wells and the harmful effect of ocean acidification, warming, and loss of coastal wetlands to local seafood on which Plaintiffs depend. *Id*.

HexonGlobal was formed through the merger of the major U.S.-based oil producers and is incorporated with its principal place of business in the U.S. *Id*. The products sold by HexonGlobal and its corporate predecessors account for a substantial percentage of historical fossil-fuel related GHG emissions both in the U.S. and worldwide. *Id*.

The U.S. is the largest national contributor to historic GHG emissions, responsible for 20% globally. *Id*. at 6. While continuing to support energy independence and infrastructure development, the U.S. has taken steps to abate GHG emissions, including the signing and ratification of the United Nations Framework Convention on Climate Change (UNFCC) in 1992, the Environmental Protection Administration's (EPA) regulation of GHG emissions under the Clean Air Act (CAA) and adoption of emissions standards for existing power plants. *Id*. at 7. The U.S. has since indicated a shift in climate policy, including an intention to withdraw from the Paris Agreement. *Id*.

Mana brought a claim in the United States District Court for the District of New Union Island against HexonGlobal under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, alleging that HexonGlobal's fossil fuel production and sales activities violated the law of nations. *Id*. at 8. Flood brought a separate claim against the U.S., under the public trust doctrine ("PTD") as incorporated by the Fifth Amendment Due Process Clause, by failing to take effective action to regulate the global atmospheric climate system. *Id*. at 10. The district court granted defendants' motion to dismiss for failure to state a claim on August 15, 2018, holding that the CAA displaced any ATS claim Mana might have, and that there is no fundamental due process right to support Flood's claim. *Id*. at 9-10. Plaintiffs filed timely Notice of Appeal to this Court. *Id*. at 11.

STANDARD OF REVIEW

The Courts of Appeals review *de novo* dismissals for failure to state a claim. *See, e.g., Muir v. Navy Fed. Credit Union*, 529 F.3d 1100, 1108 (D.C. Cir. 2008). A plaintiff's complaint need only provide a "short and plain statement of the claim showing that the pleader is entitled to relief" in order to survive a motion to dismiss. Fed. R. Civ. P. 8(a)(2). "[W]hen ruling on a defendant's motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint." *Erickson v. Pardus*, 551 U.S. 89, 94 (2007).

SUMMARY OF THE ARGUMENT

Domestic corporations may be liable under the ATS, because corporate civil liability was established at the time the ATS was enacted and there is no evidence that Congress intended to abrogate it. Corporate civil liability today exists across jurisdictions, and subjecting domestic corporations to suit for torts committed in violation of the law of nations advances the ATS' purpose of reducing diplomatic friction.

The duty to avoid transboundary harm announced in *Trail Smelter* has become a norm of customary international law, through its subsequent application in numerous international cases and arbitrations, reaffirmation in treaties, and recognition as such by leading jurists. The principle is capable of enforcement under the ATS because it is universal, obligatory, specific, and definable. Allowing a claim enforcing the *Trail Smelter* principle to proceed under the ATS would be a wise exercise of residual common law discretion, because it would reduce diplomatic friction.

Domestic, non-governmental actors are bound to the obligations of the States since they are under State jurisdiction. Consistent with international practice, the U.S. created its own enforcement mechanism for the law of nations in the ATS, which could address a violation of the *Trail Smelter* principle. The international community, including the U.S., has previously held private corporations liable for transboundary environmental harm. Historically, transboundary environmental injuries were first resolved in federal common law. An act of Congress addressing a particular matter will displace the common law on that subject. Congress has eliminated the need to address any surviving part of Mana's ATS claim through common law by regulating domestic emissions under the CAA, as well as the production and sale of oil in various statutes.

Flood's novel public trust claim arising under the Fifth Amendment's Due Process clause is not a viable cause of action. First, the U.S. government is protected from private suit by

sovereign immunity. Further, Flood's claim that the U.S. has failed to protect the global atmospheric climate system does not articulate any "fundamental" rights for which he is owed protection. The government's actions regarding fossil fuel regulation have a rational basis and therefore survive scrutiny by the courts. Even if such a novel fundamental right were recognized, the PTD is an inappropriate vehicle for suit and the government generally has no affirmative duty to protect citizens from private harms.

Both of Plaintiffs' claims also raise non-justiciable political questions. Flood's claim, though silent on requested relief, necessarily contemplates the introduction of domestic fossil fuels to the international market, which the Constitution has committed to Congress. Even if the Court vindicated Flood's claim, it lacks the requisite expertise to craft a remedy. Mana's claim is similarly non-justiciable because granting a remedy would upheave the reasoned policy decisions of the political branches. Appellate resolution of these claims is thus inappropriate.

ARGUMENT

I. DOMESTIC CORPORATIONS MAY BE SUBJECT TO SUIT UNDER THE ATS.

The ATS grants to the federal district courts "original jurisdiction of any civil action by any 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 (2012). By its terms, the ATS does not immunize any particular class of defendant. *See Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 438 (1989) (the ATS "by its terms does not distinguish among classes of defendants").

A. Congress did not intend for the ATS to immunize domestic corporations.

Corporations were subject to suit at common law at the time the ATS was enacted, and the ATS incorporated this principle of corporate liability. The ATS was enacted "against the backdrop of the general common law." *Jesner v. Arab Bank, PLC*, 138 S.Ct. 1386, 1397 (2018). When it creates a tort action, Congress "legislates against a legal background of ordinary tort-

related . . . liability rules and consequently intends its legislation to incorporate those rules." *Meyer v. Holley*, 537 U.S. 280, 285 (2003). It was well established at the time Congress enacted the ATS that corporations could be held liable in tort. *See Philadelphia, Wilmington, and Baltimore R.R. Co. v. Quigley*, 62 U.S. (21 How.) 202, 210 (1858) ("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."); 1 William Blackstone, Commentaries *475 (every corporation lawfully formed acquires power "[t]o sue or be sued"). By extending federal jurisdiction broadly to torts "committed in violation of the law of nations," Congress expected the principle of corporate liability would apply.

B. Courts have consistently recognized domestic corporate liability under the ATS.

Every circuit court case addressing the question, except a split-panel in the Second Circuit, has held that corporations may be held liable under the ATS.[1] Moreover, the Supreme Court has recently and repeatedly declined invitations to hold that the ATS categorically forecloses corporate liability. In 2013, the Supreme Court granted certiorari to answer precisely that question after the Second Circuit departed from its sister circuits in holding so, only to decide the case on other grounds. *Kiobel v. Royal Dutch Petroleum Co.* (*Kiobel II*), 569 U.S. 108, 114 (2013). The Court upheld the Second Circuit's judgment, but strictly on the ground that the presumption against extraterritoriality applies in the ATS context and was not rebutted in that case. *Id.* at 124–25. Again in 2018, the Supreme Court was asked to decide whether the ATS forecloses corporate liability. *Jesner*, 138 S.Ct. at 1394. Rather than ruling on whether the ATS immunizes *all* corporate defendants, however, a plurality of the Supreme Court held that *foreign*

[1] *See Flomo v. Firestone Nat. Rubber Co.*, 643 F.3d 1013, 1017 (7th Cir. 2011) (Posner, J.); *Romero v. Drummond Co.*, 552 F.3d 1303, 1315 (11th Cir. 2008); *Doe I v. Nestle USA, Inc.*, 766 F.3d 1013, 1022 (9th Cir. 2014); *Doe VIII v. ExxonMobil Corp.*, 654 F.3d 11, 57 (D.C. Cir. 2011), *vacated on other grounds*, 527 Fed.Appx. 7 (D.C. Cir. 2013); *but see Kiobel v. Royal Dutch Petroleum Co.* (*Kiobel I*), 621 F.3d 111, 120 (2d Cir. 2010).

corporations cannot be subject to suit under the ATS. *Id.* at 1407. The Court reasoned that judicial caution "guards against our courts triggering . . . serious foreign policy consequences, and instead defers such decisions, quite appropriately, to the political branches." *Id.* (quoting *Kiobel II*, 569 U.S. at 124). Thus, the judicial caution around imposing corporate liability has focused entirely on the foreign policy implications that subjecting foreign corporations would have—implications absent in suits against domestic corporations.

Following *Kiobel II* and *Jesner*, lower courts have continued to hold that the ATS does not categorically bar corporate liability. *See, e.g., Kaplan v. Cent. Bank of the Islamic Republic of Iran*, 896 F.3d 501, 505 (D.C. Cir. 2018) (finding that *Jesner* stands for the proposition that "*foreign* corporations . . . are not subject to liability" under the ATS) (emphasis added); *Al Shimari v. CACI Premier Tech.*, 320 F. Supp. 3d 781, 783 (E.D.Va. 2018) ("Rather than resolving [the] categorical question" of corporate liability, the *Jesner* court "held only that ATS suits may not proceed against *foreign* corporations.") (emphasis added).

Even the Second Circuit, which stood alone in *Kiobel I*, has retreated from that holding in dicta. In 2015, the court was asked to decide whether *Kiobel II* overruled its holding in *Kiobel I* that corporations may not be liable under the ATS. *In re Arab Bank*, 808 F.3d 144, 157 (2d Cir. 2015). The court observed that the Supreme Court's decision in *Kiobel II* "suggests a reading of the ATS that is at best 'inconsistent' with *Kiobel I*'s core holding," and that "the views of [its] sister circuits indicates that something may be wrong with *Kiobel I*." *Id.* Nevertheless the Second Circuit could not overrule *Kiobel I*, because Circuit rules prohibited the panel from overruling a former panel, and therefore left it "to either an en banc sitting of this Court or an eventual Supreme Court review" to do so. *Id.*

C. Corporate civil liability is firmly established in international law.

Corporate civil liability already inhered in the law of nations at the time the ATS was enacted. The law of nations was implicated in "mercantile questions" and "in all marine causes," providing rules of decision for such cases through the "law merchant," which "emerged from the customary practices of international traders and admiralty." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 715 (2004) (quoting 4 William Blackstone, Commentaries *67). In passing the ATS, Congress assumed that federal courts could enforce the law merchant. *Id.* at 730. The law merchant has long recognized that corporations may be held liable. In 1666, for instance, the English House of Lords held the East India Company liable and ordered it to pay damages for stealing a ship on the high seas. *Thomas Skinner v. The E. India Co.* (1666), 6 State Trials 720 (H.L.). Early U.S. cases confirm this principle.[2] If corporations were immune from liability for violations of the law of nations sounding in tort, these cases would have been dismissed.

A series of multilateral treaties provide evidence that corporate civil liability is a norm in customary international law.[3] A convention with 136 contracting parties representing 97.5% of the world fleet subjects that corporation to liability "for any pollution damage caused by oil which has escaped or been discharged from the ship as a result of the incident." International Convention on Civil Liability for Oil Pollution Damage art. III(1), Nov. 29, 1969, 973 U.N.T.S. 3. Similarly, a convention with 187 contracting parties creates strict and fault-based liability regimes enforceable against legal persons for damage caused by the transboundary movement and disposal of hazardous waste. Protocol on Liability and Compensation to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal art. 4, 5, Mar. 22, 1989, 1673 U.N.T.S. 57.

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[2] *See, e.g., Maryland Ins. Co. v. Woods*, 10 U.S. (6 Cranch) 29, 43 (1810) (Marshall, C.J.) (recognizing corporate liability under a marine insurance contract); *New Jersey Steam Nav. Co. v. Merchant's Bank of Boston*, 47 U.S. (6 How.) 344, 354–57 (1848) (holding incorporated maritime carrier liable in admiralty tort action for damage to goods).

[3] Though *Jesner* in dicta found that international law did not impose *criminal* liability on corporations, it did not look to evidence of corporate *civil* liability. 138 S.Ct. at 1399–1402.

General principles common among states, even those not reflected in customary international law or treaties, "may be invoked as supplementary rules of international law." The Restatement (Third) of Foreign Relations Law § 102(4) (Am. Law Inst. 1987); *see also United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160–61 (1820) (the law of nations may be ascertained by "the general usage and practice of nations"). Corporate civil liability is a general principle common to virtually every country. An expert panel of international jurists concluded in 2008 that "[a]cross all types of jurisdictions, civil liability can arise for both company entities (legal persons) and for company officials (natural persons)." International Commission of Jurists, 1 *Report on Corporate Complicity in International Crimes* 4 (2008); *see also Flomo*, 643 F.3d at 1019 ("[C]orporate tort liability is common around the world."). The prevalence of corporate civil liability across jurisdictions thus confirms it a norm of customary international law.

D. Corporate liability is permissible under the ATS because it will decrease diplomatic disputes.

The ATS was intended to "promote harmony in international relations" and "avoid foreign entanglements," 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." *Jesner*, 138 S.Ct. at 1397, 1406. The relevant question is "whether the United States would be embroiled in fewer international controversies" by allowing a cause of action against a particular type of defendant. *Id.* at 1411. Finding this standard not met, the Court in *Jesner* noted that Jordan deemed the suit over injuries allegedly caused by a Jordanian corporation and sustained in the Middle East "grave affront to its sovereignty." *Id.* at 1407.

Allowing this case to proceed would present no such concern, because no foreign person is a named defendant. Rather, allowing domestic corporate liability under the ATS actively decreases diplomatic disputes. Where the domestic conduct of U.S. corporations causes harms abroad, providing a remedy for victims of such conduct in federal court reduces diplomatic

tension. A large number of successful ATS suits involved claims against corporate defendants. Holding that corporations may not be liable under the ATS would reshape the legal landscape, and cause untold diplomatic friction hitherto avoided. Such a dramatic alteration would eviscerate the function of the ATS and render its purpose nugatory.

II. THE TRANSBOUNDARY HARM PRINCIPLE IN *TRAIL SMELTER* BELONGS TO THE CORPUS OF CUSTOMARY INTERNATIONAL LAW.

The ATS confers jurisdiction to the federal courts over civil actions by aliens for torts committed in violation of the "law of nations."[4] 28 U.S.C. § 1350. In order for an international law norm to be actionable under the ATS, it must be universal, obligatory, and "defined with a specificity comparable to the features of the 18th-century paradigms" of "violation of safe conducts, infringement of the rights of ambassadors, and piracy." *Sosa*, 542 U.S. at 724–25, 32–33. Having found such a norm, courts exercise their "residual common law discretion" to define the bounds of the private cause of action. *Id.* at 738; *see also Jesner*, 138 S.Ct. at 1399.

A. The duty not to cause transboundary harm is specific and definable.

Trail Smelter first announced an international law duty to avoid causing transboundary harm. *Trail Smelter Case* (*United States v. Canada*), 3 R.I.A.A. 1905 (Mar. 11, 1941). The dispute in *Trail Smelter* arose over sulphur dioxide emissions from a zinc and lead smelter in British Columbia, which caused harm to crops, timber, and fisheries in Washington state. *Id.* at 1913–19. Canada and the U.S. entered negotiations and litigation, culminating in the arbitral body ruling against Canada and awarding damages. *Id*. at 1980. The arbitral body held that "under the principles of international law, . . . no State has the right to use or permit the use of its territory in such a manner as to cause injury . . . in or to the territory of another or of the

[4] The "law of nations" is either synonymous with "customary international law," or a broader body of law that includes customary international law. *Compare Doe v. Drummond Co.*, 782 F.3d 576, 583 n.8 (11th Cir. 2015) ("law of nations" in the ATS is "used synonymously with 'customary international law'"); *Igartua-De La Rosa v. United States*, 417 F.3d 145, 170 (1st Cir. 2005) ("law of nations" in the ATS incorporates treaty law and customary international law).

properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence." *Id.* at 1965. *Trail Smelter* thus defined a specific rule proscribing conduct and imposing a duty, reaffirmed recurrently through subsequent international cases, arbitrations, declarations, and treaties. *See* discussion *infra*, §§ II.B.1–2.

B. The duty not to cause transboundary harm is universal and obligatory.

The *Trail Smelter* principle has risen to the level of customary international law, as evidenced through its application in subsequent arbitrations, appearance in multilateral treaties, and recognition by leading international jurists.

1. The *Trail Smelter* principle has been applied in numerous arbitrations.

The International Court of Justice (ICJ) first applied the principle in holding Albania liable for failing to notify passing English ships of sea mines, which detonated causing the death of 44 English sailors. *Corfu Channel Case* (*United Kingdom v. Albania*), Merits, 1949 I.C.J. Rep. 4, 12–14 (April 9). The ICJ found held that under "certain general and well-recognized principles" of international law, Albania violated its "obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States." *Id.* at 22. Responding to a United Nations (UN) request for an advisory opinion on the legality of the threat or use of nuclear weapons, the ICJ in 1996 recognized that "the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national jurisdiction is now part of the corpus of international law relating to the environment." *Legality of the Threat or Use of Nuclear Weapons,* Advisory Opinion ("*Nuclear Weapons Advisory Opinion*"), 1996 I.C.J. Rep. 226, 227, 242 (July 8). The ICJ recited this admonition in at least two subsequent disputes. *Gabčíkovo-Nagymaros Project Case* (*Hungary v. Slovakia*), Judgment, 1997 I.C.J. Rep. 7, 41 (Sept. 25); *Case Concerning Pulp Mills on the River Uruguay* (*Argentina v. Uruguay*), Judgment, 2010 I.C.J. Rep. 18, 56, 78 (April 20). The

Permanent Court of Arbitration has also applied the principle, describing it as "a foundational principle of customary international environmental law." *In re The Indus Waters Kishenganga Arbitration* (*Pakistan v. India*), Partial Award, Int'l Court of Arb., ¶ 448–49 (Feb. 18, 2013). This extensive body of international case law clearly evidences that the *Trail Smelter* principle belongs to the corpus of customary international law.

2. The *Trail Smelter* principle has been codified in multiple treaties and framework conventions.

The *Trail Smelter* principle has been codified in numerous treaties, declarations, and framework conventions. These instruments constitute evidence of customary international law, and are "sufficient proof of a norm of customary international law if an overwhelming majority of States have ratified [them], and those States uniformly and consistently act in accordance with its principles." *United States v. Bellaizac-Hurtado*, 700 F.3d 1245, 1255 (11th Cir. 2012); *see also Flores v. Southern Peru Copper Corp.*, 414 F.3d 233, 248 (2d Cir. 2003) ("States need not be universally successful in implement[ion] … for a rule of international law to arise.") .

The 1972 Stockholm Declaration provides the "basic rules" governing international responsibility of states regarding the environment. In 1972, the United Nations Conference on the Human Environment adopted the Stockholm Declaration. U.N. Doc. A/Conf.48/14/Rev.1, Stockholm Declaration (1973). Principle 21 of the Stockholm Declaration provides 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 of areas beyond the limits of national jurisdiction." *Id.* That same year, the UN General Assembly recommended Principle 21 as "lay[ing] down the basic rules" governing international responsibility of states in regard to the environment. G.A. Res. 2996, International responsibility of States in regard to the environment (Dec. 15, 1972).

Twenty years later, over 170 countries including the United States signed the Rio Declaration on Environment and Development, Principle 2 of which mirrors exactly the language of the Stockholm Declaration. U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I) (Aug. 12, 1992). Principle 21/2 has been recited and reaffirmed in numerous subsequent treaties and framework conventions.[5] The number and diversity of these instruments establish the status of the *Trail Smelter* principle as a norm under customary international law.

3. Jurists have described the duty not to cause transboundary harm as a principle of customary international law.

The law of nations "may be ascertained by consulting the work of jurists." *Smith*, 18 U.S. at 160–6; *see also* United Nations, Statute of the International Court of Justice, Art. 38(1), 18 April 1946 ("the teachings of the most qualified publicists of the various nations" may be used "as a subsidiary means for the determination of the rules of law"). Many leading jurists have concluded that the duty not to cause transboundary harm is a norm of customary international law. In 1970, noted international environmental law jurist L.F.E. Goldie described the *Trail Smelter* principle as customary international law. L.F.E. Goldie, *International Principles of Responsibility for Pollution*, 9 Colum. J. Transnat'l L., 283, 306 (1970). The authors of a leading contemporary textbook on international environmental law have argued that after the *Nuclear Weapons Advisory Opinion*, "there can be no question that Principle 21 reflects a rule of customary international law." Philippe Sands & Jacqueline Peel, *Principles of International*

[5] *See, e.g.,* United Nations Framework Convention on Climate Change, May 9, 1992, 1771 U.N.T.S. 107, Preamble; United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397; Convention on Biological Diversity, June 5, 1992, 1760 U.N.T.S. 79, art. 3; G.A. Res. 37/7, World Charter for Nature ¶ 21(d) (Oct. 28, 1982); Vienna Convention for the Protection of the Ozone Layer, Mar. 22, 1985, 1513 U.N.T.S. 293, Preamble; Convention on the Transboundary Effects of Industrial Accidents, Mar. 18, 1992, 2105 U.N.T.S. 457, Preamble.

Environmental Law, 3rd Ed. (Cambridge 2012). Other leading textbook authors have reached the same conclusion.[6]

C. Allowing this claim to proceed is an appropriate exercise of residual common law discretion because it would actively decrease diplomatic disputes.

After identifying a qualifying norm of customary international law, courts retain "residual common law discretion" to define the bounds of a private cause of action under the ATS. *Sosa*, 542 U.S. at 738. A claim under the ATS may proceed if it would cause the United States to be "embroiled in fewer international controversies." *Jesner*, 138 S.Ct. at 1411. This is evaluated in light of the purpose of the ATS 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.

Recognizing this cause of action will decrease diplomatic disputes and therefore is an appropriate exercise of residual common law discretion. The factual record indicates that entire island nations will be submerged by the sea, that weather events threaten calamitous property damage and the outbreak of infectious disease, and that food networks are being pushed to the brink of collapse due to climate change. These factors drive regional conflict and mass migration. Climate change is transforming the earth into a pressure cooker, threatening the harmony of international relations. Individuals and nations aggrieved by the contribution of U.S. corporations will likely hold the U.S. accountable if a private remedy is not available.

III. THE *TRAIL SMELTER* PRINCIPLE IMPOSES OBLIGATIONS ENFORCEABLE AGAINST NON-GOVERNMENTAL ACTORS.

A. The principle that international law creates only State obligations has exceptions.

[6] *See* Patricia Birnie, *International Law and the Environment* (3d ed. 2009); Malgosia Fitzmaurice, *The Oxford Handbook of International Environmental Law, International Responsibility and Liability* (2007).

International law is chiefly negotiated among sovereigns and so defines obligations enforceable *vis-à-vis* States. The international community "defines norms and determines their scope" but "delegates to domestic law the task of determining the civil consequences of any given violation of these norms." *Doe I v. Nestle USA, Inc.,* 766 F.3d 1013, 1022 (9th Cir. 2014), *cert. denied*, 136 S. Ct. 798 (2016) (citations omitted). Nothing about this dynamic negates the fact that subjects of the sovereign may cause actionable violations of these obligations. Blackstone warned against misconstruing the enforcement of customary law:

> "But where the individuals of any state violate this general law, it is then the interest as well as duty of the government under which they live, to animadvert upon them with a becoming severity, that the peace of the world may be maintained. *For in vain would nations in their collective capacity observe these universal rules, if private subjects were at liberty to break them at their own discretion, and involve the two states in a war...*"

1 William Blackstone, Commentaries *68 (emphasis added). Because the State risks the retaliation of other States for its citizens' private conduct, it is encouraged to directly attribute liability to that private conduct; in this way, international law governs private actors. *see Sosa*, 542 U.S. at 714-15; 1 Restatement (Third) of Foreign Relations Law, pt. II, Introductory Note, pp. 70-71 (Am. Law Inst. 1987).

Congress enacted the ATS to "ensur[e] 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." *Jesner*, 138 S.Ct. at 1397 (emphasis added). To make victims whole, the scope of the norm emphasizes the breach of a duty over the perpetrators' identity. The international liability of juridical groups has roots in piracy. In admiralty, particularly piracy, it was common "to treat the vessel in which . . . a wrong or offence has been done . . . without any regard whatsoever to the personal misconduct or responsibility of the owner thereof." *Harmony v. United States (The Malek Adhel)*, 43 U.S. (2 How.) 210, 233 (1844). The U.S. may thus avoid "serving as a safe harbor for today's pirates" who violate *Trail Smelter*. *Jesner*, 138 S. Ct. at 1427-28 (Sotomayor, J., dissenting) citing *Kiobel*, 569 U.S., at 129 (Breyer, J., concurring).

The parties to *Trail Smelter* created precedent for international arbitration of private violations each agreed to abate within its territory. Because the U.S. demanded Canada remedy the "nuisance" of one of its private actors, the U.S. likewise opened itself to actions challenging the tortious conduct of its private subjects. When the Canadian smelting corporation of Trail injured the property of Washingtonians, who had no other legal recourse, Canada consented to nominal liability and paid damages on behalf the privately-owned smelter. Just as Canada approved the smelter's operations, the U.S. authorized HexonGlobal to produce and sell oil. However, through the ATS the U.S. has provided relief for international common law "nuisance" as illustrated by *Trail Smelter* against an open class of domestic defendants, unlike Canada when it entered arbitration. The U.S. maintains sovereignty by granting its courts jurisdiction under the ATS to hold domestic corporations liable for violating international law. Therefore, the harm principle established by *Trail Smelter* imposes obligations enforceable on HexonGlobal.

B. Although *Trail Smelter* expressed the prohibition on transboundary harm as between states, subsequent cases did not so limit the principle.

International practice demonstrates corporations are directly liable for causing transboundary environmental harm. Without addressing the merits, the European Court of Justice ruled a French mining corporation could be sued in Belgium for salt waste discharges impacting Dutch gardeners pursuant to Article 5 (3) of the Brussels Convention. Case 21/76, *Handelskwekerij G.J. Bier BV v. Mines de Potasse d'Alsace S.A.,* 1976 E.C.R. 1735; *see also Bastia Fisherman's Union v. Montedison Co.*, Cour de Cassation [Cass] [supreme court for judicial matters] 2e Civ., April 3, 1978, No. 106, S. Jur. I. (Fr.) (holding Italian company liable in French court for damages caused by industrial waste discharges into Mediterranean Sea).

As discussed, the U.S. has agreed with international consensus that corporations are among those private actors bound to multiple existing international norms, including the prohibition against torture, genocide, and war crimes. *See Olympic Airways v. Husain*, 540 U.S.

644 (2004) (imposing liability on corporate airline for violation of Warsaw Convention). Article 17 of the Warsaw Convention, which the U.S. signed, entitles foreign plaintiffs injured on private carriers to compensatory damages; Articles 22 and 25(1) respectively limit a carrier's liability and assigns liability for the equivalent of willful misconduct. *Id*. The U.S. also follows international practice in the environmental context. *See Com. of Puerto Rico v. SS Zoe Colocotroni,* 456 F. Supp. 1327 (D.P.R. 1978), *aff'd in part and vacated in part on other grounds* 628 F.2d 652 (1st Cir. 1980) (holding crew of ship liable in admiralty for discharge of crude oil at sea causing harms in Puerto Rico).

C. International agreements confirm the *Trail Smelter* Principle establishes private liability.

International treaties and declarations confirm that violation of the duty to avoid transboundary harm is amenable to a private right of action against non-governmental actors. In addition to reaffirming the *Trail Smelter* principle, the Rio Declaration set forth the principle that "the polluter should, in principle, bear the costs of pollution," and that States "shall co-operate . . . to develop further international law regarding liability and compensation for adverse effects of environmental damage caused by activities within their jurisdiction or control to areas beyond their jurisdiction." *Rio Declaration*, Principles 16, 13. This landmark instrument thus affirms that the harm principle articulated by *Trail Smelter* confers private liability.

The U.N. subsequently reaffirmed the "polluter pays" principle set forth in the Rio Declaration in the transboundary harm context, providing that "States shall provide their domestic judicial . . . bodies with the necessary jurisdiction and competence and ensure that these bodies have prompt, adequate and effective remedies available in the event of transboundary harm caused by hazardous activities located within their territory or otherwise under their jurisdiction or control." G.A. Res. 61/36, Principle 6 (Dec. 4, 2006). The U.N. continued, "Victims of transboundary damage should have access to remedies in the State of origin that are

no less prompt, adequate and effective than those available to victims that suffer damage, from the same incident, within the territory of that State." *Id.* The U.N. urged that these remedies should "include the imposition of liability on the operator, or, where appropriate, other person *or entity*." *Id.* at Principle 4 (emphasis added).[7] Thus, the U.N. has called upon all States to make the *Trail Smelter* principle enforceable against responsible non-governmental entities. With this Court finding the principle enforceable under the ATS, the U.S. will meet this key obligation.

IV. THE CLEAN AIR ACT DISPLACES ANY ENFORCEABLE OBLIGATIONS IMPOSED BY *TRAIL SMELTER.*

EPA's regulation of domestic GHG emissions and CAA Sections 115 and 307 displace Mana's claim by addressing the source of her harm and providing her a forum to protect her interests. Displacement refers to legislative acts that codify common-law rights formerly only recognized by the judiciary. "[W]hen Congress addresses a question previously governed by a decision rested on federal common law the need for such an unusual exercise of law-making by federal courts disappears." *City of Milwaukee v. Illinois*, 451 U.S. 304, 314 (1981). Before the passage of federal environmental statutes, disputes over "air and water in their ambient or interstate aspects" sounded in federal common law. *See Illinois v. City of Milwaukee*, 406 U.S. 91, 103 (1972). International nuisance claims from domestic air emissions[8], as prohibited by the *Trail Smelter* Principle, are also based in federal common law given their ambient, global nature. Once Congress addressed the main cause of these emissions in statutes like the CAA and CWA, it displaced these common law claims. To the extent a plaintiff seeks damages stemming from foreign GHG emissions, those claims do not overcome the presumption against

[7] In a separate pronouncement, the U.N. affirmed that "transnational corporations … are also obligated to respect generally recognized responsibilities and norms contained in United Nations treaties and other instruments such as… the Rio Declaration." Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, U.N. Doc. E./CN.4/Sub.2/2003/12/Rev.2 (2003).

[8] Assuming some of HexonGlobal's oil is consumed domestically within the CAA's reach.

extraterritoriality. *City of New York v. BP P.L.C.*, 325 F. Supp. 3d 466 (S.D.N.Y. 2018); *City of Oakland v. BP P.L.C.*, 325 F. Supp. 3d 1017 (N.D. Cal. 2018).

Common law claims are displaced wherever Congress has redressed the sources of the claims by providing regulation or remedy. In *Milwaukee*, the Court held the Illinois's interstate nuisance claims against Milwaukee for discharges into Lake Michigan arose under federal common law, but had been displaced by the CWA Amendments of 1972 because:

> "Congress ha[d] not left the formulation of appropriate federal standards to the courts through the application of vague and indeterminate nuisance concepts and maxims of equity jurisprudence, but rather ha[d] *occupied the field through the establishment of a comprehensive regulatory program supervised by an expert administrative agency*."

City of Milwaukee, 451 U.S. at 317 (emphasis added). Reliance on common law is inappropriate where plaintiffs have "any forum in which to protect its interests unless federal common law were created", which Illinois lacked prior to the passage of the Amendments. *Id*. at 1796-97.

The Supreme Court clarified the relevant inquiry for displacement is "whether the field has been occupied, not whether it has been occupied in a particular matter." *Am. Elec. Power Co., Inc. v. Connecticut*, 564 U.S. 410 (2011) ("*AEP*") (rejecting State's common law nuisance claim against domestic GHG emitters for causing sea level rise); citing *Milwaukee*, 451 U.S. at 324. The common law of nuisance was displaced even though EPA had yet to set enforceable GHG emissions standards. *Id.* Congress delegated to EPA the decision "whether and how to regulate carbon-dioxide emissions . . . the delegation displaces federal common law." *AEP*, 564 U.S. at 426. The CAA also displaces "any federal common-law right to seek abatement of carbon-dioxide emissions" from domestic sources for injuries caused by climate change. *Id*. Courts must inquire whether Congress spoke "directly to the question at issue," by providing "a sufficient legislative solution" that operated "to the exclusion of federal common law." *Native Village of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849 (9th Cir. 2012) (rejecting village common law claim against oil producer for climate change-induced injury), citing *Mich. v. U.S.*

Army Corps of Eng'rs, 667 F.3d 765, 777 (7th Cir. 2011). The Ninth Circuit in *Kivalina* applied *AEP* holding the CAA displaced nuisance claims because EPA could regulate GHG emissions from stationary sources. Because remedies inhere in common law claims, it held the difference in remedy sought was irrelevant to the displacement inquiry. *Id*. By regulating emissions, the CAA provided a "sufficient legislative solution" for complaints of sea level rise caused by climate change. *Id*.; *see also County of San Mateo v. Chevron Corp.*, 294 F. Supp. 3d 934, 937 (N.D. Cal. 2018) ("*Kivalina* stands for the proposition that federal common law is not just displaced when it comes to claims against domestic sources of emissions but also when it comes to claims against energy producers' contributions to global warming and rising sea levels").

Here, Mana's *Trail Smelter* claim is displaced because the Act speaks to domestic GHG emissions and provides her a "forum" to protect her interests. Since the ATS only creates jurisdiction not a cause of action, Mana's claim arises under federal common law. *Kivalina*, 696 F.3d at 856 ("[F]ederal common law can apply to transboundary pollution suits"). While *Milwaukee* held the CWA displaces common law complaints for discharges completely *within* the U.S., thus forming the "interstate nuisance" basis of Plaintiff's claims, Mana's claims a form of international or "intrastate" nuisance. This distinction does not negate displacement by the CAA because, like the CWA in *Milwaukee*, the CAA provides a "comprehensive regulatory scheme" for domestic GHG emissions vested in an "expert administrative agency" as evidenced by regulation stationary emissions under Part C Title I and standards for mobile sources pursuant to Section 202. 42 U.S.C. §§ 7470-7492, 7521. While the future manner of regulation of GHGs by EPA is uncertain, the common law field remains unquestionably occupied.

Section 115 provides Mana a forum to protect her interests by petitioning EPA to study emissions of pollutants that "cause or contribute to air pollution reasonably anticipated to endanger public health or welfare in a *foreign* country." 42 U.S.C. § 7415. If EPA finds air

pollutants emitted from the U.S. "may reasonably be anticipated to endanger public health or welfare in a foreign country", EPA "shall" give formal notification to . . . the State to abate emissions through a State Implementation Plan ("SIP"). The State is then compelled to revise its SIP to the extent necessary "to prevent or eliminate the endangerment." *Id*. § 7415(b). International endangerment and reciprocity findings[9] are subject to formal rulemaking requirements. *Thomas v. State of N.Y.*, 802 F.2d 1443, 1445 (D.C. Cir. 1986) (EPA administrator letters to foreign diplomats do not legally bind successor administrations to make findings). Given the mandatory nature of the SIP revision process and its resource intensity, EPA has discretion over the initial endangerment determination while ascertaining the relevant information. *Her Majesty the Queen in Right of Ontario v. U.S. E.P.A.*, 912 F.2d 1525, 1533-34 (D.C. Cir. 1990)[10]. It is enough that EPA could make a foreign endangerment finding and irrelevant for displacement purposes.

CAA Section 307 also displaces Manas complaint. *City of Milwaukee*, 451 U.S. at 324. Non-citizens are not textually barred from bringing a "citizen suit"; any "person" may commence a civil action for violations of the CAA. 42 U.S.C. § 7604(a). A "person" is "an individual, corporation, partnership, association." *Id.* at § 7602. The "district courts shall have jurisdiction, *without regard to the . . . citizenship of the parties*, to enforce an emission standard or limitation, or such an order, or to order the Administrator to perform such act or duty." *Id*. § 7604(a) (emphasis added). Mana may address her injuries from domestic GHG emissions under two statutory sections, displacing the need for this court to create a common law cause of action. The CAA displaces claims against HexonGlobal to the extent it sells product for domestic

[9] Pursuant to a "reciprocity finding", Section 115 provides a remedy for a foreign country if EPA determines the country has given the United States "essentially the same rights with respect to the prevention or control of air pollution occurring in that country as is given that country by this section." *Id*. § 7415(c).

[10] A Canadian province, states, and environmental groups formally petitioned EPA for an endangerment finding under Section 115 for acid rain deposition.

consumption outside of U.S. jurisdiction. Finally, statutes regulating the production and sale of oil in concert with ATS eliminate the need for a judicially-created common law remedy under *Trail Smelter*.

V. THE PUBLIC TRUST DOCTRINE DOES NOT PROVIDE A CAUSE OF ACTION AGAINST THE U.S. GOVERNMENT UNDER SUBSTANTIVE DUE PROCESS.

The plaintiff here seeks the Court's vindication of a Constitutional right to an "undisturbed global atmospheric climate system" when nothing in the Constitution enumerates such a "right." A strong judicial presumption cautions against implying causes of action under the Constitution. *See, e.g.*, *Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009) ("[I]mplied causes of action are disfavored."). Recognizing an implicit due process right should be done only with the "utmost care and restraint," lest the "liberty protected by the Due Process Clause be subtly transformed into" preferential policy-making by the judiciary. *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992); *see also Washington v. Glucksberg*, 521 U.S. 702, 720 (1997).

Flood's claim fails first because the U.S. is protected by sovereign immunity. *See generally*, *Larson v. Domestic & Foreign Commerce Corp*, 337 U.S. 682 (1949); *see also Malone v. Bowdoin*, 396 U.S. 643, 646-48 (1962) (expanding and reinforcing the doctrine of federal sovereign immunity). Furthermore, the PTD is an inappropriate vehicle for suit against the U.S. because no fundamental right exists and it does not encompass the global atmosphere. *See, e.g.*, *Alec L. v. Jackson*, 863 F. Supp. 2d 11, 15-16 (D.D.C. 2012); *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 196 (1989). Finally, even if the Constitution protects such a right, there is generally no affirmative duty of the government to protect individuals from privately created harms. *DeShaney*, 489 U.S. at 196.

A. The U.S. Government is protected from suit under the doctrine of sovereign immunity.

Federal sovereign immunity protects the U.S. government from suit by its citizens except in cases where its immunity protection has been waived or the government consents to suit. *See United States v. Mitchell*, 445 U.S. 535, 538 (1980); *Gray v. Bell*, 712 F.2d 490, 507 (D.C. Cir. 1983). Congress has lowered the shield of immunity through several well-defined statutory waivers. Examples of Congressional abrogation of federal sovereign immunity include: suits regarding certain contracts made with the government, *see* 28 U.S.C § 1491 ("Tucker Act") suits against state officials, *see Ex parte Young*, 209 U.S. 123 (1902); and various tort claims against a federal employee acting on behalf of the U.S., *see* 28 U.S.C. § 1346(b) ("FTCA").

Here, the Plaintiff brings a claim against the U.S. government without any reference to waiver of its presumed sovereign immunity and thus fails to state a viable cause of action. Flood's Fifth Amendment PTD claim does not fall within any of the clearly defined exceptions to sovereign immunity, instead suggesting a private cause of action under the Constitution. The claim implies a remedy that would have a federal judge interrupt the international flow fuel, well beyond his or her authority. There is no indication that Congress contemplated waiver of sovereign immunity for public trust claims and the U.S. has not consented to suit as a "trustee."

B. There is no fundamental right to an undisturbed atmospheric climate system.

The right to an undisturbed atmospheric climate system can neither be found enumerated or implied in the Constitution's text. Although rights not enumerated by the text may still be fundamental, the right must still be "deeply rooted" in the nation's history, a standard courts must apply narrowly. *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 767 (2010); *Michael H. v. Gerald D.*, 491 U.S. 110, 122 (1989). Judicial constraint avoids virtual legislation by non-democratically appointed leaders under the façade of implying new rights where none existed before. *See, e.g.*, *Glucksberg*, 521 U.S. at 722 (Due process rights "have . . . been carefully refined by concrete examples involving fundamental rights found to be deeply rooted in our legal

tradition."). In the absence of a fundamental right, the government's conduct survives if it demonstrates a "rational basis", or any plausible means to satisfy a legitimate government purpose. *See*, *e.g.*, *Roe v. Wade*, 410 U.S. 113, 115 (1973). Here, the right asserted is not rooted in the nation's history and the U.S. government's fossil fuel policies reflect a rational basis which the plaintiff has not overcome. *See Juliana v. United States,* 217 F. Supp. 3d 1224, 1249 (D. Or. 2016) (discussing that the defendants' similar conduct there would survive rational basis review).

A claim to a novel right cannot be sustained under the Fifth Amendment Due Process clause as "fundamental." *Reno v. Flores*, 507 U.S. 292 (1993). In *Reno*, a class of alien juveniles brought suit pursuant to the Immigration and Naturalization Service (INS) policy holding them in custody indefinitely pending a deportation. *Id.* at 297. The plaintiffs had no fundamental right to be placed in a "decent and humane custodial institution" under those conditions. *Id*. at 299-300. The Court reasoned the plaintiffs' claims were not "so rooted in . . . tradition" to be considered fundamental and that the "mere novelty" of the claim indicated its incompatibility with due process. *Id*. at 303-05.

The overwhelming rejection by the judiciary of any right to an undisturbed atmospheric climate system as rooted in the nation's history emphasizes this claim's novelty.[11] For instance, one court dismissed a complaint that a new shopping mall and associated increased traffic injured a plaintiff's Constitutional right to a "healthful environment" by impairing air and water quality because no such right was either implicit or explicit. *Pinkney v. Ohio Envtl. Prot. Agency*,

[11] *See, e.g.*, *Federal Defendants' Memorandum of Points and Authorities in Support of Their motion to Dismiss*, Civ. No. 6:15-cv-01517-TC (D. Or. 2015) (citing various cases declining to find such a right, e.g., *Concerned Citizens of Neb. v. U.S. Nuclear Regulatory Comm'n,* 970 F.2d 421, 426 (8th Cir. 1992) (no Ninth Amendment right to be free from environmental harm due to radioactive waste); *Pinkney v. Ohio Envtl. Prot. Agency*, 375 F. Supp. 305, 310 (N.D. Ohio 1974) ("[T]he Court has not found a guarantee of the fundamental right to a healthful environment implicitly or explicitly in the Constitution.").

375 F. Supp. 305, 307-10 (N.D. Ohio 1974). Further, *Juliana* is insufficient alone to prove a right to a stable climate system is rooted in the nation's history. *Juliana*, 217 F. Supp. 3d 1224. Ms. Juliana is one of a group of young plaintiffs alleging the U.S. has violated her fundamental right to a stable climate system through environmentally harmful policy decisions. *Id*. at 1234 . *Juliana* is the only federal case to suggest the right to a stable climate system is rooted in the nation's history; it amounts to little given it was only a motion on the pleadings–and an inconsistent one at best since voluminous precedent denied the same claim. *Id*. Relying on *Obergefell v. Hodges* in holding that a stable climate system was implicit to due process protection of "life" and "liberty," Judge Aiken reasoned that recognition of a fundamental right may be concluded where that right "underl[ies] and support[s] other vital liberties." *Id*. at 1250-51 (citing *Roe*, 410 U.S. at 152–53).

Plaintiff's reliance on *Juliana* cuts against the well-established doctrine of judicial restraint when deciding whether the Constitution implicitly grants a substantive due process right. Here, Mr. Flood relies "heavily" on *Juliana* to assert an undisturbed "global atmospheric climate system," like the right to a "stable climate system" there, is a protected "fundamental" right. *Juliana*, 217 F. Supp. 3d 1224. Precedent demonstrates, however, that there is no recognized fundamental right to an global atmospheric climate system undisturbed by the fossil fuel industry. That judicial weight belies any suggestion that the right to an undisturbed global atmospheric climate system is "so rooted in the traditions and conscience of our people to be ranked as fundamental."

Further, the District Court here properly disregarded *Juliana*'s reasoning, because *Juliana* relied on an overly broad interpretation of the interest at stake. That court reasoned, "a stable climate system is quite literally the foundation 'of society, without which there would be neither civilization nor progress.'" Such a broad construction does not comport with the principle that

the interest at stake be narrowly defined. Instead, such a pronouncement seemingly encompasses nearly every corollary right conceivable thereunder. Arguably, the 'fundamental right' sought to be created here is even broader. While *Juliana* conditions its holding by stating that the right is "to a climate system *capable of sustaining human life*," *Juliana*, 217 F. Supp. 3d at 1250 (emphasis added), the precise right claimed here is to a "global atmospheric climate system" *undisrupted* by the "production, sale, and burning of fossil fuels." An atmosphere free from any such disruption cannot possibly comply with the conservative requirements of the court when fashioning a new fundamental right.

The U.S. governance of fossil fuel production and the regulation of GHG emissions satisfy the relatively low "rational basis" requirements as even Judge Aiken noted. As there is no fundamental right to an undisturbed global atmospheric climate system, the U.S. has satisfied its Constitutional obligations.

C. Precedent demonstrates that the PTD does not extend to the global atmosphere.

The PTD does not properly encompass the global atmosphere and thus cannot be sustained as a cause of action. The PTD has its roots in ancient Roman Law and has established that certain lands and waters are held in trust by the government for its citizens. J. Inst. 2.1.1 (J.B. Moyle trans., 1911). In practice, however, the doctrine has never been extended to the global atmosphere. *Alec L,* 863 F.Supp.2d 11 (D.D.C. 2012). The doctrine has historically protected only submerged tidal lands and navigable waterways, limiting the government's ability to alienate these protected lands (e.g. in sale to private parties). *See, e.g.*, *Ill. Cent. R.R. Co. v. Illinois,* 146 U.S. 387 (1892); *United States v. Mission Rock Co.,* 189 U.S. 391, 407 (1903).

The government does not hold in trust for its citizens the "atmosphere" under the PTD. *Alec L.*, 863 F.Supp.2d at 13. In *Alec*, a group of citizens and organizations brought suit alleging defendants had violated a federal public trust right as it applies to the atmosphere for failure to

reduce GHG emissions. *Id*. at 12. The court eventually concluded that their claim failed because the PTD was a matter of state law but in so deciding, the court also noted the plaintiffs' claim did not comport with the traditional application of the PTD. *Id*. at 15-17. The court in *Alec* noted that, given the paucity of legal support, the application of the PTD to the atmosphere "represent[ed] a significant departure" from traditional application and refused to extend it as such. *Id*. at 13.

Although the PTD has been expanded in recent years from its historical roots, it precludes the atmosphere as an asset for protection by the government. Plaintiff here may draw from *Juliana* to argue that the PTD is an expanding concept. However, as the court in *Alec* noted, no court has ever held that the PTD extends to the atmosphere. Even the trailblazing *Juliana* decision declined to extend the PTD to the atmosphere, leaving that question unresolved and instead grounding the plaintiffs' public trust right to their claims related to oceanic conditions. Unlike *Juliana*, the issue here is specifically related to a "global *atmospheric* climate system" undisturbed by GHG emissions, suggesting a direct connection to the atmosphere as a purported public trust asset. Contrary to alienable lands or navigable waters — the assets historically protected by the public trust — the claim here seeks to hold the government accountable for the global atmosphere, a diffuse and ill-defined system far removed from the type of public trust originally envisioned. The government has no duty as a fiduciary to protect the atmospheric climate system as a public trust and the Plaintiff has failed to state a claim on these grounds.

D. The U.S. Government has no affirmative duty to protect plaintiffs from private harms.

Pursuant to due process, the general rule is that the U.S. has no affirmative duty to protect citizens, "even when 'such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual.'" *Juliana*, 217 F. Supp. 3d at 1250-5

(citing *DeShaney*, 489 U.S. 189 (1989)). The "danger creation" exception overcomes this presumption, but has not been satisfied here. *DeShaney*, 489 U.S. at 196. The "danger creation" exception presents a high bar to satisfy, requiring the claimant to prove the defendant knowingly took some action with "[d]eliberate indifference" to the well-being of the plaintiff and put them in a worse position than they otherwise would have been in. *Id*.; *see also Pauluk v. Savage*, 836 F.3d 1117, 1125 (9th Cir. 2016).

The "danger creation" exception does not negate the presumption against an affirmative duty when the government merely fails to act. *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982); *see also Pena v. DePrisco*, 432 F.3d 98, 108 (2d Cir. 2005). In *Bowers*, a wrongful death suit was brought when a schizophrenic individual, released from prison after a violent crime, murdered a woman. *Bowers*, 686 F.2d. at 617. The claim asserted state officials had a duty to protect the victim and were indifferent as to the ex-prisoner's accountability. *Id*. Judge Posner highlighted the requisite governmental action to trigger an affirmative duty, stating that intentionally placing a citizen in danger of being murdered by a "madman" would be "as if it had thrown [the victim] into a snake pit." *Id*. at 618. However, in reasoning that the State merely "failed adequately to protect" the victim, Judge Posner concluded that it did not *actively* "place [her] in . . . a position of danger." *Id*. The court concluded that due process is a limitation of state power that prevents the government from *affirmatively* abusing its power.[12] *Id*.

Due process provides provides no guarantee that the government will protect citizens from private harms. *DeShaney*, 489 U.S. at 195. In *DeShaney*, the mother of a child beaten by his father brought suit against local officials on the grounds that they had received complaints of the abuse but failed to remove the child. *Id*. at 191. The child endured significant abuse and

[12] Veronica Zhang, *Throwing the Defendant into the Snake Pit: Applying a State-Created Danger Analysis to Prosecutorial Fabrication of Evidence*, 91 B.U. L. Rev. 2131 (2011) ("[N]ine out of ten circuits as well as *DeShaney* . . . require the Sec. 1983 plaintiff to allege affirmative state conduct.").

sustained permanent injuries. *Id*. at 191. Nonetheless, the court held the Due Process Clause conferred no constitutional duty on the State to protect the child from a private harm, even after receiving reports of the possible abuse by his father. *Id*. at 194–203. A claim that the State failed to prevent some private harm therefore "simply does not constitute a violation of the Due Process Clause." *Id*. at 197.

The government's alleged harms here do not overcome the presumption against a governmental affirmative duty. First, the government is charged with harms of a passive sort, including a failure to adequately regulate GHG emissions. In *Bowers*, the court openly acknowledged a failure to ensure a past violent criminal's release did not overcome the presumption there. While the government arguable could have done more to prevent anthropogenic climate change, the test does not turn on whether a harm *could* be avoided through more governmental action. Instead, the "danger creation" exception requires affirmative action by the government through which the government knowingly put the individual at risk. The claim here stems primarily from an *absence* of action. This passive conduct is not like throwing someone into the "snake pit" as Judge Posner suggested.

The plaintiffs may argue that the government's indicia of tacit approval to the fossil fuel industry amounts to active harms. However, the government's conduct amounts to a failure to protect the plaintiffs from private harms — precisely the kind rejected by *DeShaney* as obligating an affirmative duty. Providing a cause of action in this instance would open the floodgates for litigation by allowing victims to seek redress against the government any time they suffered a cognizable harm from a private entity which the government ostensibly could have, but failed, to regulate sufficiently. Here, the Plaintiff's allegation is really that the government failed to do enough. Such a claim does not overcome the presumption against an affirmative duty and the plaintiffs have therefore failed to raise a viable cause of action.

VI. PLAINTIFFS' CLAIMS ARE BARRED BECAUSE THEY RAISE QUESTIONS APPROPRIATELY LEFT TO THE POLITICAL BRANCHES.

The political question doctrine provides that certain questions are fundamentally political in nature and are therefore better left to the political branches of government. *Baker v. Carr*, 369 U.S. 186 (1962); *Marbury v. Madison*, 5 U.S. (Cranch 1) 137 (1803). The Supreme Court set out six tests in *Baker*, any one of which renders a question non-justiciable if satisfied. *Baker*, 369 U.S. 186. In lieu of specific relief, Flood would have the court fashion a common law remedy for harms related to GHG emissions-related climate change. His claim therefore raises issues that are textually committed to the political branches and have in fact been addressed by Congress. *Id*. at 217; *see also* 42 U.S.C. § 7401. Resolution of his claim by the court is also inappropriate due to a lack of judicially manageable standards for constructing relief. *Id*. at 217; *Gilligan v. Morgan*, 413 U.S. 1, 14 (1973).

Baker's fifth test[13] generally contemplates a situation in which resolution of a claim would "seriously interfere with important governmental interests." *Baker*, 369 U.S. 186, 217; *Kadic v. Karadzic,* 70 F.3d 232, 248-49 (2d Cir. 1995); *see also Alperin v. Vatican Bank*, 410 F.3d 532, 544 (9th Cir. 2005). Because resolution of Mana's claims would require the court to make pronouncements challenging affirmative policy decisions already made by the political branches, his claim is similarly barred under *Baker*.

A. Flood's PTD claim is non-justiciable under the Political Question Doctrine.

1. Flood's claim is non-justiciable under *Baker*'s first test.

If a claim presents issues constitutionally committed to the political branches it is non-justiciable. *Nixon v. United States*, 506 U.S. 224 (1993). In *Nixon*, a terminated federal district court judge refused to sign his commission, leading the Senate to initiate impeachment

[13] *Baker*'s fifth test states, a question is non-justiciable if there is "an unusual need for unquestioning adherence to a political decision already made."

proceedings. *Id*. at 227–28. After a Senate-created "special committee" ultimately terminated the judge, he argued the creation of the committee violated his constitutional right to hearing by the Senate. *Id*. at 229 (citing U.S. Const. art. I, § 3, cl. 6). The Court pointed to the language of the Senate Impeachments Clause, Art. I, § 3, cl. 6, which states that "[t]he Senate shall have the sole Power to try all Impeachments." *Id*. at 229. Because the Constitution's text unambiguously reserved impeachment authority for the Senate, the Court concluded that the question was non-justiciable and therefore the Senate was free to devise its own impeachment procedures. *Id*. at 233–34.

Though the Court is left to guess what relief Flood seeks, because the harm here is being perpetrated predominately by private companies throughout the U.S., resolution of his claim necessarily contemplates the regulation of interstate commerce. In *Nixon*, the Court held that a constitutionally committed function to a coordinate political branch rendered the plaintiff's claim non-justiciable. Here, resolution of the plaintiff's claim would undoubtedly require the government to curtail fossil fuel sales, production, and other related aspects of interstate commerce. Thus the claim here similarly raises a non-justiciable issue via the regulating commerce — a province textually committed to Congress under the constitution. U.S. Const. art. I, §§ 1, 8.

2. Flood's claim is non-justiciable under *Baker*'s second test.

A claim is non-justiciable if it requires the creation of standards or oversight of complex governmental operations. *Gilligan v. Morgan*, 413 U.S. 1, 10-12 (1973). In *Gilligan*, plaintiffs were a group of students seeking relief after deaths of individuals at their university. *Id*. at 3. They alleged the deaths, resulting from a confrontation between demonstrators and the Ohio National Guard, were the result of the Guard's poor training and improper weaponry. *Id*. The court noted that relief would entail the establishment of "standards for . . . training,"

specifications about weapons, and prolonged judicial surveillance to ensure compliance thereafter. *Id*. at 6. The court stated that the plaintiffs' claim amounted to "a broad call on judicial power to assume continuing regulatory jurisdiction over the activities of the Ohio National Guard," a complex task constitutionally reserved for the other branches of government and therefore non-justiciable *Id*. at 5, 10-12.

Judicially manageable standards are those with established and rational substantive legal bases, without which the courts cannot resolve the issue. *Alperin*, 410 F.3d at 553. In *Alperin*, a class of Jews and other Holocaust survivors brought an ATS claim against the Vatican Bank for its alleged role during World War II. *Id*. at 539-41. Plaintiffs sought to recover property looted during the conflict. *Id*. at 543. The critical inquiry, as *Alperin* clarified, was whether the court had the necessary "legal tools" to fashion relief in a way that is "principled, rational, and based upon reasoned distinctions," and that judicial resolution was *not* pursued merely to provide "hope" of a reasoned outcome. *Id*. at 553. Their claims, though logistically complex, relied on well-established and tested doctrines of property law and were therefore justiciable. *Id*. at 552.

Relief for Flood implicates a reformulation of national pollution standards and a comprehensive plan for compliance and oversight. Such a role is wholly unsuited for the courts and is better handled (and currently is handled) by the political departments. In *Gilligan*, the court specifically rejected that the *establishment* of standards was a proper role for the government. Here, like *Gilligan*, the court is presented with a broad claim requiring the court to craft new emissions standards to change the plot of U.S.-fueled anthropogenic climate change. While climate change is indeed a concern to be taken with the utmost seriousness, such is not properly a role for the judiciary.

Second, Flood's claim fails for a lack of judicial standards in crafting relief, because the courts are almost entirely without any precedent for resolving PTD claims under the Fifth

Amendment's Due Process Clause. In *Alperin*, the court crafted relief from well-established rules, based on commonly utilized laws, upon which the court could "easily rely". Unlike commonly litigated environmental claims like public nuisance actions, a public trust claim arising under the Fifth Amendment is a mostly unheard of legal tact, the resolution of which is largely an unknown. Because the courts lack a recognized standard by which to resolve the issue, resolution by the court would not be reasoned or rational. Rather, it would rely on the sort of "hope" that the Supreme Court has specifically rejected. Flood's claim is thus non-justiciable.

B. Mana's ATS claim is non-justiciable under the Political Question Doctrine

Where policies are already in place addressing a particular issue, judicial resolution is inappropriate. *Alperin*, 410 F.3d at 557. In *Alperin*, there were "no prior political decisions" being questioned "or even implicated" as it related to the plaintiffs' claims. *Id*. In discussing the fifth *Baker* test, the court explained that where no policy decision is implicated, resolution of the claim is not barred. *Id*. Because no policy decision was implicated there, the claims raised by plaintiff Holocaust survivors were not barred under the political question doctrine. *Id*. at 557-58.

The political branches have already spoken to the issues raised in Mana's ATS claim and it is thus non-justiciable under the fifth *Baker* test. As a general matter, regulation of private entities is a matter for the exclusive domains of Congress and the Executive, respectively. Mana's claim regards HexonGlobal's sale and production of fossil fuels and the transboundary harms created as a result thereof. Unlike *Alperin*, where no policy existed that spoke to the claims being raised by plaintiffs there, the issues raised by Mana's claim squarely implicate legislation already promulgated by the political branches: namely, the Clean Air Act (CAA). As discussed above, the CAA directly regulates GHG emissions. Resolution of Mana's claim would violate the fifth *Baker* test, which is implicated when "challenge the judiciary's role would "challenge the wisdom or legality of [a] governmental act or decision" *Alperin* at 557 (citing

Northrop Corp. v. McDonnell Douglas Corp., 705 F.2d 1030, 1047 (9th Cir. 1983)). The political branches of the U.S. have made a clear policy pronouncement in choosing to regulate the conduct at issue under Mana's ATS claim and judicial resolution therefore is barred.

CONCLUSION

In sum, U.S. corporations may be subject to suit under the ATS, and could be held liable for violations of the *Trail Smelter* principle because it is a norm of customary international law capable of enforcement against non-governmental actors. However, the *Trail Smelter* principle is displaced by the CAA and therefore Mana's ATS claim against HexonGlobal cannot proceed. Flood's claim against the U.S. cannot proceed because there is no cause of action under the Fifth Amendment for violation of the PTD, because the claim is barred by sovereign immunity, there is not a fundamental right guaranteed by the Fifth Amendment Due Process clause to an undisturbed global atmosphere, and because any such claim would be a non-justiciable political question. For the foregoing reasons, the lower court's order granting defendants' motions to dismiss should be affirmed in all respects.