Team Number 16

Docket No. 18-000123

UNITED STATES COURT OF APPEALS FOR THE TWELFTH CIRCUIT

ORGANIZATION OF DISAPPEARING ISLAND NATIONS,

APA MANA, and NOAH FLOOD,

Appellants,

v.

HEXONGLOBAL CORPORATION,

Appellee,

v.

THE UNITED STATES OF AMERICA,

Appellee.

On Appeal from the United States District Court for New Union Island in No. 66-CV-2018,

Judge Romulus N. Remus

BRIEF OF APPELLEE, HEXONGLOBAL CORPORATION

Oral Argument Requested

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STATEMENT OF JURISDICTION

The United States District Court for the District of New Union Island had federal-question jurisdiction to hear this case. Federal district courts have "original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331 (2012). The exclusive claims presented in the Plaintiff-Appellants' complaint arose under a federal statute and an amendment to the Constitution. *Org. of Disappearing Island Nations v. HexonGlobal Corp.*, Case No. No. 66CB2018 (RMN), slip op. at 3 (D. New Union Island Aug. 15, 2018). All federal courts of appeals besides the Federal Circuit "have jurisdiction of appeals from all final decisions of the district courts of the United States." § 1291. The District Court's Order and Opinion granting dismissal of Plaintiff-Appellants' complaint was a final determination by that court. Therefore, the United States Court of Appeals for the Twelfth Circuit has jurisdiction to hear this appeal of the Order and Opinion.

STATEMENT OF THE ISSUES

I. Whether Mana can bring an Alien Tort Statute, 28 U.S.C. § 1350 (ATS), claim against a domestic corporation.

II. Whether the Trail Smelter Principle is a recognized principle of customary international law enforceable as the "Law of Nations" under the ATS.

III. Assuming the Trail Smelter Principle is customary international law, whether it impose obligations enforceable against non-governmental actors.

IV. If otherwise enforceable, whether the trail Smelter Principle is displaced by the Clean Air Act.

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

VI. Whether Appellants' law of nations claim under the ATS and public trust claim present a non-justiciable political question.

STATEMENT OF THE CASE

A. Statement of the Facts

Appellant Apa Mana is an alien national residing in A'Na Atu, and Appellant Noah Flood is a U.S. citizen resident of the New Union Islands. *Org. of Disappearing Island Nations v. HexonGlobal Corp.*, Case No. No. 66CB2018 (RMN), slip op. at 3 (D. New Union Island Aug. 15, 2018). A'Na Atu and the New Union Islands are islands in the East Sea with a maximum height of less than three meters above sea level. *Id.* at 4. Both Mana and Flood are members of Appellant Organization of Disappearing Island Nations (ODIN), a not-for-profit organization focused on protecting the interests of island nations threatened by sea level rise. *Id.* at 3.

Appellants' speculate that climate change-induced sea level rise of one half to one meter would make both islands uninhabitable by the end of this century. *Id.* at 3–4. They also claim to have suffered seawater damage to their homes during storms and experienced seawater intrusion into their drinking wells. *Id*. at 5. Finally, Appellants predict that increasing temperatures resulting from climate change will put their health at risk and challenge their ability to rely on locally caught seafood in the future. *Id.*

Defendant United States is the largest national contributor to greenhouse gas emissions. *Id.* at 5–6. Human production and distribution of fossil fuels has been found to be a factor contributing to climate change. *Id.* at 4. Until recently, the United States has taken limited action to address greenhouse gas emissions from fossil fuels, instead incentivizing the production and combustion of fossil fuels. *Id.* at 6. Despite preliminary regulatory actions to reduce greenhouse gas emissions, United States greenhouse gas emissions have decreased only slightly over the past

decade, and the Trump Administration has proposed to reverse existing regulatory measures and commitments. *Id.* at 7.

Defendant HexonGlobal is a United States corporation, which resulted from the merger of all the major U.S. oil producers. *Id.* HexonGlobal is incorporated in the state of New Jersey, with its principal place of business in Texas. *Id.* HexonGlobal operates refineries throughout the world, including one on New Union Island. The historical greenhouse gas emissions from products sold by HexonGlobal and its predecessor businesses constitute thirty-two percent of United States cumulative fossil fuel-related greenhouse gas emissions, but only six percent of global historical emissions. *Id.*at 5. Cumulative sales of fossil fuels by HexonGlobal constitute merely nine percent of global fossil fuel-related emissions. *Id.*

B. Procedural History

The three plaintiff-appellants in this action—Apa Mana, a subject and resident of the nation of A'Na Atu; Noah Flood, an American citizen residing in the New Union Islands; and ODIN, a non-profit entity among whose members are Flood and Mana—filed a complaint in the United States District Court for the District of New Union Island. *Id.* at 3. Mana alleged that HexonGlobal, an American-based producer and distributor of fossil fuels, violated the law of nations through those commercial activities. *Id.* In so alleging, Mana invoked the limited jurisdiction provided to federal district courts by the Alien Tort Statute, 28 U.S.C. § 1350. *Id.* Flood did not raise claims against HexonGlobal but alleged that the United States' longstanding support of fossil fuel production, along with the government's perceived ineffectiveness in controlling greenhouse gas emissions, violated his due process rights under the Fifth Amendment

of the United States Constitution. *Id.* The defendants, HexonGlobal and the United States of America, moved to dismiss. *Id.* at 4. On August 15, 2018, the District Court issued an Opinion and Order granting both defendants' motions to dismiss the complaint. *Id.* at 11. The plaintiff-appellants filed a Notice of Appeal to continue to argue for novel, expanded applications of the Alien Tort Statute and the Fifth Amendment. *Id.* at 1.

SUMMARY OF THE ARGUMENT

Under the Alien Tort Statute (ATS), "district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. Appellant Mana argues that the law of nations prohibits HexonGlobal from producing and selling fossil fuels because such activities allegedly violate a principle of the law of nations that emissions into the environment within the territory of one nation must not be allowed to cause substantial harms in the territory of other nations. However, to sue a domestic corporation under the ATS, claimants must set forth allegations based on a principle of international law that specifically, universally, and obligatorily provides for the possibility of corporate liability. *See infra* Part I(A). Corporate liability has been excluded even from bodies of international law recognizing a potential for personal liability. *See The Nurnberg Trial (United States v. Goering)*, 6 F.R.D. 69, 110 (Int'l Military Trib. At Nuremberg 1946) ("[c]rimes against international law are committed by men, not by abstract entities."). Customary international law has consistently held that only nation-states are subject to ATS jurisdiction. *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 126 (2d Cir. 2010). Therefore, any ATS claim against HexonGlobal is inappropriate.

Furthermore, the *Trail Smelter* Principle is not a component of the law of nations actionable under the ATS and is unenforceable against private actors, because the substantive norm alleged is not specific, universal, obligatory, and has serious foreign policy ramifications. Because the *Trail Smelter* Principle, *Trail Smelter Arbitration*, 3 U.N.R.I.A.A. 1938, 1965 (1941) (hereinafter, "*Trail Smelter Arbitration*"), arose from an international arbitration initiated solely for the benefit of the parties involved—both governmental actors—the decision is limited only to those parties and does not apply to HexonGlobal's fossil fuel productions.

Additionally, the Clean Air Act displaces any common law air pollution claims against HexonGlobal. The Supreme Court has held that the Clean Air Act displaces common law claims and regulates greenhouse gas emissions. *See infra* Part III(A). Recent challenges in district courts against oil producers have concurred that the Clean Air Act displaces federal common law air pollution claims like the one Appellants attempt to bring here. *See generally City of Oakland v. B.P., PLC*, No. C17-06011 (N.D. Cal. Jun. 25, 2018); *City of New York v. B.P., PLC*, No. 18 Civ. 182 (S.D.N.Y. Jul. 19, 2018).

Disregarding the Clean Air Acts authority over climate regulation and applying the *Trail Smelter* Principle to HexonGlobal's fossil fuel production would prove unworkable and violate separation of powers principles. HexonGlobal and other private-sector businesses rely on, and abide by, environmental laws and regulations. Applying an ambiguous, aspirational standard like the *Trail Smelter* Principle would allow ad hoc claims against the private sector and ultimately paralyze businesses. It is not within this court's authority to extend regulatory measures to areas in which the Legislature never intended. Therefore, this court must abide by the regulatory framework our country has developed over the past five decades and render Appellants' ATS claim invalid.

Additionally, Appellants' due process-based public trust claim to governmental protection from global climate change is improper because it is not a fundamental right under the Fifth Amendment. The text of the Constitution and the foundations of the public trust doctrine mandate against the unprincipled expansion upon due process rights advanced by Appellants. Even if Appellants' asserted substantive due process right were valid, the Due Process Clause does not impose an affirmative obligation on the federal government to interfere with the production, sale, and combustion of fossil fuels by any private parties because of an alleged connection to climate change. There are two exceptions to this general rule and apply when either a "special relationship" exists between the individual and the government actor or when the government creates the danger through conduct that places a person in peril through deliberate indifference to health and safety. *See infra* Part III(b). However, under the danger creation exception, the government cannot be said to have created the danger of global climate change. Accordingly, this court must not overstep the boundaries of established constitutional law and should affirm the District Court's refusal to recognize a Due-Process-based public trust right to governmental protection from climate change.

Although both of Appellants' claims lack substantive merit, such claims are appropriate for judicial review. This court has appropriate authority to review the ATS claim, as it is within the purview of federal courts to determine if international law claims are identifiable under the ATS and subject to relief. Additionally, the Appellants' Fifth Amendment due process claim is appropriate for review, as federal courts are more than qualified to address questions arising under the Constitution. Therefore, this Court should find that the Appellants claims are appropriate for judicial review.

STANDARD OF REVIEW

This Court, like its sister circuits, reviews district courts' determinations on questions of law de novo. *See, e.g.*, *Brod v. Omya, Inc.*, 653 F.3d 156, 164 (2d Cir. 2011) ("[a] district court's interpretation of law is reviewed de novo."); *S.E.C. v. Suter*, 732 F.2d 1294, 1300 (7th Cir. 1984) ("[a]n appellate court may properly conduct an independent review and resolution of questions of law determined by a district court."). This applies with equal force to district courts' determinations on substantive due process claims. *See, e.g.*, *United States v. DeCoster*, 828 F.3d 626, 632 (8th Cir. 2016) ("[w]e review de novo a substantive due process claim.").

ARGUMENT

I. THE DISTRICT COURT CORRECTLY DISMISSED APPELLANTS' ALIEN TORT STATUTE CLAIMS.

A. Suing a Domestic Corporation Under the ATS Requires Allegations Based on a Principle of International Law That Specifically, Universally, and Obligatorily Provides for the Possibility of Corporate Liability.

Arguing that he should be permitted to sue a domestic corporation for an alleged violation of international custom under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, Appellant Apa Mana asks that this Circuit summarily disregard a consistent norm in international law of electing not to impose corporate liability. At the same time, Mana asks this Circuit to consider a principle espoused in an ad hoc, bilateral arbitration and echoed in various international soft law commitments to be a "specific, universal, and obligatory" component of the law of nations. *Jesner v. Arab Bank, PLC,* 138 S. Ct. 1386, 1399 (2018). Nothing in the plain language of the ATS and nothing about the specific wrongs it seeks to address permits this selective hearing of international law in determining whether a plaintiff has alleged an actionable violation of the law of nations. Congress has declared that, in the absence of an applicable treaty, international norms

are the source of any substantive violation actionable under the ATS, and by logical necessity, a "specific, universal, and obligatory" norm must define those who are potential violators of that norm. *Id.*

"[T]he ATS is a jurisdictional statute creating no new causes of action*." Sosa v. Alvarez-Machain*, 542 U.S. 692, 724 (2004). It provides simply that "district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations . . . ." 28 U.S.C. § 1350. By its express terms, the ATS delegates the task of defining any substantive violations to "the law of nations," absent an applicable treaty. *Id. See The Paquete Habana*, 175 U.S. 677, 700 (1900) (in discerning the law of nations, "where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations."); *Kiobel,* 621 F.3d 121–22, (citations omitted) ("[T]he ATS does not specify who is liable; it imposes liability only for a 'violation of the law of nations,' and thus it leaves the question of the nature and scope of liability—who is liable and for what—to customary international law."). Appellant Mana's exclusive argument that the *Trail Smelter* Principle is "a principle of the law of nations, or customary international law," (slip op. at 6–7), concedes that none of the international agreements cited in the Complaint as a statement of the *Trail Smelter* Principle constitute "a treaty of the United States" applicable under the facts of the case. § 1350. Thus, any cause of action under the ATS in the instant case must arise from the law of nations.

The Supreme Court has recognized that the law of nations gives content not only to the wrong actionable under the ATS, but also to the parties that may be held accountable for the

wrong. *Sosa*, 542 U.S. at 724. Based on a careful review of the historical record, the Supreme Court has determined that "[t]he jurisdictional grant [made by the ATS] 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." *Id.* (emphasis added). By necessary implication, no cause of action could be raised under the ATS for a violation of the law of nations at all without international law norms that are themselves defined to include the potential for personal liability. And, as discussed *infra* in Part I(B), international law does not define the *Trail Smelter* Principle to include a potential for personal liability and instead speaks only of a responsibility on the part of sovereign states.

Because international norms themselves establish the potential for personal liability, the Supreme Court has declared that when determining if a norm is definite enough to be considered part of the law of nations, "[a] related consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual." *Id*. at 763 n.20. In terms of a framework for analyzing this consideration, the Court has attributed "considerable force and weight" to the Second Circuit's approach. *Jesner*, 138 S. Ct. at 1400. The Second Circuit's analysis, in turn, recognizes that "corporate defendants may be held liable under the ATS only if there is a specific, universal, and obligatory norm that corporations are liable for violations of international law." *Id.* (citing *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 127 (2d Cir. 2010)).

If international agreements recognizing a norm consistently focus on the liability of non-corporate parties, corporate liability for violating the norm is not specific, universal, and

obligatory under international law. *Kiobel*, 621 F.3d at 119–20. In *Kiobel*, several residents of Nigeria brought an ATS claim against multinational oil corporations in American federal district court, alleging that the corporations violated the law of nations by assisting Nigerian military forces in committing violence upon their persons or damaging their property. *Id.* at 123. The Second Circuit observed that "[t]he singular achievement of international law since the Second World War has come in the area of human rights, where the subjects of customary international law—i.e., those with international rights, duties, and liabilities—now include not merely states, but also individuals." *Id.* at 119. This "singular achievement" was a response to "heinous and unbounded" crimes of the kind prosecuted at Nuremberg and remains singular in international law. *Id*. Yet, even within this narrow exception to a general rule of no personal liability, the corporate form has been excluded from personal liability from the beginning, on the recognition that "[c]rimes against international law are committed by men, not by abstract entities," *The Nurnberg Trial (United States v. Goering)*, 6 F.R.D. 69, 110 (Int'l Military Trib. At Nuremberg 1946). "[A]s new international tribunals have been created, the customary international law of human rights has remained focused not on abstract entities but on the individual men and women," *Kiobel*, 621 F.3d at 119, and "[a]lthough there was a proposal at the Rome Conference to grant the [International Criminal Court ("ICC")] jurisdiction over corporations . . . that proposal was soundly rejected." *Id.* at 119. Therefore, "[l]ooking to international law," the Second Circuit found "a jurisprudence, first set forth in Nuremberg and repeated by every international tribunal . . . that offenses against the law of nations (i.e., customary international

law) for violations of human rights can be charged against States and against individual men and women but not against juridical persons." *Id.* at 120.

Mana incorrectly asserts that international law provides that corporations are liable for the effects of sea level rise he claims to have experienced. To establish his claim, he cites the T*rail Smelter* Principle, a narrow, non-precedential decision by an arbitral panel applying only the governmental actors before it. *See Trail Smelter Arbitration* at 1965 ("*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.") (emphasis added); see also discussion *infra* Part 1(B). This principle, and the generalized restatements of it in two non-binding United Nations declarations, afford even less of a basis for subjecting corporate persons to liability than was present in *Kiobel*. As the Second Circuit unanimously observed in *Kiobel*, "it 'is entirely accurate' that 'international law imposes no liabilities on private juridical persons.'" *Id.* at 121 (quoting *id.* at 186 (Leval, J., concurring in judgment)). *See also Jesner,* 138 S. Ct. at 1396 ("The respective opinions by Judges Cabranes and Leval are scholarly and extensive, providing significant guidance for this Court in the case now before it."). Just as international criminal law has excluded corporations from liability, international environmental law has recognized from the time of the *Trail Smelter Arbitration* that any duty not to cause injury to another state's territory applies exclusively to sovereign states, not to private entities residing within those states. The dispute at issue in the *Trail Smelter Arbitration* itself, though arising from a claim of injury "by the operations of a Canadian corporation," was at all times understood to be a "controversy . . . between two Governments." *Trail Smelter Arbitration*. at 1938. *See* Austen L. Parrish, *Trail Smelter Déjà Vu*, 85 BOSTON

U.L. REV. 363, 422 (2005) (quoting *Trail Smelter Arbitration* at 1965 n.320) (in the *Trial Smelter Arbitration*, "a special arbitration tribunal . . . determine[d] whether Canada should pay the U.S., among other things, compensation for additional damages, and whether the Trail smelter should refrain from causing damage in the State of Washington in the future" and "held that 'the Dominion of Canada is responsible in international law for the conduct of the Trail Smelter.'").

The United Nations' Rio and Stockholm Declarations further reinforce that the *Trail Smelter* Principle is a "responsibility" that "*[s]tates* have." U.N. Conference on Environment and Development, *June 3–14, 1992, Rio de Janeiro, Braz., Rio Declaration on Environment and Development*, 3, U.N. Doc. A/CONF.151/26/REV.1(VOL.I) (1992) (emphasis added); U.N. Conference on 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) (emphasis added). The maintenance of this state-focused language in the Rio Declaration is particularly telling, as the Declaration was written and approved concurrently with Agenda 21, which declares sustainable development responsibilities on the part of "nations *and corporate enterprises.*" *Id.* (emphasis added). And whereas the Rome Statute and other tribunal-establishing agreements surveyed in *Kiobel* act with binding force upon sovereign states in their recognitions of personal liability, the Stockholm and Rio Declarations are purely aspirational documents. *See Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 263 (2d Cir. 2003) ("The Rio Declaration includes no language indicating that the States joining in the Declaration intended to be legally bound by it."); *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161, 167 (5th Cir. 1999)

(the Rio Declaration "refer[s] to a general sense of environmental responsibility and state[s] abstract rights and liberties."); Dinah Shelton, *Stockholm Declaration (1972) and Rio Declaration (1992)*, *in* MAX PLANCK ENCYCLOPEDIA OF PUB. INT'L LAW (2008), http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1608 ("The Stockholm Declaration was not adopted as a treaty and is not legally binding as such," and "[l]ike the Stockholm Declaration, the Rio Declaration was not adopted as a legally binding instrument.").

Thus, international law does not support the proposition that corporations can be held liable for environmental harms to a foreign nation-state's territory resulting from their domestic activities. As in *Kiobel*, this is not because international law has silently punted the resolution of who is bound by the responsibilities articulated in *Trail Smelter* and the Stockholm and Rio Declarations to individual nation-states, but indeed because "[i]nternational law is not silent on the question of the *subjects* of international law," *Kiobel*, 621 F.3d at 126, and has consistently determined that only the nation-states themselves are subject to these responsibilities. This is also because, unlike in *Kiobel*, there is no obligatory international agreement among nation-states expressing these responsibilities in the first place. Where no consensus among nations binds corporations to a norm, neither does the law of nations. *See Jesner*, 138 S. Ct. at 1399. Accordingly, Mana's claim against HexonGlobal is not actionable under the ATS.

B. The *Trail Smelter* Principle Does Not Impose Enforceable Obligations Against the Private Sector.

Any obligations the *Trail Smelter* Principle imposes apply *only to governmental actors*, and not on private-sector actors like HexonGlobal. The Trail Smelter tribunal did not impose liability

on the company operating the smelter; instead, it found the Canadian government liable for its failure to protect the United States from damage by the Canadian smelter. Moreover, subsequent restatements of the *Trail Smelter* Principle in international law further reflect its limited nature, addressing only public sector responsibilities. Finally, any attempt to apply the *Trail Smelter* Principle to private-sector entities would have untenable public policy consequences. Thus, this court must cabin its interpretation of the *Trail Smelter* Principle and refrain from extending its reach to private-sector actors like HexonGlobal.

i. *The* Trail Smelter *Principle, as Adopted, Applies Only to Public-Sector Entities and Not to Private-Sector Corporations.*

The *Trail Smelter* Principle arose from an international arbitration initiated solely for the benefit of the parties involved—both governmental actors. Accordingly, the decision was limited only to those parties. The United States and Canadian governments initiated the *Trail Smelter* arbitration in 1935 by signing and ratifying a convention subjecting themselves to the arbitration panel's authority. *See Convention for Settlement of Difficulties Arising from Operation of Smelter at Trail, B.C.*, U.S. Treaty Series No. 893. Although the arbitration involved claims arising from private-sector activities, the only parties that signed the convention were the United States and Canada, and not the business operating the smelter. Moreover, the damages the arbitration panel assessed were imposed not on any private actors, but on the governmental actors before the panel.

The text of the panel's decision most often cited as the "*Trail Smelter* Principle" supports application only to sovereign actors like the ones before it. It makes no mention of the private

sector and instead imposes an obligation on states to avoid adverse environmental impacts on others:

> [U]nder the principles of international law . . . no *state* [sovereign] has the right to use or permit the use of its territory in such a manner as to cause injury . . . to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.

Trail Smelter Arbitration at 1965 (emphasis added).

While Appellants might read the tribunal's decision to impose emission limitations on the smelter as a finding of private-sector liability in the matter, this is an incorrect understanding of *Trail Smelter*. Rather than directly imposing limits on the smelter, the arbitration tribunal required that the Canadian government enforce such a regime through regulation. *See Trail Smelter Arbitration* at 1965–1966 ("[T]he Dominion of Canada is responsible in international law for the conduct of the Trail Smelter. . . . [I]t is, therefore, the duty of the Government of the Dominion of Canada to see to it that this conduct should be in conformity with the obligation of the Dominion . . . . *"). See also id*. at 1974 ("[T]he operation of the Smelter and the maximum emission of sulphur dioxide from its stacks *shall be regulated* as provided . . . .") (emphasis added). The remedy in *Trail Smelter* did not impose responsibility on the private sector to cap its emissions, but rather placed responsibility in the hands of the government to regulate the smelter's emissions.

ii. *Later Iterations of the* Trail Smelter *Principle Do Not Impose Obligations on the Private Sector, but Only on Governmental Actors.*

The *Trail Smelter* Principle has never been used to resolve a private dispute over international environmental harm. *See* John H. Knox, *The Flawed Trail Smelter Procedure: The*

Wrong Tribunal, the Wrong Parties and the Wrong Law, *in* TRANSBOUNDARY HARM IN INTERNATIONAL LAW: LESSONS FROM THE TRAIL SMELTER ARBITRATION 66 (Rebecca M. Bratspies & Russell A Miller, eds., 2006) (footnote omitted). It is reflected in other key international law doctrines like Principle 21 of the Stockholm Declaration and Principle 2 of the Rio Declaration. *See* Daniel Bodansky, *Customary (and Not So Customary) International Environmental Law*, 3 IND. J. GLOBAL LEGAL STUD. 105, 114 (1995) (footnotes omitted).

However, in accordance with the *Trail Smelter* Principle's original scope and reach, none of these doctrines implicate the private sector. Principle 21 of the Stockholm Declaration proclaims that "States have . . . the 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." United Nations Conference on 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). Twenty years later, the United Nations Conference on Environment and Development reaffirmed this concept in Principle 2 of the Rio Declaration. *See* United Nations Conference on Environment and Development, Rio de Janeiro, Braz., June 3-14, 1992, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. 1) (Aug. 12, 1992).

As an initial matter, principles contained in the Stockholm and Rio Declarations are not legally binding. Kathleen Jaeger, *Environmental Claims Under the Alien Tort Statute,* 28 BERKELEY J. INT'L L. 519, 534 (2010). Moreover, even if such documents did impose enforceable obligations, these obligations would be incumbent only on the nations subject to them and not on

private actors. These principles, which specifically reference "states," make it clear that to the extent they apply, they address only governmental actors. To reach the private sector, such obligations must be explicitly adopted as public regulation, such as the Clean Air Act. To date, such action has not been taken, and therefore the *Trail Smelter* Principle cannot be imposed on private actors.

C. The *Trail Smelter* Principle Is Not a Component of the Law of Nations Actionable Under the ATS, Because the Substantive Norm It Is Alleged to State Is Not Itself Specific, Universal, and Obligatory and Has Serious Foreign Policy Ramifications.

The few and specific violations of the law of nations recognized under the common law at the time of the ATS's enactment in 1789 delimit the modern scope of the ATS. "Congress enacted [the ATS] against the backdrop of the general common law, which in 1789 recognized a limited category of 'torts in violation of the law of nations.'" *Jesner*, 138 S. Ct. at 1397. Accordingly, the Supreme Court has "assume[d] that the First Congress understood that the district courts would recognize private causes of action for certain torts in violation of the law of nations, though [the Court] ha[s] found no basis to suspect Congress had any examples in mind beyond . . . violation of safe conducts, infringement of the rights of ambassadors, and piracy." *Sosa*, 542 U.S. at 724. These three offenses were the subject of criminal sanctions in England contemporaneous with the passage of the ATS, *id.*at 715, and each involves an intentional and immediately manifesting interference with personal or property rights. *See generally Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2102 (2015) (Thomas, J., dissenting) (citations omitted) ("safe-conducts were given to persons who could not otherwise enter with safety the dominions of the sovereign granting it."); *Kiobel,* 569 U.S. at 120 ("Two notorious episodes involving violations of the law of nations occurred in the United States shortly before passage of the ATS," a verbal and physical assault on an ambassador and the arrest of an ambassador's domestic servant); *Id.* at

121 (citations omitted) (piracy "consists in committing those acts of robbery and depredation upon the high seas, which, if committed upon land, would have amounted to felony there.").

Despite the fact that "[t]here is no federal general common law," *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 82 (1938), the Supreme Court has held that the ATS remains "open to a narrow class of international norms today." *Sosa*, 542 U.S. at 729. *But see Jesner*, 138 S. Ct. at 1408–09, 1412 (three justices in five-justice majority concurring that "[c]ourts should not be in the business of creating new causes of action under the Alien Tort Statute."). That narrow class is anchored to the three causes of action explicitly referenced in *Sosa*, 542 U.S. at 725. Moreover, "the determination whether a norm is sufficiently definite to support a cause of action should (and, indeed, inevitably must) involve an element of judgment about the practical consequences of making that cause available to litigants in the federal courts." *Id.* at 732. The Court has fashioned these principles into a two-part test:

> An initial, threshold question is [1] whether a plaintiff can demonstrate that the alleged violation is of a norm that is specific, universal, and obligatory. And even assuming that . . . there is a specific norm that can be controlling, it must be determined further [2] whether allowing this case to proceed under the ATS is a proper exercise of judicial discretion, or instead whether caution requires the political branches to grant specific authority before corporate liability can be imposed.

Jesner, 138 S. Ct. at 1399. In the instant case, neither prong of this test can be met by Appellants.

In its original, ad hoc arbitral context, the *Trail Smelter* Principle was applicable specifically to "injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence," and that principle bound Canada through its consent to an arbitral resolution of the particular

dispute. *Id.* at 1907. Mana's Complaint does not contend that this one-off bilateral arbitral agreement established customary international law, nor could it, given the requirement of establishing a "universal" norm. *Jesner*, 138 S. Ct. at 1399. Instead, to assert the principle that "emissions into the environment within the territory of one nation must not be allowed to cause substantial harms in the territory of other nations," (*Org. of Disappearing Island Nations*, slip op. at 9), Mana relies on the *Trail Smelter Arbitration* in concert with the U.N.'s Stockholm and Rio Declarations. These Declarations divorce the principle Mana asserts from (1) the context of emissions, (2) the damages limitation to substantial harms, and (3) the geographical limitation to other nations. *See Beanal*, 197 F.3d at 167 (the Rio Declaration "refer[s] to a general sense of environmental responsibility and state[s] abstract rights and liberties devoid of articulable or discernable standards and regulations to identify practices that constitute international environmental abuses or torts."). What's more, neither of the Declarations is a binding instrument creating recognized obligations under international law. *See Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 263 (2d Cir. 2003) ("The Rio Declaration includes no language indicating that the States joining in the Declaration intended to be legally bound by it."); Shelton, *supra* ("The Stockholm Declaration was not adopted as a treaty and is not legally binding as such," and "[l]ike the Stockholm Declaration, the Rio Declaration was not adopted as a legally binding instrument."). As a result, Appellant Mana has walked his own claim into a legal checkmate. The *Trail Smelter Arbitration* was specific and obligatory but lacked universality, while the Rio and Stockholm Declarations were universal but did not give rise to a specific international law obligation. Though Mana attempts to split the difference, the fact remains that the specificity of

the *Trail Smelter Arbitration* does not have universal acceptance and the Rio and Stockholm Declarations do not bind any nation to specific obligations. Therefore, Mana has failed to show that the principle he asserts to be part of customary international law is "specific, universal, and obligatory." *Jesner*, 138 S. Ct. at 1399.

Moreover, while the international affairs concerns that animated the Supreme Court's decision in *Jesner* that foreign corporations could not be held liable under the ATS are concededly not fully present in the instant case, the different set of foreign policy concerns thrown into stark relief by this litigation also militate judicial caution in the absence of any direction from the political branches. HexonGlobal is a large multinational entity that produces and distributes fossil fuels throughout the world—the only company of its kind that remains headquartered in America. Its operations are vital to the distribution of a scarce resource so vital to a functioning economy that access to it has frequently been identified as a concern of national security. Were this Circuit to recognize the *Trail Smelter* Principle asserted by Mana to be a part of the law of nations actionable under the ATS, litigation from similarly situated claimants threatens to flood the federal courts and penalize an activity—the refining and distribution of oil —on which not only the United States depends, but also countries throughout the world. In this regard, deciding to obligate a large producer and distributor of oil to a non-obligatory international norm under the ATS will have broad-based impacts on the global economy, and the President and Congress ought to be allowed to weigh those impacts before a panel of generalist judges removed from electoral scrutiny takes action.

Therefore, the *Trail Smelter* Principle for which Appellant Mana argues has no binding authority to recommend it, and a wealth of practical considerations to recommend against it. Either reason is independently sufficient to conclude that it is not enforceable as part of the law of nations under the ATS.

II. THE CLEAN AIR ACT DISPLACES APPELLANTS' FEDERAL COMMON LAW AIR POLLUTION CLAIM.

Appellants' Alien Tort Statute claim is grounded in federal common law. As such, this court must dismiss it because the Clean Air Act has displaced federal common law air pollution claims. Further, this court must refuse to allow this claim because hearing such a claim would inappropriately delegate decisional power to the judiciary that Congress has wisely delegated to EPA.

A. The Supreme Court Has Decided That the Clean Air Act Displaces the Federal Common Law of Air Pollution.

The Alien Tort Statute is solely a jurisdictional statute, and instead of creating new, substantive causes of action, it relies on federal common law. Federal common law governs suits involving legal principles related to our nation's relationship with other nations, such as the *Trail Smelter* Principle. *See, e.g., Banco Nacional de Cuba v. Sabbatino* (1964) 376 U.S. 398, 425–426 (1964); *Filartiga v. Pena-Irala*, 630 F.2d 876, 885 (2d Cir. 1980) ("The constitutional basis for the Alien Tort Statute is the law of nations, which has always been part of the federal common law."). Accordingly, the District Court found that, "[a]s claims sounding in international tort, these claims must of necessity be considered to be claims arising under federal common law." *Org. of Disappearing Island Nations*, slip op. at 9.

In *Am. Elec. Power Co., Inc. v. Connecticut,* 564 U.S. 410, 415 (2011) (hereinafter, "AEP"), a coalition of states, the City of New York, and three land trusts brought common law nuisance and state tort law claims against five power generation companies with the goal of capping these companies' contributions to global warming. The Court held that the Clean Air Act displaced common law nuisance claims. Under *Massachusetts v. EPA*, 549 U.S. 497, 528–529 (2007), emissions of carbon dioxide and other greenhouse gases were already subject to EPA regulation under the Clean Air Act, and the AEP court determined that there was "no room for a parallel track." *Id.* at 425. *See also Milwaukee v. Illinois*, 451 U.S. 304, 314 (1981) (hereinafter, "*Milwaukee II*") (holding that when Congress addresses a matter previously governed by the courts under federal common law, "the need for such an unusual exercise of law-making by federal courts disappears."). Recent challenges in district courts against oil producers have concurred that the Clean Air Act displaces federal common law air pollution claims like the one Appellants attempt to bring here. *See generally City of Oakland v. B.P., PLC*, No. C17-06011 (N.D. Cal. Jun. 25, 2018); *City of New York v. B.P., PLC*, No. 18 Civ. 182 (S.D.N.Y. Jul. 19, 2018).

Any argument to the effect that global warming is further reaching or more complex a problem than the Act covers must fail. The Clean Air Act has a broad reach, addressing emissions… emissions of air pollutants without regard to whether their impacts are primarily local, as with a pollutant like particulate matter, or global in nature, as with acid rain or carbon dioxide. Such an argument would be a strained attempt to manufacture a claim that the Clean Air Act does not reach. Moreover, the judiciary has been reluctant to allow new claims under federal common law. *Sosa*, 542 U.S. at 692. Particularly where a potential claim enters the arena of

foreign relations, courts must be "wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs." *Id.* at 727.

Nor does the fact that EPA is still in the process of defining carbon dioxide emissions standards under the Clean Air Act change the fact that displacement of air pollution claims under the federal common law has already occurred. Case law is clear that federal common law can be displaced, even when an agency has yet to act on its rulemaking authority. *AEP*, 564 U.S. at 426 ("The critical point is that Congress delegated to EPA the decision whether and how to regulate carbon-dioxide emissions from power plants; the delegation is what displaces federal common law.").

Finally, lest Appellants attempt to carve out a federal common law claim on the basis of when the emissions occurred, the broad displacement effected by the Clean Air Act also extends to past emissions. In *Milwaukee II*, 451 U.S. at 316, the Supreme Court held that that amendments to the Clean Water Act displaced a common law nuisance claim the Court had previously recognized because Congress had since occupied the field. In *Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 858 (9th Cir. 2012), the Ninth Circuit Court of Appeals recognized this precedent in extending Clean Air Act displacement to an oil producer's past emissions. This court must follow precedent, just as the *Kivalina* court did, and recognize that the Clean Air Act's displacement of Appellants' claims reaches past emissions as well.

B. Disregarding the Clean Air Act's Authority Over Climate Regulation and Allowing Courts to Apply the *Trail Smelter* Principle to the Private Sector Would Prove Unworkable and Violate Separation of Powers Principles.

Imposing liability on private-sector parties by failing to recognize the indefiniteness and limited application of the *Trail Smelter* Principle and the Clean Air Act's displacement of federal common law air pollution claims would create an unworkable regulatory scheme. Private-sector

businesses like HexonGlobal abide by a complex array of environmental laws and regulations, and HexonGlobal's emissions-producing activities are lawful in every country in which they operate. Particularly in the energy sector, such businesses routinely make long-term, capital-intensive investments, and rely on the certainty and stability of public regulation like the Clean Air Act. Applying an ambiguous, aspirational standard like the *Trail Smelter* Principle would allow ad hoc claims against the private sector and ultimately paralyze businesses. Operating under such uncertainty would limit business's ability to plan, divert resources from compliance with existing statutory and regulatory obligations, and ultimately raise customer costs.

Moreover, allowing district courts to make the kinds of decisions reserved for the legislature and for expert agencies under the Clean Air Act would undermine the role of statutory law and raise serious separation-of-powers issues. The *Trail Smelter* tribunal conducted extensive investigation into the effects of sulfur dioxide pollution and subsequently required the Government of Canada to enforce a permanent emission control regime on the Smelter. This is precisely the role that public agencies play in our modern state. Assigning a similar role to the courts, rather than to agencies, duplicates and undermines the Clean Air Act's emission control regime. Moreover, it imposes a responsibility on the courts that they are not equipped to carry out. It has been the measured judgment of the courts that EPA is better situated to regulate greenhouse gas emissions than the courts. Indeed, "it is primarily the office of Congress, not the federal courts, to prescribe national policy in areas of special federal interest." *AEP*, 564 U.S. 410 at 423–424 (citing T*VA v. Hill*, 437 U.S. 153, 194 (1978)).

Dealing with transboundary pollution—particularly pollution that involves global issues and international relations—is a role that should clearly be left to the Executive and to Congress. *See City of New York v. BP* at *22 ("To litigate such an action for injuries from foreign greenhouse

gas emissions in federal court would severely infringe upon the foreign-policy decisions that are squarely within the purview of the political branches of the U.S. Government."). Moreover, EPA has substantially more expertise and resources available for developing and implementing emissions regulation programs than the judiciary. *See AEP*, 564 U.S. 410 at 428 ("The expert agency is surely better equipped to do the job than individual district judges issuing ad hoc, case-by-case injunctions. Federal judges lack the scientific, economic, and technological resources an agency can utilize in coping with issues of this order.") (citing *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865–866, (1984). Indeed, it is absurd to contemplate the federal courts effectively policing the emissions of individual polluters. This is not their proper role.

Finally, Appellants' efforts to circumvent the Clean Air Act should remind the court of why the Clean Air Act exists in the first place—to provide a uniform solution to a problem too large for individual actors to address effectively. Prior to the Clean Air Act's enactment, air pollution regulation was generally subject to the police powers of the states and typically regulated at the local level. Jan Stevens, *Air Pollution and the Federal System: Responses to Felt Necessities*, 22 HAST. L. J. 661, 661 (1971). *See also* Jonathan H. Adler, *Judicial Federalism and the Future of Federal Environmental Regulation*, 90 IOWA L. REV. 377, 382 (2005) (noting "widespread dissatisfaction" with local environmental regulation in the 1960s and the resulting demand for increased federal involvement).

In the case of carbon dioxide emissions, the argument for a uniform, comprehensive regulatory scheme is even clearer. *See California v. B.P., PLC*, BP 2018 WL 1064293, at *3 (N.D. Cal. Feb. 27, 2018) ("If ever a problem cried out for a uniform and comprehensive solution, it is the geophysical problem described by the complaints, a problem centuries in the making (and studying) with causes ranging from volcanoes, to wildfires, to deforestation to

stimulation of other greenhouse gases—and, most pertinent here, to the combustion of fossil fuels."). This court may not simply set aside the comprehensive, sophisticated air pollution regulatory framework our country has developed over the past five decades. Such a decision would return us to the dark ages of inconsistent, ad hoc regulatory controls and allow unelected judges to author their own approaches. This would not only violate established Constitutional principles—it is simply insufficient to govern an issue as complex as climate change.

III. THERE IS NO DUE PROCESS-BASED PUBLIC TRUST RIGHT TO GOVERNMENTAL PROTECTION FROM GLOBAL CLIMATE CHANGE BECAUSE SUCH PROTECTION IS NOT A FUNDAMENTAL RIGHT AND THE GOVERNMENT HAS NO AFFIRMATIVE OBLIGATION TO SECURE SUCH PROTECTION.

Relying on the foundations of the public trust doctrine, Appellant Flood incorrectly asserts that he is afforded Constitutional protection against global atmospheric climate change. Based on the notion that the sovereign holds trust in common property, Appellant Flood contends the Fifth Amendment affords him a substantive due process guarantee against government action that deprives him of his right to life, liberty, and property. *Org. of Disappearing Island Nations*, slip op. at 10. The Supreme Court has made clear that federal courts must "exercise the utmost care" whenever asked to break new ground in the field of substantive due process. *See Washington v. Glucksberg*, 521 U.S. 702, 720 (1997).

The Due Process Clause of the Fifth Amendment prevents the federal government from depriving a person of "life, liberty, or property without due process of law." U.S. Const. amend. V. The American public trust doctrine evolved from ancient Roman law and English common law, and asserts that *res communes*, the common property of air, running water, the sea, and the seashore, are held in trust by the government to be preserved for the benefit of the public. Michael O'Loughlin, *Understanding the Public Trust Doctrine Through Due Process*, 58 B.C. L.

REV. 1321, 1330–1331 (2017). In its early application, the only change from English common law was that "individual States took the place of the Crown" as the owner of the common property; the people of the state retain the rights to use those lands, not the federal government. James L. Huffman, *A Fish Out of Water: The Public Trust Doctrine in a Constitutional Democracy*, 19 ENVTL. L. 527, 562 (1989). As a matter of federalism, the public trust doctrine is correctly asserted as a matter of state law and is limited in application.

The Supreme Court has long recognized that the doctrine is limited in application to navigable, tidal waters and submerged lands. *Illinois Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 458–59 (1892). Since this first pronouncement in 1892, the Supreme Court has only interpreted the doctrine on two occasions: once in 1988 to expand the doctrine to non-navigable segments of tidal rivers, and again in 2012 to distinguish the public trust doctrine from the federal equal-footing doctrine. *See Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 476 (1988); *see also PPL Montana, LLC v. Montana*, 565 U.S. 576, 604–605 (2012).

The text of the Constitution and the foundations of the public trust doctrine mandate against the unprincipled expansion upon Fifth Amendment substantive due process rights advanced by Appellant Flood. Flood's claim fails because protection from global climate change is not a fundamental right protected by the Fifth Amendment, and the Due Process Clause does not impose an affirmative obligation on the federal government to act in protection of citizens' life, liberty, or property interests. This Court must not overstep the boundaries of established constitutional law and, accordingly, should affirm the District Court's refusal to recognize a Due-Process-based public trust right to governmental protection from climate change.

A. Protection from Global Atmospheric Climate Change Is Not a Fundamental Right Under the Fifth Amendment.

The principal function of substantive due process is to guard against "arbitrary and irrational government intrusions into [fundamental] rights." *O'Loughlin* at 1327. When a plaintiff asserts a due process claim against governmental action, rational basis review applies, which requires the court to "uphold challenged governmental action so long as it implements a rational means of achieving a legitimate governmental end." *Juliana v. United States*, 217 F. Supp. 3d 1224, 1349 (N.D. Or. 2016) (citation omitted). However, when a plaintiff asserts that the government has infringed upon a fundamental right, the court must look through the lens of strict scrutiny. *Id*. (citation omitted).

Fundamental rights are those "so rooted in the traditions and conscious of our people as to be ranked as fundamental." *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934) (citations omitted). An inquiry into fundamental rights begins by looking to those "expressly enumerated in the Constitution" or those found in our country's history and culture. *Washington,* 521 U.S. at 720. The Constitution lists rights the Framers deemed fundamental to democracy and personal liberty; however, protection of the global atmospheric climate system is not among them. U.S. Const. amend. I–XXVII; *see also Huffman, supra,* at 545–46. Therefore, an inquiry into whether such a right exists must focus on those customs "rooted in the Nation's history and tradition." *See Moore v. East Cleveland*, 431 U.S. 494, 503 (1977).

In recent decades, the Supreme Court expanded fundamental rights to include unenumerated rights to marital privacy, same-sex marriage, and contraception. In declaring these unenumerated privacy rights to be fundamental, the Court reasoned that such privacy rights must exist to enable the exercise of the enumerated fundamental rights to life, liberty, and property. *Washington*, 521

U.S. at 720; *See generally Loving v. Virginia*, 388 U.S. 1 (1967), *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), *Griswold v. Connecticut*, 381 U.S. 479 (1965), *Eisenstadt v. Baird*, 405 U.S. 438 (1972). This assortment of implied rights is inferred from several constitutional provisions. However, the Supreme Court has cautioned federal courts to "exercise reasoned judgment in identifying interests of person[s] so fundamental that the [government] must accord them its respect." *Obergefell*, 135 S. Ct. at 2589.

To say that such a right exists by virtue of the principles of the public trust doctrine is incorrect. The text of the Constitution does not mention the public trust doctrine, or the principles imposed by it. *PPL Mont.,* 565 U.S. at 604. As previously indicated, the public trust doctrine is not prescribed by federal statutory or constitutional law; it is a creature of common law and therefore is limited to precedent protected by stare decisis. *O'Loughlin*, at 1340. Since the Supreme Court's initial pronouncement of the public trust doctrine in 1892, case law has been limited. This static history speaks volumes to the nation's understanding and acceptance of the public trust doctrine at the federal level.

Only one district court has erroneously held that protection against climate change is an unenumerated substantive due process right. In doing so, it failed to exercise the reasoned judgment required by the Supreme Court by expanding the concept of fundamental rights beyond reasonable limits. *Juliana*, 217 F. Supp. 3d 1224. In *Juliana,* the court held that protection of a healthy, stable global climate system is necessary in exercising other rights of life, liberty, and property. *Id.* at 51. Drawing on an analogy to *Obergefell's* right to marriage as being the foundation of the family, the *Juliana* court reasoned that a stable climate system is "quite literally the foundation of society, without which there would be neither civilization nor progress." *Id.* at 50. However, this conclusion is unreasonable. While a healthy environment and

climate system is one important contributor to human health, to say that it is necessary to exercise the Constitutional commitments to life, liberty, and property rights is exaggerated beyond reasonableness. Just because something is important does not automatically confer a Constitutionally protected right to it. Thus, the *Juliana* court's analysis was unfocused and not an exercise of reasoned judgment.

Here, Appellant Flood alleges that insufficient government action allows *the operation of natural phenomena*, not the operation of the federal government, to deprive people of life, liberty, and property. It is simply unreasonable and unrealistic to impose a due process obligation on the U.S. government to redress harms stemming from a global ecological issue. Therefore, it is reasonable for this Court to conclude that the Government's decisions pertaining to greenhouse gas emissions is reasonable and is within the proper bounds of executive and administrative conduct.

B. The Government Has No Due Process Obligation to Restrain the Private Sector's Alleged Climate Change-Inducing Activities.

Even if Appellants' asserted substantive due process right were valid, the United States has no due process obligation to interfere with the production, sale, and combustion of fossil fuels by any private party because of an alleged connection to climate change. Generally, the Due Process Clause does not impose an affirmative duty on the federal government, even when "such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive individual[s]." *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 196 (1989). Only under two narrow exceptions has the Supreme Court required a government actor to engage in affirmative actions to protect life, liberty, or property interests. *Id.* The first applies when a "special relationship" exists, such as when the government takes an individual into

custody and places limitations on his freedom to act on his own behalf. *Id.* at 199–200. Because this type of "special relationship" does not exist between Appellant Flood and the Government, this exception does not apply. The second instance, often referred to as the "danger-creation exception," applies when government conduct places a person in peril through deliberate indifference to health and safety. *Id.* at 200.

Due process claims are inapplicable where the government's lack of due care causes inadvertent injury to life, liberty, or property interests. *Daniels v. Williams*, 474 U.S. 327, 331-333 (1986). The Supreme Court has made clear that negligence and gross negligence are not sufficient to give rise to an affirmative obligation to prevent deprivation of a due process right. *Id.* at 335–36. Except in narrow emergent-situations, where government action must "shock the conscience" (*see Cty. of Sacramento v. Lewis*, 523 U.S. 833, 849 (1998)), the standard is deliberate indifference or recklessness. Circuits have adopted various standards for what constitutes deliberate indifference, but it generally stems from the notion that the government actor was aware of the risk of "unconstitutional conduct and deliberately assumed or acquiesced in such risk." *Pena v. Deprisco*, 432 F.3d 98, 114 (9th Cir. 2005) (citation omitted). Some of the more restrictive tests are those adopted by the Fifth and Fourth Circuits, which require the state actor to have known of, and disregarded, an excessive risk to the victim's health and safety. *Beltran v. City of El Paso*, 367 F.3d 299, 307 (5th Cir. 2004). Similarly, the Tenth Circuit imposes a "but for" causation requirement, *Currier v. Doran*, 242 F.3d 905, 918 (10th Cir. 2001), and the Sixth Circuit requires an affirmative act by the government that placed the

plaintiff specifically at risk (rather than a risk that affects the public at large). *Cartwright v. City of Marine City*, 336 F.3d 487, 492 (6th Cir. 2003).[1]

In contrast to these more restrictive standards, Appellants rely on the rather lenient Ninth Circuit test, which requires the government to create the danger, be aware of the danger, and fail to act to prevent harm. *L.W. v. Grubbs*, 974 F.2d 119, 121 (9th Cir. 1992); *Penilla v. City of Huntington Park*, 115 F.3d 707, 709 (9th Cir. 1997). However, even under this more lenient standard, the Appellants have failed to establish deliberate indifference, as the government cannot be said to have created the danger of global climate change. Furthermore, because the Appellants allege the government has failed to act, this court should pay heed to the Second Circuit test distinguishing between government action and inaction. *Pena,* 432 F. 3d at 109. If the inaction is merely an omission, there is no basis for liability, and since the Appellants claim the government has failed to act in regulating greenhouse gas emissions, under the Second Circuit test, there is no liability.

Regardless of which test this court adopts or creates, the government actions that Appellant Flood complains of long predate any awareness of the potential dangers of human-induced climate change. The United States government did not officially recognize the potential effects of human-induced climate change until 2009 when the EPA published an "Endangerment

[1] The Eighth Circuit test requires that plaintiff prove that they were members of a limited, precisely definable group, the government's conduct put them at risk of serious, immediate, and proximate harm, the risk was obvious or known to the government, the government acted recklessly in conscious disregard of the risk, and in total, shocks the conscience. *Hart v. City of Little Rock*, 432 F.3d 801, 805 (8th Cir. 2005). The Third Circuit test requires that the harm ultimately caused was foreseeable and direct, a government actor acted with degree of culpability that shocks conscience, a relationship between the government and the plaintiff existed such that the plaintiff was a foreseeable victim to defendant's acts and that the government affirmatively used the authority in a way that created the danger to the citizens. *Kaucher v. County of Bucks*, 455 F.3d 418, 431 (3d Cir. 2006).

Finding." *Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act*, 74 FR 66,496 (Dec. 15, 2009) (to be codified at 40 C.F.R. pt. 1). In response to these findings, the EPA and other government agencies acted swiftly in proposing regulations limiting emissions and regulating greenhouse gases. *Org. of Disappearing Island Nations*, slip op. at 6–7 .

This Court must not pass beyond its appropriate sphere of action and therefore must affirm the District Court's decision. The Fifth Amendment substantive due process protections for life, liberty, and property do not include the right to protection of the global atmospheric climate system from disruption due to production, sale, and burning of fossil fuels, and even if they did, the government has no Due Process obligation to prevent such harms.

IV. APPELLANTS' LAW OF NATIONS CLAIM AND PUBLIC TRUST CLAIM ARE SUBJECT TO JUDICIAL REVIEW.

This court has ample authority to review both claims in this case, although neither claim has any substantive merit. Nonjusticiable political questions arise when a court issues a policy judgment grounded in legislative ideology rather than resolving the dispute through legal and factual analysis. *E.E.O.C. v. Peabody Western Coal Co.,* 400 F.3d 774, 785 (9th Cir. 2005*).* Generally, courts use the six factors laid out in *Baker* when faced with a potential nonjusticiable political question. *Baker v. Carr,* 369 U.S. 186, 217 (162). A nonjusticiable political question is one that consists of: (1) A textually demonstrable constitutional commitment of the issue to a coordinate political department; (2) or a lack of judicially discoverable and manageable standards for resolving it; (3) or the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; (4) or the impossibility of a court's undertaking independent resolution without expressing lack of respect due the coordinate

branches of government; (5) or an unusual need for unquestioning adherence to a political decision already made; (6) or the potentiality of embarrassment from multifarious pronouncements by various departments on one question. *Id.* at 217. Although environmental regulation and climate change discussions are often motivated by partisan ideology, just because a claim raises an issue "of great importance to the political branches" doesn't necessarily mean a claim must be entirely insulated from judicial involvement, particularly when addressing issues traditionally within the province of the courts. *Id.* at 209.

Customary international law "is part of our law and must be ascertained and administered by the courts of justice of appropriate jurisdictions[s] . . . ." *Sosa,* 542 U.S. at 730. Courts have recognized that international law provides "judicially discoverable and manageable standards for adjudicating suits brought under the [ATS], which obviates any need to make initial policy determinations of the kind normally reserved for nonjudicial discretion." *Kadic v. Karadzic*, 70 F.3d 232, 249 (2d Cir. 1995). It is within the purview of federal courts to determine if such causes of actions are identifiable under the ATS and subject to relief. Although courts are required to take a cautious approach to ATS claims, courts have continued to find ATS law of nations claim justiciable. Amy Endicott, *The Judicial Answer: Treatment of the Political Question Doctrine in Alien Tort Claims*, 28 BERKELEY J. INT'L. L. 537, 538.

Further, the Appellant's constitutional due process claim to a healthy, stable climate system is proper for judicial review, as it requires interpretation of the Fifth Amendment. This court, along with every other federal court, is more than qualified to address constitutional due process claims. *Juliana*, 217 F. Supp. 3d at 1239. By filing this suit, the Appellants subjected themselves to this court's authority to examine whether the government is acting in conformity with the Constitution and therefore, review is proper.

CONCLUSION

Appellants' claims present the Court a Pandora's Box of speculative arguments without foundation in domestic or international law. They attempt to add new layers onto traditional Due Process norms and require this Court unilaterally to write an ambiguous, limited principle into law. Accepting such arguments would cause immense uncertainty and compromise the ability of businesses to understand and comply with legal norms. Accordingly, this Court must dismiss Appellants' farfetched claims.