Team # 18

CA. No. 18-000123

IN THE UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

ORGANIZATION OF DISAPPEARING ISLAND NATIONS,

APA MANA, *and*

NOAH FLOOD,
Plaintiff-Appellants,

v.

HEXONGLOBAL CORPORATION,
Defendant-Appellee,

and

THE UNITED STATES OF AMERICA,
Defendant-Appellee.

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW UNION ISLAND

BRIEF OF APPELLEE THE UNITED STATES OF AMERICA

Oral Argument Requested

Attorneys for the Appellee,
The United States of America

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitution and Statutes

Other Sources of Authority

STATEMENT OF JURISDICTION

The United States District Court for New Union Island from which this appeal is filed has original jurisdiction over all matters in this case, pursuant to 18 U.S.C. § 1331, because Plaintiff-Appellant Mana asserts a claim against HexonGlobal under the Alien Tort Statute 28 U.S.C. § 1350 and Plaintiff-Appellant Flood asserts a constitutional claim against the United States under the Due Process Clause of the Fifth Amendment. On August 15, 2018, the District Court issued a final order to dismiss the claims brought by Appellants, and Appellants timely filed a Notice of Appeal to this Court under Fed. R. App. P. 4(a)(1). This Court has jurisdiction over the appeal according to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

I. Whether Appellant Mana may bring an Alien Tort Statute 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. If the *Trail Smelter* Principle is customary international law, does it impose obligations against nongovernmental, private actors, when the violations of the international law are of universal concern?

IV. If the *Trail Smelter* Principle is otherwise enforceable as a customary international law, has it been displaced when Congress has created a comprehensive legislative scheme to address the emission of greenhouse gases caused by fossil fuel?

V. Whether Plaintiff has a valid Fifth Amendment substantive due process claim against the United States government for failure to protect the global atmospheric climate system from disruption caused by private oil companies?

VI. Whether Plaintiffs' law of nations claim and public trust claim present a nonjusticiable political question?

STATEMENT OF THE CASE

I. Factual Background

Appellant Apa Mana is a foreign national of the island nation of A'Na Atu. R. 1. Noah Flood is a U.S. citizen from the New Union Islands, a U.S. possession. *Id.* Both Mana and Flood are members of the Organization of Disappearing Island Nations (ODIN). *Id.*

A'Na Atu and the New Union Islands are both located in the East Sea. *Id.* Appellants alleged that the islands are experiencing rising sea levels due to increased greenhouse gas emissions caused by the burning of fossil fuels. *Id.* Because both islands contain populated areas that are below one meter of elevation, a sea level rise of more than one-half to one meter would make both islands uninhabitable. R. 4. Mana and Flood both own homes and reside in areas with elevations of less than one-half meter above sea level and allege that they have suffered damage to their homes during several storms over the past three years. R. 4-5. Mana and Flood have also alleged that they have been harmed due to seawater intrusions in their drinking water wells, the increased risk of heat stroke and mosquito-borne illnesses, and a change in ocean acidity which reduces the availability of fish in their community. R. 5.

The burning of fossil fuels leads to emissions of greenhouse gases such as carbon dioxide and methane, which have an insulating effect, leading to heat retention on Earth. R. 4. Current projections state that if global emissions of greenhouse gases continue at current levels, global temperatures will rise by over four degrees Celsius, and sea levels will likely rise, on average, by between one-half and one meter by the end of the century. *Id.*

Appellee HexonGlobal is the surviving corporation, following a merger of all major U.S. oil producers. R. 5. They are responsible for thirty-two percent of the United States' fossil fuel-related greenhouse gas emissions, making up six percent of the global historical total and nine percent of the current global fossil fuel related emissions. *Id.* HexonGlobal has been aware since the 1970s that the emissions of their fossil fuel products would result in

substantial harmful global climate change and sea level rise. *Id.* HexonGlobal has refineries all over the world, including one on New Union Island. *Id.*

Appellee United States has historically been the number one producer of greenhouse gas emissions and has been responsible for twenty percent of cumulative human-caused greenhouse gas emissions to date. R. 5-6. Appellants argue that the United States has encouraged the production of greenhouse gas emissions by way of providing tax subsidies; leasing public lands and seas for coal, oil, and gas production; and developing the interstate highway system and fossil fuel power plants. R. 6. In more recent years, the United States has acknowledged the threat of climate change and has taken several steps toward the regulation of domestic greenhouse gas emissions, including signing the United Nations Framework Convention on Climate Change in 1992, and enacting pieces of legislation that regulate the greenhouse gas emissions, such as the Clean Air Act. R. 6-7. That said, it is difficult to determine which direction the Trump administration will take. President Trump has announced both an intention to withdraw from the Paris Agreement and a proposal to reverse regulatory measures and commitments to lowering emissions. R. 7.

II. Procedural History

Plaintiff Apa Mana brought an action against HexonGlobal Corporation under the Alien Tort Statute (ATS), 28 U.S.C. § 1350, alleging that the corporation's fossil fuel related business constituted a violation of the law of nations, and sought damages and injunctive relief. R. 3. Plaintiff Noah Flood brought suit against the United States, alleging violations of Due Process Clause of the Fifth Amendment based on the public trust doctrine to protect the global climate system. *Id.* ODIN joins in both claims. *Id.* On August 15, 2018, the District Court of New Union Island dismissed both claims for failure to state a claim for relief. R. 11. The District Court held that the *Trail Smelter* Principle as the law of nations under the ATS was displaced by greenhouse gas regulation under the Clean Air Act. R. 1. The court also

refused to recognize a Due Process-based public trust right to governmental protection from atmospheric climate change. *Id.* Following the issuance of the order, all plaintiffs timely filed a Notice of Appeal to the United States Court of Appeals for the Twelfth Circuit. *Id.*

SUMMARY OF THE ARGUMENT

The Alien Tort Statute (ATS) provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. In determining whether foreign nationals can bring ATS claims against corporations for violations of law of nations, the Supreme Court tries to draw a definite boundary by holdings in two recent cases: *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013) and *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386 (2018). Despite the Court's express rejection of imposing liability against foreign corporations under the ATS, the holdings of the two cases and the lower courts' interpretations clearly show that it is possible for federal courts to assert jurisdiction over domestic corporations under the ATS, when the alleged violations occurred within the territories of the United States with sufficient force to rebut the presumption against extraterritorial application.

The Government argues with Appellant Mana that the *Trail Smelter* Principle is a recognized principle of customary international law enforceable as the law of nations under the ATS. An actionable claim under the ATS requires the showing of a violation of the law of nations that is specific, universal, and obligatory. The *Trail Smelter* Principle, initially recognized by a bilateral international arbitration agreement, has been incorporated into the United Nation's declarations adopted and endorsed by the majority of international community members. It also specifically defines the obligations among nations to refrain from conduct occurring within the jurisdiction which adversely affect another nation.

Therefore, the *Trail Smelter* Principle is a specific, universal, and obligatory norm that is actionable under the ATS.

The *Trail Smelter* Principle creates obligations for nongovernmental actors as well as state actors. Customary international law can give rise to obligations for private actors when regulating certain kinds of conduct, including those of "universal concern." Because the *Trail Smelter* Principle seeks to regulate greenhouse gas emissions, which can impact the health and well-beings of massive populations across the world, it can create obligations for nongovernmental actors. Additionally, there are strong policy reasons for creating obligations for private actors, as corporations are one of major contributors to the total amount of global greenhouse gas emissions.

Even if the *Trail Smelter* Principle is enforceable as the law of nations under the ATS, it has been displaced by the Clean Air Act. Congress is responsible for creating laws regarding federal questions, and thus federal common law should only be used when Congress cannot or has not addressed the issue. Once Congress occupies a particular field, the federal common law may no longer be used. The Supreme Court has held that the Clean Air Act has displaced federal common law related to greenhouse gas emissions. Therefore, Appellant's law of nations claim based on the *Trail Smelter* Principle must be dismissed. This is true even if the complaint alleges that the sale of fossil fuels violates the *Trail Smelter* Principle, and the Clean Air Act does not address the sale of fossil fuels but rather the emission and production. The actual harm alleged is caused by the actual emission of the fuel, not the sale, and thus is subject to the comprehensive legislative scheme laid out by Congress in the Clean Air Act.

The District Court correctly refuses to recognize a Due Process-based public trust right to governmental protection from atmospheric climate change. Public trust doctrine is not a federal common law and does not provide Appellant any basis to bring a constitutional

claim against the federal government. Appellant cannot offer this Court any authority to create a new public trust asset, namely the atmosphere, or to recognize a fundamental right to a healthy climate system. On the other hand, *DeSahney* bars Appellant from bringing a substantive Due Process claim against the Government for oil companies' greenhouse gas emissions. Appellant also fails to prove that the Government created or increased the dangers of human induced climate change because the Government was not aware of such dangers in the past and has been taking regulatory actions to reduce domestic greenhouse gas emissions. Therefore, Appellant fails to state a claim against the Government for relief under the Fifth Amendment.

Lastly, at the onset of this case, the Government asks this Court to dismiss both of Appellants' claims because they present a non-justiciable political question. Appellant Flood requires this Court to recognize a Due-Process based public trust right but cannot provide any judicially discoverable and manageable standards for this Court to adjudicate their federal public trust claim. Likewise, this Court cannot decide Appellant Mana's Alien Tort Statute claim against HexonGlobal based on customary international law without making any initial policy determinations charged to political branches. Adjudicating this case is beyond this Court's expertise and would violate the separation of powers principle.

STANDARD OF REVIEW

Court of Appeals review *de novo* the district court's ruling of a motion to dismiss under Fed. R. Civ. P. 12(b)(6). *Tamayo v. Blagojevich*, 526 F.3d 1074, 1081 (7th Cir. 2008). Courts construe a plaintiff's complaint in the light most favorable to the nonmoving party, accepting as true all well-pleaded facts alleged, and drawing all possible inferences in her favor. *Id.* "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

ARGUMENT

I. Allowing Appellant Mana to Bring A Suit Under the Alien Tort Statute Against A Domestic Corporation Is Compatible with The Supreme Court's Holdings in *Jesner* And *Kiobel.*

The Supreme Court, in the plurality opinion in *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386 (2018), forecloses the ability of foreign nationals to sue foreign corporate defendants under the ATS. The Court stressed "judicial caution" against imposing liability on foreign corporations via ATS suits in light of the foreign policy and separation of powers concerns. *Id.* at 1407. But it left an unresolved question about domestic corporations, against which claims under the ATS do not create serious foreign policy consequences. On the other hand, the Court's holding in *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 124-25 (2013) implies that plaintiffs can bring ATS suits against domestic corporates when the claims sufficiently "touch and concern the territory of the United States."

In *Jesner*, petitioners brought ATS suits against a foreign bank for facilitating terrorists overseas through money laundering at its New York branch. *Jesner.* 138 S. Ct. at 1393. Justice Kennedy wrote for the majority that "absent further action from Congress it would be inappropriate for courts to extend ATS liability to foreign corporations." *Id.* at 1403. The Court emphasized the perils of extending the scope of ATS liability to foreign corporations, namely that it would cause "significant diplomatic tensions" with other nations. *Id.* at 1406. However, in Justice Sotomayor's dissent, joined by four other Justices, she noted that the text, history and purpose of the ATS all support corporation liability under the ATS for law-of-nations violations. *Id*. at 1419. To categorically foreclose foreign corporation liability, she wrote, "absolves corporations from responsibility under the ATS for conscience-shocking behavior." *Id.* Besides freedom from foreign policy concerns, exercising jurisdiction over a domestic corporation for violations of law of nations is consistent with the purpose of the ATS: to provide a federal forum for tort suits by aliens against Americans for international law violations. *See Al Shimari v. CACI Premier Tech., Inc*., 320 F. Supp. 3d

781, 788 n.6 (E.D. Va. 2018) (explaining that against the backdrop of the majority of the circuits allowing corporate liability under the ATS, the *Jesner* Court's narrow holding suggests that it did not intend to disturb this status quo with respect to domestic corporations.)

On the other hand, the Supreme Court's narrow approach in *Kiobel* suggests that a domestic corporation could be subject to suit under the ATS if all the relevant conduct took place within the United States. 569 U.S. at 124. In *Kiobel*, the Court chose not to address the Second Circuit's broad holding that categorically exempted corporate liability under the ATS, instead focusing on the narrow issue of whether the location of the conduct is relevant to determining the liability rising from that conduct. *Id.* at 114. The Court noted that the alleged violations must touch and concern the territory of the United States with sufficient force to displace the presumption against extraterritorial application, and mere corporate presence would not be sufficient. *Id.* at 124-25.

Following *Kiobel*, courts have applied the touch and concern test in determining whether alleged U.S.-based conduct is actionable under the ATS. For example, the Fourth Circuit held in *Al Shimari v. CACI Premier Tech., Inc.* that the presumption against extraterritoriality was displaced in a suit for claims arising from alleged torturous acts in an Iraq prison. 758 F.3d 516, 520 (4th Cir. 2014). The plaintiffs sufficiently alleged that the torture was committed by American citizens employed by an American corporation pursuant to a contract with a U.S. government agency and defendant's managers located in the United States were aware of reports of misconduct abroad and attempted to cover up the misconduct. *Id.* at 528-29.

At the present case, HexonGlobal is U.S. corporation incorporated in New Jersey and has its principle place of business in Texas. R.5. Allowing Appellant Mana to assert an ATS claim against HexonGlobal for its fossil fuel production and sales activities does not implicate substantial foreign-relations problems. Nor does it lead to a prolonged litigation

like *Jenser*, that caused significant diplomatic tensions with any countries. Arguably, addressing Mana's law of nations claim will raise a serious nonjusticiable political question, which the Government will discuss in Section VI. Meanwhile, offering Mana a federal forum meets the principal objective of the ATS, allowing her to seek an adequate remedy for HexonGlobal's alleged tortious acts in violations of international law.

Moreover, HexonGlobal's activities alleged to give rise to Mana's claim have occurred principally within the jurisdiction of the United States. R. 5. Unlike the corporate defendants in *Kiobel*, which were sued for their activities in Nigeria, HexonGlobal and its corporate predecessors are major U.S. oil producers, which are responsible for 32% of U.S. cumulative fossil fuel-related greenhouse gas emissions. *Id.* Even though HexonGlobal operates refineries throughout the world, like *CACI Premier Tech., Inc.*, HexonGlobal and its corporate predecessors have been long aware that continued global sales or fossil fuel production would result in substantial, harmful global climate change. *Id.* Therefore, HexonGlobal's conduct sufficiently touchs and concerns the territory of the United States to rebut the presumption against extraterritorial application.

II. The *Trail Smelter* Principle Is a Recognized Principle of Customary International Law Enforceable as The Law of Nations Under the ATS Because It Is a Norm That Is Sufficiently Specific, Universal, And Obligatory.

The Alien Tort Statute (ATS) provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. The law of nations is seemingly ambiguous, but case law has clarified which actions qualify under the doctrine. The Supreme Court held in *Smith* that "[w]hat the law of nations on [a given] subject is, may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law." *United States v. Smith*, 18 U.S. 153, 160-61 (1820). In the seminal case *Sosa v. Alvarez-Machain*, the

Court redefined the present-day law of nations which rests on a norm of (1) international character accepted by the civilized world, (2) defined with a specificity comparable to the features of the 18th-century paradigms that Congress had in mind when it enacted the ATS, and (3) obligatory. 542 U.S. 692, 732 (2004).

The Government agrees with Appellant Mana that the *Trail Smelter* Principle is a recognized principle of customary international law and therefore is enforceable as the law of nations under the ATS. The *Trail Smelter* Principle, coming from an arbitration agreement which dealt with harm caused to Washington State by air pollution from a smelter sitting within the Canadian boarders, states that a State is responsible for the tortious conduct of manufacturers in their territory and shall be "required to refrain from causing any damage through fumes" to another State. *Trail Smelter Arbitration,* 3 U.N.R.I.A.A. 1905, 1911 (1941). The principle has been adopted by the United Nations in 1972 in Stockholm, and reasserted in 1992 in Rio De Janeiro, Brazil. R. 8-9.

A. The *Trail Smelter* Principle is enforceable as law of nations under the ATS because it is a universally recognized norm of international law.

International law governs the scope of liability for violations of customary international law under the ATS. *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, (N.Y. Ct. App 2010), *aff'd*, 569 U.S. 108 (2013). In order to prove a rule is universally recognized as a norm of international law, the rule must be one that is as definite and well-accepted among civilized nations as the historical paradigms familiar when the statute was enacted. *Sosa*, 542 U.S., at 732. *Filartiga v. Peña-Irala*, the case that first looked at the ATS through a modern lens, held that an action is sufficiently universal to be a law of nations when among several nations exists a "universal condemnation of [an action] in numerous international agreements, and the renunciation of [the action] as an instrument of official policy by virtually all of the nations of the world (in principle if not in practice)." 630 F.3d 876, 880 (2nd Cir. 1980). In *Kiobel v. Royal Dutch Petro. Co*., the Supreme Court cautioned that

courts must be wary of "the danger of unwarranted judicial interference in the conduct of foreign policy," suggesting that a law must be so well-accepted among foreign jurisdictions that a federal court's decision will not be viewed as unwarranted interference in the decisions of other nations. 569 U.S. at 116.

The *Trail Smelter* Principle is universal, because it has been upheld by numerous states and in numerous international agreements. The principle, established as treaty between the United States and Canada, was later modified at the 1972 Stockholm Conference on the Human Environment as the principle 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." R. 8-9. The *Trail Smelter* Principle arising from Stockholm was later endorsed by 190 nations at the 1992 U.N. Conference on Environment and Development in Rio de Janeiro. R. 9.

The principle is definite and well-accepted. *Sosa* and *Filartiga* jointly require that a rule is sufficiently accepted among civilized nations, and that violation of the rule will result in universal condemnation. Because the principle has been established, first as a treaty, then as a rule at a Conference, then defined and agreed to by the vast majority of nations in the United Nations, the rule is one that is sufficiently accepted to satisfy each of these requirements. R. 8-9. Moreover, the *Kiobel* court was rightly concerned with ensuring that ruling on a law of nations rule would not appear to be an overstep of U.S. courts into issues of foreign jurisdiction. Here, the corporate conduct occurs domestically, and the rule violated is one that has been proven to be one that is well-accepted among a majority of the nations, and therefore there is no way that ruling on this principle could reasonably be believed to be an overstep into foreign sovereign jurisdictions.

B. The *Trail Smelter* Principle is enforceable as law of nations under the ATS because it is defined with a specificity comparable to the historical paradigms the Court has recognized.

In order to be a rule under the law of nations, it must be a rule that is defined with specificity. At the time that the ATS was enacted, the framers understood that the law of nations fell into a few specific categories, such as violation of safe conduct, infringement of the rights of ambassadors, and piracy. *Sosa*, 542 U.S. at 715. The Restatement (Third) gives examples of state violations of international law, which occur when as a matter of state policy, the state actor practices, encourages, or condones acts which include genocide, slavery, murder, and a consistent pattern of gross violations of internationally recognized human rights. Restatement (Third) of the Foreign Relations Law of the U.S. § 702 (A.L.I 1987).

The Supreme Court interprets specificity as a rule that has been directly proscribed under international law or by the international community. *Jesner v. Arab Bank, PLC,* 138 S. Ct. 1386, 1400-01 (2018). In *Sosa*, the Court held that violations of the law of nations were acts that could threaten consequences in international affairs; and that "a single illegal detention of less than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment," was not a violation of one of these norms. 542 U.S., at 715, 738. *Pauling v. McElroy*, while not an ATS case, illustrates the specificity that noncitizens must bring to suits against actions of the United States. 164 F. Supp 390 (D.D.C. 1958), *aff'd*, 278 F.2d 252 (D.C. Cir. 1960), *cert. denied*, 364 U.S. 835 (1960). In *Pauling*, residents and noncitizens of the United States sought an injunction against nuclear testing claiming imminent harm, and the district court held that the possible deleterious effects to human beings outweigh a public interest in development of those weapons. *Id.* at 392.

The *Trail Smelter* Principle is specific, because the principle is unambiguously defined. As stated above, the principle specifies that as a matter of international law, a State is responsible for the conduct of manufacturers in their territory, and that they shall be

"required to refrain from causing any damage through fumes" to another State. *Trail Smelter Case,* 3 U.N.R.I.A.A. 1905, 1911 (1941). As required by *Jesner*, the rule has been specifically proclaimed, not only by the United States and Canada in their treaty, but also in the following agreements outlined in the previous subsection. R. 8-9. Appellant Mana argues that, unlike in *Sosa*, non-action of the violation of this law of nations will be an act that threatens consequences in international affairs, arguing that if the emissions of Defendants continue unabated, state will be inhabitable due to sea level rise by the end of the century. R. 3-4. Unlike *Pauling*, the U.S. agencies responsible for maintaining air quality standards have specifically found emissions of greenhouse gases are pollutants that endanger public health and welfare when left unregulated; these emissions are actually subject to regulation under Agency regulations, which suggests that the public interest in unmitigated emission of greenhouse gases does not actually outweigh the duty of the government to protect public health and welfare. R. 6-7.

C. The *Trail Smelter* Principle is enforceable as law of nations under the ATS because it imposes norms that are obligatory.

In order to be obligatory under the law of nations, a rule must create obligations enforceable in federal courts. *Sosa*, 542 U.S. at 735. *Pauling* held that a claimed violation of "international obligations and principles may be asserted only by diplomatic negotiations between the sovereignties concerned." *Pauling*, 164 F. Supp. at 393. Similarly, Merriam-Webster defines obligatory as something that is "[r]equired by a law, a rule, etc.; mandatory." Obligatory Definition, *Black's Law Dictionary* (10th ed. 2014), *available at* Westlaw.

The *Trail Smelter* Principle is a composition of numerous defined obligations. The original agreement states that each party will take the necessary actions to "ensure due performance of the obligations undertaken hereunder, in compliance with the decision of the Tribunal." *Convention for the Establishment of a Tribunal to Decide Questions of Indemnity Arising from the Operation of the Smelter at Trail, British Columbia,* U.S.-Can., art. 12, Apr.

15, 1935, T.S., No. 893. Principle 26 of the Stockholm agreement states that the US supports the purpose of the Principle, and that they regard their commitment as "including the requirement of 'strict and effective international control.'" 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). The Rio agreement reaffirms the obligations of the Stockholm agreement, and sets additional goals for the international community in environment and development. 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).

The original agreement states obligations to each of the parties involved. In obligating themselves to the decisions of the Tribunal, the US and Canada each satisfied *Sosa*'s requirement that they will be bound to federal courts. *Pauling* is also satisfied, because each party agreed between themselves through an international arbitration, later codified and ratified by over 190 countries. R. 9. To say that the *Trail Smelter* Principle is not obligatory is to ignore the very language of the Agreement itself.

Because the *Trail Smelter* Principle is specific, universal, and obligatory, the Principle satisfies the three prongs of the *Sosa* test to be considered as a Law of Nations.

III. The *Trail Smelter* Principle Does Impose Obligations Enforceable Against Non-Governmental Actors Because Greenhouse Gas Emissions Are of Universal Concern.

Customary international law will reach the actions of state and governmental actors. *See e.g.*, *Filartiga v. Pena-Irala*, 630 F.2d 876, 880 (2d Cir. 1980) (holding that a former state official who committed an act of torture violated established norms of the international human rights law). However, there has been controversy over whether, and under what circumstances, nongovernmental actors may be liable under the Alien Tort Statute. Bradford Mank, *Can Plaintiffs Use Multinational Environmental Treaties as Customary International Law to Sue Under the Alien Tort Statute?*, 4 Utah L. R. 1085, 1096 (2007). The Supreme

Court pointed to this open question in *Sosa*, noting that a "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." 542 U.S., at 762 n.20. In response, Justice Sotomayor clarified that the first step of the norm-specific query contemplated by *Sosa* is to determine whether a customary international law is sufficiently "specific, universal, and obligatory[.]" *Jesner v. Arab Bank, PLC*, 138 S.Ct. 1386, 1422 (2018) (Sotomayor J., dissenting). Section II of this brief has addressed this analysis. Justice Sotomayor further states that the norm-specific query does not distinguish between types of private actors, however, and that courts should consider whether the given international-law norm binds only state actors or state and private actors alike. *Id.* at 1437 n.2.

The Second Circuit in *Kadic v. Karadzic*, 70 F.3d 232, 239 (2d Cir. 1996) held that an individual defendant may be found liable under the ATS for acts of genocide, piracy, war crimes, and crimes against humanity in his private capacity, and for other violations in his capacity as a state actor. *Id.* at 236. Citing the Restatement (Third) of the Foreign Relations Law of the United States (1986), the court acknowledged that private actors may be held liable for certain offenses recognized by the community of nations as of "universal concern." *Id.* at 240. The court also held that a private actor may be treated as a state actor for purposes of an ATS suit when he "acts together with state officials or with significant state aid." *Id.* at 245.

Similarly, the *Trail Smelter* Principle, by way of regulating greenhouse gas emissions, impacts the health and well-beings of massive populations. Thus, the area is one of "universal concern," and the principle should be applicable to state actors and nonstate actors alike. The emissions of greenhouse gases, particularly carbon dioxide, can result in increased temperatures, which causes global climate change and rising sea levels. R. 4. As a result,

people living in low-lying islands, as the Appellants are, will face damages to their properties and an adverse impact on their water supply and source of food. R. 5. Moreover, as seen in the facts of this case, HexonGlobal contributes greatly to the emission of greenhouse gases, and thus they should be subject to the international laws that seek to regulate said emissions. *Id.* HexonGlobal and its corporate predecessors have been receiving tax subsidies and development aids from the federal and state agencies. R. 6. Because HexonGlobal acts in such close concert with the state actors, like the defendant in *Kadic*, it should be held liable under the ATS. Therefore, the *Trail Smelter* Principle creates obligations for nongovernmental actors as well as state actors.

IV. If Otherwise Enforceable, The *Trail Smelter* Principle Has Been Displaced by The Clean Air Act Because Congress Has Occupied the Field with A Comprehensive Regulatory Program Supervised by The Environmental Protection Agency.

Congress is responsible for creating federal statutes to govern federal questions. *City of Milwaukee v. Illinois and Michigan*, 451 U.S. 304, 305 (1981). Therefore, "the determination of whether federal statutory or federal common law governs starts with the assumption that it is for Congress, not federal courts, to articulate appropriate standards to be applied as a matter of federal law." *Id.* at 305. This is because the enactment of federal law in areas of national concern is meant to be performed by the people, through their elected representatives in Congress, rather than the federal judiciary, which is purposefully insulated from the political pressures that elected representatives are faced with. *Id.* at 313.

However, on the rare occasion that federal statutes cannot or have not fully answered a federal question, federal common law can fill in those gaps. *Id.* at 305. This federal common law cannot be used when federal statutes occupy the field. *American Elec. Power v. Connecticut (AEP)*, 564 U.S. 410, 426 (2011). In other words, "federal common law is 'subject to the paramount authority of Congress.'" 451 U.S. at 313-14 (quoting *New Jersey v. New York*, 283 U.S. 336, 348 (1931)). As soon as Congress addresses a question previously governed under federal common law, "the need for such an unusual exercise of law-making

by the federal courts disappears." *AEP*, at 423 (quoting *City of Milwaukee*, 451 U.S. at 314). Additionally, when Congressional acts "speak directly to a question, the courts are not free to 'supplement' Congress' answer so thoroughly that the Act becomes meaningless." *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978).

In the present case, the *Trail Smelter* Principle has been displaced by the comprehensive legislative scheme created by the Clean Air Act. Even if the Clean Air Act does not directly address the sale of fossil fuels, the harm alleged comes from the emission of greenhouse gases, and thus the Clean Air Act still governs.

A. Congress has occupied the field of greenhouse gas emission regulation, and thus the *Trail Smelter* Principle has been displaced.

Federal statutes will displace federal common law when the federal legislation "occupie[s] the field through the establishment of a comprehensive regulatory program supervised by an expert administrative agency." *City of Milwaukee*, 451 U.S. at 305. To determine whether Congress has occupied the field, the question is whether the statute "speaks directly the question at issue." *AEP*, at 423 (quoting *Mobil Oil Corp.*, 436 U.S., at 625). It can also be useful to look to Congressional intent when determining whether the federal statute was meant to displace the federal common law. *City of Milwaukee*, 451 U.S. at 318. There are several cases that have found that regulation of pollution, including the emission of greenhouse gases, is controlled by federal statutes, including the Clean Air Act, and thus federal common law in the area has been displaced. These cases including binding authority from the Supreme Court, and persuasive authority from other circuit and district courts.

In *City of Milwaukee*, the Supreme Court addressed a suit filed by citizens complaining of sewage discharges that were allegedly threatening the health of the citizens. *Id.* at 317. The Court held that the 1972 Amendments to the Federal Water Pollution Control Act were, as viewed by Congress, a complete restructuring and rewriting of water pollution

legislation, and thus the federal common law was displaced on the issue. *Id.* at 317-18. Therefore, Congress "occupied the field through the establishment of a comprehensive regulatory program supervised by an expert administrative agency." *Id.*

In *AEP*, the Court addressed whether plaintiffs could bring a federal common law public nuisance claim against carbon-dioxide emitters including private power companies and a government actor. 564 U.S. at 415. The Court described the various steps that the Environmental Protection Agency (EPA) had taken to regulate greenhouse gases, including conducting research on the dangers of greenhouse gases and their effects, issuing rulings regarding emissions from vehicles, and phasing in requirements for major greenhouse gas emitting facilities. *Id.* at 417. The Court disagrees with plaintiffs' argument that federal common law is not displaced until the EPA sets standards governing emissions. *Id.* at 426. Instead, the Court note that "the relevant question for displacement purposes is "whether the field has been occupied, not whether it has been occupied in a particular manner." *Id.* Thus, the Court concluded that the Clean Air Act, in which Congress delegated to the EPA the decision whether and how to regulate carbon-dioxide emissions, displaced federal common law on the issue. *Id.* at 427-29.

In *Native Vill. of Kivalina v. ExxonMobil Corp.*, an Alaskan City brought suit under the federal common law of public nuisance against multiple oil, energy, and utility companies, alleging that the massive greenhouse gas emissions created by the defendants had resulted in global warming, which had eroded the city's land and threatened the island with imminent destruction. 696 F.3d 849, 853 (9th Cir. 2012). The Ninth Circuit held that the Supreme Court had "already determined that Congress has directly addressed the issue of domestic greenhouse gas emissions from stationary sources and has therefore displaced federal common law." *Id.* at 856.

The Southern District of New York similarly addressed a claim brought by New York City against several multinational oil and gas companies. *City of New York v. BP P.L.C.*, 325 F. Supp. 3d 466 (S.D.N.Y. 2018). The city alleged that pollution from the fossil fuels sold by the oil companies was a dominant cause of global warming, and thus the companies were responsible for the damage caused. *Id.* at 471. Addressing claims for nuisance and trespass for domestic greenhouse gas emissions, the district court held that "the Clean Air Act displaces such federal common law claims." *Id.* 472.

Here, Mana alleges that HexonGlobal's production and sale of fossil fuels violate the *Trail Smelter* Principle, which as the Government argues in the Section II is a recognized principle of customary international law enforceable for the purpose of the ATS. Nevertheless, the Government contends that the *Trail Smelter* Principle is displaced by the Clean Air Act.

The Clean Air Act has displaced federal common law claims regarding greenhouse gas emissions because Congress has occupied the field. Like in *AEP*, federal common law nuisance claims could not be brought related to greenhouse gas emissions, and Appellant Mana cannot allege violations of a principle that similarly deals with the emission of greenhouse gases. *Native Vill. of Kivalina* correctly stated that the federal common law had been displaced, as the Supreme Court held in *AEP*. Similarly, in *Native Vill. of Kivalina* and *City of New York*, federal common law claims could not be brought against oil companies regarding the production and sale of fossil fuels, and here a similar claim cannot be alleged under the *Trail Smelter* Principle. Thus, this Court should affirm the dismissal of Mana's Alien Tort Statute claim based on the *Trail Smelter* Principle, because Congress has exercised its authority to create the federal statute, the Clean Air Act, to address the regulations of greenhouse gas emissions.

B. The *Trail Smelter* Principle Has Been Displaced, Even as To the Regulating Sales of Fossil Fuels, Because the Injuries Alleged Are the Result of The Use of Fossil Fuels.

The federal common law regarding the regulation of greenhouse gas emissions has been displaced, for the reasons stated above. This also extends to the sale of fossil fuels, because even if Congress has not directly regulated such sales, the injuries allegedly caused by the sale are in actuality caused by the emission of greenhouse gases as a result of fossil fuel use and production. In *City of New* York, the district court states that "regardless of the manner in which the City frames its claims in its opposition brief, the amended complaint makes clear that the City is seeking damages for global-warming related injuries resulting from greenhouse gas emissions, and not only the production of Defendants' fossil fuels." 325 F. Supp. 3d at 471-72.

Likewise, in *City of Oakland v. BP P.L.C.*, 325 F. Supp. 3d 1017, 1024 (N.D. Cal. 2018), in which plaintiffs alleged oil companies' production of fossil fuels has posed a threat to the global climate, the district court there held that "Congress has vested in the EPA the problem of greenhouse gases and has given it plenary authority to solve the problem at the point of emissions," and thus the claims brought under federal common law were displaced. The court found unpersuasive defendants' contention that the displacement did not apply because the alleged harm was caused by their sale of fossil fuels, not their own emissions. *Id.* at 1024. The court held that the distinction does not prevent the displacement because if the oil producer could not be sued under federal common law for their own emissions, they also could not be sued for selling fossil fuel products to others who eventually burn the fuel. *Id.*

In the present case, Appellant Mana alleges that the sale of petroleum fuels violates the *Trail Smelter* Principle, as opposed to the emissions of the companies themselves. R. 9. This allegation is similar to those in *City of Oakland* and *City of New York*. However, the harm alleged in the current complaint is damage to the island and to the property on the island caused by the actual greenhouse gas emissions, rather than the sale of the fossil fuels.

R. 4-5. Therefore, even if plaintiffs allege that the Clean Air Act does not displace the federal common law because it does not actually address the sale of fossil fuels, because the harm alleged is caused by the actual greenhouse gas emissions, Congress has occupied the field and thus the federal common law is displaced, even as to fossil fuel sales.

V. Appellant Flood Does Not Have A Valid Fifth Amendment Substantive Due Process Claim Against the United States Government for Failure to Protect the Global Atmospheric Climate System from Disruption Caused by Oil Companies.

The Due Process Clause of the Fifth Amendment bars the federal government from depriving a person of "life, liberty or property" without "due process of law." U.S. Const. amend. V. Appellant Flood alleged that the United State government violates the Fifth Amendment substantive due process guarantee by failing to prevent atmospheric climate change caused by oil companies' production, sale, and burning of fossil fuels. R. 10. But Appellant's constitutional challenge fails for several reasons: first, Flood wrongly established her Due Process claim on an expanded view of the state common law public trust doctrine; second, there is no constitutionally protected property interest or fundamental rights with respect to the global climate system; and third, there is no affirmative duty under the Due Process Clause imposed upon the United State Government for wrongful acts by private parties. Therefore, the United State Government asks this Court to refrain from applying the public trust doctrine expansively to the atmosphere and climate system, and to find that Appellant fails to state a Fifth Amendment due process claim against the government.

A. Flood cannot use a state common law public trust doctrine as a font of the Fifth Amendment due process-based right.

Public trust doctrine describes a state's fiduciary duty with respect to land under navigable waters. The basis for American public trust doctrine is rooted in the English common law "on public navigation and fishing rights over tidal lands and in the state laws of this country." *PPL Montana, LLC v. Montana*, 565 U.S. 576, 603 (2012). In the seminal public trust case *Illinois Cent. R. Co. v. State of Illinois*, 146 U.S. 387, 452 (1892), the Supreme Court held that the state of Illinois held the title to the navigable waters and lands

underneath them "in trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, freed from the obstruction or interference of private parties."

The public trust doctrine is not federal common law. In *PPL Montana*, the Supreme Court has expressly declared that "the public trust doctrine remains a matter of state law." 565 U.S. at 603. In affirming a district court's dismissal of a federal public trust claim, the D.C. Circuit held that "[t]he Supreme Court in *PPL Montana* . . . directly and categorically rejected any federal constitutional foundation for [public trust] doctrine, without qualification or reservation." *Alec L. ex rel. Loorz v. McCarthy*, 561 Fed. Appx. 7, 8 (D.C. Cir. 2014) (per curiam) (unpublished opinion). *See also United States v. 32.42 Acres of Land, More or Less, Located in San Diego Cty., Cal.*, 683 F.3d 1030, 1038 (9th Cir. 2012) ("the contours of [the public trust doctrine] are determined by the states, not by the United States Constitution."). In contrast, only one district court has recognized a federal public trust doctrine. *Juliana v. United States*, 217 F. Supp. 3d 1224, 1259 (D. Or. 2016), *motion to certify appeal denied*, No. 6:15-CV-01517-TC, 2017 WL 2483705 (D. Or. June 8, 2017). However, the court's reasoning is wrongly based on two distinguishable cases involving federal government eminent domain authority, which is different from public trust doctrine's common law origin. *See id.* at 1258; *see also* Matthew Schneider, *Where Juliana Went Wrong: Applying the Public Trust Doctrine to Climate Change Adaptation at the State Level*, Environs Envtl. L. & Pol'y J., Fall 2017, at 47, 58.

The historical scope of American public trust doctrine is quite narrow. Since *PPL Montana*, the Supreme Court has clearly foreclosed a federal public trust claim. Accordingly, Flood cannot use the public trust doctrine as her basis to bring a Fifth Amendment Due Process claim against the United States government.

B. The Public Trust Doctrine Cannot be Expanded to Encompass the Atmosphere as a Trust Asset, and There is No Fundamental Due Process Right to a Heathy Climate System.

The core proposition of the public trust doctrine is a limitation upon the sovereign power to impair the public means of navigation and fishing in navigable waters. *See Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 488 (1988) (O'Connor, J., dissenting) (the fundamental purpose of the public trust doctrine is to "preserv[e] to the public the use of navigable waters from private interruption and encroachment." (citations omitted)). In recent decades, courts have applied the principle of public trust to controversies beyond those conventional interest. *See, e.g.*, Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich. L. Rev. 471, 556 (1969).

Nevertheless, Flood's contention of creating an atmospheric trust is "a significant departure from the [public trust] doctrine as it has been traditionally applied." *Alec L. v. Jackson*, 863 F. Supp. 2d 11, 13 (D.D.C. 2012). The Government finds neither the Supreme Court nor any of our sister circuits have expressly recognized the atmosphere as a public trust asset. On the other hand, a number of state appellate courts expressly declined to include the atmosphere as a public trust asset. *See, e.g.*, *Aronow v. State*, No. A12-0585, 2012 WL 4476642 (Minn. Ct. App. Oct. 1, 2012) ("[W]e are aware of no caselaw from Minnesota, or any other jurisdiction, in which a court has expanded the scope of the public-trust doctrine to include the atmosphere."); *Filippone ex rel. Filippone v. Iowa Dep't of Nat. Res.*, 829 N.W.2d 589 (Iowa Ct. App. 2013) ("The public trust doctrine in Iowa has a narrow scope.").

Furthermore, the inclusion of the atmosphere as a public trust asset not only deviates from tradition and precedent, but also creates uncertainty, and invokes a non-justiciable political question. Because of the atmosphere's transboundary nature, the U.S. government cannot adequately protect the atmosphere from pollution caused by other countries over whom the government has no control. Additionally, how to protect the atmosphere from

global greenhouse gas emissions is a geopolitical question that the judiciary should avoid answering. The Government will discuss the non-justiciable political question in Part VI.

On the other hand, this Court should restrain itself from recognizing a fundamental due process right to a heathy climate system. The Supreme Court has cautioned against expanding the concept of substantive due process "because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (citations omitted). It has instructed courts considering an unenumerated fundamental right to "exercise the utmost care" and directed courts to "our nation's history, legal traditions, and practices" as crucial guideposts. *Id.* at 721. The majority of federal courts have not recognized a constitutional right to a healthy environment. *See, e.g.*, *Stop H-3 Ass'n v. Dole*, 870 F.2d 1419, 1430 (9th Cir. 1989) (recognizing the importance of a healthful environment to human life without determining whether it gives rise to a right of constitutional magnitude); *MacNamara v. Cty. Council of Sussex Cty.*, 738 F. Supp. 134 (D. Del.), *aff'd*, 922 F.2d 832 (3d Cir. 1990) (finding no authority for the view that there is a constitutionally protected liberty interest in a person's health).

Flood's reliance on *Juliana v. United States* to find a fundamental right to a healthy climate system is simply wrong. The *Juliana* court's comparison between the right to a climate system capable of sustaining human life and the right to marry is misplaced. 217 F. Supp. 3d at 1249. The right to marry is "part of the fundamental 'right of privacy.'" *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978). In contrast, recognizing a right to a healthy climate system is to command the government to guarantee a right to basic services, which the Supreme Court has consistently refused to do. *See* Toni M. Massaro & Ellen Elizabeth Brooks, *Flint of Outrage*, 93 Notre Dame L. Rev. 155, 157–58 (2017) ("The United States Supreme Court has consistently refused to constitutionalize affirmative rights to basic human needs such as food, medical care, education, and housing.").

Accordingly, Flood cannot use the public trust doctrine to encompass the atmosphere as a protected property interest, and also fails to establish that enjoyment of a healthful climate system is a fundamental liberty interest for substantive due process purposes.

C. Alternatively, Flood Cannot Bring A Fifth Amendment Due Process Claim Against the United States Government Because the Government Has No Affirmative Duty to Protect Flood from Climate Change Allegedly Caused by Oil Companies.

It is well established that the Due Process Clause of Fifth Amendment does not generally confer any affirmative duty on the government "to protect the life, liberty, and property of its citizens against invasion by private actors." *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 195 (1989). *DeShaney* forecloses Flood's Due Process claim against the Government when Flood alleged that HexonGlobal, the only oil producer in the United States, is responsible for the global climate change due to its historical and current production, sale, and combustion of fossil fuels. R. 5. Flood attempts to circumvent *DeShaney* by applying the "state created danger" exception, which *DeShaney*'s progeny infers from the Supreme Court's implication that the government may be liable for injuries suffered by an individual if the government creates or increase the danger. *DeSahney*, 489 U.S. at 201.

To sustain a substantive Due Process claim under the state created danger exception, plaintiffs must prove the government acted with deliberate indifference. *DeShaney* has made clear that the government's mere awareness of a risk of harm to an individual was not sufficient to impose an affirmative duty to provide protection. *Id.* at 200. Circuits, applying the state created danger exception, have different factor-based tests, but all require plaintiffs to prove that the government acted intentionally or wrongfully in disregarding a known danger. *See, e.g., Hart v. City of Little Rock*, 432 F.3d 801, 805 (8th Cir. 2005) (requiring in its 5-parts test that the government acted recklessly in conscious disregard of the risk); *Jones*

v. Reynolds, 438 F.3d 685, 690 (6th Cir. 2006) (requiring the state knew or should have known that its action specifically endangered the plaintiff).

In *Hart*, the court held that the city's release of personnel files of its police officers to criminal defendant's counsel without redacting sensitive personal information did not rise to the level of deliberate indifference because the city employee did not consider the specific risk of harm to officers when she released the files in response to the defendant counsel's subpoena. 432 F.3d, at 806-07. Likewise, Appellant Flood in the present case cannot prove federal government deliberately or intentionally placed her in a dangerous situation without adequate protection. The global greenhouse gas emission caused by production and combustion of fossil fuels started as early as the Industrial Revolution. Even though the government has historically promoted the production of fossil fuels through programs such as tax subsidies and land leasing, R. 6, like in *Hart*, the government had not acknowledged then the threat of greenhouse gas emissions to global climate system. Flood concedes that the United States has been aware of human induced climate change only in the recent decades. *Id*. Moreover, federal agencies have taken regulatory actions over the past decade to control and to reduce greenhouse gas emissions. R. 7. Therefore, Flood fails to show that the U.S. government deliberately disregard a substantial risk of serious harm of climate change.

Moreover, *DeShaney* teaches us that only a government actor's affirmative act can amount to a violation of substantive due process, because the Due Process Clause "is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security." 489 U.S. at 195. *See, e.g., Pena v. DePrisco*, 432 F.3d 98, 109–10 (2d Cir. 2005) ("In applying our 'state created danger' principle, we have sought to tread a fine line between conduct that is 'passive' . . . and that which is 'affirmative' . . . ."); *Jones v. Reynolds*, 438 F.3d at 690 (requiring an affirmative act by the state which either created or increased the danger that the plaintiff exposed by a third party's action).

In *Jones v. Reynolds*, in which police officers failed to stop an illegal drag race which led to a spectator being killed, the Sixth Circuit held that the state created danger exception did not apply when the plaintiff failed to prove that the officers engaged in a cognizable affirmative act because they did not create or increase the danger that the victim voluntarily undertook. 438 F.3d at 691. Similarly, here the federal government's failure to prevent the climate change caused by private parties is not an affirmative act under the state created danger exception because Flood has not shown that the federal government's inaction rendered her more vulnerable to global warming or directly created the risk of harm he suffered. Flood has suffered damages due to global warming and sea level rise which are caused by global greenhouse gas emissions. Despite the EPA's regulatory action limiting greenhouse gas emissions over the past decade, global greenhouse gas emissions have still increased. R. 7. The international community that committed to reducing greenhouse gas emissions has been making independent determinations on regulatory schemes in their own nation. *See id.* It is impossible for the U.S. government alone to prevent anthropogenic climate change. Accordingly, Flood does not prove that the U.S. government's failure to reduce greenhouse gas emissions created or increased the harm of global climate change caused by worldwide players.

Therefore, the Government respectfully asks this Court to affirm the district court's dismissal of Flood's Fifth Amendment claim against the Government.

VI. Appellants' Claims Should be Dismissed Because Both Claims Raise Non-Justiciable Political Questions.

The non-justiciability of a political question derives from the principle of separation of powers. *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 980 (9th Cir. 2007). The presence of a political question deprives a federal court of subject matter jurisdiction under Article III. *Id.* In determining whether courts should defer to political branches on an issue involving a political question, the Supreme Court has held that application of any one of the following

elements renders a claim non-justiciable: [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; [2] a lack of judicially discoverable and manageable standards for resolving it; [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; [5] an unusual need for unquestioning adherence to a political decision already made; [6] the potential of embarrassment from multifarious pronouncements by various departments on one question. *Baker v. Carr*, 369 U.S. 186, 217 (1962). Government contends that because several *Baker* tests are implicated in Appellants' law of nations claim and public trust claim, this Court should hold that both Appellants raise a nonjusticiable political question.

A. There Are No Judicially Manageable Standards for Determining Appellant Flood's Public Trust Claim

Justice Powell summarized that the second and third *Baker* tests inquire whether "resolution of the question demand[s] that a court move beyond areas of judicial expertise[.]" *Goldwater v. Carter*, 444 U.S. 996, 998 (1979) (Powell, J., concurring). In *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004) where the plurality held that political gerrymandering claims are non-justiciable because there are no judicially discernible and manageable standards to adjudicate such claims, Justice Scalia wrote that the judicial power under Article III is "the power to act in the manner traditional for English and American courts." "One of the most obvious limitations imposed by that requirement is that judicial action must be governed by *standard*, by *rule*." *Id.* (emphasis in original). The Ninth Circuit explained in *Alperin v. Vatican Bank*, 410 F.3d 532, 553 (9th Cir. 2005) that the second *Baker* test is not about whether the case is unmanageable due to logistical obstacles, but whether there is a legal framework exists by which courts can grant relief in a reasoned fashion.

In *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 875 (N.D. Cal. 2009), *aff'd*, 696 F.3d 849 (9th Cir. 2012), in which an Eskimo village brought federal nuisance claim suit against oil companies for emission of greenhouses gases causing erosion of Artic sea ice, the district court held that their claims failed to articulate any judicially discoverable and manageable standards that would guide a factfinder to balance the benefits and risks of the complained energy-producing activities. The court also found that the existing nuisance cases based on water or air pollution are distinguishable, and do not offer the court any guidance to reach a resolution of the case at issue in any reasoned manner. *Id.* at 876.

In last five years, the non-justiciable political question issue has appeared in a line of cases filed in the nationwide state courts, in which plaintiffs seek judicial adjudication that the state has a common law duty under public trust doctrine to protect the atmosphere by regulating greenhouse emissions. State courts generally find such question justiciable, when state constitutions or statutes provide a substantive legal basis. *See, e.g., Kanuk ex rel. Kanuk v. State, Dep't of Nat. Res.*, 335 P.3d 1088, 1099 (Alaska 2014) (finding the Alaska constitution provides context for the court to interpret the public trust doctrine); *Butler ex rel. Peshlakai v. Brewer*, No. 1 CA-CV 12-0347, 2013 WL 1091209, at *3 (Ariz. Ct. App. Mar. 14, 2013) ("Arizona law establishes the legal framework for the [public trust] [d]octrine . . .").

Here, Flood cannot provide this Court with any discernible and manageable standards to adjudicate her federal public trust claim. The foregoing discussion in Section V shows that Flood offers no authority to this Court to support her claim that federal government owes a fiduciary duty to protect the atmosphere as a federal public trust asset. Unlike the state courts that can find a legal tool from the state constitutions and statutes, this Court will find no existing legal framework for federal public trust doctrine. More importantly, this Court

should follow the Supreme Court's declaration, finding that the public trust doctrine is a matter of state law. Like *Native Vill. of Kivalina*, the cases that Flood relies on to establish an unenumerated fundamental right are distinguishable and cannot help this Court to determine the existence of a fundamental right to healthy climate system. While asking this Court to expand a state public trust doctrine, Flood fails to articulate a judicially discoverable and manageable standard to guide a factfinder in rending a principled and rational decision.

B. Determining Mana's Claim Would Require the Court to Make Initial Policy Judgments Beyond Its Competence.

The third *Baker* test asks the courts to determine whether it would be impossible for the judiciary to decide the case "without an initial policy determination of a kind clearly for nonjudicial discretion." *Baker*, 369 U.S. at 217. Like the previous factor, this test also reflects circumstances in which adjudication would go beyond courts' competence, because "courts cannot resolve a dispute in the absence of a yet-unmade policy determination charged to a political branch[.]" *Zivotofsky v. Clinton*, 566 U.S. 189, 203 (2012) (Sotomayor, J., concurring).

When the Supreme Court in *American Elec. Power Co., v. Connecticut*, 564 U.S. 410, 423-24 (2011) held that the Clean Air Act and the EPA's authority thereunder to regulate carbon dioxide emission displaced federal common law claims, the Court explained that "it is primarily the office of Congress, not the federal courts, to prescribe national policy in areas of special federal interest." The Court also pointed out that the EPA, the expert administration agency, is best suited to serve as the primary regulator of greenhouse gas emissions because federal judges "lack the scientific, economic, and technological resources an agency can utilize in coping with issues of this order." *Id*. at 428. In *City of Oakland v. BP P.L.C.*, 325 F. Supp. 3d 1017 (N.D. Cal. 2018), plaintiffs brought public nuisance claims under federal common law against the five largest private oil companies in the world for their responsibility in carbon dioxide and methane pollution that cause sea level rise. The district court granted

the motion to dismiss and held that courts should defer to legislative and executive branches when "regulation of the worldwide problem of global warming should be determined by our political branches, not by our judiciary." *Id.* at 1029.

Global warming has already been the subject of international treaties and agreement, of which the U.S. government has been an active player. It is an area that requires global cooperation, because every country has contributed to the greenhouse gas emissions. Balancing the worldwide competing interests is impossible without an initial policy determination from the elected branches. When courts are asked to decide global warming nuisance suits, their ad hoc, case-by-case decision regarding a worldwide issue would potentially undermine political branches' overall strategy in international affairs. The changing climate policies in the current administration further highlight this case as one for nonjudicial discretion because emission regulation is an issue still calling for initial policy determination from political branches.

Here, Mana's claim implicates a wide array of policy considerations not suitable for judicial determination. Like the federal common law nuisance claims in *AEP* and *City of Oakland*, Mana's Alien Tort Statute Claim is based on international tort and is displaced by the Clean Air Act. Even though the *Trail Smelter* Principle imposes actionable obligations on private parties, to adjudicate Mana's law of nations claim, this Court would have to make decisions reserved for political branches. This Court's decision on HexonGlobal's liability for carbon dioxide and methane pollution would affect the executive branch's regulatory scheme, and may undermine the government's strategy during international negotiations. As the foregoing discussion in Section IV shows, the *Trail Smelter* Principle is displaced by the Clean Air Act. There is no reason for this Court to adjudicate Plaintiff's customary international law claim involving a significant geopolitical issue that courts are not prepared to answer.

Accordingly, both Appellants' claims present non-justiciable political questions, and adjudication of the questions demands this Court move beyond its areas of judicial expertise.

CONCLUSION

For the foregoing reasons, the United States respectfully requests that this Court affirm the district court's dismissal of Appellant's claim against HexonGlobal under the Alien Tort Statute because the Trail Smelter Principle has been displaced by the Clean Air Act, and also to affirm the district court's dismissal of Appellant's Fifth Amendment Due Process claim against the United States based on the public trust doctrine.