Team # 30

September Term, 2018

Docket No. 18-000123

IN THE UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

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

Petitioner,

v.

HEXONGLOBAL CORPORATION,

Respondent,

and

UNITED STATES OF AMERICA

Respondent.

On Appeal from the United States District Court for New Union Islands.

BRIEF OF RESPONDENT THE UNITED STATES.

Attorneys for Respondent, United States

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JURISDICTIONAL STATEMENT

The Organization of Disappearing Island Nations (ODIN), Apa Mana, and Noah Flood filed a Notice of Appeal from the United States District Court for New Union Islands, seeking judicial review of District Court Order Civ. 66-2018, dated August 15, 2018. Standing of the parties are not disputed on appeal.

STATEMENT OF THE ISSUES

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

II. Is the *Trail Smelter* Principle displaced by the Clean Air Act?

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

IV. Is the *Trail Smelter* Principle a recognized principle of customary international law enforceable as the "Law of Nations" under the ATS?

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

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

STATEMENT OF THE CASE

This case concerns liability for the impact of fossil fuel production on the global climate. Climate change is a concrete concern. The United States recognizes that working towards environmentally friendly approaches is an important policy consideration. However, the plaintiffs in this case fail to state claims that are redressable by a court. The district court properly dismissed these claims, leaving these issues to be resolved more appropriately through other political and legal avenues.

I. Parties

Plaintiffs, Noah Flood and Apa Mana - Noah Flood is a citizen of the United States and resides on New Union Islands. R. at 3. Apa Mana is a national of the A'Na Atu island nation. R. at 3. Both islands have similar features and both plaintiffs complain of similar damages. New Union and A'Na Atu islands have a maximum height above sea level of less than three meters. R. at 4. The populated areas are below one meter above sea level. Id. Flood and Mana each own homes in these populated areas. Id. If sea levels rise by as much as one half-meter, both islands will be rendered uninhabitable. Id.

Both Flood and Mana have expended resources to remedy and protect against damage caused by rising sea levels. R. at 5. They fear further future ramifications of climate change related to heat stroke and an increase in mosquito borne illnesses. Id. Both individuals depend on local seafood for their diet, which is threatened by climate change and its impact on the oceans.

ODIN - The Organization of Disappearing Island Nations (ODIN) is a non-profit organization that works on issues of sea-level rise and its impacts on island nations. R. at 3. Both Mana and Flood are individual members of ODIN. Id.

Defendants, The United States and HexonGlobal - HexonGlobal formed from the merger of all major United States oil producers. R. at 5. It is incorporated in New Jersey and its principle place of business is Texas. *Id.* HexonGlobal and its predecessors are believed to have contributed about 32% of cumulative US fossil fuel-related greenhouse gas emissions, which is six percent of global historical emissions. *Id.* Their cumulative worldwide sales constitute as much as nine percent of global fossil fuel emissions. *Id.*

In recent years, the United States has worked towards addressing the environmental impact of these gases. *Id.* In response to a 2007 Supreme Court case (finding greenhouse gases to be potentially subject to Clean Air Act regulation), the Environmental Protection Agency issue

the "Endangerment Finding." This set the stage for the development of greenhouse gas emission regulations through the Clean Air Act. *Id.* In 2010, the EPA promulgated new regulations to help control the impact of greenhouse gases. These included a Clean Air Act rule requiring the establishment of technology-based limits on greenhouse gas emissions, and a joint rule with the National Highway Transportation Agency to create fuel economy standards for passenger cars and light trucks through model year 2025. R. at 6.

The EPA went further in 2015 with the "Clean Power Plan" requiring states to control greenhouse gas emissions from existing power plants and establishing standards for new plants. President Barack Obama in 2015 also signed the international Paris Agreement's commitment to reduce greenhouse gas emissions by 26-28% by 2025 compared to those levels in 2005. R. at 6.

Over the last decade, Greenhouse gas emissions have increased globally yet the United States has decreased its own emissions. The current administration is proposing new approaches to this issue, including withdrawing from the Paris Agreement when its terms allow, and maintaining current emissions reductions under the fuel economy standards. *Id.*

II. Greenhouse Gas Emissions and Climate

The Earth is heated by solar radiation from the Sun that reaches Earth. The global climate results from the amount of this heat that reaches Earth and the amount radiated from Earth back into space. R. at 4. "Greenhouse gases," as the name suggests, are gases in the atmosphere that retain this solar radiation and reduce the amount radiated back into space. Id. Two such gases are carbon dioxide and methane, which constitute less than one-half of one percent of the composition of Earth's atmosphere. R. at 4. Levels of methane and carbon dioxide in the atmosphere have increased over time, due in part to human production, distribution, and burning of natural gas and other fossil fuels, as well as emissions from agricultural and industrial activity.

The long-term impact of this greenhouse gas concentration includes changes to rainfall patterns and sea levels (up to as much as one-meter elevation), and an increase in global temperatures.

III. Procedure Below

ODIN, Apa Mana, and Noah Flood brought suit in the District of New Union Island against HexonGlobal and The United States respectively. R. at 3. Apa Mana asserts that HexonGlobal's fossil fuel-related business violates the Law of Nations under the *Trail Smelter* Principle. *Id.* She seeks injunctive relief and damages against HexonGlobal. *Id.* Apa Mana seeks damages and injunctive relief. *Id.* Noah Flood asserts that the United States has the Fifth Amendment obligation to maintain the global atmospheric climate as part of the public trust, and that their failure to do so is a violation of his Substantive Due Process rights. *Id.* It is unclear what relief Flood seeks. The District Court dismissed the entire complaint for failure to state a claim. The court held 1) Any claim Mana had under the Alien Tort Statute has been displaced by the Clean Air Act, and 2) Noah's Due Process claim is preempted by the Supreme Court's ruling in *Deshaney v. Winnebago Cnty. Dep't of Soc. Servs.,489* U.S. 189 (1989).

STANDARD OF REVIEW

The District Court's decision to dismiss the Plaintiffs' claims under Rule 12(b)(6) should be reviewed *de novo* on appeal. *See e.g., Carroll v. Fort James Corp.*, 470 F.3d 1171, 1173 (5th Cir. 2006), *Allaire Corp. v. Okumus*, 433 F.3d 248, 250 (2d Cir. 2006).

SUMMARY OF THE ARGUMENT

Apa Mana's law of nations claim under thepublic trust claim should both be dismissed as non-justiciable political questions. Apa Mana's Law of Nations claim under the Alien Tort Statute and non-justiciable political questions. Mana's ATS Law of Nations claim should also

be dismissed for failing to state a claim because the Clean Air Act displaces air pollution claims sounding in international tort or federal common law. FRCP 12 (b) (6). The United States acknowledges that foreign plaintiffs may bring an ATS claim against a domestic corporation, the *Trail Smelte*r Principle is a recognized principle of customary international law, and that the *Trail Smelter* Principal imposes obligations enforceable against non-government actors. Further, there is no cause of action against the United States Government based on the substantive due process doctrine. .

The United Sates acknowledges that climate change is a serious concern, and urge the court allow the political branches of government to debate and deliberate on this public policy conundrum by dismissing all of the Plaintiffs' claims as non-justiciable political questions.

ARGUMENT

I. The Plaintiffs' Claims are Non-Justiciable Political Questions.

Apa Mana's law of nations claim under the Alien Tort Statute 28 U.S.C. § 1350. Noah Flood's public trust claim should both be dismissed as non-justiciable political questions.

The political question doctrine is a limit imposed on federal judicial power by the Constitution itself; *Baker v. Carr*, 369 U.S. 186, 210 (1962), the United States Supreme Court identified six criteria – *Baker* factors – each of which could signify that a case contains a political question:

> (1) [A] textually demonstrable constitutional commitment of the issue to a coordinate political department; (2) a lack of judicially discoverable and manageable standards for resolving it; (3) the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial 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; or (6) the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker, 369 U.S. at 217.

The first *Baker* factor calls for federal courts to decline a case when another political branch expressly controls the subject matter of the issue. *Id* at 691. This constitutional textual commitment needs to be clear. For example, the power specifically designated to the president of the united states in article two of the Constitution to propose, and negotiate agreements between the United States and other countries, or the power of congress granted in Article one to the senate to define and punish offences against the Law of Nations. *See* U.S. Const. art. II, §2, cl.2, *See also* U.S. Const. art I, §8.

The second and third *Baker* factors together indicate that a federal court should not answer questions that would result in decision-making beyond their competence. *Juliana v. United States*, 217 F.Supp.3d 1224, 1238 (D.Or. 2016). Specifically, the second *Baker* factor discourages courts from deciding cases where there is not a solid legal framework for them to base their judgment upon. *Id* at 1239. Existing legal tools and baselines must be in place for a court to make a decision that is "principled, rational, and based upon reasoned distinctions." *Vieth v. Jubelirer,* 541 U.S. 267, 278 (2004). In cases where injunctive relief if sought, the second *Baker* factor becomes an issue when the remedy would impede on the decision-making processes typically managed by another branch of government. *Gilligan v. Morgan*, 413 U.S. 1, 11 (1973). In this way, the second *Baker* factor connects to the third.

The third *Baker* factor has been illustrated as a court making a decision while being "rudderless." *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 204 (2012). Essentially, when a court would have no proper means of determining what a proper course of action could be, they should decline to decide the case. *Id.* An example of subject matter beyond the courts competency is given in *Gilligan v. Morgan*: courts should not render a decision in a case

regarding such a minimal "professional decisions as to the composition, training, equipping, and control of a military force." *Gilligan*, 413 U.S. at 8.

In similar fashion to the third *Baker* factor, the final three *Baker* factors collectively address the judiciary's prudence in not making decisions that should be, or indeed already have been made by coordinate branches of government. *Juliana*, 217 F.Supp.3d at 1240.

The fourth *Baker* factor has bared cases when courts were asked to "question the good faith with which another branch attests to the authenticity of its internal acts" *Zivotofsky*, 566 U.S. at 1433. In other words, the judiciary should not question acts of congress or the executive branch by countermanding their duly formed legislation or orders. *Id*. Supporting this interpretation, the Second Circuit Court of Appeals in *Kadic v. Karadzic* found that the fourth *Baker* factor applied when a court decision would "contradict prior decisions taken by a political branch" and would subsequently "seriously interfere with governmental interests." *Kadic v. Karadzic,* 70 F.3d 232, 249 (2nd Cir. 1995).

The fifth *Baker* factor makes a case non-justiciable when a court would need to give unquestioning adherence to a political decision already made. *Juliana*, 217 F.Supp.3d at 1240. Finally, the sixth *Baker* factor dissuades a court from rendering a decision when there is a potential of embarrassment from multifarious pronouncements by various departments on one question. *Id*.

A. The political question doctrine has historically challenged climate change actions in federal courts.

Climate change, pollution management, and environmental justice are extremely "political" in the sense that they have motivated partisan discussion and policy development. Courts, however, frequently struggle with whether or not environmental and climate change cases present non-justiciable political questions.

In regards to the second *Baker* factor, courts have found that since an environmentally themed tort – a mudslide in *Gordon v. State of Texas* (*Gordon*) – only calls for an assessment of damages and liability, the court does not lack the tools to deal with the issue at hand. *Gordon v State of Tex*, 153 F.3d 190, *194-195* (5th Cir. 1998) Furthermore, in *Gordon*, the court could conclude that nothing was being asked of the federal government, and so the matter was not a political question under either of the first two *Baker* factors, or indeed at all. *Id*.

The third *Baker* factor applies to environmental claims in that it is frequently claimed that political decisions need to be made before a court can regulate a certain environmental hazard. *Id.* Courts have rejected this again on the premise that they may regulate simple torts, needing only to find liability and calculate damages. *Id.*

Highlighting the relevance of the second, third, and possibly fourth through sixth *Baker* factors to climate change litigation, the Northern District of California and Ninth Circuit found that the combination of these factors indicated a political question in a plaintiff's nuisance claim. *Native Village of Kivalina v. ExxonMobil Corp.*, 696 Fe.d 849, 855-56 (9th Cir. 2012). In *Kivalina v. ExxonMobil Corp* (*Kivalina)* plaintiffs sought relief on the theory that the greenhouse gas emissions from several United States fossil fuel companies contributed to global climate change, which in turn caused severe land erosion due to rising sea levels. *Id* at 851. The District Court dismissed this claim as non-justiciable based in part on the second and third *Baker* factors. *Id* at 855-856. For the second *Baker* factor, the court found that making a decision in the *Kivalina* case required it to weigh too many factors beyond its capacity, including which energy producing alternatives were available in the past, their respective impact on global climate issues, alternate sources reliably, and in general the competing interests of reducing greenhouse

gas emissions and preserving economic development. *Id* at 874, see also *People of the State of Calif. V. Gen. Motors Corp.* 431 F.2d 732, at *8 (1970)

In considering the third *Baker* factor, the District Court in *Kivalina* found it equally problematic to the plaintiff's case. *Native Village of Kivalina v. ExxonMobil Corp.*, 663 F.Supp.2d 863, 871 (N.D. Cal. 2009) Essentially, the court found that plaintiff's claim would require them to make a judgment on what emissions standards should be. *Id* at *876.* Additionally, the court found it would have to decide, "*who* should bear the cost of global warming." *Id* at 877. These decisions combined presented issues with the third *Baker* factor, and therefore presented a political question. *Id*.

Finally, in affirming the decision of the District Court, the Ninth Circuit Court of Appeals found that the Clean Air Act occupied the field of the decision. *Kivalina* 696 F.3d at 857. In language mirroring the theory behind the fourth through sixth *Baker* factors, the court found that the judiciary couldn't offer a remedy unless there is a right subject to their power for redress. *Id*. The Supreme Court of the United States held in *American Elec. Power Co., Inc. v. Connecticut* that the Clean Air Act displaces the federal common law right to seek abatement of emissions from fossil fuel fired power plants. *American Elec. Power Co., Inc. v. Connecticut*, 654 U.S. 410, 423 (2011). Based on this holding, the Court of Appeals in *Kivalina* found that the plaintiff's common law claim was extinguished. *Kivalina*, 696 F.3d at 857.

B. The first, second, and third Baker factors together present a political question in response to Apa Mana's claims; the court lacks proper legal standards to decide the matters at hand.

First, in regards to the first *Baker* factor in this case, previous cases have interpreted international powers commitment narrowly. *Baker*, 369 U.S. at 211. However, this case deals directly with the United States relationship with a foreign nations, and treaties defining that relationship. This case, due to that narrow focus, is beyond just dealing with the globalized, and

indeed U.S. applicable concept of climate change. Therefore, the first *Baker* factor is not absent from this case.

The case at hand bears strong similarity to *Kivalina.* While the Apa Mana is neither citizens nor residents of the United States, the plaintiffs circumstances overall, and their pleadings are nearly identical to those in *Kivalina*. Due to HexonGlobal's greenhouse gas emissions, the plaintiffs claim that they have lost and are loosing their land due to sea level rise. Because of this, following two major lines of reasoning involving the second and third *Baker* factors, this court should follow the reasoning of the District and Appellate courts in *Kivalina.*

First, this case presents a non-justiciable political question based on the second and third *Baker* factors. Like *Kivalina*, the court would have to make several decisions outside of its competency to give an ultimate decision on this case. Unlike *Kivalina* the plaintiffs in this case are not seeking damages or injunction based on a theory of nuisance. While this means that the court would not necessarily be asked to engage in the same difficult balancing decisions specifically identified in *Kivalina*, it would still be required to address issues such as whether or not the emissions of HexonGlobal are able to be held as the proximate cause of the effect to plaintiffs land, whether or not similar emissions from other corporations constitute a intervening factor, and essentially, who should pay for the damages of global warming. While the daunting and complex nature of this decision alone should not dissuade courts from making a decision, the fact that the courts would have to reach a consensus and decide an issue that would likely be difficult even for specialists to consider is indicative that the courts competency is limited in this field. The court lacks proper legal tools to address Apa Mana and Noah Flood's claims.

Next, this is not a simple tort claim as envisioned in *Gordon*. To make a decision in this case, the court would need to do far more than simply assign liability and calculate damages.

Unlike the direct nature of damage from a landslide, the inherently ephemeral nature of the effects from greenhouse gas pollution necessitates a much more nuanced decision, to the degree that courts do not yet have the standards necessary to make a decision.

C. Preemption of the Clean Air Act, and limitations of the public trust doctrine indicate a political question in this case based on the fourth through sixth Baker factors.

This is not just a tort case for damages; plaintiffs are also seeking injunctive relief in pursuing a claim against the United States for violating the due process clause of the Fifth Amendment. This fact, that plaintiffs are essentially seeking to have the United States government take action to limit greenhouse gas emissions in and of itself warns of a political question through the fourth through sixth *Baker* factors.

This concern is made more concrete by the fact that, as the Ninth Circuit Court of Appeals discussed in *Kivalina,* the other political branches have already occupied the field of regulating greenhouse gas emissions with the Clean Air Act. Beyond just the concept of preemption washing away the plaintiffs claim for relief, for a court to make a decision mandating the government to further regulate a corporations emissions of greenhouse gasses, on top of the already existing CAA, would be the epitome of questioning the good faith in which a coordinate branch of government. The courts here, by rendering a decision, would be disrespecting both the legislative and executive branches by mandating action contrary to measures already taken.

Additionally, deciding a case favorable to the plaintiffs asserted scope of the Public Trust Doctrine further implicates concerns with the final three *Baker* factors. The legislative branch of government has not yet decided to expand the public trust doctrine beyond its traditional bounds of navigable waterways, as evidenced by the current progress of the *Juliana* case. Therefore, the court must wait for this decisions; to hold that the public trust expands further than it is currently

understood to would be more than just interpretation of the law, as it would involve making decisions of a scientific, and legislative nature.

For the reasons cited above, this court should dismiss this action, as it presents a non-justiciable political question.

II. The Clean Air Act Displaces Apa Mana's International Law Claims.

In addition to being a non-justiciable political question, the foreign plaintiff Apa Mana's claim is also precluded by the Clean Air Act. Claims sounding in international tort arise under federal common law. However, "when Congress addresses a question previously governed by . . . federal common law, the need for such an unusual exercise of law-making by federal courts disappears." *City of Milwaukee v. Illinois & Michigan*, 451 U.S. 304, 314 (1981) ("*Milwaukee II*"). Therefore, Congress has displaced "any federal common law right" to challenge air pollution emissions when it enacted the Clean Air Act and delegated the task to the EPA. *American Electric Power Company, Inc. v. Connecticut*, 564 U.S. 410, 424 (2011) ("*AEP*"); *accord, 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). The district court correctly found that any action Mana might have under the ATS has been displaced by greenhouse gas regulation under the Clean Air Act. The United States urges this court to affirm.

A. Claims sounding in international tort arise under federal common law.

The ATS created jurisdiction to hear torts claims based on the international law of nations, but it does not provide a cause of action. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 724 (YEAR); *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013); *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1397, (2018). In this case, the foreign plaintiffs seek to invoke the Trail Smelter Principle as their cause of action. *Odin v Hexon,* No. 66-CV-2018, (D.N.U.I., Aug. 15,

2018). This principle declared it a violation of international law for a State to permit activities in its territory to cause injury to the territory of another State. 3 U.N.R.I.A.A. 1965 (1941). Because the Plaintiffs' allege a tort arising under international law, it is necessarily a claim sounding in federal common law. *See Filartiga v. Pena-Irala*, 630 F.2d 876, 878 (2d Cir. 1980) (holding that "with the founding of the 'more perfect Union' of 1789," ATS claims invoking the law of nations shifted from State common law to become "preeminently a federal concern.") However, the federal common law in this area has already been displaced by the Clean Air Act, and therefore, as discussed below, cannot support the Plaintiffs' international tort claim.

B. Congressional enactment of the Clean Air Act displaces the federal air pollution common law because the statute speaks directly to the question at issue.

"The Clean Air Act and the EPA actions it authorizes displace any federal common law right to seek abatement of carbon dioxide emissions from fossil-fuel" industries. *American Electric Power Company, Inc. v. Connecticut*, 564 U.S. 410 (2011) ("*AEP*"). Therefore, the Clean Air Act precludes the foreign plaintiffs' cause of action sounding in international tort.

It is primarily the office of Congress, not the federal courts, to prescribe national policy in areas of special federal interest. *TVA v. Hill*, 437 U.S. 153, 194 (1978). Therefore, "when Congress addresses a question previously governed by a decision rested on federal common law, the need for such an unusual exercise of law-making by federal courts disappears." *Milwaukee II*, 451 U.S., at 314. *Milwaukee II* held that the relevant question for purposes of displacement is "whether the field has been occupied, not whether it has been occupied in a particular manner." *Id.*, at 324. The test for whether congressional legislation excludes the declaration of federal common law is simply whether the statute "speak[s] directly to [the] question" at issue. *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978); *see also, Milwaukee II*, 451 U.S., at 315; *County of Oneida v. Oneida Indian Nation of N. Y.*, 470 U.S. 226, 236–237 (1985).

The Clean Air Act and the EPA actions it authorizes speaks directly to the issue raised by ODIN and Apa Mana. Therefore, the Clean Air Act has abolished any federal common law right the plaintiffs might have had to seek abatement of carbon-dioxide emissions from the fossil-fuel industry. *Massachusetts v. EPA* made plain that emissions of carbon dioxide qualify as air pollution subject to regulation under the Act. *Massachusetts v. E.P.A.*, 549 U.S. 497, 528–29 (2007) The court in *Massachusets* noted that the "Clean Air Act's sweeping definition of 'air pollutant' includes any air pollution agent or combination of such agents, including any physical, chemical ... substance or matter which is emitted into or otherwise enters the ambient air." *Id.* The Court held that "the definition embraces all airborne compounds of whatever stripe," therefore, "[c]arbon dioxide, methane, . . . and hydrofluorocarbons are without a doubt" air pollutants subject to regulation under the Clean Air Act. *Id.* Therefore, the Act speaks directly to greenhouse gas emissions from Hexon's products and its operation, and speaks directly to the pollutants at issue in this case.

The Clean Air Act also speaks directly to the harms alleged by the plaintiffs, and provides for potential remedies. The reach of remedial provisions is important to determination whether statute displaces federal common law. *County of Oneida*, 470 U.S., at 237–239. Section 115 of the Clean Air Act, codified as 42 U.S.C. § 7415, provides a specific provision addressing harms arising from international air pollution. This provision of the Clean Air Act creates a process by which the EPA Administrator on his own, or at the request of the Secretary of State, may require a state to decrease emissions that "cause or contribute to air pollution which may reasonably be anticipated to endanger health or welfare in a foreign country." 42 U.S.C. § 7415(a). This provision states that "[w]henever" the EPA Administrator has "reason to believe" that an air pollutant emitted in the United States causes or contributes to air pollution that may

reasonably be anticipated to endanger health or welfare in a foreign country, he "shall give formal notification thereof to the Governor of the State in which such emissions originate." 42 U.S.C. § 7415(a). The Act also specifies that once such a finding is made, the Administrator "shall" notify the Governor of the specific State emitting the pollution and require it to revise its State Implementation Plan (SIP). *Id.* The statute mandates remedial procedures once the endangerment finding is made, the SIP revision process must follow. 42 U.S.C. § 7415(b). The SIP must be revised to prevent or eliminate the endangerment to the foreign country.

The Clean Air Act provides a clear process under which Apa Mana, ODIN, or the diplomatic representatives of the island nation of A'Na Atu may petition the Administrator of the EPA or the Secretary of State to address air pollutant emissions that endanger public health or welfare in A'Na Atu. It also mandates regulatory remedies through the SSIP revision process, should the Administrator find that there in in fact reasonable anticipated endangerment of health and welfare in A'Na Atu. If a private corporation does not comply with the regulatory changes to the SIP, the Clean Air Act provides multiple avenues for enforcement. The EPA retains the power to inspect and monitor regulated sources, to impose administrative penalties for noncompliance, and to commence civil actions against polluters in federal court. 42 U.S.C. §§ 7411(c)(2), (d)(2), 7413, 7414. If State Regulators or the EPA fail to enforce emissions limits against regulated sources, the Act permits "any person" to bring a civil enforcement action in federal court. § 7604(a). The Act itself thus provides a means to seek limits on emissions of carbon dioxide from domestic power plants—the same relief the plaintiffs seek by attempting to invoke federal common law. The Clean Air Act provides extensive remedies for the harms alleged by the plaintiff, which supports finding that this statute has displaced any federal common law right to seek similar remedies in tort.

III. Domestic Corporations can be Held Liable in Alien Tort Statute Claims.

Throughout the course of its early use, the Alien Tort Statute (ATS) was a tool to bring justice against alien individuals for violations of the law of nations. In *Sosa v. Alvarez-Machain*, the United States Supreme Court considered in a footnote whether or not the body of international law extends liability to private actors, including corporations. *Sosa*, 524 U.S. n.20. With only the Second Circuit finding otherwise, a majority of these courts have evolved their arguments to find that corporations can be held liable in ATS claims; the scope of such liability is determined not by international law, but our own federal common law.

A. The Seventh, Ninth, Eleventh, and D.C. Circuit Courts support corporate liability under the Alien Tort Statute.

While the Supreme Court shaped the modern Alien Tort Statute in *Sosa*, *Kiobel*, and *Arab Bank*, the federal circuits debated the extent of the revived statutes scope regarding liability.

In *Doe v. Unocal Corp. (Doe),* the 9th Circuit Court of Appeals found that corporations could be held liable for certain violations under the Alien Tort Statute. *Doe v. Unocal Corp,* 395 F.3d 932, 946 (9th Cir. 2002). The court identified "whether the alleged tort requires the private party to engage in state action" as a threshold question to such liability. *Id.* at 945. This question identifies that, in the case of certain violations of international law, corporations can be held liable, even if they are in no way acting in concert with state actors. *Id.* The Court in *Doe* held that genocide, war crimes, and other "crimes against humanity" constituted acts that did not require private entity action to be paired with state action for ATS liability to attach. *Id.* This opinion was in fact drawn from a Second Circuit court holding; In *Kadic v. Karadzic,* the Second Circuit recognized that there were actions so unacceptable that even private individuals could be held liable through the ATS. *Kadic v. Karadzic*, 70 F.3d 232, 236 (2nd Cir. 1995).

Similarly, in *Sarei v. Rio Tinto* (*Sarei)* the 9th Circuit found that claims of genocide and war crimes were properly brought against a corporation under the ATS. *Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 748 (9th Cir. 2011). In considering the legislative intent of the ATS in this case, the court found no specific bar to suit against corporations, *Id* at 748. Similarly, In *Doe I v. Nestle USA, Inc.* the court held that it would be against both the prohibition on slavery, and in essence the moral character of the ATS to find that incorporation immunized those violating the Law of Nations. *Doe I v. Nestle USA, Inc.*, 766 F.3d 1013, 1022 (9th Cir. 2014).

Supporting the Ninth, The Seventh Circuit in *Flomo v. Firestone Co.* (*Flomo*) strongly cuts against the idea that corporations cannot be held liable in ATS suits. *Flomo v. Firestone Nat. Rubber Co,, LLC*, 643 F.3d 1013, 1025 (7th Cir. 2011). Like *Doe*, the *Flomo* court illustrates the absurdity of the idea that a pirate, subject to suit as an individual under the traditional bounds of the ATS, would suddenly find immunity should they enter into Pirates Incorporated. *Id* at 1017. the court in *Flomo* reflects that instead of excluding corporations, the majority of cases addressing corporate liability in ATS suits want to keep ATS liability within strict limitations of abhorrent conduct. *Id.* at 1018. Unlike the Ninth Circuit cases, however, the court here goes further and finds that this restriction has nothing to do with corporate liability. *Id.*

In *Romero v. Drummond*, the Eleventh Circuit Court of Appeals found similarly to the Ninth in *Sarei*: the ATS contains no express exception from liability for corporation liability. *Romero v. Drummond Co., Inc.*, 552 F.3d 1303, 1315 (11th Cir. 2008). The court reflected that it has, in fact, previously held corporate defendants liable under ATS claims. *Id.* Likewise, the D.C. Circuit in *Doe v. Exxon Mobil Corp.* looked at the legislative history of the ATS to determine that it does allow for corporate liability. *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 15 (D.C. Cir. 2011).

B. The Second Circuit alone has split to find that corporate liability is beyond the scope of the Alien Tort Statute.

While the Second Circuit Court of Appeals did support the idea of private liability in ATS suits in *Kadic v. Karadzic*, it has chiefly endeavored to find that corporations are not to be held liable.

In deciding *Kiobel v. Royal Dutch Petroleum Co.* (Kiobel), the Second Circuit Court of Appeals sharply denied corporate liability. *Kiobel v. Royal Dutch Petroleum Co.,* 569 U.S. 108, 124-125 (2013). In *Kiobel,* foreign nationals finding asylum in the U.S. filed suit under the ATS against multiple foreign corporations for aiding and abetting in several tortious violations of the Law of Nations. *Id* at 118. When *Kiobel* made its way to the Supreme Court of the United States, the lower courts decision was affirmed, but on the basis of another issue: whether or not the ATS allows recognition of a cause of action for violations of the Law of Nations in a non-soverign territory. *Id.* Essentially, the Supreme Court invoked the Assumption Against Extraterritoriality to ATS cases. *Id* at 116. Nothing in the language of the ATS gives it extraterritorial reach. *Id.* The presumption against extraterritoriality therefore duly limits the reach of the ATS. *Id.* Thus, the Supreme Court found that if an ATS case is brought based on conduct that took place outside the U.S., the violations of the Law of Nations must "touch and concern" the U.S. with "sufficient force to displace the presumption against extraterritorial application." *Id* at 124-25. Because the only contact the foreign corporations had with the United States was one office in New York, the court found that the request force to displace the presumption was not present. *Id.* when it heard the similar case of *Jesner v. Arab Bank, PLC,* the Supreme Court did not re-assert its finding in *Kiobel,. Arab Bank, PLC*, 138 S.Ct. 1386, 1399 (2018).

Following *Kiobel,* the Court of Appeals for the Second Circuit continued to find against holding corporations liable for ATS claims. In *Chowdhury v. Worldtel Bangladesh Holding, Ltd.* the court found that since corporate liability "is not recognized under customary international law" it is not an option under an ATS claim. *Chowdhury v. Worldtel Bangladesh Holding, Ltd.*, 746 F.3d 42, 49 (2nd Cir. 2014).

C. Following the Supreme Court's decision in Kiobel, other circuits continue to hold that corporate liability is allowed under the ATS; domestic common law should decide the scope of liability.

Before *Kiobel*, the Court in *Flomo* argued that it is the responsibility of individual nations to decide how the substantive obligations imposed by international law should be enforced. *Flomo*, 643 F.3d at 1020. Several courts since *Kiobel* have supported this opinion.

The Ninth Circuit Court of Appeals voiced its accordance in *Doe I v. Nestle USA, Inc.*, stating that courts should look to "domestic tort law to determine whether recovery from the corporation is permissible." *Doe I v. Nestle USA, Inc.*, 766 F.3d 1013, 1019-1020 (9th Cir. 2014). In case of *Estate of Alvarez v. Johns Hopkins University*; the D.C. Circuit Court found in accordance that domestic law governs the topic of corporate liability. *Estate of Alvarez v. Johns Hopkins University*, 275 F.Supp.3d 670, 673 (D. Md. 2017).

The Second Circuit persists that corporations cannot be held as liable until such liability is recognized within the international body of norms on which the ATS basis its jurisdiction. The remainder of courts who have commented on the issue follow the reasoning that the international body of law is only relevant to define a norm being violated under the ATS. After this norm has been identified, it is up to U.S. domestic law to decide how to enforce liability. *Nestle USA, Inc.*. 766 F.3d at 1022.

D. The Supreme Court decisions based on cases originating in the Second Circuit do not eliminate domestic corporation liability in this case.

The Supreme Court's holdings in both *Kiobel* and *Jesner v. Arab bank* (*Jesner*) denied extending liability to foreign corporations. The Court did not explicitly state that corporations were entirely outside the scope of ATS litigation. Furthermore, the Supreme Court reached the decisions in both cases based on specific characteristics of the corporation in question, characteristics not held in common with HexonGlobal. The corporation in *Kiobel* was deemed beyond the scope of ATS jurisdiction chiefly because it failed to have substantial enough connection to the United States to displace the presumption against extraterritoriality; it had one office in New York. HexonGlobal is based in the United States, and is, in fact, a collection of its major oil companies, making its connections to the U.S. quite substantial. R. at 3. Like the corporation in *Kiobel,* the organization in *Jesner* was a foreign corporation with minimal connections to the United States. The Supreme Court was reluctant to hold a foreign corporation liable for harms committed outside of the U.S. to non-United States Nationals. This concern would not be an issue in this case. Again, HexonGlobal is a U.S. national corporation that has caused harms abroad. In this way the concerns blocking the Supreme Court from finding foreign corporations to be liable under ATS suits in the past would not create an issue in this case.

The court in this case should find itself siding with the majority of the seventh, ninth, eleventh, and D.C. federal courts. The second circuit has tried through multiple cases to assert that corporations in general may not be held liable in ATS suits. However, at each interval the Supreme Court has denied this finding. They have found the foreign corporations may not be held liable, and they have somewhat found that a corporation must have substantial connections with the United States in order to be liable. Neither of these holdings presents an issue in this case, as HexonGloal represents a massive United States corporation.

The Alien Tort Statute has been identified, consistently, as purely jurisdictional; it seeks only to hold a party liable for a violation of an international norm. International law speaks to what this norm may be. It is thus the role of domestic common law to decide who may be liable for violating that norm. The Second Circuit errs in interpreting that this question of who is liable must additionally be identified by a standard of international law. The Supreme Court has heard cases asserting this claim, and denied to reassert it. Furthermore, this court should remain conscious of the underpinnings behind majority federal circuits decisions: it does not make sense that an individual who is liable for violating the international law of nations should suddenly be immune simply because they incorporate. For these reasons, this court should find that domestic corporations can indeed be held liable in ATS suits, for committing crimes against humanity by robbing them of their place of domicile.

IV. The Trail Smelter Principle is a Well-Recognized Principle of Customary International Law Enforceable as the "Law of Nations" Under the ATS

The United States concurs with plaintiffs 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. This is a long-standing, widely-recognized principle of international law is encapsulated by the legal maxim, "*utere tuo ut alienum non laedas*" ("conduct your activities so as not to harm others"). This principle is reflected in the Trail Smelter Arbitration, 3 U.N.R.I.A.A. 1965 (1941), in which an international arbitral panel held that harms to agriculture interests in the State of Washington caused by air pollution emissions from a smelter in British Columbia were a violation of international liability principles. State practice and *opinion juris* show that, for air pollution concerns that are not already displaced by the Clean Air Act, the principle is indeed customary international law enforceable in US Courts under the ATS because it is a "specific, universal and obligatory" norm. *In re Estate of Marcos*, 25 F.3d 1467, 1475 (CA 1994).

A. The Trail Smelter Principle is a long-standing, widely-recognized principle of international law

The legal principle invoked in the Trail Smelter Arbitration harkens back to ancient Roman civil law and is reflected in the Latin legal maxim "*utere tuo ut alienum non laedas.*" Canada and the United States implicitly recognized this principle in 1941 when the two countries participated in, and abided by, the Trail Smelter Arbitration. That decision declared it a violation of international law for a State to permit activities in its territory to cause injury to the territory of another State. 3 U.N.R.I.A.A. 1965 (1941).

In 1972, the same principle was adopted by representatives of 115 countries at the United Nations Conference on the Human Environment. The principle was codified as Principle 21 of the Conference's landmark declaration of guiding environmental principles. U.N. Doc. A/Conf.48/14 (July 3, 1972). Stockholm Principle 21 declared 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." This principle was reaffirmed *verbatim* in 1992 at the United Nations Conference on Environment and Development (UNCED) in Rio de Janeiro, also known as the Rio de Janeiro Earth Summit. This time, it was codified as Principle 2 of the Rio Declaration on Environment and Development.

In 1996, The International Court of Justice affirmed that "The existence of the general obligation of states to ensure that activities within their jurisdiction and control respect the environment of other states and of areas beyond national control is now part of the corpus of international law relating to the environment." *Nuclear Weapons Advisory Opinion*, (para. 29). In 2001, the International Law Commission adopted detailed articles implementing Principle 2, establishing the contours of the responsibility of states. International Law Commission, *Articles on the Prevention of Transboundary Harm for Hazardous Activities* (2001), submitted to the

General Assembly of the United Nations.

B. State practice and opinion juris observing the rule shows that the Trail Smelter Principle is indeed customary international law

Customary international law is "a general practice accepted as law," as determined through the general practice of states and what states have accepted as law. International Court of Justice Statute Article 38(1)(b). Two requisites are necessary for the creation of a customary international law rule. The first element is state practice observing the rule in question. State practice "includes diplomatic acts and instructions as well as public measures and other governmental acts and official statements of policy, whether they are unilateral or undertaken in cooperation with other states." Restatement (Third) of the Foreign Relations Law of the United States, section 102, comment b (1986). State action includes inaction when a state acquiesces to the actions of another state. To create customary law, state practice must be "general and consistent." A practice can be general even if not universally followed. There is no precise formula to indicate how widespread a practice must be, but it should reflect wide acceptance among the states particularly involved in the relevant activity. Failure of a significant number of states to adopt a practice can prevent a principle from becoming general law, although it might become "particular customary law" for the participating states.

The second element required is a showing of *opinio juris sive necessitatis*. The Restatement comment 'c' defines this element as follows: "a practice that is generally followed but which States feel free to disregard does not contribute to customary law. A practice initially followed by States as a matter of courtesy or habit may become law when states generally come to believe they are under a legal obligation to comply with it. . . . Explicit evidence of a sense of legal obligation (e.g., by official statements) is not necessary; *opinio juris* may be inferred from

acts or omissions." Restatement (Third) of the Foreign Relations Law of the United States, section 102, comment c (1986).

There is a long history of nations observing the *Trail Smelter* Principle. The United State recognizes this principle through Section 115 of the Clean Air Act, which provides a remedy should the EPA Administrator find that emissions from the United States are endangering the welfare of another country. The inclusion of this principle in the Stockholm Declaration and the Rio Declaration constitutes diplomatic actions that observe the *Trail Smelter* Principle as customary international law. States have also recognized liability under this principle by claiming or paying compensation for transboundary harm. In 1972, Canada claimed compensation from the United States when a Liberian-registered oil tanker leaked 12,000 gallons of crude oil, fouling beaches in British Columbia. *See* Handl, State Liability for Accidental Transnational Environmental Damage by Private Persons, 74 Am.J. Int'l'L. 525, 544–45 (1980). The United States paid compensation to Japanese fishermen on the high seas injured by the 1954 nuclear tests carried out in the Marshall Islands. The United States also compensated the inhabitants of the Marshall Islands for personal injuries and property damage suffered during the tests. 8 M. Whitman, Digest of International Law 764–67(1967).

Opinio Juris affirming the *Trail Smelter* Principle is well established. In addition to the *Trail Smelter* Arbitration itself, Canada also paid compensation imposed by international arbitral claims tribunal to affected U.S. property owners In the Gut Dam case where American property was flooded by a dam Canada built across the St. Lawrence River. 17 U.S.T. 1566, T.I.A.S. No. 6114, 4I.L.M. 473 (1965); Gut Dam Arbitration (United States v. Canada), 8 I.L.M.118 (1969). The same principle was also articulated by the International Court of Justice in the Nuclear Weapons Advisory Opinion, (para. 29), and the International Law Commission's articles

implementing Principle 2. International Law Commission, Articles on the Prevention of Transboundary Harm for Hazardous Activities (2001), submitted to the General Assembly of the United Nations. Since the *Trail Smelter* Principle is well established by state practice and *opinio juris*, the *Trail Smelter* Principle is indeed Customary international law.

C. The Trail Smelter Principle is enforceable in US Courts under the ATS because it is a "specific, universal and obligatory" norm.

Trail Smelter Principle is not only customary international law, but also sufficiently specific, universal and obligatory to be enforceable in US Courts under the ATS. Not all violations of international law give rise to a cause of action under the ATS. Federal Courts only recognize private claims under federal common law for violations of those international law norms which had the same definite content and acceptance among civilized nations as did the three historical paradigms at the time the ATS was enacted (offences against ambassadors, violation of safe conducts, and piracy). In *Filartiga*, the court held that "for the purposes of civil liability, the torturee has become – like the pirate and slave trader before him hostis humanis generis, an enemy of all mankind." *Filartiga* 890. The court noted in *In re estate of Marcos* that the ATS requires a norm that is specific, universal and obligatory. 25 F 3d 1467 (CA 1994), 1475.

Climate change is a global phenomena and would therefore be a threat to all mankind. The connection between greenhouse gas emissions from fossil fuel industries and climate change is also well establish and specific. The *Trail Smelter* Principle was adopted by representatives of 115 countries at United Nations Conferences not just once, but twice. And as discussed above states observe it as obligatory. Therefore, the *Trail Smelter* Principle is not only customary international law, but also sufficiently specific, universal and obligatory to be enforceable in US Courts under the ATS.

V. The *Trail Smelter* Principle Imposes Enforceable Obligations on Non-Governmental Actors.

The *Trail Smelter* case was limited to a dispute between two states, but the core principle to emerge imposes obligations on non-governmental actors as well. Looking beyond *Trail Smelter* itself, it is clear that neither the polluting party nor the party claiming damages need to be a state actor for the principle to apply.

A. The Trail Smelter Principle is a Re-articulation of Nuisance and Trespass Doctrine.

As discussed above, the heart of the no-harm principle is as ancient as the Latin commandment "*sic utere tuo ut alienum non laedas*." This maxim is the foundation of modern trespass and nuisance doctrines. In English Common Law, the concept was epitomized by the Rule in *Rylands v. Fletcher* L.R., 3, H.L., 330. Rylands hired contractors to build a reservoir. They discovered coal shafts filled with debris but chose to leave them rather than blocking them off. This ultimately resulted in the reservoir bursting and flooding the neighboring mines belonging to Fletcher. Justice Blackburn of the Court of Exchequer Chamber wrote "the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape." *Id.* The principle is deeply imbedded in American torts as well. *See e.g. Munn v. People of the State of Illinois* 94 U.S. 113, 145 (1876) ("The doctrine that each one must so use his own as not to injure his neighbor-*sic utere tuo ut alienum non laedas*-is the rule by which every member or society must possess and enjoy his property; and all legislation essential to secure this common and equal enjoyment is a legitimate exercise of State authority."); *E. Rauh & Sons Fertilizer Co. v. Shreffler* 139 F2d 38, 41 (6th Cir. 1943) ("A nuisance rests upon the maxim, 'sic utere tuo ut

alienum non laedas, 'that one's enjoyment and use of his own property should be such as not to injure the rights of another in his property.").

What happens in *Trail Smelter* is not the creation of a brand-new norm. Instead, the Tribunal takes this age-old norm and applies it to interactions between sovereigns much as they have always been applied between individuals. While it takes on new dimensions when disputes are between sovereigns, the core nature of the principle remains the same: one cannot use what is theirs in a way that harms what is not theirs.

B. Trail Smelter's focus on statehood clarifies how states can be damaged by these transgressions, but does not limit the transgression based upon statehood.

Determining the scope of the international custom requires looking at "widely dispersed" relevant evidence. *Flores v. Southern Peru Copper Corp.* 414 F.3d 233, 247-48 (2nd Cir. 2003) ("customary international law . . . is created by the general customs and practices of nations and therefore does not stem from any single, definitive, readily-identifiable source."). The *Trail Smelter* Tribunal was tasked with answering, among other questions, "whether the Trail Smelter should be required to refrain from causing damage in the State of Washington in the future and, if so, to what extent?" 3 U.N.R.I.A.A. 1904 1962. The tribunal looked to several cases in the United States and other jurisdictions to construct the applicable principle. In *Trail Smelter*, the dispute involved one state claiming it was damaged by the actions or inactions of another state. This required determining whether a State can experience harms separate from those of individual property owners, such that the State could bring an action for harm against itself, and whether a government entity has an obligation such that its violation is a transgression. This is not to the exclusion of non-governmental actors, but an addition on top of principles already presumed to apply to individuals.

The *Trail Smelter* principle at its core applies to situations where an actor generates environmental harms (often through some form of intentional or accidental pollution). *Trail Smelter*'s challenge was how to articulate these harms and obligations in such a way that States were bound to expectations already felt by non-governmental actors. See *State of Georgia v. Tennessee Copper Co.* 206 U.S. 230 (1907). The *Tribunal* looked to *Tennessee Copper* as one such example. The copper company based in Tennessee emitted "sulphorous acid gas" into the air within the state which traveled to parts of Georgia. *Id.* at 238. This pollution threatened Georgia with myriad harms including the "wholesale destruction of forests, orchards, and crops." *Id.* at 236. Georgia sought to resolve the issue directly with the State of Tennessee but failed. *Id.*

The State of Georgia filed suit against the copper company directly. It did not assert that harm came to any individual or non-governmental entity. Instead, as the court explained, the harm came from how the copper company's actions "threaten damage on so considerable a scale to the forests and vegetable life, if not to health, within the plaintiff state." *Id.* at 239-40. The issue facing the court was not whether the copper company had an obligation to avoid harming others. Instead, the key inquiry was twofold. First, whether there was sufficient harm to the State of Georgia itself such that it could bring the suit. Second, whether the state was entitled to an injunctive remedy as opposed to monetary damages.

The harm articulated was an "injury to [Georgia] in its capacity of quasi-sovereign." *Id.* at 237. The state's harm was not a destruction to one identifiable location. Instead, Georgia asserted that the copper company was threatening vast swaths of natural resources on such a large scale that it challenged the quasi-sovereign right to let these resources be free from destruction by transboundary harms. This was not to say that only such sovereign interests are

recognizable. Rather, it clarified that traditional notions of trespass and nuisance play out in different ways against sovereign entities with their own rights to the entirety of the land.

The rights of sovereigns are particularly important for the calculation of remedies. The *Tennessee Copper* Court noted that cases of this sort between private parties ordinarily yields monetary damages rather than specific performance. However, "It is not lightly to be required to give up quasi-sovereign rights for pay; and, apart from the difficulty of valuing such rights in money, if that be its choice it may insist that an infraction of them shall be stopped." *Id.* at 237. There was no question that the copper company polluted or that this pollution caused environmental harms throughout Georgia. If this pollution destroyed the entirety of a private citizen's farm, there is no question that they had suffered a harm of property damage and were entitled to seek relief under doctrines of trespass or nuisance. The real question was what harms were experienced by the State itself, particularly considering that it "owns very little of the territory alleged to be affected." *Id.* Thus, the introduction of harms against quasi-sovereign resource rights emerged, not as a new principle, but as a new articulation of nuisance and trespass principles, particularly in terms of how sovereigns can be harmed, as applied to the unique nature of sovereign entities.

VI. No Fifth Amendment Substantive Due Process Cause of Action is Available for Failure to Protect the Global Atmospheric Climate.

A. The global atmospheric climate is not part of the public trust

The public trust doctrine broadly asserts that certain natural resources are held in trust by the sovereign, to be maintained for the public's benefit. The exact scope of the doctrine varies from state to state. For example, the Washington Supreme Court described the doctrine as originally applying to "The title to lands under tide waters in the sea, arms, and inlets thereof, and in tidal rivers, within the realm of England, was by the common law deemed to be vested in

the king, as a public trust, to subserve and protect the public right to use them as a common highway for commerce, trade, and intercourse." *City of New Whatcom v. Fairhaven Land Co.* 24 Wash. 493, 499. Over time, the state interpreted it to cover the "public's right to navigation and the incidental rights of fishing, boating, swimming, waterskiing, and other related recreational uses of public waters." *Citizens for Responsible Wildlife Management v. State* 124 Wash.App 566, 569. While other states vary in their articulation of the rule, the common underpinning is that it applies to land and water that lies in the physical domain of the sovereign.

By its very nature, the *global* atmospheric climate cannot be part of the public trust. As the above cases illustrate, a key feature of public trust resources is that they are physically within one territory. Imagine a river stretched all the way from northeast Maine (point *A*) to southeast California (point *B*). A Californian could not claim that point *A* of the river falls within the public trust of California, because point *A* does not reside in California. Point *A* constitutes an external resource which cannot be managed by the state, for the interests of its own citizens or otherwise. Likewise, if point *B* was made completely inaccessible to all humans, a citizen of Maine could not lodge a public trust complaint with the state of Maine. Unlike parcels of land or bodies of water, the global atmospheric climate is, at all times, *global*. It is not under the dominion of one sovereign, nor can its condition be secured or controlled by any one sovereign. It acts as an ocean which at all times brushes against the territory of *every* sovereign. Unlike the ocean, however, there is no "shoreline" or "high-low tide" to cleanly mark the point at which the sovereign may control the resource for the public benefit. The global climate is certainly a resource for all citizens, but it is never under the control of any one sovereign.

B. The Public Trust Doctrine does not apply to the federal government

Even if the global atmospheric climate is part of the public trust, the entire public trust doctrine is not applicable to the federal government. The Supreme Court has noted that "At

common law, the title and the dominion in lands flowed by the tide were in the king for the benefit of the nation . . . Upon the American Revolution, these rights, charged with a like trust, *were vested in the original states* within their respective borders, subject to the rights surrendered by the constitution to the United States." *Shively v. Bowlby* 152 U.S. 1, 57 (1894) (emphasis added). However, the resources in the public trust are "subject always to the paramount right of congress to control their navigation so far as may be necessary for the regulation of commerce with foreign nations and among the states." *Illinois Cent. R. Co. v. State of Illinois* 146 US 387, 435 (1892). The resources of each state are held in trust by that state for the use and benefit of the people. However, the public trust itself is subordinate to federal control.

C. The Fifth Amendment does not require government protection from private parties

The district court correctly found that the Due Process clause does not compel the government to protect the rights of individuals from private parties. *DeShaney* 489 U.S. 189. In *DeShaney,* a young boy's parents divorced and a Wyoming court granted custody to his father. *Id.* at 191. Within the next two years, the state of Wisconsin (where the DeShaney's now resided) received numerous reports, including several from hospital staff, of suspected child abuse at the hands of Mr. DeShaney. *Id.* at 192-93. Despite these reports, the state continued returning the child back to his father. *Id.* This continued until Randy DeShaney beat his 4-year-old son into a coma and caused permanent, debilitating brain damage. *Id.* at 194. The plaintiffs argued that the county department of social services had violated the child's due process rights because they knew or should have known that he was in grave danger while in his father's care and yet they did nothing to remove him. There was no dispute as to whether the department knew or should have known, or their ability to intervene. *Id.* The issue was that there existed no constitutional obligation to do so. The Supreme Court held that "nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens

against invasion by private actors. The Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security. . . its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means." *Id.* at 195.

As the lower court aptly notes, Flood's claim is essentially that "the United States government failed to prevent harms caused by private parties – the production, sale, and combustion of fossil fuels in the U.S. market." R. at 10. This is precisely the kind of claim which the *DeShaney* Court rejected. Even if the federal government holds the atmospheric climate in a public trust, the Fifth Amendment does not compel the government to prevent harms caused by private parties, even where the government knows or has reason to know of that harm.

The Ninth Circuit's "government-created danger" exception should not be adopted because it is overly broad. See *L.W. v. Grubbs* 974 F.2d 119 (9th Cir. 1992). In *Grubbs*, the Ninth Circuit articulated the rule from *DeShaney* that there is no general affirmative government obligation to protect against third party harms. *Id.* at 121. The court then clarified that "This general rule is modified by two exceptions: (1) the "special relationship" exception; and (2) the "danger creation" exception." *Id.* The Ninth Circuit contends that the former applies to situations where the state has incapacitated a person or committed them such that they are unable to protect their own interests. The latter, by contrast, applies where a person's liberty may not be restrained, but the government created the danger to which the plaintiff was exposed. The Ninth Circuit concludes this by drawing upon language in *DeShaney* which states "[the state] played no part in [the danger's] creation, nor did it do anything to render him any more vulnerable to them." *Deshaney* 489 U.S. at 201. The suggestion, according to the *Grubbs* court, is that the

Supreme Court implied that relief would be available if the government *had* played a part in creating the danger, even absent any special relationship to the individual harmed.

A special relationship must exist for there to be a Substantive Due Process claim. *See. DeShaney* 489 U.S. at 200. In *DeShaney*, the Supreme Court was hesitant to promulgate an overly broad rule allowing for an onslaught of Due Process claims. The Court noted that "in certain *limited circumstances* the Constitution imposes upon the State affirmative duties of care and protection with respect to *particular individuals*." *Id.* at 198 (emphasis added). It clarified, however, that "The affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from *the limitation which it has imposed on his freedom to act on his own behalf*." *Id.* at 200 (emphasis added). It is affirmative actions like taking a person into custody, or committing them to a facility against their will, that invokes affirmative obligations because the state has targeted that individual and impaired their ability to self-protect these interests.

Other circuits have declined to follow the Ninth Circuit. *See Pinder v. Johnson* 54 F.3d 1169 at 1175 (4th Cir. 1995) ("Pinder was never incarcerated, arrested, or otherwise restricted in any way. Without any such limitation imposed on her liberty, *DeShaney* indicates Pinder was due no affirmative constitutional duty of protection from the state); *Beltran v. City of El Paso* 367 F.3d 299 at 307 (5th Cir. 2004) (finding that *DeShaney* requires a "special relationship" for there to be an affirmative government duty). Plaintiffs in the present case assert that the government has had a role in the diminishing quality of global environmental resources and that this constitutes a substantive due process violation against all individuals impacted in some way. R. at 3. The explicit language of *DeShaney* warns against such broad readings. The Court emphasized that there is, as a standard rule, absolutely no affirmative obligation to protect

individuals and that those obligations may exist only as an uncommon exception to the general rule. These uncommon exceptions may only emerge where that special relationship forms between the state and the individual, such that the individual's ability to act for themselves is inhibited. To hold otherwise would suggest that the government is now liable to all citizens for any policy determination which may lead to general social harms felt on the individual level.

The Ninth Circuit's "government-created danger" exception does not apply. *See Penilla v. City of Huntington Park,* 115 F.3d 707 (9th Cir. 1997). In *Penilla*, police officers responded to a call that a man was sitting on his porch and needed emergency medical attention. They assessed the caller and found that he was in dire need of medical attention. The officers cancelled the request for paramedics that had previously been placed, broke open the caller's front door, carried him inside, and locked the door shut behind them, leaving him to die alone overnight. The officers claimed qualified immunity from suit, and argued that, under *DeShaney*, there was no Due Process violation because they had not caused the man's death. *Id.* The court disagreed. The Ninth Circuit found that "The officers in this case allegedly took affirmative actions that significantly increased the risk facing Penilla . . . by cancelling the 911 call, removing Penilla from public view, and locking the front door, the officers made it impossible for anyone to provide emergency medical care to Penilla. And they allegedly did so *after* they had examined him and found him to be in serious medical need." *Id.* at 710 (emphasis in original). The key issue for the *Penilla* court was that government actors identified a person who needed emergency help and then affirmatively acted in a way that they knew would, and did, increase the risks.

The claims here allege an entirely different kind of state action. Officers in *Penilla* immediately knew both the serious need of the caller and the risks they would create by removing him from view and cancelling emergency services. There is no one precise moment

when the United States government can be said to "know" the risks of atmospheric climate damage from specific greenhouse gasses, especially given that even the scientific community's understanding of these issues is constantly developing. Moreover, the facts here do not suggest that the government was aware of these risks when they affirmatively acted such as by constructing the interstate highway system or creating tax subsidies for energy development.

Furthermore, *DeShaney* and *Penilla* revolve around instances where the government has prevented a person from helping themselves or accessing help. In *Penilla*, a huge part of the danger created by the government was that "the officers made it impossible for anyone to provide emergency medical care to Penilla." *Id.* at 710. These are instances where the State has deprived them of their own liberty to care for themselves.

CONCLUSION

For the reasons stated above, the United States asks this Court to: (1) dismiss all the plaintiffs' claims as nonjusticiable political questions; (2) affirm the District Court's finding that while the *Trail Smelter* Principle is indeed customary international law, and while the alien tort statute would support a claim against a U.S. domestic corporation, the Clean Air Act displaces air pollution claims sounding in international tort and federal common law; and, (3) affirm the District Court's finding that Flood has failed to state a viable claim under the Fifth Amendment.

Respectfully submitted,

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Team 30
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