# 2019 JEFFERY G. MILLER
# PACE NATIONAL ENVIRONMENTAL LAW
# MOOT COURT COMPETITION

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT
C.A. No. 18-000123

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

v.

HEXONGLOBAL CORPORATION,
*Appellee*,

*and*

THE UNITED STATES OF AMERICA,
*Appellee*,

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT FOR NEW UNION ISLAND
NO. 66-CV-2018

Brief of THE UNITED STATES OF AMERICA,
Appellee

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## JURISDICTIONAL STATEMENT

The District Court for New Union had jurisdiction pursuant to 28 U.S.C. § 1331. Jurisdiction in the District Court was undisputed. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291 which grants the United States Courts of Appeals jurisdiction over "appeals from all final decisions of the district courts of the United States." Since the parties appeal the District Court of New Union's judgment, which is a final order disposing of the claims, this Court has jurisdiction.

## STATEMENT OF THE ISSUES

1. The Alien Tort Statute (hereinafter "ATS"), allows federal courts to hear "any civil action by an alien for a tort only, committed in violation of the law of nations." 28 U.S.C. § 1350. The text and purpose of the ATS are inclusive of domestic corporate liability. Circuit Courts overwhelmingly allow domestic corporate ATS liability, and the Supreme Court has not held otherwise. Apa Mana (hereinafter "Mana"), an alien, brought a tort claim for a violation of the Law of Nations. May a federal court hear Mana's claim?

2. The Supreme Court has held that specific, universally recognized, and obligatory norms of international law are enforceable as the law of nations under the ATS. The *Trail Smelter* Principle is specific and definable, recognized by over 150 nations, and an obligatory norm of international law. Is the *Trail Smelter* Principle enforceable as the "Law of Nations" under the ATS?

3. International law requires the United States to remedy their violations of customary international law. The *Trail Smelter* Principle is customary international law that requires the United States. to ensure that activities within the United States. do not damage other nations. The United States may enforce customary international law within the United States. Pursuant to the *Trail Smelter* Principle may the United States impose obligations on a domestic non-governmental actor that is damaging another nation?

4. Because the ATS is a jurisdictional statute and does not create causes of action, claims under the ATS must be based in federal common law. The Supreme Court has held that where Congress addresses a question previously governed by federal common law, the federal common law is displaced by the statute. The *Trail Smelter* Principle imposes liability for transboundary air pollution. The Clean Air Act (hereinafter "CAA") speaks

directly to the issue of air pollution and greenhouse gas emissions. Is the *Trail Smelter* Principle displaced by the CAA?

5. Courts may not answer political questions. One indication that a political question exists is if the issue is dedicated to another branch of government. International and national climate change policy has been dedicated to the Executive. Do the Appellants' law of nations claim under the ATS and public trust claim related to climate change present non-justiciable political questions?

6. The Fifth Amendment substantive due process clause ensures citizens protection of life, liberty, and property. In *DeShaney*, the Supreme Court held that the substantive due process clause cannot be used to hold the United States liable for actions of private parties. Noah Flood (hereinafter "Flood") seeks to hold the United States liable for the actions of HexonGlobal Corp (hereinafter "HexonGlobal"), a private party, through the substantive due process clause. Is there a cause of action based on the substantive due process clause for harm to the atmosphere caused by greenhouse gas (hereinafter "GHG") emissions?

## STATEMENT OF THE CASE

This is an appeal from the District Court for New Union granting both HexonGlobal's and the United State's motion to dismiss for failure to state a claim upon which relief can be granted. Appellants Organization of Disappearing Island Nations (hereinafter "ODIN"), Mana, and Flood assert claims against Appellees HexonGlobal, a United States corporation incorporated in New Jersey, and the United States based on the ATS and the United States Constitution. Record (hereinafter "R") at 3. These claims focus on emissions from the petroleum fuels sold by HexonGlobal, and the United State's alleged failure to prevent climate change related harm.

The District Court for New Union dismissed all of the Appellants' claims in its order dated August 15th, 2018. The District Court found that Appellants failed to state a claim upon which relief could be granted. R. at 10–11. The District Court held that *Trail Smelter* claims were displaced by CAA GHG regulations. R. at 9. It also held that there had been no Fifth

Amendment due process violation. R. at 11. ODIN, Mana and Flood timely appealed the District Court's order and assert that the District Court dismissed their claims in error.

## STATEMENT OF FACTS

Appellants are Mana, Flood, and ODIN. R. at 3. Mana is an alien residing on A'Na Atu, an island nation in the East Sea. *Id*. Flood, a United States citizen, resides on New Union Island, which is a possession of the United States. *Id*. Both Mana and Flood are members of ODIN. Appellee HexonGlobal is "the surviving corporation resulting from the merger of all the major United States oil producers," and is responsible for 32% of United States fossil fuel related GHG emissions. R. at 5. HexonGlobal operates refineries around the world, with one located on New Union Island. Appellee the United States, like every industrialized nation, emits GHGs. The United States regulates domestic GHG emissions through a variety of sources including statutory and administrative regulatory schemes. R. at 6.

The United States acknowledges the threat posed by anthropogenic climate change and has taken steps to regulate domestic GHG emissions. Following the Supreme Court's decision in *Massachusetts v. EPA*, 49 U.S. 497 (2007), which held that GHGs qualify as "air pollutants" under the CAA, the Environmental Protection Agency (hereinafter "EPA") began implementing GHG regulations. What started with the "Endangerment Finding" under the CAA eventually led to a comprehensive body of regulations addressing emission rates for vehicles and power plants. *See* 74 Fed. Reg. 66,496 (Dec. 15, 2009); 75 Fed. Reg. 25,324 (May 7, 2010); 80 Fed. Reg. 64,662 (Oct. 23, 2015). The United States, in restructuring its regulatory policies, revised some GHG regulations by repealing the Clean Power Plan, and proposing a new regulatory scheme for GHG based fuel economy standards through the Safer Affordable Fuel-Efficient Vehicles Rule. *See* 83 Fed. Reg. 44,746 (Aug. 31, 2018); 83 Fed. Reg. 42,986 (proposed Aug. 24, 2018).

A'Na Atu and New Union are both "low-lying islands with a maximum height above sea level of less than three meters." R. at 4. Both Appellants' homes are located in areas less than one-half meter above sea level. *Id.* The Appellants have suffered damage to their properties from storms, seawater intrusion into their drinking water wells, and a loss of ocean productivity. R. at 5. Appellants assert that their respective islands will become uninhabitable "unless action is taken to limit emissions of greenhouse gases." R. at 3–4. As such, appellants seek to hold HexonGlobal responsible for the GHG emissions induced by the sale of its petroleum products that contribute to climate change, and the United States responsible for an alleged lack of measures to prevent climate change.

## STANDARD OF REVIEW

The District Court's dismissal under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted is reviewed de novo. First, the Court must accept as true all well-pleaded facts, but not conclusory statements. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 679.

## SUMMARY OF THE ARGUMENT

This Court should affirm the New Union District Court's dismissal of the Appellants' claims for the following reasons.

First, the Court should hold that ATS claims may be brought against domestic corporations. The ATS' text, purpose, and case law indicate domestic corporations are valid ATS

defendants. The ATS states "[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 ATS' text does not suggest domestic corporations are excluded from ATS jurisdiction. Additional, the ATS has jurisdiction over domestic corporations because immunity for domestic corporations would harm foreign relations and harming foreign relations is contrary to the ATS' purpose. The Supreme Court has not immunized domestic corporations from ATS liability. *See Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1407 (2018); *Kiobel v. Royal Dutch Petro. Co.*, 569 U.S. 108, 114 (2013). The overwhelming majority of Circuit Courts allow ATS liability for domestic corporations. Therefore, this Court should hold domestic corporations are within the jurisdiction of the ATS.

Second, the Court should determine that the *Trail Smelter* Principle is a recognized principle of customary environmental law enforceable as the law of nations under the ATS. The *Trail Smelter* Principle has become customary international law over the past century. This is reflected by international arbitration decisions, multilateral treaties, and international law texts and treatises.

Third, assuming this Court holds the *Trail Smelter* Principle is customary international law, this Court should also hold the *Trail Smelter* Principle imposes obligations enforceable against non-governmental actors. International law requires a State to remedy violations of the Law of Nations (i.e., customary international law) occurring within its borders. *See e.g.*, U. N. Charter art. 2 ¶¶ 2–3. International law also requires the United States ensure remedies for *Trail Smelter* violations. 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) [hereinafter "Rio Principle 2"]. Importantly, the federal

government has the power to enforce violations of international law. Therefore, the *Trail Smelter* Principle imposes enforceable obligations against non-governmental actors via the federal government. This Court should hold the *Trail Smelter* Principle imposes obligations enforceable against non-governmental actors.

Fourth, the Court should affirm the District Court's disposition of Mana's claim on the grounds that the *Trail Smelter* Principle is displaced by the CAA. The Supreme Court held, in the context of both air and water pollution, that "when Congress addresses a question previously governed by a decision rested on federal common law" the federal common law is displaced by that Congressional action. *Am. Elec. Power Co. v. Conn.*, 564 U.S. 410, 426 (2011). This Court should follow the precedent of other federal courts in holding that the CAA speaks directly to GHG emissions and displaces the federal common law, including the *Trail Smelter* Principle. As a result this Court should dismiss Mana's ATS claim.

Fifth, the Court should dismiss Mana's law of nations claim under the ATS and Flood's public trust doctrine claim because they are non-justiciable political questions. Courts are prohibited from answering questions that are "in their nature political," and "submitted to the executive." *Marbury v. Madison*, 5 U.S. 137 (1803). International climate change policy is submitted to the executive as evidenced by multiple international agreements, including the Paris Climate Accords. National climate change policy is addressed by the CAA and EPA regulations. The Court should refrain from assessing the United State's approach to climate change policy and dismiss Appellants' claims as non-justiciable political questions.

Sixth, the Court should dismiss Flood's Fifth Amendment substantive due process claim because it attempts to hold the United States liable for actions of private parties - an approach the Supreme Court rejected in *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S.

189 (1989). In addition, there is no fundamental right to a healthy and stable environment, and the public trust doctrine cannot provide that right for Flood. Lastly, the public trust doctrine is a matter of state law that has historically applied to waters and lands beneath navigable waters. Flood's proposal would stretch the public trust doctrine farther than any court has been willing to accept. Flood's substantive due process claim, through the public trust doctrine, should be dismissed.

## ARGUMENT

### I. ATS CLAIMS MAY BE BROUGHT AGAINST DOMESTIC CORPORATIONS.

The ATS states "[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 ATS permits alien plaintiffs to bring actions against domestic corporations because 1) the ATS' text and purpose are inclusive of domestic corporate liability, 2) the Supreme Court has not precluded domestic corporate ATS liability, and 3) Circuit Courts overwhelmingly allow domestic corporate ATS liability. Therefore, this Court should hold ATS claims may be brought against domestic corporations.

#### A. Immunity for Domestic Corporations is Contrary to the Plain Language and Purpose of the ATS.

The ATS's jurisdiction has narrow limitations designed to protect foreign relations. *See* 28 U.S.C. § 1350; *see also Kiobel v. Royal Dutch Petro. Co.*, 569 U.S. 108, 121 (2013). These limitations do not include immunity for domestic corporations. *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1419 (2018) ( "The text, history, and purpose of the ATS, as well as the long and consistent history of corporate liability in tort, confirm that tort claims for law-of-nations violations may be brought against corporations under the ATS.") (Sotomayor, J., dissenting).

Domestic corporations may be held liable for ATS claims. This is particularly true when corporate liability does not harm foreign relations and involves United States' interests. *Kiobel*, 569 U.S. at 124–25.

Statutory interpretation begins with the text of the statute. *Allison Engine Co.* v. *United States ex rel. Sanders*, 553 U. S. 662, 668 (2008). The ATS states "[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. Congress expressly limited ATS plaintiffs to "aliens", but did not limit defendants. Moreover, the ATS does not distinguish among classes of defendants. *See Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 438 (1989); *see also Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 748 (9th Cir. 2011) ("The ATS contains no such language. . . to suggest that corporate liability was excluded."). The ATS contains four elements, 1) any civil action, 2) brought by an alien, 3) for a tort, 4) committed in violation of the law of nations or a treaty of the United States.[1] None of these elements prohibit corporate liability. Rather, there is a presumption of domestic corporate liability because plaintiffs are limited to "aliens" while defendants are not limited. If Congress had intended to limit defendants it could have done so explicitly, similar to its limitation on plaintiffs.

Statutes should be interpreted according to the purpose and intent of Congress. *Moskal v. United States*, 498 U.S. 103, 117 (1990); *Director v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 135–36 (1995) (explaining statutes should be interpreted liberally to achieve their purpose). The ATS' purpose is improving foreign relations by allowing aliens access to

[1]*See* Brief for the United States as Amicus Curiae Supporting Neither Party at 23, Jesner v. Arab Bank, PLC, 138 S. Ct. 1386 (2018) (No. 16-499) ("A 'Civil Action' Against A Corporation Under The Alien Tort Statute May Be Premised On A 'Tort In Violation Of The Law Of Nations.'").

judicial remedies through United States courts. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 716–17 (2004) (noting the court's inability to punish defendants who violated the Laws of Nations during the Marbois-Longchamps incident prompted Congress to pass the ATS). Congress recognized granting federal jurisdiction to aggrieved foreign plaintiffs benefits foreign relations by allowing legal redress for injuries caused by domestic defendants. *Jesner*, 138 S. Ct. at 1406 ("The ATS was intended to promote harmony in international relations by ensuring foreign plaintiffs a remedy . . . where the absence of such a remedy might provoke foreign nations to hold the United States accountable."); *see also* Emmerich de Vattel, *The Law of Nations, Or Principles of the Law of Nations, Applied to the Conduct and Affairs of Nations and Sovereigns* 300 (Liberty Fund ed., 2008) (originally published 1758) ("The sovereign who refuses to cause a reparation to be made of the damage caused by his subject or . . . to deliver him up, renders himself . . . an accomplice . . . and becomes responsible."). The legislative history does not indicate that Congress intended to preclude domestic corporate liability from ATS actions. *See Sarei* 671 F.3d at 748; *c.f.* (*Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 41 (D.C. Cir. 2011) ("[W]e establish that corporate liability is consistent with the purpose of the ATS, with the understanding of agency law in 1789 and the present, and with sources of international law.").

Immunizing domestic corporations from ATS liability would harm foreign relations. For the ATS to serve its purpose, foreign plaintiffs must have access to United States courts for damages caused by domestic corporations. Holding otherwise would create an ATS liability loophole that would incentivize law of nations violations by domestic corporations. If such a loophole existed, foreign nations could hold the United States accountable for the actions of domestic corporations. This is particularly true given domestic corporations are the engine of the United States economy. Therefore, ATS immunity for domestic corporations would be viewed as

the United States placing its economic interests above the law of nations. This would strain diplomatic relations because foreign nations could characterize the United States as an accomplice in law of nations violations. Congress passed the ATS to avoid this type of diplomatic tension. Allowing ATS immunity for domestic corporations would exacerbate diplomatic tensions, and run contrary to the purpose of the ATS. This Court should hold domestic corporations are not immune from being held liable under the ATS.

### B. Supreme Court Precedent Preserves ATS Liability for Domestic Corporate Defendants.

In the last five years, the Supreme Court had two opportunities to prohibit ATS claims against corporate defendants in *Jesner*, 138 S. Ct. at 1386 and *Kiobel*, 569 U.S. at 108. In each case, the Court carefully limited its holding to preserve domestic corporate liability. *Jesner*, 138 S. Ct. at 1390 (reasoning that concerns over impacts to international relations precluded ATS claims against foreign corporations only); *Kiobel*, 569 U.S. at 124–25 (articulating a "touch and concern" requirement that displaces the presumption against extraterritoriality and creates an actionable ATS claim against a corporate defendant). If the Supreme Court interpreted blanket ATS prohibitions against corporate liability, the Court would have ruled that way in either *Kiobel* or *Jesner*. Rather, the Supreme Court carefully preserved ATS liability for domestic corporations. Given that the ATS' text and purpose indicate jurisdiction over domestic corporations, and the Supreme Court did not hold otherwise, ATS claims may be brought against domestic corporations.

#### *1. Jesner v. Arab Bank Preserved ATS liability Against Domestic Corporations by Precluding ATS Liability for Foreign Corporations Only.*

In 2018, the Supreme Court preserved ATS liability against domestic corporations by holding that only foreign corporations were precluded as ATS defendants. *Jesner*, 138 S. Ct. at

1407. In *Jesner*, foreign petitioners filed an ATS suit against Arab Bank, one of the largest financial institutions in the Middle East and a major component of the Jordanian economy. *Id.* at 1394. Petitioners alleged Arab Bank enabled terrorist act by transferring funds to terrorist organizations. *Id.* at 1394–95. The Court established a bright-line rule by holding the ATS did not grant federal courts jurisdiction over foreign corporations. *Id.* at 1408. The Court reasoned separation of powers principles restricted the jurisdiction of federal courts over foreign corporations because ATS claims against foreign corporation would likely strain diplomatic relations. *Id.* For example, Jordan's amicus brief described *Jesner* as a "direct affront to its sovereignty," and "risks destabilizing Jordan's economy and undercutting one of the most stable and productive alliances the United States has in the Middle East." Brief for The Hashemite Kingdom of Jordan as Amicus Curie Supporting Respondent at 5, *Jesner*, 138 S. Ct. 1386 (No. 12-1485)). The Court explained "[t]he political branches, not the Judiciary, have the responsibility and institutional capacity to weigh foreign-policy concerns." *Jesner*, 138 S. Ct. at 1403. Importantly, the Court limited its holding to foreign corporations only. *Id.* at 1408.

*2. Kiobel Preserved ATS Liability Against Domestic Corporations by Intentionally Not Addressing the Issue.*

In *Kiobel*, Nigerian petitioners living in the United States filed an ATS claim against foreign oil companies for alleged aiding and abetting Nigerian government's human rights abuses. *Kiobel*, 569 U.S. at 114. The Supreme Court granted certiorari to determine whether corporations could be held liable under the ATS, but ultimately left that issue unresolved. *Id.*, (affirming the lower court's dismissal based on a presumption against extraterritoriality). Reasoning that the facts of the case did not "touch and concern" the United States "with sufficient force to displace the presumption against extraterritorial application," the Court did not address the corporate liability issue. *Id*. at 124–25. *Kiobel* held that ATS claims brought by

foreign plaintiffs against foreign defendants for actions that took place wholly in a foreign nation are precluded by the presumption against extraterritoriality under most circumstances. However, this holding does not preclude ATS claims against domestic corporations.

### C. Circuit Courts Overwhelmingly Allow ATS Claims Against Domestic Corporations.

The Fourth, Seventh, Ninth, Eleventh and D.C. Circuits allow domestic corporate liability in ATS claims.[2] Further, the Ninth Circuit reasoned that status as a domestic corporation was itself enough to overcome a *Kiobel*-like presumption against extraterritoriality. *Mujica v. AirScan Inc.*, 771 F.3d 580, 594 (9th Cir. 2014) (cert. denied, 136 S. Ct. 690 (2015)). The Second Circuit is the only Circuit Court with a bright-line rule prohibiting ATS liability against domestic corporations. The Second Circuit reasoned, "customary international law has steadfastly rejected the notion of corporate liability for international crimes, and no international tribunal has ever held a corporation liable for a violation of the law of nations." *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 120 (2d Cir. 2010) aff'd on other grounds, 569 U.S. 108 (2013). *Contra Id.* at 153 (Leval, J., concurring)) ("No principle of domestic or international law supports the majority's conclusion that the norms enforceable through the ATS . . . apply only to

[2] *See* Stephen P. Mulligan, The Alien Tort Statute (ATS): A Primer n. 164 (2010) ("Doe I v. Nestle USA, Inc., 766 F.3d 1013, 1021-22 (9th Cir. 2014), reh'g en banc denied, 788 F.3d 946 (2015), cert. denied, 136 S. Ct. 798 (2016); Doe VIII v. Exxon Mobil Corp., 654 F.3d 11, 57 (D.C. Cir. 2011), vacated on other grounds, 527 Fed.Appx. 7 (D.C. Cir. 2013); Flomo v. Firestone Nat. Rubber Co., 643 F.3d 1013, 1021 (7th Cir. 2011); Romero v. Drummond Co., 552 F.3d 1303, 1315 (11th Cir. 2008). See also Al Shimari v. CACI Premier Tech., Inc., 758 F.3d 516, 530-31 (4th Cir. 2014) (holding that an ATS claim against a corporate defendant sufficiently "'touch[ed] and concern[ed]' the territory of the United States" based on, among other things, the corporate defendant's "status as a United States corporation"). In addition, the Fifth Circuit appeared to implicitly assume that the ATS allows jurisdiction over corporations in Beanal v. Freeport-McMoran, Inc., although it ultimately dismissed the claims against the corporate defendants on other grounds. See 164, 164-68 (5th Cir. 1999) (dismissing ATS claims against corporate defendants for failure to plead sufficient facts in support of the claims without addressing whether defendants' corporate status makes ATS liability categorically unavailable).").

natural persons and not to corporations, leaving corporations immune from suit and free to retain profits earned."). Notably, the Supreme Court did not expressly agree the Second Circuit's reasoning in *Kiobel*. *Kiobel*, 569 U.S. at 124–25. Instead, the Court preserved domestic corporate liability by applying the presumption against extraterritoriality to its holding rather than corporate liability. *Id.* Therefore, the Court did not adopt the Second Circuit's reasoning. Even the Second Circuit itself is wary of its precedents, and acknowledges that its rule against domestic corporate ATS liability is an aberration. *In re Arab Bank, PLC Alien Tort Statute Litig.*, 808 F.3d 144, 151 (2d Cir. 2015) ("[T]here is a growing consensus among our sister circuits. . . on the issue of corporate liability under the ATS . . . [our precedent] now appears to swim alone against the tide."). This court should join the overwhelming majority of Circuits by refusing to immunize domestic corporations from ATS liability.

## II. The *Trail Smelter* Principle is a Recognized Principle of Customary International Law Enforceable as the "Law of Nations" Under the ATS.

The ATS is a jurisdictional statute in the sense that it only addresses the power of courts to entertain certain claims and does not create statutory causes of action for aliens. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 713–114 (2004); *Kiobel*, 621 F.3d at 125. The Supreme Court's ruling in *Sosa* set forth specific limitations on the causes of action contemplated by, and thus actionable under, the ATS. In *Sosa*, the Supreme Court held that conduct that violates specific, universally recognized, and obligatory norms of international law is actionable under the ATS. *Sosa*, 542 U.S. at 732. Violations of international law can be actionable under the ATS when based upon international norms with no "less definite content and acceptance among civilized nations than the 18th-century paradigms familiar" when the ATS was enacted. *Id.* at 732 (citing *U.S. v. Smith*, 18 U.S. 153, 163–80 (illustrating the specificity with which the law of nations defined piracy)). Because the *Trail Smelter* Principle, establishing liability for transboundary environmental harm,

meets the standard set forth in *Sosa*, this Court should hold that it is a recognized principle of customary international law and thus actionable under the ATS.

### A. The *Trail Smelter* Principle's Prohibition on Transboundary Environmental Harm is Sufficiently Universal to be Considered Customary International Law.

While plaintiffs bringing a claim for a violation of customary international law under the ATS need not demonstrate unanimity on the world stage regarding the norm at issue, they must show "a general recognition among states that a specific practice is prohibited." *Filartiga v. Pena-Irala*, 630 F.2d 876, 888 (2d Cir. 1980). This showing demonstrates that the norm has obtained the "general assent of civilized nations," through which a custom may grow "into a settled rule of international law." *The Paquete Habana*, 175 U.S. 677, 694 (1900). The acceptable practices of war underwent a "slow and silent, but very substantial migration" throughout the 19th century from a set of customary practices to "part of the law of nations." *Id.* at 694 (quoting Discourse on the Law of Nations, 38; 1 Miscellaneous Works, 360.) The *Trail Smelter* Principle, i.e. the recognition of international liability for significant transboundary environmental harm, took a similar path over the course of the 20th century. Through a series of international arbitration decisions, multilateral treaties, customary practices and international recognition, the ancient common law maxim *sic utere tuo ut alienum non laedas*, ("one should not do harm to another person's property") has found its way into international law and become part of the law of nations. Kiss and Shelton, *International Environmental Law*, 180–82 (3d ed. 2004); *see also International Water Law: The Contributions of Western United States Water Law to the United Nations Convention on the Law of the Non-Navigable Uses of International Watercourses*, 15 Duke J. Comp. & Int'l L. 333, 336 (2005).

Liability for substantial transboundary environmental harm has been recognized since at least 1941 when an international tribunal held that harms to agricultural interests in the United

States caused by air pollution emissions from a smelter in British Columbia were a violation of international liability principles. *Trail Smelter Arbitration*, 3 R.I.A.A. 1965 (1941). The *Trail Smelter* tribunal determined that "under principles of international law as well as the law of the United States" no State has the right to use or permit the use of its territory in a way that causes "injury by fumes in or to the territory of another" where the case is "of serious consequence and injury is established by clear and convincing evidence." *Id.* This has become known as the *Trail Smelter* Principle. The United States and 112 other nations came together and recognized this principle through the Declaration of the 1972 Stockholm Conference on the Human Environment, which stated in Principle 21 that "States have, in accordance with . . . the principles of international law . . . the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or areas beyond the limits of national jurisdiction." U.N. Conference on the Human Environment, Stockholm, *Declaration of the United Nations Conference on the Human Environment* 5, U.N. Doc. A/CONF.48/14.Rev.1 (June 16, 1972) [hereinafter "Stockholm Principle 21"]. Officials from both the United States and Canada viewed Stockholm Principle 21 as codifying the *Trail Smelter* Principle. *See* Wade Rowland, *The Plot to Save the World: The Life and Times of the Stockholm Conference on the Human Environment* 99–100 (1973) (quoting statements of Canada and the United States). This has been reaffirmed by 190 nations in Principle 2 of the 1992 Rio Declaration on Environment and Development, and by 166 nations through the multilateral treaty stemming from the United Nations Convention on the Law of the Sea ("UNCLOS"). U.N. Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397, 478 (stating that "States shall take all measures necessary to ensure that activities under their jurisdiction are so conducted as not to cause damage by pollution to other States and their environment."). Despite

the fact that the United States was not a party to UNCLOS, the district court in *Sarei v. Rio Tinto, PLC*, 221 F.Supp.2d 1116, 1161 (C.D. Cal. 2002), recognized that UNCLOS "appears to represent the law of nations" under the ATS. (*rev'd on other grounds by Sarei v. Rio Tinto, PLC*, 550 F.3d 822 (9th Cir. 2008)). The *Trail Smelter* Principle has been recognized by the International Court of Justice, Gabcikovo-Nagymaros Project (Hungary-Slovakia), Judgement, 1997 I.C.J. Rep. 88, ¶ 53 (Sep. 25), which acknowledged that a nation's obligation to "ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law." Restatement (Third) of Foreign Relations Law § 601(Am. Law Inst. 1987) also acknowledges the *Trail Smelter* Principle. The wide recognition of the *Trail Smelter* Principle on the international stage, evidenced by a variety of sources, supports finding that it is sufficiently universal to be considered customary international law.

### B. The *Trail Smelter* Principle's Prohibition on Transboundary Environmental Harm is Specific and Definable.

Plaintiffs seeking to pursue a claim based on the present-day law of nations under the ATS must show that the international norm at issue is "defined with a specificity comparable to the features of the 18th-century paradigms" recognized in *Sosa* (violations of safe conducts, infringement on the rights of ambassadors, and piracy). 542 U.S. at 724. While an international norm must be defined with specificity, it need not be defined to the point of having a single definition or one that eliminates all ambiguity. International law is inherently general, hence the focus on "norms" rather than one specific authority. The Supreme Court in *Sosa* cited *U. S. v. Smith*, 18 U.S. 153 (1820) to illustrate the level of specificity required. *Id.* at 732. In *Smith*, the Court recognized that piracy "is defined by the law of nations with reasonable certainty" despite the fact that there were a "diversity of definitions" of piracy because certain core aspects of

piracy are universally acknowledged. 18 U.S. 153 at 160–61. Core aspects of the obligation to prevent substantial transboundary environmental harms in the territory of other nations are similarly acknowledged and defined with specificity.

It is not the position of the United States that every instance of international transboundary environmental harm violates international law. The *Trail Smelter* Principle is applicable only to substantial environmental harm, which the tribunal characterized as "of serious consequence," where the injury is "established by clear and convincing evidence." 3 R.I.A.A. 1965 (1941). This clarification is crucial in that it imposes a limiting principle on this international norm, making it both specific and definable. These core aspects of the *Trail Smelter* Principle have become part of the law of nations. This is evidenced by the fact that, like the *Trail Smelter* tribunal, the U.N. General Assembly, the Restatement, and the ICJ all specifically require transboundary harm to be significant for international liability to arise. U.N. General Assembly Resolution 2995, Co-operation Between States in the Field of the Environment, Dec. 15, 1972; Restatement (Third) of Foreign Relations Law § 601 (Am. Law Inst. 1987); *Gabcikovo-Nagymaros Project* (1997). This liability threshold "excludes minor incidents causing minimal damage," further defining the norm. Restatement (Third) § 601 cmt. c. (1987). Meanwhile, the "clear and convincing" causation requirement makes the *Trail Smelter* Principle specific in that it is not concerned with claims, like Mana's in this case, where the causation is attenuated. The harm alleged in Mana's claim is just as likely to have been caused by GHG emissions in Detroit as by emissions in Moscow. The *Trail Smelter* Principle is specific in that it deals with significant, localized, environmental harms that are clearly caused by a discrete act (or acts) of pollution.

## III. A STATE THAT IS LIABLE FOR *TRAIL SMELTER* VIOLATIONS DUE TO ACTS OF A NON-GOVERNMENTAL ACTOR MUST IMPOSE OBLIGATIONS ON THAT NON-GOVERNMENTAL ACTOR TO STOP TRANSBOUNDARY HARM.

International law requires a State to remedy violations of the Law of Nations (i.e., customary international law) occuring within the State's borders. *See e.g.*, U. N. Charter art. 2 ¶¶ 2–3 ("All Members… shall fulfill in good faith the obligations assumed by them in accordance with the present Charter…. All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered."). Moreover, International law requires the United States ensure remedies for *Trail Smelter* violations. *See* Principle 21; Principle 2 ("States have... the responsibility to ensure that activities within their jurisdiction or control do not cause damage ... beyond the limits of national jurisdiction."). Importantly, the federal government has the power to "punish… Offenses against the Law of Nations." U.S. Const. art. I, § 8. Therefore, the *Trail Smelter* Principle imposes enforceable obligations against non-governmental actors via the federal government. If the *Trail Smelter* Principle did not impose obligations enforceable against non-governmental actors then the United States, without additional statutory authority (e.g., the CAA), could not prevent a non-governmental entity from "use[ing State] territory in such a manner as to cause injury by fumes in or to the territory of another." *Trail Smelter*, 3 R.I.A.A. at 1965. Rather, the *Trail Smelter* Principle requires a State to impose obligations on the non-governmental entity by requiring the non-governmental entity stop the transboundary harm, with or without supplemental authority such as the CAA. *See* Principle 2. For these reasons the *Trail Smelter* Principle imposes obligations enforceable against non-governmental actors.

## IV. Mana's Claim Based on the *Trail Smelter* Principle Under the ATS is Displaced by GHG Regulation Under the CAA.

The district court was correct in determining that Mana's claim under the ATS is displaced by GHG regulation under the CAA. In reaching this conclusion, the court noted that the ATS creates jurisdiction to hear tort claims based on the international law of nations, which must be considered claims arising under federal common law. R. at 9. Though the *Trail Smelter* Principle regarding international transboundary environmental harm is a recognized principle of customary international law otherwise enforceable under the ATS, Mana's claim fails because the CAA displaces claims under the federal common law for air pollution from GHG emissions. R. at 9 (citing *Am. Elec. Power Co.*, 564 U.S. at 410).

The test for whether an act of Congress has displaced a particular area of federal common law is whether Congress has enacted a statute that "speaks directly" to the question at issue. *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978). It is true that "post-*Erie*, federal common law includes both the general subject of environmental law" and "specifically includes ambient or interstate air and water pollution." *Native Village of Kivalina v. ExxonMobil Corp.* 696 F.3d 849, 855 (9th Cir. 2012). However, in the context of both air and water pollution, the Supreme Court held that "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." *City of Milwaukee v. Illinois* 451 U.S. 304, 314 (1981); *Am. Elec. Co.*, 564 U.S. at 426. Following the Supreme Court's holding in *Massachusetts v. EPA*, 549 U.S. 497 (2007), it cannot be denied that the CAA speaks directly to the regulation of GHG emissions.

In *Massachusetts v. EPA*, the Supreme Court held that carbon dioxide and other GHGs qualify as "air pollutants" and are thus potentially subject to federal regulation under section 202(a)(1) of the CAA, 42 U.S.C. § 7521. *Massachusetts*, 549 U.S., at 528–29. There, the Court

stated that EPA had not acted "in accordance with law" in denying a rulemaking petition seeking controls on emissions from new motor vehicles. *Id.* at 534–535. Following that decision, the EPA began taking steps to implement GHG regulations. This led to the "Endangerment Finding" under the CAA, 74 Fed. Reg. 66,496 (Dec. 15, 2009), which set the stage for regulatory action regarding GHG emissions. Following the Endangerment finding, the EPA commenced joint rulemaking with the National Highway Transportation Agency to set emission rates for vehicles, 75 Fed. Reg. 25,324 (May 7, 2010), and implemented various measures to curb carbon dioxide emissions from power plants, including the "Clean Power Plan," 80 Fed. Reg. 64,662 (Oct. 23, 2015). Appellants take issue with the fact that, under the current administration, the EPA has proposed regulations which would change many of the agency's previous efforts to regulate GHGs under the CAA. This includes the Safer Affordable Fuel-Efficient (SAFE) Vehicle Rule for Model Years 2021–2026 Passenger Cars and Light Trucks, which would freeze emissions reductions under the greenhouse gas-based fuel economy standards, as well as the EPA's repeal of the Clean Power Plan. 83 Fed. Reg. 42,986 (proposed Aug. 24, 2018) (to be codified at 49 C.F.R. pts. 523, 531, 533, 536, & 537); 83 Fed. Reg. 44,746 (Aug. 31, 2018). However, these proposed regulatory changes have no bearing on whether the CAA has displaced the common law because the focus of the displacement doctrine is not whether administrative action rooted in the executive branch has displaced the common law but whether Congress has done so by enacting a statute that speaks to the issue. *Mobile Oil Corp.*, 436 U.S. at 625.

Legislative displacement of federal common law "does not require 'the same sort of evidence of a clear and manifest purpose' demanded for preemption of state law" because it is the primary duty of Congress to set national policy "in areas of special federal interest." *Am. Elec. Power Co.*, 564 U.S. at 424 (quoting *Milwaukee*, 451 U.S. 304 at 317). As the Supreme

Court noted in *Am. Elec. Power Co*., the "critical point is that Congress delegated to EPA the decision whether and how to regulate carbon-dioxide from power plants; *the delegation is what displaces federal common law*." U.S. 564, at 426 (emphasis added). There, the Court went as far as saying that, because the CAA displaced regulation of GHGs from power plants, even if EPA were to "decline to regulate carbon-dioxide emissions altogether" at the conclusion of its then-ongoing rulemaking under 42 U.S.C. § 7411, the federal courts would have no warrant to "upset the agency's expert determination" by employing the federal common law. *Id.* The regulatory changes currently underway are the product of precisely the type of "expert determination" by the EPA that the Court was referring to in *Am. Elec. Power Co.*, 564 U.S. at 426. While subject to a plaintiff's challenge, and potentially judicial reversal, under 42 U.S.C. § 7607(d)(9)(A) (if arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law), such regulatory action does not change the fact that Congress, through the CAA, has displaced the federal common law regarding air pollution via GHG emissions.

Appellant Apa Mana's claim differs from that of the plaintiffs in *Kivalina* (that sought damages for past emissions), and *Am. Elec. Power Co.* (that sought an abatement of current emissions) in the sense that Mana's claims focus on emissions resulting from Appellee HexonGlobal's *production and sale of* fossil fuels rather than HexonGlobal's actual *combustion* of fossil fuels. R. at 9. This presents a slightly different context for the applicability of the displacement doctrine. However, this focus on the sale of fossil fuels should not lead to a different application of the displacement doctrine than in *Am. Elec. Power* or *Kivalina*. The harm alleged in this instance, harm caused by HexonGlobal's contribution to climate change, is still a harm caused by fossil fuel emissions. The crux of Appellants' complaint focuses on the fact that "HexonGlobal (and its corporate predecessors) are responsible for 32% of the United States'

cumulative fossil fuel-related greenhouse gas emissions, or six percent of global historical emissions . . . [and] nine percent of global fossil fuel related emissions." R. at 5. The actual sale of fossil fuels (a tanker of oil, for example), does result in emissions stemming from the extraction and transportation of those fuels. However, the emissions incident to HexonGlobal's extraction or transportation of fossil fuels is not what Mana's claims take issue with. It is a harm from emissions resulting from the combustion of those fuels that is at issue here; and such claims have been deemed squarely displaced by the CAA in both *Kivalina* and *Am. Elec. Power*. *See also, County of San Mateo v. Chevron Corp.*, 294 F.Supp.3d 934, 937 (N.D. Cal. 2018) (finding plaintiffs' claims that defendant's contributions to greenhouse gas emissions constitute "a substantial and unreasonable interference with public rights'" to be displaced by the CAA under *Kivalina*). Though Appellants' have utilized a different jurisdictional avenue (the ATS) to pursue their claims, and directed their focus toward Appellee's sale of fossil fuels rather than Appellee's emissions, they cannot circumvent these decisions. As the District Court noted while granting the motion to dismiss, two other district courts hearing similar claims against multinational oil and gas companies have recently reached the same conclusion. R. at 9. Both courts held that the plaintiffs' federal common law claims for nuisance and trespass based on domestic GHG emissions from fuel sold by defendants were displaced by the CAA. To the extent the plaintiffs sought to hold the defendants liable for emissions outside of the United States, these claims were barred by the presumption against extraterritoriality and the need for "judicial caution" as these claims interfere with the separation of powers and foreign policy. *City of New York v. BP P.L.C.*, 325 F.Supp.3d 466, 474–75 (S.D.N.Y. 2018); *City of Oakland v. BP P.L.C.*, 325 F.Supp.3d 1017 (N.D. Cal. 2018). Therefore, this Court should hold the CAA displaces the *Trail Smelter* Principle.

## V. Appellants' Law of Nations and Public Trust Claims Present Non-Justiciable Political Questions.

The Supreme Court has placed limits on justiciability of claims, one of which is that courts may not answer political questions. "The nonjusticiability of political questions is primarily a function of the separation of powers." *Baker v. Carr*, 369 U.S. 186, 210 (1962). The doctrine prohibits courts from answering questions that are better suited for other branches of government. In *Marbury v. Madison*, 5 U.S. 137 (1803), Chief Justice Marshall wrote, and the majority held "[q]uestions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court."

The Appellants' Law of Nations and Public Trust Doctrine claims are nonjusticiable political questions. Both are "in their nature political," and "submitted to the executive." *Marbury v. Madison*, 5 U.S. 137 (1803). At their worst, the Appellants' claims seek to have the Court affirmatively create environmental and energy policy, a task that is unambiguously within the purview of the political branches of the United States government. At their best, the Appellants' claims are asking the Court to assess the entirety of the United State's approach to GHG emission regulation and climate change control, which is also unambiguously within the purview of the political branches. Because the Appellants' claims are political in their very nature, this Court should affirm the District Court's holding that they are nonjusticiable.

### A. Mana's Law of Nations Claim is a Non-Justiciable Political Question.

"The political branches, not the Judiciary, have the responsibility and institutional capacity to weigh foreign-policy concerns." *Jesner*, 138 S. Ct. at 1403. Climate change is a global issue that must be addressed by not just the United States, but other countries as well. Given that solving climate change is a global issue that is addressed by the United States through

the Executive, and HexonGlobal is a domestic corporation with refineries in many countries, Mana's law of nations claim should be dismissed as a political question.

In *City of New York v. BP P.L.C.*, 325 F.Supp.3d 466 (S.D.N.Y 2018), claims similar to Mana's were raised. The plaintiffs in *City of New York* bought nuisance and trespass claims against BP, an international oil producer. The claims were based on emissions from fossil fuel combustion. The court determined both that the CAA displaced federal common law claims, and that the plaintiff's claims were political questions that if answered by courts "would severely infringe upon the foreign-policy decisions that are squarely within the purview of the political branches of the U.S. Government." *Id*. at 476. The court recognized that the claims based on climate change implicate foreign policy concerns that are addressed by many nations. "[T]he immense and complicated problem of global warming requires a comprehensive solution that weighs the global benefits of fossil fuel use with the gravity of the impending harms." *Id*. at 475–76. The court dismissed plaintiff's claims because they were nonjusticiable political questions. *Id.*

Like the plaintiffs in *City of New York*, Mana seeks to hold HexonGlobal and the United States government responsible for GHG emissions from fossil fuel combustion. Mana's claims ask the Court to assess foreign policy considerations that are entrusted to the Executive. The United States has entered into various international agreements to address the harmful effects of climate change. *See e.g.* Paris Agreement to the United Nations Framework Convention on Climate Change, opened for signature Apr. 22, 2016, U.N. Doc. FCCC/CP/2015/L.9 (Dec. 12, 2015). Because climate change is a global issue that involves weighing foreign policy concerns, this Court should find that Mana's claim is non-justiciable in nature, and properly dismissed by the district court.

### B. Flood's Public Trust Claim is a Non-Justiciable Political Question.

Flood asks the Court to weigh in on important questions of federal policy related to climate change and regulation of GHGs with his public trust claim. He asks the court to declare that the United States is violating its public trust duties by alleged insufficient regulation of the atmosphere. However, questioning federal climate policy is not within the powers of the Court under Article III of the United States Constitution. Climate policy is dedicated to the Executive and Legislative branches, and has been exercised by those branches in the past. For example, Congress has enacted the CAA, the EPA has addressed emissions through various regulations, and the President has signed treaties with other countries limiting emissions internationally. When it comes to creating national and international climate change policy, Congress and the Executive are "surely better equipped to do the job than individual district judges issuing ad hoc, case-by-case injunctions. Federal judges lack the scientific, economic, and technological resources an agency can utilize in coping with issues of this order." *Am. Elec. Power Co.,* 564 U.S. at 428. Because Flood's public trust claims are political questions and would interfere with established separation of powers principles, they should be dismissed by this Court.

## VI. No Cause of Action Exists Against the United States Based on Fifth Amendment Substantive Due Process for Alleged Failure to Protect the Global Atmospheric Climate System from Disruption Due to the Production, Sale, and Burning of Fossil Fuels.

Flood seeks to assert claims against the United States Government based on the Fifth Amendment due process clause, through the public trust doctrine. R. at 10. More specifically, Flood argues that he has a "fundamental due process right to a healthy and stable climate system, and seeks to support this right by relying on public trust principles." *Id*. He argues that the United States has failed to protect the global climate system due to the production, sale, and burning of fossil fuels by private parties. Flood's claims against the United States are not for

emissions produced by the United States, but rather for federal programs that he claims "promote" fossil fuels. *Id*. at 6.

The District Court correctly dismissed Flood's Fifth Amendment claim. The United States Government respectfully requests this Court to affirm the District Court's dismissal of Flood's Fifth Amendment claims based on the following arguments. First, the Supreme Court rejected a fundamental due process right to protection from private parties in *DeShaney*. Because Flood seeks to hold the United States liable for the actions of HexonGlobal, a private party, his claim must be dismissed. Second, the Supreme Court has recognized that there is no fundamental due process right to a healthy and stable environment. Third, any United States action with respect to HexonGlobal did not "create danger" for Flood or any other citizen. Therefore, the United States cannot be held liable under the "danger creation" exception to *DeShaney*. Fourth, even if the Court finds a fundamental due process right to a healthy and stable climate system, the public trust doctrine is state-based and cannot be applied to compel federal action. Fifth, even if the Court finds both a fundamental due process right to a healthy and stable environment and that the public trust doctrine can be used to compel federal government action, the public trust has been found to compel government action only with respect to water, and lands beneath navigable waters. Because Flood seeks to apply the public trust doctrine to the atmosphere, an approach that has been rejected by courts throughout the nation, his claim must be dismissed.

**A. There is No Substantive Due Process Right to Protection from Private Parties.**

The Fifth Amendment's substantive due process clause states that no person shall be "deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. This amendment has been generally understood to prohibit deliberate decisions on the part of the government to deprive citizens of life, liberty, or property without due process of law. *U.S. v.*

*Crouch*, 854 F.3d 1497, cert. denied 519 U.S. 1076 (Tex. 1996). While the Fifth Amendment's due process clause protects citizens from *government* action that infringes on life, liberty, or property, it has not been understood to protect citizens against similar invasion by *private* actors. *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189 (1989). The Supreme Court in *DeShaney* found that the due process clause "forbids the State itself to deprive individuals of life, liberty, or property without 'due process of law,' but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means." *Id*. at 195. Moreover, the Court found that the clause limits the State's power to act but does not "guarantee . . . minimal levels of safety and security." *Id*.

The United States recognizes the ill effects of climate change and has taken a proactive role in reducing the effect of climate change on its citizens. While the United States recognizes climate change is a problem that must be addressed, it cannot be held liable for actions of private parties. *DeShaney*, 489 U.S. at 195. Flood claims that the United States failed to prevent climate change related harms caused by private party action, in this case by HexonGlobal. This argument is an attenuated way of attempting to hold the United States liable for the actions of private parties. Because precedent counsels against an attempt to hold the United States liable in this manner, this Court should dismiss Flood's Fifth Amendment claims.

Moreover, policy strongly counsels against holding the United States accountable for the ill-effects of climate change. Climate change is a global phenomenon, contributed to by every country which emits GHGs. Many of these GHGs are emitted because of the combustion of fossil fuels. It is true that the United States has contributed, through private actors, to climate change. However, since climate change is a global challenge, it must be resolved by global

efforts. The Executive Branch is entrusted with responsibility over foreign policy, including international efforts to combat climate change, as evidenced by the Paris Accords. *See* Paris Agreement to the United Nations Framework Convention on Climate Change, opened for signature Apr. 22, 2016, U.N. Doc. FCCC/CP/2015/L.9 (Dec. 12, 2015). The judiciary is not the correct branch of government to address climate change and as such, this Court should affirm the dismissal of Flood's claims.

### B. There is No Fundamental Due Process Right to a Healthy and Stable Environment.

The due process clause requires that there be a fundamental right for the United States Government to protect. However, the range of interests protected by due process is not infinite. *See McFarland v. United States*, 517 F.2d 938 (U.S. Court of Claims, 1975). Protected rights include access to courts, equal protection, freedom from torture, privacy, and many others. While the due process clause protects many fundamental rights, the right to a healthy and stable environment is not one of them.

Courts have consistently rejected that the due process clause confers on citizens a fundamental right to be free from environmental harm. In *Lake v. City of Southgate,* 2017 WL 767879 (E.D. Mich. 2017), the court enumerated many cases rejecting such a "fundamental" right and affirmed that the due process clause does not encompass the right to a clean environment. *See, e.g., Ely v. Velde,* 451 F.2d 1130, 1139 (4th Cir. 1971) (holding that there is no constitutional right to a healthful environment); *SF Chapter of A. Philip Randolph Inst. v. U.S. EPA*, 2008 WL 859985, at *7 (N.D. Cal. Mar. 28, 2008) (rejecting asserted rights to be free from climate change pollution and to have a certain quality of life); *In re Agent Orange Prod. Liab. Litig.*, 475 F. Supp. 928, 934 (E.D.N.Y. 1979) ("[T]here is not yet any constitutional right ... to be free of the allegedly toxic chemicals involved in this litigation."); *Pinkney v. Ohio EPA*,

375 F. Supp. 305, 310 (N.D. Ohio 1974) ("[T]he Court is unable to rule that the right to a healthful environment is a fundamental right under the Constitution."); *Tanner v. Armco Steel Corp.*, 340 F. Supp. 532, 537 (S.D. Tex. 1972) ("[N]o legally enforceable right to a healthful environment, giving rise to an action for damages, is guaranteed by the Fourteenth Amendment or any other provision of the Federal Constitution.").

Appellants cite *Juliana v. United States*, 217 F.Supp.3d 1224 (D. Or. 2016) for the proposition that the Fifth Amendment recognizes a fundamental right to a healthy and stable environment. The United States notes that *Juliana* is not controlling or binding on this Court. The *Juliana* court erred, and significantly deviated from prior precedent in finding a substantive due process right in the environment.

Moreover, if this Court decides to follow the *Juliana* decision, the facts of Flood's claims against the government are markedly distinguishable from the claims alleged against the government in *Juliana*. The *Juliana* court recognized a fine distinction between the facts before it, and previous cases rejecting a fundamental right to a healthy and stable climate. In *Juliana*, the plaintiffs alleged that:

> "the government has caused pollution and climate change on a catastrophic level, and that if the government's actions continue unchecked, they will permanently and irreversibly damage plaintiffs' property, their economic livelihood, their recreational opportunities, their health, and ultimately their (and their children's) ability to live long, healthy lives. Echoing *Obergefell*'s reasoning, plaintiffs allege *a stable climate system is a necessary condition to exercising other rights to life, liberty, and property." Id*. at 1250. (emphasis added).

Therefore, the *Juliana* court recognized that it needed to "provide some protection against the constitutionalization of all environmental claims," and that in order to allege a due process violation, the complaint must allege that "government action is affirmatively and substantially damaging the climate system in a way that will cause human deaths, shorten human lifespans,

results in widespread damage to property, threaten human food sources, and dramatically alter the planet's ecosystem." *Id*. Flood's assertion of a "fundamental right" does not meet this lofty standard. He merely asserts the right to a "healthy and stable" environment. Therefore, his complaint fails to allege a fundamental right which the United States failed to protect.

**C. The "Danger Creation" Exception to *DeShaney* Does Not Apply.**

Courts have recognized limited exceptions to the *DeShaney* prohibition on claims against the government for private harm for special relationships with citizens, and "danger creation" by the government. *DeShaney*, 489 U.S. at 200. Since a special relationship does not exist between Flood and the United States, Flood alleges that the "danger creation" exception applies. The "danger creation" exception permits a substantive due process claim when "affirmative conduct on the part of a state actor places a plaintiff in danger, and the [government] acts in deliberate indifference to that plaintiff's safety." *Penilla v. City of Huntington Park*, 115 F.3d 707, 710 (9th Cir. 1997).

Danger creation precedent holds that affirmative action on the part of the government that "independently created the opportunity for and facilitated" the alleged harm is necessary to substantiate a due process claim. *L.W. v. Grubbs*, 974 F.2d 119, 122 (9th Cir. 1992). Danger creation cases are generally predicated on serious harm to plaintiffs. *DeShaney* involved a father brutally beating his child. 489 U.S. at 192. A social worker had previously suspected the father of beating his child but had not removed the child from his custody. *Id. Grubbs* involved a violent rape and assault of a nurse by a young male at a correctional institution. 974 F.2d at 120. The correctional officers knew of the offender's violent history of assaulting women yet allowed him to be in the same room as the plaintiff anyway. *Id.* In *Penilla*, officers found a gravely ill man on his porch, took him inside his home, cancelled an ambulance that was on the way, and

left. 115 F.3d at 708. The man was found dead the next day. *Id.* All of these cases presented tragedies that were caused in part by the government's failure to act after recognizing danger to a citizen. Flood cannot allege a similar failure on the part of the United States with respect to its alleged failure to adequately address GHG emissions.

Flood's claims are not comparable to those previously considered under the danger creation exception. The United States did not have knowledge of the ill effects of climate change until after fossil fuels had been combusted for decades. If the United States did not know of the danger of fossil fuel combustion, it could not protect citizens from it. Ever since the United States discovered the dangers of climate change, it has proactively attempted to curb the impact on citizens. Congress enacted the CAA to address pollution of the atmosphere, and the EPA has enacted regulations to reduce GHG emissions from power plants and vehicles. Moreover, the United States did not "independently create[] the opportunity for and facilitate[]" harm from GHGs, as climate change is undisputedly a global issue contributed to by every industrialized country. *Grubbs*, 974 F.2d at 122. The United States did not act with the "deliberate indifference" required for the danger creation exception to apply. *Penilla*, 115 F.3d at 710.

### D. The Public Trust Doctrine is State-Based and Cannot be Used to Compel Federal Action.

Flood argues that the public trust doctrine, through the Fifth Amendment due process clause, confers a right to sue the government for alleged failure to regulate the production and burning of fossil fuels that have damaged the environment. This is a novel claim that must be dismissed as a matter of law.

"The public trust doctrine can be traced back to Roman civil law, but its principles are grounded in English common law on public navigation and fishing rights over tidal lands." *Alec L. v. Jackson*, 863 F.Supp.2d 11, 13 (D.C. Cir. 2012). The public trust doctrine has been applied

to individual states to vest them with responsibility to hold lands under navigable waters in trust for the people of each individual state. In the landmark case of *Illinois Cent. R. Co. v. State of Illinois*, 146 U.S. 387, 435 (1892), the Supreme Court found that "[i]t is the settled law of this country that the ownership of and dominion and sovereignty over lands covered by tide waters, within the limits of the several states, belong to the respective states within which they are found." The *Illinois Cent. R. Co.* case has been understood by courts as establishing the basis of the public trust doctrine in state law, not federal common or statutory law. The United States Supreme Court confirmed this proposition by recently holding that "the public trust doctrine remains a matter of state law" in *PPL Montana, LLC v. Montana*, 565 U.S. 576, 603 (2012). The *PPL* Court further noted that "the contours of the public trust doctrine do not depend on the Constitution." *Id*. at 604.

In *Jackson*, 863 F.Supp.2d at 11, the D.C. Circuit considered facts similar to Flood's. The plaintiffs in *Jackson* brought an action against the federal government seeking both injunctive and declaratory relief, alleging that the government failed to reduce GHG emissions in violation of the public trust doctrine. *Id*. at 12. The court dismissed the plaintiff's claims, primarily because it found that the public trust doctrine could not be used to compel federal action. *Id.* at 17. The court cited *PPL*'s holding that the public trust doctrine does not apply to the federal government and dismissed the plaintiff's claims for failure to raise a federal question to invoke jurisdiction. *Id.* at 13.

Flood's claims against the United States are very similar to the plaintiff's in *Jackson*. He alleges that the federal government failed "to take effective action to control greenhouse gas emissions." R. 10. Because the Supreme Court and lower federal circuit courts have disposed of

any argument that the public trust doctrine applies to the federal government, the District Court in this case properly dismissed Flood's claims.

*1. Any Federal Public Trust Doctrine Claims Have Been Displaced by the CAA.*

Should the court find that the public trust doctrine applies to the federal government and creates a federal common law claim, which the United States asserts would be contrary to the binding precedent laid down in *PPL*, the Supreme Court has also found that the CAA displaces all federal common law claims. In *Am. Elec. Power Co.*, 564 U.S. 410 (2011), the Supreme Court unambiguously held that "the Clean Air Act and the EPA actions it authorizes displace any federal common law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired power plants." Since the CAA "speaks directly" to emissions of carbon dioxide, the Supreme Court "[saw] no room for a parallel track" rooted in federal common law. *Id*. at 425. Because all federal common law claims to regulate emissions have been affirmatively displaced by the CAA, any federal common law public trust claim rooted in a claim in clean air must also be found to be displaced. Since Flood and other Appellants in the present action base all their claims on emissions from HexonGlobal, their claims are based on emissions and clean air. Their claims must be dismissed.

**E. The Public Trust Doctrine Only Applies to Water and Lands Beneath Navigable Waters. The Doctrine Has Never Been Used to Compel Government Regulation of the Atmosphere.**

If this Court finds that Flood may assert a federal common law public trust doctrine, and that the federal common law has not been displaced by the CAA, which the United States argues is a departure from established precedent, Flood's claims must be dismissed as a matter of law because the public trust doctrine does not apply to the atmosphere.

The public trust doctrine is widely understood to apply to water and lands beneath navigable waters. Courts have imposed restrictions on state government action, and compelled state governments to protect these assets. *See Illinois Cent. R. Co. v. Illinois*, 146 U.S. 387 (1892); *Martin v. Lessee of Waddell*, 10 L.Ed. 997 (1842). Many courts have considered whether the public trust doctrine can be used to compel government regulation of the atmosphere. Courts have resoundingly declined to extend the doctrine to the atmosphere. *See e.g., Sanders-Reed ex rel. Sanders-Reed v. Martinez*, 350 P.3d 1221 (N.M. Ct. App. 2015) ("[C]ourts cannot independently intervene to impose a common law public trust duty upon the State to regulate greenhouse gases in the atmosphere."); *Jackson*, 863 F.Supp.2d at 13 (dismissing plaintiff's public trust claim, and finding that applying the public trust to the atmosphere would be a "significant departure from the doctrine as it has traditionally been applied."). Because the public trust doctrine has not been applied to compel government regulation of the atmosphere, Flood's claims are a significant departure from precedent. As such, the Court should affirm the District Court's dismissal of his due process claim.

## CONCLUSION

For the foregoing reasons, the United States respectfully requests the Court to affirm the district court's order of dismissal.