Team No. 43

C.A. No. 18-000123

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

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

Appellants,

v.

HEXONGLOBAL CORPORATION,

Appellee,

and

THE UNITED STATES OF AMERICA

Appellee.

On Appeal from The United States District Court
For New Union Island

Brief of THE UNITED STATES OF AMERICA

Appellee

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STATEMENT OF JURISDICTION

The United States District Court for New Union Island ("the District Court") has subject matter jurisdiction over appellant Mana's ("Mana") claim under the Alien Tort Statute ("ATS"). See 28 U.S.C. § 1350. HexonGlobal Corporation ("HexonGlobal") has consented to general personal jurisdiction in The District Court. The District Court has subject matter jurisdiction over appellant Flood's ("Flood") claim, as it arises out of a federal question. 28 U.S.C. § 1331. This Court has appellate jurisdiction over The District Court's final decision. See 28 U.S.C. § 1291. Mana and Flood, in conjunction with the Organization of Disappearing Island Nations ("ODIN"), timely filed a Notice of Appeal to this Court.

STATEMENT OF ISSUES

I. May a domestic corporation be a named defendant in an ATS suit?

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

III. Assuming the *Trail Smelter* Principle is customary international law, does it impose obligations enforceable against nongovernmental actors?

IV. If the *Trail Smelter* Principle is otherwise enforceable, is it displaced by the Clean Air Act?

V. Does the Fifth Amendment create a cause of action for an appellant suing the United States—and relying on public trust principles—for the fossil fuel industry's production, sale, and burning of fossil fuels?

VI. Do appellants' claims present non-justiciable political questions?

STATEMENT OF CASE

I. Facts

Greenhouse Gas Emissions and Climate Change. The correlation between global greenhouse gas emissions and climate change has been well documented to show that an increase in anthropogenic greenhouse gas emissions results in rising global temperatures, changing rainfall patterns, and sea level rise. *See Order Granting Def. Mot. Dismiss, Organization of*

Disappearing Island Nations v. HexonGlobal Corp., No. 66CV2018, slip op. at 2 (D.N.U.I. 2018).

Organization of Disappearing Island Nations. ODIN is a not-for-profit membership organization devoted to protecting the interests of island nations threatened by sea level rise. *Id.* at 1. Both A'Na Atu and New Union Islands are low-lying islands located in the East Sea with a maximum height above sea level of less than three meters. *Id.* at 1–2. The effects of anthropogenic greenhouse gas emissions threaten the inhabitability of the populated areas of these low-lying islands. *Id.* Limits on fossil fuel production and combustion would reduce further damage to appellant's properties, maintain the habitability of the populated areas of these low-lying islands, and minimize potential health risks. *Id.*

HexonGlobal Corporation. HexonGlobal is the surviving corporation resulting from a merger of all of the major domestic oil producers. *Id.* HexonGlobal is incorporated in New Jersey, headquartered in Texas and operates refineries throughout the world, including one refinery on New Union Island. *Id.* The greenhouse gas emissions from products sold by HexonGlobal (and its corporate predecessors) are responsible for thirty-two percent of domestic emissions, or six percent of global historical emissions. *Id.*

United States of America. In the last decade, coinciding with domestic regulation of greenhouse gas emissions, United States emissions have decreased overall. *Id.* at 3–5. The United States government has limited fossil fuel production, distribution, and combustion. *Id.* at 4. Acknowledging the threat of climate change, in 1992, the United States signed and ratified the United Nations Framework Convention on Climate Change (UNFCCC) aimed at promoting the stabilization of greenhouse gas concentrations in the atmosphere and encouraging the adoption of domestic policies that limit greenhouse gas emissions. *Id.* Following a United States Supreme Court holding that greenhouse gases were pollutants that were potentially subject to regulation

under section 202(a)(1) of the Clean Air Act, 42 U.S.C. § 7521 (2018), the United States Environmental Protection Agency ("EPA") made a finding (the "Endangerment Finding") that the emission of greenhouse gases and resulting climate change had the potential to endanger the public health and welfare. *HexonGlobal*, slip op at 4. The Endangerment Finding set a regulatory predicate for regulation of greenhouse gas emissions under the Clean Air Act ("CAA"). *Id.* In furtherance of these regulatory measures, the EPA, jointly with the National Highway Transportation Agency, adopted a rule aimed at establishing both fuel economy standards and greenhouse gas emissions rates, and these regulations were subsequently extended in 2012 to require increasingly stringent emissions limitations. *Id.* at 4–5; *See* Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, 75 Fed. Reg. 25,324 (May 7, 2010). Additionally, the EPA issued a rule under the CAA requiring major new sources of greenhouse gases to undergo review to establish more stringent technology-based limits on greenhouse gas emissions. *HexonGlobal*, slip op at 5. The EPA also issued regulations establishing carbon dioxide emissions standards for new power plants, and through the "Clean Power Plan," states were required to implement controls on greenhouse gas emissions from existing power plants. *Id.* In 2015, the President of the United States signed the Paris Agreement and committed to reduce greenhouse gas emissions by 26-28% by 2025, compared to 2005 levels, in an effort to commit the United States and other nations to reduce their future greenhouse gas emissions by an amount independently determined by each signatory nation. *Id.*

II. Procedural History

ODIN, Mana, and Flood brought an action against HexonGlobal and the United States in the District Court. *Id*. at 1. Mana asserted a claim against HexonGlobal under the ATS asserting that defendant's fossil fuel related business activities constituted a violation of the Law of Nations and sought damages and injunctive relief. *Id*. Flood asserted a constitutional claim

against the United States for violations of public trust obligations to protect the global climate ecosystem incorporated through the Due Process Clause of the Fifth Amendment to the Constitution. *Id*. The District Court granted both defendants' motions to dismiss for failure to state a claim for relief. *Id*. Following the issuance of the Order of the District Court dated August 15, 2018, in Civ. 66-2018, ODIN, Ms. Mana, and Mr. Noah Flood filed a Notice of Appeal and now take issue with the District Court's holding that the *Trail Smelter* Principle under the international Law of Nations is displaced by greenhouse gas regulation under the Clean Air Act, and the District Court's refusal to recognize a due Process-based public trust right to governmental protection from atmospheric climate change. *Id*.

SUMMARY OF ARGUMENT

The ATS provides a federal forum to aliens that allege a tort in violation of Law of Nations. 28 U.S.C. § 1350 (2018). A violation of the law of nations must be underlined by a norm of international customary international law that is specific, obligatory, and universal. *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386 (2018). The defendant and their tortious conduct must touch and concern the United States. Id. at 1390; *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 124–25 (2013). *Jesner* did not foreclose domestic corporate liability. 138 S. Ct. at 1390. Subject to vigilant oversight, the door is ajar for judicial discretion to recognize domestic corporate liability in ATS suits and the *Trail Smelter* Principle (prohibition against transboundary harm) as customary international law. The door is also ajar for a court to recognize the Trial Smelter Principle imposes obligations enforceable against nongovernmental actors. Nevertheless, this Court need not approach the door to these difficult questions to affirm the District Court's holding that Mana's claims are displaced by the Clean Air Act.

Assuming the *Trail Smelter* Principle is enforceable, under notions of customary international law as federal common law, the Clean Air Act displaces the Trail Smelter Principle

because it is legislation enacted by Congress that speaks directly to the problem of greenhouse gas emissions and courts have consistently held that federal common law claims relating to greenhouse gas emissions are subsequently precluded. Customary international law is incorporated under the umbrella of federal common law. *See The Paquete Habana*, 175 U.S. 677 (1900). The precedent set by the Supreme Court in *Am. Elec. Power Co., Inc. v. Connecticut* ("*AEP*") establishes that the Clean Air Act and the agency action it authorizes displaces federal common law claims for abatement relating to greenhouse gas emissions. 564 U.S. 410, 423 (2011). Subsequent court decisions have extended that holding to suggest that because greenhouse gas emissions are spoken for in the CAA, other federal common law claims based on greenhouse gas emissions sounding in tort, as well as any remedy they seek, are also displaced. *See Exxon Shipping Co. v. Baker*, 554 U.S. 471, 128 (2008); *Middlesex County Sewerage Authority v. Nat'l Sea Clammers Ass'n.*, 453 U.S. 1, 4 (1981); *Native Village of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849 (2012) ("*Kivalina*").

The United States takes issue with Flood's use of the public trust doctrine as a basis for his assertion that the failure to take effective action to control greenhouse gas emissions, along with its alleged support for fossil fuel production violates a fiduciary obligation and a fundamental right to a healthy and stable climate system. These claims fail to assert a cause of action under the Fifth Amendment to the Constitution for many reasons. First, a fundamental due process right to a healthy and stable climate system is not constitutionally protected because a right to a healthful environment is not stated implicitly or explicitly in the Constitution. *See Pinkney v. Ohio EPA*, 375 F. Supp. 305, 310 (N.D. Ohio 1974). Second, the public trust doctrine has historically been recognized as rooted in state law, where accepted principles of federalism have defined the scope of the trust in relation to a state's sovereign duties. *See PPL Mont., LLC v. Montana*, 565 U.S. 576, 603 (2012). Third, even if the public trust doctrine imposed a

fiduciary duty on the United States, the global climate system is not a common property owned in trust because the public trust doctrine has historically been addressed within the scope of navigable waters and submerged lands beneath tidal waters. *See Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 481 (1988). Finally, as per *Deshaney v. Winnebago Cty. Dep't of Soc. Servs.*, Flood's claim is ineffective because the federal government does not have an affirmative duty to protect all citizens against the production, sale, and combustion of fossil fuels by private parties. 489 U.S. 189, 196 (1989).

The United States also takes issue with Mana's Law of Nations claim under the Alien Tort Statute and Flood's public trust claim because they each independently present a non-justiciable political question. Under *Baker v. Carr*, if any one of six prescribed elements are inextricable from the facts of a case, then dismissal for a non-justiciable political question is proper. 369 U.S. 186, 217 (1962). Mana's Law of Nations claim would require this Court to impede on the delegated authority of other political branches of government in order to unilaterally tackle a global phenomenon such as rising temperatures—a matter in which the United States is not solely responsible for. Additionally, Flood's public trust claim also implicates *Baker* elements because judicial precedent calls for courts not to acknowledge whether a single federal forum has the authority to mandate and supervise relevant policies in regard to maintaining a healthy and stable climate system. *See Alec L. v. Jackson*, 863 F. Supp. 2d 11, 13–14 (D.D.C. 2012), *aff'd sub nom. Alec L. ex rel. Loorz v. McCarthy*, 561 F. App'x 7 (D.C. Cir. 2014). Thus, since Flood and Mana's claims implicitly ask this court to make unprecedented policy considerations, this Court should hold that both appellants' claims present a non-justiciable political question.

STANDARD OF REVIEW

"A dismissal for failure to state a claim is reviewed de novo. All factual allegations in the complaint are accepted as true, and the pleadings construed in the light most favorable to the nonmoving party." *Abagninin v. AMVAC Chem. Corp.*, 545 F.3d 733, 737 (9th Cir.2008) (relying on Fed. R. Civ. P. 12(b)(6)(2018)).

ARGUMENT

I. A DOMESTIC CORPORATION MAY BE A NAMED DEFENDANT IN AN ATS SUIT.

The Alien Tort Statute (ATS) provides, in full: "The 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. This jurisdictional statute does not create a private cause of action, but rather provides a federal forum "for a relatively modest set of actions alleging violations of the law of nations." *Sosa v. Alvarez–Machain*, 542 U.S. 692, 713–714, 720 (2014). The presumption against extraterritoriality applies to ATS suits, thus the defendant and their tortious conduct must "touch and concern" the United States "with sufficient force to displace the presumption against extraterritorial application." *Kiobel* 569 U.S. at 124–25. It follows that foreign corporations are barred from being named defendants in an ATS suit. *Jesner* 138 S. Ct. at 1390. Nonetheless, these Supreme Court decisions have left the door ajar for a plaintiff to bring an ATS suit against a domestic corporation. *See generally Al Shimari,* 320 F. Supp. 3d at 788 (allowing an ATS claim against a domestic corporation to go forward in a post-*Jesner* landscape).

A. Holding Domestic Corporations Liable in ATS Suits Does Not Affront the Spirit of the ATS or the Holding and Reasoning of *Jesner*.

1. The ATS was Enacted to Provide a Federal Forum for Aliens to Sue Americans in American Courts.

The First Congress enacted the ATS in response to foreign ambassadors being slighted in America and having no form of recourse in the American legal system to remedy the

infringement of their rights. *Sosa* 542 U.S. at 717–19, 724. (citing Casto, *The Federal Courts' Protective Jurisdiction over Torts Committed in Violation of the Law of Nations*, 18 Conn. L.Rev. 467, 494, n. 152 (1986) "the federal government [did] not appear . . . to be vested with any judicial Powers competent to the Cognizance and Judgment of such Cases"); Kiobel, 569 U.S. at 120. The result of the ambassador fiascos was the birth of the ATS. *Sosa* at 717. (remedying the Continental Congress' inability to "cause infractions of treaties, or of the law of nations to be punished," J. Madison, *Journal of the Constitutional Convention* 60 (E. Scott ed. 1893)); Kiobel, 569 U.S. at 120; Jesner, 138 S.Ct. at 1397 ("ensur[ing] the availability of a federal forum where the failure to provide one might cause another nation to hold the United States responsible for an injury to a foreign citizen").

Sosa focused on the history of the ATS because the statute was relatively dormant for centuries. *Sosa* at 712 (providing jurisdiction once in over 170 years). *Sosa* came to two findings: 1) the First Congress enacted the ATS as more than a "jurisdictional convenience" to be shelved and await further legislation that might create causes of action and it did not itself "make some element of the law of nations actionable for the benefit of foreigners;" and 2) ATS claims must be based on present-day law of nations "norm[s] of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized." *Id.* at 719–20, 725. (defining the 18th-century paradigms of the law of nations as being "violation of safe conducts, infringement of the rights of ambassadors, and piracy").

Ultimately, the *Sosa* standard is "federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted." *Id.* at 731–32. Simply put, the alleged violation must be "of a norm that is specific,

universal, and obligatory." *Jesner*, 138 S. Ct. at 1390 (citing *Sosa*, 542 U.S., at 732). If an ATS claim is underlined by a proper norm, then a district court must then "determine[] whether allowing the case to proceed under the ATS is a proper exercise of judicial discretion or whether caution requires the political branches to grant specific authority before corporate liability can be imposed." Id., at 732–733, n. 20–21. This standard does not close the door on "further independent judicial recognition of actionable international norms," rather, "the door is still ajar subject to vigilant doorkeeping." *Id.* at 729.

2. The Presumption Against Extraterritoriality Can Be Displaced.

As previously mentioned, the presumption against extraterritoriality can be displaced if the defendant and their actions in question touch and concern the United States with sufficient force. *Kiobel*, 569 U.S. at 124–25; *Jesner*, 138 S. Ct. at 1390. The purpose of the presumption is "to protect against unintended clashes between our laws and those of other nations which could result in international discord." *Kiobel*, 569 U.S. at 115 (citing EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991). Unfortunately, *Kiobel* "[left] for another day the determination of just when the presumption against extraterritoriality might be 'overcome.'" *Kiobel*, 569 U.S. at 131 (Breyer, J., concurring).

Since *Kiobel*, the Supreme Court has developed a two-prong test to apply the presumption against extraterritoriality. *RJR Nabisco, Inc. v. European Cmty.*, 136 S.Ct. 2090, 2101 (2016). A court must first determine "whether the presumption has been rebutted." *Id.* If, like the ATS, the statute does not give a clear, affirmative indication that the statute applies extraterritorially, then it proceeds to the next prong. *Id.* at 2101, n. 5; *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247, 267, n. 9 (2010). A court must then look to the statute's "focus" to determine whether the case involves a domestic application of the statute. *RJR Nabisco*, 136 S.Ct. at 2101.

> If the conduct relevant to the statute's focus occurred in the United States, then the case involves a permissible domestic application even if other conduct occurred abroad; but if the conduct relevant to the focus occurred in a foreign country, then the case involves an impermissible extraterritorial application regardless of any other conduct that occurred in U.S. territory.

Id. Morrison states a cause of action falls outside the scope of the presumption when "the 'focus' of congressional concern under the relevant statute takes place within the United States." 561 U.S. at 2884 (quoting *EEOC*, 499 U.S. at 255). The "focus" of the ATS has yet to be determined by the Supreme Court because it did not need to in *Kiobel*. *See Balintulo v. Daimler AG*, 727 F.3d 174, 191 (2d Cir. 2013) ("[S]ince all the relevant conduct in *Kiobel* occurred outside the United States . . . the Court had no reason to explore, much less explain, how courts should proceed when some of the relevant conduct occurs in the United States").

The Fifth Circuit has held the second prong of the *RJR Nabisco* test requires a court to determine "whether there is any domestic conduct relevant to plaintiffs' claims under the ATS." *Adhikari v. Kellogg Brown & Root, Inc*., 845 F.3d 184, 195 (5th Cir. 2017). Under *RJR Nabisco*, "if the conduct relevant to the statute's focus occurred in the United States, then the case involves a permissible domestic application even if other conduct occurred abroad." *RJR Nabisco*, 136 S.Ct. at 2101.

Two cases have displaced the presumption against extraterritoriality in ATS suits with domestic corporations named as defendants. *See Doe I v. Nestle USA, Inc.*, 766 F.3d 1013 (9th Cir. 2014); *Al Shimari II*, 320 F. Supp. 3d at 781. Both are instructive and persuasive and will be analyzed further in the subsequent discussion.

3. The Supreme Court Carefully Qualified Its Holding and Reasoning in Jesner to Only Exclude Foreign Corporate Liability.

Jesner's question presented was "[w]hether the [ATS] categorically forecloses corporate liability." Pet. for a Writ of Certiorari at i, *Jesner*, 138 S.Ct. 1386. This question was presented to the Supreme Court before in *Kiobel*, yet the court circumvented the question by resolving the case on other grounds. *Id.* at i, 11. The United States maintained, as it does now, that "[c]ourts

may recognize corporate liability in actions under the ATS as a matter of federal common law." Br. for the United States as Amicus Curiae Supporting Petitioners at 7, *Kiobel*, 133 S. Ct. 1659 (No. 10–1491). The circuit courts subsequently split 4–1 on the issue in favor corporate liability in ATS suits. Pet. for a Writ of Certiorari at 14, *Jesner*, 138 S.Ct. 1386.

The Ninth Circuit held international-law norms "that are 'universal and absolute,' or applicable to 'all actors,' can provide the basis for an ATS claim against a corporation." *Nestle*, 766 F.3d 1021–22 (internal citations omitted). Subsequently, the Ninth Circuit held a domestic corporation liable for aiding and abetting child slavery. *Id.* at 1028–29. Judge Posner wrote for a unanimous panel that the Seventh Circuit believes "corporate liability is possible under the Alien Tort Statute." *Flomo v. Firestone Nat. Rubber Co.*, 643 F.3d 1013, 1021 (2011) (holding the ATS insinuates "no objection to corporate civil liability" when violations are "directed, encouraged, or condoned at the corporate defendant's decision-making level"). The Eleventh Circuit has frequently held that "corporate defendants are subject to liability under the ATS." *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1263 (2009); see also *Romero v. Drummond Co.*, 552 F.3d 1303, 1315 (2008) (The ATS "grants jurisdiction from complaints of torture against corporate defendants") (citing *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242 (11th Cir. 2005)). The D.C Circuit also held "corporations can be held liable" under the ATS. *Doe VIII v. Exxon Mobil Corp.*, 654 F.3d 11, 54–57 (2011). The Second Circuit admittedly swam alone as the only circuit to preclude corporate liability in ATS suits. Pet. for a Writ of Certiorari at 14, *Jesner*, 138 S.Ct. 1386 (internal citation omitted). The D.C. Circuit rejected the Second Circuit's holding regarding the ATS and corporate liability, finding it contrary to "the plain text, history, and purpose of the ATS," as well as this Court's precedent. *Exxon Mobil Corp.*, 654 F.3d at 54–57.

Despite the turmoil in the circuit courts and the broad question presented, *Jesner* carefully confined the holding and reasoning to foreign corporations and the role of the political branches in conducting foreign relations. *See generally* 138 S.Ct at 1408. It follows that domestic corporate liability has yet to be barred, the *Jesner* Court itself noted "questions that 'merely lurk in the record are not resolved, and no resolution of them may be inferred.'" 138 S.Ct at n.4 (citing Illinois Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 183, (1979); *accord*, *RJR Nabisco*, 136 S.Ct. at 2108, n. 10 (issue present but unaddressed by the Court in a previous case was not implicitly decided)). While the issue of domestic corporate liability is certainly not resolved, post-*Jesner* courts have upheld suits against domestic corporations because—at least in part—as *Al Shimari* noted,

> The vast majority of the circuits to have considered the question have adopted a rule allowing ATS claims to proceed against corporate defendants . . . and *Jesner*'s careful limiting of the analysis and holding suggests to this Court that the *Jesner* Court did not intend to disturb this status quo with respect to domestic corporations.

Al Shimari, 320 F. Supp. 3d at n. 6. Accordingly, the door is still ajar for domestic corporations to be named defendants in ATS suits, however, the reasons why Mana's claims must fail in the instant case will be analyzed in the subsequent discussion.

II. THE *TRAIL SMELTER* PRINCIPLE IS A RECOGNIZED PRINCIPLE OF CUSTOMARY INTERNATIONAL LAW ENFORCEABLE AS THE "LAW OF NATIONS" UNDER THE ATS.

As a prerequisite, an ATS claim must contain violation of the Law of Nations underlined by a norm of customary international law that is specific, obligatory, and universal. Infra. In determining what norms satisfy the *Sosa* standard—where no controlling U.S. government act or decision concerning the norm exist—a court must look towards international customs, evidenced by jurists, commentators, and judicial tribunals. 542 U.S. at 734 (citing *The Paquete Habana*, 175 U.S. 677, 686 (1900). The principle stemming from the *Trail Smelter* Arbitration can be summed up as a prohibition on transboundary harm. Perre-Marrie Dupuy & Jorge E. Viñuales,

International Environmental Law 55–57 (2015). Principle 21 of the Stockholm Declaration—which the International Court of Justice ("ICJ") has recognized codified customary international law—reflects the *Trail Smelter* Principle. *Id.* The prohibition on transboundary harm is a specific, obligatory, and universal norm of customary international law and thus enforceable as the Law of Nations under the ATS. *See Generally* Ajmel Quereshi, *The Search for an Environmental Filartiga: Trans-Boundary Harm and the Future of International Environmental Litigation*, 56 How. L.J. 131 (2012).

A. Transboundary Harm is a violation of the Law of Nations

As the Supreme court has held, when determining what constitutes the Law of nations, the works of jurists, commentators, and judicial tribunals are not "speculations of their authors concerning what the law ought to be, but [are] trustworthy evidence of what the law really is." *Sosa*, 542 U.S. at 734 (citing *The Paquete Habana*, 175 U.S. at 686). It follows that *Trail Smelter* and its progeny must be analyzed here. *Trail Smelter* stemmed from a dispute between Canada and the Unites State, due to a Smelter's air pollutant emissions that damaged the property of farmers in the state of Washington. 3 R.I.A.A. 1905 (Trail Smelter Arb. Trib. 1941). The arbitral tribunal ultimately reasoned in favor of the United States, reasoning that:

> [U]nder 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 such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.

Id. 1965. The ICJ furthered the Trail Smelter Principle in its Corfu Channel Case (United Kingdom v. Albania), recognizing the existence of "certain general and well-recognized principles, namely . . . every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States." ICJ Reports 1949, p. 4, 22. Principle 21 of the Stockholm Declaration on the Human Environment codified these cases and went beyond the simple idea of transboundary harm in writing 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." United Nations Conference Stockholm, Sweden, 11 I.L.M. 1416, 1420 (June 16, 1972). United States legal scholars then incorporated the principle in their Restatement (Third) of the Foreign Relations Law of the United States, stating in relevant part:

> A [S]tate is obligated to take such measures as may be necessary, to the extent practicable under the circumstances, to ensure that activities within its jurisdiction or control . . . are conducted so as not to cause significant injury to the environment of another state or of areas beyond the limits of national jurisdiction.

Restatement (Third) of the Foreign Relations Law of the United States §601(1) (1987). The international community recognized the *Trail Smelter* Principle again in Principle 2 of the Rio Convention. Rio Declaration on Environment and Development, princ. 2, U.N. Doc. A/CONF.151/26, 31 I.L.M. 874, 876 (June 14, 1992). The ICJ then recognized the codification of *Trail Smelter* in Principle 21 of the Stockholm declaration as the codification of customary international law in its Advisory Opinion on the Legality of Nuclear Weapons. See Viñuales, 55–57 (2015) (citing Legality of the Threat or Use of Nuclear Weapons, ICJ Reports, p. 226 para. 30. (1996)). As being customary international law, it follows that the door is ajar for claims concerning violations of this norm to be brought under the ATS.

1. For ATS purposes, the Prohibition on Transboundary Harm is universal.

For ATS purposes, to satisfy the "universal" requirement, plaintiffs need not show that every nation recognizes a custom, but merely show that the custom has the "general assent of civilized nations." *Filartiga v. Pena-Irala*, 630 F.2d 876, 881 (2d Cir. 1980) (citing *The Paquete Habana*, 175 U.S. 694). Evidence of civilized nations' general assent to the prohibition on transboundary harm can be found in:

> (1) the decisions of numerous American courts; (2) the writings of eminent legal scholars; (3) various regional and trans-regional agreements creating liability for trans-boundary polluters; (4) binding treaties applying the principle in specific environmental contexts; (5) the widespread approval garnered by the Stockholm and Rio Declarations; (6) the common use of environmental impact assessments;

> and (7) the decisions of the International Court of Justice and other international arbitral tribunals.

Quereshi, 56 How. L.J. at 158.

American jurisprudence has shown that the door is ajar concerning transboundary harm being customary international law. *See generally Beanal v. Freeport-McMoran*, Inc., 969 F. Supp. 362, 384 (E.D. La. 1997). While *Beanal* rejected certain international environmental principles, it cited to a legal scholar's suggestion that transboundary harm is probably a viable claim under the ATS and then did not refute that. *Id.* (citing Phillipe Sands, *Principles of International Environmental Law I: Frameworks, Standards and Implementation* 183–18 (1995)). Additionally, and analogously, the Sixth Circuit has noted that "there may be a federal common law of nuisance applicable to injuries by pollution of water or air across state boundaries." *Michie v. Great Lakes Steel Div., Nat'l Steel Corp.*, 495 F.2d 213 (1974). Regional and trans-regional agreements for trans-national polluters also evidence the existence of a customary prohibition against transboundary harm. Quereshi, 56 How. L.J. at 158 (noting that twenty-seven multilateral environmental agreements, two draft multilateral environmental agreements, twenty-six regional environmental agreements, and twenty-six national laws, impose liability for transnational pollution). Binding treaties like the International Convention for the Prevention of Pollution from Ships ("MARPOL") and widely accepted treaties like the United Nations Convention on the Law of the Sea ("UNCLOS") both implement the Trail Smelter Principle in a limited fashion that evidence its wide acceptance in the international community. *Id.* at 148–49 (noting both treaties having signatories of over 130 countries). As aforementioned, the Stockholm and Rio principles have wide acceptance amongst the international community and while they are non-binding and not evidence of customary international law in and of themselves, taken in conjunction with these other factors listed, the declarations act as a buttress to evidence the custom. *Id.* (citing *Amlon Metals, Inc. v. FMC Corp.*, 775 F. Supp. 668, 671

(S.D.N.Y. 1991) (rejecting Principle 21 as evidence of customary international law because the Stockholm Declaration is non-binding). Additionally, the state practice of requiring environmental impact assessments ("EIA") when an action creates "significant effects on the environment outside the geographical borders of the United States," while not creating a cause of action, shows the United States' recognition of the prohibition on transboundary harm. *See* Quereshi, 56 How. L.J. at 145 (citing 42 U.S.C. § 4321 (2006)). As of 2004, over 100 nations require EIAs. Quereshi, 56 How. L.J. at 145. Finally, the ICJ's recognition of the prohibition on transboundary harm as customary international law is additional evidence of the general assent of civilized nations. See *id.* at 154; *see also* Viñuales at 55–57. While none of these factors can stand alone as evidence of customary international law, the door is ajar for a court to reasonably infer that all of the factors taken together are evidence of civilized nations' assent to the prohibition on transboundary harm.

2. For ATS purposes, the Prohibition on Transboundary Harm is specific.

The ATS requires that the prohibition on transboundary harm is defined as specifically as the paradigms of the aforementioned 18th-century torts described by the Supreme Court in *Sosa*. 542 U.S., at 725. Evidence of the prohibition on transboundary harm specificity exists in the language of *Trail Smelter*, ICJ opinions, the Stockholm Declaration, the United Nations International Law Commission ("ILC") opinions, and the requirements for an EIA. *See* Viñuales at 55–57; *see also* 42 U.S.C. § 4321. *Trail Smelter* uses the term "serious consequence," when describing the damage by transboundary pollution. Viñuales at 56. The ICJ, in its recent Pulp Mills case, focused around of a "significant damage to the environment of another State." *Id.* (citing *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, ICJ Reports 2010, p. 14 para. 101). The ILC has also consistently used the term "significant harm." Viñuales at 56 (citing codification efforts by the ILC on the "Law of Non-navigational Uses of International

Watercourses" and the ILC's "Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities").[1] While the Stockholm Declaration simply states damage, it suggests that the magnitude of the damage be based on "criteria such as the likelihood of significant harmful effects on the environment." Viñuales at 56. Lastly, an EIA is triggered when there are "significant effects" on the environment outside of the United States and defines a significant effect as "significant harm to the environment." 42 U.S.C. § 4321. These international decisions and domestic legislation leave the door ajar for a court to reasonably infer that the prohibition on transboundary harm is sufficiently specific for ATS purposes.

3. For ATS purposes, the Prohibition on Transboundary Harm is obligatory.

The ATS requires that the prohibition on transboundary harm is as obligatory as the paradigms of the aforementioned 18th-century torts described by the Supreme Court in *Sosa*. 542 U.S., at 725. Evidence of the obligatory nature of the prohibition on transboundary harm can be found in the United Nations Framework Convention on Climate Change (UNFCCC), the obligations set forth for an EIA, and American jurisprudence governing nuisance suits. *See* Maxine Burkett, *A Justice Paradox: On Climate Change, Small Island Developing States, and the Quest for Effective Legal Remedy*, 35 U. Haw. L. Rev. 633, 654–55 (2013); Quereshi, 56 How. L.J. at 162. The UNFCCC—which has been ratified by the United States—binds its signatories to "achieve . . . stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system." HexonGlobal, slip op at 4 (quoting United Nations Framework Convention on Climate Change, May 9, 1992, 1771 U.N.T.S. 107, 169). Climate change is inherently caused by transboundary

[1] *See United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses*, 21 May 1997, 36 ILM 700 ('UN Convention on Watercourses'), Art. 7(1). 19; *Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities*, 12 December 2001, GA Res. 56/82, UN Doc. A/RES/56/82 ('ILC Prevention Articles'), Art. 2(a).

pollution. *See generally* Burkett, 35 U. Haw. L. Rev. 633. An EIA is required when there is significant harm to the environment outside of the United States, per the statute's repeated usage of the word "shall." 42 U.S.C. § 4321. As aforementioned, the Sixth Circuit has stated that transboundary pollution may be prohibited in nuisance suits. *Michie*, 495 F.2d 213. The international agreements, U.S. legislative action and judicial decision leave the door ajar for a court to reasonably infer that the prohibition against transboundary harm is sufficiently obligatory for the purposes of the ATS.

III. ASSUMING THE *TRAIL SMELTER* PRINCIPLE IS CUSTOMARY INTERNATIONAL LAW, IT MAY IMPOSE OBLIGATIONS ENFORCEABLE AGAINST NONGOVERNMENTAL ACTORS SUCH AS CORPORATIONS.

A. Courts have not foreclosed the possibility of corporate liability in ATS claims against domestic entities.

International law is normally understood to involve disputes between states or nations. But that does not mean that actions against corporations under the ATS are not enforceable. As previously discussed, persons can sue corporations or private entities under the ATS. The dissent in *Jesner* notes that in the actionable claims under *Sosa*, the norms involved do not distinguish between 'natural and juridical persons', in fact they are all referred to as 'private actors'. *Jesner,* 138 S. Ct. at 1415. The earlier notion that a suit can be brought against a private corporation under the ATS would be hollow if it were not *enforceable* or *actionable*.

In this context, the question of enforceability speaks to the potential for *liability,* or more broadly redressability, under the customary international laws invoked in any given ATS claim of this sort. There are varying schools of thought on the question of corporate liability in claims involving customary international law. One approach asserts that enforcement is a matter of procedure or remedy which should be determined by domestic law. *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964) ("Although it is, of course, true that United States courts apply

international law as a part of our own in appropriate circumstances, …. the public law of nations can hardly dictate to a country which is in theory wronged how to treat that wrong within its domestic borders.") (internal citations omitted). Another approach asserts that where an ATS claim is based on customary international law in the substantive sense, the court should turn to that customary international law for questions on liability. *See Sosa* at 724 ("The jurisdictional grant is best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time.").

The court in *Flomo* took the approach that domestic law should supply the remedy for the tort under customary international law stating, "We keep harping on criminal liability for violations of customary international law in order to underscore the distinction between a principle of that law, which is a matter of substance, and the means of enforcing it, which is a matter of procedure or remedy." 643 F.3d 1013, 1019 (2011). The court summarized the position further by paraphrasing *Sabbatino*, "International law imposes substantive obligations and the individual nations decide how to enforce them." *Id*. at 1020. The idea here is that if the prohibition of transboundary harm is one of customary international law and the ATS gives the court jurisdiction to hear the case, the liability for a violation of the customary international law could or should fall within the scope of domestic law.

The court in *Flomo* determined that corporate liability was possible in light of the limitation for the scope of that liability with respect to "cases in which the violations are directed, encouraged, or condoned at the corporate defendant's decision[-]making level." *Flomo* at 1021. The court also looked to historical notions of liability with *in rem* judgments against pirate ships analogizing that "the burden of confiscation of a pirate ship falls ultimately on the ship's owners, but similarly the burden of a fine imposed on a corporation

falls ultimately on the shareholders." *Id*. The reasoning in *Flomo* reflects notions in U.S. domestic law concerning strict liability against corporations for the actions of their employees (or agents).

Based on the Supreme Court's language in *Sosa*, the U.S. Court of Appeals for the Second Circuit in *Kiobel*, came to a different conclusion stating, "[I]nternational law, and not domestic law, governs the scope of liability for violations of customary international law under the ATS." 621 F.3d 111, 126 (2010). The Supreme Court appears to be following the approach that corporate liability in an ATS suit must be based on the customary international laws upon which the suit is grounded. The recent decision of the Court in *Jesner* addressed some of the concerns with corporate liability noted in *Sosa*, "Footnote 20 in *Sosa* flags this distinction and instructs courts to consider whether there is "sufficient consensus" that, with respect to the particular conduct prohibited under "a given norm," the type of defendant being sued can be alleged to have violated that specific norm." *Jesner,* 138 S. Ct. at 1422.

These approaches to the question of corporate liability for the sake of enforceability of the instant ATS claim demonstrate that there is still room to find corporate liability in certain ATS claims based on customary international law. The approach described in *Sabbatino* is more lenient in the sense that is allows for *successful* ATS claims against corporations or other nongovernmental actors. The approach described in *Sosa* is stricter and requires that corporate liability be determined by the customary international laws at play in the case.

IV. ASSUMING THE *TRAIL SMELTER* PRINCIPLE IS OTHERWISE ENFORCEABLE, THE CLEAN AIR ACT ("CAA") DISPLACES THIS PRINCIPLE WITH RESPECT TO GREENHOUSE GAS EMISSIONS.

Notwithstanding the previous discussion, the United States maintains that this Court need not decide on these difficult issues to affirm the District Court's proper holding that Mana's claims must fail because her claim is displaced by the CAA.

A. As enforceable principles of customary international law the *Trail Smelter* Principle would fall into the category of federal common law.

The notion of customary international law being couched in U.S. law is not a novel one, although it has been subject to debate. *See generally* Young, *Sorting Out the Debate Over Customary International Law*, 42 Va. J. Int'l L. 365 (2002). There is strong support for the idea that customary international law is part of the body of federal common law. *See, e.g., The Paquete Habana* at 700 ("International law is part of our law"); *Sosa* at 729 ("[T]he domestic law of the United States recognizes the law of nations"); *Ali v. Rumsfeld*, 649 F.3d at 778 ("The *Sosa* Court's statement 'that the domestic law of the United States recognizes the law of nations, however, is best understood to refer to the common law of the United States, not its statutory law") (quoting *Sosa v. Alvarez-Machain*, 542 U.S. 692, 729 (2004)) (D.C.Cir. 2011). Assuming for the sake of argument that the 'no harm' and the 'polluter pays' principles are enforceable against non-government actors in an ATS suit, these principles of international environmental law would be incorporated into the federal common law.

The Supreme Court has held, "There is no federal general common law." *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). However, the Supreme Court noted in *Texas Industries, Inc. v. Radcliffe Materials, Inc.*, "[A]bsent some congressional authorization to formulate substantive rules of decision, federal common law exists only in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases." 451 U.S. 630, 641 (1981). This characterization demonstrates the Court's assertion that there is *some* federal common law, particularly in areas where it would be "inappropriate for state law to control." *Id*. In *Illinois v. City of Milwaukee* ("*Milwaukee I")*, the Supreme Court noted, "When we deal with air and water in their ambient or interstate aspects, there is a federal

common law, as *Texas v. Pankey*, 10 Cir., 441 F.2d 236, recently held." 406 U.S. 91, 103 (1972).

In the instant case, the ATS provides jurisdiction for the court to hear the case that involves issues of customary international law. The framework of the federal common law as described by the Court in *Texas Industries, Inc.*, is narrow but does incorporate instances where the rights and obligations of the United States are at issue, as they are in the instant case. Because the instant claims are related to greenhouse gas emissions as violations of customary international laws and as violations of the United States' obligations to regulate greenhouse gas emissions, this is a matter of federal common law under *Milwaukee I*. Therefore, it is important to consider whether this area of federal common law has been displaced by an act of Congress, or otherwise.

B. Courts are consistently holding that federal common law claims related to greenhouse gas emissions are displaced by the Clean Air Act.

1. Congress has spoken directly to the problem of greenhouse gas emissions via the Clean Air Act and the EPA actions it authorizes.

The test for displacement of federal common law by a federal statute is not as rigid as that for the preemption of state law by a federal statute in the sense that it doesn't require the same kind of evidence or clear purpose. AEP at 423. Rather, "[t]he 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." *Id*. at 424 (quoting *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978)). In its holding with respect to the issue of displacement, the Court noted, "[W]e think it equally plain that the [Clean Air] Act 'speaks directly' to emissions of carbon dioxide from the defendants' plants." *Id*. With this holding, the Supreme Court has made it apparent that carbon dioxide emissions from fossil fuel burning plants are spoken for in the CAA. In *AEP*, Connecticut, along with several other states, cities,

and land trusts, sued power corporations that owned and operated fossil fuel fired power plants in a large number of states. *Id*. at 410. The plaintiffs sought abatement of the defendants' continuing contribution to the problem of global warming via greenhouse gas emissions from the power plants. *Id*. On the issue of displacement the Court held, "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." *Id*. at 424.

2. Federal common law tort claims related to greenhouse gas emissions are displaced by the Clean Air Act.

With respect to claims of a similar nature seeking a different remedy, the U.S. Court of Appeals for the Ninth Circuit noted, "[U]nder current Supreme Court jurisprudence, if a cause of action is displaced, displacement is extended to all remedies." *Kivalina* at 857. In *Kivalina*, an Alaskan city was seeking damages under several theories including a public nuisance claim against a myriad of oil, energy, and utility companies for damage to their community as a result of global warming. The court held that the CAA, and agency action authorized by the CAA, displaced federal common law and precluded a claim for public nuisance. The court's reasoning included the idea that once the cause of action under the federal common law is displaced, other remedies are also displaced. *See Exxon Shipping Co. v. Baker*, 554 U.S. 471, 128 (2008); *Middlesex County Sewerage Authority v. Nat'l Sea Clammers Ass'n.*, 453 U.S. 1, 4 (1981).

The U.S. District Court for the Northern District of California addressed a public nuisance action brought by the City of Oakland against BP P.L.C. and other fossil fuel producers seeking damages for anticipated harms to the cities resulting from sea level rise which was attributed to the combustion of fossil fuels. *City of Oakland v. BP P.L.C.*, 325 F.Supp.3d 1017 (2018). The court granted the defendant's motion to dismiss based on displacement of the public nuisance global warming claim under *AEP* and the interference with separation of powers and foreign policy as described in *AEP* and *Sosa*. The court noted, "[P]laintiffs seek to impose

liability on five companies for their production and sale of fossil fuels worldwide. These claims—through which plaintiffs request billions of dollars to abate the localized effects of an inherently global phenomenon—undoubtedly implicate the interests of countless governments, both foreign and domestic." *Id*. at 1026. Similarly, in the instant case appellants seek to hold HexonGlobal accountable for global greenhouse gas emissions resulting from the *lawful* production and sale of fossil fuels. The court maintains that these issues are best left to the executive branch of the government as opposed to the judiciary. *Id*. at 1025. In the comparable case of *City of New York v. BP P.L.C.*, the city brought action against five major producers of oil and gas seeking damages for injuries sustained by the city as a result of sea level rise caused by the greenhouse gas emissions attributable to the defendant corporations. 325 F.Supp.3d 466 (2018). In this case the U.S. District Court for the Southern District of New York held that global warming tort claims could only be pursued under federal law, and that the federal common law torts of nuisance and trespass based on domestic greenhouse gas emissions from fuels sold by the defendants were displaced by the CAA. *Id*.

If federal common law tort claims relating to greenhouse gas emissions are consistently found to have been displaced by the CAA, it follows that an international tort claim based on the same framework positing the same kind of arguments would also be displaced by the CAA since customary international law *is* also federal common law. Claims under otherwise enforceable principles of customary international law are essentially federal common law claims and are therefore similarly displaced by the CAA if the nature of the claim is based on a theory of injury or tort liability as a result of greenhouse gas emissions.

V. THE FIFTH AMENDMENT SUBSTANTIVE DUE PROCESS PROTECTIONS FOR LIFE, LIBERTY, AND PROPERTY DOES NOT PROVIDE A CAUSE OF ACTION AGAINST THE UNITED STATES FOR THE ALLEGED FAILURE TO PROTECT THE GLOBAL ATMOSPHERIC CLIMATE SYSTEM FROM DISRUPTION.

Flood asserts that the failure of the United States Government to take effective action to control greenhouse gas emissions, along with its historical support for fossil fuel production violates its obligations under the public trust doctrine. *HexonGlobal*, slip op at 8. Thus, Flood aims to extend the contours of the Constitution by asserting a fundamental right to a healthy and stable climate system and seeks to support this right by claiming that the global atmospheric climate system is a common property owned in trust by the United States that must be protected. *Id.* Flood's contentions are not based on legal judgment since the rights claimed have no basis in the Constitution or even in Supreme Court jurisprudence. There has not been a recognized federal constitutional right to a healthy and stable climate system, and the source of the public trust doctrine is entirely rooted in state law. *See PPL Mont., LLC*, 565 U.S. at 603; *Ely v. Velde*, 451 F.2d 1130, 1139 (4th Cir. 1971) (holding that constitutional protection for the environment has not yet been accorded judicial sanction). Furthermore, the Supreme Court has expressly rejected any fundamental Due Process right to government protection from allegedly wrongful acts by private parties—therefore, Flood's use of the Fifth Amendment and public trust principles as an anchor to his sweeping claims is profoundly misguided and lacks merit. *See Deshaney*, 489 U.S. at 196. The District Court rightfully did not recognize a due process claim against the federal government because not every threat to human well-being constitutes a violation of Due Process rights. *HexonGlobal*, slip op at 9. Thus, this Court should affirm and dismiss Flood's claims for failure to state a claim for relief under the Fifth Amendment to the Constitution.

A. There Is Not A Fundamental Due Process Right to A Healthy and Stable Climate System.

In determining whether substantive due process protection should go beyond the confines of rights that are explicitly identified in the Constitution, Supreme Court precedent has insisted

that judges should exercise caution in identifying implied fundamental rights. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2616 (2015) (Roberts, J., dissenting). The Due Process Clause should not be used as a mechanism for straying away from fixed rules that have traditionally governed the interpretation of laws. *Id.* at 2617. Precedent requires that implied fundamental rights be "objectively, deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty." *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997). Additionally, in determining whether an interest is a fundamental right under the Constitution, the importance of a right is not the critical determinant in ruling whether that right is fundamental—it is whether the Constitution explicitly or implicitly guarantees a right to a healthy and stable climate system. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 33–34 (1973).

The Supreme Court has not found a guarantee of the fundamental right to a healthful environment implicitly or explicitly in the Constitution. *See Pinkney*, 375 F. Supp. at 310. In fact, there is no established judicial precedent for any court at the federal level that has held for a right to be safeguarded from environmental degradation. *See Hagedorn v. Union Carbide Corp.*, 363 F. Supp. 1061, 1064 (N.D.W. Va. 1973). Courts have consistently dismissed similar arguments that have been aimed at creating a legally enforceable right to a healthy environment through any provisions of the Federal Constitution. *Tanner v. Armco Steel Corp.*, 340 F. Supp. 532, 537 (S.D. Tex. 1972). For example, in *Nat'l Sea Clammers Association v. New York*, among various constitutional provisions, the plaintiff's alleged violations of their fifth amendment right. 616 F.2d 1222, 1237–38 (3d Cir. 1980). In particular, they argued that they could enforce a constitutional right to a pollution-free environment. *Id.* The Third Circuit Court of Appeals disagreed with the plaintiffs' contentions and held that the district court correctly rejected their constitutional claims. *Id.* at 1238. In reaching its decision, the court explained that in addition to

the Third Circuit, it had been established elsewhere that there is no constitutional right to a pollution-free environment. *Id.*

In the matter at hand, Flood makes similar unprecedented claims that aim to go beyond established judicial precedent. Flood claims that the failure of the United States government to take effective action to control greenhouse gas emissions is a violation of their asserted fundamental rights. *HexonGlobal*, slip op at 8. However, the United States has taken several steps toward the regulation of domestic greenhouse gas emissions such as the EPA and the National Highway Transportation Agency adoption of a rule establishing both fuel economy standards and greenhouse gas emissions rates for passenger cars and light trucks. *See* Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, 75 Fed. Reg. 25,324 (May 7, 2010) (codified at 40 C.F.R. pt. 85). Due to these efforts by the federal government, greenhouse gas emissions have decreased. *HexonGlobal*, slip op at 5. If this Court were to recognize an unenumerated fundamental right to a healthy and stable climate system, it would essentially undermine the function of executive agencies in prescribing environmental regulations and undertake unprecedented unilateral judicial supervision. Additionally, lack of recognition in the courts shows that the claimed fundamental right is not deeply rooted in legal tradition—as stated as a requirement in *Glucksberg*. 521 U.S. at 720–21. This Court should avoid overstepping jurisdictional boundaries and acknowledge that since the fundamental right to a healthy and stable climate system does not relate to any rights that have been previously afforded constitutional protection, a due process claim against the federal government should not be recognized.

B. The Global Atmospheric Climate System Is Not a Common Property Owned in Trust by The United States That Must Be Protected and Administered for The Benefit of Current and Future Generations.

1. There is No Federal Application of The Public Trust Doctrine That Places an Obligation on The Federal Government.

As previously stated, there is no fundamental right to a healthy and stable climate system. Even so, the public trust doctrine cannot be used by Flood to enforce this nonexistent right because it historically does not apply to the federal government. *PPL Mont., LLC*, 565 U.S. at 603. The Supreme Court did not specifically address the public trust doctrine until *Illinois Central Railroad Co. v. Illinois*, where the Court gave what presently stands as the foundational proclamation of the public trust in navigable and tidal waters and their submerged lands and the state's sovereign duty and power as trustee of the public trust. 146 U.S. 387, 433 (1892). Furthermore, in *Phillips Petroleum Co. v. Mississippi*—several decades after *Illinois Central*—the Supreme Court considered title to non-navigable segments of tidal rivers and held that state ownership of lands subject to the public trust doctrine includes non-navigable tidal lands, thus, regardless of navigability, title to tidal lands vested in the state upon admission to the union under the Equal Footing Doctrine. 484 U.S. at 481. In holding that the public trust doctrine extends to lands submerged under both navigable in fact and tidally influenced waters, the Court made its last prominent statement of the public trust doctrine's scope. *Id.* Since then, the Supreme Court has only once discussed the public trust doctrine in *PPL Montana* where it proclaimed it is a matter of state law. *PPL Mont., LLC*, 565 U.S. at 603. This concept, that the public trust doctrine explicitly pertains to a state's sovereign duties, is supported by decisions such as *United States v. 32.42 Acres of Land*, where the Ninth Circuit reiterated *PPL Montana's* position that the contours of the public trust doctrine are determined by the individual states and not by the United States Constitution. 683 F.3d 1030, 1038 (9th Cir. 2012). Therefore, the Court's discussion of the application of the public trust doctrine within these judicial opinions furthers the notion that the public trust doctrine lies inherent in the sovereignty of the states.

In the instant case, just as Flood makes an unprecedented claim for a fundamental right to a stable and healthy climate system, he also cannot support that alleged right by claiming that the public trust doctrine obligates the federal government to protect that resource. Similarly, in *Alec L. v. Jackson*, plaintiffs alleged that the federal government violated their supposed duties to protect the atmosphere because it was a public resource under the public trust doctrine. 863 F. Supp. 2d at 13–14. The district court dismissed the suit with prejudice for lack of subject matter jurisdiction because there was no support for the assertion that the public trust doctrine arises under federal law. *Id.* at 15. The court also ruled that even if the public trust doctrine provided a claim under federal law, that claim was displaced by federal regulations such as the CAA. *Id.* at 15–16. Thus, as various courts have recognized, this Court should follow this reasoning and prevent the possibility of the use of the public trust doctrine as a basis for claims against the federal government.

2. The Global Climate System Is Not A Common Property Owned in Trust by the United States.

As established, even if the public trust doctrine were to be applied to the federal government, it has always been addressed within the context of navigable waters and submerged lands beneath tidal waters. *Phillips Petroleum Co.*, 484 U.S. at 479. Additionally, most cases where plaintiffs seek a declaration that the atmosphere is a trust resource are recognized at the state level—not in a federal forum. *See Butler v. Brewer*, No. 1 CA-CV 12-0347, 2013 Ariz. App. Unpub. LEXIS 272, at *18 (Ct. App. Mar. 14, 2013) (assumes that the atmosphere is a part of the trust subject to the state's public trust doctrine). Flood—through his claims against the federal government—inadvertently seeks to make this Court acknowledge that the global climate system is a public trust resource, and in effect, expand the scope of the traditional public trust doctrine. Recognition of these claims would hold the federal government responsible through a fiduciary standard for actions that relate to the protection of the global climate system and other

matters subject to the public trust doctrine. However, as discussed, the evolution of the public trust doctrine in American jurisprudence has evolved under accepted principles of federalism where the states remain in control of determining the scope of the trust in relation to state-owned waters. *PPL Mont., LLC*, 565 U.S. at 603. Thus, in determining whether the global climate system is a resource under the public trust doctrine and whether it applies at the federal level, this Court should hold that the public trust doctrine does not apply to an ill-defined entity such as the climate system because of the Supreme Court's repeated discussion of the doctrine's historical function when determining its present role.

C. Flood Cannot Assert a Fundamental Due Process Right to Government Protection from Allegedly Wrongful Acts by Private Parties.

Flood makes an ineffective claim that that the United States government failed to prevent harms caused by private parties through the production, sale, and combustion of fossil fuels in the U.S. market. *HexonGlobal*, slip op at 8. In addition to affirming the District Court's denial of a Due Process based public trust right to a healthy and stable climate system, this Court should also affirm the lower court's rejection of the government-caused danger exception to *Deshaney*. *HexonGlobal*, slip op at 9.

Supreme Court jurisprudence has recognized that the Due Process Clause does not impose on the government an affirmative obligation to act, even where such aid may be necessary to secure life, liberty, or property interests that the government itself may not deprive the individual. *Deshaney*, 489 U.S. at 196. This rule, however, is subject to two exceptions—one of which is primarily used in the Oregon district court case that appellants in the instant case heavily rely on. *HexonGlobal*, slip op at 8. The "danger creation" exception is a limited Due Process right applied by the Ninth Circuit which permits a substantive due process claim when specific government conduct "places a person in peril in deliberate indifference to their safety." *See Penila v. City of Huntington Park*, 115 F.3d 707, 709 (9th Cir. 1997). To have a

cognizable "danger creation" due process claim, certain circumstances must be present. *Juliana v. United States*, 217 F. Supp. 3d 1224, 1252 (D. Or. 2016). There must be an overt government act that created the dangerous situation to arise; a deliberate indifference by the government to the particular plaintiff's safety; and with this knowledge, there must be a failure to prevent the alleged harm. *Id.*

In the instant case, none of the circumstances required for a state-created "danger exception" are present to warrant this Court to extend a protective duty to the federal government. In fact, the United States has taken several steps towards the regulation of domestic greenhouse gas emissions through the Clean Air Act. *HexonGlobal*, slip op at 4. As the lower court noted, even if such an exception were to apply, the majority of government actions complained of by appellant's predated the government's acknowledgment of the potential dangers of anthropogenic climate change. *HexonGlobal*, slip op at 9. This is evidenced by the United States' reaction to the threat of climate change and the numerous regulatory and international commitments taken as a measure to prevent anthropogenic interference with the climate system. *HexonGlobal*, slip op at 4–5. Thus, since Flood failed to provide a basis for a substantive due process claim that the federal government has a duty to protect all citizens against the production, sale, and combustion of fossil fuels by private parties, this Court should affirm the District Court's decision to dismiss his claims for failure to state a claim for relief.

VI. MANA'S LAW OF NATIONS CLAIM UNDER THE ALIEN TORT STATUTE AND FLOOD'S PUBLIC TRUST CLAIM IMPLICATE *BAKER* ELEMENTS THAT RENDER THEM NON-JUSTICIABLE POLITICAL QUESTIONS.

Appellants' claims are an unconstitutional attempt at unilaterally undermining a central tenet of our system of government—the separation of powers. The Supreme Court's seminal statement on whether a political question has been raised is found in *Baker v. Carr*, where six elements that are essential in making such a determination were enunciated. 369 U.S. at 217. If

one of these elements is inextricable from the case at bar, then dismissal for non-justiciability on the grounds of a political question is present. *Id.* These factors include:

> [(1)] The presence of a textually demonstrable constitutional commitment of the issue to a coordinate department; [(2)] or a lack of judicially discoverable and manageable standards for resolving it; [(3)] or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; [(4)] or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; [(5)] or an unusual need for unquestioning adherence to a political decision already made; [(6)] or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. When appellants' distinct arguments are presented together, they categorically present subject matter that is not justiciable. Thus, their attempt at obscuring the roles of the legislative, executive and judiciary should not be given merit, and this Court should affirm the districts court's dismissal.

A. Mana's Law of Nations Claim Under the Alien Tort Statute Presents a Non-Justiciable Political Question.

As aforementioned, while generally, the Supreme Court has left the door ajar for domestic corporate liability, given the particular facts in the instant case, Mana's claim fails because it presents a non-justiciable political question. Application of certain *Baker* elements indicates the potential for a clash between a federal court and other branches of the federal government which is fundamental to the existence of a political question. *Gordon v. Texas*, 153 F.3d 190, 194 (5th Cir. 1998). Importantly, the political branches and not the judiciary, have the responsibility and institutional capacity to weigh matters of foreign policy concerns. *Jesner*, 138 S. Ct. at 1403. For ATS purposes,

> [A]ssuming that, under international law, there is a specific norm that can be controlling, it must be determined further whether allowing [a] case to proceed under the ATS is a proper exercise of judicial discretion, or instead whether caution requires the political branches to grant specific authority before corporate liability can be imposed. "[T]he potential implications for the foreign relations of the United States of recognizing such causes should make courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs."

Jesner (quoting *Sosa,* 542 U.S at 727, 732–33). Holding otherwise would unquestionably impede on the delegated authority given to other political branches of government. *Baker*, 369 U.S. at 217.

Mana's claim that HexonGlobal's greenhouse gas emissions constitute an actionable violation of the Law of Nations is barred by the political question doctrine. As previously discussed, in *City of New York v. BP P.L.C.*, plaintiffs sought damages for global warming-related injuries that were alleged to be caused by the multinational oil and gas company defendants' greenhouse gas emissions that resulted from their production, marketing, and sale of fossil fuels. 325 F. Supp. 3d at 473. The Second Circuit held that since plaintiffs sought to hold defendants liable for their cumulative production of fossil fuels, which made them among the top sources of global greenhouse gas emissions, their claims were barred due to the need for judicial caution in the face of "serious foreign policy consequences." *Id.* at 475 (quoting *Jesner*, 138 S. Ct. at 1390). The Second Circuit district court reasoned that such claims "implicate countless foreign governments and their laws and policies." *Id.* The harmful impacts of rising global temperatures are an immense and complicated phenomenon that requires a comprehensive and globally integrated solution. *Id.* at 475–76. Additionally, a federal forum should exercise extreme caution when adjudicating environmental claims under principles of international law in order to ensure that policies of the United States do not displace environmental policies of foreign countries. *See Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161, 167 (5th Cir. 1999). Thus, this Court should follow a similar reasoning and hold that a Law of Nations claim would implicate the second, third, fourth, and sixth *Baker* elements and infringe upon the foreign policy decisions that are directly within the authority of the political branches.

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

As previously noted, Flood cannot argue for judicial enforcement of a fiduciary obligation because the federal government does not have a duty to protect a global and widely shared resource such as the climate system under the public trust doctrine. *Alec L.*, 863 F. Supp. 2d at 13–14. Even if such claims existed under federal law, at least one of the *Baker* elements deem relevant in rendering the public trust claim non-justiciable. Additionally, this Court should not entertain Flood's contentions because other courts have decided on the issue of whether a single federal forum has the power and jurisdiction to mandate and supervise relevant policies regarding maintaining a healthy and stable climate system. *See Id.* at 17 (disagreeing with plaintiffs who were seeking to have the judiciary mandate federal agencies to undertake regulatory action not required by a Congressional statue).

In establishing a fundamental due process right to a healthy and stable climate system and creating a fiduciary obligation under the public trust doctrine, this Court would essentially create an "independent resolution without expressing lack of the respect due coordinate branches of government." *Baker*, 369 U.S. at 217. In *American Electric Power Company, Inc., v. Connecticut*, the Supreme Court spoke against the notion of regulation of emissions standards by way of judicial decree because it would impede on other branches of government. 564 U.S. at 427–28. In the instant case, since Congress has expressly designated the EPA as the primary regulator of emissions and other complained of activities that affect the stability of the global climate system, a court order would unconstitutionally abrogate the EPA's delegated authority and require this Court to decide on matters beyond their constitutional authority. Thus, Flood's improbable recourse through a federal forum seeks to challenge the balanced regulatory approach established by the Constitution and should be dismissed on non-justiciable grounds.

In *Alec L. v. Jackson*, although the D.C. Circuit Court ruled on alternative grounds, it recognized that the political question defense had clearly been implicated due to the plaintiffs'

contention that the atmosphere is a public trust resource that the United States government, as trustee, has a fiduciary duty to protect. 863 F. Supp. 2d at 13–14. Additionally, in *Comer v. Murphy Oil USA, Inc.*, plaintiffs asked the district court to make environmental policy determinations without regard to legislative or administrative regulation that had been delegated by Congress to the EPA and state environmental authorities. 839 F. Supp. 2d 849, 864 (S.D. Miss. 2012), *aff'd,* 718 F.3d 460 (5th Cir. 2013). The Mississippi Southern district court held that such claims presented a non-justiciable political question due to an absence of judicially discoverable and manageable standards for resolving the issues presented. *Id.* at 865. Like the aforementioned case law, Flood's claims implicitly require this Court to make policy considerations that impose an affirmative duty on the government to adopt a newly considered regulatory scheme for the alleged trust resource. Since such actions have been assigned to other political branches, this Court should avoid substituting its judgment for those proper entities. Thus, a non-justiciable issue has been implicated before this Court.

CONCLUSION

For the reasons stated above, the United States respectfully asks this Court to affirm the District Court's holding that 1) Mana's ATS claim must fail because the CAA displaces the Trail Smelter Principle; 2) Flood's due-process claim must fail because the public trust doctrine is a creature of state law, not federal law; and 3) the District Court properly decided not to exercise its jurisdiction over these claims because they present non-justiciable political questions best left to the executive and legislative branches.