Team No. 47

IN THE UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

CA. 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

Oral Argument Requested

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STATEMENT OF JURISDICTION

The United States District Court of New Union Island had original jurisdiction over Plaintiff Apa Mana's claims under the Alien Tort Statute ("ATS"). 28 U.S.C. § 1350. The District Court also possessed jurisdiction of Plaintiff Noah Flood's due process claim under 28 U.S.C. § 1331. The United States Court of Appeals for the Twelfth Circuit retains jurisdiction over all final orders of district courts. 28 U.S.C. § 1291. The instant matter comes before this Court following the District Court's final order dismissing all claims by both plaintiffs for failing to state a claim for which relief could be granted.

STATEMENT OF ISSUES

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

II. Can Mana bring an ATS claim against a domestic corporation?

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

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

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

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

STATEMENT OF CASE

I. Facts[1]

The Organization of Disappearing Island Nations ("ODIN"), the organizational plaintiff in the instant matter, is a not-for-profit membership group "devoted to protecting the interests of island nations threatened by sea level rise." R. at 3. Apa Mana, an alien national of the island nation of A'Na Atu, and Noah Flood, a citizen of New Union Island – a territory of the United States – are named plaintiffs and members of ODIN. R. at 3. Mana and Flood each bring distinct grievances relating to global greenhouse gas emissions against two separate defendants: the United States government and HexonGlobal Corporation. R. at 3.

Greenhouse gases include carbon dioxide and methane, which are trace atmospheric gases that constitute less than one-half of one percent (< 0.5%) of the composition of the atmosphere. R. at 4. Such gases have an insulating effect, which in turn leads the Earth to retain heat. R. at 4. Too little greenhouse gas would result in colder global temperatures while too much of the gas would result in higher temperatures. R. at 4. Greenhouse gases are emitted from several sources including agricultural and industrial activities. R. at 4. Human production and burning of fossil fuels for energy production and distribution of natural gas have also resulted in an increase of greenhouse gas emissions. R. at 4. All of these activities are causing a shift in the global climate, resulting in a hotter Earth with changing rainfall patterns and rising sea levels. R. at 4. The complaint alleges that if global emissions continue at its current rate, global temperatures will rise by over four degrees Celsius compared to pre-industrial temperatures, and average sea levels will likely rise by one-half to one meter by the end of this century. R. at 4.

[1] All facts are referenced by (R. at _) and are taken from the District Court's Order No. 66-CV-2018 that was revised on 10/26/18.

HexonGlobal is the surviving domestic corporation resulting from the merger of all of the major United States oil producers. R. at 5. HexonGlobal is incorporated in New Jersey and has its principal place of business in Texas. R. at 5. It operates refineries around the world, including one refinery in New Union Island, where HexonGlobal has consented to personal jurisdiction as a condition for operating on the island. R. at 5. Greenhouse gas emissions from products sold by HexonGlobal and its corporate predecessors are responsible for 32% of the United States cumulative fossil fuel-related greenhouse gas emissions. R. at 5. That number translates to six percent of global historical emissions. R. at 5. Cumulative worldwide sales of fossil fuels by HexonGlobal constitute nine percent of global historical emissions. R. at 5.

The United States has been responsible for twenty percent of cumulative global human-caused greenhouse gas emissions to date. R. at 6. Historically, United States agencies have promoted the industrialization of fossil fuels through tax subsidies, leasing lands and seas for coal, oil, and gas production, creating the interstate highway system, and developing fossil fuel power plants through public agencies. R. at 6. The United States, through the Executive and Legislative branches, has since attempted to implement policies to mitigate climate change and regulate industries that depend on fossil fuel use. R. at 6. In 1992, the United States signed the United Nations Framework Convention on Climate Change ("UNFCCC") which acknowledged the potential for human-caused climate changed and stated an objective "to achieve . . . stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system." 1771 U.N.T.S. 107, 169. R. at 6.

Following the UNFCCC's sentiments, the Environmental Protection Agency ("EPA") has since employed many regulatory guidelines under the Clean Air Act. 42 U.S.C. § 7521. *See eg.*, 74 Fed. Reg. 66,496 (Dec. 15, 2009); 75 Fed. Reg. 31,514 (June 3, 2010); 80 Fed. Reg. 64,510

(Oct. 23, 2015); 80 Fed. Reg. 64,662 (Oct. 23, 2015) R. at 6-7. Under the Obama Administration, the United States signed the Paris Agreement, an international executive agreement that committed all nations who participated to reduce greenhouse gas emissions by a number set by each nation. R. at 7. The United States committed to reduce greenhouse gas emissions by 26-28% by 2025 compared to 2005 levels. R. at 7. Since taking office, President Trump has proposed to reverse past regulatory measures including freezing emissions reductions through EPA and withdrawing from the Paris Agreement at the first opportunity. R. at 7.

A'Na Atu and New Union Islands are two low-lying islands with a maximum height above sea level of less than three meters. R. at 4. According to the complaint, Mana and Flood have suffered seawater damage to their homes and drinking wells. R. at 5. Both plaintiffs fear that increased temperatures will put themselves and their communities at risk of heat stroke and mosquito-borne diseases. R. at 5. Plaintiffs also claim that ocean acidification, warming, and loss of coastal wetlands will reduce ocean productivity which in turn will reduce seafood as a food source. R. at 5. According to the complaint, limited fossil fuel production and combustion would reduce further damage to plaintiffs' properties, decrease health risks, and would maintain the habitability of both island communities. R. at 5. Plaintiffs ultimately allege that both islands will be completely uninhabitable due to rising seas by the end of the century unless action is taken to limit greenhouse gas emissions. R. at 3-4.

II. Procedural History

Individual plaintiffs Mana and Flood, residents of low-lying islands A'Na Atu and New Union, brought suit against HexonGlobal and the United States alleging that both defendants' actions have caused and will continue causing greenhouse gas concentrations to rise, triggering irreparable damage to their island communities. R. at 3. Mana, establishing jurisdiction through

the ATS, sued HexonGlobal, and alleged that its fossil fuel-related business activities constitute a violation of the Law of Nations and sought damages and injunctive relief. R. at 3. Flood asserted that the United States government violated its public trust obligations to protect the global climate ecosystem, obligations incorporated through the Due Process Clause of the Fifth Amendment. R. at 3.

HexonGlobal and the United States filed motions to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6). R. at 4. The District Court for New Union Island, after taking all facts alleged by the plaintiffs as true, granted both motions. R. at 4. Specifically, the District Court dismissed Mana's international tort claim because such claims have been displaced by greenhouse gas regulation under the Clean Air Act. R. at 9. The District Court dismissed Flood's public trust claim because Flood was essentially claiming that the United States government failed to prevent harms caused by private parties through the production, sale, and combustion of fossil fuels in the United States market, which is not a viable constitutional infringement claim. R. at 10. The District Court's dismissal order further reasoned that the majority of government actions complained of long predated any awareness of the potential dangers of human-induced climate change. R. at 11. Plaintiffs appeal.

STANDARD OF REVIEW

Rule 12(b)(1) requires dismissal when the court lacks statutory or constitutional power to adjudicate it. Fed. R. Civ. P. 12(b)(1). Lack of subject-matter jurisdiction is a non-waivable, fatal defect. *Von Dusner v. Aronoff*, 915 F.2d 1071, 1074 (6th Cir. 1990). The standard of review for reviewing courts regarding motions to dismiss for failure to state a claim under Rule 12(b)(6) is de novo. *Lee v. City of Los Angeles,* 250 F.3d 668, 679 (9th Cir. 2001). To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a

claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The complaint must set forth facts supporting a plausible, not merely possible, claim for relief. *Twombly*, 550 U.S. at 555.

SUMMARY OF ARGUMENT

Plaintiffs bring suit against private and governmental defendants, attempting to extract monetary damages and injunctive relief for a worldwide change in the Earth's climate that has affected the two low-lying islands where each plaintiff resides. But because plaintiffs' claims fail to state any facts or legal theory upon which relief can be granted, the claims were properly dismissed by the District Court.

As a threshold matter, though not specifically decided by the court, plaintiffs' claims present a non-justiciable question. Under *Baker v. Carr* and its progeny, plaintiffs' allegations and request for relief present unmanageable standards of implementation to this Court. 369 U.S. 186 (1962). Essentially, Mana and Flood are asking the judiciary to hold two entities liable for the worldwide phenomenon of climate change, contradicting numerous regulations that Congress and EPA have already implemented.

Second, even if this Court holds that plaintiffs' claims do not present a political question and this Court has jurisdiction to entertain them, both plaintiffs' allegations were nonetheless properly dismissed for failure to state a claim. Though the ATS confers jurisdiction to non-citizens like Mana in order to bring claims that violate customary international law, the ATS itself does not create causes of action. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 713-14 (2004). And though an alien plaintiff can theoretically sue a domestic corporation for tortious conduct that occurs in the United States that violates a law of nations, the conduct Mana complains of is displaced by the Clean Air Act and EPA's judgment and policies regarding greenhouse gas

emissions. *See American Electric Power Co. v. Connecticut*, 564 U.S. 410 (2011). Mana's claim was properly dismissed.

Lastly, Plaintiff Flood, a citizen resident of United States possession New Union Island, attempts to assert a due process-based public trust claim that was also rightly dismissed by the District Court. Flood endeavored to fashion a newly discovered fundamental right under the 5th Amendment by claiming the United States has failed to protect the global atmospheric climate from disruption from fossil fuel use. Heavily relying on pending litigation in Oregon that is as unprecedented as it is innovative, *Juliana v. United States*, 217 F. Supp. 3d 1224 (D. Or. 2016), Flood's claim fails because (1) there is no fundamental due process right based on public trust principles, (2) the United States cannot be held liable for conduct of private parties since the Industrial Revolution; and (3) the notion of public trust is a state-created remedy rather than a federal one. Flood's claim, too, was properly dismissed. This Court should now affirm.

ARGUMENT

I. MANA'S LAW OF NATIONS CLAIM AND FLOOD'S PUBLIC TRUST CLAIMS PRESENT A NON-JUSTICIABLE POLITICAL QUESTION.

As a threshold matter, plaintiffs' claims are non-justiciable under the political-question doctrine and should be dismissed. The political-question doctrine prevents courts from deciding issues assigned to the Executive or Legislative branches of the United States government. *See Baker v. Carr*, 369 U.S. 186 (1962). To determine whether or not any case involves a political question, the *Baker* Court announced six factors to consider:

> (1) a textually demonstrable constitutional commitment of the issue to a coordinate political department;
> (2) or a lack of judicially discoverable and manageable standards for resolving it;
> (3) or the impossibility of deciding without an initial policy determination of a kind clearly for 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. at 217. The *Baker* Court also advised that any one factor could be dispositive. *Id.* at 210. In *Goldwater v. Carter*, Justice Powell's concurrence broke the *Baker* factors into three general inquiries: "(i) Does the issue involve resolution of questions committed by the text of the Constitution to a coordinate branch of Government? (ii) Would resolution of the question demand that a court move beyond areas of judicial expertise? (iii) Do prudential considerations counsel against judicial intervention?" 444 U.S. 996, 998 (1979) (Powell, J. concurring).

Thus, the first inquiry covers factor one; the second inquiry covers factors two and three; and the third covers factors four through six. *Id.* at 998-1000. Other courts further simplify *Baker*: "The first three *Baker* factors focus on the constitutional limitations of a court's jurisdiction, while the final three are 'prudential considerations [that] counsel against judicial intervention.'" *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 981 (9th Cir. 2007) (quoting *Goldwater*, 444 U.S. at 998). Plaintiffs' claims fall under both of the camps described by *Corrie* and must subsequently fail under the political question doctrine.

A. Plaintiffs' Claims Require This Court To Reach Beyond The Areas Of Judicial Expertise.

Plaintiffs' claims land outside the purview of the judiciary. Plaintiffs' claims trigger *Baker* factor two by imploring the Court to involve itself in managing untenable standards beyond any court's judicial expertise. *Native Village of Kivalina v. Exxon Mobil Corp*. is similar to the instant matter. 663 F. Supp. 2d 863 (N.D. Cal. 2009), *aff'd* 696 F.3d 849 (9th Cir. 2012). In *Kivalina*, plaintiffs from an Alaskan village sued oil and energy companies, seeking damages under four different theories, including a federal common-law claim of nuisance based on excessive emission of greenhouse gases. *Id.* at 868. The district court dismissed the suit due to

the political question doctrine. *Id.* The court was unpersuaded that the allegations presented triggered a "textually demonstrable constitutional commitment of the issue to a coordinate political department." *Id.* at 872 (quoting *Baker*, 369 U.S. at 217). The court clarified that the "indisputably international dimension of this particular problem does not render the instant controversy a non-justiciable one" and held that the first factor was not implicated. *Id.* at 873. So too, here, the United States concedes there is nothing in the Constitution that directly speaks on the issue of environmental policy or greenhouse gas emissions. Though foreign policy is usually the Executive and Legislative Branches prerogatives, *Baker* made clear that not every case "which touches foreign relations lies beyond judicial cognizance." *Baker*, 369 U.S. at 211.

The court then considered factors two and three which ask the same question: whether the resolution of the question demands that a court move beyond areas of judicial expertise. *Kivalina*, 663 F. Supp. 2d at 873 (citations omitted). The district court cites *Alperin v. Vatican Bank* from the Ninth Circuit to explain that the focus of the second *Baker* factor is "not whether the case is unmanageable in the sense of being large, complicated, or otherwise difficult to tackle from a logistical standpoint. Rather, courts must ask whether they have the legal tools to reach a ruling that is 'principled, rational, and based upon reasoned distinctions.'" 410 F.3d 532, 552 (9th Cir. 2005). For the nuisance claim, *Kivalina* held that resolution of such a claim "is not based on whether the plaintiff finds the invasion unreasonable, but rather, 'whether reasonable persons generally, looking at the whole situation impartially and objectively, would consider it unreasonable.'" *Kivalina*, 663 F. Supp. 2d at 874 (citations omitted). The court reasoned that the factfinder would then have to weigh "energy-producing alternatives that were available in the past and consider their respective impacts on far-ranging issues such as their reliability as an energy source, safety considerations, and the impact of the different alternatives on consumers

and business at every level." *Id.* The court concluded that "[p]laintiffs' global warming nuisance claim seeks to impose liability and damages on a scale unlike any prior environmental pollution case" that the parties presented and found the second *Baker* factor precluded judicial consideration of the claim. *Id.* at 876.

Plaintiffs are asking this Court to do the same now. Plaintiff Mana is petitioning the court for damages and to injunct HexonGlobal, America's largest and only major oil-producing company, from selling petroleum fuels within or outside the United States because of *worldwide* greenhouse gas emissions. R. at 9 (emphasis added). Granting such relief would be extraordinary. Plaintiff Flood is seeking damages from the government for alleged failure to protect the *global* climate system from disruption due to fossil fuel use, going as far to say that "the global climate system is a common property owned in trust by the United States." R. at 3, 10. The very problem with claims declaring specific entities liable for global climate change is within the allegation itself: greenhouse gases are emitted *globally*.

It is not up to this Court or any court to hold specific parties liable for the "innumerable sources located throughout the world and *affecting the entire planet and its atmosphere*." *Kivalina*, 663 F. Supp. 2d at 876 (emphasis in original). But that is what the plaintiffs here are demanding. The *Kivalina* plaintiffs and plaintiffs now are asking the judiciary to make a policy decision about *who* should bear the cost of global warming, implicating *Baker* factor three. *Id.* at 876-77 (emphasis in original). The allocation of fault – and cost – of global warming is a matter for the other two co-equal branches of government, not this Court. Therefore, the claims should be barred by the political question doctrine.

B. Prudential Considerations Counsel Against Judicial Intervention.

Moreover, prudential considerations under *Baker* are triggered by plaintiffs' requests and warn against judicial intervention. Even if this Court considers that it could construct a legal remedy without micro-managing the Executive branch, its agencies, or the Legislature, it would be impossible for the Court to undertake "independent resolution without expressing a lack of respect" for the other two co-equal branches of government. *Baker*, 369 U.S. at 217. The District Court's Order is chock-full of policies that EPA has enacted through Congress' Clean Air Act as well as Executive action by the President as it relates to foreign nations. R. at 6, 7, 8. The mere fact that a new Administration proposes a change in policy does not suddenly call for the up-ending of the separation-of-powers doctrine. R. at 7. Rather, the balancing of vast policy considerations affecting numerous facets of domestic and foreign policy is the perfect task for Congress and the President – not the Judiciary.

Plaintiff Flood may argue that an alleged constitutional violation is surely a question best-suited for this Court; but an independent issue is Flood's failure to state an actionable claim for relief. A plaintiff cannot claim a constitutional violation if no right exists to have been violated. And in any event, Flood's contention, even if cognizable (though it is not), would lead to the same outcome: this Court would improperly impose independent resolution in the face of what the President, EPA and Congress have already considered and implemented. Because the political question doctrine is a threshold jurisdictional question and plaintiffs' claims are forbidden by it, the claims should be dismissed.

II. ALIEN PLAINTIFFS, ESTABLISHING JURISDICTION THROUGH THE ALIEN TORT STATUTE, CAN SUE DOMESTIC CORPORATIONS FOR TORTIOUS CONDUCT IN VIOLATION OF CUSTOMARY INTERNATIONAL LAW.

Assuming this Court is not barred from hearing this case, alien plaintiffs like Mana can theoretically sue domestic corporations for violations of the law of nations by establishing jurisdiction through the ATS if certain conditions are met. The ATS, in its essence, states that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. The ATS gives non-citizens a federal cause of action for violations of international law. *Bowoto v. Chevron Corp.*, 557 F. Supp. 2d 1080, 1089 (N.D. Cal. 2008). A plaintiff lacks standing to sue under the ATS unless they are an alien. *Weisskopf v. United Jewish Appeal-Federation of Jewish Philanthropies of New York, Inc.*, 889 F. Supp. 2d 912, 921 (S.D. Tex. 2012); *see Jerez v. Republic of Cuba*, 777 F. Supp. 2d 6, 20 (D.D.C. 2011). Mana, an alien national of A'Na Atu, has proper standing to file a claim under the ATS, but the law is unsettled on if a domestic corporation could be a defendant in a suit.

ATS jurisprudence is murky at best. The Second Circuit has held that corporate liability is not a rule of customary international law applicable under the ATS because corporate liability is not recognized as a specific, universal, and obligatory norm; imposing liability on corporations for violations of customary international law has not attained a discernible, much less universal, acceptance among nations of the world in their relations. *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 145 (2d Cir. 2010) (*Kiobel I*), *aff'd Kiobel II*, 569 U.S. 108 (2013). Though the Supreme Court affirmed the Second Circuit's dismissal of the case, the Court did not affirm any bright-line bar against *all* corporations being sued under the ATS. Then, in 2018, the Supreme Court held that foreign corporations are not subject to any claim brought under the ATS

regarding international human-rights crimes but left open the question of whether or not domestic corporations have that same autonomy. *Jesner v. Arab Bank*, 138 S. Ct. 1386 (2018).

Other federal courts have considered many cases arising under the ATS. Those courts have held that American corporations are not able to assert claims under the ATS. *S.K. Innovations, Inc. v. Finpol*, 854 F. Supp. 2d 99, 114 (D.D.C. 2012). But, when a claim alleges direct corporate liability for war crimes, a corporation may be held liable under the ATS. *In re XE Services Alien Tort Litigation*, 665 F. Supp. 2d 569, 588 (E.D. Va. 2009). Another district court has held that the ATS provides federal jurisdiction over domestic corporations in suits that allege the companies violated international law. *In re South African Apartheid Litigation*, 15 F. Supp. 3d 454, 466 (S.D.N.Y. 2014). Furthermore, the Seventh Circuit – after *Kiobel I* was decided – concluded that it disagreed that corporations cannot be held liable for violating the ATS, though the appellate court agreed with the judgment. *Flomo v. Firestone Nat'l Rubber Co., LLC*, 643 F.3d 1013, 1025 (7th Cir. 2011). Again, *Jesner* only affects federal courts' holdings with regards to *foreign* corporations – not statements about corporate liability that may allege different facts, like entities enjoying incorporation status and presence in the United States.

Here, Mana should not be preliminarily barred from filing a suit against a domestic corporation if a complaint can allege specific tortious conduct that arose or otherwise had significant contacts in or with the United States. While reasonable and fair-minded jurists may disagree as to ATS's applicability in specific instances, the only absolute "black-letter law" is that *foreign* corporations cannot be subject to claims filed under the ATS. *Jesner*, 138 S. Ct. at 1407. Thus, this Court should hold that Mana can theoretically bring a claim under the ATS and ensnare a domestic corporation as a party-defendant.

A. Foreign Corporations Cannot Be Sued Under The ATS Because Federal Courts Will Not Hold Foreign Entities Liable For Conduct Outside Of American Jurisdiction Absent Authorization From Congress.

The ATS requires that aliens only may bring claims for a commission of a tort that has violated customary international law or United States treaty. *Weisskopf*, 889 F. Supp. 2d 912, 921. It is undisputed that Mana is an alien who has standing to bring a claim under the ATS. R. at 1. The Supreme Court has addressed three major ATS lawsuits – and one was in 2018. *See Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004); *Kiobel II*, 569 U.S. 108 (2013); *Jesner*, 138 S. Ct. 1386 (2018).

Sosa considered the question of whether courts may recognize new, enforceable international norms in ATS lawsuits. 542 U.S. at 730-31. The Court held that in certain narrow circumstances, courts may recognize a common-law cause of action for claims based on the present-day law of nations, in addition to the "historical paradigms familiar when § 1350 was enacted." *Id.* at 732. *Kiobel II* clarified and narrowed a Second Circuit's decision by holding "the presumption against extraterritoriality applies to claims under the ATS, and that nothing in the statute rebuts the presumption." *Kiobel II*, 569 U.S. at 124. The Court was precise, continuing: Under the ATS,

> [P]etitioners' case seeking relief for violations of the law of nations occurring *outside* the United States is barred. On these facts, all the relevant conduct took place outside of the United States. And even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application. Corporations are often present in many countries, and it would reach too far to say that *mere corporate presence suffices*.

Id. at 124-25 (emphasis added). This holding narrows the Second Circuit's blanket statements declaring *all* corporations are shielded from liability. *Kiobel I*, 621 F.3d at 121 ("[N]o corporation has ever been subject to any form of liability under the customary international law of human rights, and thus the ATS, the remedy Congress has chosen, simply does not confer

jurisdiction over suits against corporations."). And, the Supreme Court's holding is justifiable: allowing claims from aliens alleging tortious conduct against foreign corporations worldwide would pose significant foreign policy obstacles. Indeed, the political branches, not the Judiciary, have the responsibility and institutional capacity to weigh such foreign-policy concerns. *Kiobel II*, 569 U.S. at 116-17.

In 2018, a plurality of Justices in *Jesner v. Arab Bank* held that foreign corporations are not subject to ATS claims in federal court until Congress expands the scope of liability to such corporations. 138 S. Ct. at 1405, 1407. Plaintiffs there alleged that Arab Bank, a Jordanian financial institution with branches around the world including New York, helped finance attacks by terrorist groups in the Middle East. *Id.* at 1394. Plaintiffs further alleged that the New York branch played a significant role in facilitating the transfer of funds from a Texas-based charity to bank accounts of terrorist-affiliated charities in the Middle East. *Id.* The Court began by restating the question federal courts must ask before recognizing a common-law action under the ATS: can a plaintiff demonstrate that the alleged violation is "of a norm that is specific, universal, and obligatory? *Id.* at 1399 (citing *Sosa*, 542 U.S. at 732). In acknowledging that crimes against humanity like terrorism are universal violations of a norm, the Court nonetheless held that the international community has not yet decided if corporate liability is a recognizable violation for human-rights crimes. *Id.* at 1402 (quoting *The Nurnberg Trial*, 6 F.R.D. 69, 110 (1946)) ("Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.").

Jesner cites ample evidence in explaining why federal courts, absent authorization by Congress, should not extend ATS liability to foreign corporations – at least with respect to

torture and extrajudicial killing in violation of international law. But Mana's claim is different in at least two respects: Mana is not alleging an ATS claim against a foreign corporation, and she is not alleging an injury that a natural person could inflict on their own. Mana alleges specifically that based on the entity's own scientific research, HexonGlobal knew since at least the 1970s that "continued sales and combustion of fossil fuel products would result in substantial harmful global climate change and seal level rise." R. at 5. HexonGlobal's knowledge and indifference towards these environmental concerns are analogous to other human-rights crimes, but the acts themselves were a result of HexonGlobal's actions rather than the acts of any individual.

B. Domestic Corporations Can Be Subject To Suits Brought Under The ATS For Tortious Conduct In Violation Of The Law Of Nations.

Domestic corporations can be distinguished from *Jesner*'s ruling affecting ATS liability of foreign corporations. As previously noted, the Second Circuit wrote – in responding to its opinion's own dissenting judge – that corporations of any kind may not be sued under the ATS. *Kiobel I*, 621 F.3d at 121. But the Supreme Court, through *Jesner* and *Kiobel II*, never answered the question of whether or not a jurisdictional bar holds true for domestic corporations.

In *Kiobel I*, the Second Circuit discussed the dichotomy between established domestic law and established international laws, clarifying that the "ATS requires federal courts to look beyond rules of domestic law – however well-established they may be – to examine the specific and universally accepted rules that the nations of the world treat as binding in their dealings with one another." *Id.* at 118. In that case, the plaintiffs sued incorporated entities in the Netherlands, England, and Nigeria that aided and abetted Nigerian militants to terrorize a village within Nigeria. *Id.* at 123. A main point the *Kiobel I* majority made was that outside of the United States, no other international court or tribunal recognizes corporate liability as customary international law. *Id.* at 127. And if corporate liability is not customary international law, the

court reasoned, corporate defendants could not be found liable under the ATS according to the statute's own terms. *Id.* The Supreme Court, again, held less than that. *Kiobel II*, 569 U.S. 108 (2013). The Court's affirmed the judgment, but even Judge Lavel – the dissenter in the Second Circuit's holding – agreed with the *outcome*. *Kiobel I*, 621 F.3d at 149 (Level, J., concurring only in judgment) (emphasis added). The Supreme Court speculated that if the facts had involved violations occurring *inside* of the United States with more than "mere corporate presence," a different result may have been reached. *Kiobel II*, 569 U.S. at 125.

HexonGlobal's conduct and status of incorporation are distinguishable from all three Supreme Court decisions discussed *supra*. Here, HexonGlobal is incorporated in New Jersey with its principal place of business in Texas. R. at 8. Mana alleges statistics regarding HexonGlobal's historical domestic and worldwide greenhouse gas emissions, specifically, that the corporation is responsible for 32% of United States emissions, translating to six percent of global historical emissions. R. at 5. Furthermore, if Mana alleges tortious conduct under customary international law through a treaty or law of nations that does not limit liability to "natural persons" like treaties regarding human-rights violations do, there is even more reason to allow her or others to be able to bring claims against a domestic corporation if all conditions are met.

Therefore, this Court can reconcile all binding precedent with Mana's ATS claim. This Court can hold that in general, there is not a per se bar against domestic corporations being party-defendants because the policy considerations are different than when considering foreign entities. Thus, domestic corporations can be sued by alien nationals under the ATS if the corporation's conduct violates international customary law or a United States treaty. Because differentiating *Kiobel*'s facts from the instant matter is as straight-forward as it is imperative in order to reach a

logical result, this Court should hold that domestic corporations can theoretically be party-defendants to suits arising from alleged tort violations of customary international law when the international law in question does not limit jurisdiction to only natural persons or otherwise restrict a claim.

III. THE *TRAIL SMELTER* PRINCIPLE IS CUSTOMARY INTERNATIONAL LAW BECAUSE IT IS VASTLY RECOGNIZED UNDER DECLARATIONS TO WHICH THE UNITED STATES IS A SIGNATORY.

Kiobel II reiterates that the ATS provides jurisdiction over (1) tort actions, (2) brought by aliens only, (3) for violations of the law of nations, also called customary international law. *Kiobel II,* 569 U.S. at 133-34. In order to be actionable under the ATS, a defendant's conduct must violate well-established, universally recognized norms of international law. *Presbyterian Church*, 244 F. Supp. 2d at 304 (citing *Kadic v. Karadzic*, 70 F.3d 232, 239 (2d Cir. 1995)). Mana alleges that HexonGlobal has violated universally recognized norms of international law by violating the *Trail Smelter* Principle. *Trail Smelter Arbitration*, 3 U.N.R.I.A.A. 1905 (1941). R. at 8. The principle holds that emissions into the environment within the territory of one nation must not be allowed to cause substantial harms in the territory of other nations. *Id.*

This principle arose due to a dispute Canada and the United States over a Trail Smelter in British Columbia that emitted noxious Sulphur dioxide. *Id.* at 1917. The gases drifted across the United States-Canadian border, causing harm to crops in the State of Washington. *Id.* The arbitration panel held Canada responsible for the agricultural damage on the basis that 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 . . . ." *Id.* While the *Trail Smelter* Principle itself is not a treaty, it has been recognized in the *Declaration of the United Nations on the Human Environment* as Principle 21:

> States have, in accordance with the Charter of the United Nations and the Principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

U.N. Conference on the Human Environment, Stockholm, June 5-16, 1972, *Declarations of the United Nations Conference on the Human Environment*, 5, U.N. Doc A/CONF.48/14/REV.1 (VOL.I) (June 16, 1972) ("Stockholm Declaration"). The *Trail Smelter* Principle is again recognized as Principle 2 in the *Rio Declaration on Environment and Development*. *See* U.N. Conference on Environment and Development, *June 3-14, Rio de Janeiro, Braz*., 3, U.N. Doc. A/CONF.151/26/REV.1(VOL.I) (1992) ("Rio Declaration"). The United States is a signatory to both the Stockholm and Rio Declarations.

Flores v. Southern Peru Copper Corp. examined the Rio Declaration in detail and opined that "[a] treaty will only constitute sufficient proof of a norm of customary international law if an overwhelming majority of States have ratified the treaty, and those States uniformly and consistently act in accordance with its principles." 414 F.3d 233, 256 (2d Cir. 2003) (citations omitted). There, the court dismissed the plaintiff's claim because the plaintiffs did not demonstrate that high levels of environmental pollution *within a nation's borders*, harm to human life, health, and development violated "well-established, universally recognized norms of *international* law." *Id*. at 525 (quoting *Filartiga v. Pena-Irala*, 630 F.2d 630, 888 (2d Cir. 1980)) (emphasis added). The opinion leaves open the question of whether or not high levels of environmental pollution spreading to *neighboring sovereigns* would be a violation of customary international law, however.

It would be an understatement to say that the *Trail Smelter* Principle is merely "sufficient proof of a norm of customary law." *Id*. In 2015, President Obama's signing the Paris Agreement

committed the Nation and other nations to reduce greenhouse gas emissions. R. at 7. *See generally*, Paris Agreement to the UNFCCC, opened for signature Apr. 22, 2016, U.N. Doc. FCCC/CP/2015/L.9 (Dec. 12, 2015). As of September 1, 2018, 184 of 197 parties to the UNFCCC have ratified this agreement. *See Paris Agreement – Status of Ratification*, https://unfccc.int/process/the-paris-agreement/status-of-ratification. As a direct result of this agreement, the United States committed to reducing its greenhouse gases by 26-28% relative to 2005 levels. R. at 7. Clearly, 184 nations ratifying a mandate to lessen greenhouse gas emissions is ample evidence of the *Trail Smelter* Principle's universal acceptance as a law of nations because the majority of nations recognize the issue of transboundary pollution. Even if the Paris Agreement had not been ratified by the United States, it would still provide evidence of customary international law, though it would not provide directly for a cause of action. *Bowoto*, 557 F. Supp. 2d at 1091 (N.D. Cal. 2008).

Here, Mana alleges damages from transboundary air pollution against HexonGlobal, just like the United States alleged against Canada in *Trail Smelter*. The complaint alleges A'Na Atu has seepage in its drinking wells, sea levels have risen, and the fishing industry is subject to depreciation due to changes in climate brought on by greenhouse gas emissions. R. at 5. These damages are analogous to the damages to the crops in the State of Washington. Because the *Trail Smelter* Principle is customary international law that nations have recognized as universal, Mana's claims under the ATS against HexonGlobal is cognizable.

IV. ASSUMING THE TRAIL SMELTER PRINCIPLE IS CUSTOMARY INTERNATIONAL LAW, IT CAN IMPOSE ACTIONABLE OBLIGATIONS TO PRIVATE ACTORS LIKE HEXONGLOBAL.

In order for conduct to impose actionable obligations under the ATS, there must be a violation of "well-established, universally recognized norms of international law." *Presbyterian*

Church, 244 F. Supp. 2d 305 (quoting *Kadic*, 70 F.3d at 239). "Law of nations" or "customary international law" describes the general rules that the international community accepts out of legal obligation or mutual concern. *Velez v. Sanchez*, 693 F.3d 308, 316 (2d Cir. 2012) (citing *Filartiga,* 630 F.2d at 888). Assuming that the *Trail Smelter* Principle is customary international law, then by the definition set forth in *Presbyterian Church*, any conduct that violates it would set forth enforceable obligations. Courts have already held that actionable conduct may be taken against an *individual* where the law of nations has been violated. *Sexual Minorities of Uganda v. Lively*, 960 F. Supp. 2d 304, 323 (D. Mass. 2013) (holding an American citizen accountable for violation of law of nations to persecute the LGBTI community in Uganda) (emphasis added); *see also*, *Chowdhurry v. WorldTel Bangladesh Holding, Ltd.*, 588 F. Supp. 2d 375, 385-86 (E.D.N.Y. 2008) (holding individuals liable under the ATS for allegedly having plaintiff arrested and subjected to torture in Bangladesh).

Accordingly, "[p]rivate individuals and those acting under color of law may be held liable for violations of customary international law." *In re South African Apartheid Litigation*, 617 F. Supp. 2d at 249. Corporations are liable in the same way that individuals are for violating the law of nations. *Id*. at 255. *In re South African* shows that the plaintiffs were allowed to proceed in their claims against multinational corporate defendants for violations of the law of nations. *Id*. at 241. Assuming that the *Trail Smelter* Principle is in fact customary international law, then *South African* not only shows that private actors can be held to enforceable obligations, but those obligations can be enforced against corporations as well.

A private individual who acts under the color of law, or "in concert with the state," can be held liable under the ATS. *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163, 189 (2d Cir. 2009), *cert. denied*, 561 U.S. 1041 (2010); *see Escarria-Montano v. U.S.*, 797 F. Supp. 2d 21, 24 (D.D.C.

2011); *Garcia v. Chapman*, 911 F. Supp. 2d 1222, 1236 (S.D. Fla. 2012); *Tachiona v. Mugabe*, 169 F. Supp. 2d 259, 315 (S.D.N.Y. 2001). State action can be found when "there is such a close nexus between the State and the challenged action that seemingly private behavior may be fairly treated as that of the State itself." *Brentwood Acad. v. Ten. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001) (quoting *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974)). In *Brentwood Acad.*, the question was whether or not a statewide association to regulate athletics could be regarded as a state actor when it would enforce a rule against member schools. *Id*. at 290. The association would regulate in lieu of the State Board of Education, almost all of the public schools in the state were members of the association, and state school officials were prevalent in the structure of the association. *Id*. at 291. The court concluded that since the State board was so entwined with the member public schools, the ostensibly private organization should be held to public character and constitutional standards. *Id*. at 302.

HexonGlobal can theoretically be held liable under international customary law via the *Trail Smelter* Principle and under the color of law as well. HexonGlobal is now the only surviving entity of all major United States oil producers as the result of a merger. R. at 5. The oil industry in the United States in general has been the benefactor of tax subsidies for production, leases of public land and seas for coal, oil, and gas production. R. at 6. Power plants have even been developed by public agencies like the Tennessee Valley Authority. R. at 6. Like the association in *Brentwood*, the United States has been completely intertwined with fossil-fuel production, as evidenced by EPA regulations as well as subsidies. R. at 6. With HexonGlobal being the last surviving corporation, Mana could argue that HexonGlobal is liable as a private actor by acting under the color of law. Furthermore, due to the unique nature of HexonGlobal

being the sole oil producer in the United States, Mana could recover from obligations arising under customary international law through the *Trail Smelter* Principle.

V. ASSUMING THE *TRAIL SMELTER* PRINCIPLE IS OTHERWISE ENFORCEABLE, THE PRINCIPLE IS NONETHELESS DISPLACED BY THE CLEAN AIR ACT.

Notwithstanding that the *Trail Smelter* Principle is customary international law as contemplated under the ATS, Mana's claims arising under the principle are displaced by the Clean Air Act. First, the Clean Air Act defines the scope of EPA's duties to regulate greenhouse gas emissions and the extent to which federal courts may enforce such duties – not customary international law. Therefore, the Clean Air Act is controlling authority; not the *Trail Smelter* Principle. Moreover, the Supreme Court has already held that the Clean Air Act displaces the federal common law of air pollution, and the *Trail Smelter* Principle is an arbitration decision on that exact subject: air pollution in the form of greenhouse gas emissions. *See American Electric Power Co. v. Connecticut*, 564 U.S. 410 (2011). Again, because an international arbitration tribunal decided *Trail Smelter*, it is evidence of customary international law which has no per se binding effect on any nation's courts, though it is persuasive. To be clear, this Court *could* hold a domestic corporation liable under the principle in favor of Mana, but only if no United States political branch has taken a different position or implemented policy on the matter.

Assuming the principle is enforceable as a law of nations and viable against domestic corporations, Mana's claim is still displaced by controlling authority – the Clean Air Act. In 2007, the Supreme Court held that greenhouse gases, including carbon dioxide, were "pollutants" that were potentially subject to regulation under 202(a)(1) of the Clean Air Act, 42 U.S.C. § 7521. *Massachusetts v. EPA*, 549 U.S. 797 (2007). Following this holding, EPA made the "Endangerment Finding" that the emission of greenhouse gases and resulting climate change

had the potential to endanger the public health and welfare, setting the regulatory base for regulations of such pollutants under the Clean Air Act. 74 Fed. Reg. 66,496 (Dec. 15, 2009). More regulations followed. *See* 75 Fed. Reg. 25,324 (May 7, 2010) (establishing fuel economy standards and greenhouse gas emissions rates for motor vehicles model years 2012-2016); 77 Fed. Reg. 62,623 (Oct. 15, 2012) (extending motor vehicle regulations to year 2025). EPA has clearly attempted to tackle the issue of anthropogenic climate change through regulations since *Massachusetts* declared carbon dioxide subject to EPA's judgment.

In *American Electric*, Justice Ginsberg penned for a unanimous Court that

> [I]t is an academic question whether, in the absence of the Clean Air Act and EPA actions the Act authorizes, the plaintiffs *could* state a federal common-law claim for curtailment of greenhouse gas emissions because of their contribution to global warming. Any such claim *would* be displaced by the federal legislation authorizing EPA to regulate carbon-dioxide emissions.

564 U.S. at 423 (emphasis added). "[W]hen 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." *Id.* (quoting *Milwaukee v. Illinois II*, 451 U.S. 304, 314 (1981)). Finding that EPA had indeed prescribed national policy regarding carbon-dioxide emissions, the Court held that the Clean Air Act displaces "any federal common-law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired powerplants." *Id.* at 424.

This Court must come to the same conclusion. The District Court considered that Mana's claim centered in international tort, meaning it must be considered a claim arising under federal common law. R. at 9-10. District courts across the country have adhered to *American Electric*'s holding to dismiss similar complaints relating to displacement as recently as this year. *See City of Oakland v. B.P., PLC*, No. C17-06011 (N.D. Cal. Jun. 25, 2018) (dismissing complaint because "claims are foreclosed by the need for federal courts to defer to the legislative and executive

branches when it comes to worldwide fossil fuel sales and foreign emissions"); *City of New York v. B.P., PLC*, No. 18 Civ. 182 (S.D.N.Y. Jul. 19, 2018) (dismissing complaint because "'interstate pollution' claims arise under federal common law, and the Clean Air Act displaces claims arising from damages caused by domestic greenhouse gas emissions because Congress has expressly delegated these issues to the EPA.").

It is apparent that transboundary air pollution is problematic globally. That is why it is impracticable to allow Mana's claim against HexonGlobal based on a violation of international law proceed in the face of EPA's absolute authorization to administer the greenhouse-gas emissions standards domestic corporations are bound by. Awarding injunctive relief and damages to Mana based on customary international law in the absence of HexonGlobal violating the Clean Air Act is as nonsensical as it is unjust. District Court Judge Alsup in *City of Oakland* pondered – before dismissing the case on legal grounds –

> [O]ur industrial revolution and the development of the modern world has literally been fueled by oil and coal. Without those fuels, virtually all of our monumental progress would have been impossible. . . . Having reaped the benefits of that historic progress, would it really be fair to now ignore our own responsibility in the use of fossil fuels and place the blame for global warming on those who supplied what we demanded? Is it really fair, in light of those benefits, to say that the sale of fossil fuels was unreasonable?

City of Oakland, No. C17-06011 at *8. Though dicta at best, Judge Alsup's questions are important ones that Congress has already considered and implemented through its regulations, which ultimately displaces the *Trail Smelter* Principle. For these reasons, Mana's claims must be dismissed for failure to state a claim entitled to relief.

VI. THERE IS NO CAUSE OF ACTION AGAINST THE UNITED STATES ROOTED IN THE FIFTH AMENDMENT FOR FAILURE TO PROTECT THE GLOBAL ATMOSPHERIC CLIMATE SYSTEM FROM DISRUPTION VIA FOSSIL FUEL USE.

Lastly, the District Court properly dismissed Plaintiff Flood's public trust complaint for failing to state a claim of relief under Rule 12(b)(6). Flood asserts that the failure of the United States government to take effective action to control greenhouse gas emissions, together with its historical support for fossil fuel production, violates its obligations under the public trust doctrine, incorporated under the Fifth Amendment. R. at 10. Flood claims a fundamental due process right to a healthy and stable climate system and seeks to support this right through public trust principles. R. at 10. Following that, Flood argues that the global climate system is a common property owned in trust by the United States that must be protected and administered for the benefit of current and future generations. R. at 10.

There are at least three reasons why Flood's claim fails: first, there is no fundamental right to be free from global carbon dioxide emissions. Second, the government cannot be found liable for conduct of private parties. *See DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189 (1989). Third, the public trust doctrine is a creature of state law, not federal law. In any event, the United States *has* properly implemented policies through proper avenues (the executive and legislative branches) to *decrease* greenhouse gas emissions under its jurisdiction and abroad, decreasing domestic emission rates though global emissions have continued to rise. R. at 7.

A. There Is No Constitutional Right To Be Free From Global Carbon Dioxide Emissions.

The Fifth Amendment provides in part that "no person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. CONST amend. V. Flood attempts to

assemble a substantive due process guarantee through the public trust doctrine against government action. R. at 10. But, courts must exercise the "utmost care and restraint" when considering enlarging Constitution-based protections beyond the ones specifically enumerated. *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992).

Here, Flood asserts that the global climate system is a common property owned in trust by the United States that must be protected and administered for the benefit of current and future generations. R. at 10. No court has ever contemplated such a statement. To the contrary, federal courts at all levels have held the opposite of what Flood asserts now. *See 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 or *any other* provision of the Federal Constitution.") (emphasis added); *Nat'l Sea Clammers Ass'n v. City of New York*, 616 F.2d 1222, 1237-38 (3rd Cir. 1980), *dismissed and vacated on other grounds*, 453 U.S. 1 (1981) ("[T]here is no constitutional right to a pollution-free environment.").

B. The Fifth Amendment Does Not Apply to Private Actors or Industries.

The United States government cannot be held liable for the alleged wrongful conduct of private parties. The Supreme Court has specifically held that the Fifth Amendment does not apply to the acts or omissions of non-governmental actors. *DeShaney*, 489 U.S. at 195 ("the [D]ue Process clause is phrased as a limitation on the state's power to act, not as a guarantee of certain minimal levels of safety and security."). Simply, the language of the Due Process Clause does not impose an affirmative obligation on the government to ensure that certain minimal levels of safety and security are not harmed through other means. *Id.* Thus, the Due Process Clause imposes no affirmative duty to protect a citizen who is not in state custody.

Despite the Supreme Court's clear holding, plaintiffs wish to coax this Court into adopting non-binding and even contradictory authority. Plaintiffs enthusiastically point to *Juliana v. United States*, a district court case in Oregon where "atmospheric trust litigation" is currently pending. 217 F. Supp. 3d 1224 (D. Or. 2016). This Court should look at the legal theories presented in *Juliana* and plaintiffs' claims now through a suspect lens. Indeed, the Supreme Court has previously stated about new legal theories that "the mere novelty of such a claim is reason enough to doubt that 'substantive due process' sustains it; the alleged right certainly cannot be considered 'so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Reno v. Flores*, 507 U.S. 292, 303 (1993).

Plaintiffs further urge this Court to adopt the Ninth Circuit's "danger-creation" exception to *Deshaney*. The danger-creation exception involves affirmative conduct on the part of the state in placing the plaintiff in clear and present danger. *L.W. v. Grubbs*, 974 F.2d 119, 121 (9th Cir. 1992) (cause of action arose where prison personnel selected an inmate with a known history for violence against women to work alone with a female nurse who was subsequently raped by the inmate); *Penilla v. City of Huntington Park*, 115 F.3d 707, 709-10 (9th Cir. 1997) (cause of action arose where police "took affirmative actions that significantly increased the risk facing Penilla: they cancelled the 911 call to the paramedics; they dragged Penilla from his porch, where he was in public view, into an empty house; they then locked the door and left him there alone after they examined him and found him to be in serious medical need.").

The difference between the example cases and the instant case is stark. Here, Flood would have to allege that the United States has solely placed him in clear and present danger through the United States' actions or inactions regarding greenhouse gas emissions. Flood claims that the United States' pro-fossil fuel production policy promoted increased private

industry usage in corporations like HexonGlobal, further injuring him. But Flood ignores that the United States government cannot be liable for the multitude of factors that have increased greenhouse gas emissions. Agricultural industries, as the District Court already acknowledged, plays its own role in climate change. R. at 4. Gas-powered motor vehicles produced and driven *worldwide* contribute to increased greenhouse gas concentrations, and "EPA is the designated expert agency best suited to serve as primary regulator of greenhouse gas emissions." *American Electric*, 564 U.S. at 427-28.

C. The Public Trust Doctrine Does Not Impose Duties On The Federal Government.

The public trust doctrine is a claim based on state law. The District Court correctly noted that the public trust pedigree traced from Roman law to British common law before American courts acknowledged its principles. R. at 9. But the District Court did not precisely hold that claims involving the public trust arise under state law. The Supreme Court, however, has reaffirmed that "the public trust doctrine remains a matter of state law" and that "the contours of that public trust do not depend upon the Constitution." *PPL Mont., LLC v. Montana*, 565 U.S. 576, 603-04 (2012); *See also Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 475 (1988).

Moreover, the D.C. Circuit has recently rejected nearly the same claim that Flood brings to this Court now. *Alec L. v. Jackson*, 561 App'x 7, 8 (D.C. Cir. 2014). There, the D.C. Circuit noted that there is no case "standing for the proposition that the public trust doctrine – or claims based upon violations of that doctrine – arise under the Constitution or laws of the United States." *Id.* Relying on Supreme Court precedent that a federal public trust doctrine does not exist, the D.C. Circuit affirmed the district court's Rule 12 dismissal of a plaintiff's claims that there was a public trust duty to prevent carbon dioxide emissions in the atmosphere. *Id*. Flood's claim is nearly identical to *Alec L.* and should be dismissed following the same rationale of the

D.C. Circuit and Supreme Court precedent. Lastly, even if a public trust claim could be brought to constrain the United States, any such claim would be improper in light of the Clean Air Act for the same reasons Mana's claims are displaced by it: EPA's regulation efforts trump federal common law. *American Electric*, 564 U.S. at 424. For these reasons, Flood's claim must be dismissed.

CONCLUSION

The District Court of New Union Island properly dismissed Mana's and Flood's claims. First, plaintiffs' allegations pose a non-justiciable political question, and this Court can dismiss this appeal without considering the merits of the claims under the six-factor test in *Baker v. Carr*.

In the alternative, the District Court rightly found that though Mana had jurisdiction to bring a tort claim under the ATS against a domestic corporation, her claim against HexonGlobal under the *Trail Smelter* Principle failed because the principle is displaced by the controlling authority of the Clean Air Act's greenhouse gas regulations.

Furthermore, the District Court properly found that Flood failed to state a claim for relief under the Fifth Amendment. Flood alleged harms couched in a fabricated fundamental right that cannot be satisfied through judicial recourse. The United States government, as the Supreme Court has specifically held in *DeShaney*, cannot be sued for protection from alleged wrongful acts by private parties. Moreover, the public trust doctrine is a claim rooted in state law, and federal court is the wrong venue to entertain such a claim.

Due to all of the foregoing, this Court should affirm the District Court's dismissal of plaintiffs' claims in favor of the United States.