Team #56

CA. No. 18-000123

THIRTY-FIRST ANNUAL
JEFFREY G. MILLER PACE
NATIONAL ENVIRONMENTAL LAW
MOOT COURT COMPETITION

IN THE UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

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

v.

HEXONGLOBAL CORPORATION
Defendant-Appellee,

and

THE UNITED STATES OF AMERICA,
Defendant-Appellee,

On Appeal from the United States District Court
for New Union Island
No. 66-CV-2018

Brief for HexonGlobal Corporation,
***Defendant-Appellee*,**

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND RULES

OTHER AUTHORITIES

STATEMENT OF JURISDICTION

Jurisdiction was proper at the District Court level. The Alien Tort Statute ("ATS") expressly gives the District Court original jurisdiction of any civil tort claim brought by an alien, like Apa Mana. 28 U.S.C. § 1350 (2018). Jurisdiction was likewise proper for Noah Flood's constitutional claim because it presents a federal question under 28 U.S.C § 1331. The plaintiffs' alleged damages occurred in the South Pacific Islands, including New Union Island, and the Defendant has agreed to personal jurisdiction in New Union Island. Therefore, the venue was proper under 28 U.S.C. § 1391 (2018). The District Court entered its final order to dismiss all claims for failure to state a claim on August 15, 2018. This Court now has jurisdiction under 28 U.S.C. § 1291 (2018), which provides for review of all final decisions of District Courts.

STATEMENT OF ISSUES PRESENTED ON APPEAL

1. Under the Alien Tort Statute ("ATS"), can Apa Mana bring a claim against a domestic corporation, since HexonGlobal is domiciled in the United States?

2. Under the ATS, is the *Trail Smelter* principle recognized and enforceable as the "Law of Nations," when Mana can point to no ATS case recognizing environmental law as customary international law?

3. If the *Trail Smelter* principle were customary international law, could it impose obligations enforceable against non-governmental actors, when Principle 21 of the Stockholm Declaration, which Apa Mana relies on, expressly assigns a duty to the states and not to private actors?

4. If enforceable, is the *Trail Smelter* principle displaced by the Clean Air Act 42 U.S.C. § 7415 (2018) ("CAA"), when HexonGlobal's domicile is the United States, and the Clean Air Act can speak directly to international air pollution?

5. Under the Due Process Clause of the Fifth Amendment, is there a cause of action against the United States for failure to protect the global atmosphere from climate change, when Noah Flood makes the unprecedented claim that the climate system is a common property owned in trust by the United States?

6. Under the Political Question Doctrine, do the appellants' ATS, and public trust claims present a non-justiciable question, when the plaintiffs do not ask

> the judiciary to create a solution to global climate change, and when they are asking this court to determine a constitutional question?

STATEMENT OF THE CASE

This court is being asked to affirm the District Court's dismissal of both claims on appeal for failure to state a claim. Apa Mana, Noah Flood, and the Organization of Disappearing Island Nations ("ODIN") brought this action against HexonGlobal and the United States in the United States District Court for New Union Island. R. 3. According to their complaint, both islands Mana and Flood live on will become uninhabitable by the end of the century due to rising seas unless action is taken to limit greenhouse gas emissions. *Id*.

Both individual appellants are members of ODIN. *Id.* Apa Mana is a citizen and resident of the island nation A 'Na Atu. *Id*. She asserts that HexonGlobal's fossil fuel related business activities have violated the "Law of Nations" under the Alien Tort Statute ("ATS") 28 U.S.C. § 1350 and is seeking injunctive relief and damages. *Id*. Flood is a United States citizen and resident of New Union Island; also a member of ODIN. *Id*. He asserts a constitutional claim under the Due Process Clause of the Fifth Amendment against the United States, alleging that the country has violated its public trust obligations to protect the global climate system. *Id*.

On August 15, 2018, the District Court dismissed both the ATS and constitutional claims for failure to state a claim. R. 10 and R. 11. The court declined to reach the difficult questions presented by Mana's ATS claim. R.9. The court identified those difficult questions as

> "1) whether the *Trail Smelter* principle is indeed a universally accepted principle of customary international law; 2) whether, the *Trail Smelter* principle imposes actionable obligations on private parties, as opposed to national governments; 3) whether the Alien Tort Statute allows for a suit against a domestic corporation; and 4) whether Mana's claims [and the public trust claims] are barred by the Political Question doctrine."

Id. The court reasoned that any action Mana may have had was displaced by greenhouse gas regulation under the Clean Air Act. *Id.* Accordingly, the court dismissed her claim. *Id*. The court

also dismissed Flood's constitutional Public Trust Doctrine claim because the Supreme Court has already rejected any fundamental Due Process rights for government protection from wrongful acts by private parties. R. 10.

Following the dismissal, the plaintiffs filed an appeal asking this court to reconsider the difficult issues presented in the lower court. Those issues include the four ATS questions listed above, whether or not the Clean Air Act displaces the ATS claim, and whether there is a constitutional cause of action against the United States for failure to protect the global climate system. R. 2. This court granted review on October 8, 2018. R.1.

STATEMENT OF FACTS

The Appellants. Human production and distribution of fossil fuels (particularly natural gas), along with carbon and methane emissions from agricultural and industrial industries, have significantly contributed to global warming. R. 4. It is expected as climate change progresses, that the sea level will rise. *Id.* If the sea rises another meter, the appellants' islands could become uninhabitable due to storm waves crashing over their low-lying islands. R. 4. Both plaintiffs have already suffered seawater damage to their homes and saltwater intrusion in their drinking water. R. 5. The island residents rely on locally caught seafood as a food source, and ocean warming and acidification have reduced the availability of this food source. R. 5. Appellants Apa Mana, Noah Flood, and ODIN are suing HexonGlobal for the production and sale of fossil fuels, and the United States for the cumulative effect that climate change will have on their islands. *Id.*

HexonGlobal. HexonGlobal is the surviving corporation of all the major oil companies in the United States. *Id.* The company is incorporated in New Jersey, and the principal place of business is in Texas. *Id.* Historically, the corporation and its predecessors have contributed six percent of global greenhouse gas emissions. *Id.* HexonGlobal has known about the harmful

effect fossil fuel combustion has had on the atmosphere since the 1970s. *Id.* The corporation has oil refineries throughout the world, including one refinery on New Union Island and it has consented to general jurisdiction in all courts in the territory of New Union Islands. *Id.*

The United States. America has historically contributed twenty percent of cumulative greenhouse gas emissions to date. R. 6. Until recently, the government has not limited fossil fuel production, distribution, or combustion. *Id.* The government has promoted the industry by providing tax subsidies and by leasing public lands for extraction. *Id.* More recently, the United States has acknowledged the threat of climate change. *Id.* The Senate has ratified the United Nations Framework Convention on Climate Change ("UNFCCC") that states an objective to stabilize greenhouse gases, though no legislation implementing this commitment has been adopted. *Id.* In 2007 the Supreme Court held that greenhouse gases were potentially subject to regulation under the Clean Air Act, 42 U.S.C. § 7521 (2018). *Id.* The EPA has since adopted rules establishing both fuel economy standards and emissions rates for passenger cars. R. 7. In 2015, the EPA issued the "Clean Power Plan" which established carbon emissions standards for new power plants. Fed. Reg. 64662, (Oct. 23, 2015). *Id.* In 2015, the President of the United States signed the Paris Agreement, committing to reduce greenhouse gas emissions by an amount to be determined by each signatory. Paris Agreement to the United Nations Framework Convention on Climate Change, opened for signature Apr. 22, 2015, U.N. Doc. FCCC/CP/2015/L.9 (Dec. 12, 2015). *Id.* Despite all of these commitments to reducing greenhouse gases, United States emissions have decreased only slightly, and global emissions have increased. *Id.*

STATEMENT OF REVIEW

The United States District Court for New Union Island dismissed both Apa Mana and Noah Flood's claims for failure to state a claim. When claims are dismissed on such grounds, the standard of review is *de novo*. *Harry v. Marchant*, 237 F.3d 1315, 1317 (11th Cir. 2001). This standard requires this court to accept all allegations in the complaint as true and to construe the facts in a light most favorable to the plaintiffs. *Harper v. Thomas,* 988 F.2d 101, 103 (11th Cir. 1993).

SUMMARY OF THE ARGUMENT

The District Court correctly found that the Clean Air Act ("CAA") displaces Apa Mana's Alien Tort Statute ("ATS") claim and that Noah Flood has no recognized Due Process right to a stable climate system.

The Supreme Court has held that "The Clean Air Act displace[s] any federal common-law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired power plants." *American Elec. Power Co. v. Connecticut*, 564 U.S. 410, 428 (2011) ("*AEP*"). When the courts "deal with air and water in their ambient or interstate aspects, there is a federal common law." *Illinois v. City of Milwaukee*, 406 U.S. 91, 103 (1972) ("*Milwaukee I*"). Therefore, Apa Mana's tort claim is a matter of federal common law and the Clean Air Act displaces it.

This court has asked us to look past the displacement issue and address the difficult questions presented by the ATS claim that the lower court sought to avoid. Those questions are 1) whether Mana can sue a domestic corporation, 2) whether the *Trail Smelter* principle is recognized international law, and 3) whether that law is binding on corporations as opposed to government entities. First, the argument below explains that even though there are no statutory procedural hurdles to suing a domestic corporation in an ATS claim, there several prudential

procedural hurdles, like the *foreign non conveins* doctrine, that should bar this claim. Second, this Court will find that *no court* has ever recognized an environmental ATS claim under by itself as customary international law enforceable by the "Law of Nations." Third and finally, HexonGlobal cannot be assigned a duty and be held liable as a private corporation because of the express language in the Stockholm Principle (adapted from the *Trail Smelter* principle) that assigns duty directly to the sovereign nation.

In addition to Apa Mana's incorrect assertions regarding the ATS, Noah Flood has incorrectly claimed a fundamental substantive Due Process right to a healthy and stable climate system. This claim is deeply flawed, as no settled case law has recognized such a right. *Lake v. City of Southgate*, 2017 WL 767879 (slip op.) at 4 (E.D. Mich. 2017). Courts have consistently rejected claims where plaintiffs assert fundamental rights to a 'healthful environment." *Id.* With no statute or settled case law to stand on, this court should dismiss Mr. Flood's claim.

Flood tries to create a new Due Process right by asserting that the federal common law recognizes a federal trust duty to preserve the atmosphere for the public, but that assertion deviates significantly from the traditional application of the Public Trust Doctrine. First, no court has ever held that the atmosphere is a public trust asset. *Alec L. v. Jackson*, 863 F.Supp.2d 11, 13 (2012). Second, the doctrine is grounded in state law, not federal law. *PPL Montana, LLC v. Montana*, 565 U.S. 576, 605 (2012) ("*PPL*"). Finally, the government is allowed to balance several interests when maintaining natural resources under the trust. *National Audubon Society v. Superior Court*, 33 Cal.3d 419, 445 (1983) ("NAS"). So significantly, even if this court created an entirely new federal public trust asset, the court cannot mandate the government to regulate HexonGlobal further than it already has. Ultimately, the Public Trust claim is unpersuasive.

Even though the both plaintiffs' claims lack merit, the claims should not pose non-justiciable political questions. The Supreme Court has already held that political question is not an issue in fact patterns where a plaintiff sues a domestic fossil fuel companies in a tort claim. *AEP*. Furthermore, the highest court in the land has also said, "No policy underlying the political question doctrine suggests that Congress or the Executive . . . can decide the constitutionality of a statute." *INS v. Chada*, 462 U.S. 919, 941-942 (1983). Ms. Mana's tort claim presents a very similar fact pattern to *AEP*, and Mr. Flood is asking the court to recognize a constitutional Due Process right. Therefore, both claims do not present political questions.

Regardless of the appellants having politically justiciable claims, their arguments are deeply flawed on all other counts, and the court should summarily affirm the dismissal of these claims.

ARGUMENT

I. Apa Mana's Alien Tort Statute claim presents complications that should bar it from court, not withstanding it being displaced by the Clean Air Act.

The Alien Tort Statute ("ATS") states that "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 (2018). The first and second elements are met here because Apa Mana is an alien asserting a public nuisance tort claim against HexonGlobal. What remains to be determined is whether or not HexonGlobal's business activities violate the "Law of Nations" since Ms. Mana did not allege the company has violated a treaty of the United States.

There are important limitations to the ATS. First, a tort that would violate the law of nations must be one that is universally recognized and accepted. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004). To determine what is universally recognized and accepted, courts must

decide if the law in question is "comparable" to international violations recognized when the Alien Tort Statute was created in 1789. *Sosa*, 542 U.S. at 725. Second, a cause of action for an ATS claim is limited to actions that occur in the United States or one of its territories. *Kiobel v. Royal Dutch Petroleum*, 569 U.S. 108, 124 (2013). Third, the defendant in an ATS claim cannot be a foreign corporation, *Jesner v. Arab Bank, PLC.*, 138 S. Ct. 1386, 1407 (2018).

The second and third procedural limitations are not issues here, because HexonGlobal is an American corporation and conducts its business in the United States. This brief will address the first limitation in some detail, along with the issues this Court has asked us to address. After considering the argument below, this Court should conclude that 1) Apa Mana cannot bring a claim against this domestic corporation, 2) that the *Trail Smelter* principle is not a recognized "Law of Nations," and 3) that the international declarations Apa Mana rely on are not binding on HexonGlobal as a private actor. For those reasons, this ATS claim must be dismissed.

A. Apa Mana cannot bring an ATS claim against a domestic corporation because the prudential jurisdiction doctrines of *forum non conveniens* and comity should bar it from suit in an American court.

First, the *forum non conveniens* doctrine should bar Apa Mana's ATS claim. American companies are consistently sued under the ATS, but there are four procedural doctrines that commonly bar ATS claims; the doctrine of *forum non conveniens*, the act of state doctrine, the political question doctrine, and the doctrine of comity. Kathleen Jawger, Environmental Claims under the Alien Tort Statute, 28 Berkley L. Rev. 519, 525 (2010). The second and third doctrines are discussed in more detail later in this argument.

The doctrine of *forum non conveniens* gives the court the ability to dismiss cases brought by non-U.S. citizens when another forum will be better suited to hear the claim. *Id.* A court

considers the convenience of the parties, while balancing the interests of justice when determining whether to dismiss a claim. *Id.*

Based on this doctrine alone, this court should dismiss Ms. Mana's ATS claim. The harm alleged has occurred in A 'Na Atu and it is impossible to trace American carbon emissions to the harm affecting A 'Na Atu. Mana may be able to show general causation, as almost every country in the world is affected by climate change. However, she cannot prove specific causation, which is required for environmental tort claims. Todd Aagaard Et Al., Practicing Environmental Law 167 (2017). In this case, the interests of justice support a dismissal of this complaint.

Furthermore, Apa Mana's complaint cannot overcome the doctrine of comity. The doctrine of comity allows the courts wide discretion in dismissing cases that could have "serious foreign policy consequences" *Kiobel*, 569 U.S. at 124. Additionally, the Supreme Court in *Sosa* has directed lower courts to use caution when allowing ATS claims to be heard, noting that the executive branch and legislative branch are better suited to extend the ATS to new situations. *Sosa*, 542 U.S. at 725. Moreover, there are many negative implications of allowing a non-citizen to sue a domestic corporation for alleged environmental harm across the globe. This could result in countless non-citizens around the globe suing American fossil fuel corporations. Our court system could be flooded with these highly technical and attenuated claims. Therefore, under both the doctrine of comity and of *forum non conveniens*, this Court should decline to hear this case.

B. The *Trail Smelter* principle is not recognized as customary international law, enforceable as the "Law of Nations" under the ATS.

Apa Mana claims that HexonGlobal violated the *Trail Smelter* principle, and this court should hold that this principle is not enforceable as a "Law of Nations." The *Trail Smelter* principle establishes that no sovereign has the authority or right to pollute with fumes and cause harm to another sovereign. Trail Smelter, 3 R.I.A.A. 1938 1965 (Trail Smelter Arb. Trib. 1941).

The *Trail Smelter* principle was later adopted at the Stockholm Conference on the Human Environment in Principle 21. R. 8. Principle 21 states that sovereigns have the responsibility to ensure that their exploitation of resources does not damage the environment of another sovereign. U.N. Conference on the Human Environment, Stockholm, June 5-16, 1972, *Declaration of the United Nations Conference on the Human Environment,* 5, U.N. Doc A/CONF.48/14/Rev. 1 (June 16, 1972) (*Hereinafter* "Principle 21"). Since the *Trail Smelter* Arbitration and the Stockholm Conference, the principle was subsequently adopted at the U.N. Conference on the Human Environment and the Rio Declaration on Environment and Development.

Despite the *Trail Smelter* principle being adopted in different environmental international treaties, an ATS claim for a violation of international environmental law has never been successful.[1] Specifically, the violation of Principle 21 of the Stockholm Declaration, which transcribes the *Trail Smelter* principle into international law, has been repeatedly rejected as universally accepted violation of international law. *Id.* at fn 1. The court rejects this principle because it imposes a general responsibility on nations, rather than an affirmative duty to ensure that their exploitation of resources does not harm another country. *Amlon Metals, Inc. v. FMC Corp.*, 775 F. Supp. 668, 971 (S.D.N.Y. 1991). Accordingly, this Court should follow precedent and decline to extend alien tort liability in environmental violations. Therefore, this Court should affirm the dismissal of Apa Mana's ATS claim.

[1] *See, e.g.*, Amlon Metals, Inc. v. FMC Corp., 775 F. Supp 668 (S.D.N.Y. 1991); Beneal v. Freeport-McMoran, Inc., 969 F. Supp. 362 (E.D. La. 1997)*;* Jota v. Texaco, Inc., 157 F.3d 153 (2d Cir. 1998); Anguinda v. Texaco, Inc., 303 F.3d 470 (2d Cir. 2002); *Flores v. Southern Peru Copper, Corp.*, 253 F. Supp. 2d 510 (S.D.N.Y. 2002).

C. The *Trail Smelter* principle does not impose actionable obligations on private parties as opposed to national governments.

In a world where the *Trail Smelter* principle is recognized as customary international law, it could not be imposed on private actors like HexonGlobal. First and foremost, the Supreme Court held that "absent further action from Congress it would be inappropriate for courts to extend ATS liability to foreign corporations." *Jesner v. Arab Bank, PLC*, 138 S.Ct. 1386, 1403 (2018). *Jesner* does not address whether domestic corporations can be sued. Therefore, an analysis of the transboundary pollution declarations that Apa Mana relies on is appropriate to determine if HexonGlobal, as a private actor, can be held liable.

Ms. Mana asserts that the *Trail Smelter* principle is reflected in the Stockholm and Rio Declarations, and argues that those transboundary pollution declarations are enforceable as the "Law of Nations." R. 9. As explained above, Principle 21 of the Stockholm Declaration states that a "sovereign [has a] 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." Principle 21.

However, courts have already held that plaintiffs should not rely on the Stockholm Principle as an enforceable environmental law. *Amlon Metals*, *Inc. v. FMC Corp*, 775 F. Supp. 668, at 671 (S.D.N.Y. 1991). In *Amlon Metals, Inc.*, the court declared that the Principle was void of "any specific proscriptions." *Id.* Both the Stockholm Principle and the Rio Declaration are considered soft law that is not legally binding. 28 Berkley L. Rev. 519, 534 (2010). Furthermore, both declarations only speak of the states as duty bearers and not private actors. *Id.* at 535. "At the outset [the declarations] do not cover corporate conduct." *Id.* Thus, HexonGlobal cannot be assigned a duty that has expressly been assigned to the sovereign.

II. The District Court did not err in holding that even if the *Trail Smelter* Principle were enforceable, the Clean Air Act would displace it.

The District Court correctly concluded that the Clean Air Act ("CAA") displaced the Apa Mana's ATS claim. To determine when a claim is displaced, the court must decide, "whether Congress has provided a sufficient legislative solution to the particular [issue]." *Mich. v. U.S. Army Corps of Eng'rs,* 667 F.3d 765, 777 (7th Cir. 2011). Courts have explained that legislative solutions are sufficient when "Congress [has established] a comprehensive regulatory program supervised by an expert administrative agency." *City of Milwaukee v. Illinois and Michigan,* 451 U.S. 304, 305 (1981). The CAA is the "most complex regulatory program in [United States] environmental law," and the Supreme Court has recognized the Environmental Protection Agency ("EPA") as "an expert agency ... best suited to serve as primary regulator of greenhouse gas emissions." Todd Aagaard Et Al., Practicing Environmental Law 167 (2017); *American Elec. Power Co. v. Connecticut*, 564 U.S. 410, 428 (2011) ("*AEP*"). Thus, without evening scratching the surface of the statute, it is clear Ms. Mana's claim is displaced.

A. The Supreme Court has already held that the CAA displaces these types of public nuisance claims.

This Court must defer to the Supreme Court, which has already held that the CAA displaces public nuisance claims seeking the reduction of greenhouse gas emissions. *Id.* at 415. In this case, Ms. Mana may argue that the EPA does not regulate the sales of petroleum products in the United States, so the CAA should not displace her claim. But courts have not found this argument persuasive, reasoning that the alleged injuries from sales arise "only because [of] third-party users of fossil fuels" in this country and around the world. *City of New York v. BP P.L.C.*, 325 F.Supp.3d 466, 474 (2018). With the sales argument not recognized by the court, Ms. Mana

ultimately seeks to hold HexonGlobal liable for greenhouse gas emissions, and the CAA displaces that type of claim under *AEP* and *City of New York*.

B. The petitioners have ignored the relief available to them in the Clean Air Act that specifically addresses international pollution.

The CAA has also spoken directly to International Air pollution. The test for displacement is "whether or not there is a statute that speak[s] directly to [the] question at issue." *AEP,* 564 U.S. at 415. As an example, in *Milwaukee I,* after considering multiple statutes that potentially affected the federal question at issue, the Supreme Court held that no statute directly addressed the question, and federal common law was not displaced. 406 U.S. at 101. Apa Mana's case is unlike *Milwaukee I*.

Section 115 of the CAA is an underutilized section of the statute that speaks directly to International Air Pollution. 42 U.S. Code § 7415 (2018). The section explains that "[a]ny foreign country so affected by such emission of pollutant or pollutants [from the United States] shall be invited to appear at any public hearing associated with any revision of the appropriate portion of the applicable implementation plan." § 7415(b). In return, the reciprocity clause states that this privilege is only available to foreign countries that give the United States the same rights to prevent or control air pollution occurring in that country." Therefore, if Ms. Mana and ODIN wanted injunctive relief from HexonGlobal's activities in the United States *and* A'Na Atu, they should have utilized Section 115.

Utilizing Section 115 of the CAA is, in fact, the only legal procedure that Mana and ODIN have available to them. Under the *act of state* doctrine, United States Courts cannot adjudicate claims "when doing so would require the court to invalidate the official acts ... [of] a foreign sovereign ... performed on its territory." Kathleen Jawger, Environmental Claims under the Alien Tort Statute, 28 Berkley L. Rev. 519, 525 (2010). "The act of state doctrine is not some

vague doctrine of abstention but a "*principle of decision* binding on federal and state courts alike." *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., Intern*, 493 U.S. 400, 405 (1990); quoting *Banco Nacional de Cuba v. Sabbantino*, 376 U.S. 398, 427 (1964) (emphasis added by the Court).

To fully grant the worldwide relief the petitioners seek, the United States Court would have to invalidate the regulatory programs and official decisions of all foreign countries that have welcomed HexonGlobal's business. Moreover, this court would be invalidating these countries decisions when the United States itself is one of the largest emitters of fossil fuels, *and* it has jurisdiction over the corporation in controversy. That is the type of result the *act of state* doctrine seeks to prevent. Consequently, this court can only provide relief by directing the EPA to regulate HexonGlobal further domestically and in any foreign sovereign nation that has utilized Section 115. Ms. Mana and ODIN have taken an incorrect procedural route, and the sufficient legislative solutions of the CAA displace their claim. This Court should affirm the District Court's holding and dismiss this tort claim.

III. The District Court did not err in dismissing the petitioners' claims, because they do not have a recognized fundamental Due Process right.

The lower court correctly held that Mr. Noah Flood does not have a substantive Due Process right to a stable climate system. Only one federal court has found a fundamental Due Process right to a "climate system capable of sustaining human life," but that case has yet to proceed to trial on the merits, and most courts have ruled in the opposite direction. *Juliana v. United States*, 217 F. Supp. 3d 1224, 1250 (D. Or. 2016); *Lake v. City of Southgate*, 2017 WL 767879 (slip op.) at 4 (E.D. Mich. 2017). In every other case where "federal courts have faced assertions of fundamental rights to a 'healthful environment' ... they have invariably rejected

those claims."[2] *Id.* Even if this court decides to follow *Juliana* and hold that there is a fundamental right to a stable global climate system, this court should affirm the District Court's dismissal on the following grounds.

A. The Supreme Court has rejected any fundamental Due Process right to government protection from acts committed by private parties.

The government has no affirmative duty to protect the public from wrongful acts by private parties. The Supreme Court has stated that the "Due Process Clauses generally confer no affirmative right to governmental aid" and "nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors." *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs*., 489 U.S. 189, 195 (1989). The Court reasoned that the text of these clauses could not be fairly extended to impose an affirmative obligation on the government to ensure individuals do not come to harm through other means. *Id.* Noah Flood is asking this Court to extend the meaning of the Due Process Clause of the Fifth Amendment and obligate the United States to protect its residents from the many private actors that contribute to global climate change. This court cannot do that without ignoring Supreme Court precedent. Thus, the District Court correctly dismissed Noah Flood's fundamental Due Process claim.

[2] *See, e.g.*, Ely v. Velde, 451 F.2d 1130, 1139 (4th Cir. 1971) (holding that there is no constitutional right to a healthful environment); SF Chapter of A. Philip Randolph Inst. v. U.S. EPA, 2008 WL 859985, at 7 (N.D. Cal. Mar. 28, 2008) (rejecting asserted rights to be free from climate change pollution and to have a certain quality of life); Pinkney v. Ohio EPA, 375 F. Supp. 305, 310 (N.D. Ohio 1974)("[T]he Court is unable to rule that the right to a healthful environment is a fundamental right under the Constitution."); Tanner v. Armco Steel Corp., 340 F. Supp. 532, 537 (S.D. Tex. 1972) ("[N]o legally enforceable right to a healthful environment, giving rise to an action for damages, is guaranteed by the Fourteenth Amendment or any other provision of the Federal Constitution."). Lake v. City of Southgate, 2017 WL 767879 (slip op.) at 4 (E.D. Mich. 2017).

B. Noah Flood has mistakenly relied on the Public Trust Doctrine to support a substantive Due Process right.

The District Court correctly wrote that the Public Trust Doctrine "cannot be the font of the Due Process right claimed by the plaintiff." R.10. A natural resource public trust, "operates according to basic trust principles, which impose upon the trustee a fiduciary duty to 'protect the trust property against damage or destruction.'" *Juliana,* 217 F. Supp. 3d at 1254. Traditionally, the Public Trust Doctrine restrained the state's ability to alienate submerged lands because the state had to reserve the land, and the water above it, in trust for public access and enjoyment. *Alec L. v. Jackson*, 863 F.Supp.2d 11, 13 (2012). Courts have expanded the doctrine in recent years to protect the natural habitat around tidelands and even to water itself. *Marks v. Whitney*, 6 Cal.3d 251, 259 (1971); *National Audubon Society v. Superior Court*, 33 Cal.3d 419, 445 (1983). ("NAS"). However, for this court to grant the relief requested by Noah Flood's public trust claim it must 1) expand the Public Trust Doctrine to cover the atmosphere, 2) recognize a federal public trust obligation to that asset for the first time, and 3) give the doctrine more Due Process power than it traditionally has in this type of case. Even when viewed in a light most favorable to Mr. Flood, the facts and precedent on the Public Trust Doctrine do not create a substantive Due Process right.

i. The atmosphere has never been recognized as a public trust asset in court.

This court should affirm the District Court's decision because no cases have held that the atmosphere is a public trust asset. *Alec L*., 863 F.Supp.2d at 13. The *Juliana* court avoided such a holding by concluding that it was "not necessary at this stage to determine whether the atmosphere is a public trust asset because plaintiffs have alleged violations of the Public Trust Doctrine in connection with the territorial sea." *Juliana,* 217 F. Supp. 3d at 1255. Noah Flood has not made this allegation. He asserts that the global climate system itself 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. 10. Courts have already held that applying the Public Trust Doctrine to the atmosphere would be a "significant departure" from the traditional application of the doctrine. *Alec L.*, 863 F.Supp.2d at 13. This court should not significantly depart from precedent and should not recognize an entirely new public trust asset.

ii. The Public Trust Doctrine is rooted in state law, and the federal government does not have a fiduciary duty to hold in trust a global stable climate system vulnerable to global pollution.

Noah Flood incorrectly asserts that there is a federal public trust duty. The Supreme Court has already spoken on this issue stating "the Public Trust Doctrine remains a matter of state law." *PPL Montana, LLC v. Montana*, 565 U.S. 576, 605 (2012) ("*PPL*"). The court in *Juliana* argues that this phrase taken in isolation says nothing about the viability of a federal public trust claim. *Juliana,* 217 F. Supp. 3d at 1257. But following this phrase in *PPL*, Justice Kennedy explains that state public trust law is "subject to the federal power to regulate vessels and navigation under the Commerce Clause and admiralty power." *PPL,* 565 U.S. at 605. He does not say that there is a state public trust subject to a federal public trust duty. *Juliana* declines to follow *PPL* without being able to point to a single case after *PPL* that contradicts this Supreme Court ruling. *Juliana,* 217 F. Supp. 3d at 1258. Moreover, in other recent federal public trust challenges, courts have followed *PPL*'s decision, holding that the Public Trust Doctrine is a matter of state law. *Alec L.*, 863 F.Supp.2d at 11. This Court should defer to Supreme Court precedent and decline to recognize a federal public trust duty.

iii. At most, a new federal atmospheric trust could only create a procedural Due Process right.

Assuming there was a federal public trust duty to protect the atmosphere, then like the states, the government is allowed to balance all competing interests in fossil fuel regulation. As

the court in *Juliana* explains, there are three types of government restrictions under the doctrine. *Juliana,* 217 F. Supp. 3d at 1254. First, property subject to the trust must be held available for the public. *Id.* Second, the government may not sell trust property to a private party, when doing so would bar public use. *Id.* Third, the government must maintain the property for particular types of uses. *Id.* Most public trust litigation involves the second restriction. *Id.* This case involves the third restriction.

When considering the third restriction, courts have held that the Public Trust Doctrine is not "antecedent" to all other competing uses. *NAS*, 33 Cal.3d 445. *NAS* was a water law case dealing with the third restriction. *Id.* The plaintiffs argued that California had a public trust duty to maintain a certain water level in Mono Lake, from which the City of Los Angeles had a prior appropriation right to divert water. *Id.* The plaintiffs asserted that the Public Trust Doctrine limited all water rights in the state. *Id.* The court did not accept that position and explained that it "would be disingenuous to hold that such appropriations are ... improper to the extent that they harm [the] public trust." *Id.* at 446. The court reasoned that the doctrine *and* the water rights system should be responsive to the diverse needs and interests in water resources. *Id.* at 445. "To embrace one system of thought and reject the other would lead to an unbalanced structure, ... [which is] essential to the economic development of this state." *Id.* The court held that the plaintiffs could rely on the doctrine to request reconsideration of Mono Lake's diversions, but ultimately, the court gave the State Water Board the responsibility of balancing the competing doctrines. *Id.* at 452. In essence, the court recognized a procedural sort of Due Process right.

Noah Flood makes the same claims as the plaintiffs in *NAS*. Like the water in Mono Lake, he asserts that the global climate system is a "common property" owned in trust. R.10. He asserts that the federal government has a duty to protect the atmosphere from climate change. *Id.*

Following *NAS*, if the global climate system became a trust asset, then the government must consider competing interests and needs when regulating it. The idea that the United States can preserve the atmosphere, when eighty percent of greenhouse emissions come from other countries, is unreasonable. It is likewise unreasonable for the government to ignore that fossil fuels are still needed to support our electrical grid and transportation system. Should this court create a new federal atmospheric trust, then as the Court deferred to the State Water Board in *NAS*, this court should defer to the EPA to regulate greenhouse gas emissions as it always has. At most, a newly recognized public trust asset and duty like this would merely create a procedural Due Process right. Thus, in this case, the Public Trust Doctrine cannot create a substantive Due Process right for Mr. Flood. The District Court was correct in its dismissal of this claim

IV. The District Court erred in holding that the petitioner's claims present a non-justiciable political question because their challenge does not threaten the separation of powers, any constitutionally delegated authority, or foreign policy.

Though this court should dismiss both cases for the reasons above, the lower court incorrectly held that these claims present non-justiciable political question. Six situations have recognized the existence of a non-justiciable issue. *Baker v. Carr*, 369 U.S. 186, 198 (1962). Those situations include when there is

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

Baker, 369 U.S. at 217. The *Baker* tests are most likely "listed in descending order of both importance and certainty." *Vieth v. Jubelirer,* 541 U.S. 267, 278 (2004). More than fifty years after *Baker*, the Supreme Court has dismissed *only two* cases for political question; both of which

fell under the first factor. *Connecticut v. American Elec. Power Co.*, 582 F.3d 309, 322 (2009). In essence, the "common underlying inquiry" is whether "the question is one that can properly be decided by the judiciary," without jeopardizing the separation of powers. *Alperin v. Vatican Bank,* 410 F.3d 532, 544 (9th Cir. 2005). Deciding the public nuisance and Public Trust Doctrine claims would not threaten the separation of powers and it is certain the District Court erred by holding that the claims present a political question.

A. The Supreme Court has already held that a political question is not presented when a plaintiff sues the fossil fuel industry in the United States.

The court can hear the Apa Mana's claim regarding climate change because the Supreme Court has already spoken on this issue. In a landmark public nuisance case, calling for the regulation of greenhouse gas emissions, the political question doctrine was asserted as a defense. *AEP*, 564 U.S. at 410. In the lower courts, eight states sued the five largest emitters of carbon dioxide in the United States. *Connecticut v. American Elec. Power Co.*, 582 F.3d 309, 314 (2009). The defendants argued that the court could not decide such a case without interfering with the President's authority to manage foreign relations related to reducing emissions. *Id*. at 324. The Court said their argument was conclusory, and that nowhere in the Plaintiffs complaints do they "ask the court to fashion a comprehensive and far-reaching solution to global climate change [which] falls within the purview of the political branches." *Id.* at 325. Accordingly, the Court of Appeals held that the case did not present a non-justiciable political question and the Supreme Court affirmed. *Id. at* 314.

Recently, a decision from a similar case from the Southern District of New York distinguished *AEP* and held that the plaintiff's claim presented a political question. *City of New York,* 325 F.Supp.3d at 476. The City of New York sued five multinational oil and gas companies for compensatory damages for past and future costs incurred by the City to protect its

infrastructure and property, and to protect the public health, safety, and property of its residents from the impacts of climate change. *Id.* at 470. If the companies refused to pay damages, the City then requested an injunction of their activities. *Id.* The City argued that their case was similar to *AEP*, but the District Court said that in *AEP* the plaintiffs only sought to limit the amount of greenhouse gas emissions from six domestic coal plants. *Id.* at 474. The court relied on the reasoning in *AEP*; that a "decision by a single federal court [,] brought by domestic plaintiffs against domestic companies for domestic conduct, does not establish a national or international emissions policy." *Id*. By contrast, the plaintiffs in *City of New York* were holding both foreign and domestic companies liable for their worldwide conduct. *Id.* The Court held that this fact distinguished the two cases and dismissed the claims for political question (The City filed an appeal in July 2018). *Id.*

Apa Mana's case is more like *AEP* than *City of New York*. The court can decide this case without fashioning a comprehensive and far-reaching solution to global climate change. In *City of New York*, the plaintiffs were litigating the worldwide activities of both foreign and domestic companies. While HexonGlobal is a domestic company that operates worldwide, this case is different. As mentioned previously, the *act of state* doctrine limits this case to domestic issues. Therefore, this court only has to determine whether HexonGlobal should be held liable for its domestic activities in the United States. Deciding this question would hardly establish a national or international emissions policy. Thus, Apa Mana's claim does not create a political question.

B. Flood's Public Trust Doctrine claim presents a constitutional question that can only be decided properly by the judiciary.

Noah Flood's Public Trust Doctrine claim also belongs in front of the judiciary. His claims may not be dismissed simply because they raise an issue of great importance to the political branches. *U.S. Dep't of Commerce v. Montana,* 503 U.S. 442, 458 (1992). In *INS v.*

Chada, the Supreme Court explained that a political question arises when a plaintiff challenges the constitutional authority of the political branch. 462 U.S. at 941. By contrast, it does not arise when the person is challenging the constitutionality of the law made by that branch. *Id.* Otherwise, "every challenge to the constitutionality of a statute would be a political question." *Id.* The Court concluded, "No policy underlying the political question doctrine suggests that Congress or the Executive . . . can decide the constitutionality of a statute; that is a decision for the courts." *Id.* at 941-942. Since Mr. Flood's claim presents a constitutional question, only a court can answer it.

Regardless of the merits, Flood's Public Trust Doctrine claim does not present a political question. The claim alleged is a fundamental Due Process claim under the fifth amendment of the Constitution, seeking protection of the right to life, liberty, and property. This claim does not challenge the authority of Congress or the President. It asserts that the laws and treaties made by those branches of government have not done enough to protect their fundamental rights, and the plaintiffs are merely asking this court to decide if they have a constitutional right and whether or not the United States violated that right. Regardless of whether there is a fundamental right to healthy and stable climate system, the claim made here does not challenge any enumerated constitutional powers. Therefore, Flood's public trust claim does not present a non-justiciable political question.

CONCLUSION

For the foregoing reasons explained above, this court should affirm the District Court's decision on the first five issues and dismiss this case.