Team No. 6

Docket No. 18-000123

IN THE UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

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

Appellant,

v.

HEXONGLOBAL CORPORATION,

Appellee,

and

THE UNITED STATES OF AMERICA,

Appellee.

Appeal from The United States District Court for New Union Island in No. 66-Cv-2018, Judge Romulus N. Remus.

BRIEF OF THE UNITED STATES OF AMERICA
Appellee

Oral Argument Requested

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VI. Do the plaintiffs' claims present a non-justiciable political question, making the political branches best suited to decide the question?

STATEMENT OF JURISDICTION

The Alien Tort Statute "ATS" presents a novel and complex jurisdictional question. To have jurisdiction under ATS, the court must first discern whether a plaintiff's claim is a violation of the "Law of Nations." *Filartiga v. Pena-Irala*, 630 F.2d 876, 887 (2d Cir. 1980). However, courts should not dismiss a plaintiff's claim on the merits without first establishing subject matter jurisdiction. *Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 86 (1998).

Additionally, because a district court is a court of limited jurisdiction, it cannot assume jurisdiction. *Id.* The United States District Court for the District of New Union Island had jurisdiction over Apa Mana's claims under 28 U.S.C. § 1350. ATS grants the federal courts jurisdiction when an alien brings a tort in violation of the "Law of Nations." 28 U.S.C. § 1350 (2012). Mana is a national of A'na Atu. Mana brought a claim against HexonGlobal for property damage, past and future expense, and an increase in health and safety risks. R. at 5. Mana alleges HexonGlobal's fossil fuel emissions violate the "Law of Nations" through the *Trail Smelter* Principle. Accordingly, the court had jurisdiction over Mana's claims.

The district court had jurisdiction over Noah Flood pursuant to 28 U.S.C. § 1331. Flood is a U.S. citizen resident of the New Union Islands, a U.S. possession. R. at 3. Flood brought a constitutional claim against the United States, which is a federal question. *Id*. Therefore, the district court had federal question jurisdiction over Flood's claims.

The United States Court of Appeals for The Twelfth Circuit has jurisdiction under 28 U.S.C. § 1291. The district court dismissed for failure to state a claim that resulted in a final judgment disposing of all of the plaintiff's claims, giving this Court appellate jurisdiction.

STATEMENT OF THE CASE

I. Factual Background

Climate change is a crisis facing every country, every locality, every community and every individual around the world. Climate change is not unique to the United States. Every person on Earth shares the burdens of climate change. Accordingly, the United States joins with the global community in creating policies to curb the devastation of climate change. R. at 6. Still, climate change persists. *Id*. Frustrated with the slow progression of climate change policies and agendas, a select few among the injured populous turn to the courts for relief. R. at 3.

Even though increased greenhouse gas "GHG" emissions affect everyone on earth, the disruptions to ordinary life are no less painful for each. Apa Mana and Noah Flood experienced the effects of climate change every time storms hit their homes. R. at 4. Mana is an alien national of A'Na Atu, a small island nation. R. at 3. Flood is a U.S. citizen resident of the New Union Islands, a possession of the United States. *Id*. The population centers of A'Na Atu and New Union Islands have an elevation less than one meter above sea level. R. at 4. Due to rising sea levels, Mana and Flood suffer water damage to their homes every time it storms. R. at 5. Further, due to rising temperatures, they, like many other people on earth have an increased risk of heat strokes and mosquito born disease. *Id*. Unhappy with their environmental conditions, Mana and Flood turned to the courts, despite the United States' efforts to create balanced climate change policies. R. at 3.

The United States recognizes the gravity of climate change and one of its leading contributors, an excess of GHGs. R. at 6. The GHGs, specifically carbon dioxide and methane, provide an insulating blanket for the earth. R. at 4. GHGs help the earth retain heat. R. at 4. The earth depends on a measured amount of GHGs. *Id*. Too much, and the earth retains to much heat. One leading cause of excess GHGs is the burning of fossil fuels for energy production. *Id*. The damage of fossil fuel energy production includes increased temperatures, changing rainfall patterns, and rising sea levels. *Id*.

Recognizing the dangers of increased GHG emissions, the United State actively engages in climate change policies. R. at 6. Because of its role as the leader of the twentieth-century industrial world, the United States led in GHG emissions. *Id*. Regulating GHGs, however, is not straightforward. The United States is obligated to balance many different policy decisions, some

of which conflict with the reduction of GHG emissions. *Id*. Still, the United States is proactive in developing climate change policies balanced with other considerations. *Id*.

The United States joins with the global community to curb what is a global crisis. The United States stood with the world when it agreed to the United Nations Framework Convention on Climate Change "UNFCCC." *Id*. UNFCCC's objective is "to achieve . . . GHG concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system." United Nations Framework Convention on Climate Change, May 9, 1992, 1771 U.N.T.S. 107, 169. The United States engaged with the global community again when it agreed to the Paris Agreement, obligating the United States to reduce GHG emissions. Paris Agreement to the United Nations Framework Convention on Climate Change, opened for signature Apr. 22, 2016, U.N. Doc. FCCC/CP/2015/L.9 (Dec. 12, 2015). While the United States has signaled an exit from the accord, the accord remains until 2020. R. at 7.

The United States has not relegated its climate change policies to global initiatives. Climate change policies fall under the purview of an entire federal agency, the Environmental Protection Agency "EPA." R. at 6. To further domestic climate change policies, the United States established the Clean Air Act. 42 U.S.C. § 7521 (2012). The Clean Air Act provides the regulation of GHGs. *Massachusetts v. EPA*, 549 U.S. 497, 533 (2007). Accordingly, the EPA has issued various regulations aimed at lowering GHG emissions. R. at 6-7. Each Presidential administration has a different method of balancing the many policy considerations, including climate change R. at 7-8.

Although the United States plays an important role in regulating greenhouse emissions, it is not actively involved in the production of GHG emissions. Companies like HexonGlobal, the surviving corporation of a merger of all major U.S. oil producers, are actively involved in the production of GHG emissions. HexonGlobal is one of the United States' largest contributors of

fossil fuel-related GHG. R. at 5. HexonGlobal is a New Jersey corporation with its principal place of business in Texas. *Id*. Among its global refinery facilities, HexonGlobal operates a refinery on New Union Island. *Id*. Through the use of its products, HexonGlobal and its predecessors contribute thirty-two percent of the United States' cumulative fossil fuel GHG emissions. *Id*. Unlike the United States, HexonGlobal is a direct contributor to increased GHG emissions.

II. Procedural Background

Without consideration of the complexities closely integrated with climate change policies, Mana, Flood, and the Organization of Disappearing Island Nations brought suit against HexonGlobal and the United States. R. at 3. Mana seeks relief from HexonGlobal through ATS, 28 U.S.C. § 1350, on the grounds that HexonGlobal's fossil fuel production is a violation of the "Law of Nations." *Id*. Flood seeks relief from the United States for violation of public trust obligations to protect the global climate ecosystems based on the Due Process Clause of the Fifth Amendment. *Id*.

Flood and Mana's suit proved futile at the trial court. The learned Judge Romulus N. Remus of the United States District Court for New Union Island granted the Appellee's motion to dismiss. R. at 1. Judge Remus dismissed Mana's claims because the *Trail Smelter* Principle under the "Law of Nations" is displaced by the Clean Air Act. *Id*. He further rejected the idea of a public trust right to governmental protection from climate change, a fatal blow to Flood's claims. *Id*. The Plaintiffs appealed the district court's decision to this Court.

SUMMARY OF THE ARGUMENT

Climate change is undoubtedly one of the greatest issues facing humanity today. The United States has the moral obligation to develop policies that further climate change goals. However, climate change policies are among numerous and often conflicting policy

determinations the United States must make. It is a nearly impossible task to balance the various policy decisions. Though the United States may have a moral obligation to regulate GHG emissions, it is not burdened by a constitutional right to a clean environment. Therefore, the United States should not be held liable for the strength or weakness of its climate change polices.

While the United States is not directly responsible for climate change, HexonGlobal, one of the United States' largest contributors to GHG emissions may be. ATS allows Mana to bring a claim against HexonGlobal. Although ATS is not a separate cause of action, it grants jurisdiction when a tort is a violation of international law. The policy reasons for limiting foreign corporation's liability do not extend to domestic corporations. Therefore, HexonGlobal is subject to suit under the ATS.

HexonGlobal is liable under the "Law of Nations." The "Law of Nations" is not governed by *stare decisis* but by the general practice of the international community. The *Trail Smelter* Principle contends that a State does not have the right to permit the use of its territory to cause injury to another State. Additionally, HexonGlobal's GHG emissions will lead to an effectual genocide of two nations through rising sea levels, implicating the *Trail Smelter* Principle.

Also, the *Trail Smelter* Principle applies to non-governmental actors. The *Trail Smelter* arbitration imposed obligations on non-governmental actors causing harm. Further, courts have allowed suits under ATS against American non-governmental actors. Additionally, Congress exempted non-governmental actors from liability under the ATS in the Torture Victim Protection Act ("TVPA"), which shows that Congress can choose to subject non-governmental actors to liability under ATS.

The *Trail Smelter* Principle, as federal common law, is displaced by the Clean Air Act. Federal common law is displaced where Congress has legislated on specific topics. The *Trial*

Smelter Principle governs harmful emissions, the same subject covered by the Clean Air Act. The Supreme Court has held that the Clean Air Act is specific legislation by Congress that displaces federal common law. By extension, the *Trail Smelter* Principle is similarly displaced. Therefore, while the *Trail Smelter* Principle would hold HexonGlobal liable, it is not an appropriate vehicle.

As to the United States' climate change responsibility, it is clear the right to a clean environment is not a fundamental right. The Supreme Court is hesitant to recognize new fundamental rights. The United States cannot fully safeguard individuals from climate change. Further, the Supreme Court has been loath to find fundamental rights that would require the Court to affirmatively act, a requirement of the protection of a clean environment.

The Public Trust Doctrine "PTD" is not an appropriate vehicle for climate change protections. The PTD applies to navigable waters, not the atmosphere. Nor is it applicable to the federal government. Therefore, the PTD cannot impose an obligation on the United States.

Finally, this Court may not force an obligation on the United States because the regulation of GHG emissions presents a non-justiciable political question. Climate change involves several "constitutional commitments" that are appropriately left for the other branches. These commitments include foreign policy, an executive branch function, and the regulation of interstate commerce, a Congressional function. Furthermore, the Court does not have the capacity to control and govern any standards that would be necessary to control climate change. Therefore, the regulation of GHG's presents a non-justiciable political question.

The ability of the United States to balance all policy considerations is vital to the well-oiled functioning of the government. Accordingly, the United States federal government must be allowed the freedom to create regulations for GHG emissions, free of the courts' interference.

Therefore, the Court should affirm the decision of the District Court dismissing the claims against the United States.

STANDARD OF REVIEW

The district court dismissed plaintiff's claims for failure to state a claim upon which relief can be granted. R. at 10-11. A dismissal for failure to state a claim is reviewed *de novo*. *Abagnin v. AMVAC Chem. Corp.*, 545 F.3d 733, 737 (9th Cir. 2008). Under the *de novo* standard, all factual allegations in the complaint are accepted as true, and the pleadings construed in the light most favorable to the nonmoving party. *Id*.

ARGUMENT

I. Mana Can Bring a Claim Against HexonGlobal, a Domestic Corporation, Under the Alien Tort Statute.

As HexonGlobal may be appropriately responsible for excess GHG emissions, Mana may be able to bring a claim against HexonGlobal. The historical application of the ATS indicates its application to domestic corporations. The First Congress enacted ATS in 1789. *Filartiga v. Pena-Irala*, 630 F.2d 876, 878 (2d Cir. 1980). For nearly one-hundred seventy years after its enactment, ATS granted jurisdiction only once before 1980. *Id*. at 889.

ATS grants district courts the power to "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 (2012). The Supreme Court clarified the granting of jurisdiction under ATS in *Sosa v. Alvarez-Machain*. 542 U.S. 692, 712 (2004). The Court in *Sosa* explained that the statute is purely jurisdictional and does not create an independent cause of action. *Id*. However, the Court explained that there is reason to believe the First Congress did not pass ATS "to be placed on the shelf." *Id.* at 719. Therefore, the Court concluded any tort that violates the "Law of Nations" could grant jurisdiction under § 1350.

Other concerns with ATS have risen while courts deliberate over when a tort violates the "Law of Nations." One such concern is whether a corporation can be liable under the statute. *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1390 (2018). The text of the statute gives no indication as to whether corporate liability was intended. Historically, individuals and human persons committed violations of international law, not corporations. *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 119 (2d Cir. 2010) (decided on other grounds by the Supreme Court in *Kiobel*, 569 U.S. 108, 124 (2013)). Many circuit courts have concluded all corporations and entities can be liable under the statute. However, the Supreme Court has limited the liability, holding foreign corporations cannot be liable under the statute. *Jesner*, 138 S. Ct. at 1402 (2018). By carving out an exception for foreign entities, the Court indicates its acceptance that ATS applies to corporations.

A. The Policy Reasons Behind the Supreme Court's Decision Not to Allow Alien Tort Statute Suits Against Foreign Corporations Does Not Extend to Domestic Corporations.

The debate about whether a corporation is liable to suit under ATS originates from *Sosa*. *Sosa*, 542 U.S. at 732. The Court noted in a solitary footnote, "[a] related consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the appellee is a private actor such as a corporation or individual." *Id*. at 732, note 20. Justice Souter's thirty-seven-word footnote spurred a circuit split as to whether corporate appellees could be liable under ATS. The disagreement centers on whether courts should look to the norms of the law of nations to find corporate liability or if they should apply regular corporate liability.

When the Supreme Court held that foreign corporations could not be liable under ATS, the Court stated it did not have to decide whether international law governed corporate liability. *Jesner*, 138 S. Ct. at 1402 (2018). Nor did the Court determine if international law imposes liability

on corporations as a norm of the "Law of Nations." *Id*. Alternatively, the Court determined the foreign corporation's liability under ATS based on policy reasons. The first policy reason was rooted in potential international discourse caused by suits brought in U.S. federal court by foreign citizens against foreign corporations. *Id*. Second, the Court noted political branches were in the best position to make foreign policy determinations. *Id*. The Court's reasoning centered on the presumption against extraterritorial application of statutes without clear intent from Congress. *Id.*

The Supreme Court's decision in *Jesner* follows similar cases with parallel reasoning. In *Kiobel v. Royal Dutch Petrol Company*, the Court barred a suit with ATS jurisdiction because all the activities complained of occurred in a foreign nation. 569 U.S. at 116. The Court analogized the decision to disallow suits against foreign corporations with the presumption against extraterritorial application. *Jesner*, 138 S. Ct. at 1404. Before reaching the Supreme Court, the 2nd Circuit held ATS barred corporate liability due to the reasoning of the footnote in *Sosa*. *Kiobel*, 569 U.S. at 116. The Supreme Court, however, based its decision on the presumption against extraterritorial application. *Id*. The Court repeatedly stressed Congress is in the best position to make foreign policy decisions. *Id*. The Court concluded that when all the conduct of a tort complained of by the plaintiffs has occurred in a foreign state, without further action from Congress, the presumption against extraterritorial application bars the plaintiff's relief under ATS. *Id.*

Similarly, in *Jesner*, the Court recognized the parallels to *Kiobel*. The Court justified its decision to disallow jurisdiction for ATS suits against foreign corporations by equating foreign corporate liability to extraterritorial application. *Jesner*, 138 S. Ct. at 1407. The Court reasoned that if exercising jurisdiction is barred when all the conduct complained of occurs outside the

United States, then it is similarly barred when a foreign citizen seeks to sue a foreign corporation in federal court. *Id*. However, the Court did not extend its reasoning to domestic corporations.

In the present case, foreign citizens seek to hold a domestic corporation liable for conduct in the United States and elsewhere that is affecting a foreign state. Accordingly, the reasoning of *Jesner* is not applicable. The production and distribution of fossil fuels have substantially increased the methane in the atmosphere. R. at 4. The increase of methane causes the ocean temperature to increase and sea levels to rise. *Id*. Already, the islands the plaintiffs reside on have suffered damage from the rising sea levels. R. at 3, 4, 5. Further, the islands will be completely uninhabitable due to rising sea levels by the end of the century. *Id*. Even though HexonGlobal has refineries throughout the world, the conduct the plaintiffs complain of has not occurred completely in foreign territory, distinguishing this case from *Kiobel.* HexonGlobal has refineries in the United States. R. at 5. Therefore, the Supreme Court's bar against extraterritorial application does not apply here.

Additionally, HexonGlobal is a U.S. corporation. *Id*. Thus, the Supreme Court's reasoning in *Jesner* that the non-judicial branches are in the best position to decide if foreign corporations should be hauled into court by a foreign citizen is not applicable. Accordingly, none of the Court's restraints are applicable, and this ATS suit may proceed.

B. Many Circuit Courts Have Expressly Allowed Jurisdiction Under the Alien Tort Statute for Suits Against Corporations.

Circuit courts, unlike the Supreme Court, have fully discussed the issue of ATS application to corporations. The 7th Circuit, 9th Circuit, and the D.C. Circuit have all held that corporations are liable under ATS. *Doe I, et al. v. Nestle USA*, 766 F.3d 1013, 1021 (9th Cir. 2014); *Flomo v. Firestone Nat. Rubber Co., LLC*, 643 F.3d 1013, 1017 (7th Cir. 2011); *Doe v. Exxon Mobil Corp.,* 654 F.3d 11, 15 (D.C. Cir. 2011) (vacated on other grounds, 527 Fed. Appx. 7 (D.C. Cir. 2013)). Central to the courts' reasoning is the absence of a compelling policy reason to subject an

individual, human tortfeasor to liability under the statute but allow Tortfeasor's, Inc. to be free from liability. The circuit split as to whether a corporate appellee can be liable under ATS is due to the disagreement over whether courts should apply international law norms or customary principles of corporate liability. The 7th Circuit, the 9th Circuit, and the D.C. Circuit have chosen to apply customary corporate liability. *Nestle*, 766 F.3d at 1021; *Flomo*, 643 F.3d at 1017; *Doe,* 654 F.3d at 15. Transversely, the 2nd Circuit follows the norms of international law, which have not found corporate appellees liable. *Kiobel*, 621 F.3d at 127. (decided on other grounds by the Supreme Court in *Kiobel*, 569 U.S. at 124).

Based on the footnote in *Sosa*, the 2nd Circuit concluded that courts must look to international law to determine if corporations can be liable under ATS. *Id*. The concurring opinion, authored by Judge Leval, boldly stated, "[t]he majority opinion deals a substantial blow to international law and its undertaking to protect fundamental human rights." *Kiobel* 621 F.3d at 149. (Judge Leval Concurring). Judge Leval's reasoning aligns with the majority of circuit courts across the nation who have ruled on corporate liability under ATS. The majority of circuit courts have concluded that international tortfeasors should not be able to escape liability simply by incorporating. *Id*. at 150; *Nestle*, 766 F.3d at 1021; *Flomo*, 643 F.3d at 1017; *Doe,* 654 F.3d at 15. Although the Supreme Court has held that foreign corporations cannot be liable under ATS, it has not expressly ruled on domestic corporations. Therefore, the circuit courts' holdings are still applicable to domestic corporations.

In a case involving child slaves who were forced to harvest cocoa for Nestle USA, Inc., the 9th Circuit re-affirmed a previous holding that there was no compelling reason for corporations to avoid liability under ATS. *Nestle*, 766 F.3d at 1021. The court noted that there was no norm for corporate immunity or liability under the "Law of Nations." *Id*. Also, the court re-affirmed that

corporate liability under an ATS claim does not depend on the existence of international precedent enforcing legal norms against corporations. *Id.* Finally, the court believed norms that are "universal and absolute," or applicable to "all actors," should provide the basis for an ATS claim against a corporation. *Id*. The court's reasoning closely follows that of its sister courts.

In a similar case to *Nestle*, the 7th Circuit noted the absurd consequences of allowing corporations to be free from liability under the ATS. *Flomo* involved children forced to work in a rubber plantation. *Flomo,* 643 F.3d at 1017. Analogizing the case to piracy, a recognized violation of the "Law of Nations," the court found it absurd that a pirate is liable under ATS, but a pirate corporation is not. *Id*. at 1017. Furthermore, while the court in *Flomo* did not think that courts should have to look to international law norms to determine corporate liability, the court reasoned that even if international norms did not already subject corporations to liability, "[t]here is always a first time for litigation to enforce a norm; there has to be." *Id.*

The D.C. Circuit followed the reasoning of *Nestle* and *Flomo* in *Doe v. Exxon Mobile*. In *Doe*, the court held that corporate immunity is inconsistent with ATS because corporate liability was an accepted principle of tort law in the United States when Congress adopted ATS in 1789. *Doe,* 654 F.3d at 48. The court noted that corporations being liable for their torts would not have been surprising to the First Congress. *Id*. Therefore, the court concluded that ATS applies to corporations. *Id*.

Similar to the reasoning in *Flomo*, *Nestle*, and *Exxon*, there is no compelling reason to allow a U.S. corporation to avoid liability for its torts. In all three cases, the circuits allowed corporate liability based on torts committed by employees or agents. *Nestle*, 766 F.3d at 1021; *Flomo*, 643 F.3d at 1017; *Doe,* 654 F.3d at 15. However, this Court should be even more willing to subject HexonGlobal to liability because the torts, in this case, were the torts of the company

through high-ranking officials and vice principals and not simply the vicarious liability of employees. R. at 5. HexonGlobal and the corporation's predecessors knew of the harmful effects of burning fossil fuels since the 1970s. R. at 5. Such blatant disregard for humanity's rights should subject HexonGlobal to liability. In line with the 2nd Circuit's holding in *Filartiga,* this Court should take a "small but important step in the fulfillment of the ageless dream to free all people from brutal violence." *Filartiga,* 630 F.2d at 890. Accordingly, HexonGlobal should have liability under ATS.

II. The *Trial Smelter* Principle is a Recognized Principle of Customary International Law Enforceable as the "Law of Nations" Under the Alien Tort Statute.

Although ATS does not create a new cause of action for aliens to sue in federal court, it does allow aliens to bring torts in federal courts that violate the "Law of Nations." *Sosa,* 542 U.S. at 711. In *Sosa*, the Supreme Court concluded that courts "should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized." *Sosa,* 542 U.S. at 725. The 18th-century paradigms recognized at the statute's enactment were piracy, offenses against ambassadors, and violations of safe conducts. *Id*. at 721. ATS grants jurisdiction in tort actions, brought by aliens, in violation of the law of nations. *Filartiga*, 630 F.2d at 890.

A. The "Law of Nations" Is Not Constricted to Its Historical Paradigms.

The "Law of Nations" is an ever-changing body of law not governed by *stare decisis.* 6 Treatise on Environmental Law § 13.02 (2018). As such, the law of nations "may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law." *United States v. Smith*, 18 U.S. 153, 160 (1820). However, when there are no treaties and no controlling legislative

acts or judicial decisions, the "Law of Nations" can be determined by the works of commentators who have by years of labor and research made themselves well-known on the subjects they choose. *The Paquete Habana*, 175 U.S. 677, 700 (1900). In *Sosa*, the Supreme Court stressed that the "Law of Nations" should be based on the "present-day law of nations." 542 U.S. at 725, 732. Accordingly, the Court did not limit the "Law of Nations" purely to the historical paradigms present at the statute's enactment. *Id*. There is room for recognizing norms outside of the historical paradigms not previously recognized by US courts. *Id*. Therefore, the "Law of Nations" is not static and changes as the problems facing the global community change.

B. The *Trail Smelter* Arbitration Established the Internation Right to Be Free From Harm Caused by Other Nations, Pursuant to the "Law Of Nations."

The crux of the *Trail Smelter* Principle is that a State has no right to use its territory or permit the use of its territory in a manner that causes injury to another State. The *Trail Smelter* arbitration between the U.S. and Canda started around 1928. *Trail Smelter (U.S. v. CA)*, 3 R.I.A.A. 1905, 1917 (1941). Trail Smelter was located in Canada, near the U.S. border. *Id*. at 1913. Trail Smelter produced harmful emissions from smelting. *Id*. at 1915. The emissions injured farmers' crops in the U.S. state of Washington. *Id*. In the most famous passage from the arbitration, the international arbitral pannel stated,

> Under principles of international law, as well as the law of the United States, no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.

Id. at 1965. Later, the Declaration of the 1972 Stockholm Conference on the Human Environment promulgated the *Trial Smelter* Principle as Principle 21. U.N. Conference on the Human Environment, Stockholm, June 5-16, 1972, *Declaration of the United Nations Conference on the Human Environment*, U.N. Doc A/CONF.48/14/Rev. 1 (June 16, 1972). The principle evolved to

say that States could exploit their lands as long as those activities did not harm other nations. *Id*. A couple decades later, Principle 2 of the 1992 Rio Declaration on Environment and Development reasserted the principle, which has been endorsed by nearly two hundred nations. U.N. Conference on Environment and Development, June 3-14, 1992, Rio de Janeiro, Braz., *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26/Rev.1(V.I) (1992).

The *Trail Smelter* arbitration provides clear authority that international law outright prohibits pollution of one State from damaging another State. 6 Treatise on Environmental Law § 13.02 (2018). Thus international tribunals may, "1) order the payment of compensation by the state responsible for causing pollution damage in another state; 2) prohibit the injurious act entirely or allow it to continue on such a scale that it will not injure the other state…" *Id.* Accordingly, the *Trail Smelter* arbitration established the global right to be free of harm from another nation, specifically its pollutants.

C. HexonGlobal's Pollution Will Eventually Cause a Genocide of Two Nations, Which Is a Recognized Actionable Tort Under the Allien Tort Statute.

The *Trail Smelter* Principle prevents a State from harming another State. Genocide is the ultimate harm to a State. Genocide is a recognized violation of the law of nations. *Kadic v. Karadzic*, 70 F.3d 232, 242 (2d Cir. 1995); *Doe*, 654 F.3d at 48; *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 778 (D.C. Cir. 1984). In *Kadic*, the plaintiff sued for genocide, rape, forced prostitution and torture committed by military forces during the Bosnian civil war. *Kadic,* 70 F.3d at 237. Genocide typically requires a level of intent to be proved. *Id*. at 244. However, in *Kadic*, the 2nd Circuit held that the plaintiffs did not have to prove the appellee had the requisite intent to survive a motion to dismiss. *Id*. The court held that the atrocities committed by the appellee were sufficiently actionable under ATS for the plaintiff's to survive a motion to dismiss. *Id*.

Accordingly, to bring a case based on genocide under ATS, proof of the specific intent of the perpetrator is not necessary to survive a motion to dismiss.

The harm that pollution causes as a whole should be a recoginized tort in violation of the "Law of Nations" because of its capacity to erase nations like A'Na Atu and the New Union Islands. Within a century, the activities of HexonGlobal will cause two island nations to be completely uninhabitable. R. at 5. In line with *Kadic*, the islands do not have to prove intent at the motion to dismiss stage. Further, because HexonGlobal knew since the 1970s of the damage that would occur as a result of the continued burning of fossil fuels, it is likely that the islands can prove some level of intent. Pollution may not always cause the genocide of nations, but when it has the potential to, courts should hold the bad actors responsible for their actions. Accordingly, the *Trail Smelter* Principle would allow Mana to bring this suit.

III. The *Trail Smelter* Principle Imposes Obligations Enforceable Against Non-Governmental Actors, Including HexonGlobal.

As a recognized principle of customary international law enforceable as the "Law of Nations," the *Trail Smelter* Principle uses ATS as its vehicle for application in particular cases. The requirements of ATS must be followed to permit application. These requirements govern the *Trail Smelter* Principle's application to non-governmental actors.

A. The *Trail Smelter* Principle Impliedly Imposes Obligations on Non-Governmental Actors.

Because a non-governmental actor committed the damage in *Trail Smelter*, the principle must apply to non-governmental actors. The *Trail Smelter* tribunal found that the emissions of the smelter in Canada caused damage to the territory of the United States. *Trail Smelter*, 3 R.I.A.A. 1905, 1915. To abide by the ruling in *Trail Smelter*, Canada required the smelter to alter its

operations. Accordingly, the smelting company made changes to reduce the cause of the damage. *Id*. at 1919.

The *Trail Smelter* Principle speaks regarding States causing harms to other States. *Id*. at 1965. At first glance, the principle does not impose obligations on non-governmental actors, only upon the governments of the States. This cannot be the extent of the *Trail Smelter* Principle's reach. For the State to comply with its obligations under the *Trail Smelter* Principle, the State must prevent or reduce the harm at its source. In the *Trail Smelter* Arbitration, the source was a Canadian company, a non-governmental actor. *Id*. at 1915. While the arbitration itself only imposed obligations explicitly upon Canada, the company running the Trail Smelter was necessarily required to alter its behaviors. Consequently, the *Trail Smelter* Arbitration imposed an obligation upon a non-governmental actor.

B. Non-Governmental Actors Fall Under the Authority of the Alien Tort Statute and By Extension the *Trail Smelter* Principle.

District courts have maintained foreign party suits under the Alien Tort Statute holding American companies liable. In *Estate of Alverez v. Johns Hopkins University*, a group of plaintiffs brought suit against Johns Hopkins University and a collection of other appellees for wrongful death caused by a series of experiments to which the deceased parties did not consent. 275 F. Supp. 3d 670, 673 (D. Md. 2017). The district court held the plaintiffs could recover for wrongful death under ATS. *Id.* at 711. The Court stated, "[i]nternational law controls the threshold question of whether an international legal norm provides the basis for an ATS claim against a corporation." *Id.* at 688. Johns Hopkins University is a non-governmental actor. Additionally, the other named appellees were non-governmental actors. *Id*. at 670. The suit, maintained through ATS, imposed potential liability and obligations on a non-governmental actor. *Id.* at 711. Accordingly, *John Hopkins* supports the imposition of obligations on non-governmental actors.

In the present case, Mana is seeking to hold HexonGlobal liable under ATS by application of the *Trail Smelter* Principle. As the *Trail Smelter* Principle is customary international law, it can be applied through the ATS. Accordingly, the combination of ATS and *Trail Smelter* Principle allows a foreign citizen to sue an American non-governmental actor. As seen in *John Hopkins*, a appellee's status as a non-governmental actor does not prevent the application of ATS. Nor does it prevent the application of the Law of Nations through the same. Therefore, the *Trail Smelter* Principle can impose obligations on non-governmental actors.

C. Other Standards of International Law Support the Imposition of the *Trail Smelter* Principle on Non-Governmental Actors.

Various customs of international law imply obligations on non-governmental actors. The "Law of Nations" is made of customs of international law. *Sosa,* 542 U.S. at 734. One custom of international law is the condemnation of genocide. In the aftermath of the atrocities committed during the Second World War, the condemnation of genocide as contrary to international law quickly received broad acceptance by the community of nations. *Kadic,* 70 F.3d at 241. In *Kadic*, the court held that "[g]enocide is a crime under international law that is condemned by the civilized would, whether the perpetrators are 'private individuals, public officials or statesmen." *Id.* Similarly, piracy has been recognized by the "Law of Nations" as a crime. *Smith*, 18 U.S. at 162. The custom of international law was to punish "all persons, whether natives or foreigners, who have committed this offence." *Id*. While genocide and piracy are admittedly extreme examples, so too is the devastation of global populations due to climate change. Accordingly, international law does not shy away from imposing obligations on private, non-governmental actors.

D. The Torture Victim Protection Act of 1991 Supports the Imposition of Obligations on Non-Governmental Actors by the *Trail Smelter* Principle.

Established statutory law supports the imposition of obligations on non-governmental actors. The TVPA provides "[a]n individual who, under actual or apparent authority, or color of law, of any foreign nation." 28 U.S.C. §1350 (2012). Through the TVPA, Congress codified its interpretation of *Filartiga*. These customs were already a part of federal common law through ATS. Statutes that invade the common law are read with the presumption favoring retention of long-established and familiar principles, except when the statutory purposes to the contrary are evident. *Baker Botts, LLP v. ASARCO, LLC*, 135 S. Ct. 2158 (2015). The TVPA demonstrates that it is only under specific circumstances that non-governmental actors are not subject to the obligations posed by the ATS. Congress, while invading common law principles, was making it clear that non-governmental actors would not be liable for torture. That same level of specificity is not present in the *Trail Smelter* Principle as applied through the ATS. Therefore, the lack of specificity in ATS or the *Trial Smelter* Principle related to the obligations of non-governmental actors lends further support to the imposition of obligations on non-governmental actors by the *Trail Smelter* Principle through the ATS. Accordingly, the *Trail Smelter* Principle can impose obligations on non-governmental actors.

IV. The *Trial Smelter* Principle is Displaced by the Clean Air Act.

The *Trial Smelter* Principle is not established U.S. law. It was not written by a state legislature or Congress. Further, it did not emerge from the brilliant minds of the Supreme Court. Rather, the *Trial Smelter* Principle is simply a principle that emerged from an international arbitration between the United States and Canada in the early twentieth century. *Trail Smelter*, 3 R.I.A.A. at 1905. As a custom of international law, the United States would recognize the *Trail Smelter* Principle through the ATS as the governing "law." However, in the nearly eighty years

since the *Trail Smelter* Arbitration, there has been little to no need for American courts to apply the *Trail Smelter* Principle. In 1963, Congress passed and later amended the Clean Air Act. 42 U.S.C. § 7521 (2012). The Clean Air Act specifically addresses the concerns of the Trail Smelter Principle.

A. International Law is Part of the Federal Common Law.

Federal common law includes customs of international law. The courts are "bound by the Law of Nations, which is part of the law of the land." *Filartiga*, 630 F.2d at 887. More specifically, "federal common law develops when courts must consider federal questions that are not answered by statutes." *Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 855 (9th Cir. 2012). For many years the United States did not have statutes addressing the issues covered by the *Trail Smelter* Principle. Accordingly, the *Trail Smelter* Principle integrated with federal common law as a customary international law.

B. The Clean Air Act Displaces Federal Common Law.

The *Trail Smelter* Principle, as federal common law, is displaced by the Clean Air Act. Courts use the principles developed in federal common law only when necessary and only where Congress has not spoken on an issue. *Am. Elec. Power Co., Inc. v. Connecticut*, 564 U.S. 410, 423 (2011). However, "when Congress addresses a question previously governed by a decision rested on federal common law . . . the need for such an unusual exercise of law-making by federal courts disappears." *Id*. Prior to the Clean Air Act, the United States did not have laws regulating the harms addressed by the *Trail Smelter* Principle. The *Trail Smelter* Principle addresses injury by one State to another State due to harmful emissions, including air pollution. Through the Clean Air Act, Congress gave the EPA the power to regulate air pollution. *Massachusetts*, 549 U.S. at 533. The EPA has exercised this power, finding

> The Administrator finds that GHGs in the atmosphere may reasonably be anticipated both to endanger public health and to endanger public welfare. Specifically, the Administrator is defining the "air pollution" referred to in CAA section 202(a) to be the mix of six long-lived and directly-emitted GHGs: carbon dioxide (CO_2) . . .

Endangerment and Cause or Contribute Findings for GHGs Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496 (Dec. 5, 2009). Congress, through the EPA, has spoken directly to the regulation of GHGs. There is no longer a need for the "unusual exercise of law making by federal courts." *Am. Elec.*, 564 U.S. at 423. Therefore, the *Trail Smelter* Principle is displaced by the Clean Air Act.

C. The United States Supreme Court Addressed the Displacement of Federal Common Law by the Clean Air Act.

The Supreme Court directly addressed the issue of the Clean Air Act displacing all relevant federal common law in *American Electric*. In *American Electric*, eight states, New York City, and three land trusts sued an electric power company seeking abatement of the appellee power company's ongoing contributions to the public nuisance of global warming. *Am. Elec*, 564 U.S. at 424. The Court explicitly stated, "[w]e hold that the Clean Air Act and the EPA actions it authorizes displace any federal common law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired power plants." *Id*. The Supreme Court declared specifically that the displacement of federal common law applied to future emissions while not specifically addressing past emissions. *Id*. However, the 9th Circuit extended that displacement to also include past emissions of greenhouse gases. *Kivalina*, 696 F.3d at 858. The court noted, "[t]he Supreme Court has held that federal common law addressing domestic GHG emissions has been displaced by Congressional action. That determination displaces federal common law public nuisance actions seeking damages, as well as those actions seeking injunctive relief." *Id*. The Clean Air Act displaced all actions related to the emission of GHGs, both past, and future. Therefore, emissions

that would be governed by the *Trail Smelter* Principle are similarly displaced by the Clean Air Act. Accordingly, while HexonGlobal is responsible for GHG emissions, the *Trail Smelter* Principle is not an appropriate vehicle to bring a suit against HexonGlobal.

V. The Responsibility of the United States to Safeguard the Atmosphere from Climate Change Is Not a Right Protected by the Constitution.

Even though HexonGlobal may bear some responsibility for the current state of the environment, Flood claims the United States violated its public trust obligations of the Due Process Clause. However, there is no constitutionally mandated responsibility of the federal government to protect the atmosphere from climate change.

A. Protection from Climate Change Is Not a Fundamental Right as Recognized by the United States Supreme Court.

The United States Supreme Court has never recognized the right to a clean environment as a fundamental right. For compelling reasons, the right to a clean environment is not a fundamental right.

i. Environmental Rights Do Not Fit the Pattern of Recognized Fundamental Rights.

The Supreme Court has long recognized certain rights as fundamental, giving them special protection by the Constitution. Fundamental rights are protected from any governmental infringement unless the interreference is "narrowly tailored to serve a compelling state interest." *Reno v. Flores*, 507 U.S. 292, 302 (1993). The Due Process Clause of the Fifth Amendment protects citizens from deprivation "of life, liberty, or property, without due process of law." U.S. Const. amend. V. Similar protection included in the Fourteenth Amendment applies to the states. U.S. Const. amend. XIV. The Supreme Court defines fundamental rights as "those rights enumerated in the Constitution as well as some unenumerated rights," including rights that are

"deeply rooted in this Nation's history and tradition" or are "fundamental to out scheme of ordered liberty." *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 756-67 (2010).

The Supreme Court is hesitant to recognize new fundamental rights. In *Washington v. Glucksberg*, Chief Justice Rehnquist concluded the Court must "exercise the utmost care whenever we are asked to break new ground in this field, lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the members of the Supreme Court." 521 U.S. 702, 720 (1997). Accordingly, the Court seldom recognizes fundamental rights. One example of a fundamental right recognized by the Supreme Court is the right to vote. *See Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 670 (1966) Transversely, some freedoms long engrained in American society, the Court found not to be fundamental rights. *Compare Lochner v. New York*, 198 U.S. 45, 53-54 (1905) (recognizing the fundamental right to contract), with *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 392 (1937) (holding "there is no absolute freedom" to contract). Over the years, the Supreme Court has found the right to privacy as the basis for several fundamental rights. *See Griswold v. Connecticut*, 381 U.S. 479, 527 (1965) (the rights to procreational autonomy); *Lawrence v. Texas*, 539 U.S. 558, 585 (2003) (to engage in same-sex sexual intercourse).

The right to a clean environment is unlike any previously recognized fundamental right. In each of the recognized fundamental rights, the government can safeguard the individual right. For the right to privacy, the government must refrain from interfering in an individual's zone of privacy. *Griswold*, 381 U.S. at 484. For the right to vote, the government need only provide citizens the freedom to vote without governmental restraint or coercion. *Harper*, 383 U.S. at 670. The right to a clean environment is not as easily satisfied. The United States only contributes a fraction of the global GHGs. *Global GHG Emissions Data*, U.S. ENVIRONMENTAL PROTECTION AGENCY,

https://www.epa.gov/ghgemissions/global-greenhouse-gas-emissions-data#Country. Even if the United States ceased all GHG production, climate change would continue. The United States government cannot fully safeguard the right to a sustainable environment.

Because fundamental rights are so basic to American society, a hallmark of fundamental rights is that the government can and must protect them. The United States cannot fully protect the right to a clean environment. Therefore, the right is not a fundamental right.

ii. Environmental Rights Do Not Fall in One of the Very Narrow Exceptions for Affirmative Action Fundamental Rights.

While the right to protection from climate change does not fit the mold of other fundamental rights, other methods of applying the Due Process Clause prove equally futile. Rather than protecting the individual from governmental abuse or infringement like other fundamental rights, the right to a clean environment asks the government to protect citizens from the climate change practices of individuals and organizations. The Supreme Court has been loath to find the existence of a fundamental right that requires the government to affirmatively act. *Deshaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 195 (1989). In fact, the whole point of privacy rights is the right to be free from governmental interference. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2636 (2015). In *Deshaney*, the Court found the Due Process Clause's "language cannot fairly be extended to impose an affirmative obligation on the state to ensure that those interests do not come to harm through other means." *Deshaney*, 489 U.S. at 195. Accordingly, with few exceptions, a fundamental right cannot impose obligations on the government to affect the behavior of individuals.

Some circuit courts have recognized very narrow exceptions to *Deshaney*'s prohibition. *See Pauluk v. Savage*, 836 F.3d 1117, 1132 (9th Cir. 2016); *Penilla v. City of Huntington Park*, 115 F.3d 707, 711 (9th Cir. 1997). In *Juliana v. United States*, a similar case to the present, the

Oregon District Court attempted to apply an exception to *Deshaney* espoused by the 9th Circuit. 217 F. Supp. 3d 1224, at 1253 (D. Or. 2016). However, this application is misguided. The exception applies when a government agent creates the danger. *Id*.

The situations in which courts have applied the 'danger creation' exception are strikingly different than climate change. In *Penilla*, a man became seriously ill prompting his neighbors to call 911. *Penilla*, 115 F.3d at 708. The first officers on the scene canceled the request for paramedics, dragged the man into his house, left him on the floor, and shut the door. *Id*. The man's neighbors discovered him in his house, dead, the next day. *Id*. The court held that "when an officer's conduct places a person in peril in deliberate indifference to their safety, conduct creates a constitutional claim." *Id*. at 709. Other 9th Circuit cases have similar despicable fact patterns. *See L.W. v. Grubbs*, 974 F.2d 119 (9th Cir. 1992); *Wood v. Ostrander*, 879 F.2d 583 (9th Cir. 1989). Other circuits have restricted if not rejected the 'danger creation' exception. *Jackson v. Byrne*, 738 F.2d 1443, 1448 (7th Cir. 1984) (no liability for firefighter's failure to rescue a person); *Bradberry v. Pinellas County*, 789 F.2d 1513, 1514-15, 1518 (11th Cir. 1986) (no liability for lifeguard's failure to rescue a person).

The 'danger creation' exception does not apply to climate change for multiple reasons. First, the exception is only widely recognized by one circuit court. *L.W.*, 974 F.2d at 119 (9th Cir.). Second, the exception has only applied to the behavior of governmental agents, not the government itself. *L.W.*, 974 F.2d at 119 (supervisor of the facility); *Wood*, 879 F.2d at 583 (police officer). Finally, the government does not possess the required mental state as it pertains to climate change. *Pauluk v. Savage*, 836 F.3d 1117, 1125 (9th Cir. 2016) (requires a "culpable mental state more than gross negligence"). It is difficult to imagine the federal government and its agents have a nefarious intent to subject individuals in America to climate change and its devastating

consequences. Government behavior related to climate change does not match the standards of the 'danger creation' exception. Therefore, climate change does not implicate an exception to the Supreme Court's general rule that fundamental rights do not require affirmative acts. Accordingly, a fundamental right cannot be created to require the United States to affirmatively act to reduce GHGs and to limit climate change.

B. The Duty to Protect the Environment from Climate Change Is Not Applicable to the United States Federal Government Through the Public Trust Doctrine.

Similar to the fundamental rights theory, the Public Trust Doctrine "PTD" is also an ineffective vessel to force on the United States government a responsibility to protect the environment from climate change. The PTD traces its roots to the days of Roman law. Resources such as water, the Roman Emperor Justinian claimed, "are by natural law common to all." J. Inst. 2.1.1 (J.B. Moyle trans.). The PTD came to the United States by way of the English common law. *Shively v. Bowlby*, 152 U.S. 1, 57 (1894). In the seminal case, *Shively v. Bowlby*, the Supreme Court recognized "[u]pon the American Revolution, these rights, charged with a like trust, were vested in the original States within their respective borders, subject to the rights surrendered by the Constitution to the United States." *Id*.

Subsequent Supreme Court cases laid the framework of the American PTD. *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 474 (1988). Early on, the Court recognized the sovereign authority of the states over the navigable water and the land beneath it. *Id*. However, the Court also recognized, "[t]he State can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them . . . than it can abdicate its police powers in the administration of government and the preservation of the peace." *Ill. C. R. Co. v. Illinois.*, 146 U.S. 387, 453 (1892). Ultimately, the state holds the lands and water as a trustee and must preserve the land for the benefit of the public. *Id*.

Recently, groups began initiating Atmospheric Trust Litigation ("ATL") based on the principles of the PTD. ATL has struggled to gain traction in many state courts. *See Butler ex rel. Peshlakai v. Brewer*, No. 1 CA-CV 12-0347, 2013 WL 1091209 (March 14, 2013) (Arizona case dismissed on procedural grounds); *Filippone ex rel. v. Iowa Dept. of Nat. Res.*, 829 N.W.2d 589 (2013) (Iowa case upholding agency's denial of a proposed rule). Regardless of its merits, ATL or other similar theories cannot overcome the restraints placed on the PTD by the courts.

i. Climate Change Protection Is Not an Exception to the General Rule that the Public Trust Doctrine Applies Primarily to Navigable Waters.

The PTD has been applied almost exclusively to public waterways. At its introduction to the United States, courts applied the PTD to navigable water. *See Arnold v. Mundy*, 6 N.J.L. 1, 15 (1821); *Pollard v. Hagan*, 44 U.S. 212, 230 (1845). Even though the doctrine has expanded in the United States, it has remained in the wheelhouse of water. *See Nat'l Audubon Soc'y v. Superior Court*, 33 Cal. 3d 419, 435 (1983) (applying the PTD to streams that were not navigable). There are countless cases where the Supreme Court has applied the PTD to water, but none where the Court has expanded the doctrine to include the atmosphere.

The PTD as recognized by the Supreme Court, should not apply to the atmosphere because the government does not recognize the same type of property interest in the atmosphere. When the Court applies the PTD, a state has a property interest in the land held in trust. *See Ill. C. R. Co.*, 146 U.S. at 455. The United States does not recognize the same property interest in the air. The Court has held airspace functions as a public highway, and the public should have a right to use it. *United States v. Causby*, 328 U.S. 256, 260-61 (1946). The Court has not recognized that the atmosphere as a trust. Just because the United States government has the right to regulate and control the traffic in the airspace, does not mean it has the responsibility to maintain the quality of the atmosphere. If the United States government does not recognize a property interest in the

atmosphere that gives it exclusive authority to manage it, the atmosphere cannot be subject to a public trust.

ii. The Public Trust Doctrine Does Not Apply to the Federal Government.

Even if the PTD could apply to the atmosphere, the PTD is not a limitation on the federal government. *Alec L. v. Jackson*, 863 F. Supp. 2d 11, 15 (D.D.C. 2012). Historically, the Supreme Court has applied the PTD to the states. *See, e.g., Ill. C. R. Co.*, 146 U.S. at 434 (suit against Illinois); *Phillips*, 484 U.S. at 472 (suit against Mississippi). At least one court has held expressly the PTD does not apply to the federal government. *Alec L.*, 863 F. Supp. at 15. In *Alec L.*, several youth citizens brought an action against various federal agencies for failure to reduce GHG emissions. *Id*. at 12. The court held the PTD expressly does not apply to the states. *Id*.

In coming to its conclusion, the *Alec* court cited the Supreme Court's decision in *PPL Montana*, where the Court "stated that 'the public trust doctrine remains a matter of state law' and its 'contours . . . do not depend upon the Constitution.'" *Id*. at 15 (quoting *PPL Mont., LLC v. Montana*, 565 U.S 576, 132 S. Ct. 1213, 1235 (2012)). Even assuming the language from *PPL Montana* is dicta, the court noted that "carefully considered language of the Supreme Court, even if technically dictum, generally must be treated as authoritative." *Id*. at 15 (quoting *Overby v. Nat'l Ass'n of Letter Carriers*, 595 F.3d 1290, 1295 (D.C. Cir. 2010)). The D.C. Circuit subsequently upheld the decision in *Alec L. Alex L. ex rel. Loorz v. McCarthy*, 561 F. App'x 7 (D.C. Cir. 2014) (per curiam). Supporting the decision of *Alec L.* is the fact that the Supreme Court has never applied the PTD to the federal government.

There are no situations similar to the present case where courts have recognized a PTD argument against the federal government. Some district courts, however, have narrowly applied an exception when the federal government condemns land owned by the states. *City of Alameda*

v. Todd Shipyards Corp., 635 F. Supp. 1447, 1450 (N.D. Cal. 1986); *United States v. 1.58 Acres of Land*, 523 F. Supp. 120, 124 (D. Mass. 1981). The atmosphere and climate change do not fit into this narrow application. The PTD's purpose is primarily "navigation, commerce and fishing." *Nat'l Audubon Soc'y v. Superior Court*, 658 P.2d 709, 719 (Cal. 1983). The states primarily achieve these objectives. The state's ability to manage public trust property is why the PTD passed from the English king to the states rather than to the federal government. The states are still capable of achieving the objectives of the PTD. Therefore, the PTD should only apply to the states.

In the present case, Flood claims the United States violated its obligations under the Due Process Clause. The right to protection from climate change is not a fundamental right. Nor is it applicable to the federal government through the PTD. Accordingly, Flood has no claim against the United States based on the Due Process Clause.

VI. Regardless of the Merits of the Claims, the Level of Greenhouse Gas Emissions Allowed in the Atmosphere Presents a Non-Justiciable Political Question.

The Court need not decide the merits of the case related to the United States because the claims present a non-justiciable political question, best left to the political branches of the U.S. government. The political branches are best suited and more capable of determining the appropriate level of GHG emissions allowed in the atmosphere. Therefore, the case presents a non-justiciable political question, making it inappropriate for the courts.

A. In the Interest of Separation of Powers, the Judiciary Will Not Decide Questions Best Left for the Political Branches of Government.

In the spirit of separation of powers, the Supreme Court recognizes self-imposed restraints on the federal judiciary. The judiciary will not decide non-justiciable issues. That is, the judiciary leaves political questions to the political branches. The political question doctrine traces its roots to the landmark case *Marbury v. Madison*. In *Marbury*, the court held that where acts are political

in nature, "nothing can be more perfectly clear than that their acts are only politically examinable." *Marbury v. Madison*, 5 U.S. 137, 166 (1803).

The Court fleshed out the contours of the political question doctrine in *Baker v. Carr.* 369 U.S. 186, 217 (1962). The *Baker* Court held that "[a] political question is essentially a function of the separation of powers." The Court went on to outline six factors:

> Prominent on the surface of any case held to involve a political question is found [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] 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. Only one of these factors is required to create a non-justiciable political question. *Id*. Areas in which the Court has found non-justiciable political questions include impeachment proceedings, termination of treaties, the Guarantee Clause, and political gerrymandering. *See Nixon v. United States*, 506 U.S. 224, 237-38 (1993); *Goldwater v. Carter*, 444 U.S. 996, 1005 (1979); *Luther v. Borden*, 48 U.S. 1, 58-59 (1849); *Vieth v. Jubelirer*, 541 U.S. 267, 317 (2004). Similarly, combating climate change falls into this list of non-justiciable political questions.

B. The Protection of the Atmosphere from Climate Change Is a Non-Justiciable Political Question.

The question is not whether more needs to be done to reduce climate change, it is whether climate change is better left for the political branches. Because the issue is intertwined with constitutional commitments, requires undiscoverable and unmanageable judicial standards, and requires an initial policy decision by political branches, the issue creates a non-justiciable political

question. Therefore, the Court should exercise reasoned judgment in not allowing the case to proceed against the United States, leaving the issues to the other branches.

i. Climate Change Presents a Textually Demonstrable Constitutional Commitment Reserved for a Coordinate Political Department.

Climate change involves several "constitutional commitments" that are appropriately left to the other branches, particularly foreign policy. As one district court explained, "the political branches have weighed in on the issue, and have made foreign policy determinations regarding the United States' role in the international concern about global warming." *California v. GMC*, No. CV-06-05755-MJJ, 2007 U.S. Dist. LEXIS 68547 *42 (N.D. Cal. 2007). There is little doubt that foreign policy is interwoven with climate change policies. As the Supreme Court noted, "the very nature of executive decisions as to foreign policy is political, not judicial." *Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948).

Foreign policy is implicated at every large step in climate change policy. The United States chose to be a member of the UNFCC. R. at 6. The United States lead in negotiating the Paris Climate Accord, even though it may leave the accord in 2020. R. at 7. While not debating the wisdom of this decision, it is important to note that a political branch had the authority to enter and exit the agreement.

Climate change is a global crisis. It does not recognize borders as the GHG emissions of one country effect the climate of the entire world. Further, the United States represents a fraction of the total GHG emissions. *Global GHG Emissions Data*, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, https://www.epa.gov/ghgemissions/global-greenhouse-gas-emissions-data#Country. Any solution to climate change will take the efforts of the global community. Climate change is an international problem implicating the foreign policy function of the United States on the most basic levels.

Foreign policy is not the only "constitutional commitment" implicated by climate change policy. Interstate commerce is undoubtedly affected. Fossil fuels make up about three-fourths of the United States' energy consumption. *The United States uses a mix of energy sources*, U.S. E.I.A, https://www.eia.gov/energyexplained/?page=us_energy_home. However, climate change policies affect interstate commerce far beyond the energy market. Trucks, planes, and ships fueled by fossil fuel deliver food to restaurants. They put everyday essentials in stores. They even deliver Amazon packages to individuals who impatiently wait two days. While change is needed to curtail America's GHG emissions, the fact remains the American economy is driven by fossil fuels. Accordingly, climate change implicates interstate commerce. Because climate change policies implicate constitutional commitments, it presents a non-justiciable political question.

ii. The Court's Lack of Judicially Discoverable and Manageable Standards for Resolving Climate Change Creates a Political Question.

Climate change presents complex and judicially unmanageable policy decisions, best left for the political branches. The Court recognized in *Massachusetts v. EPA*, judges "have neither the expertise nor the authority to evaluate these policy judgments." 549 U.S. at 533. In *Kivalina*, citizens of a small village near Alaska sued twenty oil companies over erosion to their coastline due to global warming. *Native Vill. of Kivalina v. Exxon Mobil Corp.*, 663 F. Supp. 2d 863, 869 (N.D. Cal. 2009) (affirmed in *Kivalina*, 696 F.3d at 858). In finding the question satisfied *Baker*'s second point, the court noted the complexity of both the issue of climate change and the solution. *Id*. Accordingly, the court could not "reach a resolution of this case in any 'reasoned' manner." *Id*.

The *Kivalina* court believed it did not possess the capacity to decide the complex issues of climate change and develop potential solutions. *Id*. The same logic applies in this case. It is not that global warming and climate change are issues too complex to comprehend, but the policies to effect change balanced with other relevant factors are undiscoverable and unmanageable by the

court. For example, for a proposed rule on GHG emission standards for certain vehicles, the EPA conducted an extensive cost-benefit analysis utilizing the tools, knowledge, and expertise it is uniquely positioned with. Greenhouse Gas Emissions and Fuel Efficiency Standards for Medium- and Heavy-Duty Engines and Vehicles— Phase 2, 81 Fed Reg. 73,478 (Oct. 25, 2016). Courts do not have the capacity to discover and manage such standards. Accordingly, the undiscoverable and unmanageable standards of climate change create a non-justiciable political question.

iii. The Court Must Make an Initial Policy Determination of a Kind Clearly for Nonjudicial Discretion, Creating a Non-Justiciable Political Question.

This case implicates the third *Baker* point. The 9th Circuit wisely explained *Baker*'s third factor "exists when, to resolve a dispute, the court must make a policy judgment of a legislative nature, rather than resolving the dispute through legal and factual analysis." *EEOC v. Peabody W. Coal Co.*, 400 F.3d 774, 784 (9th Cir. 2005). This reasoning extends to the executive departments tasked with such policy, such as the EPA. The present case requires a policy judgment best left for the legislative and executive branches.

The EPA makes policy decisions similar to that required here. The EPA issued rules regulating GHG emissions for cars and light trucks. Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, 75 Fed. Reg. 25,324 (May 7, 2010); 2017 and Later Model Year Light-Duty Vehicle Greenhouse Gas Emissions and Corporate Average Fuel Economy Standards, 77 Fed. Reg. 62,623 (Oct. 15, 2012). Also, the EPA issued various other rules relating to GHG emissions. *See* Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514 (June 3, 2010); Standards of Performance for Greenhouse Gas Emissions From New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,510 (Oct. 23, 2015). The EPA demonstrates it is capable and best suited to make policy decisions on appropriate GHG levels.

Kivilana presents a compelling argument, in a parallel to the present case. As the court noted, the request requires "the Court to delve into the task of retroactively determining what emission limits *should* have been imposed." *Kivalina*, 663 F. Supp. 2d at 876. Further, the claim "requires the judiciary to make a policy decision about who should bear the cost of global warming." *Id*. at 876-77. The court concluded that the policies were "appropriately left for determination by the executive or legislative branch in the first instance." *Id*. at 877. Just as the court in *Kivalina* held that policies affecting global warming are best left to the political branches, so too are the ones in this case.

Here, the Court is asked to decide if the amount of GHG emissions allowed is reasonable. The reasonableness of emissions is a policy decision. The policy decision is reserved for the political branches. Therefore, the court should uphold the lower court's dismissal because the case raises a non-justiciable political question.

CONCLUSION

President Franklin Roosevelt once said "we think of our land and water and human resources not as static and sterile possessions but as life giving assets to be directed by wise provisions for future days. We seek to use our natural resources not as a thing apart but as something that is interwoven with industry, labor, finance, taxation, agriculture, recreation, good citizenship." While not bound by constitutional rights, the United States must have the freedom to continue to balance climate change policies according to its moral obligations. The judgment of the District Court for the District of New Union Island dismissing this suit against the United States should be affirmed.