Team No. 12

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,
Appellants,

v.

HEXONGLOBAL CORPORATION,
Appellee,

and

THE UNITED STATES OF AMERICA,
Appellee.

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

BRIEF OF THE UNITED STATES OF AMERICA
Appellee

Oral Argument Requested

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STATEMENT OF JURISDICTION

This appeal is of the District Court of New Union Island's final judgment entered on August 15, 2018. Plaintiffs and appellants, the Organization of Disappearing Island Nations ("ODIN"), Ms. Apa Mana ("Ms. Mana"), and Mr. Noah Flood ("Mr. Flood") (collectively "Plaintiffs"), filed a timely Notice of Appeal in response to the district court's grant of Defendants HexonGlobal Corporation ("HexonGlobal") and the United States' Motion to Dismiss. Fed. R. App. 4(a). The district court had proper subject matter jurisdiction over Plaintiffs' Law of Nations violation claim, pursuant to 28 U.S.C. § 1350, and federal question jurisdiction over Plaintiffs' Due Process and public trust violations claims, pursuant to 28 U.S.C. § 1331. The United States Court of Appeals for the Twelfth Circuit has proper jurisdiction to review the district court's final decision granting Defendants' motion to dismiss, pursuant to section 28 U.S.C. § 1291.

STATEMENT OF ISSUES

1. Whether Ms. Mana can bring an Alien Tort Statute, 28 U.S.C. § 1350 ("ATS") claim against a domestic corporation.

2. Whether the *Trail Smelter* Principle is a recognized principle of customary international law, enforceable as the "Law of Nations" under the ATS.

3. Under the assumption that the *Trail Smelter* Principle is customary international law, whether it imposes obligations enforceable against non-governmental actors.

4. Whether the Clean Air Act displaces the *Trail Smelter* Principle, assuming the Principle is otherwise enforceable.

5. Whether a cause of action lies against the United States Government based on the Fifth Amendment substantive due process protections for life, liberty, and property, for failing to protect the global atmospheric climate system from disruption due to the production, sale, and burning of fossil fuels.

6. Whether Plaintiffs' law of nations claim under the Alien Tort Statute and public trust claim present a non-justiciable political question.

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

Earth's global climate system relies on a balance of atmospheric greenhouse gases and solar radiation. R. at 4. This balance has evolved with changing natural and anthropogenic conditions. *Id.* For centuries, societal modernization prompted an increase in agricultural and industrial activities, which placed a greater demand on energy availability. *Id.* Developed nations responded by substantially increasing fossil fuel use. *Id.* In the United States, federal tax subsidies and public land leases enabled corporations such as New Jersey-based HexonGlobal to expand their domestic and international oil exploration operations. R. at 6. *Id.* Because fossil fuel combustion invariably emits carbon dioxide and methane gases, global greenhouse gas concentrations have steadily risen alongside these rising demands. *Id.* HexonGlobal's cumulative worldwide fossil fuel sales comprise nine percent of global emissions, and the United States comprises twenty percent of cumulative global emissions. R. at 5–6. This increase has purportedly yielded tangible effects associated with climate change, including increased temperatures, changing rainfall patterns, and rising sea levels. R. at 4.

As a global leader in industrialization and environmental regulation, the United States has responded to the effects of climate change by promulgating numerous regulatory measures. R. at 6. In 1992, the United States signed and ratified the 1992 United Nations Framework Convention on Climate Change, which acknowledged the threats of anthropogenic climate change, and set forth objectives to stabilize greenhouse gas emissions. R. at 6. In the decades that followed, the United States Environmental Protection Agency ("EPA") began regulating greenhouses gases as "pollutants" under the Clean Air Act ("CAA"). *Id.* The Supreme Court's landmark decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007) affirmed this authority, and ultimately prompted a

wave of related CAA regulations, including: the 2009 "Endangerment Finding," (74 Fed. Reg. 66,496 (Dec. 15, 2009) (finding greenhouse gases and climate change a danger to public health and welfare)); the 2010 passenger vehicle fuel economy standards and new source emission limits (75 Fed. Reg. 31,514 (June 3, 2010)); and the 2015 "Clean Power Plan" (80 Fed. Reg. 65510, 64662 (Oct. 23, 2015) (heightening carbon dioxide emission standards and requiring state control over power plants).

In bringing this action, Plaintiffs assert that they directly suffer from the effects of climate change. Ms. Mana is a resident citizen of the foreign island nation of A'Na Atu, and Mr. Flood is a resident citizen of the U.S. possession of New Union Islands. R. at 3. Plaintiffs argue that greenhouse gas-induced sea level rise has adversely impacted their homes and lifestyles, through seawater intrusion and storm damage. R. at 5. Plaintiffs further contend that climate change will implicate their future livelihoods through increased health and ecological risks such as heat stroke, mosquito borne diseases, and less locally available marine food sources. *Id.*

II. PROCEDURAL HISTORY

This case involves an appeal from an August 15, 2018 order, entered by Judge Remus, granting Defendants HexonGlobal and the United States' motions to dismiss. Plaintiffs collectively brought this action for damages and injunctive relief in the United States District Court for the District of New Union Island for HexonGlobal's Law of Nations violation under the Alien Tort Statute, 28 U.S.C. § 1350 ("ATS"), and the United States' violation of the Due Process Clause of the Fifth Amendment to the Constitution. R. at 1. In response, Defendants timely filed motions to dismiss. R. at 4. The district court granted Defendants' motions and dismissed plaintiffs' action for failing to state a claim for relief. *Id.* The district court justified its dismissal on the grounds that: (1) plaintiffs' Law of Nations claim under the Alien Tort Statute

was displaced by the CAA; and (2) plaintiffs do not possess a Due Process-based public trust right to government protection from atmospheric climate change. R. at 9, 11. Following the issuance of the district court's Order, Plaintiffs timely filed a Notice of Appeal with the United States Court of Appeals for the Twelfth Circuit. R. at 1.

SUMMARY OF THE ARGUMENT

This Court should affirm the district court's dismissal of Plaintiffs' action because it fails to state a plausible claim for relief. Specifically, this Court should uphold the portions of the district court's Order, which found that the CAA displaces Ms. Mana's Alien Tort Statute claim, and which rejected Mr. Flood's claim asserting a Due Process-based public trust right to governmental protection from climate change. However, the district court's decision was not correct in its entirety. This Court should reverse the district court's holding with respect to the acceptability and enforceability of the *Trail Smelter* Principle as customary international law. Moreover, this Court should find that dismissal of both claims was proper because they present non-justiciable political questions that are constitutionally reserved to the legislative and executive branches.

First, Ms. Mana can bring an actionable claim against a domestic corporation under the Alien Tort Statute. Multiple courts have found that domestic corporations can be held liable for violations of customary international law under the Alien Tort Statute. As such, HexonGlobal may be held liable under Ms. Mana's claim. As a matter of policy and future precedent, the district court erred in excluding this analysis when dismissing Ms. Mana's claim.

Second, the *Trail Smelter* Principle constitutes a recognized principle of customary international law that may be enforced as the "Law of Nations" under the Alien Tort Statute. The *Trail Smelter* Principle has been continuously followed in international environmental dispute

resolutions and has been repeatedly recognized by international declarations. Furthermore, the *Trail Smelter* Principle is considered by treaties, textbooks, and scholars to be customary international law. Though dismissal of Ms. Mana's claim was proper, the district court's reasoning erroneously failed to further find that the *Trail Smelter* Principle constitutes customary international law and is enforceable as the "Law of Nations" under the Alien Tort Statute.

Third, because the *Trail Smelter* Principle operates as customary international law, it imposes obligations enforceable against non-governmental actors. Although HexonGlobal is not a State actor, the private entity has committed serious violations while acting under the color of State law. Specifically, HexonGlobal's activities satisfy the joint action and governmental nexus tests for liability because its business operations benefitted from its relationship with the United States' and its complex regulatory scheme. For these reasons, the district court erred in failing to include this analysis when it dismissed Plaintiffs' claims.

Fourth, the district court properly dismissed Ms. Mana's claim because the *Trail Smelter* Principle is federal common law that is displaced by the CAA. Congress enacted the CAA to regulate interstate air pollution. The CAA delegates regulatory authority to the EPA to control air pollutants and greenhouse gases. Thus, because the EPA has thoroughly regulated the field of greenhouse gas emissions through agency policies, it has "directly spoken" to the issues covered by the *Trail Smelter* Principle. As such, dismissal of Ms. Mana's law of nations violation claim was proper because the CAA displaces any federal common law action brought under the *Trail Smelter* Principle.

Fifth, the district court properly dismissed Mr. Flood's claim for failing to state a cause of action because the public trust doctrine does not confer a constitutionally protected Due Process right to a healthy climate system. Federal courts have consistently rejected claims asserting a

fundamental right to a healthy environment, and the public trust doctrine does not grant a federal cause of action because it exclusively operates as a matter of state law. Further, the Due Process Clause does not affirmatively obligate the United States to protect its citizens from the conduct of private actors. Thus, dismissal was proper because Mr. Flood failed to identify a substantive due process right that the United States infringed upon.

Finally, dismissal of Ms. Mana and Mr. Flood's claims was proper because both present nonjusticiable political questions that concern matters reserved to the coordinate political branches. Adjudication of both claims is improper because it would require this Court to move beyond areas of judicial expertise and make a policy judgment of legislative nature. Given the magnitude and nature of the liability alleged, this Court lacks judicially discoverable and manageable standards to grant Plaintiffs with reasonable relief. Thus, dismissal of Ms. Mana and Mr. Flood's claims remains appropriate under the political question doctrine.

STANDARD OF REVIEW

This case involves an appeal from the district court's Order granting HexonGlobal and the United States' motions to dismiss. R. at 1. Dismissal is proper if an action fails to "state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). Challenges to a dismissal for failure to state a claim are reviewed *de novo. Carlin v. DairyAmerica, Inc.*, 705 F.3d 856, 866 (9th Cir. 2013). This standard applies to dismissals based on a district court's interpretation and application of federal statutes, the Constitution, and treaties. *Ministry of Def & Support for the Armed Forces of the Islamic Republic of Iran v. Frym*, 814 F.3d 1053, 1057 (9th Cir. 2016). Accordingly, this Court should limit its *de novo* review to the face of the complaint and consider whether relief can be granted under any set of facts that could be proven consistent with the Complaint's allegations. *Gasoline Sales, Inc. v. Aero Oil Co.*, 39 F.3d 70, 71 (3d Cir. 1994).

ARGUMENT

I. MS. MANA CAN BRING AN ALIEN TORT STATUTE CLAIM AGAINST A DOMESTIC CORPORATION.

The Alien Tort Statute can confer a cause of action against a domestic corporation. Though dismissal of Ms. Mana's claim was ultimately proper, review of her claim under the ATS was imperative as a matter of judicial precedent and policy. Given the potential for future similar claims brought under the statute, the district court should have addressed the substance of the claim's merits, and found that Ms. Mana can bring an Alien Tort Statute claim against a domestic corporation.

The Alien Tort Statute provides, "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350 (1948). Thus, the statutory language grants federal jurisdiction, but does not create a substantive cause of action. A cause of action only arises if it can be found in a treaty or the Law of Nations. *Sosa v. Alvarez*, 542 U.S. 692, 713–14 (2004); *Kiobel v. Royal Dutch Petroleum*, 621 F.3d 111, 125 (2nd Cir. 2010), *aff'd*, 569 U.S. 108 (2013).

Generally, the Alien Tort Statute applies to laws between states and state conduct, rather than the conduct of private individuals or corporations. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 791–95 (D.C. Cir. 1984). However, courts have increasingly found that Alien Tort Statute claims can apply to the conduct of private parties in certain instances. *See, id.* at 794–96; *Kadic v. Karadzic*, 70 F.3d 232, 245 (2nd Cir. 1995).

There is a split of authority as to whether a corporation can be held civilly liable under the Alien Tort Statute for violating international law. The Supreme Court declined to decide this issue in its recent review of a Second Circuit decision, *Kiobel v. Royal Dutch Petroleum*, 569 U.S. 108 (2013). In *Kiobel*, the Second Circuit initially found that a corporation could not be

civilly liable for international law violations. *Kiobel*, 621 F.3d at 148–49. In a compelling concurring opinion, however, Judge Leval pointed out the "unscrupulous business advantages of incorporation" available as a result of the majority's finding. *Id.* at 150. He argued that companies that incorporate, "act in the form of a trust," or "adopt the corporate form," can protect their profits and abuse fundamentally protected human rights, yet remain shielded from civil liability to victims. *Id.* His analysis further found a complete lack of basis for the majority's holding because, "[n]o precedent of international law endorses this rule. No court has ever approved it, not is any international tribunal structured with a jurisdiction that reflects it. (Those courts that have ruled on the question have explicitly rejected it.) No treaty or international convention adopts this principle. And no work of scholarship on international law endorses the majority's rule. Until today, [the] concept had no existence in international law." *Id.* at 151. On review, the Supreme Court declined to evaluate whether the corporation could be held civilly liable for violating international law. *Id.* Instead, it concluded the facts did not support a finding of liability because the violative conduct had occurred solely in a foreign nation. *Kiobel*, 569 U.S. at 118–25.

However, in *Flomo v. Firestone Natural Rubber Co.*, 643 F.2d 1013 (7th Cir. 2011), the Seventh Circuit analyzed whether Liberian children could sue the Firestone Natural Rubber Company under the Alien Tort Statute for using child labor in its Liberian rubber plantation, in violation of customary international law. The court addressed the issue of "whether a corporation or any other entity that is not a natural person (the defendant is a limited liability company rather than a conventional business corporation) can be liable under the Alien Tort Statute." *Id.* at 1015. The court noted that the issue was "left open in an enigmatic footnote in *Sosa*," and that "[a]ll but one of the cases at our level hold or assume (mainly the latter) that corporations can be held

liable." *Id.* at 1017. The court determined that *Kiobel* was an outlier, and the opinion's factual premise was "incorrect." *Id.* The court even noted that "suppose no corporation *had* ever been punished for violating customary international law. There is always a first time for litigation to enforce a norm; there has to be." *Id.* Ultimately, the court held that there was no compelling reason for corporations to avoid criminal or civil liability for violating customary international law. *Id.* at 1018.

Based on the current split in circuit authority, the facts of the case at bar compel this Court to adopt the reasoning in *Flomo.* Under *Flomo*, domestic corporations can be held liable under the Alien Tort Statute. By preventing immunity from international law violations, corporations will be unable to engage in "unscrupulous business advantages" that oppose the objective of protecting universally accepted rights. Here, Ms. Mana's ATS claim against HexonGlobal was actionable because the *Trail Smelter* Principle constitutes customary international law that the United States recognizes. As such, substantive review of the claim prior to dismissal was imperative. A merit-based analysis will establish clearer precedent and help the United States litigate future claims involving domestic corporations. For these reasons, and as a matter of policy, this Court should find that Ms. Mana can bring an ATS action against HexonGlobal for violating international law.

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

The *Trail Smelter* Principle constitutes customary international law that may be enforced as the "Law of Nations" under Alien Tort Statute jurisdiction. Though the United States does not contest the dismissal of Ms. Mana's claim, judicial review of the *Trail Smelter* Principle was imperative for establishing future standards of enforceability and liability.

The Alien Tort Statute provides only for federal jurisdiction, and thus, does not create a cause of action. 28 U.S.C. § 1350 (1948). In *Sosa v. Alvarez-Machain*, the Supreme Court found that the Alien Tort Statute provided for jurisdiction to redress violations of well-established customary international laws. *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). Thus, whether a claim is actionable under the Alien Tort Statute "must be gauged against the current state of international law, looking to those sources we have long, albeit cautiously, recognized." *Id.* at 733. The court in *Sosa* explained which sources it could look at to determine international law:

> [W]here there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators… Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.

Id. at 734.

In *Flores v. Southern Peru Copper Corp.*, the Second Circuit also determined that "customary international law—as the term itself implies—is created by the general customs and practices of nations and therefore does not stem from any single, definitive, readily-identifiable source. All of these characteristics give the body of customary international law a 'soft, indeterminate character' that is subject to creative interpretation." *Flores v. Southern Peru Copper Corp.*, 414 F.3d 233, 248 (2d. Cir. 2003). The court continued, "customary international law is composed only of those rules that States universally abide by, or accede to, out of a sense of legal obligation and mutual concern." *Id.* Therefore, "States need not be universally successful in implementing the principle in order for a rule of customary international law to arise… But the principle must be more than merely professed or aspirational." *Id.* Matters of "mutual" concern between states include "those involving States' actions 'performed…towards or with regard to

the other,'" whereas matters of "several" concern between States are "in which States are separately and independently interested." *Id.* at 249 (internal citations omitted).

In the *Trail Smelter Arbitration,* an international arbitral panel found that air pollution emissions from a privately-owned smelter company in Canada violated international liability principles by demonstrably injuring agricultural interests in the United States. *Trail Smelter Arbitration*, 3 U.N.R.I.A.A. 1965 (1941). The decision established that nations have a duty to ensure that the activities within their control conform to international law. *Id.* Since the decision, the *Trail Smelter* Principle has continuously been followed by the International Court of Justice in international environmental dispute resolutions. *See The Corfu Channel Case (United Kingdom v. Albania)*, Merits, I.C.J. 4 (1949); *Nuclear Tests (Australia v. France)*, I.C.J. 253 (1974); *Nuclear Tests (New Zealand v. France)*, I.C.J. 457 (1974). In the Corfu Channel case, the court found that each State has an "obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States." *The Corfu Channel Case*, I.C.J. 4 at 22. In the Nuclear Test cases, the court found that nations have an obligation to protect the environment from pollution and radioactive contamination, under customary international law. *Nuclear Tests (Australia v. France)*, I.C.J. 253; *Nuclear Tests (New Zealand v. France)*, I.C.J. 457.

The *Trail Smelter* Principle has been recognized multiple times by international declarations. The *Trail Smelter* Principle was specifically adopted in the Declaration of the 1972 Stockholm Conference on the Human Environment as Principle 21:

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

U.N. Conference on the Human Environment, Stockholm, June 5–16, 1972, *Declaration of the United Nations Conference on the Human Environment*, 5 U.N. Doc A/CONF.48/14/Rev. 1 (June 16, 1972).

The Principle was later reasserted and endorsed by 190 nations in the 1992 Rio Declaration on Environment and Development as Principle 21. U.N. Conference on Environment and Development, June 3–14, 1992, Rio de Janeiro, Braz., *Rio Declaration on Environment and Development*, 3, U.N. Doc. A/CONF.151/26/REV.1(VOL.I) (1992). Furthermore, while not enforceable law, "[t]reaties, textbooks, and scholars state that Principle 21 is considered to be customary international law." John H. Knox, *The Myth and Reality of Transboundary Environmental Impact Assessment*, 96 Am. J. Int'l L. 291, 292 (2002) (citing Alexandre Kiss & Dinah Shelton, *International Environmental Law* 130 (1991)); s*ee also* David Hunter et al., *International Environmental Law and Policy* 321, 345 (1998).

As such, the *Trail Smelter* principle, and Principle 21, have met the required tests to be considered customary international law. As required by *Sosa*, jurists and commentators consider the principle to be such. As required by *Flores*, the Principle has been universally acceded to by 190 States, and the United States specifically committed to "adopt[ing] national policies and tak[ing] corresponding measures on the mitigation of climate change, by limiting its anthropogenic emissions of greenhouse gases…," along with other developed nations, in the United Nations Framework Convention on Climate Change. The principle has even been reaffirmed in subsequent declarations. The *Trail Smelter* Principle itself has been followed by the International Court of Justice in environmental pollution cases. Accordingly, the Principle constitutes customary international law under the "law of nations," and thus, can be enforced as a cause of action under the Alien Tort Statute.

III. THE *TRAIL SMELTER* PRINCIPLE IS CUSTOMARY INTERNATIONAL LAW THAT IMPOSES OBLIGATIONS ENFORCEABLE AGAINST PRIVATE, NON-GOVERNMENTAL ACTORS.

The *Trail Smelter* Principle is established customary international law, and thus, imposes enforceable obligations against private non-governmental actors. In dismissing Ms. Mana's claim, the district court improperly declined to evaluate whether HexonGlobal must conform to the *Trail Smelter* Principle's. To ensure judicial equity, this Court should uphold dismissal of Ms. Mana's claim against the United States, and find that liability can attach to HexonGlobal for violating customary international law under the *Trail Smelter* Principle.

A. The Restatement (Third) of Foreign Relations Law generally supports a private entity's liability as a State actor.

While the *Trail Smelter* Principle was reasonably articulated, federal courts provide little guidance on what constitutes "responsibility" or "jurisdiction" under Principle 21. The Restatement (Third) of Foreign Relations Law clarifies that "[a]n activity is considered to be within a state's jurisdiction under this section if the state may exercise jurisdiction to prescribe law with respect to that activity." Restatement (Third) of Foreign Relations § 601 cmt. C (Am. Law Inst. 1987). Furthermore, a State is responsible "for both its own activities and those of individuals or private or public corporations under its jurisdiction." *Id.* § 601 cmt. D. This indicates at least some willingness on the part of legal scholarship for ascribing private actions to State conduct.

Courts have been hesitant to enact language from "treatises" as a basis for international law. *United States v. Yousef*, 327 F.3d 56, 99 (2d Cir. 2003). While they cannot be primary independent sources of law, they can still have a substantial "indirect effect on international law." *Id.*; *Sosa v. Alvarez-Machain*, 542 U.S. 692, 735 (2004). Thus, this Court may use the Restatement language as secondary guidance for this case. Here, the Restatement provides some

support that HexonGlobal, as a private, non-governmental entity, could still be held liable for violations of customary international law, particularly under the *Trail Smelter* Principle.

B. The *Trail Smelter* Principle does not implicate a universal concern and should thus be analyzed as an action under the color of law of State action.

Customary international law typically applies to State actors that have "universally agreed to abide by, or accede to, out of a sense of legal obligation and mutual concern." *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 248 (2d Cir. 2003). However, courts have not restricted this application to State actors. In *Kadic v. Karadzic*, the Second Circuit found "that certain forms of conduct violate the law of nations" even when performed by private entities. *Kadic v. Karadzic*, 70 F.3d 232, 239 (2d Cir. 1995). These so-called "universal concerns" were so sufficiently important that they were not exclusively limited to State actors. *Id.* at 240 (defining universal concerns as piracy, slave trade, genocide, and war crimes).

Here, this case does not concern any of the enumerated "universal concerns." However, as the court reasoned in *Kadic*, actions can still be considered violations of customary international law if they fall under the color of law of State action. Thus, this Court should rely on the color of law analysis to determine whether the *Trail Smelter* Principle applies to non-governmental actors.

C. Even if private entities are not liable under traditional international law doctrines, they may still liable for actions that fall under the color of law of State action.

Even though HexonGlobal is not liable under customary international law as a State actor, it has still committed actions under the color of law in concert with the State. "The color of law jurisprudence of 42 U.S.C. § 1983 is a relevant guide" that courts may use in this context. *Id.* at 245. A non-governmental actor may be treated as a State actor "because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise

chargeable to the State." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982). The Court in *Lugar* further clarified the color of law analysis by identifying four tests that can be used to identify State action: (1) public function; (2) state compulsion test; (3) governmental nexus; and (4) joint action test. *Id.* at 939 (citations omitted). Aside from subtle differences in naming conventions, these tests are consistently applied across various federal circuits and the Supreme Court. *See, e.g.*, *Kirtley v. Rainey*, 326 F.3d 1088, 1092 (9th Cir. 2003) (describing the test in the 9th Circuit); *Gallagher v. Neil Young Freedom Concert*, 49 F.3d 1442, 1447 (10th Cir. 1995); *Beanal v. Freeport-McMoRan, Inc.*, 969 F. Supp. 362, 377 (E.D. La. 1997), *aff'd*, 197 F.3d 161 (5th Cir. 1999) (replacing the state compulsion test with the symbiotic relationship test).

"Satisfaction of any one test is sufficient to find state action." *Kirtley*, 326 F.3d at 1092. And in fact, courts have implied that these tests may be "simply different ways of characterizing the necessarily fact-bound inquiry" that each test necessitates. *Lugar*, 457 U.S. at 939. Given that the facts only need to weigh in favor of one of the four tests, the analysis for the present case will focus on the two strongest tests for this case: the governmental nexus and joint action tests.

1. *HexonGlobal's willingness to engage in the United States government's regulatory scheme satisfies the joint action test for State actor liability.*

Individuals act under the color of law where "a private party is a 'willful participant in joint action with the State or its agents.'" *Gallagher*, 49 F.3d at 1453 (citing *Dennis v. Sparks*, 449 U.S. 24, 27 (1980)). The Supreme Court has held that the joint action test needs nothing "more than invoking the aid of state officials to take advantage of state-created . . . procedures." *Lugar*, 457 U.S. at 942. A private actor's "misuse of a state statute does not describe conduct that can be attributed to the State," however, the State still retains oversight over the "procedural scheme" that can give rise to a violation. *Id.* at 941. For this test, courts are tasked with determining "whether state officials and private parties have acted in concert in effecting a

particular deprivation." *Gallagher*, 49 F.3d at 1453. A State's mere acquiescence of private action is not sufficient to meet the joint action test. *Id.* The joint action test generally requires either "cooperative action and overt participation" on the part of the State. *Id.* at 1454.

Here, the United States government has promulgated numerous programs and regulations that enable and encourage fossil fuel production and activity. This includes tax subsidies, public lands leasing for fossil fuel production, interstate highway development, and encouraging power plant construction. R. at 6. HexonGlobal, as the single oil producer in the United States, directly benefits from these measures and uses these incentives to develop its largescale business operations. Furthermore, HexonGlobal has been aware of the harmful environmental impacts of its business but continues its "profitable business activities despite this knowledge." R. at 5.

The inquiry for State action by a private entity is fact-specific. *Lugar*, 457 U.S. at 939. Here, the facts indicate that the United States government created a procedural scheme through an array of financial incentives and infrastructure that enticed private entities, like HexonGlobal, to engage in improper conduct. HexonGlobal's willingness to take advantage of these opportunities and engage in further business activity that contributed to increased greenhouse gas emissions makes it a willful participant in the violation of customary international law set out by the *Trail Smelter* Principle. Thus, HexonGlobal would sufficiently meet the joint action test for State actor liability under customary international law.

2. *HexonGlobal's relationship with the United States government satisfies the governmental nexus test for State actor liability.*

Independent of the joint actor test, HexonGlobal's relationship with the United States government also supports a finding of liability under the governmental nexus test. "To satisfy the nexus test, the state must be significantly involved in or actually participate in the alleged conduct." *Beanal*, 969 F. Supp. at 377. A court's inquiry should focus on "whether there is a

sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself." *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974) (citations omitted).

However, there are limits to what actions count towards the governmental nexus test, therefore, analysis will be limited to the specific facts of the case. *Gallagher*, 49 F.3d at 1448. "[T]he existence of governmental regulations, standing alone, does not provide the required nexus." *Id.* (citations omitted). Furthermore, "the fact that a private entity contracts with the government or receives governmental funds or other kinds of governmental assistance does not automatically transform the conduct of that entity into state action." *Id.* Lastly, the State's "approval of or acquiescence in the initiatives of a private party" is not enough to show a nexus. *Id.*

In the present case, HexonGlobal's relationship with the United States federal government satisfies the governmental nexus test. In *Jackson v. Metropolitan Edison*, the court noted that heavily regulated utilities may be the types of entities supported by State acts. *See Jackson*, 419 U.S. at 350–51. While HexonGlobal is not technically a regulated utility, it shares many characteristics with regulated utilities in the United States. HexonGlobal is in the business of producing and selling oil, which is a highly regulated commodity in the United States. Furthermore, traditional United States law "has not limited fossil fuel production, distribution, or combustion," and instead has generally encouraged fossil fuels through various agency-initiated programs. R. at 6.

Because the State action inquiry is fact-specific, "[t]he true nature of the State's involvement may not be immediately obvious, and detailed inquiry may be required in order to determine whether the test is met." *Jackson*, 419 U.S. at 351. Here, while none of the United

States government's initiatives are sufficient to show a nexus on their own, taken together they create a robust relationship between the HexonGlobal and the federal government. Without these enabling programs, HexonGlobal would not possess its present-day power as the country's only surviving oil producer. The United States government has historically encouraged fossil fuel production to meet the demands of an evolving society, thus, any resulting greenhouse gas emissions result from the relationship between the United States government as the State actor, HexonGlobal as the private entity. Accordingly, HexonGlobal satisfies the governmental nexus test for State actor liability under customary international law. For these reasons, dismissal of Ms. Mana's claims required a finding that the *Trail Smelter* Principle imposes enforceable obligations on private, non-governmental actors.

IV. THE CLEAN AIR ACT DISPLACES CLAIMS BROUGHT UNDER THE *TRAIL SMELTER* PRINCIPLE.

The district court properly dismissed Ms. Mana's action for failing to state a claim for relief because the Clean Air Act displaces the *Trail Smelter* Principle. As a customary international law, the *Trail Smelter* Principle operates as a doctrine of federal common law. Therefore, the Clean Air Act displaces any claim brought under the *Trail Smelter* Principle because it is an established federal statute that occupies the field of air pollution regulation that the *Trail Smelter* Principle otherwise protects.

A. The *Trail Smelter* Principle is a customary international law that must be treated as federal common law.

Federal courts treat well-established customary international laws as common law. Restatement (Third) of Foreign Relations § 111 cmt. D (Am. Law Inst. 1987) ("Customary international law is considered to be like common law in the United States, but it is federal law."). The Second Circuit in *Filartigia v. Pena-Irala* affirmed this by holding that the law of

nations "has always been part of the federal common law." *Filartiga v. Pena-Irala*, 630 F.2d 876, 885 (2d Cir. 1980). Therefore, the question of whether the Clean Air Act displaces the *Trail Smelter* Principle is a question of whether the federal statute displaces the federal common law.

B. Federal common law cannot withstand displacement by established federal statutes like the Clean Air Act.

In reviewing whether the statute in question has displaced the related federal common law in that area, a court must evaluate: (1) whether Congress intended to displace the federal common law with the statute, or was intended the statute to operate as its own rule of law; and (2) whether agency action has sufficiently preempted federal common law.

1. *Congress intentionally enacted the Clean Air Act to displace federal common law principles of air pollution regulation.*

Federal common law is generally developed for "few restricted instances" to address "significant conflict[s] between some federal policy or interest and the use of state law" where there is no legislative guidance. *City of Milwaukee v. Illinois & Michigan*, 451 U.S. 304, 313 (1981) (internal citations omitted). As such, "federal common law is 'subject to the paramount authority of Congress.'" *Id.* at 313–14 (quoting *New Jersey v. New York*, 283 U.S. 336, 348 (1931)). When Congress legislatively addresses an issue that was previously governed by common law, the resulting federal statute removes common law jurisdiction. *Id.* at 314 (describing common law as "an unusual exercise of lawmaking by federal courts [that] disappears" after Congress creates federal law on the subject).

While courts are cautious of federalism principles when reviewing legislative displacement, "evidence of a clear and manifest [congressional] purpose" is not required when comparing legislation to federal common law. *Id.* at 317; *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 424 (2011). Instead, the legislation must "speak directly" to the legal issue in

question to displace federal common law on the subject. *United States v. Texas*, 507 U.S. 529, 534 (1993) (quoting *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978) ("In such cases, Congress does not write upon a clean slate."). Mere existence of an applicable law that pertains to the legal issue is not enough. *Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 856 (9th Cir. 2012). There must be a more searching inquiry into the facts of the case and the law in question to determine "how much congressional action is enough" to show sufficient displacement. *Id.* (internal quotation marks omitted). Here, that fact-specific inquiry is not necessary because "[t]he Supreme Court has already determined that Congress has directly addressed the issue of domestic greenhouse gas emissions from stationary sources and has therefore displaced federal common law." *Id.* (citing *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410 (2011)).

Even without the Supreme Court's decision in *AEP v. Connecticut*, there is still enough factual information to show that Congress, through the EPA's delegated authority, has regulated in a manner that "speaks directly" to the greenhouse gas emissions. Historically, federal common law controlled interstate pollution and greenhouse gases. *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 492 (1987); *see Am. Elec. Power Co.*, 564 U.S. at 416. However, this changed when Congress enacted the CAA regulations that granted the EPA full regulatory authority. The Supreme Court confirmed that all greenhouse gas emissions unambiguously fell within the CAA's "sweeping definition of air pollutant[s]." *Massachusetts v. E.P.A.*, 549 U.S. 497, 528–29 (2007) (internal quotations omitted). Thus, the EPA possesses the authority to determine when and how it will regulate any and all air pollutants emitted from power plants. *Am. Elec. Power Co*, 564 U.S. at 426. It is this "delegation [that] is what displaces federal common law" and indicates Congress' explicit desire to so. *Id.*

2. *Acts by the EPA preempt the Trail Smelter Principle by occupying the field it governs.*

Even if this Court finds that Congress has not explicitly displaced the federal common law in enacting the CAA, the EPA, in promulgating the CAA, has enacted regulations that preempt the *Trail Smelter* Principle as common law. In the context of this case, displacement of federal common law is not whether the agency or Congress has chosen to regulate in a certain manner, but rather "whether the field has been occupied." *Id.* In the state law context, the whole field will be preempted or occupied when "the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *Hillsborough Cty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985) (noting that this is normally referred to as "field preemption"). This rationale similarly applies here – if a federal agency decision occupies a particular legal field, it could preempt the related federal common law. The EPA could even "decline to regulate emissions all together . . . [and] the federal courts would have no warrant to employ federal common law. . . to upset the agency's expert determination." *Id.*

Here, the EPA and the United States government have taken various steps to address increasing greenhouse gas emissions. This began with EPA's 2009 "Endangerment Finding" as a response to the landmark case *Massachusetts v. EPA*, which upheld the EPA's authority to regulate greenhouse gases under the CAA. 74 Fed. Reg. 66,496 (Dec. 15, 2009); *Massachusetts v. E.P.A.*, 549 U.S. at 528–29. Since then, the EPA has continued to adopt rules and regulations in support of this finding. These notably include the 2010 rules imposing more stringent fuel economy standards and new source emission limits, as well as the 2015 Clean Power Plan, which imposed emissions limits on new power plants. R. at 6–7. Ultimately, these regulations have achieved their goal of reducing overall domestic greenhouse gas emissions. *Id.*

Furthermore, the CAA is "a lengthy, detailed, technical, complex, and comprehensive response to a major social issue." *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council*, Inc., 467 U.S. 837, 848 (1984). Congress designated the EPA as the "expert agency" charged with regulating greenhouse gas emissions given its ability to integrate scientific findings and seek public comment before issuing new regulations. *Am. Elec. Power Co.*, 564 U.S. at 428. Accordingly, judicial resolution is inappropriate given the limited knowledge of these technical issues. *Id.* (noting that "individual district judges issu[e] ad hoc, case-by-case injunctions . . . [and] are confined by a record comprising the evidence the parties present"). In promulgating CAA regulations pursuant to the Endangerment Finding, EPA has spoken directly to the issue of greenhouse gas regulation. These regulations are comprehensive enough that there is no room for further regulation by the *Trail Smelter* Principle. Any penalties or procedural remedies sought by the Plaintiffs should be addressed by the EPA and its proper administrative channels. As such, the Plaintiffs have not stated a cognizable claim under federal common law sufficient to override the CAA as a federal statute.

V. MR. FLOOD CANNOT MAINTAIN AN ACTION AGAINST THE UNITED STATES BECAUSE THE DUE PROCESS CLAUSE DOES NOT CONFER AN ENFORCEABLE PUBLIC TRUST RIGHT TO A HEALTHY CLIMATE SYSTEM.

Mr. Flood alleges a substantive Due Process right "to a healthy and stable climate system, and seeks to support this right by relying on public trust principles." R. at 10. He argues that the United States government violated this substantive right by failing to "prevent harms caused by private parties – the production, sale, and combustion of fossil fuels in the U.S. market." *Id.* The district court properly dismissed the Mr. Flood's claim for failing to state a claim for relief because he has not stated a cognizable cause of action against the federal government. Specifically, Mr. Flood does not possess a substantive Due Process right to a healthy climate

system. Though Mr. Flood argues this right is founded upon the public trust principles set forth in *Juliana v. United States*, 217 F.Supp.3d 1224 (D. Or. 2016), the public trust doctrine is only enforceable as a matter of state common law, and thus, does not support a federal cause of action. However, even if recognized as a federal cause of action, Mr. Flood still fails to state a claim upon which relief can be granted because the Due Process clause does not require government actors to protect citizens from harms committed by private actors. For these reasons, this Court should affirm the district court's holding and reject Mr. Flood's action for failing to state a plausible claim for relief against the United States.

A. Mr. Flood does not possess a fundamental liberty interest in a healthy climate system based on public trust principles.

The Due Process Clause of the Fifth Amendment to the United States Constitution prohibits the government from depriving an individual of "life, liberty, or property, without due process of law." U.S. Const. amend. V. The Clause also protects against "government interference with certain fundamental rights and liberty interests." *Washington v. Glucksberg*, 521 U.S. 702, 719 (1997). Fundamental liberties include those that are "deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Id.* at 721 (internal citations omitted). However, courts "have always been reluctant to expand the concept of substantive due process" because "[t]he doctrine of judicial self-restraint requires [courts] to exercise the utmost care whenever they are asked to break new ground in this field." *Collins v. City of Harker Heights, Tex.*, 503 U.S. 115, 125 (1992).

Mr. Flood does not state a plausible claim for relief because the Constitution does not confer a fundamental public trust right to a healthy climate system. First, the right Mr. Flood has asserted is not one "deeply rooted in this Nation's history and tradition" or "implicit in the

concept of ordered liberty," *Washington*, 521 at 721, because federal courts have routinely rejected a legally enforceable right to a healthy environment. Second, the public trust doctrine does not confer federal substantive due process protections because it principally operates as a matter of state common law. Thus, a court is unlikely to "break new ground in this field," *Collins*, 503 U.S. at 125, because "[r]ights derived from state law, as opposed to the constitution, usually…do not rise to the level of substantive due process protection." *In re City of Detroit, Mich.*, 841 F.3d 684, 700 (6th Cir. 2016).

1. *Courts have consistently rejected a fundamental right to a healthy climate system.*

A plaintiff asserting a previously unrecognized substantive Due Process right must "provide a careful description of the asserted fundamental liberty interest," before a court evaluates whether the government improperly interfered with the right. *Collins*, 503 U.S. at 125. The plaintiff must demonstrate that the right is deeply rooted in the Nation's traditions, based on "careful respect for the teachings of history and solid recognition of the basic values that underlie our society." *Moore v. City of E. Cleveland, Ohio*, 431 U.S. 494, 503 (1977).

Here, Mr. Flood has failed to meet this standard because federal courts have invariably rejected a fundamental right to a healthy environment and climate. In fact, courts have consistently found that nothing in the Constitution's text, history, tradition provides for a protected environmental right. *See, e.g.*, *Ely v. Velde*, 451 F.2d 1130, 1139 (4th Cir. 1971) (declining to recognize a constitutional protection for the environment because the "newly-advanced constitutional doctrine has not yet been accorded judicial sanction"); *Tanner v. Armco Steel Corp.*, 340 F. Supp. 532, 536–37 (S.D. Tex. 1972) ("there is not a scintilla of persuasive content in the words, origin, or historical setting of the [Due Process Clause] to support the assertion that environmental rights were to be accorded its protection…this Court holds that no

legally enforceable right to a healthful environment, giving rise to an action for damages, is guaranteed by…the Federal Constitution"); *Pinkney v. Ohio EPA*, 375 F. Supp. 305, 310 (N.D. Ohio 1974) ("the Court has not found a guarantee of the fundamental right to healthful environment implicitly or explicitly in the Constitution…[t]herefore the Court is unable to rule that the right to a healthful environment is a fundamental right under the Constitution"); *SF Chapter of A. Phillip Randolph Inst. v. U.S. EPA*, 2008 WL 859985 at *7 (N.D. Cal. Mar. 28, 2008) (the "right to be free of climate change pollution" is not a constitutionally protected Due Process right); *Lake v. City of Southgate*, 2017 WL 767879, at *6 (E.D. Mich. Feb. 28, 2017) (the Due Process Clause does not guarantee a fundamental right to environmental health or freedom). Thus, for this reason alone, Mr. Flood fails to state a plausible claim for relief because he has not been deprived of a historically well-recognized liberty interest.

2. *The public trust doctrine is a state law doctrine that does not confer a federally protected constitutional right to a healthy climate system.*

The public trust doctrine incorporates the early common law principle that States hold certain resources in trust for public benefit. *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 284 (1997). Under the doctrine, states cannot discharge "the management and control of property in which the public has an interest" to "the use and control of private parties." *Illinois Cent. R. Co. v. State of Illinois*, 146 U.S. 387, 452–53 (1892). "[T]rusts connected with public property, or property of a special character…cannot be placed entirely beyond the direction and control of the state." *Id.* at 454–55. Because States control their trust resources, "the public trust doctrine remains a matter of state law." *PPL Montana, LLC v. Montana*, 565 U.S. 576, 603 (2012). For this reason, "the contours of that public trust do not depend upon the Constitution. Under accepted principles of federalism, the States retain residual power to determine the scope of the

public trust over waters within their borders[.]" *Id.* at 604; *also see United States v. 32.42 Acres of Land, More or Less, Located in San Diego Cty., Cal.*, 683 F.3d 1030, 1038 (9th Cir. 2012).

Because the public trust doctrine operates under state law jurisprudence, it does not confer Mr. Flood with a federal constitutional right to a healthy climate system. State laws and state-created rights do not rise to the level of substantive Due Process protections under the federal Constitution. *In re City of Detroit, Mich.*, 841 F.3d at 700. The D.C. Circuit Court of Appeals reaffirmed this in *Alec L. ex. rel. Loorz v. McCarthy*, 561 F. App'x 7, 8 (D.C. Cir. 2014). There, the court rejected a similar claim alleging the federal government abdicated its trust duty to protect the atmosphere from harm. *Id.* Relying on the *PPL Montana* holding, the court squarely rejected a federal constitutional foundation for the doctrine, and found that no case stands for the proposition that public trust doctrine violations may attach liability to the federal government. *Id.*

Per the D.C. Circuit court's holding in *Alec L.*, dismissal of Mr. Flood's claim was proper because he pled an inadequate claim "devoid of merit as not to involve a federal controversy." *Id.* As a creature of state law, the public trust doctrine does not confer a federally protected constitutional right, such that Due Process liability may attach to federal actors. Accordingly, this Court should affirm the district court's holding dismissing Mr. Flood's claim because precedent prohibits an individual from advancing a substantive right to public trust interests.

B. The Due Process Clause does not impose an affirmative obligation on the United States government to protect the life, liberty, and property of its citizens against the conduct of private actors.

The Due Process Clause prohibits state and federal governments from engaging in conduct that deprives citizens of their life, liberty, or property, without due process of the law. *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 194 (1989). The purpose of the

Clause "was intended to secure the individual from the arbitrary exercise of the powers of the government." *Daniels v. Williams*, 474 U.S. 327, 331 (1986) (internal citations omitted). However, this limitation does not "guarantee certain minimal levels of safety and security… [i]ts purpose was to protect the people from the State, not to ensure that the State protected them from each other." *DeShaney*, 489 U.S. at 195–96. Accordingly, the Due Process Clause confers no affirmative right to governmental aid in securing life, liberty, or property. *Id.* at 196–97; *also see*, *L.W. v. Grubbs*, 974 F.2d 119, 121 (9th Cir. 1992) ("[a]s a general rule, members of the public have no constitutional right to sue state employees who fail to protect them against harm inflicted by third parties").

For this reason alone, the district court properly dismissed Mr. Flood's claim. Mr. Flood contends that the United States government violated his Due Process right by "fail[ing] to prevent harms caused by private parties – the production, sale, and combustion of fossil fuels in the U.S. market." R. at 10. Notably, Mr. Flood pinpoints HexonGlobal, a private corporation, as the actor that created such harms. However, as announced by the Supreme Court in *DeShaney*, "a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." *DeShaney*, 489 U.S. at 197. Thus, even if Mr. Flood possessed a substantive right to a healthy climate system, this reasoning refutes his claim because the United States government is not constitutionally obligated to protect him from harms created by HexonGlobal.

1. *The United States government did not place Mr. Flood in danger or act in deliberate indifference to his safety.*

The district court properly declined to adopt the government-created "danger exception" to the *DeShaney* rule. A Due Process violation claim may be actionable under the "danger creation" exception if "affirmative conduct on the part of a state actor places a plaintiff in

danger, and the officer acts in deliberate indifference to that plaintiff's safety…" *Penilla v. City of Huntington Park*, 115 F.3d 707, 711 (9th Cir. 1997). "A plaintiff asserting a danger-creation due process claim must show (1) the government's acts created the danger to the plaintiff; (2) the government *knew* its acts caused that danger; and (3) the government with *deliberate indifference* failed to act to prevent the alleged harm." *Juliana*, 217 F.Supp. 3d at 1252. Custody is not a prerequisite for a danger creation-exception claim to survive – rather, the defendant must affirmatively create the dangerous situation that exposed the individual to third party violence. *Grubbs*, 974 F.2d at 121.

Mr. Flood's claim fails under the "danger creation" exception because the United States did not knowingly place Mr. Flood in danger with deliberate indifference to his safety. As detailed in the district court's Order, the United States has taken affirmative regulatory measures to mitigate the impacts of climate change and reduce greenhouse gas emissions. *See* R. at 6–7. These proactive steps demonstrate the United States' affirmative efforts to *counter* the dangers of climate change, and absolve an otherwise dangerous situation. Thus, it cannot be said that the United States has remained officially and deliberately "indifferent" in creating the dangers associated with climate change. Holding the United States liable under the danger-exception would "trivialize the centuries-old principle of due process law" *Daniels*, 474 U.S. at 332, and hold a state actor responsible for harms created by a multitude of third parties. Thus, the United States did not endanger Mr. Flood in violation of his life, liberty, and property. Finally, for these foregoing reasons, the District Court properly dismissed Mr. Flood's action for failing to state a plausible claim for relief because the United States did not violate his Fifth Amendment Due Process rights.

VI. THE DISTRICT COURT CORRECTLY DISMISSED PLAINTIFFS' LAW OF NATIONS AND PUBLIC TRUST CLAIMS BECAUSE THEY REQUIRE THE COURT TO DECIDE A NONJUSTICIABLE POLITICAL QUESTION.

The district court properly dismissed Ms. Mana and Mr. Flood's claims because they implicate the political question doctrine. Article III of the Constitution maintains separation of powers principles by granting federal courts with limited jurisdiction. U.S. Const., art. III, § 2, cl. 1; *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006). Legal disputes that require resolution of a political question rest outside the scope of limited federal jurisprudence. *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 980 (9th Cir. 2007). The political question doctrine prevents federal courts from resolving "[q]uestions [that], in their nature [are] political, or which are, by the constitution and laws, submitted to the executive." *Marbury v. Madison*, 5 U.S. 137, 170 (1803). Thus, a nonjusticiable political question exists when a "court must make a policy judgment of legislative nature, rather than resolving the dispute through legal and factual analysis." *E.E.O.C. v. Peabody Western Coal Co.*, 400 F.3d 774, 784 (9th Cir. 2005).

Per the Supreme Court's six-factor test in *Baker v. Carr*, 369 U.S. 186 (1962), a claim constitutes a nonjusticiable political question and is subject to dismissal if the court finds:

> [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; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due to coordinate branches of government; or [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.

Id. at 217. When distilled into three inquires, courts ask: (1) "[d]oes the issue involve resolution of questions committed by the test of the Constitution to a coordinate branch of Government?"; (2) "[w]ould resolution of the question demand that a court move beyond areas of judicial

expertise?"; and (3) "do prudential considerations counsel against judicial intervention?" *Goldwater v. Carter*, 444 U.S. 996, 998 (1979).

Ms. Mana and Mr. Flood's claims constitute nonjusticiable political questions because they would require this Court to resolve questions committed to the coordinate branches of government. Resolution of both claims would demand this Court to move beyond areas of judicial expertise, and into areas reserved to the Legislative and Executive branches – specifically, in matters concerning foreign affairs and environmental regulation. As such, prudential considerations counsel against judicial intervention because these controversies "revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress [and] the confines of the Executive Branch." *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 223 (1986).

A. The Constitution textually commits matters of foreign affairs and environmental regulation to the Executive and Legislative branches.

The first *Baker* prong examines whether there is a "textually demonstrable constitutional commitment of the issue to a coordinate political department." *Baker*, 369 U.S. at 217. Certain decisions are not subject to judicial review because they "have been exclusively committed to the legislative and executive branches of the federal government." *McMahon v. Presidential Airways Inc.*, 502 F.3d 1331, 1358–59 (11th Cir. 2007). To evaluate this, courts must examine the "constitutional provisions governing the exercise of the power in question," or, "may infer the presence of a political question from the text and structure of the Constitution." *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 872 (N.D. Cal. 2009) (internal citations omitted). Ultimately, "the issue is whether the Constitution has given one of the political branches final responsibility for interpreting the scope and nature of such a power." *Id.*

Adjudication of Ms. Mana's ATS claim would undoubtedly involve this Court in issues constitutionally committed to the political branches. The Constitution reserves foreign relations authority to the Executive and Legislative branches. *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918); *Schneider v. Kissinger*, 412 F.3d 190, 194 (D.C. Cir. 2005). Though not an absolute bar, the judiciary is "particularly ill-suited to make such decisions, as courts are fundamentally underequipped to formulate national policies or develop standards for matters not legal in nature." *Japan Whaling Ass'n*, 478 U.S. at 230 (internal citations omitted). For claims asserted under the ATS, federal courts are encouraged to "give serious weight to the Executive Branch's view of the case's impact on foreign policy," and limit adjudication to claims that concern individual or narrowly defined causes of action. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 733, fn. 21, 712 (2004). Finally, "federal courts should exercise extreme caution when adjudicating environmental claims under international law to insure that environmental policies of the United States do not displace environmental policies of other governments." *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161, 167 (5th Cir. 1999).

The court's holding in *City of Oakland v. BP P.L.C.*, 325 F. Supp. 3d 1017 (N.D. Cal. 2018) controls the case at bar. The District Court for the Northern District of California rejected the City of Oakland's suit against numerous oil companies for their alleged contribution to climate change. *Id.* at 1025. The court found the claims nonjusticiable under the political question doctrine because they concerned "questions of how to appropriately balance these worldwide negatives against the worldwide positives of the energy itself, and of how to allocate the pluses and minuses among the nations of the world." *Id.* at 1026. Instead, resolution of complex international issues "demand[s] the expertise of our environmental agencies, our diplomats, our Executive, and at least the Senate." *Id.*

This proposition directly applies to Ms. Mana's ATS claim against the United States because resolving it would require this Court to infringe upon the Executive and Legislative branches' foreign affairs authority by deciding the rights of a foreign citizen asserting a claim under customary international law. Because her claim "reaches conduct within the territory of another sovereign," resolution of her claim will certainly result in "unwarranted judicial interference" into international policy. *Id.* Resolving a globally pressing issue such as climate change cannot be solved with a single court case. Rather, the international weight of Ms. Mana's claims, and the potential repercussions on extraterritoriality, demand this Court to follow the Northern District Court's holding in *City of Oakland*, and uphold dismissal of this claim under the political question doctrine.

B. Resolution of Ms. Mana and Mr. Flood's claims demands this Court to move beyond areas of judicial expertise.

A claim may be dismissed under the political question doctrine if there is a lack of judicially discoverable and manageable standards, and if arriving at a decision is "impossible without an initial policy determination of a kind clearly for nonjudicial discretion." *Goldwater*, 444 U.S. at 998.

1. *This Court lacks judicially discoverable and manageable standards to grant Ms. Mana and Mr. Flood relief in a reasoned fashion.*

The focus of the second *Baker* prong is "not whether the case is unmanageable in the sense of being large, complicated, or otherwise difficult to tackle from a logistical standpoint. Rather, courts must ask whether they have the legal tools to reach a ruling that is principled, rational, and based upon reasoned distinctions." *Alperin v. Vatican Bank*, 410 F.3d 532, 552 (9th Cir. 2005) (internal citations omitted). In doing so, courts must evaluate whether the judiciary

can grant relief in a reasoned fashion, rather than allowing claims to proceed in order to "merely provide hope without a substantive legal basis for a ruling." *Id.*

The Northern District of California's holding in *Native Village of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863 (N.D. Cal. 2009), *aff'd*, 696 F.3d 849 (9th Cir.) speaks directly to the case at bar. The Alaskan Village of Kivalina filed a public nuisance action against major oil companies for emitting greenhouse gases that contributed to global warming, which ultimately caused sea ice erosion and coastal harm to the small fishing town. *Id.* at 869. The district court dismissed the claim under the political question doctrine because the plaintiffs failed to articulate judicially discoverable and manageable standards that would guide the court to a rational and well-reasoned decision. *Id.* at 875. The court held that,

> [i]n a global warming scenario, emitted greenhouse gases combine with other gases in the atmosphere which *in turn* results in the planet retaining heat, which *in turn* causes the ice caps to melt and the oceans to rise, which *in turn* causes the Arctic sea ice to melt, which *in turn* allegedly renders Kivalina vulnerable to erosion and deterioration resulting from winter storms…neither Plaintiffs nor [prior case precedent] offers any guidance as to precisely what judicially discoverable and manageable standards are to be employed in resolving the claims at issue. Although federal courts undoubtedly are well suited to resolve new and complex issues and cases, the Court is not persuaded that this is such a case. Plaintiffs' global warming nuisance claim seeks to impose liability and damages on a scale unlike any prior environmental pollution case cited by Plaintiffs. Those cases do not provide guidance that would enable the court to reach a resolution of this case in any 'reasoned' manner.
>
> *Id.* at 876.

The factual similarities between *Native Village of Kivalina* and this case support dismissal of Ms. Mana and Mr. Flood's claims. The harms Plaintiffs complain of are analogous to those in *Kivalina* because they are "based on the emission of greenhouse gases from innumerable sources located throughout the world and *affecting the entire planet and its atmosphere*." *Id.* at 875. As such, this Court is unequipped to adjudicate Ms. Mana and Mr. Flood's claims because there are no judicially discoverable standards to evaluate whether, and to

what extent, the United States' and HexonGlobal's activities and subsequent greenhouse gas emissions directly caused the alleged harms suffered. For these reasons, the public question doctrine compels this Court uphold dismissal for it will be fundamentally unable to grant Ms. Mana and Mr. Flood reasonable relief through judicially discoverable and manageable means.

2. *Resolution of Ms. Mana and Mr. Flood's claims will require this Court to make a policy judgment of legislative nature.*

The third *Baker* prong requires a reviewing court to determine whether "it would be impossible for the judiciary to decide the case without an initial policy determination of a kind clearly for nonjudicial discretion." *Baker*, 369 U.S. at 217. In actions involving foreign affairs or constitutional litigation, the judicial process is "peculiarly ill-suited to solving problems of environmental control [b]ecause such problems frequently call for the delicate balancing of competing social interests, as well as the application of specialized expertise, [and] it would appear that their resolution is best consigned initially to the legislative and administrative process." *Tanner*, 340 F.Supp. at 536. Again, the court's decision in *Village of Kivalina*, compels dismissal of the claims at bar because adjudication would require this Court "to make a policy decision about *who* should bear the cost of global warming." *Vill. of Kivalina*, 663 F. Supp. 2d at 876. Specifically,

> [t]hough alleging that Defendants are responsible for a 'substantial portion' of greenhouse gas emissions, Plaintiffs also acknowledge that virtually everyone on Earth is responsible on some level for contributing to such emissions. Yet, by pressing this lawsuit, Plaintiffs are in effect asking this Court to make a political judgment that the two dozen Defendants named in this action should be the only ones to bear the cost of contributing to global warming. Plaintiffs respond that the Defendants *should be* the ones held responsible…because 'they are responsible for more of the problem than anyone else in the nation. But even if that were true, Plaintiffs ignore the allocation of fault – and cost – of global warming is a matter appropriately left for determination by the executive or legislative branch in the first instance.

Id. at 877.

The substance of Ms. Mana and Mr. Flood's claims concern matters that have been historically governed by legislative policy. On both a national and international scale, the United States has committed to various climate change and greenhouse gas reduction measures, primarily by way of statutory regulations and legislative decisions. As such, this Court is not poised to further evaluate Ms. Mana and Mr. Flood's claims, without risking potential infringement on legislative history and authority. The United States recognizes that global climate change is of increasing importance. However, separation of powers principles and long-standing precedent encourage legislative and executive action, rather than judicial adjudication, for equitably resolving the monumental environmental issues at hand. For these reasons, this Court should uphold the district court's Order and dismiss Mr. Mana and Mr. Flood's claims for lack of judiciability under the political question doctrine.

CONCLUSION

For the aforementioned reasons, the United States Government respectfully asks this Court to uphold the district court's dismissal of all claims submitted by Plaintiffs Organization of Disappearing Island Nations, Apa Mana, and Noah Flood. However, as a matter of policy, the United States respectfully asks this Court to further consider, and find that: (1) the *Trail Smelter* Principle is universally recognized as customary international law; (2) the *Trail Smelter* Principle imposes actionable obligations on private parties; (3) the Alien Tort Statute authorizes suits against a domestic corporation; and (4) dismissal was proper because Plaintiffs' claims are barred by the political question doctrine.