CA. No. 18-000123

IN THE UNITED STATES COURT OF APPEALS FOR THE TWELFTH CIRCUIT

———————

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

v.

HEXONGLOBAL CORPORATION,
Defendant-Appellee

and

THE UNITED STATES OF AMERICA,
Defendant-Appellee

———————

Appeal from The United States District Court for New Union Island in NO. 66-CV-2018,
JUDGE ROMULUS N. REMUS

Brief for HEXONGLOBAL CORPORATION, Defendant-Appellee

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STATEMENT OF JURISDICTION

This case involves an appeal from a judgment of the United States District Court for the District of New Union Island. The District Court had subject matter jurisdiction under 28 U.S.C. § 1331 (2012) because the claims arose under the laws of the United States, namely the Clean Air Act (CAA), Alien Tort Statute (ATS), 28 U.S.C. § 1350, and U.S. Constitution, Article V. The district court granted the defendants' motions to dismiss for failure to state a claim, holding that the ATS had been displaced by the CAA and holding that the public trust doctrine (PTD) did not apply in providing protection under the Fifth Amendment substantive due process guarantee. R. at 9-11. This brief addresses the propriety of those rulings. This Court has appellate jurisdiction over the district court's final judgment of dismissal pursuant to 28 U.S.C. § 1291 (2012). The notice of appeal was filed in a timely manner. Fed. R. App. 4(a).

STATEMENT OF THE ISSUES

1. Can an ATS claim be brought against a domestic corporation when the statute specifically addresses individual citizen torts?

2. Is the Trail Smelter Principle (TSP) a globally accepted principle of customary international law, enforceable as the "Law of Nations" under the ATS even though the TSP only applies to an agreement over trail smelter pollution between the United States and Canada?

3. Even if the TSP is customary international law, does it create obligations enforceable against non-governmental actors?

4. If otherwise enforceable, is the TSP displaced by the CAA when Congress has explicitly stated that was the intent?

5. Is there a cause of action against the United States Government, under the PTD, for failure to protect the global atmospheric climate system from disruption due to the production, sale, and

burning of fossil fuels when the PTD is a State, not Federal, resource policy applying to natural resources within the State's boundaries?

6. Do Plaintiffs' law of nations claim under the ATS and public trust claim present a non-justiciable political question when the claims deal with a political issue but are not addressed by the Executive or Legislative branches, are ripe for review, and the judiciary is the appropriate forum in which to resolve the issues?

RELEVANT STATUTES AND CONSTITUTIONAL PROVISIONS

The relevant provisions are set forth in the Appendix.

STATEMENT OF THE CASE

This is an appeal from the United States District Court for the District of New Union Island. Plaintiff Mana asserts a claim under the ATS seeking to hold HexonGlobal (HG) liable for tort violations as a result of HG's fossil fuel production, which Mana also claims violates the TSP. Plaintiff Flood asserts that the United States ineffective regulation of greenhouse gases (GHG) violates its obligations under the PTD, as incorporated in the U.S. Constitution, Article V. Both Plaintiffs' claims were correctly dismissed for failure to state a claim and they have appealed.

STATEMENT OF FACTS

As the residents are aware, A'Na Atu and New Union Islands are low-lying islands. R. at 4. The populated areas of both islands are below one meter in elevation which means residents with homes with an elevation of less than one-half meter above sea level suffered seawater damage to their homes and seawater intrusion into drinking water wells during several storms over the past three years. R. at 4-5. Despite their knowledge of the risks from living on low-lying islands, both Plaintiffs claim that this damage would not have occurred in the absence of GHG. R. at 5.

The reality is that for centuries tropical islands have faced perils from severe storms, heat exposure and other diseases on a regular basis. Despite these facts, Plaintiff alleges HG and the United States are to blame for their damages. *Id.* Plaintiffs are relying on the claim that GHG perpetuates climate change, enhances ocean acidification, and causes global warming; all of which results in a loss of coastal wetlands that will subsequently reduce ocean productivity and reduce the availability of a major food source they rely upon. *Id.* Summarily, Plaintiffs assume that limits on fossil fuel production and combustion would reduce further damage to Plaintiffs' properties, reduce health risks, and would maintain the habitability of Plaintiffs' communities. *Id.*

HG is a domestic corporation of the United States that was a result of a merger of all major United States oil producers. *Id.* HG is incorporated in the State of New Jersey, and has its principal place of business in Texas. *Id.* HG has no presence in the island nation of A'na Atu but has done business with the New Union Islands, which has personal jurisdiction over HG. *Id.*

HG is regulated by and complying with domestic statutes that aim to protect public health, curb global GHG emissions and reduce the overall pollution created within the United States, including pollution that may affect the global community. R. at 6-7. In fact, HG is only responsible for 32% of United States cumulative fossil fuel-related GHG emissions, which is only 6% of global historical emissions. R. at 5. In recognition of a signed and ratified observer of the United Nations Convention on Climate Change, the United States has pledged to curb the use of GHG's to prevent drastic interference with the atmosphere. R at 6. Both HG and the United States are doing their part in cooperation with other developed countries to mitigate GHG's impact on climate change.

SUMMARY OF THE ARGUMENT

The ATS allows for federal courts to have jurisdiction over a civil action by an alien in instances where United States individuals have violated a law of nations or a treaty recognized by the United

States. Additionally the ATS provides for jurisdiction and not a claim of relief, yet in the present case the Plaintiff not only lacks a claim of relief but does not meet the requirements of the ATS to apply federal jurisdiction.

When the TSP is considered as customary international law, it is bound by international tribunals, treaties or publicists. While these sources have established individual liability for international torts, the existence of corporate liability has been questioned and, in some cases, explicitly renounced. Furthermore, due to a lack of existing legislative statutes, it would be inappropriate for a nation's judiciary branch to establish a stance on corporate liability. Finally, establishing corporate liability under international law would be economically and socially detrimental to all nation states.

Because the Environmental Protection Agency (EPA), is delegated regulatory authority directly from Congress, the CAA cannot be displaced by federal law. The Supreme Court has explicitly stated that when a federal agency's Act directly addresses an issue by implementing a standard, federal common law is displaced in favor of the Act. Furthermore, because federal law cannot occupy any roles not already filled by the CAA, there can be no displacement. Finally, courts have recognized that the legislative branch is better suited to dealing with GHG emissions which is a principle considered with the displacement standard.

The Plaintiff is attempting to allege that their claims are governed by the PTD which is protected under the Fifth Amendment substantive due process clause. The PTD was originally designed to protect the public interest in navigable waters and occasionally has been expanded to include other natural resources within a state's boundaries. However, Plaintiff is overstating the PTD applications by attempting to enforce it against the United States Government and including the atmosphere as a natural resource to which the doctrine applies. In addition, the Plaintiff is

incorrect in assuming that the United States Government is responsible for the acts and omissions of others whose GHG emissions are the result of industry operations.

Finally, the United States asserts that due to the political issues of Plaintiff's claims, the claims are non-justiciable. However, political issues being present in a case does not necessarily mean that the case is subject to a political question. In fact, recent case precedence has established that unless the Constitution specifically designates the matter to the Executive or Legislature, and thereby to an agency with power over the entity, the appropriate forum for such disputes is the judiciary.

STANDARD OF REVIEW

This Court reviews a district court's grant of a motion to dismiss *de novo*, accepting the Plaintiff's allegations as true when considering the motion to dismiss. *Tindall v. Poultney High Sch. Dist.*, 414 F.3d 281, 283 (2d Cir. 2005). As to the merits, the district court's decisions were based on motions to dismiss filed by the Defendants which presented questions of law. This Court reviews these determinations by applying the same standards that applied in the district court. *See Kahle v. Gonzales*, 487 F.3d 697, 699 (9th Cir. 2007); *Westlands Water Dist. v. U.S. Dep't of Interior*, 376 F.3d 853, 865 (9th Cir. 2004). Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) and *Anderson v. Liberty Lobby*, 477 U.S. 242, 250 (1986).

ARGUMENT

I. The Court should affirm the lower court's holding that Plaintiff failed to state a claim because the ATS provides jurisdiction for individual, not corporate, torts, the ATS was displaced by the CAA, and because HG's presence in the Plaintiffs' nation is required and lacking.

The court correctly identified that the ATS was designed to hold individuals, rather than abstract entities like domestic corporations, accountable, for torts violating the law of nations. The court also correctly determined that the law of nations, which is based on common law, was displaced by the CAA and as a result Plaintiff may not bring a claim under the ATS against HG. Finally, HG is not present in the Plaintiffs' nation which is required for jurisdiction to exist.

The ATS is, "a federal statute that gives the federal courts jurisdiction over a civil action by an alien for a tort committed in violation of the law of nations or a treaty of the United States. Also known as the Alien Tort Claim Act (ATCA)." 28 U.S.C. § 1350. The ATS was adopted in 1789 and gave non-U.S. citizens the right to sue for torts committed in violation of safe conduct, infringement of the rights of ambassadors, and piracy. The statute has expanded to include violations of human rights and property rights "out of a sense of legal obligation and mutual concern." *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 248 (2d Cir. 2003). Customary international law only addresses wrongs that are of "mutual" concern to the States, those wrongs that affect the relationship between states or between an individual and a foreign state." *Id*. at 249. The courts have also determined that an individual, not a corporation, must violate a law of nations or treaty for a court to have jurisdiction. *See Sosa v. Alvarez–Machain*, 542 U.S. 692 (2004).

In the present case, Plaintiff is attempting to avail themselves of the ATS to further their claim against HG for GHG emissions and resulting climate change. The ATS is not a public policy

remedy nor was it created with an intent to address environmental harms that are already regulated by the CAA, Clean Water Act (CWA) and the Resource Conservation Recovery Act (RCRA). All of these statutes displace common law which the law of nations was based upon.

Consequently, the lower court accurately concluded that the ATS does not provide Plaintiffs with a cause of action because the statute was created to provide jurisdiction and not a claim for relief. Moreover, Plaintiffs' belief that HG has enhanced global warming and caused a personal harm, does not fall within the scope of ATS jurisdiction because HG is a corporation and lacks a presence in Plaintiffs' nation.

A. The ATS does not provide Plaintiff with jurisdiction because customary international law focuses on individual liability rather than on domestic corporations and therefore there is no jurisdiction under the ATS.

The ATS aims to remedy wrongs committed by individuals. HG is a domestic corporate entity and therefore falls outside of the scope of the ATS.

Our Founding Fathers and the First Congress aimed to hold U.S. Citizens accountable for torts and allowed for aliens of foreign nations to bring suits specifically against *citizens*. However, Congress' intent in creating the ATS did not and has not aimed to include corporate entities. In his analysis on the origins of the ATS, Curtis A. Bradley writes in the Virginia School of International Law Journal, "This construction of the Statute is consistent with the law of international responsibility in the late 1700s. Nations were responsible under the law of nations to punish and compensate offenses committed by their citizens." Curtis A. Bradley, *The Alien Tort Statute and Article III,* 42 Va. J. Int'l L. 587, 641–642 (2002). This interpretation of the ATS is consistent with *Kiobel,* a case in which the Supreme Court stated, "We conclude, therefore, that the relatively few international treaties that impose particular obligations on corporations do not establish

corporate liability as a "specific, universal, and obligatory" norm of customary international law." *Kiobel v. Royal Dutch Petrol. Co.*, 621 F.3d 111, 125 (2d Cir. 2010), *aff'd*, 569 U.S. 108 (2013)

The damages that Plaintiff claims HG is liable for are not established or widely recognized norms of customary international law. The court has held "Rather, sources of customary international law have, on several occasions, explicitly rejected the idea of corporate liability. Thus, corporate liability has not attained a discernable, much less universal, acceptance among nations of the world in their relations *inter se*, and it cannot not, as a result, form the basis of a suit under the ATS." *Id*. at 149. In addition, Plaintiff has not accused HG of violating the CAA. This is very telling because the United States sets and regulates environmental standards under the CAA which therefore ensures that the United States holds corporations accountable, including being subject to penalties and liability in the United States or any foreign nation where it has a presence. The court correctly determined the Plaintiff is making a claim under the ATS because they have no claim against HG under the governing law of the United States.

Therefore, the court should affirm the lower court's holding because HG is a domestic corporation and the ATS applies to individual torts.

B. The court should hold that Plaintiffs lacks subject matter jurisdiction and their claim fails as a matter of law because HG has no extraterritorial presence in A'na Atu.

In addition to the ATS only being applicable against torts committed by individuals, courts have also determined that the ATS does not allow for domestic laws to be applied abroad. Any extraterritorial application of statutes designed to regulate and hold accountable domestic corporations, do not apply in foreign nations, especially when the domestic corporation has no presence in that foreign nation. Therefore, Plaintiffs lack a claim against HG for their alleged damages.

The Supreme Court has addressed whether there is:

> "… a cause of action under U.S. law to enforce a norm of international law. The reference to "tort" does not demonstrate that the First Congress "necessarily meant" for those causes of action to reach conduct In the territory of a foreign sovereign. In the end, nothing in the text of the ATS evinces the requisite clear indication of extraterritoriality." *Kiobel* at 119.

Additionally, in *William v. AES Corp.,* the court found that foreign nationals could not bring action against a local power company under the ATS, even though the local company was one whose parent company was a United States corporation. *See William v. AES Corp*., 28 F. Supp. 3d 553 (E.D. Va. 2014). The alleged acts occurred entirely on foreign soil and was not related to United States territory. *Id*.

HG has operations in the New Union Islands and none in Plaintiff's home nation of A'na Atu. R. at 5. Therefore, HG's lack of existence in A'na Atu does not provide jurisdiction for the Plaintiff's claim and the claim fails as a matter of law.

II. The TSP is a recognized principle of customary international law but it is not enforceable as the "Law of Nations" under the ATS.

The TSP is an agreement between the United States and Canada, and therefore a form of international law, but it is not enforceable under the ATS in Plaintiff's claim because the TSP is a unique agreement, not a "Law of Nations." Therefore, the TSP is not enforceable against HG.

The TSP originated from the United States concern over trail smelter that was polluting the waters of the United States from Canadian operations. As a result, the two nations codified in 3 U.N. Rep. Int'l Arb. Awards 1905 (1941), the TSP which ensures that a nation-state has the duty to protect other nation states from any harmful actions committed by individuals that fall within

their jurisdiction. *See* 3 U.N.R.I.A.A. 1965 (1941). In the precedent TSP case of *Georgia v. Tennessee Copper Co.,* the Supreme Court found "In that capacity the state has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain." *Georgia v. Tennessee Copper Co.* 237 U.S. 474 (1915). Specifically, the court established that the states had an interest in protecting its' citizens from harm. The court also recognized that domestic regulations sufficiently hold domestic individuals and corporations accountable. In their analysis of whether a statute or regulatory act may apply when violations occur in foreign nations, the court stated it "is a domestic, rather than an extraterritorial application of CERCLA, even though the original source of the hazardous substances is located in a foreign country." *Pakootas v. Teck Cominco Metals,* 452 F.3d 1066 (9th Cir.2006). Additionally, the court found that, "If the Trail Smelter were in the United States, the discharge of slag from the smelter into the Columbia River would potentially be regulated by RCRA and the Clean Water Act." *Id*. at 1079. Finally, it is important to note, that the enforcement of the TSP involved a Canadian company with a United States subsidiary, the company had physical presence in the United States and the company was based in a contiguous nation.

In the present case, Plaintiffs' nation is not Canada and therefore is not a nation to which the TSP applies. The TSP is not binding on every member of the global community. In addition, Plaintiff's nation is not a contiguous nation nor a nation where HG is operating. It is arguable that the extent of the TSP is limited to those states or quasi-states that are contiguous and contiguous only. Moreover, the TSP seeks to hold individuals and not corporations accountable similar to the ATS. The damages Plaintiffs are claiming did not result from any affirmative act of HG to dump GHG directly into their atmosphere, and had their actions been affirmative and direct, HG would

have been governed by the CAA, not the ATS, because federal common law, which is the basis of the law of nations, is displaced by the CAA, further barring the ATS from regulating HG.

Therefore, Plaintiffs' claim fails as a matter of law because the TSP is not enforceable under the ATS.

III. The TSP does not impose obligations enforceable against non-governmental actors.

While we have established that the TSP is a form of international law, it is not enforceable against domestic corporations. The TSP is an agreement between two specific nation-states to protect the natural resources within their boundaries from harm caused by another nation's industry. The TSP governs the actions of the nations, not the non-governmental, entity.

Corporate liability has not been explicitly established as part of customary international law, nor has it been established as a precedent within the United States. Customary international law differs significantly from nation-state domestic laws, in part because there is no governing legislative body to pass binding statutes. Article 38 of the Statute of the International Court of Justice has been widely considered as the highest authority and used by the Supreme Court to approach international law. *See Kiobel* at 132. Article 38 describes sources as "international conventions, international custom, general principles of law recognized by civilized nations, and subject to Article 59, judicial decisions and teachings of the most highly qualified publicists." *Id*. The court in *Kiobel* examined each of these sources in detail to determine corporate liability under international law and found that the sources either declined to impose corporate liability or explicitly rejected the notion of corporate liability. *Id*. In another precedent case, *Jesner v. Arab Bank,* the Supreme Court declined to hold corporations liable under the ATS, expressing that this was a decision better left to Congress. *See Jesner v. Arab Bank, PLC,* 138 S. Ct. 1386, 1391 (2018).

Plaintiffs' claim that corporations are liable for actions that result in foreign damages fails to distinguish between the intended subjects of international law; individuals, entities and nation-states. Even if Plaintiff argues that there is a circuit split and thus, corporate liability *could* apply to HG's fossil fuel business activities, the mere fact that Congress has not explicitly passed a statute establishing corporate liability means that it has not been determined to be an international custom or norm. Plaintiffs are attempting to establish a dangerous precedent that has not been considered in the past and has been explicitly rejected in the present.

This Court should affirm the lower court's holding due to Plaintiff's failure to state a claim for relief.

A. The absence of corporate liability in international laws and norms show that the TSP was meant to encompass only nation-states.

In *Sosa*, it was made clear by the Supreme Court that a norm must be "specific, universal, and obligatory" in order to "attain the status of a rule of customary international law." *Sosa* at 732. This applies to an ATS suit brought under customary international law, where jurisdiction is limited only to violations of international norms that are "specific, universal, and obligatory." *Kiobel* at 148. In other words, such a tort must violate a "universally recognized right" that is "definable, obligatory and universally condemned". *In re Estate of Ferdinand Marcos, Human Rights Litig.*, 25 F.3d 1467, 1475 (9th Cir. 1994). Furthermore, *Kiobel* further defined norms as "customs and usages of civilized nations" represented by tribunals and publicists that courts look to when there is a lack of an international treaty or controlling decision by government branches. *See Kiobel* at 131. The basis for these norms can be found in the sources for customary international law, which *Kiobel* cites from Article 38 as including international conventions, customs, general principles of law, and judicial decisions and teachings subject to Article 59. *Id.*

at 132. Also, in *Jesner*, the court noted that the Nuremburg Tribunal charged a German corporation through its employees since the Tribunal concluded that "corporations act through individuals". *Jesner* at 1400. During the trial, the corporation itself was not held liable, and the court further noted that more recent international tribunals have been limited to "natural persons". *Id*. The tribunal specifically stated that "crimes against international laws are committed by men, not abstract entities, and only by punishing individuals…can the provisions of international law be enforced". *Id*. The drafters of the Rome Statute of the International Criminal Court explicitly rejected a proposal to give the court jurisdiction over corporations. *Id*. The court in *Jesner* also emphasized that the International Convention for the Suppressing of the Financing of Terrorism only imposed its obligations on nation states to "enable" domestic corporations to be held liable and that such regulations could not be displaced by courts without congressional authorization. *Id*. at 1401. However, the convention made clear that such corporations would only be held liable domestically by its nation state and no liability arose from claims under customary international law. *Id*. Asides from tribunals, the court in *Kiobel* also analyzed international treaties and concluded that because international law would apply to all nation states regardless of ratification, treaties ratified by minor nations or for specific subject matters could not be considered as defining norms. *See Kiobel* at 138. The court finally noted that the opinions and work of publicists regarding corporate liability was far from universal. *Id*.

In the present case, assuming the TSP is customary international law, Plaintiff argues that HG can be held liable as a corporation because the principle states that nations have the "responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States." R. at 9. However, the TSP itself imposes obligations on nation-states that ratified it as opposed to corporations directly. As shown by the court in *Jesner*, the

subjects of international laws have historically either been ratifying nation states or individuals who make up an abstract entity, not "corporations" themselves. Regardless of whether Plaintiffs argue that HG is a foreign or domestic corporation due to the locations of its various refineries, the fact remains that corporations are distinguished from nation states or individuals. R. at 5.

Furthermore, corporate liability itself has not been established as a norm that has been recognized as customary international law. As shown in *Kiobel*, acceptance of corporate liability is far from universal in the world and in fact, many international tribunals and publicists explicitly reject corporate liability. Plaintiffs may argue that *Flomo* supports corporate liability due to the court's argument that there is a first time for everything (in other words, just because corporations have historically never been held liable, does not mean they are immune), that the Nuremburg Tribunal did in fact charge the corporation, and that raising the standard for ATS claims to an international law level would be unreasonable. *See Flomo v. Firestone Nat. Rubber Co.*, LLC, 643 F.3d 1013, 1018 (7th Cir. 2011). However, principles reflected in this case and emphasized by the courts in *Kiobel* and *Jesner* address these points sufficiently. While corporations can be held liable, without precedent established by Congress, it would be imprudent for the courts to begin a norm. *See Jesner* at 1405. Furthermore, corporations can be charged through their individuals, something that the Nuremburg Tribunal recognized when it charged IG Farben but prosecuted the individuals making up the corporation itself. *Id*. at 1400. Finally, in this case, there is nothing preventing Plaintiffs from presenting an ATS claim directly at individuals comprising HG. For policy reasons further elaborated below, denying corporate liability would ensure that claims are specifically targeted at responsible individuals rather than being used as "potshots in the dark."

Thus, this court should find that as customary international law, the TSP does not impose obligations on non-government entities such as corporations. A lack of international law norm

establishing corporate liability as well as the principle's plain language itself show why Plaintiff lacks a claim.

B. The Judiciary branch should not create precedent establishing corporate liability when the Legislative and Executive branches have declined to do so.

The court in *Jesner* re-emphasized its "reluctance to extend judicially created private rights of action" due to its recognition that "the Legislature is in the better position to consider if public interest would be served by imposing a new substantive legal liability." *See Jesner* at 1402. Extending this principle to corporate liability, the court cited *Kiobel* in stating that the "political branches have the responsibility and institutional capacity to weigh foreign policy concerns" and consequently, a "high bar" for private claims against international law was highly appropriate. *Id*. Further, the court states that in weighing an ATS claim, it looks to comparable legislative statutes for guidance. *Id*. In *Jesner*, the key comparison was with the Torture Victim Protection Act (TVPA) where Congress specifically addressed foreign policy implications as well as who may be liable. *Id*. Specifically, Congress limited liability to "individuals" who were unambiguously defined as "natural persons", an indication of the court carefully defining the scope of the act in light of foreign policy implications. *Id*. at 1404.

In the present case, Plaintiffs are trying to set a precedent that a higher court has explicitly rejected due to foreign policy implications. As the record shows, the United States is aware of GHG emissions and has both ratified international treaties as well as created the EPA. R. at 6. Neither treaties signed by the United States nor policies enacted by the EPA however, have addressed or taken a stance on corporate liability. R. at 7. Corporate liability is the very liability *Jesner* refrains from endorsing due to no precedent set by either the Executive or Legislative branches of the United States. *See Jesner* at 1399. Whereas the TVPA explicitly and specifically

addresses the subjects of the act, Congress did not label corporations as subjects in the ATS. This shows that Congress deliberately did not address corporate liability because they were aware of the foreign policy implications that revolved around it. Setting a judicial standard despite this fact would negatively impact both foreign relations and open the floodgates to litigation.

Plaintiffs may argue that the Supreme Court in *Jesner* only addressed foreign corporate liability and that domestic corporate liability is still possible. However, this argument fails to refute the concern that setting a dangerous precedent before the Legislative branch is a bad idea. Furthermore, this falls in line with the argument in *Flomo* where there's a "first time for everything". *See Flomo* at 1018. While there is certainly a first time for everything, the courts have already recognized that it is not their place to start a chain of events that affect international relations.

Accordingly, this court should find that setting a precedent by establishing corporate liability under the ATS would be detrimental and not in accordance with Legislative intent. Therefore, Plaintiffs' claim should fail.

C. <u>It goes against policy to impose customary international law on non-governmental actors.</u>

In *Jesner*, the court was aware that "holding foreign corporations liable for international law violations" would allow claims to target multinational corporate entities instead of human perpetrators. *Jesner* at 1405. Furthermore, the court also noted that other nations, applying the law of nations, could "hale our corporations into their courts for alleged violations of the law of nations." *Id*. Consequently, American corporations would be subject to "constant risks of claims" against their agents and subsidiaries around the world, especially in developing nations. *Id*. Developing countries would lose investment from American corporations, a vital part of their

economy which serves as the foundation for improved human rights. *Id*. at 1406. The *Kiobel* court recognized that accepting "norms that have not been universally accepted by the rest of the civilized world" would create international friction and undermine the intent behind international statutes. *See Kiobel* at 140–41.

In the present case, Plaintiff pushes for this court to recognize corporate liability in order to remedy damages suffered by increases in GHG emissions. R. at 5. While these damages are regrettable, Plaintiff is only looking at the immediate results while ignoring long term consequences. Declaring corporations liable for international tort claims under the ATS would severely harm the economies of both developed and developing countries, who depend on trade for exchange of material and revenue. As noted, corporations would no longer invest in foreign countries due to the massive liability involved with setting up subsidiaries and agents. As evidenced by the record, Plaintiffs live in a developing country where safe drinking water and malaria are major concerns. R. at 5. Supposing that Plaintiffs receive damages through a lawsuit, this neither relieves them of their problem regarding rising water levels, nor does it benefit their nation's economy. On the contrary, corporations would be reluctant to invest in Plaintiff's nation, and a reduced efficiency economy would mean that Plaintiff's current problems would be exacerbated.

Plaintiff may argue that by setting a precedent of corporate liability GHG emissions will reduce, and the water levels will rise at a much slower rate, if at all. However, as seen in the record, HG is incorporated in and does primary business in the United States. By establishing corporate liability, Plaintiff would simply force companies to operate within their own nation-states and arguably, new domestic corporations would eventually take over and replace foreign corporations. The result would be an increase in GHG emissions much closer to home. Accordingly, this court

should find that setting a precedence of corporate liability will not relieve Plaintiff's current situation, and may on the contrary, accelerate it.

Taken in conjunction with the fact that there is no historical precedence of corporate liability in customary international law, a lack of Legislative intent to establish such liability, and the Judiciary branch's reluctance to set precedence before Congress, this court should find that the TSP, as customary international law, does not impose obligations on HG, a non-governmental actor.

IV. The TSP is displaced by the CAA.

The TSP was endorsed by international conventions to allow nation states to responsibly exploit domestic natural resources while containing adverse side effects within their borders. R. at 9. Notably, the TSP was limited to the agreement reached between the United States and Canada. In addition, the CAA was enacted after the EPA was authorized and obligated to regulate GHG emissions. *See Massachusetts v. E.P.A.*, 549 U.S. 497, 534 (2007). Although Plaintiff may argue that these two pieces of legislation are mutually exclusive, on the contrary, the CAA established the United States obligation to regulate under the TSP. In *American Electric Power Company (AEP)* the Supreme Court found that the CAA displaced federal common laws that were covered within the Act. *See Am. Elec. Power Co. v. Conn.*, 564 U.S. 410, 424 (2011). Because the ATS gives federal courts jurisdiction over Plaintiff's claim, a TSP claim under the ATS would fall under federal common law governing GHG emissions, which is governed by the CAA.

This Court should affirm the lower court's holding that Plaintiff failed to state a claim for relief. As noted in the record, the trial court's finding that any action Plaintiff may have had under the

ATS would be displaced by the CAA, which provides standards regulating GHG emissions, enforced by state implementation plans. R. at 9.

A. The CAA speaks directly to the question at issue and thus, qualifies for displacement of the TSP.

The court in *AEP* notes the test used to determine whether displacement can occur, as "simply whether the statute speaks directly to the issue." *See AEP* at 410. Furthermore, the CAA has already been established to speak "directly to emissions of carbon dioxide from plants." *Id*. The EPA sets guidelines and standards which are then enforced by individual States. *Id*. It is especially important to note that the CAA allows multiple avenues of enforcement, with the EPA being allowed to inspect and monitor sources of pollution, to impose penalties and to make civil claims in federal court. *Id*. at 425. The court makes it very clear that if the Act provides means to obtain the same relief provided by federal common law, it is considered "parallel" and displaced. *Id*.

In the present case, Plaintiffs acknowledge that HG contributes a significant amount of GHG emissions to the United States global emissions and that HG is primarily based in the United States. R. at 5. Plaintiff however, would incorrectly argue that the TSP addresses issues that are not "spoken to directly" by the CAA. The TSP primarily obligates nation-states to responsibly regulate resource gathering activities within their borders, which in this case, includes HG's production of carbon dioxide after burning fossil fuels. R. at 9. The CAA similarly, gives the EPA the authority to regulate maximum emission levels and the ability to enforce penalties against corporations who do not comply. While the CAA is a domestic law, it still speaks to the issue by providing the same punitive measures accessible to Plaintiffs through the TSP.

Plaintiffs may argue in this case that HG is not directly generating GHG emissions, but by selling products to entities that do, the CAA does not regulate. However, as courts have made clear, when the harm suffered was due to the GHG emissions and not the sales itself, federal law was still displaced. *See City of New York v. BP P.L.C.*, 325 F. Supp. 3d 466, 474 (S.D.N.Y. 2018). Because all of Plaintiff's grievances result directly from the rising sea levels which are a consequence of increased GHG emissions, the CAA still speaks to the issue at hand. R. at 5.

Thus this court should find that Plaintiff's issues raised through the TSP are sufficiently addressed by the CAA, and consequently, federal law is displaced.

B. The CAA has already displaced Federal common law because there are no roles left for Federal common law to fill.

The court in *AEP* emphasized that in determining whether displacement has occurred, the question is "whether the field has been occupied, not whether it has been occupied in a particular manner." *See AEP* at 426. The fact that "Congress delegated to the EPA the authority to decide whether and how to regulate carbon dioxide emissions" is what displaces federal common law. *Id*. Likewise, the EPA is still subject to judicial review and cannot decline to regulate emissions if the "refusal to act would be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id*. at 427. The court in *Milwaukee* noted that "when a problem has been thoroughly addressed through the administrative scheme established by Congress…there is no basis for a federal court to impose more stringent limitations". *See Milwaukee v. Ill. & Mich.*, 451 U.S. 304, 320 (1981). Finally, the court also goes on to note that if there is no role to be filled by federal common law and all overflows have been addressed by the Act, then mere disagreement with the agency's approach is no basis for the creation of federal law. *Id*. at 323.

In the present case, Plaintiffs may argue that the CAA does not displace the TSP because the problem is not thoroughly addressed and that there are more roles to be filled by federal common law (e.g. public nuisance claim). Under the Restatement of Torts, a public nuisance is described as "unreasonable interference with a right common to the general public." *See Oakland v. BP P.L.C.*, 325 F. Supp. 3d 1017, 1022 (N.D. Cal. 2018). "A successful public nuisance claim requires proof that a defendant's activity unreasonably interferes with the use or enjoyment of a public right, and thereby causes widespread harm." *Id*. "When the interference is intentional, it must also be "unreasonable", which is determined through weighing the gravity of the harm against the utility of the conduct". *Id*. Although the record shows that HG continued to sell fossil fuels despite knowing about the negative effects of GHG emissions, the court should determine whether the activities were unreasonable. R. at 5. As the *Oakland* court notes, the burning of fossil fuels was crucial in industrial advancement and societal needs. *See Oakland* at 1023. HG operates refineries around the world and there can be no doubt that its activities were important to development of other nation states. R. at 5. As addressed below, there are significant policy concerns that weigh into balancing whether the harm of burning fossil fuels outweighs the benefits. Regardless, the CAA gives the EPA discretion to deal with any nuisance claim, which are checked by judicial review should any activity be arbitrary.

Thus, this court should find that because Plaintiff is alleging harms due to the GHG emissions caused by HG's sales, the CAA covers all possible tort claims that may arise. Congress's delegation of discretion to the EPA to deal with this issue means that federal common law has already been overwritten and displaced.

C. <u>For policy reasons, Congressional agencies and their regulations are better suited to deal with regulation of GHG versus federal courts.</u>

The Court in *AEP* noted that the prescribed order of decision making, the first decider being the "expert administrative agency" followed by federal judges, is a reason to resist setting emission standards through judicial decrees. *See AEP* at 410. The CAA entrusts the EPA with deciding how to balance national interests with international environmental concerns to determine the emission standards to set. *Id*. In contrast, federal judges lack the scientific, economic, and technological resources utilized by an agency and may not receive counsel or expert opinion to facilitate their judgements. *Id*. Further, district judges are confined to the record brought up by the parties and cannot make precedential decisions that bind other jurisdictions. *Id*.

In the present case, Plaintiff is pushing for the TSP to govern matters that are already addressed by the EPA's CAA. Even if the Trail Smelter groups were comprised of knowledgeable experts in the field of GHG emissions, they would certainly not have been able to access the same amount of data and resources available to the EPA. The EPA, as a domestic agency that was given authority by the Legislative branch to deal exclusively with GHG emissions, works alongside state governments to administer measured standards and then, to enforce such standards as they see fit. The question then, is whether to subject Plaintiff's claim to domestic law through the EPA or to international law through judiciary application of the TSP. Plaintiffs cannot reject a viable solution that falls under the CAA in favor of a broader, more disputed area of law. Not only would this set a poor precedent, it also gives federal judges higher priority in the decision making process, the exact opposite of what the court in *AEP* advised. Results due to uninformed federal district judges, who deal with different subject matters daily, cannot possibly compare to the EPA's sole duty to provide accurate and balanced guidelines.

Thus, this court should find that the EPA's CAA displaces the TSP because the former encompasses the latter and was specifically created to deal with the issue of GHG emissions.

Furthermore, in light of policy reasons, it would set a dangerous precedent to prioritize the opinions of federal district court judges over a specialized legislative agency like the EPA.

V. There is no cause of action against the United States Government and the Court should affirm the lower court's holding that Plaintiff failed to state a claim based on violations of the PTD protected under the Fifth Amendment substantive due process clause.

The PTD is the fiduciary obligation that requires states, not the United States Government, to manage assets for the benefit of the general public. The PTD is protected by the Fifth Amendment of the U.S. Constitution substantive due process clause which states that "No person shall be… deprived of life, liberty, or property, without due process of law…" *U.S. Const. art. V.* The PTD has a long legislative history dating back to the Roman Empire and throughout Great Britain's common law. R. at 10.

The seminal American case framing the PTD was *Illinois Central Railroad Co. v. Illinois (Illinois). Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387 (1892). This case established that the PTD "is a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein …" *Id*. at 452.

Plaintiff is attempting to establish that the United States is responsible for atmospheric climate change as a result of its actions or lack thereof in reducing GHG emissions. Under the PTD, the Plaintiff asserts that the global climate system is a common property owned in trust by the United States that must be protected for current and future generations. R. at 1,3,10,11. The law and case precedent do not agree with Plaintiff's view and the lower courts holding that Plaintiff failed to state a claim under the PTD should be affirmed as a matter of law.

A. The United States Government does not have an obligation to the nation's citizens under the PTD to combat climate change because the PTD applies to state resource policy and specific natural resources.

The court did not err in deciding that Plaintiff lacked a due process-based public trust right to governmental protection from atmospheric climate change. R. at 1. As *Illinois* clearly stated, the public trust doctrine protects certain natural resources and these resources are limited to the geographic region of a state. *Illinois* at 452. There is no PTD governance over the United States Government and the courts have not extended the PTD governance in this manner. When the courts do extend the PTD, which only occurs occasionally, the courts will apply the PTD to natural resources that are not water or commerce related. For example, United States common law explication of the PTD has included wildlife. *See, e.g., Owsichek v. State Guide Licensing & Control Bd.,* 763 P.2d 488, 494-95 (Alaska 1988). *See also Wade v. Kramer*, 459 N.E.2d 1025, 1027 (Ill. App. Ct. 1984). But in most cases, the court has not broadened the interpretation or scope of the PTD. R. at 10. Therefore, the PTD is a state resource policy governing natural resources within the jurisdiction of the state.

The argument that the atmosphere was a public trust resource and that the United States Government was responsible to the public for the harm caused by GHG emissions has been addressed in the courts before. The claims were determined to be "a significant departure from the doctrine as it has been traditionally applied*." Alec L. v. Jackson*, 863 F. Supp. 2d 11, 13 (D.D.C. 2012), *aff'd sub nom. Alec L. ex rel. Loorz v. McCarthy*, 561 F. App'x 7 (D.C. Cir. 2014). The court applied the logic and holding of another precedent case, *PPL Montana, LLc v. Montana (PPL)*, which stated "the public trust doctrine *remains a matter of state law*." *PPL Mont., LLC v. Mont.*, 132 S. Ct. 1215, 1235 (2012). As in our case, the court dismissed the complaint.

Similarly, in *Kanuk ex rel. Kanuk v. State, Dept. of Natural Resources*, the court again was addressing whether the PTD governed the atmosphere, harms from GHG, and whether the state was responsible for those harms. The court again analyzed the PTD and determined that it applied to the state and its natural resources which included water, fish and wildlife. *See Kanuk ex rel. Kanuk v. State, Dep't of Nat. Res.*, 335 P.3d 1088 (Alaska 2014). The court never decided to expand the doctrine to include the atmosphere and dismissed the case because it also posed a political question.

Plaintiff mistakenly alleges that the United States Government is responsible for providing a clean environment through a "healthy and stable climate system." R. at 10. Although the plaintiffs do not explicitly refer to a "right to a clean environment" it is worth noting that the federal courts have yet to infer such a right from the Constitution. In *Environmental Defense Fund v. Corps of Engineers of U.S. Army* (1971), the court concluded that such a right was not protected under the 5th, 9th, and 14th Amendments. See *Envtl. Def. Fund, Inc. v. Corps of Engineers of U. S. Army*, 325 F. Supp. 728, 739 (E.D. Ark.) *supplemented*, 325 F. Supp. 749 (E.D. Ark. 1971). Similar decisions have been issued in other courts. *See In re Agent Orange Product Liability Litigation*, 475 F.Supp. 928 (D.C.N.Y. 1979*). See also Tanner v. Armco Steel*, 340 F.Supp.532 (S.D. Tex. 1972).

In contrast, another case regarding this same issue is *Juliana v. United States (Juliana)* which is currently on appeal. *See Juliana v. United States*, 217 F.Supp. 3d 1224 (D. Or. 2016). In *Juliana* the court ignored case precedent, the fact that the PTD is a state resource policy, and determined that there is a substantive due process claim. *Id*. The court determined that *Alec L. v. Jackson (Alec)* had misconstrued the public trust doctrine by basing it on *PPL* because PPL was a state issue and the allegations were against the federal government. *Id*. However, Juliana is incorrect.

As *Illinois* clearly indicates, and the case precedent has established, the PTD is strictly governed by the state and related to specific natural resources within the state's boundaries.

In addition, the *Juliana* court erred in its interpretation that the Plaintiff's claims were subject to substantive due process by attempting to liken them to the rights of same-sex couples to marry. *See Obergefell v. Hodges*, 135 S. Ct. 2584, 192 L. Ed. 2d 609 (2015). In regards to Substantive Due Process claims, the Supreme Court has held that the asserted fundamental liberty interest must be "deeply rooted in [our] Nation's history and tradition." *Washington v. Glucksberg*, 521 U.S. 702, 706-07 (1997). The Supreme Court also stated that judicial analysis must be performed with "the utmost care whenever we are asked to break new ground in this field." *Reno v. Flores*, 507 U.S. 292, 302 (1993). Again, the *Juliana* court disregarded specific directions on matters of substantive due process in addressing this matter. It is likely that on appeal the court will recognize that *Juliana* was mistaken in in its interpretation of the law.

As the courts have clearly determined, the PTD is a state policy that governs water and other specific natural resources within the state's boundaries. No final court decision has ever determined that the atmosphere is a natural resource governed by the PTD. In addition, no court has determined that the federal government is subject to the PTD. Therefore, the court should affirm the lower court's holding as a matter of law.

B. The CAA displaces Plaintiffs' common law rights under the PTD.

Citizens' rights to resources are not absolute and their rights are governed by a balance between the needs of citizens, business, industry, and the government. Laws and treaties say nothing about how permanent, justiciable, or universal those rights are. R. at 6-8. Not only is Plaintiff incorrectly asserting that the PTD governs the United States Government, plaintiff is mistakenly asserting that this matter is governed by the PTD when in fact the CAA has

displaced the PTD. R. at 6-7.

When considering a case, the courts must determine who the parties are and whether a governmental agency regulates the matter in controversy. In this case, the EPA regulates GHG emissions. R. at 6-8. When a governmental agency is involved the courts have stated "We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer." *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984). This policy has become known as the Chevron deference. In essence, the court believes that it is beyond the scope of its power to direct a federal agency to regulate when Congress has already delegated such authority to an agency with greater expertise on the matter.

Again, the displacement of the PTD by the CAA has been addressed by the courts before and was discussed in *Alec*. *See Alec* at 11. Specifically, the court referred to *AEP*, a case in which the plaintiffs alleged that the five defendant power companies' GHG emissions constituted a public nuisance under federal common law. *See AEP* at 410. The Supreme Court struck down the claim, because it was" displaced by the federal legislation authorizing EPA to regulate carbon-dioxide emissions." *Id*. at 423. From this, the *Alec* court concluded that the plaintiffs' public trust claim was similarly displaced by the CAA. *Alec* at 17. The court also noted that *AEP* does not only apply to common law nuisance claims but rather to *any* federal common law right associated with the CAA. *Id*. at 16. Additionally, the court echoed the *AEP* court's concerns that "the judgments the plaintiffs would commit to federal judges . . . cannot be reconciled with the decision-making scheme Congress enacted." *AEP* at 2540. The court exercised Chevron deference and stated that Congress designated EPA as the primary regulator of GHG emissions because it "is surely better

equipped to do the job than individual district judges issuing ad hoc, case-by-case injunctions." *Id*. at 2539.

In contrast, the *Juliana*, court disagreed with the *Alec* interpretation. The court stated that based on the PTD responsibility for protecting the public resources the character of the PTD "obligation is that it cannot be legislated away, Because of the nature of public trust claims, a displacement analysis simply does not apply." *Juliana* at 1260. Again, the *Juliana* court is incorrect. The court again ignored case precedent, which specifically established that the PTD was displaced by the CAA. The court also failed to take into account that even if the PTD was not displaced, the court would exercise Chevron deference and defer to the EPA anyway and its governance under the CAA.

Therefore, the court should affirm the lower court's holding that Plaintiff failed to state a claim as a matter of law.

C. <u>The United States is not responsible for the acts and omissions of others under the substantive due process clause.</u>

The court correctly identified that the Plaintiff is attempting to claim that the United States government is responsible for the conduct of entities that produce GHG. R. at 10. Such an assumption of responsibility would result in the United States being responsible for all the GHG in the atmosphere. This is an unreasonable result and not substantiated by substantive due process.

The courts have addressed the culpability of government officials throughout history and a notable precedent has emerged. When the conduct of the government, through its agents, is not directly responsible for the harm caused, the government is not liable. The court specifically addressed this concept, and its link to the due process clause, in a child abuse case

where the mother sued after her child was left in the care of his father and the father assaulted him. In *DeShaney v. Winnebago Cty. Dep't of Soc. Servs*. the court determined:

> "A State's failure to protect an individual against private violence generally does not constitute a violation of the Due Process Clause, because the Clause imposes no duty on the State to provide members of the general public with adequate protective services. The Clause is phrased as a imitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security; while it forbids the State itself to deprive individuals of life, liberty, and property without due process of law, its language cannot fairly be read to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means." *DeShaney v. Winnebago Cty. Dep't of Soc. Servs*., 489 U.S. 189, 189, 109 S. Ct. 998, 1000, 103 L. Ed. 2d 249 (1989).

However, if the government is responsible for putting a citizen in danger through no will of their own, then the government is liable under the government caused danger exception the court referred to in reference to *Penila v. City of Huntington Park*. R. at 11. This exception occurs in situations where the government agent places a citizen in danger by some affirmative act. In *Penila*, police officers responding to an emergency call, failed to render aid, and left the victim in his home were found liable for the victim's death because they cancelled services of paramedics. *See Penila v. City of Huntington Park*, 115 F.3d 707 (9th Cir. 1992). The police officers action were deliberate and contributory to, if not responsible for, the victim's death. *Id*.

In this case, the United States is not responsible for the harm Plaintiff is claiming because the United States made no affirmative act to put the Plaintiff in harm's way. The citizens by their own volition are living in areas where the effect of GHG emissions are high and the citizens have a choice to remove themselves from the harm. In addition, the United States is working with other nations in forming treaties and initiating laws and regulations to mitigate the harm. R. at 6-8.

Although the United States does govern the conduct of GHG emitting businesses, a balance between the industry growth, which is the basis for our economy, and the harm growth causes must be weighed. Citizens' rights are not absolute and therefore the government has taken necessary action to protect the interests of all concerned.

Therefore, the court should affirm the lower court's holding that the Plaintiff's claims fail as a matter of law because the United States Government did not act affirmatively in putting the Plaintiff in harm's way.

VI. The Court should hold that Plaintiffs' law of nations claim under the ATS and public trust claim under the common law are justiciable in accordance with the U. S. Constitution and the claims are not subject to the political question doctrine (PQD).

Article III of the U.S. Constitution, known as the judicial power clause, gives courts the power to adjudicate cases arising from international treaty obligations and specifically states:

> "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority… to Controversies to which the United States shall be a Party… and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." *U.S. Const. art. III, § 2, cl. 1*.

In addition, as the record reflects, and Article III allows, the ATS gives district courts the right to adjudicate treaty matters. R. at 8. Despite the clear language of the law, the United States is attempting to claim that this matter is subject to the PQD. R. at 2.

The lower court did not reach a determination on this matter because it held that Plaintiff had failed to state a claim. R. at 9. However, had the court considered this matter, it should have determined that the Plaintiffs' law of nations claims are justiciable and not subject to the PQD.

A. Plaintiffs' law of nations claims under the ATS and PTD are justiciable.

Claims brought under the ATS are subject to adjudication by a district court. R. at 8. This power is granted to the district court in accordance with Article III of the U. S. Constitution which "limits federal court jurisdiction to Cases and Controversies." *Massachusetts* at 516. The plain language of the law makes it clear that the ATS governs the Plaintiffs' claims and the United States assertion that they are non-justiciable fails as a matter of law.

The courts have addressed the ATS justiciability in the precedent case of *Sosa*. In this case, the Plaintiff sued under the ATS after the US Drug Enforcement Agency allegedly arranged to have him abducted from Mexico to the United states in order for him to face charges for his crimes. *See Sosa* at 692. In deciding *Sosa,* the Court established several important principles. First, while the ATS is a jurisdictional statute, it allows for private rights of action. *Sosa* at 698. They recognized certain offenses to be criminal under the law of nations, and they wanted the statute to have practical effect in being able to address those offenses. *Id*. Second, the Court found that Congress intended for the ATS to allow jurisdiction for "a relatively modest set of actions alleging violations of the law of nations." *Id*. at 720. ATS enforces "offences against this law [of nations] are principally incident to whole states or nations,' and not individuals seeking relief in court." *Id*. Finally, the Court acknowledged that there is some element of judgment involved on the part of courts deciding whether to grant a cause of action under ATS in any particular case. *Id*. at 732-33. "Determining] whether a norm is sufficiently definite to support a cause of action should (and, indeed, inevitably must) involve an element of judgment about the practical consequences of making that cause available to litigants in the federal courts." *Id*. The court also advised that courts should use judicial caution and interpret the ATS narrowly and not rely on common law to expand the rights afforded in customary international law. *Id*. at 725-29.

Customary international law topics have included human rights, aiding and abetting, racial discrimination, and slavery. *See Filartiga v. Pena-Irala,* 630 F.2d 876, 878 (2d Cir. 1980). *See also Presbyterian Church of Sudan v. Talisman Energy,* 374 F. Supp. 2d. 331, 337-41 (S.D.N.Y. 2005). *See Sarei v. Rio Tinto, PLC*, 487 F.3d 1193, 1209 (9th Cir., 2007). *See Doe I v. Nestle USA, Inc.*, 766 F.3d 1013 (9th Cir. 2014). The courts have also addressed environmental abuses subject to the PTD with the ATS. In *Beanal v. Freeport-McMoran*, the Plaintiff alleged, among other things, that environmental damage was being caused by domestic mining in the Republic of Indonesia. The court determined that environmental abuses met the requirement of ATS as being "shockingly egregious violations of universally recognized principles of international law." *Zapata v. Quinn*, 707 F.2d 691,692 (2d Cir. 1983) (per curiam). Unfortunately, the court dismissed the case because the treaties and international law governing environmental issues at that time did not have measurable standards for enforcement of the Plaintiff's claim.

Therefore, based on the plain language of the law, and the fact that courts have previously addressed environmental issues subject to the PTD, the court should adjudicate this matter under the ATS.

B. The United States assertion of the PQD fails as a matter of law because Plaintiff's claims fail the political question tests and therefore are justiciable.

The PQD, is raised when there is a concern that the matter being addressed is governed by another branch of government, either the Executive or Legislative, resulting in the matter not being subject to judicial review. The origins of the PQD can be traced back to Chief Justice Marshall's opinion in *Marbury v. Madison*. *Marbury v. Madison,* 5 U.S. 137 (1803). In *Marbury,* Justice Marshall explained that the Constitution entrusted a scope of discretion in some areas to the "executive departments alone". *Id*. at 164. But, "whether the legality of an act of the head of a

department be examinable in a court of justice or not, must always depend on the nature of that act." *Id*. at 165. The majority emphasized that when a statute is "alleged to conflict with the Constitution," it is the duty of the courts to "say what the law is." *Id*. at 177.

It is important to distinguish the PQD from cases presenting political issues. The Supreme Court itself has noted that the PQD has caused significant confusion and requires "a delicate exercise in constitutional interpretation." *Baker v. Carr*, 369 U.S. 186, 211 (1962).

Political questions are "essentially a function of the separation of powers." *Id*. at 217. In *Baker*, the court identified six independent tests to determine the existence of a political question:

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

The Court did not, however, explain precisely how these factors were to be applied in future cases, nor did it describe the relative weight of each factor; although in a later case applying the doctrine, a plurality of the Court explained that they "are probably listed in descending order of both importance and clarity." *Vieth v. Jubelirer*, 541 U.S. 267, 277 (2004).

In analyzing whether a matter is subject to a political question, the court engages in a "a discriminating analysis of the particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in the light of its nature and posture in the specific case, and of the possible consequences of judicial action." *Baker* at 211-212. Until recently, courts had followed a precedent of deciding that a case posed a political question if the matter being decided involved a political issue. *See Nixon v. U.S.*, 506 U.S. 224,

236 (1993) ("In addition to the textual commitment argument, we are persuaded that the lack of finality and the difficulty of fashioning relief counsel against justiciability."). However, the Supreme Court has cautioned that a case does not present a political question simply because it touches upon a political issue or foreign affairs. In *Japan Whaling Association v. American Cetacean Society*, the Court noted the "premier role which both Congress and the Executive play" in foreign affairs, but concluded that "under the Constitution, one of the Judiciary's characteristic roles is to interpret statutes, and we cannot shirk this responsibility merely because our decision may have significant political overtones." *Japan Whaling Ass'n v. Am. Cetacean Soc.*, 478 U.S. 221, 230 (1986). The case involved the highly controversial topic of enforcement of international whaling quotas and the Court ruled that the case did not raise a political question, explaining that the interpretation of treaties, executive agreements, and legislation was a proper judicial function. *Id*. at 230.

Similarly, in *Zivotofsky v. Clinton*, the Court rejected application of the political question doctrine to another statutory claim. *Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421, (2012). The Plaintiff sought to have his passport read "Jerusalem, Israel" as the place of birth; but the State Department refused consistent with department policy to "not write Israel or Jordan" as the birthplace of someone born in Jerusalem. *Id*. at 1425. The Supreme Court reversed the lower court's opinion by holding that the political question doctrine did not bar adjudication of the claim. *Id*. at 1426-31. The Court explained that, contrary to the framing of the question given by the lower courts, it was "not being asked to supplant a foreign policy decision of the political branches with the courts' own unmoored determination of what United States policy toward Jerusalem should be. Instead, Zivotofsky requests that the courts enforce a specific statutory right"; *Id*. at 1427. The Court noted that there was no "exclusive commitment to the Executive of the power to

determine the constitutionality of a statute." *Id*. at 1428. Likewise, the Court reasoned, there might be "'a lack of judicially discoverable and manageable standards for resolving' ... whether the Judiciary may decide the political status of Jerusalem." *Id*. But such "concerns ... dissipate when the issue is recognized to be the more focused one of the constitutionality of" the statute in question. *Id*. The court's decision was based on the first two *Baker* tests. In his concurring opinion, Justice Sotomayor's opinion listed all six, and explained that they represented "three distinct justifications for withholding judgment on the merits of a dispute." *Id*. at 1431.

Returning to the case at bar, as discussed above, GHG emissions are governed by the EPA. At first glance, this would result in the matter being determined to meet the first *Baker* test. However, this is incorrect because the EPA governs the conduct of the entity emitting GHG. The EPA does not govern the acts and omissions of the United States Government, which through Congress, established the agency. In addition, there are GHG emission standards and scientific data available from which the court can resolve the matter and, as case precedent establishes, GHG emission controversies are being addressed. Finally, GHG emissions' impact on atmospheric climate change is one of the leading topics of concern in the international community and yet there has been no adherence domestically, or otherwise, to a political decision or pronouncement. As a result, the Plaintiff's claims fail each Baker test when applied to the United States Government.

Therefore, since there is no other coordinate branch that would oversee this matter, and none of the other Baker factors apply, the matter does not pose a political question and is justiciable.

CONCLUSION

For the reasons set forth above, HG respectfully requests this Court to affirm the holding of the lower court and grant any further relief to which HG is entitled.

APPENDIX

28 U.S.C. § 1350 – Alien Tort Statute

The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

42 U.S.C. § 7521 – Clean Air Act Section 202(a)(1)

The Administrator shall by regulation prescribe (and from time to time revise) in accordance with the provisions of this section, standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare. Such standards shall be applicable to such vehicles and engines for their useful life (as determined under subsection (d) of this section, relating to useful life of vehicles for purposes of certification), whether such vehicles and engines are designed as complete systems or incorporate devices to prevent or control such pollution.