Team 17

CA. No. 18-000123

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 New Union Island
in No. 66-CV-2018, Judge Romulus N. Remus.

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

Appellants

ORAL ARGUMENT REQUESTED

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JURISDICTIONAL STATEMENT

The U.S. Court of Appeals for the Twelfth Circuit has appellate jurisdiction over this case pursuant to 28 U.S.C. § 1291 (2012). Plaintiffs have filed a timely Notice of Appeal following the Order of the District Court dated August 15, 2018 in Civ. 66-2018. This Notice of Appeal was granted by the Twelfth Circuit, ordering the following issues be briefed.

ISSUES PRESENTED FOR REVIEW

1. Can Apa Mana bring an Alien Tort Statue claim against HexonGlobal for causing substantial harm in A'na Atu in violation of a recognized law of nations?

2. Is the *Trail Smelter* Principle, recognized as customary international law, enforceable under the Alien Tort Statute?

3. Does the *Trail Smelter* Principle, originating from a dispute between private parties, impose obligations on non-governmental actors?

4. Is the *Trail Smelter* Principle displaced by the Clean Air Act, where the Supreme Court has held the Act does not uniformly treat greenhouse gases as air pollutants throughout its sections?

5. Is there a cause of action based on Fifth Amendment substantive due process against the U.S. for failure to prevent atmospheric climate change, when the U.S. directly contributed to global warming by consistently enabling and encouraging fossil fuel businesses?

6. Can these claims be brought in a federal court where the federal legislature has persistently neglected and failed its obligations to preserve the public trust?

STATEMENT OF THE CASE

A. Statement of Relevant Facts

Fossil fuels, such as natural gas, are commonly collected and burned by humans to produce heat and/ or energy. The acts of collecting and burning fossil fuels cause an increase in carbon dioxide and methane concentrations in the atmosphere. R. at 4. Agricultural and other industrial activities also generate and release increased concentrations of carbon dioxide and methane into the atmosphere. *Id*. Carbon dioxide and methane negatively affect the atmosphere because they

are "greenhouse gases" which cause Earth to retain heat when concentrations increase. *Id*. When Earth retains heat, and the global temperature increases, the global climate system changes in negative ways. *Id*. Some changes include increased surface temperatures, changing rainfall patterns, and rising sea levels. *Id*. "If global emissions of greenhouse gases continue at current rates, global temperatures will rise by over four degrees Celsius compared to pre-industrial global temperatures, and average sea level will likely rise by between one-half and one meter by the end of this century." *Id*.

1. Greenhouse gases, and the resulting climate change, affect the low-lying islands of A'Na Atu and New Union Islands and the residents thereof.

The maximum height of both A'Na Atu and New Union Islands is less than three meters above sea level, and the elevation of the populated areas of both islands is less than one meter. *Id*. These populated areas would become uninhabitable if sea levels rose between one-half and one meter. *Id*. Plaintiff Apa Mana ("Mana") resides on A'Na Atu, and plaintiff Noah Flood ("Flood") resides on one of the New Union Islands. *Id*. Both plaintiffs own their homes, and both homes have elevations below one-half meter. Greenhouse gas induced sea level rise, combined with the greenhouse gas induced rainfall pattern change, have already caused damage to their homes during storms. *Id*. at 5. Both Mana and Flood incurred substantial expenses to repair the past damage and prevent future damage from rising sea levels. *Id*. They will continue to incur substantial expenses in the future as a result of the rising sea levels. *Id*. In addition to property damage, both plaintiff's water wells have seawater intrusion. *Id*. The increasing temperatures put plaintiffs at an increased risk of developing heat stroke and mosquito borne illnesses. *Id*. Greenhouse gas induced climate change will also lead to ocean acidification, ocean warming, and loss of coastal wetlands. *Id*. These transformations will reduce the availability of locally caught seafood, which seriously affects plaintiff's source of food. *Id*. The threat of future harm to plaintiffs' property, health, food, water,

and communities could be avoided or reduced if defendants limit future fossil fuel production and combustion. *Id*.

2. Defendants U.S. and HexonGlobal control a percentage of emissions of greenhouse gases into the atmospheric climate system.

HexonGlobal, a New Jersey corporation, is the surviving corporation after a merger of all of the major U.S. oil producers. R. at 5. HexonGlobal is responsible for 32% of U.S. greenhouse gas emissions related to fossil fuels, and it is responsible for six percent of global emissions. *Id*. HexonGlobal's international sales of fossil fuels constitute nine percent of global fossil fuel related emissions. *Id*. "Based on their own scientific research, HexonGlobal, and its corporate predecessors have been aware since the 1970s that continued global sales and combustion of fossil fuel products would result in substantial harmful global climate change and sea level rise." *Id*. Despite its research and awareness, HexonGlobal continued production without any reduction or modification. *Id*. HexonGlobal operates refineries across the globe, has its principal place of business in Texas, and operates one refinery on New Union Island. *Id*.

"The U.S. is, historically, the largest single national contributor to emissions of greenhouse gases." *Id*. To date, the U.S. produced twenty percent of the cumulative global anthropogenic greenhouse gas emissions. R. at 6. Rather than creating regulations to limit emissions, the U.S. promoted the production, distribution, and combustion of fossil fuels. *Id*. Some examples of U.S. promotion are: (1) tax subsidies for fossil fuel production; (2) leasing of public lands and seas under its jurisdiction for coal, oil, and gas production; (3) creation of the interstate highway system; and (4) the development of fossil fuel power plants by public agencies. *Id*. The U.S. took some preliminary regulatory actions over the past decade, but U.S. greenhouse gas emissions have only slightly decreased while global greenhouse gas emissions have increased. R. at 7. President Trump's current administration seeks to reverse these regulatory actions. *Id*. President Trump

intends to withdraw from the Paris Agreement in 2020, and the Environmental Protection Agency ("EPA") proposed freezing emissions reductions regulations. *Id.*

B. Procedural History

The Organization of Disappearing Island Nations ("ODIN"), Apa Mana, and Noah Flood filed suit against HexonGlobal Corporation and the U.S. of America. R. at 1. Plaintiffs filed suit (case Civ. 66-2018) with the U.S. District Court for New Union Island. *Id*. As a national of the nation A'na Atu, Mana filed a claim pursuant to the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350. R. at 8. Since ATS only provides jurisdiction, Mana relied on the principles outlined in the Trail Smelter Arbitration, *3 U.N.R.I.A.A. 1965 (1941),* for the source of a cause of action. *Id*. Flood, a U.S. citizen, filed a claim under the Fifth Amendment that alleges violations of both the public trust doctrine and his right to substantive due process. R. at 10.

District Court Judge Remus issued Order of the District Court on August 15, 2018. R. at 1. Judge Remus held that the Clean Air Act's greenhouse gas regulations displace international Law of Nations, including the *Trail Smelter* principle. *Id*. Judge Remus also declined to recognize a Due Process-based public trust right to governmental protection from atmospheric climate change. *Id*. Following the District Court's Order, Plaintiffs (now Appellants) filed a Notice of Appeal. *Id*.

STANDARD OF REVIEW

Because both of the District Court's dismissals were based on questions of law, the standard of review in this Court is *de novo.* The *de novo* standard applies when issues of law predominate in the district court's decision. *U.S. v. Mateo-Mendez,* 215 F.3d 1039, 1042 (9th Cir. 2000). Federal statutory interpretation, as well as Constitutional interpretation, are both questions of law to be reviewed under the *de novo* standard. *Schleining v. Thomas*, 642 F.3d 1242, 1246 (9th Cir. 2011); *Pierce v. Underwood*, 487 U.S. 552, 558 (1988).

SUMMARY OF THE ARGUMENT

Plaintiffs are allowed to bring their claims under the Alien Tort Statute for the transboundary harm committed by HexonGlobal. The Supreme Court has outlined the requirements for a viable claim under this statute: the violation of international law must be universally accepted and give rise to individual liability, the activities that give rise to the cause of action must occur principally within the U.S., and the defendant must not be a foreign corporation. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004); *Kiobel v. Royal Dutch Petro. Co.*, 569 U.S. 108, 124 (2013); *Jesner v. Arab Bank, Pub. Ltd. Co.*, 138 S. Ct. 1386, 1407 (2018). The duty not to cause transboundary pollution harm, illustrated by the Trail Smelter Arbitration *, 3 R.I.A.A 1965 (1941)*, is an accepted practice of nations in dealing with one another. HexonGlobal is a domestic corporation, and their activities within the U.S. have caused substantial harm to Plaintiffs. Further, the *Trail Smelter* Principle is a recognized principle of customary international law, and is enforceable under the Alien Tort Statute. This principle has been restated by the International Court of Justice in both the *Corfu Channel* Case (*United Kingdom v. Alb*.), 1949 I.C.J. Reports 4, 21-22, and the Gabčíkovo-Nagymaros Project (*Hung. v. Slovk*.), 1997 I.C.J. 7, 41. This principle has been implemented into national practice in a general and consistent manner, and has created a binding legal obligation on states and individuals alike.

The *Trail Smelter* Principle is enforceable against non-governmental actors. The original dispute was harm caused by a private company to a number of private citizens. Many procedural bars existed at the time, and the private parties had no choice but to petition their respective governments to take on their cause. Even as the case took on an international setting, the outcome of the arbitration imposed obligations on the private company. *Trail Smelter* parallels the current global climate change regime where non-governmental actors play a significant role. The non-

governmental actors use pertinent international governing bodies as the vehicle to express their interests. Though the states are the technical "parties" to these international decisions, the ramifications fall directly on the non-governmental actors in question. Non-governmental parties must be held responsible for their actions influencing the global climate change regime, much like they were in *Trail Smelter*. The Clean Air Act does not displace the ability of Plaintiffs to hold the Defendants responsible for their infringements. The Supreme Court held in *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302 (2014) that the Clean Air Act does not uniformly treat greenhouse gases as air pollutants throughout each of its sections. Federal common law claims must be allowed to supplement the gaps of the Clean Air Act that inevitably lead to serious harm.

The U.S. government can be sued for failure to protect the global climate system pursuant to the Fifth Amendment. The federal government took affirmative conduct by permitting, subsidizing, and refusing to strictly regulate HexonGlobal's greenhouse gas emissions. By taking these affirmative actions, the government placed Plaintiffs in danger of losing life, liberty, and property to rising sea levels and other perilous effects of climate change. The government's permitting and subsidizing were done with deliberate indifference to the plaintiffs' safety, and with knowledge of the harmful effects of greenhouse gases. By creating this certain danger, the government has violated Plaintiffs Fifth Amendment rights and must be held accountable for their failures. All of these claims are justiciable in a federal court. None of the elements of a political questions outlined in *Baker v. Carr*, 369 U.S. 186, 209 (1962) are present in this case: the questions presented are fully justiciable and non-political.

ARGUMENT

This Court should reverse the district court's decision that the Clean Air Act has displaced Plaintiffs' action under the Alien Tort Statute. This is a valid claim against a domestic corporation,

the *Trail Smelter* Principle is customary international law that enforces obligations on non-governmental actors, and it is not displaced by the Clean Air Act. This Court should also reverse the district court's decision that there is no Fifth Amendment due process claim available to Plaintiffs. Plaintiffs' harms are justiciable, and a Fifth Amendment due process claim against the U.S. to remedy these harms should be upheld.

I. PLAINTIFF, MANA, CAN BRING AN ALIEN TORT STATUTE, ("ATS") CLAIM AGAINST THE DOMESTIC CORPORATION DEFENDANT, HEXONGLOBAL.

ATS as codified in 28 U.S.C. § 1350 provides that district courts shall have "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 U.S.." The Supreme Court has held that the ATS does not create a cause of action, but rather jurisdiction to hear tort claims based on the international law of torts. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004). The cause of action must be found in a treaty or the law of nations in order for a district court of the U.S. to have jurisdiction. A lawsuit under the ATS can proceed for any harm resulting from a violation of international law, no matter where the harm occurred, or who inflicted the harm, as long as the plaintiff serves process. *Filartiga v. Pena-Irala*, 630 F.2d 876 (1980). ATS claims can proceed against both natural persons and legal persons. *Sosa*, 542 U.S. 692.

The Supreme Court has outlined ATS limitations. First, the alleged violation of international law must be one that is universally accepted and understood to give rise to individual liability. *Id*. at 731. Second, the activities that give rise to the cause of action must have occurred principally within the jurisdiction of the U.S. *Kiobel v. Royal Dutch Petro. Co.*, 569 U.S. 108, 124 (2013). Finally, the defendant must not be a foreign corporation. *Jesner v. Arab Bank, Pub. Ltd. Co.*, 138 S. Ct. 1386, 1407 (2018).

Mana's claim against HexonGlobal can be brought under the ATS. HexonGlobal's emissions into the environment within the territory of the U.S. has caused substantial harms in the territory of A'na Atu in violation of the law of nations or customary international law. This claim of transboundary harm is within the scope of the ATS, as defined by the Supreme Court. Transboundary harm is a violation that is universally accepted and gives rise to individual liability. Trail Smelter Arbitration, *3 R.I.A.A 1965 (1941)*. The emissions caused by HexonGlobal, a domestic corporation, have occurred principally in the United States. R. at 5. HexonGlobal's contribution to greenhouse gas emissions have caused, and will continue to cause, transboundary harm against A'na Atu.

A. The cause of action against HexonGlobal is found in a treaty or "Law of Nations".

The ATS does not create a cause of action. 28 U.S.C. § 1350. Congress intended the ATS to provide jurisdiction for a limited set of actions alleging violations of the law of nations. *Sosa*, 542 U.S. at 720. The law of nations was understood by the Framers to refer to "the accepted practices of nations in their dealings with one another (treatment of ambassadors, immunity of foreign sovereigns from suit, etc.) and with actors on the high seas hostile to all nations and beyond all their territorial jurisdictions (pirates)." *Id*. at 749. The international legal norms that will qualify as a cause of action under the ATS must be "specific, universal, and obligatory." *Id*. at 732. Transboundary harm, as committed by HexonGlobal, is a violation of the law of nations.

In *Sosa v. Alvarez-Machian*, the plaintiff Alvarez, a Mexican physician, allegedly prolonged the life of a Mexican agent of the U.S. Drug Enforcement Agency ("DEA") in 1985 in order to facilitate torture and interrogation by Mexican drug lords. *Id*. at 698. When the Mexican government refused to hand over Alvarez, the DEA hired Mexican nationals to abduct him and bring him to the U.S. *Id.* Alvarez moved to dismiss his federal indictment and the Court rejected

Alvarez's claim on the ground that it failed to state a violation of the law of nations with the requisite "definite content and acceptance among civilized nations." *Id*. at 699, 732. The Court held ATS claims are not limited to gross, widespread, or systematic violations of human rights. Instead, violations of customary international law are enforceable under the ATS. *Id*.

The *Trail Smelter* arbitration defined the prevention of transboundary harm as customary international law. The *Trail Smelter* principle has been cited to and expanded upon in many international cases and has significantly influenced international conventions and treaties. In *Trail Smelter*, an international arbitral panel held that harms to agriculture interests in the state of Washington caused by air pollution emissions from a smelter in British Columbia, Canada were a violation of international liability principles. Trail Smelter Arbitration, *3 R.I.A.A 1965 (1941)*. The arbitration stated that "[n]o state has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence." Trail Smelter Arbitration, *3 R.I.A.A 1965 (1941).*

Transboundary harm is a violation of the "accepted practices of nations in their dealings with one another." *Sosa*, 542 U.S. at 749. A transboundary harm action under the ATS is specific (one nation cannot harm the territory of another); universal (it is a globally accepted violation); and obligatory (a nation found in violation can be held liable for the damages caused.) *Id*. at 732. HexonGlobal caused transboundary harm in violation of international law by directly contributing to greenhouse gas emissions, global climate change, and rising sea levels through their use of fossil fuels. R. at 5. HexonGlobal recognized the risk of transboundary harm and failed to fully address their contribution to global climate change. R. at 5.

B. The emissions into the environment by HexonGlobal within the U.S. have caused substantial harms to the territory of A'na Atu, which is a violation of international law that is universally accepted and understood to give rise to individual liability.

As the Supreme Court held in *Sosa v. Alvarez-Machain*, the violation of international law must be one that is universally accepted and understood to give rise to individual liability. 542 U.S. at 731. HexonGlobal's fossil fuel production and sales activities violate a principle of the law of nations, or customary international law, that emissions into the environment within the territory of one nation must not be allowed to cause substantial harms in the territory of other nations. Trail Smelter Arbitration, *3 R.I.A.A 1965 (1941)*.

The Supreme Court held in *Massachusetts v. EPA* that greenhouse gases (CO2) are "pollutants" potentially subject to regulation under the Clean Air Act.[1] 549 U.S. 497, 528 (2007). The presence of carbon dioxide and methane in the atmosphere, even in small amounts, has an insulating effect which leads to the Earth retaining heat. R. at 4. These emissions from fossil fuels have significantly contributed to global climate change, which has directly contributed to the rising sea level among other effects, such as an increase in temperature and changing rainfall patterns. R. at 4. At the current rate of global climate change, the average sea level will likely rise by one-half to one meter by end of the century. R. at 4. In 2009, the Environmental Protection Agency ("EPA") published an endangerment finding. R. at 6. The EPA found that greenhouse gases and resulting climate change endangered the public health and welfare. R. at 6. This finding set the regulatory predicate for regulation of greenhouse gases under the Clean Air Act. R. at 6.

[1] The term "air pollutant" means any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive (including source material, special nuclear material, and byproduct material) substance or matter which is emitted into or otherwise enters the ambient air. Such term includes any precursors to the formation of any air pollutant, to the extent the Administrator has identified such precursor or precursors for the particular purpose for which the term "air pollutant" is used. 42 U.S.C. § 7602.

The plaintiff, Mana, resides on a low-lying island, A'na Atu, which has a maximum height of fewer than three meters. R. at 4. The populated area of this island, including where the plaintiff resides, are below one meter. R. at 4. The rising sea levels resulting from global climate change would cause the island to be uninhabitable. Mana has already sustained significant damage to her property that would not have occurred in the absence of the emission of greenhouse gases caused by fossil fuels. R. at 5. The rising sea levels resulting from the emissions of HexonGlobal have been a direct violation of the law of nations as transboundary harm.

C. The emissions into the environment by HexonGlobal have occurred principally within the jurisdiction of the U.S..

Under the ATS, the activities alleged to give rise to the cause of action must have occurred principally within the jurisdiction of the U.S. *Kiobel,* 569 U.S. at 124. The ATS does not create extraterritorial jurisdiction. *Id.* The activities by HexonGlobal that gave rise to Mana's cause of action have occurred principally within the jurisdiction of the U.S.

In *Kiobel*, a group of Nigerian nationals residing in the U.S., filed suit in federal court under the ATS, alleging that foreign corporations aided and abetted the Nigerian Government in committing violations of the law of nations in Nigeria. *Id*. at 112. The Supreme Court held that "the presumption against extraterritoriality applies to claims under the ATS, and nothing in the statute rebuts that presumption." *Id*. at 108.

The defendant, HexonGlobal, is a domestic corporation resulting from the merger of all major U.S. oil producers. R. at 5. The greenhouse gas emissions from products sold by HexonGlobal are responsible for 32% of the U.S. cumulative greenhouse gas emissions, and 9% of the cumulative global emissions. R. at 5. Historically, the U.S. is the largest single national contributor to greenhouse gases. R. at 5. At the present time, the U.S. is responsible for 20% of the cumulative global anthropogenic greenhouse gas emissions. R. at 6. The emissions by products

sold by HexonGlobal in the U.S. are one of the largest contributors to greenhouse gas emissions occurring principally in the U.S.

The HexonGlobal activities that caused transboundary harm to A'na Atu have occurred primarily in the U.S. HexonGlobal is one of the largest producers and sellers of fossil fuels in the world, and the U.S. is the single largest contributor to greenhouse gas emissions. HexonGlobal has contributed significantly to U.S. emissions, the activity that has directly caused the violation under international harm. The ATS transboundary harm claim against HexonGlobal is not extraterritorial, as set forth by the Supreme Court in *Kiobel.* 569 U.S. at 124.

D. The defendant, HexonGlobal, is not a foreign corporation.

The final limitation placed on the ATS is that the defendant must not be a foreign corporation. *Jesner*, 138 S. Ct. at 1407. The Court held that it is not the roll of the Judiciary to decide whether to extend the scope of liability under the ATS to foreign corporations. *Id*. at 1405. Absent any congressional action, the scope of the ATS does not reach foreign corporations. HexonGlobal is a corporation of the U.S., incorporated in New Jersey and has its principal place of business in Texas. R. at 5. As a domestic corporation, litigation against HexonGlobal under the ATS does not exceed the scope intended by Congress.

The Second Circuit in *Khulumani* suggested that there is a knowledge requirement for corporate liability. *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 288 (2d Cir. 2007). HexonGlobal was aware of the dangerous effects of greenhouse gas since the 1970s and continued to operate and profit from the harm that has been caused by their emissions. R. at 5. The knowledge of HexonGlobal meets the Second Circuit standard for knowledge and should be held liable for the damages caused.

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

The Restatement (Third) of the Foreign Relations Law of the U.S. ("*Restatement*") defines customary international law as state practice combined with the conviction that the practice flows out of binding legal obligations. *Restatement*, §102(2). Both elements are necessary to create a binding rule in international law. State practice, the objective element, must be "general and consistent" although it is not required to be universal. *Id*. The legal obligation is not required to be explicit and may be inferred from acts or omissions. *Id*. The *Trail Smelter* Principle has become customary international law enforceable as the "law of nations" under the ATS. The *Trail Smelter* principle has been implemented into state practice in a general and consistent manner and creates a binding legal obligation.

A. The "Trail Smelter" Principle has been implemented into state practice in a "general and consistent" manner.

Transboundary harm as a violation of international law began with *Trail Smelter*. The *Trail Smelter* Principle states that "[N]o State has the right to use or permit the use of its territory in such a manner as to cause injury... in or to the territory of another or of the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence." Trail Smelter Arbitration, *3 R.I.A.A 1965 (1941)*. The principles outlined in *Trail Smelter* have been used in several international transboundary harm cases such as *Corfu Channel* and *Hungary v. Slovakia*, along with implementation in several international covenants and declarations.

Corfu Channel arose from damage to British warships caused by the explosion of underwater mines in the Albanian waters of the Corfu Channel. The ICJ expanded upon *Trail Smelter* by stating that is "every state's obligation not to allow knowingly its territory to be used

for acts contrary to the rights of other states." Corfu Channel Case (*United Kingdom v. Alb*.), 1949 I.C.J. Reports 4, 21-22. In *Hungary v. Slovakia,* the ICJ further solidified *Trail Smelter* as customary international law by holding that the prevention of transboundary harm should be the priority of all states. Gabčíkovo-Nagymaros Project (*Hung. v. Slovk*.), 1997 I.C.J. 7, 41. The ICJ reasoned that environmental harms are "often irreversible" and that there is a general lack of remediation or reparation after the fact of such harms, so prevention of such harms should be paramount. *Id*.

The UN Conference on Environment and Development in 1992 produced the Rio Declaration. UN Doc. A/CONF.151/26 (Vol 1), Annex I, 12 August 1992. The Rio Declaration expressed in Article 16 the polluter-pays principle, which states:

> National Authorities should endeavor to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment.

Id. The objectives of the Rio Declaration have been increasingly included in general economic treaties and regional integration treaties.

The *Trail Smelter* principle has been implemented into state practice in a general and consistent manner. *Trail Smelter* has been used both on the international level and the domestic level in the U.S. for over 70 years. This general and consistent implementation further proves that the *Trail Smelter* principle is customary international law enforceable as the law of nations under the ATS.

B. The "Trail Smelter" Principle creates a binding legal obligation.

As customary international law, the *Trail Smelter* Principle has created a binding legal obligation. The *Trail Smelter* Principle of transboundary harm as a violation of international law

has been used in several international cases, covenants, and declarations. Human rights treaties usually require each state to respect and ensure guaranteed rights to "all individuals within its territory and subject to its jurisdiction." International Covenant on Civil and Political Rights, art. 2(1). *Trail Smelter* has been used in the *Corfu Channel* case and the *Hungary v. Slovakia* decision. The ICJ in both of those cases found the harming nation-state to be liable for the transboundary harm that it caused.

The *Trail Smelter* principle has created a legally binding obligation as customary international law. The 1979 Geneva Convention on Long-Range Transboundary Air Pollution ("LRTAP"), of which the U.S. is a party, was the first international legally binding instrument to deal with problems of air pollution on a broad regional basis. The LRTAP laid down the general principles of international cooperation for air pollution reduction. 2237 U.N.T.S. 4. In 2001, the ILC adopted the Draft Articles of the Prevention of Transboundary Harm from Hazardous Activities. ILC *Ybk* 2001/II(2), 144-70. The Draft Articles provide an authoritative statement on the scope of a state's international legal obligation to prevent a risk of transboundary harm. Handl, in Bodasky, Brunnee & Hey (2007) 540. The ICJ stated in its 1996 Nuclear Weapons advisory opinion that there now exists a "general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control" in international law. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 243.

The *Trail Smelter* Principle has been implemented into state practice in a general and consistent manner and has created a binding legal obligation upon states. With these elements easily met, the Trail Smelter principle is customary international law enforceable as the law of

nations under the ATS. The transboundary harm caused by HexonGlobal is an enforceable violation under the law of nations that allows Mana to bring her claim.

III. THE *TRAIL SMELTER* PRINCIPLE UNEQUIVOCALLY IMPOSES OBLIGATIONS ENFORCEABLE AGAINST NON-GOVERNMENTAL ACTORS.

As discussed above, the *Trail Smelter* Principle is a recognized principle of customary international law, and is enforceable as the "Law of Nations" under the ATS. Furthermore, although *Trail Smelter* has been noted throughout its existence for the role it has played in international environmental law, the original dispute was between two private parties. There were a number of legal and political barriers at the time of *Trail Smelter* which prohibited the case from remaining a dispute among private parties. Due to these barriers, the individuals were forced to request that their nation take up their cause to prevent further transboundary pollution harm. Though the international arbitral tribunal awarded damages against the Canadian government, the behavior in question originated from private parties. Because the original and true parties to the *Trail Smelter* arbitration were private parties, the effect and holding of *Trail Smelter* imposes obligations on private parties to not cause injury by fumes to the territory, property, or persons of another.

A. "Trail Smelter" was a dispute between private parties.

The issue in *Trail Smelter* was pollution originating at the Consolidated Mining and Smelting Company in Trail, British Columbia causing damage to farms in Steven's County, Washington. The smelter roasted sulphur bearing ores, releasing sulphur dioxide gas into the air. When the air drifted, the smoke clouds containing the sulphur dioxide gas caused damage to the farming operations being conducted in Steven's County. It is crucial to note that the subject matter of this dispute, though adjudged by an international arbitral tribunal, did not concern the two governments. It did not involve claims against the Canadian government and did not come within

any of the ordinary classes of arbitrable international disputes. The claims were based on nuisance, alleging a Canadian corporation had caused damage to U.S. citizens and property in the State of Washington.

However, the border between the U.S. and Canada provided a great difficulty for the Washington farmers seeking legal redress. As summed up by one scholar, "the problem in the *Trail Smelter* incident was that the boundary between Canada and the U.S. was not as porous to private litigation as it was to the winds that carried the fumes."[2] The Consolidated Mining and Smelting Company's activities in the past had caused disputes in Canadian Territory. The company dealt with those claims most often by outright purchase of the affected land from the aggrieved landowners.[3] Consolidated Mining was prohibited from purchasing the land in Washington due to the 1921 Alien Land Law.[4] Because potential direct negotiations between the company and the harmed landowners were not an option, the dispute would have to enter into a more litigious phase.

Private litigation in *Trail Smelter* would turn out to be a legal impossibility. This impossibility is what caused the dispute between two private parties to become a dispute between two nations. The plaintiffs in *Trail Smelter* would have had two conceivable scenarios for redress of their private harms: sue the foreign company in a U.S. court, or sue as foreign nationals in a Canadian court. Neither of these options were available to the *Trail Smelter* plaintiffs. At that time, a U.S. court would not have been able to assert personal jurisdiction over the foreign corporation.

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[2] Caron, D.D., 'Foreward' in R.M Bratspies and R.A. Miller, *Transboundary Harm in International Law: Lessons from the Trail Smelter Arbitration* (Cambridge University Press, 2006) xxi.

[3] J.D. Wirth, *Smelter Smoke in North America: The Politics of Transborder Pollution* (University Press of Kansas 2000) 3.

[4] Martijn van de Kerkhof, *The Trail Smelter Case Re-Examined: Examining the Development of National Procedural Mechanisms to Resolve a Trail Smelter Type Dispute,* 27 Merkourious-Utrecht J. Int'l & Eur. L. 68 (2011).

Jurisdiction ended at the border, and Washington did not have any form of a long-arm statute to bring the company within the power of the local courts.[5] Aside from the strategic drawbacks of filing in a foreign country, the common law local action rule would have barred the plaintiffs from filing in Canada. The local action rule stipulated that plaintiffs who wished to bring a case relating to their land must do so in the country where that land is located.[6]

Because of these procedural bars, the Washington farmers had no choice but to bring their complaints with their federal representatives, transforming what is truly a private dispute into a public international arbitration.[7] The Arbitration Tribunal imposed a direct regime of control over the Trail Smelter, forcing the company to limit emissions of sulphur dioxide fumes.[8] Consolidated Mining was forced to spend over twenty million dollars to comply with the control regime.[9] This shows that the effects of the arbitration decision applied to and enforced obligations upon the private corporation. Consolidated Mining was not Canada's agent to act on the nation's behalf, nor was it employed to perform services in the affairs of Canada. The procedural bars of the time required this case to be heard by an international arbitration panel, yet the true parties were private citizens, and the effect of the award by the tribunal enforced obligations upon the private company involved. Since that time, the pertinent procedural law has changed, and similar disputes among private parties can be handled through litigation. In *Michie v. Great Lakes Steel Div., Nat'l Steel Corp.*, 495 F.2d 213 (6th Cir.), *aff'd*, 419 U.S. 997 (1974), several Canadian residents successfully

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[5] A.L. Parrish, "*Trail Smelter Déjà Vu: Extraterritoriality, International Environmental Law, and the Search for Solutions to Canadian-US Transboundary Water Pollution Disputes"* (2005) 85 Boston University Law Review 363, 387.
[6] Commission for Environmental Cooperation, "*North American Environmental Law and Policy 2000"* 227 http://www.cec.org/Storage/41/3376_Naelp4e_EN.pdf.
[7] C.P.R. Romano, *The Peaceful Settlement of International Environmental Disputes: A Pragmatic Approach* (Kluwer Law International 2000) 261, 263.
[8] *Results of International Arbitral Awards,* Volume III, 1905, 1966.
[9] *Id.*

sued three Michigan corporations for harm caused by the discharge of air pollutants from the defendants' plants. If this case had been brought forty years earlier, the *Michie* plaintiffs would have resorted to petitioning their government for international intervention to have their complaints heard. Without settlement or litigation options to express their grievances, the *Trail Smelter* parties had to make their complaints international in nature. This does not change the fact that the essence of the case was a private dispute, resulting in awards that imposed obligations on private parties. The *Trail Smelter* principle imposes a duty on HexonGlobal to not cause harm to others via their polluting fumes.

B. Non-governmental actors, much like they did in "Trail Smelter", have a crucial role in the global climate change regime, and must be held accountable for their actions.

Despite the drastic changes in environmental focus between *Trail Smelter* and the present case, there are significant parallels between the global climate change regime and *Trail Smelter*. The greatest parallel is that non-state actors have a crucial role in global climate change, much like they did in *Trail Smelter*. Though this realm of environmental law has long been considered to preserve state interests, such heavy involvement of non-state actors show that climate change battles occur (much like in *Trail Smelter*) between interests of private parties through the state in an international realm, while the effects of decisions and regulations eventually fall on private individuals and companies.

It has become impossible to engage in international environmental issues without balancing competing interests of environmental non-governmental organizations (NGOs) and international industries. This was true even during the times of *Trail Smelter*. The Washington farmers' case was furthered by a group known as the Citizens' Protective Association (CPA), a committee of

farming residents who began complaining of smoke damage in the early 1920s.[10] The Association was an early, environmental NGO, much like the Organization of Disappearing Island Nations. The CPA came to dictate and control the dispute, even as it became an issue before the international tribunal. They were responsible for rejecting the original judgment of the International Joint Commission, and the CPA attorney assumed control of presenting the American case, including the hearings before the Tribunal.[11] Though playing out on the international scale, the American side of the case was controlled entirely by the interests of the local Washington farmers. Similarly, the Canadian side of the case was controlled by Consolidated Mining and the international industrial interests which they represented. Canada served as a mere front for the advancement of Consolidated Mining's agenda as the U.S. served as the vehicle for advancing the interests of the CPA.[12]

Much like in *Trail Smelter*, non-governmental interests are at the forefront of climate change discussions, with states merely serving as the vehicles of expressing these interests. At a Conference of Parties under the United Nations Framework Convention on Climate Change (UNFCCC) in 2000, representatives of environmental NGOs outnumbered representatives of states.[13] On the other hand, international fossil fuel industries were heavily involved as well, attempting to stave off undesired regulation by launching campaigns to counter the scientific

[10] Russell A. Miller, *Surprising Parallels Between Trail Smelter and the Global Climate Change Regime*, Transboundary Harm in International Law, Cambridge University Press (2006).
[11] John D. Wirth, *Smelter Smoke in North America* 80 (2000) at 39-40.
[12] Miller, *Surprising Parallels Between Trail Smelter and the Global Climate Change Regime,* at 170.
[13] Michele Bestill, *Environmental NGOs Meet the Sovereign State: The Kyoto Protocol Negotiations on Global Climate Change,* 13 Colorado Journal of International Environmental Law & Policy 49 (2002).

evidence of environmental proponents through the well-funded Global Climate Coalition and the Global Climate Information Project.[14]

Like in *Trail Smelter*, although the nations are the strictly technical "parties" to these international arbitration decisions, treaties, and agreements on environmental regulations, the positions advanced and the effects which occur come from and pertain to the NGOs. The states merely serve as a means for which these entities can present their positions on potential new international environmental regulations. NGOs are called to the table to take part in these discussions, and national decisions which become international law and policy stem directly from the lobbying and advancement of these non-governmental actors. This reality, in both *Trail Smelter* and in global climate change regimes, requires that where the NGOs play such an important role, they must also be held responsible for the harms they commit. To interpret *Trail Smelter* to only impose liability on nations would be to ignore the reality that non-governmental actors are the engines propelling all forms of international environmental law. As a society, we must continue to move towards a more environmentally conscious world to protect global citizens and lands from the harsh effects of climate change. The *Trail Smelter* principle must be enforced against non-governmental actors: they were the true parties to the *Trail Smelter* arbitration itself, and they are the true parties to the international global climate change regime.

IV. THE *TRAIL SMELTER* PRINCIPLE IS NOT DISPLACED BY THE CLEAN AIR ACT.

The district court dismissed Apa Mana's claims based on *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410 (2011), in which the Supreme Court "held that the Clean Air Act displaces the federal common law of air pollution." R. at 9. However, this conclusion was

[14] Perry Wallace, *Global Climate Change and the Challenge to Modern American Corporate Governance*, 55 Southern Methodist Law Review, 493, note 40 at 495.

misguided as it disregarded subsequent Supreme Court precedent, leaving the holding of *Am. Elec. Power* in question. The federal common law of air pollution, and therefore the *Trail Smelter* Principle, have not been displaced by the Clean Air Act and Apa Mana is entitled to bring her claim.

A. The Supreme Court has held the Clean Air Act does not uniformly treat greenhouse gases as air pollutants throughout each of its sections.

In *American Electric Power,* eight states, New York City, and three nonprofit land trusts sued the five largest emitters of carbon dioxide in the U.S.. *Id*. at 418. The plaintiffs' theory was that the defendants' contribution to global warming constituted a public nuisance under federal common law. *Id*. The Supreme Court found that the Clean Air Act (42 U.S.C. § 7411(d)) provides "a means to seek limits on emissions of carbon dioxide from domestic power plants," and therefore, the plaintiffs "parallel" federal common law claims were displaced by the Clean Air Act. *Am. Elec. Power Co.*, 564 U.S. at 425. This was seen as a great victory for industry groups, as the federal common law of public nuisance appeared to be an extinct tort.[15] Many scholars agreed that the *American Electric Power* decision had eliminated the ability to enjoin any type of air pollution under federal common law, and in fact only one climate change suit under common law nuisance claims has been brought since the decision.[16] The dismissal of Mana's claim relied

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[15] *The Death of Environmental Common Law?*, MCGUIREWOODS (Oct. 3, 2012), https://www.mcguirewoods.com/Client-Resources/Alerts/2012/10/Death-Environmental-Common-Law.aspx [https://perma.cc/RTU6-Y734]; *see also* Keith Goldberg, *No Future for Climate Change Torts, Attys Say*, LAW360 (May 23, 2013), http://www.law360.com/articles/444225/no-future-for-climate-change-torts-attys-say.

[16] Damian M. Brychcy, Note, American Electric Power v. Connecticut*: Disaster Averted by Displacing the Federal Common Law of Nuisance*, 46 GA. L. REV. 459, 486 (2012); *see also* R. Trent Taylor, *The Obsolescence of Environmental Common Law*, 40 ECOLOGY L. CURRENTS 1, 1 (2013); *see also* Juscelino F. Colares & Kosta Ristovski, *Pleading Patterns and the Role of Litigation as a Driver of Federal Climate Change Legislation*, 54 JURIMETRICS 329, 333 (2014).

upon the holding of *American Electric Power*, however that decision was based on an erroneous assumption. The Supreme Court assumed that the Clean Air Act uniformly addressed greenhouse gases throughout the statute, and therefore the common law claims were displaced by the legislation. However, subsequent precedent has logically upended this assumption, in holding that there are sections of the Clean Air Act that do not address greenhouse gases.

The Clean Air Act was intended to protect the public from pollution caused by a number of sources. Four years prior to the *American Electric Power* decision, the Supreme Court held that the Clean Air Act's broad definition of air pollution undoubtedly encompassed greenhouse gases. *Massachusetts v. EPA*, 549 U.S. 497 (2007). Relying upon this holding, *American Electric Power* articulated that the test for whether legislation displaces federal common law is "simply whether the statute speaks directly to the question at issue." 564 U.S. at 429. Because "*Massachusetts* made plain that emissions of carbon dioxide qualify as air pollution subject to regulation under the Clean Air Act" the Supreme Court decided "it is equally plain that the Clean Air Act 'speaks directly' to emissions of carbon dioxide from the defendants' plants." *Id*. at 424 (citing *Massachusetts v. EPA*, 549 U.S. 497, 528-29 (2007)). Furthermore, the *American Electric Power* court discussed that 42 U.S.C. § 7411 of the Clean Air Act allows the EPA to set standards for sources of greenhouse gases, and the Act "provides multiple avenues for enforcement" of these standards. *Id*. If the EPA fails in issuing the pertinent standards, interested parties may petition the EPA to regulate, and that petition may be entitled to review in federal court. *Id*. "The Act itself thus provides a means to seek limits on emissions of carbon dioxide from domestic power plants—the same relief the plaintiffs seek by invoking federal common law. We see no room for a parallel track." *Id*.

However, *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302 (2014) undermined the logic of *American Electric Power,* by holding that the Clean Air Act does not uniformly treat greenhouse gases as air pollutants throughout each of its sections. In that case, a number of states and industry groups challenged rules by the EPA seeking to force greenhouse gas sources to obtain permits under Title V of the Clean Air Act. *Id*. at 306. The Court held that the phrase "any air pollutant" used in Title V could not be construed to include greenhouse gases. *Id*. at 312. It distinguishes *Massachusetts* by stating the Act-wide definition of air pollutant "is not a command to regulate, but a description of the universe of substances the EPA may consider regulating under the Clean Air Act's operative provisions," and that the regulation at issue must be reasonable in the context of the section under which it is promulgated. Because the need to get a Title V permit carried a "heavy substantive and procedural burden", the Court determined it was unreasonable to regulate sources under that section simply because of their greenhouse gas emission capacity. The EPA's desired interpretation would have required a Title V permit, but the Court stressed the necessity of Congressional clarity to regulate greenhouse gases under that section: "We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast economic and political significance." *Id.* at 320. This decision clearly demonstrates that the Clean Air Act does not comprehensively address greenhouse gases. In fact, it states that a context analysis is necessary, and a section of the Act may only be said to address greenhouse gases if that is a reasonable construction under the statutory language and in light of the economic impact of the regulation.

B. Federal common law claims must be allowed to supplement the gaps of the Clean Air Act.

Utility Air Regulatory Group undermined the basic assumption on which *American Electric Power* rested its displacement holding upon; that the Clean Air Act comprehensively addressed greenhouse gases. Because of the holding in *Utility Air Regulatory Group,* it can no

longer be said that the federal common law of air pollution has been displaced wholly by the Clean Air Act. The common law claims would only be displaced if a specific section of the Act provides for sufficient regulation of the sources of greenhouse gases. The Clean Air Act does not sufficiently regulate the emissions of HexonGlobal, an existing source of greenhouse gas emissions, and is therefore subject to federal common law claims to fill the gaps and deficiencies of the Act.

42 U.S.C. §§ 7408, 7409 of the Clean Air Act allow the EPA to develop air standards for pollutants, which states apply to sources of the air pollutants. 42 U.S.C. § 7408 allows the EPA Administrator to list air pollutants which "in his judgment, cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7409(a)(1) (2012) then requires the EPA to set a national air quality standard at a level "requisite to protect public health" with "an adequate margin of safety." Neither of these sections can be interpreted to address greenhouse gases in light of *Utility Air Regulatory Group*. The EPA is not allowed to factor costs when determining ambient levels of greenhouse gases that are protective of public health[17], which would result in the same sort of high administrative costs which the Court specifically disallowed in *Utility Air Regulatory Group.*

42 U.S.C. § 7412 allows the EPA to set standards for hazardous air pollutants. To be considered a pollutant of this sort, the pollutant must present "through inhalation or other routes of exposure, a threat of adverse human health effect." *Id.* § 7412(b)(2). Similarly, this section cannot be construed to address greenhouse gases. 42 U.S.C. § 7412 has been used only to regulate substances having direct effects on human health at relatively low quantities.[18] As noted in the

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[17] *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 471 (2001) ("The text of § 109(b). . . unambiguously bars cost considerations from the NAAQS-setting process . . . .").

[18] *EPA Announces Biggest Air Toxic Reduction in Agency History, EPA (Mar. 1, 1994),* https://archive.epa.gov/epa/aboutepa/epa-announces-biggest-air-toxic-reduction-agency-history.html [https://perma.cc/C5UV-9CBV].

record, greenhouse gases affect the environment indirectly and do not fit within the text of this section. *Utility Air Regulatory Group* stressed the importance of Congressional clarity, and any clarity regarding greenhouse gas regulation under 42 U.S.C. § 7412 is wholly missing. 42 U.S.C. § 7415 of the Act fails for a lack of clarity and the inevitable imposition of "untenable" burdens to existing sources. 42 U.S.C. § 7415 allows the EPA to regulate air pollution within the U.S. that endangers other countries, by implementing state or federal limiting plans. *Id*. § 7415. The breadth of 42 U.S.C. § 7415 could potentially apply to every economic sector in every state of the union, again implying that certain sources would be incapable of shouldering the regulatory burdens that authorizing greenhouse gas emission regulation under this section would inevitably impose. This, again, falls directly into the concerns expressed by the Court in *Utility Air Regulatory Group*, and similarly this section cannot be construed to encompass greenhouse gases.

Because of these gaps in the Clean Air Act, and due to the holding of *Utility Air Regulatory Group*, it is clear that the logic of *American Electric Power* is flawed. Its holding cannot be valid, in light of the fact that the Court specifically acknowledged portions of the Clean Air Act do not address greenhouse gases. Therefore, federal common law claims of air pollution should be allowed to fill the gaps of the Act. Allowing the federal common law claims would force the federal courts to clarify whether or not certain sections of the Clean Air Act do allow for regulation of greenhouse gases: if certain sections do, the EPA could be forced the regulate greenhouse gases under those sections. However, if the courts find that a section does not provide for the regulations of greenhouse gases of a certain source, heavy polluting fossil fuel industries, like HexonGlobal, would be subject to litigation risks. In either case, the allowance of federal common law suits in air pollution further the goals of the Clean Air Act to protect the public from the consequences of

pollution. Because the logic of *American Electric Power* has been undermined, and because the Clean Air Act does not comprehensively address greenhouse gases, federal common law suits in air pollution must be allowed to vindicate the harm caused by the emissions of greenhouse gas sources.

V. THE U.S. GOVERNMENT CAN BE SUED UNDER THE FIFTH AMENDMENT FOR FAILURE TO PROTECT THE GLOBAL ATMOSPHERIC CLIMATE SYSTEM FROM THE ACTIONS OF PRIVATE PARTIES.

"No person shall be deprived of life, liberty, or property, without due process of law". U.S. CONST. amend. V. The fundamental rights to life, liberty, property, and due process were so important that they were codified once again in the Fourteenth Amendment to require that states provide and protect them as well. U.S. CONST. amend. XIV, § 1. While the United States Constitution protects a person's right to property, some earthly elements cannot be owned by any individual. "[T]he following things are by natural law common to all – the air, running water, the sea, and consequently the seashore." R. at 10 (citing J. Inst. 2.1.1 (J.B. Moyle trans.)). Instead of private ownership, these common things are entrusted to the government. Inherent in the constitutional protection of property is yet another protection: the public trust doctrine. Acting as an implied contract, the Constitution obligates the government to protect the common (public) property. "Property is held by the state, by virtue of its sovereignty, in trust for the public." *Ill. C. R. Co. v. Illinois*, 146 U.S. 387, 433 (1892). Although the public property is owned by the government, the right to due process before deprivation of property still applies. "There can be no irrepealable contract in a conveyance of property by a grantor in disregard of a public trust, under which he was bound to hold and manage it." *Id*. at 460. As society's trustee, the government cannot dispose of public property unless it "can be disposed of without detriment to the public interest in the lands and waters remaining." *Id*. at 433.

Here, the government's failure to regulate greenhouse gases essentially disposes of multiple public properties without substantive due process, and the disposal of the public properties have a significant detrimental effect on the public interest in remaining lands and waters. The government provides tax subsidies for fossil fuel production, leases public lands and seas for fossil fuel production, creates the interstate highway system, and develops fossil fuel power plants through public agencies. R. at 6. These government actions dispose of common air by permitting and subsidizing operations that release carbon dioxide and methane into the shared atmosphere. These government actions dispose of common water by allowing these operations to cause ocean acidification and saltwater intrusion into clean drinking water. These government actions dispose of common seashore by failing to regulate and limit operations that contribute to rising sea levels and coastal erosion. By allowing corporations such as HexonGlobal to pollute the atmosphere and accelerate climate change with minimal regulation, the United States government has alienated public property, impaired people's ability to stay alive, and revoked people's liberties without providing substantive due process as required by the Fifth Amendment.

A. Pursuant to the public trust doctrine and Fifth Amendment, the government must refrain from allowing and/ or promoting acts by private parties that deny people of their rights to life, liberty, and property without due process of law.

Relying on *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189 (1989), the District Court for New Union Island denied plaintiff's due process claim on the basis that the Due Process Clause did not provide "government protection from allegedly wrong acts by private parties". R. at 10. The district court also declined to adopt the government-caused danger exception to *DeShaney* for reasons that were not explained. While *DeShaney* was correctly decided, its holding was incorrectly applied to this case by the district court.

In *DeShaney*, a father beat his son so severely that the son was "expected to spend the rest of his life confined to an institution for the profoundly retarded." *Id*. at 193. The son and his mother brought action against a county, the county's Department of Social Services ("DSS"), and several individual DSS employees, pursuant to 42 U.S.C. § 1983. *Id*. Their claim was that the defendants "deprived [the son] of his liberty without due process of law, in violation of his rights under the Fourteenth Amendment, by failing to intervene to protect him against a risk of violence at his father's hands of which they knew or should have known." *Id*. When analyzing whether the county and DSS had an obligation to protect the son from his abusive father, the Court concluded "that a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." *Id*. at 197.

It was this statement, referring to private violence, that the district court erroneously applied to Flood's due process claim. HexonGlobal's "private violence" towards Flood, New Union Island, and the rest of the world are not solely private, as it was in *DeShaney*. The United States government incorporated HexonGlobal, provided necessary permits and licenses to HexonGlobal, collected taxes and other income from HexonGlobal, and subsidized certain actions taken by HexonGlobal. But for the government's permission and encouragement, HexonGlobal could not begin nor continue its greenhouse gas-producing operations; thus, the government's authorizations are the "but for" causes of the "violence" inflicted upon the plaintiff.

By applying the *DeShaney* holding to this case, the district court characterized HexonGlobal as the abusive father, the federal government as the county and DSS, and plaintiff Flood as the abused son. The district court implied that HexonGlobal was "beating" Flood with the climate change-causing greenhouse gases, and the federal government did not have an obligation to intervene under the Due Process Clause. However, these characterizations and

comparisons are incorrect. The federal government gave HexonGlobal the initial permission to begin operations, and the federal government continued to review and renew permits for HexonGlobal as required by federal regulations. In *DeShaney*, the county and DSS did not give the abusive father initial permission to begin beating his son. The county and DSS did not regularly review and renew the father's permits to beat his son. The father in *DeShaney* acted alone, without government permits or subsidies, while HexonGlobal's operations were completely dependent upon government authorizations and regulations. "The [Due Process] Clause is phrased as a limitation on the State's power to act, . . . It forbids the State itself to deprive individuals of life, liberty, or property without 'due process of law'" *Id*. at 195. Further, "the liberty protected by the Due Process Clause affords protection against unwarranted government interference." *Id*. at 196. The Court in *Deshaney* reinforced the law that government cannot act, or interfere, in a manner that deprives persons of life, liberty, or property without due process of law. This is the only dicta from *DeShaney* that applies to Flood, HexonGlobal, and the federal government.

B. The government-caused danger exception to DeShaney applies in this case.

Generally, members of the public have no constitutional right to sue state employees who fail to protect them against harm inflicted by third parties. *DeShaney*, 489 U.S. at 197. However, "[t]his general rule is modified by two exceptions: (1) the "special relationship" exception; and (2) the "danger creation" exception." *L. W. v. Grubbs*, 974 F.2d 119, 121 (9th Cir. 1992). The second, "danger creation" exception requires "affirmative conduct on the part of the state in placing the plaintiff in danger." *Id*. Physical custody is not a prerequisite for the "danger creation" exception. *Id*. at 121-22. Plaintiffs can recover "when a state officer's conduct places a person in peril in deliberate indifference to their safety." *Penilla v. City of Huntington Park*, 115 F.3d 707, 709 (9th Cir. 1997). Further, the Court in *DeShaney* emphasized that the county and DSS "played no part

in [the creation of the dangers], nor did it do anything to render him any more vulnerable to [the dangers]", suggesting that DeShaney could have recovered if the dangers were created by the government. *Grubbs*, 974 F.2d at 121.

The federal government took affirmative conduct by permitting, subsidizing, and refusing to strictly regulate HexonGlobal's greenhouse gas emissions. By taking these affirmative actions, the government placed plaintiffs in danger of losing life, liberty, and property to rising sea levels and other perilous effects of climate change. The government's permitting and subsidizing were done with deliberate indifference to the plaintiffs' safety. As explained above, the government's actions are the "but for" causes of HexonGlobal's pollution; thus, the government created the dangers in the manner discussed by the Court in *DeShaney*. By subsidizing, refusing to regulate, and renewing permits for HexonGlobal's operations, the government rendered plaintiffs even more vulnerable to the dangers it created.

C. The U.S. government had knowledge of the dangers caused by greenhouse gases.

For Flood to prevail, he must show the government had actual knowledge of, or willfully ignored, impending harm. *L.W. v. Grubbs*, 92 F.3d 894, 900 (9th Cir. 1996). Further, Flood must show that the government participated in creating the dangerous condition (greenhouse gas-induced climate change), and acted with deliberate indifference to the known or obvious danger in subjecting the plaintiff to it. *Id*. (citing *Manarite v. City of Springfiield*, 957 F.2d at 956). "Deliberate indifference" may be proven by showing an unusually serious risk of harm, defendant's actual knowledge of (or, at least, willful blindness to) that elevated risk, and defendant's failure to take obvious steps to address that known, serious risk. *Id*.

The government acknowledged climate change and greenhouse gases by signing and ratifying the United Nations Framework Convention on Climate Change in 1992. This convention

demonstrates the government's actual knowledge of HexonGlobal's dangerous emissions for at least twenty-six years. Despite this knowledge, the government continued to allow HexonGlobal to operate without any significant changes to its limitations on emissions. The government allowed greenhouse gas emissions to continue at the existing level for at least twenty-six years; thus, the government both created the condition during those years and acted with deliberate indifference to future dangers. Greenhouse gases, and the climate change caused by greenhouse gases, posed an unusually serious risk of harm to plaintiff and the rest of civilization. The government had actual knowledge of the serious risk of harm, and it failed to take obvious steps (regulation of and reduction in emissions) to address the known, serious risk.

VI. PLAINTIFFS' CLAIMS ARE BOTH JUSTICIABLE IN FEDERAL COURT.

Although Mana and Flood brought claims under different causes of action, plaintiffs' claims share one question: whether a federal court may issue relief against the United States government and HexonGlobal Corporation for their involvement in greenhouse gas-induced climate change, or if this poses a political question that is non-justiciable.

A. The atmosphere, and government regulation thereof, constitute justiciable subject matter.

The judicial branch may properly decide which natural resources, such as the atmosphere, are subject to state sovereignty, federal sovereignty, or dual sovereignty.[19] In regards to the atmosphere, "[t]he United States Government has exclusive sovereignty of airspace of the United States."[20] Congress defined the "United States" as "the several States, the District of Columbia, and the several Territories and possessions of the United States, including the territorial waters and

[19] *U.S. v. Causby*, 328 U.S. 256, 261, 266 (1946) see also *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 283-84 (1997).
[20] 49 U.S.C. § 40103(a)(1); see also *Causby*, 328 U.S. at 260-61 ("the air is a public highway" of which the U.S. government is sovereign).

the overlying airspace thereof."[21]. Additionally, some state courts have acknowledged that the atmosphere is a public resource.[22]

B. Plaintiffs' claims do not present a political question.

Seeking protection of a political right does not necessarily mean the plaintiff is presenting a non-justiciable political question. *Baker v. Carr*, 369 U.S. 186, 209, 82 S. Ct. 691, 706 (1962). *Baker* outlined the requirements for establishing whether a suit presents a political question:

> Prominent on the surface of any case held to involve a political question is found [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; 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 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 187.

The Constitution did not commit regulation of the atmosphere or greenhouse gases to a particular political department, so the subject matter is not textually committed. While the legislative branch has the power to legislate environmental and public trust issues under the Commerce Clause, and the executive branch has the power to create agencies and regulations to execute such legislation, the judicial branch retains the power to interpret actions taken by the legislative branch and/ or executive branch.

Judicially discoverable and manageable standards are available. The only inquiry for this factor is whether "a legal framework exists by which courts can evaluate these claims in a reasoned

[21] Pub. L. No. 85-726, § 101(33), 72 Stat. 731, 740 (1958).
[22] See *Foster v. Wash. Dep't. of Ecology*, No. 14-2-25295-1, slip op. at 8 (Wash. King Cnty. Super. Ct. Nov. 19, 2015); *Kanuk v. State, Dep't of Natural Res*., 335 P.3d 1088, 1101-02 (Alaska 2014).

manner." *Alperin v. Vatican Bank*, 410 F.3d 532, 552 (9th Cir. 2005). While standards related to greenhouse gases can be found in various international treaties and conventions, plaintiffs in this case are not asking this Court to decide standards for greenhouse gas emissions. This case asks the Court to instead interpret the Alien Tort Statute, *Trail Smelter* Principle, Clean Air Act, and Fifth Amendment. Extensive precedent exists to establish comprehensive legal frameworks for these topics, by which this Court can evaluate the plaintiffs' claims in a reasoned manner. Standards are readily available for interpreting previous legislative and executive action.

Any policy determinations of a kind clearly for non-judicial discretion that are needed for this case have already been made. The legislative branch and/ or executive branch finalized international conventions, the Clean Air Act, and federal regulatory actions. R. at 6-7. These final acts of the branches established adequate policy determinations for the judiciary to interpret. Since the legislative branch and executive branch have already acted and determined policy, the judiciary would not express a lack of respect towards the other branches. The Supreme Court deemed the subjects of climate change and greenhouse gas emissions as justiciable and respectful when it decided *Massachusetts v. EPA*, 549 U.S. 497 (2007), and prior judicial decisions regarding the Alien Tort Statute or due process have been issued without disrespecting the other branches. Further, plaintiffs' claims do not request a dismantling of executive or legislative policy. Rather, the claims request additional policy be enacted. No unusual need for unquestioning adherence to a political decision already made presents itself in this case.

Finally, the potentiality of embarrassment from multifarious pronouncements by various departments on one question is a non-issue. All three branches recognize the rights to life, liberty, and property, and all three branches agree that those rights cannot be deprived without due process of law. Additionally, the executive branch signed, and legislative branch ratified, the United

Nations Framework Convention on Climate Change. R. at 6. This Convention acknowledged greenhouse gases and climate change. *Id*. The judicial branch similarly acknowledged greenhouse gases and climate change in *Massachusetts v. EPA*. Thus, pronouncements from the various departments would not be multifarious. Without any element of a political question, as outlined in *Baker v. Carr*, plaintiffs' claims are fully justiciable and non-political.

CONCLUSION

For the foregoing reasons, the Appellants respectfully requests that this Court reverse the District Court's holding that the *Trail Smelter* Principle under the International Law of Nations is displaced by greenhouse gas regulation under the Clean Air Act. This Court should allow the claims against HexonGlobal under the Alien Tort Statute, recognizing that *Trail Smelter* is enforceable as the "Law of Nations", it imposes obligations on non-governmental actors, and is not displaced by the Clean Air Act. The Appellants also request that this Court reverse the District Courts refusal to recognize a Due Process-based public trust right to governmental protection form atmospheric climate change, and to rule that all of these claims are justiciable in the Federal Courts.

Respectfully submitted,

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Counsel for Organization of Disappearing Island Nations, Apa Mana, and Noah Flood.