Team No. 20

Docket Nos. 18-000123 and 66-CV-2018

UNITED STATES COURT OF APPEALS FOR THE TWELFTH CIRCUIT

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

v.

HEXONGLOBAL CORP.,
Respondent,

and

THE UNITED STATES OF AMERICA,
Respondent.

(Appeal from the United States District Court of New Union Island in No. 66CV2018)

BRIEF OF RESPONDENT HEXONGLOBAL CORP.

Oral Argument Requested

Attorneys for Respondent,
HexonGlobal Corp.

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STATEMENT OF JURISDICTION

The United States Court of Appeals for the Twelfth Circuit has jurisdiction over this case pursuant to the Alien Tort Statute (also known as the "Alien Tort Claims Act"), 28 U.S.C. § 1350, as this case alleges that HexonGlobal's actions violate the Alien Tort Statute ("ATS"). This appeal is from a final judgment entered by the U.S. District Court for New Union Island on August 15, 2018. The Appellants filed a timely notice of appeal. Accordingly, this Court has jurisdiction under 28 U.S.C. § 1291 which provides, in pertinent part, that the "courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States ...".

STATEMENT OF THE ISSUES

1. Can Appellant bring an Alien Tort Statute ("ATS"), 28 U.S.C. § 1350 claim against a domestic corporation?

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

3. Assuming the *Trail Smelter* Principle is customary international law, does it impose obligations enforceable against non-governmental actors?

4. If otherwise enforceable, is the *Trail Smelter* Principle displaced by the Clean Air Act ("CAA")?

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

6. Do Appellants' law of nations claim under the ATS and public trust claim present a non-justiciable political question?

STATEMENT OF FACTS

The Appellants, Apa Mana and Noah Flood, live on A'Na Atu and New Union Islands that are low-lying islands. R. at 4. Sea level rise of one-half to one meter would render both of these islands uninhabitable due to ocean waves washing over the islands during storms. R. at 4. Storms have damaged their homes over the past three years. R. at 5. Appellants allege that such damage would not have occurred in the absence of a rise in sea level, which they attribute to greenhouse gases. R. at 5.

HexonGlobal is the surviving corporation resulting from the merger of all of the major United States oil producers. R. at 5. It is incorporated in the State of New Jersey, and it has its principal place of business in Texas. R. at 5. HexonGlobal operates refineries globally, including one refinery located on New Union Island. R. at 5. Appellants allege the sea level rise near their home is due to HexonGlobal's sales of products, which they claim emit greenhouse gasses, and its combustion of fossil fuel products. R. at 3.

The United States has, historically, emitted a large amount of greenhouse gases. R. at 6. Nonetheless, the country has in recent decades acknowledged the threat of climate change. R. at 6. The United States signed and the Senate ratified, the United Nations Framework Convention on

Climate Change (UNFCCC) in 1992. R. at 6. The UNFCCC acknowledged the potential for dangerous anthropogenic climate change and stated an objective "to achieve . . . stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system." R. at 6. The UNFCCC also committed foreign parties to "adopt national policies and take corresponding measures on the mitigation of climate change, by limiting its anthropogenic emissions of greenhouse gases and protecting and enhancing its greenhouse gas sinks and reservoirs." R. at 6.

The United States has taken several steps in the last decade towards the regulation of domestic greenhouse gas emissions. R. at 6. The United States Supreme Court held, in *Massachusetts v. E.P.A.*, that greenhouse gases, including carbon dioxide, were "pollutants" that were potentially subject to regulation under section 202(a)(1) of the CAA, 42 U.S.C. § 7521 (2018). R. at 6. Following this holding, in 2009 the United States Environmental Protection Administration found the emission of greenhouse gases and resulting climate change could endanger the public health and welfare, setting the regulatory predicate for regulation of greenhouse gas emissions under the CAA. R. at 6. Subsequently in 2010, E.P.A., jointly with the National Highway Transportation Agency, adopted a rule establishing both fuel economy standards and greenhouse gas emissions rates for passenger cars and light trucks for model years 2012-2016. R. at 6. The agencies extended these regulations in 2012 to require increasingly stringent emissions limitations through model year 2025. R. at 7. Also in 2015, the President of the United States signed the non-binding Paris Agreement to reduce greenhouse gas emissions by 26-28% from 2005 levels by 2025. R. at 7.

The current Trump Administration has proposed and is in the process of repealing regulatory climate change protections promulgated by the E.P.A. Also, President Trump

decided to pull the United States from the Paris Agreement at the earliest opportunity in 2020. R. at 7.

Appellants, Ms. Apa Mana and Mr. Noah Flood have filed a timely notice of appeal after the United States District Court for New Union Island's final opinion and order dismissed their complaint on August 15, 2018. R. at 1. Appellants challenge the District Court's holding that the Trail Smelter Principle under the international Law of Nations is displaced by greenhouse gas regulation under the CAA. R. at 1. Appellants also challenge the District Court's refusal to recognize a Due Process-based public trust right to government protection from atmospheric climate change. R. at 1.

SUMMARY OF THE ARGUMENT

This Court should affirm the judgment of the United States District Court for New Union Island for the following reasons. First, nothing within the history of the ATS indicates Congress intended the courts to apply the ATS to corporations. International law has rejected the notion of corporate liability for international crimes, and customary international law has not recognized liability for corporations that violate norms. Notably, no international tribunal has ever held a corporation liable for a violation of the law of nations. Further, the Supreme Court has implicitly approved the prohibition on liability of foreign corporations under the ATS, but ultimately indicated that Congress should be the branch to decide this inquiry.

Second, the United States District Court of Appeals for the Twelfth Circuit properly found the *Trail Smelter* Principle brought under the ATS must be considered arising under common tort law. Thus, since the *Trail Smelter* Principle arises under common tort law, the CAA displaces the *Trail Smelter* Principle because the post-trail smelter history shows the "field has been occupied". For example, Sections 7415 and 7411(d) of the CAA "speak to the issue" of whether HexonGlobal's fossil fuel-related business and sales activities violate the principle that emissions

from one nation must not cause substantial harm to another nation. Moreover, through notice and comment rulemaking Congress provided a means by which the Appellants can pursue the same relief they would through common law. Also, precedent indicates it is reasonable in the context of these statute sections to assume the use of the term air pollutant encompasses greenhouse gases.

Third, the U.S. Supreme Court has explicitly rejected any fundamental due process right to government protection from acts by private parties. Under U.S. Supreme Court precedent, the claim that the court can hold the U.S. government liable based on the public trust doctrine, a matter of state law, is legally unsound. Lastly, both the ATS and Public Trust Doctrine Claims do not present non-justiciable political question issues because each claim does not implicate any of the controlling *Baker* tests. For these reasons, this Court should affirm the judgment of the United States Court of Appeals for the Twelfth Circuit.

ARGUMENT

I. Appellant cannot bring an ATS claim against a domestic corporation.

No court has issued any binding rulings that the ATS can apply to corporations. Furthermore, the Supreme Court of the United States specifically and explicitly refused to address the issue, saying that Congress must make a rule stating the ATS can apply to corporations before courts may hold corporations liable under the statute. *Jesner v. Arab Bank*, 138 S. Ct. 1386, 1408 (2018).

But, the Second Circuit Appellate Court specifically held the ATS may never apply to corporations. *Kiobel v. Royal Dutch Petroleum Co.,* 621 F. 3d 111, 147 (2nd Cir. 2010). When the Supreme Court reviewed the case, they declined to address that holding by the lower court, and instead addressed only the question whether courts may recognize a cause of action under the ATS for violations of the law of nations occurring within the territory of a sovereign other than the

United States. *Kiobel v. Royal Dutch Petroleum Co*., 569 U.S. 108, 112 (2012). The Court held that courts may not do so. *Id*. at 124.

A. History of the Alien Tort Statute

The Supreme Court has turned to Blackstone's Commentaries to determine the intent of the First Congress in enacting the ATS. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 715 (2004). The *Sosa* Court found that Blackstone referred to the statute while mentioning "three specific offenses against the law of nations addressed by the criminal law of England; violation of safe conducts, infringement of the rights of ambassadors, and piracy." *Id*. at 715. The *Sosa* Court concluded that "it was this narrow set of violations of the law of nations, admitting of a judicial remedy and at the same time threatening serious consequences in international affairs, that was probably on minds of the men who drafted the ATS with its reference to tort." *Id*. at 715.

Before Blackstone's Commentaries, the *Sosa* Court noted, the 1781 Congress asked the states to "provide expeditious, exemplary and adequate punishment for "the violation of safe conducts or passports,...of hostility against such as are in amity...with the United States ...infractions of the immunities of ambassadors and other public ministers…[and] infractions of treaties and conventions to which the United States are a party." (*Sosa* Court, quoting 21 Journals of the Continental Congress 1136-1137 (G. Hunt ed. 1912)). The Congressional resolution states authorize suits...for damages by the party injured, and for compensation to the United States for damage sustained by them from an injury done to a foreign power by a citizen" (*Sosa* Court quoting *Id*. at 1137).

Congress became increasingly aware of its inability to deal with such cases because of the verbal and physical assault of a French adventurer on the Secretary of the French Legion in Philadelphia, as the *Sosa* Court noted. *Id*. at 716-717. The incident has come to be called "The Marbois incident." *Id.* at 716. In response, "Congress called again for state legislation addressing

such matters, and concern over the inadequate vindication of the law of nations persisted through the time of the Constitutional Convention" *Id*. at 717.

As a result, the Framers of the Constitution in Art. II § 2 gave the Supreme Court original jurisdiction over "all Cases affecting Ambassadors, other public ministers and Consuls." The Judiciary Act reinforced that original jurisdiction and included the ATS. *Id*.

The *Sosa* Court drew two conclusions from the history of the ATS: 1) Congress meant for the ATS to have a practical effect, not for the statute "to be placed on the shelf for use by a future Congress or state legislature that might, someday, authorize the creation of causes of action or itself decide to make some element of the law of nations actionable for the benefit of foreigners." *Id*. at 719.

The second conclusion the *Sosa* Court drew from the statute's history is that "Congress intended the ATS to furnish jurisdiction for a relatively modest set of actions alleging violations of the law of nations," particularly offenses against ambassadors, violations of safe conduct, and "individual actions arising out of prize captures and piracy." *Id.* at 720.

Nothing in the history of the statute indicates that Congress intended for courts to apply the statute to corporations.

B. Second circuit discussion of the issue

The Second Circuit gave a very thorough, well researched discussion about why courts may not hold corporations accountable under the ATS in *Kiobel*. 621 F.3d. 111. In *Kiobel*, the petitioners were Nigerian nationals living in the United States. They sued Dutch, British and Nigerian corporations in federal court under the ATS. *Id*. at 123. They accused those corporations of aiding and abetting, or otherwise complying with, the Nigerian government in violating the law of nations in Nigeria. *Id.* at 123.

The Second Circuit held in the case that "corporate liability is not a norm that we can recognize and apply in actions under the ATS because the customary international law of human rights does not impose any form of liability on corporations (civil, criminal or otherwise)." *Id*. at 147. The Second Circuit seemed to defer to Congressional authority with regard to corporate liability under the ATS when the Circuit wrote: "...no corporation has ever been subject to any form of liability under the customary international law of human rights, and thus the ATS, the remedy Congress has chosen, simply does not confer jurisdiction over suits against corporations." *Id*. at 148.

The Second Circuit first reasoned that when parties bring an ATS suit against a corporation that no relevant U.S. Treaty corroborates, "we must ask whether a plaintiff...has alleged a violation of customary international law." *Id*. at 118. That court went on to find that "international law has steadfastly rejected the notion of corporate liability for international crimes, and no international tribunal has ever held a corporation liable for a violation of the law of nations." *Id*. at 120.

The *Kiobel* Court found that a subject must be liable under customary international law to be liable under the ATS. In fact,the Court found that liability under the statue "depends entirely" on this factor. *Id*. at 122.

The *Kiobel* Court concluded that international law, not domestic law, must govern the question of corporate liability under the ATS. *Id.* at 125. The Court based this conclusion largely on the *Sosa* Court's holding that federal courts may recognize claims based on present-day international law if the claims "rest on 'norm[s] of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-Century paradigms [the] Court had recognized" 542 U.S. 692, 749.

The *Sosa* Supreme Court held that whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor,

such as a corporation or an individual" is "a related consideration to the determination whether a norm is sufficiently definite to support a cause of action." *Id.* at 732. The Second Circuit in *Kiobel* concluded from that language that they must let international law determine whether it has jurisdiction over ATS claims against corporations. 621 F. 3d. 111, 130.

The Court then found that "customary international law of human rights has not to date recognized liability for corporations that violate its norms." *Id*. at 125. The *Kiobel* Court used the standard the *Sosa* Court set which stated that a norm must be "specific, universal, and obligatory" to be a rule of customary international law," (*Sosa* court quoting with approval the court who wrote *In re Estate of Marcos Human Right*s *Sosa* at 732. and found no such norm for corporate liability in international law. 621 F. 3d. 111, 145. To find such a norm, the Court looked: to the Nuremberg trials and the "London Charter," or "Charter of the International Military Tribunal," which authorized punishment of major war criminals after World War II; *Id*. at 133-136, international tribunal since Nuremberg (e.g. the charter establishing the International Criminal Tribunal for the former Yugoslavia;); *Id*. at 136-137 and international treaties (finding that "the few specialized treaties imposing liability on corporations have not had such influence that a general rule of corporate liability has become a norm of customary international law." *Id*. at 139. The Court also looked to publicists for their opinions on whether international law recognizes liability for corporations that violate its norms. *Id*. at 142-145. The Court seems to have found persuasive the opinions of two international law professors, James Crawford and Christopher Greenwood (who became a judge at the time the Court issued its opinion), both of whom "forcefully declared" that international law recognizes no such liability. *Id*. at 143.

The Court also considered the writing of Michael Koeble in Corporate Responsibility Under the Alien Tort Statute 196 (2009): "Despite trend to the contrary, the view that international law primarily regulates States and in limited instances such as international criminal law,

individuals, but not [transnational corporations], is still the prevailing one among international law scholars." *Id.* at 143.

The *Kiobel* Court also noted that "sources of international law have, on several occasions, explicitly rejected the idea of corporate liability" *Id.* at 148. The *Kiobel* Court affirmed an order of the District Court insofar as it dismissed claims against the corporate defendants, and reversed the order insofar as it declined to dismiss remaining claims against the corporate defendants. *Id*. at 149.

The Supreme Court, upon reviewing the case, did not address the issue of corporate liability under the ATS, declining to overrule or uphold that judgment of the lower court. 569 U.S. 108, 112-113. The Supreme Court affirmed the lower court's judgment, holding that courts may not recognize a cause of action under the ATS for violations of international law occuring in foreign lands. *Id*. at 125.

The Supreme Court has specifically refused in *Jesner* to rule that corporations may be liable under the ATS deferring the matter to Congress. In *Jesner*, about 6,000 plaintiffs in five ATS lawsuits, (most of the plaintiffs being foreign nationals), alleged that Arab Bank, a Jordanian financial institution, helped finance attacks by Hamas and other terrorist groups that injured them or their family members *Id*. at 1394. The Supreme Court affirmed the appellate court's judgment, which had affirmed the District Court's dismissal of the ATS claims based on the Kiobel holding in the Second Circuit that corporations may not be held liable under the ATS. *Id*. at 1408.

The Supreme Court in *Jesner* explicitly made its holding narrow, relevant only to foreign corporations. *Id*. at 1407. The Court held that "foreign corporations may not be defendants in suits brought under the ATS." *Id*. at 1407. The Court reasoned that Congress must first decide whether to provide a federal remedy for international law violations against foreign corporations. Id. at 1407. The Court explicitly refused to rule on whether domestic corporations may be held liable,

stating that such a ruling would require a specific direction from Congress. Id. at 1408. The Court wrote that the political branches are "in the better position to define and articulate" considerations that must "shape and instruct the formulation of principles of international and domestic law." *Id*. at 1408.

Under *Jesner*, a court may not hold HexonGlobal Corp. as a corporation, liable under the ATS without a specific direction from Congress to hold corporations liable under the ATS.

II. The Trail Smelter Principle is not a recognized principle of customary international law enforceable as the "Law of Nations" under the ATS.

A. Definition of "Law of Nations," or "Customary International Law," for purposes of the Alien Tort Statute.

The ATS permits an alien to assert a cause of action in tort for violations of a treaty of the United States and for violations of "the law of nations," which as used in this statute, refers to the body of law known as customary international law. 28 U.S.C. § 1350. The determination of what offenses violate customary international law, however, is no simple task. *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 247 (2d Cir. 2003). Scholars discern customary international law from myriad decisions made in numerous and varied international and domestic arenas. *Id.* Furthermore, the relevant evidence of customary international law is in many various sources and generally unfamiliar to lawyers and judges. *Id.* Nations' general customs and practices affect customary international law and thereby further complicate its discernment. *Id*.

Accordingly, in determining what offenses violate customary international law, courts must proceed with extraordinary care and restraint. *Id*. States must universally abide by a principle for it to become part of customary international law. *Filartiga v. Pena-Irala*, 630 F. 2d 876, 888 (2d Cir. 1980) (holding that customary international law includes only "well-established, universally recognized norms of international law"). Furthermore, customary international law

includes a principle only if States accede to it out of a sense of legal obligation. *Chubb & Son, Inc. v. Asiana Airlines*, 214 F.3d 301, 307–08 (2d Cir. 2000) ("Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.") Finally, customary international law does not comprise practices which nations have adopted for moral or political reasons, but not out of sense of legal obligation. *Hain v. Gibson*, 287 F.3d 1224, 1243–44 (10th Cir. 2002). Here, HexonGlobal has no legal obligation to protect the interests of island nations which sea level rise threatens.

B. Sources of evidence of customary international law

Courts must look to concrete evidence of the customs and practices of States In determining whether a particular rule is a part of customary international law—i.e., whether States universally abide by, or accede to, that rule out of a sense of legal obligation and mutual concern. 414 F.3d 233, 250. The Second Circuit looks primarily to the formal lawmaking and official actions of States and only secondarily to the works of scholars as evidence of States' established practice. *Id*. The Second circuit explained why the usage and practice of States—as opposed to judicial decisions or the works of scholars—constitute the primary sources of customary international law. *United States v. Yousef,* 327 F. 3d 56, 99-103 (2d Cir. 2003). In that case, the court looked to the Statute of the International Court of Justice ("ICJ Statute")—to which the United States and all members of the United Nations are parties—as a guide for determining the proper sources of international law. *Id*. at 100-103. Article 38 of the ICJ Statute provides in relevant part:

> "(1) The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations; and (d) judicial decisions and the teachings of the most highly qualified publicist [i.e., scholars or "jurists"] of the various nations, as a subsidiary means for the determination of rules of law."

ICJ Statute, June 26, 1945, art. 38, 59 Stat. 1055, 1060.

Article 38 embodies the understanding of States as to what sources offer competent proof of the content of customary international law. 414 F. 3d 233, 251. It establishes that the proper primary evidence consists only of those "conventions" that set forth "rules expressly recognized by the contesting states." *Id*. Article 38's enumeration of the sources of international law notably does not include conventions that set forth broad principles without setting forth specific rules. *Id*. at 252. Such a regime makes sense because, as a practical matter, courts cannot discern international pronouncements that promote amorphous, general principles or apply such pronouncements in any rigorous, systematic, or legal manner. *Id*.; *See Beanal v. Freeport–McMoran, Inc.*, 197 F.3d 161, 167 (5th Cir. 1999) (concluding that "abstract rights and liberties devoid of articulable or discernable standards and regulations" cannot establish customary international law). In the instant matter, Appellant's claim that the *Trail Smelter* Principle is a principle of the law of nations because two declarations adopted it: the Declaration of the 1972 Stockholm Conference on the Human Environment and the 1992 Rio Declaration on Environment and Development. These recognitions by two international declarations are insufficient reason for this Court to recognize the principle as customary international law.

C. Environmental damage claims and the rights to life and health are insufficiently definite to constitute rules of customary international law.

In *Flores*, the Second Circuit held that the asserted "right to life" and "right to health" are insufficiently definite to constitute rules of customary international law. 414 F. 3d 233, 254. The Second Circuit has required a plaintiff allege a violation of a "clear and unambiguous" rule of customary international law to state a claim under the ATS. *Id*. The Plaintiffs in a case alleged that the right to life "is specifically applicable to cases involving severe environmental harm"; that the right to health "constitutes a norm of customary international law"; and that international law

recognizes "that harm which threatens human life or health necessarily implicates a violation of the right to security of the person." *Sarei v. Rio Tinto PLC*, 221 F. Supp. 2d 1116 (C.D. Cal. 2002). Specifically, Plaintiffs asserted that the Defendant, Rio Tinto, violated their rights to life and health "by appropriating land owned by indigenous people for the purpose of opening a mine, [and by] knowingly emitting and depositing volatile and highly toxic mine waste onto the land and into the water, thus destroying rivers and land that provided a way of life for the native people." *Id*.

In *Rio Tinto*, the court concluded that, although various international law treaties and/or agreements reference the rights to life and health, and some address the impact environmental degradation has on those rights, nations had not reached adequate consensus regarding the type of conduct that violated the rights for purposes of the ATS. 221 *Id.* at 1158. Ultimately, the court was unable to conclude that other nations universally recognized that harm to the environment may violate the rights to life and health. *Id*. (citing *Aguinda v. Texaco, Inc.*, No. 93 Civ. 7527(VLB), 1994 WL 142006, *7 (S.D.N.Y. Apr. 11, 1994) ("Not all conduct which may be harmful to the environment, and not all violations of environmental laws, constitute violations of the law of nations")); *see also*, e.g., 197 F.3d 161, 167 (rejecting plaintiffs' reliance on "several sources of international environmental law to show that the alleged environmental abuses caused by Freeport's mining activities are cognizable under international law," the court explained that "Beanal fails to show that these treaties and agreements enjoy universal acceptance in the international community."

Since *Rio Tinto*, federal courts have continued to hold that, at present, claims that environmental damage or destruction has injured or threatened individuals' rights to life and health are not sufficiently specific to give rise to the ATS. 650 F. Supp. 2d at 1025. Courts so holding have recognized that this lack of specificity, and nations' differing interpretations of the conduct that violates the rights, undercut any claim that they are universal. *Id*. Appellants in the instant

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

Appellants' claim that the *Trail Smelter* Principle constitutes an actionable violation of the law of nations is incorrect because it does not specifically mention responsibility of a single State to prevent the rise of sea levels resulting from greenhouse gas emissions. When impacts are hard to trace to individual states, originate in multiple sources, or affect the environment beyond the jurisdiction of the states (e.g. the high seas, the ozone layer, and the global climate), the *Trail Smelter* Principle falls short. Jutta Brunnée, *Transboundary Harm in International Law: Lessons from the Trail Smelter Arbitration*. Cambridge, New York, Melbourne: Cambridge University Press, 2006. Pp. Xxi, 335. I, 102 Am. J. Int'l L. 395, 396 (2008). Although HexonGlobal represents all oil production in the United States, the cumulative worldwide sales of fossil fuels by HexonGlobal only constitute nine percent of global fossil fuel related emissions. R. at 5. Therefore, this court should not find that the *Trail Smelter* Principle is a recognized principle of customary international law enforceable as the "Law of Nations" under the ATS.

III. The *Trail Smelter* Principle does not impose obligations enforceable against non-governmental actors.

A. Corporations are not liable under the Alien Tort Statute.

A legal culture long accustomed to imposing liability on corporations may, at first blush, assume that corporations must be subject to tort liability under the ATS, just as corporations are generally liable in tort under our domestic law (what international law calls "municipal law"). 621

F. 3d at 117. But the substantive law that determines our jurisdiction under the ATS is neither the domestic law of the United States nor the domestic law of any other country. *Id*. at 117-118. The ATS confers subject matter jurisdiction over a limited number of offenses defined by customary international law. The statute thereby requires federal courts to look beyond rules of domestic law—however well-established they may be—to examine the specific and universally accepted rules that the nations of the world treat as binding in their dealings with one another. *Id*. Our recognition of a norm of liability as a matter of domestic law, therefore, cannot create a norm of customary international law.

In other words, corporations' liability as juridical persons under domestic law does not mean that they are liable under international law (and, therefore, under the ATS). *Id*. Moreover, A legal norm is not a part of customary international law merely because most or even all "civilized nations" accept it. *Id*. Accordingly, absent a relevant treaty of the United States, we must ask whether a plaintiff bringing an ATS suit against a corporation has alleged a violation of customary international law. *Id*. From the beginning, courts have held only natural persons—not "juridical" persons such as corporations—liable for violations of international law because the moral responsibility for a crime so heinous and unbounded as to rise to the level of an "international crime" has rested solely with the individual men and women who have perpetrated it. *Id*. at 119. In short, because customary international law imposes individual liability for a limited number of international crimes—including war crimes, crimes against humanity (such as genocide), and torture—courts have held that the ATS provides jurisdiction over claims in tort against individuals who are alleged to have committed such crimes. *Id*. at 120.

However, customary international law has steadfastly rejected the notion of corporate liability for international crimes, and no international tribunal has ever held a corporation liable for a violation of the law of nations. *Id.* We must conclude, therefore, that insofar as Appellants

bring claims under the ATS against corporations, Appellants fail to allege that corporations are liable for violations of the law of nations, and Appellants' claims fall outside the limited jurisdiction that the ATS provides. *Id*.

B. Scope of liability under the Alien Tort Statute

In *Sosa*, the Supreme Court instructed the lower federal courts to consider "whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation of individual". 542 U.S. at 732 n. 20. That language requires that we look to international law to determine our jurisdiction over ATS claims against a particular class of defendant, such as corporations. 621 F. 3d at 127. Justice Breyer reinforced hat conclusion by reformulating the issue in his concurrence: "The norm [of international law] must extend liability to the type of perpetrator (e.g., a private actor) the plaintiff seeks to sue." 542 U.S. at 760. The Second Circuit wrote that "the Supreme Court's instruction to look to international law to determine the scope of liability under the ATS did not involve a revolutionary interpretation of the statute—in fact, it had long been the law of this Circuit." 621 F. 3d at 127.

The Circuit continues: "Since *Sosa*, we have continued to adhere to the method prescribed in *Sosa* footnote 20 by looking to customary international law to determine both whether certain conduct leads to ATS liability and whether the scope of liability under the ATS extends to the defendant being sued." *Id*. at 128. "In sum, we have little difficulty holding that, under international law, *Sosa*, and our three decades of precedent, we are required to look to international law to determine whether corporate liability for a 'violation of the law of nations,' is a norm 'accepted by the civilized world and defined with a specificity' sufficient to provide a basis for jurisdiction under the ATS." *Id*. at 130. The court noted that it had looked to international law to determine whether it can hold state officials, private individuals, and aiders and abettors, liable under the

ATS. *Id*. "There is no principled basis for treating the question of corporate liability differently." *Id*. The Court wrote that "Like the issue of aiding and abetting liability, whether corporations can be liable for alleged violations of the law of nations 'is no less significant a decision than whether to recognize a whole new tort in the first place.'" *Id.* at 130-131. (Quoting *Presbyterian Church of Sudan v. Talisman Energy*, 582 F.3d 244, 259). The Court concluded: "It is, therefore, a decision properly made only by reference to customary international law." *Id*.

IV. The District Court properly held greenhouse gas regulation under the Clean Air Act displaces the *Trail Smelter* Principle.

Appellant's claim that the CAA does not displace the *Trail Smelter* Principle is unsupportable for four reasons. First, assuming the *Trail Smelter* Principle brought under the ATS is enforceable, this "customary international law" appropriately would fall under federal common tort law, according to Supreme Court precedent and lower court decisions. Second, Congress developed and enacted at least two sections of the CAA that regulate greenhouse gases, providing a basis for displacing federal common law. Third, the Supreme Court has repeatedly emphasized the CAA displaces federal common law. Lastly, in addition to the air pollution protection under the CAA, U.S. E.P.A. promulgates rules specifically regulating greenhouse gases, and the agency addresses transboundary flows in North America through international cooperation.

A. The District Court properly found the *Trail Smelter* Principle brought under the Alien Tort Statute claim must arise under common tort law.

The Supreme Court has stated the ATS does not create a cause of action and only provides jurisdiction to bring causes of action. 542 U.S. 692, 713. Litigants have used the ATS to bring common law nuisance claims alleging global warming related injuries. *American Electric Power Co., Inc. v. Connecticut* , 564 U.S. 410 (2011); *Comer v. Murphy Oil USA*, 839 F. Supp. 2d 849 (S.D. Miss. 2012); *Native Village of Kivalina v. ExxonMobil Corp*., 663 F. Supp. 2d 863 (N.D.

Cal. 2009); *California v. General Motors Corp*., No. Co6-05755, 2007 WL 2726871 (N.D. Cal. Sep. 17, 2007). Although these cases dealt with nuisance claims, the cases are instructive to this case because the nature of the air pollution nuisance claims are similar to the transboundary air pollution claim in this case. Also, the arbitrators in the *Trail Smelter* case relied on public nuisance suits to come to their decision. Thus, the *Trail Smelter* Principle claim under the ATS must similarly arise under common tort law.

B. The Clean Air Act displaces the *Trail Smelter* Principle brought under the Alien Tort Statute.

The *Trail Smelter* arbitration in 1935 came long before: the first federal legislation involving air pollution, the first federal legislation regarding air pollution control, legislation allowing enforcement proceedings in areas subject to interstate air pollution transport, comprehensive federal and state regulations to limit emissions from stationary and mobile sources including four major regulatory programs, establishment of the U.S. E.P.A., and amendments to the CAA that included a program to phase out chemicals that deplete the ozone layer and permit program requirements. U.S. E.P.A., *Evolution of the Clean Air Act*, https://www.epa.gov/clean-air-act-overview/evolution-clean-air-act. Further, Congress intended the CAA to protect the public from air pollution, and Congress gave the E.P.A. appropriate avenues to deal with greenhouse gas emissions. U.S. E.P.A., *Summary of the Clean Air Act*, https://www.epa.gov/laws-regulations/summary-clean-air-act.

Specifically, Section 7415 of the CAA, which Congress enacted in 1965, allows the E.P.A. to regulate domestic air pollution that endangers other countries. Michael Burger et. al, *Legal Pathways to Reducing Greenhouse Gas Emissions Under Section 115 of the Clean Air Act*, POLICY INTEGRITY (January 2016), https://policyintegrity.org/files/publications/CAASection115_report.pdf. One part of the

legislative history of the section suggested Congress included it in the CAA because, "there was no provision which would authorize cooperative federal action with foreign countries when air pollution is endangering the health or welfare of their people. It is important that we, in the interest of international amity and in fairness to the people of other countries, afford them the benefit of protective measures." *Id.* at 21 (citing S. Comm. Env't & Pub. Works, Clean Air Act Amendments and Solid Waste Disposal Act, S. Rep. No. 89-192, at 6 (1965)).

Another part of the legislative history suggested, "the language of the bill provides for enforcement proceedings to correct international pollution problems originating in the United States." *Id.* at 8-9 (citing S. Comm. Env't & Pub. Works, Clean Air Act Amendments and Solid Waste Disposal Act, S. Rep. No. 89-192, at 6 (1965)). Lastly, another portion of the legislative history stated, "[T]he United States cannot in good conscience decline to protect its neighbors from pollution which is beyond their legal control. Therefore, the bill provides remedies for foreign countries adversely affected by air pollution emanating from the United States, if reciprocal rights are granted to the United States." *Id.* at 9. (citing H.R. Comm. Interstate & Foreign Com., Clean Air and Solid Waste Disposal Acts, H.R. Rep. No. 89-889, at 6 (1965)).

This provision allows E.P.A. to require states to address emissions that contribute to air pollution endangering public health or welfare in other countries, if the other countries provide the U.S. with reciprocal protections. 42 U.S.C. § 7415(c). The provision also addresses international air pollution through the CAA's State Implementation Plan. 42 U.S.C. § 7415(b). To illustrate, under the section, two conditions must be satisfied to trigger a state's obligations to reduce emissions. First, the E.P.A. Administrator must have reason to believe based on data from an international agency that air pollutants emitted in the U.S. cause or contribute to air pollution that may endanger the health of a foreign country. 42 U.S.C. § 7415(a). Second, the Administrator must determine that the endangered foreign country gives the same rights and respect to pollution

prevention with its own air. 42 U.S.C. § 7415(c). When these conditions are present, the Administrator must notify the governor of the state where the pollution originates and determine whether the State's Implementation Plan is inadequate in which case, the state must revise its plan, and, if this plan is not satisfactory to the E.P.A., the E.P.A. may create a Federal Implementation Plan for the State. 42 U.S.C. § 7415(b). Subsequently, this process is subject to notice-and-comment rulemaking consistent with the requirements of Section 553 of the APA. 5 U.S.C. § 553. Thus, Congress provided a means by which plaintiffs can pursue the same relief they would through common law.

This section of the statute conflicts with the *Trail Smelter* Principle because it requires as a prerequisite, actions by other nations before addressing domestic emission reductions, whereas the *Trail Smelter* Principle prohibits emission-related activities outright by the States that injure other territories. Since the *Trail Smelter* Principle conflicts with the statute, the statute prevails in accord with precedent. *E.g. Whitney v. Robertson*, 124 U.S. 190, 194 (1888). Another alternative to addressing greenhouse gas emissions is Section 7411(d) of the CAA, which enables the E.P.A. to set performance standards for new and existing stationary sources of greenhouse gases, including power plants. 42 U.S.C. § 7411. E.P.A. states, "…[7411] means that new, cleaner facilities are built, the county's industrial base becomes cleaner overall. Public health is protected as economic growth proceeds." *Progress Cleaning the Air and Improving People's Health,* U.S. E.P.A. https://www.epa.gov/clean-air-act-overview/progress-cleaning-air-and-improving-peoples-health (last visited Nov. 29, 2018).

Today, the E.P.A. also addresses transboundary flows in North America through International Cooperation including the Mexico Border 2020 Program, the U.S. Canada Air Quality Agreement, and the North American Commission for Environmental Cooperation. *Transboundary Air Pollution*, U.S. E.P.A., https://www.epa.gov/international-

cooperation/transboundary-air-pollution (last visited Nov. 29, 2018). In sum, this post-trail smelter history of air pollution regulation shows the "field has been occupied". 564 U.S. 410, 426. Thus, based on the discussion above, the displacement factors are present: (1) the statutes "speak directly" to air pollution, (2) the statutes provides "sufficient regulation" of HexonGlobal to the exclusion of federal common law, and (3) it is reasonable in the context of these statute sections to assume the use of the term "air pollutant" encompasses greenhouse gases because the Supreme Court in *Massachusetts v. E.P.A.* held the phrase "any air pollutant" includes greenhouse gases. *Massachusetts v. E.P.A*., 569 U.S. 497, 506 (2007). The E.P.A., regulated facilities, and the federal government have followed and relied upon this displacement rule. Stare decisis should deter the court from overruling cases that decided the CAA displaces federal common law. If this Court were to find the CAA did not displace the federal common law, this and other courts may have to decide other issues, such as: whether this Court's ruling would apply retroactively to cases that applied the displacement rule; and whether this Court overstepped its constitutional powers by imposing federal common law.

V. Appellants have no cause of action against the U.S. government based on the Fifth Amendment substantive due process protections due to the production, sale, and burning of fossil fuels.

The Supreme Court has explicitly rejected any fundamental due process right of government protection from acts by private parties in *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 196 (1989). In *DeShaney*, a minor child and his mother brought an action against a county department social services and its employees for failure to intervene to protect the child against the risk of violence by his father. *Id*. at 193. The District Court granted summary judgment, and the Court of Appeals affirmed. *Id*. at 193.

The Supreme Court held the county or state's failure to protect the child against his father did not violate his rights under the Due Process Clause because the father, a private party, injured the child. *Id*. at 197. The Court held that both the Fifth Amendment and Fourteenth Amendment Due Process clauses were intended to prevent government "from abusing its power or employing it as an instrument of oppression." (*DeShaney* Court quoting *Davidson v. Cannon*.) *Id*. at 196. The Court held that "Due Process Clauses generally confer no affirmative right to government aid, even where such aid may be necessary to secure life, liberty or property interests of which the government itself may not deprive the individual." *Id*. at 196.

A. The Public Trust Doctrine is a Matter of State Law

The Supreme Court has held the "Public Trust Doctrine remains a matter of state law." *PPL Mont., LLC v. Montana*, 565 U.S. 576, 603 (2012). In *PPL Mont.*, the parents of Montana children filed a federal lawsuit, claiming that PPL, an owner of a hydroelectric facility, placed facilities on riverbeds that the state owned. and that were part of Montana's school trust lands. *Id*. at 587. The state joined the suit and sought rents from PPL for using the riverbeds. *Id*. at 587. The court dismissed the case, PPL and other power companies filed a state court lawsuit claiming that Montana could not seek compensation for the company's use of the riverbeds. *Id*. at 587. The state counterclaimed, and argued inter alia that denying the state title to the riverbeds would undermine the public trust doctrine. *Id*. at 587. The Montana Supreme Court ruled that the state owned the riverbeds and could charge for the company's use of them. *Id*. at 588.

The U.S. Supreme Court stated explicitly in its opinion that "Unlike the equal footing doctrine, however, which is the Constitutional foundation for the navigability rule of riverbed title, the public trust doctrine remains a matter of state law." *Id*. at 603. The Supreme Court reversed the Montana Supreme Court's opinion and remanded for further proceedings. *Id*. at 605.

Under *PPL Mont.*, the claim by Flood that a court may hold the U.S. government liable based on public trust doctrine, which is a matter of state law, is legally unsound.

VI. Under the factors enumerated in *Baker v. Carr*, the Alien Tort Statute and Public Trust Doctrine claims raise no political question issues.

Finally, Appellants' claims that the ATS and Public Trust Doctrine present non-justiciable political questions are inaccurate for the following reasons. Applying the *Baker* test, this case has no: (1) textually demonstrable constitutional commitment of the issues to a coordinate political department, (2) judicially discoverable and manageable standards for resolving the dispute, (3) need to make initial policy determinations, (4) actions projecting lack of the respect due coordinate branches of the government are present, (5) unusual need for unquestioning adherence to a political decision already made, or (6) potential embarrassment from multifarious pronouncements by various departments on one question. *Baker v. Carr*, 369 U.S. 186, 217 (1962). In other words, both the ATS and Public Trust Doctrine claims do not present a non-justiciable political question because neither claim implicates any of the Baker test factors.

A. Background of the Political Question Doctrine

Article III of the Constitution limits the jurisdiction of the federal Courts to questions, issues, cases, and controversies. U.S. Constitution Art. III. Therefore, if the Constitution or federal law has committed a matter exclusively to the executive or legislative branches, it is non-justiciable. For more than fifty years, the Supreme Court has dismissed only two cases as political questions, and the Supreme Court has not ruled explicitly on the justiciability of a global warming claim. Katherine A. Guarino, *The Power of One: Citizen Suits in the Fight Against Global Warming*, 28 B.C. ENVTL. AFF. L. REV. 125, 127 (Apr. 2011),

https://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1213&context=ealr.

In a case interpreting the Alien Tort Statute, the D.C. Circuit Court of Appeals stated, "[The] political question doctrine is a very limited basis for nonjusticiability. It does not provide the judiciary with a carte blanche license to block the adjudication of difficult or controversial cases." *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 798 (D.C. Cir. 1984). *Baker v. Carr* is the modern case on the political question doctrine. The Supreme Court in that case established six independent tests to determine whether an issue is a nonjusticiable political question. 369 U.S. 186, 210.

The first test is whether the Constitution demonstrably commits the issue to a coordinate political department. *Id.* The second test is whether judicially discoverable and manageable standards for resolving the issue do not exist. *Id.* The third test is whether courts, to decide the issue, require an initial policy determination of a kind that the Constitution clearly leaves for nonjudicial discretion. *Id*. The fourth test is whether the court's undertaking an independent resolution expresses a lack of respect due to coordinate branches of government. *Id.* The fifth test is whether unusual circumstances require unquestioning adherence to a pre-existing political decision. *Id.* The sixth test is essentially, "a concern that if the President, Congress, and the courts each try to speak authoritatively to resolve a foreign affairs issue, the possibility or likelihood of embarrassment for the US would increase." Daniel Abebe, *One Voice or Many? The Political Question Doctrine Acoustic Dissonance in Foreign Affairs*, U. CHI. PUB. L. & LEGAL THEORY WORKING PAPER 233, 240-241, (Sept. 2013), https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1445&context=public_law_and_legal_theory.

B. The Alien Tort Statute claim does not present a political question issue.

1. This case has no textually demonstrable commitment of the issues to the political branches.

First, the Constitution itself does not place the regulation of HexonGlobal's greenhouse gas emissions in the hands of a political branch. Rather, Congress has delegated power to the E.P.A., and the E.P.A. has authority to regulate greenhouse gases as the Supreme Court discussed in *Massachusetts v. E.P.A*.. 549 U.S. 497, 500. However, President Trump has carved away at E.P.A.'s authority to regulate greenhouse gases, and the E.P.A. has deregulated facilities including: (1) cancelling a requirement for oil and gas companies to report methane emissions; (2) withdrawing guidance for federal agencies to include greenhouse gas emissions in environmental reviews; (3) replacing the Clean Power Plan with a new rule to regulate CO2 from power plants that is far less stringent; (4) reviewing recently updated standards for limiting carbon dioxide emissions from new, modified, and reconstructed power plants; (5) reviewing emission rules for power plant startups, shutdowns, and malfunctions; (6) repealing a rule limiting methane emissions on public lands; (7) changing rules to allow oil and gas facilities to forego repairs to methane leaks during unscheduled or emergency shutdowns; (8) directing agencies to stop using the "social cost of carbon" metric that the E.P.A. used to justify government rules addressing climate change, and many others. Nadja Popovich et al., *76 Environmental Rules on the Way Our Under Trump*, THE N.Y.C. TIMES: CLIMATE, (July 2018), https://www.nytimes.com/interactive/2017/10/05/climate/trump-environment-rules-reversed.html.

Therefore, these facts support the finding that the political branches are not committed to air pollution control or greenhouse gas regulation. Further, the political branches are not responsible for enforcing the *Trail Smelter* principle. Thus, under the *Baker test,* the ATS does not

present a political question issue. Although the United States signed on as a participant to the 1972 Stockholm Conference on the Human Environment and attended the 1992 Rio Declaration on Environment and Development, the status of implementation is unclear. *Report of the United Nations Conference on the Human Environment*, U.N. 43, (June 1972), http://www.un-documents.net/aconf48-14r1.pdf.

2. This Court can decide the dispute over the *Trail Smelter* principle under judicially manageable standards and does not require any initial policy determination.

Justice Marshall once wrote, "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803). This Court should follow this declaration today. In this case, Appellant, Mana, asserts a claim under the Alien Tort Statute claiming HexonGlobal's fossil fuel production and sale activities violate a principle of the law of nations reflected in the *Trail Smelter* Arbitration (that emissions into the environment within the territory of one nation must not cause substantial harms in the territory of other nations). In forming its decision, the *Trail Smelter* arbitration considered Supreme Court air and water pollution cases to guide international law. *Trail Smelter* 3 U.N.R.I.A.A. 1965 (1941) (citing *Missouri v. State of Illinois*, 200 U.S. 496 (1906) (discharge of sewage from Illinois was a public nuisance); *New York v. New Jersey*, 256 U.S. 296 (1921) (pollution of waters of bay as to amount to public nuisance); *New Jersey v. New York*, 283 U.S. 473 (1931) (dumping large quantities of garbage into the ocean and would wash up on beaches was a public nuisance); *Georgia v. Tennessee Copper Co*., 206 U.S. 230 (1907) (discharging noxious fumes from its smelting activities over its territory, which was a public nuisance)). The *Trail Smelter* Arbitration involved a situation normally viewed as a public nuisance. 3 U.N.R.I.A.A 1965 (1941). In that case, a smelter operating in Canada discharged fumes that damaged cleared and uncleared land in the

State of Washington. *Id.* Therefore, Appellant's underlying claim stems from public nuisance or tort law, and the Court must treat the claim accordingly.

The Supreme Court has recognized, "when we deal with air and water in their ambient or interstate aspects, there is federal common law" that exists after *Erie*. *Illinois v. City of Milwaukee*, 406 U.S. 91, 103 (1972). However, the court also cautioned, "When Congress addresses a question previously governed by a decision rested on federal common law the need for such an unusual exercise of law-making by federal courts disappears." 564 U.S. 410, 423. Therefore, this Court does not need to make an initial policy determination because of the enactment of the CAA sections that conflict with and displace the *Trail Smelter* Principle. The Court may use tools of statutory interpretation and apply the law to find the CAA displaces the *Trail Smelter* Principle. Therefore, HexonGobal satisfies the second and most prominent *Baker* factor by showing that the ATS does not present a political question issue.

3. Resolving this dispute will not demonstrate a lack of respect toward the political branches, contravene any pre-existing relevant political decision, or embarrass the nation.

In fact, the Court's resolution of this dispute will do the opposite. Although the current Congress and E.P.A. may not show a "textually demonstrable commitment" to the air pollution and global warming issues, previous congresses and administrations have shown such. The Court would show respect for the political branches by finding the CAA displaces federal common law. Such a finding would be an adherence to the Court's essential principles of judicial deference and stare decisis. Also, the United States government is unlikely to negotiate with foreign nations regarding climate change, as President Trump has demonstrated by his actions a lack of interest and opposition to pro-climate initiatives at industries expense. Therefore, this case would not present interference in agreements between the United States and other countries.

As for the fourth, fifth, and sixth *Baker* factors, although Congress enacted sections of the Clean Air that it intends to deal with climate change, the sections do not form a cohesive policy. Notably, Congress has not enacted substantive climate change legislation, and the United States lacks a uniform approach on climate change regulations, partly because of the Trump administration's actions. Therefore, the Court would not disrespect the political branches, disregard a relevant, pre-existing political decision, or embarrass the nation. The decision in this case would not disrespect the political branches either way because if the Court were to deny relief to the Appellants, then that ruling would bring the situation back to the status quo before the lawsuit, or if the Court were to find in favor of the Appellants, that ruling would be mostly consistent with the Clean Air Section 7415 and would be consistent with the United States' policy of stabilizing greenhouse gases for most of recent history. Therefore, HexonGlobal satsifies the last *Baker* factors by showing the ATS claim does not present a political question issue.

C. The Public Trust Doctrine Claim Does Not Present a Political Question Issue.

1. The issues of this case have no textually demonstrable commitment to the political branches.

The Appellant, Noah Flood, seeks to extend the Public Trust Doctrine to consider the atmosphere as a public trust resource and the Constitution does not commit this issue to the political branches. In contrast, the Fifth Amendment to the Constitution does prohibit Congress and the President from depriving any person "of life, liberty, or property without due process of law." U.S. Constitution Amend. V. However, this language does not explicitly apply to deprivation of a stable global atmospheric climate system. Thus, HexonGlobal satisfies the first *Baker* factor by showing the Public Trust Doctrine claim does not present a political question issue.

2. The Court can decide this case under judicially manageable standards without an initial policy determination for nonjudicial discretion.

The CAA displaces the Appellant's claim of the atmosphere as a public trust resource. Therefore, this argument does not prevent the court from choosing judicially manageable standards because this Court will use statutory interpretation and apply the law to come to this finding. *American Electric Power Company v. Connecticut* held that CAA displaced *any* common law right to seek abatement of carbon dioxide emissions. 564 U.S. 410, 424. Based on this holding in *American Electric*, the Public Trust Doctrine would be eligible for displacement because the doctrine stems from the common law of property, and the Appellant uses the doctrine to seek abatement of carbon dioxide emissions.

3. Resolving this dispute will not demonstrate a lack of respect toward the political branches, contravene any pre-existing relevant political decision, or embarrass the nation.

Similar to the Alien Tort Statute issue, in determining that the CAA displaces the claim that the atmosphere is a public trust resource, it allows the Court to defer to Congress and the E.P.A.'s authority over the matter. Thus, the Court would show respect for the political branches by not creating new rights or judge made laws. Such a finding would appropriately adhere to the controlling principle of stare decisis. Also, the United States government is unlikely to negotiate with foreign nations regarding climate change, given that the Trump Administration has demonstrated by his actions a lack of interest and opposition to pro-climate initiatives at industries' expense. Therefore, this case would not present interference in agreements between the United States and other countries.

CONCLUSION

For these reasons, this Court should affirm the judgment of the United States District Court of New Union Island.

Dated: November 29, 2018

Respectfully Submitted,
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