IN THE
UNITED STATES COURT OF APPEALS FOR TWELFTH CIRCUIT

Case No. 18-000123

ORGANIZATION OF DISAPPEARING ISLAND NATIONS, APA MANA, and NOAH FLOOD ***Appellants,***	)	Appeal
	)	of the Order of
	)	The United States District Court for the New Union Islands
v.	)	
	)	
HEXXONGLOBAL and THE UNITED STATES OF AMERICA		
	)	[Trial court or administrative agency
	)	case no.]
	)	
		Hon. Judge Romulus N. Remus
_____	)	[name and title of presiding judge,
Appellees	)	e.g., judge, special judge, judge pro
	)	tempore]

APELEE'S BRIEF for HEXXONGLOBAL

Attorneys for HexxonGlobal

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TABLE OF CONTENTS

STATEMENT OF JURISDICTION

HexonGlobal has consented to general personal jurisdiction in all courts in the Territory of New Union Islands.

STATEMENT OF ISSUES

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

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

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

IV. If otherwise enforceable, is the *Trail Smelter* Principle displaced by the ca?

V. Is there 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?

VI. Do Plaintiff's law of nations claim under the Alien Tort Statute and public trust claim present a non-justiciable political question?

STATEMENT OF CASE

I. FACTS

The United States has a long history of promoting the production and combustion of fossil fuels through special programs including "tax subsidies for fossil fuel production, leasing public lands and seas under its jurisdiction for coal, oil, and gas production, creating the interstate highway system, and the development of fossil fuel plants by public agencies such as the Tennessee Valley Authority." *ODIN, Apa Mana, and Noah Flood v. HexxonGlobal and United States,* Civ. 66-2018 (N.U.I.D. Aug. 15, 2018). Considering the United States has historically been the largest contributor to greenhouse gas emissions, making up 24% of cumulative global anthropogenic greenhouse gas emissions in the world to date, it is evident the Government's policy succeeded in promoting the domestic fossil-fuel industry. *ODIN, Apa Mana, and Noah Flood v. HexxonGlobal and United States,* Civ. 66-2018 (N.U.I.D. Aug. 15, 2018) at 5–6.

The recent merger of all major United States oil producers yielded the sole surviving entity, HexxonGlobal (Hexxon). *ODIN, Apa Mana, and Noah Flood v. HexxonGlobal and United States,* Civ. 66-2018 (N.U.I.D. Aug. 15, 2018). Historically, the combined emissions from all United States oil producers constitutes only 6% of global fossil-fuel related gas emissions. *ODIN, Apa Mana, and Noah Flood v. HexxonGlobal and United States,* Civ. 66-2018 (N.U.I.D. Aug. 15, 2018). The surviving entity HexxonGlobal operates production sites throughout the world, including a refinery in the New Union Islands. *Id.* Cumulative worldwide sales of fossil fuels by Hexxon contributes to 9% worldwide fossil-fuel related emissions. *Id.* Since Hexxon and its corporate predecessors contribute to 6% of global fossil-fuel related gas emissions, a 9% worldwide contribution indicates that Hexxon's international operations constitute 3% of world-wide fossil-fuel related emissions.

Since at least the 1970s, the all the United States oil producers that were later merged under Hexxon have understood the impact of fossil fuels on the global climate based on the results of their own scientific research. *ODIN, et. al., v. United States, et. al.* Civ. 66-2018 (N.U.I.D. Aug. 15, 2018). In the absence of federal efforts to curb these practices, United States oil producers persisted in these profitable business activities and enjoyed numerous government incentives that further bolstered the domestic fossil-fuel industry. *ODIN* Civ. 66-2018 (N.U.I.D. Aug. 15, 2018).

In recent years, the United States has acted to reduce and mitigate the consequences of their longstanding policy of promoting the production and combustion of fossil fuels through various agencies and programs. *ODIN, Apa Mana, and Noah Flood v. HexxonGlobal and United States,* Civ. 66-2018 (N.U.I.D. Aug. 15, 2018). In 1992, the United States signed the United Nations Framework Convention on Climate Change (UNFCCC), pledging to "adopt national

policies and take corresponding measures. . . [to mitigate] climate change[] by limiting. . . emissions of greenhouse gases. . .” *ODIN, et. al. v. HexxonGobal, et. al.,* Civ. 66-2018(N.U.I.D. Aug. 15, 2018) (discussing UNFCCC 171).

In 2007, the United States Supreme Court held that greenhouse gases are pollutants which were potentially subject to regulation under the Clean Air Act. U.S.C. § 7521 (2018); *Massachusetts v. EPA*, 549 U.S. 497 (2007); *ODIN, et al. v. U.S. et. al.,* Civ. 66-2018 (N.U.I.D Aug. 15, 2018). In 2010, the EPA adopted a joint rule with the National Highway Transportation Agency (“NHTA”) which established fuel emissions limitations which subsequently extended to increase emissions limitations on new automobiles manufactured through 2025. 40 C.F.R. 62, 623. In the same year, EPA also issued a regulation under the Clean Air Act (“CAA”)(42 U.S.C. §§ 7401–77671q) which required new sources of greenhouse gases to be subject to review. (40 CFR 52.21(b)(11), 52.21(a)(2)). Again in 2015, the EPA issued regulations establishing greenhouse gas emissions limitations for new power plants, 80 Fed. Reg. 64510 (Oct. 23, 2015), and required states to introduce controls on emissions for already existing power plants. 80 Fed. Reg. 64662 (Oct. 23, 2015); id. In 2015 President Barack Obama signed the Paris Agreement which committed the United States, among other nations, to reduce their future greenhouse gas emissions by 26-28% from 2005 levels by the year 2025. USA First NDC (Sept. 3, 2016).

Although the United States has seen an overall decrease in greenhouse gas emissions in correlation with their adoption of these new initiatives, the true success of these efforts remains unclear as sea levels continued to rise, to the detriment of low-lying islands that support permanent residences. *ODIN, et al. v. U.S. et. al.,* Civ. 66-2018 (N.U.I.D Aug. 15, 2018). One of the appellants, Apa Mana, is a non-resident alien from A’Na Atu, a sovereign nation on a small low-lying island located in the East Sea. *Id.* The other individual appellant, Noah Flood,

is a citizen resident of the New Union Islands, a United States protectorate and also a small low-lying island in the East Sea. *Id.* The populations of these low-lying islands are concentrated in areas that rise no higher than a precarious one meter above sea level, with the peak elevation not exceeding three meters in any area on either island. *ODIN, et al. v. U.S. et. al.*, Civ. 66-2018 (N.U.I.D Aug. 15, 2018). A mere half-meter rise in sea levels would render these islands totally uninhabitable because of waves washing over the islands during storms. *Id.*

Apa Mana and Noah Flood are homeowners in communities perilously situated less than one-half meter above sea level and have suffered water damage to their homes during storms. damaged by water during storms. *ODIN, et al. v. U.S. et. al.,* Civ. 66-2018 (N.U.I.D Aug. 15, 2018). Their drinking water from wells have been rendered unpotable by seawater intrusion. *Id.* Neither have suffered health consequences from rising sea levels and their primary food source, fish from the East Sea, are currently unaffected. *ODIN, et al. v. U.S. et. al.,* Civ. 66-2018 (N.U.I.D Aug. 15, 2018). However, they claim that increases in global temperatures and sea level rise presents a future harm to their health due to an increased likelihood of heat stroke, mosquitos-borne illness, and depletion of their primary food source. *Id.*

II. PROCEDURAL HISTORY

Co-Appellants are Apa Mana, an individual and nonresident alien, Noah Flood, a citizen resident, and the non-profit organization Organization of Disappearing Island Nations (ODIN). In the district court, Mana brought an Alien Tort Statute claim (ATS)(28 U.S.C. §1350) seeking damages and an injunction on the theory that Hexxon's fossil-fuel business activities violated customary international law. *ODIN, et al. v. U.S. et. al.,* Civ. 66-2018 (N.U.I.D Aug. 15, 2018). Flood's claim before the district court was against the United States, alleging the government was obligated under the public trust doctrine, incorporated through the Due Process Clause of the

Fifth Amendment, to protect the global climate ecosystem, and that the government had violated those public trust obligations by failing to act despite knowing the detrimental effects of fossil-fuels on the global climate. *ODIN, et al. v. U.S. et. al.,* Civ. 66-2018 (N.U.I.D Aug. 15, 2018). Plaintiffs joined in alleging that if sea level rise persisted at current rates, the islands of A'Na Atu and the New Union Islands would be completely uninhabitable due to rising seas by the end of the century. *Id.*

The complaint was filed in United States District Court in the District of New Union Island. Defendants filed to dismiss the claim. On August 15, 2018, the Honorable Romulus N. Remus granted the motion based and issued an Order of the District Court that proclaimed: (1) the *Trail Smelter Principle* under the International Law of Nations is preempted by greenhouse gas regulation under the CAA, and (2) there is no Due Process-based public trust right to governmental protection from atmospheric climate change. Plaintiffs timely appealed the decision to the United States Court of Appeals for the 12th Circuit.

SUMMARY OF ARGUMENT

Apa Mana cannot bring a claim based on the Alien Tort Statue against a domestic corporation because the scope of liability for ATS claims is defined by international customary law, which has never recognized violations by corporations. Additionally, the doctrine against extraterritoriality precludes non-resident aliens from bringing claims against domestic corporations for injuries in a foreign jurisdiction. Finally, for this Court to allowing non-resident aliens to sue domestic defendants for injuries in a foreign jurisdiction would present insurmountable practical difficulties. Even if the trail smelter principle is recognized under the

law of nations, it is not enforceable under the ATS because to do so would create a new cause of action in contravention of the purpose of the ATS.

The *Trail Smelter Principle* is not actionable as the law of Nations under the Alien Tort Statue because the international community does not recognize it as a general *jus cogens* rule of international relations and the history and practice of international environmental law demonstrates that it is not subjectively acknowledged as a standard of conduct in the international community.

Trail Smelter does not allow for enforcement against non-governmental actors. The plaintiffs have falsely asserted that Hexon is liable for the damage to their homes, and this is a misapplication of the principle. See Canadian Yearbook of International Law 1 Can. at 216, 217. The principle stands for the proposition that states can be held liable if the state or a corporation within the state's boarders contributed to pollution that has harmed another state. Id. A finding that Hexon contributed to the damaging rising sea levels, the Court could find that the United States, rather than Hexon, was liable. Id. Thus, the Court should affirm the District Court's motion to dismiss for failure to state an actionable claim. The accurate application of the Trail Smelter principle can be found in the the Trial Smelter Arbitration of 1965, where the principle originated. In that case, toxic fumes from Canada reached Washington. Canadian Yearbook of International Law 31 Can. at 224. Canada, not any private party, was found liable. Id.

Even if this Court finds that *Trail Smelter* applies to Hexon, the Court should still affirm the District Court's dismissal because the *Trail Smelter Principle* has been displaced by the Clean Air Act. American Elec. Power Co., Inc. v. Connecticut, 131 S.Ct. 2530. In American Electric Power Company Inc. v. Connecticut, the Supreme Court held that "The Clean Air Act and the EPA action the Act authorizes displace any federal common-law right to seek abatement

of carbon-dioxide emissions from fossil-fuel fired power plants." Id. In accordance with the Erie Doctrine, where Congress has legislated, the court shall not address the question as to whether federal common law creates a claim. Id. at 2530. Thus, this Court should not look to federal common law over statutory law legislated by Congress. See id.

There is no cause of action against the United States based on Fifth Amendment Substantive Due Process protections because the Due Process Clause does not impose on the government any affirmative duty to act. *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 196, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989). There are two exceptions to his rule: 1) the "special relationship" exception; and 2) the "danger creation" exception. *L.W. v. Grubbs*, 974 F.2d 119, 121 (9th Cir. 1992). Neither exception applies. See id. The "special relationship" exception is completely unrelated to the situation at bar. See id. The "danger creation" exception imposes on the government an affirmative duty where 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). This requires a showing that the defendant's mental state is more culpable than gross negligence. *Pauluk v. Savage*, 836 F.3d 1117, 1125 (9th Cir. 2016). The extensive efforts taken by the United States to address climate change over the past several decades preclude Plaintiffs from showing a deliberate indifference. Moreover, the exception requires a showing that the injured party was made worse off than it would have been had the defendant not acted at all. Id; *Johnson*, 474 F.3d at 641 (quoting *DeShaney*, 489 U.S. at 201, 109 S.Ct. 998); *accord Kennedy*, 439 F.3d at 1063. The nature of a competitive global economy and the fact that even when greenhouse gas emission from the United States decreased global emissions continued to rise, demonstrates that it cannot be shown that without the conduct of the United

States the Plaintiff would be in a better position. Thus, this Court should affirm the District Court's dismissal for failure to state a claim for relief.

Plaintiff's Law of Nations Claims under the Alien Tort Statute and Public Trust Claim do not present a non-justiciable political question. There mere that controversy before the court involves any kind of political question does not in and of itself preclude the court from hearing it. *Alperin*, 410 F.3d at 539 (quoting *Liu v. Rep. of China*, 892 F.2d 1419, 1433 (9th Cir. 1989) and *W.S. Kirkpatrick & Co. v. Envt'l Tectonics Corp., Int'l*, 493 U.S. 400, 409, 110 S.Ct. 701, 107 L.Ed.2d 816 (1990)); Juliana. When making this determination, the Court looks to the six signaling factors identified in Baker v. Carr, to determine whether the question can be properly decided by the court. *Alperin v. Vatican Bank*, 410 F.3d 532, 544 (9th Cir. 2005); *Baker v. Carr*, 369 U.S. 186, 210, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962). Circumstances in which a Court should refrain from hearing a case because of a non-justiciable political question are rare, and should only be done when one of the Baker factors is "inextricable" from the case. *Baker*, 369 U.S. at 217, 82 S.Ct. 691; Juliana. Courts have heard cases involving issues as political as national security, reproductive rights, marriage rights, and segregation. So there is no reason for the line to be drawn at environmental policy in its entirety. None of the Baker factors are inextricable from the case, so this Court should not rule that Alien Tort and Public Doctrine claims are non-justiciable political questions. And this Court should affirm the District Court's dismissal for failure to state a claim for relief.

ARGUMENT

I. A DOMESTIC CORPORATION IS AN IMPROPER DEFENDANT FOR CLAIMS UNDER THE ALIEN TORT STATUTE (ATS)

A. The Scope of Liability for ATS Claims is Defined by International Customary Law, which has Never Recognized Violations by Corporations.

In 1789, the First Congress enacted the Alien Tort Statute, which states in totality: "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. Statutory interpretation begins with the text of the statute itself, with a plain reading of the language according to the ordinary meaning of the words. *Artis v. District of Columbia,* 138 S.Ct. 594 (2018).

Unfortunately, our textual analysis of the ATS is severely constrained by its brevity. The statutory text unambiguously provides that an "alien" is the proper plaintiff to bring an ATS claim, but makes no express or implied references to appropriate defendants. 28 U.S.C. § 1350. The plain language also indicates "tort" in this context refers to a tortious violation of the Law of Nations or a treaty of the United States—a meaning wholly untethered from the substantive wrongs recognized under common law tort doctrine among the several states. *Filartiga v. Pena-Irala,* 577 F. Supp 860 (1984). In other words, the disputes that may properly be litigated under the ATS (28 U.S.C. § 1350) must arise from violations defined by international law rather than by federal common law or broad judicial discretion. *Id.*

Due to the limited text of the statute itself and the lack of legislative history to guide our interpretation, it is proper to consider the history and practice of the ATS to ascertain the appropriate claims and defendants. The Supreme Court adopted this inquiry in *Sosa v. Alvarez-Mackain* to conclude that the ATS is only a jurisdictional statute that does not create any new

causes of action. 542 U.S. 692, 724 (2004). The *Sosa* court looked to the historical context of the ATS's drafting, explaining that the United States as a young nation needed a mechanism for aliens to seek redress against the United States for violations of customary international law in situations where courts might otherwise lack personal or subject matter jurisdiction. *Id.* Jurisdiction was granted ". . .on the understanding that the [international] common law would provide a cause of action for the modest number of international law violations" that were the most broadly recognized and consistently defined in that era: interfering with foreign ambassadors, violations of safe conduct, and piracy. *Sosa v. Alvarez-Mackain*, 542 U.S. 692, 730-5 (2004).

Sosa emphasized the importance of construing the conception of the law of nations under the ATS in alignment with this conception of the law of nations and cautioned that allowing judges to define new norms of international custom would grant the courts overly broad discretion more appropriately exercised by Congress. *Sosa v. Alvarez-Mackain*, 542 U.S. 692, 730-5 (2004). Finding a domestic corporation liable under the ATS would contradict *Sosa*'*s* interpretation. No international tribunal ever has found a corporation liable for violating customary international law. Christiansen, David D. "Corporate Liability for Overseas Human Rights Abuses: The Alien Tort Statute After *Sosa v. Alvarez-Machain.* This principle was recognized by Congress when it was codified into the International Law in the Torture Victim Protection Act.

B. The Doctrine Against Extraterritoriality Precludes Non-Resident Aliens from Bringing Claims Against Domestic Corporations for Injuries in a Foreign Jurisdiction.

The presumption against extraterritoriality means that courts should not interpret statutes to apply to conduct outside of the territorial jurisdiction of the United States unless there is clear and unequivocal Congressional intent otherwise. *Morrison v. National Australia Bank*, 130 S. Ct. 2869, 2877 (2010). Since the early 1800s, this Court has interpreted this presumption against the overextension of federal law based on their theory that "the legislation of every country is territorial," and that "of sovereignty must be exercised within the territory of the sovereign. *Rose v. Himley*, 8 U.S. (4 Cranch) 241, 279 (1808).

The Court declined to adopt an interpretation of Title VII would extend claims against two United States-based corporations for allegations of discrimination that occured in *Saudi Arabia. EEOC v. Arabian American Oil Co*., 499 U.S. 244 (1991) The Defendant's status as a United States corporation was irrelevant to the decision because fundamentally the presumption against extraterritoriality is not designed to address fairness to foreign defendants. *See Id.* Rather, purpose of the presumption against extraterritoriality to provide for uniform interpretation of Congressional intent on international matters. *Id. at 248*.

None of the harms that Mana claims occurred within the territory of the United States. Although the fossil-fuel related business activities of Hexxon contributed to 6% of the emissions which are the cause of the meteorological phenomena of which the injuries she claims are the result, this attenuated connection stretches the jurisdiction of the ATS beyond any recognition of its historical use or the established principle against extraterritorial application.

C. Allowing Non-Resident Aliens to Sue Domestic Defendants for Injuries in a Foreign Jurisdiction Would Present Insurmountable Practical Difficulties.

The Court should interpret the presumption against extraterritorialty as turning on the locus of of the actual alleged injury rather than the national affiliation of the corporation. The opposite would open the federal courts of the United States to claims brought by any array of foreign plaintiffs claiming various injuries by subsidiaries an affiliates of domestic corporations all over the world.

II. THE TRAIL SMELTER PRINCIPLE IS NOT A RECOGNIZED NORM OF INTERNATIONAL LAW ENFORCEABLE AS THE LAW OF NATIONS UNDER THE ATS

A. The Trail Smelter Principle Is Not A Consistent and General Practice By States

The law of nations refers to a network of rules of custom that dictate how sovereign states interact in the international arena. One of the earliest Supreme Court decisions acknowledged that those customary rules shared among nations is a distinctly humanistic set of norms "established by the general consent of mankind." This recognition has generally been echoed in subsequent Supreme Court opinions, characterizing the law of nations as "founded on the common consent as well as the common sense of the world." *Ware v. Hylton*, 3 U.S. 199, 227 (1796); see also *United States v. Darnaud*, 25 F. Cas. 754, 760 (1855) (No. 14,918) ("[Mlankind recognize... mankind concur in... the general sense. . .").

The Supreme Court has not provided concrete guidance on the specific acts that constitute law of nations violation. In *Sosa v. Alvarez*, the Court suggested an act that violates the law of nations must rise to the level of the international norms contemplated during the

American constitutional period, such as piracy and assaulting a foreign ambassador, but did not instruct the lower courts on how to properly analogize violations such as piracy to contemporary international issues. WASH. & LEE L. REV 1219 (2005). Courts have relied on *Sosa* to reason that cultural, social, economic, rights lack the specificity required to constitute a law of nations violation actionable under the ATS. *Infra*. The Second Circuit struck down an ATS claim alleging violations to the right to life and to health, reasoning that those rights were too indeterminate to support a cause of action under the ATS. Flores v. Southern Peru Copper Corp.,

In lieu of conclusive legal authority, the Court should look to the interpretation by The International Court of Justice which posits that customary international law, a norm rising to the level of the law of nations, consists of two necessary elements: (1) consistent and general international practice by states, and (2) a subjective acceptance of the practice as law by the international community (*opinio juris*). Hugh Kindred, *International Law, Chiefly as Interpreted and Applied in Canada*, 6th ed. (Toronto: Emond Montgomery, 2000) at 130. Further illuminating is the general consensus of the academic community, which can be summarized as "the list of principles that may be said to have ripened into universally accepted norms of international law, includes the proscriptions against piracy, slave trade, attacks on or hijacking of aircraft, genocide, and war crimes." 62 WASH. & LEE L. REV 1219 (2005)

The Trail Smelter Principle is not incorporated into the Law of Nations because it does not represent a consistent and general practice adhered to by the broad global community of sovereign states. While it is true that the *Trail Smelter Arbitration* was an official proceeding where two sovereign states agreed to be bound by the result, this is not sufficient to elevate the principle to a consistently and generally abided practice. Regardless of whether the United States and Canadian governments honored their commitments in accordance with the Principle, a

true custom of international law requires far more pervasive integration into the arena of international relations and foreign affairs.

The fact that the *Principle* has been subsequently incorporated into various international treaties does not render it a Law of Nations because, as the *North Sea Continental Shelf Cases* provide, "[c]ustomary law is not a written source." (ICJ Reps, 1969, p. 3 at 44). Although sovereign states commonly sign treaties with foreign governments pledging to reduce air pollution, history and practice have shown that time and time again, it is not a general practice of the vast majority of both industrialized and developing countries to place a high priority on reducing emissions.

B. The Trail Smelter Principle Is Not Subjectively Accepted as Practice By the International Community

The concept of "practice" in terms of the Law of Nations refers "not just the practice of the government of a State but also of its courts and parliament. It includes what States say as well as what they do. Also practice needs to be carefully examined for what it actually says about law." (North Sea Continental Shelf cases, ICJ Reps, 1969, p. 3 at 44). Considering the ongoing debate in the United States over whether global climate change is "real" even in the face of strong scientific evidence, the *Trail Smelter Principle* can hardly be characterized as rising to the level of a subjectively accepted practice by the international community.

C. Even if the Trail Smelter Principle is Recognized under the Law of Nations, it is Not Enforceable Under the ATS because to do so Would Create a New Cause of Action In Contravention of the Purpose of the ATS.

As previously discussed, *Sosa* holds that ATS claims are only appropriate for violation of the most broadly recognized and consistently defined international norms of the day—those that are comparable to the public consensus on the severity of violations involving interference with foreign ambassadors, violations of safe conduct, and piracy during the American colonial period. 542 U.S. 692, 730-5 (2004). To say that winds carrying toxic particles over a boarder is a modern day equivalent to piracy in the 1800s is ludicrous and, although evident of an admirable intent to protect the environment, such an attenuated extension of the historical purpose of the ATS is precisely the kind of interpretation that the court cautioned against in *Sosa.* Recall the Supreme Court's admonition that "because customary international law is created by the general customs and practices of nations and therefore does not stem from any single, definitive, readily-identifiable source, we have advised district courts to exercise extraordinary care and restraint in deciding whether an offense will violate a customary norm." *Sosa,* 542 U.S. 692, 730-5 (2004).

III. THE TRAIL SMELTER PRINCIPLE DOES NOT ALLOW FOR ENFORCEMENT AGAINST NON-GOVERNMENTAL ACTORS

In the event that the Court does find the Trail Smelter Principle to be a recognized principle of customary international law, the Court should still find for HexonGlobal because the Trail Smelter Principle does not apply to non-governmental persons or organizations. Plaintiffs have incorrectly used the Trail Smelter Principle in an attempt to hold HexonGlobal liable for the damage to their homes. This is a fundamental misapplication of the Principle. The Principle established that states can be held liable if they themselves, or if a corporation or person within their borders, contributed to pollution that has harmed another state. John E. Read, *The Trail Smelter Dispute*, 1 Can. Y.B. Int'l L. 213, 216, 217 (1963). If the Court finds that HexonGlobal contributed to the increase in greenhouse gases to the detriment of the Plaintiffs, under the Trail Smelter Principle, this merely means that the United States government could be held liable. This liability would stem from the United States government's failure to prevent HexonGlobal from increasing their greenhouse gas emissions. However, nothing in the Trail Smelter Principle authorizes an actionable claim against the corporation itself. Therefore, the Appeals Court should affirm the District Court's motion to dismiss, as the Plaintiffs have failed to state an actionable claim against HexonGlobal.

The Trail Smelter Principle originated from an action brought by the United States government against the Canadian government. In Canada, a smelter significantly raised the amount of zinc and lead that they were letting out. Karin Michelson, Rereading Trail Smelter, 31 Can. Y.B. Int'l L. 219, 224 (1993). The toxic fumes from the smelter were able to reach the state of Washington. Id. at 224. An arbitration hearing held the Canadian government liable and this

created the Trail Smelter Principle. Read, supra at 216, 217. The Principle was then further supported by the Conference on the Human Environment, which wrote a Declaration in 1972. Louis B. Sohn, The Stockholm Declaration on the Human Environment, 14 Harv. Int'l L. J. 423 (1973).

One of the Declaration's principles stated that "States have…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." Franz Xaver Perrez, *The Relationship Between Permanent Sovereignty and the Obligation Not to Cause Transboundary Environmental Damage*, 26 Env. L. 1187, 1201 (1996).This means that in the event the Court finds that HexonGlobal did damage theenvironment through the burning of fossil fuels, the United States government can be held liable because the damage went outside the United States borders and into other states.

Nowhere in the Tribunal's arbitration decision does it say that the organization themselves areresponsible for making sure that they do not damage the environment. Rather, it states that if the corporation causes such damage, the country in which they are located would be held liable.

This was the exact finding of the Tribunal in their hearing. The Tribunal stated that "no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence". Ved P. Nanda; Jeffrey C. Lowe, Nuclear Weapons and the Ecology: Is International Law Helpless to

Address the Problem, 19 Denv. J. Int'l L. & Pol'y 87, 93 (1990). Only the State itself which has permitted the corporation to damage the environment is mentioned as being held liable. There is no reference to the corporation itself being held liable under this Principle.

The Tribunal ultimately held that "the Dominion of Canada is responsible in international law for the conduct of the Trail Smelter. Apart from the undertakings in the Agreement, it is, therefore, the duty of the Government of the Dominion of Canada to see it that this conduct should be in conformity with the obligation of the Dominion under international law as herein determined." Stephen C. McCaffrey, The Law of the Non-Navigational Uses of International Watercourses, 1988 U.N.Y.B. Int'l L. Comm'n 205, 235 (1988). The Tribunal did not impose any liability on the Trail Smelter itself. Instead, it only held the Canadian government liable. Applying this Principle to the facts at hand, there is no aspect of the Principle that authorizes private citizens or private corporations to be sued. The Principle is not applicable here because it is not a recognized principle of customary international law, but even if the Court finds that it is, the Principle only can cause the United States government to be held liable and not HexonGlobal.

IV. THE TRAIL SMELTER PRINCIPLE HAS BEEN DISPLACED BY THE CLEAN AIR ACT

In the event that the Court finds that the Trail Smelter Principle is a recognized principle of customary international law, and that it also applies to non-governmental actors, the Court should still affirm the decision to dismiss the Plaintiffs' claims because the Trail Smelter Principle has been displaced by the Clean Air Act. The Plaintiffs based their Complaint on the Principle and since it is superseded by the Clean Air Act, they have no cognizable claim. The District Court was correct in finding that the Clean Air Act preempts federal common law in this situation.

A. Federal Common Law Can Exist, But Only in the Absence of Congressional Legislation

The United States Supreme Court has already heard a case very similar to this one. The Supreme Court stated that although the Erie Doctrine rejected the idea of there being a "federal general common law", there is an exception when a federal common law can be used. This "emerged for subjects of national concern." *American Elec. Power Co., Inc. v. Connecticut,* 131 S.Ct. 2350. The Court made the "emerging distinction between general common law and the new federal common law". *Id.* In the event that there is a question relating to a national issue, federal courts can use common law even though in ordinary circumstances, there is no federal common law. *Id.* This is part of the basis for the Complaint. However, for the Court to use federal common law, and therefore the Smelter Trail Principle, it would have to ignore another requirement for the use of federal common law which is not met in these circumstances.

The Court made it clear that even if there is a question of national concern, and federal common law can be used, it can still only be used if Congress has not legislated that specific issue. *City of Milwaukee v. Illinois and Michigan*, 101 S.Ct at 1790. We accept that the issue of

greenhouse gas emissions and climate change is one of national concern. But it is very clear that Congress has already legislated this issue with the Clean Air Act. Therefore, courts must defer to Congressional legislation in suits arising from actions covered by the Act. The Supreme Court has stated that when there is Congressional legislation on a particular issue, then "the Court need not address the question" of if the federal common law gives the Plaintiff a cognizable claim, because the federal common law would not be assessed in these circumstances. *American Elec. Power Co., Inc. v. Connecticut*, 131 S.Ct. 2530.

The Court had also previously held that when legislation "does speak directly to a question, the courts are not free to 'supplement' Congress' answer so thoroughly that the act becomes meaningless." Mobil Oil Corp. v. Higginbotham, 98 S.Ct. 2015. In general, "Federal courts, unlike state courts, are not general common-law courts and do not possess a general power to develop and apply their own rules of decision". *City of Milwaukee v. Illinois and Michigan*, 101 S.Ct. at 1790.

B. <u>The Clean Air Act is Congressional Legislation, and It Speaks Directly to the Issue of Greenhouse Gas Emissions</u>

The Clean Air Act is a clear example of Congressional legislation. Congress initially passed the Act in 1970 and amended it twice, in 1977, and 1990. 42 U.S. Code § 7401. It also speaks directly to the issue of greenhouse gas emissions, which is at the center of this case. The Supreme Court heard a case in which the plaintiffs sued electricity companies who they alleged were releasing significant amounts of carbon dioxide, and that this caused damages to the plaintiffs. The Supreme Court stated "that the [Clean Air] Act 'speaks directly' to emissions of carbon dioxide from the defendants' plants." *American Elec. Power Co.*, 131 S.Ct. at 2530. They went on to say it wasn't necessary to assess whether there even is a federal common law claim

that could possibly exist for the plaintiffs, because the federal common law is preempted by the Congressional legislation of the Clean Air Act. *Id.* at 2537.

The Court came to this conclusion by assessing whether the Clean Air Act governs the issue in question, and if the Act "speaks directly" to that issue. *Id*. at 2537. The Court cited a previous Supreme Court case and said that it established "that emissions of carbon dioxide qualify as air pollution subject to regulation under the Act." *Id.* at 2537. The Court also found that the Clean Air Act does in fact speak directly to the defendants' increase in the emissions of carbon dioxide.

The Clean Air Act states that it is to "protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." 42 U.S. Code § 7401(b)(1). It also states that "a primary goal…is to encourage or otherwise promote reasonable Federal, State, and local governmental actions, consistent with the provisions of this chapter, for pollution prevention." 42 U.S. Code § 7401(c).

Applying this to the facts at hand, HexonGlobal has been accused of impacting the quality of the air resources through the burning of fossil fuels and the release of greenhouse gases, primarily carbon dioxide and methane. This clearly falls within the purview of the Clean Air Act. Furthermore, the Clean Air Act speaks directly to HexonGlobal's increase in the emissions of carbon dioxide. This is an almost identical set of facts as the Supreme Court heard in *American Elec. Power Co*., when the Supreme Court found that the federal common law on this national issue had been displaced by the Clean Air Act. This Court should come to the same conclusion as HexonGlobal's actions are not governed by federal common law due to the existence of Congressional legislation on this issue.

V. THERE IS NO CAUSE OF ACTION AGAINST THE UNITED STATES GOVERNMENT BASED ON THE FIFTH AMENDMENT SUBSTANTIVE DUE PROCESS PROTECTIONS.

A. The Due Process Clause Does Not Impose on the Federal Government an Affirmative Duty to Act

Even if this Court finds that a sustainable global atmospheric climate system is a fundamental right, the Due Process Clause of the Fifth Amendment does not impose any affirmative duties to act on the Government. *Juliana v. United States*, 217 F. Supp. 3d 1224, 1251 (D. Or. 2016); *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 196, (1989). This rule applies even where "such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual." *Juliana* 217 F. Supp. 3d at 1251 ; *DeShaney.*, 489 U.S. at 196. There are two exceptions to the rule. *Juliana* 217 F. Supp. 3d at 1251; *L.W. v. Grubbs*, 974 F.2d 119, 121 (9th Cir. 1992). The first is the "special relationship" exception, which states that when the government takes a person into custody against their will, it assumes the responsibility of keeping that person safe from harm. *Id*. This exception is clearly not applicable because the plaintiffs have not alleged any facts relating to an individual being taken into custody. *See id;* In re ODIN Appeal No. 18-000123 (2018). The second is the "danger creation" exception, which provides for a substantive due process claim where government action or inaction 'places a person in peril in deliberate indifference to their safety." *Juliana* 217 F. Supp. 3d at 1251; *Penilla v. City of Huntington Park*, 115 F.3d 707, 709 (9th Cir. 1997).

The Ninth Circuit established the elements for application of the "danger creation" exception in the 2006 case, *Kennedy v. City of Ridgefield*. *Juliana* 217 F. Supp. 3d at 1251;

Kennedy v. City of Ridgefield, 439 F.3d 1055, 1061 (9th Cir. 2006); A plaintiff asserting application of the exception must first show that the "state actor create[d] or expose[d] an individual to danger which he or she would not have otherwise faced." *Id*. A plaintiff must next show "the 'state actor … recognize[d]' the unreasonable risks to the plaintiff and 'actually intend[ed] to expose the plaintiff to such risks without regard to the consequences to the plaintiff.'" *Juliana* 217 F. Supp. 3d at 1251; *Campbell v. Wash. Dep't of Soc. & Health Servs.*, 671 F.3d 837, 846 (9th Cir. 2011) (brackets and quotation marks omitted).

Proper application of the danger creation exception requires a showing that the defendant's indifference is deliberate, which "requires a culpable mental state more than gross negligence." *Pauluk v. Savage*, 836 F.3d 1117, 1125 (9th Cir. 2016). The exception also requires the affected individuals be exposed to danger "they otherwise would not have faced." Juliana 217 F. Supp. 3d at 1251; *Pauluk*, 836 F.3d at 1122. Though the United States has been the largest contributor to emissions of greenhouse gases historically, the United States has acknowledged the threat of climate change and taken extensive critical steps, as outlined previously in this brief, to reduce effects in recent decades. In re ODIN Appeal No. 18-000123 at 5–7 (2018). In 1992, the United States signed and ratified the United Nations Framework Convention on Climate Change (UNFCCC). Id. The UNFCCC's stated objective is "to achieve . . . stabilization of greenhouse gas concentrations in the atmospheric interferences with the climate system." United Nations Framework Convention on Climate Change, May 9, 1992, 1771 U.N.T.S. 107, 169. *Id.* The Convention also provided a commitment from developed nation parties to the agreement, to "adopt national policies and take corresponding measures on the mitigation of greenhouse gases and protecting and enhancing its greenhouse gases and protecting and enhancing its greenhouse gas sinks and reservoirs." UNFCCC, at 171; In re ODIN Appeal

No. 18-000123 at 6 (2018). The United States has also taken a number of steps at home to increase regulation of greenhouse has emissions, including EPA led litigation and stricter regulations, the signing of the Paris Agreement, a commitment to reduce greenhouse gas emissions by 26-28% of 2005 levels by 2025. In re ODIN Appeal No. 18-000123 at 7 (2018). These regulatory actions have resulted in a decrease in United States greenhouse gas emissions, whereas global levels have continued to increase. *Id*. Granted, the Trump Administration has proposed reversing some measures and withdrawing from the Paris Agreement. *Id*. Nonetheless, forward-looking statements of intent are just that this Court should not consider them in determining whether past conduct demonstrates a deliberate indifference. *See Pauluk,* 836 F.3d at 1125; *Id*.

The conduct of the United States does not rise to the level of deliberate indifference. *Pauluk,* 836 F.3d at 1125. As the *Pauluk* Court said, conduct must place the harmed individual in a "worse position than that in which he would have been had [the state] not acted at all." *Id; Johnson,* 474 F.3d at 641 (quoting *DeShaney*, 489 U.S. at 201, 109 S.Ct. 998); accord Kennedy, 439 F.3d at 1063. But the fact that global emissions continued to increase, even while the United States decreases emissions, demonstrates that the United States is not the only actor at play. In re ODIN Appeal No. 18-000123 at 7 (2018). In a global economy, counties and private actors are in constant competition, when refrains from or reduces their part in some kind of conduct, they are only creating space for another actor to fill that role. Thus, it cannot be shown that Plaintiffs were made off by the conduct of the United States than it would have been without such conduct. Moreover, in a complex democratic society, change does not occur over night. In the face of increased awareness of the dangers resulting from greenhouse gas emissions, the United States has taken significant steps and acted in good faith to prevent and mitigate damages. Thus, the

Court should not find that the conduct reaches the level of "a culpable mental state more than gross negligence." See *Pauluk,* 836 F.3d at 1125. And this Court should affirm the District Court's dismissal for failure to state a claim for relief. See *id.*

VI. PLAINTIFF'S LAW OF NATIONS CLAIM UNDER THE ALIEN TORT STATUTE AND PUBLIC TRUST CLAIM DO NOT PRESENT A NON-JUSTICIABLE POLITICAL QUESTION

Plaintiffs assert claims under the Alien Tort Statute, 28 U.S.C. §1350 (ATS) and Public Trust Doctrine. In re ODIN Appeal No. 18-000123 at 1 (2018). The United States contends that the Court is barred from determining this question, arguing it is a non-justiciable political question. Id. This is incorrect. See Juliana 217 F. Supp. 3d at 1235. Federal courts lack the subject matter jurisdiction to determine political questions because political questions are to be left to the legislature. *Jesner v. Arab Bank, P.L.C.*, 138 S. Ct. 1386, 1407 (2018), *id*. The doctrine functions to limit the role of federal courts in accordance with the separation of powers, which was first recognized in *Marbury v. Madison. Baker v. Carr*, 369 U.S. 186, 210 (1962); *Marbury v. Madison*, 5 U.S. 137, 170, (1803). But as the Court said in *Juliana,* this doctrine shall not be overstated, citing Alexis Tocqueviile's exerpt from Alexis de Tocqueviile, Democracy in America 400, "[t]here is hardly any political question in the United States that sooner or later does not turn into a judicial question." Juliana 217 F. Supp. 3d at 1235; 1 Alexis de Tocqueviile, *Democracy in America 440* (Liberty Fund 2012).

The signals of a potential non-justiciable political question were introduced in the 1962 Supreme Court case, *Baker v. Carr.* Any of the following, on its own, could show a political question:

[(1) A] textually demonstrable constitutional commitment of the issue to a coordinate political department; [(2)] a lack of judicially discoverable and manageable standards for resolving it; [(3)] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; [(4)] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; [(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. *Baker,* 369 U.S. at 210 (1962); *Juliana* 217 F. Supp. 3d at 1236. The underlying question is whether or not "the question is one that can properly be decided by the judiciary." *Juliana* 217 F. Supp. 3d at 1236; *Alperin v. Vatican Bank*, 410 F.3d 532, 544 (9th Cir. 2005). Determining whether there is a political question which the court should avoid, requires a balancing of interests. *Loving v. United States*, 517 U.S. 748, 756, 116 S.Ct. 1737, 135 L.Ed.2d 36 (1996); *Juliana* 217 F. Supp. 3d at 1236. The separation of powers, prohibits one branch of government from intruding into the scope of another branch's duties. *Marbury*, 5 U.S. at 170 (1803). The duty of Congress is to enact legislation and the duty of federal courts is to decide the controversies before them. *Juliana* 217 F. Supp. 3d at 1236.

The mere fact that a question before the court "raises an issue of great importance to the political branches" does not in and of itself require a court to abstain from answering. *U.S. Dep't of Commerce v. Montana*, 503 U.S. 442, 458 (1992); *Juliana* 217 F. Supp. 3d at 1236.

It is only appropriate for a court to dismiss based on a political question when one of the Baker factors is "inextricable" from the case. *Juliana* 217 F. Supp. 3d at 1236; *Baker,* 369 U.S. at 217, 82 S.Ct. 691. Courts have heard and made groundbreaking decisions on several inherently political cases. See *Juliana* 217 F. Supp. 3d at 1236. In *Jewel v. Nat'l Sec. Agency*, the controversy was over the alleged warrantless eavesdropping on residential telephone customers following the September 11, 2001 attacks. *Juliana* 217 F. Supp. 3d at 1236; Jewel v. Nat'l Sec. Agency, 673 F.3d 902, 912 (9th Cir. 2011). In *Chiles v. Thornburgh*, Plaintiffs challenged the operation of a federal facility where aliens were detained. *Juliana* 217 F. Supp. 3d at 1236; *Chiles v. Thornburgh*, 865 F.2d 1197, 1216 (11th Cir. 1989). The court determined standing issues and explicitly stated that the issues were not non-justiciable political questions. *Id.* And *Planned Parenthood Fed'n of Am, Inc. v. Agency for Int'l Dev*, involved a challenge to the lawfulness of the insertion into family planning grants a clause that precluded assistance from foreign nongovernmental organizations that perform or promote abortions. *Juliana* 217 F. Supp. 3d at 1236; *Planned Parenthood Fed'n of Am, Inc. v. Agency for Int'l Dev*., 838 F.2d 649, 656 (2d Cir. 1988). There again, the Court explicitly determined that the issue was not a nonjusticiable political question. *Planned Parenthood Fed'n of Am, Inc.*, 838 F.2d 649, 656 (2d Cir. 1988).

Neither Appellant's Alien Tort Statute claim or Public Trust claim are non-justiciable political questions. Public trust refers to the principle that the government cannot fail to undertake its core duties. *Juliana* 217 F. Supp. 3d at 1252. The Public Trust claims by Appellants in this case and in *Juliana*, come from the application of the public trust doctrine to essential natural resources. *Id*. "With respect to these core resources, the sovereign's public trust obligations prevent it from 'depriving a future legislature of the natural resources necessary to

provide for the well-being and survival of its citizens.' *Id*.; Br. of Amici Curiae Global Catholic Climate Movement and Leadership Council of Women Religious at 3 (footnote omitted) (doc. 51–1). The United State asserts that these claims boil down to questions of environmental policy suited to be answered in the legislature. In re ODIN Appeal No. 18-000123 at 1 (2018). Though environmental issues are political in that it is "motivated partisan and sectional debate during important portions of our history," this on its own does not preclude a Court from hearing cases relating to the area. *U.S. Dep't of Commerce v. Montana*, 503 U.S. 442, 458 (1992); *Juliana* 217 F. Supp. 3d at 1236. None of the *Baker* factors is "inextricable" from the case. *Baker*, 369 U.S. at 210 (1962); *Juliana* 217 F. Supp. 3d at 1236. The "textual commitment" from the first *Baker* factor has been found in only a few cases. *Juliana* 1237. The Court identified a textual commitment in *Nixon v. United States*, where the Senate process for taking evidence in an impeachment trial was challenged. *Nixon v. United States*, 506 U.S. 224, 226 (1993). The Court found this claim non-justiciable because the Constitution expressly grants the Senate "the sole Power to try all Impeachments." *Id*. at 229, 113 S.Ct. 732 (quoting U.S. Const, art. I, § 3, cl. 6). Here, there is no such provision requiring environmental policy issues to be determined exclusively by the legislature. As the *Juliana* Court provided, the Constitution does not mention environmental policy, atmospheric emissions, or global warming. *Juliana*, 217 F. Supp. 3d at 1237.

The second and third *Baker* factors consider issues which the court lacks the requisite competence to resolve an issue. *Juliana* 217 F. Supp. 3d at 1238. Like the plaintiffs in *Juliana*, Appellants have not asked the Court to perform any high-level science to find the optimal level of emissions. *Id*; In re ODIN Appeal No. 18-000123 (2018). Rather, the Court is asked to determine, whether the conduct of the United States and Hexon constitutes a violation of the Law

of Nations, such that injunctive relief and damages are available for Appellants. In re ODIN Appeal No. 18-000123 (2018). The relevant question for identifying a political question with the second and third *Baker* factors is, whether "a legal framework exists by which courts can evaluate . . . claims in a reasoned manner." *Juliana* 217 F. Supp. 3d at 1239; *Alperin*, 410 F.3d at 552, 555. Relevant case law and applicable legal principals exist relating to Appellants' Law of Nations claims. Therefore, the Court is capable of using a legal framework to come to a conclusion.

A non-justiciable legal question cannot be found from the final three factors. *See Juliana* 217 F. Supp. 3d at 1240. These factors identify situations in which it would not be prudent for a court to resolve an issue. *Juliana* 217 F. Supp. 3d at 1240; *Zivotofsky ex rel. Zivotofsky v. Kerry*, 566 U.S. 189, 204 (2012). Such circumstances are rare. *Zivotofsky*, 566 U.S. at 204.

The fourth factor may apply in a situation where "judicial adjudication of a claim would be wholly incompatible with foreign-relations decisions made by one of the political branches." *Juliana* 217 F. Supp. 3d at 1240. Given the United States' expressed intent to reduce/mitigate climate change, this factor is not applicable. See id. Nor are the last two. *See id.* There is no "unusual need for unquestioning adherence to a political decision already made," nor is there "potentiality of embarrassment from multifarious pronouncements by various departments on one question. See *Baker*, 369 U.S. at 217; *Juliana* 217 F. Supp. 3d at 1241. Moreover, the decision to refrain from resolution because of a political question has been called one of the "gravest and most delicate duties that this Court is called on to perform." *Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (Holmes, J., concurring). Thus, an analysis of the *Bake*r factors does not provide any distinguishing considerations between the case at hand and other cases of great importance that this court has resolved, such as questions about the right to marry and the right to

an abortion. As the Court said in *Cohens v. Virginia*, "Questions may occur which we would gladly avoid; but we cannot avoid them. All we can do is, to exercise our best judgment, and conscientiously to perform our duty." *Cohens v. Virginia*, 6 Wheat. 264, 404, 5 L.Ed. 257 (1821); *Zivotofsky ex rel. Zivotofsky v. Kerry*, 566 U.S. 189, 205.

In People of State of *California v. General Motors Corp*., the Court found the issue of common law nuisance was non-justiciable by virtue of the third Baker factor because there were "initial global warming policy determinations that must be made by the elected branches prior to the proper adjudication of Appellant's federal common law nuisance claim." *People of State of California v. Gen. Motors Corp.*, No. C06-05755 MJJ, 2007 WL 2726871, at *6 (N.D. Cal. Sept. 17, 2007); *Baker*, 369 U.S. at 217. The Court in *American Electric Power Co. v. Connecticut*, came to the same conclusion when it rejected a similar global warming nuisance claim. 406 F.Supp.2d 265, 274 (S.D.N.Y.2005). In AEP, the Court referenced "the statements from Congress and the Executive on the issue of global climate change in general and their specific refusal to impose the limits on carbon dioxide emissions Appellants [sought] to impose by judicial fiat and asserted that the statements "confirm[ed] the making the 'initial policy determination[s]'"addressing global climate change is an undertaking for the political branches. *Id.* at. 274. However, the actions and statements by the legislative and executive branch in past decades has demonstrated an interest in reducing and mitigating damage from greenhouse gas emissions. In re ODIN Appeal No. 18-000123 at 5–7 (2018). Thus, this Court should not follow the line of reasoning from either *People of State of California* or *AEP* to find a non-justiciable issue with either the Alien Tort or public trust claims.

In *People of State of California*, the Court also identified a textually demonstrable constitutional commitment in the plaintiff's claim, which weighs in favor of the Court finding a

non-justiciable political question in accordance with *Baker*. *People of State of California* No. C06-05755 MJJ, 2007 WL 2726871, at 6; *Baker*, 369 U.S. at 217. The Court found that the Commerce Clause, Article 1, Section 8, Clause 3 of the United States Constitution, gave Congress the power to regulate commerce with foreign Nations and the States. *People of State of California No.* C06-05755 MJJ, 2007 WL 2726871, at 13. And in doing so, excluded issues of commerce from the courts. *People of State of California No*. C06-05755 MJJ, 2007 WL 2726871, at 13. Moreover, the Court also found that the issues of foreign policy implicated by the plaintiff's claim made the issue non-justiciable since the Executive and Legislative branches only were empowered to regulate foreign relations. *Id.* But this construction of the first Baker factor is too narrow, and should theoretically have excluded from the Court some of the most important cases to be presided over. If an issue is really non-justiciable just because it implicates the Commerce Clause, the Court should have never heard *Katzenback v. McClung,* which upheld the Civil Rights Act of 1964 prohibition of segregation in schools and public places. 379 U.S. 294 (1964). If the highest court in the land is precluded from hearing cases like that, what is its role? This Court should not follow the exclusionary construction adopted by *People of State of California* and *AEP*, and should find that the Alien Tort and Public Trust claims are not non-justiciable issues. Additionally, the Court should affirm the District Court's dismissal for failure to state a claim for relief. See *id*.

CONCLUSION

For the foregoing reasons we respectfully ask the Court to AFFIRM the judgement of the District Court of the Union Islands.