Team #25

Docket No. CA. No. 18-000123

UNITED STATES COURT OF APPEALS FOR THE TWELFTH CIRCUIT

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

v.

HEXONGLOBAL CORPORATION,
Appellee,

and

THE UNITED STATES OF AMERICA,
Appellee

On Appeal from the United States District Court for New Union Island, NO. 66-CV-2018

BRIEF FOR APPELLEE, HEXONGLOBAL CORPORATION

Oral Argument Requested

Attorneys for the Appellee,
HexonGlobal Corporation

TABLE OF CONTENTS

TABLE OF AUTHORITIES ..... **III**

JURISDICTIONAL STATEMENT **1**

STATEMENT OF THE ISSUES **1**

STATEMENT OF THE CASE **2**

I. FACTS 2

II. PROCEDURAL HISTORY 4

SUMMARY OF THE ARGUMENT **4**

ARGUMENT **7**

I. PLAINTIFFS' CLAIMS UNDER THE ALIEN TORT STATUTE AND THE PUBLIC TRUST DOCTRINE DO NOT PRESENT NON-JUSTICIABLE POLITICAL QUESTIONS. 7

A. Alien Tort Statute claims are regularly litigated and are not political questions. *9*

B. Questions of environmental law brought pursuant to the public trust doctrine are justiciable. *9*

II. PLAINTIFFS CANNOT SUE HEXONGLOBAL, A DOMESTIC CORPORATION, UNDER THE ALIEN TORT STATUTE DUE TO THE STATUTE'S NARROW SCOPE AND SEPARATIONS OF POWERS CONCERNS. 12

A. The Supreme Court has significantly narrowed the scope of the ATS and therefore the ATS does not give rise to a cause of action against domestic corporations. *12*

B. Allowing a domestic corporation to be sued under the ATS would violate the doctrine of separation of powers and would be inconsistent with the purpose of the ATS. *15*

III. THE *TRAIL SMELTER* PRINCIPLE IS NOT A UNIVERSALLY ACCEPTED PRINCIPLE OF CUSTOMARY INTERNATIONAL LAW AND THEREFORE IS NOT ENFORCEABLE UNDER THE ALIEN TORT STATUTE. 17

A. The Trail Smelter Principle is not customary international law because it is not sufficiently universal. *18*

B. The Trail Smelter Principle is not customary international law because it is not sufficiently specific. *19*

C. The Trail Smelter Principle is not customary international law because it is not sufficiently obligatory. *20*

IV. EVEN IF THE *TRAIL SMELTER* PRINCIPLE IS CUSTOMARY INTERNATIONAL LAW, IT DOES NOT IMPOSE ENFORCEABLE OBLIGATIONS ON NON-GOVERNMENT ACTORS. 21

A. International law is only enforceable upon consent, and corporations do not consent to be parties to international environmental agreements. *21*

B. State sovereignty dictates that nations have the independent authority to control what occurs within their territories, including the extraction and use of natural resources. *22*

V. CLIMATE CHANGE CLAIMS BROUGHT PURSUANT TO THE *TRAIL SMELTER* PRINCIPLE HAVE BEEN DISPLACED BY GREENHOUSE GAS REGULATION UNDER THE CLEAN AIR ACT. 24

A. Courts should apply the Milwaukee v. Illinois displacement doctrine to international tort claims because Congress has approved judicially-created tort remedies for violations of international law. *24*

B. Courts should bar application of the Trail Smelter Principle to climate change claims because the Clean Air Act contains a means for plaintiffs to seek the same relief. *25*

VI. THE PRODUCTION, SALE, AND BURNING OF FOSSIL FUELS HAS NOT CAUSED THE UNITED STATES TO VIOLATE FIFTH AMENDMENT SUBSTANTIVE DUE PROCESS PROTECTIONS 27

A. Parties cannot establish that an alleged right to a protected environment under the public trust doctrine is a fundamental right granted constitutional protection. *27*

B. There is no substantive due process cause of action against United States Government for alleged failure to protect the global atmospheric climate system from disruption. *29*

CONCLUSION 35

TABLE OF AUTHORITIES

CASES

Al Shimari v. CACI Premier Tech., Inc., 840 F.3d at 147 (4th Cir. 2016)……..9

Alperin v. Vatican Bank, 410 F.3d 532 (9th Cir. 2005)…….7, 8, 9, 10

Am. Elec. Power Co., Inc. v. Connecticut, 564 U.S. 410 (2011)……...10, 24, 25

Amlon Metals, Inc. v. FMC Corp., 775 F. Supp. 668 (S.D.N.Y. 1991)…….....20

Baker v. Carr, 369 U.S. 186 (1962)……..5, 7, 12

Beanal v. Freeport-McMoran, Inc., 197 F.3d 161 (5th Cir. 1999)……..12, 19

Campbell v. Wash. Dep't of Soc. & Health Servs., 671 F.3d 837 (9th Cir. 2011)…….33

Connecticut v. Am. Elec. Power Co., Inc., 582 F.3d 309 (2d Cir. 2009)……...10

Corrie v. Caterpillar, Inc., 503 F.3d 974 (9th Cir. 2007)……7

DeShaney v. Winnebago Cty. Dep't of Soc. Services, 489 U.S. 189 (1989)……..28, 30, 31

Doe I v. Nestle USA, Inc., 766 F.3d 1013 (9th Cir. 2014)……...17, 18

Flomo v. Firestone Nat. Rubber Co., LLC, 643 F.3d 1013 (7th Cir. 2011)……...13

Flores v. S. Peru Copper Corp., 414 F.3d 233 (2d Cir. 2003)……20, 21

Hua Chen v. Honghui Shi, No. 09 Civ. 8920, 2013 WL 396375 (S.D.N.Y. 2013)……...14

Japan Whaling Ass'n v. American Cetacean Soc'y, 478 U.S. 221 (1986)……..8

Jesner v. Arab Bank, PLC, 138 S. Ct. 1386 (2018)……...12, 14, 15

Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995)……9

Kennedy v. City of Ridgefield, 439 F.3d 1055 (9th Cir. 2006)……..33

Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108 (2013)……...12, 13, 14, 17, 18, 25

Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111 (2d Cir.2010)……..13, 17, 18

Korematsu v. United States, 323 U.S. 214 (1944)…….30

L.W. v. Grubbs, 974 F.2d 119 (9th Cir. 1992)…….31, 32

Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871 (1990)……..34

Massachusetts v. EPA, 549 U.S. 497 (2007)……...11, 26

McDonald v. City of Chicago, 561 U.S. 742 (2010)……..28

Milwaukee v. Illinois, 451 U.S. 304 (1981)…….6, 23, 24

Native Vill. of Kivalina v. ExxonMobil Corp., 696 F.3d 849 (9th Cir. 2012)……10, 11, 27

Pauluk v. Savage, 836 F.3d 1117 (9th Cir. 2016)……33, 34

Penilla v. City of Huntington Park, 115 F.3d 707 (9th Cir. 1997)……..33, 34

Reno v. Flores, 507 U.S. 292 (1993)…….29

Sarei v. Rio Tinto, PLC, 550 F.3d 822 (9th Cir. 2011)……..12, 13, 14

Shively v. Bowlby, 152 U.S. 1 (1894)……29

Sosa v. Alvarez-Machain, 542 U.S. 692 (2004)……...12, 15, 16, 25

United States v. Juliana, 217 F.Supp.3d 1224 (D. Or. 2016)……..8, 9, 10, 11, 28, 29, 33, 34

Vieth v. Jubelirer, 541 U.S. 267 (2004)……...7

Vietnam Ass'n for Victims of Agent Orange v. Dow Chemicals, 517 F.3d 104 (2d Cir. 2008)…...9

Washington v. Glucksberg, 521 U.S. 702 (1997)……..28

Witt v. Dep't of the Air Force, 527 F.3d 806 (9th Cir. 2008)……29

Zivotofsky ex rel. Zivotofsky v. Clinton, 566 U.S. 189 (2012)……...8, 11

STATUTES

5 U.S.C. § 8912……1

28 U.S.C. § 1291……..1

28 U.S.C. § 1331……..1

28 U.S.C. § 1350……..5, 9

28 U.S.C. § 2107……..1

42 U.S.C. 7401 *et seq*……...6

42 U.S.C. § 7411……26

Pub. L. No. 102-256, H.R. 2096, 106 Stat. 73 (1991)……...16

OTHER AUTHORITIES

74 Fed. Reg. 66,496……...32

75 Fed. Reg. 25,324……...32

75 Fed. Reg. 31,514……...32

80 Fed. Reg. 64,662……...32

83 Fed. Reg. 42,986……3

83 Fed. Reg. 44,746……3

138 Cong. Rec. 8071……..16

CHRIS WOLD, ET AL., CLIMATE CHANGE AND THE LAW 168 (LexisNexis, 2d ed. 2013)…….21, 22

Int'l B. Ass'n, Report of the Task Force on Extraterritorial Jurisdiction 124 (2009)…….18

Trail Smelter Arbitration, 3 U.N.R.I.A.A. 1907 (1941)……..17, 21, 22, 24

U.S. Const. amend V……..27, 28, 30

United Nations Framework Convention on Climate Change, 1771 U.N.T.S. 107, May 9, 1992……..3, 21, 23

JURISDICTIONAL STATEMENT

This Court has jurisdiction to review the decision of the United States District Court for New Union Island pursuant to 28 U.S.C. § 1291. The district court had jurisdiction pursuant to 5 U.S.C. § 8912 and 28 U.S.C. § 1331, and the district court's final order disposing of all claims was entered on August 15, 2018, in Civ. 66-208. R. at 11[1]. The Organization of Disappearing Islands, Ms. Apa Mana, and Mr. Noah Flood filed a timely notice of appeal on September 1, 2018, pursuant to 28 U.S.C. § 2107. *Id*. at 1.

STATEMENT OF THE ISSUES

1. Do Plaintiffs' law of nations claim under the ATS and public trust claim present a non-justiciable political question?
2. Can Ms. Mana bring an Alien Tort Statute (ATS) claim against a domestic corporation?
3. Is the *Trail Smelter* Principle a recognized principle of customary international law enforceable as the "Law of Nations" under the ATS?
4. Assuming the *Trail Smelter* Principle is customary international law, does it impose obligations enforceable against non-governmental actors?
5. If otherwise enforceable, is the *Trail Smelter* Principle displaced by the Clean Air Act?
6. 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?

[1] Citations to the record (R.) refer to the record and order of the court below, NELMCC Problem 2019.

STATEMENT OF THE CASE

I. FACTS

HexonGlobal is an American company that provides energy to nations around the world through its sale of oil and gas products. *See* R. at 5. To achieve this, HexonGlobal operates oil refineries in many locations, including on the American-possessed New Union Islands. *See id*. Appellant Ms. Apa Mana is an alien national of the island nation of A'Na Atu and is suing HexonGlobal in her foreign capacity under the Alien Tort Statute (ATS). *See id*. at 3. Appellant Mr. Noah Flood is a U.S. Citizen and resident of the New Union Islands. *See id*. Both individual plaintiffs are members of the non-profit Appellant, Organization of Disappearing Island Nations (ODIN), which works to protect island nations threatened by sea level rise. *See id*. Appellants collectively allege that HexonGlobal's energy business is operating in violation of their legal rights, and that HexonGlobal's refinery operations have directly caused damage to Appellants' homes, drinking water, and local seafood supply due to the impact of greenhouse gases (GHGs) on sea level rise. *See id*.

HexonGlobal and its corporate predecessors are responsible for only six percent of global historical GHG emissions. *See id*. at 5. Additionally, fossil fuel sales by HexonGlobal constitute a mere nine percent of global sales of all fossil fuels. *See id*. Within the United States, sixty-eight percent of emissions are produced by companies that are not HexonGlobal. *See id*. There is no dispute that fossil fuels contribute to climate change, but HexonGlobal is responsible for a small portion of global emissions and it is impossible to prove that emissions by HexonGlobal caused the sea level rise that lead to Ms. Mana and Mr. Flood's injuries.

HexonGlobal has always remained in strict compliance with all relevant federal and state law, s*ee id*. at 6, although the United States Government has adopted little legislation attempting to prevent or mitigate harm from climate change. *See id*. Past administrations have ratified the United Nations Framework Convention on Climate Change (UNFCCC), which strives to reduce

GHG emissions worldwide. *See id*. (citing UN Framework Convention on Climate Change, May 9, 1992, 1771 U.N.T.S. 107, 169 [hereinafter UNFCCC]). However, GHG emissions have continued to increase worldwide and President Trump has announced his intention to withdraw from UNFCCC at the earliest opportunity allowed by its terms. *See id*. at 7. Further, the United States Environmental Protection Agency (EPA) has proposed regulations freezing emissions reductions under the GHG based fuel economy standards and repealing the Clean Power Plan. *See id*. (citing The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021–2026 Passenger Cars and Light Trucks, 83 Fed. Reg. 42,986 (proposed Aug. 24 2018) (to be codified at 49 C.F.R. pts. 523, 531, 533, 536, & 537, and 40 C.F.R. pts. 85-86); Clean Power Plan. 83 Fed. Reg. 44,746 (Aug. 31, 2018))). Despite the inconsistencies between presidential administrations in addressing harm caused by GHGs, HexonGlobal has operated in compliance with all relevant laws and remains committed to providing energy to its clients around the world.

The federal government has continued to promote the production of fossil fuels through various agency policies and programs. *See id*. at 8-9. These programs include tax subsidies for fossil fuel production; leasing of public lands and seas under its jurisdiction for coal, oil, and gas production; the creation of the interstate highway system; and the development of fossil fuel power plants by public agencies such as the Tennessee Valley Authority. *See id*. HexonGlobal has furthered the goals of the federal government through its operations worldwide. With a confusing international and domestic framework regarding GHG emissions, it has been impracticable for HexonGlobal to adopt emissions control standards for its production processes.

Appellants collectively argue that A'Na Atu and the New Union Islands, which are located less than one meter above sea level in the East Sea, will be completely uninhabitable due to rising seas by the end of this century unless action is taken to limit emissions of GHGs. *See id*. at 3. This is an unfortunate result of a lack of governmental oversight and international

agreement on emissions reductions. Yet it is impossible to infer from Appellants' complaint that HexonGlobal caused this damage. Further, assuming *arguendo* that the damage was directly caused by HexonGlobal, HexonGlobal has operated within the bounds of federal law and continues to further the goals of the presidential administration.

II. PROCEDURAL HISTORY

Plaintiffs ODIN, Ms. Apa Mana, and Mr. Noah Flood brought this action against HexonGlobal Corporation and the United States. *See id*. at 3. Ms. Mana asserts a claim against HexonGlobal under the ATS that HexonGlobal's fossil fuel related business activities constitute a violation of the Law of Nations and seeks damages and injunctive relief. *See id*. Mr. Flood asserts a constitutional claim against the United States Government, asserting violations of public trust obligations to protect the global climate-ecosystem incorporated through the Due Process Clause of the Fifth Amendment to the Constitution. *See id*.

The United States District Court for New Union Island issued an order to dismiss on August 15, 2018, in Civ. 66-2018. *See id*. at 11. Plaintiffs filed a Notice of Appeal, taking issue with the district court's holding that the *Trail Smelter* Principle under the international Law of Nations is displaced by greenhouse gas regulation under the Clean Air Act and that the district court did not recognize a Due Process-based public trust right to governmental protection from atmospheric climate change. *See id*. The parties have not disputed standing, and no party raises the issue of standing on appeal. *See id*.

SUMMARY OF THE ARGUMENT

HexonGlobal Corporation (HexonGlobal) respectfully requests that this court uphold the United States District Court for New Union Island dismissal of this case for five reasons. First, although Plaintiffs' ATS claims do not present non-justiciable political questions, Plaintiffs cannot bring an ATS claim against a domestic corporation. Second, the *Trail Smelter* Principle,

which Plaintiffs cite to support their claims, is not a recognized principle of customary international law. Third, even if the *Trail Smelter* Principle were customary international law, the principle does not impose enforceable obligations upon non-governmental actors. Fourth, climate change claims brought pursuant to the *Trail Smelter* Principle are displaced by the Clean Air Act. Fifth and finally, a Fifth Amendment substantive due process claim cannot be brought against the United States Government for alleged failure to protect the global climate system from disruption.

Petitioners' ATS claims do not create a non-justiciable political question. Courts have regularly refused to dispose of ATS claims on the grounds that these claims create non-justiciable political questions because the political question doctrine is extremely narrow in scope. Additionally, public trust doctrine claims do not present non-justiciable political questions. The factors listed in *Baker v. Carr*, 369 U.S. 186, 217 (1962), when applied to this case, do not indicate the presence of a political question. Therefore, this Court can fairly and properly decide the issues presented.

Domestic corporations cannot be sued under the ATS, 28 U.S.C. § 1350, because suits against domestic corporations do not fall within the narrow scope of the ATS. The Supreme Court has refused to extend corporate liability under the ATS to alleged violations committed abroad by a foreign corporation that operated domestically. Therefore, domestic corporations cannot be held liable under the ATS. Furthermore, domestic corporations cannot be sued under the ATS because doing so would create separation of powers issues as articulated by the Supreme Court.

The *Trail Smelter* Principle is not customary international law (custom) because an analysis of international conventions, international customs, the general principles of law recognized by civilized nations, judicial decisions, and the works of scholar concludes that it is

neither sufficiently universal, nor sufficiently specific, nor sufficiently obligatory. Therefore, the *Trail Smelter* principle is not enforceable as custom under the ATS.

Even if the *Trail Smelter* principle is international custom, it does not impose enforceable obligations on non-government actors. General principles of international law provide that international agreements are enforceable against a party only when that party or nation state has consented to be bound, and corporations are not signatories to international climate change agreements. Additionally, the international principle of state sovereignty dictates that nations have the independent authority to control what occurs within its territory, including the extraction and use of its natural resources. As such, imposing obligations upon corporations or other private actors within another country's jurisdiction would constitute a violation of national sovereignty.

Any action brought by Plaintiffs under the ATS is displaced by the Clean Air Act (CAA), 42 U.S.C. §§ 7401 *et seq*., because judicially-created tort remedies for violations of international law are subject to the *Milwaukee v. Illinois* displacement doctrine. *See Milwaukee v. Illinois,* 451 U.S. 304, 333 (1981). Precedent bars application of a federal common law where the CAA contains a means for plaintiffs to seek the same relief. Therefore, in the present case, the *Trail Smelter* Principle is displaced by the CAA, because the CAA contains a means for Plaintiffs to seek damages for greenhouse gas emissions.

Finally, there can be no Fifth Amendment substantive due process cause of action brought against the United States Government due to the production, sale, or burning of fossil fuels. Parties cannot establish that an alleged right to a protected environment under the public trust doctrine is a fundamental right granted constitutional protection. Additionally, there is no Fifth Amendment cause of action against the United States Government for alleged failure to protect the global atmospheric climate system from disruption for four reasons. The actions of

the United States are narrowly tailored for compelling state interests, the United States did not create the climate change risks plaintiffs allege; the United States did not take affirmative action to place Plaintiffs in danger; and, even if the United States had placed Plaintiffs in danger, the government is afforded qualified immunity because the government did not violate any clearly established rights of which a reasonable person should have known.

ARGUMENT

I. PLAINTIFFS' CLAIMS UNDER THE ALIEN TORT STATUTE AND THE PUBLIC TRUST DOCTRINE DO NOT PRESENT NON-JUSTICIABLE POLITICAL QUESTIONS.

Plaintiffs' claims under the ATS and the public trust doctrine do not present non-justiciable political questions for two reasons. First, the political question doctrine is narrowly construed. Second, courts have allowed cases brought under both the ATS and public trust doctrine to be litigated without determining that any political question issues exist.

Federal courts lack subject matter jurisdiction to decide political questions, *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 982 (9th Cir. 2007), and the Supreme Court has explicitly articulated the test for a political question. *Baker v. Carr*, 369 U.S. 186, 217 (1962). There are six elements of a case that, if present, indicate the existence of a political question:

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

Id. These elements are listed in "descending order of both importance and certainty." *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004). The common underlying inquiry is whether the question is one that can properly be decided by the judiciary. *Alperin v. Vatican Bank*, 410 F.3d 532, 544

(9th Cir. 2005) *cert. denied*, 546 U.S. 1137 (2006). A case which merely addresses politics or foreign relations, however, is not automatically dismissed as a non-justiciable political question. *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 229 (1986). Rather, the political question doctrine excludes cases that require policy choices and value determinations explicitly delegated by the Constitution to another branch of the federal government. *Id.* at 229-30. The Supreme Court has repeatedly held that courts have the authority to interpret treaties and legislation. *Id.* at 230 (internal citations omitted). As the present case does not require the Court to choose policy, this Court has authority to examine these claims.

The decision whether to deny judicial relief based on the presence of a political question should never be taken lightly as courts are obligated to decide "cases and controversies properly presented to them." *Alperin*, 410 F.3d at 539 (internal citations omitted). Even when an issue is politically important, however, it may be decided by the judiciary unless the question is "inextricable" from one of the Supreme Court's explicit considerations in *Baker*. *United States v. Juliana*, 217 F.Supp.3d 1224, 1236 (D. Or. 2016).

Neither the ATS nor the public trust doctrine claims in this case are inextricable from any of the factors outlined in *Baker*. The first, fourth, fifth and sixth *Baker* factors relate to judicial deference to other branches of government that are constitutionally committed to resolving the issue or have already declared a position on the issue. Neither scenario is applicable in the present case. The second and third *Baker* factors examine the ability of the judiciary to properly adjudicate the issue. *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 203 (2012) (Sotomayor, J., concurring). None of the factors dictated under *Baker* weigh in favor of Ms. Mana's ATS claims or Mr. Flood's public trust doctrine claims being non-justiciable political questions.

A. Alien Tort Statute claims are regularly litigated and are not political questions.

Courts often refuse to recognize ATS claims as non-justiciable under the political question doctrine. *Vietnam Ass'n for Victims of Agent Orange v. Dow Chemicals*, 517 F.3d 104, 107 (2d Cir. 2008) (affirming the district court's decision to deny a motion for summary judgment on the basis of an ATS claim's non-justiciability as a political question); *Kadic v. Karadzic*, 70 F.3d 232, 249 (2d Cir. 1995) (holding that actions under the ATS were not precluded by the political question doctrine due to the doctrine's narrow construction). For example, a government contractor's alleged statutory violation during a military operation was subject to judicial review despite the military being a function of the executive branch. *Al Shimari v. CACI Premier Tech., Inc.*, 840 F.3d at 147, 159 (4th Cir. 2016).

The ATS, by its nature, addresses issues of foreign policy. 28 U.S.C. §1350. However, foreign policy implications alone do not render a case non-justiciable under the political question doctrine. *Alperin*, 410 F.3d 532, 547 (9th Cir. 2005). Therefore, ATS claims should not be erroneously assumed to be non-justiciable simply because they implicate foreign policy. Additionally, there is no provision of the U.S. Constitution that explicitly or implicitly grants the executive or legislative branches of government the exclusive authority to determine questions of air pollution or global warming.

B. Questions of environmental law brought pursuant to the public trust doctrine are justiciable.

Despite being politically significant, questions of environmental law and climate change policy brought under the public trust doctrine do not fall within the narrow criteria that designates an issue as a political question. *See Juliana v. U.S.*, 217 F.Supp.3d 1224,1224 (D. Or. 2016) (holding that a public trust doctrine claim against fossil fuel industries for emissions of greenhouse gases did not give rise to a non-justiciable political question). In regard to the first *Baker* factor, this Court will not infringe upon the authority of other governmental branches by

adjudicating this case. However, climate change policy is not limited to one branch of government. *Id.* at 1237-38. Additionally, climate change policy is "not *inherently,* or even primarily, a foreign policy decision;" therefore, the first *Baker* factor does not apply to the present case. *Id.* (emphasis in original).

The second and third *Baker* factors are also inapplicable in the present case. The second *Baker* factor is not intended to deter courts from handling complex litigation or large cases, but rather to ensure that courts are able to reach a decision that is "principled, rational, and based upon reasoned distinctions." *Alperin*, 410 F.3d at 552. The second *Baker* factor should not be applied even when the precise effect of greenhouse gases is impossible to determine. *Connecticut v. Am. Elec. Power Co. Inc.*, 582 F.3d 309 (2d Cir.2009), *rev'd on other grounds,* 564 U.S. 410 (2011). In determining that a public nuisance claim brought against various oil companies over the impact of GHGs on Arctic sea ice was not judicially manageable under the second *Baker* factor, a district court noted that claims involving "a discrete number of "polluters" identified as causing a specific injury to a specific area" were, in fact, justiciable. *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F.Supp.2d 863, 875 *aff'd*, 696 F.3d 849 (9th Cir. 2012), *cert. denied* 133 S.Ct. 2390 (2013).

The present case is distinguishable from *Kivalina* for several reasons. Primarily, the present claims have been brought against one alleged polluter, HexonGlobal, and therefore the concerns outlined by the district court are inapplicable to this case. Absent the many polluters and vague injury present in *Kivalina,* the district court noted in its reasoning that a related case with a different set of facts may not present the same political question issues. *Kivalina*, 663 F.Supp.2d at 875. The present case falls within *Kivalina's* noted exception. Since many of the district court's concerns do not apply in the present case, it would be erroneous for this Court to find the holding in *Kivalina* relevant here. Additionally, the *Kivalina* case was heard in the

district court for the Central District of California and is therefore not binding upon this Twelfth Circuit Court of Appeals.

The third *Baker* factor barring adjudication is also inapplicable here. The court in *Kivalina* declared that a public nuisance claim—alleging harm from greenhouse gases—implicated a policy determination because adjudication of the claim would require a court to assess the best energy-producing option in light of past and present safety concerns. *Id.* at 874-75. However, the assessment dictated in *Kivalina* is not necessary for the present case. While this Court may be encouraged by Plaintiffs to select an agency or governmental branch to determine an appropriate emission-reduction policy, this Court would not be required to become an expert in GHG emissions or determine this policy itself. Simply requesting that a court "declare [that] the United States' current environmental policy [infringes upon appellant's] fundamental rights" and direct resulting agency action does not implicate the political question doctrine. *Juliana v. U.S.*, 217 F.Supp.3d 1224, 1239 (D. Or. 2016). Courts are well equipped to handle complex litigation and direct agency action, *see generally, Mass. v. EPA*, 549 U.S. 497 (2007) (holding that EPA is empowered to regulate greenhouse gas emissions), and therefore neither the second nor third *Baker* factors apply here.

The final three *Baker* factors rarely render a case non-justiciable. *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 203 (Sotomayor, J., concurring). However, these factors still weigh in favor of this case being heard. Because the relief requested by all appellants in the present case is congruent with the United States' ratified climate change goals, there is no chance of being disrespectful to coordinate branches of government by adjudicating this case. *Juliana*, 217 F.Supp.3d at 1241. The United States' commitment to international climate change treaties and emissions reductions goals do not render this case non-justiciable under the political question doctrine. *Id.* at 1240. Additionally, there is no evidence in the present case of "an

unusual need for unquestioning adherence to a political decision already made," or "a potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Baker v. Carr*, 369 U.S. 186, 217 (1962). The judiciary can fairly and justly decide this case. The political question doctrine is narrowly construed and this Court will not be in danger of violating separation of powers principles by allowing these claims to be adjudicated.

II. PLAINTIFFS CANNOT SUE HEXONGLOBAL, A DOMESTIC CORPORATION, UNDER THE ALIEN TORT STATUTE DUE TO THE STATUTE'S NARROW SCOPE AND SEPARATIONS OF POWERS CONCERNS.

Although Plaintiffs' claims are justiciable, Ms. Mana cannot sue HexonGlobal under the ATS. The ATS provides federal courts with subject matter jurisdiction when an alien brings a claim in tort alleging that a defendant violated the "law of nations" or a treaty of the United States. *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161, 163 (5th Cir. 1999). In the present case, Ms. Apa Mana's claims brought under the ATS are insufficient to give rise to an ATS cause of action for two reasons. First, the Supreme Court recently limited the scope of the ATS to exclude domestic corporations. Second, allowing lawsuits against domestic corporations under the ATS would violate the doctrine of separation of powers.

A. The Supreme Court has significantly narrowed the scope of the ATS and therefore the ATS does not give rise to a cause of action against domestic corporations.

The Supreme Court has decided cases under the ATS three times and has restricted the scope of the statute in each ruling. *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386 (2018); *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013); *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). The Court's 2004 decision in *Sosa v. Alvarez-Machain* allowed lawsuits to be brought under the ATS but clarified that such lawsuits are "subject to vigilant doorkeeping" due to potential separation of powers and foreign policy concerns. *Sosa*, 542 U.S. at 716. In adherence to this doctrine, many circuit courts have denied claims brought under the ATS when the petitioner has not exhausted legal remedies available within their own domicile. *See Sarei v. Rio*

Tinto, PLC, 550 F.3d 822, 824 (9th Cir. 2011) (denying ATS jurisdiction over a corporation's alleged environmental torts due to the violation's "weak nexus" to the United States). In *Sosa,* the Supreme Court held that Congress intended the ATS to apply only to a "modest set of actions alleging violations of the law of nations." *Id.* at 719. The Supreme Court urged federal district courts to exercise "judicial caution" in deciding whether to hear claims under the ATS at all. *Id.* at 727.

In 2013, the Supreme Court affirmed a Second Circuit holding that the ATS is not applicable to corporations and affirmed the limited nature of corporate liability under the ATS. *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir.2010) (hereinafter *Kiobel I*) *aff'd*, *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013) (hereinafter *Kiobel II*). The Supreme Court in *Kiobel II* further restricted the scope of the ATS to include "only claims that touch and concern the territory of the United States… with sufficient force[.]" *Kiobel II*, 569 U.S. at 124-25. *Kiobel II* resolved a circuit split when it held that the ATS fails to create jurisdiction to sue a domestic corporation when all of the alleged conduct took place outside of the United States. *Id.* at 126 (Kennedy, J., concurring). Prior to *Kiobel II*, the Seventh Circuit had held that corporations can be liable under the ATS. *Flomo v. Firestone Nat. Rubber Co.*, *LLC*, 643 F.3d 1013, 1015 (7th Cir. 2011). However, the Seventh Circuit's interpretation is now inconsistent with the settled legal principles dictated by the Supreme Court. *Kiobel II*, 569 U.S. 108 (2013). In fact, the Seventh Circuit erroneously listed several cases from other federal circuit courts to support its assertion that domestic corporations can be held liable under the ATS for alleged violations committed on foreign soil and cited *Kiobel* as the only federal circuit opinion conflicting with this principle. *Id.* Even if these cases were meritorious at the time, now that the Supreme Court has affirmed the Second Circuit's holding in *Kiobel,* the *Flomo* case and all other cases cited by the Seventh Circuit are inapplicable. Indeed, one of the holdings cited by the

Seventh Circuit has been explicitly vacated and remanded in light of the Supreme Court's *Kiobel* decision. *See Sarei*, 671 F.3d at 736 (holding a corporation liable under the ATS for environmental torts committed abroad) (vacated by the Supreme Court in light of *Kiobel II*, 569 U.S. 945 (2013)). *Flomo* itself has been abrogated by district courts within its own circuit. *Hua Chen v. Honghui Shi*, No. 09 Civ. 8920, 2013 WL 396375 at *6-7 (S.D.N.Y. 2013) (determining a lack of subject matter jurisdiction on plaintiff's ATS claims in light of the Supreme Court's decision in *Kiobel*). The Supreme Court has clearly overturned the principles described in *Flomo*, and therefore the Seventh Circuit's reasoning, and its analysis of the caselaw in other circuits, is unpersuasive in the present case. As such, *Flomo* should not be relied upon.

The Supreme Court again declined to extend corporate liability under the ATS to a foreign corporation in 2018. *See Jesner v. Arab Bank, PLC*, 138 S.Ct. 1386, 1390 (2018). In *Jesner*, the Court stated that it would be "inappropriate" for courts to apply this liability "absent further action from Congress." *Id.* (citing prior Supreme Court precedent for the principle that Congress should decide whether corporate defendants can be held liable under the ATS). The evolution of ATS jurisprudence has consistently shown that the ATS liability of domestic corporations is either nonexistent or limited to very narrow circumstances.

Courts have never applied the ATS to domestic corporations, and the Twelfth Circuit should decline to do so in the present case as it is analogous to the Supreme Court's ruling in *Jesner*. In *Jesner,* the Court declined to hold the New York branch of the Jordan-based Arab Bank liable for allegedly financing terror attacks in Israel, the West Bank, and the Gaza Strip. *Jesner*, 138 S.Ct. at 1388. In the present case, Ms. Mana alleges that HexonGlobal's oil refinery in the New Union Islands directly caused sea level rise that damaged her home in the New Union Islands. R. at 5. The limitations imposed on domestic corporate liability under the ATS in

Jesner should also apply to HexonGlobal because both cases involve lawsuits brought against a domestic branch of a corporation for violations that the corporation allegedly committed abroad.

The District Court for the District of New Union Island was correct in granting HexonGlobal's motion to dismiss for Ms. Mana's ATS claims. While the merits of Ms. Mana's ATS claim are not at issue here, this Court does not have jurisdiction to adjudicate this issue on the merits. Ms. Mana's dangerous assertion that the ATS provides this Court jurisdiction over a domestic corporation goes against Supreme Court precedent and has the potential for harmful foreign policy consequences that the Supreme Court has actively endeavored to avoid.

B. Allowing a domestic corporation to be sued under the ATS would violate the doctrine of separation of powers and would be inconsistent with the purpose of the ATS.

Permitting parties to bring ATS claims against domestic corporations would violate the doctrine of separation of powers. "Separation-of-powers concerns… apply with particular force in the context of the ATS, which implicates foreign-policy concerns that are the province of the political branches." *Jesner*, 138 S.Ct. at 1390. The Supreme Court has directed the judiciary to be particularly cautious in ensuring proper judicial discretion to the other branches of government, and has stated that the creation of causes of action outside of the eighteenth-century international norms dictated above should be left to the legislature. *Sosa*, 542 U.S. 692, 727 (2004). The Supreme Court has described the relevant eighteenth-century norms over which the ATS was intended to provide jurisdiction as piracy, violations of safety conduct standards, and offenses against ambassadors. Therefore, unless a domestic corporation has committed a violation of one of these aforementioned international norms, the corporation should not be held liable under the ATS. HexonGlobal has not committed any such violations.

The Supreme Court has also been "reluctant to infer intent to provide a private cause of action" for international conduct due to "possible collateral consequences" for the judiciary,

including a lack of necessary prosecutorial discretion. *Id.* Other statutes that provide relief for international conduct, such as the Torture Victim Protection Act, have explicit mandates establishing judicial authority to adjudicate specific violations of international law. *See generally*, Torture Victim Prevention Act, Pub. L. No. 102-256, H.R. 2092, 106 Stat. 73, pt. 1, 3 (1991) (providing a basis for federal claims of extrajudicial killing and torture). No such mandate exists in the ATS. Further, Congress has "expressly declined to give the federal courts the task of interpreting and applying international human rights law" on several occasions. *Sosa*, 542 U.S. at 728 (citing to 138 Cong. Rec. 8071 in which the Senate declared that substantive provisions of the International Covenant on Civil and Political Rights are not self-executing). Both Congress and the Supreme Court have declined several opportunities to hold domestic corporations liable under the ATS; this unwillingness should be heeded so as to not violate separation of powers principles.

Ms. Mana's claims under the ATS fail because Supreme Court precedent, Congressional intent and a concern for separation of powers clearly determine that the ATS does not provide jurisdiction over domestic corporations. While the issue before the Court does not address the merits of Ms. Mana's ATS claim, it is important to note that the Supreme Court has been unambiguous in its wariness of considering ATS claims due to the strong protentional for violations of the separation of powers doctrine. Should this Court find that domestic corporations can be held liable under the ATS, the Supreme Court has noted that the ATS was originally intended to provide jurisdiction over claims such as piracy, violations of safety conduct standards, and offenses against ambassadors—none of which are applicable in the present case. *See Sosa*, 542 U.S. at 732-33. Therefore, allowing this case to go forth on its merits would frustrate the efficiency of the judiciary by forcing the adjudication of a case in which the law is settled.

III. THE *TRAIL SMELTER* PRINCIPLE IS NOT A UNIVERSALLY ACCEPTED PRINCIPLE OF CUSTOMARY INTERNATIONAL LAW AND THEREFORE IS NOT ENFORCEABLE UNDER THE ALIEN TORT STATUTE.

The *Trail Smelter* Principle (*Trail Smelter*), 3 R.I.A.A. 1938, (1941), is not a universally accepted principle of "customary international law" (custom) and therefore is not enforceable under the ATS. The *Trail Smelter* adjudication was based on The Boundary Waters Treaty of 1909, an international treaty regarding the air pollution flowing across the boundary between the United States and Canada. *See Trail Smelter*, 3 U.N.R.I.A.A. at 1965. The United States alleged that Canada violated international legal principles because air pollution emissions from a smelter in Canada harmed agriculture in Washington. *Id*. A Special Arbitral Tribunal (Tribunal) ordered Canada to compensate the United States for past pollution damage and to minimize future damage relevant to the existing agreement. *Id*. The Tribunal held that emissions into the environment within the territory of one nation must not be allowed to cause substantial harms in the territory of other nations. *Id*. Despite suggesting a customary duty to prevent transboundary pollution, no other case held a state internationally responsible for causing transboundary harm in the many decades following this arbitration.

Custom, also called "law of nations," supplies the norms underlying ATS claims and consists of rules that States universally abide by, or accede to, out of a sense of legal obligation and mutual concern. *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 117 (2d Cir. 2010), *aff'd*, 569 U.S. 108 (2013); *Doe I v. Nestle USA, Inc.*, 766 F.3d 1013, 1019 (9th Cir. 2014) (explaining that custom includes only those standards, rules, or customs that (1) affect the relationship between states or between an individual and a foreign state, and (2) are used by those states for their common good or in dealings *inter se*), *cert. denied*, 136 S.Ct. 798 (2016). To determine the content of custom for purposes of a claim under the ATS, courts look

to the sources of law identified by the Statute of the International Court of Justice, which include international conventions, international customs, the general principles of law recognized by civilized nations, judicial decisions, and the work of scholars. *See Doe I v. Nestle USA, Inc.*, 766 F.3d at 1019. Courts also consult authorities that provide an authoritative expression of the views of the international community even if, strictly speaking, the authority is not meant to reflect customary international law. *Id*.

While addressing climate change may be a legal norm in civilized nations, that does not make a climate change-related law an international custom. *See Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 118 (2d Cir. 2010), *aff'd*, 569 U.S. 108 (2013) (finding that the fact that a legal norm is found in most or even all civilized nations does not make that norm a part of custom). The Court in the present case, therefore, must analyze international conventions, international customs, the general principles of law recognized by civilized nations, judicial decisions, and the work of scholars to determine whether the *Trail Smelter* Principle is sufficient to constitute custom. This Court should follow United States Federal Court precedent that states that principles similar to the *Trail Smelter* Principle are neither sufficiently universal, nor sufficiently specific, nor sufficiently obligatory.

A. The *Trail Smelter* Principle is not customary international law because it is not sufficiently universal.

Courts have routinely rejected environmental norms on the grounds that they lack sufficient universal approval among the international community. Typically, "universal approval" extends only to crimes that are so offensive that they are a threat to international peace and security, such as war crimes and genocide. *See* Int'l B. Ass'n, Report of the Task Force on Extraterritorial Jurisdiction 124 (2009), available at http://www.ibanet.org/Article/Detail.aspx?ArticleUid=597D4FCC-2589-499F-9D9B-0E392D045CD1p.68. Thus far, domestic courts have infrequently applied international

environmental norms, in contrast to human rights norms, which have often been the subject of litigation in U.S. courts. This suggests a big gap in the requirements for the universality of customary principles.

United States federal precedent also suggests a lack of universality in climate change-related principles. For example, in *Beanal v. Freeport-McMoran*, the plaintiffs asserted violations of international environmental law as a result of the defendant's copper mining operations. *Beanal v. Freeport-McMoran, Inc.*, 969 F. Supp. at 370 (delineating that to constitute customary international law, "the alleged violation must be definable, obligatory (rather than hortatory), and universally condemned"). The district court reviewed caselaw, the Restatement (Third) of Foreign Relations, and one of Phillip Sands' recent environmental treatises before rejecting the "Polluter Pays Principle," which is similar to the principle in question here. *Id*. In *Beanal*, the plaintiff's fatal error was failing to allege that the defendant violated a specific treaty provision. *Id*. Similarly, in the present case, Plaintiffs allege that the polluter should pay for its damage, but fail to allege that the defendant violated a specific treaty provision. *See* R. at 3. Therefore, the Court should find that because Plaintiffs did not "establish the existence of cognizable intentional tort," Plaintiffs have not proven that the *Trail Smelter* Principle constitutes custom. *See Beanal v. Freeport-McMoran, Inc.*, 969 F. Supp. at 383. The *Trail Smelter* Principle is not sufficiently universal in the present case because courts have not litigated it, and similar principles have been dismissed as not sufficiently universal.

B. The *Trail Smelter* Principle is not customary international law because it is not sufficiently specific.

Secondly, federal courts have consistently found that international environmental norms are not sufficiently specific to create a cause of action in federal court. Courts have taken issue with asserted norms because such norms do not specify which activities are prohibited. For example, in *Amlon Metals v. FMC*, a British importer of metal wastes for recycling brought an

action against its American supplier for its alleged mislabeling and illegal shipment of unusable solid wastes to the plaintiff's plant. *Amlon Metals, Inc. v. FMC Corp.*, 775 F. Supp. 668, 670 (S.D.N.Y. 1991). The district court rejected the plaintiffs' claim based on Principle Twenty-One of the Stockholm Declaration. *Id*. In the present case, plaintiffs may similarly rely on Principle Twenty-One. However, as in *Amlon Metals v. FMC*, the *Trail Smelter* Principle does not set forth any specific proscriptions; rather, it refers in a general sense to the responsibility of nations to ensure that activities within their jurisdiction do not cause damage to the environment beyond their borders. *See id*. ("Plaintiffs' reliance on the Stockholm Principles is misplaced, since those Principles do not set forth any specific proscriptions, but rather refer only in a general sense to the responsibility of nations to insure that activities within their jurisdiction do not cause damage to the environment beyond their borders"). The *Trail Smelter* Principle is not sufficiently specific to constitute custom in the present case because it does not specifically prohibit HexonGlobal's activities, but rather, it refers only to environmental damage generally.

C. The *Trail Smelter* Principle is not customary international law because it is not sufficiently obligatory.

Finally, courts have found that asserted environmental norms are merely aspirational, rather than obligatory. As such, the alleged norms merely create non-binding goals rather than specifically prohibiting particular conduct. In *Flores*, for example, the Second Circuit found insufficient evidence that the alleged prohibition on intra-national pollution was binding on the countries of the world. *Flores v. S. Peru Copper Corp*., 414 F.3d 233, 259-63 (2d Cir. 2003). The plaintiffs relied largely on non-binding resolutions and other international declarations. The court explained that even if the norm plaintiffs asserted was found in the sources on which plaintiffs relied, the documents were non-binding and thus insufficient to support an ATS claim. *Id*. The claims in *Flores* are directly analogous to the present case because the *Trail Smelter* Principle has only been supported by documents that are non-binding and thus insufficient. *See*

Flores v. S. Peru Copper Corp., 414 F.3d at 259-63. The *Trail Smelter* Principle is not sufficiently obligatory because no binding international law specifically prohibits HexonGlobal's conduct. The *Trail Smelter* Principle is neither sufficiently universal, nor sufficiently specific, nor sufficiently obligatory and, therefore, it is not a universally accepted principle of custom. As a result, this Court cannot enforce the *Trail Smelter* Principle under the ATS.

IV. EVEN IF THE *TRAIL SMELTER* PRINCIPLE IS CUSTOMARY INTERNATIONAL LAW, IT DOES NOT IMPOSE ENFORCEABLE OBLIGATIONS ON NON-GOVERNMENT ACTORS.

Non-governmental actors—including corporations—cannot be liable under the international *Trail Smelter* Principle. If this Court finds that the *Trail Smelter* Principle is customary international law, such international custom is not enforceable against non-governmental parties for three reasons. First, international climate agreements, such as the UNFCCC, only have nation-states as parties to the agreement. *See generally*, UNFCCC, May 9, 1992, 1771 U.N.T.S. 107. Second, general principles of international law provide that international agreements are enforceable against a party only when that party or nation-state has consented to be bound. *See* CHRIS WOLD, ET AL., CLIMATE CHANGE AND THE LAW 168 (LexisNexis, 2d ed. 2013). Third, the concept of state sovereignty—which underpins all international law—provides that each country has the freedom and authority to control and oversee that which is within its jurisdiction and territorial boundaries. *Id*. at 168–70.

A. International law is only enforceable upon consent, and corporations do not consent to be parties to international environmental agreements.

International principles are only enforceable pursuant to agreements between parties that have consented to some obligation, restriction, or law. *See* CHRIS WOLD, ET AL., CLIMATE CHANGE AND THE LAW 168 (LexisNexis, 2d ed. 2013). The *Trail Smelter* dispute and arbitration, for example, arose pursuant to an agreement between the Canadian and American federal governments. *Trail Smelter Arbitration*, 3 U.N.R.I.A.A. 1907 (1941); *see* CHRIS WOLD, ET AL.,

CLIMATE CHANGE AND THE LAW 556–57 (LexisNexis, 2d ed. 2013). While the Canadian smelting facility discussed in *Trail Smelter* was polluting the air quality of places in the United States, the dispute proceeded to arbitration solely because both governments previously agreed that a tribunal would arbitrate such an international dispute. *Trail Smelter Arbitration*, 3 U.N.R.I.A.A. 1907 (1941).

The *Trail Smelter* decision included a discussion of the parties which would be bound by the arbitration and explained the limited involvement of other interested parties:

> In this controversy, the Tribunal is not sitting to pass upon class presented by individuals or on behalf of one or more individuals by their government, although individuals may come within meaning of 'parties concerned', in Article IV and of 'interested parties', in Article VIII of the convention and although the damage suffered by individuals may, in part, 'afford a convenient scale for the calculation of the reparation due to the State.

Trail Smelter Arbitration, 3 U.N.R.I.A.A. 1907, 1912–13 (1941). As such, interested parties may be involved in the calculation of damages, but are not directly liable to the tribunal in arbitration. *Id*.

B. State sovereignty dictates that nations have the independent authority to control what occurs within their territories, including the extraction and use of natural resources.

Imposing obligations upon corporations or other private actors within another country's jurisdiction would constitute a violation of national sovereignty. The concept of state sovereignty is an essential principle of international law which grants each nation with the right to govern affairs that occur within its territory. *See* CHRIS WOLD, ET AL., CLIMATE CHANGE AND THE LAW 168–70 (LexisNexis, 2d ed. 2013). State sovereignty confers independence upon each nation and allows each nation to enter into international agreements. *Id*. The concept of state sovereignty is affirmed in the preamble to the UNFCCC, to which the United States is a party, and includes the rights of nations to use their resources—including fossil fuels—as they see fit.

Id. As such, imposing obligations or enforcing concepts of international law upon a U.S. corporation clearly within the jurisdiction of the United States would violate the basic principles of international law.

While a country relinquishes some portion of its sovereignty when agreeing to be bound by international treaties, the United States has certainly not agreed to bind U.S. corporations to international custom. *See generally*, UNFCCC, May 9, 1992, 1771 U.N.T.S. 107 (which has no provisions regarding direct enforcement measures, much less direct enforcement of private third parties). A decision by this Court finding that another nation may dictate the stringency of the United States' GHG emissions standards would destroy the sovereignty of the United States. Furthermore, that manner of judicial decision-making would be especially concerning due to inability to trace or connect climate change impacts to specific pollutant sources.

Moreover, climate change is a global problem which should be addressed at all levels of government; climate pollutants mix in the atmosphere and sources cannot be directly linked to individual polluters. For international efforts to be successful and enforceable, such efforts must be focused at the national and international levels. The United States, should it so choose, may draft laws and regulations which impose obligations on corporations, like HexonGlobal, to reduce GHG emissions. International law, however, must remain focused on large-scale agreements made between nations.

Even if this Court finds that 1) the *Trail Smelter* Principle is customary international law *and* 2) that this principle may limit state sovereignty to an extent which prohibits a country from determining its own emissions standards, the *Trail Smelter* Principle does not impose liability on HexonGlobal because Plaintiffs' injuries have not been established by clear and convincing evidence to have been caused by the United States or any U.S. corporation. The Trail Smelter tribunal concluded that:

> under the principles of international law, as well as of the law of the United States, 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*.

Trail Smelter Arbitration, 3 U.N.R.I.A.A. 1907, 1965 (1941) (emphasis added).

Plaintiffs have not established with clear and convincing evidence that the injuries of which they complain have been caused by GHGs emitted by parties within the United States. While the Court may take notice of the connection between greenhouse gases and climate change, there is no scientific way to connect U.S. greenhouse gas emissions with Plaintiffs' injuries. As such, Plaintiffs have no claim under the *Trial Smelter* Principle.

V. CLIMATE CHANGE CLAIMS BROUGHT PURSUANT TO THE *TRAIL SMELTER* PRINCIPLE HAVE BEEN DISPLACED BY GREENHOUSE GAS REGULATION UNDER THE CLEAN AIR ACT.

Even if otherwise enforceable, the CAA displaces the *Trail Smelter* Principle because Congress' enactment of the CAA preempts any action regarding climate change. The Supreme Court established the displacement doctrine in *Milwaukee v. Illinois* (Milwaukee). 451 U.S. 304, 333 (1981). The displacement doctrine bars application of federal common law when a congressional enactment has already spoken directly to the question at issue. *See Milwaukee v. Illinois & Michigan*, 451 U.S. 304, 317 (1981); *see Am. Elec. Power Co., Inc. v. Connecticut* (hereinafter "*American Electric*"), 564 U.S. 410, 424 (2011) (specifying that preemption does not turn on whether the field has been occupied *in a particular manner*).

A. Courts should apply the *Milwaukee v. Illinois* displacement doctrine to international tort claims because Congress has approved judicially-created tort remedies for violations of international law.

Claims sounding in international tort are subject to examination under the displacement doctrine because they arise under federal common law. *See* R. at 3. The Supreme Court has

deferred to Congress to create federal common law causes of action; however, in *Sosa*, the Court concluded that Congress has tacitly approved judicially-created tort remedies for violations of international law. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 727 (2004) (reasoning that Congress must have believed that the common law provides private remedies for some violations of international tort and holding that "torts in violation of the law of nations were understood to be within the common law"). As the court explained in *Sosa*, ATS litigation is based upon a federal common law cause of action and involves judicial lawmaking. Furthermore, in *Kiobel*, the Supreme Court ruled that when a party has asserted jurisdiction under the ATS, domestic United States law applies. *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 117 (2013) (explaining that Congress, even in a jurisdictional provision, can indicate that it intends federal law to apply to conduct occurring abroad). Therefore, the *Trail Smelter* claim in the present case is considered to arise in federal common law and is therefore subject to review under the *Milwaukee v. Illinois* displacement doctrine.

B. Courts should bar application of the *Trail Smelter* Principle to climate change claims because the Clean Air Act contains a means for plaintiffs to seek the same relief.

Courts have found that the CAA is sufficient to displace federal common law public nuisance claims for damages, and in particular, for air pollution. *See American Electric*, 564 U.S. at 424 (2011) (holding that the CAA, and the U.S. Environmental Protection Agency (EPA) actions it authorized, displace any federal common law right to seek abatement of carbon dioxide emissions from fossil fuel-fired power plants).

The CAA provides a means to seek limits on emissions of carbon dioxide and methane from domestic power plants, which is the same relief that Plaintiffs seek by invoking the federal common law. The Supreme Court's decision in *American Electric* relied on the CAA containing a means for the plaintiffs to seek the same relief that Plaintiffs seek in their federal civil action under the ATS. *See American Electric*, 564 U.S. at 416. The Supreme Court referenced

Massachusetts v. EPA when it held that carbon dioxide emissions qualified as air pollution subject to regulation under the CAA. *See id.* (citing *Massachusetts v. EPA*, 549 U.S. 497 (2007)). The court concluded that the CAA "speaks directly" to emissions of carbon dioxide from the defendants' plants through language directing the EPA to establish emissions standards for categories of stationary sources that cause or contribute significantly to air pollution. *Id*. ("CAA and EPA actions it authorizes displace any federal common law right to seek abatement of carbon dioxide emissions from fossil-fuel fired power plants.").

Under the CAA, the EPA must list "categories of stationary sources" that "in [her] judgment ... caus[e], or contribut[e] significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare" and establish standards of performance for emission of pollutants from new or modified sources within that category. 42 U.S.C. § 7411(b)(1)(A)-(B); *see also* 42 U.S.C. § 7411(a)(2). CAA § 7411(d) requires regulation of existing sources within the same category. For existing sources such as carbon dioxide, the EPA issues emissions guidelines in compliance with those guidelines, and states then issue performance standards for stationary sources within their respective jurisdictions. *See* CAA § 7411(d)(1). The complex body of law and regulation surrounding the CAA ensure that it displaces any federal common law regarding climate change.

In the present case, Plaintiffs base their claim on HexonGlobal's fossil fuel-related GHG emissions. *See* R. at 3. The CAA regulates fossil fuel-related GHG emissions and "speaks directly" to the subject of Plaintiffs' claims under federal common-law nuisance claims. *See American Electric*, 564 U.S. at 416. Similar to *American Electric*, the CAA displaces the federal common law claims and remains the controlling law on carbon dioxide emissions. The CAA contains a means for Plaintiffs to seek the same relief that they seek in their ATS action.

In another "polluter pays," the Ninth Circuit applied *American Electric* and reviewed federal common law claims for damages in connection with GHGs. *See Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849 (9th Cir. 2012). The *Kivalina* plaintiffs brought a claim in an attempt to hold a polluter liable for the shrinking ice barrier insulating the Village of Kivalina from coastal storm waves which would render the village uninhabitable. *See id*. The village sued twenty-four oil, energy, and utility companies for costs of relocation, alleging that the defendants' excessive emission of GHGs contributed to global warming caused the melting of the village's protective ice wall and forced the village to relocate. *See id*. (rejecting the plaintiff's argument that CERCLA does not provide a remedy for personal injury).

Thus, because Plaintiffs have alleged claims under the *Trail Smelter* Principle implicating domestic GHG emissions, and because these emissions "are certainly regulated by the Clean Air Act," Plaintiffs' claims are displaced.

VI. THE PRODUCTION, SALE, AND BURNING OF FOSSIL FUELS HAS NOT CAUSED THE UNITED STATES TO VIOLATE FIFTH AMENDMENT SUBSTANTIVE DUE PROCESS PROTECTIONS.

The United States government has not violated Plaintiffs' Fifth Amendment substantive due process rights to life, liberty, or property. Plaintiffs' Fifth Amendment claims relating to the United States' actions to allow the use of fossil fuels, *see* R. at 10, cannot proceed because Plaintiffs have not identified a fundamental right that has been violated. Further, Plaintiffs' Fifth Amendment claims regarding the United States' alleged inaction cannot proceed because the United States Government has no affirmative duty to protect Plaintiffs, or anyone, from climate change.

A. Parties cannot establish that an alleged right to a protected environment under the public trust doctrine is a fundamental right granted constitutional protection.

The Fifth Amendment of the United States Constitution prohibits the federal government from depriving any person of life, liberty, or property without due process of the law. *See* U.S.

Const. amend. V. As such, the Fifth Amendment protects individuals from oppression or abuse of power by their government. *See DeShaney v. Winnebago Cty. Dep't of Soc. Services*, 489 U.S. 189, 196 (1989). Plaintiffs have failed to show, however, that their claimed right to "protection of the global climate ecosystem," *see* R. at 3, is a fundamental right granted protection under the U.S. Constitution. This claimed right is not enumerated in the U.S. Constitution. Therefore, to receive constitutional protections, Plaintiffs must show that a right to an environment free from climate change is "either (1) 'deeply rooted in this Nation's history and tradition,' or (2) 'fundamental to our scheme of ordered liberty.'" *Juliana v. United States*, 217 F. Supp. 3d 1224, 1248 (D. Or. 2016) (quoting *McDonald v. City of Chicago*, 561 U.S. 742, 767 (2010)). The Supreme Court of the United States has signaled that courts must use great care and provide reasoned judgment when determining whether to create new fundamental rights afforded protection under the Due Process Clause. *See Washington v. Glucksberg*, 521 U.S. 702, 720 (1997).

In the present case, Plaintiffs have not shown, and cannot show, that the United States Government has violated their Fifth Amendment rights. The claimed right to an environment free from climate change is not a fundamental right as it neither deeply rooted in United States history nor fundamental to ordered liberty. *See McDonald v. City of Chicago*, 561 U.S. 742, 767 (2010). What *is* deeply rooted in our nation's history and tradition, rather, is independence and industrial progress. The extraction of fossil fuels and the burning of those fuels has been part of U.S. history and tradition since the 1800s, *see* U.S. Environmental Protection Agency, Report on the Environment: U.S. Greenhouse Gas Emissions (2017), long before GHGs were scientifically linked to climate change. Additionally, the use of fossil fuels is fundamental to our scheme of ordered liberty as those fossil fuels allow the people of the United States to, *inter alia*, travel, receive medical care, and conduct business.

Furthermore, the public trust doctrine, cited Plaintiffs in support of their claims for environmental protection, does not apply to the atmosphere or climate. Rather, common law relating to the public trust doctrine confers a governmental duty to protect submerged lands in a trust for its citizens. *See Shively v. Bowlby*, 152 U.S. 1, 49 (1894) (stating that the public trust doctrine applies to commerce, navigation and fishing).

B. There is no substantive due process cause of action against United States Government for alleged failure to protect the global atmospheric climate system from disruption.

Even if an environment free from climate change was a fundamental right, there are four reasons why the United States Government would not have violated that alleged right: 1) the actions of the United States are narrowly tailored for compelling state interests; 2) the United States did not create the climate change risks Plaintiffs allege; 3) the United States did not take affirmative action to place Plaintiffs in danger; and 4) even if the United States placed Plaintiffs in danger, the government is afforded qualified immunity because it did not violate any clearly established rights of which a reasonable person should have known.

1. The United States' actions and inactions relating to the use of fossil fuels have been, and continue to be, narrowly tailored for the compelling state interest of national security.

When parties allege a violation of a fundamental right, as plaintiffs do in the present case, the court applies strict scrutiny standard. *See Juliana v. United States*, 217 F. Supp. 3d 1224, 1248 (D. Or. 2016) (citing *Witt v. Dep't of the Air Force*, 527 F.3d 806, 817 (9th Cir. 2008). Under a strict scrutiny standard, the government may not infringe upon fundamental rights unless such infringement is "narrowly tailored to serve a compelling state interest." *See Juliana v. United States*, 217 F. Supp. 3d 1224, 1248 (D. Or. 2016) (quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993)).

The United States actions which Plaintiffs cite have been narrowly tailored for compelling state interests. The actions and inactions challenged by Plaintiffs were all made to protect national security by reducing the country's dependence on foreign supplies of oil. Compelling state interests definitively include national security. *See generally, Korematsu v. United States*, 323 U.S. 214 (1944) (finding that national security is a compelling government interest which withstands strict scrutiny review). As such, the government's actions, if subjected to the strict scrutiny standard, would be upheld as constitutional.

2. The United States did not create the harms or impacts caused by climate change.

The Due Process Clause does not impose an affirmative duty for the government to act, even when such actions may be necessary to secure life, liberty, and property interests; while the government may not itself deprive any person of these interests, the government is not required to protect people from the acts of third parties. *See* U.S. Const. amend V; *DeShaney v. Winnebago Cty. Dep't of Soc. Services*, 489 U.S. 189, 195 (1989) (holding that the Due Process Clause does not impose a duty on the government to protect people from harms of third parties). While the government must not act in a manner which deprives any person of fundamental rights without due process of law, "nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors." *DeShaney v. Winnebago Cty. Dep't of Soc. Services*, 489 U.S. 189, 195 (1989).

In *DeShaney v. Winnebago Cty. Dep't of Soc. Services*, the Supreme Court held that, although a state government may have been aware that a father was abusing his child, the state did not violate the child's substantive due process rights because the state did not abuse the child nor did it make the child more vulnerable to his father's abuse. *See DeShaney v. Winnebago Cty. Dep't of Soc. Services*, 489 U.S. 189, 201 (1989). The court also discussed that, should the state legislature have so desired, it could have reformed state tort law or imposed affirmative duties of

care upon the government in relation to suspected child-abuse cases. *See DeShaney v. Winnebago Cty. Dep't of Soc. Services*, 489 U.S. 189, 202–03 (1989). The court correctly declined to impose its own policy views in this matter.

As in *DeShaney*, third parties directly caused the harms of which Plaintiffs complain in the present case. As stated in the record, climate change is caused by the burning of fossil fuels and the emission of greenhouse gases into the atmosphere. R. at 4. However, countless individuals— including citizens and corporations—have emitted these GHGs for hundreds of years. The third-party emitters are not government actors and therefore the actions of these third-party emitters cannot be challenged under the Due Process Clause. The United States government has not created Plaintiffs' injuries and does not have an affirmative duty to protect Plaintiffs from the actions of third parties, even if such actions affect the life, liberty, and property interests. *See DeShaney v. Winnebago Cty. Dep't of Soc. Services*, 489 U.S. 189, 195 (1989)

3. The United States has not taken affirmative actions to place anyone in danger of climate change impacts.

The United States Court of Appeals for the Ninth Circuit has held that, as a general rule with only two exceptions, individuals cannot bring a cause of action against government actors who fail to provide protection from harm caused by third parties. *L.W. v. Grubbs*, 974 F.2d 119, 121 (9th Cir. 1992). The exceptions to this rule are invoked when there is either a special relationship between the government and the plaintiff or when the government or government actors have taken affirmative actions to place the plaintiff in danger. *See L.W. v. Grubbs*, 974 F.2d 119, 121 (9th Cir. 1992). In *L.W. v. Grubbs*, L.W. alleged that her right to due process had been violated when her employers, correctional officers in a state-run custodial institution, independently facilitated and created a situation in which a man in custody had opportunity and means to assault her. *See L.W. v. Grubbs*, 974 F.2d 119, 122 (9th Cir. 1992). L.W. alleged that

the defendants knew or should have known that the assailant was a violent sex offender who could not be treated and was likely to assault a woman if ever alone with one. *See L.W. v. Grubbs*, 974 F.2d 119, 123 (9th Cir. 1992). The court found that L.W. did indeed have a claim that the defendants, acting in their capacity as state correctional officers, had deprived L.W. of her due process rights by affirmatively creating a significant risk of harm. *See L.W. v. Grubbs*, 974 F.2d 119, 123 (9th Cir. 1992).

In the present case, there is no custodial or special relationship between the government and Plaintiffs; therefore, the "danger creation" exception is the only potentially applicable standard. Unlike the situation described in *L.W. v. Grubbs*, the United States has not intentionally placed its citizens in danger. Plaintiffs allege that the United States Government knew that GHGs cause climate change and, knowing as much, allowed third parties to emit GHGs. However, these allegations cannot be compared to *L.W. v. Grubbs* because the defendants in Grubbs *assigned* the violent prisoner to work with L.W.. Neither L.W. nor the assailant voluntarily placed themselves in that situation; rather, the situation was constructed by the defendants. In the present case, however, the United States did not mandate the burning of fossil fuels or the emission of GHGs. In fact, the United States has taken steps in the past to limit the emission of GHGs. *See, e.g.*, 74 Fed. Reg. 66,496 (Dec. 15, 2009) (EPA "Endangerment Finding," explaining that GHGs and climate change negatively impact public health and welfare); 75 Fed. Reg. 25,324 (May 7, 2010) (establishing fuel economy and emissions standards for cars and trucks); 75 Fed. Reg. 31,514 (June 3, 2010) (providing technology-based standards under the CAA for greenhouse gases emitted from major new sources); 80 Fed. Reg. 64,662, (Oct. 23, 2015) (the "Clean Power Plan"). While the United States did not prevent the risk of harm from a third party, it certainly did not impose the risk or mandate that such the risk occur.

4. *The United States did not violate any clearly established right of which it should have known and is therefore is entitled to qualified immunity.*

Even when the danger creation exception to the general rule against liability exists, government actors may be immune from liability if able to show that "their discretionary conduct did not violate any clearly established rights of which a reasonable person should have known." *Penilla v. City of Huntington Park*, 115 F.3d 707, 709 (9th Cir. 1997). This qualified immunity is not available when it is sufficiently clear to a reasonable official that such actions would violate substantive due process rights. *See Penilla v. City of Huntington Park*, 115 F.3d 707, 709 (9th Cir. 1997). While the *Penilla v. City of Huntington Park* court found that the plaintiff's rights had been violated in that case, the court reached its conclusion because the defendant police officers found a man in need of serious medical attention and locked his unconscious body in his house without calling for medical assistance. *See Penilla*, 115 F.3d at 710. By taking affirmative actions to cancel a neighbor's 9-1-1 call for help, placing Penilla in his house, and locking the door, the officers drastically increased the risk of Penilla's death and clearly placed him in more significant danger. *Id*. The Ninth Circuit characterized this case as illustrating the "stark [line] between state action and inaction in placing an individual at risk." *Id*.

When a party claims that the government acted or failed to act in a manner which created a danger in violation of their due process rights, that party must show two things: that the government actor "created or exposed an individual to a danger which he or she would not have otherwise faced," *Juliana v. United States*, 217 F. Supp. 3d 1224, 1251 (D. Or. 2016) (quoting *Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1061 (9th Cir. 2006)), and that the state actor recognized an unreasonable risk and intentionally exposed the individual to that risk while disregarding the consequences. *See Juliana v. United States*, 217 F. Supp. 3d 1224, 1251 (D. Or. 2016) (citing *Pauluk v. Savage*, 836 F.3d 1117, 1125 (9th Cir. 2016); *Campbell v. Wash. Dep't of Soc. & Health Servs.*, 671 F.3d 837, 846 (9th Cir. 2011)). It is not enough for the government

to have been negligent; rather, the government must have acted with "'deliberate indifference,' which 'requires a culpable mental state more than mere negligence.'" *See Juliana v. United States*, 217 F. Supp. 3d 1224, 1251 (D. Or. 2016) (quoting *Pauluk v. Savage*, 836 F.3d 1117, 1125 (9th Cir. 2016)).

The United States is entitled to qualified immunity from any claim of "danger creation" because the actions of the United States Government did not violate any clearly established rights of which a reasonable person should have known. *See Penilla v. City of Huntington Park*, 115 F.3d 707, 709 (9th Cir. 1997). Plaintiffs have not shown that the government created or exposed Plaintiffs to a danger which they would not have otherwise faced or that the government recognized an unreasonable risk and intentionally exposed Plaintiffs to that risk while disregarding the consequences. The United States did not create climate change and did not expose Plaintiffs to climate change to which they would not have otherwise been exposed. Climate change is, by its nature, a global concern. GHGs enter the global atmosphere and cannot be traced to any one actor.

Additionally, the United States did not intentionally expose Plaintiffs to risks associated with climate change. Rather, the United States intentions were to promote progress and prosperity in the country by allowing the use of fossil fuels for business, health, and welfare.

Finally, HexonGlobal contends that, under *Lujan v. National Wildlife Federation*, plaintiffs cannot challenge the wholesale programmatic decisions of federal agencies. *See Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 891 (1990) (holding that parties "cannot seek *wholesale* improvement of this [Bureau of Land Management] program by court decree, rather than in the offices of the Department or the halls of Congress, where programmatic improvements are normally made." (emphasis in original)). Rather, challenges may only be made to final agency actions. *Id*.

CONCLUSION

For the foregoing reasons, Appellee, HexonGlobal Corporation, respectfully requests that this Court uphold the dismissal of this case ordered by the United States District Court for New Union Island.

Dated: November 28, 2018

Respectfully submitted,
Counsel for the Appellee,
HexonGlobal Corporation