TEAM NUMBER 29

CASE NO.: 18-000123-DR

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**IN THE**
**UNITED STATES COURT OF APPEALS**
**FOR THE TWELFTH CIRCUIT**

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ORGANIZATION OF DISAPPEARING ISLAND NATIONS,
APA MANA,
AND NOAH FLOOD

Appellants

v.

HEXONGLOBAL CORPORATION

and

THE UNITED STATES OF AMERICA

Appellees

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**ON APPEAL FROM THE UNITED STATES DISTRICT COURT**
**FOR THE NEW UNION ISLAND**

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# BRIEF OF APPELLANTS

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November 26, 2018

Oral Argument Requested

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## ISSUES PRESENTED

I. Whether Apa Mana can bring an Alien Tort Statute, 28 U.S.C. §1350 claim against a domestic corporation?

II. Whether the *Trail Smelter* Principle is a recognized principle of customary international law enforceable as the "Law of Nations" under the Alien Tort Statute?

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

IV. If enforceable, whether the *Trail Smelter Principle* is displaced by the Clean Air Act?

V. Whether there is 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?

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

## STATEMENT OF JURISDICTION

Courts of Appeals in the United States have jurisdiction of appeals from final decisions at the District Court level based on 28 U.S.C. §1291. Ms. Apa Mana, an alien and one of the Appellants, brings forth this appeal under 28 U.S.C. §1350, which gives federal courts original jurisdiction to hear 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. The other Appellants, Mr. Noah Flood and ODIN, may bring forth this suit in Federal Court based on Diversity Jurisdiction. 28 U.S.C. § 1332(a)(2). HexonGlobal has consented to general personal jurisdiction in all courts in the Territory of New Union Islands. R-5.

## STATEMENT OF THE CASE

## I. FACTUAL BACKGROUND

Carbon dioxide and methane are trace atmospheric gases, atmospheric concentrations of which have been substantially increased by the human burning of fossil fuels. R-4. These increased emissions are causing global climate change, resulting in increasing temperatures, and rising sea levels. R-4. Continuing at current rates, emissions of these gases will raise the global temperature by four degrees Celsius over pre-industrial levels, raising the sea level up to one meter by the end of this century. R-4. A'Na Atu and New Union Islands are both low lying islands whose populated areas are below one meter in elevation, and will both be rendered uninhabitable by such a sea level rise. R-4. Both Apa Mana and Noah Flood, Appellants, reside in homes below one-half meter in elevation and have suffered seawater damage over the past three years which would not have occurred but for emissions induced sea level rise. R-5. Both have incurred and will continue to incur substantial repair expenses for home damage caused by sea level rise. R-5. Increasing temperatures has exposed both individuals to increased health risks involving heat stroke and mosquito borne diseases. R-5. Ocean acidification and level rise has also led to drinking water wells being intruded by seawater, and reduced availability of ocean borne staple food sources. R-5. Limits on the production and combustion of fossil fuels would reduce these risks posed to Appellants, and maintain the habitability of both concerned islands.

Appellee HexonGlobal is the resultant corporation from a merger of all major United States oil producers, which is incorporated in New Jersey and has its principle place of business in Texas. R-5. HexonGlobal is responsible for 32% of United States, and 6% of global fossil fuel emissions historically. R-5. HexonGlobal is also responsible for 9% of global fossil fuel related emissions through cumulative worldwide sales. R-5. The heat-retention properties of carbon

dioxide and methane gases have been established scientific facts since the nineteenth century, and HexonGlobal was aware since the 1970s that continued global sale would result in substantial harmful climate change, and persisted nonetheless. R-5.

The United States is historically the largest single national contributor to greenhouse gas emissions, and is responsible for 20% of global anthropogenic emissions to date. R-5,6. The United States has promoted fossil fuel production and combustion through numerous policies such as tax subsidies, leasing of public lands, creation of the interstate highway system, and the development of fossil fuel power plants. R-6. In 1992, the United States signed and ratified the United Nations Framework Convention on Climate Change, but to date has not introduced any legislation implementing this commitment to limit its anthropogenic emissions. R-6. A few steps toward regulation that have been taken include the Supreme Court's defining carbon dioxide and other greenhouse gases as "pollutants", the setting of the regulatory predicate for greenhouse gas regulation under the Clean Air Act, and the establishment of fuel economy standards and emissions rates for passenger vehicles which were extended with stringent limitations through model year 2025. R-6,7. The United States Environmental Protection Administration required the establishment of technology-based limits on major new sources of greenhouse gases in 2010, and established carbon dioxide emissions standards for new power plants along with implementing controls on emissions from existing ones in 2015. R-7. The President of the United States signed the Paris Agreement in 2015, consequently committing the United States reduce greenhouse gas emissions by 26-28% compared to 2005 levels by the year 2025. R-7.

United States emissions of greenhouse gases have decreased only slightly since the signing, as global emissions have increased. R-7. The Trump administration proposed the reversal of these recent regulatory measures, and declared the intent to withdraw from the Paris

Agreement effective in 2020. R-7. The EPA has also proposed freezing emissions reductions under fuel economy standards set by the Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule, and repealing the Clean Air Plan. R-7, 8.

## II. PROCEDURAL HISTORY

Ms. Apa Mana, Mr. Noah Flood, and the Organization of Disappearing Island Nations (ODIN), filed a suit against HexonGlobal Corporation and the United States of America for violations under the *Trail Smelter* principle under the Law of Nations and a Due Process claim under the Fifth Amendment of the U.S. Constitution. The District Court refused to recognize the claims and granted Defendants' motion to dismiss. The plaintiffs filed a Notice of Appeal following the issuance of the Order of the District Court date August 15, 2018, in Civ. 66-2018.

## SUMMARY OF THE ARGUMENT

This case examines the duties of corporations and the United States Government as contributors to the wellbeing or the downfall of citizens across the world, and holds each accountable for their pollution emissions and catastrophic consequences that accompany them.

Apa Mana, as an Appellant in this suit, brings forth a cause of action under 28 U.S.C. §1350 against HexonGlobal because it has violated treaties the United States has agreed to uphold in order to prevent further climate change. Mana's claim succeeds under the Alien Tort Statute because it falls within the causes of action of violations against safe conducts authorized by the ATS. Furthermore, the Appellee, HexonGlobal, is a domestic corporation that should be held accountable by the Government under which it was incorporated.

The *Trail Smelter* principle has been recognized since the 1940's when the case against Canada was brought for the pollution the smelter within that nation was producing. This principle has become a globally adopted principle that is universally recognized as the Law of

Nations. This principle can be imposed against non-governmental actors because it falls under the ATS, which has been held to be applicable to individuals.

Additionally, the *Trail Smelter* principle is not displaced by the Clean Air Act as the Act does not reach Appellee's facilities outside of the U.S. However, in the alternative that this Court ruled that the CAA did, in fact, displace the *Trail Smelter* principle, Appellants would still have a cause of action against Appellees (including the U.S. Government). This claim would include the violations of the International Air Pollution section of the CAA.

The cause of action against the United States lies in the violation of the substantive due process clause of the Fifth Amendment of the United States Constitution. The violation has occurred as a failure to protect the global atmospheric climate system through the production, sale, and burning of fossil fuels. There is an implicit fundamental right to a stable climate capable of sustaining human life which allows for the exercise of other enumerated rights such as life, liberty, and property, that have been violated through the Government's failure to properly regulate emission levels.

The public trust doctrine and its fiduciary duty of protecting the public's property is inextricably tied to sovereignty. This duty is meant to protect present and future beneficiaries from destruction to the public property they are entitled to. Appellants are directly affected by the Government's failure to adhere to the public trust doctrine as their homes have been damaged by climate change-induced storms, and will likely be completely destroyed in the near future. Not to mention, the islands in which they reside, will likely be completely submerged due to climate change and sea level rising, which will create further abuse to people's right to trust property.

The Appellants claims under the ATS and the public trust doctrine are justiciable and do not present a political question because they fail to meet the *Baker* factors. Specifically, climate change is not an issue textually committed to any one political branch, established legal frameworks exist through which this Court can evaluate the case, and a remedy can be carefully crafted that would avoid separation of power issues by directing the government to ameliorate Appellant's injuries without specifying how to do so.

For these reasons, this Court should reverse the lower Court's decision, and remand for further proceeding in Appellant's favor.

## ARGUMENT

### I. MANA MAY BRING A CLAIM TOWARDS A DOMESTIC CORPORATION UNDER THE ALIEN TORT STATUTE, 28 U.S.C. §1350

The Alien Tort Statute (ATS) provides that "[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. This provision was created by Congress in 1789 to give jurisdiction over matters concerning the Law of Nations or treaties of the United States that are in "violation of safe conducts, infringement of the rights of ambassadors, and piracy." *Jesner v. Arab Bank, PLC,* 138 S. Ct. 1386, (2018).

For a claim to succeed under the ATS, the violation must be specific and obligatory, as well as universally accepted and understood to give rise to individual liability through which the ATS "not only provides federal courts with subject matter jurisdiction, but also creates a cause of action for an alleged violation of the law of nations." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 699, (2004). Furthermore, the activities leading to the cause of action must have occurred primarily within jurisdiction of the United States as there is no extraterritorial application. *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 117 (2013). Accordingly, the defendant must not

be a *foreign* corporation. *Jesner*, 138 S. Ct. at 1397. The Supreme Court purposefully left the question of liability against domestic corporations unanswered in *Jesner*, giving this court the opportunity to set precedent to hold corporations liable for the injustices they have indulged upon for profit.

### A. The violations to Appellees under the ATS are specific, obligatory, and universally understood to give rise to individual liability

Claims brought under the "present-day" law of nations must be "accepted by the civilized world and defined with a specificity" analogous to the claims recognized when the ATS was conceived. *Sosa*, 542 U.S. at 725. Furthermore, "the norm [applied] must extend liability to the type of perpetrator (e.g., a private actor) the plaintiff seeks to sue." *Id.* at 761.

In *Sosa*, the defendants failed to meet the narrow set of violations leading to a cause of action under the law of nations and "exceed[ed] any binding customary rule having the specificity [the Court] require[d]." *Id*. at 757. In *Sosa*, the case was brought under broad principles of arbitrary arrest which did not meet customary international law, leading the Court to opine the defendant had a better chance of being liable under Mexican law. *Id.*

In this case, the Appellee, HexonGlobal, is liable under the specific claim of violation of the 1992 United Framework Convention on Climate Change (UNFCCC). According to the UNFCCC, the United States agreed to reduce anthropogenic emissions of Greenhouse Gasses (GHGs), and the Senate ratified the agreement. R-6. The UNFCCC reaffirmed "the principle of sovereignty of States in international cooperation to address climate change" as a unified world, and thus hold responsible the entities creating the damage. United Nations Framework Convention on Climate Change, May 9, 1992, 1771 U.N.T.S. 107, 169.

In this case, Appellee is the largest domestic GHG producer in the U.S., and it is responsible for 32% of cumulative fossil fuel-related GHG emissions. R-5. The specificity of the damage

caused by Appellee's purposeful failure to make any changes or improvements to its systems while knowingly causing harm through emissions since the 1970s, and instead persisting with its harmful activities for profit. R-5. Appellee has been aware that continuous global sales and combustion of fossil fuel products leads to harmful global climate change and sea level rise, and imminent destruction of people's homes. R-5.

The other Appellee, the United States, has not limited fossil fuel production, distribution or combustion, though it agreed to the objective of achieving stabilization of GHGs to reduce climate change. R-6. Though in the past decade the U.S. has started taking action towards regulation of emissions, the U.S. has failed to enforce regulations upon corporations such as HexonGlobal, and instead the EPA has proposed regulations "freezing" emission reductions under some regulations. R-7. The U.S. and EPA has failed to regulate the sales and combustions of its highest polluters to the point that GHG emissions have barely decreased, and global emission have increased. *Id.*

The failure of Appellees to uphold the universally agreed-upon goal of emissions reduction and blatant disregard for the effects of continued pollution have led to seawater damage and inevitable destruction of Apa Mana's and Noah Flood's homes, as well as seawater intrusion into their drinking water wells, that would hot have occurred in the absence of GHG induced sea level rise. R-5. Therefore, this Court should hold the violations of Appellees to meet the specific and obligatory standard in Sosa.

### B. There is no extraterritorial cause of action because Appellee is a domestic corporation

*Jesner* emphasizes that "Congress drafted the ATS "to furnish jurisdiction for a relatively modest set of actions alleging violations of the law of nations" to "avoid foreign entanglements" leading to the U.S. being held liable in a hostile forum. 138 S. Ct. at 1397. Because of this, there

is no extraterritorial application of the ATS, meaning the corporation in question must not be foreign. See *Id*.

In Jesner, the Court poses the question of liability against a corporation but refuses to answer it in a clear way. See *Id.* at 1386. The question itself is based on violations committed by its employees on behalf of the corporation, but the case fails to hold the corporation, as a person under United States law, responsible. The Court further mentions that "[m]odern ATS litigation" can involve large groups of alien plaintiffs against U.S. corporations for human rights violations, but does not outwardly agree with *Kiobel* in holding that only natural persons were intended to be held liable under ATS. *Jesner,* 138 S. Ct. 1398. The Court does, however, explain that the defendant cannot be a *foreign* corporation. *Id*.

Appellee, HexonGlobal, is incorporated in the State of New Jersey with a principal place of business in Texas, (R-5) thus meeting the *Jesner* requirement. Additionally, the objective of preventing the U.S. government from being held responsible for harm caused by domestic corporations is precisely why Appellees are subject to the ATS, and why this court should hold all domestic corporations to be liable under the law of nations.

In *Kiobel v. Royal Dutch Petroleum Co.*, the Court for the second district found that customary international law includes "those standards, rules or customs (a) affecting the relationship between states or between an individual and a foreign state, and (b) used by those states for their common good and/or in dealings *inter se.*" *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 118 (2d Cir. 2010). *Kiobel* further states that liability for violations of international law have "*never* extended the scope of liability to a corporation;" *Id.* at 120. While at the same time, acknowledging that the ATS is a jurisdictional provision "unlike any other" that has repeatedly been given new life as cases arise under it. *Id.* at 116.

*Kiobel* differs from the case at hand because the defendants in that case were U.S. citizens, *id*. at 123, thus the extraterritorial exception, later affirmed in *Jesner*, was born. The holding further states that the ATS "does not specify who is liable," and rightly concludes that the U.S. does not have jurisdiction over foreign corporations.

In this case, Appellee, HexonGlobal, is a *domestic* corporation (incorporated and holding its principal place of business within the U.S.) who is substantially contributing to climate change, and has not been held responsible for such harm. By holding corporations accountable for the damages they have caused to individuals within our nation and outside of it, this Court has the unique opportunity to set proper precedent for the Supreme Court to finally decide this crucial matter. Holding corporations as immune to claims under ATS is a slippery slope leading to corporations being immune to other claims as well. Holding corporations liable for their offenses abroad would benefit U.S. citizens who diligently contribute to their government and who in turn would have to pay (in the form of taxes) for the U.S. to redress damages caused by corporations.

Consequently, this Court should hold that domestic corporations are liable under the ATS and its limited causes of action.

## II. THE *TRAIL SMELTER* PRINCIPLE IS A RECOGNIZED PRINCIPLE OF CUSTOMARY INTERNATIONAL LAW ENFORCEABLE AS THE LAW OF NATIONS UNDER THE ATS THE APPELLATE BRIEF TEMPLATE INCLUDES A FORMATTED:

The Law of Nations is "that code of public instruction which defines the rights and prescribes the duties of nations, in their intercourse with each other." *Sosa*, 542 U.S. at 714. International treaties are considered customary international law when they create "*legal obligations* akin to contractual obligations on the States parties to them" and when an "overwhelming majority" of states have ratified them. *Kiobel*, 621 F.3d at 137.

*The Paquete Habana* started the notion that nations must be respectful of the needs of each other by establishing respect in the form of immunity for fishing ships bringing food into nations during times of war and "deal with each other in peace." See generally *The Paquete Habana*, 175 U.S. 677, 687 (1900). From then on, international law has developed into contractual principles between nations to hold themselves accountable for damages caused to others.

The conclusions of the Trail Smelter Arbitration are a continuation of these principles set so long ago. *Trail Smelter Arbitration*, 3 U.N.R.I.A.A. 1965 (1941). The conclusions of the Trail Smelter Arbitration are now a central concept in conventions on climate change through the years. These have agreed that:

> "States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental 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"

*Declaration of the United Nations Conference on the Human Environment*, 5, U.N. Doc A/CONF.48/14/Rev. This principle was Principle 2 of the 1992 Rio Declaration on Environment and Development, endorsed by 190 nations. U.N. Conference on Environment and Development, *June 3-14, 1992, Rio de Janeiro, Braz., Rio Declaration on Environment and Development*, 3, U.N. Doc. A/CONF.151/26/REV.1(VOL.I) (1992).

The Trail Smelter Arbitration occurred in 1941 between the state of Washington and Canada, where a Tribunal decided questions of causation and damages, for past and future harm, leading to a regime being put in place to control further pollution. *Trail Smelter Arbitration*, 3 U.N.R.I.A.A. 1907. The complaint arose from the chemical and slag discharges of the smelter that were damaging the lands of farmers and other residents of the state. *Id.* at 1913. Though the

Tribunal concluded that further research would need to be conducted to come to a more permanent solution, the state of Washington received compensation for the damages created by the smelter at Trail. *Id.* at 1938. Furthermore, the concept of "polluter pays" was asserted for the first time outside of CERCLA application as done within the U.S.

When the *Trail Smelter* principle was adapted into the UNFCCC and ratified by the Senate, it became a universally recognized principle under the law of nations. Moreover, the legal obligations arising from the Arbitration met the *Sosa* test. Because of this, this Court should hold the Trail Smelter principle to be customary international law enforceable under the ATS.

## III. THE TRAIL SMELTER PRINCIPLE IMPOSES OBLIGATIONS ENFORCEABLE AGAINST PRIVATE ACTORS

It is a defined notion that "human-rights norms must bind the individual men and women responsible for committing humanity's most terrible crimes, not just nation-states in their interactions with one another." *Jesner*, 138 S. Ct. at 1400.

Prior to the Arbitration, the Smelter had settled claims with individuals from Washington state. During the Arbitration, the Tribunal addressed matters of the Smelter as it was an individual, although at a later point concluded that the tribunal did not sit to pass upon claims by individuals or on their behalf. *Trail Smelter Arbitration*, 3 U.N.R.I.A.A. 1938. However, as causes of action similar to the ones leading to the Arbitration continue to arise, the applicable principles have evolved to encompass claims on behalf of individuals. The Supreme Court has made it clear that individuals, not just nations, have been held responsible for their actions against other nations since before *Filartiga*, where the Court established that "a violation of the law of nations arises only when there has been 'a violation by one or more *individuals.*'" (Emphasis added) *Filartiga v. Pena-Irala*, 630 F.2d 876, 888 (2d Cir. 1980). Thus, it is proper

for this Court to conclude that the *Trail Smelter* Principle, as considered a principle of the law of nations, can be imposed against individuals and the harms they have committed.

Customary international law is undeniably enforceable against individuals, and as such so is the *Trail Smelter* Principle. Failing to apply it to non-governmental actors would make the government, and its innocent citizens, liable for crimes committed by private corporations. This would give corporations the freedom to exploit other nations and people at the expense of U.S. Mana and the other appellants are asking for injunctive relief from Appellee's damages, and this Court the Appellee's liable and responsible for the harm they caused under these principles.

## IV. THE TRAIL SMELTER PRINCIPLE IS NOT DISPLACED BY THE CLEAN AIR ACT BECAUSE THE JURISDICTION OF THE CAA DOES NOT REACH APPELLEE'S REFINERIES OUTSIDE OF THE U.S.

The test for exclusion under the Clean Air Act "is simply whether the statute "speak[s] directly to [the] question" at issue." *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 424 (2011). The federal common law is considered a necessary resource if Congress has not addressed a particular issue. *Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 856 (9th Cir. 2012). But, "[i]f Congress has addressed a federal issue by statute, then there is no gap for federal common law to fill." *Id.* Nevertheless, the Supreme Court has conclusively addressed the issue of international jurisdiction in *Jesner* stating "Congress drafted the ATS "to furnish jurisdiction for… actions alleging violations of the law of nations." *Jesner*, 138 S. Ct. at 1397. The issue of displacement over another statute is not mentioned in the CAA, nor is that statute held to be the only one applicable to clean air claims when defendants are domestic corporations abroad. Therefore, this court should hold that the CAA cannot displace the ATS as it is not an appropriate application of jurisdiction, and furthermore because the CAA does not speak directly to the matter in controversy.

### A. The *Trail Smelter* principle is not displaced by the Clean Air Act because the Act does not speak to enforcement of regulations to U.S. refineries throughout the world

The Clean Air Act "authorizes federal regulation of emissions" of GHGs emitted by human activities as well as those "naturally present in the atmosphere." *Am. Elec. Power Co.*, 564 U.S. at 416. The CAA's jurisdiction over international air pollution is only as far reaching as Title 42 of the Act allows, which is only to "give formal notification thereof to the Governor of the State in which such emissions originate." 42 U.S.C. §7415. This section does not speak to pollution from domestic corporations with extraterritorial facilities. Therefore, in this case the CAA does not displace the *Trail Smelter* principle brought under the ATS claim.

Displacement under the CAA is determined by whether the Act directly speaks to the matter in controversy. *Am. Elec. Power Co.* 564 U.S. 424. Also, Appellees in this case have jurisdiction in federal courts under the ATS, which "are grounded in federal statute, not merely in federal common law… [a]s such, the claims cannot be so easily displaced by other federal statutes, which are entitled to no more respect than the ATS." *Al Shimari v. CACI Premier Tech., Inc.*, 324 F. Supp. 3d 668, 702 (E.D. Va. 2018).

The reason why the CAA does not displace the Trail Smelter principle in this case is because the issue is not just a domestic regulatory matter of transboundary pollution. *Transboundary air pollution* being defined as "air pollution whose physical origin is situated wholly or in part within the area under the jurisdiction of one Party and which has adverse effects, other than effects of a global nature, in the area under the jurisdiction of the other Party." Canada-United States: Agreement on Air Quality, 30 I.L.M. 676, 679, 30 I.L.M. 676 (1991), 679.

The issue at hand deals with the pollution discharges by a corporation with its origins within the U.S. but with facilities located in different parts of the world, where the CAA does not touch.. The *Trail Smelter* principle, along with the Stockholm and Rio Declarations, speak directly to this matter when they state that nations have "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" when exploiting their resources.

The Plaintiffs in this case are seeking damages and injunctive relief (R-3) not further regulation by the EPA, and the CAA cannot provide the relief sought. The matter of regulation is not addressed in 42 U.S.C. §7415 or any other section of the CAA. These principles extend further than the reach of the CAA, and therefore there is no displacement.

### B. In the alternative that the Act displaces the *Trail Smelter* Principle, Appellants still have a cause of action under the CAA under which Appellees are subject to liability

In the alternative that this Court holds the CAA to displaces the *Trail Smelter* principle under the ATS claim, the Appellees would still have a claim for injunction against the Appellants because there has been a failure to reduce emissions as agreed upon under the UNFCCC.

The primary purpose of the CAA is "to encourage or otherwise promote reasonable Federal, State, and local governmental actions… for pollution prevention." 42 U.S.C. §7401. Additionally, transboundary pollution has been addressed to be a matter that should be prevented under 42 U.S.C. §7415. Therefore, if the Court finds that the CAA does extend beyond the borders of the United States, then the Appellees should be held accountable for the amount of pollution they have emitted in other nations, including the emissions from their refineries all over the world.

## V. APPELLEES VIOLATED THE FIFTH AMENDMENT SUBSTANTIVE DUE PROCESS WHEN THEY FAILED TO PROTECT THE GLOBAL ATMOSPHERIC

**CLIMATE SYSTEM BY PRODUCING, SELLING, AND BURNING FOSSIL FUELS**

No person shall be deprived of life, liberty, or property, without due process of law. U.S. Const. amend. V. The Due Process Clause protects rights and liberties which are deeply rooted in this Nation's history and tradition. *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934). Fundamental rights are also found to be implicit in the concept of ordered liberty. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937). Such fundamental rights must be articulated with the utmost care. *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997).

### A. There is a substantive due process claim against the United States Government for the violation of the fundamental right to a climate capable of sustaining human life

Liberty rights afforded constitutional protections are more numerous than those expressly provided for within the Constitution. The Supreme Court has recognized fundamental rights which although themselves are not expressly provided for, nonetheless are implicitly present within the penumbras of protection which are specifically enumerated. *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965). The rights to privacy, procreation, and an abortion were found to be inherently within the aegis of constitutional protection. *Roe v. Wade*, 410 U.S. 113, 152-53 (1973). Recently, the right to marriage was found to be fundamental as well. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2598 (2015). In that opinion, Justice Kennedy proclaimed:

> The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights . . . did not presume to know the extent of freedom in all its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning. When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed.

*Id*. Just as the Supreme Court found that marriage was the foundation of the family in Obergefell, a stable climate system capable of sustaining human life is the foundation of

civilization itself and a necessary condition to exercising other rights to life, liberty, and property. Serving as a precondition to the exercise of other rights, a climate capable of sustaining human life is a fundamental right articulated carefully enough to avoid rendering minor and moderate acts, which contribute to global warming, constitutional violations. Such a fundamental right, articulated with the "utmost care", would only find acts which "affirmatively and substantially damage the climate system in such a way that will cause human deaths, shorten human lifespans, result in widespread damage to property, threaten human food sources, and dramatically alter the planet's ecosystem" would violate due process. *Juliana v. United States*, 217 F. Supp. 3d 1224, 1250 (D. Or. 2016). This type of damage is evidenced by widespread seawater damage to Appellants' homes, seawater intrusion into drinking wells, increased exposure to illness, and reduction in staple food source availability linked to climate change. R-5.

Failure to meet greenhouse gas emissions reduction commitments, intent to withdraw from international agreements, freezing of emissions reductions, and general government inaction do not typically fall under substantive due process protections. R-7. The Due Process Clause generally confers no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests. *Deshaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 198 (1989). But the "danger creation" exception confers upon the government a duty to act when its conduct puts an individual in peril due to "deliberate indifference" to safety. *Penilla v. City of Huntington Park*, 115 F.3d 707, 709 (9th Cir. 1997). Decades of fossil fuel promotion and subsidization policies linked to the United States' status as the historically largest single national contributor to emissions of greenhouse gases establishes that the government's acts created the danger posed to Mr. Flood and ODIN, meeting the first

exception requirement. R-5,6. The United States own acknowledgement of the threat of climate change in 1992 establishes that it knew its acts caused the danger posed, fulfilling the second requirement of the "danger creation" exception. R-6. In light of this knowledge, freezing of emissions reductions and withdrawal from binding commitments to further those reductions sufficiently illustrates "deliberate indifference" in failing to prevent the injuries suffered by Mr. Flood and ODIN. R-7. The United States government's acts created the danger of global warming, it knew its acts had created the danger posed, and it acted with deliberate indifference in failing to protect Appellants against that danger. Under these facts, government inaction violates the protections of the Due Process Clause, providing a cause of action against the United States government.

### B. There is a substantive due process claim against the United States Government for the breach of fiduciary duty under the public trust doctrine

#### 1. Public Trust Doctrine's fiduciary duty of protection is implicitly tied to sovereignty

Public trust doctrine was first established under Roman law, the legal system which has served as the foundation for English law and subsequently American jurisprudence. R-10. Predating the Constitution, public trust doctrine limitations are implicitly recognized rather than created by it, much like the Tenth Amendment's recognition of state police powers. U.S. Const. amend. X. Consequently, the public trust doctrine is inherently a component of sovereignty, "a natural outgrowth of the perceived public character . . . a perception which underlies and informs the principle that these lands are tied in a unique way to sovereignty." *Idaho v. Coeur D'Alene Tribe*, 521 U.S. 261, 286 (1997).

In a case involving a state conveying lands tied to navigable waters to private parties, the Supreme Court declared that the sovereign cannot relinquish control over public trust property. *Ill. C. R. Co. v. Ill.*, 146 U.S. 387, 453 (1892). While that case specifically involved navigable waters and lands beneath them, a subsequent Supreme Court case has held that a public claim to the atmosphere exists. *United States v. Causby*, 328 U.S. 256, 261 (1946). Furthermore, the scope of public trust doctrine has been interpreted as to extend to the atmosphere due to its effects on navigable waters, making it "nonsensical" to separate the two. *Foster v Washington Dept. of Ecology*, 2015 WL 7721362, at *4 (Wash.Super. Nov. 19, 2015). Under the basic principles of trusts, the United States government has a fiduciary duty to protect the trust property against damage or destruction, for the benefit of both current and future beneficiaries of the trust. A duty which the Appellee has failed by favoring the current beneficiaries through fossil fuel subsidies and emissions deregulation, to the detriment of the trust property and future beneficiaries' interest in it. R-5,6.

**2. Public trust claims are substantive due process claims**

By virtue of predating the Constitution, public trust doctrine vests interest and rights to the protection of the trust property which are inalienable. The Pennsylvania Supreme Court declared as much when it held public trust rights were reserved "inherent and indefeasible" by the citizens when government was formed. *Robinson Twp.v. Commonwealth*, 83 A.3d 901, 948 (2013). In 1993, the Philippines Supreme Court found that public trust rights "need not even be written in the Constitution for they are assumed to exist from the inception of humankind*." Oposa v. Factoran*, 224 S.C.R.A. 792, 804-05 (S.C. July 30, 1993) (Phil.). These holdings frame public trust rights within the scope of fundamental rights through their ties to sovereignty and consent of the governed, passing

the "implicit in ordered liberty" and "deeply rooted in this Nation's history" tests. Consequentially, public trust claims concerning the atmosphere are "properly categorized as substantive due process claims" under the Fifth Amendment, providing both ODIN and Mr. Flood's cause of action in this case. *Juliana*, 217 F. Supp. 3d at 1261.

## VI. APPELLANTS' LAW OF NATIONS CLAIM UNDER THE ALIEN TORTS STATUTE AND PUBLIC TRUST CLAIM DO NOT PRESENT A NON-JUSTICIABLE POLITICAL QUESTION

Questions that are political in nature or committed to other branches of government cannot be reviewed by courts. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803). The nonjusticiability of a political question is primarily a function of the separation of powers, identified through the prominent factors of (1) textually demonstrable constitutional commitment of the issue to a coordinate political department, (2) lack of judicially discoverable and manageable standards for resolving the issue, (3) impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion, (4) impossibility of the 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, and (6) the potentiality of embarrassment from multifarious pronouncements by various departments on one question. *Baker v. Carr*, 369 U.S. 186, 217 (1962).

"[A] court cannot simply err on the side of declining to exercise jurisdiction when it fears a political question may exist; it must instead diligently map the precise limits of jurisdiction." *Juliana*, 217 F. Supp. 3d at 1236. While the last three of the Baker Factors rarely render an issue non-justiciable and are considered to be the weaker of the set, the more important first three factors show that Appellants' claims do not present a non-justiciable political question.

The first Baker factor requires that any case which would require a court to decide an issue which is textually committed to a coordinate political department be abstained due to lack of authority in resolving that issue. "The question is not whether a case implicates issues that appear in the portions of the Constitution allocating power to the Legislative and Executive Branches . . . the question is whether adjudicating a claim would require the Judicial Branch to second-guess decisions committed exclusively to another branch of government." *Id*. at 1238. Nowhere is the issue of global warming textually committed to any branch or department of government. While climate change may implicate broad areas of granted power such as foreign policy "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." *Baker*, 369 U.S. at 211. Climate change is not an issue committed to any political department, nor is it inherently a component of any of the issues which are textually committed, and so the first Baker factor does not apply to this case.

*Baker* factors two and three are concerned with issues which are outside of the competence of the court, both of which do not apply here. Factor two, lack of manageable standards for resolving the issue, is concerned only with whether a legal framework exists which the court can use to evaluate the case. Appellants assert both statutory and constitutional claims which have established legal standards which federal courts regularly apply to new and different sets of facts. Novelty and complexity of the facts presented in this case do not alienate these claims from the Court's competence. Lastly, the third Baker factor addresses issues which require an initial policy decision not left to the courts. In the present case, the issue only requires the consideration of damages suffered by Appellants and the outer contours of permissible action under the Constitution's substantive due process protections. Federal courts retain broad authority "to fashion practical remedies when confronted with complex and intractable

constitutional violations." *Brown v. Plata*, 563 U.S. 493, 526 (2011). This Court could carefully craft a remedy which avoids separation-of-powers issues by directing the government to ameliorate Appellants' injuries without specifying precisely how to do so. Any speculative difficulty in crafting a remedy in this case would be an improper consideration and irrelevant to the purpose of political question analysis at this stage. *Baker*, 369 U.S. at 198.

Appellants' claims and their merits do not present any inextricable Baker factors which would render them barred under the political question doctrine. Accordingly, this Court should reverse the lower court's decision to grant the Appellees' motion to dismiss.

## CONCLUSION

For these aforementioned reasons, this Court should reverse and remand to the lower courts in favor of the Appellants, Apa Mana, Noah Flood, and ODIN.