Team 3

No.18-000123

UNITED STATES COURT OF APPEALS FOR THE TWELFTH CIRCUIT

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

Plaintiffs-Appellants,

v.

HEXONGLOBAL CORPORATION,

Defendants-Appellees

and

THE UNITED STATES OF AMERICA,

Defendants-Appellees

APPEAL FROM THE UNITED STAES DISTRICT COURT FOR NEW UNION ISLAND IN NO.66-CV-2018

BRIEF FOR THE APPELLEE UNITED STATES OF AMERICA

Counsel for the Defendants-Appellees

November 27, 2018

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JURISDICTIONAL STATEMENT

This is a in response to an appeal from the United States District Court for New Union Island. The jurisdiction of the District Court was invoked pursuant to 28 U.S.C. § 1350 and the Public Trust Doctrine incorporated through the Due Process Clause of the Fifth Amendment of the U.S. Constitution. U.S. Const. amend. V. The appeal is from a final order entered on August 15, 2018. The United States Court of Appeals for the Twelfth Circuit has Jurisdiction in this case pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Can Mana bring an Alien Tort Statute, 28 U.S.C. § 1350 (ATS) claim against a domestic corporation?
2. Is the *Trail Smelter* Principle a recognized principle of customary international law enforceable as the "Law of Nations" under the ATS?
3. Assuming the Trail Smelter Principle is customary international law, does it impose obligations enforceable against non-governmental actors?
4. If otherwise enforceable, is the Trail Smelter Principle displaced by the Clean Air Act?
5. Is there a cause of action against the United States Government, based on the Fifth Amendment substantive due process protections for life, liberty, and property, for failure to protect the global atmospheric climate system from disruption due to the production, sale, and burning of fossil fuels?
6. Do Plaintiffs' law of nations claim under the Alien Tort Statute and public trust claim present a non-justiciable political question?

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

This claim arises out of allegations by plaintiffs for two different causes of action. Apa Mana is an alien national of the island nation of A'Na Atu and asserts a claim under the Alien Tort Statute, 28 U.S.C. § 1350, that HexonGlobal's fossil fuel related business activities violate the Law of Nations. (R. at 3). Mana is seeking damages and injunctive relief. *Id.* Noah Flood is a U.S. citizen residing on the New Union Islands, a United States possession, and he asserts through the Due Process Clause of the Fifth Amendment, that the United States government violates public trust obligations to protect the global climate ecosystem. *Id.* The defendant HexonGlobal is a major oil producing corporation incorporated in New Jersey and with its principle place of business in Texas. (R. at 5).

In this case, the alleged wrongdoing is that the actions taken by HexonGlobal in the course of its business have contributed to global climate change and sea level rise. *Id.* HexonGlobal has been aware of the warming effect of greenhouse gases and that continuing business around the globe would result in harmful climate change and sea level rise, but nonetheless, HexonGlobal continues to operate refineries around the world. *Id.* Mana's contends that the actions of HexonGlobal have resulted in sea level rise damaging Mana's property, while also increasing global temperatures to a degree that the temperatures negatively affect Mana's health and food availability. *Id.* The alien claim is brought because the allegation contends HexonGlobal's business in the United States caused the problems. (R. at 3). The international principle that was allegedly violated in this case is the Trail Smelter Principle, which holds emissions into the environment of one territory must not be allowed to cause substantial harms in the territory of other nations. (R. at 8). This principle was later adopted by the Stockholm Declaration and reasserted in Principle 2 of the 1992 Rio Declaration on Environment and

Development. (R. at 7-8). Mana seeks damages for the harms already caused by HexonGlobal and injunctive relief to reduce future damage to the plaintiffs' properties, health and communities.

The alleged wrongdoing of the United States government is the failure to take effective action to control greenhouse gas emissions, along with historical support for fossil fuel production, effectively violates obligations under the public trust doctrine. (R. at 10). Flood seeks a fundamental due process right to a healthy and stable climate system and relies on public trust principles. *Id.* The United States recognized the threat of climate change in 1992, when the United States signed and the Senate ratified, the United Nations Framework Convention on Climate Change. The United States moved towards regulating domestic greenhouse gases with the Supreme Court decision in *Massachusetts v. EPA* holding greenhouse gases were pollutants and could be subject to regulation under the Clean Air Act. The Environmental Protection Administration ("EPA") adopted rules to regulate greenhouse gas emissions from passenger cars and light trucks for model years 2012-2016, while also adopting a rule requiring major new sources of greenhouse gases to endure review to establish technology-based limits on similar emissions. (R. at 6-7). The United States has taken other steps, whether through the EPA or international agreements, to limit its greenhouse gas emissions, and these preliminary regulatory actions have seen the total greenhouse gas emissions of the United States begin to decrease. (R. at 7).

II. PROCEDURAL BACKGROUND

The Petitioners, Organization of Disappearing Island Nations, Mana, and Flood brought suit against HexonGlobal Corporation and the United States of American in the District Court for New Union Island. Plaintiff Mana alleged HexonGlobal's fossil fuel related business activities violated the Law of Nations. (R. at 3). Plaintiff Flood alleged the United States violated the

public trust obligations to protect the global climate ecosystem incorporated through the Due Process Clause of the Fifth Amendment to the Constitution. *Id.* The district court granted both defendants' motion to dismiss. The district court rejected the alien claim from Mana stating any action Mana had under the ATS was displaced by the greenhouse gas regulations under the Clean Air Act. (R. at 9). The international tort claims are considered to arise under federal common law, but the Supreme Court has held the Clean Air Act displaces the federal common law of air pollution. *Id.* Therefore, Mana failed to state a claim for relief. (R. at 10).

In relation to Flood's constitutional claim, the district court found there to not be a Due Process right to government protection from the allegedly wrongful actions of a private party. *Id.* The district court stated that even if an exception were found, the majority of the actions in question by the United States government were conducted long before the dangers of human induced climate change became publicized. (R. at 11). Therefore, the second claim was dismissed for failure to state a claim for relief under the Fifth Amendment to the Constitution.

SUMMARY OF THE ARGUMENT

An alien may bring a non-frivolous Alien Tort Statute (ATS) claim against a domestic corporation because none of the restrictions set by the Supreme Court apply in this situation. The ATS statute only requires that a plaintiff be an "alien" and bringing a claim for "a tort only, committed in violation of the law of nations or a treaty of the United States." However, the Supreme Court has also set three limitations on the ATS statute (1) the alleged activities took place in the United States, (2) the corporation must be a United States corporation, and (3) the alleged international law must be universally accepted and understood. Therefore, if an alien brings a non-frivolous claim alleging a violation of a law of nations and none of the restrictions apply, the alien may bring a claim against a domestic corporation. Assuming the alien claim being brought under the ATS, in this case, is non-frivolous and none of the restrictions apply the District Court should have jurisdiction to hear the case.

The *Trail Smelter* Principle is a customary international law that is enforceable as a law of nation under the ATS because it is universally accepted. The standard set by the Supreme Court for when an alleged law is considered a law of nation is when the law is universally accepted evidence by in documents such as treaties, controlling executive or legislative act or judicial decision, or if there is no such document available, the customs and usage of civilized nations. Here, there was no treaty; controlling executive or legislative acts are also absent; however, the customs and usage of civilized nation as documented by jurists and commentators may be present. This is because the *Trail Smelter* principle was adopted in two United Nation declarations and the International Court of Justice has also mentioned it as part of the international law relating to the environment. Because the *Trail Smelter* Principle is universally accepted as an international law the court should consider it as a law of nations enforceable under the ATS.

Principles read from the Stockholm Conference on the Human Environment and the Rio Declaration of Environment and Development demonstrate that international States intended for non-governmental organizations to be responsible for protecting the environment. The polluter pays principle, found in Principle 16 of the Rio Declaration, reflects the theory that the source of the pollution has an obligation to bear the cost of pollution. The Stockholm Conference also declared international organizations needed to play a part in the protection of the environment. The harm caused in this case is created by HexonGlobal, so holding the United States accountable for the harmful pollution caused by a private company would be unjust. The international agreements made clear that non-governmental actors are part of international law and can be held accountable for harmful pollutants spreading into outside States.

The Clean Air Act displaces the Trail Smelter Principle, because the Trail Smelter Principle comes from an international agreement rather than an international treaty. According to the Constitution, the advice and consent of the Senate is required for an agreement to be recognized as a treaty in the United States. U.S. Const. art. II, § 2, cl. 2. A treaty is only binding if it is the equivalent of an act of the legislature and operates without the aid of legislative provisions. *Medellin v. Texas,* 552 U.S. 491, 504 (2008). Courts will also examine the language of the agreement in order to assist in the determination. *Id.* The Trail Smelter arbitration case was decided by an arbitration tribunal and the decision of the tribunal was made effective according to the laws of the United States and Canada. The final decisions were not submitted to the Senate for advice and consent and the language of the agreement was specific to the questions answered by the tribunal, rather than broad language applying to other areas of domestic federal law. The Trail Smelter Principle is an international agreement that the United States follows on its honor and obligation, and thus is not a treaty under the meaning of the Constitution. This allows the

Clean Air Act to displace the Trail Smelter Principle under the Supremacy Clause, because the federal legislation overrides the international agreement.

In order for this Court to grant a cause of action using the Due Process Clause in the Fifth Amendment, the Court must first find language authorizing the fundamental right in the Constitution. The prevailing test for finding a fundamental right was used in *San Antonio School District v. Rodriguez*, where the Supreme Court determined the right must be found explicitly or implicitly in the Constitution. 411 U.S. 1 (1973). The direct language of the Constitution does not grant a fundamental right for a healthful environment and there is nothing to suggest the right can be read implicitly. Furthermore, this Court should not find an exception because a substantial body of case law can be found demonstrating courts have not been willing to grant a fundamental due process right to a healthy environment free of harmful pollutants. The Supreme Court has also stated the United States government cannot be held responsible for the actions of a private party, so given all the information at hand this Court cannot find a fundamental right to protect the global climate from fossil fuel production.

Both the law of nation claim, under the ATS, and the public trust claim, under due process, are non-justiciable political question because both of these claims implicate the *Baker* factors. The Supreme Court standard for when a claim is a political question is from the Baker case where it laid out six factors anyone of which if implicated may deem the claim non-justiciable because of the political question doctrine. The factors are (1) if the constitution has designated the issue to another branch of the government; (2) there lacks judicially discoverable and manageable standards for resolving the issue; (3) it would be impossible to resolve the issue without an policy determination from another branch of government; (4) it would be impossible for the court to resolve without disrespecting another branch of government; (5) if there would be a need to strictly adhere to a political decision already made; and (6) if resolving would mean

embarrassment. Here, to resolve the appellants' claim means the court would have to move beyond the area of judicial expertise implicate which implicates, at least, the second and third *Baker* factors. Because all it takes is implication of one *Baker* factor for a claim to be non-justiciable and multiple are implicated, both of the claims are non-justiciable because of the political question doctrine.

ARGUMENT

I. MANA MAY BRING AN ATS CLAIM AGAINST A DOMESTIC CORPORATION BECAUSE THE RESTRICTIONS SET BY THE COURT DOES NOT APPLY IN THIS SITUATION.

Mana may bring a claim against a domestic corporation because the restrictions set by the Court do not apply in this situation. The Alien Tort Statute (ATS) gives jurisdiction to district courts to hear "civil action [brought] 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. The ATS only provides for jurisdiction in the district court and does not create a cause of action. *Sosa v. Alverez*, 542 U.S. 692, 713-14 (2004), see also *Kiobel v. Royal Dutch Petroleum*, 621 F.3d 111, 125 (2d Cir. 2010), aff'd 569 U.S. 108 (2013).

Jurisdiction refers to a court's power to hear a case. Brief for Petitioner at 8, *Kiobel v. Royal Dutch Petroleum Co*., 569 U.S. 108 (2013) (No. 10-1491), 2011 WL 6425363, at *8; citing *Morrison v. National Australia Bank Ltd*., 130 S. Ct. 2869, 2877 (2010). Granting jurisdiction does not mean granting relief. Brief for Petitioner at 8, *Kiobel v. Royal Dutch Petroleum Co*., 569 U.S. 108 (2013) (No. 10-1491), 2011 WL 6425363, at *8. "[I]t is well settled that the failure to state a proper cause of action calls for a judgement on the merits and not for a dismissal for want of jurisdiction." *Bell v. Hood*, 327 U.S. 678, 682 (1946). "Unless the claim is so 'plainly unsubstantial' that it falls outside the statutory grant of jurisdiction, failure to state a claim does not affect the court's power to hear the case." *Ex parte Poresky*, 290 U.S. 30, 32 (1933).

So long as an alien's tort claim is non-frivolous and could potentially violate the law of nations, the district court has jurisdiction under the ATS to hear the case. *Sarei v. Rio Tinto*, PLC, 487 F.3d 1193, 1201 (9th Cir. 2007). A case may be dismissed by applying as a standard "the existence or lack of arguable merit or substance in the claim." 52 A.L.R. Fed. 679

(Originally published in 1981), see also *Newburyport Water Co. v. City of Newburyport*, 193 U.S. 561, 579, 24 S. Ct. 553, 557, 48 L. Ed. 795 (1904).

Here, Mana's claim is that HexonGlobal's fossil fuel related business activities violated the law of nations and is seeking damages and injunctive relief. (R. at 3). The records show that HexonGlobal has knowledge of the of the warming effect of "greenhouse gases." (R. at 4). The greenhouse gas warmed the earth, and which led to the sea level rise that ultimately damaged Mana's home. (R. at 4). Therefore, the claim is non-frivolous and should be able allowed to continue.

HexonGlobal being a corporation does not bar the claim in this case. In footnote 20 of *Sosa v. Alverez*, the Court explained that "[a] related consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual." 542 U.S. at n.20. This footnote was referred to in Justice Breyer's concurring opinion in *Sosa*. The opinion interpreted this footnote to mean "liability [is extended] to the type of perpetrator (*e.g.,* a private actor) the plaintiff seeks to sue." *Id*. at 760. The footnote also includes corporations as part of the private actors. *Id*. at n.20.

However, the Supreme Court has set other limitation on corporate liability. Specifically, (1) the activities alleged must not be extraterritorial, (2) the company must be a United States corporation, and (3) the alleged international law violation must be universally accepted and understood. (R. at 8).

Extraterritorial is when the alleged events occurred outside of the United States. In *Kiobel v. Royal Dutch Petroleum*, the plaintiffs were aliens bringing a claim against foreign defendants about events that occurred outside of the United States. 569 U.S. 108, 113, 133 S. Ct. 1659,

1662, 185 L. Ed. 2d 671 (2013). The Court held that because this was extraterritorial the court had no jurisdiction. *Id*. at 1660.

Here, the defendant, HexonGlobal, is the "surviving corporation resulting from the merger of all the major United States oil producers." (R. at 5). "It is incorporated in New Jersey, and it has its principle place of business in Texas." *Id*. The alleged wrongdoing is HexonGlobal's business activities in the United States which led to sea level rise. (R. at 3). Therefore, because the alleged activities occurred in the United States the extraterritorial limitation does not apply.

Being a United States corporation is a requirement under the ATS. In *Jesner v. Arab Bank, P.L.C*., alien petitioners filed suit under the ATS alleging that Arab Bank, a foreign corporation, facilitated terrorist acts abroad which resulted in injury or death to them or the ones they are asserting the claim. 138 S. Ct. 1386, 1388, 200 L. Ed. 2d 612 (2018). The Court held that "foreign corporations may not be defendants in suits brought under the ATS." *Id*. at 1390.

Here, HexonGlobal is incorporated in New Jersey and its principal place of business is in Texas. (R. at 5). The record demonstrates that HexonGlobal is a United States corporation and, therefore, the United States corporation limitation does not apply.

For an alleged international law violation to be universally accepted there should be a treaty, controlling executive or legislative act or judicial decision stating so; if none exist then the court resorts to the work of jurists and commentators on the customs and usage of civilized nations to give guidance on international laws that have been universally accepted. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 734, 124 S. Ct. 2739, 2767, 159 L. Ed. 2d 718 (2004).

In *Sosa*, a Mexican doctor who was believed to have helped torture and murder a Drug Enforcement Agency (DEA) agent was abducted for a short period and transported to the United States by other Mexican nationals. *Id.* at 2747. After the doctor was acquitted, he brought suit under the ATS. *Id*. Because the ATS only grants jurisdiction, the doctor had to point to an

international law to gain relief. The doctor pointed to two well-known international agreements, the Declaration of Human Rights and the Covenant on Civil and Political Rights, to prove that his abduction was in violation of international law. *Id*. at 2763.

The Supreme Court dismissed the ATS claim because the declaration was deemed not a treaty and, therefore, not binding. *Id*. The covenant, however, was binding because the Unites States was a party to this covenant, but it was ratified on the express understanding that it was not self-executing and so it did not create an obligation enforceable in federal court. *Id*.

The doctor further argued that the cross-border abduction was an arbitrary detention, which is considered sanctioned action exceeding positive authorization under the domestic law of some government, regardless of the circumstance. *Id*. at 2768.

The Court stated that the arbitrary detention rule the doctor was asking for was too broad and that the doctor cited nothing to show that such a rule had the status of a binding customary norm today. *Id*. Because there was no treaty, controlling executive or legislative act, or judicial decision stating that a short detention and cross-border abduction was in violation of international law, the doctors ATS claim, which the Court of Appeals affirmed, was reversed. *Id*. at 2769.

Unlike *Sosa*, where the doctor could not point to a national law, in this case there is a high possibility that a violation of a recognized principle of international law occurred. The international principle that may have been violated is reflected in the *Trail Smelter* Arbitration, 3 U.N.R.I.A.A. 1965 (1941), where an "international arbitral panel held that harms to agriculture interests in the State of Washington caused by air pollution emissions from a smelter in British Columbia [was] a violation of international liability principles." (R. at 8). This principal was later adopted by the Declaration of the 1972 Stockholm Conference (Stockholm Declaration) on the Human Environment as Principle 21. *Id*. Nonetheless, like in Sosa, the Stockholm

Declaration was still not considered a treaty and, as a declaration it was also not adopted by the United States and, therefore, it was not binding.[1]

However, the facts regarding the declaration, here, are vastly different to those in *Sosa* because the *Trail Smelter* Principle was a principal recognized by the United States before it was adopted by other civilized nations as Principal 21 under the Stockholm Declaration. Unlike in *Sosa*, where the dismissal of the Mexican doctor's claim was due to the non-binding nature of the two agreements he cited; one because the United States never adopted and the other because it was ratified by the United States with the understanding that it wouldn't be binding; here, the United States was the first to adopt this principle when it was the *Trail Smelter* Principle. Because the United States recognizes this principle, coupled with the international acceptance of this principle, it may be considered an international law.

II. THE TRAIL SMELTER PRINCIPLE IS A RECOGNIZED PRINCIPLE OF CUSTOMARY INTERNATIONAL LAW ENFORCEABLE AS THE "LAW OF NATIONS" UNDER THE ATS BECAUSE IT IS UNIVERSALLY ACCEPTED.

The *Trail Smelter* Principle is a recognized principle of customary international law and enforceable as a law of nations under the ATS. For a customary international law to be enforceable under the ATS the alleged law must be universally accepted. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 734, 124 S. Ct. 2739, 2767, 159 L. Ed. 2d 718 (2004). Universal acceptance is demonstrated by a treaty, controlling executive or legislative act, or judicial decision stating its acceptance. *Id.* If there is no such document stating that the alleged law was accepted as a law of nations, then the court resorts to the work of jurists and commentators on

[1] Oxford Public International Law, Stockholm Declaration (1972) and Rio Declaration (1992), http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1608. (last visited Nov. 25, 2018) ("The Stockholm Declaration was not adopted as a treaty and is not legally binding . . . ").

the customs and usage of civilized nations to give guidance on what is and is not a law of nation. *Id*.

The *Trial Smelter* Principle is a universally accepted principle of international law, adopted as Principle 21 of the Stockholm Declaration.[2] The UN General Assembly (UNGA) adopted this declaration as Resolution 2994.[3] A total of 113 States were represented at this conference including the United States, United Kingdom, Germany, France, Japan, Spain, and South Africa, all of which are civilized nations.[4] However, this declaration by name is not a treaty nor was it adopted by the United States and, therefore, it is not binding.[5] However, this principle was first adopted by the United States, as the *Trail Smelter* Principle, before it became Principle 21 under the Stockholm Declaration, therefore, it may be binding.

To further evidence that the *Trail Smelter* Principle is universally accepted as a law of nation after it became Principle 21 of the Stockholm Declaration, it was also adopted by the Rio Declaration of 1992 as Principal 2, twenty years later.[6] Additionally, in 1996 the International Court of Justice (ICJ) released an advisory opinion declaring that Principle 21 of the Stockholm Declaration, "is now part of the corpus of international law relating to the environment."[7]

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[2] Oxford Public International Law, Stockholm Declaration (1972) and Rio Declaration (1992), http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1608. (last visited Nov. 25, 2018).
[3] *Id*.
[4] United Nations, Report of the United Nations Conference on the Human Environment Stockholm, 5-16 June 1972, http://www.un-documents.net/aconf48-14r1.pdf. (last visited Nov. 25, 2018), see also *Sosa*, 542 U.S. at 734
[5] Stockholm Declaration (1972) and Rio Declaration (1992), http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1608. (last visited Nov. 25, 2018).
[6] *Id*.
[7] International Court of Justice, Report of Judgements, Advisory Opinions and Orders Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion of 8, July 1996, https://www.icj-cij.org/files/case-related/95/095-19960708-ADV-01-00-EN.pdf. (last visited Nov. 25, 2018).

If the Stockholm Declaration, the Rio Declaration, and the ICJ advisory opinion do not amount to a treaty and are not binding, the *Trail Smelter* Principle may still meet the ATS standard set by the *Sosa* Court. 542 U.S. at 734. The declarations and advisory opinion may be considered works of jurists and commentators on the customs and usage of civilized nations. *Id*. As the *Sosa* Court explained, jurists and commentators, "who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects . . ." they help determine what international law "really is." *Id*.

Since the *Trail Smelter* Principle was adopted by two separate declarations along with an ICJ advisory opinion, all of which were written by jurists and commentators, it may meet the ATS standard as a customary international law enforceable as a "law of nation." *Id*.

III. PRINCIPLES FROM THE RIO DECLARATION AND STOCKHOLM CONFERENCE DEMONSTRATE THE UNITED NATIONS INTENDED FOR NON-GOVERNMENTAL ACTORS TO HAVE OBLIGATIONS TOWARDS THOSE INJURED BY ITS HARMFUL POLLUTANTS.

The principles of international agreements ratified by the United Nations demonstrate an intent to ensure non-governmental actors possess a key role in protecting the environment, developing international doctrines, and working with the State where the private actor is located. In the Trail Smelter arbitration, the pollution was not coming from the actions of a State, but rather the Consolidated Mining and Smelting Company of Canada (COMINCO), a private business operating within Canada's borders. When the final decision of the tribunal came across, Canada was imposed responsibility for the air pollution coming from within its borders, however, COMINCO still had a responsibility to regulate and control the emissions stemming from the smelting. This responsibility was necessary to ensure that there would be no further harm to individuals adversely affected by the smelting pollution.

Placing obligations on a non-governmental actor would not be unheard of for environmental law within the United States. Already the Clean Air Act employs the "polluter

pays principle," a theory that if the polluter of the environment is responsible for damages caused by the pollution. This is an obligation that can be placed upon a private company if the company is polluting the environment. The polluter pays principle was also given effect by the Rio Declaration in Principle 16, which demonstrates that international States sought to ensure non-governmental actors bear the cost of the pollution. This is an obligation that is placed upon the polluter, and the language of the Principle is broad to ensure that any party, including non-governmental actors, can be held responsible. The Rio Declaration wanted to include market-oriented economic approaches to help shape attitudes and behaviors towards the environment, noting that environmental law and regulations cannot alone deal with global climate problems.[8] The approach intended to create a broader framework for policies, law and regulation in order to ensure the policies were mutually beneficial.[9] This broad approach in the international agreement signals that non-governmental actors were intended to have responsibility and obligations during the development of international law.

Further support for providing obligations to non-governmental actors can be found in Principle 25 of the Stockholm Conference on the Human Environment, which declares "states shall ensure that international organizations play a coordinate, efficient and dynamic role for the protection and improvement of the environment."[10] This principle reflects the intent of the United Nations to ensure that private parties are involved in ensuring the environment is protected.

In this case, the United States government has demonstrated its commitment to protecting the environment through passage of the Clean Air Act and EPA regulations on vehicles and new

[8] *Rio Declaration on Environment and Development*, art. 8.28, June 3-14, 1992, 1 U.N. 26.
[9] *Rio Declaration on Environment and Development*, art. 8.30, June 3-14, 1992, 1 U.N. 26.
[10] *Declaration of the United Nations Conference on the Human Environment*, principle 25, 14 U.N. 48.

sources of major pollution. The source of the greenhouse gases that are threatening Mana and Flood are produced by HexonGlobal, and even though HexonGlobal has refineries located in the United States, the government should not be responsible for the pollution caused by HexonGlobal. As the Rio Declaration and Stockholm Conference made clear, countries expected non-governmental actors to participate in protecting the environment and holding themselves accountable for any pollution created. Therefore, this Court should follow the international agreements and hold HexonGlobal and other non-governmental actors have an obligation to those injured by its pollution.

IV. DUE TO THE ARBITRATION DECISION LACKING THE SENATE'S ADVICE AND CONSENT, THE TRAIL SMELTER PRINCIPLE CANNOT BE UPHELD AS A TREATY WITHIN THE MEANING OF THE CONSTITUTION, AND THUS, THE CLEAN AIR ACT OVERRIDES THE TRAIL SMELTER PRINCIPLE ACCORDING TO THE SUPREMACY CLAUSE.

A "treaty" does not have the same meaning in the United States and international law, because the Constitution provides for a narrower definition. In international law, a treaty is an agreement between two or more independent states that is formally signed and ratified by the rulers or the supreme power of each independent state. *Black's Law Dictionary*. However, the Constitution states a treaty is an agreement that is made by and with the advice and consent of the Senate. U.S. Const. art. II, § 2, cl. 2. This is an important distinction, as a treaty must fall under the definition prescribed by the Constitution in order to have binding effect on both international law and domestic law.

There is also a long-recognized distinction by the Supreme Court between treaties that have effect as domestic law and those that are not binding as federal law. *Medellin v. Texas*, 552 U.S. 491, 504 (2008). A treaty that is binding is one that is the equivalent of an act of the legislature and is self-executing so that the treaty operates without the aid of legislative provisions. *Medellin*, 552 U.S. at 505. A treaty that is not binding is considered an international

law obligation and cannot be self-executing, but instead must be enforced pursuant to legislation in order to have effect. *Id.* This implementing legislation was recognized as important by the Court in order for a treaty to have domestic effect.

In *Medellin*, the Court found that the United Nations Charter ("U.N. Charter") in question was an international law obligation rather than an international law binding on domestic courts. The Court examined the text of the agreement and determined there was no evidence the agreement was ratified by the Senate to give immediate legal effect. Furthermore, nothing in the agreement stated the United States "shall" or "must" comply with the decisions of an international judge. Due to these reasons, the Court likened the U.N. Charter to an agreement between nations, with the enforcement of its provisions depending upon the interests and honor of the governments involved. *Id.*

The Trail Smelter Principle was established at the conclusion of the Trail Smelter case, which was decided by an arbitration tribunal. A special agreement signed by the United States and Canada gave and limited the power of the conclusion made by the tribunal. Thus, the results of the tribunal would be ratified in accordance with the constitutional forms of the parties involved in the dispute. *Trail Smelter Arbitration*, 3 U.N.I.R.A.A. 1910 (1945). The language of the arbitration indicated that the purpose of the tribunal was to decide the four questions that were referred to it by the United States and Canada. *Id.* at 1907. The specific purpose of putting together this tribunal was to specifically deal with the Trail Smelter dispute between the United States and Canada, rather than establishing binding international laws on the parties involved. The language in the decision, that the agreement "shall be ratified in accordance with the constitutional forms of the contracting parties . . ." is evidence that the intention of the tribunal was for the decisions regarding the four questions to be international obligations, rather than a body of international law that would become binding on the respective parties. *Id.* at 1910. This

intent is clear when considering the Senate was not consulted for approval of the final arbitration decision that would go into effect.

The decision by the tribunal in the *Trail Smelter* arbitration case was not submitted to the Senate for advice and consent, and therefore, the *Trail Smelter Principle* cannot be considered a treaty under the terms of the Constitution. As in *Medellin,* the *Trail Smelter Principle* is an international law obligation that the United States follows on its honor and interest. The *Trail Smelter Principle* is not self-executing because the arbitration tribunal was required in order to give effect to the results of the dispute and the agreement only contemplates the answers to the four questions in the dispute. Furthermore, there is no evidence of implementing legislation passed by Congress in order to give the *Trail Smelter* arbitration binding effect on domestic law, which would be necessary in order for the agreement to be self-executing.

Since the *Trail Smelter Principle* cannot be considered a treaty within the meaning of the Constitution, the Supremacy Clause gives priority and effect to the Clean Air Act. The Supremacy Clause establishes that the Constitution, federal laws and treaties made under Constitutional authority are the supreme law of the land. *Art. VI*. The Clean Air Act is federal legislation that was passed by Congress and approved by the President, so while the Trail Smelter Principle is an international agreement, the Supremacy Clause dictates that the federal legislation passed by the United States government displaces the international agreement. Therefore, should this Court find the Trail Smelter Principle enforceable, the international agreement cannot be imposed upon the United States government because the Clean Air Act is the superior law of the land.

V. A FUNDAMENTAL RIGHT PRESCRIBED BY THE FIFTH AMENDMENT MUST BE FOUND WITHIN THE LANGUAGE OF THE CONSTITUTION, AND SINCE THERE IS NO LANGUAGE REGARDING A HEALTHFUL ENVIRONMENT OR FREEDOM OF CLIMATE CHANGE, THERE IS NO FUNDAMENTAL RIGHT TO SUCH.

The Fifth Amendment provides United States citizens with substantive due process protections for life, liberty and property, but this Court should not allow the substantive due process protections to extend to the global climate. The prevailing test used by the Supreme Court to determine whether a fundamental right exists in the Constitution does not provide for a cause of action for changes to the global climate, and any narrow case law exceptions are outweighed by the overwhelming body of evidence that suggests a fundamental right should not be found for a healthful environment.

A. The prevailing test for determining if a fundamental right exists within the substantive due process protections afforded by the Constitution finds no explicit or implicit mention of a fundamental right to a healthful environment.

In *Pinkney v. Ohio Environmental Protection Agency*, a district court was asked to determine whether the right to live in a healthful environment was a fundamental right guaranteed by the Constitution. 375 F.Supp. 305, 309 (N.D. Ohio 1974). In order to determine whether the interest in living in a healthful environment was a fundamental right, the district court followed the reasoning of the Supreme Court in *San Antonio School District v. Rodriguez*, 411 U.S. 1 (1973), where five justices agreed the critical determinant in ruling whether a right is fundamental is whether the right is explicitly or implicitly guaranteed in the Constitution. *Pinkney*, 375 F.Supp. at 310. The district court noted that the Supreme Court failed to find language supporting a fundamental right to education for Rodriguez, and that the Court was not moved by the perceived societal importance of education. *Id.* Thus, applying the prevailing test for determining if a fundamental right exists, the district court found that there was no explicit or implicit language that would create a fundamental right to a healthful environment. *Id.*

This Court should follow the test used in *San Antonio School District* in order to determine if a plaintiff can have a cause of action against the United States Government based on a fundamental right protected by due process in the Fifth Amendment. The language of the

Constitution does not explicitly or implicitly mention any fundamental right a citizen would be owed for a healthful environment free of disruption due to fossil fuels. The Supreme Court acknowledged that creating a substantive constitutional right in order to guarantee equal protections of the laws is not within the power of the Court. *San Antonio School District*, 411 U.S. at 33. If the Supreme Court acknowledges that a fundamental right cannot be created without explicit or implicit language in the Constitution, then this Court must follow the reasoning of the Supreme Court. Going further, when the Supreme Court was debating whether education fell within the Constitution's protections, the majority stated the relative societal significance of education compared to other fundamental rights is not important to the Court's analysis. *Id.* at 33. While the arguments of the plaintiffs detail the importance of a healthy environment and the need to limit fossil fuel production, the lack of evidence for language in the Constitution regarding climate change cannot be ignored. This Court should focus solely on whether explicit or implicit language in the Constitution offers the plaintiffs a cause of action under substantive due process for the right to a healthy environment. A reading of the text of the Constitution will not find any language purporting for a fundamental right to a healthy environment, and therefore, this Court cannot find that such a right and cause of action exists.

B. Prior case law regarding substantive due process rights in a healthful environment outweigh the recent decision in *Juliana v. United States*, and therefore, this Court should not be influenced by the ongoing *Juliana* case.

This Court should not be swayed by the recent decision in *Juliana v. United States*, because there is a substantial body of case law that indicates the right healthy environment does not exist within the meaning of the Constitution. 2016 WL 6661146, at *16 (D. Or. Nov. 10, 2016). The initial district court ruling has been challenged by the United States and the subsequent outcome of the case is still unknown and difficult to predict. Another court declined to extend the decision in *Juliana*, claiming that there was no fundamental right to health or

freedom from bodily harm within the due process clause. *Lake v. City of Southgate*, 2017 WL 767879 *5 (E.D. Mich. 2017). In that case, the court noted that federal courts often face assertions of a fundamental right to a healthy environment or freedom from harmful pollutants, but these are often struck down, with the only arguable exception being *Juliana*. *Id.* Other cases demonstrate how federal courts view whether a fundamental right to a healthy environment is found in the Constitution.

A district court in California rejected a plaintiff's claim for depravation of the right to be free of climate change pollution, finding that the right was not protected by the Constitution. *SF Chapter of A. Phillip Randolph Institute v. U.S. E.P.A.*, 2008 WL 859985 *7 (N.D. Cal. 2008). Another court was unwilling to allow a cause of action for plaintiffs against the Director of the Department of Welfare and Institutions for the State of Virginia for failure to consider environmental and cultural impacts when deciding the location of a new government-sponsored building. *Ely v. Velde*, 451 F.2d 1130, 1139 (4th Cir. 1971). Other courts have found that existing legislation did not provide an enforceable right to a healthful environment that would give rise to damages in the Constitution. *Tanner v. Amico Steel Corp.,* 340 F.Supp. 532, 537 (S.D. Tex. 1972). These courts all similarly found that a right to a healthful environment cannot be found in the Constitution, and this Court should note the reluctance to create such a right for plaintiffs.

The district court found that the reasoning in *Juliana* was not persuasive enough to be followed and this Court should come to a similar conclusion. R. at 11. The cases listed above demonstrate the existing theory that the government cannot be responsible for providing a safe and healthy environment. The Supreme Court has also held a there is no language in the substantive component of the Due Process Clause that requires the government to protect citizens' life, liberty, and property from private actors. *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 196 (1989). The United States government is not the party that

caused the rise in global atmospheric temperatures, rather that is the result of HexonGlobal and other fossil fuel producers. The United States government has taken initiative to protect the environment with the Clean Air Act and recent court decisions such as *Massachusetts v. EPA*. To hold the United States government accountable for the actions of private parties would go directly against the direction of the Supreme Court and discount the work done so far to reverse environmental damages.

As Justice White stated in *Lindsey v. Normet*, "the Constitution does not provide judicial remedies for every social and economic ill." 405 U.S. 56, 92 (1972). While the environmental concerns of the plaintiffs are troubling, the Constitution does not provide a cause of action against the United States government for failure to protect the global environment from fossil fuels, and this Court should not find an exception applicable to this issue either.

VI. MANA'S LAW OF NATION CLAIM UNDER THE ATS AND FLOOD'S PUBLIC TRUST CLAIM UNDER DUE PROCESS BOTH PRESENT A NON-JUSTICIABLE POLITICAL QUESTION BECAUSE THESE CLAIM IMPLICATES THE *BAKER* FACTORS.

Mana's law of nation claim under the ATS and Flood's public trust claim under the due process both present a non-justiciable political question because these claims implicate the *Baker* factors. "[N]on-justiciability of a political question is primarily a function of the separation of powers." *Baker v. Carr*, 369 U.S. 186, 217, 82 S. Ct. 691, 706, 7 L. Ed. 2d 663 (1962). A claim is a non-justiciable political question when *Baker* factors implicated. *Native Vill. of Kivalina v. ExxonMobil Corp*., 663 F. Supp. 2d 863, 872 (N.D. Cal. 2009), *aff'd,* 696 F.3d 849 (9th Cir. 2012).

A. The law of nation claim under the ATS is non-justiciable because it implicates the *Baker* factors.

In *Barker*, the plaintiff, Baker, brought suit under the Equal Protection Clause alleging that because Tennessee had not actually redistricted since 1901 and the urban county where he

lived had grown since, his vote mattered less and therefore, he was not afforded equal protection. *Baker*, 369 U.S. at 696, 698. The district court's reasoning for dismissing the case was that the claim was non-judiciable because it was a political question. *Id*. at 705. This is because the district court relied on precedents and "[f]rom a review of th[ose] decisions [the court held] there can be no doubt that the federal rule . . . is that the federal courts . . . will not intervene in cases of this type to compel legislative reapportionment." *Id*. The Supreme Court, in analyzing the case, stated:

> Prominent on the surface of any case held to involve a political question is found [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. at 710. These factors became known as the *Baker* factors, and the first three "factors focus on the constitutional limitations of a court's jurisdiction, while the final three are 'prudential considerations [that] counsel against judicial intervention.'" *Kivalina,* 663 F. Supp. 2d at 872, quoting *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 981 (9th Cir. 2007).

The Court concluded that because none of the *Baker* factors were implicated, the case was justiciable, and the Court reversed and remanded the case. *Baker,* 369 U.S. at 720. Therefore, it is reasonable to conclude that if a *Baker* factor is implicated, then the claim is non-justiciable due to the political question doctrine. Though, the facts in *Baker* and the present case are significantly different, there are non-justiciable cases with similar facts.

One such case with similar facts to the present case, is *Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849 (9th Cir. 2012). In *Kivalina*, Alaskan Natives brought a nuisance suit alleging that Exxon and other energy producers created greenhouse gas which

resulted in global warming, and this caused sea level to rise and resulted in damages to their land. *Id.* at 869. The *Kivalina* Court held that the claims were non-justiciable because of the political question doctrine. *Id*. at 883. The *Kivalina* Court reasoned that to resolve the claims the court must "move beyond areas of judicial expertise." *Id.*, at 873, quoting *Wang v. Masaitis*, 416 F.3d 992, 995 (9th Cir. 2005). Going beyond judicial expertise implicated the second and third *Baker* factors. *Kivalina*, 663 F. Supp. at 873. The Kivalina Court further stated that "[p]laintiffs also fails to confront the fact that resolution of their claim requires the judiciary to make a policy decision about who should bear the cost of global warming." *Id*. at 876-877.

Unlike *Baker* but similar to *Kivalina*, here, the *Baker* factors are present. Mana's claim, similar to *Kivalina*, is that HexonGlobal's legal business practices created greenhouse gases which led to sea level rise and damage to Mana's property. (R. at 8). The law of nation that is alleged to be violated is the *Trail Smelter* Principle. *Id*. Because the facts alleged here are similar to the facts in *Kivalina*, the reasons why Mana's claim is a non-justiciable must also be similar. In *Kivalina* the claim was non-justiciable because resolving the claim would have meant the court had to move beyond areas of judicial expertise, *Kivalina*, 663 F. Supp. at 873, implicating the second and third *Baker* factors. Similarly, Mana's claim would require the court to go beyond judicial expertise which would also implicate the second and third *Baker* factor. Here too, Mana's claim would require the judiciary to make a policy decision about who should bear the cost of global warming. Since *Baker* factors are implicated, Mana's law of nation claim is non-justiciable because of the political question doctrine.

B. The public trust claim is non-justiciable because it also implicates the *Baker* factor.

Flood's claim is likewise non-justiciable because it also implicates the *Baker* factors. As established in the previous section, if the *Baker* factors are implicated the claim is non-justiciable because of the political question doctrine. *Kivalina,* 663 F. Supp. at 872. However, there are

distinguishable facts between Flood's and Mana's claim. There are two main difference: (1) Flood is a U.S. Citizen and bringing suit against the United States Government, (R. at 3), whereas Mana is an alien bringing suit against a private corporation, (R. at 3), and (2) Flood is suing under the public trust doctrine, as incorporated by the Fifth Amendment, (R. at 10), whereas Mana is suing under the ATS. (R. at 3).

Regardless of the difference, the non-justiciable analysis of Flood's claim is the same as Mana's claim because they are both non-justiciable due to the political question doctrine. Here, Flood alleges that the United States violated the public trust obligations by failing to protect the climate ecosystem. (R. at 3). In order for a court to resolve Flood's claim the court will be forced to "move beyond areas of judicial expertise[,]" *Kivalina*, 663 F. Supp. at 873, quoting *Wang v. Masaitis*, 416 F.3d 992, 995 (9th Cir. 2005), implicating the second and third *Baker* factors. *Baker*, 369 U.S. at 710. Here, like Mana, Flood also "fails to confront the fact that resolution of [his] claim requires the judiciary to make a policy decision about who should bear the cost of global warming." *Kivalina*, 663 F. Supp. at 876-877. Because multiple *Baker* factors will be implicated, Flood's claim is non-justiciable because of the political question doctrine.

CONCLUSION

For the foregoing reasons, this Court should affirm the United States District Court of New Union Island and find the United States is not responsible for damages to the plaintiffs caused by fossil fuel production.