Team #31

CA. No. 18-000123

IN THE UNITED STATES COURT OF APPEALS FOR THE TWELFTH CIRCUIT

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

Appellants,

v.

HEXONGLOBAL CORPORATION,

Appellee,

and

THE UNITED STATES OF AMERICA,

Appellee.

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

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

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1.0 Jurisdictional Statement

The Appellants' claims arise under the *Trail Smelter* Principle (*Trail Smelter)*, under the international Law of Nations, applicable under the Alien Tort Statute (ATS), 28 U.S.C. § 1350 (2012), and the Due Process Clause of the Fifth Amendment of the United States Constitution, U.S. Const. amend. V. Under ATS "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. Code § 1350. Further, district courts have original jurisdiction over all cases arising under the laws of the United States. 28 U.S.C. § 113 (2006). The Appellants filed a timely appeal from a final judgment of a federal district court. Therefore, this court has jurisdiction over the present matter. *Id.* at § 1291.

2.0 Standard of Review

The United States District Court for New Union Island dismissed the appellants' claims for failure to state a claim of relief. A dismissal for failure to state a claim under the Federal Rules of Civil Procedure Rule 12(b)(6) is a judgment on the merits and subject to de novo review. 2 Milton A. Shadur, *Moore's Federal Practice – Civil* §12.34 (2018). *See* Haley v. City of Boston, 657 F.3d 39, 36 (1st Cir. 2011) (dismissal for failure to state a claim reviewed de novo). The appellate court is required to construe the complaint in the light most favorable to the plaintiff in determining whether the lower court applied the relevant law correctly. *In re DeLorean Motor Co.,* 991 F.2d 1236, 1240 (6th Cir. 1993).

3.0 Statement of the Issues

I. Can Appellant Mana bring an ATS claim against a domestic corporation?

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

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

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

V. 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?

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

4.0 Statement of the Case

4.1. Procedural History

The Organization of Disappearing Island Nations (ODIN), Apa Mana, and Noah Flood brought suit against HexonGlobal Corporation (HexonGlobal) and the United States of America (U.S.) for harms related to greenhouse gas emissions and climate change. Appellant Mana asserted HexonGlobal's fossil fuel-related business activities constituted a violation of *Trail Smelter*, which is a recognized principle of the law of nations under ATS, seeking damages and injunctive relief. R. at 3. Appellant Flood asserted the U.S. violated its Public Trust obligations to protect the atmosphere, incorporated through the Due Process Clause of the Fifth Amendment. *Id.* The district court granted the Appellee's motions to dismiss. First, the court held the Clean Air Act (CAA) displaced ATS and declined to consider whether *Trail Smelter* is a universally accepted principle of customary international law, whether *Trail Smelter* is actionable against private parties, and

whether ATS allows suit against a domestic corporation. *Id. at 9.* Second, the court found the Public Trust doctrine could not be the face of a claim considering the violation of a right guaranteed by Due Process. *Id.* at 10.

4.2. Statement of Facts

Appellant Mana is a national of the island-nation of A'Na Atu, and Appellant Flood is a U.S. Citizen resident of the U.S. New Union Islands. Record (R.) at 3. The maximum elevation of these islands is less than three meters above sea level, with the populated areas located below one meter. *Id*. An increase in sea level by one-half to one meter would make both of these islands uninhabitable. *Id.*

Sea levels are expected to rise by one-half to one meter by the end of the century if global temperatures increase by four degrees Celsius. R. at 4. It is known that burning fossil fuels for energy substantially increases concentrations of greenhouse gases in the atmosphere, such as carbon dioxide. *Id.* Anthropogenic emissions of greenhouse gases are causing significant changes in the global climate, including increased global temperatures and rising sea levels. *Id.*

Appellee HexonGlobal is a corporation resulting from the merger of every major United States oil producer. R. at 5. HexonGlobal is historically responsible for 32% of the United States cumulative fossil fuel-related greenhouse gas emissions, amounting to six percent of global historical emissions. *Id.* Their global sales of fossil fuels amount to nine percent of worldwide fossil fuel related emissions. *Id.* Although scientific data has proven the earth-warming capabilities of greenhouse gases since the nineteenth century, and HexonGlobal had personal knowledge that continued sale and production of fossil fuels would result in significant environmental harm, HexonGlobal nevertheless continued with these harmful activities, turning a substantial profit. *Id.*

Unfortunately, the Appellants are already experiencing the harmful effects from greenhouse gas emissions, as they reside in communities located less than one-half meter above sea level. R. at 5. The Appellants have suffered significant seawater damage to their homes and drinking water wells from severe storms, costing them substantially for repairs. *Id.* In addition, rising temperatures will significantly impact the Appellants' health, through increased risk of heat stroke and insect-carrying diseases. *Id.* Finally, the impacts from climate change deplete the Appellants' food source of locally caught seafood through ocean acidification, ocean warming, and loss of coastal wetlands. *Id.* Limiting fossil fuel combustion and production will help mitigate future damage to the Appellants' properties, maintain habitability of these low lying islands, and reduce adverse health effects from climate change. *Id.*

Although the U.S. government has acknowledged the threat of climate change since at least 1992, it has not limited fossil fuel production, distribution, or combustion. Instead, the U.S. has promoted these initiatives through tax subsidies, providing land for fossil fuel production, and the development of publicly owned fossil-fuel power plants. R. at 6. The U.S. has recently attempted to take measures towards combatting increased emissions. After the Supreme Court held the EPA could regulate greenhouse gases in *Massachusetts v. EPA*, the EPA issued an "Endangerment Finding," stating greenhouse gas emissions impact human health and the environment. *Id.* Subsequently, regulations were put in place addressing emissions from passenger cars and light trucks, new sources of emissions, and controls of emissions from existing power plants. R. at 7. Further, the U.S. has committed to reduce greenhouse gas emissions by 26-28% by signing the Paris Agreement *Id.*

Although the U.S. has taken steps to minimize impacts from greenhouse gas emissions, U.S. emissions have barely decreased, and global emissions have increased. *Id.* Worse, the current

U.S. administration has indicated intentions to withdrawal from the Paris Agreement and has proposed regulation to freeze emission reductions from fuel economy standards. *Id.* Without limits on the production and combustion of fossil fuels, damage to the Appellants' property and wellbeing will likely continue. The islands will become inhabitable, and negative impacts to human health will persist. R. at 5.

5.0 Summary of Argument

Trail Smelter is not displaced by the CAA, as the Act does not speak to the production and sale of fossil fuels, which are the bases for Appellant Mana's claim. *Trail Smelter* is a recognized principle of customary international law, enforceable as the law of nations under ATS, as this principle has been accepted as an international custom for over 70 years, thus establishing it as a specific, universal, and obligatory norm. Further, claims against domestic corporations can be brought under the ATS because corporate liability satisfies the *Sosa* test, and HexonGlobal's business activities touch and concern the U.S. with sufficient force to displace the presumption against extraterritoriality inherent in ATS claims. Finally, *Trail Smelter* can be applied to non-governmental actors because the *Trail Smelter* Arbitral Tribunal formed its decision based on U.S. law that involved claims against both state and private actors.

Appellant Flood's due process claim is valid because the U.S. failed to protect the atmosphere, in violation of the substantive due process guarantees of the Fifth Amendment. As the Public Trust doctrine creates an obligation, with respect to protecting natural resources, and this obligation predates the founding of the U.S., this doctrine's application is firmly rooted in the history and tradition of this nation. Alternatively, the U.S.'s activities violate the Appellant's substantive due process rights to life, liberty, and property.

As the Appellants' claims do not present non-justiciable political questions under *Baker*, this court has jurisdiction over the Appellant's claims.

6.0 Argument

6.1 The *Trail Smelter* Principle is not displaced by the Clean Air Act.

The CAA was enacted in order "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." 42 U.S.C. §7401(b)(1) (2012). The Supreme Court has held federal regulation of greenhouse gas emissions is regulated by the CAA. *Massachusetts v. EPA*, 540 U.S. 497, 560 (2007). Subsequently, the Court held in *Am. Elec. Power v. Connecticut* "the [CAA] and the EPA actions it authorizes displace any federal common-law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired powerplants". 564 U.S. 410, 424 (2011) [hereinafter *AEP*]. Both *Massachusetts* and *AEP* speak to regulation of emissions. Here, the Appellant's claim rests on harms from HexonGlobal's fossil fuel production and sales activities. R. at 8. Therefore, the lower court improperly held the CAA displaced the *Trail Smelter* Principle (*Trail Smelter)* because the CAA does not speak to production and sales activities and is only intended to regulate emissions.

6.1.1 The CAA does not speak to the production and sale of fossil fuels, and thus, the harms claimed by Appellant Mana under the *Trail Smelter* Principle are not displaced by the CAA.

In a suit against five major electric companies, the Court in *AEP* held claims for the restriction of greenhouse gas emissions were displaced by the CAA, which authorizes EPA to regulate carbon dioxide emissions. *Id.* at 423. The Court looked to *Milwaukee II,* where it had previously been decided the Clean Water Act displaced federal common law because the "legislation installed an all-encompassing regulatory program . . . to deal comprehensively with interstate water pollution." *Id.* at 419. In determining whether the CAA could displace federal common laws of nuisance and trespass, the Court in *AEP* articulated that "the test for whether

congressional legislation excludes the declaration of federal common law is simply whether the statute 'speak[s] directly to [the] question' at issue." *Id.* at 424 (citations omitted). The finding that the CAA speaks to emissions of carbon dioxide, in combination with the Court's finding in *Massachusetts* that carbon dioxide emissions qualify as air pollution, led the Court in *AEP* to hold the CAA displaces federal common law claims for harms from greenhouse gas emissions. *Id.*

In the wake of *AEP*, *Kivalina* was decided in the Ninth Circuit. There, the plaintiffs claimed that greenhouse gas emissions from ExxonMobil Corporation contributed significantly to global warming, causing the plaintiffs' land to be severely eroded. Unlike *AEP*, where the plaintiff was seeking abatement of emissions, the plaintiffs in *Kivalina* were seeking damages for harms caused by past emissions. *Native Village of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 857 (9th Cir. 2012). Following AEP, the *Kivalina* court held the plaintiff's federal common law nuisance claims were displaced by the CAA, stating "if a cause of action is displaced, displacement is extended to all remedies." *Id.*

The plaintiffs in *City of Oakland v. BP P.L.C.*, by contrast, claimed the defendants should be held liable for their sale of fossil fuels instead of their own emissions. 325 F. Supp. 3d 1017 (N.D. Cal. 2018). The court stated "the [CAA] did not necessarily displace plaintiffs' federal common law claims." The court specifically recognized this displacement issue, but ultimately did not need to resolve this question, as the case was decided on a different issue. *See also California v. BP P.L.C.*, No. C 17-06011 WHA, 2018 U.S. Dist. LEXIS 32990 at *14 (N.D. Cal. Feb. 27, 2018) (On motion to remand, Plaintiffs asserted "[h]ere, the [CAA] does not provide a sufficient legislative solution to the nuisance alleged to warrant a conclusion that this legislation has occupied the field to the exclusion of federal common law.").

Similarly, in *City of New York v. BP P.L.C.*, the plaintiffs claimed the defendant's global fossil fuel production, marketing, and sales activities exacerbated climate change. 325 F. Supp. 3d 466, 475 (S.D.N.Y. 2018). The court ruled in favor of the defendants, reasoning that, because climate change is a result of the emissions from third-party users of the defendant's fossil fuels, the plaintiff's claims were essentially the same as the claims in *AEP* and *Kivalina*, in that they concerned emissions and were therefore displaced by the CAA. *Id.*

Neither *AEP* nor *Kivalina* address the claims made by Appellant Mana under *Trail Smelter*. Appellant's claims are premised on HexonGlobal's continued fossil fuel production and sales activities despite HexonGlobal having the knowledge that "continued global sales and combustion of fossil fuel products would result in substantial harmful global climate change and sea level rise." R. at 5. Additionally, unlike *AEP* and *Kivalina*, which were primarily concerned with the defendants' domestic conduct, the Appellant's claim focuses on both domestic and international behavior. While some of their production occurs domestically at one refinery in New Union Island, HexonGlobal also operates refineries worldwide. R. at 5. It is likely that even if the CAA could regulate the sale and production of fossil fuels, these activities would be outside of the scope of the EPA and the CAA's authority.

The Appellant's claims mirror those made in *City of Oakland* and *City of New York*, as Appellant's claims are based on HexonGlobal's global sales and production of fossil fuel related products. The court in *City of Oakland* explicitly indicated claims arising from sales of fossil fuels may not be displaced by the CAA. 325 F. Supp. 3d 1017, 1024. Although there the plaintiff's claims were foreclosed under theories of separation of powers and foreign policy, it is dispositive that the court stated that claims arising from the sale and production of fossil fuels are not necessarily displaced by the CAA. *Id.*

The court's interpretation of the plaintiff's claims in *City of New York* was erroneous. The court's statement that the sale of fossil fuels equated to the emission of fossil fuels for the purposes of displacement under the CAA was a completely inappropriate and unjustified expansion of the CAA. The CAA addresses emissions, but the Act is silent as to environmental harms caused by the production and sales of fossil fuel products. After *Massachusetts*, it is clear that "[e]missions from domestic sources are certainly regulated by the [CAA]." *California v. BP P.L.C.*, 2018 U.S. Dist. LEXIS 32990, at *12. However, in this case, the Appellant's claims arise from "an earlier moment in the train of industry, the earlier moment of production and sale of fossil fuels, not their combustion." *Id*. There is no indication the CAA was intended to regulate that "earlier moment;" therefore, the Appellant's claims are outside the CAA's regulatory scope. Accordingly, the court should reverse the lower courts holding that the CAA displaces *Trail Smelter*.

6.2 The *Trail Smelter* Principle is a recognized principle of customary international law enforceable as the law of nations under ATS.

ATS provides that the "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. Code § 1350 (2012). While ATS is a jurisdictional statute and has not been construed to grant a cause of action, the Supreme Court has held the grant of jurisdiction is best interpreted as "provid[ing] a cause of action for the modest number of international law violations." *Sosa v. Alvarez-Machain,* 542 U.S. 692, 725 (2004). Traditional violations of the law of nations include Justice Blackstone's three primary offenses: "violation of safe conducts, infringement of the right of ambassadors, and piracy." *Id.* at 749. Although there are limited causes of action that can be brought under ATS, courts have found they are not precluded from considering a new cause of action, albeit with caution. *See Filartiga v. Pena-Irala*, 630, F.2d 876, 881 (2nd Cir. 1980) ("[C]ourts must interpret international law not as it was in 1789, but as it has

evolved and exists among the nations of the world today."); *Sosa*, 542 U.S. 692, 729 ("judicial power should be exercised on understanding that the door is still ajar subject to vigilant doorkeeping, and thus open to a narrow class of international norms today."). The Court in *Sosa* articulated that actionable offenses under the law of nations must be "specific, universal, and obligatory." *Id.* at 748.

The *Trail Smelter* Principle undoubtedly meets these universal and obligatory standards, as it has been widely accepted and restated in many international Declarations and subsequent cases. Furthermore, *Trail Smelter* meets the *Sosa* specificity test because HexonGlobal's actions are comparable to piracy and are of the same "definite content and acceptance among civilized nations" as the "historical paradigms familiar when [ATS] was enacted". *Id.* at 732. Thus, this court should hold *Trail Smelter* is a recognized principle of customary international law enforceable as the law of nations under ATS.

6.2.1 The *Trail Smelter* Principle has been an accepted international norm by civilized nations for over 70 years, indicating a universal and obligatory norm under *Sosa.*

The court should hold the *Trail Smelter* Principle meets the universal and obligatory standards articulated in *Sosa*. *Id.* The *Trail Smelter* principle originated from the *Trail Smelter* Arbitration, concerning smoke from a Canadian smelting company which caused environmental harms to crops and forests in Washington State. Trail Smelter (U.S. v. Cand.), 3 R.I.A.A. 1905, 1938 (1949). The Arbitral Tribunal concluded "under the principles of international law, as well as of the law of the United Sates, no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence." *Id.* at 1965. This arbitration has been deemed "the most influential decision on transboundary pollution in international law." Thomas W. Merrill, *Golden Rules for*

Transboundary Pollution, 46 Duke L.J. 931, 947 (1997). It has since been adopted by the Declaration of the 1972 Stockholm Conference on the Human Environment as Principle 21 and reasserted in the 1992 Rio Declaration on Environment and Development as Principle 2. R. at 9.

There are many tools the Court can use to determine that *Trail Smelter* qualifies as universal and obligatory. The law of nations "may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decision recognizing and enforcing that law." *United States v. Smith,* 18 U.S. 153, 160-61 (1820). *See also, Sosa v. Alvarez-Machain*, 542 U.S. 692, 734 (2004) ("[W]here there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations." (citing *The Paquete Habana,* 175 U.S 677, 700 (1900))). Because *Trail Smelter* is not a binding treaty, the court should look to prior case law, as well as international Declarations, to determine the universal and obligatory nature of *Trail Smelter*.

In *Filartiga v. Pena-Irala*, the court held torture was a violation of the accepted norms of international law. 630 F.2d 876 (2d Cir. 1980). There, the court looked to the United Nations Charter and the Declaration on the Protection of All Persons Being Subjected to Torture. *Id.* at 881-84. The court stated:

> [t]hese U.N. declarations are significant because they specify with great precision the obligations of the member nations under the Charter . . . thus, a Declaration creates an expectation of adherence, and "insofar as the expectation is gradually justified by State practice, a declaration may by custom become recognized as laying down rules binding upon the States".

Id. at 883 (citations omitted). The court in Filartiga found an international consensus regarding torture, such that it has "found expression in numerous international treaties and accords." *Id.*

Similarly, the Court in *Sosa* looked to international declarations and covenants as evidence of customary international law. 542 U.S. 692, 734. There, the plaintiff attempted to bring a claim under the ATS for his unlawful abduction from Mexico and subsequent detention in the United States. Ultimately, the Court found "a single illegal detention of less than a day" did not violate a norm of customary international law. *Id.* at 738. Despite this, it is relevant that, in determining whether the plaintiff's claim was actionable under ATS, the court considered international agreements and similar accords.

Beanal v. Freeport-McMoran, Inc. is particularly instructive in determining whether environmental harms amount to a violation of the law of nations. There, the plaintiffs sued the defendant mining company for environmental harms, human rights violations, and cultural genocide. *Beanal v. Freeport-McMoRan, Inc*., 969 F. Supp. 362 (E.D. La. 1997). The court acknowledged as a preliminary matter that ATS could apply to environmental harms. *Id.* at 383. The court relied on *Principles of International Environmental Law I: Frameworks, Standards and Implementation* 183-18 (Phillipe Sands ed., 1995) [hereinafter "Sands"], to articulate its findings. Sands listed general principles that have "broad, if not necessarily universal, support and are frequently endorsed in practice." *Id.* at 67. Sands stated:

> "[t]he obligations reflected in Principle 21 of the Stockholm Declaration and Principle 2 of the Rio Declaration namely that states have sovereignty over their natural resources and the responsibly not to cause environmental damage" . . . "are sufficiently substantive at this time to be capable of establishing the basis of an international cause of action."

Id. The plaintiff in *Beanal* did not rely on these principles; therefore, the court held his claim did not constitute a universal consensus amounting to the law of nations.

Although the *Trail Smelter* decision has no binding authority, it has influenced "numerous official and semi-official international charters, declarations, and statements of principle dealing with transboundary pollution." Thomas W. Merrill, *Golden Rules for Transboundary Pollution*, 46 Duke L.J. 931, 961 (1997). *Trail Smelter* was adopted by the Declaration of the 1972 Stockholm Conference on the Human Environment as Principle 21 and reasserted in the 1992 Rio Declaration on Environment and Development as Principle 2. R. at 9. Subsequent international cases have reaffirmed the Trail Smelter Principle. *See* Corfu Channel (U.K. v. Alb.) 1949 I.C.J. (Apr. 9); Lake Lanoux Arbitration (Spain v. Fr.), 12 R.I.A.A. 281, 24 I.L.R. 101 (1957). Further, many other treaties have followed the ideas set forth in *Trail Smelter.* For example, "the International Convention for the Prevention of Pollution from Ships (MARPOL) limits the discharge of certain pollutants from ships … and "[t]he United Nations Convention on the Law of the Sea, embodies similar principles." Ajmel Quereshi, *The Search for an Environmental Filartiga: Trans-boundary Harm and the Future of International Litigation.* 56 How. L.J. 131 (2012).

The reaffirmance of *Trail Smelter* in these Declarations is evidence of an "international consensus" and an indication of acceptance among civilized nations. *Filartiga,* 630 F.2d 876, 883 (2d Cir. 1980). In *Filartiga,* the court stated "although torture was once a routine concomitant of criminal interrogations in many nations . . . it has been universally renounced." *Id.* The Declarations are clear examples of an international consensus that countries are holding one another to higher standards regarding transboundary environmental harms. The *Trail Smelter* Arbitration was decided in 1941, and the principle has been rearticulated worldwide for more than 70 years. Furthermore, Principle 21 of the Stockholm Declaration and Principle 2 of the Rio Declaration, which restated the holding of *Trail Smelter*, are known to "have broad, if not necessarily universal, support" in practice throughout the world. *Beanal v. Freeport-McMoRan,*

Inc., 969 F. Supp. 362, 383 (E.D. La. 1997). These international Declarations, combined with the many international cases upholding the *Trail Smelter* principle, are strong evidence that *Trail Smelter* is a universal and obligatory international norm under *Sosa.* Therefore, this court should hold *Trail Smelter* is customary international law enforceable as the law of nations under the ATS.

6.2.2 Violating *Trail Smelter* is comparable to piracy, and is therefore of the same definite content as historically accepted torts under ATS.

The ATS has created jurisdiction for a limited number of torts. When enacted in 1789, there was a common understanding "the common law would provide a cause of action for the modest number of international law violations." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724 (2004). The Court in *Sosa* set out a test of specificity, requiring new causes of action under ATS to resemble causes of action available under ATS during the 18th century. *Id.*at 745. Piracy was among those offenses. *Id.* at 762. The ATS is premised on the backdrop of *hostis humani generis*, a factor of tortious conduct, indicating "an enemy of all mankind." *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980). The Court has held "[a] pirate is deemed, and properly deemed, hostis humani generis . . . Because he commits hostilities upon the subjects and property of any or all nations, without any regard to right or duty, or any pretense of public authority." *Harmony v. United States*, 43 U.S. 210, 232 (1844).

HexonGlobal has been aware since the 1970's that the global sales and burning of fossil fuel products would "result in substantial harmful global climate change and sea level rise." R. at 5. Nonetheless, HexonGlobal continued to operate and profit from these activities. Greenhouse gas emissions from HexonGlobal's products contribute to 32% of the cumulative fossil fuel-related emissions in the United States and 6% of fossil fuel related emissions worldwide. R. at 5. These practices deprive the population of clean air to breathe and contributes to widespread property damage without any notion of accountability. Air pollution does not stay within jurisdictional

bounds, and its harmful effects are widespread. Thus, greenhouse gas emissions from HexonGlobal should be considered an "enemy to all mankind;" and therefore in violation of the law of nations, with similarly "definite content" as historically accepted torts under ATS. *Sosa,* 542 U.S. 692, 732.

The Court held the "door is still ajar" when recognizing international norms. *Id.* at 729. *Trail Smelter* has existed as an international custom for more than 70 years, reiterated in numerous international tribunals and declarations since its enactment. Further, causing significant harm to the health and property of another nation in the name of profit is precisely the type of harm that falls under the jurisdiction of ATS. Just as pirates pillage and plunder, HexonGlobal is ransacking the atmosphere and effectively robbing the Appellants of their homes and wellbeing by contributing to rising seas and increasing diseases. This type of deprivation undoubtedly falls within the same "definite content" as the "historical paradigms familiar when [ATS] was enacted." *Id.* at 729. Therefore, the court should hold the Trail Smelter Principle is a recognized principle of customary international law, enforceable as the law of nations under ATS.

6.3 Appellant Mana has a valid cause of action against HexonGlobal, a domestic corporation, under ATS.

ATS grants original jurisdiction to the federal district courts over any civil tort claim by an alien, if the alleged action was committed in violation of international law or a treaty of the United States. 28 USCS §1350. Ultimately, the text of ATS does not explicitly state who can be sued. 28 USCS §1350. *See International Human Rights Litigation in U.S. Courts*, p. 46. Over the years, courts have extended ATS liability to non-state actors. *Kadic v. Karadzic*, 70 F.3d 232, 239 (2d Cir. 1995). When determining if a court has jurisdiction over ATS claims brought against a specific class of defendants, the courts have first determined whether the alleged conduct leads to liability

under ATS, and second, whether the scope of liability under ATS governs the defendant who committed that act. *Kiobel v. Royal Dutch Petro. Co.*, 621 F.3d at 128 (2d Cir. 2010) [hereinafter *Kiobel I]*. *Kiobel II* stated "corporate defendants may be held liable under ATS only if there is a specific, universal, and obligatory norm that corporations are liable for violations of international law." *Jesner v. Arab Bank, PLC, 1400*. As the issue of domestic corporate liability has not yet been decided by a binding court but has been found to meet the *Sosa* test by persuasive authority, the Appellant may bring an ATS claim against a domestic corporate defendant.

Sikhs for Justice Inc. stated ATS does not bar claims from being brought against corporate defendants, as the court found binding precedent, per the Supreme Court, suggesting liability of corporate defendants under ATS would be appropriate. *Sikhs for Justice v. Indian Nat'l Cong. Party*, 17 F. Supp. 3d 334, 340 (S.D.N.Y 2014). *See Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989) (stating ATS "does not distinguish among classes of defendants."); *Nguyen Thang Loi v. Dow Chem. Co.*, 373 F. Supp. 2d 7, 58 (E.D.N.Y 2005) ("A corporation is not immune from civil legal action based on international law."). *Kiobel I*, while holding a foreign corporation not liable, retained the option for corporate liability to ripen into a rule of international law, through the achievement of "universal recognition and acceptance as a norm in the relations of States[.]" *Kiobel v. Royal Dutch Petro. Co.*, 621 F.3d 111, 149 (2d Cir. 2010). It has been demonstrated that HexonGlobal's conduct, per international law norms, leaves them open to liability under ATS. *See supra* Section 6.2.

A claim under ATS can be brought against HexonGlobal, under *Kiobel II* and *Jesner*, as non-state, corporate liability under ATS is well-established, and is therefore a specific, universal, and obligatory norm of international law. *See Sikhs for Justice,* 17 F. Supp. 3d 334*; Nguyen Thang Loi,* 373 F. Supp. 2d 7. As domestic corporate liability has not yet been considered by binding

authority, we proceed to the extraterritoriality analysis, assuming the court will follow the above cases in holding domestic corporations may be held liable under ATS.

6.3.1 Appellant Mana is able to rebut the presumption against extraterritoriality, as HexonGlobal touches and concerns the United States with sufficient force to displace that presumption.

If the federal courts are found to have jurisdiction over a claim under ATS, a plaintiff still must rebut the presumption against extraterritoriality. *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1398 (2018). "Mere corporate presence" is insufficient to rebut this presumption. *Sikhs for Justice*, 17 F. Supp. 3d at 344. *Kiobel* stated that a claim must "touch and concern" the United States, for jurisdictional purposes, "with sufficient force to displace the presumption against extraterritorial application." *Kiobel v. Royal Dutch Petro. Co.*, 569 U.S. 108, 124-25 (2013). Examples of sufficient force include conduct which occurred in the United States or claims brought against a defendant who is an American national. *Sikhs for Justice*, at 343.

Kiobel and *RJR Nabisco* outlined a two-step test for determining extraterritoriality, in which the Court must first ask whether a statute "gives a clear, affirmative indication that it applies extraterritorially." *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2101 (2016). The second step, which considers the focus of the statute, applies only if the statute does not apply extraterritorially. *Id*. ("If the conduct relevant to the statute's focus occurred in the United States, then the case involves a permissible domestic application even if other conduct occurred abroad"); *Mastafa v. Chevron Corp.*, 770 F.3d 170, 186 (2d Cir. 2014) (analyzing extraterritoriality by asking whether the relevant conduct sufficiently touches and concerns the United States, then determining if the conduct may be relied upon for jurisdictional purposes).

Interpreting *Kiobel*, the court in *Al Shimari* held the actions of an American corporation and government personnel sufficiently touched and concerned the United States to rebut the

presumption against extraterritoriality. *Al Shimari v. CACI Premier Tech., Inc.*, 758 F.3d 516, 528, 530-31 (4th Cir. 2014). *See Mastafa*, 770 F.3d at 195. (holding, as the claim alleged specific, domestic conduct, the conduct sufficiently touched and concerned the United States to rebut the presumption against extraterritoriality). When considering extraterritoriality, the court must conduct a fact-based analysis, considering a broad range of facts. *Al Shimari*, at 529. *See Drummond Co.*, at 592 ("Displacement of the presumption will be warranted if the claims have a U.S. focus and adequate relevant conduct occurs within the United States."). However, in the absence of non-specific allegations of domestic conduct, a defendant's U.S. citizenship alone is insufficient to rebut the presumption against extraterritoriality. *Id.*at 589-90.

The relevant conduct considered when deciding the issue of extraterritoriality is "the conduct of the defendant which is alleged by plaintiff to be either a direct violation of the law of nations[.]" *Mastafa,*770 F.3d at 185-86 ("Where a complaint alleges domestic conduct . . . *but* such conduct does not satisfy even a preliminary assessment of the merits, the court may not rely on that conduct"); *Drummond Co.*, 782 F.3d at 591 ("There must be some conduct in the United States that is . . . 'directed at' the underlying violation . . . Further, the relevant conduct must be alleged 'to a degree necessary to overcome the presumption.'").

ATS gives a clear and affirmative indication that it applies extraterritorially, both in its text by granting jurisdiction to foreign nationals, and through the case law applying the statute. Therefore, the first prong of the *Kiobel* test is satisfied. Alternatively, if the Court does not find ATS indicates its extraterritorial application, HexonGlobal touches and concerns the United States with "sufficient force to displace the presumption against extraterritorial application" of ATS. *Kiobel v. Royal Dutch Petro. Co.*, 569 U.S. 108, 124-25 (2013). HexonGlobal is incorporated in the State of New Jersey, with its principal place of business in the State of Texas. *R-5*. Therefore,

more than "mere corporate presence" in the United States exists in this case. While HexonGlobal may own and operate refineries throughout the world, Appellant is seeking relief for domestic conduct. Not only does HexonGlobal produce, distribute, and combust fossil fuels in the United States, creating greenhouse gas, but these activities have been historically promoted by the United States government. While the harm to Appellant is reaching A'Na Atu, the conduct creating that harm originates in the United States. Therefore, per *RJR Nabisco*, as the conduct relevant to ATS' focus occurred in the United States, Appellant's claim "involves a permissible domestic application even if other conduct occurred abroad[.]" *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2101 (2016).

The case at hand is factually analogous to *Al Shimari*, in that this case also involves an American corporation and the United States government. As the extraterritoriality determination is a fact-based analysis, this Court should follow the reasoning and holding of *Al Shimari* to hold the conduct in the present matter sufficiently touches and concerns the United States. Therefore, as HexonGlobal is an American company, and its conduct occurring in America contributes to 9% of global greenhouse gas emissions and 32% of American greenhouse gas emissions, HexonGlobal touches and concerns the United States sufficiently to rebut the presumption against extraterritoriality for ATS, allowing for jurisdiction under ATS.

Accordingly, the Appellant has a valid claim against the domestic corporation HexonGlobal under ATS. Therefore, the lower court decision to dismiss her claim should be reversed.

6.4 The *Trail Smelter* Principle is enforceable against non-governmental actors, because it was founded on principles of U.S. law that involve both State and private actors.

The *Trail Smelter* arbitration originated from a large mining smelter operation, located in Trail, British Columbia, that emitted mass amounts of sulfur dioxide. *Trail Smelter Arbitration*, 3

U.N.R.I.A.A. 1965 (1942). The sulfur dioxide pollution was blown downwind into the northern part of Washington State. *Id.* This pollution harmed crops and fisheries. The ultimate decision of the tribunal was that Canada had a duty to prevent harms in the United States, caused by the use of Canadian property. *Id.* The frequently cited holding states "under the principles of international law, as well as of the law of the United States, no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another." *Id.* The Tribunal made its decision based largely on the law of the United States, relying upon *Missouri v. Illinois,* 200 U.S. 496 (1906), *New York v. New Jersey,* 256 U.S. 296 (1921), and *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907). *Id.* These cases involved claims against both private entities and States, indicating the Trail Smelter Principle is broad enough to encompass claims by non-governmental actors. Recently, the doctrine has been applied in the Ninth Circuit's decision in *Pakootas v. Teck Cominco Metals, Ltd.*, where the court held a Canadian corporation could be found liable for environmental harms affecting the United States. 452 F.3d 1066 (9th Cir. 2006).

The Arbitral Tribunal in *Trail Smelter* reached its conclusion by interpreting three Supreme Court cases. In *Missouri v. Illinoi*, Missouri challenged a plan to reverse the direction of the Chicago River, in order to solve Chicago's water quality problem. 200 U.S. 496 (1906). Prior to the plan, raw sewage was being dumped into the Chicago River which flowed into Lake Michigan. By reversing the flow of the river, the raw sewage would flow through the river, downstate towards St. Louis, Missouri, solving Chicago's contaminated water supply issue. *Id.* The Tribunal cited to *Missouri* to articulate the "serious magnitude" test to determine state liability for transboundary pollution. The Court in *Missouri*, however, found the evidence of the serious magnitude in that case was not "clearly and fully proved." *Id.* at 521. *See also New York v. New Jersey*, 256 U.S. 296, 297 (1921) (holding, in an action to enjoin New Jersey from implementing a plan to dispose

of sewage in the New York Harbor, "the evidence failed to prove that the proposed addition of sewage would cause increased damage to hulls of vessels or danger of air-borne disease . . .").

One year after *Missouri,* a similar issue came before the Court in *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907). In *Tennessee Copper*, the claims developed from three privately owned copper smelting operations in Tennessee. Large quantities of sulfur fumes were emitted from these operations, causing damage to vegetation and physical ailments to residents living nearby in Georgia. *Id.* The Court emphasized "[i]t is a fair and reasonable demand on the part of a sovereign that the air over its territory should not be polluted" . . . "by the act of persons beyond its control". *Id.* at 238. Granting the injunction, the court held "we are satisfied by a preponderance of evidence that the sulphurous fumes cause and threaten damage on so considerable a scale to the forests and vegetable life, if not to health, within the plaintiff State as to make out a case within the requirements of *Missouri v. Illinois*." *Id.* at 238-39.

Nearly 100 years after *Tennessee* was decided, the Ninth Circuit was faced with a strikingly similar fact pattern to the *Trail Smelter* case in *Pakootas v. Teck Cominco Metals, Ltd.*, 452 F.3d 1066 (9th Cir. 2006). In *Pakootas*, Teck owned a lead-zinc smelter in Trail, British Columbia, which caused significant contamination of the Upper Columbia River and Lake Roosevelt in the Washington State. The plaintiffs filed a citizen suit under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) for "a declaration that Teck has violated the Order, injunctive relief enforcing the Order against Teck, as well as penalties for non-compliance and recovery of costs and fees." *Id.* at 1070. The court affirmed the district court's decision to deny the corporation's motion to dismiss, holding CERCLA applicable, "even though the original source of the hazardous substances is located in a foreign country." *Id.* at 1075.

In making its determination that a state shall use its property responsibly to ensure significant harm does not occur in another country, the *Trail Smelter* Tribunal used sources of U.S. law. The cases cited to in *Trail Smelter* point to applications of this principle, previously applied to both government and non-governmental actors. These cases do not differentiate between State actors or corporations. The Court held both State actors and corporations to the same "serious magnitude" standard. This is convincing evidence that *Trail Smelter* can be applied to harms caused by non-governmental actors, including corporations. Furthermore, the *Pakootas* case "indicates that [U.S.] courts might well serve as appropriate forums to resolve a Trail Smelter type dispute on the private level". Martijn van de Kerkhof, *The Trail Smelter Case Re-examined: Examining the Development of National Procedural Mechanisms to Resolve a Trail Smelter Type Dispute*, Utrecht Journal of International and European Law (2010). Similar to the plaintiffs in *Pakootas* and *Tennessee Copper Co.,* HexonGlobal is a private corporation causing transboundary environmental harms. Since the beginning of the 19th Century, the courts have not distinguished between State actors and non-governmental actors in cross-border environmental claims. Therefore, it is proper to apply the Trail Smelter Principle to non-governmental actors like HexonGlobal.

6.5 The lower court erred in dismissing Appellant Flood's Due Process claim, because the U.S. failed to protect the atmosphere from the production, sale, and burning of fossil fuels which violates the life, liberty, and property protections guaranteed under the Due Process Clause of the Fifth Amendment.

The Due Process Clause is intended to protect "those personal activities and decisions . . . so deeply rooted in our history and traditions, or so fundamental to our concept of constitutionally ordered liberty." *Washington v. Glucksberg*, 521 U.S. 702, 727 (1997). An affirmative act by the government, which deprives an individual of their freedom and liberty, triggers the guarantees of substantive due process. *Deshaney v. Winnebago Cty. Dep't. of Soc. Serv.*, 489 U.S. 189, 200

(1989). In a recent landmark case, *Juliana v. United States,* the court held "where a complaint alleges governmental action is affirmatively and substantially damaging the climate system in 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, it states a claim for a due process violation." 217 F. Supp. 3d 1224 (D. Or. 2016) [hereinafter *Juliana II*]. The court in that case adopted the findings and recommendations from the pre-trial hearing, stating "[w]hether such action, or inaction in the face of a duty to act, shocks the conscience cannot be determined on a motion to dismiss, which is focused solely on the plaintiffs' complaint and is bereft of any evidentiary record." *Juliana v. United States*, 217 F. Supp. 3d 1224 (D. Or. 2016) (order denying motion to dismiss) [hereinafter *Juliana I*]. In the case at hand, the lower court erred by not following *Juliana*, as the U.S.'s actions violated the long-standing public trust doctrine. Even if this court agrees with the lower court that the Public Trust Doctrine cannot be the face of a Due Process claim, the U.S.'s actions shock the conscience and shows deliberate indifference to the threat of climate change. Therefore, the U.S. violated their affirmative duty to protect the Appellant's life, liberty, and property guarantees under the Due Process Clause. U.S. Const. amend. V. Thus, this court should reverse the dismissal of the Appellant's Due Process Claim.

6.5.1 The lower court erred in holding that the Appellant's public trust claim could not be the font of the Due Process right.

The Due Process Clause protects fundamental rights and liberties known to be "deeply rooted in this Nation's history and tradition." *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997). The obligations of the State, with respect to the application of the public trust doctrine to essential natural resources, prevent the State from depriving future generations of those natural resources which impact the well-being of the citizens. *Juliana* I, 217 F. Supp. 3d at 1253. This

obligation predates the founding of the United States, having been incorporated into the country's values through English common law, and, as such, is firmly rooted in the history and tradition of this Nation. *Id*. As the government holds this property in trust, the government has a duty to protect that property for future generations. *Id*. at 1254.

The court in *Juliana* held the defendants responsible for failing to mitigate climate change impacts, acknowledging the fundamental notion that "air, running water, the sea, and consequently the seashore" are assets held under the public trust doctrine. *Juliana II*, at 1253. The "term public trust refers to the fundamental understanding that no government can legitimately abdicate its core sovereign powers. The power of governing is a trust committed by the people to the government, no part of which can be granted away." *Id.* The plaintiffs in *Juliana* alleged harm caused by rising sea levels, ocean acidification, and changes in the global atmosphere. *Juliana I*, at1275. The court held, in light of EPA's "duty to protect the public health from airborne pollutants and the government's public trust duties deeply ingrained in this country's history," the plaintiffs had stated a substantive due process claim sufficient to survive the motion to dismiss. *Id.* at 1276. Accordingly, the motion to dismiss was denied. *Id.*

Similar to *Juliana*, the claim in this case turns on the impact of the government's actions on those territorial ocean waters and the atmosphere held in public trust. The harm in this case is identical to that in *Juliana*, as the harm is resulting from rising sea levels, ocean acidification, and atmospheric changes due to greenhouse gas emission. Accordingly, this court should follow the ruling of the *Juliana* court and hold, as the government's duty to protect the public health and duties under public trust are deeply ingrained in American history, the motion to dismiss for failure to state a substantive due process claim must be denied.

6.5.2 Even if the public trust claim fails, the U.S. violated the Appellant's substantive due process rights to life, liberty, and property.

The Due Process Clause provides "heightened protection against government interference" for "certain fundamental rights and liberty interests." *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997). The analysis for substantive due process claims has historically required two concerns to be met. *Glucksberg*, 521 U.S. at 720.

The first prong states the Due Process Clause protects those asserted "fundamental rights and liberties . . . objectively, 'deeply rooted in this Nation's history and tradition' . . . and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed[.]'" *Id. at* 720-21. "[O]ur Nation's history, legal traditions, and practices" must guide the Court's determinations when analyzing a claim under the Due Process Clause. *Id.* at 710, 721.

The second prong of the *Glucksberg* analysis requires substantive due process claims to carefully describe the asserted fundamental right or liberty interest. *Id. at 721-22. Glucksberg* states this threshold is met if the action challenged by the claim implicates a fundamental right. *Washington v. Glucksberg*, 722.

If an action by the government creates the danger or harm to an individual, deliberate indifference by the government may be sufficient to establish a violation of the individual's substantive due process rights. *Juliana I*, 217 F. Supp. 3d at 1271. *See Panetta*, 35 F. Supp. at 72 ("To state a substantive due process claim, a plaintiff must assert that a government official was so 'deliberately indifferent' to his constitutional rights that the official's conduct 'shocks the conscience.'"(citations omitted). Deliberate indifference is defined as the "creation of a dangerous situation with actual knowledge or willful ignorance of impending harm." *Juliana I*, at 1271.

A cause of action arises if the State denies its affirmative duty to protect that individual, created due to the limitations imposed on the individual's freedom by the State. *Deshaney v. Winnebago Cty. Dep't. of Soc. Serv.*, 489 U.S. 189, 200 (1989). While *Deshaney* does not allow for due process claims for governmental failure to protect citizens from the actions of private parties, in this case, the government is the perpetrator of the harm. *Id.* at 196. In this case, the U.S. failed to protect the Appellant from the effects of the distribution, production, and combustion of fossil fuels, which created an increase in greenhouse gas emissions. This is applicable under *Deshaney* because the U.S. Government, through its promotion and emission of greenhouse gases, acted in such a way that constrained the Appellant's freedom.

Defendants' greenhouse gas emissions, caused by the production, distribution, and combustion of fossil fuels, have led to an increase in global temperatures and rising sea levels. *R-4*. Not only did the U.S. promote the harmful practices by private actors through actual promotion and assistance, as well as a failure to regulate, but the U.S. itself participated in the production, distribution, and combustion of fossil fuels, causing the build-up of greenhouse gases, and ultimately, the harm to the Appellant. R. at 6. The rights to life, liberty, and property predate the Constitution, and as such, are deeply rooted in the legal tradition and history, of the United States. This is evidenced in that these rights were considered so fundamental, the Framers considered them inalienable. From the classification of these rights as inalienable, it naturally follows that a claim based on these rights must be protected by the Fifth Amendment. There can be no other rights more deeply rooted in American history and tradition than those which the Framers considered to be inalienable, which have continued to be so considered in modern times.

Not only has the U.S. promoted this harmful conduct, causing the increase in greenhouse gas emissions, but the U.S. government is historically the largest American contributor to

emissions of greenhouse gases. R. at 5. The U.S. also developed its own fossil fuel power plants under public agencies, *Id.*, which emit greenhouse gases through the distribution, production, and combustion of those fossil fuels. As such, the U.S. has affirmatively acted in such a way that has constrained the Appellant's freedom. While, in recent years, the U.S. has taken small steps towards mitigating emission levels, the harms resulting from past action are still present today. Additionally, the current administration has threatened to eliminate initiatives which have only slightly decreased greenhouse gas emissions by the U.S. and have had no impact on global emission reduction. *R. at 7*. Therefore, the U.S. significantly contributed to the emissions of greenhouse gases which caused the harm claimed by the Appellant in this case. An affirmative duty to protect the Appellant was created, as the U.S.'s actions imposed limitations on the Appellant's freedoms as guaranteed by the Due Process Clause. Therefore, the Appellant has a cause of action for the violation of his substantive due process rights committed by the U.S.

The Appellant's right to life is limited by defendants' actions, due to the threat of crashing waves, caused by storms and rising sea levels, destroying his community and severely limiting his food source. Global climate change will negatively affect ocean productivity, reducing the Appellant's ability to locally catch seafood. *R-5*. As locally caught seafood is crucial to the Appellant's diet, illness and death could result from his inability to continue to eat locally caught seafood. Additionally, the increase in temperature caused by greenhouse gas emissions by defendants puts the Appellant at risk of both heat stroke and mosquito-borne diseases, both of which are life-threatening. *R-5*. The Appellant's rights to liberty and property are also limited by the defendants' actions due to rising sea levels. The change in the environment, caused by defendants' actions, has already caused seawater damage to Appellant's home, due to crashing waves and the low-lying nature of his island community. *R-4-5*. Additionally, as a result of rising

sea levels, Appellant has experienced seawater flowing into his water well, which is used for drinking water. *R-5*. If temperatures continue to rise as a result of greenhouse gas emissions, Appellant's home will be uninhabitable. His inability to live where he chooses, in the home which he owns, limits Appellant's inalienable rights to liberty and property. Accordingly, global climate change will be devastating to Appellant's fundamental rights, if greenhouse gas emissions by defendants continue. Therefore, Appellant's inalienable rights to life, liberty, and property are severely limited or completely taken away, by defendants' actions.

Additionally, the finding of the court in *Juliana* should be followed, in stating "the right to a climate system capable of sustaining human life is fundamental to a free and ordered society." *Juliana v. United States*, 217 F. Supp. 3d 1224, 1250. As these rights are inalienable, the Appellant's claim satisfies the first prong of the *Glucksberg* analysis, as, if these rights were to continue to be limited or taken away, both justice and liberty would cease to exist.

As the Appellant's constitutional claim is valid, the U.S. may not infringe upon these fundamental interests "*at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Washington v. Glucksberg*, 721. To trigger this rule, plaintiffs must prove the U.S.'s actions "implicate a fundamental right – before requiring more than a reasonable relation to a legitimate state interest to justify the action[.]" *Washington v. Glucksberg*, 722. While the U.S. may argue industry and capitalism are the interests which their actions promote, these reasons are not compelling, nor is the production, distribution, and combustion of fossil fuels narrowly tailored to serve that interest. Therefore, the U.S. may not infringe upon Appellant's rights, and Appellant's claim is valid.

While the U.S. has taken steps towards mitigating the harms caused by greenhouse gas emissions and preventing future increase, the severe damage that has been done to the atmosphere

requires significantly greater action from the U.S. in order to have any effect on global climate change. Additionally, the current Presidential administration and leadership of EPA have stopped the progress achieved by the former administration, indicating they will roll-back the agreements and limitations imposed by the former administration. As such, the small steps taken by defendant are insufficient to rebut the Appellant's claim.

Accordingly, the Appellant has a valid substantive due process claim for violations of his inalienable rights to life, liberty, and property, by the U.S. Thus, the lower court ruling to dismiss Appellant's claim should be reversed.

6.6 Appellants' claims do not present non-justiciable political questions.

Federal courts only have jurisdiction over "cases" and "controversies," limiting the jurisdiction of the courts to adversarial questions able to be resolved through the judicial process. U.S. Const. art. III, § 2, cl. 1. *See Nguyen Thang Loi v. Dow Chem. Co.*, 373 F. Supp. 2d 7, 64 (E.D.N.Y. 2005) (citations omitted) ("justiciability doctrine instructs federal courts to avoid deciding political questions"). Non-justiciability is defined as the inappropriateness of the consideration of the subject matter of the case by a court. *Baker v. Carr*, 369 U.S. 189, 198 (1962). The Court may not reject, under the political question doctrine, a bona fide controversy, even if considering a political act, when the issue is if the alleged harmful act exceeds constitutional authority. *Baker*, 369 U.S. at 217. When considering the applicability of the political question doctrine, the Court must use a "fact-specific analysis of the 'particular question' posed by a specific case." *Al-Aulaqi v. Obama*, F. Supp. 2d at 51.

Per *Baker*, the judiciary may not reject a bona fide controversy when the issue is if the alleged harmful act exceeds constitutional authority even if such act is considered a political act; therefore, Appellant Flood's substantive due process claim against the U.S. may not be rejected

on these grounds, regardless of any political underpinnings. Additionally, neither claim by Appellants may be rejected, as no *Baker* factors apply to either claim.

6.6.1 The *Baker* factors do not apply to any of the claims in this case.

The political question doctrine applies when a case includes at least one of the following: "[1] textually demonstrable constitutional commitment for 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." *Baker v. Carr*, 369 U.S. 186, 217 (1962).

Baker factor 1 inquires whether the judiciary must consider an issue committed to the legislative or executive branches by the Constitution to resolve the case. *Native Village of Kivalina v. Exxon Mobil Corp.*, 872. However, a mere grant of authority to the coequal branches does not preclude judicial consideration. *Native Village of Kivalina v. Exxon Mobil Corp.*, 663 F. Supp. 2d 863, 872 (N.D. Cal. 2009). *Baker* factors 2 and 3 ask whether the court would need to consider areas outside the scope of the authority of the judiciary. *Id.* at 872. *Baker* factors 4, 5, and 6 are relevant if the judiciary's consideration of the issue would contradict action taken by the executive or legislative branches, and only if that contradiction would "seriously interfere with important governmental interests.'" *Kadic v Karadzic*, 70 F.3d 232, 249 (2nd Cir. 1995). *See Kivalina,* at 872. (stating the inquiry required by *Baker* factors 4, 5, and 6 is whether "prudential considerations

counsel against judicial intervention"). The sixth *Baker* factor considers the presence or absence of action by the coequal branches. *Nguyen Thang Loi*, 373 F. Supp. 2d 7, 72 (E.D.N.Y. 2005).

Considering *Baker* factor 1, the issue in this case is the effect of greenhouse gases on the global climate. As there is nothing in the Constitution giving authority over the regulation of greenhouse gas emissions to either coequal branch, the first *Baker* factor does not apply. When considering *Baker* factor 2, the judicial standard for Flood's claim is the Constitution, and the Constitution grants the authority over due process claims to the judiciary. When the courts have jurisdiction under ATS, that case necessarily satisfies *Baker* factor 2, due to the universal recognition of the claim by international law. *Kadic,* 70 F.3d at 249. Accordingly, the political question doctrine may not be applied to ATS claims, as there are no policy issues which could implicate the coequal branches. *Id.* at 249. As there is jurisdiction under ATS for Appellant Mana's claim and a judicial standard for Flood's claim, *Baker* factor 2 is inapplicable to this case.

The third *Baker* factor considers if the Court may decide a case without making policy decisions reserved for the political branches of the government. As the present issue of environmental harms is squarely within the authority of the judiciary, the third *Baker* factor does not apply to this case. *See Massachusetts v. EPA*, 549 U.S. 497, 516 (2007) (holding the consideration of EPA's statutory authority to regulate greenhouse gases, through the CAA, did not present a non-justiciable political question because the dispute turned on the interpretation of a federal statute). *Baker* factors 4, 5, and 6 are relevant, per *Kadic*, only when judicial consideration will inappropriately contradict one of the coequal branches. *Kadic,* 70 F.3d at 249. As evidenced through the changing positions of the executive branch regarding greenhouse gas emissions, while the legislature has taken steps towards a similar goal to that of the Appellants, a decision in favor

of the Appellants would not be lacking in the deference and respect due to the coequal branches. Accordingly, *Baker* factors 4, 5, and 6 do not apply to this case.

As no *Baker* factor applies to any claim in this case, this Court should hold the political question doctrine inapplicable.

6.6.2 This matter does not implicate policy decisions reserved for the coequal branches.

The political question doctrine excludes cases which turn on policy decisions constitutionally granted to the legislative or executive branches of the government. *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230-31. *See also Juliana v. United States*, 217 F. Supp. 3d 1224, 1270 (D. Or. 2016) (order denying motion to dismiss) ("While courts cannot intervene to assert 'better' policy, . . . they can address constitutional violations by government agencies and provide equitable relief."). While the separation of powers must be a consideration under *Baker,* claims have not been considered non-justiciable by the courts simply because of potential interference with the coequal branches. *Nguyen Thang Loi v. Dow Chem. Co.*, 373 F. Supp. 2d 7, 71 (E.D.N.Y. 2005).

Cases or controversies involving foreign relations may not be held outside the scope of judicial authority for that reason alone. *Baker v. Carr*, 369 U.S. 186, 211 (1962). As stated in *Panetta*, binding precedent states "claims based on [due process] rights are justiciable, even if they implicate foreign policy[.]" *Al-Aulaqi v. Panetta*, 35 F. Supp. 3d 56, 69 (D.D.C. 2014). Per *Nguyen*, the federal courts have historically decided issues which are a combination of tort and international law, refusing to hold individual personal injury claims as non-justiciable under the political question doctrine. *Nguyen Thang Loi v. Dow Chem. Co.*, 67, 70. Additionally, as stated in *Juliana*, no branch has been given exclusive authority over creating and considering climate change policy.

Juliana, F. Supp. 3d at 1237-38. In fact, it has been explicitly stated "climate change policy is not *inherently*, or even primarily, a foreign policy decision." *Id.* at 1238.

Ultimately, foreign relations are not implicated in the present matter. Instead, this case concerns the environmental harm perpetrated against the Appellants by HexonGlobal and the U.S. Appellant Flood's claim does not implicate foreign policy, as he is a domestic plaintiff bringing a claim against a domestic defendant. While Appellant Mana may be a foreign national, per *Juliana*, climate change issues do not necessarily implicate foreign policy issues. *Id*. Alternatively, even if this case is found to implicate foreign policy issues, authority over foreign policy has not been explicitly granted to any branch of the government. Furthermore, Courts have held "it is the task of the judiciary to interpret treaties and customary international law." *Nguyen Thang Loi,* 373 F. Supp. 2d at 195. Therefore, the policy considerations for application of the political question doctrine do not apply to this case.

A finding of a non-justiciable political question prevents all future judicial review of that issue. *Id.* at 78. As such, the application of the political question doctrine allows for an avoidance of the judicial check, through the separation of powers, of the executive and legislative branches. *Id*. Therefore, the political question doctrine should be applied only in the most extreme cases. As stated in *Al-Aulaqi v. Obama*, while there is no explicit exception to the political question doctrine for constitutional claims by American citizens, no court in the U.S. has ever refused to hear a claim, on justiciability grounds, that an American citizen's constitutional rights were violated by action by the U.S. government. *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 49 (D.D.C. 2010).

A finding for the Appellants in the present matter would not restrict the legislative and executive branches such that they would lose their freedom to govern over similar issues which fall within their authority. Within the issue of the effects of greenhouse gases on global climate

change, the coequal branches would retain the freedom to create positive law and regulations expanding on the protections recognized by this court. As the elected branches of government may not use their power to cause harm or contradict the Constitution, any regulation or law those branches wish to enact could not contradict Appellants' claim. Accordingly, this court should hold the political question doctrine does not apply to any claim in the present matter.

7.0 Conclusion

For the foregoing reasons, Appellants respectfully request that this Court reverse the ruling of the United States District Court from New Union Island. Appellants request that this Court hold the *Trail Smelter* Principle has not been displaced by the Clean Air Act, and hold Appellant Flood brings a valid Due-Process-based public trust claim.