Team No. 32

IN THE UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

CA. No. 18-000123

ORGANIZATION OF DISAPPEARING ISLAND NATIONS,
Appellant,

And

APA MANA,
Appellant,

And

NOAH FLOOD,
Appellant

- 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 THE ORGANIZATION OF DISAPPEARING ISLAND NATIONS, APA MANA, and NOAH FLOOD.
Appellants

Oral Argument Requested

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STATEMENT OF JURISDICTION

The Organization of Disappearing Island Nations, Ms. Apa Mana, and Mr. Noah Flood, Appeal the District Court's holding that, under the international Law of Nations, the *Trail Smelter* Principle displaces the Clean Air Act in regard to greenhouse gas regulation. Plaintiffs also challenge the District Court's refusal to recognize a Due Process-based public trust right to governmental protection from atmospheric climate change. On Appeal, no party has raised any standing issue, and no party has a standing dispute. The Court has ordered all parties to brief all issues for purpose of review.

STATEMENT OF ISSUES

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

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

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

IV. If otherwise enforceable, is the *Trail Smelter* Principle displaced by the 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 the Alien Tort Statute and public trust claim present a non-justiciable political question?

STATEMENT OF CASE

I. Facts

The Earth tolerates a balance of greenhouse gases (GHGs) in the atmosphere, and when the GHG levels are too high, higher global temperatures ensue. R. at 4. When the global temperature rises, the global climate changes resulting in increasing temperatures, changing rainfall patterns, and rising sea levels. *Id*. Human production and distribution of fossil fuels have

resulted in substantial increases in the concentration of GHGs such as methane and carbon dioxide in the atmosphere. *Id*. If global emissions continue at current rates, the average sea level will likely rise by between one-half and one meter by the end of this century. *Id.* Apa Mana (Mana) and Noah Flood (Flood) own homes on A'Na Atu and New Union Islands (a U.S. property), respectively, and a sea level rise of one-half to one meter would render both of these islands uninhabitable. *Id*. Mana and Flood have already suffered seawater damage to their homes during several storms, and this damage would not have occurred in the absence of the amount of GHGs emitted in the atmosphere. R. at 5. The GHG levels in the atmosphere have also caused the following: seawater intrusion into drinking water wells, increased risk of heat stroke and mosquito borne diseases, and the reduction in locally caught seafood (an important part of Mana and Flood's diet) due to the loss of coastal wetlands. *Id*. If the GHG emissions do not lower dramatically, Mana, Flood, and their communities will inevitably experience all of these issues.

Historically, the U.S. is the largest single national contributor to emissions of GHGs and has been responsible for twenty percent of cumulative human caused GHGs to date. R. at 6. Before recently, the U.S. had a multitude of oil producers, but after a large-scale merge, HexonGlobal Corporation (HexonGlobal) remains as the surviving corporation in the U.S., accounting for thirty-two percent of the country's fossil-fuel related GHG emissions and six percent of global historical emissions. R. at 5. The United States government (U.S.) and HexonGlobal are aware of the harms of climate change and seal level rise from fossil fuel sales and combustion, releasing GHGs into the atmosphere. *Id*. Despite this knowledge, HexonGlobal has continued in these profitable business activities in its refineries located throughout the world, including one refinery located on New Union Island. *Id*. The U.S. has not limited GHGs emission, but has promoted fossil fuel production, distribution, and combustion. R. at 6. In more

recent decades, the U.S. has acknowledged the threat of climate change on an international scale, signing and ratifying treaties such as the United Nations Framework on Climate Change (UNFCCC), ruling that GHGs are subject to regulation under the Clean Air Act (CAA), signing the Paris Agreement, and establishing review for transportation emissions and GHG emissions alike. R. at 6-7. Despite these preliminary regulatory actions by the U.S., domestic GHG emissions have decreased only slightly and global GHG emissions have increased. *Id*. The Trump Administration has announced its goals to reverse these regulatory measures and commitments that are working toward reducing the threat of climate change. R. at 7.

II. Procedural History

Upon the issuance of the Order of the District Court dated August 15, 2018, in Civ. 66 2018, the Organization of Disappearing Island Nations (ODIN), Mana, and Flood, filed a Notice of Appeal. R. at 1. Mana asserts the following claims in the Appeal: an Alien Tort Statute (ATS) claim against HexonGlobal, and that HexonGlobal's fossil fuel production and sales violate a principle of the Law of Nations. R. at 10. Flood asserts a constitutional claim against the U.S. regarding its failure to take effective action to control GHG emissions, purporting that this inaction violates its obligations under the public trust doctrine, as incorporated by the Fifth Amendment substantive due process guarantee. R. at 10-11. The U.S. District Court dismissed Mana's and Flood's claims. *Id*.

SUMMARY OF THE ARGUMENT

Plaintiffs assert claims against HexonGlobal and the U.S. for the harm caused to their homes by the defendants' contribution to the deterioration of the global climate. The ATS permits plaintiff Mana to bring a claim against domestic corporation, HexonGlobal. The ATS also provides jurisdictional boundaries, and the cause of action must be found in a treaty or in the Law of Nations. The cause of action in this case is corporate liability (holding HexonGlobal

accountable), and corporate liability is actionable because it qualifies as an international norm. Plaintiffs are permitted to bring an ATS claim against a domestic corporation because it is not restricted in the statute or precedential domestic or international case law.

The *Trail Smelter* Principle is a recognized principle of customary international law enforceable under the ATS because it is universally recognized by the States out of a legal obligation and mutual concern. Further, the International Court of Justice's (ICJ) enabling statutes recognized the *Trail Smelter* Principle as a qualified source of international law, under ATS, through: 1) international conventions, 2) International custom, 3) general principles of law, and 4) judicial decisions and teachings. The *Trail Smelter* Principle is also enforceable against non-governmental actors. The U.N. has recognized that States are responsible for actions taken by non-governmental actors when the action on the instruction or under the direction or control of the State. G.A. Res. 56/83 at art. 5 (2001). The U.S. has created tax subsidies to encourage the development and continuation of the fossil fuel industry and has enacted regulatory guidelines under the CAA, providing knowledge, direction, and control over air emissions within the U.S. jurisdiction. HexonGlobal is operating within the jurisdiction of the U.S. and is, therefore, operating under the direction or control of the U.S. government.

The CAA does not displace the *Trail Smelter* Principle. Recent case law has created new federal common law that exists when "air and water in ambient or interstate aspects" are at issue. *Am. Elec. Power Co.*, 564 U.S. at 421 (quoting *Ill. v. Milwaukee*, 406 U.S. 91, 103 (1972). A court may develop a substantive law for air pollution under federal common law, and it must fall under the uniquely federal interest exception. *Id.* at 1201. These federal interests exist only in narrow areas directly implicating the rights and obligations of the U.S.. In this case, the U.S. has created a right and obligation through the Paris Agreement and the Rio Principles. *United*

Nations Conference on Environment and Development, JU.N.e 3-14, 1992, *Rio Declaration on Environment and Development,* Principle 13, U.N. Doc. A/CONF.I51/26.

The CAA does not speak to, nor prevent, a State from filing for a lawsuit in court, thus allowing the court to enforce the *Trail Smelter* Principle in this case. Further, the CAA does not displace federal common law. Federal law displaces common law when Congress has intended to occupy the entire field of law. *Kavlina v. ExxonMobil Corporation*, 663 F.Supp.2d 863, 857 (N.D. Cal. 2009). According to recent case law, the CAA has left open many areas related to the regulation of GHGs. *Util. Air Reg. Grp. v. EPA*, 134 S.Ct. 2427, 2448 (2014). The courts may use common law to "fill in the interstices" of the law when necessary. *Am. Elec. Power Co., Inc. v. Connecticut*, 564 U.S. 410, 420-1 (2011). Therefore, the court here may use federal common law to fill in the gaps left in the CAA related to the regulation of GHGs.

Lastly, the separation of powers principles bar the judicial branch from answering any claims that present a political question better suited for a political branch. *Baker*, 369 U.S. 186, 198-9, 217 (1962). However, the claims brought against the U.S. and HexonGlobal do not present a political question. Neither claim presents a question that implicates a power given to another branch, there are no former decisions made by other branches that the court must adhere to, a court deciding these claims would not embarrass a political branch, and the court has the judicially-discoverable and manageable standards required to answer this question. Therefore, separation of powers does not forbid the court from hearing these claims.

For the foregoing reasons, this Court should reject the Defendants claims and allow remedies for the Plaintiffs.

ARGUMENT

I. MANA IS PERMITTED TO BRING AN ATS CLAIM AGAINST A DOMESTIC CORPORATION.

Parties do not dispute standing requirements for any of the claims brought in this case. Instead, the dispute centers on whether Mana is permitted to bring a claim under the ATS against a domestic corporation, HexonGlobal. According to the Supreme Court, the ATS "was intended to promote harmony in international relations by ensuring foreign plaintiffs a remedy for international-law violations in circumstances where the absence of a remedy might provoke foreign nations to hold the United States accountable." *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1406 (2018). This case is the epitome of the mission of the ATS.

This issue involves an undisputed civil action with a civil plaintiff, and therefore the question here is whether the claim is a "a tort in violation of the Law of Nations…". 28 U.S.C. § 1350. The ATS grants jurisdiction to federal district courts "of any civil action, where an alien, sues for a tort in violation of the Law of Nations or of a treaty of the United States." 28 U.S.C. § 1350. However, the ATS only provides jurisdiction, and the cause of action must be found in a treaty or the Law of Nations. R. at 8; *Sosa v. Alvarez*, 542 U.S. 692,714 (2004); *Kiobel v. Royal Dutch Petroleum*, 621 F.3d 111, 125 (2d Cir. 2010), aff'd 569 U.S. 108 (2013). In *Sosa*, the Supreme Court found that the Law of Nations can be translated to mean customary international law, and customary international law can be defined as international norms. 542 U.S. at 723. Determining the norm is necessary to regulate which claims are actionable under the ATS, and the norm at issue here is corporate liability.

A. Corporate Liability Is An Actionable Tort Because Legal Persons Have The Same Rights As Natural Persons Under The ATS.

Mana's claim defines corporate liability as a norm actionable under the ATS. R. at 3. This Court should uphold Mana's claim because corporate liability aligns with the intentions of Justice Sotomayor's dissent in *Jesner*, passes the *Sosa* two-step test, and is the subject of United Nations (U.N.) treaties. *Jesner,* 138 S.Ct. at 1419 (stating that ATS litigation against foreign

corporations may be useful in aspects of U.S.-foreign relations, and discouraging a blanket ban on ATS claims for corporate liability); *Sosa*, 542 U.S. at 723.

The language of the ATS expressly restricts all classes of plaintiffs except for aliens in an ATS case, but does not expressly restrict classes of defendants. *Argentine Republic v. Amerada Hess Shipping Corp*., 488 U.S. 428,437 (1989). The absence of a similar restriction on defendants indicates that the defendant slot is open-ended, and therefore open to domestic corporations. This satisfies the "domestic" requirement for this analysis. Further, if natural persons may be held liable, and if those natural persons are acting on behalf of a corporation, the statute allows for the employer (corporation) to be held liable. *U.N. Responsibility of States for Internationally Wrongful Acts*, G.A. Res. 56/83 at art. 5 (2001). This is a common feature of domestic and international common law, and this Court should apply it here as well. *Id*.

1. *Under The ATS, Corporations And Natural Persons Are Equally Held Liable.*

To determine whether corporations (domestic or foreign) can be held liable for ATS claims, the relevant question is whether under international law or U.S. domestic law there is reason to "distinguish between a corporation and a natural person who is alleged to have violated the Law of Nations under the ATS." *Jesner*, 138 S. Ct. at 1425. In concurrence with this point, international law provides no reason to distinguish the two, as the Supreme Court determined in *Kiobel*. 621 F.3d at 145 (Leval, J., concurring in judgment)(stating that international law takes no position on the question). Furthermore, in U.S. federal law the text, history, and purpose of the ATS support the notion that corporations may be held liable. *Jesner*, 138 S.Ct. at 1425. The ATS allows the federal district courts jurisdiction to hear civil action(s) for tort(s). 28 U.S.C. § 1350. The Supreme Court in *Morissette*, stated that when Congress utilizes a term such as "tort", it takes on the definition of the term as found in other statutes because it is considered a "term of art." *Morissette v. U.S.*, 342 U.S. 246,263 (1952). As far as tort claims go, corporations have

been held liable under federal common law, and the Supreme Court has defined "tort" claims to relate to ordinary tort-related rules. *Meyer v. Holley*, 537 U.S. 280, 281 (2003). As Sotomayor states in *Jesner*, "The presumption, then, is that, in providing for "tort" liability, the ATS provides for corporate liability." 138 S.Ct. at 1426.

2. *Sosa Determines Domestic Corporations Can Be Liable Under The ATS.*

Corporate liability passes the two-step *Sosa* test to determine that corporate liability is a universal, specific, and obligatory norm, and thus actionable under the ATS. 542 U.S. at 723. The *Sosa* test from was utilized in the majority decision in *Jesner* after it was determined that *Kiobel* left the question unsolved as to whether foreign or domestic corporations *per se* can be held liable under the ATS. *Id.; Jesner*, 138 S.Ct. at 1390.

The first prong of the *Sosa* test roots from the notion that the ATS is strictly jurisdictional, and therefore, does not supply a cause of action for international law violations. R. at 8. This prong requires the plaintiff to show that the norm relied upon is widely accepted and clearly defined. *Jesner*, 138 S.Ct. at 2761. In order to prove that corporate liability as a norm is indeed widely accepted and clearly defined, thus giving Mana basis to file a claim under the ATS, we must refer to other countries and jurisdictions that provide express or implied language regarding holding a corporation civilly liable for its actions. *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996, p. 226, 253.

a. Corporate Liability Is A Widely Accepted And Clearly Defined Norm

In 2011, the U.N. issued the Guiding Principles on Business and Human Rights (2011 Guidance), which includes guidance on how corporations should conduct business in relation to human rights. Special Representative of the Secretary-General, *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*, A/HRC/17/31, Annex, 21 Mar. 2011. The 2011 Guidance expressly states, "When a

business enterprise abuses human rights, States must ensure that the people affected can access an effective remedy through the court system or other legitimate non-judicial process." *Id*. In order for the U.S., a member of the U.N., to utilize this guidance it must have a codified opportunity for citizens to hold corporations liable. *Medellin v. Tex.*, 552 U.S. 491,504 (2008). On an international level, the U.N. International Law Commission confirmed that it was necessary to add a provision which extends legal persons to include corporations. *Report of the International Law Commission on the Work of Its Sixty-Eighth Session*, UN Doc. A/71/10 (Sept. 19, 2016). In 2014, the U.N. created an Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights (IWG) with the purpose of regulating the activities of transnational corporations. *Elaboration of an international legally binding instrument on Transnational Corporations and other Business Enterprises with respect to Human Right*s, UN Doc. A/HRC/26/L. 22 (June 26, 2014). Domestically, members of the U.S. Senate submitted a Brief of Amici Curiae in support of the Petitioners in *Jesner*. Brief of Amici Curiae United States Senators Sheldon Whitehouse and Lindsey Graham in Support of Petitioners, *Jesner, et al. v. Arab Bank*, PLC, No. 16-499 (June 27, 2017). This brief concluded that "ATS jurisdiction over suits against both natural and legal persons is an essential component in Congress' comprehensive counterterrorism framework." *Id*. Furthermore, the Attorney General acknowledged that the ATS could hold corporations liable. 26 Op. Atty. Gen. 250, 252 (1907) (stating that citizens of Mexico could bring a claim under the ATS against a domestic corporation, the American Rio Grande Land and Irrigation Company, for violating provisions of a treaty between the U.S. and Mexico).

In choosing between competing legal standards, we consider which standard best reflects a consensus of the well-developed democracies of the world. *Sosa*, 542 U.S. at 692 (directing

federal courts to apply legal norms in ATS litigation that are accepted by "civilized nations"); *Khulumani v. Barclay Ntl. Bank Ltd.*, 504 F.3d 254,276 (2d Cir. 2007). Laws are developing regarding holding corporations liable for their actions in jurisdictions such as Australia[1], Canada[2], France[3], and the Netherlands[4], among others. Furthermore, treaties are allusive to the customs and norms of a nation. Examples of international treaties that address corporate liability or liability of legal persons include: the 1999 International Convention for the Suppression of the Financing of Terrorism; the 2000 Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography; and the 2003 U.N. Convention against Corruption.

b. Defining Corporate Liability As A Cause Of Action Under Sosa Is An Appropriate Exercise Of Judicial Discretion.

The second prong of the *Sosa* test bears on whether allowing a new cause of action claim to proceed is an appropriate exercise of judicial discretion. *Jesner*, 138 S.Ct. at 2756. Although the judicial branch does not have the power to create laws, its job is to interpret them. In *Daimler AG*, the Supreme Court determined that a federal court may "exercise personal jurisdiction over a foreign corporate defendant only if the corporation is incorporated in the United States," which left the power to determine personal jurisdiction of federal courts to the court itself. *Daimler AG v. Bauman*, 571 U.S. 117, 125(2014). HexonGlobal, a domestic corporation, goes above and beyond this statute by being incorporated in the U.S. as a domestic defendant. Congress has not

[1]Parliament of the Commonwealth of Australia's "Modern Slavery Act" written in 2017 to require mandatory annual reporting by large businesses and organizations on the risks of modern slavery in their supply chains and operations.
[2] Canadian Minister of International Trade announced two new initiatives to strengthen approach to responsible business conduct in Jan. 2018.
[3] In Feb. 2017, France and the Netherlands implemented mandatory due diligence and reporting rules regarding the impact of an employer's operations and supply chains on human rights..
[4] *id*.

seen it necessary to immunize corporations from ATS liability even though corporations have been named as defendants in ATS suits for years. *Monessen Sw. Ry. Co. v. Morgan*, 486 U.S. 330 (1988). If Congress truly had an adverse opinion on the matter, it would have noted that corporate liability as a cause of action for the ATS is not a judicial determination, but Congress never expressly stated this opinion.

Sosa proves that corporate liability, generally, is an actionable norm under the ATS, while Justice Sotomayor's dissent in *Jesner* proves that there is no distinction in foreign and domestic corporations in corporate liability claims, and the U.N. treaties and conferences support both factors bringing together a holistic approval of the claim in this case. This Court should find that the ATS permits Mana to bring a claim against domestic corporation, HexonGlobal.

II. THE *TRAIL SMELTER* PRINCIPLE IS A RECOGNIZED PRINCIPLE OF CUSTOMARY INTERNATIONAL LAW ENFORCEABLE UNDER THE ATS.

The ATS requires that the actionable tort be one that qualifies as a norm under the Law of the Nations, also known as customary international law. In *Flores*, the court defined customary international law as "composed only of those rules that States universally abide by, or accede to, out of a sense of legal obligation and mutual concern." *Flores v. S. Peru Copper Corp*., 414 F.3d 233, 248 (2d Cir. 2003). Specifically, the ICJ's enabling statute states the sources of international law are: 1) international conventions, 2) international custom, 3) general principles of law, and 4) judicial decisions and teachings. *The Statute of the International Court of Justice*, art. 36, Jun. 26, 1945, 1 U.N.T.S. 151

The *Trail Smelter Arbitration* is unique in that it was one of the first major disputes concerning transboundary environmental harm. Trail Smelter Arbitration, (*U.S. v Can.)*, 1938 UNRIAA, (Apr. 16), pp. 1905-1982. The dispute was one in which 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 were a violation of international liability principles. R. at 8. In its response, the arbitral panel brought life to two resounding instances of, what has developed into, customary international law titled, the *Trail Smelter* Principle including – "polluter pays" principle and "no-harm" principle. These principles are directly applicable to the case at hand because Mana's claim is based upon the fact that pollution from HexonGlobal has caused her injuries beyond her repair. The "polluter pays" principle stems from the fundamental, logical, and fair proposition that those who generate pollution, not the government, should bear pollution costs. OECD, Council Recommendation on the Application of the Polluter-Pays Principle to Accidental Pollution, July 7, 1989, 28 I.L.M 1320 (1989); Johnathan Nash, *Too Much Market? Conflict Between Tradable Pollution Allowances and the "Polluter Pays" Principle*, 24 Harv. Envtl. L. Rev. 465 (2000). In the disputed claim, Mana is suing HexonGlobal, a domestic corporation responsible for polluting more than its share of GHG emissions. In light of this, naming HexonGlobal as a defendant in this case aligns with the "polluter pays" principle. The idea behind the "no-harm" principle is that "no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence." *Trail Smelter Arbitration* at 1965.

In this disputed claim, Mana is suing HexonGlobal for the air pollution it has caused to accelerate the effects of climate change in her place of living, in a foreign State. At face value, the claim aligns directly with the no-harm principle, and although the *Trail Smelter Arbitration* was an arbitration between two States and this dispute is amongst a private citizen and foreign entity, the principles still apply. There is no limit of classes of defendants or plaintiffs in this

principle, and therefore *Trail Smelter* can still be considered international customary law, deeming it enforceable under the ATS.

A. The ICJ Recognizes The *Trail Smelter* Principle.

After the arbitral panel ruled on the *Trail Smelter Arbitration*, it continued to restate the essential principles of the opinion in successive ICJ cases. The ICJ quickly utilized the *Trail Smelter* Principle in the non-environmental *Corfu Channel* case in 1947 when it determined, "The obligations incumbent upon the Albanian authorities consisted in notifying…such obligations are based …on certain general and well-recognized principles, namely: elementary considerations of humanity…and every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States." Corfu Channel Case (*U.K. v. Alb.*); *Assessment of Compensation*, 15 XII 49, 1949 I.C.J., 15 (Dec.).

Three more ICJ cases highlight the obligation of regard for the wellbeing of other States. The *Nuclear Tests I* case in 1974 and the *Nuclear Tests II* case in 1995 presented two more chances for the ICJ to address transboundary harm. Nuclear Tests (*Austl. v. Fr.*), 1974 I.C.J., 20 (Dec.); *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996, p. 226. The ICJ acknowledged in these cases that "[T]he obligations of States to respect and protect the natural environment, obligations to which both New Zealand and France have in the present instance reaffirmed their commitment." *Id*. The *Gabčíkovo-Nagymaros* judgment in 1997 incorporated the *Trail Smelter* Principle in a case regarding the construction of a barrage system on the River Danube. Gabcikovo-Nagumaros Project (*Hun. v. Slovk.*), 1997 I.C.J. 3 (Order of Feb. 5). In the ICJ judgment, Hungary's concerns about the protection of the natural environment were expressly addressed further qualifying that the principle was evolving into an international norm. *Id*. Finally, the *Pulp Mills* judgment in 2010 regarded the construction and implementation of a pulp mill project between Uruguay and Argentina. Pulp Mills on the River

Uruguay (*Arg. v. Uru.*), 2010 I.C.J. (Apr. 20). Argentina filed a complaint with the ICJ bearing similar grievances as *Trail Smelter* complaints, stating that, "[M]ajor risks of pollution of the river, deterioration in biodiversity, harmful effects on health and damage to fish stocks…". *Id.* The ICJ found that the project involved a risk of causing substantial harm to Argentina because of the transboundary harm the project would likely cause. *Id.*

Without explicitly stating the *Trail Smelter* Principle was the basis for the decisions in the above cases, the details indicate that the decisions based the transboundary issues on the "no-harm" principle. This is an indication of a variety of States looking to an international tribunal to help determine an international standard, and the ICJ speaks loud and clear when it says that States shall respect the non-jurisdictional environment.

B. *Trail Smelter* Is Recognized In U.N. Conventions And Treaties.

Treaties are allusive of the customs and norms of a nation, and the significance of each treaty can be measured by the amount of States who have accepted and signed the treaties in conjunction with the amount of States reaching the standards of the non-binding agreement. *Kiobel*, 621 F.3d at 137. Most significantly, *Trail Smelter* principles have been referenced in the 1972 Declaration of the U.N. Conference on the Human Environment in Stockholm[5], the 1992 Rio Earth Summit in Rio de Janeiro[6], and the 1992 and 2015 UNFCCC[7].

[5] The Stockholm Declaration is the first document to explicitly recognize the right to a healthy environment, the declaration places great emphasis on protecting both species and their habitat. The Declaration and Principle 21 were adopted by a vote of 103 to 0, including the U.S. Principle 21 reads: "[T]he responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction."

[6] Principle 21 is restated almost identically at the Earth Summit 20 years later as Principle 2.

[7] The U.S. was the fourth state to ratify the UNFCCC, and alongside the Kyoto Protocol, is a primary source of international climate change law.

In a much broader sense, the Paris Agreement of 2015 requires Parties that ratify the treaty to adopt regulatory and administrative procedures that are geared toward preventing harm to other states and areas beyond a national jurisdiction, in accordance with a due diligence standard. *Paris Agreement under the United Nations Framework Convention on Climate Change*, CFCCC/CP/2015/L.9/Rev.1, at 22. It is apparent that the *Trail Smelter* principles have been steadily referenced and continue to evolve since the 1972 Stockholm Declaration to the 2015 Paris Agreement. This fact helps to express that despite the non-binding nature of the principle within these conventions and treaties, there is widespread, international acceptance of the principle.

In the transpiration of the *Trail Smelter Arbitration* in international environmental law, the two main principles of this case continue to develop and appear throughout all qualifications of the ICJ enabling statute, including the texts of 1) international conventions, 2) international custom, 3) general principles of law, and 4) judicial decisions and teachings. The principles developed in *Trail Smelter* have been adopted and exemplified by the U.N., individual States, domestic case law decisions, and in ICJ case law decisions. For this reason, Mana's claim should be upheld, and the *Trail Smelter* Principle shall be recognized as customary international law, deeming it enforceable under the ATS.

III. THE *TRAIL SMELTER* PRINCIPLE IMPOSES ENFORCEMENT OBLIGATIONS AGAINST NON-GOVERNMENTAL ACTORS.

As it is accepted that the *Trail Smelter* Principle is a recognized under customary international law, the question arises if it is enforceable against private parties, or non-governmental actors. Mana's claim purports that HexonGlobal, a non-governmental actor, violates the *Trail Smelter* Principle. Generally, the *Trail Smelter Arbitration* created a court-enforceable duty to prevent transboundary harm. Following the guidelines of this Principle, a

State is required to remediate the damage it has created through the transmission of air pollutants, chemicals, and matter into another territory. The U.N. holds governments accountable for actions taken by non-governmental entities within their respective jurisdictions, which proves the *Trail Smelter* Principle is enforceable against non-governmental actors. HexonGlobal is a non-governmental actor that is causing substantial harm to Mana and Flood through its GHG contributions, and it must be held liable for its actions under the obligations that the *Trail Smelter* Principle creates.

A. The *Trail Smelter* Principle Is Enforceable Against Non-Governmental Actors Because The Government Is Responsible For All Actions Of Non-Governmental Actors Within Its Jurisdiction.

When a State has breached its duty to prevent transboundary harm, the court can compel the state to cease the activity, guarantee the actionable behavior will not happen again, pay damages, and return the harm back to its previous condition. *United Nations Conference on Environment and Development, Rio Declaration on Environment and Development*, Jun. 13, 1992, 31 I.L.M. 876. However, a State must have knowledge of the transboundary breach to be held accountable. Corfu Channel Case (*U.K. v. Alb.*), *Assessment of Compensation,*15 XII 49, 1949 I.C.J., 15 (Dec.). This knowledge requirement includes constructive knowledge in situations where the State would or objectively should have known about the harm created. *Id*. Constructive knowledge means knowledge is created when a government-produced regulatory program is in place to regulate the action in question. In this case, the CAA regulates the emissions from producers through its programs, which means that the government had knowledge of the emissions and problems being created by U.S. regulated entity, HexonGlobal.

Further, a breach of international law caused by a non-governmental actor who acts on behalf of, or with permission by, a governmental entity creates governmental responsibility for all of the non-governmental actor's actions. This principle is shown under the U.N.

Responsibility of States for Internationally Wrongful Acts (UNRSIWA), explaining that States are responsible for the conduct of a person (legal or natural), or group of persons, if the person or group of persons is in fact 1) acting on the instruction or 2) under the direction or control of the State. *U.N. Responsibility of States for Internationally Wrongful Acts*, G.A. Res. 56/83 at art. 5 (2001). Further, the UNRSIWA creates two questions to determine responsibility: 1) whether or not such action is prohibited by international law; and 2) if an act of a State causing damage to another State was committed willfully and maliciously or in a grossly negligent manner which would equal intentional delinquency. *Id.*

The *Trail Smelter* Principle satisfies the first prong to the test, and gives basis to determine that the polluter must pay for the damages it creates. The "polluter pays" principle, found within the *Trail Smelter* Principle, stems from the fundamental, logical, and fair proposition that those who generate pollution, not the government, should bear pollution costs. OECD, Council Recommendation on the Application of the Polluter-Pays Principle to Accidental Pollution, July 7, 1989, 28 I.L.M 1320 (1989); Johnathan Nash, *Too Much Market? Conflict Between Tradable Pollution Allowances and the "Polluter Pays" Principle*, 24 Harv. Envtl. L. Rev. 465 (2000). Neither the "polluter pays" nor the *Trail Smelter* principle restrict classes of defendants, and therefore, following these principles, holding non-governmental actors accountable is encouraged by international law.

The second prong is satisfied because the U.S. and HexonGlobal committed gross negligence within the fossil fuel industry by encouraging fossil fuel production, distribution and combustion, and thus encouraging the production of GHG emissions, despite the foreseeable impacts to the effects of climate change. R. at 8. The U.S. has given the industry tax subsidies, leases on public lands and seas, created an interstate highway system, and developed fossil fuel

power plants by public agencies. R. at 6. The U.S. ratified the UNFCCC, the Supreme Court has recognized that pollutants must be regulated through the *Massachusetts v. EPA* decision, and has implemented a regulatory framework meant to take control over the ever-increasing threat of air pollution. R. at 6. It is apparent that the U.S. has knowledge of the dangers of GHGs, but permits and incentivizes non-governmental actors to continue to produce these harmful emissions; therefore, HexonGlobal is acting with permission from the U.S. government, satisfying the second prong.

In addition to actual knowledge, the U.S. had constructive knowledge of the dangers HexonGlobal posed to global climate change due to the amount of GHG emissions released in the air by its regular fossil fuel operations through the CAA. R. at 8. HexonGlobal is responsible for thirty-two percent of the U.S. cumulative fossil fuel emissions and six percent of global historical emissions. R. at 5. HexonGlobal's cumulative sales of fossil fuels accounts for nine percent of global fossil fuel related emissions. Even more importantly, HexonGlobal's scientific research demonstrated that continued fossil fuel combustion would result in substantial harmful global climate change and sea level rise, but even with this knowledge HexonGlobal continues to operate unabatedly, while the U.S. government stands beside it. R. at 5. Furthermore, in 2015, EPA established carbon dioxide emissions standards for new power plants and required states to implement controls on GHG emissions from existing power plants. This is evidence of further constructive knowledge and subsequently meets the knowledge requirements under the UNRSIWA to hold the U.S. accountable. G.A. Res. 56/83 at art. 5 (2001) (1) acting on the instruction or 2) under the direction or control of the State). As previously stated, a governmental actor takes on the responsibility of non-governmental actors working on its behalf. In this case, the U.S. government should be held accountable, under international law, and has a duty to

correct the problem created by any non-governmental actor, such as HexonGlobal, who operates under the U.S. government's approval.

HexonGlobal can, and must, be held accountable by the U.S. government for its contribution to pollution. This obligation is found largely under the *Trail Smelter* Principle, and more pointedly under the "polluter pays" principle, which states that the polluter, not the government should be held responsible for its actions. In this case, the only way that HexonGlobal can be held accountable for its actions is through its regulator, the U.S. government, but the *Trail Smelter* Principle creates this action.

IV. THE *TRAIL SMELTER* PRINCIPLE IS NOT DISPLACED BY THE CAA.

A. International Common Law, As Applied Under Federal Common Law, Is Permitted Due To The Unique Federal Interests.

Initially, *Erie* ruled that no federal general common law exists, and that the power lies with the states to create general common law. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 80 (1938) (ruling that federal courts are not entitled to create their own common law for issues that fall within state law). Federal common law addresses subjects within Congress' national legislative power, as long as Congress has directed it to do so, or where the Constitution demands. A new form of federal common law emerged when national concern is implicated. *Am. Elec. Power Co.*, 564 U.S. at 421. Under most situations, environmental protection is the responsibility of the legislature; however, *Milwaukee* ruled that when discussing "air and water in ambient or interstate aspects," federal common law exists. *Am. Elec. Power Co.*, 564 U.S. at 421 (quoting *Milwaukee*, 406 U.S. at 103). The *Erie* doctrine is an important consideration when ruling on cases that involve issues that should, and do, fall within state law; however, this case does not involve state law but instead involves air in ambient aspects, the federal government, and foreign relations taking the issue properly out of state control.

In situations where the statute does not answer the issue, the courts must take prudent action to adopt the applicable, ready-made body of law until Congress acts to address the issue. *Am. Elec. Power Co.*, 564 U.S. at 422. A plaintiff's pollution claim is displaced by the federal legislation when the plaintiff is under the jurisdiction of the U.S., this includes the CAA. *Id.* at 423. However, this case involves a unique federal interest, which implicates the new federal common law. Unique federal interest exists in narrow situations concerning the rights and obligations of the U.S., interstate, and international disputes where the issue implicates conflicting rights of states or foreign relations, and admiralty cases. *Nat'l Audubon Soc. V. Dept. of Water*, 869 F.2d 1196, 1202 (9th Cir. 1988) (quoting *Tex. Indus. v. Radcliff Materials*, 451 U.S. 630, 641 (1981)). The Supreme Court has recognized the need and authority to fashion federal common law in this restricted situation, a unique federal interest. *Id*. at 1201.

The court in *Nat'l Audubon Soc*. ruled that the CAA is a comprehensive statute when implicating state rights, which prevents the courts from developing substantive law. *Id.* at 1201. However, *Nat'l Audubon Soc.* also recognized that a court may develop substantive law for air pollution under federal common law it must fall under the unique federal interest exception. *Id.* The court determined unique federal interests exist only in narrow areas, areas that are directly implicating the rights and obligations of the U.S., interstate, and international disputes that implicate state rights, foreign relations, and admiralty cases. *Id*. While the court ruled the CAA is a comprehensive statute, the CAA does not address what actions foreign nations may take when the CAA is at issue. This case involves a right and obligation of the U.S. government and an international dispute affecting foreign relations because the U.S. is a member of the U.N., thus binding itself to the U.N. Charter, and also because the environmental affects implicates a foreign nation.

B. Courts May Use Federal Common Law When A Right And Obligation Of The U.S. Government Exists Within a Case Including Contracts or Treaties.

Courts have ruled that if the obligations of the U.S. government are at issue in a contract or treaty in which the U.S. is a party, and the outcome bears some relationship to a federal program, no rule may be applied which would not comply with the program. *Nat'l Audubon Soc.*, 869 F.2d at 1203. However, this does not mean courts cannot fashion federal common law at all. Any federal common law that is created by a court must be in line with the federal program. In addition, the Supreme Court has ruled courts may create federal common law when dealing with air and water in their ambient or interstate aspects. *Id*. The Court may fashion federal common law when a U.S. obligation is implicated through a contract or treaty that the U.S. is a party to and there is a relationship to a federal program, such as the CAA. *Id.*

The U.N. charter states that "in the event of a conflict between the obligations of the Members of the U.N. under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail." *U.N. Charter* art. 103. This section of the U.N. Charter binds the U.S., because the U.S. is a member of the U.N., and therefore the U.S. is bound by the U.N. charter. This creates an obligation in the case at hand.

The U.S. has created a right and obligation through the signature and ratification of the Paris Agreement, and the Rio Principles. The U.S. entered into the Paris Agreement in 2015, and the Paris Agreement aims to strengthen global response to climate change by requiring all parties to combat climate change and report regularly on their emissions and on their implementation efforts. R. at 7. The Paris Agreement is of special interest to the U.S. because it is widely accepted within the global community creating expectations that the U.S. actively work towards decreased emissions. In addition, the U.S. government's response to the Paris Agreement is

directly related to the CAA, a federal program that creates the regulatory framework for pollution control. However, while the CAA discusses the role of state governments, the CAA does not address the unique interest of the federal government when international conflict arises that may adversely affect foreign relations. The Rio Principles additionally discuss the environmental implications of the *Trail Smelter* Principle; specifically, the "polluter pays" principle and the "no harm" principle. It allows a government the right to exploit its own resources, but in exchange, the government has a responsibility to ensure that activities within its jurisdiction do not cause damage to the environment of other States or in areas beyond the limits of national jurisdiction. *United Nations Conference on Environment and Development*, Jun. 3-14, 1992, *Rio Declaration on Environment and Development*, Principle 13, U.N. Doc. A/CONF.I51/26. In this case, because the U.S. government did not consider the damage that would occur to the Island Nations, a right and purely federal interest is implicated, allowing a court to rule without the CAA preempting federal common law.

C. Federal Common Law Exists When International Disputes Implicate Rights Of Foreign States And Foreign Relations.

Where international disputes concern incompatible rights of States or foreign relations, the Supreme Court has allowed for the use of federal common law because the international nature of the controversy makes it inappropriate for state law to control. *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981).

Under the CAA, transboundary air pollution requires the Secretary of the Environmental Protection Agency (EPA) to allow any State affected by emissions or pollutants to appear at any public hearing associated with any revision of the appropriate portion of applicable implementation. 42 U.S.C. § 7415. The CAA requires the Executive to enter into international agreements to foster cooperative research which complements studies and research authorized to

foster cooperation and to develop standards and regulations to protect the stratosphere. 42 U.S.C. §7671(p). While the CAA does discuss required U.S. governmental actions in consideration of international interests, the CAA does not discuss how to address international conflicts when transboundary harm from pollutants arises. In addition, the CAA does not speak to nor prevent an international state from filing for a lawsuit in Court.

The CAA does not preempt federal common law, under the current circumstances because the CAA does not speak directly to the point at issue. The CAA does not prevent foreign governments from filing suit nor does the CAA address the what actions may be taken when the U.S. government and non-governmental actors who are acting with permission of the U.S. government have irreparably harmed a foreign nation due to the emissions and pollutants that the U.S. allows to enter the atmosphere.

V. PLAINTIFF'S CONSTITUTIONAL CLAIM AGAINST THE U.S. GOVERNMENT DOES ASSERT A CAUSE OF ACTION UNDER FEDERAL COMMON LAW AND THE DUE PROCESS CLAUSE.

The public trust doctrine is derived from a long history of established case law. It refers to the government's core sovereign powers and the inability to abdicate its authority over those elements of society that have a public interest attached to them. *See Juliana*, 217 F. Supp. 2d 1224, 1254 (citing *Ill. Cen. R.R. Co. v. Ill.*, 146 U.S. 387, 452-4 (1892) (holding that the Illinois legislature could not give control over the waters or the land beneath it to the private railroad company because of the public interest)). The public trust doctrine states that the federal government must protect certain assets from damage so current and future beneficiaries will enjoy the benefits of these assets. *Id.* at 1253-4. The claim in the case at hand rests on whether, under the public trust doctrine, this Court should consider the global climate system as something that the U.S. government has an obligation to protect. In order for the public trust obligation to apply to the global climate system, this court must decide: 1) if the global climate

system is a protected public asset; 2) if the federal government as a whole, not just the states, has an obligation to protect public assets; 3) if there is a federal law that displaces the federal government's obligation to protect public assets; and 4) if this claim creates a right of action enforceable in federal court. *Id.* at 1255.

A. The U.S. Government Has A Public Trust Obligation Under Federal Common Law To Protect The Climate System From Change Because The Climate Is A Public Asset.

Traditionally, the court has applied the public trust doctrine as a restraint against a state's ability to relinquish control of submerged lands to private corporations, and the public's claim to those lands and the waters above it. *Alec L. v. Jackson,* 863 F.Supp.2d 11, 13 (D.C. District Court 2012); *See e.g., Phillips Petroleum v. Miss.*, 484 U.S. 469 (1988); *Shively v. Bowlby*, 152 U.S. 1 (1894); and *Illinois Central Railroad,* 146 U.S. 387. However, the courts have recently begun to expand the doctrine to apply in other contexts as well. *Alec L.*, 863 F.Supp.2d at 13; *See e.g., D.C. v. Air Fla., Inc.*,750 F.2d 1077, 1083 (D.C.Cir. 1984) (finding that the public trust doctrine can apply to water-related uses such as aesthetic enjoyment and recreational uses).

1. *The Climate Should Be Protected By The U.S. Government Because The Climate Includes Natural Resources That Precedent Has Established Are Within The Scope Of The Public Trust Doctrine.*

In this case, the Court should include only the atmosphere it its consideration of whether a claim against the government for failure to protect the climate is within the scope of a defined public asset for claim, but it should consider the other elements of the global climate as well. In previous cases where the court has ruled against claims similar to those made in this case, the court has only considered whether the atmosphere is a public asset, and did not consider other measures. *See e.g., Alec L. v. Jackson,* 863 F.Supp.2d at 13 (stating the D.C. Circuit Court is not aware of any case where the court expanded the doctrine to the atmosphere). However, EPA defines 'climate system' to include atmosphere, hydrosphere, cryosphere, lithosphere, and

biosphere.[8] Specific to this claim, a hydrosphere is "[T]he component of the climate system comprising liquid surface and subterranean water, such as: oceans, seas, rivers, fresh water lakes, underground water." Additionally, the courts have established the notion that waters such as the defined above fall under the public trust doctrine since the time of *Illinois Central Railroad*. *See Juliana*, 217 F. Supp. 2d at 1253-4. Therefore, this claim should fall under the scope of the public trust doctrine.[9]

2. Federal Common Law Establishes That The Federal Government Has A Public Trust Obligation To Protect The Climate At A Public Asset, Which The CAA Does Not Displace.

First, the existence of the federal common law must be shown in order to establish that the public trust doctrine applies to the federal government, and not just the state governments. The Supreme Court has recognized the existence of the federal common law when dealing "with air and water in their ambient or interstate aspects." *Milwaukee*, 406 U.S. at 103 (holding that the federal district court had jurisdiction to hear a nuisance claim about water pollution). Recently, the Supreme Court and the Ninth Circuit Court have recognized the need for a federal common law regarding pollution and all environmental aspects. *Am. Elec. Power Co., Inc.*, 564 U.S. at 420-1 (2011) (stating "Environmental protection is undoubtedly an area . . . in which federal courts may fill in "statutory interstices," and, if necessary, even "fashion federal law."); *Native Vill. of Kivalina v. ExxonMobil*, 696 F.3d 849, 855 (2012). In contrast, the D.C. Circuit Court in *Alec L.* relies on *PPL Montana, L.L.C. v. Montana* to establish that the Supreme Court has

[8] The definitions for climate system and hydrosphere are taken from the EPA Vocabulary Catalog on Climate Change Terms.

[9] However, in *Juliana* there is also an argument for the scope of the public trust doctrine does include the atmosphere, or air. The Supreme Court has recognized that private claims over airspace would interfere with the public's claim over it. *Juliana*, 217 F. Supp. 2d 1224, n. 10 (citing *United States v. Causby*, 328 U.S. 256, 261 (1946)). Although, the court does not need to rule the atmosphere is a public asset for the claim to fall under the public trust doctrine, there is an argument for the court to establish the atmosphere within the scope of a public trust claim.

rejected the idea that the public trust doctrine is applicable to the federal government. *See PPL Montana, LLC v. Montana*, 565 U.S. 576, 603-4 (2012) (stating that the public trust doctrine "*remains a matter of state law*."). Additionally, the existence of the federal common law public trust doctrine requires an analysis of federal law displacement in a claim against the U.S. for the effects of pollution on the global climate.

Displacement of federal common law action can only occur when Congress has acted to "occupy the entire field." *Kavlina*, 696 F.3d at 857. In *Am. Elec. Power Co.*, plaintiffs asked the court to making a ruling requiring the reduction of carbon emissions, and the Supreme Court found that "the Clean Air Act displaces any federal common law right to challenge CO_2 emissions" because it speaks "directly to the issue of carbon-dioxide emissions from domestic power plants." 564 U.S. at 424-5, 428. However, the courts have the power to "fill in statutory interstices" and may use federal common law to do so when there is an overriding federal interest in the need for the courts to create a uniform rule of decision. *U.S. v. Solvents Recovery Serv. of New England*, 496 F. Supp. 1127, 1136 (District Court of Connecticut, 1980). In *Util. Air Regulatory Grp. v. EPA*, the Supreme Court held that portions of the CAA do not regulate GHGs. 134 S.Ct. 2427, 2448 (2014).

This Court should enforce the public trust doctrine as a limit on all government sovereignty, not just states', and apply it to atmospheric trust cases such as this one. The Supreme Court recognized the existence of the federal common law in *Milwaukee*, and the courts have failed to override this precedent. Additionally, the Supreme Court has acknowledged the need in the environmental context for the courts to create law when necessary. *See Am. Elec. Power Co.*, 564 U.S. at 421. With the ruling in *Util. Air Regulatory Grp. v. EPA*, the court has recognized that the entirety of the CAA does not regulate GHGs and therefore the act does not

displace all claims. Instead, the Court should use the federal common law public trust doctrine to fill in the interstices left in the CAA in regard to the regulation of GHGs. Therefore, the Court should apply the federal common law public trust doctrine to hold the U.S. accountable for damage to the climate that directly and severely effects citizens of U.S. territories.

B. This Claim Is Enforceable In Federal Court Because The Public Trust Doctrine Is Incorporated Into The Due Process Clause Of The Federal Government Which Protects Against Government Violations Of The Fundamental Right To A Global Climate.

In order for a public trust claim against the U.S. to be actionable in a court of law, the court must consider the claim's 1) basis in law, and 2) whether the court is the appropriate forum to hear the claim. Section VI of this brief provides the analysis of the second question. In order to apply a strict scrutiny review of a substantive due process claim, the claim must allege an infringement on a fundamental right. *Juliana*, 217 F.Supp.3d at 1248. As the public trust rights are related to the inherent sovereignty of the U.S. government and authority, satisfy both aspects of this test according to the *Juliana* court. *Id.* at 1261. Although this is not a fundamental right found in the Constitution, substantive due process protection for these public trust assets can be found in the Ninth Amendment. *Id.* In *Obergefell v. Hodges*, the court recognized that the Constitution left open the creation of fundamental rights for future generations because the framers recognized that "the nature of injustice is that we may not always see it in our own times." 135 S.Ct. 2584, 2598 (2015). In *Juliana*, the court states, in finding a fundamental right to a stable climate, that when "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 at 1250. Moreover, there is a presumption that the government does not have a duty to affirmatively act to protect a

fundamental right unless the government creates the danger itself. *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 196 (1989). The Ninth Circuit has found that in order to show that the government created the danger, the plaintiff must prove that the government exposed Mana and Flood to danger they otherwise would not have faced, and that the government recognized the unreasonable risk and acted without regard to the consequences. *Juliana*, 217 F.Supp.3d at 1251 (citing *Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1061 (9th Cir. 2006)).

There is a fundamental right to a stable global climate inherent in the fundamental right to life that creates a substantive due process challenge. The court has historically recognized a fundamental right to life, mostly in death penalty cases, and the due process clause language includes the right as well. *See e.g.*, *Panetti v. Quarterman*, 551 U.S. 930, 957. Echoing the reasoning in the *Juliana* court, protecting the air and water that are vital to the livability of this planet should be recognized as a fundamental right in this case. Despite the lower court's rejection of the danger creation test, the U.S. is and has been aware of the danger that the country's contribution to global warming has created over the past many decades. R. at 11. The government's efforts to regulate the GHG emissions in the CAA and in *Massachusetts v. EPA*, the many regulations passed by the EPA, the Clean Power Plan, and attendance at the UNFCCC demonstrate the U.S. government's acknowledgement of the government's responsibility in the deteriorating global climate. R. at 5-7. Therefore, the danger creation test applies and creates a responsibility for the government to act in the affirmative to protect the global climate. By not taking the affirmative action necessary to protect this fundamental right, the U.S. government has violated the due process clause, creating a right of action for the claims here.

The U.S. government has an obligation to protect the climate, and the components of the climate, under the federal common law public trust doctrine. The cause of action for this claim is the Due Process Clause of the Fourteenth Amendment because the climate is a fundamental right. Even if this Court decides that the climate is not a public asset, or a claim for a public asset cannot be brought under a substantive due process claim, the climate should still be considered a fundamental right and therefore provide a cause of action.

VI. PLAINTIFFS' LAW OF NATIONS CLAIM UNDER THE ATS AND PUBLIC TRUST CLAIM DO NOT PRESENT A NON-JUSTICIABLE POLITICAL QUESTION UNDER THE BAKER FACTORS.

In order to maintain the separation of powers between the three branches of government, the federal courts dismiss any claims that present a political question for lack of subject matter jurisdiction. *Baker*, 369 U.S. at 198-9 (1962). This doctrine should not be overstated as to prohibit the Court's review of any claim that raises a question that is important to the political branch or has at one point been political. *Juliana v. United States*, 217 F. Supp. 3d 1224, 1235 (D. Oregon, 2016); *U.S. Dep't of Commerce v. Montana*, 503 U.S. 442, 458 (1992); *Baker v. Carr*, 369 U.S. at 210. In *Baker*, the court identified the following six factors to invoke the political question doctrine: 1) a textually demonstrable constitutional commitment of the issue to another branch; 2) a lack of judicially discoverable and manageable standards; 3) the need for a policy determination in order to make a decision on the issue; 4) respect for the other branches; 5) if another branch has made a decision on this issue that the court must adhere to; or 6) whether a decision would embarrass another branch. 369 U.S. at 217. These factors can be simplified into two categories: whether the courts can properly decide the question, and whether a judiciary decision on the claim would embarrass or express lack of respect for another branch. *See e.g., Alperin*, 410 F.3d at 544-6; *Kadic v. Karadzic*, 70 F.3d 232, 249-50 (2d Cir. 1995). A court faced with a political question claim should consider the presence of any one of these factors enough to

dismiss the case on the grounds of non-justiciability, as long as it is "inextricable" from the case and the court has done a "discriminating inquiry into the precise facts." *Baker v. Carr*, 369 U.S. at 217. Neither Flood nor Mana's claims violate any of the *Baker* Factors, and therefore do not present a non-justiciable political question.

A. Neither Of Plaintiff's Claims Violate The First Through Third *Baker* Factors.

The claims against the U.S. for violating the public trust doctrine and against HexonGlobal for violating the ATS, do not present a non-justiciable political question. Applying each of the six factors outlined in *Baker*, neither of plaintiffs' claims present a non-justiciable political question doctrine that would prevent this Court from hearing them. The first three factors ask whether the judiciary in the appropriate forum to answer the claim.

The first factor requires an analysis of whether the Constitution gave the power to decide the issue to a specific branch or if the issue is a question better decided by policy making powers of the political branches. *See Nixon v. U.S.*, 506 U.S. 224, 229 (1993) (holding that the Constitution, and the Framers after long debate, gave the sole power of impeachment to Senate, and therefore, the Senate's impeachment proceedings was not reviewable); *Zivotofsky ex rel Zivotofsky v. Clinton*, 566 U.S. 189, 194 (holding that Constitution gives the President the exclusive authority to recognize foreign nations and governments consistent with the President's power to conduct diplomatic relations). Additionally, the second and third factors require the court to dismiss a case when the relief granted would be the duty of a political department. *Zivotofsky*, 566 U.S. at 203-4 (2012) (Sotomayor, J., concurring)). This occurs in instances when a claim calls for decision-making beyond a court's expertise or requires an unmade policy that the political branch is more suited to handle. *Id.* However, the courts can decide these complex questions as long as the remedy is not one that requires the court to create an overarching policy, and there is "judicially–discoverable and manageable standards" for the court to use. *Connecticut*

v. American Elec. Power Co., 582 F.3d 309, 326, 329-31 (2d Cir. 2009) (holding that a claim against a corporation for GHG emissions does not ask the court to create an overreaching policy because the tools to answer a tort claim already exist). Similarly, in *Juliana*, the District Court of Oregon held that the question of climate change did not violate the political question doctrine because the Constitution does not mention environmental policy and none of the powers given to Congress or the Executive imply that either of the branches should have control over it. 217 F. Supp.3d at 1238. The *Juliana* court also ruled that the second and third factors did not restrict the claim because the court has the ability to remedy the situation and the logical complexities do not remove this claim from the court's ability. 217 F. Supp. 3d at 1239. In contrast, the Northern California District Court held that a claim against ExxonMobil for its "significant" GHG emission would be better answered by the political branches because it requires the court to make determinations about the safety of GHG emissions and decide who should be held responsible for global warming. *Native City of Kavalina v. ExxonMobil Corporation*, 663 F.Supp.2d 863, 873-5 (N.D. Cal. 2009).

The claims against the U.S. government and HexonGlobal do not violate the first through third factors of the political question doctrine because the judiciary is the appropriate forum to provide relief for plaintiff's claim. Similar to the reasoning of the court in *Juliana*, the claims made by plaintiffs here do not represent explicit language allocating power in the Constitution and climate change policy is not significantly related to any a fundamental power related of another branch. Additionally, dismissal of this claim because of its potential impact on foreign policy would result in an application of the "textually committed" inquiry that would be too broad, which the *Baker* court specifically warned against. 217 F. Supp. 3d at 1238. The court deciding the plaintiff's claims here do not need the fact-finding tools of the legislature because it

has the judicially–discoverable and manageable standards needed to make a decision on the claim. The Executive's actions through conferences and agencies, can provide the court with what it needs to provide relief for the claims in this case. R. at 6-7. Therefore, the first through third *Baker* factors are not inextricable to the plaintiff's claim and do not require dismissal from this court.

B. Neither Of Plaintiff's Claims Violate The Fourth, Fifth, Or Sixth *Baker* Factor.

The *Baker* court found that the importance of each factor was descending in the order it stated them. *Alperin*, 410 F.3d at 545. Subsequent courts have echoed this and often dismissed claims on findings in the first two. *Id*. at 545-6 (citing a number of cases that have disproportionally focused on the first two tests in the Supreme Court and lower courts).

The court must consider the fourth through sixth Baker factors to determine if a judicial remedy would directly contradict another branch's decision and interfere with government interests. *American Elec. Power Co.*, 582 F.3d at 331 (citing *Kadic v. Karadzic*, 70 F.3d at 250). The court should not inherently forbid foreign policy implications that raise political questions from judicial review. *Kadic*, 70 F.3d at 250. In *Am. Elec. Power Co.*, the court held that the policies of the political branches, expressed through regulations and statutes, demonstrated the U.S government's policy to reduce GHG emissions and therefore no finding of the court could contradict this policy. 582 F.3d at 332. Additionally, the court found that there was no need to protect this claim through the political question doctrine because the Executive and Legislative branches could override any decision made by the court and therefore the separation of powers considerations are not necessary in this context. *Id*. The court in *Juliana* also ruled that these factors did not prohibit the court from answering the question about GHG emissions because a finding to reduce GHGs would be consistent with commitments already made by the U.S. and no finding here would express disrespect for those commitments. 217 F.Supp.2d at 1240-1.

Mana's and Flood's claims against HexonGlobal and the U.S. do not invoke the fourth, fifth, or sixth *Baker* factors because a decision on the claims would not embarrass the political branches or contradict a previous finding. Although there has been no legislation passed on this issue, the Executive has dealt with the question of climate change for over two decades. R. at 6-7. The Executive has made efforts in dealing with the question through conventions and treaties with foreign nations and agency regulations, which give the judicial the tools it needs to answer plaintiff's claim. R. at 6. Therefore, the question at hand is if this Court hearing plaintiffs' claims, and its rendering of a subsequent judicial remedy, would interfere with the decisions of the Executive over the past two decades. Similar to *Juliana* and *Am. Elec. Power Co.*, the claims in this case request a finding for the reduction of GHGs that would be wholly consistent with the previous legislation and policy decisions at international conferences, and therefore, the court should bar them from review.

Mana's and Flood's claims against the U.S. and HexonGlobal do not present a political question that violates any of the six *Baker* factors. Therefore, without a political question bar to a review of these claims, this Court should grant subject matter jurisdiction.

CONCLUSION

Plaintiff Mana is permitted to bring a claim under the ATS against domestic corporation, HexonGlobal. The ATS provides jurisdictional boundaries, and the cause of action must be found in a treaty or in the Law of Nations. The cause of action in this case is corporate liability (holding HexonGlobal accountable), and it is actionable because it is an international norm to hold corporations accountable for their actions. Specifically, plaintiffs are permitted to bring an ATS claim against a domestic corporation because it is not restricted in the statute or precedential domestic or international case law.

The *Trail Smelter* Principle is a recognized principle of customary international law enforceable under the ATS because it is universally recognized by the States out of a legal obligation and mutual concern. Further, the *Trail Smelter* Principle is recognized by the ICJ's enabling statutes qualified sources of international law: 1) international conventions, 2) International custom, 3) general principles of law, and 4) judicial decisions and teachings, thus qualifying it as an enforceable principle of customary international law under the ATS.

Furthermore, HexonGlobal is operating under the direction and control of the U.S. government. HexonGlobal has benefited from tax subsidies granted by the U.S. government to encourage the development of the fossil fuel industry. HexonGlobal must comply with the regulatory framework, the CAA. HexonGlobal's actions under the permission and encouragement of the U.S. government falls directly under the UNRSIWA. The U.S. is responsible for HexonGlobal's actions and therefore the *Trail Smelter* Principle is enforceable against HexonGlobal, a non-governmental actor.

The CAA does not displace the *Trail Smelter* Principle. The new federal common law exists when "air and water in ambient or interstate aspects" are at issue. *Am. Elec. Power Co.*, 564 U.S. at 421 (quoting *Ill. v. Milwaukee*, 406 U.S. at 103). A court may develop a substantive law for air pollution under federal common law it must fall under the uniquely federal interest exception. *Id.* at 1201. Federal interests exist only in narrow areas directly implicating the rights and obligations of the U.S.. The U.S. has created a right and obligation through the Paris Agreement, and the Rio Principles. *United Nations Conference on Environment and Development*, JU.N.e 3-14, 1992, *Rio Declaration on Environment and Development*, Principle 13, U.N. Doc. A/CONF.I51/26. Where international disputes concern incompatible rights of States, the Supreme Court has allowed for the use of federal common law because the

international nature is inappropriate for state law regulations. While the CAA does discuss U.S. actions in consideration of international interests, the CAA does not discuss how to address international conflicts when transboundary harm from pollutants arises. The CAA does not speak to, nor prevent an international state from filing for a lawsuit in court. Therefore, the CAA does not preempt federal common law, nor does it preempt the *Trail Smelter* Principle.

Furthermore, the CAA does not displace federal common law. Federal law displaces common law when Congress has intended to occupy the entire field of law. *Kavlina*, 663 F.Supp.2d at 857. According to recent case law, the CAA has left open many areas related to the regulation of GHGs. *Util. Air Regulatory Grp.*, 134 S.Ct. at 2448. Additionally, the courts may use common law to "fill in the interstices" of the law when necessary. *Am. Elec. Power Co.*, 564 U.S. at 420-1. Therefore, the court here may use federal common law to fill in the gaps left in the CAA related to the regulation of greenhouses gases.

Lastly, the principles of separation of powers bars courts from answering any claims that present a political question that would be better suited for a political branch. *Baker*, 369 U.S. at 198-9, 217. However, the claims brought against the U.S. and HexonGlobal do not present a political question. Neither claim presents a question that directly implicates a power given to another branch, there are no former decisions made by other branches that the court must adhere to, a court deciding these claims would not embarrass a political branch, and the court has the judicially-discoverable and manageable standards required to answer this question. Therefore, separation of powers does not forbid the court from hearing these claims.

For the foregoing reasons, this Court should reject the Defendants claims and allow remedies for the Plaintiffs.