Team #34

CA. No. 18-000123

IN THE
UNITED STATES COURT OF APPEALS FOR THE TWELTH CIRCUIT

ORGANIZATION OF DISAPEARING ISLAND NATIONS, APA MANA, and NOAH FLOOD,
Appellants,

v.

HEXONGLOBAL CORPORATION.
Appellee,

and

THE UNITED STATES OF AMERICA,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR NEW UNION ISLAND IN NO. 66-CV-2018, JUDGE ROMULUS N. REMUS

BRIEF FOR APPELLEE, HEXONGLOBAL CORPORATION

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JURISDICTIONAL STATEMENT

Petitioners Organization of Disappearing Island Nations, Apa Mana, and Noah Flood appeal to the United States Court of Appeals for the Twelfth Circuit regarding the United States District Court for New Union Island's decision on August 15, 2018. The District Court for New Union Island dismissed the Petitioners' complaint and ruled in favor of Respondents HexonGlobal Corporation and The United States of America. These rulings, and the District Court's orders, were entered by the Honorable Romulus N. Remus in the United States District Court for New Union Island.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Can Mana bring an Alien Tort Statute, 28 U.S.C. § 1350 (ATS) claim against a domestic corporation? (Petitioners argue she can; the United States argues she can; and HexonGlobal argues she cannot.)

2. Is the *Trail Smelter* Principle a recognized principle of customary international law enforceable as the "Law of Nations" under the ATS? (Petitioners argue it is; the United States argues it is; and HexonGlobal argues it is not.)

3. Assuming the *Trail Smelter* Principle is customary international law, does it impose obligations enforceable against non-governmental actors? (Petitioners argue it does; the United States argues it does; and HexonGlobal argues it does not.)

4. If otherwise enforceable, is the *Trail Smelter* Principle displaced by the Clean Air Act? (Petitioners argue it is not; the United States argues it is; and HexonGlobal argues it is).

5. Is there a cause of action against the United States Government, based on the Fifth Amendment substantive due process protections for life, liberty, and property, for failure to protect the global atmospheric climate system from disruption due to the production, sale, and

burning of fossil fuels? (Petitioners argue there is; the United States argues there is not; and HexonGlobal argues there is not.)

6. Do Petitioners' law of nations claim under the Alien Tort Statute and public trust claim present a non-justiciable political question? (Petitioners argue the claims do not; the United States argues the claims do; and HexonGlobal argues the claims do not.)

STATEMENT OF THE CASE

Organization of Disappearing Island Nations ("ODIN"), Apa Mana, and Noah Flood recently brought this action against Respondents HexonGlobal Corporation and the United States. R. at 3. Mana has brought a suit against HexonGlobal regarding its fossil fuel related business activities as an "alleged" violation of the law of nations. R. at 3. Flood asserts a constitutional claim against the United States, alleging violations of public trust obligations to protect the global climate ecosystem incorporated through the Due Process Clause of the Fifth Amendment to the Constitution. R. at 3.

ODIN is a not-for-profit organization which is devoted to protecting island nations threatened by rising sea levels. R. at 3. Mana and Flood are both members of this organization. Mana is an alien national of A' Na Atu, while Flood is a U.S. Citizen resident of the New Union Islands, a U.S. possession. R.at 3. These islands are both located in the East Sea, and petitioners allege that the East Sea Islands will be uninhabitable due to rising sea levels. R. at 3-4. The petitioners allege that they have already suffered seawater damage to their homes due to storms occurring from the presence of greenhouse gases, among other injuries. R. at 4.

Respondent HexonGlobal is a United States Corporation which is incorporated in New Jersey and has its principal place of business in Texas. R. at 5. HexonGlobal has acquired other United States oil producers, and as a result, its fossil fuel-related greenhouse gas emissions

amount to 6% of the global historic greenhouse gas emissions and 32% of the United States greenhouse gas emissions. R. at 3. HexonGlobal, while incorporated in the United States, operates refineries throughout the world (including on New Union Island). R. at 5.

The United States has recognized and acknowledged the threat of climate change, enacting several laws and ratifying a few treaties to combat this issue. In 1992, the United States signed and the Senate ratified, the United Nations Framework Convention on Climate Change, which sought to achieve stabilization of greenhouse gas concentrations and to take corresponding measures on the mitigation of climate change. (p. 6 citing UNFCCC). In the past decade, the United States has taken further steps towards regulating domestic greenhouse gas emissions. In *Massachusetts v. EPA*, 547 U.S. 497 (2007), the Supreme Court held that greenhouses gases, including carbon dioxide, were "pollutants" that were potentially subject to regulation under section 202(a)(1) of the Clean Air Act, 42 U.S.C. § 7521 (2018). R. at 6.

After the Supreme Court's ruling in *Massachusetts v. EPA*, the EPA set the regulatory scheme for regulation of greenhouse gas emissions under the Clean Air Act. R. at 6 (citing 74 Fed. Reg. 66,496 (Dec. 15, 2009)). In 2010, the EPA, along with the National Highway Transport Authority, set regulations for emissions rates for passenger cars and light trucks and extended these regulations through model year 2025. R.at 7 (citing 77 Fed. Reg. 62,623 (Oct. 15, 2012)). The EPA took further action in 2010 when they issued a rule under the Clean Air Act which requires major new sources of greenhouse gas (which were already subject to review for non-greenhouse gas emissions) to undergo review to establish technology-based limits on greenhouse gas emissions. R. at 7 (citing 75 Fed. Reg. 31,514 (June 3, 2010)).

In 2015, the EPA issued regulations for carbon dioxide emissions standards for new and existing power plants. R. at 7 (citing 80 Fed. Reg. 64,510 (Oct. 23, 2015); 80 Fed. Reg. 66,642

(Oct. 23, 2015)). The United States also signed onto the Paris Agreement, which committed the United States and other nations to reduce their future greenhouse gas emissions, and the United States agreed to reduce greenhouse gas emissions by 26-28%. R. at 7 (citing *USA First NDC* (Sept. 3, 2016)). However, President Trump has proposed to reverse these regulatory measures and commitments, specifically stating an intention to withdraw from the Paris Agreement by 2020. R. at 7.

SUMMARY OF THE ARGUMENT

The Alien Tort Statute ("ATS") is a jurisdictional statute which was enacted in 1789, granting "original jurisdiction of any civil actions by an alien for a tort, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C.S. §1350. It was enacted to recognize a narrow set of torts in violation of the law of nations: "violations of safe conducts extended to aliens, interference with ambassadors, and piracy." *Sosa v. Alvarez*, 542 U.S. 692, 720 (2004). The ATS causes of action (outside of the original three sets of torts) is to only be extended with "great caution in adapting the law of nations to private rights." *Id.* at 728-30. Further, the ATS can only be invoked if the underlying international norm applies to the "perpetrator being sued." *Sosa* at 732 n.20. Neither the ATS, nor customary international law, has ever recognized corporate liability. *Kiobel v. Royal Dutch Petro. Co.*, 621 F.3d 111, 121 n.22 (2d Cir. 2010) ("*Kiobel I*"). International tribunals have refused to extend customary international law, even when the corporations were in clear violation. *Id.* The ATS can only be extended through "great caution," and the ATS must be subject to "vigilant doorkeeping." Sosa at 727. Further, the ATS can only be invoked where the underlying international norm applies to the perpetrator being sued, and corporations have never been held liable under customary

international law. HexonGlobal cannot be sued under the ATS. Therefore, Mana's claim against HexonGlobal must fail under the ATS.

For one to bring a claim under the ATS, the claim must be a: 1) tort action; 2) brought by aliens only; and 3) for violations of the Law of Nations or a treaty of the United States. *Kiobel v. Royal Dutch Petro. Co*., 621 F.3d 111, 116 (2d Cir. 2010), aff'd, 569 U.S. 108 (2013). Petitioner has failed to meet the third requirement of an ATS claim. There is no governing treaty with respect to the Trail Smelter Principle, so Petitioner's claim rests on whether the principle is customary international law. It is not because United Nations treaties are not automatically considered customary international law, and countries have not uniformly adopted the trail smelter principle.

Even if the Court finds that the Trail Smelter Principle is customary international law, Petitioners claim still falls flat. For the ATS to impose affirmative obligations stemming from the trail smelter principle on a non-governmental actor would run contrary to the plain language of the principle and its intent. When analyzing a principle, law, or statute, "the first step 'is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case'". *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002) (citing *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 240 (1989)). As such, the starting point for analysis is the language itself. *Watt v. Alaska*, 451 U.S. 259, 265 (1981). Words used in a statute normally must be given their usual, natural, plain, ordinary, and commonly understood meaning in the absence of any indication of a legislative intention to the contrary. 82 C.J.S. Statutes § 413. The language of the trail smelter principle is unambiguous; the state, not the individual, is liable for a trail smelter violation.

Additionally, international tort claims, like the one before the court, arise under federal common law. When dealing "with air and water in their ambient or interstate aspects, there is a federal common law". *Illinois v. City of Milwaukee, Wis.*, 406 U.S. 91, 92 (1972). If Congress addresses a question that previously relied on court-created common law, "the need for such an unusual exercise of law-making by federal courts disappears". *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 423 (2011). The Court has unequivocally ruled on this issue: The Clean Air Act speaks directly to the question of air pollution and displaces any federal common law. *Id.*

Petitioner's Fifth Amendment substantive due process claim should be dismissed because the right to a healthy environment is not deeply rooted in the Nation's history and Tradition. A healthy environment is not as fundamental as the rights established in the Bill of Rights or the right to marriage. Furthermore, the petitioner's alleged right is not fundamental ordered liberty. The ordered liberty test has not been applicable except as to rights already established in the bill of rights. Even if the court determines that Petitioner's claim for a healthy environment is a fundamental right, neither the special relationship nor danger creation exception applies. The special relationship exception is wholly inapplicable because there is no relationship between the government and the petitioners. The danger creation exception does not apply because the government has taken several measures to reduce the damage that was caused to the environment once they were privy to the effects of climate change.

Petitioners' claims cannot be dismissed under the political question doctrine because their claims do not present a non-justiciable political question. Petitioners' claims are not textually committed to a coordinate political department as climate change. Neither of Petitioner's claims requires a departure from judicial expertise because the Alien Tort claim can be resolved with

either the Trail Smelter Arbitration or the Clean Air Act. Furthermore, Petitioners Public Trust claim can be resolved as it does not request any specific reductions or policies be made by non-judicial entities. Lastly, there are no prudential considerations that counsel against judicial resolution.

ARGUMENT

I. DOMESTIC CORPORATIONS CANNOT BE SUED UNDER THE ALIEN TORT STATUTE

a. The ATS Has Been Purposefully Narrowed, And Any Attempt To Extend Its Reach Requires The Court To Exercise "Great Caution"

The Alien Tort Statute ("ATS") "grants original jurisdiction of any civil actions by an alien for a tort, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C.S. §1350. The ATS was enacted in 1789 to recognize a limited category of torts in violation of the law of nations: "violations of safe conducts extended to aliens, interference with ambassadors, and piracy." *Sosa v. Alvarez*, 542 U.S. 692, 720 (2004). These rights, in 1789, were recognized as ""the rights subsisting between nations or states." E. de Vattel, Law of Nations, Preliminaries § 3 (Joseph Chitty ed. and trans., 1883). Because of this narrow reading of the ATS, it was invoked in only a handful of cases from 1789 to 1980. *Kiobel v. Royal Dutch Petro. Co.*, 569 U.S. 108, 113 (2012) ("*Kiobel II*").

The ATS was invoked in *Filartiga v. Pena-Irala*, 630 F.2d 876, 880 (2d Cir. 1980) in a case involving an alien suing their torturer, who was in the United States. After the Second Circuit recognized liability under the ATS in *Filartiga*, litigation swiftly increased against all classes of Respondents (individuals, corporations, etc.).

In 2004, the Supreme Court heard arguments regarding the applicability of the ATS. The Supreme Court stated that the ATS is strictly jurisdictional and requires a violation of customary international law. *Sosa v. Alvarez*, 542 U.S. 692, 713 (2004). The Court further stated that any

new causes of action under the ATS must be based on “specific, universal, and obligatory” norms of international law. *Id.* at 727-28, 732. These claims based on present-day law of nations must "rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized." *Id.* at 725. If the claim meets these standards, the claim must then be one which “extends the scope of liability for a violation of [the] norm to the perpetrator being sued." *Id.* at 733 n.20.

For example, if there were a violation of a customary international law for human trafficking against individuals, an injured person could bring a claim against an individual, as that is the norm for the perpetrator being sued. The injured person could not, however, bring a claim against a corporation, the government, or a charity under the ATS, as it is not a norm for those perpetrators to be sued under that customary international law.

The *Sosa* Court recognized that even if there was a customary international law norm which was specific, universal, and obligatory, courts had to exercise “great caution in adapting the law of nations to private rights.” *Id.* at 728-30. The Supreme Court in *Jesner* also outlined this concern, stating that ATS claims of customary international law must be subject to “vigilant doorkeeping” as they implicate “serious separation-of-powers and foreign-relations concerns.” *Jesner v. Arab Bank, PLC*, 138 S.Ct 1386, 1398 (2017). The Supreme Court has “repeatedly” stated that deciding to create a private right of action is better left to the legislature in the vast majority of cases. *Sosa* at 727. In *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 183 (1994), the Supreme Court further recognized that it is the job of Congress to define who may be liable for a tort. This was echoed in *Sosa*, where crafting remedies for violations of new norms of international law “would raise risks of adverse foreign policy consequences.” *Id.* at 728.

The foreign policy consequences of crafting remedies under the ATS against corporations, coupled with the concerns of the Supreme Court regarding the separation of powers concerns regarding the courts and crafting remedies, strongly evidence significant concerns of corporate liability under the ATS. The ATS is a strictly jurisdictional statute with a narrow reach, as was so intended at its inception. This court is required to exercise "great caution" when interpreting causes of action under the ATS, as compelled by the Supreme Court, and exercising great caution yields only one result: no corporate liability under the ATS.

b. Corporations Have Never Been Held Liable Under The ATS

Every international tribunal to consider corporate liability under customary international law for violations of customary international law has rejected such liability, even where corporations violated the law of nations. *Kiobel v. Royal Dutch Petro. Co.*, 621 F.3d 111, 121 n.22 (2d Cir. 2010) ("*Kiobel I*"). Rejecting corporate liability, and not allowing for corporate liability, is a specific, universal, and obligatory norm under customary international law. The Supreme Court in *Kiobel II* also recognized that "far from avoiding diplomatic strife, providing such a cause of action [ATS] could have generated it," as seven countries objected to any extraterritorial application of the ATS. *Kiobel II* at 124 (citing *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 77-78 (C.A.D.C. 2011) (Kavanaugh, J., dissenting in part)). Corporate liability has never been found under the ATS, and objections from numerous countries regarding the expansion of the ATS suggest that corporations should not be liable under the ATS.

c. Extending The ATS To Corporations Would Undermine The "Great Caution" Required To Expand Its Scope

If the court is to recognize a cause of action under the ATS, they can do so only if the underlying international norm being invoked applies to the "perpetrator being sued." *Sosa* at 732 n.20. As stated in the introduction of this section, every international tribunal to consider

corporate liability under customary international law has rejected it, even where the corporations committed violations of customary international law. *Kiobel I* at 121 n.22. Corporate liability under the ATS is unattainable until corporate liability is recognized internationally by other tribunals. If the international norm needs to apply to the "perpetrator being sued," and there has never been a corporation found liable for a violation of customary international law, then a corporation cannot be liable for any offense under the ATS. Therefore, Mana's claim against HexonGlobal under the ATS is improper and should be dismissed.

II. THE ABSTRACT TRAIL SMELTER PRINCIPLE IS NOT RECOGNIZED AS CUSTOMARY INTERNATIONAL LAW AND IS NOT ENFORCEABLE AS THE "LAW OF NATIONS" UNDER THE ALIEN TORT STATUTE.

For one to bring a claim under the Alien Tort Statute (herein ATS), the claim must be a: 1) tort action; 2) brought by aliens only; and 3) for violations of the Law of Nations or a treaty of the United States. *Kiobel v. Royal Dutch Petro. Co.*, 621 F.3d 111, 116 (2d Cir. 2010), aff'd, 569 U.S. 108 (2013). The first and second prongs are not at issue. Rather, Petitioner has failed to meet the third requirement of an ATS claim. There is no governing treaty with respect to the Trail Smelter Principle, so Petitioner's claim rests on whether the principle is customary international law. It is not.

Something is considered customary international law when "nations of the world have demonstrated that the wrong is of mutual, and not merely several, concern, by means of express international accords." *Filartiga v. Pena-Irala*, 630 F.2d 876, 888 (2d Cir. 1980). The law must be one that **is universally recognized** and understood to allow individual liability, as in cases of kidnapping or piracy. *Sosa v. Alvarez*, 542 U.S. 692, 731-32 (2004). The court, whose purpose is to decide in accordance with international law disputes that are submitted to it, must use the following factors when evaluating whether something is considered customary international law*:*

> 1) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; 2) international custom, as evidence of a general practice accepted as law; 3) the general principles of law recognized by civilized nations; and 4) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists [i.e., scholars or "jurists"] of the various nations, as subsidiary means for the determination of rules of law. Statute of the International Court of Justice, art. 38 ¶ 59.

When these factors are evaluated, and the customs and practices of States prove that they do not universally follow a specific practice out of a sense of legal obligation and mutual concern, "that practice cannot give rise to a rule of customary international law." *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 252 (2d Cir. 2003). The Trail Smelter Principle is not ratified by binding convention, is far from custom, and lacks a generally accepted implementation practice. Accordingly, it cannot be customary international law.

a. Any United Nations Declarations are Non-Binding and are not Indicative of Customary International Law, nor do they Articulate any Meaningful Rules or Standards for Member Countries to Follow.

United Nations General Assembly Declarations are non-binding as a rule – even for countries that have adopted the declaration. *See Isaac v. Sigman*, 2017 U.S. Dist. LEXIS 79311, *14, 2017 WL 2267264; *Khara Amun Bey v. 24th Judicial District Court*, No. 14-2457, 2015 U.S. Dist. LEXIS 64556, *2 n.6 (E.D. La. May 15, 2015); *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 259 (2d Cir. 2003); *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161, 167 (5th Cir. 1999); Yoram Dinstein, THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, 98 Am. J. Int'l L. 371 (2004).The United Nations is simply not a law-making body. While the lower court noted that an attenuated, vague form of the Trail Smelter Principle was affirmed at

the 1992 U.N. Conference on Environment and Development (herein principle 2), the principle does not articulate any meaningful standards, rules, or enforcement mechanisms unto which member countries can follow. U.N. Conference on Environment and Development, June 3-14, 1992, Rio de Janeiro, Braz., Rio Declaration on Environment and Development, 3, U.N. Doc. A/CONF.151/26/REV.1(VOL.I) (1992). Because it is non-binding, the Trail Smelter Principle's adoption via a United Nations declaration cannot be considered determinative of whether it is customary international law. The principles failure to articulate any meaningful rules or standards removes itself further from the realm of customary international law.

b. There is no International Custom or General International Practice that Indicates that Civilized Nations have Adopted or Employed a Consistent Trail Smelter Principle.

While the United Nations has undoubtedly recognized some indeterminate trail smelter-*esque* standard, the idea that Principle 2 "prohibits all transboundary harm has generally been rejected." John H. Knox, The Myth and Reality of Transboundary Environmental Impact Assessment, 96 Am. J. Int'l L. 291, 293 (2002). Experts have been quick to note that Principle 2 has multiple, defensible interpretations. Whether the declaration limits state liability to an affirmative duty on states to actively refrain from causing transboundary harm regardless of actual harm occurring is an open question. *Id.* at 294. Given this interpretation, a state would not be responsible for trans-boundary harm occurring if they performed their requisite due diligence while attempting to prevent the harm. *Id*. Alternatively, principle 2 can be read to impose liability if harm occurs, regardless of a state's procedural mechanisms that attempt to defray the harm or risk thereof. *Id.* at 293. The international community is not approaching a consistent reconciliation between the multiple readings of principle 2 with one another or with domestic practice. *Id*. at 295. As a result, there is clearly no accepted general practice that nations have employed while pursuing adherence to the Trail Smelter Principle, or the subsequent United

Nations declarations. A principle cannot be customary international law when there is a conspicuous lack of a customary understanding of the principle.

III. EVEN IF THE TRAIL SMELTER PRINCIPLE IS CUSTOMARY INTERNATIONAL LAW, IT DOES NOT IMPOSE ENFORCEABLE OBLIGATIONS AGAINST HEXON-GLOBAL BECAUSE THE PRINCIPLE IS AIMED AT COMPELLING STATE BEHAVIOR, NOT PRIVATE.

To impose affirmative obligations, stemming from the Trail Smelter Principle, on a non-governmental actor would run contrary to the plain language of the principle and its intent. When analyzing a principle, law, or statute, "the first step 'is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case.'" *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002) (citing *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 240 (1989)). As such, the starting point for analysis is the language itself. *Watt v. Alaska*, 451 U.S. 259, 265 (1981). Words used in a statute normally must be given their usual, natural, plain, ordinary, and commonly understood meaning in the absence of any indication of a legislative intention to the contrary. 82 C.J.S. Statutes § 413. The language of the Trail Smelter Principle is unambiguous; the state, not the individual, is liable for a trail smelter violation.

The Trail Smelter Principle makes it clear that the state is responsible for regulating and monitoring environmental compliance with international norms. The famous passage from the tribunal responsible for the arbitration reads:

> Under principles of international law, as well as the law of the United States, no **State** has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by

clear and convincing evidence. *Trail Smelter,* 3 R.I.A.A. 1938, 1965 (Trail Smelter Arb. Trib. 1941) (emphasis added).

Later adoptions of the same principle by the United Nations mirror this intention. Principle 2, adopted by the United Nations in 1992 reads, in relevant part "States have… the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States." U.N. Conference on Environment and Development, June 3-14, 1992, Rio de Janeiro, Braz., Rio Declaration on Environment and Development, 3, U.N. Doc. A/CONF.151/26/REV.1 (VOL.I) (1992) (emphasis added).

Although likely understood, it bears emphasizing: HexonGlobal is not a State. No possible interpretation of the word "state" can infer that private corporations, like HexonGlobal, are considered as such. If Petitioners seek recompense for perceived damage under the Trail Smelter Principle, there may be appropriate avenues to do so. However, their attempt to hold HexonGlobal liable is misguided and unsound. The state is solely responsible for claims stemming from Trail Smelter's "polluter pays" principle – a principle that was written and applied as exclusively imposing state liability, not private liability.

IV. THE TRAIL SMELTER PRINCIPLE IS DISPLACED BY THE CLEAN AIR ACT, WHICH SPEAKS DIRECTLY TO AIR POLLUTION AND THE ALLEGED CONDUCT.

International tort claims, like the one before the court, arise under federal common law. When dealing "with air and water in their ambient or interstate aspects, there is a federal common law." *Illinois v. City of Milwaukee, Wis.*, 406 U.S. 91, 92 (1972). If Congress addresses a question that previously relied on court-created common law, "the need for such an unusual exercise of law-making by federal courts disappears." *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 423 (2011).

Once Congress "addresses a problem whether through direct legislative regulation or by conferring regulatory authority on a federal officer or agency, related common law claims are displaced." *City of Milwaukee v. Illinois & Michigan*, 451 U.S. 324 (1981); *see Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 21-22 (1981). Statutory displacement of federal common law does not require the "same sort of evidence of a clear and manifest [congressional] purpose" that is required to find pre-emption. *Am. Elec. Power Co.*, at 424 (citing *City of Milwaukee II*, at 315). When evaluating displacement, the court must "start with the assumption required for displacement of state law, that is for congress, not the federal courts, to articulate the appropriate standards to be applied as a matter of federal law." *City of Milwaukee II*, at 304. 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. *Am. Elec. Power Co.*, at 424 (citing *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978) (emphasis added). The Clean Air Act speaks directly to the question of air pollution – the crux of petitioner's position. Because of this, the Trail Smelter Principle (federal common law) is displaced, and Petitioner has failed to state a claim of relief.

a. The Clean Air Act Speaks Directly to the Regulation of Air Pollution.

The court does not need to look further that the "Congressional Findings and Declaration of Purpose" in 42 U.S.C.A. § 7401 to see that the explicit purpose of the Clean Air Act is: "(1) 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.A. § 7401(b)(1)(A). This is a statutory mandate that speaks directly to protecting the air quality in the United States.

The Court recently evaluated the applicability of the Clean Air Act to the regulation of air pollution. In *American Electric*, two groups of Petitioner's filed suit against four major power

companies and the Tennessee Valley Authority in federal court, alleging that the carbon dioxide output from the Respondent's power plants significantly contributed to climate change; also creating a "substantial and unreasonable interference with public rights." *Am. Elec. Power Co.,* at 418. In evaluating petitioners' claims, the Court did not look further than the Clean Air Act, holding that it speaks directly to the air pollution being produced by the Respondents' power plants. *Am. Elec. Power Co.,* at 424. Because the Clean Air Act spoke [speaks] directly to greenhouse gas emissions and authorizes the EPA to regulate said emissions, any federal common law – whether international or domestic - like the Trail Smelter Principle, is displaced by the Act.

Much like *American Electric,* the instant case presents a question that the EPA has direct regulatory authority over. Section 111 of the Clean Air Act commands the EPA director to list "categories of stationary sources" that "in [her] judgment ... caus[e], or contribut[e] significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C.A. § 7411 (b)(1)(A). 7411(d) then requires regulation of existing sources within the category. *See* 40 C.F.R. § 60.22, .23 (2009); 42 U.S.C.A. § 7411(d). The EPA director has issued direct findings as to the causes and effects of greenhouse gas [carbon] emissions, as well as specific emissions standards. *See* 42 U.S.C.A. § 7521(b); 40 C.F.R. § 60.22, .23 (2009). HexonGlobal is subject to comply with the Clean Air Act and the Authorized EPA directives.

The regulations in question go so far as to provide enforcement mechanisms for the EPA to ensure regulatory compliance. The agency can delegate regulatory authority, consistent with directives, but maintains overarching inspection and monitoring authority over the source. *Am. Elec. Power Co.,* at 425. If Petitioner's contention is that the Agency has failed to properly implement or regulate emissions from HexonGlobal, there are appropriate avenues to express

their concern. Undoubtedly, however, the Clean Air Act was crafted to speak directly about air pollution – vesting substantial responsibility in the EPA director to implement environmental policy.

b. Greenhouse Gas Emissions are Considered "Air Pollutants", thus, are regulated by the Clean Air Act.

The Clean Air Act defines "air pollutant" to embrace "any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive ... substance or matter which is emitted into or otherwise enters the ambient air." 42 U.S.C.A § 7602(g). Congress went on to further enunciate air pollution to include "the release of carbon dioxide, chlorofluorocarbons, methane, and other trace gasses into the atmosphere." 15 U.S.C.A. § 2901. Greenhouse gasses are considered gasses that contribute to the "greenhouse effect," trapping heat in the earth's atmosphere, increasing global temperatures. *Massachusetts. v. EPA*, 549 U.S. 497, 510 (2007).

In *Massachusetts. v. EPA*, the Court held that greenhouse gas emissions are considered "air pollution" and that private parties can petition courts to review a lack of rulemaking in an area subject to regulation. *Massachusetts,* at 526; *see In the Matter of Proposed Clean Air Act Title V Operating Permit Issued to American Electric Power/Southwestern Electric Power Company for Operation of John W. Turk, Jr. Power Plant*, 2008 WL 8277204. However, such reviews are "extremely limited and highly deferential." *Massachusetts*, at 528; (citing *National Customs Brokers & Forwarders Assn. of America, Inc. v. United States*, 883 F.2d 93, 96 (C.A.D.C. 1989).

Petitioner's claim that HexonGlobal emits harmful greenhouse gasses is self-defeating. Over the last decade, there is no question that Greenhouse gasses are considered "air pollutants"

subject to regulation under the Clean Air Act. In the case before the court today, the EPA has wielded its wide-ranging discretion to promulgate a regulatory scheme that the director deemed appropriate to pursuing the Clean Air Acts mandate. 42 U.S.C.A. § 7401. This case presents a question of policy implementation, not of court sanctioned judgement.

If the court were to accept Petitioner's notion that it is appropriate to substitute congressional legislation with an abstract principle that has since been displaced by specific statutes and regulations, it would set a dangerous precedent equivalent to judicial law making. It is indisputable that HexonGlobal, incorporated in New Jersey and primarily doing business in Texas, is subject to the EPA regulations on greenhouse gasses authorized by the Clean Air Act. The EPA regulations, and the Clean Air Act, speak **directly to the question** presented before the court, as it regulates "air pollutants" like greenhouse gasses. As such, it must take precedent and displace the federal common-law Trail Smelter Principle.

V. THE DISTRICT COURT CORRECTLY DISMISSED PETITIONER'S FIFTH AMENDMENT SUBSTANTIVE DUE PROCESS CLAIM BECAUSE THE UNITED STATES CANNOT BE HELD LIABLE FOR ALLEGEDLY WRONGFUL ACTS BY PRIVATE PARTIES.

This court should affirm the district court's decision to dismiss Petitioner's Public Trust claim against the United States. The public trust doctrine was established in the English common law system by the Institutes of Justinian, the ancient body of Roman law that is the "foundation for modern civil law systems." J. Inst. 2.1.1 (J.B. Moyle trans.). The Institutes of Justinian stated "the following things are by natural law common to all--the air, running water, the sea, and consequently the seashore." *Id.* While the public trust doctrine has existed since the time before the constitution and has been included in federal regulations regarding waterways; the district court correctly rejected to extend it to the atmospheric climate. R. at 11.

Furthermore, the Petitioner's claim must fail solely based on the established law of the Fifth Amendment due process clause. The Supreme Court has established a rigorous two-step analysis to determine whether a right is fundamental and thus a protected due process right. First, the court must decide whether that right is "fundamental to the Nation's scheme of ordered liberty" or, whether it is "deeply rooted in this Nation's history and tradition." *McDonald v. City of Chi.*, 561 U.S. 742, 767 (2010).

a. The Right to Government Protection from Global Atmospheric Climate Change Is Not Deeply Rooted In the Nation's History And Tradition Nor is it Fundamental to the Nation's Scheme of Ordered Liberty.

The protections provided by the due process clause of the Fifth Amendment are great, consequently, the courts have been very hesitant to extend them to new governmental action. *See Moore v. City of East Cleveland, Ohio*, 431 U.S. 494, 502 (1977). Currently, the only specific freedoms that are protected by the due process clause are: the rights specifically protected in the bill of rights, marriage, right to have children, direct the education and upbringing of one's children, marital privacy, contraception, bodily integrity, abortion and the right to refuse unwanted life saving medical treatment. *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997). Petitioners contend that they are entitled to a "healthy and stable climate system" based on the public trust doctrine. R. at 10.

Petitioner relies primarily on *Juliana v. United States*, an Oregon District court ruling which determined that public trust claims are properly categorized as substantive due process claims. *Juliana v. United States*, 217 F. Supp. 3d 1224, 1261 (D. Or. 2016). While both cases arise from a dispute based on the United States role in combating climate change and the effect of CO_2 on the global climate, the two courts came to separate conclusions. *See Id.* at 1233-34 and R. at 4-6. In *Juliana*, the court reasoned that the Petitioner's claims must be able to proceed

because, taking all alleged facts in the light most favorable to the non-moving party, damage to the atmosphere is within the scope of the public trust and the federal government is in the purview of public trust. *Juliana*, 217 F. Supp. 3d 1256-60.

The *Juliana* court applied the reasoning in *Obergefell v. Hodges* to determine that a sustainable environment is a fundamental right. *Juliana*, 217 F. Supp. 3d 1249. The *Obergefell* standard suggests a right is fundamental if it can be deemed fundamental using "reasoned judgment." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2598 (2015). This court should reject applying the *Obergefell* standard in this case. *Obergefell* was unique because it reasoned that the spirit of the right to marry was not disrupted simply because the persons seeking to invoke that right were not textually included. *Id.* at 2599. There was no question that the right to marriage was a fundamental right, the question was whether or not it could be applied to same sex couples. *Id*. In *Juliana* and the instant case, there was no established fundamental right to a sustainable environment. *Juliana*, 217 F. Supp. 3d 1254. The only available foundation is the public trust doctrine which to date does not included the atmosphere. *Id.* at 1255. While the court did not hold that the atmosphere should not be included in the public trust, the fact that the court chose not to is indicative of the weakness of such a proposition. *Id.* The court in Juliana relied on the assertion that where marriage is the "foundation of the family" a healthy climate system is "the foundation of society." *Juliana v. United States*, 217 F. Supp. 3d 1224, 1250 (D. Or. 2016). It is undisputed that the climate is important and the climate system must retain a certain level of stability to prevent catastrophic changes. However, the court "must exercise the utmost care" when declaring a right "fundamental" lest the liberty protected be determined by the proclivities of the members of the court. *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997).

The "ordered liberty" test was one of many tests considered to determine if a right was fundamental and thus protected by the Due Process clause. *McDonald v. City of Chi.*, 561 U.S. 742, 760 (2010). The ordered liberty test was traditionally used when deciding if the rights proscribed in the Bill or Rights were applicable to the states with the advent of the Fourteenth Amendment. *Id.* at 766. *McDonald* was only one of the many cases that utilized the ordered liberty test; in *McDonald* the right questioned was the right to bear arms under the Second Amendment. *Id*. at 758. The court ruled that the right to bear arms and the right to self-defense are not only fundamental to ordered liberty; these rights are also deeply rooted in our nation's history. *Id*. at 768, 778. The instant case is distinguishable because the Second Amendment and most Amendments in the Bill or Rights are both deeply rooted in the country's history and fundamental to the nation's scheme of ordered liberty. This is evidenced by legislative history and textual commitment discussed in *McDonald* and other Bill of Rights disputes. See *McDonald v. City of Chi.*, 561 U.S. 768; *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968); *Pointer v. Texas*, 380 U.S. 400, 403-404 (1965); *Washington v. Texas*, 388 U.S. 14, 18 (1967). Alternatively, the public trust doctrine has been repeatedly questioned based not only on which parts of the climate it extends to but also whether it actually applies to the federal government.

Unlike the right to marriage, which has been a fundamental right since the inception of the county, the public trust doctrine has only been invoked in limited cases involving the public waterways. The Supreme Court revisited the public trust doctrine in *Phillips Petro. Co. v. Mississippi* and reaffirmed that the public trust included title to land under tidewater for uses not related to navigability. *Phillips Petro. Co. v. Mississippi*, 484 U.S. 469, 482 (1988). The case involved a land dispute between landowners and the state as to who owned the tidal property. *Id.*

at 472. The court held that the land was held in the public trust by the state due to its connection with the water for non-navigational purposes *Id.* at 481.

As discussed above, the public trust doctrine has historically only applied to the waterways and not the other factors discussed in the text of the rule. Additionally, there are many courts that rejected applying any portion of the public trust doctrine to the federal government. In *Alec L. v. McCarthy*, the DC court of appeals refused to apply the public trust doctrine to the federal government. *Alec L. v. McCarthy*, 561 F. App'x 7, 8 (D.C. Cir. 2014). Moreover, the case in *Alec L*, was based on the "irreparable harm" caused to the atmosphere and the government neglecting a duty to protect these natural resources. *Id*. The instant case differs slightly because the appellant's allegations do mention by reference the rising sea levels as a result of the atmospheric climate change R. at 4. However, even if this distinction is persuasive, when asked to apply the public trust doctrine to the federal government, courts have consistently asserted that the public trust is controlled by the state

In *PPL v. Montana*, the Court held that Montana could not change navigability status of a public trust resource and retroactively charge for its use under the equal footing doctrine. *PPL Mont., LLC v. Montana*, 565 U.S. 576, 604 (2012). In this decision, the court was explicit, stating that public trust is a matter of state law and does not depend on the constitution. *Id.* at 603. Other courts have since adopted this language and applied it to mean that the public trust doctrine is completely foreclosed from application to the federal government. *United States v. 32.42 Acres of Land*, 683 F.3d 1030, 1038 (9th Cir. 2012). The "deeply rooted" and the "ordered liberty" tests are essentially the same and differ solely based on the right asserted. Petitioners fail to satisfy either test because a right to a healthy environment is not guaranteed by the Bill of Rights and cannot find shelter in any established common law.

b. If the Court finds the Fifth Amendment Protects Citizens from Global Atmospheric Climate Change; the Danger Creation Exception does not Apply.

Even if the court is persuaded that petitioners have a fundamental right to protection from global atmospheric climate change, the federal government is not liable as the danger creation exception does not apply. Generally, the government is not liable for the endangerment of a fundamental right if such deprivation is caused by a third party. *Deshaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 196 (1989). There are two exceptions that can hold the government liable for such violations of fundamental rights: the "special relationship" exception; and the "danger creation" exception. *L. W. v. Grubbs*, 974 F.2d 119, 121 (9th Cir. 1992). The "special relationship" exception unquestionably does not apply because the US government did not create a special relationship with petitioners and petitioners have not alleged any abuse to a special relationship. *Id.* To invoke the danger creation exception, a petitioner must show the government's acts **created** the danger to the petitioner; the government **knew** its acts caused that danger; and the government with **deliberate indifference** failed to act to prevent the alleged harm. *Juliana v. United States*, 217 F. Supp. 3d 1224, 1252 (D. Or. 2016) (emphasis added).

The *Juliana* court declined to examine the elements of the danger creation exception because in their view, the complaint properly alleged of the government's role, knowledge, and deliberate indifference to the injuries caused by climate change. *Id.* An examination of the facts alleged in the instant case clearly does not invoke the danger creation exception as the court in *Juliana* suggested. The record speaks to the United States' role in global climate change as a country, citing the 20% contribution to global pollution, at no point do the petitioners allege that harm has been caused by tangible governmental action R at 7. Furthermore, as the 12th district court reasoned in their decision, the United States did not know about the real danger that

climate change posed until 1992. R. at 11. Lastly, while the United States has historically provided tax subsidies for fossil fuel providers, the record lists the many congressional and executive actions taken to reduce emissions. R. at 6-7. Some of these include, the Clean Air Act, joining the United Nations Framework Convention on Climate Change ("UNFCCC"), and steadily reducing emissions in concert with the EPA and UNFCCC. *Id*. These actions signal an antithesis to the deliberate indifference burden that petitioners face. Since petitioner's claims rest solely upon the alleged damage caused by private parties and neither the special relationship or danger creation exceptions apply, this court cannot impose Due Process liability on the United States for the alleged harms suffered by petitioners.

VI. PETITIONERS' CLAIMS DO NOT PRESENT A NON-JUSTICIABLE POLITICAL QUESTION

Climate change is undoubtedly ''political'' as it is ''motivated partisan and sectional debate during important portions of our history.'' *U.S. Dep't of Commerce v. Montana*, 503 U.S. 442, 458 (1992). But a case does not present a political question merely because it ''raises an issue of great importance to the political branches.'' *Id.* When a case presents a political question, federal courts are unable to intervene because they lack subject matter jurisdiction to decide that question. *Davis v. Bandemer*, 478 U.S. 109, 118 (1986). The political question doctrine has a long pedigree, originally being articulated in *Marbury v. Madison*: "[q]uestions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court." *Marbury v. Madison*, 5 U.S. 137, 170 (1803). The political question doctrine was clarified in *Baker v. Carr*. In *Baker*, the Court articulates a six-factor test where if the question is "inextricable" from any one of the factors, courts lack subject matter jurisdiction. *Baker v. Carr*, 369 U.S. 186, 217 (1962). The six *Baker* factors are:

[(1) A] textually demonstrable constitutional commitment of the issue to a coordinate political department; [(2)] a lack of judicially discoverable and manageable standards for resolving it; [(3)] the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; [(4)] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; [(5)] an unusual need for unquestioning adherence to a political decision already made; or [(6)] the potentiality of embarrassment from multifarious pronouncements by various departments on one question. *Id*.

The test has since been simplified to three considerations: textual constitutional commitment to a coordinate branch of Government, necessity to move beyond areas of judicial expertise, or prudential considerations against judicial intervention. *Goldwater v. Carter*, 444 U.S. 996, 998 (1979). The political question doctrine has only been used by the courts in specific situations which courts "ought not enter the political thicket" including political apportionment and gerrymandering. *Colegrove v. Green*, 328 U.S. 549, 556 (1946).; impeachment, *Nixon v. United States*, 506 U.S. 224 (1993); constitutional amendments, *Coleman v. Miller*, 307 U.S. 433 (1939); and treaty abrogation, *Goldwater* 444 U.S. 996. This court should reject any invocation of the political question doctrine because petitioner's claims do not run afoul of any of the *Baker* factors.

a. Petitioner's Claims Are Not Textually Committed To A Coordinate Political Department

The first *Baker* factor does not apply in this case because the rule is very clear that there must be a "textual" constitutional commitment of an issue to the coordinate political department. *Baker v. Carr*, 369 U.S. 186, 217 (1962). Since Baker, There have been a limited number of applications of the first factor. In *Nixon v. United States*, petitioner argued that the judicial

impeachment proceedings violated the authority of the senate to "try" all impeachments as all members were not present at the evidentiary hearing. *Nixon v. United States,* 506 U.S. 224, 228 (1993). The Court rejected this argument and instead focused on the word "sole", which was understood as granting the Senate the sole power over impeachment, foreclosing petitioner from judicial review of his impeachment conviction. *Id.* at 231.

In *Zivotofsky v. Kerry*, the court determined that the text of the constitution granted the president exclusive authority to recognize foreign nations and governments. *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2086 (2015). While the constitution does not explicitly use the term "recognition," the power of recognition can be extracted from the "reception" clause. *Id.* at 2084-85. This inference is further supported by other Article II powers such as treaty making power and the power to appoint ambassadors *Id.* at 2085. The Court draws the conclusion that recognition is a unilateral power by the necessity of the nation to speak with one voice and leave no doubt towards intention *Id.* at 2086.

In *Connecticut v. Am. Elec. Power Co.*("*AEP*"), The court rejected the political question doctrine as a means for dismissing a federal public nuisance case involving climate change. *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 325 (2d Cir. 2009). In *AEP*, petitioners sued the nation's five largest emitters of carbon dioxide in the United States, seeking injunctive relief. *Id.* at 314. The court held that none of the *Baker* factors were present; specifically, that climate change is not constitutionally consigned to the either branch. *Id.* at 325.

The first *Baker* factor is not invoked because unlike in *Nixon* there is no clear reference to environmental policy, emissions, or climate change in any constitutional passage. Furthermore, while in *Zivotofsky* the Court did have to stretch the plain meaning of the *Baker* rule to capture "recognition" in "reception" there were several policy considerations and other instances in

Article II that suggested the power was granted to the president and solely the president. The instant case is much further removed as there is no constitutional passage that could be remotely construed to contain climate issues to either political branch as discussed *AEP*. Lastly, even if such an implication can be drawn, the language from *Baker* is clear that the constitution must provide for the restriction "textually", not inferentially. *Baker,* 369 U.S. 217. Unlike the specific grant of impeachment power in *Nixon* or the reception and other Article II wording in *Zivotofsky*, there is no grant of authority over climate issues to either political branch and therefore, the first *Baker* factor does not apply.

b. Petitioner's Claims Do Not Require A Departure From Judicial Expertise

The second and third Baker factors can be simplified to whether the court has expertise to resolve a dispute. The judiciary's Article III abilities are not unlimited; they are constrained to act in a manner traditional for English and American law. *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004). However, this Court need not depart from typical judicial expertise in this matter.

i. *Petitioner's Alien Tort Claim*

The Alien Tort Statute simply grants jurisdiction to the district courts for a tort committed against an alien in violations of the law of nations or a treaty. 28 U.S.C.S. § 1350 (LexisNexis). Whether the court considers the Petitioner's claim under the Trail Smelter Arbitration or the Clean Air Act, the fact remains that Petitioner's action can be resolved by ordinary tort suit. While the nature of this suit is undoubtedly political, the fact that the issues arise in a politically charged context does not change an ordinary tort suit into a non-justiciable political question. *Klinghoffer v. S.N.C. Achille Lauro Ed Altri-Gestione, etc.*, 937 F.2d 44, 49 (2d Cir. 1991). *Klinghoffer* was an international dispute between the Palestine Liberation Organization ("PLO") and an Italian passenger cruiser resulting in the death of the named petitioner. *Id.* at 46. All of the

Baker factors suggested that there was no political question in this case, namely the duty of the judiciary to handle tort claims and the common law of tort providing clear and settled rules for the district court *Id.* at 49. Furthermore, there were no political assessments needed about the value of terrorism so there was no need for initial policy decisions about the value of terrorism *Id*. Similarly, petitioner's Alien Tort claim allows the Judiciary to resolve the conflict with either the Trail Smelter Arbitration or the Clean Air Act, and petitioner's claim does not compel this court to impose regulations on the EPA or other agencies, simply to hold HexonGlobal liable for the alleged damage to the environment.

ii. *Petitioner's Public Trust Claim*

The public trust doctrine has been applied in various US courts specifically against private actors regarding the portions dedicated to the sea and the seashore. See *Marks v. Whitney*, 6 Cal. 3d 251 (1971); and *Mineral Cty. v. Walker River Irrigation Dist.*, 900 F.3d 1027 (9th Cir. 2018). Petitioner's public trust claim cannot be dismissed on the basis of the political question doctrine. While courts have been divided on the applicability of the public trust doctrine and the Fifth Amendment, the *Juliana* court recognized it as a judicial solution to a similar claim. *Juliana v. United States*, 217 F. Supp. 3d 1224, 1239 (D. Or. 2016). Interpretation of the constitution is the sole responsibility of the judicial branch and the Fifth Amendment has clear standards for which the judiciary can apply to a new set of facts. *Id.* This strongly suggests petitioner's claims are within the courts' competence.

Furthermore, the court need not make non-judicial determinations to rectify petitioner's complaints. There are several claims that are forbidden under the public trust claim as a political question. In *Kanuk v. State*, the court reasoned that claims that dictate state agents to act in a specific way are non-justiciable but atmospheric public trust claims, and the state's affirmative

duty to protect it are not political questions *Kanuk v. State, Dep't of Nat. Res.*, 335 P.3d 1088, 1099 (Alaska 2014). *Kanuk* is like the instant case because petitioners claimed a public trust violation against the state of Alaska for failing to protect the atmosphere from climate change and denying a future for petitioners and their descendants *Id.* at 1091. The instant case is similar as the petitioner is claiming that the United States has failed to prevent climate change and protect the atmosphere as part of the public trust. R. at 10. The record does not indicate that petitioner seeks any specific agencies impose regulations or reduce emissions. Therefore, this court would not have to make non-judicial policy decisions to satisfy Petitioner's claims.

c. There are no Prudential Considerations that Counsel Against a Court's Resolution of the Petitioner's Claims.

The final three *Baker* factors address special circumstances in which "prudence may counsel against a court's resolution of an issue presented." *Zivotofsky v. Clinton*, 566 U.S. 189, 204 (2012) (Sotomayor, J., concurring). The final *Baker* factors are far less persuasive than the previous three factors and thus it is rare that any of these factors singularly render a case non-justiciable. *Id*. at 205.

The fourth *Baker* factor relates to a total lack of respect to another branch of government. *Baker v. Carr*, 369 U.S. 186, 217 (1962). This is an extremely high standard and has only been found in cases where a judicial resolution would contradict prior decisions of other branches, one such consideration would be foreign relations. *Juliana v. United States*, 217 F. Supp. 3d 1224, 1240 (D. Or. 2016). A possible application of this factor would be the current administration's declaration to withdraw from the Paris Agreement in 2020. R. at 7. Additionally, the EPA has proposed freezing regulations on motor vehicles and repealing the Clean Power Plan. R. at 7-8.

The court in *Whiteman v. Dorotheum* determined that the fourth Baker factor was sufficient to render a claim non-justiciable. *Whiteman v. Dorotheum GmbH & Co KG*, 431 F.3d

57, 72 (2d Cir. 2005). The *Whiteman* court declined to resolve property claims against the Austrian government from Jewish families during WWII because two presidential administrations had decided to solve such conflicts through international agreement *Id.* at 59. The key difference between *Whiteman* and the instant case is the level of contradiction that would arise with judicial intervention. In *Whiteman*, judicial interference would have severely undermined foreign affairs and violated agreements set forth by multiple iterations of the executive branch. *Id.* at 74. In the instant case there would be dissonance among the courts and the executive branch, but it would not rise to the level of disrespect for the executive branch. The actions taken by the executive branch are not affirmative obligations to foreign entities or an expressed important government interest; they are simply policy changes. R. at 7. Furthermore, even if the court does determine a ruling to show a total lack of respect for the executive branch, the claim is not necessarily non-justiciable. *Zivotofsky*, 566 U.S. 205.

The final two *Baker* factors are: unusual adherence to previous decisions, and potential embarrassment from multifarious pronouncements from multiple branches on one question. *Baker v. Carr*, 369 U.S. 186, 217 (1962). There does not appear to be a violation of either of these factors. The fifth factor contemplates emergency cases that require a final political decision, such as the cessation of armed conflict. *Gross v. German Found. Indus. Initiative*, 456 F.3d 363, 390 (3d Cir. 2006). While climate change is a serious question, policy has shifted consistently over the last 30 years, declaring climate change as an emergency case would be disingenuous. R. at 6-7. The final *Baker* factor is not invoked because while there would be a disconnect between the executive branch and the judicial branch, as discussed above, the position of the executive branch is not to deny climate change but to seek alternatives due to the

ineffectiveness of previous efforts. R. at 6. Therefore, the judiciary would not risk embarrassing the executive by recognizing the alleged damage caused by private corporations.

Petitioners' claims cannot be dismissed under the political question doctrine because their claims do not present a non-justiciable political question. Petitioners' claims are not textually committed to a coordinate political department as climate change. Neither of petitioner's claims requires a departure from judicial expertise because the Alien Tort claim can be resolved with either the Trail Smelter Arbitration or the Clean Air Act. Furthermore, petitioners Public Trust claim can be resolved as it does not request any specific reductions or policies be made by non-judicial entities. Lastly, there are no prudential considerations that counsel against judicial resolution.