Docket No. CA-18-000123

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

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

- v. -

HEXONGLOBAL CORPORATION,
Appellee,

and

THE UNITED STATES OF AMERICA,
Appellee.

On Petition for Review of the Decision of the
United States District Court for the District of New Union Island

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BRIEF OF APPELLEE HEXONGLOBAL CORPORATION

Oral Argument Requested

Attorney for the Appellee,
HexonGlobal Corporation

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STATEMENT OF JURISDICTION

The district court had jurisdiction over Plaintiff Apa Mana's claims pursuant to the Alien Tort Statute, 28 U.S.C. § 1350. The district court had jurisdiction over Plaintiff Noah Flood's claim pursuant to 42 U.S.C. § 1983. This Court's jurisdiction is invoked under 28 U.S.C. § 1294, as an appeal from a final decision of the United States District Court for the District of New Union Island. The district court entered a final judgment in this matter on August 15, 2018. R. at 11. Notice of appeal was timely filed in accordance with Rule 25 of the Federal Rules of Appellate Procedure.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Under *Baker v. Carr*, do Plaintiffs' claims present non-justiciable political questions when the all of the *Baker* factors are extricable from each Plaintiff's case?
2. Under the Supreme Court's interpretation of the Alien Tort Statute, where the norm of international law violated must be specific, universal, and obligatory to be enforceable, is the *Trail Smelter* Principle enforceable even though it is not universally accepted and practiced by a majority of civilized nations?
3. Under the *Trail Smelter* Principle, which established that the sovereign has the sole duty to prevent transboundary environmental harm, is the Principle enforceable against a non-governmental actor?
4. Under the Alien Tort Statute, can Mana hold a domestic corporation liable for greenhouse gas emissions when the Supreme Court has cautioned against extending the statute's liability past its historical applications against individuals committing acts such as piracy, torture and slave labor?
5. Under the displacement doctrine for common law claims, is the *Trail Smelter* Principle displaced by the Clean Air Act when the Act speaks directly to the issue of greenhouse gas emissions and when the Supreme Court has held that the Act displaces all common law claims relating to these emissions?
6. Under the Substantive Due Process doctrine, does the Constitution establish a right to a federally protected global climate system where there has been no state action causing the alleged harm and the doctrine has traditionally been used to protect the private decisions of individuals from government interference?

STATEMENT OF THE CASE

A. Proceedings Below

This is an appeal from a judgment of the United States District Court for the District of New Union Island, rendered August 15, 2018. R. at 1. At the District Court, Plaintiff-Appellee Noah Flood, a United States Citizen from the U.S. territory of New Union Island, asserted that the United States' encouragement of the growth of the American energy sector amounted to a violation of an alleged due process right to a global climate system protected by the federal government. R. at 1, 3. Plaintiff-Appellee Apa Mana, a citizen of the island nation of A'Na Atu, brought claims against HexonGlobal under the Alien Tort Statute, 28 U.S.C. § 1350, claiming that its business activities in the production and sale of fossil fuels constitute a violation of the law of nations. *Id.*

The Alien Tort Statute granted United States courts jurisdiction over tort actions brought by foreign nationals for violations of customary international law. R. at 9. Mana's claim relies on a principle established by the *Trail Smelter Arbitration*, 3 U.N.R.I.A.A. 1965 (1941), between the United States and Canada regarding international pollution emissions by sovereign actors. R. at 8. Noah Flood relies on the public trust doctrine to claim that the United States have violated an alleged due process right to a protected global climate system. R. at 3.

HexonGlobal filed a motion to dismiss for Mana's failure to state a claim upon which relief can be granted, which the District Court granted, finding that any action Mana might have had under the Alien Tort Statute was displaced by greenhouse gas regulation under the Clean Air Act. R. at 9. The United States also filed a motion to dismiss for Flood's failure to state a claim for relief under the Fifth Amendment of the Constitution, which the District Court granted, reasoning that not every threat to human well-being constitutes a violation of due process rights. R. at 11.

Appellees subsequently filed a timely Notice of Appeal contesting the District Court's finding that the *Trail Smelter* Principle is displaced by greenhouse gas regulation under the Clean Air Act and the District Court's refusal to recognize a due process-based public trust right to governmental protection from atmospheric climate change. R. at 1. All parties now seek review from this Court and request oral argument. *Id.*

B. Statement of the Facts

HexonGlobal is a United States corporation resulting from the merger of all major United States oil producers and is incorporated in New Jersey with its principal place of business in Texas. R. at 5. HexonGlobal operates refineries worldwide, including on New Union Island, and has thus consented to personal jurisdiction in the Territory. *Id.* The single largest emitter of greenhouse gases is the United States. R. at 5. The United States is responsible for 20% of cumulative global anthropogenic emissions. R. at 5-6. As the major oil producer in the United States, the emissions of HexonGlobal and its predecessors make up 32% of the United States' cumulative historical emissions. R. at 5. However, HexonGlobal contributes only nine percent of global fossil fuel related emissions and six percent of historical emissions. *Id.* The relationship between greenhouse gas emissions, fossil fuel production, and the environment is well understood and accepted. R. at 5. Nothing in the record indicates that HexonGlobal's activities have violated any United States law or regulations regarding greenhouse gas emissions. *Id.* HexonGlobal continues to provide power and fuel in accordance with these regulations, playing a vital role in the United States energy sector and economy. *Id.*

The United States has historically supported the energy sector, providing the oil industry with tax subsidies for fossil fuel production and leasing public lands and seas for oil and gas production. R. at 6. It has also participated in the fossil fuel industry directly through public agencies such as the Tennessee Valley Authority. *Id.* The United States government, recognizing the potential threats of climate change, signed the United Nations Framework Convention on Climate Change in 1992. *Id.* The United States has also regulated greenhouse gas emissions under the Clean Air Act and has established separate standards for emissions from passenger cars. R. at 6-7. These regulatory activities have only slightly decreased the United States' greenhouse gas emissions and global emissions continue to rise. R. at 7. In recent years, the United States government has proposed reversing many of the initial steps it took towards regulation. *Id.* The Paris Agreement, signed by the United States in 2015, represented a commitment to reduce greenhouse gas emissions. *Id.* However, the current administration has declared its intention to withdraw from the Agreement. *Id.* The EPA has also proposed freezing its emission reductions. R. at 6-7.

SUMMARY OF ARGUMENT

Plaintiffs' Alien Tort Statute and constitutional claims do not present a non-justiciable political question because adjudicating these questions would not disturb the separation of powers and all of the *Baker* factors are extricable from their claims. Thus, the court may proceed with adjudicating the claims.

However, the *Trail Smelter* Principle, on which Mana bases her Alien Tort Statute claim, is not a recognized principle of customary international law that may be enforced under the ATS because it is not a sufficiently specific or universally accepted international norm. Even if the *Trail Smelter* was enforceable as an international norm, it cannot be enforced against non-governmental actors because the principle only establishes a duty for sovereigns.

Additionally, a court cannot hold a domestic corporation liable under the Alien Tort Statute because this would extend the statute's liability without congressional action, something beyond the court's discretion. Domestic corporate liability is also inappropriate because the Alien Tort Statute applies international norms, and corporate liability is not universally accepted on the international level.

Even if Mana's claim under the Alien Tort Statute was actionable, that claim would be displaced by the Clean Air Act. Under the Supreme Court's jurisprudence, all common law claims relating to greenhouse gas emissions have been displaced by the Act because the Act represents a congressional occupation of the area of law.

Finally, Flood argues that the Constitution protects a substantive due process right to protection of a global climate system. Deriving such a right would stretch substantive due process jurisprudence far beyond the current case law. Substantive due process has previously been used to protect private, individual decisions from government interference. Furthermore, the alleged government actions do not meet the state action requirement for a constitutional violation, nor any circuit's test for the state-created danger exception.

STANDARD OF REVIEW

Reviewing whether a district court properly granted a motion to dismiss is a question of law that courts review de novo. *Highland Fall-Fort Montgomery Cent. Sch. Dist. v. United States*, 48 F.3d 1166, 1170 (Fed. Cir. 1995). In conducting that review, the court deems the facts in the complaint to be correct. *United States v. Cocoa Berkau*, Inc., 990 F.2d 610,612 (Fed.Cir.1993). Here, the District Court dismissed the complaint brought by the Organization of Disappearing Island Nations, Apa Mana, and Noah Floods against HexonGlobal Corporation and the United States of America. Thus, on appeal, the standard of review is de novo.

ARGUMENT

I. As a Threshold Matter, Adjudicating Plaintiff's Claims Would Not Disturb the Separation of Powers Because the Constitution Does Not Delegate Environmental Policy to a Particular Branch of Government and Historically These Decisions Have Been Shared Amongst the Branches

Neither of Plaintiffs' claims present a non-justiciable political question. As noted by the Fourth Circuit Court of Appeals, "political question doctrine is a 'function of the separation of powers,' and prevents federal courts from deciding issues that the Constitution assigns to the political branches, or that the judiciary is ill-equipped to address." *Al Shimari v. CACI Premier Tech., Inc.*, 758 F.3d 516, 531 (4th Cir. 2014) (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)). However, the mere presence of politics or of decisions made by the political branches does not render a case nonjusticiable, and there is a presumption that each case is justiciable. *See Baker*, 369 U.S. at 209.

In the foundational *Baker v. Carr* decision, the United States Supreme Court outlined six factors that define a non-justiciable political question:

> [1] [] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.
> *Id.* at 217 (numeration added).

A court must determine whether any one or more of these factors is "inextricable from the case." *Id.* If any factor is found to be inextricable, a court must dismiss the case. *Id*. Courts have largely focused their analysis on the first two factors. *See, e.g.*, *Nixon v. U.S.*, 506 U.S. 224, 228 (1993); *Powell v. McCormack*, 395 U.S. 486, 519 (1969). The ultimate question is whether a case "can be properly decided by the judiciary." *Alperin v. Vatican Bank*, 410 F.3d 552, 555 (9th Cir. 2005).

Regarding the first factor, courts generally only consider an issue textually committed if the Constitution specifically references the issue. *See*, *e.g.*, *Nixon*, 506 U.S. at 228; *Powell*, 395 U.S. at 519. In *Nixon v. U.S.*, the court held that the presence of the word "try" in the Article I impeachment clause textually committed the impeachment process of federal officials to the Senate. U.S. CONST. Art. I, § 5 ("[t]he Senate shall have the sole Power to try all Impeachments"); *see Nixon*, 506 U.S. at 229. This language made review of impeachment matters a realm for the legislative branch alone, not the judicial branch. *See id.* Thus, the claims of an impeached federal judge, who alleged that the Senate used improper procedure during his impeachment, were nonjusticiable in the courts. *See Nixon*, 506 U.S. at 226. Alternatively, in *Powell v. McCormack* the court found that the phrase "[e]ach House shall be the Judge of the . . . Qualifications of its own Members" in Article I did not bar the courts from reviewing the qualification of Senators to serve in Congress. *See* 395 U.S. at 548. Rather, the court found that that there was only a textual commitment to the legislature to determine whether an elected Senator met the qualifications explicitly listed in the constitution,[1] making only those particular qualification determinations unreviewable by the court system. U.S. CONST. Art. I, § 5; *Powell*, 395 U.S. at 548.

The first *Baker* factor is not implicated in this case. The Constitution does not specifically speak to environmental policy, energy policy, climate change, greenhouse gas emissions, or sea level rise. *See generally*, U.S. CONST. Additionally there is no clear reason why environmental policy should be the sole province of a particular branch. Indeed, environmental policy has historically been the business of the legislative and executive branches, as with many areas of domestic policy, and the courts have long exercised judicial review over these decisions via

[1] "No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen." U.S. CONST. Art. I, § 5.

statutes such as the Administrative Procedure Act. *See generally* 5 U.S.C. § 500, *et seq* (Administrative Procedure Act, establishing judicial review of agency enforcement of the Clean Air Act, inter alia); 42 U.S.C. § 7401, *et seq.* (Clean Air Act).

The third *Baker* factor, the necessity of a nonjudicial policy determination, is not implicated in this case. *See Baker v. Carr*, 369 U.S. 186, 217 (1962). Simply put, plaintiffs do not ask the court to issue any specific injunctive relief. R. at 3. Rather, the court is only asked to determine whether a due process or law of nations violation has occurred and what relief would resolve this violation. *Id.* As *Juliana v. United States* noted, the court is not asked to "pinpoint the 'best' emissions level; . . . [rather] what emissions level would be sufficient to redress [plaintiff's] injuries." 217 F. Supp. 3d 1224, 1239 (D. Ore. 2016). This is a factual question (albeit a complicated one), not a policy determination, and factual or logistical complexity is not implicated at a threshold political question determination. *See id.*; *Baker*, 369 U.S. at 217; *see also Alperin v. Vatican Bank*, 410 F.3d 532, 552-55 (9th Cir. 2005).

A. Flood's Claims Regarding the Due Process Clause Do Not Present a Nonjusticiable Political Question Because Courts Have a Well Established Framework for Addressing Due Process Violations and this Court Would Not Be Forced to Make a Policy Determination

Courts have a well-established framework for addressing due process violations and this court would not be forced to make a policy determination in this case. In analyzing the second *Baker* factor, whether a judicially manageable standard exists for a court to decide a case, courts have noted that the question is not whether the issue is too factually or legally complicated to consider, but whether a legal framework exists through which the courts may evaluate the claim. *See Alperin*, 410 F.3d at 555. In *Alperin v. Vatican Bank*, plaintiffs sued the Vatican Bank in part for the return of property seized by Nazi Germany in World War II. *See Id.* at 537. While the case involved complex issues of international relations, property law and class action status, the Ninth Circuit Court of Appeals noted, among other points, that the complexity of achieving class status was not a bar on the court's jurisdiction because a legal framework existed for adjudicating complex class action suits. *See id.* at 552-55. The Ninth Circuit contrasted the case with the Supreme Court's decision in *Vieth v. Jubelier*, where a majority of the court noted that decades of litigation on the issue of political gerrymandering had failed to produce a judicially

manageable standard, leading four justices to conclude that a standard did not exist. 541 U.S. 267, 268 (2004).

A legal framework exists to evaluate due process claims and is bolstered by over a half century of case law. The plaintiff's claims rely on the Fifth Amendment's Due Process Clause. U.S. CONST. AMEND. V; R. at 3. Due process protections have been adjudicated countless times by courts in determining whether an alleged right is protected and, unlike the issue under consideration in *Vieth*, the court has a well-developed framework to address substantive due process claims. *See, e.g.*, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *United States v. Virginia*, 518 U.S. 515 (1996); *Roe v. Wade*, 410 U.S. 113 (1973); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

Rarely will the final factors of the Baker test "alone render a case nonjusticiable." *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 207 (2012) (Sotomayor, J., concurring). Justice Sotomayor offered a list of these "rare occasions" where the latter *Baker* factors would render a case non-justiciable. *See id.* These cases include: questions of the authenticity or internal processes of another branch of government; particular pronouncements of another branch, such as foreign policy or military decisions by the executive; and finally disputes between the other branches that are not ripe for judicial review. *Id.* at 205-06. None of these concerns are implicated in Flood's claim. The asserted claims do not ask the court to review internal procedures of another branch, nor the military or foreign policy decisions, nor an ongoing political debate between the executive branch and the legislature. *See id.*, R. at 3.

As a threshold matter, none of the *Baker* factors are inextricable from the Plaintiff Flood's case and thus this court should proceed with adjudicating the claim.

B. Mana's Claims Regarding the Alien Tort Statute Do Not Present a Nonjusticiable Political Question Because Congress Has Specifically Given Courts Jurisdiction in Alien Tort Statute Cases and the Claims Do Not Raise National Security Concerns.

Political Question doctrine does not render Alien Tort Statute (ATS) claims non-justiciable. Congress has specifically given the courts jurisdiction over such cases and the law of nations claim does not raise separation of powers concerns because the court is not being asked to make foreign policy and national security determinations. 28 U.S.C. § 1350. In *Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 (2004), the Supreme Court urged caution extending liability under the ATS, especially "when the exercise of judicial review involved the assessment of

foreign policy." Amy Endicott, *The Judicial Answer: Treatment of the Political Question Doctrine in Alien Tort Claims*, 28 BERKELEY J. INT'L L. 537, 544 (2010). Like *Baker*, however, the *Sosa* court required a case-by-case analysis of the facts and issues presented without "mandating categorical deference to the political branches." *See id.* at 546.

Foreign policy concerns implicate the fourth *Baker* factor: the need for a court to respect a decision by a coordinate branch. *See Baker*, 369 U.S. at 217. The Second Circuit in *Whiteman v. Dorotheum GmbH & Co. KG* dismissed a class action suit against Austrian nationals concerning Nazi-era property seizures as nonjusticiable because the United States government had conducted extensive negotiations with Austria and created a fund to alleviate these deprivations. 431 F.3d 57, 59-60 (2d Cir. 2005). The Court held that these executive actions firmly established that the executive was owed deference in these cases and removed the claims from the jurisdiction of the courts. *Id.* Similarly, in *Schneider v. Kissinger*, the D.C. Circuit held nonjusticiable a case concerning covert American operations in Chile. 412 F.3d 190, 194 (D.C. Cir. 2005). Adjudicating the claim would have required the court to pass judgment on the means that the executive branch chose to defend national security in a foreign territory. *Id*. at 198.

However, the decisions of the political branches do not create a conflict regarding the ATS. Unlike *Whiteman* and *Schneider*, the other branches have specifically given courts jurisdiction over the limited international issues that may be raised under the ATS. *See* 28 U.S.C. § 1350; *Sosa v. Alvarez-Machain*, 542 U.S. 692, 693-94 (2004). In analyzing issues under the ATS, the court is not aggrandizing power; rather, it is fulfilling the role that Congress granted it. *See generally INS v. Chadha*, 462 U.S. 919 (1983). In cases where political question is implicated, courts have given special deference to the political branches over issues of national security. *See Schneider, 412 F.3d at 198*. National security concerns are not implicated by Plaintiff's law of nations claims under the ATS regarding transboundary environmental pollution in this case. The plaintiff is not asking a court to make a change to U.S. foreign policy, she is asking that the court follow a previously decided foreign policy agreement: the *Trail Smelter Arbitration*. R. at 3.

Plaintiff's law of nations claims on their own do not raise issues of nonjusticiability. Plaintiff at the outset has claimed that the law of nations has been violated. R. at 3. American courts are not barred from ruling on international law issues. As the Supreme Court noted in *The Paquete Habana*: "[i]nternational law is part of our law, and must be ascertained and

administered by the courts of justice . . . ." 175 U.S. 677, 700 (1900). A court is not automatically barred from adjudicating international law claims.

The injunctive relief and damages sought by plaintiffs do not, on their own, implicate separation of powers concerns as all of the *Baker* factors are extricable from the case. Therefore, these claims are justiciable for a court to adjudicate.

II. The Trail Smelter Principle Is Not a Recognized Principle of Customary International Law Enforceable under the Alien Tort Statute Because It Is Not a Norm that is Specific, Universally Recognized and Obligatorily Practiced by a Vast Majority of Nations

The *Trail Smelter* Principle is not a recognized norm of customary international law and does not create a cause of action under the Alien Tort Statute (ATS). For a claim to be brought under the ATS, it must have been "committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. In the current case, Mana claims that HexonGlobal's fossil fuel production and sales activities within the United States violate the *Trail Smelter* Principle, which Mana claims is a principle of the law of nations. R. at 8.

However, the Supreme Court has set limitations on the causes of action contemplated by the ATS. *See Jesner v. Arab Bank, PLC*, 138 S.Ct. 1386; *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013); *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). First, the alleged violation of international law must be one that is universally accepted and understood to give rise to individual liability as in cases of kidnapping or piracy. *Sosa*, 542 U.S. at 720, 733. Next, in order to establish a cause of action, the activities alleged must have occurred principally within the jurisdiction of the United States. *See Kiobel II*, 569 U.S. at 124. Finally, the defendant must not be a foreign corporation. *Jesner*, 138 S.Ct. at 1390.

In *Sosa*, the Supreme Court maintained that "the common law would provide a cause of action for the modest number of international law violations thought to carry personal liability at the time." 542 U.S. at 730. In *Filartiga v. Pena-Irala*, where Paraguayan nationals filed suit in U.S. court against another Paraguayan national for torturing their relative, the plaintiffs' claim arose not directly under a treaty of the United States but rather from a violation of the law of nations. 630 F.2d 876, 880 (2d Cir. 1980). The court decided that "the renunciation of torture as an instrument of official policy by *virtually all of the nations of the world* . . . we find that an act of torture . . . violates established norms of the international law of human rights, and hence the

law of nations." *Id*. (emphasis added). The Supreme Court insists that when nothing is written and when customary international law is not abundantly clear, it must be generally accepted and practiced throughout a vast majority of civilized nations. *Id.* at 880-81, (*citing The Paquete Habana*, 175 U.S. 677, 700 (1900)).

The *Trail Smelter* Principle arose from a situation where a small town, Northport, Washington, alleged that the pollution emitted by a smelting plant in nearby Trail, British Columbia caused injury to crop yields and other industries in their town. *Trail Smelter Arbitral Tribunal* (U.S. v. Can.) 3 U.N.R.I.A.A. 1905, 1913-14 (1941). The *Trail Smelter Arbitration* established the following principles: (1) the sovereign has a duty to prevent transboundary harm; and (2) the "polluter pays" – the harmed party will be compensated for any damage they've incurred as a result of the pollution *Id*. at 1965, 1980. Plaintiff Mana relies on the results of the *Trail Smelter Arbitration*, as well as two U.N. declarations to support her position. R. at 8-9.

Endorsing a general principle does not constitute universal acceptance and obligatory practice, even if 190 nations endorsed the *Trail Smelter* Principle in a U.N. declaration. *Amlon Metals, Inc. v. FMC Corp.*, 775 F. Supp. 668, 671 (S.D.N.Y. 1991). In *Amlon Metals v. FMC Corp.*, the plaintiffs argued that the defendant's conduct was violative of the Stockholm Principles from the United Nations Conference on the Human Environment, but the court dismissed the claim, holding that "these invocations of international law do not establish a violation of such law under the Alien Tort Statute." *Id*.

Specific crimes against humanity, such as torture, are universally accepted. *Id*. at 880. In contrast, the plaintiff Mana, much like the plaintiffs in *Amlon Metals*, has misplaced her reliance on a U.N. declarations. *See Amlon Metals*, 775 F. Supp. at 671. These principles only refer generally to the nations' sense of responsibility to ensure that "activities within their jurisdictions do not cause damage to the environment beyond their borders." *Id*. However, this general sense of responsibility is not specific enough to establish a clear obligation under the law of nations. *Filartiga v. Pena-Irala*, 630 F.2d 876, 888 (2d Cir. 1980).

Mana contends that many civilized nations have endorsed the *Trail Smelter* Principle. R. at 5-6. However, the Principle isn't specific enough, so Mana would need to show that these nations have put the Principle into practice universally in order for it to be applicable. *Filartiga*, 630 F.2d at 888. Without evidence of near universal adoption, the interpretation of the law of nations would be highly subjective, left to the whims of individuals, which *Sosa* vehemently

cautioned against. *Id.* 727-30. The *Trail Smelter* Principle is not sufficiently specific nor universally accepted by a majority of civilized nations and is therefore not enforceable under the Alien Tort Statute.

III. The Trail Smelter Principle Is Not Enforceable Against Non-Governmental Actors Because the Principle Established that the Sovereign Has a Duty to Prevent Transboundary Harm to Other States

Even if this Court were to expand the Alien Tort Statute (ATS) to include claims brought under the *Trail Smelter* Principle, the Principle is unenforceable against non-governmental actors. Although the original dispute was between a corporation and a small community, it implicated larger questions of national sovereignty and transboundary international harms. *Trail Smelter Arbitral Tribunal* (U.S. v. Can.) 3 U.N.R.I.A.A. 1905, 1938-39 (1941). Atmospheric emissions do not observe national borders, so the question at issue became whether Canada violated the United States' sovereignty as a nation by allowing the emissions to cross international boundaries. *Id*. at 1962-64. The *Trail Smelter* arbitration tribunal held that the Dominion of Canada was responsible under international law for the actions of the smelting plant. *Id.* at 1965. The tribunal declared 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." *Id*. at 1965 (emphasis added). It is evident by the language in the decision that the main policy interest of the tribunal was preserving the sovereignty of nations by ensuring that the states themselves remained responsible for the repercussions of their actions and the actions of others within their borders. *Id*.

Plaintiff claims that HexonGlobal's fossil fuel production violates the principles of the *Trail Smelter* arbitration. R. at 8. However, the *Trail Smelter* arbitration provides only that the *sovereign* has a duty to prevent transboundary harm; corporations have not been found to share in that duty. *Id*. at 1964-65. HexonGlobal is not a sovereign nation. The United States has allowed HexonGlobal and its corporate predecessors to operate within U.S. borders lawfully for years, holding HexonGlobal to the highest federal environmental standards under the Clean Air Act and other domestic laws. R. at 5-6. Once the pollution crosses an international boundary the state has violated the sovereignty principle of international law and has failed in their duty to prevent transboundary harm. *Trail Smelter Arbitral Tribunal,* 3 U.N.R.I.A.A. at 1965. Plaintiff's allegations against HexonGlobal are misguided; if Plaintiffs seek to vindicate an international

right against transboundary pollution, a proper application of the *Trail Smelter* Principle mandates that the U.S. government be held accountable as a state actor for violating the sovereign principles of international law.

However, even if this court were to take the unprecedented position that the *Trail Smelter* Principle was enforceable against non-governmental actors, neither the urgency nor the remedy the plaintiff seeks, establishes that the harm is of serious consequence. The *Trail Smelter Arbitration* established that the court must identify whether the pollution in question "is of serious consequence and the injury is established by clear and convincing evidence." *Id*. Fossil fuel emissions combined with emissions of greenhouse gases from agricultural and industrial activity are causing a change in the global climate. R. at 4. HexonGlobal's worldwide sales of fossil fuels constitute only 9% of global *fossil fuel* related emissions. R. at 5. The plaintiff believes that penalizing HexonGlobal would alleviate her concerns, but the difference would be marginal at best. As a contributor of only a small portion of global emissions, the results stemming from the injunctive relief that the plaintiff seeks would do little to improve her circumstances. The seriousness of the alleged harm is also undermined by the fact that it is not imminent. Sea level rise that the plaintiff complains of would only likely happen within the century. R. at 3-4. The plaintiff seeks to remedy global climate change resulting from emissions that countless actors produced by holding one individual company liable. That is not a good use of this Court's time or resources.

The plaintiff has evidently suffered a harm, but the blame has been placed in the wrong hands. The *Trail Smelter* Principle is not enforceable against a non-governmental actor. Even if it were, the plaintiff's claims are not adequately redressable by this court because the alleged harms are not of sufficiently serious consequence to support enforcing the Principle.

IV. Plaintiff's Claims Against a Domestic Corporation are Unrecognized Causes of Action Under the Alien Tort Statute

The Alien Tort Statute (ATS) does not support Apa Mana's cause of action nor her theory of liability. The ATS was originally created to give jurisdiction to American courts for violations of international laws. *Sosa v. Alvarez-Machain,* 543 U.S. 692, 712 (2004). Traditionally, these violations have included high seas piracy, danger to safe conducts, and violence against diplomats, and are actionable when committed against a foreign national by a natural person. *Id.* The statute was largely dormant for over 170 years until plaintiffs began

utilizing it for torture claims in 1980. *Id.* This kicked off a string of litigation where foreign nationals brought claims against natural persons for more general "crimes against humanity," usually torture, extrajudicial killings, or slave labor. *See, e.g., id.; Jesner v. Arab Bank, PLC*, 138 S.Ct. 1386, 1390 (2018); *In re Estate of Ferdinand Marcos, Human Rights Litigation*, 25 F.3d 1467, 1475 (9th Cir. 1994); *Filartiga v. Pena-Irala*, 630 F.2d 876 (1980).

In the case at hand, the plaintiff is attempting to bring claims that have not been recognized as obligatory norms of customary international law, as discussed in Section II of this brief. She is also attempting to bring these claims for a vague range of "fossil fuel related business activities" from a corporation, not against the direct acts of a natural person. R. at 3. The ATS was not intended for such cases. Even where the cause of action, such as torture, rises to the level of a clear violation of international law, courts have declined to impute such actions to whole corporations. *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 119 (2d Cir. 2010); *Jesner v. Arab Bank, PLC*, 138 S.Ct. 1386, 1405 (2018). In cases with more nebulous causes of action against corporations, such as the one Apa Mana brings here, courts often do not even reach the question of corporate liability. *See, e.g., Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 124 (2013) (affirming the decision of the Second Circuit on the basis of the presumption against extraterritoriality rather than the validity of corporate liability). However, the Court continued to analogize to the Torture Victim Protection Act (TVPA), where Congress constrained an ATS cause of action to individual liability. *Kiobel II*, 569 U.S. at 117.

While the Circuit Courts of Appeal remain split on this matter, for the reasons discussed below, the Second Circuit's approach is the most compliant with the Supreme Court's jurisprudence in *Jesner* and *Sosa*. The Second Circuit, closely following the Supreme Court's cautions in *Sosa*, declined to recognize corporate liability under the ATS because it is a novel type of liability that has not been addressed by Congress, and because the kinds of claims actionable under the ATS carry too high a moral responsibility to impute to abstract entities. *Kiobel I*, 621 F.3d at 119. Under the Second Circuit's holding, Mana cannot bring her claims against a domestic corporation.

A. Courts Must Use Extreme Caution In Recognizing Novel Types of Liability Under the Alien Tort Statute Without Congressional Guidance

ATS lawsuits have been successful where the defendant is a natural person and the international norm violated is sufficiently "specific, universal, and obligatory." *Sosa v. Alvarez-*

Machain, 543 U.S. 692, 748 (2004). For example, the plaintiffs in *Filartiga v. Pena-Irala* prevailed on a claim of deliberate torture committed by a citizen of Paraguay when the court held that this "violate[d] universally accepted norms of the international law of human rights." *Filartiga v. Pena-Irala*, 630 F.2d 876, 878 (1980). This standard has been refined over the years to create the "specific, universal, and obligatory" test that is used today. *Sosa*, 542 U.S. at 732; *see also In re Estate of Ferdinand Marcos, Human Rights Litigation*, 25 F.3d 1467, 1475 (9th Cir. 1994). This test established a high bar for ATS litigation; in particular, the *Sosa* Court advised strong caution in allowing *any new causes of action* to proceed under the ATS. *Sosa*, 542 U.S. at 694. The *Sosa* court held that courts should not recognize any claim for violations of any international law norm with "less definite content and acceptance among civilized nations" than the original 18th-century paradigms. *Id.* In *Sosa*, the test excluded short-term illegal detention as a valid ATS cause of action; here, the test would exclude contribution to climate change by a corporation. *Sosa*, 542 U.S. at 692; see discussion on actionable international norms *supra* Section II.

The second half of this test for ATS litigation as stated by the Supreme Court is whether it is within the court's discretion to allow the case to proceed. *Jesner v. Arab Bank, PLC*, 138 S.Ct. 1386, 1390 (2018). A norm of international law may be specific, obligatory, and universal, but courts still may not overstep the bounds of the judicial branch. *Id.* This is especially important when considering the issues of foreign policy that ATS cases involve. Courts are guided by analogous statutes, congressional intent, and whether allowing a case to move forward is essential to further serve the goals of the ATS. *Jesner*, 138 S.Ct. at 1391. These are some of the considerations the *Jesner* court used when it ruled against allowing liability for foreign corporations under the ATS. There, the Court analogized to the TVPA, which is the only ATS cause of action created by Congress and which constrains liability to "individuals, a term which unambiguously limits liability to natural persons." *Id.* In applying the only ATS cause of action not created by the courts or the common law, *Jesner* advised that courts should "not deviate from [the TVPA] model" without a "compelling justification." *Id.* The Court went so far as to note that there was even an argument that "a proper application of *Sosa* would preclude the courts from ever recognizing any new causes of action under the ATS." *Id.* at 1403. For this reason, the Court held that foreign corporations could not be held liable under the Alien Tort Statute without action from Congress. *Id.*

Under the proper application of *Sosa*, domestic corporations cannot be held liable for claims under the ATS because that would extend the ATS without congressional guidance, which is not permissible. *Jesner*, 138 S.Ct. at 1391; *see also Sosa v. Alvarez-Machain*, 543 U.S. 692, 694 (2004). The only existing congressional guidance, the TVPA, is addressed in *Jesner* when the Court ruled that foreign corporations cannot be held liable under the ATS. *Id.* at 1403. This same logic applies to domestic corporations. The foreign policy concerns that existed in *Jesner* are still present in this case. Additionally, the TVPA excludes all corporate liability by limiting itself specifically to individuals. *Id.* Here, Mana brings allegations of harm done to the global climate system through HexonGlobal's business and oil production activities, which are conducted both domestically and internationally. Injunctive relief against HexonGlobal would have ramifications for foreign customers and employees that would impact foreign policy, especially given the United States' government's involvement with the energy sector. *See* R. at 5-6.

Some circuits have allowed domestic corporate liability for actions, such as child labor or extrajudicial killings, that are far more direct and violent than conducting legal business activities. *Doe I v. Nestle USA, Inc.*, 766 F.3d 1013, 1016 (9th Cir. 2014); *Flomo v. Firestone Nat. Rubber Co., LLC*, 643 F.3d 1013, 1020 (7th Cir. 2011). However, those cases come dangerously close to contravening the TVPA model used by *Jesner* as well as the warnings in *Sosa*, as discussed below. Even if those circuits were correct, such a "compelling justification" for allowing domestic corporate liability does not exist in this case. *See Jesner v. Arab Bank, PLC*, 138 S.Ct. 1386, 1391 (2018). HexonGlobal is not accused of such heinous injuries as murder or child slavery. Therefore, proper application of *Jesner* requires excluding domestic corporate liability from the ATS without further congressional action.

B. The Second Circuit in *Kiobel v. Royal Dutch Petroleum Co.* Correctly Applied Supreme Court Jurisprudence in Holding That The Scope of Liability Under The Alien Tort Statute Is Drawn from Norms of International Law

The Second Circuit in *Kiobel I* correctly applied Supreme Court jurisprudence in holding that the scope of liability under the ATS is drawn from international law norms. The Second Circuit in *Kiobel I* followed *Jesner* in analogizing to the TVPA and limited liability under the ATS to individuals. *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 128, *aff'd*, 569 U.S. 108 (2013). Additionally, the court reasoned that in order to determine their jurisdiction under the

ATS, courts must look to international law, including when determining the type of defendant who can be sued. *Kiobel I*, 621 F.3d at 128. While corporate liability is an accepted norm of domestic United States law, it is not a norm of customary international law. *Id.* at 118. The concept of corporations as juridical persons does not appear as an obligatory norm among most civilized nations. *Id.* Therefore, liability for violations of international law must continue to be limited to natural persons, rather than juridical persons. *Id.* Considering the heinous nature of violations that "rise to the level of an international crime," the Second Circuit was additionally unwilling to impute these violations to abstract entities because of the high level of individual moral responsibility involved. *Id.* at 119 (internal quotations omitted). For these reasons, extending ATS liability to domestic corporations is beyond judicial discretion. *Kiobel I*, 621 F.3d at 118.

While some circuits have allowed ATS liability for domestic corporations when those corporations are responsible for child slavery or extrajudicial killings, these circumstances are limited and likely contravene the *Sosa* warning against overstepping judicial boundaries. The Ninth Circuit has held that domestic corporate liability is allowable under the ATS; however, it did so in the case of genocide, where group liability is internationally recognized as a possibility. *Sarei v. Rio Tinto* PLC, 671 F.3d 736, 759 (9th Cir. 2011). The Seventh Circuit reasoned that corporate liability under the ATS was acceptable in a case regarding hazardous child labor practices because corporate liability is an accepted norm of domestic law, and therefore could be applied to ATS cases. *Flomo v. Firestone Nat. Rubber Co., LLC*, 643 F.3d 1013, 1020 (7th Cir. 2011). However, it notes that corporate liability is only internationally accepted when "a corporation directs the corporation's managers to commit war crimes, engage in piracy, abuse ambassadors, or use slave labor." *Id.*

As *Kiobel I* states, ATS cases apply international law both in the cause of action and in the scope of liability. 621 F.3d at 128. Even where other Circuits have allowed domestic corporate liability that might fall into one of the *Jesner* Court's "compelling justifications," their rules likely contravene the Supreme Court's concerns about judicial boundaries and foreign policy in ATS cases. *See Jesner v. Arab Bank, PLC*, 138 S.Ct. 1386, 1391 (2018). As discussed *supra* section IV(A), the *Jesner* Court was uncertain that any court-created extensions of ATS liability are acceptable without congressional action. Therefore, the *Kiobel I* approach of limiting ATS liability to individuals is the correct application of Supreme Court precedent.

In the current case, application of any of the above discussed circuit rules would not allow Mana to bring her claim against HexonGlobal. There is no coherent international recognition of corporate liability for effects on the global climate, unlike the holdings in the Seventh and Ninth Circuits regarding genocide and slave labor. However, proper application of the Supreme Court's ATS jurisprudence, as demonstrated in *Kiobel I*, prevents Mana from bringing an ATS claim against a domestic corporation entirely. There is no compelling justification for deviating from the model set out by Congress in the TVPA, and application of domestic legal standards to a case brought by a foreign national against a company that operates internationally is beyond judicial discretion. Therefore, Mana cannot bring her claim against a domestic corporation.

V. The Plaintiffs' Claims Against HexonGlobal Are Displaced By The Clean Air Act

Even if the *Trail Smelter* Principle was enforceable under the Alien Tort Statute (ATS), the Plaintiff's claims are displaced by the Clean Air Act under the Supreme Court decision in *American Electric Power Co., Inc. v. Connecticut (AEP)*. 564 U.S. 410 (2011). This decision expressly displaces all common law claims relating to the abatement of greenhouse gas emissions because the Clean Air Act represents Congress's complete occupation of that area of law. *Id.* at 423. The only distinction in the current case is that it is brought under the ATS rather than as a direct federal common law claim, and although *AEP* addressed federal common law claims, the rule holds true for cases brought under the ATS. Thus, greenhouse gas-related claims under the ATS are displaced just as any other greenhouse gas-related claim drawn from the common law.

A. All Common Law Claims Related to Greenhouse Gas Emissions Are Displaced By The Clean Air Act

Common law claims, whether federal or international, exist to fill gaps in the existing, codified law; for this reason, a common law claim is said to be displaced when a statute exists that speaks directly to that claim. *AEP*, 564 U.S. at 421. This preserves the paramount authority of Congress, prevents parallel remedies, and avoids court-created causes of action. *Id.* at 427-28. The test for whether a claim has been displaced by a statute is simply if a statute exists that "speaks directly to" the issue at hand. *Id.* at 424 (internal quotations omitted). However, this is an issue-specific inquiry and ultimately depends on a second question: whether Congress has provided a sufficient legislative solution to occupy the field on a particular area of law. *Id.*; *Kivalina v.*

ExxonMobil Corp., 696 F.3d 849, 859 (9th Cir. 2012). For example, the Court in *Illinois v. Milwaukee* found that public nuisance actions were not displaced by a number of statutes. 406 U.S. 91, 93 (1972). There, the issue at hand was the pollution of a lake for which the available federal statutes did not provide a sufficient remedy, indicating that Congress had not fully occupied that field of law. *Id.*

However, in cases that involve greenhouse gas emissions, courts "need not engage in that complex issue and fact-specific analysis" often presented by federal displacement issues, because the Supreme Court has already provided direct guidance in *AEP*. *Kivalina*, 696 F.3d at 856. In *AEP*, the Supreme Court addressed the issue of a common law nuisance claim brought by plaintiffs who alleged very similar facts to the case at hand. *See AEP*, 564 U.S. at 418-19; R. at 4-5. The defendants in *AEP* were several major power companies who the plaintiffs alleged were the largest emitters of carbon dioxide in the United States. *AEP* 564 U.S. at 418. The plaintiffs alleged that those emissions were contributing to global warming in a way that interfered with the plaintiffs' rights. *Id.* The court held that the Clean Air Act and the actions it authorizes for the EPA displaced "any federal common law right to seek abatement of carbon dioxide emissions from fossil-fuel power plants." *Id.*

Subsequently, the *AEP* rule has been extended to include cases where damages are sought instead of abatement, as in *Kivalina v. ExxonMobil Corp.* 696 F.3d 849 (9th Cir. 2012). There, the plaintiffs sought damages for harm caused by past emissions, rather than an injunction against current emissions, again under the federal common law of nuisance. These claims were still displaced by the Clean Air Act, relying directly on the rule in *AEP*. *Kivalina*, 696 F.3d at 856.

District courts have consistently applied the *AEP* decision in subsequent cases in which plaintiffs have brought common law claims related to greenhouse gas emissions. *See, e.g.*, *Oakland v. BP PLC*, 325 F.Supp.3d 1017 (N.D. Cal. 2018); *City of New York v. BP PLC*, 325 F.Supp.3d 466, 474 (S.D.N.Y. 2018). The court in *Oakland v. BP* considered distinguishing cases where the defendants are not accused of nuisance claims for their own emissions, but instead for the sale of fossil fuels to third parties who would eventually cause emissions. *Oakland*, 325 F.Supp.3d at 1024. However, that court concluded that the harm alleged was still ultimately caused by emissions governed under the Clean Air Act, whether or not those emissions were caused by the defendants or by third party customers. *Id.* Though the international sale of fossil fuels might have changed the court's perspective on its own, at that point the court ran into the presumption against

extraterritoriality, which also arises in ATS cases. *See Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 177 (2013) (discussing the presumption of extraterritoriality and its constraints on ATS litigation); *Oakland*, 325 F. Supp. 3d at 1024 ("The Supreme Court has cautioned that where recognizing a new claim for relief under federal common law could affect foreign relations, courts should be 'particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs' (quoting *Sosa v. Alvarez-Machain*, 543 U.S. 692, 727 (2004)")).

Ultimately, it is not for the courts to make decisions entrusted to regulators in matters such as the Clean Air Act, or to legislators on foreign policy. *Oakland*, 325 F. Supp. 3d at 1025. The plaintiffs in *City of New York v. BP* similarly attempted to argue that the Clean Air Act does not displace claims related to the sale of fossil fuels, rather than a company's own emissions. However, as in *Oakland*, the court found that third party emissions, even worldwide, are still directly addressed and regulated by the Clean Air Act, displacing any related common law claims. *City of New York v. BP PLC*, 325 F. Supp. 3d 466, 474 (S.D.N.Y. July 19, 2018).

In the current case, Mana seeks both damages and injunctive relief against HexonGlobal for its "fossil fuel related business activities" causing greenhouse gas emissions. R. at 3. These claims are drawn from an arbitral principle, similar to claims drawn from federal common law. Therefore, *AEP* and its progeny cases, which hold that all claims relating to greenhouse gas emissions are displaced, apply to this case. *See, e.g., American Electric Power Co., Inc. v. Connecticut (AEP)*. 564 U.S. 410 (2011); *Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 859 (9th Cir. 2012). Mana's claims are displaced by the Clean Air Act, which represents Congress's complete occupation of the field of law relating to greenhouse gases.

B. The *AEP* Decision Also Applies To Greenhouse Gas Emission Cases Brought Under the Alien Tort Statute Because the Alien Tort Statute Does Not Create an Independent Cause of Action

Courts have repeatedly held that the Alien Tort Statute does not create its own cause of action distinct from the federal common law. *Kiobel v. Dutch Petroleum Co.*, 569 U.S. 108, 115 (2013); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 713 (2004); *Filartiga v. Pena-Irala*, 630 F.2d 876, 887 (2d Cir. 1980). The ATS merely grants jurisdiction for the courts to hear cases brought for violations of specific international law norms, which the courts then apply according to the federal common law. *Sosa*, 542 U.S. at 713. In this case, plaintiffs bring claims related both to

HexonGlobal's own emissions of greenhouse gases as well as its sale of fossil fuels around the world, leading to third party emissions. R. at 8. These claims seek both damages and injunctive relief. R. at 3. However, each of these issues have already been addressed by the Supreme Court's decision in *AEP* and its progeny, and under that line of cases, the claims are displaced by the Clean Air Act.

A small number of district courts have addressed the issue of displacement in Alien Tort Statute cases. In *Al Shimari v. CACI Premier Tech., Inc.*, a district court decided that the *AEP* rule on displacement did not apply to the plaintiff's torture-related claims. 324 F. Supp. 3d 668, 702 (E.D. Va. 2018). However, this decision relied on reasoning that the ATS creates a cause of action. *Id.* This is directly controverted by the Second Circuit in its interpretation of the ATS since it first became a feature of modern litigation in *Filartiga v. Pena-Irala*, and confirmed by the Supreme Court in *Sosa* and *Kiobel II. Kiobel v. Dutch Petroleum Co.*, 569 U.S. 108, 115 (2013); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 713 (2004); *Filartiga v. Pena-Irala*, 630 F.2d 876, 887 (2d Cir. 1980). Since the ATS does not, as the *CACI* court proposed, create a cause of action, the *AEP* rule applies to ATS cases on the same basis that it applies to federal common law cases.

In light of the delicate balancing act courts must undertake in any litigation that dips into foreign policy and other typically nonjudicial matters, displacement in ATS cases must be analogized to federal common law claims. Otherwise, courts risk running afoul of the *Sosa* warning against creating new causes of action. 542 U.S. at 723. The sole decision interpreting the *AEP* rule to be inapplicable relied on reasoning that is controverted by the Supreme Court's decisions on the limits of the ATS. In the current case, Mana's claims are drawn from an arbitral principle that she claims constitutes a principle of customary international law, not from the ATS itself, which merely confers the court's jurisdiction. Assuming Plaintiff is correct in deriving this principle, the court must then apply it "in a common law way" to resolve the case. *Sosa*, 542 U.S. at 729. Because the plaintiffs' claims are derived from a common law, not from the statute, these claims are displaced by the Clean Air Act under the rule in *AEP*.

VI. The Due Process Clause of the Fifth Amendment Does Not Extend Beyond Current Case Law to Guarantee a Global Climate System

No cause of action exists against the United States for a wholly unprecedented substantive due process right to a livable climate. Plaintiff Noah Flood asserts that the United States violated the Due Process Clause of the Fifth Amendment by failing to protect the global climate system and

indirectly causing the sea level rise on his home of New Union Island, which he argues the government had a responsibility to protect under the amendment. R. at 3-4. Flood does not assert that the government directly caused changes to the climate, but rather encouraged developments that contributed to these changes and failed to act to regulate emissions by private parties. R. at 3, 5-6, 10.

Liability for due process violations requires two elements: (1) that a right protected under the due process clause of the Fifth and Fourteenth amendments was violated; and (2) that the state was the cause of that violation. *See, e.g., DeShaney v. Winnebago Co.,* 489 U.S. 189, 194-95 (1989); *see also Malinski v. New York*, 324 U.S. 401, 415 (1945) (Frankfurter, J., concurring) ("To suppose that 'due process of law' meant one thing in the Fifth Amendment and another in the Fourteenth is too frivolous to require elaborate rejection."). Because this right does not exist and because the government action in this case fails to meet any circuit court's definition of the state-created danger exception, Flood's claims must fail.

A. Plaintiff Invents a New Due Process Right That Does Not Resemble Any Previously Recognized Substantive Due Process Right

Courts have, with one exception, never recognized a constitutional right to a global climate system. *See generally Juliana v. United States*, 217 F. Supp. 3d 1224 (D. Or. 2016) (recognizing this right). In order to derive a new constitutional substantive due process right, a court must first carefully define the "asserted fundamental liberty interest." *See Washington v. Glucksberg,* 521 U.S. 702, 721 (1997). Additionally, a court must determine if the right allegedly violated is one "deeply rooted in this Nation's history and tradition," *Glucksberg*, 521 U.S. at 720-21, or "is fundamental to *our* scheme of ordered liberty," *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 767 (2010) (emphasis in original). Generally, the Courts have cautioned that judges should exercise the utmost care in deriving new substantive due process rights, "'lest the liberty protected by the Due Process Clause be subtly transformed into' judicial policy preferences." *Juliana,* 217 F. Supp. 3d at 1249 (quoting *Glucksberg*, 521 U.S. at 720). Plaintiff's claims present an unprecedented and previously unrecognized constitutional due process right that would require a court to expand the bounds of this doctrine beyond its current jurisprudential scope.

The *Juliana* court's reasoning fundamentally misunderstands the doctrine of substantive due process. The decision claims it is "simply" holding that plaintiffs have alleged a constitutional violation when governmental action "damage[es] the climate system in a way that will cause

human deaths . . . result in widespread damage to property . . . and dramatically alter the planet's ecosystem." 217 F. Supp. 3d at 1250. How does a climate cause such action? What constitutes widespread damage? What level of damage to the atmosphere indicates an irreparable harm? How can an American constitutional right protect a global climate? The *Juliana* court itself noted that such rights must be cautiously derived, and the Supreme Court in *Glucksberg* held that deriving a new right involves a "'careful description' of the asserted fundamental liberty interest." 521 U.S. at 721 (*quoting Reno v. Flores*, 507 U.S. 292, 302 (1993)). Previously derived due process rights, such as the right to marriage, or even the broader right to privacy are far more carefully defined. *See generally Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *Griswold v. Connecticut*, 381 U.S. 479 (1965). If this right to a healthy climate were to be accepted, it is hard to imagine the limit of the due process doctrine. Accepting rights like these would open up the court system to due process challenges to nearly every governmental policy. The *Juliana* court has done exactly what it cautioned against: derived a new right to fulfill its own "policy preference." 217 F. Supp. 3d at 1249.

The district court in *Juliana* could only analogize to three American cases in holding that plaintiffs in the case have alleged a constitutional violation: *Obergefell v. Hodges*, *Roe v. Wade*, and *Maynard v. Hill*. *Juliana*, 217 F. Supp. 3d at 1249-50. None of these cases concerned the climate or environmental law. *See generally Obergefell v. Hodges*, *Roe v. Wade*, 135 S. Ct. 2584 (2015); 410 U.S. 113 (1973); *Maynard v. Hill*, 125 U.S. 190 (1888). The court could only cite to a case in the Philippines to find a decision supporting its holding. *See Minors Oposa v. Sec'y of the Dep't of Envt'l & Natural Res.*, G.R. No. 101083, 33 I.L.M. 173, 187–88 (S.C., Jul. 30, 1993) (Phil.).

Not only has no other court in the nation recognized plaintiff's alleged constitutional law right to a global climate system, but it also does not resemble any of those rights previously derived by the Courts under the substantive due process doctrine. Previously derived substantive due process rights have involved personal rights where the government was infringing on the decisions of private individuals and families. *See, e.g.*, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Roe v. Wade*, 410 U.S. 113 (1973); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). In *Obergefell*, the court outlined an individual right to marry that the state could not limit to the opposite sex. *See*, 135 S. Ct. at 2584. In *Griswold*, the court protected a right to contraceptive use by married couples, essentially prohibiting the state from infringing on

how married couples choose to have sex. 381 U.S. at 479. In *Pierce v. Society of Sisters*, the court found that parents, not the state, had the right to make decisions over how to raise their children and that the state could not force all children to attend public schools. 268 U.S. at 510. These decisions all concern individual rights with a focus on personal, often family-based, choices.

The alleged right in this case in no way resembles the previously recognized substantive due process rights and would represent a marked departure from due process jurisprudence. The government is not imposing a choice on plaintiffs or banning an action, as in *Obergefell*, *Roe*, or *Pierce*. *See* 135 S. Ct. at 2584; 410 U.S. at 113; 268 U.S. at 510. The government is not making decisions typically decided by a couple or family, as in *Griswold* and *Pierce*. *See* 381 U.S. at 479; 268 U.S. at 510. In sum, there are many reasons why no other court in the country has recognized a constitutional right to a particular climate system. The right does not resemble any previous right derived under the doctrine and there is a strong policy argument that the judiciary would be flooded with due process litigation were it to greatly expand the reach of the substantive due process doctrine.

B. The Government Action in This Case Fails to Meet Any Circuit Court's Definition of a State-Created Danger

Even if the court were to find that a substantive due process right to a protected global climate system exists, the Supreme Court has held the protections of the due process clause do not extend to action between private parties. *See DeShaney*, 489 U.S. at 195. Nor does the clause impose an obligation on the government to affirmatively act. *See id.* The Supreme Court has held that the second prong of a due process violation exists in the absence of state action where the state has created the danger. *See id.* at 200. Plaintiffs allege that certain actions of the U.S. government fall within this state-created danger exception. R. at 11. However, these actions do not fall within the exceptions that have been recognized by the Supreme Court, which has limited its review to cases involving police custody. *See id.*; *see also Town of Castle Rock v. Gonzales* 545 U.S. 748 (2005).

Different Circuit Courts have adopted a variety of measures to assess whether state action falls into the exception. *See generally,* Erwin Chermerinsky, *The State-Created Danger Doctrine,* 23 Touro Law Review 1 (2007). These tests have included requirements that the state affirmatively acted to increase a risk of violence from a third party, *see Jones v. Reynolds*, 438 F.3d 685, 690 (6th Cir. 2006); that the government's actions put plaintiffs "at significant risk of serious, immediate, and proximate harm" and that the government's actions "shock[] the conscience," *Hart*

v. City of Little Rock, 432 F.3d 801, 805 (8th Cir. 2005); and that "the harm ultimately caused was foreseeable and fairly direct." *Mark v. Borough of Hatboro*, 51 F.3d 1137, 1152 (3rd Cir. 1995). The Ninth Circuit has required that the state actor "actually intended" the harm. *Campbell v. Wash. Dep't of Soc. & Health Servs.*, 671 F.3d 837, 846 (9th Cir. 2011). The Third, Fourth and Fifth Circuits have also required that a special relationship must exist between the government and the plaintiff. *See Pinder v. Johnson*, 54 F.3d 1169, 1175-76 (4th Cir. 1995); *Beltran v. City of El Paso*, 367 F.3d 299, 307 (5th Cir. 2004); *Mark*, 51 F.3d at 1153. In *Mark*, the Third Circuit noted that the state-created danger exception required that a state action "leav[e] a discrete plaintiff vulnerable to foreseeable injury," and that a policy directed at the public cannot denote a special relationship between the state and the individual. 51 F.3d at 1153.

Plaintiff fails to prove a state-created danger under any circuit court's test. While the record mentions ways in which the United States has encouraged the growth of the energy industry, there is no evidence that this has led to violence by a third party, as required under the Sixth Circuit's analysis. *See Jones*, 438 F.3d at 690; R. at 6. The actions of the government in subsidizing one of the largest sectors of the economy do not "shock the conscience." *See Hart*, 432 F.3d at 805.[2] Subsidizing industries are a common government function. The government actions described in the record date back a century, long before the development of modern climate science, belying the foreseeability requirement of the Third and Eighth Circuits. (R. at 6). *See id.* ("serious, immediate, and proximate"); *Mark*, 51 F.3d at 1153 ("foreseeable and fairly direct").

The state had no special relationship to the plaintiff Flood beyond that of the government with any citizen. *See Pinder*, 54 F.3d at 1175-76; *Beltran*, 367 F.3d at 307. The policies alleged by the plaintiff to have encouraged the changes to the global climate were instead akin to the generally applicable public policies the Third Circuit dismissed in *Mark* that failed to establish a special relationship. *See* 51 F.3d at 1153. In fact, only one district court case has recognized a state-created danger exception in this area of law. *Juliana v. United States*, 217 F. Supp. 3d 1224 (D. Or. 2016).

[2] The Eighth Circuit in *Hart* noted that shocking the conscience did not involve negligence or gross negligence, rather behavior that was "inspired by malice or sadism rather than merely careless or unwise excess of zeal . . . ."432 F.3d at 806 (internal citations omitted). The Supreme Court has also held that in emergency situations, the conduct shocks the conscience if the plaintiff can demonstrate that the government intended to cause harm to the victims. (This seems important, should it go up top?) *See, Lewis v. Sacramento*, 523 U.S. 833, 846 (1998).

Even under the less stringent Ninth Circuit standard, used in *Juliana* and rejected by the district court below (R. at 11), still requires that the government "actually intended" the plaintiff to be put at risk. *Id.* at 1251 (*quoting Campbell v. Wash. Dep't of Soc. & Health Servs.*, 671 F.3d 837, 846 (9th Cir. 2011)); *see also Pauluk v. Savage*, 836 F.3d 1117, 1125 (9th Cir. 2016)). There is no evidence in the record that the government "actually intended" for the alleged harm to befall the plaintiff in this case. *See generally*, R. at 5-8.

Supreme Court jurisprudence has held that the government is not obligated to affirmatively act, thus plaintiff's claims that the government failed to protect him are legally moot. *See DeShaney*, 489 U.S. at 195. Furthermore, under any of the circuit court tests, the alleged actions of the U.S. government in promoting the energy sector fail to rise to the level of the state-created danger exception. This lack of state action, coupled with a lack of a cognizable right to a protected global climate system, demands that this court uphold the district court dismissal and find that no due process violation has occurred in this case.

CONCLUSION

For the foregoing reasons, Appellee, HexonGlobal Corporation, respectfully requests that this Court uphold the final decision of the District Court, affirming the dismissal of Organization of Disappearing Island Nations, Apa Mana, and Noah Flood's complaint.

Respectfully submitted,

Counsel for Appellee,
HexonGlobal Corporation

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