Team No. 40

IN THE UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

CA. No. 18-000123

ORGANIZATION OF DISAPPEARING 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

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BRIEF OF THE UNITED STATES OF AMERICA, Appellee

Oral Argument Requested

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STATEMENT OF JURISDICTION

The district court had jurisdiction over the case docketed as No. 66-CV-2018 pursuant to the Alien Tort Statute, 28 U.S.C. § 1350, and 28 U.S.C. § 1331. The district court had federal question jurisdiction over Plaintiff Flood's Fifth Amendment substantive due process claim.

The Court of Appeals has jurisdiction of this appeal pursuant to 28 U.S.C. § 1291. The final judgment that is being appealed from disposed of all parties' claims and was entered on August 15, 2018. Plaintiffs filed a Notice of Appeal in a timely manner.

STATEMENT OF THE ISSUES

I. Can Alien Tort Statute, 28 U.S.C. § 1350, claims be brought against a domestic corporation by Mana?

II. Does the *Trail Smelter* Principle qualify as a recognized principle of customary international law that can be enforced as the "Law of Nations" under the ATS?

III. Does the *Trail Smelter* Principle create obligations that are enforceable against non-governmental actors?

IV. Does the Clean Air Act displace the *Trail Smelter* Principle?

V. Does the Fifth Amendment's substantive due process protections for life, liberty, and property create a cause of action that could be brought against the United States Government for "failing to protect" the global climate system from the harms of production, sale, and burning of fossil fuels?

VI. Are the Plaintiffs' law of nations and public trust claims non-justiciable political questions?

STATEMENT OF THE CASE

Procedural History

Plaintiffs Organization of Disappearing Island Nations (ODIN), Apa Mana, and Noah Flood brought an action against HexonGlobal Corportion and the United States. Mana brought a claim against HexonGlobal under the Alien Tort Statute, 28 U.S.C. § 1350. Mana asserted that the defendant's fossil fuel related business activities violated the Law of Nations, and sought damages and injunctive relief. Flood asserted a constitutional claim against the United States

under the Due Process Clause of the Fifth Amendment for violations of public trust obligations to protect the global climate ecosystem. Both Mana's and Flood's claims were dismissed for failure to state a claim for relief.

Statement of Facts

Carbon dioxide and methane are trace atmospheric gases known as "greenhouse gases" that, even in small amounts, have an insulating effect which leads the Earth to retain heat. The climate on Earth depends on the balance between the amount of solar radiation that reaches the Earth and the amount of heat that is radiated from Earth back into space. Too little greenhouse gas in the atmosphere would result in lower global temperatures as more heat is radiated to space, and too much greenhouse gas leads to higher global temperatures as more heat is reflected back to Earth. Human production and burning of fossil fuels for energy production has lead to a substantial increases in carbon dioxide and methane concentrations in the atmosphere. These emissions, along with the emissions of greenhouse gases from agricultural and industrial activity are causing a change in the global. This is resulting in increasing temperatures, changing rainfall patterns, and rising sea levels. If global emissions of greenhouse gases continue at the current rate, global temperatures will rise by over four degrees Celsius and average sea level will likely rise by between one-half and one meter by the end of this century.

A'Na Atu and New Union Islands are low-lying islands with a maximum height above sea level of less than three meters, with the populated areas below one meter above sea level. Sea level rise of one-half to one meter would render the islands uninhabitable due to waves during storms washing over the land. Both Apa Mana and Noah Flood own homes and reside in communities with an elevation of less than one-half meter above sea level, and have suffered seawater damage to their homes during storms over the past three years. This damage would not have occurred in the absence of the sea level rise due to greenhouse gas emissions that has

already occurred. Mana and Flood will continue to incur substantial expenses to repair past damages and prevent future damage. Mana and Flood have experienced seawater intrusion into their drinking water well. The increasing temperatures will increase their risk of heat stroke and mosquito borne diseases, putting their health at risk. Climate change induced ocean acidification, warming, and loss of local wetlands will reduce ocean productivity and reduce seafood availability. Local seafood is an important part of both individuals' diet. Limits on fossil fuel production would reduce future damage to plaintiffs' properties, reduce health and diet risks, and would maintain the habitability of plaintiffs' communities.

HexonGlobal is the surviving corporation from the merger of all the major United States oil producers. It is incorporated in the State of New Jersey with its principal place of business in Texas. About 32% of United States cumulative fossil-fuel related greenhouse gas emissions and six percent of global historical emissions can be attributable to products sold by HexonGlobal and its corporate predecessor. Cumulative worldwide sales of fossil fuels by HexonGlobal makes up nine percent of global fossil fuel related emissions. The heat-retention properties of carbon dioxide and methane have been established as scientific fact since the nineteenth century, and emissions of substantial amounts of greenhouse gases is the expected result of the combustion of fossil fuels. HexonGlobal have been aware that the continued sale and combustion of fossil fuels would cause global climate change and sea level rise through their own research since the 1970s, but continued with these profitable business activities. HexonGlobal operates refineries throughout the world, including one on New Union Island, where it has consented to personal jurisdiction as a condition of doing business on the island.

The United States historically has been the largest single national contributor of greenhouse gas emissions, responsible for twenty percent of anthropogenic greenhouse gas

emissions. Until recently, the United States has not limited fossil fuel use, but has instead promoted the production and combustion of fossil fuels through tax subsidies for fossil fuel production, leasing of public lands and seas for production, creation of the interstate highway system, and the development of fossil fuel power plants by public agencies, such as the Tennessee Valley Authority. In more recent decades, the United States has acknowledged the threat of climate change, signing and ratifying the United Nations Framework Convention on Climate Change. The UNFCCC acknowledged the threat of anthropogenic climate change, stated an objective to stabilize greenhouse gas concentrations, and charged parties to limit their greenhouse gas emissions. United Nations Framework Convention on Climate Change, May 9, 1992, 1771 U.N.T.S. 107, 169.

The United States has taken steps towards regulating greenhouse gas emissions in the last decade. In *Massachusetts v. EPA*, the Supreme Court held that greenhouse gases were "pollutants" that were potentially subject to regulation under section 202(a)(1) of the Clean Air Act, 42 U.S.C. § 7521 (2018). *Massachusetts v. EPA*, 549 U.S. 479 (2007). The United States Environmental Protection Administration then issued the "Endangerment Finding" in 2009, stating that greenhouse gas emissions and consequential climate change were potentially dangers to public health and welfare. Following this finding, in 2010 EPA and the National Highway Transportation Agency established a joint rule entitled "The Safer Affordable Fuel-Efficient Vehicles" that set fuel economy standards and greenhouse gas emission rates for passenger cars and light trucks, 75 Fed. Reg. 25,324 (May 7, 2010); this rule was extended through 2025, 77 Fed. Reg. 62,623 (Oct. 15, 2012). EPA also issued a new rule under the Clean Air Act in 2010 requiring new major sources of greenhouse gases to undergo review. 75 Fed. Reg. 31,514 (June 3, 2010). In 2015, EPA issued regulations establishing carbon dioxide emissions standards for

new power plants, 80 Fed. Reg. 64510 (Oct. 23, 2015), and requiring states to regulate greenhouse gas emissions from existing power plants. 80 Fed. Reg. 64662, (Oct. 23, 2015). Also in 2015, the President of the United States signed the Paris Agreement, committing the United States and other signatory nations to reducing their greenhouse gas emissions by amounts to be determined independently. Paris Agreement to the United Nations Framework Convention on Climate Change, opened for signature Apr. 22, 2016, U.N. Doc. FCCC/CP/2015/L.9 (Dec. 12, 2015). The United States later decided on a 26-28% reduction by 2025, compared to 2005 emissions. USA First NDC (Sept. 3, 2016), http://www4.unfccc.int/ndcregistry/PublishedDocuments/United%20States%20of%20America%20First/U.S.A.%20First%20NDC%20Submission.pdf.

However, these relatively recent regulations notwithstanding, United States greenhouse gas emissions have only marginally decreased, while global greenhouse gas emissions have increased. Moreover, the current administration has proposed reversing regulatory measures and commitments, and announced an intention to withdraw from the Paris Agreement in 2020. EPA has also proposed freezing the reduction of greenhouse gas emissions under the fuel economy standards, The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021–2026 Passenger Cars and Light Trucks, 83 Fed. Reg. 42,986 (proposed Aug. 24 2018) (to be codified at 49 C.F.R. pts. 523, 531, 533, 536, & 537, and 40 C.F.R. pts. 85-86) and repealing the Clean Power Plan. 83 Fed Reg 44746 (Aug. 31, 2018).

SUMMARY OF THE ARGUMENT

Mana can bring an Alien Tort Statute claim against a domestic corporation. Corporations are liable for violations of international law, and historically have been. In the Nuremberg era, many corporations that supported the Nazi genocide and war effort were dissolved and had their assets seized by international governing bodies for reparations under the color of international

law. Not allowing corporations to be held liable for their crimes would go against the purpose of international law to protect victims. The custom in international law is to leave it to the individual States to decide how to enforce the norms of international law according to their own, varying legal systems. Many cases in the United States have held or assumed that corporations may be liable under the ATS. Holding domestic corporations liable for the international law violations they commit in United States court also serves the purpose of the ATS to reduce international tensions. By offering a process for remedy to foreign citizens when they are harmed by United States corporations.

The Trail Smelter Principle is customary international law. It is universal and specific enough to be the basis for an ATS suit. The Principle has been upheld in several international arbitrations since the Trail Smelter Arbitration and was reinforced in international treaties and by the International Court of Justice. Specific methods of enforcement of the Principle are generally left up to the States according to their own legal systems, but enforceable guidelines have been constructed by the International Law Commission. These guidelines provide sufficient specificity to enable States to provide a process and remedy for victims of transboundary harm. The ATS fits these guidelines. Transboundary polluters are among "today's pirates" that the entire international community has an interest in policing and punishing.

The Trail Smelter Principle imposes obligations enforceable against non-governmental actors. "The Draft Principles of Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities" create an international good faith obligation for the United States to ensure compensation for victims of transboundary pollution, and establishes an ultimate purpose of protecting the environment. The Rio Declaration on Environment and Development corroborates the Draft Principles in accordance with the Trail Smelter Principle. It requires the

United States to develop its own legal structure for imposing liability on the parties responsible for harm caused by transboundary pollution in order to compensate victims.

If otherwise enforceable, the Trail Smelter Principle is displaced by the Clean Air Act. The United States has codified and acted upon the Trail Smelter Principle through international agreements and subsequent unilateral measures, making it customary international law. According to precedent, customary international law is federal common law. And under the doctrine of legislative displacement upheld by the Supreme Court, federal common law is displaced by applicable federal legislation. The Clean Air Act is applicable federal legislation for the case at present, as it already imposes significant financial penalties, as well as possible criminal liability, on non-governmental actors for their pollution. As such, allowing private claims to proceed under the Trail Smelter Principle would create a double obligation for these actors, which necessitates the use of the doctrine of legislative displacement.

The plaintiffs do not have a Fifth Amendment due process claim under the public trust doctrine in this case. It has long been established that the government cannot be found liable for the actions of private parties, save for two exceptions: if there is a special relationship or if the government created the danger. In this case, there is no special relationship because the government at no time had custody of either of the plaintiffs. Further, the United States Government's actions do not qualify as a state-created danger. It did nothing to create the danger, nor did it know about the danger or act with deliberate indifference toward that danger. Once the United States became aware of the dangers of greenhouse gas emissions and climate change, it began to shift its policies to minimize those dangers.

Lastly, both Mana's Law of Nations claim and Flood's public trust claim qualify as non-justiciable political questions and can therefore not be decided by this court. The third *Baker*

factor states that questions that are impossible to decide without an initial policy decision from one of the nonjudical branches are political questions. In this case, in order to decide either of the Plaintiffs' claims, the Court would have to make a determination about what the proper amount of greenhouse gas emissions would have been and how to divvy up the costs of climate change. These are questions that need to be settled by the political branches before a Court can address them and thus are non-justiciable.

ARGUMENT

I. MANA CAN BRING AN ALIEN TORT STATUTE CLAIM AGAINST A DOMESTIC CORPORATION.

A. International law and United States case law support corporate liability.

1. Corporations are liable under international law.

Corporate liability has long been a part of international law. The "singular achievement of international law" coming out of World War II and the Nuremberg trials was the imposition of liability for certain international law violations on individuals, not just states. *Kiobel v. Royal Dutch Petroleum Co*., 621 F.3d 111, 118 (2d Cir. 2010). This Nuremberg-era jurisprudence, contrary to the analysis by the Second Circuit in *Kiobel*, supports the imposition of liability on all actors, including juridical entities such as corporations. While only natural persons were tried in the criminal proceedings of Nuremberg, many German corporations were subject to dissolution and had their assets seized and used to pay reparations under the color of international law by the Allied Control Council and other international judicial bodies. The Allied Control Council was the governing body in the Allied Occupation Zones in Germany after World War II and was provided with "means of legislative action," including laws, orders, and directives. Control Council Directive No. 10, Control Council Methods of Legislative Action, reprinted in 1 Enactments and Approved Paper of the Control Council and Coordinating

Committee 95 (1946). The Control Council established laws and directives that impacted corporations.

Control Council Law No. 5 defined "person" to include "collective" or "juridical" persons or entities. Control Council Law No. 5, Vesting and Marshalling of German External Sources (Oct. 30, 1945), reprinted in 1 Enactments and Approved Papers of the Control Council and Coordinating Committee 176, 179 (1945). The main corporation impacted by the Control Council laws was I.G. Farben, the German pharmaceutical and chemical company that produced the poison gas used to kill people in the Nazi concentration camps. The Control Council Law No. 9 provided for the dissolution of I.G. Farben and the dispersal of its assets and was based on the international prohibition of crimes against peace- international customary law. Control Council Law No. 9, Providing for the Seizure of Property Owned by I.G. Farbenindustrie and the Control Thereof (Nov. 30, 1945), reprinted in 1 Enactments and Approved Papers of the Control Council and Coordinating Committee 22. As the court in *Doe v. Exxon Mobil Corp.* said, "the corporate death penalty enforced against I.G. Farben was as much an application of customary international law" as the criminal trials. *Exxon*, 654 F.3d 11, 52 (D.C. Cir. 2011). Insurance companies that supported the Nazi war effort and genocide were also dismantled through the Control Council. Control Council Law No. 57, Dissolution and Liquidation of Insurance Companies Connected with the German Labor Front, reprinted in 8 Enactments and Approved Papers of the Control Council and Coordinating Committee 1 (1947).

Other Nuremberg jurisprudence makes clear that corporations can violate international law. The German coal, iron, and steel industries were restructured similarly to Farben and other companies by the Allied High Commission. Allied High Comm'n Law No. 75, On the Reorganization of German Coal and Iron and Steel Industries (May 16, 1950), reprinted in 20

Official Gazette of the Allied High Comm'n of Germany 299 (1973). The Nuremberg Military Tribunal noted that corporations could be legally responsible even though they were not before the court, stating that where "private individuals, including juristic persons" exploited the occupancy and took property against the consent of the owner, they were "in violation of international law." U.N. War Crimes Comm'n, 10 Law Reports of Trials of War Crimes 4 at 44. The London Charter, which set down the rules and procedures by which the Nuremberg trials were to be conducted, indicated that groups could violate international law when it authorized the IMT to designate organizations as criminal. Charter of the Int'l Mil. Trib. at Nuremberg, art. 9 82 U.N.T.S 279 (1945) ("the tribunal may declare…that the group or organization of which the individual was a member was a criminal organization").

It is apparent from Nuremberg-era jurisprudence that corporations can violate international law. Many corporations were punished by dissolution and seizure of assets on the basis of international law during this time period. Simply because the Nuremberg criminal trials were concerned with natural persons rather than artificial does not mean that corporations cannot violate international law. As Judge Leval stated in his concurring opinion in *Kiobel*, corporations are not tried in criminal court because "criminal punishments are inappropriate for corporations." *Kiobel*, 621 F.3d 111, 151 (Leval, J., concurring). Judge Posner reasoned similarly, stating that "criminal punishment of corporations is a peripheral method of social control adopted by few countries" and that just because corporate liability has not been a part of the prosecutions of war criminals "doesn't mean that corporations are exempt from that law" and "would be a poor reason for denying both criminal and civil liability for abhorrent conduct by a corporation." *Flomo v. Firestone Natural Rubber Co., LLC*, 643 F.3d 1013, 1019 (7th Cir. 2011). Barring corporate liability under international law would allow those who earn profits from committing

atrocities to shield such profits from their victims' claims, which would be "in opposition to the objective of international law to protect" those victims and their rights. *Kiobel*, 621 F.3d 111, (Leval, J., concurring).

The actual custom of international law is to leave it to the States to determine how to enforce international law. International norms prescribe norms of conduct and call for States to enforce them according to their own legal systems. *Kiobel*, 621 F.3d 111, 152 (Leval, J., concurring). Telling States how to meet their obligations under international law in a world with varying legal and political systems does not make much sense and would be impracticable. *Id*. at 173. Many international treaties governing a wide variety of customary norms leave enforcement to the individual State. For example, the International Convention on the Suppression and Punishment of the Crime of Apartheid obligates States "to adopt legislative, judicial and administrative measures to prosecute, bring to trial and punish in accordance with their jurisdiction." The Slavery Convention ordered States "to adopt the necessary measures in order that severe penalties may be imposed. The International Convention to Suppress the Slave Trade and Slavery, art. 6, Sept. 25, 1926, 60 L.N.T.S 253. *See also* the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 2(1), Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85 ("each State Party shall take effective legislative, administrative, judicial or other measures"); the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, May 25, 2000, G.A. Res. 54/263, Annex II, 54 U.N. GAOR Supp. (No. 49) at 6 ("Subject to the legal principles of State Party, such liability of legal persons may be criminal, civil or administrative); the Convention on Combating Bribery of Foreign Public Officials in International Business. The Rio Declaration similarly in Principle 10 charges States to provide "effective access to judicial

and administrative proceedings, including redress and remedy" and in Principle 13 to "develop national law regarding liability and compensation for the victims of pollution and other environmental damage." United Nations Conference on Environmental and Development, Rio de Janeiro, Brazil, June 3-14, 1992, 31 I.L.M. 874.

From these treaties that cover a wide range of international laws, the custom about enforcement and liability leaves it to the states to decide. The United States has opted for civil liability through the ATS. Just because other countries have not decided to impose civil liability on corporations for violations of the law of nations does not mean that the United States is barred from doing so. In fact, most states and the Nuremberg trials did not impose civil liability for violations of the law of nations on natural persons, either. Only the United States has a statute like the ATS. *Flomo*, 643 F.3d 1013, 1019. But "the absence of a wide consensus imposing civil liability has never been construed as barring civil liability" *Kiobel*, 621 F.3d 111, 176 (Leval, J., concurring). Barring civil liability completely, as this approach would suggest, is inconsistent with the statute, its history, and United States case law.

2. The case law of the United States and the ATS support corporate liability.

Corporate liability is supported by the ATS and United States case law. While the ATS expressly limits the class of permissible plaintiffs to aliens, it "does not distinguish among classes of defendants." *Argentine Republic v. Amerada Hess Shipping Corp.,* 488 U.S. 428, 438 (1989). As noted by the dissent in *Jesner*, "this silence cannot be presumed to be inadvertent." *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1426 (2018), (Sotomayor, J., dissenting). Corporations have been held liable in tort historically under the federal common law, and it can thus be presumed that in providing for tort liability, the ATS provides for corporate liability. *See Chestnut Hill & Spring House Turnpike Co. v. Rutter*, 4 Serg. & Rawle 6, 17 (Pa. 1818) ("from the earliest times to the present, corporations have been held liable for torts").

Numerous cases have held or presumed that corporations are subject to international law. Several courts have held that corporations are liable under the ATS, noting that barring corporate liability would be inconsistent with the history of the ATS and legislative intent. In *Doe v. Exxon Mobil Corp.*, the court said that there was no reason to believe that the First Congress that enacted the ATS would have been concerned with natural persons causing foreign tension, "but was content to allow formal legal associations of individuals, i.e., corporations to do so." *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 47 (D.C. Cir 2011). As the dissent in *Jesner* notes, barring corporate liability under the ATS "would have been at odds with the contemporaneous practice of imposing liability for piracy on ships, juridical entities." *Jesner*, 138 S. Ct. 1386, 1426 (Sotomayor, J., dissenting). Other cases have followed this reasoning and also held that corporations are liable under the ATS. *See Sinaltrainal v. Coca-Cola Co*. 578 F.3d 1252, 1263 (11th Cir 2009) ("corporate defendants are subject to liability under the ATS and may be liable for violations of the law of nations"), *Flomo*, 643 F.3d 1013. Additionally, courts have presumed corporate liability, though the issue was not specifically addressed. *See Al Shimari v. CACI Int'l, Inc.*, 679 F.3d 205 (4th Cir. 2012).

B. Domestic corporate liability serves the purpose of the ATS to reduce international tensions and is in the interest of the United States.

Allowing foreign citizens to sue domestic corporations under the ATS serves the purpose of the statute of reducing international tension. The ATS was intended to provide a remedy for foreign plaintiffs for violations of international law "where the absence of such a remedy might provoke foreign nations to hold the United States accountable." *Jesner*, 138 S. Ct. 1386, 1406. Holding our own corporations accountable for violations of international law serves this purpose. Ensuring that our citizens, natural or artificial, abide by the law of nations is key in avoiding reprisals against this country and in preventing international strife. If we do not hold our own

corporations accountable for the violations of international law they commit against foreign citizens, other nations could hold the United States accountable which could raise diplomatic tensions. This is similar to the tensions raised when ambassadors harmed by United States citizens could not find remedy under the Articles of Confederation, one of the main reasons the ATS was created in the first place.

Allowing suits against domestic corporations under the ATS is also in the interest of the United States. Domestic corporate liability raises no concerns that other nations may hale United States corporations in their courts for alleged violations of international law. It would, in fact, set the precedent that nations hold their own corporations liable for the atrocities they commit. This precedent could help United States citizens as well as foreign citizens. It would encourage other nations to set up methods of remedy for when their corporations commit international law violations- violations that could potentially harm United States citizens. Domestic corporate liability would also not attract extra human rights litigation from around the world, another concern about creating new causes of action under the ATS. It would only be United States corporations being sued under the United States justice system for the crimes they committed against foreign citizens, as they would be by United States citizens.

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

Under the *Sosa* decision, when a plaintiff brings a suit alleging the violation of an international law norm, the court must determine whether that norm "is accepted by the civilized world and defined with a specificity comparable to the features of the 18th century paradigms," for which the ATS was enacted- piracy, the illegal treatment of ambassadors, and violation of safe conducts. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004). The Trail Smelter principle today is universally accepted by the international community and defined with sufficient

specificity to provide a process and remedy for victims. Transboundary polluters are among "today's pirates" that all nations have an interest in punishing.

The Trail Smelter Principle arose out of the Trail Smelter Arbitration between the United States and Canada regarding transboundary pollution. The Principle holds that "no state has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein." The Trail Smelter Case (U.S. v. Can.), 3 R.I.A.A. 1905, 1938 (1941). Since the Trail Smelter Arbitration, the principle has been reaffirmed in other transboundary pollution disputes, including the Corfu Channel arbitration, which held that every State has an "obligation not to knowingly allow it territory to be used for acts contrary to the rights of other States." Corfu Channel Case (UK v. Alb), 1949 I.C.J. 4, 22 (1949). The Lac Lanoux Arbitration reaffirmed what was dictated in the Corfu Channel and Trail Smelter Arbitrations. Lac Lanoux Arbitration (Spain v. Fr.), 12 R.I.A.A 281, 314-17 (1957).

Since the Trail Smelter Arbitration, the principle has become customary international law. Principle 21 of the Stockholm Declaration grants nations "the sovereign right to exploit their own resources pursuant to their own environmental policies," but also imposes on them "the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or areas beyond the limits of national jurisdiction." United Nations on the Human Environment, Stockholm, Swed., June 5-16, 1972, Declaration of the United Nations Conference on the Human Environment, princ. 21, U.N. Doc. A/CONF.48/14/Rev. 1. The Stockholm Declaration was adopted in 1972 by a vote of 103 to 0, including the United States, and is now widely accepted as reflecting customary international law. Bradford Mank, *Can Plaintiffs Use Multinational Environmental Treaties as customary International Law to Sue Under the Alien Tort Statute*, 2007 Utah L. Rev. 1085, 1149 (2007).

The International Court of Justice, in the context of nuclear weapons, stated that the obligation of States to ensure that activities that occur within their jurisdiction do not impact the environment of other States "is now part of the corpus of international law relating to the environment." Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226. The Rio Declaration on Environment and the Development was produced in 1992 and reaffirmed the Trail Smelter Principle and Principle 21 of the Stockholm Principle in Principle 2 and was signed by over 170 countries. United Nations Conference on Environmental and Development, Rio de Janeiro, Brazil, June 3-14, 1992, 31 I.L.M. 874. The Rio Declaration in Principle 13 also charges States to "develop national law regarding liability and compensation for the victims of pollution and other environmental damage." *Id*. princ. 13.

The U.N. International Law Commission in 2006 developed draft principles that gave States guidelines regarding the allocation of loss resulting from transboundary pollution based on the Rio Declaration and the Stockholm Principle 21, which were annexed into the text of the United Nations General Assembly Resolution 61/36. G.A. Res. 61/36, at 2-5 (Jan. 8, 2008). *See* Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising Out of Hazardous Activities, in Report of the International Law Commission, 61 U.N. GAOR Supp. (No. 10) P 76, U.N. Doc. A/61/10 (2006). Principle 4 charges States "to take all necessary measures to ensure that prompt and adequate compensation is available for victims of transboundary damage." *Id.* princ. 4. Principle 6(1) states that "States shall provide their domestic judicial and administrative bodies with the necessary jurisdiction" to provide "prompt and adequate compensation" for any transboundary damage. *Id.* princ. 6(1). Principle 6(2) says that "victims of transboundary damage should have access to remedies in the State of origin that

are no less prompt, adequate and effective" than those victims that suffer damage within that State. *Id.* princ. 6(2).

The Stockholm and Rio Declarations describe a general and universal principle that States are responsible for providing compensation to victims of pollution arising from activities that occur within their jurisdictions. Methods of enforcement are generally left to the States according to their own legal and political systems, and the Draft Principles provide details and guidelines on enforcement. The Draft Principles specify that States should open their domestic judicial systems to foreign nationals harmed by pollution originating in their State, and to provide access to remedies that are as "prompt, adequate and effective" as remedies available to citizens of that State. This is as specific as international guidelines that are to be used by many nations, all with their own unique legal and political systems, can be. The ATS fits these guidelines very well. It provides United States courts with the jurisdiction to hear suits by foreign nationals, as Principle 6(1) of the Draft Principles says. It is the same judicial system that United States citizens could also use when they are harmed by pollution, and so would be as "prompt, adequate and effective." Damages could be determined as in any environmental tort case.

Several cases in the United States have discussed whether the Rio Declaration and the Trail Smelter Principle can be the basis for an ATS suit. However, these cases only discuss intranational pollution, and the courts declined to impose the United States' environmental policy on other nations. In *Flores v. S. Peru Copper Corp,* the court said that intranational pollution "generally a concern of that particular nation alone and not a mutual concern of the international community at large" and therefore an inappropriate subject for and ATS suit. *Flores v. S. Peru Copper Corp,* 414 F.3d 233, 266 (2d Cir. 2003). In *Beanal v. Freeport-McMoran, Inc.*, the court emphasized that the Rio Declaration also gave nations "the sovereign right to exploit

their own resources" according to their own policies, and that "federal courts should exercise extreme caution…to ensure that environmental policies of the United States do not displace environmental policies of other governments." *Beanal v. Freeport-McMoran, Inc,* 197 F.3d 161, 167 (5th Cir. 1996). No such concerns are present in transboundary cases in which pollution from the United States causes damage in another nation. In transboundary cases, the United States has the responsibility to provide access to compensation for victims of pollution originating in the United States. The ATS is an excellent way to provide that access.

In deciding whether a court should allow a cause of action under the ATS, *Sosa* leads courts to ask, "who are today's pirates?" *Kiobel v. Royal Dutch Petro. Co.,* 569 U.S. 108, 129 (2013) (Breyer, J., dissenting). Pirates were, as the dissent in *Kiobel* discusses, "common enemies of all mankind" and so "all nations have an equal interest in their apprehension and punishment." *Id*. at 131. Transboundary polluters are among "today's pirates" who the United States and every other nation have an interest in holding liable. The global waters on which pirates sailed were shared by all nations. Every nation had an interest in policing and protecting those waters from pirates, so their own property and people would not be harmed by them. Transboundary polluters are among "today's pirates" who the United States and every other nation have an interest in holding liable. Transboundary polluters are often causing harm in waterways shared by multiple countries or the atmosphere, which knows no borders. In other words, transboundary polluters cause harm in the global commons used by many, sometimes all, nations, similarly to how pirates caused damage in global waters. All nations benefit from shared clean waters and a clean atmosphere, just the way all nations benefited from a pirate-free sea. And all nations could be harmed when an actor pollutes shared waters and the atmosphere, similarly to how all nations were harmed when pirates roamed global waters. Just as all nations

had an interest in the punishment of pirates, so they have an interest in the punishment of transboundary polluters.

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

In transboundary pollution disputes, established principles of international law and precedent both urge for the enforcement of obligations on non-governmental actors.

A. International agreements hold polluting parties responsible for the transboundary pollution and subsequent damages that they cause.

Principle 4 of the Draft Principles of Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities creates an international good faith obligation for the United States to ensure compensation for victims of transboundary damage caused by pollution within its territories. Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising Out of Hazardous Activities, in Report of the International Law Commission, 61 U.N. GAOR Supp. (No. 10) P 76, U.N. Doc. A/61/10 (2006). Principle 3 establishes the ultimate purposes of the Draft Principles as securing the aforementioned compensation for victims, and protecting and preserving the environment. *Id* at 72. Principle 13 of the Rio Declaration on Environment and Development corroborates this by requiring the United States to develop its own laws to impose liability on parties responsible and ensure compensation for victims, while Principle Sixteen specifies that the polluter should pay for such damages. Rio Declaration on Env't and Dev., at 3-4, UN Doc. A/CONF.151/26 (1992).

Therefore, if a non-governmental actor's transboundary pollution harms victims, then under the Trail Smelter Principle, it has enforceable obligations to compensate those victims.

1. The Principles of Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities require governments to limit transboundary pollution within their territories.

Principle 4 requires that "[e]ach State should take all necessary measures to ensure that prompt and adequate compensation is available for victims of transboundary damage caused by hazardous activities located within its territory or otherwise under its jurisdiction or control." Draft Principles, 61 U.N. GAOR Supp. (No. 10) P 76. Specifically, such measures "should include the imposition of liability on the operator or, where appropriate, other person or entity," with no evidentiary requirement of proof of fault. *Id*. Consistent with Principle 3, the purpose of the imposition of this liability is to ensure prompt and adequate compensation to victims of transboundary damage, and to preserve and protect the environment. *Id* at 72.

In order to make a valid claim that the Trail Smelter Principle imposes obligations enforceable against corporations and other non-governmental entities, the plaintiff must show that the defendant was responsible for the production of transboundary pollution. *Id*. Moreover, it must be demonstrated that the imposition of liability on the party responsible is for the purposes of mitigating environmental harm and the restoration or reinstatement of the environment are the focus of such efforts. *Id*. In order to impose obligations enforceable to those ends, the inquiry must establish the causational link between the party's activities and the environmental harm afflicting the plaintiffs caused by transboundary pollution. *See* Michael Burger & Jessica Wentz, *Holding fossil fuel companies accountable for their contribution to climate change: Where does the law stand?*, 74 Bulletin of the Atomic Scientists 397, 403 (2018). Therefore, if a company knowingly and significantly contributes to transboundary pollution through its activities, then it has obligations enforceable under the Trail Smelter Principle to compensate victims of the harm that its pollution caused.

2. The Rio Declaration on Environment and Development requires polluters to pay for the environmental damage that they cause.

The Trail Smelter Principle is consistent with the ideas enumerated in the Rio Declaration produced at the United Nations "Conference on Environment and Development" (UNCED) in 1992. The Rio Declaration laid out important international principles regarding transboundary pollution and corresponding enforceable. Principle 13 requires nations to create laws that impose liability and provide compensation for the victims of pollution, which also requires cooperation with other nations to achieve the same ends with respect to the environmental damage "caused by activities within their jurisdiction or control to areas beyond their jurisdiction." Rio Declaration, at 3, UN Doc. A/CONF.151/26. Principle 16 then establishes that national governments should internalize environmental costs by "taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment." *Id* at 4. This is a codification of the "Polluter-Pays" Principle, which has come to mean that the parties generating pollution, but not the government, should be the ones to pay for the costs of their pollution. Jonathan Remy Nash, *Too Much Market? Conflict Between Tradable Pollution Allowances and the "Polluter Pays" Principle*, 24 Harv. Envtl. L. Rev. 465, 466 (2000).

To make a valid claim that the Trail Smelter Principle can enforce obligations against non-governmental actors, it must be shown that the government of the country in which they reside has a legal structure to impose liability on the parties responsible for transboundary pollution, secure damages for victims, and cooperate with other countries to develop relevant international law. The party responsible for the pollution must pay for the damage that it has thereby inflicted on the environment in a manner consistent with the law of the state that the party resides in. *See City of Los Angeles ex rel. Dep't of Water & Power v. Great Basin Unified Air Pollution Control Dist.,* No. 1:12CV1683 AWI SAB, 2013 WL 1858397, at 7 (E.D. Cal.

May 2, 2013) (finding that Congress evinced its intent that polluters should pay by granting to the state broad authority to form implementation plans specific to different situations that fall under the Clean Air Act). Therefore, non-governmental actors can be subjected to obligations enforceable under the Trail Smelter Principle in the form of polluter pay plans for transboundary pollution.

B. The Trail Smelter Principle imposes enforceable obligations on non-governmental actors in accordance with precedent.

In previous disputes over the eponymous Trail Smelter in Canada, corporations have been held liable for the environmental damage caused by their transboundary pollution. In private nuisance suits, governments can also voluntarily intercede on behalf of the private parties, but this does not remove the obligations enforceable against those parties. As such, non-governmental actors have obligations enforceable under the Trail Smelter Principle to compensate victims for damages that their own transboundary pollution caused, and to prevent future harms.

In the eponymous *Trail Smelter* arbitration, the tribunal found that the Canadian corporate defendant owed compensatory damages to the American farmers harmed by the defendant's transboundary pollution, and that the corporation had an obligation to regulate its own polluting activities. Trail Smelter, 3 R.I.A.A. at 1965. This was notwithstanding the fact that the United States and Canadian governments were not involved in the original private nuisance suit, and only upon request of the parties did they voluntarily intercede. *Id*. Collectively, those voluntary actions turned the private nuisance suit into an international affair, when it could have remained between the two private parties. Under the Trail Smelter Principle, for a claim arising out of international tort between private parties, the parties' respective governments can disclaim international responsibility if they were not originally parties to the claim. *See Id.*; *Pakootas v.*

Teck Cominco Metals, Ltd., 452 F.3d 1066 (9th Cir. 2006). Liability is therefore imposed directly on the companies for their transboundary pollution. In a highly related case over the same smelter many years later, the Canadian corporation operating the Trail smelter in British Columbia was also found liable for the environmental harm to an American river that its transboundary pollution caused. *See Pakootas*, 452 F.3d at 1066. Therefore, there is precedent for the enforcement of obligations against non-governmental actors under the Trail Smelter Principle.

IV. IF OTHERWISE ENFORCEABLE, THE TRAIL SMELTER PRINCIPLE IS DISPLACED BY THE CLEAN AIR ACT.

The United States has codified and acted upon the Trail Smelter Principle through international agreements and subsequent unilateral measures, making it customary international law. Customary international law is federal common law. Federal common law is displaced by applicable federal legislation, and the Clean Air Act is applicable federal legislation in this case due to its penalization of non-governmental actors for pollution.

A. The Trail Smelter Principle is customary international law.

"[I]n order for a principle to become part of customary international law, States must universally abide by it." *Filartiga v. Pena-Irala*, 630 F.2d 876, 888 (2d Cir. 1980) (finding that customary international law includes only "well-established, *universally recognized* norms of international law"). However, States need not be successful in universally implementing international principles in order for a rule of customary international law to arise; rather, the principle must be more than merely professed or aspirational. *See Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 247–48 (2d Cir. 2003). Furthermore, a principle is only incorporated into customary international law if States accede to it out of a sense of legal obligation. *See, e.g., Chubb & Son, Inc. v. Asiana Airlines*, 214 F.3d 301, 307–08 (2d Cir.2000) ("Customary

international law results from a general and consistent practice of states followed by them from a sense of legal obligation." (quoting Restatement (Third) § 102(2)) (internal quotation marks omitted) (emphasis added)).

Thus, in order to make a valid claim that an international principle is international law, evidence of countries' formal law-making customs and practices must demonstrate that sense of obligation and concern. This is an inherently subjective inquiry, because the body of customary international law has an indeterminate character that is subject to different interpretations. *See Flores*, 414 F.3d at 247.

The Alien Tort Statute enables alien plaintiffs to sue in tort for violations of "the law of nations," a designation that the statute uses to refer to customary international law. 28 U.S.C. § 1350. For the case at present, the Trail Smelter Principle has been codified in multiple international agreements that the United States has acted upon by imposing liability on corporations for environmental harms, and by limiting corporations' ability to pollute. It is not merely aspirational, but rather an actionable agreement that the United States has made concrete efforts to abide by; for example, greenhouse gases were found to be subject to regulation under the Clean Air Act. Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 FR 66496-01 (2009). Power plant emissions have also been restricted under the Clean Power Plan. Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 FR 64662-01 (2015). These efforts, among others, are not simply arbitrary actions by the United States, as they are a significant step towards reducing pollution. The international impact of these actions lends credence to the agreements codifying the Trail Smelter Principle. Thus, the Trail Smelter Principle falls under the designation of customary international law.

B. Customary international law is federal common law.

United States courts have consistently respected the authority of customary international law. *See, e.g., Banco Nacional de Cuba v. Sabbatino,* 376 U.S. 399, 423, 84 S.Ct. 923 (1964). ("[I]t is, of course, true that United States courts apply international law as a part of our own in appropriate circumstances"); *The Paquete Habana,* 175 U.S. 678, 700, 20 S.Ct. 290 (1900) ("International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination").

The modern position is to treat customary international law as federal common law. Curtis A. Bradley and Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position,* 110 Harv. L. Rev. 815, 824 (1997). The inquiry to determine the status of customary international law in United States law depends on the nation's good faith in upholding international agreements, especially with regard to humane values. F. Giba-Matthews, *Customary International Law Acts As Federal Common Law in U.S. Courts*, 20 Fordham Int'l L.J. 1839, 1876–77 (1997). Additionally, as a matter of common sense, "international precepts should be judicially applied on a national rather than a state level". *Id.* The Supreme Court has also found that federal courts retain the authority to recognize new causes of action based on customary international law, subject to a few strict limitations, or "vigilant doorkeeping." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 729 (2004).

The Trail Smelter Principle is thus federal common law, as it is an established precedent of customary international law based on good faith. It permits the free use of a country's resources so long as that use does not harm the constituents or environment of another country, and so it is consistent with the nation's obligation to the rest of the international community to uphold international rules. Climate change and the concrete international harm caused by

transboundary pollution for the case at present are sufficient to be recognized as a new cause of action under federal common law.

C. Federal common law is displaced by applicable federal legislation.

The purpose of common law is to fill gaps in the laws made by the other branches of government. F. Giba-Matthews, *Customary International Law Acts As Federal Common Law in U.S. Courts*, 20 Fordham Int'l L.J. at 1877. The concern that human rights norms are liable to change without legislation is unfounded, because that contradicts this purpose. *Id*.

The 9th Circuit Court of Appeals has adhered to the doctrine of legislative displacement, which bars the application of federal common law when a federal statute directly addresses the question at issue. *Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 853 (9th Cir. 2012) (dismissing the federal common law claim of public nuisance because Congress had already authorized the Environmental Protection Agency to regulate greenhouse gas emissions under the Clean Air Act). Moreover, the Supreme Court has unanimously held that the Clean Air Act displaces federal common law public nuisance claims against emitters of greenhouse gases. *See Am. Elec. Power Co., Inc. v. Connecticut*, 131 S.Ct. 2527, 2531 (2011) (finding that Federal common law can even be displaced before the Environmental Protection Agency actually exercises its regulatory authority in setting emissions standards for polluting power plants; finding that the Clean Air Act displaced the federal common law nuisance and trespass claims which the city based on the domestic emission of greenhouses gases from fuels sold by defendants); *City of New York v. BP P.L.C.*, 325 F. Supp. 3d 466, 472 (S.D.N.Y. 2018). The Clean Air Act is a considered judgment of the legislature, since Congress delegated to the Environmental Protection Agency the decision of whether and how to regulate carbon-dioxide emissions from power plants. *Am. Elec. Power Co.,* 131 S.Ct. at 2531. It is the delegation of authority that displaces federal common law. *Id*.

In order to demonstrate that federal common law is displaced by applicable legislation, the inquiry should also consider courts' general deference to the legislature. Climate change and global warming raise significant and global dangers, and the fossil fuels that exacerbate those dangers are used around the world. Therefore, "[w]hile it remains true that our federal courts have authority to fashion common law remedies for claims based on global warming, courts must also respect and defer to the other co-equal branches of government when the problem at hand clearly deserves a solution best addressed by those branches." *City of Oakland v. BP P.L.C.*, 325 F. Supp. 3d 1017, 1029 (N.D. Cal. 2018) (finding that the city's public nuisance claims against fossil fuel producers, seeking damages for the anticipated harm to cities that would result from the rise of sea level as a result of combustion of fossil fuels, were foreclosed by the need for deference to the legislative and executive branches in international matters). The Supreme Court has also cautioned that if recognizing a new federal common law claim for relief could impact foreign relations, the judiciary should be "particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs." *Sosa*, 542 U.S. at 727.

Regarding the case at present, the Clean Air Act is applicable federal legislation for displacement purposes, since it already imposes significant financial penalties, as well as possible criminal liability, on non-governmental actors for their pollution. 229 Env. Couns. Article II; § 10:6. Federal environmental statutes containing criminal penalties—Clean Air Act, 1 Toxic Torts Litigation Guide § 10:6. As such, allowing private claims to proceed under the Trail Smelter Principle would create a redundant and extra obligation for these actors for the same action, which necessitates the use of the doctrine of legislative displacement. Moreover, the overall trend of judicial deference to the legislative and executive branches for international

matters indicates a strong precedential basis for upholding the doctrine of displacement. Therefore, an otherwise enforceable claim under the Trail Smelter Principle, such as the plaintiff's in the present case, is still displaced by the Clean Air Act.

V. THE PLAINTIFFS DO NOT HAVE A FIFTH AMENDMENT SUBSTANTIVE DUE PROCESS CLAIM AGAINST THE UNITED STATES GOVERNMENT.

A. The Fifth Amendment does not provide due process protections against private parties.

The Supreme Court made it abundantly clear in *Deshaney v. Winnebago County Department of Social Services* that the government has no obligation to protect private parties from themselves under the Due Process Clause. 489 U.S. 189 (1989). "Its purpose was to protect the people from the State, not to ensure that the State protected them from each other." *Id.* at 196.

Deshaney was an unfortunate case about a child who was abused by his father. Though the Winnebago County Department of Social Services had reason to suspect that Joshua DeShaney was being abused by his father, they never had sufficient evidence to do anything about it. *Id.* at 192. At one point, Joshua was briefly held in the custody of the court, but was returned to his father shortly thereafter. *Id.* Eventually, poor Joshua was beat by his father so badly that he became comatose. *Id.* at 193. Despite these tragic facts, the Court could not fault Winnebago County for them. Ultimately, the Court held that "[w]hile the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them." *Id.* at 201.

In this case, the United States has not done anything to directly cause greenhouse gas emissions to increase. The Plaintiffs' claims are based off of HexonGlobal's actions as a private company selling fossil fuels. The United States is not responsible for HexonGlobal's actions and should therefore not be held liable for said actions. Further the Due Process Clause "does not transform every tort committed by a state actor into a constitutional violation." *Id.* at 202.

B. There is no special relationship between the United States government and the Plaintiffs in this case.

In *Deshaney*, the court discussed one type of exception to the rule that the government is not responsible for the actions of private parties based on special relationships, and the *Estelle-Youngerberg* analysis for said exception. *Id.* at 197-201. The Court states that the analysis does not apply because the cases "stand only for the proposition that when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being." *Id.* at 200. That was not the case in *Deshaney*, and is not the case here.

C. This claim does not meet the test under any circuit's state-created danger exception.

Though the District Court declined to adopt the Ninth Circuit's government-caused danger exception [R. at 11.], the majority of circuits have some form of danger-created exception or have at least considered it on one or more occasions. See *Pena v. DePrisco*, 432 F.3d 98 (2d Cir. 2005); *Kneipp v. Tedder*, 95 F.3d 1199 (3d. Cir. 1996); *Pinder v. Johnson*, 54 F.3d 1169 (4th Cir. 1995); *Beltran v. City of El Paso*, 367 F.3d 299 (5th Cir. 2004); *Jones v. Reynolds*, 438 F.3d 685 (6th Cir. 2006); *Monfils v. Taylor*, 165 F.3d 511 (7th Cir. 1998); *Freeman v. Ferguson*, 911 F.2d 52 (8th Cir. 1990); *L.W. v. Grubbs*, 974 F.2d 119 (9th Cir. 1992). Assuming this court does decide to adopt the state-created danger exception, under any version of the test, this case will not qualify for that exception.

The Ninth Circuit uses the following factors to determine whether there is a government-caused danger: whether (1) the government's acts created the danger to the plaintiff; (2) the government knew its acts caused that danger; and (3) the government with deliberate indifference failed to act to prevent the alleged harm. *Juliana v. United States*, 217 F. Supp. 3d 1224, 1251 (9th Cir. 2016). The crux of the test is whether the government affirmatively acted in

some way. *See L.W. v. Grubbs*, 974 F.2d 119, 121 (9th Cir. 1992) (allowing a Section 1983 claim to move forward because "the defendant officer had affirmatively created the particular danger that exposed her to third party violence"); *Penilla v. City of Huntington Park*, 115 F.3d 707, 710 (9th Cir. 1997) ("We have interpreted *Deshaney* to mean that if affirmative conduct on the part of a state actor places a plaintiff in danger, and the officer acts in deliberate indifference to that plaintiff's safety, a claim arises under Section 1983").

Other circuits, such as the Third Circuit, have included a fourth element requiring a relationship between the government and the plaintiff, somewhat combining the two *Deshaney* exceptions: "(1) the harm ultimately caused was foreseeable and fairly direct; (2) the state actor acted in willful disregard for the safety of the plaintiff; (3) there existed some relationship between the state and the plaintiff; (4) the state actors used their authority to create an opportunity that otherwise would not have existed for the third party's crime to occur." *Kneipp v. Tedder*, 95 F.3d 1199, 1208 (3d Cir. 1996). However, as established above, there was no special or custodial relationship between the United States and these plaintiffs.

In this case, there was no affirmative action on the part of the government that led to plaintiff's cause of action. Nothing the United States has done meets all three factors for state-created danger as set out by the Ninth Circuit.

1. The United States' actions did not create the danger to the plaintiff.

The United States has not created any danger to the plaintiff because it did not directly cause any of the greenhouse gas emissions in question, that were actually created by HexonGlobal. The danger caused by climate change and consequences were the direct result of greenhouse gas emissions from fossil fuels sold by companies like HexonGlobal. In *Juliana*, the court allowed the plaintiffs' case to continue because they had alleged sufficient facts that, when taken as true, would satisfy the requirements for a danger creation claim. *Juliana*, 217 F. Supp.

1224, 1251-52. Even taking the Plaintiffs' allegations as true in this case, they have not alleged enough facts to connect the United States to the issue of fossil fuel sales and combustion. The causal chain between the United States' actions and the issue of climate change is far too attenuated.

2. The United States was not aware of the danger of greenhouse gas emissions.

Regardless of how this court decides the first factor of the danger-creation test, the United States should not be found to have been aware of the danger of greenhouse gas emissions. Even though the heat-retention properties of carbon dioxide and methane have long been known, it was not until the 1970s that it became well known that the sales and usage of fossil fuels would lead to substantial climate change and seal level rise. R. at 5. As the lower court stated "the majority of government actions complained of long predated any awareness of the potential dangers of human induced climate change." R. at 11.

3. The United States did not act with deliberate indifference with regard to climate change and its consequences.

Again, regardless of how this court decides the other factors of this test, it is clear that the United States had not acted with deliberate indifference to the consequences of climate change. Since learning of the dangers of greenhouse gas emissions and climate change, the United States has taken steps to address and lower emissions. The United States signed on to the United Nations Framework Convention on Climate Change in 1992, which set a goal of stabilizing the amount of greenhouse gases in the atmosphere at a concentration that would lead to dangerous human-caused climate change. R. at 6. The United States Environmental Protection Agency made an endangerment finding in 2009 that there was a potential danger to health and welfare from the emissions of greenhouse gases and consequent climate change. 74 Fed. Reg. 66,496 (Dec. 15, 2009).

Since the endangerment finding, the United States has taken many more proactive steps to curb greenhouse gas emissions and tackle the problem of climate change. *See, e.g.,* 75 Fed. Reg. 25,324 (May 7, 2010) (setting fuel economy standards and greenhouse gas emission rates for passenger cars and light trucks); 75 Fed. Reg. 31,514 (June 3, 2010) (requiring major new sources of greenhouse gases to establish technology based limits for greenhouse gas emissions); 80 Fed. Reg. 64,510 (Oct. 23, 2015) (creating new standards for carbon dioxide emissions from new power plants). The United States has undoubtedly shown that it is not indifferent to the danger that greenhouse gas emissions and climate change pose. It takes time for the government to catch up with science and vice versa. But, in the time since learning that excess, anthropogenic greenhouse gas emissions pose a threat to the stability of the atmosphere and can cause further problems such as sea level rise, the United States has undertaken the task of dealing with that.

VI. BOTH OF THE PLAINTIFFS' LAW OF NATIONS AND PUBLIC TRUST CLAIMS ARE NON-JUSTICIABLE POLITICAL QUESTIONS.

Both Mana's law of nations claim and Flood's public trust claim are claims under federal common law. As explained in Section IV of the Argument above, these claims are displaced by the Clean Air Act and should not be allowed to continue. Barring that, however, this Court still does not have jurisdiction to decide to rule on these claims because they are non-justiciable political questions.

Baker v. Carr gives us six factors to determine whether an issue is 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."

369 U.S. 186, 217 (1962). In applying these factors to both of the plaintiffs' claims as mentioned above, it is clear that the court cannot decide these issues.

A. Flood's public trust claim is a non-justiciable political question.

In *Kivalina*, the court found that a similar claim against an oil company based on the public nuisance doctrine was a non-justiciable political question. 663 F. Supp. 2d 863 (N.D. Cal, 2009), *aff'd* 696 F.3d 849 (9th Cir. 2012). The second and third *Baker* factors were what caused the court to determine that the claim was a political question. *Id.* at 876-77. Only the court's reasoning for the third factor is relevant here though. The third *Baker* factor is about whether the court can decide the question "without an initial policy determination of a kind clearly for nonjudicial discretion." *Baker*, 369 U.S. 186, 217. The court in *Kivalina* found that, in order to resolve the village's claim, the court would have to make "a determination of what would have been an acceptable limit on the level of greenhouse gases emitted by Defendants," *Kivalina*, 663 F. Supp. 2d 849, 876, as well as "a policy decision about *who* should bear the cost of global warming. *Id.* at 876-77.

In this case, the Court would have to make similar conclusions in order to resolve Flood's public trust claim. It would have to decide what the United States' greenhouse gas emissions policies should have been, and how to allocate the cost of climate change. There is no doubt that these are political questions that should not be decided by the Court.

B. Mana's law of nations claim is a non-justiciable political question.

Mana's claim is similarly problematic for the Court to hear because it would require the Court to make the same policy decisions about the proper level of greenhouse gas emissions and the correct way to allocate costs from climate change. Without more guidance from the political branches of the government, there is no way for the courts to resolve the Plaintiffs' claims in this case.

CONCLUSION

For the above stated reasons, the United States respectfully requests that this Court affirms the dismissal of the Plaintiffs' claims.