Team No. 42

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IN THE UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

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Docket No. 18-000123

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

*Appellants,*

*v.*

DEFENDANT CORPORATION,

*Appellee,*

*and*

THE UNITED STATES OF AMERICA,

*Appellee.*

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Petitions for Review of the Decision from the United States District Court For New Union Island
in No. 66-CV-2018

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BRIEF FOR THE ORGANIZATION OF DISAPPEARING ISLAND NATIONS, APA MANA,
and NOAH FLOOD
*Appellant*

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Oral Argument Requested

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# JURISDICITONAL STATEMENT

Defendant operates refineries throughout the world, including one refinery on New Union Island, therefore Defendant has consented to general personal jurisdiction in all courts in the Territory of the New Union Islands. This general personal jurisdiction gave the District Court for the New Union Island jurisdiction in this matter. The District Court dismissed the complaint for a failure to state a claim for relief. Appellants appeal to the United States Court of Appeals for the Twelfth Circuit. The Courts of Appeals has jurisdiction to review all final decisions of the district courts of the United States as stated under 28 U.S. Code § 1291. In addition, Federal Question cases are conducted under Federal Court's jurisdiction; the present case involves a violation of the Fifth Amendment. All proceedings have been filed in a timely manner. 28 U.S.C. § 1331.

# STATEMENT OF THE ISSUES

I. Under Alien Tort Statute, 28 U.S.C. § 1350, can Apa Mana bring a claim against a domestic corporation when the action is sufficiently definite under international law?

II. Under the Alien Tort Statute is the *Trail Smelter* Principle recognized principle of customary international law enforceable as the "Law of Nations" when the principle is a matter of mutual concern and acceded to by the states?

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

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

V. Under the Fifth Amendment, is there a cause of action against the United States when the government fails to protect global atmospheric climate systems?

VI. Under the law of the nations, is there a non-justiciable political question when the issue can be properly addressed by the judiciary?

   A. Under Article III, when does the court have authority and competence to render a decision?

   B. Under Article III, what must ODIN show to prevail under "case and controversies"?

# STATEMENT OF THE CASE

## Statement of the Facts

A'Na Atu and New Union Islands are located in the East Sea. R. at 3. Appellant, Apa Mana, is an alien national of the island nation of A'Na Atu; Appellant, Noah Flood, is a United States Citizen resident of the New Union Islands, a U.S. possession. R. at 3. Both islands are low-lying islands with a maximum height above sea level less than three meters. R. at 4. The areas populated on both islands are even less, below one meter in elevation. R. at 4. These islands will be uninhabitable if the sea level rises one-half to one meter higher. R. at 4. Apa Mana and Noah Flood own homes on these islands, and reside, in communities with an elevation of less than one-half meter above sea level. R. at 4,5. Both have suffered seawater damage to their homes during several storms over the past three years, as well as, seawater intrusion into their drinking water wells. R. at 5. Such damage would not have occurred in the absence of the greenhouse gas induced sea level rise which has already occurred. R. at 5. In addition, both individuals rely on locally caught seafood as an important part of their diet and if the climate change induced ocean acidification, warming, and loss of coastal wetlands will reduce ocean productivity and reduce the availability of the locally caught seafood. R. at 5.

Carbon dioxide and methane are trace atmospheric gases known as "greenhouse gases" because like windowed-walls of a greenhouse, these gases have an insulated effect which leads the Earth to retain heat. R. at 4. Greenhouse gases play an important role in balancing amount of solar radiation that reaches the Earth and the amount of heat that is radiated from Earth back into space. R. at 4. Minute amounts of greenhouse gas would result in colder global temperatures, whereas, and excessive amounts would result in higher global temperatures. R. at 4. Humans burning fossil fuels substantially increases the concentrations of methane and carbon dioxide in

the atmosphere. R. at 4. If the temperatures continue to rise, the average sea level will likely rise between one-half and one meter by the end of this century. R. at 4.

Defendant, The United States, has historically been the largest, single national contributor to emissions of greenhouse gases – twenty percent of cumulative global, human-caused greenhouse gas emissions to date. R. at 5, 6. Defendant, HexonGlobal, is the surviving corporation resulting from the merger of all of the major United States oil producers. R. at 5. Defendant operates refineries throughout the world, including one refinery located in New Union Island. R. at 5. Defendant's corporation is responsible for thirty-two percent of the United States cumulative fossil-fuel related greenhouse gas emission, or six percent of global historical emission. R. at 5. The United States has taken several steps towards attempting to regulate domestic greenhouse gas emissions, in 2007 the Supreme Court announced that greenhouse gases, including carbon dioxide, were "pollutants" that were potentially subject to regulation under section 202(a)(1) of the Clean Air Act, 42 U.S.C. § 7521 (2018). R. at 6. Following this, the Environmental Protection Administration (EPA) made a finding that the emission of greenhouse gases and resulting climate change had the potential to endanger the public health and welfare, setting the regulatory predicate for regulation of greenhouse gas emissions under the Clean Air Act. R. at 6. However, despite attempts at regulatory actions, the United States' greenhouse gas emissions have only slightly decreased, while global greenhouse gas emissions have increased. R. at 7. In addition, the Trump administration has proposed to reverse the regulatory measures and commitments – intending to withdraw from the Paris Agreement, the United States' agreement to reduce their future greenhouse gas emissions independently. R. at 7. This withdrawal will lead to continuing increases in climate change affecting the entire globe. R. at 7.

## Procedural History

This is a petition to review District Court's refusal to acknowledge Appellant's claims under the *Trail Smelter* Principle and Due Process based public trust rights to governmental protection from atmospheric climate change. R. at 1. The Organization of Disappearing Island Nations ("ODIN"), is a not-for-profit membership organization devoted to protecting the interests of nations threatened by sea level rise. R. at 3. ODIN, along with individuals, Apa Mana and Noah Flood, bring concerns of limiting emissions of greenhouse gases because of the possibly inhabitability of island nations of A'Na Atu and New Union Islands due to rising sea levels. R. at 3,4.

The joined Appellants (from here on, referred to as "ODIN") brought this action against defendant's corporation and the United States of America for their irresponsible emissions of greenhouse gases. R. at 3. Defendant's persisted use of fossil fuels for profit while knowing that continued global sales and combustion of fossil fuel products would result in substantial harmful global climate change and rising sea levels. R. at 5. ODIN claims that defendant's greenhouse gas emissions within the United States constitutes an actionable violation of the law of nations. Despite the serious threat that greenhouse emissions impose on climate change, the District Court dismissed the claim for a failure to state a claim for relief. R. at 10, 11.

The District Court dismissed ODIN's claim of violation of Due Process, reasoning that the complaint fails to state a claim for relief under the Fifth Amendment of the Constitution. R. at 11. Both complaints were dismissed on August 15, 2018. R. at 1,11. The Organization for Disappearing Island Nations, Ms. Mana, and Mr. Flood ("ODIN") filed a notice of appeal to the order on August 15, 2018 to the United States Court of Appeals for the Twelfth Circuit. R. at 1.

The parties take issue with the holdings dismissing their complaints, but do not dispute standing. R. at 1.

## STANDARD OF REVIEW

An action may be dismissed if the complaint fails to state a claim upon which relief can be granted. Federal Civil Rule 12(b)(6). This court's review is subject to the Federal Rules of Civil Procedure, a complaint must contain sufficient factual matter to, "state a claim for relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). This court's review is de novo of the district court's dismissal for failure to state a claim, assuming all well-plead, nonconclusory factual allegations in the complaint to be true. See *Iqbal*, 129 S. Ct. at 1949-50; *Selevan v. N.Y. Thruway Auth.*, 584 F.3d 82, 88 (2d Cir. 2009). The court will also review questions of subject matter jurisdiction de novo. *Bank of N.Y. v. First Millennium, Inc.*, 607 F.3d 905, 920 (2d Cir. 2010); *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 241 (2d Cir. 2003).

## SUMMARY OF ARGUMENTS

The Alien Tort Statute ("ATS") states that, "the district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. The Supreme Court of the United States made clear that the ATS was intended only as a jurisdictional grant, however, the Court believes that the statute was intended as jurisdictional in the sense of granting power to address cases concerned with a certain subject matter as well. The Supreme Court decision caused a split among circuits, however, the majority hold or assume that domestic corporations can be liable under the Alien Tort Statute.

The Alien Tort Statue permits an alien to assert tort action for violations of the United States' treaty, as well as, for violations of "the law of nations," which refers to the body of law known as customary international law. Customary international law is composed only of those rules that are universally abided by, out of a sense of legal obligation and mutual concern; customary international law addresses only those "wrongs" that are "of mutual, and not merely several, concern". Therefore, the *Trail Smelter* Principle is a recognized principle of customary international law, enforceable as the "Law of Nations" under the Alien Tort Statute because the principle is of mutual concern and acceded to by the States.

Under the case law of the Second Circuit, when applying the Alien Tort Statute, the Court should look towards international customary law. When the Court is determining the international customary law to be applied, the court should look at what norm has been violated. The *Trail Smelter* Principle imposes obligations on a nation to use its territory in a way that it will not pollute and harm the neighboring nation. The *Trail Smelter* Principle applies if there are serious consequences resulting from the action of the nation. Although the *Trail Smelter* Principle applies to nations, it is the only international law doctrine that has been established on the issue of air pollution. Therefore, the *Trail Smelter* Principle is the piece of international customary law that needs to be applied to this situation.

Courts have displaced common law with federal Statutes. Additionally, courts have used the Clean Air Act, 42 U.S.C. § 7521 (2018) to displace common law nuisance claims. The Alien Tort Statute is a federal act that can be used to established jurisdiction over international law claims. Therefore, because this is an issue of international law and the claim is not brought under the common law, the court should not displace the Trail Smelter Principle with the Clean Air Act.

The Fifth Amendment guards against government infringement on individuals' rights without due process. The global atmospheric climate system is a fundamental right. The government not only failed to protect the atmosphere but contributed to the failing system. ODIN properly showed that the government infringed upon a fundamental right and that that government had a duty to act.

There is not a non-justiciable political question because the issue can be appropriately decided by the judiciary. The judiciary has the ability to decide the legal issue pursuant to Article III. This is a legal issue because it does not fall under any of the Baker test factors. Therefore, the claim can be decided and judgment should be found for ODIN because it fulfills the "cases and controversies" elements spelled out in Article III.

# ARGUMENTS

## I. THE DISTRICT COURT ERRED BY DISMISSING APA MANA'S CLAIM UNDER THE ALIEN TORT STATUTE, 28 U.S.C. § 1350, AGAINST A DOMESTIC CORPORATION BECAUSE HER ACTION IS SUFFICIENTLY DEFINITE TO SUPPORT A CAUSE OF ACTION UNDER INTERNATIONAL LAW.

The Alien Tort Statute ("ATS") states that, "the district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. For jurisdiction to vest under 28 USCS § 1350, three elements must be present; first, the claim must be made by aliens; second, it must be for a tort; and third, the tort must be in violation of law of nations or treaties of United States. *Hanoch Tel-Oren v. Libyan Arab Republic*, 517 F. Supp. 542 (D.D.C. 1981). "Tort" means wrong in violation of law of nations, rather than merely wrong actionable under law of appropriate sovereign state. This means the court will determine substantive principles to be applied by looking to international law. *Filartiga v. Pena-Irala*, 630 F. 2d 876 (1980).

The requirements of the Alien Tort Statute are fulfilled. First, Mana is an alien because she is a national of A'na Atu. Second, defendant has caused a harm to ODIN's health and property by burning fossil fuel in excess. Third, this excessive production violates a principle of the law of nations, or customary international law.

The Supreme Court of the United States made clear that the ATS was intended as a jurisdictional grant, not as authority for the creation new tort actions in violation of international law. *Sosa v. Alvarez-Machain,* 542 U.S. 692, 713 (2004). However, the Court also believes that the statute was intended as jurisdictional in the sense of addressing the power of the courts to entertain cases concerned with a certain subject matter. *Id.* at 714. These additional jurisdictional inquiries include, but may not be limited to, a determination that: the complaint pleads a violation of the law of nations, *see Sosa*, 542 U.S. at 732; *Kadic v. Karadzic*, 70 F.3d 232, 238 (2d Cir. 1995); the theory of liability alleged by plaintiffs is recognized by customary international law, *see Khulumani v. Barclay National Bank Ltd.*, 504 F.3d 254, 264 (2d Cir. 2007) (Katzmann, J., concurring).

First, the Supreme Court determined that a claim may not be brought against a foreign corporation but left open the question of whether a domestic corporation may have a claim brought against it under the ATS when pleading a violation of the law of nations. *Jesner v. Arab Bank, PLC*, 138 U.S. 1386, 1407 (2018). The Court decided the criteria for federal courts in accepting a cause of action subject to jurisdiction under § 1350; courts should recognize claims for violations of any international law norm with definite content and acceptance among civilized nations. *Sosa*, 542 U.S. at 732.

The Court in *Sosa* observed, "whether a norm is sufficiently definite to support a cause of action" raises a "related consideration of whether international law extends the scope of liability

for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual." *Sosa*, 542 U.S. at 732 & n.20. This left a split among circuits, but all but one of the cases at the circuit level hold or assume that corporations can be liable. *Romero v. Drummond Co*., 552 F.3d 1303, 1315 (11th Cir. 2008); *Herero People's Reparations Corp. v. Deutsche Bank*, 370 F.3d 1192, 1195 (D.C. Cir. 2004); *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161, 163 (5th Cir. 1999); *see also Abdullahi v. Pfizer, Inc.*, 562 F.3d 163, 174 (2d Cir. 2009); *Sarei v. Rio Tinto, PLC*, 550 F.3d 822, 831 (9th Cir. 2008) (en banc).

The second circuit has developed strong case law on the application of whether international customary law through the Alien Tort Statute establishes jurisdiction over a corporation. *Kiobel v. Royal Dutch Petroleum*, 621 F.3d 111, 117 (2d Cir. 2010). The case involved several citizens from Nigeria who sued Dutch, British, and Nigerian oil companies who aided and abetted the Nigerian government in committing violations of the law of nations. *Id.* The Claims brought by the plaintiffs included "aiding and abetting arbitrary arrest and detention; crimes against humanity; and torture or cruel, inhuman, and degrading treatment." *Id.* at 124. Ultimately, the court decided to extend liability to a private corporation because precedent established that the Alien Tort Statute could be applied to state officials, private individuals, and aiders and abettors. *Id.* at 130.

The present case establishes a valid claim of international law violations with a potential for personal liability – holding the corporation liable. The act of emitting greenhouse gases into the environment causes a harmful effect, this harm has been acknowledged by many nations of the world. *Sosa* determined that claims must be sufficiently definite to fulfill the law of the nations' tort action. *Sosa* left the door open and *Kiobel* decided to fill it – stating that liability does extend to corporations. This thoroughly policy-based decision applies to ODIN's claim – state officials

or aiders and abettors would be liable for international harms, corporations need to take responsibility as well.

This extension of liability to aiders and abettors directly implicates fourth element stated previously – the theory of liability alleged by plaintiffs is recognized by customary international law, *see Khulumani v. Barclay National Bank Ltd.*, 504 F.3d 254, 264 (2d Cir. 2007) (Katzmann, J., concurring). Customary international law generally recognizes the need to hold aiders and abettors personally liable; we have already determined that personal liability extends to corporations.

In determining the theory of aiding and abetting, the court must engage in a two-step jurisdictional analysis of this conduct. *Mastafa v. Chevron Corp.*, 770 F.3d 170, 185 (2d Cir. 2014) The first step is to determine whether the "relevant" conduct sufficiently "touches and concerns" the territory of the United States so as to displace the presumption against extraterritoriality. *Kiobel*, 133 S. Ct. at 1669. The second step is to make a preliminary determination that the relevant conduct may in fact be relied upon in establishing jurisdiction. *Mastafa*, 770 F.3d 170 at 186. The complaint must adequately state a claim that the defendant violated the law of nations *or* aided and abetted another's violation of the law of nations. *Id. (emphasis added.)* It must be "plausible," and allow the court "to infer more than the mere possibility of misconduct[.]" *Iqbal*, 556 U.S. at 679. The complaint must appear to satisfy the standard for alleging a violation of the law of nations or aiding and abetting such a violation. *Mastafa*, 770 F.3d 170, at 186.

In the present case, the action must sufficiently "touches and concern" the territory of the United States. It has been previously distinguished that mere nationality or citizenship is pertinent only insofar as it relates to its alleged U.S. conduct. *Mastafa*, 770 F.3d 170 at 190. The

United States is a part of the Paris Agreement, this means the United States has promised to reduce its contribution to global warming. Defendant as a corporation is aiding and abetting the United States' failure to decrease its greenhouse gas emissions. Defendant is the main source of producing thirty-twopercent of the U.S. greenhouse gas emission and six percent of the entire globe. This conduct aids and abets global warming and a claim may be brought against it under the ATS.

Defendant is likely to counter that this theory of aiding and abetting fails because it has been long recognized in only the criminal realm of international law. *Kiobel,* 621 F.3d 111 at 268. Defendants likely counter that there is a need for an mens rea, or guilty mind, element to this method. Defendants would argue that since these actions were done without intending a bad effect, they cannot be liable. Unfortunately, the international legislation is less helpful in identifying a specific standard in this regard. *Id*. at 277. However, there is case law that provides for aiding and abetting in the environmental sense has a set standard, "substantial assistance" Defendants' counter would fail under this standard because the environmental sense should apply to a domestic corporation under the ATS.

For the foregoing reasons, the District Court erred by dismissing Apa Mana's claim under the Alien Tort Statute, 28 U.S.C. § 1350 against a domestic corporation because the action is sufficiently definite to support to extend personal liability to a corporation under international and the claim appropriately illustrates the defendants aiding and abetting.

## II. UNDER THE ALIEN TORT STATUTE, THE *TRAIL SMELTER* PRINCIPLE IS RECOGNIZED AS CUSTOMARY INTERNATIONAL LAW WHEN THE PRINCIPLE IS A MATTER OF MUTUAL CONCERN AND ACCEDED TO BY THE STATES.

The Alien Tort Statue permits an alien to assert a cause of action in tort for violations of a treaty of the United States and for violations of "the law of nations," which, as used in this statute, refers to the body of law known as customary international law. 28 U.S.C. § 1350. The principle of *Trail Smelter* refers to a trail in British Columbia between 1906 and 1995, where there was a disposal of hazardous materials into the Columbia River. *Pakootas v. Teck Cominco Metals, Ltd.*, 452 F.3d 1066, 1069 (9th Cir. 2006). Although the discharge took place within Canada, the EPA concluded that hazardous substances from the Trail Smelter were carried downstream in the passing river current and settled in slower flowing quiescent areas. *Id.* at 1069-70. The result was the *Trial Smelter Arbitration*, in which an international arbitral panel held that the harms, to the State of Washington's agricultural interest, caused by air pollution emissions from a smelter in British Columbia were a violation of international liability principles. 3 U.N.R.I.A.A. 1965 (1941).

This principle was thereafter adopted by the Declaration of the 1972 Stockholm Conference on the Human Environment as Principle 21: "states have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environment policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction." U.N. Conference on the Human Environment, Stockholm, *Declaration of the United Nations Conference on the Human Environment*, 5 U.N. Doc A/CONF .48/14/REv. 1 (June 16, 1972).

With these principles established, it must then be determined what offenses violate customary international law. *Flores v. S. Peru Copper Corp.,* 414 F.3d 233, 247 (2d Cir. 2003). Customary international law, as the term itself implies, is created by the general customs and practices of nations; therefore, it does not stem from any single, definitive, readily-identifiable source. *Id.* These characteristics give the body of customary international law a "soft, indeterminate character." *Id*. *See also* Louis Henkin, *International Law: Politics and Values* (1995). Generally, customary international law is composed only of those rules that States universally abide by out of a sense of legal obligation and mutual concern. *Id.* Customary international law addresses only those "wrongs" that are "of mutual, and not merely several, concern" to States. *Filartiga*, 630 F.2d at 888. Matters of "several" concern among States are defined as matters to which States are separately and individualistically interested. *See Oxford English Dictionary*.

Taking what has been established, in the present case, it is apparent that the *Trail Smelter* Principle is recognizable international law under the Alien Tort Statute because States universally abide. The *Trail Smelter Arbitration* was an international panel that held that the harms to agricultural interests caused by air pollution emissions from a smelter were a violation of international liability principles. The present case is strongly similar to the facts of *Trail Smelter.* Apa Mana, an alien national of the island nation of A'Na Atu, asserts that defendant's burning of fossil fuel violates a principle of the law of nations. Similar to the *Trail Smelter case*, an individual's habitat is being disrupted and destroyed by greenhouse gas emissions from a distant entity that is causing the sea levels to rise at an increasingly higher rate. In addition, the facts alleged in this case present a wrong that is of mutual concern to States – greenhouse gas emissions are a wrong that is affecting the globe. Creating a substantial increase of the

concentrations of methane and carbon dioxide in the atmosphere. Therefore, causing increased temperatures and rising sea levels, which is a mutual concern of States and is validated by the creation of the Paris Agreement.

As a corporation, in one of the most industrial countries in the world, defendant is likely to argue that the corporation is conducting business and it happens to be emitting greenhouse gases into the environment. Defendants would argue that the principle in which ODIN is attempting to bring action do not constitute mutual concern among the nations of the world. To rebut this simplistic argument, the Paris Agreement is just one of many strides by numerous states to combat the mutual concern of environmental harm as addressed in the U.N. Conference on the Human Environment, the Declaration of the United Nations Conference on the Human Environment, and the Kyoto Protocol. The states have demonstrated by these movements that emissions of greenhouse gases from individual states that affect the entire globe are a matter of mutual concern.

For the foregoing reasons, the *Trail Smelter Principle* is a recognized principle of customary international law enforceable as the "Law of Nations" under the Alien Tort Statute because the principle is of mutual concern and acceded to by the States.

## III. UNDER THE TRAIL SMELTER PRINCIPLE, THERE ARE OBLIGATIONS IMPOSED ON A NON-GOVERNMENTAL ACTOR THAT REQUIRE ITS PROPERTY TO BE USED IN A MANNER SO AS TO NOT CAUSE INJURY BY FUMES TO ANOTHER PERSON OR PROPERTY

Obligations imposed on non-governmental actors determine the scope of liability in the event of a violation; the scope extends insofar as there is a "'violation of a given norm'" by a "'private actor such as a corporation or individual.'" *Kiobel v. Royal Dutch Petroleum*, 621 F.3d 111, 127

(2d Cir. 2010) (quoting *Sosa* 542 U.S. at 732). "[T]he scope of liability for ATS violations should be derived from international law." *Kiobel v. Royal Dutch Petroleum*, 621 F.3d 111, 128 (2d Cir. 2010) (citing, *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 258 (2d Cir. 2009). Therefore, the scope of liability under the Alien Tort Statute requires a tort "'committed in violation of the law of the nations'" and this law must acknowledge the defendant's obligations in regard to that violation.

*Trail Smelter Arbitration* is still the only piece of international law to deal with the issue of air pollution. Austen L. Parrish, *Trail Smelter Deja Vu: Extraterritoriality, International Environmental Law, and the Search for Solutions to Canadian-U.S. Transboundary Water Pollution Disputes*, SSRN ELECTRONIC JOURNAL (2004). The Trail Smelter Principle set the standard for imposing obligations. The standard that needs to be met under the *Trail Smelter* Principle to be applicable is "when the case is of serious consequence and the injury is established by clear and convincing evidence." 3 U.N.R.I.A.A. 1965 (1941).

The *Trail Smelter Arbitration* of 1941 established the piece of international customary law. Within this case the defendant, a Canadian Corporation owned and operated a smelter that emitted hazardous fumes that carried from its location in Canada to the neighboring state of Washington, crossing international boundaries. 3 U.N.R.I.A.A. 1965 (1941). The court decided that Canada was liable and needed to act to control the emissions of harmful gases. *Id.* Ultimately, Canada was required to pay damages for the harm caused by the pollution. The court reasoned, Canada is responsible for dealing with the Smelter and should regulate the corporation within the laws and requirements of the nation. *Id.*

Failure to fulfill the obligations of the international standards results in serious consequences. In *Georgia v. Tennessee Copper Co.*, a case the *Trail Smelter Arbitration* leaned

heavily on for precedent, established serious consequences that meet a clear and convincing standard. *Georgia v. Tenn. Copper Co.*, 237 U.S. 474, 477 (1915). *Georgia* involved a smelting operation that in June of 1913 the company shipped more than 846,000 pounds. *Id.* It was determined that the amount of sulfur emitted by the company in that single month was thirty tons per day, seven percent of the year's total, which was well above the average emissions in other months. *Id.* The Court in *Georgia* determined that the excessive emissions of sulfur resulted in serious consequences. The court reasoned that this determination is clear and convincing due to the massive amount of sulfur emitted in one day alone. Corporations have an obligation to use its property in a manner that will not harm others – emitting thirty ton per day disregards this obligation.

The *Trail Smelter* Principle can be used to impose obligations on the defendant in our current case. Defendant is similar to *Trail Smelter Arbitration* because defendant is an American corporation causing harm to ODIN, whereas, *Trail Smelter* involved a corporation operating the smelter in Canadian causing harm in the United States. The pollution created by the smelter forced the court to place obligations on Canada. The corporation needed to take steps to enforce the standards of the country – not using its property to harm others. Although, the *Trail Smelter* Principle is the only international pollution law, this principle directly applies to defendant. Therefore, the court should hold the defendant to this standard – a corporation must refrain from polluting across state boundaries.

The emissions caused by HexonGlobal resulted in a serious consequence. This is similar to *Georgia* because the smelting operation was contributing a well-above average amount of emissions. The emissions by HexonGlobal, as a result of a merger of United States oil producers, has produced thirty-two percent of the United States greenhouse gas emissions and six percent of

the global historical emissions. Therefore, HexonGlobal's large contribution to the greenhouse gas emissions causes a serious consequence.

## IV. UNDER THE CLEAN AIR ACT, THE TRAIL SMELTER PRINCIPAL SHOULD NOT DISPLACE BECAUSE IT ADDRESSES FEDERAL STATUTE, NOT COMMON LAW.

The *Trail Smelter* Principle should not be displaced by the Clean Air Act, 42 U.S.C. § 7521 (2018) because the Clean Air Act displaces common law, not a federal statute that grants jurisdiction such as the Alien Tort Statute. The *Trail Smelter Arbitration* states 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." 3 U.N.R.I.A.A. 1965 (1941). The *Trail Smelter* Principle should be followed and not displaced by the Clean Air Act because displacement of a law occurs "'[w]hen Congress addresses a question previously governed by a decision rested on federal common law[.]'" *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 423 (2011) (quoting *Milwaukee v. Ill.*, 451 U.S. 304, 314 (1981)). To determine "whether congressional legislation excludes the declaration of federal common law" it must ask "whether the statute speaks directly to the question at issue." *Id.*

Many courts have used the Clean Air Act, 28 U.S.C. § 1331 to displace various forms of common law. The court in *American Electric Power Company* held, "the Clean Air Act and the EPA actions it authorizes displace any federal *common-law* right to seek abatement of carbon-dioxide emissions from fossil-fuel fired powerplants." *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 424 (2011) *(emphasis added).* In *Am. Elec. Power Co. v. Connecticut*, the plaintiffs brought an action against the defendant under the federal common law of interstate nuisance because the defendants' carbon dioxide emissions created a "substantial and unreasonable

interference with public rights." *Id.* at 418. The Court held *Am. Elec. Power Co. v. Connecticut* that the Clean Air Act will displace federal common law.

In *Native Village of Kivalina v. ExxonMobil Corp.* the court decided to uphold the decision from *Am. Elec. Power Co. Native Village of Kivalina* which held that "when federal statutes directly answer the federal question, federal common law does not provide a remedy because legislative action has displaced the common law." *Kivalina v. Exxon Mobil Corp.*, 663 F. Supp. 2d 849, 856 (N.D. Cal. 2009).

The standard of displacement was determined in *City of Oakland v. BP P.L.C.* The *City of Oakland* involved defendants being sued for common law nuisance, in addition, there was also a suit for creating a common law nuisance outside of the United States. The court decided that displacement was proper because the claims were "foreclosed by the need for federal courts to defer to the legislative and executive branches when it comes to such international problems." *City of Oakland v. BP P.L.C.*, 325 F. Supp. 3d 1017, 1024 (N.D. Cal. 2018). The court reasoned that "plaintiffs' nuisance claims centered on defendants' placement of fossil fuels into the flow of international commerce, and because foreign emissions are out of the EPA and Clean Air Act's reach, the Clean Air Act, did not necessarily displace plaintiffs' federal common law claims." *Id.* at 1024. Therefore, when there is a claim based on foreign emissions, the Clean Air act cannot reach the international law.

Displacement has been founded in other cases. In *City of New York* held that where "climate-change related injuries are the direct result of the emission of greenhouse gases from the combustion of Defendants' fossil fuels, and not the production and sale of those fossil fuels . . . ultimately seeks to hold Defendants liable for the same conduct at issue in AEP and Kivalina." *City of N.Y. v. BP P.L.C.*, 325 F. Supp. 3d 466 (S.D.N.Y. 2018). This court held that this claim of

domestic greenhouse emissions would be displaced by the Clean Air Act. This is to say that the claim was displaced not because of the creation of the oil, but because of the domestic emissions of the oil.

Other courts did not follow *Am. Elec. Power Co.* and chose not to displace claims with the Clean Air Act when the claim is grounded in a federal statute. The court in *Al Shimari v. CACI Premier Tech., Inc.* found that "plaintiffs' ATS claims are grounded in federal statute, not merely in federal common law like the claims in AEP. As such, the claims cannot be so easily displaced by other federal statutes, which are entitled to no more respect than the ATS." *Al Shimari v. CACI Premier Tech., Inc.,* No. 1:08-cv-827 (LMB/JFA), 2018 U.S. Dist. LEXIS 132943 at *77 (E.D. Va. Feb. 21, 2018). The reasoning *Al Shimari* held that the Anti-Torture Act ("ATA") 18 U.S.C. § 2340, and the Torture Victims Protection Act ("TVPA"), 28 U.S.C § 1350, did not preempt or displace the cause of action under the ATS was because "allowing plaintiffs' claims to proceed is not an example of the judiciary using federal common law to invent a 'parallel track' to a process designed by Congress." *Al Shimari*, No. 1:08-cv-827 (LMB/JFA), 2018 U.S. Dist. LEXIS 132943 at *77 (E.D. Va. Feb. 21, 2018).

The case at bar is not like *Am. Elec. Power Co. v. Connecticut* because the plaintiff is not bringing a claim under the federal common law – the plaintiff is using the Alien Tort Statute to bring a claim under the *Trail Smelter* Principle. The Alien Tort Statute mandates that a district court has "original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350 (ATS). The plaintiffs have met the ATS's requirement of bringing a claim under a law of the nations or a treaty of the United States by bringing the ATS claim on the *Trail Smelter* Principle. Whereas the reason that the court in *Am. Elec. Power Co.* chose to displace the common law rule was

because the Clean Air act was an act of congress meant to regulate the emissions of greenhouse gases. Therefore, because the ATS is also a piece of legislation passed by congress, it should not be displaced by the Clean Air Act.

Our case is not like *Native Village of Kivalina,* where the court displaced a federal common law rule with a law passed by congress. In *Native Village of Kivalina,* the issue of a law passed by congress will displace a common law claim is irrelevant here. Here, since this case does not deal with a common law issue, the ATS does not displace the customary international law under the *Trail Smelter* Principle.

In *City of Oakland* the defendant placed fossil fuels into the stream of international commerce, making the emissions foreign so that EPA and the Clean Air Act are out of reach by the United States Government. In our case, the defendant has contributed six percent of global fossil fuel emissions. The court in *City of Oakland* held that the Clean Air Act does not displace a common law nuisance claim because the Clean Air Act has no jurisdiction outside of the United States. In our case ODIN is placing a tort claim under the *Trail Smelter* Principle through the Alien Tort Statute. Therefore, the Alien Tort Statute which allows an alien to bring a tort claim should allow customary international law such as the *Trail Smelter* Principle to remain the valid law and not be displaced by the Clean Air Act.

This case is different from the *City of New York* because we are not dealing with domestic emissions in this case. ODIN has brought a claim of action under a federal statute and not a common law charge. This is an issue of international law that is being invoked through the Alien Tort Statute. The issue arises from a company within the United States who is selling and distributing to people within the United States as well as throughout the world. Unlike *City of New York,* where the plaintiff was a citizen of the United States, Apa Mana, is a citizen of the

foreign nation A'Na Atu. This is not an issue regarding domestic emissions only, the Clean Air Act, a U.S. statute, does not displace the *Trail Smelter* Principle because it is customary international law that is being invoked through a U.S. statute.

Our case is similar to *Al Shimari v. CACI Premier Tech., Inc.* in that the claim here is being brought through the federal Alien Tort Statute and not common law. In *Al Shimari* the court held that it would not displace the action under the Alien Tort Statute with another act of congress such as the ATA. The Alien Tort Statute is not common law and it is an act of law that has been passed by congress. Therefore, like *Al Shimari*, ODIN is not using the common law as a "parallel track," but rather is using an act of congress to establish a claim. For the foregoing reasons and principles, the Trail Smelter Principle is not displaced by the Clean Air Act.

## V. UNDER THE FIFTH AMENDMENT, THERE IS A CAUSE OF ACTION AGAINST THE UNITED STATES WHEN THE UNITED STATES FAILS TO PROTECT GLOBAL ATOMSPHERIC CLIMATE SYSTEMS.

As addressed previously, the Alien Tort Statute grants non-citizens of the United States the ability to bring claims against the United States. The Fifth Amendment guards against federal government "depriv[ing] life, liberty, or property without due process of law[.]" *USCS Const. Amend. 5.* The purpose of the Fifth Amendment is to limit the powers of the federal government; it serves to protect individuals' rights against governmental interference. In order to prevail under a Fifth Amendment due process claim, claimant must show that the government (1) infringed upon a fundament right and (2) the government had a duty to act. *USCS Const. Amend. 5.*

Failing to protect the global atmospheric climate system from disruption is an infringement on the appellants' fundamental rights. *Juliana v. United States*, 217 F. Supp. 3d 1224, 1249 (D. Or. 2016). There are two categories of fundamental rights: enumerated and unenumerated. Enumerated rights are those

listed in the Constitution, whereas unenumerated rights are not. *Id.* Appellants claim against the United States for failure to protect the atmosphere is an unenumerated right – not explicitly stated in the Constitution. *Id.* Unenumerated rights are no less fundamental than enumerated rights. *Id.* Unenumerated fundamental rights must be deeply rooted in either history or tradition, or that right must be fundamental to our scheme of ordered liberty. *Id.*

There is a duty to identify and protect fundamental rights – this responsibility does not come with instructions. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2598 (2015). In *Obergefell*, the Court determined that same-sex couples have a fundamental right to marry. *Id. Obergefell's* Court illustrates the need "to exercise reasoned judgment" in establishing fundamental rights not listed in the Constitution. *Id.* This reasoned judgment is required because "history and tradition guide and discipline this inquiry but do not set its outer boundaries." *Id.* Thus, the responsibility of identifying and protecting fundamental rights needs to consider "broad principles" to enable an ordered liberty within society. *Id.*

"Just as marriage is the 'foundation of the family,' a stable climate system is quite literally the foundation 'of society, without which there would be neither civilization nor progress.'" *Juliana*, 217 F. Supp. 3d at 1250. The right to protected global atmospheric climate system is a fundamental right that is central to our scheme of ordered society. *Id.* In *Juliana*, the plaintiff brought suit against the United States for the defendant's decisions that caused the Earth's temperature to rise, that resulted in ocean levels rising. *Id. at 1234.* The court determined "the right to a climate system capable of sustaining human life is fundamental to a free and ordered society." *Id.* at 1250. The court reasoned that to hold otherwise would be the same as looking the other way while knowing the government is poisoning the air. *Id.* Certain rights may be necessary to enable the exercise of other rights. For example, it is impossible to live a healthy life with "permanently and irreversibl[e] damage to plaintiff's property, their economic livelihood [… and the ability to live long, healthy lives.]" *Id.*

There was a violation of ODIN's Fifth Amendment rights because the government infringed on their fundamental right to a stable environment and the government had a duty to act to protect this right.

The government infringed upon ODIN's unenumerated fundamental right to a protected atmosphere. In *Obergefell*, the court determined that "reasoned judgment" is necessary to determine unenumerated rights because tradition and history only set boundaries but do not change as the environment does. Same-sex marriage was not addressed in history or tradition because it was not recognized, it was not a prevalent issue. Similarly, the warming of the Earth is not addressed in history or tradition because it was not acknowledged, it was not a prevalent issue. This reasoned judgement is necessary in this case because history and tradition do not address the issue of environment as an unenumerated fundamental right.

Unenumerated fundamental rights include the right to a stable living environment. In *Juliana*, the plaintiffs brought a claim against the United States for failing to protect the increase of the Earth's temperature. In our present case, ODIN is bringing a case against the United States for the very same reason. The court in *Juliana* held that failing to protect the climate system is a violation of a fundamental right. The court reasoned that holding differently would condone the government's improper actions. In order to prevent condoning the government's improper actions, the court needs to apply the Juliana holding to our current case.

It has been proven that the government infringed upon the appellants' fundamental rights. The due process clause does not force an obligation on the government to take an affirmative action to protect these rights unless the situation falls under one of the two exceptions. *Id.* at 1251. The purpose of these exceptions is to protect individuals from governmental harm. The first exception is the "special relationship" which only applies when the government has a duty to protect the individual from harm because the government has taken the individual into custody, against his or her will. *Id.* This exception is not applicable, but the second exception is, the "danger creation" exception, which allows claims when the "government conduct 'places a person in peril in deliberate indifference to their safety[.]'" *Id.*

To prevail under this exception the claimant must first illustrate that the government acts created a danger to the plaintiff. In *Pauluk v. Savage*, the plaintiff was a widow bringing a claim against a government agency when her husband died from toxic mold in the work place. *Pauluk v. Savage*, 836

F.3d 1117, 1119-20 (9th Cir. 2016). The court held that the government's failure to act created a danger to the plaintiff's husband. *Id.* at 1122. The court reasoned that "a state actor can be held liable for failing to protect a person's interest[.]" *Id.* Pauluk had repeatedly brought the mold issue to the attention of his superiors, he even went so far as to request a transfer, which he received but was quickly transferred back to the location with the mold. *Id.* The court held for the plaintiffs because the government "placed Pauluk in a 'worse position' than before." *Id.* at 1125.

*Pauluk's* transfer back to the mold infested building is crucial because it shows that the government knew its acts created a danger. The second element that needs to be illustrated is knowledge – plaintiff must show that the government knew its acts created danger. In *Campbell v. State Dep't of Soc. & Health Servs.*, plaintiff contends that the government is liable for the death of her developmentally delayed daughter, who was found unconscious in her bathtub and died shortly thereafter, while in their care. *Campbell v. State Dep't of Soc. & Health Servs.*, 671 F.3d 837, 839 (9th Cir. 2011). The court held for the defendants, finding that the government was not liable because there was no mental culpability. The court reasoned that knowledge requires "a higher standard than gross negligence[.]" *Id.* at 846.

This heightened standard increases the likelihood that the government is acting with "deliberate indifference[.]" *Juliana*, 271 F. Supp. at 1251. In *Juliana* the plaintiffs brought a claim against the government for failing to protect the atmosphere with the excessive emissions of greenhouse gases. The plaintiff contends that the "defendants acted 'with full appreciation' of the consequences of their acts[.]" *Id.* The court held for the plaintiffs, reasoning that the government acted with deliberate indifference. *Id.* This is to say that the government had knowledge of the harmful risks of failing to regulate greenhouse gas emissions, however, the government decided not to act anyway. *Id.*

Due process does not impose a duty upon the government to take affirmative action unless the situation falls within the special relationship exception or the danger creation exception. ODIN's situation falls directly under the danger creation exception because the government, knowingly and with deliberate disregard, acted in a way that placed ODIN in a precarious situation.

The government created the danger that was exposed to ODIN because it failed to take actions in ensuring a reduction of greenhouse gas emissions. In *Pauluk*, the widow brought a claim against the government for failing to act in response to the mold that ultimately killed her husband. The court ruled for the wife because the government can create a danger by failing to protect a person's fundamental rights. The court reasoned that the government had "placed [him] in a 'worse position' than before." This holding is directly applicable to our current case because the government is failing to protect ODIN's fundamental right to a stable environment. Failing to protect the environment places ODIN in a worse position that before.

When the government fails to protect the atmosphere, it does so knowingly. In *Campbell* the court determined that the government was not liable for the death of plaintiff's daughter because her death was a result of negligence. The government had taken precautions and had no knowledge of the daughter going to the bathtub. In our current case, the government does have knowledge of the level of greenhouse gas emissions and has failed to take necessary precautions. *Campbell* states that mental culpability requires "a higher standard than gross negligence[.]" Our case illustrates the actions of government are beyond gross negligence because it is aware the atmospheric issues, as well as, its contribution to the issue but the government still fails to act.

Government's failure to act was done with deliberate indifference. *Juliana*, the case against the government's failure to protect the climate, determines that acting deliberately indifferent requires the actor to know the consequences of their actions but acting anyway. The government knew the status of the climate and the United States contribution to the problem but refused to act or regulate emissions anyway. *Juliana* court decided the defendants acted with deliberate indifference to the environment because they acted with "'with full appreciation' of their consequences[.]" Government in our current case had an identical lack of action with the same amount of knowledge as that in Juliana, therefore, Juliana's holding and reasoning should be directly applied to ODIN's case.

## VI. UNDER THE LAW OF NATIONS, ODIN DOES NOT PRESENT A NON-JUSTICIABLE POLITICAL QUESTION WHEN THE QUESTION CAN BE APPROPRIATELY ADDRESSED BY THE JUDICIARY.

### A. ODIN does not present a non-justiciable political question because the court has authority and competence to determine a legal question that will not contradict with prior decisions.

ODIN's claim does not present a non-justiciable political question; therefore, the court can render a decision. Political questions are reserved for Congress, whereas a justiciable question is a legal question left to the courts; article III grants this power to the federal courts. USCS Const. Art. III, § 1. To illustrate that the claim does not present a non-justiciable political question, the issue cannot fall into one of the six Baker factors. *Baker v. Carr*, 82 S. Ct. 691, 706 (1962). So long as the claim remains outside the Baker factors the plaintiff can then illustrate "(1) an injury in fact; (2) causation; and (3) redressability" as established in the "case and controversies" clause imbedded in the third amendment. *Native Vill. of Kivalina v. Exxon Mobil Corp.*, 663 F. Supp. 2d 863, 877 (N.D. Cal. 2009).

To determine whether an issue falls squarely within a non-justiciable political claim, a court must decide that the question is one that can be properly decided by a judiciary. The political question doctrine will prevent a court from deciding on that issue. *Juliana*, 217 F. Supp. 3d at 1235. This doctrine is "a tool for maintenance of governmental order[.]" *Baker*, 82 S. Ct. at 709. A court must balance separation of powers against the decision to deny judicial relief. *Id.* This balancing test prevents "err[ing] on the side of declining to exercise jurisdiction when [the court] fears a political question may exist[.]" *Juliana*, 217 F. Supp. 3d at 1236. Prevention is necessary because not all significant political issues present a political question. *Id.* at 1235. However, this balancing test leaves a myriad of decisions to the discretion of the judge.

The safety net for a misuse of discretion came to fruition in *Baker v. Carr*. If any of the six factors apply to a case – the court may not decide the case. The Baker test consists of six factors that

ultimately address three issues: lack of court authority, lack of court competence, and resolutions that threaten to contradict prior decisions. *Baker*, 82 S. Ct. at 710.

The first Baker factor requires a court to abstain when a decision on an issue is "'textually committed to political department[.]'" *Id.* In *Nixon v. United States*, a former judge challenged the Senate for obtaining evidence for his impeachment trials. *Nixon v. United States*, 113 S. Ct. 732, 734 (1993). The Court found this claim nonjusticiable because the Framers of the Constitution had granted the Senate "the sole power to try all impeachments." *Id.* Had the Court ruled differently, there would be a violation of the separation of powers.

Baker's second and third factors address the court's inability to decide due to a lack of standard in which to judge or lack of policy in which to rely on. The main focus of these two factors is "whether 'a legal framework exists by which court can evaluate . . .claims in a reasoned manner." *Juliana*, 217 F. Supp. 3d at 1239. In *Juliana*, defendants argued that the plaintiffs did not point to a specific provision, in order to provide the court with a standard or policy to base its decision on. *Id.* The court in *Juliana* rejects this argument, reasoning that the defendants' actions "violate their substantive due process rights and the government's public trust obligations." *Id.* at 1240.

The fourth through sixth Baker factors "appear to be relevant only if judicial resolution of a question would contradict prior decisions by a political branch … where such contradiction would seriously interfere with important government interests." *Kadic v. Karadzic*, 70 F.3d 232, 250 (2d Cir. 1995). Rarely ever will these final factors, on their one, be dispositive. *Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1434 (2012). The defendants in *Juliana* argued that the executive and legislative branches work hard to implement regulations to address climate change and to hold the government liable in this instance would be to contradict and disrespect those prior efforts. *Juliana*, 217 F. Supp. 3d at 1240. The court rejects this argument because granting relief to the plaintiff "would be fully consistent" with the prior efforts made by the executive and legislative branches. *Id.* Granting relief would hold the executive and legislative branches to the standards it created. *Id.*

ODIN's claim does not present a non-justiciable political question because there is no intrusion on the separation of powers and ODIN is entitled to judicial relief as a matter of law. ODIN's claim does not fall into any of the six Baker factors; thus, the court has authority and competence to render a decision that will not contradict prior actions.

Factor one under the *Baker* test looks directly at written, federal law. In *Nixon*, a former judge challenged his impeachment evidence, but the Court ruled against him because the Constitution explicitly says that impeachment is power reserved for the Senate. Adversely, our case does not implicate any federal documents – there is no written language granting a particular department to resolve the issue of relief to non-citizens due to government actions increasing Earth's temperature; therefore, this court is able to render a decision under baker factor one.

Factors two and three require a lack of standard to decide. In *Juliana*, the plaintiffs brought a suit against the government for actions that lead to increase of global warming. In our case, ODIN's action is similarly situated – seeking relief for loss created by government's actions increasing global warming. In *Juliana*, the court rejects the argument that there needs to be a specific provision that creates a standard; court ruled for the plaintiffs because explicit provisions are not required – there are overall policies in which to lean on. This directly applies to our case; the government must follow basic public trust obligations, as well as, substantive due process. Thus, there is a standard in which to lean on to render the decision.

The public trust obligations are an important governmental interest; the fourth through sixth *Baker* factors directly address the inability of a court to resolve a claim if that claim directly interferes with an important governmental interest. In *Juliana*, the court held in favor of the plaintiffs because the granting relief would be consistent with the efforts made by the government. Defendants argued that granting relief would be contradictory to the efforts made. The court reasoned that holding for the plaintiffs is consistent with the legislative and executive efforts because it is holding the government to

the standards they have created. Holding for ODIN in our case would further this ideal; it would hold the government to the standards it has created.

Opposing counsel will argue that rendering a decision will interfere with governmental actions already in place. This argument is flawed because granting relief to ODIN would simply hold the government to the standards that have been created by the government.

B. ODIN's claim illustrates a need for remedy because there was a substantial injury due to the causal relationship of the actions of the government, with the opportunity for redressability.

ODIN's claim fulfills "case and controversies" elements required for bringing a suit because the government (1) created a substantial injury in fact, there is (2) causal relationship between the actions of the government and (3) the injury to the plaintiff and there is redressability. *Id.* at 1241.

Environmental claims require a heightened level of injury, it is not enough for the plaintiff to claim that the defendant harmed the environment – the plaintiff must show that the defendant's actions directly harmed the plaintiff. *Id.* The injury must lie in fact; injury must be "concrete and particularized invasion of a legally protected interest[.]" *Id.* at 1242. In *Juliana*, the court stated that the requirement could be fulfilled by "alleging the challenged activity 'impairs his or her economic interests or aesthetic and environmental well-being.'" *Id.* In *Juliana*, the plaintiffs demonstrated that the government has an obligation to preserve the natural resources for future generations. *Id.* at 1233. The court determined that this argument was sufficient because it illustrates the future generations inability to live the quality of life they are entitled to. *Id.*

The causal relationship must illustrate a "fairly traceable" connection between the injury alleged and the conduct of the defendant. *Kivalina,* 663 F. Supp. 2d at 877. This connection "need not rise to the level of proximate causation[.]" *Id.* In *Kivalina*, the plaintiffs brought suit against the United States due to its action in global warming that would cause the relocation of the plaintiffs. *Id.* at 869. The plaintiffs in this case admitted that "they are unable to trace their alleged injuries to any particular defendant but

instead claim that they need not do so." *Id.* at 878. The plaintiffs argued that it is not necessary to show with certainty that it was only the defendants' actions but that the defendant had contributed to the injury. *Id.* at 880. The court agreed with this contribution theory but did not rule in the plaintiff's favor on this element because at the time of this case "there are no federal standards limiting the discharge of greenhouse gases." *Id.*

Redressability analyzes the injury in conjunction with requested relief. "A plaintiff need not show a favorable decision is certain to redress the injury, but it must show a substantial likelihood to do so." *Juliana,* 217 F. Supp. 3d at 1247. In *Massachusetts v. EPA*, the plaintiffs brought a claim against the EPA for failing to regulate the motor vehicle emissions. The court granted relief for the plaintiffs because "[a] reduction in domestic emissions would slow the pace of global emissions[.]" *Massachusetts v. EPA*, 127 S. Ct. 1438, 1458 (2007). The court reasoned that "it is sufficient for the redressability inquiry to show that the requested remedy would 'slow or reduce' the harm." *Juliana,* 217 F. Supp. 3d at 1247 (citing *Massachusetts*, 127 S. Ct at 1458).

The government created an injury in fact to ODIN by overly contributing to the greenhouse gas emissions that caused the Earth's temperature and water levels to rise, taking out ODIN's land that they live on. In *Juliana*, the court held that the failure to preserve the environment for future generations is a legally protected interest that is being violated. The court in Juliana reasoned that impairment on economic or environmental well-being is a legally protected interest. In our case, the defendant is failing to protect the individuals' ability to live, not just the future generations. This failure is not only an economic impairment but an environmental impairment as well because the plaintiffs' will lose their home's land. Loss of home land is an economic and environmental impairment.

The causal relationship of ODIN's injury and the government actions is fairly traceable. In *Kivalina*, the court accepted the argument that simply showing that the defendants contributed is enough so long as there are federal standards limiting the discharge of greenhouse gases. In our case, the defendant has contributed because it failed to regulate greenhouse gas emissions. The Clean Act Air

authorizes the EPA to regulate these emissions, therefore the injury of loss of home land is fairly traceable to the defendant.

Injunctive relief and damages show a substantial likelihood to grant ODIN relief because it will aid in the procurement of a home land. In *Massachusetts*, the court reasoned that the redressability must illustrate a reduction in harm or the potential to slow down the harm. In our case, granting injunctive relief will slow down the harm because it will force the defendant to address the issue. Injunctive relief will force the government to act. The government created an injury in fact to ODIN by overly contributing to the greenhouse gas emissions that caused the Earth's temperature and water levels to rise and take out the land that they live on. In *Juliana*, the court held that the failure to preserve the environment for future generations is a legally protected interest that is being violated. The court in *Juliana* reasoned that impairment on economic or environmental well-being is a legally protected interest. In our case, the defendant is failing to protect the individuals' ability to live, not just the future generations. This failure is not only an economic impairment but an environmental impairment as well because the plaintiffs' will lose their home's land. Loss of home land is an economic and environmental impairment.

Opposing counsel will argue that the court should follow the holding in Kivalina. This argument is flawed because there are federal standards in which the government needs to be held to, such as, the Clean Air Act or the Paris Agreement.

# CONCLUSION

For the reasons set out above, ODIN requests that the district court's decision be rejected. The district court erred in dismissing the claim because there was a proper statement of a claim for relief under the Federal Rules of Civil Procedure, as well as, the Fifth Amendment of the Constitution.

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Respectfully Submitted,
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