Team #45

CA. No. 18-000123

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

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

V.

HEXONGLOBAL CORPORATION, *Appellee*

and

THE UNITED STATES OF AMERICA, *Appellee*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR NEW UNION ISLAND
NO. 66-CV-2018
Judge Romulus N. Remus

BRIEF FOR APPELLEE UNITED STATES OF AMERICA

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SUMMARY OF THE ARGUMENT

1. The *Trail Smelter* Principle is a principle of customary international law ("CIL") enforceable as a "law of nations" under the Alien Tort Statute ("ATS"). The *Trail Smelter* Principle has been considered CIL and discussed as such in numerous international declarations, treaties, judgments, resolutions, and pieces of scholarly work. Because the court recognizes a principle as a law of nations if it finds "trustworthy evidence" that it is considered CIL, the *Trail Smelter* Principle is enforceable under the ATS. Additionally, there is no discretionary risk that allowing for enforcement of this principle under the ATS would infringe on judicial or legislative prerogatives to set foreign policy. The *Trail Smelter* Principle is essentially a public nuisance claim under federal common law and therefore, has the specificity required under the ATS.

2. The *Trail Smelter* Principle imposes obligations enforceable against non-governmental actors because it is considered federal common law and there was no explicit act by Congress to limit corporate liability under the ATS. CIL is considered federal common law that applies directly in federal United States district courts, regardless of whether the executive or legislative branches have formally codified the principles in legislation. Because the *Trail Smelter* Principle is considered CIL, it is also federal common law. Federal common law is generally enforceable against non-governmental actors unless Congress explicitly limits their liability.

3. The ATS is a civil statute. Because civil corporate liability is recognized in the United States, in most countries around the world, and in international law itself, the ATS does support a cause of action against domestic corporations. This is especially true when, as

here, the defendant corporation's domestic activities are the focus of litigation and when there are limited foreign policy concerns at stake.

4. Ultimately, though Appellant Mana's claim is enforceable under the ATS, the *Trail Smelter* principle is displaced by the Clean Air Act ("CAA") which regulates greenhouse gas emissions. The *Trail Smelter* Principle is essentially a cause of action for "international public nuisance" and the Supreme Court has found that public nuisance claims were displaced by the CAA.

5. Appellant Flood's claim that the United States' actions in allowing the continued operation of the fossil fuel industry violate the Fifth Amendment is untenable because the Due Process Clause does not require the government to provide affirmative aid. Plaintiffs would be exposed to the impacts of climate change resulting from foreign greenhouse gas emissions even if the United States were to ban all domestic fossil fuel use. Additionally, the United States has not acted with deliberate indifference to the impacts of air pollution. Thus, Appellant Flood cannot rely on the created danger doctrine to impose an affirmative Due Process obligation on the government.

6. Although Appellant Mana's claim under the ATS would otherwise be permissible against a domestic corporation, this litigation involves air pollution and economic and foreign policy considerations that are too broad in scope for this Court to decide unilaterally without direction from the political branches. For this reason, the United States strongly argues that the Court should hold that Appellant Mana's claim ultimately concerns a political question and is thus non-justiciable.

ARGUMENT

Appellants' claims regarding the impact of fossil fuels on climate change, and the government's responsibility to address such impacts, implicate complex scientific and policy considerations involving public health, the national and global economies, and foreign relations. Although the United States agrees with Appellants' interpretation of the Alien Tort Statute, including Appellants' contention that the *Trail Smelter* Principle is customary international law enforceable against domestic corporations, these issues are too broad in scope to be properly decided by a court without further direction from the political branches. For this reason, the United States ultimately urges this Court to affirm the District Court's dismissal of the complaint based on the non-justiciability doctrine and the lack of an adequate Constitutional claim under Due Process Clause of the Fifth Amendment.

The *Trail Smelter* case was decided over seventy years ago and the principles announced have become an integral part of international environmental law. In the case, a Canadian company operated a smelter in Trail, British Columbia, the fumes of which caused damages in the United States. Trail Smelter Case (U.S. v. Can.), 3 R.I.A.A. 1905, 1913 (Trail Smelter Arb. Trib. 1938). The smelter was located along the Columbia River, approximately eleven miles from the United States/Canada border. *Id*. The main principle of *Trail Smelter* case is that "no State has the right to use or permit the use of its territory in such a manner to cause injury . . . in or to the territory of another [State], when the case is of serious consequence." Trail Smelter Case (U.S. v. Can.), 3 R.I.A.A. 1905, 1963 (Trail Smelter Arb. Trib. 1941). (quoting CLYDE EAGLETON, THE RESPONSIBILITY OF STATES IN INTERNATIONAL LAW 80 (N.Y. Univ. Press 1928); Convention for Settlement of Difficulties Arising from Operation of Smelter at Trail, B.C., U.S.-Can., Apr. 13, 1935, T.S. No. 893.

I. The *Trail Smelter* Principle is a recognized principle of customary international law enforceable as the "law of nations" under the ATS because it is essentially a public nuisance claim under federal common law that is of the specificity required for a typical cause of action in federal courts.

A cause of action is available under the Alien Tort Statute ("ATS") for violations by HexonGlobal of the *Trail Smelter* Principle because the principle is CIL and has the required specificity. The ATS provides that "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 (2018). Any claim based on a present-day "law of nations" must be one that is considered CIL, meaning that it is a "universal" and "obligatory" norm of international character, and designed with "a specificity comparable to the features" of the original causes of action encompassed by the statute; violation of safe conducts, infringement of the rights of ambassadors, and piracy. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 723-25 (2004). When there is no treaty, legislative or executive act, or judicial decision to look to in determining whether a principle is considered CIL and whether it has the necessary specificity, the court looks to international jurists and commentators for trustworthy evidence. *Id*. at 734. The court must exercise its judicial discretion in taking account of the practical consequences of making a particular cause of action available to litigants in the federal courts, including the usurpation of political authority held by the executive and legislative branches. *Id*. at 732-33.

To show that a principle is binding CIL, a plaintiff must cite international authority that the principle is recognized as such in the international legal community. In *Sosa*, the plaintiff sought to bring a tort claim against the United States Government for an "arbitrary arrest" as defined in the Universal Declaration of Human Rights ("Declaration") and article nine of the International Covenant on Civil and Political Rights ("Covenant"), to which the United States is a party. *Id*. at 734. The plaintiff was captured by Mexican citizens, transported to the United

States, and arrested by the United States Drug Enforcement Agency after the Mexican government refused to extradite him. *Id*. at 698. The court found that neither the Declaration nor the Covenant established the applicable rule of international law asserted by the plaintiff. *Id*. at 735. The Declaration, in its' own force, did not impose obligations on the United States as a matter of international law. *Id*. at 734. It was a "statement of principles" and not a treaty or international agreement that imposed legal obligations. *Id*. at 734-35. Additionally, though the Covenant bound the United States as a matter of international law, the United States ratified it on the understanding that that it was not self-executing and so did not create obligations enforceable in federal courts. *Id*. at 735. Ultimately, the plaintiff cited little other authority that ". . . a single illegal detention of less than a day . . ." violated any norm of CIL ". . . so well defined as to support the creation of a federal remedy." *Id*. at 736, 38.

Even if the *Sosa* court could find support that such a rule was considered CIL, the court found that the implications of adopting such a broad rule would be "breathtaking"; it would support a cause of action in federal court for any arrest, anywhere in the world, unauthorized by the law of the jurisdiction in which the arrest took place and it would create a cause of action for any seizure of an alien in violation of the Fourth Amendment and statutory remedies. *Id*. at 736-37.

The *Trail Smelter* Principle has been incorporated in international declarations, treaties, judgements, and United Nations resolutions and has been cited by many international scholars as CIL. *See* Corfu Channel (U.K. & Ir. v. Alb.), Judgment, 1949 I.C.J. Rep. 4, 22 (Apr. 9) ("[Every State has an] obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States."); U.N. Conference on the Human Environment, *Report of the United Nations Conference on the Human Environment*, 3, princ. 21, U.N. Doc. A/CONF.48/14/Rev.1

(Nov. 1973) ("States have . . . 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 Environment and Development, *Rio Declaration on Environment and Development*, princ. 2, U.N. Doc. A/CONF.151/25 (Vol. 1) (Aug. 12, 1992) ("States have . . . 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."); Organisation for Economic Co-Operation and Development [OECD], *Recommendation of the Council on Principles Concerning Transfrontier Pollution*, tit. B(2), OECD/LEGAL/0133 (Nov. 14, 1974) ("[States should] . . . individually and jointly, take all appropriate measures to prevent and control transfrontier pollution . . . ."); INT'L LAW ASS'N, REPORT OF THE SIXTIETH CONFERENCE HELD AT MONTREAL 160 (1983) (". . . States are in their legitimate activities under an obligation to prevent, abate and control transfrontier pollution to such an extent that no substantial injury is caused in such territory of another State."); U.N. Convention on the Law of the Sea, art. 194(2), *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397 (entered into force Nov. 16, 1994) ("States shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment, and that pollution arising from incidents or activities under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights in accordance with this Convention."); PATRICIA W. BIRNIE & ALAN E. BOYLE, INTERNATIONAL LAW AND THE ENVIRONMENT 89-95 (1st ed. 1992); and PIERRE-MARIE DUPUY, INTERNATIONAL LAW AND POLLUTION 64-65 (Daniel B. Magraw ed., 1991).

The *Trail Smelter* Principle has been recognized in all major forms of international law and international commentators have come to the consensus that it is CIL. If a cause of action

under the ATS were to be created for violations of the *Trail Smelter* principle, the results would hardly be "breathtaking" as the court in *Sosa* found that a short-term arbitrary arrest would be. Few domestic corporations and actors cause the type of expansive transboundary environmental harm that would be actionable under the ATS's *Trail Smelter* cause of action. Industries that contribute to global warming would only be at risk if the particular case was of "serious consequence" as is required by the *Trail Smelter* Principle. In the present case, HexonGlobal's sales constitute nine percent of global fossil fuel related emissions, and thirty-two percent of the United State's cumulative emissions. Opinion and Order of the District Court p. 5. It is unlikely that another domestic industry contributes this much to global carbon dioxide emissions and the point at which harm is of "serious consequence" could be further litigated. Ultimately, the court should create a cause of action for violations of the *Trail Smelter* Principle under the ATS because of its clear acceptance as CIL and because of the lack of foreign policy related political consequences of the decision and risk of opening the "floodgates" to massive amounts of litigation. Finally, as discussed further in Part IV, a cause of action under the *Trail Smelter* Principle is essentially a public nuisance claim under federal common law and therefore, has the specificity required of federal common law in United States courts.

II. The *Trail Smelter* Principle, as customary international law, imposes obligations enforceable against non-governmental actors because federal common law torts are generally enforceable against corporations.

A. The *Trail Smelter* Principle is a part of federal common law because customary international law is considered federal common law regardless of whether it is codified by the legislative or executive branches.

CIL binds all nation states, regardless of adherence to a treaty. Marte Jervan, The Prohibition of Transboundary Environmental Harm. An Analysis of the Contribution of the International Court of Justice to the Development of the No-harm Rule, PluriCourts Research Paper No. 14-17, 7 (2014). There are generally two schools of thought on how CIL should be

treated by United States courts; under the "modernist" view, CIL is considered federal common law that applies directly in United States courts, regardless of whether the executive or legislative branch formally codify the principles in legislation, whereas the "revisionist" view holds that customary international law controls only when the legislature or executive has formally incorporated it into federal law. *See* F. Giba-Matthews, *Customary International Law as Federal Common Law in U.S. Courts*, 20 FORDHAM INT'L L. REV. 1839 (1996) (advocating for the modernist view); Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997) (rejecting modernist view and advocating for revisionist view). Federal courts have uniformly endorsed the modern approach. *See Filartiga v. Pena-Irala*, 630 F.2d 8876, 877 (2d Cir. 1980); *Kadic v. Karadzik*, 70 F.3d 232, 246 (2d Cir. 1995); *In re Estate of Marcos Human Rights Litig.*, 978 F.2d 493, 502 (9th Cir. 1992); *Radriguez-Fernandez v. Wilkinson*, 505 F. Supp. 787, 798 (D. Kan. 1980); *Xuncax v. Gramajo*, 885 F. Supp. 162, 193 (D. Mass. 1995).

Because the *Trail Smelter* Principle is considered customary international law, it is therefore, considered federal common law under the modern approach endorsed by United States Courts.

B. The *Trail Smelter* Principle is enforceable against non-governmental actors because torts brought under federal common law are typically enforceable against non-governmental actors and Congress did not limit liability for these actors under the ATS.

The *Trail Smelter* Principle is enforceable against non-governmental actors including HexonGlobal because federal common law tort actions typically encompass torts committed by corporations and Congress did not limit liability for corporations under the ATS. International law determines what conduct violates the law of nations, but specific rules of how to enforce CIL

and remedy violations is left to states. *Jesner v. Arab Bank, PLC*, 138 S.Ct. 1386, 1420 (2018) (Sotomayor, J., dissenting). "Norm" as used by the *Sosa* court refers to substantive conduct and does not encompass enforcement mechanisms including which actors can be held liable. *Id*.

In *Jesner*, the plaintiffs filed suit against the defendants, a foreign corporation with a branch in New York, for facilitating terrorist attacks committed abroad that injured or killed the plaintiffs in violation of fundamental precepts of international law. *Id*. at 1393. The dissent offered by Justice Sotomayor found that a corporation should be held liable under an ATS cause of action because neither the text, history, nor the purpose of the ATS support distinguishing liability for corporations and natural persons. *Id*. at 1425. Corporations have long been held liable for torts under federal common law. *Id*. Therefore, it is presumed that when Congress provided for "tort" liability under the ATS, it provided for corporate liability. *Id*. at 1426. Though this is the dissenting view in *Jesner*, it should be noted that the majority view, that non-governmental actors should be accountable only if there is a "specific, universal, and obligatory norm" that they are responsible under CIL, was only endorsed by three justices. *Id*. at 1393. Justice Alito, who issued a concurring opinion, would only find a new cause of action under the ATS if it "best effectuate[d]" the purpose of the ATS. *Id*. at 1410. In other words, he would only approve of a cause of action if it "materially advanced" the purpose of the ATS; avoiding diplomatic friction by providing a form for adjudicating offenses that, if left with no remedy, would be cause for complaint against the United States. *Id*. at 1410. Justice Gorsuch, who also wrote a separate concurrence on the topic, would never find a new cause of action because he believes the job is always left to the political branches and not the judiciary. *Id*. at 1412. Justice Gorsuch would, therefore, overturn *Sosa*.

Because of the diversity of the concurring opinions in *Jesner*, it is unreasonable to argue that were the current case to find its way to the Supreme Court, it would be forced to follow the test set out in the majority opinion by Justice Kennedy in *Jesner*. If anything, Justice Alito's position that a cause of action should be created only if it materially advanced the original purpose of the ATS could reasonably swing in favor of Appellant Mana in this case.

Therefore, following Justice Sotomayor's reasoning, a corporation is liable under the ATS unless there is some other reason to exercise judicial discretion as provided for by *Sosa*. Political concerns in creating a new cause of action have typically been announced by courts in evaluating potentially new ATS claims when a foreign defendant is involved because the judiciary does not want to infringe on the foreign policy powers left to Congress and the Executive. However, it is unlikely that the policy concerns faced by the majority in *Jesner*, namely that the corporation to be held liable was a foreign one, would be found in the current situation with a domestic corporation. Therefore, a cause of action should be sustained for violations of the *Trail Smelter* Principle under the ATS when that action is pursued against a non-governmental actor, specifically a domestic one.

III. Appellant Mana can bring an ATS claim against HexonGlobal because the ATS allows corporate liability to be imposed on domestic corporations.

Because the ATS is a civil statute, and "because corporate tort liability is common around the world," we respectfully urge this Court to hold that domestic corporations can be held liable under the ATS. *Flomo v. Firestone Nat. Rubber Co., LLC*, 643 F.3d 1013, 1019 (7th Cir. 2011). Although the Circuits are split on the issue, most Circuits that have addressed this question have held that the ATS permits corporate liability when the defendant is a domestic corporation. *Flomo,* 643 F.3d at 1021; *Doe I v. Nestle U.S.A., Inc.*, 766 F.3d 1013, 1021 (9th Cir. 2014); *Romero v. Drummond Co., Inc.*, 552 F.3d 1303, 1315 (11th Cir. 2008); *see also Beanal v.*

Freeport-McMoran, Inc., 197 F.3d 161, 163, 167(5th Cir. 1999) (assuming, without analysis, that ATS applied to a domestic corporation defendant); *contra Kiobel v. Royal Dutch Petroleum Co*., 621 F.3d 111,125 (2d Cir. 2010), *vacated on other grounds*, 569 U.S. 108 (2013) ("*Kiobel I*") (rejecting corporate liability under the ATS because the customary international law of human rights has not recognized corporate liability).[1]

When applying the ATS, most courts other than the Second Circuit draw a distinction between a principle of international law, "which is a matter of substance" to be determined by international customary law, and "the means of enforcing [that law], which is a matter of procedure or remedy" to be determined by a nation's domestic law. *Flomo*, 643 F.3d at 1019; *Sosa*, at 732 n.20 (raising, but declining to answer, the question 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."). "International law imposes substantive obligations and the individual nations decide how to enforce them." *Flomo*, 643 F.3d at 1020; *but see Kiobel v. Royal Dutch Petroleum Co*., 621 F.3d 111 (2d Cir. 2010), *vacated on other grounds*, 569 U.S. 108 (2013) ("*Kiobel I*") (noting in dicta that "the fact that corporations are liable as juridical persons under domestic law does not mean that they are liable under international law" and holding that the ATS did not permit corporate liability.).

Two Supreme Court cases have touched on the question of corporate liability under the ATS without definitively addressing the permissibility of domestic corporate defendants. In *Kiobel v. Royal Dutch Petroleum Co*., 569 U.S. 108, 114, 124–125 (2013) (*Kiobel II*), the Court

[1] The Seventh Circuit has criticized the factual premise underlying the court's decision in *Kiobel I*, arguing that international law has recognized corporate liability on at least one occasion. *Flomo*, 643 F.3d at 1018 (noting that after World War II, the allied powers dissolved German corporations that had assisted the Nazi party and seized some of their assets for the purpose of paying reparations.)

held that a case involving a corporation could not proceed under the ATS because ""all the relevant conduct" allegedly committed by the defendant corporation "took place outside the United States" and thus was precluded by the presumption against extraterritorial application of the ATS. *Id.* at 124. The Court's holding vacated, on different grounds, the Second Circuit's decision in *Kiobel I*, which had held that the ATS did not permit corporate liability.

In *Jesner*, the Court held that the ATS does not provide jurisdiction over defendants who are foreign corporations. *Jesner*, 138 S.Ct. at 1407. The Court based its reasoning on the sensitive foreign policy concerns implicated by a foreign defendant. *Id.* at 1402-1405. As the Court observed, "[t]he political branches, not the Judiciary, have the responsibility and institutional capacity to weigh foreign-policy concerns." *Id.* at 1403. Notably, the Court found it unnecessary to answer "whether corporate liability is a question that is governed by international law, or, if so, whether international law imposes liability on corporations." *Id.* at 1402. Accordingly, *Jesner* did not foreclose the possibility that domestic corporations could be liable under the ATS.

Unlike the involvement of the foreign corporation in *Jesner*, which caused "significant diplomatic tensions" with that corporation's parent country, the involvement of HexonGlobal, a domestic corporation, in this case does not risk exacerbating political tensions with other countries. *Jesner*, 138 S.Ct. at 1406. As discussed in Part II above, Congress provided for tort liability in enacting the ATS. *Jesner*, 138 S.Ct. at 1426. Thus, because the foreign policy implications of ATS litigation involving a domestic corporation are significantly lower than those at stake in *Jesner*, we urge the Court to adopt the reasoning of the Seventh, Ninth, and Eleventh Circuits and hold that domestic corporations can be held liable under the ATS.

IV. The *Trail Smelter* Principle is displaced by the Clean Air Act because the Principle is an international version of "public nuisance" which was displaced for actions brought for harm caused by greenhouse gas emissions.

Appellant Mana's ATS claim has been displaced by Congress's delegation to the EPA to promulgate greenhouse gas regulations under the CAA. When a federal statute is passed that directly addresses a federal common law claim, that claim becomes displaced by the statute, no matter if further regulations must be promulgated to fully realize all aspects of the areas that have been delegated. *See Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410 (2011).

In *American Electric*, plaintiffs brought federal common law interstate nuisance claims against several power companies that emitted carbon dioxide for their contribution to climate change. *Id*. at 416. Under federal common law, a "public nuisance" is an "unreasonable interference with a right common to the general public." *City of Oakland v. B.P., P.L.C*, 325 F. Supp. 3d 1017, 1022 (N.D. CA 2018) (quoting Restatement (Second) of Torts § 821B(1) (Am. Law Inst. 1979)). The court found that these claims had been displaced by the CAA because congressional legislation displaces federal common law if the statute "speaks directly to the question at issue." *Am. Elec. Power Co.*, 564 U.S. at 424 (quoting *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1985)). Because carbon dioxide emissions were subject to regulation under the CAA and the actions it authorized by the EPA, *see Massachusetts v. EPA*, 549 U.S. 497 (2007), all federal common law rights to seek abatement of carbon dioxide emissions from fossil fuel fired power plants were displaced. *Am. Elec. Power Co.*, 564 U.S. at 424. At the time the litigation was initiated, the EPA had yet to regulate carbon dioxide emissions. *Id*. at 425. However, this did not bear on the Court's decision because the "field" had already been occupied. *Id*. at 426. The delegation to the EPA by Congress itself displaced the federal common law right and it was of no consequence that the EPA had yet to use its delegated authority. *Id*.

In *City of Oakland*, plaintiffs brought federal common law nuisance claims against the five largest investor-owned producers of fossil fuels in the world alleging that they contributed to global warming induced sea level rise through the international sale of fossil fuels. *City of Oakland v. B.P., P.L.C*, 325 F. Supp. 3d at 1021-22. Though plaintiffs alleged that the harm was caused by "sales," the court found that the harm alleged was actually caused by emissions. *Id*. at 1024. Because *American Electric* found that suits based on nuisance claims arising from emissions were displaced by the CAA, the *City of Oakland* court too found that the plaintiff's claims were displaced. *Id*. The court went on to further examine the plaintiff's claim that emissions originating in *international* locations were outside the scope of the CAA's reach and did not displace federal common law claims. *Id*. (emphasis added). The court refused to recognize this claim for relief under federal common law because of the foreign policy implications of the decision that may run counter to the political will of the executive and legislative branches and the presumption against extraterritoriality. *Id*. at 1025.

In *City of New York v. B.P., P.L.C.*, 325 F. Supp. 3d 466 (S.D.N.Y. 2018), the City brought state common law claims of public nuisance, private nuisance, and trespass against the same five companies in *City of Oakland* for their contributions to global warming and thereby, sea level rise. *Id*. at 468. The court first found that the City's claims were claims under federal common law, not state, because "interstate pollution is primarily a matter of federal common law" necessarily because a uniform standard is needed to deal with ". . . the environmental rights of a state against improper impairment by sources outside its domain." *Id*. at 471. (first quoting *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 492 (1987); then quoting *Illinois v. City of Milwaukee*, 406 U.S. 91, 107 (1972)). To determine liability for nuisance and trespass, the court would have to find an "unreasonable interference" and "unlawful invasion" on the City's

property. *Id*. at 473. (quoting *City of Milwaukee v. Illinois*, 451 U.S. 304, 348 (1981); then quoting *In re Methyl Tertiary Butyl Ether (MTBE) Prod. Liab. Litig.*, 745 F.35 65, 119 (2d. Cir. 2013)). Because Congress delegated to the EPA "the determination as to what constitutes a reasonable amount of greenhouse gas emission under the [CAA]," the City's federal common law claims were displaced. *Id*.

The EPA has the authority to, and has taken steps to in the past, regulate greenhouse gas emissions under § 202(a)(1) of the CAA. *See Massachusetts v. EPA*, 549 U.S. 497, 533 (2007); 42 U.S.C. § 7521(a)(1).[2] Though Appellant Mana is a foreign plaintiff in this case, her cause of action is no different than those brought in *American Electric*, *City of Oakland*, and *City of New York*. The *Trail Smelter* principle is an "international public nuisance" claim. She argues that the emissions of HexonGlobal have unreasonably interfered with the rights of her and her island community. This is the definition of public nuisance under federal common law, no matter that her claim is brought due to harm felt internationally. Therefore, her claim is displaced by the CAA.

V. The Fifth Amendment does not provide a cause of action based on the climate impacts of fossil fuels because the Due Process Clause does not confer an affirmative right to governmental aid and because the Created Danger Exception does not apply.

As a general rule, the Due Process Clauses of the Fifth and Fourteenth Amendments "confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual." *DeShaney v. Winnebago Cty. Dep't of Soc. Servs*., 489 U.S. 189, 196 (1989). One exception to this rule is called the "created danger" exception: in rare instances, a state's "failure

[2] Additionally, the CAA regulates "international air pollution" and requires air pollution implementation plans to be revised to prevent endangerment to the public health or welfare of a foreign country. 42 U.S.C. § 7415(a)-(b).

to protect an individual against private violence" can violate due process "where [the] state action creates or exposes an individual to a danger which he or she would not have otherwise faced." *Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1061 (9th Cir. 2006). A plaintiff asserting the created danger exception must show that: (1) the government "affirmatively place[d] an individual in danger" and (2) the government with "deliberate indifference failed to act to prevent the alleged harm." *Id.* at 1062 (citations and internal quotation marks omitted); *see Juliana v. United States*, 217 F. Supp.3d 1224, 1252 (D. Or. 2016) (articulating the same standard in a 3-prong test); *Wood v. Ostrander*, 879 F.2d 583 (9th Cir. 1989).

Appellant Flood's claim does not satisfy either prong of the created danger exception to *DeShaney*. First, the United States' actions in allowing the continued production, sale, and burning of fossil fuels have not exposed Appellant to dangers that he "would not otherwise have faced." *Kennedy*, 439 F.3d at 1061; *Munger v. City of Glasgow*, 227 F.3d 1082, 1086 (9th Cir. 2000) (inquiring whether government's actions left the affected person in a worse situation). Air knows no boundaries. Neither does airborne pollution – indeed, this fact is the very premise underlying the *Trail Smelter* Principle. Each of the other 192 nations of the world contribute to global air pollution and, thus, to the global atmospheric climate. Even if the United States were to immediately cease all fossil fuel burning activities, the vast majority of other countries would continue to use such fuels. Climate change is a global problem; no one country single-handedly causes the problem and no one country can prevent it. Thus, Appellant would be exposed to the impacts of climate change even if the United States effectively banned fossil fuels. This in itself renders the created danger exception inapposite.

Even assuming that the impact of domestic fossil fuel use could satisfy the first prong of the created danger exception, Appellant cannot meet the required showing of the second prong:

He cannot prove that the United States has acted with "deliberate indifference" in failing to prevent the harm. *Kennedy*, 439 F.3d at 1062. Deliberate indifference "is a stringent standard of fault, requiring proof that a [governmental] actor disregarded a known or obvious consequence of his action." *Bryan County v. Brown*, 520 U.S. 397, 410 (1997); *Kennedy*, 439 F. 3d at 1064. The CAA—and the plethora of federal regulations promulgated pursuant to it—defeat any claim that the United States is deliberately indifferent to the deleterious effects of air pollution. On the contrary, the CAA's text resoundingly affirms the federal government's interest in mitigating the worst effects of such pollution. 42 U.S.C. § 7401(b) ("the purposes [of the Act] are to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population.").

Admittedly, climate change is a foreseeable "consequence" of the United States' decision to allow the continued operation of the fossil fuel industry; however, in enacting the CAA, the United States Congress has weighed the negative effects of air pollution with the beneficial economic impact of fossil-fuel-burning industries. The CAA represents the Legislature's best attempts to balance these competing interests. Legislative compromise hardly constitutes "deliberate indifference." For this reason, Appellant Flood cannot meet the standard of *Kennedy's* second prong. Thus, the created danger exception to *DeShaney* does not apply. This Court is bound by *DeShaney*'s general rule that the Due Process Clause does not confer an affirmative federal duty to provide aid to Appellant Flood.

VI. Appellant Mana's "law of nations" claim under the ATS presents a non-justiciable political question.

Ultimately, Appellant Mana's claim under the ATS, even if such claim was permissible otherwise, present a non-justiciable political question. To evaluate whether a case presents a non-justiciable political question, courts inquire if the case involves any one of six criteria:

> (1) a constitutional commitment of the issue to a coordinate political department;
>
> (2) a lack of judicially discoverable and manageable standards for resolving the problem;
>
> (3) the impossibility of deciding the problem without a non-judicial initial policy determination;
>
> (4) the impossibility of a court making its decision without expressing lack of the respect due coordinate branches of government;
>
> (5) an "unusual need for unquestioning adherence to a political decision already made;" or
>
> (6) the "potentiality of embarrassment from multifarious pronouncements by various departments on one question."

Baker v. Carr, 369 U.S. 186, 217 (1962). Relative to the Appellant's claim of domestic corporate liability under the ATS, the second, third, and fourth factors are indeed implicated. "At its most basic level, [Appellant's] suit is not a Case or Controversy cognizable under Article III;" rather, Appellant Mana's attempt to make international "energy and environmental policy" through this Court instead of through the "political Branches entrusted by the Constitution with policy making authority." Def. Br. Supp. Mot. Summ. J., *Juliana v. United States*, No. 6:15-CV-01517-TC, 2018 WL 2441145 (D. Or. May 22, 2018). Any attempt to use the *Trail Smelter* Principle to reduce or prohibit the production, sale, and use of fossil fuels necessarily involves sweeping economic considerations—not just for domestic corporations but also for foreign corporations operating within the United States. Appellant Mana's complaints, and any possible redress, is simply too broad and have too great a potential impact on foreign relations for this Court to undertake a decision without direction from the legislative and executive branches.

CONCLUSION

For the foregoing reasons, the United States urges the Court to find that:

1. The *Trail Smelter* Principle is customary international law enforceable as the law of nations under the ATS;
2. The *Trail Smelter* Principle is enforceable against non-governmental actors;
3. The Alien Tort Statute provides a cause of action against domestic corporations;
4. The *Trail Smelter* Principle is displaced by the Clean Air Act;
5. The Fifth Amendment's Due Process Clause does not provide a cause of action for the continued operation of the fossil fuel industry; and
6. Appellant Mana's claim under the Alien Tort Statute is a non-justiciable political question.

Accordingly, the United States respectfully requests the Court to AFFIRM the District Court's dismissal of the Complaint in this action.

Appendix

28 U.S.C. § 1350 - Alien's Action for Tort

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.

42 U.S.C. § 7521 - Emission Standards for New Motor Vehicles or New Motor Vehicle Engines

(a) Authority of Administrator to prescribe by regulation. Except as otherwise provided in subsec. (b)--

(1) The Administrator shall by regulation prescribe (and from time to time revise) in accordance with the provisions of this section, standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare. Such standards shall be applicable to such vehicles and engines for their useful life (as determined under subsection (d), relating to useful life of vehicles for purposes of certification), whether such vehicles and engines are designed as complete systems or incorporate devices to prevent or control such pollution.

42 U.S.C. § 7415 - International Air Pollution

(a) Endangerment of public health or welfare in foreign countries from pollution emitted in United States

Whenever the Administrator, upon receipt of reports, surveys or studies from any duly constituted international agency has reason to believe that any air pollutant or pollutants emitted in the United States cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare in a foreign country or whenever the Secretary of State requests him to do so with respect to such pollution which the Secretary of State alleges is of such a nature, the Administrator shall give formal notification thereof to the Governor of the State in which such emissions originate.

(b) Prevention or elimination of endangerment

The notice of the Administrator shall be deemed to be a finding under section 7410(a)(2)(H)(ii) of this title which requires a plan revision with respect to so much of the applicable implementation plan as is inadequate to prevent or eliminate the endangerment referred to in subsection (a). Any foreign country so affected by such emission of pollutant or pollutants shall be invited to appear at any public hearing associated with any revision of the appropriate portion of the applicable implementation plan