Team Number 46

C.A. 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, and The United States of America,

Appellee.

On Appeal From the United States District Court for New Union Island

Brief for Appellants Organization of Disappearing Island Nations, APA Mana, and Noah Flood

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STATEMENT OF JURISDICTION

The United States District Court for the District of New Union Islands exercised jurisdiction under 28 U.S.C. § 1331. The Court of Appeals for the Twelfth Circuit asserted jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES PRESENTED

I. Whether an American corporation can be liable for a violation of international law under the Alien Tort Statute, 28 U.S.C. § 1350.

II. Whether the *Trail Smelter* principle is customary international law to the extent that it is cognizable as the "Law of Nations."

III. If so, whether *Trail Smelter* is enforceable against private parties.

IV. If it is enforceable, whether the domestic Clean Air Act displaces the international *Trail Smelter* principle.

V. Whether the Fifth Amendment's substantive due process rights to life, liberty, and property provide a right to a sustainable environment.

VI. Whether the actions present a non-justiciable political question.

STATEMENT OF THE CASE

Apa Mana, Noah Flood, and Organization of Disappearing Island Nations (ODIN) bring this action against HexonGlobal and the United States. Mana asserts a claim under the Alien Tort Statute, 28 U.S.C. § 1350 (ATS), because excessive fossil fuel pollution is a violation of the Law of Nations. Against the United States, Flood claims violations of his Fifth Amendment rights and violations of the public trust. Both Mana and Flood are members of ODIN. The plaintiffs originally filed in the United States District Court for the District of New Union Island. *ODIN v. HexonGlobal Corp.*, Civ. A. No. 66CV2018, 3 (2018). Defendants HexonGlobal and the United

States filed motions to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). *Id.* at 4 Judge Romulus N. Remus granted the motions on August 15, 2018. *Id.* Shortly after the dismissal, the plaintiffs filed a timely appeal to the United States Court of Appeals for the Twelfth Circuit.

STATEMENT OF THE FACTS

Proliferation and use of fossil fuels add carbon dioxide and methane to the atmosphere. *Id.* These gasses are classified as greenhouse gasses because they cause the atmosphere to function increasingly like a greenhouse—heat cannot escape because the gasses insulate solar radiation, causing Earth's atmosphere to warm slowly. *Id.* Anthropogenic greenhouse gas pollution caused by the production, distribution, and burning of fossil fuels is inarguably causing a rise in global atmospheric temperatures known as climate change. *Id.* Climate change has caused rising temperatures, rising sea levels, and abnormal rainfall patterns. *Id.* Assuming current fossil fuel emission rates remain the same, the sea level will rise between a half meter and a meter (1.6–3.3ft) in around eighty years. *Id.*

Apa Mana owns a home on A'Na Atu; Noah Flood owns a home on the New Union Islands. Both islands are members of ODIN. *Id.* The Islands have a maximum elevation of three meters above sea level, with their population centers one meter below sea level. *Id.* When the sea eventually rises, both A'Na Atu and the New Union Islands will be perpetually uninhabitable. *Id.* Today, the islands incur substantial damage from more frequent storms caused by climate change; Flood and Mana have experienced seawater damage to their personal and real property. *Id.* at 5. Flood and Mana will also lose significant food sources as the ocean becomes decreasingly productive due to climate change. *Id.* The district court concluded that a limit to fossil fuel emissions would decrease the ongoing damage and "maintain habitability of the plaintiffs'

communities." *Id.* The damages visited upon Flood and Mana are directly attributable to HexonGlobal and the United States.

Defendant HexonGlobal is an American oil corporation. *Id.* It is incorporated in New Jersey with its principal place of business is in Texas. *Id.* The energy products from HexonGlobal and the companies that merged to become it are to date responsible for 32% of United States fossil fuel pollution. *Id.* That accounts for 6% of global historical fossil fuel emissions. *Id.* HexonGlobal knew as early as 1970 that fossil fuel emissions would eventually and irreparably damage Earth's environment. *Id.*

The United States is responsible for at least 20% of all greenhouse gas pollution. *Id.* at 6. The U.S. Government is not limiting fossil fuels; rather, it promotes, rewards, and assists in the expansion, consumption, and combustion of natural gas, coal, and petroleum. The U.S. Government even operates fossil fuel power plants. *Id.* Prior to the current administration, the U.S. at least acknowledged that climate change was a threat, and it took domestic steps to curb its own emissions. *Id.* In 2015, the United States in concert with other countries, formed and agreed to the Paris Agreement where it committed to reducing its greenhouse pollution by 28%. *Id.* at 7. Recently, the United States has committed reverse its plan to reduce its greenhouse gas pollution. *Id.* It plans to stop increased fuel emission standards and it will repeal the Clean Power Plan. *Id.* Additionally, under the direction of the Trump administration, it plans to leave the Paris Agreement. *Id.*

SUMMARY OF THE ARGUMENT

A corporation can be sued under the ATS. There is no international norm against suing corporations for violations of international law, and examples exist of corporations being punished for doing so. Congress has had over 200 years to amend the ATS to preclude corporate liability

and it has not. The drafters of the ATS knew that a lifeless body could and did violate the Law of Nations. Therefore, the ATS should not be interpreted to exclude corporations.

Trail Smelter is a recognized principle of international law and the United States' own actions show that it believes the *Trail Smelter* and *sic utere* principles are *opinio juris*. The U.S. instigated the *Trail Smelter* action and it presumably would not have if it did not believe that transboundary pollution harmed its sovereignty. The U.S. and Canada enshrined the *Trail Smelter* principles into a treaty that requires the U.S. to refrain from transboundary pollution. International declarations and International Court of Justice opinions establish the universal applicability of a norm against transboundary pollution. Finally, the United States-Marshall Islands Compact shows that the United States knows, at the very least, that international pollution is wrong.

Trail Smelter should apply when a private party is sued in its home forum. A private actor must be liable under the *Trail Smelter* principle because private parties can be liable under international law generally, and because to hold otherwise would allow private parties to freely pollute as long as the pollution crosses an international border. If private actors could pollute without penalty, the burden of an international legal judgment would fall on a country's taxpayers rather than the party responsible. Simply, private party can face a violation of international law, and *Trail Smelter* is international law, a private party can be sued for a violation of the *Trail Smelter* principle.

The Clean Air Act (CAA) does not displace *Trail Smelter* because it does not address foreign fossil fuel pollution. For the international aspect of the CAA to apply, the EPA would have needed to meet certain procedural and notice requirements, and they have not done so. Further, there is a presumption against the extraterritorial application of the CAA. There is no evidence that

congress ever intended the CAA to apply to any instance of international air pollution. In fact, there is evidence that it was intended to be a domestic statute.

The protective blanket of substantive due process under the Fifth Amendment recognizes a right to a clean, sustainable environment because it is a predicate to exercising other protected rights. The danger creation doctrine applies to property just the same as it would to other protected rights of life and liberty. Here, the policies and practices of the defendants have created a situation that puts the property rights of the plaintiffs in danger. Finally, the public trust doctrine requires the U.S. to protect the atmosphere for future generations.

Finally, the actions before the court do not present nonjusticiable political questions because the claims are effectively complex nuisance claims. The remedies might be large and scientific, but not overly complicated to the degree that a court cannot provide one. Likewise, there is no constitutional delegation over environmental protection, and making a judgment does not give an order to a federal agency.

ARGUMENT

I. CORPORATIONS CAN BE LIABLE UNDER THE ALIEN TORT STATUE BECAUSE CORPORATE IMMUNITY IS NOT A NORM OF INTERNATIONA LAW

The Alien Tort Statute (ATS) confers upon federal courts jurisdiction over a civil tort action for breach of the law of nations or a treaty of this country. 28 U.S.C. § 1350. The ATS is a wholly jurisdictional statute which does not provide a cause of action. *Sosa v. Alvarez–Machain*, 542 U.S. 692, 713–14 (2004). The law of nations referenced in the ATS consists of customary international law, or international norms. *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 117 (2013) (quoting *Sosa*, 542 U.S. at 732); *see Estate of Alvarez v. Johns Hopkins Univ.*, 275 F. Supp. 3d 670, 683 (D. Md. 2017).

The statute's scope, its jurisdictional grant, is limited to rules or customs of international law, or, the "the customs and usages of civilized nations[.]" *Sosa,* 542 U.S. at 734 (quoting *The Paquete Habana,* 175 U.S. 766, 700 (1900)). Put differently, for an American court to have jurisdiction to hear the claim as a part of the law of nations or an international norm, the injury must be a violation of customary international law. *Flomo v. Firestone Nat. Rubber Co., LLC,* 643 F.3d 1013, 1015–16 (7th Cir. 2011). A "norm" of international law is vague; notwithstanding, federal courts "focus on whether a contemporary international legal norm underlying a proposed ATS claim is "specific, universal, and obligatory."; *Sosa,* 542 U.S. at 732 (quoting and approving of the definition as stated in *In re Estate of Marcos Human Rights Litig.,* 25 F.3d 1467, 1475 (9th Cir.1994); *see Doe I v. Nestle USA, Inc.,* 766 F.3d 1013, 1019 (9th Cir. 2014).

Federal courts look to customary sources of international law such as international conventions, international customs, universal principles of international law, and international courts to determine whether a norm or custom exists. *Id.* at 1019–20. Sources of international law generally include: (a) international conventions, universal or otherwise, establishing rules expressly recognized by the contesting states; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations; (d) and judicial decisions and opinions of experts. *Filartiga v. Peña-Irala,* 630 F.2d 876, 881 n. 8 (2nd Cir. 1980) (citing Statute of the International Court of Justice, art. 38(1), June 26, 1945, 59 Stat. 1055, 1060, 33 U.N.T.S. 993 (entered into force Oct. 24, 1945)); *See Vietnam Ass'n for Victims of Agent Orange v. Dow Chem. Co.,* 517 F.3d 104, 116 (2d Cir. 2008); *See also Flomo,* 642 F.3d at 1017–18 (looking to the Nuremberg Tribunals as a source of generally accepted international norms); *see Kiobel v. Royal Dutch Petroleum Co.,* 621 F.3d 111, 145 (2d Cir. 2010); *see Abagninin v. AMVAC Chem. Corp.,* 545 F.3d 733, 739 (9th Cir. 2008) (recognizing the International Criminal

Tribunal for Rwanda and the International Criminal Tribunal for Yugoslavia as sources of international law to define genocide.).

Private parties may face liability under the ATS. *Kadic v. Karădzíc*, 70 F.3d 232, 239–41 (2nd Cir. 1995) (holding that private actors can be liable for violating international law); *but see Tel–Oren v. Libyan Arab Republic*, 726 F.2d 774, 791–95 (D.C. Cir. 1984) (Edwards, J., concurring) (international law has limited or no application to private actors). It is unsettled whether a domestic corporation may be a party to a lawsuit brought under the ATS. Some courts say no. *Kiobel*, 621 F.3d at 145, *aff'd on other grounds*, *Kiobel*, 569 U.S. at 114. Other courts say corporate liability is possible under the ATS. *Flomo*, 643 F.3d at 1021 (7th Cir. 2011). The Supreme Court has left the question open. *Sosa*, 542 U.S. at 732 n. 20 (asking the question of whether liability exists for a corporation in international law); *see Kiobel*, 569 U.S. at 114 (affirming on other grounds the Second Circuit's decision in *Kiobel*.). Although, the Court has precluded corporate liability for foreign corporations. *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1403 (2018). HexonGlobal is a domestic corporation and *Jesner*'s holding has no application to it.

American corporations can face liability under the ATS. *Nestle USA, Inc.*, 766 F.3d at 1022. In *Flomo*, 643 F.3d at 1020–21, Judge Posner found corporate liability to be possible. In explaining corporate liability as an international norm, he pointed out that after the second world war, I.G. Farben, a German corporation that aided the Nazis, was liquidated by the allies and sold for reparations to the survivors. *Id.* at 1017. Judge Posner further noted that even if a corporation had not, at the time, faced liability before, all corporate liability would not be precluded in perpetuity. *Id.* Put differently, even if a corporation had not been sued for a violation of international law, does not mean corporations are exempt from international law. *Id.* at 1019.

Finally, the court said that imposing liability against unnatural persons is well established in *in rem* judgments against pirate ships. *Id.* at 1020.

Other circuits have found corporate liability to be permissible under the ATS. *Accord Romero v. Drummond Co.*, 552 F.3d 1303, 1315 (11th Cir. 2008) (finding no constraints on who can be a defendant under the ATS); *Doe VIII v. Exxon Mobil Corp.*, 654 F.3d 11, 56–57 (D.C. Cir. 2011), *vacated on other grounds*, 527 F. App'x 7 (D.C. Cir. 2013) (stating that the historical underpinnings and federal common law allow for corporate liability under the ATS); *Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 748 (9th Cir. 2011), *vacated on other grounds*, 569 U.S. 945 (2013) (explaining that the ATS contains no exclusion for corporations and that there is no evidence that it was intended only to apply to natural persons); *See also Doe v. Drummond Co.*, 782 F.3d 576, 595–96 (11th Cir. 2015) (noting that U.S. citizen and corporate defendants can confer jurisdiction upon federal courts because alleged international law violations concern U.S. interests, and the ATS is intended to hold U.S. citizens accountable for those violations abroad.); *See also Al Shimari v. CACI Premier Tech., Inc.*, 758 F.3d 516, 530 (4th Cir. 2014).

Notwithstanding, some interpret the ATS to preclude corporate liability. In *Kiobel*, 621 F.3d at 126, the Second Circuit, citing *Sosa*'s footnote 20, found that international norms govern the scope of the ATS. The *Kiobel* court held that there must be a norm of corporate liability in international law in order to establish a court's jurisdiction over a claim against a corporation. *Id.* at 127. Its reasoning was likewise partially grounded in I.G. Farben. *Id.* at 134. The *Kiobel* court said that only I.G. Farben executives were legally charged. *Id.* at 134–35. It next looked to other international criminal tribunals and found that the jurisdictions of both were confined to "natural persons." *Id.* at 136. The Rome Statute of the International Criminal Court limits jurisdiction to "natural persons," and a proposal to expand its jurisdiction to unnatural persons was rejected. *Id.*

at 136–37. All these factors meant that corporate liability had not become a norm of international law. *Id.* at 137.

The Second Circuit incorrectly decided *Kiobel*. After *Sosa*, the Supreme Court implied that a domestic corporation could be sued under the ATS. The Court granted certiorari in *Kiobel* specifically to address whether a corporation could be a party to the ATS and then it expressly declined to provide an answer. *Kiobel*, 569 U.S. at 114. The Court implicitly recognized corporate liability because it had an opportunity to protect corporations from all liability under the ATS and it refused to do so. *See also Jesner*, 138 S. Ct. at 1395 (clarifying that the Court did not answer the question of whether a corporation could ever be a party to an ATS claim.); *see also* Ursula Tracy Doyle, *The Evidence of Things Not Seen: Divining Balancing Factors from Kiobel's "Touch and Concern" Test*, 66 Hastings L.J. 443, 448 (2015). In *Jesner*, the Court limited ATS liability only for foreign corporations, not domestic ones. The Court's silence is resounding.

The text of the ATS, while not providing a cause of action, contains no limit on who or what can be held liable. Nowhere in the statute does it say that only natural persons or state actors can be sued. 28 U.S.C. § 1350; *Romero*, 552 F.3d at 1315. *Kiobel* points to no legal reason why it would be impossible to charge a corporation. Corporations are considered persons in any natural reading of the statute. *Barrow S.S. Co. v. Kane*, 170 U.S. 100, 106 (1898) (interpreting the Judiciary Act of 1789: "the words 'citizens' and 'aliens,' in these provisions of the constitution and of the judiciary act [of 1789], have always been held by this Court to include corporations.").

There is no reason to think the ATS was intended to apply only to natural persons. The Court points out the principle international offenses at the time ATS was drafted were violations of safe conducts, infringement of the rights of ambassadors, and piracy. *Kiobel*, 569 U.S. at 119; *Sosa*, 542 U.S., at 723. Judge Posner aptly points out that pirate ships were tried *in rem* and were

treated with the rights of persons. *Accord* Rufus Waples, *A Treatise on Proceedings in Rem*, 310–12 (1882); *The Marianna Flora*, 24 U.S. 1, 1 (1825); *The Malek Adhel*, 43 U.S. 210, 234 (1844). The drafters of the ATS knew a non-living thing could be sued; *in rem* judgments had been in the law since the Hebrews and Justinian and were part of Anglo-American common law. Rufus Waples, s*upra*, 16–17, 31–32 (1882). Because *in rem* judgments and judgments against pirate ships were known to the drafters, they would have conceptualized a judgment against an unnatural entity for a violation of international law. *The Palmyra*, 25 U.S. 1, 14 (1827), *superseded by statute,* 21 U.S.C. § 853, *as recognized in Honeycutt v. United States*, 137 S. Ct. 1626, 1635 (2017) (explaining that the ship was considered the offender, i.e., offence was attached primarily to the thing). Furthermore, like modern corporations, the loss of those ships fell on its owners. *The Marianna Flora*, 24 U.S. at 27. According to the plain text of the statute, a domestic corporation ought to be vulnerable to suit—historical tradition dictates it.

While *Kiobel*'s discussion of I.G. Farben is historically accurate, it is misleading. I.G. Farben was never criminally charged, but it was mostly broken up by allied officials and became Bayer, Hoechst, and BASF, and a large part of it was liquidated in 1952. Edmund L. Andrews, *THE BUSINESS WORLD; I.G. Farben: A Lingering Relic of the Nazi Years*, N.Y. Times, May 2, 1999, 3003004; *see also* Michael J. Kelly, *Prosecuting Corporations for Genocide*, 30 (2016) (describing the decision to not to prosecute Farben as a company as political, not legal). While I.G. Farben might not be precedent of a company being a party to an international criminal action, it is precedent of a company being punished for human rights violations.

Even if Nuremberg, the International Criminal Tribunal for Rwanda, the International Criminal Tribunal for Yugoslavia, and the Rome statute of the International Criminal Court all limited jurisdiction to "natural persons," the scope of the ATS as applied to Americans should not

change. Just because these courts chose not to prosecute corporations does not mean a domestic corporation cannot be prosecuted. The jurisdiction of those courts also does not establish a widely accepted international norm precluding corporate liability comparable to well established international norms against piracy, genocide, torture, or slavery. *See Princz v. Fed. Republic of Germany*, 26 F.3d 1166, 1173 (D.C. Cir. 1994); *see also Belhas v. Ya'alon*, 515 F.3d 1279, 1286 (D.C. Cir. 2008). Congress and the Supreme Court control the scope of the ATS, and neither have limited the ATS to the extent that domestic corporations are immune from international law.

II. TRAIL SMELTER IS A RECOGNIZED PRINCIPLE OF INTERNATIONAL LAW APPLICABLE UNDER THE ALIEN TORT STATUTE.

Sosa holds that federal courts may recognize hybrid international law—common-law claims based on the modern law of nations. *Sosa*, 542 U.S. at 732. To do so, courts must not only consult executed conventions and treaties, but also executive and legislative acts, judicial decisions, non-binding declarations, jurists, commentators, and publicists. *Nestle USA, Inc.*, 766 F.3d at 1019–20; *Abagninin*, 545 F.3d at 739 (9th Cir. 2008); *see also* Restatement (Third) of Foreign Relations Law § 102 (1987).

Article 38 of the International Court of Justice uses four sources to determine what constitutes international law: international conventions; international customs showing general practice; general principles of law recognized by civilized nations; and finally, judicial decisions and international law experts. Art. 38(1), June 26, 1945 I.C.J. Acts & Docs. 59 Stat. 1055, 1060. United States courts look to the ICJ statute as evidence of what is international law. *Kiobel*, 621 F.3d at 132; *Filártiga*, 630 F.2d at 881 n.8. Once a custom or practice is determined, it can be further shown to be a rule of international law by referencing multiple probative sources to show that states follow it as a rule in an international context. Restatement (Third) of Foreign Relations

Law § 103; *see Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 247–48 (2d Cir. 2003). Courts also look to whether countries view a practice as *opinio juris*, or obligatory. *North Sea Continental Shelf (Ger. v. Den.; Ger. v. Neth.)*, Judgment, 1969 I.C.J. 3, 41–42, 70–77 (Feb. 20) (explaining that to constitute *opinio juris*, the acts concerned must be a settled practice and the states must act like the practice is an obligatory legal obligation).

The *Trail Smelter* arbitration establishes an obligation to prevent transboundary air pollution. *United Nations Legislative Series, Book 25: Materials on the Responsibility of States for Internationally Wrongful Acts*, 115, U.N. Doc. ST/LEG/SER.B/25 (2012). In *Trail Smelter*, the United States sued Canada because a private smelting plant was dumping sulfur dioxide and other pollutants across the border into Washington. *Trail Smelter Arbitration*, 3 U.N.R.I.A.A. 1905, at 1938–39 (1941). A tribunal was formed to adjudicate the claim. *Id.* at 1938. The tribunal found that the Trail Smelter's sulfur fumes damaged land in Washington. *Id.* at 1941. The tribunal held that: "under the principles of international law . . . no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes . . . or to the territory of another or the properties or persons therein[.]" *Id.* at 1965. *Trail Smelter* also impregnates international environmental law with the idea of *sic utere ut alienum non laedas*, or, one should use one's own property in such a manner as to not injure that of another. *Id.* at 1965. The tribunal further declared that "a State owes at all times a duty to protect other States against injurious acts by individuals from within its jurisdiction." *Id.* at 1963. Applying these international legal principles, the Tribunal found Canada responsible for the Trail Smelter pollution and ordered Canada to prevent further transborder damage from the Trail Smelter. *Id.* at 1965–66. The Tribunal based its reasoning in part on *Georgia v. Tennessee Copper Co.*, 237 U.S. 474, 478 (1915), where the Supreme Court

required a Tennessee smelting plant to limit its sulfur discharge across the border into Georgia to prevent further pollution.

The United States certainly considers the *Trail Smelter* principle a legal obligation—it initiated the action against Canada for the smelter's pollution. If the United States did not believe that international air pollution was a problem, presumably, it would not have initiated the action at all.

Trail Smelter's principle against transboundary pollution and *sic utere* have been established in other international fora. Principle 21 of the Stockholm Declaration of the United Nations Conference on the Human Environment says that states have a right to exploit their own resources and a "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." *Stockholm Declaration of the United Nations Conference on the Human Environment*, Report of the United Nations Conference on the Human Environment, U.N. Doc. A/CONF.48/14/Rev.1 (1973), 5. Based on the Stockholm declaration, the United Nations General Assembly passed Resolution 2995 (XXVII), saying states must not produce "harmful effects" outside their national jurisdiction while exploiting and developing their natural resources. GAOR, Resolution 2995 (XXVII), Dec. 15, 1972. Stockholm's *sic utere* principle was affirmed in Principle 2 of the Rio Declaration, which says the principles of international law give states the right to exploit their own resources, but that states also must ensure that their activities do not pollute across borders. *Rio Declaration on Environment and Development*, 1992, A/CONF.151/26 (vol. I), 2. The Rio Declaration reiterated international community's assertion that transboundary pollution is a violation of international principles.

The International Court of Justice (ICJ) recognizes the *Trail Smelter* principle as customary international law. *The Corfu Channel Case*, (U.K. v. Alb.), 1949 I.C.J. 4, 23 (Merits Judgment of April 9); *see New Zealand v. France*, 106 I.L.R. 1, 68–69 (1955) (holding that "[the principle that damage must not be caused to other nations] is well entrenched in international law and goes as far back as the *Trail Smelter* case[.]") (Weeramantry, J.); *see Indus Waters Kishenganga Arbitration*, 154 I.L.R. 1, 171 (2015) (describing *Trail Smelter* as "a foundational principle of customary international law[.]"). The ICJ likewise recognizes both Principle 2 of the Rio Declaration and Principle 21 of the Stockholm declaration as expressing a universal law that transborder pollution violates international duties. *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, 1996 I.CJ. 226, 241–42. *See also Iron Rhine Arbitration (Award)*, 140, I.L.R. 130, 219 (2005) (quoting and endorsing *Nuclear Weapons*: "the [ICJ] expressed the view that '[t]he existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other states or areas beyond national control is now part of the corpus of international law relating to the environment[.]'").

If the ICJ recognizes *sic utere* principles and principles against transboundary pollution, and United States courts look to the ICJ as a guide on what constitutes international law, there must exist a presumption that *Trail Smelter* is universal, customary, obligatory, and applicable under the ATS. *See* Restatement (Third) of Foreign Relations of the United States § 601 cmt (b) (1986) (citing *Trail Smelter* to establish that states are obligated to reduce injury to the environment of another state); *see also Sosa*, 542 U.S. at 737 (citing the Restatement (Third) of Foreign Relations Law of the United States as a guiding authority on what establishes international law.).

In addition to the international recognition of *Trail Smelter* and *sic utere*, the United States' own actions demonstrate its belief in principles against transboundary and international pollution. In 1980, the United States and Canada formed a treaty and agreed to:

> (a) develop domestic air pollution control policies and strategies, and as necessary and appropriate, seek legislative or other support to give effect to them; (b) promote vigorous enforcement of existing laws and regulations as they require limitation of emissions from new, substantially modified and existing facilities in a way which is responsive to the problems of transboundary air pollution[.]

Memorandum Of Intent Between The Government Of The United States And The Government Of Canada Concerning Transboundary Air Pollution, Can-U.S., Interim Action 2, Aug. 5, 1980 T.I.A.S. No. 9856. This Treaty is a recognition by the United States that it has an obligation to abide by *sic utere* and *Trail Smelter* principles. Therefore, there exists a presumption that the United States has consented to abide by *sic utere* and *Trail Smelter* in an international context. Transboundary pollution is cognizable international law and applicable under the ATS.

The U.S. has paid reparations for irreversible pollution to a foreign country. In the course of nuclear testing between 1946 and 1958, the United States detonated sixty-six nuclear weapons in the Marshall Islands. *John v. United States*, 77 Fed. Cl. 788, 792 (2007), *aff'd sub nom. People of Bikini o/b/o Kili/Bikini/Ejit Local & Gov't Council v. United States*, 554 F.3d 996 (Fed. Cir. 2009). The testing destroyed some of the islands outright and vaporized parts of some, caused high levels of radiation exposure, and perpetual nuclear contamination. *Id.* In 1983, the United States and the Marshall Islands entered into a Compact of Free Association. *Agreement Concerning the Compact of Free Association, Marshall Islands-U.S.*, June. 25, 1983 T.I.A.S. 04-501. The Compact provided, *inter alia*, Marshallese living space in the United States as nonimmigrants, § 141; the United States must prevent environmental damage and follow U.S. environmental laws in the Marshall Islands, § 161(a). In § 177 of the Compact, the United States accepted

responsibility for damage and compensation related to the nuclear testing program. § 177(a). The U.S. also agreed to pay $150 million to the Marshall Islands. § 177(c). Finally, the U.S. agreed to pay damages for claims arising out of the nuclear testing program in the Marshall Islands. § 174(b).

In function, the damages on the Marshall Islands and the inevitable damages on A'Na Atu are the same. Just as many of the Marshall Islands were either destroyed or rendered uninhabitable due to radiation, A'Na Atu will be destroyed or rendered uninhabitable due to rising seas. While the pollutant is different obviously different, the end result is the same. In both situations, native populations either faced or face displacement due to a foreign country's policy decision. At a minimum, the U.S.–Marshallese compact represents an example of a tacit, American acknowledgement of a norm against international pollution and land degradation. The agreement acknowledges that U.S. policy and activities have polluted a place to such a degree that it became uninhabitable. The U.S. paid reparations accordingly. Simply, the agreement means the United States has acknowledged that pollution of a foreign country is wrong.

The *Flores* court found neither international rights to life or health, nor an international law violation of intranational pollution. *Flores*, 414 F.3d at 253–55. The court reasoned that the plaintiffs' reliance on nonbinding declarations, nonbinding treaties, multinational declarations, and ICJ opinions did not present a clear and unambiguous rule of international law against international pollution. *Id.* at 254–64. This evidence failed to present a rule of law, because very little of it was binding upon the United States or otherwise created enforceable legal obligations. *Id.*

However, the *Flores* court did not consider *Trail Smelter*—an international tribunal proceeding that is binding upon the United States and certainly creates enforceable legal obligations. Next, the *Flores* court's requirement that only party-specific binding decisions and instruments can constitute international law, wholly ignores performance and action, another way

parties "consent to be bound." *Id.* at 256 (Cabranes, J.) Next, if the *Flores* standards are used, and only binding agreements can constitute a universal principle of international law, international law is, in effect, limited to *jus cogens* norms and whatever countries have explicitly agreed to be bound by. This allows countries like the United States to pollute—or otherwise act uncouth—without repercussion.

The *Trail Smelter* principle is a recognized international law applicable to the ATS because it is used in ICJ opinions and has been implanted into international declarations. The prevention of transboundary pollution as *opinio juris* is also demonstrated in the American initiation of *Trail Smelter*, the incorporation of the *Trail Smelter* principle into international declarations and court decisions, and the enshrinement of the *Trail Smelter* principle into a binding treaty between the United States and Canada. Finally, American reparations to the Marshall Islands show that it believes international pollution is wrong. This court should apply the *Trail Smelter* principle in the instant case because it is a customary principle of international law recognized in multiple contexts.

III. *TRAIL SMELTER* IMPOSES OBLIGATIONS AGAINST PRIVATE PARTIES BECAUSE COUNTRIES SHOULD NOT BE HELD WHOLLY ACCOUNTABLE FOR ITS CORPORATE CITIZENS' POLLUTION.

Trail Smelter principle imposes a legal obligation on HexonGlobal Corporation, a non-governmental actor. *Trail Smelter* has established the international environmental law that every nation "is obligated to take such measures as may be necessary, to the extent practicable under the circumstances, to ensure that activities within its jurisdiction or control . . . are so as not to cause a significant injury to the environment of another . . ." Restatement (Third) of the Foreign Relations Law of the United States § 601 (1)(1987).

A. *Trail smelter* established the general principle that bans any party from engaging in conduct that pollutes their neighboring states.

On its face, it appears that this rule was established to only extend liability to an alleged polluting party's state. In turn, the state is responsible for preventing their constituents from engaging in conduct that would harm another state through laws and regulations. When a party engages in conduct that harms another, the state then is responsible for that private actor's conduct to the other state. *Trail Smelter*, however, only addresses the situation of when a litigant cannot sue an international party in their own home forum. In the present case, *Trail Smelter* should be applied in a different fashion. Specifically, when a private party is sued in their home a private entity can be held accountable for their action.

Initially, *Trail Smelter*'s rule formed as a result of the United States' difficulty with imposing an injunction against a private non-U.S. organization. Trail Smelter, located in Canada about 10 miles from the U.S.–Canada border, emitted thousands of tons a month of sulfur dioxide fumes that harmed crops and animals in the U.S. Michael J. Robinson-Dorn, *The Trail Smelter: Is What's Past Prologue? EPA Blazes A New Trail for CERCLA*, 14 N.Y.U. Envtl. L. J. 233, 243 (2006). A group of U.S. farmers attempted to sue the Trail Smelter in Canada. *Id.* At the time, Canadian law barred the U.S. farmers' claim in a Canadian court because the harms occurred outside of Canada. *Id.* To redress their injury, the U.S. farmers banned together and turned to their congressional delegation. *Id.* at 246. The U.S. Department of State agreed to help. In 1927, the U.S. Department Justice sent an official complaint to the government of Canada, which turned what was originally a public nuisance claim into an international dispute. *Id.* at 248. The U.S. suggested using the International Joint Commission (IJC). *Id.* Initially Canada refused because they were concerned that negotiations with the U.S. would result in a solution that would curtail the operation of the Trail Smelter. *Id.* Eventually, in 1928, Canada agreed to submit the matter to the IJC. *Id.* at 250. Canada paid the damages, as apportioned by the tribunal. *Id.* Ultimately, the

IJC created a rule stating that "no state has the right to use or permit the use of territory in a manner as to cause injury . . . to the territory of another." *Id.* at 253.

Many of the problems of holding a foreign party accountable are circumvented by the plaintiffs filing suit against HexonGlobal in its own home country. Here, HexonGlobal Corporation is a company incorporated in the state of New Jersey. Plaintiffs filed suit against HexonGlobal in the United States District Court for the District Court of New Union Island a U.S. territory. In *Trail Smelter*, the plaintiffs could not sue the Canadian corporation in Canadian courts or sue a Canadian company in U.S. courts.[1] The plaintiffs' only course of action was for the federal government of the United States to resolve the issue by diplomatic international negotiations. The distinction here is that such international mechanism would not be required here. This Court has the ability to issue a judgement against HexonGlobal a U.S. located entity. Accordingly, this court should find that the Trail Smelter can be applied to private parties.

B. Nonapplication of *Trail Smelter* provides private entities an escape hatch for conduct for which they should be held liable.

A private actor must be liable under the *Trail Smelter* principle because otherwise the government—and its taxpayers—would be liable for the pollution violations of private corporations that polluted across an international border. If we only hold the state accountable, private companies would be less likely to be deterred from engaging in conduct that would harm neighboring counties.

To prevent this escape hatch, private parties should be held accountable under the polluters pays principle. Under the polluter pays principle, a court order should deter environmental

[1] The litigants could have sued the Canadian Company. But, as with any international dispute, Canada is by no means required to recognize that judgment. Although they may have one on a public nuisance claim, they would have lost trying to seek remedies in Canada.

degradation by imposing liability on to the actual polluter. *See Joslyn Mfg. Co. v. Koppers Co.*, 40 F.3d 750, 762 (5th Cir. 1994). Polluters have been required to pay for the cost of undoing damages caused by their own activities and connected damages as a result of those damages. In the United State, courts have applied polluter pays to remedy harms to the environment. *See e.g., United States v. Capital Tax Corp*., 545 F.3d 525, 530 (7th Cir. 2008) (holding that the government can recover damages from responsible parties to clean up hazardous waste because "the 'polluter pays'" under Title 42, Sections 9606(a) and 9604(a) of the United States Code); *Joslyn Mfg. Co.*, 40 F.3d at 762 (holding the polluter to pay the cost of restoring a contaminated site and denying the polluter's "scheme under which it could defray part of its clean-up cost by passing the contaminated property through a series of innocent landowners and then, when the contamination is discovered, demanding contribution from each"); *see also* Fla. Const. art. II, § 7(b) (incorporating the polluter pays rule to protect the Everglades Agricultural Area by ordering that those who cause pollution "primarily responsible for paying the costs of the abatement of that pollution"). Under this rule, HexgonGlobal should be held directly accountable for its actions that pollute foreign companies.

Furthermore, international law can and has been applied to private actors. *See Kadic*, 70 F.3d at 239–41 (finding Private corporations can face liability for violations of international law). If a private party can face a violation of international law, and trail smelter is international law, a private party can be sued for a violation of the trail smelter principle.

IV. THE CLEAN AIR ACT DOES NOT DISPLACE TRAIL SMELTER BECAUSE IT DOES NOT SPEAK DIRECTLY TO THE INTERNATIONAL ASPECT OF EMISSIONS.

"The appropriate analysis in determining if federal statutory law governs a question previously the subject of federal common law is not the same as that employed in deciding if

federal law pre-empts state law." *City of Milwaukee v. Illinois*, 451 U.S. 304, 316 (1981). When analyzing if a federal statute displaces a state law, the court assumes that the federal statute does not supersede the state law unless Congress clearly intended to do so with a clear and manifest purpose. *Rice v. Santa Fe Elevator Corp*., 331 U.S. 218, 230 (1947). "However, when deciding whether federal statutory or federal common law governs, the court does not require the same sort of evidence of a clear and manifest purpose to preempt." *Resolution Tr. Corp. v. Gibson*, 829 F. Supp. 1110, 1117 (W.D. Mo. 1993) (citing *City of Milwaukee*, 451 U.S. at 316–17)). "The test for preemption of federal common law is less stringent than that applied to state law because the former does not involve the same concerns over federalism." *Resolution Tr. Corp.*, 829 F. Supp. 1110, 1117 (W.D. Mo. 1993) (citing *Barnes v. Andover Co., L.P.*, 900 F.2d 630, 638 (3rd Cir. 1990)). "In determining whether a federal statute pre-empts common law causes of action, the relevant inquiry is whether the statute speaks directly to the question otherwise answered by federal common law." *County of Oneida v. Oneida Indian Nation of N.Y.*, 470 U.S. 226, 236–37 (1985) (internal marks and citations omitted).

In *Oneida*, Indian tribe members filed suit against counties in New York alleging that the conveyance of land to New York violated the Indian Trade and Intercourse Act. *County of Oneida*, 470 U.S. at 229. The Tribe members also sought damages for fair rental value of the land, under federal common law. *Id.* The counties argued that "the Nonintercourse Act pre-empted whatever right of action the Oneidas may have had at common law." *Id.* at 233. The Supreme Court held that the Nonintercourse Act did not preempt federal common law since the Act did not directly address remedies for the unlawful transfer of Indian land. *Id.* at 239. The Court stated that "federal common law is used as a 'necessary expedient' when Congress has not 'spoken to a particular issue." *Id.* at 237. Although the Act provided for criminal penalties and gave the President the

discretion to decide whether to remove squatters from the Indian land, the Act did "not address directly the problem of restoring unlawfully conveyed land to the Indians." *Id.* at 239. Therefore, the court determined that federal common law was not preempted by the act.

In *Milwaukee*, after the state had commenced its federal common law action of public nuisance, Congress enacted the Federal Water Pollution Control Act Amendments of 1972. *Milwaukee v. Ill*., 451 U.S. at 309 (1981). The Court held that the Act established an all-encompassing program of water pollution regulation and preempted federal common law. *Id.* The Act thoroughly addressed the problem of effluent limitations, and there was no basis for the lower court to impose more stringent limitations than those imposed under the regulatory regime. The court further reasoned that "all three of the permits issued to [the sewer operator] explicitly address the problem of overflows." Thus, the Clean Air Act (CAA) displaced the federal common law because Congress had regulated the specific pollutants at issue.

In *New England Legal Foundation v. Costle*, 666 F.2d 30, 32 (2d Cir. 1981), the Second Circuit determined the federal common law of nuisance action was preempted by the CAA on narrow grounds because the EPA authorized the power company's emission levels. The court reasoned, by analogizing the case to *Milwaukee*, that the nuisance claim had been preempted because the EPA had approved a variance for the power company's emission level. *Id.* It is important to note that the court did not answer the broad question of "whether the CAA totally preempts common law nuisance actions." *Id.*

Trail Smelter is not displaced because the CAA, as congress has directly spoken, is primarily limited to domestic situations. *See Am. Elec. Power Co. v. Connecticut*, 564 U.S. 510, 425 ("The [Clean Air] Act thus provides a means to seek limits on emissions of carbon dioxide from domestic power plants."); *see also City of New York v. BP P.L. C.*, No. 18 Civ. 18 (JFK),

22018 WL 104293, 4* (2018) ("The [CAA] displaced the nuisance claims asserted in *Kivalina* and *AEP* because the Act 'spoke directly' to . . . domestic emissions of greenhouse gases."). The CAA, originally enacted in 1955, is a comprehensive federal law that regulates air emissions from stationary and mobile sources. Air Pollution Act of 1955, Pub. L. No. 84-159, 69 Stat. 322 (1955); 42 U.S.C. § 7401(b) (2012). Under § 110, EPA identifies the criteria pollutants and establishes the National Ambient Air Quality Standards (NAAQS) to protect public health and public welfare and to regulate emissions of hazardous air pollutants. Clean Air Act Amendment of 1970, Pub. L. No. 91-604, § 4(a), 84 Stat. 1676, 1680 (1970). Then, states are required to prepare a "plan which provides for implementation, maintenance, and enforcement" of any national ambient air quality standard. *Id.*

The CAA only applies to international situations only when:

> [T]he 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*.

§ 7415(a). Furthermore, the EPA is only required to act when "the Administrator determines [that the foreign country] has given the United States essentially the same rights with respect to the prevention or control of air pollution occurring in that country as is given that country by this section." § 7415(c). The context under which congress has decided to apply the CAA on international issues is limited.

Trail Smelter applies because the CAA, as administered by the EPA, does not speak directly to the issue. The EPA does not regulate the foreign carbon dioxide at all. The record is devoid of sufficient evidence, as statutorily required by congress, for when the CAA would apply

to foreign countries. The CAA only applies when the EPA has reason to believe that air pollutants emitted in the United States may endanger public health or welfare in a foreign country, gives a notification to the governor of the state in which the pollutants originate, but only if that foreign country has given the U.S. the same rights. § 7415 (a), (c). Although the U.S. has many regulations regarding the domestic emissions of carbon dioxide,[2] the government has not demonstrated that it has devoted any time or resources towards the international emission of gases. The implications that carbon dioxide would have domestically would be starkly different than to a foreign country. From the record, it only appears that the EPA only considered domestic implications regarding carbon dioxide emissions. Thus, EPA has not created a foreign carbon dioxide regulation.

This complete lack of regulation stands in marked contrast to the regulation of pollution in *Milwauke*, where specific pollutants were thoroughly addressed by the FWPCA procedures. *New England Foundation* is also distinguished because, here, the EPA could not have authorized HexonGlobal to emit gases without satisfying the statutory requirements. By not following the clear steps required by congress, the EPA has chosen to not regulate New Union foreign Carbon Dioxide at all. Thus, the *Trail Smelter* action remains affirmed.

A. There is a presumption against the extraterritorial application of the Clean Air Act.

"It is a basic premise of our legal system that, in general, United States law governs domestically but does not rule the world." *RJR Nabisco, Inc. v. European Cmty*., 136 S. Ct. 2090, 2100 (2016) (quoting *Microsoft Corp. v. AT&T Corp*., 550 U.S. 437, 454 (2007)). The "presumption against extraterritoriality" is a canon of statutory construction, and represents the default assumption that legislation is only meant to apply within the U.S.. *Morrison v. Nat'l Austl.*

[2] In 2009, 2010 and 2015, the EPA has made findings and regulations regarding air pollution, but were unrelated to international concerns. *ODIN*, Civ. A. No. 66CV2017 at 7.

Bank Ltd., 561 U.S. 247, (2010)). "Under this canon of construction, a statute should be construed to reach only conduct within the United States unless Congress affirmatively states that the statute applies to conduct abroad." *Id.* (quoting *EEOC v. Arabian Am. Oil Co. (Aramco)*, 499 U.S. 244, 248 (1991)). This presumption is meant to provide "a stable background against which Congress can legislate with predictable effects," *Morrison*, 561 U.S. at 255 (2010), and also "protect against unintended clashes between our laws and those of other nations which could result in international discord," *Aramco*, 499 U.S. at 248. "But it also reflects the more prosaic "commonsense notion that Congress generally legislates with domestic concerns in mind." *Smith v. United States*, 507 U.S. 197, 204, n. 5 (1993). The Supreme Court has stated that this "presumption [applies] across the board, "regardless of whether there is a risk of conflict between the American statute and a foreign law." *Morrison*, 561 U.S. at 255.

The Court must apply a two-step approach for analyzing extraterritoriality. *RJR Nabisco, Inc.* 136 S. Ct. at 2101. "At the first step, we ask whether the presumption against extraterritoriality has been rebutted—that is, whether the statute gives a clear, affirmative indication that it applies extraterritorially." *Id.* "If the statute is not extraterritorial, then . . . we determine whether the case involves a domestic application of the statute . . . by looking to the statute's 'focus."" *Id.* "If the conduct relevant to the statute's focus occurred in the United States, then the case involves a permissible domestic application even if other conduct occurred abroad; but if the conduct relevant to the focus occurred in a foreign country, then the case involves an impermissible extraterritorial application regardless of any other conduct that occurred in U.S. territory." *Id.*

Step 1: besides § 7415—which the government does not use here—the government does not give a clear affirmative indication that it intended the CAA to apply internationally. In fact, there is evidence suggesting that the CAA was intended to only be applied domestically. The

statutory framework of the CAA suggest that it was intended to only apply domestically. The "EPA may delegate implementation and enforcement authority to the States, §§ 7411(c)(1), (d)(1)." *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 424 (2011). "If States (or EPA) fail to enforce emissions limits against regulated sources, the Act permits "any person" to bring a civil enforcement action in federal court. § 7604(a)." *Id.* The CAA relies on states to do a lot of the work. The use of states in the statutory frame work of the CAA suggests that the statute was intended by congress to only be applied domestically. States are generally limited to only making policy concerning local state matter. U.S. Const. amend. X.

Step 2: The statute is primarily focused on the harms air pollution can cause. Section 7401 states "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," "to initiate and accelerate a national research and development program to achieve the *prevention and control of air pollution*;" and "to encourage and assist the development and operation of regional air pollution prevention and control programs."). Next, a court looks to where the focus of the statute has occurred. The focus of the statute is the actual harm that resulted from the harm of the pollution. Here, the focus of the statute occurred outside of the United States. Here, the water damage occurred outside of the United States. Accordingly, the CAA as applied here involves an impermissible extraterritorial application regardless of the fact that the actual pollution occurred in the United States.

V. THE DUE PROCESS CLAUSE PROTECTS THE RIGHT TO A CLEAN ENVIRONMENT BECAUSE IT IS A PREREQUESITE TO OTHER FUNDAMENTAL RIGHTS PROTECTED UNDER DUE PROCESS.

The Due Process Clause of the Fifth Amendment of the United States Constitution reads: "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. Substantive Due Process rights are the rights to which a free and self-governing

people are entitled. *Washington v. Gluksberg*, 521 U.S. 702, 721 (1997). In the United States, these rights are prophylactics against arbitrary legislation. *Hurtado v. California*, 110 U.S. 516, 532 (1884); *Reno v. Flores*, 507 U.S. 292, 301–02 (1993).

Courts have the power to determine what constitutes a fundamental right, even those not enumerated in the Constitution. *United States v. Carolene Prod. Co.*, 304 U.S. 144, 152 n.4 (1938). To discern what constitutes a fundamental right under the Due Process Clause, it is necessary to determine whether the issue in question is deeply rooted in the social and legal traditions of our country. *Gluksberg*, 521 U.S. at 720. A court also determines whether the government infringement shocks the conscience. *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 834 (1998).

The Supreme Court has found substantive due process to include myriad rights central to modern life. *See, e.g.*, *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (finding sodomy proscriptions to be a violation of privacy); *Roe v. Wade*, 410 U.S. 113, 153 (1973) (finding the right to terminate a pregnancy implicit within the Fourteenth Amendment); *Boddie v. Connecticut*, 401 U.S. 371, 382 (1971) (finding the right to divorce); *Loving v. Virginia*, 388 U.S. 1, 3 (1967) (invalidating the prohibition of interracial marriages); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35 (1925) (declaring unconstitutional an initiative forbidding parochial schools); *Meyer v. Nebraska*, 262 U.S. 390, 403 (1923) (annulling a state statute proscribing German in public schools).

The government is generally not required to protect its citizens substantive due process rights. *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 195 (1989); *Youngberg v. Romeo*, 457 U.S. 307, 317 (1982) (A state is not generally obligated to provide substantive services). The *DeShaney* Court carved out two narrow exceptions to the general rule: first, for those who are incapacitated, either through incarceration, institutionalization, or to other full state control, the government is required to act on behalf of the incapacitated person to keep

due process intact by providing a safe environment; and second, where the state creates the danger visited upon the plaintiff. *DeShaney*, 489 U.S. at 200–01.

A. A healthy environment is fundamental to due process because it is implicit to the concepts of life and property.

Property and the concept of private ownership are explicit in the Constitution. Property is generally protected from forfeiture without due process. U.S. Const. amend. V. It is protected from being taken for a public use without just compensation. *Id.* Most property is protected from search and seizure without a warrant. U.S. Const. amend. IV. These clauses are probative of the value of private property within the United States.

Several courts have found that environmental protection or the right to a clean environment is not protected by the constitutional guarantee of substantive due process. *Accord In re Agent Orange Prod. Liab. Litig.*, 475 F. Supp. 928, 934 (E.D.N.Y. 1979) (finding no due process right to a clean environment); *Pinkney v. Ohio Environmental Protection Agency*, 375 F. Supp. 305, 310 (N.D. Ohio 1974) (same); *Tanner v. Armco Steel Corp.*, 340 F. Supp. 532, 534 (S.D. Tex. 1972); *Ely v. Velde*, 451 F.2d 1130, 1132-33 (4th Cir. 1971).

However, the U.S. Constitution absolutely guarantees a right to the use and enjoyment of privately held property. Property is deeply imbedded in the country's history and tradition. The Supreme Court has found that property, deprived of its value, constitutes a taking. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027 (1992). While the situation at hand is not alleged to be a taking, the same principle is in effect. The government of the United States, through lax environmental protection and systemic, tangible rewards for fossil fuel proliferation, is creating an environment where property and the ownership value of it are at risk. A substantive due process right to property is worthless if it is inexecutable. Here, the policy of the United States is creating a situation that is currently and will continue to degrade the values of coastal and island properties

to the point where they either do not exist or are so volatile that all economic value will have been erased without any sort of due process to the rightful owners. That must be a substantive due process violation.

The district court in *Juliana* ruled that Americans have a fundamental right to a climate system capable of sustaining human life, because it is a necessary condition of exercising other rights to life, liberty, and property. *Juliana v. United States*, 217 F. Supp. 3d 1224, 1250 (D. Or. 2016). The court defended its finding under the theory of danger creation, an exception which "permits a substantive due process claim where the government places a person in peril in deliberate indifference to their safety." *Id.* at 1251 (quoting *Penilla v. City of Huntington Park*, 115 F.3d 707, 709 (9th Cir. 1997)). The *Juliana* court applied danger creation to climate change because it recognized that where government action contributes to climate change (which will damage human life, shorten life, damage property, and alter the ecosystem), a claim for a due process violation has been stated. *Id.* at 1250.

In *Penilla v. City of Huntington Park*, 115 F.3d at 708, Huntington Park Police left Mr. Juan Penilla to die by cancelling an ambulance and hiding him from public view when it was clear that he would die without immediate help. *Id*. The *Penilla* court found the police put Penilla in a more dangerous situation that ultimately led to Penilla's death. *Id.* at 710. In distinguishing Penilla's harm from the situation in *DeShaney*, the court explained that in *DeShaney* the state played no role in creating the danger, whereas state officers actively created the perilous situation faced by Penilla. *Compare DeShaney*, 489 U.S. at 193 (a child suffered permanent, debilitating brain injuries from domestic abuse) *with Penilla*, 115 F.3d at 708 (police officers canceled a necessary ambulance, dragged the dying Penilla into his house, and locked the door). Where state actors actively create a situation which endangers an individual, a violation of the right to life,

liberty, and property can occur. *Id.* at 710. Additionally, the state or its agents must have some direct knowledge that its actions are creating a dangerous situation. *Martinez v. California*, 444 U.S. 277, 285–85 (1980).

The danger creation doctrine should not function any differently if it is applied to property. The Due Process Clause lists life, liberty, and property as the three things that cannot be deprived; therefore, the danger creation theory is presumably applicable to all three, as it is a way to violate due process. Americans on New Union Island will be functionally barred from exercising their rights to buy, hold, and sell property if that property is underwater, or if it is universally understood that the property value will continue to decline until it is effectively worthless because the land will be erased "off the map ASAP." T.I., URBAN LEGEND (GRAND HUSTLE RECORDS AND ATLANTIC RECORDS 2004). The situation faced by New Union Island is like *Penilla* in that the United States, like the officers in *Penilla*, has created a setup where it has created the danger and will not take any action to prevent the damage that it acknowledges will visit the island.

This court must recognize that the danger creation theory is applicable to property. If greenhouse gas emissions are not curbed, Noah Flood will either lose or suffer significant, irreversible property damage without due process. Even if substantive due process does not contain a right to a clean environment or impose general government obligations to protect substantive due process, it certainly requires the government to protect property from dangerous situations that it creates. Climate change is one of these situations and the United States must act in order to preserve the right to property.

B. The public trust doctrine obligates the United States to act as a trustee to protect the environment and its resources for future generations.

The public trust doctrine is rooted in English common law. *PPL Montana, LLC v. Montana*, 565 U.S. 576, 603 (2012). At English common law, title to tidal waters and lands below high-

water mark remained in the king, as sovereign, who maintained the waters and lands for the public's benefit. *Shively v. Bowlby,* 152 U.S. 1, 11-14 (1894). After the American Revolution, the United States succeeded the rights of the King and acquired title to lands below high-water mark. *Martin v. Waddell's Lessee*, 41 U.S. 367, 410 (1842); *see Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 284 (1997) Under the equal footing doctrine, that same title extends to all other states and territories admitted to the Union. *Pollard v. Hagan*, 44 U.S. 212, 229 (1845). More explicitly, the Supreme Court has stated that this common-law principle "is the law of this country." *Shively*, 152 U.S. at 14. Public trust property can be described broadly as sovereign powers or as physical property. *Stone v. Mississippi*, 101 U.S. 814, 820 (1879). As applied to resources, the public trust doctrine obliges the government to reserve natural resources necessary for the future of the country. *Juliana*, 217 F. Supp. 3d at 1253.

The public trust doctrine as it exists now in American common law was prescribed in *Illinois Central Railroad Co. v. Illinois*, 146 U.S. 387, 452–53 (1892). It mirrors the doctrine as it existed at English common law, but has its own principles providing for when a state may alienate public trust property in favor of private parties. *Id.* In *Illinois Cent. R.R*, the Court held that a state may not abandon its power over properties which concern the public at large. *Id.* Natural resources are deserving of this same treatment because resources are important and require protection from the tragedy of the commons. *Juliana*, 217 F. Supp. 3d at 1254.

The atmosphere, ocean, and the resident wildlife are surely deserving of public trust protections. By allowing the atmosphere to be polluted to the extent that it creates uninhabitable areas, the United States has failed in its trustee duties as a sovereign state. *Illinois Cent. R.R.* found that the citizens of Chicago were entitled to the use and enjoyment of the lakeshore property because it was public to the degree that Chicago could not sell its entire harbor. *Illinois Cent. R.R.*,

146 U.S. at 454. Chicagoans use the harbor for myriad activities such as fishing, commerce, and leisure. *Id.* Here, the atmosphere is a public resource in a much more extreme way. All people breathe the atmosphere, fly in it, hunt in it. The ocean is likewise employable by the world for recreation, commerce, and fishing. The only difference between *Illinois Cent. R.R.* and this case is that the United States is not selling the atmosphere, it is destroying it.

As the sovereign, the government cannot allow any more environmental degradation to the atmosphere because the public needs it to survive. Just as the paper industry requires regulation to prevent logging depletion, the United States requires environmental action to prevent fossil fuel pollution which will doom future generations.

VI. THE CLAIMS PRESENTED ARE JUSTICIABLE UNDER THE *BAKER* TEST.

Political questions or issues which are constitutionally assigned to a particular branch are non-justiciable by a Federal court. *Marbury v. Madison*, 5 U.S. 137, 170 (1803). The political question doctrine is a function of separation of powers. *Baker v. Carr*, 369 U.S. 186, 210 (1962). *Baker* provides the political question test:

> [I] A textually demonstrable constitutional commitment of the issue to a coordinate political department; [II] a lack of judicially discoverable and manageable standards for resolving it; [III] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; [IV] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; [V] an unusual need for unquestioning adherence to a political decision already made; [VI] or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. at 217.

The presence of one of the six factors is sufficient for the existence of a political question. *Baker*, 369 U.S. at 210. Because *Baker* is a balancing test, the presence of one factor is not evidence of a political question *per se*. *See Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004) (plurality op.)

(explaining that *Baker* factors "are probably listed in descending order of both importance and certainty.") (Scalia, J.); *See Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 207 (2012) ("it will be the rare case in which Baker's final factors alone render a case nonjusticiable") (Sotomayor, J., concurring).

The *Baker* factors can be organized into three groups: "(I) does the issue involve resolution of questions committed by the text of the Constitution to a coordinate branch of Government? (II) would resolution of the question demand that a court move beyond areas of judicial expertise? (III) do prudential considerations counsel against judicial intervention?" *Goldwater v. Carter*, 444 U.S. 996, 998 (1979) (Powell, J., concurring).

The first factor is not present because there is not a constitutional commitment of climate change issues. The decision of the matters present does not trample on U.S. foreign policy because these issues are not appreciably different from deciding a common nuisance claim. If the answer to those questions harms HexonGlobal's business or requires the U.S. to follow the Constitution, so be it. The government cannot violate the Fifth Amendment because it would be beneficial to the economy.

The second factor is not present because judicially discoverable and manageable standards exist for this claim. Determining whether judicially discoverable and manageable standards exist turns on if a court possesses the ability to properly remedy the matter before it. *Vieth,* 541 U.S. at 278. Here, Judge Remus concluded that a limit to fossil fuel emissions would decrease the ongoing damage and "maintain habitability of the plaintiffs' communities." *ODIN*, Civ. A. No. 66CV2018 at 5. (Remus, J.). These claims, while important and scientifically complex, are comparable to a common nuisance claim that has a scientific remedy. *See Juliana,* 217 F.Supp.3d at 1239; *but see Native Village of Kivalina v. ExxonMobil Corp*., 663 F.Supp.2d 863, 875 (N.D. Cal. 2009). An

entity is causing pollution which it knows will damage the property of others. This court can order those entities to stop or limit the activity just as it would for another pollutant. *See Georgia v. Tennessee Copper Co.*, 237 U.S. 474, 478 (1915) (requiring a Tennessee smelting plant to limit its sulfur discharge across the border into Georgia to prevent further pollution.).

Limiting the fossil fuel pollution from the defendants would not violate the third *Baker* factor because this court can make a remedy through proper legal analysis. *See Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986). The court does not have to make a policy decision here. The court can, without giving an order to an executive agency, direct the United States to change its general energy policy to comply with applicable international law and the constitution. *Juliana*, 217 F.Supp.3d at 1239. An injunction or a limitation will remedy the harm in this case. Fossil fuel pollution will decrease if the United States is required to decrease its emissions.

Prongs IV–VI of *Baker* deal with whether considerations counsel against judicial interventions. Here, the court can decide without disrespecting the other branches of government just as it would if it were reviewing any other substantive due process issue. Congress can make unconstitutional laws and it is the job of the judiciary to correct unmoored legislation. Whether a branch will feel disrespected is not a concern of this court; rather, the court is to make an objective determination about whether another branch is disrespected. Further, there exists no "unusual need for adherence to a political decision already made" because unconstitutional political decisions are still against the law. Finally, the potential for embarrassment to a branch cannot outweigh constitutional considerations of rights intrinsic to the people of the United States.

CONCLUSION

For the reasons stated herein, this court must decide for ODIN, Apa Mana, and Noah Flood.