Team No. 05

==========

CA. No. 18-000123

==========

IN THE 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

United States of America,
Appellee.

==========

Appeal from the United States District Court
for New Union Island in No. 66-cv-2018, Judge
Romulus N. Remus.

==========

BRIEF OF ORGANIZATION OF DISAPPEARING ISLAND NATIONS, APA MANA, AND NOAH FLOOD
Appellants.

==========

Oral Argument Requested

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

Rules

Regulations

Constitutional Provisions

STATEMENT OF JURISDICTION

The district court and this Court have subject matter jurisdiction over this case pursuant to 28 U.S.C. § 1331 because the Plaintiffs filed the Complaint under the Alien Tort Statute ("ATS"), 28 U.S.C. §1350. The United States Court of Appeals for the Twelfth Circuit has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291(a)(1) because this is an appeal from an Order dismissing the Complaint in the United States District Court, District of New Union Island. *See LaVine v. Blaine School Dist.*, 257 F.3d. 981 (9th Cir. 2001). In Civ. 66-2018, the district court entered the order dismissing the Complaint on August 15, 2018. Appellants timely filed its Notice of Appeal. *See* Fed. R. App. P. 4(a)(1)(A).

STATEMENT OF ISSUES

I. Can Ms. Mana bring an Alien Tort Statute, 28 U.S.C. § 1350 (ATS), which authorizes jurisdiction for civil actions in tort by an alien committed in violation of the Law of Nations, against a domestic corporation for its actions within the territory of the United States in violation of the Law of Nations?

II. Is the *Trail Smelter* Principle, an adopted and reasserted principle of the United Nations, a recognized principle of customary international law enforceable as the Law of Nations under the ATS?

III. Assuming the *Trail Smelter* Principle is customary international law, does it impose obligations enforceable against non-governmental actors through the ATS which gives a cause of action against individuals?

IV. If otherwise enforceable, is the *Trail Smelter* Principle, a recognized principle of customary international law, displaced by the federal Clean Air Act?

V. Is there a cause of action against the United States government, based on the Fifth Amendment substantive due process protections for life, liberty, and property and based on historical public trust principles, for failure to protect the global atmospheric climate system from disruption due to the production, sale, an burning of fossil fuels where the United States knew of the danger and nevertheless subsidized the burning of fossil fuels?

VI. Do Plaintiffs' Law of Nations claim under the Alien Tort Statute and public trust claim present a non-justiciable political question simply because they are political in nature

where Ms. Mana's claim is about the nature and applicability of international law and both claims assert affirmative relief?

STATEMENT OF THE CASE

The Organization of Disappearing Island Nations (ODIN) is a not-for-profit membership organization devoted to protecting the interests of island nations that are threatened by rising sea levels. R. at 3. Both Apa Mana and Noah Flood are members of the organization. *Id.* Ms. Mana is an alien national of the island nation of A'na Atu. *Id.* Mr. Flood is a U.S. Citizen and resident of the New Union Islands, a U.S. possession. *Id.* Both Ms. Mana and Mr. Flood own homes and reside in communities on these islands with an elevation of less than one-half meter above sea level. R. at 4-5. A'na Atu and the New Union Island are located in the East Sea and will be completely uninhabitable due to rising seas by the end of this century due to climate change. R. at 3-4.

Greenhouse gases like carbon dioxide and methane help to regulate Earth's climate in balancing the amount of solar radiation that reaches the Earth and the amount of heat that is radiated from Earth back into space. R. at 4. Too much greenhouse gas means higher global temperatures, while too little means lower global temperatures. *Id.* Due to human production and distribution of fossil fuels for energy and use of natural gas have substantially increased concentration of carbon dioxide and methane in the atmosphere. *Id.* The emissions from this production and distribution along with other greenhouse gas production from industry and agriculture are casing a change in the global climate. *Id.* These changes are reflected in increasing temperatures, changing rainfall patterns, and rising sea levels. *Id.* Unchecked, "global temperatures will rise by over four degrees Celsius compare to pre-industrial global temperatures, and average sea level will likely rise by between one-half and one meter by the end of the century." *Id.*

For residents of A'Na Atu and the New Union Islands that is particularly disturbing as they are both low-lying island with a maximum height above sea level of less than three meters and populated areas below one meter. *Id.* Thus, these islands would be completely uninhabitable as storms would cause waves to wash over the entire island. *Id.* Both Ms. Mana and Mr. Flood have already suffered seawater damage during storms over the past three years and would not have suffered such damaged if the sea level had not risen. R. at 5. Location of their homes are not their only issue, however. They have experienced seawater intrusion in drinking water wells and have a higher risk for heat stroke and mosquito borne diseases. *Id.* They also rely on seafood as part of their diet and the supply of seafood has been and will be reduced by climate change. *Id.*

HexonGlobal is a corporation incorporated in the state of New Jersey with its principal place of business in Texas. *Id.* It resulted from a merge of all of the major United States oil producers. *Id.* HexonGlobal and its predecessors are responsible of 32% of United States fossil fuel-related greenhouse gas emissions. *Id.* That figure accounts for 6% of all global historical emissions. *Id.* Globally, HexonGlobal's sales account for 9% of fossil fuel related emissions. *Id.* Based on their own scientific research, HexonGlobal and its predecessors have known since the 1970s that their continued global sales of fossil fuel products "would result in substantial harmful global climate change and sea level rise." *Id.* Despite this knowledge, HexonGlobal continued its business. *Id.*

Historically, the United States is the largest single national contributor to emissions of greenhouse gases, responsible for 20% of cumulative global greenhouse emissions. R. at 5-6. Rather than limiting fossil fuel production, the United States has *promoted* the production and combustion of fossil fuels with tax subsidies, leasing of public lands and seas, creation of the interstate highway system, and the development of fossil fuel power plants by public agencies. R.

at 6. Despite this promotion, the United States has acknowledged the threat of climate change at least since 1992 when it signed and ratified the United Nations Framework Convention on Climate Change (UNFCCC). *Id.* The UNFCCC acknowledged the potential for dangerous human-made climate change and committed parties to adopt principles to mitigate climate change. *Id.* Although the United States signed the UNFCCC, no legislation implementing this commitment has ever been adopted. *Id.*

More recently, the United States took steps towards regulating domestic greenhouse gas emissions. *Id.* The United States Supreme Court held that greenhouse gases were pollutants subject to regulation under the Clean Air Act. *Massachusetts v. EPA*, 549 U.S. 497 (2007). In 2009, the United States Environmental Protection Administration (EPA) then made a finding that greenhouse gases and climate change had the potential to endanger the public health and set the regulatory predicate to regulate greenhouse gas emissions. R. at 6; 74 Fed. Reg. 66,496 (Dec. 15, 2009). Subsequently in 2010 the EPA and the National Highway Transportation Agency adopted a rule with fuel economy standards and greenhouse gas emission rates for passenger cars and light trucks with specific model years. R. at 6-7; 75 Fed. Reg. 25,324 (May 7, 2010). In 2012 those regulations were extended to model year 2025. R. 7; 77 Fed. Reg. 62,623 (Oct. 15, 2012). In 2010 the EPA also required that new sources of greenhouse gases had to undergo review to establish technology-based limits on those emissions. R. at 7; 65 Fed. Reg. 31,514 (June 3, 2010). The EPA also issued regulations for carbon dioxide emissions standards with new power plants, R. at 7; 80 Fed. Reg. 64510 (Oct. 23, 2015) and required states to have standards for existing plants. 80 Fed. Reg. 64662 (Oct. 23, 2015). The President signed the Paris Agreement, an international executive agreement, and agreed to reduce future greenhouse gas emissions. R. at 7.

While these regulations sound like a number of steps in the right direction, the reality is that United States greenhouse gas emissions have decreased only slightly, while globally greenhouse gas emissions have *increased*. *Id.* Furthermore, the Trump administration has proposed to reverse many of these regulatory measures and commitments, and President Trump has announced an intent to withdraw from the Paris Agreement as soon as possible in the year 2020. *Id.* The EPA has already proposed regulations to freeze emissions reductions for fuel economy standards. R. at 7-8.

Ms. Mana and Mr. Flood filed an action in the United States District Court for the District of New Union Island against HexonGlobal and the United States. R. at 3. Ms. Mana asserted a claim against HexonGlobal under the Alien Tort Statute (ATS) claiming that HexonGlobal's fossil fuel related business was a violation of the Law of Nations. She sought damages and injunctive relief. *Id.* Mr. Flood asserted a constitutional claim against the United States asserting violations of public trust obligations to protect the global climate ecosystem through the Due Process Clause of the Fifth Amendment. *Id.* The district court found that any action Ms. Mana might have had with the ATS was displaced by the Clean Air Act. R. at 9. Her claims were dismissed for failure to state a claim for relief. R. at 10. It also found that Mr. Flood had failed to state a claim for relief under the Fifth Amendment because the Supreme Court had rejected any Due Process right to government protection from wrongful acts by private parties and that the behavior predated the government's awareness. R. at 10-11. Mr. Flood's claims were also dismissed. R. at 11. Plaintiffs timely appealed to the United States Court of Appeals for the Twelfth Circuit. R. at 1.

STANDARD OF REVIEW

When reviewing a motion to dismiss, the standard of review is *de novo* and the facts are viewed favorable to the nonmovant party. *See Garity v. APWU Nat'l Labor Org.*, 828 F.3d 848,

854 (9th Cir. 2016). The complaint must be liberally construed in favor of the plaintiff, and all facts pleaded in the complaint must be taken as true. *Beanal v. Freeport McMoran Inc.*, 197 F.3d 161, 164 (5th Cir. 1999). The district court did not reach issues I, II, III, and VI.

SUMMARY OF THE ARGUMENT

Ms. Apa Mana's claim against a domestic corporation, HexonGlobal, is permitted under Alien Tort Statute (ATS), 28 U.S.C. §1350, for its actions within the territory of the United States for violations of international law under the Law of Nations. A domestic corporation has the capacity to be sued and may be held liable for torts committed under the ATS. A private corporation is a juridical person and has no per se immunity under U.S. domestic or international law. The activities alleged to give rise to the cause of action must have occurred principally within the jurisdiction of the United States. Therefore, Ms. Mana can bring an ATS claim against HexonGlobal, a domestic corporation, for its actions within the territory of the United States for violations of international law under the Law of Nations.

The *Trail Smelter* Principle is a recognized principle of customary international law enforceable as the Law of Nations under the ATS. Customary international law is the Law of Nations and includes the *Trail Smelter* Principle. When courts interpret the ATS, they define the Law of Nations as "customary international law." Customary international law is composed of rules that nations universally abide by, or accede to, out of a sense of legal obligation and mutual concern. The *Trail Smelter* Principle states that if a Nation harms the environment of another Nation then the first Nation violates international liability principles. This Principle was reasserted in Principle 2 of the 1992 Rio Declaration on Environment and Development, endorsed by 190 nations. U.N. Conference on Environment and Development, June 3-14, 1992, Rio de Janeiro, Braz., Rio Declaration on Environment and Development, 3, U.N. Doc. Here, the *Trail Smelter*

Principle is customary international law and HexonGlobal should be held liable for violating the Principle.

The *Trail Smelter* Principle is customary international law and therefore imposes obligations enforceable against non-governmental actors. Non-government actors are liable under the ATS. Offenses against the Law of Nations for violations of human rights can be charged against States and against individual men and women. Corporations are viewed as individuals in the judiciary. Therefore, even though HexonGlobal is a non-governmental actor, HexonGlobal can be held liable under the ATS for violating international customary law – the *Trail Smelter* Principle.

The *Trail Smelter* Principle is not displaced by the Clean Air Act because it is a defined part of the international Law of Nations. The Clean Air Act's purpose is to "encourage or otherwise promote reasonable Federal, State, and local governmental actions, consistent with the provisions of this Act, for pollution prevention." 42 U.S.C. § 7401(c). The Clean Air Act uses a vast regulatory framework and creates a right for civil citizen suits against any person who is in violation of an emission standard or limitation of the Act. 42 U.S.C. § 7604(a). The *Trail Smelter* Principle is a defined part of the international Law of Nations, not simply a body of common law and is not displaced by the Clean Air Act. Because the Clean Air Act does not "speak directly" to the specific issue of the *Trail Smelter* principle, which is about pollution between nations rather than regulation of pollution in a country internally, it cannot displace it even under the framework established in *American Electric Power*. Thus, the *Trail Smelter* principle is not replaced by the Clean Air Act.

There is a cause of action against the United States government, based on the Fifth Amendment substantive due process protections, for failure to protect global atmospheric climate system from disruption due to protection, sale, and burning of fossil fuels because the public trust

doctrine is deeply rooted in our nation's history and the United States knows about the danger. The fifth amendment provides that "no person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. Const. Amend. V. Conduct must "shock the conscience" to be a due process violation. *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998).

There is a cause of action against the United States government based on the Fifth Amendment substantive due process clause, for failure to protect the global atmospheric climate system from disruption because the public trust doctrine is deeply rooted in our nation's history. Here, a public trust would provide necessary substantive due process protections as the United States would have to act as the trustee to protect and administer the global climate system for the benefit of current and future generations. The "danger creation" exception provides an affirmative obligation to act where the government has created the danger or places a person in peril with deliberate indifference to their safety.

In this case, the "danger creation" exception creates an affirmative obligation to act because the United States government has acknowledged the threat of climate change and nevertheless subsidized fossil fuels. The United States knew about the danger and beyond the subsidies, showed a deliberate indifference or reckless disregard with its policies. The United States put Mr. Flood into a much worse situation because the New Union Islands, where he lives, will be completely uninhabitable due to rising seas by the end of this century. Because a public trust is deeply rooted in our nation's history and would be provide substantive due process protections and the United States has an affirmative obligation to act under the "danger creation" exception, there is a cause of action against the United States government based on the Fifth Amendment substantive due process protections.

The Law of Nations claim under the ATS and public trust doctrine claim do not present a non-justiciable political question. Issues that raise the nature and applicability of substantive international law are not political questions. Here, Ms. Mana's claims HexonGlobal violated the *Trail Smelter* Principle, which is international law under the Law of Nations and therefore justiciable. A case does not present a political question simply because it raises a "political" topic or an "issue of great importance to the political branches." *Juliana v. United States*, 217 F. Supp. 3d 1224, 1241 (D. Or. 2016). A claim solely asking for declaratory relief, absent the prospect of any concrete relief qualifies as a political question; but claims asserting affirmative relief are justiciable. In this case, Mr. Flood asserts the failure of the United States government to take effective action to control greenhouse gas emissions violated its obligations under the public trust doctrine, as incorporated by the Fifth Amendment Due Process Clause. Therefore, Mr. Noah Flood's public trust doctrine claim does not present a non-justiciable political question.

ARGUMENT

This Court should reverse the district court's order and remand back to hold HexonGlobal and the United States government liable for polluting the global atmospheric climate system.

The Appellants seek relief on two grounds and there are multiple issues within each. First, the Appellants sued for relief under the Alien Tort Statute (ATS) by claiming HexonGlobal is in violation of international law under the Law of Nations by violating the *Trail Smelter* Principle. The ATS allows an alien to file a civil action for a tort that violations the Law of Nations. *See* 28 U.S.C. § 1350. Under the ATS, defendants must be capable of being liable. *See Mastafa v. Chevron Corp.*, 770 F.3d 170 (2d Cir. 2014). HexonGlobal, a U.S. domestic corporation may be held liable for the harm they caused with their greenhouse gas emissions. *See Doe v. Exxon Mobile Corp.*, 2015 U.S. Dist. LEXIS 91107 *1, *8 (D.D.C. July 6, 2015)(holding that corporations may be liable

under the ATS). The *Trail Smelter* Principle was adopted by 190 nations and the United States agreed to abide by its principles. *See* U.N. Conference on Environment and Development, June 3-14, 1992, Rio de Janeiro, Braz., Rio Declaration on Environment and Development, 3, U.N. Doc. Past precedent has held non-governmental actors liable under the ATS for violations of international Law of Nations. *See Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995); *Doe I v. Nestle USA, Inc.*, 766 F.3d 1013 (9th Cir. 2014); *Baloco ex rel. Tapia v. Drummond Co.*, 640 F.3d 1338 (11th Cir. 2011). The *Trail Smelter* Principle is not replaced by the Clean Air Act because it does not "speak directly" to it. *See American Electric Power Co. v. Connecticut*, 564 U.S. 410, 429 (2011). Raising issues that are substantive international law, does not raise a non-justiciable political question issue. *Nguyen Thang Loi v. Dow Chem. Co.*, 373 F. Supp. 2d 7, 72 (E.D.N.Y 2005).

Second, the Appellants sued for relief under the Fifth Amendment Due Process Clause for failure to protect global atmospheric climate system from disruption due to protection, sale, and burning of fossil fuels because the public trust doctrine is deeply rooted in our nation's history and the United States knows about the danger. The Fifth Amendment provides that "no person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. This right was violated when the United States failed to protect the public trust to prevent atmospheric climate change, especially when the United States has known about this danger, promoted the production of fossil fuels, and is responsible for more than 20% of the global greenhouse gas emissions. *See* R. 5-6. Raising claims of affirmative relief are justiciable under the political question doctrine. *Kanuk v. State, Dep't of Natural Res.*, 335 P.3d 1088, 1103 (Alaska 2014).

I. MS. APA MANA'S CLAIM AGAINST A DOMESTIC CORPORATION, HEXONGLOBAL IS PERMITTED UNDER THE ATS, 28 U.S.C § 1350, FOR THEIR ACTIONS WITHIN THE TERRITORY OF THE UNITED STATES FOR VIOLATIONS OF INTERNATIONAL LAW OF NATIONS.

Ms. Mana's claim under the ATS, asserting that a domestic corporation, HexonGlobal's production of fossil fuel within U.S. territory is a violation of the *Trail Smelter* Principle – a violation of the Law of Nations. The ATS states, "[t]he 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 (2012). This statute is strictly jurisdictional; it does not create a cause of action itself. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724 (2004). The Supreme Court has held that Congress "understood that the district courts would recognize private causes of action for certain torts in violation of the law of nations." *Id.* There are five jurisdictional predicates, but only one is at issue here: the defendants must have the capacity to be liable under ATS. *Mastafa*, 770 F.3d at 179 (describing the jurisdictional predicates that must be met for jurisdiction in an ATS claim these include: pleading a violation of law of nations,; presumption against extraterritoriality does not bar the claim; customary international law recognizes liability for defendants; and the theory of liability alleged is recognized by customary international law.). Corporations, as a defendant, may be held liable for causes of action arising under the ATS. *Doe*, 2015 U.S. Dist. LEXIS 91107 at *8.; *Presbyterian Church of Sudan v. Talisman Energy*, Inc., 244 F. Supp. 2d 289, 319 (S.D.N.Y. 2003). The activities alleged to give rise to the cause of action must have occurred principally within the jurisdiction of the United States; the ATS does not create rules of extraterritorial application, which helps ensure the judiciary does not erroneously adopt an interpretation of U.S. law that carries foreign policy consequences not clearly intended by the political branches. *Kiobel v. Royal Dutch Petroleum*, 569

U.S. 108, 116, 124 (2013). Following *Kiobel*, the Supreme Court held foreign corporations may not be a defendant under the ATS. *Jesner v. Arab Bank*, 138 S. Ct. 1386, 1408 (2018).

A domestic corporation has the capacity to be sued and may be held liable for torts committed under the ATS. *See Doe*[1], 2015 U.S. Dist. LEXIS 91107 at *8; *Doe v. Exxon Mobile Corp.*, 654 F.3d 11, 57 (D.C. Cir. 2011), vacated in part, 527 F. App'x 7 (D.C. Cir. 2013) (vacating the judgment in light of intervening changes in the law governing the extraterritorial reach of the ATS and the standard for aiding and abetting liability). In *Doe 1*, Exxon operated facilities in Indonesia and began developing and producing natural gas in the area; plaintiffs lived near the area. *Id.* at *4 -*5 Plaintiffs alleged Exxon's security personnel inflicted grievous injuries on them, including sexual assaults, torture, and murder. *Id.* Plaintiffs filed a claim under the ATS alleging common law tort claims and violations of international law. *Id.* at *6. Defendants moved to dismiss for lack of subject matter jurisdiction and failure to state a claim. *Id.* The court dismissed the plaintiff's ATS claims, but allowed them to amend their complaint. *Id.* at *48

A private corporation is a juridical person and has no per se immunity under U.S. domestic or international law. *Presbyterian Church of Sudan*, 244 F. Supp. 2d at 319. There, the Church claimed that Talisman, a large Canadian energy company, collaborated with Sudan to conduct "ethnic cleansing" and commit gross human rights violations to facilitate oil exploration and extraction activities. *Id.* at 296. Talisman moved to dismiss for lack of subject matter jurisdiction, arguing corporations are incapable of violating the Law of Nations. *Id.* at 308. The district court relied on Second Circuit precedent from *Wiwa v. Royal Dutch Petroleum Co.*, where the court extended an earlier decision, *Kadic*, to apply the ATCA[2] to the acts of corporations that constitute

[1] *Doe 1* for purposes of this brief.
[2] Alien Torts Claim Act, which is also known as the ATS.

international law violations. *Id.* at 312; *see Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000); s*ee also Kadic v. Karadzic*, 70 F.3d 232 (2nd Cir. 1995). The district court also relied on Ninth Circuit precedent in *Deutsch v. Turner Corp.*, where it explicitly recognized a corporation can be sued under the ATCA. 317 F.3d 1005 (9th Cir. 2003). It relied on Fifth Circuit precedent in *Beanal v. Freeport-McMoran, Inc.*, the court dismissed the ATCA claims for different reasons, but the court never questioned if it had subject matter jurisdiction over it and in a previous case, the court held it had subject matter jurisdiction in an ATCA action against a corporation. *Presbyterian Church of Sudan*, 244 F. Supp. 2d at 314; 197 F.3d at 161, 165-66; *see also Carmichael v. United Technologies Corp.*, 835 F.2d 109, 113-14 (5th Cir. 1988). Along with this extensive precedent, the district court looked at other district courts and international tribunals. *Presbyterian Church of Sudan*, 244 F. Supp. 2d. at 314-15. The district court denied Talisman's motion to dismiss. *Id.* at 354.

In the present case, the domestic corporation HexonGlobal may be sued and held liable under the ATS for violations of the Law of Nations. This statute is strictly jurisdictional; it does not create a cause of action itself. Therefore, the analysis of this issue should only be to resolve if this Court has subject matter jurisdiction under ATS. Like in *Presbyterian Church*, where the court relied on other circuit precedent, this court should rely on that court's reasoning and other circuits' decisions that have held corporations liable under the ATS. Unlike *Jesner*, where the defendant was a foreign corporation, here, the defendant, HexonGlobal, is a U.S. domestic corporation that is incorporated in New Jersey, its principle place of business in Texas, and all of its operations were conducted inside territory of the United States, including in the New Union Islands, a U.S. territory. This Court would not be required to create extraterritorial application because all of the relevant conduct was inside the United States, not in a foreign country. Also, under the precedent

set in the Fifth Circuit in *Beanal* and *Carmichael*, HexonGlobal would have been given notice that it could be liable under the ATS because the company is in Texas.

Although the U.S. Supreme Court has never ruled if domestic corporations can be a defendant under the ATS, various circuit and district court rulings weigh heavily in favor that with regards to jurisdiction, corporations may be sued and liable under the ATS. Since the U.S. District Court of New Union Island did not rule on the Defendant's motion to dismiss on this issue, it should be remanded to the court for further review. When large domestic corporations are capable of harmful actions, they should be capable of being sued and held liable under the ATS.

Therefore, Ms. Mana can bring an ATS claim against HexonGlobal, a domestic corporation, for their actions within the territory of the United States for violations of international law under the Law of Nations.

II. BECAUSE THE LAW OF NATIONS IS CUSTOMARY INTERNATIONAL LAW AND THE *TRAIL SMELTER* PRINCIPLE IS A WIDELY RECOGNIZED CUSTOMARY INTERNATIONAL LAW, MS. MANA CAN SUE HEXONGLOBAL UNDER THE ATS.

Ms. Mana can sue HexonGlobal under the ATS because the *Trail Smelter* Principle is a recognized principle of customary international law enforceable as a Law of Nations. The ATS states that aliens can file suit in federal district courts for tort when an act violates the Law of Nations or a treaty of the United States. 28 U.S.C. § 1350. In *Sosa*, the Court explained that the ATS is jurisdictional but also provides a cause of action "for the modest number of international law violations with a potential for personal liability…" *Sosa,* 542 U.S. at 724; *see also Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1246 (11th Cir. 2005). A court can recognize new causes of action under the ATS if the claim is "based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th century paradigms we have recognized." *Id*.

When courts interpret the ATS, they define the "Law of Nations" as "customary international law." *Balintulo v. Ford Motor Co.,* 796 F.3d 160, 163 (2d Cir. 2015); *see, e.g., Mastafa,* 770 F.3d at 176 (equating violations of the law of nations with violations of customary international law); *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 237 n. 2 (2d Cir. 2003) ("In the context of the [ATS], we have consistently used the term 'customary international law' as a synonym for the term the 'law of nations.'"); *see also Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 815 (1993) (Scalia, J., dissenting in part) (using customary international law and Law of Nations interchangeably).

Customary international law is composed of rules that nations universally abide by, or accede to, out of a sense of legal obligation and mutual concern. *Flores*, 414 F.3d at 248. To attain the status of a rule of customary international law, a norm must be specific, universal, and obligatory. *Kiobel v. Royal Dutch Petroleum,* 621 F.3d 111, 120 (2d Cir. 2010), *aff'd,* 569 U.S. 108 (2013). Customary international law is "standards, rules or customs (a) affecting the relationship between states or between an individual and a foreign state, and (b) used by those states for their common good and/or in dealings inter se." *IIT v. Vencap, Ltd., 519 F.2d 1001,* 1015 (2nd Cir. 1975); *see also Flores*, 414 F.3d at 249.

Additionally, courts have "long recognized as authoritative the sources of international law identified in Article 38 of the Statute of the International Court of Justice," which include "international conventions . . . establishing rules expressly recognized by the contesting states, international custom, the general principles of law recognized by civilized nations, and certain judicial decisions and teachings of the most highly qualified publicists . . . of the various nations, as subsidiary means for the determination of rules of law." *Kiobel*, 621 F.3d at 132.

The *Trail Smelter* Principle comes from the *Trail Smelter* Arbitration, 3 U.N.R.I.A.A. 1965 (1941), in which an international arbitral panel held that air pollution emissions from a smelter in British Columbia violates international liability principles because it harmed the agriculture interests in the State of Washington.

This principle was subsequently adopted in Principle 21 which stated that:

> States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

U.N. Conference on the Human Environment, Stockholm, June 5- 16, 1972, Declaration of the United Nations Conference on the Human Environment, 5, U.N. Doc A/CONF.48/14/Rev. 1 (June 16, 1972).

International conventions with stated rules establish international customary law. *Kiobel*, 621 F.3d at 120. Even though the Stockholm U.N. Convention is enough to establish international customary law, the *Trail Smelter* Principle was reasserted in Principle 2 of the 1992 Rio Declaration on Environment and Development. U.N. Conference on Environment and Development, June 3-14, 1992, Rio de Janeiro, Braz., Rio Declaration on Environment and Development, 3, U.N. Doc; *Id*. The United States attended the U.N. Conference and agreed to abide by its principles including the *Trail Smelter* Principle along with 189 additional nations. *Id*.

The United States furthered its commitment to the *Trail Smelter* Principle in the Restatement of Foreign Relations Law which explains a state's obligations with respect to environment of other states and the common environment. Restatement (Third) of Foreign Relations Law § 601. Specifically, Comment c. states "The obligation under Subsection (1)(a) refers to both general rules of customary international law (*see, e.g.*, the *Trail Smelter* case) and

those derived from international conventions, and from standards adopted by international organizations pursuant to such conventions, that deal with a specific subject, such as oil pollution or radioactive wastes. Restatement (Third) of Foreign Relations Law § 601 cmt. c. "A state is also obligated to comply with an environmental rule or standard that has been accepted by both it and an injured state, even if that rule or standard has not been generally accepted." *Id*.

In *Flores*, the court reviewed (i) treaties, conventions, and covenants; (ii) declarations of the United Nations General Assembly, (iii) multinational declarations of principle; (iv) decisions of multinational tribunals, and (v) affidavits of international law scholars and incorrectly found intranational pollution is not a customary international law. 414 F.3d at 255–56. As shown above, all of this evidence is admissible and persuasive to establish a customary international law. *Kiobel*, 621 F.3d at 132. However, *Flores* held that the existence of rule of customary international law against intranational pollution was not established and does not provide a basis for jurisdiction under ATS. 414 F.3d at 266.

Here, the *Trail Smelter* Principle is customary international law and HexonGlobal should be held liable for violating the Principle. Because international conventions with stated rules establish customary international law, the Declaration of the United Nations Conference on the Human Environment in Stockholm and the 1992 Rio Declaration on Environment and Development establish that the *Trail Smelter* Principle is a recognized principle of customary international law. Nations universally abide by, or accede to the Principle, out of a sense of legal obligation and mutual concern which is shown by over 190 nations agreeing to the 1992 Rio Declaration on Environment and Development. Because many cases including *Balintulo*, *Mastafa*, and *Flores* define the Law of Nations as customary international law, the *Trail Smelter* Principle is a Law of Nations enforceable under the ATS.

Even if this court reviews the *Trail Smelter* Principle as a treaty, the overwhelming majority of nations (190 nations) that ratified the Principle show that the *Trail Smelter* Principle is international customary law. Additionally, the United States furthered its commitment to the Principle by including it in the Restatement of Foreign Relations and establishing environmental standards such as the Clean Air Act. *Flores* flagrantly ignored the U.N. Conventions with established rules and Restatement of Foreign Relations showing that intranational pollution is a customary international law. Also, *Flores* did not reach a decision on the *Trail Smelter* Principle specifically, only intranational pollution, and, as shown above, the *Trail Smelter* Principle is international customary law.

Furthermore, the disappearance of nations must be viewed as universally condemned behavior and nations accede to the *Trail Smelter* Principle out of mutual concern and obligation. HexonGlobal, a United States corporation, is polluting the foreign island nation of A'Na Atu in violation of the *Trail Smelter* Principle. Ms. Mana is an alien national of the island nation of A'Na Atu. A'Na Atu will be completely uninhabitable due to rising seas by the end of this century unless action is taken to limit emissions of greenhouse gases. Therefore, Ms. Mana can sue HexonGlobal under the ATS and the claim should succeed because the *Trail Smelter* Principle is customary international law enforceable as the Law of Nations.

III. BECAUSE THE *TRAIL SMELTER* PRINCIPLE IS CUSTOMARY INTERNATIONAL LAW, THE *TRAIL SMELTER* PRINCIPLE IMPOSES OBLIGATIONS ENFORCEABLE AGAINST NON-GOVERNMENTAL ACTORS.

Ms. Mana can sue HexonGlobal under the ATS because the *Trail Smelter* Principle is customary international law and customary international law is enforceable against non-governmental actors. Many circuits held non-government actors liable under the ATS. *Kadic v. Karadzic*, 70 F.3d at 236 (holding that Karadžić may be found liable for genocide, war crimes, and

crimes against humanity in his private capacity); *Doe I v. Nestle USA, Inc.*, 766 F.3d 1013 (9th Cir. 2014) (defendants who aided and abetted child slavery can be held liable under the ATS) *Abdullahi v. Pfizer, Inc*., 562 F.3d 163 (2d Cir. 2009) (holding that prohibition on nonconsensual medical experimentation on human beings constituted a universally accepted norm of customary international law, and consequently an alleged violation thereof fell within jurisdiction of Alien Tort Statute); *Baloco ex rel. Tapia*, 640 F.3d at 1338 (holding that individuals can be held liable under the ATS).

Even if an individual violates international law with some official authority, the individual can be held liable under the ATS. *Filartiga v. Pena–Irala*, 630 F.2d 876, 876 (2d Cir. 1980). Whenever an alleged torturer is found and served with process by an alien within the borders of the United States, the ATS provides federal jurisdiction because torture perpetrated under the color of official authority violates universally accepted norms of international law of human rights regardless of the nationality of the parties. *Id*.

In *Kadic*, the court concluded that "that certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals." 70 F.3d at 239. *Kadic* recognized that claims for genocide and war crimes against individuals could proceed without state action. *Id*. at 244. Therefore, even an individual acting on his own is liable for violations of international customary law. *Id*. A private corporation is a juridical person and can be held liable like an individual under the ATS. *Presbyterian Church of Sudan*, 244 F. Supp. 2d at 319; *see also* Section I.

The court in *Kiobel* stated that "[l]ooking to international law, we find a jurisprudence, first set forth in Nuremberg and repeated by every international tribunal of which we are aware, that

offenses against the law of nations (i.e., customary international law) for violations of human rights can be charged… against individual men and women." *Kiobel*, 621 F.3d at 120.

Here, Ms. Mana can sue HexonGlobal even though the corporation is not a governmental actor. Because the ATS gives a cause of action against individual men and women, this court can hold a non-government actor liable for violating customary international law. In the cases cited above, a successful ATS can be filed against individuals and corporations who were not acting under official authority. Therefore, even though HexonGlobal is a non-governmental actor, under the ATS, HexonGlobal can be held liable for violating international customary law.

IV. THE *TRAIL SMELTER* PRINCIPLE IS NOT DISPLACED BY THE CLEAN AIR ACT BECAUSE IT IS A DEFINED PART OF THE INTERNATIONAL LAW OF NATIONS.

The *Trail Smelter* principle is not displaced by the Clean Air Act because it is a defined part of the Law of Nations and not simply part of the federal common law that can be displaced by congressional action. The Clean Air Act's purpose is to "encourage or otherwise promote reasonable Federal, State, and local governmental actions, consistent with the provisions of this Act, for pollution prevention." 42 U.S.C. § 7401(c)(2012). The Clean Air Act uses a vast regulatory framework and creates a right for civil citizen suits against any person who is in violation of an emission standard or limitation of the Act. 42 U.S.C. § 7604(a).

While *American Electric Power* held that the Clean Air Act displaced the federal common law, the Court did not reach the question of whether state statutes with similar causes of action would be preempted by the Act. 564 U.S. at 429. The Court specifically held that any state law claims would have to be analyzed under a preemption analysis, because those claims were not part of the federal common law which was the only decision made in the case. *Id.*

The federal common law is at the heart of the *American Electric Power* decision. *Id.* Although the Supreme Court had earlier declared in *Erie v. Tompkins* that there was no federal common law, *Erie's* real purpose was to ensure that state laws were being used in federal courts when not sitting for federal questions. 304 U.S. 64, 78 (1938). As *American Electric Power* explains, however, federal common law nevertheless developed to fill in issues where there was no statutory framework. *American Electric Power*, 564 U.S. at 421.

In that case, because Congress had created a framework with the Clean Air Act, there was no reason that the Court should continue to act as an interim lawmaker. *Id.* at 423-24. The test to decide if a statute displaces federal common law is whether the statute "speaks directly to the question." *Id.* at 424 (internal citations omitted.) Because the Clean Air Act clearly had a strong regulatory scheme it spoke directly to the question that was raised under the federal common law nuisance claim for carbon emissions. *Id.* at 425.

Even if federal common law were displaced in this case, a claim under the Alien Tort Statute is a claim under a federal statute *not* federal common law. *Suhail Najim Abdullah Al Shimari v. CACI Premier Tech*., 300 F. Supp. 3d 758, 791 (E.D. Va. 2018) ("Although recognition of causes of action under the ATS requires judicial interpretation of the statute and analysis of international law norms, the ATS is itself a congressional enactment that reflects Congress's decision to provide a cause of action for victims of violations of the law of nations.") Thus, like any other federal statute, ATS cannot be easily replaced by another statute as both are entitled equal respect. *Id.* In *Al Shimari*, defendant CACI argued that per *American Electric Power*, plaintiffs were preempted from creating a cause of action for torture because of the existence of the federal Anti-Torture Act and Torture Victims Protection Act. *Id.* at 790-91. The court rejected this argument, noting that *American Electric Power* relied on the fact that the Clean Air Act created

a means for the plaintiffs to get the relief they were looking for under the federal common law. *Id.* at 791. Unlike the Clean Air Act, neither the Anti-Torture Act nor the Torture Victim Protection Act created an avenue for plaintiff's claims. *Id.*

Courts have also made a distinction between claims in the international arena under the ATS and those purely about federal common law: "[t]he broader point made by the Supreme Court in these decisions is that federal courts should exercise great caution before fashioning federal common law in areas touching on foreign affairs." *City of Oakland v. BP PLC*, 325 F. Supp. 3d 1017, 1028 (N.D. Cal. 2018) (citing *Kiobel*, 569 U.S. at 114-15 and *Sosa*, 542 U.S. at 724).

The *Trail Smelter* Principle is a defined part of the Law of Nations, not simply a body of common law and is not displaced by the Clean Air Act. Unlike *American Electric Power*, the *Trail Smelter* principle was actually adopted by the United Nations. While one might claim that the original arbitration was simply a matter of something like international common law, the subsequent adoption of this principle by the United Nations makes it more than simply a holding from case law. This principle was adopted in 1972 and reasserted again in 1992, showing an ongoing commitment of the United Nations to the *Trail Smelter* principle. It is clear in its mandate that countries may not damage the environment of areas beyond the limits of its national jurisdiction.

As the court has warned, courts should take caution in areas touching on foreign affairs. In a case like this one, fashioning federal common law or even applying a statute in place of federal common law is a difficult proposition. States in an international system need to have respect for one another and the Laws of Nations, which is precisely what the *Trail Smelter* principle is about.

Furthermore, the *Trail Smelter* principle is not a gap filler the way the federal common law was used in *American Electric Power*. As discussed above, it is part of the recognized Law of

Nations. Because it is not federal common law, the *Trail Smelter* principle is more analogous to state law claims. *American Electric Power* specifically held state law claims were not precluded without their own separate preemption analysis. But unlike state law claims, *Trail Smelter* in this case is being brought in through the ATS, a federal statute. As with the claim in *Al Shimari*, the ATS cannot be replaced by another statute because they are both federal statutes. Here, the ATS and the Clean Air Act should be entitled the same weight and respect as federal statutes.

Without the ATS and the *Trail Smelter* principle, there is no other remedy. As in *Al Shimari*, other applicable federal statutes do not create a remedy that Ms. Mana can take advantage of. The civil suits authorized under the Clean Air Act are citizen suits, which would exclude her. And unlike in *American Electric Power*, here the Clean Air Act does not "speak directly" to the specific issue of the *Trail Smelter* principle, which is about pollution between nations rather than regulation of pollution in a country internally. The Clean Air Act instead is about regulating federal, state or local emissions without looking at an international scope or the effect those emissions would have on other nations. Thus, the *Trail Smelter* principle is not replaced by the Clean Air Act.

V. THERE IS A CAUSE OF ACTION AGAINST THE UNITED STATES GOVERNMENT, BASED ON THE FIFTH AMENDMENT SUBSANTIVE DUE PROCESS PROTECTIONS, FOR FAILURE TO PROTECT THE GLOBAL ATMOSPHERIC CLIMATE SYSTEM FROM DISRUPTION DUE TO PROTECTION, SALE, AND BURNING OF FOSSIL FUELS BECAUSE THE PUBLIC TRUST DOCTRINE IS DEEPLY ROOTED IN OUR NATION'S HISTORY AND THE UNITED STATES KNOW ABOUT THE DANGER.

Mr. Flood has a cause of action against the United States government based on the Fifth Amendment substantive due process for failure to protect the global atmospheric climate system. The Fifth Amendment provides that "no person shall . . . be deprived of life, liberty, or property,

without due process of law." U.S. Const. Amend. V. Conduct must "shock the conscience" to be a due process violation. *Lewis*, 523 U.S. at 846.

For a fundamental right to be recognized under substantive due process, the claim must be "deeply rooted" in our nation's history. *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977). Generally, the government is not required to act affirmatively, *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 195 (1989), but the court has recognized exceptions where danger is created by the government itself. *L.W. v. Grubbs*, 974 F.2d 119, 121-22 (9th Cir. 1992).

A. Public Trust is Deeply Rooted in Our Nation's History and Would Provide Proper Substantive Due Process Protection.

There is a cause of action against the United States government based on the Fifth Amendment for failure to protect the global atmospheric climate system from disruption because the public trust doctrine is deeply rooted in our nation's history. Any due process claim must be "deeply rooted" in our nation's history. *Moore*, 431 U.S. at 503. The public trust doctrine is so deeply rooted in our nation's history that it may even predate it. *Shively v. Bowlby*, 152 U.S. 1, 14 (1894) ("Upon the acquisition of a territory by the United States, whether by cession from one of the states, or by treaty with a foreign country, or by discovery and settlement, the same title and dominion passed to the United States, for the benefit of the whole people, and in trust for the several states to be ultimately created out of the territory.") The public trust doctrine was even recognized by the ancient Roman code of Justinian. J. Inst. 2.1.1 (J.B. Moyle trans.)

The analysis does not end there, however, as "history and tradition guide and discipline this inquiry but do not set its outer limits." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2598 (2015) (internal citations omitted). In *Obergefell*, the Court used "reasoned judgment" to find a fundamental right of same-sex couples to marry. *Id.* at 2604. Courts have used this reasoning to

justify, "that the right to a climate system capable of sustaining human life is fundamental to a free and ordered society." *Juliana v. United States*, 217 F. Supp. 3d. 1244, 1250 (D. Or. 2016)

In *Juliana*, plaintiffs alleged harm from carbon emissions and claimed that further action needed to be taken immediately. *Id.* at 1263. In order to solve this problem, the court wrote at the motion to dismiss stage that it could not say "that the public trust doctrine does not provide at least some substantive due process protections for some plaintiffs within the navigable water areas of Oregon." *Id.* at 1276. The litigation in *Juliana* claimed a public trust in the atmosphere, water, seas, shores, and wildlife. *Id.* at 1255. Part of the defense alleged that a claim could not be made for the atmosphere, but the court did not reach the issue as at least some of the claim touched on the territorial sea. *Id.* The court also suggested that the lack of litigation about the air may simply be because of the limited state of scientific knowledge. *Id.* at n. 10. While the issue of the atmosphere has not come up in the public trust context, the Supreme Court in property contexts has said, "[t]o recognize such private claims to the airspace would clog these highways, seriously interfere with their control and development in the public interest, and transfer into private ownership that to which only the public has a just claim." *United States v. Causby*, 328 U.S. 256, 261 (1946).

The public trust doctrine is not merely a matter of state law. *Juliana*, 217 F. Supp. 3d at 1256. There, defendants relied on a Supreme Court case about equal footing doctrine which said that public trust doctrine applies only to the states. *Id.* (citing *PPL Montana, LLC v. Montana*, 565 U.S. 576 (2012)). *PPL Montana*, however, wrote about public trust in contrast to the equal footing doctrine. 565 U.S. at 603-604. Although the Court said that "the public trust doctrine remains a matter of state law" it went on to explain that "the States retain residual power to *determine the scope* of the public trust over waters within their own borders." *Id.* (Emphasis added.)

PPL Montana did not preclude any federal public trust doctrine claims and in a subsequent case, the 9th Circuit found "no valid reason why this state law distinction restricts federal power" in a case where the federal government was attempting to use eminent domain and California was claiming public trust. *U.S. v. 32.42 Acres of Land, More or Less, Located in San Diego County, Cal.*, 683 F.3d 1030, 1038 (9th Cir. 2012). In that case, the district court had held specifically that 4.88 acres of property were held in federal public trust and the United States did not appeal that determination allowing it to remain. *Id.* at 1039, n. 2.

Here, a public trust would provide necessary substantive due process protections as the United States would have to act as the trustee to protect and administer the global climate system for the benefit of current and future generations. The facts in this case are strikingly similar to the facts in *Juliana*, where the court held that a public trust could be an appropriate substantive due process protection. Like in *Juliana*, the right to a global climate that is capable of sustaining future generations is a fundamental right.

This case involves a claim for public trust that could encompass the atmosphere, water, seas, shores, and wildlife. Because Mr. Flood's claim concerns the territorial seas around New Union Island, this court does not have to reach the issue of the atmosphere. Nevertheless, there may be good reason to do so. Rather than weaken the claims in this case, a public trust for the atmosphere is an appropriate application of the federal public trust doctrine rather than a state public trust doctrine. *32.42 Acres of Land* acknowledged that a small portion of land, even after *PPL Montana*, was being held in a federal public trust. Thus, federal public trust claims are not theoretical. The atmosphere, as a common resource across all states which moves and affects citizens in multiple areas despite any attempts that might be made to contain it, is even more compelling a candidate for a federal public trust. As the Supreme Court discussed in *Causby*, the

atmosphere a common resource that could not be the subject of private claims. Thus, the atmosphere is even more of a common resource than navigable water, and the necessity for the federal government rather than a state government to have a trust in the atmosphere is that much more important.

B. The "Danger Creation" Exception Provides an Affirmative Obligation to Act Because the United States Failure to Regulate When it has Known of the Dangers to the Environment has Placed Plaintiffs in Peril.

The "danger creation" exception provides an affirmative obligation to act where the government has subsidized the conduct and failed to regulate emissions. Although due process does not normally require affirmative action *see DeShaney.*, 489 U.S. at 189, when a state official "places a person in peril in deliberate indifference to their safety, that conduct creates a constitutional claim." *Penilla v. City of Huntington Park*, 115 F.3d 707, 709 (9th Cir. 1997). Most federal circuits recognize danger creation as a basis for substantive due process violations. *Gormley v. Wood-El*, 93 A.3d 344, 360 (N.J. 2014); *Sanford v. Stiles*, 456 F.3d 298, 304 (3d Cir. 2006). Under this exception, the first question is whether the public officer left a person in a situation that was more dangerous than the one that person was found in. *Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1061 (9th Cir. 2006). The second question is whether the state actor acted with "deliberate indifference" to a "known or obvious danger." *Pauluk v. Savage*, 836 F.3d 1117, 1125 (9th Cir. 2016). Although such claims have been under 42 U.S.C. § 1983, there is no suggestion in any of the opinions that this analysis would be limited purely to § 1983 claims. *Juliana*, 217 F. Supp. 3d at 1252. The court rejected the idea that allowing a claim against the federal government with this exception would allow any suit against any government action because the exception has such a rigorous proof requirement. *Id.*

In *Juliana*, the court found that the plaintiffs had adequately alleged a danger creation claim because of the "historic and continuing permitting, authorizing, and subsidizing of fossil fuel extraction, production, transportation, and utilization." *Id.* at 1251. Plaintiffs claimed that the United States played a "central role" in the creation of the climate crisis and did so with full knowledge of what would happen. *Id.* Plaintiffs claimed a timeline starting as early as 1955 and included testimony before the Senate Committee on Energy and Natural Resources from 1988. *Id.*

In this case, the "danger creation" exception creates an affirmative obligation to act because the United States government has acknowledged the threat of climate change and nevertheless subsidized fossil fuels. Under the test articulated by the Ninth Circuit for the danger creation exception, the first prong is that the situation is worse than if the actor had done nothing, which is the case here. President Trump has proposed to reverse regulatory measures and commitments and announced an intent to withdraw from the Paris Agreement and the EPA has proposed freezing emissions reductions. As in *Juliana*, however, it is not simply a question of what might happen in the future, the United States also participated in subsidies of fossil fuels and contributed to the global climate crisis. The United States put Mr. Flood into a much worse situation because the New Union Islands, where he lives, will be completely uninhabitable due to rising seas by the end of this century.

The second prong is that the United States knew about the danger and showed a deliberate indifference or reckless disregard. The United States has known for decades about the threat to the environment. Although the United States has signed the United Nations Framework Convention on Climate Change, no legislation implementing this commitment has been adopted showing a deliberate indifference to a known or obvious danger. Thus, the danger creation exception applies.

Because a public trust is deeply rooted in our nation's history and would be provide substantive due process protections and the United States has an affirmative obligation to act under the "danger creation" exception, there is a cause of action against the United States government based on the Fifth Amendment substantive due process protections.

VI. THE LAW OF NATIONS CLAIM UNDER THE ALIEN TORT STATUTE AND PUBLIC TRUST DOCTRINE CLAIM DO NOT PRESENT A NON-JUSTICIABLE POLITICAL QUESTION.

Plaintiffs' claims do not present a political question and therefore may be resolved by this Court. Chief Justice Marshal stated in *Marbury v. Madison*, the political question applies to "questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court." 5 U.S. 137, 170 (1803). The Court later established a six-factor test to analyze political questions:

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

Baker v. Carr, 369 U.S. 186, 217 (1962). The political question is a powerful weapon; it should be used with great restraint. *Nguyen Thang Loi*, 373 F. Supp. 2d at 72 ; *see The Supreme Court, 1992 Term--Leading Cases*, 107 Harv. L. Rev. 144, 303 (1993). None of these *Baker* factors are applicable to this case.

A. Ms. Apa Mana's Alien Tort Statute claim does not present a non-justiciable political question.

Ms. Mana's claim that HexonGlobal is liable under the ATS for violations of international law under the Law of Nations is not a political question and should be resolved by this Court. Raising issues that are structured and empowered to decide, such as the nature and applicability of substantive international law, does not raise a non-justiciable political question issue. *Nguyen Thang Loi*, 373 F. Supp. 2d at 72. The political question doctrine derives from the principles of separation of powers, and provides certain questions are political and must be resolved by the political branches rather than by the judiciary. *Al Shimari v. CACI Premier Tech., Inc.*, 840 F.3d 147, 154 (2016). The political question doctrine does not strip courts of their authority to construe treatises and agreements from the executive branch; courts still have availability to interpret statutes. *See id.* at 159; *Massachusetts*, 549 U.S. at 497 (holding that this case was not a political question and that greenhouse gases were pollutants and the polluters were potentially liable under the Clean Air Act).

Issues that raise the nature and applicability of substantive international law are not political questions. *Nguyen Thang Loi*, 373 F. Supp. 2d at 72. In *Nguyen Thang Loi*, the plaintiffs were from Vietnam and they sued under the ATS for harm caused by the United States' use of Agent Orange and other pesticides during the Vietnam War, alleging violations of international law and domestic tort law. *Id.* at 15. The court held that claims that raise issues of substantive international law are not political questions. *Id.* at 72. The court relied on *Rasul v. Bush*, where the Supreme Court held that an ATS claim was not a political question because the alien plaintiffs sued for an actionable tort committed in violation of nations or a treaty of the United States. *Id.*; *citing Rasul v. Bush*, 542 U.S. 466, 485 (2004).

Courts cannot risk weakening prohibitions of the United States and international law by question the justiciability of cases. *See Al Shimari*, 840 F.3d at 162. In *Al Shimari*, the plaintiffs,

who were Iraqi nationals alleged they were abused while detailed in custody of the U.S. Army. *Id.* at 151. They sued CACI Technology, which provided contract interrogation services for the military, pursuant to the ATS. *Id.* The court held that the claims are justiciable and not political questions if the actions of the defendants were unlawful when committed. *Id.* Courts may not "decline to resolve a controversy within their traditional competence and proper jurisdiction simply because the question is difficult, the consequences weighty, or the potential real for conflict with the policy preferences of the political branches." *Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1432 (2012) (Sotomayor, J., concurring in part and concurring in the judgment).

In this case, Ms. Mana's ATS claim is justiciable under the political question doctrine. Like *Nguyen Thang Loi*, where the court held that raising substantive international law is not a political question, Ms. Mana's claims HexonGlobal violated the *Trail Smelter* Principle, which is international law under the Law of Nations and therefore justiciable. The courts cannot risk weakening the United States and international law by refusing to hear a case due to the justiciability. Like *Al Shimari*, where the court held that claims that raise unlawful activity when committed are not political questions and should be resolved, therefore the case with HexonGlobal, the surviving corporation of oil producers, shall proceed because they are responsible for 32% of the United States greenhouse gas emissions and 6% globally – a clear violation of the *Trail Smelter* Principle, which is unlawful activity. This court should not be wary of resolving this issue simply because it is difficult because the consequences outweigh the complexity. The Court decided *Massachusetts v. EPA* and held it was not a political question because the court found that greenhouse gases were pollutants and the polluters were potentially liable under U.S. law. Therefore, this case should proceed because greenhouse gases produced by HexonGlobal are

hazardous and are increasing the speed of climate change, which will result in rising sea levels and will negatively impact Ms. Mana. None of the six factors from *Baker* are applicable to this case.

Ms. Apa Mana's Alien Tort Statute claim does not present a non-justiciable political question.

B. Mr. Noah Flood's public trust doctrine claim does not present a non-justiciable political question.

When a court can issue a request for declaratory relief without violating the separation of powers and the plaintiff's constitutional rights were violated is within the judiciary's power to address and not a political question. *Juliana*, 217 F. Supp. 3d at 1241. Raising claims of affirmative relief are justiciable under the political question doctrine. *Kanuk*, 335 P.3d at 1103.

A case does not present a political question simply because it raises a "political" topic or an "issue of great importance to the political branches," it should only qualify as a political question if the *Baker* considerations are "inextricable" from the case. *Juliana*, 217 F. Supp. 3d at 1236 (*quoting U.S. Dep of Commerce v. Montana*, 503 U.S. 442, 458 (1992)), *Baker*, 369 U.S. at 217. In *Juliana*, a group of young people sued the United States government alleging the defendants have known for over fifty years that the carbon dioxide produced by burning fossil fuels was destabilizing the climate system in a way that would "significantly endanger plaintiffs, with the damage persisting for millennia. *Id.* at 1233. The plaintiffs alleged a violation of their substantive due process rights under the U.S. Constitution and the defendants' obligation to hold certain natural resources in trust for future generations. *Id.* The court held this suit was not a political question because the court could issue the requested declaratory relief was sufficient and the case, although a political issue, did not raise to the effect of the *Baker* test. *Id.*

A claim solely asking for declaratory relief, absent the prospect of any concrete relief qualifies as a political question; but claims asserting affirmative relief are justiciable. *Kanuk*, 335

P.3d at 1101, 1103. In *Kanuk*, minors from Alaska sued the State for declaratory relief, claiming it violated its duties under the Alaska Constitution and the public trust doctrine by failing to take steps to protect the atmosphere and climate change. *Id.* at 1090. The plaintiffs also wanted a declaratory judgment that the atmosphere is subject to the public trust doctrine. *Id.* at 1102-03. The court found this issue was a political question because of the claimed relief and better answered by other branches. *Id.* at 1091. The court said that if the plaintiffs were able to allege claims of affirmative action in the future, then this question would be justiciable and they would have a basis on which to proceed even absent a declaration the atmosphere is subject to the public trust doctrine. *Id.* at 1103.

In this case, Mr. Flood asserts the failure of the United States government to take effective action to control greenhouse gas emissions violated its obligations under the public trust doctrine, as incorporated by the Fifth Amendment Due Process Clause. Like *Juliana*, the plaintiffs are suing for a due process right to life under the United State Constitution, Mr. Flood is also suing using the United States Constitution by claiming a fundamental due process right to a healthy and stable climate system. Like *Juliana*, the United States government had an obligation under the public trust doctrine to hold certain resources in trust for the future, the U.S. government failed to prevent harm cause by private parties caused by the production, sale, and combustion of fossil fuels in the U.S. market. Unlike *Kanuk*, where the court found the case was a political question due to the relief the plaintiffs sought – declaratory relief, Mr. Flood seeks effective action to take control against greenhouse gases to prevent the rise in water levels due to climate change. Due to this threat, Mr. Flood sued. Unlike *Kanuk*, where the plaintiffs sued Alaska using the state constitution, Mr. Flood is relying on the U.S. constitution. None of the six factors from *Baker* are applicable to this case.

Therefore, Mr. Noah Flood's public trust doctrine claim does not present a non-justiciable political question.

CONCLUSION

This Court should reverse the district court's order and remand back to hold HexonGlobal and the United States government liable for polluting the global atmospheric climate system.

Corporations and non-government actors can be held liable for violating customary international law. The Clean Air Act does not replace the *Trail Smelter* Principle because the Principle is a defined part of the Law of Nations and not simply part of the federal common law that can be displaced by congressional action. The United States government violated the Fifth Amendment substantive due process protections because it failed to protect global atmospheric climate system from disruption due to protection, sale, and burning of fossil fuels, the public trust doctrine is deeply rooted in our nation's history, and the United States knew about the danger. Finally, the claims put forth by Appellants do not present a political question and may be resolved by this Court. Therefore, this Court should reverse the district court's order dismissing the Complaint and remand for further consideration of the claims.

Respectfully Submitted,

_____

Team 05
Counsel for Appellant
November 28, 2018