CA. No. 18-000123

United States Court of Appeals for the Twelfth Circuit

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

v.

HEXONGLOBAL CORPORATION,
Appellee

and

THE UNITED STATES OF AMERICA,
Appellee

On Appeal from an Order of the
United States District Court
for the District of New Union Island

Brief for Appellants

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JURISDICTIONAL STATEMENT

The court below had subject matter jurisdiction based on 28 U.S.C. § 1331 because this is a civil action arising under the Constitution and laws of the United States.

This court has subject matter jurisdiction based on 28 U.S.C. § 1291 because this is an appeal of a final judgement by a District Court.

The appeal is from a final judgment dismissing all of the plaintiffs' claims against all defendants.

ISSUES PRESENTED

1. Can Mana bring an Alien Tort Statue, 28 U.S.C. § 1350 (ATS) claim against a domestic corporation?

2. Is the *Trail Smelter* Principle a recognized principle of international law enforceable as the "Law of Nations" under the ATS?

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

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

5. Is there a cause of action against the United States Government, based on Fifth Amendment substantive due process protections for life, liberty, and property, for failure to protect the global atmospheric climate system from disruption due to the production, sale, and burning of fossil fuels?

6. Do Plaintiffs' law of nations claim under the Alien Tort Statute and public trust claim present a non-justiciable political question?

STATEMENT OF THE CASE

Plaintiffs filed claims in the District Court for the District of New Union Island alleging harms in violation of the Law of Nations under the Alien Tort Statute (ATS), and in violation of public trust obligations incorporated through the Due Process Clause of the Fifth Amendment. R. 3. Plaintiff Apa Mana is an alien national of the island nation of A'Na Atu. R. 3. Noah Flood is a

U.S. citizen resident of the New Union Islands, a U.S. possession. R. 3. Both islands are located in the East Sea and are under threat of becoming uninhabitable due to rising sea levels. R. 3. Both individual plaintiffs are members of organizational plaintiff Organization of Disappearing Island Nations (ODIN). R. 3. Plaintiffs are at an increased risk for heat stroke and mosquito-borne disease as a result of climate change. R. 5. They have suffered damage to their homes as a result of sea level rise caused by greenhouse gases. R. 5. Their access to food supplies and drinking water have been compromised, and they expect further harms to those resources. R. 5. These harms could be reduced and mitigated by limits on fossil fuel production and combustion. R. 5.

Defendant HexonGlobal (Hexon) is a U.S. corporation, incorporated in New Jersey with a principal place of business in Texas. R. 5. It, and its predecessors, are responsible for 32% of U.S. fossil-fuel related greenhouse gas emissions, and 15% of global emissions (including the U.S.). R. 5. Emission of greenhouse gasses is the expected and inevitable result of burning fossil fuels. R. 5. Greenhouse gasses have been known for centuries to cause heat retention. R. 5. Hexon and its predecessors have known since the 1970s, based on their own research, that continued global sales and combustion of fossil fuels would result in substantial harmful global climate change and sea level rise, and persisted anyways. R. 5.

Defendant United States (U.S.) is the largest single emitter of greenhouse gasses historically, causing 20% of cumulative anthropogenic emissions to date. R. 5-6. U.S. policy until recently has not limited production, distribution or combustion of fossil fuels, and has in fact promoted production and combustion through tax subsidies, leasing of public lands for exploration and development, development of fossil fuel plants, and development of highway systems. R. 6. The U.S. has recently acknowledged the potential harms posed by anthropogenic

greenhouse gas emissions, including through signature and ratification of the United Nations Framework Convention on Climate Change (UNFCCC). R. 6. That treaty committed developed nations to adopt national policies to limit emissions and enhance reparative measures. R. 6. Since ratification in 1992, the U.S. has not adopted any legislation to implement that commitment. R. 6.

However, the United States had taken steps to regulate domestic greenhouse gas emissions. R. 6. For example, it was held by the Supreme Court that the Environmental Protection Agency (EPA) may regulate greenhouse gas emissions through the Clean Air Act (CAA). R. 6. In 2015, the EPA created regulations to control greenhouse gas emissions from power plants, and required states to implement controls. R. 6. The United States also participated in the Paris Agreement, pledging to reduced greenhouse gas emissions by 26-28%. R. 6. However, under the Trump administration, many of the actions taken by the EPA and the commitments promised are set to be reversed. R. 6.

The District Court for the District of New Union Island dismissed all claims by the plaintiffs against both defendants. R. 3. Plaintiffs have appealed the dismissal to the United States Circuit Court for the Twelfth Circuit. R. 1. Upon order of that court, plaintiffs (now appellants) have briefed on six issues. R. 1; *infra* at 1.

SUMMARY OF THE ARGUMENT

The plaintiffs have plead a cause of action under the ATS. The ATS provides for suits by aliens for violations of treaties and the law of nations. 28 U.S.C. § 1350. The law of nations is equivalent to today's customary international law (CIL), found in agreements, principles and international court decisions, and reflecting an international consensus. A domestic corporation may be a defendant in a suit under the ATS under widely-held principles of civil liability, when

the corporation's conduct is a violation of CIL. The harm plaintiffs allege is a violation of CIL because it involves action in one country causing environmental harm to aliens residing in another. This conduct is barred by the Trail Smelter principle, which stated that no country shall cause harm to the environment of another. Since the Trail Smelter principle has become CIL, plaintiffs must be able to use the ATS to hold Hexon liable for domestic conduct that has caused harm to their land.

A private individual, or entity, that violates CIL may be held accountable for their conduct if they are acting under the color of law, or if the violation is one that normally extends to private actors. Since Hexon has received much of its success due to actions of the U.S., it can be said that they are acting under the color of law with significant state aid. Further, the idea that businesses be held accountable for such a violation has been recognized as a norm of universal concern through its promulgation in various treaties. Thus, the action may be sustained against Hexon under the Trail Smelter principle.

The CAA does not displace the Trail Smelter principle due to the fact that the principle has been solidified in treaties that were created subsequent to the relevant CAA provision. §7415 covers air pollution that happens to cause international harm in a foreign country, and was codified in the 70's. The Trail Smelter principle has been included in both the UNFCCC and Rio Declaration, which the United States accepted in 1992. Thus, the treaty would control the issue, and the CAA may not be found to displace the principle due to its subsequent inclusion in international agreements.

The plaintiffs have properly plead a cause of action under the Fifth Amendment. The Fifth Amendment is a flexible feature of the Constitution that provides a basis for justice to be done even where courts are faced with questions that could not have been predicted by the

founders. The Constitution itself suggests that there should be specific protections for plaintiffs against the violence of anthropogenic climate change and its resulting invasions. Further, the sovereign power of the United States flows from the people, and therefore the United States owes a duty of protection where the people have no power to act. The plaintiffs' complaints fall under the "special relationship" and "danger creation" doctrines that some circuit courts have used to find that the government was obligated to protect persons at risk of harm.

The federal government can and should be charged with public trust obligations. The theory of public trust evolves with our understanding of our environment. The spirit of the public trust doctrine supports finding a public trust obligation tied to the climate, and more limited rulings from prior cases are distinguished because they were based on more limited understanding of natural sciences. Supreme Court jurisprudence supports the expansion of the doctrine in this case. The global climate system is essential for maintenance of all property held in public trust, and must be protected for the good of the future of our nation.

The plaintiffs' claims are not barred by the political question doctrine. That doctrine should be invoked narrowly and should not be used to avoid difficult questions. Under the *Baker v. Carr* factors, the issues involved do not present nonjusticiable political questions. Issues of fossil fuel use and climate change are not textually committed by the Constitution. Plaintiffs do not ask the Court to set out a climate policy, only to recognize the plaintiffs' rights under the Constitution and order that the political branches act in accordance with those rights. It is unacceptable for the political branches to take a position that nothing needs to be done to protect against climate change, just as it would be unacceptable for the courts to refuse to hear the plaintiffs' claims.

ARGUMENT

I. The Alien Torts Statute allows a corporation to be a defendant.

The ATS grants jurisdiction to district courts to hear civil actions for torts committed in violation of the law of nations or a treaty of the United States. 28 U.S.C. § 1350. When it was passed in 1790, violations of the "law of nations" were understood to encompass infringement of the rights of ambassadors, violations of safe conduct, and piracy. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 715 (2004). Violations of the laws of nations mean violations of "customary international law." *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 247 (2d Cir. 2003). A court deciding whether the ATS encompasses a claim before it must inquire first whether the conduct at issue qualifies as a violation of CIL and whether to apply the ATS to the particular perpetrator involved. Addressing the second question first, a court must determine whether international law "extends the scope of liability to the perpetrator being sued, if . . . a private actor *such as a corporation* or individual." *Sosa*, 542 U.S. at 733 n. 20 (emphasis added).

A. Corporations are civilly liable for their actions in international law.

A corporation is a "juridical person" and is not necessarily immune under United States domestic or international law. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 319 (S.D.N.Y. 2003). The inclusion of the statement "individual or corporation" in *Sosa* suggests that the Supreme Court envisioned cases in which imposing corporate liability would be appropriate. *Sosa*, 542 U.S. at 733 n. 20. Corporate civil liability is well accepted both domestically and internationally, in such diverse areas as tort law, human rights law, and international treaty obligations regarding nuclear energy and oil pollution. *See Presbyterian Church*, 244 F. Supp. at 316-17; *see also Flomo v. Firestone Nat. Rubber Co., LLC*, 643 F.3d 1013 (7th Cir. 2011) ("corporate tort liability is common around the world.").

As long as the conduct in question is a violation of customary international law, *see infra* p. 9-14, there is no reason a corporation cannot be held liable for its conduct through the ATS. Because the harm from emissions alleged here falls within the parameters of CIL, *see infra* p. 9-14, the plaintiff has stated a claim for relief on the question of corporate liability. The mere fact of incorporating, an easy process in most states, should not mean a grant of immunity for all corporate actions influencing non-citizens.

B. There are boundaries beyond which the ATS cannot impose civil liability.

There are policy reasons courts have been reluctant to impose liability on certain corporations and for certain corporate conduct. None of these reasons for reluctance is present here.

C. Foreign corporations are not liable under the ATS.

The Supreme Court has held that foreign corporations are not liable under the ATS. *See Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386 (2018). This is due to the foreign policy implications of American courts encroaching on foreign countries' authority over their own corporations. These foreign policy concerns are absent in the case at hand. Instead of dragging a foreign corporation with minimal United States' contacts into a United States court, as was the case in *Jesner,* the alien plaintiffs here seek to hold a United States corporation liable for the grievous harm it has done to their country. Unlike the overreach feared in *Jesner*, this would demonstrate an appropriate concern for aliens injured by the actions of an American corporation. *Id.*

D. Domestic corporations are not liable for conduct carried out entirely within the boundaries of another country.

Until recently, circuits were divided on whether corporate conduct causing harm solely in another country's territory could be addressed through the ATS. The Second Circuit held in 2010 that corporations could not be liable under the ATS. *Kiobel v. Royal Dutch Petroleum Co.*

(*Kiobel I*), 621 F.3d 111 (2d Cir. 2010). In reviewing the *Kiobel* decision, the Supreme Court held only that domestic corporations are not liable under the ATS for conduct occurring solely in other countries, avoiding the question of domestic corporate liability for domestic conduct. *Kiobel v. Royal Dutch Petroleum Co.* (*Kiobel II*), 569 U.S. 108 (2013). In so holding, the Supreme Court reaffirmed the "presumption against territoriality," that "[w]hen a statute gives no clear indication of an extraterritorial application, it has none". *Morrison v. Nat'l Australia Bank Ltd.,* 561 U.S. 247, 255 (2010). In other words, "unless there is the affirmative intention of the Congress clearly expressed" to give a statute extraterritorial effect, "we must presume it is primarily concerned with domestic conditions." *Morrison*, 561 U.S. at 255 (quoting *EEOC v. Arabian Am. Oil Co.* (*Aramco*)*,* 499 U.S. 244 (1991).

This presumption "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord." *Aramco,* 499 U.S. at 248. Because of the presumption against extraterritoriality, the ATS does not encompass torts committed by domestic corporations solely within foreign countries.

E. A domestic corporation is liable for its conduct within United States boundaries when that conduct harms aliens in other countries.

This court should allow a claim under the ATS against a domestic corporation for conduct originating within United States borders and causing harm to aliens. Following the implications of the principle against extraterritoriality, there is a presumption that statutes intend to reach "domestic conditions." *Morrison*, 561 U.S. at 255. Additionally, the majority of circuits have held that the ATS does apply to domestic corporations. *See*, *e.g.*, *Doe v. Exxon Mobil Corp.*, 654 F.3d 11 (D.C. Cir. 2011), *vacated for reconsideration on questions of extraterritoriality and aiding and abetting liability*, 527 F. App'x 7 (D.C. Cir. 2013) ("We join the Eleventh Circuit in holding that neither the text, history, nor purpose of the ATS supports

corporate immunity for torts based on heinous conduct allegedly committed by its agents in violation of the law of nations."); *Flomo*, 643 F.3d at 1019 ("It is neither surprising nor significant that corporate liability hasn't figured in prosecutions of war criminals and other violators of CIL. That doesn't mean that corporations are exempt from that law."); *Aragon v. Che Ku*, 277 F. Supp. 3d 1055, 1063 (D. Minn. 2017) ("The Seventh Circuit's reasoning in *Flomo*, which is consistent with the majority view, is persuasive" on the question of corporate liability.).

If the violation is truly one of the "law of nations," *see infra* p. 9-14, then corporations must be held liable through the ATS. Argument. As Justice Souter noted in *Sosa*, the ATS had and has a purpose and was not intended to sit on the shelf. *Sosa*, U.S. 542 U.S. at 719. If foreign corporations are exempt from liability, and domestic corporations are immune for their acts in other countries, then the ATS must reach domestic corporate activity in order to fulfill its purpose. If Congress had meant to abdicate all federal court jurisdiction for harms to aliens, it would not have passed the ATS. If Congress wishes to send that message now, it can do so, repealing the ATS and stating that United States' corporations have no responsibility to anyone else in the world. But while the ATS stands, it must encompass the behavior of a domestic corporation causing harm to aliens. This Court should find as a matter of law that the ATS encompasses domestic conduct by domestic corporations that harms aliens.

II. The Trail Smelter principle is a principle of customary international law.

The ATS allows tort suits for violations of the "law of nations" in federal courts. 28 U.S.C. § 1350. The law of nations may be found in CIL. *Flores*, 414 F.3d at 247. "Where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations." *Filartiga v. Pena-Irala*, 630 F.2d 876, 880-81 (2d Cir. 1980). The definition of the law of nations necessarily changes over time. *See id* ("It is

clear that courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today); *see also Ware v. Hylton*, 3 U.S. 199 (1796) (distinguishing between the "ancient" and "modern" law of nations).

The Second Circuit has recognized that the "customs and usages of civilized nations" can be found in sources such as international conventions, general principles of law recognized by civilized nations, and international judicial decisions. *Flores*, 414 F.3d at 250-51.

Courts applying CIL must identify "clear and unambiguous rules." *Filartiga*, 630 F.2d at 884. The rules must be articulated with "a specificity comparable to the features of the 18th-century [violations the court] recognized," i.e. violation of safe conduct, infringement on ambassadors' rights, and piracy. *Sosa*, 542 U.S. at 724.

One might argue that because international conventions are not "binding," the United States need not recognize them as the bases for claims under the ATS. But to focus on whether they are binding treaties misses the point. *See Flomo*, 643 F.3d at 1019 ("The law of nations, seen in [CIL], arises from custom and international recognition, not simply from statutory enactments and treaties."). Although it must be articulated with specificity, CIL need not originate in legislation or a state-signed treaty to be the basis of a claim under the ATS.

A. The Trail Smelter principle is sufficiently specific to be CIL.

A principle of CIL must be articulated with sufficient specificity. *Sosa*, 542 U.S. at 725. The Trail Smelter principle is sufficiently specific.

The Trail Smelter Arbitration was held in 1938 and 1941, and bound Canada and the United States to its decisions. *Trail Smelter Arbitration* (U.S. v. Can.), 3 R.I.A.A. 1905 (1941). The United States brought suit against Canada for transboundary harm caused by a smelter owned and operated by Consolidated Mining and Smelting Company of Canada in Trail, British

Columbia. *Id.* at 1917. The smelter emitted up to 350 tons of sulfur per day, causing damage to land, plants and water across the border in Washington State. *Id.*

The ultimate decision of the arbitration was that

> under the principles of international law, as well as of the law of the United States, no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.

Id. at 1965.

The Trail Smelter principle satisfies *Sosa*'s requirement for specificity at least equivalent to the original ATS causes of action. It specifies the elements of a cause of action: use of a nation's territory; causation of injury to the territory of another nation, or to property or persons within that nation; the case is of serious consequence; the injury must be established by clear and convincing evidence. Piracy, at least "general piracy," such as is referenced in the ATS and in Constitution's "define and punish" clause, is also defined by the laws of nations. *Sosa*, 542 U.S. at 761-62 (Breyer, J., concurring) ("Because it is created by international consensus, general piracy is restricted in substance to those offenses that the international community agrees constitute piracy.").

In its essence piracy requires harm to a ship on international waters, "outside of any nation's territorial jurisdiction, without pretense of state authority, irrespective of the target vessel's nationality, and with devastating effect to global commerce and navigation." *United States. v. Hasan*, 747 F. Supp. 2d 599 (E.D. Va. 2010), *aff'd sub nom, United States. v. Dire*, 680 F.3d 446 (4th Cir. 2012). Akin to piracy, the Trail Smelter principle forbids using the territory of one nation to cause harm to others outside that nation's territorial jurisdiction, "irrespective of

target nationality," when it has devastating effects—here, on not only commerce but on the other nation's very existence.

B. The Trail Smelter principle is clearly incorporated into international conventions and international court decisions.

A principle of CIL must be expressed in international conventions, general principles of law, and international courts. *See Flores*, 414 F.3d at 250-51. The Trail Smelter principle has been incorporated into international conventions, expressed in general principles of law held by civilized nations, and, most compellingly, used by international courts. Principle 21 of the Declaration of the Stockholm Convention of 1972 states that

> States have … 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, *Declaration of the United Nations Conference on the Human Environment*, Principle 21, U.N. Doc A/CONF.48/14/Rev.1 (June 16, 1972). Twenty years later, the 190 nations assembled at Rio adopted Principle 2, which stated, almost identically, that states have "the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction." U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development*, Principle 2, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I) (Aug. 12, 1992). Both these international agreements articulate the Trail Smelter principle.

The use of a principle by judges deciding international disputes is also a strong indicator of the principle's status as CIL. In 1949, the International Court of Justice (ICJ) held that one of the "general and well-recognized principles of international law is 'every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other states.'" *Corfu Channel Case* (U.K. v. Albania), Merits, 1949 I.C.J. Rep. 22 (Apr. 9). In 1973, the ICJ granted a

provisional order stopping France from conducting nuclear testing that resulted in radioactive fallout landing on Australian territory. *Nuclear Tests* (Australia v. France), Interim Protection Order, 1973 I.C.J. Rep. 87 (June 22). While not reaching the merits of Australia's claim, the court's willingness to intervene and stop the harm to one country by another suggests the principle that one country may not cause substantial damage to another's environment.

The ICJ reached this very issue in a dispute between Hungary and Slovakia over the Slovakia's diversion of the Danube River following a treaty breach by Hungary. Grave environmental harm was seen from altering the course of the river. *Gabcikovo-Nagymaros Project* (Hungary v. Slovakia), Judgment, 1997 I.C.J. 7, 89 (Sept. 25).

In resolving the issue, the ICJ held that "the people of both Hungary and Slovakia are entitled to development for the furtherance of their happiness and welfare. … They are likewise entitled to the preservation of their human right to the protection of their environment." *Id.* at 90. The ICJ continued that "development can only be prosecuted in harmony with the reasonable demands of environmental protection. . . . [t]he right to development . . . does not exist in the absolute sense, but is relative always to its tolerance by the environment." *Id*. at 92. The ICJ resoundingly repeated the Trail Smelter principle: developing and using the resources of one's own country does not trump other countries' right to a habitable environment.

The presence of the Trail Smelter principle in international law decisions shows that it is CIL. The ATS specifically includes offenses against the laws of nations, a category that is defined at any moment by international conventions, shared principles, and court opinions. The Trail Smelter principle clearly expresses a contemporary consensus in international law: that it is a violation of the "laws of nations" to perform acts in one's own country that cause harm to the environment of another country.

III. Trail Smelter is customary international law that imposes obligations against non-governmental actors.

In *Kadic v. Karadzic*, the Second Circuit held that there are "certain forms of conduct that violate the law of nations whether undertaken by those acting under the auspices of a State or only as private individuals." 70 F.3d 232 (2d Cir. 1995). The court found that early examples of such conduct involved piracy, slave trade, and war crimes. *Id*. It held that the private parties could be held accountable for their actions if the conduct was undertaken under the color of law, or if it violated a norm of international law that has been recognized as extending to the conduct of private parties. *Id*. at 245. Here, the plaintiff has alleged that Hexon should be held liable for damages that its operations have caused in A'Na Atu, under the no harm principle articulated in the Trail Smelter Arbitration. Not only have these actions been taken under the color of law, but they are also in violation of a norm of international law that can extend to private actors. Thus, the "no harm principle" can impose an obligation upon Hexon.

A. Hexon has been acting under color of state law.

The court in *Kadic* relied upon actions commenced under 42 U.S.C. § 1983 as a guide to determine whether one had engaged in action that would be considered to be under the "color of law." § 1983 allows a person who has been deprived of a Constitutional right or privilege to bring suit against one who caused the deprivation, unless the action was taken within the "officer's judicial capacity." 42 U.S.C. § 1983. A private individual is acting under the color of law, or within their judicial capacity, when he acts together with state officials or with significant state aid. *Lugar v. Edmonson Oil Co*., 457 U.S. 922, 937 (1982). When there is a "close nexus" between the State and the challenged action, the private action may be considered "as that of the State itself." *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001). *See also Segreto v. Kirschner*, 977 F. Supp. 553, 563 (D. Conn. 1977) (conduct that is related to

state authority conferred upon the person is sufficient to be deemed under color of state law, whether it be actually vested, or made possible due to a privilege of employment). Although suits brought under § 1983 only reach those acting under color of state law, the *Kadic* opinion extended the coverage to actions taken under the authority of a federal government by concluding that the defendant had acted under the authority given by the Yugoslavian government. *Kadic*, 70 F.3d at 245.

Hexon has been acting under the color of law because much of its success is due to the policies and programs promulgated by the United States, which has actively promoted the production and combustion of fossil fuels. R.6. This state aid is significant because it has included subsidies for fossil fuel production, leasing of public land and seas for increased production of coal, oil and gas, as well as the development of fossil fuel power plants by public agencies. *Id*. These policies and programs have not only promoted fossil fuel production, but have aided in the revenues received and protections in place. For years, the fossil fuel industry has been able to continue its production due to the sheer amount of support provided by the Federal government. Such aid is significant enough to conclude that Hexon has been acting under the color of law.

B. A violation of Trail Smelter is a norm that is recognized as extending to private actors.

Kadic relied upon the Restatement (Third) of Foreign Relations Law of the United States to extend liability to private actors who are not acting under the color of state law. *Kadic*, 70 F.3d at 240. "A state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern." RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 404 (AM. LAW INST. 1987). Piracy, slave trade, attacks or hijacks of aircraft, genocide, war crimes, and certain acts of terrorism are regarded as instances of universal

concern. *Id*. A comment to the Restatement defined universal concern as instances that have been universally condemned and incite a general interest to cooperate to suppress them, as reflected in widely accepted international agreements and resolutions of international organizations. *Id*.

In *Trail Smelter*, it was held that "no State has to right to use or permit the use of its territory in such a manner as to cause injury by fumes in, or to the territory of another". *Trail Smelter*, 3 R.I.A.A. at 1964. The dispute initially involved private actors, but led to a settlement between the United States and Canada. *Id*. However, the decision did state that a State owes at all times a duty to protect other states against injurious acts by an individual within its own jurisdiction. *Id*. at 1964. Additionally, the action originated between two private actors. Therefore, although the arbitration itself did not involve a resolution of transboundary harms between private actors, it did provide that an individual's injurious acts should not be tolerated.

The holding in *Trail Smelter* has been widely accepted in international agreements to make it a matter of universal concern. Principle 21 of the Declaration of the Stockholm Convention states that "States have...the sovereign right to exploit their own resources....and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States." U.N. Conference on the Human Environment, *supra* at Principle 22. This statement was reiterated in the UNFCCC and included as Principle 2 of the Rio Declaration. United Nations Framework Convention on Climate Change (UNFCCC), FCCC/INFORMAL/84 (1992); *Rio Declaration*, *supra* at Principle 2.The fact that the Trail Smelter principle has repeatedly been included in such agreements is an indication that it is of universal concern.

Additionally, the idea that businesses have the responsibility to respect human rights has entered international law through the Human Rights Councils Guiding Principles on Business

and Human Rights. Human Rights Council, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises* A/HCR/17/13 (Mar. 21, 2011). The document requires businesses to avoid causing and contributing to adverse human rights impacts through its own activities, and to address violations that may arise by preventing or mitigating the impacts attributable to operations. *Id*. at ¶ 13. Further, all business should comply with applicable laws and respect internationally recognized human rights. *Id*. at ¶ 23.

The Trail Smelter principle can be considered widely accepted by international law due to the fact that it has been included in various agreements, thus its reach extends to Hexon. It has allegedly violated a norm of that has been continuously included in treaties and agreements. Further, its actions have hindered the lives of the plaintiffs by increasing sea level rise, that has resulted in substantial expenses. R.5. Each human deserves the right to have a home on land, and a violation of such should not be disregarded simply because the perpetrator is not a governmental entity. The Trail Smelter decision itself also imposed a duty upon the State to ensure that an individual's injurious acts were not affecting any foreign nation. *Trail Smelter*, 3 R.I.A.A. at 1964. It would be improper to allow Hexon to get away with violating a well-recognized norm, instead of facing justice and addressing the real concerns of the plaintiffs.

IV. Trail Smelter is not displaced by the Clean Air Act.

The District Court relied upon the Supreme Court's holding in *American Electric Power Company v. Connecticut* in reasoning that the Trail Smelter principle has been displaced by the CAA. In that decision, the Supreme Court reasoned that to determine whether congressional legislation displaces federal common law, a court must determine whether a statute speaks directly to the issue at hand. *See American Electric*, 564 U.S. 410, 424 (2011). There, the court

declined to mandate that each private electric company have CO2 emissions set at a cap, because the Clean Air Act already vested such power within the Environmental Protection Agency ("EPA"). *Id*.

American Electric is distinguishable from the present dispute because the present issue is much larger than something set by federal common law, but is an alleged violation of customary international law. In *City of N.Y. v. BP P.L.C*., the Southern District of New York found that the CAA had spoken directly to the issue of domestic emissions, and dismissed claims that were against domestic corporations. 325 F. Supp.3d 466, 474 (S.D.N.Y. 2018). The City had also brought claims against foreign corporations, but the court declined to address that issue since it has dismissed those against the domestic corporations. However, the court said in dicta that these types of claims would be subject to international agreements since "appropriate caution" must be exercised when dealing with claims that have the potential to implicate foreign relations. *Id*. at 475-76.

Here, the plaintiff alleges that Hexon has violated the law of nations by allowing its emissions to cause substantial harms in a foreign territory. Such serious allegations, and the United States response, will have a tremendous effect on foreign relations. Further, the issue should be approached cautiously due to the fact that the *Trail Smelter* holding has been preserved in international treaties as CIL. The analysis of *American Electric* cannot apply here because this case concerns not federal common law and the CAA, but instead a conflict between an international treaty and the CAA.

A. The Trail Smelter principle is not displaced by the Clean Air Act because it has been solidified by treaties made subsequent to the promulgation of the Clean Air Act.

"This Constitution, and the Laws of the United States...and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme law of the land."

U.S. CONST. art. VI, cl. 2. This language makes it clear that both a law and a treaty are upon the same playing field. The Supreme Court has found a treaty has been displaced by a statute only when the statute is created subsequent to the treaty. *See Breard v. Green*, 523 U.S. 371 (1998) (stating that an act of Congress renders a treaty null only when it is promulgated subsequent in time); *see also Whitney v. Robertson*, 124 U.S. 190, 194 (1888) ("if a treaty and federal statute conflict, the one last in time will control the other"). A treaty is considered to be domestic law when Congress either enacts implementing statutes or the treaty itself "conveys an intention that it be 'self-executing' and is ratified on those terms." *Medellin v. Texas*, 522 U.S. 491, 505 (2008). Thus, the language of the treaty, as well as subsequent negotiations and drafting history, will be used to understand the effect the treaty was intended to have in the United States. *Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 226 (1996).

One may be quick to rely upon the regulations issued by the EPA that established carbon emission standards for new power plants, when considering the current issue. 80 Fed. Reg. 64510 (Oct. 23, 2015). The Supreme Court's holding in *Massachusetts v. EPA* that greenhouse gases are "pollutants" that may be subject to regulations promulgated by the EPA has the potential to be even more persuasive. 549 U.S. 497 (2007). However, such reliance is misplaced because these are not the provisions of the CAA at concern in this case, for they do not speak directly to the issue. The plaintiff has alleged that Hexon has violated the law of nations by causing harm in a foreign nation. If these allegations were controlled by the CAA at all, it would be found in § 7415, which addresses international air pollution.

§7415 of the CAA requires an implementation plan to be revised or created when it is found that an air pollutant from the United States has caused or contributed to air pollution that endangers the public health and welfare in a foreign country. 42 U.S.C. § 7415. The plan

revision is intended to provide a mechanism by which the endangerment can be abated or eliminated. *Id*. The affected foreign country is invited to attend negotiations about the plan revision. *Id*. This section was added to the statute in 1977. Certain aspects of the CAA had been amended in the 90's; however, this particular provision was not.

In 1992, the United States signed and the Senate ratified the UNFCCC. R 6. The UNFCCC incorporated the no harm principle by stating that "States have...the sovereign right to exploit their own resources....and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States." UNFCCC, *supra*. This principle was then reaffirmed in the Rio Declaration as Principle 2. Before the United States would accept the Rio Declaration, it requested several concessions. U.S. DEP'T OF STATE, U.S. INTERPRETIVE STATEMENT ON WORLD SUMMIT ON SUSTAINABLE DEVELOPMENT DECLARATION (1993). For one, the United States would not agree to recognize the idea of "common but differentiated responsibilities." *Id*. Further, it stated that it did not believe that aid should be increased to developing countries based on donor gross national product. *Id.* However, there was no mention of Principle 2, which included the Trail Smelter principle.

The CAA was likely in the minds of lawmakers because it had been amended just two years prior, and yet it was not discussed in regards to the Rio Declaration. Due to the close proximity of both, had the United States believed § 7415 was more controlling, it had the opportunity to make this known. Yet, it declined to do so. The CAA cannot displace the Trail Smelter principle because Trail Smelter was solidified in a treaty created subsequent to § 7415. The treaty is more binding upon the United States, and the principles within it control.

V. Plaintiffs have properly plead a cause of action based on the Fifth Amendment substantive due process protections for the failure of the United States to sufficiently protect the global atmospheric climate system from disruption related to fossil fuels.

A. Due process protection is a key feature of the Constitution that allows it to grow and develop with society.

Our Constitution is pushing a quarter of a millennium in effect. Just as today's society would be in many ways unrecognizable to its authors, the reach of Constitutional protections is beyond what the authors could have understood. "The generations that wrote and ratified the Bill of Rights…did not presume to know the extent of freedom in all its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning." *Obergefell v. Hodges*, 135 S.Ct. 2584, 2598 (2015). The judiciary has a duty to hear the claims of the people who believe they are owed protection by the supreme law of our land, and to hold as void whatever may be repugnant to the Constitution. *See* U.S. CONST. art. VI; *Marbury v. Madison*, 5 U.S. 137, 180 (1803).

The text of the Constitution itself is not exhaustive, and the founders sought to ensure that understanding. This view was shared by Federalists and Anti-Federalists alike, though they disagreed on the manner. While the Anti-Federalists demanded a Bill of Rights, the Federalists feared enumeration of rights could be read as a narrowing of the rights of the people and an expansion of the powers of government. *See, e.g.* Federalist 84. The compromise came in the Ninth Amendment, codifying the understanding that the rights of the people are broad. U.S. CONST. amend. IX. The right to a climate system that does not threaten the lives and property of the people as a result of the exercise of government powers is exactly the type of issue that could not have been foreseen at the close of the 18th century, but which must be considered today.

B. The Constitution suggests that the rights claimed by plaintiffs should be protected and thus deserve to be fully heard.

The issue could be analogized to one that the founders did understand, and for which they crafted an affirmative duty of the United States. While they would have expected to see ships sailing upon the sea, the rising tides caused by climate change are no less an "Invasion," and the assault on the climate system by the deliberately indifferent conduct of the fossil fuel industry, aided by government action, is a form of "domestic Violence." *See* U.S. CONST. art. IV, § 4 ("The United States…shall protect each [state] against Invasion; and…against domestic Violence"). The plaintiffs have already suffered such an invasion. R.4-5. The Constitution commands that the United States protect against such Invasions and such domestic violence. *Id*.

One of the key duties defining the relationship of federalism is protection of the constituent states. Self-defense is an unquestionable sovereign right, but one that the states agreed to relinquish for the greater good of the Union. This balance has been addressed in the context of atmospheric pollution, over a century ago in *Georgia v. Tenn. Copper Company*, 206 U.S. 230 (1907). The Supreme Court recognized that the states, in giving up the sovereign power to forcibly abate outside nuisances when they entered the Union, did not leave themselves helpless. *Id.* at 237. The federal courts became the battleground for the assertion of rights that could not be self-enforced. *Id*, citing *Missouri v. Illinois*, 180 U.S. 208, 241 (1901).

The sovereign power of the United States comes from below, offered up by the states in the hopes that, as a Union, something greater could be made. That sovereign power did not simply appear, nor was it seized by force, but was granted by the only true source of authority: the people. And be not mistaken that this power flows from the hearts of citizens, through the statehouse, and to the nation's capital, but proceeds in two direct paths. *See* U.S. CONST. amend. XIV § 1 (recognizing the privileges and immunities of citizens of the United States that exist

beyond the power of any State to abridge them). Plaintiffs seek protection, a duty incumbent upon the United States if it shall exist truly as a democratic republic and not a tolerant tyrant. The courts owe a duty to hear these pleas and to decide whether the other branches are under a duty to act.

C. The exceptions to the limited obligations of the Due Process Clause impose a duty on the United States to secure the plaintiffs' rights to life and property.

Although the United States has a duty to protect its citizens from harm, courts have held the Due Process Clause imposes only limited obligations upon the government to act, even where "…aid may be necessary to secure life, liberty, or property interests…" *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 196 (1989). Obligations can exist where a special relationship exists, or where the danger presented has been created by the government. *See L.W. v. Grubbs*, 974 F.2d 119, 121 (9th Cir. 1992).

i. A special relationship exists and should be recognized under the special relationship exception.

The "special relationship" has normally been applied to scenarios where an individual is held against his will under color of law. *See, e.g., id*. Plaintiffs argue that the unique framework of the climate change problem creates a special relationship that imposes an affirmative duty on the government. The threat presented by carbon emissions is global and inescapable. It cannot be addressed by individual or even small collective efforts and, as we lack a global government, appeals must go to the highest available authorities: national governments. The people of the United States and of the Earth are in the "custody" of the United States insofar as they may not forcibly abate the nuisance presented by fossil fuel production and distribution by Hexon without facing criminal liability. Their liberty of movement is realistically limited to this planet, meaning plaintiffs and others cannot escape the area over which the United States exerts significant control based on the amounts of emissions resulting from its policies. It is the United States

which has sole control of carbon emissions resulting from exploration and distribution by Hexon, under statutes and/or federal common law. The people are powerless and are therefore dependent on the protection of the United States.

ii. The danger creation exception applies.

The "danger creation" exception is well accepted, and should apply here. The danger creation exception holds that the government should be held responsible when it unreasonably contributes to dangers faced by members of the public, even if the harms are inflicted by third parties. Although it has been most applied in the Ninth Circuit, the doctrine has been addressed in the Seventh and Tenth circuits as well. *See, e.g., Waubanascum v. Shawano Cty.*, 416 F.3d 658 (7th Cir. 2005); *T.D. v Patton,* 868 F.3d 1209 (10th Cir. 2017).

In *DeShaney*, the court noted that the dangers faced by the petitioner were neither caused nor exacerbated by the government. *DeShaney*, 489 U.S. at 201. For example, the Ninth Circuit reversed dismissal of a claim by a state-employed nurse who was raped by an inmate. *Grubbs*, 974 F.2d. The court held that the victim's supervisors could be liable under a 1983 claim because it was under their authority that the inmate, who had a proclivity for violent sexual assault against women, was placed in a position where he was able to be alone with the victim. *Id.* at 121. Similarly, the Tenth Circuit found a violation of substantive due process rights where a social worker caused a minor to be placed in the custody of his father who subsequently sexually abused him. *Patton,* 868 F.3d at 1212.

The current claim alleges danger on a much more massive scale. The government's conduct has placed every person in the country within reach of the harm of global warming caused by the government permitting use of fossil fuels and their carbon emissions. The current risk is extremely high for plaintiffs, who have already suffered seawater damage to their homes, and who have had their source of drinking water contaminated. R.5. Sea level rise, storms,

increased risk of harm from heat and from animal-borne disease, interference with drinking water, and interference with food sources will continue to plague plaintiffs and are the types of harm that many others will likely face as climate change increases and compounds. R.4-5.

While some danger creation exception cases have focused on a knowledge disparity, highlighting the fact that the government was aware of danger while the victim was not, that element does not have any logical application to the current claims. The value of that knowledge would be to allow the victim to have at least attempted to protect him- or herself or avoid the danger. The danger of climate change is inescapable—thus the connection to a "special relationship" as argued above. Further, whether the United States had knowledge of the dangers in the past is immaterial. Its current conduct is continuing to exacerbate the dangers posed. Had the social worker in *Patton* only learned of the father's criminal history after placing the child in his custody, liability would logically still attach for any harms inflicted after she had that knowledge and opportunity to remove the child from custody. Justice should not permit the government to sit idly by, aware of a danger it has created, without taking corrective action.

D. The federal government can and should be charged with public trust obligations.

Public trust obligations apply to the federal government. In *U.S. v. 32.42 Acres of Land, More or Less, Located in San Diego County, Cal.,* the District Court noted that nearly five acres of the land in question was acquired subject to federal trust. *See* Order dated April 28, 2006(#24) at P. 11 in *United States v. 32.42 Acres of Land*, Case No. 05-cv-1137-DMS, (S.D. Cal. April 28, 2006). That holding was not appealed by the government and was not disturbed by the Ninth Circuit in its review of the case. There can be no question as to the applicability of public trust obligations to the federal government.

Much of the public trust precedent limits application of the doctrine to states and not the federal government. This precedent can be distinguished from the current claim. Land is

immobile, it remains within the state boundaries, and it can be properly protected by the state. Navigable waters may be mobile but they are contained. The global climate is far too broad and interconnected to be effectively protected by an individual state. Our application of the public trust doctrine should evolve along with our understanding of natural sciences. *See, e.g.,* Mary C. Wood, *Atmospheric Trust Litigation Across the World*, in Fiduciary Duty and the Atmospheric Trust 113 (Ken Coghill et al. Eds. 2012) (explaining that atmosphere was not traditionally thought of in public trust terms due to flawed understanding of the atmosphere, not a reasoned decision on some other basis to exclude it).

Prior statements of the Supreme Court suggest the possibility of expansion of the public trust doctrine as applied to the federal government. Justice Douglas has stated that "The authority over [the sea] can no more be abdicated than any of the other great powers of the Federal Government. It is to be exercised for the *benefit of the whole*." *Alabama v. Texas*, 347 U.S. 272, 282 (1954) (Douglas, J., dissenting) (emphasis added). Writing for the majority in *United States v. Causby*, Justice Douglas also suggested that only the public has a "just claim" to airspace rights. 328 U.S. 256, 261 (1946).

Public trust obligations can change over space and time. In *Illinois Central Railroad v. Illinois*, the Supreme Court departed from common law rules because the landscape of the United States was different from that of England. 146 U.S. 387, 436 (1892). Just as protecting the waters on this continent required a different approach than in England, protecting natural resources in the era of climate change requires a different approach than in the past.

E. The global climate is common property owned in trust and must be protected and administered for the benefit of current and future generations.

If the public trust obligations of the federal government exist, the global climate clearly falls within their scope. The global climate is a complex system with wide-reaching effects. It is

without dispute in the scientific community that climate change is harming animal populations and will lead to increased extinction. Climate change causes drought patterns that impact agricultural and silvicultural uses of land and increase the risk of massive wildfires. A failure to protect the global climate in public trust necessarily leads to harms affecting other common property held in the public trust.

This public trust applies to the territorial seas as well. *See Juliana v. United States*, 217 F.Supp. 3d 1224, 1255-56 (D. Or. 2016). Because the United States claims territorial seas extending to twelve miles beyond the coast, and the seaward boundary of a coastal state is set at three miles, there is a nine-mile-wide stretch of ocean under Federal claim. *Id.,* citing Presidential Proclamation of Dec. 27, 1988, No. 5928, 3 C.F.R. § 547 and 43 U.S.C. § 1312. Ocean acidification and rising ocean temperatures, resulting from global climate change driven by carbon emissions, may be directly harming public trust assets. *Juliana,* 217 F. Supp. at 1256.

Maintenance of the global climate is essential to continued human existence. To argue that the government has no responsibility to protect the human environment from the devastation of global climate change is to argue that the government would have no responsibility to at least attempt to divert a massive asteroid hurtling towards the Earth. The potential results are no less dire. The only difference is that the effects of climate change appear more incrementally and require more scientific analysis to connect them to their cause. Strict fossil fuel regulation might not seem as exciting as sending Ben Affleck and Bruce Willis to space, but there is more than one way to save the world.[1]

[1] *See* ARMAGEDDON (Touchstone Pictures 1998). Plaintiffs are not making light of the truly dire circumstances at play here, but believe that the comparison highlights the absurdity of inaction.

These are bold new questions that the nation, and the human race, have never faced before. They must be approached with an open mind. It would be wholly inappropriate to avoid direct consideration of the merits by relying on prior doctrine based on outdated understanding.

VI. Neither plaintiffs' law of nations claim under the Alien Tort Statute nor plaintiffs' public trust claim present a non-justiciable political question.

A. Courts must not invoke the political question doctrine lightly and must wield the full extent of judicial power.

The federal courts are vested with the power of determining the law and its just application. "[T]he Judiciary has a responsibility to decide cases properly before it, even those it 'would gladly avoid.'" *Zivotofsky ex rel. Zivotofsky v.* Clinton, 566 U.S. 189, 194-95 (2012) (citing *Cohens v. Virginia*, 19 U.S. 264, 404 (1821)). "We have no more right to decline the exercise of jurisdiction which is given, than to usurp that is which not given. The one or the other would be treason to the constitution." *Cohens v. Virginia*, 19 U.S. 264, 404 (1821). The bar for invoking the political question doctrine to refuse hearing a case is set very high. One of the six political question factors the Supreme Court has identified must be "inextricable" from the case to justify dismissal. *Baker v. Carr*, 369 U.S. 186, 217 (1962). The doctrine is rarely invoked successfully. Between 1962 and 2002, only twice did the majority find a political question had been presented. *See* Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine & the Rise of Judicial Supremacy*, 102 COLUM. L. REV 237 (2002). A political question claim should be very closely scrutinized.

Alexis de Tocqueville commented that "[t]here is hardly any political question in the United States that sooner or later does not turn into a judicial question." ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 440 (Liberty Fund 2012). This is undoubtedly true, and the transition can come quickly. The Supreme Court held that political gerrymandering claims were nonjusticiable in 2004, but suggested that the question remained open in 2018. *Vieth v.*

Jubelirer, 541 U.S. 267 (2004); *Gill v. Whitford,* 138 S.Ct. 1916 (2018) (ruling on other grounds, but noting that precedent has left the question "unresolved"). The question of whether to act to address carbon emissions from fossil fuels might once have been an arguably political question, but our modern understanding of the danger presented, its imminence, and our ability to make a positive impact by government action indicate that the question of whether to act is now properly justiciable.

B. *Baker v. Carr* sets out six factors to be considered in deciding whether an issue presents a non-justiciable political question.

Since 1962, courts have relied on the *Baker* factors to analyze claims of non-justiciability under the political question doctrine. *See, e.g., Am. Elec.*, 582 F.3d at 321 (2009), *aff'd* 564 U.S. 410 (2011); *Powell v. McCormack*, 395 U.S. 486, 512 (1969). As the Court stated,

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

Baker, 369 U.S. at 217.

These six factors are listed in descending order of importance and certainty. *Vieth*, 541 U.S. at 278. The final three factors are easily dismissed in the current case, as they are the weakest anyway and would not be implicated. A ruling in favor of plaintiffs would not disrespect the executive and legislative branches. Courts routinely issue orders compelling the government to act based on challenges to the Administrative Procedures Act. *See* 5 U.S.C. § 551(defining "agency action" subject to review to include a failure to act). Nor is there an unusual need for unquestioning adherence to prior decisions; in fact,

as plaintiffs argue, there is an unusual need to question prior decisions based on the evolving scientific understanding of climate change. Finally, the potential for embarrassment should not apply to this case. That prong has focused more on the perceived legitimacy of a government in conflict with itself. *See Nixon v. United States*, 506 U.S. 224 (1993) (Stevens, J., concurring) (noting that the potential for embarrassment existed in an action brought by a former federal judge challenging the procedure of his impeachment). Any potential for embarrassment cannot outweigh the life-or-death claims brought by plaintiffs.

C. Neither the Alien Tort Statute claim nor the public trust claim are barred from consideration by the federal courts under the *Baker v. Carr* factors.

i. There is no textual commitment to other branches precluding judicial involvement.

The first *Baker* factor is the most important, and the most obviously triggered. *See Lamont v. Woods*, 948 F.2d 825, 831 (2d Cir. 1991). It addresses the separation of powers and recognizes that certain decisions are committed to the political branches by the Constitution and are thus outside the purview of the courts.

The Second Circuit addressed this question in *American Electric* and found "…no textual commitment in the Constitution that grants the Executive or Legislative branches responsibility to resolve issues concerning carbon dioxide emissions or other forms of alleged nuisance." *American. Electric*, 582 F.3d at 325. The Second Circuit recognized that fashioning a "comprehensive and far-reaching solution to climate change" would be within the purview of the political branches, but that was not what plaintiffs were seeking. *Id.* The plaintiffs here also do not ask the Court to set policy or craft the solution. They seek an order instructing the political branches to exercise their textually-committed powers.

It should also be noted that even the District Court in *Native Vill. of Kivalina v. ExxonMobil Corp.* (*Kivalina I*), which wrongly dismissed an Alien Tort Statute climate change claim as a political question, found that the first *Baker* factor was not implicated. 663 F.Supp.2d 863 (2009).

ii. There is no lack of judicially discoverable and manageable standards for resolution.

The courts have long heard and ruled on cases alleging due process protection and implicating the public trust doctrine. In fact, they are *the* venue for bringing these claims. Again, the plaintiffs are not asking the Court to prescribe policy. They seek an order acknowledging rights and compelling the political branches to act to protect those rights. The only complexity potentially presented would be the question of causation, and the District Court accepted the causation element as true for purposes of its ruling. R.4 (noting that "These emissions…are causing a change in the global climate, resulting in increasing temperatures, changing rainfall patterns, and rising sea levels").

The District Court finding in *Kivalina* that an Alien Tort Statute climate change claim was barred by the political question doctrine should carry no weight. *Kivalina I*, 663 F. Supp. 2d 863. The District Court decision in *Kivalina* came within weeks of the Second Circuit's decision in *American Electric.* The Supreme Court accepted the Second Circuit's ruling that the case was not barred by the political question doctrine and moved forward to resolve on the merits. *Am. Elec.*, 564 U.S. at 420. The Ninth Circuit upheld the dismissal of *Kivalina I*, relying on the Supreme Court ruling in *American Electric* and not addressing the District Court's political question decision. *See Native Vill. of Kivalina v. ExxonMobil Corp.* (*Kivalina II*), 696 F.3d 849 (9th Cir. 2012). Insofar as the Northern District of California rejected the Second Circuit's decision on the second *Baker* factor, it should be held as having no persuasive value.

iii. There is no requirement that the Court make an initial policy determination of a kind clearly for nonjudicial discretion.

As already noted, the bar for the *Baker* factors is set high. The third factor is even more limited, requiring that any "initial policy determination" required be "of a kind *clearly* for nonjudicial discretion." *Baker*, 369 U.S. at 217 (emphasis added).

Plaintiffs reiterate that they seek no policy decision of the type normally left to the legislature or executive. The due process challenge asks the Court to recognize constitutional rights and leave to the political branches the question of determining how those rights should be vindicated. The Alien Tort Statute claim asks the Court to interpret law and rule on the liability of a single corporation under the law. It is well within the established jurisdiction of the Court to interpret and apply customary international law. *Infra* at p. 9-17. Again, the *Kivalina I* decision should not hold sway here. The *Kivalina I* court treated the second and third *Baker* factors as intertwined, and based their conclusion on the third factor on their analysis of the second factor, which was itself flawed. *Kivalina I*, 663 F.Supp.2d at 876.

That relief could impact domestic energy policy, which may relate to global energy policy, does not bar jurisdiction. Such an order would not implicate "drastic measures of foreign policy and national security." *Schneider v. Kissinger,* 412 F.3d 190, 197 (D.C. Cir. 2005) (third *Baker* factor counseled against jurisdiction where the ruling would require judgment of U.S. decision to use covert intelligence agents to kidnap foreign nationals). Nor are all cases that may touch on the realm of international policy nonjusticiable. *See Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189 (2012) (holding that petitioner's challenge to a denial by the Secretary of State to recognize his place of birth as "Jerusalem, Israel" was properly justiciable).

Related to the third *Baker* factor, as well as the fourth and sixth, is reliance on executive management of an issue. *See Gross v. German Found. Indus. Initiative*, 456 F.3d 363, 378-79

(3d Cir. 2006). The President has announced intention to withdraw from the Paris Agreement. R.7. This lack of a commitment to an international solution by the executive leaves open the door for the judicial branch to evaluate what obligations the government may have. If plaintiffs do in fact have Constitutional or other protections owed, then rejection of a *laissez-faire* approach to climate change poses no political question problem. There can be no lack of respect, or embarrassment, or improper intrusion into policy decisions, when the policy approach of the political branches is in violation of law. The courts cannot claim deference to the other branches as a means of abdicating their duty to interpret the law.

CONCLUSION

For the foregoing reasons, Appellants respectfully request that this Court reverse the decision of the court below and remand the case for further consideration on the merits.