2019 National Environmental Law Moot Court Competition (NELMCC)

In the United States Court of Appeals for the Twelfth Circuit

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

vs.

HEXONGLOBAL CORPORATION,
Appellee,

and

THE UNITED STATES OF AMERICA
Appellee.

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR NEW UNION ISLAND
NO. 66-CV-2018

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Brief for The United States of America

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TABLE OF CONTENTS

I. ISSUES PRESENTED 1

II. STATEMENT OF JURISDICTION 1

III. INTRODUCTION 2

IV. STATEMENT OF FACTS 3

V. ARGUMENT 4

A. The *Trail Smelter* Principle is part of the Law of Nations, and is thus enforceable under the Alien Tort Statute. 4

1. The TSP is specific. 5

2. The TSP is a universally accepted part of international law. 6

3. Finding that the TSP is part of the Law of Nations is consistent with the purpose of the ATS. 9

B. The *Trail Smelter* Principle is enforceable against non-governmental actors. 10

1. The TSP encompasses the rights of states and their residents to be free from pollution originating outside their borders, regardless of its source. 10

2. Achieving the goals of the ATS necessitates enforcing the TSP against non-governmental actors. 12

C. Mana may bring an Alien Tort Statute claim against a domestic corporation. 13

1. Claims against domestic corporations do not implicate the separation of powers or foreign policy concerns that disallow liability for foreign corporations. 13

2. Corporate liability is otherwise allowable under an ATS claim. 15

D. The Clean Air Act displaces the *Trail Smelter* Principle. 18

E. Plaintiffs' Due Process and Public Trust Doctrine claims fail as a matter of law. .. 21

1. A new judicially enforceable right to a stable climate system cannot be found in the Due Process Clause. 21

2. Plaintiffs Cannot Argue that Climate Change is a State-Created Danger. 24

3. The common law Public Trust Doctrine is state law and traditionally applies to submerged land; therefore, it does not apply to the federal government's regulation of the atmosphere. 27

F. Plaintiff's claims present non-justiciable political questions. 29

1. Mana's ATS claim is a non-justiciable political question. 30

2. Noah's public trust claim is a non-justiciable political question. 33

VI. CONCLUSION 34

TABLE OF AUTHORITIES

Cases

Adhikai v. Dauod, 697 F. Supp.2d 674, 687 (S.D. Tex 2009) 6, 10

Alec L. ex rel. Loorz v. McCarthy, 561 F. App'x 7, 8 (D.C. Cir. 2014) 28

Alec L. v. Jackson, 863 F. Supp. 2d 11, 13 (D.D.C. 2012) 28, 29

Am. Elec. Power Co. v. Connecticut, 564 U.S. 410, 424 (2011) 18, 19, 20, 29, 32, 34

Baker v. Carr, 369 U.S. 186, 217 (1962) 29, 30, 31, 33

Balintulo v. Daimler AG, 727 F.3d 174, 182 (2d Cir. 2013) 15

Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 572 (1972) 22

Carey v. Population Services International, 431 U.S. 678 (1977) 22

City of Milwaukee v. Illinois & Michigan, 451 U.S. 304, 314 (1981) 18

City of Oakland v. BP P.L.C., 325 F. Supp. 3d 1017, 1024 (N.D. Cal. 2018) 20

Collins v. Harker Heights, 503 U.S. 115, 126 ..... 24, 26

Connecticut v. Am. Elec. Power Co., 582 F.3d 309, 326 (2d Cir. 2009), *rev'd*, 564 U.S. 410 (2011) 33

Corfu Channel (U.K. v. Alb.), Merits, 1949 I.C.J. 4, 10 (April 9) 8, 10, 11

Corrie v. Caterpillar, Inc., 503 F.3d 974, 979 (9th Cir. 2007) 1

County of Sacramento v. Lewis, 523 U.S. 833 (1998) 24

Del. Riverkeeper Network v. FERC, 895 F.3d 102 (D.C. Cir. 2018) 22, 23

Deshaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 199-200 (1989) 24, 25

District of Columbia v. Air Florida, Inc., 750 F.2d 1077, 1082 (D.C. Cir. 1984) 28

Doe I v. Nestle USA, Inc., 766 F.3d 1013, 1022 (9th Cir. 2014) 16, 17

Doe v. Exxon Mobil Corp., 654 F.3d 11, 41 (D.C. Cir. 2011), *vacated on other grounds*, 527 F. App'x 7 (D.C. Cir. 2013) 16

E.E.O.C. v. Peabody W. Coal Co., 400 F.3d 774, 784 (9th Cir. 2005) 32, 33, 34

Georgia v. Tennessee Copper, 206 U.S. 230, 237 (1907) 8, 9

Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 284-88 (1997) 28

Illinois Cent. R. Co. v. State of Illinois, 146 U.S. 387, at 435 (1892) 27

In re S. African Apartheid Litig., 238 F. Supp. 2d 1379, 1380 (J.P.M.L. 2002) 14

Jesner v. Arab Bank, PLC, 138 S. Ct. 1386 (2018) 13, 14, 15, 16

Johnson v. City of Seattle, 474 F.3d 634, 639, 641 (9th Cir. 2007) 25, 26

Juliana v. United States, 217 F.Supp.3d 1224, 1250 (D. Or. 2016) 23, 29

Kadic v. Karadzic, 70 F.3d 232, 241-42 (2d Cir. 1995) 9, 10

Khulumani v. Barclays, 504 F.3d 254, 260 (2d Cir. 2007) 11

Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 115 (2013) 4, 14, 15

Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 131-44 (2d Cir. 2010), *aff'd*, 569 U.S. 108, 133 S. Ct. 1659, 185 L. Ed. 2d 671 (2013) 16

Licea v. Coracoa Drydock, 584 F. Supp.2d 1355, 1358 (S.D. Fla. 2008) 6, 11

Lombardi v. Whitman, 485 F.3d 73, 74-76 (2nd Cir. 2007) 26, 27

Martin v. Lessee of Waddell, 41 U.S. 367 (1842) 29

Mich. v. U.S. Army Corps of Eng'rs, 667 F.3d 765, 777 (7th Cir.2011) 18

Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 21-22 (1981) 19

Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 625 (1978) 18

Moore v. City of E. Cleveland, 431 U.S. 494, 502 (1977) 21

Native Vill. of Kivalina v. ExxonMobil Corp., 696 F.3d 849, 856 (9th Cir. 2012) 18, 19, 20

Obergefell v. Hodges, 135 S.Ct. 2584 (2015) 22, 23

Oneida Cty., N.Y. v. Oneida Indian Nation of New York State, 470 U.S. 226, 237-39 (1985)..... 19

Penilla v. City of Huntington Park, 115 F. 3d 707, 710 (9th Cir. 1997) 27

People of State of California v. Gen. Motors Corp., No. C06-05755 MJJ, 2007 WL 2726871, at *13 (N.D. Cal. Sept. 17, 2007) 31, 34

Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 473-76 (1988) 28

Pollard v. Hagan, 44 U.S. 121 (1845) 29

PPL Mont., LLC v. Montana, 565 U.S. 576, 603-04 (2012)..... 28

Sarei v. Rio Tinto, 671 F.3d 736, 758 (9th Cir. 2011).....6, 11, 16

Sosa v. Alvarez-Machain, 542 U.S. 692, 749 (2004) 4, 5, 6, 9, 12, 13, 14, 15, 16, 17

Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 783 (D.C. Cir. 1984)..... 12

The Paquete Habana, 175 U.S. 667, 700 (1900)..... 6

Trail Smelter Arbitration (U.S. v. Can.), 3 R.I.A.A. 1905-8 (1941).....7, 11

Troxell v. Granville, 530 U.S. 57 (2000)..... 22

United States v. 32.42 Acres of Land, 683 F.3d 1030, 1037-38 (9th Cir. 2012) 28

United States v. Lopez, 514 U.S. 549, 559 (1995) 31

United States v. Smith, 18 U.S. 153, 157 (1820)..... 5

Vieth v. Jubelirer, 541 U.S. 267, 278 (2004)..... 30, 32

Washington v. Glucksberg, 521 U.S. 702, 721 (1997) 2, 21

Statutes

28 U.S.C. § 1291..... 1

28 U.S.C. §1331..... 1

28 U.S.C. §1350 1

28 U.S.C. §1367 1

U.S. Const. art. I, § 8, cl. 3 30

Other Authorities

Convention on Biological Diversity art. 3, June 5, 1992, 1760 U.N.T.S. 79 7

David A. Wirth, *The Rio Declaration on Environment and Development,* 29 Ga. L. Rev. 599, 620 (1995) 7, 8

Geoffrey Palmer, *The Earth Summit,* 70 Washington U. L. Rev. 1005, 1009 (1992) 7

Legality of the Threat or Use of Nuclear Weapons. Advisory Opinion, 1996 I.C.J. 226 (July 8) .. 8

Patricia W. Birnie & Alan E. Boyle, Int'l L. and the Env't 11, 84-85 (1992) 9

Pierre-Marie Dupuy, *Overview of the Existing Customary Legal Regime Regarding International Pollution,* in International Law and Pollution 61 (Daniel B. Magraw ed., 1991) 9

Restatement (Third) of Foreign Relations Law § 601 (1987) 8

Robert V. Percival, *Liability for Environmental harm and Emerging Global Environmental Law*, 25 Md. J. Int'l L. 37, 39 (2010) 8

Stockholm Dec. United Nations Conference on the Human Environment, *Stockholm Declaration* prin. 21, U.N. Doc. A/Conf.48/14 (1972) 5, 7, 8, 9, 10

U.N. Convention to Combat Desertification, Oct. 14-15, 1994, 1954 U.N.T.S. 3 7

U.N. Framework Convention on Climate Change, June 3, 1992, 1771 U.N.T.S. 107 7

I. ISSUES PRESENTED

1. Is the Trail Smelter Principle a recognized principle of customary international law enforceable as the "Law of Nations" under the ATS?
2. Assuming the Trail Smelter Principle is customary international law, does it impose obligations enforceable against non-governmental actors?
3. Can Mana bring an Alien Tort Statute, 28 U.S.C. § 1350 (ATS) claim against a domestic corporation?
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 the 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?

II. STATEMENT OF JURISDICTION

Because the suit raises political questions, the District Court did not have Article III jurisdiction. *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 979 (9th Cir. 2007). The District Court otherwise had jurisdiction pursuant to 28 U.S.C. §1350 (the Alien Tort Statute), 28 U.S.C. §1331 (federal question jurisdiction), and 28 U.S.C. §1367 (supplemental jurisdiction) for the asserted claims. The District Court ordered dismissal on August 15, 2018, and Plaintiffs timely filed Notice of Appeal afterwards. This Court has appellate jurisdiction under 28 U.S.C. § 1291.

III. INTRODUCTION

Climate change poses a serious threat not just to the United States but to the entire world. The causes of anthropogenic climate change are complex and global in scale. Solutions to the climate crisis require nations, cities, corporations, and individuals to make radical changes to the way daily life is conducted. The United States has acted over the past two decades, in coordination with foreign nations, to facilitate policy changes to reduce GHGs. Unsatisfied both with the United States' actions on this highly political issue and with HexonGlobal's business model, Plaintiffs attempt to persuade this court to craft a complex policy remedy regarding climate change through the use of the Alien Tort Statute (ATS), Due Process Clause of the Fifth Amendment, and the public trust doctrine.

While the ATS permits domestic corporations to be sued by foreign entities, the ATS cannot serve as a tool for holding domestic corporations liable for climate harms under the Trial Smelter Principle (TSP). The TSP is a common law doctrine and any federal common law action based on GHG production has been displaced by the Clean Air Act. Ruling otherwise would upset the carefully balanced scientific solutions to GHG emissions proposed and enacted by the Environmental Protection Agency (EPA). Moreover, to find a constitutional right to a stable climate under the Due Process Clause that the United States has violated, this Court must ignore Supreme Court precedent holding that any Due Process Clause-based right must be "deeply rooted in this Nation's history." *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997). Likewise, to use the public trust doctrine to help establish this constitutional violation, this Court would need to dramatically expand the scope of the public trust doctrine, which for over three hundred years has been applied primarily to navigable waters or lands submerged under navigable waters.

Finding for the Plaintiffs on any of the above issues establishes this Court as the court-of-the-world, vested with plenary legislative and executive authority.

IV. STATEMENT OF FACTS

The climate is currently undergoing radical changes. GHGs are causing temperatures around the globe to rise. NELMCC 4. As a result of increasing temperatures, the average sea level is likely to rise by at least half a meter by the end of this century. *Id.* Plaintiffs Apa Mana and Noah Flood own homes on A ‘Na Atu and the New Union Islands respectively. *Id.* Their homes are less than half a meter above sea level and have been significantly damaged by seawater and storms, damage that would not have occurred had sea levels not already started to rise. *Id.* at 5. Rising sea levels also threaten the plaintiffs’ drinking water and food supplies, and increased their risk of disease. *Id.*

Many sources have contributed to the rise in GHG emissions. As a country, the United States is responsible for 20 percent of all GHG emissions. NELMCC 6. However, for more than two decades, the United States has committed to lowering greenhouse gas emissions. *Id.* It has signed several international agreements geared towards slowing climate change and has put in place wide-ranging regulations to reduce GHG emissions. *Id.* at 6-7. Over the past decade, the United States has decreased its GHG emissions. *Id.* at 7.

In contrast, for nearly five decades HexonGlobal has known that its products would result in substantial global climate change and sea level rise, but did nothing to limit their impact. NELMCC 5. HexonGlobal is the largest oil producer in the United States, the result of all major American oil companies merging. *Id.* It is also responsible for 32 percent of American GHG emissions, and nine percent of all global GHG emissions. *Id.* Since the 1970s, HexonGlobal has

been aware that its products would lead to global climate change and sea level rise. *Id.* Despite this knowledge, HexonGlobal continued to extract and sell fossil fuels even as the United States made political determinations to lower its impact on climate change." *Id.* at 5-7.

V. ARGUMENT

A. The *Trail Smelter* Principle is part of the Law of Nations, and is thus enforceable under the Alien Tort Statute.

The criteria for determining whether an international norm is part of the Law of Nations, which is necessary for federal courts to exercise ATS jurisdiction over Law of Nations claims, were articulated by the Supreme Court in *Sosa v. Alvarez-Machain*. In that case, the Court determined that federal courts have the ability to recognize new Law of Nations claims that did not exist when the ATS was passed. *Sosa v. Alvarez-Machain,* 542 U.S. 692, 749 (2004). It held that these recognized claims would, therefore, be incorporated into the federal common law. *Id.* at 732; *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 115 (2013) ("We thus held that federal courts may 'recognize private claims [for such violations] under federal common law.'").The Court then held that courts may recognize new claims under the Law of Nations, as long as the claims "rest on a norm of international character accepted by the civilized world" and are "defined with a specificity comparable to the features of the 18th-century paradigms we have recognized." *Id.* at 725.

The TSP is a specific and universally accepted rule of international law. In its most commonly cited form, the TSP states 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.

Stockholm Dec. United Nations Conference on the Human Environment, *Stockholm Declaration* prin. 21, U.N. Doc. A/Conf.48/14 (1972) [*Stockholm Declaration*]. The TSP is as specific as the offenses that were considered violations of the Law of Nations at the time of the ATS's passage. Moreover, the TSP is as specific as offenses courts have subsequently recognized as part of the Law of Nations. The TSP is also recognized by American law, international law, and experts in international law, and thus enjoys universal recognition as a Law of Nations. Finally, allowing TSP claims under the ATS is consistent with the original, sovereignty-based justification for the ATS.

1. The TSP is specific.

The TSP exceeds the historical standard for specificity the Supreme Court set in *Sosa*. In *Sosa,* the Supreme Court cited the definition of piracy in *United States v. Smith* to illustrate the degree of specificity international norms must have in order to be part of the Law of Nations. *Sosa*, 542 U.S. at 732. However, *Smith* actually defined piracy very loosely, determining that "any person who shall commit the crime of robbery, or murder, on the high seas" was a pirate. *United States v. Smith*, 18 U.S. 153, 157 (1820). The decision further noted that there is no exact definition of murder because it is a common law offense. *Id.* at 160. Finally, the decision observed that even this wide definition of piracy was not universal and there were several definitions of piracy. *Id.* at 160-61. Thus, the only clear element of *Smith*'s definition of piracy is that it takes place on the high seas. The definition specifies neither the identity of the perpetrator nor the nature of the act. Conversely, the TSP prohibits pollution (the act) of a sovereign nation (the location) by an entity outside of the sovereign's borders (the perpetrator). *Stockholm Declaration,* at prin. 21. The TSP is therefore even more specific than the benchmark *Sosa* set for specificity.

The TSP also matches the specificity of other successful Law of Nations ATS claims since *Sosa*. In *Sarei v. Rio Tinto*, the Ninth Circuit held that the prohibition against genocide in international law meet the specificity required by *Sosa*. *Sarei v. Rio Tinto*, 671 F.3d 736, 758 (9th Cir. 2011). The definition of genocide adopted by the court is any of a series of acts, ranging from killing to forcibly transferring children with intent to destroy a national, ethnic, racial, or religious group. *Id.* This only fixed element of this definition is the intent. The identity of the perpetrators, the identity of the victims, and the nature of the acts are all either undefined or defined very broadly. Similarly, in *Adhikari v. Dauod* and *Licea v. Curacoa Drydock*, the District Courts for the Southern District of Florida and the Southern District of Texas held that international prohibitions on forced labor and human trafficking were specific enough to satisfy *Sosa*. *Adhikai v. Dauod*, 697 F. Supp.2d 674, 687 (S.D. Tex 2009); *Licea v. Coracoa Drydock*, 584 F. Supp.2d 1355, 1358 (S.D. Fla. 2008). The decisions did not even define forced labor and human trafficking, saying only that "forced labor and international human trafficking…clearly constitute violations of universal and obligatory norms of international law," and "numerous courts have found Trafficking, forced labor, and involuntary servitude cognizable under the ATS." *Id.* The TSP, which specifies the prohibited act, the location of the act, and the perpetrator, is far more specific than the definition adopted by the courts in *Adhikari* and *Licea.*

2. The TSP is a universally accepted part of international law.

In *Sosa,* the Supreme Court held that international agreements, judicial decisions, academic opinions, and the general "customs and usages of civilized nations" can be used to prove that a norm of international law has been universally accepted. *Sosa,* 542 U.S. at 733-34 (quoting *The Paquete Habana*, 175 U.S. 667, 700 (1900)). All of these sources support finding that the TSP is universally accepted.

First, the TSP has been included in a number of international agreements. In 1962, the United Nations (UN) General Assembly passed the Resolution on the Permanent Sovereignty over Natural Resources, which recognized "the inalienable right of all States freely to dispose of their natural wealth and resources in accordance with their national interests." G.A. Res. 1803 (XVII), at 15 (Dec. 14, 1962). This resolution embodies the TSP's recognition of the rights of states to control their natural resources. Then, in 1972, the UN adopted the Stockholm Declaration. *Stockholm Declaration*. Principle 21 of the declaration, which the United States delegation regarded as a codification of existing international law, contains the most commonly cited formulation of the TSP, which is quoted above. *Id.,* at prin. 21; David A. Wirth, *The Rio Declaration on Environment and Development,* 29 Ga. L. Rev. 599, 620 (1995). Not a single state opposed the declaration's adoption. Geoffrey Palmer, *The Earth Summit,* 70 Washington U. L. Rev. 1005, 1009 (1992). Subsequent binding international agreements have adopted Principle 21 almost verbatim. Its language appears in the Convention on Biological Diversity, the U.N. Framework Convention on Climate Change, and the Convention to Combat Desertification. Convention on Biological Diversity art. 3, June 5, 1992, 1760 U.N.T.S. 79; U.N. Framework Convention on Climate Change, June 3, 1992, 1771 U.N.T.S. 107; U.N. Convention to Combat Desertification, Oct. 14-15, 1994, 1954 U.N.T.S. 3. Over 190 states ratified each of these agreements. *Id*.

Second, the TSP has been widely recognized in international judicial and arbitral decisions. The first decision to incorporate the TSP, which traces its origins to Roman law, was the 1941 *Trail Smelter Arbitration*, an arbitration between the US and Canada to determine Canada's liability for the pollution of American agricultural land by a Canadian smelter. *Trail Smelter Arbitration* (U.S. v. Can.), 3 R.I.A.A. 1905-8 (1941); Robert V. Percival, *Liability for*

Environmental harm and Emerging Global Environmental Law, 25 Md. J. Int'l L. 37, 39 (2010). The decision states that "no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein." *Id.* at 1965. The 1949 International Court of Justice (ICJ) *Corfu Channel* decision was the next TSP decision. The UK brought the case against Albania, alleging that Albania failed to warn the UK that the Corfu Channel was mined before UK ships sailed through it. *Corfu Channel* (U.K. v. Alb.), Merits, 1949 I.C.J. 4, 10 (April 9). The ICJ held that it was a "general and well recognized principle" that states have an obligation "not to allow knowingly its territory to be used for acts contrary to the rights of other states." *Id.* at 22. Lastly, in 1996 the ICJ issued the advisory opinion *Legality of the Threat or Use of Nuclear Weapons.* Advisory Opinion, 1996 I.C.J. 226 (July 8). The opinion recognized that the TSP, as articulated in the *Stockholm Declaration,* was "part of the corpus of international law." *Id.* at 242.

Third, American courts and legal treatises have recognized the TSP. In fact, the *Trail Smelter* decision itself drew heavily on American case law. *Trail Smelter,* 3 R.I.A.A. at 192. The opinion particularly relied on *Georgia v. Tennessee Copper*, a Supreme Court case holding that transboundary pollution from one state to another was a violation of the polluted state's sovereignty. *Id.* at 1964; *Georgia v. Tennessee Copper*, 206 U.S. 230, 237 (1907). The TSP is also included in the Third Restatement of the Law of Foreign Relations. Section 601 restates the TSP, and the reporters' notes describe to the Stockholm Declaration as a "general principle of state responsibility." *Restatement (Third) of Foreign Relations Law* § 601 (1987).

Lastly, numerous experts in international law have stated that the TSP is a universally recognized part of international law. Scholars have described the TSP as a widely agreed upon, "well-established" rule of international law whose existence is "beyond serious argument." Wirth

at 620; Patricia W. Birnie & Alan E. Boyle, Int'l L. and the Env't 11, 84-85 (1992); Pierre-Marie Dupuy, *Overview of the Existing Customary Legal Regime Regarding International Pollution,* in International Law and Pollution 61 (Daniel B. Magraw ed., 1991). Recognized by international agreements, international judicial and arbitral decisions, the American legal canon, and experts in international law, the TSP exceeds the standards that American courts have set for inclusion of a norm into the Law of Nations, and is a valid basis for an ATS claim. *See, e.g., Kadic v. Karadzic*, 70 F.3d 232, 241-42 (2d Cir. 1995) (finding that genocide violates the Law of Nations solely because of international treaties).

3. Finding that the TSP is part of the Law of Nations is consistent with the purpose of the ATS.

The TSP embodies the principle of sovereign integrity embedded in the ATS. The TSP is rooted in a state's right to sovereignty. It recognizes a state's right to control its natural resources and environment. *Stockholm Declaration* at prin. 21. As the Supreme Court said in *Tennessee Copper,* a sovereign "has an interest…in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air." *Tennessee Copper*, 206 U.S. at 237. Transboundary pollution violates the TSP because it violates states' sovereignty.

Like the TSP, the ATS exists to protect states sovereignty. As the Supreme Court wrote in *Sosa*, Congress passed the ATS so there could be an American judicial response to events that "impinged upon the sovereignty of the foreign nation." *Sosa,* 542 U.S. at 715. If the TSP, a principle of international law rooted in sovereignty, cannot be enforced under the ATS, then the ATS will be unable to fulfill its purpose of responding to affronts to sovereignty.

B. The *Trail Smelter* Principle is enforceable against non-governmental actors.

Federal courts have repeatedly recognized that some violations of the Law of Nations are enforceable against non-state actors, and the content and effect of the TSP demonstrate that it is enforceable against non-state actors. The TSP recognizes states' right to exclusive control of the management of their environment. This right is a right to freedom from interference by all actors, not just governmental actors. Unless the TSP is enforced against non-governmental actors, American courts will not be able to fully respond to affronts to sovereignty, undermining the foundational purpose of the ATS.

1. The TSP encompasses the rights of states and their residents to be free from pollution originating outside their borders, regardless of its source.

While the TSP's duty to prevent transboundary pollution is limited to states, the TSP also encompasses states' right to be free of extra-territorial interference with their management of their environments, and this right is not limited to interference by other states. For example, Principle 21 of the Stockholm Declaration states that "[s]tates have…the sovereign right to exploit their own resources pursuant to their own environmental policies." *Stockholm Declaration* at prin. 21. All other expressions of the TSP in international law likewise do not limit states' right to manage their environments without interference by other states. *See, e.g., Corfu Channel*, 1949 I.C.J. at 22 (addressing only the question of breaches of sovereignty by other states).

Additionally, enforcing the TSP against non-governmental actors is consistent with prior ATS decisions, which recognized that private parties can violate the Law of Nations. As the Second Circuit noted in *Kadic v. Karadzic,* there is a "substantial body of law…that renders private individuals liable for some international law violations." *Kadic*, 70 F.3d at 239. Similarly, in *Adhikari* the District Court for the Southern District of Texas held that "the state action

requirement is not inherent to the ATS." 697 F. Supp.2d at 686. These statements are not merely dicta. In *Adhikari*, *Licea*, and *Khulumani v. Barclays*, federal courts found that private parties could violate the Law of Nations and be liable for damages under the ATS. *Id.* at 687; *Licea*, 584 F. Supp.2d at 1358; *Khulumani v. Barclays*, 504 F.3d 254, 260 (2d Cir. 2007).

Enforcing the TSP against a non-governmental actor is also in accordance with international TSP decisions, which—as explored above—help define the boundaries of the Law of Nations. No international court or tribunal has ever held that the TSP is limited to non-governmental actors. Instead, the lack of non-governmental TSP plaintiffs reflects the fact that, in all but one international TSP decision, a state or a state entity was the source of the transboundary harm. *Corfu Channel*, 1949 I.C.J. at 10; *Use of Nuclear Weapons,* 1996 I.C.J. at 16. The sole international TSP decision where a state was not alleged to be the source of the transboundary harm was the original Trail Smelter arbitration. *Trail Smelter,* 3 R.I.A.A. at 1907. However, the arbitrators did not hold that only governmental actors could be liable for transboundary pollution. The arbitrator's holding was confined to finding that Canada was liable for that particular case of transboundary pollution because the treaty governing the tribunal did not extend to determining the liability of the private company that was the source of the pollution. *Id.* at 1911. Furthermore, as the *Sarei* decision notes, federal courts "cannot be bound to find liability only where international fora have imposed liability." 671 F.3d at 761. Instead, federal courts applying the ATS should be informed by the full canon of international law when deciding against whom the Law of Nations is enforceable. In the case of the TSP, international law's recognition of the breadth of a sovereign's right to manage its environment indicates that the TSP should be enforceable against non-governmental actors.

2. Achieving the goals of the ATS necessitates enforcing the TSP against non-governmental actors.

The ATS exists in part to respond to affronts to other states' sovereignty before they can become international incidents, regardless of whether the party who carried them out was a government or private actor. In *Sosa,* the Supreme Court explained that when the ATS was drafted "uppermost in the legislative mind appears to have been offenses against ambassadors." *Sosa,* 542 U.S. at 720. This included offenses by private citizens. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 783 (D.C. Cir. 1984) (Edwards, J., concurring opinion). The legislature's concern was motivated by the 1784 Marbois Incident, when a private citizen assaulted the French ambassador but there was no clear route for the ambassador to sue his assailant. *Sosa,* 542 U.S. at 717. The drafters of the ATS wanted to ensure that if there was an affront to other states' sovereignty, American courts could hear suits by the parties who were injured. *Id.* at 716. In short, the ATS was passed to address harms to sovereigns, regardless of who the perpetrator was.

Limiting TSP enforcement to governmental actors would ignore the intent of the ATS drafters and lead to the environmental equivalents of the Marbois incident. States' ability to control the exploitation of their resources is integral to their sovereignty. Transboundary pollution interferes with that control. Thus, transboundary pollution from non-governmental actors is no different from the assault upon the French ambassador: a violation of a state's sovereignty by a private party. If the ATS cannot be used to sue non-governmental transboundary polluters in American courts, the driving purpose of the ATS will be erased. States whose sovereignty is violated by Americans will once against be left without a legal mechanism to seek satisfaction, risking "serious consequences in international affairs" that the ATS was designed to prevent. *Sosa,* 542 U.S. at 714.

C. Mana may bring an Alien Tort Statute claim against a domestic corporation.

Domestic corporate liability exists under the ATS. Although the Supreme Court held that foreign corporations may not be sued under the ATS in *Jesner*, it left open the question of whether a domestic corporation could be. *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386 (2018) (citing *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004)). The court's reasoning in *Jesner* and other ATS precedent demonstrates that domestic corporations can be held liable. Claims brought by a foreign national against a domestic corporation do not implicate the foreign relations concerns of the majority in *Jesner*, and corporate liability is otherwise allowable under the ATS.

1. Claims against domestic corporations do not implicate the separation of powers or foreign policy concerns that disallow liability for foreign corporations.

ATS suits against domestic corporations do not carry the same "serious separation-of-powers and foreign-relations concerns" that the Court in *Jesner* concluded suits against foreign corporations would face. *Jesner*, 138 S. Ct. at 1398. The Court noted that "[t]he ATS was intended to promote harmony in international relations by ensuring foreign plaintiffs a remedy for international-law violations in circumstances where the absence of such a remedy might provoke foreign nations to hold the United States accountable." *Id.* at 1390. Allowing domestic corporate liability accomplishes this goal.

The holding that was reached by the five-member majority in *Jesner* was narrow and solely based on foreign policy judgments that "courts are not well suited to make." *Id.* at 1407. Therefore, the only mandatory precedent that this Court must consider in relation to *Jesner* is whether liability for domestic corporations raises those same separation of powers and foreign relations concerns. It does not.

No separation of powers or foreign policy harms occur when a foreign plaintiff sues a domestic corporation under the ATS. In *Jesner*, the Court recognized that the litigation against a Jordanian-based bank had caused "significant diplomatic tensions with Jordan" because it was seen as a "grave affront to its sovereignty." *Id.* at 1406-07. Claims against domestic corporations do not intrude on the sovereignty of a foreign state. For example, HexonGlobal is a United States corporation incorporated in and principally doing business in the United States. NELMCC 5. Mana's ATS suit is purely based on GHG emissions caused by sale of their "petroleum fuels *within* the United States," so there is no risk that liability against this domestic corporation would be viewed as stepping on the toes of a foreign sovereign state. NELMCC 9 (emphasis added). Suits against domestic corporations do not have the presumptive ties to foreign diplomacy that would undermine the ATS's goal of "promot[ing] harmony in international relations." *See Jesner*, 138 S. Ct. at 1390. Rather, as mentioned in the previous section, allowing suits against the perpetrating party, which might be a domestic corporation, could cure affronts to sovereignty on the international stage.

In the rare cases where an ATS suit against a domestic corporation affects foreign diplomacy, courts can resolve those on a case-by-case basis, negating the need for a general rule against domestic corporate liability. In discussing customary international law, the *Sosa* Court noted that suits had been brought against corporations, including domestic ones, that had allegedly "participated in, or abetted, the regime of apartheid that formerly controlled South Africa." *Sosa*, 542 U.S. at 733 n.21 (citing *In re S. African Apartheid Litig.*, 238 F. Supp. 2d 1379, 1380 (J.P.M.L. 2002)). In those cases, the Government of South Africa had indicated the suits were interfering with their policy of "confession and absolution." *Id.* However, not only were these suits dismissed based on *Kiobel*'s ban on extraterritorial ATS claims, the Court in

Sosa specifically labeled the situation as one that might require "case-specific deference to the political branches." *Id; Balintulo v. Daimler AG*, 727 F.3d 174, 182 (2d Cir. 2013) ("The opinion of the Supreme Court in *Kiobel* plainly bars common-law suits, like this one, alleging violations of customary international law based solely on conduct occurring abroad.") In summary, it would be rare for an ATS suit to involve both domestic corporate liability, where the conduct of the domestic corporation occurred within the United States, and adverse foreign policy implications. And a federal court could handle such a case, as *Sosa* urges, by issuing a narrow holding that defers to the political branches in that particular case for foreign policy reasons.

2. Corporate liability is otherwise allowable under an ATS claim.

Corporate liability is acceptable under the ATS as a threshold matter. While *Jesner* disallowed foreign corporate liability for foreign policy reasons, domestic corporate liability remains otherwise allowed if the claim meets the *Sosa* criteria. In *Sosa* the Supreme Court created a two-step inquiry to determine if there was a proper cause of action against corporations: (1) is alleged violation is an international law "norm that is specific, universal, and obligatory;" and (2) is creating the cause of action "under the ATS [] a proper exercise of judicial discretion." *Jesner*, 138 S. Ct. at 1390. Domestic corporate liability fulfills the second question based on the lack of foreign relations concerns pursuant to *Jesner*, so the first inquiry is the focus here.

Corporate liability is established if corporations are subject to liability for the specific conduct found to be an international law norm.

Corporate liability against a defendant is determined by asking if it is a norm of international law to hold a corporation liable for the defendant's specific conduct, not if corporate liability is itself a norm. The Second Circuit in *Kiobel* conducted an analysis to determine if corporate liability was an international law norm that was "specific, universal, and

obligatory," and it ultimately held that no such norm existed. *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 131-44 (2d Cir. 2010), *aff'd*, 569 U.S. 108, 133 S. Ct. 1659, 185 L. Ed. 2d 671 (2013). That analysis was done incorrectly. Instead, the analysis should be done "norm-by-norm; there is no categorical rule of corporate immunity or liability." *Doe I v. Nestle USA, Inc.*, 766 F.3d 1013, 1022 (9th Cir. 2014); *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 41 (D.C. Cir. 2011), *vacated on other grounds*, 527 F. App'x 7 (D.C. Cir. 2013).

A norm of international law refers to the conduct itself, such as genocide or piracy, not who can be sued for that conduct. With no majority opinion on the issue, the four-Justice dissent in *Jesner* concluded that "*Sosa* consistently used the word 'norm' to refer to substantive conduct" because international norms can be violated, and corporate liability cannot be violated like the prohibition against genocide can. *Jesner*, 138 S. Ct. at 1420 (Sotomayor, J., dissenting); *see, e.g., Doe I v. Nestle USA, Inc.*, 766 F.3d at 1022. The Ninth Circuit conducted a similar analysis in *Sarei* and held that "corporate identity [was] no bar to liability" under the ATS for the conduct of genocide. *Sarei v. Rio Tinto*, PLC, 671 F.3d 736, 759-61 (9th Cir. 2011), *cert. granted, judgment vacated on other grounds*, 569 U.S. 945 (2013). On the other hand, a violation of the norm against torture "requires state action." *Jesner*, 138 S. Ct. at 1422 (citing Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Art. 1, Dec. 10, 1984, S. Treaty Doc. No. 100–20, 1465 U.N.T.S. 114 (Torture Convention)). Such findings demonstrate that the question of who may be liable only applies after the conduct itself is established as a norm. After establishing the norm, only then is the question whether a defendant corporation may be held liable for the conduct.

Once a norm is established, if it can be applied to all actors and does not differentiate between particular perpetrators, it "can provide the basis for an ATS claim against a corporation."

Doe I v. Nestle USA, Inc., 766 F.3d at 1022. There is no need for "a decision from an international tribunal enforcing that norm against a corporation." *Id.* at 1021. Lack of enforcement against corporations for the norm might be caused by a whole host of reasons, such as strategic considerations, that do not "imply that corporate liability is a legal impossibility under international law." *Id.* Rather than looking to past enforcement, the determination to allow corporate liability only asks if there is a specific bar to "extend[ing] [the norm's] prohibitions to the perpetrators in question." *See id.* at 1022. If none exists, corporate liability is allowed. *Id.*

The TSP is an international law norm that corporations may be held liable for violating.

The TSP is a norm under the Law of Nations that allows for corporate liability. As mentioned previously, Mana's ATS claim is brought under the TSP, which is an international norm per *Sosa*'s criteria. As a norm of international law, the TSP may be enforced against non-governmental actors, and more specifically, corporations.

The right to remain free from transboundary harm caused by pollution originating from outside a nation's borders does not depend on the identity of the perpetrator. There is no explicit bar against holding corporations liable for such pollution in the TSP. The court in *Doe I* held that the prohibition against slavery was an international law norm and that "there [were] no rules exempting acts of enslavement carried out on behalf of a corporation." *Id.* It reasoned that forbidding corporate liability would be contrary to the very purpose of prohibiting slavery if all it took was incorporation to absolve a defendant of an act of enslavement. *Id.* The same reasoning exists here. Corporations heavily contribute to the transboundary harms from pollution that the TSP seeks to prevent—products sold by HexonGlobal are responsible for 32% of the cumulative fossil-fuel related GHG emissions created by the United States. NELMCC 5. Therefore, preventing corporate liability would undermine both the TSP's goal of stopping transboundary

pollution and the ATS's goal of offering remedy for a harm that might threaten a foreign nation's sovereignty.

D. The Clean Air Act displaces the *Trail Smelter* Principle.

Although the TSP is enforceable under the ATS, and can be enforced against corporations, the TSP has been displaced by the Clean Air Act, so no claim can be brought pursuant to it. A statute may displace federal common law, under which ATS claims fall, when "Congress addresses a question previously governed by… federal common law." *City of Milwaukee v. Illinois & Michigan*, 451 U.S. 304, 314 (1981). The displacement occurs if "the statute 'speak[s] directly to [the] question' at issue," but it "does not require the 'same sort of evidence of a clear and manifest [congressional] purpose' demanded for preemption of state law." *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 424 (2011) (citing *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978)). Additionally, displacement does not require that the statute speak directly to the application of the issue in the case or the particular defendants. Id. at 426 ("[T]he relevant question for purposes of displacement is 'whether the field has been occupied, not whether it has been occupied in a particular manner.'"). Rather, Congress speaks directly to an issue when it "provide[s] a sufficient legislative solution to the particular [issue] to warrant a conclusion that [the] legislation has occupied the field to the exclusion of federal common law." *Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 856 (9th Cir. 2012) (quoting *Mich. v. U.S. Army Corps of Eng'rs*, 667 F.3d 765, 777 (7th Cir.2011)). Congress has occupied the field of resolving harms from GHG emissions with the Clean Air Act, which the TSP previously occupied, and concerns over remedy-type and particular defendants do not affect the Clean Air Act's displacement of the TSP.

The Clean Air Act governs standards and restrictions on GHG emissions, and therefore speaks directly to the question of GHG emissions and the effects of climate change. The Supreme Court in *American Electric Power Company* (*AEP*) explicitly held "the Clean Air Act and the EPA actions it authorizes displace any federal common law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired power plants. *AEP*, 564 U.S. at 424. However, its rationale was not limited only to power plants. The Court noted that even if the "EPA [were] to decline to regulate carbon-dioxide emissions altogether… the federal courts would have no warrant to employ the federal common law." *AEP*, 564 U.S. at 426. The EPA's expertise as the congressionally-designated "primary regulator of GHG emissions" meant that courts and the federal common law should defer to the EPA's judgements under the C. *See id.* at 428-29.

Displacement of federal common law by statute does not depend on the type of remedy sought. Although Mana seeks both damages and injunctive relief under the ATS, the claim is still displaced by the Clean Air Act. The Ninth Circuit extended *AEP*'s holding in *Kivalina*, stating that any "federal common law addressing domestic GHG emissions has been displaced by Congressional action," regardless of whether the action seeks damages or injunctive relief. 696 F.3d at 857 ("[I]f a cause of action is displaced, displacement is extended to all remedies."); *see also Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 21-22 (1981) (determining that a claim for damages, and not injunctive relief, incurred by water pollution was displaced by the Clean Water Act). Although a complete lack of remedial measures for the particular issue in a statute might be relevant to determine displacement, the Clean Air Act offers a comprehensive remedial scheme for harms caused by GHG emissions. *See e.g., Oneida Cty., N.Y. v. Oneida Indian Nation of New York State*, 470 U.S. 226, 237-39 (1985) (finding no displacement where the Nonintercourse Act "contain[ed] no remedial provision" for violations of

Indian property rights). In sum, the Clean Air Act occupies the entire field regarding GHG emissions displacing both the cause of action and the remedies because any judgement on remedies is already established by the Clean Air Act. *cf. Kivalina*, 696 F.3d at 857.

Furthermore, the Clean Air Act displaces actions brought against oil producers and sellers so long as the harm alleged results from GHG emissions. The fact that the defendant, HexonGlobal, is an oil producer rather than an emitter of GHGs is irrelevant. Both *AEP* and *Kivalina* show that the question of displacement is determined by if Congress has occupied the relevant field. The purpose of Mana's suit is to prevent further air pollution by GHG emissions, so the suit should be displaced because the Clean Air Act already provides a "sufficient legislative solution" to the issue of air pollution and occupies the field. NELMCC 8. The court in *City of Oakland* was confronted with this exact same issue and determined that the distinction between seller and emitter was not "enough to avoid displacement under *AEP* and *Kivalina*[.]" *City of Oakland v. BP P.L.C.*, 325 F. Supp. 3d 1017, 1024 (N.D. Cal. 2018). Like the situation here, the court concluded that "the harm alleged… remains a harm caused by fossil fuel emissions, not the mere extraction or even sale of fossil fuels" Id. Petroleum products have other uses than to be combusted for energy, such as their use in the chemicals and plastics industry. [CITE] The fact that this suit is only brought in connection to harms caused by HexonGlobal's oil sales through emissions proves that emissions are what Mana seeks a remedy from, but that remedy is displaced. Additionally, Mana's assertion of the claim through the TSP would make no sense if the claim were centered around the sale and production of oil rather than the emissions caused by the fossil fuel because the emissions, not the oil itself, cause the transboundary harm. Mana asks for a remedy to those harms and should not, therefore, be able to evade Congress's and the EPA's determination of how those harms should be addressed, the Clean Air Act.

E. Plaintiffs' Due Process and Public Trust Doctrine claims fail as a matter of law.

Plaintiffs Due Process and public trust doctrine claims pose three purely legal questions: (1) whether a new legal right to a stable climate system can be found in the Due Process Clause; (2) whether complex energy/environmental policy decisions give rise to a valid "state-created danger" claim against the federal government under the Due Process Clause; and (3) whether the traditionally state-based public trust doctrine can apply to the federal government. The answer to all three questions is no.

1. A new judicially enforceable right to a stable climate system cannot be found in the Due Process Clause.

Courts are reluctant to create novel rights through the Due Process Clause because it forces courts to function as a policy creating entities, risking upsetting the balance of powers prescribed by the Constitution. *Glucksberg*, 521 U.S. at 720. Therefore, when creating rights courts must "exercise the utmost care whenever we are asked to break new ground in this field," and ensure that their decisions do not simply reflect the "policy preferences" of the court. *Id.* at 720 (quoting *Moore v. City of E. Cleveland*, 431 U.S. 494, 502 (1977)). Courts should be guided by the United States' "history, legal traditions, and practices." *Glucksberg*, 521 U.S. at 721.

Plaintiffs claim to a new climate right does not meet these long-established criteria. Not only is there no environmental or climate right in the Constitution, the Constitution does not even mention those concerns. Moreover, unlike other unenumerated rights recognized by the Supreme Court, a climate-based right does not implicate long-held historical values or principles fundamental to individual liberty. Finally, neither the Supreme Court nor any federal appellate court has ever recognized a fundamental right involving the environment or climate.

The right to a stable climate is dramatically different than other unenumerated rights that have been recognized through the Due Process Clause. Previously recognized rights are

grounded in long-held American principles of individual liberty or shifts in social norms over long periods of history." *See Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 572 (1972). For example, the freedom of parents to control the upbringing of their children has been established by a long-line of cases recognizing that children are not "creatures of the state." *Troxell v. Granville*, 530 U.S. 57 (2000). Likewise, the right of individuals to purchase and use contraceptives implicates principles of individual privacy and freedom of choice. *See Carey v. Population Services International*, 431 U.S. 678 (1977).

While individual liberty has been a core principle of American society since the founding, other un-enumerated rights are the product of evolutions in social norms. The liberty of individuals to engage in same-sex marriage emerged from a long-line of cases demonstrating gradual shifts in American traditions regarding marriage. *See Obergefell v. Hodges*, 135 S.Ct. 2584 (2015) (establishing that prohibitions on an individual's choice to engage in same-sex marriage are unconstitutional.) This long history recognizing the right to marry demonstrates that the right to same-sex marriage "was not simply deduced from abstract concepts of personal autonomy." *Glucksberg*, 521 U.S. at 703; *see also Obergefell*, 135 S.Ct. at 2598 (listing several cases to show that same-sex marriage is built on a long tradition recognizing the fundamental right to marry). No similar tradition like this historical development of the right to marry supports Plaintiffs' proposed novel right to a stable climate system.

To the contrary, the D.C. Circuit recently held that the Constitution does not protect the "right to clean air, pure water, and preservation of the environment" *Del. Riverkeeper Network v. FERC*, 895 F.3d 102 (D.C. Cir. 2018). In that case, Riverkeeper argued that an environmental right creates a "protected liberty or property interest as a matter of federal due process." *Del. Riverkeeper Network* at 108. However, the D.C. Circuit recognized that such a right "bears no

relationship to the quintessential liberty interest—'freedom from bodily restraint'" and it does not "protect activities that have been held to constitute federally protected liberty interests." *Del. Riverkeeper Network* at 108 citing *Bd. of Regents of State Colls v. Roth*, 408 U.S. 564, 572 (1972). The court reasoned that even if a healthy environmental is necessary for such rights to be truly meaningful, "that hardly suggests that the right to a healthy environmental can itself fairly be described as a 'liberty' interest." *Del. Riverkeeper Network* at 108.

Although a single district court in Oregon has recognized a "right to a climate system capable of human life" at the motion to dismiss stage, that finding is not supported by this nation's history, traditions, or caselaw. *Juliana v. United States*, 217 F.Supp.3d 1224, 1250 (D. Or. 2016) (affirming in full Judge Coffin's recommendation not to dismiss in 2016 WL 183903). Instead, citing neither prior case law nor national traditions, the *Juliana* court legislated a policy issue from the bench. In *Juliana*, the court approved Judge Coffin's use of the Supreme Court's decision in *Obergefell* to extrapolate a novel right to a stable climate from a long-recognized right to marry. *See Juliana*, 217 F.Supp. at 1224-40. The *Juliana* court grafted an abstract, ahistorical climate right from the *Obergefell* Court's recognition of an individual's liberty-based and history-based right to marry whom they choose. In short, the *Juliana* court failed to connect the new climate right to our Nation's history or traditions and attempted to create a climate right through a weak analogy to the long-existing right to marriage.

In short, the Plaintiffs in this case are asking this court to create a new right based on abstract reasoning not grounded in our nation's history. If this court recognized such a novel right, it would be going against the entirety of this Nation's substantive due process jurisprudence.

2. Plaintiffs Cannot Argue that Climate Change is a State-Created Danger.

Traditionally, only an affirmative act by the government causing a distinct injury to a particular citizen leads to a state-created danger under the Due Process Clause. *Deshaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 199-200 (1989); *County of Sacramento v. Lewis*, 523 U.S. 833 (1998). If the state-created danger emerges from an omission, then that omission must be the result of "deliberate indifference" through "arbitrary government action" that must "shock the conscience of federal judges." *Collins v. Harker Heights*, 503 U.S. 115, 126. However, if the omission leading to a state-created-danger is the result of complex policy decisions then that decision cannot shock the conscience because the presumption is that "the administration of government programs is based on a rational decision-making process that takes account of competing social, political, and economic forces." *See Collins*, 503 U.S. at 128-29. The plaintiff alleges that the United States' alleged knowledge of climate change should have led "the United States Government to take effective action to control greenhouse gas emissions" and to discourage "fossil fuel production," but this charge does not rise to the level of "deliberate indifference." NELMCC 10.

Even in situations where the government's arguably negligent inaction caused an individual's death, the Supreme Court has held that such inaction does not rise to the level of deliberate indifference. In *Collins v. Harker Heights* the Supreme Court held that the City of Harker Heights' failure to take action to protect its public employees did not constitute deliberate indifference giving rise to a state-created danger claim. 503 U.S at 126. In this case, a city employee died of asphyxia after entering a manhole to unstop sewer lines. *Id.* at 117. The employee's wife alleged that the city violated her husband's due process right by not adequately training its employees on the dangers of unstopping sewer lines, not providing safety equipment

at jobsites, and not providing safety warnings. *Id.* at 117. Moreover, there was reason to believe that the city had notice of the risks of entering sewer lines and chose not to provide the training and equipment required by a Texas statute. *Id.* at 118. Even given these facts, the Court refused to find deliberate indifference leading to a due process violation because providing employees with "a safe work environment" is not a "substantive component of the Due Process Clause." *Id.* at 126. *See also Deshaney*, 489 U.S. at 191-203 (holding that there was no deliberate indifference giving rise to a state-created danger where a child was nearly beaten to death after social services failed to take action to protect the child even though they had knowledge he was being abused).

In accordance with this Supreme Court precedent, the Ninth Circuit in *Johnson v. City of Seattle* held that the failure of Seattle police to protect Plaintiffs from violence did not give rise to a state-created danger exception even if in hindsight authorities realized a different policy should have been chosen. *Johnson v. City of Seattle*, 474 F.3d 634, 639, 641 (9th Cir. 2007). In that case, the police failed to stop a riotous crowd from harming plaintiffs. *Id.* at 638-39. On the night the injuries occurred, the police did not use a more violent method of dispersing the crowd that had been successfully implemented on previous nights; rather, the police opted for a more passive strategy. *Id.* at 641. The court held that even though the "police at one point had an operational plan that might have more effectively controlled the crowds," that "does not mean that an alternation to this plan was affirmative conduct" leading to state-created danger. *Id.* And even if the police now knew that they could have prevented the harm by taking the more forceful policy, choosing the more passive plan did not violate Due Process under a state-created danger exception. *Id.*

Here, Plaintiffs' claims that the United States' environmental and energy policy constitutes deliberate indifference does not accord with this precedent. As in *Collins*, where the

Court held that the Due Process Clause did not impose on the city of Harker Heights a duty to ensure "a safe work environment," here the Due Process Clause does not impose a duty on the federal government to ensure a safe environment for over 320 million Americans. 503 U.S. at 126. This case is also similar to *Johnson* where police realized in hindsight that they should have acted differently to prevent harm to plaintiffs. *See Johnson*, 474 F.3d at 639, 641. As in that case, here the federal government in 2018 may better understand how its action or inaction in the past has impacted climate change, but that hindsight understanding cannot give rise to a state-created danger violating the Due Process Clause. *See id.*

In line with Supreme Court decisions about the state-created danger exception, most Circuits have held that a violation of Due Process requires an affirmative act on the part of the government, which is not present in this case. For example, in *Lombardi v. Whitman*, the Second Circuit found no Due Process violation where the Environmental Protection Agency (EPA), the White House Council on Environmental Quality (CEQ), and the Occupational Safety and Health Administration (OSHA) failed to warn 9/11 emergency responders about the health risks of the air quality near the collapsed towers and failed to provide those workers with safety equipment. *See Lombardi v. Whitman*, 485 F.3d 73, 74-76 (2nd Cir. 2007). The Court came to this decision because, unlike all other Second Circuit cases finding state-created danger when a third party's actions harmed a plaintiff, the government did not take proactive steps to increase the danger to the plaintiffs. *Id.* at 80.

The Ninth Circuit has also emphasized the importance of specific affirmative acts toward particular individuals. In *Penilla v. City of Huntington Park*, the court found a Due Process cause of action where police officers "took affirmative actions that significantly increased the risk facing Penilla: they cancelled the 9-1-1 call to the paramedics; they dragged Penilla from his

porch, where he was in public view, into an empty house; then they locked the door and left him there alone . . . after they had examined him and found him to be in serious medical need." *Penilla v. City of Huntington Park*, 115 F. 3d 707, 710 (9th Cir. 1997).

This case is much more similar to *Lombardi* than to *Penilla.* Here, the alleged state-created danger arises from decades of environmental and energy policy decisions made by various agencies, Cabinet Members, Congress, and the President. NELMCC 10. Therefore, the claim lacks the particularity and specificity required to establish a state-created danger claim. Instead, the actions of the federal government are more akin to the actions of the EPA, OSHA, and CEQ in *Lombardi* because like the actions of those agencies, the federal government's actions involved complex political and policy decisions that cannot be arbitrary in the sense that they are able to "shock the conscience" of this Court. *See* 485 F.3d at 84-85

3. The common law Public Trust Doctrine is state law and traditionally applies to submerged land; therefore, it does not apply to the federal government's regulation of the atmosphere.

The common law public trust doctrine applies to the states not the federal government, and the public trust doctrine applies to submerged land and water, not the atmosphere. In *Illinois Central*, the Supreme Court defines the public trust doctrine as "the settled law of this country that the ownership of and dominion and sovereignty over lands covered by tide waters, within the limits of the several states, belong to the respective states within which they are found." *Illinois Cent. R. Co. v. State of Illinois*, 146 U.S. 387, at 435 (1892). These submerged lands can be disposed of in any way by the sovereign state so long as the state does not harm the public's interest in using those waters for recreation or fishing. *See id.* All recent cases from the Supreme Court demonstrate that "the public trust doctrine remains a matter of state law" and that "the contours of that public trust do not depend upon the Constitution." *PPL Mont., LLC v. Montana*, 565 U.S. 576, 603-04 (2012). *See also Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 284-

88 (1997) (reasoning that the public trust doctrine is a matter of state law); *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 473-76 (1988) (treating the public trust doctrine as a matter of state law); *United States v. 32.42 Acres of Land*, 683 F.3d 1030, 1037-38 (9th Cir. 2012) (relying on PPL Montana in holding that "the contours of [the public trust doctrine] are determined by the states, not by the United States Constitution).

Because the public trust doctrine applies to states and not the federal government, it cannot be used to bring claims against federal agencies. In *Alec L. v. Jackson*, the D.C. district court held that the public trust doctrine does not "impose duties on the federal government." *Alec L. v. Jackson*, 863 F. Supp. 2d 11, 13 (D.D.C. 2012). That court also explained that "in this country the public trust doctrine has developed almost exclusively as a matter of state law." *See Alec L.*, 863 F. Supp. at 13 (citing *District of Columbia v. Air Florida, Inc.*, 750 F.2d 1077, 1082 (D.C. Cir. 1984)). The D.C. Circuit later affirmed in full the district court's decision in *Alec L.,* reasoning that the plaintiffs in that case "point to no case . . . standing for the proposition that the public trust doctrine—or claims based upon violations of that doctrine—arise under the Constitution or laws of the United States, as would be necessary to establish federal question jurisdiction." *Alec L. ex rel. Loorz v. McCarthy*, 561 F. App'x 7, 8 (D.C. Cir. 2014). The D.C. Circuit also noted that the Supreme Court has consistently declared the public trust doctrine a matter of state law. *Alec L.*, 561 F. App'x at 8.

Even if the public trust doctrine were applicable to the federal government, that doctrine applies only to lands submerged in water. In *Martin v. Lessee of Waddell*, the Court traced the history of the public trust doctrine and explained that

> "when the revolution took place, the people of each state became themselves sovereign; and in that character hold their absolute right to all their navigable waters, and soils under them, for their common use, subject only to the rights since surrendered by the constitution to the general government."

Martin v. Lessee of Waddell, 41 U.S. 367 (1842). Furthermore, in *Pollard v. Hagan*, the Supreme Court declared that "the shores of navigable waters and the soils under them, were not granted by the Constitution of the United States, but were reserved to the states respectively." *Pollard v. Hagan*, 44 U.S. 121 (1845). In no public trust doctrine case has the Supreme Court ever applied that doctrine to the atmosphere.

Finally, besides *Juliana*, Plaintiffs can cite to no other cases "that have expanded the doctrine to protect the atmosphere or impose duties on the federal government." *See Alec L.*, 863 F. Supp. at 13. Therefore, the manner in which Plaintiffs strive to arbitrarily extend the public trust doctrine to apply to the atmosphere "represents a significant departure from the doctrine as it has been traditionally applied." *Alec L.*, 863 F. Supp. at 13 (affirmed in full by D.C. Circuit in *Alec L. ex rel Loorz* (2014)). And even if the public trust doctrine extended to the atmosphere, it would do so as a matter of federal common law and thus would be displaced by the Clean Air Act per the Supreme Court's decision in *AEP*. 564 U.S. at 424. (holding that "the Clean Air Act and the EPA actions it authorizes displace any federal common law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired power plants.").

F. Plaintiff's claims present non-justiciable political questions.

Both Mana and Flood bring claims that must be dismissed as non-justiciable political questions. Whether something is a non-justiciable public question is determined by a six-factor test set forth by the Supreme Court in *Baker*. *Baker v. Carr*, 369 U.S. 186, 217 (1962). A non-justiciable political question is created if there is: (1) a textually demonstrable constitutional commitment of the issue to a coordinate political department; (2) a lack of judicially discoverable and manageable standards for resolving it; (3) the impossibility of deciding without

an initial policy determination of a kind clearly for nonjudicial discretion; (4) the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; (5) an unusual need for unquestioning adherence to a political decision already made; or (6) the potentiality of embarrassment from multifarious pronouncements by various departments on one question. *Id.* The Supreme Court has noted that the factors "are probably listed in descending order of both importance and certainty." *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004). But a non-justiciable political question exists if just one of the factors or inquiries is "inextricable from the case at bar." *Baker*, 369 U.S. at 217. The claims brought by Mana and Flood fall within multiple categories barred in *Baker*.

1. Mana's ATS claim is a non-justiciable political question.

The ATS claim is based upon harms caused by HexonGlobal's production and sale of fossil fuels which is an area best left to the political branches for determination. The first three factors described by *Baker* are "inextricable from the case at bar." *Baker*, 369 U.S. at 217.

The Constitution textually commits questions of interstate commerce to Congress, such as the national regulation and governance of fossil fuel production and sales.

Mana's claim is barred because it requires the courts to determine if an act of interstate commerce, an area committed to Congress by the Constitution, is allowable. The first *Baker* factor indicates that a political question exists if there is a "a textually demonstrable constitutional commitment of the issue to a coordinate political department." *Id.* at 217. Although this is usually "a delicate exercise in constitutional interpretation," the Constitution is clear on this issue. *See id.* at 211. The Constitution empowers Congress as the branch of government to "regulate Commerce… among the several States." U.S. Const. art. I, § 8, cl. 3. The question of whether something is a regulatable activity under the Commerce Clause is only "whether the regulated activity 'substantially affects' interstate commerce." *United States v. Lopez*, 514 U.S.

549, 559 (1995). HexonGlobal's production and sale of petroleum fuels within the United States does not just "substantially affect" interstate commerce; it *is* interstate commerce.

Court-mandated relief in this case would intrude upon Congress's authority over interstate commerce by determining whether HexonGlobal's interstate sale of petroleum fuels is acceptable. The court in *General Motors* found that a suit against automobile manufacturers for their contributions to GHG emissions would "impose burdens on the interstate market for automobiles." *People of State of California v. Gen. Motors Corp.*, No. C06-05755 MJJ, 2007 WL 2726871, at *13 (N.D. Cal. Sept. 17, 2007). Here, a similar imposition would occur. In order to grant Mana damages and injunctive relief, this court will have to decide how much petroleum fuel HexonGlobal, the sole United States producer of oil, could sell based on balancing the potential effect that such sales will have on emissions down the line with the goal of "advancing and preserving economic and industrial development." *See id.* at 8. That decision would necessarily involve making the type of decision that the Constitution authorizes Congress to make when determining the permissibility of the sale of goods between states. Thus, for the courts, this issue is a non-justiciable political question that the Constitution calls for Congress to answer.

An initial policy determination is needed because there are no judicially discoverable or manageable standards for courts to decide what level of fossil fuel production or sale will sufficiently reduce harm caused by subsequent emissions by third-parties.

Mana's ATS claim is also non-justiciable because it is impossible to adjudicate without an initial policy determination providing a manageable standard by which to measure HexonGlobal's production and sales activities. The second and third factor of the *Baker* test ask if the "resolution of the question demand that a court move beyond areas of judicial expertise." *Wang v. Masaitis*, 416 F.3d 992, 995 (9th Cir. 2005). Whether or not a case is manageable is determined by if the court feels that it has "the legal tools to reach a ruling that is 'principled,

rational, and based upon reasoned distinctions.'" *Gen. Motors Corp.*, 2007 WL 2726871 at 15 (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004).). If "the court must make a policy judgment of a legislative nature, rather than resolving the dispute through legal and factual analysis," then it is not justiciable under these *Baker* factors. *E.E.O.C. v. Peabody W. Coal Co.*, 400 F.3d 774, 784 (9th Cir. 2005). No legal tools exist here for a court to decide how much, or to whom, petroleum products should be sold in order to decrease the GHG emissions created by third-party buyers over whom HexonGlobal has no control. Therefore, if any determination is made, it is one "clearly for nonjudicial discretion." *Baker*, 369 U.S. at 217.

Balancing the harms and benefits of all domestic sales of oil by HexonGlobal is not a task courts are equipped to handle. This case does not just present the already difficult task of weighing "the harm caused by the defendants' actions against the benefits of the products they produce." *Comer v. Murphy Oil USA, Inc.*, 839 F. Supp. 2d 849, 854 (S.D. Miss. 2012), *aff'd*, 718 F.3d 460 (5th Cir. 2013) (holding that this task had been "entrusted to the EPA by Congress"); *see also Gen. Motors Corp.*, 2007 WL 2726871 at 15-16 (holding that there was no manageable standard because no guidelines had been given on an acceptable level of carbon dioxide emissions). This court would have to determine how to translate HexonGlobal's domestic sale of petroleum products into calculable harms caused by the eventual emissions of its potential buyers. Courts "lack the scientific, economic, and technological resources an agency can utilize" to resolve these currently unaddressed questions. *AEP*, 564 U.S. at 428. The fact that not all of HexonGlobal's buyers would use the petroleum product for GHG emitting activities further complicates this consideration. Furthermore, "[o]ur country… rel[ies] on the products defendants produce" to fuel individual livelihoods and the economy at-large. *Id.* Any relief given by this single federal court, damages or injunctive, will likely incentivize or force HexonGlobal

to make changes in their nationwide sales structure for petroleum products that will significantly affect the national economy. Although the Second Circuit found there to be no political question in a similar case, its reasoning was based on precedent involving direct polluters rather than their suppliers. *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 326 (2d Cir. 2009), *rev'd*, 564 U.S. 410 (2011) (citing cases involving waste disposal by municipalities). Here, the Court's balancing act is not just about the harms and benefits of the direct polluter; it will have to determine how much blame to place on a company whose hand are free of the actual production of emissions. *See id.*, 582 F.3d at 326. This Court would be determining, absent any democratic or political process, that sales of petroleum products deserve the same type of regulation that apply to direct emissions under the Clean Air Act. Thus, the decision would look much more like a policy judgement made by the EPA than a court using legal tools to reach an equitable ruling.

2. Noah's public trust claim is a non-justiciable political question.

Even if Noah's public trust claim could be brought against the federal government, it would still fail as a non-justiciable political question. A claim is inextricable from the third *Baker* factor if "the court must make a policy judgment of a legislative nature, rather than resolving the dispute through legal and factual analysis." *E.E.O.C. v. Peabody W. Coal Co.*, 400 F.3d at 784. Noah's claim requires such a policy judgement. Even more than regulating the nation-wide sales of petroleum products, this Court ruling in favor of Noah's public trust claim would dictate the United States' wholesale policy on climate change.

If this Court granted relief for the public trust claim, the United States' policy on climate change and GHG emissions, past and present, would be declared unconstitutional because it did not take "effective action to control greenhouse gas emissions." NELMCC 10. However, the "reductions in carbon dioxide emissions is an issue still under active consideration by [the

political] branches of government." *Gen. Motors Corp.*, 2007 WL 2726871 at 8. Thus, a determination that the United States government has not taken "effective action" to combat global climate change is inherently a policy judgment. Judge Remus' opinion is telling as it describes changes in the United States position on climate change—from its recognition in 1992, to enactment of regulations meant to lower emissions, and to the Trump administration's drawback of those regulations. NELMCC 6-8. Ruling in favor of Noah's public trust claim would just entail another change in stance, which by their very nature are "policy judgement[s] of a legislative nature." *Cf. E.E.O.C.*, 400 F.3d at 784. Allowing courts to make that determination would be like allowing the EPA to regulate this issue without commissioning scientific studies, convening groups of experts for advice, or issuing rules under notice-and-comment procedures inviting input by an interested person. *See AEP*, 564 U.S. at 428. It would be asking the courts to create laws with all the authority and none of the tact.

VI. CONCLUSION

Because the district court correctly found that any ATS claim based on the TSP was displaced by the Clean Air Act and that there is no Due Process-based right to a stable climate system, this Court should affirm the judgment of the district court. Moreover, this court should make it clear that the judiciary cannot be used as a policy-setting entity whenever a group of individuals is dissatisfied with the political policy choices of the legislative and executive branches. To this end, even if this Court finds that Plaintiffs can bring an ATS claim against HexonGlobal or that there is a right to a stable climate system in the Due Process Clause, then this Court should find that the ATS presents a political non-justiciable question and that the

United States is already acting through a series of complex agency actions, federal laws, and international agreements to protect the American people's right to a stable climate system.

Respectfully submitted,

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