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Measuring Brief (HexonGlobal Corporation)

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THIRTY-FIRST ANNUAL JEFFREY G. MILLER PACE NATIONAL ENVIRONMENTAL LAW MOOT COURT COMPEITION

Measuring Brief*

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C.A. No. 18-000123
UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

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

v.

HEXONGLOBAL CORPORATION,
Appellee,

and

UNITED STATES of America,
Appellee,

On Appeal from the United States District Court for New Union Island.

Brief of Appellee, HexonGlobal Corporation

* This brief has been reprinted in its original format. Please note that the Table of Authorities and Table of Contents for this brief have been omitted.

JURISDICTIONAL STATEMENT

This case involves an appeal from the District Court for New Union Island. R. at 1. Jurisdiction was proper in the district court because this is a claim arising under the ATS. 28 U.S.C. § 1350 (2018). The United States Court of Appeals for the Twelfth Circuit has jurisdiction over this case because it is an appeal from a final decision in a District Court of the United States. 28 U.S.C. § 1291 (2018). The notice of appeal was filed in a timely manner. Fed. R. App. 4(a).

ISSUES

1. Is there a ripe norm of international law that holds a domestic corporation liable under the Alien Tort Statute?

2. Does the *Trail Smelter* Principle meet the high burden for recognition as a principle of customary international law enforceable as a "Law of Nations" under the Alien Tort Statute? 3.

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

4. Does the Clean Air Act's displacement of federal common law causes of action include Plaintiff's Alien Tort Statute common law claim based on the *Trail Smelter* Principle?

5. Does the Fifth Amendment's substantive due process protections create a cause of action against the United States Government to protect the entire global atmospheric climate system?

6. Do Plaintiffs' public trust claim and law of nations claim under the Alien Tort Statute present a justiciable question that is properly decided by the courts?

STATEMENT OF THE CASE

Plaintiffs Organization of Disappearing Island Nations, Apa Mana, and Noah Flood ("Plaintiffs") brought this action against Defendant HexonGlobal Corporation ("HexonGlobal") for a claim under the Alien Tort Statute ("ATS") and for violations of public trust obligations. R. at 3. Plaintiff's suit arose from their claim that HexonGlobal's fossil fuel related business activities are causing the sea level around A'Na Atu and New Union Islands to rise so rapidly that the islands will be completely uninhabitable by the end of this century unless action is taken to limit emissions of greenhouse gasses. R. at 3-4. On August 14, 2018, the District Court granted HexonGlobal's motions to dismiss. R. at 11. From that order, Plaintiffs appeal. R. at 1.

STATEMENT OF THE FACTS

Defendant HexonGlobal is an American corporation, incorporated in New Jersey, with its principal place of business in Texas. R. at 5. It is the surviving corporation resulting from the merger of all major United States oil producers. *Id.* HexonGlobal and its predecessors have produced and sold fossil fuels globally since at least the 1970s. *Id.* Plaintiffs Mana, Flood, and the Organization of Disappearing Island Nations (ODIN) filed suit against HexonGlobal and the United States (U.S.) alleging injuries from greenhouse gas emissions that contribute to global climate change. *Id.* at 3–4. Mana is a foreign national from the island nation of A 'Na Atu and Flood is a U.S. citizen residing in the New Union Islands, a U.S. possession. *Id.* at 3.

Plaintiffs allege that their homes will become uninhabitable as a result of seal level rise caused by global climate change. *Id.* at 3–4. The damage to property and other harms cited by Plaintiffs have already occurred, caused by the current rise in sea levels. *Id.* at 5. Historically, the U.S. government heavily subsidized and encouraged the production and use of fossil fuels. *Id.* at 5–6. The U.S. is responsible for twenty percent of historical global emissions. *Id.* at 6. HexonGlobal is responsible for six percent of

global fossil fuel-related greenhouse gas emissions. *Id.* at 5. Though HexonGlobal and its processors were aware that emissions could contribute to sea level rise, the production and sale of fossil fuels has been legal in the U.S. for the entire time period at issue in Plaintiffs' suit. *Id.*

Only recently has the U.S. government enacted policies to limit emissions. Prior to 2007, the U.S. Environmental Protection Agency ("EPA") was not directed to regulate greenhouse gasses like carbon dioxide as pollutants under the Clean Air Act ("CAA"). *Id.* at 6. In 2009, the EPA began promulgating regulations limiting emissions of greenhouse gases, including fuel efficiency standards for cars and trucks, technology-based standards for new power plants, and the "Clean Power Plan," which limits emissions from existing power plants and requires states to create emissions limit plans. *Id.* at 6–7; Clean Power Plan, 80 Fed. Reg. 64662, 64663-64664 (Oct. 23, 2015) (codified at 40 C.F.R. pts. 51, 52, 70, 71). These measures have only slightly reduced U.S. emissions. R. at 7. Over the same period, global emissions have increased. *Id.*

The current Administration seeks to reverse many of the EPA's climate regulations, complicating domestic efforts to reduce emissions. *Id.* at 7. New proposals freeze regulations for vehicle fuel efficiency and repeal the Clean Power Plan. *Id.* at 7–8. President Trump also announced the U.S. will withdraw from the Paris Agreement, the most recent multilateral effort to commit countries to nationally-determined emissions reduction targets. *Id.* at 7. U.S. Withdrawal from the Paris Agreement becomes effective in 2020. *Id.*

Plaintiff Mana seeks damages and injunctive relief under the Alien Tort Statute alleging injury from the impacts of climate change and sea level rise. *Id.* at 8. Mana claims production and sale of fossil fuels contributes to transboundary harms and creates liability for companies like HexonGlobal. *Id.* Plaintiff Flood brings suit against the U.S. government for its historical support for fossil fuels and for its failure to take action to limit greenhouse gas emissions. *Id.* at 10. Flood alleges the federal government has violated his Fifth Amendment substantive due process right against government deprivation of life, liberty, and property based on the public trust doctrine. *Id.*

SUMMARY OF THE ARGUMENT

First, an Alien Tort Statute (ATS) claim cannot be brought against a domestic corporation, as corporate liability is not a ripe or universal norm under customary international law. Following the guidance of traditional sources and Supreme Court dicta, no norm of corporate liability has been internationally incorporated so as to be customary international law. Imposing domestic corporate liability directly opposes the Supreme Court's emphasis on a cautionary approach and causes practical issues in the evaluation and consistent application of corporate liability within ATS claims.

Second, the *Trail Smelter* principle does not establish a norm that is specifically defined and universally abided by out of sense of legal obligation so as to make it a recognized principle of customary international law. No articulable or discernable standards have been established in order to determine what conduct would be considered customarily harmful. Additionally, no legal obligations exist within the many sources of international law that have implemented the *Trail Smelter* Principle. Instead, these documents serve only as guide for the United States that has not been historically enforced and is not enough to raise the principle to the level of a customary international law.

Third, even if the *Trail Smelter* Principle were found to be customary international law, the plain language of the ATS imposes no obligations against non-governmental actors. Only violations with identifiable individual perpetrators should be held liable under ATS. Where HexonGlobal is one of many contributors to the harm, the principle under *Trail Smelter* cannot impose liability. Ultimately, it is nations, and not individual actors like HexonGlobal, that are responsible for any harm caused.

Fourth, any ATS claim based on the *Trail Smelter* Principle has been displaced by the Clean Air Act (CAA) because the Supreme Court has held that any federal common law right to reduction of emissions of carbon dioxide falls under the statute. A claim based on the ATS is not an exception to this displacement, even if Plaintiff does not have an alternative remedy.

Fifth, no cause of action based on substantive due process and the principles of the public trust doctrine exists because there is no fundamental right to a stable environment. The doctrine's foundational focus on navigable and tidal waters cannot be expanded to encompass the climate atmospheric system because the atmosphere is not a public resource that the doctrine can govern. Additionally, the government has no affirmative duty to ensure a stable environment or protect against actions from private parties, and no exception applies to a public trust doctrine claim. Even if an affirmative duty could be found, the public trust doctrine applies only against the states.

Finally, both claims made under the ATS and the public trust doctrine are properly decided by the courts because they implicate traditional areas of judicial concern and do not satisfy the elements necessary to find a political question. In evaluating an ATS claim, a fact specific analysis allows courts to evaluate individuals' claims despite the politically charged context of the claim. The public trust doctrine claim is also justiciable because it rests primarily on constitutional grounds

ARGUMENT

This Court should not adopt a new rule under the ATS allowing suits for injuries from climate change brought against domestic corporations, nor should it allow suits alleging substantive due process violations from government inaction on climate change based on the public trust doctrine. The district court dismissed both claims for failure to state a claim for relief. R. at 10–11. Dismissal for failure to state a claim or a cause of action is reviewed *de novo*. *Carroll v. Fort James Corp.*, 470 F.3d 1171, 1173 (5th Cir. 2006); *Velez v. Levy*, 401 F.3d 75, 84 (2d Cir. 2005). Because there is no ripe norm of customary international law to support Plaintiff's ATS claim against HexonGlobal, nor is there a Fifth Amendment due process right based on the public trust doctrine to support Plaintiffs' claim against the U.S., this Court should affirm the dismissal of both claims for failure to state a claim for relief.

I. PLAINTIFF CANNOT BRING AN ALIEN TORT

STATUTE CLAIM AGAINST A DOMESTIC CORPORATION BECAUSE CORPORATE LIABILITY IS NOT A NORM OF INTERNATIONAL LAW.

The Alien Tort Statute ("ATS") grants original jurisdiction over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350 (2018). The ATS is constitutionally based on the idea that the law of nations has been adopted as part of the federal common law, so any tort arising out of a violation of the law of nations arises out of federal law. *See Filartiga v. Pena-Irala*, 630 F.2d 876, 885 (2d Cir. 1980). This Court should not adopt a new rule that Plaintiff can bring an ATS suit against a domestic corporation because corporate liability is not a ripe norm under customary international law (CIL). Multiple policy and practical reasons counsel against corporate liability. The Supreme Court has not approved of domestic corporate liability under the ATS. The Court should refrain from finding new applications for the ATS given the serious implications of expanding its scope.

A. Corporate Liability is Not a Ripe, Universal Norm Under Customary International Law.

Plaintiff cannot bring an ATS claim against a corporate defendant because corporate liability is not sufficiently definite and universal as to constitute a clear norm of customary international law. Courts may only find jurisdiction for ATS claims where the norm of CIL invoked is already "specific, universal, and obligatory" as to constitute common law of the United States. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 712, 732 (2004). Norms ripen under CIL when there is (1) "general and consistent practice of states," and (2) states follow the practice "from a sense of legal obligation," known as *opinio juris*. *Kiobel v. Royal Dutch Petroleum Co.* (*Kiobel I*), 621 F.3d 111, 131, 139 (2d Cir. 2010) (quoting Restatement (Third) of the Foreign Relations Law of the United States, § 102(2) (Am. Law Inst. 1987)). Customary international law provides both the substance of the cause of action under the ATS and the scope of liability, including whether corporations can be held liable. *See Kiobel I*, 621 F.3d at 126; *see also Jesner v. Arab Bank, P.L.C.*, 138 S. Ct. 1386, 1402 (2018). In *Sosa*, the Supreme

Court specifically questioned whether the norm of corporate liability was sufficiently definite under international law. *Sosa*, 542 U.S. at 732 n.20. Fourteen years later, the *Jesner* Court again expressed skepticism about the ripeness of the norm of corporate liability, urging restraint towards expanding liability under the ATS. *Jesner*, 138 S. Ct. at 1399–1400. If this Court cannot establish that a clear, universal norm of corporate liability already exists under CIL, it should reject adopting a new rule of liability under the ATS.

1. Traditional sources that courts use to discern customary international law do not support a norm of corporate liability.

No norm of corporate liability can yet be derived from the traditional sources of evidence that courts use to identify the substantive rules of customary international law. Courts look to a variety of sources to determine whether state practices have ripened into clear norms of CIL: the "customs and usages of civilized nations," "works of jurists and commentators" experienced in the relevant practices, and judicial tribunals "recognizing and enforcing" these customs. *Filartiga*, 630 F.2d at 880–81 (quoting *The Paquete Habana*, 175 U.S. 677, 700 (1900)). The Second Circuit in *Kiobel I* conducted a thorough investigation of these sources, and the Supreme Court lauded its analysis and precisely tracked its examples in *Jesner*. *Jesner*, 138 S. Ct. at 1396–1402.

An exhaustive review of the major international tribunals, the work of "publicists" (commentators), and possibly relevant treaties finds no "discernible, much less universal" agreement among states that corporations are liable for violations of customary international law. *Kiobel I*, 621 F.3d at 145. First, no international tribunal has ever found a corporation liable for a violation of CIL. *Id.* at 132. The prominent tribunals representing agreed norms of international law have limited jurisdiction to exclude corporations or "legal persons." Julian G. Ku, *The Curious Case of Corporate Liability Under the Alien Tort Statute: A Flawed System of Judicial Lawmaking*, 51 Va. J. Int'l L. 353, 379 (2011). The International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda, and the Nuremberg Tribunals all

reject jurisdiction over corporations, with the Nuremberg trials explicitly charging corporate executives as individuals, rather than exerting jurisdiction over the company itself. *Jesner*, 138 S. Ct. at 1400–01; *Kiobel I*, 621 F.3dat 133–37; Ku, *supra*, at 380–82. Additionally, the two major world courts, the International Court of Justice (ICJ) and the International Criminal Court (ICC), only assert jurisdiction over individuals and not over corporations. *Kiobel I*, 621 F.3d at 136–37, 139–40. Proposals to include corporate liability in the Rome Statute, establishing the ICC's jurisdiction, were rejected because of a "deep divergence" in views on the issue. *Id.* at 137. Second, where individual treaties have subjected corporations to liability, they are limited to their subject matter and are not evidence of a broad norm under CIL. *Id.* at 138. The ICJ has specifically stated that corporate liability in a "handful of specialized treaties cannot be said to have a 'fundamental norm-creating character.'" *Id.* at 139. Third, the work of scholars leans against a norm of corporate liability, despite being less homogenous than previous sources. *Id.* at 143–45, 144 n.48. Most proponents of corporate liability write to provide normative support for the idea, rather than describing the current state of CIL. *Id.* at 144 n.48; Ku, *supra*, at 374. Scholars that support corporate liability often cite the assessment of scholarly work in Judge Leval's concurrence in *Kiobel I*, but he concludes that the rules of international law "do not provide for any form of liability of corporations." *Kiobel I*, 621 F.3d at 181–86 (Leval, J., concurring). Taken together, the primary sources courts use as evidence for finding universal norms under CIL do not demonstrate a ripe norm of corporate liability.

2. This Court should adopt the Second Circuit's approach and is not bound to follow other circuits that have found liability.

This Court should align itself with the Second Circuit and find corporate liability is not ripe under international law, despite the presence of a circuit split. Supreme Court dicta in *Sosa* and *Jesner* clearly lean towards the Second Circuit's finding of no norm of corporate liability, in opposition to the findings by the Seventh, Ninth, Eleventh, and District of Columbia Circuits. *Jesner*, 138 S. Ct. at 1396 (citing *Flomo v. Firestone Nat. Rubber Co.*, 643 F.3d

1013, 1017–21 (7th Cir. 2011); *Doe v. Nestle USA* (*Doe I*), 766 F.3d 1013, 1020–22 (9th Cir. 2014); *Doe v. Exxon Mobil Corp.* (*Doe III*), 654 F.3d 11, 40–55 (D.C. Cir. 2011)); *Sosa*, 542 U.S. at 734–36; *Romero v. Drummond Co.*, 552 F.3d 1303, 1315 (11th Cir. 2008). This Court should adopt the position that most closely reflects the Supreme Court's jurisprudence, while avoiding compounding the errors reached by other circuits. Circuits finding corporate liability under the ATS have erred in multiple ways, including: (1) declaring a rule of CIL where one is not actually universally accepted; (2) considering themselves "bound" by previous cases that did not address the legal issue and thus have no precedential weight; or (3) relying on a faulty distinction between international substantive obligations and domestically authorized remedies. These problematic approaches explain the major ATS decisions in most other circuits. First, the *Sosa* Court instructed lower courts to avoid "seek[ing] out and defin[ing] new and debatable violations" of CIL. *Sosa*, 542 U.S. at 728. However, several circuits do just that by relying on the absence of a universal norm *barring* corporate liability, rather affirmatively finding than the presence of a universal norm *supporting* liability—in essence, "gap-filling" where CIL is difficult to determine. Ku, *supra*, at 391. This error reflects the Ninth Circuit's approach in *Doe I*, finding that "the *absence* of decisions finding corporations liable does not imply that corporate liability is a legal impossibility." *Doe I*, 766 F.3d at 1021 (emphasis added). Second, no precedent binds future courts when cases do not affirmatively resolve the legal issues that "merely lurk in the record." *Jesner*, 138 S. Ct. at 1418 n.4 (Gorsuch, J., concurring). Some courts "did not analyze the question at all" in ATS suits brought against corporations. Ku, *supra*, at 366–67. When a court passes on a jurisdictional issue "*sub silentio*," other courts are not required to follow those decisions in a later case. *Kiobel I*, 621 F.3d at 124 (majority opinion). The Eleventh Circuit's ATS rule in *Romero* developed in this fashion, holding that it was "bound" by the precedent of corporate liability established in *Aldana*, even though that opinion did not analyze corporate liability at all. *Romero*, 552 F.3d at 1315 (citing *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1242 (11th Cir. 2005)). Third, the Supreme Court rejected the distinction that CIL provides the substantive legal rights under the ATS, while domestic law provides the remedies. *Jesner*, 138 S. Ct. at 1402

(majority opinion). The Seventh Circuit incorrectly relied on this distinction in *Flomo*. 643 F.3d at 1020– 21 (finding "no objection" to corporate civil liability because a few treaties authorize variation in domestic enforcement methods). This Court is not bound to adopt one circuit court's rule over another, and it should not follow a circuit whose inquiry into the substantive provisions of CIL is lacking.

B. The Practical Concerns Raised by a New Rule Imposing Domestic Corporate Liability Outweigh the Potential Benefits and Alternatives Exist for Plaintiff.

A new rule imposing domestic corporate liability under the ATS raises serious practical concerns for courts that warrant judicial caution. Adjudicating ATS claims against domestic corporations poses difficulties for courts resolving disputes when the underlying international law norms provide minimal direction. Further, Plaintiff has sufficient alternative forms of relief.

First, practical problems will arise for courts adjudicating ATS claims against corporate defendants because there are few examples under CIL for courts to look at for substantive legal guidance. For example, international law has yet to develop clear standards for vicarious liability as it applies in a civil context. Ku, *supra*, at 388. Courts struggle with evaluating agency theories of liability given "the utter lack of customary international law standards for 'piercing the corporate veil.'" Ku, *supra*, at 388. How would courts determine the *mens rea* of a corporation for an intent crime? Is liability imputed to shareholders of publicly traded companies? How would civil or criminal punishments be imposed on a corporation? CIL does not have clear norms of corporate liability to answer these questions. *See* Ku, *supra*, at 389. Seeking answers invites the judicial experimentation the Supreme Court cautions against.

Second, this Court does not need to adventure into fashioning new rules because foreign plaintiffs can already bring ATS suits directly against individuals for actions taken while working for a corporation. Rejecting domestic liability, the Second Circuit noted that "*individual liability* under the ATS is wholly consistent" with rejecting a rule of corporate liability. *Kiobel I,* 621 F.3d at 148. ATS

suits can be brought against individuals who violate international law, including the "employees, managers, officers, and directors of a corporation." *Id.* at 122. This Court does not need to adopt a new rule imposing corporate liability because international law holds individuals liable for acts committed under the color of their employment.

II. *TRAIL SMELTER* IS NOT A RECOGNIZED PRINCIPLE OF CUSTOMARY INTERNATIONAL LAW BECAUSE IT IS NOT SPECIFIC, UNIVERSAL, OR OBLIGATORY.

Courts define the law of nations by interpreting customary international law. *See Filartiga*, 630 F.2d at 881; *Kadic v. Karadzic*, 70 F.3d 232, 239 (2d Cir. 1995). The burden to establish a norm of customary international law is on the party wishing to invoke it. *Kiobel I*, 621 F.3d at 120-21. Customary international law only includes "those standards, rules or customs (a) affecting the relationships between states or between an individual and a foreign state, and (b) used by those states for their common good and/or in dealings *inter se*." *Id.* at 118 (emphasis in original). The Second Circuit has gone as far as stating that the ATS only applies to "shockingly egregious violations of universally recognized principles of international law." *Zapata v. Quinn*, 707 F.2d 691, 692 (2d Cir. 1983) (per curiam). For an offense to violate the law of nations, the international norm must be "specific, universal, and obligatory." *Jesner*, 138 S. Ct. at 1399.

A. The *Trail Smelter* Principle Does Not Establish a Norm That is Specifically Defined and Universally Abided by States Out of a Sense of Legal Obligation.

The Supreme Court has noted that new principles proffered as the present-day law of nations must be "defined with the specificity comparable to the features of the 18th-century paradigms [they] have recognized." *Sosa*, 542 U.S. at 725 (referring to violation of safe conducts, infringement of the rights of ambassadors, and piracy). Therefore, for an action to qualify as an offense of the law of nations, the basis must be a well-established, universally recognized norm of international law." *See id.* These customary

international laws are only "rules that States universally abide by, or accede to, out of a sense of legal obligation and mutual concern." *Flores v. S. Peru Copper Corp*., 414 F.3d 233, 248 (2d Cir. 2003). Laws or practices that are "adopted for moral or political reasons . . . do not give rise to rules of customary international law." *Id.*

A legal norm is not part of customary international law merely because it is found in most or all nations. *Kiobel I*, 621 F.3d at 118. A wrong must be "of mutual, and not merely several, concern, by means of express international accords" before it is recognizable as international law punishable by the ATS. *Id.* Courts should exercise "vigilant doorkeeping" and ensure principles meet a high bar before recognizing new private causes of action for violations of international law. *Jesner*, 138 S. Ct. at 1398; *Sosa*, 542 U.S. at 729. When doing so, a court must consider the "practical consequences of making a cause available to litigants in the federal courts." *Sosa*, 542 U.S. at 732–33.

A proffered legal norm is not specifically defined and universally abided by out of a sense of legal obligation so as to qualify as a customary international law if it asserts general propositions with little to no actual definitions and does not establish articulable and discernable standards. *See Flores*, 414 F.3d at 233; *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161, 167 (5th Cir. 1999). For example, in *Flores v. S. Peru Copper Corp*., the Second Circuit held that the asserted rights to life and health made by plaintiffs who claimed that pollution from an American mining company caused their lung disease were "insufficiently definite" to qualify as rules of customary international law when the statements relied on by the plaintiffs were merely "virtuous goals" that did not define what actions fell in or outside the law. 414 F.3d at 254–55. Similarly, in *Beanal v. Freeport-McMoran, Inc*., the Fifth Circuit held that the sources of international law cited by the plaintiff in their claim against a mining company for allegedly engaging in environmental abuses merely referred to "a general sense of environmental responsibility and state abstract rights and liberties devoid of articulable and discernable standards." 197 F.3d at 167.

On the other hand, a legal norm is specific and universally abided by out of a sense of legal obligation so as to qualify as a

customary international law when the norm is explicitly defined and sets out standards for what conduct is and is not reprehensible. *See United States v. Smith*, 18 U.S. 153, 161 (1820); *Sexual Minorities Uganda v. Lively*, 960 F. Supp. 2d 304, 317– 19 (D. Mass. 2013); *John Roe I v. Bridgestone Corp.*, 492 F. Supp. 2d 988, 1020–21 (S.D. Ind. 2007). For example, the Supreme Court in *United States v. Smith* defines piracy, one of the first international norms recognized by the *Sosa* court, as actionable under the ATS. 18 U.S. at 161. The Court states that there is "no doubt" as to what is understood as the crime of piracy, and it analyzes reports from several scholars and world leaders, and court cases. *Id.* at 163 n.8. Similarly, in *John Roe I v. Bridgestone Corp.*, the court addressed the issue of forced child labor on a plantation. 492 F. Supp. 2d at 988. The court outlined the explicit standards for the minimum age for different types of work in different nations found in the International Labour Organization Convention ("ILO Convention"). *Id.* at 1020–21. The U.S. has implemented and adhered to these norms through statements from the U.S. Department of State, the Fair Labor Standards Act ("FLSA"), and an international convention the U.S. has ratified. *Id.* at 1020–22.

The *Trail Smelter* Principle is not an enforceable rule of customary international law because it is merely a virtuous goal, devoid of articulable and discernable standards. The "responsibility to ensure" that activities in one jurisdiction do not harm the environment of another jurisdiction gives no further guidance or definition, similar the vague references to a right to life or health in *Flores*. *See Flores*, 414 F.3d at 245–55; R. at 9. Neither the Stockholm Declaration nor the Rio Declaration outline explicit standards for the environmental protection process which must be implemented, unlike the minimum age for child worker standards in the ILO Convention. *See Bridgestone*, 492 F. Supp. 2d at 1020–21. Just as the plaintiff in *Beanal* relied on the Rio Declaration, Plaintiffs cannot show that the treaties implementing and reasserting the *Trail Smelter* Principle "enjoy universal acceptance in the international community" or that the treaties refer to more than "a general sense of environmental responsibility and state abstract rights or liberties devoid of articulable or discernable standards and regulations to identify practices that constitute international [ ] abuses or torts." *See Beanal*, 197 F.3d at 167; R. at 9.

Finally, the court must consider the practical consequences of making this claim available to plaintiffs in federal courts. *Sosa*, 542 U.S. at 732. Because the *Trail Smelter* Principle does not outline any standards for which actions are or are not actionable, allowing plaintiffs to bring suit for any environmental damage a potential defendant may cause to the environment of another State would open up the floodgates to a massive amount of litigation. Who would be sued next— every car manufacturer who contributes to fossil fuels emissions, and every real estate developer who cuts down trees and decreases the amount of oxygen they produce? Allowing a cause of action in federal courts with such little guidance simply is not practical.

B. The Sources of International Law Implementing the *Trail Smelter* Principle are not Obligatory.

Courts must interpret the scope of the law of nations based on laws as they exist today. *Filartiga*, 630 F.2d at 881. When there is no treaty, executive, judicial, or legislative act, the law of nations is found by "consulting the work of jurists, by following the general practice of nations, or by interpreting judicial decisions enforcing these laws." *The Paquete Habana*, 175 U.S. at 700. If declarations of international norms are not in and of themselves binding, then there must be evidence of state practice showing the norm has developed into an obligatory requirement. *See Wiwa v. Royal Dutch Petroleum Co.*, 626 F. Supp. 2d 377, 381 (S.D.N.Y. 2009).

Agreements under international law implementing a purported international norm are not obligatory when they are non-self-executing, the U.S. has declined to ratify the document, or if the documents are merely aspirational and were never intended to be binding. *See Flores*, 414 F.3d at 233; *Peiqing Cong v. ConocoPhillips Co.*, 250 F. Supp. 3d 229, 234–35 (S.D. Tex. 2016); *Almon Metals, Inc. v. FMC Corp.*, 775 F. Supp. 668, 671 (S.D.N.Y. 1991). For example, in *Flores*, the Second Circuit found that plaintiffs did not demonstrate that the instruments they relied on established a legal rule prohibiting pollution when the plaintiffs cited to two treaties which have not been ratified by the U.S., one treaty the U.S. has specifically declined to ratify, and several United Nations ("UN") General Assembly resolutions which were "merely aspirational and were never intended to be binding."

Flores, 414 F.3d at 258–59. Similarly, in *Almon Metals, Inc. v. FMC Corp.*, the court found plaintiff's reliance on the Stockholm Principles and Restatement (Third) of Foreign Relations Law unpersuasive in their claim that chemicals used in the defendant's manufacturing process created a serious health and environmental hazard. 775 F. Supp. at 671. The court stated that the Stockholm Principles "do not set forth any specific proscriptions, but rather refer only in a general sense to the responsibility of nations," and that the Restatement only iterates the U.S. view of the law of nations, not a universal view. *Id.* at 671.

In contrast, sources of international law implementing a purported international norm are obligatory when the United States is a party to a universally accepted treaty or protocol, and has taken steps to implement and enforce that norm in the United States. *See Filartiga*, 630 F.2d at 876; *M.C. v. Bianchi,* 782 F. Supp. 2d 127, 131 (E.D. Pa. 2011); *Bridgestone*, 492 F. Supp. 2d at 988. For example, in *M.C. v Bianchi*, the Optional Protocol on the Rights of the Child, Sale of Children, Child Prostitution and Child Pornography, offered by the plaintiffs to show that punishing sex trafficking is an international norm, was obligatory because the Protocol was ratified by the United States, implemented in the United States through two pieces of further legislation, and enforced through courts across the United States. 782 F. Supp. 2d at 131. Similarly, in *Bridgestone*, the court found that the customary international law norm prohibiting child labor on plantations was obligatory even though the U.S. did not ratify the ILO Convention because the key source of international child labor standards used by the ILO Convention was a Convention which the U.S. had ratified, and the U.S. implemented those ideals through the FLSA. *Bridgestone*, 492 F. Supp. 2d at 1020–21.

In the case at hand, unlike *Bianchi*, the international sources Plaintiff references as implementing the *Trail Smelter* Principle are mere guidance principles and not obligatory so as to raise the Principle to the level of a customary international law. *See Bianchi*, 782 F. Supp. 2d at 131. The Trail Smelter Arbitration, the source of the *Trail Smelter* Principle, was a conflict and decision between only two countries—United States and Canada. *See Trail Smelter Arbitration* (U.S. v. Can.), 3 R.I.A.A. 1907 (2006). Further, the issue addressed by the Trail Smelter Arbitration was a specific

source causing a specific type of damage. *Id.* The type of damage Plaintiff claims cannot be exclusively or conclusively linked to HexonGlobal because contribute only a fraction of global emissions. R. at 5 (HexonGlobal is responsible for six percent of global historical emissions).

The two UN conferences adopting and reasserting the *Trail Smelter* Principle, the Stockholm Conference and the Rio Declaration, were actually attended by the U.S., but neither document contains any information about enforcement or implementation of the Principle. *See Almon*, 775 F. Supp. at 671; U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development*, 3, U.N. Doc. A/CONF. 151/26/REV.1 (VOL.1)(1992) [hereinafter *Rio Declaration*]; U.N. Conference on the Human Environment, *Declaration of the United Nations Conference on the Human Environment*, 5, U.N. Doc A/CONF. 48/14/Rev. 1 (June 16, 1972) [hereinafter *Stockholm Declaration*]. . While it is true that the U.S. has implemented some of the ideas of the *Trail Smelter* Principle through federal legislation, like the minimum age requirement in *Bridgestone*, this case differs because the United States' legislation on clean air is made out of concern for the United States' own population. *See Bridgestone*, 492 F. Supp. 2d at 1020–21. The express purpose behind the Clean Air Act is, "to protect and enhance the quality of the *Nation's* air resources." 42 U.S.C. § 7401 (2018) (emphasis added). In fact, as evidenced by the President's plans to reverse domestic regulatory measures and international commitments, the U.S. is in no way obligated to follow the *Trail Smelter* Principle. R. at 7. Entertaining the possibility of withdrawing from the Paris Agreement shows that the U.S. is concerned with environmental issues within its own country, not abroad. *See* R. at 7.

III. EVEN IF THE *TRAIL SMELTER* PRINCIPLE IS A NORM OF CUSTOMARY INTERNATIONAL LAW, IT DOES NOT IMPOSE OBLIGATIONS ENFORCEABLE AGAINST NON-GOVERNMENTAL ACTORS SUCH AS HEXONGLOBAL.

The plain language of the ATS does not contain any requirement of state action. *Bianchi*, 782 F. Supp. 2d at 132. The

nature and scope of liability is not defined by the ATS, instead it is defined by the customary international law being enforced. *Kiobel I*, 621 F.3d at 121–22. This means that international law governs the scope of liability for violations of customary international law under the ATS, not domestic law. *Id.* at 126; *see Sosa*, 542 U.S. at 732 n.20. Depending on the cause of action, the ATS can find either a government or an individual liable. *See Kiobel I*, 621 F.3d at 120 ("violations of human rights can be charged against States and against individual men and women but not against jurisdictional persons such as corporations.").

Violations with individual identifiable perpetrators should be held liable under the ATS. *See Abebe-Jira v. Negewo,* 72 F.3d 844, 846 (11th Cir. 1996); *Chavez v. Carranza,* No. 03-2932 M1/P, 2006 WL 2434934, at *11 (W.D. Tenn. Aug. 15, 2006), aff'd, 559 F.3d 486 (6th Cir. 2009). For example, in *Abebe-Jira v. Negewo*, the Eleventh Circuit affirmed a finding of liability on a former Ethiopian government official for the torture and cruel, inhumane treatment of the plaintiffs. 72 F.3d at 846. Similarly, in *Chavez v. Carranza*, a suit was properly brought under the ATS against a former Salvadoran military officer for the torture and extrajudicial killings of plaintiffs and plaintiff's family members that was authorized by the military officer. 2006 WL 2434934, at *1.

In the case at hand, the *Trail Smelter Principle*, or the "no-harm principle" as it is sometimes called, has had limited effect on the climate regime. *See* Benoit Mayer, *The Relevance of the No-Harm Principle to Climate Change Law and Politics*, 19 Asia-Pac. J. Envtl. L. 79-104, 6 (Oct. 9, 2016). Through the Rio and Stockholm Declarations, States across the globe agreed to a general goal of ensuring that activities within their jurisdiction do not damage the environment of other states, without outlining any particulars for how that goal was to be achieved or policed. *See Rio Declaration*; *Stockholm Declaration*. Additionally, these documents do not contain any language identifying who is liable for activities that damage the environment of other states.

Although the original Trail Smelter Arbitration resulted in a finding of liability on an individual Canadian company for damage caused to individual residents in the U.S., this was a case where the source of the harm could be pinpointed to a single company. *Trail Smelter Arbitration*, 3 R.I.A.A. at 1913–19. In the case at

hand, HexonGlobal is not like the defendants in *Negewo* or *Carranza* because HexonGlobal is a single contributor to an activity rather than the sole contributor. *See Negewo,* 72 F.3d at 846; *Carranza,* 2006 WL 2434934, at *11. HexonGlobal is only responsible for six percent of global historical emissions. R. at 5. This means that other parties are responsible for ninety-four percent of the cause of Plaintiff's alleged harm.

Finally, in an advisory opinion by the International Court of Justice, the court reinforces the idea that it is States who are responsible for violations of the *Trail Smelter* Principle, not individual actors. *See* Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 226, ¶ 29 (July 8). The court states that it is an "obligation of *States* to ensure that activities within their jurisdiction and control respect the environment of other States." *Id.* (emphasis added). Therefore, the *Trail Smelter* Principle does not create a cause of action enforceable against private actors such as HexonGlobal. If anyone were to be liable for Plaintiff's alleged harm, it would be the U.S. government, not HexonGlobal.

IV. THE CLEAN AIR ACT DISPLACES ANY ATS CLAIM BASED ON THE *TRAIL SMELTER* PRINCIPLE

This Court should affirm the district court's dismissal of Plaintiff's ATS claim based on the *Trail Smelter* Principle because the Clean Air Act displaces the cause of action. R. at 9–10. The Supreme Court in *American Electric Power* held that the Clean Air Act ("CAA") displaces any federal common law right to seek abatement for emissions of carbon dioxide, mirroring its Clean Water Act cases. *Am. Elec. Power Co. v. Connecticut* (*AEP*), 564 U.S. 410, 424 (2011). When Congress enacts a comprehensive regulatory scheme to address a specific harm, any federal common law cause of action addressing that harm is displaced by statute. *Id.* at 419. As in *AEP*, Plaintiff's ATS claim based on federal common law is displaced by the CAA. No factor distinguishes an ATS claim from any other claim at common law to render the Court's prevailing jurisprudence inapplicable. In fact, multiple courts have grounded their displacement analysis in the Supreme Court's treatment of the federal common law in ATS cases. Courts have also found common law cause of actions are displaced

regardless of the type of remedy sought, whether or not the legislation allows the plaintiff to bring a cause of action to enforce the displacing statute. This Court should find that Plaintiff's ATS suit is displaced even if Plaintiff cannot seek alternative relief under the CAA. R. at 10.

A. Plaintiff's ATS Suit to Limit Emissions is Displaced by the CAA Under the Rule Established in *AEP*.

Plaintiff's ATS suit based on the *Trail Smelter* Principle is displaced by the Clean Air Act, eliminating any source of redress based on federal common law rights of action to limit emissions. *AEP*, 564 U.S. at 424. Courts resort to applying federal common law only "in absence" of an applicable statute. *City of Milwaukee v. Illinois* (*Milwaukee II*), 451 U.S. 304, 314 (1981). When Congress addresses a question previously governed by federal common law, the need for Court rulemaking "disappears." *Id*. The test for displacement asks whether the statute "'speak[s] directly to [the] question' at issue." *AEP*, 564 U.S. at 424 (quoting *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978)). The *AEP* Court held the CAA displaces any federal common law right to seek emissions limits because the Act provides specific avenues for enforcement, thus making judicial imposition of emissions limits inappropriate. *Id*. at 425–28.

AEP's displacement analysis applies to Plaintiff's claim because the ATS is purely a jurisdictional statute and does not itself create any cause of action. *See Sosa*, 542 U.S. at 714; R. at 9–10. In both its ATS and displacement cases, the Supreme Court relies on the primacy of congressional lawmaking to determine where a cause of action exists at federal common law. *AEP*, 564 U.S. at 426; *Sosa*, 542 U.S. at 727. Courts should not entertain causes of action when Congress has provided a remedy or contemplated other methods of redress outside of the ATS. *Jesner*, 138 S. Ct. at 1402. Lower courts have also specifically applied ATS jurisprudence to their displacement analysis when finding the CAA has displaced a cause of action. *City of New York v. BP P.L.C.*, 325 F. Supp. 3d 466, 475 (S.D.N.Y. 2018) (citing *Jesner*, 138 S. Ct. at 1402); *City of Oakland v. BP P.L.C.*, 325 F. Supp. 3d 1017, 1024–25, 1028–29 (N.D. Cal. 2018) (citing *Jesner*, 138 S. Ct. at 1402; *Sosa*, 542 U.S. at 728).

Plaintiff's cause of action is similar to the cases where lower courts found that CAA displacement applies to all possible remedies, regardless of the manner in which a defendant contributed to global emissions. *See Native Village of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 857–58 (9th Cir. 2012); *City of New York*, 325 F. Supp. 3d at 474–76; *City of Oakland*, 325 F. Supp. 3d at 1025, 1028; R. at 8–9. First, Plaintiff alleges harms from HexonGlobal's production and sale fossil fuels, like the claim held displaced by the CAA in *City of New York*. 325 F. Supp. 3d at 476; R. at 8–9. In *City of New York*, the plaintiff's cause of action was still displaced by the CAA even though the injury alleged was defendants' "worldwide production, marketing, and sale of fossil fuels," rather than the CAA's main target for regulation—current emissions from power plants. 325 F. Supp. 3d at 474–75. Second, a court's displacement analysis does not change based on the type of relief sought. *Kivalina*, 696 F.3d at 857. When Congress displaces a cause of action, all remedies that flow from it are also displaced. *Id.* The CAA thus displaces claims for damages and injunctive relief. *Id.* at 857–58 (citing *Massachusetts v. EPA*, 549 U.S. 497, 528-29 (2007)). In this case, Plaintiff seeks both damages and injunctive relief, which are displaced. R. at 3.

B. This Court Should Find Displacement by the CAA Even if Plaintiff Lacks an Alternative Remedy.

Potential legal objections to displacement of ATS claims based on a congressional intent or a lack of remedy for Plaintiff are not persuasive. First, the Supreme Court rejected the argument that a clear or express statement of displacement from Congress is necessary for the courts to find the CAA displaces a federal common law right of action. *AEP*, 564 U.S. at 423–24. Enacting a comprehensive regulatory scheme is itself sufficient to show Congress has "occupied the field." *Milwaukee II*, 451 U.S. at 317–18. Second, availability of a federal remedy may be a factor in a court's initial displacement analysis, but lack of a remedy alone does not justify any exceptions once a court finds statutory displacement. *Kivalina*, 696 F.3d at 857. The "comprehensive nature" of the CAA means Congress has spoken on the remedies available for emissions, and "the lack of a federal damages remedy is not indicative of a gap which federal common law must fill." *Id.*

at 866 (Pro, J., concurring). Neither the Supreme Court nor the Ninth Circuit found lack of a remedy for the plaintiff alone is sufficient to overwhelm the court's finding of displacement. *AEP*, 564 U.S. at 422–23; *Kivalina*, 696 F.3d at 857 (majority opinion). Third, the "nonrestriction of other rights" language in the CAA's citizen suit provision does not imply that a federal common law cause of action remains generally available. 42 U.S.C. § 7604(e) (2018). The Supreme Court held the Clean Water Act "as a whole" displaces common law causes of action that might exist outside its citizen suit provision, and the same is true for the CAA's citizen suit provision, which is worded identically to the Clean Water Act. *Kivalina*, 696 F.3d at 861 (Pro, J., concurring) (quoting *Milwaukee II*, 451 U.S. at 328–29). *Compare* 33 U.S.C. § 1365(e) (2018) (Clean Water Act's citizen suit nonrestriction of remedy clause) *with* 42 U.S.C. § 7604(e) (Clean Air Act's citizen suit clause).

This Court should thus affirm the district court's holding that Plaintiff's cause of action is displaced by the CAA. R. at 9–10. The Supreme Court's displacement analysis finds no exception for a claim based on the ATS or brought by a plaintiff who may be denied the ability to bring an enforcement under the CAA.

V. NO SUBSTANTIVE DUE PROCESS CAUSE OF ACTION EXISTS UNDER THE PUBLIC TRUST DOCTINE BECAUSE THERE IS NO FUNDAMENTAL RIGHT TO A STABLE ENVIRONMENT, NOR AN AFFIRMATIVE DUTY TO PROTECT THE GLOBAL CLIMATE SYSTEM.

No substantive due process right to a stable environment can be found through the foundation of the public trust doctrine, as the doctrine does not implicate the entirety of the climate system, it does not apply to the federal government, and the government has not caused any of the harm that would create a duty to protect the global climate system. Any Fifth Amendment cause of action bases itself on the deprivation of the interests of life, liberty, and property. U.S. Const. amend. V. The public trust doctrine fundamentally functions to protect certain property interests, but does not serve as a basis for a claim that Plaintiff's Fifth Amendment right to property has been infringed.

Grounded first in Roman civil law and English common law, the public trust doctrine considers things like air, running water,

the sea, and the seashore to be in a common trust available to all under natural law. J. Inst. 2.1.1. (J.B. Moyle trans.); *Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 452 (1982). The doctrine focuses on the idea that a sovereign government, such as a state government, cannot grant away the title it holds to its natural resources that are stored in a public trust for current and future beneficiaries. *Ill. Cent. R.R. Co.*, 146 U.S. at 452. In American common law, the doctrine has been strictly limited in its application to determining the state's property rights in submerged lands under navigable and tidal waters. *Phillips Petroleum v. Mississippi*, 484 U.S. 469, 473–76 (1988). The state's ownership of these lands was found to be a public trust and thus had to be compatible with the public interest that favored public access to the lands. *Ill. Cent. R.R. Co.,* 146 U.S. at 435; *Shively v. Bowlby*, 152 U.S. 1, 11–12 (1894). The limited scope in which the doctrine has been applied, primarily to states, cannot be applied here to create a fundamental right to a stable climate through incorporation in the Due Process Clause, nor can it be used to obligate the government to protect against actions by private parties.

A. The Public Trust Doctrine Does Not Create a Cause of Action Through the Due Process Clause Because Its Principles Cannot Be Expanded to Find a Basis for a Fundamental Right to Protect the Global Climate System.

The public trust doctrine does not create a fundamental right to a stable climate because the doctrine cannot properly be expanded to protect the entire global climate atmospheric system. Excluding the single exception of the recent Oregon district court decision in *Juliana v. United States*, no court has so broadly applied the public trust doctrine, limiting it to its primary focus on the public's interests in navigation and commerce. *United States v. Mission Rock Co.*, 189 U.S. 391, 407 (1903); *Juliana v. United States*, 217 F. Supp. 3d 1224, 1250 (D. Or. 2016), *motion to certify appeal denied*, No. 6:15-CV-01517-TC, 2017 WL 2483705, at *1–2 (D. Or. June 8, 2017). State common law applications of the doctrine, even in the broadest cases, have still focused specifically on the public's right to water resources. *See Envtl. Prot. Info. Ctr. v. Cal. Dep't of Forestry & Fire Prot.*, 187 P.3d 888, 926 (Cal. 2008)

(extending the doctrine to "the planning and allocation of water resources"); *Kelly v. 1250 Oceanside Partners*, 140 P.3d 985, 1002 (Haw. 2006) (applying Hawaii's public trust doctrine to all water resources in the state).

The public trust doctrine even in its most expansive form cannot be applied to find a fundamental right to a stable climate because the atmosphere, and by extension the global atmospheric climate, is not a public use resource over which the doctrine can govern. The novel conception of the entire atmospheric climate system, a resource that exists within no confined bounds and is affected by acts in every nation and jurisdiction, exceeds the scope of the doctrine. *See Wash. Envtl. Council v. Bellon*, 732 F.3d 1131, 1143 (9th Cir. 2013). Additionally, the atmosphere is not a resource that is exhaustible and irreplaceable, which the public trust doctrine was developed to and has historically addressed. *See Chernaik v Brown*, No. 16-11-09273, 2015 WL 12591229, at *7 (Or.Cir. May 11, 2015) (citing *Morse v. Oregon Div. of State Lands*, 581 P.2d 520, 523 (Or. Ct. App. 1978), *aff'd*, 590 P.2d 709 (1979)).

The only case that found a basis for a fundamental right to stable climate through the public trust principles, *Juliana*, improperly expanded the public trusts doctrine's principles. The court found a fundamental right to a climate system capable of sustaining human life. *Juliana*, 217 F. Supp. 3d at 1250. However, the court did not address the question of whether the atmosphere was a public trust asset at that stage in litigation. *Id*. at 1255. The court instead found that there was a public trust violation in the territorial sea that related to the plaintiff's injury. *Id*. at 1256. Here, despite Plaintiff's alleged injuries relating to claims regarding waters, they assert a fundamental right to the entirety of a stable environment that exceeds the narrow scope of the violation found by the *Juliana* court. *See id*. The court did not address the right to a stable environment in the context of the atmosphere or consider the entire climate as a public trust right, instead relying primarily on an amalgamation of due process rights, such as a fundamental right to privacy. *See id*. at 1249–51. The singular holding of this court cannot be a basis to expand the public trust doctrine to grant a protection of a fundamental right to the atmospheric climate system as a whole.

B. The Government has No Affirmative Duty to Ensure a Stable Environment by Protecting Against Private Party Actions and it Played No Role in Creating the Danger.

The Due Process Clause cannot support Plaintiff's cause of action because it imposes no duty on the government to affirmatively act to protect the environment, and no exception applies because government did not create the danger. The Supreme Court held that there is no affirmative duty for government protection to address actions that have allegedly been committed by private parties. *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.,* 489 U.S. 189, 196 (1989). Even if the claim were to implicate securing liberty, life, or property interests, the Due Process Clause does not compel the government to act or affirmatively confer aid. *Id*. at 196-200. The Ninth Circuit has applied an exception to this rule when the government has created the danger that impacts due process. *Id.* at 201; *Penilla v. City of Huntington Park*, 115 F.3d 707, 709–10 (9th Cir. 1997). The elements for establishing government created danger are: (1) the government's acts created the danger to the plaintiff; (2) the government knew its acts caused the danger; and (3) the government with deliberate indifference failed to act to prevent the alleged harm. *Juliana*, 217 F. Supp. 3d at 1252 (quoting *Penilla*, 115 F.3d at 709); *L.W. v. Grubbs*, 974 F.2d 119, 121 (9th Cir. 1992). None of these elements are met in this case. This government indifference must be the product of a culpable mental state and not just gross negligence. *Juliana*, 217 F. Supp. 3d at 1251 (citing *Pauluk v. Savage*, 836 F.3d 1117, 1125 (9th Cir. 2016)).

The Ninth Circuit applied this danger creation exception without *DeShaney*'s emphasis on the duty of care being triggered when a person is in custody. *DeShaney*, 489 U.S. at 201; *Grubbs*, 974 F.2d at 121 (finding that custody of victim was not a prerequisite for danger creation to apply where security custodial was raped and terrorized by inmate), *Penilla*, 115 F.3d at 710 (finding that officers were deliberately indifferent to the plaintiff's safety and placing him in danger by removing him from the potential of medical care). These exceptions significantly broadened *DeShaney*'s original exception, only in these extreme

cases and do not provide a basis for a broad application of a government caused danger exception.

In this case, even if the government caused danger exception test was applied, the elements of the exception would not be met, as the U.S. government did not actively create the danger, particularly after becoming aware of the potential harm. When the majority of the harmful emissions were being produced, the government had no knowledge of the dangers of climate change. R. at 6. Additionally, the government did not act culpably or with deliberate indifference to prevent the harm. Instead, beginning as early as 1992, the government has worked to adopt policies and take measures specifically designed to mitigate climate change and its effects, like establishing fuel economy standards and greenhouse gases emission limits for passenger cars. R. at 6-7. The government caused danger exception does not apply, and the government has no affirmative duty to protect a stable climate both under *DeShaney* and because there is no expansion of the public trust doctrine that can incorporate protecting the entire climate as a substantive due process right.

C. The Due Process Clause of the Fifth Amendment Provides No Basis for a Public Trust Doctrine Suit Against the Federal Government Because the Doctrine Only Applies to State Governments

The public trust doctrine imposes no duties upon the federal government because it applies to state laws and state actors. Even if a fundamental right or an exception to *DeShaney* is found, the public trust doctrine's historical incorporation into American law only obligates state government action and does not broadly create a federal cause of action. In the seminal case considering the application of the public trust doctrine, *Illionis Central,* the Supreme Court used the public trust doctrine to void the sale of submerged land in Chicago harbor because the sale would harm public interest. *Ill. Cent. R.R. Co*, 146 U.S. at 451–53. The Court has made clear that the application of the public trust doctrine in this case was "a statement of Illinois law" and not a statement of federal law, limiting the doctrine's application to solely be against the state. *Appleby v. City of New York*, 271 U.S. 364, 395 (1926). The Supreme Court recognizes that the public trust doctrine is not

based on the Constitution, but rather that it "remains a matter of state law" with no application to the federal government. *See Alec L. ex rel. Loorz v. McCarthy*, 561 F. App'x 7, 8 (D.C. Cir. 2014) (citing *PPL Montana, LLC v. Montana*, 132 S. Ct. 1215, 1235 (2012)); *see also Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 284–88 (1997) (treating the public trust doctrine as a matter of state law); *Phillips*, 484 U.S. at 473–76 (similar). Though the public trust doctrine has been implicated in some federal actions regarding navigable and tidal waters, it has largely developed almost exclusively as a matter of state law. *Phillips*, 484 U.S. at 476; *District of Columbia v. Air Florida*, *Inc.*, 750 F.2d 1077, 1082 (D.C. Cir. 1984). The courts that have applied the public trust doctrine against the federal government applied it only in narrow situations that are not relevant to this case. *City of Alameda v. Todd Shipyards*, 635 F. Supp. 1447, 1450 (N.D. Cal. 1986); *United States v. 1.58 Acres of Land*, 523 F. Supp. 120, 124 (D. Mass. 1981). In these cases, the court focused solely on submerged lands and held that where the U.S. has title to these lands, the transfer of it does not violate the public trust doctrine that was applicable to it under state law. *City of Alameda,* 635 F. Supp. at 1450; *1.58 Acres of Land*, 523 F. Supp. at 124. The application of the public trust doctrine to the federal government in these cases still rested on the original federal application to navigable and tidal waters, providing no ground for broader expansion of the doctrine against the federal government. *See Alec L.*, 561 F. App'x at 8. Allowing public trust principles to support a claim against the federal government expands the doctrine past its intended scope to apply solely to state governments, and so the doctrine cannot provide a federal cause of action.

VI. THE LAW OF NATIONS CLAIM UNDER THE ALIEN TORT STATUTE AND THE PUBLIC TRUST CLAIM ARE JUSTICIABLE QUESTIONS BECAUSE CONSTITUTIONAL AND STATUTORY INTERPRETATION ARE PROPERLY ADJUDICATED BY THE COURTS

Plaintiffs' claims under the Alien Tort Statute and Public Trust Doctrine are justiciable political questions because the issues addressed in each fall within the role of the judiciary, and neither claim constitutes a political question under the factors of

Baker v. Carr. *Baker v. Carr*, 369 U.S. 186, 215–18 (1962). The political question doctrine reflects the essential nature of the separation of powers within a democracy by assigning different duties to each branch of government. *Id.* Issues deemed to be essentially political in nature cannot be decided by federal courts as the courts lack subject matter jurisdiction. *Id.*

In *Baker*, the Supreme Court established six factors to determine the presence of a political question: (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*. at 217. These six *Baker* factors are used to guide a case-by-case analysis that often collapses some of the individual factors together. *Alperin v. Vatican Bank*, 410 F.3d 532, 544 (9th Cir. 2005). Only when one of these factors is wholly inseparable from the case should the court dismiss it as a nonjusticable political question. *Id*. A case involving political issues or actions is not automatically nonjusticiable. *U.S. Dep't of Commerce v. Montana*, 503 U.S. 442, 458 (1992).

A. Public Trust Doctrine Claims are Justiciable Because They Allege Violations of Constitutional Rights That are Properly Adjudicated by the Courts

Courts have proper jurisdiction over claims made under the Public Trust Doctrine because the doctrine does not specifically implicate other branches of government, and the claim relies on Constitutional foundations. Claims under the public trust necessarily implicate both the executive and legislative branches, through legislation and regulations of the assets within the public trust, but the doctrine does not direct a specific action or process to fulfill its protections. Michael C. Blumm & Mary Christina Wood,

"No Ordinary Lawsuit": Climate Change, Due Process, and the Public Trust Doctrine, 67 Am. U. L. Rev. 1, 43–48 (2017). However, these claims also implicate the judicial branch because the courts have a role in protecting the beneficiaries of the public trust by holding the legislative and executive branches accountable. *Ariz. Ctr. for Law in the Pub. Interest v. Hassell*, 837 P.2d 158, 169 (Ariz. Ct. App. 1991); *Nat'l Audubon Soc'y v. Superior Court of Alpine Cnty.*, 658 P.2d 709, 731–32 (Cal. 1983). Court intervention on behalf of these beneficiaries does not impose policy decisions on the other branches of governments, but enforces the obligations already owed. *Ill. Cent. R.R.*, 146 U.S. at 440.

Public trust claims made within the context of climate change do not impact the court's authority to adjudicate the claim, as public trust claims do not violate any of the six *Baker* factors that set a high bar for courts to dismiss claims as nonjusticiable. *Baker*, 369 U.S. at 217. In the most recent public trust doctrine claim in the context of the climate, the *Juliana* court found that the claim did not raise a political question. *Juliana,* 217 F. Supp. 3d at 1235–42. The Constitution has not textually allocated fundamental power over managing public trust resources to any particular branch, and the courts regularly adjudicate cases about the climate, thereby satisfying the first *Baker* factor. *Id.* at 1238. Public trust claims do not rest solely on statutory or regulatory frameworks, instead focusing largely on the beneficiaries of the public trust through examination of the constitutional rights that affect those beneficiaries. *Id.* at 1238–40. Constitutional interpretation is a traditional area of purview of the courts, and resolving the scope of these rights does not require an initial policy decision that would create a political question. *Id.* Courts therefore have competence to hear public trust claims consistent with the second and third *Baker* factors because the claim rests on a constitutional claim of a deprivation of property, and does not require initial policy decisions from the courts. *Id.* at 1239. It is rare that the final three factors will make a case nonjusticable. *Zivotofsky ex rel. Zivotosfsky v. Clinton*, 566 U.S. 189, 203–04 (2012). In analyzing the factors, the court in *Juliana* found that none rendered the issue of a public trust claim a nonjusticable question. *Juliana,* 217 F. Supp. 3d at 1240–41.

Where courts have found that the political question doctrine bars the courts adjudication of a climate change case, the rulings improperly diminished the appropriate role of the judiciary. *See Ungaro-Benages v. Dresdner Bank AG,* 379 F.3d 1227, 1236 (11th Cir. 2004) ("Federal courts adjudicate claims against foreign corporations every day and can consider the nation's foreign policy interests and international comity concerns in their decisions"); *Aji P. v. State*, No. 18-2-04448-1, 2018 WL 3978310, at *1 (Wash.Super. Aug. 14, 2018). In *Aji P.*, the court found a policy-making prerogative in the climate action plan that encroached on the roles of the two political branches of government. *Aji P.*, 2018 WL 3978310, at *3. Additionally, the political question doctrine has mostly barred adjudication in cases implicating the Executive Branch's authority over foreign relations. *Id*. However, here, environmental policy under the public trust doctrine is not an inherently a foreign policy decision, nor is it relegated to the legislature. *Juliana*, 217 F. Supp. 3d at 1241. Some remedies would require specific care to avoid separation of powers conflicts, but the legal issues themselves are still properly addressed by the courts. *Id.* at 1241–42. This public trust doctrine claim is properly justiciable because the traditional role of the judiciary is to interpret constitutional rights, protection of public trusts are not exclusively relegated to any one branch of government, and no other *Baker* factors suggest this case is non- justiciable.

B. The ATS Claim is Not Barred by the Political Question Doctrine Because Interpreting the Scope of the Law of Nations and Federal Causes of Action are Traditional Judicial Functions.

The Alien Tort Statute claim does presents a justiciable question for the courts because courts have historically adjudicated ATS claims based on a case specific analysis and prioritization of concurrent jurisdiction where claims have not been allocated to a specific governmental branch. Law of nations claims under the ATS, due to their inherent nature of international law, may have implications on the country's foreign relations. *Kadic*, 70 F.3d at 248–49. However, courts have routinely found that ATS claims are within the judiciary's proper role because claims that rise in a politically charged context does not convert the claim necessarily

into a non-justiciable political question. *Jewel v. Nat'l Sec. Agency*, 673 F.3d 902, 912 (9th Cir. 2011) (finding no political question in an ATS claim involving electronic surveillance); *Klinghoffer v. S.N.C. Achille Lauro*, 937 F.2d 44, 49 (2d Cir. 1991); *Planned Parenthood Fed'n of Am, Inc. v. Agency for Int'l Dev.*, 838 F.2d 649, 656 (2d Cir. 1988) (holding the political question doctrine did not bar an ATS claim based on international funding for birth control and abortion). Though the *Sosa* Court, in dicta, advocates for a cautious judicial approach in addressing ATS claims so as to avoid interfering with the political branches, lower courts have routinely decided the merits of these cases, particularly when claims are based on infractions by an individual. *Alperin*, 410 F.3d at 545; *Sosa*, 542 U.S. at 728. The ATS allows for judicial review by authorizing courts to hear claims by individuals for violations of international norms. Amy Endicott, *The Judicial Answer? Treatment of the Political Question Doctrine in Alien Tort Claims*, 28 Berkeley J. Int'l L. 537, 551 (2010).

Courts have found in the majority of cases that when applying a fact-specific analysis of ATS law of nations claims, the political question doctrine does not apply. *See Doe III*, 654 F.3d at 11; *Mamani v. Berzain*, 654 F.3d 1148, 1151 n.4 (11th Cir. 2011). In these cases, courts found that even though there were executive branch foreign policy decisions implicated, these were insufficient to render the claims nonjusticable. *See Doe III*, 654 F.3d at 11; *Mamani*, 654 F.3d at 1151. Where courts have found the political question doctrine renders an ATS case nonjusticable, they found that it would require courts to directly decide national policy, infringing on powers committed to the other branches. See *Gonzalez-Vera v. Kissinger*, 449 F.3d 1260, 1263 (D.C. Cir. 2006) (holding court evaluation of measures taken by the U.S. to implement U.S. policy in Chile would require policy decision textually allocated to political branches); *Robertson v. Republic of Nicaragua*, No. 17-cv-00852-JST, 2017 WL 2730177, *4 (N.D. Cal. 2017) (finding plaintiff's complaint would require adjudication of 200 years of relationship between a people and a sovereign government). Here, climate change has been addressed by all branches and is not committed to a single branch or specific policy approach, and thus is not subject to the political question doctrine under the fact-specific elements of this claim.

In applying the *Baker* factors, the Second Circuit in *Kadic* held that the specific, statutory jurisdictional grant over ATS claims satisfies the first three *Baker* factors. *See Kadic*, 70 F.3d at 249. Existence of discoverable and manageable judicial standards in ATS claims removes the need for the court to make policy decisions. *Id*. Cases that touch on foreign relations are weighed on a case-by-case basis to assess if judicial action is appropriate. *Id*. The remaining *Baker* factors need only be addressed if the judicial resolution of a question would contradict previous decisions made by other branches. *Id*. at 249–50. Considering both the general context of ATS claims and the specific case analysis required by the *Baker* factors, Plaintiff's law of nations claim does not implicate the political question doctrine and can be properly decided by the judiciary.

CONCLUSION

For the foregoing reasons, defendant HexonGlobal respectfully requests this court to affirm the District Court's decision dismissing claims under the Alien Tort Statute and Fifth Amendment for failure to state a claim for relief.