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Measuring Brief (Organization of Disappearing Island Nations, Apa Mana, and Noah Flood)

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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 Appellants, Organization of Disappearing Island Nations, Apa Mana, and Noah Flood

* 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.

STATEMENT OF JURISDICTION

The Organization of Disappearing Island Nations (ODIN), Apa Mana, and Noah Flood (together, "Appellants") appeal from an Opinion and Order dismissing Plaintiffs' Complaint, entered August 15, 2018, by the honorable Judge Remus in the U.S. District Court for New Union Island, No. 66-CV-2018. The district court had subject matter jurisdiction pursuant to 28 U.S.C. § 1331 (2018), given the Complaint raises questions arising under federal law and the Constitution. Appellants filed a timely Notice of Appeal pursuant to Fed. R. App. P. 4 (2016). The U.S. Court of Appeals for the Twelfth Circuit has valid jurisdiction over the appeal based on 29 U.S.C. § 1291 (2018).

STATEMENT OF ISSUES

I. Can Apa Mana bring an Alien Tort Statute (ATS or the "Statute"), 28 U.S.C. § 1350 (2018), claim against HexonGlobal, a domestic corporation?

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

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

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

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

VI. Do Plaintiffs' law of nations claim under the Alien Tort Statute and public trust claim under the Fifth Amendment present non-justiciable political questions?

STATEMENT OF CASE

I. Factual Background

Over the past several decades, the interrelatedness between greenhouse gas (GHG) emissions and the changing climate system has become evident. It is now nearly an uncontested fact among the scientific community: "Evidence tells an unambiguous story: the planet is warming, and over the last half century, this warming has been driven primarily by human activity." Jerry M. Melillo et al., 2014: CLIMATE CHANGE IMPACTS ON THE U.S.: THE THIRD NAT'L CLIMATE ASSESSMENT, U.S. GLOBAL CHANGE RESEARCH PROGRAM 7 (May 2014) [hereinafter U.S.: THE THIRD NAT'L CLIMATE ASSESSMENT]. Anthropogenic climate change presents unmatched challenges for the global community, including extreme weather events like droughts, flooding, and wildfires. U.N. Env't Programme and World Meteorological Org., Intergovernmental Panel on Climate Change [IPCC], *IPCC Synthesis Report, Climate Change 2014 (Summary for Policymakers)*, at 8 [hereinafter *IPCC Synthesis Report*]. Avoiding the catastrophic impacts of climate change requires sweeping and concerted action from local, state, national, and international governments to reduce GHG emissions.

HexonGlobal Corporation (HexonGlobal) is the surviving corporation of the merger of all major U.S. oil producers. Record (R.) at 5. HexonGlobal, through sales of its extracted fossil fuels, has contributed substantially to global GHG emissions. *Id.* The normal combustion of petroleum (a HexonGlobal fossil fuel) results in the emission of considerable amounts of carbon dioxide (CO_2). *Id.* Information establishing the heat-retention properties of CO_2 has been available since the nineteenth century. HexonGlobal does not dispute that since the 1970s the corporation has been aware that continued combustion of fossil fuels would result in harmful global climate change, including sea level rise. *Id.* Nevertheless, HexonGlobal continued to extract fossil fuels, which led to injurious GHG emissions. *Id.*

The United States is in a unique position. As the world's largest historical contributor of GHGs—responsible for twenty percent of global cumulative emissions—the country plays a critical role in the implementation of mitigation strategies. R. at 5–6. Despite the extensive research the federal government has conducted indicating that the consequences of inaction are dire, the U.S. has neglected its responsibility. In fact, for over a century, the U.S. has promoted fossil fuel production through federal policies including hundreds of billions in tax subsidies. R. at 6. Recently, the U.S. has taken steps towards reducing its GHG emissions, and has acknowledged the potential dangers of climate change. *Id.*; *see also* U.S.: THE THIRD NAT'L CLIMATE ASSESSMENT, at 7. While U.S. efforts seemed promising and emissions began to decrease, efforts were abandoned, and emissions lacked adequate control. R. at 7. Under the Trump Administration, the U.S. is reversing its commitments to safeguard the climate system. *Id.*

Appellant Apa Mana is an alien national of the island nation of A'Na Atu. Appellant Noah Flood is a U.S. citizen and resident of the New Union Islands, a U.S. possession. R. at 3. Both appellants are members of the ODIN, a non-profit membership organization devoted to protecting the interests of island nations threatened by climate change. *Id.* Both A'Na Atu and New Union Islands are low-lying islands, with the populated areas of both islands lying below one meter in elevation. R. at 4. A one-half to one-meter rise in sea level from climate change would render the islands uninhabitable. *Id.* Appellants bring the present claims to prevent this future harm and seek damages for injuries already suffered. Mana asserts a claim against HexonGlobal for violation of the law of nations under the ATS, because appellee's fossil fuel related emissions significantly contribute to climate change and have caused substantial damage to Mana's community from the rising sea level. R. at 3. Appellant Flood asserts a claim against the United States, based on the government's failure to protect the global climate system held in public trust, and therefore subjecting Flood to loss of life, liberty, and property in violation of the Due Process Clause of the Fifth Amendment. *Id.* It is undisputed that limits on fossil fuel production and combustion would reduce further damage to Appellants' properties from sea level rise, decrease health risks associated with rising temperatures, and maintain the habitability of the islands. R. at 5.

II. PROCEDURAL HISTORY

In 2018, Appellants filed a complaint against HexonGlobal and the United States of America in the U.S. District Court for New Union Island. R. at 1. The Complaint asserted claims against HexonGlobal under the Alien Tort Statute, and constitutional claims against the United States for violations of public trust obligations to protect the global climate system incorporated through the Due Process Clause of the Fifth Amendment to the Constitution. R. at 1. On August 15, 2018, Judge Remus issued an Opinion and Order dismissing Appellants' Complaint. R. at. 11. Appellants filed a timely Notice of Appeal, granted by this Court. R. at 1.

SUMMARY OF ARGUMENT

Appellant Apa Mana is entitled to bring a claim against HexonGlobal, a domestic corporation, under the Alien Tort Statute. The District Court for New Union Island incorrectly concluded the Statute precludes corporate liability. R. at 8. Traditional principles of statutory interpretation demand a finding that permits domestic corporate liability. The plain language of the ATS is unambiguous and the legislative history supports the Statute's clear language, which is at odds with corporate immunity. Allowing corporations, such as HexonGlobal, to act without consequences is illogical and antithetical to the Statute's purpose. Furthermore, the Supreme Court's recent holding in *Jesner v. Arab Bank, PLC*, excluded foreign corporate liability because the Court expressed its concern of meddling in foreign policy. 138 S. Ct. 1386, 1407 (2018). That same concern is inapplicable to Appellant's claim invoking liability against HexonGlobal.

The *Trail Smelter* Principle (the "Principle") is a principle of customary international law, which is enforceable as the law of nations under the ATS. What constitutes a tort in violation of the law of nations under the Statute remains unsettled, but it is generally accepted that any claim based on customary international law must be specific, universal, and obligatory, so as to govern the behavior among States. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 714 (2004). The Principle imposes on every State an obligation to refrain from acts in its sovereign territory that are

contrary to the rights of other States or that would cause transboundary harm. R. at 8; Trail Smelter Arbitration, (U.S. v. Can.), 3 R.I.A.A. 1905, 1963 (1941). This Principle has been specifically reiterated by international sources and practiced by nations across the world to such an extent establishing it as customary international law enforceable as the law of nations.

Non-governmental actors—including HexonGlobal—are obligated to comply with the *Trail Smelter* Principle. The Principle, which is embodied in a U.S. treaty, carries with it the same force as federal law. R. at 6; *see* United Nations Framework Convention on Climate Change (UNFCCC), May 9, 1992, 1771 U.N.T.S. 107, 169. Thus, the same obligations are imposed on actors violating the law. Further, while international law is typically carried on at a higher level, administered by States and stipulated by their representatives, the law of nations can nevertheless be enforced against private, non-governmental actors. Specifically, when the law of nations is violated under the ATS, the adjudicating court is still able to impose liability on non-governmental actors in the same way they do for other claims. While the tort committed under the ATS is one in violation of the law of nations, the claim is before a federal court and the available remedies are those originating in federal law. International law also recognizes the individual liability of non- governmental actors. The most authoritative sources of international law specifically impose duties and liabilities upon individuals as well as States. *The Nurnberg Trial 1946,* 6 F.R.D. 69, 110 (Int'l Mil. Trib. at Nuremberg 1946).

The *Trail Smelter* Principle is not displaced by the Clean Air Act (CAA or the "Act"), 42 U.S.C. § 7401 (2018), because the two are not in conflict. However, even if the Principle and the CAA do conflict, the Principle is embodied in the Preamble of a ratified U.S. treaty. UNFCCC, 1771 U.N.T.S. at 169; R. at 6. Under the Supremacy Clause of the U.S. Constitution, ratified treaties and federal law both operate as the supreme law of the land. U.S. CONST. art. VI. Federal law may displace a treaty, and vice-versa, depending on whichever is enacted most recent in time. Thus, the *Trail Smelter* Principle, as embodied in a U.S. treaty, displaces the CAA, which was enacted prior to ratification of the treaty.

The U.S. Government violated the Public Trust Doctrine by failing to protect the global atmospheric climate system from disruption. As a result, the government deprived appellant Flood

of substantive due process protections of life, liberty, and property, which he is entitled under the Fifth Amendment. U.S. CONST. amend. V. Pursuant to the Public Trust Doctrine, as custodian to its citizens, the U.S. serves as fiduciary and must protect the public trust within its sovereign boundaries. The United States has had knowledge of the dire consequences of increased GHG emissions on climate change. R. at 6. Despite this knowledge, the U.S. not only failed to adequately regulate emissions, but also supported the fossil fuel industry through federal policies and tax subsidies. R. at 6. As a result, the U.S. breached its fiduciary duty, which directly contributed to climate destabilization. Appellant Flood has already experienced property damage, limited access to food, and increased health risks, R. at 5, in violation of his substantive due process rights.

Appellants' claims before this court do not present nonjusticiable political questions. The federal courts are expressly authorized to hear cases arising under the Constitution, or those that involve the U.S. or a foreign citizen as party. U.S. CONST. art. III, § 2. Congress has also explicitly granted jurisdiction to hear claims brought by aliens under the ATS. Neither issue before this court has been constitutionally committed to another branch, therefore, it is proper for this court to rule on both matters. *Baker v. Carr*, 369 U.S. 186, 210 (1962). It is the responsibility of the Judiciary to interpret ambiguous laws and to resolve claims arising under the Constitution. *Id.* at 211. Fulfilling this duty will not require this court to adhere to any previously made political declaration, nor will it result in multiple pronouncements made in violation of the separation of powers. Resolution of these questions only requires this court to apply normal principles of interpretation to the contested provisions of law.

Appellants respectfully request that the Twelfth Circuit Court of Appeals reverse the district court's decision and remand for further proceedings.

STANDARD OF REVIEW

The U.S. District Court for New Union Island erred as a matter of law when it dismissed Appellants' Complaint. Thus, this court should review the decision *de novo*. *See Howard v. Office of the Chief Admin. Officer of the U.S. House of Representatives*, 720

F.3d 939, 945 (D.C. Cir. 2013) ("Because this case comes to us on an appeal from a motion to dismiss, we review the District Court decision *de novo*."). The district court's legal determinations are entitled to little or no deference. *Id.*

ARGUMENT

I. THE ALIEN TORT STATUTE ENABLES "ALIEN"[1] VICTIMS TO BRING SUITS AGAINST DOMESTIC CORPORATE PERSONS.

A. Traditional Principles of Statutory Interpretation Preclude a Categorical Exemption for Domestic Corporate Liability Under the Alien Tort Statute.

In place for nearly 230 years, the Alien Tort Statute grants U.S. courts the jurisdiction to hear cases and award damages to aliens who are victims of violations of customary international law. 28 U.S.C. § 1350.[2] The District Court for New Union Island incorrectly held that the ATS forecloses claims against domestic corporations. R. at 11. The Statute contains no exclusionary language such that allowing claims against corporations would contravene the plain meaning. The relevant history surrounding the ATS's enactment reinforces the notion that liability is permitted.

1. The Plain Language of the ATS is Unambiguous and Contains No Exclusionary Provision Limiting Who May be Held Accountable to Alien Victims for Violations of the Law of Nations.

Under traditional canons of statutory interpretation, analysis begins first and foremost with the plain language of the statute. If the language is unambiguous, judicial inquiry ceases. *Rubin v.*

[1] As used herein, alien refers to "[a]ny person not a citizen or national of the United States." *Definition of Terms*, U.S. DEP'T OF HOMELAND SEC., https://www.dhs.gov/immigration-statistics/data-standards-and-definitions/definition-terms (last visited Sept. 1, 2018).

[2] "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."

United States, 449 U.S. 424, 420 (1981); *see Hartford Underwriters Ins. Co v. Union Planters Bank*, 530 U.S. 1, 6 (2000) ("When 'the statute's language is plain, the sole function of the courts'—at least where the disposition required by the text is not absurd—'is to enforce it according to its terms.'"). In *Hartford Underwriters Ins. Co v. Union Planters Bank*, the Supreme Court was tasked with evaluating whether a provision of Chapter 11 of the Bankruptcy Code[3] allowed administrative claimants. *Id.* at 14. In concluding the language excluded certain claimants, the Court considered several factors. *Id.* at 6. First, when the statute "'names the parties granted the right to invoke its provision, such parties only may act.'" *Id.* at 7 (quoting 2A N. SINGER, SUTHERLAND ON STATUTORY CONSTRUCTION § 47.23 (5th ed. 1992)). Second, the Court considered whether the exclusionary language of the party granted the right "is the most obvious party who would have been thought empowered to use the provision." *Id.*

Applying the logic of *Hartford* to the present case, it would be improper to conclude that the ATS permits non-aliens to bring claims when the language clearly names the party entitled the right to invoke its provision. *See* 28 U.S.C. § 1350. Another clear example is the Torture Victim Protection Act (TVPA), oft-cited alongside the ATS. 28 U.S.C. § 1350 (2018). The TVPA states: "*An individual* who . . . subjects an *individual* to torture shall . . . be liable for damages to that individual." *Id.* (emphasis added). The TVPA expressly prescribes who may be a claimant and who may be held liable: individuals. *Id.* Consequently, the language of the TVPA excludes corporate claimants and corporate liability. *Id.* Unlike the statute in *Hartford* and the TVPA, the ATS contains no exclusionary language preventing liability for certain parties.

2. Historical Materials Surrounding the Statute's Enactment Reinforce the Notion that Domestic Corporations Should be Held Liable.

An examination of the legislative history of the ATS underpins the Statute's plain language, and suggests that domestic corporate

[3] "The *trustee* may recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such claims." 11 U.S.C. § 506(c) (2018) (emphasis added).

persons are subject to liability. In its first session, the First Congress of the United States—with little instruction from the Constitution on the structure of the Judicial Branch—set out to write a federal statute developing the Judiciary's framework. *See* JENNIFER K. ELSEA ET AL., CONG. RES. SERV., RL32118, THE ALIEN TORT STATUTE: LEGIS. HIST. AND EXECUTIVE BRANCH VIEWS 4 (2003). In 1789, Congress passed the Judiciary Act, which included the ATS. *See id.* The First Congress enacted the ATS as a jurisdictional statute, with the understanding that the district courts "would recognize private causes of action for certain torts in violation of the law of nations . . . ." *Sosa*, 542 U.S. at 724. When the ATS was drafted, the law of nations was generally comprised of two varieties: first, general norms governing behavior between nation-states, and second, where the "rules binding individuals for the benefit of other individuals overlapped with the norms of state relationships." *Id.* at 714.

Under the Articles of Confederation, the federal government lacked the authority to prevent or remedy these violations of the law of nations, so Congress called upon the states to vindicate these rights and punish individuals for breaches of treaties and conventions to which the U.S. was a party. *Id.* at 716. In its Framer-era form, the ATS "enabled the United States to avoid responsibility for law of nations violations by permitting aliens to sue US citizens for intentional torts in federal court." Anthony J. Bellia, Jr. & Bradford R. Clark, *The Alien Tort Statute and the Law of Nations*, 78 U. CHI. L. REV. 445, 454 (2011) [hereinafter Bellia]. This commitment to enforce the law of nations on a domestic level was apparent and exemplified by the drafters of the ATS with its reference to torts. *Sosa*, 542 U.S. at 714, 716. Without this statute in place, the United States would have been vulnerable to war initiated by the victim's nation. Bellia, at 454.

3. Domestic Corporate Immunity Under the ATS Leads to Absurd and Unjust Results.

An essential canon of statutory interpretation is the principle of *reduction ad absurdum* (to avoid absurd results). *See United States v. Granderson*, 511 U.S. 39, 56 (1994) (opting to follow a "sensible construction" of a statute that avoids reaching an absurd outcome). Domestic corporate immunity under the ATS is simply

incompatible with its purpose. *See Dewsnup v. Timm*, 502 U.S. 410, 427 (1992) (Scalia, J., dissenting) ("[W]e should avoid construing the statute in a way that produces . . . absurd results."). The Supreme Court has held that an "aggregate corporation, at common law, is a collection of individuals, united into one collective body, under a special name . . . possess[ing] the capacity . . . of suing and being sued." *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. 518, 667 (1819). The Court acknowledged that these entities exist and act in the same manner in every country. *Id.* at 668. The concept of a corporate entity is embedded in federal and state law, allowing a corporation to act as an individual exercising rights and responsibilities through the use of its natural members as its agents. It is a common understanding that a corporation is a juridical person with the capacity to be sued. *See Cook Cty. v. United States ex rel. Chandler*, 538 U.S. 119, 125–26 (2003).

In *Kiobel v. Royal Dutch Petro. Co*, the Second Circuit held that corporate liability was not recognized under the law of nations. 621 F.3d 111, 149 (2d Cir. 2010). The majority suggested that, by merely operating in corporate form, "commercial exploitation of abuse of fundamental human rights can successfully shield those profits from victims' claims for compensation . . . ." *Id.* at 150 (Leval, J., concurring). As Judge Leval indicated, "[t]he new rule [of corporate immunity] offers to unscrupulous businesses advantages of incorporation never before dreamed of." *Id.* Such protection of corporations from civil liability has absurd results and grave consequences. *Id.* For example, upon incorporation, businesses will "be free to trade in or exploit slaves . . . perform genocides or operate torture prisons . . . or engage in piracy" without civil ramifications. *Id.* Under the majority's wisdom, "such an enterprise could have hired itself out to operate Nazi extermination camps . . . immune from civil liability to its victims." *Id.* The corporate shield validated by the majority in *Kiobel* is not only antithetical to fundamental human rights, but it also violates the ATS's plain language and the history surrounding its enactment.

Although the issue of corporate liability under the ATS was the question the Supreme Court granted for certiorari, the Court decided the *Kiobel* appeal on a wholly separate issue: extraterritoriality. *Kiobel v. Royal Dutch Petro. Co.*, 569 U.S. 108, 124 (2013). The uncertainty of corporate liability under the ATS

was left for future determination. As Justice Breyer made clear in his concurrence, there exists a "distinct interest in preventing the United States from becoming a safe harbor (free of civil as well as criminal liability) for a torturer or other common enemy of mankind." *Id.* at 127 (Breyer, J., concurring). It is not in our nation's interest to allow corporations, like HexonGlobal, to cause harm, free of consequences. *See id.* at 135 (Kennedy, J., concurring).

B. The Supreme Court's Recent Holding in *Jesner v. Arab Bank* Does Not Shield Domestic Corporations from Liability Pursuant to the Alien Tort Statute.

In 2018, the Supreme Court faced the question of whether corporations could be sued under the Alien Tort Statute. *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1408 (2018). The Court declined to answer the broad question of corporate liability, and narrowly held that *foreign corporations* were precluded from liability. *Id.* The decision to exclude foreign corporations from the reach of the ATS hinged on the Court's incapacity to render the necessary policy judgments that are implicated under foreign corporate liability. *Id.* at 1403 ("The political branches, not the Judiciary, have the responsibility and institutional capacity to weigh foreign-policy concerns."). This analysis is not dispositive for domestic corporate liability.

Prior to the Court's decision in *Jesner v. Arab Bank, PLC*, there was a four-to-one federal circuit courts split, with the majority endorsing a theory of corporate liability under the ATS. *See Doe v. Nestle USA, Inc.*, 766 F.3d 1013, 1021–22 (9th Cir. 2014) (permitting a lawsuit against a U.S. corporate defendant for aiding and abetting child slavery); *Doe VIII v. Exxon Mobil Corp.*, 654 F.3d 11, 54–57 (D.C. Cir. 2011) (declining to follow the Second Circuit's judgment in *Kiobel* that the ATS precludes corporate liability), *vacated on other grounds*, 527 Fed. Appx. 7 (D.C. Cir. 2013); *Flomo v. Firestone Nat. Rubber Co.*, 643 F.3d 1013, 1021 (7th Cir. 2011) (noting "corporate liability is possible under the [ATS]"); *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1263 (11th Cir. 2009) ("The modern line of ATS cases initially involved state actors violating the law of nations, but subsequent cases have expanded the scope of the ATS to impose liability on . . . corporations."); *Romero v. Drummond Co.*, 552 F.3d 1303, 1315

(11th Cir. 2008) (considering the text of the ATS and noting that no provision expressly exempts corporations from liability under the statute).

Since the Court's decision in *Jesner*—which explicitly excluded foreign corporate liability but impliedly authorized domestic corporate liability—courts that have confronted the question of the latter have correctly interpreted the Supreme Court's opinion to permit such liability. *See Doe v. Nestle, USA*, 906 F.3d 1120, 1124 (9th Cir. 2018) (noting "*Jesner* did not eliminate all corporate liability under the ATS"); *Al Shimari v. CACI Premier Tech., Inc.*, 320 F. Supp. 3d 781, 787 n.6 (E.D. Va. 2018) ("*Jesner*'s careful limiting of the analysis and holding suggests to this court that the *Jesner* Court did not intend to disturb this status quo with respect to domestic corporations."). The decision in *Jesner* should not be applied expansively to foreclose domestic corporate liability under the Statute, since the Court's holding was narrow, immunizing only foreign corporations.

II. THE *TRAIL SMELTER* PRINCIPLE IS A CUSTOMARY PRINCIPLE OF INTERNATIONAL LAW ENFORCEABLE AS THE "LAW OF NATIONS" UNDER THE ALIEN TORT STATUTE.

Under the Alien Tort Statute (ATS), district courts have jurisdiction over tort actions brought by aliens alleging a violation of the law of nations or a treaty of the United States. 28 U.S.C. § 1350. What constitutes the "law of nations" has not been specified by statute, but has been exemplified through standards established by precedential cases and international sources. The principle derived from the *Trail Smelter Arbitration* is embedded as customary international law through international agreements, declarations, and practices of civilized nations. *See infra* Section II.B. The decision clearly expressed that, "a State owes at all times a duty to protect other States against injurious acts by individuals from within its jurisdiction." Trail Smelter Arbitration, 3 R.I.A.A. at 1963. The degree of specificity to which this Principle has been defined and the level of acceptance by the States of the world has established it as international law enforceable as the law of nations.

A. *Trail Smelter* Relied on State Sovereignty and

Territorial Integrity in Defining the Rule Against Transboundary Harm.

State sovereignty is understood as one of the most basic principles of international law. *See* U.N. Charter art. 2 ¶ 1 (The United Nations is "based on the principle of the sovereign equality of all its Members."). This right extends to resource management within a State's territory, as reflected in the principle of Permanent Sovereignty over Natural Resources declared by the United Nations (U.N.). G.A. Res. 1803 (XVII), at 15 (Dec. 14, 1962). Sovereignty allows a State to exploit their own resources and choose "what the land and air within will have happen to them." Trail Smelter Arbitration, 3 R.I.A.A. at 1965.

Coupled with the right to sovereignty and discretion to use one's own resources is the concept of territorial integrity. Territorial integrity obliges States to respect the sovereignty, and therefore the encompassing territory, of other States while carrying on activities which exploit resources within their own boundaries. *See* Islands of Palmas Case, (Neth v. U.K.), 2 R.I.A.A. 829, 839 (Perm. Ct. Arb. 1928). While prevention of transboundary harm is the central obligation imposed in *Trail Smelter*, R. at 8, this principle has also been declared by the International Court of Justice (ICJ) as an obligation common in the international scheme. *See* The Corfu Channel Case (U.K. v. Alb.), Judgment, 1949 I.C.J. 4, 22 (Apr. 9) (stating every "State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States" as a general and well-recognized principle). In consideration of sovereignty, it is a reasonable demand that activities outside of a State's control do not damage resources or property within the State's territory. Trail Smelter Arbitration, 3 R.I.A.A. at 1965. Accordingly, it is rational to require corporations and States, such as HexonGlobal and the U.S., to refrain from knowingly harming low-lying islands outside of their territory, such as A'na Atu. R. at 5–6.

B. States Adopt the *Trail Smelter* Principle as a Universal Norm Governing the Rights and Duties to Each Other Based on Explicit and Accepted

Obligations.

Customary international law is composed of those rules that States consistently abide by, or accede to, due to legal obligations and mutual concern. *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 248 (2nd Cir. 2003); *see* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAWS OF THE U.S. § 102(2) (AM. LAW INST. 1987). The Supreme Court requires any claim based on customary international law—or the present day "law of nations"—to be specific, universal, and obligatory so as to govern the behavior among States, including the duties corresponding to their rights as sovereign States. *Sosa*, 542 U.S. at 714, 732.

1. The Trail Smelter Principle Has Repeatedly Been Specified in Various Forms by the Most Distinguished Bodies of International Law.

The *Trail Smelter* Tribunal was clear in its ruling: "under the principles of international law, as well as of the law of the United States, no State has the right to use or permit the use of its territory in such a manner as to cause injury . . . in or to the territory of another or the properties or persons therein . . . ." Trail Smelter Arbitration, 3 R.I.A.A. at 1965. The arbitral decision was not the first, nor the last place to explicitly recognize this principle, expressed as *sic utere* (use your own property in such a manner as not to injure that of another). *See Crowley v. Christensen*, 137 U.S. 86, 89 (1890) ("*Sic utere* . . . is a maxim of universal application.").

Under the United Nations Framework Convention on Climate Change (UNFCCC), it was reiterated that States have the sovereign right to "exploit their own resources" and a "responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States." UNFCCC, 1771 U.N.T.S. at 166. As a ratified treaty, the UNFCCC's legal status is equivalent to federal legislation. *See infra* Section IV. This rule against transboundary harm was also explicitly embodied in Principle 2 of the Rio Declaration, Principle 21 of the Stockholm Declaration, U.N. General Assembly Resolutions, and by the behavior practiced among and across nations. *See* U.N. Conference on Env't and Dev., *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. 1), annex 1 (Aug. 12, 1992); U.N.

Conference on Env't and Dev., *Stockholm Declaration on Environment and Development*, U.N. Doc. A/CONF.48/14/Rev.1 (June 1972); G.A. Res. 1803 (XVII), at 15 (Dec. 14, 1962). The consistent, specific articulation of this principle is the resultant choice of the international community defining their interactions with each other. *See Sosa*, 542 U.S. at 729 ("[W]e now tend to understand common law not as a discoverable reflection of universal reason but, in a positivistic way, as a product of human choice.").

2. The Trail Smelter Principle is so Widely Practiced and Accepted by the Nations of the World That it is a Universal Norm.

Although the *Trail Smelter* decision was only binding upon the United States and Canada, the underlying principle has been reiterated, validated, and adopted on a universal basis. In addition to the international bodies that specifically convey this principle, virtually all nations abide by and adopt it. Universal acceptance and usage allow practices to ripen into rules of international law. *The Paquete Habana*, 175 U.S. 677, 686 (1899). While there is great weight in finding the provision in multiple sources as proof of universality, there is also significant value in the number and influence of States who adopt the provision and act in accordance with its fundamental principles. *Kiobel*, 621 F.3d at 138.

The greatest example of universality in the modern world of international relations is the United Nations. Membership is open to all States accepting the principles contained in the U.N. Charter, and by receiving the rights and benefits of membership, they agree to fulfill their assumed obligations in good faith. U.N. Charter art. 4 ¶ 1, art. 2 ¶ 2. Additionally, Members are to ensure non-member States act in accordance with these principles to maintain international peace and security. U.N. Charter art. 2 ¶ 6. Determining a rule is one of customary international law would mean the rule applies to nations who have not formally ratified it. *Kiobel*, 621 F.3d at 138. Of the 196 States in the world, 193 are U.N. Members, and the remaining three (Kosovo, the Vatican City, and Palestine) are non-member observers. *Non-member States*, UNITED NATIONS, http://www.un.org/en/sections/member-states/non-member-states/index.html (last visited Sept. 1, 2018). The high level of membership is not only significant in showing

broad acceptance of the United Nations' commitments and standards, but also lends support to universal adherence to the declarations of the international body. Members do not sit by idly—they actively participate in the creation of agreements and resolutions that embody principles collectively practiced by the nations of the world. The United Nations has adopted the Principle upheld in *Trail Smelter*, *see infra* Section II.B.1, and the nations of the world have universally agreed to abide by this Principle, embracing it as an international norm to be followed by all.

3. The Restriction on Transboundary Harm is Obligatory Because its Application Imposes the Rights Subsisting Between Nations and Operates as Law.

The Supreme Court is of the opinion that declarations alone are simply statements of principles setting up a common "standard of achievement" for all nations, and would not qualify as a treaty or agreement imposing legal obligations. *Sosa*, 542 U.S. at 734. When a customary international law is established, this norm "*teaches the rights subsisting between nations or states, and the obligations corresponding to those rights*," and "prescribes the *duties of nations*, in their intercourse with each other." *Sosa*, 542 U.S. at 714 (second emphasis added) (first quoting E. DE VATTEL, LAW OF NATIONS 67 (1797); and then quoting 1 J. KENT, COMMENTARIES ON AMERICAN LAW 1). The obligation does not necessarily stem from the source of the principle, but rather derives from usage by civilized nations. This aligns with the Supreme Court's historical approach—applying international law where there is no treaty or controlling act and enforcing it with the same authority as domestic laws. *See The Paquete Habana*, 175 U.S. at 700 (affirming the administration of international law); *Sosa*, 542 U.S. at 729 (stating the laws of the United States recognize the law of nations and will apply international law when appropriate).

III. THE *TRAIL SMELTER* PRINCIPLE, ACCEPTED AS THE LAW OF NATIONS, IMPOSES OBLIGATIONS ENFORCEABLE AGAINST NON-GOVERNMENTAL ACTORS BECAUSE THEY ARE JURIDICAL PERSONS

SUBJECT TO LIABILITY.

A. The Court Overlooks the Distinction Between Customary International Norms Enforceable as the Law of Nations and the Liability Imposed by Domestic Law.

By following the Second Circuit in *Kiobel*, R. at 9, the District Court for New Union Island overlooked the key distinction between international norms of conduct and the actual remedies provided by federal courts. *See Doe VIII*, 654 F.3d at 50. Although it was acknowledged that "international law, of its own force, imposes no liabilities on corporations or other private juridical entities," the *Kiobel* court also recognized that corporate liability for a violation of international law is an issue left to the individual nation who will be imposing civil liability. 621 F.3d at 121. The *Jesner* Court also followed *Kiobel* when deciding a foreign corporation would not be held liable under the ATS because corporate liability was not found to be an international norm so specific, universal, and obligatory to be considered the law of nations. 138 S. Ct. at 1401. While the courts in *Jesner* and *Kiobel* may not have held corporate liability to be a custom enforceable as the law of nations, the international norm being applied is not one of corporate liability. The international law violated is that expressed by the *Trail Smelter* Principle, but the violation is being brought before a U.S. federal court, not an international court of justice. The remedies available in federal courts arise under those laws that will be binding on the parties before the court—this includes international norms constituting the law of nations, but where no international law controls, federal laws must be applied. *See The Paquete Habana*, 175 U.S. at 700. This reflects the presumption that United States law governs domestically, but does not rule the world. *Kiobel*, 569 U.S. at 115.

When originally enforced, *Trail Smelter* imposed obligations against a non-governmental actor based on the fact that this corporation would be held liable by a decision of a U.S. court. Trail Smelter Arbitration, 3 R.I.A.A. at 1966. The *Trail Smelter* Principle not only reflects the international norm that "no State has the right to use or permit the use of its territory in such a manner as to cause injury. . . in or to the territory of another [State] or the properties or persons therein . . ." but also reflects

the same norm adopted by the United States. *Id.* at 1965; *see Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 238 (1907) ("[I]t is a fair and reasonable demand on the part of a sovereign that the air over its territory should not be polluted . . . and whatever domestic destruction they may have suffered, should not be further destroyed or threatened by the act of persons beyond its control . . . ."). While Canada was party to the arbitration, the obligations and alterations were enforced against the *company* responsible for the damage. Trail Smelter Arbitration, 3 R.I.A.A. at 1966. HexonGlobal is the domestic corporation bearing responsibility for nearly a third of all U.S. GHG emissions, which have largely contributed to Mana's climate change induced damages. R. at 5.

B. International Law Recognizes the Individual Liability of Non-Governmental Actors.

Although the remedy lies in the hands of federal courts, rather than international norms, it is nevertheless true that international law does not provide for corporate immunity, and has held non-governmental actors responsible for violations of the law of nations. The Nuremberg Tribunals are oft-cited as an authoritative source of customary international law. *See* G.A. Res. 95 (I) (Dec. 11, 1946). The Tribunal specifically recognized individual liability while stating "international law imposes duties and liabilities upon individuals as well as upon states" and "individuals can be punished for violations of international law." *Kiobel*, 621 F.3d at 126 (quoting *The Nurnberg Trial 1946,* 6 F.R.D. 69, 110 (Int'l Mil. Trib. at Nuremberg 1946)).

While the Tribunal itself is authoritative on international law, the principles it enforces stem from developed national laws, considering that international law comes into existence by widespread application and acceptance of such laws. *See* BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 24 (2006). International law draws from domestic laws because they are generally more developed and "for the good reason that a principle which is found to be generally accepted by civilized legal systems may fairly be assumed to be so reasonable" as to be applicable to all just legal systems. J.L. BRIERLY, THE LAW OF NATIONS 62–63 (6th ed. 1963). General principles of international law—derived from domestic

laws and applied to non-governmental actors—lend support to the principle practiced by the United States, *see* Section I.A.2., and other nations, that corporations can be held liable for their actions. *Doe VIII*, 654 F.3d at 54. It is recognized in legal systems throughout the world that corporate responsibility is part of the privilege of legal personhood. *See First Nat'l City Bank v. Banco Para El Comercio Exterior De Cuba*, 462 U.S. 611, 629 n.20 (1983).

IV. THE *TRAIL SMELTER* PRINCIPLE IS NOT DISPLACED BY THE CLEAN AIR ACT BECAUSE IT DOES NOT CONFLICT WITH THE ACT AND THE PRINCIPLE IS EMBODIED IN A SUBSEQUENTLY ENACTED U.S. TREATY.

A. In the United States, Ratified Treaties are the Supreme Law of the Land.

The Supremacy Clause[4] ranks the Constitution as the supreme law of the land. U.S. CONST. art. VI. Federal law and formalized treaties are equally elevated to this status, so long as they are not in conflict with—or "displaced" by—the Constitution. *Id.*; *see Whitney v. Robertson*, 124 U.S. 190, 194 (1888) ("By the Constitution a treaty is placed on the same footing, and made of like obligation, with an act of legislation."); *see also Sanchez-Llamas v. Oregon*, 548 U.S. 331, 346 (2006). The power to enter into treaties is conferred in Article II of the Constitution. U.S. CONST. art. II, § 2, cl. 2. In the U.S., a treaty enters into full force of law, "when the President, with the advice and consent of the Senate, has ratified it or otherwise given official notification of consent to be bound, provided the agreement is also in force internationally." RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW OF THE U.S., Td No. 2 § 104 cmt. c (AM. LAW INST. 2017).

B. When a Ratified Treaty and Federal Law are Not in Conflict, They Ought to be Construed so as to

[4] "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Effectuate Both.

It is well established that federal law and treaties have the effect of preempting conflicting state law. When a federal law and a ratified treaty broach the same subject but can coexist, since both are declared by the Constitution as supreme law, "the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either." *Whitney*, 124 U.S. at 194.

1. The Trail Smelter Principle Has Been Incorporated into a Treaty Ratified by the United States.

The *Trail Smelter* Principle, discussed at length in Section II, has been embodied by numerous international agreements and treaties ratified by the U.S. For example, the Convention on Long-Range Transboundary Air Pollution (LRTAP) was adopted in 1979, signed and ratified by the U.S. in 1981, and went into force in 1983. *LRTAP*, U.N. TREATY COLLECTION, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII- 1&chapter=27&clang=_en. The agreement aims to limit and "gradually reduce and prevent air pollution including long-range transboundary air pollution." LRTAP, Nov. 13, 1979, 1302 U.N.T.S. 217, 220. The *Trail Smelter* Principle is incorporated in LRTAP's Preamble.[5] *Id.* at 219. As a ratified, self-executing treaty, LRTAP remains the supreme law of the land, unless in conflict with constitutional provisions, or followed by inconsistent federal legislation.

Roughly a decade after LRTAP went into effect, the U.S. reaffirmed its recognition of the *Trail Smelter* Principle as domestic law. *See* R. at 6. In 1992, then-President George H.W. Bush, upon advice and consent of the Senate, ratified the United Nations Framework Convention on Climate Change (UNFCCC). *Id.* The UNFCCC recognized the impact of anthropogenic GHG emissions on destabilizing the climate system and entrusted

[5] "States have, in accordance with . . . 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 . . . ."

developed nations with adopting mitigation policies commensurate with their GHG emissions. *See* UNFCCC, 1771 U.N.T.S. at 169. Just as the LRTAP, the UNFCCC's Preamble[6] articulates the *Trail Smelter* Principle and its prohibition of transboundary harm. *Id.* at 166. The UNFCCC remains a ratified treaty in the United States. Thus, it is entitled to constitutional supremacy. U.S. CONST. art. VI.

2. Treaties Embodying the Trail Smelter Principle Do Not Conflict with the Clean Air Act's Regulation of Greenhouse Gases.

The *Trail Smelter* Principle is not at odds with section 202(a)(1) of the Clean Air Act (CAA), 42 U.S.C. § 7521 (2018), and both should operate with the full force of law. The Principle, as articulated in the arbitration between the U.S. and Canada, focuses on territorial infringement by one State of another State through environmental pollution. Trail Smelter Arbitration, 3 R.I.A.A. at 1966. The notion that one may not conduct itself in such a way that imposes harm across national boundaries can coexist with the CAA's regulation of greenhouse gases. In fact, courts should seek to enforce both the federal law and the treaty when possible. *Whitney*, 124 U.S. at 194.

C. Even If the *Trail Smelter* Principle Conflicts with the Clean Air Act, the UNFCCC Displaces the Federal Legislation Because It Went into Effect Most Recently.

When federal law and a ratified treaty are inconsistent "the one last in date will control the other . . . ." *Whitney*, 124 U.S. at 194; *see Breard v. Greene*, 523 U.S. 371, 376 (1998); *see also* Michael P. Van Alstine, *The Judicial Power and Treaty Delegation*, 90 CALIF. L. REV. 1263, 1265 (2002) ("When properly approved and ratified, [a treaty's] substantive provisions can both preempt conflicting state law and even *displace earlier federal statutes*.")

6 "States have, in accordance with . . . 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 . . . ."

(emphasis added). Even if the Preambles of the LRTAP and UNFCCC, which contain the *Trail Smelter* Principle, conflict with the Clean Air Act's regulation of greenhouse gases, the UNFCCC went into full force subsequent to the enactment of the CAA and its most recent amendments. Thus, the treaty displaces the federal statute. *See Whitney*, 124 U.S. at 194.

In 1958, scientists began regularly recording measurements of CO_2 in the atmosphere at the Mauna Loa Observatory in Hawaii. *Trends in Atmospheric Carbon Dioxide*, NAT'L OCEANIC & ATMOSPHERIC ADMIN., https://www.esrl.noaa.gov/gmd/ccgg/trends/full.html (last visited Sept. 1, 2018). The first recording indicated a mean of 315.97 parts per million. *Id.* Shortly thereafter, the Clean Air Act of 1963 was enacted as the first federal legislation to authorize "the development of a national program to address air pollution related environmental problems." *Evolution of the Clean Air Act*, EPA, https://www.epa.gov/clean-air-act-overview/evolution-clean-air-act (last visited Sept. 1, 2018) [hereinafter *Evolution of the CAA*].

Since its enactment, three major amendments to the CAA have occurred. *Id.* In 1970, the EPA's authority to regulate air pollution expanded with the development of several programs authorizing the regulation of emissions. *Id.* "[B]y the time Congress drafted § 202(a)(1) in 1970, [CO_2] levels had reached 325 parts per million." *Massachusetts v. EPA*, 549 U.S. 497, 507 (2007). Most recently, in 1990, the EPA's authority expanded once again—this time to include stationary source permitting. *See Evolution of the CAA.* In *Massachusetts v. EPA*, the Supreme Court recognized the agency's authority to regulate GHG emissions pursuant to section 202(a)(1) of the Act. 549 U.S. 497, 533 (2007). Since the Court's decision, the EPA issued new findings and implemented various regulations pertaining to GHG emissions. *See, e.g.*, *Endangerment Finding*, 74 Fed. Reg. 66,496 (Dec. 15, 2009); *Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards Rule*, 75 Fed. Reg. 25,324 (May 7, 2010). However, these actions by the EPA are enabled through the 1990 version of the Clean Air Act. Any conflict between regulations passed pursuant to the 1990 federal legislation and a U.S. treaty ratified after that time will be supplanted by the treaty. Therefore, because the UNFCCC was ratified in 1992 and remains in effect to this day, it displaces any substantive portions of the

CAA that conflict. *See Whitney*, 124 U.S. at 194. HexonGlobal's failure to comply to the UNFCCC obligations was an act committed in violation of a binding and enforceable U.S. treaty.

V. THE UNITED STATES VIOLATED ITS PUBLIC TRUST OBLIGATION TO PROTECT THE GLOBAL CLIMATE ECOSYSTEM, THEREBY DEPRIVING PLAINTIFF FLOOD OF HIS DUE PROCESS RIGHTS.

The Public Trust Doctrine, which long predates this nation's founding, is the notion that "every sovereign government holds vital natural resources in 'trust' for the public—present and future generations of citizen beneficiaries." Mary Christina Wood, *Advancing the Sovereign Trust of Government to Safeguard the Environment for Present and Future Generations (Part I): Ecological Realism and the Need for a Paradigm Shift*, 39 ENVTL. L. 43 (2009) [hereinafter Wood]. As early as sixth century Rome's Institutes of Justinian, the doctrine of *res communis* was understood to include "air, running water, the sea, and consequently the seashore." THE INSTITUTES OF JUSTINIAN 35 (J.B. Moyle ed., trans., 4th ed. 1906). The roots of the doctrine permeated English common law, and in 1882, the doctrine was first articulated in a U.S. court decision. *Arnold v. Mundy*, 6 N.J.L. 1, 71 (1821). The New Jersey Supreme Court identified "air" among the natural resources entitled to all. *Id.* The increasing temperatures, changing rainfall patterns, and rising sea levels are, by natural law, aspects of the global climate system entitled to all. R. at 4.

A. Under the Public Trust Doctrine, The United States Serves as Fiduciary to the Trust and, Thus, Must Protect Property Held Therein.

The Public Trust Doctrine, like a private trust, includes three primary elements:

> (1) a trustee, who holds the trust property and is subject to equitable duties to deal with it for the benefit of another; (2) a beneficiary, to whom the trustee owes equitable duties to deal with the trust property for his benefit; [and] (3) trust property, which is held by the trustee for the beneficiary.

RESTATEMENT (SECOND) OF TRUSTS § 2 cmt. h (AM. LAW INST. 1959). As applied to natural resources, the doctrine obligates a trustee to uphold its fiduciary duty "to protect the trust property against damage or destruction." GEORGE G. BOGERT ET AL., BOGERT'S TRUSTS AND TRUSTEES § 582 (2016). In essence, the doctrine demands of the trustee environmental stewardship to sustain benefits of the trust intergenerationally.

A trustee's duty of protection requires action. DOUGLAS QUIRKE, ENVTL. AND NAT. RES. LAW CTR., THE PUBLIC TRUST DOCTRINE: A PRIMER 13 (2016) [hereinafter QUIRKE]. As the Supreme Court noted in *Geer v. Connecticut*, "it is the duty of the legislature to enact such laws as will best preserve the subject of the trust . . . ." 161 U.S. 519, 534 (1896), *overruled on other grounds*, *Hughes v. Oklahoma*, 441 U.S. 322, 326 (1979). Thus, taking a passive role or failing to act when necessary constitutes a breach of fiduciary duty. QUIRKE, at 13. Importantly, a trustee owes a duty "to restore the trust if it is damaged due to a breach . . . or *third-party damage*." *Id.* at 15 (emphasis added). A procedural component of this obligation is that a trustee furnishes adequate information and knowledge to perform duties competently. *Id.* at 13. The trustee's obligations are unalterable and enduring, "and can only be destroyed by the destruction of the sovereign." *United States v. 1.58 Acres of Land*, 523 F. Supp. 120, 124 (D. Mass. 1981).

B. The United States Breached its Fiduciary Duty to the Public Trust When It Failed to Adequately Regulate Greenhouse Gas Emissions and Supported the Fossil Fuel Industry through Federal Policies and Subsidies.

A solemn report released by the Intergovernmental Panel on Climate Change (IPCC), a body of the United Nations which is comprised of the globe's leading climate scientists, indicates the world and its inhabitants have limited time to act in order to halt the dire impacts of climate change. *IPCC Synthesis Report*, at 8.

> Continued emission of greenhouse gases will cause further warming and long- lasting changes in all components of the climate system, increasing the likelihood of severe, pervasive and irreversible impacts for people and ecosystems. Limiting climate change would require substantial and sustained reductions in

> greenhouse gas emissions which, together with adaptation, can limit climate change risks.

Id. The numerous reports released by the IPCC since its founding in 1988 make evident that sweeping and concerted action must occur if climate catastrophe is to be avoided. *Id.* It is clear that a "tipping point" is in sight, one in which anthropogenic climate change will set the planet on a path of no return. *See* Wood, at 50. Climate change science has been widely accessible for decades, and the United States government—as trustee to the public trust within its sovereign state—cannot claim guiltlessness on the basis of ignorance. *See* R. at 6.

Despite the overwhelming evidence of the correlation between GHG emissions and climate change, the U.S. government remains instrumental in fossil fuel dependency. R. at 6. Federal legislation has enabled agencies to regulate the depletion and destruction of numerous natural resources through permitting programs. QUIRKE, at 16–17. For example, the Environmental Protection Agency (EPA) permits water pollution through the National Pollutant Discharge Elimination System (NPDES) and air pollution through the New Source Review (NSR). *See, e.g.*, 40 C.F.R. § 122 (2014); 40 C.F.R. § 51.307 (2014). These permitting programs, however, do not sufficiently prevent impairment of natural resources held in the public trust. "When granting a permit, federal law essentially shields damaging activities from liability, regardless of how devastating the consequences to trust resources." QUIRKE, at 16–17. Such actions are antithetical to the longevity of natural resources and the trust's future beneficiaries.

Aside from regulatory permitting, the federal government has supported and continues to support the exploration, extraction, and combustion of fossil fuels through subsidies. *See* Mona Hymel, *The United States' Experience with Energy-Based Tax Incentives: The Evidence Supporting Tax Incentives for Renewable Energy*, 38 LOY. U. CHI. L.J. 43, 47 (2006) [hereinafter Hymel, *Tax Incentives*]. For more than a century, the U.S. "has added and expanded tax incentives for fossil fuel energy." Mona L. Hymel, *Environmental Tax Policy and the United States: A "Bit" of History*, 3 ARIZ. J. ENVTL. L. & POL'Y 157, 159 (2013). The U.S. is inextricably linked to the oil, gas, and coal industries, providing in excess of $370 billion in tax breaks over the past century. Hymel, *Tax Incentives*, at 71. Each year, the U.S. government provides an estimated $14.7

billion in federal subsidies. REDMAN ET AL., OIL CHANGE INT'L, DIRTY ENERGY DOMINANCE: DEPENDENT ON DENIAL: HOW THE U.S. FOSSIL FUEL INDUSTRY DEPENDS ON SUBSIDIES AND CLIMATE DENIAL 5 (Oct. 2017) [hereinafter REDMAN]. Under the Trump Administration alone, royalty rates have decreased for drilling in offshore waters, the Department of the Interior (DOI) discontinued ongoing review of royalty rates for coal extracted from public lands, and the DOI increased the budget by $10 million for the Outer Continental Shelf Oil and Gas Leasing Program, encouraging offshore oil and gas drilling. REDMAN, at 14. The federal government's persistent support of third- party fossil fuel companies, R. at 6, despite the recognized impact of fossil fuel dependency, renders the U.S. complicit in natural resource degradation, in violation of their role as trustee.

C. The United States Violated Appellant Flood's Due Process Rights When It Breached its Fiduciary Duty as Trustee to the Public Trust, Which Contributed to Destabilizing the Climate System.

The U.S. government is proscribed from depriving persons "of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. V. The federal government, in violation of its fiduciary duties to the public trust, has actively contributed to GHG emissions reaching dangerous levels through pollution permitting and fossil fuel subsidies. *See infra* Section V.B. Consequently, U.S. actions were integral in destabilizing the climate system. R. at 6. In *Juliana v. United States*, a case on point, Judge Aiken correctly concluded, "the right to a climate system capable of sustaining human life is fundamental to a free and ordered society." 217 F. Supp. 3d 1224, 1250 (D. Or. 2016). Without a stable climate system, civilization would be nonexistent. *Id.*

The changing climate has already impacted Flood. R. at 5. He has incurred financial loss associated with seawater damage to his home—damage that would not have occurred but for the GHG-induced sea level rise. R. at 5. Flood is at increased risk of heat stroke and mosquito-borne diseases because of higher temperatures. R. at 5. Ocean acidification, global warming, and loss of coastal wetlands will soon reduce Flood's access to local seafood, which he heavily relies on. R. at 5. The parties do not dispute that limits on fossil fuel production and combustion would

reduce further property damage, lessen the health risks associated with increased temperatures, and maintain the habitability of Flood's community. R. at 5. Since a stable climate is a necessary condition to existing fundamental rights, including life, liberty, and property, the federal government's role in anthropogenic GHG emissions violates Flood's due process rights.

VI. APPELLANTS' ALIEN TORT STATUTE AND PUBLIC TRUST CLAIMS DO NOT PRESENT POLITICAL QUESTIONS AND ARE PROPER FOR ADJUDICATION CONSIDERING THE ABSENCE OF ALL OF THE *BAKER* FACTORS.

Federal courts have jurisdiction to adjudicate a case or controversy capable of resolution through the judicial process. *Massachusetts*, 549 U.S. at 516. Courts are unable to revise implemented policies or entertain issues otherwise entrusted to Congress or the Executive Branch. *Vieth v. Jubelirer*, 541 U.S. 267, 277 (2004). This restriction against deciding "political questions" does not prevent federal courts from creating resolutions which will remedy violations of rights or interpret statutes to enforce previously authorized actions. *Juliana*, 217 F. Supp. 3d at 1270; *see also Massachusetts*, 549 U.S. at 530–35 (explaining the EPA's duties cannot be ignored because the consequences touch on obligations of other agencies, nor does the subject preclude the Court from enforcing obligations). A nonjusticiable political question would be present if any of the factors identified in *Baker v. Carr*[7] were reflected in the dispute. 369 U.S. 186, 210 (1962). Neither claim presently before the court demonstrate these factors, therefore both are proper for judicial resolution.

[7] Factors include: "[1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [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."

A. Resolution of the Alien Tort Statute Claim and Public Trust Claim Have Been Designated to the Judiciary through Constitutional Commitment, Express Statutory Language, and a Lack of Assignment to Other Political Branches.

The political question doctrine prevents federal courts from deciding cases where there is a "textually demonstrable constitutional commitment of the issue to a coordinate political department." *Baker*, 369 U.S. at 210. The duty to resolve the Alien Tort Statute (ATS) and public trust claims have been designated to the Judicial Branch—rather than the Executive or Legislative Branch—by various sources. The Constitution expressly gives judicial power to all cases arising under the Constitution and laws of the United States, including controversies to which the United States shall be a party, such as the public trust claim, and where the dispute involves citizens of foreign States, such as the ATS claim. U.S. CONST. art. III, § 2. Furthermore, the public trust claim arises under the Constitution by its origination in the Due Process Clause, imposed to prevent the government from abusing its power. U.S. CONST. amend. V.; *see Deshaney v. Winnebago County Dep't of Social Services*, 489 U.S. 189, 196 (1989). The duty to interpret such cases is committed by the Constitution to the Judicial Branch alone.

Express statutory language and established case law have also provided the Judiciary with control over such matters. The language of the ATS specifically provides jurisdiction over civil actions brought by aliens. 28 U.S.C. § 1350 (2018). While foreign policy power is delegated to the President, it would be erroneous to assume any case touching foreign relations lies beyond judicial cognizance. *Native Village of Kivalina v. Exxon Mobil Corp.*, 663 F. Supp. 2d 863, 873 (N.D. Ca. 2009). Presupposing such is outside of the Judiciary's power would defeat the purpose of statutes like the ATS or others similarly rooted in areas generally designated to the Executive or Legislative branches, and would turn any challenge into a political question. *See INS v. Chadha*, 462 U.S. 919, 941 (1983). Additionally, the Judicial Branch has resolved issues regarding property held in public trust since the United States came into existence. *See Johnson v. M'Intosh*, 21 U.S. 543, 574 (1823) (clarifying that the United States' exclusive ownership of all lands within it was established by discovery and conquest).

Resolving public trust questions is a familiar practice for the courts. *See Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469 (1988).

Further evidence of the judicial power to resolve this issue is presented by a lack of constitutional commitment of the issue to any other branch. The political question doctrine prevents the courts from intruding on policy choices and judgments of Congress or the President. *Koohi v. United States*, 976 F.2d 1328, 1331 (9th Cir. 1992). Here, there is no express provision of the Constitution granting power over these matters—a tort claim brought against a domestic corporation by an alien and a public trust claim brought against the United States by its own citizen—to either of the other branches. On the contrary, the final determination of such controversies rests solely with the Judiciary, as expressed by the Constitution, the statutes constructed by Congress, and precedent case law surrounding the claims.

B. Analysis of Both Claims are Within the Judiciary's Legal Expertise and Ability to Discover Manageable Standards Necessary for Resolution Rather than Requiring the Court to Determine New Policies.

The second and third factors presented in *Baker*[8] ask whether resolution of the question would demand the court to go beyond the scope of its judicial expertise, in both the ability to declare judicially discoverable and manageable standards, and under the condition that claims be resolved without an initial policy determination. *Native Village of Kivalina*, 663 F. Supp. 2d at 874. Both claims brought by plaintiffs are capable of resolution without surpassing judicial limits. Plaintiffs seek a determination of whether a law has been violated and whether the United States holds property in public trust—these require interpretation of the law and the Constitution, and are determinations for which there are clearly judicially manageable standards. *See Powell v. McCormack*, 395 U.S. 486, 549 (1969).

[8] "[2] lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion..."

1. Judicial Resolution Does Not Require Scientific Certainty and the Court Only Needs to Administer Broad Obligations to the Extent Necessary for Action.

The question is not whether the case is unmanageable in terms of its complexity or consequences, but whether courts have the "legal tools to reach a ruling that is principled, rational, and based upon reason distinctions." *Native Village of Kivalina*, 663 F. Supp. 2d at 874. The District Court for New Union Island, in following *Native Village of Kivalina v. Exxon Mobil Corp.*, incorrectly interpreted what manageable standards entail. 663 F. Supp. 2d at 874–75. While the court must necessarily balance the competing interests of the parties, this does not require resolution of the dispute with the high level of scientific certainty requested in *Kivalina*. *See id.* Manageable standards have been developed in similar situations, such as in *Massachusetts v. EPA*, where the Court simply directed the EPA to look at the available scientific evidence and adopt standards which would prevent the alleged violations from causing further harm. 549 U.S. at 519– 20. While the court should respect an agency's broad discretion in carrying out delegated responsibilities, the obligation to carry out those responsibilities will be enforced where the refusal to act causes harm. *Id.* at 534 ("Nor can EPA avoid its statutory obligation by noting the uncertainty surrounding various features of climate change and concluding that it would therefore be better not to regulate at this time."). Although the court may be uninterested in oppressing one party to advance the interests of the other, this is not necessary. It is possible to analyze and adjust competing interests in order to allow continuation and prevent damage. *See* Trail Smelter Arbitration, 3 R.I.A.A. at 1939.

2. Courts are Capable of Resolving Claims Without Creating New Policies, Particularly When the Constitution and Statutes Clearly Provide for Judicial Enforcement.

Federal courts have proven they are capable of crafting creative results without an initial policy determination. While courts are unable to adopt a new or better policy, they are able to enforce policy and address constitutional violations. *See Massachusetts*, 549 U.S. at 533–35; *Juliana*, 217 F. Supp. 3d at

1270. By resolving both the ATS and public trust claims, the court would not be creating new policies, but simply enforcing those already established. The ATS provides for resolution of violations of the law of nations as defined in Section II above. The purpose of the Statute is to provide a platform for enforcement of international law violations. *Sosa*, 542 U.S. at 714. It is also the court's duty to address constitutional violations as they arise. By resolving the public trust claim, the court is not creating a new doctrine, but rather protecting the people from obstruction or interference with property held in public trust, as protected by the Due Process Clause. *See Ill. Cent. R. Co v. Illinois*, 146 U.S. 387, 452 (1892).

C. Prudential Considerations of Prior Political Declarations Cannot Prevent the Court from Fulfilling its Designated Obligation to Settle Disputes.

The remaining *Baker* factors[9] prevent the court from ruling on political questions where resolution would violate the separation of powers. Such prudential concerns call for mutual respect among the three branches. *Goldwater v. Carter*, 444 U.S. 996, 1000 (1979). While at first sight these claims seem to invoke the authority of the other branches, courts have the authority to construe legislation, executive agreements, treaties, and international laws. *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986) ("it goes without saying that interpreting congressional legislation is a recurring and accepted task for the federal courts"). Questions may arise in areas where the court would gladly avoid them, but the court cannot avoid such questions where it is their duty to address them. *Cohens v. Virginia*, 19 U.S. 264, 404 (1821).

The claims presently before the court are purely legal questions. While there is an interplay between foreign relations and domestic regulations, it is the Judiciary's role to interpret statutes and the Constitution, and this responsibility cannot be

9 "[4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [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."

avoided merely because the decisions may have political overtones. *Id.*; *Powell*, 395 U.S. at 548–49. This responsibility does not show a lack of respect due a coordinate branch of government, but rather emphasizes the role of the Judicial Branch. Congress or the President cannot determine the applicability of an unclear statute or interpret the Constitution—this decision is left to the courts. *Zivotofsky v. Clinton*, 566 U.S. 189, 196 (2012). Our federal system may require courts to interpret the Constitution and statutes in a "manner at variance with the construction given the document by another branch." *Powell*, 395 U.S. at 549. But, resolution of these claims will not result in "multifarious pronouncements by various departments on one question," for it is the responsibility of the courts to act as the ultimate interpreter of such claims arising under the Constitution. *Baker*, 369 U.S. at 211. Additionally, these claims are presently before the court because there have not been declarations by any other branch which provide enough specificity to resolve the issues.

Resolution of these questions may not be easy, but they only require the court to apply normal principles of interpretation to the provisions at issue. *See Powell*, 395 U.S. at 548–49. Because the claims do not raise questions entrusted to one of the other political branches, nor has a political decision already been made which the court should adhere to or which would result in multifarious pronouncements by various departments on one question, the court must fulfill its duty to resolve discrepancies in the law. *Alperin v. Vatican Bank*, 410 F.3d 532, 552 (9th Cir. 2005). It has long been the responsibility of the Judiciary to resolve difficult issues of interpretation. Whether such disputes touch on areas of international law or otherwise impact foreign policy, or in those decisions which will uphold the constitutional protections afforded to the people of the United States, so long as prudential concerns do not disrupt the balance of power between the coordinate branches of government, the Judicial Branch must carry out its duty to hold individuals, entities, and the government responsible for violations of the law.

CONCLUSION

Upon the foregoing, Appellants, Organization of Disappearing Island Nations, Apa Mana, and Noah Flood, respectfully request

that this appellate court reverse the district court's decision and remand for further proceedings.

Respectfully submitted this 28th day of November, 2018,

Attorneys for the Appellants, Organization of Disappearing Island Nations, Apa Mana, and Noah Flood

CERTIFICATION

We hereby certify that a copy of the foregoing has been furnished, by mail, this 28th day of November, 2018 to:

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Respectfully submitted this 28th day of November, 2018,

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