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Measuring Brief (United States of America)

Kayla Race
University of Utah S.J. Quinney College of Law

Gordon Rowe
University of Utah S.J. Quinney College of Law

Sydney Sell
University of Utah S.J. Quinney College of Law

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

Measuring Brief*

UNIVERSITY OF UTAH S.J. QUINNEY COLLEGE OF LAW
KAYLA RACE, GORDON ROWE, SYDNEY SELL

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, UNITED STATES OF AMERICA

* *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

The United States District Court for the Territory of New Union Island exercised federal question jurisdiction over the Plaintiffs' claims against the United States of America under 28 U.S.C. § 1331 (2012) and jurisdiction for the Alien Tort Statute (ATS) claims under 28 U.S.C. § 1350 (2012). The District Court entered its judgement on August 15, 2018, dismissing all of Plaintiffs' claims. Plaintiffs filed a timely notice of appeal. This court has jurisdiction over the order of the District Court pursuant to 28 U.S.C. § 1291 (2012).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. May a claim be brought under the ATS against a domestic corporation, as a general, categorical matter?

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

III. Does the *Trail Smelter* Principle impose obligations enforceable against non- governmental actors?

IV. Does the Clean Air Act (CAA) displace ATS claims alleging violation of the *Trail Smelter* Principle for harms caused by greenhouse gas (GHG) emissions?

V. Should this court create a federal public trust cause of action and a new Fifth Amendment substantive Due Process right for the global climate system?

VI. Do Plaintiffs' attempts to use the ATS and public trust doctrine to regulate GHG emissions present non-justiciable political questions?

STATEMENT OF THE CASE

This case is an appeal of an order of the District Court for New Union Island granting Defendants' motion to dismiss. Plaintiffs—an alien national, a U.S. citizen, and a not-for-profit organization—had sought injunctive and monetary relief for harms caused by global climate change and sea level rise, allegedly induced by greenhouse gas emissions attributable to HexonGlobal's fossil fuels and the United States government's failure to more significantly control such emissions. This case is ultimately about the scope of a court's power to extend common law solutions to the global problem of climate change, and whether such solutions have already been or should be decided by the political branches. This appeal is also about whether a court should craft its decision on grounds broader than necessary to resolve the case. In dealing with these complex issues, the District Court correctly held that the Clean Air Act displaces Plaintiffs' claim brought under the Alien Tort Statute for HexonGlobal's alleged violations of the *Trail Smelter* Principle. The District Court also correctly declined to extend an unprecedented Due Process-based public trust claim to government protection of a stable climate system.

STATEMENT OF THE FACTS

I. Parties

Plaintiffs include: Apa Mana (Mana), an alien national of the island nation A'Na Atu; Noah Flood (Flood), a U.S. Citizen and resident of New Union Island, a United States territory; and the Organization of Disappearing Island Nations (ODIN), a not-for-profit membership organization representing the interests of island nations threatened by sea level rise. Record at 3. Defendants are the United States federal government and HexonGlobal, a U.S. corporation created from the merger of all major U.S. oil producers. R. at 5.

II. Plaintiffs' Alleged Injuries from Climate Change

Climate change is a global phenomenon caused by an overabundance of GHGs in the atmosphere, which is largely

attributable to the burning of fossil fuels for energy (electricity, heat, and transportation), as well as emissions from agricultural and industrial activity. R. at 4. Some impacts of climate change include rising temperatures, rising sea levels, more intense storms, and ocean acidification. R. at 4–5.

Plaintiffs Flood and Mana reside and own homes on islands whose populated areas are at an elevation projected to be completely inundated by sea level rise and rendered uninhabitable by the end of the century if current GHG emissions trends continue. R. at 4–5. Due to rising sea levels, Flood and Mana have suffered seawater damage to their homes and drinking water wells. *Id.* Further, rising temperatures threaten their health by increasing risk of heat stroke and mosquito-borne diseases, while ocean acidification threatens to deplete the fish population, which is their primary food supply. R. at 5.

III. HexonGlobal's GHG Contributions

Defendant HexonGlobal is an oil producer that is incorporated in New Jersey, has its primary place of business is in Texas, and operates refineries throughout the world, including in New Union Island. *Id.* HexonGlobal and its predecessors are responsible for 32% of the United States' cumulative fossil fuel-related GHG emissions and 6% of global historical emissions. *Id.*

IV. The United States' Management of GHG Emissions

Activities in the United States are responsible for 20% of cumulative global human- caused GHG emissions. R. at 6. The U.S. government has sought to address the dual needs for energy production and environmental protection through a variety of programs, commitments, and regulations. On one hand, the United States promotes energy production by providing tax subsidies for fossil fuel production, leasing lands and waters for energy production, developing an interstate highway system, and creating public agency-run power plants. *Id.* On the other hand, the United States has acknowledged the threat of climate change and made commitments and taken steps to regulate GHG emissions from a comprehensive range of sources. *Id.*

In 1992, the United States Senate ratified the United Nations Framework Convention on Climate Change (UNFCCC). *Id.*; UNFCCC, May 9, 1992, 1771 U.N.T.S. 107, 169. This Convention, seeking to achieve "stabilization of greenhouse gas concentrations . . . at a level that would prevent dangerous anthropogenic interference with the climate system," committed the nation parties to "adopt national policies and take corresponding measures on the mitigation of climate change, by limiting its anthropogenic emissions of greenhouse gases and protecting and enhancing its greenhouse gas sinks and reservoirs." *Id.* at 169–71.

The United States has fulfilled this international commitment in numerous ways. First, Congress adopted the CAA, which requires the United States Environmental Protection Agency (EPA) to regulate "air pollutants" from a comprehensive range of sources, including (but not limited to) motor vehicles under Section 202, 42 U.S.C. § 7521(a)(1) (2012); new, modified and existing stationary sources such as power plants under Section 111, *id.* at §7411(b), (d), (f); and commercial aircrafts, *id.* at §7571(q). The Supreme Court confirmed that, under the CAA, the EPA can regulate GHGs as "air pollutants" from motor vehicles under Section 202(a), R. at 6; *Massachusetts v. EPA*, 549 U.S. 497, 532 (2007), as well as from stationary sources under Section 111. R. at 9; *Am. Elec. Power Co. v. Connecticut* (*AEP*), 564 U.S. 410, 424–26 (2011). In 2009, the EPA issued an "endangerment finding," recognizing that GHGs pose a threat to public health, and triggering the EPA's CAA duty to regulate GHGs from motor vehicles. R. at 6; 74 Fed. Reg. 66,496 (Dec. 15, 2009). The EPA subsequently regulated GHG emissions from new motor vehicles under the CAA, 75 Fed. Reg. 25,323, 25,329–30 (May 7, 2010); 77 Fed. Reg. 62,624, 62,638 (Oct. 15, 2012); medium-and heavy-duty trucks, 76 Fed. Reg. 57,106 (Sept. 15, 2011); 81 Fed. Reg. 73,478 (Oct. 25, 2016); new power plants pursuant to Section 111(b), 80 Fed. Reg. 64,510 (Oct. 23, 2015); and existing power plants pursuant to Section 111(d), Clean Power Plan, 80 Fed. Reg. 64,661 (Oct. 23, 2015). The EPA also issued regulations pertaining to GHG emissions from new and modified sources under the Act's Prevention of Significant Deterioration (PSD) Program, 42 U.S.C. §§ 7470–7479, and Title V permitting program, *Id.* At §§ 7661–7661f, 7602(j). 75 Fed. Reg. 31,514 (June 3, 2010). However, the

Supreme Court limited application of these PSD and Title V regulations to sources that would be regulated anyway due to their non-GHG pollutants. *See Util. Air Regulatory Grp. v. E.P.A.* (*UARG*), 573 U.S. ___, 134 S. Ct. 2427, 2440–41, 2449 (2014); R. at 7.

Showing the complexity and political nature involved in regulating GHG emissions and addressing global climate change while balancing the economic, health, and safety needs of the nation, some of these administrative actions are being rolled back under President Trump. For example, the EPA repealed the Clean Power Plan. R. at 8; 83 Fed. Reg. 44746 (Aug. 31, 2018), and announced its intent to repeal other regulations. In addition, President Trump announced his intent to withdraw from the Paris Agreement. R. at 7. Congress, however, has not changed the CAA's legislative scheme authorizing GHG regulation.

V. Legal Claims Asserted

Plaintiff Mana and ODIN brought suit against HexonGlobal under the Alien Tort Statute (ATS), which allows United States District Courts to hear disputes brought by aliens for violations of a treaty of the United States or a law of nations. 28 U.S.C. § 1350 (2012). Mana asserts that HexonGlobal's GHG emissions, induced by the sale and production of fossil fuels, violates the principle announced in the *Trail Smelter Arbitration*, which holds that emissions within one country may not cause substantial harm in another country. R. at 8.

Plaintiffs Flood and ODIN brought suit against the United States, asserting that the U.S. Constitution provides citizens a fundamental Due Process right to a healthy and stable climate system, actionable under a federal public trust doctrine. R. at 10. Although the public trust doctrine has not traditionally provided protections to the climate system or the atmosphere, Flood asserts the global climate system is common property the government has an obligation to protect. *Id.* Flood asserts the U.S. government failed to stop private parties from producing, selling, and combusting fossil fuels, and that this has infringed upon a potential fundamental right to a stable environment and violated the government's public trust obligations. *Id.*

VI. Procedural History

The District Court properly dismissed Plaintiffs' claims for failure to state a valid claim. R. at 10–11. Specifically, the District Court found that Mana's claim under the ATS is displaced by the Clean Air Act. R. at 10. The Court also dismissed Plaintiff Flood's claim, finding no legal basis for a Fifth Amendment right to government protection from atmospheric climate change under the public trust doctrine. R. at 11. Flood, Mana, and ODIN brought this appeal.

SUMMARY OF THE ARGUMENT

This court should affirm the District Court's holding that the CAA displaces Plaintiffs' claim brought under the ATS for HexonGlobal's alleged violation of the *Trail Smelter* Principle. Likewise, this court should follow the District Court in declining to create an unprecedented Due Process-based public trust claim to a stable climate system. Alternatively, this court should find such claims are nonjusticiable political questions. Finally, this court should refrain from drawing its holding any broader and risk barring all valid ATS claims against corporate defendants or valid *Trail Smelter* Principle claims. We address the issues in the order presented by this court.

First, the text, purpose, and history of the ATS permit claims against domestic corporations. The plain language of the ATS—which allows aliens to bring civil actions for torts committed in violation of international norms—does not bar any specific type of defendant, and corporations have long been liable for torts. Categorically barring domestic corporate defendants would undermine the original purpose of the ATS, which was to avoid international friction by ensuring that foreign plaintiffs have a remedy for international law violations committed on U.S. soil or waters. Domestic corporate defendants do not inherently increase the risk of international friction, while barring claims against them could abet institution-wide harms and might provoke foreign nations to hold the United States accountable. Every U.S. Circuit Court of Appeals, except for the Second Circuit, agrees domestic corporations may be held liable under the ATS, and this court should follow. While Mana's *specific claim* should not move

forward because it either has already been or should be addressed by the political branches, this court should not issue an unprecedented, sweeping rule barring all other ATS claims against corporations.

Second, the *Trail Smelter* Principle is a recognized norm of customary international law actionable under the ATS because it passes *Sosa*'s two-step inquiry. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004). The *Trail Smelter* Principle is a norm broadly accepted by civilized nations, as evidenced by its wide use in international treaties, declarations, conventions, and courts. Further, scholarly sources extensively refer to it as a customary international law. The Principle proscribes conduct—transboundary pollution that directly harms people or property in another State—with sufficient specificity to make it enforceable under the ATS, while ensuring the courts' floodgates will not be opened to claims of a different nature. Thus, the *Trail Smelter* Principle is actionable under the ATS for concrete harms of transboundary pollutants.

Third, the *Trail Smelter* Principle imposes obligations on non-governmental parties. The original arbitration required a private, Canadian smelter to make extensive operational changes. Therefore, this court should similarly allow claims brought under the ATS to impose obligations on non-state parties. However, even if this court were to decide the Principle is generally only enforceable against state actors, the court should allow liability against private parties acting under the color of state law, consistent with past precedent.

Fourth, although the *Trail Smelter* Principle may be a valid cause of action under the ATS in other situations, Mana's use of the Principle to address GHG emissions and climate change has been displaced by Congress with the CAA. Federal common law claims, such as those under the ATS, are displaced when a federal statute directly addresses the issue raised in the lawsuit. Mana's claims are indistinguishable from holdings of the Supreme Court and lower courts that the CAA authorizes the regulation of GHGs from mobile and stationary sources and therefore displaces federal common law claims seeking to address GHGs. Further, the CAA affords Mana multiple avenues to enforce emissions standards, including the Citizen Suit and "International Air Pollution" provisions, and petitioning for a rulemaking.

Fifth, Plaintiffs stretch the public trust doctrine—a common law doctrine preventing the monopolization of navigable waterways—far beyond what any court or legislature has ever recognized, by providing protections to the global climate system. The U.S. Supreme Court clearly established that the public trust doctrine does not provide a cause of action under federal law, and Plaintiffs' claim would require this court to invent a new fundamental right that dozens of courts emphatically rejected. Recognizing Plaintiffs' public trust doctrine claim would require this court to contravene Supreme Court precedent and impose on the federal government a retroactive fiduciary duty to act as a global trustee to the atmosphere and climate system.

Finally, even if Mana's claim is not fully displaced by the CAA, and even if Flood could bring a Due Process claim under the public trust doctrine, these claims present nonjusticiable political questions the court should leave to the politically accountable executive and legislative branches. While a federal court is the appropriate venue for typical ATS claims, Plaintiffs' claims stretch the ATS and *Trail Smelter* Principle beyond their scope to circumvent the legislative and executive branches' international and domestic policy authority. Similarly, Plaintiffs' claims would improperly use the public trust doctrine, a matter of state law, as a vehicle to set international climate change policy impacting every consumer of fossil fuels. Not only would these claims require this court to interfere with sensitive international policy decisions, crafting climate policy would require the court to make initial policy determinations on appropriate levels of GHGs and manage the standard for millions of people and corporations.

STANDARD OF REVIEW

Circuit courts review the grant of a motion to dismiss de novo. *Call Henry, Inc. v. United States*, 855 F.3d 1348, 1354 (Fed. Cir. 2017); *Davis v. Billington*, 681 F.3d 377, 379 (D.C. Cir. 2012). To survive a motion to dismiss, plaintiffs must plead "enough facts to state a claim that is plausible on its face" and that rises "above the speculative level." *Bell Atlantic Co. v. Twombly*, 550 U.S. 544, 555, 570 (2007).

ARGUMENT

I. Claims Against Domestic Corporations May Be Brought Under the ATS

The District Court asked, without answering, if a claim may be brought against a domestic corporation under the Alien Tort Statute (ATS). R. at 9. While there are other reasons Mana's claim should not move forward, *see infra* §§ IV, VI, HexonGlobal's corporate status is not one. As at least four justices on the Supreme Court agree, "[t]he text, history, and purpose of the ATS, as well as the long and consistent history of corporate liability in tort, confirm that tort claims for law-of-nations violations may be brought against [domestic] corporations under the ATS." *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1419 (2018) (Sotomayer, J., dissenting).[1]

The ATS provides, in full, that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350 (2012). As the District Court noted, R. at 8, the Supreme Court has placed some limits on ATS claims with regard to the allegedly violative conduct and who may be a defendant. First, a claim must allege a violation of an international "norm that is specific, universal, and obligatory." *Sosa*, 542 U.S. at 732. Second, adjudicating the claim must be an "appropriate" exercise of judicial discretion in light of the "serious separation-of-powers and foreign relations concerns" implicated by the ATS. *Jesner*, 138 S. Ct. at 1403 (Kennedy, J., majority) (holding, under this second test, that it would be "inappropriate" to extend ATS liability to *foreign* corporations, due to foreign relations concerns) (citing *Sosa,* 542 U.S. at 729).

We apply the first test to Mana's *Trail Smelter* claim in Sections II and III, *infra*, to examine what "conduct violates the law of nations" and whether the *specific norm* at issue requires that the "conduct must be undertaken by a particular type of

[1]The *Jesner* majority only barred ATS claims against *foreign* corporations; neither the majority nor plurality decided if the ATS imposes liability on corporations generally. 138 S. Ct. at 402.

actor." *Jesner*, 138 S. Ct. at 1436 (Sotomayor, J., dissenting). However, this "norm-specific first step is inapposite to the categorical question [of] whether corporations may be sued under the ATS as a general matter." *Id.* at 1420. Rather, this court's threshold question of whether the ATS allows claims against domestic corporations may be answered in the affirmative under the second ATS test, because "nothing about the [domestic] corporate form in itself raises foreign policy concerns" that would require barring all claims against domestic corporations. *Id.* at 1428. Although resolution of Mana's *specific* claims must be to be left to the political branches, *see* §§IV, VI, a sweeping ban on all claims against domestic corporations contravene the text, purpose, and history of the ATS.

A. The text of the ATS does not limit the type of available defendant

"It is axiomatic that '[t]he starting point in every case involving construction of a statute is the language itself.'" *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 685 (1985) (citation omitted). First, the plain language of the ATS "provides no express exception for corporations." *Romero v. Drummond Co.*, 552 F.3d 1303, 1315 (11th Cir. 2008). In fact, the ATS "does not distinguish among classes of defendants" at all. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 438 (1989). By contrast, the ATS does expressly limit the class of permissible *plaintiffs* (to aliens). "That silence as to defendants cannot be presumed to be inadvertent." *Jesner*, 138 S. Ct. at 1426 (Sotomayor, J., dissenting). "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (citation omitted). Therefore, it can be inferred that Congress intentionally limited what *plaintiffs* may bring an ATS claim and intentionally chose not to limit range of available *defendants*.

Second, the ATS allows aliens to bring "a civil action" for a "tort." 28 U.S.C. § 1350. When Congress used the term of art "tort," "it presumably kn[ew] and adopt[ed] the cluster of ideas that were attached." *Morissette v. United States*, 342 U.S. 246, 263 (1952). "Corporations have long been held liable in tort under the federal

common law." *Jesner*, 138 S. Ct. at 1425 (Sotomayor, J., dissenting) (citing *Phila., Wilminton, & Balt. R.R. v. Quigley*, 62 U.S. 202 (1859). In sum, while the specific international norm issue in an ATS claim may only allow claims against certain actors, the statute itself does not create such limitations.

B. The purpose of the ATS requires that domestic corporations be held liable

"The ATS was intended to promote harmony in international relations by ensuring foreign plaintiffs a remedy for international-law violations in circumstances where the absence of such a remedy might provoke foreign nations to hold the United States accountable." *Jesner*, 138 S. Ct. at 1406 (Kennedy, J., majority). Given this purpose and the "foreign-policy and separation-of-powers concerns inherent in ATS litigation," the Supreme Court has cautioned that ATS claims should be allowed only in "narrow circumstances" and "must be 'subject to vigilant doorkeeping.'" *Id.* at 1398 (quoting *Sosa,* 542 U.S. at 729). Closing the door entirely, however, would undermine Congress' intent in passing the ATS. Courts should only bar a claim when allowing it to proceed will cause or has "caused significant diplomatic tensions." *Id.* at 1406.

In *Jesner*, the Court held that "*foreign* corporations may not be defendants in suits brought under the ATS," in a case where claims were brought against Arab Bank for allegedly financing terrorism. *Id.* at 1407 (emphasis added). Because Arab Bank is a "major Jordanian financial institution," and both Jordan and Arab Bank are counterterrorism allies of the United States, the prolonged litigation "caused significant diplomatic tensions." *Id.* at 1406. Considering this case to be demonstrative of a general axiom that "foreign corporate defendants create unique problems" in foreign relations, the Court explained it was necessary to set a categorical bar against judicially allowing foreign corporations to be defendants in ATS suits. *Id.* at 1407.

In contrast to the *Jesner* Court's concerns that imposing liability on *foreign* corporations provokes foreign policy consequences, "nothing about the [domestic] corporate form in itself raises foreign policy concerns" to a level that requires the court to create a new prohibition on claims against domestic corporations. *Jesner*, 138 S. Ct. at 1428 (Sotomayer, J., dissenting). Rather, refusing to provide a remedy against a corporate defendant

could actually *raise* the possibility of international friction—the precise situation the ATS was originally designed to avoid. For example, if a U.S. corporation engaged in piracy in U.S. waters or trafficked foreign individuals on U.S. soil, allowing only *individual* employees to be held liable would shirk "accountability for the institution-wide [violation of an international norm]. Absent a corporate sanction, that harm will persist unremedied." *Id.* at 1435. Domestic corporate accountability is therefore necessary under the ATS for the same reasons it is necessary generally—to cut-off institutionally supported and widespread injustices. There is no reason to conclude that, in enacting the ATS, Congress thought it was necessary to provide foreign plaintiffs with a piecemeal remedy for comparatively small harms caused by individuals, but not for larger harms caused by corporations. Creating a categorical bar against all domestic corporate liability would be using "a sledgehammer to crack a nut." *Id.* at 1431. Instead, courts should ensure ATS claims adhere to the intent of the First Congress by enforcing the presumption against extraterritoriality applied in *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 124–25 (2013), and examining on a claim-by-claim basis whether the provision of a remedy would create international friction.

C. Judicial precedent maintains that corporations may be held liable

Every U.S. Circuit Court of Appeals except for the Second Circuit has allowed corporations to be held liable under the ATS.[2] In addition, the Supreme Court's failure to categorically bar all corporate liability in the two occasions it expressly considered the question may indicate the Court's agreement that it would be

[2] *See Romero*, 552 F.3d at 1315 ("The text of the Alien Tort Statute provides no express exception for corporations"); *Beanal v. Freeport–McMoran, Inc.,* 197 F.3d 161, 163 (5th Cir.1999) (implicitly allowing ATS jurisdiction over a corporation but ultimately dismissing the claim for failure to plead sufficient facts); *Al Shimari v. CACI Premier Tech.*, Inc., 758 F.3d 516, 530–31 (4th Cir. 2014) (holding that an ATS claim against a corporate defendant sufficiently "'touch[ed] and concern[ed]' the territory of the United States" base partially, but not entirely, on the defendant's "status as a United States corporation")*; Flomo v. Firestone Nat. Rubber Co.,* 643 F.3d 1013, 1017–1021 (7th Cir. 2011); *Doe I v. Nestle USA, Inc.,* 766 F.3d 1013, 1020–1022 (9th Cir. 2014); *Doe VIII v. Exxon Mobil Corp.,* 654 F.3d 11, 40–55 (D.C. Cir. 2011), *vacated on other grounds*, 527 Fed.Appx. 7 (D.C. Cir. 2013)).

inappropriate to draw a bright-line rule against domestic corporate liability under the ATS. *See Kiobel*, 569 U.S. at 114 (granting certiorari on the question of corporate liability under the ATS, but deciding the case based on the presumption against extraterritoriality); *see also Jesner*, 138 S. Ct. at 1394 (granting certiorari on the question of whether the ATS "categorically forecloses corporate liability," but holding more *Al Shimari v. CACI Premier Tech.*, Inc., 758 F.3d 516, 530–31 (4th Cir. 2014) (holding that an ATS claim against a corporate defendant sufficiently "'touch[ed] and concern[ed]' the territory of the United States" base partially, but not entirely, on the defendant's "status as a United States corporation") narrowly that the ATS bars *foreign* corporate liability). Moreover, the one federal court to expressly consider the reach of *Jesner* held that domestic corporate liability "fully aligns with the original goals of the ATS: to provide a federal forum for tort suits by aliens against Americans for international law violations," and did not risk "offend[ing] any foreign government." *Al Shimari*, 320 F. Supp. 3d 781, 787 (E.D. Va. 2018). Finally, "Congress' failure to disturb [this] consistent judicial interpretation," of allowing corporate liability under the ATS "may provide some indication that Congress at least acquiesces in, and apparently affirms, that [interpretation]." *Monessen Southwestern R. Co. v. Morgan*, 486 U.S. 330, 338 (1988) (citation omitted). In sum, the judiciary's consistent interpretation, the purpose of the ATS to avoid *foreign* policy concerns, and the statute's silence on allowable defendants all counsel against categorically barring *domestic* corporate defendants under the ATS.

II. The *Trail Smelter* Principal is a Recognized Principle of Customary International Law Enforceable Under the Alien Tort Statute

As a general manner, the *Trail Smelter* Principle is actionable under the Alien Tort Statute as a "Law of Nations" because it is: (1) a norm widely accepted by civilized nations; and (2) defined with a specificity comparable to the three specific offenses recognized in 1789, as mandated by the Supreme Court in *Sosa*. 542 U.S. at 725. While there were only "three principle offenses against the law of nations" when the ATS was passed, the Court

has made clear that other causes of action can be brought so long as they are "specific, universal, and obligatory," *Id.* at 726, 732 (citation omitted), and the court uses "judgment about the practical consequences of making [new] cause[s] available to litigants in the federal courts." *Id.* at 732–33.

The *Trail Smelter* Principle is derived from the *Trail Smelter Arbitration*, an international conflict between Washington State and Canada. *Trail Smelter Arbitration*, 3 U.N.R.I.A.A. 1965 (1941). A smelter in Canada emitted harmful air pollutants, which traveled fourteen miles south to Washington and harmed agriculture. *Id.* The panel announced that "no state has the right to use or permit the use of its territory in such a manner to cause injury by fumes in or to the territory of another or the properties or persons therein." *Id.* As detailed below, this Principle is actionable as a law of nations under the ATS because it is widely accepted by civilized nations in a variety of domestic and international forums, and it proscribes a specific and definite harm.

A. The *Trail Smelter* Principle is widely accepted by civilized nations as an obligatory norm of international law

When deciding whether a customary norm exists under the ATS, courts "gauge[] [claims] against the current state of international law, looking to those sources [they] have long, albeit cautiously, recognized." *Sosa*, 542 U.S. at 733. Customary international law is law which is "the general and consistent practice of states that is followed out of a sense of legal obligation." Restatement (Third) of Foreign Relations Law of the United States §§ 102, 103 (1987). *See also Sosa*, 542 U.S. at 724 (stating courts should look at "the customs and usages of civilized nations." (quoting *The Paquete Habana*, 175 U.S. 677, 700 (1900)). Courts have found principles to be customary international law when embraced in international courts and tribunals, scholarly writings, and international agreements, among other sources. *See Filártiga v. Peña-* Irala, 630 F.2d 876, 880 (2d Cir. 1980); *see also* Statute of the International Court of Justice, art. 38(1), June 26, 1945, 59 Stat. 1055, 1060, T.S. No. 993 (listing such sources as "competent proof"); *see also* Restatement (Third) of the Foreign Relations Law of the United States, §103 (stating these sources should be given

"substantial weight"). The *Trail Smelter* Principle is found in all of these sources, therefore satisfying *Sosa's* first requirement.

The principle announced in *Trail Smelter* has been repeated and agreed upon in several international contexts. Most notably, it was adopted by the Declaration of the 1972 Stockholm Conference on the Human Environment, under Principle 21, which was endorsed by 113 nations, including the United States. 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). The *Trail Smelter* Principle was also adopted by the Rio Declaration on Environment and Development in Principle 2, which was endorsed by 178 nations, including the United States. U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development*, 3, U.N. Doc. A/CONF.151/26/Rev.1 (Vol.I) (Aug. 12, 1992). This principle was also repeated in the 2002 World Summit on Sustainable Development[3], the 1979 Geneva Convention on Long Range Transnational Air Pollution[4], the 1992 U.N. Framework Convention on Climate Change[5], and the U.N. Convention on Biological Diversity[6]. The International Court of Justice (ICJ) also found the *Trail Smelter* Principle constitutes a "general obligation of states." Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 ICJ Rep. 226, 242, para. 29 (July 8). Further, the Principle has been reflected in scholarly works too numerous to quantify.[7] This court should find the *Trail Smelter*

3 2002 World Summit on Sustainable Development, *Report of the World Summit on Sustainable Development*, 29, U.N. Doc A/CONF.199/20/Rev.1 (Aug. 26– Sept. 4, 2002).

4 Convention on Long-Range Transboundary Air Pollution, Nov. 13, 1979, T.I.A.S. 10541, 18 I.L.M. 1442.

5 U.N. Conference on Environment and Development: Framework Convention on Climate Change, May 9, 1992, 31 I.L.M. 849.

6 U.N. Conference on Environment and Development: Convention on Biological Diversity, June 5, 1992, 31 I.L.M. 818.

7 *See, e.g.* Alexandre Kiss & Dinah Shelton, International Environmental Law 107 (1991) (describing the Trail Smelter decision to have "laid out the foundations of international environmental law"); Rudiger Wolfrum, *Purposes and Principles of International Environmental Law*, 33 Ger. Y.B. Int'l L. 308, 309 (1990) ("There is agreement in international law that, in general, transfrontier damage is prohibited. This prohibition has essentially been developed under customary international law."); Pierre-Marie Dupuy, *Overview of the Existing Customary Legal Regime Regarding International Pollution*, in International Law and Pollution 63 (Daniel B. Magraw Ed., 1991) (stating the obligation to prevent transboundary pollution is "well established").

Principle meets *Sosa*'s first requirement because it has been widely embraced by the United Nations, the International Court of Justice, and various scholarly works.

B. The conduct proscribed by the *Trail Smelter* Principle is defined with sufficient specificity

When the ATS was adopted, the three recognized offenses were piracy, violations of safe conduct, and offenses against ambassadors. *Sosa*, 542 U.S. at 724. However, the Supreme Court made clear that other Law of Nations claims may be asserted, so long as they are "defined with a specificity comparable to the features of the 18th-century paradigms," *id.* at 725, so as not to open the floodgates to litigation for claims of a different nature. *Id.* at 732–33 (the "determination of whether a norm is sufficiently definite" must include consideration of practical consequences).

International norms found to be defined with sufficient specificity include: state- sanctioned torture, *Filártiga,* 630 F.2d 876; forced labor, *Doe v. Unocal Corp.*, 963 F. Supp. 880, 883 (C.D. Cal. 1997), *aff'd in part, rev'd in part* by 395 F.3d 932 (9th Cir. 2002); aerial pesticide fumigation, *Arias v. Dyncorp*, 517 F. Supp. 2d 221 (D.D.C. 2007); aiding and abetting liability, *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007); nonconsensual medical experimentation, *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163 (2d Cir. 2009); and extrajudicial killings. *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 36 (D.D.C. 2010). On the other hand, offenses found not to be specific enough to be enforced under the ATS include: the use of herbicides in wartime, *In re Agent Orange Product Liability Litigation*, 373 F. Supp. 2d 7, 43 (E.D.N.Y. 2005); and fraud. *IIT v. Vencap, Ltd.*, 519 F.2d 1001 (1975) (abrogated on other grounds).

The *Trail Smelter* Principle prohibits a specific offense—transboundary pollution that directly harms people or property in another State. It closely resembles a common law nuisance claim, which courts routinely adjudicate. While a norm must be "specific" and "definable" in accordance with *Sosa*, its precise contours need not be universally agreed upon. For example, in *Sosa*, the Court cited *United States v. Smith* to demonstrate what level of specificity piracy is defined within the international context. *Sosa*, 542 U.S. at 732 (citing *United States v. Smith*, 18 U.S. 153 (1820)). In *Smith*, the Court acknowledged that while piracy is defined in

a variety of ways, there are certain core aspects of the principle that are universally understood. *Smith*, 18 U.S. at 160–62. Similarly, while the precise contours of the *Trail Smelter* Principle may differ based on a court's interpretation, the core aspects of the principle remain clear, and specifically proscribe certain harmful and direct transboundary pollution.

Although two courts found principles related to *Trail Smelter* to be defined with insufficient specificity, these courts failed to scrutinize whether the *core aspects* of the principles were defined with the required specificity under *Sosa. See Amlon Metals v. FMC Corp.*, 775 F. Supp. 668, 670 (S.D.N.Y. 1991); *Beanal*, 197 F.3d at 166–67. By misapplying the standard, these courts failed to recognize that the *Trail Smelter* Principle does proscribe the specific conduct of direct transboundary pollution which causes concrete harms. Therefore, this court should hold the *Trail Smelter* Principle is actionable under the ATS as a customary international law. However, as explained in section VI, *infra,* Plaintiffs' use of the principle for the indirect harms of global climate change stretch the doctrine too far.

III. *Trail Smelter* Imposes Obligations on Non-State Actors

This court should recognize that the *Trail Smelter* Principle imposes obligations on non-state actors who emit harmful pollutants that cause concrete damage in another country. When recognizing an international customary law norm under the ATS, a court must consider "whether [the norm] extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual." *Sosa*, 542 U.S. at 732 n.20. As an initial matter, customary international law does not sweepingly foreclose imposing liability on non-state actors. *See Kadic v. Karadzic*, 70 F.3d 232, 250 (2d Cir. 1995) (finding genocide violates international law, regardless of whether undertaken by state or non- state actor).

While the *Trail Smelter* Principle frames liability on sovereigns, the original arbitration required the private smelter to change its internal smelter operations, a very costly endeavor. This court should not foreclose this type of redress in the future. Furthermore, even if this court were to find that the Principle does

not generally impose obligation on non-state actors, it should hold that obligations may be imposed upon private actors operating under the color of law.

A. The *Trail Smelter Arbitration* imposed obligations on the privately-owned smelter

Although liability in the *Trail Smelter Arbitration* was framed in terms of the "state," the arbitration imposed obligations on the private Canadian smelter by requiring it to make operational changes that would reduce its total emissions. *See Trail Smelter Arbitration* at 1977 ("Nothing shall relieve the Smelter from the duty of reducing the maximum Sulphur emission below the amount permissible."). These required operational changes cost the smelter nearly $20 million. Catherine Prunella, *An International Environmental Law Case Study: The Trail Smelter Arbitration*, INTERNATIONAL POLLUTION ISSUES (2014). Therefore, the *Trail Smelter* Principle leaves open the door to imposing obligations on private actors.

Although few other courts have considered the question of private liability under ATS claims using transboundary environmental law principles and customary international law, at least one court did consider the issue and found there were no obvious policy reasons against imposing liability on private parties for violations of such international law norms. *In re Agent Orange*. 373 F. Supp. 2d at 58; *but see Beanal v. Freeport-McMoRan, Inc.*, 969 F. Supp. 362 (E.D. La. 1997) (finding that a private corporation could not be bound by Principle 21 of the Stockholm Declaration, and instead "could be bound to such principles by treaty [only]" or when acting under the color of law.). Even if this court is unwilling to recognize that the *Trail Smelter* Principle applies directly to private actors in all situations, the court should at least find such liability is allowed in *some* situations, including where private entities act under the color of law.

B. *Trail Smelter* Principle imposes obligations on private parties acting under authority of a state

It is a long-standing precedent that private actors may be held liable for international customary laws when they act under color

of law. *See Beanal*, 969 F. Supp. at 376 ("[A] corporation found to be a state actor can be held responsible for human rights abuses which violate international customary law."). Both *Beanal* and *Arias* considered claims under transboundary pollution principles, and implied that the *Trail Smelter* Principle imposes liability on private actors who operate under the color of law. *Id.* at 377 (applying the color of law test to private defendant); *Arias*, 517 F. Supp. 2d at 227–28 (same). This court should hold consistent with those cases, and *In re Agent Orange,* and find the *Trail Smelter* Principle imposes obligations, at least in some instances, on private parties.

IV. The CAA Displaces Mana's *Trail Smelter* Claim Because the Supreme Court has Already Held the Act 'Speaks Directly' to the Issue of GHG Emissions

The District Court correctly ruled that the CAA displaces Mana's action under the ATS for alleged violation of the *Trail Smelter* Principle. R. at 9. ATS claims are considered "claims under federal common law." *Sosa*, 542 U.S. at 732. "Federal common law is subject to the paramount authority of Congress." *Native Vill. of Kivalina v. ExxonMobil Corp.* (*Kivalina*), 696 F.3d 849, 856 (9th Cir. 2012) (citing *New Jersey v. New York,* 283 U.S. 336 (1931). Therefore, Congress may displace a federal common law claim when it adopts a statute that implicitly or explicitly "speaks directly to the question at issue." *AEP*, 564 U.S. at 424 (citation and quotations omitted). The court here should follow Supreme Court precedent, *see Id.*, and find Mana's claims are displaced by the CAA because: (A) greenhouse gas emissions are the thrust of the "*particular* issue" raised, *Oneida Cty., N.Y. v. Oneida Indian Nation of New York State*, 470 U.S. 226, 237 (1985) (citation omitted); (B) the "scope of the legislation and. . .scheme established by Congress" comprehensively address greenhouse gas emissions, *Kivalina*, 696 F.3d at 859 (Pro, J., concurring) (citing *City of Milwaukee v. Illinois* ("Milwaukee II"), 451 U.S. 304, 315 n. 8 (1981); and (C) the "reach of remedial provisions" in the CAA leave no room for common law remedies. *AEP*, 564 U.S. at 425 (citing *Oneida Cty.*, 470 U.S. at 237–239).

A. The "particular issue" raised by Mana is GHG-

induced climate change, which the Supreme Court held is displaced by the CAA

"[T]he applicability of displacement is an issue-specific inquiry." *Kivalina*, 696 F.3d at 856. Courts must examine the scope of the "question at issue" in the claim. *AEP*, 564 U.S. at 424. The thrust of Mana's claim is that GHG emissions from the global sales and combustion of HexonGlobal's fossil fuel products cause climate change and sea level rise, which harm Mana's home and health, and the entire island of A'Na Atu. R. at 4–5. Mana claims this violates the *Trail Smelter* Principle, "which holds that emissions. . .within the territory of one nation must not be allowed to cause substantial harms in the territory of other nations." R. at 8.

Mana's claim is virtually indistinguishable from the common law nuisance claim in *Kivalina*, which sought damages based on the "conten[tion] that GHGs released by the Energy Producers [oil, energy, and utility companies] cross state lines and thereby contribute to the global warming that threatens the continued existence of its village." *Kivalina*, 696 F.3d at 855. Mana's claim also bears remarkable similarities to claims in *AEP* seeking abatement of GHG emissions from the defendants' fossil-fuel fired power plants, which allegedly contributed to global warming that, in turn, risked harm to infrastructure, health, and public lands. *AEP*, 564 U.S. at 418–19. In each case, the Ninth Circuit and Supreme Court held, respectively, that such common law nuisance claims based on GHG emissions and climate change were displaced by the CAA. *See Kivalina*, 696 F.3d at 854; *see also AEP*, 564 U.S. at 424.

1. Emissions, not sales or production, are the heart of Mana's claim

To the extent Mana seeks to distinguish this case from *AEP* and *Kivalina* by fashioning the claim as one based on HexonGlobal's *production* or *sales* of fossil fuels, R. at 9, rather than emissions, such a maneuver has already been attempted and failed in at least two district courts. See *City of Oakland v. BP P.L.C.*, 325 F. Supp. 3d 1017, 1024 (N.D. Cal. 2018) (rejecting Oakland's assertion that *AEP* and *Kivalina* did not apply to a nuisance claim that alleged harm from the *sale* of fossil fuels,

reasoning the "harm alleged by our plaintiffs remains a harm caused by fossil fuel emissions, not the mere extraction or even sale of fossil fuels"); *see also City of New York v. BP P.L.C.*, 325 F. Supp. 3d 466, 471–72 (S.D.N.Y. 2018). "If an oil producer cannot be sued under the federal common law for their own emissions, *a fortiori* they cannot be sued for someone else's." *Oakland*, 325 F. Supp. 3d at 1024. Therefore, because Mana alleges injuries from climate change caused by the emissions of fossil fuel combustion, not from fossil fuels on their own, *AEP* applies and this court should hold the CAA displaces Mana's claim.

2. *International* emissions are beyond the reach of U.S. courts

To the extent Mana aims to distinguish this case from *AEP* and *Kivalina* by framing the claim as based on HexonGlobal's "global" actions occurring *outside of the United States*, R. 5, such a tactic has already been attempted and failed in at least two district courts based on the presumption against extraterritoriality, which "constrains courts considering common law claims brought under the Alien Tort Statute" and bars claims that "reach[] conduct within the territory of another sovereign." *City of Oakland*, 325 F. Supp. 3d at 1025 (quoting *Kiobel*, 569 U.S. at 117; see also *City of New York*, 325 F. Supp. 3d at 475. Alternatively, to the extent that Mana's claim focuses on *domestic* emissions resulting in international harm, such issues are addressed and displaced by the CAA, as explained below.

B. The scope of the CAA comprehensively addresses GHG emissions from a spectrum of sources, displacing Mana's common law claims

A federal common law claim is displaced if Congress provides "a sufficient legislative solution to the particular [issue] to warrant a conclusion that [the] legislation has occupied the field to the exclusion of federal common law.'" *Kivalina*, 696 F.3d at 856 (quoting *Michigan v. U.S. Army Corps of Eng'rs*, 667 F.3d 765, 777 (7th Cir. 2011)). But, "[l]egislative displacement of federal common law does not require the 'same sort of evidence of a clear and manifest [congressional] purpose' demanded for preemption of state law." *AEP*, 564 U.S. at 423 (citing *Milwaukee II*, 451 U.S. at

317). Further, "Congressional action, not executive action, is the touchstone of displacement analysis." *Kivalina*, 696 F.3d at 858 (citing *AEP*, 564 U.S. at 424).

1. The CAA Directly and Comprehensively Addresses Emissions from Stationary and Mobile Sources, Regardless of the Status of Regulations

The CAA directs the EPA to regulate "air pollutants" from a comprehensive range of sources, including but not limited to: motor vehicles, 42 U.S.C. §7521(a)(1) (2012); new, modified, and existing stationary sources (including power plants), *Id.* at §7411(b), (d), (f); and commercial aircrafts. *Id.* at §7571(q). The Supreme Court held that GHGs fit "well within the Clean Air Act's capacious definition of 'air pollutant,'" and therefore "the EPA has statutory authority to regulate greenhouse gas emissions from new motor vehicles." *Massachusetts,* 549 U.S. at 532. The Court subsequently and unanimously held in *AEP* that the EPA also has the authority to regulate GHGs from new, modified, and existing stationary sources under CAA Section 111, and such authority displaces federal common law nuisance claims related to GHG emissions from power plants. 564 U.S. at 424–26. The EPA subsequently regulated GHG emissions from a variety of mobile and stationary sources. R. at 6–7. Although the Court in *UARG* limited (but did not bar) EPA's authority to regulate GHGs under some provisions of the CAA, its narrow holding left *Massachusetts* and *AEP* as good law, and the EPA maintains authority delegated by Congress to regulate GHG emissions from a spectrum of mobile and stationary sources. *See UARG*, 134 S. Ct. at 2440–41, 2449; CONG. RES. SERV., R44807, U.S. CLIMATE CHANGE REGULATION AND LITIGATION: SELECTED LEGAL ISSUES, 22 (2017). Therefore, cases relying on *AEP* in holding that the CAA displaces federal common law claims for harms caused by GHGs also remain good law. *See Kivalina*, 696 F.3d at 855 (citing *AEP*, 564 U.S. at 424); *City of Oakland*, 325 F. Supp. 3d at 1024; *City of New York*, 325 F. Supp. 3d at 471–72.

2. "Congressional action" of the CAA displaces Mana's claims, regardless of the status of

EPA's regulations

While the CAA's implementing regulations may be truncated by the regulatory rollbacks of the Trump administration, *see* R. at 7, this is not relevant to a court's determination of displacement. "The critical point is that Congress delegated to EPA the decision whether and how to regulate carbon-dioxide emissions. . .the delegation is what displaces federal common law." *AEP*, 564 U.S. at 426. The Court in *AEP* held that plaintiffs' nuisance claims related to GHG emissions were displaced by the CAA regardless of whether the "EPA actually exercises its regulatory authority." *Id.* at 425–26. Therefore, in our case, unless Congress rescinds its delegation of authority to EPA to regulate GHGs as air pollutants, Mana's claims are displaced by the CAA under *AEP*, regardless of the status of EPA's regulations.

C. The CAA's remedial provisions allow Mana to enforce or seek to change GHG standards set pursuant to the CAA, leaving no room for common law

A third factor courts consider in determining if federal common law is displaced is the statute's "reach of remedial provisions" or enforcement mechanisms. *AEP*, 564 U.S. at 425. However, "the *type* of remedy asserted is not relevant to the applicability of the doctrine of displacement. . .if a cause of action is displaced, displacement is extended to all remedies." *Kivalina*, 696 F.3d at 857 (emphasis added) (holding that a federal common law nuisance claim for damages was displaced, when the Supreme Court had already held such claims for injunctive relief were displaced); *accord Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1, 21–22 (1981). Common law claims are displaced when the "statutory scheme established by Congress provides a forum for the pursuit of [plaintiff's] claims before expert agencies" or in courts. *Milwaukee II*, 451 U.S. at 326.

In our case, Mana's claims are displaced because the CAA affords "multiple avenues for enforcement" and "provides a means to seek limits on emissions of carbon dioxide. . .the same relief the plaintiffs seek by invoking federal common law." *AEP,* 564 U.S. at 425. In addition to government-led administrative, civil, and criminal enforcement provisions, 42 U.S.C. §§7411(c), 7411(d),

7413, 7414, the CAA includes a "Citizen Suit" provision that permits any person to bring a private, civil enforcement action against a corporation, government entity, or individual in federal court if states or the EPA fail to enforce emissions standards against regulated sources. *AEP,* 564 U.S. at 425 (citing 42 U.S.C. § 7604(a)). Further, states and private parties may petition for a rulemaking "if the EPA does not set emissions limits for a particular pollutant or source of pollution." *AEP,* 564 U.S. at 425 (citing 42 U.S.C. § 7607(b)(1)). In addition, Mana may engage the government of A'Na Atu to utilize the CAA's "International Air Pollution" provision, which requires the EPA and states take remedial action when "air pollutant[s]. . . emitted within the United States. . .endanger public health or welfare in a foreign country." 42 U.S.C. § 7415(a). This provision requires states to "prevent or eliminate the endangerment" and invite affected foreign nations to participate in any associated public hearing. *Id. at* §7415(b). The combination of the CAA's Citizen Suit, petition for rulemaking, and International Air Pollution provisions afford Mana the opportunity to impose GHG emission limits.

In sum, the CAA displaces Mana's *Trail Smelter* claim because Mana seeks to redress harm caused by GHG emissions, and the Supreme Court, Ninth Circuit, and multiple district courts have concluded the Act displaces such claims based on the its comprehensive scheme addressing emissions and its array of mechanisms to enforce or change emissions standards.

V. Plaintiffs Fail to State a Valid Claim Under the Public Trust Doctrine and Due Process Clause of the United States Constitution

This court should uphold the District Court's dismissal of Plaintiffs' claim under the public trust doctrine and the Due Process clause of the United States Constitution. These doctrines do not provide relief to Plaintiffs because: (A) the public trust doctrine does not provide protections to the global climate system; and (B) there is no fundamental right to a healthy and stable climate.

A. The public trust doctrine does not provide a federal cause of action nor provide relief for Plaintiffs'

alleged climate-induced injuries

The District Court's dismissal of Plaintiffs' claim under the public trust doctrine should be upheld because the scope of the public trust doctrine does not provide federal protections, nor protections to the global climate system. The common law public trust doctrine does not provide protections for resources outside of navigable rivers and tidal waters. *See Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 479 (1988); *Ill. Cent. R.R. Co. v. State of Illinois*, 146 U.S. 387, 452 (1892). Moreover, the public trust doctrine does not allow suits against the federal government because "the public trust doctrine remains a matter of state law." *PPL Mont., LLC v. Montana*, 565 U.S. 576, 603 (2012). Therefore, any relief sought by Plaintiffs under the public trust doctrine would require this court to take two unprecedented steps by creating a federal public trust doctrine and expanding the doctrine beyond the scope allowed by any state or federal court.

1. The public trust doctrine applies to waterways, not the climate system

The public trust doctrine is a long-standing doctrine with roots firmly in ancient common law. *See PPL Montana*, 565 U.S. at 603. However, the American version of doctrine, ever since it was announced in *Illinois Central,* has been used exclusively to protect waterways and their surrounding banks and shores from monopolization by private parties and has never been extended to provide protections to the atmosphere or global climate system. 146 U.S. 387; *see, e.g. Alec L. v. Jackson*, 863 F. Supp. 2d 11, 13 (D.D.C. 2012), *aff'd sub nom. Alec L. ex rel. Loorz v. McCarthy*, 561 F. App'x 7 (D.C. Cir. 2014) (per curium) ("[Plaintiffs] have cited no cases, and the Court is aware of none, that have expanded the doctrine to protect the atmosphere."); *Aronow v. State*, 2012 WL 4476642 (Minn. Ct. App. 2012) (same). Under the American common law public trust doctrine, states are trustees to the public to ensure submerged lands under navigable and tidal waters are not disposed of in a way that would cause "substantial impairment of the interest of the public in the waters" in navigation, fishing, or commerce. *Ill. Cent. R.R. Co.*, 146 U.S. at 435. Here, in asking the court to provide global atmospheric protections, Plaintiffs are asking the court to extend the doctrine far beyond what any court

has ever recognized. Therefore, this court should uphold the District Court's dismissal of the claim.

2. The public doctrine does not provide a federal cause of action

Plaintiffs' public trust claim is also legally deficient because it fails to bring a valid *federal* cause of action, since the public trust doctrine is purely a matter of *state* law. *PPL Montana*, 565 U.S. 576, 603–04. This court should follow the lead of the D.C. Circuit, which dismissed a public trust claim, almost identical to Plaintiffs', for lack of subject matter jurisdiction because the doctrine is not a matter of federal law. *Alec L. ex rel. Loorz*, 561 Fed. App'x at 8 (citing *PPL Montana*, 566 U.S. at 603–04); *see also W. Indian Co. v. Gov't of Virgin Islands*, 844 F.2d 1007, 1019 (3d Cir. 1988). Plaintiffs' federal question claim would require this court to impose public trust duties on the federal government, an action no court has ever recognized in a final judgement. *See Alec L.*, 863 F. Supp. 2d at 13. Although, *Juliana v. United States*, 217 F. Supp. 3d 1224 (D. Or. 2016), allowed a similar claim to survive a motion to dismiss, the District Court in our case properly chose to not follow that unprecedented, singular, initial ruling of the District Court for the District of Oregon. R. at 11. As the overwhelming weight of legal precedent counsels against imposing such new obligations on the federal government, this court should uphold the District Court's dismissal as a matter of law.

B. There is no constitutional right to protection of a healthy or stable climate

Even if Plaintiffs could use the public trust doctrine as a cause of action to bring their substantive Due Process claim, there is not a constitutional right as claimed by Plaintiffs. First, Plaintiffs are asking this court to go where no court has gone before by announcing a fundamental right to stable and healthy climate system under the Due Process Clause of the Fifth Amendment of the United States Constitution. Second, the Due Process Clause does not impose an affirmative duty on the government to protect against private harm, even when their actions substantially increase risk of harm. *See DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189 (1989).

1. History and tradition do not provide a right to a stable climate

While cases like Plaintiffs' claim have been heard by courts across the nation, no federal court has ever found that Americans have a constitutional right to be protected from general environmental harm. In fact, federal courts have consistently rebuffed similar attempts to provide constitutional protections for the climate or a "pollution-free environment." *Nat'l Sea Clammers Ass'n v. City of New York*, 616 F.2d 1222, 1237–38 (3d. Cir. 1980), *dismissed and vacated in part on other grounds* 453 U.S. 1 (1981).[8]

In order for Plaintiffs' claim to succeed, this court would have to go against all other courts and announce a new fundamental right to government protection of a healthy and stable climate. The steady refusal of courts to entertain substantive Due Process claims for climate or environmental protections speaks to the judiciary's cautious approach in announcing new fundamental Due Process rights. The Supreme Court insists any proposed fundamental Due Process right must be "rooted in history and tradition," *Michael H. v. Gerald D.*, 491 U.S. 110, 123 (1989), and the Court uses the "utmost care when [they] are asked to break new ground in [the] field." *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997); *Reno v. Flores*, 507 U.S. 292, 302 (1993). Similar to

[8] *See also Concerned Citizens of Neb. v. U.S. Nuclear Regulatory Comm'n*, 970 F.2d 421, 426 (8th Cir. 1992) (no right to be free from environmental harm from radioactive waste); *Ely v. Velde*, 451 F.2d 1130, 1139 (4th Cir. 1970) (no constitutional right to be protected from unnecessary and unreasonable environmental degradation and destruction); *S.F. Chapter of A. Philip Randolph Inst. v. EPA*, No. C 07-04936 CRB, 2008 WL 859985, at *6–7 (N.D. Cal. Mar. 28, 2008) ("Plaintiffs also allege deprivation of the right to be free of climate change pollution, but that right is not protected by the Fourteenth Amendment either."); *Pinkney v. Ohio Envtl. Prot. Agency*, 375 F. Supp. 305, 310 (N.D. Ohio 1974) ("[T]he Court has not found a guarantee of the fundamental right to a healthful environment implicitly or explicitly in the Constitution."); *Gasper v. La. Stadium & Exposition Dist.*, 418 F. Supp. 716, 720–21 (E.D. La. 1976) ("[T]he courts have never seriously considered the right to a clean environment to be constitutionally protected under the Fifth and Fourteenth Amendments"), *aff'd*, 577 F.2d 897 (5th Cir. 1978); *MacNamara v. Cnty. Council of Sussex Cnty.*, 738 F. Supp. 134, 142-43 (D. Del. 1990), *aff'd* 922 F.2d 832 (3d Cir. 1990); *Sequoyah v. Tenn. Valley Auth.*, 480 F. Supp. 608, 611 (E.D. Tenn. 1979), *aff'd*, 620 F.2d 1159 (6th Cir. 1980); *Upper W. Fork Watershed Assoc. v. Corps of Eng'rs, U. S. Army*, 414 F. Supp. 908, 931–32 (N.D. W.Va. 1976) *aff'd*, 556 F.2d 576 (4th Cir. 1977); *Hagedorn v. Union Carbide Corp.*, 363 F. Supp. 1061, 1064–65 (N.D. W. Va. 1973); *Tanner v. Armco Steel Corp.*, 340 F. Supp. 532, 537 (S.D. Tex. 1972).

their predecessors in District and Circuit courts around the country, Plaintiffs have failed to demonstrate a "deeply rooted in our legal tradition" in a healthy and stable climate. *Glucksberg*, 521 U.S. at 722. To the contrary, the record shows the climate has not been historically stable, the United States has a history of supporting industries that produce GHG emissions, and Congress only recently provided limited statutory protections for the environment. R. at 4, 6, 10.

2. There is no constitutional right for protection against private harm

In the District Court proceedings, Plaintiffs asserted a fundamental right to a healthy and stable climate by relying on an unprecedented denial of a motion to dismiss by the Oregon District Court. R. at 11, citing *Juliana*, 217 F. Supp. 3d 1224, 1251–52. The Supreme Court in *DeShaney* held the Due Process Clause does not impose an affirmative duty on the government to protect against private harm, even when their actions substantially increase risk of harm. *See DeShaney*, 489 U.S. 189. The *Juliana* District Court denied the defendant's motion to dismiss by relying on a Ninth Circuit "government-caused danger" exception to the Supreme Court's *DeShaney* rule. This exception does not apply to the case at bar because the United States government does not have the required "special relationship" with Plaintiffs (as it would with persons in its physical custody). *DeShaney*, 489 U.S. at 197. Further, the government here did not literally and directly create the danger. *Id.* (holding state's placement of a child in an abusive home, resulting in coma and permanent brain damage, was not a "deprivation" of Due Process).

Moreover, Plaintiffs here have not pled sufficient facts to show the United States' conduct "place[d] a person in peril in deliberate indifference to their safety." *Juliana*, 217 F. Supp. 3d at 1251 (citing *Penilla v. City of Huntington Park*, 115 F.3d 707, 709 (9th Cir. 1997)). In *Juliana*, the Oregon District Court admitted that this rigorous standard "pose[d] a significant challenge for plaintiffs," but allowed the claim to move forward, finding the plaintiffs alleged that defendants had acted with the requisite state of mind, an allegation the court was required to accept as true. *Id.* at 1252. The record in this case, on the other hand, contains no allegation that the U.S. government acted with

deliberate indifference towards Plaintiffs' safety. The record states that U.S. government has only been aware of the dangers of climate change since the 1990s, long after the vast majority of GHG emissions authorized by the government took place. R. at 6, 11. Since learning of the dangers of climate change, the government has taken steps to reduce GHGs in an effort to slow climate change. R. at 6–7. Here, the court would have to go beyond the Ninth Circuit's government-caused danger rule requiring "deliberate indifference," and allow claims of negligence or strict liability to impose a duty to act on the government.

Plaintiffs here are not only asking this court to follow *Juliana*, they are asking this court to go further by extending the danger-creation exception to *DeShaney* far beyond where even the Oregon District Court took the doctrine, for a Due Process right that does not yet exist. Particularly in the face of consistent precedent declining to extend Due Process rights to environmental protection, *see supra* note 2, a single, unprecedented case surviving a motion dismiss at the district court level is insufficient to constitute a right "objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed," as required to establish a new fundamental right. *Glucksberg*, 521 U.S., at 720–721 (internal quotations omitted). Therefore, this court should uphold the District Court's dismissal for failure to state a valid claim.

VI. Plaintiffs' Public Trust Doctrine and ATS Claims are Barred as Nonjusticiable Political Questions

Even if Plaintiffs presented valid ATS and public trust doctrine claims, this court should dismiss them as nonjusticiable political questions. While the judiciary is well-equipped to deal with ATS, public trust, and Due Process claims generally, Plaintiffs claims stretch these causes of action to the point where they improperly tread on the executive and legislative branches of the federal government. These claims are nonjusticiable because they are "not legal in nature," and concern complex issues of "national polic[y]" that courts reserve for those political branches

of the government. *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 230 (1986). A case presents a nonjusticiable political question if any of the six *Baker v. Carr* tests are met:

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

369 U.S. 186, 217 (1962). When applying the Baker tests, courts must engage in a "discriminating inquiry into the precise facts and posture of the particular case." Id.

A. Application of the first three *Baker* tests bar Plaintiffs' claims

The Supreme Court noted that the *Baker* tests "are probably listed in descending order of both importance and certainty." *Vieth v. Jubelirer,* 541 U.S. 267, 278 (2004). In the context of ATS litigation, the Court has noted the separation-of-powers issues addressed under the first three *Baker* tests are of particular and serious concern. *Sosa*, 542 U.S. at 727–28. Here, a "discriminating inquiry" using the first three *Baker* tests show both of Plaintiffs' claims are nonjusticiable, as they would require the court to create a cause of action available to everyone in the world and would require the judiciary to make complex scientific and policy judgements the Constitution reserves for the political branches of the government. *Baker*, 369 U.S. at 217.

1. Plaintiffs' claims involve foreign policy decision designated to the executive and legislative

branches

Under the first *Baker* test, claims are nonjusticiable political questions where "constitutional commitment of the issue to a coordinate political department" is evident. *Id.* The U.S. Constitution vests Congress with the authority "[t]o regulate Commerce with foreign Nations and among the several States, and with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3. Matters of foreign policy and national security "are rarely proper subjects for judicial intervention." *Haig v. Agee*, 453 U.S. 280, 292 (1981).

Here, both claims brought by Plaintiffs tread on the powers of the executive and legislative branches because they entangle critical decisions of foreign climate change policy, not matters that merely touch foreign relations. *See Baker*, 369 U.S. at 211. Plaintiffs are essentially asking this court to curb otherwise lawful activities that rely on fossil fuels worldwide, instead of allowing the political branches to continue to craft legislative solutions that balance environmental, energy, and economic needs. Solutions to the complex and global problem of climate change "cannot be prescribed in a vacuum." *AEP*, 564 U.S. at 427. This sensitive balance "is appropriately vested in branches of the government which are periodically subject to electoral accountability." *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973). This court should avoid wading into international climate change and energy policy debates the executive and legislative branches have already been addressing though international treaties and legislation for decades. R. at 6–8. For example, the United States has entered into United Nations Framework Convention on Climate Change and the Paris Agreement and Congress has given the EPA the authority to regulate GHG emissions under the Clean Air Act. R. at 7; *see Massachusetts*, 549 U.S. at 531. The fact that the current administration has voiced its intention to withdraw from some past steps addressing climate change does not give the judiciary authority to step in to fill the executive or legislative branches' policy making position.

2. Plaintiffs' claims lack judicially discoverable and manageable standards and require the

court to make an initial policy determination.

Plaintiffs' claims are nonjusticiable under the second and third *Baker* tests because they would require the court to make a policy determination about appropriate quantities and methods to reduce GHG emissions. *See AEP*, 654 U.S. 428. Under the second and third *Baker* tests, a case is nonjusticiable for a "lack of judicially discoverable and manageable standards," or if it requires the court to make an "initial policy determination of a kind clearly for nonjudicial discretion." *Baker* 369 U.S. at 217. A claim lacks judicially discoverable and manageable standards if it presents "complex[,] subtle" issues in which "courts have less competence" than the political branches of the government. *See Gilligan*, 413 U.S. at 10. In regulating climate change and GHGs, the Supreme Court recognized that courts "have neither the expertise nor the authority to evaluate" the fundamental economic, social, and national security policy issues raised by the regulation of greenhouse gases, *Massachusetts*, 549 U.S. at 533, and "lack the scientific, economic, and technological resources [of] an agency. . ." to regulate climate change. *AEP*, 564 U.S. at 428. Plaintiffs fail to point to an accepted standard or methodology the court could employ to address these complicated inquiries.

The implications of Plaintiffs' common law-based claims are sweeping; they would allow any party in the world who could allege injury from climate change to a make a claim against any party who is responsible in some way for producing GHG emissions. *See AEP*, 564 U.S. at 428–29. Courts across the country would be required to determine whether and to what extent each GHG producer created climate changed-induced damages using the general principals of tort and public trust law. Adjudicating these disputes would also require the court to make an "initial policy determination" about the appropriate level of GHGs each party can produce without creating unreasonable harm to the climate or significantly impairing the alleged atmospheric trust. *See Kivalina*, 696 F.3d at 855. Adding in the fact that GHG emissions do not adhere to geographically discoverable borders makes the impact of these emissions on an individual plaintiff even more difficult to manage.

Even if this court had the authority to enact such a remedy, reducing the emissions of the United States would not prevent Plaintiffs' alleged injuries because no "judicially discoverable

standard" can simply stop climate global climate change and sea level rise. Adjudicating this claim would require individual federal judges to make intricate international policy decisions on climate change and enact an appropriate standard for every GHG emitter in the nation. Since courts are not in a possession to make such initial policy determinations or manage a standard for granting Plaintiffs' relief, this court should dismiss Plaintiffs' claims as nonjusticiable.

CONCLUSION

Plaintiffs are ultimately asking this court to legislate common law solutions to the global problem of climate change, when such solutions have already been or should be decided by the political branches. Therefore, this court should affirm the District Court's holding that the CAA displaces Plaintiffs' claim brought under the ATS for HexonGlobal's alleged violations of the *Trail Smelter* Principle. This court should also affirm District Court's denial to extend an unprecedented Due Process-based public trust claim to government protection of a stable climate system. Further, to the extent such claims are not otherwise barred, this court should find they are barred by the political questions doctrine, as they present sensitive international policy decisions. Finally, this court should not craft its decision on grounds broader than necessary to resolve the case. Although this court should dispose of Plaintiffs' claims for the aforementioned reasons, this court should not draw its holding so broadly as to bar all ATS claims against corporate defendants or all claims under *Trail Smelter* Principle for other kinds of emissions harms, as such categorical bars would undermine Congressional intent and international law.