IN THE UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

CASE NO. 66CV2018 (RMD) OPINION AND ORDER

ORGANIZATION OF DISAPPEARING ISLAND NATIONS, APA MANA, AND NOAH FLOOD,
Plaintiffs - Appellants
- v. -
HEXONGLOBAL CORPORATION,
Defendant - Appellee
and
THE UNITED STATES OF AMERICA,
Defendant – Appellee.

Appeal from the United States District Court
for New Union Island
In NO. 66-CV-2018, Judge Romulus N. Remus.

Brief of the United States of America, Defendant – Appellee

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STATEMENT OF JURISDICITON

Federal District Courts must have original jurisdiction under Article III of the Constitution to hear cases brought by U.S. citizens. Controversies must satisfy Federal Question or Federal Diversity Subject Matter jurisdiction under the Federal Rules of Civil Procedure. Fed. R. Civ. P. 1331-32. United States federal courts can hear civil claims for violations of customary international law, or Law of Nations, under the Alien Tort Statue. 28 U.S.C. §1350. Plaintiffs must be aliens to bring Alien Tort Statue claims, whereas defendants need not be aliens themselves. *Miner v. Begum*, 8 F. Supp. 2d 643, 644 (S. D. Tex. 1998). Any claim based on the Law of Nations must rest on an international norm accepted by the civilized world and defined with specificity. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004).

The Supreme Court held the Clean Air Act displaces the federal common law of air pollution. *American Electric Power v. Connecticut*, 564 U.S. 410 (2011). United States Court of Appeals has original and exclusive jurisdiction over Environmental Protection Agency actions enumerated in the Clean Air Act. 42 U.S.C. §7607(b)(1).

STATEMENT OF ISSUES

I. When a prior court has declined to adopt a public trust doctrine due process claim, can a cause of action be recognized under the Fifth Amendment against the U.S. government for failure to protect the global atmospheric climate system from actions by private parties?

II. Whether political questions presented under the due process doctrine and the Alien Tort Statute Law of Nations regarding global greenhouse gas emissions are non-justiciable claims?

III. Where the *Trail Smelter* Principle is specific, universal and obligatory, is it enforceable as a recognized norm defined by the Law of Nations?

IV. Are non-governmental actors obligated by the *Trail Smelter* Principle because it is customary international law?

V. Where a domestic corporation's actions both violate an international norm and sufficiently touch and concern the United States, can Mana, as a foreign national, bring an Alien Tort Statute Claim against HexonGlobal, Inc.?

VI. Because the Supreme Court has recognized the Clean Air Act displaces federal common law in several instances, does it also displace the *Trail Smelter* Principle?

STATEMENT OF CASE

I. Facts

Two island nations, A'Na Atu and New Union Island, located in the East Sea, are experiencing the harmful effects of global warming and, according to their complaint, will become uninhabitable unless greenhouse gas emissions are limited. R. 3-4, 5. Greenhouse gases, such as carbon dioxide and methane released from fossil fuels, have an insulating effect on the Earth. R. 4. Human sale, production, and burning of fossil fuels have substantially increased the amount of greenhouse gases in the atmosphere and caused global climate change resulting in increased temperatures, changing rainfall patterns, and rising sea levels. *Id.*

The continued effect will result in a rise of the Earth's temperature by four degrees Celsius and a rise in sea level between one-half and one meter. *Id.* Due to global emissions, both Appellants have incurred substantial debt from storm repairs and sea water intrusions into their drinking water, and are subject to increased health risks from heat stroke and mosquito born diseases. R. 5. Natural resources on the islands are also at risk from ocean acidification, warming, and loss of coastal wetlands. *Id*.

HexonGlobal, Inc. ("Hexon"), a New Jersey corporation with its principle place of business in Texas, formed when all the major United States oil producers merged. *Id*. Through its production and sales of fossil fuels, Hexon cumulatively contributes to 32% of United States

total emissions and nine percent of global emissions.[1] *Id*. Hexon conducted scientific research on the effect of fossil fuel emissions on climate change in the 1970s that showed substantial harm from continued use and sea level rise. *Id*. However, Hexon continued to operate worldwide refineries, producing and selling fossil fuels knowing of the harmful effects. *Id.*

In recent decades, the United States ("U.S.") acknowledged the threat of climate change and took steps to mitigate harm through regulations and emissions controls. *Id*. at 6, 7. Prior to the known effects of climate change, the U.S., through various agency policies and programs, leased public land for fossil fuel production, created an interstate highway system and fossil fuel power plants. *Id*. at 6. Since discovering the alleged harmful effects, the U.S. signed and ratified the United Nations Framework Convention on Climate Change ("UNFCC") with the commitment to adopt national policies and take measures to mitigate emissions. *Id*. Following, several steps were taken toward regulation, specifically:

(a) *Massachusetts v. EPA*, 549 U.S. 497 (2007) (holding that greenhouse gases, including carbon dioxide, were "pollutants" that were potentially subject to regulation under section 202(a)(1) of the Clean Air Act, 42 U.S.C. § 7521);
(b) 74 Fed. Reg. 66,496 (Dec. 15, 2009) (finding by the Environmental Protection Agency that emission of greenhouse gases and resulting climate change had the potential to endanger the public health and welfare, which set the regulatory predicate for regulation of greenhouse gas emissions under the Clean Air Act);
(c) 75 Fed. Reg. 25,324 (May 7, 2010) (adopting a rule establishing both fuel economy standards and greenhouse gas emissions rates for passenger cars (extended through model year 2025 by 77 Fed. Reg. 62,623 (Oct. 15, 2012));
(d) 75 Fed. Reg. 31,514 (June 3, 2010) (requiring major new sources of greenhouse gases to undergo review to establish technology based limits on greenhouse gas emissions);
(e) 80 Fed. Reg. 64510 (Oct. 23, 2015) and 80 Fed. Reg. 64662, (Oct. 23, 2015) (standardizing carbon dioxide emissions and implementing controls for new and existing power plants); and
(f) the U.S. signing into the Paris Agreement furthering the commitment to reduce greenhouse gas emissions.

[1] Historically, Hexon contributed to six percent of global emissions and United States contributed twenty as the largest single national contributor.

II. Procedural History

The Organization of Disappearing Island Nations, Ms. Apa Mana, and Mr. Noah Flood commenced this action against Hexon and the U.S. in the United States District Court, asserting that: 1) Hexon's fossil fuel production and sales activities violates the *Trail Smelter* Principle ("Principle"), which is established customary international law as a Law of Nations, under the Alien Tort Statute ("ATS"), 28 U.S. § 1350; and 2) the U.S. failed to take effective action to control greenhouse gas emissions and supported fossil fuel production, violating obligations under the public trust doctrine, as incorporated by a Fifth Amendment substantive due process fundamental right to a healthy and stable climate system. *Id*. at 8, 10. The court dismissed Ms. Mana for failing to state a claim for relief. *Id*. at 10. The court also dismissed Mr. Flood's complaint for failing to state a claim for relief under the Fifth Amendment. *Id*. at 11. All Appellants filed a Notice of Appeal, seeking review of the District Court's holding that the *Trail Smelter* Principle is displaced by greenhouse gas regulations under the Clean Air Act ("CAA"), and the District Court's refusal to recognize governmental protections from atmospheric climate change. *Id*. at 1.

SUMMARY OF ARGUMENT

The right to a "healthy and stable global climate system" is not a recognized fundamental right under the United States' Fifth Amendment Due Process Clause. That right does not provide a careful description that the Supreme Court has traditionally recognized, nor is it in line with historical precedent rejecting claims for government protection of the global atmosphere.

The Fifth Amendment Due Process Clause does not extend obligations or liability to the U.S. for harms caused by third parties. Hexon's fossil fuel related activities are worldwide and the danger creation exception does not apply to U.S. action taken prior to the government's

knowledge of harmful emissions. The exception is narrowly applicable to affirmative government actions when the knowledge of potential consequences was available.

Further, the public trust doctrine does not obligate the federal government to protect the global atmosphere. Regardless, the Clean Air Act displaces federal common law when the legislative branch occupies the field, as it has done with emission standards.

Lastly, Mr. Flood's claim presents a non-justiciable political question because the text of the Constitution commits governance of U.S. territories to the legislative branch. The separation of powers doctrine prevents the judicial branch from hearing cases that present foreign policy questions in areas where extensive congressional action takes place.

U.S. federal courts can hear Ms. Mana's claim under the Alien Tort Statute. The *Trail Smelter* Principle is recognized as customary international law enforceable as a Law of Nations because it is "specific, obligatory, and universal." Further, non-governmental actors, such as corporations, are obligated to uphold international law principles. The ATS requires an international norm violation and a cause of action under domestic common law, such as negligence and nuisance. However, Mana's claim is displaced by the Clean Air Act because the issues are centered around fossil fuel emissions, which the Environmental Protection Agency has the authority to regulate. Federal common law issues addressing domestic greenhouse gas emissions relate to foreign policy where they have a global affect, making the issue non-justiciable.

ARGUMENT

STANDARD OF REVIEW

Under Fed. R. Civ. P. 12(b)(1), a civil action must be dismissed whenever the court lacks subject matter jurisdiction. The plaintiff has the burden of establishing subject matter

jurisdiction, *Demetres v. E.W. Constr., Inc.*, 776 F.3d 271, 272 (4th Cir. 2015), and the Court "may consider evidence outside the pleadings without converting the proceeding to one for summary judgment,*" In re KBR, Inc., Burn Pit Litig*., 744 F.3d 326, 333 (4th Cir. 2014) (internal quotation marks omitted).

A dismissal for failure to state a claim is reviewed *de novo*. All factual allegations in the complaint are accepted as true, and the pleadings construed in the light most favorable to the nonmoving party. *Abagninin v. AMVAC Chem. Corp*., 545 F.3d 773 (9th Cir. 2008) (internal citations omitted).

If a complaint presents a non-justiciable political question, the proper course is to affirm dismissal. *See 767 Third Ave. Assocs. v. Consulate Gen. of the Socialist Fed. Republic of Yugo.*, 218 F.3d 152, 164 (2d Cir. 2000) ("[W]here adjudication would force the court to resolve 'political questions,' the proper course for the courts is to dismiss").

I. FLOOD FAILS TO STATE A CLAIM FOR RELIEF UNDER THE FIFTH AMENDMENT BECAUSE THERE IS NO PUBLIC TRUST BASED FUNDAMENTAL RIGHT FOR PROTECTION OF THE GLOBAL ATMOSPHERIC CLIMATE SYSTEM FROM THIRD-PARTY EMISSIONS, PRESENTING A NON-JUSTICIABLE POLITICAL QUESTION

The Fifth Amendment precludes the federal government from depriving any person of "life, liberty, or property" without "due process of law." U.S. Const. Amend. V. In addition to those rights enumerated in the Constitution, fundamental liberty interests are "of the very essence of a scheme of ordered liberty," and "'rooted in the traditions and conscience of our people.'" *Palko v. Connecticut*, 302 US. 319, 325 (1937) (citing *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)) Courts have repeatedly rejected claims asserting a fundamental liberty interest to a

healthful environment[2] because extending constitutional protection to a new matter places it outside public debate and legislative action. *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997). The right to a "healthful and stable global environment" is the type of previously rejected interest courts are cautioned against expanding the concept of substantive due process for. *See Pinkney v. Ohio EPA*, 375 F. Supp. 305, 310 (N.D. Ohio 1974).

Further, substantive due process protections cannot be used as a cause of action against the government for failure to control third parties' sales, production, and emissions of greenhouse gases because the purpose of due process is to ensure people are protected from the state, not each other. *Deshaney v. Winnebago County Dep't of Social Services*, 489 U.S. 189, 196 (1989). The District Court declined to adopt the danger creation exception out of the Ninth Circuit. It is inapplicable in this case because the government lacked knowledge of the potential harm of climate change necessary to demonstrate culpability.

Additionally, public trust rights to natural resource protections do not obligate the U.S. to administer the global atmosphere as if it were a common property asset held in trust for each U.S. citizen's use.[3] This doctrine provides rights for "the following things, [which] are by natural law common to all — the air, running water, the sea, and consequently the seashore," but not the atmosphere. J. Inst. 2.1.1 (J.B. Moyle trans.) There is also no binding authority that has held the Public Trust Doctrine can be applied to the federal government. However, even if federal public trust common law protections exist, claims for alleged harms due to greenhouse gas emissions would be displaced by the CAA.

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[2] *See e.g. Barnett v. Carberry* 2010 U.S. Dist. LEXIS 146295 at *24 (D. Conn. Mar. 11, 2010) (holding that "there is no recognized constitutional right to a healthful environment").

[3] *See* Joseph L. Sax, The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention, 68 Mich. L. Rev. 471, 477 (1970).

Finally, Appellant's claim presents a non-justiciable political question because he is a resident of a U.S. territory and the Constitution commits governance of such areas to Congress. Article IV, Section 3, [2]: "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory." Further, as evidenced by the breadth of legislative and executive actions taken to regulate greenhouse gas emissions, to adjudicate these claims would require the court to make complex international policy determinations.

A. There is No Fundamental Liberty Interest in a Healthy and Stable Global Climate System Under the Fifth Amendment Substantive Due Process Clause

There are few recognized fundamental liberty interests outside those enumerated by the Constitution because the Supreme Court has "always been reluctant to expand the concept of substantive due process." *County of Sacramento v. Lewis*, 523 U.S. 833, 842 (1998). Appellant's complaint presents a constitutional claim to a previously unrecognized fundamental liberty interest and "the doctrine of judicial self-restraint requires [courts] to exercise the utmost care whenever . . . break[ing] new ground in this field." *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992). There is no recognized fundamental liberty interest to a healthy environment,[4] let alone a stable global atmospheric climate system, so the Court would have to articulate a novel Constitutional right.

Courts have only taken "the extraordinary step of announcing . . . a new fundamental interest" when it is asserted with a "careful description" and "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if [it were] sacrificed." *Lake v. City of Southgate*, 2017 U.S. Dist. LEXIS 27623 at *9 (E.D. Mich. Feb. 28, 2017) (quoting *Glucksberg*,

[4] *See In re "Agent Orange" Prod. Liab. Litig.*, 475 F.Supp. 928, 934 (E.D.N.Y. 1979) (dismissing constitutional claims to be free from allegedly toxic chemicals for failure to state a claim because "there is not yet a constitutional right to a healthful environment.")

521 U.S. at 720-21). The Supreme Court looks to "our nation's history, legal traditions, and practices [to] provide the crucial 'guideposts for responsible decisionmaking,' that direct and restrain our exposition of the Due Process Clause." *Glucksberg*, 521 U.S. at 721 (quoting *Collins*, 503 U.S. at 125).

The District Court in its learned wisdom already declined to adopt the reasoning of *Juliana*,[5] instead dismissing the complaint for failure to state a claim, a ruling directly aligned with this Nation's legal history and case precedent.[6] *See e.g., MacNamara v. County Council of Sussex County*, 738 F. Supp. 134, 142 (D. Del. 1990) (dismissing Plaintiffs complaint- which alleged that harmful health and property value effects of pollution and emissions would result from the government's decision to rezone property for construction of a power station- for failure to state a claim for a constitutionally protected interest because "the only cases on the issue clearly state that there is no constitutional right to a healthful environment.")

Here, Appellant asks this Court to recognize a fundamental right to a "healthy and stable global climate system." This nebulous assertion of a constitutional right for the U.S. to prevent the entire global climate system from experiencing any changes in temperatures, sea levels,

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[5] *Juliana* reasoned that "a stable climate system is a necessary condition to exercising other rights to life, liberty, and property." *Juliana v. United States*, 217 F. Supp. 3d 1224, 1250 (D. Or. 2016). Throughout history, humanity across the globe has coped with changes in temperatures, food sources, seasons, terrain, and biodiversity. Stability across the entire global climate system has never truly existed. Framing the global atmosphere as a constitutional right "necessary to enable the exercise of other rights" sets an unrestrained path for constitutional environmental claims.

[6] The District Court's decision is harmonious with District Court rulings from across the country that rejected constitutional rights conferring categorical protections the environment and health. *See Tanner v. Armco Steel Corp.*, 430 F Supp. 532, 537 (S.D. Tex. 1972) (holding that exposure to air pollutants emitting from petroleum factories fails to assert deprivation of a constitutional right because there is "no legally enforceable right to a healthful environment giving rise to an action for damages . . . guaranteed by . . . the Federal Constitution.")

ocean acidification, biodiversity, or habitats is a far cry from the type of "careful description" required for the Supreme Court to recognize a fundamental liberty interest. Rather, the right to a "healthy and stable global climate system" is comparable to rights that courts have historically rejected.

Further, recognizing a fundamental liberty interest in the global atmosphere is a direct contradiction to the very "guideposts for decisionmaking" the court is required to rely on when extending substantive due process rights. The alleged harms claimed as justification for a "healthy and stable global climate system" stem from greenhouse gas emissions causing damage to private property, increased health risks, and reduced availability of locally caught sea food. Courts have already rejected a fundamental liberty interest in protection against synonymous damages attributed to emissions. It cannot be understated that, for decades, courts have clearly rejected claims asserting fundamental liberty interests to a healthy environment or freedom from bodily harm due to contaminants in the environment.

Consequently, although the Appellant's claims are grave, they cannot be used to assert a fundamental liberty interest to the global climate system. Such broad and attenuated allegations claiming an unrecognized fundamental right, which courts have rejected, is exactly the type of precedent for expanding constitutional protections that this Court should avoid setting.

B. Due Process Protections Do Not Extend to the Actions of Third Parties and the Danger Creation Exception Would Not Apply Because the Government Did Not Have Knowledge of the Potential Dangers of Climate Change

The due process clause "affords protection against unwarranted *government* interference . . . it does not confer an entitlement to such [government aid] as may be necessary to realize all the advantages of that freedom." *Deshaney*, 489 U.S. at 196 (quoting *Harris v. McRae*, 448 U.S. 297, 317-18 (1980)). Due process protections against government infringement on life, liberty,

and property "cannot be fairly extended to impose an affirmative obligation on the [government] to ensure that those interests do not come to harm through other means." *Deshaney*, 489 U.S. at 196. Allowing a cause of action thereof, when 80% of global changes in the atmospheric climate system can be attributed to third party actions, stretches constitutional interpretations to unprecedented limits.

The due process clause cannot be invoked to hold the government accountable for the actions of private parties across the globe occurring well beyond its reach. The Ninth Circuit danger creation exception would not apply even if the Court disagreed with the District Court's refusal to adopt it. This exception is not meant to hold the government responsible for providing utilities to Americans because the exception was meant to protect against harms that were known.

i. There is No Fundamental Due Process Right to Government Protection from Private Parties Such as Hexon Selling, Producing, and Burning of Fossil Fuels

The Supreme Court has specifically rejected any fundamental due process right to government protection from allegedly wrongful acts by private parties because "the touchstone of due process is protection of the individual against arbitrary action of government." *Lewis,* 523 U.S. at 844 (quoting *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974)). Courts have historically "recognized that the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests." *Deshaney*, 489 U.S. at 196. As such, a public trust based Fifth Amendment violation cannot be upheld as a cause of action against the U.S. for failure to protect Appellant against third parties' global fossil fuel activities.

In this case, 80% of global greenhouse gases emissions occur outside the U.S. Although the U.S. historically contributes approximately 20% of global fossil fuel-related emissions, the

Appellant's own complaint concedes that Hexon is responsible for 32% of those emissions. To reverse substantive due process rights in an attempt to hold the U.S. responsible for alleged inaction, essentially failure to control the entire global community's actions, is a constitutional interpretation that provides a basis for frivolous Fifth Amendment claims for years to come. Courts will adjudicate claims against the U.S. for violations of the Fifth Amendment for failure to control *any* actions of *any* private party that are in *any* way related to the environment or climate change. Not only does this disgrace the sanctity of constitutional due process protections, it also opens the floodgates of litigation for constitutional environmental claims into the court.

Ergo, Fifth Amendment constitutional protections against deprivation of life, liberty, and property cannot be used as a tool for blame against the U.S. for failing to control the world's actions. Substantive due process protects against arbitrary government action not third parties' fossil fuel related activities.

ii. Even if the Court Adopts the Danger Creation Exception, it Does Not Apply Because the Government Lacked Knowledge of the Potential Dangers of Climate Change

The District Court declined to adopt the Ninth Circuit's government-caused danger creation exception. This reasoned decision recognizes that application of this exception is largely limited to instances where state governments took "affirmative actions" to place individuals in their custody in danger with a "sufficient culpable state." *Penila v. City of Huntington Park*, 115 F.3d 707, 710 (9th Cir. 1997); *L. W. v. Grubbs*, 974 F.2d 119, 121 (9th Cir. 1992). Also, the Ninth Circuit applies this exception[7] when the government behaves with "deliberate

[7] This Circuit specific exception should not be misconstrued to allege violations of actions that are "in the service of a legitimate governmental objective" *Lewis*, 523 U.S. at 846 (1999). Even if the Court concluded a fundamental right was involved, the government action at issue would pass the strict scrutiny test because any alleged "infringement is narrowly tailored to serve a compelling state interest." *Reno v. Flores*, 507 U.S. 292, 302 (1993).

indifference" to the safety of individuals by "creat[ing] or expos[ing] an individual to a danger which he or she would not have otherwise faced" with knowledge of "the unreasonable risks" and intentional disregard of the consequences. *Kennedy v. City of Ridgefield,* 439 F.3d 1055, 1061 (9th Cir. 2006); *Campbell v. Wash. Dep't of Soc. & Health Servs.,* 671 F.3d 837, 846 (9th Cir. 2011).

Here, even if the Court adopts a version of the danger creation exception, it cannot apply to accuse the U.S. of harming the Appellant. To do so would be mischaracterizing valid exercises of governmental authority implemented to increase the economy and provide Americans access to basic necessities such as electricity and transportation. These decisions were made prior to the availability of conclusive information that fossil-fuel emissions from energy production would contribute to global climate change, let alone that such changes would result in the impacts being experienced today.[8] To impose upon the U.S. knowledge which it did not have when making decisions intended to benefit the American people would in essence be holding the government responsible for not being able to predict the future of modern science. In fact, Appellants' allegations conveniently include only vague references to past policies and programs of various unnamed agencies. This fails to recognize the numerous steps the U.S. has taken since its knowledge of clear and reliable science regarding anthropogenic climate change. *See p. 25*.

[8] Differences between IPCC reports in 2007 and 2018 alone are evidence of the leaps recent science has made in discovering all the effects of anthropogenic climate change. And even these reports have been subject to widespread criticism and skepticism. The government does not make this point lightly, and it does not do so to undermine the importance of taking effective global steps to address the sources and impacts of climate change. However, to pretend the drastically varied results and availability of scientific evidence regarding climate change over the course of the last few decades sufficiently demonstrate the government knowledge necessary to apply the government caused danger exception adopted by the Ninth Circuit for a public trust based substantive due process violation, would open up the floodgates.

Moreover, this narrow exception is meant to apply when tangible and concrete action directly correlates to the harm that occurred. To try and hold the U.S. responsible for sea level rise and global warming, more than 80% of which is caused by the actions of international governmental and private actors, because of programs that were instituted in response to a need for economic growth and increased quality of life for Americans predating government awareness of the potential dangers of climate change, would be a gross misuse of this exception. This exception is intended to hold the government responsible for affirmative conduct taken with the knowledge that harmful consequences would result and has never been applied when the government's actions were only 20% responsible for a party's situation.

Finally, recent U.S. actions supporting further research of anthropogenic climate change and commitments to reducing global emissions across various sectors offer further evidence that the government is not acting with deliberate indifference to the effects of global climate change. The U.S. is making real time decisions based on the reliable scientific data available, not taking affirmative action knowing that policies or programs will result in potentially harmful problems from climate change.

C. The Public Trust Doctrine Does Not Obligate the U.S. Government to Administer the Global Atmosphere as a Public Trust Asset and Even if it did, the Clean Air Act Displaces Federal Common Law Claims Regarding Greenhouse Gas Emissions

The public trust doctrine provides natural resource protections for the air, water, and the sea. J. Inst. 2.1.1 (J.B. Moyle trans.) However, the public trust doctrine does not apply to the federal government and the global atmosphere is not common property held in trust or title by any state or even country. Regardless of whether a federal public trust common law can be the basis for a cause of action against the U.S., it would be displaced by the CAA when adjudicating claims regarding greenhouse gas emissions

i. The Public Trust Doctrine Does Not Mandate the U.S. Government to Hold the Global Atmosphere as Common Property

Dating back to its inception, the public trust doctrine affords protection to a narrow range of natural resources.[9] Past courts extended the public trust doctrine to natural resources, such as non-navigable waters and wildlife. *See Alec L. v. Jackson*, 863 F. Supp. 2d 11, 13 (D.D.C. 2012) However, incorporation is generally limited to more traditional applications.[10] *Id.* As such, the public trust in natural resources does not provide authority to assert that the global atmosphere is a trust asset held as common property by the U.S.

Although courts have also considered whether the phrase "the public trust doctrine remains a matter of state law" forecloses any federal public trust claims, the New Union District Court declined to adopt the reasoning of *Juliana. PPL Montana, LLC. V. Montana*, 565 U.S. 576, 603 (2012); s*ee also United States v. 32.42 Acres of Land*, 683 F.3d 1030, 1038 (9th Cir. 2012). This implicitly acknowledges the binding precedent that the public trust doctrine is informed by state law and therefore, does not apply to the federal government.

Here, although there is logic in the assertion that the public trust doctrine protects the components of the atmosphere such as air and water, the doctrine should not be stretched to afford new protections for the mere fact that a connection to a protected resource exists. There is

[9] "[States] hold the absolute right to all their navigable water, and the soils under them, for their own common use, subject only to the rights since surrendered by the Constitution to the general government." *Shively v. Bowlby*, 152 U.S. 1, 17 (1894) (holding that a donation land claim from Spain to the U.S. includes no title or right to land below the high-water mark against the state of Oregon's dominion over and title to the lands under navigable waters.)

[10] The *Juliana* Court avoided wading into the question of whether the atmosphere is a public trust asset by holding that the Plaintiff alleged sufficient claims for violations of the public trust doctrine in connection with the territorial sea. This is irrelevant to the case at hand because Appellant's complaint alleges violations of the public trust doctrine specifically in connection with the atmospheric climate system.

particular risk with incorporating the global atmosphere into the public trust doctrine. Doing so entails an expectation that the federal government has the capability to control each scientific and physical element of the global atmosphere. This doctrine is limited to the states and the natural resources within their territories. Changes in the global atmosphere cannot be regulated or managed by any one State because parties across the world emit greenhouse gases.

Using the public trust doctrine to obligate the federal government to protect the global atmosphere from experiencing climate change stands in stark contrast to historic applications of the public trust doctrine to limited resources in geographically defined jurisdictions.

ii. The Public Trust Doctrine Would be Displaced by Federal Statutes Such as the Clean Air Act when Greenhouse Gas Emissions are the Subject of the Claims

The Court need not unequivocally state whether the public trust doctrine places affirmative duties on the federal government to regulate greenhouse gas emissions in the global atmosphere because such federal common law claims would be displaced by the CAA.[11] *Amer. Elec. Power Co.*, 564 U.S. at 424 (holding that "the Clean Air Act and the EPA actions it authorizes displace any federal common law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired power plants"). Federal common law is displaced when Congress "has occupied the field through the establishment of a comprehensive regulatory program supervised by an expert administrative agency" *Milwaukee v. Ill.*, 451 U.S. 304, 317 (1981).

For example, in *Alec L.*, citizens brought claims for public trust violations against the U.S. for failing to preserve and protect the atmosphere. *Alec L. v. McCarthy* 561 F. App'x 7,12-

[11] *See Native Village of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849 (9th Cir. 2012) (holding that the Clean Air Act displaced federal common law nuisance claims brought by a federally recognized tribe against oil companies for emitting greenhouse gases that resulted in destruction of coastal land attributed to global warming.) Subsequent California District Courts held this case is not controlling over claims regarding foreign emissions.

14 (D.C. Cir. 2014). The court concluded "that, even if the public trust doctrine had been grounded in federal common law at some point in time, Congress plainly displaced any such doctrine…through its passage of the comprehensive and field-occupying Clean Air Act" *Alec L. v. Perciasepe*, 2013 U.S. Dist. LEXIS 72301at *5 (D.D.C. May 22, 2013) (internal citation omitted). Further, the court reasoned that adjudicating this question would require making determinations "that are best left to the federal agencies that are better equipped, and that have congressional mandate to serve as the "primary regulator of greenhouse gas emissions." *Id* at 14 (citing *Amer. Elec. Power Co.*, 564 U.S. at 428).

A federal common public trust law would not create a fundamental liberty interest in a healthy and stable global climate system, asking courts to regulate emissions, because the issue is displaced by the CAA. Like in *Alec L.*, Appellant's claim specifically alleges damage attributable to greenhouse gas emissions. Many federal agencies dedicate efforts to identify and implement necessary limitations on global greenhouse gas emissions.[12] Therefore, the CAA would displace the public trust doctrine in the adjudication of any claims arising from the emissions of greenhouse gas air pollutants.

D. Questions Committed to Congress by the Constitution Regarding Foreign Policy Determinations Present Non-Justiciable Political Questions

Appellant's public trust based Fifth Amendment claim presents a non-justiciable political question as demanded by both the Constitution and the separation of powers doctrine because New Union is a U.S. Territory and Congress has taken extensive international action in the areas of global climate change and greenhouse gas emissions. Congress' power over territories is "without limitation . . . and from the power given by the Constitution, to make all needful rules

[12] *See* p. 25 of this brief for a detailed overview.

and regulations respecting the territory or other property belonging to the United States." *Downes v. Bidwell*, 182 U.S. 244, 268 (1901) (quoting *Justice* Bradley, *Mormon Church v. United States*, 136 U.S. 1, 10 (1890). As such, Congress has the exclusive Constitutional authority to regulate greenhouse gas emissions in respect to New Union.

The political question doctrine exists to prevent federal courts from intruding on policy determinations constitutionally committed to the legislative and executive branches. *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004). Dismissal of a case on political question grounds is proper if one of the following factors is "inextricable":

> [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 the 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.

Id. (citing to *Baker v. Carr*, 369 U.S. 186, 217 (1962).

The political question doctrine bars courts from determining policies that require the court to balance the social utility of conduct related to interstate commerce and national security with the harm global greenhouse gas emissions inflict.[13] *See Kivalina*, 663 F. Supp. 2d at 877 (holding that claims for damages attributable to global warming caused by greenhouse gas emissions present non-justiciable political questions because there are no judicially manageable

[13] *See also City of Oakland v. BP P.L.C.*, 325 F. Supp. 3d 1017, 1025 (N.D. Cal. 2018) (holding that claims against oil companies for greenhouse gas emissions present non-justiciable political questions because determining liability would require courts to wade into Congress' authority whether greenhouse gas emissions are committed to the EPA through the CAA or are a matter of global concern and thus require caution "where recognizing a new claim for relief under federal common law could affect foreign relations.")

standards for the court to resolve the case in a "reasoned manner" and "global warming is a matter appropriately left for determination by the executive or legislative branch.")

Here, the first *Baker* factor is applicable. As a U.S. territory, the Constitution squarely commits any rules or regulations necessary for the governance of New Union to Congress. However, in the event New Union's status as a territory is somehow extricable from Appellant's claims, Appellant is still asking the Court to determine emission levels that should be enforced through foreign policy decisions made by the political branches, thus invoking the remaining *Baker* factors. Combine constantly evolving science with competing economic, political, and social interests across a climactically diverse global scale and you end up with an issue requiring unparalleled expertise and longevity.

In conclusion, Appellant's claim presents a non-justiciable political question because rules and regulations of New Union are textually committed to Congress by the Constitution. Further, these complex decisions about setting greenhouse gas emissions rest with the legislative and executive branches, especially when these branches have taken extensive action to address emissions and doing so requires continued collaborative policies and programs.

II. UNITED STATES FEDERAL COURTS CAN HEAR MANA'S CLAIM BECAUSE THE TRAIL SMELTER PRINCIPLE IS A RECOGNIZED LAW OF NATIONS ENFORCEABLE AGAINST CORPORATIONS UNDER THE ALIEN TORT STATUTE FOR THEIR FOSSIL FUEL RELATED ACTIVITIES; YET THE CLEAN AIR ACT DISPLACES THE PRINCIPLE, CREATING A NON-JUSTICIABLE POLITICAL QUESTION

The Principle is customary international law because it is "specific, obligatory, and universal." Since it arises from a mutual obligation, it is enforceable as a Law of Nations against non-governmental actors, including domestic corporations. The ATS is a U.S. federal statute that allows alien nationals to bring claims into U.S. federal court. To satisfy ATS requirements, there must be an alleged "Law of Nations" violation, along with a federal common law cause of

action, such as a negligence or nuisance. While the Court has the authority to hear Appellants' claim under the ATS, the CAA displaces issues regarding greenhouse gas emissions, thus presenting a non-justiciable political question.

A. The *Trail Smelter* Principle is Clear and Unambiguous, a Mutual Concern to the States and Arises from a Legal Obligation, Rendering the Principle as Customary International Law and Therefore, Enforceable Under the Alien Tort Statute as a Law of Nations

The U.S. agrees with the lower court's determination that the Principle is customary international law, enforceable as a "Law of Nations" under the ATS. 28 U.S.C § 1350. The ATS grants jurisdiction to federal district courts over civil actions brought by an alien national "committed in violation of the law of nations or a treaty of the United States." § 1350. Common law must provide a cause of action because the ATS is an extraterritorial jurisdictional statute. *Sosa*, 542 U.S. at 724.

A dispute along the U.S. and Canadian border created the Principle and found:

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

3 R.I.A.A. 1905, 1965 (1938 & 1941). In Trail, British Columbia, a smelter was operated by Consolidated Mining and Smelting Company of Canada, which released sulphur-dioxide fumes into the air daily, while smelting zinc and lead. *Id*. at 1913. In 1930, the International Joint Commission found that the sulphur fumes caused $350,000 worth of damages in Washington state, based on witness testimony and scientific reports. *Id.* at 1918. The Tribunal that over saw the dispute held Canada as responsible based on international law for the transboundary harm of the Trail Smelter operations. *Id*. at 1965.

Claims brought under the ATS, based on present-day Law of Nations, are required to "rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th century paradigms we have recognized." *Id*. at 725. (Recognized historical paradigms such as: piracy, infringement on the rights of ambassadors and violations of safe conducts). Moreover, the customary international norm must "specific, universal, and obligatory" to equate to a Law of Nations. *Id*. at 732. The Court has affirmed that the U.S. recognizes the Law of Nations as domestic law. *Id*. at 729-30.

The Law of Nations is defined as "the body of rules that nations in the international community universally abide by out of a sense of legal obligation and mutual concern."[14] Customary international law refers to "international obligations arising from established international practices" and results from consistent practice of States, derived from a sense of legal obligation. *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 248, 252 (2d Cir. 2003); *See Sosa*, 542 U.S. at 734-35.

The Principle is a "specific, universal and obligatory" customary international law. First, it is "clear and unambiguous;" second, it arises from "established international practices" that are a "mutual concern" to States; and third, the Principle is an international norm that arises from a legal obligation

i. The Trail Smelter Principle is Clear and Unambiguous by Narrowly Confining Transboundary Harms to Emissions and is Specific as Historical Paradigms

For a principle to become customary international law, it must be "clear and unambiguous." *Filartiga v. Pena-Irala*, 630 F.2d 876, 884 (2d Cir. 1980). As a source of international law, there must be specific rules and not just broad principles. *Flores*, 414 F.3d at

[14] *Duhaime,* Duhaime's Encyclopedia of Law, http://duhaime.org/LegalDictionary/L/LawofNations.aspx (last visited Nov. 25, 2018).

252. Article 38 of the International Court of Justice's ("ICJ") Statute provides that, judicial decisions are a source of international law. *Id*. at 251-52.

Here, the language of the Principle is clear and definite. The Principle focuses solely on "emissions into the environment" that cause substantial harm to other territories. The Tribunal was specific in narrowing their holding to transboundary emissions based on contentions in the complaint limited to "fumes discharged from the smelter." 3 R.I.A.A. at 1932. Further, along with the Principle as a holding, the Tribunal set forth specific rules to mitigate transboundary harm in Part Four, Section Three. 3 R.I.A.A. at 1974.

The emissions in this case are very narrow as well. Carbon dioxide and methane are greenhouse gases that have an insulating effect on the Earth, causing heat retention. These gases play an important role in regulating global temperatures. The human production, distribution and burning of fossil fuels substantially increase the amounts of carbon dioxide and methane released into the atmosphere as emissions. Hexon's emissions from the sale, production and other fossil fuel related activities are causing substantial transboundary harm to the global climate.

Further, the Principle is specifically comparable to the 18th-century paradigms recognized under the ATS. In defining piracy, the Court looked first to Congress's interpretation of piracy and then to the universal definition of piracy. *United States v. Smith*, 18 U.S. 153, 158-61 (1820). While looking through "the general usage and practice of nations...or by judicial decisions," the Court found a consistent interpretation of piracy. Id. at 160-61. Here, Congress defines air pollutants as "any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive substance or matter which is emitted into or otherwise enters the ambient air. 42 U.S.C. §7602(g). Similarly, the Tribunal referenced to emissions as fumes emitted into the air that cannot cause injury in or to the territory of another. 3 R.I.A.A. at

1917, 1965. To illustrate, when emissions enter the air, they get caught in the wind and flow to other nations. This affects the air quality, pollution and weather in other States; causing *global* warming.

ii. There is a Mutually Accepted Understanding that States are Responsible for Preventing Harm to the Environment of Other States as Evidenced by the Stockholm Conference and Other Declarations Adopting the Trail Smelter Principle

Established international practices recognize a mutual concern to prevent emissions from causing injuries in other territories. *Flores*, 414 F.3d at 248, 252. While universally successful implementation of the Principle is not necessary in order for it to become customary international law, it must be more than merely professed or aspirational. *Id*. at 248. Only wrongs that are of a "mutual, and not merely several" concern to States, and addressed in an "express international accord," become customary international law. *Id*. at 249.

After the *Trail Smelte*r Tribunal's decision, the 1972 Stockholm Conference on the Human Environment, subsequently adopted the Principle in their Declaration as Principle 21:

> *States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction*.

U.N. Conference on the Human Environment, Stockholm, June 5- 16, 1972, *Declaration of the United Nations Conference on the Human Environment*, 5, U.N. Doc A/CONF.48/14/Rev. 1 (June 16, 1972) (emphasis added). Similarly, the Principle was reasserted by the 1992 Rio Declaration on Environment and Development, as endorsed by 190 nations. U.N. Conference on Environment and Development, *June 3-14, 1992, Rio de Janeiro, Braz., Rio Declaration on Environment and Development*, 3, U.N. Doc. A/CONF.151/26/REV.1(VOL.I) (1992).

One hundred ninety separate states endorsing a reassertion of the Principle effectively

demonstrates a mutual concern in an "express international accord" as warranted by *Flores* and *Filartiga*. States did not merely incorporate the Principle into their own nation's rules, which would exhibit a several concern; they took additional steps to endorse the Principle, as incorporated into multiple declarations.

iii. The Trail Smelter Principle Becomes a Legal Obligation Through its Recognition as a Principle of International Law by the International Court of Justice and the United Nations

When determining if States must abide by a universal practice out of a legal obligation, courts look to concrete evidence of the customs and practices of other States. *Flores*, 414 F.3d at 250. Practices adopted for moral or political reasons are not enough, they must be "carried out in such a way[] as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it." *Id.* at 248-49 (quoting North Sea Continental Shelf (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. The Netherlands), 1969 I.C.J. 3, 44).

The Second Circuit in *Flores* looked at Article 38 of the Statute of the ICJ when determining the proper source of international law. *Flores*, 414 F.3d at 250. The court found that primary evidence of customary international law includes international conventions, "establishing rules expressly recognized by the contesting states" and "international custom, as evidence of a general practice accepted as law" as well as secondary sources such as judicial decisions and scholarly works. *Id.* at 251.

Accordingly, the Principle renders a legal obligation upon states through its incorporation into subsequent Declarations. It is recognized "custom and practice" by States reaffirming the Principle's existence since established in 1941. Aside from the aforementioned Rio Declaration, the Principle was asserted in 1992 by the UNFCCC. With 197 signatories as of 2015, the treaty

is a commitment where "States have, in accordance with the Charter of the United Nations and the principles of international law, … 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." United Nations Framework Convention on Climate Change, art. 20, June 12, 1992, C.N.81.2013.

Then, in 1996, the ICJ issued an advisory opinion declaring that: "[t]he existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment." Legality of the Threats or Use of Nuclear Weapons, Advisory Opinion, 1996I.C.J. Rep., ¶ 226, 241. This provides evidence that both the United Nations and the ICJ recognize the Principle as international law.

Even if the Principle is incorporated into a declaration that is not binding, time and State practices "provide evidence that a norm has developed the specificity, universality, and obligatory nature required for ATS jurisdiction." *Abdullah v. Pfizer, Inc.*, 562 F.3d 163, 177 (2nd Cir. 2009). When looking to the customs and practices of the U.S., as warranted by *Flores* and *Abdullah*, there is concrete evidence that the Principle is obligatory. The Supreme Court held that carbon dioxide and other greenhouse gases were "pollutants" subject to regulation under the CAA, 42 U.S.C. § 7521, section 202(a)(1). *Massachusetts v. EPA*, 549 U.S. 497 (2007). Following, the Environmental Protection Agency ("EPA") found that greenhouse gas emissions and the resulting climate change could endanger public health and welfare, thus the CAA was set to regulate greenhouse gas emissions. 74 Fed. Reg. 66,496 (Dec. 15, 2009). The next year, the EPA adopted fuel economy standards and greenhouse gas emissions rates for passenger vehicles, 75 Fed. Reg. 25,324 (May 7, 2010), and required major sources of greenhouse gas emissions to

establish technology-based limits on emissions. 75 Fed. Reg. 31,514 (Jun. 3, 2010).

Further, in 2015, regulations extended to power-plants through the Clean Power Plan, 80 Fed. Reg. 64,662 (Oct. 23, 2015) and the U.S. signed into the Paris Agreement, with the commitment to reduce greenhouse gas emissions. Paris Agreement to the United Nations Framework Convention on Climate Change, opened for signature Apr. 22, 2016, U.N. Doc. FCCC/CP/2015/L.9 (Dec. 12, 2015). In sum, the Principle is a "specific, universal and obligatory" norm, and therefore a principle of the law of nations, or customary international law.

B. Hexon is Obligated to Follow the *Trail Smelter* Principle as Customary International Law Due To Its Worldwide Refineries and Sales Activities Contributing to Global Warming and Climate Change

When tortious conduct "violates norms of universal concern that are recognized to extend to the conduct of private parties" claims can be brought against non-governmental actors. *Abdullah*, 562 F.3d at 173 (internal quotations omitted). In *Sosa*, the Court stated that the Law of Nations applies to private rights in a "narrow class of international norms" where common law creates a cause of action. *Sosa*, 542 U.S. at 729. The international norms must have "contravened the law of nations, admitted of a judicial remedy, and simultaneously threatened serious consequences in international affairs." *Abdullah*, 562 F.3d at 173 (citing *Sosa*, 542 U.S. at 714). Thus, a federal court can recognize a violation of customary international law by a non-governmental actor if the norm is recognized by U.S. courts as "specific, universal, and obligatory." *Abdullah*, 562 F.3d at 174. However, the court must address the "practical consequence of making that cause available to litigants." *Id*. at 173-74 (quotations omitted).

i. Customary International Law Obligations are Enforceable Against Hexon as a Non-Governmental Actor.

In 2016, at the Johannesburg Conference, the International Law Association, which has consultation status with a number of United Nations specialized agencies, compiled a final report

on Non-State Actors ("NSA").[15] Within, the following was provided as a working definition of non-state, synonymous with non-governmental, actors:

> *a) NSA's are not bodies comprised of and governed or controlled by States or groups of States; b) NSA's are actors that actually perform functions in the international arena that have real or potential effects on international law; and c) are legally recognized and organized entities. The legal recognition can take place in national or international law.*

Non State Actors, Johannesburg Conference, International Law Association, ¶ 18. (2016), available at: *http://www.ila-hq.org/index.php/about-us/aboutus2*. Further, the report stated that "references to non-state actors have appeared in certain acts adopted at the international level" such as the UN Security Council Resolution 1540 (2004) on Non- Proliferation of Weapons of Mass Destruction and the European Commission. *Id*. at ¶ 22-24. Another international entity that includes NSA is the United Nations Global Compact initiative "which challenges business leaders to embrace and enact nine basic principles with respect to human rights, including labor rights and the environment. Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, U.N. Doc.E/CN.4/Sub.2/2003/ 12/Rev.2 (2003). Available at: http://hrlibrary.umn.edu/links/norms-Aug2003.html.

Hexon became a corporation through a merger of all major U.S. oil producers. It is not a U.S. entity, but incorporated in New Jersey and its principle place of business in Texas. Hexon performs functions in the "international arena" through its operation of refineries throughout the world. The incorporation process allows Hexon to be legally recognized and the corporation has made contracts with other States, such as New Union Island. Thus, Hexon is a non-state actor recognized by international law.

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[15] *Non State Actors*, Johannesburg Conference, International Law Association, (2016), available at: *http*://www.ila-hq.org/index.php/about-us/aboutus2

ii. Emissions from HexonGlobal are a violation of the Trail Smelter Principle, which Obligations are Extended to Non-Governmental Actors

As discussed above, the *Trail Smelter* Principle is part of the Law of Nations, recognized since its establishment, and is enforceable under the ATS. Emissions, such as the ones from Hexon "contravened the law of nations" by causing substantial harm to A'nu Atu and New Union Island, evidenced by extensive storm damage, sea water intrusion, loss of resources and increased health risks. Additionally, judicial remedy is available for the violation as evidenced by the Principle under the ATS through monetary and injunctive relief. Lastly, the emissions have "threatened serious consequences in international affairs." Hexon's emission contribute to six percent of historic global emissions and currently contribute to nine percent of global emissions through worldwide sales.

The harm caused to other nations from the emissions, plus the effects of regulating world-wide refineries would threaten serious consequences due to international affairs. Recognizing transboundary harm as an international norm would "open the door" for courts to hold non-state actors liable for the harm their emissions cause. While this could only provide some monetary relief (under the *Trail Smelter Arbitration*), it could also provide the incentive for non-state actors to further regulate their emissions.

iii. Common Law Provides a Cause of Action for ATS Claims Against Non-Governmental Actors

A non-governmental actor must violate customary international law and face a cause of action provided by common law in order to substantiate a civil suit. *See e.g. Sosa*, 542 U.S. at 725. The common law torts of negligence and nuisance could provide the basis for the cause of action under *Sosa*.

a. *Negligence*

Under U.S. common law, where a non-governmental actor fails to comply with an established duty, which caused harm to another, they are liable for the damages. *See e.g. Palsgraf v. Long Island R. Co.*, 162 N.E. 99 (N.Y. 1928). The Principle is the established duty. The Tribunal found that the Trail Smelter was liable for the substantial harm caused by the transboundary emissions, which is incorporated into several accords subsequent to its holding in 1941. Hexon knew, based on their own scientific research, that continued global sales and burning of fossil fuels would result in substantial harmful global climate change; yet it still contributes to nine percent of global emissions. Further, Hexon's emissions contribute to nearly a third of the U.S. emissions. Those emissions caused global climate change, which resulted in harm suffered by the Appellants in the form of flooding, sea water intrusion, loss of natural resources and increased health risks.

b. *Nuisance*

Common law nuisance is when a person unreasonably interferes with a right that the general public shares in common. *See e.g. Smith v. ConocoPhilips Pipe Line Co.*, 801 F.3d 921 (8th Cir. 2015). Here, Hexon unreasonably interfered with the sinking island nations' use of their lands. Both islands of A'Na Atu and New Union suffer from the effects of the emissions. Limits on production and combustion of fossil fuel will reduce further damage. Hexon is aware of the effect the emissions have on the global climate but still operate world-wide. There is no evidence to suggest that they have taken reasonable means to limit production or sales.

Therefore, when a non-governmental actor, such as Hexon, takes part in tortious conduct like negligence and nuisance, they are liable under customary international laws "recognized to extend to the conduct of private parties." Hexon is responsible for a portion of the emissions, just

as any non-governmental actor involved in the production, sale and distribution of fossil fuels. Hexon's world-wide tortious conduct negatively impacts the global climate system.

C. HexonGlobal, Inc.'s Fossil Fuel Activities are Violative of a Recognized International Norm and Touch and Concern the United States with Sufficient Force to Induce the Alien Tort Statute

"[E]ven where claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application." *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 124-25 (2013). Foreign nationals can bring civil claims into U.S. courts when there is a recognized international norm under the Law of Nations. Claims based on U.S. global corporate activities must "touch and concern" the United States with "sufficient force" to place those claims under U.S. jurisdiction.

i. Hexon's Corporate Activities Violate a Recognized International Norm and Thus Falls within the ATS

Domestic corporate ATS liability is permissible when the harm is a recognized international norm, allowing for extraterritorial application of U.S. federal laws. Appellant asserts that Hexon's fossil fuel related business activities constitute a violation of the Law of Nations. Whether international recognized norms extend to domestic corporations requires a norm-by-norm analysis; in which there is no categorical rule of corporate immunity. *Doe I v. Nestle USA, Inc.*, 766 F.3d 1013, 1022 (9th Cir. 2014). Liability does not depend on international precedent because norms that are universal or absolute to all actors provide a basis for ATS claims against corporations. *Id*.

As mentioned, the U.S., and multiple countries recognized the threat of climate change through signing and ratifying the UNFCCC, which acknowledges climate change as a potential threat. Hexon is responsible for substantial harmful global climate change such as increased global temperatures and rising sea levels. Thus, Hexon's adverse contribution to global

greenhouse gases as a recognized international norm allows for extraterritorial application of U.S. federal laws.

ii. Hexon's Global Activities Touch and Concern the U.S. with Sufficient Force to Apply the ATS

It is not sufficient to merely say that because corporations inflicted injury abroad extraterritorial application is induced. ATS claims must appropriately connect to activities within a U.S. jurisdiction. *Kiobel's* "touch and concern" test determines when it is permissible for an ATS claimant to seek extraterritorial application of U.S. federal laws. A court has subject matter jurisdiction over a plaintiff's ATS claim when the "relevant conduct" alleged "touches and concerns the territory of the United States with sufficient force." *Al Shimari v. CACI Premier Technology, Inc.*, 758 F.3d 516, 528 (4th Cir. 2014) (quoting *Kiobel*, 569 U.S. at 1669)). *Kiobel* did not articulate express factors in the "touch and concern test," therefore, lower courts have broad discretion in what satisfies the test.

In *Al Shimari*, four Iraqi citizens brought suit under the ATS against CACI Premier Technology, Inc., a military contractor, alleging abuse and torture during their detention. *Al Shimari*, 758 F.3d at 525. The court applied *Kiobel's* "touch and concern" test and found that there was "sufficient force" to enact extraterritorial application. *Id*. at 530. In deciding, the court considered: (1) CACI maintained the status of a U.S. corporation; (2) the corporation's employees are U.S. citizens; (3) the orders were issued in the U.S and the contracts required government approval; (4) the allegations were against the corporation's managers in the U.S.; and (5) Congress expressly intended to provide aliens access to U.S. courts through the enactment of the Torture Victim Protection Act of 1991 and 18 U.S.C. § 2340A (Torture). *Id.*

In contrast, the *Balintulo* court found that the corporation's lacked "relevant conduct" to displace the presumption against extraterritorial application. *Balintulo v. Ford Motor Co.*, 796

F.3d 160, 168 (2nd Cir. 2015). Victims of apartheid-era violence brought a class-action suit under the ATS, against Ford Motor Company ("Ford") and International Business Machines ("IBM"), claiming those companies aided and abetted violations of customary international law in South Africa. *Balintulo*, 796 F.3d at 163. The plaintiffs' only basis of "relevant conduct" against Ford was through a subsidiary. *Id*. at 168. The court found that "[a]llegations of general corporate supervision are insufficient to rebut the presumption against territoriality." *Id*. In the case of IBM, all "relevant conduct" occurred in South Africa by an IBM subsidiary. *Id*. at 169.

An ATS claim induces extraterritorial application when the "touch and concern" test proves that the "relevant conduct" applied "sufficient force" to connect corporate liability to U.S. federal jurisdiction; as is the case with Hexon. Al Shamari and Balintulo may serve as guideposts for future courts exerting their discretion in extraterritorial application. First, Hexon committed the conduct, not a subsidiary of Hexon. Additionally, Hexon maintains status as a U.S. corporation. Decisions regarding sales and production activities are made in Texas at their principle place of business. Further, Hexon contributes to a third of U.S.' total emissions. As the court found in *Al Shimari*, there is enough "relevant conduct" by Hexon that "touch[es] and concern[s]" the U.S. with "sufficient force" to induce extraterritorial application of U.S. federal laws inside federal courts.

D. The Clean Air Act Displaces Mana's Claim Under the *Trail Smelter* Principle and Thus Presents a Non-Justiciable Political Question

The judicial branch does not have the authority to hear non-justiciable claims, whereby the harm flows into international commerce, such as fossil fuels. *See City of Oakland*, 325 F. Supp. at 1024; *City of New York v. BP P.L.C.*, 325 F. Supp. 3d 466 (S.D.N.Y. 2018). The EPA's authority to set emission standards through the CAA displaces federal common law when the question centers around greenhouse gas production from fossil fuels. *Amer. Elec. Power Co.*,

Inc., 564 U.S. at 424. "When Congress has acted to occupy the entire field, that action displaces any previously available federal common law action . . . [and] displacement of a federal common law right of action means displacement of remedies." *Kivalina*, 696 F.3d at 857.

Further, the Supreme Court found that congressional action displaces federal common law addressing domestic greenhouse gas emissions. *Id*. at 858. This also displaces public nuisance claims seeking damages and injunctive relief. *Id*. Under *Baker's* six factor test to determine non-justiciability, policy determinations are better left to the other branches of federal government. *Vieth*, 541 U.S. at 278 (2004).

Appellant argues she is suffering harm from Hexon's greenhouse gas emission due to fossil fuel related activities and seeks damages and injunctive relief. However, because Appellant's claim flows into the stream of international commerce, the issue is non-justiciable and thus leaves Congress and the executive branch to answer the question. Appellant's claims center around greenhouse gas emissions, which are regulated under the EPA. Those claims fall within legislative and executive jurisdiction, displacing Appellant's claim by the CAA. Greenhouse gas emissions are policy determinations because they involve the global atmosphere and not just the U.S. and therefore, would be further reason to allow the other branches to decide the issue. The displacement also entails any damages that may be sought for similar issues. Meaning, Appellant's claim against Hexon's business activities are displaced by the CAA and any damages and forms of relief against Hexon would follow. Because the EPA has authority to set emission standards with regards to greenhouse gases, a pollutant at the root of Appellant's claim, the issue is displaced by the CAA.

Thus, Appellant's ATS claim against Hexon, as a domestic corporation, would provide sufficient force to displace the presumption against extraterritorial application since its fossil fuel

related activities "touch and concern" U.S. soil. Once inside U.S. jurisdiction, however, Appellant's claim is displaced by the CAA because the EPA regulates emissions. Greenhouse gas emissions become part of the global atmosphere, presenting foreign policy issues, subject to Congressional and executive authority. As such, Appellant's claim would present a non-justiciable question.

Conclusion

The Court should uphold the District Court's decision to dismiss Appellant Flood's complaint for failure to state a claim under the Fifth Amendment because there is no Constitutional right to a "healthy and stable global climate system" through the public trust doctrine. Even if a fundamental liberty interest was recognized, due process protection does not extend to alleged harm to the global atmosphere caused by anthropogenic climate change when over 85% of the greenhouse gases are emitted by third parties' sale, production, burning of fossil fuels. Further, if the Court disagrees with the District Court and adopts the danger creation exception, it is not met because the government action cited predated any knowledge that potential harms of climate change existed. Finally, this claim presents a non-justiciable political question because New Union's rules and regulations are textually committed to Congress by the Constitution and the Appellant is asking the court to make policy determinations about global greenhouse gas emission limitations that would violate the separation of powers principles.

The Court should uphold the District Court's decision to dismiss Appellant Mana's complaint. Under the *Trail Smelter* Principle recognized by U.S. common law, Hexon's fossil fuel related activities are violations of international norms recognized under the Law of Nations. As third-party non-state actors, emissions standards recognized under the Law of Nations, are binding on Hexon. Further, as a norm, Appellant's claim is allowed into federal courts under a

negligence or nuisance claim. The ATS provides Appellant with subject matter jurisdiction because Hexon's activities provide sufficient force to displace the presumption against extraterritoral application. Here, the CAA would displace Appellant's common law claim and present a non-justiciable question. A policy determination that would be better left to the other branches of government.

In conclusion, the Court should uphold the District Court's dismissal of the case because Appellants' failed to state a claim for relief and presented cases with non-justiciable political questions.