Team No. 44

CA. No. 18-000123

IN THE 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

THE UNITED STATES OF AMERICA,

Appellee.

On Appeal from the United States District Court
for New Union Island in No. 66-CV-2018

BRIEF OF APPELLEE, HEXONGLOBAL CORPORATION, Appellee

Oral Argument Requested

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STATEMENT OF JURISDICTION

The United States Court of Appeals for the Twelfth Circuit lacks subject matter jurisdiction under 28 U.S.C. § 1331 and 28 U.S.C. § 1350. The public trust doctrine does not implicate a "federal question" under 28 U.S.C. § 1331 because the United States Supreme Court held that the doctrine is a matter governed solely by state laws. Pursuant to Article III of the United States Constitution, this Court has jurisdiction to hear claims that do not implicate nonjusticiable political questions. Moreover, this Court does not have jurisdiction under 28 U.S.C. § 1350 ("ATS") for claims that fail to allege a customary international law violation. Appellee agrees that this Court has jurisdiction to review the final judgment of the United States District Court for New Union, dismissing the claims for lack of jurisdiction pursuant to 28 U.S.C. § 1291.

STANDARD OF REVIEW

The standard of review of a motion to dismiss for lack of subject matter jurisdiction and for failure to state a claim upon which relief may be granted is reviewed *de novo*. Therefore, this Court "must accept as true all allegations in the complaint and draw all reasonable inferences in favor of the non-moving party." *Taylor v. Vt. Dep't of Educ.*, 313 F.3d 768, 776 (2d Cir. 2002).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

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

II. Can Mana assert an Alien Tort Statute, 28 U.S.C. § 1350 claim against a domestic corporation?

III. Is the *Trail Smelter* Principle a recognized principle of customary international law enforceable as the "Law of Nations" under the Alien Tort Statute?

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

V. If otherwise enforceable, whether the district court correctly held that the *Trail Smelter* Principle is displaced by greenhouse gas regulation under the Clean Air Act?

VI. Whether Mana's claim under the Alien Tort Statute and Flood's public trust claim present nonjusticiable political questions?

STATEMENT OF THE CASE

I. Statement of Facts

HexonGlobal is a major United States oil producer incorporated in New Jersey with its principle place of business in Texas. R. 5. HexonGlobal operates multiple refineries around the world, including one in New Union Island, a United States possession in the East Sea. As the surviving corporation of all United States oil producers, HexonGlobal contributes thirty-two percent of United States cumulative fossil fuel-related greenhouse gas emissions. R. 5. Global consumption of HexonGlobal's products represent only six percent of historic, global emissions. R. 5.

Appellants, Apa Mana, a resident of A'na Atu Island, and Noah Flood, a citizen of New Union Island, are members of the Organization of Disappearing Island Nations (ODIN). Mana asserts an ATS claim against HexonGlobal alleging that its business activities effect global climate change. R. 3. Flood brings forth a claim against the United States government for not protecting the global climate system. R. 3. Flood fails to state his relief. Because Mana and Flood reside in communities with an elevation of less than one-half meter above sea level, Both Mana and Flood have experienced property damage and contaminated water wells caused by rising sea levels. Accordingly, Mana and Flood also allege potential future damages. R. 5.

The United States government has recognized the dangers associated with anthropogenic climate change and has implemented numerous regulations limiting greenhouse gas emissions. *See* R. 6-8. These regulatory actions have decreased greenhouse gas emissions in the United States. R. 7.

II. Course of Proceedings

This is an appeal from the Order of the United States District Court for New Union Island issued August 15, 2018. R. 1. The district court dismissed Apa Mana's claim under 28 U.S.C. § 1350 finding that the *Trail Smelter* Principle is displaced by the Clean Air Act. R.1. The district court dismissed Noah Flood's public trust claim because the Fifth Amendment of the United States Constitution does not provide governmental protections from atmospheric climate change. R.1.

SUMMARY OF ARGUMENT

HexonGlobal argues that Mana and Flood do not have a cause of action based on Fifth Amendment substantive due process protections because a sustainable environment is not a fundamental right under the public trust doctrine. In addition, the public trust doctrine does not traditionally or historically recognize protections of natural resources as fundamental rights. However, even if atmospheric protection is recognized as a fundamental right, the public trust doctrine does not satisfy strict scrutiny.

Mana's Alien Tort Statute claim should be dismissed for lack of subject matter jurisdiction because corporate liability is not a universally recognized customary international norm. Alternatively, Mana's Alien Tort Statute claim should be dismissed for failure to state a claim because the *Trail Smelter* Principle does not satisfy *Sosa*'s universal and specific standard. A States' duty to prevent, reduce, and control the risk of environmental harm to other states lacks universal consensus among the international community and fails to identify the level of prevention required. Assuming *arguendo* that the *Trail Smelter* Principle is a universal and specific customary international law, it does not impose obligations enforceable against HexonGlobal, a non-governmental actor. The *Trail Smelter* Principle explicitly imposes liability against state

sovereigns for the actions of private entities within its borders. Moreover, even if the Trail Smelter principle were enforceable against HexonGlobal, it would fail to meet the clear and convincing evidence burden since no evidence exists directly connecting HexonGlobal to the source of pollution causing climate change in A'na Atu Island and New Union Island.

HexonGlobal further argues that even if the *Trail Smelter* Principle is a universal, specific, and obligatory customary international norm enforceable against non-governmental actors, the Clean Air Act displaces any cause of action Mana may have under the Alien Tort Statute. The Clean Air requires the Environmental Protection Agency to establish emission standards for pollutants that significantly contribute to air pollution and endanger the public health and welfare. Therefore, Congress has occupied the field of greenhouse gas emissions from domestic power plant which completely displaces Mana's federal common law cause of action.

Lastly, Mana and Flood's claims do not present nonjusticiable political questions. The Supreme Court in *Baker v. Carr* outlined six dispositive factors that suggest nonjusticiable political questions. Appellant's claims do not implicate any of these factors because the claims are not textually committed to a coordinating branch of government, there are judicially discoverable and manageable standards for the claims' resolution, and they can be adjudicated without disrespecting another branch of government.

ARGUMENT

I. THERE IS NO FIFTH AMENDMENT CAUSE OF ACTION UNDER THE PUBLIC TRUST DOCTRINE BECAUSE IT IS A MATTER OF STATE LAW.

Flood does not have a cause of action under the public trust doctrine to support his Fifth Amendment claim. The public trust doctrine is an archaic state principle that dates back to the Justinian Roman Code, J. Inst. 2.1.1 (J.B. Moyle trans.), and is determined by states rather than

the Constitution. The public trust doctrine does not protect the atmosphere or impose duties on the federal government. *Alec L. v. Jackson*, 863 F. Supp. 2d 11, 13 (D.D.C. 2012) *aff'd*, 561 F. App'x 7 (D.C. Cir. 2014). As a result, under federal common law jurisdiction, there is not a valid cause of action against the federal government. *PPL Montana, LLC v. Montana*, 565 U.S. 576, 603-04 (2012). The doctrine recognizes states' ownership to navigable and tidal waters and, therefore, has never extended to the atmosphere. *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 476 (1988). Courts have not applied this doctrine to extend to the federal government's regulation of the atmosphere or the government obligation to act as a fiduciary for the environment. *See e.g. Alec L.*, 863 F. Supp. 2d at 13. Even if the United States had the duty to protect public resources under the public trust doctrine, the public trust doctrine would be displaced by federal common law, specifically the Clean Air Act ("CAA"). *See infra.* Part V; *Amer. Elec. Power Co. v. Connecticut*, 564 U.S. 410 (2011); *see also Ill. Cent. R.R. Co. v. Ill.*, 146 U.S. 387, 452 (1892).

The public trust doctrine remains a matter of state law that does not create a federal cause of action. In *Phillips Petroleum Co. v. Mississippi*, the recorded titleholders of land underlying a bayou and other streams brought suit against the state to clear title from oil leases granted by the state. *Phillips Petroleum Co.*, 484 U.S. 469, 469 (1988). The court held that the doctrine recognizes states' ownership to navigable and tidal waters and the lands lying under waters that are influenced by non-navigable waters, and not its broader statements. *Id.* at 476. Likewise, in *Alec L. v. Jackson*, plaintiffs brought suit against federal officers alleging that they violated their fiduciary duties to preserve and protect the atmosphere under the public trust doctrine, the court held that the court's jurisdiction was misplaced because the public trust doctrine remains a matter of state law. *Alec L.*, 863 F. Supp. 2d at 15-16.

Here, because the public trust doctrine does not apply to the federal government's regulation of greenhouse gases, Flood fails to raise a federal question that the federal judiciary has jurisdiction over. Unlike the recognized states' ownership in *Phillips Petroleum Co.*, which included navigable and tidal waters and the lands lying under waters, the global atmospheric climate system is not property subject to the public trust doctrine. Although Flood has experienced damage to his property, seawater intrusion into his drinking water, and potentially reduced availability to food sources, *see* R. 5, the government does not have a fiduciary duty to oversee the global atmosphere, air, or sea levels under the public trust doctrine. As a "low-lying island with a maximum height above sea level of less than three meters," R. 4, New Union Island owns only non-navigable waters and lands not lying under waters that are influenced by non-navigable waters. Like the court's decision in *Alec L.*, which held that the public trust doctrine remains a matter of state law, Flood does not have a cognizable federal cause of action because the government does not have any fiduciary duties to protect the atmosphere from the production, sale, and burning of fossil fuels. Even if his public trust claim created a federal cause of action, it would be displaced by federal common law, specifically the CAA. *See infra* Part V. Therefore, Flood fails to raise a cause of action under the public trust doctrine.

A. A Sustainable Environment Is Not A Fundamental Right Under The Public Trust Doctrine.

Flood does not have a cause of action against the United States government, based on Fifth Amendment substantive due process protections, for failure to protect the global atmospheric climate system from the disruption due to the production, sale, and burning of fossil fuels.

The Due Process Clause of the Fifth Amendment to the United States Constitution bars the federal government from depriving a person of "life, liberty, or property" without "due process of law." U.S. Const. amend. V. Fundamental rights include both rights enumerated elsewhere in the Constitution and rights and liberties which are "deeply rooted in the Nation's history and tradition" and "implicit in the concept of ordered liberty." *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997). Courts must "exercise the utmost care whenever . . . break[ing] new ground in [a] field," *Id*. at 720, because the court is establishing a fundamental right without legislative approval, *Obergefell v. Hodges*, 576 U.S.___135 S.Ct. 2584, 2605-06 (2015). The only court recognizing that a sustainable environment is a fundamental right is a district court in the state of Washington. *Juliana v. United States*, 217 F. Supp. 3d 1224, 1250 (D. Or. 2016).

Fundamental rights must be deeply rooted in the nation's history and tradition and implicit in the concept of ordered liberty. In *Obergefell v. Hodges*, a same-sex couple brought a due process claim against several states that defined marriage as a union between a man and a woman. *Obergefell*, 135 S.Ct. at 2588. The court held that the right to marry is a fundamental right that extends to same-sex couples because of the underlying principles and tradition of marriage. [1] *Id*. at 2598-602. The court stated that "these liberties extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs." *Id*. at 2597. However, in *Juliana v. United States*, after numerous children brought a substantive due process claim against the United States government alleging that greenhouse gases

[1] The four underlying principles and tradition of marriage consist of (1) the right to choose whether and whom to marry is inherent in the concept of individual autonomy, (2) the right serves relationship that are equal in importance to all who enter them, (3) assuring the right to marry protects children and families, and (4) marriage being the keystone of our social order and foundation of the family unit.

destabilized the climate system which led to catastrophic levels of pollution, the district court held that a climate system capable of sustaining human life is a fundamental right. *Juliana*, 217 F. Supp. 3d at 1233-34. The court reasoned that any governmental action that would affirmatively and substantially damage the climate system in a way that would harm people, threaten food sources, or alter the planet's ecosystem is a violation of the due process clause. *Id.* at 1250.

Here, a sustainable climate is not a recognized fundamental right that is deeply rooted in the nation's history or implicit in the concept of ordered liberty. Unlike the liberties in *Obergefell*, which affords all individuals the dignity and autonomy when deciding whether and whom to marry, a healthy and stable climate system does not pertain to all individual's autonomous liberties that extend to intimate choices that define personal identities and beliefs. Although natural resources are protected under the public trust doctrine, there is not a strong enough nexus between the plaintiff's threat to his well-being and the implicit concept of ordered liberty. Unlike the court's reasoning in *Juliana*, which stated that any governmental action that would affirmatively and substantially damage the climate system in a way that would harm people, not all individuals will be affected by rising sea levels that are induced by greenhouse gases. Thus, the damage to Flood's home, drinking water supply, and, potentially, his food sources and health, does not amount to a due process violation. Further, because no court has addressed this issue until *Juliana* and the court would be acting without legislative approval, the utmost care must be given when breaking new ground. Because a sustainable environment is not deeply rooted in the nation's history and tradition under the public trust doctrine, it cannot be recognized as a fundamental right.

1. Even If A Sustainable Environment Is A Fundamental Right, The Public Trust Doctrine Does Not Satisfy Strict Scrutiny.

Even if the public trust doctrine creates a cause of action under due process rights, it does not meet the applicable level of scrutiny for the right to be fundamental. Strict scrutiny is applied when the government infringes a fundamental right, "unless the infringement is narrowly tailored to serve a compelling state interest." *Reno v. Flores*, 507 U.S. 292, 302 (1993). An infringement is not narrowly tailored if it is overly inclusive or under inclusive. *See Zablocki v. Redhail,* 434 U.S. 374, 387 n. 12 (1978). If the right is not fundamental, rational basis requires the court to uphold the challenged government actions so long as it "implements a rational means of achieving a legitimate governmental end." *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 55 (1973) (finding education not a fundamental right subject to ration basis).

Here, Flood's claim fails because the public trust doctrine is not narrowly tailored to serve a compelling state interest. Flood's claim rests on the emission of greenhouse gases into the atmosphere which causes climate change to the Islands located in the East Sea. Although the public trust doctrine does serve a compelling state interest in preserving state owned lands and waterways, it is not narrowly tailored to protect against *global* climate change. Flood's application of the doctrine is overly inclusive because it would require all states to adopt new principles not recognized, but it is also under inclusive because it applies only to states' ownership to navigable and tidal waters and the lands lying under waters and not its broader statements, including atmospheric gases. Therefore, at minimum, the government's actions of regulating the production, sale, and combustion of fossil fuels in the U.S. market would only meet the standard of rational basis. Thus, even if a sustainable environment is considered a fundamental right, the public trust doctrine does not meet the stringent standard of strict scrutiny.

2. The Government Is Not Required to Take Affirmative Actions to Protect The Global Atmospheric Climate System.

The Due Process Clause imposes no affirmative duty to protect citizens from global atmospheric climate change due to the production, sale, and burning of fossil fuels. The government is not obligated to take affirmative action even when "such aid may be necessary to secure life, liberty, or property itself may not deprive the individual." *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 196 (1989). Nor is it obligated to take affirmative action from allegedly wrongful acts by private parties. *Id.* (holding that government officials are not obligated to remove child from a suspected abusive home.) The government is required to protect a person's rights under limited circumstances when it has created a danger or has a special relationship with an individual. *L.W. v. Grubbs*, 974 F.2d 119 (9th Cir. 1992); *Penilla v. City of Huntington*, 115 F.3d 707 (9th Cir. 1997). However, negligent inflicted harm is not a valid due process claim, *Grubbs*, 974 F.2d at 122 ("not every tort claims automatically becomes a constitutional wrong."), and only the most egregious abuse of power which shocks the conscience will be "arbitrary in the constitutional sense," *see Cty. of Sacramento v. Lewis*, 523 U.S. 833, 846- 47 (1998); *Rochin v. California*, 342 U.S. 165, 209-10 (1952)(pumping a suspect's stomach against his will was an act that shocked the conscience and violated his due process rights.)

In this case, neither the government or New Union Island are required to protect citizens from disrupted global atmospheric climate systems due to the production, sale, and burning of fossil fuels. Like the plaintiffs in *DeShaney* who tried to hold the government responsible for not protecting the child from his father's abuse, Flood cannot hold the government responsible for the cumulative fossil fuel-related greenhouse gas emissions from products sold by HexonGlobal. The government has not dealt with atmospheric climate change in a negligent manner that would

"shock the conscience." Although the government created tax subsidies for fossil fuel production, leases of public plants for coal, oil, and gas production, and development of fossil fuel power plants, R. 6., the government has taken multiple actions to reduce and regulate greenhouse gases domestically and internationally. Domestically, the Environmental Protection Agency ("EPA") regulates pollutants under the CAA, including a rule establishing both fuel economy standard and greenhouse gas emission for cars and light trucks through model year 2025. 77 Fed. Reg. 62,623 (Oct. 15, 2012). The EPA also issued regulations establishing carbon dioxide emissions standards for new power plants, 80 Fed. Reg. 64510 (Oct. 23, 2015) and requires states to implement controls on greenhouse gas emissions from existing power plants, the so-called "Clean Power Plan." 80 Fed. Reg. 64662, (Oct. 23, 2015). Internationally, the United States signed the United Nations Framework Convention on Climate Change (UNFCCC), which intends to globally stabilize greenhouse gas concentrations in the atmosphere, United Nations Framework Convention on Climate Change, May 9, 1992, 1771 U.N.T.S. 107, 169. Despite President Trump's intent to withdraw from the Paris Climate Agreement by 2025, the United States is committed to reduce greenhouse gas emissions by 26-28% by 2025, compared to 2005 levels.[2]

Thus, Flood does not have a cause of action against the United States government, based on the Fifth Amendment substantive due process under the public trust doctrine, for failure to protect the global atmospheric climate system from the disruption due to the production, sale, and burning of fossil fuels.

[2] USA First NDC (Sept. 3, 2016), http://www4. unfccc.int/ndcregistry/Publis hedDocument s/United%20States%20of %20America%20 First/U.S.A.%20First%20NDC%2 0Submission.pdf.

II. THE ATS DOES NOT PROVIDE JURISDICTION FOR CLAIMS BROUGHT AGAINST DOMESTIC CORPORATIONS.

The Alien Tort Statute ("ATS") provides: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. The Supreme Court in *Sosa* granted federal courts the authority to "recognize private claims under federal common law" for violations of modern international law norms that are as well defined and accepted as "the historical paradigms familiar when § 1350 was enacted." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724 (2004). These "historical paradigms" include: "violation of safe conducts, infringement of the rights of ambassadors, and piracy." *Id.* at 715. Following *Sosa,* the ATS provides a cause of action for violations of international norms that are "specific, universal, and obligatory." *Id.* at 732. However, in exercising this extended judicial authority courts must consider "the practical consequences of making that cause available to litigants in the federal courts." *Id.* at 732-33. Courts must exercise "great caution," only recognizing "a narrow class of [modern] international norms." *Id.* at 729.

Therefore, ATS plaintiffs alleging violations of the "law of nations" must show that: (1) international law extends liability to the defendant being sued; and (2) the alleged conduct violates a "specific, universal and obligatory" norm of customary international law. In the present case, international law does not grant jurisdiction over corporations, and the *Trail Smelter* Principle ("TSP") is not a "universal, specific and obligatory" norm under the stringent *Sosa* standard. Thus, this Court should dismiss Mana's ATS claim against HexonGlobal for lack of jurisdiction.

A. Corporate Liability Is Not A Recognized Customary International Norm.

Courts determining corporate liability under the ATS must consider whether "*international* law extends the scope of liability to the [corporation] being sued." *Id.* at 732 n.20 (emphasis added). The claimant must show that corporate liability is recognized as customary international

law. *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 131 (2d Cir. 2010), *aff'd,* 569 U.S. 108 (2013) Customary international law results from a "general and consistent state practice followed from a sense of legal obligation." Restatement (Third) of Foreign Relations § 102 (1987). This requires "concrete evidence" showing "that States feel themselves under a legal obligation to impose [corporate] liability." *Flores v. Southern Peru Copper Corp.*, 414 F.3d 233, 250 (2d Cir. 2003). In doing so, courts look "primarily to the formal lawmaking and official actions of States and only secondarily to the works of scholars." *Id.*

First, international tribunals expressly reject corporate liability. For example, after World War II, the Nuremberg Tribunal did not grant jurisdiction over the German company responsible for producing and supplying poison gas used in Nazi gas chambers. *Jesner v. Arab Bank, P.L.C.*, ___ U.S. ___, 138 S. Ct. 1386, 1400 (2018). The tribunal specifically explained: "[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced." *The Nuremburg Trial*, 6 F.R.D. 69, 110 (1946). Similarly, the 1998 Rome Statute of the International Criminal Court ("ICC") limited jurisdiction to "natural persons" only. The Rome Statute of the International Criminal Court, art. 1 2187 U.N.T.S. 90, 37 I.L.M 1002 (1998). Even more telling, during negotiations, the French Delegation proposed corporate liability and the ICJ explicitly rejected.[3] Furthermore, "no international tribunal … has *ever* held a corporation liable for a violation of the law of nations." *Kiobel*, 621 F.3d at 133.

In addition, federal courts have explicitly rejected corporate liability under the ATS. For instance, in *Kiobel*, plaintiffs brought an ATS claim against multinational corporation for allegedly

[3] *See* Albin Eser, *Individual Criminal Responsibility,* in 1 Antonio Cassese et al., The Rome Statute of the Int'l Criminal Court: A Commentary 767, 778–79 (2002).

aiding and abetting the Nigerian government in human rights violations. *Id.* at 117. The court rejected the ATS claim finding that corporate liability is "not a rule of customary international law." *Id.* at 145.

Alternatively, courts have considered imposing corporate liability for a narrow set of norms violating human rights laws. In *Doe I v. Nestle USA, Inc.*, plaintiffs alleged that the corporation aided and abetted in child slavery. *Doe I v. Nestle USA, Inc.*, 766 F.3d 1013, 1017 (9th Cir. 2014). The court rejected *Kiobel* and held that the prohibition against child slavery "applies to all actors" and "could be asserted against corporations." *Id.* at 1022.

However, even if this Court adopts the reasoning in *Doe*, Mana fails to allege a human rights violation that potentially imposes corporate liability. Unlike the prohibition of child in *Doe,* global climate change resulting from the production and sale of fossil fuels does not rise to the malicious intent associated with slavery, genocide, and war crimes. Thus, international law does not impose corporate liability against HexonGlobal and Mana's ATS claim should be dismissed for lack of jurisdiction.

III. THE *TRAIL SMELTER* PRINCIPLE IS NOT A UNIVERSALLY RECOGNIZED, SPECIFICALLY DEFINED INTERNATIONAL LAW ENFORCEABLE UNDER THE ATS.

Under the "Law of Nations" prong, the ATS provides jurisdiction for violations of "customary international laws." *Kiobel*, 621 F.3d at 116. To proceed under the ATS, the claimant must prove that the alleged conduct violates a "universal, specific, and obligatory" international norm. *Sosa*, 542 U.S. at 732. Here, Mana's ATS claim should be dismissed for failure to state a claim because the *Trail Smelter* Principle does not satisfy *Sosa*'s universal and specific standard. A States' duty to prevent, reduce, and control the risk of environmental harm to other states lacks universal

consensus among the international community and fails to specifically proscribe the level of prevention required.

A. The *Trail Smelter* Principle Is Not A Universally Recognized Customary International Norm.

While the TSP has obtained *some* international recognition, it has not enjoyed consistent practice among civilized nations. As discussed *supra* Part II, customary international norms result from "general and consistent state practice followed from a sense of legal obligation." Restatement (Third) §102(2). The Supreme Court in *Sosa* declared a heightened standard for recognizing norms of international law in which only claims recognized by virtually all nations suffice for purposes of the ATS. *Sosa*, 542 U.S. at 732. Therefore, the norm underlying plaintiffs claim must be of "mutual, and not merely several, concern." *Filartiga v. Pena-Irala*, 630 F.2d 867, 888 (2d Cir. 1980). This is shown through "myriad decisions made in numerous and varied international and domestic arenas." *Flomo v. Firestone Nat. Rubber Co., LLC*, 643 F.3d 1013, 1015 (7th Cir. 2011). In making this determination, courts look at tribunals, treaties, declarations, and the writings of scholars and jurists as evidence of customary international law.

The TSP, also referred to as the "no-harm rule" originated from an international dispute between the United States and Canada. *see Trail Smelter Arbitration* (U.S. v. Canada), 3 R.I.A.A. 1965 (1941). The tribunal held:

> [N]o State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein when the case is of serious consequence and the injury is established by clear and convincing evidence.[4]

However, the *Trail Smelter* case does not provide binding precedential authority, but merely serves as one single example of state practice. While subsequent tribunals have recognized the

[4] *Trail Smelter Arbitration*, 3 U.N.R.I.A.A. 1965 (1941) ("The *Trail Smelter* case").

TSP or no-harm rule, *see* The Gabčíkovo-Nagymaros Project (Hung. v. Slovk.), 7 I.C.J. (1997) (recognizing the duty to prevent significant damage to the environment); *see also* the *Lac Lanoux* Case discussed *infra* Part III B, these international tribunals do not, by themselves, demonstrate general and consistent practice among nations. This is because international tribunals have no "independent force" and merely serve to persuade.[5]

Notably, the holding from the *Trail Smelter* dispute was subsequently implemented in the 1972 Stockholm Conference on the Human Environment as Principle 21: "Sates have … 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). This is the "no-harm rule," i.e., the duty to prevent, reduce and control the risk of pollution in other nations. However, courts have continuously held that Principle 21 is soft law and falls short under *Sosa's* universal requirement. *see Beanal*, 197, F.3d at 167; *Amlon Metals,* 775 F. Supp. at 670-71.

Even though the United States has implemented environmental regulations recognizing the no harm rule, these regulations substantially differ among the countries of the world today.[6] States *within* the United States have not obtained universal consensus regarding environmental regulation. This is evidenced by President Trump's proposal to withdraw from the Paris

[5] *See* David Hunter et. al., International Environmental Law and Policy 346 (2d ed., 1998).
[6] *See, e.g.,* Andrew P. Morriss & Roger E. Meiners, *Borders and the Environment,* 39 Envtl. L. 141, 142–45 (2009) (substantial disagreement exists among nations as to the appropriate reach of international environmental regulation).

Agreement and reverse current regulatory measures. R. 7. While the UNFCCC acknowledged a potential regime for preventing this type of harm,[7] "no legislation implementing this commitment has been adopted." R. 6. Therefore, the TSP has not obtained universal consensus among the international community. As a result, the TSP fails to meet *Sosa*'s universal requirement.

B. The *Trail Smelter* Principle Is Insufficiently Specific Under *Sosa*

Even if the TSP is universal, it is insufficiently specific under *Sosa*'s stringent standards. The Supreme Court made clear that a norm must be defined with a high specificity to "raise even the *possibility* of a private cause of action." *Sosa,* 542 U.S. at 732, 738 n. 30. (emphasis added). Thus, the alleged norm must have "sufficient criteria to determine whether a given action amounts to the prohibited act and thus violates the norm." *Xuncax v. Gramajo*, 886 F. Supp. 162, 184 (D. Mass. 1995). Accordingly, the norm must specify the degree of harm in an "articulable or discernable" manner. *Beanal v. Freeport-McMoran, Inc.*, 197, F.3d 161, 167 (5th Cir. 1999).

Vague rules that lack specific prohibitions are not actionable under the ATS. For instance, in *Amlon Metals Inc.*, *v. FMC Corp.*, plaintiff brought action against an American supplier claiming that the supplier violated Principle 21 and the Restatement (Third) of Foreign Relations Law. *Amlon Metals Inc. v. FMC Corp.,* 775 F. Supp. 668, 670-71 (S.D.N.Y. 1991). The court rejects plaintiff's claim holding that the international sources did not set forth any "specific proscriptions," but rather referred in a "general sense" to the responsibility to ensure that activities within their jurisdiction do not cause damage to the environment of another nation. *Id.* Similarly, the TSP contains vague language and fails to specify the level of prevention required. While the TSP

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[7] United Nations Framework Convention on Climate Change, May 9, 1992, 1771 U.N.T.S. 107, 169.

prohibits "serious consequences," it fails to identify the level of prevention required to prevent this threshold of harm. In the *Lac Lanoux* Case, another transboundary dispute, the tribunal dismissed France's claim because the tribunal could not determine what "significant" harm would occur as a result of the alleged conduct. *The Lac Lanoux Arbitration*, (Spain v. France), 12 R.I.A.A. (1957). Similarly, the TSP does not describe the type of conduct that would prevent "serious consequences." Even more in definitive is whether the TSP applies to pollution from multiple sources. Here, the TSP fails to define the level of prevention necessary for protecting the global atmosphere. Thus, the TSP is too vague to fall within *Sosa*'s specific threshold.

In sum, the TSP is not a universally recognized customary international norm. And even if this Court recognizes the principle as a norm, it fails to sufficiently satisfy Sosa's specific requirement. Therefore, Mana's ATS claim should be dismissed for failure to state a claim under international law.

IV. THE *TRAIL SMELTER* PRINCIPLE IS NOT OBLIGATORY AGAINST NON- GOVERNMENTAL ACTORS.

Assuming *arguendo* that the *Trail Smelter* Principle is a specific and universal customary international law, it does not impose obligations enforceable against HexonGlobal, a non-governmental actor. Generally, only government actors can be held liable for violations of customary international laws. *Kadic v. Karadzic*, 70 F.3d 232, 239-40 (2d Cir. 1995). However, courts can impose liability on private individuals if the alleged conduct was committed under the color of law. *See Arias v. Dyncorp*, 517 F. Supp. 2d 221, 223 (D.D.C. 2007) (holding the non-state actor liable under the color of law where the defendant was aided by government officials).

Inspired by the TSP, Principle 21 of the Stockholm Declaration traditionally applies only to state sovereigns because it is their "responsibility to ensure that the activities within their

jurisdiction or control do not cause damage to the environment or other states or areas beyond the limits of national jurisdiction." *Beanal*, 197, F.3d at 167 n. 6.

HexonGlobal's activities allegedly causing the rising sea level of A'na Atu does not fall within the exhaustive list that impose liability on non-governmental actors outlined in the Restatement (Third) § 404. Even if the TSP is customary international law, violations of the Principle or other environmental international law principles do not create a "universal concern" meant for adjudication pursuant to the ATS. Further, HexonGlobal is dissimilar to the private corporation in *Arias* because HexonGlobal is not controlled by any state agency, entwined with governmental policies, or funded by any act of Congress. *See Arias*, 517 F. Supp. 2d at 228. Therefore, HexonGlobal's conduct does not fall within § 1983 color of law jurisprudence and is not a state actor for ATS purposes.

Further, Principle 21 of the Stockholm Declaration primarily applies to state sovereignties because governments usually assume responsibility for the actions of private entities. For example, Canada voluntarily took responsibility in the *Trail Smelter* arbitration dispute for the smelter operations within its borders. Therefore, any alleged violations, of the TSP do not impose obligations on HexonGlobal because the corporation is a private entity, and the Principle itself is traditionally applied to state sovereigns and their efforts to prevent environmental harm across their borders.

V. MANA'S CLAIM ARISING UNDER THE ALIEN TORT STATUTE IS DISPLACED BY THE CLEAN AIR ACT.

However, even if the TSP is a universal, specific and obligatory customary international law, the CAA effectively displaces any cause of action Mana might have under the ATS. When an international legal principle achieves the status of customary international law, this triggers the application of federal common law. *Filartiga*, 630 F.2d at 881. Although the landmark decision of

Erie Railroad v. Tompkins struck down general federal common law, a "new" federal common law recently surfaced where courts must consider federal questions that arise after congressional action or where the Constitution demands. *Native Village of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 855 (9th Cir. 2011). Environmental law, specifically that dealing with ambient or interstate air and water pollution, falls within the subject of federal common law. *Illinois v. City of Milwaukee*, 406 U.S. 91, 103 (1972). Thus, federal common law applies to environmental pollution, and these suits usually arise under the theory of public nuisance. *Kivalina*, 696 F.3d at 855.

However, federal common law does not allow for claims where federal statutes directly answer the federal questions presented. *Id.* at 856. Therefore, the test for whether federal legislation displaces federal common law is whether the statute "speak[s] directly to [the] question" the court is considering. *American Electric Power*, 564 U.S. at 424 (2011) (citing *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978)). Evidence of displacement is found when Congress assigns a particular problem to an executive agency, or where Congress expresses an intention that an executive agency addresses that particular problem. *Michigan v. U.S. Army Corps of Engineer*s, 667 F.3d 765, 777 (7th Cir. 2011). Thus, the question is whether Congress has provided a "sufficient legislative solution" to the issue presented to the court to warrant a conclusion that the legislation "occupie[s] the field" and excludes the federal common law. *Id.*

The CAA and the regulatory power it authorizes to the EPA "displace any federal common law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired power plants." *American Electric Power*, 564 U.S. at 424. When congressional authority displaces a cause of action, that displacement extends to all its remedies including injunctive relief and money damages. *Kivalina*, 696 F.3d at 857. Further, if the injurious emissions of greenhouse gasses occur

on foreign soil, these claims are foreclosed because the judiciary should defer to the executive and legislative branches of government to weigh international matters. *City of Oakland v. BP P.L.C.*, 325 F. Supp. 3d 1017, 1024 (N.D. Cal. 2018).

In *American Electric Power v. Connecticut* (AEP), Plaintiffs (several states, New York City, and three private land trusts), issued federal common law public nuisance claims against Defendants (five power companies whose carbon-dioxide emissions constitute 10% of all domestic human activity) for their carbon dioxide emissions and ongoing contributions to global warming. *American Electric Power*, 564 U.S at 415. Specifically, the plaintiffs sought a decree setting carbon dioxide emission for each defendant at an initial cap, to be further reduced annually. *Id.* The Supreme Court found that the CAA and the EPA actions it authorizes displace any federal common law right for the reduction of greenhouse gas emission. *Id.* at 423. The Act itself provides numerous "avenues for enforcement," including state authority, and civil and criminal penalties. *Id*. at 425.

Specifically, the CAA requires the EPA to identify and establish performance standards for existing carbon-dioxide emitters, as well as pollutants from new or modified sources. *Id.* at 423. The EPA is tasked with establishing emission standards for categories of pollutants that, in the EPA Administrator's judgment, cause, or significantly contribute to, air pollution that endangers the public health or welfare. 42 U.S.C.S. § 7411(b)(1)(A). The Act requires the Administrator to determine primary and secondary national ambient air quality standards that protect the public health and welfare. 42 U.S.C.S. § 190(b)(1)-(2). Thus, the Court held that the CAA provides a sufficient means to address federal common law complaints because the Act itself offers the same relief the plaintiffs sought. *American Electric Power*, 564 U.S at 415. In other words, the Court

determined that the CAA "speaks directly" to emissions of carbon dioxide from domestic power plants, satisfying the test for displacement. *Id.*

In *Native Village of Kivalina v. ExxonMobil* (Kivalina), a small Alaskan city brought a federal common law claim of public nuisance against multiple energy producers for their contribution to global warming and rising sea levels. *Kivalina*, 696 F.3d at 853. Due to erosion and powerful wave action resulting from large emissions of greenhouse gasses by the energy producers, Kivalina risked imminent devastation and total flooding. *Id.* at 854. Unlike the plaintiff in *AEP*, Kivalina did not seek abatement of greenhouse gas emissions, but rather damages for harm caused by the energy producers' past emissions. *Id.* at 857. By relying on the Supreme Court's decision in *AEP*, the Ninth Circuit Court of Appeals also found that the CAA and its authorizations to the EPA displaced the plaintiffs' federal common law claim for public nuisance. The court concluded that when congressional authority displaces a cause of action, that displacement extends to all its remedies. *Id.*

In contrast, the plaintiffs in *City of Oakland v. BP P.L.C.* sought damages for anticipated harm from a rise in sea levels caused by the defendants' contributions to global warming. *City of Oakland*, 325 F. Supp. 3d at 1022. The plaintiffs sought to distinguish their cause of action from those in *AEP* and *Kivalina* by alleging that the defendants' liability resulted from their sale of fossil fuels to those who would eventually burn the fuel. *Id.* at 1024. Nonetheless, the district court found that the plaintiffs' harm resulted from greenhouse gas emissions, not the sale of fossil fuels, and thus the Supreme Court's holding in *AEP* displaced their federal common law cause of action. *Id.* see also *City of New York v. BP P.L.C.*, No. 18 Civ. 182, *5 (S.D.N.Y. Jul. 19, 2018).

The plaintiffs also shifted their argument by alleging that the defendants' conduct and emissions are contributing to the global climate arise outside the United States and are therefore

beyond the reach of the CAA. *Id.* at 1025. Yet, the district court cautioned that shifting to interstate conduct runs counter to the presumption against extraterritoriality. *Id.* This cautionary presumption also applies to causes of action brought under the ATS and ensures that the judiciary refrains from weighing on foreign policy concerns meant for the other branches of government. *Id.* The court held that the plaintiff's claims were foreclosed by the need for federal courts to defer to the legislative and executive branches in areas touching international affairs. *Id.* at 1226. If the judiciary does not defer to its co-equal branches, the court reasoned, this creates an "unwarranted judicial interference" and binding foreign policy by a single judge or jury. *Id.* (citing *Kiobel*, 569 U.S. at 117).

In the present case, the CAA also displaces Mana's claims arising under the federal common law. As previously stated, greenhouse gas emissions and interstate pollution fall within the limits of federal common law. See *Kivalina*, 696 F.3d at 855. Nevertheless, the CAA displaces any action that Mana might have under an ATS violation of the TSP because the Act "speaks directly" to the issue of greenhouse gas emissions and authorizes the EPA to regulate current and future pollutants. Congress occupied the field of greenhouse gas emissions when it delegated to the EPA authority to implement emission limits and created multiple ways to enforce these regulations. Therefore, the CAA provides a "sufficient legislative solution" to relieve Mana's injuries and displaces any role for federal common law.

Further, this case resembles *City of Oakland* because Mana is a national of a foreign island asserting a claim via the ATS of a violation of the TSP. The presumption against extraterritoriality also bars Mana's claim because it is the political branches responsibility, not the judiciary, to weigh foreign policy concerns. Therefore, the alleged violation of federal common law is foreclosed because this court must defer to the legislative and executive branches of government.

VI. PLAINTIFF'S CLAIMS DO NOT RAISE A NONJUSTICIABLE POLITICAL QUESTION.

Mana and Flood's claims do not raise a nonjusticiable political question that the court cannot adjudicate because it does not implicate any of the dispositive *Baker* factors. Federal courts lack subject matter jurisdiction if a case presents a political question. *See Baker v. Carr*, 369 U.S. 186 (1962). A nonjusticiable question is the primary function of separation of powers and must be determined by a case-by-case inquiry. *Id.* at 210-11. The court identified a dispositive six criteria basis in *Baker v. Carr* to determine the presence of a political question, which can be condensed into "three distinct justifications for withholding judgment on the merits of a dispute": (1) "[w]hen a case would require a court to decide an issue whose resolution is textually committed to a coordinate political department" *Zivotosfky ex rel Zivotosfsky v. Clinton*, 566 U.S. 189, 203 (2012) (Sotomayor, J., concurring); (2) when the circumstances of a case "calls for decisionmaking beyond the courts' competence", *Id.*; and (3) when the case presents issues that "address circumstances in which prudence may counsel against a court's resolution of an issue presented", *Id.* at 204. Further, courts should never deny access to judicial relief in fear that a political question exists; instead, it must determine the limits of its jurisdiction. *Juliana*, 217 F. Supp. at 1236. Mana and Flood's claims are justiciable because the claims are textually committed to the executive and legislative branches, there are judicially discoverable and manageable standards for resolving the alleged claims, and the alleged claims can be adjudicated without disrespecting or embarrassing a coordinate branch of government.

A. Plaintiffs' Claims Are Not Textually Committed to The Coordinate Branches of The Government.

Neither Mana or Flood's claims involve issues that are committed by the text of the Constitution to the executive and legislative branches that bars the court from adjudicating the case. A nonjusticiable issue is presented "[w]hen a case would require a court to decide an issue whose resolution is textually committed to a coordinate political department." *Zivotosfky*, 566 U.S. at 203 (Sotomayor, J., concurring). Climate change is not textually committed to a coordinating political department. *See* U.S. Const. art. I, art. II. Climate change policy is not inherently or even primarily a foreign decision that is inherent to the executive branch. *Juliana*, 217 F. Supp. at 1237-38. Although foreign affairs are typically nonjusticiable, *see e.g. Sadowski v. Bush*, 293 F. Supp. 2d 15, 21 (D.C. Cir. 2003) (ruling that to go to war in Afghanistan was not justiciable because that power has been explicitly committed to the executive branch), the court may review legislative and executive actions involving foreign affairs. *See Marbury v. Madison*, 5 U.S. 137 (1803); *see e.g. Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 229-31 (1986) (interpreting statutes involving foreign affairs as a justiciable question). The courts are allowed to establish fundamental rights that are not enumerated in the constitution. U.S. Const. amend. IV; *see also e.g. Obergefell* 135 S.Ct. at 2605.

In *Goldwater v. Carter,* the plaintiff filed a constitutional challenge against the president for exceeding his bounds of power by not receiving a two-thirds vote by the Senate to resident a treaty. *Goldwater v. Carter*, 617 F.2d 697, 700-01 (1979), *vacated*, 444 U.S. 996. The United States Supreme Court, in a four-justice plurality, held that the constitutionality of a unilateral action by the executive branch to rescind a treaty without Senate involvement was a nonjusticiable political question because the constitution is silent as to whether both executive and legislative actions are required to rescind a treaty. *Goldwater*, 444 U.S. at 999-100 (Rehnquist, J., concurring) ("it

involves authority of the President in the conduct of our country's foreign relations and the extent to which the Senate or the Congress is authorized to negate the action of the President").

In this case, neither Plaintiff's claims involve issues that are committed by the constitution to the coordinating branches of the government. Foreign affairs are not textually committed to either the executive branch or the legislative branch. Despite the executive branches involvement in foreign treaties and policy making, the court is acting within its bounds when determining if Mana has a cause of action. This dispute is unlike *Goldwater*, where the constitution was silent as to who could rescind a treaty, this case does not involve conflicting authority between the branches. In Flood's case, courts have the power to acknowledge rights that are not enumerated in the Constitution but are fundamental rights and liberties.

B. There Are Judicially Discoverable and Manageable Standards for Resolving the Alleged Claims.

Both Mana's and Flood's claims have a judicially discoverable and manageable standard for resolving the issue that is not beyond the courts' competence. A claim is justiciable and within the courts discretion to decide if there are "judicially discoverable and manageable standards for resolving it." *Baker*, 369 U.S. at 217. The court will not adjudicate an issue when the circumstances of a case "calls for decisionmaking beyond the courts' competence." *Zivotosfky*, 566 U.S. at 203 (Sotomayor, J., concurring). The court is not only competent in applying the standards governing due process claims without legislative action, *see Obergefell*, 135 S.Ct. at 2605; *see also infra* Part I, but it also has a relevant guild to determine the governing scope of liability of customary international laws under the ATS, *see Sosa*, 542 U.S. 731-33; *see also infra* Part II.

In this case, both Mana and Flood's claims do not call for decisionmaking beyond the courts' expertise or competence. Flood asserts a Fifth Amendment substantive Due Process claim that is an enduring part of the judicial duty to interpret the Constitution. *See Infra* Part I. The court is not

only competent to determine a fundamental right that is not enumerated in the constitution, but it has a pertinent guild in determining whether a due process claim meets the level of scrutiny applicable. *See infra* Part I**.** Despite Flood failing to ask the court for relief, the court is able to implement a remedy that does not conflict with coordinating branches of government. However, injunctive relief should not be granted for either Mana or Flood's claims because it would grant the court an opportunity to regulate the economy. Injunctive relief also allow the court to regulate foreign affairs by proxy, which is the prototypical non-justiciable issue. In Mana's ATS claim, the Supreme Court has announced important limitations on the action contemplated by the ATS. The court is authorized to determine whether the alleged violation of international law is universally accepted and understood to give rise to individual liability, as in cases of kidnapping or piracy, and if the customary norm is specific, obligatory, and universal. Therefore, the court has a discoverable and manageable standard for resolving the Plaintiff's claims and are not beyond the court's' competence.

C. Plaintiffs' Alleged Claims Can Be Adjudicated Without Expressing Lack of Respect to Other Branches of Government.

Both Mana's and Flood's claims can be adjudicated without disrespecting or embarrassing a coordinate branch of government. The fourth through sixth *Baker* factors deal with a claim that should not be adjudicated when the case presents issues that "address circumstances in which prudence may counsel against a court's resolution of an issue presented." *Zivotosfky*, 566 U.S. at 203 (Sotomayor, J., concurring). In the rare circumstances where the final factors alone render a case nonjusticiable, *id.*, judicial resolution should not be made only if it contradicts prior decisions by a political branch that would "seriously interfere with important governmental interests." *Kadic,* 70 F.3d at 249.

Neither of the Appellant's claims would disrespect or embarrass a coordinating branch if the court were to adjudicate the issues. Despite President Trump's intentions to withdraw from the Paris Agreement and the EPA's proposed regulations freezing emission reductions under the greenhouse gas-based fuel economy standards, the United States remains in the Paris Agreement until 2020 and the EPA's proposed action has not taken affect.

Thus, because neither claim involves issues that are committed by the text of the Constitution to the executive and legislative branches, that lack a judicially discoverable and manageable standard for resolution, and that would disrespect or embarrass a coordinate branch, a nonjusticiable political question is not presented.

CONCLUSION AND PRAYER FOR RELIEF

For the foregoing reasons, HexonGlobal respectfully requests that this Court affirm the district court's decision to dismiss Plaintiff's claims. HexonGlobal specifically request that this court find that Flood does not have a cause of action based on substantive due process because a sustainable environment is not right a fundamental right under the public trust doctrine. Even if the public trust doctrine did pertain to his cause of action, the doctrine would not satisfy strict scrutiny and it is only a matter of state law.

Further, Mana's Alien Tort Statute claim should be dismissed for lack of jurisdiction because corporate liability is not a universally recognized customary norm enforceable under the law of nations. Even if the Alien Tort Statute granted jurisdiction to corporations, the *Trail Smelter* Principle is not universally recognized, specific, or obligatory under customary international law. In the alternative, if the *Trail Smelter* Principle is considered to be universally recognized and specific, it does not impose obligations on HexonGlobal, a non-governmental actor, because the *Trail Smelter* Principle explicitly applies to state sovereigns and actors. The district court correctly

did not address these expansive legal analyses and fact-specific inquires because the claim is displaced under the Clean Air Act; Congress has occupied the field of greenhouse gas emissions from domestic power plants.

Lastly, both Plaintiff's claims do not raise a nonjusticiable political question that the court cannot adjudicate because it does not implicate any of the dispositive *Baker* factors.