Team No. 49

UNITED STATES COURT OF APPEALS FOR THE TWELFTH CIRCUIT

Docket Nos. 18-000123

Spring Term, 2019

ORGANIZATION OF DISAPPEARING ISLAND NATIONS, APA MANA, and NOAH FLOOD, *Appellants,*

-v-

HEXONGLOBAL CORPORATION, *Appellee,*

and

THE UNITED STATES OF AMERICA, *Appellee,*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR NEW UNION ISLAND IN NO. 66-CV-2018, JUDGE ROMULUS N. REMUS.

Brief for Appellee, HexonGlobal Corp.

Team 49
Attorneys for Appellee

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STATEMENT OF JURISDICTION

This case involves an appeal from a judgment of the United States District Court for New Union Island. The District Court has original jurisdiction under 28 U.S.C. § 1350, Alien Tort Statute ("ATS") because the claims are made by an alien for a tort, alleged to be in violation of a principle of the law of nations and the Due Process Clause of the Fifth Amendment. All courts in the Territory of New Union Islands have general personal jurisdiction over HexonGlobal as a condition of HexonGlobal doing business on New Union Island.

The District Court for New Union Island issued its order on August 15, 2018 dismissing the complaint. The Organization of Disappearing Island Nations (ODIN), Ms. Apa Mana, and Mr. Noah Flood timely filed petitions for review in this Court, less than 60 days after August 15, 2018.

STATEMENT OF THE ISSUES

1. Whether Mana, a national of the island nation of A'Na Atu, can bring a claim under the Alien Tort Statute, 28 U.S.C. § 1350, against HexonGlobal, a domestic corporation.

2. Whether the *Trail Smelter* Principle is a universally accepted principle of customary international law enforceable as the "Law of Nations" under Mana's ATS claim.

3. Assuming the *Trail Smelter* Principle is customary international law, whether this principle imposes actionable obligations enforceable against private parties, not governmental actors or national governments.

4. Assuming the *Trail Smelter* Principle is otherwise enforceable, whether the *Trail Smelter* Principle is displaced by the Clean Air Act.

5. Whether there is a cause of action against the United States Government for failure to protect the global atmospheric climate system from disruption due to the production, sale, and burning of fossil fuels, under the public trust doctrine incorporated by the Fifth Amendment substantive due process guarantee against government action that deprives persons of their rights to life, liberty, and property.

6. Whether Appellant Mana's law of nations claim under the ATS and Appellant Flood's public trust claim both present a non-justiciable political question.

STATEMENT OF THE CASE

Appellant Apa Mana, a national of the island nation of A'Na Atu, commenced this action against HexonGlobal under the Alien Tort Statute, 28 U.S.C. § 1350 ("ATS"). D. New Union Island Op. and Order, 66CV2018, at 3. ("R.") Mana alleges that HexonGlobal violated the Law of Nations because of its fossil fuel related business activities and is seeking damages and injunctive relief. *Id.* Appellant Noah Flood, a citizen of the United States and resident of the United States possession New Union Islands, joined this action by filing a constitutional claim against the United States under the Due Process Clause of the Fifth Amendment to the Constitution. *Id.* Flood alleges that the United States violated public trust obligations to protect the global climate ecosystem, a protection incorporated through the Due Process Clause of the Fifth Amendment. *Id.* Both individual Appellants are members of the organizational appellant Organization of Disappearing Island Nations (ODIN), who joined this action because it is a non-profit membership organization committed to protecting the interests of island nations threatened by rising sea levels. *Id.*

Appellee, HexonGlobal Corporation "HexonGlobal", filed a motion to dismiss each Appellant's claims. R. at 4. On August 15, 2018 the District Court for New Union Island issued an order dismissing Appellants claims. *Id.* at 1. The District Court dismissed Mana's claim and held that any action Mana might have under the ATS has been displaced by greenhouse gas regulation under the Clean Air Act, thus the Court found Mana failed to state a claim for relief. *Id.* at 8-10. The District Court dismissed Flood's claim and held that threats to human well-being caused by climate change do not always constitute a violation of Due Process rights, thus the Court dismissed Flood's claims for failure to state a claim for relief under the Fifth

Amendment to the Constitution. *Id.* at 11. Appellants appeal the District Court's decision on their claims.

STATEMENT OF THE FACTS

Apa Mana is a national of the island nation of A'Na Atu a low-lying island with a maximum height of less than three meters above sea level, located in the East Sea. R. at 3-4. Noah Flood is a citizen of the United States and resides in the New Union Islands, a United States possession. *Id.* at 4. The New Union Islands are also low-lying island with a maximum height of less than three meters above sea level, located in the East Sea. *Id.* at 3-4. Both own homes on their respective islands and reside in communities that have an elevation of one-half meter above sea level with the elevation of the populated communities on both islands below one meter above sea level. *Id.* at 4. Both have suffered seawater damage to their homes during storms that have occured over the past three years, which caused seawater intrusion into their drinking water wells and the damage was caused by the rising sea level. *Id.* at 5. Additionally, both have incurred substantial costs to repair the damage and prevent future damage to their homes due to the sea level rising. *Id*. Both also blame climate change for potentially putting their health at risk due to increasing temperatures and for reducing the availability of locally caught seafood. *Id.*

HexonGlobal is the surviving corporation that was the result of a merger of all of the major United States oil producers/corporations. *Id*. HexonGlobal is incorporated in New Jersey with its principal place of business in Texas. *Id.* HexonGlobal is responsible for 32% of the United States cumulative fossil fuel-related greenhouse gas emissions, but this only accounts for 6% of emissions globally. *Id.* Globally, HexonGlobal sales of fossil fuels is responsible for 9% of global fossil fuel related emissions. *Id.* The normal combustion of petroleum products when used as a fuel results in the expected emission of carbon dioxide. *Id.*

Carbon dioxide and methane are "greenhouse gases" because these gases have an insulating effect leading to the Earth's atmosphere retaining heat. *Id.* at 4. The burning of fossil fuels for energy production and the distribution of fossil fuels have increased the concentrations of carbon dioxide and methane in the Earth's atmosphere. *Id.* These fossil fuel related emissions, combined with emissions from agricultural and industrial industries, are causing the global climate to change, resulting in increasing temperatures, changing rainfall patterns, and rising sea levels. *Id.*

The heat-retention properties of carbon dioxide and methane have been known to oil corporations and these corporations have been aware that these emissions would result in substantial harmful global climate change and sea level rise. *Id.* This awareness has been known since the 1970s, but oil corporations continued global sales of petroleum products that lead to the combustion of fossil fuels. HexonGlobal continued its business activities despite this knowledge because of the lack of renewable energy resources worldwide. *Id.* at 5. HexonGlobal operates refineries worldwide, including one refinery located on New Union Islands. *Id.*

Within the jurisdiction of the United States, the United States is responsible for twenty percent of cumulative global anthropogenic (human caused) greenhouse gas emissions and the United States governments has not enacted legislation to limit fossil fuel production, distribution, or combustion. *Id.* at 6. Over recent decades, the United States has acknowledged the threat of climate change and has taken several steps towards the regulation of domestic greenhouse gas emissions enacting the "Clean Power Plan," signing the Paris Agreement committing the US and other nations to reduce their future greenhouse gas emissions by twenty-six to twenty-eight percent by 2025, compared to 2005 levels. *Id.* at 6-7. However, under the new Presidential administration these regulatory steps are in the process of being reversed and repealed, but while

these regulatory steps have been in place, the United States greenhouse gas emissions have only decreased slightly, and global emissions have increased. *Id.*

SUMMARY OF THE ARGUMENT

Climate change is a serious threat to the United States and humanity across the globe, however harm caused to individuals as a result of world wide climate change is best resolved through the legislative process, nationally or internationally. Courts issuing rulings on claims for harm caused by world wide climate change is an area the courts should proceed with caution moving forward to maintain the integrity of the courts and discontinue any slippery slope or viewpoints that the court is performing a legislative function violating the United States Constitution.

First, Appellant Mana cannot bring a claim against HexonGlobal under the Alien Tort Statute ("ATS") because HexonGlobal is a private corporation and cannot be held liable under the ATS for violating a principle of customary international law. Second, the Trail Smelter Principle is not cause of action actionable under the ATS because violations for greenhouse gas emissions are not a cause of action promulgated by the 1789 Congress. The Trail Smelter Principle is not actionable under the ATS because it is not recognized as customary international law enforceable as the "Law of Nations." The United States has continuously objected to implement any international agreement or regulation involving the assessment of climate change. Third, even if Mana could bring a claim under the Trail Smelter Principle, it would not be enforceable because the Clean Air Act displaces any action involving greenhouse gas regulation including the application of the Trail Smelter Principle. Fourth, the Fifth Amendment does not provide a cause of action against the United States government because there is no substantive due process right to a certain climate system. Fifth, although the Appellant's legal theories under

the the Alien Tort Statute and the public trust doctrine have political ramifications, the claims do not raise issues regarding the political question doctrine because the issues raised are not inextricable from the case.

STANDARD OF REVIEW

This is an appeal of an order granting motions to dismiss under 28 U.S.C. § 1350 and the Due Process Clause of the Fifth Amendment. To withstand a motion to dismiss, a Appellants need only allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Here, the facts upon which the District Court rendered its judgment are not in dispute and are accepted as true. Therefore, this appeal is reviewing the District Court's application and interpretation of the law in question. The standard of review when reviewing a district court's conclusions of law is de novo. *Pierce v. Underwood*, 487 U.S. 552, 557 (1988). Therefore, this Court should review the District Court's order *de novo*.

ARGUMENT

I. APPELLEE MANA, CAN NOT BRING A CLAIM AGAINST HEXONGLOBAL, UNDER THE ALIEN TORT STATUTE, BECAUSE HEXONGLOBAL IS A PRIVATE DOMESTIC CORPORATION.

The Alien Tort Statute ("ATS") grants original jurisdiction to United States District Courts over any civil claim made by an alien, or non-United States citizen, for a tort only, committed in violation of the Law of Nations or a treaty of the United States. 28 U.S.C. § 1350 (2012). The conduct that is the basis for a cause of action under the ATS, must have occurred principally within the jurisdiction of the United States; thus the ATS does not create rules of extraterritorial application. *Kiobel v. Royal Dutch Petro.*, 621 F.3d 111, 124 (2nd Cir. 2010), *aff'd* 569 U.S. 108 (2013). If the conduct took place outside the United States, but the claim touch and concerns the jurisdiction of the United States, the claim must have sufficient force to

displace the presumption against extraterritorial application. *Id.* at 118. Corporations can be present and conduct business in many countries. The mere presence of a corporation in the United States is a "reach too far" to say the corporation is principally within the jurisdiction of the United States. *Id.* Lastly, claims made under the ATS the defendant must not be a foreign corporation. *Jesner v. Arab Bank, P.L.C.,* 138 S. Ct. 1386, 1407 (2018). Additionally, no international tribunal has held corporations liable for *any* form of liability for violating customary international law. *Id.* at 1400.

Under the ATS, corporate liability has been left open by the United States Supreme Court in a footnote in *Sosa v. Alvarez.* 542 U.S. 692, 732 (2004). In the Circuit Courts, all but one circuit held or assumed corporations can be liable. *Romero v. Drummond Co*., 552 F.3d 1303, 1315 (11th Cir. 2008); *Herero People's Reparations Corp. v. Deutsche Bank, A.G*., 370 F.3d 1192, 1193, 1195 (D.C. Cir. 2004); *Wiwa v. Royal Dutch Petro. Co*., 226 F.3d 88, 91-92 (2nd Cir. 2000); *Beanal v. Freeport-McMoran, Inc*., 197 F.3d 161, 163 (5th Cir. 1999); *Sarei v. Rio Tinto, PLC*, 550 F.3d 822, 831 (9th Cir. 2008). The Second Circuit found corporations cannot be held liable in *Kiobel*. The Second Circuit found corporations not liable under the ATS because corporations have never been prosecuted or held liable criminally or civilly, for violating customary international law. *Id.*, 621 F.3d at 125. Therefore, this Court should follow the Second Circuit and rule there is no principle of customary international law finding corporate liability because *Kiobel* is the most recent decision indicating the direction the United States is moving towards regarding corporate liability for violations relating to climate change.

Here, Mana's claim against HexonGlobal is displaced because HexonGlobal is a private domestic corporation that operates refineries worldwide and is responsible for providing fossil fuels to energy producers accounting only for 32% of cumulative fossil fuel emissions in the

United States and just 9% worldwide. R. at 5. One claim against one corporation does not have sufficient force to displace the presumption against extraterritorial application. The majority of the conduct at issue here took place outside the United States and outside of the island nation of A'Na Atu, nor does the conduct touch and concern the United States. Thus, the claims do not have sufficient force to displace the presumption against extraterritorial application.

Additionally, HexonGlobal is domiciled in the United States, therefore an action cannot be brought by Mana because a claim can only be brought under the ATS when applied extraterritorially. Mana is domiciled on the island of A'Na Atu, a territory owned by the United States. Thus, Mana cannot bring an action against his own nation under the ATS because the action must be against a foreign nation. Therefore, Mana cannot bring a claim against HexonGlobal, because HexonGlobal is a domestic corporation not a foreign nation and can not be held liable under the ATS.

II. MANA CANNOT BRING A CLAIM UNDER THE TRAIL SMELTER PRINCIPLE BECAUSE IT IS NOT A RECOGNIZED PRINCIPLE OF CUSTOMARY INTERNATIONAL LAW.

In order for a claim to be brought under the ATS's "Law of Nations" provision, the alleged conduct must be a tort that violates a principle of customary international law. 28 U.S.C. § 1350 (2012). Courts in ATS jurisprudence have "consistently used the term 'customary international law' as a synonym for the term the 'law of nations.'" *Flores v. S. Peru Copper Corp*., 414 F.3d 233, 237 n.2 (2nd Cir. 2003). The ATS provides only for jurisdiction in the District Court; it does not create a cause of action, the violation which must be found in a treaty of the United States or in the Law of Nations. *Sosa,* 542 U.S. at 713–14; *Kiobel*, 621 F.3d at 125.

The ATS was originally promulgated under the Alien Torts Claim Act ("ATCA"), which was enacted under the First Congress as part of the Judiciary Act of 1789. *Filartiga v. Pena-*

Irala, 630 F.2d 876, 878 (2nd Cir. 1980). The ATS is a jurisdictional statute and creates no new causes of action than ones initially promulgated by 1789 Congress. *Sosa*, 542 U.S. at 697. Thus, the ATS was intended to have practical effect the moment it became law in 1789 on the understanding that the common law would provide a cause of action for a modest amount of international law violations that carry the claim of personal liability. *Id*. The causes of action promulgated were defined as actions against ambassadors, violations of safe conducts, and piracy. *Id.*

The Trail Smelter Principle ("TSP") was formed from the Trail Smelter Arbitration, which was an international arbitration panel held between the State of Washington and a smelter in British Columbia in 1941. R. at 8. The TSP was adopted by the Declaration of the 1972 Stockholm Conference on the Human Environment 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." *Declaration of the United Nations Conference on the Human Environment,* U.N. Conference on the Human Environment, Stockholm, June 5- 16, 1972, 5, U.N. Doc A/CONF.48/14/Rev. 1 (June 16, 1972). The TSP has two core principles of international environmental law: (1) that states have a duty to prevent transboundary environmental harm, and (2) that the states have an obligation to pay compensation for the harm they cause, but has not been used to prohibit transboundary environmental harm. *U.S. v. Can.*, Trail Smelter, 3 R.I.A.A. 1905, 1965 (1941).

In order for a claim to be actionable under the ATS's "law of nations" provision, the alleged tort must violate a norm of customary international law. *Kiobel,* 621 F.3d at 117. In

order for a claim to be considered actionable as a principle of customary international law, the alleged violation of international law must be one that is universally accepted and understood to give rise to individual liability, as in cases of kidnapping or piracy. *Sosa*, 542 U.S. at 731–32. United States District Courts have recognized customary international law status of very few norms, including extraterritorial torture, summary execution, disappearances, war crimes, genocide, prolonged arbitrary detention, and in some instances, cruel, inhumane, or degrading treatment as norms actionable under the ATS. Hari Osofsky, *Environmental Human Rights Under the Alien Tort Statute: Redress for Indigenous Victims of Multinational Corporations,* 20 Suffolk Transnat'l L. Rev. 335 (1996-1997) . The court in *Beanal v. Freeport-McMoRan Inc.*, 969 F.Supp. 362 (E.D. La. 1997), specifically rejected the plaintiff's argument that the defendant mining company violated the "law of nations" by causing massive environmental devastation. *Id.* at 382-84.

Customary international law includes only "those standards, rules or customs (a) affecting the relationship between states or between an individual and a foreign state, and (b) used by those states for their common good and/or in dealings *inter se*." *IIT v. Vencap, Ltd.,* 519 F.2d 1001, 1015 (2nd Cir. 1975). The substantive law that determines the federal court's jurisdiction over ATS claims is limited to offenses defined by customary international law, these offenses include offenses nations of the world have demonstrated that such offenses are of mutual concern, and capable of impairing international peace and security. *Kiobel*, 621 F.3d at 118. This determination requires the federal courts to look beyond rules of domestic common law to rules and norms that are specific and universally accepted by the nations of the world and those rules nations treat as binding in their dealings with other countries. *Id.*

A norm is "specific" or "definable" if adequate criteria exist by which a court can determine whether an act violates it. *Xuncax v. Gramajo,* 886 F. Supp. 162, 184 (D. Mass. 1995). The Restatement (Third) of Foreign Relations Law ("Restatement") reads, "customary international law results from a general and consistent practice of *states* followed by them from a sense of legal obligation" or opinio juris." *Id*. 102(2) & cmt. c (1987)(emphasis added). Further, if a state government has persistently objected to accepting a customary norm during formation, the state government is not bound to that particular norm. *See Siderman de Blake v. Rep. of Argentina,* 965 F.2d 699, 715 (9th Cir. 1992). Restatement § 712, *supra* note 46, 102 cmt. D. For a court to determine whether an asserted norm of international law is sufficiently definite to support a cause of action under the ATS, the court should involve an element of judgment about the practical consequences on international relations in making a determination that a cause of action under the ATS is available in the United States courts. *Sosa*, 542 U.S. at 732.

The TSP is not cause of action under the ATS because violations for greenhouse gas emissions are not a cause of action promulgated by the 1789 Congress. Additionally, violations for greenhouse gas emissions are not a common law cause of action included in the ATS by the 1789 Congress, therefore such violation cannot be included under the ATS as a cause of action. Like the Court in *Beanal* ruled, customary international law does not recognize a definable right to a healthy environment. *Beanal*, 197 F.3d at 168. Like *Beanal,* the Appellants here have failed to show that the Stockholm Principle and Rio Declaration, both adopting the TSP, are international treaties or agreements that have enjoyed universal acceptance among nations. These sources of international law are referred to as a "general sense of environmental responsibility and state abstract rights and liberties devoid of articulable or discernable standards and

regulations to identify practices that constitute international environmental abuses or torts." *Id*. at 167.

Here, Mana claims HexonGlobal's fossil fuel production and sales activity violate the TSP. This claim is not actionable under the ATS "law of nations" provision because the TSP is not a universally accepted principle of customary international law. The TSP is not accepted by the United States, because the United States has continually objected to any norm regulating climate changed formed on an international level. For example, President Trump has announced intention to withdraw from the Paris Agreement at the earliest opportunity allowed by its terms, which would be effective in the year 2020. The Paris Agreement is an international executive agreement that commits the United States and other nations to reduce their future greenhouse gas emissions by an amount determined independently by each signatory nation. 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). The United States intention to withdraw from the Paris Agreement demonstrates that the TSP has not been accepted by the United States as a customary norm. Also, the TSP has rarely been invoked internationally and was not mentioned for a 40 year time period from the time of enactment to the 1980's. In conclusion, to say the TSP has been consistently practiced and universally accepted is a gross exaggeration.

III. MANA CANNOT BRING A CLAIM UNDER THE TRAIL SMELTER PRINCIPLE BECAUSE IT DOES NOT IMPOSE ACTIONABLE OBLIGATIONS AGAINST NON-GOVERNMENT ACTORS.

The Trail Smelter Arbitration reflected the Trail Smelter Principle ("TSP"), which is that emissions into the environment within the territory of one nation must not be allowed to cause substantial harms in the territory of other nations. *Trail Smelter Arbitration*, 3 U.N.R.I.A.A. 1965 (1941). The TSP was constructed when an international arbitral panel held that harms to

agriculture interests in the State of Washington caused by air pollution emissions from a smelter in British Columbia, Canada were a violation of international liability principles. *U.S. v. Can.*, Trail Smelter, 3 R.I.A.A. 1905 (1941).

The international tribunal at Nuremberg rejected that only states could be liable under international law by stating, "[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." *United States v. Goering*, The Nuremberg Trial, 6 F.R.D. 69, 110 (Int'l Military Trib. at Nuremberg 1946). However, the international tribunal at Nuremberg, was prosecuting individuals acting on behalf of the state or who were employed by the state.

Customary international law has been defined to include only "those standards, rules or customs (a) affecting the relationship between states or between an individual and a foreign state, and (b) used by those states for their common good and/or in dealings *inter se*." *IIT,* 519 F.2d at 1015. International human rights law normally governs the conduct of state actors, not private parties, but certain acts violate customary international law or the law of nations when private parties commit them. *Kadic v. Karadzic*, 70 F.3d 232, 239 (2nd Cir. 1995). These act exceptions include genocide, slave trade, and war crimes. *Id.* at 240. Therefore, for a party to be held liable they must be a state actor in order for the claim to be actionable under the ATS "law of nations" provision. *Beanal*, 969 F. Supp. at 371.

The TSP formulates a state responsibility doctrine that reads, "no state has the right to use or permit the use of its territory in such a manner as to cause injury ... in or to the territory of another or the properties or persons therein, when the case is of serious consequence." *U.S. v. Can*., Trail Smelter Arbitration, 3 R.I.A.A. 1938, 1965 (1941). In order to hold private parties liable under the TSP, the court must determine the private party to be a state actor because the

state responsibility doctrine dictates that the states owe the duty imposed by Trail Smelter to private individuals in neighboring states as well as to the neighboring states themselves. Restatement, supra note 46, 601, cmt. D. However, the TSP has never been applied to solely private parties. One or both parties must be a state actor to apply the TSP. Richard L. Herz, *Litigating Environmental Abuses Under the Alien Tort Claims Act: A Practical Assessment*, 40 Va. J. Int'l L. 545 (2000).

The United States Supreme Court has said, "in the typical case raising a state-action issue, a private party has taken the decisive step that caused the harm to the Appellants, and the question is whether the State was sufficiently involved to treat that decisive conduct as state action." *NCAA v. Tarkanian*, 488 U.S. 179, 192 (1988) (*quoting Lugar v. Edmondson Oil Co.,* 457 U.S. 922, 937 (1982)). The mere fact that the state regulated the private party does not, itself, warrant the private party to be classified as a state actor. *Blum v. Yaretsky*, 457 U.S. 991, 1004-05 (1982).

In order to treat a private party as a state actor for customary international law purposes, one must determine the private party's involvement in state behaviors. One test to determine the involvement is under the "joint action" test, which asks whether "state officials and private parties have acted jointly in concert in effecting a particular deprivation" of rights in violation of customary international law. *Dennis v. Sparks*, 449 U.S. 24, 27-28 (1980). Appellants may also demonstrate state action by showing the private party exercises powers traditionally reserved exclusively to the state or to a state actor. *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 352-53 (1974). To determine whether a private party is a state actor for ATS claim purposes, the court must conduct an in depth, fact based inquiry to determine the relationship before reaching the substance of the Appellant's claim. *Lugar*, 457 U.S. at 939.

Here, the TSP does not apply to the claims against HexonGlobal because HexonGlobal is a private corporation and Mana is an individual, thus neither are government actors and the TSP cannot apply. Additionally, the TSP has never been applied to non-government actors so HexonGlobal cannot be held liable under the TSP, because an action cannot be brought against a private domestic corporation.

Additionally, HexonGlobal is a private party, not a government official or state actor because there is no relationship between the State or State government and HexonGlobal in doing business, nor do they work together on other business activities whatsoever. HexonGlobal does not perform any public contracts on behalf of the State government, nor does the State government rely on HexonGlobal in any manner. HexonGlobal does not exercise any powers traditionally reserved exclusively to the State, thus HexonGlobal is not committing any form of state action to constitute being a state actor for an actionable ATS claim. HexonGlobal is a regulated entity of the United States, but this is not enough to constitute HexonGlobal as a state actor. Therefore, Mana cannot bring a claim against HexonGlobal under the TSP because TSP does not impose actionable obligations against non-government actors.

IV. EVEN IF MANA COULD BRING A CLAIM UNDER THE TRAIL SMELTER PRINCIPLE, IT WOULD NOT BE ENFORCEABLE BECAUSE THE CLEAN AIR ACT DISPLACES THE TRAIL SMELTER PRINCIPLE.

This Court should affirm the lower court's dismissal of Mana's ATS claim because any action Mana might have has been displaced by greenhouse gas regulation under the Clean Air Act. R. at 9. The United States Supreme Court in *American Electric Power v. Connecticut* ruled that the Clean Air Act displaces the federal common law of air pollution. *Am. Elec. Power v. Conn.*, 564 U.S. 410 (2011). This Court should find any action Mana might have under the ATS has been displaced by greenhouse gas regulation under the Clean Air Act. District Courts hearing

claims against oil producers have reached this same conclusion as the Supreme Court about federal common law displacement. *City of Oakland v. B.P., PLC*, No. C17-06011 (N.D. Cal. Jun. 25, 2018); *City of New York v. B.P., PLC*, No. 18 Civ. 182 (S.D.N.Y. Jul. 19, 2018).

As the Supreme Court made clear in *Sosa, Kiobel*, and *Arab Bank*, the ATS does not create a cause of action, but rather creates jurisdiction to hear torts claims based on the international law of nations. Tort claims made under the ATS "law of nations" provision, must be claims sounding in international tort, therefore claims must of necessity be considered to be claims arising under federal common law. R. at 9. Federal common law can serve two purposes: 1) federal common law can implement and fully effectuate federal policies by "filling the interstices of a pervasively federal framework and 2) federal common law can "assure each State the right to be free from unreasonable interference with its natural environment and resources when the interference stems from another State or citizens." 24 Pace Envtl. L. Rev. 565, 584 (2007)(*quoting City of Milwaukee v. Ill. and Mich.,* 101 S. Ct. 1784 (1981)).

The Clean Air Act authorizes federal regulation of emissions of carbon dioxide and greenhouse gases. It also provided means to seek limits on greenhouse gas emissions, which is the same relief sought by invoking international common law. Congress delegated the authority to the EPA to decide whether and how to regulate carbon-dioxide emissions from power plants. This Congressional delegation to the EPA is what displaced federal common law under the Clean Air Act. In 2007 the United States Supreme Court held, in *Massachusetts v. EPA*, that greenhouse gases, including carbon dioxide, were "pollutants" that were subject to regulation under section 202(a)(1) of the Clean Air Act. 42 U.S.C. § 7521 (2018). *Id.* 549 U.S. 497 (2007). In *American Electric,* the United States Supreme Court ruled that under the Clean Air Act itself, the Act provided means to seek limits on greenhouse gas emissions, the same relief sought by

invoking the federal common law of nuisance by the Appellants. *Am. Elec. Power,* 564 U.S. at 413.

Congress gave the EPA authority in the Clean Air Act to promulgate categories of stationary sources that in the EPA's judgment cause, or contribute significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare. 42 U.S.C.S. § 7411(b)(1)(A) (2012). Once the EPA promulgates a category, the EPA establishes standards of performance for emissions of pollutants from new or modified sources within that category. *Id.* § 7411(b)(1)(B). In the Clean Air Act, the EPA retains the power to inspect and monitor regulated sources, impose administrative penalties for noncompliance, and to commence civil actions against polluters in federal court. *Id.* §§ 7411(c)(2), (d)(2), 7413, 7414 (2012).

The Clean Air Act provides means for private enforcement if *states* fail to enforce the EPA's emission limits against regulated sources, "any person" can bring a civil enforcement action in federal court. *Id.* § 7604(a) (2012). Like the TSP, the United States has approved federal common-law suits brought by one State to abate pollution emanating from another State. *See Miss.* v. *Ill.*, 180 U.S. 208, 241-243 (1901). If the EPA does not set emissions limits for a particular pollutant or source of pollution, States and private parties may petition the agency for a rulemaking on the matter, and the EPA's response to this petition will be reviewable in federal court. *See Id.* § 7607(b)(1) (2012).

Here, Mana is requesting an injunction against HexonGlobal for the production and sale of materials that contribute to greenhouse gas emissions. The Clean Air Act speaks directly to the regulation of emissions of greenhouse gases, also the Clean Air Act provides means for parties to seek enforcement and injunctive relief against the state or EPA, the same relief Mana is requesting here today, but against a private party.

Federal judges can not set limits on greenhouse gas emissions with a Congressional statute that empowers the EPA to set the same limits, subject to judicial review only to ensure against arbitrary, capricious, or unlawful action under 42 U.S.C.S. § 7607(d)(9) (2012). The Clean Air Act prescribes an order of decision making when setting emission standards. Decisions are first made by the expert agency, and then the decision is reviewed by federal judges. *See Id.* § 7607(b)(1) (2012). This decision making process promulgated by Congress is reason for federal judges to resist setting emissions standards by judicial decree under federal tort law. "[W]hen Congress addresses a question previously governed by a decision rested on federal common law the need for such an unusual exercise of law-making by federal courts disappears." *Milwaukee* v. *Ill.*, 451 U.S. 304, 314 (1972). It is settled precedent, that the expert agency is better equipped to promulgate rules and regulations on a particular topic than federal judges, who lack the scientific, economic, and technological resources an agency utilizes in coping with these issues. Thus, even if Mana could bring a claim under the TSP, the claim would not be enforceable because the Clean Air Act displaces greenhouse gas regulation which includes the TSP.

V. FIFTH AMENDMENT DOES NOT PROVIDE SUBSTANTIVE DUE PROCESS PROTECTIONS TO A PARTICULAR CLIMATE SYSTEM.

The Due Process Clause of the Fifth Amendment of the United States Constitution bars the federal government from depriving a person of life, liberty, or property without the due process of law. *U.S. Const. Amend. V*. The substantive due process right forbids the government to infringe upon certain 'fundamental' liberty interests, no matter what process the government provides, with one exception if the government infringement is narrowly tailored to serve a compelling state interest. *Reno v. Flores*, 507 U.S. 292, 302 (1993) (*emphasis in original*). Here, Appellants are requesting this Court to establish new legal precedent and recognize an alleged

infringement of a new fundamental right to a human life-sustaining climate system. Appellants assert that the global climate system is common property owned in trust by the United States and this property must be protected and administered for the benefit of current and future generations. R. at 10.The request by Appellants relies heavily on the case of *Juliana v. United States.* The *Juliana* Court significantly diverged from legal precedent, Judge Aiken illustrated the departure in his holding:

> In this opinion, this Court simply holds that where a complaint alleges governmental action is affirmatively and substantially damaging the climate system in a way that will cause human deaths, shorten human lifespans, result in widespread damage to property, threaten human food sources, and dramatically alter the planet's ecosystem, it states a claim for a due process violation. To hold otherwise would be to say that the Constitution affords no protection against a government's knowing decision to poison the air its citizens breathe or the water its citizens drink.

Id. 217 F.Supp. 3d 1224, 1250 (D. Or. 2016). Fundamental liberty rights include both rights enumerated elsewhere in the Constitution and rights and liberties that are deeply rooted in this Nation's history and traditions or rights that are fundamental to this nation's scheme of ordered liberty. *McDonald v. City of Chicago*, 561 U.S. 742, 767 (2010) (internal citations, quotations, and emphasis omitted). However, climate change was not caused by one or more affirmative decisions made by solely the federal government, but climate change was caused by the affirmative decisions by all Americans and persons across the globe exercising their fundamental liberty interests in the form of consumption of fossil fuels. Appellants are wrong to claim that Americans have considered a global climate system to be deeply rooted in our nation's history or is fundamental to the scheme of ordered liberty because climate change is a relatively new issue for Americans with the earliest concerns being addressed with the passage of the Clean Air Act

in the second half of the twentieth century. Therefore, climate change cannot be rooted in our nation's history.

The principle issue concerning the expansion of substantive due process rights to include a fundamental right to a life-sustaining climate, is that the climate is a moving target while rights enumerated in the Constitution are considered as fundamental and unchanging. As the needs of the climate and society continue to change independently of one another, the notion of a "life sustaining climate" will also change as technology improves and softens the harms felt by those experiencing the effects of global warming. The definition of "life-sustaining climate" the Appellants propose to add to the Fifth Amendment will be elastic and continually in need of narrowing by the courts. The Court here does not know with certainty what will be implicated in a global effort to address climate change. Moreover, if this Court decides to expand upon enumerated rights, the fundamental rights promised and enjoyed presently will be rendered meaningless or violated due to the elastic and changing nature of the right Appellant's are requesting, in order to achieve their particular environmental result.

Climate change is an issue that is predicted to span across multiple future generations. The scientific community has also determined that climate change will not be completely resolved during the lifetime of any human beings alive today. Jonathan A.Patz, *Nature,* volume 438, 310–317 (17 Nov. 2005). The only benefactors of the Appellant's requested fundamental liberty right are people not alive presently and potentially among future generations many generations removed. Future generations are not yet considered legal entities because they exist only in the future and it is impossible to ascertain specific identities and characteristics of future beings. Additionally, another issue regarding climate change is people's ability to think about

climate change in a context that spreads over future generations because like mentioned above it is impossible to ascertain specific identities and characteristics of future beings. The size and scale of climate change leaves people with a deep pessimism about the timeliness of the government's actions to remedy it or regulate, even if every person in the world wholeheartedly adopts an attitude to disrupt their entire lifestyle for it. Nonetheless, the recognition of a new fundamental liberty right under the Due Process Clause does not provide the remedy the Appellants are requesting because the remedy only benefits future generations the Appellants will never enjoy the benefits of the requested remedy presently or during their lifetime. Therefore, this Court should use caution when creating a fundamental right for the Appellant's nonexistent remedy requested.

As the Twelfth Circuit noted in this case, the United States Supreme Court has specifically rejected any claim for a fundamental Due Process right to government protection from allegedly wrongful acts committed by private parties. *Deshaney v. Winnebago Cnty. Dep't of Soc. Servs*., 489 U.S. 189, 196 (1989). Appellant's rely on the holding in *Juliana* which is not binding precedent on this Court. Additionally, neither does *Juliana* discuss the acts of third parties, such as Appellee HexonGlobal. The implications on this Court in establishing a new fundamental right as broad and ever changing as a "life-sustaining climate system" requires too much research and debate this Court does not have the authority to perform or resources required for the issue of a "life-sustaining climate system" to be settled for all generations. The risk this Court accepts if it decides to establish a new fundamental right, imposes upon and diminishes other fundamental liberty interests solely in pursuit of the Appellants' environmental goal. This goal can be neutralized by the traditional legislative tools all available at Appellant's disposal.

The Appellant's reliance on blaming Congress, is not a valid argument in a democratic society because not using Congress for a traditionally Legislative problem is unfounded, otherwise one can expect the same problem to remain well after any over-reaching decision from this Court.

The Due Process Clause of the Fifth Amendment is not a legal cause of action for the claims Appellants raise. Expanding the Fifth Amendment to include a substantive due process right to a life-sustaining climate would set a legal precedent with unknown ramifications. The size and scale of climate change can not be properly addressed by a Court by establishing a new fundamental right protected under the Constitution. Climate change is best addressed in the traditional legislative manner where policy and debate shape the regulations that address climate change written by Congress. This Court should strike down the Appellants' claim that the Fifth Amendment provides a substantive due process right to a life-sustaining climate because the consequences of expanding Constitutional law unilaterally could lead to an upheaval of legal norms and jurisprudence for generations to come.

VI. APPELLANT'S CLAIMS UNDER THE ALIEN TORT STATUTE AND PUBLIC TRUST DOCTRINE DO NOT REPRESENT NON-JUSTICIABLE POLITICAL QUESTIONS.

Federal courts are courts of limited jurisdiction. "The Supreme Court has indicated that disputes involving political questions lie outside of the Article III jurisdiction of federal courts." *Carrie v. Caterpillar, Inc.* 503 F.3d 974, 980 (9th Cir. 2007). Federal courts have had this jurisdiction limitation imposed upon them since *Marbury v. Madison*, in which Chief Justice John Marshall wrote, "[q]uestions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court." *Marbury v. Madison*, 5 U.S. 137, 170 (1803). This limitation on the judiciary is "primarily a function of the separation of

powers." *Baker v. Carr*, 369 U.S. 186, 210 (1962). In *Baker*, a case involving the redistricting of voting maps in Tennessee, the United States Supreme Court identified six criteria or factors to signal the presence of a political question:

> (1) A textually demonstrable constitutional commitment of the issue to a coordinate political department;
> (2) A lack of judicially discoverable and manageable standards for resolving it;
> (3) The impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion;
> (4) The impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government;
> (5) An unusual need for unquestioning adherence to a political decision already made; or
> (6) The potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker, at 217 (1962). Each factor identified above, can individually signal the presence of a political question. However, the "common underlying inquiry" is whether "the question is one that can properly be decided by the judiciary. *Alperin v. Vatican Bank*, 410 F.3d 532, 544 (9th Cir. 2005). The Separation of Powers doctrine reflects a "basic principle of our constitutional scheme that one branch of the Government may not intrude upon the central prerogatives of another." *Loving v. United States*, 517 U.S. 748, 757 (1996). However, a case does not present a political question simply because it "raises an issue of great importance to the political branches." *U.S. Dep of Commerce v. Montana*, 503 U.S. 442, 458 (1992). Dismissal of a claim on political question grounds is appropriate only if one of the *Baker* factors is "inextricable" from the case at issue. *Baker*, 369 U.S. at 217.

In *Juliana,* the District Court of Oregon weighed each *Baker* factor respectively and reasoned that the Appellants' claims, as presented, present "no need to step outside the core role of the judiciary to decide this case." *Juliana*, 217 F.Supp. 3d at 1241. Here, the same is true with respect to the Appellants' claims. Judge Aiken in *Juliana,* drew upon a comparison between the

youth Appellants' claims in *Juliana* and the Appellant's claims in *Baker,* writing that in *Juliana*, the youth Appellants are minors who cannot vote and must depend on others to protect their political interests. Thus, the youth Appellants claims are "rooted in a 'debasement of their votes' and an accompanying diminishment of their voice in representational government." *Id.* at 1241.

Baker, Juliana, and this case share a common degree of concern for respecting the separation of powers and adhering to the political question doctrine while still raising political issues. However, as the *Baker* court found, the political issues raised are not "inextricable" from the case. The overlapping legislative, executive, and judicial interests around solving a global problem on the scale of climate change, do not inherently bar any one branch from using the constitutional faculties at their disposal to attempt to solve the problem, but "[s]hould Appellants prevail on the merits, this Court would no doubt be compelled to exercise great care to avoid separation-of-powers problems in crafting a remedy." *Id.*

The six *Baker* factors can be grouped into three general inquiries: "(i) Does the issue involve resolution of questions committed by the text of the Constitution to a coordinate branch of Government? (ii) Would resolution of the question demand that a court move beyond areas of judicial expertise? (iii) Do prudential considerations counsel against judicial intervention?" *Wang v. Masaitis*, 416 F.3d 992, 995 (9th Cir. 2005)). (citing *Goldwater v. Carter*, 444 U.S. 996, 997 (1979) (Powell, J., concurring)).

A. The issues raised in this case do not involve the resolution of textual questions committed by the Constitution to a coordinate branch of Government.

The first Baker factor examines whether there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department." *Baker*, 369 U.S. at 217. Climate change is a relatively recent issue, which the constitution has made no commitment to any one branch of government. "The indisputably international dimension of this particular

environmental problem does not render the instant controversy a non-justiciable one. While Defendants have shown that global warming issues may implicate foreign policy and related economic issues, the fact that this case "touches foreign relations" does not *ipso facto* place it beyond the reach of the judiciary." *Native Village of Kivalina v. Exxon Mobil Corp.*, 663 F. Supp. 2d. 863, 873 (N.D. of Cal. 2009). As the court wrote in *Kivalina,* because "none of the Defendants cite to any express provision of the Constitution or provision from which it can be inferred that the power to make the final determination regarding air pollution or global warming has been vested in either the executive or legislative branch of the government. *Id.* Given their failure to do so, the Court must presume that no such limitation exists. *Id*. Like in *Kivalina*, the Appellant United States has failed to cite to any express provision of the Constitution or provision from which it can be inferred that the power to make a final determination regarding global warming is vested in the executive or legislative branch of the government. Because of their failure to do so, the Court must presume that any such express provision or interpretation of the Constitution does not exist and thus is not blatantly a political question.

B. This Court is not condemned to move beyond areas of judicial expertise to hear this case.

The *Kivalina* court felt the presence of a political question within the combination of the second and third *Baker* factors, "[w]hether there is 'a lack of judicially discoverable and manageable standards' and whether a decision is impossible without an initial policy determination of a kind clearly for non-judicial discretion. The *Kivalina* court noted, that the common inquiry presented by these two factors is whether resolution of the question demand[s] that a court move beyond areas of judicial expertise[.]" *Kivalina* at 873. (quoting *Wang v. Masiatis*, 416 F.3d 992, 995-996 (9th Cir. 2005)).

The court cautioned that, "the factfinder will have to weigh, inter alia, the energy-producing alternatives that were available in the past and consider their respective impact on far ranging issues such as their reliability as an energy source, safety considerations and the impact of the different alternatives on consumers and business at every level." *Kivalina* at 874. The court was not provided any particular judicially discoverable and manageable standards from the Appellants that would guide a factfinder in rendering a decision that is principled, rational, and based upon reasoned distinctions.

However, the court in *Kivalina* incorrectly combined their province and concern for having judicial expertise with actual policy expertise of the scientific community resolving policy issues concerning global warming. As *Juliana* pointed out, redressability in this case is scientifically complex, particularly in light of the specter of irreversible climate change. *Juliana* at 1247. Judge Aiken continued to point, that it is not any particular permit, specific tax break, royalty rate, or contract, but rather the defendants' *aggregate actions* violate the Appellants' substantive due process rights and the government's public trust obligations. *Id* at 1240.

Given this court's ability to find whether or not the aggregate actions of the United States and HexonGlobal constitute violations of the constitution and public trust doctrine, the court is not burdened with exercising a judicial expertise on each individual causation or sequence of causations alleged by the Appellants, and may rely on the same judicially discoverable and manageable standards that have been litigated in the past.

C. There are no prudential considerations counseling this Court against judicial intervention.

The fourth, fifth, and sixth Baker factors "address circumstances in which prudence may counsel against a court's resolution of an issue presented." *Zivotofsky v. Clinton*, 566 U.S. 189, 204 (2012). Only in "rare" cases will *Baker*'s "final factors alone render a case nonjusticiable."

Id. at 1434. Prudential considerations look to the consequences of a court asserting its jurisdiction, while purely constitutional ones look to the text and structure of the Constitution itself for clues about the limitations on a court's Article III powers. *Carrie,* 503 F.3d at 981.

The United States has made several commitments to the international community with respect to lowering its greenhouse gas emissions, but those commitments would be fully consistent with the relief being sought by the Appellants. Although foreign policy and negotiation is usually within the purview of the Executive Branch to make foreign policy considerations when bargaining with other nations, the relief sought by Appellants would not produce any contradictions between the Executive's promise to other nations to reduce emissions and a domestic court order to reduce those emissions.

Although the Appellants erroneously raise particular claims under the Alien Tort Statute and public trust doctrine to address climate change, that does not *ipso facto* make raising these claims in this context a political question unable to be heard in this Court. The issues raised by the Appellants do not involve the resolution of textual questions committed by the Constitution to a coordinate branch of government. The Appellants also do require the Court to move beyond their judicial expertise in deciding that these claims cannot be used to provide any relief which the Appellants are seeking. Moreover, there are no prudential considerations for this Court to not assert its jurisdiction over these claims.

CONCLUSION AND RELIEF

For the above reasons, HexonGlobal asks this Court to affirm the District Court's order rejecting Appellant's claims on all issues. The District Court correctly dismissed Mana's claim holding that any action Mana might have under the ATS has been displaced by greenhouse gas regulation under the Clean Air Act, thus the Court correctly found that Mana failed to state a

claim for relief. *Id.* at 8-10. Also, the District Court correctly dismissed Flood's claim holding that threats to human well-being caused by climate change does not constitute a violation of Due Process rights, thus the Court correctly dismissed Flood's claims for failure to state a claim for relief under the Fifth Amendment to the United States Constitution. Appellants appeal the District Court's decision on their claims.

The remedies to Appellant's claims are best addressed by Legislative processes rather than Courts creating law, especially constitutional law, unilaterally from the bench. For the foregoing reasons, this Court should reject Appellants' claims and uphold the District Court's opinion and order dismissing Appellant's claims.