*Team No. 50*

**Docket Nos. 18-000123 and 18-000124**

---

**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.***

---

**Measuring Brief**

---

# BRIEF OF APPELLANTS ORGANIZATION OF DISAPPEARING ISLANDS, APA MANA, and NOAH FLOOD

---

**Oral Argument Requested**

---

***Attorneys for the Petitioner,***
***Organization of Disappearing Islands,***
***Apa Mana,***
***Noah Flood***

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

Cases

United States Constitution



Statutes

Other Authorities

## STATEMENT OF JURISDICTION

This case concerns a petition for judicial review of the Order of the United States District Court for the District of New Union Island dated August 15, 2018, in Civ. 66-2018. The parties have consented to general personal jurisdiction in all courts in the Territory of New Union Islands. The District Court had original jurisdiction pursuant to the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350. This Court has jurisdiction of appeals from the final decision of the District Court under 28 U.S.C. § 1291.

## STATEMENT OF ISSUES

I. Whether Mana can bring an ATS, 28 U.S.C. § 1350 claim against a domestic corporation.

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

III. Assuming the *Trail Smelter* Principle is customary international law, whether the *Trail Smelter* Principle imposes obligations enforceable against non-governmental actors.

IV. Assuming enforceability, whether the *Trail Smelter* Principle is displaced by the Clean Air Act.

V. Whether there is a cause of action against the United States, based on the 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.

VI. Whether Plaintiff's law of nations claim under the ATS and public trust claim present a non-justiciable political question.

## STATEMENT OF CASE

Human burning of fossil fuels for energy production has substantially increased the concentrations of carbon dioxide in the atmosphere. R. at 4. There carbon dioxide emissions combined with emissions of greenhouse gases from agricultural and industrial activity are causing a change in global climate. As a result, temperatures worldwide have increased, changes in rainfall patterns have occurred, and sea levels have increased. R. at 4. If global emissions of

greenhouse gases continue at the current trend, the average sea level will likely rise as much as one meter by the end of the century. R. at 4.

Plaintiffs Apa Mana and Noah Flood own homes and reside in communities on island nations with an elevation of less than one-half meter above sea level. R. at 4. Mana and Flood have suffered extensive seawater damage to their homes during storms that have occurred over the last three years. R. at 5. These storms were extreme consequences of fossil fuel production and consumption. R. at 5. The damages that the plaintiffs have suffered would not have occurred, but for the extreme use of fossil fuels. Both plaintiffs have and will continue to incur damages to their property due to sea levels rising. R. at 5. The damages that plaintiffs have suffered included seawater intrusion into their drinking water wells, increasing temperatures that have had adverse health effects on both individuals, reduced availability in locally caught seafood that serves as a substantial food source. R. at 5.

Defendant HexonGlobal is an oil production company that is incorporated in New Jersey and has its principle place of business in Texas. R. at 5. HexonGlobal is responsible for 32% of United States cumulative fossil-fuel related greenhouse gas emissions, which is six percent of global historical emissions. Cumulative worldwide sales of fossil fuels by HexonGlobal constitute nine percent of global fossil fuels related emissions. R. at 5. HexonGlobal has been aware since the 1970s that ongoing global sales and combustion of fossil fuels products would result in substantial harmful global climate change and sea level rise. Nevertheless, HexonGlobal continued in their business with refineries operating throughout the world, including one refinery located on New Union Island. R. at 5.

The United States has emitted more greenhouse gas emissions than any other nation and has been responsible for twenty-five percent of cumulative global anthropogenic greenhouse gas

emissions to date. R. at 6. Despite this fact, the United State has made minimal effort towards mitigating the damages caused by their fossil fuel use. R. at 6. In fact, the United States has promoted the production and combustion of fossil fuels through promulgating various agency policies and programs that benefit fossil fuel production companies. R. at 6. However, the United States has more recently taken minimal efforts to mitigate their effects on climate change. As a result, United State greenhouse emissions have not significantly decreased, and global greenhouse gas emissions have, in fact, increased. R. at 7. Most recently, the Trump administration has proposed to reverse various regulatory measures and commitments dedicated to decreasing greenhouse gas emissions. Most notably, this includes withdrawal from the Paris Agreement and the Environmental Protection Agency (" EPA") freezing emissions reductions under the greenhouse gas-based fuel economy standards. R. at 7.

Plaintiffs appeal as of right to the Twelfth Circuit Court of Appeals from a decision from the United States District Court, dismissing the case due to the Plaintiffs' failures to state a proper claim for relief under the ATS. The Plaintiffs further appeal the decision from the United States District Court dismissing the case due to Plaintiffs failure to state a claim for relief under the Fifth Amendment of the United States Constitution.

## SUMMARY OF ARGUMENT

The ATS is a proper vehicle for the Plaintiffs to bring a claim against HexonGlobal, a domestic corporation as the harmful carbon emissions produced in high quantities by the company represent conduct deemed to be repugnant and actionable by international standards. Because the ATS provides jurisdiction for tort claims, the court should take the plain language of the statute at its historical and canonical meaning and allow for a claim against corporations.

Furthermore, the ATS has not been replaced by the Clean Air Act ("CAA") as both the ATS and the CAA should be considered on equal footing as legislative statutes.

The *Trail Smelter* Principle is recognized as a principle of customary international law enforceable as the "Law of Nations" under the ATS. Customary international law is defined by a myriad of decisions made in both international and domestic tribunals, as well as provisions within international treaties. The *Trail Smelter* Principle both qualifies as customary international law as defined by previous case law and has been reflected within numerous provisions in international treaties.

Assuming the *Trail Smelter* Principle is recognized as customary international law, it imposes obligations enforceable against corporations, such as HexonGlobal. Recent case law has suggested a trend of recognizing that corporate liability could be customary international law if the corporation's conduct is a "violation of the law of nations." 28 U.S.C. § 1350 and if the conduct violates a norm that is "accepted by the civilized word and defined with a specificity."

If otherwise enforceable, the *Trail Smelter* Principle is displaced by the CAA. A claim by ATS is cabined to tort claim supported by international law, that of which is governed by federal common law. However, that law is only applicable if Congress has not yet spoken to the subject at hand. As this subject, the regulation of greenhouse gas emissions has been spoken to by Congress in EPA regulation under the CAA.

However, there is a cause of action against the United States Government in violation of Flood's Substantive Due Process rights. Following *Obergefell*, a reading of Substantive Due Process rights can include a fundamental right to a healthy and stable climate system. Additionally, under the "danger creation" or similar exception to the *DeShaney* bar to

government protection from allegedly wrongful acts by private parties. Taken together, Flood's claim against the United States under a Substantive Due Process claim is valid.

The claim made by the Plaintiffs does not present a non-justiciable political question as a standard of liability already exists by way of the CAA. Applying such a standard would not preclude the Plaintiffs from bringing a claim and is an equitable standard to apply to HexonGlobal, a company incorporated within the United States. Finally, the court need not create a new instrument of relief for the Plaintiffs as one already exists by way of joint and severable liability. Because the damage created by HexonGlobal and the United States cannot be adequately separated, joint and severable liability provides the court a standard of allocation of both fault and cost without displacing political judgment.

## STANDARD OF REVIEW

The District Court incorrectly applied the law to the facts of this case. The District Court dismissed Plaintiffs Mana and Flood's case for failure to state a claim for relief under the ATS and the Fifth Amendment of the Constitution, respectively, and did so incorrectly. These issues presents an issue of law over which this Court must exercise de novo review. A lower court's dismissal for failure to state a cause of action is subject to de novo review. *Susan Fixel, Inc. v. Rosenthal & Rosenthal, Inc.*, 842 So. 2d. 204, 206. Under a de novo standard of review, this Court does not owe deference to the District Court's ruling to dismiss Plaintiffs case. *Pell v. E.I. DuPont de Nemours & Co.*, 539 F.3d 292, 305 (3d Cir. 2008).

## ARGUMENT

### I. MANA MAY BRING AN ALIEN TORT STATUTE, 28 U.S.C. 1350 (ATS) CLAIM AGAINST HEXONGLOBAL, A DOMESTIC CORPORATION, GIVEN THAT THE COURT'S HAS MISCONSTRUED THE LANGUAGE OF THE STATUTE AND AS A LEGISLATIVE ACT, THE ATS HAS NOT BEEN REPLACED BY THE CLEAN AIR ACT.

This Court should overturn the Twelfth Circuit Court of Appeals' holding that Mana's claims ought to be dismissed due to failure to state a claim for relief. Congress passed the ATS in an effort to redress wrongdoing done to a noncitizen outside the borders of the United States, by a party within the jurisdiction of the United States. *Jesner v. Arab Bank, PLC,* 138 S. Ct. 1386, 1397 (2018). In order to state a claim, a plaintiff must allege the following three elements: that the plaintiff is an alien; that the plaintiff is suing for a tort; and that the alleged tort was "committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. In creating ATS, the legislature made an affirmative statement that it sought to protect individuals from harm that did not just violate the laws of the United States but also represented, "acts repugnant to all civilized peoples." *Jesner,* 138 S. Ct. at 1401 (2018). Furthermore, the tortious conduct does not need to be committed domestically to create subject matter jurisdiction. The matter must, however, "touch and concern the territory of the United States" "with sufficient force to displace the presumption against extraterritorial application." *Kiobel v. Royal Dutch Petroleum Co.,* 569 U.S. 108, 125 (2013). While the Court has most often attempted to categorize such violations within, "redress for violations of clear and unambiguous international human-rights protections", there is no reason why the Court should not find compelling interest to find a claim stated in this case under the ATS. *Jesner*, 138 S.Ct. at 1389.

### A. The Court in *Jesner v. Arab Bank PLC* misconstrued the qualifying language of the statute regarding how to determine what kind of complaint qualifies as redressable by judicial review.

In the Supreme Court case of *Sosa v. Alvarez-Machain,* the Court opined that federal courts could, "recognize private causes of action for certain torts in violation of the law of nations" even without "further congressional action." 542 U.S. at 124. In order to limit the claim under its opinion, the Court established a two-part test which a claim must satisfy in order to

have standing. The first part of the test requires that the alleged wrongdoing be, "accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms," such as "violation of safe conducts, infringement of the rights of ambassadors, and piracy." *Id.* at 724–725. The second part of the test called for the Court to decide "whether allowing a particular case to proceed is an appropriate exercise of judicial discretion." *Id.* at 727–728, 732–733, 738. In other words, the Court wished to reserve giving remedy by invoking the ATS to a limited scope of private actions that had very clearly violated norms of international law.

It is in the language of the first part of the test where the Court has misinterpreted the standard for applying the ATS. While *Sosa* does require a consensus on the type of behavior which will fit an international standard or norm, which could be brought to the Court as actionable, the test does not set the bar so high as to ask that the methods by which the international community deal with such conduct be uniform, as well. The plain language of the statute bears testimony to this by using the phrase "of the law of nations" to describe the term "violation" instead of the term "civil action." 28 U.S.C. § 1350.

Finally, there is no reason to conclude that the ATS was meant to preclude corporations from liability from a tortious claim. When the term "tort" was utilized by Congress within the statute, it is reasonable to infer that the legislature understood its meaning and all that it implies. Rather than regarding the term as mere surplusage, absent evidence to the contrary we ought to assume that Congress, "knows and adopts the cluster of ideas that were attached to [the] borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind." *Morissette v. United States*, 342 U.S. 246, 263 (1952). It has long been established in federal common law that corporations may be held liable in tort.

*Philadelphia, W., & B.R. Co. v. Quigley*, 21 How. 202, 210 (1859). This has been the case both domestically and internationally. *Chestnut Hill & Spring House Turnpike Co. v. Rutter*, 4 Serg. & Rawle 6, 17 (Pa.1818).

In this case, the question as to whether Mana may bring a tort claim against HexonGlobal turns on the issue of whether the alleged conduct of the Defendant fits a definable action that is recognized by the international community as a violation against which a civil or criminal action could be brought. Because the present case involves a civil matter, the bar is substantially lower to make that argument. The international community, including the United States, has set specific statutes in place to hold corporations responsible for harmful carbon emissions. Whether Mana can win on his claim by way of the ATS is another matter. However, the Court should find that he does have standing to bring such a claim.

### B. The Alien Tort Statute is a legislative statute and has not been superseded by the Clean Air Act.

In its opinion regarding *Mana v. HexonGlobal Corporation*, the Twelfth Circuit Court of Appeals has stated that because the CAA displaces the federal common law of air pollution the ATS has also been superseded and cannot be used to bring a claim for relief in the matter. The court has cited other district court cases as well as a Supreme Court decision involving claims based upon harms created by carbon emissions in which the court declined "to fashion common law remedies for claims based on global warming," reasoning that, "courts must also respect and defer to the other co-equal branches of government when the problem at hand clearly deserves a solution best addressed by those branches." *City of Oakland v. BP P.L.C.*, 325 F. Supp. 3d 1017, 1029 (N.D. Cal. 2018). However, all of those claims were brought by a reliance upon common law principles such as public nuisance and trespass. This is a key difference from the plaintiff's vehicle for relief under the ATS as the ATS was not fashioned by the courts, but rather, by the

legislature. Created as a portion of the Judiciary Act of 1789 in the first session of the First United States Congress, the ATS has long been recognized as a proper avenue for a non-citizen to bring a tort claim in federal court. Here, the plaintiff is not asking the Court to fashion any new type of relief by way of common law. Instead, Mana only asks that the Court treat the ATS with equal deference as it would the CAA.

## II. THE *TRAIL SMELTER ARBITRATION*, 3 U.N.R.I.A.A. 1965 (1941) ESTABLISHED THE *TRAIL SMELTER* PRINCIPLE AS CUSTOMARY INTERNATIONAL LAW ENFORCEABLE AS THE "LAW OF NATIONS" UNDER THE ALIEN TORT STATUTE.

The *Trail Smelter* Principle was established in the *Trail Smelter Arbitration*, 3 U.N.R.I.A.A. 1965 (1941). This case between the United States and Canada asserted that the Trail Smelter located in Trail, British Columbia was emitting pollutants that harmed crops and animals on American farms. Trail is located approximately 10 miles from the U.S.-Canada border. Michael J. Robinson-Dorn, *Article: The Trail Smelter: Is What's Past Prologue? EPA Blazes A New Trail for CERCLA*, 14 N.Y.U. Envtl. L.J. 233, 235 (2006).

Currently, the Trail Smelter operates as one of the largest integrated lead and zinc smelting and refining complexes in the world. As the company has grown larger, the amount of pollutants emitted from the plant also dramatically increase. Eventually, Canadian farmers near Trail sought redress for damages to their farmland caused by the Trail pollutants. However, the pollution from Trail did not stop at the U.S.-Canada border. The Trail Smelter's emissions were carried into Washington State. It was not long before Americans were also suffering the consequences of the increased pollution coming from the Trail Smelter, and American farmers filed their case against the Trail Smelter. The international arbitral panel in the *Trail Smelter Arbitration* ultimately held that it is the responsibility of the Nation to protect other Nations from

the harmful acts of its citizens within the Nation's jurisdiction. The panel famously established the following as the *Trail Smelter* Principle:

> Under principles of international law, as well as the law of the United States, no State has the right to use or permit the use of its territory in such 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.

*Id.* at 253.

### A. The Scope of Customary International Is Established By A Myriad of International and Domestic Law.

This Court should recognize the *Trail Smelter Arbitration* as a recognized principle of customary international law enforceable as the "Law of Nations" under the ATS. The Court in *Sosa* opined "When an ATS suit is brought under the "law of nations," also known as "customary international law," jurisdiction is limited to those cases alleging a violation of an international norm that is specific, universal, and obligatory." *Sosa*, 542 U.S. at 732 (2004). Furthermore, it has been established that "[C]ustomary international law is composed only of those rules that States universally abide by, or accede to, out of a sense of legal obligation and mutual concern." *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 248 (2d. Cir. 2003). The Flores Court has also opined that defining the scope of international law "is no simple task" as customary international law is discerned from myriad decisions made in numerous and varied international and domestic arenas. *Flores*, 414 F. 3d at 247 (quoting *Kiobel v. Royal Dutch Petroleum*, 691 F.3d 111, 131 (2010)). Finally, the court in *Filartiga* opined, "It is only where the nations of the world have demonstrated that the wrong is of mutual, and not merely several, concern, by means of express international accords, that a wrong generally recognized becomes an international law violation within the meaning of the [ATS]. *Filartiga v. Pena-Irala*, 630 F.2d 876, 888 (1980).

In the case at hand, the *Trail Smelter* Principle has been established as customary international law because the holding of the *Trail Smelter Arbitration* has been incorporated into the Declaration of the United Nations Conference on the Human Environment. This Declaration was written with the understanding that there needs to be a common outlook on the topic of climate change and for there to be globally shared principles to inspire and guide people around the world to work towards the goal of preserving the human environment. Furthermore, Article 21 of this Declaration, which reflects the holding in the *Trail Smelter Arbitration*, states:

> States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign to exploit their own resources pursuant to the 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 same principle was reasserted in Principle 2 of the 1992 Rio Declaration on Environment and Development which was endorsed by 190 nations. U.N. Conference on Environment and Development, *June 3-14, 1992, Rio de Janeiro, Braz., Rio Declaration on Environment and Development*, 3, U.N. Doc A/CONF.151/26/REV.1(VOL.I)(1992).

The international community, including the United States, has recognized the dangers of climate change and the need to implement policies in order to mitigate the severe consequences of global warming. Furthermore, any actor that conducts business knowing their actions are causing substantial environmental harm resulting in the worsening of climate change is a violation of an international norm that is "specific, universal, and obligatory." It has been well established that climate change has and will continue to cause extreme weather conditions that will result in a multitude of damages. The plaintiffs, in this case, allege specific harms they have

suffered including seawater intrusion into their drinking water wells, increasing temperatures negatively affecting their health by increasing their risk of heat stroke and mosquito-borne diseases, reduced availability in local fish sources. These harms suffered by the plaintiffs are harms that will universally affect the planet, especially island nations and coastal lands if the earth's temperature continues to increase. It is, therefore, obligatory that these issues be addressed in order to mitigate the consequences of climate change. The principle set forth in the *Trail Smelter Arbitration* is to not cause damage to the environment of other nations, and the goal is to ultimately address the current and future consequences of climate change. Therefore, this Court should recognize that environmental policies that seek to halt climate change must be recognized as an international norm that must be adopted as customary international law.

**B. International Treaties Establish the Scope of Customary International Law**

This Court should recognize the *Trail Smelter* Principle as customary international law because this principle and the ultimate goal of the *Trail Smelter Arbitration* to mitigate the effects of greenhouse gas emissions has been reflected in international treaties. Treaties "are proper evidence of customary international law because, and insofar as, they create *legal obligations* akin to contractual obligations on the States parties to them." *Flores,* 414 F.3d at 256 The *Flores* court also opined that "a treaty will only constitute sufficient proof of *customary international law* if an overwhelming majority of States have ratified the treaty, *and* those States uniformly and consistently act in accordance with its principles. *Id*. Finally, the International Court of Justice opined in the *North Sea Continental Shelf Cases* that for a treaty provision to attain the status of a norm of customary international law, "[i]t would in the first place be necessary that the provision concerned should, at all events potentially, be of a *fundamentally*

*norm-creating character* such as could be regarded as forming the basis of a general rule of law." *North Sea Continental Shelf Cases*, [1969] 8 I.L.M. 340, at 373-74.

While the *Trail Smelter* Principle is aimed to protect States environment from another's states use of their own resources that result in environmental degradation, the fact of the matter is that the ultimate goal of this principle is the protect and preserve the global environment. There is no disputing that "pollution is ubiquitous" and it "does not recognize nation-states, and it cares not about territorial sovereignty." One nation's lack of a strict environmental regime will cause damage to the environment of neighboring states, regardless if those neighboring states have implemented their own environmental policies. Therefore, the reflection of the *Trail Smelter* Principle, as well as the overall goal of the *Trail Smelter Arbitration*, within international treaties should be taken into consideration as to whether or not the *Trail Smelter* Principle is recognized as customary international law.

It was mentioned in the previous section the holding of the *Trailer Smelter Arbitration* has been incorporated into the Declaration of the United Nations Conference on the Human Environment. More importantly, international treaties that have been signed by an overwhelming majority of States, seek to promote environmental conservation through reduction of greenhouse gas emissions. Most prominently, the United States and 165 other nations signed and ratified the United Nations Framework Convention on Climate Change (UNFCCC). The UNFCCC recognizes that danger of anthropogenic climate change and set forth the objective "to achieve… stabilizations of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system." United Nations Framework Convention on Climate Change, May 9, 1992, 1771 U.N.T.S. 107, 169. The most recent goal

added to this treaty is embodied in Article 2 of the Paris Agreement, which sets the goal for all signatories to enhance the UNFCCC though:

> (a) Holding the increase in the global average temperature to well below 2°C above pre-industrial levels and to pursue efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change;
>
> (b) Increasing the ability to adapt to the adverse impacts of climate change and foster climate resilience and low greenhouse gas emissions development, in a manner that does not threaten food production;
>
> (c) Making finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development.

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 Court must consider the UNFCCC and the Paris Agreement as evidence customary international law that seeks to reduce greenhouse gas emissions and mitigate climate change. The international community has shown its recognition of the current and ongoing issue of climate change and the need to act quickly in order to prevent further substantial harm to the environment. Furthermore, any policies related to the curtailing of greenhouse gas emissions, such as the *Trail Smelter* Principle, must be considered in the same manner because these two documents hold the same ultimate goal of conserving the environment.

## II. THE *TRAIL SMELTER* PRINCIPLE IS CUSTOMARY INTERNATIONAL LAW THAT IS ENFORCEABLE AGAINST HEXONGLOBAL.

This Court should find that the *Trail Smelter* Principle imposes obligations enforceable against non-governmental actors, such as corporations. Corporate liability is not generally a norm of customary law; however, recent case law has shown a trend of holding corporations liable for their actions in the corporation's conduct is a "violation of the law of nations," 28 U.S.C. § 1350, and is a norm "accepted by the civilized world and defined with a specificity."

*Sosa,* 542 U.S. at 725. The holding in *Presbyterian Church* states that in order to determine whether international law extends the scope of liability to corporations, courts must look to international law to identify who the violation of the international norm is attributable to. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 259 (2006). The *Presbyterian Church* case comes to a conclusion contrary to previous cases that have ruled that corporations are free from liability under international law. The judge in *Presbyterian Church* opines that while most treaties do not bind corporations, however, corporations have, in the past, been held liable for unintentional torts such as oil spills or nuclear accidents, and can, therefore, be held liable for intentional torts, as well. This judge further explains that the scope of corporate liability within international law develops "through the custom and practice 'among civilized nations… gradually ripening into a rule of international law.'" Using this logic, the Court in *Kiobel* held that the rule of corporate liability has yet to be determined within the realm of international law. However, there is a clear recognition within the international community that corporate liability can be established "only by achieving universal recognition and acceptance as a norm in the relations of States."

Global climate change is and will continue to cause detrimental damage to our environment and, ultimately, our lives. It is inevitable that if greenhouse gas emissions are not controlled, the human race will face catastrophic consequences within the century. The harms and damages that the Plaintiffs in the case claim are substantial require redress, but more importantly, these harms will soon be suffered by more than just those who live on island nations and coastal land. Climate change and the environmental disasters that will occur will be a substantial obstacle in maintaining human rights. The international community recognizes the human right to life. Furthermore, the United States has codified this right in the 5th Amendment

of the U.S. Constitution which guarantees government action that deprives persons of their rights to life, liberty, and property. The worsening of climate change will effectively infringe upon these rights that both the international community and the United States has established, as climate change will cause people to suffer a multitude of harms that affect their property, health, access to opportunity, and security. HexonGlobal's conduct is a direct violation of not only the rights set forth in the 5th Amendment, but also violates provisions within international treaties that guarantee similar rights. As one of the top greenhouse gas emission producers, HexonGlobal's conduct in running their business is directly related to the worsening of climate change. Furthermore, despite being aware since the 1970s that their continued global sales and combustion of fossil fuels would result in substantial harmful global climate change and sea level rise, HexonGlobal has not made any efforts to decrease their contributions to greenhouse gas. emissions. They have persisted in their business activities despite this knowledge. Therefore, HexonGlobal has knowingly contributed to the degradation of the environment, and their wrongful conduct amounts to an intentional tort. Due to the extreme consequences of climate change and the widespread, catastrophic effects it will have on the planet, any international policies that seek to hold corporations that exacerbate these effects liable should achieve universal recognition and acceptance as a norm within the States. For these reasons, the Court has the duty to rule that the *Trail Smelter* Principle imposes obligations enforceable against HexonGlobal.

## IV. EVEN IF OTHERWISE ENFORCEABLE, THE *TRAIL SMELTER* PRINCIPLE IS DISPLACED BY THE CAA.

This court should sustain the District Court's ruling that the *Trail Smelter* principle is displaced by the CAA. The *Trail Smelter* Principle, if otherwise enforceable, is enforceable as customary international law. *Kiobel*, 621 F.3d at 118. A claim under the *Trail Smelter* Principle

through the ATS is not simply a grant of jurisdiction. Sosa, 542 U.S. at 724. Historically understood, a claim under the ATS would support not only jurisdiction but a cause of action for a modest number of international law violations, governed by federal common law. *Id.* While federal common law may fill in statutory interstices and fashion federal law when necessary, federal common law is sustained only "until Congress strikes a different accommodation." *American Electric Power v. Connecticut*, 564 U.S. 410, 422 (2011).

In *Massachusetts v. EPA* and subsequent EPA administrative action, Congress promulgated rules regarding allowable greenhouse gas emission standards. 549 U.S. 497, 127 S.Ct. 14389 (2007). Pre-*Massachusetts v. EPA*, the EPA had ruled that the CAA did not permit greenhouse gasses to be regulated as "air pollutants" under the CAA's regulatory provisions. *Id.* at 513. A challenge of this statutory interpretation resulted in review by the Supreme Court, which held that the EPA has misinterpreted the CAA regulation:

> … § 202(a)(1) provides that EPA 'shall by regulation prescribe ... standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in [the Administrator's] judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.

*Id.* at 528, citing 42 U.S.C. § 7521(a)(1). The Court found that the EPA's reading of the text, leading to subsequent interpretation and regulatory inaction, was "foreclosed" by the statutory text, as the CAA's definition of "air pollutant" included "*any* air pollution agent or combination of such agents, including *any* physical, chemical ... substance or matter which is emitted into or otherwise enters the ambient air." *Id.* at 528-29. Thus, as "the statute is unambiguous" and the EPA offered "no reasoned explanation for its refusal to decide whether greenhouse gases cause or contribute to climate change," the Court's ruling demanded that the EPA "must ground its reasons for action or inaction." *Id.* at 529, 534-35.

Subsequently, the EPA declined to ground reasons for inaction and undertook greenhouse gas regulation. *American*, 564 U.S. at 416. The EPA and Department of Transportation issued final rules regulating emissions from light-duty vehicles, initiated joint rulemaking covering medium- and heavy-duty vehicles, began phasing in modifications to major greenhouse gas emitting facilities to use the best available control technology, and set limits on greenhouse gas emissions from new, modified, and existing fossil-fuel fired power plants. *Id.* at 417-18.

Applying these statutory and regulatory principles to this case, any federal common law covering the emission of greenhouse gases has been displaced by the federal statutory scheme and regulation following *Massachusetts v. EPA* and *American Electric Power v. Connecticut*. An ATS claim that would present a cause of action under federal common law is enforceable unless the federal common law has been spoken to by Congress. EPA regulations of greenhouse gases are exactly that: they are an extension of federal legislation authorizing the EPA to regulate greenhouse gas emission. Thus, any claim, including Mana's instant claim, grounded in federal common law pertaining to the regulation of greenhouse gas emission has been spoken to by Congress, and ultimately displaced by the CAA. As such, the District of New Union Island's opinion should be sustained.

## V. THERE IS A CAUSE OF ACTION AGAINST THE UNITED STATES GOVERNMENT, BASED ON FIFTH AMENDMENTS 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.

This Court should overrule the District Court's holding that there is no fundamental Due Process right to government protection from atmospheric climate change. Following *Obergefell*, a fundamental right to a healthy and stable climate system could be found within the Due Process Clause. Additionally, although *DeShaney* rejects fundamental Due Process right to government

protection from allegedly wrongful acts by private parties, *DeShaney*'s holding is not absolute and the "danger creation" basis for a claim recognized in the Ninth Circuit provides a substantive due process claim when government conduct places a person in peril in deliberate indifference to their safety. Following these authorities, there is a substantive due process claim against the United States Government for failing to protect the global atmospheric climate system from disruption.

### A. The Fifth Amendment Substantive Due Process rights include a right to a healthy and stable climate system.

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. For a claim of substantive due process to stand, the challenged governmental action must infringe upon a "fundamental" liberty right, wherein a "fundamental liberty right" is a right enumerated in the Constitution or rights and liberties which are either "'(1) deeply rooted in this Nation's history and tradition' or (2) 'fundamental to our scheme of ordered liberty.'" *Juliana v. United States*, 217 F.Supp.3d 1224, 1249 (D. Or. 2016). Rights that are not enumerated can be "found" within the deeply rooted history and tradition or within the scheme of ordered liberty, provided the federal courts exercise care "lest the liberty protected by the Due Process Clause be subtly transformed into ... policy preferences." *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997). To avoid creating rights found in policy preferences, guidance for interpreting constitutional rights is found within the sphere and influence of the Constitution, flowing from "penumbras, formed by emanations" of the Constitution's specific guarantees. *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965). The Due Process Clause's interpretation is necessary to the concept of liberty, as those who wrote and ratified the Bill of Rights "did not presume to know the extent of freedom in all its dimensions,

and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning." *Obergefell v. Hodges*, ___ U.S. ___, 135 S.Ct. 2584, 2598 (2015). Following this guidance, a federal judge, exercising "reasoned judgment," could find a substantive Due Process right to a healthy and stable climate system. *Id* at 2598.

In *Juliana*, petitioners brought an action for declaratory and injunctive relief against the United States, the President, and other executive agencies for permitting, encouraging, or otherwise enabling continued exploitation, production, and combustion of fossil fuels, which in turn destabilizes the climate and violated the plaintiff's substantive due process rights. 217 F.Supp.3d at 1233. The District Court for the State of Oregon found there is "no doubt that the right to a climate system capable of sustaining human life is fundamental to a free and ordered society." *Id.* at 1250. The Court reasoned that, as marriage is the "foundation of the family" so too is a climate system "quite literally the foundation 'of society, without which there would be neither civilization nor progress.'" *Id*. In reaching this decision, the Court distinguished between a crucial mischaracterization of the plaintiff's argument by defendants regarding the breadth of the claim and the fundamental rights therein. *Id.* Rather than constitutionally objecting to *any* production of pollution or in causing *any* climate change, plaintiffs alleged that the government's actions had caused pollution and climate change on a "catastrophic level, and that if the government's actions continue unchecked, they will permanently and irreversibly damage plaintiff's property, their economic livelihood, their recreational opportunities, their health, and ultimately their (and their children's) ability to live long, healthy lives." *Id.* However, this realization did not constitutionalize all environmental claims. *Id*. The Court clarified:

> ... 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.

*Id.* (emphasis added). In doing so, the Court's "reasoned judgment" in finding a substantive due process right was cabined between requiring the plaintiff to allege more than any "minor or even moderate act that contributes to the warming of the planet" but less than a requirement that a plaintiff must allege governmental action will result in the extinction of humans as a species." *Id.* Ultimately, with a guide of "reasoned judgment", the Due Process Clause's text supports that an emanation of the right to life, liberty, and property is the foundation upon which those rights exist: a planet capable of sustaining life. Without this necessary condition, it is impossible for the rights of life, liberty, and property to be exercised. In this case, claims brought by Flood fall squarely within a possible interpretation of the Substantive Due Process Clause. While Flood's assertion that this right falls within his constitutional rights may not be fully recognized by most courts, Flood's interpretation is not outside the bounds of constitutionality, especially at the motion to dismiss stage.

### B. Following the Ninth Circuit's interpretation of *DeShaney*, the "danger creation" exception allows for government protection from allegedly wrongful acts by private parties, including failure to limit third-party $CO_2$ emissions.

The Due Process Clause does not ordinarily impose on the government an affirmative obligation to act, even when "such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual." *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 196 (1989). However, it is improper to construe that any fundamental Due Process right to governmental protection from allegedly wrongful acts by private parties would be rejected, as there are exceptions to the *DeShaney* formulation. *Youngberg v. Romeo*, 457 U.S. 307 (1982), *Estelle v. Gamble*, 429 U.S. 97 (1976). Notably, the general *DeShaney* rule is modified in the Ninth Circuit by two exceptions: (1) the

special relationship exception, and (2) the "danger creation" exception. *L.W. v. Grubbs*, 974 F.2d 119, 121 (9th Cir. 1997). The special relationship exception is triggered when the state has created a special relationship with a person, as in the case of custody or involuntary hospitalization. *Id.* In instances where the special relationship would be created, the state has imposed liability under due process theory, premised on abuse of that special relationship. *Id.* In contrast, the "danger creation" basis for a claim involves affirmative conduct on the part of the state in placing the plaintiff in danger. *Id*., *Wood v. Ostrander*, 879 F.2d 583, 588-90 (9th Cir. 1989). For a *prima facie* case asserting a danger-creation due process claim to survive, a plaintiff must show (1) the government's actions created the danger to the plaintiff; (2) the government knew its acts cause that danger; and (3) the government with deliberate indifference failed to act to prevent the alleged harm. *Juliana,* 217 F.Supp.3d at 1252. These standards must be met in the course of litigation but need not be reached at the motion to dismiss stage. *Id.*

The District Court's ruling erred in finding, under *DeShaney*, that *any* fundamental Due Process right to government protection from allegedly wrongful acts by private parties would fail, as *Deshaney* itself holds presumptions of exemptions in certain instances. In *DeShaney*, suit was brought by an abused boy (and his mother) who, as a result of being beaten by his father, fell into a coma and suffered injuries to the head that left him "confined to an institution for the profoundly retarded." *DeShaney*, 489 U.S. at 193 (1989). The suit was brought against social workers and other local officials who received complaints that DeShaney was being abused by his father and had reason to believe that this was the case but did not act to remove petitioner from father's custody. *Id.* at 191. In holding that state actors, in this case, social workers and local officials, and the state had no constitutional duty to protect DeShaney, the Court conceded that that in certain limited circumstances "the Constitution imposes upon the State affirmative

duties of care and protection with respect to particular individuals." *Id* at 198. Though generally cabined to cases in which institutionalization for forced hospitalization has fully limited an individual's liberty, the Court opined about conditions in which the Due Process Clause for deprivation of substantive due process occurs:

> ... when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to case for himself, and at the same time fails to provide for his basic human needs – *e.g.*, food, clothing, shelter, medical care, and reasonable safety – it transgresses the substantive limits on state action set by ... the Due Process Clause.

*Id.* Thus, to read that there is an absolute bar against the state to provide protection from private parties is incongruous with *DeShaney*, as "*DeShaney* thus suggests that had the state created the danger, [plaintiff] might have recovered." *Penilla v. City of Huntington Park*, 115 F.3d 707, 709 (9th Cir. 1997) (citing *L.W. v. Grubbs*, 974 F.2d 119, 121 (9th Cir. 1992). Therefore, to read that *DeShaney* affirmatively prohibits any Due Process right to government protection from allegedly wrongful acts by private parties is a misreading of applicable law, hence the validity of the Ninth Circuit's interpretation and subsequent exceptions to the supposed bright-line rule in *DeShaney*.

In this case, the District Court erred in dismissing Flood's claims for failure to state a claim for relief under the Fifth Amendment as Flood's assertion survives the *DeShaney* through the Ninth Circuit's "danger creation" or similar exception. Contrary to the District's opinion, the *DeShaney* limitation on Due Process claims bars many claims but is not absolute. Several exceptions adopted by the various districts allow for Due Process claims where the government has an affirmative obligation to act. Under this reasoning, Flood's claim could be established through a *DeShaney* exception, dependent upon the district's interpretation. For example, Flood's claim could survive under the Ninth Circuit's "danger creation," as, shown from the record, (1) government act in promoting the sale and use of fossil fuels, (2) the government was

aware of the danger in promoting the sale and use of fossil fuels to the environment, and (3) the government acted with indifference to this danger. Given the permissible interpretation of the Fifth Amendment's Due Process Clause in a right to a healthy and stable climate system combined with no affirmative bars against a *DeShaney* exception, at least at the motion to dismiss stage, this Court should overrule the District of New Union Island's dismissal of Noah Flood's claim for relief under the Fifth Amendment to the Constitution.

## VI. MANA'S LAW OF NATIONS CLAIM UNDER THE ALIEN TORT STATUTE (ATS) AND PUBLIC TRUST CLAIM DO NOT PRESENT A NON-JUSTICIABLE POLITICAL QUESTION GIVEN THAT THERE ARE ALREADY STANDARDS OF LIABILITY WHICH HEXONGLOBAL HAS MOST LIKELY BREACHED.

This Court should rule in favor of Mana for subject matter jurisdiction under the ATS. In *Kivalina v. Exxon Mobil Corp*, Plaintiffs asserted that, "as a result of global warming, the Arctic sea ice that protects the Kivalina coast from winter storms has diminished, and that the resulting erosion and destruction will require the relocation of Kivalina's residents." 663 F. Supp. 2d 863, 868 (N.D. Cal. 2009), aff'd, 696 F.3d 849 (9th Cir. 2012). In making its decision, the Court looked to six factors, "any one of which demonstrates the presence of a non-justiciable political question." Id. The Court distilled those factors into the following three questions: "(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?" *Id.* In that case, the court found that while, "foreign affairs [which] may be affected by a judicial decision does not implicate abstention, "the fact that the case was based upon an assertion of damages caused by global warming was too broad of a scale for the court to "reach a resolution of this in any 'reasoned' manner." *Id.* Finally, the court looked to the

question of whether a political question exists. The court defined the existence of a political question, "when, to resolve a dispute, the court must make a policy judgment of a legislative nature, rather than resolving the dispute through legal and factual analysis." *Id* at 876. In that case, the court ruled that the Plaintiff's nuisance claim created a two-part political question.

First, a nuisance claim asks a court to create a balancing test to determine what an acceptable amount of greenhouse gases would be a threshold for liability. Second, the Plaintiff's claim asked the court to "make a political judgment that the two dozen Defendants named in this action should be the only ones to bear the cost of contributing to global warming." *Id.* The Court further asserted that even if the Defendants were responsible for "more of the problem than anyone else," "allocation of fault—and cost—of global warming is a matter appropriately left for determination by the executive or legislative branch in the first instance." *Id.*

This political question analysis by the Court in *Kivalina* is inapplicable to the present case in regard to the first portion of the test and is incorrect in its underlying assumption in the second portion of the test.

### A. Mana's claim by way of the Alien Tort Statute does not require a balancing test; only for the court to determine if a violation of the law of nations has occurred.

In *Kivalina*, the court asserted that it was being asked to create a balancing test to determine what amounts of greenhouse gas was acceptable by the court to find causation for a nuisance tort and that such an act by the court would overstep its bounds of judicial function. Here, the court need not attempt to create a balancing test. The test which the court ought to apply is whether a violation of the law of nations has occurred. As discussed in the first issue of the brief, the ATS does not require a uniformity of punitive dispensation amongst nations. The only requirement is that there be a consensus regarding the universal criminal nature of the act toward mankind. 28

U.S.C. § 1350.

Furthermore, the court may look to domestic law to find specific standards of liability by way of the CAA. While the Act does not preclude Mana bringing a suit to the court through the ATS, it does give specific standards which, if violated, a corporation may be found liable. This gives the court an excellent test to determine whether HexonGlobal, a U.S. based corporation violated a legislatively set standard.

### B. The Court may allocate fault and cost to HexonGlobal without a requisite decision by way of Joint and Several Liability.

In *Kivalina*, the court claimed that it would be impossible to find a proper remedy for the affected tribe due to the innumerable persons who could be found corporately liable for the creation of greenhouse gas. This analysis is flawed in two ways. First, the Plaintiff was not asking the court to find the Defendant solely liable but rather, substantially liable. Second, a remedy already exists for this type of situation by way of joint and several liability. Joint and Several Liability has been defined as a principle by which "liability of those engaged in concerted activity is for the total comparative responsibility assigned to all who engage in the concerted activity." RESTATEMENT (THIRD) OF TORTS § 15 (AM. LAW INST., 2018). In other words, an individual tortfeasor can be held liable for the totality of the damage caused by multiple parties acting together.

Here, Mana is suing both HexonGlobal as well as the United States for damages as a result of both parties' failure to comply with legislative standards. As HexonGlobal is a U.S. based company, the United States has neglected to keep HexonGlobal within safe limits of greenhouse gases, and as such has become a willing accomplice in HexonGlobal's torts against Mana. For these reasons, the court need not supersede the legislature in creating a new standard to allocate fault and cost to HexonGlobal.

## CONCLUSION

For all the foregoing reasons, the Appeals Court should sustain the District Court's ruling regarding Apa Mana's claim under the ATS. However, the Appeals Court should overrule the District Court's ruling of Noah Flood's claim under a violation of his Substantive Due Process rights.

Dated: Nov, 28, 2018

Respectfully submitted,

*Counsel for Petitioners*
*Organization of Disappearing Islands,*
*Apa Mana, and*
*Noah Flood*