Team No. 51

IN THE UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

Docket No. 18-000123

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

Petitioners,

- v. -

HEXONGLOBAL CORPORATION,

Respondent,

and

THE UNITED STATES OF AMERICA,

Respondent.

On Petition for Review of an Order Dismissing
Plaintiffs' Claims in the District Court

BRIEF OF THE ORGANIZATION OF DISAPPEARING ISLAND NATIONS, APA MANA, and NOAH FLOOD
Petitioners

Oral Argument Requested

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STATEMENT OF JURISDICTION

This case concerns the application of the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350 (2012), as well as questions of constitutional law. Jurisdiction was proper in the district court pursuant to 28 U.S.C. § 1350 (2012). This Court has jurisdiction over this appeal from the final order of the district court. *Id.*; *see also* R. at 11.

STATEMENT OF ISSUES

I. Supreme Court precedent disallows liability for foreign corporations acting internationally but has yet to definitively speak to domestic corporate civil liability. HexonGlobal is a domestic corporation, acting as the surviving corporation resulting from the merger of all major U.S. oil producers. Should this Court recognize corporate civil liability for domestic corporations violating the law of nations?

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

III. The *Trail Smelter* Principle, a principle of customary international law, provides 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. HexonGlobal, a United States Corporation, is emitting large amounts of greenhouse gases in the sale of petroleum fuels and causing substantial harm to the nation of A'na Atu. Does HexonGlobal have an enforceable obligation to ensure its activities do not cause damage to A'na Atu's environment?

IV. The Supreme Court found the Clean Air Act preempted federal common law claims brought by United States and cities to prevent harm within the United States. App Mana, a foreign national, seeks to prevent harm resulting from emissions by an American corporation. Should the court hold the *Trail Smelter* Principle is not preempted by the Clean Air Act as interpreted by the Supreme Court or as stated in the Act?

V. Whether a cause of action exists against the United States Government, 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. The political question doctrine provides that certain questions are political as opposed to legal, and thus, must be resolved by the political branches rather than the judiciary. Petitioners assert claims under the Alien Tort Statute and the Due Process Clause of the Fifth Amendment to the United States Constitution. Are Petitioners' claims justiciable?

STATEMENT OF THE CASE

I. Facts

The Earth's climate and temperature is determined by "balance between the amount of solar radiation that reaches the Earth and the amount of heat that is radiated from Earth back into space. R. at 4. The Earth's current climate is dependent on this balance. *Id*. Greenhouse gases, named for their "windowed-walls of a greenhouse like effect" on the atmosphere, are carbon dioxide and methane gases making up less than one-half of a percent of the atmosphere which impacts global temperatures. *Id*. Human production of fossil fuels, which increase greenhouse gases in the atmosphere, also contribute to the global climate. *Id*. It is uncontested that "[i]f global emissions of greenhouse gases continue at current rates, global temperatures, and average seal level will likely rise by between one-half and one meter by the end of this century." *Id.*

It is further uncontested that the United States is "the largest single national contributor to emissions of greenhouse gases[,]" and "is responsible for twenty percent of cumulative global anthropogenic (human caused) greenhouse gas emission to date." R. at 5–6. It is also uncontested the United States has actively promoted the production of greenhouse gas emissions. *See* R. at 6. HexonGlobal, who has benefited from the United States' policies, contributes to thirty-two percent of the United States' emissions and six percent of the total historic global emissions. *Id*. at 5; *see id.* at 6. Additionally, HexonGlobal's global wide sales contribute to nine percent of the globe's current greenhouse gas emissions. *Id*. at 5.

Due to the increased global temperatures, sea levels have risen. *Id*. at 4. This caused the communities of A'Na Atu and the New Union Islands to be put at risk of losing their homes and way of life. *See id*. Apa Mana and Noah Flood have already sustained property damages and contaminated drinking water due to rising sea levels that "would not have occurred in the absence of greenhouse has induced sea level rise . . . ." *Id.* Further, if sea levels continue to rise, Mana and Flood, as well as their communities, will suffer loss of coastal wetlands which are

relied on as a food source, as well as adverse health effects such as increased risk of heat stroke. *Id*. It is not contested the damages "would not have occurred in the absence of greenhouse has induced sea level rise which has already occurred." *Id*. If fossil fuel production is limited, then further damages to Flood, as well as Mana, will be reduced. *Id*.

II. Procedural History

This is an appeal from the final order of the United States District Court for the District of New Union Island granting Defendants' HexonGlobal Corporation ("HexonGlobal") and the United States of America ("United States"), motion to dismiss for failure to state a claim for relief. R. at 11. The Organization of Disappearing Island Nations ("ODIN"), Apa Mana ("Mana"), and Noah Flood ("Flood") brought civil actions against HexonGlobal and the United States. Mana brought an action under the Alien Tort Statute, 28 U.S.C. § 1350 ("ATS"), asserting HexonGlobal's activities violates the law of nations and is seeking damages and injunctive relief. R. at 3. Flood brought a constitutional claim against the United States, asserting a violation of the public trust doctrine and the Due Process Clause of the Fifth Amendment to the United States Constitution. *Id.* Both Defendants filed motions to dismiss. The district court held: (1) Mana's ATS claim has been displaced by the CAA's greenhouse gas regulations; (2) Flood failed to assert a fundamental right under the Fifth Amendment Due Process clause. R. at 9–11. The Organization of Disappearing Island Nations, Mana, and Flood filed a Notice of Appeal for both holdings of the district court. R. at 1.

III. Standard of Review

The district court granted both Defendants' motions to dismiss. This court reviews a district court's grant of a motion to dismiss *de novo*. *Harry v. Marchant*, 237 F.3d 1315, 1317 (11th Cir. 2001).

SUMMARY OF THE ARGUMENT

Mana may bring an ATS claim against a domestic corporation as the law of nations requires only that the subject of the suit, not the identity of the defendant, be specific, universal, and obligatory. To date, Supreme Court precedent places various limits on ATS suits. None of which, however, preclude Mana's claim that domestic corporations may be held liable for violations of the law of nations. Her claim, however, relies on an interpretation of Sosa's Footnote 20; a finding the majority in *Jesner* failed to solidify. *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386 (2018). As the weight of authority and reason suggest the dissent's interpretation is correct, Mana's claim requires only that the *Trail Smelter* Principle recognize corporate liability. *See id*. at 1422 (Sotomayor, J. dissenting). This court should find domestic corporations should be held liable under the ATS for violations of the law of nations because the Supreme Court has not disallowed such liability and corporate liability is governed by the specific law of nation used as the cause of action not by international norms.

The *Trail Smelter* Principle is a recognized principle of customary international law enforceable as the "law of nations" under the ATS. The ATS requires a claim to be in violation of the law of nations. 28 U.S.C. § 1350 (2012). Law of nations is defined "as rules that States universally abide by, or accede to, out of a sense of legal obligation and mutual concern." *Doe I v. Nestle USA, Inc*., 766 F.3d 1013, 1019 (9th Cir. 2014). Sources of law of nations can be derived from a variety of sources including international conventions and scholarly sources. *Id*. The *Trail Smelter* Principle is considered a landmark principle in international environmental law and is cited in variety of international law sources. *See* Austen L. Parrish, Article: *Trail Smelter Déjà vu: Extraterritoriality, International Environmental Law, and the Search for Solutions to Canadian-U.S. Transboundary Water Pollution Disputes,* 85 B.U.L. REV. 363, 634

(2005). Further, precedent interpreting the Alien Tort Act does not preclude the *Trail Smelter* principle as part of the law of nations.

This court should find the *Trail Smelter* Principle, as customary international law, imposes obligations against HexonGlobal. While state action will often be required to establish a violation of a law of nations under the ATS, Mana's claims fall within the "universal concern" exception to this requirement. *Kadic v. Karadzic*, 70 F.3d 232, 239 (2d Cir. 1995). The international community continually evidences its universal concern for, and exhibits cooperative efforts against, global climate change, much like it does for other universal concerns. *See* discussion *supra* Section III.A. While climate change has not traditionally been recognized as a "universal concern," international law is consistently evolving, and courts should interpret it as it stands today. Therefore, the current international community's focus on global climate change makes it an issue of universal concern for which liability is imposed upon non-state actors.

The district court erred in holding that Mana's claim was preempted by the Clean Air Act's ("CAA") greenhouse gas emissions regulations. The Supreme Court, in *American Electric Power Company*, held the CAA preempted domestic plaintiffs common law tort claims. 564 U.S. 410 at 425–426 (2011). The Court's holding in *American Electric Power Company*, however, is distinguishable because the issues involved different types of plaintiffs seeking redress from different types of harm. Whereas the Court addressed American States and Cities seeking redress from harm caused by American corporations polluting within the United States, the present issue concerns an international individual seeking redress from harm done to her foreign homeland caused by an American corporation polluting in the United States. *C.f. id.*, *with* R. at 3–5, 8–10. Subsequently, as the Supreme Court has not found preemption, an analysis of the CAA supports

the proposition that the CAA does not speak to Mana's issue. While section 7415 discusses a foreign nation's ability to seek redress caused by pollution emitted within the United States, the CAA does not discuss a foreign national's right to sue to redress a similar issue. 42 U.S.C. § 7415. This court, therefore, should allow Mana's claim to continue, finding the CAA does not preempt the *Trail Smelter* Principle because the CAA is silent on the issue of international citizens seeking to sue American corporations.

The Fifth Amendment substantive due process protections establishes a cause of action for the United States' failure to protect the global atmospheric climate system from disruption due to the production, sale, and burning of fossil fuels. It is well established the Fifth Amendment's "guarantee of 'due process of law' include[s] a substantive component which forbids the government to infringe certain 'fundamental' liberty interests *at all,* no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Reno v. Flores,* 507 U.S. 292, 301–302, 113 S. Ct. 1439, 1447 (1993). A right has traditionally been defined as 'fundamental' if the right is 'implicit in the concept of ordered liberty.'" *Palko v. Connecticut,* 302 U.S. 319, 325, 58 S. Ct. 149, 152, 82 L. Ed. 288 (1937). *Obergefell v. Hodges* requires courts to exercise "reasoned judgement" when determining if a right is a fundamental right. 135 S. Ct. 2584, 2598 (2015). In this process, history does not set the outer bounds, but provides a guide. *Id*. Under the "reasoned judgement" test, the interest in a healthy and stable environment is a fundamental right. Generally, the due process clause does not create an affirmative duty for the government to act. *Deshaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 196, 109 S. Ct. 998, 1003 (1989). An exception to this is the danger creation exception which has been developed by the Ninth Circuit. *Id*.; *Pauluk v. Savage*, 836 F.3d 1117 (9th Cir. 2016). The United States has created climate disruption through its

facilitation of greenhouse gas emissions, which creates danger to Flood's home and community on the New Union Islands he would not otherwise have faced. *See* R. at 4–6.

This court should find Mana's claims under the ATS and the Fifth Amendment Due Process Clause justiciable. The weight of analysis indicates this is the correct holding. Dismissal for non-justiciability is a rare remedy that should not be applied here because, in part, the doctrine is ill-suited for the present facts. *See Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 873 (N.D. Cal. 2009), *aff'd*, 696 F.3d 849 (9th Cir. 2012). Further, in the absence of a constitutional provision or federal law explicitly directing that climate change has been relegated to the executive branch, analysis under the Supreme Court's *Baker* formulations is not required. *See Nixon v. United States,* 506 U.S. 224, 113 S. Ct. 732, 122 L.Ed.2d 1 (1993).

ARGUMENT

I. APA MANA MAY BRING AN ATS CLAIM ATAINST A DOMESTIC CORPORPORATION.

The ATS, in its entirety, states "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350 (2012). The statute "is 'strictly jurisdictional' and does not by its own terms provide or delineate the definition of a cause of action for violations of international law." *Jesner v. Arab Bank, PLC,* 138 S. Ct. 1386, 1397 (2018) (quoting *Sosa v. Alvarez-Machain*, 542 U.S. 692, 713–714). The Second Circuit, in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2nd Cir. 1980), stated the ATS grants federal subject-matter jurisdiction when three elements are met: "(1) an alien sues (2) for a tort (3) committed in violation of the law of nations (i.e., international law)." *Kadic v. Karadzic*, 70 F.3d 232, 238 (2nd Cir. 995) (quoting *Filartiga*, 630 F.2d at 887).

In addition to the statutory requirements, the Supreme Court placed limitations upon ATS claims. First, claims arising from "present-day law of nations [must] rest [up]on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized." *Sosa*, 542 U.S. at 725. Second, "where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application." *Kiobel v. Royal Dutch Petro. Co.*, 569 U.S. 108, 124–125 (2013). Third, and finally, "foreign corporations may not be defendants in suits brought under the ATS." *Jesner*, 138 S. Ct. at 1407.

A. The Supreme Court's American Electric Power Company Holding is Limited to Domestic Corporations Emitting in the United States, Not Domestic Corporations Emitting Internationally.

Whether corporations can be liable for violations of the law of nations under the ATS, while a persistent issue on appeal to the Supreme Court, has never been resolved. *See Kiobel*, 569 U.S. at 115 (resolving "whether a claim may reach conduct occurring in the territory of a foreign sovereign."); *Jesner*, 138 S. Ct. at 1394 (resolving "whether the law of nations imposes liability on corporations for human-rights violations committed by its employees." *Id.*). What is clear from these cases, however, is that claims "'based on the present-day law of nations [must] rest on a norm of international character accepted by the civilized world and defined with a specificity' sufficient to provide a basis" for ATS jurisdiction. *Kiobel v. Royal Dutch Petroleum Company,* 621 F.3d 111, 130 (2nd Cir. 2010) (quoting *Sosa*, 542 U.S. at 725).

In *Kiobel v. Royal Dutch Petroleum Company,* the Second Circuit held that the ATS does not extend liability to corporations. 621 F.3d at 120. The court first looked to Footnote 20 in *Sosa*, isolating the issue as "whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual." *Id.* (quoting *Sosa*, 542 U.S. at n.20). Finding international law governed the

question, the Second Circuit then determined whether international law extends liability to corporations violating the law of nations. *Kiobel*, 621 F.3d at 125. After a survey of international treaties, arbitrations, and scholarly articles, the Second Circuit held that "customary international law of human rights has not to date recognized liability for corporations that violate its norms." *Id.* at 126. Although the Supreme Court granted certiorari to resolve the issue of whether corporations may be held liable for violations of the law of nations, the Court determined a primary question was whether foreign corporations can be liable for violations of the law of nations occurring in foreign nations. *Kiobel*, 569 U.S. at 112, 114.

Originally dismissed by the Second Circuit following its decision in *Kiobel*, the Supreme Court granted certiorari in *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386 (2018), to resolve two issues: first, "whether the law of nations imposes liability on corporations for human-rights violations committed by its employees," and, second, "whether the Judiciary has the authority, in an ATS action, to make the determination and then to enforce that liability in ATS suits, all without any explicit authorization from Congress to do so." *Id.* at 1394. The Court, in its disposition, held only that "any imposition of corporate liability on foreign corporations for violations of international law must be determined in the first instance by the political branches." *Id.* at 1408; *accord Sosa*, 542 U.S. at n.20. On the issue of Footnote 20, the Court stated there was "considerable force and weight to the position" that corporate liability itself be recognized as an international norm prior to corporate liability be being recognized under the ATS. *Id.* This holding, however, left unanswered the question of liability for domestic corporations under the ATS for violations of the law of nations. *See Jesner*, 138 S. Ct. at 1399, 1408. As Supreme Court precedent does not require any particular application of Footnote 20, resolution of this issue is found in the meaning of the footnote.

B. Corporate Liability is an Issue of Domestic Common Law, Not International Common Law.

The meaning of *Sosa*'s Footnote 20 is the precise issue on appeal here. In its entirety, Footnote 20 states: "A related consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual." *Sosa*, 542 U.S. at n.20. While simply stated, its interpretation drew a heated debate in the Second Circuit's *Kiobel* decision. Judge Carmen, writing for the majority, interpreted Footnote 20 as requiring a two-part test: "by looking to customary international law to determine *both* whether certain conduct leads to ATS liability *and* whether the scope of liability under the ATS extends to the defendant being sued." *Kiobel*, 621 F.3d at 128. Although the ATS exclusively discusses who may be the plaintiff, the majority determined the ATS's "requirement that a claim be predicated on a 'violation of the law of nations' incorporates any limitation arising from customary international law on who properly can be named a *defendant*." *Id.* at n.29 (citing 28 U.S.C. § 1350 (2012)). Judge Leval's concurrence, conversely, interprets Footnote 20 as drawing attention to the distinction between private actors (i.e., "corporation or individual") and state actors. *Id.* at 177; *see also Jesner*, 138 S. Ct. at 1422 (Sotomayor, J. dissenting) ("Footnote 20 in *Sosa* flags this distinction and instructs courts to consider whether there is sufficient consensus that, with respect to particular conduct prohibited under a given norm, the type of defendant being sued can be alleged to have violated that specific norm." (internal quotations omitted)).

This distinction, expounded upon by Judge Leval in *Kiobel*,[1] reads a singular question into *Sosa*'s Footnote 20: does plaintiff rely upon a law of nations which imposes liability against

[1] *See Kiobel, 621 F.3d at 165* (Leval, J. dissenting) ("If the violated norm is one that international law applies only against States, then a private actor, such as a corporation or an individual," who acts independently of a State, can have no liability for violation of the law of nations because there has been no violation of the law of nations. On the other hand, if the conduct is of the type classified as a violation of the norms of international law regardless of

an actor including corporations? *Kiobel*, 621 F.3d at 165, *accord Sosa*, 542 U.S. at n.20.[2] Further, the issue is resolved by determining whether the international law being relied upon seeks to hold *private actors* liable "because there does not appear to be an international-law norm that contemplates a finer distinction between types of private actors." *Jesner*, 138 S. Ct. at 1423, n.2 (Sotomayor, J. dissenting). As a private actor, therefore, corporate liability is neither precluded by the Supreme Court nor dependent upon an international norm for corporate liability; rather this court itself must determine whether Mana's claim relies upon a law of nations, namely *Trail Smelter*, allowing for private liability.[3]

II. THE TRAIL SMELTER PRINCIPLE IS CUSTOMARY INTERNATIONAL LAW ENFORCEABLE AS THE "LAW OF NATIONS."

Mana bases its ATS claim on the *Trail Smelter* arbitration (hereinafter referred to as "*Trail Smelter*"). *Trail Smelter* established that nations have a duty to not cause transboundary harm. *Trail Smelter*, (United States v. Canada), 3 R.I.A.A. 1905 (1941). *Trail Smelter* addressed whether Canada was liable to the United States for damages to crops in the State of Washington caused by fumes produced by a smelter in Trail, British Columbia. *Id.* at 1908. The two countries agreed to establish an arbitration tribunal to determine if damages had occurred and to what extent. *Id*. The tribunal found sulfur dioxide fumes from the smelter were carried downstream in the Columbia River and by air currents, across the border, into the United States. *See id*. at 1922–1924. The Tribunal then found that

> under the principles of international law, as well as of 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

whether done by a State or a private actor, then a private actor, such as a corporation or an individual, has violated the law of nations and is subject to liability in a suit under the ATS." (internal quotations omitted)).

[2] *See also Jesner*, 138 S. Ct. at 1421–1423 (Sotomayor, J. dissenting) ("[F]ootnote 20 contemplates a norm-specific inquiry, not a categorical one.").

[3] *See infra* Part II.

> therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.

Id. at 1965. Under this principle, Canada was found responsible under international law for the damage to the United States caused by its smelter. *Id*.

The ATS provides district courts with "original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C § 1350 (2012). "Law of nations" has been defined as "rules that States universally abide by, or accede to, out of a sense of legal obligation and mutual concern." *Doe I v. Nestle USA, Inc*., 766 F.3d 1013, 1019 (9th Cir. 2014).

Trail Smelter is known as a "landmark decision in international environmental law." Austen L. Parrish, Article: *Trail Smelter Déjà vu: Extraterritoriality, International Environmental Law, and the Search for Solutions to Canadian-U.S. Transboundary Water Pollution Disputes,* 85 B.U.L. REV. 363, 364 (2005). As a landmark case on transboundary harm, the *Trail Smelter* principle has been used in a variety of international declarations, recommendations, and resolutions. *See* Daniel Bodansky, *Customary (and not so Customary) International Environmental Law,* 3 IND. J. GLOBAL L. STUD. 105, 114–115 (1995). For example, the *Trail Smelter* principle has been used in the Stockholm Declaration, the Rio Declaration, and the O.E.C.D Council Recommendation Concerning Transformer Pollution. *Id*. In addition, the Restatement of Foreign Relations Law of the United States recognizes the *Trail Smelter* Principle as part of the "general and well-recognized principles of international law [that] every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW scope (AM. LAW INST. 1987). The wide use of the *Trail Smelter* Principle in a variety of international law contexts strongly suggests the principle is a rule "that States universally abide by, or accede to,

out of a sense of legal obligation and mutual concern[,]" and therefore is part of the law of nations. *Doe I*, 766 F.3d at 1019.

Despite *Trail Smelter*'s application in a wide variety of international law contexts, it is the only case which has held a state liable for transboundary harm. Daniel Bodansky, *Customary (and not so Customary) International Environmental Law,* 3 IND. J. GLOBAL L. STUD. 105, 114 (1995). However, sources of law of nations are not exclusively cases and "include international conventions, international customs, the general principles of law recognized by civilized nations, judicial decisions, and the works of scholars." *Doe I v. Nestle USA, Inc*., 766 F.3d 1013, 1019 (9th Cir. 2014); *see also* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW § 102 (AM. LAW INST. 1987).

Courts have also held the "law of nations deals primarily with the relationship among nations rather than among individuals." *Guinto v. Marcos*, 654 F. Supp. 276, 279 (S.D. Cal. 1986). This is not an issue for Mana's position. The *Trail Smelter* provides "no State has the right to 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. *See Trail Smelter (United States v. Canada),* 3 R.I.A.A. 1905, 1965 (1949) (emphasis added). The language of the *Trail Smelter* principle itself establishes it governs one's state duty to another and therefore meets this characteristic of the law of nations.

The question of whether a claim is based on a violation of the law of nations has been addressed at length in the context of the ATS. One such case is *Beanal v. Freeport-McMoRan, Inc.*, 969 F. Supp. 362, 382–83 (E.D. La. 1997). In this case, the plaintiff's alleged the defendant's "mining operations and drainage practices . . . resulted in environmental destruction with human costs to the indigenous people." *Id*. at 382. The Louisiana district court found the law of nations did not support the claim for a general international environmental tort. *Id*.

While the court did not find a general environmental tort under the law nations, its analysis did not preclude the *Trail Smelter* principle as part of the law of nations. In its analysis, the court relied on two cases which previously addressed whether the ATS supports an international environmental claim: (i) *Aquinida v Texaco, Inc.*, and (ii) *Amlon Metals, Inc. v. FMC Corp.* *Id*. at 383. Both cases "recognized the Alien Tort Act may be applicable to international environmental torts." *Id.; Aquinida v Texaco, Inc.*, No. 93 CIV. 7527 (VLB), 1994 WL 142006, at *1 (S.D.N.Y. Apr. 11, 1994), *on reconsideration*, 850 F. Supp. 282 (S.D.N.Y. 1994). However, neither case found an international environmental tort supported by the law of nations. *Id*. In *Aquindia,* the court never decided the issue on the merits because the case was dismissed for other procedural reasons. *See Beanal v. Freeport-McMoRan, Inc.*, 969 F. Supp. 362, 382–83 (E.D. La. 1997); *Aquinida*, 1994 WL 142006 at *1.

In *Amlon,* the court rejected the application of the Stockholm Principles as part of the law of nations, "because it did not set forth any specific proscriptions." *Amlon Metals, Inc. v. FMC Corp.,* 775 F. Supp. 668, 671 (S.D.N.Y. 1991). As discussed above, the Stockholm Declaration cites to *Trail Smelter*, but they are two different sources of international environmental law, and *Trail Smelter* does set forth specific proscriptions. *See* discussion *supra* Section II. In the tribunal's articulation of the *Trail Smelter* principle, the tribunal prohibited states "[from] caus[ing] 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*." *Trail Smelter, (United States v. Canada),* 3 R.I.A.A. 1905, 1965 (1949) (emphasis added). The requirements that the harm be of "serious consequence" and the injury established by "clear and convincing evidence" does set forth specific proscriptions and thus meets the test articulated in *Amlon*.

Additional cases interpreting the law of nations requirement under the ATS have limited claims which are a "shockingly egregious violation[] of universally recognized principles of international law." *Zapata v Quinn,* 702 F.2d 691, 692 (1982). Apa Mana and Noah Flood will lose their homes and their island communities due to the rise of sea levels. *See* R. at 4. The total loss of an island community and its culture, due to actions by a state, is shockingly egregious.

The *Trail Smelter* Principle is part of the law of nations, and therefore supports a claim under the ATS. The Principle is cited in a variety of international environmental law sources, defines conduct between two states, and if violated can lead to shockingly egregious results, such as the entire loss of an island community.

III. BECAUSE THE TRAIL SMELTER PRINCIPLE IS CUSTOMARY INTERNATIONAL LAW, IT IMPOSES OBLIGATIONS ENFORCEABLE AGAINST NON-GOVERNMENTAL ACTORS.

As previously established, the *Trail Smelter* Principle is a universally accepted principle of customary international law sufficient to constitute a law of nations. *See* discussion *supra* Section II. It is clearly understood to impose obligations upon national governments, who fall under the definition of "states" within Principle 21 of the 1972 Stockholm Conference on the Human Environment.[4] *See* discussion *supra* Section I. While case law indicates state action may be required in certain circumstances to establish a violation of the law of nations under the ATS, *see, e.g.*, *Carmichael v. United Technologies Corp.*, 835 F.2d 109, 113 (5th Cir.1988), the universal nature of the obligations set forth under the *Trail Smelter* Principle indicates that actionable obligations can be imposed upon private parties, acting in a non-governmental capacity, sufficient to hold them liable under the ATS.

[4] When used in international law, the term "state" refers to "an entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 201 (AM. LAW INST. 1987).

A. The Trail Smelter Principal is an Offense of "Universal Concern" for Which a Non-State Actor May be Held Liable Under Customary International Law.

In many circumstances, acts committed by a non-state actor will be insufficient to violate the law of nations. *Beanal v. Freeport-McMoRan, Inc.*, 969 F. Supp. 362, 371 (E.D. La. 1997), *aff'd*, 197 F.3d 161 (5th Cir. 1999). However, a clearly delineated exception has been carved out of this requirement by several courts, wherein certain obligations imposed under the law of nations have been found to extend beyond the national government. *Kadic v. Karadzic*, 70 F.3d 232, 239 (2d Cir. 1995) ("[C]ertain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals."); *Tel–Oren v. Libyan Arab Republic*, 726 F.2d 774, 795 (D.C.Cir.1984) (Edwards, J., concurring) (noting the presence of a "handful of crimes to which the law of nations attributes individual responsibility."); *Beanal v. Freeport-McMoRan, Inc.*, 969 F. Supp. 362, 371 (E.D. La. 1997), *aff'd*, 197 F.3d 161 (5th Cir. 1999) (adopting the approach laid forth in *Kadic*).

In determining which offenses are of such a nature that, when undertaken by private parties, they will constitute a violation of the law of nations under the ATS, the Second Circuit has indicated courts should look to the Restatement (Third) of the Foreign Relations Law of the United States (hereinafter "the Restatement"). *Kadic*, 70 F.3d at 239. The Restatement lays forth the general proposition that "[i]ndividuals may be held liable for offenses against international law, such as piracy, war crimes, and genocide." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW intro. note (AM. LAW INST. 1987). Section 404 of the Restatement further delineates universal offenses "for which a state has jurisdiction to punish without regard to territoriality or the nationality of the offenders." *Kadic*, 70 F.3d at 240. Specifically, Section 404 provides:

> A state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps

> certain acts of terrorism, even where none of the bases of jurisdiction indicated in § 402 is present.

RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 404 (AM. LAW INST. 1987). The Second Circuit applied this provision to find, for example, that genocide is an offense of such universal concern it constitutes a violation of international law when committed by both private and state actors, whereas torture and summary execution do not. *Kadic*, 70 F.3d at 240. Similarly, the Second Circuit found that racially discriminatory takings of property were not of such universal concern that claims could be sustained absent state action. *Bigio v. Coca-Cola Co.*, 239 F.3d 440, 448 (2d Cir. 2000).

The basis for the Second Circuit's determinations, as well as justifications for expanding the reach of section 404 to the *Trail Smelter* Principal, can be found under a plain reading of section 404 and its comments. The Restatement's plain language reveals that the offenses listed are not exclusive of those for which a non-state actor may be liable. The usage of the idiom "such as" indicates the Restatement Drafters intended to introduce a series of examples—not provide an exhaustive list of offenses. *Such as*, MERRIAM-WEBSTER DICTIONARY (11th ed. 2016). Indeed, such an interpretation would be incompatible with the general consensus that "[i]nternational law is not static, but an evolving body of directives which courts must interpret in a contemporaneous fashion." *Xuncax v. Gramajo*, 886 F. Supp. 162, 180 (D. Mass. 1995); *see also Filartiga v. Pena-Irala*, 630 F.2d 876, 881 (2d Cir. 1980) ("courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today."). Section 404 itself has reflected this fluctuation; "[t]he previous Restatement (Second) included only piracy and the reporter's notes of the Restatement (Third) reference additional offenses, such as apartheid and hostage taking." *Beanal*, 969 F. Supp. at 37, n.4.

The offenses listed in section 404 are also said to reflect "universal condemnation . . . and [a] general interest in cooperating to suppress them, as reflected in widely-accepted international agreements and resolutions of international organizations." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 404 cmt. (1987). Those offenses previously identified by the Second Circuit as requiring state action, namely, torture, summary execution and racial discrimination, are not wide-spread offenses which require international cooperation to resolve. Instead, they reflect individualized offenses which may be combated by each nation internally.

Anthropogenic climate change caused by greenhouses gasses and implicated by the *Trail Smelter* Principle, on the other hand, create concerns which are "sufficiently similar" to the offenses listed in section 404 "to treat them as though they were incorporated . . . by analogy." *Bigio*, 239 F.3d at 448. Rising sea levels pose a global threat and have caused actual harm to Petitioners. R. at 4–5. The universal nature of the *Trail Smelter* Principle is particularly well evidenced by the various international cooperative efforts that have already been undertaken to suppress its effects. *See, e.g.*, United Nations Conference on the Human Environment, Stockholm, June 5–16, 1972, 5 U.N.T.S 1; United Nations Framework Convention on Climate Change, May 9, 1992, 1771 U.N.T.S. 107; Paris Agreement to the United Nations Framework Convention on Climate Change, opened for signature Apr. 22, 2016, U.N.T.S. 1. Therefore, unlike the individualized offenses explored by the Second Circuit, the *Trail Smelter* Principle is of such universal concern so as to qualify under section 404 of the Restatement and impose liability upon non-state actors.

B. Even if This Court Finds the Trail Smelter Principle is Not of Such Universal Concern for Which a Non-State Actor May be Liable, HexonGlobal Acted Under Color of Law.

Alternatively, even if this court finds state action was required to hold HexonGlobal liable under the *Trail Smelter* Principle, HexonGlobal likely acted under color of law in a state actor capacity. "A private individual acts under color of law within the meaning of section 1983 when he acts together with state officials or with significant state aid." *Kadic v. Karadzic*, 70 F.3d at 245. When state action is required, "color of law" jurisprudence under 42 U.S.C. § 1983 may provide guidance as to "whether a defendant has engaged in official action for purposes of jurisdiction under the Alien Tort Act." *Id*.

Four tests may be derived from the section 1983 color of law jurisprudence: "(1) the nexus test, (2) the symbiotic relationship test, (3) the joint action test, and (4) the public function test." *Beanal*, 969 F. Supp. at 377. In the instant case, state action by HexonGlobal is demonstrated under the symbiotic relationship test. This test requires the state to "insinuate[] itself into a position of interdependence" with a private party by becoming "physically and financially integral" so that "it must be recognized as a joint participant in the challenged activity." *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725, 81 S. Ct. 856, 862, 6 L. Ed. 2d 45 (1961). Defendant HexonGlobal is the surviving corporation resulting from the merger of all major United States oil producers. R. at 5. The nature of HexonGlobal's business operations and its near exclusive domination the oil production market would indicate that factors supporting a symbiotic relationship, such as state profit from HexonGlobal's practices, as well as long-term dependence by the United States upon HexonGlobal's activities, would be easily satisfied. *See Gallagher v. Neil Young Freedom Concert*, 49 F.3d 1442, 1449 (10th Cir. 1995) (placing emphasis on these factors). However, in the event this Court should find the record factually

insufficient to make a determination on these grounds, the Court should remand to the District Court with a direction for findings of fact as to this issue.

IV. THE CLEAN AIR ACT DOES NOT DISPLACE THE TRAIL SMELTER PRINCIPLE.

Mana argues the CAA, 42 U.S.C. § 7401 *et seq.*, does not displace the *Trail Smelter* Principal and, therefore, the District Court erred. Generally, "[t]he test for whether congressional legislation excludes the declaration of federal common law is simply whether the statute 'speak[s] directly to [the] question' at issue." *Am. Elec. Power Co. v. Conn.*, 564 U.S. 410, 424 (2011) (quoting *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978)); *see also Milwaukee v. Ill. et al.*, 451 U.S. 304, 315 (1981). "Federal common law is a necessary expedient and when Congress addresses a question previously governed by a decision rested on federal common law the need for such an unusual exercise of lawmaking by federal courts disappears." *Milwaukee*, 451 U.S. at 314. While a plaintiff may question of adequacy of Congress' findings, "the relevant question for purposes of displacement is whether the field has been occupied, not whether it has been occupied in a particular manner." *Am. Elec. Power Co.*, 564 U.S. at 448 (quotations omitted).

With respect to the CAA preempting common-law claims, the courts are generally reluctant to find preemption. *See* Sam Kalen, *Policing Federal Supremacy: Preemption and Common Law Damage Claims as a Ceiling to the Clean Air Act Regulatory Floor*, 68 FLA. L. REV. 1597, 1606 (2016). The District Court, however, held the CAA displaced "any action Mana might have under the ATS." R. at 9. In so finding, the court relied primarily on *American*

Electric Power v. Connecticut, 564 U.S. 410, for the proposition that "the Clean Air Act displaces the federal common law of air pollution."[5] R. at 9.

A. The Supreme Court's American Electric Power Company Holding is Limited to Domestic Corporations Emitting in the United States, Not Domestic Corporations Emitting Internationally.

The Second Circuit, in American Electric Power Company, followed the general reluctance to find preemption, stating "that federal common law is not displaced until EPA actually exercises its authority." Am. Elec. Power Co., 564 U.S. at 425–426. On appeal, however, the Supreme Court "disagree[d]." *Id.* The Court addressed the issue of whether "federal common-law public nuisance claims against carbon-dioxide emitters" were displaced by the CAA. *Id.* at 415. To resolve this issue, the Court looked first at the regulations promulgated under the CAA and the Court's interpretation of those regulations. *Id.* Regulations promulgated under the CAA define greenhouse gases as being naturally occurring and anthropogenic gases which "trap . . . heat that would otherwise escape from the [Earth's] atmosphere, and thus form the greenhouse effect that helps keep the Earth warm enough for life." 74 Fed. Reg. 66499 (2010). Then, as interpreted in *Massachusetts v. EPA*, the CAA authorizes federal regulation of greenhouse gases, including carbon dioxide. 549 U.S. 497 (2007); see also *Am. Elec. Power Co.* 564 U.S. at 442. The EPA determined motor vehicle emissions of greenhouse gas "cause, or contribute to, air pollution" requiring EPA regulation. *Id.*; 42 U.S.C. § 7521(a)(1) (2018). Finally, while EPA stated it recognized the harms caused by anthropogenic emissions of greenhouse gases,[6] its joint final rule required only, among other limited applications to vehicles, a "phasing in [of]

[5] The District Court also cites to two decision from district courts out of this circuit: *City of Oakland v. B.P. P.L.C.*, 325 F. Supp. 3d 1017 (N.D. Cal. 2018) and *City of New York v. BP P.L.C.*, 325 F. Supp. 3d 466 (S.D.N.Y. 2018).

[6] *See, e.g.,* 74 Fed. Reg. 66531 ("national security concerns for the United States."), and *id.* at 66535 ("humanitarian, trade, and national security issues for the United States" from, for example, "small islands, due to high exposure of population and infrastructure to risk of sea-level rise and increased storm surge.").

requirements that new or modified major greenhouse gas emitting facilities use the best available control technology." *Am. Elec. Power Co.*, 564 U.S. at 417 (quotations omitted). Based on this analysis, the Court determined that federal common law may be displaced absent an agency actually exercising its authority. Id.

The Court's holding in American Electric Power Company, that the CAA "displace[s] any federal common-law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired powerplants," should be limited to the facts of that case. *Id.* at 424. While the defendants were the Nation's largest emitters, the Court shaped its discussion around harm to the United States.[7] *Id.* at 418. The harm addressed was harm to the United States generally, not harm to international bodies. *See, generally id.* Notably, the Court's interpretation of the CAA in American Electric Power Company is consistent with Congress' empowerment of the EPA in the CAA. *See* 42 U.S.C. § 7401 (Congress's "[f]indings" and "[d]eclaration" limited to air pollution effecting the United States.). Such a focus limits the application of American Electric Power Company to domestic plaintiffs, and, therefore, binds courts to find CAA preemption when domestic plaintiffs seek court intervention to prevent domestic harm.[8]

The present case is distinguishable from American Electric Power Company, as Mana, an international plaintiff, seeks court intervention to prevent destruction of her homeland, an international State. *See* R. at 3, 4, 8, 9. The Supreme Court, therefore, has never held an ATS claim, such as Mana's, is nevertheless preempted by the CAA.

B. The CAA Speaks Only to Regulating Emissions Effecting the United States But is Silent on the United States' Contribution to Global Climate Change.

[7] *See, e.g., id.* at 418 ("The States and New York City alleged that public lands, infrastructure, and health were at risk from climate change.").

[8] Notably, no discussion is included for two other cases cited by the District Court in support of the *American Electric Power Company* holding. *See* R. at 9–10. To the extent those district court cases support the same proposition, they are likewise limited to application to domestic plaintiffs seeking court intervention to prevent domestic harm.

As referenced above, the test to determine whether a statute preempts federal common law is whether Congress spoke directly to the issue. *Am. Elec. Power Co.*, 564 U.S. at 424. The issue, here, is the *Trail Smelter* Principle. *See* discussion *supra* Sections II, III. The inquiry, therefore, is whether the CAA speaks directly to an international plaintiff's ability to seek court intervention to prevent emissions from the United States harming citizens of another country.

The CAA speaks to international emissions in only one section. *See* 42 U.S.C. § 7415 (2018). Generally, this section allows the EPA Administrator to prevent domestic emitters who the Administer determines is harming a foreign corporation. *Id.* at § 7415(a)–(b). While similar to Mana's claims, this section is distinct for two reasons. First, this section provides redress only for foreign countries. The CAA is silent as to Mana, as a foreign nation's citizen. It may be argued that Congress did speak to the issue of international pollution and, by comparing the general reluctance to add judicial rules where Congress has spoken, this court should find Congress intentionally excluded foreign nationals. *C.f. Jesner*, 138 S. Ct. 1387–1403, *with* 42 U.S.C. § 7415. "While these concerns will inform the court's construction of the Clean Air Act preemption provision, the *Jesner* rationale should not be read to broadly foreclose the development of federal common law causes of action outside of the context of statutory interpretation." Tracy Hester, *Climate Tort Federalism*, 13 FIU L. REV. 79, n.70, *accord Jesner*, 138 S. Ct. 1398–1403.

Second, even if this court determines Section 7415 preempts Mana's claim, it must still remand. Specifically, the record is unclear as to whether the nation of A'Na Atu qualifies for reciprocity. *See id.* at § 7415(c). If it does not qualify, then Section 7415 does not preempt Mana's claims even if the CAA speaks to the issue. As the CAA speaks only to national regulation, federal common law still controls on issues of international harm. As such, the

District Court erred in finding the CAA preempted Mana's ATS claim, and, therefore, this court should remand.

V. THE FIFTH AMENDMENT SUBSTANTIVE DUE PROCESS PROTECTIONS ESTABLISH A CAUSE OF ACTION FOR THE UNITED STATES' FAILURE TO PROTECT THE GLOBAL ATMOSPHERIC CLIMATE SYSTEM FROM DISRUPTION DUE TO THE PRODUCTION, SALE, AND BURING OF FOSSIL FUELS.

A. There is a Fundamental Right to a Healthy Atmospheric Climate System.

1. *The appropriate test to identify a fundamental right is the reasoned judgment test established by the Obergefell Court.*

The Fifth Amendment dictates "[n]o person shall be deprived of life, liberty or property, without due process of law." U.S. CONST. AMEND. V. It is well established the Fifth Amendment's "guarantee of 'due process of law' [includes] a substantive component which forbids the government to infringe certain 'fundamental' liberty interests *at all,* no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Reno v. Flores,* 507 U.S. 292, 302, 113 S. Ct. 1439, 1447 (1993); *see also Collins v Harker Heights,* 503 U.S. 115, 125, 177 L. ed. 2d. 261, 112 S. Ct. 1061 (1992). A right has traditionally been defined as "fundamental" if the right is "implicit in the concept of ordered liberty." *Palko v. Connecticut,* 302 U.S. 319, 325, 58 S. Ct. 149, 152 82 L. Ed. 288 (1937). The Fifth Amendment Substantive Due Process Clause protects unenumerated rights, as well as enumerated ones. *See Washington v. Glucksberg*, 521 U.S. 702, 756, 117 S. Ct. 2258, 2277, 117 S. Ct. 2302, 2277 (1997). When determining if a right is a fundamental right in a substantive due process analysis, "the doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field." *Reno,* 507 U.S. at 302 (internal quotations omitted).

While courts are careful to "break new ground" when first recognizing a fundamental right, "[t]he nature of injustice is that we may not always see it in our own times." *Obergefell v. Hodges,* 135 S. Ct. 2584, 2598 (2015). This means, "[w]hen new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed." *Id*. With these principles in mind, in *Obergefell v. Hodges,* Justice Kennedy established the "reasoned judgement" test. *See generally id*. When identifying a fundamental right, a court must "exercise reasoned judgement." *Id*. In doing so the court is

> guided by many of the same considerations relevant to analysis of other constitutional provisions that set forth broad principles rather than specific requirements. History and tradition guide and discipline this inquiry but do not set its outer boundaries. That method respects our history and learns from it without allowing the past alone to rule the present.

Id. The reasoned judgement test requires courts to follow the doctrine of judicial restraint while not being shackled to historic injustice. *See id*.

Following *Obergefell,* lower courts grappled with its application. Some courts have focused on the role of history and tradition as guiding but not setting the "outer boundaries" of what is and is not a fundamental right. *Mohamed v. Holder*, 266 F. Supp. 3d 868, 877 (E.D. Va. 2017); *Gary B. v. Snyder*, No. 2:16-cv-13292, 2018 U.S. Dist. LEXIS 125581, at *42 (E.D. Mich. July 27, 2018). While courts have consistently acknowledged history does not set the outer bounds when determining if a right is a fundamental due process right, the interplay between *Obergell* and *Glucksberg* has been questioned.

In *Struniak v. Lynch,* a Virginia District Court discussed the interaction between *Obergefell* and *Glucksberg*. 159 F. Supp. 3d 643, 667 (E.D. Va. 2016). *Glucksberg* directs courts to require a "careful description" of the fundamental right in question during a substantive due process analysis. 521 U.S. 702, 756, 117 S. Ct. 2258, 2277, 117 S. Ct. 2302, 2277 (1997). But, as stated in *Obergefell* and noted in *Struniak*, the standard established by *Glucksberg* "does not

insist that liberty under the Due Process Clause must be defined in a most circumscribed manner, with central reference to specific historical practices." *Obergefell v. Hodges,* 135 S. Ct. 2584, 2602 (2015); *Struniak v. Lynch*, 159 F. Supp. 3d 643, 667 (E.D. Va. 2016).

As discussed above, the Oregon District court applied the "reasoned judgement test" to determine if there was a viable due process claim to a healthy and stable environment. *Juliana v. United States*, 217 F. Supp. 3d 1224 (D. Or. 2016). In its analysis the court looked to the role a healthy environment plays as "the foundation of society, without which there would be neither civilization nor process." *Id*. (internal quotations omitted). If this court exercises its "reasoned judgment" it too will find a healthy and stable environment is a fundamental due process right.

2. *Under the danger creation exception, the United States violated Noah Flood's substantive due process right to a healthy and stable environment without the due process of law.*

Flood asserts a fundamental due process right in a healthy and stable environment. One source of this fundamental right is the public trust doctrine. The public trust doctrine is generally understood to prohibit any government from "abducat[ing] its core sovereign powers." *Juliana v. United States*, 217 F. Supp. 3d 1224, 1252 (D. Or. 2016). In the context of natural resources, the public trust doctrine imposes an obligation on the sovereign to not "depriving a future legislature of the natural resources necessary to provide for the well-being and survival of its citizens." *Id*. This principle is founded in Roman law. *See id.*; Hope M. Babcock, *The Public Trust Doctrine: What A Tall Tale They Tell,* 61 S.C. L. REV. 393, 396 (2009). A healthy and stable environment is a "natural resource necessary to provide for the well-being and survival" society. *See Juliana v. United States*, 217 F. Supp. 3d 1224, 1252 (D. Or. 2016). The long-held principles of the public trust doctrine supports the assertion of a fundament right in a healthy and stable climate, but it is not the only source.

The United States has a long and turbulent history with the scientific discovery of climate change. In 1896, the first scientific article discussing the "greenhouse effect" was published but was discounted for many years. Mia Hammersley, *The Right to A Healthy and Stable Climate: Fundamental or Unfounded?,* 7 ARIZ. J. ENVTL. L. & POL'Y 117, 123 (2017). However, in the 1930s, in response to a significant increase in temperature in the United States over a 50-year period, additional research of the "greenhouse gas effect" was advocated for. *Id*. Further, the Cold War brought to light national security concerns which motivated the funding of climate change research. *Id*.

American Jurisprudence first recognized environmental harm, specially harm caused by DDT in *Envtl. Def. Fund, Inc. v. Hardin*, 428 F.2d 1093 (D.C. Cir. 1970). In more modern case law, Courts have been alert to the nature of environmental actions and have adjusted requirements, such as for standing, in order to allow parties to protect their environmental interests. *See Massachusetts v. EPA*, 59 U.S. 497, 526 (2007); Mia Hammersley, *The Right to A Healthy and Stable Climate: Fundamental or Unfounded?*, 7 ARIZ. J. ENVTL. L. & POL'Y 117, 123 (2017).

Further evidence of the fundamental nature of environmental health is found in the enactment of environmental legislation, such as the National Environmental Protection Act, the Clean Water Act and the Clean Air Act. 42 U.S.C. § 4331 *et seq*. (2012); 33 U.S.C. §1251 *et seq*. (1972): 42 U.S.C. § 7401 *et seq.* (2012). These acts illustrate the fundamental nature of the right to a healthy and stable environment. Federal regulations also reflect the fundamental nature of a clean and stable climate system. For example, the 2009 *Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act* EPA regulation, discusses at length the impact climate change has on the public health and welfare. 74 Fed. Reg. 66496 (2010). "The evidence provides compelling support for finding that greenhouse gas air

pollution endangers the public welfare of both current and future generations. The risk and the severity of adverse impacts on public welfare are expected to increase over time." *Id*. at 66498–66499. "If the effect on people is to their health then we have considered it a public health issue. If the effect on people is to their interest in matters other than health, then we have treated it as a public welfare issue." *Id*. at 66527 (referring to the impacts of climate change). In addition, seven state constitutions have recognized the right to a healthy environment. Mary Ellen Cusack, *Judicial Interpretation of State Constitutional Rights to A Healthful Environment*, 20 B.C. ENVTL. AFF. L. REV. 173, 181 (1993).

Using *Obergefell's "*reasoned judgement test," the right to a healthy and stable environment is a substantive due process right. This is evident in the principles of the public trust doctrine, the development of environmental case law in American Jurisprudence, the principles illustrated in the United States' environmental statutes and regulations and the existence of enumerated rights to a healthy environment in several state constitutions. "The nature of injustice is that we may not always see it in our own times." *Obergefell v Hodges,* 135 S. Ct. 2584, 2598. This means, "[w]hen new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed." *Id*. Flood's asserted right is the type of liberty claim Justice Kennedy was referring to. *See id.* New information on climate change and advances in science illustrates the shockingly harmful nature climate change will have on many communities. *See* R. at 4-6.

B. The United States Had a Duty to Protect under the Danger Creation exception.

The next step in determining if Flood has articulated a viable substantive due process claim is to determine whether the Fifth Amendment Due Process Clause imposes an affirmative obligation to take action to prevent the displacement of a healthy and stable environment. Generally, the Due Process Clauses does not confer an "affirmative right to governmental aid,

even where 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, 109 S. Ct. 998, 1003 (1989). In *Deshaney,* Joshua Deshaney brought a claim against Winnebago County, Wisconsin, for "failing to intervene and protect him from the risk of violence at his father's hands of which they knew or should have known[,]" and therefore deprived him of his liberty without the due process of law. *Id*. at 193. While Joshua was in his father's care, his father severely beat Joshua and he suffered traumatic head injuries as a result. *Id*. The Court determined that under these circumstances the government did not have an affirmative duty to act because, *inter alia,* the state played no part in the *creation* of the dangers Joshua faced. *Id*. at 201. The Ninth Circuit has explored under what circumstances the government's inaction would violate due process rights based on danger it created. *See Penilla by & Through Penilla v. City of Huntington Park*, 115 F.3d 707 (9th Cir. 1997); *Kennedy v. Ridgefield City*, 439 F.3d 1055 (9th Cir. 2006); *Pauluk v. Savage*, 836 F.3d 1117 (9th Cir. 2016).

The Ninth Circuit has articulated the danger creation exception as "where state action creates or exposes an individual to a danger which he or she would not have otherwise faced," there can be a violation of a due process right guarantee. *Kennedy*, 439 F.3d at 1061. In *Juliana,* the court applied this exception specifically to an environmental claim. *Juliana v. United States*, 217 F.Supp.3d 1224, 1251 (D. Org. 2016). The court found the plaintiffs had sufficiently alleged the government had acted in such as manner, "with full appreciation of the consequences of [its] acts . . . knowingly caused, and continue to cause, dangerous interference with our atmosphere and climate system." *Id*.

Due to the increased global temperatures, sea levels have risen. R. at 4. This caused the communities of A'Na Atu and the New Union Islands to be put at risk of losing their homes and way of life. *See id*. Flood has already sustained property damages and contamination of drinking

water due to rising sea levels, and it is not contested the damages "would not have occurred in the absence of greenhouse has induced sea level rise which has already occurred." R. at 5. Further, if sea levels continue to rise, Flood and his community will suffer loss of coastal wetlands which are relied on as a food source and adverse health effects such as increased risk of heat stroke. *Id*. If fossil fuel production is limited, then further damages to Flood, as well as Mana, will be reduced. *Id*.

It is uncontested the United States is "the largest single national contributor to emissions of greenhouse gases[,]" and "is responsible for twenty percent of cumulative global anthropogenic (human caused) greenhouse gas emission to date." R. at 5–6. It is also uncontested the United States has actively promoted the production of greenhouse gas emissions. *See* R. at 6. HexonGlobal, who has benefited from the United States' policies, contributes to thirty-two percent of the United States emissions and six percent of the total historic global emissions. *Id*. at 5; *See id.* at 6. Additionally, HexonGlobal's international sales contribute to nine percent of the globe's current greenhouse gas emissions. *Id*. at 5. Flood has sufficiently alleged the United States has substantial control over greenhouse gas emission, and it has created the dangers Petitioners now face.

While the court below failed to apply the danger-creation exception, the exception was established by the United States Supreme Court in *Deshaney* and is binding precedent. Further, the Ninth Circuit's application of the exception is informative in this case. Flood has established there is a fundamental right to a healthy and stable environment and that the United States Government created the dangers that Petitioners face in their island communities. The court below erred when it dismissed Flood's substantive due process claim under the Fifth Amendment.

VI. PETITIONERS' LAW OF NATIONS CLAIM UNDER THE ATS AND PUBLIC TRUST CLAIM DOES NOT PRESENT A NON-JUSTICIABLE POLITICAL QUESTION.

Article III of the Constitution confers subject matter jurisdiction upon the federal judiciary for actual "Cases" and "Controversies." U.S. CONST. art. III, § 2, cl. 1. In one of the United States' earliest cases, Chief Justice John Marshall placed limitations on this jurisdiction, noting that: "Questions, in their nature political or which are, by the [C]onstitution and laws, submitted to the executive, can never be made to this court." *Marbury v. Madison*, 5 U.S. 137, 169–70 (1803). This limitation, known today as the "political question" doctrine, "is a species of the separation of powers doctrine [which] provides that certain questions are political as opposed to legal, and thus, must be resolved by the political branches rather than by the judiciary." *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 871 (N.D. Cal. 2009), *aff'd*, 696 F.3d 849 (9th Cir. 2012). While it is frequently invoked, this doctrine is ultimately of "limited application." *Barasich v. Columbia Gulf Transmission Co.*, 467 F. Supp. 2d 676, 681 (E.D. La. 2006). It may serve as grounds for dismissal only if the issue "'cannot properly be decided by the judiciary.'" *Juliana v. United States*, 217 F. Supp. 3d 1224, 1236 (D. Or. 2016) (quoting *Alperin v. Vatican Bank*, 410 F.3d 532, 544 (9th Cir. 2005)). Otherwise, "the Judiciary has a responsibility to decide cases properly before it, even those it 'would gladly avoid.'" *Zivotofsky v. Clinton*, 566 U.S. 132 S. Ct. 1421 (2012) (citing *Cohens v. Virginia*, 6 Wheat. 264, 404 (1821)).

This doctrine is ill-suited to the claims at issue in the present case, and accordingly should not be applied. The political question doctrine is generally held inapplicable to tort actions, even if political aspects are present. *See McKay v. United States*, 703 F.2d 464, 470 (10th Cir. 1983) ("[T]he political question theory and the separation of powers doctrines do not ordinarily prevent individual tort recoveries."). The international nature of Mana's tort claim

does not otherwise place it within the bounds of the political question doctrine. *See Kivalina,* 663 F. Supp. 2d at 873 (noting that "[w]hile [d]efendants 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."). Similarly, Flood's Substantive Due Process claim under the Fifth Amendment to the United States Constitution would fall "squarely within the purview of the judiciary." *Juliana*, 217 F. Supp. 3d at 1241. Accordingly, each of Petitioners' claims would be justiciable by this court.

This conclusion is further supported under an application of the "*Baker*" principles. In the seminal case of *Baker v. Carr*, 369 U.S. 186 (1962), the Supreme Court set forth six factor tests to determine whether an issue is nonjusticiable as a political question:

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

Kivalina, 663 F. Supp. 2d 863, 871–72 (quoting *Baker v. Carr*, 369 U.S. 186, 210, 82 S. Ct. 691, 7 L.Ed.2d 663 (1962)). However, several years later, the Supreme Court clarified its intended application of *Baker* in the case of *Nixon v. United States.* 506 U.S. 224, 113 S. Ct. 732, 122 L.Ed.2d 1 (1993). Specifically, the Court in *Nixon* indicated that, prior to applying any of the *Baker* tests, an initial determination should be made as to whether the issue was "textually committed" to a political branch. *Id*. at 228 ("But the courts must, in the first instance, interpret the text in question and determine whether and to what extent the issue is textually committed."). Absent such a commitment, the issue should be justiciable. *See id*.

Thus, to determine whether this case is justiciable, this court should place its focus first upon whether the Petitioners' issues have been textually committed to a political branch. *See Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 194, 132 S. Ct. 1421, 1427, 182 L. Ed. 2d 423 (2012). In the instant case, the issues presented by Mana and Flood involve those which may arise during the adjudication of a claim under the Alien Tort Statute and the Fifth Amendment Due Process Clause of the United States Constitution. R. at 8–11. Similar to those issues presented in *Juliana v. United States*, Petitioners' claims arise in the context of "climate change, energy policy, and environmental questions." 217 F. Supp. 3d 1224, 1236 (D. Or. 2016). And, as noted within *Juliana*, "[t]he Constitution does not mention environmental policy, atmospheric emissions, or global warming." *Id*. at 1237. Further, "a mandate to regulate a certain area is not the equivalent of delegating the exclusive power to resolve that issue to another branch." *Kivalina*, 663 F. Supp. 2d at 872. Therefore, the Supreme Court's holding in *Massachusetts v. EPA*, relegating that greenhouse gasses were "pollutants" subject to potential regulation under section 202(a)(1) of the Clean Air Act, 42 § 7521 (2012), would be insufficient to establish the requisite delegation. Massachusetts v. EPA, 549 U.S. 497 (2007). Thus, in the absence of a Constitutional provision or explicit federal mandate, courts have generally been unable to locate textual commitments of either greenhouse gas emissions or climate change. *See generally Native Vill. of Kivalina v. ExxonMobil Corp.,* 663 F. Supp. 2d 863, 871 (N.D. Cal. 2009), *aff'd*, 696 F.3d 849 (9th Cir. 2012); *Juliana v. United States*, 217 F. Supp. 3d 1224, 1236 (D. Or. 2016).

Any remaining issues arising under Petitioners' underlying tort and Substantive Due Process rights claims should also fall within the realm of the judiciary, as they reflect traditional tort, international, and constitutional laws. Such standard legal issues do not present a political question merely because they implicate "an issue of great importance to the political branches." *Id*. (quoting *U.S. Dep't of Commerce v. Montana*, 503 U.S. 442, 458, 112 S. Ct. 1415, 118

L.Ed.2d 87 (1992)). Accordingly, Petitioners' claims are justiciable, and any further application of the Baker principles should not be applied. *Comer v. Murphy Oil USA*, 585 F.3d 855, 872 (5th Cir. 2009) (standing for the proposition that unless the party moving to dismiss identifies a constitutional provision or federal law "that arguably commits a material issue in the case exclusively to a political branch, the issue is clearly justiciable and the motion should be denied without applying the Baker formulations.").

CONCLUSION

For the foregoing reasons, Petitioner-Appellants, Organization of Disappearing Island Nations, Apa Mana and Noah Flood, respectfully requests that this Court reverse the district court's holding that Ms. Mana's ATS claim has been displaced by the CAA and Mr. Flood's Due Process claim cannot be sustained by the Public Trust doctrine.