Case No. 66-CV-2018

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

Organization of Disappearing Island Nations, APA MANA, and NOAH FLOOD,
Appellants,
v.
HexonGlobal Corporation,
Appellee,
and
The United States of America,
Appellee,

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

BRIEF OF PLAINTIFFS-APPELLANTS ORGANIZATION OF DISAPPEARING ISLAND NATIONS

Dated: November 28, 2018

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

TREATIES AND UN RESOLUTIONS

INTERNATIONAL ARBITRATIONS

ARTICLES

OTHER SOURCES

JURISDICTIONAL STATEMENT

The District Court had subject matter jurisdiction over this case pursuant to the Alien Tort Statute, 28 U.S.C. § 1350. Apa Mana alleges violation of the internal law of nations, which can be brought in the federal district courts of the United States. Noah Flood bring a federal constitutional claim under the Fifth Amendment. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

1. Can Mana bring an Alien Tort Statute, 28 U.S.C. § 1350 (ATS) claim against a domestic corporation?

2. Is the *Trail Smelter* Principle a recognized principle of customary international law enforceable as the "Law of Nations" under the ATS?

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

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

5. Is there a cause of action 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?

6. Do Plaintiffs' law of nations claim under the Alien Tort Statute and public trust claim present a non-justiciable political question?

SUMMARY OF THE ARGUMENTS

The *Trail Smelter* Principle is a recognized principle of the law of nations under the *Paquete Habana* factors. These factors include binding international treaties, findings by the courts of other nations, writings of publicists and scholars recognizing the custom, a general international acceptance for observing the custom, and prior consistent actions by the United States. Apa Mana properly claims jurisdiction under the Alien Tort Statute. The Clean Air Act does not preempt Mana's claim that HexonGlobal violated the Trail Smelter Principle. The Clean Air Act does not provide nor deny right of action by an alien alleging transboundary environmental harms. Furthermore, the Court's holding in *Kiobel* and *Jesner* do not bar claims against domestic corporations, including HexonGlobal.

The Public Trust Doctrine obligates the federal government to hold some resources, including access to navigable waters and the seashore, in trust for everyone. The Federal Government has failed to protect access to the seashore by failing to prevent private actors from rendering the New Union Island Territory uninhabitable. This gives rise to a substantive due process right to a Stable Climate System. The Federal Government must act to prevent violations of Plaintiff Noah Flood's Right to a Stable Climate System.

The Political Question Doctrine does not bar Plaintiffs' claims because they do not violate the principle of Separation of Powers or the *Baker* Test.

STATEMENT OF THE CASE

This action for damages and injunctive relief is brought by plaintiffs Apa Mana ("Mana") against HexonGlobal Corporation ("Hexon"), and by Jacob Flood ("Flood") against the United States ("U.S."). *ODIN, et al. v. HexonGlobal Co., et al.*, No. 66-cv-2018 (D.N.U.I. filed Aug. 15,

2018). Mana claims that Hexon's greenhouse gas emission constitute a violation of the law of nations. *Id.* at *4. Specifically, she alleges that Hexon's greenhouse gas emissions violate the *Trail Smelter* Principle because they contributed to the destruction of her property and livelihood. *Id.* at *5. Mana is a citizen of A'Na Atu and states that the court has jurisdiction under the Alien Tort Statute ("ATS"). *Id.* at *3. Flood is a U.S. citizen and brings a Fifth Amendment Due Process claim against the U.S. government. *Id.* at *10. Specifically, Flood claims that the U.S. government violated the Public Trust Doctrine by failing to take effective measures against greenhouse gas emissions and for historically supporting the fossil fuel industry. *Id.*

Both Mana and Flood have suffered damage to their homes caused by rising sea levels due to global warming. *Id.* at *5. Seafood is a large part of the plaintiffs' diets; however, climate change induced ocean acidification and loss of coastal wetlands will reduce the availability of this vital food source. *Id.* These injuries would not have occurred if not for global warming caused by greenhouse gases. *Id.*

Furthermore, Hexon's internal scientific research reveals that Hexon knew that the sale and use of fossil fuels causes significant global warming related harms since the 1970s. *Id.* The U.S. has emitted twenty percent of global greenhouse gases and that Hexon is responsible for thirty two percent of the U.S. emissions. *Id.* at *5-6. The U.S. began efforts to mitigate greenhouse gases in recent years by carrying out agency regulation of greenhouse gases and ratifying the United Nations Framework Convention on Climate Change. *Id.* However, these efforts are overshadowed by President Trump's stance on rollbacks of greenhouse gas regulations and pulling out of the landmark Paris Agreement. *Id.* at *7.

The District Court for the District of New Union Island dismissed both the plaintiffs' claims. *Id.* at *11. The lower court denied Mana jurisdiction under the ATS by arguing that the Clean Air Act displaces federal common law for greenhouse gas suits. *Id.* at *9. The lower court left many substantive questions unanswered, such as whether the *Trail Smelter* Principle is a principle of the law of nations. *Id.* The District Court also dismissed Flood's Fifth Amendment public trust claim against the U.S. government on grounds that Flood did not have a substantive due process right to a stable climate system. *Id.* at *10.

ARGUMENT

I. APA MANA STATES A VALID CLAIM UNDER THE ALIEN TORT STATUTE AND THE *TRAIL SMELTER* PRINCIPLE

A. The *Trail Smelter* Principle is a Universally Accepted Principle of Customary International Law Under *The Paquete Habana* Standard

The Court in *The Paquete Habana* set the rule for establishing binding international customary law. *The Paquete Habana*, 175 U.S. 677 (1900). The Court held that "international law is part of our law," and that our courts have jurisdiction to determine customary international law. *Id.* at 700.

The Court established several factors which contribute to finding international customary law. In *Paquete Habana*, the Court determined that several sources could determine the existence of customary international law including; (1) binding international treaties, (2) findings by the courts of other nations, (3) a general international acceptance for observing the custom, and (4) prior consistent actions by the United States. *Id.* at 686. The following sections will

establish the *Trail Smelter* Principle as customary international law by applying the standards as laid out in *Paquete Habana*.

The first section will discuss the continued application of the *Trail Smelter* Principle in International Court of Justice ("ICJ") and other international courts. The second section sets out international applications of *Trail Smelter* in treaties and other international convention reports. The third section looks at the writings of legal scholars from the U.S. and other nations. The final section will look at the public policy of the *Trail Smelter* Principle.

1. Court Decisions Applying *Trail Smelter* Principle and Continued Use

The conclusion of the Trail Smelter Arbitration laid out the principle underlying its decision. The conclusion provides:

> No State as 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.

Trail Smelter Arbitral Decision, 35 American Journal of International Law 684, 716 (1941).

The 1977 *Gabčíkovo-Nagymaros* case concerned a treaty to build a dam on the Danube River between Czechoslovakia and Hungary. *See* Gabcikovo-Nagymaros Project, 1997 I.C.J. 7 (Sept. 25), *reprinted in* 37 International Legal Materials 162 (1998). The case built on principles of international environmental law established in the Trail Smelter Arbitration. *See id.* The ICJ determined that the parties must consider the dam's impact on the surrounding land and waterways consistent with the *Trail Smelter* Principle. *See id.*

A 2015 ICJ case addressed Costa Rican development along the San Juan riverbank, raising concerns of potential transboundary harm to the river, which was under Nicaraguan

sovereignty. *See* Construction of a Road In Costa Rica Along the San Juan River (Nicaragua v. Costa Rica), Judgment 2015 I.C.J. 662 (December 16). Nicaragua argued that Costa Rica's actions violated its obligations under customary international law to not cause significant transboundary harm. *See id.* at 726. This followed the same principle established in Trail Smelter. Ultimately, the ICJ determined that Nicaragua failed to establish substantive evidence of transboundary harm. *See id.* at 736. On these grounds the allegations that Costa Rica had breached their obligations under customary international harm in regard to transboundary harm were dismissed. *See id.* at 737.

The Monaco Supreme Court addressed a suit by the municipality of Beausoleil, France to enjoin a construction ordinance in Monaco to prevent transboundary environmental harm. Municipality of Beausoleil v. State of Monaco, Monaco Supreme Court, (May 29, 2013), https://www.legimonaco.mc/305/legismc.nsf/06fbdeff618e11bec1257a4b003c5f29/d70d96ac72b70b74c12581fd0037a9ab!OpenDocument. The Monaco case resembles the case at bar because the local courts recognized a claim by a foreign party against their own nation.

Together, these cases show that courts have consistently applied the *Trail Smelter* Principle since its establishment nearly eighty years ago.

2. Treaties Between the U.S. and Other Nations that Incorporate Trail Smelter

The United Nations consistently upheld the *Trail Smelter* Principle beginning with the UN Conference on the Human Environment, Stockholm, June 5-16, 1972. The Conference issues a report to decide common principles and create a guide regarding the preservation of the human environment. *See* Report of the Stockholm Conference, U.N. Doc. A/CONF.48/14, *reprinted in* 11 International Legal Materials 1416, (1972). The Conference broadened the *Trail Smelter*

Principle to apply as an aspect of dueling sovereignty. *See id.* The Conference enumerated this idea in Principle 21:

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

Id. at 1420. Essentially, States have the right to use their natural resources but also have a responsibility to protect their neighbors from harm which results from that use.

The U.S. and Canada signed the Air Quality Agreement in 1991 to address the issue of transboundary air pollution. *See* Canada - United States Agreement on Air Quality, March 13, 1991, *reprinted in* 30 International Legal Materials 676 (1991). Within this agreement, the parties recognize Principle 21 of the Stockholm Conference as a principle of international law. In the opening statement, the parties "[n]ot[ed] their tradition of environmental cooperation as reflected in…the Trail Smelter Arbitration of 1941…." *Id.* at 676. The U.S. explicitly recognized the *Trail Smelter* Principle as a foundational element of international environmental law.

The U.S., Canada and Mexico established the Commission for Environmental Cooperation ("CEC") under the North American Agreement on Environmental Cooperation ("NAAEC") to establish means for protecting the shared environment of these three countries. Within the preamble of the NAAEC, the parties:

> [R]eaffirm the sovereign right of States to exploit their own resources pursuant to their own environmental and development policies and their 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[.]

North American Agreement on Environmental Cooperation, Can.-Mex.-U.S., 32 I.L.M. 1480.

Through the NAAEC, the U.S. directly applied *Trail Smelter* Principle in a multilateral treaty that we still recognize today. This use of the *Trail Smelter* Principle in respect to transboundary environmental harms shows that the U.S. recognizes Trail Smelter as a principle of international law.

Prior to the establishment of NAAEC, at the Conference on Environment and Development in Rio in 1992, the United Nations reiterated the *Trail Smelter* Principle into their final report. *See* Report of the United Nations Conference on Environmental and Development, Annex I, U.N. Doc. A/CONF.151/26 (Vol. I), *reprinted in* 31 International Legal Materials 874 (1992). Principle 2 of the Rio Conference is nearly a verbatim recitation of Principle 21 from the Stockholm Conference. *See id.*

The United Nations Framework Convention on Climate Change explicitly acknowledged the same principle. *See* United Nations Framework Convention on Climate Change, Mar. 21, 1994, S. Treaty Doc. No., 102-38, 1771 U.N.T.S 107 (Recognizing in the preamble the principle as it was adopted in Stockholm). The United Nations Framework Convention on Climate Change is the parent treaty for both the 2005 Kyoto Protocol and the 2016 Paris Agreement. While neither agreement explicitly references the principle, both have roots in the Trail Smelter. See, *id.* Both agreements are recent examples of the continued application the *Trail Smelter* Principle.

There is a clear progression in international law expanding the *Trail Smelter* Principle. *See* The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes

and Their Disposal, Mar. 22, 1992, 1673 U.N.T.S. 57 ("Fully recognizing that any State has the sovereign right to ban the entry or disposal of foreign hazardous wastes and other wastes in its territory…."); Protocol on the Prevention of Pollution of the Mediterranean Sea by Transboundary Movements of Hazardous Wastes and their Disposal, Oct. 1, 1996, 2942 U.N.T.S. ("Recognizing also that any State has the sovereign right to ban the entry, transit or disposal of hazardous wastes in its territory…."); United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (UNCCD), Oct. 14, 1994, S. Treaty Doc. No. 104-29, 1954 U.N.T.S. 3 ("Reaffirming the Rio Declaration on Environment and Development which states … that States have … the sovereign right to exploit their own resources pursuant to their own environmental and developmental 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…."); Convention on Biological Diversity art. 3, June 5, 1992, 1760 U.N.T.S. 79 ("States have … the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction."); Convention on the Protection and Use of Transboundary Watercourses and International Lakes, Mar. 17, 1992, 1936 U.N.T.S. 269 ("Recalling the pertinent provisions and principles of the Declaration of the Stockholm Conference on the Human Environment…").

No longer is the principle narrowly defined to include only transboundary harm affecting air pollution. Instead, the principle encompasses a wide variety of environmental pollutants that could harm a neighboring sovereignty.

The International Law Commission adopted the Articles on Prevention of Transboundary Harm from Hazardous Activities in 2001. *See* Int'l Law Comm'n, Rep on the Work of Its Fifty-Third Session, U.N. Doc. A/56/10. The Commission concluded the examination on the responsibility for injuries resulting from acts not prohibited by international law. *See id.* In 2001, the Commission adopted the articles and submitted them to the General Assembly. *See id.* In their final report, the Commission repeatedly referenced the Trail Smelter Arbitration. *See id.* Specifically, the Commission

> [N]oted that the well-established principle of prevention [of transboundary harm from hazardous activities] was highlighted in the arbitral award in the Trail Smelter case and was reiterated not only in principle 21 of the Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration) and principle 2 of the Rio Declaration, but also in General Assembly resolution 2995 (XXVII) of 15 December 1972 on cooperation between States in the field of the environment.

Id. at 148.

Moreover, the opening statements of the final articles directed the final ruling in the Trail Smelter Arbitration. G. A. Res. 56/82, preamble (Dec. 12, 2001) ("Bearing in mind the principle of permanent sovereignty of States over the natural resources within their territory or otherwise under their jurisdiction or control, Bearing also in mind that the freedom of States to carry on or permit activities in their territory or otherwise under their jurisdiction or control is not unlimited….").

These reports published by the UN offer a noteworthy understanding of the accepted principles of environmental international law. Such consistent international agreements and

findings supports a finding of customary international law. *The Paquete Habana*, 175 U.S. 677, 700 (1900).

3. Writings of Publicists and Scholars Recognizing the *Trail Smelter* Principle as Customary International Law

"[A]s evidence of [customs and usages of civilized nations], to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals... but for trustworthy evidence of what the law really is." *The Paquete Habana*, 175 U.S. 677, 700 (1900).

Numerous legal professionals and scholars have discussed the *Trail Smelter* Principle generally agreeing to the authoritativeness of the Trail Smelter decision. Thomas W. Merrill, *Golden Rules for Transboundary Pollution*, 46 Duke L.J. 931, 951 (1997); *See also* Transboundary Harm in International Law: Lessons from the Trail Smelter Arbitration (Rebecca M. Bratspies & Russell A. Miller eds., 2006). Many legal scholars believe the principle to be the *locus classicus*[1] of international environmental law. Gunther Handl, *Territorial Sovereignty and The Problem of Transnational Pollution*, 69 American Journal of International Law 50 (1975). One scholar declared that Trail Smelter establishes the "textbook case on environmental law." Jason Buhi & Lin Feng, *The International Join Commission's Role in the United States-Canada Transboundary Air Pollution Regime; A Century of Experience to Guide the Future*, 11 Vt. J. Envtl. L. 107, 116 (2009).

The *Trail Smelter* arbitration created a precedent which still applies in international environmental law more than a century later. *See* Noah D. Hall, Transboundary Pollution:

[1] Meaning"[a]n authoritative passage from a standard or classic work, cited as an instance or illustration of a point." *Locus classicus*, Black Law's Dictionary (10th ed. 2014).

Harmonizing International and Domestic Law 40 U. Mich. J.L. Reform 681(2007). This decision formed the basis of a number of international charters, declarations, and statements of principles. Additionally, a treatise on international environmental law states that, "the arbitral judgement … in the *Trail Smelter* case is considered as having laid out the foundations of international environmental law, at least regarding transfrontier pollution." A. Kiss and D. Shelton, International Environmental Law 107 (1991).

Trail Smelter forms not only the foundation for transboundary environmental harms, it has become "ubiquitous" when speaking on that issue. Jaye Ellis, *Has International Law Outgrown Trail Smelter?*, *in* Transboundary Harm in International Law: Lessons from the Trail Smelter Arbitration Lessons 56, 56 n.3 (Rebecca M. Bratspies & Russell A. Miller eds., 2006) (quoting Alfred P. Rubin: "Every discussion of the general international law relating to pollution states, and must end, with a mention of *Trail Smelter Arbitration* between the United States and Canada.").

4. Continued Use Supports Recognizing the *Trail Smelter* Principle as Customary International Law

The Court in *Paquete Habana* set the standard for applying continued acceptance of a norm as customary international law. *The Paquete Habana*, 175 U.S. 677 (1900). The Court recognized that the laws of nations have roots in "ancient usage among civilized nations, beginning centuries ago, and gradually ripening into a rule of international law…" *Id.* at 688.

The latin maxim *sic utere tuo ut alienum non laedas*[2], also known the principle of good neighborliness likely dates back to Roman times. *See* Jaye Ellis, *Has International Law*

[2] Translates to use your own property in such a manner as not to injure that of another. Available at http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1607.

Outgrown Trail Smelter?, *in* Transboundary Harm in International Law: Lessons from the Trail Smelter Arbitration Lessons 56, 62 (Rebecca M. Bratspies & Russell A. Miller eds., 2006). Emperor Justinian's *Institutes* stated that "the following things are by natural law common to all—the air, running water, the sea, and consequently the seashore." J. Inst. 2.1.1 (J.B. Moyle trans.).

The U.S. Supreme Court has a long history of applying the principle of good neighborliness in our own jurisprudence. *See*, *Missouri v. Illinois*, 200 U.S. 496 (1906) (regarding the dumping of sewage from the city of Chicago into a tributary that was allegedly causing the uptick of typhoid in St. Louis); *Wisconsin v. Illinois*, 278 U.S. 367 (1929) (concerning the diversion of water from Lake Michigan to the Chicago River, causing injury to other states by way of lowering the water level of the Great Lakes); *Georgia v. Tenn. Copper Co.*, 206 U.S. 230 (1907) (finding Tennessee had a constitutional obligation to prevent a private copper-smelting business from polluting the air of a neighboring state); *Vermont v. New York*, 417 U.S. 270 (1974) (finding New York had an obligation to prevent a privately owned paper mill from polluting an interstate waterway); *Idaho ex rel. Evans v. Oregon*, 462 U.S. 1017 (1983) (finding that Oregon was obligated to regulated private fisherman so as to prevent overfishing of a natural resource shared with other states); *North Dakota v. Minnesota*, 263 U.S. 365 (1923) (concerning North Dakota's claim of transboundary river flooding).

Continued use of the principle of good neighborliness from the time of the Romans into U.S. case law supports a finding of customary international law.

B. Apa Mana's Alien Tort Statute Claim Invoking the *Trail Smelter* Principle is Not Preempted by the Clean Air Act.

The Clean Air Act ("CAA") does not preempt Mana's Trail Smelter claim under the ATS. 42 U.S.C. §§ 7610, 7401 (2018). The CAA states that its provisions do not impact other laws of the United States and the CAA does not deal with environmental claims brought by aliens. §§ 7610, 7401. Statutory preemption for federal statutes concerns causes of action that can be brought under multiple statutes. *See Bowoto v. Chevron Co.*, 621 F.3d 1116, 1124 (9th Cir. 2010). The Court in *Dooley* stated that the statute which specifically addresses a cause of action or specifically limits damages for a cause of action preempts the more general statute. *Dooley v. Korean Air Lines Co.*, 524 U.S. 116, 124 (1998). In *Am. Elec. Power Co. v. Connecticut* the Court held that a federal statute preempts federal common law when the statute "speaks directly" to the harm alleged. *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 411-12 (2011).

However, for purposes of Mana's ATS claim the Court's ruling in *Am. Elec. Power Co.* is irrelevant because that case deals with statutory displacement of federal common law. *Id.* The ATS is not a product of federal common law. Rather, it is a federal statute enacted by the First Congress giving the federal courts power to hear tort claims by an alien for violations of the law of nations. 28 U.S.C. § 1350 (2018). Therefore, the proper preemption analysis is whether the CAA provides a more specific cause of action than the ATS or whether it prevents such an action. *See Dooley*, 524 U.S. at 124.

The *Dooley* standard does not prevent an alien from invoking the ATS to bring a *Trail Smelter* claim for damages from greenhouse gas emissions. In *Dooley*, the Court dealt with a survival action brought by decedent's of individuals that died in a plane crash at sea. *Id.* at 118-19. The plaintiffs brought a survival action seeking damages under the Warsaw Convention ("WC"), which allowed for damages resulting from a variety of claims arising out of airline

accidents. *Id.* at 118 (stating that the jury awarded $50 million in punitive damages). The Court noted that WC "permits compensation only for legally cognizable harm but leaves the specification of what harm is legally cognizable to the domestic law applicable under the forum's choice-of-law rules." *Dooley*, 524 U.S. at 119 quoting *Zicherman v. Korean Air Lines, Co.*, 516 U.S. 217, 231 (1996). However, the Court found that the Death on the High Seas Act (DOHSA) particularly deals with survival claims and limited damages for survival claims to pecuniary losses. *Dooley*, 524 U.S. at 124. The Court reversed the jury award for punitive damages because DOHSA's specificity over survival actions governs any high seas survival claim and preempts bringing survival actions under the more general WC. *Id.*

The WC dealt with a variety of claims related to airline accidents. *See* Convention for the Unification of certain rules relating to international carriage by air, Oct. 12, 1929, 49 Stat. 3000, 137 L.N.T.S. 11. DOHSA's specific treatment of survival actions for high sea deaths limited the more general WC. *See Dooley*, 524 U.S. at 124.

The nexus between ATS and the CAA has little resemblance to the nexus between the WC and DOHSA. None of the relevant CAA provisions enable or prevent aliens from recovering for transboundary harms caused by U.S. greenhouse gas emissions under the *Trail Smelter* Principle. *See* 42 U.S.C. §§ 7401, 7470, 7521, 7602, 7610. The Ninth Circuit interpreted *Dooley* to mean that a cause of action under a specific statute preempts a general statute for the same claim. *Bowoto*, 621 F.3d at 1125. The CAA does not preempt claims under ATS and the *Trail Smelter* Principle even when applying this strict test because the CAA states that its provisions do not supersede or limit any other provisions of law (such as the ATS). 42 U.S.C. § 7610 (2018). Furthermore, Congress clearly limited the CAA's scope to domestic harms. The CAA

does not speak to a cause of action under the *Trail Smelter* Principle. 42 U.S.C. §§ 7401, 7470 (2018).

Unlike the nexus between DOHSA and WC, the CAA neither provides nor limits a cause of action for transboundary harm under the ATS. 42 U.S.C. § 7610. Because the CAA fails to address causes of action under the *Trail Smelter* Principle, the CAA does not preempt Mana's claim under the ATS. *Id*; *See* 42 U.S.C. §§ 7401, 7470, 7521,7602.

C. The Alien Tort Statute Allows Apa Mana's Claim Against Hexon Because Hexon's Activities in the U.S. Led to the International Harm.

Mana's *Trail Smelter* claim under the ATS does not raise the issue of extraterritoriality because Hexon is a domestic corporation whose domestic actions caused the harm. In *Kiobel v. Royal Dutch Petroleum*, the Court declined to extend ATS jurisdiction to plaintiffs alleging human rights violations for harms caused by a Dutch corporation in Nigeria. *Kiobel v. Royal Dutch Petroleum*, 569 U.S. 108, 113-15 (2013). The Court reasoned that the ATS has a strong presumption against extraterritoriality. *Id* at 124. In order to rebut this presumption the claimant must show that the claims "sufficiently touch and concern" American territory. *Id*. The Court stated that a corporation's mere presence in the U.S. does not meet the "sufficiently touch and concern" standard. *Id.*

Mana's action against Hexon rebuts the presumption against extraterritoriality. The U.S. is the single largest national contributor to greenhouse gas emissions, the effects of which include rising sea levels. *ODIN, et al. v. HexonGlobal Co., et al.*, No. 66-cv-2018, at *5 (D.N.U.I. filed Aug. 15, 2018). Hexon is responsible for thirty-two percent of America's greenhouse gas emissions. *Id.* at *5-6. Mana's claim sufficiently touches and concerns the territory of the U.S. because Hexon's actions on American soil violated the laws of nations.

Mana's claim differs from the claims in *Kiobel* because Hexon's alleged violations of the law of nations that occured in the U.S. Instead, Hexon's activities sufficiently touch and concern the territory of the U.S. because Hexon's greenhouse gas emissions violated the *Trail Smelter* Principle.

Additionally, the Court's holding in *Jesner v. Arab Bank* does not prevent Mana's claim against Hexon. In *Jesner*, foreign plaintiffs sued Arab Bank (a foreign corporation) under the ATS, alleging that Arab Bank's financial services allowed terrorist organizations to carry out attacks overseas. *See Jesner v. Arab Bank, PLC.*, 138 S. Ct. 1386, 1393-94 (2018). The Court denied suit against a foreign corporation under the ATS. *See Id.* at 1403. The litigation caused tension between the Kingdom of Jordan (Jordan) and the U.S. *Id.* The Court also made clear that the First Congress intended the ATS, "to promote harmony in international relations by ensuring foreign plaintiffs a remedy for international-law violations when the absence of such a remedy might provoke foreign nations to hold the United States accountable. But here … the opposite is occurring." *Id.* at 1406.

Unlike Arab Bank, Hexon is a domestic corporation; therefore, adverse litigation will not impact U.S. foreign policy in a similar manner to the *Jesner* litigation. *Id.* at 1399 (noting that the *Jesner* litigation caused significant diplomatic tension between the U.S. & Jordan). The Court also points out that the First Congress intended the ATS to be a tool for aliens to seek remedy when the absence of a remedy may prompt the alien's nation to hold the U.S. accountable. *Id.* at 1406. We should note that *Jesner* is a plurality opinion and is not binding authority for the present case.

In enacting the ATS, the First Congress intended to reduce tension between the U.S. government and its foreign counterparts by allowing aggrieved aliens to bring claims directly

against the wrongdoer. *Jesner*, 138 S. Ct. at 1406. If denied jurisdiction under ATS for Mana's claim, A'Na Atu's government will look to hold the U.S. responsible for the destruction of its residents' livelihood and property. *ODIN, et al. v. HexonGlobal Co., et al.*, No. 66-cv-2018, at *6 (D.N.U.I. filed Aug. 15, 2018). As the Twelfth Circuit correctly pointed out, A'Na Atu's population primarily resides below sea level and rising seas are a result of greenhouse gas emissions. *Id.* at *4. If the court allows jurisdiction under the ATS to A'Na Atu residents it would help further the First Congress' intent in passing the ATS. This would reduce the likelihood that A'Na Atu's government would hold the U.S. responsible for Hexon's massive contributions to greenhouse gases.

D. The *Trail Smelter* Principle Imposes Actionable Obligations on Private Parties.

The *Trail Smelter* Principle imposes obligations on private parties because the *Trail Smelter Arbitration* itself involved liability against a corporation. The event leading to the arbitration involved sulphur dioxide emissions from a smelter in Canada that caused damage to individuals in the U.S. *Trail Smelter Arbitration*, 35 AMERICAN JOURNAL OF INTERNATIONAL LAW 684 (1941). Prior to the arbitration, the corporation and the aggrieved Americans came to an agreement for damages. The Arbitral Tribunal ultimately recognized the corporation's wrong doings and increased the damages. *Trail Smelter Arbitration*, 35 AMERICAN JOURNAL OF INTERNATIONAL LAW 684 (1941).

European and North American countries reaffirmed the *Trail Smelter* Principle in a manner that allows actions against private parties. The North American Agreement on Environmental Cooperation (NAAEC) recognized the *Trail Smelter* Principle and allows private access to remedies such as the right to sue private parties in the other member states. *See* North American Agreement on Environmental Cooperation art. 6, Can.-Mex.-U.S., 32 I.L.M. 1480.

A French court in *Bier v. Mines de Potasse d'Alsace* found that Dutch plaintiffs alleging environmental harm caused by a French corporation could sue the corporation in France or in the Netherlands. *See* Case 21/76, Handelskwekerij G.J. Bier B.V. v. Mines de Potasse d'Alsace S.A, 1976 E.C.R. 1735. These applications of the *Trail Smelter* Principle to private parties signify a global trend to allow recovery against a private party that causes environmental harm to individuals in another country.

Finally, the idea of corporations as mere entities that form contracts and create profit has evolved in recent years. Recognizing the increasingly international nature of the modern economy, the United Nations adopted the *Guiding Principles on Business and Human Rights*. The Principles state that business enterprises must comply with all laws and respect human rights. *See id.* The Principles also state that the "need for rights and obligations to be matched to appropriate and effective remedies." Human Rights Council Res. 17/4, U.N. Doc. A/HRC/RES/17/4 at 1 (July 6, 2011). International parties affected by corporate actions can hold such corporations directly accountable. *See id.* The *Trail Smelter* Principle is not limited to situations where states choose to assume the burdens of the respective parties. Instead, nations have consistently applied the *Trail Smelter* Principle so as to allow suits directly against corporations that cause transboundary harms.

II. NOAH FLOOD'S SUBSTANTIVE DUE PROCESS RIGHT TO A STABLE CLIMATE SYSTEM ALLOWS HIS CLAIM AGAINST THE UNITED STATES

The Due Process Clause of the Fifth Amendment to the United States Constitution denies the federal government the power to deprive a person of "life, liberty, or property" without due process of law. U.S. Const. amend. V.

The Public Trust Doctrine recognizes that access to some property belongs to all people, and the Supreme Court has guaranteed and protected these rights under our constitutional jurisprudence. *See Shivley v. Bowlby*, 152 U.S. 1 (1892). Before examining the resulting right from the Public Trust Doctrine, we must examine the doctrine itself.

A. The Public Trust Doctrine Requires the Government to Hold Some Essential Resources in Trust for All People

The Public Trust Doctrine provides that the sovereign holds some essential resources in trust, such as land between high and low tide lines, regardless of whether a private party owns the land. In effect, the doctrine requires the sovereign to protect those particular resources, even if that protection requires intrusion into the property rights of private parties. The Public Trust Doctrine has ancient origins and has been carried into our present common law.

The Romans recognized that all people have a right to particular resources held in trust for the public. Emperor Justinian's *Institutes* stated that "the following things are by natural law common to all—the air, running water, the sea, and consequently the seashore." J. Inst. 2.1.1 (J.B. Moyle trans.). Under the *Institutes*, the seashore "extends to the limit of the highest tide in time of storm or winter." J. Inst. 2.1.3 (J.B. Moyle trans.).

England's Magna Carta recognized the Public Trust Doctrine in removing fish-weirs, which diverted the flow of fish for private consumption, from public rivers. Magna Carta, 1215, cl. 33. From the common law of England, the United States incorporated the Public Trust Doctrine.

The Public Trust Doctrine has roots in our Supreme Court jurisprudence since 1892. *See Shivley v. Bowlby*, 152 U.S. 1 (1892). The Court stated that "at common law, the title and dominion in lands flowed by the tide water were in the King for the benefit of the nation. . . . Upon the American Revolution, these rights, charged with a like trust, were vested in the original

States within their respective borders, subject to the rights surrendered by the Constitution of the United States." *Id.* at 1.

The Court held that the duties owed by the sovereign under the public trust extend even when the sovereign has contracted away title of the property to a private party. *See Ill. C. R. Co. v. Ill.*, 146 U.S. 387, 460 (1892). "There can be no irrepealable contract in a conveyance of property by a grantor in disregard of a public trust, under which he was bound to hold and manage it." *Id.* at 460. The Court held that an attempt by the legislature to abdicate its public trust duties would be "absolutely void as a positive infranction of the Federal Constitution." *Id.* at 433. The Court also stated such an act would be a "wanton abuse of power and gross breach of high and important public trust." *Id.* at 433. Citing *Illinois*, the Court later held that a congressional act allowing a private actor to completely obstruct a navigable river by creating a dam to be unconstitutional. *See Long Sault Development Co. v. Call*, 242 U.S. 272, 279 (1916).

The Court expanded the Public Trust Doctrine to govern not only navigable waters, but "all lands beneath waters influenced by the ebb and flow of the tide." *Phillips Petroleum Co. v. Miss.*, 484 U.S. 469, 480 (1988).

B. The Federal Government Holds the Territories and Territorial Waters in Public Trust

The States have Public Trust duties under properties in their jurisdictions, but the Federal Government also retains a duty of Public Trust. Some courts have stated that while the federal government has no public trust obligations under state law, the same principle underlies a federal public trust. *See United States v. 1.58 Acres of Land Situated in the City of Boston, Suffolk Cnty., Mass.*, 523 F. Supp. 120, 124 (D. Mass. 1981).

The Court in *PPL Montana* provided that Public Trust Doctrine "remains a matter of state law," but within the framework of Federalism under the U.S. Constitution. *PPL Mont., LLC v.*

Montana, 565 U.S. 576, 603 (2012). The larger federal system, therefore, limits the scope of the Public Trust Doctrine as applied to the states. The Court provided that "the States retain residual power to determine the scope of the public trust over waters within their borders." *PPL Mont., LLC v. Montana*, 565 U.S. 576 (2012). However, the case turned on the federal Equal Footing Doctrine, which the court summarized, stating that "[u]pon statehood, the State gains title within its borders to the beds of waters then navigable (or tidally influenced . . .)[.]" *Id.* at 589-90. The Federal Government confers title upon statehood, and states retain residual public trust authority and duty at that point. It follows that the federal government must first have the title and trust to be able to confer it to the states.

"The federal government, like the states, holds public assets — at a minimum, the territorial seas — in trust for the people." *Juliana v. United States*, 217 F. Supp. 3d 1224, 1259 (D. Or. November 10, 2016). States do not hold title or trust to the territories or territorial seas, that the federal government has not yielded title to.

Therefore, the Federal Government holds the New Union Island Territory in Public Trust. Yet, rising oceans will soon make the territory uninhabitable and deny access to the seashore, violating the Federal Government's Public Trust duties.

C. Noah Flood has a Substantive Due Process Right to a Stable Climate System

Emperor Justinian codified a right under "natural law" of all people to "air, running water, the sea, and consequently, the seashore." J. Inst. 2.1.1 (J.B. Moyle trans.). While the sovereign could make all manner of laws pertaining to and managing use of the air, water, and seashore, the sovereign could not preclude access to them or allow others to deny access. Air, being fundamental for human life, could never be deprived. Running water and the sea, being

fundamental for nourishment, livelihood, and trade, could likewise never be deprived. The seashore, the point which provides access to water, is necessarily included.

With this in mind, the Supreme Court elevated the government's obligations to a constitutional level. See *Ill. C. R. Co. v. Ill*., 146 U.S. 387, 460 (1892). We examine the nature of this constitutional right as it applies to the present case.

The Court has applied many tests to finding which rights are "fundamental." The Court in Powell v. Alabama asked whether a right invokes "'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions,'" *Powell* v. *Alabama*, 287 U.S. 45, 67 (1932) (quoting *Hebert* v. *Louisiana*, 272 U.S. 312, 316 (1926)); whether the right is "of the very essence of a scheme of ordered liberty," *Palko v. Connecticut*, 302 U.S. 319, 325 (1937); whether it is "basic in our system of jurisprudence," *In re Oliver*, 333 U.S. 257, 273 (1948); or "deeply rooted in this Nation's history and tradition," *McDonald v. City of Chicago*, 561 U.S. 742, 744 (2010). The fundamental rights protected by the Fifth Amendment's Due Process Clause include most of the those enumerated in the Bill of Rights. *See Duncan* v. *Louisiana*, 391 U.S. 145, 147-149 (1968). These rights extend to include those not explicitly recognized within the text of the Constitution, but considered fundamental, including the right to marry, *See Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); and the right to travel. *See U.S. v. Guest* 383 U.S. 745, 747 (1966).

The method for finding a substantive right under the Fifth Amendment's Due Process Clause "has not been reduced to any formula." *Poe* v. *Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting). Finding a right under substantive due process ultimately relies on the Court's "reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2598 (2015).

D. Noah Flood's Substantive Due Process Right to a Stable Climate System Requires the Government to Act

The case before us involves drastic and preventable changes to the air and water rendering an entire territory of the United States uninhabitable. The New Union Island Territory will be completely submerged beneath the rising oceans. More than merely restricting access to the seashore, Hexon's actions will eliminate the seashore. More than merely depriving access to the sea, Hexon's actions deprive Plaintiff access to land from which to utilize any resource held under public trust.

A stable climate system is fundamental to all other rights. Without land, a person's rights to real property have no basis in fact. Without a climate system capable of supporting human life, no right has any meaningful value.

Today, the New Union Islands Territory is at risk of destruction, and rendering that territory uninhabitable for human life. The Supreme Court has recognized that no legislature can abdicate the duty owed to the public to protect these resources, even if the sovereign must take action against private parties to provide that protection. *See Ill. C. R. Co. v. Ill.*, 146 U.S. 387, 433 (1892).

The framers of the Bill of Rights and the Fourteenth amendment did not perceive those laws as the strict limits of human freedom. They knew circumstances would arise they had not yet considered. They could not have envisioned that the engines that drive industrial growth would also drive the destruction of our world as we know it. "The nature of injustice is that we may not always see it in our own times." *Obergefell,* 135 S. Ct. at 2598.

Our ancient obligations to each other, and modern threats to our world, collide today. The question is not whether we have, or this court has, the power to address these issues. Neither our

people, nor our courts, have ever shied away from a problem because its scale was too great. The question is whether we still owe those obligations to each other, or if they too will fall beneath the rising oceans.

E. Noah Flood's Claim Mandates Government Action to Protect His Right to a Stable Climate System

The Court in *DeShaney* held that the Due Process Clause does not require the government 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).

The Court in *Penilla* created a 'danger creation' exception to the rule, holding that a substantive due process claim may proceed when government conduct "places a person in peril in deliberate indifference to their safety[.]" *Penilla v. City of Huntington Park*, 115 F.3d 707, 709 (9th Cir. 1997).

The government's conduct created the harm to Noah Flood and the island territory on which he resides. The government has worked hand-in-hand with HexonGlobal and its predecessors to power vehicles, infrastructure, and other needs. But they did this, more recently, knowing it would result in rising temperatures and rising oceans. Yet oil exploration subsidies continue. Fossil fuel extraction on federal lands continues. Our governments' direct massive daily use of fossil fuel continues unabated. The harm to the New Union Islands, and the citizens that reside there, were caused by simple lack of will to act. The Supreme Court has already made clear, that such an abdication by the legislature of its duties is a "wanton abuse of power and

gross breach of [a] high and important public trust." *See Ill. C. R. Co. v. Ill*., 146 U.S. 387, 433 (1892).

III. NEITHER MANA'S ALIEN TORT STATUTE CLAIM, NOR FLOOD'S SUBSTANTIVE DUE PROCESS CLAIM, PRESENT A NONJUSTICIABLE POLITICAL QUESTION

The Political Question Inquiry does not turn on the controversial nature or political magnitude of a case. Alexis de Tocqueville recognized a reality in our courts. He noted that "there is hardly any political question in the United States that sooner or later does not turn into a judicial question." 1 Alexis de Tocqueville, Democracy in America 440 (Liberty Fund 2012).

A. Separation of Powers, as Directed by the *Baker* Test, Sets the Political Question Standard

Our courts have ruled on many cases involving hotly contested issues of immense national importance. Our courts upheld the existence of a national bank. *McCulloch v. Maryland*, 17 U.S. 316 (1819). They have ruled on the breadth of Congress' power under the commerce clause. *See, e.g.*, *Lochner v. New York*, 198 U.S. 45 (1905); *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937). They have ruled that the constitution protects a woman's choice in reproductive matters. *See Roe v. Wade*, 410 U.S. 113 (1973). They have ruled that the President is not immune from the judicial process. *See United States v. Nixon*, 418 U.S. 683 (1974). Rather than reject these large-scale matters as political questions, our courts have ruled on the merits on those cases and controversies properly brought before the court.

Instead, the Court stated that the existence of a political question is "essentially a function of separation of powers," and the various facets of their test all aim toward this single end. *Baker*

v. Carr, 369 U.S. 186, 217 (1962). The Court's test provided a political question may arise where there exists:

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

Baker v. Carr, 369 U.S. 186, 217 (1962).

The plurality opinion in *Vieth* noted that "[t]hese tests are probably listed in descending order of both importance and certainty." *Vieth v. Jubelirer*, 541 U.S. 267 (2004).

The Court in *Baker* stated that the inquiry turns on "'political questions,' not . . . 'political cases.'" *Baker v. Carr*, 369 U.S. 186, 217 (1962). The Court imposed a high burden on finding a political question, providing that "unless one of these formulations is inextricable from the case at bar, there should be no dismissal for non-justiciability on the ground of a political question's presence." *Id.* at 217.

B. Neither Mana nor Flood's Claims Present Nonjusticiable Political Questions

The first *Baker* Factor does not apply in the present case. The Supreme Court has noted few cases where the plain text of the constitution commits an issue to another branch. The Court in *Nixon* held that the Senate's "sole power to try all Impeachments" clearly assigned procedural

methods for impeachment to the Senate. *See Nixon v. United States*, 506 U.S. 224 (1993) (quoting U.S. Const. Art. I, § 3, cl. 6). The Constitution does not assign questions of environmental law as the exclusive province of any branch. The Constitution makes no mention of rising oceans, pollution, or climate change, and therefore no plain textual separation of powers issue arises.

The Second and Third *Baker* Factors do not apply in the present case. The present questions before the court present a variety of technical problems. But these problems do not make a judicial decision impossible, and our courts are well equipped to deal with them. "The crux of this inquiry is thus not whether the case is unmanageable in the sense of being large, complicated, or otherwise difficult to tackle from a logistical standpoint," but "whether [courts] have the legal tools to reach a ruling that is 'principled, rational, and based upon reasoned distinctions.'" *Alperin v. Vatican Bank*, 410 F.3d 532, 552, (9th Cir. 2005) (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004)).

Baker itself concerned the constitutionality of the creation of particular congressional districts, which required an in-depth understanding of the various formulas for reapportionment. See *Baker v. Carr*, 369 U.S. 186 (1962). Additionally, the Supreme Court has already addressed the existence and nature of the threat of climate change, and that it can fulfill the requirements for standing. *See* *Massachusetts v. EPA*, 549 U.S. 497 (2007). The present case has substantially similar facts to *Massachusetts*, which the Court found justiciable. The factual determinations on climate change and its relation to a particular area of the United States still apply.

The Fourth, Fifth, and Sixth *Baker* Factors do not amount to the existence of a political question. These factors primarily address the problems that arise when multiple branches deal with the same issue. Naturally, being at the center of a huge political debate, climate change has

garnered interest from the executive and legislative branches. In that respect, it is impossible for the court to act without affecting how congress or the executive might otherwise have acted. But this is always the case. Cases and controversies do not come before the court if another branch or other circumstance deal with the cause of their distress.

The Federal government has made no significant efforts to address climate change so as to create a conflict between different branches of government. The Clean Air Act passed in 1970, when no national debate existed on the question of climate change. While the United States government has acquiesced or approved international agreements on climate change, only in the past few years has either branch made token attempts to address it. These efforts have taken the form of gas mileage requirements, power plant regulations, and providing funding for some forms of alternative energy. But none of these plans function under even the pretense of providing a comprehensive solution to climate change as it relates to low-lying island territories and nations in the Pacific. That the courts' decisions have implications for policy is not a new element in consideration - that much is integral to our system of justice.

Foreign policy implications for such a ruling as may result from this case provide no barrier to relief. While "'foreign policy [is] the province and responsibility of the Executive,'" "the mere fact that foreign affairs may be affected by a judicial decision does not implicate abstention." *Dep't of Navy v. Egan*, 484 U.S. 518 (1988); *Khouzam v. Attorney Gen. of United States*, 549 F.3d 235, 250 (3rd Cir. 2008). The *Baker* Court determined that "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance[.]" *Baker v. Carr*, 369 U.S. 186, 211 (1962). A decision in this case may ultimately have policy implications for relations with low-lying island nations and major producers of fossil

fuels. But these implications do not impede the discretion of the Executive in matters of foreign policy.

If we accepted that those cases with a significant effect on policy must be avoided, then most cases of any significance would fall under the political question doctrine. The courts have five parties before it today, three of them requesting relief. "The courts cannot reject as 'no law suit' a bona fide controversy as to whether some action denominated 'political' exceeds constitutional authority." *Baker v. Carr*, 369 U.S. 186, 217 (1962).

CONCLUSION

For the forgoing reasons, the district court's grant of appellee's motion to dismiss should be reversed and the case remanded for further proceeding.