Team No. 53

Docket No. 18-000123

IN THE UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

ORGANIZATION OF DISAPPEARING ISLAND NATIONS,

APA MANA,

and

NOAH FLOOD,

Appellants,

–v. –

HEXONGLOBAL CORPORATION,

Appellee,

THE UNITED STATES OF AMERICA.

Appellee.

On Appeal from the United States District Court for New Union Island
in No. 66-CV-2018, Judge Romulus N. Remus

BRIEF OF HEXONGLOBAL CORPORATION, *Appellee*

Oral Argument Requested

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STATEMENT OF JURISDICTION

The Organization of Disappearing Island Nations ("ODIN"), Ms. Apa Mana ("Mana"), and Mr. Noah Flood ("Flood") brought an action against HexonGlobal Corporation ("HexonGlobal") and the United States in the United States District Court for the District of New Union Island. Mana asserted a claim against HexonGlobal under the Alien Tort Statute 28 U.S.C § 1350 (2012) ("ATS"). Flood asserted a constitutional claim against the United States alleging violations of the Due Process Clause of the Fifth Amendment to the United States Constitution. U.S. Const. amend. V. The United States District Court for the District of New Union Island dismissed the Complaint on August 15, 2018, in Civ. 66-2018.

Mana and Flood challenged the District Court's holding and filed this Notice of Appeal. This Court accepted jurisdiction of the case and ordered the parties to brief the issues. A federal court of appeals reviews "*de novo* a district court's grant of Defendant's motion to dismiss." *City of Pontiac General Employees' Retirement System v. MBIA, Inc.*, 637 F.3d 169, 173 (2d. Cir. 2011).

STATEMENT OF ISSUES

I. Can Mana bring an Alien Tort Statute, 28 U.S.C. § 1350 (2012) (ATS) claim against a domestic corporation?

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

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

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

V. 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?

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

STATEMENT OF THE CASE

Greenhouse gases including trace amounts of carbon dioxide and methane play an important role in maintaining the balance between the amount of solar radiation that reaches the Earth and the amount of heat that is radiated from Earth into outer space. *Organization of Disappearing Island Nations v. HexonGlobal Corporation*, No. 66CV2018, at *4 (D.N.U.I. Aug. 15, 2018). Too little greenhouse gas results in colder global temperatures, while too much results in higher global temperatures. *Id.* The burning of fossil fuels for energy production has increased the trace amounts of carbon dioxide and methane in the atmosphere. *Id.* These emissions, along with those of greenhouse gases from agricultural and industrial activity, contribute to an unspecified change in the global climate. *Id.*

Historically, the United States is responsible for twenty percent of cumulative global anthropogenic greenhouse gas emissions. *Id.* at *5-6. Of this twenty percent of the United States' cumulative fossil fuel-related greenhouse gas emissions, HexonGlobal (the surviving corporation from the merger of all major United States oil producers) is responsible for thirty-two percent. *Id.* at *5. This represents a mere six percent of global emissions. *Id.*

A'Na Atu and the New Union Islands are low-lying islands with a maximum height above sea level of less than three meters, with the populated areas of both islands being below one meter in elevation. *Id.* at *4. Mana is an alien national of the island of A'Na Atu. *Id.* at *3. Flood is a U.S. citizen residing in the New Union Islands, a U.S. possession. *Id.* Both Mana and Flood own homes with an elevation of less than one-half meter above sea level. *Id.* at *4-5. Both homes have experienced seawater damage during several storms over the past three years. *Id.* at *5. Additionally, both Mana and Flood have experienced seawater intrusion into drinking wells. *Id.*

Increasing temperatures may put Mana and Flood at an increased risk of stroke, mosquito borne disease, and reduced availability of local fish as a food source. *Id.*

ODIN, Mana, and Flood bring this action against HexonGlobal (a private, non-governmental entity) and the United States. *Id.* at *3. ODIN is a not-for-profit membership organization dedicated to protecting the interests of island nations against sea level rise. *Id.* Both Mana and Flood are members of ODIN. *Id.* Mana asserts a claim under the Alien Tort Statute, 28 U.S.C. § 1350 (2012) ("ATS"), accusing HexonGlobal of violating the Law of Nations by participating in fossil fuel-related business activities. *Id*. Flood asserts a constitutional claim against the United States, accusing the federal government of violating its public trust obligations (as incorporated by the Due Process Clause of the Fifth Amendment to the Constitution) to protect the global climate ecosystem. *Id*. at *3; U.S. Const. amend. V. Recognizing the "dramatic nature of the plaintiffs' claimed harms," the United States District Court for the District of New Union Island granted both HexonGlobal and the United States' motions to dismiss. *Id*. at *4.

SUMMARY OF ARGUMENT

Mana cannot bring a claim against a domestic corporation, HexonGlobal, under the ATS, 28 U.S.C § 1350 (2012). The Supreme Court has declined to rule on whether a claim for corporate liability can be brought under the ATS, and no binding precedent establishes that corporate liability is an international law norm. *See Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 108 (2013); *see also Jesner v. Arab Bank, PLC*, 138 S.Ct. 1386 (2018). The history of international law also does not enable corporate liability, as the first customary international law norms (established during the Second World War) decided that liability for human rights violations lies with *individuals*; not corporations. *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 133 (2d. Cir. 2010). There is also no indication that corporate liability was included in the original creation of

the ATS, as it was established to combat piracy and protect foreign ambassadors. *See* 4 W. Blackstone, Commentaries on the Laws of England 68 (1769). Additionally, the Supreme Court has declined to rule on whether corporate liability is included under the ATS, but reiterates that existing evidence is insufficient to demonstrate that it does. *Jesner v. Arab Bank, PLC*, 138 S.Ct. 1386, 1402 (2018). Therefore, this Court is not the judicial forum best suited to determine corporate liability under the ATS absent any definitive ruling from the Supreme Court.

Further, the *Trail Smelter* Principle is not considered a customary international norm enforceable as the Law of Nations under the ATS. The Principle merely establishes a moral, rather than legal obligation, to refrain from hazardous environmental activities that may impact other jurisdictions. *See Beanal v. Freeport-McMoran Inc.*, 197 F.3d 161, 167 (5th Cir. 1999). The Principle fails to qualify as a customary international norm because it relies on untrustworthy evidence and lacks judicial acknowledgment and enforcement. See *United States v. Smith*, 18 U.S. 153, 160-61 (1820); *see also The Paquete Habana*, 175 U.S. 677, 700 (1900). Additionally, several courts have declined to recognize environmental torts as a Law of Nations violation under the ATS. *See Beanal v. Freeport-McMoran Inc.*, 197 F.3d 161, 167 (5th Cir. 1999); *see also Flores v. Southern Peru Copper Corporation*, 414 F.3d 233 (2d. Cir. 2003).

Even if this Court finds that the *Trail Smelter* Principle is customary international law, it does not impose obligations on non-governmental actors because it does not meet the standards of enforceable international law established by courts. According to the Supreme Court's ruling in *Sosa v. Alvarez-Machain*, 542 U.S. 692, 713, 732 (2004), customary international law is considered federal common law, and courts should not recognize violations of international law norms that are not defined and accepted among nations. Environmental tort principles such as the *Trail Smelter* Principle do not fall under the historical ambit of the ATS. Therefore, they are not

enforceable under the ATS because environmental torts do not create a cognizable claim under the Law of Nations. *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161, 166 (5th Cir. 1999); *Filartiga v. Pena-Irala*, 630 F.2d 876, 888 (2d. Cir. 1980). Additionally, the *Trail Smelter* Principle does not become customary international law simply because it is incorporated in the Stockholm and Rio Declarations. *Flores v. Southern Peru Copper Corp.*, 414 F.3d 233, 239-40 (2d. Cir. 2003). As recently as *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1402 (2018), the Supreme Court has repeatedly stated that the decision to create new private rights of action is better left to legislative judgment.

Even if the *Trail Smelter* Principle is enforceable as the Law of Nations, it is displaced by the Clean Air Act 42 U.S.C. § 7401 *et seq*. because international law is treated like federal common law. Where "an applicable Act of Congress" governs an issue, a judicial ruling based on federal common law is unnecessary. *Clearfield Trust Company v. United States*, 318 U.S. 363, 367 (1943). The Supreme Court spoke directly to this issue in *American Electric Power Company, Inc. v. Connecticut*, 564 U.S. 410, 424 (2011), and held that "the Clean Air Act and the EPA actions it authorizes *displace any federal common law right* to seek abatement of carbon-dioxide emissions from fossil-fuel fired power plants." (emphasis added). Therefore, this Court should find that Mana's ATS claim is displaced by the Clean Air Act.

Furthermore, there can be no substantive due process right to a healthy and stable climate system because the Due Process Clause does not impose affirmative obligations upon the government to protect individuals from harm that is caused by private parties. *DeShaney v. Winnebago County Department of Social Services,* 489 U.S. 189, 195 (1989). Additionally, any substantive due process right cannot be predicated on the Public Trust Doctrine because the atmosphere is not an asset that is traditionally held in public trust. *Phillips Petroleum Company v.*

Mississippi, 484 U.S. 469, 484 (1988). Also, the Public Trust Doctrine is not applicable to the federal government. *PPL Montana., LLC v. Montana.*, 565 U.S. 576, 604 (2012).

Finally, Mana's *Trail Smelter* Principle claim against HexonGlobal and Flood's substantive due process claim against the United States are not political questions. Mana's *Trail Smelter* Principle claim is not a political question because any foreign policy component that it may contain is not inextricable from the environmental tort at the heart of its legal component. Likewise, Flood's substantive due process claim is not a political question because this Court can adjudicate the claim by relying on judicially manageable standards that are well-established by the Supreme Court. This Court can also grant meaningful relief without making a value judgment.

ARGUMENT

I. MANA CANNOT BRING AN ALIEN TORT STATUTE CLAIM AGAINST A DOMESTIC CORPORATION.

Mana cannot bring a claim under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350 (2012) against a domestic corporation, HexonGlobal. The ATS provides that, "[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 ATS is a jurisdictional statute that does not create a cause of action. *See Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 108 (2013). It permits federal courts to "recognize private claims [for a modest number of international law violations] under federal common law." *Id.* (citing *Sosa v. Alvarez–Machain*, 542 U.S. 692, 716 (2004)). The Second Circuit in *Kiobel I* relied on *Sosa* to establish that for corporate liability to be a violation of the Law of Nations sufficient to provide a basis for jurisdiction under the ATS, it must be "accepted by the civilized world and defined with a specificity." *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 130 (2d. Cir. 2010). The *Kiobel I* court found it "particularly significant, therefore, that no international

tribunal of which we are aware has *ever* held a corporation liable for a violation of the law of nations." *Id*.

A. There is no historical support to warrant extending liability to corporations under the ATS.

Corporate liability has no basis in the history of international law. Individual (but not corporate) liability for human rights violations under customary international law was first established by the London Charter and the Nuremburg Trials. *Kiobel I*, 621 F.3d at 133. Specifically, the Nuremberg Trials after the Second World War recognized *individual* liability for the violations of customary international law of human rights, but did not extend or mention any corporate liability. *Id.* Further, the United States Military Tribunals, granted by the London Charter, prosecuted corporate executives for their role as *individuals* in violating customary international law during the Second World War, but not the corporations themselves. *Id.* at 134. While corporations aided in the Nazi regime's actions by producing materials that facilitated the war crimes, the corporations themselves were not responsible for the crimes. *Id.* at 135. Only the *individuals* who worked for the corporations were found liable. *Id.*

There are no specific international treaties or agreements that allow for corporate liability for international violations. Mana's claim is based on the *Trail Smelter* Principle, which is not incorporated into a treaty. However, other courts have looked to treaties to establish a basis for including corporations under international law. Under this theory, only one court has extended ATS liability to corporations. *Presbyterian Church of Sudan v. Talisman Energy*, *Inc.*, 244 F.Supp.2d 289 (S.D.N.Y. 2003). The court in *Presbyterian Church I* found that some international treaties established corporate liability under a customary international norm. *Id.* In reaching their flawed conclusion, the court stated that "most treaties do not bind corporations," and reasoned that if corporations can be held liable for unintentional torts, they should also be held liable for

intentional ones such as "complicity in genocide, slave-trading, or torture." *Id.* at 317. The case was later remanded and vacated by a different judge in the same court, and summary judgement was granted in favor of the Defendants. *See Presbyterian Church of Sudan v. Talisman Energy, Inc.,* 453 F.Supp.2d 633 (S.D.N.Y. 2006). The Second Circuit in *Kiobel I* strongly disagreed with the holding in *Presbyterian Church I*, and found that without ratification by the individual States, the treaties were insufficient to demonstrate that corporate liability is universally recognized as a norm of customary international law. *Kiobel I*, 621 F.3d at 131, 138.

Additionally, although the Supreme Court has declined to officially rule on the question of corporate liability under the ATS, it has stated that corporate liability does not currently exist. In its most recent ATS decision, the Supreme Court in *Jesner v. Arab Bank, PLC*, 138 S.Ct. 1386, 1386 (2018), found that "[c]orporate liability under the ATS has not been shown to be essential to serving that statute's goals." The Court also looked to statutory history to determine its intended purpose. *Id.* As understood by Blackstone, the ATS was intended for "three specific offenses against the law of nations addressed by the criminal law of England: violation of safe conducts, infringement of the rights of ambassadors, and piracy." *Id.* (citing 4 W. Blackstone, Commentaries on the Laws of England 68 (1769)). Thus, the ATS was only meant to include a very narrow set of violations of the Law of Nations. *Jesner*, 138 S.Ct. at 1386. Based on the current principles of international law, the Court concluded that liability for human rights violations (either criminal or civil) does not extend to corporations or other "artificial entities." *Id.* at 1400. "This is confirmed by the fact that the charters of respective international criminal tribunals often exclude corporations from their jurisdictional reach." *Id.* Further, the Supreme Court in both *Jesner* and *Kiobel II* ultimately declined to rule on the question of corporate liability, but the Court in *Jesner* found that there is "at least sufficient doubt on the point." *See id.* at 1402; *see also Kiobel v. Royal Dutch*

Petroleum Co., 569 U.S. 108, 108 (2013). This Court is not in the best position to rule on whether there is corporate liability under the ATS since the Supreme Court has not definitively decided this issue.

B. Corporate liability is not recognized as a customary international law norm.

Courts have repeatedly rejected the idea that corporate liability is a customary norm under international law. Therefore, Mana cannot bring a claim under the ATS against a domestic corporation. The court in *Kiobel I* stated, "[c]orporate liability has not attained a discernible, much less universal, acceptance among nations of the world," therefore it cannot "form the basis of a suit under the ATS." 621 F.3d 111, 149 (2d. Cir. 2010). The court clarified that its ruling does not create immunity for corporations because the States of the world have determined that "moral and legal responsibility for heinous crimes should rest on the *individual* whose conduct makes him or her an 'enemy of all mankind.'" *Id.* (citing *Sosa v. Alvarez–Machain* 542 U.S. 692, 732 (2004)) (emphasis added), (quoting *Filartiga v. Pena–Irala,* 630 F.2d 876, 890 (2d. Cir. 1980)). There are no limits to bringing an ATS suit against a corporation's "employees, managers, officers, directors, or any other person who commits, or purposefully aids and abets, violations of international law." *Id*. The *Kiobel I* court also stated that nothing in its opinion "limits or forecloses corporate liability under any body of law *other than the ATS*" or "limits or forecloses Congress from amending the ATS to defendants within our jurisdiction." *Id.* Therefore, Mana cannot bring a claim under the ATS against HexonGlobal because corporate liability is not recognized as an international law norm.

II. THE TRAIL SMELTER PRINCIPLE IS NOT A RECOGNIZED PRINCIPLE OF CUSTOMARY INTERNATIONAL LAW ENFORCEABLE AS THE "LAW OF NATIONS" UNDER THE ATS.

The *Trail Smelter* Principle is not a recognized customary international law norm. There is no federal subject matter jurisdiction under the ATS unless the conduct and claim sufficiently pleads a violation of the Law of Nations. *Filartiga v. Pena Irala*, 630 F.2d 876, 887-88 (2d. Cir. 1980). The Supreme Court has emphasized the need for caution when recognizing claims for newly alleged customary international norms. "This Court has no congressional mandate to seek out and define new and debatable violations of the [L]aw of [N]ations, and modern indications of congressional understanding of the judicial role in the field have not affirmatively encouraged greater judicial creativity." *Sosa v. Alvarez–Machain,* 542 U.S. 692, 728 (2004). The Supreme Court has also established that federal courts should not recognize private claims under common law for violations of any international law norm that is not well-defined and accepted among civilized nations. *Id.* at 732.

Mana brings an ATS claim asserting that HexonGlobal's greenhouse gas emissions violate the *Trail Smelter* Principle because it is a customary international law norm. However, while there is no specific test to determine what constitutes a customary international law norm, this Court should not find that the *Trail Smelter* Principle is a violation under the Law of Nations.

A. Under the analysis defined in *Smith* and *Paquete Habana*, the *Trail Smelter* Principle fails to qualify as customary international norm.

The *Trail Smelter* Principle does not meet the standards required to establish customary international law as defined by the Supreme Court in *Smith* and *Paquete Habana*. *United States v. Smith*, 18 U.S. 153, 160-61 (1820); *The Paquete Habana*, 175 U.S. 677, 700 (1900). In *Smith*, the Supreme Court stated that the Law of Nations "may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law." 18 U.S. at 160-61. In *Smith*, a statute proscribing "the crime of piracy as defined by the [L]aw of [N]ations," was held to be sufficient

to afford the basis for a death sentence. *Id.* The *Smith* Court relied upon the works of Lord Bacon, Grotius, Bochard, and other commentators, and found that the law of piracy was "sufficiently and constitutionally defined" to be considered customary international law under the Law of Nations. *Id.* at 162. Further, the Court in *Paquete Habana* reaffirmed that when there is no treaty, controlling legislation, or applicable judicial decision, one may look to the works of jurists and commentators. 175 U.S. at 700. However, the Court cautioned that such works may not be used for "the speculations of their authors concerning what the law *ought to be*, but for trustworthy evidence of what the law *really is*." *Id.* (emphasis added).

The *Trail Smelter* Principle arose out of the *Trail Smelter Arbitration*, 3 U.N.R.I.A.A. 1965 (1941), which held that air pollution emissions from the Trail Smelter in British Columbia harmed the agricultural interests of the State of Washington. The Principle acknowledges States' sovereignty to use their own resources in accordance with their own environmental policies, so long as any polluting activities within their jurisdiction do not damage the environment in other States' jurisdictions. *Organization of Disappearing Island Nations v. HexonGlobal Corporation*, No. 66CV2018, at *8-9 (D.N.U.I. Aug. 15, 2018). This Principle was subsequently adopted by the Declaration of the 1972 Stockholm Conference on the Human Environment as Principle 21. *Id.* at *9; United Nations Conference on the Human Environment, Stockholm, Sweden, June 16, 1972, Principle 21, 215 I.L.M. 1416. It was later reasserted in 1992 in the Rio Declaration. United Nations Conference on Environment and Development, Rio de Janeiro, Brazil, June 13, 1992, Principle 2, 31 I.L.M. 874.

The *Trail Smelter* Principle is not an established customary international norm. This arbitration and endorsement do not create a customary international norm because they do not meet the *Paquete Habana* standard of "trustworthy evidence of what the law *really is*." *The Paquete*

Habana, 175 U.S. 677, 700 (1900) (emphasis added). Unlike the extensive works by Lord Bacon, Grotius, Bochard, and other commentators discussed in *Smith*, the documents here do not have the attending legal gravitas necessary to establish the *Trail Smelter* Principle as a customary norm. There is also no judicial decision recognizing or enforcing the Principle as required under the *Smith* analysis. *United States v. Smith*, 18 U.S. 153, 160-61 (1820). While the *Trail Smelter* Principle does acknowledge that States should not cause damage to environments beyond their jurisdiction, it fails to establish any actual liability. Absent any enforcement mechanism, the *Trail Smelter* Principle fails the analysis under *Smith*. Thus, the Principle is not a universally accepted custom or norm, so it fails to meet the standard of customary international law enforceable as the Law of Nations under the ATS.

B. Environmental law violations are not considered customary international norms.

To prove that the *Trail Smelter* Principle is a norm under the Law of Nations, Mana must show that HexonGlobal's actions violated "well-established, universally recognized norms of international law." *Filartiga v. Pena Irala*, 630 F.2d 876, 888 (2d. Cir. 1980). Under *Filartiga*, the violation alleged must be a "clear and unambiguous" rule of customary international law. *Id.* at 884 (holding that the prohibition on official torture is "clear and unambiguous" and, as such, can serve as a basis for suit under the ATS). A wrong only becomes "an international law violation within the meaning of the statute" if States have demonstrated that the wrong is "of mutual, and not merely several, concern, by means of express international accords." *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d. Cir. 1975).

There are no Supreme Court cases for this Court to look to when establishing whether an environmental tort is a customary international norm. However, this Court can look to rulings on similar environmental violations in *Flores v. Southern Peru Copper Corp.*, 414 F.3d 233 (2d. Cir.

2003) and *Beanal v. Freeport-McMoran Inc.*, 197 F.3d 161, 166 (5th Cir. 1999) for guidance. The court in *Flores* (relying on *Paquete Habana*) did not find sufficient evidence that high levels of environmental pollution causing harm to human life, health, and development constituted a violation of any well-established, universally recognized norms of international law. *Flores*, 414 F.3d at 241. The *Flores* plaintiffs brought an ATS claim against a United States mining company, alleging that pollution from the company's Peruvian operations caused their severe lung disease. Plaintiffs submitted documents from several scholars and jurists to support their claim. Both the District Court and the Second District Court of Appeals rejected these arguments and documents as insufficient. *Id.* at 265. Both courts found that the plaintiffs failed to provide sufficient evidence beyond mere "speculations" about what the law *ought to be*. *Id.* Therefore, the plaintiffs' ATS claim failed because both courts determined that environmental pollution was not a customary international norm.

Similarly, the Fifth Circuit in *Beanal v. Freeport-McMoran Inc.*, 197 F.3d 161, 166 (5th Cir. 1999), found that "allegations of environmental torts are not cognizable under the '[L]aw of [N]ations.'" The court further found that Beanal failed to demonstrate that the corporation's mining activities violated any "universally accepted environmental standards or norms." *Id.* Beanal cited to treaties, agreements, and scholars, but in the court's estimation, these documents did not demonstrate universal acceptance in the international community. *Id.* at 167. Beanal's evidence was "devoid of articulable or discernable standards and regulations to identify practices that constitute international environmental abuses or torts." *Id.* Instead, the court found that the sources cited by Beanal referred to a general sense of environmental responsibility rather than a legal obligation. *Id.*

Here, this Court should proceed with "extraordinary care and restraint" when determining whether the *Trail Smelter* Principle is a customary international norm. *See Flores v. Southern Peru Copper Corp.*, 414 F.3d 233 (2d. Cir. 2003). This case does not warrant such care and restraint because the Principle clearly does not overcome the tests set forth in *Smith* and *Paquete Habana*. Further, the arbitration and subsequent endorsements of the Principle demonstrate that it is a mere suggestion and a general sense of environmental responsibility rather than a codified legal obligation. *See Beanal v. Freeport-McMoran Inc.*, 197 F.3d 161, 167 (5th Cir. 1999). "Practices adopted for moral or political reasons, but not out of a sense of legal obligation, do not give rise to rules of customary international law." *See Hain v. Gibson,* 287 F.3d 1224, 1243–44 (10th Cir. 2002). The Principle places a purely moral obligation on States, but it does not give rise to any actual legal obligation. Therefore, the *Trail Smelter* Principle is not considered a customary international norm under the Law of Nations. Thus, Mana's ATS claim must fail.

III. ASSUMING THE *TRAIL SMELTER* PRINCIPLE IS CUSTOMARY INTERNATIONAL LAW, IT DOES NOT IMPOSE OBLIGATIONS ENFORCEABLE AGAINST NON-GOVERNMENTAL ACTORS.

Under Mana's theory of using the ATS as the jurisdictional hook to bring a cause of action against HexonGlobal, the *Trail Smelter* Principle does not impose obligations that are enforceable against non-governmental actors. Even if this Court finds that the Principle is customary international law, it is still not a well-defined, binding norm. Therefore, this Court could not reasonably interpret the Principle to create an enforceable cause of action. Additionally, the language of the Principle as adopted by the 1972 Stockholm Conference on the Human Environment (and reaffirmed in the 1992 Rio Declaration), does not impose obligations on non-governmental actors. *See Organization of Disappearing Island Nations v. HexonGlobal Corporation*, No. 66CV2018, at *8-9 (D.N.U.I. Aug. 15, 2018).

A. The *Trail Smelter* Principle does not meet the test for recognition of causes of action under federal common law established by the Supreme Court in *Sosa*.

As affirmed by the Supreme Court in *Sosa*, the *Trail Smelter* Principle does not impose obligations on non-governmental actors because it does not meet the standards of enforceability international law. *See Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). Assuming that the *Trail Smelter* Principle is customary international law, it is considered federal common law as developed in post-Erie decisions. *Id.* at 713 (citing *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938)). As the Second Circuit restated in the seminal case *Filartiga v. Pena Irala*, 630 F.2d 876, 888, 885 (2d. Cir. 1980), the Law of Nations "has always been part of the federal common law." In *Sosa*, the Supreme Court clarified that a cause of action under tort law does not come from the ATS which is "strictly jurisdictional," but instead from federal common law. 542 U.S. at 713.

Therefore, if the *Trail Smelter* Principle is considered customary international law, it will be evaluated as federal common law when determining whether it creates an enforceable obligation against a non-governmental actor. In *Sosa*, the Supreme Court created a test that restricts federal courts from recognizing private claims for violations of international law norms "with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted." 542 U.S. at 732. The *Sosa* court pointed out that this limit upon judicial recognition is rooted in the jurisprudence long developed by lower courts. *Id.* For example, the *Filartiga* court interpreted the modern torturer to be equivalent to a pirate or slave trader at the time of the enactment of the ATS. 630 F.2d at 890. In his *Tel-Oren v. Libyan Arab Republic*, 726 F.2d. 774, 781 (D.D.C. 1986) concurrence, Judge Edwards suggested that the limits of the ATS be defined by "a handful of heinous actions—each of which violates definable, universal, and obligatory norms." Even if the *Trail Smelter* Principle is considered customary international law, it is not

"definable, universal, and obligatory" under the Law of Nations that would create an enforceable cause of action.

1. Environmental tort principles do not have any historical paradigms familiar when the ATS was enacted and are not enforceable as the Law of Nations.

Environmental tort principles such as the *Trail Smelter* Principle do not fall under the historical ambit of the ATS and are therefore not enforceable under the statute today. Although the Supreme Court has not ruled on an ATS case involving environmental tort law, its cautionary tone in *Sosa* and *Kiobel II* regarding the expansion of the scope of ATS jurisdiction are instructive. *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004); *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013).

Even if the Supreme Court has yet to see an environmental tort case of this type, other federal courts have ruled on this issue and held that environmental torts do not provide a cognizable claim under the Law of Nations. In *Beanal v. Freeport-McMoran Inc.*, 197 F.3d 161, 166 (5th Cir. 1999), the Fifth Circuit held that Beanal had no cognizable cause of action based on an environmental tort because he failed to show that Freeport's mining activities (described by Beanal as "environmental genocide") violated any universally accepted environmental standards or norms. Although Beanal and the *amici* referred the court to several sources of international environmental law (including the *Rio Declaration on Environment and Development* that Mana cites as authority in this case), the Fifth Circuit found that, "Beanal fail[ed] to show that these treaties and agreements enjoy universal acceptance in the international community." *Id.* at 167 (citing *Filartiga v. Pena Irala*, 630 F.2d 876, 888 (2d. Cir. 1980); *Zapata v. Quinn*, 707 F.2d 691, 692 (2d. Cir. 1983) (stating that the ATS "applies only to shockingly egregious violations of universally recognized principles of international law")).

2. The *Trail Smelter* Principle's incorporation into United Nations Declarations does not mean that the Principle may impose obligations on any party.

Neither international arbitration, nor the principles in the United Nations Declarations create any obligation that would be enforceable against a non-governmental actor. The Supreme Court has established that United Nations Declarations do not on their own impose obligations as a matter of international law. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 734 (2004). The appellee in *Sosa* tried to use Universal Declaration of Human Rights (Declaration), G.A. Res. 217A (III), U.N. Doc. A/810 (1948) to argue that his abduction by Sosa was an "arbitrary arrest" within the meaning of the Declaration. *Id*. He also traced the rule against arbitrary arrest to article nine of the International Covenant on Civil and Political Rights, Dec 16, 1966, 999 U.N.T.S. 171; an argument which the Supreme Court also rejected. *Id*. This is consistent with the Second Circuit's position in *Filartiga* that the right to be free from torture embodied in the Universal Declaration of Human Rights has attained the status of customary international law. *Filartiga v. Pena Irala*, 630 F.2d 876, 883 (2d. Cir. 1980). The *Filartiga* court explained that although the Universal Declarations are non-binding, they evidence customary international law "insofar as the expectation is *gradually justified by State practice.*" *Id.* (emphasis added). Unlike environmental rights, the right to be free from torture is well established in international legal jurisprudence, so although the Universal Declarations in *Filartiga* serve as an indicator of its acceptance, the declarations are not necessary to prove that the rights of torture victims are a recognized norm of international law. *See id.* Therefore, this Court should find that the Declaration of the United Nations Conference on the Human Environment (like the Universal Declaration of Human Rights in *Sosa*), is insufficient to establish an enforceable, relevant, and applicable rule of international law.

The *Trail Smelter* Principle does not become customary international law simply because it is incorporated in the Stockholm Declaration on the Human Environment. *Flores v. Southern Peru Copper Corp.*, 414 F.3d 233, 239-40 (2d. Cir. 2003) (citing, *Amlon Metals, Inc. v. FMC Corporation*, 775 F.Supp. 668, 671 (S.D.N.Y. 1991)). Similar to the *Sosa* Court in 2004, the *Amlon Metals* and *Flores* courts rejected the Stockholm Principles as evidence of customary international law because they refer in a general sense to the responsibilities of nations instead of setting forth specific proscriptions.

B. This Court should not interpret the *Trail Smelter* Principle to create a cause of action under customary international law where one is not already well-defined.

Although the ATS has not categorically precluded federal courts from recognizing a claim under the Law of Nations, "there are good reasons for a restrained conception of the discretion a federal court should exercise in considering a new cause of action of this kind." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004). As recently as *Jesner*, the Supreme Court has repeatedly stated that the decision to create new private rights of action is better left to legislative judgment. *Jesner v. Arab Bank, PLC*, 138 S.Ct. 1386, 1402 (2018). Therefore, this Court should follow the Supreme Court's lead and find that the *Trail Smelter* Principle does not create a new cause of action under customary international law.

1. The language of the *Trail Smelter* Principle clearly applies only to "States" and not non-governmental actors.

As adopted by the 1972 Stockholm Conference, the language of the *Trail Smelter* Principle does not impose any obligations on a non-governmental actor. The Principle, adopted as Principle 21 of the Conference, reads as follows:

> 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.

United Nations Conference on the Human Environment, Stockholm, Sweden, June 16, 1972, Principle 21, 215 I.L.M. 1416; *see* United Nations Conference on Environment and Development, Rio de Janeiro, Brazil, June 13, 1992, Principle 2, 31 I.L.M. 874.

The Principles language clearly applies to "States" which are necessarily governmental actors that were parties at the U.N. conferences. No part of the Principle refers to non-governmental actors. The reading of the Principle that is most generous to the Mana's argument is that "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" is meant to create an obligation on the *States* to curb the activities of non-governmental actors that may cause damage to the environment of other *States*. *Id.* (emphasis added). However, any claim that this creates an obligation on any non-governmental actor is tenuous at best. It follows that the *Trail Smelter* Principle does not impute any obligation on HexonGlobal or any other non-governmental actor.

2. This Court should not interpret the *Trail Smelter* Principle to create an enforceable obligation against non-governmental actors.

The Supreme Court has repeatedly cautioned against expanding international law to include enforceable actions against non-governmental actors. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 727 (2004); *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 116 (2013); *Jesner v. Arab Bank, PLC*, 138 S.Ct. 1386, 1402 (2018). In *Sosa* the Supreme Court reaffirmed its position that the potential foreign policy implications of recognizing new causes of action under the ATS "should make courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs." 542 U.S. at 727. The Supreme Court has

established that for courts to interfere in areas of international relations, there must be an affirmative intention that Congress has expressed. *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957). In *Kiobel II*, the Supreme Court noted that "the danger of unwarranted judicial interference in the conduct of foreign policy is magnified in the context of the ATS, because the question is not what Congress *has done*, but instead what courts *may do*." 569 U.S. at 116 (emphasis added).

According to the *Sosa* court, "a decision to create a private right of action is one better left to legislative judgment in the great majority of cases." 542 U.S. at 727, (citing *Correctional Services Corporation v. Malesko*, 534 U.S. 61, 68 (2001); *Alexander v. Sandoval*, 532 U.S. 275, 286-87 (2001)). Further, the *Sosa* court acknowledged that even in the absence of congressional action addressing private rights of action, "the possible collateral consequences of making international rules privately actionable argue for judicial caution." 542 U.S. at 727. Therefore, this Court should refrain from inferring intent to provide a private cause of action where a statute does not expressly fashion one. The possible foreign policy consequences of creating a cause of action where none exists cautions this Court against ruling that the *Trail Smelter* Principle imposes obligations that are enforceable against a non-governmental actor.

IV. EVEN IF OTHERWISE ENFORCEABLE UNDER THE ATS, THE *TRAIL SMELTER* PRINCIPLE IS DISPLACED BY THE CLEAN AIR ACT.

The *Trail Smelter* Principle is displaced by the Clean Air Act because even if it is considered enforceable as the Law of Nations, international law is treated like federal common law, which is displaced by federal legislation that speaks directly to the question at issue. *See* 42 U.S.C. § 7401 *et seq.* As the Second Circuit restated in the seminal case *Filartiga v. Pena-Irala*, the Law of Nations "has always been part of the [post-Erie] federal common law." 630 F.2d 876, 883, 885 (2d. Cir. 1980). However, a judicial ruling based on federal common law is only resorted

to "[i]n absence of an applicable Act of Congress." *Clearfield Trust Co. v. United States*, 318 U.S. 363, 367 (1943). As the Clean Air Act is an applicable act of Congress in the area of greenhouse gas emissions, this Court should hold that it displaces the *Trail Smelter* Principle.

The *Trail Smelter* Principle is displaced by the Clean Air Act just as the federal common law claims brought by plaintiffs in *American Elec. Power Company, Inc. v. Connecticut,* 564 U.S. 410, 418 (2011) ("*AEP"*) were displaced by the Act. In *AEP*, two groups of plaintiffs sued the five largest emitters of carbon dioxide in the United States, whose collective annual emissions of 650 million tons of carbon dioxide consisted of 25 percent of the total emissions from the domestic electric power sector. Plaintiffs asserted that the defendants' carbon dioxide emissions contributed to climate change by creating a "substantial and unreasonable interference with public rights," in violation of the federal common law of interstate nuisance. *Id.* The Supreme Court held that "the Clean Air Act and the EPA actions it authorizes *displace any federal common law right* to seek abatement of carbon-dioxide emissions from fossil-fuel fired power plants." *Id.* at 424 (emphasis added).

The Supreme Court in *AEP* reached this holding by reviewing post-*Erie* jurisprudence, which develops a "new" federal common law to address subjects within the national legislative power or demanded by the basic scheme of the Constitution. *Id.* (citing *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938)). It ultimately found the argument established in *Massachusetts v. EPA*, 549 U.S. 497, 528-29 (2007) persuasive, where the Supreme Court found that legislative purpose displaces federal common law. The *AEP* Court expressed agreement with the *Milwaukee II* Court's reasoning that "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." *American Elec. Power Co., Inc. v. Connecticut,* 564 U.S. 410, 424 (2011) (citing *City*

of Milwaukee v. Illinois and Michigan, 451 U.S. 304, 314 (1981) (holding that amendments to the Clean Water Act displaced the nuisance claim recognized in *Milwaukee I*)). The *AEP* Court then established that "[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." 564 U.S. 410, 424 (2011) (citing *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978); *see Milwaukee II*, 451 U.S. at 315).

One important distinction exists between *AEP* and the case before this Court today. In *AEP*, the action being litigated was the defendants' *emission of carbon-dioxide*. *Id.* at 418. In contrast, Mana's claim is that "HexonGlobal's greenhouse gas emissions induced by *the sale* of petroleum fuels within the United States constitutes an actionable violation of the [L]aw of [N]ations." *Organization of Disappearing Island Nations v. HexonGlobal Corporation*, No. 66CV2018, at *9 (D.N.U.I. Aug. 15, 2018) (emphasis added). The action being litigated here may not be the *emission* of fossil fuels so much as it may be *the sale* of fossil fuels. However, other courts have encountered this distinction and held that federal common law was still displaced by the Clean Air Act. *Native Village of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849 (9th. Cir. 2012); *City of New York v. BP, P.L.C.*, 325 F.Supp.3d 466, 474 (S.D.N.Y. 2014); *City of Oakland v. BP P.L.C.*, 325 F.Supp.3d 1017, 1024 (N.D. Cal. 2018). In *City of New York*, the City contended that the Clean Air Act does not displace federal common law because the Act "does not regulate the *production and sale* of fossil fuels." 325 F.Supp.3d at 474 (emphasis added). The court found that whether it is called "production and sale" or "emissions" is a distinction without a difference because the emissions themselves are the same. *Id.* It held that "because the Clean Air Act has spoken 'directly to the question' of domestic greenhouse gas emissions, the City's [federal common law] claims are displaced." *Id.*

This same principle was followed in *City of Oakland v. BP P.L.C.*, where defendants were accused of the "sale of fossil fuels to those who eventually burn the fuel," and the court held that emissions were still the same harm. 325 F.Supp.3d 1017, 1024. However, *City of Oakland* introduced a further wrinkle; the conduct and emissions contributing to the nuisance arose *outside* of the United States even though their negative effects were felt *inside* the United States. *Id.* Plaintiffs specifically alleged that emissions "send greenhouse gases into our atmosphere, warm our globe, melt its ice, raise sea levels, and, via the navigable waters of the United States, threaten coastal flooding in Oakland and San Francisco." *Id.* (compare with *Organization of Disappearing Island Nations v. HexonGlobal Corporation*, No. 66CV2018, at *4-5 (D.N.U.I. Aug. 15, 2018), where Mana makes nearly identical damage claims). Nevertheless, the court still held that these claims were displaced "by the need for federal courts to defer to the legislative and executive branches when it comes to such international problems…" *Id.* Furthermore, the Ninth Circuit in *Native Village of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 857 (9th. Cir. 2012), held that not only does the Clean Air Act displace federal common law claims seeking damages for harms caused by past emissions under *AEP*, but it also displaces claims against energy producers' contributions to climate change and rising sea levels. (compare with *Organization of Disappearing Island Nations v. HexonGlobal Corporation*, No. 66CV2018, at *4 (D.N.U.I. Aug. 15, 2018), stating that Mana bases her claim on "HexonGlobal's greenhouse gas emissions induced by the sale of petroleum fuels within the United States"). Therefore, as applied to the specific wording of Mana's claim, the *Trail Smelter* Principle is displaced by the Clean Air Act.

V. THERE IS NO COGNIZABLE FIFTH AMENDMENT SUBSTANTIVE DUE PROCESS CAUSE OF ACTION AGAINST THE UNITED STATES GOVERNMENT FOR FAILURE TO PROTECT THE GLOBAL ATMOSPHERIC CLIMATE SYSTEM FROM DISRUPTION DUE TO THE PRODUCTION, SALE, AND BURNING OF FOSSIL FUELS.

The Due Process Clause of the Fifth Amendment serves to prevent the government from depriving persons of life, liberty, or property without the due process of law so that individuals can remain free from the arbitrary use of government power. U.S. Const. amend. V; *Daniels v. Williams*, 474 U.S. 327, 331 (1986). In substantive due process cases where a party alleges the existence of a previously unknown fundamental liberty right, a court must inquire if the alleged right is either "deeply rooted in this Nation's history and tradition" or "fundamental to our scheme of ordered liberty." *McDonald v. City of Chicago, Illinois,* 561 U.S. 742, 767 (2010). In these cases, a court is required to exercise its reasoned judgment to determine if a right is fundamental by exercising judicial restraint when asked to break new ground in this field "lest the liberty protected by the Due Process Clause be subtly transformed into judicial policy preferences." *Obergefell v. Hodges*, 135 S.Ct. 2584, 2598 (2015) (referencing *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting); *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997).

A. The District Court correctly refused to apply the government-caused danger exception to the *Deshaney* doctrine.

There is no substantive due process right to a healthy and stable climate system because, with limited exceptions, the Due Process Clause does not apply to private actors and does not create an affirmative obligation for the government to prevent them from damaging the environment. *DeShaney v. Winnebago County Department of Social Services,* 489 U.S. 189 (1989). The Supreme Court in *DeShaney* established that the Due Process Clause is a "limitation on the State's power to act" and is not "a guarantee of certain minimal levels of safety and security." *Id.* at 195. Therefore, the language of the Due Process Clause cannot be extended "to impose an affirmative obligation on the state." *Id.* The "danger creation" exception to this general rule is relied upon by the Ninth Circuit. *Penilla v. City of Huntington Park*, 115 F.3d 707, 710 (9th Cir. 1997). This exception allows for liability under section 1983 if the affirmative conduct of a

state actor places an individual in danger while demonstrating a deliberate indifference to their safety. *Id.*

Even if this Court adopts the government caused danger exception to *DeShaney*, it is still not applicable here. The crux of Flood's claim is that the United States government has not gone far enough to prevent his climate change related injuries from occurring. *See Organization of Disappearing Island Nations v. HexonGlobal Corporation*, No. 66CV2018, at *6-7 (D.N.U.I. Aug. 15, 2018). Actions that successfully mitigate a danger cannot be fairly said to increase the risk of that danger, and it certainly has not put him "in a worse position than that in which he would have been [in] had the state not acted at all." *Pauluk v. Savage*, 836 F.3d 1117, 1125 (9th Cir. 2016) (punctuation omitted). Therefore, even if the federal government is able to increase its mitigation of climate change, it is not affirmatively obligated to do so under the government caused danger exception. Likewise, the federal government has enacted at least some rules and regulations that have diminished domestic greenhouse gas emissions, so it has not been deliberately indifferent to Flood's safety. *Organization of Disappearing Island Nations v. HexonGlobal Corporation*, No. 66CV2018, at *7 (D.N.U.I. Aug. 15, 2018). Simply because regulation levels are not up to Flood's standards does not mean the federal government has been deliberately indifferent to climate change initiatives.

B. The District Court properly declined to follow the reasoning of the *Juliana* court in applying Public Trust Doctrine principles to create a substantive due process right to a healthy and stable climate system.

The Public Trust Doctrine originates from the Roman Code of Justinian, which asserts 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.). At common law, these natural resources were originally held in trust by the King of England on behalf of his subjects, but after

the American Revolution, it was transferred to the States. *Shively v. Bowlby*, 152 U.S. 1, 57 (1894). As trustee, the States have a fiduciary duty to current and future beneficiaries of the public trust to prevent the damage or destruction of trust property. *Juliana v. United States*, 217 F.Supp.3d 1224, 1254 (D. Or. 2016). The Public Trust Doctrine establishes that no government can legitimately delegate or abdicate certain core aspects of sovereignty such as the police power or the preservation of lands held in public trust. *Stone v. Mississippi*, 101 U.S. 814, 820 (1879). This is because "every succeeding legislature possesses the same jurisdiction and power with respect to [the public interest] as its predecessors," so any attempt to diminish that power or jurisdiction is always illegitimate. *Newton v. Mahoning City Commissioners*, 100 U.S. 548, 559 (1879); *Illinois Cent. R. Co. v. Illinois.*, 146 U.S. 387, 453 (1892).

The District Court correctly declined to follow the *Juliana* court in holding that there is a substantive due process right to a healthy and stable climate system, and this decision should not be disturbed on appeal. *Organization of Disappearing Island Nations v. HexonGlobal Corporation*, No. 66CV2018, at *11 (D.N.U.I. Aug. 15, 2018).

1. This Court should not incorporate the atmosphere in the public trust because doing so would contradict the traditional understanding of the Public Trust Doctrine.

This Court should refrain from extending the Public Trust Doctrine to encompass Flood's substantive due process claim to a healthy and stable climate system because the atmosphere is not traditionally thought to be an asset held in public trust. While "the air" was included in the classical Roman and British iterations of the Public Trust Doctrine, American courts have consistently been limited to navigable and tidal waters. *Phillips Petroleum Company v. Mississippi*, 484 U.S. 469, 484 (1988). If this Court holds that the atmosphere is an asset held in public trust, it would represent a significant departure from tradition and the rule of *stare decisis*.

2. Applying the Public Trust Doctrine to the federal government invokes significant federalism concerns.

The Public Trust Doctrine cannot be held applicable to the federal government without invoking significant federalism concerns. Title to the assets held in public trust were transferred to the States after the American Revolution. *Shively v. Bowlby*, 152 U.S. 1, 57 (1894). As such, "'[t]he doctrine is a matter of state law' and '[under] accepted principles of federalism, the States retain residual power to determine the scope of the public trust.'" *PPL Montana, LLC v. Montana*, 565 U.S. 576, 604 (2012). The assets held by the States in public trust are subject to the federal government's power to regulate, but those assets are still held by the states and are creatures of state law. *Phillips Petroleum Co.*, 484 U.S. 469, 479 (1988). This emphasis on state level public trust governance has not led to a uniform law upon the subject, "but … each State has dealt with the lands under the tide waters within its borders according to its own views of justice and policy." *Id.* at 483 (quoting *Shively v. Bowlby*, 152 U.S. 1, 26 (1894)). Therefore, the maintenance of land held in public trust is a fundamental and inalienable aspect of state sovereignty. Any attempt by the federal government to increase that power at the expense of the states must be treated cautiously to ensure that the principle of federalism is followed.

This Court should carefully consider whether the federal government holds a fiduciary duty to maintain the quality of the atmosphere as a public trust asset. In order to better adhere to the principle of federalism, this Court should find that the Public Trust Doctrine is inapplicable to the federal government, and that the administration of the public trust is a privilege and obligation of the States.

VI. MANA'S LAW OF NATIONS CLAIM AND FLOOD'S PUBLIC TRUST CLAIM DO NOT PRESENT POLITICAL QUESTIONS AND ARE THEREFORE JUSTICIABLE.

The political question doctrine is a justiciability doctrine derived from the "case or controversy" requirement of Article III of the United States Constitution. *Baker v. Carr*, 369 U.S. 186, 210 (1962). It serves to both limit the jurisdiction of the federal courts and ensure adherence to the structural principle of the separation of powers. *Id.* A question is a political question when it requires a court to make a political or policy judgment rather than a legal or factual judgment that is based on reasoned distinctions. *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004).

In *Baker v. Carr*, the Court set forth a six factor test to determine when an issue is a non-justiciable 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 non-judicial 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.

369 U.S. at 210.

Although the six *Baker* factors "are probably listed in descending order of both importance and certainty," any individual factor being satisfied is sufficient to render an issue a political question. *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004). As such, an issue is a political question when its political component is "inextricable" from its legal component, and absent that high level of inseparability, federal courts retain the "virtually unflagging obligation … to exercise the jurisdiction given them." *Baker v. Carr*, 369 U.S. at 217; *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 818 (1976).

A. Mana's *Trail Smelter* Principle claim is not a political question.

Mana's *Trail Smelter* Principle claim is not a political question because it does not require this Court to make a judgment that the constitution has textually committed to one of the political branches.

1. The first *Baker* factor is not satisfied because there is not a textually demonstrable constitutional commitment of the issue to a coordinate political department.

Although foreign policy and national security decisions are textually committed by the constitution to the two political branches, a court addressing the first *Baker* factor must still determine that the specific issue posed to it does not lie outside the capabilities of the judiciary. *Schneider v. Kissinger*, 412 F.3d 190, 194 (D.C. Cir. 2005); *Baker v. Carr*, 369 U.S. 186, 210, 216 (1962). The Supreme Court has repeatedly cautioned against the assumption that all cases with a foreign policy component inherently raise a political question and that an issue is not a political question "merely because a decision may have significant political overtones." *Baker*, 369 U.S. at 211; *Japan Whaling Association v. American Cetacean Society*, 478 U.S. 211, 230 (1986). Therefore, the first *Baker* factor should be read narrowly to prevent courts from unnecessarily withdrawing from adjudicating all cases that touch on foreign relations in some way. *Alperin v. Vatican Bank*, 410 F.3d 532, 547 (9th Cir. 2005).

While this issue does contain a foreign policy component, it is not inextricable from its legal component because it is merely a vehicle to bring an environmental tort. The resolution of environmental torts brought pursuant to the Alien Torts Statute is well within the bounds of the judicial function, as "the political question theory and the separation of powers do not ordinarily prevent individual tort recoveries." *McKay v. United States*, 703 F.2d 464, 470 (10th Cir. 1983). This is especially true when jurisdiction has been affirmatively granted by legislation like the Alien

Torts Statute. Because this claim is merely an environmental tort, any political component that may be present is not inextricable from its legal component.

2. The fourth, fifth, and sixth *Baker* factors are not satisfied because this Court can adjudicate Mana's *Trail Smelter* Principle claim without disrespecting a coordinate branch of the government, contradicting a pre-existing political decision, or embarrassing the judicial system.

This Court is able to resolve Mana's *Trail Smelter* Principle claim without contradicting the political branches by improperly answering a political question. The final three *Baker* factors are only relevant when "judicial resolution of a question would contradict prior decisions taken by a political branch in those limited contexts where such contradiction would seriously interfere with important governmental interests," and no such problem arises here. *Kadic v. Karadzic*, 70 F.3d 232, 249 (2d. Cir. 1995). The current administration has consistently stated its intention to withdraw from the Paris Accords and to reverse regulatory provisions such as the Clean Power Plan, none of these measures go so far as to propose that the United States *increase* its share of global carbon emissions. *Organization of Disappearing Island Nations v. HexonGlobal Corporation*, No. 66CV2018, at *7-8 (D.N.U.I. Aug. 15, 2018). Because this Court and the political branches are both mitigating climate change, there is no risk of contradiction and any political component that may be present is not inextricable from the claim's legal component.

B. Flood's substantive due process claim is not a political question.

In addition, the United States asserts that Flood's substantive due process claim presents a non-justiciable political question because its resolution would require the court to rely on several non-judicially manageable standards or to make a value judgment regarding various acceptable levels of contribution towards climate change. However, this assertion is incorrect for two reasons: (1) plaintiff has alleged a constitutional claim which lies well within the domain of judicial expertise

and (2) the court is fully capable of providing Flood with a remedy for that constitutional claim without making a value judgment or moving beyond its competencies.

1. The second and third *Baker* factors are not satisfied because Flood's substantive due process claim presents judicially discoverable and manageable standards, and can be decided without making a value judgment.

The purpose of the second and third *Baker* factors are to verify whether it is feasible for the court to reach a decision and to provide meaningful relief in a manner that is "principled, rational, and based upon reasoned distinctions." *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004); *Equal Employment Opportunity Commission v. Peabody Western Coal Company*, 400 F.3d 774, 784 (9th Cir. 2005). Courts must resolve disputes that are properly placed before them, no matter how important, complicated, or logistically challenging those disputes may be. *Alperin v. Vatican Bank*, 410 F.3d 532, 552 (9th Cir. 2005).

The essence of Flood's public trust claim is that it possesses a substantive due process right that would require the federal government to guarantee a healthy and stable climate system. As such, Flood's claim would merely require the court to do exactly what it does in all other cases where a party seeks a novel declaration of its substantive due process rights. Here, the court should rely on notions of rights that are cognizable as either "deeply rooted in this Nation's history and tradition" or "fundamental to our scheme of ordered liberty" to determine if Flood's fundamental liberty rights have been infringed upon. *McDonald v. City of Chicago, Illinois,* 561 U.S. 742, 767 (2010). Even though this claim is unlikely to succeed on the merits, "the identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution." Therefore, this Court should make a ruling on the merits rather than dismiss the claim as being non-justiciable. *Obergefell v. Hodges*, 135 S.Ct. 2584, 2598 (2015). This Court should determine that a political question is not inextricable from Flood's substantive due process

claim because the Supreme Court's precedent provides judicially discoverable and manageable standards to resolve novel substantive due process claims.

If Flood prevails on his substantive due process claim, this Court is capable of granting him relief without making a value judgment. The key distinction lies with Flood's framing of their complaint against the United States as a substantive due process claim instead of as an environmental tort. *Organization of Disappearing Island Nations v. HexonGlobal Corporation*, No. 66CV2018, at *3 (D.N.U.I. Aug. 15, 2018). Their requested remedy is merely a declaration of their right to a healthy and stable climate system. *Id.* at *3. This means that the Court is not required to balance the utility of additional pollution against the harms alleged or otherwise make a value judgment like it would have to in an environmental tort claim. *Chevron U.S.A., Inc. v. Natural. Resources Defense Council, Inc.*, 467 U.S. 837, 847 (1984) (explaining the required balancing of competing interests that arises in transboundary nuisance cases). Because this Court is only required to determine if Flood's fundamental liberty rights have been infringed upon, it can resolve this case without being required to make a value judgment.

2. The fourth, fifth, and sixth *Baker* factors are not satisfied because this Court can adjudicate Flood's substantive due process claim without disrespecting a coordinate branch of the government, contradicting a pre-existing political decision, or embarrassing the judicial system.

The remedy sought by Flood does not raise prudential concerns as the remedy can be granted without negatively impacting the political branches. Notably, should the Court even reach this stage of the *Baker* inquiry, it is already contemplating the possibility that a fundamental right belonging to the plaintiff has been infringed upon. At that point, this Court may be called upon to exercise its aptitude "to fashion practical remedies when confronted with intractable constitutional violations." *Brown v. Plata*, 563 U.S. 493, 526 (2011). The Court in *Baker* warned against the

temptation to "create" a political question out of a fear that crafting a remedy for the prevailing party might prove to be difficult. *Baker v. Carr*, 369 U.S. 186, 198 (1962). In similar situations in the past it is not unknown for the Supreme Court to hold that the status quo is unconstitutional and then obligate the political branches to enact policy to effectuate change. *See e.g.*, *Brown v. Board of Education of Topeka, Kan.*, 349 U.S. 294, 300 (1954) (finding segregation in public schools to be unconstitutional and remanding various cases to the district courts they originated in to fashion a remedy based on equitable principles). If this Court is so inclined, it could replicate this remedy by holding that Flood has a substantive due process right to a healthy and stable climate system and then require the district court to oversee the crafting of a remedy by the political branches. In doing so, the political branches would be allowed to make all value judgments necessary. This Court could demonstrate the deference and respect to the other coordinate branches of government that the constitution requires, which means that any political question is not inextricable from this claim's legal component.

CONCLUSION

For the reasons stated above, HexonGlobal respectfully requests that this Court affirm the District Court's ruling dismissing Mana and Flood's claims and additional find that: (1) Mana cannot bring a claim under the ATS against HexonGlobal, a domestic corporation; (2) the *Trail Smelter* Principle is not a customary international norm as the Law of Nations enforceable under the ATS; (3) if this Court finds that the *Trail Smelter* Principle is customary international law it still does not impose obligations enforceable against non-governmental actors; (4) even if enforceable under the ATS, the *Trail Smelter* Principle is displaced by the Clean Air Act; (5) there is no cognizable Fifth Amendment Substantive Due Process cause of action against the federal government for failure to protect the global atmospheric climate system from disruption due to the

production, sale, and burning of fossil fuels; and (6) Mana and Flood's Law of Nations claim under the ATS and public trust claim do not present political questions and are therefore justiciable.