

1 RONALD L. OLSON (SBN 44597)
Ronald.Olson@mto.com
2 DANIEL P. COLLINS (SBN 139164)
Daniel.Collins@mto.com
3 MUNGER, TOLLES & OLSON LLP
355 South Grand Avenue, 35th Floor
4 Los Angeles, CA 90071-1560
Telephone: (213) 683-9100
5 Facsimile: (213) 687-3702

6 JEROME C. ROTH (SBN 159483)
Jerome.Roth@mto.com
7 MUNGER, TOLLES & OLSON LLP
560 Mission Street
8 San Francisco, CA 94105-2907
Telephone: (415) 512-4000
9 Facsimile: (415) 512-4077

Attorneys for Defendant
10 SHELL OIL COMPANY

11 [*Counsel Listing Continued on Next Page*]

12 UNITED STATES DISTRICT COURT
13 NORTHERN DISTRICT OF CALIFORNIA
14 OAKLAND DIVISION

15 NATIVE VILLAGE OF KIVALINA and CITY
OF KIVALINA,

16 Plaintiffs,

17 vs.

18 EXXON MOBIL CORPORATION; BP P.L.C.;
BP AMERICA, INC.; BP PRODUCTS NORTH
19 AMERICA, INC.; CHEVRON CORPORATION;
CHEVRON U.S.A., INC.; CONOCOPHILLIPS
20 COMPANY; ROYAL DUTCH SHELL PLC;
SHELL OIL COMPANY; PEABODY ENERGY
21 CORPORATION; THE AES CORPORATION;
AMERICAN ELECTRIC POWER COMPANY,
22 INC.; AMERICAN ELECTRIC POWER
SERVICES CORPORATION; DTE ENERGY
23 COMPANY; DUKE ENERGY CORPORATION;
DYNEGY HOLDINGS, INC.; EDISON
24 INTERNATIONAL; MIDAMERICAN ENERGY
HOLDINGS COMPANY; MIRANT
25 CORPORATION; NRG ENERGY; PINNACLE
WET CAPITAL CORPORATION; RELIANT
26 ENERGY, INC.; THE SOUTHERN COMPANY;
AND XCEL ENERGY, INC.,

27 Defendants.

CASE NO. C 08-01138 SBA

**NOTICE OF MOTION AND
MOTION OF CERTAIN OIL
COMPANY DEFENDANTS TO
DISMISS PLAINTIFFS'
COMPLAINT PURSUANT TO FED.
R. CIV. P. 12(b)(1);
MEMORANDUM OF POINTS AND
AUTHORITIES**

Time: December 9, 2008, 1:00 P.M.
Ctrm.: Courtroom 3, 1301 Clay Street,
Oakland, California
The Honorable Sandra B. Armstrong

1 JOHN F. DAUM (SBN 52313)
jdaum@omm.com
2 O'MELVENY & MYERS LLP
400 South Hope Street
3 Los Angeles, CA 90071-2899
Telephone: (213) 430-6111
4 Facsimile: (213) 430-6407

5 JONATHAN D. HACKER (*Pro hac vice pending*)
jhacker@omm.com
6 O'MELVENY & MYERS LLP
1625 Eye Street, NW
7 Washington, DC 20006-4001
Telephone: (202) 383-5300
8 Facsimile: (202) 383-5414

9 Attorneys for Defendant
EXXON MOBIL CORPORATION

10
11
12

13 STUART A. C. DRAKE (*Pro hac vice*)
sdrake@kirkland.com
14 ANDREW B. CLUBOK (*Pro hac vice*)
aclubok@kirkland.com
15 SUSAN E. ENGEL (*Pro hac vice*)
KIRKLAND & ELLIS LLP
16 655 Fifteenth Street, N.W.
Washington, D.C. 20005
17 Telephone: (202) 879-5173
Facsimile: (202) 879-5200

18 ELIZABETH DEELEY (SBN 230798)
edeeley@kirkland.com
19 KIRKLAND & ELLIS LLP
555 California Street
20 San Francisco, CA 94104
Telephone: (415) 439-1861
21 Facsimile: (415) 439-1500

22 Attorneys for CONOCOPHILLIPS COMPANY

23
24
25
26
27
28

ROBERT MEADOWS (*Pro hac vice*)
rmeadows@kslaw.com
TRACIE J. RENFROE (*Pro hac vice*)
trenfroe@kslaw.com

JONATHAN L. MARSH (*Pro hac vice*)
jlmarsh@kslaw.com
KING & SPALDING LLP
1100 Louisiana Street, Suite 4000
Houston, TX 77002-5213
Telephone: (713) 751-3200
Facsimile: (713) 751-3290

LISA KOBIALKA (SBN 191404)
lkobialka@kslaw.com
KING & SPALDING LLP
1000 Bridge Parkway, Suite 100
Redwood City, CA 94065
Telephone: (650) 590-0700
Facsimile: (650) 590-1900

Attorneys for Defendants
CHEVRON CORPORATION and
CHEVRON U.S.A. INC.

MATTHEW HEARTNEY (SBN 123516)
Matthew.Heartney@aporter.com
ARNOLD & PORTER LLP
777 S. Figueroa Street, 44th Floor
Los Angeles, CA 90017-5844
Telephone: (213) 243-4150
Facsimile: (213) 243-4199

PHILIP H. CURTIS (*Pro hac vice*)
Philip.Curtis@aporter.com
MICHAEL B. GERRARD (*Pro hac vice*)
Michael.Gerrard@aporter.com
ARNOLD & PORTER LLP
399 Park Avenue
New York, New York 10022
Telephone: (212) 715-1000
Facsimile: (212) 715-1399

Attorneys for BP AMERICA INC., AND
BP PRODUCTS NORTH AMERICA INC.

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1 **NOTICE OF MOTION AND MOTION**

2 TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

3 PLEASE TAKE NOTICE that on December 9, 2008 at 1:00 P.M., or as soon thereafter as
4 counsel may be heard in Courtroom 3 of the above-captioned Court, located at 1301 Clay Street,
5 Oakland, California, 94612, Defendants Shell Oil Company, Exxon Mobil Corporation, Chevron
6 Corporation, Chevron U.S.A. Inc., ConocoPhillips Company, BP America Inc., and BP Products
7 North America Inc. (“Oil Company Defendants” or “Defendants”) will and hereby do move to
8 dismiss the Complaint pursuant to Fed. R. Civ. P. 12(b)(1).

9 By this motion, Defendants seek an order from this Court dismissing the case with
10 prejudice. This motion is based on this Notice of Motion and Motion, the attached Memorandum
11 of Points and Authorities, the Declaration of Daniel P. Collins (“Collins Decl.”) filed
12 concurrently herewith and the attachments thereto, the pleadings and records on file in this action,
13 such additional authority and argument as may be presented in any Reply and at the hearing on
14 this Motion, and such other matters of which this Court may take judicial notice.

15 Pursuant to Section C of this Court’s Standing Order (as revised June 16, 2008),
16 Defendants, through counsel, certify that, as contemplated in the stipulation previously filed with
17 the Court on May 8, 2008, counsel for Defendants and counsel for Plaintiffs met and conferred
18 telephonically on May 19, 2008, concerning, *inter alia*, the grounds to be asserted in this motion.

19 **MEMORANDUM OF POINTS AND AUTHORITIES**

20 **I. INTRODUCTION**

21 This case is anything but typical. Plaintiffs seek to establish that certain segments of the
22 U.S. energy industry are responsible for all injuries allegedly caused by global warming—
23 including the coastal erosion of Plaintiffs’ remote Alaskan fishing village of Kivalina. While
24 Plaintiffs’ allegations represent a sharp departure from settled legal principles, these Plaintiffs are
25 not the first to try them out. Three different courts have considered similar lawsuits alleging that
26 various corporations, including many of the defendants here, are liable for damages caused by
27 global warming. Each court has reached the same conclusion: adjudicating such a suit would
28 impermissibly invite the judiciary to craft global warming policy, a task that the Constitution

1 reserves to the political branches of government. *See California v. General Motors Corp.*
2 (“GMC”), No. C-06-5755-MJJ, 2007 WL 2726871 at *8 (N.D. Cal. Sept. 17, 2007) (Jenkins, J.),
3 *appeal pending*, No. 07-16908 (9th Cir.); *Connecticut v. American Elec. Power Co.* (“AEP”), 406
4 F. Supp. 2d 265, 270-74 (S.D.N.Y. 2005), *appeal pending*, No. 05-5104 (2d Cir.); *see also Comer*
5 *v. Murphy Oil USA Inc.*, 1:05-CV-00436 (S.D. Miss. Aug. 30, 2007) (Oral Ruling on Motion to
6 Dismiss and Written Order of Dismissal) (respectively, Collins Decl., Exs. B, C) (dismissing the
7 case based on both the political question doctrine and lack of Article III standing), *appeal*
8 *pending*, No. 07-60756 (5th Cir.). This Court should reach the same conclusion here.

9 The extraordinary nature of Plaintiffs’ theory is apparent from the “global” nature of their
10 claims. According to Plaintiffs, the *worldwide* accumulation of greenhouse gases over the last
11 several centuries has produced global warming that has “affected the thickness, extent, and
12 duration of sea ice” around Kivalina; this loss of sea ice, in turn, “subject[s] Kivalina to coastal
13 storm waves and surges,” and these “storms and waves are destroying the land upon which
14 Kivalina is located.” Complaint (“Compl.”), ¶¶ 16, 185. Although Defendants’ emissions
15 represent only a fraction of the total greenhouse gas emissions that have been produced by
16 innumerable persons and entities throughout the world “since the dawn of the industrial
17 revolution in the 18th century,” *id.*, ¶ 125, Plaintiffs seek to hold Defendants liable for all of the
18 assertedly global-warming-induced storm damage incurred by Kivalina. By singling out
19 Defendants’ greenhouse gas emissions—from lawful energy production that is vital to the
20 national economy—as somehow having been “unreasonable,” *id.*, ¶ 250, Plaintiffs effectively
21 attempt to make Defendants alone the insurers for damage assertedly caused by emissions
22 produced over generations of human activity in every part of the globe.

23 Plaintiffs’ suit founders on two fatal constitutional and *jurisdictional* objections. *First*,
24 Plaintiffs’ allegations raise inherently nonjusticiable political questions that the judiciary lacks the
25 authority to resolve. Plaintiffs’ theory assumes that some emissions of greenhouse gases are
26 lawful, while others are not. But no statute or regulation sets forth standards of any kind for
27 determining what levels of greenhouse gas emissions are excessive for which activities. To
28 adjudicate Plaintiffs’ claims, this Court would have to make that determination on its own—

1 retroactively, no less—without guidance from the political branches. As three other district
2 courts have recognized, the only way a court could perform this task is by weighing myriad
3 competing policy considerations—economic, foreign policy, and environmental, among others—
4 that are non-legal in nature and inappropriate for judicial resolution. By what yardstick would the
5 Court assess what level of greenhouse gas emissions is “too much” for a particular activity? How
6 would the Court weigh the competing effects of such a de facto capping of emissions on the
7 economy, the national security, and the Nation’s foreign policy? At what point do increases in
8 energy prices, disruption to the national economy, and increased dependence upon foreign oil
9 become sufficiently great as to outweigh the asserted benefits of limiting the energy sector’s
10 emissions to what Plaintiffs think is reasonable (as opposed, for example, to limiting emissions
11 elsewhere or adopting other alternative measures)? Plaintiffs’ effort to enlist this Court in
12 effectively setting greenhouse gas emissions standards for the United States (if not the world as a
13 whole) would directly contravene the principle that large-scale societal change should be
14 developed through the democratic process, where competing and incommensurate policy trade-
15 offs can be made.

16 *Second*, Plaintiffs lack standing under Article III to raise their claims because they allege
17 no facts showing that their injuries are “fairly traceable” to the actions of Defendants. Plaintiffs’
18 theory of global-warming liability, as set forth in the Complaint, forecloses proof of the very
19 causal connection the Constitution requires. By Plaintiffs’ own account, countless entities and
20 persons emit greenhouse gases throughout the world and have done so for hundreds of years, and
21 it is only the overall accumulation of these gases in the atmosphere that allegedly produces global
22 warming, which in turn assertedly contributed to the injuries of which Plaintiffs complain.
23 Because Plaintiffs’ own theory is that their injuries were caused by an undifferentiated mixing of
24 gases from innumerable sources, including billions of independent third-parties not before the
25 Court, Plaintiffs cannot establish that their injuries are “fairly traceable” to *Defendants’*
26 emissions. Plaintiffs also lack standing because the causal chain they advance is far too
27 attenuated to satisfy Article III standards. Plaintiffs lay out a theory that begins with Defendants’
28 greenhouse gas emissions and ends with an Alaskan island facing increased storm damage, a

1 causal chain requiring multiple tenuous intermediate leaps all along the way. Article III clearly
2 demands more.

3 What Plaintiffs attempt to style as an ordinary tort suit is thus an improper attempt to
4 wrest from the political branches the authority to make the fundamental choices required to
5 develop global warming policy. Centuries of tort law offer no examples of even remotely
6 comparable questions being adjudicated by courts, and Plaintiffs' reliance on the lingo of torts—
7 "nuisance" and "proximate cause"—is wholly insufficient to paper over the resulting justiciability
8 problems. The political branches of government have devoted substantial effort to considering
9 the proper approach to global warming, including negotiating with foreign counterparts in the
10 interest of developing appropriately balanced global solutions. It is not the province of the courts
11 to intermeddle in these efforts when the strictures of Article III are not met.

12 **II. STATEMENT OF FACTS**

13 **A. The Political Branches' Efforts to Formulate a National Policy on Global** 14 **Climate Change**

15 The President and Congress have devoted increasing attention over the last thirty years to
16 the complex policy issues associated with global warming, carefully researching and evaluating
17 how government regulation could affect the economy, national security, and foreign relations.
18 These extensive efforts reflect the fact that global warming presents challenges of an entirely
19 different order from other environmental issues. For one thing, the primary greenhouse gas—
20 carbon dioxide—differs in obvious respects from conventional "pollutants"; for example, it is
21 produced every time a person exhales. Moreover, assessing the significance of particular
22 emissions of greenhouse gases involves a level of complexity that greatly transcends that
23 associated with a single-point source discharging a pollutant into a discrete body of water, *see*,
24 *e.g.*, *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 53-54 (1987)
25 (discussing the Clean Water Act), or the remediation of a single piece of property damaged by
26 environmentally hazardous substances, *see, e.g.*, *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543
27 U.S. 157, 160-63 (2004) (discussing Comprehensive Environmental Response, Compensation
28 and Liability Act (CERCLA)). Plaintiffs emphasize in their Complaint that global warming is a

1 *global* phenomenon, caused by the accumulated effects of activities throughout the world since
2 the 18th century. Compl., ¶ 125, 255. That greenhouse gases are emitted around the world, by
3 every industrial, agricultural, residential, and governmental concern, and indeed by every person,
4 only serves to make the policy tradeoffs inherent in any environmental regulation that much more
5 pronounced. As the EPA has commented, “[i]t is hard to imagine any issue in the environmental
6 area having greater ‘economic and political significance’ than regulation of activities that might
7 lead to global climate change.” *Control of Emissions of New Highway Vehicles and Engines*, 68
8 Fed. Reg. 52922, 52928 (Sept. 8, 2003) (hereinafter “*Control of Emissions*”). The justiciability of
9 Plaintiffs’ claims must accordingly be assessed against the backdrop of the political branches’
10 decades-long efforts in this area. Notably, the political branches thus far have declined to adopt
11 emission caps or standards, largely because of competing economic, energy, and foreign policy
12 concerns.¹

13 **1. Early Congressional Activity**

14 Early congressional efforts concerning global climate change centered on researching and
15 understanding the issue. Congress focused primarily on non-regulatory policy approaches, and
16 expressly declined to adopt binding emission reduction measures in the absence of a
17 comprehensive international regime.

18 For example, in 1978, Congress established a “national climate program” to improve
19 understanding of global climate change through research, data collection, and international
20 cooperation. National Climate Program Act of 1978, 15 U.S.C. § 2901, *et seq.* Two years later,
21 Congress directed the Office of Science and Technology Policy to engage the National Academy
22 of Sciences in a study of the “projected impact, on the level of carbon dioxide in the atmosphere,
23 of fossil fuel combustion, coal-conversion and related synthetic fuels activities.” Energy Security
24 Act, Pub. L. No. 96-294, tit. VII, § 711, 94 Stat. 611, 774-75 (1980). Underscoring the need for a
25 comprehensive approach to this multi-faceted and inherently global issue, Congress in 1987
26 enacted the Global Climate Protection Act, Title XI of Pub. L. No. 100-204, 101 Stat. 1407,

27 ¹ The relevant actions taken by the political branches are properly subject to judicial notice in
28 determining whether a political question is presented. *Corrie v. Caterpillar, Inc.*, 503 F.3d 974,
978 n.2 (9th Cir. 2007).

1 which ordered the Environmental Protection Agency (“EPA”) to propose a “coordinated national
2 policy on global climate change,” *id.*, § 1103(b), and directed the State Department to work
3 “through the channels of multilateral diplomacy” to coordinate efforts addressing global climate
4 change, *id.*, § 1103(c).

5 In 1990, Congress enacted the Global Change Research Act, which established a ten-year
6 research program for global climate issues. 15 U.S.C. §§ 2931-2938. Congress also amended the
7 Clean Air Act in 1990, stating that the United States’ domestic approach to global climate change
8 is “to develop, evaluate and demonstrate *nonregulatory* strategies and technologies for air
9 pollution prevention.” 42 U.S.C. § 7403(g) (emphasis added). Congress stated that “[n]othing in
10 this subsection shall be construed to authorize the imposition on any person of air pollution
11 control requirements.” *Id.*

12 Mindful of the profound impacts that would result from limitations on greenhouse gases,
13 Congress in 1992 directed the Energy Department to report on “the feasibility and economic,
14 energy, social, environmental, and competitive implications, including implications for jobs,” of
15 stabilizing and reducing greenhouse gas emission levels. Energy Policy Act of 1992, Pub. L. No.
16 102-486, § 1601(5), 106 Stat. 2776, 3002. Congress’s stated strategy was to “analyze the
17 important technical and policy issues that will enable us to make wiser decisions on more
18 dramatic and possibly higher cost actions which should be undertaken only in the context of
19 concerted international action.” H.R. REP. No. 102-474, pt. 1, at 152 (1992), *reprinted in* 1992
20 U.S.C.C.A.N. 1953, 1975.

21 **2. U.S. Participation in International Negotiations and Protocols**

22 As Congress passed the Energy Policy Act of 1992, President George H.W. Bush signed,
23 and the Senate ratified, the United Nations Framework Convention on Climate Change
24 (“UNFCCC”). The UNFCCC was a conceptual agreement among 154 nations to reduce
25 atmospheric concentrations of carbon dioxide and other greenhouse gases for the purpose of
26 “prevent[ing] dangerous anthropogenic [*i.e.*, human-induced] interference with the [Earth’s]
27 climate system.” S. TREATY DOC. No. 102-38, art. 2, p.5 (1992). Member nations of the
28 UNFCCC subsequently negotiated and adopted the Kyoto Protocol on December 11, 1997, which

1 called for mandatory limits or reductions in greenhouse gas emissions for developed nations, but
2 *not* for developing countries (such as China and India). *See* 37 I.L.M. 22 (1998).

3 President Clinton signed the Kyoto Protocol, but did not present it to the Senate for
4 ratification, having stated that the “United States will not assume binding obligations unless key
5 developing nations meaningfully participate in this effort.” Remarks at the National Geographic
6 Society, 2 PUB. PAPERS 1408, 1410 (Oct. 22, 1997). By a 95-0 vote, the Senate adopted a
7 resolution objecting to any international protocol that would result in serious harm to the United
8 States economy or that exempted developing countries from binding greenhouse gas limits or
9 reductions. S. RES. 98, 105th Cong. (1997). Thereafter, Congress passed a series of
10 appropriations bills that effectively barred the EPA from implementing the Kyoto Protocol. *See*,
11 *e.g.*, Pub. L. No. 105-276, 112 Stat. 2461, 2496 (1998); Pub. L. No. 106-74, 113 Stat. 1047, 1080
12 (1999); Pub. L. No. 106-377, 114 Stat. 1141, 1441A-41 (2000).

13 3. Recent Developments

14 a. U.S. International Efforts

15 The Bush Administration has opposed the Kyoto Protocol because it exempts developing
16 nations who are major emitters, fails to address two major pollutants, and would have a negative
17 economic impact on the United States. Letter from President George W. Bush to Senators Hagel,
18 Helms, Craig, & Roberts (Mar. 13, 2001), *available at* <[http://www.whitehouse.gov/news/
19 releases/2001/03/20010314.html](http://www.whitehouse.gov/news/releases/2001/03/20010314.html)>. The Bush Administration’s policy “emphasizes international
20 cooperation and promotes working with other nations to develop an efficient and coordinated
21 response to global climate change.” *Control of Emissions*, 68 Fed. Reg. at 52933.

22 On December 15, 2007, the Bush Administration agreed to the “Bali Roadmap,” which
23 sets out an agenda for two years of diplomatic negotiations on a new global agreement to reduce
24 greenhouse gas emissions. *See* Statement by the Press Secretary (Dec. 15, 2007), *available at*
25 <<http://www.whitehouse.gov/news/releases/2007/12/20071215-1.html>>. In doing so, the
26 Administration emphasized that, “for these negotiations to succeed, it is essential that the major
27 developed *and developing* countries be prepared to negotiate commitments, consistent with their
28 national circumstances, that will make a due contribution to the reduction of global emissions.”

1 *Id.* (emphasis added). The Administration also reiterated that “any arrangement must also take
2 into account the legitimate right of the major developing economies and indeed all countries to
3 grow their economies, develop on a sustainable basis, and have access to secure energy sources.”

4 *Id.* These negotiations are well underway in a series of “Major Economies Meetings.” *See* U.S.
5 Dept. of Energy, *Major Economies Process on Energy Security and Climate Change*, available
6 at, <http://www.eere.energy.gov/international/major_economies.html>.

7 **b. Federal Domestic Initiatives**

8 While the political branches have been working with the international community to
9 develop a global solution to climate change, they also have been active in developing domestic
10 policies on the subject. In February 2002, President Bush announced a voluntary, incentive-
11 driven approach intended to reduce domestic greenhouse gas emission intensity levels by 18% by
12 2012. *See Control of Emissions*, 68 Fed. Reg. at 52931-52932. Consistent with this voluntary
13 policy, the EPA refused to issue new mandatory rules on motor vehicle greenhouse gas emissions
14 for climate change purposes, stating that it did not possess authority under the Clean Air Act to do
15 so, and that, in any event, it would have declined to exercise such authority for scientific and
16 policy reasons. *Id.* at 52925-52933.

17 After the Supreme Court held in *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007), that the
18 EPA did in fact possess such authority under the Clean Air Act, President Bush issued an
19 Executive Order calling for cooperation among agencies with respect to motor vehicle
20 greenhouse gas emissions. Exec. Order No. 13432, 72 Fed. Reg. 27717 (May 14, 2007). On
21 December 19, 2007, Congress enacted new legislation that, *inter alia*, increases fuel economy
22 standards in part to reduce greenhouse gas emissions from motor vehicles and directs the
23 Secretary of Energy to conduct research aimed at developing new approaches “to capture and
24 sequester, or use[,] carbon dioxide to lead to an overall reduction of carbon dioxide emissions.”
25 Pub. L. No. 110-140, § 702, 121 Stat. 1492, 1705 (amending 42 U.S.C. § 16293). The EPA also
26 continues to take a lead role in addressing global climate change. On March 27, 2008, the EPA
27 announced that it will request, through an Advanced Notice of Proposed Rulemaking, public
28 input on possible regulations on greenhouse gas emissions under the Clean Air Act. *See* Letter

1 from EPA Administrator Stephen L. Johnson to Senators Boxer and Inhofe (Mar. 27, 2008),
2 available at <[http://epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=](http://epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=48cc5c7d-56ef-426b-ba32-d027aad08eb6)
3 [48cc5c7d-56ef-426b-ba32-d027aad08eb6](http://epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=48cc5c7d-56ef-426b-ba32-d027aad08eb6)>.

4 Meanwhile, Congress continues actively to debate whether, and to what extent, the U.S.
5 should undertake efforts to mandate reductions in domestic greenhouse gas emissions in the
6 absence of binding commitments from major developing economies, such as China and India.
7 Most notably, the Lieberman-Warner Climate Security Act (S. 3036)—which, *inter alia*, would
8 have set *prospective* mandatory caps on domestic greenhouse gas emissions—was debated on the
9 floor of the Senate in June 2008. However, the bill was ultimately blocked after opponents of the
10 measure defeated an effort to end debate on a key amendment to the bill. *See* Washington Post,
11 *Senate Leaders Pull Measure on Climate*, at A3 (June 7, 2008), available at <[http://www.](http://www.washingtonpost.com/wp-dyn/content/article/2008/06/06/AR2008060600333.html)
12 [washingtonpost.com/wp-dyn/content/article/2008/06/06/AR2008060600333.html](http://www.washingtonpost.com/wp-dyn/content/article/2008/06/06/AR2008060600333.html)>; *see also* 154
13 Cong. Rec. S5334 (June 6, 2008) (Senate vote defeating effort to close debate on sponsor’s
14 substitute amendment for S. 3036). In addition, shortly before the Senate’s action, the White
15 House issued a statement explaining the reasons for the President’s opposition to the bill and
16 affirming his intention to veto it if passed by Congress. *See* <[http://www.whitehouse.gov/omb/](http://www.whitehouse.gov/omb/legislative/sap/110-2/saps3036-s.pdf)
17 [legislative/sap/110-2/saps3036-s.pdf](http://www.whitehouse.gov/omb/legislative/sap/110-2/saps3036-s.pdf)>. Notably, neither the Lieberman-Warner bill, nor any of
18 the other major global-warming bills introduced in the current Congress,² would create
19 *retroactive* liability for emissions of the sort Plaintiffs ask the Court to create here.

20 The Executive Branch likewise continues actively to consider measures aimed at
21 addressing global warming. On April 16, 2008, President Bush announced that the United States
22 would endeavor to stop the growth of U.S. greenhouse gas emissions by the year 2025. *See*
23 *President Bush Discusses Climate Change* (Apr. 16, 2008), available at <[http://www.whitehouse.](http://www.whitehouse.gov/news/releases/2008/04/20080416-6.html)
24 [gov/news/releases/2008/04/20080416-6.html](http://www.whitehouse.gov/news/releases/2008/04/20080416-6.html)>. Citing the need for a “rational, balanced
25 approach” that would “reduce greenhouse gases, reduce our dependence on oil, and keep our

26 ² *E.g.*, Climate Stewardship and Innovation Act of 2007, S. 280 (Sens. Lieberman and McCain);
27 Safe Climate Act of 2007, H.R. 1590 (Reps. Waxman and Allen); Low Carbon Economy Act of
28 2007, S. 1766 (Sens. Bingaman and Specter); Electric Utility Cap and Trade Act of 2007, S. 317
(Sens. Feinstein and Carper); Global Warming Pollution Reduction Act, S. 309 (Sens. Sanders
and Boxer).

1 economies vibrant,” the President explained that “America’s national plan will be a
 2 comprehensive blend of market incentives and regulations to reduce emissions by encouraging
 3 clean and efficient energy technologies.” *Id.* The President also reiterated the longstanding
 4 position that the United States would be willing to commit to a binding international agreement
 5 only if other major greenhouse gas producers (such as China and India) would do the same. *Id.*
 6 The President also emphasized that, given the “far-reaching impact” of any decision to reduce
 7 greenhouse gas emissions, the matter “should not be left to unelected regulators and judges but
 8 should be debated openly and made by the elected representatives of the people they affect.” *Id.*

9 **B. Plaintiffs’ Complaint**

10 It is against this backdrop of substantial and ongoing political branch activity with respect
 11 to greenhouse gas emissions and global climate change that Plaintiffs ask this Court to decide
 12 whether Defendants can and should be held liable, based on their emissions of greenhouse gases
 13 over the past several decades, for harms allegedly caused by global warming. Plaintiffs are the
 14 Native Village of Kivalina and the City of Kivalina, the self-described “governing bodies” of a
 15 small Alaskan village of 400 persons located north of the Arctic Circle. Compl., ¶ 1. The
 16 present-day village is situated at the tip of a slender barrier island that is exposed to extreme
 17 Arctic weather conditions. *See* U.S. Army Corps of Engineers, Alaska District, *Alaska Village*
 18 *Erosion Technical Assistance Program: An Examination of Erosion Issues in the Communities of*
 19 *Bethel, Dillingham, Kaktovik, Kivalina, Newtok, Shishmaref, and Unalakleet* 21-23 (Apr. 2006)
 20 (Collins Decl., Ex. D) (hereinafter “*Alaska Village Erosion*”); United States General Accounting
 21 Office, *Alaska Native Villages: Most Are Affected by Flooding and Erosion, but Few Qualify for*
 22 *Federal Assistance* 29-30 (Dec. 2003) (Collins Decl., Ex. E).³

23 According to Plaintiffs’ Complaint, Defendants have “for many years” emitted
 24 “greenhouse gases,” such as carbon dioxide and methane. Compl., ¶¶ 3, 163-80. As a result of

25 _____
 26 ³ Plaintiffs cite both of these governmental reports in their Complaint, *see* Compl. ¶ 185 & n.60;
 27 *id.*, ¶ 186 & n.61, and they are thus appropriate subjects for judicial notice against the party
 28 whose pleading references them. *See Dreiling v. American Express Co.*, 458 F.3d 942, 946 n.2
 (9th Cir. 2006) (court considering a motion to dismiss “may consider documents referred to in the
 complaint”); *see also Corrie*, 503 F.3d at 979 (in considering whether a case presents a political
 question a court may “tak[e] into consideration facts beyond the complaint”).

1 these emissions—which are generated through such economically vital activities as oil
2 exploration, electricity generation, and refining, *id.*, ¶¶ 163-80—Defendants have “contribut[ed]
3 to global warming,” *id.*, ¶ 2, and thus must be held singularly “responsible” for the “special
4 injuries” suffered by Plaintiffs, namely, increased erosion to Kivalina’s barrier island caused by
5 winter storms that previously would have been buffered by sea ice (which sea ice, Plaintiffs
6 contend, has been reduced by global warming), *id.*, ¶¶ 3, 4, 16, 185.

7 The numbers alleged in Plaintiffs’ Complaint, together with those in the other documents
8 they cite, give some context to Plaintiffs’ allegation that Defendants “are substantial contributors
9 to global warming.” Compl., ¶ 260. Plaintiffs explicitly allege specific numbers for the total
10 tonnage (in “carbon dioxide equivalents”) of all of the alleged 2006 greenhouse gas emissions of
11 the Oil Company Defendants except for ExxonMobil (but apparently including, in some
12 instances, affiliated companies not before the Court). *See, e.g., id.*, ¶¶ 23, 29, 34, 46; *see also id.*,
13 ¶ 23 n.1 (explaining that carbon dioxide equivalent is “the universal unit of measurement used to
14 indicate the global warming potential of each of the six greenhouse gases”). The total of these
15 four numbers (converting them from short tons into metric tons) is approximately 275.2 million
16 metric tons. Compl., ¶ 23, n.2 (numbers in Complaint are shown in short tons). But another
17 document referenced in the Complaint reveals that in the United States alone, total anthropogenic
18 (man-made) U.S. emissions of greenhouse gases in 2006 totaled approximately 7075.6 million
19 metric tons of carbon dioxide equivalent, meaning that the alleged emissions of the four
20 companies amount to less than 4% of the U.S. total. *See Energy Information Administration,*
21 *Emissions of Greenhouse Gases in the U.S. 2006* at 1 (Collins Decl., Ex. F) (hereinafter
22 “*Emissions of Greenhouse Gases*”) (cited in Compl., ¶ 167, n.45, which gives the web address for
23 the 2006 report, but incorrectly describes it as the 2005 report). That same report estimates (using
24 only carbon dioxide figures) that the U.S. share of anthropogenic emissions is approximately 22%
25 of the worldwide total, *id.* at 6, meaning that Plaintiffs’ idea of a “substantial contribution” for
26 these four companies is one that amounts to less than 1% of worldwide anthropogenic emissions.
27 In addition, because Plaintiffs allege that greenhouse gas emissions have been accumulating in
28 the atmosphere “since the dawn of the industrial revolution in the 18th century,” Compl., ¶ 125,

1 these companies' emissions would be yet an even smaller fraction than 1%.

2 Unsurprisingly, Plaintiffs' Complaint does not allege that Defendants' fraction of
3 emissions by itself caused them any injury, but only that Defendants' alleged emissions
4 contributed to global warming "*in combination with emissions and conduct of others*" who are
5 not before the Court. Compl., ¶ 255 (emphasis added). Moreover, Plaintiffs do not allege that
6 they can trace any of the alleged effects of global warming (including their alleged injuries) to
7 any specific emissions of Defendants. On the contrary, the Complaint asserts that "greenhouse
8 gas emissions resulting in global warming are inherently interstate in nature," *id.*, ¶ 254, and that
9 Defendants' emissions "rapidly mix in the atmosphere" and "inevitably merge[] with the
10 accumulation of emissions in California and in the world," *id.*, ¶¶ 10, 254. Plaintiffs thus seek to
11 impose liability for emissions in a manner that is unbounded by temporal or geographic
12 limitations: the Complaint seeks damages for "defendants' *past and ongoing* contributions to
13 global warming," *id.*, ¶ 6 (emphasis added), arising from all of Defendants' operations "*no matter*
14 *where such operations are located*," *id.*, ¶ 254 (emphasis added). Indeed, even though Plaintiffs
15 allege injury to property north of the Arctic Circle, they rely on Defendants' alleged emissions
16 activity *in California* to justify their filing this suit in a forum far from home, with no particular
17 connection to their claims. *See, e.g., id.*, ¶ 10.

18 Based on these allegations, the Complaint seeks wide-ranging monetary damages and
19 purports to assert, under "federal common law" and "applicable" (though unspecified) state law,
20 causes of action for public and private nuisance, civil conspiracy, and concert of action. Compl.,
21 ¶¶ 6, 249-82. Plaintiffs' alleged damages consist of injury to their property and the costs of
22 relocating the entire village. *E.g., id.*, ¶ 266. Plaintiffs seek these damages notwithstanding that
23 "[e]rosion issues are not the only reasons why [Kivalina] want[s] to relocate," as village residents
24 want to leave their barrier island for the additional reason that "their current location has made it
25 infeasible for them to have running water and sewer hookup," a scenario that has "little to do
26 with" erosion. *See Alaska Village Erosion, supra*, (Collins Decl., Ex. D) at 3. Plaintiffs also
27 pursue this suit now, against these Defendants, even though "[t]he community has long assumed
28 that the island would succumb to natural forces, and that [it] would have to move." *Id.* at 24.

1 Indeed, discussions about relocating the village have been going on for decades. *See id.*

2 **III. ARGUMENT**

3 **A. Plaintiffs' Global Warming Claims Raise Nonjusticiable Political Questions**

4 Under the system of separated powers that is the hallmark of our constitutional
5 government, the judiciary has no authority to “formulate national policies or develop standards
6 for matters not legal in nature”; those matters are committed for resolution to the Legislative and
7 Executive Branches. *Japan Whaling Ass’n v. American Cetacean Soc’y*, 478 U.S. 221, 230
8 (1986) (citation omitted). As a result, the courts lack jurisdiction over “those controversies which
9 revolve around” such legislative or executive policy choices. *Id.* (citation omitted); *see also*
10 *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 981-82 (9th Cir. 2007) (political question doctrine
11 implicates “a court’s power under Article III to hear a case” and precludes courts from making
12 policy decisions that belong to political branches); *see also No GWEN Alliance of Lane County,*
13 *Inc. v. Aldridge*, 855 F.2d 1380, 1384 (9th Cir. 1988) (political question doctrine bars courts from
14 deciding, for example, “the merits of national defense policy”).⁴ Adjudication of Plaintiffs’
15 claims would violate these settled principles by improperly requiring this Court to resolve at least
16 two political questions.

17 *First*, to adjudicate Plaintiffs’ claim that Defendants should be held liable for “their
18 emissions of large quantities of greenhouse gases” that “contribut[e] to global warming,” Compl.,
19 ¶¶ 2-3, the Court would have to take upon itself the task of defining what quantities of carbon
20 dioxide and methane were *wrongfully* emitted by each Defendant throughout the world over the
21 course of many decades. This question, however, inescapably involves initial political judgments
22 of the sort that only the political branches can make. To determine what constitutes a wrongful
23 level of emissions, the Court would have to determine—without any guidance from the political
24 branches—what amount of greenhouse gases Defendants *should* have emitted, taking into
25 account (1) any resulting contribution to global warming from these emissions; (2) the very

26 ⁴ Because the political question doctrine, like standing, goes to the Court’s Article III jurisdiction
27 over the matter, these threshold jurisdictional issues can be resolved in any order. *Sinochem Int’l*
28 *Co. Ltd. v. Malaysia Intern. Shipping Corp.*, 127 S.Ct. 1184, 1191 (2007) (although jurisdictional
questions generally must be resolved before addressing the merits, “there is no mandatory
‘sequencing of jurisdictional issues’”) (citation omitted).

1 significant competing concerns about national energy policy and foreign policy (including the
2 concern that self-imposed caps reduce U.S. leverage in negotiating agreements with other
3 nations), as well as the negative effects that imposition of mandatory domestic emissions caps
4 would have on the national economy; (3) the extent to which comparable reductions in
5 greenhouse gases could be more effectively achieved through other and different domestic
6 regulatory measures that are more broadly targeted; and (4) how these balances might reasonably
7 have been struck at different points in time over the past several decades. As the Supreme Court
8 recently stated, the courts “have neither the expertise nor the authority to evaluate these policy
9 judgments.” *Massachusetts*, 127 S. Ct. at 1463.

10 *Second*, even assuming the Court could somehow set standards for determining how much
11 greenhouse gas emissions for energy production are too much, Plaintiffs’ claims still raise a
12 further political question. In order for *Plaintiffs* to have a cause of action, they must show, not
13 merely that Defendants’ conduct was wrongful in the abstract, but also that the alleged wrongful
14 emissions were sufficiently causally connected to Plaintiffs’ injuries to warrant the imposition of
15 liability from Defendants to Plaintiffs. But there are no judicially manageable standards for
16 determining how to assign liability for particular injuries that are assertedly caused by global
17 warming. Plaintiffs allege that the greenhouse gases emitted worldwide over the last several
18 centuries by innumerable persons and enterprises “rapidly mix in the atmosphere and cause an
19 increase in the atmospheric concentration of carbon dioxide and other greenhouse gases
20 worldwide.” Compl., ¶ 254 (emphasis added). Because Plaintiffs’ own theory is that causation is
21 mediated (in a highly attenuated fashion) through the contributions of billions of persons to an
22 undifferentiated and global pool of emissions that has accumulated over centuries, the inevitably
23 *ad hoc* policy judgments and trade-offs that would have to be made to assign fault can only be
24 done by a legislature and not by a court.

25 Unsurprisingly, every court to have considered similar allegations of global warming
26 injury has found them nonjusticiable under the political question doctrine. *See GMC*, 2007 WL
27 2726871 at *8 (suit alleging that defendant auto manufacturers produced vehicles that emitted
28 greenhouse gases, leading to global warming); *AEP*, 406 F. Supp. 2d at 270-74 (suit alleging that

1 defendant utilities emitted greenhouse gas, leading to global warming); *Comer v. Murphy Oil*
 2 *USA Inc., supra*, (Oral Ruling on Motion to Dismiss) (Collins Decl., Ex. B) at 34-41 (suit alleging
 3 that defendant oil and energy companies' greenhouse gas emissions heated the Gulf of Mexico,
 4 exacerbating the strength of Hurricane Katrina).

5
 6 **1. A Case Presents a Political Question if Any One of the Six Alternative**
Tests Set Forth in *Baker v. Carr* Is Satisfied

7 From its earliest days, the federal judiciary has held that "political questions" are reserved
 8 for the political branches of government, and are not the proper domain of courts. *See generally*
 9 *Baker v. Carr*, 369 U.S. 186, 210-17 (1962) (reviewing history of "political question" doctrine).
 10 Firmly rooted in fundamental constitutional principles of separation of powers, *see Corrie*, 503
 11 F.3d at 980 (citing *Baker*, 369 U.S. at 210), the political question doctrine "excludes from
 12 judicial review those controversies which revolve around policy choices and value determinations
 13 constitutionally committed for resolution to the halls of Congress or the confines of the Executive
 14 Branch," *EEOC v. Peabody W. Coal Co.*, 400 F.3d 774, 784 (9th Cir. 2005) (quoting *Japan*
 15 *Whaling Ass'n*, 478 U.S. at 230). The doctrine thus precludes courts from endeavoring to address
 16 policy matters that are inappropriate for judicial resolution. *Baker*, 369 U.S. at 210.

17 The controlling standards for determining whether a case raises a nonjusticiable political
 18 question were set forth in *Baker v. Carr*. The Supreme Court identified six independent and
 19 alternative formulations that characterize a case as falling within that doctrine:

20 [1] a textually demonstrable constitutional commitment of the issue to a
 21 coordinate political department; *or* [2] a lack of judicially discoverable and
 22 manageable standards for resolving it; *or* [3] the impossibility of deciding
 23 without an initial policy determination of a kind clearly for nonjudicial
 24 discretion; *or* [4] the impossibility of a court's undertaking independent
 25 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.

26 *Id.* at 217 (emphasis added). If any "one of these formulations is inextricable from the case at
 27 bar," the court should dismiss the suit as nonjusticiable on the ground that it involves a political
 28 question. *Id.*; *see also Alperin v. Vatican Bank*, 410 F.3d 532, 547 (9th Cir. 2005) ("[A]ny single

1 [Baker] test can be dispositive”); *United States v. Mandel*, 914 F.2d 1215, 1222 (9th Cir. 1990)
 2 (“Implicating any one of these factors renders a question ‘political’ and thus nonjusticiable.”).

3 **2. Plaintiffs’ Theory That Defendants’ Emissions Were at a Level That**
 4 **“Wrongfully” Contributed to Global Warming Raises Inherently**
 5 **Political Questions**

6 Plaintiffs’ Complaint confirms that all of their claims are based on the premise that
 7 Defendants emitted too large a quantity of greenhouse gases. The *sole* injuries alleged by
 8 Plaintiffs are that, due to changes in “the thickness, extent, and duration of sea ice that forms
 9 along Kivalina’s coast,” Kivalina is more vulnerable to storms, which “now routinely batter
 10 Kivalina and are destroying its property to the point that Kivalina must relocate or face
 11 extermination.” Compl., ¶ 185. The Complaint alleges that these changes in sea ice formation
 12 are due to “[r]ising temperatures caused by global warming.” *Id.* Global warming, in turn, “is
 13 caused by emissions of greenhouse gases.” *Id.*, ¶ 133. And because “Defendants contribute to
 14 global warming through their emissions of large quantities of greenhouse gases,” the Complaint
 15 alleges that they should be held legally responsible for Plaintiffs’ storm-related injuries. *Id.*, ¶ 3.

16 In challenging Defendants’ emissions, Plaintiffs pointedly do *not* focus on any
 17 geographically specific activities of the Defendants. They do not, for example, contend that
 18 Defendants took any action in the immediate vicinity of Kivalina that had any sort of direct and
 19 specific impact on that village. On the contrary, Plaintiffs’ theory is that the emissions of
 20 “greenhouse gases from defendants’ operations, *no matter where such operations are located,*
 21 rapidly mix in the atmosphere and cause an increase in the atmospheric concentration of carbon
 22 dioxide and other greenhouse gases *worldwide.*” Compl., ¶ 254 (emphasis added).

23 Accordingly, to adjudicate Plaintiffs’ claims, the Court necessarily would have to
 24 determine what lesser quantity of emissions the Defendants should have been releasing over the
 25 last several decades. As every court confronted with similar claims has found, this issue raises a
 26 nonjusticiable political question.

27 **a. Determining “Wrongful” Levels of Emissions Would Require**
 28 **the Court to Make Initial Policy Judgments That Are**
 Inherently Political in Nature

The third *Baker* test is triggered when it is impossible to decide a case “without an initial

1 policy determination of a kind clearly for nonjudicial discretion.” *Baker*, 369 U.S. at 217. This
2 test recognizes that, while the judiciary may *effectuate* regulatory programs that the political
3 branches have adopted, *see Massachusetts*, 127 S. Ct. at 1463 (holding that Clean Air Act
4 imposed certain limits on EPA’s authority to decline to adopt global-warming-based motor
5 vehicle emissions standards), the courts ““are fundamentally underequipped to *formulate* national
6 policies or develop standards for matters not legal in nature.”” *Japan Whaling*, 478 U.S. at 230
7 (citation omitted) (emphasis added). Put simply, the nature, complexity, scope, and multi-faceted
8 implications of some problems call for an initial exercise of legislative or executive policy
9 judgment before the courts may intervene.

10 That is the case here. As then-Judge Jenkins concluded in rejecting analogous claims
11 against the automobile industry, the third *Baker* test “largely controls the analysis in the current
12 case due to the complexity of the initial global warming policy determinations that must be made
13 by the elected branches prior to the proper adjudication” of the plaintiffs’ suit. *GMC*, 2007 WL
14 2726871 at *6. Plaintiffs, of course, identify no statute or regulation that supports their claims
15 and that could provide the necessary predicate policy judgments that could guide courts in
16 determining when the emission of greenhouse gases crosses the line from lawful energy
17 production to unlawful, liability-attaching conduct. But in the absence of such a legislatively
18 created framework that reflects and incorporates the political branches’ evaluation and weighing
19 of the competing concerns implicated by the worldwide phenomenon of global warming, the
20 courts “*have neither the expertise nor the authority to evaluate these policy judgments.*”
21 *Massachusetts*, 127 S. Ct. at 1463 (emphasis added).

22 Consideration of the specific policy questions that Plaintiffs seek to foist upon the Court
23 demonstrates how inappropriate this matter is for judicial resolution. In order to determine the
24 supposedly optimal amount of greenhouse gas emissions that Defendants *should* have been
25 emitting from energy production—so as not to “*unreasonably* interfere with the use and
26 enjoyment of Plaintiffs’ properties,” Compl., ¶ 265 (emphasis added)—the Court would have to
27 weigh and evaluate a variety of competing policy judgments that are entirely non-legal in nature.
28 Among other things, the Court necessarily would have to determine what level of reduced energy

1 production would properly balance the concerns about climate change with such competing
2 considerations as the health of the national economy, the need for energy independence, the effect
3 on national security, and the effect on foreign relations (including the ability to secure multi-
4 lateral agreements). *See AEP*, 406 F. Supp. 2d at 272-73; *GMC*, 2007 WL 2726871 at *8.

5 Moreover, this balancing of competing concerns could not be done in isolation, with a
6 myopic focus only on the U.S. oil and energy industries. Because Plaintiffs allege that *all*
7 greenhouse emissions from *all* sources “rapidly mix in the atmosphere” and that Defendants’
8 emissions could have an impact on global warming only “in combination with emissions and
9 conduct of others,” Compl., ¶¶ 254-55, any evaluation of the optimal level of emissions from
10 Defendants’ energy activities is inescapably a *comparative* judgment—in other words, one must
11 consider the relative contributions to emissions reductions that are appropriate from all sectors of
12 the economy, not just the energy sector. *See AEP*, 406 F. Supp. 2d at 273 (noting that one of the
13 “initial policy determinations” that would have to be made is *which* industries and activities
14 should be expected to reduce their comparative emissions); *cf.* Anchorage Daily News, *PETA*
15 *Wants Kivalina to Sue Meat Producers* (Mar. 5, 2008), available at <[http://www.adn.com/
16 news/alaska/story/335887.html](http://www.adn.com/news/alaska/story/335887.html)> (“People for the Ethical Treatment of Animals faxed a letter to
17 the Kivalina mayor this week alleging that raising animals for food creates 40 percent more
18 greenhouse gases than all the world’s cars, trucks, planes and ships combined.”).

19 On top of all this, the Court would have to make judgments *retroactively* with respect to
20 decades’ worth of emissions. Plaintiffs’ Complaint is explicitly based on the *aggregate* impact of
21 all of the greenhouse gas emissions that have occurred “since the dawn of the industrial
22 revolution.” Compl., ¶ 125. As Plaintiffs explain, “[a] large fraction of carbon dioxide emissions
23 persist in the atmosphere for several centuries, and thus have a lasting effect on climate.
24 Atmospheric concentrations of carbon dioxide and other greenhouse gases continue to increase as
25 each year’s emissions are added to those that came before.” *Id.* Plaintiffs’ Complaint thus does
26 not call for a single judgment as to the propriety of one particular set of emissions at one point in
27 time. Rather, Plaintiffs’ theory would require an assessment of what levels of emissions
28

1 Defendants “should” properly have been releasing from a wide variety of activities over a period
2 of several decades or more.

3 These policy questions and numerous others thus must be answered (either explicitly or
4 implicitly) before the Court could even hope to determine whether liability can and should attach
5 to Defendants’ actions. But the responsibility for making these sorts of judgments and balancing
6 these competing interests—with their potentially enormous implications for the Nation’s
7 economy and foreign affairs—lies with the policymaking branches of our government, not the
8 judiciary. As the *GMC* court concluded in rejecting a comparable global-warming claim,
9 “adjudication of Plaintiff’s claim would require the Court to balance the competing interests of
10 reducing global warming emissions and the interests of advancing and preserving economic and
11 industrial development,” but the “balancing of those competing interests is the type of initial
12 policy determination to be made by the political branches, and not this Court.” 2007 WL
13 2726871 at *8; *see also AEP*, 406 F. Supp. 2d at 272-73; *Comer v. Murphy Oil USA*, *supra*, (Oral
14 Ruling on Motion to Dismiss) (Collins Decl., Ex. B) at 40 (explaining that adjudication of
15 plaintiffs’ claim would require a court to do exactly “what *Baker versus Carr* told [it] not to do,
16 and that is to balance economic, environmental, foreign policy, and national security interest[s]
17 and make an initial policy determination of a kind which is clearly nonjudicial”).

18 The difficulty and impropriety of a court making the initial policy determinations that
19 adjudication of Plaintiffs’ suit would require is underscored by the political branches’ ongoing
20 efforts to formulate an appropriate policy response to the many issues raised by global warming.
21 *See AEP*, 406 F. Supp. 2d at 273 (“Looking at the past and current actions (and deliberate
22 inactions) of Congress and the Executive within the United States and globally in response to the
23 issue of climate change merely reinforces [the] opinion that the questions raised by Plaintiffs’
24 complaints are [non-justiciable] political questions.”); *GMC*, 2007 WL 2726871 at * 8 (“The
25 political branches’ actions and deliberate inactions in the area of global warming further highlight
26 this case as one for nonjudicial discretion.”). As explained at length above, the political branches
27 have been grappling for many years and on many fronts with the difficult and complex task of
28 fashioning an appropriate response to global warming, and they have thus far failed to establish

1 fixed standards (much less retroactive ones) for appropriate levels of greenhouse gas emissions.
 2 *See supra* at 4-10; *see also Massachusetts*, 127 S. Ct. at 1448-49 (describing evolution of
 3 executive and legislative policy on global warming). It would be inappropriate for the courts to
 4 attempt to resolve these sorts of questions where, as here, the political branches are continuing
 5 actively to consider the political judgments necessary for their resolution, and it would be
 6 especially inappropriate for the courts to purport to resolve them in a manner that is inconsistent
 7 with the judgments made by the political branches thus far.

8 Moreover, these ongoing policy debates within the elected branches amply demonstrate
 9 that responding to global climate change brings to the fore a wide range of rival considerations—
 10 domestic economic prosperity, national security, and environmental responsibility, among
 11 others—that are inherently political in nature, nuanced in dimension, and ever-changing in their
 12 relative importance, as particular events (such as war and economic slowdown) inevitably modify
 13 the Nation’s priorities. As the EPA has observed, “[i]t is hard to imagine any issue in the
 14 environmental area having greater ‘economic and political significance’ than regulation of
 15 activities that might lead to global climate change.” *Control of Emissions*, 68 Fed. Reg. at 52928.

16 Put simply, Plaintiffs seek to have the judiciary do precisely what the political question
 17 doctrine forbids—namely, to determine matters that are “not the stuff of adjudication, but of
 18 policymaking.” *Schneider v. Kissinger*, 412 F.3d 190, 197 (D.C. Cir. 2005).⁵

19 **b. There Are No Judicially Manageable Standards for**
 20 **Determining What Emissions “Wrongfully” Contribute to**
 21 **Global Warming**

22 For similar reasons, Plaintiffs’ claims are likewise barred under *Baker*’s second test,
 23 which requires dismissal when there is “a lack of judicially discoverable and manageable
 24 standards” for adjudication. *Baker*, 369 U.S. at 217; *see Wang v. Masaitis*, 416 F.3d 992, 996

25 ⁵ That Plaintiffs’ Complaint seeks damages and not injunctive relief makes no difference to the
 26 application of the political question doctrine in this case. The principal political question here
 27 arises not from the particular remedy requested, but rather from the *theory of liability* asserted—
 28 to find Defendants’ emissions wrongful, the courts would have to make political judgments that
 can be made only by the political branches. The court in *GMC*—in which the plaintiffs sought
 money damages—reached precisely this conclusion, holding that “regardless of the relief sought,
 the Court is left to make an initial decision as to what is unreasonable in the context of carbon
 dioxide emissions.” *GMC*, 2007 WL 2726871 at *8.

1 (9th Cir. 2005) (considering second and third *Baker* factors together); *Alperin*, 410 F.3d at 544
2 (explaining that “in practice,” the analyses under the independent *Baker* tests “often collaps[e]
3 into one another”).

4 As the Ninth Circuit has recognized, the second *Baker* inquiry requires the courts to “ask
5 whether they have the legal tools to reach a ruling that is ‘principled, rational, and based upon
6 reasoned distinctions.’” *Alperin*, 410 F.3d at 552 (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 278
7 (2004) (plurality op.)). Here, Plaintiffs’ suit inescapably would require the Court to separate out
8 permissible, “reasonable” greenhouse gas emissions that are the acceptable byproduct of an
9 appropriate level of economically valuable activities by worthy industries, from those
10 inappropriate emissions that constitute “a substantial and unreasonable interference” with the
11 right to enjoy public and private property. *See* Compl., ¶ 250. But, in the absence of the sort of
12 initial policy guidance discussed above, there are simply no legal standards by which courts could
13 attempt to intelligibly undertake this exercise. *See GMC*, 2007 WL 2726871 at *15 (“The Court
14 is left without guidance in determining what is an unreasonable contribution to the sum of carbon
15 dioxide in the Earth’s atmosphere.”). Indeed, Congress and the Executive Branch have been
16 struggling for years to develop appropriate legal standards; that the political branches have not yet
17 done so does not somehow suddenly make this task appropriate for resolution by the judiciary.

18 Although Plaintiffs apparently believe that the common law of torts can somehow supply
19 the necessary legal framework for reasoned judicial decision-making in this case, that is wrong.
20 The rhetorical assertion that the Court need only determine whether Defendants’ emissions
21 constitute a “substantial and unreasonable interference” with Plaintiffs’ property does not resolve
22 the political question, but merely restates it. Such a “recasting” of political questions “in tort
23 terms does not provide standards for making or reviewing [such] judgments.” *Schneider*, 412
24 F.3d at 197; *Alperin*, 410 F.3d at 562 (noting that “slave labor claims” pleaded in tort “present no
25 mere tort suit,” and dismissing those claims under the political question doctrine). Indeed, Judge
26 Jenkins in *GMC* squarely rejected this precise argument that the common law of nuisance could
27 provide a satisfactory set of legal principles sufficient to avoid dismissal under *Baker*’s second
28 factor. Citing the unique “national and international policy issues” implicated in a global-

1 warming nuisance suit, Judge Jenkins explained that nuisance law simply does not provide courts
2 with “a manageable method of discerning the entities that are creating and contributing to the
3 alleged nuisance.” *GMC*, 2007 WL 2726871 at *15; *see also AEP*, 406 F. Supp. 2d at 272
4 (rejecting contention that plaintiffs’ global warming suit was “simple nuisance claim of the kind
5 courts have adjudicated in the past”).

6 c. **Judicial Promulgation of Climate Policy Would Interfere with**
7 **Issues of Foreign Policy Committed to the Political Branches**

8 Any effort by a court to assign liability to specific industries for the effects of global
9 climate change would also be barred under the first *Baker* test, because it would intrude upon the
10 political branches’ constitutionally committed authority over foreign policy. As *Baker* itself
11 makes clear, numerous cases have applied the political question doctrine to matters “touching
12 foreign relations.” 369 U.S. at 211. This is in accord with our constitutional design, as “[i]t is
13 axiomatic that ‘the conduct of foreign relations is committed by the Constitution to the political
14 departments of the Federal Government; [and] that the propriety of the exercise of that power is
15 not open to judicial review.’” *Mingtai Fire & Marine Ins. Co. v. United Parcel Serv.*, 177 F.3d
16 1142, 1144 (9th Cir. 1999) (quoting *United States v. Pink*, 315 U.S. 203, 222-23 (1942)).

17 Several Congresses and various Presidents have by now actively considered the
18 interrelationship between global climate change and foreign affairs. As discussed above, *supra*,
19 at 5-10, the political branches have refused to adopt emissions caps *without agreement that*
20 *developing nations be willing to participate in greenhouse gas reduction*. See S. RES. 98, 105th
21 Cong. (1997); President Clinton, 2 PUB. PAPERS at 1410. The political branches’ continued
22 refusal thus far to establish limits on greenhouse gas emissions without commitments from
23 countries such as China and India rests on two stated considerations. First, the political branches
24 have recognized that efforts to address global warming will be successful only if they are global
25 in approach. As President Clinton observed, “[i]f the entire industrialized world reduces
26 emissions over the next several decades but emissions from the developing world continue to
27 grow at their current pace, concentrations of greenhouse [gases] in the atmosphere will continue
28 to climb.” *Id.* Second, the political branches have also recognized that if the United States acts

1 without international cooperation, it could find itself in an inferior bargaining position during any
2 future diplomatic attempts to address climate change. As the EPA has explained, “[u]nilateral
3 EPA regulation of [greenhouse gas] emissions could ... weaken U.S. efforts to persuade key
4 developing countries to reduce the [greenhouse gas] intensity of their economies.... Any
5 potential benefit of EPA regulation could be lost to the extent other nations decided to let their
6 emissions significantly increase in view of U.S. emission reductions.” *Control of Emissions*, 68
7 Fed. Reg. at 52931.

8 By asking this Court to establish (retroactively) appropriate levels of greenhouse gas
9 emissions for the particular U.S. corporations before this Court, Plaintiffs would have this Court
10 override the considered foreign policy judgment of the political branches and, in effect, award to
11 the Nation’s counterparts in the rapidly developing world the sort of one-sided emissions caps
12 that they have been unable to obtain by diplomatic means. The request is entirely improper. *See*
13 *GMC*, 2007 WL 2726871 at *14 (finding first *Baker* test applicable because “the political
14 branches have weighed in on the issue, and have made foreign policy determinations regarding
15 the United States’ role in the international concern about global warming”); *see also Corrie*, 503
16 F.3d at 984 (because decision to award foreign aid to Israel is foreign policy judgment committed
17 to political branches, suit based on an aspect of that aid was nonjusticiable under political
18 question doctrine).

19 To the extent that Plaintiffs’ Complaint seeks to address any emissions by Defendants in
20 other countries, Compl., ¶ 10, adjudication of Plaintiffs’ suit could also result in the inappropriate
21 extraterritorial imposition of American (judge-crafted) emissions standards on point sources in
22 other nations, confounding the attempts of foreign governments to regulate greenhouse gases
23 within their sovereign territories, thereby producing international tension with the United States.
24 The political question doctrine is designed to prevent courts from becoming embroiled in such
25 matters of foreign affairs, which are constitutionally assigned to the President and Congress. *See*
26 *GMC*, 2007 WL 2726871 at *14.⁶

27 ⁶ The remaining three *Baker* tests are also implicated here for substantially the same reasons
28 discussed above. *See Alperin*, 410 F.3d at 544 (noting that the *Baker* factors often overlap). Any
attempt by a court to assess liability against Defendants for injuries caused by global warming

1 *also Antolok v. United States*, 873 F.2d 369, 383 (D.C. Cir. 1989) (Sentelle, J., concurring) (“As
2 plaintiffs view the cause, these are simply questions of tort liability and damages—obviously
3 matters within normal judicial competence. Were we to follow plaintiffs’ view, there would
4 hardly be a political question doctrine left.”). Plaintiffs’ invocation of “proximate causation” and
5 “joint and several liability” is not sufficient to avoid the political question inherent in attributing
6 fault for particular global-warming-induced injuries.

7 As Defendants have explained in their separate motion to dismiss under Fed. R. Civ. P.
8 12(b)(6), Plaintiffs cannot satisfy the minimum requirements of proximate causation, such as the
9 requirement for “some direct relation between the injury asserted and the injurious conduct
10 alleged.” *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 268 (1992). But the
11 proximate causation inquiry requires more: “[a]t bottom, the notion of proximate cause reflects
12 ‘ideas of what justice demands, or of what is administratively possible and convenient.’” *Id.*
13 (citation omitted). In the unique context of a *global* phenomenon in which, according to
14 Plaintiffs’ allegations, *all* emissions from *all* sources around the world “mix in the atmosphere”
15 over many centuries into a “worldwide” blending of gases that only in the aggregate, and over
16 time, causes particular injury, an initial *legislative* judgment would be required to fix attributions
17 of fault that are consistent with “what justice demands” and “what is administratively possible
18 and convenient.” Just as in the Article III standing context a lack of the requisite “fair
19 traceability” between a defendant’s conduct and a plaintiff’s injury can be cured, in some cases,
20 only by Congress’s articulation of “‘chains of causation that will give rise to a case or controversy
21 where none existed before,’” *Massachusetts*, 127 S. Ct. at 1453 (citation omitted); *see infra* at 36,
22 so too here, only a legislative articulation of rights and liabilities can sort out the inherently
23 intractable problem of assigning fault for allegedly contributing (along with literally everyone
24 else in the world) to a phenomenon that purportedly contributes (in varying degrees) to particular
25 injuries. *See also infra* at 32-37. Only a legislature can make the sort of *ad hoc* distinctions that
26 would be necessary to differentiate in law what Plaintiffs allege is undifferentiated in fact. “Laws
27 promulgated by the Legislative Branch can be illogical, inconsistent, and ad hoc; laws
28

1 pronounced by the courts must be principled, rational, and based on reasoned distinctions.”

2 *Vieth*, 541 U.S. at 278 (plurality op.).

3 Contrary to what Plaintiffs may contend, assigning fault for particular injuries is not
4 simply a matter of figuring out which entities have released more greenhouse gases than others.
5 Rather, there is no available legal apparatus that is capable of dealing with the enormous number
6 of causal factors at play (every industrial, agricultural, and governmental entity, and indeed every
7 person emits greenhouse gases), and the severe issues of proximate causation that Plaintiffs’ suit
8 presents. *See Comer v. Murphy Oil USA, supra*, (Oral Ruling on Defendants’ Motion to Dismiss)
9 (Collins Decl., Ex. B) at 39-40 (“[T]his is a case in which the plaintiffs directly ask this Court to
10 attribute fault to these defendants under standards that as of yet do not exist.”). Any attempt to
11 assign responsibility for Plaintiffs’ injuries to particular emissions would thus inevitably return to
12 policy considerations about who *should* bear liability for what level of contribution to the
13 purported effects of greenhouse gases (whether liability should be assessed on each producer,
14 only certain industries, or the entire world); which victims of alleged global-warming-enhanced
15 erosion should receive compensation from whom for what injuries; and the relative
16 blameworthiness of Defendants’ emissions (as well as the relative utility of Defendants’
17 otherwise lawful activities) as compared to the myriad other factors that also contributed to the
18 injury in question. Simply put, in this case a court is not “capable of granting relief in a reasoned
19 fashion.” *Alperin*, 410 F.3d at 553.

20 Plaintiffs’ appeal to joint and several liability principles fares no better. Even assuming
21 *arguendo* that that standard could be applied here, it would simply amplify the magnitude of the
22 political questions at the heart of this case. Given Plaintiffs’ allegations concerning the
23 undifferentiated nature of cumulative global greenhouse gas emissions, *see* Compl., ¶¶ 10, 125,
24 254, Plaintiffs’ Complaint presumably rests on the remarkable and completely unprecedented
25 suggestion that Defendants alone can be held jointly and severally liable for *all* injuries allegedly
26 caused by global warming at any time and throughout the world. But if Plaintiffs’ theory would
27 internalize all liability for all global warming injuries in a single set of industries in a single
28 country, that only serves to underscore how dramatically Plaintiffs seek to use the courts to set

1 national (if not worldwide) energy policy in utter disregard of the competing economic, national
2 security, and foreign policy concerns.

3 There is another important respect in which Plaintiffs' invocation of joint and several
4 liability fails to evade the political question doctrine. Application of joint and several liability
5 would simply mean that Defendants would have to add to this litigation all other emitters of
6 greenhouse gases. *See, e.g., American Motorcycle Ass'n v. Superior Court*, 20 Cal. 3d 578, 598
7 (1978) (under doctrine of equitable indemnity, defendant can assert a cross-complaint to obtain
8 indemnity from other defendants (including defendants not listed in the complaint) on a
9 "comparative fault basis"). The Court would thus inevitably confront the inherently political task
10 of trying to allocate liability among the parties. *See GMC*, 2007 WL 2726871 at *15 ("[T]he
11 Court is left without a manageable method of discerning the entities that are creating and
12 contributing to the alleged nuisance. In this case, there are multiple worldwide sources of
13 atmospheric warming across myriad industries and multiple countries."). The enormously
14 unwieldy nature of what would easily become the largest and most complex litigation in the
15 annals of jurisprudence would dramatically illustrate the complete "lack of judicially discoverable
16 and manageable standards for resolving it." *Baker*, 369 U.S. at 217.

17 Finally, the issue of which State's laws should apply to these claims presents another
18 intractable layer of complexity that magnifies the unmanageability of the case and the need for an
19 initial political judgment by the elected branches. While Plaintiffs' Complaint conspicuously
20 avoids informing the Court of the applicable state law in this case, counsel for Plaintiffs has
21 elsewhere suggested that it is "the law of the state"—and presumably the country—"where the
22 source of the pollution is located." Matthew Pawa, *Global Warming Litigation Heats Up*, TRIAL
23 18, 22 (April 2008). Unsurprisingly, the laws of the States differ quite dramatically in their rules
24 for allocating fault in tort suits. For example, many States, including Alaska, have adopted
25 "pure" several (but not joint) liability schemes that require courts and juries to calculate "the
26 percentage of the total fault" that is to be allocated to each plaintiff, defendant, third-party
27 defendant, and all other persons, and to enter judgment against each defendant based only on the
28 percentage of fault for which it is responsible. Alaska Stat. §§ 09.17.080(a)(2), (d). Thus, Alaska

1 specifically requires that “[i]n determining the percentages of fault, the trier of fact shall consider
2 both the nature of the conduct of each person at fault, and the extent of the causal relation
3 between the conduct and the damages claimed.” *Id.* § 09.17.080(b). This sort of task would be
4 impossible enough with respect to all of the responsible emitters in a single State over the course
5 of many decades; but that, of course, would allocate responsibility for only the activities of that
6 State’s emitters. There is still the further, larger problem of emitters in other States, under
7 possibly other rules, and the additional problem of what to do about emitters in foreign countries
8 (even assuming the highly dubious proposition that the Court has the power to define the
9 standards of liability or allocation for those emissions). And then the Court would have to figure
10 out—without any help from the political branches—how to amalgamate all of this complexity
11 into an overall composite determination that a particular industry’s contribution to global
12 warming is responsible to a specified degree for a particular injury. One could scarcely contrive a
13 more unmanageable controversy.

14 **4. Plaintiffs’ Reliance on “Civil Conspiracy” and “Concert of Action”**
15 **Does Nothing to Avoid the Political Question Doctrine**

16 For several reasons, Plaintiffs’ allegations of a “civil conspiracy” and of liability based on
17 “concert of action,” Compl., ¶¶ 268-82, cannot avoid or resolve the political questions that lie at
18 the heart of this lawsuit.

19 First, it is well settled that civil conspiracy and concert of action are not separate torts, but
20 rather are merely theories of secondary liability. *See Sprewell v. Golden State Warriors*, 266 F.3d
21 979, 992 (9th Cir. 2001); *In re Sunset Bay Assocs.*, 944 F.2d 1503, 1516 n.14 (9th Cir. 1991);
22 2 Dan B. Dobbs, *THE LAW OF TORTS* 936 (2001) (“Conspiracy is not a tort in itself; it reflects the
23 conclusion that each participant should be liable for the tortious course of conduct.”). As a result,
24 these doctrines of secondary liability can operate only to extend to additional parties an
25 underlying liability that *otherwise* already exists. Accordingly, allegations of secondary liability
26 cannot cure a fatal deficiency in, or survive independently from, the alleged underlying torts; if
27 the predicate tort fails, there is nothing to which secondary liability can attach. Because
28 Plaintiffs’ theories of liability in this case all would require resolution of nonjusticiable political

1 questions, *see supra* at 13-28, Plaintiffs’ addition of allegations of joint conduct does not and
2 cannot make the underlying political questions justiciable. *See* Collins Decl., Exs. A, C
3 (respectively, the Complaint and Written Order of Dismissal in *Comer v. Murphy Oil Co.*, *supra*)
4 (political question doctrine barred suit for global warming damages where plaintiffs asserted
5 causes of action for, *inter alia*, civil conspiracy).

6 Second, the allegations of Plaintiffs’ own Complaint make clear that, as a factual matter,
7 all of Plaintiffs’ theories unavoidably rest on nonjusticiable political questions. Regardless of the
8 theory invoked (nuisance, civil conspiracy, or concert of action), the Complaint confirms that
9 Plaintiffs’ *sole* theory of injury is that emissions-induced global warming caused damage to
10 Plaintiffs’ property; as a result, *all* of their claims (including the causes of action for civil
11 conspiracy and concert of action) are dependent upon their allegations that Defendants’ emissions
12 were greater than they otherwise should have been. *See* Compl., ¶ 269 (civil conspiracy)
13 (alleging that “[t]he Conspiracy Defendants have engaged in agreements to participate in the
14 intentional creation, contribution to and/or maintenance of a public nuisance, global warming”);
15 *id.*, ¶ 279 (concert of action) (alleging that “Defendants have engaged in and/or are engaging in
16 concert with each other over the creation, contribution to and/or maintenance of a public
17 nuisance, global warming”). Consequently, all of Plaintiffs’ theories necessarily rest on the
18 untenable premise that this Court can decide what the “proper” level of greenhouse gas emissions
19 should have been over the last several decades. Because the political question problem is thus
20 “inextricable from the case at bar,” *Baker*, 369 U.S. at 217, Plaintiffs’ Complaint must be
21 dismissed in its entirety.

22 **B. Plaintiffs Cannot Demonstrate Article III Standing**

23 Plaintiffs’ claims fail as a matter of law for the additional reason that, as their own
24 Complaint confirms, they cannot satisfy the standing requirements of Article III—specifically,
25 they cannot show that the alleged injuries are “fairly traceable” to Defendants’ challenged
26 emissions.

27 For example, the Complaint does not state when and where on the planet the greenhouse
28 gas emissions that allegedly caused harm to Plaintiffs occurred. Which, if any, of these alleged

1 injury-producing emissions were “excessive” at the time they occurred such that tort liability
 2 could be based on them? How can Plaintiffs’ alleged injury be traced to any one of these
 3 Defendants’ emissions, as opposed to the emissions of the many other emitters on the planet,
 4 dating back centuries? Have Defendants’ emissions actually caused an impact to Plaintiffs or
 5 have they been offset by other factors or forces? The Complaint is devoid of well-pleaded facts
 6 necessary to answer these questions and to connect these Plaintiffs’ claimed injuries to these
 7 Defendants’ alleged emissions; indeed, the Complaint itself makes clear that Plaintiffs cannot do
 8 so. Because, as a matter of law, Plaintiffs cannot satisfy all of the required elements for Article
 9 III standing, their Complaint must be dismissed.

10 **1. To Establish Article III Standing, Plaintiffs Must Plead Sufficient**
 11 **Facts to Show That Their Injuries Are “Fairly Traceable” to**
 12 **Defendants’ Conduct**

13 The Supreme Court has long held that “the irreducible constitutional minimum of standing
 14 contains three elements”: (1) the plaintiff must have suffered an injury-in-fact; (2) “there must be
 15 a causal connection between the injury and the conduct complained of—the injury has to be
 16 ‘fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the
 17 independent action of some third party not before the court’”; and (3) it must be “‘likely,’” rather
 18 than simply “‘speculative,’” that a favorable decision will redress the plaintiff’s injury. *Lujan v.*
 19 *Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (quoting *Simon v. Eastern Ky. Welfare Rights*
 20 *Org.*, 426 U.S. 26, 41-42 (1976)); *see also Smelt v. County of Orange*, 447 F.3d 673, 682 (9th Cir.
 21 2006). The primary standing element at issue in this case is the second one—fair traceability.
 22 This element, which the Supreme Court has defined as “the causation requirement” of standing,⁷
 23 requires that the plaintiff’s injury be “fairly traceable” to *the defendant’s challenged conduct*
 24 rather than to “the independent action of some third party not before the court.” *Bennett v. Spear*,
 25 520 U.S. 154, 167 (1997). In addition, an injury is not fairly traceable to the defendant’s conduct
 26 if the causal chain linking the two is “too attenuated.” *Allen v. Wright*, 468 U.S. 737, 757 (1984);

27 ⁷ *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 106 n.7 (1998); *see also Fleck & Assocs. v.*
 28 *City of Phoenix*, 471 F.3d 1100, 1104 (9th Cir. 2006) (this element of standing requires “a fairly
 traceable *causal connection* between the alleged injury and the ... challenged conduct”) (citation
 omitted) (emphasis added).

1 *see also Prescott v. County of El Dorado*, 298 F.3d 844, 846 (9th Cir. 2002) (fair traceability
2 requirement not satisfied where the “causal relationship is too remote”).

3 Plaintiffs bear the burden of establishing the elements of Article III standing, including
4 fair traceability. *See DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 & n.3 (2006); *Lujan*,
5 504 U.S. at 561. They cannot satisfy that burden simply by presenting labels or conclusions or
6 generalized factual allegations. *See, e.g., Valley Forge Christian College v. Americans United for*
7 *Separation of Church and State, Inc.*, 454 U.S. 464, 471 (1982) (“The requirements of Art. III
8 standing are not satisfied merely because a party requests a court of the United States to declare
9 its legal rights, and has couched that request for forms of relief historically associated with courts
10 of law in terms that have a familiar ring to those trained in the legal process.”). Rather, as “an
11 indispensable part of the plaintiff’s case,” the elements of Article III standing “must be supported
12 in the same way as any other matter on which plaintiff bears the burden of proof.” *Lujan*, 504
13 U.S. at 561. Thus, as with any other element of a plaintiff’s claim, the plaintiff must plead
14 “enough facts to state a claim to relief that is plausible on its face,” *Bell Atlantic Corp. v.*
15 *Twombly*, 127 S. Ct. 1955, 1974 (2007), and “to raise a right to relief above the speculative
16 level,” *id.* at 1965 (emphasis added). The Federal Rules require “more than labels and
17 conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Id.*⁸

18 **2. Plaintiffs Have Not Pleaded Sufficient Facts to Establish That Their**
19 **Alleged Injuries Are “Fairly Traceable” to Defendants’ Emissions**

20 As set forth below, Plaintiffs’ theory of causation fails to satisfy the fair traceability
21 requirement in two respects. First, their own Complaint confirms that they cannot trace their
22 alleged injuries to *Defendants’ emissions*, as opposed to the independent emissions of countless
23 third parties occurring throughout the world over the last several centuries—not to mention other
24 potential competing causes of coastal erosion on barrier islands in northwestern Alaska. Second,

25 ⁸ Accordingly, Plaintiffs’ conclusory allegations of causation (*e.g.*, Compl., ¶163) are manifestly
26 inadequate to establish fair traceability, especially where (as here) the Complaint’s factual
27 allegations actually negate the fair traceability required by Article III. *See Clegg v. Cult*
28 *Awareness Network*, 18 F.3d 752, 754-755 (9th Cir. 1994) (legal conclusions presented as factual
allegations are insufficient to establish federal court’s jurisdiction); *see also Whitmore v.*
Arkansas, 495 U.S. 149, 155-156 (1990) (“A federal court is powerless to create its own
jurisdiction by embellishing otherwise deficient allegations of standing.”).

1 Plaintiffs have failed to plead fair traceability for the additional reason that the alleged causal
 2 chain between Defendants' emissions and Plaintiffs' damage is much too attenuated to satisfy
 3 Article III standards.

4 a. **Because Plaintiffs Allege That Greenhouse Gas Emissions Are**
 5 **Undifferentiated in the Global Atmosphere, Plaintiffs' Injuries**
 6 **Cannot Be Fairly Traced to Defendants' Emissions, As Opposed**
 7 **to Those of Third Parties**

8 It is well settled that there is no Article III standing where the plaintiff's injuries cannot be
 9 fairly traced to the defendant's challenged conduct, as opposed to the independent actions of *third*
 10 *parties* not before the court. *See, e.g., Simon*, 426 U.S. at 41-42 ("the 'case or controversy'
 11 limitation of Art. III still requires that a federal court act only to redress injury that fairly can be
 12 traced to the challenged action of the defendant, *and not injury that results from the independent*
 13 *action of some third party not before the court*") (emphasis added); *see also Lujan*, 504 U.S. at
 14 560 (same). This principle controls this case. Global warming, as its name indicates, is a global
 15 phenomenon: every person and entity on the planet is responsible for some emissions of
 16 greenhouse gases. As established by Plaintiffs' own Complaint and the documents cited in it, the
 17 levels of atmospheric greenhouse gases that Plaintiffs decry are the result of worldwide emissions
 18 by many persons over a very long period of time. Thus, Plaintiffs' Complaint asserts that global
 19 warming is the "'globally averaged *net effect of human activities since 1750*,'" *see* Compl., ¶ 161
 20 (emphasis added) (quoting Intergovernmental Panel on Climate Change, *Climate Change 2007:*
 21 *Synthesis Report* 37 (Collins Decl., Ex. G)), and that Defendants' emissions only "contribut[ed] to
 22 global warming and caus[ed] injuries to" Plaintiffs "*in combination with emissions and conduct*
 23 *of others*," Compl., ¶ 255 (emphasis added).⁹ Moreover, Plaintiffs' Complaint and the materials
 24 it cites also assert that greenhouse gases, once emitted into the atmosphere, are *undifferentiated*—
 25 making them necessarily *untraceable* to any source—because they "rapidly mix in the
 26 atmosphere" with gases emitted by persons all across the planet. *See* Compl., ¶ 254.¹⁰ Plaintiffs

26 ⁹ *See also Emissions of Greenhouse Gases, supra*, (Collins Decl., Ex. F) at 6, 11-25 (attributing
 27 most greenhouse gas emissions to sources *other than* the challenged emissions of Defendants).

28 ¹⁰ *See also* Compl., ¶ 254 ("Carbon dioxide and other greenhouse gas emissions resulting in
 global warming are inherently interstate in nature. Emissions of carbon dioxide and other

1 further expressly allege that carbon dioxide, once emitted, remains in the atmosphere for
2 “hundreds of years,” *id.*, ¶ 180; *see also id.*, ¶ 125 (a “large fraction of carbon dioxide emissions
3 persist in the atmosphere for several centuries”), and that two-thirds of the increase in carbon
4 dioxide emissions occurred between the mid-18th century and 1980, *id.* But if Plaintiffs cannot
5 identify *when* the particular emissions occurred that allegedly put in motion the events leading to
6 their injuries, they cannot hope to trace their injuries to *Defendants’* emissions, as opposed to
7 those of the many others that have emitted greenhouse gases over the last century or longer.

8 In view of the Complaint’s allegations as to the undifferentiated nature of the greenhouse
9 gas emissions from all global sources, and their worldwide accumulation over long periods of
10 time, Plaintiffs’ own pleading makes clear that there is no realistic possibility of *tracing* any
11 particular alleged effect of global warming to any *particular* emissions of any *specified* person,
12 entity, or group, at any specific point in time. Taking the allegations of the Complaint as true,
13 there is no way to say which emissions—emitted by whom and at what time in the last several
14 centuries and at what place in the world—“caused” Plaintiffs’ alleged global-warming related
15 injuries. As the District Court in *Comer* held in dismissing analogous global-warming claims for
16 lack of the fair traceability required by Article III, the injuries alleged are not “attributable or
17 traceable to these individual defendants,” but rather “are attributable to a larger group” that is
18 “not before this Court, not only within this nation but outside of our jurisdictional boundaries as
19 well.” *Comer v. Murphy Oil USA, supra*, (Oral Ruling on Motion to Dismiss) (Collins Decl., Ex.
20 B) at 36.

21 The lack of fair traceability is exacerbated by the fact that Plaintiffs must tie their alleged
22 global-warming related injuries, not merely to Defendants’ emissions as a whole, but rather to
23 that *portion* of Defendants’ emissions that were supposedly tortious. *See Lujan*, 504 U.S. at 560

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25 greenhouse gases from defendants’ operations, no matter where such operations are located,
26 rapidly mix in the atmosphere and cause an increase in the atmospheric concentration of carbon
27 dioxide and other greenhouse gases worldwide.”); *id.*, ¶ 10 (alleging that Defendants’ emissions
28 “do[] not remain localized and inevitably merge[] with the accumulation of emissions in
California and in the world”); *see also* National Academy of Sciences, *Climate Change Science:
An Analysis of Some Key Questions* 10 (2000) (Collins Decl., Ex. H) (cited in Compl., ¶ 157,
n.36) (CO₂, and other long-lasting gases, are spread “throughout the lower atmosphere” within a
year or more).

1 (injury must be fairly traceable “to the *challenged* action of the defendant”) (quoting *Simon*, 426
2 U.S. at 41-42) (emphasis added). As noted earlier, Plaintiffs’ Complaint necessarily rests on the
3 premise that Defendants emitted *excessive* amounts of greenhouse gases. *See supra* at 16-20.
4 (No one contends that greenhouse gas emissions can or should be reduced to zero.) The
5 Complaint identifies no plausible way in which Plaintiffs could hope to fairly trace their global-
6 warming relating injuries to that *subset* of Defendants’ greenhouse gas emissions that exceeded
7 some hypothetical “proper” level of emissions—as opposed to Defendants’ proper emissions, and
8 the emissions (proper or wrongful) of everyone else in the world. *See Twombly*, 127 S. Ct. at
9 1974 (plaintiff must plead “enough facts to state a claim to relief that is plausible on its face”).

10 These already insurmountable fair traceability problems are compounded yet further by
11 the principle of “inertia”: as explained in the Intergovernmental Panel on Climate Change report
12 cited in Plaintiffs’ Complaint (¶ 161), a stabilization in greenhouse gas levels would take at least
13 a “few decades” to slow increases in global temperatures, and even then “[s]mall increases in
14 global average temperatures could still be expected for several centuries.” *Climate Change 2007:*
15 *Synthesis Report, supra*, (Collins Decl., Ex. G) at 66. Accordingly, even if Defendants (and the
16 rest of the world) had stopped emitting greenhouse gases decades ago, this “inertia” principle
17 suggests that global warming sufficient to have melted protective Arctic sea ice may well have
18 occurred anyway. As a result, only by “unadorned speculation” could Plaintiffs hope to say that
19 greenhouse gases emitted in any particular *timeframe* caused their injuries. *Simon*, 426 U.S. at
20 44. It is, of course, essential to evaluating the reasonableness of any particular emissions to know
21 *which* emissions are at issue and at *what* point in time. Plaintiffs’ failure to trace their injuries to
22 particular wrongful levels of emissions by these Defendants at particular points in time confirms
23 their inability sufficiently to plead the fair traceability required by Article III.

24 Plaintiffs’ Complaint thus reveals a failure of fair traceability that is far beyond what has
25 been found inadequate by the Supreme Court and the Ninth Circuit in cases implicating the
26 independent actions of third parties. *See, e.g., Allen*, 468 U.S. at 756-59 (no standing to challenge
27 IRS’s non-enforcement of policy denying tax-exempt status to racially discriminatory private
28 schools because attendance of plaintiffs’ children in integrated schools depended not only on IRS

1 enforcement but on decisions by third parties, such as school officials and parents); *Simon*, 426
2 U.S. at 43 (holding that indigent plaintiffs lacked standing to challenge IRS policy according
3 favorable tax treatment to certain non-profit hospitals because the denial of service to indigents
4 could have “result[ed] from decisions made by the hospitals without regard to the tax
5 implications”); *Warth v. Seldin*, 422 U.S. 490, 505-06 (1975) (no standing to challenge zoning
6 ordinance because lack of low-income housing may have been attributable to builders’
7 unwillingness to build low-cost housing and to plaintiffs’ financial situations); *see also Pritikin v.*
8 *Department of Energy*, 254 F.3d 791, 797 (9th Cir. 2001) (no Article III standing to challenge
9 Energy Department’s failure to make budget requests for medical monitoring program; any
10 resulting injury to Plaintiff would depend critically on the independent decisions of a separate
11 agency, “a third party not before the court, to begin the medical monitoring program”). Indeed,
12 whereas all of those cases involved a *finite* number of additional actors, Plaintiffs’ claims here
13 implicate the conduct of *all* individuals and entities on the planet, each of whom emitted their
14 own quantities and concentrations of greenhouse gases over varying periods of time. *See* Compl.,
15 ¶¶ 125, 161, 254. If standing did not exist in the much less complex third-party causation
16 scenarios of *Allen*, *Simon*, *Warth*, and comparable cases, there can be no standing here where the
17 traceability analysis must disentangle the role of billions of third-party emitters over centuries.

18 Plaintiffs’ Complaint suggests that they believe that these problems can be evaded merely
19 by alleging that Defendants “contribute” to global warming, *see* Compl., ¶¶ 3, 251, 255, 260, and
20 that this alleged contribution, “in combination with emissions and conduct of others,” has caused
21 injury to Plaintiffs, *id.*, ¶ 255. These conclusory labels do nothing to address the clear lack of fair
22 traceability; on the contrary, they simply beg the question, because *all* emitters likewise
23 “contribute” to global warming. *See, e.g., Warth*, 422 U.S. at 504 (lack of fair traceability due to
24 role of independent third parties was not cured by allegation that the defendants’ conduct “*ha[d]*
25 *contributed, perhaps substantially, to the cost of housing*” in the plaintiffs’ locality) (emphasis
26 added). A theory that would give undifferentiated standing to sue almost anyone and everyone in
27 the whole world is the very antithesis of “fair traceability.” The fatal lack of the required
28 traceability is likewise not cured by the allegation that Defendants are “*substantial* contributors to

1 global warming.” Compl., ¶ 260 (emphasis added). Even setting aside the fact that the
2 Complaint has a very broad notion of what counts as “substantial,” *see supra* at 11, Plaintiffs fail
3 to explain how the relative size of a party’s emissions can do anything to cure the fact that *all*
4 worldwide emissions from all sources, occurring over very long periods of time, join together in
5 creating the aggregate levels of greenhouse gases allegedly necessary to cause Plaintiffs’ injury.

6 Indeed, Plaintiffs’ complete inability to establish traceability only serves to reinforce the
7 need for an initial policy decision by the political branches. *See supra* at 24-28. As the Supreme
8 Court recently reaffirmed, “Congress has the power to define injuries and articulate chains of
9 causation *that will give rise to a case or controversy where none existed before.*” *Massachusetts*,
10 127 S. Ct. at 1453 (citation omitted). Congress, for example, has exercised such power in the
11 Clean Water Act by defining (through permits and regulations) what levels of what substances
12 may be released by a party into a waterway and by providing that discharges in excess of the
13 permitted levels that contribute to injuries to another may give rise to liability. *See, e.g., Public*
14 *Interest Research Group of New Jersey, Inc. v. Powell Duffryn Terminals Inc.*, 913 F.2d 64, 72
15 (3d Cir. 1990) (plaintiff in Clean Water Act action must show that “a defendant has 1) discharged
16 some pollutant *in concentrations greater than allowed by its permit* 2) into a waterway in which
17 the plaintiffs have an interest that is or may be adversely affected by the pollutant and that 3) the
18 pollutant causes or contributes to the kinds of injuries alleged by the plaintiffs”) (emphasis
19 added); *see also Natural Resources Defense Council v. Southwest Marine, Inc.*, 236 F.3d 985,
20 995 (9th Cir. 2000) (following *Powell Duffryn* and its progeny). Here, of course, there is a
21 complete absence of any statutory scheme that would define the relevant wrongful emissions of
22 greenhouse gases, much less one that establishes which chains of causation associated with those
23 emissions should give rise to liability for what injuries to which persons. That sort of statutory
24 “authorization is of critical importance to the standing inquiry,” *Massachusetts*, 127 S. Ct. at
25 1453, and its absence here is fatal to Plaintiffs’ effort to establish traceability. *Cf. id.* at 1454-55
26 (relying critically on, *inter alia*, Congress’s creation of statutory procedural rights in holding that
27 Massachusetts had standing to challenge the EPA’s failure to regulate automobile emissions of
28 greenhouse gases); *Center for Biological Diversity v. Brennan*, No. 06-7062-SBA, 2007 WL

1 2408901 at *11 (N.D. Cal. Aug. 21, 2007) (holding that Congress’s creation of statutory
 2 procedural rights to participate in commenting on climate-change reports “relaxes a plaintiff’s
 3 burden on the traceability and redressability prongs of the Article III standing test” because
 4 “[t]he person who has been accorded a procedural right to protect his concrete interests can
 5 assert that right without meeting all the normal standards”) (quoting *Lujan*, 504 U.S. at 572 n.7).

6 Moreover, it is telling that, even the statutorily based Clean Water Act cases *disallow*
 7 standing based on geographically remote contributions to an alleged pollution injury: the
 8 plaintiffs in such cases must “demonstrate a more specific geographic or other causative nexus in
 9 order to satisfy the ‘fairly traceable’ element of standing.” *Friends of the Earth, Inc. v. Crown*
 10 *Cent. Petroleum Corp.*, 95 F.3d 358, 361 (5th Cir. 1996) (holding that eighteen-mile distance
 11 from discharge to place of alleged impact on plaintiff was “too large to infer causation” for
 12 standing purposes); *see also Texas Independent Producers & Royalty Owners Ass’n v. EPA*, 410
 13 F.3d 964, 973 (7th Cir. 2005) (*en banc*) (“[T]o satisfy the ‘fairly traceable’ causation requirement,
 14 there must be a distinction between the plaintiffs who lie within the discharge zone of a polluter
 15 and those who are so far downstream that their injuries cannot fairly be traced to that defendant.”)
 16 (internal quotation omitted).

17 Plaintiffs’ asserted injuries concededly cannot be “fairly traced” to any geographically
 18 proximate contribution of greenhouse gases, because the Complaint alleges that any injuries were
 19 caused only by an undifferentiated *worldwide* accumulation of greenhouse gases. That Plaintiffs
 20 could not satisfy even the *relaxed* standing requirements applicable to a congressionally created
 21 liability regime only underscores their inability to establish Article III standing here, where *no*
 22 statutory scheme is available that could possibly serve to relax the required chain of causation.

23 **b. Plaintiffs Cannot Demonstrate “Fair Traceability” for the**
 24 **Additional Reason That the Alleged Line of Causation From**
Emission to Injury Is Too Attenuated

25 Plaintiffs’ claims must be dismissed for the additional reason that “[t]he links in the chain
 26 of causation between the challenged ... conduct and the asserted injury are far too weak for the
 27 chain as a whole to sustain [Plaintiffs’] standing.” *Allen*, 468 U.S. at 759. Indeed, Plaintiffs’
 28 allegations epitomize an impermissibly attenuated and speculative theory of causation: the Oil

1 Company Defendants' exploration and production activities release greenhouse gases; those
2 emissions have joined with all of the other emissions of people and entities worldwide over the
3 past several centuries to increase greenhouse gas levels; those increased greenhouse gas levels,
4 together with other factors, contribute to overall global warming; global warming (together with
5 yet other factors) contributes to higher temperatures in the Arctic region; those warmer
6 temperatures have resulted in melting of sea ice that has acted in the past as a barrier against the
7 effects of coastal storms that occur in the Chukchi Sea; those storms (again, together with other
8 factors) have subjected the barrier reef (on which the Village of Kivalina is located) to waves and
9 surges that have resulted, over time, in the erosion of the reef; and the erosion of the reef (again,
10 together with other factors) poses a threat to the integrity of structures that make up the village,
11 allegedly necessitating relocation of Kivalina's residents. *See* Complaint, at ¶¶ 3, 10, 16, 123,
12 127, 130, 131, 185, 254.

13 Plaintiffs' proffered causal chain, to put it mildly, is "attenuated at best." *Allen*, 468 U.S.
14 at 757. Plaintiffs' theory of traceability contains too many links and relies on the conduct of too
15 many parties over too long a period of time and dispersed over too wide a geographic area. This
16 flaw is only magnified by the role of independent third parties and other competing influences.
17 *See id.* (no fair traceability where chain of causation was "highly indirect" and depended on
18 actions of third parties); *Prescott*, 298 F.3d at 846 (no standing where the alleged "causal
19 relationship is too remote" in light of the role of independent third parties); *see also supra* at 32-
20 37. At bottom, Plaintiffs' allegations improperly "rely on little more than the remote possibility,
21 unsubstantiated by allegations of fact, that their situation might have been better had [Defendants]
22 acted otherwise." *Warth*, 422 U.S. at 507.

23 Moreover, while the exact traceability standard may not be "susceptible of precise
24 definition," in "many cases the standing question can be answered chiefly by comparing the
25 allegations of the particular complaint to those made in prior standing cases." *Allen*, 468 U.S. at
26 751-52. In this regard, Plaintiffs' Complaint advances a causal chain that is exceedingly more
27 strained than those the courts have previously rejected. *See, e.g., DaimlerChrysler*, 547 U.S. at
28 346 (theory that taxpayer was injured by tax breaks to corporation was too attenuated and

1 speculative to support Article III standing); *Allen*, 468 U.S. at 757-59 (holding that line of
 2 causation between IRS’s grant of tax exemptions to racially discriminatory schools and plaintiffs’
 3 children attending segregated schools was too tenuous); *Pony v. County of Los Angeles*, 433 F.3d
 4 1138, 1146 (9th Cir. 2006) (claim that attorney would have received higher fees if county
 5 rescinded its alleged policy of only agreeing to lump-sum settlements was too speculative to be
 6 fairly traceable and could not support standing); *see also supra* at 34-35 (discussing *Simon* and
 7 *Warth*).

8 * * *

9 “[T]he standing inquiry requires *careful judicial examination of a complaint’s*
 10 *allegations*” to determine whether “the line of causation between the illegal conduct and injury
 11 [is] too attenuated” to justify standing. *Allen*, 468 U.S. at 752 (emphasis added). That is
 12 consistent with the principle that standing questions are “threshold determinants of the propriety
 13 of judicial intervention,” *Warth*, 422 U.S. at 518, and are thus often resolved early in litigation,
 14 preferably so as to prevent the expenditure of judicial resources where the court ultimately lacks
 15 power to act. Plaintiffs’ inability to allege traceability here counsels strongly against judicial
 16 involvement in a suit that is hardly of the sort “traditionally thought to be capable of resolution
 17 through the judicial process.” *Allen*, 468 U.S. at 752 (internal quotation omitted).¹¹

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 26 ¹¹ Plaintiffs’ allegations of conspiracy and concert of action—all of which rely on these same
 27 attenuated theories of causation to connect Defendants’ alleged conduct (through Defendants’
 28 alleged emissions) to Plaintiffs’ asserted injuries—do nothing to cure Plaintiffs’ fatal lack of
 standing. And, as noted earlier, Plaintiffs’ invocation of these theories of secondary liability,
 which are not independent causes of action, necessarily fail where (as here) the predicate torts
 alleged are legally defective. *See supra* at 28-29.

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IV. CONCLUSION

For the foregoing reasons, Plaintiffs' Complaint should be dismissed with prejudice.

Dated: June 30, 2008

Respectfully Submitted,

MUNGER, TOLLES & OLSON LLP

O'MELVENY & MYERS LLP

By: /s/ Daniel P. Collins
Daniel P. Collins

By: /s/ John F. Daum
John F. Daum

Attorneys for Defendant
SHELL OIL COMPANY

Attorneys for Defendant
EXXONMOBIL CORPORATION

KING & SPALDING LLP

KIRKLAND & ELLIS LLP

By: /s/ Tracie J. Renfroe
Tracie J. Renfroe

By: /s/ Andrew B. Clubok
Andrew B. Clubok

Attorneys for Defendants
CHEVRON CORPORATION and CHEVRON
U.S.A. INC.

Attorneys for Defendant
CONOCOPHILLIPS COMPANY

ARNOLD & PORTER LLP

By: /s/ Matthew Heartney
Matthew Heartney

Attorneys for Defendants
BP AMERICA, INC., AND BP PRODUCTS
NORTH AMERICA, INC.

